13-2522
TAX TYPE: INDIVIDUAL INCOME
TAX YEAR: 2009
DATE SIGNED: 4-20-2015
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO
EXCUSED: D. DIXON

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER-1 & TAXPAYER-2, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 13-2522 Account No. ##### Tax Type: Individual Income Tax Year: 2009 Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE-1 FOR TAXPAYER, CPA (by telephone)
REPRESENTATIVE-2 FOR TAXPAYER, CPA (by telephone)
TAXPAYER-1, Taxpayer (by telephone)
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on December 16, 2014.

TAXPAYER-1 and TAXPAYER-2 (the "Petitioners" or "taxpayers") are appealing Auditing Division's (the "Division") assessment of additional Utah individual income tax for the 2009 tax year. On October 24, 2013, the Division issued a Notice of Deficiency and Estimated Income Tax ("Statutory Notice") to the taxpayers, in which it imposed additional tax and interest (calculated through November 23, 2011),[1] as follows:

1 Interest continues to accrue until any tax liability is paid.

Year	Tax	Penalties	Interest	Total
2009	$$$$$	$$$$$	$$$$$	$$$$$

The taxpayers did not file a Utah income tax return for the 2009 tax year. The Division, however, determined that both taxpayers, who are married, were Utah resident individuals for all of 2009. As a result, the Division assessed Utah tax on all of their 2009 income.

The taxpayers contend that TAXPAYER-1, who earned all, or almost all, of the income at issue, was not domiciled in Utah during 2009. They acknowledge, however, that TAXPAYER-2 was domiciled in Utah in 2009, but was not employed. The taxpayers contend that TAXPAYER-1 was domiciled in FOREIGN COUNTRY-1 in 2009 until he returned to the United States in December 2009 to attend to his young son's unexpected diagnosis with leukemia. As a result, the taxpayers ask the Commission to find that TAXPAYER-1 was not domiciled in Utah during 2009 and to reverse the Division's assessment.

The Division proffered that it is a close call as to whether TAXPAYER-1was domiciled in Utah or in FOREIGN COUNTRY-1 during 2009 and that it has determined that the Commission should decide the matter. Nevertheless, the Division's position is that TAXPAYER-1 was domiciled in Utah during the entirety of 2009 and that its assessment should be sustained. However, if the Commission were to decide that TAXPAYER-1 was domiciled in FOREIGN COUNTRY-1 until sometime in December 2009, the Division indicated that it is not asking the Commission to find that any portion of the taxpayer's 2009 income is subject to Utah taxation.

APPLICABLE LAW

1. Under Utah Code Ann.§59-10-104(1)[2], "a tax is imposed on the state taxable income of a resident individual[.]"

2 All citations are to the 2009 version of the Utah Code and the Utah Administrative Code, unless otherwise indicated.

2. For purposes of Utah income taxation, a "resident individual" is defined in UCA §59-10-103(1)(q), as follows in pertinent part:

> (i) "Resident individual" means:
> (A) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of the period during which the individual is domiciled in this state; or
> (B) an individual who is not domiciled in this state but:
> (I) maintains a permanent place of abode in this state; and
> (II) spends in the aggregate 183 or more days of the taxable year in this state.

3. Utah Admin. Rule R865-9I-2 ("Rule 2") provides guidance concerning the determination of "domicile," as follows in pertinent part:[3]

> A. Domicile.
> 1. Domicile is the place where an individual has a permanent home and to which he intends to return after being absent. It is the place at which an individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the intent of making a permanent home.
> 2. For purposes of establishing domicile, an individual's intent will not be determined by the individual's statement, or the occurrence of any one fact or circumstance, but rather on the totality of the facts and circumstances surrounding the situation.
> a) Tax Commission rule R884-24P-52, Criteria for Determining Primary Residence, provides a non-exhaustive list of factors or objective evidence determinative of domicile.
> b) Domicile applies equally to a permanent home within and without the United States.
> 3. A domicile, once established, is not lost until there is a concurrence of the following three elements:
> a) a specific intent to abandon the former domicile;
> b) the actual physical presence in a new domicile; and
> c) the intent to remain in the new domicile permanently.
> 4. An individual who has not severed all ties with the previous place of residence may nonetheless satisfy the requirement of abandoning the previous domicile if the facts and circumstances surrounding the situation, including the actions of the individual,

3 Effective January 1, 2012, Utah law concerning "domicile" was substantively amended. The definition of "domicile" in Rule 2 was deleted from the rule, and new criteria concerning "domicile" was enacted in UCA §59-10-136. However, the 2009 version of Utah law concerning "domicile" is applicable to this appeal.

