

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Kevin and Melissa Claussen,
Appellant,

v.

Hall County Board of Equalization,
Appellee.

Case No. 20R 0653

**ORDER FOR DISMISSAL
WITH PREJUDICE**

THE COMMISSION FINDS AS FOLLOWS:

I. PROCEDURAL HISTORY

The Commission held a jurisdictional show cause hearing on December 16, 2020. Kevin and Melissa Claussen (the Taxpayers) 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 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

On or before August 2, or on or before August 18 in a county that has adopted a resolution to extend the deadline for hearing protests, the county clerk shall mail to the protester written notice of the board's decision.³ Any person otherwise having a right to appeal may petition the Commission in accordance with Neb. Rev. Stat. § 77-5013, on or before December 31 of each

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

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

³ Neb. Rev. Stat. § 77-1502(6) (Reissue 2018).

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 §§ 77-1501 to 77-1510.⁴ When an appellate tribunal is without jurisdiction to act, the appeal must be dismissed.⁵ 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.⁶

III. FINDINGS OF FACT

On November 30, 2020, the Commission received a completed appeal form, a decision of the County Board made pursuant to Neb. Rev. Stat. § 77-1502, dated July 21, 2020, the required filing fee, and other supporting documents. The envelope in which these materials were received was stamped but not visibly postmarked. The County Board’s decision is recorded on Form 422, a one-page form that includes the protest by the Taxpayer, the recommendation of the referee, the decision of the County Board, and the certification of the County Clerk that notice of the decision was mailed to the protester.⁷ The certification indicates that the “Date Notice of Decision was Mailed to Protester” was August 3, 2020, but it also states that “a copy of this protest and report ... has been mailed to the protester at the above-shown address on July 21, 2020.”

Melissa Claussen testified at the jurisdictional show cause hearing. She acknowledged that the appeal materials were not mailed to the Commission on or before August 24, 2020. Claussen did not recall when she received the County Board’s decision. She thought she received it sometime in August, possibly before August 24, but she had not kept the envelope and did not know the precise date. She did not attempt to contact the County Clerk’s office regarding the outcome of the protest before August 24. Claussen decided to file the petitions with the Commission sometime in November 2020, after researching and obtaining additional information about the actions and obligations of the County Board and County Clerk.

Marla Conley, Hall County Clerk, testified at the jurisdictional show cause hearing. According to her testimony, mailing the decisions of the County Board regarding property

⁴ Neb. Rev. Stat. § 77-1507.01 (Reissue 2018).

⁵ *Carlos H. v. Lindsay M.* 283 Neb. 1004, 815 N.W.2d 168 (2012).

⁶ *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000).

⁷ See case file. When complete, a single Form 422 qualifies as both the “decision ... appealed from” that must be filed with the Commission to establish jurisdiction under Neb. Rev. Stat. § 77-5013(1)(d) and the “written notice of the board’s decision” that must be provided to the protestor under Neb. Rev. Stat. § 77-1502(6). The form also has a section for the recommendation of the County Assessor, but the Assessor is not required to make a recommendation. See Neb. Rev. Stat. § 77-1502(5).

valuation protests is one of the duties of her office, which she has held for the past 22 years. Conley was aware of the statutory requirement that the County Board's decisions be mailed on or before August 2 of each year, but in years when the mailing deadline fell on a weekend or a holiday, Conley's practice was to mail the notices on the following working day. August 2, 2020, was a Sunday, so Conley mailed out the notices on August 3, 2020. Conley also testified that the indication the decision was mailed on July 21, 2020, was incorrect; she conceded that the decision was actually mailed to the Taxpayers on August 3, 2020.

IV. ANALYSIS

There is no evidence that the County Board extended the protest hearing deadline, so the applicable deadline to file an appeal with the Commission was August 24, 2020. The Taxpayers acknowledge that the appeal was not filed until after this deadline, but they assert that they have a right to petition the Commission pursuant to Neb. Rev. Stat. § 77-1507.01 because the County Clerk mailed the notice of the County Board's decision on August 3 instead of on or before August 2.

Because the County Board did not extend the protest hearing deadline, August 2, 2020, was the statutory deadline for the county clerk to mail written notice of the County Board's decision to the Taxpayers. The County Board asserted that the August 3 mailing was not a failure of notice because August 2 was a Sunday. In support of this position, the Board cited Neb. Rev. Stat. § 25-2221, which provides, in part:

Except as may be otherwise more specifically provided, the period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a day during which the offices of courts of record may be legally closed as provided in this section, in which event the period shall run until the end of the next day on which the office will be open.⁸

The County Board also asserted that Neb. Rev. Stat. § 49-1203 should apply to its notice obligation. § 49-1203 provides:

If the date for filing any report, claim, tax return, tax valuation, equalization, or exemption protest, or tax form, petition, appeal, or statement, or for making any payment, referred to in section 49-1201, falls upon a Saturday, Sunday,

⁸ Neb. Rev. Stat. § 25-2221, 2020 Neb. Laws 301, LB 848.

nonjudicial day, or legal holiday, such filing or payment shall be considered timely if performed in person or postmarked on the next business day.

