

MINUTES OF COMMISSION MEETING

November 21, 2019

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Andrew O. Bunn (via telephone); Commissioner Virginia Long (via telephone); Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner David Lopez; and Grace Bertone, Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

Minutes

With the modifications recommended by Chairman Gagliardi and Commissioner Bell, and on the motion of Commissioner Bunn, which was seconded by Commissioner Bell, the Minutes from the October 17, 2019 meeting were unanimously approved by the Commission.

Mandatory Sentencing

John Cannel discussed with the Commission a Draft Final Report on Mandatory Sentencing which suggested statutory modifications consistent with the United States Supreme Court decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013). In *Apprendi* the Supreme Court held that a fact that increases the maximum sentence for an offense is an element of the offense, and therefore must be found by a jury beyond a reasonable doubt. In *Alleyne* the Court extended this concept to increases in the minimum allowable sentence. Although the New Jersey Legislature amended the statutory provisions at issue in *Apprendi*, it has taken no action to address the other statutory provisions impacted by the determinations of unconstitutionality.

Mr. Cannel also discussed a Memorandum that was drafted after his receipt of comments on this topic. He explained that he received a telephone call from Alyson Jones, Legislative Liaison for the Judiciary, from the Administrative Office of the Courts. Ms. Jones stated that there was no Constitutional impediment to a finding by a judge rather than a jury that a crime was committed while the defendant was on pre-trial release. Federal cases have established that the determination whether the defendant had been convicted of prior offenses may be made by the judge. Mr. Cannel explained that he appreciated the analogy between the decision about prior offenses and whether the defendant was on pre-trial release. There is no case law, however, that makes an exception for the pre-trial release determination. Mr. Cannel noted that caution and conservatism motivated the inclusion of the proposed amendment of N.J.S. 2C:44-5.1 in the Memorandum.

Commissioner Bell commented that it is consistent with the principles of due process to allow the judge to make the determination whether the defendant committed a crime while on pre-trial release. Permitting the judge to make this decision, would prevent such facts from biasing the

jury. Commissioner Long noted that although determination could be made by a jury, for practical purposes she believes that it should be made by a Judge. Commissioner Bunn agreed with Commissioner Long's rationale for allowing the judge to make such a decision, as did Commissioner Bertone, Commissioner Bell, and Chairman Gagliardi.

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

Definition of "Marital Status"

Samuel Silver discussed a Draft Final Report relating to the Definition of Marital Status within New Jersey's Law Against Discrimination ("LAD"), N.J.S. 10:5-1 et seq. This Report proposes modifications to amend the LAD to incorporate the definition of "marital status" identified by the New Jersey Supreme Court in *Smith v. Millville Rescue Squad*, 225 N.J. 373 (2016).

In *Smith* the New Jersey Supreme Court determined that "marital status" included those who are single, married or those in transition from one state to another. Staff was initially authorized to conduct outreach to ascertain the viability of incorporating this definition into the law against discrimination. Mr. Silver advised the Commission that the Division of Civil Rights (DCR) advised Staff that the proposed definition of "marital status" was consistent with the definition set forth by the Court in *Smith v. Millville*.

The DCR did, however, express concerns about defining marital status, expressing concern that courts might limit the term "transition" to only cases involving marital status. In response, Mr. Silver incorporated language as recommended by the Director of Civil Rights to extend the broad protections of the LAD to members of a protected class, those transitioning among and between protected classes, and those associated or perceived to be a part of a protected class. The newly drafted subsection (h) was added to the rules of general construction statute to ensure that it encompasses the comprehensive protections contained in Title 10. In response to these modifications, the DCR suggested that perhaps the protections contained in this statute could be drafted in the affirmative, but the Commission was concerned that doing so would create a drafting inconsistency in the statute.

Mr. Silver also explained that during the September 19, 2019, meeting Commissioner Bunn had asked whether the term "protected class" was defined in the Law Against Discrimination. Mr. Silver stated that the term "protected class" is defined once in the LAD. This definition, however, is set forth in N.J.S. 10:5-12(t), and is applicable in the context of unlawful employment practices.

Title 10 contains a total of 84 statutes. Thirty-two of these statutes reference 25 separate characteristics that are "protected" under the Civil Rights Statutes. No one statute, however, sets forth all 25 of these characteristics. Commissioner Bunn thanked Mr. Silver for the extensive research that was conducted to provide him with the answer to his question.

