time of the shooting "undermines its finding that [Smith] could have retreated rather than fire the weapon."[77]

We disagree. Even if Smith was *provoked* by a sudden quarrel to fire the shot which hit Marcus, it does not necessarily follow that he was *justified* in using deadly force by a belief that it was necessary to protect himself against death or serious bodily harm. We agree with the Court of Appeals that on this record, there is no evidence that Smith had a reasonable and good faith belief that he needed to protect himself against death or serious bodily harm at the moment that he fired the shots. Whether he was provoked by a sudden quarrel to fire the shots is a separate and distinct inquiry which is not dependent upon a reasonable and good faith belief in the necessity of using deadly force for self-protection.

V. CONCLUSION

For the reasons discussed, we affirm the judgment of the Nebraska Court of Appeals which affirmed in part and in part reversed the judgment of the district court and remanded the cause for a new trial.

AFFIRMED.

CASSEL, J., not participating.

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[77] *Id.* at 9.

MIKE BLAKELY, APPELLANT, V. LANCASTER COUNTY, NEBRASKA, AND THE LANCASTER COUNTY PERSONNEL POLICY BOARD, APPELLEES.

825 N.W.2d 149

Filed November 16, 2012. No. S-11-686.

1. **Administrative Law: Words and Phrases.** An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.
2. **Civil Service: Administrative Law: Words and Phrases.** Under the County Civil Service Act, Neb. Rev. Stat. §§ 23-2517 to 23-2533 (Reissue 2012), a "personnel policy board" is an administrative agency performing quasi-judicial functions when it reviews a grievance of, or disciplinary action against, a classified service employee.

3. **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.
4. **Administrative Law: Evidence: Appeal and Error.** The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did from the testimony and exhibits contained in the record before it.
5. **Administrative Law.** An administrative agency decision must not be arbitrary or capricious.
6. ____. Agency action is arbitrary and capricious if it is taken in disregard of the facts or circumstances of the case, without some basis that would lead a reasonable and honest person to the same conclusion.
7. ____. Agency action taken in disregard of the agency's own substantive rules is also arbitrary and capricious.
8. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
9. **Statutes.** The interpretation of statutes and regulations presents questions of law.
10. **Contracts.** Contract interpretation presents a question of law.
11. **Administrative Law: Judgments.** Whether an agency decision conforms to the law is by definition a question of law.
12. **Judgments: Justiciable Issues.** Justiciability issues that do not involve a factual dispute present a question of law.
13. **Moot Question: Jurisdiction: Appeal and Error.** Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.
14. **Moot Question.** Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.
15. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.
16. **Moot Question.** The central question in a mootness analysis is whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.
17. ____. A case is not moot if a court can fashion some meaningful form of relief, even if that relief only partially redresses the prevailing party's grievances.
18. **Civil Service: Administrative Law: Statutes.** Statutory requirements under a civil service act regarding appointments and promotions are mandatory. Appointing authorities must comply with them for an appointment or promotion to be valid.
19. **Civil Service: Words and Phrases.** An "appointment" under the County Civil Service Act, Neb. Rev. Stat. §§ 23-2517 to 23-2533 (Reissue 2012), refers to an appointing authority's designation of a person to fill a vacant classified service position.

20. **Civil Service.** Properly conducted examinations provide the cornerstone of a merit-based civil service system.
21. **Civil Service: Administrative Law.** Neb. Rev. Stat. § 23-2525(13) (Reissue 2012) does not preclude a county from defining a transfer to include transfers within the same department.
22. **Administrative Law: Statutes.** A county is not free to promulgate rules that directly violate statutory requirements.
23. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. A court must then reasonably or liberally construe the statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose.
24. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.
25. **Civil Service: Administrative Law: Legislature: Intent.** Under Neb. Rev. Stat. § 23-2525(3) (Reissue 2012), the Legislature intended a county to conduct competitive examinations to fill all open positions in the classified service, unless an exception applies.
26. **Civil Service: Administrative Law: Labor and Labor Relations: Contracts.** Under the County Civil Service Act, Neb. Rev. Stat. §§ 23-2517 to 23-2533 (Reissue 2012), a county cannot implement any provision of the county employees' collective bargaining agreement that would violate a provision of the act.
27. **Civil Service: Administrative Law: Legislature: Intent.** Under Neb. Rev. Stat. § 23-2525(4) (Reissue 2012), the Legislature intended a county to conduct promotional examinations. And appointing authorities must consider records of performance, seniority, and conduct when making promotions.
28. **Civil Service: Administrative Law.** When a vacancy in the classified service is not filled by a transfer or under a statutory exception, Neb. Rev. Stat. § 23-2525(3) and (4) (Reissue 2012) required the county to fill it through one of two types of examinations: open competitive examinations or promotional examinations.
29. ____: ____. When a civil service statute requires an appointing authority to consider seniority in making a promotion, that requirement must be respected.
30. ____: ____. Under Neb. Rev. Stat. § 23-2525(4) (Reissue 2012), a county is not conducting promotional examinations when it posts a position as available to all county employees and fails to consider seniority.
31. **Civil Service: Administrative Law: Legislature: Intent.** Under Neb. Rev. Stat. § 23-2525(3) (Reissue 2012), the Legislature intended to limit an appointing authority's selection of an applicant to one of the applicants who scored highest on the final score of the examination process.
32. **Civil Service.** Under Neb. Rev. Stat. § 23-2525(3) (Reissue 2012), when oral interviews are part of the examination process for an appointment to the civil service, an applicant's score on an oral interview must be included in the final score.
33. **Civil Service: Administrative Law.** Under Neb. Rev. Stat. § 23-2525(3) (Reissue 2012), a county must devise objective standards to test the fitness of applicants as far as possible. When oral examinations are used to test an applicant's subjective

> traits, the scoring must be guided by measurable standards. That is, the examinations must provide some reasonable means of judicial review.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Reversed and remanded with directions.

Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Joe Kelly, Lancaster County Attorney, and Thomas W. Fox for appellees.

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

CONNOLLY, J.

I. SUMMARY

The appellant, Mike Blakely, appeals from a district court order that affirmed the Lancaster County Personnel Policy Board's[1] decision that denied Blakely's grievance. Blakely's grievance alleged that the county denied him an opportunity to fairly compete for job vacancies because county officials did not follow the county's personnel rules or the employees' collective bargaining agreement (CBA).

There are two vacancies at issue. The first was a vacancy at the county's mental health center. For that vacancy, the county reassigned one of its employees to that position without conducting competitive examinations. The second vacancy was a grounds maintenance position left open after the county reassigned the first employee to the mental health center.

