

**BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION**

Duane G. Merkel,  
Appellant,

v.

Hall County Board of Equalization,  
Appellee.

Case No. 20C 0169

**ORDER FOR DISMISSAL  
WITH PREJUDICE**

**THE COMMISSION FINDS AS FOLLOWS:**

**I. PROCEDURAL HISTORY**

The Commission held a jurisdictional show cause hearing on October 21, 2020 at 3:00 p.m. Duane G. Merkel (the Appellant) appeared telephonically. Sarah Carstensen, Deputy Hall County Attorney, appeared telephonically on behalf of the Hall County Board of Equalization (the County Board). The Commission took notice of its case files, received evidence, and heard argument regarding its jurisdiction to hear this appeal.

**II. APPLICABLE LAW**

The Commission obtains jurisdiction over an appeal when the it 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.<sup>1</sup> 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.<sup>2</sup> When an appellate tribunal is without jurisdiction to act, the appeal must be dismissed.<sup>3</sup> Parties cannot confer subject matter

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<sup>1</sup> Neb. Rev. Stat. § 77-5013 (Reissue 2018).

<sup>2</sup> Neb. Rev. Stat. § 77-1510 (Reissue 2018).

<sup>3</sup> *Carlos H. v. Lindsay M.* 283 Neb. 1004, 815 N.W.2d 168 (2012).

jurisdiction on a tribunal by acquiescence or consent nor may jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.<sup>4</sup>

### **III. FINDINGS OF FACT**

On August 28, 2020, the Commission received an envelope containing a completed appeal form, the required filing fee, and a decision of the County Board. The envelope was postmarked August 26, 2020.<sup>5</sup> The envelope also contained a handwritten letter dated August 27, 2020. The appeal form was dated August 18, 2020. The decision of the County Board was recorded on a protest form certified to have been mailed to Appellant on August 3, 2020. The certification was made by the Hall County Clerk. The form also indicates that the protest hearing took place on July 21, 2020.

At the jurisdictional show cause hearing, Appellant testified that he was informed of the County Board's decision on his protest by Kristi Wold, the Hall County Assessor, about a month after appearing before the County Board for the protest hearing. At that time, Wold handed Appellant a copy of the County Board's decision. Appellant looked at the materials given to him by Wold and concluded that the applicable deadline was October 15, 2020. He testified that he then forgot about the matter for a couple of days before completing his appeal to the Commission.

### **IV. ANALYSIS**

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.<sup>6</sup> There is no evidence that the County Board extended the protest hearing deadline, so the deadline to file an appeal to the Commission for a decision of the County Board pursuant to Neb. Rev. Stat. § 77-1502 was August 24, 2020. The October 15 deadline applies to appeals under Neb. Rev. Stat. § 77-1504, which describes the procedure counties follow when the county assessor discovers property that has been overvalued or undervalued after the deadline for preparing the assessment

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<sup>4</sup> *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000).

<sup>5</sup> No evidence was received to show that the County Board passed a resolution to extend the deadline for hearing protests under Neb. Rev. Stat. § 77-1502. See, Neb. Rev. Stat. § 77-1510 (Reissue 2018).

<sup>6</sup> Neb. Rev. Stat. § 77-5013(2) (Reissue 2018).

roll.<sup>7</sup> The record contains no basis to conclude that this appeal was brought under Neb. Rev. Stat. § 77-1504.<sup>8</sup>

The record indicates that Duane Merkel signed a protest form on June 5, 2020 and it was filed in the Hall County Clerk's office on June 8, 2020. The County Board made a decision regarding the protest and the Chairperson signed that decision on July 21, 2020. The record establishes that notice of the decision of the County Board was mailed August 3, 2020.<sup>9</sup> The plain language of Neb. Rev. Stat. § 77-1502 requires that the determination be mailed by August 2. The Commission therefore finds that the County Board failed to meet its statutory obligation to mail the notice to the Appellant no later than August 2, 2020. In reaching this conclusion, the Commission is mindful that August 2, 2020 was a Sunday, but we are aware of no statute that authorizes the County Board to satisfy the mailing requirement by mailing the notices the next day.<sup>10</sup>

However, even though the County Board failed to give the notice required by statute, the right to file a petition with the Commission arises only "if a failure to give notice *prevented* timely filing of a protest or appeal."<sup>11</sup> The rules of statutory interpretation require a tribunal to give effect to the entire language of a statute.<sup>12</sup> We are required to attempt to give effect to each word or phrase in a statute and ordinarily will not read language out of a statute.<sup>13</sup> Following this principle, as explained further below, we find that it is not sufficient to show that the County Board failed to strictly comply with the statute; Appellant must also show that the County Board's failure actually *prevented* timely filing of a protest or appeal.

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<sup>7</sup> See Neb. Rev. Stat. §§ 77-1303, 77-1315.01, 77-1504 (Reissue 2018).

