

## ERIC J. SCHMERTZ

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To state my bias up front, I freely confess – other than my late father and mother, nobody has had a more profound impact on my professional life than Eric Schmertz. This may sound banal and hackneyed (referring, of course, to my observation, not my life) but that is the unsullied truth.<sup>1</sup> He was learned mentor and role model, and a very dear friend. He was also one of two people – the other being the late Walter Eisenberg – who served both as an impartial member of the Board of Collective Bargaining in New York City and as a member of the Public Employment Relations Board, two of the Taylor Law's more outstanding achievements. I will limit the following discourse to the role he played as a third-party neutral in public sector collective bargaining under the Taylor Law.<sup>2</sup> His life, taken as a whole, reflected his uncompromising view that a third-party neutral has as a master, the public interest (which includes, but extends beyond, the interests of the parties before him or her), and is endowed with the authority to exercise his or her conscience for the public good. The third-party neutral, to Eric, was the quintessence of the public servant.

By way of background, Eric was born on Christmas Eve, 1925, in the Bronx but grew up in New Rochelle where his father ran as the losing Republican candidate for State Assembly in 1936, although he purportedly ran ahead of Franklin Roosevelt in his district. Eric's father was a Republican, as was Eric.<sup>3</sup>

He was such an outstanding baseball player in high school that the Pittsburgh Pirates offered him a professional contract but he declined the opportunity to play. In later years, as an arbitrator, he would more formally enter the world of Major League Baseball contracts and forever change them.<sup>4</sup> With World War II underway, rather than being drafted to play baseball or being drafted into the military, he voluntarily enlisted in the United States Navy where he served in the Pacific on shipboard as a Lieutenant Junior Grade. After the war, he attended and graduated from Union College, to which

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<sup>1</sup> But for Eric Schmertz, whose infectious love of labor relations and profound respect for the collective bargaining process, I would never have discovered for myself the pleasures of attending the School of Industrial and Labor Relations at Cornell University and subsequent employment by the Office of Collective Bargaining (as intern in the mid-1970's and years later as a trial examiner) and subsequent appointment as Chair of the Public Employment Relations Board.

<sup>2</sup> I note that he was the first recipient of the American Arbitration Association's J. Noble Braden Chair of Arbitration, was awarded the Whitney North Seymour, Sr. Arbitration Medal and Alexander Hamilton Law Citation. He served a Dean of Hofstra Law School from 1982 for seven years and later taught at Pace Law School. For a thoughtful remembrance of Eric by his academic colleagues and former students see Rabinowitz, Stuart; Demleitner, Nora V.; Mahon, Malachy T.; Lane, Eric; Resnick, Alan N.; Gregory, John DeWitt; Feldman, David B.; Englander, Jeffrey P.; and Goldstein, Joanne F. (2011) "Dedications to the Memory of Eric J. Schmertz, Distinguished Professor of Law and Dean Emeritus, Hofstra University School Of Law (1982-1989) - in Remembrance of Eric J. Schmertz," Hofstra Labor & Employment Law Journal: Vol. 28: Iss. 2, Article 1.

<sup>3</sup> A personal note: My father, Burton C. Agata, was the first Max Schmertz Distinguished Professor of Law at Hofstra Law School. Eric endowed the chair in his father's memory.

<sup>4</sup> His 1975 salary award of \$114,500 to professional baseball player Ralph Garr arguably ushered in the era of mega-salaries for athletes that flowed with the demise of baseball's "reserve clause." He never again was chosen as a baseball arbitrator after rendering that award.

he remained eternally faithful, and received his law degree from New York University in 1954.

He began his professional labor relations life studying at NYU's night law school while working during the day for labor unions employed by a subsidiary of General Cable Corporation. He began work as a third party neutral in the 1950's where he worked for the American Arbitration Association and in the early 1960's became a fulltime third-party neutral following a stint as a member and then executive director of the New York State Board of Mediation under Governor Nelson Rockefeller.

In the area of public sector labor relations, except for a controversial spell as "Labor Commissioner" for the City of New York under Mayor David Dinkins (a title he created because he felt that the term "Commissioner" carried greater gravitas than Director and did not fully represent the broad role he saw for himself), he worked almost exclusively as a neutral. Along with Saul Wallen and Arvid Anderson, Eric was one of the first impartial members of the Board of Collective Bargaining under the newly enacted New York City Collective Bargaining Law. He served on that Board until Mayor Ed Koch refused to reappoint him.