Regarding the first vacancy at the mental health center, the crux of the issue is the county's claim, and the court's implicit ruling, that a department head's decision to place a current department employee in a newly created vacancy is a "reassignment"—not an appointment subject to competitive examinations. Regarding the second vacancy, the court affirmed the county's promotion of a department employee to the vacancy although the department did not consider the applicants' seniority. Finally, the court ruled Blakely's claim

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[1] See Neb. Rev. Stat. § 23-2520 (Reissue 2012).

moot because he no longer worked for the county after being laid off in December 2009.

We reverse. We will explain our holding with specificity in the following pages, but briefly stated, it is this:

- Blakely's claim is not moot. Blakely worked for the county when the new positions became available and when he filed his grievance. Because we conclude that his procedural challenges have merit, the county must consider him in new competitive examinations for the vacancies that comply with the county's statutory and contractual duties.
- The court erred in affirming the personnel policy board's denial of Blakely's grievance. The County Civil Service Act[2] required county officials to comply with its provisions. In filling the first vacancy, the county failed to post notice of, and conduct, competitive examinations. In filling the second vacancy, it failed to properly conduct competitive examinations. Thus, its hiring and promotion decisions were arbitrary and capricious, and therefore void.

II. BACKGROUND

In 2009, when Blakely filed his grievance, he worked for the county at Lancaster Manor. He had worked for the county for 17 years, and his position was classified as a maintenance repair worker II (MRW-II). The county had long treated Lancaster Manor as a separate department. All other maintenance repair workers were employed by the county's department of property management (the department). At Lancaster Manor, Blakely maintained the heating and cooling systems and the kitchen equipment and performed general maintenance duties. He had extensive experience working with boilers, water systems, laundry equipment, and other types of equipment. He had obtained a certificate of completion for a 14-month masonry program and had always received good evaluations. In November 2008, Blakely was Lancaster Manor's employee of the month, and in March 2009, he received the "Commissioner's Award of Excellence" for his speedy handling of a water pipe break that caused emergency flooding at Lancaster Manor.

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[2] See Neb. Rev. Stat. §§ 23-2517 to 23-2533 (Reissue 2012).

This dispute arises out of the county's actions in April and May 2009. On April 2, the county's board of commissioners approved a request from the department for an additional maintenance employee at the mental health center. Don Killeen, the department's director, stated in a letter to Blakely's attorney that when he asked for the new position, he intended to fill it through "assignment" of a current employee.

On April 13, 2009, Fred Little, the department's facilities manager, posted the vacancy. The posting stated the position was open only to county employees. It stated that the position required an applicant to perform grounds maintenance; operate, maintain, and repair heating, ventilating, and air conditioning systems; install, maintain, and repair plumbing fixtures and equipment; perform general carpentry work; and perform interior and exterior painting of buildings.

After posting the position, and at Killeen's direction, Little asked the people in the department whether anyone was interested in the vacancy. One department employee, Jim Kohmetsher, expressed interest but said that he needed time to think about it. Before the county hired him, Kohmetsher had experience working with heating, air conditioning, and plumbing systems. But as a county employee, Kohmetsher worked with a grounds maintenance crew, and he had worked only 1½ years for the county. The county assigned an MRW-II classification to his grounds maintenance position. Later, Kohmetsher told Little that he wanted the job at the mental health center, and Little "reassigned" him to that vacancy. Kohmetsher did not formally apply for the position, nor did Little conduct competitive examinations before filling the vacancy.

After Little reassigned Kohmetsher to the new position, the department determined that it would fill Kohmetsher's former grounds maintenance position through the same previous posting. In other words, because the posting did not specify a worksite for the MRW-II position, the department concluded that it could change the new vacancy without issuing a new posting. Little said that when he posted the position, he was not sure where the successful applicant would work because he did not know whether a department employee would take the position at the mental health center.

Blakely had learned about the MRW-II position and applied for it the same week that the county posted it. The county was considering selling Lancaster Manor, and Blakely was concerned that if it were sold, he might lose his job. Blakely's supervisor supported his decision to apply for the new position. Blakely also spoke to Little at Lancaster Manor about the position during the week of April 13, 2009. Little told Blakely that the MRW-II position was for a vacancy at the mental health center. But Little also told Blakely that another employee was interested in the vacancy and that Blakely should wait and apply for the other employee's position. Blakely, however, had already applied for the posted vacancy at the mental health center. Although the county later changed the vacancy to be filled, Blakely believed, from speaking to Little, that the MRW-II vacancy was for the mental health center.

Before Little "reassigned" Kohmetsher to the mental health center vacancy, he had received a list of five county employees who had applied for the position and met the minimum eligibility requirements. The list included Blakely. As Kohmetsher had not applied, Blakely was the only applicant who held a position with an MRW-II classification. But Little did not interview these applicants for the mental health center vacancy because he had already assigned Kohmetsher to the vacancy; the county had determined that it was not required to fill the vacancy through competitive examinations because Kohmetsher's reassignment was not an "original appointment" open to the public under its personnel rules.

Instead, at the interview, Little informed each applicant that the vacancy was for a grounds maintenance and snow removal position—the position that became available when Little reassigned Kohmetsher. He stated that Blakely was the only applicant who knew that the vacancy was originally for the mental health center.

In selecting an applicant for the grounds maintenance vacancy, Little did not consider the seniority of any applicant. He also said that an MRW-II classification did not denote a higher qualified employee than a maintenance repair worker I (MRW-I) classification. Little did not ask the applicants about

their duties or performance appraisals in their current positions or attempt to obtain this information from the applicants' managers.

At his interview, Blakely was surprised when he learned that the interview was not for the position at the mental health center. He expressed, however, that he was interested in any position that would allow him to keep his employment with the county. Little stated that Blakely performed well in the interview, but he promoted another applicant, Mark Bartusek, an MRW-I employee in the department.

Bartusek had worked for the county for 3 years, and Little said he believed that Bartusek was more qualified than Blakely. Little said that he had worked with Bartusek for 4 to 5 months during a remodeling project and that he knew from his observations that Bartusek had a good work ethic and worked well with others. Little said that he had not worked with Blakely, yet he admitted that he did not inquire about Blakely's conduct or performance appraisals: "[N]othing against [Blakely], but I don't know how he works with the other people at the manor. I just know him in casual conversation."

1. The County's Hiring and Promotion Procedures

Pat Kant, the manager of the county's employment office, said that although the rules permit department heads to agree on a current employee's transfer without posting the position, it rarely happens and only when it is in the county's best interests to move a person. She cited disciplinary concerns as a typical example of when such a transfer would occur. She said that county employees usually must compete for the position.

But Kant denied that the county's personnel rules required the county to conduct, or post notice of, competitive examinations for the vacancy at the mental health center. She said that the CBA, instead of the personnel rules, governed the filling of the new vacancy because it was a bargaining unit position. Kant claimed that the CBA did not require the county to inform the public or any classified service employees of the new position at the mental health center.

