



OFFICE OF THE LEGISLATIVE AUDITOR
STATE OF MINNESOTA

Minnesota State University, Mankato: The Coach Todd Hoffner Case

Special Review

October 23, 2014

Report 14-19

Office of the Legislative Auditor
Centennial Building – Suite 140
658 Cedar Street – Saint Paul, MN 55155
Telephone: 651-296-4708 • Fax: 651-296-4712
E-mail: legislative.auditor@state.mn.us
Web site: <http://www.auditor.leg.state.mn.us>
Through Minnesota Relay: 1-800-627-3529 or 7-1-1



OFFICE OF THE LEGISLATIVE AUDITOR

State of Minnesota • James Nobles, Legislative Auditor

October 23, 2014

Senator Roger J. Reinert, Chair
Legislative Audit Commission

Members of the Legislative Audit Commission

Senator Terri E. Bonoff, Chair
Senate Committee on Higher Education and Workforce Development

Representative Gene Pelowski, Jr., Chair
House Committee on Higher Education Finance and Policy

Steven Rosenstone, Chancellor
Minnesota State Colleges and Universities

Richard Davenport, President
Minnesota State University, Mankato

Todd Hoffner, Head Football Coach
Minnesota State University, Mankato

This report presents the results of an Office of the Legislative Auditor (OLA) review of a personnel dispute between Minnesota State University, Mankato and Todd Hoffner, Head Football Coach at Minnesota State University, Mankato.

The OLA review was conducted by James Nobles, Legislative Auditor, and Elizabeth Stawicki, Director of OLA Legal Services. We received full cooperation from Minnesota State Colleges and Universities, Minnesota State University, Mankato, and Coach Hoffner.

A handwritten signature in black ink that reads "James R. Nobles".

James R. Nobles
Legislative Auditor

Table of Contents

	<u>Page</u>
Introduction	1
Background and Context	1
Objective and Method	3
Data Privacy Issue.....	3
Key Facts	5
MSU Mankato’s Investigation.....	6
Concluding Observations	7
Responses	9
Minnesota State Colleges and Universities	9
Christopher W. Madel, Attorney for Coach Todd Hoffner	11

Introduction

On May 6, 2013, Richard Davenport, President of Minnesota State University, Mankato (MSU, Mankato), terminated the employment of the university's head football coach, Todd Hoffner. A state arbitrator overturned President Davenport's decision on April 9, 2014, and shortly thereafter, Todd Hoffner returned to his position as MSU, Mankato's head football coach.

President Davenport's decision to terminate Coach Hoffner's employment and the state arbitrator's decision to reinstate him have raised questions and concerns about how two public officials could reach such different decisions based on the same evidence. As a result, the chairs of House and Senate committees with jurisdiction over higher education institutions asked the Office of the Legislative Auditor (OLA) to review the Hoffner case.

In a letter dated April 23, 2014, Senator Terri Bonoff and Representative Gene Pelowski requested the following:

...we ask your help in garnering a better understanding of the internal process at Minnesota State University, Mankato and the Minnesota State Colleges & Universities, which through a series of events ultimately led to the decision to fire Coach Hoffner.

The Chancellor of Minnesota State Colleges and Universities (MnSCU), Steven Rosenstone, and MSU, Mankato President Richard Davenport also asked OLA to review the Hoffner case. In their letter, also dated April 23, 2014, Chancellor Rosenstone and President Davenport noted that because the Hoffner case is a personnel matter, they are unable to provide legislators and others with information about what occurred. More specifically, they are unable to explain why Coach Hoffner was fired or offer opinions on the arbitrator's report.¹

Background and Context

On August 10, 2012, Coach Hoffner asked a MSU, Mankato information technology staff person to examine his cell phone because it was not working properly. The staff person found a video recording of naked children on the phone and brought it to the attention of MSU, Mankato officials, who turned the cell phone over to the Mankato police. Coach Hoffner was arrested at his home

¹ *Minnesota Statutes* 2013, 13.43, subd. 2 (a)(5), make public "the final disposition of any disciplinary action together with the specific reasons for the action..." However, *Minnesota Statutes* 2013, 13.43, subd. 2(b), says, in part, "A disciplinary action does not become public data if an arbitrator sustains a grievance and reverses all aspects of any disciplinary action." We discuss the data privacy issue related to the Hoffner case later in this report.

on August 21, 2012. The following day, the Blue Earth County Attorney filed charges against Todd Hoffner alleging that the images of the children were pornographic and criminal.