Laura Tharney asked whether the Commission would like Staff to conduct additional research regarding a comprehensive definition of “protected class”. Commissioner Bell questioned whether the instant project could be released without defining “protected class.” Chairman Gagliardi suggested that defining “protected class” would be an impossible project for the Commission to undertake. Staff advised that instead of attempting to define “protected class,” Staff worked with commenters to draft language that would cover those in the statutorily described classes as well as those transitioning, and that a plaintiff’s pleading would identify the relevant protected class.

After a discussion, and on the motion of Commissioner Bell, which was seconded by Commissioner Bertone, the Commission unanimously voted to release the project as a Final Report.

Harassment

John Cannel discussed a Revised Draft Tentative Report proposing the modification of N.J.S. 2C:33–4 to criminalize expressive activity narrowly in order to avoid any conflict with constitutionally protected free speech as discussed in *State v. Burkert*, 231 N.J. 257 (2017).

Mr. Cannel suggested that the project has to be broad enough to include things like spousal violence situations and narrow enough to avoid violating constitutional protections. He noted that the statute explains that annoyance is not enough to trigger the protections against harassment.

Commissioner Long said that this is not an area of the law where perfection is possible. Chairman Gagliardi observed that the word purpose was used three times in the proposed statute and asked whether “intent” could be used to address that drafting issue. Commissioner Bell noted that the word intent denotes both “purpose and desire.” He asked the Commission to consider replacing the word “purpose” with “intent” in the first line of the proposed statute. The Commissioners unanimously agreed with Commissioner Bell’s recommendation.

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

Statute of Limitations

Samuel Silver discussed a Draft Tentative Report regarding modification of N.J.S. 39:6A-9.1 to clarify the event that triggers the statute of limitations in matters involving personal injury protection (PIP) claims as considered by the Court in *Abdulai v. Casabona et al.*

Mr. Silver explained that an insurer that has provided personal injury protection (“PIP”) benefits must bring suit seeking reimbursement from a tortfeasor before the conclusion of the two-year statute of limitation or lose the ability to bring such an action. The two-year period begins

upon “the filing of a claim” for such benefits. A question regarding the commencement of the statute of limitations arises, however, upon the filing of multiple PIP applications with the insurance company.

In the case of *Abdulai v. Casabona et al.*, the Appellate Division was asked to determine the date that a PIP claim was “filed” because the insured and his health care provider each submitted a PIP application on separate dates, using separate forms for their submissions. The Court recognized that the language in N.J.S. 39:6A-9.1(a) is ambiguous regarding the date on which a PIP claim is deemed to be “filed” for purposes of calculating the statute of limitations.

The Appellate Division concluded that a “claim” is “filed” when an insured’s submission of a PIP application, in the form requested by the insurer, is received by the insurer. The Court suggested that an insurer is entitled to rely on information that it deems necessary for the proper processing of an application for benefits, and that the information should be submitted in the form requested by the insured. To protect tortfeasors from delaying tactics by insurance companies, such as allowing a claim to languish, the Court signaled that unreasonable delays in the processing of such paperwork may result in running of the statute of limitations.

Mr. Silver proposed revisions of the statute to enhance the clarity of N.J.S. 39:6A-9.1 by explicitly stating that it is an insured’s submission of a PIP application in the form requested by the insurer that triggers the statute of limitations, and that such submissions should be submitted without an unreasonable delay or be barred by the statute of limitations.

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

Property Tax Refund

Jennifer Weitz discussed a Draft Tentative Report proposing modifications to N.J.S. 54:4-54, to clarify that a municipality must refund property taxes mistakenly paid, as discussed in *Hanover Floral Co. v. East Hanover Township*, 30 N.J. Tax 181 (2017).

In *Hanover Floral*, the Tax Assessor mistakenly listed the Plaintiff as the owner of the adjacent lot and thereafter sent tax bills to the Plaintiff. The Plaintiff mistakenly overlooked the error on the tax bill and continued to pay the incorrect assessment from 2001 to 2011. In December of 2012, upon realizing the error, the Plaintiff filed suit against the Township to obtain a refund from the Township of East Hanover. The Tax Court ruled that the refund of overpayment of taxes is mandatory, despite the use of the word “may” in the statute. The refund, however, was subject to a three-year statute of limitation.

