

MINUTES OF COMMISSION MEETING

December 17, 2020

Present at the New Jersey Law Revision Commission meeting, held via video conference, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Andrew O. Bunn; Commissioner Virginia Long; Commissioner Louis N. Rainone; Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner David Lopez; and Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

Minutes

The Minutes from the November 19, 2020 meeting were unanimously approved by the Commission on the motion of Commissioner Bunn, which was seconded by Commissioner Long.

Towing Act

The question of whether or not the victim of a non-consensual towing ordered by a municipal actor must first exhaust administrative remedies before filing a lawsuit is not explicitly answered by the statutory text of N.J.S. 56:13-21. This issue served as the focus of the Draft Final Report that Samuel Silver discussed with the Commission.

In *Pisack v. B&C Towing*, 455 N.J. Super. 225 (App. Div. 2018), three separate plaintiffs had their cars towed at the direction of a municipal actor, without their consent. Each of the plaintiffs paid the charges to have their vehicles released from the various impound lots. Two of the three plaintiffs proceeded pro se, while the third was represented by an attorney. Two of the three trial courts determined that the Towing Act required that the plaintiffs exhaust their administrative remedies before filing an action in the Superior Court. The third trial court did not address this issue. The three plaintiffs appealed the decisions in their cases. The Appellate Division consolidated the appeals and determined that no exhaustion of administrative remedies was required before a litigant could file an action in the Superior Court.

After the Appellate Division issued its decision in *Pisack*, the Legislature amended the Towing Act. Prior to the *Pisack* decision, N.J.S. 56:13-16(f)(1) did not permit a towing company to charge a fee not included within the Director's schedule. The most recent amendment to the Towing Act, NJS 56:13-16(i), permits towing companies to charge fees not included in the Director's schedule if the fee is authorized by a municipal ordinance. This amendment does not, however, address the requirement that litigants exhaust their administrative remedies before filing an action against the towing company. The decision of the Appellate Division was ultimately upheld by the New Jersey Supreme Court in *Pisack v. B&C Towing*, 240 N.J. 360 (2020).

During the course of this project, the Commission received thoughtful comments from numerous stakeholders.

The Garden State Towing Association recognized that the holding of the Supreme Court in *Pisack* does not require a plaintiff to exhaust all administrative remedies before pursuing a claim in the Superior Court. Nevertheless, it asked the Commission to consider proposing language that would require any consumer challenging fees charged for non-consensual towing in accordance with a duly authorized fee schedule established by a municipality to exhaust all administrative remedies before filing suit in the Superior Court. The Conference of Northeast Towing Associations joined in this request. Since neither the Legislature nor the Court imposed such a requirement, Mr. Silver advised the Commission that the language in the Appendix to the Draft Final Report is consistent with the holding of the *Pisack Court*.

For ease of reference, Commissioner Bunn and Commissioner Long requested that Mr. Silver consolidate subsections b.(2) and (3). Chairman Gagliardi suggested that listing the administrative remedies prior to the phrase “before filing a claim in court” will benefit *pro se* litigants who are the majority of individuals that take advantage of this particular statute.

The Commission asked for subsection b.(2) to read as follows: “An individual who seeks reimbursement from a towing company for charges paid is not required to exhaust administrative remedies with either the Division of Consumer Affairs, or any dispute resolution entity identified or established by a municipality, before filing a claim in court.”

Subject to the modification requested by the Commission, and on the motion of Commissioner Long, which was seconded by Commissioner Bunn, the Commission unanimously voted to release the Final Report on this subject.

Kidnapping

The cases of *State v. Sherman*, 367 N.J. Super. 324 (App. Div. 2004) and *State v. Nunez-Mosquea*, 2017 WL 3623378 (App. Div. 2017) raised the fact that the “unharmful release” provision of New Jersey’s kidnapping statute, N.J.S. 2C:13-1(c)(1), does not set forth the type of harm contemplated by the Legislature for a defendant to be convicted of first-degree kidnapping. Samuel Silver said that the word “harm” does not appear in the current kidnapping statute but the term “unharmful” appears in subsection c. and is referred to as the “unharmful release” provision.

In *State v. Nunez-Mosquea* the victim was kidnapped at gunpoint and forced into a van. She was taken to a location and sexually assaulted by the defendant before being released. From the defendant’s home, and car, the police recovered evidence sufficient to arrest the defendant. The defendant was convicted for first degree kidnapping and sentenced to 25 years in state prison.

By contrast, in *State v. Sherman*, the defendant abducted and attempted to ransom a child. During the abduction, the defendant built the child a pillow fort and gave her snacks. After a day, he abandoned his ransom plot and returned victim in “good condition” with no signs of “physical injury. The victim, however, was subsequently diagnosed with post-traumatic stress disorder.

