Plenary Three

Taylor Law at 50
May 10, 2018 | 4:00 p.m. – 5:15 p.m.

The Taylor Law over the Years: A Discussion with Former PERB Chairs

The Taylor Law at 50

John F. Wirenius,
Chair, NYS PERB

I

"The Rest is Procedural"

In 1969, Jerome Lefkowitz, then Deputy Chair of the Public Employment Relations Board ("PERB"), used the story of the pagan who asked the great Jewish sage Hillel to explain the substance of Judaism—while standing on one foot—to make a point. As Jerry retold the story, Hillel raised one foot, and quickly answered, "The substance of Judaism is to love thy neighbor as thyself. All the rest is procedural. Now you must go and study the procedures so as to be able to accomplish the substance."[1] Jerry then drew the parallel:

> The substance of the Taylor Law can also be stated briefly. It is that public employees have the right to join or not to join any employee organization of their own choosing, and that public employers are required to negotiate with the employee organizations which have been chosen by their employees to represent them. All the rest is procedural.[2]

This statement holds true today, a half century after the enactment of the Taylor Law.[3]

The relegation of "all the rest" to "procedure" may seem jarring, but bear in mind that "sometimes substantive values cannot be achieved except by reshaping the process for an area of law. Thus, in addition to substantive rules arising from procedural

---

[1] Jerome Lefkowitz, "The Taylor Law, Discrimination and Nontenured Teachers," *Labor Law Journal*, Sept. 1969 575, 575 (Chicago, CCH 1969). The story as given by Jerry is a variant of Talmud Shabbat 31a. *See* 1 THE BABYLONIAN TALMUD: TRACT SABBATH (Michael L. Rodkinson. tr. (1903)).

[2] *Id.*

[3] The Public Employees' Fair Employment Act, Article 14 of the Civil Service Law was enacted April 21, 1967, and effective on September 1, 1967. L. 1967, c. 392. The statute is generally known as the "Taylor Law" as it is based upon the recommendations in a report to the Governor of a committee headed by Professor George W. Taylor of the University of Pennsylvania.

opportunities or shortcomings, procedural rules often serve substantive objectives."[4] Or, as Oliver Wendell Holmes put in as long ago as 1881, "whenever we trace a leading doctrine of substantive law far enough back, we are very likely to find some forgotten circumstance of procedure at its source."[5] From almost the dawn of the Anglo-American system, through the enactment of the Federal Rules of Civil Procedure in 1938 and beyond, substantive legal reform has been accomplished by crafting procedures that "nudge" or steer the parties to a desired outcome.[6]

The Taylor Law is just such a statute; it creates what has been called a "choice architecture"[7] system, one that guides the parties to a desired outcome. In the Taylor Law, that preferred outcome is for the parties to collectively negotiate terms and conditions of employment and to resolve differences at the bargaining table, until it is clear that no such resolution is possible at that time. Only in the last resort, and only for employees in specific public safety positions, is arbitration available to settle a contract, and even that is for a sharply limited time.[8]

---

[4] Scott M. Matheson, "Procedure in Public Person Defamation Cases: The Impact of the First Amendment," 66 Tex. L. Rev. 215, 224 (1987).
[5] Oliver Wendell Holmes, THE COMMON LAW 253, 252-254 (1881).
[6] See Joseph Biancalana, "For Want of Justice: Legal Reforms of Henry II," 84 Colum L Rev 433, 434 (1988); Paul Brand, "Henry II and the Creation of the Common Law," in Christopher Harper-Bill & Nicholas Vincent, eds., HENRY II: NEW INTERPRETATIONS 215-240 (2007); Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," 135 U. Penn L. Rev. 909 (1987).
[7] Richard H. Thaler, Cass R. Sunstein & John P. Balz, "Choice Architecture," in Eldar Shafir, THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY,428, *et seq*. (2012); see generally, Richard H. Thaler, Cass R. Sunstein, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WELFARE, AND HAPPINESS (2008).
[8] For most other non-pedagogical employees, if no agreement results after fact-finding, the appropriate legislative body may, for one budget period, "take such action as it deems to be in the public interest, including the interest of the public employees involved." Civ Serv. Law § 209.3 (e) (iv). However, under the so-called "Triborough Amendment," which made it an improper practice for an employer to "to refuse to continue all the terms of an expired agreement until a new agreement is negotiated," the "legislative body is precluded . . . from imposing a settlement which diminishes employee rights under an expired collective bargaining agreement." *County of Niagara v. Newman*, 104 AD2d 1, 4, 17 PERB ¶ 7025, 7054-7054 (4th Dept 1984), citing 1982 Laws c. 921, adding § 209-a (1) (e). For pedagogues, the Taylor Law only allows negotiation, with statutory non-binding impartial assistance, until agreement is reached. § 209.3 (f).

At the core of the Taylor Law, as Jerry's parable suggests, are two correlative values—the recognition of the right of employees to be represented and to bargain collectively, and the duty on both the employer and the selected employee organization to negotiate over terms and conditions of employment. As Governor Nelson A. Rockefeller phrased it in his memorandum approving the bill, the Taylor Law's "primary impact will be to impose upon the public employer, the public employee and the employee organization a joint responsibility for solving employment relations without injury to the public interest."[9] Professor George W. Taylor, who chaired the committee that proposed the law that is called by his name, agreed. For Taylor, the law's reciprocal expansion of employee rights, which was concomitant with reaffirming employee organizations' duty to the public, made it a landmark: "*Effective participation by employees in the determination of their conditions of employment*," he emphasized (quite literally), "*is the basic idea behind the new law*."[10]

That basic idea of employee input through collective bargaining has flourished in New York, as has the value of mutual, reciprocal duties owed by both management and labor not only to each other, but, ultimately, to the people of the State. New York's Taylor Law has respected those reciprocal duties, with the vast majority of public sector employees' terms and conditions of employment being negotiated between management and labor, while collective negotiations have also ensured the delivery of services with almost no interruptions due to workplace disputes.

---

[9] L. 1967, "Public Employees' Fair Employment Act of 1967," Governor's Memoranda, at 1528. Those reciprocal duties are acknowledged as well in the statute's text; for example, § 207 (c), provides that in determining the appropriate composition of a bargaining unit, "the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public."

