



# bulletin

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## HAROLD NEWMAN'S CLOUDY CRYSTAL BALL

"There is no law governing all things."

Giordano Bruno  
1548-1600

Never, in these columns, have I sought to treat the question of the role of the neutral in the resolution of impasses involving supervisory personnel. Yet, and particularly with regard to school district administrators, it continues to be a problem that vexes and irritates. I have not discussed the subject because as Oliver Cromwell told some friends in conversation in 1641, "I can tell you Sirs, what I would not have; though I cannot tell you what I would." Seven years later what Cromwell would have was law for everybody. I cannot look forward to that.

Intrinsic to the problem is, of course, our statutory language. Section 201, subdivision 7(a) of the Taylor Law provides in part "... (E)mployees may be designated as managerial only if they are persons (1) who formulate policy or (2) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgement."<sup>1</sup> Further, there is the language of the legislative intent. "It is the intention of the Legislature that designations of employees as management or confidential pursuant to subdivision seven of section two hundred one of the civil service law as amended by this act reflect the extent to which a public employer has from time to time organized itself for collective negotiations. It is not the intention of the Legislature to destroy existing employer-employee negotiating units such as principals or other school administrators who do not formulate policy or who do not have a significant role in employee relations as described in subdivision seven of section two hundred one of such law as amended by this act."<sup>2</sup> Compare this rather complex almost Janus-like language, with the simple Taft-Hartley exclusion in the definition of employee, "or any individual employed as a supervisor".<sup>3</sup>

The PERB Board which, of course, never flinches at any challenge, has through our Representation section responded to the statutory definition of managerial by drawing distinction between those who might be thought to be management merely

<sup>1</sup> CSL, Art. 14, Sec. 201.7(a).

<sup>2</sup> CSL, Art. 14, Sec. 201.12.

<sup>3</sup> LMRA, Sec. 3, ¶2.



because of their titles and those who truly are of that genus by virtue of meeting the criteria that exist in the statute. The Board's decisions in the *Matter of Hempstead*<sup>4</sup> and the *Matter of Copiague*<sup>5</sup> delineate our position with regard to school principals well enough.

Prior to the passage of the legislative amendments re managerial and confidential employees, two of my former PERB colleagues, Paul Klein and Janet Axelrod, in an article in the *Labor Law Journal*<sup>6</sup> commented on the question of conflict of interest where inappropriate bargaining units are established and stated that in their view: "Conflicts are most likely to arise when employees do not share similar benefits, statutory protection, or professional outlook, or when they have supervisory authority over other employees. Taking the last point first, supervisory employees are not excluded from the coverage of the Law and there is no statutory taboo against including them in a unit with the employees they supervise. However, the Board and the Director have concluded that supervisory employees exercising a significant degree of control over their subordinates' working lives would prove to be incompatible negotiating partners with those whom they supervised - regardless of any similarity of terms and conditions of employment. Accordingly, principals, assistant principals, coordinators, directors, food service managers, head custodians, superintendents of buildings and grounds, and various noninstructional foremen - who have the power to hire, fire, initiate or take disciplinary action, evaluate subordinates, or assign personnel, or the power effectively to recommend such action, have been excluded from units of rank-and-file employees." Now that we have the amendments excluding managerial and confidential employees from Taylor Law coverage, the view that Paul and Janet expressed about the appropriate bargaining unit remains that of Paul Klein's successor Harvey Milowe and of the PERB Board and those administrators not deemed managerial are generally to be found in separate bargaining units from the teachers.

While the determination of bargaining units is not one of the crosses I have to bear, the conciliation of disputes involving administrators is, indeed, among the heaviest. There was recently held in New York City the founding convention of an AFL-CIO chartered union of school administrators to be known as American Federation of School Administrators and Supervisors. This presumes a drive to organize nationwide. But the problems of administrators in bargaining, except in large cities like New York where the number of administrators and school supervisors is very large, seem to me almost insuperably difficult. The bottom line in bargaining is power, or the power relationship between employer and union. In bargaining with a unit of a few administrative personnel, does the board of education have the same concern about the ability to reach agreement as it has in negotiations with the teachers or with a union representing the substantial number of non-professional staff employed? Well, it may indeed. If it does not? Under our law and in the private sector under the National Labor Relations Act the parties are expected to bargain in good faith. It has oft been repeated, however, that the duty to bargain does not require either the employer or the union to

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<sup>4</sup> 6 PERB ¶3001.

<sup>5</sup> 6 PERB ¶3001 and 8 PERB 3095.

