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MIDWEST RENEWABLE ENERGY, LLC, APPELLANT, V. LINCOLN COUNTY BOARD OF EQUALIZATION, APPELLEE.

815 N.W.2d 922

Filed July 13, 2012. No. S-10-1106.

1. **Taxation: Appeal and Error.** The Tax Equalization and Review Commission may determine any question raised in a proceeding upon which an order, decision, determination, or action of a county board appealed from is based. The order, decision, determination, or action shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.
2. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.

Petition for further review from the Court of Appeals, IRWIN, MOORE, and CASSEL, Judges, on appeal thereto from the Tax Equalization and Review Commission. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jerrold L. Strasheim for appellant.

Rebecca Harling, Lincoln County Attorney, and Joe W. Wright for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

The Lincoln County Board of Equalization (Board) determined that Midwest Renewable Energy, LLC (Midwest), failed to timely file its 2009 personal property tax return and was therefore subject to a penalty. Midwest appealed this determination to the Tax Equalization and Review Commission (TERC), which affirmed. Midwest then appealed to the Nebraska Court of Appeals, which also affirmed. We conclude that TERC erred in affirming the assessment of the penalty. On further review, we reverse the judgment of the Court of Appeals and remand the cause with directions.

BACKGROUND

Nebraska requires taxpayers to file personal property tax returns by May 1 of each year and imposes penalties for late

filing.[1] On August 27, 2009, the Lincoln County assessor notified Midwest that it had not filed its 2009 personal property tax return and that as a result, a penalty of 25 percent of the tax due had been assessed. Contending its return was timely filed, Midwest appealed the assessor's imposition of the penalty to the Board, which has authority to correct a penalty that is wrongly imposed.[2]

The Board conducted an evidentiary hearing. The assessor produced documentary evidence showing that no return was received from Midwest prior to May 1, 2009. Midwest submitted affidavits to the Board. Its controller, Penny Thelen, averred in her affidavit that she prepared Midwest's personal property tax return on April 21 and mailed it "by first class mail with sufficient postage" to the assessor's address on April 23. Thelen averred that Midwest's return address was on the envelope and that the envelope was not returned. She further averred that when mailing the return she "followed the same practice as she had done . . . in filing hundreds of personal property tax returns." According to Thelen, none of the personal property tax returns she had mailed in the same manner had ever failed to be timely received. James G. Jandrain, a certified public accountant who had been the chairman of Midwest's board of managers since January 2008, also averred in his affidavit that he had reviewed Midwest's office records and that those records confirmed the return was mailed on April 23, 2009.

Pursuant to its policy, the Board did not require witnesses appearing at the hearing to give sworn testimony. Thelen informed the Board that on the evening of April 22, 2009, she put the return in an envelope, "ran it through the postage meter and threw it in the mailbox." The assessor informed the Board that she did not receive a return from Midwest prior to May 1, but, rather, first received a return from Midwest on September 4.

In response to questions from the Board, the county attorney opined that the legal question was whether the return was

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[1] See Neb. Rev. Stat. §§ 77-1229 and 77-1233.04 (Reissue 2009).

[2] Neb. Rev. Stat. § 77-1233.06 (Reissue 2009).

timely received and advised the Board that to avoid imposition of the penalty, Midwest had to show that the assessor had received the return prior to May 1, 2009. After hearing this, one member of the Board stated, "I don't think it's a matter of me doubting whether [Midwest] filled it out, whether they — it got mailed. I'm not questioning that for a second." Another member of the Board stated, "I'm not doubting the honesty, integrity of [Midwest] one — one second either, not for a second. I just have a question mark as to why it wasn't — if it was received or wasn't received, why not?"

Ultimately, the Board voted to affirm the imposition of the penalty due to a lack of evidence that the return had been received by the assessor prior to May 1, 2009. After announcing its decision on the record, a Board member stated to Midwest, "I hope . . . there's a way you can appeal this to [TERC] and for your sake I hope they overturn us." A second board member echoed, "So do I. So do I."

Midwest appealed to TERC. Pursuant to a joint motion of the parties, the case was submitted without a hearing.[3] The joint motion asserted that the case was to be decided based on the record made before the Board and a stipulation of facts.[4] The stipulation included additional affidavits from Thelen and the assessor, and a copy of Neb. Rev. Stat. § 49-1201 (Reissue 2010).

In her affidavit to TERC, the assessor averred, consistent with the evidence she presented to the Board, that she did not receive a personal property tax return from Midwest prior to May 1, 2009. And in her affidavit to TERC, Thelen averred, consistent with her evidence before the Board, that on April 22, she placed the personal property tax return for Midwest in an envelope addressed to the assessor and attached a return address label and sufficient first-class postage. Thelen added in this affidavit that she then placed the envelope in Midwest's "outgoing mail box." She described this box as a "sturdy box located behind the secretary's workspace, inaccessible

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[3] See, Neb. Rev. Stat. § 77-5021 (Reissue 2009); 442 Neb. Admin. Code, ch. 5, § 015 (2009).

[4] See 442 Neb. Admin. Code, *supra* note 3, § 015.02.

to anyone other than the secretary and accountants in our office, and . . . designated solely for pickup of mail by a US Postperson." Thelen averred that every Monday through Saturday, a "US Postperson" came and picked up outgoing mail from this box. She recalled only one stormy day in the last 16 years when a "US Postperson" failed to pick up the outgoing mail.

