

**BEFORE THE STATE BOARD OF EQUALIZATION
FOR THE STATE OF WYOMING**

IN THE MATTER OF THE APPEAL OF)
NATRONA COUNTY ASSESSOR) Docket No. **2021-79**
FROM A DECISION BY THE NATRONA)
COUNTY BOARD OF EQUALIZATION)
(Kleiner, 2019 Property Valuation))

DECISION AND ORDER

APPEARANCES

Charmaine Reed, Natrona County Attorney’s Office, appeared on behalf of Natrona County Assessor Matt Keating.

Taxpayer Anita Kleiner appeared pro se.

SUMMARY

[¶ 1] Natrona County Assessor Matt Keating appeals from two Natrona County Board of Equalization decisions, both related to the 2019 assessment of real property owned by Anita Kleiner. The County Board initially dismissed Ms. Kleiner’s appeal as untimely, but we remanded with instructions to consider whether Assessor was equitably estopped from arguing untimeliness. The County Board issued an opinion finding that Assessor was estopped, and on the same day issued a second opinion reversing the valuation because it was not supported by substantial evidence.

[¶ 2] Assessor appealed both orders, but presents issues and argument on only the equitable estoppel question. Therefore, if we affirm the County Board’s decision estopping Assessor from asserting untimeliness, we must also affirm the decision reversing the valuation, for lack of cogent argument. Finding that the County Board erred in finding that one of Assessor’s staff committed “authorized affirmative misconduct,” we reverse the County Board’s finding of equitable estoppel. Assessor, therefore, is not estopped from asserting the untimeliness of Ms. Kleiner’s appeal.

ISSUES

[¶ 3] Assessor presented this statement of the issues, which Ms. Kleiner echoed in her brief:

1. Did the Natrona County Board of Equalization rule on the Taxpayer's equitable estoppel claim without observance of procedure required by law?
2. Does substantial evidence support each element required for equitable estoppel?
3. Did the CBOE act arbitrarily, capriciously, and otherwise not in accordance with law when it concluded that Taxpayer met her burden of establishing each element required for equitable estoppel?

(Assessor's Br. 1; Kleiner Br. 1). A 33-page "transcript" of uncertain origin accompanied Ms. Kleiner's brief. Because it is not part of the official record, we did not consider it.

JURISDICTION

[¶ 4] The State Board shall "hear appeals from county boards of equalization ... upon application of any interested person adversely affected." Wyo. Stat. Ann. § 39-11-102.1(c) (2021). An aggrieved taxpayer or assessor may file an appeal with the State Board within 30 days after a county board's final decision. Rules, Wyo. State Bd. of Equalization, ch. 2, § 5(e) (2021). The County Board issued its final decision on June 3, 2021. (Ex. 500). Assessor filed his appeal on July 5, 2021. (Notice of Appeal). Accordingly, we have jurisdiction.

PROCEEDINGS AND EVIDENCE PRESENTED TO THE COUNTY BOARD

[¶ 5] We presented this statement of the proceedings and evidence in our earlier decision:

Ms. Kleiner owns real property in Natrona County. Assessor mailed Ms. Kleiner's 2019 assessment on April 26, 2019. Eighteen days later, Ms. Kleiner's representative, John Burd, visited Assessor's office because he and Ms. Kleiner thought the assessment was incorrect. He spoke with Renee Berry, who told Mr. Burd that Assessor could review the assessment. Mr. Burd stated that Ms. Berry told him Ms. Kleiner would have 30 days to appeal after Assessor completed the review. Ms. Berry, however, stated that she told Mr. Burd that Ms. Kleiner would have a new 30 day appeal period only if Assessor changed the assessment. Assessor mailed Ms. Kleiner a

letter on June 10, 2019, announcing that the review resulted in no change to the assessment.

Ms. Kleiner filed her appeal on June 18. The County Board scheduled a hearing for November 13. At that hearing, Assessor's attorney conceded that Ms. Berry's statement could have led Ms. Kleiner to believe she had 30 days to appeal after completion of the review. Ms. Berry subsequently said that she didn't remember exactly what she told Ms. Kleiner.

