

MINUTES OF COMMISSION MEETING

February 16, 2023

Present at the meeting of the New Jersey Law Revision Commission, held virtually, were: Chairman Vito A. Gagliardi, Jr.; Vice-Chairman Andrew O. Bunn; Commissioner Virginia Long; Professor Bernard W. Bell, attending on behalf of Dean Rose Cuison-Villazor; Professor Edward Hartnett, attending on behalf of Interim Dean John Kip Cornwell; and Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Dean Kimberly Mutcherson.

In Attendance

Alex Daniel, Counsel for the New Jersey Civil Justice Institute, and Fletcher Duddy, Deputy Public Defender, Special Litigation Unit, New Jersey Office of the Public Defender, were in attendance.

Minutes

The Minutes of the January 26, 2023, Commission meeting were unanimously approved on the motion of Vice-Chairman Bunn, seconded by Commissioner Long.

Unemployment Benefits for Individuals Who Were Wrongfully Incarcerated

At the January 26, 2023, meeting of the Commission, Staff was directed to examine the majority and dissenting opinions in *Haley v. Board of Review, Department of Labor*, 245 N.J. 511 (2021) and determine what the points of agreement were in both opinions regarding any ambiguity in N.J.S. 43:21-5. Staff was also directed to draft language to clarify the statute and incorporate a rebuttable presumption that individuals who were wrongfully subject to pre-trial detention did not leave work voluntarily. Mr. Silver advised the Commission that, on February 15, 2023, Staff received thoughtful comments from Commissioner Hartnett that he would incorporate into this discussion.

Mr. Silver explained that in examining possibility of including a presumption in N.J.S. 43:21-5, Staff considered that the Unemployment Compensation Law (UCL) is remedial legislation enacted to further the public good and to protect the general welfare of the citizens of New Jersey. As remedial legislation, it construed liberally in favor of allowing benefits. A presumption that an exonerated employee who lost their job as a result of pretrial detention did not leave work voluntarily advances the remedial purpose of the UCL.

The use of a presumption in the UCL is not unprecedented. The Act currently contains two presumptions. The first is found in N.J.S. 42:21-4(g)(9), the statute governing the employment of individuals in educational institutions. N.J.S. 43:21-5(d)(4) also contains a presumption that a replacement worker is considered to be permanent unless the employer certifies that the claimant will be permitted to return to their position upon conclusion of the dispute.

Mr. Silver said that the proposed statutory modifications reflect contemporary legislative drafting practices, dividing the statute into four subsections to improve accessibility.

In subsection (a)(1)(A), the proposed modifications clarify that wrongful incarceration shall be reviewed as a voluntary leaving work issue consistent with the New Jersey Supreme Court decision in *Haley v. Board of Review, Department of Labor*. In response to a Commission inquiry, Staff confirmed that “resignation” is not treated as a voluntary separation from work in N.J.A.C. 12:17-9.1(e)(1)-(10).

Commissioner Hartnett, in his written submission, noted that this subsection enumerated ten circumstances that were to be treated as voluntary leaving work issues while the next subsection called for an examination of the totality of the circumstances. Mr. Silver explained that the language in subsection (a)(1)(A) directs review of the ten enumerated circumstances as a voluntary leaving work issue and that the Board is required to examine the totality of the circumstances to determine whether the applicant did leave work voluntarily. If the employee was separated from work as a result of pre-trial detention, then the presumption in subsection (a)(1)(C) would attach.

The proposed presumption in subsection (a)(1)(C) provides that “the State’s dismissal of the charges against the individual, or the grand jury’s decision not to indict the individual shall be presumptive evidence that the individual did not voluntarily leave work.” To rebut this presumption, the Department of Labor and Workforce Development would be required to consider the totality of the circumstances surrounding the individual’s separation from employment. These circumstances, as discussed in *Haley*, would include whether the applicant for benefits engaged in voluntary acts resulting in the absence from work; whether the applicant actively tried to keep the job; and the length of the absence from work.

