

## BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

Independent School District  
No. 750, Rocori Area Schools,  
Cold Spring

BMS Case No. 11PA0018  
(Bargaining Unit Work)

and

SEIU, Local 284

### Appearances:

Mr. Brendan D. Cummins, Esq., and Mr. Kyle A. McCoy, Esq., Miller O'Brien Cummins, PLLP, One Financial Plaza, Suite 2400, 120 South Sixth Street, Minneapolis, Minnesota 55402, on behalf of the Union.

Ms. Jennifer K. Earley, Esq., Knutson Flynn & Deans, P.A., 1155 Centre Point Drive, Suite 10, Mendota Heights, Minnesota 55120, on behalf of the District.

### Arbitration Award

By letter dated August 3, 2010, the parties listed above advised Sharon A. Gallagher that they had jointly requested her to hear and resolve a dispute between them regarding the status of the Rocori Kids Program and the work connected with that Program.

The parties agreed to hold the first day of hearing on October 27, 2010, in Cold Spring, Minnesota. However, on October 7, 2010, the Arbitrator was advised that the parties had agreed to cancel the October 27<sup>th</sup> hearing date. Thereafter, the parties agreed to hold the hearing on January 31, 2011 at the District's offices in Cold Spring, Minnesota. On January 19, 2011, a conference call was held to discuss subpoenas requested by the Union and letters sent by both parties thereon.

The hearing was held as agreed on January 31<sup>st</sup> and it resumed and was completed the next day, February 1, 2011. All witnesses were sworn on oath or affirmation. Seven Joint Exhibits, forty Union Exhibits, and twenty-one District Exhibits were admitted into the record.

At the close of the hearing, the parties agreed to submit their briefs, postmarked April 1, 2011, directly to each other with copies sent to the Arbitrator, and they agreed to waive the right to file reply briefs. A stenographic transcript of the proceedings was made and received by February 15, 2011. The parties' briefs were received by April 18, 2011, whereupon the record herein was closed.<sup>1</sup>

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<sup>1</sup> The parties agreed to waive the Article XIV Section 3, Subd. 6 requirement for timely issuance of the Award herein, if needed by the Arbitrator.

Issues:

The parties were unable to stipulate to the issues for determination herein. However, they stipulated that the Undersigned could frame the issues based on the parties' suggested issues and the relevant evidence and argument.

The Union suggested the following issues:

- 1) Did the Employer violate the paraprofessional contract by unilaterally subcontracting the bargaining unit work of school-age care employees and school-age care assistants?<sup>2</sup>
- 2) If so, what is the appropriate remedy?

The District suggested the following issues:

- 3) Did the School District violate the parties' collective bargaining agreement when it discontinued the school-age care program?
- 4) If so, what is the appropriate remedy?

Based on the relevant evidence and argument and the parties' suggested issues, this Arbitrator finds that the District's issues properly state the dispute before her and they shall be decided herein.

Relevant Contract Provisions:

ARTICLE II

RECOGNITION OF EXCLUSIVE REPRESENTATIVE

Section 1. Recognition: In accordance with the P.E.L.R.A., the School District recognizes School Service Employees Local 284 as the exclusive representative for paraprofessionals and related personnel employed by the School District, which exclusive representative, shall have those rights and duties as prescribed by the P.E.L.R.A. and as described in the provisions of this Agreement.

Section 2. Appropriate Unit: The exclusive representative shall represent all such employees of the district contained in the appropriate unit as defined in Article III, Section 2 of this Agreement and the P.E.L.R.A. and in certification by the Director of Mediation Services.

ARTICLE III

DEFINITIONS

Section 1. Terms and Conditions of Employment: The "terms and conditions of employment" means the hours of employment, the compensation therefor, including fringe benefits, and the employer's personnel policies affecting the working conditions of the employees.

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<sup>2</sup> Errors in the transcript have been corrected above (Tr. 14, lines 8-9).

Section 2. Description of Appropriate Unit: For purposes of this Agreement, the term paraprofessionals and related personnel shall mean all persons in the appropriate unit employed by the school district in such classifications excluding confidential employees, supervisory employees, essential employees, part time employees whose services do not exceed the lesser of 14 hours per week or 35 percent of the normal work week in the employees bargaining unit, employees who hold positions of a temporary or seasonal character for a period not in excess of 67 working days in any calendar year and emergency employees.

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ARTICLE IV

SCHOOL BOARD RIGHTS

Section 1. Inherent Managerial Rights: The exclusive representative recognizes that the school board is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.

Section 2. Management Responsibilities: The exclusive representative recognizes the right and obligation of the school board to efficiently manage and conduct the operation of the school district within its legal limitations and with its primary obligation to provide educational opportunity for the students of the school district.

Section 3. Effect of Laws, Rules and Regulations: The exclusive representative recognizes that all employees covered by this Agreement shall perform the services prescribed by the school board and shall be governed by the laws of the State of Minnesota, and by school board rules, regulations, directives and orders, issued by properly designated officials of the school district. The exclusive representative also recognizes the right, obligation, and duty of the school board and its duly designated officials to promulgate rules, regulations, directive and orders from time to time as deemed necessary by the school board insofar as such rules, regulations, directives and orders are not inconsistent with the terms of this Agreement. The exclusive representative also recognizes that the school board, all employees covered by this Agreement, and all provisions of this Agreement are subject to the laws of the State of Minnesota, Federal laws, rules and regulations of the State Board of Education, and valid rules, regulations and orders of State and Federal governmental agencies. Any provision of this Agreement found to be in violation of any such laws, rules, regulations, directives or orders shall be null and void and without force and effect.

ARTICLE VI  
RATES OF PAY

Section 1. Rates of Pay:

Subd. 1. The wages and salaries reflected in Schedule A, attached hereto, shall be a part of the Agreement for the period commencing July 1, 2007 through June 30, 2009.

Subd. 2. During the duration of this Agreement advancement on any salary schedule shall be subject to the terms of this Agreement. New employees hired before January 15 shall advance to the next step on the following July 1. Thereafter, employees shall advance to the next step each July 1. In the event a successor Agreement is not entered into prior to the expiration of this Agreement, an employee shall be compensated according to the current rate until a successor Agreement is entered into.

SCHEDULE A  
BASE HOURLY SALARY RATES

<u>Group III</u>	<u>Group V</u>	<u>Group VI</u>	<u>Group VII</u>
100-109 Pints Library Clerk	121-130 Points Paraprofessionals Chapter I Special Ed. Behavior Mgmt. Kindergarten Preschool/ECFE Library School Age Care	131-145 Points Health	146-159 Points Interpreter RAP Piano Accompanist Drummer Assistant School Age Care Center Assistant

The following base hourly salary rates shall be in effect for the period commencing July 1, 2007 through June 30, 2009:

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**2008-2009 Salary Ranges**

Group	III	V	VI	VII
3	11.45	12.05	12.55	13.55
4	11.95	12.65	13.15	14.15
5	12.45	13.25	13.75	14.75
6	12.95	13.85	14.35	15.35
7	13.45	14.45	14.95	15.95

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ARTICLE IX

HOURS OF SERVICE AND DUTY YEAR

Section 1. Basic Work Week: The regular work week shall be prescribed by the school district.

Section 2. Basic Work Year: the regular work year shall be prescribed by the school district.

Section 3. Part-time Employees: The school district reserves the right to employ such personnel as it deem [sic] desirable or necessary on a part-time or casual basis for time less than that of the regular employees.

Section 4. Shifts and Starting Time: All employees will be assigned starting time and shifts as determined by the school district.

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ARTICLE XIV

GRIEVANCE PROCEDURE

Section 1. Grievance Definition: A “grievance” shall mean an allegation by an employee of the exclusive representative resulting in a dispute or disagreement between the employee or the exclusive representatives and the school district as to the interpretation or application of terms and conditions of employment insofar as such matters are contained in this Agreement.

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Section 3. Definitions and Interpretations:

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Subd. 8. Jurisdiction: The arbitrator shall have jurisdiction over disputes or disagreements relating to grievance properly before the arbitrator pursuant to the terms of this procedure.

ARTICLE XV

DURATION

Section 1. Terms and Reopening Negotiations: This Agreement shall remain in full force and effect for a period commencing on July 1, 2007, through June 30, 2009, and thereafter as provided by P.E.L.R.A. If either party desires to modify or amend this Agreement commencing at its expiration, it shall give written notice of such intent no later than 90 days prior to said expiration. Unless otherwise mutually agreed, the parties shall not commence negotiations more than 90 days prior to the expiration of this Agreement.

Section 2. Effect: This Agreement constitutes the full and complete Agreement between the school district and the exclusive representative representing the employees. The provisions herein relating to terms and conditions of employment supersede any and all prior Agreements, resolutions, practices,

school district policies, rules or regulations concerning terms and conditions of employment inconsistent with these provisions.

Nothing in this Agreement shall be construed to obligate the school district to continue or discontinue existing or past practices, or prohibit the school district from exercising all management rights and prerogatives, except insofar as this exercise would be in express violation of any term or terms of this Agreement.

Section 3. Finality: Any matters relating to the term and conditions of employment, whether or not referred to in this Agreement, shall not be open for negotiation during the term of this Agreement.

