

MINUTES OF COMMISSION MEETING

September 17, 2015

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 Anthony R. Suarez, and Commissioner Virginia Long (participating by telephone). Professor Bernard W. Bell, of Rutgers Law School, attended on behalf of Commissioner Ronald K. Chen; Professor Edward A. Hartnett, of Seton Hall University School of Law, attended on behalf of Commissioner Kathleen M. Boozang; and Grace C. Bertone, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner John Oberdiek.

Ms. Mary McManus-Smith, Esq., of Legal Services of New Jersey (LSNJ), and Ms. Alexandra Staropoli, Esq., of the Drug Policy Alliance, were also in attendance.

Minutes

The Minutes of the July 2015 Commission meeting were approved on motion of Commissioner Bell, seconded by Commissioner Hartnett.

Retroactive Child Support Orders

Vito Petitti summarized a Memorandum regarding specific feedback received from Legal Services of New Jersey (LSNJ) and introduced Mary McManus-Smith, Chief Counsel, Family Law, LSNJ. Ms. McManus-Smith was present in support of revisions to two sections of statute providing for the granting, revocation, or suspension of licenses. Mr. Petitti explained that the proposed revisions would be a slight expansion of the scope of the project, which is focused on the reporting of technical arrearages to credit reporting agencies after the *Cameron* case.

Mr. Petitti informed the Commission that, as the original scope of the project involved the reporting of judgments, Staff has also been looking at language in the judgment statutes. As a part of that review, John Cannel drafted new language to take obligors in technical arrears out of N.J.S. 2A:16-11, entitled "Civil judgment and order docket." Mr. Petitti requested the Commission's guidance as to whether to expand the scope of the project as outlined in the Memorandum, to include LSNJ's proposed revisions.

Mr. Cannel explained that he had received a telephone call from a member of the public who believed that the language of the judgment statute was relevant because, even though the Commission is working in the area of reporting and licensing, a child support judgment is automatically entered in the judgment docket. Thus, even though Staff had been working on language to forestall reporting of technical arrearages, these arrearages would likely

be picked up by credit reporting agencies anyway because they are judgments. Mr. Cannel noted that one potential problem associated with removing technical arrearages from the judgment and order docket is that an individual could make a single payment, and then sell the house and leave the state, making it more of a challenge to collect on the overdue child support. The Commission considered the issue and suggested that, in practical terms, the risk is limited by the fact that it generally takes some period of time to sell a house, so the party to whom the support was owed would likely have time to act. Commissioner Hartnett noted that Staff could consider modifying the draft statutory language to say that a judge is empowered to enter the judgment immediately under circumstances when doing so is warranted on the facts. The draft statutory language could say something like “Except as otherwise ordered...”

The public commenter also suggested that there were federal implications to any change to the language in this area, once enacted. Commissioner Bunn advised seeking comment from the Administrative Office of the Courts (AOC) for proposed revisions to the judgment statute and Mr. Cannel explained that the proposed language was a preliminary draft only and would be improved by Staff.

Ms. McManus-Smith was recognized by the Chairman and spoke in support of the Commission’s proposed revisions to N.J.S. 2A:17-56.21. She explained that the Family Practice Committee has considered this issue repeatedly and that LSNJ supports the Commission’s proposal and believes it to be a good resolution of the issue. She suggested that the same dichotomy should also exist with two additional statutory sections pertaining to licensing, N.J.S. 2A:17-56.41 and N.J.S. 2A:17-56.44. She emphasized that LSNJ is not recommending changes to any statutory provisions that allow for specific and sometimes extraordinary collection methods, such as garnishments of wages and interception of tax refunds.

Chairman Gagliardi directed Mr. Petitti to provide a Revised Tentative Report for the next meeting, taking into account the proposed new judgement statute language and input from LSNJ.

Liability; Weather-related public streets and highways – N.J.S. 59:4-7

Jayne Johnson summarized a Memorandum to the Commission outlining a potential project to clarify the statutory language of N.J.S. 59:4-7, which governs the liability of public entities for injuries resulting from weather-related road conditions. The concurring opinion in the 1989 New Jersey State Supreme Court case, *Pico v. State*, noted that the statutory language of this provision failed to adequately describe the immunity available to public entities for injuries resulting from weather-related road conditions. Alex Firschbaum, a former NJLRC legislative

law clerk, encountered the case during the course of independent research and brought the issue to Staff's attention.

