

## MINUTES OF COMMISSION MEETING

July 30, 2020

Present at the New Jersey Law Revision Commission meeting, held via video conference, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Virginia Long; Commissioner Louis N. Rainone; Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner David Lopez; and Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang.

### Preliminary Item

Laura Tharney advised the Commission that Mark Ygarza's last day as a Legislative Fellow with the Commission was July 24, 2020. She was pleased to advise the Commission that Mr. Ygarza left the Commission to begin work as an associate with a Bergen County law firm. Mr. Ygarza was in attendance to thank the Commissioners for the opportunity to work with the NJLRC over the past year, stating that he very much enjoyed his time with the Commission.

On behalf of the Commission, Chairman Gagliardi thanked Mr. Ygarza for his work and wished him success in his future endeavors.

### Minutes

On the motion of Commissioner Long, which was seconded by Commissioner Rainone, the Minutes from the June 18, 2020, meeting were unanimously approved by the Commission.

### Aggravated Assault

John Cannel and Samuel Silver jointly discussed a Draft Final Report recommending modification of the aggravated assault statute to address the throwing of bodily fluids in violation of N.J.S. 2C:12-13, as discussed in *State v. Majewski*, 450 N.J. Super. 353 (App. Div. 2017) and in light of recent events involving Coronavirus transmission.

In *State v. Majewski*, the defendant spit in the face of a corrections officer but claimed that the intended target was an inmate being escorted by the officer. The defendant moved to dismiss the indictment because the required mental state was ambiguous. The State acknowledged this ambiguity.

N.J.S. 2C:12-13 requires that the actor "purposely subjects an employee to contact with a bodily fluid." Although the statute was enacted in 1997, there is no published decision construing it, and there is scant legislative history. In a comparable statute, N.J.S. 2C:2-2(c)(3), the absence of an explicitly stated culpability requirement has been interpreted to mean that only knowledge is required. In the relevant Model Jury Charge, a footnote indicates that "purpose" applies to all material elements under 2C:2(c)(1).

Mr. Cannel noted that three responses to the Draft Tentative Report were received. One was from the Cape May County Prosecutor, who had been involved in the *Majewski* case. His comments highlighted the legislative history of the statute, which focused on protecting the health and well-being of officers and employees. In addition, the commenter informed the Commission that the statute has the unintended consequence of providing all defendants with an absolute defense. Further, he noted that whether an officer is targeted or is exposed incidentally, the risk of infection is the same. The commenter agreed that at a minimum the statute should reflect the holding of the Court in *Majewski*.

The second response was from the Office of the Public Defender (OPD), which expressed no objection to explicitly setting forth the higher mental state in the statute. The OPD did, however, object to the other proposed modification that would make it illegal for an individual to “attempt[ ] to put a person in reasonable fear of infection.” This concern was shared by the County Prosecutors Association of New Jersey (CPANJ), the third commenter. Commissioner Cornwell observed that the *mens rea* is already set forth in the statute.

Mr. Silver noted two slight modifications to the Appendix. The first would add parole officers to the list of protected law enforcement titles covered by the statute. In response to the CPANJ, the second modification would amend N.J.S. 2C:12-1(a)(4) to read “...subjecting the individual to contact with bodily fluids, or otherwise having physical contact with the other person *for no lawful reason*.” The CPANJ requested this addition to protect first responders. Mr. Cannel opined that this addition was not harmful to the spirit of statute. The Commission unanimously approved these additions.

Commissioner Cornwell questioned whether Adult Diagnostic and Treatment Center (ADTC) employees are included in N.J.S. 2C:12-13. Mr. Cannel answered that an ADTC employee is similar to a prison guard. Commissioner Long followed-up by inquiring whether such individuals are Department of Corrections employees. Mr. Cannel answered that ADTC employees are part of the Department of Corrections. Commissioner Long then inquired whether it was necessary to separately enumerate them in the statute. Commissioner Cornwell suggested that the term “ADTC employee” may include therapists and other health care professionals for which there is no equivalent in a correctional setting. Mr. Cannel suggested that no action be taken to remove them from the enumerated statutory list.

