

MINUTES OF COMMISSION MEETING

July 19, 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 Andrew O. Bunn; Commissioner Virginia Long (via telephone); Professor Bernard W. Bell, of Rutgers Law School, attending 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 Bertone, of Bertone Piccini, LLP, attending on behalf of Commissioner Michael T. Cahill.

Minutes

The Minutes of the June 21, 2018, Commission meeting were unanimously approved on the motion of Commissioner Bunn, seconded by Commissioner Long.

Mens Rea – Disorderly Persons Offenses

John Cannel discussed with the Commission a Memorandum based on the work of Susan Thatch, a former staff member. The Memorandum set forth the issues raised in the case of *State v. Bessey*. The Appellate Division, in *Bessey*, found that where a statute does not contain a *mens rea* requirement, N.J.S. 2C:2-2 provides a presumption that the crime must be committed “knowingly.” Mr. Cannel also advised the Commission that the statute contains no such presumption for a “disorderly persons” offense.

Mr. Cannel advised the Commission that the New Jersey Code of Criminal Justice contains no crimes that are strict liability crimes “as to the whole crime”. He did note, however, that there are several instances in which there is strict liability as to an element of the crime. According to Mr. Cannel, subsection (c)(1) of N.J.S. 2C:2-2 allows for strict liability elements and the culpability element applies “to all the material elements of the offense, unless a contrary purpose plainly appears.” Commissioner Long suggested that N.J.S. 2C:2-2(c)(3) provides that the culpability defined in paragraph (b)(2), knowingly, should be used absent a legislative intent to impose strict liability.

Commissioner Bunn asked whether the project is limited to the New Jersey Code of Criminal Justice. Mr. Cannel confirmed that it is. Commissioner Hartnett asked Mr. Cannel whether he had any insight as to why the Code of Criminal Justice treated the issue this way. Mr. Cannel advised the Commission that what is reflected in the statute is a compromise. After a brief discussion about conforming the draft language in the Memorandum, Staff was authorized to prepare a Draft Tentative Report for consideration by the Commission.

Open Public Meetings Act

Samuel Silver discussed with the Commission a Memorandum discussing the New Jersey Supreme Court decision in the matter of *Kean Federation of Teachers v. Morel* and other legislative developments.

Mr. Silver stated that the *Kean Federation* case focused on two issues. The first issue was the obligation of a public body to make meeting minutes promptly available to the public. The second issue was the obligation of a public body to provide an employee whose employment status may be adversely affected with a notice informing them of their right to compel the public body to hold any discussion concerning their employment during the public portion of the meeting.

In the case of *Kean Federation*, it took the Board 94 and 58 days to disseminate the minutes from two meetings. The trial court, the Appellate Division, and Supreme Court all found that the minutes of those meetings were not made promptly available to the public. Ultimately, the Supreme Court determined that complaints alleging a delay in the production of a public body's minutes should be reviewed on a case-by-case basis, and that "reasonableness" was the standard with which such matters were to be evaluated.

Mr. Silver advised the Commission that two bills, S106 and A1019, have been introduced in the Legislature proposing modifications to the Open Public Meetings Act (OPMA). With respect to the production of minutes, the pending legislation would require public bodies to keep "comprehensive" minutes of public meetings. In addition, he continued, these entities would be required to make their meeting minutes available "as soon as possible" but not later than 15 business days after the next meeting of the public body occurring after the meeting for which the minutes were prepared.

Regarding the issue of notice, the trial court in *Kean Federation* found that no additional notice to the plaintiff was required since her employment was discussed during the public portion of the meeting. The Appellate Division reversed the decision of the trial court and held that a public body must give notice whenever it intended to act on employment matters. The Supreme Court, however, disagreed, and found that a public body was not required to give their employees notice when then planned to discuss employment related matters during the public portion of a meeting.