Commissioner Bunn asked whether any issues, with the interpretation of the plain language of the statute, were raised in the 26 years since the *Pico* decision. Ms. Johnson replied that, based on Staff's research, the concerns identified by Justice Clifford were not raised in subsequent cases, and case law reflects that the statute has been applied in accordance with the Legislature's intent to provide immunity to public entities for injuries resulting from weather-related road conditions.

Commissioner Bell asked whether the statute enforces absolute immunity and whether immunity was available to a public entity if the manner in which the entity removes snow from the public roadway leads to injury. Commissioner Bunn noted that the use of the term "solely" in the statute appears to limit the immunity only to circumstances where the injury resulted from weather-related road conditions. Commissioner Suarez suggested that intervening acts are not covered under this particular statute, and only naturally occurring road conditions were contemplated. Ms. Johnson stated that, regarding the hypothetical presented by Commissioner Bell, the entity would not be immune under the statute because the injury was not caused solely by the weather-related road conditions. In that case, the public entity's independent negligent act contributed to the injury. Ms. Johnson said, according to the Court in *Pico*, "[i]n the absence of the public entity's independent negligence, the weather immunity provided in N.J.S.A. 59:4-7 trumps liability predicated on ordinary negligence under N.J.S.A. 59:2-2.

Chairman Gagliardi asked whether the Commission should recommend statutory revisions based on Justice Clifford's concurring opinion in *Pico v. State*. Commissioner Long responded that she would not recommend modifying the statute only to correct this particular grammatical concern. Commissioner Bunn stated that he agreed with Justice Clifford's concurrence, but he felt that, if the issue was not raised in the years since, it is advisable to refrain from proposing revisions to this statute.

Commissioner Hartnett asked if this issue had come before the Commission in the past. Laura Tharney said that it had not. She explained that when this particular statute was enacted, the Commission had only been in existence for two years and the computer research tools available at that time were not likely to have identified this issue, so it would most likely have come to the Commission's attention only if it was raised by a public commenter.

Chairman Gagliardi indicated that the Commission would consider this issue if it had been raised by a commenter, but since it was discovered during the course of research and does

not seem to have caused a problem in the years since its enactment, a project in this area is not warranted at this time.

Expungement

Susan Thatch discussed a Draft Tentative Report proposing a modest revision to New Jersey's expungement statute for the Commission's consideration. She noted that the Commission authorized this project at the July Commission meeting, recognizing that the lack of statutory clarity could be problematic for pro se petitioners.

Ms. Thatch explained that the issue decided in *In re D.J.B.* was whether juvenile adjudications should be considered "prior crimes" for purposes of expungement of an adult conviction. She stated that, in light of the Supreme Court's analysis and holding, the Appendix proposes additional language in 52-4.1(a)(3) clarifying that the final sentence of the section only applies to the evaluation of juvenile delinquency expungement petitions and not to the expungement statute as a whole.

Chairman Gagliardi asked whether the project meets the Commission's expectations with regard to the proposed revisions and Commissioner Bunn asked for clarification regarding the sentence being modified. Mr. Cannel said that what would have been a second degree crime for an adult is treated as such for expungement purposes. Ms. Thatch added that the Supreme Court held that the Legislature did not intend for the language to apply as drafted. She explained that the proposed modifications in the Draft Tentative Report were drafted conservatively to reflect the Court's holding, but that it would certainly be possible to revise the language more extensively to increase clarity. Commissioner Bell agreed that, as written, the statutory language was not as clear as it could be.

Ms. Thatch offered that, while there are numerous issues with the language, Staff had limited its efforts to the scope authorized by the Commission. The Chairman asked whether it would be more appropriate to address the entire statute or to write a comment explaining how the statute operates. Ms. Tharney expressed a concern with limiting the Commission's actions to a comment. If the modest change were enacted, it is not clear that the Commission's comment would be readily available to those who might access the statute, so the comment might not accomplish the Commission's goal. Chairman Gagliardi suggested that drafting the language consistent with Ms. Thatch's explanation may satisfy the Commission's concerns. Commissioner Hartnett added that a prominently displayed comment could also help provide a remedy. Staff will provide a revised Report for the next meeting.

