



TENTH ANNIVERSARY ISSUE

In Retrospect...

By Robert D. Helsby
Chairman

We are celebrating the Tenth Anniversary of the Taylor Law! From the perspective of the time of its enactment, that is astonishing. Many doubted that the Law would remain intact for that long — and they were the pessimists! Few saw anything to celebrate in the prospect of a law that both required public employers to engage in collective bargaining with unions representing their employees and denied those unions the right to strike. Nevertheless, as we mark ten years of the Public Employment Relations Board, unions are competing with each other for credit for the passage of legislation that increases the powers of PERB while employers generally support the essential characteristics of the Law. Evaluated against objective criteria, the Taylor Law is successful. A higher proportion of public employees in New York State are covered by collective bargaining agreements than elsewhere, while the incidence of public employees' strikes is among the lowest in the country.

As Chairman of PERB, I would like to take the credit for this success, and I would also like to say that I knew it all along. Actually, neither is true. When I was first nominated as Chairman, I thought of myself as a sacrificial lamb, and I accepted the appointment reluctantly. The unassumingness of my assignment, however, proved an asset. Perhaps

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The Law — Goals and Achievements

By Muriel K. Gibbons
Editor, PERB NEWS

Ten years have elapsed since New York State's Taylor Law went into effect on September 1, 1967 and in that one decade the face of labor relations for public employers and public employees in the state has changed markedly. There is perhaps no other law that has had such an immediate and profound effect on government, the economy, the welfare of the employees, the role of public employers and the public itself.

In the ten year span, the Law, which was considered experimental at the outset, has undergone change, both major and minor and the atmosphere surrounding public sector bargaining has modified from one of strong militancy to an accepted way of creating stability between government and its employees. The Law and the Public Employment Relations Board, which administers the Law, have established an impressive record on many fronts and have been leaders in establishing precedents in public sector labor relations.

Over the years membership on the Board has changed twice. The original members included Robert D. Helsby, Chairman, Joseph R. Crowley and George H. Fowler. Fred L. Denson was appointed to Mr. Fowler's post on December 2, 1973 and served until June 2, 1976 when Ida Klaus joined the Board.

To note the 10th anniversary, this edition of the *PERB News* will be devoted to articles by Board members and the Directors of the various sections of PERB on the effect of this new force on New York State.

To put it all in perspective, however, it is important first to provide a brief history of the first ten years.

The Law and How It Changed

Based on the recommendations of the Governor's Committee on Public Employee Relations in its report of March 31, 1966, the 1967 Legislature enacted the Public Employees' Fair Employment Act, popularly known as the Taylor Law. In 1969 two major amendments were enacted — a section prohibiting improper practices by both public employers and employee organizations and an amendment to the section prohibiting strikes establishing penalties applicable to individual employees. Other clarifying amendments were adopted in 1969 and 1970, but there were no fundamental changes. In 1971, PERB was empowered to exclude management and confidential employees from coverage of the Law upon application by the employer. No significant amendments were adopted in 1972 and 1973.

Significant changes were made in 1974 concerning resolution of contract disputes. One related to resolution of deadlocked negotiations in school

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The Captain of PERB Has Gone Ashore

By Joseph R. Crowley,
Board Member

In the summer of 1967 the pangs resulting from the birth of the Taylor Law were striking at the nerve centers of labor and management representatives in the public sector. One group felt the law illusory, inadequate and inept. The other regarded it as an unwarranted interference with the obligation of public officials to serve their constituents. In brief, the fledgling law was not well received by either group and, indeed, many vociferously sought its repeal forthwith.

Into this maelstrom strode the new Captain of PERB, Robert Helsby, confident and determined to make every effort to see that the objectives of the legislative enactment be achieved. While some viewed the law with despair, he saw only Hope — while some predicted chaos, he saw a resultant order in the relations between employer and employees.

He realized at once that the fears, the concerns and, indeed, the outrage engendered by the new law resulted in the main from a lack of understanding of the law and the manner of its implementation, giving recognition to that truism, "Men tend to fear that which is unknown."

The new Captain thereupon established a massive educational program throughout the state preaching the gospel, the message of the new law to employer groups, employee groups, legislators at all levels and to the news media. In brief, where two or more people would gather to learn about the new law, Bob Helsby or his designated alter ego would be there in the midst of them. The acceptance, albeit reluctant at times, of the law in its early years owes much to our Captain's educational program.

At the same time, he addressed himself to two equally important tasks:

First, the ship of PERB surely had to sail in troubled waters. To this our Captain was no stranger. Thus, he knew the ship would flounder unless manned by a crew who feared not the storms — who were well trained to accomplish the arduous tasks to be assigned, and this above all, who would share his devotion and commitment to achieve the objectives of the legislation. He signed on such a crew.

Second, he realized the new law was, in many ways, mere bones and though well-structured sorely needed to be fleshed out. He gathered a group — a task force of labor experts — and he and his task force worked long in the summer of 1967 to draft rules and procedures so that when the law went into full force and effect, PERB would be ready. It was. The rules and procedures so drafted reflect the measure of our Captain — adhere strictly to the legislative mandates, be fair and equitable to all parties and that the resultant procedures be feasible. They were.

Thus, in September 1967, PERB sailed from a safe harbor and in the course of the ensuing years weathered severe blows, avoided being grounded on the shoals or

crushed against the reefs, and sailed safely through Scylla and Charybdis — all due to the steady hand and presence of the man who had the conn.

This careful and safe navigation resulted from our Captain's resolve that PERB in its administration, determinations and decisions reflect its impartiality even, where necessary, in reviewing and rejecting a determination of the appointing authority, the Governor. Clearly during the command of our Captain the fog of "political influence" never put the ship of PERB off course.

As noted previously, he chose the crew of PERB most carefully utilizing exacting standards. Yet this was just the beginning. He developed and engendered in the entire staff from professional to file clerk an esprit de corps. This spirit was premised on the concept of the Chairman that the Taylor Law would succeed only if the staff had the commitment to use all its resources and energies to make it work. This the staff did — Labor Day weekends over the years were seldom looked upon as an oncoming holiday but rather as a time to gird one's conciliatory loins to ensure as far as possible the opening of schools unfettered by labor strife. So it can be said

"Be it Buffalo, downstate or the southern tier,
Helsby was there and most every year."

