

MINUTES OF COMMISSION MEETING

June 15, 2017

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Chairman Vito A. Gagliardi, Jr., Commissioner Andrew Bunn (via telephone), and Commissioner Anthony Suarez. Professor Bernard W. Bell, of Rutgers Law School, attended on behalf of Commissioner Ronald K. Chen; Professor Edward A. Hartnett, of Seton Hall University School of Law, attended on behalf of Commissioner Kathleen M. Boozang; and Grace C. Bertone, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner Michael T. Cahill.

Also in attendance was Sharon Rivenson Mark, Esq., from the New Jersey Chapter of the National Academy of Elder Law Attorneys.

Minutes

The Minutes of the May 2017 Commission meeting were approved on motion of Commissioner Bunn, seconded by Commissioner Hartnett.

Alternative Procedure for Dispute Resolution Act (APDRA)

Samuel Silver discussed a Revised Draft Tentative Report setting forth the ambiguity in the language of N.J.S. 2A:23A-13(a) which was recognized by the New Jersey Appellate Division in *Citizen United Reciprocal Exch. v. N. NJ Orthopedic Specialists*. As drafted, Mr. Silver noted that the statute provides a party with time frames within which to commence a summary action after receiving an award; or, after receiving an award modified pursuant to subsection d. of the statute. He noted the statute does not, however, provide a timeframe for a party to commence a summary action where an umpire denies modification of the award. Finally, Mr. Silver stated that the statute does not set forth the amount of time a party has to challenge an award when the application to modify is made pursuant to rules adopted by the arbitrating organization and not N.J.S. 2A:23A-12 subsection d.

Mr. Silver answered questions that had been raised by the Commissioners during the May 2017, Commission Meeting. He noted that in *Citizen United Reciprocal Exch. v. N. NJ Orthopedic Specialists* the Appellate Court refers to the decision of the Alternative Dispute Professional (“ADP”) as an “order.” The APDRA statute, N.J.S. 2A:23A-12(a) and N.J.S. 2A:23-13, refers to the determination of an ADP as an award. In order to remain consistent with the statute, Mr. Silver, stated that references to the ADP decision would be termed as “awards.”

In response to a question about the form of an award and the means by which it is transmitted to the parties, Mr. Silver noted that pursuant to N.J.S. 2A:23A-12(a), the award of an

umpire must be reduced to written form. In addition, the award must be delivered: personally; *via* certified mail, return receipt requested; or, as provided for in the agreement of the parties.

With regard to what happens if there is a simple math or reasoning error in the determination, Mr. Silver informed the Commission that a party has twenty (20) days within which to request the modification of the award under N.J.S. 2A:23A-12(d). A “12(d)” application for modification must be based on one of the grounds set forth in N.J.S. 2A:23A-13(e). This section, he observed, allows an applicant to seek modification of the award based any one, or all of the following errors: (1) miscalculation of figures; (2) the award assumes facts not in evidence; (3) the award is imperfect in a matter of form; and, (4) the award prejudices one of the parties because the umpire erroneously applied the law to the issues and facts.

The Commission focus then shifted to the proposed modifications to the statute. Commissioner Hartnett requested clarification of the proposed language to N.J.S. 2A:23A-13(a). Specifically, he asked whether subsection two (2) could be clarified in order to provide context for the basis of the applicant’s request for modification. Chairman Gagliardi inquired whether Staff had any proposed language to address the concern of Commissioner Hartnett. In response, Mr. Silver suggested the following revisions to the language contained in subsection (2):

(2) 30 days after a denial or an amended award, pursuant to subsection d. of section 12 of this act, or the rules of a dispute resolution organization, is delivered to the applicant.

The proposed revisions to the language of subsection 2 were approved by the Commission.

The Commission then voted unanimously to release the Revised Draft Tentative Report on the motion of Commissioner Hartnett, which was seconded by Commissioner Bunn.

Title 44 – The Poor Law

John Cannel discussed his Memorandum regarding Title 44, The Poor Law. He began by noting that the statute has not been enforced since the 1980s. He questioned whether the statute is “alive” or “dead.” Mr. Cannel cautioned that the Commission should be clear about what is being repealed. He stated that what is needed is a substantive decision as to the current state of the law.

Chairman Gagliardi expressed concern that the Commission is being asked to make a policy determination, and that there is no one on the Commission who can comfortably comment on the current state of Title 44. Mr. Cannel observed that this was an unusual set of circumstances because the law is so unclear – in this case, making a decision can be

characterized as a policy decision, and not making a decision can likewise be characterized as a policy decision. He noted that the statute may have been tacitly repealed by WorkFirst and that there is no indication that the statute ever applied to Medicaid.

Commissioner Bunn asked Mr. Cannel why he believed the statute was repealed. Mr. Cannel stated that the terms used by the statute, such as “alms houses” are not used in modern day. He also noted that the statute was never applied to Medicaid. Commissioner Bunn observed that the statute was amended as late as 1979. Therefore, he was not inclined to think that the statute was repealed. Finally, Commissioner Bunn questioned why the statute never applied to Medicaid and theorized that it was because of the federal involvement.

The Commission acknowledged Ms. Sharon Rivenson Mark, Esq., a member of the National Academy of Elder Law Attorneys. She stated that the enactment from the “old general welfare days” has not been applied since approximately 1983. Ms. Rivenson Mark observed that the County Welfare Departments have stated that they can no longer enforce claims against debtors. She recounted one of the limited cases in which the County pursued a claim against a party and in the end obtained an award of \$10 per month against them. She opined the statute was so unwieldy and the steps to obtain a judgment so difficult that it no longer makes economic sense for the County to pursue such orders.

