

## **MINUTES OF COMMISSION MEETING**

**December 16, 2021**

Present at the New Jersey Law Revision Commission meeting, held at the law offices of Porzio, Bromberg, Newman, P.C., 100 Southgate Parkway, Morristown, New Jersey 07962-1997, and simultaneously via video conference, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Virginia Long; Commissioner Andrew O. Bunn; 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**

Commissioner Bell requested a modification to the Minutes pertaining to Mental Incapacity. He asked that the third paragraph in that section be amended to say “Commissioner Bell also expressed concern that there may be a policy question involved in situations where individuals have *knowingly* ingested an intoxicant.”

Commissioner Bell also requested a modification to the Minutes pertaining to the Transfer of Jurisdiction in Tax Challenges. He requested that the third paragraph on page six be amended to remove the fifth sentence of that paragraph.

With the modifications proposed by Commissioner Bell, the Minutes of the November 18, 2021, meeting were unanimously approved by the Commission on the motion of Commissioner Bunn, seconded by Commissioner Bell.

### **County Commissioner**

Samuel Silver discussed with the Commission a Draft Final Report that recommended statutory modifications to eliminate references to the term “freeholder” and “chosen freeholder” from the New Jersey statutes where appropriate.

During the Commission’s examination of the term “workhouse,” a County Counsel requested that the term “freeholder,” which appears in many of the same statutes as the term “workhouse,” be replaced with the term “County Commissioner.”

The term freeholder appears in 1,253 New Jersey Statutes. An individual accessing any of these statutes will encounter this term in any number of different contexts – governmental, non-governmental, or organizational. These statutes span thirty-seven titles, appendices, and validating acts.

In connection with this Report, Staff sought comments from knowledgeable individuals and organizations regarding the proposed modifications. The Commission received support from

the Commissioner of the Department of Community Affairs, Lieutenant Governor, Sheila Oliver. Mr. Silver stated that Commissioner Oliver agrees with the Commission's recommendation to replace the term "Freeholder" and "county freeholder" in each of the statutes in which it appears with the term "county commissioner." Commissioner Oliver stated that such a modification will ensure that the term "freeholder" is removed in all instances.

On the motion of Commissioner Bunn, seconded by Commissioner Bell, the Commission unanimously voted to release the Final Report.

### **Indemnity**

Samuel Silver discussed with the Commission a Draft Final Report recommending the clarification of the statutes pertaining to the defense or indemnification of State and County employees in legal actions (N.J.S. 59:10A-1 and N.J.S. 40A:14-117) as discussed in *Kaminskas v. Office of the Attorney General*, 236 N.J. 415 (2019).

Mr. Silver stated that the Tort Claims Act, N.J.S. 59:10A-1, provides that the Attorney General shall, upon the request of a current or former employee of the State, provide for the defense of an action brought against the employee on account of an act or omission within the scope of their employment. Similarly, pursuant to N.J.S. 40A:14-117, the governing body of a county is required to provide a member of the county police with the necessary means for the defense of any action arising out of or incidental to the performance of the officer's duties.

With some frequency, county employees are called upon to act on behalf of the State in the prosecution of criminal cases. Mr. Silver explained that the New Jersey statutes do not address a situation in which a county officer is called upon to participate in a State criminal prosecution, and is subsequently sued, and both the county and the State decline to indemnify the employee. This was the situation that the New Jersey Supreme Court considered in *Kaminskas v. Office of the Attorney General*, 236 N.J. 415 (2019).

In connection with this Report, Staff sought comments from knowledgeable individuals and organizations regarding the proposed modifications to N.J.S. 59:10A-1 and 59:10A-2. The Atlantic County Counsel offered written support for the modifications proposed by the Commission, noting that it is not uncommon for county employees, particularly in the law enforcement sector, to perform duties which are clearly for the benefit of the State. When indemnification is sought, he continued, the Attorney General's Office consistently takes a narrow view of the defense pursuant to *Wright v. State*, 169 N.J. 422 (2001). He concluded that the Commission's proposed statutory amendments would make it easier for county employees to claim the benefit of defense and indemnification.

Mr. Silver stated that the Commission also received support for this project from an attorney in private practice who agreed with the Commission's proposed modifications for fairness reasons. In addition, he noted that these changes would encourage subordinate agencies to provide their staff and resources to the State and lessen the burdens on local and county governments.