Thus hours, holidays, sleepless nights and gruelling days were never the concern of staff (emulating the Captain); rather the main concern was the reduction of strife and the achievement of labor peace.

Our Captain did not neglect the education of the parties after the first year; rather he expanded the programs. He set up a myriad of such sessions formal and informal. Under his leadership PERB sponsored national and international symposia bringing to New York outstanding experts in the United States, Europe, Canada, and Australia.

To insure a supply of neutrals he established training programs both to educate the inexperienced and to sharpen the skills of the experienced. Further, he initiated training to equip members of minorities to assume the role of mediator, factfinder and arbitrator.

Through all of this, PERB gained a position of preeminence throughout the nation and soon our Captain's advice was sought by many states either in the formulation of legislation or the establishment of agencies similar to PERB.

All of the above is but a small part of Bob Helsby's contribution to PERB and in turn, to the People of the State of New York.

As our Captain is piped ashore, we hope and trust that his high standards, his sense of commitment and his great spirit will always be the mainstay of PERB.

God Speed, You Our Captain.

Relationship Between Unit Size And Scope of Bargaining

By Harvey Milowe
Director of Public Employment
Practices and Representation

There has not been a proliferation of negotiating units in the New York State public sector — less than 3,000 for the more than 900,000 state and local employees exercising Taylor Law rights, some 700,000 since the enactment of the Law in 1967. This should not be surprising since the Board has consistently maintained that the statutory criteria, taken together, require that a unit be the most



HARVEY MILOWE

appropriate one, not merely an appropriate unit. Further, the "administrative convenience" standard that the unit "...be compatible with the joint responsibilities of the public employer and public employees to serve the public" requires the designation of as few units as possible. That fragmentation is to be avoided unless negotiating incompatibility can be demonstrated has resulted in the division of state employees into large interdepartmental groupings of related occupations and local government employees typically into overall, residual or large blue and white collar units with only teachers, nurses, policemen and firemen having their own units.

Because of this approach to uniting and since there are numerous professional and technical personnel in government service, it was anticipated that scope — the determination of which items are proper subjects for negotiations, would be a threshold problem. Logically, the larger the unit, the greater the potential for controversy since the pressing concerns of a large unit will necessarily relate to the overall operation of the government, and the occupational interests of the professional and technical groups will necessarily relate to the level and nature of services delivered by the government.

Expedited Procedures

To handle the expected deluge of scope cases, the Board, in late 1971, established an expedited procedure under which the record and briefs are submitted directly to it, rather than to the hearing officer, for determination.

Now, after ten years' experience, has there been demonstrated any relationship between size of unit and scope?

At this point, some numbers would seem in order; excluding the state and public authorities, there are in local government 219 police, 93 fire, and 488 "other" units, and in the field of education, 732 teacher, 176 administrative, 35 community college faculty, 8 community college administrative, and more than 900 non-instructional units. Since 1969, there have been more

3,000 improper practice charges filed, about half alleging a failure to negotiate in good faith. While of these some concern the negotiating process — a refusal to meet or to furnish information, the vast majority refer to a unilateral action by the employer and its ultimate disposition would require a scope determination. In this type of case, the underlying action — the unilateral change, certainly reflects the employer's view of its management prerogative, but the union's reaction — the filing of a charge, need not be correlative of its view of scope, as engendered by either size or composition of the unit, and a distinction should be drawn between "formal" and "real" scope. Under "formal," the union's reaction is defensive; its aim is to preserve the very nature of the obligation to negotiate in good faith over as broad a range of items as possible. Under "real," the union's reaction is affirmative; rather than attempting to preclude the employer from acting, its aim is to gain objectives expressing the negotiating aspiration of the unit which, if controverted, would be brought to the Board under its expedited determination procedure.

Few Expedited Cases

Under this procedure, from 1971 to 1974, there were only five cases; three instituted by police and fire unions, one by a union representing employees in higher education and one by a union representing a non-instructional unit. From 1975 to date, there were 35 cases; nine brought by teacher unions, two by unions representing county units and, obviously triggered by the police-fire arbitration amendment of July 1974, 24 involving police and fire units (13 by unions). While a limiting factor relating to the use of the procedure may be the Board's determination that a party may propose for agreement matters which are not mandatory subjects but not insist upon carrying them "into and beyond fact-finding," the numbers show that police-fire units are almost the exclusive user of the procedure — resort, however, being limited to less than 6% of all the police-fire unions. When compared to the total number of units in the state, its use is infinitesimal.

The paucity of "real" scope cases might be explained by the supposition that unions have successively obtained their demands in negotiations without having to involve the Board, or somehow avoided the confrontation by devising and agreeing to alternatives or perhaps not yet reached that point of negotiating maturity where attention can be turned to other than bread and butter items. From my perspective, the passage of ten years and the thumbing through a sampling of contracts would not support any of these hypotheses. Instead, I would empirically conclude that there is no relationship between size and scope and tentatively offer as explanation that public sector employees have no desire to participate in managerial decision making.

My Freshman Year At PERB

By Ida Klaus,
Board Member

I entered the PERB freshman class of 1976 convinced that the nine-year service gap between me and upper classmen Helsby and Crowley would close almost as quickly as it takes to toss off with ease the words "Public Employees' Fair Employment Act" and to keep in mind the total number of amendments added to it each year.

It was not immodest, I thought, to believe that I was bringing with me a treasure chest crammed with credits for immediate advance placement garnered from my professional life experience in three previous performance-related careers.

First, and most essentially, heavy credit would have to be allotted to the grounding acquired at the NLRB in the fundamental principles of labor-relations jurisprudence and philosophy evolved over the years in the development of our national labor policy. Then, it would be reasonable to expect an equally high rating for attempting to open up the separate world of labor relations in the public sector by an early experimental design of a program for New York City employees, a venture which, in turn, served as a model for the early Federal employee relations plan. The shift in my third career into the real-life scene around the bargaining table and the actual relationships forged by its processes seemed to me to be worth plenty — not only for the years of service, but for the scars of battle as well. All I needed, then, to catch up with the class of '67 was a short orientation period, after which I could live off the fat of that apperceptive mass of accumulated experience.

