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IN THE NEBRASKA COURT OF APPEALS

MATTHEW SCHIFFMANN,

*Appellant,*

*v.*

STATE OF NEBRASKA, GAME AND PARKS COMMISSION,

*Appellee.*

On Appeal from the
Lancaster County District Court
Honorable Darla S. Ideus, District Court Judge

# REPLY BRIEF OF APPELLANT

Dated: June 22, 2026

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## PROPOSITIONS OF LAW

1. "A judgment or final order rendered by a district court in a judicial review under the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing such an order, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable." *Parker v. State ex rel. Bruning*, 276 Neb. 359, 365 (2008).
2. "The collective bargaining agreement . . . is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).
3. "But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. . . . The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *Id.* at 581.
4. "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement." *Id.*
5. A grievance is the predicate to an unresolved dispute being arbitrated. Elkouri & Elkouri, *How Arbitration Works*, ch. 5 (Elizabeth J. Fabrizio ed., 2021) (ebook) ("Grievances: Prelude to Arbitration").
6. "A contract must be construed as a whole and, if possible, effect must be given to every part thereof." *Baker's Supermarkets, Inc. v. Feldman*, 243 Neb. 684, 691 (1993) (quoting *Crowley v. McCoy*, 234 Neb. 88, 91 (1989)).

7. The maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another) is often applied in the interpretation of collective bargaining agreements. Elkouri & Elkouri, *supra* at ch. 9, § 9.3.A.xi.
8. Where there are two contractual provisions concerning the same matter in conflict, the specific provision controls over the general. *Panwitz v. Miller Farm Home Oil Serv., Inc.*, 228 Neb. 220, 223-24 (1988).
9. Restatement (Second) of Contracts, in listing "Standards of Preference in Interpretation" states, at § 203(c), "specific terms and exact terms are given greater weight than general language." The subsequent Comment at e, addressing "General and specific terms," states, in pertinent part: "If the specific or exact can be read as an exception or qualification of the general, both are given some effect, in accordance with the rule stated in Subsection (a)." Subsection (a) of § 203 provides the interpretative rule that "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." Restatement (Second) of Contracts § 203 (A.L.I. 1981).

## ARGUMENT

### I. Denials of reclassification requests which do not result in immediate adverse financial impact to the requesting employee are grievable under the comprehensive grievance procedure contained in the NAPE-State CBA's Article 4; none of the State's arguments in its responsive brief refute that proposition.

This case raises the question of whether denials of employee job reclassification requests where the requesting employee does not suffer an immediate adverse financial impact as a result of the denial are grievable under the comprehensive grievance procedure contained in Article 4 of the collective bargaining agreement ("CBA") between the Nebraska Association of Public Employees ("NAPE") and the State of

Nebraska ("State"). The District Court below committed reversible legal error by finding such requests are not grievable; it applied the wrong legal standard and an inapposite canon of contract construction to hold that the State Personnel Director's denials of reclassification requests like that of Appellant Matthew Schiffmann are final and unreviewable through the grievance process.

### A. The State's brief mischaracterizes Mr. Schiffmann's argument.

In its responsive brief, the Nebraska Game and Parks Commission ("State") spends most of its efforts refuting a purported argument that the Appellant *is not making*. The State accuses Mr. Schiffmann of trying to do an "end run" around the reclassification procedure contained in the CBA's Article 19. According to the State, the CBA's grievance procedure in Article 4 "as Schiffmann tries to use it, would allow Schiffmann to obtain review of his job classification without complying with procedures that Article 19 requires for employees to obtain such review." Appellee Br. 10. The State reiterates this basic argument at multiple points throughout its brief. The State seems to have read a different brief than the one the Appellant's counsel filed; the State completely mischaracterizes the Appellant's argument.

Here, Mr. Schiffmann sought to have his job as a Maintenance Technician with the Game and Parks Commission reclassified. Rather than, as the State would have it, try to evade the reclassification process described in the CBA's Article 19, Mr. Schiffmann complied with that process's every requirement, as the record evidence summarized in the Appellant's initial brief makes crystal clear. Thus,

> On April 18, 2023, he initiated a reclassification review by submitting a Personnel Description Questionnaire ("PDQ") to his supervisor, seeking to be reclassified to a Maintenance Specialist 1. In the PDQ, he described his responsibilities and duties, why his current classification was inappropriate, and why the classification he sought

> better described the responsibilities and duties he was assigned. His supervisor commented on the PDQ and signed it on April 30, 2023; the Agency Director or Designee signed off on it on May 8, 2023. On June 26, 2023, Sean Davis, the State Personnel Director, sent a written decision to the Commission's Personnel Director denying the reclassification request, finding that Mr. Schiffmann's job was properly classified as a Maintenance Technician. Mr. Schiffmann was advised of the decision on July 23, 2023.

