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## Advisory Opinion 10-002

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2009). It is based on the facts and information available to the Commissioner as described below.

### **Facts and Procedural History:**

On December 10, 2009, the Information Policy Analysis Division (IPAD) received a letter, dated December 8, 2009, from Paul Cady, General Counsel for Independent School District 11, Anoka-Hennepin. In his letter, Mr. Cady asked the Commissioner to issue an advisory opinion regarding the classification of certain data the District maintains. (IPAD requested clarification and additional information, which Mr. Cady provided on December 18 and 23, 2009.)

Because the outcome of this opinion may affect the rights of the data subject, the Commissioner offered him/her an opportunity to submit comments. The Commissioner also invited Anne Krisnik of Education Minnesota (the labor union representing the employee), and John Borger and Leita Walker, attorneys representing the *Star Tribune*, to submit comments if they choose. Ms. Krisnik submitted comments in a letter dated January 13, 2010; Ms. Walker submitted comments in a letter dated January 8, 2010.

A summary of the facts follows. According to Mr. Cady, following an investigation of a complaint, the District took disciplinary action including a Minnesota Statutes, section 122A.40, subdivision 9, Letter of Deficiency. Subsequently, the employee grieved the discipline, the grievance was denied and the matter was referred to arbitration. Prior to the arbitration hearing, the parties reached a “mutual resolution” of the grievance. According to Mr. Cady, the resolution included disciplinary action. He wrote:

A final disposition of any disciplinary action is classified as public data. Minn. Stat. §13.43, subd. 2(a)(5). . . . A final disposition is defined by Minn. Stat. §13.43, subd. 2(b) which provides, in part, that in the case of arbitration proceedings arising under collective bargaining agreements, a final disposition occurs at the conclusion of the arbitration proceedings, or upon the failure of the employee to elect arbitration within the time period provided by the collective bargaining agreement. A final disposition may also include any discipline agreed to by the parties as a resolution and disposition of the grievance process. In the instant matter, the parties’ . . . grievance resolution constitutes a final disposition. When the parties resolve a matter in the grievance process, they are also electing not to proceed forward to arbitration. As such, the resolution is a final disposition. Consequently, if the resolution includes discipline, then the discipline together with the specific reasons for the action and data documenting the basis of the action is public.

. . . . [i]t is the District's position that the public data, as set forth in Minn. Stat. §13.43, subd. 2(a)(5), regarding the final disposition of the disciplinary action includes the . . . letter summarizing the grievance resolution and final disposition together with the specific reasons for the action and data documenting the basis of the action (including the . . . Letter of Deficiency . . . as well as Summary of Investigative Findings) . . . . [Emphasis omitted.]

Mr. Cady also discussed the District's general policies and practices related to how it handles discipline of its employees.

In her comments to the Commissioner, Ms. Krisnik disagreed with the District's position that the resolution of the grievance included disciplinary action, a factual dispute the Commissioner cannot resolve. Regarding the issue of whether there has been a final disposition here, Ms. Krisnik wrote:

The key question in this case is how settlement of a grievance, short of arbitration, impacts the classification of the original action. . . .

. . . in cases covered by a grievance procedure, final disposition occurs (1) once an arbitrator rules on a grievance, or (2) when the employee/union gives up the right to challenge the action. In this case, the school district imposed discipline, the employee filed a grievance, and the discipline was subsequently rescinded by agreement of the parties. The original action cannot now be released as disciplinary action.

**Issue:**

Based on Mr. Cady's request, the Commissioner will address the following issue:

Pursuant to Minnesota Statutes, Chapter 13, what is the classification of certain data maintained by Independent School District 11, Anoka-Hennepin, related to the following circumstance: 1) the District disciplined an employee; 2) the employee grieved the discipline under collective bargaining rights; 3) the grievance was denied and the matter was referred to arbitration; and 4) prior to the arbitration hearing, the parties reached a mutual resolution of the grievance, which, according to the District, included disciplinary action.

**Discussion:**

Pursuant to Minnesota Statutes, section 13.03, government data are public unless otherwise classified.

Minnesota Statutes, section 13.43, classifies data on individuals who are current or former employees of a government entity. Subdivision 2 lists the types of personnel data that are public and subdivision 4 classifies most other types of personnel data as private.

When a government entity has taken disciplinary action against an employee and a final disposition has occurred, the following data are public under section 13.43, subdivision 2(a)(5): the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis for the action.

Also, according to section 13.43, subdivision 2(a)(6), the following data, in part, are public: the terms of any agreement settling any dispute arising out of an employment relationship.