Mr. Silver advised the Commission that, in anticipation of the meeting, Commissioner Bell provided Staff with proposed modifications to the language set forth in the Appendix. Based upon Commissioner Bell's proposals, Mr. Silver prepared a Draft Supplemental Appendix, which was emailed to each Commissioner prior to the meeting.

Commissioner Bell recommended modifying the language in subsection a. of N.J.S. 59:10A-1 to clarify the identity of the individual making a request to the Attorney General for indemnification. In addition, he proposed moving subsection b.(2)(D) to the beginning of the list of requirements set forth in subsection b.(2), because if the work performed does not satisfy that requirement, the analysis would cease.

With respect to N.J.S. 59:10A-2, Commissioner Bell recommended that a reference to the requesting party's employment be inserted into subsection a. to clarify that it applied only to State employees. In addition, he suggested that the proposed language in subsection b., which mirrored the list of requirements in N.J.S. 59:10A-1b.(2) – designated as Option #1 - could be replaced with more streamlined language that links the two statutory sections together, referred to as Option #2.

Commissioner Bell also suggested modifying subsection d. to address situations in which the Attorney General receives a request from a public entity other than the State of New Jersey that would give rise to a conflict of interest between the parties. Commissioner Bell had previously asked Staff to ascertain how the Attorney General addresses such conflicts of interest. Mr. Silver advised the Commission that pursuant to N.J.S. 59:10A-5 the Attorney General may provide for a defense by utilizing an attorney from his office, other counsel, or with counsel provided by an insurer.

Chairman Gagliardi noted that Staff had contacted a number of diverse entities concerning this project and received no negative comments. Commissioner Bell expressed his appreciation for Staff's consideration and incorporation of his comments, as well as the additional research concerning the appropriate manner of dealing with conflicts of interest.

Commissioner Bunn expressed a preference for the language in Option #2 of N.J.S. 59:10A-2b. He noted that by incorporating the list of requirements in N.J.S. 59:10A-1 by reference, it will allow future requirements to be incorporated without the necessity of modifying both statutes. Commissioner Long expressed her support for Commissioner Bell's revisions and also favored Option #2.

On the motion of Commissioner Bell, seconded by Commissioner Bunn, the Commission unanimously voted to adopt Option #2 and the revisions in the Draft Supplemental Appendix, and release the work as a Final Report.

### **Uniform Recognition and Enforcement of Canadian Domestic Violence Protection Orders**

Samuel Silver discussed a Draft Final Report recommending modifications to the New Jersey statutes to permit recognition of Canadian domestic violence protection orders through incorporation of provisions of the Uniform Recognition and Enforcement of Canadian Domestic Violence Protection Orders Act (URECDVPOA). The URECDVPOA proposes the recognition of

domestic violence protection orders across international jurisdictions.

Mr. Silver noted that to determine whether any, or all, portions of the Act would be appropriate for enactment, the Commission examined the New Jersey statutes that address this area of law and the comments received from the Office of the Attorney General. The Commission's Revised Tentative Report was recirculated among the interested parties and individuals with proposed statutory modifications incorporating, with limited exceptions, the Attorney General's suggestions. The Commission did not receive any objections to the proposed modifications in the Revised Tentative Report.

Commissioner Bell asked whether the proposed amendments incorporated domestic violence protection orders from countries other than Canada. Mr. Silver explained that URECDVPOA specifically addresses protection orders that originated in Canada. Given the complexities of addressing European domestic violence prevention orders, the scope of the Commission's proposed modifications is limited to the recognition of Canadian orders. Mr. Silver did note that the language of N.J.S. 2C:39-7b(2) prevents a person who has been convicted in this state or elsewhere from possessing a weapon. It is possible that the phrase "or elsewhere" is broad enough that it may include orders or convictions issued by any foreign tribunal. Having reviewed the Attorney General's comments, a decision was made not to make any changes that would limit this statute because it was expansively written.

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

### **Title 26 – Health and Vital Statistics**

The Commission previously authorized a project to consolidate two definition sections in Title 26, the Health and Vital Statistics Act, at N.J.S. 26:1-1 and 26:1A-1. In January of 2019, the project was expanded to address other duplicative definition sections in Title 26. Whitney Schlimbach discussed with the Commission a Draft Tentative Report recommending changes to the Health Act to consolidate definitions where appropriate.