Commissioner Bell observed that the list of statutorily protected individuals in N.J.S. 2C:12-1 and N.J.S. 2C:12-13 are similar, but not identical. Mr. Cannel responded that these lists were untouched and noted that this project deals with very unusual circumstances. He also clarified that the behavior in question is still an illegal act, and that the project seeks only to grade the act.

Commissioner Rainone asked if section eight includes all titles. Mr. Silver answered that the section utilized the list set forth in the statute. He noted that the CPANJ examined both statutes and recommended a modification to the statute that would protect a broader range of individuals from the behavior prohibited by the statute. Mr. Cannel stated that while both statutes could be combined into one, it would be prudent to retain them as two separate statutes.

On the motion of Commissioner Rainone which was seconded by Commissioner Cornwell, the Commission unanimously voted to release the Final Report of the Commission.

### **Pending Tenure Charges & Back Pay**

Arshiya Fyazi discussed a Draft Final Report focused on the impact of an appellate remand on a suspended educator's entitlement to back pay while the remand was pending. The plain language of N.J.S. 18A:6-14 does not address this issue, which was brought to Staff's attention after a review of the 2018 Appellate Division decision in *Pugliese v. State-Operated School District of City of Newark*, 454 N.J. Super. 495 (App. Div. 2018).

In *Pugliese*, two tenured teachers appealed the decisions of the Commissioner of Education, which denied teachers back pay from the 121st day of their suspension up to the date when the arbitrators' decisions were rendered on remand from the Appellate Division, after it vacated their terminations. The Court stated that that an order vacating and remanding an initial decision made by a trial court or agency is akin to the grant of a motion for a new trial. The Court 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 and hence both the teachers were entitled to back pay under the statute.

In its current form N.J.S. 18A:6-14 does not address the situation in which the Appellate Division vacates and remands an arbitrator's determination. Ms. Fyazi explained that the suggested language in subsection (b) of the Appendix was derived in part from modifications proposed by the Commission and reflects the Appellate Division's decision in *Pugliese*.

With the changes proposed by the Commission, the Tentative Report was released following the March 19, 2020 Commission meeting. The Commission sought comments from numerous stakeholders, including: the Attorney General of New Jersey; the New Jersey Education Association; the New Jersey Department of Education; the Employment Section of New Jersey State Bar Association; the New Jersey State Board of Education; the New Jersey School Board Association; Newark Teachers Union Local 481; and the attorneys of record in *Pugliese*.

The New Jersey Education Association, Newark Teachers Union Local 481 and the New Jersey School Boards Association supported the change to refine the statutory language. The New Jersey Department of Education (NJDOE), however, did not find it necessary to modify the language. In support of its objection, the NJDOE observed that the procedural history in *Pugliese* suggests that it is not typical to most tenure proceedings because TEACHNJ has provided standards in assessing teacher's poor performances. The commenter further noted that arbitrator's decisions are usually upheld by the Court.

Ms. Fyazi advised the Commission that, in an abundance of caution, regardless of the frequency of a remand of the arbitrator's decision in tenure proceedings, the proposed statutory changes would address instances in which the arbitrator's award is vacated or remanded. Additionally, while TEACHNJ sets forth procedures for addressing a teacher's tenure charges and establishing a timeframe within which an arbitrator must complete a tenure hearing, it does not

speak to effect of a vacatur and/or remand of the arbitrator's decision by a reviewing Court. The proposed statutory modifications in the Appendix clarify that compensation of tenured employees continues from the 121st day after suspension until a final determination is made.

On the motion of Commissioner Bell, which was seconded by Commissioner Rainone, the Commissioner unanimously moved to release the work as a Final Report.

### **Magistrate**

Samuel Silver discussed with the Commission a Draft Final Report recommending the elimination of the term "magistrate" from the New Jersey statutes. This project arose during the Commission's previous review of the term "misdemeanor".

The term "magistrate" has historical origins dating back to the Proprietors. It was woven into the fabric of New Jersey history from shortly after the Revolutionary War. In 1947 the New Jersey Constitution included references to "such inferior courts as established by the Legislature," thereby allowing the Legislature to create what commonly became known as municipal courts.

