

MINUTES OF COMMISSION MEETING

July 17, 2014

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 Andrew Bunn, Commissioner Virginia Long, and Commissioner Anthony Suarez. Professor Bernard Bell, of Rutgers School of Law - Newark, attended on behalf of Commissioner John J. Farmer, Jr. and Grace C. Bertone, of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon.

Mary McManus-Smith, Esq., of Legal Services of New Jersey; Joseph Accardo, Esq. of Public Service Electricity & Gas Co. (PSEG); Noreen Giblin, Esq. and Robert Brady, Esq. of Gibbons, P.C. were also in attendance.

Minutes

Chairman Gagliardi acknowledged that the commencement of this meeting was a historic moment, marking the first time in the Commission's history that Albert Burstein, Esq. was not a sitting member of the NJLRC. Chairman Gagliardi noted the retirement of Mr. Burstein after twenty-seven years with the Commission – serving as the first Chairman, when the NJLRC began in 1987, the last original member, and the longest-serving member of the Commission.

The Minutes of the June meeting were unanimously approved on motion of Commissioner Bunn, seconded by Commissioner Long.

Title 9 – Children; Abused, Neglected and Dependent Children

John Cannel informed the Commission of a last-minute communication from a representative of the Department of Children and Families suggesting changes to the definitions of “child abuse or neglect” and “child in need of services.” An additional change to “child in need of services” was suggested by the Office of Law Guardian.

Mr. Cannel offered the three possible changes for the Commission's consideration. Change One consisted of amending the language of N.J.S. 9:27-1 subsection a.(3) to substitute “grossly negligent” for “reckless.” Change Two would strike the second paragraph of N.J.S. 9:27-2 entirely. Change Three would strike “imminent” and add “or ameliorated” to the first paragraph of N.J.S. 9:27-2.

In response to Commissioner Bunn's concern regarding Change Two's effect on parents, Mr. Cannel explained that Change Two avoids stigmatizing parents and, if parents are not providing medical care, there is a duty to go in and provide for the child. Mr. Cannel said that, while it was not clear what kind of services would be provided against a parent's will, action is

based on the needs of the child. When Commissioner Bunn asked about potential constitutional issues, Mr. Cannel assured the Commission that safeguards could be added. Commissioner Bunn noted that the project would have a better chance with the Legislature with such protections in place to address the potential dangers.

There followed a discussion regarding where to insert the new language as follows: “The court shall not order services when parents oppose them unless necessary to avoid harm to the child.” Mr. Cannel suggested inserting it as subsection e. under 9:27-31.

Mary McManus-Smith, Esq., of Legal Services of New Jersey, stated that her office proposed parallel language in the child abuse and neglect definition, but not in the section being discussed. She did not object to the present language. Ms. McManus-Smith added that she was present at this meeting to say that her office does not object to any of the proposals made.

Chairman Gagliardi called for and received a motion to release the project as a Final Report with the additions from Mr. Cannel’s Memo and the new language. Commissioner Bunn made a motion that was seconded by Commissioner Long and followed by a unanimous vote in favor of release. Commissioner Bunn suggested that Mr. Cannel and the Commission conduct a final read-through prior to releasing the Final Report.

Long-Term Capacity Pilot Project Act (LCAPP)

Mark Leszczyszak presented a potential project to the Commission that resulting from Staff’s review of the recent Supreme Court of New Jersey decision in *PPL EnergyPlus v. Hanna*, in which the Court determined that the Long-Term Capacity Pilot Project Act was unconstitutional.

Mr. Leszczyszak explained that before government regulation of the electric energy industry, states had the authority to control rates companies charged their customers. These rates were established to reimburse companies for building and maintenance expenses. The growing need for electricity triggered interstate sales of its capacity, which ultimately resulted in government regulation under the commerce clause giving rise to the Federal Power Act.

Pursuant to the Federal Power Act, the states retained some authority. In order to supervise interstate transactions, regional transmission organizations such as PJM Interconnection, LLC were established. PJM Interconnection, LLC created the reliability pricing model, which is an auction that sets the price a company may charge. This auction and method of calculating the price, among other things, were authorized by the Federal Energy Regulatory Commission that was established under the Federal Power Act. Some concerns were raised about the auction since it was not a pure open bidding process; this left existing generators with an advantage since they could bid at the lowest price. So, the minimum offer price rule was established; it gave new generators the opportunity to compete with existing generators in the auction. Nevertheless, New Jersey continued to struggle with its energy needs, and in order to

address this issue, the Long-Term Capacity Pilot Project Act was enacted. This Act was meant to attract new generators to build in-state, but it modified federally-approved terms of the reliability pricing model. These modifications were found by the Court to have intruded on the province of the federal government in a manner deemed unconstitutional.