The “unharmful release” provision of the kidnapping statute, N.J.S. 2C:13-1(c) includes emotional or psychological harm. Since the *Sherman* decision, the Judiciary has amended the Model Jury Charge (MJC) for kidnapping on two separate occasions. In 2007, the MJC was

amended to provide that the State must prove that the defendant “knowingly harmed” or “knowingly did not release victim in a safe place prior to apprehension.” The latest modification to the MJC, in 2014, provides that when emotional or psychological harm is alleged, the State must prove that the victim suffered such harms beyond those inherent in a kidnapping. These harms must be either substantial or enduring.

The Commission’s proposed modifications to the kidnapping statute were sent to interested stakeholders including: the Attorney General of New Jersey; the New Jersey Administrative Office of the Courts; the New Jersey Municipal Prosecutor’s Association; the Association of Criminal Defense Attorneys; the Office of the Public Defender; the Criminal Law Section of the New Jersey State Bar Association; the New Jersey County Prosecutor’s Association and each County Prosecutor; several criminal defense attorneys; the New Jersey State League of Municipalities; the New Jersey Association of Counties; the New Jersey State Association of Chiefs of Police; and, the New Jersey Police Traffic Officers Association.

With slight modification, the Division of Criminal Justice (DCJ) advised the Commission that they found that the proposed revisions to capture the case law’s guidance and adaptations in a way that will provide greater comprehension and clarity to this statute. The DCJ expressed support for the Commission’s recommendation to incorporate the “knowledge” standard into the text of subsection a. of the statute. According to the DCJ, the collapse of the “removal” element clarifies the statute by streamlining the language without substantially altering its meaning as the two alternatives that currently exist in the statute do. This modification will reduce disputes over textual ambiguities; provide well-defined parameters for defendants, counsel, jurors, and jurists; and, by eliminating the ambiguous requirement of “removing a victim a substantial distance,” creates a better-defined parameter to delineate conduct. In addition, the DCJ expressed a preference for option numbered two, in subsection b. because it is a “a clearer expression of the intended elements.” Finally, the definition of harm will reduce misinterpretations of an essential element of the offense; clarify that emotional and psychological harm equals harm and reduces the risk of incorrect verdicts; and, will reduce the chance that prosecutor may inadvertently overlook kidnappings that do not include physical injuries.

A single clause in subsection f. that reads “substantial or enduring emotional or psychological harm, or both,” was recommended by the DCJ. This modification was adopted by Staff and included in the draft appendix to the Draft Final Report.

The Commission unanimously adopted the language set forth in option number two of subsection b. Thereafter, on the motion of Commissioner Bertone, which was seconded by Commissioner Long, the Commission unanimously voted to release the Report as a Final Report of the Commission.

Interpretive Statement

Arshiya Fyazi discussed with the Commission a Draft Final Report which focused on the issue of which municipal actor has the authority to draft and submit an interpretive statement with a referendum ballot. This issue was brought to the Commission’s attention after a review of the

2018 Appellate Division decision in *Desanctis v. Borough of Belmar*, 455 N.J. Super. 316 (App. Div. 2018).

In *Desanctis*, the Plaintiff filed a suit to invalidate the interpretive statement for a proposed ordinance drafted by the borough administrator. The Plaintiff alleged that because the interpretive statement was not voted on by the Mayor and the governing body, it deprived the Plaintiff and the public an opportunity to comment on and object to its content.

The Appellate Division examined N.J.S. 19:3-6 and concluded that the interpretive statement by the borough administrator was invalid, and that an interpretive statement must be passed by a resolution or ordinance voted upon by the governing body of the municipality. Further, the language of the statement must fairly interpret the public question and set forth its true purpose of the ordinance.

The proposed statutory modifications were derived from the Chancery Division case of *City of Orange Twp. Bd of Educ v. City of Orange Twp.*, 451 N.J. Super. 310 (Ch. Div. 2017), modifications proposed by the Commission at the June 18, 2020 meeting, and the language and the principals highlighted by the Appellate Division in *Desanctis v. Borough of Belmar*.

The modifications are intended to clarify that the interpretive statement must be approved by the governing body and must fairly and accurately reflect the ballot question presented to the voters. In addition, the proposed changes make it clear that approval of any interpretive statement shall not be unreasonably withheld by the governing body. The proposed amendments also modify the phrase “true purpose” so that voters have a better understanding of the consequences and scope of their vote for a public question.

Ms. Fyazi advised the Commission that the Tentative Report was distributed to interested stakeholders including: the New Jersey League of Municipalities; the New Jersey Association of Counties; the leadership of the Local Government Section of the New Jersey State Bar Association; the Municipal Clerk Association; and each of the twenty-one County Counsel Offices. During the comment period, no objections were received to the modifications proposed by the Commission.