Magistrate is defined six times across four titles without a uniform definition. The word "magistrate" is used within 88 statutes, and there are references to six distinct types of magistrates which have all been eliminated in New Jersey statutes. The Appendix proposes modifications which seek to eliminate the term magistrate. These modifications are derived from language and context of references contained in similar statutes and the New Jersey Court Rules.

Mr. Silver informed the Commission that in connection with this Report, the Commission sought comments from several knowledgeable individuals and organizations. The Monmouth County Prosecutor expressed no objection to "eliminating the term 'magistrate' and replacing it with the word 'judge' or 'municipal court judge.'" The Cape May County Prosecutor's office strongly supported the Law Revision Commission's recommendation and the Department of Environmental Protection, Division of Fish and Wildlife, advised that they agree with the proposed modifications.

Commissioner Bell observed that the use of the terms "nearest available judge" and "neighboring magistrate." He questioned whether these terms are synonymous or whether the modification will invite litigation. To clarify the proposed statutory language, he proposed replacing the term "from a contiguous jurisdiction" or "from a contiguous township." John Cannel opined that this may not be a problem because in every county the assignment judge has appointed a municipal court judge to serve as an auxiliary for every other municipality in the county. He agreed, however, that Staff could modify the language. Commissioner Long and Commissioner Rainone suggested eliminating "nearest available" and substituting the term "before a judge" where applicable.

Commissioner Bell questioned how the provisions on page 18, N.J.S. 32:4-6 might affect interstate compacts, as the language of interstate compacts is often changed, and whether it would require the consent of other states to the compact. Mr. Silver replied he would be happy to examine

impact of this modifications on interstate compacts. The Commission determined that such an examination would not be necessary given the scope of this project.

Subject to the changes recommended by Commissioner Long and Commissioner Rainone and on the motion of Commissioner Bell, seconded by Commissioner Rainone, the Commission unanimously voted to release the work as a Final Report.

### **Local Lands and Building Laws**

Samuel Silver discussed a Revised Draft Tentative Report proposing modifications to N.J.S. 40A:12-5(a)(3), to clarify that the acquisition of real property, under certain circumstances, is subject to the Local Public Contracts Law (N.J.S. 40A:11-1 et seq.) and that the construction or repair of any capital improvement as a condition of acquisition is subject to the Prevailing Wage Act (N.J.S. 34:11-56.25 et seq.)

Mr. Silver stated that the Local Lands and Building Law allows a governmental unit to acquire property in a variety of ways. It also permits a governing body to require the seller, or lessor, to construct or repair a capital improvement as a condition of acquisition. The statute that permits the inclusion of such a condition precedent is silent, however, regarding whether the entity must adhere to the public bidding requirements set forth in the New Jersey Local Public Contracts Law and the Prevailing Wage Act.

In February of 2020, the Commission authorized the release of a Tentative Report asking stakeholders to review modifications to the report and the statute which would indicate that construction and repair required pursuant to this section is subject to the provisions of the Local Public Contracts Law. Of those who responded, there was no objection by the Cumberland County, an objection by the Atlantic County and a request by a private practitioner for additional modifications.

On May 21, 2020, the Commission asked Staff to examine the best practices recommendations of attorneys who work in this area and the impact of the New Jersey Prevailing Wage Act (N.J.S. 34:11-56.25). In response to the Commission's request, Mr. Silver advised that the best practice in this area includes compliance with the Local Public Contracts Law when more than one property meets the specifications of the governmental entity. The Prevailing Wage Act provides that "every contract for *any* public work to which *any* public body is a party or for public work to be done on property or premises owned by a public body or leased or to be leased by a public body shall contain a provision stating the prevailing wage rate which can be paid to workers employed in performance of the contract."

He explained that option three in the Appendix incorporates the legislative intent of the two provisions. As modified, N.J.S 40A:12-5(a)(3)(A) now requires compliance with the Local Public Contract Law when more than one location meets the requirements of the public body; N.J.S 40A:12-5(a)(3)(B) would reference the requirements of the Prevailing Wage Act when construction or repair is required pursuant to this subsection. Mr. Silver requested that the Report

be released as a Revised Tentative Report and circulated to stakeholders who previously commented.

