

## **MINUTES OF COMMISSION MEETING**

**March 19, 2020**

Present at the New Jersey Law Revision Commission meeting held via telephone conference, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Andrew O. Bunn; Commissioner Virginia Long; Commissioner Louis N. Rainone; Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner David Lopez; 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**

On the motion of Commissioner Bunn, which was seconded by Commissioner Bertone, the Minutes from the February 20, 2020, meeting were unanimously approved by the Commission.

### **Harassment**

In *State v. Burkert*, 231 N.J. 257 (2017), the New Jersey Supreme Court considered whether the creation of lewd flyers that seriously annoyed the subject they portrayed was constitutionally protected free speech, or criminal harassment under the Code of Criminal Justice. John Cannel discussed with the Commission a Draft Final Report recommending the modification of N.J.S 2C:33-4 to clarify the statute and eliminate the constitutional defects recognized by the Supreme Court in *State v. Burkert*.

Mr. Cannel advised the Commission that no objections were received by Staff in response to the proposed changes set forth in the Appendix to the Report. In reviewing the proposed modifications, Commissioner Long opined that the word “intent” is not one of the four mental states recognized in New Jersey’s Code of Criminal Justice. In place of the word “intent”, Commissioner Long suggested that the word “purposely” be used in its place. Mr. Cannel noted that “intent” was synonymous with “purposely” and could be used in its place. Commissioner Bell recalled that Commissioner Cornwell had previously pointed that the statute utilizes the word “purpose” three times in subsection a, which resulted in the use of the term in question.

Commissioner Cornwell suggested that alternatives such as “justification” or “reason”, could be used in place of the term “legitimate purpose” so as not to confuse the other use of the word “purpose” in the sentence. Commissioner Bell noted that the term “purpose” would be restored to subsection a. and the word “justification” would replace the word “purpose” in the second and third instances in this section.

On the motion of Commissioner Bell, which was seconded by Commissioner Cornwell, the Commission unanimously voted to release this work as a Final Report.

### **Hearsay**

John Cannel discussed with the Commission a Revised Draft Final Report and Memorandum recommending a change to the Commission's previously released project in this area to reflect the current law based on recent legislative action in the area of "Child Abuse and Neglect."

According to Mr. Cannel, the recently enacted statute follows the position of the Department of Human Services that children's out-of-court statements should be admissible in abuse and neglect as well as termination of parental rights proceedings. He explained that the newly enacted statute supersedes *New Jersey Div. of Child Prot. & Perm. v. T.U.B.*, 450 N.J. Super. 210 (App. Div. 2017), and settles the issue as to current law. As a result, Staff removed the parts of the Draft Final Report on this subject that proposed amendment to the current law. This most recent enactment also settles the issue of hearsay in the context of Child Abuse and Neglect. Chairman Gagliardi stated that the revisions set forth in the Draft Final Report reflect the recent, expressed view of the Legislature on the subject.

On the motion of Commissioner Bell, which was seconded by Commissioner Bunn, the Commission unanimously voted to release the project as a Revised Final Report of the Commission.

### **Personal Injury Protection Claims**

Samuel Silver presented a Draft Final Report regarding the modification of N.J.S. 39:6A-9.1 to clarify the event that triggers the statute of limitations in matters involving personal injury protection (PIP) claims as discussed in *Abdulai v. Casabona et al.*, 2016 WL 1334539 (App. Div. 2016). In that case, the Appellate Division was asked to determine the date on which a PIP claim was filed because the insured and the health care provider each submitted a PIP application on separate dates, using two different claim forms.

Mr. Silver explained that N.J.S. 39:6A-9.1 requires the insurer that provides PIP benefits to bring a suit seeking reimbursement within two years as required by the statute of limitations. The Court noted that the language in N.J.S. 39:6A-9.1(a) is ambiguous regarding the date on which a PIP claim is deemed to be "filed" for purposes of calculating the statute of limitations.

The Appellate Division concluded that a "claim" is "filed" when an insured's submission of a PIP application, in the form requested by the insurer, is received by the insurer. The Court suggested that an insurer is entitled to rely on information that it deems necessary for the proper processing of an application for PIP benefits, and that the information should be submitted in the

form requested by the insured. The Court cautioned that unreasonable delays may result in the running of the statute of limitation.