Appellant Br. 12-13 (record citations omitted). It was only after the Article 19 process ended with a denial of his reclassification request that Mr. Schiffmann filed a grievance contesting that denial under the CBA's Article 4. Thus, Mr. Schiffmann was not trying to evade Article 19's requirements; rather, he meticulously complied with those requirements and only sought review of the result after his request was denied in the Article 19 procedure.

CBA Article 4.1 defines a "grievance" comprehensively: "A grievance is a written complaint alleging a violation involving the application and interpretation of the provisions of this labor contract." (E11, p. 7, Vol. II). As CBA Article 19.1 provides, in relevant part: "Employer agrees to classify/reclassify positions based on the duties performed, the scope and level of responsibilities assigned, the nature and extent of supervision received and/or exercised, and the knowledge, abilities and skill required . . . ." *Id.* at 60, Mr. Schiffmann's grievance contended that the State Personnel Director erred in his application of these contractual reclassification standards—thus, in plain language, Mr. Schiffmann's grievance alleged "a violation involving the application . . . of the provisions of this labor contract." *Id.* at 7.

The Hearing Officer ("HO") assigned to hear Mr. Schiffmann's grievance agreed that the reclassification denial was grievable, but, on the merits, recommended denying the grievance. The State Personnel Board rejected the HO's decision and held that the matter was not grievable. The District Court upheld the Board's decision.

For the actual arguments in his initial brief—as opposed to the imaginary straw man the State conjures up and then purports to knock down—Mr. Schiffmann relied on well-established law for the proposition that, in order for a dispute to be non-grievable under a comprehensive grievance procedure like Article 4 of the NAPE-State-CBA, the parties must *affirmatively agree to exclude* the matter.

> Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement.

*United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

Mr. Schiffmann next pointed out that Article 4 contains no list of exclusions from its broadly defined ambit; rather, when the collective bargaining parties wanted to exclude a matter, they used specific, identical language contained in the particular contractual section at issue—"The provisions of this section are non-grievable." This exclusionary language is found in the CBA in only two places: Articles 14.9 and 14.27.6. (E11, pp. 47, 56, Vol. II). And, Mr. Schiffmann concluded that, in light of these specific exclusions, the *expressio unius est exclusio alterius* canon of contract interpretation—a canon frequently applied to the interpretation of CBAs, *See* Elkouri & Elkouri, *How Arbitration Works*, ch. 9, §9.3.A.xi (Elizabeth J. Fabrizio ed., 2021) (ebook)—supported a determination that, where grievance exclusions are specifically listed, all other unlisted matters are to be included within the grievance procedure's broad scope.

Applying these principles, the Appellant's initial brief pointed to two reversible legal errors in the District Court's decision. First, the District Court required that Article 19 affirmatively state that reclassification denials were grievable, thereby reversing the proper standard that would find reclassification decisions were grievable unless Article 19 contained language specifically *excluding* reclassification denials

from the broadly applicable, comprehensive grievance procedure. As Mr. Schiffmann pointed out, the lengthy NAPE-State CBA contains 27 articles, many with numerous subsections, and is 247 pages long including appendices. (E11, Vol. II). The standard applied by the District Court would require affirmative grievability language in each of those sections and subsections, an absurdly redundant drafting requirement that no experienced contract negotiator would countenance. Rather, here the bargainers negotiated a broadly applicable grievance procedure, with two very specific, very limited exclusions. Reclassification denials like Mr. Schiffmann's are not among those listed exclusions, and thus his grievance comes within Article 4's broad scope.

Second, the District Court erred in its reliance on language in Article 19.7 (E11, pp. 61-62, Vol. II) providing for review by a Classification Appeal Panel of a different type of reclassification denial—a denial having an immediate negative financial impact on the employee. The denial of Mr. Schiffmann's reclassification request left him in his current position and did not have an immediate negative financial impact on him. Thus, the parties agreed that Article 19.7's discrete review procedure did not apply to his situation.

