MINUTES OF COMMISSION MEETING

March 18, 2021

Present at the New Jersey Law Revision Commission meeting, held via video conference, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Andrew O. Bunn; Commissioner Virginia Long; 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, of Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

In Attendance

Timothy J. Prol, Esq., of Alterman & Associates, L.L.C.; M. Scott Tashjy, Esq., The Tashjy Law Firm, LLC; Craig S. Gumpel, Esq., of Craig Gumpel, LLC; and Paul L. Kleinbaum, Esq., of Zazzali Fagella Nowak Kleinbaum & Friedman, were in attendance.

Minutes

The Minutes from the February 18, 2021, meeting were unanimously approved by the Commission on the motion of Commissioner Bunn, seconded by Commissioner Bell.

Definition of Traumatic Event

At the September 2020 meeting, the Commission approved a Tentative Report to clarify the term "traumatic event" as it used in the accidental disability pension statute, N.J.S. 43:16A-7. The Report's Appendix sought to clarify the requirements for claiming physical and non-physical disabilities resulting from a traumatic event. Arshiya Fyazi and Jennifer Weitz utilized language from the New Jersey Supreme Court's decisions in *Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 192 N.J. 189, 196 (2007) and *Patterson v. Bd. of Trs., State Police Ret. Sys.*, 194 N.J. 29 (2008), and created new subsections outlining the elements a member must prove to receive the enhanced pension.

The Commission noted that one goal of the proposed statutory modification should be to address the suddenness of a traumatic event. The Commission also expressed concern regarding pre-existing conditions known to the member that are aggravated and accelerated by such an event.

Ms. Weitz and Ms. Fyazi revised the Appendix and sent the Report to stakeholders for comment, including: the New Jersey Attorney General, the New Jersey State Bar Association, the State Association of Chiefs of Police, the New Jersey Police Traffic Officers Association, the New Jersey State Firemen's Association, the New Jersey State Policemen's Benevolent Association, the New Jersey State Firefighters Mutual Benevolent Association, the attorneys of record in *Mount v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 233 N.J. 402 (2018), and private practitioners.

Ms. Fyazi and Ms. Weitz discussed with the Commission the responses that they received. They advised that the general consensus among the commenters was that the statute should be revised. One commenter suggested that incorporating the *Richardson* Court's definition of traumatic event would further clarify the term and benefit practitioners and the courts. A unifying concern among stakeholders who objected to the project was the separation of the criteria "caused by an external event" from the phrase "not the result of pre-existing disease that is aggravated or accelerated by the work."

Consistent with comments from the Commission, the stakeholders said that a pre-existing condition should not automatically prevent a member from qualifying from an accidental disability pension. The New Jersey Supreme Court, in *Gerba v. Bd. of Trs., PERS*, 83 N.J. 174 (1980), expressed this as the "direct result" test, with the Appellate Division in *Slater v. Bd. of Trs., PFRS*, 2020 WL 3442965 (App. Div. Jun. 24, 2020), noting that "the lodestar of the direct result inquiry is simply whether the traumatic event is 'the essential significant or substantial contributing cause of the disability.'"

Language in the Report bifurcating one of the prongs of the *Richardson* analysis formed the basis of a number of comments from members of the public.

Timothy J. Prol, Esq., said that he believed that the attempt to clarify the statute was a worthwhile pursuit. He expressed concern, however, about the bifurcation of the language involving pre-existing conditions, suggesting that the second clause is merely a clarification of the first, not a separate component of the analysis. He noted that confusion arose in this area as a result of the impact of heart conditions on accidental disability pension claims. Mr. Prol added that a bifurcation of the statutory language will likely cause the Pension Board to add a condition to its analysis that is beyond those the Legislature intended in these cases.

Scott Tashjy, Esq., concurred with Mr. Prol. The statute, he continued, was enacted to allow an injured worker to obtain accidental disability pension benefits, but the Legislature intended to make it more difficult for an injured worker to obtain them than it was for a worker to obtain workers compensation benefits. Once the Pension Board saw the language "more difficult" in an aggravation case, they interpreted it to mean that a claimant is not able to get benefits. The statutory language, he stated, should therefore be simple as possible.

