

## **MINUTES OF COMMISSION MEETING**

**February 20, 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; Commissioner Virginia Long (via telephone); 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, Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

### **In Attendance**

Professor Jon Romberg of Seton Hall University School of Law, and David McMillin, Esq., Director of New Jersey Legal Services, were in attendance.

### **Minutes**

On the motion of Commissioner Bunn, which was seconded by Commissioner Cornwell, the Minutes from the January 23, 2020 meeting were unanimously approved by the Commission.

### **Meaning of “Physical Examination”**

Samuel Silver discussed with the Commission the meaning of physical examination in the context of the public immunity granted under the Tort Claims Act, N.J.S. 59:6-4. This issue was brought to Staff’s attention by *Parsons v. Mullica Twp. Bd. Of Educ.*, 266 N.J. 297 (2016).

The litigation in *Parsons* arose after a school nurse failed to disclose the results of an elementary school student’s eye examination. The Appellate Division reversed the decision of the trial court and held that reporting the results is part of the physical examination. The Supreme Court held that immunity for public entities is the rule, and liability is the exception. The Court agreed with the Appellate Division that an adequate physical examination includes the reporting of the results to the patient. The Court noted that “physical examination” is not defined in the N.J.S. 59:6-4.

Mr. Silver noted that outreach was conducted with draft language and Staff received feedback that ranged from complete support to opposition. On January 23, 2020, the Commission asked Staff to draft three options for their consideration based on the comments made during the meeting and those received from stakeholders. Mr. Silver discussed each of the options with the Commission.

Commissioner Long discussed possible modifications to Option #1. She recommended the elimination of the phrases, “investigating the cause of the reported symptom(s)” and “or the failure to report” from the second sentence in section (b)(ii). Commissioner Cornwell found this option, along with Commissioner Long’s modifications, to be robust. Option #3 was Commissioner Long’s second choice. This option was also supported by Commissioners Bertone and Cornwell. Commissioners Bell, Bunn and Chairman Gagliardi expressed a preference for Option #2. After a lengthy discussion, the Commissioners concluded that Option #2 best captures the Legislature’s intent.

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

### **Clarification of Tenure**

On the day that the Commission released its Final Report on this subject, Jennifer Weitz received comments from the New Jersey Education Association (NJEA). Ms. Weitz noted that the NJEA proposed a modification to the newly adopted section N.J.S. 18A:17-2(d)(1)(b). The NJEA modification to section (d)(1)(b) would substitute the reference to “a position that is covered by this chapter” to “a position that is covered by this section.” Ms. Weitz advised the Commission that the proposed modification appears in the Appendix of the Revised Draft Final Report.

Commissioner Cornwell inquired whether this NJEA modification was a substantive change. Ms. Weitz noted that other than the substitution of the word “chapter” for the word “section,” all other aspects of the Appendix remain the same. Commissioner Long questioned whether or not the change should be applied to section (1)(d)(2) as well. Ms. Weitz stated that the NJEA did not request such a modification and therefore she did not draft such a change. Laura Tharney noted that other uses of the term “chapter” appear in the statute.

The Commission then engaged in a discussion of the difference between a transfer and promotion as opposed to a voluntary transfer. Ms. Weitz noted that an employee may be moved to a new job and that the move may not be voluntary. Chairman Gagliardi noted that an employee may be transferred by a school district and that such a move should not be interpreted as eliminating the individual’s tenure.

Commissioner Long observed that it appears that several ideas had been collapsed into section (d)(2). She questioned whether the term “voluntary” belonged in this section. Ms. Tharney noted that at a prior meeting the Commission struggled with the question of whether “voluntary” was important for inclusion in the draft language. Commissioner Bell observed that there is a distinction between people who are forced out of their positions and those who leave voluntarily. Chairman Gagliardi stated that when a tenured position is eliminated and a new position is available, without tenure protection, the move cannot be seen as voluntary. This type of move occurs as a result of circumstances beyond the employee’s control. If an individual applies for a

posted position, however, such a move may be seen as voluntary, and there would likely be documentation of the employee's choice in such a case.

In response to the concerns raised by the Commission with respect to the structure of the proposed modification, Chairman Gagliardi suggested that section (d)(2) be re-designated as section e. Thereafter, section (d)(1)(a) would become section (d)(1) and section (d)(1)(b) would become section (d)(2). Staff would then draft additional language to introduce the newly created section e. Commissioner Bell suggested that these modifications should be reflected in extensive comments in the Appendix.

Subject to the reordering of the section d. and with the addition of comments recommended by Commissioner Bell, the Commission moved to release this work as a Revised Final Report of the Commission on the motion of Commissioner Cornwell, which was seconded by Commissioner Bunn.

