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HAROLD NEWMAN'S CLOUDY CRYSTAL BALL

"The laws of God, the laws of man,
He may keep that will and can;
Not I; let God and man decree
Laws for themselves and not for me."

Last Poems

A. E. Housman (1859-1936)

Several Sundays ago, I climbed aboard the Allegheny commuter plane which Ted Gerber of my staff calls the "Quasimodo Special". He refers to the cramped space in the sixteen passenger Twin Otter aircraft which twists Ted's 6'5" body into terrifying shapes and leaves me - though I am three inches shorter than Ted - feeling after each flight as though I am doomed to a permanent arthritic condition. No State car was available - hence Quasimodo. Ted, Ben Westervelt and I were meeting with the parties in a teacher strike whose resolution on some previous visits by Ben and Ted seemed elusive. I was now joining them because they felt (correctly as it turned out) that the parties were feeling sufficient pain so that a massive assault by conciliators would bring a cease fire.

Upon our arrival at the motel where the negotiations were being carried on, we found two large and hyperthyroid groups of citizens awaiting us in the lobby. One group, which described itself as the "Concerned Parents" wanted us to "compel" the Board of Education to bargain "fairly" with the teachers and to insure that those non-mandatory subjects which the Board bargainers wanted excised from the new contract would be sent to binding arbitration. The other group, who identified themselves as "Parents and Taxpayers", wanted the Board of Education to stand firm against the teacher lawbreakers and urged us to encourage the Board to drag the rabble of Jacobin pedagogues to an Onondaga County version of the guillotine. Ben, Ted and I recognized - *vox populi, vox dei*. Before meeting with either the teacher or board negotiators, we met with the two citizens groups first. We assured them separately of our shared concerns and were presented on the departure of each delegation with what seemed to be a ton of signed petitions. Given the total population of the school district, it appeared that there were outraged citizens prepared to sign anything. I am sure, though we took no time to compare, that some people signed the petitions of both groups.

After meeting with the teachers, we were convinced that we could not have an agreement on the substantive issues unless the strikers were assured that beyond the penalties required by statute, the Board of Education was not planning a White Terror. The teacher negotiators described for the mediators scenes in which board members, principals and the superintendent met like Antony, Octavius and Lepidus after the murder of Julius Caesar, to prick down the names of conspirators who were marked for death. Their language lacked the graceful flow in Shakespeare's re-creation,¹ but the apprehension was very real.

We then met with the Board of Education and sought from them not only the assurance that at the conclusion of the strike, those who had taken part would not be broiled over a slow flame without due process of law, but that the Board's excellent young attorney-negotiator could be given authority to write such assurance in language that would be part of the memorandum of agreement. We obtained such a commitment from the Board at 5:00 P.M. and were able to get final agreement on all issues by 5:00 A.M. the next morning. (Given the nature of teacher-school board bargaining, a probable record!) Please note that we did not seek an amelioration of statutory penalties or to obtain an "amnesty". That is activity that is absolutely forbidden PERB conciliators and we pray none attempt it.

Three days after this happy event, I was in Chicago at the American Bar Association's National Institute on Labor Relations Law in the Public Sector. (I had been invited to deliver a paper at the Institute. With the candor which I hope characterizes my every

¹ Shakespeare, William, "Julius Caesar", Act IV - Scene I.

utterance, I had warned that the paper might be as stimulating as a Playboy interview with Chief Justice Burger. They failed to flinch and I gave my paper.) The events leading to the conclusion of the teacher strike which I have described were, of course, very fresh in my mind in Chicago and since many of the speakers addressed such matters as job security, procedural due process and the duty of fair representation, I listened with great attention. These are, of course, topics which the labor relations professional must now put at the very top of his list for study and discussion. I shall be astonished if the next meeting of the National Academy of Arbitrators does not give a great deal of time to cases such as *Holodnak v. Arco Corp.* and *UAW Local 1010*,² *Vaca v. Sipes*,³ *Hines v. Anchor Motor Freight, Inc.*,⁴ etc. Indeed, Jean McKelvey, a former President of the National Academy devoted much of her excellent paper at the recent SPIDR meeting in Toronto to these cases. The ones I have cited arose in the private sector. Ben Aaron pointed out in his address to the Chicago ABA meeting that the great majority of procedural "due process" issues raised in private sector grievances do not reach the constitutional level; in this context "due process" means standards of fairness either agreed to by the parties and embodied in their collective bargaining agreements or applied by arbitrators according to their personal and varying notions of fair play. In grievances arising out of federal and state or local government employment, Professor Aaron stated the courts will insist constitutional guarantees be respected. We have already seen a substantial number of major decisions in the public sector involving constitutional due process in dismissal cases - *Perry v. Sindermann*,⁵ *Board of Regents v. Roth*,⁶ *Arnett v. Kennedy*,⁷ and *Bishop v. Wood*⁸ among them. I have discussed the subject of fair dismissal before in this column,⁹ particularly the *Antinore* case¹⁰ here in New York. (When the Appellate Division reversed the lower court, one of my PERB colleagues remarked sourly that they came to the right decision for the wrong reason.) Now, not only we in New York, but the people throughout the country will be interested to see what the Court of Appeals ruling in the case will be.

