

MINUTES OF COMMISSION MEETING

December 15, 2022

Present at the New Jersey Law Revision Commission meeting, held at 153 Halsey Street, 7th Floor, Newark, New Jersey 07103, were: Chairman Vito A. Gagliardi, Jr.; Vice-Chairman Andrew O. Bunn; Commissioner Virginia Long; Commissioner Louis N. Rainone; Professor Bernard W. Bell, of Rutgers University School of Law, attending on behalf of Commissioner Rose Cuison-Villazor; and Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

In Attendance

Dan Sperrazza, the Executive Director of External Affairs, New Jersey Department of Corrections, and Lisa Palmiere, the Director of Classification at the New Jersey Department of Corrections, were in attendance.

Minutes

The Minutes of the November 17, 2022, meeting were unanimously approved on the motion of Vice-Chairman Bunn, seconded by Commissioner Bell.

Autobus

Both the Petroleum Products Gross Receipts Tax Act and the Motor Fuel Tax Act contain provisions to exempt specific bus services from the tax on fuel. The language in both acts concerning this exemption are identical. The sentence governing the exemption, and the subject of controversy in *Senior Citizens United Community Services, Inc. v. Director, Division of Taxation*, 32 N.J. Tax 381 (2021), is 112 words long and contains ten conjunctions.

The issue before the tax court was whether the term “autobus,” as set forth in the Public Utilities statutes, has been incorporated into the taxation statutes, thereby excluding certain types of bus service from the tax exemptions otherwise permitted pursuant to the Motor Vehicle Fuel Tax and the Petroleum Products Gross Receipts Tax. This issue represented the intersection of complex areas of tax law and public utilities regulation and formed the basis of Samuel Silver’s discussion of the Commission’s Final Report on this subject.

Mr. Silver noted that the Tax Court engaged in an in-depth historical examination of the origin and evolution of the statute from the 1920s until the early 1990s. The *Senior Citizens United* Court determined that neither the express words of the 1992 enactment, nor the legislative history, indicate an intent that the definition of autobus in N.J.S. 48:4-1 was intended to apply to the Motor Fuel Tax exemption and Title 54. Rather, the clear legislative purpose of the Act is to relieve counties and third-party providers of the expense that would result from Department of Transportation regulation.

Consistent with contemporary legislative drafting practices, the language in the Appendix to the Report divides the statute into subsections to improve accessibility. The use of subsections is intended to eliminate the ambiguity concerning the nature of the exemption and eliminate the possibility that the Title 48 definition of autobus could be applied to the “special or rural transportation” exemption. Additionally, the proposed modifications separate the nested definitions from the substantive portion of the statute.

In connection with this project, the Commission sought comments from knowledgeable individuals and organizations. Mr. Silver stated that the New Jersey Division of Taxation indicated that the proposed amendments accomplish the Commission’s stated goal that non-profits, similar to those served seniors in *Senior Citizens United Community Services, Inc.*, will be exempt from the Motor Fuel Tax and Petroleum Products Gross Receipts Tax.

On the motion of Vice-Chairman Bunn, seconded by Commissioner Long, the Commission unanimously agreed to release the work as its Final Report.

Wrongful or Mistaken Imprisonment and NERA

Samuel Silver discussed with the Commission a Draft Final Report recommending modifications to N.J.S. 2C:43-7.2 to clarify whether a defendant wrongfully or mistakenly compelled to remain in prison beyond their prescribed sentence is still required to serve the entire period of parole supervision. Mr. Silver noted that in New Jersey, parole supervision for persons convicted of violent crimes begins upon the completion of the sentence of incarceration.

In *State v. Njango*, 247 N.J. 533 (2021), the New Jersey Supreme Court considered whether the period of parole supervision required under the No Early Release Act (“NERA”), should be reduced when the defendant’s time in prison exceeded the permissible custodial term authorized by their sentence. In the Appendix to the Commission’s Report, option one incorporates the guidance provided to Staff during the July 2022 meeting.

The Commission sought comments from numerous individuals and organizations regarding this project, including the New Jersey Department of Corrections (“NJDOC”) and the New Jersey State Parole Board (“Parole Board”). The NJDOC provided the Commission with proposed language, that has been incorporated in the Appendix of the Draft Final Report and designated as option two.

Mr. Silver stated that in subsection (c)(2)(B) of Option 2, the language proposed by the NJDOC clarifies that the Judiciary, not the NJDOC, should award credit in the excess amount to reduce the defendant’s mandatory parole supervision after NJDOC has certified the calculation. This language also facilitates the exhaustion of the appellate process before taking the final steps to recalculate the defendant’s sentence.