After reviewing the images, other evidence, and considering the applicable laws, on November 30, 2012, a Blue Earth County District Court Judge dismissed the criminal charges for lack of “probable cause.” In her order, the judge noted that the children in the video were Todd Hoffner’s children, who asked their father to record a “performance” after they emerged from a bath. The judge went on to say that the context of the video showed that the “children’s performance was not intended to be erotic or pornographic in nature.” She also noted that the children acted silly, playful, and age appropriate.

Shortly after the video recording was found on Coach Hoffner’s cell phone, MSU, Mankato placed him on investigative leave.² In addition, MSU, Mankato initiated its own investigation of Coach Hoffner. Both the investigative leave and the university’s investigation continued after the Blue Earth County District Court Judge dismissed the criminal charges against Todd Hoffner. In fact, before the charges were dismissed, President Davenport notified Coach Hoffner that he had made a “tentative” decision to terminate Coach Hoffner’s employment as head football coach at MSU, Mankato.³ President Davenport told us that this decision—and all subsequent decisions related to Coach Hoffner’s status at MSU, Mankato—were based on the university’s investigation of Coach Hoffner, which focused on allegations that were different from those addressed in the Blue Earth County District Court criminal process.

President Davenport also told us that he responded to the allegations against Coach Hoffner with the Pennsylvania State University (Penn State) football sex scandal in mind.⁴ In that case, a former Penn State assistant football coach, Jerry Sandusky, was accused of sexually abusing children for more than a decade. In addition, university officials were accused of failing to respond adequately when concerns about the coach were brought to their attention. The failures of Penn

² MSU, Mankato put Coach Hoffner on investigative leave on August 17, 2012.

³ The notice of a “tentative decision” to terminate Coach Hoffner’s employment at MSU, Mankato was withdrawn after the university and the faculty union agreed to continue Coach Hoffner’s paid administrative leave.

⁴ In June 2012, former Pennsylvania State University (Penn State) assistant football coach Jerry Sandusky was found guilty of 45 counts of child sexual abuse and, in October 2012, he was sentenced to at least 30 years in prison. The National Collegiate Athletic Association (NCAA) imposed severe sanctions against the Penn State football program, including: a \$60 million fine to create an endowment to prevent child sexual abuse and help child abuse victims; barring Penn State’s football program from post-season play for four years; and vacating the team’s wins from 1998-2011. In addition, former Penn State officials, President Graham Spanier, Senior VP for Finance and Business Gary Schultz, and Athletic Director Tim Curley were indicted for endangering the welfare of children, conspiracy, obstruction of justice, and perjury. They are awaiting trial. See: http://en.wikipedia.org/wiki/Penn_State_child_sex_abuse_scandal; and www.ncaa.com/content/penn-state-conclusions.

State officials to appropriately address concerns about Coach Sandusky were thoroughly documented in a report released by former FBI Director Louis Freeh just a month before the Hoffner case emerged at MSU, Mankato.⁵

Objective and Method

The Hoffner case is complex and controversial for many reasons. Our review of the Hoffner case, however, had a limited objective: we sought simply to gain an understanding of how MSU, Mankato responded to allegations against Coach Hoffner and provide as much information as possible to legislators and others in a public report. We did not seek to affirm or contradict the judgments made by MSU, Mankato and MnSCU officials or the judgments made by the state arbitrator or others (i.e., the police, county attorney, and district court judge who were involved in earlier aspects of the Hoffner case).

Our method was also relatively simple.

- We reviewed the arbitrator’s report and a significant amount of evidence compiled during the arbitration process, which included material developed by Blue Earth County officials, MSU, Mankato and MnSCU officials, and Coach Hoffner and his representatives.
- We interviewed under oath President Davenport, Chancellor Rosenstone, Coach Hoffner, and Linda Hanson, MSU, Mankato’s Affirmative Action Officer and the person who conducted the MSU, Mankato investigation of Coach Hoffner.
- We reviewed media reports related to the Hoffner case.

Data Privacy Issue

Fulfilling the second part of our objective—to write and issue a public report based on what we learned—was a significant challenge because of data privacy restrictions.