Commissioner Hartnett questioned whether applicants for benefits who were found not guilty after a trial should receive the benefit of the presumption. Mr. Silver said that in such a case, a grand jury had either indicted the individual or the court found probable cause to believe that a crime was committed. The proposed language does not foreclose such an applicant from making an application without the benefit of the presumption.

Finally, Commissioner Hartnett noted that he would replace the term “presumptive evidence” as used in the draft language of subsection (a)(1)(C). Mr. Silver explained that before proposing new statutory language, Staff examines the language of similar statutes. When it seems appropriate to do so, Staff recommends using language in statutes that have been enacted by the Legislature and interpreted by the courts and practitioners. The term “presumptive evidence” is found in N.J.S. 52:27BBB-70 and was incorporated into subsection (a)(1)(C) for the Commission’s consideration. Mr. Silver noted that Staff will always be guided by the direction of the Commission.

Commissioner Bell questioned whether an individual who is convicted of a crime and later found to be not guilty after pursuing a habeas corpus petition should be included in the subsection dealing with presumptions. Vice-Chairman Bunn stated that, as drafted, the presumption allows

the Division of Labor to come forward with evidence that the applicant left work voluntarily. In such instances, or even where the applicant is found not guilty, the matter is examined based upon the totality of the circumstances.

Vice-Chairman Bunn suggested that subsections (1) through (3) be eliminated in subsection (a)(1)(C) and that the statute refer to provisions (1) through (3) in subsection (B) instead. Chairman Gagliardi suggested that the language at the end of section (a)(1)(A) be replaced with the phrase “for reasons including, but not limited to:”. In addition, the Chairman asked that the language from the dissenting opinion be added to the discussion found on page six, in the third full paragraph. On page twelve, the Chairman asked that the inadvertently omitted word “not” be added to the comment on subsection (a)(1)(A) after the word “shall” and before the word “be.” Finally, the Chairman asked that language regarding “not guilty findings” suggested by Commissioner Hartnett be incorporated into subsection (a)(1)(C).

With the modifications discussed by the Commission and on the motion of Commissioner Bell, seconded by Vice Chairman Bunn, the Commission unanimously released the Tentative Report.

Interest Rates in Eminent Domain Actions

The Eminent Domain Act of 1971 (Act) provides uniform procedures for the exercise of eminent domain. The Act includes a general repealer, N.J.S. 20:3-50, and an interest rate provision, N.J.S. 20:3-32, which permits the court to fix the rate of interest on just compensation awards. In Title 27, which authorizes the Commissioner of Transportation to exercise the power of eminent domain, N.J.S. 27:7-22 requires a six percent interest rate on just compensation awards. Whitney Schlimbach presented a Draft Tentative Report that addressed the impact of the Act upon the interest rate provision in Title 27.

In *State by Commissioner of Transportation v. St. Mary’s Church Gloucester*, 464 N.J. Super. 579 (App. Div. 2020), the Appellate Division determined that the general repealer in the Act abolished the interest rate provision in Title 27. Ms. Schlimbach reviewed New Jersey’s eminent domain statutes to determine whether any other interest rate provisions might be impacted by the general repealer, as discussed in *St. Mary’s Church Gloucester*. She explained that in *St. Mary’s Church Gloucester*, the Commissioner of Transportation used the power of eminent domain to condemn property belonging to St. Mary’s church. The Commissioner argued for an interest rate to be determined by the court pursuant to N.J.S. 20:3-32. St. Mary’s argued that the six percent interest rate set forth in N.J.S. 27:7-22 was applicable.

The trial court determined that the Act had not repealed the interest rate provision in N.J.S. 27:7-22 and applied a six percent interest rate to the just compensation award. The Appellate Division reviewed the statutory language in the general repealer provision of the Act and in N.J.S. 27:7-22.

The Court determined that the Legislature’s primary purpose in enacting the Eminent Domain Act was to make the legal requirements of eminent domain uniform for all entities and

agencies with that power. The Court also noted the N.J.S. 20:3-32 and N.J.S. 27:7-22 were “clearly” repugnant to one another. The Appellate Division explained that early versions of the bill contained a fixed six-percent interest rate that was subsequently removed before enactment of the Eminent Domain Act. It held that the fixed interest provision in N.J.S. 27:7-22 was impliedly repealed by N.J.S. 20:3-50.

