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of the attorneys' office, and that this is somehow determinative. But whether considered attorney work product or the expert's opinions, it is clear from the rules above that, at the very least, the Podrazas had to demonstrate a substantial need for the materials.

There is no such substantial need to use at trial for impeachment purposes someone else's characterization that the retained expert had indicated that an unbiased radiologist would "hopefully" have a favorable reading of the CT scan. This is not a case, such as those relied upon by the Podrazas, where the Podrazas are seeking information necessary to understand the basis for the expert's opinion. Indeed, the correspondence in question relates more to administrative matters within the attorneys' office than to the formation and basis of any expert's testimony. Nor do we find merit to the Podrazas' contention that the inadvertent disclosure waived the protections afforded by the discovery rules. The trial court did not abuse its discretion in granting a protection order in favor of New Century for the e-mail communications.

VI. CONCLUSION

We reverse the trial court's order of summary judgment in favor of New Century, but affirm its grant of a protection order for e-mail correspondence between New Century's attorneys' office and its expert witness. We affirm the trial court's denial of the Podrazas' partial motion for summary judgment.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

JAMES M. SCOTT, APPELLEE, V. COUNTY OF RICHARDSON, APPELLANT.

789 N.W.2d 44

Filed October 15, 2010. No. S-10-039.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency.

2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the court below.
4. **Due Process: Public Officers and Employees: Property: Contracts.** A public employee's due process rights arise from a contractually created property right to continued employment.
5. **Termination of Employment: Due Process: Case Overruled.** Deficiencies in due process during pretermination proceedings may be cured if the employee is provided adequate posttermination due process. To the extent that *Martin v. Nebraska Dept. of Public Institutions*, 7 Neb. App. 585, 584 N.W.2d 485 (1998), holds to the contrary, it is expressly overruled.
6. **Public Officers and Employees: Termination of Employment: Due Process.** Due process requires that a public employer provide its employees with appropriate pretermination and posttermination proceedings.

Appeal from the District Court for Richardson County: DANIEL E. BRYAN, JR., Judge. Reversed and remanded with directions.

Vincent Valentino for appellant.

Jeanette Stull, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee.

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

WRIGHT, J.

NATURE OF CASE

After James M. Scott was terminated from his employment as a deputy sheriff for Richardson County (County), he filed a grievance. Richardson County's grievance board (Board) found irregularities in the manner in which Scott was terminated, and it reinstated his employment for the period between his termination and the date of the grievance hearing. Scott was also awarded backpay and benefits. Finding just cause, the Board subsequently terminated Scott's employment effective the date of the grievance hearing. After Scott filed a petition in error, the district court reversed and vacated the Board's decision to terminate Scott's employment and ordered that he be reinstated. The County appeals.

SCOPE OF REVIEW

[1] In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008).

[2,3] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Hickey v. Civil Serv. Comm. of Douglas Cty.*, 274 Neb. 554, 741 N.W.2d 649 (2007). On a question of law, an appellate court is obligated to reach a conclusion independent of the court below. *Id.*

FACTS

Scott's employment was terminated by Randy Raney, who was the chief deputy and Scott's supervisor, on February 17, 2009. As a deputy sheriff, his employment with the sheriff's department was covered by a labor agreement between the County and the International Union of Operating Engineers, Local 571 (Union). The agreement includes a multistep grievance procedure.

Scott filed a grievance with Sheriff Vernon Buckminster, who denied it. Scott next submitted a complaint to the Richardson County Board of Commissioners, which complaint was also denied. He then appealed to the Board, which consists of two members appointed by the county commissioners, two members appointed by the Union, and one member agreed upon by the County and the Union. The Board upheld the termination of Scott's employment effective July 16, 2009.

Testimony about the basis for Scott's termination was received at a hearing before the Board on July 16, 2009. Raney testified that June Dettmann, a dispatcher and jailer for the sheriff's office, complained in December 2008 that Scott had "become affectionate toward her" and indicated he wanted a relationship with her. Dettmann stated that after she told Scott she was not interested in a relationship, Scott became distant, slammed doors when he left the office area, failed to contact her on the radio as required by office policy, and hung up on

her when she called him. Raney asked Dettmann to submit her complaint in writing, and Raney subsequently met with Scott and advised him that his conduct was not acceptable and that it could be considered sexual harassment. Raney advised Scott not to talk to Dettmann about personal matters at work. Scott denied Dettmann's allegations.

