S T A T E O F N E W Y O R K

4840

2009-2010 Regular Sessions

I N S E N A T E

April 27, 2009

Introduced by Sen. AUBERTINE -- read twice and ordered printed, and when printed to be committed to the Committee on Commerce, Economic Development and Small Business

AN ACT to amend the state administrative procedure act, in relation to fostering the use of alternative dispute resolution techniques in resolving public disputes and to establish a state committee on public dispute resolution relating thereto

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The state administrative procedure act is amended by adding a new article 6 to read as follows:

ARTICLE 6

ALTERNATIVE DISPUTE RESOLUTION

SECTION 601. DEFINITIONS.
602. AUTHORIZATION.
603. LIMITATION ON AGREEMENTS.
604. NEUTRALS.
605. LIABILITY.
606. CONFIDENTIALITY.

S 601. DEFINITIONS. 1. "AGENCY" SHALL HAVE THE SAME MEANING AS IN SUBDIVISION ONE OF SECTION ONE HUNDRED TWO OF THIS CHAPTER.

2. "PUBLIC DISPUTE" MEANS A DISPUTE WHICH INVOLVES THE PUBLIC INTEREST AND THE DETERMINATION OF RIGHTS, OBLIGATIONS AND PRIVILEGES OF PERSONS, AGENCIES, UNITS OF LOCAL GOVERNMENT, OR OTHER ENTITIES.

3. "ALTERNATIVE DISPUTE RESOLUTION" OR "ADR" SHALL MEAN ANY PROCESS OTHER THAN LITIGATION USED TO RESOLVE DISPUTES, INCLUDING BUT NOT LIMITED TO MEDIATION, FACILITATION, REGULATORY NEGOTIATION, FACT-FINDING, CONCILIATION, MINI-TRIALS, EARLY NEUTRAL EVALUATION AND PARTICIPATION IN POLICY DIALOGUES.

4. "CONVENOR" SHALL MEAN ANY PERSON, AGENCY OR OTHER ENTITY, INCLUDING THE COMMITTEE ON PUBLIC DISPUTE RESOLUTION, WHO HELPS PARTIES TO A

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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PARTICULAR PUBLIC DISPUTE DETERMINE WHETHER AN ADR TECHNIQUE IS FEASIBLE AND APPROPRIATE OR WHO ATTEMPTS TO PERSUADE PARTIES TO UTILIZE ADR IN SUCH DISPUTE.

5. "NEUTRAL" MEANS AN INDIVIDUAL WHO PROVIDES SERVICES AS A MEDIATOR, FACILITATOR, FACT-FINDER, OR CONCILIATOR, OR OTHERWISE ACTS TO AID PARTIES IN RESOLVING DISPUTES. A NEUTRAL SHALL HAVE NO OFFICIAL, FINANCIAL OR PERSONAL CONFLICT OF INTEREST WITH RESPECT TO AN ISSUE IN CONTROVERSY UNLESS SUCH INTEREST IS FULLY DISCLOSED IN WRITING TO ALL PARTIES AND ALL PARTIES AGREE THAT THE NEUTRAL MAY SERVE.

S 602. AUTHORIZATION. 1. GENERAL AUTHORITY. EXCEPT WHERE PROHIBITED BY LAW, AN AGENCY MAY USE ADR TO RESOLVE ANY DISPUTE, ISSUE OR CONTROVERSY IN WHICH THE AGENCY IS INVOLVED. THE TECHNIQUES TO BE EMPLOYED SHALL BE VOLUNTARY PROCEDURES TO BE USED AT AN AGENCY'S DISCRETION EITHER UPON ITS OWN INITIATIVE OR AT THE REQUEST OF ANY PERSON. NOTHING CONTAINED IN THIS ARTICLE SHALL BE CONSTRUED TO REQUIRE AN AGENCY TO EMPLOY ANY SUCH TECHNIQUE IN ANY PARTICULAR MATTER, AND A DECISION BY AN AGENCY TO EMPLOY OR NOT TO EMPLOY AN ADR TECHNIQUE SHALL NOT BE SUBJECT TO JUDICIAL REVIEW.

2. SUITABILITY OF ADR. AN AGENCY SHALL CONSIDER USING ADR WHERE THE NATURE OF THE CONTROVERSY IS SUCH THAT IT APPEARS TO BE SUITED TO RESOLUTION THROUGH CONSENSUS BUILDING AND WHERE THE PARTIES WITH A SUBSTANTIAL INTEREST IN THE CONTROVERSY HAVE BEEN OR CAN BE IDENTIFIED AND APPEAR TO BE WILLING TO UTILIZE AN ADR PROCESS EITHER BY DIRECT PARTICIPATION OR THROUGH A REPRESENTATIVE. AN AGENCY SHALL CONSIDER NOT USING ADR IF A DEFINITIVE OR AUTHORITATIVE RESOLUTION OF THE MATTER IS REQUIRED FOR PRECEDENTIAL VALUE AND AN ADR PROCEDURE IS NOT LIKELY TO BE ACCEPTED AS SUCH A PRECEDENT, OR IF A FULL PUBLIC RECORD OF THE PROCEDURE IS REQUIRED AND AN ADR PROCEDURE CANNOT PROVIDE SUCH A RECORD.