But for those involved in the conciliation of teacher disputes, particularly here in New York State, no judicial decision has cast a larger shadow I think, than the *Matter of Tuller*¹¹ which arose after the bitter teacher strike in the Susquehanna Valley School District in 1972. (Erwin Kelly still twitches at any recollection of that strike.) You may recall that the case which finally ended at the Court of Appeals involved two probationary teachers - probationary because they had lost their tenure due to participation in the strike. Under Section 210(2)(f) of the Taylor Law, they were placed on probation for one year. During the probationary period they were dismissed without a hearing. An Article 78 proceeding restored them to their jobs with back pay. Then, under the Civil Service Law and the rules of the Civil Service Commission, they were terminated at the end of the probationary year. The termination was for "unsatisfactory performance" in their teaching duties. With only Justice Cooke dissenting, Justice Fuchsberg spoke for the court. ... "Were this a case involving a newly-appointed probationer, in view of the teachers' allegations that the quality of their supervision was less than exemplary, it might be appropriate to remit for a finding of fact on that issue. Here, however, we see no need to do so. It is clear that some evaluation did take place and the teachers were informed of its results. Moreover, the pre-probationary performance levels of the experienced teachers here indicate that they knew and understood what was required to meet the district's standards. The evaluations of their supervisors simply show that, for whatever reasons, their performance levels during the probationary year had become unacceptable to the district."

² 381 F. Supp. 191 (D. Conn. 1974), aff'd in part and rev'd in part, 514 F.2d 285 (2d Cir. 1975), cert. denied, 96 Sup. Ct. 188 (1976).

³ 386 U.S. 171 (1967).

⁴ 96 Sup. Ct. 1048 (1976).

⁵ 408 U.S. 593 (1972).

⁶ 408 U.S. 564 (1972).

⁷ 416 U.S. 134 (1974).

⁸ 96 Sup. Ct. 2074 (1976).

⁹ PERB Bulletin, January 1975, Vol. 6, No. 1.

¹⁰ 79 Misc. 2d 8, 356 N.Y.S. 2d 794 (Sup. Ct. 1974), rev'd, 49 A.D. 2d 6, 371 N.Y.S. 2d 213 (1975).

¹¹ 40 N.Y. 2d 487 (1976).

We understand the position of the experienced teacher who is suddenly a probationer again and thus subject to constraints of supervision and criticism from which he had long been free. But a school district is entitled to weigh the teacher's performance itself, not merely the reasons for it, and its decision, if not wholly arbitrary, must be respected by the courts...." (The court was careful to state that the case would have been "on a different footing" if there was any question of reprisal for striking involved. But even the petitioner teachers did not charge that.) It does not matter much. The *Tuller* case has created shock waves but not ended teacher strikes. Since we are at a time when there are far more unemployed teachers than teaching job openings, job security is rapidly succeeding money as the chief issue at the bargaining table in school district negotiations involving professionals.

Moreover, job security and procedural due process seem to me to be arising as the major issues in the public sector generally. (Neither the *Amett v. Kennedy* nor the *Antinore* cases, for example, involved educators.) When the state of the economy makes bargaining over wages and other "cost items" more and more difficult, when losing a job in these times, particularly a civil service job, can be a monumental tragedy, we must expect job security, fair dismissal procedures and due process will loom large at every public sector bargaining table.

More than eighty years ago, Justice Oliver Wendell Holmes in an oft-quoted decision¹² wrote, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman...." "There are few employments for hire in which the servant does not suspend his constitutional right of free speech, as well as idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him." The guarantees of the Bill of Rights are far more binding on government employers than on those in the private sector. Nevertheless, there are limits to due process even for the civil servant. The Education Law - especially the tenure sections - the Civil Service Law, etc., provide limits as well as protections. The public sector mediator, fact finder and arbitrator should make them a catechism.

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1976-77 TEACHER SALARY SCHEDULES SHOW 4.6% STATEWIDE INCREASE

Analysis of 179 teacher contracts received by PERB's Research Office shows that teacher salary schedules for 1976-77 are up an average of 4.6% statewide. The average increase for 149 upstate districts was 4.7%; while downstate in the Metropolitan Area covering Nassau, Suffolk, Westchester and Rockland Counties, schedule increases averaged 4.4%.

The average statewide starting salary at the Bachelor's level is \$9,988; upstate the average is \$9,637 and downstate the average is \$11,320. Increments, which are in addition to the salary schedule increases, average \$521 statewide, \$487 upstate and \$598 downstate.

Contracts negotiated in 1976 show significantly lower increases for 1976-77. The average Bachelor's Degree Step 1 salary for 83 contracts negotiated throughout the State is \$9,776, up 2.8% over 1975-76. Upstate, the average starting salary for 69 districts is \$9,232, up 3.1% over 1975-76 plus increments of \$441. For 14 downstate contracts negotiated in 1976, the starting salary averaged \$11,453, up 2.2% over 1975-76, plus average increments of \$581.

Teachers covered for 1976-77 by multiple-year contracts negotiated in previous years received greater salary increases whether the contracts provided for a fixed, predetermined salary schedule or where increases were based on changes in the Consumer Price Index.

Changes in each district's salary schedule were calculated by averaging the increases at the first, seventh and top consecutive salary steps on the Ba, B+30 and B+ 60 scales. Statewide, upstate and downstate averages were obtained by weighting the increases of each district by the number of full-time classroom teachers employed as of the Fall of 1975.

A complete report showing the salary schedule changes at each of the 179 districts summarized on the following table is available from PERB's Research Office. The report also summarizes salary provisions for those districts that have non-traditional salary schedules which are not included in computing the summary averages. Requests for copies of the complete report should be addressed to Dr. Thomas E. Joyner, Director of Public Employment Research, New York State Public Employment Relations Board, 50 Wolf Road, Albany, New York 12205 (Tel: 518 457-2593).

¹² *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892).