

MINUTES OF COMMISSION MEETING

March 17, 2022

Present at the New Jersey Law Revision Commission meeting, held at the law offices of Porzio, Bromberg, Newman, P.C., 100 Southgate Parkway, Morristown, New Jersey 07962-1997 and simultaneously via video conference, were: Chairman Vito A. Gagliardi, Jr.; Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang; Professor Bernard W. Bell, of Rutgers University attending on behalf of Commissioner Rose Cuison-Villazor; and, Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

Minutes

The Minutes of the February 17, 2022, meeting were unanimously approved by the Commission on the motion of Commissioner Cornwell, seconded by Commissioner Bertone.

Re-Enrollment in PERS

Whitney Schlimbach discussed with the Commission a Draft Tentative Report proposing clarification of the “teaching role” exception in N.J.S. 43:15A-57.2b(2). The statute mandates that retired Public Employee Retirement System (PERS) 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 January 2022, the Commission authorized a project to clarify the teaching role exception in N.J.S. 43:15A-57.2b(2), which exempts teaching staff positions at qualifying public institutions of higher education from the statute’s requirements.

The teaching role exemption includes a reference to \$10,000, which had been the annual compensation limit set by another section of the statute, referred to as the “salary cap” exception, which allows retirees returning to employment to earn up to a certain amount of money per year without reenrolling in PERS. The salary cap exception was later amended to allow compensation up to \$15,000 before re-enrollment was required, which left the \$10,000 reference in the teaching role exception unlinked from the cap in the “salary cap” exception.

Ms. Schlimbach explained that Staff first reviewed the legislative history of the teaching role exception to determine the legislative intent when originally enacting the exemption. It was enacted in 2001 and drafted as a continuation of the existing salary cap exception. The Sponsor’s Statement indicated that the exception permits retirees to accept qualifying teaching roles without losing retirement benefits even when making more than \$10,000 per year. The Statement also explained that under current law, those earning less were already exempt pursuant to the salary cap exception. The Statement demonstrates a legislative intent to exempt all qualifying teaching roles regardless of annual salary. Also supportive of this interpretation of the Legislature’s intent in enacting the teaching role exception is a description of the teaching role and salary cap

exceptions in the Senate Education Committee Statement. That Statement indicated that retirees earning \$10,000 or less, or those employed in teaching staff positions by a public institution of higher education, are exempt from re-enrollment. Shortly after enacting the teaching role exception, the Legislature amended the salary cap exception to increase the \$10,000 limit to \$15,000 annually, which eliminated the source of the \$10,000 reference in the teaching role exception.

Staff recommends eliminating the reference to the \$10,000 salary limit to clarify the scope of teaching role exemption, consistent with the legislative intent to exempt retirees regardless of annual salary, and because the \$10,000 reference has been outdated and unconnected to any other provision in the statute since the salary cap exception was amended.

Ms. Schlimbach explained the modifications set forth in the Appendix.

Subsection a.

Subsection a. is divided into three further subsections based on the content of each paragraph and the language is rendered gender-neutral. The first half of the first paragraph sets forth events triggering the application of subsection a., and no substantive changes have been proposed with respect to it. The second half of the first paragraph is labeled subsection a.(1) because it addresses the cancellation of retirement benefits. The second paragraph is labeled subsection a.(2) and describes the consequences of re-enrollment in PERS. The third paragraph is labeled subsection a.(3) because it sets forth the effects of a subsequent retirement after re-enrollment.

Subsection b.

In subsection b(2), it is recommended that the reference to the \$10,000 annual salary be eliminated to maintain consistency with the statute's legislative intent to exempt qualifying teachers regardless of income. The recommendation is also based on the outdated nature of the reference, since the salary cap exception was amended to allow up to \$15,000 per year. It is also recommended that the final paragraph of subsection b. be moved to subsection b.(1), because it describes the authority of Director of the Division of Pensions and Benefits to adjust compensation amount in subsection b.(1).

Subsection c.

It is recommended that subsection c. be divided into subsections c.(1) and c.(2), each addressing a separate category of "critical need" employment. The recommendations move the paragraph setting forth the time period required between retirement and a return to employment with the pre-retirement employer to the beginning of subsection c. because this language applies to both categories of critical need employment. It is also recommended that the paragraph setting forth time limits applicable to employment with boards of education be moved to subsection c.(2), since the limitation applies only to that category of critical need employment.

Commissioner Bell suggested adding language to the end of subsection b.(2), after “staff position,” to clarify that a retiree qualifies regardless of salary. Laura Tharney asked about substituting “compensation” for “salary” in the added language so it is consistent with language elsewhere in the section. Commissioner Bell agreed with that change, and the Commissioners agreed that the additional language should read “, regardless of the amount of compensation.”