TERC framed the issue as "whether the . . . Board's determination that a penalty was properly imposed is arbitrary or unreasonable." It noted that because the statements made before the Board were unsworn, it was giving greater weight to the affidavits than to the unsworn statements. TERC also determined that § 49-1201 was applicable. That statute provides:

> Any . . . tax return . . . required or authorized to be filed or made to the State of Nebraska, or to any political subdivision thereof, which is: (1) Transmitted through the United States mail [or] (2) mailed but not received by the state or political subdivision . . . shall be deemed filed or made and received on the date it was mailed if the sender establishes by competent evidence that the . . . tax return . . . was deposited in the United States mail on or before the date for filing or paying.

But TERC did not acknowledge that the Board had failed to recognize the applicability of § 49-1201 and had actually decided the appeal based upon its understanding that the return could not be considered filed until it was received. Instead, TERC undertook its own analysis of whether Midwest had established the elements of § 49-1201 and, specifically, whether Midwest had proved the return was deposited in the U.S. mail. In its analysis, TERC noted that the evidence presented to it was identical to the evidence presented to the Board. This was erroneous, because the affidavits submitted to TERC contained additional information that was not before the Board.

Ultimately, three members of the TERC panel concluded that although different conclusions as to whether the requirements of § 49-1201 were met might be drawn from the factual evidence, because one interpretation of the facts supported the

Board's decision to uphold the penalty, that decision could not be deemed arbitrary or unreasonable. TERC therefore affirmed the Board's decision imposing the penalty on Midwest. A fourth member of the panel filed a dissenting opinion in which he concluded that the evidence submitted to TERC created a presumption that the return was mailed on April 23, 2009, and that the presumption had not been rebutted.

Midwest timely appealed from TERC's decision. The Court of Appeals determined that the Board had applied the wrong law in requiring Midwest to prove the return was received by the assessor and that § 49-1201 was the applicable law.[5] The Court of Appeals did not, however, address TERC's failure to find that the Board had applied the wrong law. Neither did the court address TERC's erroneous conclusion that the evidence before it was the same as the evidence before the Board. Instead, the Court of Appeals found that in order to come within § 49-1201, Midwest had to establish that the return was "'deposited in the United States mail.'"[6] The Court of Appeals then examined the evidence presented to TERC, including the evidence TERC failed to recognize, and found that Midwest had established that each Monday through Saturday, a U.S. postal carrier came to the office to deliver Midwest's mail and retrieve outgoing mail from the box in which the return was placed. But the Court of Appeals found that because Midwest "did not establish that a U.S. postal carrier picked up the mail on April 23, 2009, and placed it in a regular U.S. mail depository," Midwest's evidence simply created "an inference of regular transmission," which was "a question of fact for TERC's resolution."[7] The Court of Appeals concluded that TERC's decision to affirm the penalty (1) was not arbitrary, capricious, or unreasonable; (2) conformed to the law; and (3) was supported by competent evidence. Midwest filed a petition for further review, which we granted.

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[5] See *Midwest Renewable Energy v. Lincoln Cty. Bd. of Eq.*, 19 Neb. App. 441, 807 N.W.2d 558 (2011).

[6] *Id.* at 449, 807 N.W.2d at 565.

[7] *Id.* at 450, 807 N.W.2d at 566.

ASSIGNMENT OF ERROR

Midwest assigns, restated and summarized, that the Court of Appeals erred in affirming TERC's affirmance of the Board's decision that the penalty was not wrongly imposed.

STANDARD OF REVIEW

[1] TERC may determine any question raised in a proceeding upon which an order, decision, determination, or action of the County Board appealed from is based.[8] The order, decision, determination, or action shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.[9]

[2] Appellate courts review decisions rendered by TERC for errors appearing on the record.[10]

ANALYSIS

It is clear from the record that the Board upheld the penalty based on its mistaken belief that mailing the return could not, under any circumstances, constitute filing. This was incorrect, because if the requirements of § 49-1201 are met, mailing can constitute filing.

TERC correctly found that the pertinent inquiry was whether Midwest had met the requirements of § 49-1201. But TERC erred in failing to recognize that the evidence presented to it differed from that presented to the Board. The parties' joint stipulation submitted to TERC included both a copy of § 49-1201 and additional facts relevant to whether the return was mailed by depositing it in the U.S. mail. Further, in finding that one interpretation of the facts supported the Board's decision, TERC improperly deferred to the Board because the Board did not apply the facts to § 49-1201. For these reasons, TERC committed error on the record.

TERC may determine any question raised in a proceeding upon which an order, decision, determination, or action of a

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[8] See Neb. Rev. Stat. § 77-5016(8) (Supp. 2011).

[9] See *id.*

[10] Neb. Rev. Stat. § 77-5019 (Supp. 2011).

county board appealed from is based.[11] Here, TERC should have exercised its authority to make a determination pursuant to § 49-1201 of whether the return was timely mailed and therefore filed, based upon all of the evidence. We reverse, and remand with directions to the Court of Appeals to reverse the order of TERC and to remand the cause with directions to review all the evidence in the record before it and determine whether the return was filed in accordance with § 49-1201.

CONCLUSION

The Board applied the wrong law when it decided Midwest's appeal. TERC erred on the record when it failed to analyze the effects of this and when it failed to recognize that the record before it contained evidence not presented to the Board. Accordingly, we reverse the judgment of the Court of Appeals and remand the cause with directions to reverse the order of TERC and remand the cause with directions to TERC to determine whether the return was timely mailed and filed pursuant to § 49-1201.

REVERSED AND REMANDED WITH DIRECTIONS.

[11] § 77-5016(8).

STATE OF NEBRASKA, APPELLEE, V.
FRANCIS L. SEBERGER, APPELLANT.
815 N.W.2d 910

Filed July 13, 2012. No. S-10-1207.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews factual findings of the trial court for clear error.
3 **Records: Appeal and Error.** It is incumbent upon an appellant to supply a record which supports his or her appeal.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review.