Additionally, Kant explained the county's examination and scoring of applicants. She said that applicants had to complete an electronic application and a supplemental questionnaire, which permitted an employment technician to evaluate the applicants' training and experience. The employment technician verifies that the applicants' computer scores based on their answers is accurate. The ones who scored the highest points were the most desirable applicants. Kant said that the employment office does not review the performance appraisals of current employees or check references about their conduct. She said that a department head could check those items.

Kant admitted that the technician would normally factor in the applicant's seniority: An applicant would normally receive one point for each year that he or she had worked for the county. But Kant testified that here, the technician failed to consider seniority. She claimed that the mistake was irrelevant, however, because the county would have selected the same five applicants for interviews.

Kant explained that the employment office tries to select at least five people for interviews. She said that if there had been a large pool of applicants, Blakely's seniority points might have made a difference in whether he was a top applicant whom the county selected for an interview. But because there were only five applicants remaining after the employment office determined that some were ineligible, Kant said that producing a point score was unnecessary. That is, the county would have selected the same five applicants for oral interviews even if the employment office had considered seniority. Kant said that the employment office does not rank the applicants by their scores or provide the manager who interviews the applicants with their scores. The manager knows only that the applicants were the top five applicants in the pool, but he or she can see their questionnaire responses.

Little testified that he received each applicant's supplemental questionnaire and asked each applicant a list of questions that he had developed for an MRW-II vacancy. He said that he used the same questions regardless of the position's duties.

Yet, he did not keep notes of the applicants' answers or rank the applicants based on their seniority, previous job performance, or answers in the oral interviews. In May 2009, the county informed Blakely by letter that he was not selected for the MRW-II position.

2. Procedural History

In May 2009, Blakely filed his grievance, alleging that the county had violated its personnel rules and the CBA. In September, the county's personnel policy board voted unanimously to deny Blakely's grievance. In October, Blakely filed a petition for review in district court. He alleged that the county had violated the County Civil Service Act. He specifically alleged that the county had not complied with the following personnel rules: 5.1(a) and (b), 5.2, 5.5, 5.6, 5.7, 5.9, and 9.1. In addition, he alleged that the county had not complied with the following provisions of the CBA: article 16, § 9, and article 17, §§ 1 and 2.

The county moved to dismiss the petition for lack of jurisdiction and failure to state a claim for which relief could be granted. The court treated the petition as a petition in error. But it concluded that Blakely had not timely filed a transcript of the county proceedings—a jurisdictional requirement. The Nebraska Court of Appeals, in case No. A-10-125, on February 11, 2011, remanded the cause with directions.

After remand, the county filed an answer. It affirmatively alleged that Blakely's grievance was moot. It alleged that because the county had terminated Blakely's employment in December 2009, he no longer had any rights under the CBA or under the County Civil Service Act. In its brief, the county states that all county employees who worked at Lancaster Manor were laid off on December 31, 2009, when the county sold the facility to a private party. In Blakely's reply, he denied that his grievance was moot, but he did not deny that the county had terminated his employment.

After an evidentiary hearing, the district court affirmed the personnel policy board's decision. It further concluded that Blakely's grievance was moot because the county no longer employed him, and it dismissed his petition.

III. ASSIGNMENTS OF ERROR

Blakely assigns that the court erred in affirming the personnel policy board's denial of his grievance because the decision violated the county's personnel policies and the CBA. In addition, he assigns that the court erred in concluding that the issue was moot.

IV. STANDARD OF REVIEW

[1,2] An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.[3] Under the County Civil Service Act, a "personnel policy board" is an administrative agency performing quasi-judicial functions when it reviews a grievance of, or disciplinary action against, a classified service employee.[4]

[3,4] 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.[5] The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.[6] The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did from the testimony and exhibits contained in the record before it.[7]

[5-7] In addition, an administrative agency decision must not be arbitrary or capricious.[8] Agency action is arbitrary and capricious if it is taken in disregard of the facts or circumstances of the case, without some basis that would lead a

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[3] *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004) (superseded by statute as stated in *In re Application of Olmer*, 275 Neb. 852, 752 N.W.2d 124 (2008)).

[4] See, § 23-2522(5); *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008); 15A Am. Jur. 2d *Civil Service* § 8 (2011).

[5] *Pierce, supra* note 4.

[6] *Id.*

[7] *Id.*

[8] See *id.*

reasonable and honest person to the same conclusion.[9] Agency action taken in disregard of the agency's own substantive rules is also arbitrary and capricious.[10]

[8-12] We independently review questions of law decided by a lower court.[11] The interpretation of statutes and regulations presents questions of law.[12] Contract interpretation also presents a question of law.[13] Whether an agency decision conforms to the law is by definition a question of law.[14] And justiciability issues that do not involve a factual dispute present a question of law.[15]

V. ANALYSIS

1. Mootness

[13] We first address the county's mootness claim. Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.[16] The county contends that the court properly determined that the issues in Blakely's grievance are moot. It contends that because Blakely no longer has any rights to enforce under the county's personnel rules or the CBA, this court cannot provide any meaningful relief.

Blakely contends that the court erred in determining that the case is moot, because he is entitled to a judgment placing him in one of the positions for which he applied and those positions still exist. He argues that by analogy, a plaintiff's wrongful

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[9] *Middle Niobrara NRD v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011).

[10] *Id.*

[11] See *Fleming v. Civil Serv. Comm. of Douglas Cty.*, 280 Neb. 1014, 792 N.W.2d 871 (2011).

[12] See *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012).

[13] *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011).

[14] See *Robbins v. Neth*, 273 Neb. 115, 728 N.W.2d 109 (2007).

[15] See *In re Interest of Shaleia M.*, 283 Neb. 609, 812 N.W.2d 277 (2012).

[16] *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011); *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

termination claim is not moot because the plaintiff no longer works for the defendant.

[14,15] Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.[17] A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.[18]

[16,17] The central question in a mootness analysis is whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.[19] A case is not moot if a court can fashion some meaningful form of relief, even if that relief only partially redresses the prevailing party's grievances.[20]

We disagree with the county's argument and the court's reasoning that because the county laid Blakely off, the case is moot. We agree with Blakely that under this reasoning, wrongful termination claims would be moot if an employee claimed procedural violations. But that is not correct.[21] Similarly, the county cannot evade review of unlawful hiring or promotion decisions by discharging affected employees and claiming that they no longer have any rights to enforce.