## Background:

The Union has represented paraprofessional employees at the District for many years. Represented paraprofessionals (hereafter paras) include Library Clerk, Title I, special education, behavior management, Kindergarten, Pre-school, Library health, interveners, school-age care and school-age care site lead, interpreter, RAP, Piano Accompanist, and Drummer Assistant paras. As of January 31, 2011, the District employed 58 paras.<sup>3</sup>

The Rocori Kids Program (RKP) began as an informal kids club at Cold Spring Elementary School and grew into a school-age child care program at Cold Spring's Rockville and Richmond sites, its elementary school and at St. Boniface Catholic School. RKP has never been part of the District's core educational programming but at some point during its history the state legislature made clear that RKP and programs like it are elective programs which districts are not required to offer under law. Here, RKP has operated separately from the District for some time. The Community Education Program (CEP) and current CEP Director Grelson oversee the RKP and other CEP activities/programs. Under state law, any profits from the RKP must be held in the CEP's accounts and cannot be placed in the District's general fund. However, if the RKP or other CEP activities lose money, it is the District that must be responsible. (U. Exhs. 21 and 22).<sup>4</sup>

Traditionally, the District has hired RKP personnel by running advertisements, asking individuals known to desire these opportunities, but it has never posted RKP vacancies per Article XI of the para labor contract. In addition, the District has regularly employed nine of its paras in the RKP (as site leaders), paying them contract wages listed in Article VI (from \$12.00 to \$18.00 per hour). District paras employed as RKP employees and assistants<sup>5</sup> are lead workers at each site who have the authority to order supplies, food and equipment and to give children their medications; site leaders can

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<sup>3</sup> The District no longer employs Agricultural Assistants, Piano Accompanists and Drummer Assistants due to almost \$4 million in budget cuts over the past nine years. The Union did not file grievances over the elimination of these positions/programs

<sup>4</sup> The District can levy for monies to care for special education students in RKP but this money then must go to CEP and it is only 2/3 of the cost, partial reimbursement.

<sup>5</sup> School age care employees and School age care assistants have been paras who are hired and employed by the District to fill other unit positions with one exception. The site leader at St. Boniface Catholic School was hired by Grelson from St. Boniface's staff and is not a District unit para. No grievances have been filed over the District's use of non-unit site leaders at St. Boniface.

schedule other RKP employees (including sending employees home if the child census is down for the day/week and calling in replacement employees for RKP staff who call in sick), they schedule/plan field trips and they communicate with parents.<sup>6</sup> The remaining RKP employees (47) are not in the para bargaining unit (or any other unit)—they are high school students and college students who are paid from \$7.00 to \$9.00 per hour. The Union has never grieved the District’s use of non-unit high school and college students in RKP.

The District has generally not applied the para labor contract to unit paras who have worked in the RKP. Thus, as stated above, openings are not posted under Article XI. No LTD (Article VIII), annuity or group health insurance has been paid or credited for RKP work time; no family or personal leave has been granted based on RKP work; RKP paras have not earned District seniority credit for RKP work (Article XI); reduction in para hours notifications have never included RKP hours (Article XII); Union dues calculations have never been based on RKP work hours. Generally paras have not received notice of RKP assignments/hours available in RKP, with the exception of Para Nancy Schwindel, who received such notices (Article 6, Sec. 11). The District has also never negotiated regarding the pay of the non-unit high school and college students who have been hired as RKP staff. However, the District has admittedly been inconsistent in applying Article III Sick Leave provisions to unit paras who have worked in RKP, so that some paras have reported RKP hours worked and received credit toward sick leave for those work hours and some paras have not requested and received sick leave credit for RKP hours worked. In any event, non-unit RKP staff received no sick leave benefits. It is significant that the Union has not filed any grievances regarding the District’s denial of contract benefits to unit paras who worked in RKP or regarding denial of such benefits to non-unit RKP staff.

The District has historically granted other community activities/programs the right to long-term use of District facilities: the Cold Spring Senior Center uses the Middle School building; the Great Northern Theater uses the District’s auditorium; the Maennor Choir uses District space for its programs. In each of these instances, the District receives funds or volunteer work hours, in exchange for the use of District facilities. For example, although the District pays the Senior Center Director an undisclosed amount, the Senior Center then pays the District \$300 per month and seniors also act as volunteers in the District’s library. The Great Northern Theater pays the District \$2,000 per annum in exchange for the Theater’s use of space. Finally, the Maennor Choir either pays the District \$600 per year, or they tune the District’s piano.

In 2001, the District discontinued RKP at its Richmond site and in 2009 the District discontinued the RKP at its Rockville school. The Union did not file grievances over the elimination of the RKP site leader/site leader assistant positions at these schools.

The six-year financial history of the RKP (Union Exh. 21), shows that for 2003-04 through 2005-06, RKP made increasingly higher profits each year, from more than \$20,000 in 2003-04, to over \$64,000 in 2005-06. Also, during this period, the District was not paid any rent for use of its facilities by RKP. During this period, RKP received

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<sup>6</sup> Although CEP Director Grelson oversees RKP, he is not at the sites day-to-day, so site leaders/assistants direct the work of RKP staff and run their sites. The site leader at St. Boniface is not paid pursuant to the para contract.

declining levy payments for caring for special education students and increasing parent tuition payments, as follows:

	<u>Tuition</u>	<u>Levy</u>
2003-04:	\$149,229.05	\$18,214.30
2004-05:	\$162,105.75	\$16,854.04
2005-06:	\$203,134.17	\$15,982.74

From 2006-07 through 2008-09, levy payments declined even more dramatically, from just over \$9,000 in 2006-07, down to just over \$1,800 in 2008-09. Although parent tuition payments increased in 2006-07 (\$216,688.40) and in 2007-08 (\$231,115.71), in 2008-09, RKP had a significant decline in enrollment, as tuition payments dropped to \$190,331.10. Also, for the first time beginning in 2006-07 through 2008-09, the District charged the RKP \$11,750.00 for “rent” of District facilities. As a result of these various factors, the RKP profit/loss for 2006-07 through 2008-09 were as follows:

	<u>Profit/(Loss)</u>
2006-07:	\$53,229.36
2007-08:	\$36,735.12
2008-09:	(\$24,157.77) <sup>7</sup>

Union Exhibit 21 showed that the cost of wages and benefits consistently increased for RKP from 2003-04 through 2008-09 as did the cost of food (for the children) and supplies so that wages and benefits costs went from \$144,939.35 in 2006-07 to \$185,000.13 in 2008-09 while costs of field trips, food and costs of supplies in 2006-07 went from \$11,245.71 to \$17,311.06 in 2009-09.

Facts:

The Boys & Girls Club is a not-for-profit organization which offers before and after school care and care during times when schools are not in session for school-age children through seventh grade. Because of their non-profit status the Boys & Girls Club can offer qualifying families scholarships (available through the United Way) (Dist. Exh. 13). When operated by the District, the District was not eligible to offer parents any tuition scholarships and the District was limited to offering RKP in its buildings and it was limited by state law to offering child care to elementary school students, up to sixth grade only.

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<sup>7</sup> Even if “rent” is removed from the 2008-09 expenditures, RKP would have shown a loss of \$12,407.77 in 2008-09.

District Administrator Staska stated that in 2002 when he was first hired as Superintendent, he toured the Boys & Girls Club and was told about their services. The Boys & Girls Club and Staska then shared information to see if the Boys & Girls Club could potentially take over the RKP. Nothing was done about this idea, although Staska stated he kept in touch with the Boys & Girls Club over the years. In the fall of 2009, after the RKP suffered its first loss, Staska contacted the Boys & Girls Club again to discuss whether the Boys & Girls Club would be interested in coming in and running the RKP. Also sometime in the fall of 2010, Staska conducted tours of RKP sites for Boys & Girls Club executives. Staska never contacted or spoke to Union representatives about his contacts/discussions with the Boys & Girls Club. After the close of the 2009 fiscal year on June 30, 2009, the District's auditors advised the District that the RKP was an unsustainable program given the significant loss it suffered in 2008-09 (\$25,000) due to rising staff costs and declining enrollment (Dist. Exh. 7).

The Union's initial proposal for the 2009-11 labor agreement was given to the District at a face-to-face meeting held on November 12, 2009. At this meeting, the District did not bring up the Rocori Kids Program and it was not otherwise discussed. Only two proposals in the Union's initial proposal concerned the Rocori Kids Program, as follows:

1) ARTICLE VI RATES OF PAY (pg. 5)  
Group VI clean-up Job Title – Health **Paraprofessional**, Group VII clean-up  
Job Title – School age Care Center **Site Lead Assistant**  
*Intervener position, receive same increase as applied to wage schedule.*

2) (pg. 6) Section 4. Certification. Members of the Group V paraprofessional staff, **Group VI Health Para and Group VII School Age Care Center Site Lead, Interpreter and Intervener** who earn certification through a recognized Educational Assistant Program **or hold a related 2 year degree or more (i.e. education degree)** will be awarded additional certification compensation. Change in compensation will occur only at the beginning of the school year when verification of certification is submitted. The rate of compensation ~~for~~ **2007-2009** will be \$1.50 per hour and will be paid in addition to the base rate of pay.

On December 9, 2009,<sup>8</sup> Staska stated he met with GEP Director Grelson, Business Manager Parker and the three RKP site leaders (Mueller, Groetsch and Schwindel) to try to determine why staff costs had risen significantly that year and to tell the three site leaders that RKP was operating in the red. Staska asked the RKP site leaders to come up with ideas how the RKP could break even in the future (Tr. 80-81 and Dist. Exh. 8). At this time, Staska gave the three site leaders a copy of a document showing the financial history of the RKP from 2003-04 through 2008-09 (U. Exh. 21). However, Staska did not tell the RKP site leaders that the District was considering bringing the Boys & Girls Club in to run the RKP. Staska also did not notify the Union that the District was considering eliminating the RKP and having the Boys & Girls Club offer the service because, Staska believed, he had no legal obligation to do so.

After December 9<sup>th</sup>, Union Site Leader Rose Mueller e-mailed Staska twice on January 13<sup>th</sup>, again on January 19<sup>th</sup> and twice on January 25<sup>th</sup>, expressing her dismay that

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<sup>8</sup> Staska stated this advice was received in November, 2009, when the auditors finished their report.

Staska had not told RK site leaders sooner about RKP's financial problems, that the District was actively considering having the Boys & Girls Club come in to take over providing child care services, and her frustration that Staska would not/did not respond fully to her e-mails (Dist. Exh. 8). Staska's only response to Mueller was a partial one which was e-mailed to her on January 13<sup>th</sup> regarding a meeting District managers had with the Boys & Girls Club, as follows:

Thanks for the note.

There was a meeting (I was not able to attend, but Mark and Lynn were involved) on January 4<sup>th</sup>. The initial feedback is that there is interest on the part of Boys and Girls Club in conducting a program here. As I understand the meeting, there were a lot of clarification items addressed in the meeting. Before Boys and Girls Club could move any further with discussions, they had to move through their processes. The essence of the meeting is that we know there is interest in running a program but there has not yet been a proposal to assess.