First Board Meeting

Then, on the morning of June 10, 1976, I was sworn in as a happy freshman member of the Board. Within an hour, I was sitting with the two veterans of the class of '67 at my first oral argument. The issue concerned the legality of the inclusion in an agreement of a "parity" clause. The subject was, to be sure, one I had encountered and dealt with in practical terms in my most recent former career. But the legal question was a novel one for me, yielding no direct answer in NLRB law. My colleagues, however, moved comfortably in the area, as they had already expressed their views in a somewhat different context in what has come to be considered a lead case. Now, in my quasi-judicial role, I became aware of the significance of the case law so carefully and empirically evolved by PERB over the years on the duty to bargain under its own separate and special legislative mandate. The value of some of my treasured credits began to look a little soft as I found myself unable to persuade at least one of my colleagues of the soundness of my views. Much research lay ahead of me. Eventually, I wrote my first dissent, to which I still adhere.

Another early orientation experience foreshadowed a less than easy life for me in yet another area. That was in the realm of issues as to the demarcation of the boundary lines of the duty to bargain, i.e., scope of bargaining. Here, again, I found myself on rather strange ground. Even after the **Borg-Warner** decision, it did not seem to me that long lists of bargaining proposals were brought before the NLRB for dissection and opinion. The typical case there presented a small number of significant items. But my first two PERB cases in this area appeared to me to invite an exercise by PERB in bargaining for the parties, rather than in instructing them on what they must bargain about. It was as though I were back at the bargaining table engaged in a discussion of the anatomy of demands. The first two cases were, in fact, sent back to the parties and were soon resolved through PERB mediation. Nevertheless, a steady line of scope issues on which we must pass continues to appear on our agenda. It suggests an inability or an unwillingness on the part of some public employers and unions to bargain out their differences, not only in twilight-zone areas, but in what often appear to include almost the entire roster of demands placed on the bargaining table. Perhaps the recent amendments broadening PERB's remedial powers may provide an appropriate way of stemming the tide.

Other new and challenging issues for me have come up in other areas and I have even learned about the geography of the State and the names of many of its subdivisions.

A Learning Experience

It is fair to characterize my freshman year as a learning experience on terrain in which my brothers Helsby and Crowley were obviously sure-footed. Without attempting to work out the equation, it is clear now that nine years of PERB experience from the day of its creation weigh heavily in their favor and that I have had to run hard in attempting to achieve parity with them on many of the demands of the job. Nevertheless, I continue to hold on to the treasure chest I brought with me for whatever it may still be worth.

I don't know whether I have made the Dean's list for my first year and I probably never will find out, as the Dean has escaped that responsibility.

On To New Challenges

Next year, if permitted elective courses, I look forward to those on the other significant aspects of PERB's operations and to learn, as well, about the life inside the agency that lies outside the Board room.

How Does The Taylor Law Impact The Civil Service Law In New York State?

By Martin L. Barr,
Counsel



MARTIN L. BARR

In the 10 years since the Taylor Law was enacted, there has been surprisingly little litigation that can be said to involve direct conflict between the Taylor Law and the Civil Service Law. One could conclude that while there is considerable potential conflict between collective bargaining and the civil service system, very little such conflict has in fact surfaced. On the contrary, it could be concluded

that the advent of collective bargaining has in fact strengthened the civil service system. Unions, through collective bargaining, have not sought to undermine the civil service system but have tried to achieve effective implementation. They have, for example, demanded more frequent examinations, updating of the classification system and strict observance of the Civil Service Law. Indeed, it could be concluded that collective bargaining may have filled a vacuum created by the failure of local civil service commissions to operate effectively.

Although several points of serious impact unquestionably remain, the experience reflects continued piecemeal efforts to accommodate both the collective bargaining and civil service systems. Such impact and accommodation can be seen in several areas: (1) scope of negotiations, (2) bargaining unit determinations, (3) administrative uniformity, (4) classification and related pay structures, (5) management structure.

I will briefly touch upon each and will conclude with some observations regarding what should be the respective responsibilities of the civil service system and the collective bargaining system.

Scope of Negotiations

The problems related to the question of scope of negotiations in New York's public sector really involve two separate but related questions: (1) what is the scope of the duty to negotiate? and (2) what is the scope of the power of a public employer to agree to terms in a collective bargaining contract? The first is primarily a Taylor Law question involving a definition of the phrase "terms and conditions of employment." The second affects the problem of accommodation to the Civil Service Law. How do the provisions of the Civil Service Law affect the duty to negotiate terms and conditions of employment under the Taylor Law?

Subjects of negotiation may be classified under three

headings: (1) mandatory, (2) permissive, and (3) prohibited. The problem is to what extent the Civil Service Law prohibits agreement on subjects which are sought to be negotiated. In *Great Neck Board of Educ. v. Areman*, 41 N.Y.2d 527 (1977), the Court of Appeals summarized the line of cases establishing the rules this way:

To begin, we note that this is but another variant in a line of recent cases wherein the board of education of a school district, be it union free, city or other, has entered into a collective bargaining agreement with the recognized organization representing the district's teachers and then, later, raises questions as to its power to agree and bind itself to certain of the contract provisions (see, e.g., *Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v. Associated Teachers of Huntington*, 30 NY2d 122 [various economic benefits and arbitration of disputes concerning disciplinary action]; *Syracuse Teachers Assn. v. Board of Educ., Syracuse City School Dist.*, 35 NY2d 743 [establishment of a "Sick Leave Bank"]; *Matter of Susquehanna Val. Cent. School Dist. at Conklin [Susquehanna Val. Teachers' Assn.]*, 37 NY2d 614 [staff size]; *Matter of Union Free School Dist., No. 2 of Town of Cheektowaga v. Nyquist*, 38 NY2d 137 [transfer credits]; *Matter of Cohoes City School Dist. v. Cohoes Teachers Assn.*, 40 NY2d 774 [tenure determinations]; cf. *Matter of West Irondequoit Teachers Assn. v. Helsby*, 35 NY2d 46 [class size]).

