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**Current Legal Issues Affecting School Districts
in These Tough Economic Times**

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I. UNREQUESTED LEAVE OF ABSENCE

A. Authority to Place Teachers on Unrequested Leave of Absence

1. A school board may place on unrequested leave of absence, without pay or fringe benefits, as many teachers as may be necessary because of discontinuance of position, lack of pupils, financial limitations or merger of classes caused by consolidation of districts. *See* Minn. Stat. § 122A.40, subds. 10 and 11.
2. The statute provides for one of two plans, either:
 - a. Negotiated plan (Minn. Stat. § 122A.40, subd. 10); or
 - b. Statutory plan (Minn. Stat. § 122A.40, subd. 11).
3. A negotiated plan pursuant to Minnesota Statutes Section 122A.40, subdivision 10 may not include provisions which would result in:
 - a. the exercise of seniority by a teacher holding a provisional license, other than a vocational education license, contrary to the provisions of Minnesota Statutes Section 122A.40, subdivision 11(c); or
 - b. the reinstatement of a teacher holding a provisional license, other than a vocational education license, contrary to the provisions of Minnesota Statutes Section 122A.40, subdivision 11(e).

B. Grounds for Placement of Teachers on Unrequested Leave of Absence

1. Statutory Grounds. The existence of a single statutory ground is sufficient to support placement of a teacher on ULA. *See Bates v. Independent Sch. Dist. No. 482*, 379 N.W.2d 239 (Minn. App. 1986).
2. Discontinuance of Position
 - a. Discontinuance of a position does not require that all the duties of that position cease to exist.
 - (1) A school district may discontinue the position of an elementary principal and assign duties of that discontinued position to the superintendent and other employees. *See*

Quiring v. Board of Educ. of Indep. Sch. Dist. No. 173, 623 N.W.2d 634 (Minn. App. 2001); *see also Jordahl v. Independent Sch. Dist. No. 129*, 225 N.W.2d 224 (Minn. 1974) (placement on ULA upheld even though functions of discontinued teacher’s position were going to be retained and performed by other teachers).

(2) However, the Minnesota Court of Appeals has held that a school district failed to establish the discontinuance of an equity coordinator position where the school district intended to employ an equity coordinator for the following school year, although it intended to petition the BMS for removal of that position from the teachers’ bargaining unit prior to the start of school for the next school year. As the school district failed to complete the removal process until after the statutory deadline for placing teachers on ULA, the court held that the equity coordinator position was not discontinued before the teacher was placed on ULA. *See Nemanick v. Independent Sch. Dist. No. 2020*, No. C4-93-1426 (Minn. App. 1993) (unpublished decision).

b. A “position” for purposes of ULA is not a teacher’s relative place or standing in the school system but, rather, is that of a teacher at a level and in curricula for which the teacher is certified (i.e., secondary social studies as opposed to 9th grade social studies). *See Hendrickson v. Independent Sch. Dist. No. 319*, 228 N.W.2d 126 (Minn. 1975).

3. Lack of Pupils

a. A gradual decline in enrollment over several years constitutes “lack of pupils,” justifying placement of a teacher on ULA. *See Laird v. Independent Sch. Dist. No. 317*, 346 N.W.2d 153 (Minn. 1984).

b. Drop in enrollment need not occur in a single school year. *Id.*

4. Financial Limitations

a. More than mere financial inconvenience must be demonstrated to justify placing a teacher on ULA, although absolute financial necessity need not be shown.

- b. School districts are not required to reduce their financial reserves to the point of insolvency before boards may consider reducing staff. *See Laird v. Independent Sch. Dist. No. 317, supra.*
- c. Courts have held that school districts are required to act under conditions that exist at the time, and the fact that the Legislature acted at a later date to change the financial status does not invalidate school boards' actions.
- d. Once a school district demonstrates financial limitations for placing teachers on ULA, it does not need to prove financial limitations specific to each position. *See Bye v. Special Intermediate Sch. Dist. No. 916, 379 N.W.2d 653 (Minn. App. 1986), pet. for rev. den. (Minn. 1986).*

5. Evidence Necessary to Prove Grounds for Placement on ULA

- a. A school district must establish the existence of statutory grounds for placement of a teacher on ULA by competent and substantial evidence. *See Pinkney v. Independent Sch. Dist. No. 691, 366 N.W.2d (Minn. App. 1985).*

A school board's informal telephone survey to project future enrollment was not competent evidence to establish the ground of lack of pupils. *Id.*

- b. A school district must show that it has, in fact, discontinued the position(s) in question.
- c. For lack of pupils, a school district should be prepared to show that enrollment has declined using enrollment figures covering five previous years and projections for five years using census data.
- d. For financial limitations, a school district should be prepared to show the school district is experiencing financial limitations as evidenced by relevant financial information, including:
 - (1) General fund revenues for the previous three years and estimated revenue for next five years.

- (2) Operating fund revenues for previous three years and estimated revenue for the next five years.
- (3) Current and previous years' operating budgets, actual and estimated.
- (4) Revenue minus expenditures for past five years and next five years in general fund, with fund balance, if any, at the end of each year.
- (5) General fund projection for next five years without planned reductions.
- (6) General fund projection for next five years with planned reductions.
- (7) Operating fund balances for past five years, current year and next five years.
- (8) Levy limit and certification for past five years and current year.
- (9) Any policy regarding district fund balance.

C. Selection of Teacher(s) for Placement on ULA

1. Probationary Teachers

a. Probationary teachers are not entitled to placement on ULA. *See Columbia Heights Fed'n of Teachers Local 710 v. Independent Sch. Dist. No. 13*, 457 N.W.2d 775 (Minn. App. 1990).

b. Probationary Period

(1) The "probationary period" for all independent school districts is defined as the first three consecutive years of a teacher's first teaching experience in Minnesota in a single school district and, after completion thereof, the probationary period in each school year in which the teacher is thereafter employed shall be one year. Minn. Stat. § 122A.40, subd. 5.

(2) What constitutes a “year” for purposes of probationary periods?

(a) For substitute teachers, each “full year” that the teacher is employed constitutes one year of the teacher’s probationary period. Minn. Stat. § 122A.44, subd. 2(b).

(b) For regular teachers, any portion of a year, regardless of how minimal, constitutes one year of the teacher’s probationary period. Op. Minn. Att’y Gen. (June 16, 2004); *Poirer v. Independent Sch. Dist. No. 191*, 255 N.W.2d 400 (Minn. 1977) (teacher who was employed for first two quarters of school year completed one year of probation); *Flaherty v. Independent Sch. Dist. No. 2144*, 577 N.W.2d 229 (Minn. App. 1998) (79 hours of non-substitute employment during a school year constituted one year of probation).

(3) In *Emanuel v. Independent Sch. Dist. No. 273*, 615 N.W.2d 415 (Minn. App. 2000), the teacher completed two years of teaching in the school district during the 1979–80 and 1980–81 school years, and then resigned (at the time, only a two-year probationary period was in place). Seventeen years later, the teacher was hired as a long-term substitute for a teacher on medical leave for the 1998–99 school year. The court noted that a preliminary non-determinative question was whether the teacher was required to fulfill an additional one-year probationary period despite the fact that she previously taught in the same school district for two consecutive years. In this regard, the court stated as follows:

The requirement of an additional year of probation in subsequent school districts undoubtedly allows the new district an opportunity to evaluate the skills of the teacher before committing itself to a continuing contract. It is reasonable to apply this rationale to *Emanuel*. After an absence of 17 years, the school district should be

allowed to evaluate the skills of a teacher candidate before committing to a continuing contract, particularly when it has had no prior continuing contract with her. The facts of this case are distinguishable from those where the teacher returned after an absence, but had worked under a continuing contract with the school district and had made a reservation of the right to return.

Id. at 418. Since this language does not go to the heart of the issue before the court, it is considered dicta and does not have precedential value. However, it does give some insight into the court's interpretation of the statute and provides support for the argument that an additional probationary year is required.

2. Seniority

- a. Teachers who have acquired continuing contract rights shall be placed on ULA in fields in which they are licensed in the inverse order of their employment. Minn. Stat. § 122A.40, subd. 11(b).
- b. Breaks in Seniority
 - (1) A break in service terminates accrued seniority. Op. Minn. Att'y Gen. No. 172d (Nov. 20, 1975).
 - (2) Continuous service is not broken and seniority is preserved when a teacher is on an extended leave of absence pursuant to Minnesota Statutes Section 122A.46. Minn. Stat. § 122A.46, subd. 4. *See Urdahl v. Independent Sch. Dist. No. 181*, 396 N.W.2d 244 (Minn. App. 1986).
 - (3) However, the Minnesota Court of Appeals also has held that a teacher who was granted an additional year of extended leave after the completion of a five-year extended leave of absence pursuant to Minnesota Statutes Section 122A.46 did not retain seniority rights as a teacher on extended leave. *See Berger v. Independent Sch. Dist. No. 706*, 362 N.W.2d 369 (Minn. App. 1985).

- (4) Teachers on unrequested leave of absence continue to accrue seniority. *See* Minn. Stat. § 122A.40, subd. 11(b).
- c. Under the Teacher Tenure Act (Minn. Stat. § 122A.41), seniority of a principal must be determined from the date of employment in the school district, not from the date of employment as a principal. *See McManus v. Independent Sch. Dist. No. 625*, 321 N.W.2d 891 (Minn. 1982).
 - d. Breaking Ties in Seniority
 - (1) In the case of equal seniority, the order in which teachers who have acquired continuing contract rights shall be placed on ULA in fields in which they are licensed is negotiable. *See* Minn. Stat. § 122A.40, subd. 11(b).
 - (2) Such negotiated process cannot provide for arbitrarily breaking ties by, for example, a flip of a coin. *Op. Minn. Att’y Gen. No. 172d* (Nov. 20, 1975).
 - e. Teachers’ collective bargaining agreement language cannot modify seniority rights of employees outside of the bargaining unit. *See Jensen v. Joint Intermediate Sch. Dist. No. 287*, 408 N.W.2d 203 (Minn. App. 1987).
 - f. Challenges to Seniority Ranking
 - (1) The Minnesota Court of Appeals held that a principal’s failure to file a grievance challenging the accuracy of the seniority list constituted a waiver of his right to challenge his seniority ranking. *See Abeln v. School Bd. of Indep. Sch. Dist. No. 276*, 2001 WL 243202 (Minn. App. 2001).
 - (2) The Minnesota Supreme Court similarly held that a teacher’s failure to challenge the seniority list under the terms of the collective bargaining agreement precluded the teacher from challenging the school board’s decision placing her on ULA. *See Blank v. Independent Sch. Dist. No. 16*, 393 N.W.2d 648 (Minn. 1986), *rev. den.* (1986); *see also Holmquist v. Joint Vocational Technical Dist. No. 2204*, No. C8-93-1493 (Minn. 1994) (unpublished decision).