Ms. Schlimbach stated that courts have consistently held that trial court judges should consider prevailing commercial interest rates, the prime rate or rates, and the applicable legal rates of interest when calculating interest in eminent domain actions. In addition, trial court judges must impose an interest rate that best indemnifies the condemnee for the loss of use of the compensation to which the condemnee was entitled. Ms. Schlimbach indicated that appellate courts have upheld interest rates calculated in accordance with New Jersey Court Rule 4:42-11, pertaining to both pre- and post-judgment interest.

Ms. Schlimbach explained that there are hundreds of statutes that authorize entities to exercise the power of eminent domain. Only a few employ language similar to that found in N.J.S. 27:7-22 and impose a fixed interest rate on just compensation awards. In New Jersey, there are two types of fixed interest. The six percent interest rate in N.J.S. 27:7-22 and the “legal rate” of interest. In N.J.S. 20:3-32, the Legislature vested the court with the discretion to determine and fix the appropriate interest rate.

The proposed language set forth in the Appendix identifies the various sources that a court may consider when determining the appropriate interest rate. In N.J.S. 27:7-22 and other eminent domain statutes imposing a fixed interest rate, Ms. Schlimbach recommended the elimination of the fixed rate language and the addition of language setting forth the procedure for determining interest rates in N.J.S. 20:3-32.

Commissioner Hartnett, in a written submission, noted that the use of the term “best” in subsection (b) of N.J.S. 20:3-32 suggested “highest and best use.” Ms. Schlimbach stated that this language was derived from New Jersey’s common law. Commissioner Long suggested that the term “justly” replace the term “best” in this subsection. Commissioner Bell concurred.

With the proposed modification recommended by Commissioner Long and on the motion of Commissioner Bell, seconded by Commissioner Long, the Commission unanimously released the Tentative Report.

Interpretation of the Household Exception to Inclusion in the Sex Offender Central Registry

The Internet registration of individuals convicted of sex offenses is governed by N.J.S. 2C:7-1. An offender’s internet record will be made available to the public unless one of three exceptions applies. The household exception is set forth in N.J.S. 2C:7-13(d)(2). This exception excludes offenders from inclusion in the Sex Offender Central Registry if their “sole sex offense” involved a victim related by blood or with whom they are in a parent-child relationship.

Ms. Schlimbach explained that the phrase “sole sex offense” is defined in N.J.S. 2C:7-13(d)(2) as a single conviction, adjudication of guilt, or acquittal by reason of insanity for a sex offense which involved no more than one victim, no more than one occurrence or — in the case of an offense which meets the criteria of the household exception — members of no more than a single household.

In the case of *In re N.B.*, 222 N.J. 87 (2015), the New Jersey Supreme Court considered the applicability of the household exception when the defendant had one conviction involving a victim in the same household but admitted to multiple acts of sexual abuse as part of his plea agreement. The Court addressed the manner in which the definition of “sole sex offense” was to be applied to an offense qualifying under the household exception. It concluded that the Legislature intended the household exception to be less restrictive than the two other exceptions in N.J.S. 2C:7-13(d). The Court determined that an offense that meets requirements of either of the other two exceptions is excluded if it involves more than one victim or more than one occurrence. An offense qualifying for the household exception, however, is eligible if it involves no more than one victim, no more than one occurrence, *or* members of no more than a single household. The *N.B.* Court explicitly declined to address whether the household exception is applicable to an offense involving more than one victim in the same household.

Ms. Schlimbach said that Staff conducted targeted outreach to determine whether commenters believed that the clarification of the statute was necessary, reaching out to: the New Jersey Public Defender’s Office; the New Jersey County Prosecutor’s Association; James Maynard, Esq., who represented the defendant-appellant in *N.B.*; Joel Silberman, Esq., who represented the defendant-appellant in *H.C.*; and other private practitioners.