Assessor moved for dismissal on the grounds that the notice of appeal didn't meet the requirements set forth in our rules governing CBOE proceedings. The Hearing Officer granted the motion to dismiss on the grounds that the notice of appeal was untimely. The County Board chairman signed an order dismissing Ms. Kleiner's appeal as untimely. The County Board did not address the question of estoppel in its decision and order.

In re Anita Kleiner (Kleiner I), 2020 WL 3041253, * 1-2, Docket No. 2020-06, ¶¶ 5-7, (Wyo. State Bd. of Equalization, June 2, 2020). We remanded to the County Board with instructions "to rule on Ms. Kleiner's equitable estoppel claim." (*Id.* at ¶ 12).

[¶ 6] After the County Board initiated proceedings to comply with our remand, Assessor, through counsel, wrote to the County Board and proposed that in return for a County Board finding that Ms. Berry did not commit misconduct, Assessor would forgo his untimeliness argument. (R. at 35-36) ("If the Natrona County Board of Equalization makes a specific finding that there is NO evidence of any kind of misconduct or culpable negligence by Assessor or any member of the Assessor's Office, Assessor will not assert an untimeliness objection to CBOE # 2019-012, and the CBOE could proceed with an evidentiary hearing for the case.") (underline in original). Ms. Kleiner and Mr. Burd responded with a vigorous, well-reasoned letter opposing Assessor's proposal. (R. at 37-39). The County Board didn't issue an oral or written ruling on Assessor's proposal, and we infer that the County Board implicitly rejected it.

[¶ 7] The County Board held a hearing, or series of hearings, that is recorded on seven separate audio files because the hearing was started and stopped frequently.¹ The hearing began on January 20, 2021, and the Hearing Officer suggested that the County Board should hear testimony and allow argument on the equitable estoppel question. (BOE 3 Anita Kleiner 2019-0012, -2426, -2434 at 1:20-1:50). Assessor's attorney disagreed and contended that the County Board should just listen to the recording of the 2019 hearing. (*Id.* at 18:45). This session ended with nothing resolved.

¹ None of the audio files include any indication of the date or time of the hearing, so we were left to figure out on our own the order in which they happened.

[¶ 8] The hearing resumed later the same day, but quickly became bogged down as the commissioners struggled with the legal concepts. The chairman declared that the County Board would seek legal advice and re-convene at a later date. (BOE ANITA KLEINER 2019-0012 ESTOPPO).

[¶ 9] The hearing resumed once again on February 18, 2021. (boe 2019-0012, SBOE 2020-06). The County Board had not received legal advice and didn't know how it should proceed. Assessor's attorney asked if the County Board would accept her written offer to forego the untimeliness argument in return for a finding of no affirmative misconduct. (*Id.* at 0:26). The County Board did not rule on that proposal. The hearing was again recessed so the County Board could "get a procedure in place on how we are going to proceed." (*Id.* at 9:10).

[¶ 10] During the recess, the County Board reportedly listened to the November 13, 2019 hearing and held a discussion in executive session. (boe 2019-0012, SBOE 2020-06(2)). After the County Board came out of executive session, there was a motion to grant Ms. Kleiner's claim of equitable estoppel. (*Id.* at 3:10). Ms. Reed interjected that Assessor had more testimony and argument to present, and the County Board allowed her to proceed. (*Id.* at 3:20; 4:54). She called Ms. Berry, asked her two questions, and then presented argument for two minutes. (*Id.* at 5:10-7:45). Mr. Burd then argued for a few minutes, followed by Assessor arguing on his own behalf. (*Id.* at 7:45-10:30; 10:30-14:00). The Board then voted to find Assessor equitably estopped from asserting the untimeliness of Ms. Kleiner's appeal. (*Id.* at 17:38). With the timeliness issue resolved, the County Board went on to hear testimony on the merits of Ms. Kleiner's appeal.

[¶ 11] On June 3, 2021, the County Board issued a written opinion finding that Assessor was equitably estopped from asserting that the appeal was untimely, and a separate opinion finding that Assessor's 2019 valuation of Ms. Kleiner's property was not supported by substantial evidence. (R. 40-46).