In rendering its decision in *Blank*, the supreme court emphasized the importance of having a seniority list that provides accurate information on which to rely in determining the status of each teacher with certainty and finality.

- (3) However, in another case, the Minnesota Court of Appeals upheld a teacher's challenge to his seniority ranking in the ULA hearing. In doing so, the court concluded that the parties did not intend to have ULA matters, including seniority issues, submitted to arbitrators. Rather, according to the court, it was the parties' intent to invoke the statutorily prescribed procedures for ULA hearings and, therefore, it was the teacher's prerogative to contest his seniority ranking at the ULA hearing. *See Berger v. Independent Sch. Dist. No. 706*, 362 N.W.2d 369 (Minn. App. 1985).
- (4) In another case, the Minnesota Court of Appeals held that a teacher was not precluded from challenging his placement on the seniority list in the ULA hearing, even though he failed to follow the grievance procedure, where the teacher's claim did not challenge the proper application of a contract term but, rather, asserted that the extended leave of absence statute controlled. *See Urdahl v. Independent Sch. Dist. No. 181*, 396 N.W.2d 244 (Minn. App. 1986).
- (5) A teacher also is not barred from re-litigating a seniority dispute even though the same dispute (i.e., teacher's seniority rights vis-a-vis another teacher) had been determined in a previous hearing, provided the teacher was not a party to the prior hearing, did not have any controlling participation in the prior hearing, and was not a successor in interest to any derivative claim of a party to the prior hearing, and the teacher's interests were not adequately represented by the school district in the prior hearing. *See Pirrotta v. Independent Sch. Dist. No. 347*, 396 N.W.2d 20 (Minn. 1986).

However, failure by a teacher to intervene after receiving notice of conflicting seniority claims is deemed acquiescence to the school district's action. *See Chopp v. Independent Sch. Dist. No. 706*, Nos. C7-90-206 and C8-90-1351 (Minn. App. 1991) (unpublished decision).

3. Bumping

- a. Bumping by seniority and licensure is a statutory right. *See Beste v. Independent Sch. Dist. No. 697*, 398 N.W.2d 58 (Minn. App. 1986).
- b. Bumping is defined as the direct exercise of authority by a more senior teacher about to lose his/her job or teaching position to a less senior teacher. *See Westgard v. Independent Sch. Dist. No. 745*, 400 N.W.2d 341 (Minn. App. 1987).
- c. Administrators who are hired by a school district and attain continuing contract rights may bump into teaching positions if their administrative position is eliminated. *See Evans v. Independent Sch. Dist. No. 281*, 396 N.W.2d 616 (Minn. App. 1986).
- d. A classroom teacher, however, may not bump into a position as an assistant superintendent, a principal or to a position that is promotional from the position currently held. *See Minn. Stat. § 122A.40*, subd. 4.
- e. A counselor who held an elementary teaching license and whose position had been discontinued was entitled to bump a less senior elementary teacher.
- f. Bumping rights do not require districts to make unlimited staffing changes. If the staffing changes necessitate that students be unsupervised for a period of time, the change would be unreasonable. A school board must balance the feasibility of the staffing change with the educational interest of the school children. *See Moe v. Independent Sch. Dist. No. 696*, 623 N.W.2d 81 (Minn. App. 2001).
- g. A school district is not required to create a position in order to provide a vacancy in which a teacher may bump into.

In *In re Independent School District No. 318*, 435 N.W.2d 81 (Minn. App.1989), the school district proposed to place a full-time elementary teacher on ULA. The full-time elementary teacher was subsequently recalled to a .5 FTE Title I position. The teacher requested a hearing contending that she should also be allowed to bump a less senior or probationary teacher from a similar morning .5 FTE Title I position. The effect of this would be to create a .5 FTE afternoon position so that the teacher could teach both positions (Title I morning position and Title I afternoon position). The court of appeals upheld the school board's action of placing the teacher on ULA to the extent of .5 FTE, which was consistent with the school district's rationale for conducting the Title I program in the morning as students were fresher and better able to assimilate in the morning.

h. Split Positions

In *State ex rel. Dreyer v. Board of Educ. of Indep. Sch. Dist. No. 542*, 344 N.W.2d 411 (Minn. 1984), the school district reduced a full-time elementary principal position to half time. The school district offered the elementary principal one of two choices, either to take a full-time teaching position or a half-time principal position. The elementary principal, on the other hand, requested a combination half-time elementary principal/half-time elementary teacher position. When the elementary principal did not agree to either of the school district's choices, the school district proposed to place him on ULA. The elementary principal requested a hearing. During the hearing, the school district presented no evidence to support its rejection of the elementary principal's request. The supreme court reversed the elementary principal's placement on ULA and remanded the matter for determination of whether the elementary principal's request was not justified by sound educational policy.

i. Whether a Teacher is Qualified for a Position

- (1) General rule is that a teacher is qualified for a position if they have the appropriate license. *See* Minn. Stat. § 122A.16, subd. 1.

- (a) Failure of teachers to have proper license at the time required by a negotiated ULA plan prevented teachers from bumping less senior teachers. *In the Matter of the Proposed Placement of Meyer*, 381 N.W.2d 476 (Minn. App. 1986).
- (b) In *Kvermo v. Independent Sch. Dist. No. 403*, 541 N.W.2d 620 (Minn. App. 1996), the Minnesota Court of Appeals rejected the teacher's argument that she should have been allowed to bump less senior teachers out of study halls. In doing so, the court stated that seniority rights attach for positions for which teachers are licensed, and since there was no license required to supervise study hall, seniority rights did not attach to study hall supervision.
- (c) However, in a subsequent case, the Minnesota Court of Appeals held that whether seniority rights attach to a particular position, including supervision of study hall and lunch supervision, turns on the past practice of the school district. *See Moe v. Independent Sch. Dist. No. 696*, 623 N.W.2d 899 (Minn. App. 2001).
 - i) In *Moe*, the court, after finding that such a past practice did exist, stated that a teacher is entitled to bump into an existing supervisory position held by a less senior teacher provided the bump did not require scheduling adverse to the interests of the school district's students.
 - ii) The *Moe* court also rejected the teacher's claim of entitlement to bump into certain supervisory positions and, in doing so, held that a school district need not reschedule the school curriculum in a manner that compromises the students' educational needs or the school district's supervisory responsibilities in order to accommodate the seniority rights afforded a teacher under Minnesota Statutes Section 122A.40, subdivision 11.

- (d) In *Bye v. Special Intermediate Sch. Dist. No. 916*, 379 N.W.2d 653 (Minn. App. 1986), *pet. for rev. den.* (Minn. 1986), the court held that vocational teachers' seniority rights were not violated when their students were assigned to a less senior teacher's course to learn some components of the senior teachers' program, as senior teachers were not licensed to teach the course even though they had taught the same material in their program.
 - (e) The Minnesota Court of Appeals also has held that a business education teacher whose position was discontinued could not bump into a business math position because the business math position required a math license that the teacher did not possess. See *DeGeorgeo v. Independent Sch. Dist. No. 833*, 563 N.W.2d 755 (Minn. App. 1997), *rev. den.* (Minn. 1997).
 - (f) In *Hinckley v. School Bd. of Indep. Sch. Dist. No. 2167*, 678 N.W.2d 485 (Minn. App. 2004), the court held that an elementary principal who was licensed to teach elementary education—grades 1–6 and moderate-to-severe mentally handicapped education—grades K–12, who also held licenses to serve as a director of special education and an elementary principal, was not properly licensed to bump into a K–12 principal position assigned to a less senior K–12 principal.
- (2) School districts may negotiate language that determines what qualifications are needed by a teacher, as opposed to mere licensure, in order to assert bumping. See *In re the Matter of the Proposed Placement of Meyer*, 381 N.W.2d 476 (Minn. App. 1986); see also *In the Matter of the Proposed Placement on Unrequested Leave of Absence of Nelson*, 416 N.W.2d 848 (Minn. App. 1987).

- (a) Terms of a collective bargaining agreement between a school district and teachers' exclusive bargaining representative will prevent a teacher who had not successfully taught a subject in the school district from bumping a less senior teacher who had taught that subject. *See Peck v. Independent Sch. Dist. No. 16*, 348 N.W.2d 100 (Minn. App. 1984).
- (b) Teachers are precluded from disputing what subjects they have successfully taught at the ULA hearing when such information is contained in the seniority list and they failed to challenge the accuracy of the seniority list under the terms of the collective bargaining agreement. *See Blank v. Independent Sch. Dist. No. 16*, 363 N.W.2d 648 (Minn. 1986), *reh. den.* (1986).
- (c) Parties also can agree that in order to be "qualified," the teacher must have completed a major in the subject matter involved in addition to possessing the proper licensure. *See In the Matter of the Proposed Placement on Unrequested Leave of Absence of Nelson*, 416 N.W.2d 848 (Minn. App. 1987).