Vice-Chairman Bunn inquired about the process of certifying the calculation by NJDOC, and the amount of time it would take to issue such a certification. Mr. Silver answered that in *Njango*, the Court remanded the matter to the New Jersey Parole Board to determine the amount of excess time served by the defendant. He added that the second option preserves that process by

directing that NJDOC calculate and certify the reduction amount while the first option does not provide the process of calculating the excess time served. Vice-Chairman Bunn noted his concern that the language does not compel prompt action by either the Parole Board or the NJDOC in a situation where an individual has already served excess time in prison and remains in custody.

Lisa Palmiere, Director of Classification at NJDOC, indicated that individuals subject to the process of calculation as set forth in option two would have already been released from custody because the determination that their custodial sentence had “max-ed out” would already have been made. She further explained that the amount of time required to make the calculation would depend on the complexity of the case but generally would take no longer than one to two days.

Vice-Chairman Bunn inquired about the process for obtaining this relief and whether applying the calculation is done by court order or is done administratively. Mr. Silver explained that in *Njango* the defendant filed a petition for post-conviction relief and requested the reduction of his mandatory parole supervision term. Ms. Tharney asked whether the defendant and court are provided with the calculation prior to filing such a petition or whether the filing of the petition triggers the calculation. Commissioner Long suggested that an administrative process for the calculation could provide that the issue be resolved between the defendant and parole without court involvement.

Dan Sperrazza, the Executive Director of External Affairs for the NJDOC, commented that a court must determine whether and how to apply a calculation to the defendant’s sentence. Although the NJDOC can provide the defendant and court with a calculation, the procedure set forth in option two appropriately aligns with the jurisdiction of the agency. Commissioner Bell proposed that in the unique situation where time is of the essence, the NJDOC should advise the court to ensure the process is expedited.

Commissioner Bell stated that these types of cases involve unique situations. As the person who is incarcerated nears their release date, the NJDOC will know the amount of time that the defendant will be on mandatory parole supervision. Presumably, the NJDOC will advise the court of the period of parole supervision and the court will act expeditiously. Commissioner Long noted that option two does not include the language “through no fault of their own,” that is included in the first option.

The Commission requested that Staff consider these comments and suggestions and provide the Commission with a revised report in 2023.

Rescue Doctrine

New Jersey’s Rescue Doctrine permits a civilian rescuer to recover damages for injuries they sustain because a culpable party placed themselves in a perilous position which invited rescue. The New Jersey Appellate Division has consistently applied the doctrine in cases where a rescuer is injured rescuing a person. The limitations on the rescue doctrine are based upon tort concepts of duty and foreseeability. Under the doctrine, liability attaches if the actor should reasonably

anticipate that others might attempt to rescue him from the self-created peril, and the rescuer is injured.

Whitney Schlimbach stated that in *Samolyk v. Berthe*, 251 N.J. 73 (2022), the New Jersey Supreme Court considered whether the rescue doctrine extended to those who voluntarily chose to expose themselves to a significant danger to safeguard the property of another. In this case of first impression, the Court declined to expand the rescue doctrine to include injuries sustained to protect property. Ms. Schlimbach stated that the Court recognized that an exception should be made in settings in which the plaintiff has acted to shield human life.

The Restatement Third of Torts extends the rescue doctrine to real and personal property. The majority of states follow the Restatement's treatment of the rescue doctrine regarding property. Ms. Schlimbach noted that the states that have declined to extend the doctrine to property have said that public policy cannot sanction expanding the rescue doctrine to imbue property with the same status and dignity uniquely conferred upon human life.

The New Jersey Supreme Court's refusal to extend the doctrine highlighted that the majority of states have adopted the restatement expansion, while New Jersey has adopted the minority view.

To this time there are no bills in the 2022-2023 legislative session proposing to codify the rescue doctrine. Whether the rescue doctrine should be codified or expanded to include injuries sustained to protect property, or whether the development of this doctrine should be left to the common law, involves policy determinations that are best suited to the Legislature.

Commissioner Long questioned whether the Commission should recommend to the Legislature that there should be a codification of some part of the Rescue Doctrine. Laura Tharney asked whether even such a limited recommendation would be considered policy, noting that in the past the Commission has brought matters to the attention of the Legislature without a specific recommendation. Chairman Gagliardi stated that the case law on this subject is clear and that it is sufficient to bring this subject to the attention of the Legislature. Commissioner Bell supported the position of not recommending any action. Vice-Chairman Bunn and Commissioner Rainone concurred. Commissioner Rainone added that he believes that the Legislature will find it interesting that animals are considered property.