Mr. Cannel commented that the law was currently ambiguous and should not be left in such a state. Commissioner Bunn questioned whether the way to avoid the policy decision was to draft in the alternative. Laura Tharney said that, in doing so, it would be possible to indicate to the Legislature which way stakeholders were leaning.

Commissioner Bell expressed concern about the disconnect between the statutory language and the practice in this area of the law.

Chairman Gagliardi suggested that Mr. Cannel prepare an analysis of the WorkFirst program. Mr. Cannel confirmed he would conduct such an analysis and present it to the Commission.

New Jersey Franchise Practices Act

Jayne Johnson presented a memorandum requesting authorization to update the project concerning the New Jersey Franchise Practices Act (NJFPA), based on the recent decision of the United States Supreme Court in *Kindred Nursing, L.P. v. Clark*.

Commissioner Bunn observed that the United States Supreme Court has been very patient with state statutory provisions disfavoring arbitration, up until now. In *Kindred Nursing*, the United States Supreme Court made it clear that statutes attempting to regulate arbitration clauses are no longer valid.

Commissioner Hartnett questioned why federal pre-emption of the New Jersey statute was not sufficient to invalidate the state statute. He added that New Jersey has a right to allow the state statute to reflect New Jersey's high regard for an individual's right to a jury trial and its disfavor of arbitration. Ms. Johnson commented that the Commission's statutory mandate charges the NJLRC to reconcile conflicting provisions and clarify confusing sections of the law.

Chairman Gagliardi noted the mandate of the Commission to avoid confusion when working with statutes. Commissioner Bunn added that retaining a statutory provision invalidated by the "pre-emption doctrine" may lead to confusion, particularly for franchisors or franchisees relying on the statute for guidance.

Commissioner Hartnett responded that federal law does not require repeal of the provisions disfavoring arbitration and pending amendments to the Federal Arbitration Act (FAA) may further alter the current state of federal law. Commissioner Bell stated that New Jersey should not have invalid laws on the books; noting that determining whether to remove an invalid statutory provision should not be discouraged due to possible changes of federal law in the future.

Laura Tharney inquired whether retaining the state statutory provision would be problematic in a situation involving interstate franchise agreements. Commissioner Hartnett stated that the FAA invalidates the state statute and should provide guidance to parties entering franchise agreements.

The Commission did not object to Staff including recommendations repealing portions of N.J.S. 56:10-7.3 in the project concerning the NJFPA in response to the *Kindred Nursing* decision. Chairman Gagliardi said that the revised report should identify the issues raised by Commissioner Hartnett concerning the right of a state to retain a provision invalidated by federal pre-emption.

Subpoena v. Subpena

Samuel Silver discussed with the Commission a Memorandum setting forth the different spelling of the word subpoena in the Alternative Dispute Resolution Act (APDRA). Mr. Silver sought authorization from the Commission to conduct additional research and outreach regarding the inconsistent spelling and usage of the word in an effort to determine whether it would be of assistance to have uniformity in the spelling of the work throughout the New Jersey statutes.

Mr. Silver noted that within APDRA the word subpoena is spelled “subpoena” and “subpena.” He also noted that variations in the spelling “subpoena” are not limited to APDRA. A brief review of other New Jersey statutes confirmed the presence of the two different spellings of the word subpoena.

Mr. Silver provided a brief background that may account for the divergent spellings. He observed that in 1984 the United States Government Printing Office (GPO) adopted the traditional spelling of the word “subpoena.” He further commented that despite the GPO’s adoption of the traditional spelling of the word subpoena - state statutes were left with these anomalous spellings.

Searches of both the Westlaw and the Rutgers databases reveal no divergence in search results based upon the spelling of the word subpoena according to Mr. Silver. A search of the New Jersey Legislative database, however, confirms that search results vary tremendously depending on how the word subpoena is spelled by the user. Mr. Silver observed that not everyone has access to Lexis or Westlaw and that the public search engines should return the accurate results.

Commissioner Bunn noted that the spelling of the word subpoena must be corrected in the statutes. He also expressed a preference for the traditional spelling of the word – subpoena.

Affidavit of Merit Statute

Jayne Johnson presented an update on the Affidavit of Merit (AOM) project. Limited informal outreach to individuals graciously recommended by members of the Commission resulted in responses that counseled caution regarding changes in this area of the law, and suggested that that expanded outreach to the State Bar Association, the AOC, and other entities could be very useful.

The feedback also identified a concern raised at previous Commission meetings when the proposed revisions to the statutes governing the AOM were considered; specifically, instances in which a client is seeking representation on the eve of the statute of limitations expiring. Under the draft language considered at the May meeting, counsel’s ability to file a claim to toll the statute of limitations, while having the case reviewed by an expert, might be impaired and, as a consequence, a plaintiff might lose an opportunity to file a timely claim. Additional feedback might be of use in assessing the risk, and the reaction to that risk on the part of knowledgeable individuals.

Since Assemblywoman Pinkin’s office had asked that the Commission provide its recommendation by the end of June, Ms. Johnson requested, and the Commission granted,

authorization to prepare a Memorandum summarizing the work of the Commission to this time and provide it to the Commission the week following the meeting.

Miscellaneous

Laura Tharney advised the Commission that the Overseas Residence Absentee Voter Registration Act is now law in the State of New Jersey. She also noted that Bill A-926/S-2721 concerning Pejorative Terms was received in the Senate, for a second reading on concurrence, and that a full Senate vote is expected on the amendments added by the Assembly. Ms. Tharney also advised that Bill S2839, concerning Bulk Sale Notifications, was scheduled for a Senate Committee hearing on June 19th and that Mr. Silver would be in attendance.

Ms. Tharney also mentioned that Commission members had been provided with another New Jersey Law Journal article referencing the work of the Commission.

The meeting adjourned on motion of Commissioner Suarez seconded by Commissioner Hartnett.