

IN THE MATTER OF ARBITRATION BETWEEN

INDEPENDENT SCHOOL DISTRICT NO.)	BMS CASE NO. 07-PA-1072
2859 GLENCOE-SILVER LAKE, MINNESOTA)	
)	
)	
“EMPLOYER”)	DECISION AND AWARD
)	
And)	
)	RICHARD R. ANDERSON
)	ARBITRATOR
SERVICE EMPLOYEES INTERNATIONAL)	
UNION LOCAL NO. 284)	
)	
“UNION”)	APRIL 12, 2008
)	

APPEARANCES

For the Union:

Bruce P. Grostephan, Attorney
Pamela Twiss, SEIU Chief of Staff
Susan Stradtman, Former SEIU Contract Specialist
Marcie Lein, Former Local Union Steward
Gary Frahm, Bus Driver
Darlene Mackenthun, Bus Driver

For the Employer:

Joseph E. Flynn, Attorney
Christopher Sonju, Superintendent
John Hornung, former Superintendent
Michael Hennek, Co-owner 4.0 School Services
Andy Bright, Co-owner 4.0 School Services

JURISDICTION

A hearing in the above matter was conducted before Arbitrator Richard R. Anderson on January 23, 2008 in Glencoe, Minnesota. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced by both parties and received into the record.¹ The hearing was adjourned on January 23, 2008. After Post-Hearing Brief extensions were granted to both parties, they were mailed on March 28, 2008 by the parties and received from the Employer and Union, respectively on March 29 and 31, 2008.² The record was then closed and the matter was taken under advisement.

This matter is submitted to the undersigned pursuant to the terms of the parties' collective bargaining agreement that was in effect from July 1, 2005 through June 30, 2007.³ The relevant language in Article XVII provides for the filing, processing and arbitration of a grievance including the authority of the arbitrator. During the initial stage of the hearing, a dispute arose over whether the proceedings should be bifurcated, with the Employer, contrary to the Union, arguing that bifurcation was appropriate. Counsel for the Employer also entered a motion to dismiss the grievance for lack of the undersigned Arbitrator's authority to resolve the grievance. After hearing the parties' arguments, the undersigned Arbitrator granted the Employer's bifurcation request and ruled that the issue raised by the grievance would be held in abeyance until such time as the arbitrability issue was litigated and a Decision thereof issued.

¹ Court Reporter Shelia G. Smith recorded the proceedings.

² The Brief was initially returned to the Union as undeliverable and subsequently resent by messenger service, which was received on March 31, 2007.

³ Joint Exhibit No. 1.

THE ISSUE

The substantive procedural issue raised in this proceeding is, "Whether the undersigned Arbitrator has jurisdiction in this matter, and if so, the substantive issue(s) raised by the grievance will then be subject to arbitration.

RELEVANT CONTRACT PROVISIONS

ARTICLE II – RECOGNITION OF EXCLUSIVE REPRESENTATIVE

Section 1. Recognition: *In accordance with the PELRA, the School District recognizes School Services Employees Local 284 (Glencoe-Silver Lake) as the exclusive representative for the educational support personnel employed by the School District, which exclusive representative shall have those rights and duties as prescribed by the PELRA and as described in the provisions of this Agreement.*

ARTICLE III –DEFINITIONS

Section 1 Terms and Conditions of Employment: *The term, "terms and conditions of employment," means the hours of employment, the compensation therefore including fringe benefits except retirement contributions or benefits other than employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay, and the employer's personnel policies affecting the working conditions of the employees. "Terms and conditions of employment" is subject to the provisions of the PELRA.*

ARTICLE IV – SCHOOL DISTRICT RIGHTS

Section 1. Inherent Managerial Rights: *The exclusive representative recognizes that the School District 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 organization structure and selection and direction and number of personnel.*

Section 2. Management Responsibility: *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 Regulation: *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, directives 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. 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 VII – TRANSPORTATION – BUS DRIVERS

Section 4. Subcontracting: *In the event the School District determines, during the term of this agreement, to subcontract any services performed by transportation employees covered by this agreement, which results in the involuntary separation of an employee from the School District, the School District shall provide such an employee and the Union not less than ninety (90) calendar days notice prior to the effective date of subcontracting. In the event of such notice, upon request by the Union, the School District will meet and negotiate with the Union concerning the impact of any subcontracting on the affected employee.*

ARTICLE XVII – GRIEVANCE PROCEDURE

Section 1. Grievance Definition: *A “grievance” shall mean an allegation by an employee resulting in a dispute or disagreement between the employee and the School district as to the interpretation or application of terms and conditions contained in this Agreement.*

Section 2. Representative: *The employee, administrator, or School Board may be represented during any step of the procedure by a person or agent designated by such party to act on the party's behalf.*

Section 3. Definitions and Interpretation:

Subd. 1. Extension: *Time limits specified in this Agreement may be extended by mutual agreement.*

Subd. 2. Days: *Reference to days regarding time periods in this procedure shall refer to working days. A working day is defined as all week days not designated as holidays by state law.*

Subd. 3. Computation of Time: *In computing any period of time prescribed or allowed by procedures herein, the date of the act, event, or default for which the designated period of time begins to run shall not be included. The last day of the period so computed shall be counted, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.*

Subd. 4. Filing and Postmark: *The filing or service of any notice or document herein shall be timely if it is personally served or if it bears a certified postmark of the United States Postal Service within the time period.*