[10] George W. Taylor, "Strikes in Public Employment," *Good Government* (vol. 85: 1), 9, 10 (1968) (italics in original); *see also* GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS FINAL REPORT, 19.

The achievement of the Taylor Law is especially impressive in the light of the performance of its predecessor, the Condon-Wadlin Act, in effect from 1947 until its repeal and replacement by the Taylor Law in 1967.[11] Condon-Wadlin simply barred strikes, and deemed strikers to have abandoned their jobs, allowing the employer to re-hire those employees if it chose to, but requiring the erstwhile strikers to serve a five-year probationary period, and barring any pay raises for three years after their re-hiring.[12] While Condon-Wadlin was formidable on paper, "[t]he prevailing viewpoint, however, was that the act had been unenforceable."[13] The problem of enforcement was not restricted to New York and Condon-Wadlin; as the great legal scholar Glanville Williams summarized:

> Attempts have been made to make strikes illegal by statute in Australia and New Zealand and also in England when the National Arbitration Order was in force. Such attempts remain virtually dead letters because of the practical difficulties of enforcement. It is not practical politics to imprison or fine hundreds of thousands of strikers; and even if legal action is directed against their leaders, the result generally is to turn them into martyrs and prolong the dissension.[14]

Under the Taylor Law, unilateral action—whether by management or by labor—is heavily disincentivized; the statute prohibits employers from "refus[ing] to continue all the terms of an expired agreement until a new agreement is negotiated"—unless the union has violated its own obligation not to strike.[15] Unilateral action (i.e., a strike) by a union results in fines and forfeiture of agency fee and dues deduction privileges, as well

---

[11] 1947 N.Y.Laws ch. 392; see William A. Herbert, Philip L. Maier, & Richard Zuckerman, eds, 1 LEFKOWITZ ON PUBLIC SECTOR EMPLOYMENT LAW 24 (4th Ed 2016).
[12] Herbert, *et al*, LEFKOWITZ ON PUBLIC SECTOR EMPLOYMENT LAW at 24.
[13] *Id* at 25.
[14] Quoted in Theodore W. Kheel, REPORT TO SPEAKER ANTHONY J. TRAVIA ON THE TAYLOR LAW 12-13 (Feb. 21, 1968).
[15] Civil Service Law §§ 209-a.1 (e); 210.

as freeing management to act unilaterally pursuant to the Triborough Amendment. Again, the point of the statute is to draw the parties toward a negotiated resolution. This reflects former Board Chair Pauline Kinsella's description of "the basic social contract which underlies the public policy in favor of collective bargaining: the employer gives up some of its power to employees, and, in return, work will be performed efficiently and without disruption."[16]

Controversial as it was at the time, the prohibition of strikes was seen by the framers of the Taylor Law as a necessary precondition of productive collective negotiation between public employers and employees. However, it is fair to note that the authors of the Taylor Law, and its early implementers at PERB, had strongly held general philosophical objections to strikes against government employers. Professor Taylor declared that the prohibition of strikes, "I believe, is designed not simply as protection against the interruption of vital services, but—even more importantly—to preserve the processes of representative democratic government to which we are dedicated."[17]

Likewise, Robert Helsby, PERB's first Chair, viewed "a strike against the government [a]s in the nature of insurrection, or at least civil disobedience."[18] He also contended that the stakes were fundamentally different, explaining that "government, unlike private employers, . . . cannot liquidate its business and reinvest the funds elsewhere; it is obliged by law to provide specified services, some essential, others less

[16] Pauline R. Kinsella, "The Challenges Faced by the Collective Bargaining Process," PERB-Cornell-NYS OCB Conference, Dec. 2, 1997, p. 4.
[17] George W. Taylor, "Strikes in Public Employment" at 10 (emphasis in original).
[18] Robert D. Helsby, *Report to the Select Joint Legislative Committee on Public Employees' Relations* at 3 (1970).

essential."[19] Finally, Helsby was concerned that "the injury which a strike by government employees inflicts upon innocent victims is greater than that which follows most strikes in the private sector."[20]

Jerry Lefkowitz put the matter more bluntly, describing "collective bargaining, insofar as it relies upon the strike threat," as a "throwback" to "Ordeal by Battle," and that "in labor disputes, Ordeal by Battle is more likely to hurt innocent bystanders" than had been the case at common law.[21] Pointing out that the "history of jurisprudence has been the gradual displacement of such tests of strength by rational judgments," Jerry maintained that, unlike a private sector strike, which he described as a "test of economic strength," a public sector strike is "a political challenge," an effort to "change the public climate" by inflicting discomfort on the citizenry.[22] Indeed, Jerry wrote that an illegal strike should be viewed as an act of civil disobedience, but not a justified one absent "a situation where a government by its provocative conduct may precipitate a situation which suppresses the dignity of its employees."[23] Apart from their rule of law and democratic-theory based dislike for strikes, Lefkowitz, Taylor, Helsby, and Rockefeller all viewed strikes as subverting the bargaining relationship by violating the reciprocal duties inherent in the right to negotiate.

---

[19] *Id*.
[20] *Id*. at 3-4.
[21] Jerome Lefkowitz, "Civil Servants and the Strike," *Good Government* (vol. 85: 1), 15, 16 (1968). Although Jerry was not a member of the Taylor Committee and did not have any role in drafting the statute, he served as Deputy Chairperson from the agency's formation until 1987. In that capacity, he was the architect of PERB's Rules of Procedure.
[22] *Id*. at 18.
[23] *Id*. at 20. Lefkowitz did acknowledge that provocation arising to a denial of the fundamental dignity of labor could justify or excuse a strike. Absent such provocation, Lefkowitz rather harshly opined that "for government employees to engage in civil disobedience in order to fatten their pay envelopes by a few dollars" was "an abuse of the technique." *Id*.

In the past half-century, unilateral action by either labor or management has greatly diminished. Public employers throughout the state have successfully acclimated to negotiating terms and conditions of employment, and unions have found their best recourse at the table, not in the streets. While the advertising disclaimer that past performance is no guarantee of future results must be borne in mind, the overwhelming majority of public employers and employee organizations have healthy, well-functioning relationships, as established by the two metrics that matter: reaching agreements and resolving disputes.