Craig S. Gumpel, Esq., explained that he agreed with Mr. Prol and Mr. Tashjy's comments. After clarifying that the draft currently before the Commission did not feature bifurcation of the language concerning pre-existing conditions, he noted that the *Patterson* case sets forth a threshold inquiry for a benefits determination. If the *Patterson* threshold is met, the inquiry then proceeds to a *Richardson* analysis. He said that this should be clarified in the proposed statutory language because the current language does not make it clear that the *Patterson* inquiry precedes the *Richardson* analysis. In addition, Mr. Gumpel noted that the language in the Appendix at subsection d.(2), regarding individuals with similar background and training, implies a limitation on the claimant's circumstances that was not imposed by the Court in *Patterson*. He suggested that all factors pertaining to a particular event should be considered by the Court.

Paul Kleinbaum, Esq., began by noting that the Commission's willingness to undertake the revision of this statute was a noble venture, adding that the PBA had tried to propose revisions in the past. He expressed concern, however, that any attempt to modify the statute would cause more problems than it solves. Aggravation or exacerbation of a prior injury was not supposed to be precluded. He added that *Patterson* was intended to address "mental-mental" circumstances; cases in which a psychological cause results in a psychological injury. He said that the draft, in subsection d., applies the *Patterson* standard to a psychological injury with a *physical* not a psychological cause. This would broaden *Patterson* into something that the court did not intend. Finally, he noted that the "similar background and training" language contained in subsection d.(2) was intended to be an example, not a limitation, and that "in the member's circumstances" is supposed to be a fact-sensitive inquiry taking into account all of the member's circumstance.

Commissioner Long inquired whether any of the commentors had provided the Commission with proposed revisions to the language. Ms. Fyazi replied that no stakeholder had supplied proposed language.

Commissioner Bell thanked the stakeholders for their comments, indicating that he found them very helpful. He stated that he did not believe that this project represented an impossible drafting task. To facilitate the Commission's work in this area, Chairman Gagliardi invited all stakeholders to provide proposed language, and to communicate with Staff. Any proposed modifications could be synthesized by Staff in consultation with the stakeholders, and presented to the Commission during a future meeting.

County Committee

Requirements that the election of county committee members and the selection of the committee chair and vice-chair be based on gender are embedded in the New Jersey election statute, N.J.S. 19:5-3. Historically, the purpose of these provisions was to equalize opportunity and encourage the involvement of women in politics. Samuel Silver discussed with the Commission that, in recent years, the efficacy of gender provisions has been called into question by those seeking political office.

In *Hartman v. Covert*, 303 N.J. Super. 326 (Law Div. 1997), and later in *Central Jersey Progressive Democrats v. Flynn*, MER L 000732-19 (Law Div. Sept. 02, 2020), two trial courts determined that N.J.S. 19:5-3 impermissibly discriminates on the basis of gender. Mr. Silver also noted that the statute may make it impossible for individuals who do not identify with either gender to hold this office or participate in committee leadership positions.

Mr. Silver advised the Commission that on March 17, 2021, he received from Commissioner Bell thoughtful notes and proposed language designed to more clearly express the urgent tone of the project and to provide the Legislature with background concerning the constitutional issued raised by this area of the law. Commissioner Bell also suggested that additional research and language modifications may be necessary.

Commissioner Bell identified three areas of concern. The first involves the Equal Protection Clause of the United States Constitution. Statutory classifications based on gender are examined by the judiciary using "strict scrutiny." In addition, in *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), the United States Supreme Court opined that a statute that distributes benefits and burdens between sexes in different ways, very likely reflects outmoded notions of the relative capabilities of men and women.

The second area of concern involves the evaluation of the historical basis for a statutory enactment. The failure of a legislature to re-evaluate a statute after a lengthy period of time, when circumstances have changed, fails the lowest level of constitutional scrutiny. Gender classification in N.J.S. 19:5-3 has not been reconsidered since 1964. Opportunities for political leadership and the success of female candidates have changed since that time.

The third area of concern requires an examination of the manner in which the statute addresses present social needs. The exclusion of individuals who do not identify as either male or female raises constitutional questions. Although the Supreme Court has not yet addressed non-binary gender classification, it would likely be viewed as an invidious classification given its exclusion of individuals from the political process. One option would be to change "the opposite sex" to "a different gender identity." It is not clear whether doing so would impact women's opportunities to obtain political leadership roles.

Commissioner Bell confirmed that he did not expect that his proposed language would be included verbatim, and complimented Staff on the speed and extent of the work done in response to his suggestions.