> demonstrate that the individual no longer intends the previous domicile to be the individual's permanent home, and place to which he intends to return after being absent.
>
> . . . .

4. Utah Admin. Rule R884-24P-52 ("Rule 52") sets forth a non-exhaustive list of factors or objective evidence that may be determinative of domicile, as follows:

> . . . .
> E. Factors or objective evidence determinative of domicile include:
> 1. whether or not the individual voted in the place he claims to be domiciled;
> 2. the length of any continuous residency in the location claimed as domicile;
> 3. the nature and quality of the living accommodations that an individual has in the location claimed as domicile as opposed to any other location;
> 4. the presence of family members in a given location;
> 5. the place of residency of the individual's spouse or the state of any divorce of the individual and his spouse;
> 6. the physical location of the individual's place of business or sources of income;
> 7. the use of local bank facilities or foreign bank institutions;
> 8. the location of registration of vehicles, boats, and RVs;
> 9. membership in clubs, churches, and other social organizations;
> 10. the addresses used by the individual on such things as:
> a) telephone listings;
> b) mail;
> c) state and federal tax returns;
> d) listings in official government publications or other correspondence;
> e) driver's license;
> f) voter registration; and
> g) tax rolls;
> 11. location of public schools attended by the individual; or the individual's dependents;
> 12. the nature and payment of taxes in other states;
> 13. declarations of the individual:
> a) communicated to third parties;
> b) contained in deeds;
> c) contained in insurance policies;
> d) contained in wills;
> e) contained in letters;
> f) contained in registers;
> g) contained in mortgages; and
> h) contained in leases.
> 14. the exercise of civil or political rights in a given location;
> 15. any failure to obtain permits and licenses normally required of a resident;
> 16. the purchase of a burial plot in a particular location;
> 17. the acquisition of a new residence in a different location.
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> . . . .

5. UCA §59-1-1417 (2014) provides that the burden of proof is upon the petitioner in proceedings before the Commission, with limited exceptions as follows:

> (1) In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:
> (a) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
> (b) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and
> (c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:
> (i) required to be reported; and
> (ii) of which the commission has no notice at the time the commission mails the notice of deficiency.
> . . . .

DISCUSSION

TAXPAYER-2 was domiciled in Utah in 2009, but did not earn any of the taxpayers' 2009 income. At issue is whether TAXPAYER-1, who did earn their 2009 income, was a Utah full-year resident individual for 2009. Section 59-10-103(1)(q) provides that a person is a Utah resident individual under either of two scenarios: 1) if the person is domiciled in Utah; or 2) if the person maintains a permanent place of abode in Utah and spends 183 or more days of the taxable year in Utah.

The Division agrees that TAXPAYER-1 does not qualify as a Utah resident individual under the second scenario because he was only present in Utah for approximately 75 days during 2009. The Division, however, argues that TAXPAYER-1 was a Utah resident individual for all of 2009 under the first scenario because it contends that he was domiciled in Utah for all of 2009. As a result, this case rests on whether TAXPAYER-1 was domiciled in Utah during 2009, as the Division contends, or whether he was domiciled in FOREIGN COUNTRY-1, as the taxpayers contend.

TAXPAYER-1 had been a resident of FOREIGN COUNTRY-2 for more than 20 years until September 2007, when he accepted a job in FOREIGN COUNTRY-1 and at which time his wife and children moved to Utah. TAXPAYER-1 explained he was born and raised in Utah. After his initial education in Utah and after studying, subsequently, in FOREIGN COUNTRY-2 and FOREIGN COUNTRY-3, TAXPAYER-1 worked in the marketing and communications fields in FOREIGN COUNTRY-2, first for COMPANY-1and later for the BANK ("Bank") (which had purchased FOREIGN COUNTRY-2's largest bank).

TAXPAYER-1 explained that he is a FOREIGN COUNTRY-2 specialist and that he has even written a book about FOREIGN COUNTRY-2. TAXPAYER-1 married his current wife, TAXPAYER-2, in FOREIGN COUNTRY-2. He also had three children while living in FOREIGN COUNTRY-2. Because TAXPAYER-1 was married to a FOREIGN COUNTRY-2 citizen, he was able to purchase a home in FOREIGN COUNTRY-2. He also had a FOREIGN COUNTRY-2 driver's license. The taxpayers sold their home in FOREIGN COUNTRY-2 when they moved away from there in 2007.

