



bulletin

FOR MEDIATORS / FACT FINDERS

PUBLISHED BY THE NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

June 1977
(Vol. 8, No. 6)

HAROLD NEWMAN'S CLOUDY CRYSTAL BALL

"Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Lawgiver to all intents and purposes, and not the person who first wrote or spoke them."

Benjamin Hoadly
Bishop of Bangor
(Sermon Preached Before the King-1717)

The writer is not a lawyer. This is not a boast but a confession. He would also confess that he has been known to make occasional wagers at racetracks. It was therefore with some astonishment that he saw the New York State Court of Appeals reverse an unanimous decision some weeks ago, in a landmark case involving interest arbitration in New York State, an equally unanimous decision of the Appellate Division of the State Supreme Court.¹ The Court of Appeals decision is now, of course, the law and it is of extraordinary interest to the PERB and to the union and management advocates who are our clients.

Tom Rinaldo of our panels had chaired an interest arbitration panel charged with making an award involving the Police of the City of Buffalo. The Appellate Division Fourth Department had held that the award must be vacated because the majority of the arbitration panel had failed to take cognizance of the fact that the City employer lacked the means to fund the award and had thus disregarded one of the statutory criteria.² Mr. Justice Fuchsberg writing for the unanimous Court of Appeals in reversing the Appellate Division stated in part re the arbitration panel:

"It was within its province, under the applicable statute, not only to judge the facts but to choose the priorities to which, in its judgment, some matters were entitled to over others. It had a right to balance the ability of the City to pay against the interest of the public and the PBA members.... It was therefore for it, and not for the courts, to decide what weight to give each matter vis-a-vis the others."

And further:

"Beyond any such analysis, however, and most significant, it must be recognized that the statute, the wisdom of which it is for others to decide, vests broad authority in the arbitration panel to determine municipal fiscal priorities within existing revenues."

Tom Rinaldo is a law professor. We should have had faith that he would eventually be sustained....

On the day that our office received the Court of Appeals decision, the Governor signed a two year extension of the interest arbitration amendment to the Taylor Law which covers Police and Firefighter negotiations. (The bill had passed both legislative houses over-whelmingly.) In the memorandum accompanying his signature on the bill, Governor Carey stated that the changes from the prior statutory language would "... make it clear that arbitrators must make findings with respect to each statutory criterion which the parties put in issue, that each such finding must have an evidentiary basis in the record, and that the arbitrators must specify in their final determination what weight was given to each finding and why." We have always felt with regard to both fact finding recommendations and interest arbitration awards that there ought indeed to be rationale given. We have so urged on more than one occasion in this publication. Quite apart from the question of possible judicial review, we believe that the parties, and in our sector, the public, are entitled to such rationale. We sent last week to every member of our interest arbitration panel a copy of the

¹ Matter of City of Buffalo v. Thomas Rinaldo, _____ New York _____ (1977)

² Civil Service Law, Section 209.4 (vb)

bill extending police-fire interest arbitration, together with the Governor's Memorandum of Approval and a copy of the Court of Appeals decision. With this triple assortment of reading for the den rather than the coffee table, we sent a cover letter in which we said in part, "...We would especially emphasize the importance in every interest arbitration that you conduct under the new amendment of specifying the basis for your findings in the award and the articulation of reasons for the weight given to each of the statutory criteria."

Some panel members may, despite our strong feeling that this should and must be done, consider that the chore is onerous. Not only do we not so believe, but the legislature has already assuaged the pain. Under the new amendment, interest arbitrators in the police-firefighter cases will be paid by the parties. While at PERB rates you may have thought you labored almost for sweet charity's sake -- you may now charge your fee!! Thus, the parties may no longer appear as in forma pauperis.

Immediately after these most exciting events took place in Albany, we departed for the American Arbitration Association's Wingspread Conference in Wisconsin. There we delivered a paper on the general subject of the meeting which was The Training of Neutrals. We were properly chagrined when we discovered that some of the discussants, including some who are good personal friends, did not agree with all of our views. (It pains us that some of the outstanding labor relations professionals can be so wrong about some matters....) There was, however, no disagreement that anyone doing interest arbitration should have had substantial mediation as well as arbitration. Since this contention brought a cry of placet from such eminences as Wayne Horvitz, the newly enthroned Director of FMCS; AAA President, Bob Coulson; Yale Law School's Harry Edwards; Wisconsin's Jim Stern and the sainted Jean McKelvy, we are much comforted. This has been the doctrine of New York State PERB with regard to the structure of our interest arbitration panel. We would have it that every interest arbitration award should be unanimous through the neutral Chairman's mediation efforts in executive sessions.

That Elysian time is not yet. But we need not be unhappy. Lone years ago, a member of our family reflecting on the brevity of human life, sometimes before real accomplishment, wrote as part of an elegy:

Lucky, lucky tortoise!
Has no rigor mortis,
He will know his daughters, daughters, daughters.

Arthur Newman is now less despairing. He knows that while we don't usually live as long as tortoises, things do improve usually as we grow older and sometimes wiser. What did Dr. Coue advise his patients to repeat? "Tous les jours, a tous points de vue, je vais de mieux en mieux." ³

³ Emile Coue (1857-1926) "Every day, in every way, I am getting better and better."

* * * * *

Critical problems in dispute resolution will be analyzed at the 26th annual conference of the Association of Labor Mediation Agencies in Hollywood, Florida, July 24 through 29.

Wayne L. Horvitz, Director of the Federal Mediation and Conciliation Service, will highlight the problems followed by panel discussion by labor relations experts from California, New Jersey, Washington, Canada, Pennsylvania and Florida. Among the topics to be discussed are bargaining in the sunshine, the mediator's role when parties are not bargaining in good faith, and seeking a settlement at "any cost".

Theodore W. Kheel, well-known mediator-arbitrator, will present the keynote address on "Current Trends in Labor Relations". The banquet speaker will be David J. Fitzmaurice, President, International Union of Electrical, Radio and Machine Workers, AFL-CIO. Mr. Fitzmaurice will discuss "Recent Experience in Coalition Bargaining".

A comparative view of collective bargaining from the standpoint of representatives of foreign countries will be one of the features of the week-long program. Represented in this session will be the United Kingdom, Australia, Spain and Germany.

Other speakers include William Brunstad, Vice President for Labor Relations of General Motors Corporation; Robert Coulson, President, American Arbitration Association; Jerry Wurf, President, American Federation of State, County and Municipal Employees, AFL-CIO; Jeffrey B. Tener, Chairman, New Jersey PERC; Robert D. Helsby, Chairman, New York State PERB; Martin Morand, Director, Center for the Study of Labor Relations, Indiana University of Pennsylvania; and Eric W. Lawson, Jr., Chief Regional Mediator, New York State PERB.

Information on the conference may be obtained from M. Gibbons, New York State PERB, 50 Wolf Road, Albany, New York 12205.