As noted above, the District and the employee and his/her Union do not agree if the resolution of the grievance included disciplinary action. The District has made its determination, and the employee/Union have remedies available to them to pursue their disagreement.

For purposes of the discussion here, the question is whether, in general, there is a final disposition of a disciplinary action when a resolution of a grievance that includes disciplinary action happens in the midst of arbitration proceedings.

Pursuant to Minnesota Statutes, section 13.43, subdivision 2(b):

(b) For purposes of this subdivision, a final disposition occurs when the government entity makes its final decision about the disciplinary action, regardless of the possibility of any later proceedings or court proceedings. *In the case of arbitration proceedings arising under collective bargaining agreements, a final disposition occurs at the conclusion of the arbitration proceedings, or upon the failure of the employee to elect arbitration within the time provided by the collective bargaining agreement.* Final disposition includes a resignation by an individual when the resignation occurs after the final decision of the government entity, or arbitrator. [Emphasis added.]

Ms. Walker noted that the provision quoted directly above states that a final disposition occurs at the *conclusion* of the arbitration proceedings. She wrote:

It does not state, for example, that ‘a final disposition occurs when the arbitrator makes a decision after a hearing.’ The Legislature could have used such language. Indeed, it could have easily modeled the second sentence of §13.43 subd. 2(b) after the first, by stating that ‘a final disposition occurs when [the arbitrator] *makes its final decision* about the disciplinary action.’ However, it did not do so....

Although a decision on the merits is one way to conclude arbitration, it is not the only way . . . . Arbitration proceedings may also conclude when, as here, the parties resolve a grievance outside of arbitration so that no hearing or decision is necessary. It defies logic to suggest that if a matter is referred to arbitration but settles before the arbitration hearing, then the matter remains open and ‘unconcluded’ for eternity. For practical and all other purposes, settlement concludes an arbitration proceeding.

The Legislature did not define the meaning of the phrase “conclusion of arbitration proceedings” in section 13.43, subdivision 2(b). Minnesota Statutes, section 645.08, provides that words and phrases not defined in statute are to be construed according to their common and approved usage. The *Random House Dictionary*, Random House Inc. (2010) defines “conclusion” as “a result, issue, or outcome; settlement or arrangement” and “proceedings” as “a series of activities or events; happenings.”

Thus, it is reasonable to conclude that when parties resolve a grievance that has been referred to arbitration before it is settled through arbitration, the mutual resolution concludes the arbitration proceedings. Accordingly, in the scenario under discussion, if disciplinary action is part of the

resolution, there is a final disposition of that disciplinary action within the meaning of section 13.43, subdivision 2(b).

In addition, Mr. Cady stated that another way to conclude that there is a final disposition under this scenario is that “[w]hen the parties resolve a matter in the grievance process, they are also electing not to proceed forward to arbitration.” The Commissioner agrees that it is a reasonable for the District to take that position.

Accordingly, in this matter, if the District did take disciplinary action, there is a final disposition of that action, and the following data are public: the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis for the action, along with the terms of any agreement settling the dispute. If it did not, then the following data are public: existence and status of the complaint or charge, and terms settling the disagreement.

The Commissioner is aware that the Minnesota Court of Appeals ruled on a case that appears to be relevant here. However, the Court of Appeals declined to review whether the entity had taken disciplinary action, and therefore, the Commissioner concludes that case has limited applicability without legislative clarification. (See *Duluth v. Duluth Police Local*, 690 N.W.2d 357, 360 (Minn. App. 2004).)

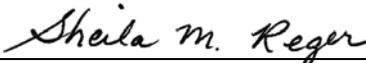
Finally, upon review of the documents in question, it appears they may contain private data about students, and about other District employees. (Subject to limited exceptions, data about students and their parents are private, and may not be released without consent. Minnesota Statutes, section 13.32, and the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g, and its implementing regulations, 34 C.F.R. Part 99. See also Advisory Opinion 09-008, which discussed changes to the federal regulations implementing FERPA, which were effective January 8, 2009.)

**Opinion:**

Based on the facts and information provided, the Commissioner’s opinion on the issue that Mr. Cady raised is as follows:

Pursuant to Minnesota Statutes, Chapter 13, if the mutual resolution entered into between the District and the employee includes disciplinary action, a final disposition has occurred within the meaning of section 13.43, subdivision 2(b). Thus, the following data are public: the final disposition of the disciplinary action together with the specific reasons for the action and data documenting the basis for the action. Also, the terms of any agreement settling any dispute arising out of the employment relationship are public.

Signed:



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Sheila M. Reger  
Commissioner

Dated:

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February 10, 2010