

MINUTES OF COMMISSION MEETING

January 20, 2022

Present at the New Jersey Law Revision Commission meeting, held via video conference, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Virginia Long; Commissioner Andrew O. Bunn; Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang; and Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

Minutes

Chairman Gagliardi requested that the first paragraph of the Minutes be modified to include the physical address of the Porzio, Bromberg & Newman. P.C. office in Morristown to clarify that the meeting was held simultaneously at a physical location and via video conference.

With the modifications proposed by Chairman Gagliardi, the Minutes of the December 16, 2021, meeting were unanimously approved by the Commission on the motion of Commissioner Bunn, seconded by Commissioner Bertone.

Farmland Assessment

The purpose of the Farmland Assessment Act is to preserve family farms by providing farmers with some measure of economic relief. The Act permits land that is actively devoted to agricultural or horticultural use to receive special tax treatment provided that the minimum gross sales requirement set forth in the statute is met. The Act also contains separate and independent financial consequences if the land is applied to a use other than agriculture or horticulture, subjecting the landowner to roll-back taxes.

Samuel Silver explained that the absence of a statutory definition for the term “applied to a use other than agricultural or horticultural” has led the Tax Courts to develop a common law definition for the term that is not readily apparent from a plain reading of the statute, and that appears to deviate from the intent of the Legislature.

The Handbook of New Jersey Assessors suggests that rollback taxes are applied if the use of the land changes from agricultural to a nonfarm use. It cautions that the loss of the farmland assessment for “inadequate” or “under-devotion” of the land during the tax year does not automatically result in rollback taxes as a change in use. The “actual use” of the land is the sole criterion to determine whether a change in use has occurred.

Mr. Silver noted that during the July 16th, 2021, Commission meeting Staff was asked to ascertain the frequency with which roll-back tax cases are filed. Based on information received from the New Jersey Tax Court Management Office, Staff calculated that during the period from 1988 – 2019, the New Jersey Tax Courts handled an average of fourteen cases per year.

The Appendix contains proposed modifications to subsection b. drafted to be consistent with the legislative intent underlying the Act. Staff recommended modification of N.J.S. 54:4-23.8 to clarify that the cessation of agricultural or horticultural activity during a given year is not a change in the use of the property, and does not trigger the imposition of rollback taxes on the property owner, in the absence of an active conversion of the land to a non-agricultural or non-horticultural use.

Chairman Gagliardi asked whether the word “temporary” should be added before the word “cessation” in subsection (b) to address situations in which a person no longer wants to farm but is unsure about what they want to do with their land. Mr. Silver responded that the intention of the Legislature is the preservation of farmland, and that there are situations in which the addition of the word “temporary” might cause a problem. A farmer may no longer wish to farm the land but may include a provision in a will or trust stating that the land cannot be used in any other way. In addition, when a farmer chooses to let land lie fallow for a number of years, the taxing authorities might construe this agricultural technique as permanent and seek to impose “rollback taxes.”

Commissioner Bunn distinguished the complete cessation of farming from circumstances in which a landowner abandons farming to build a subdivision or an office building on the land. He inquired whether the term cessation should be qualified with the addition of the term “mere.” Commissioner Long suggested adding the phrase “standing alone” to the end of “...agricultural or horticultural activity,” and bracketing the phrase with commas. Commissioners Bunn and Bertone concurred with the language suggested by Commissioner Long.

With the changes approved by the Commission and on the motion of Commissioner Bertone, seconded by Commissioner Bunn, the Commission unanimously voted to release the Tentative Report.

Re-Enrollment in PERS

Whitney Schlimbach discussed with the Commission an update memorandum proposing clarification of the “teaching role” exception in N.J.S. 43:15A-57.2b(2). N.J.S. 43:15A-57.2 mandates that retired Public Employee Retirement System members who become re-employed in a PERS-eligible position must stop receiving pension payments and re-enroll in the PERS unless a statutory exception applies.

In March 2021, the Commission authorized a project arising from the Appellate Division decision *Yamba v. Bd. of Tr., Pub. Emp. 's Ret. Sys.*, 2019 WL 2289209 (App. Div. 2019). In *Yamba*, the Appellate Division determined that the retiree was not permitted to continue receiving pension payments after being rehired because he did not meet either requirement in the “critical need” exception. Staff undertook a review of the statute’s legislative history and determined that the Legislature did not intend to expand the “critical need” exception beyond the plain language of the statute.

During the examination of the legislative history of the statute, Staff noted that in 2001, the “teaching role” exception was added to the same subsection as the “salary cap exception.” The

“salary cap” exception excluded retired members who were returning to employment and earning up to \$10,000 annually. The “teaching role” exception was drafted as an addition to the salary cap exception. It referenced the \$10,000 annual salary limit, but it did not impose a salary limit in the “teaching role” exception itself.