Dettmann contacted Raney on January 25, 2009, to report that Scott's behavior had deteriorated. That night, Scott had been in the office and responded to a disturbance call in the southeast part of the county. He did not report to Dettmann that he was responding to the call. Raney said office policy provided that the dispatcher is to be informed of where an officer is going and of the type of call because the dispatcher serves as a lifeline for officers and needs to be able to dispatch other officers for assistance.

When Scott returned to the office, Dettmann was preparing a crime report about the disturbance call. Scott asked her to change the report because he thought it would bring undue attention to him. Dettmann told Raney she felt pressured to change the report lest Scott have her fired.

On January 29, 2009, Raney informed Scott that he was on paid suspension for gross insubordination and harassment pending an internal investigation. Raney met with Scott, Buckminster, and a Union representative on February 6. Raney gave Scott a detailed report stating the reasons for the disciplinary action against him, including (1) that Scott asked Dettmann to participate in a sexual relationship and other behavior that could be considered sexual harassment if it continued; (2) that Raney found a letter, dated January 24, 2008, written by Scott on a sheriff's office computer, which letter made allegations of inappropriate conduct by Dettmann; (3) that Raney received a complaint in April 2008 from another dispatcher about Scott and Dettmann's spending time together in the office or in Scott's patrol car when Dettmann was not on duty; and (4) that Dettmann called Raney on January 25, 2009, reporting that Scott had failed to inform her of his location, hung up on her, tried to turn other employees against her, and coerced her into changing a crime report. Scott denied all the allegations included in the report.

Between February 6 and 17, 2009, Raney investigated the allegations against Scott. On February 16, Scott submitted to a polygraph examination; however, the results were not offered or admitted at the hearing. On February 17, at a meeting attended by Scott, Raney, Buckminster, and the Union representative, Raney asked for Scott's resignation. Scott refused to resign, and Raney terminated his employment.

Dettmann also testified at the grievance hearing. She stated that on January 25, 2009, Scott called in on the police radio but she did not know his location. Scott reported that he had left the information on the counter in the office. Dettmann found a note from Scott underneath the logbook indicating that he was responding to a call. Dettmann called Scott to tell him she was upset because he had not followed office procedure. In response, Scott told her that he had drafted a complaint about her that he was going to submit to Raney. Scott said that if they could work things out, he would shred the complaint.

When Scott returned to the office, Dettmann was working on the crime report for the disturbance call. Scott said he had torn up the complaint about her. Scott asked Dettmann to change the crime report so it would not include his violation of office policy, because it would reflect poorly on him. She changed the report because she was upset and intimidated by Scott.

The Board found that just cause existed to terminate Scott's employment as of July 16, 2009. The evidence showed that Scott sexually propositioned Dettmann and that he denied the accusation when questioned by Raney. The Board concluded that Scott lied to Raney, his supervisor, and, in doing so, was insubordinate and unprofessional. The Board found that Scott left the office on January 25 and failed to follow office policy and procedure by not properly notifying Dettmann of his destination or his purpose in leaving. Upon his return to the office, Scott pressured, intimidated, and coerced Dettmann into altering the crime report. The Board found that this conduct was inappropriate, unprofessional, and contrary to department policy and procedure and that it constituted insubordination and unprofessional conduct.

However, the Board expressed reservations about the manner in which Scott's termination had been handled and whether there was inappropriate reliance on the results of a polygraph examination. The Board determined that any irregularities could effectively be cured by granting Scott's grievance in part. It ordered that Scott's employment be reinstated with backpay and benefits from July 16, 2009 (the date of the Board's decision), retroactively to February 17 (the date of Scott's termination of employment). However, the Board determined that Scott's due process rights had been fully honored in the proceedings before the Board, and it denied the grievance as to Scott's employment beyond July 16.

Scott filed a petition in error pursuant to Neb. Rev. Stat. § 25-1901 (Reissue 2008). The district court concluded that Scott's pretermination due process rights under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), were violated. Under *Loudermill, supra*, a public employee with a property interest in his employment has the right to due process of law, which requires that the employee be provided with oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to explain his or her side of the story.

The district court determined that Scott was not given adequate notice of the charges, an explanation of his employer's evidence, and an opportunity to explain his side of the story before his employment was terminated. The court concluded that Scott was told only that he was on paid suspension for gross insubordination and harassment, without any details regarding Dettmann's complaints about him.