4. Realignment

- a. Realignment is defined as shifting positions and reassignment of a more senior teacher to accommodate a less senior teacher so that the least senior teacher is eventually placed on ULA. *See Westgard v. Independent Sch. Dist. No. 745*, 400 N.W.2d 341 (Minn. App. 1987).
- b. Minnesota courts have found a duty to realign in unrequested leave of absence plans. The Minnesota Supreme Court has held that reasonable alignment is required in school districts covered under Minnesota Statutes Section 122A.41 (cities of the first class). *See Strand v. Special Sch. Dist. No. 1*, 392 N.W.2d 881, 886 (Minn. 1986).
 - (1) Strand was a home economics teacher who was placed on unrequested leave of absence. A less senior teacher to Strand was not placed on leave; however, she had an additional license in work experience and was placed in a

position that required the work experience license. The district retained a teacher senior to Strand who also possessed the work experience license; however, she was in a position that only required a license in home economics.

(2) The Supreme Court held that reasonable realignment was required in order to retain the most senior teachers. Thus, in this case, the district was required to reassign the most senior of three teachers in order to preserve the employment of the next most senior teacher, resulting in the least senior teacher being placed on unrequested leave.

c. The Court of Appeals extended the duty to realign to districts covered by Minnesota Statutes Section 122A.40 in *Westgard v. ISD No. 745*, 400 N.W.2d 341 (Minn. App. 1987).

Factors to be considered in realignment are:

- (1) the teacher's length of service;
- (2) the duration and scope of the teacher's license;
- (3) the school district's needs reflecting the welfare of the students and the public;
- (4) the ease of reassignment; and
- (5) the realignment of course schedules to facilitate retention of the most senior teachers.

d. Duty to realign may be modified or eliminated by negotiation.

- (1) Realignment is not required where negotiated ULA plan provided that teachers were "qualified" only if they possessed the proper licensure and completed a major in the particular subject. *See In the Matter of the Proposed Placement on Unrequested Leave of Absence of Nelson*, 416 N.W.2d 848 (Minn. App. 1987).
- (2) Parties can eliminate duty to realign entirely. *See Destache v. Independent Sch. Dist. No. 832*, 434 N.W.2d 270 (Minn. App. 1989).

- e. When realignment is legally required, it must be practical and reasonable. *See Destache v. ISD No. 832*, 434 N.W.2d 270, 273 (Minn. App. 1989).
 - (1) Realignment of individual class periods was found unreasonable because it deprived school districts of “sufficient flexibility to effectively administer the schools.”
 - (2) Plan resulting in travel between schools with different class period times and no female supervision of the girls’ locker room was found unreasonable because it might harm the welfare of students.
 - (3) Plan resulting in requiring math teacher to teach a truncated class schedule was found unreasonable because it might harm the welfare of students.
 - (4) Plan resulting in assignment of a teacher to teach a subject that the teacher had not taught in over 20 years was found unreasonable.
- f. The Teacher Tenure Act mandates a reasonable realignment of course assignments for the protection of the seniority rights of teachers. Reassignment from a 38-week teaching position to a 46-week teaching position is not “promotional” in nature and may be a proper result of protecting seniority rights under the Teacher Tenure Act.

D. Procedure for Placement on ULA

- 1. Should Initiate Process Timely
 - a. Entire process must be completed prior to July 1. *See* Minn. Stat. § 122A.40, subd. 7.

This time cannot be extended by negotiation. *See Lund v. Independent Sch. Dist. No. 255*, 543 N.W.2d 703 (Minn. App. 1996).

- b. Begin by at least May 1st.
 - (1) Pass resolution directing administration to make recommendations.

- (2) Pass resolution discontinuing and reducing positions.
- (3) Pass resolution terminating and non-renewing probationary teachers.
- (4) Pass resolution proposing to place teachers on ULA.

Possibly include hearing date in notice of proposed placement, depending on how much time exists prior to July 1st.

c. Teacher has 14 days after service of notice of proposed placement to request a hearing.

- (1) In computing this 14-day period, the day of receipt of notice by teacher may not be counted. *See Vizenor v. Independent Sch. Dist. No. 25*, No. C6-90-1221 (Minn. App. 1991) (unpublished decision).
- (2) If no hearing is requested with the 14-day period, it is deemed acquiescence to the school board's proposed action.

d. Hearing

- (1) School district must hire an independent hearing officer. *See Schmidt v. Independent Sch. Dist. No. 1*, 349 N.W.2d 563 (Minn. App. 1984).
 - (a) Among those qualified to serve as independent hearing officers are:
 - i) a retired judge;
 - ii) an arbitrator with BMS;
 - iii) a state hearing examiner pursuant to Minn. Stat. § 14.55; and
 - iv) an attorney.

- (b) An independent showing of bias or lack of qualification or neutrality is necessary. *See Bates v. Independent Sch. Dist. No. 482*, 379 N.W.2d 239 (Minn. App. 1986).
 - (2) The hearing must be public. *See Minn. Stat. § 122A.40*, subd. 14.
- e. Decision
 - (1) Independent hearing officer issues a recommended decision.
 - (2) Law does not require a school board to follow a recommended decision of an independent hearing officer in a ULA case. It is in the school board's discretion to reach a different decision, subject to the right of judicial review. If the board chooses to not follow the independent hearing officer's recommendations, it must provide reasons to support its action. *See Beste v. Independent Sch. Dist. No. 697*, 398 N.W.2d 58 (Minn. App. 1986).
 - (3) The school board must adopt findings of fact based on competent evidence as part of its decision. Failure to do so invalidates the placement of the teacher on ULA. *See In re Iverson*, No. C0-90-1683 (Minn. App. 1991) (unpublished decision).
 - (4) The decision of the school board, including the findings of fact, must be served on the teacher prior to July 1.
 - (5) Effective date of placement on ULA is June 30. *See In the Matter of the Placement of Johnson on Unrequested Leave of Absence*, 481 N.W.2d 882 (Minn. App. 1992).
- f. Judicial Review. Teachers placed on ULA may seek review of the school board's decision by writ of certiorari in the Minnesota Court of Appeals. *See In re Pinkney*, 353 N.W.2d 676 (Minn. App. 1984).

E. Reinstatement

1. Teachers who are placed on ULA must be reinstated to the positions from which they have been given leaves of absence or, if not available, to other available positions in the school district in fields in which they are licensed. *See* Minn. Stat. § 122A.40, subd. 11(e).
2. A full-time teacher who has been placed on ULA and who then accepts a part-time position remains on ULA to the extent of the remainder of the full-time position. *See Sherek v. Independent Sch. Dist. No. 699*, 464 N.W.2d 582 (Minn. 1991), *rev. den.* (Minn. 1991).
3. A tenured principal who resigned from a teaching job to which he was reassigned after he was bumped from his former principal job, and who took a job as a principal in a second school district, still retained reinstatement rights to the job as principal with the first school district. *See Mohr v. Independent Sch. Dist. No. 697*, 471 N.W.2d 723 (Minn. App. 1991).
4. A teacher who was placed on ULA when the school district cancelled business courses previously taught by the teacher was not entitled to reinstatement where the school district arranged for its students to attend such courses in another school district pursuant to a joint powers agreement, even though a less senior teacher taught the courses in the other school district. *See Renstrom v. Independent Sch. Dist. No. 261*, 390 N.W.2d 25 (Minn. App. 1986).
5. However, the Minnesota Supreme Court held that when a school district must add teaching positions in certain grades to accommodate an increased pupil load due to the implementation of an interdistrict cooperation agreement (pursuant to Minn. Stat. § 123A.33), the teaching positions are “available positions” within that district for purposes of Minnesota Statutes Section 122A.40, subdivision 11(e). *See Sherek v. Independent Sch. Dist. No. 699*, 449 N.W.2d 434 (Minn. 1990).
 - a. Thus, the court concluded, teachers on ULA must be reinstated to such positions in accordance with a combined seniority list of teachers required pursuant to Minnesota Statutes Section 123A.32, subdivision 4. *Id.*

- b. However, a teacher placed on ULA from a school district prior to the district entering into an interdistrict cooperation agreement, and not a party to the agreement, is not entitled to assert seniority over teachers presently employed under the agreement, as these positions are new or available positions. *Id.*
6. Appointment of a new teacher must not be made while there is available on ULA a teacher who is properly licensed to fill such vacancy, unless the teacher fails to advise the school board within 30 days of the date of notification that a position is available to that teacher who may return to employment and assume the duties of the position to which appointed on a future date determined by the board. *See* Minn. Stat. § 122A.40, subd. 11(f).

However, a school district is not required to hold open a position for an unavailable teacher on ULA. *See Shaner v. Independent Sch. Dist. No. 2884*, 605 N.W.2d 803 (Minn. App. 2000), *rev. den.* (Minn. 2000) (teacher on ULA had obtained employment in another school district and, when offered recall in the middle of the school year, declined the offer because she was under contract with another school district; position then was offered to a less senior teacher).

7. Termination of Right to Reinstatement

- a. Right to reinstatement continues for a period of five years unless terminated earlier by teacher failing to file with the board by April 1 of any year a written statement requesting reinstatement. *See* Minn. Stat. § 122A.40, subd. 11(i).
- b. Situations when teacher's failure to comply with April 1 filing requirement did not terminate reinstatement rights:
 - (1) Where teacher had been reinstated partially and was already working for the school district on a part-time basis. *See Biwabik Fed'n of Teachers v. Independent Sch. Dist. No. 693*, 464 N.W.2d 728 (Minn. 1990).
 - (2) Filing of declaratory judgment action satisfied the statutory requirements of a demand for reinstatement. *See Mohn v. Independent Sch. Dist. No. 697*, 416 N.W.2d 494 (Minn. App. 1991), *rev. den.* (Minn. 1991).