CONCLUSIONS OF LAW

A. State Board's review function and burdens of proof

[¶ 12] This Board's standard for reviewing county board decisions is nearly identical to the Wyoming Administrative Procedure Act standard, found at Wyoming Statutes section 16-3-114(c)(ii) (2021), that a district court must apply in reviewing such decisions. Our review is limited to determining whether a county board's action is:

- (a) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

- (b) In excess of statutory jurisdiction, authority or limitations or lacking statutory right;
- (c) Without observance of procedure required by law; or
- (d) Unsupported by substantial evidence.

Rules, Wyo. State Bd. of Equalization, ch. 3 § 9(a)-(d) (2021). “Substantial evidence is relevant evidence which a reasonable mind might accept in support of the [County Board’s] conclusions. It is more than a scintilla of evidence.” *In re Lysne*, 2018 WY 107, ¶ 12, 246 P.3d 290, 294-95 (Wyo. 2018) (quoting *Walton v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 2007 WY 46, ¶ 9, 153 P.3d 932, 935 (Wyo. 2007)). This Board reviews county board decisions as an intermediate appellate body and treats the county board as the finder of fact. *Town of Thermopolis v. Deromedi*, 2002 WY 70, ¶ 11, 45 P.3d 1155, 1159 (Wyo. 2002).

[¶ 13] We review questions of law de novo and will affirm a county board’s conclusions of law “only if they are in accord with the law.” *Maverick Motorsports Grp., LLC v. Dep’t of Revenue*, 2011 WY 76, ¶ 12 253 P.3d 125, 128 (Wyo. 2011) (quoting *Bowen v. State Dep’t of Transp.*, 2011 WY 1, ¶ 7, 245 P.3d 827, 829 (Wyo. 2011)).

[¶ 14] We also apply de novo review to a county board’s ultimate findings of fact:

When an agency’s determinations contain elements of law and fact, we do not treat them with the deference we reserve for findings of basic fact. When reviewing an “ultimate fact,” we separate the factual and legal aspects of the finding to determine whether the correct rule of law has been properly applied to the facts. We do not defer to the agency’s ultimate factual finding if there is an error in either stating or applying the law.

Basin Elec. Power Coop., Inc. v. Dep’t of Revenue, State of Wyo., 970 P.2d 841, 850-51 (Wyo. 1988) (quoted in *Chevron U.S.A., Inc. v. Dep’t of Revenue*, 2007 WY 79, ¶ 10, 159 P.3d 131, 134 (Wyo. 2007)).

[¶ 15] “A strong presumption favors the Assessor’s valuation. ‘In the absence of evidence to the contrary, we presume that the officials charged with establishing value exercised honest judgment in accordance with the applicable rules, regulations, and other directives that have passed public scrutiny, either through legislative enactment or agency rule-making, or both.’ ” *Britt v. Fremont Cty. Assessor*, 2006 WY 10, ¶ 23, 126 P.3d 117, 1125 (Wyo. 2006) (quoting *Amoco Prod. Co. v. Dep’t of Revenue*, 2004 WY 89, ¶ 7, 94 P.3d 430, 435 (Wyo. 2004)); see also, Rules, Wyo. State Bd. of Equalization, ch. 7, § 14(a) (2021) (“There is a presumption that the assessor’s property valuation is valid, accurate, and correct.”). “Petitioner may present any credible evidence to rebut the presumption in favor of the assessor’s valuation.” *Id.* at § 14(b). “[A] mere difference of opinion as to

value” is not sufficient to overcome the presumption. *Britt*, at ¶¶ 28, 34, 126 P.3d at 126-27.

B. Does substantial evidence support the County Board’s finding of authorized affirmative misconduct?

[¶ 16] “[A] claim of equitable estoppel asserted against a governmental entity requires a showing of (1) authorized affirmative misconduct; (2) reliance; (3) substantial prejudice; (4) rare and unusual circumstances; and (5) a situation that will not defeat public policy.” *State, ex rel., Dep’t of Family Servs. v. Kisling*, 2013 WY 91, ¶ 15, 305 P.3d 1157, 1162 (Wyo. 2013). Assessor has presented argument on only one of the five elements: authorized affirmative misconduct. (Assessor’s Br. 6-7). We conclude, therefore, that Assessor has conceded that substantial evidence supports the other four elements.