Thanks!

Record documents also showed that CEP Director Grelson met with the three RKP Site Leaders, to discuss RKP's financial problems. Grelson then put together the following "Financial Savings Plan" for the Board's consideration. However, Grelson did not complete this document in time for presentation at the Board's February 8<sup>th</sup> meeting. Grelson's plan read as follows:

*Ideas:*

1. **Charge families for the duration of the summer program – no vacation time allowed.**  
*Revenue increase* – based on 2009 attendance & rates - \$18,056  
*Concern(s)* – Families may object to paying for days when their children are not in attendance. Boys & Girls Club only charges for days of attendance. Families may drop out due to increase in cost.
2. **Charge families a higher deposit/registration fee that is forfeited if they do not fulfill their contract.**  
*Revenue increase* – hard to estimate the impact.  
*Concern* – We do not want families to break contracts as then you lose the regular tuition. Making significant money as a penalty on families would not be a good situation. Will a higher deposit prevent families from breaking their contract [sic]? How do we define "breaking" the contract if the situation is parent losing a job, serious illness, divorce, etc.
3. **Limited, or no, transportation provided to Community Education activities.**  
*Expenditure decrease* by up to \$2,668 based on last year's drive time and scheduling time.  
*Concern* – transportation is a selling point for signing up for ROCORI Kids. Community Education activity numbers would be reduced, which is a loss financially.

4. **Increase tuition.**  
*Revenue increase* – If no drop in attendance and tuition increased:
  - a. \$10 per week summer\* =11,430
  - b. \$10 per month school year\*\* =12,150

\*This increase will put us \$20 per week higher than the Boys & Girls Club per child for full time.

\*\*This increase will have us at approximately \$22 per month cheaper than Boys & Girls Club for an every [sic] day before and after school child. If a child goes four days a week it is \$21.25 cheaper through Boys & Girls Club.

*Concern* – will higher tuition cause a drop in attendance?
  
5. **Change school year to weekly rather than monthly tuition.**  
*Financial impact* – not certain  
*Concern* – The current monthly tuition fee provides a consistent income with less bookkeeping. Tuition may be more easily increased if it is changed to weekly payments, but then should tuition be based on actual days of attendance? This could result in a lower tuition if children come less than five days per week.
  
6. **Start earlier (date) in summer.**  
*Revenue increase*, but staff increase also.  
*Concern* – May attract more families, but would require staff time while school is in session to get set up. Must avoid overtime hours. Can college age staff do the necessary prep work?
  
7. **Apply for Child and Adult Care Food Program Snack Reimbursement.**  
*Expenditure Decrease* – none  
*Concern* – This is a federal program that we do not qualify for because ROCORI Kids does not meet the minimum of at least 50% of children in the program must be eligible for free or reduced lunch.
  
8. **Eliminate Field Trips.**  
*Expenditure Decrease* – savings of estimated \$200-\$300, or raise event fees to cover cost. Out of town field trips may require additional staff for supervision, estimated savings is affected.  
*Concern* – field trips have been an appealing part of the program; elimination of field trips may detract from the program.
  
9. **Increase the advertisement and recruitment for new program participants.**  
*Increase revenue* – dependent on number of additional participants.  
*Concern* – Current economic conditions and effectiveness of advertising. Neither of these is a guarantee of additional participants.

At the January 25, 2010, Board meeting, the Board discussed RKP and the Boys & Girls Club. The Board minutes from this meeting summarized that discussion as follows.

- B. **ROCORI KIDS PROGRAM/BOYS AND GIRLS CLUB**  
 Throughout the fall, the district has been involved in discussions regarding the ROCORI Kids program and a potential shift from local programming to the services of the Boys and Girls Club. The discussion

initiated after a review of the program saw a significant financial shift in the 2008-09 school year. The program went from a positive to a negative impact on the budget. The change was primarily a [sic] result in a reduction in the number of parents using the services (reduced enrollment) and increasing costs of conducting the program (employee and resource costs). As the gap between revenue and expenses increased, the district leadership team began to explore other avenues of providing services. In previous years, the Boys and Girls Club (of St. Cloud) have expressed interest in working with before and after school programming in the ROCORI District. As the financial condition of ROCORI Kids changed a return to discussion of options with Boys and Girls Club occurred. Discussion of program opportunities, site visits to review common issues, and exchange of information has taken place with Boys and Girls Club. The St. Cloud office of Boys and Girls Club has expressed interest in assuming the ROCORI before and after school programming and has offered to do so. Before asking the board to act on the change, district practice is to have discussion about the issue. It is expected that a resolution from Boys and Girls Club will be presented at the next board meeting, at which time formal action would be recommended.

On January 15 and 18<sup>th</sup>, the Boys & Girls Club faxed Staska the following proposed Resolution and Memorandum of Understanding (U. Exh. 4), drafted by the Boys & Girls Club regarding the latter's potential take-over of child care services at the District:

**A RESOLUTION FORMALIZING ROCORI AREA SCHOOL  
DISTRICT 750'S PARTNERSHIP WITH THE BOYS & GIRLS CLUBS  
OF CENTRAL MINNESOTA  
January 2010**

WHEREAS, the Boys & Girls Clubs of Central MN and ROCORI Area School District 750 wish to work in partnership to provide KIDSTOP, an award-winning and affordable school-age child care and enrichment program, for every St. Boniface and District 750 student who needs such care; and

WHEREAS, the Boys & Girls Club's KIDSTOP program's goal is to serve all children who need or want the program, and no child will be turned away due to inability to pay; and

WHEREAS, the Boys & Girls Club has saved taxpayer dollars by successfully acquiring United Way and other donor dollars for KIDSTOP scholarships; and

WHEREAS, the KIDSTOP program provides all children daily access to quality programs and activities in five core program areas: character and leadership development, education and career development, health and life skills, the arts, and sports, fitness and recreation; delivered by trained and experienced youth development professionals; and

WHEREAS, the Minnesota Academic Excellence Foundation presented KIDSTOP with the MAEF's Hero Award for helping children achieve better grades in school; and

WHEREAS, ROCORI Area School District 750 and the Boys & Girls Clubs of Central Minnesota wish to collaborate to offer the KIDSTOP program according to the attached letter of agreement;

THEREFORE BE IT RESOLVED that KIDSTOP is hereby designated as ROCORI Area School District 750's designated before-school, after-school, and summer child care program of choice; and

BE IT FURTHER RESOLVED that school space, comparable and substantially equal to current space provided for School District 750's ROCORI Kids program, will be provided for KIDSTOP at no charge for at least the first 5 years that KIDSTOP operates in School District 750.

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### MEMORANDUM OF UNDERSTANDING

The Boys & Girls Clubs of Central Minnesota is very excited to enter into a partnership with ROCORI School District to provide KIDSTOP as the District's designated before-school, after-school and summer child care provider of choice. In order to foster the best possible partnership that provides KIDSTOP for ROCORI are students and their families, both the Boys & Girls Club and the School District agree to the following terms:

- KIDSTOP will run from 6:45 a.m. to 8:50 a.m. and from school dismissal to 6:00 p.m. on school days.
- KIDSTOP will run from 6:45 a.m. to 6:00 p.m. on non-school days and summer days.
- KIDSTOP will operate a summer program from the day after school ends until 2 weeks before school begins in the fall.
- KIDSTOP will be open 6:45 a.m. to 6:00 p.m. on non-school days (excluding Labor Day, Thanksgiving and Thanksgiving Friday, Christmas Eve and Christmas Day, New Year's Day, and Memorial Day). Negotiations for alternate space may occur to accommodate cleaning, maintenance or remodeling.
- Adequate space will be provided to operate KIDSTOP including: gym, cafeteria, computer lab, art room and office space. Alternate space may be negotiated to accommodate the KIDSTOP activities if regular space provided is unavailable.
- Adequate space for the KIDSTOP program will be re-negotiated after the middle school/high school construction project is complete.
- KIDSTOP will need space to operate five days per week for a large number of children. The hierarchy of space allocation to allow for dependable operation of the KIDSTOP Program will be:
  1. K-12 school activities
  2. Community Education and KIDSTOP
  3. All other activities
- KIDSTOP will need Internet access and a phone line to connect with the Boys & Girls Club's records and operating systems.
- District 750 will assist KIDSTOP with communications to District families through back pack stuffers, student mailings, link to District website, e-mail communications and newsletters.
- \_\_\_\_\_ (District 750 ROCORI Schools additions)

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Staska stated that he shared this document with the Board at the January 25<sup>th</sup> regular biweekly Board meeting merely as a sample of what such an agreement would look like and that he did not request that the Board adopt it (Tr. 262-263).

The second negotiation session between the parties took place in January 28, 2010. At this meeting, Union Representative Nieters brought up the rumor she had heard—that the District was considering subcontracting RKP and Nieters asked if the rumor was true. District Superintendent Staska replied that the District was looking at it but it was not something they had to bargain over or raise in negotiations; that such a discussion was an inherent managerial right (Tr. 80, 85). Nieters disagreed—she said the District needed to bargain not only over the termination or elimination of RKP, but also over the decision to do so and how and when that would occur. Nieters then asked for a copy of the six-year financial history of the RKP and she asked for group usage of District buildings/contracts showing what District charges, if any, other groups paid (Tr. 85). District Business Manager Parker told Nieters that the District had subsidized RKP (from \$30,000 to \$40,000 per year) until five or six years ago; and that RKP lost \$12,000 in 2008-09 and was projected to lose the same amount in 2009-10.