Ms. Weitz advised that she conducted an initial outreach with the Tax Assessors in both Somerset and Monmouth Counties. In addition, she had the opportunity to speak with attorneys in private practice who specialize in this field. Ms. Weitz noted that all commenters indicated their

support for this project, which would replace the permissive language that appears in the statute with mandatory language. This modification, she stated, would be consistent with the Tax Court's decision in *Hanover Floral*. In addition, the commenters agreed that a three-year statute of limitations applies to all such refunds. The statute of limitations ensures that municipalities are not inundated with refund requests dating back years and recognizes that taxpayers have a responsibility to check their tax bills, to ensure accuracy.

Commissioner Bunn observed that property tax appeals are generally settled and noted that the Legislature may have included the word "may" in the statute to permit parties to reach settlements in tax disputes that span long periods of time. Commissioner Long agreed with Commissioner Bunn's observation.

On the motion of Commissioner Bell, which was seconded by Commissioner Bertone, the Commission unanimously moved to release the Report as a Tentative Report.

Hearsay

John Cannel discussed a Memorandum providing a status update regarding the modification of a statute to clarify a hearsay evidence issue found in N.J.S. 9:6–8.46 pertaining to child abuse and neglect proceedings.

Mr. Cannel said that the project was considered during the September 2019 meeting and released at that time as a Draft Tentative Report. The substantive issue in September was whether the hearsay exception should apply in child abuse and neglect proceedings or in proceedings involving children in need of services.

Mr. Cannel mentioned that a recent Appellate Division decision held that prior statements of a child could no longer be used in termination of parental rights. The Department of Children and Families advised Mr. Cannel of their concerns regarding that recent decision and the fact that it might require additional testimony by young vulnerable children. Commissioner Long indicated that she would not permit hearsay in proceedings involving children in need of services.

Chairman Gagliardi stated that this project should be released as a Tentative Report that sets forth the decision of the Appellate Division, along with a Memorandum that explains the difficulties presented by this area of law, rather than just a Report containing a recommendation. The Commission, he continued, may not be able to craft a solution in this situation and it may be left to the Legislature to do so. Commissioners Bunn and Bell concurred with the procedural recommendation of the Chairman.

Definition of Traumatic Event

Arshiya Fyazi discussed with the Commission a Memorandum proposing a project to define the meaning of the term "traumatic event" as it appears in N.J.S. 43:16A-7(a)(1), and as discussed in *Mount v. Board of Trustees, Police & Fire Ret. Sys. (PFRS)*, 233 N.J. 402 (2018).

Ms. Fyazi stated that the accidental disability pension statute was originally brought to the Commission's attention in 2017. *Moran v. Board of Trustees, PFRS* was discussed in the context of whether "traumatic event" was meant to reserve the pensions for those injured through an "undesigned" or "unexpected" event; or, to preclude those with a pre-existing injury from collecting additional benefits. At that time, the Commission had authorized the project to move forward warranting attention to low-level exposures to toxins. The lack of clarity in N.J.S. 43:16A-7(1) was subsequently addressed by the Court in *Mount v. Bd. of Trs., PFRS*.

In *Mount*, the Supreme Court reviewed two findings rendered by the Police and Fireman's Retirement System ("PFRS") and the Board of Trustees (the "Board") and considered whether each police officer's claim of incapacitation as a result of a mental stressor without physical impact warranted an award of accidental disability retirement benefits.

Officer Mount was diagnosed with post-traumatic stress disorder (PTSD) after he observed a horrific traffic accident at close range. He was neither trained nor equipped with protective gear necessary to help the teenage victims involved in the accident. Additionally, he viewed the impact of the accident on the victims and faced imminent threat of explosion.

Similarly, Officer Martinez was diagnosed with PTSD after being involved in a failed hostage negotiation. Officer Martinez had spoken with the hostage-taker over 12-hour period and heard his cries for help as the police entered the premises and shot him. Martinez then saw hostage taker's body as it was being transported outside. Officer Martinez, however, was trained as a hostage negotiator.

