

MINUTES OF COMMISSION MEETING

May 20, 2021

Present at the New Jersey Law Revision Commission meeting, held via video conference, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Virginia Long; Commissioner Louis Rainone; 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.

Minutes

The Minutes of the April 15, 2021, meeting were unanimously approved by the Commission on the motion of Commissioner Long, seconded by Commissioner Bell.

Preliminary Matters

Samuel Silver advised the Commission that Christopher Mrakovcic had reached the end of his Legislative Law Clerkship with the Commission, and thanked him for his work. Mr. Mrakovcic, thanked the Chairman, the Commissioners, and Commission Staff for the experience that he received during the course of the year and for their kindness and support when working with him on the projects to which he had been assigned. Chairman Gagliardi, on behalf of the Commission, thanked Mr. Mrakovcic for the year that he spent with the Commission and for the hard work that he did on numerous projects during his tenure.

Local Government Ethics

Samuel Silver discussed a Draft Final Report pertaining to the Local Government Ethics Law (LGEL). The LGEL was enacted to provide local government officials and employees with uniform, statewide ethical guidance. To further this objective, a code of ethics was enacted within the LGEL. In the case of *Mondsini v. Local Fin. Bd.*, 458 N.J. Super. 290 (App. Div. 2019), the Appellate Division considered whether the Executive Director of a regional sewerage authority violated the section of the LGEL prohibiting the use of one's official position to secure unwarranted privileges.

In the wake of Superstorm Sandy, the Authority's Executive Director commandeered gasoline from a gas station and food for employees to keep the authority functioning and prevent millions of gallons of raw sewage from being discharged into the Rockaway River. Unbeknownst to the Executive Director, a commissioner used some of the commandeered fuel for his personal vehicles. The Local Finance Board assessed, fined, and waived a \$100 fine against Executive Director Mondsini. The Administrative Law Judge assigned to the case found no violation of the

LGEL. The Local Finance Board then reinstated its holding and Executive Director Mondsini appealed to the Appellate Division.

Mr. Silver noted that the LGEL prohibits seven types of conduct. N.J.S. 40A:9-22.5(c) specifies that no local government officer or employee shall use or attempt to use their official position to secure unwarranted privileges or advantages for themselves. The Appellate Division reviewed contemporaneously enacted statutes, noting that subsections f. and g. use language “for the purpose of” that is not used in subsection c. Subsection f. provides that a government employee is prohibited from soliciting or accepting things of value based upon an understanding that it was given or offered for the purpose of influencing the discharge of his or her duties. Subsection g. provides that a government employee is prohibited from using insider information for the purpose of securing financial gain. The Appendix contains parallel language approved by the Commission that sets forth in subsections f. and g. and conveys the holding in *Mondsini*.

Mr. Silver informed the Commission that he reached out to stakeholders for comments and that attorney Stephen Trimboli provided a response indicating that the work of the Commission provides a more realistic and workable standard. He suggested that a standard based on public perception or even ‘potential’ public perception would be one based on incomplete or inaccurate information regarding the situation. Mr. Trimboli added that a standard based on public perception invites undue hesitancy among government officials in critical situations, and that a standard not based on intent may lead to governmental officials being wrongfully punished. He further stated that neither a negligence standard nor a public perceptions standard is appropriate in this context.

The Local Finance Board (LFB) indicated that revising N.J.S. 40A:9-22.5(c) is improper at this time. It recognized that the proposed modifications would make section N.J.S. 40A:9-22.5(c) more consistent with other provisions of the LGEL that require some form of intent, but said that “such changes would undercut the intended meaning of the law.” The LFB opined that if the Legislature intended to require intent in the manner discussed in *Mondsini*, it would have included the language of subsections f. and g. in subsection c. The LFB further indicated that this case reflects only one decision of the Appellate Division, and that until the Supreme Court decides the issue, the statute remains subject to a different interpretation by another Appellate panel or the Supreme Court. Finally, the LFB mentioned that a change in the law based upon the ruling in *Mondsini* could result in local government officials being more inclined to take prohibited action under the guise of necessity.