N.J.S. 26:1-1 and N.J.S. 26:1A-1 contain virtually identically defined terms. The first two sections of Title 26 each define "state department/department of health/department," "commissioner (N.J.S. 26:1-1 also defines "director"), "council," "division," "division director," and "local board/local board of health." Although the two statutes define "local board of health" differently, the definition in N.J.S. 26:1-1 provides more detail about the creation and powers of "consolidated" and "county" boards of health. Since "consolidated" boards of health are not mentioned again in Title 26 and "county" boards are defined in significant detail in N.J.S. 26:3A2-1 *et seq.*), the detailed definition is not necessary. Staff recommended the consolidation of the general definition section and the repeal of N.J.S. 26:1-1.

Ms. Schlimbach noted that there are many terms within Title 26 that are defined consistently and used repeatedly. These terms have been relocated and included in N.J.S. 26:1A-

1 along with the terms that were originally defined in both N.J.S. 26:1A-1 and N.J.S. 26:1-1. She noted that, of the terms that are defined repeatedly and inconsistently throughout Title 26, only those terms with definitions were close enough so that a common definition could be created have been included in the proposed general definition section.

The proposed amendments to Title 26 would eliminate terms in the original N.J.S. 26:1-1 and N.J.S. 26:1A-1 from the balance of Title 26. All forty-one duplicate definitions of “department/state department/department of health” are proposed for elimination because they are nearly identical.

In addition, Ms. Schlimbach recommended the elimination of fifty of the fifty-six duplicate definitions of the term “commissioner.” The remaining six definitions of “commissioner” are not proposed for elimination because they include references to the commissioner’s agents, employees, or designees. Ms. Schlimbach stated that eliminating these definitions poses a risk of narrowing the authority of the named commissioner or the commissioner’s agents. Conversely, if the definition were modified or consolidated to include a reference to a commissioner’s agents, it might expand the authority of the Commissioner beyond that granted by the legislature.

The duplicate definitions that are proposed for addition to N.J.S. 26:1A-1, as modified, would be eliminated elsewhere in the Title. All functionally identical definitions, with one exception – long term care facility – are proposed for elimination. Ms. Schlimbach noted that certain duplicate definitions were left unaltered if they were not consistent with the balance of the definitions of the term.

The remaining terms in Title 26 not proposed for modification fall into three categories. First, there are hundreds of defined terms that apply only to specific sections of the statute, and most are defined only once. These contain scientific and medical terms or proper names of programs, organizations, and officials. Next, Title 26 contains some terms that appear throughout the Title but the various definitions cannot be reconciled, often because they are defined in relation to a specific topic. Finally, there are terms that are common or have similar definitions that could be consolidated but that are rarely used outside the chapter or subchapter defining them.

During the 2020-2021 legislative session there were several pending bills that address various statutes within the Health Act, none of them address duplicative definitions in Title 26.

Commissioner Cornwell said that the Draft Tentative Report promotes efficiency without substantive change and was well done. Commissioner Long stated that this Report reflected excellent work. Commissioner Bell concurred and noted that the Appendix was well done and well organized. Chairman Gagliardi concurred with the sentiments of the other Commissioners.

On the motion of Commissioner Bertone, seconded by Commissioner Bell, the Commission unanimously voted to release the Tentative Report.

### **Public Hearing on Tenure Charges**

The Tenured Employees Hearing Law, at N.J.S. 18A:6-11, states that the consideration and

actions of a board of education as to a tenure charge made against an employee “shall not take place at a public meeting.” By contrast, the Open Public Meetings Act, N.J.S. 10:4-12(b)(8), provides that a public body may exclude the public from a portion of an otherwise public meeting when the public body discusses a matter involving employment unless the individual employees whose rights could be adversely affected request in writing that the matter be discussed at a public meeting. Karyn White discussed a potential project concerning the intersection of these two statutes with the Commission.

In *Simadiris v. Paterson Public School District*, 466 N.J. Super. 40 (App. Div. 2021), the Board of Education brought tenure charges against the plaintiff. Her attorney was provided with email notification of the proceedings two days before the Board certified the charges in a closed session meeting. The plaintiff filed an action seeking to void the Board’s certification because she had not received sufficient notice of the proceedings. The trial court concluded that the Board’s resolution was invalid because the plaintiff had been deprived of an opportunity to request consideration of the charges in a public meeting. The Board appealed the summary determination of the trial court.

The issue before the Appellate Division was whether N.J.S. 18A:6-11, which prohibits the discussion of personnel matters involving tenured employees in public, takes precedence over N.J.S. 10:4-12b.(8), which grants affected public employees the right to demand a public hearing.