Commissioner Bunn expressed concern about the Commission's role in this matter. Although he agreed on the substantive issue of the constitutional issues raised by the statute, he noted that the only decisions on this subject were issued by the Law Division. Chairman Gagliardi agreed, and suggested that it would not be proper for the Commission to do nothing in the face of the concerns raised; he said that the Commission could identify the issue for the Legislature, taking care not to overstep its role.

Commissioner Bell said that in order to preserve the policy that it had deemed significant, the Legislature would need to do something to address the constitutional issue, and explain that the statute in its current form could be difficult to defend. Chairman Gagliardi suggested that Commissioner Bell's comments provide information that is important to addressing the issue. Commissioner Long stated that she supports this project and Commissioner Bertone said that she did as well.

Chairman Gagliardi said that the Commission would like to see a Revised Draft Final Report in April that incorporates Commissioner Bell's suggestions. Laura Tharney said that Staff will send the draft to Commissioner Bell first for his review and approval before bringing it before the full Commission.

Posse Comitatus

The New Jersey State Police may be used as a "posse" at the request of a municipal government. This term appears only once in the body of New Jersey's statutory law. N.J.S. 53:2-1 provides that "the State Police shall not be used as a posse except upon the order of the Governor…." Since the Commission was familiar with the issues, and in light of the limited focus of the Commission's work in this area, Mr. Silver's presentation to the Commission was brief, and he directed the Commission's attention to the language of the Draft Final Report proposing the removal of the word "posse" from N.J.S. 53:2-1.

The term posse is not defined in the New Jersey statutes. Neither the role nor the authority of either the Governor or the New Jersey State Police is set forth in N.J.S. 53:2-1. Mr. Silver stated that the removal of this anachronistic term eliminates possible confusion about the law contained in the statute. The proposal had been circulated to a number of individuals and entities who might have an interest in the issue, an no objection had been received.

On the motion of Commissioner Long, seconded by Commissioner Bell, the Commission voted unanimously to release the Final Report on this subject.

Disability Benefits After Leaving Public Employment

Chris Mrakovcic discussed with the Commission a Draft Tentative Report proposing statutory modification to N.J.S. 43:15A-42 to clarify that a PERS member must be working in public employment at the time of a disability in order to qualify for ordinary disability retirement benefits.

Mr. Mrakovcic explained that in New Jersey, most State employees are eligible for membership in the Public Employees' Retirement System (PERS). Pursuant to N.J.S. 43:15A-42 eligible members of PERS are allowed to receive ordinary disability retirement benefits (ODRB), as long as they meet service credit minimums. The text of the statute, however, is silent regarding the eligibility of an employee who leaves public sector service prior to becoming disabled but retains membership in PERS. This question was addressed by the Appellate Division in *Murphy v. Bd. of Tr., Pub. Emp.'s Ret. Sys.,* 2019 WL 1646371 (App. Div. 2019).

In *Murphy*, the Appellate Division stated that N.J.S. 43:15A-42 is ambiguous and that a determination of legislative intent was required to render a decision. The Court observed that the phrases "for the performance of duty" and "should be retired" indicated that the Legislature contemplated that the statute contemplated performance of duty for a public sector entity in order to qualify for ODRB. The Court citing the PERS rehabilitation statute, which requires an employee who recovers from a disability to return to public sector service. Taken together, the Court concluded that an employee must be disabled from public sector employment in addition to the other eligibility requirements set forth in the statute to receive ODRB.

The statute does not specify whether or not it permits or prohibits the extension of ordinary disability retirement benefits to eligible PERS members who leave public sector employment before the onset of disability.

The language in the Appendix to the Report proposes a change to clarify that the eligible member must be "working in New Jersey service" at the time of disability and divides the statute into subsections in order to improve clarity and accessibility. The proposed changes also delete the reference to the long-past date beginning the five-year delay before the service requirement becomes effective.

Commissioner Long suggested that the term "working in New Jersey service" is ambiguous and should be replaced with a term of art. Commissioner Bunn proposed the term "credit for public service for New Jersey" as an alternate. Ms. Tharney said that if we do not make it clear that an individual must be currently working, it will present the same issue as raised in *Murphy*. John Cannel recommended the phrase "currently employed in State public service." Commissioner Cornwell questioned whether the term "in state public service" means anyone who is an employee of the State of New Jersey? If that is not the interpretation the Commission wants to propose then the term becomes ambiguous.