<sup>6</sup> Klein, Paul E. and Axelrod, Janet, "The Taylor Law and Public Schools: A Look at the Areas of Representation and Improper Practices", *Labor Law Journal* - July 1970. Commerce Clearing House, Inc., Chicago, Illinois 60646.



come to an agreement. The National Labor Relations Board was told by the United States Supreme Court in *H. K. Porter Co.*<sup>7</sup> that it cannot compel a party to agree to anything. The New York State PERB does not have such powers either, and I assure my readers does not seek them. If the employer board of education stands fast with regard to any or all demands by administrator union representatives, there comes the request from the union for PERB to provide "superconciliation". I am loth to offer such service. Nevertheless, to administrators or for that matter to anyone else the abolition of the legislative hearing in school districts has left open-ended the question of "finality". If my office provides a post fact-finding conciliator in bargaining disputes involving administrators, he may well find a bargaining table badly tilted. It is not for him to balance it. Byron Yaffe, now counsel to the Wisconsin Employment Relations Commission, was until recent time a professor at the School of Industrial and Labor Relations at Cornell. Well do I remember, the usually mild Byron almost shouting at his classes, "The neutral never ever interferes in the power relationship between the parties". Quite right, too.

I recall that years ago, many employers, especially hotels and department store chains, would hire young men right out of college as "executive trainees". This was unfortunately, a frequent device to avoid FLSA strictures. The youthful innocents who dreamed of being profiled someday in *Forbes* or *Fortune* could not be expected to work only the statutory maximum of hours per week since they were "executive staff". Their salaries rarely reflected their executive status. It may well be that school district administrators who really are executives, should have their problems addressed through recognition by their employers that they are managers (whether they meet statutory definition or not), and besides the key to the executive washroom they need good salaries, prerogatives and recognition that they are performing highly responsible managerial service. Many school board employers do just that. Obviously, others do not.

I hope that there is no inference that the working conditions of school administrators parallel to my mind those of Appalachian crofters or Florida migrants. They are, however, organized and bargaining under the Taylor Law, and my concern really lies in the area of my jurisdiction. How effective can mediation and fact-finding or any other conciliation procedures be with a group that seems to me to be intrinsically lacking in the ability to make themselves effective bargainers? Perhaps, there is no need to have concern. Maybe bargaining with administrators is being carried on without serious problems for the parties in most of the districts that have not gone to impasse with their supervisory staffs. Perhaps I weep at scars that never felt a wound. But if memory serves, when we did have the legislative hearing in school districts the statistics were that a legislatively imposed settlement was given teacher locals eleven times and the administrator chapters eight times.<sup>8</sup>

We said at the beginning of this article that the questions involved in bargaining by supervisory or administrative personnel vex and irritate. But since I have no answers, perhaps we should let things be unstirred. I remember the cautionary words of Harry Graham in his *Ruthless Rhymes for Heartless Homes*:

<sup>7</sup> *H.K. Porter Co. v NLRB*, U.S. Sup. Ct. 1970, 73 LRRM 2561.

<sup>8</sup> Legislative Hearings in School Districts: A 5-Year Study (1970-74) by Jack A. Ginsburg, New York State Public Employment Relations Board Research Office.



"Billy, in one of his nice new sashes,  
Fell in the fire and was burnt to ashes;  
Now, although the room grows chilly,  
I haven't the heart to poke poor Billy."

What am I poking around for? Perhaps to seek answers from panel?

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Your attention is invited to some major decisions of the Court of Appeals which impact on the Taylor Law. Our Counsel, Martin Barr, offers the following precis:

RE: Court of Appeals decisions - Board of Education, Yonkers City School District v. Yonkers Federation of Teachers; Burke v. Bowen; Yonkers School Crossing Guard Union v. City of Yonkers.

In the Yonkers Federation of Teachers the Court of Appeals holds that a job security clause is a valid and enforceable contractual obligation notwithstanding that the subject matter does not involve a mandatory subject of bargaining. Such a job security clause, which is explicit, comprehensive, extends for a reasonable period of time and was not negotiated in a period of legislatively declared financial emergency, between parties of unequal bargaining power, violates no public policy, statute or controlling decisional law and is therefore valid and enforceable. Such provision may properly be submitted to arbitration. If the arbitrator determines that the agreement has been breached, the arbitrator may fashion a remedy appropriate to the circumstances considering, among other things, the financial condition of the employer and its ability to fund the positions abolished.

In Burke v. Bowen, the Court reiterates that the job security clause involving the firefighters of Long Beach was valid and enforceable. However, in the absence of an arbitration provision in the contract, the Court will not grant the equitable remedy of specific performance in the light of the grave financial crises facing the City. The Court recognizes, however, the right of the dismissed firefighters to bring their own action for breach of the collective agreement and to recover damages for such breach.

In the School Crossing Guard case, the Court concluded that the clause in dispute was not a job security clause. It therefore affirmed the Appellate Division's dismissal of an action to enjoin the firings.

These decisions are of great significance to the continued well-being of the Taylor Law. The Appellate Division, Second Department, in each of these cases had previously held that even if job security clauses are valid, they are not binding on a public employer who must in its judgment abolish positions because of economic necessity. The lower court concluded that public policy demands that the employer's job abolition power remain unfettered. The Court of Appeals on the contrary holds that the circumstances revealed by these cases do not relieve a public employer of a lawful contractual obligation. The opinion of the Court of Appeals reaffirms that a collective bargaining contract stands in the same legal posture as any other contract. Economic necessity cannot justify unilateral rescission of lawful contractual obligations set forth in a collective bargaining contract any more than it justifies unilateral rescission of a lawful contractual obligation in any other type of contract.