

MINUTES OF COMMISSION MEETING

April 20, 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 Anthony Suarez, and Commissioner Virginia Long (via telephone). Professor Bernard W. Bell, of Rutgers Law School, attended on behalf of Commissioner Ronald K. Chen; and Professor Edward A. Hartnett, of Seton Hall University School of Law, attended on behalf of Commissioner Kathleen M. Boozang.

Also in attendance was Alida Kass, Esq., Chief Counsel, New Jersey Civil Justice Institute.

Minutes

The Minutes of the March 2017 Commission meeting were approved as modified (on page 2) on motion of Commissioner Bell, seconded by Commissioner Suarez.

Clarification of Tenure Issues

Vito Petitti began by addressing questions raised at the Commission's March meeting and invited additional recommendations or guidance regarding the Revised Draft Tentative Report in preparation for its release to potential commenters.

Commissioner Long pointed out that the Report could be further revised so as to combine proposed subsection d.(3) with d.(1). Commissioner Hartnett asked whether there was an intended difference between them. Mr. Petitti replied that subsection d.(3) was added to address a concern that non-teachers be treated similarly to teachers regarding retaining tenure. Subsection d.(2) is a separate provision because it pertains to another chapter.

Chairman Gagliardi observed that, if no difference is intended, the two provisions (d.(1) and d.(3)) could be unified. Commissioner Bell suggested that, rather than combine the two subsections, it might be clearer to have a subsection d.(1)(a) and (1)(b), with the former containing d.(1) and the latter containing d.(3). In response to Commissioner Long's question regarding whether the word "voluntary" is a critical word, Mr. Petitti replied that the original intention was to clarify the language and align the statute with the ruling in *DiNapoli v. Board of Education of the Township of Verona*, 434 N.J. Super. 233 (App. Div. 2014). The Chairman clarified that a tenured employee could lose tenure rights by voluntarily taking a new position, but an employee moved involuntarily and then terminated could be left with no remedy.

Commissioner Bell suggested making an express distinction between voluntary and involuntary transfers. There followed a discussion regarding the voluntariness of promotions, i.e., one cannot be involuntarily promoted, after which the Chairman advised Staff to redraft the provisions, maintaining the voluntary/involuntary distinction, and to solicit comments. Mr. Petitti reviewed the decision in *DiNapoli*, noting the court's analysis that, if the Legislature had intended to protect non-teaching employees, the counterpart statutory sections would have been more similar. Commissioner Hartnett commented that subsection d.(3) gives protection that *DiNapoli* did not recognize. Chairman Gagliardi discussed the statutory protections afforded superintendents and said the statutes were drafted at different times. Noting that it possible to fix the problem of disparate treatment – albeit not entirely - he asked whether it would be appropriate to adopt language probably intended by the Legislature.

Commissioner Long recalled Commissioner Bunn's preference for regularizing the statute to line up with the tenure provisions as discussed in *DiNapoli*. Commissioner Bell suggested distributing alternate provisions for comment, saying that he was inclined to align with *DiNapoli*. Commissioner Hart articulated a preference to leave the draft as is. Commissioner Suarez agreed with Commissioner Long. Chairman Gagliardi advised Staff to draft two versions of the recommendations for an upcoming meeting, which the Commission would release for comment.

Title 44 – The Poor Law

John Cannel discussed his Memorandum regarding Title 44, The Poor Law. He explained that in February of 2009, the Commission published a report revising the whole of Title 44. Mr. Cannel noted that the two main assistance programs - “Work First New Jersey” act and the Work First New Jersey General Assistance Act had confusingly similar names. He also pointed out the following: County welfare agencies administer the majority of general assistance programs; 103 of New Jersey's 566 municipalities maintain offices for local administration; and, the State funds general assistance.

Mr. Cannel advised the Commission that the relationship between the two “Work First” laws is obfuscated by their statutory language. In addition, he pointed out the law is so confusing the agencies that operate under it do not generally rely on the statutes; instead, they rely on regulations and administrative practices. Mr. Cannel explained that many of the statutes in place before current welfare programs are archaic and do not reflect current reality and practice.

