

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Corey D. Stevens,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 19R 0615

**ORDER FOR DISMISSAL
WITH PREJUDICE**

THE COMMISSION FINDS AS FOLLOWS:

I. PROCEDURAL HISTORY

The Commission held a jurisdictional show cause hearing on December 18, 2019. Corey D. Stevens (the Taxpayer) appeared telephonically. Jennifer D. Chrystal-Clark, Deputy Douglas County Attorney, appeared telephonically on behalf of the Douglas County Board of Equalization (the County Board). The Commission took notice of the case file, received evidence, and heard argument regarding its jurisdiction to hear this appeal.

II. STANDARD OF REVIEW

The Commission obtains jurisdiction over an appeal when the Commission has the authority to hear the appeal, the appeal is timely filed, the filing fee is timely received and thereafter paid, and a copy of the decision, order, determination, or action appealed from, or other information that documents the decision, order, determination, or action appealed from, is timely filed.¹ Any action of the County Board pursuant to Neb. Rev. Stat. § 77-1502 may be appealed to the Commission in accordance with Neb. Rev. Stat. § 77-5013 on or before August 24, or on or before September 10 if the County Board has adopted a resolution to extend the deadline for hearing protests under Neb. Rev. Stat. § 77-1502.² Parties cannot confer subject matter jurisdiction on a tribunal by acquiescence or consent nor may it be created by waiver, estoppel, consent, or conduct of the parties.³

¹ Neb. Rev. Stat. § 77-5013 (Reissue 2018).

² Neb. Rev. Stat. § 77-1510 (Reissue 2018).

³ *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000).

III. ANALYSIS

The only jurisdictional issue in this case is whether the appeal was filed by the statutory deadline. The County Board adopted a resolution extending the deadline for hearing protests,⁴ so the filing deadline for tax year 2019 was September 10, 2019. On September 23, 2019, the Commission received an envelope containing a completed and signed appeal form, a check for the required filing fees, and a copy of a determination of the County Board made pursuant to Neb. Rev. Stat. § 77-1502. The Taxpayer testified that he took the envelope to a post office in Boy's Town (an area of Omaha) on September 9, 2019, where it was weighed and had postage affixed by an employee, who then placed the envelope in an envelope to be mailed. He testified that the envelope was subsequently returned, after which he took it to a post office where he had the envelope mailed by certified mail.

The Taxpayer's account of events is largely consistent with the physical evidence derived from the envelope,⁵ which contains two postage labels and other markings. One postage label indicates that the postage was \$1.00 and that the envelope was mailed on September 9, 2019, from ZIP code 68154. The label is marked CPU, which refers to "contract postal unit."⁶ A CPU is "a postal unit that is a subordinate unit within the service area of a main post office. It is usually located in a store or place of business and is operated by a contractor who accepts mail from the public, sells postage and supplies, and provides selected special services (for example, postal money order or registered mail)."⁷ Words stamped on the envelope indicate that it was returned to the sender due to insufficient postage;⁸ the deficient amount was \$0.45.⁹ The second

⁴ Case file.

⁵ See case file.

⁶ See, e.g., *Cooper v. United States Postal Service*, 482 F.Supp.2d 278 (2007) (modified by *Cooper v. U.S. Postal Service*, 577 F.3d 479 (Cir. 2009)). We did not disregard the Taxpayer's testimony that the initial mailing was done at a "post office," but we find the physical evidence of the label on the envelope more persuasive on this point. Because CPUs display the logo and other familiar symbols of the United States Postal Service (USPS), "the court is highly doubtful that the public at large understands the implications of the term 'contract postal unit' (i.e., that a CPU is operated by a private contractor, not the Postal Service)." *Cooper*, 482 F.Supp.2d 278, 293 (2007).

⁷ *Cooper* at 281, citing USPS's Glossary of Postal Terms.

⁸ Insufficient postage is "Mail of any class . . . that is received at either the office of mailing or office of address without enough postage. Such mail is marked to show the total (rounded off) deficiency of postage and fees." USPS, *Domestic Mail Manual*, Ch. 604 § 8.1.1. The Domestic Mail Manual is incorporated by reference into the Code of Federal Regulations. 39 C.F.R. §§ 111.1 through 111.4. The Commission may consider and utilize the provisions of the Code of Federal Regulations. Neb. Rev. Stat. § 77-5016(3).