As noted earlier, President Davenport and Chancellor Rosenstone have been advised that they can say virtually nothing about the Hoffner case. That advice is based not only on the classification of personnel information in the state’s Government Data Practices Act, but also on the fact that MSU, Mankato and MnSCU are Coach Hoffner’s employers, and their disciplinary actions against

⁵ The Pennsylvania State University Board of Trustees hired former FBI Director Louis Freeh and his law firm, Freeh Sporkin & Sullivan, LLP, to conduct an investigation of the Sandusky case. A copy of the Freeh report is available on the Pennsylvania State University’s website at <http://progress.psu.edu/the-freeh-report>.

him were overturned. In overturning those actions, the arbitrator ordered MSU, Mankato to expunge reference to past disciplinary actions from Coach Hoffner's personnel record at MSU, Mankato. Moreover, the arbitrator's report itself has been deemed "not public" based on an advisory opinion issued by the Minnesota Commissioner of Administration.⁶

Nevertheless, key legislators and others believe that such a controversial case requires some form of legislative oversight and some level of transparency.⁷ Legislators and MnSCU officials selected OLA to be the mechanism of legislative oversight and transparency because state law gives the Legislative Auditor access to all government data and documents, even those classified as not public.⁸ Therefore, as noted above, OLA was able to review the arbitrator's report and evidence compiled as part of the arbitration process. We were also able to interview President Davenport, Chancellor Rosenstone, Coach Hoffner, and MSU, Mankato investigator Linda Hanson about a wide range of facts, judgments, and circumstances related to the Hoffner case.

Because OLA is not Coach Hoffner's employer, we are not under the same restrictions as MSU, Mankato and MnSCU officials. However, OLA is required by law to "protect from unlawful disclosure" documents classified as not public.⁹ Therefore, we do not disclose details about the allegations concerning Coach Hoffner that were investigated by MSU, Mankato and which were the basis for President Davenport's disciplinary action. Nor do we quote directly from the arbitrator's report or the interviews we conducted.

On the other hand, for OLA's review to serve a meaningful purpose, we must convey some information about what we learned. In addition, all of the people we interviewed were aware that OLA would issue a public report at the conclusion of our review and that their interviews with OLA, as well as the documents related to the arbitration, would be the basis of a public report. They also knew that the

⁶According to *Minnesota Statutes* 2013, 13.072, subd. 2, data practice advisory opinions issued by the Minnesota Commissioner of Administration "are not binding," but they are given deference by a court when the data that were the subject of an opinion are involved." The opinion affecting the Hoffner case is *Minnesota Department of Administration Advisory Opinion* 14-002, issued on April 15, 2014. The opinion did not specifically reference the arbitrator's decision in the Hoffner case but arbitration decisions generally. In the opinion, the Commissioner of Administration advised that "data in an arbitration decision that sustains a grievance and reverses all aspects of any disciplinary action against a public employee are private personnel data, pursuant to *Minnesota Statutes* 2013, 13.43, subd. 2(b)." The opinion went on to say: "The Bureau can always seek the employee's consent to release the arbitrator's decision to the public...[or] elect to redact or summarize a decision and make it public, if it can do so without disclosing private personal data...."

⁷ Several editorials have called for legislators to examine what happened in the Hoffner case. See for example, Editorial Board, StarTribune, *Administrators fumbled firing of football coach*, April 18, 2014.

⁸ *Minnesota Statutes* 2013, 3.978, subd. 2.

⁹ *Minnesota Statutes* 2013, 3.979, subd. 1.

judgments concerning the level of disclosure in the report would be made by OLA. In addition, each person we interviewed was given a draft of this report to review in advance of its public release.

Finally, we note that the disclosure restrictions on MSU, Mankato and MnSCU officials are particularly odd given that there is a large amount of information about the Hoffner case in the “public domain” from media stories. Moreover, some of that information has come directly from Todd Hoffner through interviews and statements from his representatives.¹⁰ In addition, before it was deemed “not public,” the arbitrator’s report was obtained by various media outlets, which resulted in detailed accounts of its contents.¹¹

Key Facts

Based on what we learned and our understanding of what we can disclose, we state the following:

- President Davenport was closely involved in MSU, Mankato’s response to the allegations against Coach Hoffner. He sought advice from the MnSCU Office of the General Counsel, the Minnesota Office of the Attorney General, as well as human resources personnel at MSU, Mankato and MnSCU System Office. He also notified and sought advice from Chancellor Rosenstone, who sought advice from the chair and vice chair of the MnSCU Board of Trustees and kept other board members apprised of the situation.
- At President Davenport’s direction, MSU, Mankato initiated an investigation of Coach Hoffner before the Blue Earth County District Court process was concluded, and the criminal charges were dismissed. The investigator provided President Davenport with an initial report on September 7, 2012; addendum I on September 19, 2012; and addendum II on November 1, 2012. The report and addendums contained allegations against Coach Hoffner that were different from the criminal charges that were being addressed in the Blue Earth County District Court proceedings.
- Based on the results from the MSU, Mankato internal investigation, President Davenport notified Coach Hoffner in a letter dated October 18,

¹⁰ Todd Hoffner’s most extensive interview was on the ESPN program, “Outside the Lines.” Titled *Todd Hoffner: Lost Reputation*, it was aired in May 2013 and is available at <http://espn.go.com/espnw/video/9302189/todd-hoffner-lost-reputation>.

¹¹ A sample of media reports about the Hoffner case are the following: Dan Nienaber, “Update: Arbitrator rules Hoffner should be rehired,” *Mankato Free Press*, April 10, 2014; Amy Forliti, “Fired Mankato football coach Todd Hoffner returning to job; university apologizes,” *Associated Press*, April 15, 2014; and Pat Borzi, “Coach’s return is fraught with complications,” *New York Times*, April 19, 2014.

2012, that President Davenport had made a “tentative decision” to terminate Coach Hoffner’s employment at MSU, Mankato.¹² On November 30, 2012, a Blue Earth District Court Judge dismissed the criminal charges against Coach Hoffner.

- MSU, Mankato continued to investigate allegations against Coach Hoffner that were different from those dismissed by the Blue Earth District Court Judge. President Davenport took additional disciplinary action against Coach Hoffner based on his judgment that the MSU, Mankato investigation had substantiated allegations that were different from those dismissed by the Blue Earth District Court Judge.
- All of the notice letters President Davenport sent Todd Hoffner concerning disciplinary action listed reasons that involved either alleged violations of MnSCU policies and/or a concern about Coach Hoffner’s judgment; they did not cite an alleged criminal act.
- In a letter dated May 6, 2013, President Davenport notified Todd Hoffner that his employment at MSU, Mankato would terminate at the end of the day.

MSU, Mankato’s Investigation

Because the MSU, Mankato investigation was the basis for President Davenport’s disciplinary actions, we interviewed the person who conducted the investigation.¹³ We focused on a specific allegation in the investigator’s report, which was one that President Davenport listed in several disciplinary notice letters he sent Coach Hoffner, including the October 18, 2012, letter indicating that President Davenport had made a “tentative decision” to terminate Coach Hoffner’s employment as head football coach. The allegation was also the subject of considerable contention during the arbitration. We are not disclosing the allegation itself because of data privacy considerations.

As presented in the investigator’s September 7, 2012, report, the specific allegation was based on the recollections of two students who were on the MSU, Mankato football team under Coach Hoffner. According to the investigator, her interviews with the two students were not conducted under oath, they were not recorded, and the investigator destroyed her contemporaneous interview notes after she prepared the report that was provided to President Davenport. She told

¹² This initial “tentative decision” to terminate was later withdrawn, as discussed in footnote 3.

¹³ As noted earlier, the investigator is the MSU, Mankato Affirmative Action Officer, Linda Hanson. Ms. Hanson is an attorney and, according to her statements to OLA, she has extensive investigative experience both at MSU, Mankato and during her employment with the Minnesota Department of Human Rights.

us that the process and protocols she followed in the Hoffner case were consistent with her general practice.

We were surprised by what the investigator told us because she described an investigative process and protocols that contrast dramatically with those followed by OLA. Therefore, we followed up further and were told by MnSCU's General Counsel and Senior System Director for Labor Relations that the process and protocols followed by the MSU, Mankato investigator were consistent with the procedures and protocols followed in personnel investigations throughout state government. We followed up further with officials in the Office of the Attorney General and the Minnesota Department of Management and Budget and found divided opinion on what does and should occur in personnel investigations. We were told that recordings are sometimes made, as are transcriptions. Moreover, some officials said that contemporaneous interview notes should be maintained, while others said there was no legal requirement to retain them, and they should be destroyed.