In the earliest of these cases, *Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington* (30 NY2d 122, 130, supra), we recognized that absent a statutory provision expressly or impliedly prohibiting collective bargaining as to a particular term or condition of employment, boards of education are presumed to possess the broad powers needed to negotiate with employees. In *Syracuse Teachers Assn. v. Board of Educ., Syracuse City School Dist.*, 35 NY2d 743, 744, supra, this Court construed the *Huntington* language "to mean that collective bargaining under the Taylor Law (Civil Service Law, §204, subd. 1) has broad scope with respect to terms and conditions of employment, limited by plain and clear, rather than express, prohibitions in the statute or decisional law (see, generally, *Matter of West Irondequoit Teachers Assn. v. Helsby*, 35 NY2d , citing and discussing the *Huntington* case)." Further clarification and elucidation of the limitation or restriction is to

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be found in *Matter of Susquehanna Val. Cent. School Dist. at Conklin [Susquehanna Val. Teachers' Assn.]* (37 NY2d, 614, supra). There, public policy was presented as a possible restriction independent of statute. The Court explained: "Public policy, whether derived from, and whether explicit or implicit in statute or decisional law, or in neither, may also restrict the freedom to arbitrate" (37 NY2d at pp. 616-617). In *Matter of Cohoes City School District v. Cohoes Teachers' Assn.* (40 NY2d 774), the majority of this Court held unenforceable a contract provision which purported to prohibit termination of nontenured teachers at the end of the probationary period without just cause. The Court identified the several sections of the Education Law which vest in the board of education the authority to make tenure decisions (Education Law, §§2509, 2573, 3012, 3013, 6206) and recognized that, as such responsibility cannot be delegated or abnegated, it is "beyond the power of the board to surrender this responsibility as part of any agreement reached in consequence of collective bargaining" (40 NY2d 774, 778). While the Court reiterated the general rule that any matter in controversy between a board of education and its teachers may be the subject of collective bargaining, it relied upon the limitation placed upon that rule by public policy implicit there in the several sections of the Education Law.

Statutory and public policy mandates may be of two kinds: "Thou shalt not" and "Thou shalt." Case law, a statute or public policy may prohibit a public employer from agreeing to the matter in controversy. On the other hand, they may contain what the Court of Appeals referred to in the *Cheektowaga* case as an "imperative command," mandating only one response to the matter in controversy. In either event, they may be described as commands which remove discretion from the employer. If the employer has no discretion it may not agree to it and need not negotiate over it. If, on the other hand, the employer has discretion then it may agree and must negotiate, assuming that it is a term or condition of employment. Based upon what the Court of Appeals said in the *Cheektowaga* case, it also appears that even though a statute may deal with a subject, it does not follow that all matters relating to the subject are barred from negotiations. Any statute must be examined with care. It may bar agreement either by prohibition or an imperative command and it may also set forth discretionary powers.

With such general principles in mind, we can look to the Civil Service Law. There are a great many terms and conditions of employment which are not mandated by that law, such as salaries, overtime and holiday pay, increments, vacations and holidays, sick leave and other leaves, health and life insurance, hours of work, allowances and union privileges. These are areas in which

the employer has discretionary powers and are, therefore, negotiable.

Mandatory Civil Service Requirements

There are, however, certain areas where the Civil Service Law sets forth mandatory requirements. Examples include (1) appointments and promotions on the basis of examination, (2) layoff on the basis of seniority, (3) disciplinary procedures under §§75 and 76, and (4) limitations on temporary and provisional appointments.

Of great importance in considering the Civil Service Law are the powers which are granted to the State and local civil service commissions and personnel officers acting in lieu of civil service commissions. Basically the Civil Service Law empowers these commissions to prescribe and enforce rules governing (1) jurisdictional classification, (2) position classification, (3) examinations and (4) appointments, promotions, transfers, resignations and reinstatements. To the extent that the Civil Service Law sets forth mandatory requirements or empowers the State and local civil service commissions to act in certain areas, one must conclude on the basis of the case law that these areas are not now subject to collective bargaining.

An example of this restriction is found in *Kenmore Club PBA v. Civil Service Commission*, 61M.2d 685, which involved a contract clause prohibiting the use of performance ratings in promotion examinations. The Village of Kenmore is under the jurisdiction of the Personnel Officer of Erie County. A promotional examination was announced for the police department calling for the use of performance ratings with an assigned weight of 20%. The court ruled that there is no provision in the Taylor Law which authorizes the Village of Kenmore and the PBA to agree upon how the Personnel Officer of Erie County or the State Department of Civil Service shall prepare and conduct a civil service examination. The court held that the clause in question had no legal effect. There have been at least two other cases subsequent to the *Kenmore* case which hold similarly.

PERB Recognition

PERB has recognized the effect of the mandatory provisions of the Civil Service Law and the jurisdiction of local civil commissions. In the *Albany Police* case, 7 PERB 3078, PERB dealt with several subjects. PERB held that a demand over the duration of the probationary period was not a mandatory subject. Establishing duration of the probationary period is within the jurisdiction of the civil service commission. The civil service commission is a separate entity from the government which it serves and has its own powers. The employer does not have the power to fix the duration of the probationary period and therefore it cannot be a mandatory subject. On the other hand, PERB said the procedures pursuant to which the decision is made whether to grant permanent status at the conclusion of the probationary period are a mandatory subject of bargaining because they relate to discretionary powers of

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the employer. In this regard, note should be taken of the Court of Appeals decision in the *Cohoes* case where the court concluded that the actual decision to grant permanent status or not must be left to the public employer and it would be against public policy to give such decision, by way of just cause and arbitration provisions in the contract, to an impartial arbitrator.

Promotions and Vacancies

As regards promotions and filling of vacancies, PERB held in the *Albany* case that such matters are mandatory subjects of bargaining only with regard to non-competitive class positions. The promotion and filling of vacancies of non-competitive positions are not subject to any specific mandates of the statute and within the discretionary authority of the employer. On the other hand, the promotion and filling of vacancies of competitive class positions are non-mandatory subjects. Similarly, the Board held that to the extent that layoff based on seniority is governed by the Civil Service Law it is not a mandatory subject. Certain procedures relating to layoff demanded by the employees in the case were, however, found by PERB not to be in conflict with the Civil Service Law and were, therefore, mandatory.