Commissioner Rainone inquired whether the Report suggests that if a county decides to build a public works facility, they should specify their requirements and put it up for a public bid, and if there are several different possible locations for the facility, the lowest bidder would be the successful recipient. Mr. Silver answered that if there is a proposed public works facility and there is no availability in the radius that the government body is suggesting, the statutory requirements would not apply because there would not be more than one facility to meet those specifications. If within that radius there was an availability of lands or facilities then they would have to specify their requirements and request bids on that particular property. Commissioner Rainone pointed out that in planning for construction of a public facility, neighborhood opposition is a crucial factor and therefore he does not see how it would be possible for the governmental unit to set forth such a specification.

Chairman Gagliardi stated that his concern was that it would be an enormous task to get a nonpublic body to abide by the Public Contracting Laws. He suggested sending out the Report to see what kind of feedback and responses the Commission receives.

Commissioner Bell added that a private entity should not be expected to follow rules applicable to the government if the private entity has adequately developed the property and they are being consistent with their low bid. He questioned the public policy behind a bidding process, saying the decision should be up to the private entity. Commissioner Rainone answered by noting that the public policy behind the Prevailing Wage Act is that the government requires a minimum wage be paid to employees. Commissioner Bell replied that he agreed that section (b) is a good idea within the Prevailing Wage Act, which requires compliance from private entities. He wondered whether if bidding restrictions are designed to deal with public corruption, what is the risk of public corruption if a private entity can make its own decision with its own money as to how to satisfy specs. Chairman Gagliardi answered that if a buyer is buying a building and there are improvements that need to be made, the buyer would have to abide by the law, but if the buyer has the seller make the improvements then the seller does not have to abide by the laws.

Commissioner Rainone asked that Staff send a copy of the Tentative Report to the Municipal Managers Association and the Governmental Purchasing Association of New Jersey.

On the motion of Commissioner Rainone which was seconded by Commissioner Bell, the Commission unanimously voted to release this project as a Revised Tentative Report.

### **Traumatic Event**

Jennifer Weitz and Arshiya Fyazi discussed with the Commission a Draft Tentative Report proposing clarification of the term “traumatic event” in the accidental disability retirement benefits statute, N.J.S. 43:16A-7(a)(1), and as discussed in *Moran v. Bd. of Trs, Police & Firemen’s Ret. Sys.*, 438 N.J. Super. 346 (App. Div. 2014) and *Mount v. Bd. of Trs, Police & Firemen’s Ret. Sys.*, 233 N.J. 402 (2018).

Ms. Weitz stated that N.J.S. 43:16A-7, the accidental disability benefits statute, does not define the term “traumatic event,” a key threshold for an applicant seeking enhanced disability payments. In New Jersey, the courts have been left to fashion a coherent response to a variety of circumstances that have been claimed to constitute a “traumatic event.” These events may or may not involve physical impact and can result in either physical or mental injury, or both.

The project was first presented to the Commission in 2017 after the Appellate Division issued its opinion in *Moran v. Bd. of Trs, Police & Firemen’s Ret. Sys.*. The Court focused on the “undesigned and unexpected” aspect of an event to determine whether it was a “traumatic event.” In 2019, the Supreme Court’s decision in *Mount v. Bd, PFRS* again addressed the statutory requirements. The two Commission projects were then merged. For reference, since January 2020 there have been ten opinions issued in cases involving applications for an accidental disability pension.

Initially, both the accidental disability and worker’s compensation statutes defined “accident” in the same way. In time, the Worker’s Compensation Courts recognized that pre-existing cardiac conditions exacerbated by work were compensable. After a number of cases were decided based on this expanded standard, the Legislature amended the accidental disability statute and noted what did not qualify as a traumatic event. The newly enacted statute, however, did not provide a definition for this term. The New Jersey Supreme Court developed two tests that would thereafter form the basis for future inquiries.