Blakely filed his grievance when he still worked for the county and had statutory and contractual rights to enforce. The personnel policy board issued its decision while the county still employed him. And the county does not argue that the disputed positions have been eliminated or that Blakely voluntarily left his employment.[22]

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[17] *Professional Firefighters Assn. v. City of Omaha*, 282 Neb. 200, 803 N.W.2d 17 (2011).

[18] *Id.*

[19] *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

[20] *Id.*

[21] See *Simpson v. City of Grand Island*, 166 Neb. 393, 89 N.W.2d 117 (1958).

[22] See *State ex rel. Schaub v. City of Scottsbluff*, 169 Neb. 525, 100 N.W.2d 202 (1960).

[18] So a judgment in Blakely's favor would provide meaningful relief. This appeal is about the county's hiring and promotion procedures for classified service positions. Statutory requirements under a civil service act regarding appointments and promotions are mandatory. Other courts have held that appointing authorities must comply with them for an appointment or promotion to be valid. In other words, appointments and promotions that do not comply with the statutory requirements are void.[23] We agree. As discussed below, this court has also held that the county must comply with the County Civil Service Act.[24] If, as Blakely alleged, the county's procedures for making an appointment and promotion were invalid, then the decisions rendered under those procedures were also invalid. This conclusion would obviously provide relief to Blakely: The county would have to allow him to compete in new competitive examinations for these vacancies because he properly contested the invalid procedures.[25] We conclude that the issues raised by Blakely's grievance are not moot.

2. The County's Appointment Procedures for the Vacancy at the Mental Health Center Were Unlawful and Void

Blakely contends that the county's appointments violated the County Civil Service Act's provisions under §§ 23-2517 and 23-2525(3) and (4). Section 23-2517 sets out the act's purpose, and § 23-2525 sets out mandatory requirements for the county's classified service rules, which are stated in the county's personnel rules. Blakely argues that the county's appointments

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[23] See, e.g., *City of Tuscaloosa v. Marcum*, 283 Ala. 440, 218 So. 2d 254 (1969); *State ex rel. Gaski v. Basile*, 174 Conn. 36, 381 A.2d 547 (1977); *Stovall v. City of Scottsville*, 605 S.W.2d 767 (Ky. App. 1980); *State, ex rel., v. Hainen*, 150 Ohio St. 371, 82 N.E.2d 734 (1948); *State ex rel. Mulkey v. Auburn*, 60 Wash. 2d 728, 375 P.2d 499 (1962); *Martin v. Pugh*, 175 W. Va. 495, 334 S.E.2d 633 (1985). Compare *Simpson, supra* note 21.

[24] See *American Fed. S., C. & M. Emp. v. County of Lancaster*, 200 Neb. 301, 263 N.W.2d 471 (1978).

[25] See, *Ziomek v. Bartimole*, 156 Conn. 604, 244 A.2d 380 (1968); *Jensen v. State Dept. of Labor and Industry*, 213 Mont. 84, 689 P.2d 1231 (1984); *Matter of Oliver v. Levitt*, 158 A.D.2d 429, 551 N.Y.S.2d 528 (1990).

failed to comply with these rules. He contends that in failing to post the vacancy at the mental health center and conduct open examinations for the vacancy, the county violated multiple personnel rules and CBA provisions.

The county contends that neither the personnel policy board nor this court has the authority "to sit as a super personnel department reviewing the business judgments made by Lancaster County managers when hiring personnel."[26] But by passing the County Civil Service Act, the Legislature has limited those "business judgments." And it is a court's duty to enforce those statutory requirements.

(a) Statutory Requirements

[19] Under § 23-2517, "[a]ll appointments and promotions under the County Civil Service Act shall be made based on merit and fitness." Although the act does not define the term "appointment," an appointment under a civil service act refers to an appointing authority's designation of a person to fill a vacant classified service position.[27] And rule 1 of the county's personnel rules specifically defines "[a]ppointment" to mean "the designation to a position in the classified service of a person who has qualified for the appointment through appropriate examination or determination of fitness." The parties do not dispute that the positions at issue were classified service positions.[28]

Generally, civil service acts promote effective public service. They do this by establishing a personnel administration system that provides equal opportunity for public employment and advancement based on merit and fitness principles.[29]

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[26] Brief for appellees at 12.

[27] See, Neb. Rev. Stat. § 19-1826(3) (Reissue 2012); *Snygg v. City of Scottsbluff Police Dept.*, 201 Neb. 16, 266 N.W.2d 76 (1978). See, also, Black's Law Dictionary 116 (9th ed. 2009).

[28] See § 23-2519.

[29] See, Neb. Rev. Stat. § 23-2501 (Reissue 2012) and § 23-2525; *Ziomek, supra* note 25; *City of Cambridge v. Civil Service Com'n*, 43 Mass. App. 300, 682 N.E.2d 923 (1997); 3 Eugene McQuillin, The Law of Municipal Corporations § 12.124 (rev. 3d ed. 2012); 15A Am. Jur. 2d, *supra* note 4, §§ 1 and 6.

By requiring the county to incorporate these principles, the Legislature intended to prohibit the county, as much as practical, from making these decisions based on political control, partisanship, and personal favoritism.[30]

[20] Section 23-2525 of the act accomplishes this purpose by requiring appointing authorities to conduct open competitive examinations to fill vacancies or promotional examinations to fill vacancies by promotion of current employees. Properly conducted examinations provide the cornerstone of a merit-based civil service system.[31] And § 23-2525 sets forth the duties of the county personnel officer and personnel policy board to develop specific classified service rules for approval by the board of commissioners. Regarding appointments to vacancies, § 23-2525(3) provides that those rules must include the following requirements:

> [O]pen competitive examinations to test the relative fitness of applicants for the respective positions. . . . *The rules and regulations shall provide for the public announcement of the holding of examinations* and shall authorize the personnel officer to prescribe examination procedures and to place the names of successful candidates on eligible lists in accordance with their respective ratings. . . . *Certification of eligibility for appointment to vacancies* shall be in accordance with a formula which limits selection by the hiring department from among the highest ranking available and eligible candidates, but which also permits selective certification under appropriate conditions as prescribed in the rules and regulations.

(Emphasis supplied.)

As stated, this court has held that the county's board of commissioners must comply with the act's fitness and merit requirements.[32] We held that the county can bargain with county employees over rules for employees' compensation and

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[30] See, e.g., *City of Cambridge, supra* note 29.

[31] See, § 23-2517; *Kelly v. City of New Haven*, 275 Conn. 580, 881 A.2d 978 (2005).