8. Realignment on Reinstatement

- a. The Minnesota Supreme Court extended the duty to realign when reinstating teachers who are on ULA in *Harms v. Independent Sch. Dist. No. 300*, 450 N.W.2d 571 (Minn. 1990).
- b. Factors to be considered in realigning in reinstatement cases:
 - (1) *Strand* factors:
 - (a) Teacher's length of service;
 - (b) Scope and duration of teacher's license;
 - (c) School district's needs reflecting the welfare of the students and the public; and
 - (d) Ease of realignment.
 - (2) Additional factors:
 - (a) The time of the school year when an opening occurs;
 - (b) The amount of disruption of classes related to a position other than for the position to be recalled;
 - (c) The number of teachers moved as a result of the realignment;
 - (d) Whether the realignment returned all teachers to their long-held positions, as opposed to placing them in new positions; and
 - (e) Whether the realignment protects the laid off teacher's seniority rights.
- c. The Minnesota Court of Appeals has suggested that a school board does not have to split related subjects into separate courses to allow the realignment or recall of a teacher licensed to teach only one of the subjects. See *In re Petition of Dallman*, 470 N.W.2d 148 (Minn. App. 1991).

- d. The Minnesota Court of Appeals also has held that a school board is not required to consider every possible realignment configuration when making staffing decisions while a senior teacher is on ULA. *See Henderson v. Independent Sch. Dist. No. 706*, 2002 WL 857886 (Minn. App. 2002).

In *Henderson*, the senior teacher demanded that the school board undergo extensive realignment rather than hiring two less senior teachers (one less senior teacher was hired for a temporary part-time position; with regard to the other teacher, the proposal was to bump one teacher into a subject matter in which he did not hold a proper license to make position available for teacher on ULA).

- e. As the appropriate procedure to challenge a school board reinstatement and realignment decision is by a writ of certiorari to the Court of Appeals, it is incumbent on the school board to create a sufficient record in determining whether realignment for purposes of reinstatement is not reasonable.

Such a record must include:

- (1) any notice of the vacancy or position to be filled and any material relating to the determination of what position is to be filled;
- (2) all teacher correspondence requesting recall and realignment;
- (3) any realignment proposals considered;
- (4) reasons for adoption or rejection of each proposal;
- (5) any recommendations of the school administration to the school board; and
- (6) Any school board action taken, together with reasons for the selection made.

- f. It is advisable for a school district faced with a potential reinstatement and realignment situation to notify affected teachers on ULA of the school district's proposed action and to give those teachers the opportunity to challenge the proposed action in a hearing, unless the most senior teacher on ULA is reinstated.

However, if the school district does not intend to reinstate the most senior teacher on ULA, notice of the proposed action must be sent to all teachers on ULA who are more senior to the teacher proposed for reinstatement.

II. CLOSING A SCHOOL

A. Authority to Close Schools

Minnesota Statutes Section 123B.02, subdivision 2 grants authority to school boards to discontinue such schools as it may deem advisable.

B. Procedural Requirements for Closing a School (Minn. Stat. § 123B.51, subd. 5)

1. The school board must publish notice of a public hearing on the necessity and practicality of the proposed school closing.
 - a. The notice must be published at least once a week for two weeks in the official newspaper of the school district.
 - b. The notice must specify:
 - (1) The time of the meeting;
 - (2) The place of the meeting;
 - (3) The description and location of the school to be closed; and
 - (4) A statement of the reasons for the proposed closing.
2. The public hearing must be held before the school board makes its final decision.
 - a. In *Kelly v. Independent Sch. Dist. No. 623*, 380 N.W.2d 833 (Minn. 1986), the Minnesota Supreme Court noted that a school board's receipt of information and formulation of a proposal to close a designated school prior to the public hearing did not violate the law.

3. The school board must allow testimony for and against the proposal before a final decision is made.
 - a. At the hearing evidence should be presented to support the necessity and practicality of closing the school and the basis for closing one school over other schools. Such evidence may, among other things, consist of:
 - (1) Documentation regarding enrollment;
 - (2) Geographic and demographic studies;
 - (3) Transportation considerations;
 - (4) Financial and budget data;
 - (5) Cost containment data;
 - (6) Educational and curriculum data;
 - (7) Building and site evaluations; and
 - (8) Other information which supports closing the school.
 - b. It is essential that the school board prepare and consider evidence that not only supports closing a school, but the particular school closed.
 - (1) In *Kelly, supra*, the school board took action to close Kellogg High School, one of two high schools in that school district. In arriving at the decision to close Kellogg High School, the school board based its decision on the following:
 - (a) Both schools provided equivalent educational opportunities;
 - (b) Operational costs for the two buildings were equivalent; and
 - (c) Location of the schools and numerous “soft data” evaluations and comparisons.

- (2) The *Kelly* Court was particularly troubled by the school board’s reliance on “soft data” and “value judgments” and urged the board to conduct further studies or hearings to articulate the specific factors on which a decision could be based.
 - (3) The *Kelly* Court also noted, with concern, that the record did not contain any information on demographics and population shifts. Furthermore, it stated that when two school facilities are essentially equal physically, it is appropriate to consider the long-term welfare of the entire school district.
 - (4) Thus, the *Kelly* Court concluded that the school board’s decision supported closing a high school, but not Kellogg over the high school.
4. The school board must then vote on whether or not to close the school.
 - a. On appeal, the courts will review whether there was substantial evidence to support the closing of the particular school.
 - b. Substantial evidence is:
 - (1) Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;
 - (2) More than a scintilla of evidence;
 - (3) More than some evidence;
 - (4) More than any evidence; and
5. Evidence considered in its entirety.

Cable Communications Bd. v. Norwest Cable Communications P’ship,
356 N.W.2d 658, 668 (Minn. 1984).

C. Record of the Hearing

1. The statute does not require that a record be made of the hearing. However, to be able to support the school board’s decision on appeal, having a record is advisable.

2. The record can be made either through a court reporter or an audio/video recording to preserve the record of the testimony. If a court reporter is utilized, a transcript does not need to be prepared unless the school board's decision is subsequently challenged.

D. What Constitutes a “Closing?”

1. The Minnesota Supreme Court addressed the issue of whether a schoolhouse had been “closed,” thereby evoking the statutory procedures, in *Western Area Business & Civic Club v. Duluth Sch. Bd. Indep. Sch. Dist. No. 709*, 324 N.W.2d 361 (Minn. 1982).
 - a. In *Western Area*, the school district moved 250 high school students, the entire student population, out of a facility and replaced them with 250 junior high school students.
 - b. The school in question continued to have a full student body, albeit at different grade levels, a full curriculum and a full range of student activities.
 - c. Under these facts and circumstances, the Minnesota Supreme Court held that where a school district transfers students out of one school and replaces them with students from another school, the school district's actions do not constitute a “closing.”
2. Six years later, the Minnesota Court of Appeals considered whether a school district had “closed” a schoolhouse in *Concerned Citizens for the Pres. of Indep. Sch. Dist. No. 712 v. Mountain Iron-Buhl Indep. Sch. Dist. No. 712*, 431 N.W.2d 601 (Minn. App. 1988).
 - a. In *Concerned Citizens*, the school district closed Mountain Iron-Buhl High School without complying with the statutory school closing procedures.
 - b. After being challenged, the school district claimed that its action did not constitute a “closing” because the food occupations area—which consisted of a kitchen, a classroom and part-time restaurant—remained open two to four hours daily for a 20-member class.

- c. In addition, the school district operated its administrative offices, with a staff of approximately four people, out of the annex, and the school's gymnasium remained open in the fall and winter for girls' volleyball and basketball and boys' basketball. The remainder of the annex and the entire main building, however, were closed.
- d. In rejecting the school district's argument that its action constituted a "student transfer" and not a "closing," the Court stated:

[The school district's] . . . argument is meritless. Here, all but 20 students left the Mountain Iron building. The 20 students who remain spend only partial days at the Mountain Iron facility. No students replaced the "transferred" students. There is no full curriculum and few activities. The doors of the school may be open, but for all practical purposes, the building does not exist as a school.

- 3. The Minnesota Court of Appeals subsequently discussed whether a school district's actions constituted a schoolhouse "closing" in *Citizens Concerned for Kids v. Yellow Medicine East Indep. Sch. Dist. No. 2190*, 703 N.W.2d 582 (Minn. App. 2005).
 - a. In *Citizens Concerned for Kids*, the school district operated a school that included a joint elementary and junior high and housed students in kindergarten through eighth grade. The school district then decided, without complying with the statutory procedure contained in the school closing statute, to move grades seven and eight from this school facility to the high school facility. This resulted in approximately one-half (160 out of 313) of the students being moved out of the building. This action was challenged based on the claim that the school district's reassignment of its junior high students from a joint elementary and junior high facility to a separate high school constituted a schoolhouse "closing."
 - b. The Minnesota Court of Appeals noted that "[t]he decision of the district affects both the size and grade composition of the student population at the . . . facility [in question]." *Id.* at 587. However, citing the Minnesota Supreme Court's decision *Western Area*, the Court of Appeals stated that "the change in the grade composition of the student population, from a facility jointly housing elementary and junior high grades to a facility exclusively housing elementary grades, is not a relevant factor. *Id.*"

- c. The Court then turned its attention to the question of whether the reduction of the student population by approximately one-half was sufficient to constitute a schoolhouse “closing.” In holding that the reduction in student population did not constitute a schoolhouse “closing,” the Court stated as follows:

The district did not “totally suspend or cease all operation[s]” at the Clarkfield facility [citation omitted]. And because the district is continuing full educational programming for approximately 143 students in the elementary grades, it is not maintaining a nominal student population like that in *Concerned Citizens*. Thus, we conclude that the district did not close a schoolhouse when it decided to move the junior high grades out of the Clarkfield facility and reduce the number of students housed in the facility from approximately 313 to 143.

III. PRIVATE PERSONNEL DATA

A. What Is Private Personnel Data?

1. Definition of Personnel Data. The Minnesota Government Data Practices Act (“DPA”) defines data on individuals as information collected because the individual is or was an employee of or an applicant for employment by, performs services on a voluntary basis for, or acts as an independent contractor with a government entity. Personnel data includes data submitted by an employee to a government entity as part of an organized self-evaluation effort by the government entity to request suggestions from all employees on ways to cut costs, make government more efficient or improve the operation of government. *See* Minn. Stat. § 13.43, subd. 1.
 - a. Independent Contractor Data
 - (1) “Personnel data” is defined, in part, as “data on individuals collected because the individual is or was an employee of or an applicant for employment by, performs services on a voluntary basis for, or **acts as an independent contractor with a government entity.**” Minn. Stat. § 13.43, subd. 1.

