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HARAROLD NEWMAN'S CLOUDY CRYSTAL BALL

"Those who aim at great deeds must also suffer greatly."

Marcus Licinius Crassus
(70 B.C.)

"I have this past week performed an annual and always pleasurable chore. I have addressed the convention of the New York State School Boards Association. As always at meetings of those involved with education, there were questions which began, 'Now, Dr. Newman, you stated that....' I offered no correction. I never do. Sometimes, with other kinds of audiences it is assumed that I am a lawyer. If the question is not asked of me directly, I may not confess to my listeners that I have no right to toss off expressions like 'nunc pro tunc' or 'res judicata'. Of late, however, in the late hours of the night, my wife enjoying guiltless sleep, I have confessed to myself that it would have been far, far better if my youth had not been spent in dissolute ways and my formal education truncated.

"My sorrow and regret stem not from the challenges of mediation. I think I understand it and am good at it. I think I know the skilled mediator from the semi-skilled. But the challenge of our arbitration responsibilities taxes a mind insufficiently disciplined and thinking processes insufficiently trained.

"In an earlier article in this publication[1] I called attention to Marty Barr's excellent article on compulsory arbitration in the Albany Law Review.[2] In response to my article, the highly knowledgeable and skilled arbitrator, Sidney Cahn, wrote to me. Sid Cahn first noted the following from the Barr article. 'The parties may properly be required to address themselves to those recommendations and offer additional evidence only on those recommendations with which they disagree. The parties will have the burden of persuading the arbitration panel to revise the fact-finder's report.'[3]

"Sid Cahn then stated, 'I must assume that for the fact-finder to find the facts in order to make appropriate findings all the evidence at the command of the parties had been given to the fact-finder, so that it virtually would be impossible for the parties to 'offer additional evidence'. To persuade the arbitrator to revise the fact-finder's report the parties should, at the least, be permitted to

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1 PERB Bulletin For Mediators/Fact Finders, July 1975, Vol. 6, No. 7.

2 Martin L. Barr, "The Public Arbitration Panel as an Administrative Agency: Can Compulsory Interest Arbitration be an Acceptable Dispute Resolution Method in the Public Sector?" Albany Law Review (Vol. 39, No. 3, 1975).

3 Ibid.

show the arbitrator why and in what manner, facts theretofore given the fact-finder, must or may be construed in a fashion different from that adopted by the fact-finder. This is not covered by the following sentence beginning with the words, 'The parties will have the burden of persuading the arbitration panel to revise the fact-finder's report'. That burden may be met in several ways not limited to the offer of 'additional evidence'.'

"Is Sid Cahn correct? I am not sure. What was the legislative intent? Again, I am not sure. Now, I will put Ossa upon Pelion. In a very thoughtful letter to Marty Barr, Jack (Professor J. D.) Hyman of the University of Buffalo Law School, raised other questions with regard to the Law Review article. I believe that the Barr-Hyman correspondence and the references in Marty Barr's letter to Justice Burstein's decision in the Nassau Police case are of such interest and importance that I am transmitting them with this issue of the PERB Bulletin. (The Barr letter to Professor Hyman responds in part to the point raised by Sidney Cahn.)

"Jack Hyman is not only determined to force PERB's distinguished counsel, Martin Barr, to examine further the problems raised by our compulsory arbitration statute, but has sent me a letter which examines and discusses a number of other questions. I cannot reprint the letter in its entirety because of space limitation, but Professor Hyman's comments in part, '...Another problem that I encountered arose from the fact that under the statute the only issues over which the panel has jurisdiction are those which are certified by the petition and the response of the parties to PERB to be still in dispute. It seems clear that under the language of the statute, the panel cannot go back and redo other aspects of the agreement on which the parties have come to terms, even though the panel's treatment of issues in dispute would warrant a reconsideration of those earlier settlements. The inability to do that may make for an awkward situation in dealing with some of the issues in dispute. Furthermore, the panel's focus on only those issues in dispute tends to throw into the background the whole course of negotiations prior to the deadlock which led to arbitration. It is hard under those circumstances to get a good overall perspective on the settlement which is being developed. I suppose this problem exists in fact-finding generally, and maybe you have the answer. It might be easier to handle in arbitration if all three members of the panel were impartial, but in this case at least, it seems clear to me that the municipality and employee representatives were carrying on the negotiating process. This made it necessary for the chairperson to try to be sensitive to the practicalities of possible settlements of particular issues while at the same time keeping his eye firmly on the record and the statutory standards....'

"I would urge members of our fact-finding and arbitration panels to respond to the observations of both Professor Hyman and Sidney Cahn.

"Meanwhile, I recall how in the early years of the PERB, I used to kick up my Duncan Phyfe legs and like the Lord Chancellor in 'Iolanthe' would sing, 'The law is the true embodiment of everthing that's excellent. In it you'll find no fault nor flaw, and I my friends, embody the Law!' Now, alas, I am not so sure."

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