Mr. Silver stated that if enacted, S106 will require that a public body provide 2 days written notice to an employee and any adversely affected individual at which his or her employment will be discussed in a closed session. This requirement could force public bodies to give notice of a meeting to a wide range of individuals with, at most, a peripheral connection to

the employment matter in question. Thus, the confidential interests of an employee may be abrogated if any adversely affected individual was required to receive notice of this meeting.

Laura Tharney observed that S106 was reported from committee one week before the New Jersey Supreme Court issued its decision in *Kean Federation*. Given the proximity of these events, Ms. Tharney suggested that Staff reach out to the sponsors of the legislation to discuss the Supreme Court's decision in this matter. Chairman Gagliardi stated that it appears that the Supreme Court ameliorated the confusion that ensued in the wake of the Appellate Division decision in *Kean Federation* and concurred that outreach would be appropriate. It was the consensus of the Commission that Staff engage in outreach to the sponsors of the pending legislation and provide an update to the Commission.

Sentencing of Graves Act Offenders

Rachael Segal, Legislative Law Clerk, discussed her Memorandum analyzing the New Jersey Supreme Court's decision in *State v. Nance*. At issue in *Nance* was whether a sentencing court has discretion to sentence a defendant convicted of a Graves Act offense to probation without either the prosecutor's consent or the Assignment Judge's approval.

Ms. Segal explained that the Graves Act imposes a mandatory minimum term of incarceration on an offender who uses or possesses a firearm under specific circumstances. A prosecutor, she continued, may ask the Assignment Judge for a waiver of the mandatory minimum sentence for a first-time offender. The judge may then sentence a person to probation or reduce a defendant's parole ineligibility to one year.

The New Jersey Supreme Court, in *Nance*, noted that the plain language of section 6.2 of the Graves Act reveals a clear legislative intent that only the assignment judge, not the sentencing judge, has the statutory authority to place a defendant on probation or to reduce to one year the mandatory minimum term of imprisonment during which the defendant will be ineligible for parole. In addition, the assignment judge must consider the presumption of incarceration prescribed by N.J.S. 2C:44-1(d) when choosing between the probationary and one-year mandatory minimum alternatives.

Ms. Segal advised the Commission that Staff was concerned that the Directives issued in this area do not appear to have eliminated litigation. The 1981 directive mandated strict enforcement of mandatory parole ineligibility terms. The 2008 Attorney General Directive was issued to ensure statewide uniformity in the enforcement of the Graves Act. Finally, she noted that in 2018, the Acting Administrative Director of the New Jersey Courts reaffirmed the 1981 guidelines regarding the Graves Act.

Commissioner Long said that the holding of the New Jersey Supreme Court in *Nance* is that the statute is clear. She further stated that the Supreme Court did not have a question about how to interpret the Graves Act when they overturned the Appellate Division decision. Therefore, she concluded, there is nothing more for the Commission to do in this area. Chairman Gagliardi, Commissioners Hartnett, Bell, Bertone and Bunn all concurred.

DeMinimis Quantity Exemption

Wendy Llewellyn, Legislative Law Clerk, discussed her Memorandum analyzing the decision in *R & K Associates, LLC v. New Jersey Dep't of Env'tl. Prot.* in which the Appellate Division considered whether the former owner of a property was permitted to apply for a De Minimis Quantity Exemption (DQE) even though the language of the statute appears to apply only to current owners.

Des Champs, the owner of a parcel of land, used various chemicals on the property for a period of time until 1990. After 1990, the owner ceased operation and leased the site to a realty company for storage of furniture and signs. Before selling the property to R & K Associates, Inc. (R & K), the owner submitted all of the necessary filings with the Department of Environmental Protection (DEP). As a result of these filings, the original owner received a "no further action" letter (NFA) from the DEP.

In October of 2005, it was discovered that contamination from the property was the source of contaminated ground water in Livingston Township wells. As a result of this discovery, the DEP revoked the NFA letter that had been granted to the original owner of the parcel. In response, Des Champs submitted a De Minimis Quantity Exemption certification to the DEP. The DEP Commissioner found that Des Champs was not entitled to a DQE. Des Champs appealed.