Despite the number of outdated statutes, Mr. Cannel informed the Commission it is not possible to completely delete the early chapters because some chapters have continuing importance. In an effort to preserve the pertinent sections in Chapters One through Five and

Chapter Seven, he requested authorization from the Commission to conduct the legal research necessary to identify these sections and to compile an updated table of dispositions that reflects the current state of the law.

The Commission authorized Staff to conduct additional research in support of this project.

Affidavit of Merit Statute

Jayne Johnson discussed draft language proposing revisions to N.J.S. 2A:53A-27a., based on the Commission's recommendations during the March meeting. Ms. Johnson presented a proposed provision which requires the filing of the affidavit as an element of the professional malpractice or negligence cause of action.

Ms. Johnson acknowledged Ms. Kass who was present to discuss her reservations about including the filing requirement as an element of the professional malpractice cause of action. John Cannel first pointed out that the phrase "licensed professional" may be too broad since it could apply to other professionals beyond the intended scope. Ms. Johnson stated that Staff paralleled the language of the existing statute, and that the scope was addressed by the fact that N.J.S. 53A-26 defines licensed persons.

Ms. Kass asserted that she wrestled with the issues considered by the Commission and initially found inclusion of the filing requirement as an element of the cause of action a satisfactory way in which to address the issues. She noted, however, that the elegant solution would be to make the affidavit of merit part of the claim after ascertaining how it affects the running of the statute of limitations. She added that the statute should stipulate that it does not impact the when the statute of limitations begins to run. Commissioner Long observed that there is an issue with a plaintiff having "no cause of action" without filing the affidavit of merit.

Chairman Gagliardi asked whether the draft language based on the recommendations from the March NJLRC meeting were still be acceptable to the Commission. Ms. Kass stated that modifying the language further to establish that when the statute of limitations begins to run. Commissioner Hartnett replied that the Legislature has the power to define the meaning of "statute of limitations." Mr. Cannel said it seems inappropriate to have the statute of limitations begin to run when the affidavit of merit is filed. Commissioner Bell asked whether something would prevent the Legislature from defining the cause of action to include the affidavit of merit. Ms. Kass responded that it would be necessary to identify when the statute of limitations begins to run, which is difficult under the proposed construction.

Commissioner Bell suggested the following language: “Notwithstanding the foregoing, the affidavit shall not affect the date on which the cause of action accrues for the purposes of any applicable statute of limitations.” Commissioner Hartnett asked whether the discovery rule was based on accrual, referring to the timeframe in proposed subsection b. Ms. Johnson replied that the language in subsection b. will have to be revisited again, in light of the changes proposed to subsection a. Commissioner Hartnett observed that when proposing draft language for subsection b. Staff should maintain the plaintiff’s opportunity to cure the affidavit, particularly in the context of medical malpractice in which the plaintiff may not be aware of the specialist needed until after the defendant files the answer. Ms. Kass asserted that in the proposed draft language there is no requirement for a contemporaneous filing. She also identified under the existing statute that the plaintiff has an opportunity to cure the affidavit and may even file for an extension to file the correct affidavit.

Chairman Gagliardi requested that Staff present draft language for subsection b. at the next Commission meeting for further discussion and incorporate the language recommended by Commissioner Bell in the next round of draft language.

Frivolous Litigation Statute

Samuel Silver summarized his Memorandum discussing the potential clarification of the frivolous litigation rules as they apply to appellate matters. Mr. Silver explained that the general rule concerning fees and costs was the “American Rule.” Pursuant to this rule each party is required to bear his or her own legal expenses. Fee shifting, however, may occur as prescribed by either statute or court rule.

Mr. Silver noted the “Frivolous Litigation Statute” (N.J.S. 2A:15-59.1) was enacted to protect parties from baseless litigation. Section a.(1) limits the scope of the statute to complaints, counterclaims, cross-claims and defenses that are found to be frivolous by the trial court. Mr. Silver explained that, as a result, the statute does not apply to appellate matters. Furthermore, as a result of the New Jersey Supreme Court holding in *McKeown-Brand v. Trump Castle Hotel & Casino*, 142 N.J. 546 (1992), the statute does not apply to attorneys. Additionally, he noted the New Jersey Supreme Court has promulgated rules governing frivolous litigation, specifically *R. 1:4-8 and 2:11-4*. Finally, Mr. Silver remarked that Senate Bill 669 was introduced by Senator Rice to expand the “Frivolous Litigation Statute.”

