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11/25/2026 01:12 AM CST

view Garland's expert testimony in the light most favorable to Steve and Cathy, whether the defendants met that standard of care is a genuine issue of material fact for trial. Accordingly, the trial court erred in granting summary judgment to the defendants on Steve and Cathy's individual claims. Thus, we reverse the decision of the district court and remand such cause to the district court for further proceedings.

With respect to the plaintiff B&F, such corporation was indisputably a client of the defendants. There is evidence, when viewed most favorable to B&F, that the defendants breached the standard of care with respect to both the critique of the disclosure statement and the defense of B&F in the Nesler lawsuit. While the defendants offer opposing testimony from experts that there was no breach of the standard of care, resolution of that question is for the jury and is not to be decided on a motion for summary judgment. Accordingly, there is a genuine issue of material fact as to B&F's legal malpractice claims against the defendants. Thus, we reverse the grant of summary judgment to the defendants as to B&F's claims and remand the cause for further proceedings.

We find that there is no evidence that Barista's Company, W.E. Corporation, and Cup-O-Coa had an attorney-client relationship with the defendants; nor does the record before us contain evidence that these corporations would be third parties that were owed a duty of reasonable care by the defendants. Therefore, we affirm the grant of summary judgment in the defendants' favor as to these three plaintiffs.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JAMES PETERSEN, APPELLANT, V.
NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., APPELLEES.
805 N.W.2d 667

Filed November 8, 2011. No. A-10-975.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative

Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.

2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Evidence: Words and Phrases: Appeal and Error.** An appellate court will not substitute its factual findings for those of the district court where competent evidence supports those findings. Competent evidence means evidence that tends to establish the fact in issue.
4. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
5. **Termination of Employment: Words and Phrases.** "Just cause" for dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice.
6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

James L. Haszard, of McHenry, Haszard, Roth & Hupp, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and John L. Jelkin for appellees.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

INBODY, Chief Judge.

INTRODUCTION

James Petersen appeals from the Lancaster County District Court's order affirming Petersen's termination from his employment with the Nebraska Department of Health and Human Services (DHHS). For the following reasons, we affirm.

STATEMENT OF FACTS

Background.

Petersen had been employed with DHHS for approximately 28 years and was a member of the Nebraska Association of

Public Employees Local 61 of the American Federation of State, County and Municipal Employees (NAPE). Petersen worked at the Lincoln Regional Center (LRC) as a mental health security specialist II. Through his employment, Petersen was responsible for providing direct care to LRC patients in the forensics or security program, which included mental health board commitments with serious and persistent mental illnesses, court-ordered referrals, criminal defendants found not guilty by reason of insanity, and sexual offenders. On January 7, 2009, a tour of an LRC building was being given to a Nebraska State Patrol SWAT team. At approximately 2:30 p.m., one of the visiting SWAT team members stepped into the stairwell of the building to receive a cellular telephone call. Petersen, who had just arrived for work, passed the member in the stairwell, during which time the member detected the odor of burnt marijuana. LRC personnel were informed, and Petersen was assessed by the director of nursing and allowed to return to work. Shortly thereafter, Petersen was suspended, and on February 12, Petersen was terminated from his employment with DHHS.

The notice of termination indicated that Petersen had violated the NAPE labor contract by violating the "Code of Conduct for Nebraska Government," in addition to violating several subsections of article 10.2 of the labor contract, the DHHS drug testing policy, and the LRC facility/program work rules and standards.

Procedural History.

In accordance with the employee grievance procedure, Petersen immediately filed a grievance of his termination with the DHHS human resources manager. Petersen argued that said discipline was excessive and in violation of the labor contract. The manager determined that Petersen worked directly with patients in a locked unit for sex offenders at LRC and found that Petersen used marijuana prior to his shift, which increased the potential risk of harm to patients and coworkers in the unit. The manager recommended that Petersen's grievance be denied, which recommendation was adopted by the agency director.