The proposed statutory revisions, according to Mr. Silver, were drafted to comport with the Court's holding in *Abdulai v. Casabona et al.* Comments on the proposed language were sought from knowledgeable individuals and organizations such as: the New Jersey State Bar Association (Civil Trial Division); the Insurance Council of New Jersey; the New Jersey Insurance Defense Association; New Jersey Association for Justice; an insurance defense attorney; and a personal injury attorney. No objection to the proposed modifications were received by Staff.

Commissioner Bunn suggested that in order to avoid unnecessary litigation and to bring further clarity to the statute, the phrase "transmittal of" should be inserted preceding the term "document referred to..." in section c. of the Appendix. After a brief discussion, the Commission concurred with Commissioner Bunn's proposed modification.

With the changes recommended by Commissioner Bunn, on the motion of Commissioner Cornwell, which was seconded by Commissioner Bunn, the Commission unanimously voted to release the project as a Final Report.

### **Interpretive Statement**

Mark Ygarza discussed with the Commission a Draft Tentative Report proposing a project to clarify N.J.S. 19:3-6, and explain which municipal actor has the authority to draft and submit an interpretive statement with a referendum ballot, as addressed by the Appellate Division in *Desanctis v. Borough of Belmar*, 455 N.J. Super. 316 (App. Div. 2018).

In *Desanctis*, the Mayor and Council adopted an ordinance appropriating funds for the construction of a pavilion and authorizing the issuance of bonds and notes to finance part of the construction. Voters filed a protest petition to require a referendum on the ordinance. Subsequently, the Borough Administrator drafted an interpretive statement for the proposed ordinance to be voted on during the referendum. The Plaintiff filed suit to invalidate the interpretive statement because it was not voted on by the Mayor and Council, which deprived Plaintiff and the public an opportunity to comment on and object to its content. The Plaintiff alleged that the statement contained 'inaccurate, misleading and extraneous information,' presenting another ground for invalidation.

The Appellate Division considered whether the trial court correctly held that an interpretive statement submitted by the borough administrator, without a resolution by the Mayor and Council, is invalid. The Court examined N.J.S. 19:3-6 and concluded that an interpretive statement must be passed by a resolution or ordinance voted upon by the governing body of the municipality. The Appellate Division held that the statutory scheme weighs against allowing a mayor and council to "outsource" an interpretive statement. Pursuant to the Home Rule Act, a clerk is required to submit a petition, once it is found sufficient, "to the governing body of the municipality without delay so

that they may approve it through a vote.” The language of the statement should be given to the governing body, subject to “the requirement that it fairly interpret the public question and set forth its true purpose of the ordinance.”

Chairman Gagliardi stated that the proposed language contained in section c. may present an issue in the context of a municipality that wished to leave a regional school district. The Chairman suggested that the language be modified to reflect that “the governing body of the governmental unit, or units, voting to place the public question on the ballot” replace the current language in the first sentence of section c. Commissioner Bunn inquired whether “governmental body” should be used instead of “governmental unit.” Commissioner Long added that the term “entities” should be used to replace the term “entity” as it appears in this section.

Commissioner Long inquired about how sections a. b. and d. were related to one another. She expressed concern that sections a. and b. were duplicative and in contravention of one another. Laura Tharney advised the Commission that the statute is currently drafted as one large paragraph. Staff therefore separated out each provision to clarify the contents of this statute. Commissioner Bunn noted that if there is a distinction to be made between section a. and section b. that it must be clear.

Commissioner Bell raised concern over the contents of section c. He noted that the inability of a governing body to delegate this task is an issue. He questioned whether the governing body could be trusted to properly place an insurgent’s issue on the ballot. In response, Commissioner Rainone stated that a municipality established under the Faulkner Act can have items placed on its ballot by petition. John Cannel added that interpretive statements for constitutional matters are drafted by the Attorney General. Commissioner Bell suggested that other statutes that are impacted by the instant statute be found and incorporated by reference.

Laura Tharney suggested that this matter be carried until another meeting so that Staff can provide the Commission with a revised draft that addresses the Commission’s concerns, and the Commission agreed to do so.