The district court concluded that no process was followed to ensure that Scott's rights under *Loudermill, supra*, were "provided in a meaningful way." The court relied upon *Martin v. Nebraska Dept. of Public Institutions*, 7 Neb. App. 585, 584 N.W.2d 485 (1998), in which the Nebraska Court of Appeals held that posttermination proceedings cannot cure violations of pretermination due process. It held that the pretermination denial of Scott's due process rights caused the Board's decision to be a nullity. The court reversed and vacated the Board's

decision to terminate Scott's employment effective July 16, 2009. The County appeals.

ASSIGNMENTS OF ERROR

The County assigns the following errors, which we have summarized and restated: The district court erred (1) in concluding that an extensive posttermination due process hearing did not cure pretermination due process deficiencies and (2) in failing to find that Scott waived his pretermination due process argument by accepting backpay.

ANALYSIS

In this case, we are presented with whether violations of an employee's pretermination due process rights can be cured by posttermination proceedings. In *Martin, supra*, the Court of Appeals held that such violations cannot be cured by posttermination proceedings. The appellate court concluded that the posttermination proceedings, which included a de novo review of the case in the district court, although procedurally adequate, did not cure the pretermination violations of the employee's right to procedural due process. It is against this legal background that we begin our analysis in the case at bar.

[4] A public employee's due process rights arise from a contractually created property right to continued employment. *Loudermill, supra*. Neither party disputes that Scott had a protected property interest in his continued employment. When a state deprives a public employee of that right, the deprivation must "'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). *Loudermill* divides procedural due process claims into three stages. *Krentz v. Robertson*, 228 F.3d 897 (8th Cir. 2000).

> Initially, an employee receives notice that he will be terminated, and he is given an opportunity to respond: that is "pretermination process." Then, the employer actually fires the employee. Finally, in the third stage, an employee has an opportunity to receive some measure of

> post-termination process, usually a hearing with heightened procedural safeguards.

Id. at 902, citing *Loudermill, supra*. See, also, *Hickey v. Civil Serv. Comm. of Douglas Cty.*, 274 Neb. 554, 741 N.W.2d 649 (2007).

The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Id*. On a question of law, an appellate court is obligated to reach a conclusion independent of the court below. *Id*.

The County argues that the district court erred in concluding that the posttermination hearing did not cure the pretermination due process deficiencies. We have not addressed this question, and other courts are split.

The district court relied upon *Martin v. Nebraska Dept. of Public Institutions*, 7 Neb. App. 585, 584 N.W.2d 485 (1998). In that case, the employee was dismissed based on alleged insubordination and failure to fulfill basic job responsibilities. After an evidentiary hearing, the hearing officer found sufficient evidence to support the insubordination allegation, but not to support the allegation that the employee had failed to fulfill job responsibilities. The Nebraska State Personnel Board found that the employee had been dismissed for just cause, and the district court affirmed.

The Court of Appeals reversed the decision and remanded the cause with directions because it found that information relied upon in the decision to dismiss the employee was not available to the employee prior to the termination of his employment and that he was not given an adequate explanation of the evidence gathered in the investigation or an opportunity to respond. *Id*.

After determining that the employee's due process rights were violated, the Court of Appeals concluded that a failure to provide sufficient pretermination process cannot be cured by the availability of posttermination procedures.

> "To hold that a procedurally adequate post-termination hearing remedies the deprivation inflicted on a discharged employee by an earlier decision based on a pretermination hearing completely devoid of due process of law would

> be to render the United States Supreme Court's holding in [*Loudermill*] a nullity. Furthermore, no matter how fair and adequate the procedures at the post-termination hearing may be, the initial decision made after the pre-termination hearing inevitably will have diminished significantly the employee's chances of prevailing at the post-termination hearing."

Martin, 7 Neb. App. at 594, 584 N.W.2d at 491-92, quoting *Stallworth v. City of Evergreen*, 680 So. 2d 229 (Ala. 1996).

Other courts have similarly held that there is no cure for a pretermination violation of due process. "Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation." *Cotnoir v. University of Maine Systems*, 35 F.3d 6, 12 (1st Cir. 1994). If an employee is fired without pretermination protections, the constitutional deprivation is complete and posttermination procedures cannot compensate. *Id.*

A posttermination judicial finding as to an employment dismissal is not a substitute for a pretermination due process hearing. *Abraham v. Pekarski*, 728 F.2d 167 (3d Cir. 1984). The availability of postdeprivation grievance procedures does not cure a due process violation. *Schultz v. Baumgart*, 738 F.2d 231 (7th Cir. 1984). See, also, *Murray v. Dept. of Revenue & Taxation*, 543 So. 2d 1150 (La. App. 1989) (posttermination hearing does not cure failure to provide pretermination hearing).