<sup>8</sup> Neb. Rev. Stat. §§ 77-1502 and 77-1504 both relate to the work of county boards of equalization determining the assessed value of real property in Nebraska. Neb. Rev. Stat. § 77-1502 relates to protests filed by taxpayers who disagree with the assessed value of real property determined by their county assessor. Neb. Rev. Stat. § 77-1504 sets forth a process for county boards to correct the assessment of property that is identified by the county assessor as overvalued or undervalued after March 19. The deadline to file appeals with the Commission is August 24 or September 10 for appeals filed pursuant to § 77-1502, and October 15 or October 30 for appeals filed pursuant to § 77-1504.

<sup>9</sup> The August 3, 2020 mailing date was certified by the County Clerk.

<sup>10</sup> In this inquiry, we have reviewed Neb. Rev. Stat. § 25-2221, which allows an action to be taken the day after a weekend or holiday when the statute requires a "period of time within which an act is to be done." The statute applies to situations in which a period of time must be calculated from a certain act, event, or default; for example, an appeal of a county board's decision setting the taxable value of omitted property may be appealed "within thirty days after the board's final decision." We are not aware of any instance in which Nebraska courts have applied § 25-2221 to a date certain such as "August 2." Nor were we persuaded by the County Board's assertion that "on or before August 2" is a "period of time" requiring computation under § 25-2221. Therefore, we find that Neb. Rev. Stat. § 25-2221 would be inapplicable in this case. The notices should have been mailed on or before August 2, as required by the plain language of the statute.

<sup>11</sup> Neb. Rev. Stat. 77-1507.01 (Reissue 2018).

<sup>12</sup> See *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

<sup>13</sup> *Werner v. County of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012).

Appellant testified that Wold gave him a copy of the County Board’s decision, but he could not recall the date, except that it was about a month after his protest proceeding. The protest form indicates that the decision of the County Board reduced the taxable value of the Subject Property by lowering the building value to \$159,500. The Appellant included this exact amount on the appeal form. Since Appellant dated the appeal form August 18, 2020, and since the Appellant included the \$159,500 amount on the appeal form, we conclude that Wold must have given Appellant the appeal form on or before August 18, 2020. This left Appellant with at least six calendar days in which to file the appeal before the August 24, 2020 deadline. Therefore, since the Appellant did not timely file his appeal by August 24, 2020,<sup>14</sup> the Commission shall only exercise jurisdiction as a petition if the failure of the County Board to give notice to the Appellant prevented the Appellant from timely filing the appeal with the Commission.<sup>15</sup>

The failure of the County Board to give timely notice to the Appellant raises due process concerns.<sup>16</sup> Prior to 2005, the Nebraska Supreme Court consistently found that a failure to provide proper notice of an increased assessment resulted in the increased valuation being void, and the assessment was to revert back to the prior year.<sup>17</sup> In these cases, the Nebraska Supreme Court consistently emphasized that a denial of notice and the opportunity to be heard was a denial of “the process that is due under the [notice] statutes.”<sup>18</sup>

However, in 2005, the Nebraska Legislature passed LB 15,<sup>19</sup> which provides a “statutory remedy” to the due process violation when failure of notice would prevent a taxpayer from filing a protest with the county board or an appeal with the Commission.<sup>20</sup> In *Cain v. Custer County Board of Equalization*, the Court discussed at length the effect of the adoption of Neb. Rev. Stat. §77-1507.01 on the due process analysis in relation to such a failure of notice:

But the failure of the county to provide notice of an increased assessment or the county board of equalization's decision no longer deprives a taxpayer of an opportunity to be heard on the increased assessment or decision. After our decision in [*Falotico*], the Legislature adopted § 77-1507.01. See 2005 Neb. Laws, L.B. 15, § 5. Under § 77-1507.01, a taxpayer who does not receive notice has the opportunity to be heard by filing a petition directly with TERC.

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<sup>14</sup> As prescribed by Neb. Rev. Stat. § 77-1510 (Reissue 2018).

<sup>15</sup> Neb. Rev. Stat. 77-1507.01 (Reissue 2018).

<sup>16</sup> See generally, *Cain v. Custer County Bd. of Equal.*, 868 N.W.2d 334, 291 Neb. 730 (2015).

<sup>17</sup> See, for example, *Falotico v. Grant County Bd. of Equal.*, 631 N.W.2d 492, 498, 262 Neb. 292, 299 (2001) (notice actually given, but with only three days to respond). Similarly, when notice of the increased assessment itself was not given in accordance with the statutory requirements, the increased assessment was void. See, for example, *Rosenbery v. Douglas County*, 123 Neb. 803, 244 N.W. 398 (1932), *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 489 (1954).

<sup>18</sup> See *Cain*, 868 N.W.2d at 345, 291 Neb. at 743.

<sup>19</sup> 2005 Neb. Laws LB 15, codified at Neb. Rev. Stat. §77-1507.01 (Reissue 2018).

<sup>20</sup> *Cain*, 868 N.W.2d at 344, 291 Neb. at 741.