[32] See *American Fed. S., C. & M. Emp., supra* note 24.

working conditions to the extent that the terms of the county employees' CBA do not violate a direct statutory directive.[33] But the "county board has no power or authority to bargain or agree that any appointment or promotion shall be based upon anything other than merit and fitness except as provided in the act."[34]

(b) The County's Personnel Rules

The county's personnel rules 5.1 and 5.2 fulfill § 23-2525(3)'s requirement to conduct open competitive examinations for vacancies and to give notice of those examinations. Rule 5.1 provides the following notice and competitive examination requirements:

> (a) Original appointment to the classified service shall be conducted on an open-competitive basis. The Personnel Officer shall give public notice of all original appointment examinations . . . . Notice of examination shall be posted and shall be distributed . . . . *The public notice examination shall specify*: the title and salary of the class of position; *typical duties to be performed; the minimum qualifications required*; and all other pertinent information and requirements. . . .
>
> (b) *Examinations* may be limited to probationary and status employees [those who have successfully completed a probationary period] in the classified service or within a single department where the Personnel Officer, after consultation with the Department Head concerned, determines that there are a sufficient number of qualified candidates within the classified service to provide competition. *The Personnel Officer shall make distribution and post notice of such examination. This notice shall specify that information set forth in Rule 5.1(a).*

(Emphasis supplied.)

Rule 5.2 provides that "[o]pen-competitive examinations shall be open to all applicants . . . ." It requires the personnel

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[33] *Id.*, citing *Pennsylvania Lab. Rel. Bd. v. State Col. A. Sch. Dist.*, 461 Pa. 494, 337 A.2d 262 (1975).

[34] *Id.* at 305, 263 N.W.2d at 474.

officer to set forth the standards and requirements of the position for examinations. Rule 7.1 sets out the types of assignments, or the means of filling a vacancy, that the county is permitted to make. As relevant here, rule 7.1 requires "all vacancies in the classified service which are not filled by transfer, promotion or demotion" to "be filled by probationary, emergency, temporary, seasonal or on-call appointment."

(c) The County Did Not Comply With Its Rules for Filling the Vacancy at the Mental Health Center

Obviously, the county did not appoint Kohmetsher to the vacancy on a temporary, seasonal, or on-call basis, or because of a government emergency. Moreover, the county had previously assigned an MRW-II classification to Kohmetsher's grounds maintenance position, which was the same as the classification for the new position at the mental health center. So Little's assignment of Kohmetsher to the new position was not a demotion or a promotion. The CBA and personnel rules define those actions, respectively, as an employee's move to a lesser or higher pay grade. So under rule 7.1, the assignment could have only been a transfer or a probationary appointment.

(i) Assignment Was Not a Valid Transfer

[21] Section 23-2525(13) provides that the county's classified service rules must provide "[f]or transfer from a position in one department to a similar position in another department involving similar qualifications, duties, responsibilities, and salary ranges." It does not preclude the county from defining a transfer to include transfers within the same department. So such a definition does not violate a statutory directive.

The personnel rules and the CBA permit department heads, under specified circumstances, to transfer an employee to a different position *of the same class* in the same department or to a position of the same class in a different department. As mentioned, the county had assigned an MRW-II classification to both Kohmetsher's previous grounds maintenance

position and his new position at the mental health center, and both positions were in the same department. But the county did not treat Little's assignment of Kohmetsher as an interdepartment transfer because it did not comply with its transfer rules.

Specifically, rule 9.2(c) of the personnel rules and article 17, § 2, of the CBA permit a transfer only if "the classes involved are so related that *the experience in*, and entrance qualification requirements of one class, are such as to qualify the employee in a reasonable manner for the other class." (Emphasis supplied.) By requiring the employee's current experience to qualify the employee for the new position, the personnel rules ensure that appointing authorities make transfers based on merit and fitness considerations even though they are not conducting open competitive examinations.

Here, the county arbitrarily ignored its own unwritten protocol for not permitting employees to transfer to a position after it has posted notice of competitive examinations for the position. One of Blakely's coworkers at Lancaster Manor testified that after he learned about an MRW-I vacancy at the city-county building, he called the personnel office to ask if he could transfer. The coworker was told that he could apply for the job but could not transfer into the position because once a job is posted, an employee cannot transfer into it. Kant confirmed that if a vacancy has already been posted, the county does not allow transfers outside of the application process: "It wouldn't be good faith to take applications and then transfer someone that didn't apply." But the "good faith" rule was not followed here.

Even though the county's posting of the MRW-II position did not specify a worksite, the stated work requirements for the position could not reasonably be described as giving notice of examinations for a grounds maintenance position. Most of the specified requirements for the vacancy called for different skills that are needed for maintaining facilities—such as experience working with plumbing fixtures and equipment; general carpentry; and operating and maintaining heating, ventilating, and air conditioning systems. And although the department purported to change the position to be filled by its posting, the

mental health center vacancy was clearly posted before Little assigned Kohmetsher to the position. Under the county's personnel rules and unwritten protocol, the county did not validly transfer Kohmetsher. Under rule 7.1, that leaves only a probationary appointment as a permissible means of transferring Kohmetsher to the vacancy.

(ii) Assignment Was Not a Valid Probationary Appointment

The county denies that Little's assignment of Kohmetsher to the vacancy was a probationary appointment. Rule 7.1 defines a probationary appointment as an appointment to the classified service through certification from an open competitive list. Stated otherwise, a probationary appointment is an appointment to a civil service position, on a probationary basis, made from an eligibility list, which is compiled after competitive examinations; the position will ripen into a permanent position after a period of testing.[35] Because Little assigned Kohmetsher to a newly created vacancy, the assignment was an appointment under § 23-2525(3). But the county did not comply with rule 5.1(a).

As stated, rule 5.1(a) required the county to conduct open competitive examinations of applicants for original appointments to the classified service and to give notice of the examinations. Rule 5.1(b) arguably permitted the county to limit notice and competitive examinations to only county employees or only county employees in a single department. The county, however, purported to withdraw its notice of the vacancy at the mental health center, and it did not fill the vacancy on a competitive basis as required by rule 5.1.

Nonetheless, the county claims that it did not violate the requirement in rule 5.1(a) that "[o]riginal appointment to the classified service shall be conducted on an open-competitive basis." It argues that this rule did not apply because it did not choose to make the vacancy open to the general public for an "[o]riginal appointment" to a classified service position. We disagree.

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[35] See 3 McQuillin, *supra* note 29, § 12.134.

The term "original appointment" usually refers to an individual's first appointment to public service.[36] But depending on the governing rules, the term can also refer to any regular appointment to a classified service position.[37]

[22] Here, the term "[o]riginal appointment" in the county's personnel rules must be construed in a manner that is consistent with § 23-2525(3). That section requires the county to conduct open competitive examinations for *vacancies* in the classified service. A county is not free to promulgate rules that directly violate statutory requirements.[38]

[23] In construing a statute, we look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. A court must then reasonably or liberally construe the statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose.[39]

Under the county's interpretation of rule 5.1, it will fill vacancies by competitive examinations only when and if it decides to give notice of a vacancy to the general public. But its interpretation of the term "original appointment" is contrary to the Legislature's intent that the county fill *vacancies* by competitive examinations.