Section 4. Time Limitation and Waiver: *A grievance shall not be valid for consideration unless the grievance is submitted in writing to the School District's designee, setting forth the facts and the specific provision of the Agreement allegedly violated and the particular relief sought within twenty (20) days after the date of the first event giving rise to the grievance occurred. Failure to file any grievance within such period shall be deemed a waiver thereof. Failure to appeal a grievance from one level to another within the time periods thereafter provided shall constitute a waiver of the grievance. An effort shall first be made to adjust an alleged grievance informally between the employee and the School District's designee.*

Section 5. Adjustments of Grievance: *The School District and the employee shall attempt to adjust all grievances which may arise during the course of employment of any employee within the School District in the following manner:*

Subd. 1. Level I: *If the grievance is not resolved through informal discussions, the School District designee shall give a written decision on the grievance to the parties involved within ten (10) days after receipt of the written grievance.*

Subd. 2. Level II: *In the event the grievance is not resolved in Level 1, the decision rendered may be appealed to the Superintendent of Schools, provided such appeal is made in writing within five (5) days after receipt of the decision in Level 1. If a grievance is properly appealed to the Superintendent, the Superintendent or designee shall set a time to meet regarding the grievance within fifteen (15) days after receipt of the appeal. Within ten (10) days after the meeting, the Superintendent or designee shall issue a decision in writing to the parties involved.*

Subd. 3. Level III: *In the event the grievance is not resolved in Level 11, the decision rendered may be appealed to the School Board, provided such appeal is made in writing within five (5) days after receipt of the decision in Level II. If a grievance is properly appealed to the School Board, the School Board shall set a time to hear the grievance within twenty (20) days after receipt of the appeal. Within twenty (20) days after the meeting, the School Board shall issue its decision in writing to the parties involved. At the option of the School Board, a committee or representatives of the Board may be designated by the Board to hear the appeal at this level, and report its findings and recommendations to the School Board. The School Board shall then render its decision.*

Section 6. School Board Review: *The School Board reserves the right to review any decision issued under Level I or Level 11 of this procedure provided the School Board or its representative notifies the parties of the intention to review within ten (10) days after the decision has been rendered. In the event the School Board reviews a*

grievance under this section, the School Board reserves the right to reverse or modify such decision.

Section 7. Denial of a Grievance: *Failure by the School Board or its representative to issue a decision within the time periods provided herein shall constitute a denial of the grievance and the employee may appeal it to the next level.*

Section 8. Mediation: *Upon mutual agreement, the parties may petition the Bureau of Mediation Services for assistance in the resolution of any grievance prior to arbitration. If the parties so agree, the time lines for such review and appeal to arbitration shall be adjusted by mutual agreement between the parties.*

Section 9. Arbitration Procedures: *In the event that the employee and the School Board are unable to resolve any grievance, the grievance may be submitted to arbitration as defined herein:*

Subd. 1. Request: *A request to submit a grievance to arbitration must be in writing signed by the aggrieved party, and such request must be filed in the office of the Superintendent within ten (10) days following the decision in Level III of the grievance procedure.*

Subd. 2. Prior Procedure Required: *No grievance shall be considered by the arbitrator which has not been first duly processed in accordance with the grievance procedure and appeal provision.*

Subd. 5. Decision: *The decision by the arbitrator shall be rendered within thirty (30) days after the close of the hearing. Decisions by the arbitrator in cases properly before the arbitrator shall be final and binding upon the parties subject, however, to the limitations of arbitration decisions as provided in the PELRA. The arbitrator shall issue a written decision and order including findings of fact, which shall be based upon substantial and competent evidence presented at the hearing. All witnesses shall be sworn upon oath by the arbitrator.*

Subd. 7. Jurisdiction: *The arbitrator shall have jurisdiction over disputes or disagreements relating to grievances properly before the arbitrator pursuant to the terms of this procedure. The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as defined herein and contained in this written agreement; nor shall an arbitrator have jurisdiction over any grievance which has not been submitted to arbitration in compliance with the terms of the grievance and arbitration procedure as outlined herein; nor shall the jurisdiction of the arbitrator extend to matters of inherent managerial policy, which shall 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. In considering any issue in dispute, the arbitrator's order shall give due consideration to the statutory rights and obligations of the public*

school district to efficiently manage and conduct its operation within the legal limitations surrounding the financing of such operation.

FACTS

The Employer, hereinafter the School District, is an independent public school district with education facilities located in the communities of Glencoe and Silver Lake, Minnesota and its District Office located in Glencoe. The Union, through Local No. 284, is recognized as the collective bargaining representative in an educational support staff bargaining unit that includes school bus driver employees. The bargaining unit consists of approximately 60 employees. The parties have a history of collective bargaining in this unit dating back to 1999.⁴

On June 28, 2006, the School District published a legal notice in the Silver Lake Leader soliciting bids for a transportation contractor.⁵ Shortly before this date, the School District had sold its busses to Prairie Bus Services, Inc. or 4.0 School Services, Inc. as it is more commonly known.⁶ On July 10, 2006 the School District's Board, without notice to the Union, resolved to subcontract its transportation services to 4.0 School Services.⁷ It authorized the District Administration to prepare a contract consistent with the details specified on the bid from 4.0 School Services, which the School Board had approved during this July 10th meeting.⁸

During the July 10, 2006 School Board meeting the Board also voted to subcontract its custodial and maintenance services to Dashir Management Services and its food services

⁴ The Glencoe-Silver Lake Support Staff Union was formed as an independent union in 1997 and affiliated with the Union in 1999.