II

A Neutral, Independent Agency

Writing about those early years after the enactment of the statute and the formation of PERB to administer the law, Jerry noted that the future of both "did not appear very promising":

> Passed by a reluctant legislature under pressure from an aggressive governor, it was opposed by most local governments and practically all public sector unions. The local governments were disturbed that the statute's policy of fostering collective bargaining would compromise the authority of elected government to manage municipal affairs. The unions, for their part, were unwilling to settle for a law that continued to deprive them of the right to strike, and they were convinced that a law administered by an agency the heads of which were appointed by the governor, the boss of the largest contingent of public employees, could not be trusted.[24]

[24] Jerome Lefkowitz, "Joseph Crowley—A Dedicated Public Servant," 54 Ford. L. Rev. 468, 469 (1986).

Despite these bleak circumstances, "the Taylor Law and the Board became accepted fixtures within a few years after the statute took effect."[25] The late labor historian Ronald Donavan wrote that PERB's handling of the hotly contested representation proceedings for state employees in 1967-1969 "was absolutely critical in determining the future of the agency."[26] Had the agency been overly deferential, "the result would have confirmed the allegations of the law's greatest critics."[27] Instead, Donovan wrote, PERB "came through a difficult period with its independence and its integrity secured," noting that a "good deal of the credit for this success belongs to PERB's chairman, Robert Helsby."[28]

After he left PERB, Bob Helsby explained his vision of how PERB was meant to function:

> At the heart of a responsible labor relations system is an independent and impartial group of professional neutrals who decide the controversial issues with consistency and integrity on the basis of objectivity and merit. These professionals must, of course, be allowed to be insulated from political interference and lobbying.[29]

Harold Newman, who succeeded Bob as Chair, hewed to the same vision of his role. As he put it, "We see our role as implementers of the statute, not as policymakers in any sense that we shall try to influence major changes in the law," adding that "We try to maintain our neutrality and objectivity, and leave the public policy questions to the

---

[25] *Id*.
[26] Ronald Donovan, ADMINISTERING THE TAYLOR LAW: PUBLIC EMPLOYEE RELATIONS IN NEW YORK. 100 (Ithaca, NY: ILR Press) (1990).
[27] *Id*.
[28] *Id*. In memorializing Board member Joseph Crowley, Lefkowitz described Helsby as "a man of rectitude, and a superb administrator," who "organized a strong staff and motivated it to perform in accordance with the principles that he and Joe had set." Jerome Lefkowitz, "Joseph Crowley—A Dedicated Public Servant," 54 Ford. L. Rev. 468, at 469.
[29] Robert D. Helsby, "One Man's View of the Taylor Law—Thirteen Years Later," Governor's Conference on Public Sector Bargaining, at 7 (November 12, 1980).

Governor and the Legislature."[30] PERB's Executive Director, Ralph Vatalaro, agreed, emphasizing that "[t]he best we can do is to gain the respect of the two parties to a dispute, that we do our jobs in an objective and fair manner."[31] Vatalaro pointed out the classic neutral's dilemma: "We cannot expect to have both sides to a specific controversy like what we do—because in virtually all that we do there is a winner and a loser, and somebody, PERB, usually, has to make the pronouncement."[32]

At times, this has created heat for PERB and its personnel—Alton Marshall, an alumnus of the Rockefeller Administration, remembered that "Helsby was considered a god-damned Benedict Arnold;"[33] at around the same time, the editor of *The Civil Service Leader* denigrated Jerry Lefkowitz and Director of Representation Paul Klein as would-be "Labor Messiahs" and demanded their firing.[34] Even George Taylor "often remarked, somewhat ruefully, that the resulting enactment was called the Taylor Law only because the politicians knew that Taylor would never run for office."[35]

In the early years, denunciations by labor as well as friction with employers was common; Helsby noted that "[w]ithin a month after the Taylor Law was passed, some 15,000 unionists gathered in Madison Square Garden to denounce the Law and establish a fund for its repeal."[36] At around the same time, labor leader Victor Gotbaum

---

[30] "Fifteen Years of the Taylor Law," *The Chief/Civil Service Leader*, August 27, 1982 at p 1, 3.
[31] *Id*. Ralph Vatalaro was appointed Director of Information and Education upon the founding of the agency; he subsequently served as Executive Director from 1970 to 1990.
[32] *Id*.
[33] Summary of Interview with Alton Marshall, April 30, 1985, at p 6; see Donovan, ADMINISTERING THE TAYLOR LAW, at 77.
[34] Donovan, ADMINISTERING THE TAYLOR LAW, at 85.
[35] Helsby, "One Man's View of the Taylor Law—Thirteen Years Later," at 4.
[36] Robert D. Helsby, "Labor Relations in the Public Sector—A Political Approach for a Democratic Society," presented at the IRRA Annual Spring Meeting at p. 10 (May 3, 1973).

condemned the Law's anti-strike provisions at the Tri-County Long Island Labor-Management Institute forum.[37]

Currently, and for the past four decades, no such ructions disfigure PERB's relationships with the parties. That is not to say that specific decisions have not been controversial, or that both sides to a given dispute are always pleased with the outcome of any given case; I recall as Deputy Chair attending a public meeting at which PERB's non-intervention in a matter in which no proceeding had been commenced was scathingly criticized. The most supportive statement in the room was that I was "a nice man who shouldn't be blamed for the Board's mistakes." (I suspect I have since lost that immunity.)

Case-specific unhappiness with particular outcomes, though, does not remotely resemble the systemic objections to the Taylor Law and to PERB itself that marked the early days. In large part, I believe, this reflects the agency's success in preserving its integrity and its neutrality. While this reflects great credit on the staff and Board members of PERB over the years, it also reflects on the architectonic structure of the agency. Put more simply, neutrality and freedom from political pressure are baked into the structure of PERB.