[24] We will not read into a statute a meaning that is not there.[40] Nor will we interpret § 23-2525 in a manner that defeats the Legislature's intent to promote fair opportunities for public employment and effective public service. Neither § 23-2525 nor the personnel rules permitted a department head to assign a current department employee to fill a new position outside of its transfer rules or the competitive examination process. And neither § 23-2525 nor the personnel rules mention

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[36] See *Somerville v. Somerville Mun. Employees*, 80 Mass. App. 686, 955 N.E.2d 924 (2011).

[37] See *Cleveland Civil Service Employees v. City of Cleveland*, No. 79593, 2002 WL 226863 (Ohio App. Feb. 14, 2002) (unpublished opinion).

[38] See *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010).

[39] See *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012).

[40] *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012).

a "reassignment" or distinguish between a reassignment and an appointment to a vacancy.

[25] Instead, by using a broad term like "vacancies" in § 23-2525(3), the Legislature intended the county to conduct competitive examinations to fill all open positions in the classified service, unless an exception applies. And if the Legislature had intended to give appointing authorities the prerogative to fill new positions with current employees in their department without complying with rules for transfers, promotions, or competitive examinations, it would have created this exception.

The county admitted that the vacancy at the mental health center was a new position approved by the county board of commissioners. And it admitted that when the department initially posted the position to only classified service employees, the vacancy was for the mental health center position. We need not consider whether notice to only county employees is a "public announcement" of examinations under § 23-2525(3). By withdrawing its notice of the position, the county obviously did not even comply with its lesser requirement to give notice to current employees. Nor did it conduct any competitive examinations to fill the vacancy.

This case illustrates the soundness of requiring competitive examinations. By "reassigning" a department employee to the new position without complying with its transfer rules or competitive examination rules, the department shielded Kohmetsher from (1) the merit and fitness requirements within the transfer rules and (2) competition from potential applicants like Blakely who had extensive qualifications for the position. The department's wink-and-a-nod "reassignment" obviously defeated the merit and fitness requirements that the Legislature intended to promote. We conclude that the county's attempt to characterize its appointment of Kohmetsher as a "reassignment" is contrary to both the act and its personnel rules.

(d) The CBA Did Not Authorize Noncompetitive "Reassignments"

Because the county did not comply with its personnel rules, it claimed that the CBA authorized the reassignment. As

stated, the county assignment of Kohmetsher was not a valid appointment because the county did not conduct competitive examinations. So the county denied that Little's assignment of Kohmetsher was an appointment. Similarly, the assignment was not a valid transfer because the county failed to follow its "good faith" rule for transfers. So Kant claimed that the good faith rule only applied to an employee seeking a transfer from a different department. She distinguished transfers or promotions for employees from another department from "reassignments" of employees in the same department. She stated that although reassignments within a department were loosely called transfers, reassignments were not treated the same as an employee's lateral transfer or promotion to a different department.

But the county's claim that Little's assignment of Kohmetsher was not a transfer and not a probationary appointment most obviously means that under rule 7.1, Little did not fill the vacancy through any permissible assignment. In an attempt to avoid these clear violations of the governing statutes and personnel rules, the county advanced a creative contract interpretation. It argued that under the CBA, it could fill the vacancy without complying with competitive examination rules or transfer rules.

Kant claimed that because the vacancy was a bargaining unit position under the CBA, the CBA superseded the county's personnel rules. The CBA, however, required the county to post any bargaining unit vacancy to all county employees before the general public *unless* it was filled through a transfer or demotion. But Kant relied on a management rights provision in article 6, § 2(E), of the CBA that gave management the right to "hire, examine, classify, promote, train, transfer, *assign*, and retain employees." Kant characterized Little's assignment of Kohmetsher to the vacancy as a "reassignment."

Kant said that when the department reassigns an employee within the department to a new worksite, the department head is not required to file anything with her office or to post the vacancy. Kant and Killeen both claimed that under the CBA, the county could fill the vacancy by reassigning a

department employee without conducting competitive examinations. We disagree.

[26] The county's argument is not a reasonable construction of the CBA when read consistently. More important, even if the county's interpretation of the CBA were plausible, we would reject it. Under the County Civil Service Act, a county cannot implement any provision of the county employees' CBA that would violate § 23-2525(3) or any other provision of the act.[41] We have already concluded that the county's attempt to characterize its appointment of Kohmetsher as a "reassignment" is contrary to both the act and its personnel rules.

Summed up, we agree that management had the right to transfer a current employee to the vacancy or to appoint an applicant—if it complied with its own rules and its contractual duties. But it did not. Section § 23-2525 and the county's personnel rules required the county to comply with its transfer rules or announce examinations and solicit applicants for the vacancy at the mental health center. In the latter case, § 23-2525 and rule 5.1 required the county to conduct competitive examinations before appointing a person to fill that vacancy. The county followed none of these procedures. Therefore, Little's appointment of Kohmetsher to the vacancy was unlawful and void.

3. The County's Promotion Procedures for the Grounds Maintenance Vacancy Were Unlawful and Void

Blakely contends that the county failed to consider seniority in conducting examinations for the grounds maintenance position and failed to base its hiring decision on merit and fitness. He argues that the county filled the position with an employee who was less qualified, had less experience, and had less seniority. He contends that the business judgment rule does not permit county officials to determine that an applicant is the most qualified for a classified service position without any record of the relevant merit and fitness criteria.

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[41] See *American Fed. S., C. & M. Emp., supra* note 24.

To recap, after Little reassigned Kohmetsher to the vacancy at the mental health center, the department determined that notice of examinations would be for a different vacancy: Kohmetsher's former grounds maintenance position. Little then filled the position by promoting Bartusek, an employee in the department. Compared to Blakely, Bartusek had less experience in facilities maintenance and less seniority with the county.

Section 23-2525(4) requires vacancies to be filled by promotion whenever practical and sets out specific elements that must be considered in a promotion decision: "[P]romotions which shall give appropriate consideration *to examinations* and to record of performance, seniority, and conduct. Vacancies shall be filled by promotion whenever practicable and in the best interest of the service, and preference may be given to employees within the department in which the vacancy occurs." (Emphasis supplied.)