Commission Long stated that the Appellate Division decision was correct and that the language set forth in the Appendix reflects *Mondsini* decision. She added that the parallel structure of the statute is worthwhile. On the motion of Commissioner Long, which was seconded by Commissioner Bell, the Commission unanimously voted to release the Final Report.

Post-adjudication Incarceration of Juveniles

Arshiya Fyazi discussed with the Commission a Draft Final Report recommending legislative consideration of the constitutional issues raised by *State in Interest of T.C.*, 454 N.J. Super. 189 (App. Div. 2018). As a child, T.C. was classified as multiply disabled. At the age of 17, T.C. pled guilty to a crime and was sentenced to a two-year probationary term, with 30 days at the Ocean County Juvenile Detention Center and 30 days of electronic monitoring. T.C. appealed his sentence and argued that the law did not allow for developmentally disabled juveniles to be incarcerated in either a State or county juvenile correctional facility.

The State maintained that N.J.S. 2A:4A-43(c) allows a juvenile to be detained in a county in which there is a facility that meets the requirements of the Juvenile Justice Commission. At the time of the appeal, nine counties lacked access to an approved juvenile detention facility.

The Appellate Division considered the trial court's interpretation of the statutes and observed that a juvenile who is developmentally disabled and is adjudicated delinquent in a county with an approved facility is at risk of post-judgment adjudication. A developmentally disabled juvenile who is adjudicated in a county without an approved facility cannot be incarcerated. The Court indicated that this disparate treatment of juveniles with developmental disabilities based solely on geography implicated concerns of equal protection and fundamental fairness. The Fourteenth Amendment of the U.S. Constitution, and Article 1, Paragraph 1 of the New Jersey Constitution, protect against unequal treatment of those who should be treated alike. The Court noted that juvenile detention "invokes the fundamental right of personal liberty" and N.J.S. 2A:4A-43(c) implicates this right, as it deprives juveniles of their personal liberty for up to sixty days.

The Court found that there is no discernable rational basis, let alone a compelling justification, to support a geographic cause for depriving developmentally disabled juveniles of their fundamental right to liberty. The Appellate Division considered the Juvenile Justice Code (Code) and, in order to "preserve its constitutionality," interpreted the Code to prevent the post-adjudication incarceration of all developmentally disabled juveniles in any facility as long as all counties do not have access to short-term post adjudication detention programs.

Ms. Fyazi advised that although there are three bills pending in the current legislative session that seek to amend N.J.S. 2A:4A-43, none of them address the constitutional issues discussed by the Court in *T.C.*

The Commission previously recognized that addressing the constitutional issue raised by the Court would likely necessitate an expenditure of funds, and that the imposition of such a requirement is properly left to the Legislature. Ms. Fyazi explained that the Report does not contain a recommended solution; rather, is intended to bring this matter to the attention of the Legislature so that the Legislature may consider it and take the action that they deem to be appropriate.

Commissioner Bell opined that the Appellate Division may not have decided this case properly. He stated that different counties can have different strategies for dealing with the post-adjudication incarceration of juveniles and that a lack of similarity among county programs is not

necessarily improper. Chairman Gagliardi responded that the Appellate Division's opinion is binding.

Mr. Silver suggested that a possible distinction may exist between individuals who are "sentenced" to the Department of Corrections and those who are serving post-adjudication incarceration in a county facility that lacks the resources to accommodate their special needs. He noted that a juvenile must serve a post-adjudication term in the juvenile's county of residence and if the county does not have a facility to accommodate the juvenile's disability, the juvenile is permitted to go home – implicating equal protection. Commissioner Bell said that this may make a difference. He clarified that he did not think the opinion in this matter was necessarily wrong, but that he was uncertain whether counties must have uniform programs or no programs at all. Commissioner Bell also stated that the Legislature is not compelled to act based on this decision alone, since it is not the final decision of the State's judiciary.