3. CONTENTS OF AGREEMENTS. AGENCIES MAY ENTER INTO AGREEMENTS TO UTILIZE ADR WHICH MAY, AMONG OTHER THINGS: PROVIDE FOR THE APPOINTMENT OF NEUTRALS, CONSULTANTS, OR EXPERTS; PROVIDE FOR THE PAYMENT OF FEES AND EXPENSES; EXTEND ANY LIMITATION PERIODS APPLICABLE TO THE COMMENCEMENT OR CONCLUSION OF FORMAL ADMINISTRATIVE OR JUDICIAL PROCEEDINGS; AND ESTABLISH GROUND RULES FOR THE PROCEEDINGS. SUCH AN AGREEMENT MAY ALSO BE INCLUDED IN AN ENFORCEMENT ORDER, STIPULATION, CONTRACT, PERMIT OR OTHER DOCUMENT ENTERED INTO OR ISSUED BY AN AGENCY TO ASSIST IN THE RESOLUTION OF FUTURE DISPUTES.

4. COSTS. AN AGENCY MAY PAY THE COSTS NECESSARY TO ACHIEVE THE OBJECTIVES OF THIS ARTICLE, INCLUDING REASONABLE FEES FOR TRAINING, POLICY REVIEW, SYSTEM DESIGN, EVALUATION, TECHNICAL AND EXPERT ASSISTANCE AND THE USE OF NEUTRALS, FROM ANY APPROPRIATE AREA OF ITS BUDGET INCLUDING LEGAL SERVICES AND ADMINISTRATION.

5. ADR COORDINATORS. EACH AGENCY SHALL APPOINT AN ADR COORDINATOR WHO SHALL PROMOTE THE USE OF ADR WITHIN THE AGENCY. THE COORDINATOR SHALL MAKE RECOMMENDATIONS TO THE AGENCY'S EXECUTIVE STAFF ON ISSUES AND DISPUTES THAT ARE SUITABLE FOR ADR, ANALYZE THE AGENCY'S ENABLING STATUTES AND REGULATIONS TO DETERMINE WHETHER THEY CONTAIN IMPEDIMENTS TO THE USE OF ADR, AND SUGGEST WHATEVER MODIFICATIONS MAY BE NECESSARY; MONITOR THE AGENCY'S USE OF ADR; ARRANGE FOR SUCH TRAINING OF AGENCY STAFF IN ADR PRACTICES AS MAY BE DESIRABLE; AND PROVIDE INFORMATION ABOUT THE AGENCY'S ADR PRACTICES TO STAFF, THE REGULATED COMMUNITY, AND THE PUBLIC. THE NEW YORK STATE COMMITTEE ON PUBLIC DISPUTE RESOLUTION WILL PROVIDE GUIDANCE AND ASSISTANCE TO AGENCY COORDINATORS.

S 603. LIMITATION ON AGREEMENTS. NO AGREEMENT, STIPULATION OR UNDERSTANDING ARRIVED AT THROUGH THE USE OF AN ADR PROCESS AUTHORIZED HEREUNDER SHALL REQUIRE AN AGENCY TO TAKE ANY ACTION INCONSISTENT WITH ANY

STATUTE, RULE, OR REGULATION, OR TO REFRAIN FROM TAKING ANY ACTION REQUIRED BY ANY SUCH STATUTE, RULE OR REGULATION.

S 604. NEUTRALS. A NEUTRAL IN AN ADR PROCEEDING CONVENED UNDER THIS TITLE SHALL BE SELECTED BY AND SHALL SERVE AT THE WILL OF THE PARTIES TO AN ADR PROCEEDING. SUCH NEUTRAL MAY BE AN EMPLOYEE OF AN AGENCY INVOLVED IN THE DISPUTE, AN EMPLOYEE OF ANOTHER FEDERAL, STATE OR LOCAL AGENCY, AN INDIVIDUAL WITH EXPERTISE IN ADR PROCESSES OR THE SUBSTANTIVE AREAS IN DISPUTE, OR ANY OTHER PERSON ACCEPTABLE TO THE PARTIES. IN CHOOSING A NEUTRAL, COMPETITIVE BIDDING SHALL NOT BE REQUIRED. COMPENSATION FOR SUCH NEUTRAL AND THE PARTIES' RESPECTIVE RESPONSIBILITIES FOR CONTRIBUTING TO SUCH COMPENSATION SHALL BE BY AGREEMENT OF THE PARTIES. WHERE A NEUTRAL IS PROVIDED BY A NON-PARTY AGENCY, THE PARTIES MAY AGREE TO REIMBURSE THAT AGENCY FOR THE FULL OR PARTIAL COST OF ITS EMPLOYEE'S SERVICES.

S 605. LIABILITY. NO NEUTRAL OR CONVENOR SHALL BE HELD LIABLE IN NEGLIGENCE FOR ANY ACTS OR OMISSIONS RELATED TO HIS OR HER PARTICIPATION IN AN ADR PROCEEDING.