However, other courts have held that due process violations may be cured. "[*Cleveland Board of Education v.*] *Loudermill*[, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985),] instructs us that extensive post-termination proceedings may cure inadequate pretermination proceedings." *Krentz v. Robertson*, 228 F.3d 897, 902 (8th Cir. 2000). The *Krentz* court interpreted *Loudermill* "to require only limited pretermination process, especially if post-termination proceedings are available and extensive." 228 F.3d at 902-03. "Ultimately, [the *Krentz* court's] conclusion that [the employee in *Krentz*] received adequate pretermination process depends heavily upon the fact that robust post-termination proceedings may cure superficial pretermination proceedings." *Id.* at 903. See, also,

Smutka v. City of Hutchinson, 451 F.3d 522 (8th Cir. 2006); *Schleck v. Ramsey County*, 939 F.2d 638 (8th Cir. 1991) (employer not required to provide full hearing or to disclose all details of charges against employee); *Agarwal v. Regents of University of Minnesota*, 788 F.2d 504 (8th Cir. 1986) (employee's due process rights not violated even if employee did not receive all procedural safeguards during initial proceeding as long as hearing was granted at later date).

Other federal courts have also held that errors in pretermination procedures can be cured by subsequent posttermination proceedings. See, *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980); *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994). State courts have held similarly. See, e.g., *City of North Pole v. Zabek*, 934 P.2d 1292 (Alaska 1997) (evidence presented in posttermination hearing may be sufficient to justify suspension or termination even if insufficient to justify summary suspension or termination); *Maxwell v. Mayor & Alder. of Savannah*, 226 Ga. App. 705, 487 S.E.2d 478 (1997) (no violation of procedural due process rights unless and until employer refuses to make remedy available); *Smith v. Five Rivers MetroParks*, 134 Ohio App. 3d 754, 732 N.E.2d 422 (1999) (posttermination arbitration hearing sufficient to cure any deficiencies in notice of charges); *Ross v. Medical Univ. of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997) (posttermination proceedings remedied pretermination deficiencies).

This court has never addressed whether proceedings after a termination of employment can remedy the failure of due process prior to the termination of employment. Although we cited *Martin v. Nebraska Dept. of Public Institutions*, 7 Neb. App. 585, 584 N.W.2d 485 (1998), in *Hickey v. Civil Serv. Comm. of Douglas Cty.*, 274 Neb. 554, 741 N.W.2d 649 (2007), we did not discuss the specific issue presented here.

[5] Stating that it was bound to follow the "rulings of law" in *Martin*, the district court concluded in the case at bar that the posttermination proceedings did not cure the pretermination due process violations. We disagree with that conclusion. We hold that deficiencies in due process during pretermination proceedings may be cured if the employee is provided adequate posttermination due process. Such measures can be provided

by grievance procedures that have been agreed upon by the employer and the employee. To the extent that *Martin* holds to the contrary, it is expressly overruled.

[6] The interpretation of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), by the Eighth Circuit is the better reasoning. *Loudermill* requires only limited pretermination process, especially if post-termination proceedings are available and extensive. *Krentz v. Robertson*, 228 F.3d 897 (8th Cir. 2000). Due process requires that a public employer provide its employees with appropriate pretermination and posttermination proceedings. *Smutka v. City of Hutchinson*, 451 F.3d 522 (8th Cir. 2006). A pretermination hearing need not be elaborate. *Loudermill, supra*. Informal meetings with supervisors are sufficient. *Schleck v. Ramsey County*, 939 F.2d 638 (8th Cir. 1991).

A pretermination hearing need not "definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Loudermill*, 470 U.S. at 545-46. To require more than notice of the charges, an explanation of the employer's evidence, and an opportunity to present the employee's side of the story "would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.*, 470 U.S. at 546.

In the case at bar, the labor agreement outlined the steps in the grievance process. An employee is first required, before filing a grievance, to verbally inform his or her immediate supervisor of the cause of dissatisfaction and give the supervisor an opportunity to correct the situation. If the employee is not satisfied, he or she may present a grievance in writing to the supervisor, who has 5 working days to answer. If the employee remains dissatisfied, he or she may refer the matter to the Union, which must then contact the sheriff in writing and present the employee's case. If the matter remains unsatisfactorily settled, the Union must present the grievance in writing to the Richardson County Board of Commissioners. If no settlement is reached, the grievance is presented in writing to the Board,

which is made up of two members appointed by the county commissioners, two members appointed by the Union, and one member agreed upon by the County and the Union. This multistep grievance process provides employees with the due process required under *Loudermill, supra*.