[¶ 17] While most state and federal jurisdictions include “affirmative misconduct” as an element of equitable estoppel against the government, the phrase “authorized affirmative misconduct” is exclusive to Wyoming, appearing in only four Wyoming Supreme Court opinions, two of our decisions, and sundry documents discussing those six decisions. *Sweetalla v. State ex rel. Dep’t of Workforce Servs, Worker’s Comp. Div.*, 2019 WY 91, ¶ 13, 448 P.3d 825, 829 (Wyo. 2019); *Montana-Dakota Util. Co. v. Wyo. Pub. Serv. Comm’n*, 2014 WY 106, 332 P.3d 1160, 1168 (Wyo. 2014); *Kisling*, supra ¶ 15, p. 1162; *Knori v. State, ex rel., Dep’t of Health, Office of Medicaid*, 2005 WY 48, ¶ 11, 109 P.3d 905, 909 (Wyo. 2005); *In re Jedediah Corp.*, 2018 WL 492665, *5, Docket No. 2016-22 (Wyo. State Bd. of Equalization, Jan. 11, 2018); *In re Travelocity, et al.*, 2013 WL 2467818, *16, Docket Nos. 2010-112, 2010-115, 2010-113, 2010-114, 2010-146, 2010-117, 2010-127 (Wyo. State Bd. of Equalization, Feb. 28, 2013).

[¶ 18] *Knori, supra*, was the only case in which our state supreme court actually examined “authorized affirmative” misconduct beyond a cursory mention. But having added the word “authorized,” the Court ignored it and addressed only whether there had been “affirmative misconduct.” Mr. Knori sought advice from the Wyoming Department of Family Services as to whether his mother’s estate would be required to reimburse the government for its Medicaid expenses on her behalf. *Id.* at ¶ 3. A Department employee provided incorrect advice that eventually cost the estate \$259,446. *Id.* at ¶ 6. The evidence showed that the rules about which Mr. Knori sought advice had recently changed, and the Department employee who advised him did not know that. *Id.* at ¶ 13. The advice she provided would have been correct before the rule change. *Id.* The Court denied Mr. Knori’s claim of equitable estoppel because there was no affirmative misconduct. *Id.* at ¶ 12.

[¶ 19] No Wyoming Supreme Court opinion (or any other authority) plainly addresses how (or whether) “authorized affirmative misconduct” differs from “affirmative misconduct.”

“Authorized affirmative misconduct” may have its roots in a 2001 Wyoming Supreme Court opinion that doesn’t actually employ that specific phrase:

We have said that equitable estoppel should not be invoked against a government or public agency functioning in its governmental capacity, except in rare and unusual circumstances, and may not be invoked where it would serve to defeat the effective operation of a policy adopted to protect the public. In order to invoke the doctrine against a government or public agency functioning in its official capacity, there must be a showing of affirmative misconduct. Affirmative misconduct exists where a person, by his acts, representations, or admissions, intentionally or through culpable negligence induces another to believe that certain facts exist and the other person rightfully relies and acts on such belief and will be prejudiced if the former is permitted to deny the existence of such facts.

Equitable estoppel does not apply to governmental or sovereign functions, especially where it would defeat the public interest. *The state, and likewise the county, may not be estopped for the unauthorized acts or errors of its officers and employees.* In Wyoming, the recognized exception to this rule is that a governmental agency may be estopped for the unintentional, misleading statements of its representative when the agency is functioning in a proprietary capacity.

Thompson v. Bd. of Cty. Comm’rs of the Cty. of Sublette, 2001 WY 108, ¶¶ 11-12, 34 P.3d 278, 281-82 (Wyo. 2001) (citing *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 90 (Wyo. 1988)) (internal citations omitted) (emphasis added).

