

MINUTES OF COMMISSION MEETING

March 15, 2018

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 Virginia Long (via telephone); Commissioner Andrew O. Bunn; 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, attending on behalf of Commissioner Kathleen M. Boozang, and Grace C. Bertone, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner Michael T. Cahill.

Minutes

With a minor modification to add the word “the person” between the words “which” and “stay”, and an “s” after “stay”, in the first sentence of the fifth paragraph on page 4, the Minutes of the February 14, 2018, Commission meeting were unanimously approved on the motion of Commissioner Bunn, seconded by Commissioner Long.

Open Public Records Act – Security Camera Footage

Laura Tharney discussed a Memorandum prepared by Erik Topp, a Legislative Law Clerk with the Commission, which focused on the New Jersey Supreme Court case of *Gilleran v. Township of Bloomfield*. At issue in *Gilleran* was whether the public may obtain security camera footage from a public entity under the Open Public Records Act (OPRA). Ms. Tharney conveyed to the Commission that the New Jersey Supreme Court found, in *Gilleran*, that there was no absolute right of public access to such footage.

Public entities are permitted, under OPRA, to bar the release of video that reveals the security capacity for systems protecting public buildings. Ms. Tharney observed, however, that a dissenting opinion was authored in *Gilleran* by the Chief Justice. The language of the dissent was examined by Staff to determine whether a project existed for consideration by the Commission.

Thomas J. Cafferty, Esq., of Gibbons, PC, was present at the meeting on behalf of the New Jersey Press Association. He advised the Commission that he has been authorized to offer assistance to the Commission relative to this project. Chairman Gagliardi, on behalf of the Commission, thanked Mr. Cafferty for attending the meeting and for the offer of assistance.

Chairman Gagliardi observed that the issue presented in *Gilleran* is not identical to, but is related to, the issues raised in *Paff v. Ocean County Prosecutor's Office*. In *Paff*, the Court was asked to consider whether or not to release the dashboard video, and other records, which

depicted a law enforcement officer allowing his police dog to attack a suspect. The Chairman explained that that case is presently pending before the New Jersey Supreme Court and that it would be beneficial for the Commission to await any ruling before working in this area of the law. Mr. Cafferty concurred with the Chairman's proposed approach to this issue.

Commissioner Long observed that unlike *Gilleran*, the facts in *Paff* do not involve security issues. The Chairman agreed and noted that both cases do, however, involve privacy issues. Based on his experience with the *Paff* case, he added that parties on both sides of the issue appear to be calling for a bright line test regarding the release of the types of information requested, and any such test might impact the issues posed by *Gilleran*.

Ms. Tharney said that Staff would continue to monitor the pending case and follow-up with the Commission once a decision has been issued by the New Jersey Supreme Court.

“Residence” for Purposes of Sex Offender Registration

Timothy Prol summarized a Draft Tentative Report discussing whether modification of N.J.S. 2C:7-2 is appropriate to clarify that individuals subject to registration must register a “secondary” residence with the requisite authorities. Mr. Prol advised the Commission that the *Halloran* Court concluded that the address of a secondary residence must be registered with the appropriate authorities and that the failure to do so is not a *de minimis* violation of the law.

Mr. Prol discussed the Federal Sex Offender Registration Notification Act (“SORNA” or the “Act”) with the Commission. This Act requires offenders to register, and keep their registration current, in each jurisdiction where the offender resides, is employed, or is a student. According to Mr. Prol, to keep the registration current, an offender must appear in person to notify appropriate law enforcement of each change of name, residence, employment, or student status within 3 business days of the change. Failure to comply with SORNA may put federal funding at risk.

Mr. Prol explained that he had reviewed language from several states in which the criminal codes specifically address the issue of registration and notification of a sex offender's temporary or secondary residence. States typically clarify the definition of secondary residence through descriptive terminology or by way of a specific number of days within which an offender must register.

In New Jersey, according to Mr. Prol, an offender's primary point of contact is with the State Parole Board. He advised the Commission that based upon his outreach, thus far, there appears to be a significant amount of overlap between registration and lifetime supervision. An

offender in New Jersey must abide by more than 20 conditions of parole or suffer enhanced penalties resulting from non-compliance.