We do not construe § 25-2221 to allow mailing of the notice of the County Board's decision after August 2. We are not aware of any instance in which Nebraska courts have applied § 25-2221 to a date certain such as "before August 2." Nor are we persuaded by the County Board's assertion that "on or before August 2" is a "period of time" requiring computation under § 25-2221. Although § 49-1203 lists a variety of documents that can be filed on the next business day after a weekend, the documents listed do not include a "notice." We are not aware of any instance in which Nebraska courts have applied § 49-1203 to a notice of government action which a government official is required to give to a taxpayer or other private citizen. The notice of the County Board's action should have been mailed to the Taxpayer on or before August 2, as required by the plain language of the statute. Accordingly, we find that the County Board failed to give notice of its decision in the manner required by statute.

The failure of the County Board to give timely notice to the Taxpayers raises due process concerns.⁹ 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.¹⁰ 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."¹¹

However, in 2005, the Nebraska Legislature passed LB 15,¹² 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.¹³ 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

⁹ See generally, *Cain v. Custer County Bd. of Equal.*, 868 N.W.2d 334, 291 Neb. 730 (2015).

¹⁰ 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).

¹¹ See *Cain*, 868 N.W.2d at 345, 291 Neb. at 743.

¹² 2005 Neb. Laws LB 15, codified at Neb. Rev. Stat. §77-1507.01 (Reissue 2018).

¹³ *Cain*, 868 N.W.2d at 344, 291 Neb. at 741.

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.¹⁴

In this case, as a result of the county's failure to strictly observe the notice requirements of § 77-1502(6), we must analyze the Taxpayers' right to file a petition with the Commission and the specific language of the "statutory remedy."¹⁵

Even though the County Board failed to give the notice required by statute, the language of § 77-1507.01 expressly states 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."¹⁶ 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."¹⁷ 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 Taxpayers from timely filing their appeal with the Commission.

Claussen did not know when she received the notice of the County Board's decision. Nor does the record show what delay in actual notice, if any, resulted from the notice being placed in the mail on August 3 instead of August 2. According to Claussen's testimony, she did not decide to appeal the County Board's decision until November 2020, after researching and obtaining additional information about the actions and obligations of the County Board and the County Clerk. The record contains no persuasive evidence demonstrating that Conley's decision to mail

¹⁴ *Cain*, 868 N.W.2d at 345-346, 291 Neb. at 743-745.

¹⁵ Neb. Rev. Stat. 77-1507.01 (Reissue 2018).

¹⁶ Emphasis added.

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

the notice of the County Board’s decision on August 3 instead of August 1 or August 2 prevented the Taxpayers from filing their appeal prior to August 24.

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.¹⁸ 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 Taxpayers did not satisfy the requirements of the statutory remedy and we cannot find that a failure of notice prevented timely filing.

For the reasons stated above, 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 appeal.

THEREFORE IT IS ORDERED:

1. The 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: January 29, 2021

Robert W. Hotz, Commissioner

¹⁸ See *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

Commissioner Keetle, Dissenting.

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

I agree that the failure of the County Board to give timely notice to the Appellant raises due process concerns.¹⁹ 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.²⁰ Prior to the passage of § 77-1507.01, the relief to which the taxpayer was entitled was the voiding of the new assessment.²¹ Voiding of the assessment was the remedy whether the failure to provide the required notice prevented the timely filing of a protest or appeal or not.²² 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."²³ 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

¹⁹ See generally, *Cain v. Custer County Bd. of Equal.*, 868 N.W.2d 334, 291 Neb. 730 (2015).

²⁰ 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).

²¹ *Id.*

²² 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).

²³ Neb. Rev. Stat. § 77-1507.01 (Reissue 2018).

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 § 77-1502.²⁴

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.

Generally, statutes which effect a change in the common law are to be strictly construed.²⁵ 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.²⁶ 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.²⁷ 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,”²⁸ 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 petition of the Taxpayer to determine the actual value of the Subject Property.

Steven A. Keetle, Commissioner

²⁴ *Falotico*, 262 Neb at 298-299, 631 N.W.2d at 498, *emphasis added*.

²⁵ *Alisha C. v. Jeremy C.*, 283 Neb 340, 9 (2012) (Citations Omitted).

²⁶ *State v. Norman*, 282 Neb. 990, 997 (2012) (citations omitted).

²⁷ See *ML Manager v. Jensen*, 287 Neb. 171, 177, 842 N.W.2d 566, (2014).

²⁸ *Falotico*, 262 Neb. 298, 631 N.W.2d 498.