Ms. Schlimbach explained that shortly after the teaching role exception was enacted, the annual compensation limit in the salary cap exception was raised from \$10,000 to \$15,000. This change meant that the reference to a \$10,000 annual salary in the “teaching role” exception became untethered to anything in the re-enrollment statute. To this time, there are no administrative decisions that address the scope of either the “critical need” or the “teaching role” exceptions in N.J.S. 43:15A-57.2.

Chairman Gagliardi advised the Commissioners that he wished to bifurcate the discussion of this project. His initial inquiry was whether any of the Commissioners believed that work should continue in the area of “critical need.” Commissioners, Long, Bunn, Bertone, and Cornwell agreed that the Commission should discontinue its work regarding the “critical need” exception in the PERS statute. Next, he inquired whether additional work should be done regarding the “teaching role” exception. Commissioner Bunn stated that the Commission must address the untethered monetary reference set forth in the statute. He commended the Staff for identifying the issue. Chairman Gagliardi concurred and added that this project offers the Commission the opportunity to clarify the law.

Staff was authorized by the Commission to engage in additional research and outreach.

Strict Liability Vehicular Homicide

In July 2021, the Commission authorized a project addressing the relationship between the strict liability vehicular homicide statute (N.J.S. 2C:11-5.3, which prohibits raising the victim’s contributory conduct as a defense to prosecution) and mitigating factor five found in N.J.S. 2C:44-1b, which permits a court to consider at sentencing whether a victim induced or facilitated the defendant’s conduct.

Whitney Schlimbach explained that in the case of *State v. Pascucci*, 463 N.J. Super. 203 (App. Div. 2020), the trial court held that it was precluded as a matter of law from considering evidence in support of mitigating factor five at sentencing because of the strict liability nature of the offense. The Appellate Division reversed the decision of the trial court and held that the plain language of the vehicular homicide statute precluded the defendant from presenting that evidence as a defense to prosecution only, and it should have been considered at sentencing.

Ms. Schlimbach explained that there are no other decisions addressing the relationship between the strict liability vehicular homicide statute and consideration of mitigating factor five at sentencing. Additionally, there is no decision wherein a court has interpreted the language in N.J.S. 2C:11-5.3 to preclude consideration of mitigating factor five.

The statute that addresses strict liability drug-induced deaths, N.J.S. 2C:35-9, prohibits consideration of evidence that the victim contributed to their death as a defense to prosecution.

Ms. Schlimbach stated that the Appellate Division has twice affirmed sentences that relied on mitigating factor five in the context of such convictions. In addition, Ms. Schlimbach said that in *State v. Hladun*, 2020 WL 468007 (App. Div. 2020), the trial court excluded evidence of the victim's recent heroin overdose at trial because of the prohibition against raising the victim's contributory conduct as a defense to prosecution. At sentencing, the court in that case relied on mitigating factor five in determining the sentence.

Staff conducted a targeted outreach to determine the prevalence of the issue raised in *Pascucci*, and Ms. Schlimbach advised the Commission that Staff did not receive any response to its outreach.

Commissioner Cornwell said that since there is no other case that conflicts with *Pascucci*, and Staff has not received any responses from the outreach that was conducted, there is harmony between the vehicular homicide statute and other statutes and no reason to continue work on this project.

Commissioner Bunn added that whenever the Commission decides to conclude work on a project, that decision is based on the current circumstances. If anything changes, the Commission can decide to revisit the issue. Chairman Gagliardi concurred with Commissioner Bunn's statement.

The Commission agreed to conclude work in this area.

Unemployment Benefits for the Wrongfully Incarcerated

Samuel Silver discussed a potential project involving unemployment compensation eligibility when the claimant's separation from work was caused by incarceration. Mr. Silver explained that, pursuant to the statute, incarceration is viewed as if the individual voluntarily left their employment. N.J.S. 43:21-5 does not, however, address the loss of employment due to wrongful incarceration. Wrongful incarceration cases leave open the possibility that one arm of the government can cause a job loss by detaining an individual on subsequently dismissed charges, and another arm of the government can find that the detainee voluntarily left their position without good cause, thus disabling them from receiving unemployment benefits.

In *Haley v. Bd. of Rev.*, 245 N.J. 511 (2021), the Supreme Court affirmed the denial of Haley's unemployment benefits after he was wrongfully incarcerated for approximately 8 weeks. The Unemployment Compensation Law (UCL) is remedial legislation that aims to provide some income for a worker separated from work through no fault of their own. The statute is construed liberally in favor of benefits. Mr. Silver explained that historically, the New Jersey Supreme Court has consistently recognized the UCL's public policy of affording protection against the hazards of economic instability due to involuntary unemployment.