The next negotiation session was held on March 2, 2010. At this session, the District agreed to the changes the Union had initially proposed in Article VI Rates of Pay, as follows:

- 1) ARTICLE VI RATES OF PAY (pg.5)  
Group VI clean-up Job Title – Health **Paraprofessional**, Group VII clean-up  
Job Title – School Age Care Center **Site Lead Assistant**

- 2) (pg.6) Section 4. Certification: Members of the Group V paraprofessional staff, **Group VI Health Para and Group VII School Age Care Center Site Lead, Interpreter, and Intervener** who earn certification through a recognized Educational Assistant Program **or hold a related 2 year or more education degree** will be awarded additional certification compensation. Change in compensation will occur only at the beginning of the school year when verification of certification is submitted. **An employee submitting information for the first time to qualify for the certification pay with a 2 year or more education degree must submit education degree information to the District for approval.** The rate of compensation ~~for 2007-2009~~ will be \$1.50 per hour and will be paid in addition to the base rate of pay.

At this session, the parties also discussed RKP. Nieters raised the RKP issue again. She asked Staska whether the District intended to contract out the program and if so, Nieters stated contracting out is a subject of bargaining which the District is required to negotiate as well as the process, how and when to do so and the impact thereof. Again, Staska stated that the District's decisions concerning RKP involved the inherent management rights to discontinue the program and contract with the Boys & Girls Club and these actions would not violate the contract (Tr. 92-93). At the end of this session the Union advised it would file for mediation.

After receiving the documents she requested, Nieters wrote a letter dated March 5, 2010, to Staska and Board President Nadine Schnettler, regarding “Subcontracting of Paraprofessional Work”, which read as follows:

I am writing to express our strong objections to the District's apparent plans to subcontract the work of paraprofessionals represented by SEIU Local 284. The District's actions would take away the livelihoods of our hard-working members during a difficult economy. We ask you to carefully consider the impact on the lives of those community members and their families as well as the likely legal consequences of your actions.

It is our understanding that the District is considering a Resolution that would outsource the work of paraprofessionals in the Rocori Kid Care program to the Boys & Girls Clubs of Central Minnesota. Specifically, the subcontracting agreement, entitled "Memorandum of Understanding," would designate the Boys & Girls Clubs' KIDSTOP program as the before-school, after-school, and summer child care provider for the District in lieu of the Rocori Kid Care Program. This would take away the jobs of our members who currently perform the work.

The loss of jobs is particularly objectionable to us because it is so unnecessary. The reason you have given us for your decision is economic, but the decision does not make economic sense. The Rocori Kid Care program has been a significant money-maker for the District for each of the last six years with the exception of the past year. These are the profiles the District has made from the program:

2003-04	\$20,098.47
2004-05	\$30,396.76
2005-06	\$64,149.46
2006-07	\$64,979.36
2007-08	\$48,485.12

In only one year was there an operating loss in the program (\$12,407.17), and that was the exceptional year of 2008-09, which was the worst downturn in the economy since the Great Depression. With so many people out of work it is no surprise that the services of the program serving students before and after school and during the summer were not utilized as much in that year. One year of an operating loss in a terrible economy is hardly a reason to discontinue a historically successful program.

The program has yielded an average of \$35,950.33 of profit for the District (a non-profit) over the last six years. There is no economic justification whatsoever to discontinue it.

The District has argued that this is not a case of subcontracting but rather a discretionary discontinuance of a program. Nothing could be further from the truth. The same services would be performed on site by an outside provider under the contract with the District. The proposed subcontracting agreement specifies the hours of work, the length of the summer program, the space and resources to be provided to KIDSTOP, including the gym, cafeteria, computer lab, art room, internet access, a phone line, and office space and alternate space as needed. District 750 would handle communications on behalf of KIDSTOP, including back pack stuffers, student mailings, like to the District website, e-mail communications and newsletters. The subcontracting agreement also sets forth priorities of use in the form of a "hierarchy" of space allocation.

As you may know, our Union has been willing to take a stand for our members in court if necessary to protect their livelihoods from ill-considered efforts to subcontract. In the leading case on point, the Minnesota Supreme Court found

that a School District violated the law by subcontracting out food service work performed by our members. Independent Sch. Dist. No. 88 v. School Serv. Employees Union, Local 284, 503 N.W.2d 104, 110 (Minn. 1993). As in that case, the District here is attempting to eliminate a portion of our bargaining unit during negotiations and while the contract is still in effect. We will not hesitate to pursue all of our available legal remedies in this case to the fullest extent of the law.

As you consider these issues, we ask that you consider the impact on the lives and families of our members. We will take all necessary legal steps to protect their rights in this matter. Please contact me if you wish to discuss this further.

On March 8, 2010, a regular School Board meeting was held. On the Board agenda for the meeting was the following item:

B. SCHOOL AGED CARE PROGRAMS

Over the past several meetings, the district has been examining the status of the ROCORI Kids program compared to the option of the KidStop program through the Boys and Girls Club. The long-standing district program has struggled financially over the last two years because of increased costs and declining enrollment. The issue was first formally shared with the School Board at the end of January. In the interim, the ROCORI Kids staff has been invited to examine or propose options to change the local program while staff members from the KidStop program have also shared information with the board. Comparison information is provided in the board exhibits. Recommend action to discontinue the ROCORI Kids program. Recommend approval of the resolution with Boys and Girls Club to operate a KidStop program in the ROCORI School District.

Nieters appeared at the Board Meeting where she made a presentation urging the Board to continue RKP.

Although Staska had recommended that the Board discontinue RKP and enter into a contract with the Boys & Girls Club to provide the service, after listening to Nieters (who was accompanied by members of the para unit and concerned parents with children in RKP), the Board voted down Staska's recommendation and asked the Union to prepare a cost-neutral RKP budget for the coming year and bring it to the Board's next meeting on March 22, 2010 (Dist. Exh. 16).

On March 9<sup>th</sup>, Nieters e-mailed a detailed request for information to District Business Manager Parker so Nieters could prepare the budget requested by the Board (U. Exh. 8). Nieters requested detailed enrollment data for 2007-08 through 2009-10; RKP income and expenses; 2009-10 budget projection and the Boys & Girls Club proposal; and summer payroll information. Nieters worked on the Union's proposal under a time crunch because on March 17<sup>th</sup> Staska notified Nieters the Union proposal had to be turned into the District office the next day, March 18<sup>th</sup>, in order to be copied and distributed to Board members prior to the March 22<sup>nd</sup> meeting (U. Exh. 9).

Nieters' presentation can be summarized as follows. For the school year (a.m. and p.m.) and the summer program at RKP in 2011, the Union projected a profit from RKP of \$34,431.28 after deducting total staff and snack costs at the three sites of \$7,362.02 based on a 15 to 1 student to staff ratio and tuition costs to parents of \$50 per week for five days' care for both before and after school and \$1,050 for the ten-week summer program,

at \$21 per day. Parents were to pay only for days attended and they would have to hand in care calendars for their children two weeks in advance for staff planning purposes (U. Exh. 10, pp. 2-4). Nieters' presentation also showed that the Boys & Girls Club would charge higher fees per week for a.m. and p.m. care (from \$15 to \$25 more per week), but 75¢ per week less for care during a ten-week summer program. Nieters noted that the Boys & Girls Club intended to raise fees as of January 1, 2011, and would charge even for days when children did not attend (unlike RKP).<sup>9</sup>

On March 22<sup>nd</sup>, the Board again considered whether to have the Boys & Girls Club take over child care services at the District. At the beginning of the meeting, the Board granted Nieters five minutes to make her presentation (Dist. Exh. 8, p. 27). At this meeting the Board told Nieters that the Board was more concerned about the RKP program itself and program content than about finances. This was the first time Nieters had been advised of this fact.

After Nieters' presentation, Board Member Demuth moved and Board President Schnettler seconded the motion to adopt the following "Resolution Relating to the Provision of School-Age Care Program Services":

WHEREAS, the School District has provided a school-age care program ("ROCORI Kids") for School District students and resident non-public school students from kindergarten through grade six through its Community Education Program; and

WHEREAS, the School District does not possess special expertise within the School District relating to the providing of such services; and

WHEREAS, the School District has available to it a nonprofit provider of said services; namely, the Boys & Girls Clubs of Central Minnesota ("Boys & Girls Club") which is located within the School District community and which is highly skilled and successful in providing such services, including the oversight and supervision of such services; and

WHEREAS, the Boys & Girls Club is award winning and affordable childcare and enrichment program that has been recognized for its expertise in delivering and supervising such child-care services; and

WHEREAS, the Boys & Girls Club can offer a more comprehensive and complete school-age care program than is available within the School District including the provision of increased and structured programming in five core program areas (character and leadership development, education and career development, health and life skills, the arts, and sports, fitness and recreation) which is delivered and supervised by trained and experienced youth development professionals; and

WHEREAS, such enhanced supervision and expertise available through the Boys & Girls Club would translate into more consistent and effective services for the students of the School District and maximize their opportunities for social and academic achievements; and

WHEREAS, the Boys & Girls Club also can offer increased opportunities and resources to students and their parents which are not available through the School District, such as the use of any St. Cloud Metro Area Boys & Girls Club sites, opportunities for financial scholarships for parents who are unable to afford the costs of school-age child care, better value and/or anticipated costs savings for most students and parents who choose to utilize these services, more flexibility for parents in regard to the extent of program use and

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<sup>9</sup> Nieters amended her presentation on March 22<sup>nd</sup> to correct a mathematical error which resulted in the higher total projected profit for RKP (\$38,411.28) than she previously estimated (U. Exh. 10, pp. 6-9).

availability of services and infusion of United Way dollars into the community;  
and

WHEREAS, the School District, along with other school districts, is facing serious financial limitations due to the extreme economic recession and attendant lack of funding from the State of Minnesota; and

WHEREAS, the ROCORI Kids Program has experienced a significant decline in enrollment over the last two years which has resulted in a significant decrease in program revenue; and

WHEREAS, the ROCORI Kids Program also has experienced a significant increase in expenditures since the initiation of this program; and

WHEREAS, as a result of increased expenditures and decreased revenue, the ROCORI Kids Program sustained a significant financial loss during the 2008-09 school year; and

WHEREAS, based upon current trends in declining enrollment and anticipated increases in future operational costs, the ROCORI Kids Program is no longer a self-sustaining program and would continue to require the use of School District general fund resources which are already severely limited due to the economic recession and lack of funding from the State of Minnesota; and

WHEREAS, the School District will realize financial savings for school-age care services in the School District and enhanced and improved programming for students by entering into a service agreement with the Boys & Girls Club; and

WHEREAS, the decision to enter into a service agreement under Minnesota law is a management right with the understanding that, should the district subcontract for services, the employer is obligated to meet and negotiate the effects of the decision with the exclusive representative of the affected employees,

NOW THEREFORE BE IT RESOLVED by the School Board of Independent School District No. 750 as follows:

1. The School District can best provide its school-age care services through contracting with the Boys & Girls Club, which will serve the best interests of students of the School District requiring such services.

2. The development of a separate, independent agreement to allow alternative provision for such school-age care services will also be consistent with the financial needs of the School District in reducing its costs relating thereto.

3. School District representatives are authorized and directed to proceed to arrange for services with the Boys & Girls Club or such other entity as available to provide said services.

4. School District representatives are authorized and directed to take such steps as necessary to implement such programming effective the conclusion of the 2009-2010 school year or as soon thereafter as is feasible.

5. School District representatives are authorized and directed to communicate such decision to the employees and their exclusive representative, to the extent applicable.

6. School District representatives are also authorized and directed to bargain concerning the effects of such decision on affected employees who are members of the bargaining unit represented by an exclusive representative.

The Resolution (Dist. Exh. 16) was adopted by a vote of four in favor and one opposed.<sup>10</sup>

In a letter dated March 22<sup>nd</sup> (and sent by fax), the District answered Nieters' March 5<sup>th</sup> letter as follows:

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<sup>10</sup> Demuth, Schnettler, Hemmesch, and Lieser voted yea; Austreng voted nay.

. . .

At the outset, we would like to clarify with you the extent of the School District's proposed change in provision of services. We understand that the School District's current School Age Care Program employs approximately 47 employees. Out of these 47 employees, approximately 38 employees, or over 80% of the staff employed to operate the program, are nonunion, at will employees who are not part of the bargaining unit represented by the Union. These employees are not paid or provided any benefits under the terms of the present collective bargaining agreement. Therefore, the work performed by these nonunion employees is not of concern to the Union.

Notwithstanding the foregoing, the School District is not prohibited from eliminating this program and entering into an agreement with an outside entity to perform the services formerly provided by this program. This is a decision that is within the inherent management right of the School District. At most, if this issue were determined to be an issue of subcontracting, the School District would be obligated to negotiate the impact on Union employees of the School District's decision.

Based upon the foregoing, we have been requested by the School District to advise you, on behalf of your members, that the School District will be considering a resolution at its March 22, 2010 School Board meeting to discontinue its present School-Age Care Program. The resolution would also authorize the administration to enter into an agreement with an outside entity to perform these services.

The action that will be taken by the School District is merely preliminary in nature in that the School District will not be entering into any agreement with any entity to take over such services at this meeting. Rather, the School District simply will be deciding whether or not to approve the concept of dissolving its present program and seeking the services through other means. Administrators would be given the authority to then address the issues related to negotiating the terms of any agreement with an outside entity as well as to address these issues with the Union.

With respect to the Union's input, again, the School District does not intend to discuss with the Union its right to contract out these services. The School District, nonetheless, is willing to negotiate with the Union as to the effects on Union employees of this decision to seek outside provision of these services, assuming the decision is ultimately implemented.

We understand that the School District is presently negotiating with the Union over the contract that expired on June 30, 2009. In this regard, the School District would like to address these issues with the Union, as well as any other outstanding issues, at its next bargaining session.

. . .

As stated above, after the last negotiation session between the parties (on March 2<sup>nd</sup>), the Union filed for mediation with the Bureau of Mediation Services.

On March 23<sup>rd</sup>, the District sent Nieters a proposal to settle the effects of "discontinuation" of the RKP, as follows:

As you are aware, the ROCORI School Board did make a decision to discontinue the ROCORI Kids program at the March 22 regular School Board meeting. Although the action did not officially determine a replacement program, the administrative team was authorized to pursue a relationship with the Boys and Girls Club or another entity.

The ROCORI School District, as communicated with you through the offices of Knutson, Flynn and Deans has the inherent managerial right to make the decision to discontinue the program. The district would, however, like to make the transition from the ROCORI Kids program to a new program in a positive and efficient manner.

At this point in time, the paraprofessional negotiation process has been scheduled for mediation. The mediation session has been set for June 3, 2010. Given the short period of time of transition from a district program to an alternate program, the process of transition must occur in a fairly quick and efficient manner.

In resolving the effects of the discontinuation of the program, the ROCORI District offers the following steps for affected bargaining unit employees:

1. The district would provide information to an incoming organization to allow the new program to identify and communicate with potential candidates for employment;
2. The district will assist in the distribution of notices to affected members of employment opportunities within the new organization (to allow communication in both directions);
3. The district would offer information and assistance to encourage the new organization to consider employment of as many ROCORI Kids employees as possible;
4. The district will consider affected employees as candidates for any alternative summer program or other extended time positions within the ROCORI School District.

Please let me know your thoughts and reaction to these steps. We appreciate your response.

On March 24<sup>th</sup>, the District sent all RKP staff a notice that the Boys & Girls Club was expected to take over child care services at the District sites beginning on June 7, 2010, when the summer program began, to encourage RKP staff to apply for openings and to offer applicants assistance, essentially contact information, in applying to the Boys & Girls Club positions (Dist. Exh. 20).

On April 5<sup>th</sup> the Union filed the instant grievance and on this date Nieters also responded (by e-mail) to Staska's offer of March 23<sup>rd</sup>, rejecting the latter, as follows:

The decision to subcontract the ROCORI Kids Program significantly impacts the Paraprofessional Bargaining Unit and the workers that are employed in that program. The Districts [sic] offer is unacceptable. I am still in the process of assessing the damages and am planning to have a counter proposal ready for mediation on June 3<sup>rd</sup>.

I have attempted to resolve this issue with the ROCORI Kids Program by putting forward a proposal that resulted in the program not only self sustaining

but profitable as well. This was done specifically by School Board request at the March 8<sup>th</sup> meeting.

At the School Board Meeting on March 22<sup>nd</sup> the ability of the current program (ROCORI Kids) to be self sustaining and/or profitable to the District seemed to no longer be of interest. Attached is a copy of the grievance form that is also being sent certified mail. My hope is to resolve this issue as quickly as possible and maintain the work of the bargaining unit. The employees currently providing the service in the ROCORI Kids Program are willing to submit a competitive bid proposal in order for the District to maintain a program that has been successful and provided a profit to the District for many years. Please provide all relevant information and timelines for the competitive bid process.

Given the grievance and litigation filed by the Union regarding the District's elimination of RKP and the Boys & Girls Club's establishment of its KIDSTOP program, the District decided to leave its arrangement with the Boys & Girls Club informal, so no formal contract was ever executed (U. Exh. 36).

It is clear that the District did not have a hand in hiring or paying staff for KIDSTOP, that it has had no control over the program; that the District has not paid the Boys & Girls Club anything for providing child care services; and, to date, the Boys & Girls Club has not paid the District any rent or fee. For the school year 2009-10, RKP finished with \$19,000 in profit and this profit went to the CEP,<sup>11</sup> as all other profits made by RKP in the past.

Mediation was scheduled and held by BMS on June 3<sup>rd</sup> and October 11<sup>th</sup>. On June 3<sup>rd</sup>, the Union made an offer of settlement which included inter alia a proposal for an MOU to form a committee on Job Security, and a proposal that the District "will cease subcontracting the bargaining unit work in the ROCORI Kids Program in violation of the contract...", which the Union made without conceding that the District had a right to subcontract (Dist. Exh. 20). The District rejected the Union's proposal.

At the second mediation session, held on October 11<sup>th</sup>, the District made an offer to settle the two-year contract, which included a \$15,000 payment which the unit could divide as it saw fit in exchange for the resolution of RKP issues. The Union rejected the District's proposal in a letter dated December 6<sup>th</sup>, addressed to BMS Mediator Stockstead (Dist. Exh. 18), but it made no counter-proposal. On January 14, 2011, the District suggested to Stockstead that the parties engage in further mediation and inquired whether the Union had sent in a counter-proposal.

As stated above, nine of the 47 employees of the RKP were unit paras; the remaining 38 employees were non-unit employees, of the nine, three (Mueller, Groetsch and Schwindel) lost substantial income when RKP ceased operations: Mueller, -51.09%; Groetsch, -30.03%; and Schwindel, -42.85% (U. Exh. 25).

Nancy Schwindel, Rose Mueller and Dana Groetsch applied to the Boys & Girls Club for work in the District's Child Care program after RKP ceased operations. Schwindel and Mueller were not offered employment; Groetsch was offered Boys & Girls Club employment and worked there during the summer of 2010 and part of the

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<sup>11</sup> The Boys & Girls Club operated the 2010 summer program so the above profit does not include any of the profit/loss for the summer program. In addition, RKP charged a snack fee in 2009-10 and staffing stayed at 1 to 12.

2010-11 school year. Groetsch stated she was paid \$8.70 per hour by the Boys & Girls Club (almost \$10.00 less per hour than when she was employed by the District in RKP). In October, 2010, Groetsch quit working for the Boys & Girls Club and took a seven- to eight-week position at the District in Targeted Services at her \$18.00 per hour para contract rate. In 2010-11, Schwindel was offered a District para school year position for 7 ¾ hours per day and sixty hours of summer cleaning work. In 2009-10, she had worked 6 ¾ hours per day during the school year and forty hours per week for ten weeks in RKP. Groetsch and Mueller had also traditionally worked forty hours per week in RKP during the summer.

### Positions of the Parties:

#### Union:

The Union argued that the record facts prove that the District subcontracted bargaining unit work of school-age care employees and assistants while the contract was in effect and negotiations were continuing. As such, the Union urged, the District's conduct violated the recognition clause of the continuing contract because the record showed 1) that the District acted in bad faith; 2) that its decision was not a reasonable business decision; 3) that it subverted the collective bargaining agreement; and 4) that it seriously weakened the bargaining unit by its actions. Therefore, the Arbitrator must sustain the grievance.