[27] By requiring appointing authorities to consider examinations, the Legislature clearly contemplated that the county would conduct promotional examinations. And § 23-2525(4) specifically requires appointing authorities to consider records of "performance, seniority, and conduct" when making promotions. But the county argues that Little "had the authority to determine whether examinations, record of performance, seniority and conduct of the candidates he interviewed were relevant and what level of consideration was appropriate to be given to each of said items."[42] The county also argues that because Bartusek was a department employee, Little had the authority to determine that "it was in the best interest of the [department] to promote . . . Bartusek and to give preference to [him] when making the promotional decision."[43]

We disagree that Little had authority to disregard the statutory criteria for promoting an employee. Furthermore, the county's posting and procedures for filling the grounds maintenance position showed that it did not conduct promotional examinations.

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[42] Brief for appellees at 24-25.

[43] *Id.* at 25.

Much of the confusion here stems from the county's treatment of internal vacancies. Kant stated that the employment office treats all internal vacancies in a different department as promotional internal positions, even though for the successful applicant, the position could be a promotion, lateral transfer, or demotion. This treatment of all internal vacancies as promotions is contrary to the act's requirements.

[28] When a vacancy in the classified service is not filled by a transfer or under a statutory exception, § 23-2525(3) and (4) required the county to fill it through one of two types of examinations. Under subsection (3), the county could conduct open competitive examinations. Under subsection (4), it could fill the vacancy through promotional examinations. Section 23-2525 states these procedures in the alternative. And under a similar civil service act, we have held that absent statutory restrictions, an appointing authority has discretion to choose between examinations for promotion and open competitive examinations.[44] It is true that in conducting promotional examinations, § 23-2525(4) permits an appointing authority to give preference to an employee in the same department. But we conclude that the county did not conduct promotional examinations.

[29] First, § 23-2525(4) requires the county to fill a vacancy by promotion when practical, and the record fails to show that the county made this determination. Second, because the posting of this vacancy permitted any county employee to apply, obtaining the position would not have been a promotion for many applicants like Blakely. Although the county has referred to "promotional applicants,"[45] nothing in the county's posting alerted county employees that the department would fill the position through promotion, with its attendant preference for department employees. Third, not only did the posting fail to give applicants like Blakely notice that the county would fill the position by promotion—if the county had actually intended to do this—Blakely should have been disqualified because he would not have been promoted by obtaining

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[44] *Short v. Kissinger*, 184 Neb. 491, 168 N.W.2d 917 (1969).

[45] See brief for appellees at 21.

the position. Fourth, and most important, Little admitted that in promoting Bartusek, he did not consider the seniority of any applicant, and he did not inquire about their performance appraisals or their conduct in their current position with the county. When a civil service statute requires an appointing authority to consider seniority in making a promotion, that requirement must be respected.[46] So if we were to treat the county's procedures as promotional examinations, the promotion would be invalid.

[30] But we conclude that under § 23-2525(4), a county is not conducting promotional examinations when it posts a position as available to all county employees and fails to consider seniority. And when we analyze the county's procedures under the rules for open competitive examinations, the county obviously violated many of those rules in both letter and spirit.

First, rule 5.1 required the county's notice of open competitive examinations to specify the position's minimum qualifications and the typical duties to be performed. But because the county's notice was originally intended to fill the MRW-II position at the mental health center, the position's requirements, when applied to the grounds maintenance position, were incorrectly stated. Nothing in the posting alerted county employees that the position was only for grounds maintenance and snow removal. This incorrect statement of the requirements likely resulted in many county employees concluding that they were not qualified to apply. The county's equivalent classifications for grounds maintenance positions and facilities maintenance positions may be justified for determining pay schedules,[47] but the duties for these positions are considerably different for giving notice of a position's work requirements.

Second, many of the standards under which the county evaluated the applicants were not related to the position. Rule 5.2 of the personnel rules required the personnel officer to set forth the standards and requirements of the position that

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[46] See *Hainen, supra* note 23.

[47] See § 23-2525(1).

an appointing authority will apply to the examinations. The county's supplemental questionnaire was intended to broadly discern whether the applicants had training or experience in a wide range of work related to facilities maintenance, carpentry, and maintaining facilities equipment and grounds maintenance equipment. Little also asked the applicants about their experience in these areas, and his questions were designed to more clearly determine the depth of their knowledge and skills.

But leaving aside whether oral interviews were the best way to objectively evaluate the applicants' knowledge of grounds maintenance, snow removal, and equipment maintenance,[48] many of these questions were related to facilities maintenance instead of grounds maintenance and snow removal operations. In short, many of Little's interview questions were geared toward the wrong position.

[31,32] Third, the county did not treat the oral interviews as part of the examination process. Section 23-2525(3) specifically provides that examinations may include oral interviews as an examining technique. But it also provides that "[e]xaminations shall be scored objectively and employment registers shall be established in the order of *final score*."[49] In addition, the formula for certification to the eligibility list must limit the department head's selection to the highest ranking of the available and eligible candidates.[50] The Legislature intended the requirements in § 23-2525(3) to limit an appointing authority's selection of an applicant to one of the applicants who scored highest *on the final score* of the examination process. So when oral interviews are part of the examination process for an appointment to the civil service, an applicant's score on an oral interview must be included in the final score.[51] But that is not what happened here.

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[48] See 5 Sandra M. Stevenson, Antieau on Local Government Law § 76A.08[5] (2010).

[49] § 23-2525(3) (emphasis supplied).

[50] See *id*.

[51] See, e.g., *Bennett v. Blytheville Civil Service Com'n*, 293 Ark. 136, 733 S.W.2d 414 (1987).

Little asked the applicants about their knowledge and skills; he also asked them about their physical abilities and their ability to work with others and to take instructions. But he did not take notes of their answers or rate their performance. Instead, after the county evaluated the applicants based on their applications and answers to the supplemental questions, it treated this initial score as the only relevant score for determining the top applicants for the position. The county specifically argues that Little was free to choose whichever one of these employees he preferred. But because oral interviews were part of the examination process, the county could not determine an applicant's final score until the entire examination was complete.

[33] In addition, neither the employment office nor Little considered the applicants' past performance or conduct in their current positions or in any previous positions that they had held. As stated, § 23-2525(3) requires objective scoring of examinations. This requirement means that the county must devise objective standards to test the fitness of applicants as far as possible.[52] Section 23-2525(3) does not prohibit examiners from evaluating subjective traits if those traits are relevant to an applicant's fitness for a position. But when oral examinations are used to test an applicant's subjective traits, the scoring must be guided by measurable standards. That is, the examinations must provide some reasonable means of judicial review.[53] Otherwise, oral interviews could be used to render hiring and promotion decisions unchallengeable and unreviewable.

Here, Little's testimony showed that he gave preference to Bartusek because he knew him and had worked with him. But that standard meant that the examinations were a farce because Little's selection of Bartusek was based on nothing more than his personal preference for his own employee.

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[52] See 5 Stevenson, *supra* note 48, § 76A.08[4] and [5].