In *Haley* the New Jersey Supreme examined the language of N.J.S. 43:21-5(a) and determined that when incarceration is the cause of an individual's absence from work, this is considered a "voluntarily leaving work issue" that requires a fact-sensitive analysis but does not constitute an absolute bar to unemployment benefits. The Supreme Court reversed and remanded

for a fact-intensive review of the totality of the circumstances surrounding Haley's detention to determine whether he left work voluntarily; including consideration of his arrest, his pre-trial detention, the grand jury's failure to indict, the dismissal of the charges, and the steps Haley took to protect his employment.

Mr. Silver explained the dissent's position in *Haley*, that the statutory language is far from the model of clarity and that all exonerated employees who lose their jobs because of pre-trial detention should be entitled to unemployment benefits under the UCL, because doing so advances the remedial purposes of the UCL rather than leaving employees doubly victimized. The dissent also indicated that because the *Haley* case is ultimately about the meaning of the UCL, the Legislature determines, either by its silence or actions, the final word on the statute's meaning.

Commissioner Long expressed concern about the extent to which the project might eventually involve the Commission's judgment on substantive policy issues. She added that she does not object to Staff conducting further research or outreach relative to this project.

Commissioner Bunn asked whether there was already a statutory remedy for individuals who have been wrongfully convicted. Mr. Silver explained New Jersey's statutes contain remedies for those who have been wrongfully imprisoned. In *Haley*, the defendant's unemployment claim did not include the period of time during which he was wrongfully incarcerated. Rather, the defendant sought unemployment benefits from the time he was released and unable to find employment.

Commissioner Bunn also asked whether modifying the statute will involve a substantive or policy decision. He noted that since the Supreme Court has determined how the statute is to be interpreted, the Commission may wish to incorporate the decision of the Court into the statute so that others will be forewarned about how the law operates in this area. Chairman Gagliardi stated that in the past, when a substantive policy determination has to be made, the Commission has identified the problem and a potential solution and, rather than making a recommendation, has identified the issue for legislative consideration. Commissioner Bunn added that if there is something in the statute that should be clarified to assist courts in reaching the correct determination, then modification would make sense.

Chairman Gagliardi directed Staff to conduct research and outreach, but to also keep in mind that the Commission may ultimately have to limit what it recommends, consistent with prior projects where the Commission has declined to make a recommendation on policy decisions.

Personal Conveyance

Mr. Silver discussed a project addressing the use of the term "personal conveyance" in N.J.S. 39:4-92.4, which was enacted in August 2021 to protect pedestrians and other "vulnerable road users" from the possibility of being injured by motor vehicles. Commissioner Cornwell was obliged to leave the meeting early, and before doing so, he expressed his support for the project, as did Commissioners Bunn and Gagliardi.

Mr. Silver explained that the term “personal conveyance” is used six times in the New Jersey statutes and in the Administrative Code but is not defined. This issue was brought to Staff’s attention by William Yarzab, the Street Smart Coordinator with the North Jersey Transportation Planning Authority.

Mr. Silver said that the statutory language in N.J.S. 29:4-92.4 could cause confusion in the absence of clarification of the term “lawful personal conveyance.” Mr. Silver provided examples of differing definitions of the term: the US Department of Transportation Federal Motor Carrier Safety Administration defines the term as the movement of a commercial vehicle for personal use while off-duty; outside of Title 39, the term is used to define recreation vehicles or temporary living quarters used solely as a family or personal conveyance.

Mr. Silver suggested that the absence of a statutory definition of personal conveyance, as well as the conflicting definitions in other contexts, makes it difficult to know what constitutes a “lawful personal conveyance” for purposes of this statute.

Commissioner Gagliardi expressed support for the project and noted the unanimous agreement among the Commission to proceed with it.

Annual Report

Laura Tharney expressed her appreciation to the Commissioners for their input regarding the Annual Report. She explained that, if approved, the Annual Report will be distributed to the Legislature and then other recipients at the end of January consistent with the Commission’s statutory mandate.

On a motion made by Commissioner Long, seconded by Commissioner Bunn, the Commission unanimously released the Annual Report.

Miscellaneous

In light of identified scheduling conflicts for the February meeting, Chairman Gagliardi proposed that the February 17, 2022, meeting begin at 9 a.m. or 9:30 a.m., subject to confirmation from Commissioner Bell that this time is acceptable to him. Commissioners Bertone, Bunn, Cornwell, and Long advised that an earlier start time was acceptable to them.

Chairman Gagliardi further proposed that the March 17, 2022, Commission meeting be held in person. To accommodate both the Commissioners and Staff, he offered to host the meeting at the Porzio, Bromberg & Newman. P.C. office in Morristown.

Adjournment

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

The next Commission meeting is scheduled for February 17, 2022, at either 9:00 a.m. or 9:30 a.m., pending feedback from the Commissioners not present at this meeting.