State v. Bessey – N.J.S. 2C:33-7b.

Laura Tharney outlined for the Commissioners a potential project based on the Appellate Division decision in *State v. Bessey*, wherein the Court considered the mental state or mens rea element that must be proved in order to find that a defendant committed the disorderly persons offense of “obstructing highways and other public passages,” pursuant to N.J.S. 2C:33–7(b)(2). The Court in *Bessey* rejected the argument that N.J.S. 2C:2-2 c.(3) imposes a “knowing” mens rea onto N.J.S. 2C:33-7 subsection b, holding that N.J.S. 2C:2-2 c.(3) pertains only to statutes defining crimes, not disorderly persons offenses. The Court determined that, although the statutory language does not expressly identify the necessary mental element, the Legislature’s inclusion of the word “refuse” in that subsection requires a “knowing and willful act of defiance” on the part of the defendant. Ms. Tharney informed the Commissioners that the case law in this area is limited, and that N.J.S. 2C:33-7, enacted in 1978, has not been modified since that time.

Commissioner Bell observed that the mens rea requirement looks to whether the individual intended to “disobey” a provision or order. Commissioner Hartnett stated that “failing to obey” is arguably a different mental state than refusing an order that is deemed reasonable. He added that there is a difference between the mental state of “knowing” and that of “knowing and willful.” Commissioner Bell asked if there is a default mens rea for certain disorderly persons offenses, as it exists for select criminal offenses and noted that it is important to determine the scope of the mens rea required by this statute. Commissioner Hartnett agreed and asked about the limit of the mens rea requirement in the statute, describing a scenario involving an individual who offers proof that there was no intent to obstruct traffic. The Commission agreed that these and other issues should be explored further by Staff.

The Commission authorized Staff to conduct additional research in this area to determine whether a statutory modification that incorporates the mental element necessary for a violation of subsection b. of the statute would be appropriate.

State, Div. of State Police v. New Jersey State Trooper Captains Ass’n – N.J.S. 34:13A-3

Amy Huber summarized the facts of *State, Div. of State Police v. New Jersey State Trooper Captains Ass’n.*, explaining that the issue before the Commission was whether a proposed revision could address the perceived inconsistency between the plain language of N.J.S. 34:13A-3 and legislative intent to expand participation of public employees in collective negotiation.

Ms. Huber explained that the State of New Jersey Division of State Police opposed the representation of the State Police Captains by the New Jersey State Trooper Captains Association on the basis that, as managerial executives, the group is excluded from participation in collective negotiations. She said the 2010 statutory amendment defines managerial executives

in the Executive Branch as personnel at or above the level of assistant commissioner, and the confusion stems from the fact that the State Police do not have assistant commissioners and, as a paramilitary organization, have a different hierarchy and titles that other Executive Branch entities. Ms. Huber said the hearing officer, relying on extrinsic evidence to determine legislative intent, found that the statutory amendment was intended to broaden the categories of public employees eligible to engage in collective bargaining, and held that the majority of Division captains were not managerial executives as defined by the amendment. Ms. Huber requested authorization for Staff to conduct additional research to determine whether proposing revised statutory language would help resolve the issue.

Commissioner Hartnett noted that the language of N.J.S. 34:13A-3 is challenging to interpret. Commissioner Bunn stated that the statute may prove difficult to clarify, but suggested that it might be worthwhile to get additional information before deciding whether or not to proceed. Chairman Gagliardi said that it also may be appropriate to conduct some preliminary outreach before any attempt is made to modify statutory language. Commissioner Bell noted that these decisions are within the authority of PERC, so it may not be necessary to pursue a project in this area. Chairman Gagliardi indicated that while the Commission may ultimately decide not to proceed, it would be helpful to have additional information from Staff before the Commission makes its decision.

Miscellaneous

The Commission meeting was adjourned upon motion of Commissioner Bunn, seconded by Commissioner Bertone.