to acceptance" of a plea of guilty or no contest, Mena-Rivera's constitutional rights were not implicated. Given the facts of this case, I believe the district court met the requirements of the statute, and Mena-Rivera should not be entitled to withdraw his plea of guilty. I would therefore affirm the decision of the district court denying Mena-Rivera's motion to withdraw his guilty plea.

TIMOTHY MEYERS, APPELLANT, V. NEBRASKA STATE PENITENTIARY OF THE NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, AND COMMISSIONER OF LABOR OF THE STATE OF NEBRASKA, APPELLEES.

791 N.W.2d 607

Filed December 17, 2010. No. S-10-267.

1. **Employment Security: Judgments: Appeal and Error.** In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Employment Security.** Under Neb. Rev. Stat. § 48-628(2) (Cum. Supp. 2008), an individual shall be disqualified for unemployment benefits for misconduct related to his work.
4. **Employment Security: Words and Phrases.** Misconduct related to work is defined as behavior which evidences (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.
5. **Employment Security.** An employee's actions do not rise to the level of misconduct if the individual is merely unable to perform the duties of the job.

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

Kevin Ruser and Patricia A. Knapp, of University of Nebraska Civil Clinical Law Program, and Clint Cadwallader, Kurt

Arganbright, Matthew Meyerle, and Joshua Wunderlich, Senior Certified Law Students, for appellant.

John H. Albin, Special Assistant Attorney General, and Katie Baltensperger, Senior Certified Law Student, for appellees.

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

MCCORMACK, J.

NATURE OF CASE

Timothy Meyers filed a claim for unemployment insurance benefits after termination from his employment as a corrections officer at the Nebraska State Penitentiary of the Nebraska Department of Correctional Services (State Penitentiary). The issue in this case is whether Meyers' repeated failures to follow security procedures constituted misconduct in connection with his work so as to disqualify him from receiving unemployment benefits. Because the record does not support the determination that Meyers' actions amount to misconduct, we reverse the decision of the district court.

BACKGROUND

Meyers worked as a correctional officer at the State Penitentiary from January 5, 2009, until his discharge on May 8, 2009. Meyers was hired on a 6-month probationary period and was required to complete 6 weeks of training, including on-the-job training where he was assigned to certain posts for 8 hours per week. At the conclusion of his training on each post, Meyers signed a form indicating he understood the requirements of that post. Meyers also received a training manual, which included administrative regulations and the code of ethics, and an employee handbook. Meyers successfully completed his training. The appellees maintain that Meyers was discharged for failing to follow procedures that govern State Penitentiary security practices.

Throughout Meyers' employment, supervisors raised concerns regarding his ability to perform the functions of his job. In a February 21, 2009, incident report, a supervisor noted that Meyers had difficulty performing radio protocols, even

after the skills had been demonstrated and explained. Another supervisor noted that Meyers "might not be suitable in the field of corrections." This observation was based on Meyers' apparent difficulty applying restraints and retaining information. In addition, the incident reports contained in the record note that although Meyers was able to complete his training, he had difficulty grasping information and needed extensive instruction. The final report which recommended termination of Meyers' employment stated that Meyers' job performance had been unsatisfactory, that he struggled to adapt to the correctional environment, and that "Meyers' attitude is more of a person working in a library versus one working in a prison."

The report recommending termination of Meyers' employment identifies specific incidents where Meyers failed to properly carry out his duties. On February 26, 2009, Meyers was assigned to a tower to supervise movement in the prisonyard. During the hours of dark or inclement weather, an officer assigned to this post is required to challenge any individual observed walking across the yard to ensure that an inmate is not attempting to escape or access unauthorized areas. The prescribed protocol requires the officer to challenge the movement by turning on a red light. If the person moving about the yard is prison staff, that person must flash back with his or her flashlight. The report states that Meyers admitted he saw a person in the yard whom he did not challenge and that Meyers explained that his failure to challenge that movement was a result of poor lighting, shadows in the yard, and the fact that he had been watching dog handlers and dogs and scanning the area between other towers.

On April 2, 2009, Meyers was assigned to the visiting room to supervise inmates and their visitors. His supervisor reported that Meyers paid little attention to the operation of the visiting room and instead devoted his time toward getting a supervisor "to do [Field Training Officer] modules." A supervisor did complete one module with Meyers, and Meyers was thereafter informed that he was ill prepared for work and more concerned about his personal needs than those of his coworkers. After the April 2 shift, Meyers' supervisor reported

that Meyers made the statement: "'I see the predominant number of mixed couples in here are black.'" His supervisor reported that there were three mixed couples in the visiting room at the time and that he found the statement both "alarming and dangerous."