On the motion of Commissioner Bell, seconded by Commissioner Rainone, the Commission unanimously agreed to release the work as its Final Report on this subject.

Self-Representation in Involuntary Commitment and Termination of Parental Rights Matters

Samuel Silver discussed a Draft Final Report recommending modifications to the statutes governing self-representation of individuals faced with the termination of their parental rights and those subject to involuntary commitment as a sexually violent predator. Mr. Silver explained that this issue was brought to Staff's attention by the Supreme Court decisions in *In the Matter of Civil*

Commitment of D.Y., 218 N.J. 359 (2014) and *New Jersey Division of Child Protection & Permanence v. R.L.M.*, 236 N.J. 123 (2018).

In *D.Y.*, the defendant was convicted of sexual assaults on minors in federal and state court, and the state petitioned to involuntarily commit him. The *D.Y.* defendant did not want a court appointed attorney, and the Court denied his request to proceed *pro se*. The Appellate Division affirmed the trial court's denial of the defendant's request to represent himself. The Supreme Court considered the legislative intent behind N.J.S. 30:4-27.29, which provides that "[a] person subject to involuntary commitment shall have counsel present at the hearing and shall not be permitted to appear at the hearing without counsel." The *D.Y.* Court held that individuals subject to involuntary commitment proceedings must be fully represented by counsel or be represented by standby counsel. The Court provided guidance regarding the nature of the waiver of the right to counsel, but not how or when a court must be notified of the request to proceed *pro se*.

In *R.L.M.*, a parent who lost parental rights to five of his children was facing proceedings to terminate his rights to his sixth child. He wavered between self-representation and representation by counsel and was disruptive. The Court terminated his parental rights, and the Appellate Division affirmed the trial court. The Supreme Court noted that, unlike the SVP statute, the relevant statute – N.J.S. 30:4C-15.4 – does not contain mandatory language regarding representation of parents during proceedings to terminate their parental rights. The Court again provided some guidance regarding the procedure for waiving counsel, but did not explain how to "timely, clearly, or unequivocally" assert the right to self-represent.

Mr. Silver stated that outreach was conducted to a number of individuals and organizations, and comments were received from the Office of the Attorney General, Department of Law and Public Safety, Division of Law ("Division"). The Division proposed the addition of the word "timely" to N.J.S. 30:4C-15.4(2)(A), to emphasize that the family court is charged with balancing the timing of the self-representation request with the permanency needs of the child. Mr. Silver noted that N.J.S. 30:4-27.29(d)(1), governing sexually violent predator proceedings, does not impact a third-party in the same way that the parental rights termination statute does.

Mr. Silver requested that the Commission provide guidance with respect to the addition of the word "timely" to both statutes, but particularly with respect to the statute governing termination of parental rights.

Commissioner Bell noted that, although a "timely" requirement makes sense, the lack of a concrete time period could lead to a wide variety of acceptable formulations of the word in practice. Commissioner Rainone agreed. Commissioner Long added that the word would not have much meaning in practice as varied circumstances would make different time periods "timely."

Mr. Silver said that Staff reviewed self-representation requests in the context of criminal law. He explained that in *State v. Thomas*, 362 N.J. Super. 229, 240 (App. Div. 2003), the court found that a request to represent oneself made six weeks prior to trial was reasonable, but in *State*

v. Pessolano, 343 N.J. Super. 464, 473 (App. Div.), *certif. denied*, 170 N.J. 210 (2001), a request made after the jury was selected and before opening statements was denied. Mr. Silver stated that, pursuant to the proposed language in the relevant sexually violent predator statute, the request must be made prior to the preliminary “20-day” hearing or prior to final hearing.

Vice-Chairman Bunn questioned whether the addition of the word “timely” is necessary given that the statute already requires the request be made prior to the hearing. Chairman Gagliardi and Commissioner Rainone agreed that the statute already imposes a timeliness requirement in that sense. Commissioner Long added that the word “timely” gives the impression that there is an additional requirement, which could lead to unnecessary litigation.

Commissioner Bell expressed his concern that the statute does not provide “notice” regarding the time within which a request to represent oneself must be made. Vice-Chairman Bunn responded that determination would require balancing the specific facts of the case, including who is affected by the delay caused by the request for self-representation. Chairman Gagliardi, Vice-Chairman Bunn, and Commissioner Long agreed that it is not the Commission’s place to set a defined time period. Vice-Chairman Bunn added that the trial court is likely in the best position to determine the timeliness of a request. Chairman Gagliardi suggested that in both statutes the word “timely” be replaced with the phrase “reasonably in advance of the court hearing.”