We are not aware of a connection between the state arbitrator's decision to overturn the termination of Coach Hoffner's employment at MSU, Mankato and how the MSU, Mankato investigator conducted and documented her interviews with the two students (i.e., the arbitrator did not express a concern in his report). We bring the issue forth because investigative methods are important in ensuring fairness to all the people affected by an investigation, and because we found confusion and conflicts among the state officials we consulted about how interviews in personnel investigations are and should be conducted and documented. Given what we found, we recommend that MnSCU reassess how it conducts and documents interviews in personnel (and possibly other) investigations.

Finally, we think it is important to note that during the arbitration, MnSCU brought forth additional students to support the allegation that initially rested on the statements of two students. Nevertheless, the arbitrator still found that MnSCU did not adequately substantiate the allegation.

Concluding Observations

In conducting this review, we examined a large amount of evidence but, as noted previously, we did not try to decide who was "right." What we can report, however, is that both sides still think they were right. They still see the case in starkly different ways.

Based on our interviews, we learned that President Davenport, Chancellor Rosenstone, and others who are part of the MnSCU system believe they acted in a reasonable, well-intentioned, and justified way to protect MSU, Mankato. They believe that the state arbitrator should have sustained President Davenport's

actions. They also expressed ongoing concern that data privacy restrictions prevent them from publicly discussing the Hoffner case to explain the basis for President Davenport's actions.

Coach Hoffner and his private attorney, on the other hand, were extremely critical of how MSU, Mankato handled the case from beginning to end. While clearly relieved that the state arbitrator overturned President Davenport's termination decision, they believe that MSU, Mankato should have returned Coach Hoffner to work once a district judge dismissed the criminal charges. They believe MSU, Mankato continued to investigate Coach Hoffner because they wanted to "find something" to use against him. In short, they do not believe the MSU, Mankato investigation was well-intentioned or appropriately motivated.

The two sides have one point of agreement: they want the MSU, Mankato vs. Coach Hoffner case to be closed. We hope our review will help.



Minnesota
STATE COLLEGES
& UNIVERSITIES

STEVEN J. ROSENSTONE
Chancellor

30 7TH ST. E., SUITE 350
ST. PAUL, MN 55101-7804

ph 651.201.1696
www.mnscu.edu

October 21, 2014

James Nobles, Legislative Auditor
Office of the Legislative Auditor
Room 140 Centennial Building
658 Cedar Street
Saint Paul, MN 55155-1603

Dear Mr. Nobles:

We wish to extend our thanks for the detailed, in-depth review conducted by you and your staff regarding the Todd Hoffner case at Minnesota State University, Mankato, and the courtesies and professionalism extended to representatives of Minnesota State Colleges and Universities with whom you met.

The report contains a recommendation that the system “reassess how it conducts and documents interviews in personnel (and possibly other) investigations,” based on observations regarding investigative procedures and the conclusion that there are varied practices throughout state government. We agree that further assessment by the system of the approaches used is warranted to ensure that we are using best practices. We believe strongly that the fairness of investigation procedures is important to all involved in both the investigation and decision making processes. As noted in the report, there was no connection found between investigative practices used and the outcome of the arbitrator’s decision.

One statement in the report assumes that data privacy restrictions were of concern because they prevented us “from publicly defending President Davenport and those who advised him.” It is true that two fundamental concerns through this matter were adherence to the Minnesota Government Data Practices Act—which was challenging at every turn—and the inability to counter information provided by others to news media about the particulars (or even existence) of the issues. However, at no point were those concerns as great as our commitment to making the right decisions based on the information presented.

We understand that this review posed particular challenges, in part because of the limitations on the disclosure of data imposed by the Minnesota Government Date Practices Act. Again, we appreciate both your time and thoughtful approach to the review. While Minnesota State University, Mankato and Coach Hoffner are already working together and are looking to the future, we join you in hoping that this review will provide closure to all concerned.

