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FOR MEDIATORS / FACT FINDERS

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HAROLD NEWMAN'S CLOUDY CRYSTAL BALL

"Do not do unto others as you would they should do unto you.
Their tastes may not be the same...the golden rule is that
there are no golden rules."

George Bernard Shaw (1856-1950)
"Maxims for Revolutionists"

I suspect that over the last eight years and more, Chairman Bob Helsby and I, have between us done about 80 percent of the public speaking before groups to which PERB has been invited. There is a substantial difference between a Helsby talk and a Newman talk. The Chairman prepares carefully and conscientiously. I have few notes and tend to extemporize a great deal. But if the topic has to do with impasse resolution, we both always emphasize the importance of flexibility in procedures. Nothing else is of greater concern, Dr. Helsby and I believe, than the need to leave the neutral agency unfettered to do what the situation seems to require without mechanistic application of statutory impasse procedures. (I must confess that I have thought about the flexibility doctrine so much that whereas I had considered at one time the old inscription for my gravestone, "NEVER MIND THE RESURRECTION, LORD, I NEED THE REST", I have now thought of having the single word - FLEXIBLE. But this is not the place for serious discussion of anything but temporal things.)

In connection with interest arbitration in police-fire disputes, I wish I had some flexible procedures to keep the parties from going to the final step, except in the barest minimum of cases. There are at least two advocates in the downstate area who seem determined to have all of the negotiations in which they are involved go to arbitration. Short of a few of their clients being badly burned by arbitrators' awards, I don't know how they can be stopped from continuing their rather irresponsible behavior. Input in arbitrators' awards is *ultra vires* for me anyway.

We have given serious thought, my staff and I, to the questions raised by panel members at last year's seminars as to the utility of fact finding where binding interest arbitration is the last step. Right now, that is an academic question. The statute would have to be amended to excise fact finding, and we are not yet at the point where our Board and the Legislature will be discussing the police-fire amendment. More on that later. We have, however, compressed the procedures in another way. We have been sending police-firefighter cases directly to a mediator/fact finder instead of appointing a mediator first. This much resembles our practice in school district disputes.

Why, one may inquire, if we are concerned about too many cases going to arbitration, would we compress the conciliation steps before it? Simply, because police and firefighter unions and their employers are often quite similar to

teacher organizations and school boards - if there were thirty steps in impasse resolution procedure, they would use them all! There is not any rational reason to expend moneys from our slender exchequer if mediation will only be a futile first step. And, of course, the fact finder will mediate. Unlike the mediator, he has substantial muscle. The parties know that if he is compelled to write a fact-finding report, it will not only be made public, but the arbitration panel will look upon it as a guidepost. Like the Sam and John Kagel "med-arb" conciliator, he has been endowed with substantial clout. Because of the special role of the fact finder and his report in police and firefighter cases, it can and does work out that even if mediation by the fact finder before the report is written should fail, he may well be able to mediate after the parties have his report and recommendations. Arthur Jacobs had the unenviable task of fact finding in a firefighter impasse in a city that has reached the limit of its taxing power and other resources. Inevitably, there were cries of pain from at least one side when the report was received. Then, *mirabile dictu*, Art was invited back by both sides to try to work out an agreement.

Nobody that I know speaks and writes with more clarity and common sense on impasse resolution than does Arnold Zack. In an address to the inaugural convention of SPIDR three years ago, Arnold spoke to the Fact Finder's role:¹

"Perhaps, too, the parties and the neutrals should loosen the constraints of functus officio. Why shouldn't a fact finder make himself readily available to the parties if one or both want him to mediate after a fact finder's report? This is not a case of a final and binding award. It involves unsuccessful recommendations and a still unresolved dispute. Indeed, there is a great deal to be said of the private sector fact finding machinery which Chuck² referred to. There, the mediation follows the fact finding. And we all know that even when serving as a mediator our first function is to fact find - to discover what the issues are, what the funds are, what career steps the employees are on, what the proposals cost, and other such information.

Why can't all these functions be combined into one step, with the findings of fact to come first, eliminating the ignorance about them, with mediation to follow and with recommendations to be made, if necessary, on remaining undisposed-of issues. It seems odd that after making a mediator's suggestions to the parties for resolving a dispute, the mediator may still assist the parties in reaching a settlement, even if not his own, but that the same opportunity is not available to the fact finder following his recommendations. If this is due to the sanctity associated with the fact finder's recommendations, I submit that such sanctity is a sham. If it is due to the quasi-judicial nature of the proceedings with their published reports, I submit that such public proclamation is also a sham. Further, if it leaves the parties high, dry and still at impasse, with assertions of finality and clear sailing into a new contract, that, too, is a sham.

¹ Arnold Zack, "The Fact Finder's Role", Proceedings of the Inaugural Convention of the Society of Professionals in Dispute Resolution, "The Public Interest and the Role of the Neutral in Dispute Settlement", Reston, Virginia, October 17-19, 1973. Proceedings edited by J. Lefkowitz, G. Nicolau and H. Schilt, SPIDR, c/o College of Business Administration, Phillips Hall, University of Iowa, Iowa City, Iowa 52242 - March 1974.

² Zack was responding to a paper on the same subject by Charles M. Rehmus, Co-Director, Institute of Labor & Industrial Relations, University of Michigan-Wayne State University.