TAXPAYER-1 stated that he and his family decided to move away from FOREIGN COUNTRY-2 after the Bank offered him a position in FOREIGN COUNTRY-1. He finished his employment in FOREIGN COUNTRY-2 in August 2007 and began his employment in FOREIGN COUNTRY-1 around the end of September 2007. TAXPAYER-1 explained that it is a complicated process for a foreigner to receive permission to work in FOREIGN COUNTRY-1. As a result, he first worked as a consultant for the Bank in FOREIGN COUNTRY-1 while the company dealt with the regulations necessary for him to be "formally" employed, for him to have residency in FOREIGN COUNTRY-1, and for him to bring his family to FOREIGN COUNTRY-1.

Because of these regulations and because of the dangers associated with living in FOREIGN CITY, TAXPAYER-1 explained that his wife and children did not move to FOREIGN COUNTRY-1 when he first started working there. He stated that he first wanted to gauge the risks involved with having his family with

him in FOREIGN COUNTRY-1. As a result, the taxpayers agreed that TAXPAYER-2 and their children would temporarily live in Utah where they could purchase a vacation home as an investment. TAXPAYER-1 stated that it took until the summer of 2009 for the Bank and the FOREIGN COUNTRY-1 government to reach a final agreement that would have allowed his family to join him in FOREIGN COUNTRY-1.[4]

TAXPAYER-1 explained that his wife and children initially lived with his parents when they moved to Utah in 2007. Around April 2008, the taxpayers purchased a home in CITY, Utah. Initially, the Bank paid for TAXPAYER-1 to travel to Utah to visit his family for a week once every five or six weeks.[5] TAXPAYER-1 did not perform any work for the Bank while he was on his visits to Utah. TAXPAYER-1 explained that later, the Bank agreed to pay for his family to travel to FOREIGN CITY to visit him on occasion, as well. He proffered evidence to show that his wife visited him in FOREIGN CITY in July 2009. TAXPAYER-1 proffered that his wife came to FOREIGN COUNTRY-1 to look at housing options and to visit schools. However, in November 2009, several months after the agreement was reached for TAXPAYER-1's family to move to FOREIGN COUNTRY-1, he received word that his youngest son, who was around four years of age, had been diagnosed with leukemia.

TAXPAYER-1 stated that until this diagnosis, it was his priority to continue working in FOREIGN COUNTRY-4 and that he had no intention of moving to Utah. At this time, however, he stated that his priority changed and that he decided to resign his position in FOREIGN COUNTRY-1 and move to Utah where his son would be treated for his illness. The taxpayers' documents indicate that TAXPAYER-1 arrived in Utah on

4 The taxpayer proffered an email from an employee of the Bank in FOREIGN COUNTRY-1 indicating to TAXPAYER-1 that his "permit of position" has been approved and that family documents needed to be completed so he could bring his family. This email appears to be dated May 16, 2008. The email also included information about a school in FOREIGN CITY for his children.

5 For 2009, the taxpayers proffered information showing that dates and number of days that TAXPAYER-1 was present in Utah. It appears that TAXPAYER-1 visited his family in Utah once every month or two, usually for 10 days each trip.

December 13, 2009 and was in Utah for the remainder of 2009. TAXPAYER-1 explained that he remained in Utah throughout 2010 while his son was in HOSPITAL for approximately eight months for treatment. The taxpayers' son eventually recovered from the illness. Since his son's recovery, TAXPAYER-1 stated that it has been his intention to return to FOREIGN COUNTRY-4 for work. He was able to work for the Bank in FOREIGN COUNTRY-5 during part of 2011, but is currently back in Utah. He stated that he is currently exploring ways to return to FOREIGN COUNTRY-2 for work. He explained that it may be easier for the family to relocate to FOREIGN COUNTRY-2 than to other FOREIGN COUNTRY-4 countries because of his wife's FOREIGN COUNTRY-2 citizenship. He stated that his wife, who has a green card in the United States, has purposefully not become a United States citizen because it will make it easier for them to go back to FOREIGN COUNTRY-2.

For the first eight months TAXPAYER-1 worked in FOREIGN COUNTRY-1, the Bank provided him an executive suite in a hotel across the street from the Bank's offices. When TAXPAYER-1 visited his family in Utah, the hotel would rent the suite out to other customers, but would keep his personal possessions boxed up at the hotel for when he returned. Later, after his employment was formally approved by the government for a working visa, the Bank provided him an apartment with enough bedrooms for his children to visit. TAXPAYER-1 stated that his visa in FOREIGN COUNTRY-1 had to be renewed on a yearly basis, which was the same as when he lived in FOREIGN COUNTRY-2.