### **Local Lands and Building Law - Bidding**

Local governmental units may acquire property in a variety of ways. The Local Lands and Building Law (LLBL) permits a governing body to require the seller, or lessor, to construct or repair a capital improvement as a condition of acquisition. While the statute provides for the acquisition of such property, it does not specify whether the governmental unit must adhere to the public bidding requirements of the Local Public Contracts Law (LPCL). Samuel Silver discussed the convergence of these two bodies of law with the Commission.

Mr. Silver advised the Commission that this project was brought to Staff's attention by practitioners who work in the field of both the LLBL and LPCL. With the Commission's authorization, Staff drafted a modification to the Local Land and Building Law, specifically to N.J.S. 40A: 12-5 (a)(3), to clarify that the acquisition of real property, capital improvement, or personal property by a County or municipality, is subject to the Local Public Contracts Law (N.J.S. 40A:11-1 *et seq.*).

Prior to drafting the proposed modification Mr. Silver conducted a search of the New Jersey statutes for similar language. He advised the Commission that to date there are 30 statutes that subject governmental activity to the LPCL and contain language similar to the language proposed in the Appendix to this Report. Conversely, he noted that there are ten statutes that contain language exempting a governmental entity from the requirements of the LPCL.

Commissioner Bunn inquired whether the capital improvement requested by the governmental entity could be subject to the public bidding process when the property sought to be acquired is owned by a private person. Mr. Silver replied that a governmental unit may not make a demand for a capital improvement when the land is acquired from a private individual by way of gift, devise, or condemnation. By contrast, when the acquisition is made by a purchase, lease, exchange or installment plan, then the governmental entity may require the seller to make a capital

improvement. Mr. Silver also acknowledged that the public bidding requirement may prolong the time frame in which the land is acquired.

Chairman Gagliardi observed that the answer to whether N.J.S. 40A:12-5(a)(3) necessarily implicates the LPCL is unclear. Where such expenditures involve the spending of public money the law should be clear. The Chairman stated that individuals who work in this area may provide useful information regarding the practical implications of how these two areas of law relate to one another.

On the motion of Commissioner Long, which was seconded by Commissioner Bertone, the project was released as a Tentative Report.

### **Satisfactory Completion of Probation**

Arshiya Fyazi discussed with the Commission a Draft Tentative Report regarding the meaning of the term “satisfactory completion” in the context of probation under the New Jersey expungement statute, N.J.S. 2C:52-2. Ms. Fyazi advised the Commission that this issue was brought to Staff’s attention after a review of the decision in *Matter of E.C.*, 454 N.J. Super. 48 (App. Div. 2018).

After briefly summarizing the facts of the case, Ms. Fyazi stated that the Appellate Division noted that the term “satisfactory” is not defined in the expungement statute. The Court therefore consulted the Oxford English Dictionary to determine the plain meaning of this term. The term satisfactory is defined as “fulfilling expectations or needs, acceptable, though not outstanding or perfect.” In addition, the Court examined the intent of the Legislature and the public policy objectives sought to be accomplished when they enacted the statute. Ultimately, the Court held that an individual who has been discharged from probation, even with an imperfect record, and has paid all fines, has satisfactorily completed probation as contemplated by the expungement statute.

In September, the Commission authorized Staff to engage in additional research regarding the meaning of the term “satisfactory” as the term is used in the expungement statute to determine whether the statute could be clarified. Staff conducted a 50-state survey focusing on the use of the term “satisfactory” in the context of expungement of records and probation statutes.

Ms. Fyazi advised the commission that 12 states, including New Jersey, employ the term “satisfactory” in their probation or expungement statutes, although California is the only state that provides a statutory definition for the term. The California Welfare & Institutions Code defines “satisfactory completion” as “substantial compliance” and the California Court of Appeals recently defined “substantial compliance” to mean “compliance with the substantial or essential requirements of something (as a statute or contract) that satisfies its purpose or objective even though its formal requirements are not complied with.” The remaining ten states that use the term “satisfactory” in the probation context, but do not define it, give courts discretion to review the

petitioner's conduct while on probation to determine if it was satisfactory. Thirty-eight of the states surveyed do not use the term "satisfactory" in either their probation or expungement statutes. The standards used by these states are discretion of the court, strict statutory compliance, or a combination of both.

According to Ms. Fyazi, enactments during the last legislative session revised several aspects of the expungement statute. They do not, however, clarify the term "satisfactory" as discussed in *In Matter of E.C.* In the current legislative session, four bills have been introduced in the Assembly to amend the expungement statute, none of which address the ambiguity of the term "satisfactory completion."

In its current form, N.J.S. 2C:52-2 does not clarify the term "satisfactory completion." The modifications contained in the Appendix to this Report are an attempt to bring clarity to the statute. The proposed language contained in section (b)(2) was derived in part from the definition found in California Welfare Institution Code and is also based upon the language and the principals highlighted by the Court in *In the Matter of E.C.* With the exception of the modifications to section (b)(2), the proposed changes to the statutes are not substantive.