The Appellate Division considered whether the legislative intent of the relevant statute was to define "owner" as only the current owner of the property or whether the term meant to include previous owners. The Appellate Division acknowledged that there was some textual support for the argument that the statute applies only to current owners. The statutory definition of "owner," is any person who owns the property or owns the establishment. In addition, the use of the present tense is indicative that any references to "owner" within the statutory scheme do not apply to previous owners. Nevertheless, the Appellate Division went on to consider the Legislature's intent in enacting this statute.

The Appellate Division found that in enacting this Act, the Legislature was seeking to both streamline and provide certainty in the regulatory process. The DQE provision was specifically enacted in order to avoid strict enforcement of existing obligations upon owners and

operators who handled or stored only *de minimis* quantities of hazardous substances. There is no language in the statute or legislative history that explicitly prohibits a previous owner from applying for a DQE after the property has been sold. Ms. Llewellyn also noted that when an NFA letter is rescinded, the statutory scheme becomes retroactive, leading to the Appellate Division determination that the definition of owner should be read to include former owners.

Commissioner Long stated that she believed that this was a good project and that the Appellate Division's analysis was correct. She added that the statutes related to environmental protection are very technical in nature. Laura Tharney said that because of the complexities involved with the environmental statutes, Staff would like to engage in outreach to stakeholders who possessed some expertise in this area.

Commissioners Bunn and Bertone concurred with Commissioner Long's assessment of both the project and the statutes. Commissioner Bertone added that the definition of owner should not serve as an impediment to an individual who was given a NFA letter and who would have been entitled to "timely" apply for a DQE but did not because of they were in receipt of a NFA letter. It was the consensus of the Commission that Staff engage in additional research and outreach to determine whether adding "previous owners" to the definition of "owners" would be useful and provide clarity to this Act.

Open Public Records Act

Oyinkansola Lapite, Legislative Law Clerk, discussed her Memorandum analyzing the Law Division's decision in *Grieco v. Borough of Haddon Heights*. In that case, the Borough of Haddon Heights sent records to the plaintiff after receiving an Open Public Records Act (OPRA) request for records from 2014 and 2015. The information that the Borough provided to the Plaintiff in response, only included records from the year 2015. Two weeks after receiving the information from the Borough, the plaintiff filed a complaint seeking the missing 2014 documents and attorney's fees under the OPRA. Three days after receiving the complaint, the Defendant provided the Plaintiff with the missing documents. Prior to initiating the lawsuit, the Plaintiff did not communicate with the Defendant to make them aware that she had not received the records she requested from 2014.

To qualify for counsel fees, a plaintiff must be a "prevailing party" in a suit brought to obtain access to government records. When a government agency voluntarily discloses the requested records after a lawsuit is filed under OPRA, it can be more challenging to determine if the plaintiff qualifies as a prevailing party. In order to qualify, the plaintiff must prove that the legal action was the "catalyst" that induced the defendant's compliance with the law.

The trial court recognized that the plaintiff did not communicate with the defendants in any way to make them aware of their oversight. The Court determined that plaintiff was not the catalyst for the release of the records and therefore not a prevailing party entitled to attorney's fees. Ms. Lapite highlighted the trial court's reasoning that prior to the initiation of a lawsuit the cooperative spirit of OPRA seems to require some form of follow-up request, in the form of a phone call, letter, or e-mail, to notify the government agency that a mistake was made or records were omitted from their response.

Laura Tharney advised the Commission that Staff found approximately 73 cases dealing with the "catalyst theory." She also advised the Commission that of the cases reviewed, Staff has not found one addressing this issue. Chairman Gagliardi stated that he is familiar with the multitude of cases in this area and is not aware of any discernible pattern as to what constitutes a catalyst. The circumstances, he continued, warrant a review of these cases by Staff.