On April 27, 2009, Meyers was assigned to a housing unit. Meyers was to work in the control center, from which the cell and entrance doors of the housing unit are locked and unlocked to control the movement of the inmates. Each hour, inmates are allowed to move freely between their cells and the housing unit for a 10-minute period. For the remainder of the hour, inmates are not allowed to enter the housing unit or their cells unless they have a specific reason to do so. The appellees testified that this protocol is in place for security reasons; if other inmates gain access to those areas without staff observation, they might be able to hide contraband, steal items, or assault fellow inmates. Outside of the 10-minute open period, protocol requires an inmate to request access to the housing area or an individual cell via an intercom system. In order to allow the requested access, an officer must verify the inmate's identity and cell assignment before allowing the inmate to enter. Each control center contains a picture of each inmate and the inmate's cell assignment.

During Meyers' shift on April 27, 2009, on three separate occasions, he violated the protocol described above. Meyers opened the doors of cells that were unoccupied when the inmates who were assigned to those cells were not in the housing unit. These violations were reported to a lieutenant, who testified before the Nebraska Appeal Tribunal that Meyers explained that the inmates would "yell and push him to open room doors even if he was not certain if that inmate even lived in that housing unit or was assigned to that room."

Meyers received a termination letter which explained the reasons for termination as follows:

> You have failed to comprehend several essential job duties such as application of restraints and radio operation.
>
> . . . You failed to challenge movement on the External Yard while you were assigned to Tower 4.

> . . . You failed to control inmate movement in a housing unit by allowing unoccupied room doors to be unsecured.

After his employment was terminated, Meyers applied to reopen an established benefits claim. An adjudicator determined that Meyers' employment was not terminated for misconduct, and the State Penitentiary appealed that determination on June 19, 2009.

A notice of appeal filed was mailed to Meyers on June 19, 2009, stating that he would be advised of the date and time of his hearing within approximately 15 to 25 business days. Meyers was a member of the U.S. Naval Reserve and, from July 17 to August 1, was deployed overseas for reserve training duty. On July 27, Meyers was mailed the notice of hearing setting forth the date, time, and manner of the hearing. The hearing was scheduled for August 10. Notice was received when Meyers returned home; however, he did not read the notice until after the hearing had occurred. Meyers therefore did not participate in the hearing.

The appeal tribunal found that Meyers was discharged for misconduct in connection with his work. On appeal, the district court affirmed this finding and, quoting *Bristol v. Hanlon*,[1] concluded that Meyers' actions constituted misconduct "in that they evinced a 'deliberate, willful or wanton disregard of an employer's interest . . . or carelessness or negligence of such a degree or recurrence as to manifest culpability . . . .'" The court also found that Meyers was not entitled to relief under the Servicemembers Civil Relief Act[2] because the decision of the appeal tribunal was not a default judgment and Meyers did not have a meritorious defense to the action as required under the act.[3] Meyers appeals.

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[1] *Bristol v. Hanlon*, 210 Neb. 37, 312 N.W.2d 694 (1981), *overruled on other grounds, Heimsoth v. Kellwood Co.*, 211 Neb. 167, 318 N.W.2d 1 (1982).

[2] 50 U.S.C. app. § 501 et seq. (2006 & Supp. II 2008).

[3] See *id.*, § 521(g).

ASSIGNMENTS OF ERROR

Meyers assigns that the district court erred in (1) affirming the appeal tribunal's decision that Meyers had been fired from his job due to misconduct and (2) determining that Meyers was not entitled to relief under the Servicemembers Civil Relief Act.

STANDARD OF REVIEW

[1,2] In an appeal from the appeal tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4]

ANALYSIS

[3,4] Under Neb. Rev. Stat. § 48-628(2) (Cum. Supp. 2008), an individual shall be disqualified for unemployment benefits for misconduct related to his work. We have previously defined misconduct as behavior which evidences (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.[5]

[5] Meyers argues that he was discharged not for misconduct, but, rather, for his inability to perform job duties. An employee's actions do not rise to the level of misconduct if the individual is merely unable to perform the duties of the job.[6]

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[4] *NEBCO, Inc. v. Murphy, ante* p. 145, 784 N.W.2d 447 (2010).

[5] *Id*. See, also, *Douglas Cty. Sch. Dist. 001 v. Dutcher*, 254 Neb. 317, 576 N.W.2d 469 (1998); *Smith v. Sorensen*, 222 Neb. 599, 386 N.W.2d 5 (1986).

[6] See *Perkins v. Equal Opportunity Comm.*, 234 Neb. 359, 451 N.W.2d 91 (1990).