In two very recent PERB decisions, it held that the provisions of § 76.4 of the Civil Service Law authorizing the State to supplement, modify or replace the disciplinary procedures of §§75 and 76 must be interpreted as barring such power to local governments. Accordingly, PERB held that demands over disciplinary procedures are presently prohibited subjects of bargaining.

Impact of Unit Determinations

I have briefly outlined the impact of the Taylor Law and collective bargaining on the Civil Service Law and the civil service merit system as it relates to scope of negotiations. There have been other impacts on the civil service system as a result of the advent of the collective bargaining system, notably as a result of PERB's unit determinations. As to the issue of what is an appropriate bargaining unit, PERB has generally sought to avoid "fragmentation." To the extent that it is necessary or desirable for the proper functioning of the merit system to have administrative uniformity, it is obvious that unit determinations can have a considerable impact. Overfragmentation can make uniformity more difficult.

In classification and pay structures, it is generally believed that the classification system should provide an orderly system of arranging jobs according to approximately similar duties and responsibilities. When an employer's work force is divided into separate and independent bargaining units, such a goal is more difficult.

In management structure, unit determinations can be of vital importance. Such unit determinations must eventually deal with the status of management employees. The unit determination and collective bargaining have

forced public employers to rethink and re-evaluate the concept of management in the public sector. The role of non-management supervisors is a continuing problem which for many people has not yet been finally resolved.

These are suggested as some of the problems relating to the accommodation of collective bargaining to the merit system, as presently established by statute. We should not, however, assume that the merit system has been finally and fully established and written in stone. While I have outlined what is, it seems to me that we can legitimately explore what ought to be the respective responsibilities of the civil service system and collective bargaining.

Most commentators have recognized the difference between the merit *principle* and the merit *system*. The merit principle would be defined as simply the concept that public employees should be selected and retained solely on the basis of merit. They should be recruited, examined, selected and advanced under conditions of political neutrality, equal opportunity and competition on the basis of merit and fitness. The New York State Constitution (Art. V, Sec. 6) sets forth that principle. Most commentators appear to have recognized, however, that the merit system has come to encompass a broad program of personnel management. Civil Service commissions were created to provide public employees with job security against political attack and to achieve high standards of competency and professionalism in the public service. In the course of fulfilling these responsibilities, they evolved into bodies administering a wide range of personnel functions. In this respect, they act as an agent of the public employer in matters of employer-employee relations. They are not necessarily viewed as impartial third parties but often as an arm of management.

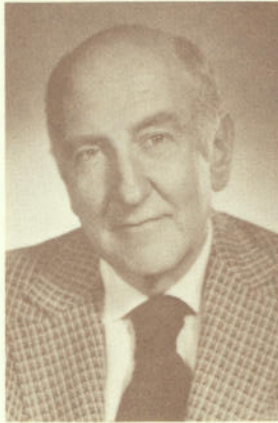
The fundamental difficulty, therefore, rests in the dual role of the civil service commission. On the one hand it represents the public interest by protecting the public employee from political influence, but on the other hand it performs certain managerial functions. In the exercise of its functions, perhaps even in the exercise of its clearly merit principle functions, there have probably been many times when employees have wondered whether local civil service commissions have really exercised their functions independently. The nagging question remains whether the chief executive officer of the local government does have real control over the civil service commission. No matter how independent and sincere such decisions by local civil service commissions may be, the essential quality of that decision is that it is unilateral in nature. Employees may very well come to resent this unilateral decision-making process and demand more of a voice in these decisions. This voice is best heard through collective bargaining.

I wish to suggest, therefore, that we can and should explore what should be the role of the civil service commission and what might appropriately be decided through collective bargaining. The answer involves, among other things, an analysis of what is really essential to the merit principle as distinguished from the merit system.

The Neutral—The Catalyst In Resolving Disputes

By Harold Newman
Director of Conciliation

If one were to review the public employment bargaining laws that have been enacted in some forty of the states, it is probable that one would note far more similarities than differences. This is especially true with regard to the provisions for resolution of impasse. There are after all, a limited number of conciliation tools. The use of mediation is universal. Fact-finding and arbitration as follow up or in a few instances, alternate conciliation procedures, are also utilized.



HAROLD R. NEWMAN

Pulling Together The Neutrals

When in 1967 the passage of the Taylor Law and the establishment of the New York State Public Employment Relations Board required the creation of a group of neutrals competent to resolve bargaining impasses through mediation, fact-finding and arbitration, the infant agency had to guess how many of these individuals would be needed and from whence they would be recruited. PERB could hire full time conciliators and the new statute also provided that the Board should, "establish, after consulting representatives of employee organizations and administrators of public services, panels of qualified persons broadly representative of the public to be available to serve as mediators, arbitrators or members of fact finding boards."¹ What should the mix be? The first judgment made was that since, unlike the private sector, where the approach of contract expiration and the appearance of Taft-Hartley notices insures a fairly even workload for the conciliators the year round, under our law impasse was geared to the government employer's budget submission date, the work of conciliation would have peaks and valleys. This made it obvious that establishment of a large full time conciliation staff would be uneconomic and administratively irrational. We decided to have a small full time mediation staff and depend largely on our per diem panel of outside neutrals for our fact finding and arbitration as well as for part of our mediation caseload.

¹CSL Arb. XIV § 105.5 (i)

Full-Time Staff

The task of choosing full time staff mediators led of course to discussion with the Department of Civil Service

and we followed the practice of the State Board of Mediation (private sector), in offering the chance to compete in the examination to individuals who had completed a minimum of five years experience in the labor relations field. We did not choose to have a written examination given. A test to determine whether the candidate was conversant with the NLRB's ruling in **J.H. Rutter-Rex Manufacturing Co.**, or Chief Justice Warren's dissent in **Linn vs. Plant Guard Workers**, could not it seemed to us, fairly or accurately determine how the applicant would function in the pressure cooker atmosphere in which much mediation is carried on. We therefore fashioned an examination in which the candidates were given a hypothetical bargaining situation and three cold eyed, mildly sadistic, labor relations professionals serving as oral examiners, plied the mediator candidate with questions and hypotheses designed to draw from him whatever ability he had to move the parties toward settlement in a highly complex and difficult impasse. So well have the oral examiners whom we have chosen, performed their cruel task that on each of the three occasions in which the test has been given over the last ten years, applicants have dropped out during the inquisition. (It should be kept in mind that each candidate had the necessary five years minimum labor relations experience.) We are satisfied that the process described has produced an outstandingly professional mediation staff.