- (2) Labor union requested employee payroll records from contractor to prove compliance with the prevailing wage law. The contractor provided the records, but marked them “confidential, private and trade secret information.” The labor union then requested the same records from the city, who refused to provide the documents. The labor union brought a lawsuit to compel the release of the documents.
 - (a) The district court determined that the names and salaries of the employees were public. The Court of Appeals reversed the district court finding that the home address of the employees could not be released. The Supreme Court held that Minnesota Statutes Section 13.43 did not apply to the data requested.
 - (b) Reviewing Minnesota Statutes Section 13.43, subdivision 1, the Supreme Court found that the contractor was a corporation and not an individual. The statutory language defines personnel data as “data on individuals because the individual . . . acts as an independent contractor with a government entity.” Consequently, the contractor’s employees were not acting as independent contractors, they were acting as employees of the contractor.

2. What Personnel Data is Public? The general rule is that *all* personnel data is classified as “private data on individuals,” with the exception of the information set out in Minnesota Statutes Section 13.43, subdivision 2, which is classified as “public data.” Thus, the following personnel data regarding employees is classified as public:

- a. Name; employee identification number, which must not be the employee’s social security number; actual gross salary; salary range; contract fees; actual gross pension; the value and nature of employer-paid fringe benefits; and the basis for and the amount of any added remuneration, including expense reimbursement, in addition to salary.
- b. Job title and bargaining unit; job description; education and training background; and previous work experience.
- c. Date of first and last employment.

- d. The existence and status of any complaints or charges against the employee, regardless of whether the complaint or charge resulted in a disciplinary action.
- e. The final disposition of any disciplinary action, together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the public body. Final disposition occurs when:
 - (1) the school district makes its final decision about the disciplinary action, regardless of the possibility of any later proceedings or court proceedings;
 - (2) in the case of arbitration proceedings arising under a collective bargaining agreement, final disposition occurs at the conclusion of the arbitration proceedings or the failure of the employee to timely elect arbitration;
 - (3) an individual resigns after the final decision of the school district or arbitrator. *See* Minn. Stat. § 13.43, subd. 2(b); *see also Annandale Advocate v. City of Annandale*, 435 N.W.2d 24 (Minn. 1989) (final disposition, in the case of a veteran, occurs after the Veterans Preference hearing).

Caveat: Upon completion of a complaint or charge against a public official, or if a public official resigns or is terminated from employment while the complaint or charge is pending, all data relating to the complaint or charge are public, unless access to the data would jeopardize an active investigation or reveal confidential sources. A public official means:

- a. *the head of a state agency and deputy and assistant state agency heads;*
- b. *members of boards or commissions required by law to be appointed by the governor or other elective officers; and*
- c. *executive or administrative heads of departments, bureaus, divisions or institutions. See Minn. Stat. § 13.43, subd. 2(e).*

- f. The terms of any agreement settling any dispute arising out of an employment relationship, including a buyout agreement, under which a person employed as a superintendent left the position before the term of the contract was over and received a sum of money, something else of value, or the right to something of value for some purpose other than performing the services of a superintendent; except that the agreement must include specific reasons for the agreement if it involves the payment of more than \$10,000 of public money.
- g. Work location, a work telephone, badge number, and honors and awards received.
- h. Payroll time sheets or other comparable data that are only used to account for employee's work time for payroll purposes, except to the extent that release of time sheet data would reveal the employee's reasons for the use of sick or other medical leave or other not public data.
- i. The following personnel data regarding current or former applicants is classified as public:
 - (1) Veteran status;
 - (2) Relevant test scores;
 - (3) Rank on eligibility list;
 - (4) Job history;
 - (5) Education and training; and
 - (6) Work availability.

Names of applicants are private data, except when certified as eligible for appointment or when considered as finalists for a position. A "finalist" means an individual who is selected to be interviewed prior to selection.

- 3. Prohibition on Agreements Limiting Disclosure or Discussion of Personnel Data. The DPA provides that a school district may not enter into an agreement settling a dispute arising out of the employment relationship with the purpose or effect of limiting access to or disclosure of public personnel data or limiting the discussion of information or opinions related

to public personnel data. An agreement or portion of an agreement that violates this paragraph is void and unenforceable. This restriction applies to the following:

- a. An agreement not to discuss, publicize, or comment on public personnel data or information;
- b. An agreement that limits the ability of the subject of personnel data to release or consent to the release of data; or
- c. Any other provision of an agreement that has the effect of limiting the disclosure or discussion of information that could otherwise be made accessible to the public, except a provision that limits the ability of an employee to release or discuss private data that identifies other employees.

This prohibition also applies to a court order that contains terms or conditions limiting access to public personnel data. *See* Minn. Stat. § 13.43, subd. 10.

B. Responding to Requests for Personnel Data from the Media/Public

1. Employee Misconduct

a. Existence and Status of Complaints

- (1) The existence and status of any complaint or charge against an employee is public data. *See* Minn. Stat. § 13.42, subd. 2(a)(4). It is permissible to state the matter is “under investigation,” “being investigated” or is “closed.” *See Navarre v. South Washington County Sch.*, 633 N.W.2d 40, *aff’d in part, rev’d in part* 652 N.W.2d 9, 27. *See also* Minn. Dept. Admin. Op. 04-002 (Jan. 21, 2004).
- (2) The basis of the charge or complaint is not public. *See Unke v. Indep. Sch. Dist. No. 147*, 510 N.W.2d 271 (Minn. Ct. App. 1994). Information regarding the nature, type, quality or characteristic of the complaint which identifies an individual employee is private data which cannot be disclosed to the public. *See Navarre, supra.*

- (a) A school district may not comment that the allegations are serious enough and substantiated enough that the school district took action to suspend the teacher. *Id.*
 - (b) Mental impressions derived directly from recorded investigative data or from the complaints or charges may not be disclosed. *Id.* at 25.
 - (c) Any statements that “appear to arise directly from the investigation of the complaint or charges” are impermissible, even where there is no evidence indicating these statements were derived directly from recorded data. *Id.* at 28.
- (3) Number of complaints received as well as the name of the employee against whom complaints have been made is public data which must be disclosed. *See id.*
 - (4) Information about a complaint pertaining to a staff member may only be shared with other staff members to the extent they require this information to perform the duties of their job. *See* Minn. R. 1205.0400, Subp. 2. If this standard is not met, members may only be provided the same information about an employee under investigation that may be provided to the public. *Id.*
 - (5) A school district has the ability to share private personnel data about complaints made to them regarding an employee, without written consent of the employee, in order to report a crime or alleged crime or to assist law enforcement in the investigation of a crime committed or allegedly committed by an employee or in reporting alleged maltreatment of a minor. *See* Minn. Stat. § 13.43, subds. 14 and 15.
 - (6) In addition, a school district may provide information regarding complaints made about a teacher in reporting and/or responding to inquiries by the Minnesota Board of Teaching. *See* Minn. Stat. § 122A.20, subd. 2.

b. Final Disposition of Any Disciplinary Action, Together With the Specific Reasons for the Action and Data Documenting the Basis of the Action

- (1) While the final disposition of disciplinary action, as well as the reasons and data documenting the basis of the action is public, not every concluded matter involving a complaint or charge against a government employee is subject to disclosure as a “disciplinary action” on which final disposition has been made. If a complaint does not result in disciplinary action, the basis for the complaint cannot be made public. *See State v. Renneke*, 563 N.W.2d 335 (Minn. Ct. App. 1997).
- (2) A union contract or school district personnel policy will likely identify a set of adverse consequences that constitute disciplinary action. *See Minn. Dept. Admin. Op. 06-021* (June 23, 2006). Particular types of disciplinary action usually include:
 - (a) verbal and written reprimands, including a notice of deficiency;
 - (b) suspension;
 - (c) demotion; or
 - (d) termination.
- (3) A letter of expectations, a letter of directive or some other form of communication that does not fit within the definition of disciplinary action in the union contract or personnel policy, is not a “disciplinary action” within the meaning of the DPA. *See Minn. Dept. Admin. Op. 96-001* (Jan. 9, 1996).
- (4) A letter of reprimand issued to an employee after they have resigned their position is not a disciplinary action under the Act. Therefore, such data cannot be made public. *See Minn. Dept. Admin. Op. 96-010* (Feb. 14, 1996).

(5) Identification of Employee on Resolutions Involving Disciplinary Action

(a) Advisory Opinion 94-042 (October 14, 1994)

i) The City Council decided to discipline an employee. At the time the decision was announced, the employee was not identified. Subsequently, a request was made for the name of the employee and the proposed disciplinary action.

a) The employee had rights under a collective bargaining agreement to grieve the proposed discipline. Consequently, the Commissioner found that there was no final disposition of disciplinary action until either the employee failed to go forward with the grievance or the proposed disciplinary action was affirmed by an arbitrator.

b) The Commissioner stated that the name of the employee and the fact that there have been complaints or charges against the employee, and the fact that disciplinary action had been proposed was public. Consequently, that information should be provided to the requestor.

c) The Commissioner also opined that the **nature** of the proposed disciplinary action was **unless** and until the proposed disciplinary action becomes final.

(b) Advisory Opinion 98-024 (May 14, 1998)

- i) The school board adopted a resolution providing that a continuing contract employee was proposed for immediate discharge under the continuing contract law. The newspaper requested access to the employee's name and was denied access.
- ii) The Commissioner opined that the employee's name was public.

(c) Advisory Opinion 01-063 (July 30, 2001)

- i) Following a closed meeting, the school board adopted a resolution terminating school district employees effectively immediately. Subsequently, the newspaper requested the names of the employees, and the school district refused. Meanwhile, the employees filed grievances contesting the disciplinary action imposed.
- ii) The Commissioner commented that the school board's "mistake in disclosing more data than it should have [i.e., termination] does not negate its obligation to release to the public the names of the employees, which are public under section 13.43, subdivision 2" and opined that the identities of the school district employees was public prior to the final disposition of disciplinary action.