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

Inmate

Samuel Silver discussed with the Commission a Draft Tentative Report proposing replacement of the term “inmate” with person-first or other updated language. Mr. Silver explained that there has been a shift in the field of criminal justice away from terms characterized as “dehumanizing” and “stigmatizing” to those that focus on the individual’s identity and capacity for growth.

On August 02, 2021, New York State enacted comprehensive legislation to replace the word “inmate” with the term “incarcerated individual.” This change served as the impetus to examine how the term inmate is used in New Jersey statutes.

In New Jersey there is no uniform definition for the term inmate. The term is used 1,310 times in 252 statutes that span 16 titles. The term is only defined in Title 30, titled Institutions and Agencies, and within that Title, inmate is defined in five statutes, four different ways. Twelve statutes, across seven titles, use either “incarcerated person” or “incarcerated individual” when referring to current or former residents of a correctional facility.

In the New Jersey statutes, the term “inmate” is used in two different contexts, criminal and non-criminal. Mr. Silver explained that in the non-criminal context, the word inmate denotes a group of persons occupying a single place of residence. He noted that N.J.S. 2C:34-1(a)(4)(b) defines the term “promoting prostitution” as “procuring an *inmate* for a house of prostitution or a place in a house of prostitution for one who would be an *inmate*.” In addition, N.J.S. 4:3.11(c) defines an “institutional customer” in the context agricultural and poultry regulation to mean any “restaurant, hotel, boarding house, or any other business, facility or place in which eggs are prepared or offered as food for the use by its patrons, residents, *inmates* or patients.” Pursuant to N.J.S. 19:32-5, a superintendent of elections has the authority to visit and inspect houses and interrogate any *inmate*. Finally, in N.J.S. 44:1-29, the superintendent of welfare manages welfare houses, the grounds, the buildings, and the *inmates* thereof. Mr. Silver said that these references differ from the contemporary use of the term and could be confusing.

In the criminal context, inmate describes an individual incarcerated in a county correctional facility, either pre-trial or after being sentenced, or a person in a State correctional facility serving a sentence.

Staff recommends removing the term inmate in almost every instance it appears in the New Jersey statutes and replacing it with the person-first terms “person” or “person who is incarcerated.” Mr. Silver sought the direction of the Commission regarding the single use of the term “eligible inmate,” because the term is specifically defined in N.J.S. 30:4-91.9 and used in only two other statutes - N.J.S. 30:4-91.10 authorizing eligible inmates in private facilities and N.J.S. 30:4-91.11, directing the Commissioner of Corrections to prepare and transmit a summary of the eligible inmate’s criminal history and background to the facility to which they will be transferred.

Commissioner Cornwell questioned whether there is any instance in which the term eligible was used by the Legislature, such as “eligible person who is incarcerated.” Mr. Silver noted that the term eligible appears in the statute that addresses a person’s application for the services of a public defender and applications for compassionate release. The statute provides that the public defender shall provide legal representative for any “eligible” person who is serving a custodial sentence and requests assistance. The person who is incarcerated is required to complete a document to confirm their eligibility. Commissioner Cornwell stated that there is no reason to keep the term inmate in the penal code.

Mr. Silver explained that the recommendations of the Commission that are set forth in the Final Reports concerning Workhouse, Poor Law, County Commissioner, Misdemeanor, and Pejorative terms have been included in the Appendix.

Commissioner Bell asked about the language found in subsection b. of N.J.S. 2C:34-1, found on page six of the Appendix. Specifically, he questioned the meaning of the language “one of a group occupying a single place of residence.” Mr. Silver replied that this section is an example of the non-criminal use of the term “inmate.” The proposed modification was designed to replace the term inmate and replace it with the original meaning of the term. Commissioner Bell suggested ending the sentence at “house of prostitution.” and removing the rest of the sentence.

Commissioner Bell suggested, without objection, that the term “including an inmate” be added to Staff’s proposed modification of N.J.S. 2C:43-3.3, located on page 8 of the Appendix.

Commissioner Bell also recommended that the term inmate be removed from subsection (c) of N.J.S. 4:3-11.11 and that the balance of the proposed modification be removed from the statute.