Laura Tharney stated that the Commission often makes recommendations based on decisions of the Appellate Division. Commissioner Bell suggested that it may suffice to note that this is the decision of one appellate panel. Chairman Gagliardi agreed that this issue should be brought to the attention of the Legislature. Commissioner Rainone asked whether this project reflected a typical response to an Appellate Division decision. Chairman Gagliardi answered that generally, if something is a final decision, it may be considered as the basis for a project. Commissioner Rainone then asked if this project was recommended to the Commission. Ms. Tharney answered that it was not, and that it was Staff's review of the case law that brought the issue to the Commission's attention.

Chairman Gagliardi noted that in the second to last paragraph of the conclusion it was necessary to add the letter "d" to the word "an" to correct a typographical error and so that the word would read "and." Ms. Tharney suggested that because of Commissioner Bell's concerns, the language proposed in the Report could be modified to read "[i]f the Legislature chooses to address the concerns expressed by the Court, ..." to make it clearer that the Commission is not taking a position on this issue, but is merely pointing it out. Commissioner Bell did not think this change would make a substantive difference, but he did not object to the new language. Ms. Tharney added that this might clarify the role of the Commission in this case as acting as a conduit from the courts to the Legislature.

Commissioner Bell said that he would not insist on any change to the Report. Commissioner Long added that she initially shared Commissioner Bell's concerns but was satisfied that this project addresses a potential deprivation of liberty. She noted that counties can have various programs that address the problem raised by the Appellate Division. She suggested striking the entire second paragraph of the Report's Conclusion. Commissioner Bell stated that he was fine with this paragraph remaining, or with deleting it. Chairman Gagliardi asked for a motion to be made to either have this paragraph retained or omitted from the Report. Commissioner Long made a motion to accept the Report without any changes, Commissioner Bertone seconded the motion, and the Commission unanimously agreed to release the work as a Final Report.

School District of Residence

In the case of *Bd. of Educ. of Twp. of Piscataway v. New Jersey Dept. of Educ.*, the Appellate Division considered whether a municipal government was obligated to provide funding for its students enrolled in charter schools located in other school districts. The decision turned on the meaning of “school district of residence,” which is not defined in the Charter School Program Act, or CSPA. The lower court found the term ambiguous, noting that an unrelated definition of “district of residence” in the New Jersey Administrative Code defines it as the district in which a charter school is physically located and that the similarity between school district of residence in the statute and district of residence in the Administrative Code could lead to confusion.

At the February Commission meeting, a Tentative Report proposing amendments to clarify the CSPA was released to the public for comment. Responses were received from Thomas Johnston, of the Johnston Law Firm LLC, the attorney for the charter school in Piscataway, and from Professor Emeritus Paul Tractenberg of Rutgers Law School. Both commenters supported the proposed amendments and found them consistent with the CSPA and recent decisions.

A response was also received from the New Jersey Department of Education. Mr. Mrakovcic explained that there appeared to have been some administrative confusion at the DOE, because the DOE contact thought they had submitted their comment earlier, but the comment was not actually received by Staff until May 17, 2021, and was therefore not reflected in the Draft Final Report. The DOE took issue with the proposed changes, opining that they might be more subjective than the existing language. Specifically, the DOE noted that the term domicile has not been clearly defined and that its use fails to account for situations such as homeless students or students in foster care. Furthermore, the DOE disagreed with the use of “as applicable.” The DOE also believed that the existing language is supported by case law.

Thomas Johnston noted in his comment that the use of domicile was an improvement because it considers the possibility of homeless students. Professor Tractenberg said that the proposed changes accord with recent decisions of New Jersey courts. He also noted that because most charter schools are located in low-income urban districts, relieving the district of domicile of financial responsibility would “do serious violence to the whole institution of charter schools.”