And that feud with Mayor Koch, other than simply being a tug of war between two incredibly strong-willed people, arose out of a fundamentally different view of the role of collective bargaining and third-party neutrals in the public sector. The New York Times got it right when it wrote that Eric "believes there is a fundamental difference between public and private unions. In the private sector, where strikes are lawful and costs can be passed to consumers, he said, 'the economic struggle is part of the bargaining.' But in city government, where strikes are prohibited, unions should be seen as the city's partners."<sup>5</sup> Eric opined this as former Mayor Koch sharply criticized his actions as Labor Commissioner during labor negotiations. But he deeply believed in creating and working within cooperative relationships despite the fundamentally and inherent different institutional views of the parties.

Obviously, not everybody then or now agrees with his assessment. Even at the time, the late Edward Silver, who among other roles, served as a New York City member of the tripartite Board of Collective Bargaining from 1968 through 1991 during Eric's tenure, said that he thought there was no difference between private sector and public sector bargaining. But to Eric, the differences were manifest.

Eric served as an impartial member of the Board of Collective Bargaining from its very inception in 1967 through 1981. During his tenure, New York City's public sector collective negotiation regimen went through its growing pains. There was a firefighters' strike in 1974 and other "hiccups" which he actively worked to resolve. The Board's opinions and Eric's private sector arbitration awards are available in the PERB's and BCB's reports and on-line for the reading.<sup>6</sup> They create a profound set of jurisprudence.

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<sup>5</sup> NYT, "Negotiator's Quiet Style Elicits Loud Protest," October 23, 1990.

<sup>6</sup> A good selection of his arbitration awards and decisions from 1967 through 2006 can be found online in Labor and Employment Law Commons.

In reviewing a book on the distinguished arbitrator, Saul Wallen, who served with Eric on the first Board of Collective Bargaining, Eric's philosophy on the role of the arbitrator and arbitration's place in collective negotiations inexorably seeps through the text. In examining the broader historical context of the growth of grievance arbitration in the second half of the last century, his deeply felt concerns with "equity and justice" as well as "stability" and the "dignity of the individual" ring through and are, indeed, co-extensive with the legislative intent of the Taylor Law:

In the post-World War II era, grievance arbitration came of age. During this period, the perception of the collective bargaining agreement moved away from residual rights toward an implied obligation theory, permitting arbitrators to apply the rule of reason more freely to many situations. The arbitrator's purpose was to create a climate in which production could be maximized, while at the same time recognizing the dignity of the individual and appreciating the representative nature of the union. It is not just the impact of individual arbitrators, although important, which is dealt with, but something much broader: a national movement from one set of policy considerations toward different policies, objectives, and emphases. Viewed in this historical context, the goals of efficiency and productivity, equity and justice, and stability of industrial relations were not the unique values of certain thinkers, but universally assimilated doctrine. A new relationship between labor and management was developing. The era may have permitted, indeed propelled, all activist arbitrators into translating these values into solutions to actual work disputes.<sup>7</sup>

He was not a captive to his desk or the board meeting room. He somewhat notoriously accompanied fire companies in Harlem and rode fire trucks to experience first-hand the impact on manning issues raised by management.<sup>8</sup> There was undoubtedly a touch of showmanship in such behavior. But he made his point, and as he would tell you (and did); there is no prohibition on being colorful.

He helped end the 1969 cab strike in New York City and later, in 2005, chaired the impasse panel that awarded a two-digit wage increase to members of the Police Benevolent Association (PBA) in New York City but helped pay for it by reducing the salaries of incoming recruits and imposing other givebacks. In so doing, he earned the enmity of the other police unions and arguably impacted future recruitment. That time

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<sup>7</sup>Schmertz, Eric J. and Sirefman, Josef P. (1978) "Value Judgments in Arbitration: A Case Study of Saul Wallen. By Brook I. Landis," Hofstra Law Review: Vol. 6: Iss. 2, Article 9, p. 484. It compares favorably with Civil Service L. § 200 which provides, in relevant part, as the "Statement of policy" for the Taylor law: "The legislature of the state of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government."

