

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

Pioneer Manor of Geneva, Inc.,  
Appellant,

v.

Fillmore County Board of Equalization,  
Appellee.

Case No: 12E 039

**ORDER FOR DISMISSAL WITH  
PREJUDICE**

THE COMMISSION BEING FULLY INFORMED IN THE PREMISES, FINDS AND DETERMINES AS FOLLOWS:

**I. PROCEDURAL HISTORY**

A jurisdictional show cause hearing was held on August 1, 2012. Steven D. Davidson appeared at the hearing before the Commission as legal counsel for Pioneer Manor of Geneva, Inc. (herein referred to as “Pioneer Manor”). Howard F. Ach, Deputy Fillmore County Attorney, appeared on behalf of the Fillmore County Board of Equalization (herein referred to as the “County Board”). The Commission took notice of its case files for the purpose of determining personal and subject matter jurisdiction and received Exhibit 1 offered by Pioneer Manor.

**II. STANDARD OF REVIEW**

Section 77-5013 of the Nebraska Statutes provides that the Commission obtains jurisdiction over an appeal when it 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> 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.<sup>2</sup>

**III. ANALYSIS**

Nebraska Statutes section 77-202.04 requires that a party appealing the determination of the county board of equalization concerning the tax exempt status of property must make the appeal

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<sup>1</sup> See, Neb. Rev. Stat. § 77-5013 (2012 Cum. Supp.).

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

to the Commission pursuant to Nebraska Statutes section 77-5013 and within thirty days after the decision of the county board of equalization.<sup>3</sup> An appeal to the Commission is timely received 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.<sup>4</sup> The Nebraska Supreme Court has held that, for purposes of calculating filing deadlines, the computation is subject to Nebraska Statutes section 25-2221.<sup>5</sup> Section 25-2221 states:

“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.”<sup>6</sup>

On May 11, 2012, Pioneer Manor’s appeal of the County Board’s determination was hand delivered to the Commission. (Case File). The filing included, among other items, a \$25 filing fee, the Commission’s appeal form, and a copy of the County Board’s determination.

At the Show Cause hearing on August 1, 2012, Pioneer Manor produced email correspondence between Lynn Mussman, the Fillmore County Assessor, and Deborah Stouff, Pioneer Manor’s Corporate Secretary. Pioneer Manor also produced an affidavit from Ms. Stouff concerning the events surrounding its appeal.

Pioneer Manor asserted that the filing should be deemed timely, and that the Commission had jurisdiction because: (1) Ms. Mussman misinformed Ms. Stouff concerning the filing deadline; (2) the County Board’s letter and notice dated April 12, 2012, was not clear concerning the date of the County Board’s decision on April 10, 2012; or (3) the notice of the County Board’s decision on April 10 was deficient and, as a consequence, Pioneer Manor’s filing deadline under Nebraska Statutes section 77-202.04(3)<sup>7</sup> was December 31, 2012.

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<sup>3</sup> See, Neb. Rev. Stat. § 77- 202.04 (2012 Cum. Supp.).

<sup>4</sup> Neb. Rev. Stat. § 77-5013(2) (2012 Cum. Supp.).

<sup>5</sup> *Strode v. Saunders County Bd. of Equalization*, 815 N.W.2d 856, 283 Neb. 802 (2012).

<sup>6</sup> Neb. Rev. Stat. § 25-2221(Reissue of 2008).

<sup>7</sup> Neb. Rev. Stat. § 77-202.04(3) (2012 Cum. Supp.).

Pioneer Manor’s allegation that Ms. Mussman provided misinformation and thereby prevented its compliance with the filing deadline under the Nebraska Statutes is equitable in nature. In *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission and Douglas County Board of Equalization*,<sup>8</sup> the Supreme Court of Nebraska held that, “TERC does not have power to apply equitable principles in jurisdictional matters...” In the *Creighton* case, the appellant filed its appeal by the incorrect appeal deadline listed on the Commission’s appeal form. Applying equitable principles, the Commission determined that the appeal was timely filed because the appellant had relied on the incorrect information provided by the Commission. The Supreme Court of Nebraska held, however, that the Commission did not have the authority to adopt equitable principles to allow jurisdiction.<sup>9</sup>