Commissioner Bunn stated that the trial court judge reached the incorrect conclusion in this case. According to Commissioner Bunn, the Plaintiff had to draft a complaint in order to induce compliance with her request. Commissioner Bell agreed that the trial court judge got the fees wrong and that further work in this area might not yield much. Commissioner Hartnett added that this case sheds light on the issue of attorney's fees. According to Commissioner Hartnett, perhaps the statutory language should be amended to provided that a requestor who prevails in any proceeding *may* be entitled to a reasonable attorney's fee. Commissioner Bertone concurred with Commissioner Hartnett who continued by noting that a trial court should look at what is reasonable as opposed to what is the catalyst. In assessing reasonableness, Commissioner Bell suggested that the court should consider whether informal methods or processes, would have yielded the same result – the production of the records.

Staff was authorized by the Commission to engage in additional research and outreach to determine whether clarity could be brought to this statute.

Title 9 – Hearsay Exception

Eileen Funnell, summer intern, discussed a potential project for the Commission resulting from the Appellate Division's decision in *New Jersey Div. of Child Prot. and Perm. v. T.U.B.* In *T.U.B.* the Court considered whether the special evidentiary provisions for Title 9 cases are applicable in Title 30 guardianship cases involving the termination of parental rights.

Under Title 30 proceedings, the Division of Child Protection and Permanency (DCPP) filed a complaint to terminate the defendant's parental rights. The defendant objected to the admission of hearsay allegations of sexual abuse contained in four of DCPP's exhibits during the guardianship trial. The trial court judge, overruled the defendant's objections and terminated his

parental rights, reasoning that Title 9 and Title 30 should be construed together as a unitary and harmonious whole and that DCPD met its burden of proof. According to Ms. Funnell, the Appellate Division would view the use of hearsay differently in the context of Title 30 proceedings.

The Appellate Division suggested that it would be illogical to read the hearsay provisions of Title 9 into Title 30 guardianship proceedings. Ms. Funnell noted that the New Jersey Supreme Court has not always held that Title 9 and Title 30 must be read in *pari materia*. The Supreme Court has previously held that Title 30 matters differ from Title 9 matters in three fundamental respects: Title 30 proceedings are more deliberative and comprehensive than Title 9 matters; Title 30 proceedings involve the permanent termination of parental rights; and, Title 30 proceedings utilize a different standard of proof.

Commissioner Long stated that this was a worthwhile project for the Commission. Chairman Gagliardi and Commissioner Bunn concurred with Commissioner Long's assessment. Chairman Gagliardi observed that this is a quintessential project for the Commission because the judiciary has identified a problem with the statutes and recognized the Legislature's ability to fix it.

Commissioner Bell interposed that modification of the statute touches upon a policy issue. He recognized that one must consider whether or not parental rights should be terminated without the testimony of the children named in the complaint. In addition, he raised the question of which title should be modified – Title 9 or Title 30. John Cannel suggested that the Legislature could change both Titles so that they reflect the current Rules of Evidence. Commissioner Bunn concurred and noted that the Rules of Evidence are codified in the statutes.

Chairman Gagliardi advised Staff that the Commission's mandate for consistency and clarity may lead to a change in Title 9 or Title 30, or both. Commissioner Bunn agreed with the Chairman's call for clarity in this area. Laura Tharney confirmed that Staff will look into the manner in which the Commission originally addressed this issue in its earlier project concerning those Titles.

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

Definition of Misconduct – Unemployment Compensation Act

Nicholas Tharney, summer intern, discussed with the Commission the various levels of misconduct that would affect an individual's ability to receive unemployment benefits as addressed in *In re N.J.A.C. 12:17-2.1*. Mr. Tharney noted that although this case was originally brought in response to an administrative regulation that attempted to rectify the ambiguity in the

corresponding statute, the Court relied on the legislative intent and history to distinguish the types of misconduct under N.J.S. 43:21-5(b).

