BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Sheila R. Hulme, Appellant, v. Hall County Board of Equalization, Appellee.	Case Nos. 20R 0384 & 20R 0385 ORDER FOR DISMISSAL WITH PREJUDICE

THE COMMISSION FINDS AS FOLLOWS:

I. PROCEDURAL HISTORY

The Commission held a jurisdictional show cause hearing on October 20, 2020. Appellant Sheila R. Hulme 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 these appeals.

II. APPLICABLE LAW

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] Any person otherwise having a right to appeal may petition the Tax Equalization and Review Commission in accordance with section 77-5013, on or before December 31 of each year, to determine the actual value or special value of real property for that year if a failure to give notice prevented timely filing of a protest or appeal provided for in sections 77-1501 to 77-1510.[3]

[1] Neb. Rev. Stat. § 77-5013 (Reissue 2018).
[2] Neb. Rev. Stat. § 77-1510 (Reissue 2018).
[3] Neb. Rev. Stat. § 77-1507.01 (Reissue 2018).

When an appellate tribunal is without jurisdiction to act, the appeal must be dismissed.[4] 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.[5]

III. FINDINGS OF FACT

On August 31, 2020, the Commission received an envelope containing two completed appeal forms, two appealable decisions of the County Board, and two checks for the required filing fees. The envelope was postmarked August 27, 2020.

At the jurisdictional show cause hearing, Appellant Hulme testified that, when she attended her protest hearing with the County Board, she was told that she would have the County Board's decisions by August 1. The decisions indicate that they were mailed to Appellant on Monday, August 3, 2020.[6] Hulme did not receive the decisions until August 12 or August 15, 2020. After receiving them, she called the Hall County Assessor's office and was told that she had until August 30, 2020 to appeal the decisions to the Commission. Relying upon this representation, Hulme signed and mailed the appeals on August 26, 2020.

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.[7] There is no evidence that the County Board extended the protest hearing deadline, so the deadline to file appeals with the Commission was August 24, 2020.

Hulme testified about two instances of inaccurate information given to her by county officials or employees, which contributed to her decision to file her appeals after the appeal deadline. These facts bring into question the doctrine of *equitable estoppel*, which applies where, as a result of conduct of a party upon which another person has in good faith relied to his or her detriment, the acting party is absolutely precluded, both at law and in equity, from asserting

[4] *Carlos H. v. Lindsay M.* 283 Neb. 1004, 815 N.W.2d 168 (2012).
[5] *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000).
[6] The County Clerk certified (using the protest form) that the County Board decision was mailed to the Appellant on August 3, 2020.
[7] Neb. Rev. Stat. § 77-5013(2) (Reissue 2018).

rights which might have otherwise existed.[8] But, under Nebraska law, jurisdiction cannot be created by estoppel, so such equitable relief is not available.[9] Since there is no equitable relief, the only remaining question is whether a statutory remedy is available.

As noted above, notice of the County Board's determinations were not mailed until August 3, 2020. The plain language of Neb. Rev. Stat. § 77-1502 requires that the notice be mailed by August 2, 2020.[10] 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 authorizing the County Board to satisfy the mailing requirement by mailing the notices the next day.[11]

However, even if the County Board failed to give the notice required by statute, the right to file a petition with the Commission arises "if a failure to give notice *prevented* timely filing of a protest or appeal."[12] The rules of statutory interpretation require a tribunal to give effect to the entire language of a statute.[13] We attempt to give effect to each word or phrase in a statute and ordinarily will not read language out of a statute.[14] Following this principle, the Commission finds that it is not sufficient merely 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.