⁹ These findings are based on our physical inspection of the envelope. The words indicating that the envelope was being returned to the sender have been marked out, but some of the message was still legible.

postage label indicates that the postage was \$3.95 and that the envelope was mailed on September 20, 2019, from ZIP code 68124.¹⁰

An appeal or petition to the Commission is timely filed if placed in the United States mail, postage prepaid, with a legible postmark for delivery to the Commission, or received by the Commission, on or before the date specified by law for filing the appeal or petition.¹¹

For the purposes of our jurisdictional inquiry, we assume that the Taxpayer's appeal materials were "placed in the United States mail" when the envelope was accepted by the CPU employee.¹² The United States Postal Service (USPS) eventually determined that the postage affixed was insufficient, at which point the USPS returned the envelope to the Taxpayer for additional postage. In *Lozier v. Douglas County Board of Equalization*,¹³ an envelope was mailed to this Commission using a postage label printed from a private postage meter before the filing deadline, but it was returned to the sender "for unknown reasons." The Court wrote,

"We give statutory language its plain and ordinary meaning, and we will not read into a statute a meaning that is not there. Section 77-5013(2) does not provide that the mailing which arrived controls over a prior mailing which did not. Instead, § 77-5013(2) focuses only on whether the appeal was properly *placed in the mail* with sufficient postage and a legible postmark for delivery to TERC before the filing deadline [...] There is no dispute that Lozier placed the envelope "in the United States mail" on September 1, 2011, or that the September 1 mailing was before the September 12 filing deadline. Nor is there any dispute that the envelope had the proper postage."¹⁴

In *Lozier*, the envelope was returned for unknown reasons, but in this appeal, the envelope was returned to the Taxpayer because the postage affixed was insufficient. In finding that the Commission had jurisdiction over Lozier's appeal, the court repeatedly stated that sufficient

¹⁰ The increase in postage may be explained by the Taxpayer's decision to send the appeal by certified mail on his second attempt.

¹¹ Neb. Rev. Stat. § 77-5013(2) (Reissue 2018).

¹² We are aware of no authority, in Nebraska or any other jurisdiction, which addresses the question of whether a letter handed to an employee of a CPU for mailing is "placed in the United States mail" at the time it is given to the CPU employee, as opposed to when the letter is transferred to USPS for delivery. Employees of a CPU are not employees of the USPS. *Ortiz v. Nance*, 131 F.3d 18 (Cir. 1998). But see *Rent-A-Tainment, Inc./Mail N' Things v. United States of America*, 119 B.R. 80, 81 (E.D.Va. 1990) ("A contract postal unit is a post office."). The Second Circuit Court of Appeals determined that a CPU qualified as a state actor under a public function test applied in an establishment clause case. *Cooper v. U.S. Postal Service*, 577 F.3d 479 (Cir. 2009). However, the facts and legal issues involved in *Cooper* were not similar to the facts and issues involved in this appeal.

¹³ *Lozier Corp. v. Douglas County Bd. of Equal.*, 285 Neb. 705, 829 N.W.2d 652 (2013).

¹⁴ *Lozier* at 709, 710 (emphasis in original).

postage was affixed to that envelope. In this case, the opposite is true: The envelope mailed by the Taxpayer on September 9 did not have sufficient postage.

We are not indifferent to the Taxpayer’s argument that he was not at fault for the inadequate postage, but the Commission “does not have the power to apply equitable principles in jurisdictional matters.”¹⁵ Instead, “[the Commission’s] jurisdiction over an appeal is derived from statute.”¹⁶ The statutes do not allow us to make a jurisdictional determination based on who was at fault for the insufficient postage. The envelope was not properly placed in the mail with sufficient postage before the filing deadline. The appeal was not timely filed in accordance with the requirements of Neb. Rev. Stat. § 77-5013(2).

IV. CONCLUSION

The Commission does not have jurisdiction to hear the above captioned appeal.

THEREFORE IT IS ORDERED:

1. The above captioned appeal is dismissed with prejudice.
2. As required by Neb. Rev. Stat. § 77-5018 (Reissue 2018), this decision, if no appeal is filed, shall be certified within thirty days to the Douglas County Treasurer, and the officer charged with preparing the tax list for Douglas County as follows:

John Ewing
Douglas County Treasurer
1819 Farnam St., Rm H03
Omaha, NE 68183

Diane Battiato
Douglas County Assessor
1819 Farnam Stre. Ste H09 Civic Center
Omaha, NE 68183-1000

3. Each party is to bear its own costs in this matter.

SIGNED AND SEALED: January 7, 2020

Robert W. Hotz, Commissioner

James D. Kuhn, Commissioner

¹⁵ *Creighton St. Joseph Regional Hosp. v. Nebraska Tax Equalization and Review Com’n*, 260 Neb. 905, 921, 620 N.W.2d 90, 102 (2000).

¹⁶ *Village at North Platte v. Lincoln County Bd. of Equal.*, 292 Neb. 533, 540, 837 N.W.2d 201, 206 (2016).