Commissioner Bell asked whether the Commission should modify the legislative findings that are set forth in a statute. Mr. Silver responded that the legislative findings were included in the Appendix since they are part of the general and permanent statutes. These findings could be modified to reflect the Legislature’s elimination of a term that it no longer deems appropriate. Chairman Gagliardi said that if we are making the changes throughout the statute, we should make them to the Legislative Findings and that these modifications are not intended to offend the Legislature, but rather to be consistent with the changes that have been made throughout the rest of the statutes on this subject matter.

Commissioner Bell suggested changing the language in the last line of subsection g., in N.J.S. 30:1B-6.9 from “persons who are incarcerated” to “women who are incarcerated” since it refers to products intended for women. Mr. Silver explained that the subsection also provides for the distribution of “aspirin, ibuprofen and any other items deemed appropriate by the chief executive officer or warden, to be provided at the request and free of charge to...” persons who are incarcerated. Mr. Silver expressed concern that if the word “women” was used, rather than “persons,” that the statute may be perceived as limiting the availability of the listed products to women. Chairman Gagliardi suggested using the word “those” rather than “persons” or “women.” Commissioner Bell agreed.

The Commission also discussed the mandatory in-service training program for correctional police officers in State correctional facilities set forth in N.J.S. 30:1B-6.13. Commissioner Bell stated that the individuals identified in subsections e.(4)(A)-(C) could be a member of more than one group. He suggested that after the phrase “persons who are incarcerated and who are” the phrase “members of one or more of the following groups” should be added to the proposed modification. Commissioner Bell inquired whether the term “questioning,” as set forth in N.J.S. 30:1B-6.13(e)(4)(B) was the appropriate terminology and whether subsections (B) and (C) could be unified into a single provision. Mr. Silver answered that the term “questioning” is the original statutory language. Chairman Gagliardi stated there is a lot that can potentially be done that is not a part of this project, for example subsection (C) utilizes the term “gender nonconforming” and it is not clear what that means. He questioned whether subsections (B) and (C) could be consolidated to reflect “all gender identities” for broader coverage. Chairman Gagliardi acknowledged that he is not qualified to make such a modification and suggested releasing the Tentative Report with the language “gender nonconforming” because it is a way to address the issue of the term inmate without making changes to something that the Commission is not qualified to do, while reaching out to more qualified individuals to see what we hear in response.

Commissioner Bell suggested that the title of N.J.S. 30:1B-45 be modified “Liaison acting on behalf of a member of a housing unit in the facility.” In addition, he suggested that the word “applicant” replace the term “inmate” in N.J.S. 30:1B-49 subsections (a)(1) and (2) and subsections (1), (2) and (3) he recommended changing the word “person” to “applicant” because when dealing with a person who is filling out an application they are referred to as applicant. Commissioner Bell also recommended that N.J.S. 30:4-1.1, subsection k., be modified to remove the word “both” and adding the word “for” after the word “and” so that it reads “for patients and for persons who are incarcerated.” Commissioner Bell also recommended that the language in N.J.S. 30:4-8.1 be updated and the word “without” be replaced with the more contemporary term “outside.” In subsection a. of N.J.S. 30:4-16.3, Commissioner Bell suggested removing the proposed reference to a “person who is incarcerated” and replacing it with “person for whom the fee is waived” so that the language emphasizes the person and not the fact that they are incarcerated.

The Commission also discussed the language contained in the statute involving involuntary commitment, N.J.S. 30:4-82.4. In the title of the statute, Chairman Gagliardi suggested that Staff

replace the word “inmate” with the word “those” in the statutory title. Commissioner Bell agreed with this recommendation. He also suggested that subsection c. be streamlined.

Commissioner Bell proposed that the definition of “emergency confinement” could be simplified by replacing the phrase “person who is incarcerated” with the term “such person” or the word “themselves.”

Finally, Commissioner Bell recommended that subsections d.(2)(a) and (b) of N.J.S. 30:4-82.8 be modified to refer to “the person” rather than “the person who is incarcerated.”

Laura Tharney sought authorization for Staff to review the balance of the Appendix and modify the language in the remaining statutes in a manner consistent with the direction provided by the Commission during this meeting. The Commission authorized Staff to do so.

With the modifications recommended by Commissioner Bell and approved by the Commission, on the motion of Commissioner Cornwell, seconded by Commissioner Bell, the Commission unanimously voted to release the Tentative Report.

Transfer of Jurisdiction in Tax Assessment Challenges

Whitney Schlimbach discussed with the Commission an update to the earlier Memorandum proposing a project to clarify the language of N.J.S. 54:3-21 to address the procedural mechanism for transferring jurisdiction to the Tax Court in cases of dual filings by opposing parties, as discussed in *30 Journal Square Partners, LLC v. City of Jersey City*, 32 N.J. Tax 91, 96 (N.J. Tax 2020).