Because this opportunity to be heard now exists, we conclude that the failure to provide notice of an increased assessment or the decision of a county board of equalization no longer renders increased assessments void for a denial of due process. The language of § 77-1507.01 confirms that a lack of notice no longer renders an increased assessment void....

By authorizing such protests and appeals, the Legislature eliminated the circumstance (no opportunity to be heard) which was the basis for our decisions declaring increased assessments void due to lack of notice.... Therefore, based on the language of § 77-1507.01, we conclude the Legislature intended that the failure to provide notice would no longer render increased assessments void.<sup>21</sup>

Therefore, as a result of the late notice in this case, we must analyze the Appellant's right to file a petition with the Commission and the specific language of the "statutory remedy."<sup>22</sup>

As noted above, even though the County Board failed to give the notice required by statute, the language of §77-1507.01 expressly requires that the right to file a petition with the Commission arises only "if a failure to give notice *prevented* timely filing of a protest or appeal." As the Court emphasized in *Cain*, "[b]ecause the lack of notice *prevented* [Cain] from filing protests, §77-1507.01 permitted him to file petitions with TERC before December 31."<sup>23</sup> Our analysis therefore must turn to whether, under the facts in evidence in this case, the County Board's failure to comply with the statutory notice requirements prevented the Appellant from timely filing his appeal with the Commission.

The record indicates that three factors may have contributed to the Appellant's late filing of the appeal form: the mailing of the notice of the decision of the County Board one day later than required; the hand-delivery of the notice of the decision of the County Board; and the Appellant's mistaken reliance upon his misreading of the appeal form instructions.

The Appellant disputes that the County Board provided any notice at all. He asserts that he did not receive any notice prior to the hand-delivery of the County Board's decision by the County Assessor on a date no later than August 18, 2020. This assertion is disputed in the record; the County Clerk certified (using the protest form) that the County Board decision was mailed to the Appellant on August 3, 2020. What is not in dispute is that the Appellant signed the appeal form on August 18, 2020, and that the appeal form included information that was taken from the County Board's decision. We therefore conclude from the evidence that the Appellant had notice of the County Board decision both by mail and by hand-delivery, and that notice was no later

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<sup>21</sup> *Cain*, 868 N.W.2d at 345-346, 291 Neb. at 743-745.

<sup>22</sup> Neb. Rev. Stat. 77-1507.01 (Reissue 2018).

<sup>23</sup> 868 N.W.2d at 346, 291 Neb. at 745 (emphasis added).

than August 18, 2020. The question then becomes whether notice as late as August 18, 2020, prevented the Appellant from timely filing his appeal by August 24, 2020.

It is important to note that the Appellant did not testify that he knew the appeal filing deadline was August 24, 2020. If that were the case, our analysis would simply be to determine whether notice of only six days, from August 18, 2020, to August 24, 2020 prevented timely filing of the appeal. But rather, Appellant testified as to his belief from August 18, 2020 until sometime after August 24, 2020, that the appeal filing deadline was October 15, 2020. It is important to note, as noted above, that the Appellant signed and dated the appeal form on August 18, 2020. Had it been mailed and postmarked the day it was signed and dated, or on any of the next several days, up till and including August 24, 2020, the appeal filing would have been timely.

Instead, we find that the Appellant's reliance upon his mistaken belief that the appeal filing deadline was not until October 2020, was the reason for the delay in filing the appeal form until after August 24, 2020. No evidence was presented to explain that six days was not enough time to get the signed and dated appeal form in the mail and postmarked.<sup>24</sup> On the contrary, the testimony of the Appellant was that after concluding that he had until October 15, 2020, he forgot about the appeal filing for some time. We conclude, therefore, that neither the notice on August 3, 2020, as certified by the County Clerk, nor the notice no later than August 18, hand-delivered by the County Assessor, prevented timely filing of the appeal.

As noted above, we are constrained by the rules of statutory interpretation which require a tribunal to give effect to the entire language of a statute.<sup>25</sup> In this case, that has required a fact-based inquiry to determine whether a "failure to give notice prevented timely filing" of an appeal. To read the statute as automatically authorizing a petition filing after late notice has been given would not give effect to the entire language of the statute. Therefore, we conclude that the Appellant did not satisfy the requirements of the statutory remedy and we cannot find that a failure of notice prevented timely filing of the appeal.

For the reasons stated above, the Commission should find that it does not have jurisdiction over the appeal.

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<sup>24</sup> Neb. Rev. Stat. §77-5013(2).

<sup>25</sup> See *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

**V. 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 Hall County Treasurer, and the officer charged with preparing the tax list for Hall County as follows:

Alaina VerPlank  
Hall County Treasurer  
121 S Pine St., Suite 2  
Grand Island, NE 68801

Kristi Wold  
Hall County Assessor  
121 S Pine St. Ste 1  
Grand Island, NE 68801

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

**SIGNED AND SEALED:** December 22, 2020

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Robert W. Hotz, Commissioner

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James D. Kuhn, Commissioner