Nonetheless, the District Court found that the arguably more specific, if inapplicable, Article 19.7 review provision was in conflict with the more general Article 4 grievance provision. Applying the canon of contract construction from *Panwitz v. Miller Farm-Home Oil Service, Inc.*, 228 Neb. 220, 223 (1988), holding that the more specific contract provision prevails over the more general in case of a conflict between the two, the District Court found that the more specific Article 19.7 prevailed over the more general Article 4, and therefore the denial of Mr. Schiffmann's reclassification request was not grievable.

On this second point, the District Court erred because the two provisions are not in actual conflict—Article 19.7's provisions apply to the different situation where the grievance denial results in a demotion with immediate financial loss to the employee. Mr. Schiffmann was not faced with a choice between filing an appeal to the

Classification Appeal Panel under Article 19.7 and filing a grievance under Article 4—the plain language of the contract foreclosed the former avenue for review, leaving the latter option as the one open to him under the equally plain comprehensive grievance procedure language. Moreover, as described above, the relevant canon of contract construction here is *expressio unius est exclusio alterius* not the specific-over-general interpretive canon applied in *Panwitz.*

Given the requirement under Nebraska law that the contract must be construed as a whole and, if possible, effect given to every part thereof, *Baker's Supermarkets, Inc. v. Feldman*, 243 Neb. 684, 691 (1993), the interpretation that would give effect to both contractual provisions would hold that individuals suffering an immediate financial loss from a reclassification demotion are able to obtain review through the Classification Appeal Panel and, where the reclassification request is denied with no such immediate financial loss, it is reviewable through the broad grievance procedure Article 4 provides. This interpretation, which treats the specific provision (Article 19.7) as an exception or qualification to the general rule (Article 4), is supported by Comment e to § 203 of the Restatement (Second) of Contracts (A.L.I. 1981). *See* Appellant's Br. 30-31.

In sum, there is no basis for the State's argument that Mr. Schiffmann is seeking to evade Article 19's requirements. As the above outline of Mr. Schiffmann's actual arguments makes clear, the plain language of the contract and the application of the proper canons of contract construction demonstrate that the District Court erred in its determination that the denial of Mr. Schiffmann's reclassification request was not grievable. And, notably, in reaching this erroneous conclusion, the District Court did not rely on the rationale the State advances here that Mr. Schiffmann was trying to evade Article 19's requirements. Rather, the District Court simply found that the State Personnel Director's reclassification denial was not reviewable through the CBA's grievance procedure.

### B. None of the State's other arguments render the denial of Mr. Schiffmann's reclassification request non-grievable.

As to the actual arguments advanced by the Appellant, the State's brief has little to say. In response to the argument that Article 19.7 and Article 4 are not in conflict, the State does not engage with the Appellant's reliance on the Restatement (Second) point described *supra* but rather recycles its argument that the provisions of Article 19 are mandatory and thus must be followed. In this regard, the State relies on Article 19's language that "[n]o position shall be classified or reclassified without written authorization of the Director of State Personnel" to contend that "Schiffmann seeks exactly what the Labor Contract forbids—he asks for his position to be 'reclassified without written authorization of the Director of State Personnel.'" Appellee Br. 14; *see also id.* at 18. But the State does not address at all the Appellant's common-sense point that "Nothing about this language forecloses the Personnel Director issuing the required written authorization after his initial determination has been reviewed through resort to the grievance procedure." Appellant Br. 27.

When the State does attempt to engage with the Appellant's points, Appellee Br. 15-16, it starts with a complete non-sequitur. Addressing the Appellant's argument that, absent a specific exclusion "all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement," Appellant Br. 21 (quoting *Warrior & Gulf*, 363 U.S. at 581), the State concludes that this "policy does not apply where a labor contract provides an appropriate forum to resolve specific employee complaints." Appellee Br. 16. Of course, the NAPE-State CBA provides "an appropriate forum to resolve specific employee complaints": that forum is Article 4's grievance procedure.

Equally unavailing is the State's citation to *Bower-Hansen v. Neb. Department of Health & Human Services*, 302 Neb. 847, 855 (2019) for the proposition that "the terms of [a] contract are to be accorded their plain and ordinary meaning." The Appellant agrees that

the terms of the NAPE-State CBA are to be given their plain and ordinary meaning. In that regard, as described in Section I.A above, the plain meaning of the Article 4 grievance procedure, when read with the specific exclusions from that procedure found only at Articles 14.9 and 14.27.6, is that complaints alleging violations of the application of the CBA's provisions are grievable under the procedure outlined in Article 4. And the State's contention that Article 19's prohibition on filing another Article 19 reclassification request within twelve months of the initial request precludes Mr. Schiffmann from filing a grievance over the denial of his initial request affirmatively mischaracterizes a grievance seeking review of the initial determination as the initiation of a second, separate reclassification request.