[¶ 20] We can find similar guidance in a leading legal encyclopedia:

The assertion of estoppel against the government requires a showing that the government’s actions amounted to affirmative misconduct. There is no “all-purpose test” to detect the presence of affirmative misconduct, and thus a court must analyze all of the circumstances of alleged misconduct and determine on a case-by-case basis whether sufficient affirmative government misconduct has occurred to invoke the estoppel doctrine against the government. Thus, for example, it is stated that the doctrine of estoppel will be applied against governmental agencies only in exceptional cases in which there has been showing of fraud, misrepresentation, deception, or similar affirmative misconduct, along with reasonable reliance thereon. A government agent’s mere mistaken advice, based on an incorrect

understanding of the law, does not amount to affirmative misconduct justifying equitable estoppel.

The affirmative act must be the act of the governmental body itself, such as the adoption of legislation, *rather than the unauthorized act of a ministerial officer or a ministerial misinterpretation*. Affirmative misconduct, for the purposes of establishing an estoppel claim against the government, involves ongoing active misrepresentations or a pervasive patten of false promises, as opposed to an isolated act of providing misinformation. Affirmative misconduct requires an affirmative misrepresentation or affirmative concealment of a material fact by the government, although it does not require that the government intends to mislead or deceive a party.

Thus various actions on the part of the public or public agents or officials will not ordinarily work an estoppel, including mere negligence, unexplained delay, silence, neglect of duty, inaction, a failure to inform, assist, or advise, simple inadvertence, mistake, imperfect conduct, or a failure to follow an internal agency rule or guideline. Thus, for example, a single oral misstatement by a government employee will ordinarily not constitute affirmative misconduct supporting estoppel against the government.

31 C.J.S. *Estoppel and Waiver* § 234 (2021) (emphasis added).

[¶ 21] The County Board ignored the “authorized” part of “authorized affirmative misconduct, and specifically found that Ms. Berry’s alleged misleading statement was misconduct even though it was unintentional. (R. at 44). Based on the guidance cited above, we find that Ms. Berry’s alleged statement to Mr. Burd – even if we accept his version of that statement – does not amount to affirmative misconduct, and there’s no evidence at all that it was authorized by Assessor. Without authorized affirmative misconduct, there’s no equitable estoppel against a governmental agency acting in its governmental capacity.

CONCLUSION

[¶ 22] Substantial evidence does not support the County Board’s finding of authorized affirmative misconduct. Therefore, the County Board’s decision estopping Assessor from asserting the untimeliness of Ms. Kleiner’s appeal cannot stand, and we must reverse. Having decided to reverse on the question of equitable estoppel, which is dispositive of the entire case, we need not decide Assessor’s other two issues.

ORDER

[¶ 23] **IT IS, THEREFORE, ORDERED** that the decision of the Natrona County Board of Equalization is **REVERSED**. Assessor is not estopped from asserting the untimeliness of Ms. Kleiner's appeal, and that appeal is dismissed as untimely.

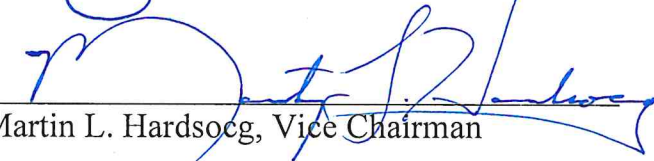
[¶ 24] **Pursuant to Wyoming Statutes section 16-3-114 (2021) and Rule 12, Wyoming Rules of Appellate Procedure, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days after the date of this decision.**

DATED this 13 day of December 2021.

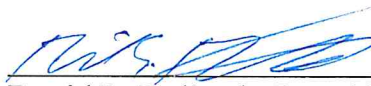
STATE BOARD OF EQUALIZATION



E. Jayne Mockler, Chairman



Martin L. Hardsocg, Vice Chairman



David L. Delicath, Board Member

ATTEST:



Jennifer Fujinami, Executive Assistant

CERTIFICATE OF SERVICE

I certify that on the 13 day of **December 2021** I served the foregoing **DECISION AND ORDER** by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

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