As former Executive Director Ralph Vatalaro said in an interview almost 30 years ago, "PERB is independent with built-in safeguards to keep politics out of the Board."[38] Board members "are appointed for six-year terms, one each on odd numbered years."[39] In addition to the staggered terms, the Taylor Law provides that "Not more than two

[37] Sy Safransky, "Taylor Act Denounced by Labor," *Long Island Press*, October 18, 1967, at p 14.
[38] "PERB Neutrality Important," *The Public Sector*, December 13, 1978, at p 7 (internal quotation marks omitted).
[39] *Id*.

members of the board shall be members of the same political party," another check against political pressure.[40]

Most importantly, however, as Vatalaro noted in 1978, the "governors have made it a practice to appoint only highly qualified and experienced people to the Board."[41] In fact, "all the board members (since 1967) have been experienced in labor relations, arbitration, mediation, and/or labor law prior to their appointments."[42] Two years later, Helsby wrote that:

> We in New York have been fortunate to have had Governors who have understood the collective bargaining process and the need for a neutral agency of this type. There has been no attempt to politicize its organization, its procedures, operations, or the substance of its decisions. . . . Likewise it [New York] has every right to be proud of the high caliber of the members it has appointed to the Board and the reputation the Board has earned for competence and integrity, not only in New York, but across the Nation.[43]

From my position as Chair in 2017, I firmly agree with Bob Helsby that the independence, integrity and quality of the Board and its members—and I would add its Directors, Administrative Law Judges, and Conciliation staff—are the hallmarks of PERB. I also agree with Pauline Kinsella that they are the primary reasons for its success and the success of the Taylor Law for fifty years.

[40] Civil Service Law § 205 (1).
[41] "PERB Neutrality Important," *The Public Sector*, December 13, 1978, at p 7.
[42] *Id*.
[43] Helsby, "One Man's View of the Taylor Law—Thirteen Years Later," at 8.

III

"Accomplishing the Substance"

According to PERB's internal statistics, 85% of public employers reach agreements with the unions representing their employees. 15% of impasses involve public safety employees, and approximately 40-45% of these go to binding arbitration.[44]

Additionally, the Taylor Law has virtually eliminated strikes—since 2012, only one declared strike has taken place, involving adjunct faculty at Nassau Community College in 2013.[45] While there have been several strike charges filed in the past decade, most have involved equivocal behavior such as suspected slowdowns or sick outs. Such charges have averaged approximately two or fewer per year, and have been settled without adjudication.

Finally, 80% of improper practice claims are settled without a decision with the mediation efforts of PERB's Administrative Law Judges; the rest are resolved by binding decisions. Over the last decade, exceptions to the Board have been filed in about one-third of the cases in which ALJs have issued decisions. By the time an appeal to the Board has been filed, settlement is much less likely; the Board has issued, on average, one-third the number of decisions the ALJs have. From this admittedly rough handling of PERB's internal and published data, an imprecise but salient portrait—not a photograph, perhaps, but at least a water color—of labor relations in New York State

[44] Conciliation Statistics:

- Approximately 2100 contracts are negotiable each year
- Approximately 15% of negotiations reach impasse (300-350) each year
- Approximately 70 % of all impasses settle in mediation
- Approximately 15% of the cases involve police and firefighters where Interest Arbitration is the final step - slightly fewer of these cases settle in mediation (55-60%).

[45] *See Nassau Community College*, 36 PERB ¶ 3006 (2014).

can be glimpsed. That picture is one of a system that is largely successful, with most disputes being settled, rather than going to a binding decision. That picture represents the Taylor Law functioning as intended.

Conciliation

The fact that the vast majority of bargaining units (85%) and employers are able to reach collective bargaining agreements without PERB intervention alone reflects a fundamentally healthy system of collective bargaining throughout the State. For those units and employers, Bob Helsby's maxim that "the best agreement is one which the parties reach themselves" has been brought to fruition.[46]

Strangers to PERB's conciliation processes might find the path leading to reaching binding interest arbitration counter-intuitive. In other contexts under New York state law, the Court of Appeals has stated that "arbitration is considered so preferable a means of settling labor disputes that it can be said that public policy impels its use."[47]

Despite this general preference by the courts in other circumstances, the Taylor Law only makes compulsory binding arbitration available to create a final resolution when the parties cannot reach a collective bargaining agreement for a subset of public employees, whose work involves public safety.[48] That is not for lack of an alternative model; the New York City Collective Bargaining Law, enacted together with the Taylor Law, makes impasse arbitration (that law's equivalent process) available to all public employees and employers falling under its jurisdiction.[49]

---

[46] Helsby, "One Man's View of the Taylor Law—Thirteen Years Later," at 8.
[47] *Matter of Associated Teachers of Huntington v. Board of Educ., Union Free School Dist. No. 3, Town of Huntington*, 33 N.Y.2d 229, 236 (1973); see also *City of Oswego v Oswego City Firefighters Assn., L. 2707*, 21 NY3d 880, 882 (2013) (Lippman, CJ, dissenting) (quoting *Huntington*).
[48] Civil Service Law §§ 209.2 & 209.3.
[49] New York City Collective Bargaining Law, 12 NYC Admin Code, ch. 3, §12-311(c).

Both the limited availability of interest arbitration and the steps required to invoke that right are examples of the "choice architecture" embedded in the Taylor Law. Even for the subset of public employees and employers who are eligible for binding interest arbitration, the Taylor Law and PERB's Rules of Procedure provide that "interest arbitration is only available under the [Taylor Law] when efforts of the parties themselves to reach agreement through true negotiations and conciliation procedures have actually been exhausted."[50] Those conciliation procedures must be pursued in good faith by both parties before empaneling an interest arbitration panel.[51]

The goal of the process is to steer all but the most entrenched parties toward jointly resolving their differences through collective bargaining, rather than having a resolution imposed by an external arbitrator. This preference in the Taylor Law is supported by several rationales, and has functioned effectively since 1974.

Asked in 1979 if he maintained his previously expressed belief that "final and binding arbitration should be used only as a last extreme, the last method," PERB Chair Harold Newman answered:

> Yes, I don't like binding arbitration. First of all, I don't know any labor relations professional who would not argue that the best kind of agreement is an agreement made by the parties themselves, without the intervention at all of any third party neutral.
>
> But if indeed a genuine impasse does occur, and the parties are unable to reach agreement by themselves, then certainly the favored way from my point of view for achieving a settlement is through the device of mediation, because they are the parties who are still making their own agreement as an extension of the collective bargaining process, and the mediator is simply serving as a kind of marriage counselor.