Finally, the State's argument that Mr. Schiffmann's interpretation of the plain language of the agreement would render Article 19's language superfluous completely misreads both the scope of Mr. Schiffmann's argument and its effect. The record testimony from State Personnel Director Davis was that four classification specialists in his office handle the initial review of approximately 800 Article 19 reclassification requests per year. (20:9-12, 22:22-23, Vol. I). Of these, approximately 80-85%—that is approximately 640-680 requests—are granted. *Id.* at 32:15-23. Mr. Schiffmann's grievability argument says nothing about those granted requests, and for those, Article 19's provisions are certainly not superfluous or read out of the CBA. Compliance with Article 19 is required for those positions to be upgraded.

As for the approximately 120-160 requests that are denied annually, Mr. Schiffmann's argument does not seek to set aside the contractual requirement that those reclassification requests be initiated through the Article 19 process or that they must comply with the process's requirements. All that Mr. Schiffmann asks is that where the reclassification request is denied without any immediate adverse financial impact on the employee—where the request is denied without a reclassification downward—the State Personnel Director's decision be reviewable through the Article 4 grievance procedure.

It may well be that the four classification specialists each reviewing approximately 200 reclassification requests per year never make a material mistake, in which case the State Personnel Director's denial decision in reliance on their recommendation will be upheld upon review. *See, e.g.*, *Laura Steele-Leahy v. Neb. Dep't of Revenue*, Case No. 24-02 (State Personnel Board, Oct. 10, 2023) (reclassification denial review pursuant to grievance, denial upheld on the merits). (E12, Vol. II). However, in the event that the reclassification denial misapplies the applicable standards described in the contract, if the denial does not result in

> reclassify[ing particular] positions based on the duties performed, the scope and level of responsibilities assigned, the nature and extent of supervision received and/or exercised, and the knowledge, abilities and skills required -- the end result being that all classifications/reclassifications shall be in balance with the classification for similar work being performed by other state employees.

(E11, p.60, Vol. II), then the employee whose reclassification request is denied is entitled to seek review of that erroneous determination by filing a grievance pursuant to Article 4's comprehensive procedure. Absent that review to address mistaken denials, the aggrieved employee will have no recourse. The availability of grievance procedure review of the State Personnel Director's denial determination is all that Mr. Schiffmann seeks, and that review is what the plain language of the contract read as a whole clearly requires.

## II. The Personnel Board and the District Court did not address the merits of Mr. Schiffmann's grievance; the matter should be remanded to the District Court with instructions to remand to the Personnel Board for it to address the merits in the first instance.

Both the Personnel Board and the District Court relied for their decisions on their determinations that the denial of Mr. Schiffmann's reclassification request was non-grievable. Thus, neither considered the merits of Mr. Schiffmann's grievance. Mr. Schiffmann's initial brief contended that this Court should not engage, in the first instance, in a fact-intensive examination of the job duties of the two classifications and review which duties Mr. Schiffmann is in fact performing, without the benefit of an underlying decision that considers and addresses those details. In its brief, the State did not address the appropriate remedy should this Court reverse the District Court. Under these circumstances, the proper course is for this Court to remand the matter to the District Court with instructions to remand it to the Personnel Board, for the Personnel Board to address the merits of Mr. Schiffmann's grievance.

## CONCLUSION

For the reasons stated above, the denial of Mr. Schiffmann's reclassification request was grievable pursuant to Article 4 of the NAPE-State CBA. This Court should so find and reverse the contrary decision of the District Court. As both the District Court and the Personnel Board found the matter non-grievable, neither ruled on the merits of Mr. Schiffmann's reclassification request. This Court should therefore remand the case to the District Court with instructions to remand the matter to the State Personnel Board to rule in the first instance on the merits of Mr. Schiffmann's request.

Dated: June 22, 2026

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## CERTIFICATE OF COMPLIANCE

The undersigned certified that the foregoing Brief of Appellant complies with Neb. Ct. R. App. P. § 2-103. It was generated on Microsoft Word Version 2601 and contains 3,750 words in Century 12 pt. font.

/s/*Abby Osborn*

# Certificate of Service

I hereby certify that on Monday, June 22, 2026 I provided a true and correct copy of this *Reply Brief* to the following:

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