In *Richardson v. Bd. of Trs, Police & Firemen’s Ret. Sys.*, 192 N.J. 189 (2007), the New Jersey Supreme Court established a five-pronged test to assess applications in which individuals claimed physical injuries. A year later, *Patterson v. Bd. of Trs, Police & Firemen’s Ret. Sys.*, 194 N.J. 29 (2008) built on Richardson and added a requirement for proving mental disability as a result of a mental stressor.

Ms. Fyazi stated that in *Moran* the Appellate Division was asked to determine whether, during the regular performance of a firefighter’s job, an unexpected event directly resulted in his permanent and total physical disability. The Court applied the *Richardson* analysis and held that the firefighter suffered disabling physical injuries while saving two victims from a burning building after he kicked in the building’s front door. The event was both “undesigned and unexpected” because he lacked not only the training but the specialized equipment that would have allowed him to save the victims. As a result, the Court determined that these events resulted in his disability.

Subsequently, in *Mount*, the New Jersey Supreme Court examined whether two police officers’ claims of mental incapacitation due to a “traumatic event” warranted an award for accidental disability retirement benefits. Police Officer Mount applied for accidental disability benefits after he observed the aftermath of a horrific traffic accident. In a separate case, Police Officer Martinez applied for benefits based on an incident in which a hostage taker was killed while the officer was serving as hostage negotiator.

The Supreme Court applied the *Paterson* test followed by the *Richardson* analysis because it was dealing with mental incapacitation due to a mental stressor. The Court determined that both police officers demonstrated that they met the standards prescribed by *Paterson* because both the events were terrifying and horror inducing. The Court then distinguished between the plaintiffs when it applied the *Richardson* test.

The Court determined that Officer Mount, who observed the results of a horrific traffic accident, experienced a “traumatic event” because the totality of the circumstances indicated that the event was undesigned and unexpected. The officer viewed the event at close range, was neither trained nor equipped with gear to help the victims and faced imminent threat of explosion. By contrast, Officer Martinez, who had been acting as a hostage negotiator, did not experience a traumatic event because he was aware that hostage negotiations sometimes fail and end with the use of lethal force. Therefore, the event was neither undesigned nor unexpected under the *Richardson* analysis. The New Jersey Supreme Court invited the Legislature to refine the statutory language to clarify its intent regarding the term ‘traumatic event.’

Ms. Fyazi advised the Commission that recent and pending legislation on this subject does not clarify the term “traumatic event.” The Appendix to the Report sets forth a proposed definition of the term “traumatic event” in a newly created subsection a.(4)(A), based on the language provided by the Supreme Court in *Richardson*. The language contained in newly created subsection a.(4)(B) is based upon the language set forth in *Patterson*. This provision was recommended by the Supreme Court in *Mount*. The remaining provisions of the statute have not been altered, rather they have been reorganized, divided into sections and subsections to make the statute more accessible.

Commissioner Bell stated that the statute is aided by clarifying physical and non-physical disabilities. He suggested that the new language does not sufficiently clarify the requirements set forth by the Appellate Division and the Supreme Court. Commissioner Bell suggested that the statute address what is physical and what is mental. Chairman Gagliardi stated that definition of “traumatic event” should be applicable to the entire statute. It should, therefore, appear in a separate section. Commissioner Rainone concurred with the Chairman’s recommendation. Commissioner Bell suggested that it would be worthwhile to reorganize the statute to clearly set forth the requirements set forth by the Supreme Court and the Appellate Division.

The Commission asked Staff to revise the Appendix to the project consistent with the issues raised by the Commissioners. Thereafter, the Commission will consider the Revised Tentative Report at a subsequent meeting.

### **Reasonable Cause**

Benjamin Cooper discussed a Memorandum proposing to clarify the standard for obtaining a search warrant for weapons in a domestic violence matter pursuant to N.J.S. 2C:25-28(j) and as discussed in *State v. Hemenway*, 239 N.J. 111 (2019).



In *State v. Hemenway*, D.S. filed a domestic violence report alleging that on June 28, 2012, the Defendant entered her premises unannounced, verbally, and physically assaulted her and shocked her with a taser gun. D.S. requested a TRO (temporary restraining order) barring defendant from contact, claiming he possessed firearms, knives and a taser.