[50] *City of Ithaca*, 49 PERB ¶ 3030, 3097 (2016); see Civil Service Law § 209.3.
[51] *Id*.

> In fact-finding, I would like to think that again that since the fact-finding report can be accepted or rejected by the parties, there is a kind of mediation with recommendations, and that too is more acceptable to me than arbitration. Arbitration means the parties have turned their responsibility for their contract terms over to somebody else.[52]

In another article, he explained that collective bargaining is inherently preferable to binding arbitration, on the ground that "[n]o labor neutral, no matter what his or her background, skills, education, or experience, can know as much about the parties' needs as they do."[53] Moreover, "the neutral doesn't live with the contract—the parties do.[54]

As a result, Newman cautioned that:

> [T]hose of us who head neutral agencies and are responsible for the appointment of mediators, arbitrators, and factfinders should always be on guard against intervening too early in negotiations. We should strive to be certain that exhaustive good faith effort by the parties to achieve agreement on their own has been made before providing the services of an impartial.[55]

The other "major attack on binding arbitration made by its critics is that it will have a 'chilling' effect upon the bargaining process."[56] Binding arbitration "will inevitably undermine collective bargaining, it is argued, whenever either party anticipates that they might gain more from arbitration than from negotiation;" this "'narcotic' effect supposedly

---

[52] "Viewpoint: Harold R. Newman, PERB Chairman," *NYS Public Employees Communicator* (vol. 3, no. 1) (February 1979) at 4.
[53] Harold Newman, "Interest Arbitration: Impressions of a PERB Chairman," 37 *The Arbitration Journal*, (vol. 37, no. 4), 7, 8 (1982).
[54] *Id*.; *see also* William Simkin, "The Mediator's Role," at 16-17.
[55] *Id*.
[56] Charles M. Rehmus, "Interest Arbitration," in Robert D. Helsby, Jeffrey Tener & Jerome Lefkowitz, THE EVOLVING PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT 249, 257 (Assn of Lab Rels Agencies; Labor Relations Press) (Ft. Washington, Pa: 1985); see also Rehmus, "Interest Arbitration," in John L. Bonner, ed., LABOR-MANAGEMENT RELATIONS IN THE PUBLIC SECTOR: REDEFINING COLLECTIVE BARGAINING 196-213 (Assn of Lab Rel Agencies) (Horsham, Pa.: LRP Publications) (1999) (same; updated).

leads to ever-increasing reliance on arbitration."[57] In describing early experience in Wisconsin with arbitration, Zel Rice concluded that "wide open arbitration has discouraged collective bargaining."[58] Even the limited interest arbitration provisions under the Taylor Law are not entirely immune; as then-Chair Pauline Kinsella pointed out in 1993, PERB's impasse resolution proceedings "are not, however, intended, as they are sometimes being used, as a substitute for collective bargaining and as a means to shift elsewhere the responsibility for making decisions."[59]

In another example of "choice architecture," PERB's interest arbitration panels are tripartite in nature—each side appoints one member, who together jointly select the public member.[60] Under the Taylor Law, the parties' appointed members effectively advocate for their respective clients. This means that the process is only one of arbitration in the last resort, after the parties, first directly, and then through their panel members, have failed to agree. Up until that moment, interest arbitration is effectively mediation under another name.

Again, Newman:

> *Tripartite interest arbitration* is certainly a misnomer. No neutral arbitrator can chair a panel with two partisan arbitrators and function as anything but a mediator. This is not necessarily bad, but we ought to recognize tripartite

[57] *Id* at 257-258. *See also,* Gary E. Bolton & Elena Katok, "Reinterpreting Arbitration's Narcotic Effect: An Experimental Study in Repeated Bargaining," 25 Games & Economic Behavior 1 (1998) (describing "substantial field evidence that bargaining with arbitration lessens the likelihood that bargainers will reach a settlement on their own"); Zel S. Rice, "The Mediator's Role," in THE PUBLIC INTEREST AND THE ROLE OF THE NEUTRAL IN DISPUTE SETTLEMENT: PROCEEDINGS OF THE INAUGURAL CONVENTION OF THE SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION 25-26 (1974); Hoyt N. Wheeler, "Compulsory Arbitration: A 'Narcotic Effect'?," 14 Industrial Relations, 117-120 (1975).

[58] Rice, "The Mediator's Role," at 26.

[59] Pauline R. Kinsella, "Public Sector Labor Developments" (1993), at 2.

[60] Civil Service Law § 209.4. Again, this is not the only direction in which the Legislature could have gone—or indeed, did go. The New York City Collective Bargaining Law provides that the parties nominate members of the impasse panel, but the Chair of the Board of Collective Bargaining, in her capacity as Director of the Office of Collective Bargaining itself appoints the panel members unless the parties' nominations coincide. NYCCBL § 12-311 (c) (2).

> arbitration for what it is—more mediation than arbitration. Heaven forbid that any arbitrator without mediation experience and skill undertake chairing a tripartite panel.[61]

Once again, the Taylor Law nudges the parties to craft their own solution.

By leaving so much responsibility in the hands of the parties, the Taylor Law allows for the risk of ongoing deadlock when a relationship breaks down, as when, in 2016, the Buffalo City School District and the Buffalo Teachers Federation completed negotiations, "resulting in the first collective bargaining agreement in over a decade" between the parties.[62] That this case was an outlier, as demonstrated by the statistics cited above, does not mean that the fundamental trust in the parties to reach agreement is without cost—though that cost is ameliorated by the *status quo* provision of the Taylor Law.