The Court noted that pursuant to *Rice v. Union County Regional High School Board of Education*, 155 N.J. Super. 64 (App. Div. 1977), school employees whose rights could be adversely affected have the right to request a public hearing and are entitled to reasonable advanced notice. The *Simadiris* Court stated that no prior decisions citing *Rice* ever held that a tenured employee is entitled to a “Rice notice” when a board meets to consider tenure charges. Rather, the Court found little guidance from past examinations of *Rice*, or from the parties, regarding the current practice in New Jersey and how such proceedings are to be handled. In addition, the Court noted that there was no legislative history to illuminate the Legislature’s intent regarding the relationship between the Open Public Meetings Act and the current version of the Tenured Employees Hearing Law.

The *Simadiris* Court concluded that a tenured employee in this circumstance does not have a right to a public discussion of matters falling within the scope of the Tenured Employees Hearing Law, specifically N.J.S. 18A:6-11. The Court determined that the OPMA, applicable to all public bodies, provides only broad strokes as to the rights of public employees, and the Legislature could determine that some specific groups of public employees would be excepted from what the OPMA allows. The Court’s decision was guided by the language of N.J.S. 18A:6-11, which makes no provision for a tenured employee’s right to demand a public hearing.

The Court concluded that N.J.S. 18A:6-11 constitutes one of the exceptions to the Open Public Meetings Act, and requires that when boards of education engage in the tenure charge processes described in N.J.S. 18A:6-11, the consideration and actions shall not take place at a public meeting. Because such consideration and actions cannot occur in public, plaintiff is not

entitled to a *Rice* notice.

During the 2020-2021 legislative session, several bills addressed aspects of the Open Public Meetings Act (A1865, S3629, and S2570) but none addressed the issue discussed by the court in *Simadiris*.

Commissioner Cornwell noted that both *Rice* and *Simadiris* were decided by the Appellate Division and the absence of a decision by the New Jersey Supreme Court on this subject matter. Commissioner Long asked what interest a teacher's union might have if a teacher wished to have tenure charges discussed in a public forum. Chairman Gagliardi said that he has never known of a union that has requested that the discussion of tenure charges be discussed in public.

Commissioner Long said that this was an interesting project and asked what section b.(8) of the OPMA would apply to if not tenure charges. Chairman Gagliardi suggested outreach to the New Jersey Teacher's Association for comments on this issue. Commissioner Bell recommended caution and stated that he would not like to see special interests serve as the impetus for a Commission recommendation of a change to the law.

Commissioner Bunn asked which of the two statutes in issue in the case was enacted first. Chairman Gagliardi said that Staff should examine the order in which the statutes were enacted and the history behind the enactment of the tenure law. Commissioner Bunn noted that the confidentiality of the other individuals involved is a concern. Chairman Gagliardi stated that issues of harassment or bullying, for example, are discussed in an executive session. When students are involved, he continued, student ID numbers or initials are used to protect the victim. The statute provides for complete anonymity. The Chairman said that he is curious about what the statute seeks to protect and the reason for it. Commissioner Cornwell added that this was an unusual exception and was curious about how it was addressed in other states.

The Commission authorized Staff to conduct additional research to answer the questions raised by the Commission and to provide an update at a future meeting after which the Commission will decide whether additional work in this area would be useful.

### **Annual Report**

Ms. Tharney said that the Annual Report for 2021 will be modified to reflect the Commission's work at this meeting. She reminded the Commission that the Annual Report will be the agenda for the Commission's January meeting so that it can be approved for filing with the Legislature in January of 2022.

Commissioner Bell inquired whether the Annual Report addresses the impact of Covid-19 on the Commission's work. Ms. Tharney replied that the Statement of the Executive Director in the 2020 Annual Report briefly touched on the impact of the pandemic and the Commission's uninterrupted work. Commissioner Cornwell suggested that the 2021 Annual Report should also reflect that throughout the pandemic, the Commission has continued to operate without interruption. Commissioner Bunn added that it is significant that outreach, public participation, and attendance by both Staff and Commissioners continued without disruption.

### **Miscellaneous**

The meetings for January and likely February in 2022 are expected to be held remotely.

Chairman Gagliardi thanked the Commissioners and Staff for their work during 2021 and offered his best wishes to the Commissioners and Staff for a happy holiday and New Year.

### **Adjournment**

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

The next Commission meeting is scheduled for January 20, 2022, at 10:00 a.m.