Support for the Commission’s work in this area was received from James Maynard, Esq. Mr. Maynard advised Staff that that the language in N.J.S. 2C:7-13 is not as clear as it should be in light of the Supreme Court’s holding in *N.B.*

Fletcher Duddy, a Deputy Public Defender, and Chief Counsel of the Special Litigation Unit, thanked the Commission for allowing him to comment on this project. He advised the Commission that he conducted a survey of his colleagues who provide legal representation to clients at Megan’s Law Tier Classification Hearings about the Commission’s work in this area. He stated that the majority believe that, if not for the Court’s decision in *In re N.B.*, clarification would be necessary. Given this decision, however, no further clarification of the statute is necessary because courts have not had trouble extending the logic of *State v. H.C.*, 2021 WL 1713300 (N.J. Super. Ct. App. Div. Apr. 30, 2021).

Mr. Duddy advised the Commission that clarity could be provided to the statute in another area. He explained that there is currently no agreement in New Jersey on the subject of whether multiple counts in the same Judgment of Conviction is considered a single conviction or multiple convictions. In addition, he suggested that the Commission might wish to address whether the registration exception should apply to Megan’s Law registrants convicted of child endangerment. Finally, he advised that the Commission may wish to examine the ambiguities in the “sunset” provision of Megan’s Law. Mr. Duddy posited that a fourteen-year-old registrant who is

subsequently convicted of theft would be prevented from removing their name from the registry as a result of this subsequent conviction.

Chairman Gagliardi stated that he was inclined to defer to the results of the in-house survey conducted by Mr. Duddy. Vice-Chairman Bunn, and Commissioners Bell, Bertone, and Long concurred.

Commissioner Bell stated that he would be inclined to examine the remaining topics that Mr. Duddy brought to the Commission's attention. Vice-Chairman Bunn agreed, saying that each of the issues should be explored.

Mandatory Attorney Review Provisions

Samuel Silver discussed with the Commission a Memorandum proposing a project to address the mandatory attorney review provision in New Jersey's Statute of Frauds, which governs palimony agreements. In New Jersey, an action for palimony requires a promise by one party to a non-marital personal relationship to provide support to the other during the relationship or after its termination. In 2010, the Legislature amended the Statute of Frauds to require that such arrangements be reduced to writing and signed by the promisor. The palimony statute further provides that the arrangement is not binding upon the parties "unless it was made with the independent advice of counsel for both parties."

In *Moynihan v. Lynch*, 250 N.J. 60 (2022) the New Jersey Supreme Court was asked to determine the validity of the mandatory attorney-review requirement for palimony agreements. The *Moynihan* parties lived in a marital and family-style relationship for almost eighteen years. They entered into a handwritten prospective property settlement agreement that was executed by both parties before a notary at some point between 2012 and 2014. Neither consulted with an attorney before signing the agreement.

Mr. Silver explained that the trial court rejected the argument that the attorney-review provision in N.J.S. 25:1-5(h) violated the Constitution and dismissed the palimony claim because the parties had not complied with the statute. The trial court determined, however, that the agreement constituted an enforceable contract. The Appellate Division held that the agreement was a palimony agreement that did not comply with the statute and was therefore unenforceable.

The Supreme Court examined the legislative history of the Statute of Frauds provision concerning palimony agreements and concluded that the attorney review requirement constituted an arbitrary government restriction. The Court found that the Legislature's amendment of the Statute of Frauds in 2010 represented a decision to abrogate the common law governing palimony. Mr. Silver stated that other laws governing the enforceability of different types of agreements between private parties do not require attorney review.

The *Moynihan* Court determined that the attorney-review requirement directly infringed the right of parties to enter a palimony agreement without retaining an attorney. The Court was unable to ascertain the "public need" for the attorney review requirement given the lack of such a requirement in other contexts and the absence of legislative history regarding the need for it in this

context. Parties may waive attorney review in related areas such as child custody, parenting time, child support, and alimony; and in unrelated areas, such as real estate purchases, consumer transactions, creating a will or securing life and health insurance. The Court explained that it was constrained to strike down the attorney review requirement in N.J.S. 25:1-5(h) and uphold the palimony agreement between the parties as written.

Mr. Silver advised the Commission that there are no pending bills proposing to modify N.J.S. 25:1-5, as discussed in *Moynihan*.