Ms. Tharney suggested "currently employed in a Public Employees' Retirement System (PERS) eligible position." The Commission concurred with the modified language proposed by Ms. Tharney.

On motion to release the Tentative Report made by Commissioner Bell and seconded by Commissioner Long, the Commission unanimously voted to release the Tentative Report as modified.

Intentional Wrong

The New Jersey Workers' Compensation Act (the Act) provides a trade-off between employees and employers. Employees injured during the course of their employment are granted automatic limited recovery in exchange for giving up their rights to sue their employers for damages for their injuries. The Act contains an exception to employer immunity when the employer commits an "intentional wrong" causing the employee's injuries, but it does not define the term or discuss how it differs from an intentional tort.

Alyssa Brandley discussed in *Bove v. AkPharma Inc.*, 460 N.J. Super. 123 (App. Div. 2019), explaining that in *Bove,* the Plaintiff sued his employer for fraudulent concealment, battery, and prima facie tort in connection with his use of a prescription nasal spray for a clinical study from 2007 until 2010. In 2013, the Plaintiff was diagnosed with permanent endocrine failure and a tumor in his colon that Plaintiff concluded was due to his prior use of the nasal spray. At trial, the Plaintiff's complaint was dismissed as a result of the Workers' Compensation Act's bar.

On appeal, the Court noted that the legislative history of the WCA does not specifically explain why the phrase "intentional wrong" was included in the Act, as opposed to the phrase "intentional tort." In *Bryan v. Jeffers,* 103 N.J. Super. 522, 523-24 (App. Div. 1968), the Court stated that the exception for "intentional wrongs" is not equivalent to "gross negligence" or concepts importing constructive intent, but rather represents a higher standard. In *Millison v. E.I. du Pont de Nemours & Co.,* 101 N.J. 161 (1985), the Court held that a plaintiff must establish that

the employer knowingly exposed the employee to a substantial certainty of injury, and that the resulting injury is not a "fact of life of industrial employment," rather "plainly beyond anything the legislature" intended the Act to immunize.

Commissioner Bell stated that these cases appear to be so fact-sensitive that he is unsure whether the Commission could come up with a definition for the term "intentional wrong." Commissioner Bunn recognized that this may be a difficult task, but that the Commission should attempt to define the term. Commissioner Cornwell said that while there may be no perfect remedy, the Commission may be able to come up with clearer language than that contained in the current statute. Commissioner Long suggested that Staff closely examine the language that the court provided in *Laidlaw,* which refined the *Millicent* standard. Commissioner Bertone stated that the Commission can likely do better than the "something more" standard found in the case law. Chairman Gagliardi suggested that the language in the statutes of other states may suggest language that can be employed in the New Jersey statute. Staff was authorized to conduct further work on this subject.

Additional Rent

The New Jersey Legislature determined that it is in the public interest of the State to maintain the broadest protection available under State eviction laws to avoid displacement and the loss of affordable housing. Joe Miller discussed with the Commission a project proposing to clarify the permissible imposition of fees and costs considered "additional rent" when rent is limited by federal law or local ordinance.

In *Opex Realty Mgmt, LLC v. Taylor*, 460 N.J. Super. 287 (Law. Div. 2019), the Court considered whether non-payment of late fees and legal fees, deemed "additional rent" in the lease, may form the basis of an eviction when the "additional rent" would cause the total rent to exceed the maximum rent allowed by local ordinance.

The defendants, in *Opex*, lived in an apartment that was subject to the Newark's rent control ordinance. Their landlord brought a summary dispossession action to evict them for the non-payment of rent. The action included a claim for $372 in "additional rent" in the form of late fees and legal fees. The defendants paid the overdue monthly rent into escrow but did not pay the $372 in fees designated "additional rent" in their lease. The defendants argued that if the landlord can claim "additional rent" as rent in an eviction proceeding, it must also be considered rent for purposes of the City's rent control ordinance.

The New Jersey statutes do not define the term "rent." Courts have consistently determined that parties are free to define the terms of a lease, including rent, "absent some superior contravening public policy." In 1998, the New Jersey Supreme Court found that parties to a lease may designate late and legal fees as "additional rent," so long as it does not violate public policy.