Ad Hoc Panels

In creating the ad hoc panels of mediators, arbitrators and fact finders we faced major challenges as well. In 1967 few neutrals had ever had public sector experience. Virtually none had ever done fact finding at any time. We began by inviting the members of the "Pantheon of the Immortal Impartial" — the National Academy of Arbitrators, who resided in and around New York State, to join our panels. We also invited the panelists of the State Board of Mediation and of the Federal Mediation & Conciliation Service. (Many of the same individuals were Academy members and also members of the two panels cited. Therefore the total was not large.) The lack of public sector experience and total lack of fact finding experience which we have cited, were serious problems.

Guide For Fact Finders

We wrote a brief "Guide for Fact Finders" which described the process and its similarities to advisory arbitration and we encouraged the panel to utilize the

The Neutral — Catalyst in Resolving Disputes

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telephone and to visit our Albany, Buffalo and New York City offices to get advice on such arcane subjects as municipal finance, civil service law and teacher salary index. We recognized early however, that this would not be enough. Beginning in our first full year, 1968, we began annual workshops and seminars for panel on techniques and problems in mediation and fact-finding. These sessions, first held in the Capital District, were moved to the Conference Center of the Cornell School of Industrial & Labor Relations so that ILR staff could not only provide their excellent meeting facilities but could be used in program planning and as seminar faculty. These annual training sessions have not only been a valuable training tool for staff and panel but provide a splendid opportunity for the groups to mingle socially and to get to know each other well. In addition, a publication for panel members—**PERB Bulletin** was established. This monthly publication unlike our house organ, **PERB News**, is sent only to panel members. It contains in addition to information on recent settlements, billing problems, questions about publication of fact finding reports and arbitration procedures and awards, a column by this writer which addresses issues arising out of Board and court decisions, amendments to the law etc. Panel members frequently write comments on the columns and some of these comments provide the basis for other articles and comment. The educational process is ongoing.

Expansion of Panels

The conciliation caseload in our early years required further expansion of our panels and this was accomplished by encouraging qualified labor neutrals and **private sector** advocates to apply. If their vitas indicated satisfactory training, education and experience they were invited to Albany for an interview by the Director of Conciliation. These interviews, which lasted 1½ to 2 hours would result either in rejection of the applicant or the submission of his vita to the Board for final approval and admission to the panels. (Applicants for the Arbitration panel were required to submit besides their vitas, five recent arbitration awards.) Nobody was permitted however, to take his first case without preparation on the firing line obtained by going out as an observer with experienced staff and panel. The screening processes described seem to have worked well. Only in rare instances in the ten years of PERB has it been necessary to excommunicate any panel member because of professional inadequacy and deny him further work. Special effort was made to expand opportunity for women and minorities and special training programs for individuals in those groups have enabled us

happily, to provide career opportunity for many whose chances had hitherto been slight. (Several graduates of the programs for minorities and women have become members of the National Academy.)

Staff-Panel Cooperation

Our panels are now closed. They are more than adequately staffed. But the services they have performed and continue to perform are a matter of great pride to the agency. Perhaps the most attractive and warming characteristic of the combined use of staff and panel in conciliation has been the excellent relationship — personal and professional — between them. PERB has always been characterized by informality and lack of the bureaucratic ambience that characterizes most government agencies and departments. Part of the reason for this is that we are small. There are only 52 employees — professional and clerical. More important, is that the informality reflects the character, philosophy and attitudes of the man who was Chairman during PERB's first ten years. Bob Helsby wears his Ph.D and his impressive list of governmental titles more lightly than many carry their membership in Rotary or Woodmen of the World. It is doubtful that in PERB's ten year history any Director has written a memorandum to another. (We cannot at least, recall having written or received one.) Resolution of problems is a matter of having a chat or discussion with a colleague — including the Chairman when necessary. Every panel member is on a first name basis with PERB staff and even when geography precludes frequent visits to our offices, telephone communication with Legal, Research, Representation or Conciliation staff is an everyday occurrence and always informal. We have striven from our first year as an agency to enable the panel member to identify himself as a member of the PERB family.

Pro Bono Publico

Several years ago, when due to the State's fiscal crisis we were literally running out of funds for conciliation services, the panel proved that they do indeed so identify themselves. We wrote letters to 150 panel members asking each to take one mediation or fact finding case for expenses only. The response was enthusiastically and unanimously affirmative. Indeed, we were deluged with individuals offering to do an unlimited number **pro bono publico** until we were out of the woods. We doubt if such a relationship between any government agency and ad hoc employees exists anywhere in the country.

Future Challenges

With our first ten years behind us, we look forward with real anticipation to the challenges of the future. The professional skills and the warm friendship and support of our panel members help make us sanguine about our ability to meet those challenges.

Smallness And Flexibility Are PERB Characteristics

By **Ralph Vatalaro**
Executive Director

PERB's tenth anniversary is novel in one important aspect administratively in that the agency continues a tradition of smallness.



RALPH VATALARO

Its size and concomitant ability to respond quickly to problems are no accidents. A conscious, deliberate effort was made in 1967 to design an agency that would escape bureaucratic characteristics that sometimes take hold in government at all levels. The original design has proven to be workable, combining speed of problem-solving with thoroughness, particularly on appeals of hearing officer decisions at the Board level.

In PERB, its clientele find turn-around time brief. From inception of a dispute, particularly in contract dispute resolution, the organization is able to respond with assistance within a very brief time, usually 24 hours.