The next day, police officers came to defendant's apartment and explained they possessed a TRO and warrant to search his apartment and car for weapons. Inside the defendant's apartment, the officers found multiple controlled dangerous substances (CDS), cash and bullets but no weapons. Ultimately, the Defendant was indicted on CDS offenses. Challenging the validity of the warrants, the Defendant moved to suppress drug related evidence from his home and car.

The trial court found that the TRO and the criminal search warrant were properly issued by the family court because they met all four prongs of the Domestic Violence Act. On appeal, the Appellate Division affirmed the decision of the trial court but noted that N.J.S 2C:25 -28(j) is unconstitutional because it allows the family court judge to issue a search warrant based on "reasonable cause," a standard lower than "probable cause" which is required by the Fourth Amendment. The defendant once again challenged the validity of both the TRO and the criminal search warrant.

The New Jersey Supreme Court granted certification and considered whether a search warrant for weapons authorized on the standard of "reasonable cause" is compatible with both the state and federal constitutions. The Court noted that the United State Constitution and the New Jersey State Constitution have identical language that guarantees the standard of probable cause when issuing a warrant for search and seizure of weapons. The Court declined to apply the "special needs doctrine" since no exceptional circumstances existed to reduce the need to apply the probable cause standard.

The Court noted that the language of the Domestic Violence Act lacked clear standards to guide a court in ordering a civil warrant for the seizure of weapons. The Court concluded that the aim of the search warrant authorized by N.J.S. 2C:25-28(j) was not to recover evidence against the defendant but to seize weapons deemed as potential threats to the victim of domestic violence. The New Jersey Supreme Court held that the statutory provision in question was in fact unconstitutional and noted that applying the probable cause standard is a flexible and commonsense way to govern the legality of all searches and seizures.

Mr. Cooper informed the Commission that currently, no pending legislation seeks to amend the "reasonable cause standard" in N.J.S. 2C:25-28(j) and asked the Commission for authorization to conduct additional research and outreach to ascertain whether the repeal or revision of N.J.S. 2C:25-28(j) would be appropriate.

Chairman Gagliardi stated his support for the project and Commissioner Cornwell concurred. Commissioner Bell asked Staff to expand on the project and research New Jersey's relinquishment law. He opined that it would serve as a beneficial statute to work in tandem with the reasonable cause statute. The Commission authorized Staff to proceed with the project to

clarify the standard for obtaining a search warrant for weapons in a domestic violence matter pursuant to N.J.S. 2C:25-28(j).

### **Indemnity**

Samuel Silver and Julianna Dzwierzynski, a Seton Hall Law School legislative extern, prepared a Memorandum proposing to clarify the statutes pertaining to the defense or indemnification of State and County employees in legal actions pursuant to N.J.S. 59:10A-1 and N.J.S. 40A:14-117 and as discussed by the Supreme Court in *Kaminskas v. Ofc. of the Attorney General*, 236 N.J. 415 (2019).

Chairman Gagliardi noted that on July 28, 2020, the New Jersey Supreme Court delivered an opinion in the matter of *Christopher J. Gramiccioni v. Dept. of Law & Public Safety*, (A-21-19) (083198). In these consolidated appeals, the Court examined whether the Department of Law and Public Safety's four final agency determinations regarding defense and indemnification for federal civil rights claims filed against the Monmouth County Prosecutor's Office and its employees were in keeping with the Court's holding in *Wright v. State*, 169 N.J. 422 (2001).

The Chairman requested that Staff examine the decision of the Court and update the Memorandum for presentation of the issue to the Commission at a future meeting.

### **Telephone Company Taxation**

Melissa Sungela, a pro bono student from Seton Hall University School of Law, discussed a Memorandum proposing a clarification of the statutory language concerning the calculation of telephone company taxation (N.J.S. 54:4-1) as discussed in *Verizon N.J., Inc. v. Borough of Hopewell*, 31 N.J. Tax 49, 61 (N.J. T.C. 2019).

Laura Tharney advised the Commission that a representative from T-Mobile was present at the meeting. The Chairman welcomed the representative from T-Mobile who advised the Commission that he had been sent to observe the Commission's discussion of this project. Chairman Gagliardi advised that after the project had been formally presented to the Commission, he would be afforded an opportunity to comment on the project. Although appreciative of the opportunity, the representative indicated that he had not prepared any formal remarks and would prefer to simply observe the proceedings.