Sincerely,

Steven J. Rosenstone
Chancellor

Richard Davenport
President, Minnesota State University, Mankato

Via Email & U.S. Mail

October 21, 2014

Mr. James Nobles, Legislative Auditor
State of Minnesota
Office of the Legislative Auditor
658 Cedar Street
Room 140 Centennial Building
St. Paul, MN 55155

Re: OLA Report regarding MSU Mankato vs. Coach Todd Hoffner

Dear Mr. Nobles:

It is our understanding that the Office of the Legislative Auditor (OLA) has finalized its report regarding the OLA's review of MSU Mankato's decision to terminate Head Football Coach Todd Hoffner – a decision that was ultimately overturned by an arbitrator's ruling. We appreciate the opportunity to submit this formal response letter for inclusion with the final report when it is released.

Even with the "limited objective" to "simply [] gain an understanding of how MSU Mankato responded to allegations against Coach Hoffner and provide as much information as possible to legislators and others in a public report" and the express disavowal of any objective to "affirm or contradict the judgments made," we found the report to lack detail even in areas that are necessary for a fulsome understanding of MSU Mankato's actions. While we believe the report to be deficient in several respects, we address only the most critical errors and omissions below. The below information is not only required to meet the OLA's delineated objectives for this report, but also to uphold OLA's Mission (*i.e.*, to promote accountability, support good management, enhance program effectiveness, and strengthen legislative oversight) and to achieve OLA's Primary Goal to issue reports that are, among other things, useful.

First, the description of the initial stages of MSU Mankato's investigation is flawed in that it includes an explanation provided by President Davenport but

does not include Coach Hoffner's perspective. (*See Report, 2.*) We dispute President Davenport's account of the events. MSU Mankato's investigation did in fact initially focus on the same or similar allegations as those in the criminal process, which apparently resulted in the "tentative" decision to terminate Coach Hoffner. Yet, after the criminal charges were dismissed for lack of probable cause, MSU Mankato did not withdraw its tentative decision; President Davenport instead chose to *begin* an investigation as part of what could only be an after-the-fact campaign to justify MSU Mankato's erroneous decision to terminate Coach Hoffner's employment. Given the timeline of Coach Hoffner's alleged conduct, President Davenport and MSU Mankato's decision to begin a second investigation and to terminate Coach Hoffner raise significant questions of whether MSU Mankato and MnSCU's internal processes are effective, efficient, and, most importantly, fair.

Second, in that same section, the OLA report devotes an entire paragraph to President Davenport's justification for his reaction to the charges against Coach Hoffner and, specifically, the description of the Pennsylvania State University sex scandal. No comparable explanation from Coach Hoffner is included, nor is the fundamental distinguishing fact that the alleged conduct that MSU Mankato investigated had nothing to do with sexual abuse or similar conduct with respect to MSU Mankato students. To omit from the OLA's report even the most basic of facts in this regard is misleading and profoundly unfair. The notion that a person could equate Coach Hoffner with Jerry Sandusky is absurd, and that a person could draw such a comparison exemplifies why that person should not have the authority to make life-changing employment decisions affecting others.

Third, despite the restrictions prohibiting dissemination of non-public information concerning Coach Hoffner, we have reason to believe that certain individuals associated with MSU Mankato continue to disseminate non-public information, including the Court-sealed family videos involved in the criminal proceeding. Dissemination of such non-public and sealed material is injurious to the Hoffner family and gives rise to causes of action for Coach Hoffner's family that have not been waived or otherwise resolved.

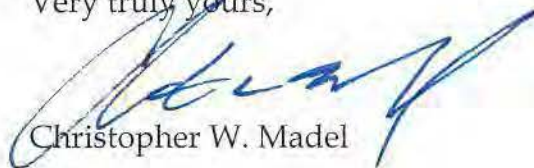
Fourth, we were disappointed to learn that the OLA's report did not determine or even describe the amount of taxpayer money spent to investigate, discipline, and litigate against Coach Hoffner. For the report to be useful and to attempt to meet the OLA's Mission, an analysis of MSU Mankato and MnSCU's fiscal responsibility is necessary. Without it, there can be no assessment by the

Legislature of MSU Mankato and MnSCU's effectiveness, let alone an assessment of how to promote effectiveness.

We believe that failure to include at least the above information renders the report a hollow, partial recitation of the parties' beliefs regarding how MSU Mankato treated Coach Hoffner. We hope that this formal response letter will assist the Legislature in understanding the dispute between Coach Hoffner, MSU Mankato, and MnSCU.

Please do not hesitate to contact me should you have any questions or concerns.

Very truly yours,



Christopher W. Madel

85234504