[53] See, e.g., *Bennett, supra* note 51; *Almassy v. L. A. County Civil Service Com.*, 34 Cal. 2d 387, 210 P.2d 503 (1949); *Ziomek, supra* note 25, citing *Matter of Fink v. Finegan*, 270 N.Y. 356, 1 N.E.2d 462 (1936).

Because the county was conducting open competitive examinations and not promotional examinations, Little's preference for an employee in his own department was an invalid basis for the hiring decision. By purporting to conduct open competitive examinations for the grounds maintenance position, but giving preference to a junior department employee, the department created arbitrary and capricious appointing procedures that were not based on the applicants' merits and fitness. Accordingly, Little's appointment of Bartusek to the grounds maintenance position was unlawful and void.

The dissent asserts that Kohmetsher and Bartusek arguably have a property interest in their current positions and that our decision could penalize innocent employees. This assertion is incorrect. Kohmetsher and Bartusek have no right to continued employment in these positions because the county did not comply with the statutory and contractual requirements that would have created that right. An unlawful and void appointment cannot create rights to a civil service position.[54] Courts have specifically held:

> Employees may be removed without compliance with the legal requirements for the filing of charges and the holding of a hearing where their certification or appointment is void ab initio, e.g., where they are guilty of fraud in procuring the appointment, where they have made false representations in their employment application, or *where their employment is not in compliance with civil service or veterans' preference laws*.[55]

Furthermore, we cannot know how the county will respond to our decision. We are not requiring the county to discharge or demote Kohmetsher and Bartusek because of its unlawful conduct. Instead, we hold that the appointments were void and that Blakely is entitled to compete in lawful examinations. If

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[54] See, e.g., *People ex rel. Betts v. Village of Maywood*, 298 Ill. App. 160, 18 N.E.2d 459 (1938); *Wiltshire v. Callis, Mayor*, 289 Ky. 753, 160 S.W.2d 173 (1942); *Snizaski v. Zaleski*, 410 Pa. 548, 189 A.2d 284 (1963).

[55] See 4 Eugene McQuillin, The Law of Municipal Corporations § 12.351 at 733-34 (rev. 3d ed. 2011) (citing cases) (emphasis supplied). See, also, *id.*, § 12:376.

Kohmetsher and Bartusek are not appointed to these positions after the county conducts lawful examinations, they may be entitled to their former positions, or the county may create other positions for them at the same rate of pay. But how the county resolves the consequences of its actions is not part of this appeal, which raises only the validity of its actions.

As in any appeal, an appellate court cannot resolve an issue that could arise as a result of its decision. As the dissent well knows, absent plain error, the scope of our appellate review is normally limited by the issues properly raised. New issues must frequently be resolved after a decision is issued. If, as the dissent hypothesizes, Blakely no longer wants to compete for one of these positions, his grievance will obviously be dismissed as moot on remand. And how much of Kohmetsher's or Bartusek's experience the county should consider in new examinations is an issue that the parties can resolve or litigate later. But those potential issues do not present a valid reason to withhold a decision in this appeal or to remand the cause to the district court to "craft an appropriate remedy."

The lawfulness of the county's employment actions was squarely before this court. Whether the county complied with the civil service statutes and its personnel rules is a question of law. Whether its appointment and promotion are void for failing to comply with those rules is also a question of law. There are no facts that the court could consider on remand that would render the county's employment actions lawful. And the court could not conclude on remand that despite our holding that these appointments were void, Kohmetsher and Bartusek are entitled to keep their positions without competing for them in lawful examinations. Finally, whatever solution or compromise that the county reaches with the employees affected by this judgment is beyond the scope of our review.

VI. CONCLUSION

The county failed to comply with statutory requirements and its own personnel rules in assigning department employees to the mental health center and the grounds maintenance vacancies. The assignments were therefore invalid.

We remand the cause to the district court with directions to reverse the personnel policy board's denial of Blakely's grievance and to order new competitive examinations for the disputed positions.

REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., concurring in part, and in part dissenting.

I concur with the majority insofar as it concludes that the county failed to comply with the statutory requirements and its own personnel rules. But I dissent from the remedy fashioned by the majority. Instead, I would remand this cause to the district court for further proceedings not inconsistent with our opinion.

This court's disposition ordering new competitive examinations does not take into account certain considerations which are relevant when crafting a remedy in this case. To begin, under Lancaster County's personnel rules, an employee can be dismissed only for cause[1] and, as such, has a likely property interest in his or her employment.[2] Where an employee has a property interest in his or her employment, that employee has a right to due process.[3]

While Blakely's rights under the County Civil Service Act and the county's personnel rules were violated, his are not the only rights that are at issue under the majority's remedy. Kohmetsher and Bartusek, both innocent parties who had been hired instead of Blakely, now arguably have a property interest in their respective employment. Such an interest entitles each to due process in connection with the employment.

Nor does the remedy take into account the current circumstances of these individuals or provide guidance for the county in conducting these examinations. For example, we do not know whether Blakely needs or wants county employment.

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[1] See County of Lancaster, Personnel Rules 1 and 11.2(b) through (h) (rev. 2001).

[2] See, *Scott v. County of Richardson*, 280 Neb. 694, 789 N.W.2d 44 (2010); *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995). See, also, *Abraham v. Pekarski*, 728 F.2d 167 (3d Cir. 1984). Cf. *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987).

[3] *Id.*

And assuming that Kohmetsher and Bartusek reapply for their positions during these new competitive examinations, should the county consider these individuals' qualifications based upon their original date of hire or can it consider the additional years of experience each presumably has gained?

It may be that the new examinations ordered by this court provide a proper resolution to this case. But the remedy as ordered could result in penalizing innocent employees, and it is not dictated by law. As such, I would leave it to the district court to craft an appropriate remedy upon a consideration of all the facts and circumstances.

STEPHAN, J., joins in this concurrence and dissent.

MELISSA AMEN, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, K.L.A., PLAINTIFF, V. MICHAEL J. ASTRUE, COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION, DEFENDANT.

822 N.W.2d 419

Filed November 16, 2012. No. S-11-1094.

1. **Statutes: Appeal and Error.** The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible.
2. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
3. ____: ____. In construing statutory language, an appellate court attempts to give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence.
4. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
5. **Decedents' Estates.** In order for a lineal descendant to inherit from an intestate estate, a descendant must survive the decedent.
6. **Decedents' Estates: Minors.** A child, conceived after his or her biological father's death through intrauterine insemination using his sperm and born within 9 months of his death cannot inherit from his or her father as his surviving issue under current Nebraska intestacy law.
7. **Courts: Legislature: Public Policy.** A court cannot contradict the Legislature on matters of public policy.