Chairman Gagliardi began by asking whether any of the Commissioners had any questions for Mr. Prol on the content of his Report. Seeing none, he turned the Commission's attention to the options drafted by Staff to clarify the registration requirements.

Chairman Gagliardi said that option number three was a choice that could be modified by the Commission for application in this area. He observed that a statute of this type is designed to capture the largest number of individuals and maintain the safety of the public. The Chairman observed that words such as "habitually lives" are vague, subject to interpretation, and might ultimately result in future litigation. Commissioners Bell and Bunn concurred that option three was the most viable of those presented by Staff. By contrast, Commissioners Hartnett and Bertone favored option number two if it complies with the requirements of SORNA.

Commissioner Bunn stated that he believed that the Utah statute nicely addressed the issues of both registration and the definition of secondary residences. The statute, according to Commissioner Bunn is compact, concise, and well-structured. Chairman Gagliardi agreed. Commissioner Long said that she thought descriptive words could be workable in the statute and favored the Minnesota statute. Commissioners Bell and Bertone expressed the opinion that they preferred a finite number of days in the statute as opposed to descriptive words.

Commissioner Hartnett said that he preferred that the statutory requirements regarding registration be expressed in terms of words. He indicated his concern that if SORNA is unconstitutional, then the New Jersey statute would be similarly unconstitutional. Commissioner Bunn agreed and suggested that it may be practically impossible for an offender to register in advance of a change in residence. Mr. Prol advised the Commission that S1174, which has been introduced in the legislature, is designed to bring New Jersey into compliance with SORNA.

Chairman Gagliardi asked whether Staff knew of any states that are planning to or are in the process of amending the language in their statutes concerning registration and requested that Staff provide the Commission with an answer to this question in the next Report. Commissioners Bell, Bertone, Bunn, Hartnett, and Long, along with Chairman Gagliardi, agreed that the Utah statute should be used as the model for the proposed amendment to N.J.S. 2C:7-2a. The focus of the Commission shifted to the number of days that an offender may stay at another residence before having to report that address with the authorities.

Commissioner Long explained that offenders should be required to notify the authorities even if they are only away from their residence overnight since this is a community safety issue. Commissioner Bunn said that he was not wedded to a specific number of days; however, he

believed that seven would be appropriate. Commissioners Bertone and Bell agreed that the seven-day period would be acceptable. Commissioner Bell added that the proposed language should contain a consecutive night provision – for example ten days in the aggregate. Commissioner Hartnett observed that ten is the minimum number of days used in other states; thus, the use of a seven-day reporting requirement would appear to make New Jersey an outlier in this area. The Commission determined that the draft should contain a reference to five consecutive days or ten in the aggregate to address this issue.

With the modifications to the proposed statutory language adopted by the Commission, Staff was directed to bring the project back at the April meeting so that the Commission could revisit the language before releasing the Report for comment

Suspended License

Under the direction of the Commission, Samuel Silver prepared a Revised Draft Tentative Report proposing a modification to the language of N.J.S. 2C:40-26(b). Mr. Silver noted that the issue was whether criminal charges can be brought under N.J.S. 2C:40-26(b) when the act of driving occurs beyond the determinate, court-imposed term of suspension, but before reinstatement, while the driver continues to be administratively suspended by the Motor Vehicle Commission. He advised the Commission that the statute criminalizes the operation of a motor vehicle only while the operator is serving the court-imposed term of suspension and not thereafter.

Mr. Silver advised the Commission that the Revised Draft Tentative Report contains new and amplified sections that set forth the historical evolution of the case law in this area of law beginning with *State v. Zalta* and ending with *State v. Rizzitello*. Pursuant to *Zalta*, the determinate period of a driver's license suspension is a mandatory consequence of the conviction and not a measure of the maximum period of time the Director of Motor Vehicles may keep a license in suspension. After the court imposed period of suspension has concluded, a license will continue to be suspended until it is restored by the Director of the Motor Vehicle Commission. Mr. Silver noted that under this paradigm a license may remain suspended indefinitely. He then discussed three proposed options that had been drafted by Staff to clarify the current statute.