The statute does not define the term "traumatic event." To provide guidance on this issue, the New Jersey Supreme Court set forth standards to determine whether an individual has suffered a traumatic event. Courts have since applied the *Paterson* and the *Richardson* test.

Pursuant to the *Paterson* test, the Supreme Court determined that both Mount and Martinez demonstrated that they had witnessed events that were both "terrifying" and "horror inducing." In addition, each was objectively capable of causing a reasonable person in similar circumstances to suffer a disabling mental injury.

The Court, however, distinguished between plaintiffs Mount and Martinez when it applied the *Richardson* test. One of the prongs, under five-pronged *Richardson* test, requires the member to prove that the traumatic event was "un-designed" and "unexpected." The Court noted that Mount did in fact faced an "un-designed" and "unexpected" traumatic event because he was not experienced or trained to handle the horror of the vehicular accident. The Court, however, found that since Martinez was a trained hostage negotiator, he was aware that not all hostage negotiations succeed and that they may result in the death of a hostage taker. Hence, the Court determined that the failed hostage negotiation was not an un-designed and unexpected event, and held that Martinez was not entitled to accidental disability benefits.

The Supreme Court concluded that matters that involve mental disability arising exclusively from mental stressors pose challenges to system members, boards, counsel, and the courts, and invited the Legislature to refine the statutory language to clarify its intent regarding the term “traumatic event.”

Commissioner Long commented that she wrote the opinions in both *Paterson* and *Richardson* cases and that drafting a definition for what constitutes a “traumatic event” would be very helpful. Chairman Gagliardi stated that Staff should utilize the opportunity to consult with Commissioner Long given her in-depth knowledge of this subject matter.

The Commission unanimously authorized Staff to engage in further research and outreach in this area.

Clarification of “Interpretive Statement” Question

Mark Ygarza discussed with the Commission a Memorandum proposing a project to clarify N.J.S. 19:3-6, and explain which municipal actor has the authority to draft and submit an interpretive statement with a referendum ballot, as addressed by the Court in *Desanctis v. Borough of Belmar*, 455 N.J. Super. 316 (App. Div. 2018).

In *Desanctis*, the Mayor and Council adopted an ordinance appropriating funds for the construction of a pavilion, and authorizing the issuance of bonds and notes to finance part of the construction. Voters filed a protest petition to require a referendum on the ordinance. Subsequently, the Borough Administrator drafted an interpretive statement for the proposed ordinance to be voted on during the referendum. The Plaintiff thereafter filed suit to invalidate the interpretive statement because it was not voted on by the Mayor and Council, which deprived plaintiffs and the public an opportunity to comment on and object to its content. The Plaintiff alleged that the statement contained ‘inaccurate, misleading and extraneous information,’ presenting another ground for invalidation.

The Appellate Division considered whether the trial court correctly held that an interpretive statement submitted by the borough administrator, without a resolution by the Mayor and Council, is invalid. The Court examined N.J.S. 19:3-6 and concluded that an interpretive statement must be passed by a resolution or ordinance voted upon by the governing body of the municipality. The Appellate Division held that the statutory scheme weighs against allowing a mayor and council to “outsource” an interpretive statement. Pursuant to the Home Rule Act, a clerk is required to submit a petition, once it is found sufficient, “to the governing body of the municipality without delay so that they may approve it through a vote.” The language of the statement should be given to the governing body, subject to “the requirement that it fairly interpret the public question and set forth its true purpose of the ordinance.”

Mr. Ygarza explained to the Commission that he was unable to locate any legislative history for this statute. He added that he searched for any pending legislation related to N.J.S. 19:3-6 and found none.

Professor Bell stated that this was a fine project. Chairman Gagliardi noted that this is a “classic” Commission project because there appears to be a void in the language of the statute that can be addressed by the Commission. Staff was authorized by the Commission to conduct further research and outreach in this area.

Miscellaneous

Laura Tharney advised the Commission that the tentative 2020 meeting dates have been circulated among the Commissioners. Chairman Gagliardi noted that Professor Cornwell has a morning class in 2020 and asked the Commissioners to consider an afternoon meeting in February 2020 so that Professor Cornwell can be in attendance.

Adjournment

The meeting was adjourned on the motion of Commissioner Bell, which was seconded by Commissioner Bertone. The next Commission meeting is scheduled to be held on December 19, 2019, at 4:30 p.m.