BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RACINE EDUCATIONAL ASSISTANTS ASSOCIATION

and

RACINE UNIFIED SCHOOL DISTRICT and the BOARD OF EDUCATION OF THE RACINE SCHOOL DISTRICT

Case 176
No. 56482
MA-10302

(Grievance of Jacqueline Corona)

Appearances:

Weber & Cafferty, S.C., by **Mr. Robert K. Weber**, on behalf of the Association.

Mr. Frank L. Johnson, Director of Employee Relations, Racine Unified School District, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "District", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Racine, Wisconsin, on April 6, 1998. The hearing was transcribed and both parties filed briefs. The Association filed a reply brief that was received by June 2, 1998. Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUES

The parties have agreed to the following issues:

1. Is the grievance arbitrable?

2. If so, did the District violate Article IV of the contract when it removed grievant Jacqueline Corona from her scorekeeper's position and, if so, what is the appropriate remedy?

BACKGROUND

Grievant Corona, an educational assistant who serves as a hall monitor at J.I. Case High School, served as the scorekeeper for the girl's sophomore and varsity basketball teams on away games during the 1995-1996 school year for which she received payment of $15 for each game, or a total of $30 per event. Corona did not serve as scorekeeper for the team's home games because that job was held by someone else. The District agrees that Corona performed her scorekeeper duties very well and that she was fully qualified for the position.

Corona in the spring of 1996 asked Stephen Benkert, the head girl's basketball coach, whether she could keep her scorekeeper's job for the ensuing 1996-1997 school year. Benkert gave Corona a response which led her to believe that she would be retained for that position.

Benkert told Corona in the fall of 1996 that she would not be given her former scorekeeper's job. Said job, instead, was then given to high school student Ryan Lepisto, the son of freshman girl's basketball coach Gene Lepisto. Corona was subsequently allowed to take tickets at certain school events, an activity that generated less money than her former scorekeeper's duties.

Benkert decided to not offer Corona her former job because of what he believed to be Corona's inappropriate conduct as a fan the year before when she shouted encouragement during the team's home games when she was not serving as scorekeeper. Benkert thus testified that some players on the team and their parents had complained to him about Corona's actions and what they believed to be her too-zealous cheering as a fan. Benkert acknowledged that Corona never made any inappropriate comments when she was working as the scorekeeper on away games.

Benkert also admitted that neither he nor anyone else on the District's behalf had ever mentioned this problem to Corona before the decision was made not to use her services for the subsequent 1996-1997 school year. He also said that he never mentioned this problem to her because: "When a person pays their admission price, I guess they're allowed to say whatever they want."

For her part, Corona testified that when she asked Benkert why she could not keep her scorekeeper's job, he replied that it was because of an incident, never identified, that happened in the past year. Corona surmises that said incident referred to when she reported certain basketball players for disciplinary action, thereby resulting in a one-game suspension of one of the players.

Corona filed the instant grievance on December 3, 1996, leading to the instant proceeding.

POSITIONS OF THE PARTIES

The Association argues that the grievance is arbitrable because "the law favors arbitration of labor disputes" and because Article VI, Section 1, of the contract "confers substantive arbitrability insofar as it permits the Employer the right to hire and to determine the basis of retention" of an assistant assigned to 'any and all work'". On the merits, the Association claims that the grievant's non-retention as a scorekeeper was "arbitrary and capricious" because her work was satisfactory; because her demeanor as a fan was not made a condition of her scorekeeper's duties; and because the hiring of a student to replace her was unreasonable. As a remedy, the Association requests a make-whole remedy that reinstates Corona to her scorekeeper's job and pays to her whatever sum of money she lost when said job was taken away from her.

The District, in turn, contends that the grievance is not arbitrable because the collective bargaining agreement does not apply to non-bargaining unit jobs such as scorekeeper and other extra-duty positions and because the grievant was "not acting within the scope of an educational assistant when she accepted and performed the job of scorekeeper." It also maintains that there in any event is no merit to the grievance because its actions here were not unreasonable, arbitrary or capricious because Benkert had a valid basis – i.e. complaints about Corona's role as a fan – for not rehiring her for the 1996-1997 school year.

DISCUSSION

In agreement with the Association, I find that the District did not treat Corona very well since it never brought any complaints to her attention at a time when she was serving as scorekeeper and when she could have done something about them. Had the District done so, it is entirely possible that Corona would have modified her behavior as a fan. Moreover, since Corona performed her scorekeeper's duties in an acceptable manner, the District surely owed Corona a full explanation as to why she could not continue in that role, which is something it never offered until the day of the instant hearing.

The District's treatment of Corona, however, is a separate question of whether her grievance is arbitrable under the contract and whether the District violated the contract.

As to that, the Association relies on Article VII Section 1, of the contract that defines a grievance as follows:

> 1. A grievance is a claim which alleges that one or more provisions of this Agreement have been incorrectly interpreted and/or applied. Such claim must be based on an event or condition which affects wages, hours, and/or conditions of employment of one or more assistants.

The Association maintains that substantive arbitrability exists here because Corona is claiming that the District has violated the following underlined parts of Article IV of the contract, entitled "Board Rights":

> The Board retains, without limitation, all powers, rights, authority, duties, and responsibilities conferred upon it and invested in it by the laws and Constitution of the State of Wisconsin, and/or the United States, including, but without limiting the generality of the foregoing, the sole and exclusive right to hire, assign, transfer, promote, demote, discipline, and discharge all employees, to determine the basis of selection, retention, and promotion, to direct and supervise the performance of any and all work, to judge efficiency and competency in the performance of work assigned, to dismiss or lay off temporarily or permanently, and to subcontract any and all work. The Board retains the right to determine the jurisdiction of the assistant's work. (Emphasis added).

Article IV's reference to "retention" and "any and all work", however, only refers to bargaining unit work, as the contract does not even refer to extra-duty positions such as scorekeeping. The scorekeeper's job thus has never been considered bargaining unit work, since Benkert testified without contradiction that said jobs have been offered to teachers and even non-school employes over the years. Benkert also testified that in filling said jobs, he has never been guided by any collective bargaining agreements with any labor organizations because it is well understood by all that said extra-duty jobs are not covered under any labor contract. Human Resources Supervisor Mary Jane Soldana and Activities Director Paul Kolpek corroborated Benkert's testimony.

The grievance therefore is not substantively arbitrable because it raises an issue that is unrelated to Corona's bargaining unit duties and because Article VII, Section 1, limits grievances to alleged violations of the contract.

Contrary to the Association's claim, this result is not contrary to the public policy of encouraging the arbitration of labor disputes since said policy – as set forth in such cited cases as UNITED STEEL WORKERS V. WARRIOR & GULF NAVIGATION CO., 36 U.S. 574 (1960), AT&T TECHNOLOGIES, INC. V. COMMUNICATION WORKERS OF AMERICA, 475 U.S. 643 (1986), and JOHN WILEY & SONS, INC. V. LIVINGSTON, 376 U.S. 543 (1964). – has no applicability when, as here, the dispute centers on work that is not covered by a contract and hence is not grievable.

That also is why there is no merit to the Association's additional claim that "the practice of making such jobs available to employes had become a 'benefit' as that term is defined in arbitrable law" under such cases as SAGINAW MINING CO., 76 LA 911 (Ruben,

1981). Thus, SAGINAW centered on whether the employer violated the contract when it discontinued its prior practice of giving out free holiday hams at Christmas time. It therefore had nothing to do with whether employes could grieve over their employer's actions in removing them from a non-bargaining unit provision. The Association's reliance on *Management Rights*, Hill & Sinicropi (BNA, 1986), is also inapposite for the same reason.

In light of the above, it is my

AWARD

That the grievance is not substantively arbitrable; the grievance is therefore dismissed.

Dated at Madison, Wisconsin this 31st day of August, 1998.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

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