### **Pending Tenure Charges and Back Pay**

Arshiya M. Fyazi discussed with the Commission a Draft Tentative Report proposing modification to the language of N.J.S. 18A:6-14 to include circumstances addressed by the Appellate Division in *Pugliese v. State-Operated School District of City of Newark*.

Ms. Fyazi explained that the plain language of N.J.S. 18A:6-14 does not address the impact that an appellate remand has on a suspended teacher’s entitlement to receive back pay while the remand is pending. This situation was brought to Staff’s attention by *Pugliese v. State-Operated School District of City of Newark*. In that case, two tenured teachers were subject to tenure charges filed by the principals of their respective schools.

The District certified the charges and suspended both teachers without pay. The arbitrators then sustained the tenure charges against both teachers. The Chancery Division confirmed both arbitration awards. The Appellate Division, however, vacated the arbitrators' awards and remanded both matters to the Chancery Division. While awaiting the decisions regarding the arbitration on remand, the appellants filed a petition with the Commissioner for back pay commencing from the 121<sup>st</sup> day of their suspension, until the second arbitration decisions were rendered.

The matters were transferred to Administrative Law Judges. One administrative law judge determined that one teacher receive back pay from the 121<sup>st</sup> day of her suspension; in the second matter, the judge denied back pay. The Commissioner on appeal adopted the finding of the ALJ in the second matter, and held that neither educator was entitled to the restoration of pay pursuant to N.J.S.18A:6-14 because the statute is silent on the issue. Both parties appealed that decision.

In the second consolidated appeal, the Court noted that the intent of the Legislature in enacting this statute was to alleviate the economic hardship endured by teachers who were suspended without pay pending the outcome of their certified tenure charges. In addition, the Court stated that that an order vacating and remanding an initial decision made by a trial court or agency is akin to the grant of a motion for a new trial.

The Court concluded that its previous decision in the 2015 consolidated appeal to reverse and remand the arbitrator's decisions meant that there was no final decision rendered as to the educator's tenure charges. The Appellate Division determined that in order to carry out the intent of the Legislature, both teachers were entitled to back pay under N.J.S. 18A:6-14.

Commissioner Long asked whether the words "without being dismissed" in section b(1) should be replaced with "being vacated." She added that this change in language would reflect the decision in *Pugliese*. Laura Tharney suggested that "without being dismissed" could be replaced with "if the determination of the arbitrator is reversed and remanded...." Commissioner Long stated that this modification would reflect the Appellate Division's decision.

On the motion of Commissioner Bell, which was seconded by Commissioner Long, the Commission unanimously voted to release the project as a Tentative Report.

### **Self-Representation**

Samuel Silver discussed with the Commission a Memorandum proposing a project to clarify a litigant's ability to represent themselves in involuntary commitment proceedings and termination of parental rights proceedings (N.J.S. 30:4-27.29 and N.J.S. 30:4C-15.4) and as discussed in *In the Matter of Civil Commitment of D.Y.*, 218 N.J. 359 (2014) and *N.J. Div. of Child Prot. & Perm. v. R.L.M.*, 236 N.J. 123 (2018).

In *In the Matter of Civil Comm. of D.Y.*, the defendant was convicted of sexual assaults in both federal and state courts. Thereafter, the State petitioned to involuntarily commit the defendant pursuant to the Sexually Violent Predator Act (SVPA). The defendant did not want his court appointed attorney and requested to proceed pro se. This request was denied by the trial court and affirmed by the Appellate Division.

The New Jersey Supreme Court, in *D.Y.*, considered the legislative intent of the SVPA. The Court determined that pursuant to N.J.S. 30:4-27.29(c) the defendant was barred from appearing in court without an attorney. Therefore, the defendant must either be represented by counsel or appear in court with standby counsel. In order to satisfy the requirements of the statute the Court promulgated guidelines to be followed by litigants and courts. Pursuant to these guidelines, litigants must clearly and unequivocally waive their right to counsel, and the waiver must be knowing, intelligent and voluntary. The guidelines, however, are silent regarding how and when a litigant must notify the court of a desire to proceed pro se or when the court should conduct the voluntariness inquiry. The statute is currently silent regarding the presence of standby counsel.