The Court recognized that a municipality may define rent, for the purposes of a rent control ordinance, as including or excluding various fees or damages. If a local ordinance does not explicitly exclude "additional rent" from its definition, it should be interpreted as rent under the

ordinance. In *Opex*, the Court found that because Newark's definition of rent was broad, it should be read liberally to include late fees and legal fees described as "additional rent" in a lease.

Courts have determined that they will not allow a landlord to claim a fee as "additional rent" for the purposes of an eviction proceeding, while simultaneously claiming the fee does not constitute rent under a local ordinance. Since the landlord in *Opex* took the position that the late and legal fees were "additional rent" under the lease, the total amount of rent exceeded the Newark rent control ordinance. As such, the Court held that the additional rent could not be imposed on the tenant.

The Court specified that its ruling did not preclude a landlord from imposing additional rent on a tenant under all circumstances. Had the tenant not already been paying the maximum allowable rent, the landlord may have been able to impose some or all of the fees as additional rent, so long as it remained within the limit of the local ordinance.

Commissioner Bunn expressed his support for further work in this area. Laura Tharney noted that since New Jersey has a long history of not defining "rent" or "additional rent," it may be useful to clarify that a fee cannot be imposed if the total amount owed by the tenant would exceed the rental cap. Chairman Gagliardi questioned whether this issue was one that arose with any frequency. He suggested that targeted outreach may provide the Commission with an idea of whether this issue was prevalent in New Jersey. Commissioner Bertone concurred with the suggestion that outreach should be done on this issue; stating that she thinks that this is a common issue. John Cannel commented that there are a number of additional fees a landlord can charge, such as pet fees, and that this becomes a problem when these fees raise the rent beyond the permitted amount. The Commission authorized Staff to conduct work in this area.

Jessica Lunsford Act

An offender convicted of an aggravated sexual assault in which the victim is less than thirteen years old will be sentenced to life imprisonment and must serve a minimum of twenty-five years of this sentence. A prosecutor may offer the defendant a negotiated plea agreement of fifteen years during which the defendant will not be eligible for parole. The Jessica Lunsford Act (JLA) does not require the State to present a statement of reasons explaining the departure from the twenty-five-year mandatory minimum sentence. It also does not provide a sentencing court with the opportunity to review the prosecutor's exercise of discretion.

Ayiah-bideha Al-Quanawi and Samantha Schultz, students from the New Jersey Institute of Technology who are working as interns with the Commission discussed the case of *State v. A.T.C.*, 239 N.J. 450 (2019).

Ms. Al-Quanawi explained that in 2014, during the course of a child pornography investigation the defendant in *State v. A.T.C.* admitted that his computer contained video files of his girlfriend's daughter that he had recorded on a number of occasions beginning when she was ten years old. The victim, then twelve years old, corroborated the defendant's confession in addition to confirming that he had sexually assaulted her on multiple occasions. Pursuant to a plea

agreement with the State, the defendant pled guilty to an accusation charging him with first-degree sexual assault of a child under thirteen, an offense subject to the mandatory minimum term of incarceration set forth in the JLA.

The defendant subsequently moved to modify his sentence, arguing that the JLA violates the separation of powers doctrine by "vesting in the prosecutor sentencing authority constitutionally delegated to the judiciary." Finding that the sentencing court retained the right to reject plea agreements under the JLA, the Court concluded that the statute did not run afoul of the separation of powers doctrine. At the defendant's sentencing hearing the State advised the Court that it had "balance[d] the relevant factors set forth in the Attorney General Guidelines", but it presented the Court with a statement "justifying its decision to waive the twenty-five-year term of incarceration and period of parole ineligibility." There was no discussion of why the interests of the victim warranted such a departure. The Court, consistent with the plea agreement, sentenced the defendant to incarceration for a term of twenty years, with twenty years parole ineligibility.

The defendant appealed his convictions, as well as the order denying his motion to modify his sentence. The Appellate Division rejected the defendant's argument that the JLA's mandatory sentencing provisions violated the separation of powers doctrine. The Appellate Division noted that the authority to decide what punishment a defendant shall receive cannot be given to the prosecuting authority by the Legislature, because the authority to impose punishment is strictly a judicial function. The New Jersey Supreme Court granted the defendant's petition for certification for the limited purpose of addressing his facial challenge to the JLA as unconstitutional for violating the separation of powers doctrine.