S 606. CONFIDENTIALITY. 1. CONFIDENTIAL MATERIAL. NOTWITHSTANDING ANY OTHER PROVISION OF LAW OR REGULATION, DOCUMENTS PREPARED SPECIFICALLY FOR USE OR PRESENTATION AT AN ADR PROCEEDING SHALL BE CONFIDENTIAL. IN ADDITION, THE PARTICIPANTS IN AN ADR PROCEEDING, INCLUDING ANY NEUTRALS OR CONVENORS, MAY AGREE TO KEEP THEIR ORAL COMMUNICATIONS CONFIDENTIAL. EXCEPT AS PROVIDED IN SUBDIVISION TWO OF THIS SECTION, PARTICIPANTS MAY NEITHER DISCLOSE NOR BE COMPELLED TO DISCLOSE CONFIDENTIAL INFORMATION IN ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING, NOR SHALL CONFIDENTIAL INFORMATION BE SUBJECT TO DISCLOSURE UNDER THE FREEDOM OF INFORMATION LAW PURSUANT TO ARTICLE SIX OF THE PUBLIC OFFICERS LAW. THIS SECTION SHOULD NOT BE CONSTRUED, HOWEVER, TO PREVENT THE RELEASE, DISCOVERY OR DISCLOSURE OF OTHER DOCUMENTS OR EVIDENCE MERELY BECAUSE THEY ARE PRESENTED IN THE COURSE OF AN ADR PROCEEDING.

2. EXCEPTION. A COURT HAVING JURISDICTION OF AN ACTION RELATED TO THE SUBJECT MATTER OF AN ADR PROCEEDING MAY ORDER DISCLOSURE OF A COMMUNICATION OTHERWISE CONFIDENTIAL UNDER SUBDIVISION ONE OF THIS SECTION IF THE COURT DETERMINES THAT SUCH DISCLOSURE IS NECESSARY TO PREVENT HARM TO THE HEALTH OR SAFETY OF AN INDIVIDUAL OR THE PUBLIC AND THAT SUCH HARM OUTWEIGHS THE DAMAGE TO DISPUTE RESOLUTION PROCEEDINGS IN GENERAL BY REDUCING THE CONFIDENCE OF PARTIES IN FUTURE CASES THAT THEIR COMMUNICATIONS WILL REMAIN CONFIDENTIAL.

3. CLOSED SESSIONS. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, THE PARTIES TO AN ADR PROCEEDING MAY AGREE TO MEET IN CLOSED SESSION TO DISCUSS THE ISSUES IN CONTROVERSY.

S 2. A New York state committee on public dispute resolution is hereby created. 1. Purpose. The purpose of the committee shall be to assist the executive, legislative and judicial branches of state and local government in resolving public disputes. It shall accomplish this purpose by disseminating information regarding the resolution of public disputes through an alternative dispute resolution by publications, workshops, seminars, and other means; by providing training in alternative dispute resolution; by establishing and maintaining a roster of neutrals with expertise in alternative dispute resolution processes and in substantive areas in which public disputes can be expected to arise; by encouraging and monitoring the use of alternative dispute resolution; by providing guidance and assistance to state agency alternative dispute resolution coordinators; by providing technical support; by helping state and local officials establish pilot and permanent programs to resolve individual public disputes and categories of such disputes; by

conducting assessments of public disputes to determine whether alternative dispute resolution is likely to succeed in resolving them; and by acting as convenor by bringing together parties to public disputes deemed likely to be successfully addressed by alternative dispute resolution processes. Where disputes are already in litigation, the committee shall work with the unified court system to identify cases which may be good candidates for alternative dispute resolution.

2. Membership and compensation. The committee shall be comprised of thirteen members. Four, including the chair, shall be appointed by the governor, of whom one shall have substantial experience in local government, one shall have substantial experience in the private sector, and one shall have substantial experience in the not-for-profit sector. The additional members shall be appointed as follows: two by the chief judge of the court of appeals, two by the attorney general, two by the temporary president of the senate, two by the speaker of the assembly, and one by the state comptroller. Members of the committee shall serve without compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of their duties.

3. Budget, facilities, and staff. The committee shall have such budget, facilities and employees as are necessary to carry out its purposes. It shall appoint a staff director who shall hire such additional staff as may be necessary.

4. Fees, other income, and contracting authority. The committee may establish, collect and retain reasonable fees for the provision of its services, including services rendered to agencies and units of local government. The committee may also apply for and accept grants, bequests, gifts and contributions to aid in the financing of its activities. The committee may also enter into contracts and agreements with government and private entities, including contracts and agreements providing for inter-agency transfers of funds, to assist in effectuating the purposes of this act.

5. Reports. Within two years of the effective date of this act, and every two years thereafter, the committee shall issue a public report on its progress in achieving its objectives and shall recommend any legislative or other measures deemed necessary to effectuate the purposes of this act.

S 3. This act shall take effect on the one hundred twentieth day after it shall have become a law.