Commissioners Long and Bell asked whether it would be appropriate for the Commission to issue a report advising the Legislature of the New Jersey Supreme Court's decision in *Moynihan*, along with other relevant background information, rather than proposing modifications to the statute. Commissioner Bell noted that this course of action would permit the Legislature to decide whether to amend the statute or to provide a reason for the apparently unique attorney-review provision in N.J.S. 25:1-5(h).

Vice-Chairman Bunn pointed out that, in an area like palimony agreements where parties are often pro se, the statute should be amended to conform with the Supreme Court decision to prevent individuals without legal training from mistakenly believing that the law requires attorney review. Commissioner Bell indicated that, even so, he is more inclined to bring this subject to the Legislature's attention than propose modifications to the statute.

The Commission authorized Staff to engage in further research and outreach and provide an update to the Commission at a future meeting.

Uniform Law Commission Acts Under Consideration in 2023

Ms. Tharney discussed with the Commission an overview of the Uniform Law Commission (ULC) Acts that Staff expects to review in 2023. Commission Staff was asked to identify recent ULC acts that may be appropriate to bring to the attention of the Commission. Among the acts to be considered by Staff are: (1) the Uniform Telehealth Act (released in 2022); (2) the Uniform Electronic Estate Planning Documents Act (released in 2022); (3) the 2022 Amendments to the Uniform Commercial Code (released in 2022); (4) the Uniform Personal Data Protection Act (released in 2021); and (5) the Uniform Restrictive Employment Agreement Act (released in 2021).

These acts have not yet been the subject of any examination by Staff, so it may be that one or more of them will not be recommended to the Commission based on factors including New Jersey's existing law or bills already introduced this session.

Ms. Tharney explained that, with respect to the 2022 Amendments to the Uniform Commercial Code, the New Jersey State Bar Association has not yet taken a formal position but that its members generally consider amendments to the UCC and that there may be support for enacting the 2022 amendments that address emerged and emerging technologies, like blockchain and artificial intelligence.

Alex Daniel, counsel for the New Jersey Civil Justice Institute (NJCJI) advised the Commission of NJCJI's position on the Uniform Personal Data Protection Act (UPDPA) and the Uniform Restrictive Employment Agreement Act (UREAA). Among the concerns about the UPDPA identified by Mr. Daniel were: the inclusion of a private cause of action; the lack of a safe harbor provision; and the broad language related to stakeholder participation in the development of voluntary compliance standards. He also expressed concerns on behalf of the NJCJI regarding what he described as the UREAA's hyper-technical requirements.

The Commission thanked Mr. Daniel for providing information about the NJCJI's position and for his offer of additional assistance. Vice-Chairman Bunn indicated that the Commission would be grateful to hear again from Mr. Daniel once Staff has begun work on the projects included in Ms. Tharney's Memorandum and hoped that Mr. Daniel would be available to assist Staff with its work in this area.

Commissioner Bell and Vice-Chairman Bunn indicated that consideration of some of the ULC proposals may involve policy decisions outside the scope of the Commission's responsibilities. They noted that legislative action at the state and federal level may also affect the course of some of the projects and that the Commission looked to hearing more from Staff at upcoming meetings.

Miscellaneous

Laura Tharney informed the Commission that the 2022 Annual Report had been distributed in accordance with the Commission's statutory mandate. Ms. Tharney advised that, as in prior years, she heard from some recipients who expressed their appreciation for the Report.

She also explained that she had engaged in discussions with Seton Hall University Law School about including the Commission as one of its externship opportunities.

Finally, Ms. Tharney advised that a bill based on the Commission's work on the elective spousal share issue was passed by the Assembly and a bill based upon the Commission's work in the area of personal conveyances has been introduced in the Legislature.

The Commission's next meeting will be held on March 16, 2023, at 4:30 p.m., in the offices of Porzio Bromberg & Newman, 100 Southgate Parkway, Morristown, New Jersey, 07962.

Adjournment

On the motion of Commissioner Bell, seconded by Commissioner Bertone, the Commission unanimously adjourned.