Commissioner Cornwell asked whether a defendant can be discharged from probation without improvement. Commissioner Long stated that an individual may either have their probation revoked, or they may be discharged from probation. Commissioner Cornwell asked whether the phrase "without improvement" was the creation of a probation officer. Commissioner Long responded in the negative and said that the phrase may be used elsewhere, she then asked whether the modifications were clear with respect to the payment of fines. Samuel Silver noted that outstanding fines may be converted to a civil judgment and collected accordingly. In addition, the satisfaction of fines is addressed in the expungement statute.

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

### **Inmate Call Services**

Samuel Silver and Veronica Fernandes discussed with the Commission a potential project regarding the provision of Inmate Call Services (ICS) in New Jersey. Mr. Silver noted that this project was brought to Staff's attention by *Securus Tech., Inc. v. Murphy*, 2019 WL 1244802 (App. Div. 2019).

Ms. Fernandes briefly reviewed the facts of *Securus* with the Commission. Securus provided ICS at both the Passaic and Cape May County Jails and alleged that during the time of their contracts, they invested a substantial amount of money in "infrastructure" improvements to these facilities. In an action seeking both injunctive and declaratory relief, Securus alleged that New Jersey's Rate Control Law violated the Takings Clause of both the United States and New

Jersey Constitutions. In response, the State moved to dismiss the complaint with prejudice. The trial court dismissed Securus' complaint with prejudice, finding that it failed to plead facts establishing an actual controversy.

According to Mr. Silver, the Rate Control Law prohibits ICS providers from billing "service charges" or "additional fees" but is silent on the issue of "infrastructure improvements." The Federal Communications Commission sets the rates for ICS. In New Jersey the rates were of such significant public and governmental interest that the Legislature enacted the Rate Control Law. Securus maintained on appeal that restricting ICS providers from recouping their infrastructure costs at present and in the future was tantamount to a "taking," in violation of the Fifth Amendment of the United States Constitution.

The Appellate Division noted that a serious constitutional issue arises when a statute operates to affirmatively preclude a plaintiff from realizing a fair and reasonable rate of return on an investment that a company has already made. Mr. Silver noted that the restrictions imposed by the RCL relate to service fees and per call charges and not infrastructure fees. He continued that in this modern era, individuals who are arrested can be held for 48 hours before a bail hearing is held by the court. This individual would have no way to communicate with friends or family except by telephone. This concern prompted the involvement of the American Civil Liberties Union in the *Securus* litigation.

Commissioner Cornwell questioned whether the addition of infrastructure fees would exceed the statutory rate cap set forth in the statute. Mr. Silver noted that the addition of these fees would permit the ICS providers to charge a rate that exceeds the present rate cap. Commissioner Bunn noted that there is currently a class action lawsuit pending in federal court pertaining to the fees charged by ICS providers. Commissioner Bell noted that the FCC has also revisited this issue.

The Commission authorized Staff to conduct research to determine the current status of the developments referenced by Commissioners Bunn and Bell.

### **Towing Act**

Mark Ygarza presented a Memorandum proposing a project to clarify whether a litigant must exhaust administrative remedies before filing suit against a towing company pursuant to N.J.S. 56:13-21 as discussed in *Pisack v. B & C Towing, Inc.*, 455 N.J. Super. 225 (App. Div. 2018).

Mr. Ygarza briefly discussed the fact of the case in *Pisack*, in which three plaintiffs were charged for the nonconsensual towing of their vehicles by privately-owned towing companies that had contracts with local municipalities to provide towing and storage services. In all three cases, the plaintiffs were towed from public roads at the direction of the police. Each plaintiff paid all charges to have their vehicles released from the lots and did not contest the charges at the time.

The Appellate Division examined N.J.S. 56:13-21, specifically the provision that a “director may [emphasis added] order a towing company that has billed a person...an amount determined by the director to be unreasonable to reimburse the person.... ” The Court observed that when a statutory provision contains both the words ‘may’ and ‘shall’ it is presumed that the statute intended to distinguish between them, so that ‘shall’ is construed as mandatory and ‘may’ as permissive. The Court concluded that the Legislature contemplated that the vehicle owners could file their CFA claims, and nothing in the Towing Act requires all administrative remedies to be exhausted before a plaintiff may file a lawsuit in Superior Court.

Mr. Ygarza further mentioned that on January 16, 2020, the New Jersey Supreme Court decided on the case of *Pisack v. B & C Towing, Inc.* The Court affirmed the Appellate Division’s decision on the issues of exhaustion of administrative remedies, derivative immunity, and CFA claims.

