

MINUTES OF COMMISSION MEETING

January 23, 2020

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 (via telephone); Commissioner Virginia Long (via telephone); Commissioner Louis N. Rainone; and, Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner David Lopez.

Minutes

On the motion of Commissioner Bell, which was seconded by Commissioner Rainone, the Minutes from December 19, 2019 meeting were unanimously approved by the Commission.

Meaning of Physical Examination

Samuel Silver discussed with the Commission a Draft Final Report to clarify the meaning of “Physical Examination” in the context of Public Entity Immunity Granted under N.J.S. 59:6-4. This issue was brought to the Commission’s attention by the New Jersey Supreme Court decision in *Parsons v. Mullica Twp. Bd. of Educ.* 226 N.J. 297 (2016).

Before briefly summarizing the facts of the case, Mr. Silver acknowledged the work of Kiersten Fowler, a former Legislative Law Clerk, and Joseph Pistritto, a former Legislative Fellow, for their contributions to this Report.

The case of *Parsons v. Mullica Twp. Bd. of Educ.* involved an elementary school student who received an eye examination as part of the state’s public health mandates. The parents of this student were not advised of the results of the examination until after her failure of the second exam. The parents filed suit against the municipality alleging that the failure to report the results of their daughter’s physical examination was not protected by the Tort Claims Act (TCA). The municipality claimed that the failure to report the results was covered by the TCA.

The trial court denied the defendant’s motion for summary judgment. The Appellate Division reversed. The New Jersey Supreme Court concluded that an adequate physical examination, under N.J.S. 59:6-4, includes reporting the results of that examination to the patient or guardian. Thus, the municipality was immune from liability for their failure to report the results to the Plaintiff.

The Commission authorized work in this area, and modifications to the existing statute were proposed, including a definition of physical examination based on the decision of the New Jersey Supreme Court in *Parsons*.

Staff sought input on this project from numerous stakeholders, including: County Counsel offices; members of the medical malpractice section of the New Jersey State Bar Association; the New Jersey League of Municipalities; the New Jersey State School Nurses Association; and private practitioners.

One stakeholder suggested that the Commission remove the words “determining” and “prompt” from the proposed statutory language, noting that the “cause” of the patient’s illness may not ultimately be “determined” during the physical examination. In addition, he suggested that the Commission should substitute the phrase, “investigating the cause of the reported symptom(s)” for “determining the cause of the reported symptoms.” Finally, he noted that the word “prompt” should be removed because “the qualification of the timing of the notice seems to run counter to the notion of immunity for failure to make an adequate examination.”

Commissioner Long stated that she would like to eliminate the word “thorough” from the language set forth in the Appendix to the Report because it is subject to broad interpretation. Commissioner Bell concurred, noting that the term is used three times in the proposed definition. He recommended the removal of the term in the first instance, and substituting the word “medical” for the second and third instances in which the term was used. He also suggested that the phrase “prompt notification” be removed and replaced by “and reporting or failure to report the test results to the patient...” Commissioner Rainone opined that whenever a term is defined it may either be limited or broadened. He construed *Parsons* as including the failure to report the results of a physical examination within the TCA, and suggested that language be included in section a. and that subsection b should be eliminated. Commissioners Bunn and Long agreed with that recommendation. Commissioner Bell stated that he was inclined to retain the format of the language in the Appendix, with the modifications discussed by the Commission.

The Chairman directed Staff to revise the Appendix to reflect the modifications discussed during this meeting and to present the Commission with a Revised Draft Final Report in February.

Clarification of Tenure

Jennifer Weitz presented a Draft Final Report recommending modifications to N.J.S. 18A:17-2, to clarify the tenure provisions for certain non-academic school employees.

The Report focuses on N.J.S. 18A:17-2, the statute governing tenure for school secretaries and clerks. The Commission observed previously that, as tenure rights expanded, this portion of the statute was not updated and made consistent with other tenure-related statutes.