(6) An action is considered to be a final disciplinary action depending upon the employee's right to challenge the discipline.

- (a) For employees covered by a collective bargaining agreement, disciplinary action is final once the arbitrator issues a decision or, if no grievance is filed, once the timelines for filing a grievance have run.

- (b) If an employee is not covered by a collective bargaining agreement, final disposition occurs once the school district make a final decision on the discipline, even if the employee seeks to appeal the decision by writ of certiorari to the court of appeals.
- (c) If the employee is a veteran, final disposition occurs once the veterans preference panel issues a decision or the timelines for filing a request for a veterans preference hearing have run.
- (d) If an employee, other than a public official, resigns prior to the arbitrator's ruling or the school district's final decision, the resignation is not a final disposition of disciplinary action even if a grievance has been filed before the resignation is effective. *See* Minn. Dept. Admin. Op. 02-053 (Dec. 26, 2002). Therefore, information as to the basis of the complaint is not public. *See* Minn. Dept. Admin. Op. 00-072 (Dec. 15, 2000).
- (e) If an employee resigns after the final decision of the government entity or arbitrator, the action still is considered to be a final disciplinary action. *See* Minn. Stat. § 13.43, subd. 2(b).
- (f) When an employee challenges a disciplinary action through arbitration and the arbitrator concludes no disciplinary action is warranted, then no disciplinary action has been imposed for purposes of the Act and information as to the complaint remains private data. *See* Minn. Dept. Admin. Op. 04-002 (Jan. 21, 2004).

2. Settlement Agreements

- a. Terms of an agreement settling an employment dispute, including a buyout agreement, are public. *See* Minn. Stat. § 13.43, subd. 2(a)(6).

- b. Although medical information about an employee is generally private data under the DPA, the Department of Administration has advised that if private medical information is included in a settlement agreement, the entirety of the agreement is still public. *See* Minn. Dept. Admin. Op. 97-017 (May 5, 1997).
3. Employee Medical Leave. The fact that an employee is on medical leave or has taken medical leave may be disclosed. *See Navarre, supra*. The reason for the leave is considered private data and may not be disclosed. *Id.*
4. Release of Information Which Would Dispel Widespread Rumor or Unrest
 - a. Data may be classified as “investigative data” in accordance with Minnesota Statutes Section 13.39. Investigative data is classified as nonpublic but under limited circumstances may be made public by the school district.
 - b. To constitute “investigative data,” the data must pertain to the commencement or defense of a pending civil legal action, which includes a judicial, administrative or arbitration proceeding. In addition, there must be a determination by the chief attorney acting for the public body that there is a pending civil action.
 - c. The standard for releasing the data is whether public access to the data will aid the law enforcement process, promote public health or safety or dispel widespread rumor or unrest.
 - d. *Deli v. Hasselmo*, 542 N.W.2d 649, *rev. denied* (Minn. Ct. App. 1996). Prior to the final disposition of disciplinary action, representatives of the University made statements to the media concerning its investigation of complaints against its gymnastics coach. The court held that ordinary rumors are part of everyday life, and the provision of the DPA authorizing release of investigative data will not override the DPA’s protection of personnel data where there is no clear justification that such rumors pose such a threat.
 - e. *Navarre v. South Washington County Schools*, 633 N.W.2d 40 (Minn. App. 2001), *aff’d in part, rev’d in part*, 652 N.W.2d 9 (Minn. 2002). The chief attorney for the government entity must be consulted about a civil legal action, or the data must be collected as part of an active investigation for the commencement

or defense of a pending civil legal action before the widespread rumor or unrest exception can be applied.

5. Other Frequently Requested Personnel Information

- a. Photographs. Photographs of current and past employees are private personnel data which cannot be disclosed to the public absent consent. *See* Minn. Dept. of Admin. Op. 98-027 (May 20, 1998).
- b. Email. A public employee's work-provided email address is part of the employee's "work location" and, therefore, is public data. *See* Minn. Dept. of Admin. Op. 97-049 (December 10, 1997). Employee emails maintained by a school district that are not created by the employee in his/her capacity as an employee, are not related to the operation of the school district and are not maintained to document past or future disciplinary action are not subject to the DPA. *See* Minn. Dept. Admin. Op. 05-017 (May 11, 2005).
- c. Cell Phone Records. If a school district has a policy that allows for employee personal use of a government-owned cell phone, related data are not "government data," but are "personal data" not subject to the DPA. *See* Minn. Dept. Admin. Op. 04-030 (May 17, 2004). Absent such a policy, information from an employee's cell phone bill, subject to the redaction of any private personnel data, would be public. *Id.*
- d. Grievances. Data relating to the grievances filed by an educational association pertaining to the application of collective bargaining provisions (i.e., use of noncertified personnel in study halls and in-school suspension room and pay for extracurricular activities) are public data. *See* Minn. Dept. Admin. Op. 95-015 (March 30, 1995).
- e. Employee Drug/Alcohol Tests. Although state law provides that final disciplinary action is public data, data relating to the results of drug or alcohol tests are private data pursuant to Part 49 of the Code of Federal Regulations, Section 382 and Minnesota Statutes Section 181.954. *See* Minn. Dept. Admin. Op. 97-006 (February 3, 1997). However, "summary data" relating to public school bus drivers who fail drug tests has been determined to be public data. *See* Minn. Dept. Admin. Op. 98-041 (Aug. 27, 1998).

IV. OVERVIEW OF THE OPEN MEETING LAW, MINNESOTA STATUTES CHAPTER 13D

A. Requirement That All Meetings Be Open

1. The Open Meeting Law provides that all meetings of the government body of a school district, including executive sessions, must be open to the public. *See* Minn. Stat. § 13D.01.
2. The Open Meeting Law requirements apply to any committee, subcommittee, board, department or commission of a school district. *See* Minn. Stat. § 13D.01.
3. The requirements of the Open Meeting Law do not apply in those instances when a school board is exercising quasi-judicial functions involving disciplinary proceedings or as otherwise expressly provided by statute. *See* Minn. Stat. § 13D.01, subd. 2(2).

B. What Constitutes a Meeting?

1. Quorum Requirement. “Meetings” subject to requirements of the Open Meeting Law are those gatherings of at least a quorum or more members of governing body, or quorum of committee, subcommittee, board, department, or commission thereof, at which members discuss, decide or receive information as a group on issues relating to official business of that governing body. *See Moberg v. ISD 281*, 336 N.W. 2d 510 (1983).
2. Application of Open Meeting Law to Advisory Committees. An advisory committee that does not have authority to make a final decision is not subject to the Open Meeting Law. *See Minn. Daily v. Univ. of Minnesota*, 432 N.W.2d 189 (Minn. Ct. App. 1988); *Sovereign v. Dunn*, 498 N.W.2d 62 (Minn. Ct. App. 1993). A working group established by a government entity, that includes members of a board but not a quorum and does not have decision-making powers of the government body, is not subject to the Open Meeting Law. *See* Minn. Dept. Admin. Op. 07-025 (Nov. 16, 2007). *See Minn. Daily v. The Univ. of Minn.*, 432 N.W.2d 189 (Minn. Ct. App. 1988).
3. Application of the Open Meeting Law to Standing Committees. Committees that are not performing a one-time function but tasks relating to the ongoing operation of a board and that make decisions about what should or should not be communicated to the board and are delegated the

responsibility to make recommendations to the board, which acts without much deliberation based on these recommendations, is subject to the Open Meeting Law. *See* Minn. Dept. Admin. Op. 05-014 (April 18, 2005).

C. Exceptions to the Open Meeting Law

1. Meetings That Must Be Closed (Minn. Stat. § 13D.05, subd. 2)
 - a. Meetings that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse or maltreatment of minors of vulnerable adults;
 - b. Meetings discussing active investigative data; or
 - c. Meetings discussing educational data, health data, medical data, welfare data, or mental health data that is not public data.
 - d. Meetings to discuss an individual's medical records, governed by Minnesota Statutes Sections 144.291 to 144.298.
 - e. Meetings to discuss preliminary allegations or charges
 - (1) A school board must close a meeting to discuss preliminary consideration of allegations or charges against an employee.
 - (2) If the school board concludes that discipline of any nature is warranted as a result of those specific charges or allegations, further meetings or hearings relating to those specific charges or allegations held after that conclusion is reached must be open.
 - (3) A meeting must be open at the request of the individual who is the subject of the meeting.
 - (4) While a school district has the authority to discuss data at an open meeting if it is within the scope of its authority and is necessary to conduct the business or agenda item, it may be held liable for discussing the data about charges made against an employee at an open meeting if the employee does not request that the meeting be open. *See Unke v. Indep. Sch. Dist. No. 147*, 510 N.W.2d 271 (Minn. Ct. App. 1994) (where charges against an employee were discussed

at a closed meeting but school board met at an open meeting a week later to discuss the allegations and evidence and proposed the employee's immediate termination, the court held that the school district violated the DPA by discussing private data involving the employee at an open meeting prior to final disposition).