Regarding the District's argument that the grievance is not arbitrable, the Union urged that the New Ulm case (Dist. Exh. 3) states that subcontracting issues are arbitrable, regardless whether the contract contains a management rights clause. The Union also noted that there is no election of remedies clause in the instant contract, and because the District prompted the civil litigation by its position herein, the Union was free to pursue both cases. Most importantly, the contract allows arbitration of grievances like this one which calls for the interpretation and application of various terms of the contract.

The Union took issue with the District's restrictive use of New Ulm—as stating only that the decision to contract out is an inherent management right. The Union urged the New Ulm decision as a whole controls this case and requires the Arbitrators to find the grievance arbitrable, as she did at the hearing herein, and to rule in the Union's favor on the substance of this case.

The Union asserted that the District's actions herein showed it acted in bad faith. In this regard, the Union pointed to evidence that showed 1) the District did not notify the Union of its intent to subcontract, even though it was actively pursuing this idea in November, 2009, during bargaining; 2) the District refused to bargain with the Union over its decision to subcontract although contract negotiations were on-going; 3) the District shifted its reason for subcontracting from RK labor to programming after the Union made a proposal to cut RK costs at the Board meeting on March 22, 2010; 4) the Union discovered the District's hidden intent to subcontract on January 28, 2010, months after contract negotiations had commenced; 5) the District gave the Union very little time to put forth its proposal to cut costs and essentially rejected that proposal even before it was presented to the Board; and 6) the Board then made cosmetic changes to the

District's Resolution with the Boys & Girls Club to remove contracting language and it refused to enter into a formal agreement with the Boys & Girls Club to try to make it look like the District was not subcontracting the work to the Boys & Girls Club.

The Union argued that the District's actions, described above, demonstrate that the District intended to and did subcontract RKP work to the Boys & Girls Club, in precisely the same manner as the New Ulm School District subcontracted its food service work, all in violation of the instant labor agreement. Here, the Boys & Girls provides the same service using non-union workers; it uses District facilities, District transportation, Internet, a District phone line, and it operates during the same hours and dates as RKP did. The District's efforts to conceal and mischaracterize its subcontracting in order to avoid its contractual and legal obligations are the essence of bad faith.

Superintendent Staska demonstrated his bad faith in an e-mail where he criticized RKP paras' protected concerted activities, putting out materials and rallying parents, and urged the Board not to reward the paras' bad behavior by continuing RKP. In addition, the evidence surrounding Board President Schnettler's application for Boys & Girls Club employment during the Board's decision-making process concerning RKP evidenced further bad faith because Schnettler's actions were unethical and violated Board practices to avoid conflicts of interest between Board business and Board member's personal business. Schnettler should have abstained from any vote on the Boys & Girls Club taking over the RKP while her Boys & Girls Club application was under consideration but she did not.

The Union asserted that the District made over \$228,000 profit on the RK program from 2003 to 2008. Only in one year was there a \$12,000 operating loss, for an average profit of over \$35,000 per year. The charge of backpay for the paras' last contract, a rise in minimum wage and the worst downturn in the economy in years which caused a drop in enrollment were unusual circumstances not likely to be repeated. Therefore, the District's primary business reason for subcontracting was not reasonable.

The District's actions in subcontracting with the Boys & Girls Club subverted the labor agreement because it essentially eliminated the two school-age care classifications and related wage and salary differentials from the contract without any bargaining thereon. The District cannot eliminate job classifications and then assign the duties to non-union employees during contract negotiations without subverting the contract. The fact that RKP paras did not receive all contract benefits for their RKP work does not detract from the fact that they were performing union work with job classifications, wages and shift differentials for their work listed in the contract. Furthermore, the District did not bargain the effects of the subcontracting as it claimed and, in any event, the District could not subcontract RKP work while the contract was in effect and negotiations were on-going.

Finally, the District's actions weakened a significant portion of the bargaining unit because nine unit paras lost significant pay, contact with children they had been caring for in RKP for years and other unit paras lost future opportunities to work in RKP, undermining the Union. As none of the facts showing the subcontract had a de minimus effect were present here (no deprivation of unit work, unit employees remained fully employed, unit employees were unfamiliar with the work) the Arbitrator must order the District to cease and desist subcontracting, restore the work of unit school-age care employees and order a full make-whole remedy for RKP paras.

District:

The District argued that the Union is precluded from pursuing this grievance (filed April 7<sup>th</sup>) because it elected to file a ULP case (on April 23<sup>rd</sup>), which can only be decided in the District Court (after the District objected that the Union's grievance was not arbitrable). The District renewed its request, made at the instant hearing, that the Arbitrator dismiss the grievance because the Union waived its right to arbitrate by seeking the same remedy based on the same fact situation in two separate forums (despite the lack of an election of remedies clause in the collective bargaining agreement).

In addition, the District urged that the Arbitrator has no jurisdiction to address and the Union has failed to prove that the RKP jobs were unit work and that the alleged subcontracting of the school-age care/assistant positions therefore violated the parties' labor agreement. Here, the school-age "unit" work (done by only nine of the 42 RKP workers) had never been performed exclusively by unit employees; only the paras' rate of pay for school-age care is listed in the labor agreement; none of the other terms and conditions of employment in the contract have been applied to the RKP positions; all paras who worked in RKP also had regular positions in the District and only three paras worked more than a few hours a week in RKP.

Also, the Arbitrator has no authority to address the Union's ULP claim. In this regard, the District noted that Minnesota law states that ULPs may only be decided by the District Court; and that there is no clause of the labor agreement that addresses either subcontracting or ULPs. Beyond this, the Union's requested remedy herein would require the District to operate a school-age care program and make paras who formerly worked in RKP whole. Were the Arbitrator to do this, she would exceed her authority as the decision whether to operate or eliminate a program is an inherent, reserved management right as expressly stated in Article IV.

Furthermore, the case law supports the District's argument that it was only required to effects bargain even if its decision to eliminate RKP is found to constitute subcontracting (Indep. S.D. No. 88, New Ulm v. SSE, Loc. 284, 503 N.W. 2d 104, 107 (Minn. 1993)). The District urged that in the District Court action, the Court ruled on Summary Judgment that the decision whether to continue RKP was an inherent management right not subject to arbitration or negotiation. As such, the District asserted the Arbitrator has no authority to order resumption of RKP or to restore any RKP positions.

On the Union's substantive argument, the District observed that the Union has failed to prove that the District "subcontracted" the RKP work. Here, the school-age care work of the Boys & Girls Club was never and is not now under the control of the District. Also, the evidence here showed that the District has no management authority over the Boys & Girls Club, that it is not paying the Boys & Girls Club for providing any services and that the District has not agreed or entered into any agreement with the Boys & Girls Club for the provision of any services. The District is merely providing the Boys & Girls Club space. The only reason the District has not formally entered into an agreement with the Boys & Girls Club under which the Club will pay rent to the District is because of the uncertainty of the outcome of this grievance and the pending litigation. The District

asserted that if it entered into such agreement it would involve nominal rent as it charges the Great Northern Theater, the Senior Center for the use of District space. In this regard, the District noted it is not “contracting” with any of these groups to provide any services; it merely allows them to use space as in a landlord-tenant relationship. In addition, the duration and recognition clauses of the contract have not been violated by the District’s conduct.

In any event, to the extent any subcontracting occurred, the District met all of the obligations (recognized in the New Ulm case) in this situation where the contract is silent concerning subcontracting. First, the District urged that it acted in good faith. The Union’s assertions that the District’s failure to timely notify the Union of its proposed actions, its having ignored the Union’s demands to bargain over the decision to eliminate RKP and the District’s failure to give the Union a fair opportunity to propose a financial package to save RKP constitute evidence of bad faith. On these points, the District asserted that RKP paras knew that the Boys & Girls Club was being considered to provide services and that RKP was in trouble financially as early as October and December, 2009; that four Board meetings were held on the subject and three contract negotiation sessions were held prior to any decision being made on the Boys & Girls Club. No action was taken until two months after the discontinuation of RKP was officially suggested. Also, the District’s refusal to bargain was only as to the decision—it was always open to engaging in effects bargaining. It was the Union that refused to bargain effects. Finally, regarding the Union’s opportunity to offer concessions, the District noted it made one proposal to the Board which was not costed properly and contained proposals that might cause further declining enrollment, and that the Union made no counterproposals to the District in bargaining.

Second, the District’s actions constituted a reasonable business decision. The Union’s argument that the District’s decision was unreasonable because it was based on a temporary loss due to a bad economy rests upon false assumptions--that the economy will improve and that District budgets will be increased not cut. The District noted that its auditors found that labor costs and the rise in the minimum wage as well as a declining enrollment caused RKP to lose money. The District also noted that the Union proposed to increase labor costs for some RKP paras in the next contract. But other issues beyond RKP costs and profitability were of concern to the District as well—transportation services, the use of community education services for RKP, Workers’ Compensation coverage and other potential liability of the District. These were all valid concerns.

Also, the Union failed to prove that Board President Schnettler was biased or unethical in voting in favor of eliminating RKP because she applied for a position at the Boys & Girls Club after the Board vote was taken on RKP. Third, the District’s actions neither subverted the labor agreement nor did they weaken the bargaining unit or a significant part thereof. Only nine of 62 paras worked in RKP to make extra money over and above their regular District para contracts. And all nine paras are still employed by the District and some have been given additional para hours so their overall losses from the elimination of RKP are de minimus. In any event, it is not the affect on individual employees that determines whether the unit has been weakened or the agreement has been subverted.

Finally, the District contended that the Arbitrator need not consider the Union’s remedy requests as no violation of the contract has occurred here. Given that 80% of

RKP work was done by non-union employees, the Union's request for reinstating the program and/or RKP positions would exceed the Arbitrator's authority. And in light of the fact that the Union proffered insufficient evidence that paras suffered any non-mitigated losses, the Arbitrator should not order any compensation herein, and she should deny the grievance in its entirety.