Jurisdiction over property assessment challenges brought by taxpayers or taxing districts is governed by N.J.S. 54:3-21. If the property is valued at more than one million dollars, the statute permits a party to file a petition with either the County Board of Taxation (County Board) or an appeal directly with the New Jersey Tax Court (Tax Court). If one party elects to file an action with the Tax Court, N.J.S. 54:3-21 grants the Tax Court exclusive jurisdiction over the entire matter, which includes any petition pending with the County Board at that time. The statute, however, does not provide guidance regarding how to transfer the County Board filing to the Tax Court.

At the November 2021 meeting of the Commission, Staff was asked to conduct preliminary research and outreach on three issues. First, the Commission asked Staff to ascertain whether the Administrative Office of the Courts was presently working in this area. Next, Staff was asked to examine the legislative history of the original choice of forums clause in the statute. Finally, Staff was asked to review the New Jersey Rules of Court to ensure that the rules do not already address the issues discussed by the court in *30 Journal Square*.

Ms. Schlimbach conducted preliminary outreach to the Administrative Office of the Court. According to Andrea Johnson, Legislative Liaison to the New Jersey Judiciary at the Administrative Office of the Courts, the Judiciary supports the Commission’s plan to review this issue and agreed that clarification from the Legislature would be beneficial. Ms. Schlimbach was advised that the Judiciary welcomes the opportunity to review any proposed language.

Next, Ms. Schlimbach examined the legislative history of the “choice of forum” clause in the statute. The choice of forum clause was added to N.J.S. 54:3-21 in 1979, soon after the Division of Tax Appeals was abolished and replaced by the New Jersey Tax Court. The Senate Special Committee on Tax Appeals Procedure was formed in 1976, pursuant to Senate Resolution No. 30, and it collected data, performed research, held public hearings, and issued a report in 1977 that included twelve recommendations.

The Committee recommended that a proposal to permit direct appeals to the Tax Court at a certain monetary threshold “not be implemented at [that] time.” The language allowing direct appeals to the Tax Court when an assessment exceeded a \$750,000 threshold was added to N.J.S. 54:3-21 in June 1979.

Finally, Ms. Schlimbach examined the New Jersey Rules of Court, specifically Part VIII, which sets forth the rules governing the Tax Courts. Ms. Schlimbach advised the Commission that the Rules do not provide any guidance on this issue.

Ms. Schlimbach advised the Commission that there is one pending bill that concerns N.J.S. 54:3-21, but it does not address the procedural issue raised in *30 Journal Square*.

Commissioner Bell expressed an interest in proceeding with this project. Commissioner Bertone noted that it is unusual for a municipality to appeal in the first instance. She asked Staff to research how many times such instances occur. Chairman Gagliardi stated that this is an area of law that the Commission should examine.

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

Audit Adjustments Involving Returns from Closed Years

Samuel Silver discussed with the Commission a proposed project based on the decision in *ROP Aviation v. Director, Div. of Tax*, 32 N.J. Tax 346 (2021). He explained that, at this time, the tax statutes do not specifically address a situation in which the Director of the Division of Taxation (Director) adjusts an “open filing” and eliminates items that have been carried forward, like net operating losses, the elimination of which impacts previously closed years, that were never audited and were accepted as filed by the Director. The two statutes governing this issue – N.J.S. 54:10A-10 and N.J.S. 54:49-6 – are at odds with each other.

N.J.S. 54:10A-10 authorizes and empowers the Director to make any adjustments in any tax report or returns as may be necessary to make a fair and reasonable determination of the amount of tax payable. N.J.S. 54:49-6 sets forth a statute of limitations, and provides that, absent tax evasion or the failure to file a return, no assessment of additional tax shall be made after the expiration of more than four years after the date of filing a return.

Mr. Silver explained that in the case, ROP, which leased aircraft to an affiliate, reported that in the tax years 2007 to 2011 it carried forward net operating losses of more than 18 million dollars. The Director of Tax did not dispute that these returns were not audited and were accepted as filed. In 2017, however, ROP’s returns for the tax years 2012 to 2015 were subject to an audit by the Division of Taxation, after the auditor noted some irregularities. Ultimately, the auditor

adjusted ROP's income, disallowing the use of any net operating losses for 2014 and of carried forward losses from 2007 to 2011 against the audit-increased income in 2012, 2013, and 2015, by reducing the net operating losses to zero. This elimination of these previously-claimed losses resulted in the audited income being the net taxable income and interest, totaling approximately \$8.5 million dollars. ROP filed a direct appeal from the Notice of Final Adjustment.