2. Meetings That May Be Closed (Minn. Stat. § 13D.05, subd.3)

a. Meetings to Evaluate Employee Performance

- (1) Data regarding employee performance generally is considered to be private data and cannot be disclosed to the public. *See* Minn. Stat. § 13.43, subd. 2.
- (2) The Open Meeting Law allows school boards to discuss not public data at an open meeting if the disclosure relates to a matter within the board's authority and is reasonably necessary to conduct the business or agenda item of the board. *See* Minn. Stat. § 13D.05, subd. 1(b); *see also Itasca County Bd. of Comm'rs v. Olson*, 372 N.W.2d 804 (Minn. Ct. App. 1985) (although personnel data deemed private should remain private under most circumstances, that classification must be changed to "public" when that data must reasonably be discussed at an open meeting of a public body which is subject to the Open Meeting Law).
- (3) If the meeting is closed, a summary of the conclusions regarding the evaluation must be disclosed at the school board's next open meeting. *See* Minn. Stat. § 13D.05, subd. 3; *see also* Minn. Dept. Admin. Op. 99-018 (June 30, 1999) (summary of conclusions regarding the evaluation of an employee's performance must contain actual conclusions and not simply statements that the board discussed the employee's strengths and weaknesses); Minn. Dept. Admin. Op. 02-021 (May 15, 2002) (each salient part of the evaluation should be summarized); Minn. Dept. Admin. Op. 02-035 (Oct. 7, 2002) (school board statement in meeting minutes that "areas of growth were identified and [Superintendent's] evaluation is an ongoing process" did not constitute proper "summary" of conclusions for purposes of Minn. Stat. § 13D.05, subd. 3(a)); Minn. Dept. Admin. Op. 05-013 (March 28, 2005) (a school board

closed a meeting for the purpose of “clearing [the superintendent’s] name and professional reputation” does not amount to a performance evaluation or the preliminary consideration of allegations or charges against the superintendent, and thus that the school board did not have the authority to close the meeting).

- (4) The meeting must be open at the request of an individual who is the subject of the meeting. *See* Minn. Stat. § 13D.05, subd. 3(a).

b. Attorney/Client Meetings

- (1) *Star Tribune v. Board of Educ., Special Sch. Dist. No. 1*, 507 N.W.2d 869 (Minn. App. 1993). Court of Appeals held that “[w]hen a public body can show that litigation is imminent or threatened, or when a public body needs advice above the level of general legal advice, i.e., regarding specific acts and their legal consequences, then the attorney-client privilege exception applies.”
- (2) *Prior Lake American v. Mader*, 642 N.W.2d 729 (Minn. 2002). Minnesota Supreme Court reiterated the necessity of balancing the policies behind the attorney-client privilege and the Open Meeting Law, noting “that the mere threat that litigation might be a consequence of deciding the matter one way or another does not, by itself, justify closing the meeting.” The Court concludes that “the attorney-client privilege exception to the Open Meeting Law applies when a public body seeks legal advice concerning litigation strategy.”

c. Meetings related to real or personal property if it is:

- (1) to determine the asking price for real or personal property to be sold by the government entity;
- (2) to review confidential or nonpublic appraisal data under section 13.44, subdivision 3; and
- (3) to develop or consider offers or counteroffers for the purchase or sale of real or personal property.

- d. Meetings to receive security briefings, security systems, emergency response procedures, security deficiencies regarding public services, except for meetings to discuss related financial decisions.
- e. Meetings expressly authorized by statute to be closed:
 - (1) Teacher Dismissal Hearings. The Continuing Contract Law provides that a hearing to terminate a teacher may be private or public, at the option of the teacher. *See* Minn. Stat. § 122A.40, subd. 14.
 - (2) School Board Negotiation Strategy Sessions. The Open Meeting Law provides that a school board may, by a majority vote in a public meeting, decide to hold a closed meeting to consider strategy for labor negotiations, including negotiation strategies or developments or discussion and review of labor negotiation proposals, conducted pursuant to Minnesota Statutes Sections 179A.01 to 179A.25.
 - (a) The time of commencement and place of the closed meeting must be announced at the public meeting.
 - (b) A written roll of members and all other persons present at the closed meeting must be made available to the public after the closed meeting.
 - (c) The proceedings of a closed meeting to discuss negotiation strategies must be tape-recorded and preserved for two years after the contract is signed.
 - (d) The tape recording of the proceedings must be made available to the public after all labor contracts are signed by the school district for the current budget period.

See Minn. Stat. § 13D.03.

- (3) Negotiation and Mediation Sessions. The Public Employment Labor Relations Act (“PELRA”), Minnesota Statutes Chapter 179A, provides that all negotiations, mediation sessions and hearings between public employers

and public employees or their respective representatives are public meetings except when otherwise provided by the commissioner of the Minnesota Bureau of Mediation Services (“BMS”). *See* Minn. Stat. § 179A.14, subd. 3.

D. Tape Recording of Meetings

1. All closed meetings, except those closed as permitted by the attorney-client privilege, must be electronically recorded at the expense of the public body. Unless otherwise provided by law, the recordings must be preserved for at least three years after the date of the meeting. *See* Minn. Stat. § 13D.05, subd. 1(d). *Note: As set forth above, different time periods apply to meetings closed to discuss labor negotiations. There also are different timeframes for security meetings (4 years) and meetings to discuss real estate (8 years).*
2. The Department of Administration has opined that the tape recording of a meeting closed to the public does not become public merely because data discussed at the meeting may become public data at some point in time in the future. *See, e.g.,* Minn. Dept. Admin. Op. 08-001 (March 5, 2008).

E. Public’s Access to Members’ Materials

1. Votes to Be Kept in Journal. The journal must be open to the public during all normal business hours where records of the public body are kept. *See* Minn. Stat. § 13D.04, subd. 4.
2. Public Copy of Members’ Materials. In any meeting which must be open to the public, the following documents must be made available to the public in the meeting room, at the time of the meeting, while the school board is considering the subject matter:
 - a. At least one copy of any printed materials relating to the agenda items of the meeting prepared or distributed by or at the direction of the governing body or its employees and distributed at the meeting to all members of the governing body;
 - b. Any documents distributed before the meeting to all members of the school board; or
 - c. Any documents available in the meeting room to all school board members.

- d. This requirement does not apply to any materials classified by law as other than public data or if they relate to agenda items of a closed meeting. *See* Minn. Stat. § 13D.01, subd. 6(b).
- e. Personal notes of board or committee members taken during a meeting that are later used to prepare minutes are public data. *See* Minn. Dept. Admin. Op. 04-018 (March 31, 2004). If, however, the board or committee member is the subject of the data recorded in the notes and the issue is not related to a matter made public during the meeting, the notes may be private personnel data. *Id.*

V. VETERANS PREFERENCE

A. Overview

1. By enacting the Veterans Preference Act (“VPA”), the State of Minnesota “recognize[s] that training and experience in the military services of the government and loyalty and sacrifice for the government are qualifications of merit.” The VPA provides additional protections and preferences for veterans employed by public employers. *See* Minn. Stat. § 197.455.
2. An employee must demonstrate eligibility to be considered a veteran for purposes of the veterans preference protections. The definition of an eligible veteran is as follows:

A “veteran” is defined as “a citizen of the United States or a resident alien who has been separated under honorable conditions from any branch of the armed forces of the United States after having served on active duty for 181 consecutive days or by reason of disability incurred while serving on active duty, or who has met the minimum active duty requirement as defined by the Code of Federal Regulations, Title 38, Section 3.12a, or who has active military service certified under Section 401, Public Law 95-202. The active military service must be certified by the United States secretary of defense as active military service and a discharge under honorable conditions must be issued by the secretary.

Minn. Stat. § 197.447.

3. The VPA also restricts eligibility. For instance, not all professions are entitled to the preference.

- a. Until July 1, 2009, the statute provided in pertinent part:

Nothing in section 197.455 or this section shall be construed to apply to the position of private secretary, **teacher**, superintendent of schools, or one chief deputy of any elected official or head of a department, or to any person holding strictly confidential relation to the appointing officer. The burden of establishing such relationship shall be upon the appointing officer in all proceedings and actions relating thereto.

Minn. Stat. § 197.46 (emphasis added).

- b. 2009 legislation expanded veterans preference rights. The statute now reads:

Nothing in section 197.455 or this section shall be construed to apply to the position of private secretary, ~~teacher~~, superintendent of schools, or one chief deputy of any elected official or head of a department, or to any person holding strictly confidential relation to the appointing officer. The burden of establishing such relationship shall be upon the appointing officer in all proceedings and actions relating thereto.

Minn. Stat. § 197.46.

B. Veterans Preference Requirements for Hiring

1. State law requires that school districts provide applicants who are veterans with preference in hiring decisions. *See* Minn. Stat. § 197.455. School districts must adopt a 100-point hiring system to enable the application of veterans preference points. *See Hall v. City of Champlin*, 463 N.W.2d 502 (Minn. 1990).

2. 100-Point Based Rating System

- a. When hiring for any position covered by the VPA after July 1, 2009, a 100-point hiring system must be used for any position covered by the VPA, including teachers, principals, and other non-exempt professional employees.
- b. The Minnesota Supreme Court has stated that “a 100-point based rating system is implicit in the . . . point-based preference law because it is necessary to the uniform application and intended effect of that law.” *See Hall v. City of Champlin*, 463 N.W.2d 502, 505 (Minn. 1990).
- c. VPA points available.
 - (1) Non-Disabled Veterans. “There shall be added to the competitive open examination rating of a nondisabled veteran, who so elects, a credit of five points provided that the veteran obtained a passing rating on the examination without the addition of the credit points.” Minn. Stat. § 197.455, subd. 4.
 - (2) Disabled Veteran. “There shall be added to the competitive open examination rating of a disabled veteran, who so elects, a credit of ten points provided that the veteran obtained a passing rating on the examination without the addition of the credit points.” Minn. Stat. § 197.455, subd. 5.
 - (a) “Disabled veteran” means a person who has a compensable service-connected disability as adjudicated by the United States Veterans Administration, or by the retirement board of one of the several branches of the armed forces, which disability is existing at the time preference is claimed. See Minn. Stat. § 197.455, subd. 6.
 - (3) Veteran’s Spouse. The preference points for non-disabled and disabled veterans may be used by the surviving spouse of a deceased veteran or by the spouse of a disabled veteran who, because of disability, is unable to qualify. See Minn. Stat. § 197.455, subd. 7.