Finally, I submit that the neutral, regardless of title, should be freed from procedural and self-imposed structural inhibitions to do more than he does to bring the parties to a settlement - they and God willing. If this means changing the title of the step or reversing its position in the impasse sequence, perhaps we should explore doing so now, while the procedure is still undergoing experimentation."

Arnold Zack was not, of course, speaking of a situation in which the final impasse step is binding arbitration, but I think his argument is just as sound under those circumstances. In fact, it may be more so.

The police-firefighter arbitration amendment is due to expire in July '77 unless it is extended by the Legislature. In early November, Professor Thomas Kochan of Cornell ILR and our panel, will have completed his exhaustive study of how the amendment has functioned. I hope that among other things, Tom can enlighten us on the question of whether fact finding is a necessary and useful step between mediation and the interest arbitration. Quite beyond the primary question of retention of the amendment, our Board will wish to advise the proper legislative committees about whether there ought to be some changes. The question of the fact-finding step is certainly one to be carefully examined.

Meanwhile, the panel may be assured whether in police-firefighter or other cases, that whatever dance they wish to perform to get the parties to agreement - waltz, minuet, tango, schottische or soft shoe, "structural inhibitions" at least of the procedural variety of which Arnold Zack spoke, will not get in the way. After almost nine years, PERB is still not an arthritic bureaucracy. We remain limber and dare I say - flexible?

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DISSENTING OPINION. Since, as everyone agrees, mediation is an art and not a science, it inevitably follows that points of view on techniques may frequently be challenged. Our friend, Walter Maggiolo, has written me from his Virginia estate, drawing on the long years of experience he had training FMCS mediators as well as his own impressive mediation experience. He is critical of at least part of the suggestions for mediators contained in the last issue of this publication. Walter writes in part:

"One of the evils of semi-retirement is that it occasionally leaves leisure time and engenders the desire to respond to articles which do not conform to one's beliefs. Hence you are singled out as the victim of this quasi phillipic.

I have particular reference to the May issue of the Bulletin.

I heartily agree that a neutral - be he mediator, arbitrator or fact finder - should take charge. The FMCS - like PERB and other agencies - had our share of diffident and unaggressive mediators. I used to call them the complacent chairmen. They were more aptly described by a local union friend who when expressing his disillusion with one of this breed stated "he don't do nothing for nobody". These neutrals follow a pattern. They usually open the meeting with some inane remarks or misplaced levity. They then proceed to ask each side at the joint meeting if they have changed their position since the last session. This usually evokes a violent negative - for what negotiator even under instructions to settle at all costs would admit unconditional surrender or weakness at the outset of negotiations. Then follows a short speech by the neutral along the lines of "Gentlemen this dispute will be settled some day, etc., etc." and an announcement of the adjourned date.

I disagree with my good friend Eve Robins and Tia Danenberg suggestion of giving the parties instructions on how a mediator works.

It is suggested that the parties be told that the mediator may want to meet with the negotiator alone without his committee. This can be disastrous because often there are intra-union and intra-company politics involved. They may have sold their committees on the slogan of "open covenants openly arrived at". Unless one is sure of his ground, he may unwittingly destroy the negotiator in the presence of his committee. Assume that the negotiator will not meet without his committee - then what. The better approach is for the mediator to sound out the negotiator at a recess or rest period without his committee to ascertain if he can meet alone. If he cannot, there are always opportunities to meet with him alone after the meeting.

If a mediator is in control of a meeting, he need not explain or account for the time he spends in separate meetings. He simply announces at the joint meeting of his intention to meet separately and makes sure to report back to the standing by committee the result of his efforts before reconvening a joint meeting.

A mediator establishes his control as he enters a case. He can do this by his physical position at the table, his initiating the talks by requesting a recitation of the open issues, and by moving the talks from one topic to another.

Each of the suggested guidelines appeals to the parties to put their faith and confidence in the mediator and his neutrality. This is wishful thinking. It is only by his actions and not by his oral exhortations that a mediator establishes the degree of confidence in his ability and neutrality necessary for a successful mediation effort.

Further, I shudder at the apologetic tone of the guidelines as they relate to "pressure". Pressure denotes compulsion. The mediator's tool is persuasion and taking advantage of timing to evolve a consent to lose. If I were a negotiator or committeeman, I would resent being told that I am going to be pressured to do this or that. All it can accomplish is to raise another mental block to the eventual settlement.

Lastly, I like your thoughts on the mediator not being the "slave" nor messenger boy for the parties, especially when requested to transmit a patently unacceptable offer

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Erwin Kelly reports that the cooperation of the panel members in indicating elapsed time by means of showing stopping and starting times has been excellent. You may recall he wrote about this in the March issue of the Redhead. However, there is still some billing coming in without it. He would appreciate your understanding in this matter.

Once again, the following would be an example:

<u>Date</u>	<u>Time Spent - Hour/Day</u>	<u>Nature of Work</u>
April 16	7:00 P.M.-12:00 P.M. 5 Hrs. - 3/4 of a Day	Mediation, Fact-finding with parties
April 18	7:00 P.M.-2:00 A.M. 7 Hrs. - 1 Day	Fact-finding Hearing
April 21	9:00 A.M.-4:00 P.M. 7 Hrs. - 1 Day	Study and Preparation of Report
April 24	9:00 A.M.-12:00 A.M. 3 Hrs. - 1/2 Day	Preparation and Completion of Report

TOTAL HOURS/DAYS: 22 Hrs - 3 1/2 Days at \$125.00 Per Diem = \$437.50