The failure of the County Board to give timely notice to the Appellant raises due process concerns.[15] 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.[16] In these cases, the Court also

[8] *Omaha Police Union Local 101 v. City of Omaha,* 292 Neb. 381, 872 N.W.2d 765 (2015).
[9] *Creighton, supra.*
[10] In this inquiry, we have reviewed Neb. Rev. Stat. §25-2221, which allows an "action" by the County Board to be taken the day after Sunday when the statute requires a "period of time within which an act is to be done." In this, case, the mailing requirement does not allow for a period of time; rather it is to be done by a date certain. Therefore, we find that Neb. Rev. Stat. §25-2221 would be inapplicable in this case.
[11] In this inquiry, we have reviewed Neb. Rev. Stat. §25-2221, which allows an "action" by the County Board to be taken the day after Sunday when the statute requires a "period of time within which an act is to be done." In this, case, the mailing requirement does not allow for a period of time; rather it is to be done by a date certain. Therefore, we find that Neb. Rev. Stat. §25-2221 would be inapplicable in this case.
[12] Neb. Rev. Stat. § 77-1507.01 (Reissue 2018).
[13] See *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).
[14] *Werner v. County of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012).
[15] See generally, *Cain v. Custer County Bd. of Equal*., 868 N.W.2d 334, 291 Neb. 730 (2015).
[16] 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

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."[17]

However, in 2005, the Nebraska Legislature passed LB 15,[18] 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.[19] 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. 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.[20]

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."[21]

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, "Because the lack of notice *prevented* [Cain] from filing protests, § 77-1507.01 permitted him to file petitions with TERC before December 31."[22] Our analysis therefore must turn to whether, under the facts in evidence in this case, the County

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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).

[17] See *Cain,* 868 N.W.2d at 345, 291 Neb. at 743.

[18] 2005 Neb. Laws LB 15, codified at Neb. Rev. Stat. §77-1507.01 (Reissue 2018).

[19] *Cain,* 868 N.W.2d at 344, 291 Neb. at 741.

[20] *Cain,* 868 N.W.2d at 345-346, 291 Neb. at 743-745.

[21] i.e., Neb. Rev. Stat. 77-1507.01 (Reissue 2018).

[22] 868 N.W.2d at 346, 291 Neb. at 745 (emphasis added).

Board's failure to comply with the statutory notice requirements prevented the Appellant from timely filing an appeal with the Commission.

The record in this case indicates that two 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, and the Appellant's mistaken reliance upon her understanding of communications from county officials or county employees.

It is important to note that the Appellant did not testify that she knew the appeal filing deadline was August 24, 2020. If that were the case, our analysis would simply be to determine whether the notice that was mailed one day late prevented timely filing of the appeal. But rather, Appellant testified as to her belief that she could timely file the appeals as late as August 31, 2020. The Appellant signed and dated the appeal form on August 26, 2020. Under these facts, the Commission cannot find that the one day late notice of August 3, 2020 *prevented* the timely filing of her appeals. Other factors, specifically her mistaken belief that the filing date was August 30, 2020, contributed to her decision to file the appeals after August 24, 2020.
No evidence was presented to explain why the Appellant did not have enough time to get the signed and dated appeal form in the mail and postmarked by August 24, 2020.[23] The Commission concludes, therefore, that the mailing of the notice on August 3, 2020, as certified by the County Clerk, did not *prevent* the Appellant's timely filing of the appeals.

As noted above, the Commission is constrained by the rules of statutory interpretation which require a tribunal to give effect to the entire language of a statute.[24] 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, the Commission concludes that the Appellant did not satisfy the requirements of the statutory remedy and the Commission cannot find that a failure of notice prevented timely filing.

The Commission should find that it does not have jurisdiction over the appeal.

V. CONCLUSION

The Commission does not have jurisdiction to hear the captioned appeals.

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[23] Neb. Rev. Stat. §77-5013(2).
[24] See *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

THEREFORE IT IS ORDERED:

1. The captioned appeals are 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: January 29, 2021

Robert W, Hotz, Commissioner

Commissioner Keetle, Dissenting.

I respectfully dissent. I disagree with the Commission's holding that the rules of statutory construction require dismissal of these appeals.