Laura Tharney asked the Commission if it wanted to take action in this area, either recommending the repeal of the statutory provisions deemed unconstitutional or engaging in outreach in an effort to identify a method by which the unconstitutional provisions could be replaced with the alternatives identified by the Court in its opinion. Commissioner Long stated that she is not an expert in this field and she complimented Mr. Leszczyszak on the work that he had done to research the issue and prepare a summary for the Commission. She cautioned that the alternative suggestions included by the Court in the opinion seemed as though they might involve highly-charged policy judgments that the Commission would not readily have a basis to recommend or not. Commissioner Long recommended that the Commission not undertake a project in this area.

Commissioner Bunn asked if the case had been appealed. Ms. Tharney apologized for not addressing that issue sooner, and added that Staff had recently been made aware that the case is, in fact, on appeal. It was her understanding that oral argument was held in March of this year, and that a determination might be made by the Court in the fall. She added that if the Commission was inclined to consider taking up a project in this area, Staff would await the outcome of the appeal and any new information that might.

Chairman Gagliardi expressed reservations similar to those identified by Commissioner Long. He asked if the commenters had anything to add, or if any in attendance wanted to recommend that the Commission take up a project in this area, and none did. The Commission determined that this issue did not represent a project for the Commission at this time.

Underground Facility Protection Act, N.J.S. 48:2-80, subsec. d.

Jayne Johnson reported that while it was contemplated that this project would be released as a Final Report, she had received further comments from both the Attorney General and another interested utility company subsequent to the filing date. As a result, she asked that the Commission refrain from taking action until September to afford her time to review and incorporate the comments into the Report as appropriate.

Highlands Water Protection and Planning Act

Alexander Firsichbaum presented a project to the Commission resulting from Staff's review of the recent Appellate Division decision, *In re New Jersey Dep't of Env'tl. Prot. Conditional Highlands Applicability Determination, Program Interest*, No. 435434, 433 N.J. Super. 223 (App. Div. 2013). In that case, the Court considered whether the construction of an electrical substation by a public utility qualified for an exemption under the Highlands Water

Protection and Planning Act (Highlands Act): The issue hinged on whether “routine” modifies merely “maintenance and operations”, or whether it also modifies the subsequent five nouns including “upgrade” in the following provision:

the routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of this act.”

Mr. Firsichbaum stated that the Appellate Division acknowledged that the provision may be subject to competing interpretations and that statutory revision is a possible remedy. He noted that the exemption was intended to help strike the balance between protecting the natural resources of the Highlands region and the economic viability promoted by industrial development.

Chairman Gagliardi stated that given the purpose of the exemption, any attempt to interpret and clarify the term “routine” could venture into policy considerations beyond the scope of the Commission’s mandate. Professor Bell added that the outstanding issue may be one in which it is most appropriate for the courts to resolve on a case-by-case basis. Commissioner Bunn stated that this provision of the Highlands Act is often the subject of litigation and added that a determination of what constitutes a routine upgrade may require an industry expert.

Mr. Firsichbaum noted that alternatively, the matter may be viewed as a drafting issue which may be resolved through statutory revision. Commissioner Long questioned whether any legislative history identified by Staff provided guidance concerning the legislative intent of the phrase in question. Mr. Firsichbaum stated that his research involved a review of the legislative history, but he did not discover any history relevant to this issue. Professor Bell said that since this issue is so detailed and precise, only a committee report or similar document would likely provide sufficient guidance to indicate the legislative intent of the provision in question, and he asked whether any helpful information had been obtained from the Highlands Council. Mr. Firsichbaum stated that he had not yet conducted any outreach and Ms. Tharney said that Staff would be happy to do so.

Chairman Gagliardi indicated that the Commission is interested in any insight the Highlands Council or their published reports may provide regarding the issue raised by the case under consideration. He added that the Commission would be interested to see if this additional research and outreach provide guidance regarding the intended meaning of the provision in question. Chairman Gagliardi indicated that evidence of the legislative intent would enable the Commission to consider statutory revisions. The Commission agreed to consider this project and Staff’s findings at an upcoming Commission meeting.

Clarification of Tenure Issues

Chelsea Perdue informed the Commission of three separate decisions regarding the tenure of secretaries, assistant secretaries, school business administrators, business managers, and secretarial and clerical employees that raised statutory clarification issues. The issues touch those who are promoted after receiving tenure. Primarily, the question is whether tenure transfers with a promotion to a new position, or does expire with the promotion.

Ms. Perdue explained that in the first case under consideration, the Plaintiff alleged that she retained secretarial tenure pursuant to N.J.S. 18A:17-2 after consenting to reassignment to assistant school business administrator. The Appellate Division held that as the promotion required the Plaintiff's consent, she essentially abandoned her previous position upon accepting her promotion. Obtaining certification upon her promotion also served as a factor in the Appellate Division's decision that the Plaintiff intended to remain in the second position and forfeit her secretarial tenure rights.