However, deliberate indifference to the standards of behavior that an employer has a right to expect is misconduct.[7] In reliance on *Bristol v. Hanlon*,[8] the appellees assert, and the district court concluded, that Meyers' failure to (1) follow security procedures when admitting inmates to the housing unit without proper authorization, (2) observe the inmates and their visitors in the visiting area, and (3) follow security procedures and challenge unknown persons walking in the prison yard after dark evidenced a deliberate, willful, or wanton disregard of an employer's interest or carelessness or negligence of such a degree or recurrence as to manifest culpability.

In support of this argument, the appellees assert that Meyers' actions show a complete disregard of his employer's interest because Meyers deliberately failed to observe important safety rules. Meyers was thoroughly trained on the expected protocol, his violations were multiple instances over a period of time, and Meyers was often reminded of the correct procedure following these violations. Specifically, during the final incident that led to the termination of Meyers' employment, Meyers violated the same rule three times even after being reminded of the proper protocol after each preceding instance. The appellees argue that this shows deliberate disregard of the employer's interest in maintaining a safe prison facility or, in the alternative, that Meyers' actions amount to negligence which manifests culpability.

We find the district court's reliance on *Bristol* to be misplaced. In that case, the claimant worked for a slaughterhouse and was trained to remove the hides of beef carcasses. The claimant damaged hides by making improper cuts; he conceded that the cuts were improper. But, when warned by another employee to stop making such cuts, he responded by shouting obscenities and continuing to make the cuts in the same fashion as he had prior to the warnings. The claimant was fired for this conduct and was denied unemployment benefits on the basis of misconduct. We affirmed the determination and found

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[7] See *Bristol v. Hanlon, supra* note 1.

[8] *Id.*

that the claimant damaged the hides intentionally; that he had been fully trained, having worked for the company for 3 years; and that his actions were due to his unhappiness about doing a particular job.[9] *Bristol* is distinguishable from the present case. The record indicates that Meyers struggled to adapt to the correctional environment and that supervisors expressed concerns that he was not suited for the field of corrections. It was also noted that Meyers had difficulty grasping basic concepts and retaining information, even for short periods of time. Aside from the appellees' assertions, there is no evidence that Meyers' failures were the result of *deliberate* indifference or were so careless or negligent as to manifest culpability.

The present case is similar to *Borbas v. Virginia Employment Com'n*,[10] in which the Virginia Court of Appeals reversed a determination that a prison security guard had been discharged for misconduct after breaching security policies on three occasions. Though all three of the breaches concerned the security of the prison facilities, the court noted that behavior that is involuntary or unintentional or results from simple negligence warrants dismissal, but not disqualification from benefits. The court also found no evidence that the guard, despite her extensive training, ever performed well, so the breaches were not a result of a decline in her performance. The court concluded that her actions were negligent at most and did not rise to misconduct.

Under the definition of "misconduct" developed in our case law, misconduct generally involves intentional actions as indicated by the phrases "'wanton and willful disregard of the employer's interests,'" "'deliberate violation of rules,'" and "'disregard of standards of behavior.'"[11] Misconduct may also involve negligence on the part of the employee, but only when it "manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or

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[9] *Id.*

[10] *Borbas v. Virginia Employment Com'n*, 17 Va. App. 720, 440 S.E.2d 630 (1994).

[11] *NEBCO, Inc. v. Murphy, supra* note 4, *ante* at 154, 784 N.W.2d at 455 (quoting *Douglas Cty. Sch. Dist. 001 v. Dutcher, supra* note 5).

of the employee's duties and obligations."[12] Poor judgment, inability to cope with situations, and occasional incidents of nondeliberate failure to precisely follow established rules and procedures do not constitute the kind of willful and deliberate misconduct that will disqualify an employee from receiving unemployment benefits as provided by law.

Meyers' apparent inability to perform the functions of his job most likely warrants dismissal. This is especially the case under the circumstances of Meyers' employment, as he was still a probationary employee at the time his employment was terminated. Meyers was employed as a corrections officer for only 4 months. Similar acts committed by a seasoned employee might prove misconduct by amounting to evidence of a deliberate violation of the rules or disregard of the employer's interest. In the present case, however, we conclude that the record does not contain competent evidence to support a finding that Meyers' violations of protocol rise to the level of misconduct as we have defined it. Because this conclusion is dispositive, we need not address Meyers' other assignment of error.

CONCLUSION

The record supports a finding that Meyers' actions constituted, at most, negligence. They did not constitute the misconduct necessary to justify a denial of benefits. Accordingly, we reverse the judgment of the district court and direct it to remand the matter to the appeal tribunal with directions to enter an award consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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[12] *Douglas Cty. Sch. Dist. 001 v. Dutcher, supra* note 5, 254 Neb. at 321, 576 N.W.2d at 472.