Petersen then filed an appeal to the State Personnel Board. A "mini-hearing" was held with the administrator of the employee relations division, after which the administrator found that progressive discipline had not been employed and that the discipline of termination was more severe than the situation warranted. The administrator recommended that Petersen's grievance be sustained and that his discipline be modified to suspension without pay from the date of termination to July 1, 2009.

DHHS appealed the administrator's determination, and on September 2, 2009, a hearing was held. At the hearing, the compliance specialist at LRC testified that on January 7, 2009, he was giving a tour to members of the Nebraska State Patrol SWAT team when a member indicated to him that an individual, identified as Petersen, smelled of burnt marijuana as he passed him in the stairwell. The compliance specialist indicated that he wrote a report and submitted it to Scott Rasmussen, the LRC human resources manager.

Rasmussen testified that once he was made aware of the SWAT team member's observations, he contacted Debbie Roberts, the director of nursing, and instructed her to assess Petersen for anything unusual. After such assessment, Petersen and Roberts met with Rasmussen at around 4 p.m. that same day. Rasmussen testified that several individuals were involved in the meeting, during which he discussed with Petersen the SWAT team member's observations and further advised Petersen that he needed to submit to a drug test. Rasmussen testified that at the meeting, Petersen admitted to smoking marijuana at around noon and was again asked to submit to a drug test. Rasmussen testified that he asked Petersen to submit to a drug test approximately four times. Rasmussen indicated that Petersen refused each request, explaining that a test was not necessary because he had already admitted to smoking marijuana. Rasmussen directed another employee to drive Petersen home, which request was also denied by Petersen. Rasmussen explained that LRC's policy was to consider a refusal to submit to drug testing as a positive test and that Petersen was placed under investigatory suspension.

The administrative services major with the Nebraska State Patrol testified that through his employment, he had received significant training on drug evaluation and classification for purposes of determining whether or not an individual was impaired or under the influence. He testified that he had reviewed Petersen's file and that, in his opinion, at 2:30 or 2:45 p.m., when Petersen arrived for work, he still would have been under the influence of marijuana that had been smoked at noon that same day.

Roberts, the director of nursing, testified that because there are various types of patients residing at LRC, employees are required to be aware at all times. On one occasion several years prior, a physician was killed by a patient, and there are documented cases of other violent outbreaks by patients. Roberts testified that Petersen's main responsibility as a security specialist was to provide direct patient care: specifically, to maintain the psychiatric care for each patient in accordance with their individualized treatment plan.

Roberts testified that on January 7, 2009, Petersen worked "the 3:00 to 11:00" p.m. shift in the convicted sex offender program. Roberts became aware of some concerns regarding Petersen when it was reported to her by a compliance specialist that Petersen smelled of marijuana. Roberts testified that she did not have any specialized training in the detection of impairment but met with Petersen at around 3:30 p.m. to assess the situation. Roberts did not detect the smell of marijuana on Petersen and did not see any outward signs of impairment. Roberts directed Petersen to return to work and, at the request of Rasmussen, later brought Petersen to the administration building for further discussion. Roberts explained that Petersen was directed to take a drug test and refused.

Roberts explained that she had reviewed Petersen's evaluations dating back to 1989, which revealed generally good-quality evaluations. Roberts testified that Petersen used a significant amount of sick leave and leave without pay and that he needed improvement with attendance and punctuality. Generally, Petersen's evaluations encouraged him to become more involved in ward routines. In both 1997 and 1998,

Petersen utilized 280 hours of sick leave and was described as having difficulty adapting to change. Special evaluations were made in 2001 and 2007, for tardiness and increased use of sick leave. Roberts testified that there were also consistent indications in his evaluations that he had good working relationships with patients and documented his activities well. Roberts testified that during his 28 years of service, he had no formal disciplinary actions.

Roberts testified that although Petersen's employment had been terminated after further investigation, lesser discipline had been discussed as an option for Petersen. However, due to the strict guidelines requiring patient safety, it was imperative that employees be alert and under no impairment at all times. Roberts also testified that "role modeling" was a vital aspect of the employee's role at LRC and that if a "trooper" had smelled marijuana on Petersen, then there was also a possibility that some of the patients who were substance abusers could smell the odor as well. Roberts explained termination came down to the facts that the potential for harm was too great in this situation and that Petersen had been insubordinate, had admitted to smoking marijuana, and had failed to comply with requests for drug testing.

Petersen testified that in his many years of employment at LRC, he had not ever received any type of formal discipline. Petersen explained that he had utilized significant amounts of sick leave in the past in order to take care of family members or for his own health reasons, but had not been formally disciplined for those issues. Petersen testified that in the present situation, he believed disciplinary action was warranted for his actions, but not termination. Petersen explained that he was not impaired that afternoon because he had smoked the marijuana 2½ hours before work and had smoked only a small amount of marijuana. Petersen specifically testified that he had smoked only a quarter to a third of a single marijuana joint, which he explained was less than 1 gram, and, further, that the quality of the marijuana was only "medium." Petersen testified that he had been asked to submit to a drug test and admitted that he denied the requests. Petersen testified that he did not violate a "direct order" because he had not been ordered to take a drug

test, only requested to take a drug test. Petersen testified that he believed by admitting to having smoked marijuana, a drug test would not be necessary and would have saved the State the unnecessary expense of a drug test. Petersen felt that he was an asset to LRC, because he was helpful and had a unique ability to work with the patients in his unit. He also testified that if he was allowed to continue his employment with LRC, he would accept probation and would submit to a random drug-testing requirement.

A former coworker testified that he worked with Petersen in 1984 in the LRC security unit as a security specialist and that he tried to emulate Petersen because he possessed great leadership skills and respect for the patients.

An addiction therapist testified that he became acquainted with Petersen in 1992, when the therapist worked in the LRC security unit. He testified that he worked with Petersen until 1998, on a day-to-day basis, because the two worked the same shift in the same unit as security specialists. He testified that Petersen was very professional and that his actions with clients were above reproach. He testified that Petersen was a good employee and always completed his requirements.

On October 7, 2009, the hearing officer issued findings of fact, conclusions of law, and a recommendation regarding DHHS' appeal of Petersen's grievance. The hearing officer found that Petersen's violation of LRC policies by smoking marijuana and going to work under the influence disrupted the workplace, placed LRC in a bad light, and failed to set a good example for the patients. The officer determined that Petersen's actions had serious consequences, because he worked with individuals who had substance abuse problems. The officer found that not only had Petersen smoked marijuana shortly before work and then reported to work under the influence, but that he had also refused to take a drug test. The hearing officer found that Petersen had violated various policies and provisions of the labor contract and that, given the nature and severity of the infraction, there had been just cause to forgo progressive discipline and terminate Petersen's employment. On November 19, 2009, the State Personnel Board reviewed

the hearing officer's findings and voted unanimously to adopt the recommended decision.

Petersen then appealed to the Lancaster County District Court. A hearing was held during which evidence was submitted and arguments were made. The district court determined that DHHS had just cause to impose discipline upon Petersen and that, even in consideration of his work history at LRC, termination was appropriate. The district court affirmed the State Personnel Board's decision, and Petersen has now timely filed an appeal to this court.

ASSIGNMENT OF ERROR

Petersen assigns, rephrased and consolidated, that the district court erred by affirming the termination of his employment.

STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009); *Holmes v. State*, 275 Neb. 211, 745 N.W.2d 578 (2008). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Ahmann v. Nebraska Dept. of Corr. Servs., supra*; *Holmes v. State, supra*.

[3] An appellate court will not substitute its factual findings for those of the district court where competent evidence supports those findings. Competent evidence means evidence that tends to establish the fact in issue. *Ahmann v. Nebraska Dept. of Corr. Servs., supra*.

[4] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Ahmann v. Nebraska Dept. of Corr. Servs., supra*; *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003).

ANALYSIS

Petersen argues that the district court erred by affirming the termination of his employment with DHHS. Petersen argues that there was no just cause to terminate his employment; he should have been disciplined, not terminated; there was no evidence he was under the influence; and he was terminated for fear of his possible future actions.

Just Cause for Termination.

Petersen argues that there was no just cause to terminate his employment and, thus, that the decision to affirm the termination by the district court was arbitrary and capricious. Article 10.1 of the labor contract, which governs the discipline of NAPE employees such as Petersen, states in pertinent part:

> Discipline will be based upon just cause . . . . The Employer shall not discipline an employee without just cause, recognizing and employing progressive discipline. When imposing progressive discipline, the nature and severity of the infraction shall be considered along with the history of discipline and performance contained in the employee's personnel file.

[5] "Just cause" for dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice. *Ahmann v. Nebraska Dept. of Corr. Servs., supra*. See *Stejskal v. Department of Admin. Servs., supra*. The Nebraska Supreme Court has applied the same standard to findings regarding "good cause" for dismissal. See *Stejskal v. Department of Admin. Servs., supra*.

Article 10.2 of the labor contract indicates that there are several instances in which appropriate disciplinary action, subject to just cause, may be taken. Specifically, Petersen was found to have violated the following subsections of article 10.2 of the labor contract:

> b. Failure or refusal to comply with a lawful order or to accept a proper assignment from an authorized supervisor.

> c. Inefficiency, incompetence or gross negligence in the performance of duties.
>
> d. Unlawful manufacture, distribution, dispensation, possession or use of a controlled substance or alcoholic beverage in the workplace or reporting for duty under the influence of alcohol and/or unlawful drugs. Use of a controlled substance by the employee as prescribed by his/her physician and/or other licensed health practitioner shall not be a violation.
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> . . . .
>
> j. Failure to maintain appropriate working relationships with the public, employees, supervisors, or managers while on the job or when performing job related functions.
>
> . . . .
>
> m. Acts or conduct which adversely affects the employee's performance and/or the employing agency's performance or function.

In support of his position, Petersen relies heavily on *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009). *Ahmann v. Nebraska Dept. of Corr. Servs.* involves an individual, John Ahmann, employed by the Nebraska Department of Correctional Services (DCS) as a receptionist. Ahmann's responsibilities included filing incident reports, filing inmate grievances, maintaining files, entering data into databases, preparing reports and correspondence, and other general secretarial duties. Ahmann's evaluations indicated that he exceeded performance level expectations and had not been disciplined or counseled for misconduct. However, in May 2006, Ahmann was subjected to a random urinalysis test and tested positive for marijuana. Ahmann was suspended without pay pending an investigation of violating article 10.2, subsections a, d, and m, of the labor contract. DCS terminated Ahmann's employment, and he appealed his termination in accordance with the employee grievance procedure. The hearing officer recommended that the grievance be sustained, in part, and that Ahmann's employment be reinstated but that he should be suspended for 20 days. The State Personnel Board voted to accept a portion of the hearing officer's recommendation, but nonetheless concluded that termination was justified.

Ahmann appealed to the district court, which concluded that while there was just cause to discipline Ahmann, there was not just cause for immediate termination. DCS then appealed to the Nebraska Supreme Court, which affirmed the decision of the district court, opining that DCS' treatment of other employees who tested positive for marijuana use indicated that DCS did not consider off-duty drug use a per se justification for immediate discharge. The Supreme Court found that Ahmann's use of marijuana did not occur on the job or otherwise "affect his job performance or in any way jeopardize the safety and security of DCS." *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. at 40, 767 N.W.2d at 112.

Petersen contends that his case is not materially different from Ahmann's case and that this court should find in accordance with that case. Petersen argues that there are two main differences from this case, which are essentially immaterial: first, that the smell of marijuana is not a material difference, and second, that the labor contract cannot be interpreted differently for different types of workers. We disagree. While some circumstances in both cases are similar, there are significant differences that distinguish the cases from one another.

As set forth above, article 10.1 of the labor contract requires that "[w]hen imposing progressive discipline, the nature and severity of the infraction shall be considered along with the history of discipline and performance contained in the employee's personnel file." In the case at hand, Petersen had been employed with DHHS for approximately 28 years and, throughout those years, had not received any formal discipline. There were several concerns addressed in his evaluations regarding sick time and tardiness, but again, no formal discipline had been taken. A Nebraska State Patrol SWAT team member observed Petersen reporting to work with the odor of burnt marijuana about his person. Petersen admitted to smoking marijuana shortly before reporting to work but refused numerous requests to take a drug test. Petersen argues that he did not refuse to take the test, because he was not ordered to take the test, only requested to; however, the DHHS drug policy clearly states, and Petersen testified that he understood, that a refusal was considered a failed test. Furthermore, Petersen himself

admitted that he worked in a highly volatile and potentially dangerous unit and that it was imperative that employees be fully aware of their surroundings due to the possibility of violence with the patients with whom he had direct contact each and every day.

Thus, while some of the facts in *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009), are similar to those in the present case, clearly, Ahmann, as a clerical worker, was not employed in the same position as Petersen, who was in direct contact with patients. Also, Ahmann did not smoke marijuana just prior to reporting to work and did not refuse to take a drug test.

We find Petersen's case more akin to several other cases in which the infraction of the individual in the course of his or her employment directly related to the safety and security of the individuals being monitored, other employees, and the public. See, *Nebraska Dept. of Correctional Servs. v. Hansen*, 238 Neb. 233, 470 N.W.2d 170 (1991) (correctional officer fell asleep while alone on duty at penitentiary; nature and severity of infraction is not measured by harm that resulted, but, rather, risk associated with it); *Percival v. Department of Correctional Servs.*, 233 Neb. 508, 446 N.W.2d 211 (1989) (actual harm not required to impose discipline; employee's violation of department rule, thereby compromising security, is sufficient for disciplinary action). See, also, *Nebraska Dept. of Health & Human Servs. v. Williams*, 16 Neb. App. 777, 752 N.W.2d 163 (2008) (good cause found when psychiatric technician's employment was terminated for failure to complete room checks, which aspect of job related directly to safety and security of patients in unit and public).

Given the nature and the severity of Petersen's infraction, and taking into account Petersen's history of discipline and performance, the district court was correct to conclude that a reasonable employer, acting in good faith, would regard the infraction as good and sufficient reason for immediate termination. Petersen worked in a potentially dangerous and violent unit where, the record indicates, a physician had been attacked and killed by a patient and, additionally, there had been other violent attacks upon employees by patients. It was of the

utmost importance, for his safety and the safety of others, that Petersen remain alert and unimpaired at work. Clearly, his use of marijuana prior to reporting to work had the potential to affect his job performance and jeopardize the safety and security of DHHS. These reasons, coupled with his admitted usage of marijuana and refusal to submit to a drug test after several requests, equate to just cause for termination of his employment, and we find that the district court's affirmation of Petersen's termination conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. This assignment of error is without merit.

Remaining Assignments of Error.

[6] Having determined that the district court did not err by affirming Petersen's termination of employment, we need not address Petersen's remaining arguments that there was no evidence he was under the influence of drugs and that he was terminated for fear of his possible future actions. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in affirming the termination of Petersen's employment with DHHS for admittedly smoking marijuana just prior to reporting for work and refusing to take a drug test. Therefore, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAVID A. DERR, APPELLANT.
809 N.W.2d 520

Filed November 8, 2011. No. A-11-101.

1. **Effectiveness of Counsel: Records: Appeal and Error.** It is the responsibility of the appellate courts to determine whether the record presented on direct appeal