⁵ Union Exhibit No. 6.

⁶ June 28, 2006 article from the Glencoe Enterprise. Union Exhibit No. 9.

⁷ Union Exhibit No. 5.

⁸ The contract between the Employer and 4.0 was approved at a School Board meeting on November 13, 2006. Union Exhibit No.

to Taher Food Service Management.⁹ On July 17 and 20, 2006, Taher and Dashir, respectively, sent a letter to respective affected School District employees soliciting whether or not they wanted to accept the School District's severance package and give up guaranteed employment or refuse the severance package and accept guaranteed employment.¹⁰ The letters also outlined the terms and conditions of employment for the respective companies.

During this same time period, the parties were engaged in negotiations for the current Agreement, which included a School District proposal for a new transportation subcontracting clause. In an e-mail submission from Union Contract Organizer Susan Stradtmann to Mediator Alan Olson dated July 28, 2006, the Union outlined its position on 21 open contract issues, which did not include the new subcontracting provision. The current Agreement, a product of BMS mediation, was subsequently agreed to on August 6, 2006 and signed by the School District on October 9, 2007 and by the Union On November 16, 2007.¹¹ This Agreement contained a new provision that allowed the School District to subcontract its school bus driving services (Article VII Section 4).

The School District, by letter from Counsel Joseph E. Flynn dated November 1, 2006 addressed to then Local Union Steward Marcie Lein, notified the Union that the School District intended to subcontract the school bus driving services and invited the Union to enter into negotiations on the impact of said subcontracting.¹² While it appears that the subcontracting agreement had already been finalized between the School District and 4.0 School Services and 4.0 was already managing the bus driving services, the school bus

⁹ Union Exhibit No. 5.

¹⁰ Union Exhibits No. 7 and 8.

¹¹ Joint Exhibit No. 1.

¹² School District Exhibit No. 2.

drivers were still employees of the School District and covered under the terms and conditions of the Agreement. Former Union Contract Organizer Konrad J. Stroh in a letter to Counsel Flynn dated November 8, 2006 informed the School District of its willingness to discuss the School District's intent to subcontract the school bus driving services.¹³

On December 18, 2006, 4.0 School Services Co-owner Mike Hennek sent a memorandum to all the School District's bus drivers. The memo stated,¹⁴

RE: Employment for the 2007 school year

Several months ago, the Glencoe-Silver Lake Board of Education voted to award the bid for the management of the current Glencoe student transportation department to the Four Point 0 School Services, also know (sic) as Prairie Bus Service. We are (sic) appreciate their vote of confidence and are excited to provide our services for the remainder of the 2006-07 school year. As part of the decision to contract the student transportation service the school district also agreed to permit the transfer of the current Glencoe-Silver Lake School bus drivers to Four Point 0 School Services.

We realize that this is a very serious decision and may have different impacts on each bus driver, before we advertise to the general public for any available positions, we would like to know if you are interested in working with us at Four Point 0 School Services.

In order to facilitate a smooth transition, we need to know your intention for employment with Four Point 0 School Services. Please sign the bottom of this letter with your intention and return to the transportation office no later than Friday, December 22, 2006. Four Point 0 School Services guarantees your 06-07 wage per hour.

I accept my severance package from that School District and understand that Four Point 0 School Services is under no obligation to rehire me for my Current position or wage.

(Signature)(Date)

Or

I do not wish to accept my severance package from the School District and understand that Four Point 0 School Services is obligated to offer me a position at my current wage.

¹³ School District Exhibit No. 3.

¹⁴ Union Exhibit No. 2.

(Signature)(Date)

*Andy Bright
Owner
4.0 School Services*

*Michael Hennek
Owner
4.0 School Services*

John Hornung, the School District Superintendent during this period, testified that when he learned of the 4.0 School Services memorandum through calls from bus drivers as well as then Union Steward Lein, he assured all of them that the School District did not authorize the memorandum and 4.0 School Services should not have issued it. He testified that he specifically informed Union Steward Lein that the memorandum could not be in effect because the parties had not negotiated the effects of the subcontracting. Superintendent Hornung also contacted 4.0 School Services co-owner Hennek and informed him that he had no authority to send out the memorandum.

Thereafter, the parties met on January 3, 2007 at which time School District Counsel Flynn presented the Union with a Letter of Agreement, which included inter alia the following language,¹⁵

4. On November 1, 2006, the School District effected such notice, through its counsel, by notifying the Union of the School District's intent to subcontract such bus driving services and also invited the Union to enter into negotiations on such matters.

5. The School District and the Union did engage in negotiations and this Letter of Agreement is entered into to outline the provisions as agreed to by the parties as follows:

A. All employees of the bargaining unit who lose their position as the result of the implementation of subcontracting by the School District shall be afforded the opportunity to a position with the successful bidder for the contracted services. Employees may or may not elect to take such employment.

¹⁵ School District Exhibit No. 4.

B. Any employee who meets the eligibility requirements for severance pay as provided in Article IX, Section 4, shall receive severance benefits for which they are eligible, if any, based on the provisions of Article IX.

C. All employees will be entitled to payment for accrued and unused wellness leave as provided in Article X, Section 1, Subd. 10 and accrued and unused personal leave as provided in Article X, Section 11.