At the January meeting, the Commission addressed the benefits of using the term domicile in the statute, suggesting that it is a less ambiguous term because while a student can have multiple residences, a student has only one domicile. Additionally, the Commission supported the use of “as applicable” to lessen ambiguity across the statute’s subsections.

Staff requested authorization to release this as a Final Report, which will be revised prior to release to include a description of the DOE’s comment.

Chairman Gagliardi stated that his experience dealing with the Department of Education is that they enforce the obligations of domicile. He added that he appreciates the Report and the comments from individuals who deal with the statute, and the parallel use of the phrase throughout the statute. Commissioner Bell questioned the DOE’s objection to the use of “as applicable,”

asking why they had an issue with the term. Mr. Mrakovcic said that the DOE did provide an explanation and Laura Tharney added that Staff did reach out to the DOE after receiving the comments to obtain more information, but has not yet heard from the DOE contact. On the motion of Commissioner Bell, which was seconded by Commissioner Bertone, the Commission unanimously voted to release the Final Report.

Reasonable Cause

Samuel Silver discussed a Draft Tentative Report proposing to clarify the standard for obtaining a search warrant for weapons pursuant to the Prevention of Domestic Violence Act (PDVA) as discussed in *State v. Hemenway*, 239 N.J. 111 (2019).

The Fourth Amendment to the U.S. Constitution and Article I, Paragraph 7 of the New Jersey Constitution, in virtually identical language, provide that “no warrant shall issue, but on probable cause....” The warrant and probable cause requirements apply to criminal, civil, and administrative searches of homes. Further, the physical entry of the home by a government actor is described as “the chief evil against which the wording of the Fourth Amendment is directed.”

In *State v. Hemenway*, the New Jersey Supreme Court considered the use of the statutorily prescribed “reasonable cause” standard when ordering the search for, and seizure of, weapons pursuant to a temporary restraining order pursuant to N.J.S. 2C:25-28(j). In that case, the victim filed a domestic violence complaint alleging defendant, perpetrated a number of criminal acts against her. The victim requested a temporary restraining order and claimed that the defendant possessed firearms, a knife, and a taser. A temporary restraining order and warrant to seize the handgun, knives and switchblade were issued for the home and three cars. Two police officers searched the home, finding controlled dangerous substances, money, and bullets but no guns.

At trial, the defendant filed a motion to suppress, which was denied. The Appellate Division affirmed the decision of the trial court but did not address the constitutional issue. The New Jersey Supreme Court then granted certification. The Court discussed the Special Needs Doctrine, stating that it applies only to exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impractical.

Subsection 2C:25-28(j) of the PDVA is directed at recovering evidence of a crime, specifically the seizure of weapons that pose a threat to victims of domestic violence. Under this subsection, probable cause is required to believe that an act of domestic violence was committed by the defendant; that search and seizure of weapons is necessary to protect the life, health, and well-being of the victim; and that weapons are located in the place to be searched.

Mr. Silver explained that every law enforcement officer must complete a Domestic Violence Offense Report, which is forwarded to the New Jersey State Police. The PDVA also mandates the collection of information, including the number and type of weapons involved in domestic violence incidents. This information is compiled in an Annual Report to the Governor, the Legislature, and the Advisory Council on Domestic Violence. According to the 2019 Annual

Report, there were 59,645 reported acts of domestic violence; 2,017 of those (.36%) involved guns. Mr. Silver noted there was no information collected as to the number of guns seized as the result of temporary restraining orders issued in domestic violence matters. The collection of anecdotal evidence presents a significant challenge, but Mr. Silver was told that there is a plan to add this information to the Report.

In cases involving weapons seizure, the victim must contact law enforcement. An officer then gathers information, and if there is probable cause to believe an act of domestic violence occurred, the officer can arrest the assailant and sign a complaint. If the victim exhibits signs of injury while a warrant is in effect, the assailant will be charged with contempt of a court order.