Moreover, the "choice architecture" and nudging of the Taylor Law and PERB's Rules can be effective even with parties who have evidenced the narcotic effect of interest arbitration. Such parties can break though and reach agreement, often as a result of the successful deployment of PERB's mediators. The New York City Police Department and the New York City Patrolmen's Benevolent Association had, in the last five rounds of bargaining prior to the 2016 negotiations, gone to interest arbitration four times.[63] The result of that fourth interest arbitration was acrimonious, with the PBA-appointed member of the panel issuing a dissent objecting to the process and describing the ultimate award as an "odious decision and callous mistreatment of the

---

[61] Harold Newman, "Interest Arbitration," 37 Arb J., at 8 (1982).
[62] *Buffalo City Sch Dist*, 49 PERB ¶ 3029, 3089 (2016).
[63] Richard Steier, "Arbitration Looms Again in PBA Wage Dispute," *The Chief*, Aug. 28, 2014 (archived at http://thechiefleader.com/arbitration-looms-again-in-pba-wage-dispute/article_9cfa6776-127e-11e4-af63-001a4bcf6878.html) (visited on April 11, 2017).

City's 23,000 Police Officers."[64] Protests took place outside the home of the public member of the panel, an unprecedented event.[65]

Despite this unpropitious setting, when the parties reached impasse for the next contract in 2016, intensive mediation by PERB's Director of Conciliation and a long-standing member of PERB's mediation panel, himself an eminent arbitrator, helped the parties to reach agreement. Mayor Bill De Blasio, at the press conference announcing the agreement, thanked:

> [The] mediators who performed a crucial role in this process. And perhaps our mediators don't get a lot of headlines, but they do extraordinarily important work and they help sides even when there is some disagreement come together and found common ground. I want to thank Kevin Flanigan from the Public Employ[ment] Relations Board for his exceptional work and Marty [Scheinman], who . . . played a crucial role as well.[66]

A half a century after the passage of the Taylor Law, PERB's Office of Conciliation is effectively resolving the vast majority of contracts that do not settle without assistance. And it still does so with the mediator's philosophy that the "opportunity to attempt to persuade—in the long run—is more potent and viable than the power to order."[67]

"Rep" and the Business of the Board

Returning to Jerry Lefkowitz's summary of the Taylor Law, it had three prongs: (1) that public employees have the right to join or not to join any employee organization

---

[64] PERB Case No. IA2014-009, dissenting opinion of Panel member Jay W. Waks at 2 (Feb. 12, 2015).
[65] Lorena Mongelli, "NYC Police Union Protests Small Raises Outside Arbitrator's House," New York Post, Nov. 5, 2015, archived at http://nypost.com/2015/11/05/nyc-police-union-protests-small-raises-outside-arbitrators-home/ (visited April 11, 2017).
[66] Transcript, "Mayor DeBlasio and Patrolmen's Benevolent Association Announce Tentative Five-Year Agreement," Jan 31, 2017, archived at: http://www1.nyc.gov/office-of-the-mayor/news/062-17/transcript-mayor-de-blasio-patrolmen-s-benevolent-association-tentative-five-year (Visited April 11, 2017).
[67] Simkin, "The Role of the Mediator," at 16.

of their own choosing; (2) that public employers are required to negotiate with the employee organizations which have been chosen by their employees to represent them; and (3) the procedures by which these two rights are protected.

Matters involving mediation, fact-finding, and interest arbitration which the Office of Conciliation facilitates do not, as a general matter, come before the Board. They are indicative of the second component of the summary—helping the parties to reach an agreement.

By contrast, the matters decided in the first instance by the staff of PERB's Office of Public Employment Practices and Representation (known as the "Rep Department" or just "Rep" internally) are the Board's daily fare. In large part, this is because those cases that go to decision in the Rep Department are essentially legal in nature. That is, they are binding decisions involving questions of the Taylor Law, as it has been construed by the Board and the courts as applied to facts found by PERB's Administrative Law Judges ("ALJs"), or its Director or Assistant Director of Rep (each of whom hear cases in addition to their administrative roles).

The questions of representation—unit definition and clarification, as well as determining what union will represent a group of employees—are handled in the first instance by the Rep Department, and then by the Board. So too are challenges to the threshold question of whether employees are entitled to representation.

Under the Taylor Law, employees are presumed to be eligible for representation for collective bargaining. Unlike the broad exclusion for "supervisors" under the National Labor Relations Act, only employees determined by PERB to be "managerial" or "confidential" under § 201 (7) of the Taylor Law are barred from representation and

collective bargaining. Under the statute, employees are "managerial" if "they are persons (i) who formulate policy or (ii) 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 judgment." Under the same section, employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees engaged in labor relations on behalf of the employer as described in clause (ii).

Improper practice charges are also handled by Rep. As is the case with Conciliation, Rep's ALJ's successfully resolve through settlement the vast majority of improper practice charges that come before them. To again use an imperfect measure, for the period from 2009-2010 through 2014-2015, an average settlement rate computed by averaging cases filed per year and cases pending at the beginning of each year with cases settled yields an approximate settlement rate of 80%.[68] For the same time period, ALJs have issued, on average, 126 decisions per year.[69]

From 2009 through 2015, the Board decided, on average, 30 improper practice cases per year.[70] Additionally, it has issued in each year, on average, five

[68] Figures drawn from 2015 NEW YORK STATE STATISTICAL YEARBOOK at 314 (39th Ed. 2016). Calculating from reported figures from 2009-2010 through 2014-2015, the average 812 cases filed per year, with 663 settled or withdrawn cases, yields an average settlement rate of 82%. An average of the year-by-year settlement rates measured against actual number of settled/withdrawn cases per year yields an approximate settlement rate of 78% for the same time period. Averaging these two admittedly imperfect figures yields an average settlement rate for the period of 80%.
[69] *Id*.
[70] *Id*. A pure average from 2009-2010 through 2014-2015 gives a slightly higher average, that is, 34 cases per year. However, in 2011-2012, the Board decided 51 improper practice cases, an aberrantly high number for that period that skews the average in a misleading way.

representation decisions, 21 certification decisions, and two unit placement or unit clarification decisions; in the same time period, the Board issued one managerial/confidential decision.[71] In sum, about a quarter of improper practice decisions by ALJs are appealed to the Board, and most of these go to decision.[72]

Because the Board functions as an appellate body, there are no statutory or regulatory mechanisms to promote settlement once a case goes before it. Also, the parties often choose to appeal decisions to the Board to clarify the Taylor Law's application to difficult or unprecedented facts, or to obtain clarity as to how the Law's policies or prior cases should be followed when they are in tension. In such cases, unlike the mediator's ideal, the answer can be more valuable than the settlement.