An earlier draft of the Report had been circulated to various educational professional associations for feedback. The current Draft Final Report had been sent out to the same pool of stakeholders, and those who responded expressed a preference for the language contained in Alternative One.

Commissioner Long stated that she was satisfied with Alternative One. Chairman Gagliardi clarified that the issue addressed by the proposed modifications was circumstances under which individuals covered by its provisions may unwittingly give up tenure rights. With one modification, the Chairman expressed a preference for the language contained in Alternative One. The term “for cause,” according to the Chairman, is foreign to the tenure process. Thus, he asked that this language be removed from the proposed draft.

With the modification requested by Chairman Gagliardi, and on the motion of Commissioner Bunn, which was seconded by Commissioner Rainone, the Commission unanimously moved to release the Report as a Final Report.

Books and Records of Account

Laura Tharney presented a Draft Tentative Report prepared by Mark Ygarza proposing modifications to the language of N.J.S. 14A:5-28 to clarify the definition of the term “books and records of account” as discussed in *Feuer v. Merck & Co., Inc.*, 455 N.J. Super. 69 (App. Div. 2018).

In *Feuer v. Merck & Co., Inc.*, the Plaintiff sought the production of twelve broad categories of documents from Merck. In response to Plaintiff’s demands, the Board appointed a “Working Group” to evaluate these demands, retain counsel, conduct investigation, and recommend a response related to the acquisition of the pharmaceutical firm. Four months later, the Working Group informed the Plaintiff that it had rejected all of his demands. The trial court held that Plaintiff had a “proper purpose” under N.J.S. 14A:5–28 in seeking the documents, but that the documents Plaintiff sought fell outside the scope of “books and records of account.” Plaintiff appealed.

The Appellate Division examined N.J.S. 14A:5-28 to determine whether the shareholder was entitled to the documents he sought. The Appellate Division reviewed secondary sources including a legal dictionary and the case law from other jurisdictions to determine the meaning of “books and records of account”. The Court also examined the structure of the New Jersey statute and noted that the phrase appears in both the first paragraph and the fourth of N.J.S. 14A:5-28.

Ms. Tharney said that in order to help clarify the scope of the term, the statute might benefit from the addition of a statutory definition to reflect the principles set out in *Feuer v. Merck & Co., Inc.*

Commissioner Bunn stated that he felt the proposed definition is too broad and would not accomplish the goal of the project. He Noted that “accounting and financial documents” are not recognized in this context and directed Staff to examine N.J.S. 45:2B-44, which contains definition of financial statements, suggesting that an examination of this statute might be useful to establish

boundaries and narrow the definition. Chairman Gagliardi also noted that checking the definition of “documents”, in light of a New Jersey Supreme Court case determining that things like meta-data and other computer code information would be included in a reference to documents.

Commissioner Bell questioned whether Staff had examined looked up provisions in other states to see if there were similar problems in this area. Ms. Tharney responded that Staff had not thus far found guidance, but will expand the scope of research consistent with the direction from the Commission.

Definition of Confinement

Laura Tharney presented a Draft Tentative Report prepared by Mark Ygarza purposing modifications to the language of N.J.S. 2C:44-3(a), clarifying the definition of the term “confinement”, as discussed in *State v. Clarity*, 454 N.J. Super. 603 (App. Div. 2018).

In *State v. Clarity*, the Appellate Division considered whether a probationary term for a defendant’s last prior crime was the equivalent of “confinement” for purposes of sentencing him to an extended term as a persistent offender. The Court noted that N.J.S. 2C:44-3(a) does not define the term “confinement.” The absence of a definition “[generates] potential uncertainty about its scope when the State seeks a persistent-offender extended term.”

The Appellate Division examined the persistent offender statute and reviewed secondary sources to determine the Legislature’s intention. The Appellate Division also reviewed other states’ persistent offender statutes, to compare the way other states define “confinement”.