The original language of the statute included misconduct and gross misconduct. Misconduct is generally construed as simple misconduct whereas gross misconduct is an indictable offense under the Code of Criminal Justice. A 2010 amendment to the statute introduced the concept of “severe misconduct” to the statutory scheme. Mr. Tharney advised the Commission that there is a question about what separates simple misconduct from severe misconduct under the statute. The regulation that was ultimately found to be invalid was the subject of proposed changes in 2017. No new regulation has been implemented to resolve this issue.

Commissioner Bunn stated that since the regulation was struck, it is important for Staff to ascertain whether the Agency is re-drafting this regulation. Chairman Gagliardi directed Staff to cease further work in this area if preliminary outreach confirms that the Agency is working on this issue. Commissioner Hartnett suggested that since this is an administrative regulation that any changes would best be left to the appropriate administrative agency. Commissioner Bunn suggested that, subject to the guidance of the Chairman, Staff should look for examples of gradation in other states. Commissioner Bell added that it would be helpful to have the definition of misconduct from other states that use these precise terms. Chairman Gagliardi advised Staff that even if the Commission declines to work in this area, it can always share its findings and research with the administrative agency so the agency could have the benefit of the time spent on the project even if the Commission does not continue with the project.

Subject to the limitations set forth by the Chairman, Staff was authorized to conduct initial outreach and research and provide the Commission with an update memorandum on this topic.

Evidentiary Standard for a Final Restraining Order

Laura Tharney discussed a Memorandum prepared by Legislative Law Clerk Renee Wilson, which considered whether the Sexual Assault Survivor Protection Act (SASPA) applied retroactively to allegations in a complaint, resulting in the issuance and ultimate dismissal of a Final Restraining Order (FRO), and the constitutionality of N.J.S. 2C:14-16.

Ms. Tharney advised the Commission that in the case of *B.C. v. V.C.* the trial court held that N.J.S. 2C:14-16 was unconstitutional as it was applied to the defendant because the entry of such an order bars contact with his children based on proof of the underlying allegations by a preponderance of the evidence. She also advised the Commission that the Appellate Division did

not address the constitutionality of the statute and asked whether the Commission wanted Staff to engage in work on this issue.

Commissioner Bell asked whether the statute was found to violate the United States Constitution or New Jersey's Constitution. Commissioner Bunn opined that this project was outside of the Commission's mandate. He continued by noting that the court did what it was supposed to do, which is to ignore the constitutional question. Commissioner Hartnett observed that the Commission's role is to examine judicial decisions for defects such as this one; therefore, a review of this statute is not outside the Commission's mandate. Commissioner Bell agreed with Commissioner Hartnett's analysis. He added that the Commission is not a court and not subject to the constraints imposed on the judiciary.

Chairman Gagliardi stated that when he first read the Memorandum, he had the same reaction as Commissioner Bunn. He asked Commissioner Bertone whether she was in favor of further work or in this area or whether she believes the Commission should discontinue work in this area. Commissioner Bertone replied that she agrees with Commissioners Hartnett and Bell and that it makes sense to examine these issues. With the authorization of a majority of the Commissioners – Bell, Bertone and Hartnett – Staff was authorized by the Commission to engage in additional research and outreach to determine whether clarity could be brought to this statute.

Miscellaneous

Laura Tharney advised that a new staff attorney has been hired and will begin with the Commission mid-to-late August. In addition, Staff will be joined by its first graduate Legislative Fellow at the end of August. Ms. Tharney also advised the Commission that Linda Woodards-French will be leaving the Commission and Chairman Gagliardi thanked Ms. Woodards-French for her service to the Commission and wished her well.

Adjournment

The meeting was adjourned on the motion of Commissioner Hartnett, which was seconded by Commissioner Bertone. The next Commission meeting is scheduled to be held on September 20, 2018, at 4:30p.m.