Eyes on the Court
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Schwanke v. Minn. Dep't of Admin., 851 N.W.2d 591 (Minn. 2014).

Performance evaluations just got a bit more complicated in the public sector. Recently, the Minnesota Supreme Court held that a public employee may challenge the "accuracy and completeness" of a performance evaluation by appealing to the Department of Administration in a contested case proceeding under the Minnesota Government Data Practices Act (MGDPA). The court also held that the employee can present new evidence in such a proceeding beyond that raised to the employer. This decision reversed the Department of Administration who summarily dismiss the employee's challenge in the first instance finding a performance evaluation was not a proper subject for an MGDPA challenge because it typically contains only subjective judgments and opinions.

After receiving a generally negative performance evaluation, Schwanke, a sergeant with the Steele County Sheriff's Office, disputed certain comments and ratings by supervisors contained in the evaluation. Schwanke requested a correction of the challenged items but the county declined to make any changes concluding the evaluation was "accurate and complete." Schwanke appealed to the Department of Administration pursuant to Minn. Stat. sec. 13.04, subd. 4. In support of his appeal, Schwanke raised claims and included exhibits that he had not previously submitted to the county. The Department declined to accept the appeal on the basis that a MGDPA challenge was not the proper vehicle for a public employee to dispute a performance evaluation. The Department indicated that Schwanke should consult his employment contract or applicable collective bargaining agreement to determine the appropriate forum for such a dispute.

The court of appeals reversed the Department's decision and remanded the case for informal resolution or a contest-case proceeding under the MGPDA. The Department had argued that the MGPDA authorizes the commissioner to summarily dismiss an appeal rather than order a contested case hearing. The court of appeals disagreed, ruling that the Department's authority to dismiss an appeal is limited to those instances in which it has successfully facilitated a voluntary resolution of the dispute. Absent such an outcome, the Department must set the matter on for a contested-case hearing. The court also declined "to adopt a per se rule that a performance evaluation is inherently subjective and therefore not subject to a data challenge."

The Minnesota Supreme Court granted the Department's petition for review but ultimately disagreed with the Department's position that Schwanke's personnel data dispute should not go to a contested case hearing. The court held that because Schwanke's performance evaluation contained "government data", an MGDPA challenge for accuracy and completeness was appropriate. The court also rejected the Department's argument that the evaluation was not proper for a challenge under the MGPDA because it is impossible to show that the subjective judgments and opinions were inaccurate or incomplete. The court reasoned that despite the subjective nature of the evaluation, the factual basis underlying some of the ratings and opinions it contained was verifiable and potentially falsifiable. The court did address the scope of such a

proceeding, however, and stressed that mere disagreement and dissatisfaction with a subjective judgment is not enough on its own to support a MGDPA claim; rather specific facts must be disputed. This distinction is very important for public employers going forward, especially those who may be facing potential administrative challenges by employees disgruntled over supervisor critiques.

Bottom-line, this case is another good example of the plain language of the statute taking center stage at the state's high court. The MGDPA provision regarding procedures for appeals by data subjects does not explicitly provide the Department with authority to dismiss even if the Department believes the matter falls outside the scope of the statute. The court agreed with the Department's understanding that the APA vests it with ultimate authority to decide Schwanke's appeal, but emphasized that it did not have discretion to dismiss the appeal without following specific APA-mandated procedures. Before dismissing an appeal, the APA requires that the Department either (1) resolve the issues informally or (2) conduct a contested-case proceeding with a presiding administrative law judge.