After reviewing the legal dictionary definitions and the definitions used in other states, the Appellate Division determined that the trial court incorrectly concluded that the defendant’s “probationary sentence was the same as being ‘confined.’” The Court recognized that the Legislature did not define the word confinement, and ultimately determined that “confinement” meant that a person must be “imprisoned” or “restrained.” In the absence of any legislative history, it is unclear whether the Legislature intended the term confinement to include probation, parole, or home confinement.

Ms. Tharney indicated a modification to the language of N.J.S. 2C:44-3(a), clarifying the definition of the term “confinement”, as discussed in *State v. Clarity*, may be of use in avoiding confusion moving forward.

Chairman Gagliardi directed that Staff modify the Conclusion of the Report to reflect the usual Tentative Report format, and Ms. Tharney said Staff would certainly do so.

Commissioner Rainone also provided Staff with his recommendation to the language in subsection a.(2). Commissioner Long said that since the Appellate Division has spoken, the Commission should release this project as a Tentative Report and see what commenters have to

say. Commissioner Bunn agreed. Commissioner Bell also agreed, and directed that Staff obtain comments regarding the manner in which things like work release would be impacted by a change to the statute. Commissioner Rainone asked whether a defendant in an in-patient drug facility is considered “confined” for purposes of the statute. Ms. Tharney advised the Commission that Staff will examine these issues.

With the modification requested by Chairman Gagliardi and Commissioner Rainone, on the motion of Commissioner Bell, which was seconded by Commissioner Long, the Commission unanimously moved to release the project as a Tentative Report.

Human Trafficking

Jennifer Weitz discussed with the Commission a Memorandum regarding the status of the project pertaining to human trafficking and seeking their guidance. When the Commission first examined this area, it considered the Uniform Law Commission’s Uniform Act on Prevention of and Remedies for Human Trafficking and compared it to New Jersey’s Human Trafficking Prevention, Protection and Treatment Act. It also considered input from human rights scholars.

According to Ms. Weitz, changes were recommended to the New Jersey law in three areas. First, providing outright immunity to victims of human trafficking rather than merely allowing for an affirmative defense. Second, more strongly establishing business entity liability for human trafficking. Third, recognizing coerced sexually explicit performances as an element of human trafficking.

Ultimately, the Commission issued a limited Final Report in this area, and in light of the creation of a Human Trafficking Commission, and the legislative activity in this area, Staff has been monitoring the area for developments. Ms. Weitz noted that there has been an increase in legislation in this area, largely pertaining to things like appropriations and signage rather than changes to the substance of the law. She asked whether the Commission would like Staff to continue any work in this area, or conclude the Commission’s efforts.

Chairman Gagliardi noted that in the past legislative session that there were approximately 15 bills introduced on the topic of human trafficking. In addition, the Chairman recognized the existence of a Commission on Human Trafficking with specialized knowledge on this subject matter. Commissioner Rainone added that such a Commission is established to take a policy position, which is beyond the authority of the Law Revision Commission. Ms. Tharney noted that in the past, the Commission has shared its work with other entities. Commissioner Rainone added that he is not opposed to sharing the Commission’s scholarship on this topic with the Human Trafficking Commission.

After a brief discussion, the Commission directed Staff to reach out to the Human Trafficking Commission to ask if there is anything that the NJLRC can do to be of assistance and, if not, to prepare a Final Report formally concluding the Commission’s work in this area.

Magistrate

During its work on the project concerning misdemeanors, Staff noted a statute that required a police officer to bring an arrested individual before a “municipal magistrate.” Mr. Silver said that a preliminary review of the New Jersey statutes confirms the reference to the term magistrate in a number of statutes.

According to Mr. Silver, the formation of judicial tribunals pre-dates the appointment of the royal governor in 1703. By 1947, New Jersey’s Constitution had replaced the multiplicity of courts with a simplified court structure that included the inferior courts established by the Legislature. Eventually, the Legislature abolished the anachronistic courts and authorized the establishment of municipal courts. Magistrates would ultimately become known as judges of the municipal court.