When the Taylor Law was first enacted, PERB was not explicitly given jurisdiction over improper practices by either management or labor. In 1967, Jerry Lefkowitz "took the lead in preparing PERB's rules of procedure," including drafting the first prohibition of improper practices, which was struck down by the courts in 1968.[73] The following year, the Legislature amended the Taylor Law statute to add § 209-a, which defines improper practices on the part of both labor and management.[74] The Taylor Law gives PERB "exclusive, non-delegable jurisdiction" over improper practice charges.[75]

It is an improper practice for an employer to:

- Interfere with, restrain or coerce public employees in the exercise of their rights under the Taylor Law for the purpose of depriving them of such rights;

---

[71] *Id*.
[72] 2015 NEW YORK STATE STATISTICAL YEARBOOK at 314.
[73] Ronald Donovan, ADMINISTERING THE TAYLOR LAW, 64; 77;123. *See CSEA v Helsby*, 21 NY2d 541, 1 PERB ¶ 702 (1968).
[74] L. 1969, ch. 24.
[75] Civil Service Law § 205.5 (d).

- dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights;

- discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization;

- refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees;

- refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in strike-related conduct as prohibited by 210(1) of the Taylor Law;

- utilize any state funds appropriated for any purpose to train managers, supervisors or other administrative personnel regarding methods to discourage union organization or to discourage an employee from participating in a union organizing drive; or

- fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action.[76]

It is an improper practice for a union to:

- Interfere with, restrain or coerce public employees in the exercise of the rights to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing;[77]

- to refuse to negotiate collectively in good faith with a public employer; or

- to breach its duty of fair representation to public employees.

The Board's decisions with respect to improper practice charges are subject to judicial review as to whether the decision "was affected by an error of law or was arbitrary and capricious or an abuse of discretion," or not "supported by substantial

[76] Civil Service Law § 209-a (1)-(g).
[77] Civil Service Law § 209-a (2) (a), incorporating by reference § 202.

evidence."[78] The Board "is accorded deference in matters falling within its area of expertise."[79]

The Board's primary purpose is, as it has been since the beginning, deciding those questions of law that *don't* get resolved by settlement or collectively bargained agreements. In deciding cases, the Board has the additional responsibility of providing guidance for the parties and their representatives. The Board must flesh out the necessarily broad language of the Taylor Law—whether a union's demand to bargain over a specific term and condition of employment is a mandatory subject of bargaining, or does it fall within management's right to assign duties, select equipment, and organize how those assignments are performed?

PERB's experience, and the extent to which its decisions have been accepted by the parties and stood the test of time, have vindicated Pauline Kinsella's judgment that:

> I believe that without strong governmental agencies which are respected by all parties, the process of collective bargaining is placed in extreme jeopardy. I don't believe the parties will police themselves, and I don't believe *ad hoc* arbitrators will adequately focus on the public interest as they review cases brought by specific parties. I believe governmental agencies should provide law enforcement functions.[80]

PERB has successfully provided those functions since it was granted improper practice jurisdiction in 1969. Part of how it has done so is by fostering a jurisprudential consistency and consensus as to the guiding principles it sets out.

---

[78] Civil Service Law § 213; the standard of review is provided in Civil Practice Law and Rules § 7803.
[79] *Kent v. Lefkowitz*, 27 NY3d 499, 505 (2016).
[80] Pauline R. Kinsella, "Privatizing the Public Interest: Who Needs the Impartial Agencies?" (Speech, July 27, 1997) at p. 6.

The Board has, throughout its history, sought to achieve consensus among its three members.[81] Dissents are welcome where a principled disagreement cannot be reconciled, of course, and have sometimes been prophetic.[82] However, the members of the Board, present as well as past, prize the virtue of providing clear, non-partisan guidance. The virtue of clarity is best served when all of the members of the Board can agree on a final articulation of a result that serves the Taylor Law, and the Board's members work to consensus in the vast majority of cases. This culture of consensus inherently stabilizes the Board. While members come, and go, bringing with them their own experience and viewpoints, the Board is not noted for the partisan swings that some scholars see in decisions of the National Labor Relations Board.[83] Indeed, that has long been the case; Ronald Donovan wrote in 1990 that:

> [w]hereas observers of the National Labor Relations Board often speak of the Eisenhower, Kennedy, or Reagan Board as a shorthand way of indicating a particular labor policy orientation associated with the political views of the incumbent president, the policies of PERB have been remarkably constant over its history, irrespective of state administration, agency leadership, or board composition.[84]

In deciding cases, the Board explains its results in written opinions, and relates them to prior Board decisions, old and new. Like any common law system, the Taylor Law, as supplemented by its Rules of Procedure, requires careful, fact-driven decisions

---

[81] *See* Donovan, ADMINISTERING THE TAYLOR LAW at 153-157.
[82] *Id.* at 157-159.
[83] See Joan Flynn, "A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000," Ohio St. L. J. 1361, 1365-1366, *et seq*. (2000) ("The most recent appointees from the management and union sides, moreover, have compiled particularly lop-sided voting records, in which "votes for the 'other' side's position are few and far between") (editing marks omitted); Zev J. Eigen & Sandro Garofalo, "Less Is More: A Case for Structural Reform of the National Labor Relations Board," 98 Minn. L. Rev. 1879, 1884 (2014) ("The [National Labor Relations] Board's approach is—some might say 'notoriously'—marked by frequent shifts in precedent when the administration changes, combined with a policy of non-acquiescence with federal appellate court rulings until the Supreme Court ultimately decides an issue").
[84] Donovan, ADMINISTERING THE TAYLOR LAW, at 154.

explaining why the material facts at issue mandate the result the Board has arrived at. The Board's decisions serve the additional purpose of persuasion, of demonstrating that a given result is rooted in the Taylor Law and in the caselaw that has developed over the years, and not a result of favoring one party over another.