I agree that the failure of the County Board to give timely notice to the Appellant raises due process concerns.[25] Courts in Nebraska have long held that strict compliance with notice requirements is required to satisfy due process and any failure to strictly comply with the notice requirements entitled the taxpayer to relief.[26] Prior to the passage of § 77-1507.01, the relief to which the taxpayer was entitled was the voiding of the new assessment.[27] Voiding of the assessment was the remedy whether the failure to provide the required notice prevented the

[25] See generally, *Cain v. Custer County Bd. of Equal*., 868 N.W.2d 334, 291 Neb. 730 (2015).
[26] See *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), *Falotico v. Grant County*, 262 Neb. 292, 631 N.W.2d 492 (2001), Cain v Custer County, 291 Neb. 730, 868 N.W.2d 334 (2015).
[27] *Id.*

timely filing of a protest or appeal or not.[28] Neb. Rev. Stat. § 77-1507.01 and several related statutes provided a new remedy in place of the voiding of the assessments for the failure of the statutorily required notice: the ability to petition the Commission prior to December 31 of that tax year "if a *failure to give notice* prevented timely filing of a protest or appeal."[29] The Commission's decision today does not merely give effect to a new remedy; it also redefines the due process violation in a manner that renders the statutory notice deadlines meaningless.

Falotico is the last case in which the Nebraska Supreme Court considered this issue prior to the enactment of § 77-1507.01. The court observed:

> The notice requirements under § 77-1502 occur at a different point in time in the assessment process than the notice required by what is now § 77-1315. However, its object is largely the same, namely, notice. Given that appeals to TERC must be taken within 30 days after the adjournment of a board of equalization, § 77-1502 ensures that a taxpayer will be notified of the board's decision *in order that the taxpayer may have time to prepare and file an appeal within the statutory 30-day period.* Without this notice provision, *the board could very well delay notification to the taxpayer, thereby preventing review of the board's decision*. Likewise, *if a violation of this provision were without consequence, the board could similarly engage in such delay and defeat the taxpayer's appeal, effectively denying the taxpayer the process that is due under the statutes*. We conclude that just as notice by the county assessor under § 77-1315 is essential to the validity of the levy, so too is notice by the county clerk under § 77-1502.[30]

The Supreme Court expressly recognized that taxpayers are entitled to a statutorily determined period of "time in which to prepare and file an appeal." The interpretation of § 77-1507.01 adopted by the Commission invites the exact harm the Supreme Court warned against. We will require a taxpayer to prove that he or she did not have time to prepare and file an appeal even if the county board's failure to comply with the notice requirements is undisputed. But how much time is enough to prepare and file an appeal? Under today's ruling, the Commission authorizes itself to answer that question on a case-by-case basis instead of uniformly adhering to the amount of time established by the Legislature.

[28] See, e.g., *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 489 (1954), *Falotico v. Grant County*, 262 Neb. 292, 631 N.W.2d 492 (2001).
[29] Neb. Rev. Stat. § 77-1507.01 (Reissue 2018).
[30] *Falotico*, 262 Neb at 298-299, 631 N.W.2d at 498, *emphasis added.*

Generally, statues which effect a change in the common law are to be strictly construed.[31] In construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute. An appellate court will place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal meaning that would have the effect of defeating the legislative intent.[32] A tribunal must give effect to the entire language of a statute and reconcile different provisions of the statutes so they are consistent, harmonious, and sensible.[33] In this case, the "consistent, harmonious, and sensible" reconciliation of §§ 77-1502 and 77-1507.01 would give effect to the Supreme Court's observation in *Falotico*: a "delay [in] notification to the taxpayer" has the effect of "preventing review of the board's decision." Consistent with the longstanding rule that "the procedure prescribed by the Legislature in respect to levying a tax must be strictly observed,"[34] I would find that any failure of a county board to mail the notice by the date specified by statute is sufficient to prevent filing of a timely appeal without any further factual showing by the Appellant.

For the forgoing reasons, I would determine that the Commission has jurisdiction over the petitions of the Appellant to determine the actual value of the Subject Property.

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Steven A. Keetle, Commissioner

[31] *Alisha C. v. Jeremy C.*, 283 Neb 340, 9 (2012) (Citations Omitted)
[32] *State v. Norman*, 282 Neb. 990, 997 (2012) (citations omitted).
[33] See *ML Manager v. Jensen*, 287 Neb. 171, 177, 842 N.W.2d 566, (2014).
[34] *Falotico*, 262 Neb. 298, 631 N.W.2d 498.