According to Mr. Silver, the first sentence of the statute could benefit from the addition of the words "court ordered" before the phrase "period of license suspension." The balance of the statute was then drafted with three options with which to charge the defendant: (1) unlicensed driver; (2) failure to produce a license; and, (3) driving with a suspended license. The selection of any one of these options, he continued, would serve to clarify the statute and reduce the possibility that an individual would be wrongly charged under this section.

Commissioner Long stated that she did not believe that charging an individual with the failure to produce a license was a viable option. Each of the Commissioners concurred with her assessment that the failure of a driver to produce a license was not the appropriate under the circumstance set forth in *State v. Torella*. Commissioner Long stated that once the court imposed period of suspension was concluded, the defendant's license should no longer be considered suspended by the MVC. Individuals, she continued, who operates a vehicle after the determine period of suspension should therefore be charged with being unlicensed drivers. The Chairman, along with Commissioners Bell, Bertone, and Bunn concurred with Commissioner Long's analysis. Commissioner Hartnett observed that after reading *Perry* and *Zalta* it appears that the operator of a vehicle should be charged with driving with a suspended license pursuant to N.J.S. 39:3-40 as held by the *Zalta* Court. Noting Commissioner Hartnett's dissent, the Commission opted to proceed with Commissioner Long's recommendation.

The Commissioners requested three changes to the statutory language. The Commission requested that the language in the third sentence of the proposed statute be amended to refer to "[a] person" rather than "person." In addition, rather than use of the third person plural word "their" the Commission asked that the statute be amended to read "... that person's license..." Finally, the Commission recommended changing the word "shall" to "may" in the final sentence of the proposed language.

With the modifications to the proposed statutory language set forth in option one and on the motion of Commissioner Bell, seconded by Commissioner Bunn, the Commission voted unanimously to release the project as a Tentative Report.

Public Assistance Law

John Cannel discussed his Draft Tentative Report relating to public assistance law. He noted that many of the statutes in the earlier chapters of Title 44 were enacted in the nineteenth century while others dated back to the 1920's and earlier. The statutes, according to Mr. Cannel, are archaic in both substance and style, and do not reflect currently reality and practice. Many of the sections contain superseded terms and citations to statutes that have been repealed by the Legislature. In an attempt to clarify this area of law, Mr. Cannel suggested that the entire title be called "Public Assistance Law." Further, he recommended that the distinctions between Assistance (Chapter 8) and Temporary Assistance to Needy Families (Chapter 10) be clarified to remove meaningless and unnecessary duplication.

Mr. Cannel advised the Commission that if this Report is released for comment that he will likely have additional, substantive topics to discuss with the Commission once he receives comments from stakeholders. Chairman Gagliardi observed that Staff's submission was entitled "Draft Revision to the 2009 Final Commission Report Relating to Public Assistance Law." He

inquired whether this should be amended and re-titled as a Draft Tentative Report. Since the title page of the Report was intended to alert the Commission to the origin of the contents, Mr. Cannel concurred with the Chairman's assessment. He also noted that the 2009 Report did not contain a "Table of Dispositions", which Mr. Cannel explained was necessary in a Report like this one to ensure that each statute has been reviewed by Staff and provide a record of the determination regarding each statutory section.

With the modifications to the title of the Report and on the motion of Commissioner Long, which was seconded by Commissioner Bunn, the Commission voted unanimously to release the project as a Tentative Report.

Guardianship

Samuel Silver discussed with the Commission a Memorandum intended to review the status of New Jersey's guardianship law and update the Commission on the research conducted by Staff to this time.

Staff is in the process of evaluating the New Jersey guardianship statutes to ascertain whether New Jersey is employing the best practices in this area of law. As a part of that process, Staff is currently reviewing: the New Jersey Statutes; the New Jersey Administrative Code; the New Jersey Rules of Court; and the Uniform Laws. In addition, Staff is analyzing each state's rules, statutes, and case law in the following areas: definition of incapacity; types of guardianships; decision-making standards; and reporting requirements.