Staff response to such disputes can be faster if circumstances warrant, such as situations where there is an impending strike. Responses by per diem members of PERB's panel of mediators and fact finders are at least as quick if not more so because assignments are made to panel members residing in the geographic area where the particular dispute arises. A telephone call is usually all that is needed to get service.

In resolution of difficult, complex legal issues which sometimes arise in the areas of improper practices or unit determinations, and which often must be fully litigated, PERB is able to acknowledge receipt of a particular petition, assign a hearing officer and arrange a pre-trial conference within a very brief period of time, usually several weeks. In most cases such disputes are resolved without the necessity of hearings. But even when an issue is litigated, the agency has tried to reduce the time lapse for recommended orders by hearing officers to the minimum without sacrificing a party's right to due process.

PERB's hearing officers strive to resolve improper practice and representation disputes by mutual consent of the parties in the pre-hearing conference. The forum is utilized effectively by hearing officers in getting issues delineated and in at least half of the cases persuading the charging party, because of the perceived weakness of the allegation, to withdraw the complaint.

Essentially, the PERB procedure permits the hearing officer to ascertain that the charging party's complaint has potential; once a hearing has been convened, if resolution of the dispute is not achieved at the conference level, the

charging party bears responsibility for prosecuting the charge at the hearing. Unlike the National Labor Relations Board, PERB does not preliminarily investigate the charge nor does it prosecute on behalf of the charging party. The result is greater speed in arriving at an ultimate decision. In fact, cases that are fully litigated including pre-hearing conferences, hearings, and time permitted for briefs and cross-briefs are decided on average, in 8.0 months, a decisively shorter period than the average in the private sector. When taking into account all cases, however resolved (withdrawal, settlement or decision) the average time for completion is 160 days.

Smallness makes it possible to be flexible, and flexibility is a virtue when workloads are cyclical. The mediation workload, for example. "The season" usually opens in late spring when teacher contracts are up for renewal. With some 750 school districts as potential users of PERB's conciliation services, staff outside the conciliation office are often pressed into service. It is not unusual, for example, for attorneys in Counsel's office or economists in the Research office to handle some of the case intake from April until November when the workload subsides.

Likewise, mediators are sometimes utilized in pre-trial conferences where conciliation skills and techniques are useful in resolving legal conflict. This is done when workloads permit.

With confidence it can be said that it was always that way; ten years ago, by design, the doctrine of flexibility was instituted and it remains today.

Economic and Fiscal Trends

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for other local government employees. Nevertheless, some rough comparisons can be made.

There is no consumer price index for New York State. The national city annual average for 1976 was 170.5. The New York Northeastern New Jersey annual average was 176.3. The Buffalo area annual average was the same as the National City average. By July 1977 these numbers were respectively 182.6, 186.4 and 181.3 (May).



THOMAS JOYNER

On an index basis over the same period for the county as a whole the average hourly earnings of manufacturing production workers averaged 183.4 for 1976 and the preliminary figure for May (the latest available) stood at 196.7. For New York State the 1976 average weekly earnings of manufacturing production workers stood at

\$207.64, an index value of 181.4. Thus, over the period, these employees more or less broke even in resisting the ravages of inflation.

New York State employees did not fare as well. Minimum and maximum salaries for a senior stenographer, the entry professional titles, and a third level professional for 1967 and 1977 were compared. These calculations included the initial five percent increases provided by latest negotiating but excluded further increases and the non-recurring 1975 \$250 bonus. Averaging the minimums and maximums for these grades yields an index value of 160.4 for the minimum and 161.5 for the maximum.

The picture with respect to teachers is not as clear. Median teacher salaries increased from \$8250 in the 1967-68 school year to \$17,150 in 1976-77 with a resulting index value of 208.0. However, the salary of beginning teacher (BA, Step 1) increased from an average of \$5895 to yielding an index value of 169.4. Over the 10 year period, the median experience of teachers has increased from six to eleven years. This is a reflection of the fact that school districts are basically hiring only on a replacement basis and that the teacher work force is aging. In addition, there have been some layoffs, which effect primarily the newer teacher. Given the mechanics of the traditional teacher salary grid which increases salaries on the basis of both experience (years of service) and training (graduate hours and/or degrees), teachers have been successful in

contending with inflation but not to the extent indicated by the higher index number.

Comparison of the maximum salaries for patrolmen in 25 jurisdictions in 1967 and 1977 suggests that police have stayed somewhat ahead of inflationary trends. The 25 jurisdictions were selected to represent the various types of departments throughout the state. In 1967 the average maximum was \$6667, and for 1977, \$13,774. The resulting index value is 206.6. While data are not available for firemen in 1967, the prevalence of parity or near parity suggests about the same result for firemen.

While data are available for county employees in 1967, extensive reclassifications and other technical problems suggests that the end product should be viewed with caution. A comparison of titles in counties which are somewhat representative geographically and in which common titles can be identified at the beginning and ending of the period yields an index value of 186.5.

In summary:

Cost of Living (National cities average)	
May 1977	181.3
State Employees (April 1, 1977)	161.5
Teachers (1976-77 school)	208.0
Police (1977)	206.6
County employees (1977)	186.6

Public sector collective bargaining would appear to have provided public employees with more protection against inflation than in previous periods of inflation such as 1949-52. On the other hand, there is little indication that public sector employees made gains relative to their private sector counterparts.



The Taylor Law and collective bargaining have been the subject of hundreds of cartoons over the years. Here's a sampling.

In Retrospect...

Continued from Page 1

moved by sympathy, the Department of Civil Service and the Division of the Budget gave me outstanding cooperation in the recruitment of a quality staff. It is primarily to that staff that the success of the Taylor Law is due.

Our political scientists often proclaim with pride that ours is a civilization that is governed by law and not by men. To the extent that this means that even those who govern must obey the law it is true, but we must recognize that no law can be better than the people who administer it. Seemingly fine statutes have been emasculated by an administering staff that is incompetent, or worse, while poorly conceived laws have been made to work by an imaginative and dedicated staff. Bureaucracy is a pejorative word for the administration of a good law in a mechanical and insensitive manner. All too often bureaucracy is the face of government. Worse yet, recently we have seen the perversion of law at the highest levels of its administration and a resultant discredit of all government service. The PERB staff, however, has consistently been responsive to the needs of its constituency. Calls are answered quickly and courteously. When appropriate service is requested it, too, is provided quickly and courteously and if it is not appropriate for PERB to provide the requested service, then the party is directed to the proper agency). Requests for information are answered quickly and competently. PERB has not separated itself from its clientele either by indifference or by timidity. It has preferred the embarrassment of an occasional error to the security of cautious insularity. It has been a service agency and not a bureaucracy.