After Scott met with Raney on January 29, 2009, he was placed on paid suspension for gross insubordination and harassment pending an internal investigation. On February 6, in a meeting also attended by Buckminster and a Union representative, Raney gave Scott a detailed report stating the reasons for the disciplinary action. The report included Dettmann's statement that Scott wanted a sexual relationship with her and that after she rejected such offer, Scott's behavior changed. He would not answer the radio, hung up the telephone, and slammed doors when he left the office. Scott was told he could be responsible for a sexual harassment complaint if his conduct continued. The report also noted the January 25, 2009, incident of Scott's failure to report his location to Dettmann, at a time when she was the dispatcher on duty, and attempt to coerce her into changing a crime report. He was given an opportunity to tell his side of the story at the February 6 meeting, where he denied all the allegations.

Following the termination of his employment, Scott was given a hearing before the Board. Prior to the hearing, he was furnished with notice, a listing of the charges, and a detailed explanation of the exhibits and witnesses. The charges described in detail Scott's attempt to participate in a sexual relationship with Dettmann and his behavior surrounding the January 25, 2009, incident, reiterating the allegations of his failure to notify Dettmann of his destination as well as his intimidation of Dettmann so she would change her report. He was advised that he had provided dishonest responses when questioned by investigators about the above events.

At the hearing, evidence was presented in the form of testimony and documents. Scott was represented by an attorney. The Board then deliberated and made its decision. The parties had specifically contracted for such procedures relating to employee grievances, and we conclude these procedures were adequate to provide the due process required.

Having concluded that the violation of Scott's due process rights was cured by the extensive posttermination hearing, we consider whether the Board acted within its jurisdiction and whether sufficient relevant evidence supports the decision of the Board. In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008).

The labor agreement granted the County the right to "hire, promote, demote, suspend, discipline or discharge for just cause." The grievance procedure granted the Board the authority to determine whether Scott's employment had been terminated for just cause. Thus, pursuant to the labor agreement, the Board had jurisdiction to affirm the termination of his employment. We do not decide any other issue concerning the Board's authority in this appeal.

We also note that the evidence supports the termination of Scott's employment for just cause. The record shows that Scott sexually propositioned Dettmann, a fellow employee of the sheriff's department, and lied to Raney, his supervisor, about the incident. He failed to follow office policy when responding to a disturbance call, and he coerced Dettmann into altering a crime report. This evidence is sufficient to support disciplinary action, including termination of employment.

The County also argues that Scott waived his pretermination due process argument by accepting backpay. Given our reversal of the district court's order, it is not necessary to reach the waiver issue.

CONCLUSION

There is no dispute whether Scott's due process rights were lacking in some respects. However, any violation of Scott's due process rights during the pretermination process was cured by the posttermination proceedings. Thus, the district court erred in ordering that Scott be reinstated to his employment with the County. The district court's judgment is reversed, and the cause

is remanded with directions to reinstate the order of termination entered by the Board.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMAS E. BURNHAM, APPELLANT, V. THE PACESETTER CORPORATION AND LIBERTY MUTUAL GROUP, APPELLEES.

789 N.W.2d 913

Filed October 15, 2010. Nos. S-10-229, S-10-344.

1. **Jurisdiction: Judgments: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
2. **Judgments: Appeal and Error.** An appellate court independently decides questions of law.
3. **Workers' Compensation: Jurisdiction: Statutes.** The Workers' Compensation Court is not a court of general jurisdiction, but, rather, is a statutorily created court.
4. ____: ____: ____. No Nebraska statute grants equity jurisdiction to the Workers' Compensation Court.
5. **Workers' Compensation: Courts: Statutes.** A statutorily created court, such as the Workers' Compensation Court, has only such authority as has been conferred upon it by statute, and its power cannot extend beyond that expressed in the statute.

Appeals from the Workers' Compensation Court. Affirmed.

Eric W. Kruger, of Rickerson & Kruger, for appellant.

Scott A. Lautenbaugh, of Hansen, Lautenbaugh & Buckley, L.L.P., for appellees.

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

HEAVICAN, C.J.

INTRODUCTION

This case comes to us from the Nebraska Workers' Compensation Court. Thomas E. Burnham was injured while working for The Pacesetter Corporation, and in 2007, the Nebraska Court of Appeals granted summary affirmance