<sup>8</sup> For an in depth analysis by Eric of how the Fire Department fared under the Taylor Law, see Schmertz, Eric J. (1975) "The New York City Fire Department Under the New York City Collective Bargaining Law," Hofstra Law Review: Vol. 3: Iss. 3, Article 2.

worn phrase – “no good deed goes unpunished” – is particularly apt given the opprobrium of his decision by subsequent mayoral and union administrations. But the tripartite panel chaired by Eric unanimously agreed to every facet of the award. In his decision, which was subject to criticism by one of his co-members in her concurrence, he objected strenuously to the statutory limit of two years on any such decision. He creatively circumvented that barrier by making a binding award for two years and non-binding recommendations for another two years.

Significantly, especially when viewed in light of recent acrimonious negotiations in New York City with the PBA, he noted that he felt:

. . . the need to make some observations, some of which are not particularly flattering. I am distressed at the apparent confrontational relationship between these two parties. Bluntly it is antagonistic, too angry and too reciprocally suspicious. As the parties no doubt engaged in due diligence in deciding on my appointment they saw in my writings and my policy statements my repeated but respectful advice to four Mayors and several leaders of the police and fire unions that they should not be in chronic dispute. It is simply contrary to the public interest.

Both the Mayor and his administration and the PBA and its members are public servants. They all have the same fiduciary duty to the public – to prevent and fight crime, to maintain civil order and now to prevent and respond first to acts of terrorism.

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There was not always such adversarialness. In the 1970’s during the City’s extreme fiscal crisis we saw an uncommon and unusual collaborative and partnership relationship between the City and its major unions of municipal employees. Granted it was formed out of a mutual fear of bankruptcy it nonetheless served a constructive purpose and provided a lesson and commendable model that unfortunately did not last.<sup>9</sup>

He was not averse to viewing decisions as a bully pulpit. When Governor Eliot Spitzer considered appointing him to PERB in 2007, New York Police Department unions (not including the PBA) did not forget his impasse decision and vociferously and successfully blocked the nomination.<sup>10</sup>

His work, of course, was not confined to the public sector while at the Board of Collective Bargaining, PERB and at other times. For example, on April 14, 1978, he was appointed as chairman of the State Labor Cost Review Panel. It had jurisdiction over the Medicare-Medicaid payments made by the State of New York to nursing

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<sup>9</sup> Opinion of the Chairman, In the Matter of the Arbitration between Patrolmen’s Benevolent Association of the City of New York and the City of New York, (New York State Public Employment Relations Board Administrator), signed June 27, 2005, pp.9-11.

<sup>10</sup> The Chief, “3 Police Unions Block Schmetz Role at PERB: Cite Impact of PBA Arbitration Award on Their Talks,” April 20, 2007. See also its continuing legacy, The Chief, “Arbitration Looms Again in PBA Wage Dispute,” August 28, 2014.

homes thereby resolving the great nursing home strike of that year. He served as a neutral at the request of President George H. W. Bush to serve on three presidential boards of inquiry into railway labor disputes. He was ultimately asked by the Philippines and Thailand to establish a system of neutral dispute resolutions. His private arbitration practice (and it has been estimated that he participated and helped resolve 10,000 disputes) covered corporations such as General Dynamics, TWA, Gimbel Bros, Hertz, UPI and General Electric, to name but a few.

Returning to the late Mayor Edward Koch, Eric's disagreements with him were notorious. The names of few arbitrators have entered the lexicon (King Solomon being a notable exception). But Mayor Koch tried turning Eric's into a curse word. In criticizing his role in negotiating on behalf of New York City with the United Federation of Teachers and the deal which was reached, Mayor Koch snarkily declared, "I have now turned Schmerz into a verb and a noun. . . If you have been abused, we say you have been Schmerzted. If you get an unwarranted and undeserved payment from the City of New York, you say, 'Thank you Mr. Mayor, for the Schmerz.'"<sup>11</sup> Eric took this all with his usual good humor and with the confidence in knowing he acted in a principled manner consistent with his legal and ethical obligations.

Perhaps Eric could be faulted for letting his innate sense of fairness as a third-party neutral spill into his role as an advocate for a party at negotiations. Perhaps those two roles are mutually exclusive, after all, as a postage stamp commemorating collective bargaining in the United States noted, the credo is: "Out of conflict. . . accord." But he did not view collective bargaining as a zero-sum game; rather, he saw collective bargaining and third-parties as being part and parcel of the broader process of serving the public good which the Taylor Law and its sister law, the New York City Collective Bargaining Law, were intended to protect. His principled career is a legacy to these sublime purposes.

Seth H. Agata

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<sup>11</sup> NYT, "Negotiator's Quiet Style Elicits Loud Protest," Oct. 23, 1990.