With respect to Pioneer Manor’s other assertions, the Commission finds *Washington County Board of Equalization v. Rushmore Borglum Ministries* controlling.<sup>10</sup> In that case the Washington County Board met on May 23 and denied Rushmore’s timely exemption application.<sup>11</sup> On its own volition, the Washington County Board reconsidered the application on June 27 and thereafter provided proper notice to Rushmore regarding the reaffirmation of its denial decision on that day. On July 25, Rushmore appealed to the Commission.<sup>12</sup>

The Commission determined that it had jurisdiction to hear Rushmore’s appeal.<sup>13</sup> On appeal to the Nebraska Court of Appeals, however, the majority decision determined that the Commission did not have jurisdiction to hear the appeal.<sup>14</sup> While the Court held that county boards have the authority to sua sponte reconsider decisions, the Court concluded that those decisions must be reconsidered before the “aggrieved party files an appeal or the statutory appeal period has expired.”<sup>15</sup> The Court reasoned that while case law allowed for a tolling of the statutory appeal deadline due to a party’s motion to the county board to reconsider its decision, reconsideration on the county board’s own volition did not toll the statutory appeal period.<sup>16</sup> The Court held that the Commission lacked jurisdiction to hear the appeal on the merits because the

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<sup>8</sup> 620 N.W.2d 90, 260 Neb. 905, 921 (2000).

<sup>9</sup> *Id.*

<sup>10</sup> 650 N.W.2d 504, 11 Neb.App. 377 (2002).

<sup>11</sup> *Id.* at 505-506.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 507 (quoting *City of Omaha v. Wade*, 1 Neb.App. 1168, 1172, 510 N.W2d 564, 567 (1993)).

<sup>16</sup> *Id.* at 507.

statutory period for appeal began on May 23 and ran until June 22.<sup>17</sup> The Court reasoned that because the statutory period had run prior to the June 27 county board hearing, the order issued from that hearing was invalid.<sup>18</sup>

In the current case, the County Board's original decision occurred on February 28, 2012, so the statutory period for appeal began to run on February 29 and expired thirty days later on Thursday, March 29, 2012. No event or circumstance defined by statute required the tolling of the appeal period beyond March 29.

The County Board's April 10 sua sponte reconsideration hearing, therefore, had no effect upon the statutory period for appeal for this case. The County Board should have been clear and concise concerning the date of its decision, and it must also comply with Nebraska Statutes concerning proper notice of hearings in order to protect the procedural due process rights of parties under the United States Constitution. Nonetheless, the County Board's failures in this case do not impact the outcome because the April 10 hearing was itself invalid under the majority opinion in *Washington County Board of Equalization v. Rushmore Borglum Ministries*.

Finally, even if the County Board's decision to sua sponte reconsider Pioneer Manor's application tolled the statutory appeal deadline, the Commission would still not have jurisdiction because the appeal was filed late. The action that triggers the appeal deadline is defined in Nebraska Statutes section 77-202.04(1), which states in part that appeals must be made to the Commission "within thirty days after the decision of the county board of equalization."<sup>19</sup> Under section 77-202.04(1), the action that triggered the thirty-day period was the "decision" of the County Board. The Commission finds that the County Board reaffirmed its decision to deny Pioneer Manor's application for exemption at the invalid rehearing on April 10, 2012. As previously noted, Pioneer Manor's appeal was not received by the Commission until May 11, 2012, more than thirty days after the County Board's invalid decision rendered on April 10, 2012.

Therefore, the Commission finds that Pioneer Manor's appeal was not timely filed.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Neb. Rev. Stat. § 77-202.04(1) (2012 Cum. Supp.).

**IV. CONCLUSION**

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

**ORDER**

**IT IS THEREFORE ORDERED THAT:**

1. The above captioned appeal is dismissed with prejudice.
2. This Decision and Order, if no appeal is filed, shall be certified within thirty days to the Fillmore County Treasurer, and the officer charged with preparing the tax list for Fillmore County as follows:

Lynn Mussman  
PO Box 351  
Geneva, NE 68361

Barbara Trapp  
PO Box 229  
Geneva, NE 68361

as required by Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).

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

**SIGNED AND SEALED** June 21, 2013.

**Seal**

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Thomas D. Freimuth, Commissioner

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Nancy J. Salmon, Commissioner