### Reply Briefs:

#### Union:

The Union urged that the cases cited by the District do not bar the instant grievance on election of remedies grounds, citing Christensen v. Eggen, 577 N.W.2d 221 (1998) and Soderbeck v. CDI, Inc., 793 N.W.2d 437 (2010). Here, the Union is not seeking double redress, no determinative conclusion has been reached in either forum and the parties have stipulated in the court to a stay pending the issuance of the arbitration award. The Union is seeking consistent remedies in both forums and it merely sought to preserve its rights given the fact that the District has raised jurisdictional defenses in both forums.

Most important, however, the Union urged, is the argument that this case is driven by the contract, not the common law. The District has conceded that the contract does not contain an election of remedies clause, and this grievance is covered by the contractual definition thereof, making the District's claims on this point entirely unpersuasive. Indeed, the Minnesota 10<sup>th</sup> District Court compelled arbitration where the contract did not contain an election of remedies clause, as in this case, as evidenced by a case used by the District herein, District Exhibit 4. Finally, the District should have raised its election of remedies argument in the district Court in its Motion to Dismiss, or in its Answer as an affirmative defense. The District failed to do this in court.

The Union took issue with the District's assertion that the case law supports a conclusion that by filing a claim based on the same fact situation in court, the Union waived its right to arbitrate the grievance. Rather, cases cited by the District are factually distinguishable. In the (unpublished) Kingbird v. Indep. S. D. No.38, Red Lake case (cited by the District) the court refused to compel arbitration where the complainant had gone to arbitration and received a substantive ruling and had abandoned the grievance arbitration process two years before. Similarly, the District's arguments that paras working in RKP were not performing unit work or their RKP work was not remunerated in all respects under contract does not detract from the fact that RKP classifications and pay rates are listed in the agreement and the interpretation/application of these rates have been grieved herein. The Union also asserted that the Arbitrator has authority to order its requested remedy in full.

As it argued in its initial brief, the Union contended that the arrangement between the District and the Boys & Girls Club is a subcontract because it was entered into while the parties were negotiating a successor contract, when the District contracted with the Boys & Girls Club for non-union employees to perform the same services under the same conditions as RKP, but for far less pay. Also, the District has retained ultimate control of the Boys & Girls Club program as it can terminate the arrangement at any time and it can field parent complaints. The Union noted that both the wage and duration provisions of

the labor agreement require a finding that the parties' agreement is considered on-going until a successor contract is reached. In any event, the grievance was filed prior to the maturation of the right to strike (April 26, 2010), tolling the expiration of the agreement for purposes of this grievance.

The Union strongly denied the District's assertions that the District provided "numerous opportunities" for the Union to make concessions. The District did not mention its plans for RKP in bargaining at any time. Even after the Union discovered the District's hidden agenda, it failed to give the Union a real opportunity to save RKP jobs by refusing to give information to the Union, and putting unfair time constraints on the Union's concessionary proposal.

Finally, the Union urged that the issue whether former RKP paras mitigated damages by seeking other employment pertains only to backpay and does not lessen the substantial monetary injuries RKP paras suffered when the District subcontracted. The Union sought the same remedy stated in its initial brief and asked the Arbitrator to retain jurisdiction of this case for 120 days should she sustain the grievance.

District:

The District argued that the Union's reliance on New Ulm is misplaced. In New Ulm, the District eliminated all District food service jobs during the contract, terminated the entire bargaining unit, and contracted with a non-union firm to perform District food service, which the court found subverted the labor agreement. Also, the contract in New Ulm did not address the reduction of hours or positions. In contrast, the Rocori agreement reserves such decisions to the District and only requires the District to "meet" and "discuss", "to meet and review" a procedure for reductions/eliminations. Thus, the requirement in New Ulm that an impasse be reached before subcontracting is not applicable here. Therefore, no contract violation has occurred here.

The District asserted that it acted in good faith. Even assuming the Union had no notice of the District's intent to subcontract until January 28, 2010, that was four months before the implementation of any changes. The District took the position from the start it was not required to bargain over the decision to eliminate RKP but it offered on numerous occasions to effects bargain. Whether the Union was rushed to get its concessionary proposal together and/or whether the Union's proposal was criticized or ignored is beside the point. The District asserted it showed good faith in considering the Union's input when it had no legal obligation to do so. The District pointed to the fact that RKP paras essentially ran the RKP so the rising costs and financial status of RKP should have been no surprise to RKP paras. The Union's proposal contained calculation errors and failed to address a number of relevant issues.

The District reiterated that Board President Schnettler's testimony is irrelevant to this case. In any event, her actions did not evidence bad faith—Schnettler had supported a move to the Boys & Girls Club before any Boys & Girls Club job was posted; hers was only one vote in the majority in favor of the move; Schnettler's application for work at the Boys & Girls Club and her vote on the arrangement with the Boys & Girls Club did not violate the State's conflict of interest for public officials (§471.87) as it did not concern a sale, lease or contract in which she had a personal financial interest, or from

which she would personally benefit. In addition, no bids were required and the District never proposed to pay the Boys & Girls Club for its services.

The District argued that the labor costs of RK--for District paras and minimum wage for RKP staff--would continue to escalate and were not limited to union backpay on a settled contract, as the Union asserted. Declining enrollment had caused the closure of the Richmond site in 2001 and the Rockville site in 2009, showing this problem was ongoing. And the fact that RKP ended in the black before its elimination did not take the far greater expenses of the summer program, which the Boys & Girls Club took over in 2010, into account. Also, the Union took Schnettler's comment that the Union's proposal appeared to work on paper out of context.

Furthermore, the labor agreement was not subverted because only 15% of all unit employees' wages were affected by the District's actions, and most former RKP paras lost far less than the average 27% of income. As there is no guarantee of employment in the contract, the District could have hired site leaders, who were not District paras. The Union submitted no evidence to show District paras lost any future work opportunities.

Finally, the District argued as follows regarding the remedy, and urged dismissal of the grievance:

As in the cases cited above, the Union has not established any direct or imminent injury to its employees nor has it taken the position that the parties have reached an impasse in negotiating the effects of the School District's decision to eliminate the ROCORI Kids Program. Therefore, the Union has not established any violation of the CBA or any direct or imminent injury to its members at this point in time that present a justiciable controversy. Accordingly, the merits of the union's claim for reinstatement, back pay and benefits are not ripe for review by the Arbitrator.

Moreover, the only obligation of the School District is to negotiate the effects of subcontracting, and the Arbitrator does not have the authority to decide how such effects must be implemented. Rather, to the extent the parties cannot agree, this is an issue to be resolved through mediation through the BMS. *See* Minn. Stat. § 179A.14, subd. 2; Minn. Sta. § 179A.15 (Dist. Reply, p. 15).

## Discussion:

In this case, the District made a Motion to Dismiss the grievance on the first day of the hearing, and after oral argument and study of documents, the Arbitrator issued a Bench Award finding the grievance arbitrable and that she had jurisdiction to decide the issues in the grievance (Tr. 58-64). Having heard the case and considered all of the evidence here, this Arbitrator firmly stands by her Bench ruling.

It is axiomatic in labor relations that it is the parties' labor agreement which describes the parameters of what is arbitrable as well as the extent of the arbitrator's authority/jurisdiction. In this case, as the Arbitrator stated in her Bench Award, Article II Recognition, Sections 1 and 2 refer to the Union as the exclusive representative of District paraprofessional employees described in Article II Section 2, Definitions. Also, Article II Section 1 clearly defines terms and conditions of employment as "...hours of employment, the compensation therefor..." and Article VI Rates of Pay lists pay rates for RKP paras as "school age care" employees and "assistants." Furthermore, Article XV, Section 1 Duration clearly shows that the terms and conditions of the parties' 2007-09

agreement continue to be in effect after its expiration given the fact that the parties still have not agreed upon a successor agreement and are still technically in mediation over the 2007-09 agreement. In addition, Article XIV, Grievance Procedure defines an appropriate grievance as a “dispute or disagreement...as to the interpretation or application of the terms and conditions of employment...contained in this agreement.” This language is extremely broad, not restrictive. Article XIV, Section 3 also states the arbitrator “shall have jurisdiction” over properly filed and raised disputes and disagreements. By the parties’ clear words it is the arbitrator who must decide the propriety of grievances under this agreement.

It must be noted that the Union’s grievance herein specifically and exclusively questions whether the District’s actions herein constituted subcontracting of bargaining unit work in violation of Articles II-III, V-VIII and XI-XIII “and any and all others that apply” (U. Exh. 17). The grievance before me does not allege or mention effects bargaining. Therefore, the evidence regarding the District’s alleged failure and refusal to provide timely financial information to the Union so the Union could draft and present its proposal to save the RKP and whether the District ultimately failed to bargain in good faith concerning the effects of the elimination of RKP cannot be and has not been considered herein.

The District has argued that Article IV School Board Rights, Section 1 requires a conclusion that the instant grievance is not appropriate for decision as its substance concerns an inherent management right expressly reserved to the District. In the view of this Arbitrator, the Union’s grievance raises the reasonably debatable question whether, in fact, a violation of the labor agreement (Articles II and VI) occurred when the District arranged to have the Boys & Girls Club take over school age care at the District or whether the facts showed that the District eliminated a program or that the District was otherwise privileged to take the actions it took under Articles IV and XV. This is certainly a dispute or disagreement over the proper interpretation or application of the terms and conditions of employment contained in the effective labor agreement. This grievance is properly before the Arbitrator for decision herein.

It is also important in this case that there is no election of remedies clause in the continuing contract<sup>12</sup> and that the case pending in the courts relating to this case has been ordered held in abeyance, pending the issuance of this Award (Union Reply, Attachment A) Therefore, the election of remedies defense is not available herein. Finally, as stated in the Arbitrator’s Bench ruling herein, this Arbitrator is well aware that in Minnesota, the courts (not the arbitrator) must decide ULP claims. This Arbitrator has no intention of interfering with the courts in this area.

Both parties have cited and urged that Independent S.D. No. 88, New Ulm v. School Service Employees Union, Local 284, SEIU, 503 N.W. 2d 104 (Minn. 1993), requires a ruling in their favor.<sup>13</sup> In New Ulm, the Employer and the Union entered into

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<sup>12</sup> Attached to its Reply Brief, the Association submitted two decisions which it urged showed that the election of remedies theory does not apply here. This Arbitrator agrees that theory applies *only* to prevent double redress for a single wrong based on the same set of facts where the two remedies requested coexist and are inconsistent with each other. See Christensen v. Eggen, 577 N.W. 2d 221 (Minn., 1998); Soderbeck v. Center for Diagnostic Imaging, Inc., 793 N.W. 2d 437 (Minn., 2010).

<sup>13</sup> District Exhibit 5, Arbitrator Anderson’s award in Glencoe-Silver Lake S.D., BMS Case 07-PA-1072 (2008) is factually distinguishable from this case. There, the issue was whether the arbitrator had

negotiations and then mediation over a successor to the 1987-88 labor agreement. Impasse was never declared by BMS. However, one week after the last mediation session (July 6, 1989), the New Ulm School Board awarded a contract to provide food services to a private company and later that month, the Board discharged all of its food services workers. The Union timely filed a grievance alleging that food service workers had been terminated without just cause. The employer refused to arbitrate, asserting that its subcontracting decision was an inherent management right, requiring a conclusion that the grievance was not grievable/arbitrable. The courts ultimately decided that it was “reasonably debatable” whether the decision to contract out was subject to arbitration and that an arbitrator should decide arbitrability. The arbitrator ordered the employer to reinstate all of its food service employees with full backpay and seniority.

In upholding the arbitrator’s award, the Minnesota Supreme Court found that “the decision to contract out was an inherent management right<sup>14</sup> of the school district which is not subject to arbitration or negotiation,” *Id.* at 107. However, the Court also held that the effects of the decision to contract out were still subject to negotiation and arbitration because the employer contracted out all food services while the parties were still technically in negotiations and the labor agreement between those parties was still in effect. The Minnesota Supreme Court also held:

While the school district would have had the right to unilaterally contract out the work if the agreement had been terminated by a formal declaration of impasse, no formal impasse was ever declared by the mediator in this case. *See* Minn. Stat. § 179A.18, subd. 2 (1992). The school district never requested the mediator to determine that an impasse had been reached....Because the commissioner had not excused the parties and impasse had not been declared, the contract continued in effect, and the school district was constrained from unilaterally eliminating the entire bargaining unit. As one commentator has noted:

In the absence of contractual language relating to contracting out of work, the general arbitration rule is that management has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it.

Elkouri and Elkouri, *How Arbitration Works* 540 (4th ed. 1985) (citations omitted).

Because the school district’s actions effectively eliminated the entire bargaining unit while the contract remained in effect, the district’s actions amounted to a “subversion of the labor agreement” in violation of the “recognition” and “contract in effect” clauses. We therefore uphold the

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jurisdiction to decide whether the district had failed to bargain in good faith over the effects of the district’s decision to subcontract school bus services. Anderson found he had such jurisdiction, but that the grievance had to be dismissed because it was not ripe for consideration, as no employees had been terminated and the parties had not completed negotiations or reached impasse over benefits.

<sup>14</sup> Concerning District Exhibit 4, *SSEU Loc. 284 v. Rockford S.D.*, this decision is also distinguishable on its facts. There, in 2010, the 10<sup>th</sup> District Court of Minnesota ordered arbitration of the effects of the district’s decision to subcontract its transportation and food services, but it refused to order arbitration of the decision to subcontract itself, that decision being an inherent management right.

arbitrator's award and conclude that the school district violated the terms of the collective bargaining agreement.

This case is clearly of great importance to the parties. They have argued strongly for their positions and presented many precedents and witnesses, and voluminous documentation. But the pivotal question here is a factual one: Do the facts show that the District entered into a subcontract and was the work involved bargaining unit work? The answer is no and no.

In this case, the evidence failed to show that the District actually entered into a true subcontract with the Boys & Girls Club. In this regard, this Arbitrator notes that the District and the Boys & Girls Club have no formal written agreement. But even if the District and the Boys & Girls Club had entered into a written agreement like the ones in the record here, these agreements could not be construed as subcontracts. This is so because there is no payment running from the District to the Boys & Girls Club under these (proposed) agreements, as there would be under a true subcontract. Rather, the Boys & Girls Club has essentially agreed to use the District's facilities at no cost to the Boys & Girls Club and the Boys & Girls Club has agreed to offer the public services for which the public will pay the Boys & Girls Club directly, with no District involvement.

It is also vital that the services rendered, school-age child care services, are not statutorily required educational services. Therefore, the District could have declined to offer these services to families of District students with impunity in the first place. Furthermore, no evidence was submitted to show that the District had had any input into who the Boys & Girls Club hired and what pay and benefits Boys & Girls Club employees were to receive. Also, no evidence was proffered to show that the District had retained control of the content of the programs offered by the Boys & Girls Club or that it would have any actual power over how the Boys & Girls Club provided school-age care services. In fact, the programs offered by the Boys & Girls Club were a reason the Board gave for switching to KIDSTOP. The fact that the Boys & Girls Club and the District agreed to have the KIDSTOP program operate during the same hours and the same time periods as RKP is insufficient to prove that the District has control over the Boys & Girls Club program. Rather, this evidence supports a conclusion that the District wanted to assure that school-age care services would transfer smoothly from RKP to KIDSTOP and that parents of students being served by RKP would be accommodated.

It is also significant that the record showed that the District has arranged with other entities to provide non-educationally required services to the public using District facilities in a manner similar to its arrangement with the Boys & Girls Club. Thus the Maennor Choir, Senior Center, and Theater have paid the District nominal amounts or they have given volunteer hours to the District in exchange for the use of District facilities. This is precisely the kind of relationship the District has contemplated with the Boys & Girls Club—that the Boys & Girls Club would pay the District a nominal for use of District facilities where the Boys & Girls Club would conduct its business with the public. Again, this is not a normal subcontract.

The Union has argued that the District's decision to get out of the school-age care business was not a reasonable one. The record in this case shows that while RKP provided services, the District was liable if RKP lost money, but if RKP showed a profit, the profits had to go to the CEP; that costs to the District for wages for the nine unit and 38 non-unit RKP employees had risen in the past and would continue to rise in the

future<sup>15</sup>; and that the District has had declining levy payments for RKP and overall, its budgets have been tight for at least the last nine years, during which period the District cut a total \$4 Million from its budgets. In 2009, the District's auditors also recommended the District eliminate the RKP based on its independent analysis of the RKP. In these circumstances, given the increasing costs and future liabilities of operating RKP and in light of continuing budgetary pressures on its statutorily required programming, the District's decision to cease operating RKP and to arrange to have the Boys & Girls Club (a well-known, award-winning provider of school-age care) to provide these services needed by District parents was a reasonable decision.<sup>16</sup>

Concerning the other issue, whether the work involved is bargaining unit work, again, this Arbitrator believes that the record facts failed to prove that RKP work was unit work. On this point, the facts showed that although unit paras were paid pursuant to the labor agreement for RKP work, unit paras who performed RKP work did not receive contract benefits based on their RKP work, and the Union never grieved this fact.<sup>17</sup> Specifically, RKP openings were also never posted pursuant to the labor agreement. It is also very significant that the Union never grieved the elimination of RKP at the Richmond and Rockville sites. Also, since there is no guarantee of work hours in this agreement (Article IX), the Union cannot argue that RKP workers must be consistently offered work hours equal to their regular RKP hours. And Article IX clearly states that the paras' hours of work are at the discretion of the District. The Union points to the listing of school-age care workers and assistants pay rates listed in Article VI, but this Arbitrator also notes that the contract continues to list pay rates for "Drummer Assistant" and "Piano Accompanist" even though those positions/programs were eliminated by the District some time ago.

Having found that the facts herein failed to prove that the District subcontracted bargaining unit work, this does not lessen the significant detriment suffered by Mueller, Groetsch and Schwindel (three of the nine unit paras who had consistently worked for RKP), who lost up to 51% of their income when the District ceased operating RKP. However, the District did offer additional hours in 2010-11 to Groetsch and Mueller, albeit not up to the level of their former RKP hours. Nonetheless, only nine of 58 unit paras (or 15.5%) were affected by the District's decision to go out of the school-age care

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<sup>15</sup> Food supplies and field trips for RKP had also risen in the past and would continue to rise in the future. Also two benefits of having the Boys & Girls Club provide school-age care services are that parents might be eligible for scholarships for their children's care and that the Boys & Girls Club could offer an additional year of services to parents—school-age care through the sixth grade. The District could not offer these benefits to parents and students in RKP.

<sup>16</sup> However, the evidence regarding the District's alleged belief that the Boys & Girls Club could offer better enrichment programs to school-age care students than RKP had done was not supported by the evidence herein. In addition, the Boys & Girls Club could not offer students the consistent personal care of the nine District unit employees who had worked with them and their siblings over many years in RKP.

The Union has also argued that Board President Schnettler should not have voted on the RKP elimination/Boys & Girls Club resolution. Although as a general ethical matter, Schnettler should have recused herself, this Arbitrator notes that the District has no policy on the subject, that Schnettler's vote was not determinative of the issue, and that there was no evidence submitted herein that Schnettler improperly influenced the votes of other Board members.

<sup>17</sup> Inconsistent granting of sick leave based on RKP hours is insufficient evidence to show unit paras expected to and did receive contract benefits based on their RKP hours.

business. In these circumstances, the facts were insufficient to prove that the District's decision herein seriously weakened the bargaining unit.<sup>18</sup>

In all of the circumstances here, it cannot be said that a violation of the labor agreement has occurred as alleged in this grievance and this Arbitrator therefore issues the following

### **AWARD**

The District did not violate the parties' collective bargaining agreement when it discontinued the school-age care program. Therefore, the grievance is denied and dismissed in its entirety.

Dated and signed this 16th day of June, 2011, at Oshkosh, Wisconsin

Sharon A. Gallagher

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<sup>18</sup> It is significant that unlike this case, in the New Ulm case, the district eliminated the entire bargaining unit when it subcontracted food service to a private entity.