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FOR MEDIATORS / FACT FINDERS

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HAROLD NEWMAN'S CLOUDY CRYSTAL BALL

"You are old," said the youth, "and your jaws are too weak
For anything tougher than suet;
Yet you finished the goose, with the bones and the beak-
Pray, how did you manage to do it?"

"In my youth," said his father, "I took to the law,
And argued each case with my wife;
And the muscular strength, which it gave to my jaw
Has lasted the rest of my life."

"Father William"
Alice in Wonderland
Rev. Charles Lutwidge Dodgson
(Lewis Carroll) 1832-1898

"I sometimes think that many of the negotiators who function under the Taylor Law have jaws like Father William. How else may one explain school district negotiations that begin in January or February and have not concluded at the opening of school? Our esteemed panel colleague, Murray Bilmes, the pride of Pine Bush, whose only blemishes are that he is a lawyer and a duplicate bridge player, has reflected on this. He has written me in part.

"One of your articles within the last several months discussed the question of time. When a mediator or fact finder first enters into an impasse situation, I believe he should spend some time in evaluating how the parties to the impasse have spent their time.

"Have the parties seriously negotiated? If so, what items have they chosen to thoroughly discuss? What items have they chosen to neglect? What does each party think that the other is trying to accomplish at that moment, and then from the point of view of accomplishing by the time that an agreement is to be reached. If the parties themselves do not seem to have any thought about these matters, then the mediator or fact finder should begin to explore these with the parties, preferably when they are apart from one another...."

"I presume that what Murray in referring to what the parties are trying to 'accomplish' means the hard political needs of each side. Even neophyte mediators are familiar with the fact that much that is superfluous and unnecessary to the real needs of the parties is put on the table as 'throwaways'. The lamentable fact appears to be, however, that the parties often spend absurd amounts of time on issues that are not 'gut' issues. And Murray Bilmes went on in his letter to me to suggest that

with the appearance of the neutral who can gain quickly the confidence of the parties, it is possible to get a true picture of the essential agenda even at the first meeting. The only caveat I have is that sometimes 'throwaways' should not be thrown away too quickly. They may at the end have cosmetic use to a party which did not achieve many of its essential goals.

"Still on the question of time, I have some glad tidings. Mediators and fact finders are bringing in settlements in police and fire cases despite the opportunity for the parties to feast with panthers by trying interest arbitration. More than time is involved here as a concern, of course. But, here, a cautionary word on cases going to arbitration. We stated at the PERB seminars at Cornell this past winter and now restate, that we look upon the interest arbitration hearings in police and fire cases under the statute as a type of 'show cause' hearing. They are not intended to provide a 'de novo' reexamination of all the issues that hit the bargaining table. PERB's counsel, Marty Barr, in an article in the Albany Law Review¹ has stated our position clearly. 'Unless the arbitration process is to be totally duplicative of the fact finding process, which does not seem consistent with the statute, the arbitration panel may properly treat the fact finder's recommendations as the basis of its considerations. The parties may properly be required to address themselves to those recommendations and offer additional evidence only on those recommendations with which they disagree. The parties will have the burden of persuading the arbitration panel to revise the fact finder's report. In short, it seems most appropriate to treat the arbitration hearing, under the particular statute, as in the nature of a hearing to show cause why the fact finder's recommendations should not be adopted.

"Such a procedure has several advantages: (1) it will save time; (2) it will reduce the labors of the arbitration panel by limiting the number of issues to be considered in depth; (3) it will reinforce the persuasive impact of the fact finder's report; (4) it may encourage the parties to reach agreement on the fact finder's report or on mutually agreed modifications thereof; (5) it may discourage use of compulsory arbitration, since the parties will recognize that it will not bring them any significant advantage.'

"Obviously, as we emphasized at the seminars, since PERB takes the position that the arbitration panel should be conducting a type of show cause hearing, the responsibility of the fact finders in police-fire cases must be emphasized. The reports must reflect in recommendations and rationale, a thoroughly professional job. We would like to take this opportunity to congratulate the panel for doing really first rate work in these cases. I have not read a sloppy or poorly reasoned report so far. Let me share with you a snippet of Jonas Silver's response, for example, to a City's argument that a previous reduction in hours annihilated the employee group's demand for wages in line with other cities in the county.... 'The City proved too much. All terms of employment having monetary aspects may be calculated on the basis of salary add-on or hourly rate increase. But such equivalence does not remove the reason for being that attaches to the term in question as a condition of employment. Thus a reduction in hours of employment accomplishes the benefit of a shorter workweek per se apart from its monetary equivalent. And while non-salary compensatory items may be equated to a salary figure for cost accounting purposes, it nevertheless remains true that salary as dollars to be paid is not received by an employee in the aggregate. He does not go to the grocer and say may I pay you with an additional 7% which I do not have because it is in the rate and not in the dollars....' Lovely!

¹ Martin L. Barr, "The Public Arbitration Panel as an Administrative Agency: Can Compulsory Interest Arbitration be an Acceptable Dispute Resolution Method in the Public Sector?" Albany Law Review (Vol. 39, No. 3, 1975).

"A long time ago, the distinguished labor relations expert and PERB panelist, Professor Emanuel Stein, delineated the function of the 'interest' arbitrator as requiring him to legislate for the parties:²

"The task is more nearly legislative than judicial. The answers are not to be found within the 'four corners' of a pre-existing document which the parties have agreed shall govern their relationship. Lacking guidance of such a document which confines and limits the authority of arbitrators to a determination of what the parties agreed to when they drew up their basic agreement, our task here is to search for what would be, in the light of all the relevant factors and circumstances, a fair and equitable answer to a problem which the parties have not been able to resolve by themselves."

"But, of course, the lack of a 'pre-existing document' in interest as against rights arbitration as described by Manny Stein does not hold for Taylor Law police-fire arbitration. You have a document when you arbitrate those cases. The document is, of course, the fact finding report and 'legislation' should be almost precluded. We can be guided by Epictetus.³"

"Here is the beginning of philosophy:
a recognition of the conflicts between men,
a search for their cause,
a condemnation of mere opinion...
and the discovery of a standard of judgment."

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ARBITRATION PANEL MEMBERS PLEASE NOTE. It is the responsibility of every arbitrator on our panel to keep the PERB office current with regard to changes in per diem rates charged or adjournment fees. Twice recently parties have protested that the fee shown on the arbitrator's vita was not the fee ultimately charged.

Further, if arbitrators wish to revise their resumes, they should forward the revisions to PERB without delay.

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RECENT AGREEMENTS

Agreement Between

Summary of Changes

City of Cohoes
(Albany County)

and
PBA

1975-1978
(Covers about 45
policemen)

Salary: 1975 - raised by 5% for all ranks and will be further increased by 6% in each of last 3 years. The 4-yr. contract signed on 6/27/75.

<u>Rank</u>	<u>1974</u>	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>
Patrolman Start	\$8,416	\$8,837	\$9,367	\$9,929	\$10,525
Patrolman-Top (in 4th year)	9,381	9,850	10,441	11,067	11,731
Lieutenant	10,512	11,038	11,700	12,402	13,146

² Emanuel Stein, New York Shipping Assn., 36 LA 44, 45 (1960). Quoted in F. and E.A. Elkouri, "How Arbitration Works," Bureau of National Affairs, Inc., Third Edition 1973.

³ Epictetus (c. 1st Cent., A.D.) "Discourses".