Commissioner Bunn noted that two of the litigants appeared pro se, and that modifications to the statute would be of assistance to future litigants. The Commission authorized Staff to engage in additional research and outreach on the subject.

### **Standard Form Contracts**

Prior to commencing a discussion on this topic, Commissioner Long recused herself because she sits on the Board of Legal Services.

John Cannel advised the Commission that Staff is in receipt of comments from various stakeholders. If the Commission is inclined to release the project, he asked that Staff be permitted to update the Comment section with case law references since additional research has been done, but the comments have not been updated to fully reflect that work.

Professor Jon Romberg began by stating that the instant project was both unnecessary and misguided. He said that in the contractual context, the balance of power continues to be relevant. The modifications made to this Report render consumer consent irrelevant and weaken other important consumer protections. As a result, Professor Romberg opined that the project was anti-consumer.

Chairman Gagliardi asked Professor Romberg what modifications he would like to make to the project, specifically regarding unconscionability. Professor Romberg replied that he would like to see changes to the secondary terms to include those recognized in contract law, and work done to make “reasonable expectations” more robust. In addition, he would like to see the word ‘sale’ removed and replaced with the word ‘term’ in Section 8.

The Report, according to Professor Romberg, appears to be moving to a classical, more conservative, position that is anti-consumer. The benefit of the current state of the law is that it compels merchants to think about their behavior at the risk of running afoul of an unconscionability

standard – this implicit act of self-policing benefits the consumer. In response to an inquiry from Commissioner Cornwell, Professor Romberg replied that his submission to the Commission contains numerous suggestions in addition to those that he summarized in response to the question from the Chairman.

Setting aside Professor Romberg’s disagreement with changes concerning the relative bargaining power of the parties, Commissioner Bell asked what additional changes should be made to Section 8. Professor Romberg answered that Section 8(a)(1) should include all the common law contractual defenses. In addition, the phrase “irrespective of the relative bargaining power of the parties” should be removed from Section 8(a)(4). Professor Romberg then yielded the floor to David McMillin.

Mr. McMillin stated that “unconscionability” is the key to the transactions set forth in this Report and the Commission’s proposed modifications represent a major change in search of a problem. He said that the doctrine of unconscionability is essential to protecting vulnerable consumers. In 1992, the New Jersey Supreme Court addressed the issue of unconscionability in *Rudbart v. North Jersey District Water Supply Comm’n*, 127 N.J. 344 (1992), and set forth a four-part test to determine whether a contract is unconscionable.

Commissioner Bell observed that the draft language eliminates factors 2 and 3 of *Rudbart* but asked what Section 7(b) eliminates. Mr. McMillin replied that this section creates a new test regarding unconscionability because it eliminates the four-factor test. He said that since unconscionability is used in other areas of the law (the UCC; consumer fraud; family law; and landlord tenant law) this project creates an inconsistency by diverging from the existing common law standard for unconscionability. Professor Romberg concurred with David McMillin’s comments.

Chairman Gagliardi noted that this project originally focused on the inadequacy of the law to deal with what were then new issues regarding standard form contracts. The goal of the project was, and remains, to be consumer protective. Commissioner Bell added that the project is not about being anti-consumer, it is about consistency and predictability. Chairman Gagliardi directed Staff to engage in a review of all the comments from stakeholders, and provide the Commission with a document for the next meeting so that the Commissioners can examine each section in issue in order to determine what modifications will be recommend as part of this Report.

David McMillin reminded the Commission that although Professor Jacob Hale Russell was unable to be in attendance, Professor Russell’s article incorporates several cases about unconscionability. Laura Tharney advised the Commission that Staff will reach out to Professor Russell about this subject.



## **Miscellaneous**

Laura Tharney informed the Commission that Assemblyman Raj Mukherji was recently named the Chairman of the Assembly Judiciary Committee, to replace Assemblywoman Annette Quijano. In this capacity he is also an ex officio Commissioner to the New Jersey Law Revision Commission. She explained that she had been in touch with his office to welcome him to the Commission and discuss the provision of meeting materials, and that she would be in touch with them moving forward.

Approval for the 2019 Annual Report of the New Jersey Law Revision Commission was unanimously ratified by the Commission.

Ms. Tharney advised the Commission that on February 6, 2020, Mr. Silver's journal article regarding the New Jersey Consumer Fraud Act was cited in a Law 360 article regarding revisions to the New York Consumer Fraud Act.

After a brief discussion, the July 16, 2020 meeting date was moved to July 30, 2020 to accommodate the schedules of all involved.

## **Adjournment**

The meeting was adjourned on the motion of Commissioner Cornwell, which was seconded by Commissioner Bell. The next Commission meeting is scheduled to be held on March 19, 2020, at 4:30 p.m.