In *R.L.M.*, a guardianship action along with an action to terminate parental rights had been instituted regarding the defendant's youngest daughter. The defendant wavered between self-representation and counsel. The trial court terminated the defendant's parental rights, and the Appellate Division affirmed. The Supreme Court granted the defendant's petition for certification regarding the issue of self-representation.

The Supreme Court, in *R.L.M.*, observed that in termination proceedings, the child is required to be represented by a law guardian. Unlike proceedings conducted under the SVPA, there is no mandatory language regarding parental representation. Thus, a parent could elect to appear pro se and the court may, in its discretion, appoint standby counsel. Much like in *D.Y.*, the Supreme Court promulgated guidelines regarding self-representation in guardianship and termination proceedings. These guidelines, however, do not make it clear how a pro se litigant must timely or unequivocally assert his or her right to self-representation.

Commissioner Long commented that it is worth looking into this subject matter. Commissioner Bunn concurred and added that this is an important constitutional issue. He further suggested that Staff should carefully examine the issue related to the deadline for notifying the court of an individual's desire to proceed pro se. Finally, he cautioned that a court's notification regarding self-representation should be phrased carefully.

Staff was authorized to conduct further research and outreach concerning the issue of self-representation in both SVPA and guardianship proceedings.

### **Statute of Limitations**

Prior to 2012, medical providers were entitled to file collection actions for payment of services in the Superior Court and did not have to participate in a workers' compensation action.

A 2012 amendment to N.J.S. 34:15-15 was designed to direct all medical provider claims to the Division of Workers Compensation. The Legislature amended N.J.S. 34:15-15 to vest the Division with exclusive jurisdiction for any disputed medical provider claim. This amendment did not mention the statute of limitations for participation in workers compensation actions.

This matter was brought to Staff's attention by *Plastic Surgery Center v. Malouf Chev-Cadillac*, 2019 WL 256698 (App. Div. 2019); 2020 WL 521659 (Feb. 03, 2020). Several medical providers filed petitions for payment for services to employees. The petitions were filed more than two years after the accident, but less than six years from the that date, so they were within the statute of limitations on contract. The Compensation Judge determined that the two-year statute of limitations in the Workers Compensation Act applies to every claimant.

The issue before the Appellate Division was whether, through its silence, the Legislature intended the 2012 amendment to apply the two-year statute of limitations (N.J.S. 34:15-51) contained in the Workers Compensation Act or whether the Legislature intended to leave things as they had been, and continue to apply the six-year SOL for suits on contracts (N.J.S. 2A:14-1). The Court noted that the Legislature did not expressly state that the two-year statute of limitations (N.J.S. 34:15-51) applies in these instances. In addition, the Court noted that the Legislature did not alter §51 when it amended §15. Finally, the Court observed that the two-year SOL does not fit most injury cases. Thus, the Court held that the 2012 amendment to the Workers Compensation Act governing medical providers did not change the statute of limitations from 6 years to 2 years. In addition, the proposition that the triggering date of medical-provider claims should be the date of service to the employee and not the date of the accident is not plainly set forth in the statute.

Mr. Silver noted that the New Jersey Supreme Court recently affirmed the decision of the Appellate Division. The Court held that "the 2012 amendment to the Workers Compensation Act (§15) did not expressly address the statute of limitations." The Court also stated that the "Legislature is, of course, free to do so in the future."

Commissioner Long stated that this was a worthwhile project. She noted that the Supreme Court has invited the Legislature to address this issue. Commissioner Bell noted that it is important that a statute of limitation should exist. He added that a six years statute of limitations is a particularly long period of time. Chairman Gagliardi suggested that Staff engage in outreach to stakeholders to determine whether the statute should be amended or left alone.

### **Miscellaneous**

Given the impact of COVID-19, Chairman Gagliardi noted that there is a likelihood that the next meeting of the Commission would be held by way of a telephone conference. To provide stakeholders with the opportunity to appear before the Commission, he asked that the Revised Draft Final Report regarding Standard Form Contracts be placed on the May 2020 Agenda.

## **Adjournment**

The meeting was adjourned on the motion of Commissioner Bertone, which was seconded by Commissioner Bell. The next Commission meeting is scheduled to be held on April 16, 2020, at 4:30 p.m.