The term magistrate is defined in six statutes, in the General Rules of Construction, the Alcohol Beverage law, New Jersey Motor Vehicle law, and the Public Utilities statutes. The definitions are not uniform and, in addition to the statutes defining the term, there are a total of 88 statutes that use the term magistrate, many without defining it. Within these statutes there are references to six distinct types of magistrates including: committing magistrates; issuing magistrates; police magistrates; municipal magistrates; chief magistrates; and, neighboring magistrates.

The Commission authorized Staff to engage in additional research and outreach regarding the term magistrate to determine whether it would be of assistance to update the affected statutes and, if appropriate, remove references to this anachronistic term.

Pending Tenure Charges and Back Pay

Arshiya Fyazi discussed with the Commission a Memorandum proposing a project to clarify New Jersey’s tenure statute. In *Pugliese v. State-Operated School District of City of Newark*, 454 N.J. Super. 495 (App. Div. 2018), the two plaintiffs were tenured teachers who worked in different schools. The District certified tenure charges and suspended both without pay. Subsequently, the arbitrator issued a decision sustaining the tenure charges against both teachers. The Chancery Division confirmed both arbitration awards. Both teachers pursued appeals which ultimately resulted in a vacation of the arbitrator’s award and a remand of both matters to the Commissioner.

While awaiting the decision on their arbitration on remand, the appellants filed a petition with the Commissioner for back pay commencing from the 121st day of their suspension until the second arbitration decisions were rendered on remand. The matters were transferred to Administrative Law Judges (ALJs). One ALJ issued a decision and recommended that the teacher receive back pay from the 121st day of her suspension because the appellate decision “wiped clean”

the arbitration award sustaining the tenure charges. The second ALJ denied the teacher back pay, finding that the remand from the Appellate Division did not dismiss the underlying tenure charges.

On appeal, the Commissioner held that neither educator was entitled to the restoration of pay pursuant to N.J.S. 18A:6-14, stating that “reversal and remand of the proceeding did not trigger the 120-day rule because there is no mechanism for such contained within the statute.” Both parties appealed the Commissioner’s decision.

N.J.S. 18A:6-14 addresses three circumstances that lead to the payment of compensation after a teacher has been suspended without pay. These circumstances are: (1) if the determination of the charge by the arbitrator is not made within 120 calendar days after certification; (2) if the charges against the teacher are dismissed; and, (3) when the charges are initially sustained but reversed on appeal. The statute does not address what occurs when the Appellate Division vacates and remands an arbitrator’s determination without dismissing the charges.

On the second consolidated appeal, the Court considered the legislature’s intent in enacting N.J.S. 18A:6-1 and, finding that the plain meaning of the statute and its legislative history were silent on the issue, the Appellate Division affirmed its 44-year-old interpretation of the Legislature’s intent. The Court in this case acted in accord with its previous conclusion that because of the volume of matters awaiting a hearing, a prompt disposition of tenure charges is not feasible. Therefore, the purpose of the statute was to alleviate the economic hardship endured by teachers suspended without pay pending the outcome of their certified tenure charges.

The Court next addressed the impact of an appellate reversal and remand of the arbitration award. The Court interpreted an order vacating and remanding an initial decision made by a trial court or agency by analogizing it to the grant of a motion for a new trial and 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 stated that she supported outreach on the issues presented in *Pugliese*. In response to Commissioner Bunn’s inquiry regarding certification, Ms. Fyazi responded that no action is presently pending before the New Jersey Supreme Court. Commissioner Rainone suggested that Staff review N.J.S. 40A-14 *et seq.* for reference. He noted that the timing of back pay has been addressed by the Legislature in the context of police officers. Chairman Gagliardi and Commissioner Bell both commented that this was a good project.

Staff was authorized to undertake this project, and to conduct additional research and outreach.

Miscellaneous

Laura Tharney advised the Commission that Governor Murphy signed into law a bill regarding sexual offenses that was based on the work of the Commission. This law makes several changes to the law pertaining to sexual assault, including removal of the element of force.

Adjournment

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

The next Commission meeting is scheduled to be held on February 20, 2020, at 4:30 p.m.