If a weapon is involved in the incident, the officer must question all persons. If a weapon is within plain view the officer is authorized to seize the weapon if it exposes the victim to a risk of serious bodily injury. However, if the defendant refuses to give consent to search, the officer must apply to the court for a domestic violence warrant to search and seize weapons. A court order, whether a temporary or a final restraining order, is issued to protect the victim from risk of serious bodily injury.

For a court to issue a restraining order, there must be reasonable cause to believe that the defendant committed an act of domestic violence, that the defendant possesses or has access to a firearm or weapon, and that such access poses an increased risk of danger or injury to the victim. The court findings must state with specificity the reasons and scope of the search and seizure authorized by the order. Law enforcement may then go to the location to make sure the defendant does not have access to weapons. If the defendant fails to surrender weapons, he may be charged with contempt.

Mr. Silver noted that a reasonable cause standard is used in other statutes such as those involving the search for explosive devices, in the duty to warn, and for alcohol and beverage control.

Mr. Silver thanked Commissioner Bell for bringing to his attention the case of *Caniglia v. Strom*, (20-157), which was decided by the United States Supreme Court on May 17, 2021. In that case, the Court considered whether the “community caretaking exception” to the warrant requirement, here in the domestic violence context, created a justification for warrantless searches.

Mr. Silver added that 19 states, including New Jersey, and Washington, D.C. have red flag laws, New Jersey’s being the Extreme Risk Protective Order Act of 2018. Mr. Silver suggested that the probable cause standard remains applicable, but may be an area to watch for a potential exception to the warrant requirement. He explained that the Appendix replaces reasonable cause with the probable cause standard consistent with the Constitutional standards.

Commissioner Cornwell began the discussion by noting that the reasonable cause standard is viewed as another way of utilizing the reasonable suspicion standard, which is the basis for stop and frisk policing. He added that the probable cause standard should be used across all statutes since the New Jersey Supreme Court wants a robust probable cause requirement. Commissioner

Bell concluded the discussion by thanking Mr. Silver for all of his hard work pulling together many disparate strands of information into this project. On the motion of Commissioner Long, seconded by Commissioner Bell, the Commission voted to release the Tentative Report.

Mistaken Imprisonment

The Mistaken Imprisonment Act currently allows a claimant to receive monetary compensation for the time an individual was mistakenly incarcerated. John Cannel discussed with the Commission a Draft Tentative Report proposing modifications to the Mistaken Imprisonment Act (N.J.S. 52:4C-1 to 7) to address issues identified as a result of a review of *Kamienski v. State Department of Treasury*, 451 N.J. Super 499 (App. Div. 2017).

Mr. Cannel discussed three issues identified by the *Kamienski* Court. The first issue involved the burden of proof, which Mr. Cannel suggested was clear in the statute and further clarified by the Court. The second issue related to the measure of damages and attorney fees. Additional clarification proposed in the Appendix would make the statute clearer on this issue. The final issue concerned the concurrent and consecutive sentences.

Mr. Cannel explained that this Report attempts to address additional concerns regarding the Act that were not reached in the *Kamienski* opinion and are not addressed in the statute. The modifications in the Appendix are intended to address these issues based upon the general purpose of the law, that a person who is mistakenly convicted and incarcerated should be compensated for the time served on the wrongful conviction.

Commissioner Cornwell asked whether this statute and the proposed modifications would affect someone sentenced to serve concurrent sentences for multiple crimes, but only mistakenly convicted only for one of those crimes, or if the statute only affects persons serving consecutive sentences. Mr. Cannel responded that if the concurrent sentences are of equal length, then the statute prohibits the recovery of monetary compensation because the person would have served those years regardless and although one conviction was mistaken, there was nothing inappropriate about his incarceration. However, if the mistaken conviction is for a twenty-year sentence and the defendant is serving a concurrent sentence of eighteen months, then the defendant should be entitled to some compensation. If the entire conviction is set aside in five years, then the defendant should be compensated for three and one-half years and the court would have to make that determination.