Ms. Schultz stated that the defendant argued to the Supreme Court that JLA was unconstitutional because it authorizes a prosecutor to negotiate a plea agreement that has a recommended sentence outside the range set forth in the statute without requiring a statement of reasons that would permit judicial review.

The New Jersey Supreme Court observed that the JLA and the Attorney General's JLA Guidelines recognize the court's discretion to accept or reject a plea bargain entered into by the defendant and the State. Neither the JLA nor the JLA Guidelines, however, ensure that the court is informed of the prosecutor's reasoning when it determines whether to accept or reject a plea agreement offered pursuant to N.J.S.A. 2C:14-2(a).

The New Jersey Supreme Court found that the JLA does not violate the separation of powers doctrine if: (1) the State provides the court with a statement of reasons explaining its decision to depart from the twenty-five-year mandatory minimum sentence; and (2) the court reviews the prosecutor's exercise of discretion to determine whether it was arbitrary and capricious. These requirements, however, are not contained in either the statute or the Attorney General's Guidelines.

To this time, six bills have been introduced in the current session of the New Jersey Legislature that concern N.J.S. 2C:14-2. None of these bills address the issue discussed in this

case, nor do they show N.J.S. 2C:14-2 subsection d. as proposed for modification or removal from the statute.

Chairman Gagliardi stated the amount of legislative activity in this area and the fact that this topic is not addressed may be an indication that the Legislature does not wish to address this issue. Commissioner Bell said that the statute, as currently written, appears to be unconstitutional, and the only way to make it constitutional would be to modify the existing language. Commissioners Bunn and Long concurred with Commissioner Bell. Commissioner Long also observed that the six pending bills deal with the substance of the statute and that it is likely that the Legislature has not considered the constitutionality of the procedural portions of the statute. She concluded that this was a good project for the Commission. Further work in this area was authorized by the Commission.

PERS – Re-enrollment

In New Jersey, most State employees are eligible for membership in the Public Employees' Retirement System (PERS), which provides pension benefits. N.J.S. 43:15A-57.2a. provides that if a former member of PERS – who is retired for any reason except disability – is rehired in a PERS-covered role, the rehired employee's pension payments must be canceled until the employee again retires. The statute sets forth several exceptions, including one for employees rehired by the State Department of Education or a board of education in a position of "critical need" as determined by either the State Commissioner of Education or the superintendent of the school district.

Chris Mrakovcic discussed *Yamba v. Bd. of Tr., Pub. Emp.'s Ret. Sys.*, 2019 WL 2289209 (App. Div. 2019), in which the Plaintiff was the retired President of Essex County College (ECC). In April 2010, he began collecting a pension and in April 2016, he was rehired by ECC as its Acting President. The Division of Pension and Benefits notified him that he must re-enroll in PERS. The Plaintiff argued that he was statutorily exempt from doing so since his rehiring filled a critical need position. The Board of Trustees rejected Plaintiff's argument, and he appealed.

The Plaintiff argued before the Appellate Division that "only ECC can determine his salary and that the Board's decision penalizes him because he is a qualified and experienced retiree." In addition, he maintained that his return to employment as a non-teacher filled a "critical need" position at ECC that exempted him from re-enrolling in PERS.

The Appellate Division disagreed, explaining that in 2001, the Legislature amended the re-enrollment statute to encourage PERS retirees to reenter public service as teaching staff members in public institutions of higher education in this State. The purpose of the Legislative amendments was to provide significant contributions to higher education by incentivizing retired teachers to return to teaching positions.

The Court found that neither of the "critical need" exceptions contained in subsection c. applied to the plaintiff. The Court added that "his position as Acting President of ECC had not been determined to be one of 'critical need' as that term is used in the PERS re-enrollment statute."

The term “critical need” is not defined in N.J.S. 43:15A-57.2 or elsewhere in Title 43. The holding in *Yamba v. Bd. of Tr., Pub. Emp.’s Ret. Sys.* creates ambiguity over what constitutes a position of “critical need” for purposes of being exempt from the statutory requirements or re-enrollment.

Chairman Gagliardi expressed his support for this project. Commissioner Bell stated that he preferred that the trustees or administrative agencies to take a lead in working through the definition of ambiguous terms. He also noted that that may not be an option here because the Appellate Division in this case did not defer to the trustees in rendering their decision. The Commission authorized Staff to work in this area.

Adjournment

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

The next Commission meeting is scheduled for April 15, 2021, at 4:30 p.m.