D. An employee who chooses not to accept employment with the successful bidder for the contract services will also be eligible for three months of health insurance contribution as provided in Article VIII, Section 2, assuming such employee is currently enrolled in the health insurance program. Employees who choose to accept employment with the subcontractor will not be eligible for health insurance contribution as outlined in this paragraph.

6. Upon execution of this agreement, the School District will provide employees with a notice on which the employee must indicate whether or not the employee intends to accept employment with the subcontractor. Employees will respond within ten days of receipt of the notice as to the employee's decision, and failure to respond within such time period shall be deemed an intention on the part of the employee to accept employment with the subcontractor.

7. The School District will process payment as provided in Paragraph 5 hereof within 30 days of receipt of the employee's response as provided in Paragraph 6 hereof.

8. Notwithstanding the provisions of Article VII, Section 4, of the collective bargaining agreement between the School District and the Union, in consideration of all provisions of this Letter of Agreement, the subcontracting shall take place on January 15, 2007.

Except as otherwise provided herein, the terms and conditions of employment as provided in the collective bargaining agreement bearing the same date as this Letter of Agreement shall govern all terms and conditions of employment during the term of the Agreement.

Contract Organizer Stroh rejected the School District's proposal in a letter to School District Counsel Flynn dated January 25, 2007. The pertinent parts of the letter state that,¹⁶

The Union's position is that the bus drivers of Glencoe Silver-Lake ISD No.2859 are a part of the bargaining unit that is covered under the 2005-2007 Master Working Agreement from which the terms and conditions of employment and benefits are so governed. SEIU is their Exclusive Representative.

Their wages, terms and conditions of employment, and benefits remain in place. We are

¹⁶ School District Exhibit No. 5.

not in agreement with, nor will we sign off of, your January 3, 2007 proposed Letter of Agreement

The School District then filed for mediation with BMS on January 29, 2007, when according to the School District, the Union did not make any counter proposal.¹⁷ On February 2, 2007, the Union through Contract Organizer Stroh filed a "class action" grievance on behalf of bargaining unit employees over the School District's subcontracting of its school bus services. The Grievance form stated,¹⁸

Nature of Grievance: *Subcontracting out of district owned busses and bus drivers as advertised in Silver Lake Leader Newspaper from June 8-June 15, 2006. Also advertised in the McLeod County Chronicle. July 10, 2006 action by school board to award Prairie Bus Service Transportation contract for 2006 - 2007. Letter from Joseph Flynn, dated 11-1-06 stating intentions to sub contract. This was already a done deal. No negotiations prior to on "impact" of the subcontracting on the affected employees.*

When was your first knowledge of the above noted grievance? *Upon receipt of Petition signed by Joseph Flynn dated 1-29-07.*

Specific Article(s) of Contract violated: ***Article VII. Transportation - Bus Drivers Section 4 Sub Contracting. Spirit and intent of the CBA. Alos (sic) for consideration Article III. Definitions; Article IX. Other Benefits; Article XV. Vacancies and Transfers, Section 2 Transfers and any and all other Articles that pertain to the terms and conditions of employment and benefits.***

Specific Remedy Sought: *Bus Drivers of Glencoe-Silver Lake are a part of the bargaining unit. They shall be covered under the terms and conditions of employment and all benefits covered under the CBA. SEIU Local 284 is their exclusive representative.*

Also on February 2, 2007, Contract Organizer Stroh sent a letter to BMS Commissioner James Cunningham Jr. informing him that the School District's request was grievance mediation and not contract mediation since the parties had a contract in place; that any grievance meditation was premature since a grievance had just been filed over the

¹⁷ School District Exhibit No. 6.

¹⁸ Union Exhibit No. 1.

subcontracting issue; and that the Agreement called for mutual BMS grievance mediation assistance, something which the Union had not agreed to.¹⁹

On February 7, 2007 School District Counsel Flynn sent Commissioner Cunningham a letter alleging that the Union was seeking to avoid mediation over subcontracting and listed the various parties' actions involving the issue as of that date. In addition, School District Counsel Flynn concluded that a petition for contract (interest) mediation was appropriate and cited the following,²⁰

- 1. The Union and the School District have a dispute relating to reaching an agreement on the impact of subcontracting on affected employees and has proceeded as contemplated by the collective bargaining agreement to meet and negotiate with the Union.*
- 2. The Union is breaching its duty to meet and negotiate in good faith as demonstrated by its communications to the parties and to the Bureau of Mediation Services.*
- 3. Mediation of a contract or interest dispute does not require a joint petition but an individual petition is sufficient and appropriate.*
- 4. The Union's reference and reliance upon Article XVII, Grievance Procedure, Section 8, Mediation, is misplaced since this refers to grievance mediation whereas the petition for mediation requests interest or contract mediation.*

Contract Organizer Stroh responded to School District Counsel Flynn's letter in his February 9, 2007 letter to Commissioner Cunningham with the position that contract mediation was not appropriate since parties' subcontracting issue was a grievance issue.²¹ School District Counsel Flynn in a letter to Commissioner Cunningham dated February 14, 2007 responded to Contract Organizer Stroh's latest letter and reiterated that his February 7, 2007 letter to Commissioner Cunningham clearly laid out the basis of the contract dispute.²² He also stated that, "*Certainly Mr. Stroh is free to file a grievance and, of*

¹⁹ Union Exhibit No. 7.

²⁰ School District Exhibit No. 8.

²¹ School District Exhibit No. 9.

²² School District Exhibit No. 10.

course, the School District will respond to it. However, the filing of a grievance by Mr. Stroh does not remove his statutory duty to engage in good faith bargaining and has nothing to do with the contract dispute for which the School District seeks mediation."

By letter dated February 21, 2007, Commissioner Cunningham notified the parties that the School District's petition for mediation was properly filed and Mediator Alan Olson would be the assigned Mediator.²³ Contract Organizer Stroh in a letter dated February 22, 2007 to Mediator Olson agreed to enter into "courtesy" mediation; but continued to maintain the Union's right to pursue grievance processing of the subcontracting dispute.²⁴ In Contract Organizer Stroh's letter he indicated that he was retiring and Union Chief of Staff Pamela Twiss would be his replacement. A mediation session was subsequently held without any resolution.²⁵

Thereafter, the parties continued to discuss the subcontracting issue. A level II grievance hearing was held on March 20, 2007 wherein nothing was resolved and a Level III hearing was scheduled for March 29, 2007.²⁶ The rescheduled hearing was held on April 11, 2007. Prior to her presentation Chief of Staff Twiss prepared an agenda to be presented at the meeting.²⁷ As a part of this agenda, Chief of Staff Twiss cited what the School District could do to resolve the grievance. The document stated,

SEIU Local 284 recognizes the district's right to sell its bus fleet and outsource management of its transportation staff. The union does NOT support the illegal subcontracting of transportation staff jobs, which has taken place over the past year.

The union will consider this issue resolved when the Board makes the following commitments in writing:

1) All drivers in the district to be made whole. At the least, all drivers need to be

²³ School District Exhibit No. 11.

²⁴ School District Exhibit No. 12.

²⁵ Exact date unknown.

²⁶ Superintendent John Hornung letter dated March 20, 2007 to Local Union Chief of Staff Twiss. Union Exhibit No. 12.

²⁷ Union Exhibit No. 13.

covered by the contracts with SEHJ Local 284, retroactively to the beginning of the school year in September of 2006;

2) Moving forward, drivers will continue to be covered by the contract with SEIU Local 284, whether they are managed by District staff or employees of 4.0 School Services, or any other management company;

3) Drivers are allowed to collectively bargain for their wages, benefits and working conditions under the Public Employees Labor Relations Act.

Pursuant to a request by School Board Treasurer Nancy Morris, Chief of Staff Twiss sent her a letter dated May 1, 2007 setting forth the resolution the Union was seeking in the grievance.²⁸ The resolution cited was,

1) All drivers in the district to be made whole. At the least, all drivers (including those currently on the payroll of 4.0 School Services) need to be covered by the contracts with SEIU Local 284, retroactively to the beginning of the school year in September of 2006;

2) Moving forward, drivers will continue to be covered by the contract with SEIU Local 284. whether they are managed by District staff or employees of 4.0 School Services, or any other management company;

3) Drivers are allowed to collectively bargain for their wages, benefits and working conditions under the Public Employees Labor Relations Act.

On May 17, 2007 Superintendent Hornung sent Chief of Staff Twiss a letter informing her that the School Board had denied the Union's grievance.²⁹ The Union subsequently filed for arbitration with BMS by letter dated May 21, 2007. On June 20, 2007, School District Counsel Flynn notified the undersigned of my selection as the arbitrator. A hearing was thereafter scheduled for August 9, 2007, but was postponed on August 6, 2007 at the request of newly retained Union Counsel Bruce Grostephan. The matter was then rescheduled for November 29, 2007; but again was postponed, this time through a request from School District Counsel Flynn.

²⁸ Id.

²⁹ School District Exhibit No. 1.

Prior to the rescheduled hearing date School District Counsel Flynn sent Union Counsel Grostephan a letter dated October 2, 2007 outlining a proposed Letter of Agreement.³⁰ This Letter of Agreement was similar to the January 3, 2007 Letter of Agreement. However, certain changes were made in Item 5. The previous language in Item 5(D) was eliminated. Item 5(D) formerly stated,

An employee who chooses not to accept employment with the successful bidder for the contract services will also be eligible for three months of health insurance contribution as provided in Article VIII, Section 2, assuming such employee is currently enrolled in the health insurance program. Employees who choose to accept employment with the subcontractor will not be eligible for health insurance contribution as outlined in this paragraph.

Language pertaining to health insurance was changed and added to Item 5(B) language as follows,

Any employee who meets the eligibility requirements for severance pay as provided in Article IX, Section 4, shall receive severance benefits for which they are eligible, if any, based on the provisions of Article IX. In the alternative, such an eligible employee may waive the severance payment and elect full single health insurance for 12 months as provided in Article VIII of the collective bargaining agreement. (Modification in bold.)

The language in Item 5(C) was retained as Item 5(D). This language stated, All employees will be entitled to payment for accrued and unused wellness leave as provided in Article X, Section 1, Subd. 10 and accrued and unused personal leave as provided in Article X, Section 11.

A new provision was added as Item 5(C) The new provision stated, Those employees who do not meet the eligibility requirements for severance pay as outlined in Article IX, Section 4 will receive prorated severance benefits based upon unused sick leave, if any, in an amount representing the fractional part of their years' of service that is to the 15-year requirement; i.e., a seven-year employee would receive 7/15 of 2/3 of accrued and unused sick leave.

Union Counsel Grostephan in a letter dated October 15, 2007 responded to School District Counsel Flynn's proposal.³¹ The letter stated.

Please be advised that the Union has reviewed your October 2, 2007 settlement

³⁰ School District Exhibit No. 13.

³¹ School District Exhibit No. 14

proposal in the above-entitled matter. The Union has rejected the settlement offer. The unions proposal is that all drivers as of September, 2006, be reinstated under the Collective Bargaining Agreement. The bus drivers will continue under the contract until they retire. The parties will engage in good faith negotiations pursuant to the Public Employment Labor Relations Act with regard to any contract modifications.

No further settlement discussions were introduced by either party at the January 23, 2008 hearing. Evidence was adduced that the school bus drivers still remain employees of the School District covered under the provisions of the Agreement. While the Union contended that five employees were terminated during the pendency of the grievance, the evidence adduced at the hearing established that only bus driver Gary Frahm was terminated. However, his termination was not the result of subcontracting, but involved alleged employee misconduct. His termination was the subject of another Union grievance that resulted in arbitration.³²

POSITION OF THE SCHOOL DISTRICT

It is the School District's position that the undersigned Arbitrator does not have jurisdiction to review the claims raised by the Union's grievance. The School District cites a number of arguments in support of its position.

- Contract Organizer Stroh does not have standing under the terms of the Agreement to bring a "class action" grievance on behalf of unnamed members of the Union. The Agreement provides that, "A *"grievance"* shall mean an allegation by an employee resulting in a dispute or disagreement between the employee and the School district as to the interpretation or application of terms and conditions contained in this Agreement." The provision requires that the grievance involve an actual employee in order for the School District to evaluate and respond to the grievance. Nowhere in the grievance

³² Arbitrator Daniel G. Jacobowski dismissed the grievance on March 27, 2008 in Independent School District No. 2859 and School Service Employees Local No. 284, BMS No. 07-PA- 1071

form is any employee identified. In fact, no employee, contrary to the Union's assertions, has been terminated as a result of the School District's intent to subcontract.

- The Union's claims that the School District bus drivers are part of the bargaining unit covered under the terms and conditions of the 2005-07 Agreement, and that the Union is their exclusive representative are not properly before the Arbitrator. The fact that the bus drivers are part of the bargaining unit and covered by the Agreement is not in dispute. As stated earlier the Agreement requires an actual dispute or disagreement to constitute a grievance. Since no claim to this effect has been stated by the Union with respect to bus drivers' coverage under the Agreement, the Arbitrator has no jurisdiction to consider the grievance.
- The Arbitrator does not have jurisdiction to address issues of whether certain employees are a part of a bargaining unit. The Union is implying through the remedy it is seeking that individuals employed by or to be employed by 4.0 School Services should be a part of the bargaining unit and given the benefits of the Agreement. The Agreement provides that the jurisdiction of an arbitrator is not extended to proposed changes in the terms and conditions of employment. By asking the Arbitrator to include non-employees in the bargaining unit, the Union is seeking a significant change to the terms of the Agreement. Moreover, the inclusion of individuals or positions within a bargaining unit is exclusively governed by Minnesota Statute (179A. 09),³³ and to be determined under the jurisdiction of the BMS Commissioner. Thus, clearly, the Arbitrator does not have jurisdiction as evidenced by law, as well as the plain and unambiguous terms of the contract, to provide the Union with the remedy it apparently is

³³Public Employment Labor Relations Act (PELRA).

seeking with respect to the application of the Agreement to non-School District bus drivers.

- The Arbitrator does not have jurisdiction to determine whether the School District has bargained in good faith as to the effects of its intent to subcontract. The failure to bargain in good faith is an unfair labor practice claim to be decided by the District Court. At hearing, the Union requested that the Arbitrator decide whether the School District bargained in good faith. The basis of the Union's claim in this regard is not clear as the School District did invite the Union to bargain on its intent to subcontract. Furthermore, the School District has not taken action to implement any subcontract during the negotiation process. Nonetheless, whether or not the School District failed to bargain in good faith is a matter for the District Court to decide pursuant to PELRA, not for an arbitrator to decide as a contract grievance.
- The School District did not expressly agree to arbitrate an unfair labor practice claim related to good faith bargaining. There is no provision in the Agreement that compels the School District to arbitrate a right or obligation under PELRA. The only dispute or disagreement that the parties have agreed to submit to arbitration under Article XVII Section 4 is a "*...dispute or disagreement between the employee and the School district as to the interpretation or application of terms and conditions contained in this Agreement.*" Terms and conditions of employment are defined in Article II Section 1 of the Agreement and do not include good faith bargaining.
- Contrary to the Union's argument at the hearing, the Agreement does not impliedly incorporate PELRA's provisions of good faith bargaining as an issue subject to the grievance procedure. The Union contends that the Agreement obligates the School

District to comply with the requirements of PELRA and makes the law enforceable through the grievance procedure. This assertion is without merit. While the Agreement provides that the parties are subject to state and federal laws, such language does not express a substantive agreement to incorporate such laws and rules. Thus, the Union's argument that the Agreement requires the School District to "obey the law" is not a term and condition of employment incorporated into the Agreement and does not reflect the clear and unambiguous meaning of the Agreement or the parties' intent to arbitrate such issues. The Union has other avenues to pursue such claims.

- The courts have not held that a grievance Arbitrator has authority to determine whether a party has engaged in good faith bargaining with respect to subcontracting. The Union argues that other arbitrators and the Minnesota courts have found that a determination as to whether good faith bargaining took place with respect to a school district's intent to subcontract is within the jurisdiction of a contract grievance, citing Elk River.³⁴ This decision, however, does not stand for this proposition. While the arbitrator and the court in Elk River addressed whether the school district engaged in good faith negotiations over the effects of its decision to subcontract, the facts in Elk River are distinguishable from this case. In Elk River, the school district and union negotiated language in their contract different from that contained in the parties' Agreement. The relevant contract language in Elk River provided: "*In the event the School Board wishes to eliminate its bus/van fleet and subcontract the entire Independent School District 728 transportation operation, it will negotiate in good faith concerning the effects of such subcontracting consistent with Minnesota Law.*"

³⁴ Service Employees Local 284 v. Independent School District No. 728, Elk River, Co., No. A05-703, 2006 WL 851935 (Minn. Ct. App. 2006)(unpublished).

The agreement in Elk River did not contain a provision that involuntary separation was a possible effect of subcontracting. The Elk River School District also took action to terminate its employees prior to any negotiation of the effect of its intent to subcontract.

Termination or involuntary separation was negotiated in the instant matter and agreed to by the parties in the Agreement. The parties agreed that if the School District determined to subcontract and terminate its employees, it would provide employees with 90-day notice; and then, and only then, negotiate the effects of the termination. Finally, the parties in Elk River did not object to the jurisdiction of the arbitrator to consider whether the school district bargained in good faith.

- The Arbitrator does not have jurisdiction to determine whether the School District can subcontract. The Courts have ruled that as a matter of law, the decision of an employer to subcontract is not a term and condition of employment rather an inherent managerial right not subject to the grievance procedure. There is no provision in the Agreement that divests the School District of this right; rather the right has been clearly spelled out in Article VII Section 4.
- The Arbitrator does not have jurisdiction to determine the effects of the School District's intent to subcontract. In this regard, the Union's claims are not ripe for review. The School District has not terminated any employees or made any other decision regarding the effects of its intent to subcontract the school bus driving services. On the other hand, the School District invited the Union to participate in effects bargaining and made an initial proposal. The negotiation process is not yet complete; therefore, the Union's claim is not ripe for consideration by the Arbitrator.

- The Union is asking for remedies that are within the inherent authority of the School District. The Union is asking the Arbitrator to decide that its bus drivers remain a part of the bargaining unit not subject to termination. The School District does not dispute that it has an obligation to negotiate the effects of its subcontracting decision that may include whether school bus drivers are terminated, transferred or offered positions with the subcontractor. There is no obligation to continue indefinite employment of the drivers. While the School District has an obligation to negotiate the subcontracting effects, the Arbitrator does not have any authority to decide how such effects must be implemented. Rather, the disagreement is an issue to be resolved through BMS mediation where BMS has already recognized its authority and jurisdiction.

POSITION OF THE UNION

The Union's position is that the issues raised by the grievance are subject to arbitration and properly before the undersigned Arbitrator for final and binding resolution. The Union cites the following arguments to support its position.

- Minnesota law requires that the School District negotiate the implementation of subcontracting in good faith. State law requires that "*a public employer have an obligation to meet and negotiate in good faith with the exclusive representative of public employees in an appropriate unit regarding grievance procedures and the terms and conditions of employment...*"³⁵. Grievance procedures are governed by Minn. Stat. §179A.21. The definition of a "grievance" is "a dispute or disagreement as to the interpretation or application of any term or terms of any contract required by §179A.20.

³⁵ Minn. Stat. §179A.07, subd. 2(a).

- The Minnesota Supreme Court in General Drivers Union v. Independent School District No. 704, 283 N.W.2d 524, 525 (1979) held that contracting out is a term and condition of employment, which is subject to the statutory obligation to negotiate. The Court determined that any waiver of the statutory right to bargain must be in clear and unmistakable language, which is not the case herein.
- The Arbitrator has jurisdiction to determine whether the School District bargained in good faith over subcontracting school bus driver services and whether subcontracting allows termination of those employees affected; and this jurisdiction has been affirmed by the courts. Arbitrator John Remington addressed this issue in an arbitration decision wherein he determined that the employer had the obligation to negotiate in good faith consistent with Minnesota state law.³⁶ The employer appealed Arbitrator Remington's decision and the Court of Appeals affirmed that the Arbitrator had jurisdiction to determine the issue whether the school district negotiated in good faith on the effects of its decision to subcontract bus driver services.³⁷ In its ruling the Court stated that the arbitrator had the jurisdiction to find that the school district violated the collective bargaining agreement by failing to bargain in good faith with the respondents over the subcontracting of transportation and by terminating the respondents without just cause. On June 20, 2006 the Minnesota Supreme Court affirmed the Appellate Court decision.³⁸

³⁶ ISD No. 728 and SEIU Local 284, BMS Case No. 03- PA-652, October 18, 2004,

³⁷ School Service Employees Local 284 v. Independent School District No. 728, Elk River, Minnesota, unpublished opinion, April 4, 2006, Court of Appeals Case No. A05-703.

³⁸ A05-703.

OPINION

The Union's argument that the subcontracting issue is arbitrable has merit. Contrary to the School District's assertions, this Arbitrator has jurisdiction to determine whether the School District negotiated in good faith over the effects of its decision to subcontract its school bus driver services to 4.0 School Services. While BMS and the courts have authority to determine whether good faith bargaining allegations are unfair labor practices under PELRA, Arbitrators can and have resolved good faith allegations, if said allegations are subject to the provisions of a collective bargaining agreement. Clearly, the School District's obligation to bargain about the effects of its decision is contained in Article VII Section 4 of the Agreement.³⁹ This Arbitrator's authority is also supported by what other arbitrators have done in the past as pointed out by the Union in its Post-hearing Brief. Arbitral authority to resolve good faith bargaining grievance issues, as set forth herein, has also withstood Appellate Court review.

In addition, the Union has never raised an unfair labor practice issue with BMS or the courts. Assuming it had, there is precedent, albeit the federal private sector, that grants arbitrators authority to resolve contract issues under certain circumstances that are also alleged to be unfair labor practices.⁴⁰

Although the issues raised by the grievance may be subject to arbitral authority, there is merit to the School District's argument that this Arbitrator lacks jurisdiction to resolve the instant grievance. The School District argued that the grievance issue, namely the failure of the School District to bargain in good faith, was not ripe for consideration since no

³⁹ While the precise language of this Section does not specifically "bargain in good faith", PELRA requires good faith bargaining over terms and conditions of employment, which includes contract provisions.

⁴⁰ Collyer Insulate Wire, 192 NLRB 837v(19671 and United Technologies Corp., 268 NLRB 557 (1984). See also Dubo Mfg. Corp., 142 NLRB 431 (1963).

employees had been terminated and/or the parties had not completed negotiations on the effects of the subcontracting. It is clear that no school bus driver has been terminated as a result of the School District's decision to subcontract school bus driver services to 4.0 School Services. It is also clear from the hearing transcript that the Employer's position is that school bus drivers are subject to termination when the effects of said subcontracting are implemented. While this may be the School District's initial and current position, no final disposition has been implemented since impasse has not been reached. Moreover, when the Union agreed to the Article VII Section 4 subcontracting provision, it knew from the language ("*...which results in the involuntary separation of an employee from the School District...*") that termination was a distinct possibility. This position in and of itself is not per se "bad faith" bargaining.⁴¹ It could, however, be cumulative conduct that establishes overall "bad faith" bargaining.

The same can be said of the School District's decision to subcontract school bus driver services.⁴² While the School District's alleged "bad faith" actions in its decision to subcontract could arguably be raised as an indicia of "bad faith" bargaining, it also is not per se "bad faith" bargaining in and of itself. This action is also not independently grievable. The reason being is that it is independently outside the time lines established by the grievance procedure. The same can also be said for the Employer's decision to subcontract as well as any subsequent implementation prior to its November 1, 2006 official notification to the Union.⁴³ Moreover, the right of the School District to subcontract

⁴¹ The Union argued in its brief that the School District's decision to terminate employees was evidence of a failure to bargain in good faith.

⁴² The Union argued in its brief that the subcontracting decision and notification to the Union was evidence of a failure to bargain in good faith.

⁴³ It is hard to imagine that the November 1st letter to the Union was its first knowledge of the School District subcontracting bus driver services to 4.0 School Services. This action, as stated earlier herein, was in the School Board July 10, 2006 minutes, which obviously the Union is copied as well as carried in local newspapers.

its transportation services was agreed to by the parties prior to any subcontracting actions of the School District and was ultimately contained in the parties' Agreement.⁴⁴

It is also clear that at the time the grievance was filed, a "bad faith" effects bargaining determination by this Arbitrator could not be made. This is reflected in the parties' actions, both before and after the grievance was filed, that I have carefully set forth in this Decision as it relates to ongoing discussions over the effects of the School District's subcontracting. The evidence shows that there had been only one meeting between the parties, that being on January 3, 2006 when the School District presented the Union with its "effects" proposal⁴⁵, which the Union rejected out of hand by letter dated January 25, 2006.⁴⁶

The parties were hardly at impasse on February 2, 2006, when the instant grievance was filed. At that point in time, allegations of "bad faith" effects bargaining were obviously premature. This is especially true when you consider that there was subsequent School District initiated mediation as well as numerous discussions between School District Counsel Flynn and Union Chief of Staff Twiss, as pointed out in the FACTS narrative portion of this Decision. Not only were there discussions, there were also proposals presented by both parties, with at least one School District proposal offering concessions to its initial January 3, 2006 proposal.⁴⁷ Thus, it is clear that the Union could hardly allege that the School District violated Article VII Section 4 when it initiated a grievance after one bargaining session and made no attempt itself to bargain prior to filing its grievance.

⁴⁴ Based upon the known bargaining chronology, it appears that the Union agreed to the subcontracting provision before the July 10, 2007 School board meeting.

⁴⁵ School District Exhibit No. 4.

⁴⁶ School District Exhibit No. 5.

⁴⁷ October 2, 2007 letter from School District Counsel to Chief of Staff Twiss. School District Exhibit No. 13.

In view of the foregoing, I conclude and find that this Arbitrator lacks jurisdiction in this matter since the Union's grievance was premature for the reasons set forth above.⁴⁸ The grievance will, therefore, be dismissed.

AWARD

Having found that this Arbitrator does not have jurisdiction to resolve the issues raised by the Union's grievance, it is hereby dismissed in its entirety.

Dated: April 12, 2008

In: Eagan, Minnesota

Richard R. Anderson, Arbitrator

⁴⁸ Since the undersigned Arbitrator has affirmed this School District argument, there is no reason to discuss its other arguments at this time.