Esprit de Corps

This tradition has served the people of the State well. It has also served the PERB staff well. There is a high *esprit de corps*, the satisfaction of a job well done. There is also a nationwide recognition that the New York State PERB and its staff are outstanding. I have travelled throughout the country consulting with public sector labor, management and neutral groups, and the reputation of PERB for high quality performance is ubiquitous. This reputation and *esprit de corps* are great assets. It has held most of PERB's senior staff despite attractive offers to many of them, and it has made the recruitment of replacements relatively easy.

Closely related to the staff is the PERB panel. These are the *per diem* people who do much of the mediation and factfinding. Highly skilled professionals, they, too, have done a difficult job well. They have made themselves available when we, and the parties, have needed them. Their dedication is such that they have volunteered their services when a temporary financial crisis prevented us from hiring them.

These observations are timely not only because a tenth anniversary is a traditional time for reflection, but because I have just retired as chairman of PERB to accept another assignment in the area of public sector labor relations. Thus I am reviewing the entirety of my career with PERB. Originally, I had expected to remain with PERB for a

short time. I stayed on because the assignment was a unique and exciting adventure in government. My associates and I were given the opportunity to set standards that would be copied throughout the country in administering a law that balances the benefits and protections of public employees against the public interest in effective and efficient government management. Our job was made easier because three successive governors recognized that PERB could function effectively only if it was insulated from the political pressures that can influence the policies of other state agencies. Three state administrations respected the fact that PERB was a quasi-judicial agency that was functioning in a very sensitive area.

This brings me to the Board itself. It is for others to evaluate the quality of our decisions, but I will attest to the character of the work of my associates. It has always been diligent and impartial. All four of the members with whom I have been associated — Joe Crowley, George Fowler, Fred Denson and Ida Klaus — personified a commitment to fair treatment of all who came before PERB. Joe Crowley, my associate for all ten years of PERB's existence, has set the standard. Openminded and tolerant of all ideas on substantive interpretations of the Taylor Law, he has been unswerving and rigid in his pursuit of objectivity. A man of conscience, he is that rare person who converts a cliché into a description; he is truly a gentleman and a scholar.

Taylor Law and Civil Service

Continued from Page 10

Most would agree that essential to the merit principle is impartial recruiting, examining and selection, including the preparation, conduct and grading of examinations and a system that protects employees from arbitrary discipline. On the other hand, many would agree that the merit principle, as distinguished from sound labor-management relations, does not encompass grievance procedures, employee training programs, safety programs, and other such personnel practices. There probably would be substantial disagreement as to whether the merit principle requires exclusive civil service commission administration of classifications, grade allocations and promotional qualifications. In considering these last functions, I raise but do not attempt to answer the following questions:

Why shouldn't the union and the employer be able to agree that performance ratings will not be used in promotional examinations?

Why cannot contractual guidelines establish rational and acceptable standards of promotion?

Why is it essential to the merit principle that the classification system rest entirely in the hands of the civil service commission?

Why can't collective bargaining help produce a rational classification system that meets the requirements of the merit principle? To the extent that collective bargaining can assist in formulating a rational classification system, should we not use it?

These are some questions which I believe have been raised by the advent of collective bargaining and which I believe deserve further exploration.



MURIEL K. GIBBONS

district disputes abolishing the legislative hearing and giving PERB continuing responsibility for achieving agreement. The other, for the first time, provided compulsory arbitration as the final step in police and firefighter disputes, an amendment whose constitutionality was challenged from many quarters and upheld by the State Court of Appeals on June 5, 1975. Changes in the Law in 1975 were minimal and there were none in 1976.

Two major changes took place in 1977 — extension of the compulsory interest arbitration for police and firefighters, with modifications, for two years until July 1, 1979 and legislation giving PERB the power to remedy improper practices.

Over the ten years, 1,100,000 State and local public employees have been covered by the Taylor Law; about one million are represented by employee organizations. The remainder that are not organized are excluded either because they are managerial, supervisory or confidential employees or because they are employees of small units of government or have chosen not to be represented.

Some 1,100 public employers negotiate with employee organizations representing 3,000 negotiating units. In the 10 years, PERB has received and processed 1,528 petitions for the establishment of negotiating units

ranging from the 10 now in existence for the 175,000 state employees to units of 5 and 6 employees in local jurisdictions. As a part of the representation process, 456 elections were conducted by PERB personnel; 391 management/confidential cases have been handled.

Since the Law was amended in 1969 to provide a mechanism for dealing with improper labor practices, 2784 charges have been processed. As the Law is silent on the entire issue of what is or is not bargainable, this has been a major factor in a large number of cases brought before PERB and the Board has ruled on over 150 issues.

More than 28,000 agreements have been negotiated from 1967 to 1977. Each year a large number of contract disputes have been brought to PERB for mediation, fact-finding, post-fact-finding conciliation and arbitration. Through August 31, 1977, PERB closed 7,288 impasses, 44.3% at the mediation stage, 47.1% by fact-finding (36.4% settled by mediation by fact-finder, 33.0% by negotiations based on fact-finding report, and 30.5% by acceptance of the fact-finding report), 6.1% by post fact-finding conciliation, and 1.1% by arbitration.

Again through August 31, 1977, there were 223 work stoppages varying from one-shift demonstrations to some of 21 to 28 days duration. In those areas where the State PERB has jurisdiction, it has ordered suspension of the dues deduction privileges in 120 strikes; no penalty was ordered in 4 cases and 11 cases were pending at the end of the ten year period.

Under one of the unique features of the Law, local governments are authorized to enact laws which, if found by PERB to be substantially equivalent to the Taylor Law, provide a substitute for PERB jurisdiction. These local laws have varied over the decade from a high of 29 to the present 14, including New York City.

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