With regard to the *Rules*, Commissioner Long stated that she does not believe, “a plain reading of Rule 1:4-8 suggests that [the] frivolous litigation rule is not applicable to frivolous appeals.” She noted that the term “pleading” is applicable to appellate paperwork. In addition, the rule is applicable to appeals because Rule 1:1-1 are applicable to the Supreme Court, the

Superior Court, the Tax Court, the surrogate's court, and the municipal courts." Commissioner Suarez concurred with Commissioner Long's interpretation of Rule 1:4-8. Commissioner Bell suggested that Staff also look at Rule 2:9-9.

The Commission authorized Staff to conduct additional research and commence initial outreach to the Civil Practice Committee and interested stakeholders in order to clarify the applicability of the frivolous litigation statute in appellate matters.

Alternative Procedure for Dispute Resolution Act (APDRA)

Laura Tharney discussed a Memorandum, prepared by Adrian Altunkara, discussing 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*, 445 N.J. Super. 371 (App. Div. 2016). As drafted, Ms. Tharney noted that N.J.S. 2A:23A-13(a) mandates that the parties have 45 days after delivery of the award by the umpire to commence a summary action in the Chancery Division of the Superior if they seek to vacate, correct, or modify the award. If the award is modified by an umpire, parties have 30 days after delivery of the award in which to commence an action.

As the Appellate Division in *Citizens United Reciprocal Exch.* Recognized, however: (1) the statute does not currently reveal the amount of time a party has to challenge an award when the application to modify has been denied; and (2) it does not reveal an amount of time a party has to challenge an award when the application to modify is made not pursuant to N.J.S. 2A:23A-12(d), but pursuant to the rules adopted by the arbitrating organization.

Ms. Tharney said that Staff was seeking authorization to engage in additional research and outreach in order to determine if clarification of the language would be appropriate. Commissioner Long stated this is a worthy project. Chairman Gagliardi stated the ambiguity seems clear.

The Commission authorized Staff to conduct additional research and commence initial outreach to interested stakeholders in order to determine whether there is support for modifying the language of N.J.S. 2A:23A-13(a) to include the 30-day time limit identified by the Appellate Division.

Accidental Disability Pension Statute

Ms. Tharney summarized a Memorandum, prepared by Brian Ashnault, relating to the meaning of "traumatic event" pursuant to N.J.S. 43:16A-7. Ms. Tharney explained that the

“traumatic event” standard in the accidental disability pension statute, N.J.S. 43:16A-7, may not be sufficiently clear in light of the Court’s determination in *Moran v. Board of Trustees, Police and Firemen's Retirement System*, 438 NJ Super. 346, 347 (App. Div. 2014). The Court, in its opinion, discussed whether “traumatic event” is meant to reserve pensions for those who are injured through an “undesigned or unexpected” event, or to preclude those with a pre-existing injury from collecting.

Commissioner Hartnett and Chairman Gagliardi expressed surprise at the Board’s decision. Commissioner Long noted that this is an incredibly complicated area with strands of decisions that cannot always be reconciled. Commissioner Bell observed that, while what constitutes a “traumatic event” is sufficiently clear, the Court in *Moran* made it even clearer. He suggested, however, that it might be worthwhile to consider the question of whether benefits should extend beyond the “traumatic event” in light of the newer focus in the law on things like toxic exposure, for which workers compensation and tort law seem to be moving in the direction of compensation. Commissioner Hartnett noted the increasing recognition that repeated low-level exposures can produce injuries.

Mindful that there might be budgetary impacts, the Commission directed Staff to look into the matter and reach out to potential stakeholders with an eye toward preparing, if not a specific recommendation, a Report that will bring this matter to the attention of the Legislature.

Miscellaneous

Ms. Tharney mentioned that the Overseas Residents Absentee Voting Law was approved by the Legislature after the Governor’s previous conditional veto, and that the Uniform Fiduciary Access to Digital Assets Act was passed by the Assembly on March 16th.

The result of a brief discussion of whether the May meeting should remain on the 18th or be moved to the 11th was that Ms. Tharney would email the absent Commissioners to check their availability for May, and then email all Commissioners to confirm the date.

The meeting was adjourned on motion of Commissioner Long, seconded by Commissioner Bell.