Commissioner Bell asked for clarification of subsection (b) of N.J.S. 52:4C-5, which states that a “claimant may be awarded other non-monetary relief...” Mr. Cannel explained that the proposed modification will not affect that section. Mr. Cannel also stated that the caption of N.J.S. 52:4C-6 was not enacted; it was supplied by the Office of Legislative Services, and therefore Staff’s proposed modification of title is only a recommendation to be considered by OLS. Commissioner Long made a motion, seconded by Commissioner Cornwell, to release the work as a Tentative Report, and the Commission unanimously voted to do so.

Residential Landlord and Tenant Act, Article 11

Jennifer Weitz discussed with the Commission a Memorandum regarding the intersection of Article 11 of the Revised Uniform Residential Landlord and Tenant Act with New Jersey's Safe Housing Act (SHA) and the Prevention of Domestic Violence Act (PDVA).

The project arose as a result of a Commission request to examine Article 11 of the Revised Uniform Landlord and Tenant Act (the Uniform Act) amended by the Uniform Law Commission in 2015. Staff was asked to determine whether New Jersey was employing the best practices in this area of law. Ms. Weitz noted that the Commission previously released a comprehensive Final Report in 2012 on the New Jersey's Landlord and Tenant Law. Because the Revised Act was approved in 2015, Ms. Weitz explained that she reviewed the Act in conjunction with the Final Report released by the Commission in 2012, current pending legislation, and case law on this subject matter.

Ms. Weitz advised the Commission that subject to the provisions of the SHA, a victim of domestic violence may unilaterally terminate a lease. Thirty days after a tenant provides the landlord with written notice to quit the premises and evidence of domestic violence, the lease-term will end. Additionally, the tenant is not required to return to the premises to retrieve the refund of the security deposit. The Act provides that an individual may elect to have the security deposit delivered to the municipal clerk on the individual's behalf.

The Uniform Act allows the termination of the lease within 15 days, instead of 30 days. Additionally, the language of the SHA does not contemplate psychological harm as a result of domestic violence as a basis on which to terminate a lease. References to psychological harm are, however, found in the PDVA and the case law. Modifying the SHA to recognize psychological harm would offer New Jersey victims of domestic violence more comprehensive protections.

Ms. Weitz informed the Commission that there is legislative activity in this area. A bill introduced in the current legislative session, which was introduced in prior sessions, would prohibit the landlord from discriminating against a potential applicant on the basis of that person having terminated a lease previously due to the SHA. The bill, however, does not include language recognizing psychological harm as grounds for termination of a lease. Ms. Weitz stated that modifying the SHA to include psychological harm would make the SHA consistent with the PDVA and the Uniform Act and requested from the Commission to conduct additional research and outreach in this area. The Commission authorized Staff to conduct work in this area.

Miscellaneous

Laura Tharney advised the Commission that the Uniform Voidable Transaction Act (A3384 and S3171), based on the work of the Commission, was signed into law by Governor Murphy on May 12, 2021.

Ms. Tharney explained that on May 20, 2021, she attended the Senate Budget and Appropriations Committee hearing on S2508 which revises the law concerning notaries and notarial acts. At the last hearing on this bill, the committee sought additional input regarding the

fee required to become a notary public and whether it should be increased from \$25 to \$50. The Committee advised that this fee would not be increased by the Legislature. The Committee did not release the bill, however, pending resolution of unrelated issues pertaining to remote notarization. Ms. Tharney conveyed to the Commission Senator Sarlo's comments that he appreciated the work of the Commission, and his indication that the bill would be released from the Committee at an upcoming meeting.

Finally, Ms. Tharney thanked Christopher Mrakovcic for his excellent work as a Legislative Law Clerk with the Commission over the past year.

Adjournment

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

The next Commission meeting is scheduled for June 17, 2021, at 4:30 p.m.