In the second case, the Plaintiff alleged that she acquired tenure immediately upon being reassigned as a secretary from her previous position as tenured clerk. The Appellate Division ruled in favor of the school district, concluding that there is an implied probationary period in N.J.S. 18A:17-2 that bars immediate tenure upon reassignment. In the third case, the Plaintiff was an attendance aide who accepted a promotion to the position of classroom aide. After review, the Commissioner overturned the determination of the administrative law judge, determining that the second position was neither clerical nor a continuation of the previous employment, the chain between the first and second position was too attenuated, the non-tenurable position was accepted voluntarily, and the absence of a legislative provision granting retention of accrued tenure rights to a position not eligible for tenure shows legislative intent to prevent such a right.

Ms. Perdue informed the Commission that two statutes exist that pertain to teachers for promotion and tenure as well as superintendents, but no statutes exist with regard to secretaries, assistant secretaries, school business administrators, business managers, and secretarial and clerical employees. She suggested that the Commission undertake a project to clarify the statutory language in this area.

Commissioner Long said that it sounded as though it was an appropriate area for Commission action. Chairman Gagliardi, who has experience in the area of school law, agreed that this area is complicated and could benefit from clarification. Commissioner Bunn expressed concern that unions might have been involved in the crafting of the statutory provisions and might then be unhappy with changes. Chairman Gagliardi said that the issue raised by the cases is not an anomaly and that cases like the three under consideration frequently arise. As tenure rights in New Jersey expanded, the statutes were not always made consistent. The Commission authorized Staff to undertake a project in this area.

Uniform Act on Prevention of and Remedies for Human Trafficking

Susan Thatch explained that the Memorandum provided to the Commission was prepared in connection with the Rutgers' International Human Rights Clinic's Memo regarding New Jersey's human trafficking laws. Ms. Thatch stated that Professor Penny Venetis and perhaps other interested parties would like to be present for the Commission's discussion of these issues. Ms. Thatch requested that discussion of this project be carried to a future Commission meeting so that the interested parties could attend.

Uniform Protection of Genetic Information in Employment Act

Vito Petitti informed the Commission that, regarding its prior inquiry about possible preemption language contained within the Genetic Information Nondiscrimination Act (GINA), federal law stipulates only that "nothing in this title shall be construed to limit the rights or protections of an individual under other Federal or State statute that provides equal or greater protection than is provided under this title." He said that, because New Jersey's Genetic Privacy Act provides protections equal to or greater than GINA, a preemption issue is unlikely to arise.

Mr. Petitti explained next that, based on the Commission's interest in how the UPGIEA compared with New Jersey law in this area, Staff had identified several provisions in which the Uniform Act provides more protection than the current New Jersey law. As a result, the Appendix of the Draft Tentative Report contains proposed language to address the disparities and to bring New Jersey law more in line with the UPGIEA. Mr. Petitti added that, since New Jersey's law (GPA) has been in place since 1996 and already contains many protections similar to those found in the Uniform Act, Staff did not recommend wholesale enactment of the Uniform Act.

Commissioner Bunn asked whether the structure of New Jersey's GPA should be adjusted to reflect that of the UPGIEA. Mr. Petitti responded in the affirmative, noting that the provisions of the GPA are not sequential. Commissioner Bell asked how many states had adopted the UPGIEA, and Mr. Petitti responded that no state had yet taken that action. Asked whether reorganization would be more prudent after more states had enacted the statute, Mr. Petitti pointed out that, even though no other states had yet enacted the UPGIEA, reorganizing and consolidating the provisions could still provide a great benefit. Commissioner Long said that many states may have adopted the content of the UPGIEA without conforming to the structure of the uniform law. Commissioners Suarez and Bertone agreed that the reorganization of the GPA would make New Jersey law more cohesive. Chairman Gagliardi expressed the Commission's consensus that Staff begin the work of drafting a proposed reorganization of the GPA and indicated that outreach to potential commenters would be appropriate at this juncture.

Tuition Aid Grant Act

Mr. Firsichbaum advised that Commission that recent Legislative action was taken to amend the statutory residency requirements for the Tuition Aid Grant program through modifications proposed by bills approved in both Houses and that took effect in December 2013. As a result, N.J.S. 18A:62-4.4 was amended to allow students who attended and graduated from a high school in New Jersey to be “exempt from paying out-of-State tuition at a public institution of high education,” even if the student has an unlawful immigration status. The bill also makes those students “eligible to apply for, and participate in, any student financial aid program administered by the Higher Education Student Assistance Authority.”

Since these changes extend beyond those proposed by the Commission, which were limited to the Court’s opinion in *A.Z. ex rel. B.Z.v. Higher Educ. Student Assistance Authority*, Staff proposed that recommendations to the Legislature in this area are no longer needed and the Commission concurred, concluding its work in this area.

Miscellaneous

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