- d. Notification of Preference Rights. School districts are required to notify veterans of their right to request veterans preference points if they pass an examination. Minn. Stat. § 197.455, subd. 9.
 - (1) Notice may be provided through the employment application.
 - (2) A veteran who wishes to avail himself or herself of the VPA benefits and protections must provide evidence of honorable discharge from the military service, generally a form DD214 is considered sufficient. In the case of a disabled veteran, the veteran must provide evidence that he or she is entitled to disability compensation for a service-related disability.
- e. A school district must award veterans preference points to a passing examination score before selecting the finalists or the finalists to be interviewed for the position. Consequently, the number of finalists should be decided before considering the points awarded.
- f. The 100-point system does not mandate any particular evaluation process. School districts “may administer any type of evaluation as long as it is based on criteria capable of being reduced to a 100-point rating system.” *Hall v. City of Champlin*, 463 N.W.2d 502, 505 (Minn. 1990).
 - (1) For example a school district could use a system based on experience and training, oral examination or written examination collectively, individually or in any combination, so long as the total points available equal 100.
 - (2) Veterans preference points are only awarded to a passing score.
- g. In the event of a tie between a non-veteran and a veteran with the veterans preference points added, the veteran must be given preference. *See* Minn. Stat. § 197.455, subd. 8.
- h. A school district is not required to hire a veteran simply because the veteran receives the highest ranking. *See* Ops. Minn. Atty. Gen. 785-E-2 (August 30, 1962).

- i. When a school district rejects a candidate who has received veterans preference points, the school district must notify the candidate in writing of the reasons for the rejection and file the notice with the school district's personnel officer. *See* Minn. Stat. § 197.455, subd. 10.
3. Employee Challenges to the Denial of a Veterans Preference Protection. In contrast to challenges regarding the veterans preference proceedings, there are cases where the employee is challenging the employer's determination that the employee has no right to veterans preference in the first place. This type of challenge falls under Minnesota Statutes Section 197.481, which requires the Commissioner of Veterans Affairs to hold a hearing within twenty (20) days of the veteran's challenge.

C. Veterans Preference Requirements for Removal

1. Employees who are eligible for veterans preference and are faced with discharge from employment also receive additional due process prior to the loss of their position. Spouses of veterans are not included in this regard. *See* Minn. Stat. § 197.46.
2. An honorably discharged veteran of the United States Armed Forces may not be removed from a position, except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing. *See* Minn. Stat. § 197.46.
3. Veterans Preference Employee Discharge Proceedings
 - a. Prior to a discharge, the employer must provide written notice to an eligible veteran of the proposed termination of the veteran's employment.
 - b. The veteran must request a hearing within sixty (60) days upon receipt of notice of intent to discharge.
 - c. During the interim time, prior to the hearing and decision, the veteran is entitled to compensation until the appeals board determines that sufficient grounds exist to discharge the veteran. *See Johnson v. Village of Cohasset*, 116 N.W.2d 692 (Minn. 1962).

- d. The hearing requested by the veteran is to be held before an established civil service board, or if no established board exists, an ad hoc board of three persons.
 - (1) The ad hoc board consists of a person appointed by the governmental subdivision, a person appointed by the veteran, and a person appointed by agreement by the two other board members.
 - (2) In the event the two persons selected by the parties cannot agree to appoint a third person within ten days after the appointment of the last two, then a judge of the district court of the county where the proceeding is pending shall have jurisdiction to appoint a third person to the board.
- e. The hearing board has the authority to determine two issues:
 - (1) Whether the school district acted reasonably in discharging the veteran; and
 - (2) Whether extenuating circumstances exist to justify modification of the disciplinary sanction. *See Meyers v. City of Oakdale*, 461 N.W.2d 242 (Minn. App. 1990) and *Matter of Schrader*, 394 N.W.2d 796 (Minn. 1986).
- f. There is no specific requirement that a stenographic report is required in a veterans preference hearing, but a record of the testimony should be made at the time of the hearing. The cost of transcripts should be borne by the party or agency requesting the transcript.
- g. Every party in the hearing shall have the right to cross-examine witnesses who testify. Additionally, each party will have the right to submit rebuttal evidence.
- h. The governmental entity has the burden of showing the truth of the allegations against a veteran. *See Johnson v. Village of Cohasset*, 116 N.W.2d 692 (Minn. 1962). The Minnesota Supreme Court has noted that the grounds of incompetency or misconduct must be proven under a just cause standard of proof. *See Leininger v. City of Bloomington*, 299 N.W.2d 723 (Minn. 1980). The just cause standard under which an employee can be discharged for incompetency or misconduct has been described as follows:

The cause must be one which specifically relates to and affects the administration of the office, and must be restricted to something of substantial nature directly affecting the rights and interest of the public. The cause must be one touching the qualifications of the veteran or his performance of its duties, showing that he is not a fit and proper person to hold the office. *See Ekstedt v. Village of New Hope*, 292 Minn. 152, 193 N.W.2d 821, 828 (Minn. 1972).

- i. In holding a discharge hearing under the VPA, the proper role of the hearing panel is to determine whether the public employer acted reasonably in terminating the veteran for incompetency or misconduct.
 - j. The decision of the panel is deemed to be final, but an appeal to district court is available.
4. Damages Awarded under the Veterans Preference Act
- a. Willful violation of the VPA by officers, officials and employees is a misdemeanor. *See* Minn. Stat. § 197.46.
 - b. Damages awarded to a veteran under the VPA include reinstatement and awards for back pay, including the reasonable value of fringe benefits. However, a veteran has a duty to mitigate damages, and any back pay award should be reduced by the amount which the veteran could earn in an employment of like-kind or grade.
 - c. A veteran who appeals a panel decision upholding the discharge is not entitled to pay while the appeal is pending unless the appellate court ultimately reverses and orders the veteran's reinstatement.

D. Unrequested Leave of Absence

- 1. Notice to the veteran is required where the school district abolishes the veteran's position in good faith. The notice should state that the veteran has 60 days under the VPA in which to petition the district court for a writ of mandamus or request a hearing before the Commissioner of Veterans

Affairs regarding the veteran's removal. *See Young v. City of Duluth*, 386 N.W.2d 732, 738 (Minn. 1986).

2. The hearing is not required to be held before the position is abolished.
3. The standard of review is whether the employer abolished the position in good faith.
4. The placement of a veteran on ULA on the grounds of lack of pupils or financial limitations has not specifically been addressed by the courts. The Minnesota Supreme Court, however, has held that an employer may lay off a veteran who has less seniority than a non-veteran, without showing incompetence or misconduct, because the law does not authorize the removal of a more senior employee in favor of the less-senior veteran. *See Evens v. City of Duluth*, 262 N.W. 681 (Minn. 1935).

E. Impact on School Districts Resulting from VPA Amendments

1. Effective July 1, 2009, the VPA applies to teachers:

Nothing in section 197.455 or this section shall be construed to apply to the position of private secretary, ~~teacher~~, superintendent of schools, or one chief deputy of any elected official or head of a department, or to any person holding strictly confidential relation to the appointing officer.

2. The VPA does not define “teacher.” Minnesota Statutes Section 122A.40 defines “teacher” as “[a] principal, supervisor and classroom teacher and any other professional employee required to hold a license from the state department shall be deemed to be a ‘teacher’ . . .” Superintendents, chief deputy, heads of departments, private secretaries and persons holding a strictly confidential relation to the appointing officer are excluded. *See* Minn. Stat. § 122A.40.

So, at a minimum, the VPA now applies to classroom teachers, principals, deans, school psychologists, guidance counselors and librarians (people who hold a teaching license).

3. Minnesota Statutes Section 197.455, subdivision 1 has been amended to read as follows:

Subdivision 1. Application. (a) This section shall govern preference of a veteran **under the civil service laws**, charter provisions, ordinances, rules or regulations of a county, city, town, **school district**, or other municipality or political subdivision of this state. Any provision in a law, charter, ordinance, rule or regulation contrary to the applicable provisions of this section is void to the extent of such inconsistency.

(b) Sections 197.46 to 197.481 also apply to a veteran who is an incumbent in a classified appointment in **the state civil service and has completed the probationary period** for that position, as defined under section 43A.16. In matters of dismissal from such a position a qualified veteran has the irrevocable option of using the procedures described in sections 197.46 to 197.481, or the procedures provided in the collective bargaining agreement applicable to the person, but not both. For a qualified veteran electing to use the procedures of sections 197.46 to 197.481, the matters governed by those sections must not be considered grievances under a collective bargaining agreement, and if a veteran elects to appeal the dispute through those sections, the veteran is precluded from making an appeal under the grievance procedure of the collective bargaining agreement.

EFFECTIVE DATE. This section is effective July 1, 2009, and applies to appointments to state and **local government positions of employment** made on or after that date.

F. Miscellaneous Military-Related Developments/Leave Provisions

1. Employment Protection
 - a. Federal law (USERRA) protects persons re-employed following military leave from being terminated except for “cause” for certain periods of time following reemployment.

- (1) For employees on military leave for more than 180 days, the period is one year.
 - (2) For employees on military leave from 30 to 180 days, the period is 180 days.
- b. Minnesota law provides that public employees who return to work after serving in a “war or other emergency” cannot be terminated, except for “cause,” for one year. *See* Minn. Stat. § 192.261, subd. 2.
- c. Minnesota law further provides that public employees who return to work after three or more months of “active duty or training” cannot be terminated, except for “cause,” for six months. *See* Minn. Stat. § 192.261, subd. 5.

2. Military-Related Leaves

- a. Under the Family Medical Leave Act (“FMLA”), eligible employees are entitled to twelve (12) work weeks of unpaid leave for any qualifying exigency arising from the employee’s spouse, son, daughter or parent being on active duty or notified of an impending call or order to active duty, in the reserve component at the Armed Forces in support of a contingency operation. *See* 29 U.S.C. § 2601, *et seq.*
- b. A qualifying exigency means situations where the eligible employee seeks leave for one or more of the following reasons:
- (1) To address issues arising from short notice deployment;
 - (2) To attend military activities and events;
 - (3) To address childcare and school activities of the military member’s child;
 - (4) To address financial and legal matters;
 - (5) To attend counseling;
 - (6) To spend up to five days with a military member on leave;
 - (7) To attend post-deployment activities; and

(8) To address other events that are agreed to be qualifying exigencies.

c. A “contingency operation” is an official military operation in which members of the Armed Forces may be involved in which the result is the call to active duty or retention on active duty.