On the motion of Vice-Chairman Bunn, seconded by Commissioner Rainone, the Commission unanimously agreed to release the Final Report with the amended language proposed by Chairman Gagliardi.

Misrepresentation of Material Fact in Income Tax Context

Samuel Silver discussed with the Commission a Revised Draft Tentative Report with proposed modifications to the tax assessment statute in N.J.S. 54A:9-4. The proposed modifications would: make the statute more accessible; remove the five-year statute of limitations on assessments for erroneous refunds induced by fraud to eliminate the apparent conflict between the two fraud exceptions; and remove the phrase “misrepresentation of material fact” from the statute.

These issues were brought to Staff’s attention after reading *Malhotra v. Director, Division of Taxation* 32 N.J. Tax 443 (N.J. Tax 2021). In *Malhotra*, the Court determined that the phrase “misrepresentation of a material fact” signified more than a mistake but less than fraud. To this time, the New Jersey tax statutes do not define the phrase “misrepresentation of a material fact.” An in-depth examination of N.J.S. 54A:9-4 identified an apparent statutory conflict between the two fraud exceptions.

During the October 2022 meeting, Commissioner Long requested additional information regarding the enactment dates of the two fraud subsections in the statute. Mr. Silver reported that the subsections were enacted in 1976, and that the legislative history did not provide any

explanation for the divergent time periods. He noted that while not dispositive, the language in the New Jersey statute closely tracks the federal statute governing assessments.

Mr. Silver discussed the modifications set forth in the Appendix. First, the modifications use contemporary statutory drafting practices to make the statute more accessible. Next, the five-year statute of limitations applying to erroneous refunds induced by fraud or misrepresentation is removed to eliminate the apparent conflict between subsection (c)(1)(B), governing fraudulent or false returns, and (c)(4), governing erroneous refunds obtained by fraud/misrepresentation. Finally, the phrase “misrepresentation of a material fact” is eliminated from (c)(4) and replaced with “false or fraudulent return,” a phrase used earlier in the statute.

Mr. Silver clarified that the modifications to subsection (c)(1)(B) would address instances in which a taxpayer files a false or fraudulent return with the intent to evade taxes and a refund is issued. In addition, pursuant to the Commission’s discussion of the Draft Tentative Report in October 2022, a cross-reference to subsection (c)(6) was added and the proposed language in subsection (c)(6) relating to false and fraudulent returns was made consistent with the language in subsection (c)(4).

Finally, Mr. Silver relayed that he has been in communication with Michael Benak, a partner at McCarter & English and a member of the New Jersey Supreme Court Committee on the Tax, and Nylema Nebbie, a partner at Cleary, Jacobbe, Alfieri, Jacobs, and the Chair of the Legislative Subcommittee on Tax. These individuals have offered to communicate with Staff regarding tax-related projects.

Chairman Gagliardi clarified that the Commission will provide both alternatives set forth in the Appendix to the public for their comments. Vice-Chairman Bunn noted that the language in subsection (c)(6) focuses on the intent to file a false or fraudulent return, so language indicating that the false or fraudulent return must be “intentionally filed” should be added to subsection (c)(4)(B). Commissioner Bell suggested that the language in subsection (c)(6) could be conformed to that in (c)(4)(B) by eliminating the reference to intent in subsection (c)(6). Vice-Chairman Bunn agreed with Commissioner Bell’s proposed modification.

As amended, and on the motion of Commissioner Long, seconded by Commissioner Bell, the report was released as a Revised Tentative Report.

Proposed Meeting Date

Laura Tharney reminded the Commission that the January meeting will be held on January 26, 2023, at 10 a.m. instead of on the third Thursday of the month, which is January 19, 2023. Commissioner Rainone asked whether the remote option will still be available in 2023, noting that such an arrangement has become common for public bodies and allows for increased public participation. Ms. Tharney said that the remote participation option will continue to be offered in 2023, noting that this provides an opportunity for commenters to appear and allows them to choose whether they want to provide the Commission with written or oral comments regarding a project.

Miscellaneous

Ms. Tharney confirmed that the Commissioners have received a copy of the 2022 Annual Report. She noted that although it does not appear as an agenda item, it has been distributed in advance of the January 2023 meeting to provide each Commissioner with the opportunity to provide comment in advance of the statutory deadline to file the report with the Legislature.

Adjournment

The meeting was adjourned on the motion of Vice-Chairman Bunn, seconded by Commissioner Bertone, and unanimously agreed to by the Commission.

The next Commission meeting is scheduled for January 26, 2022, at 10:00 a.m., at the office of the New Jersey Law Revision Commission.