

**Making a Case for Nonprofit Rates:
Has the Postal Service challenged your nonprofit mailings?
Before going postal, try filing an appeal.**

By David M. Levy

One morning at the office, you receive a letter from the U.S. Postal Service. The letter states that several months or even years ago, your organization used nonprofit postal rates to mail a fundraising solicitation or periodical publication that was ineligible for nonprofit rates. Your local post office accepted the mailing (and many similar mailings) at nonprofit rates for a number of years. But now the Postal Service says you owe a "revenue deficiency" equal to the difference between the commercial and nonprofit rates: \$2,000, \$10,000, \$100,000 or \$1.5 million.

Or maybe the envelope contains a decision revoking your organization's 70-year-old nonprofit permit on the grounds that your tax exemption falls within the wrong subsection of the Internal Revenue Code.

First, it's important to realize that you are playing a game where the U.S. Postal Service controls the entire process. It's like a small-town traffic court where the money from speeding tickets goes into the town kitty. Even so, there are positive steps you can take to protect your organization's interests:

- **Get a decision in writing.** Revenue deficiency notices and notices of permit revocation are supposed to be in writing—and nearly all are. Sometimes, however, a local postal service employee will simply refuse to accept your mailing as nonprofit mail without giving you any written explanation. If that happens, ask for a written decision explaining the employee's action. If the local post office refuses, file a request for refund of the additional postage you were required to pay. (Be sure to explain why you believe that you were entitled to the lower rates.) That should prompt a written decision.

- **To preserve your rights, verify when and where you must file your appeal.** The specific time and place for appealing usually appears at the end of the written decision. Failing to meet the deadline can result in complete waiver of your rights. (Decisions from local postal officials typically must be appealed within 30 days. Higher-level decisions usually must be appealed within 15 days.)

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• **Evaluate the merits of the Postal Service's claim.** Postal eligibility rulings generally fall into three categories:

1. They've got you dead to rights.
2. Your mailing is within a gray area. The regulations are unclear, don't precisely fit the facts of your case, or rely on a highly aggressive interpretation of the law that has never been tested in court.
3. The ruling simply misstates the law.

If your mailing falls in the first category, the best you can do is plead for mercy. But many cases, if not most, fall within categories 2 or 3. In those instances, challenging the ruling can pay off.

To determine the strength of your case, start by reviewing the relevant portions of the Domestic Mail Manual (they're usually cited in the decision). You should also review USPS Publication 417, "Nonprofit Standard Mail Eligibility," the most comprehensive USPS statement of position on nonprofit eligibility issues. Neither publication is a complete statement of the rules, however, and the discussion in Publication 417 tends to be one-sided. Precedent favorable to mailers is often obscure, arcane or unpublished.

For the most reliable advice, you should consult an expert. While members of the Alliance of Nonprofit Mailers know to contact the Alliance staff with questions, others may seek a lawyer who specializes in postal eligibility issues or an experienced publisher or mail house manager.

Preparing Your Appeal

Appeals are in writing. There are no live witnesses, oral testimony, depositions or oral arguments. An appeal normally consists of a brief or memorandum citing the statutes, court decisions and agency rulings that support your position, accompanied by affidavits from your witnesses establishing the facts you need to make your case. Normally you'll also want to supply copies of the actual mailings and other relevant documents.

Don't make the mistake of assuming that you can fill any holes in the record when you eventually get to court. Judicial review of Postal Service eligibility rulings is typically limited to whatever documentation you supplied to the Postal Service itself.

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It's important to protect your rights while your appeal is pending. When the Postal Service issues a revenue deficiency notice, it typically refuses to accept future mailings at nonprofit rates. You have a right to ask the Postal Service to keep account of the extra postage it collects while your appeal is pending. Doing so preserves your right to a refund if you ultimately prevail.

The Postal Service typically provides several layers of appeals. If you lose at one level, you have the right to appeal to the next. The district office with jurisdiction over your local post office normally decides the first-level appeal. The next level of decision is from the regional Rates and Classification Service Center that has jurisdiction over the district office. The highest level of decision is issued from Postal Service headquarters in Washington, D.C. Major or controversial cases, however, are sometimes bucked immediately to a higher level of the bureaucracy, bypassing the district or regional office.

An unfavorable ruling on your first-level appeal does not necessarily presage an unfavorable ruling higher up. This is particularly true if your case involves unusually complex issues or an interpretation of the law by headquarters that has yet to be tested in court. District and regional offices rarely show flexibility over enforcing pronouncements from high. Rates and classification officials in headquarters, however, are sometimes willing to compromise—or even abandon a claim—rather than go to court to defend a regulation of dubious legal authority. Second- and third-level appeals are similar in format and content to first-level appeals. Just be sure to respond to any new arguments raised in the decision denying your first-level appeal.

Going to Court

If you lose your highest level appeal at the Postal Service, you still have the option of going to court. U.S. District Courts have jurisdiction over appeals from final Postal Service decisions; the U.S. Courts of Appeals have jurisdiction over appeals from final District Court decisions. The courts normally give great deference to Postal Service eligibility rulings (on the grounds the Postal Service is the expert body charged by Congress with enforcing the postal eligibility rules). If both your position and the Postal Service's position are reasonable, you'll probably lose. You can win, however, by showing the Postal Service's ruling is inconsistent with a law enacted by Congress, inconsistent with the Postal Service's own rules or regulations, internally illogical or completely unsupported by the evidence.

Like appeals to the Postal Service itself, court appeals from eligibility rulings are paper proceedings: no oral arguments, depositions or live trials or hearings. That can make going to court a lot less expensive than a normal civil or criminal case. One important caveat: If you think you may want to appeal your case to court, you should appeal each adverse Postal Service ruling until you exhaust your appeal rights at the Postal Service itself. This will occur when you get a decision identified as the "final" agency decision. Failure to exhaust your appeal rights at the Postal Service could waive your right to seek relief in court.

Bargaining with the Finance Office

Suppose you exhaust your appeal rights at the Postal Service, but decide not to go to court. In about 30 days or so, you're likely to receive a dunning notice from the local finance department office of the Postal Service, demanding payment of the claim. If you don't pay, the Postal Service has the right to sue your organization to collect the unpaid balance. However, you are not without bargaining leverage. You may be able to persuade the Postal Service to settle the claim for less than 100 cents on the dollar if you can prove one of the following:

- The Postal Service's case is weak or borderline.
- The Postal Service accepted similar mailings over a lengthy period without raising any question about their eligibility.
- Your organization does not have enough assets to satisfy the judgment. (In cases of financial hardship, you may also be able to negotiate payment on the installment plan.)

Don't take seriously claims by local Postal Service officials that the Postal Service doesn't have authority to settle a claim for anything but the full amount. It does. However, if the revenue deficiency involves a mailing originally entered at Nonprofit Standard A (formerly called Third Class Nonprofit) rates, in certain circumstances, the Postal Service can seize your funds on deposit to satisfy the claim. If you receive a collection notice from the Postal Service and you are contemplating not paying, you should obtain competent legal advice.

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