While living in FOREIGN COUNTRY-1, TAXPAYER-1 had an international driver's license. However, he stated that he did not drive in FOREIGN COUNTRY-1 because it is dangerous to do so and because the Bank provided him a car and driver. TAXPAYER-1 obtained a Utah driver's license in February 2010 after moving from FOREIGN COUNTRY-1 to Utah in December 2009. TAXPAYER-1 was not registered to vote in Utah during 2009. TAXPAYER-2 obtained a Utah driver's license in May 2008. The taxpayers purchased a vehicle and registered it in Utah in February 2008. They purchased a second vehicle

and registered it in Utah in August 2010, after TAXPAYER-1 had returned. During the 2009 year at issue, the taxpayers' older children attended school in Utah.

TAXPAYER-1 was not a member of any organizations in Utah during 2009. In 2009, however, he was a member of several different organizations in FOREIGN CITY. He was a member of the FOREIGN COUNTRY-6 and American BUSINESS NETWORK, as well as the CLUB. He stated that he was replicating ties in FOREIGN COUNTRY-1 that were similar to the ties he had established in FOREIGN COUNTRY-2.

The taxpayers have received the residential exemption from property taxes on their CITY, Utah home since purchasing it in 2008, including the 2009 year at issue. The Division stated, however, that the home would qualify for the residential exemption even if TAXPAYER-1 was domiciled in FOREIGN COUNTRY-1 because it was the primary residence of TAXPAYER-2 and the taxpayers' children.

In 2009, the taxpayers banked with BANK-1 in Utah. TAXPAYER-1explained, however, that BANK-1 is "aligned" with the taxpayers' bank in FOREIGN COUNTRY-2, where they maintained the bulk of their assets during 2009. The taxpayers entered into a relationship with a Utah accounting firm after purchasing the home in Utah to file income taxes in the United States. The taxpayers maintained this professional relationship in Utah during 2009.

On their 2009 federal tax return (which was filed in 2010), the taxpayers listed their address to be the CITY, Utah home. The Division pointed out that on the taxpayers' 2009 U.S. federal return, they reported foreign earned income and claimed a foreign tax credit. The taxpayers' claimed that TAXPAYER-1 qualified under the "bona fide residence test" and that his bona fide residence in FOREIGN COUNTRY-1 began in September 2007 and continued through 2009. The Division admitted that the taxpayers' 2009 U.S. federal return is not inconsistent with their claim that TAXPAYER-1 was domiciled in FOREIGN COUNTRY-1 in 2009.

The Division stated that the taxpayers filed Utah non-resident returns for 2007 and 2008, unlike 2009 when they did not file any type of Utah return. At the hearing, the taxpayers and their CPAs stated that without doing more research, they could not remember why they decided to file Utah non-resident returns for the taxpayers for 2007 and 2008, but not 2009. The Division did not provide copies of the 2007 and 2008 Utah returns to show what income was reported as taxable to Utah for these years. For the 2010 tax year, the taxpayers filed a Utah full-year resident return.

Rule 2(A)(1) provides that "[d]omicile is the place where an individual has a permanent home and to which he intends to return after being absent. It is the place at which an individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the intent of making a permanent home." Once domicile is established, Rule 2(A)(3) provides that domicile "is not lost until there is a concurrence of the following three elements: a) a specific intent to abandon the former domicile; b) the actual physical presence in a new domicile; and c) the intent to remain in the new domicile permanently."

It is evident that TAXPAYER-1 meets the first of these three elements; i.e., that he had a specific intent to abandon his former domicile in FOREIGN COUNTRY-2. At issue is whether he, like his wife and children, then established Utah as his new domicile or whether he established FOREIGN COUNTRY-1 as his new domicile.[6] The other two elements necessary for TAXPAYER-1 to have changed his FOREIGN COUNTRY-2 domicile to a new domicile are less clear.

As to the second element, TAXPAYER-1 obviously established an actual physical presence in FOREIGN COUNTRY-1, where he worked. However, he and his wife purchased a home in Utah and he

6 The law in effect during 2009 did make it possible for spouses to have tax domiciles in different states or countries. The Commission has considered this question in prior cases and has, on occasion, determined that spouses have different tax domiciles. It is noted that effective January 1, 2012, when Section 59-10-136 (2012) became effective, it would be harder for one spouse to establish a domicile that is different from the domicile of the other spouse and their children. However, it is the 2009 law, not the 2012 law, that is applicable to this appeal.

visited his family in Utah on a regular basis, including approximately 75 days in 2009. As a result, he also had an actual physical presence in Utah. Accordingly, this case will be decided on the third element, as found in Rule 2(A)(3)(c), which involves "the intent to remain in the new domicile permanently." Specifically at issue is whether TAXPAYER-1 intended to remain permanently in FOREIGN COUNTRY-1 or in Utah between the time he moved away from FOREIGN COUNTRY-2 in 2007 and the time he resigned his job and moved to Utah in December 2009.