Ms. Sungela explained that in 1997 the New Jersey Legislature modified personal property taxation rules that applied to the three Incumbent Local Exchange Carriers (ILECs) in New Jersey.

N.J.S. 54:4-1 provides for the taxation of personal property used in the business of local exchange telephone company services. A local exchange telephone company is defined as a carrier that provides "dial tone and access lines" to 51% of a local telephone exchange. Relevant telecom industry deregulation started in January 1998. This deregulation led to a deterioration of the availability of the data previously collected that was used to calculate the tax. The term "local telephone exchange", however, was not defined.

She further explained that in January 2019, *Verizon NJ, Inc. v. Borough of Hopewell* was resolved when a New Jersey Tax Court held that the term “local telephone exchange” was to be defined based on the geographic telephone exchange area serviced by the personal property rather than being based on a theoretical “rate center.”

The *Verizon* case revealed that, as a result of deregulation, the number of “dial tone and access lines” that are provided by each carrier in each geographic telephone exchange area is no longer information that is centrally collected and available. In the *Verizon* case, each side calculated an estimate of the number of dial tone and access lines provided by Verizon and compared it to the estimated total lines using various methodologies. Ultimately, because a local telephone exchange was defined as the geographic telephone exchange area serviced, the tax was triggered in this specific instance, regardless of the methodology. Thus, the court was not required and did not opine on the methodology to be used or the sources of information to be used to calculate the number of “dial tone access and lines.”

This case also raised the issue Verizon asserted that once it falls below the “trigger” of 51% of the dial tone and access lines for a geographic telephone exchange area, it is no longer subject to the annual calculation or the tax in future years. This was brought up in the 2018 legislative session, was not resolved, and does not appear to have been raised again this session.

Ms. Sungela informed the Commission that before the meeting Staff became aware that there are relevant bills currently pending before the Legislature introduced in response to the 2012 Verizon case.

Chairman Gagliardi indicated that since the Legislature is already looking into this topic and there are bills pending, other than keeping the Commission informed of the status of the bills, no further action on this topic is necessary. Without objection, the Commission agreed that it would not undertake work in this area.

### **Mandatory Property Tax Refund**

Jennifer Weitz presented an Updated Memorandum which set forth additional research regarding the statute of limitations in property tax refund cases as discussed in *Hanover Floral v. East Hanover Township*, 30 N.J. Tax 181 (2017).

In *Hanover Floral*, the taxpayer brought an action against the Township, seeking to obtain a refund of taxes that the taxpayer mistakenly paid for property that it did not own from 2001-2012. The Tax Court held that despite the permissive language in the statute, a refund of repayment of taxes is mandatory, subject to a three-year statute of limitation.

Ms. Weitz presented the Draft Final Report to the Commission in December 2019 with modifications that replaced the permissive language that appears in the statute with mandatory language. The modification further clarified that the three-year statute of limitations would be applicable to all such refunds pursuant to the decision of the Tax Court in *Hanover Floral*. During the discussion, Commissioner Rainone opined that the language relating to the statute of limitation should be consistent with the property tax statute concerning tax appeals, and asked Staff to

conduct additional research to confirm that the approach followed by the Court, and incorporated in the Report, was consistent.

Ms. Weitz summarized that based on the additional research requested, Staff was unable to locate a statutory provision governing property tax refunds that varies from the analysis of the *Hanover* Court. Satisfied with the findings of the additional research provided by Ms. Weitz, the Commission confirmed the release of the Report as a Final Report.

### **Miscellaneous**

Laura Tharney advised that on July 20, 2020, she testified before the Legislature on behalf of the Commission regarding A4250, New Jersey Law on Notarial Acts. In addition, Ms. Tharney advised the Commission that on July 30, 2020, the bill was approved by the Assembly by a vote of 53-20-1.

### **Adjournment**

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

The next Commission meeting is scheduled to be held on September 17, 2020, at 4:30 p.m.