The Tax Court identified the issue before the court as whether the adjustment was proper as a matter of law. It referred to N.J.S. 54:49-6, pursuant to which no assessment of additional tax shall be made after the expiration of the statute of limitations. The Court determined that subsections a. and b. must be read together, and reasoned that auditing a closed year and applying the revisions from that year in an open year of audit is doing indirectly what the statute does not permit directly: bypassing the four-year statute of limitations.

The Director argued that N.J.S. 54:10A-10 authorized and empowered him to make any adjustment to any tax return. The Court recognized the scope of the Director's powers, and read the statutes harmoniously. It refused to allow the authority of the Director to defeat the repose and finality that serve as the basis for the statute of limitations. The Court noted that the Division is free to audit a return and make adjustments within the time frame set by N.J.S. 54:49-6. The Court indicated that Internal Revenue Code § 7602(a)(1) and the IRC Manual authorize the IRS to do what the New Jersey Director of Tax cannot do, and concluded that New Jersey is not bound by the IRS's construction of a federal income tax statute for purposes of the corporate business tax, when addressing a statute of limitations or audit procedures. Mr. Silver noted that there are no pending bills regarding this issue and requested authorization to conduct additional research and outreach on this subject.

Commissioner Cornwell opined that the issue is very interesting and observed that the Division of Taxation can disregard the statute of limitations if a return is fraudulent or filed with intent to evade the tax laws, but that this was not the situation in *ROP*. Mr. Silver agreed, adding that the issue is the conflict between the two statutes.

Commissioner Cornwell requested additional research to determine whether there is any adverse authority on the issue, and Chairman Gagliardi indicated that the request with respect to this project was to conduct further research and outreach. Commissioner Bertone agreed that the project presents an interesting issue and also pointed out that when a taxpayer is trying to take advantage of its losses in prior tax years, it is not surprising that the Division of Tax would want to reach back as well. Commissioner Bell expressed curiosity about how frequently the Director exercises authority in this way. Commissioner Bertone noted that the amount in *ROP* seems large for New Jersey, and was surprised that the prior years had not been audited at the time.

The Commission authorized further research and outreach on this project.

Property Taxation

In March 2016, the Commission authorized the re-establishment of a project to revise statutory provisions pertaining to property taxation in New Jersey. After the authorization, preliminary work was done in the area, but the project has not been under active Commission consideration since January 2017.

Laura Tharney explained that the project originally began in 1997 at the suggestion of Lawrence Lasser, who was then the recently retired Chief Judge of the Tax Court. At the time, Judge Lasser indicated the law was not well-organized or expressed. He also advised that some of the statutes contain language inconsistent with court decisions and settled practice. Judge Lasser's role was critical and, with his untimely death in 1998, the project was suspended.

When Staff presented to the Commission a request for authorization to re-establish the project, it anticipated that the project would be based on the drafts of eight chapters comprising the first two articles of the law that were produced in 1998. That material deals with what property is taxable, and how it is to be assessed.

Ms. Tharney explained that Staff began to update the older Commission work and engaged in efforts to identify experts to review drafts. The Taxation Committee of the New Jersey State Bar Association expressed preliminary interest in the project and brief early discussions were held with the New Jersey League of Municipalities.

Despite its best efforts at the time, however, Staff was unable to identify individuals with expertise in this area who were available and willing to provide guidance on the project. The last active work by the Commission in this area was in January 2017. Since that time, the Commission has worked on other projects concerning taxation, including the Final Report released in 2020 concerning the Mandatory Refund of Property Taxes Paid in Error, which was introduced in bill form in the former and current Legislative sessions.

Given the challenges associated with finding knowledgeable individuals willing to participate in the Commission's work in this area, and the resources required to successfully bring a project in this area to conclusion, Staff requests that the work in this area be concluded.

The consensus of the Commission was to conclude work on this project.

Miscellaneous

Laura Tharney advised the Commission that there are currently ten bills pending in the Legislature based upon the work of the Commission, including bills relating to adverse possession, oaths and affirmations, mandatory tax appeals, and unemployment benefits to persons when a job offer is rescinded.

Ms. Tharney also advised that it is her understanding that there may be legislative interest in the Commission's work in the area of election law. Staff was asked to examine the Commission's Final Report, released in 2003, to assess the impact of changes to the law in this area since that time. The Commission welcomed Staff's review of this area.

Adjournment

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

The next Commission meeting is scheduled for April 21, 2022, at 4:30 p.m. at the office of the New Jersey Law Revision Commission.