This "intent" element is also referenced in Rule 2(A)(1), which provides that "[d]omicile is the place where an individual has a permanent home and to which he **intends** to return after being absent. It is the place at which an individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the **intent** of making a permanent home" (emphasis added).

The taxpayers claim that when they left FOREIGN COUNTRY-2, it was TAXPAYER-1's intent to establish his permanent residency in FOREIGN COUNTRY-1, not Utah, and that he did not change this intent until he resigned his position in FOREIGN COUNTRY-1 and moved to Utah in late 2009 because of his son's health. Utah appellate courts have addressed whether a person is domiciled in Utah for state income tax purposes [7] and have determined that a person's actions may be accorded greater weight in determining his or her domicile than a declaration of intent.[8]

The Division stated that when it had to determine where TAXPAYER-1 established his domicile upon abandoning FOREIGN COUNTRY-2, it considered that he moved his family to Utah and that his children

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7 The issue of domicile for Utah individual income tax purposes has been considered by the Utah Supreme Court and the Court of Appeals. *See Lassche v. State Tax Comm'n*, 866 P.2d 618 (Utah Ct. App. 1993); *Clements v. State Tax Comm'n*, 839 P.2d 1078 (Utah Ct. App. 1995), *O'Rourke v. State Tax Comm'n*, 830 P.2d 230 (Utah 1992), *Orton v. State Tax Comm'n*, 864 P.2d 904 (Utah Ct. App. 1993), and *Benjamin v. State Tax Comm'n*, 2011 UT 14 (Utah 2011).

8 *See Clements v. Utah State Tax Comm'n*, 893 P.2d 1078 (Ct. App. 1995); and *Allen v. Greyhound Lines, Inc*., 583 P.2d 613, 614 (Utah 1978).

attended school in Utah. It also noted that he and his wife purchased a home in Utah, not FOREIGN COUNTRY-1, and that this home received the primary residential exemption in 2009. In addition, the Division noted that TAXPAYER-1 visited his family in Utah on a regular basis and spent vacations and holidays in Utah. Furthermore, the Division points out that the taxpayers purchased a vehicle in Utah and established a professional relationship with a Utah accounting firm prior to 2009. The Division admitted that this case is a close one. Nevertheless, the Division asks the Commission to find that the facts are insufficient to find that TAXPAYER-1's intent was to establish his domicile in a place other than Utah when he left FOREIGN COUNTRY-2.

The facts that the Division focuses on are ones that support its position. However, other facts support the taxpayers' position. TAXPAYER-1, unlike his family, did not move to Utah upon leaving FOREIGN COUNTRY-2. He moved immediately to FOREIGN COUNTRY-1 to begin his job there. While there, it appears that TAXPAYER-1 took steps to receive permission for his family to join him in FOREIGN COUNTRY-1, which suggests that he intended FOREIGN COUNTRY-1 to be his permanent home. Eventually, TAXPAYER-1's employer provided him an apartment large enough to accommodate his family. When these facts are considered in concert with TAXPAYER-1's long history of living and working in FOREIGN COUNTRY-4, they support TAXPAYER-1's stated intent to become a domiciliary of FOREIGN COUNTRY-1 instead of Utah after abandoning FOREIGN COUNTRY-2 in late 2007.

Furthermore, TAXPAYER-1 did not obtain a Utah driver's license until 2010, after he changed his intent, resigned his position in FOREIGN COUNTRY-1, and moved to Utah. Furthermore, TAXPAYER-1 developed social and business connections in FOREIGN COUNTRY-1, not Utah, while he worked there. The taxpayers filed their 2009 income tax returns consistent with their position that TAXPAYER-1 was domiciled in FOREIGN COUNTRY-1 and not Utah. When the totality of the facts are considered as a whole, the taxpayers have demonstrated that TAXPAYER-1 did not intend for Utah to be his permanent home upon

abandoning FOREIGN COUNTRY-2. The facts support his stated intent to establish his domicile in FOREIGN COUNTRY-1 in 2007. The facts also show that TAXPAYER-1 did not abandon his FOREIGN COUNTRY-1 domicile and establish his domicile in Utah until mid-December 2009.

In case the Commission were to reach this conclusion, the Division stated that it would not ask the Commission to find that any portion of the taxpayers' 2009 income is subject to Utah taxation. Accordingly, the Commission should grant the taxpayers' appeal and reverse the Division's assessment in its entirety.

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Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based upon the foregoing, the Commission grants the taxpayers' appeal and reverses the Division's assessment in its entirety. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2015.

John L. Valentine
Commission Chair

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner