

**IN THE DISTRICT COURT OF BOYD COUNTY, NEBRASKA**

**NEBRASKA PUBLIC POWER DISTRICT, a public corporation and political subdivision of the state,**

Plaintiff-Appellant,

vs.

**THE NEBRASKA COMMISSIONER OF LABOR and JACK E. MOORE,**

Defendants-Appellees.

Case No. CI02-4

**JUDGMENT ON APPEAL**

**DATE OF HEARING:** (1) May 6, 2002, and, (2) June 10, 2002.

**TYPE OF HEARING:** (both) In chambers at District Courtroom, Holt County Courthouse, O’Neill, Nebraska.

**DATE OF RENDITION:** August 4, 2002.

**DATE OF ENTRY:** Date of filing by court clerk per § 25-1301(3).

**APPEARANCES:**

For plaintiff-appellant: (1) David G. Dales, and, (2) no appearance.

For defendants-appellees:

Commissioner: (1) John H. Albin, and on brief, Thomas A. Ukinski, and, (2) no appearance.

Moore: (1) Ruth A. Laukka, and, (2) no appearance.

**SUBJECT OF ORDER:** Appeal de novo upon agency record pursuant to Administrative Procedure Act.

**FINDINGS:** The court finds and concludes that:

1. Nebraska Public Power District (NPPD) terminated the employment of Jack E. Moore (Moore), a local manager residing at Butte, Nebraska. NPPD exists as a public corporation and political subdivision of this state. NEB. REV. STAT. § 70-602 (Reissue 1996). Moore provided local management for several communities on behalf of NPPD,

including both Butte and Spencer in Boyd County. After being discharged, Moore applied for unemployment compensation. NPPD asserted that Moore used a district truck during employment hours to deliver medications from the Spencer pharmacy to the Butte nursing home for monetary compensation to Moore or his wife from 1997 to August of 1999.

2. A claims deputy initially determined that Moore was discharged for reasons other than misconduct and allowed benefits without any period of disqualification. NPPD appealed administratively. The Nebraska Commissioner of Labor (the commissioner) did not participate in the administrative hearing. The Nebraska Appeal Tribunal (the tribunal) affirmed the claims deputy's determination. NPPD filed its petition for judicial review with this court. NEB. REV. STAT. § 48-638 (Reissue 1998). As required by § 48-638, the petition named the commissioner as a party defendant. On appeal to this court, the commissioner supported NPPD's petition for reversal of the tribunal's determination.

3. The petition for review alleges that the tribunal erred in failing to find that Moore was discharged for acts constituting misconduct or gross misconduct and failing to assess appropriate disqualification from benefits.

4. The parties submitted briefs to this court. This court subsequently received the hearing record in evidence. All of this court's citations to the hearing record are to the tribunal's bill of exceptions, which was marked as Exhibit 2 and received in evidence in this court. The tribunal's bill of exceptions contains numbered exhibits. For convenience and clarity, this decision disregards the exhibit number assigned to the bill of exceptions in this court and refers to the exhibit numbers assigned by the tribunal in its bill of exceptions.

5. On appeal under the Administrative Procedure Act (APA), this court reviews the decision de novo on the agency record. *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998); *Langvardt v. Horton*, 254 Neb. 878, 581 N.W.2d 60 (1998); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997). In reviewing final administrative orders under the APA, the district court functions not as a trial court but as

an intermediate court of appeals. *Wolgamott v. Abramson, supra; Booker v. Nebraska State Patrol*, 239 Neb. 687, 477 N.W.2d 805 (1991).

6. The hearing was held at Lincoln telephonically. The APA generally requires appeal to be taken to the district court of the “county where the action is taken.” NEB. REV. STAT. § 84-917 (Reissue 1999). The “county where the action is taken” refers to the site of the first adjudication hearing. *Essman v. Nebraska Law Enforcement Training Ctr.*, 252 Neb. 347, 562 N.W.2d 355 (1997); *Metro Renovation, Inc. v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996). The hearing officer’s physical presence determines the hearing location. *Gracey v. Zwonechek*, 263 Neb. 796, \_\_\_ N.W.2d \_\_\_ (2002); *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, 618 N.W.2d 444 (2000).

7. However, § 48-638 supersedes the “county where the action is taken” requirement in employment security cases and specifically authorizes appeal to the district court of the county in which the individual claiming benefits claims to have been last employed or in which such claimant resides. NEB. REV. STAT. § 48-638 (Reissue 1998). The present appeal meets these criteria. Section 48-638 states that the appeal shall otherwise be governed by the APA. This court has subject matter jurisdiction.

8. This decision does not address the larger issue of whether Moore’s termination was justified in any other context or constituted a good business decision. The sole issue presented is whether Moore is disqualified, either partially or totally, from receiving employment security benefits.

9. Under § 48-628(2), an individual “discharged for misconduct connected with his or her work” is partially disqualified from benefits. NEB. REV. STAT. § 48-628(2) (Cum. Supp. 2000). If the misconduct was “gross, flagrant, and willful, or was unlawful,” § 48-628(2) requires total disqualification. *Id.*

10. Misconduct means behavior evidencing (1) wanton and willful disregard of the employer’s interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence

which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations. *Douglas Cty. Sch. Dist. 001 v. Dutcher*, 254 Neb. 317, 576 N.W.2d 469 (1998).

11. This court notes, as did the tribunal, that the Nebraska Employment Security Law is to be liberally construed to accomplish its beneficent purposes of paying benefits to involuntarily unemployed workers. *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637; *IBP, Inc. v. Aanenson*, 234 Neb. 603, 452 N.W.2d 59 (1990); *Memorial Hosp. of Dodge Cty. v. Porter*, 4 Neb. App. 716, 548 N.W.2d 361 (1996).

12. As noted above, this court reviews the case de novo on the record. However, where the evidence is in conflict, the district court can consider and may give weight to the fact that the hearing examiner observed the witnesses and accepted one version of the facts rather than another. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997). The tribunal rendered a detailed and thoughtful decision, and this court has given weight to the tribunal's observation of witnesses and determination of facts.

13. This court disagrees with the tribunal's reasoning regarding any delay in the employment action. No party suggested that any statute of limitations expired. Even in equity, the defense of laches is not favored in Nebraska. *Vanice v. Oehm*, 255 Neb. 166, 582 N.W.2d 615 (1998). Laches will be sustained only if a litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary. *Id.* Even if the defense should be considered, which this court doubts, the record does not support any finding of inexcusable neglect or any prejudice against Moore because of the delay. Moore's supervisor initially discounted negative information received in late 2000 concerning Moore because of known antipathy of the informant. Moore's supervisor took part-time status from about February to mid-May of 2001 because of a family illness. In mid-August, the supervisor received an additional negative report and undertook an investigation that culminated in September. This simply does not establish any inexcusable neglect by NPPD.

14. The tribunal found that the delay raised issues of waiver and ratification. A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct. *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001); *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). Ordinarily, to establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part. *Id.* The record shows no such clear, unequivocal, or decisive act.

15. Ratification is the acceptance of a previously unauthorized contract and takes effect from the making of the contract. *Stolmeier v. Beck*, 232 Neb. 705, 441 N.W.2d 888 (1989). The evidence does not support the existence of any ratification.

16. Moore's brief argued that the delay precluded NPPD from establishing that the discharge was based in fact upon the claimed misconduct. But the documentation concerning the discharge all referred to the stated conduct. Moore adduced no evidence, through NPPD's witnesses or during his own case, concerning any other motive for which the stated reason might be viewed as a mere pretext. See *Synacek v. Omaha Cold Storage Terminals, Inc.*, 247 Neb. 244, 526 N.W.2d 91 (1995) (defining "pretext" in employment discrimination context). The record fails to show any improper or unstated reason for the delay.

17. In their respective briefs, the commissioner expressly and NPPD impliedly concede that the employer bears the burden of proof and must establish that the employee was discharged for work-related misconduct.

18. NPPD introduced evidence of a prior disciplinary action in September and October of 1998 partially involving unauthorized use of district property and equipment. Moore personally accepted money for trimming a customer's trees during employment time using NPPD's equipment in July of 1998. Exhibit 11. Kevin Engler, operation team leader, specifically reviewed Policy No. HR-26, the Code of Ethics, and the Employee Respon-

bilities section of the Employee Handbook in detail with Moore. *Id.* Engler imposed a three-day suspension without pay as a sanction. *Id.* While this incident does not directly address whether the present conduct constituted a violation of NPPD's rules, it provides insight regarding Moore's state of mind. Although the conduct at issue in the present case began prior to the tree-trimming incident and continued thereafter until August of 1999, Moore did not disclose the current matter to NPPD at the time of 1998 investigation and thereafter continued his participation until it terminated for another reason.

19. Gary Kruse, NPPD's human resource manager, testified regarding the contents of Moore's personnel file. He displayed no first-hand knowledge of the facts and related no direct communication with Moore.

20. Thomas Lindhorst, NPPD's operations team leader in O'Neill, testified that he directly supervised Moore. Lindhorst related some hearsay statements that he obtained from the Spencer pharmacy and the Butte nursing home. The cross examination demonstrates why such hearsay, although admissible at the administrative hearing, carries little persuasive value. Lindhorst conceded that the hearsay statements "were a little bit unclear, especially from the Spencer Pharmacy, . . ." BOE 63:12-13. Lindhorst testified that he "point blank asked [the Butte nursing home] did [Moore] do this on company time with the company vehicle, and the answer was yes." BOE 63:14-16. But Lindhorst never testified who made this "point blank" statement or any facts showing any personal knowledge of the person answering the questions. Its absence deprives this court of any reasonable method to determine the declarant's credibility. Inability to cross examine the Butte nursing home declarant and absence of supporting details render the bare conclusion basically worthless.

21. The issuance of an IRS Form 1099 to Moore implies that Moore, rather than his wife, contracted to provide the delivery services. Exhibit 20. However, the weight of that form is more than offset by the letter from the Spencer pharmacy. Exhibit 5. Both Moore and his wife persuasively testified that Moore's wife received the compensation.

22. This court partially disagrees with the hearing officer regarding NPPD's offer of Exhibit 21 for statements of Moore's attorney. Upon de novo review, this court considers the statements. Although NPPD characterized them as "judicial" admissions, the hearing officer correctly refused them as such. However, as statements of Moore's agent, they should have been considered for what they were worth. On de novo review, this court determines that they deserve practically no weight because they fail to specifically state facts. Although considered, they do not affect the decision.

23. Judy W. Carter, a senior auditor for NPPD's Internal Audit Services unit, did not testify. Her written report was received as Exhibit 19. Although NPPD's counsel notified the tribunal of possible rebuttal testimony from Carter, she was not called. That decision raises the inference that Carter's testimony would not have substantially contradicted the testimony of Moore and his wife.

24. Moore testified at length. He and his wife, Diane Moore, lived at Butte. His NPPD office was located at his home. His wife worked at O'Neill. She drove through Spencer on her way to and from work. The pharmacy is in Spencer. Spencer is 10 miles east and south of Butte. O'Neill is further south and east from Spencer. The director of the Butte nursing home had initiated contact with Moore's wife to determine her interest in picking up the medications for the Butte nursing home from the Spencer pharmacy on her way home from work. Moore's wife agreed to provide the service and did so from December, 1997, to August, 1999. It ended in August, 1999, because the Butte nursing home obtained a different carrier.

25. Moore worked from 7:30 a.m. to 4:30 p.m. with one hour off for lunch. He was expected to report overtime, but did not log in or out for breaks or lunch.

26. Moore testified that he would assist his wife one time during the week, consuming about ten to 15 minutes per time. The Butte nursing home had empty medication bags, too heavy to be carried by Moore's wife, to be returned to the Spencer pharmacy. Moore began his work day at home at 7:30 a.m. When Moore was going to work from

Butte to Lynch or Bristow (both communities are further east from Spencer), he would stop at the Butte nursing home and pick up the empty bags and drop them off in Spencer on the way to Lynch or Bristow. This clearly occurred after Moore had begun his work day during actual employment time. None of the testimony suggests that Moore traveled any extra distance or went out of his way. The testimony clearly shows that he did use the NPPD utility truck to transport the empty medication bags.

27. Moore also testified that he would occasionally assist his wife by picking up the nursing home's medications at the Spencer pharmacy when his wife was late. His testimony showed that he used his personal vehicle if he went back to Spencer following the conclusion of his work day at 4:30 p.m. However, he also admitted that a few times he did use the truck when he was coming back home before completing work. In other words, the evidence does not show that any out-of-the-way use of NPPD's truck occurred, and Moore specifically denied any out-of-the-way use of the truck for that purpose. He specifically denied making any special trip with NPPD's truck where he wasn't going on some other district business. Moore did admit that "a few times" he stopped at the Spencer pharmacy and carried the medications to the Butte nursing home in NPPD's truck on the way home. He specifically admitted that those "few times" occurred during Moore's eight-hour work day for which he was being paid by NPPD. But he avoided any extra, out-of-the-way use by scheduling NPPD-related work at Bristow or Lynch to accommodate the required pickup.

28. This court accepts Moore's testimony as summarized above as the most persuasive evidence of the specific facts underlying the present issues.

29. NPPD presented various internal documents regulating employee conduct. The Code of Ethics required Moore, in part, to "obey the law and follow District policies and procedures" and to "not use District resources for your own or your immediate family's gain." Exhibits 12 and 15. These statements provide limited assistance in the present context in light of NPPD's policy described below. They cannot be enforced by strict,

literal application. Indeed, every NPPD employee uses district resources for his or her own gain in the form of regular, normal compensation. The Code of Ethics does not provide the answer to the specific issue presented here.

30. This court notes parenthically that, to the extent that it might be contended that Moore's actions were intended to benefit the community in aid of NPPD's business, the Code of Ethics states that "[y]ou may use District resources, *with proper approval*, to support or cooperate with communities, governmental entities, and professional, trade, or civic groups, when such support promotes the business interests of the District." *Id.* (emphasis supplied). No evidence suggests that Moore obtained any "proper approval" for the activities at issue here.

31. The document entitled Employee Responsibilities also provides little assistance to the present inquiry. Exhibit 13. It defers to "Corporate Policy/Procedure HR-26," concerning unauthorized use of district property, equipment, or facilities. *Id.* The Employee Responsibilities document also states that "[c]ompany vehicles are for business use only." *Id.* However, it does not purport to define the scope or definition of "business use." *Id.*

32. The document entitled Vision and Values provides absolutely no assistance to this court's determination. Exhibit 18. It contains only generalities and platitudes.

33. The Employee Discipline section of the Employee Handbook provides some general assistance. Exhibit 17. It generally describes various types of misconduct, including "[v]iolation of NPPD's Workplace Policies or any state or federal regulation applicable to NPPD's operations." *Id.*

34. While Exhibit 17 refers to "dishonesty" and there is some suggestion in the documentation that Moore "changed his explanation" upon being confronted, this court does not consider the present record to sustain any misconduct for dishonesty. See Exhibit 19. The synopsis does not purport to report verbatim questions and answers during the confrontational meeting, and the interpretations inherent in the "changed his explanation"

terminology make such conclusions rather suspect. The document shows that Moore admitted essentially the same information to which he testified before the tribunal and which appears in his testimony in the bill of exceptions. This court rejects any attempt to justify the discharge for “dishonesty.”

35. The Employee Conduct section of the Employee Handbook provides minor assistance. Exhibit 16. The Use of District Property/Facilities section on page 1, a similarly-titled section on pages 2 and 3, and the Political Accountability section on page 4 provide general guidance only.

36. Moore was a “public employee.” NEB. REV. STAT. § 49-1442 (Reissue 1998). As such, he was prohibited by law from using “resources [or] property . . . under [his] official care and control, other than in accordance with prescribed constitutional, statutory, and regulatory procedures, or . . . , other than compensation provided by law, for personal financial gain . . . .” NEB. REV. STAT. § 49-14,101(4) (Reissue 1998). The statute does not specifically define “personal financial gain.” This court must utilize the plain and ordinary meaning of those words. *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, \_\_\_ N.W.2d \_\_\_ (2002).

37. For the sake of completeness, this court notes that § 49-14,101 has been amended and that the quoted language has been deleted from § 49-14,101 and similar language codified in § 49-14,101.01 effective September 1, 2001. NEB. REV. STAT. §§ 49-14,101 to 49-14,101.01 (Supp. 2001). Section 49-14,101.01 has been further amended in LB 1086 in 2002, although the amendment does not affect the similar language. Because the events at issue here all preceded the effective dates of any amendments, those amendments may be disregarded except insofar as they assist in interpreting § 49-14,101(4).

38. The key language appears in Policy/Procedure No. HR-26, entitled Unauthorized Use of District Property, Equipment, or Facilities. Exhibit 14. That document expressly refers to the ethics code, but does not quote it accurately. At least, the quotation does not accurately state the applicable sections of the Code of Ethics shown in

Exhibits 12 and 15. However, that discrepancy of reference is immaterial, because the quoted language accurately reflects § 49-14,101 as it existed at the relevant times. The policy expressly states that NPPD “will not tolerate the unauthorized *nonincidental* personal use of District property.” *Id.* at 1 (emphasis supplied). Thus, the applicable policy permits incidental personal use. Of course, the policy terminology must be interpreted consistently with § 49-14,101(4), which prohibited use “other than in accordance with prescribed constitutional, statutory, and regulatory procedures” or use for “personal financial gain” other than lawful compensation.

39. While the new § 49-14,101.01(1) extends the prohibition on use of public resources or property to “financial gain of a member of his or her immediate family, or financial gain of a business with which he or she is associated,” that language does not appear in the then-effective § 49-14,101(4). NEB. REV. STAT. § 49-14,101.01(1) (Supp. 2001). Clearly, the Legislature recognized the limited application of the phrase “personal financial gain” and adopted the amendments, at least in part, to extend the prohibition to gains realized by an employee’s immediate family member or an associated enterprise. The Legislature thereby acknowledged that the phrase “personal financial gain” failed to include family-member or associated-enterprise gains.

40. This court determines as a matter of fact that the payments were made to Diane Moore and not to Moore. There is no evidence that Diane Moore ever directly paid Moore for such activities. Under the applicable statutory language, one question is whether Moore achieved “personal financial gain” from the activity. This court concludes that he did not. Family-member income does not satisfy the test under the then-effective § 49-14,101(4). Under that test, payments to Diane Moore constitute no “personal financial gain” to Moore.

41. But the new statute differs from the former statute in another significant way. The former section prohibited using public resources or property in two distinct, separate ways: (1) “other than in accordance with prescribed constitutional, statutory, and regulatory

procedures,” *or*, (2) “other than compensation provided by law, for personal financial gain . . . .” NEB. REV. STAT. § 49-14,101(4) (Reissue 1998). The new statute effectively requires both elements, turning the disjunctive into a conjunctive. It now states that a

public employee shall not use or authorize the use of, for personal financial gain, financial gain of a member of his or her immediate family, or financial gain of a business with which he or she is associated, other than compensation provided by law, . . . resources [or] property . . . under that person’s official care and control other than in accordance with prescribed constitutional, statutory, and regulatory procedures.

NEB. REV. STAT. § 49-14,101.01(1) (Supp. 2001). Under the new statute, the use must be for gain to the employee, family member, or associated business, *and* must also be contrary to prescribed constitutional, statutory, and regulatory procedures. But the former statute, which this court must consider in the present case, independently prohibited use “other than in accordance with prescribed constitutional, statutory, and regulatory procedures” without regard to the existence of “personal financial gain.”

42. The parties have not identified and this court has not found any “prescribed constitutional [or] statutory . . . procedures.” This court must then consider what is meant by § 49-14,101(4) as “regulatory procedures.” As a public power district, NPPD is empowered to “adopt rules and regulations . . . for the conduct of the business and affairs of the district. NEB. REV. STAT. § 70-621 (Reissue 1996). Although certain rules and regulations are subject to the requirements of the Administrative Procedure Act, the APA does not extend to all rules and regulations. NEB. REV. STAT. § 84-901(2) (Reissue 1999). The definition excludes “rules and regulations concerning the internal management of the agency not affecting private rights, private interests, or procedures available to the public . . . .” *Id.* This court concludes that the “regulatory procedures” contemplated by § 49-14,101(4) include a rule or regulation adopted by a public power district for the conduct of its business and affairs, and that such “regulatory procedure” is not subject to the APA where it concerns internal management and does not affect private rights, private interests,

or procedures available to the public. Policy/Procedure No. HR-26 constitutes a “regulatory procedure” within the meaning of § 49-14,101(4).

43. This interpretation effectively means that if the personal use violated Policy/Procedure No. HR-26, it also violated the “other than in accordance with prescribed constitutional, statutory, and regulatory procedures” prohibition of § 49-14,101(4) then effective. Because the regulation prohibited only “nonincidental” use, it necessarily permitted incidental use. If Moore’s use was “incidental,” it did not violate either the applicable regulation or § 49-14,101(4). If his use was “nonincidental,” it violated the regulation and § 49-14,101(4).

44. In *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909, (1989), the Nebraska Supreme Court noted that “incidental” means “occurring merely by chance or without intention or calculation: occurring as a minor concomitant . . . being likely to ensue as a chance or minor consequence . . . met or encountered casually or by accident.” *Id.* at 872, 448 N.W.2d at \_\_\_ (citing WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1142 (1981)).

45. This court concludes that use of Moore’s working time to carry empty medication bags in NPPD’s truck from the Butte nursing home to the Spencer pharmacy was not “incidental” to the normal personal needs of an NPPD employee. Similarly, this court concludes that transportation of filled medication bags occasionally from the pharmacy to the nursing home on Moore’s way home from work in the NPPD truck, even though not out of Moore’s route, did not constitute such “incidental” use. NPPD’s regulation contemplated some incidental use. Moore’s stopping by the pharmacy to pick up a prescription for himself or a family member on his way home from work probably would have been within the ambit of such incidental personal use. But assisting his wife in providing a courier service for compensation fell outside the realm of incidental personal use.

46. The situation is particularly tragic for Moore, in that the activity contained a public-service element that, with approval of NPPD management, might have been considered a civic activity for a proper NPPD purpose. BOE 116:14-20.

47. Because the use was not incidental, it violated NPPD's regulation. The violation was not accidental or unintentional. Certainly, after the July, 1998, tree-trimming-for-pay incident that culminated in the October, 1998, suspension (carried out in November), Moore could not claim any lack of familiarity with the regulation regarding use of NPPD's property, equipment, and facilities. His continued use of NPPD's truck during employment hours after October, 1998, establishes that his conduct in the present case was intentional and deliberate. *Poore v. City of Minden*, 237 Neb. 78, 464 N.W.2d 791 (1991).

48. As a deliberate violation of an employer's rules, the use constituted "misconduct" within the meaning of § 48-628(2). Because that regulation defined the scope of any exclusion from the ambit of § 49-14,101(4), such use also violated § 49-14,101(4). An "unlawful act" has been defined as "any affirmative violation of legal duty, whether imposed by criminal statute, tort law, or administrative regulation." *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). Section 49-14,101(4) was a criminal statute. The affirmative violation of that section constituted an "unlawful" act. Misconduct which is "unlawful" requires total disqualification from benefits. NEB. REV. STAT. § 48-628(2) (Cum. Supp. 2000).

49. Because of the severe consequences, this court does not easily reach this result. This court detects a similar reluctance in the tribunal's written decision. But this court concludes that the law compels the outcome, however harsh it may seem. Justice and equity do not require that costs be taxed to Moore, and the costs on appeal shall be taxed to the commissioner. NEB. REV. STAT. § 48-641 (Reissue 1998).

**JUDGMENT:**

IT IS THEREFORE ADJUDGED that:

1. The decision of the Nebraska Appeal Tribunal is reversed, and the cause is remanded with directions to disqualify the defendant-appellee, Jack E. Moore, from all

benefits under the employment security law with respect to wage credits earned prior to discharge of Moore by NPPD.

2. Costs on appeal are taxed to the Nebraska Commissioner of Labor.
3. Any request for attorney fees, express or implied, is denied.

Signed in chambers at **Ainsworth**, Nebraska, on **August 4, 2002**;  
DEEMED ENTERED upon file stamp date by court clerk.

BY THE COURT:

If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Note the decision on the trial docket as: [date of filing] **Signed "Judgment on Appeal" entered; decision of Nebraska Appeal Tribunal reversed and remanded with directions, costs taxed to commissioner.**  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Mail postcard/notice required by § 25-1301.01 within 3 days, stating "**Judgment on Appeal entered; reversed and remanded with directions.**"  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

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William B. Cassel  
District Judge

Mailed to: