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"Facts Are Stubborn Things"

Alain Rene LeSage (1668-1747)

"The Association of Labor Mediation Agencies will hold its 1975 conclave at the Chateau Halifax in Halifax, Nova Scotia. The meeting will run from July 27 through August 1. ALMA meetings always manage to be both informative and unstuffy. In addition to the formal programs for the education of neutrals, there are always some well-planned 'divertissements'. (PERB's own Muriel Gibbons is ALMA Secretary-Treasurer and she understands all the dimensions of divertissement.) I hope many panel members will be able to make arrangements to attend.

"My former Cornell colleague, Byron Yaffe, in his new role as counsel to the Wisconsin Employment Relations Commission, will probably be among the attendees. I recently reread Byron's brief but excellent article on fact-finding in the Journal of Law & Education.¹ In discussing some of the impediments to effective fact-finding, Byron states, 'Perhaps one of the most difficult problems for a fact-finder is determining whether demands made during negotiations reflect attempts by the parties to resolve legitimate problems. If the fact-finder is to be of any effect in persuading the parties to respond to their opponent's demands, he must also persuade them that legitimate problems lie behind the demands, and that these problems must be dealt with. Because the parties, as well as the fact-finder, know that many demands are 'throw aways', the chore of separating the wheat from the chaff is often that of the fact-finder's. Without extensive discussion of such demands, most effectively in a mediatory capacity, it is unlikely that the fact-finder will be able to accomplish this task with relative accuracy. Under such circumstances, the fact-finder's recommendations are not likely to be treated very seriously by the parties.'

"I have long since abandoned the virginal notion that fact-finding is anything but a misnomer. Are there still those who believe that a fact-finder is utilized to find 'facts'? I do not believe that it is often possible to have a successful fact-finding effort without mediation. The mediation may not be done overtly because of resistance by the parties to the fact-finder's undertaking such a role, but apparently, sometimes by osmosis, successful fact-finders seem to do it. We shall continue to press the panel to attempt mediation openly in each instance in which the parties permit them to do so.

"A Wisconsin Employment Relations Commission colleague of Byron Yaffe, Ed Krinsky, told an IRRA Meeting in Albany five years ago, that, 'If mediation does not precede fact-finding then the fact-finder may have to spend long hours trying

to make recommendations based on poorly defined issues and little knowledge of which issues are really important to the parties.^{1/2} A study by Yaffe and by Howard Goldblatt in 1971 seemed to demonstrate that at least in New York State PERB cases, mediation during fact-finding was much more successful than mediation which occurred prior to fact-finding.^{1/3} I suspect that a study conducted now would show this still to be true at least so far as teacher-school board disputes are concerned. I am not sure that this would be true of other kinds of impasses. In any event, Erwin Kelly has asked PERB's Research chief, Tom Joyner, to examine the possibility of a study of the effectiveness of both types of mediation. (Perhaps this is the opportunity to report with what obscene joy, Kelly cast off the robes of Prince Regent after my return from Cornell - but no, I will refrain.)

"We continue to be distressed by occasional fact-finding reports that do not clearly inform the parties precisely what the fact-finder means in his recommendations. The fact-finder must in every instance zero in on the specific issue before him and insure that there is no ambiguity in the language he uses in making his recommendations with regard to such issues. For those panel members who prefer to be literary, the rationale for each recommendation provides plenty of opportunity. Jim Belasco used to dress his recommendations with lacy trim from Shakespeare and the Elizabethan poets. Max Doner recently quoted the Talmud. I am not sure how this impacts on the parties but it is certainly not objectionable. The important thing is, of course, that there should be no misunderstanding by the reader as to what the fact-finder intended. In this connection, it is well to keep in mind that if the fact-finder were functioning as an arbitrator, he would want to be certain that the parties understood his award and the rationale that went with the arbitral opinion. In this connection I would quote Paul Prasow, the distinguished arbitrator who teaches at the University of California, Los Angeles, 'The arbitrator should, of course, strive to render a ruling and opinion that the parties can live with--an opinion that deals with and shows an understanding of the underlying problem that gave rise to the grievance. Nothing is so frustrating to the parties as to receive an arbitrator's award which fails to treat the underlying issue.'^{1/4} (Emphasis added) The rule for fact-finding is the same.

"We can continue this discussion at the ALMA Conference in Nova Scotia and I urge that you appear. Surely, of all of earth's bounty lobster is one of the most enjoyable. Where else and at what better time can one have magnificent sea food and education too?"

^{1/1} Byron Yaffe, "Fact Finding In Public Education Disputes: A Neutral View", Journal of Law & Education, Vol. 3, Number 2 (April 1974).

^{1/2} Edward B. Krinsky, "Avoiding Public Employee Strikes - Lessons From Recent Strike Activity", Proceedings of the 1970 Annual Spring Meeting of Industrial Relations Research Association, IRRRA, Social Science Building, Madison, Wisconsin 53706 (May 1970).

^{1/3} B. Yaffe & H. Goldblatt, "Fact Finding In Public Employment Disputes In New York State: More Promise Than Illusion", School of Industrial and Labor Relations, Cornell University (1971).

^{1/4} Paul Prasow, "The Arbitrator's Role", Institute of Industrial Relations Reprint No. 240, University of California, Los Angeles, Cal. 90024 (1974).