Our written opinions also make us, as former Chair Pauline Kinsella put it, "publicly accountable" because "our decisions are in the public eye and they are carefully scrutinized. The public nature of what we do makes a difference."[85]

Two other institutional constraints on the Board are the record compiled by the ALJs and the scope of appeal of their decisions to the Board. The ALJs conduct the hearings, where necessary; they weigh the credibility of witnesses, and apply the Taylor Law and the Rules, as well as the Board's prior decisions. The Board defers to the ALJ's factual findings, especially when they are based in whole or in part on the ALJ's weighing of the credibility of the witnesses' testimony on a disputed factual question.[86] The ALJ's written opinion also frames the issues before the Board; under PERB's Rules, parties must file specific exceptions to an ALJ decision, and questions of law or fact not raised before the ALJ and excepted to before the Board are waived.[87]

Where no Board decisions address the precise matter at issue, the ALJs may consult the published decisions of their predecessors and colleagues as ALJs. Sometimes, they must do their best in the absence of any guidance at all.

---

[85] Kinsella, "Privatizing the Public Interest," at 4.
[86] *Mt. Pleasant Cottage Union Free Sch Dist*, 50 PERB ¶ 3002 (2017), citing, *inter alia*, *Fashion Institute of Technology v Helsby*, 44 AD2d 550, 7 PERB ¶ 7005, 7009 (1st Dept 1974).
[87] Rules of Procedure, § 213.2 (b) (4); *see also NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n. 4 (2016).

In such cases, the importance of the Board's review is clear. Only the Board can provide clarity —an ALJ decision, however well thought out and persuasive, only binds the parties to that decision, even if no appeal is filed.[88]

The effect of these Rules is not to make appeal to the Board a technicality-strewn minefield. Rather, it makes sure that an appeal is a review of the facts and issues presented to the ALJ, and not a second bite at the apple.

Recent Chairs have steadily sought to reduce the technical nature of pleading before PERB. Under Jerry Lefkowitz, who returned to PERB, this time as Chair, in 2007, and served until January, 2015, the Directors and the Deputy Chair began a thorough review of PERB's Rules. This Rules revision was the first since 1999, and the proposed amended Rules were thoroughly reviewed and revised again under Seth Agata, my immediate predecessor as Chair. When I was appointed Chair in 2016, I inherited the work begun by Jerry and Bill Herbert (with the help of Kevin Flanigan, Monte Klein, David Quinn, and Anthony Zumbolo), and continued under Seth (with my input as Deputy Chair, and that of all the Directors who had served under both Jerry and Seth). With additional valuable contributions of Deputy Chair Sarah Coleman, the Rules were formally adopted on August 2, 2017.

Under these new Rules, pleading is less technical, electronic filing has been adopted, and is being phased in. Likewise, practices, some of which were reflected in the Board's decisions, others simply known to experienced practitioners before the

[88] *State of New York (SUNY Buffalo)*, 50 PERB ¶ 3001, n. 42 (2017), citing *County of Nassau*, 48 PERB ¶ 3023, 3089, n. 89 (2015) ("a decision of an ALJ is not binding on the Board and has no precedential value").

Agency, but not to newer practitioners or individuals without representation, are now incorporated into the Rules.

In the same time period, the Board has moved to eliminate technicalities that harmed both management and labor. So, for example, the Board has overruled precedent penalizing both labor and management for failing to recite a precise formula of words in its pleadings when the essence of the claim or defense is clear from the pleadings.[89]

Likewise, we continue to reduce our backlog of undecided cases, promoting more efficient resolution of disputes. As we have hired new staff to fill the places of those who have retired, we at PERB intend to resolve cases with full consideration, but to ensure that processing of cases can be done in a timely basis, so that our remedies actually make the parties whole, and promote the policies and values of the Taylor Law.

As PERB moves forward into its second half-century, the agency is cultivating a new generation of staff, as well as encountering a new generation of clientele and constituents. This anniversary year is not just a celebration but it is the beginning of a new era, as many experienced practitioners and parties retire or move on to other concerns. At the same time, changes at the national level, and the revitalization of communities throughout the State, present new challenges to State and local employers, and to the individuals comprising their workforces, as well as the unions representing them.[90] The post-World War II settlement, the latter years of which birthed

[89] *County of Nassau,* 49 PERB ¶ 3001 (2016) (management mislabeling defense of "duty satisfaction" as one of "waiver" not fatal); *County of Suffolk*, 49 PERB ¶ 3005 (2016) (reversing an ALJ's finding that a union had failed to timely plead repudiation as an improper practice when it asserted a contractual claim, only to be met with a deferral claim).

[90] Former PERB Chair Pauline Kinsella noted the beginning of some of these trends in the public sector in 1997. *See* "The Challenges Faced by the Collective Bargaining Process," at 2-5.

PERB, has ended. The challenges of the nascent era in which we start this second half-century are starkly different from those of the first.

As we begin to address those challenges—which are, at heart, nothing less than facilitating the efficient delivery of services to the people of the State of New York, while respecting the inherent dignity and value of all those whose work is a part of those services—we at PERB must also raise our own standards. As new participants from both management and labor come to the bargaining table, they will need to learn to manage the intricate, relationship-driven, but ultimately productive, arts of labor relations. As an agency, we intend to use this anniversary year as a catalyst to re-launch our long dormant educational mission, for the benefit of the parties, and the people, as provided for by the Taylor Law.[91] But teaching how things *were* done is not sufficient in itself. We intend to continue to advance and learn how to adapt the values of collective bargaining and of dispute resolution, to continue "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."[92]

And then we continue to do just that—get out and promote harmonious and cooperative relationships between government and its employees—in the field, at the bargaining table, and, where necessary, in our legal processes. At its best, the Board and the Agency strive to uphold both sides of the reciprocal duties owed by the parties to each other, but ultimately to the people of the State of New York.

[91] Civil Service Law § 205.
[92] Civil Service Law § 200.

All of these initiatives and resolutions, as well as our revised Rules, are intended to protect the two substantive rights provided by the Taylor Law—the right to representation and to negotiate terms and conditions of employment. The Taylor Law created PERB as a referee and facilitator to ensure that employees entitled to representation can exercise that right if they so choose; that the parties' negotiations are conducted in good faith, without coercion or the fear of reprisal; that all subjects that are mandatorily negotiable can be negotiated to fruition; and to assist the parties when their negotiations break down despite their good faith efforts.

As a wise man once wrote, the rest is all procedural.