The Uniform Guardianship Conservatorship and Other Protective Arrangements Act (UGCOPAA) is also being reviewed by Staff. This uniform act focuses on a person-centered philosophy that eliminates the use of pejorative terms. In addition, the UGCOPAA employs the least restrictive method of arriving at a decision for the person in need of guardianship called "supported decision making." Finally, the UGCOPAA recognizes the need to allow family members to obtain information about the incapacitated person.

Staff has spoken with Ben Orzeske from the Uniform Law Commission who advised that there are several state legislatures working with and reviewing the UGCOPAA. Staff will continue with its research and outreach and will update the Commission.

Out-of-State DWI

Staff had previously presented the Commission with a Memorandum that discussed whether a conviction for driving while intoxicated (DWI) in another state qualified as a predicate conviction that supported an in-state conviction for driving during the second license suspension

for DWI pursuant to N.J.S. 2C:40-26. Timothy Prol recalled that this project arose out of the Appellate Division's decision in *State v. Luzhak*. In *Luzhak* the Appellate Division held that a conviction for DWI in another state qualified as a predicate conviction that would support an in-state conviction for driving during a second license suspension for DWI.

Timothy Prol explained that Assembly Bill 2491 was introduced during the 2018-2019 legislative session. This bill would clarify that a DWI conviction in another state qualifies as a predicate conviction that can support an in-state conviction under N.J.S. 2C:40-26 for driving during a second license suspension for DWI. Since the Legislature is currently pursuing action in the area addressed by this project, Mr. Prol recommended that no further action be taken on this project by the Commission at this time and the Commissioners agreed.

Municipal Vacancy Law

Laura Tharney discussed a Memorandum prepared by Erik Topp, a Legislative Law Clerk with the Commission, which proposed a potential project to identify possible changes to the municipal vacancy law and improve its organization and effectiveness. This project was originally brought to Staff's attention by Chairman Gagliardi. A challenging issue in this area of law is the fact that seats on governing bodies are sometimes left open for extended periods of time, which may impair the ability of the body to function or force a costly special election.

Commissioner Bell commented that this was a fine project but questioned the underlying premise of simply filling vacant seats. He said that when a vacant seat is filled, it may have the effect of providing the incumbent with an advantage in the next election. Commissioner Bell offered the idea of exploring an option whereby the citizens can petition the government to fill the vacant seat.

Chairman Gagliardi concurred with Commissioner Bell's statements, noting that a vacancy is not necessarily a bad or inappropriate thing, and that any work in this area should be done with no more of an impetus or incentive to fill an empty position than is already built in to the statutes. He did, however, note that this was an area that could present challenges for municipalities and result in litigation, making mention of the case of *Booker v. Rice* and others like it.

Commissioner Long commented that the Report was very well done and Ms. Tharney replied that the students working with the Commission had been doing a substantial amount of really good work. The Commission asked that the Minutes reflect their appreciation for the excellent work being done by students in this area and in others and Staff was then authorized to conduct additional research and outreach in this area.

Miscellaneous

Chairman Gagliardi inquired about the litigation status of *Kean Federation of Teachers v. Morrell*. Ms. Laura Tharney advised the Commission that a petition for certification had, in fact, been filed and granted in this matter. Staff, therefore, will monitor the matter but will not engage in active work in this area until the Commission has the opportunity to revisit the issue after any decision of the New Jersey Supreme Court.

Ms. Tharney advised that her review of the bills introduced in the current legislative session is ongoing and that she hopes to have it completed by the time of the April Commission meeting so that she can provide a legislative update to the Commission.

The work of the New Jersey Law Revision Commission was mentioned in an article in the March 05, 2018, issue of the New Jersey Law Journal concerning the issues that may arise in the sale or purchase of residential waterfront properties.

Finally, Ms. Tharney advised the Commission that Staff has been interviewing candidates for summer legislative law clerk positions and that she expects the available positions to be filled by the time of the next Commission meeting.

Adjournment

The meeting was adjourned on the motion of Commissioner Bell which was seconded by Commissioner Bertone. The next Commission meeting is scheduled to be held on April 19th.