Chairman Gagliardi asked Ms. Fyazi to replace the word “their” with the word “its” in subsection c. of the statute.

Subject to the modification requested by Chairman Gagliardi and on the motion of Commissioner Bunn, seconded by Commissioner Rainone, the Commission unanimously voted to release the Report as a Final Report.

Open Public Meeting Act

In *Kean Federation of Teachers v. Morell*, 2015 WL 3460030 (Law Div. 2015); 448 N.J. Super. 520 (App. Div. 2017); *cert granted* No. A-84, 2018 WL 3062207 (N.J. June 21, 2018), the trial court, Appellate Division, and the New Jersey Supreme Court addressed the Open Public Meetings Act (OPMA). Specifically, they addressed the notice requirements for personnel issues

to be discussed by a public body and the time within which a public body is required to release its minutes. These issues formed the basis of Samuel Silver's discussion with the Commission.

The Supreme Court examined a public body's notice obligations under the OPMA and affirmed the current practice of providing a *Rice* notice only when a public body intends to consider taking adverse employment action related to an employee during a closed session.

Mr. Silver advised the Commission that for a second consecutive session, the Legislature has introduced bills to expand the group of individuals who are to receive notice pursuant to OPMA, specifically N.J.S. 10:4-12(b)(8). Pursuant to S379/A748 public bodies are required to give written notice of at least two days to any officer or employee, and any adversely affected individual or individuals, in advance of any proposed meeting at which his or her employment, appointment, termination, evaluation of the performance of, promotion or discipline may be discussed. The matter or matters pertaining to that person shall be discussed in closed session unless the officer or employee and any adversely affected individual or individuals, but not a third-party representative, requests in writing, that the matter or matters be discussed in open session.

In *Kean Federation*, the New Jersey Supreme Court addressed a public entity's obligation to make meeting minutes promptly available to the public and decided that "reasonableness" was the key to assessing the promptness of a public entity's action in this area. The current legislation, S379 and A748, appear to strike a balance between the public's right to information and a public entity's autonomy and logistical flexibility. These bills require organizations to make minutes available as soon as possible but not later than 15 business days after the next meeting of the public body occurring after the meeting for which the minutes were prepared.

The Commission has long considered its responsibilities to include bringing matters to the attention of the Legislature. Since the Legislature is actively working in this area, Mr. Silver recommended that the Commission formally conclude its work in this area.

Chairman Gagliardi observed a typographical error on the cover of the report. He asked that Mr. Silver change the word "meeting", as it appears on the cover, to "meetings." Thereafter, on the motion of Commissioner Rainone, which was seconded by Commissioner Long, the Commission unanimously voted to discontinue work in this area.

Workhouse

Samuel Silver presented a Memorandum regarding the use of the term "workhouse" in New Jersey's statutes. Mr. Silver explained that during a review of the criteria necessary to sentence a persistent offender to an extended term of imprisonment, the Commission examined the types of institutions in which a defendant may be imprisoned. One of those identified institutions was the workhouse.

Mr. Silver described the history of workhouses in New Jersey, explaining that Middlesex County authorized the construction of New Jersey's first workhouse on Dec. 16, 1748. In the case *State v. Ellis*, 26 N.J.L 291 (1857), the New Jersey Supreme Court observed the difference between a workhouse and a jail, finding that the two are "entirely distinct in their origin, object and

government.” The case noted that jails are designed for the confinement of criminals, whereas workhouses are authorized by the County as a place of confinement for “disorderly persons or disobedient or intemperate slaves or servants.” The New Jersey Prison Inquiry Commission observed in 1918 that “disorderly or insubordinate slaves or servants could be confined to a workhouse upon the application of their masters.”

Mr. Silver described the statutory use of this term. N.J.S. 30:8-33, enacted in 1877, states that individuals sentenced to not more than 6 months would be delivered to the Sheriff who in turn would deliver the individual to the “master of the workhouse.” In 1976, all powers and duties of the Commissioner of Institutions and Agencies with respect to county workhouses were transferred to the Department of Corrections. Mr. Silver explained the origins of the term, and that it is not defined but is used in 53 statutes spanning 12 Titles. Mr. Silver noted that “county correctional facility” could be a straightforward and appropriate replacement for the term “workhouse”, and requested authorization to engage in additional research and outreach to determine whether it is appropriate to propose updates to the statutes.

Commissioner Bunn expressed surprise that this term remained in use in the statutes. The Commissioners all agreed. Commissioner Bunn said that there was no question the term should be removed. Chairman Gagliardi agreed and noted that the history of the term makes removal more compelling. The Commission unanimously approved work on this project.

Local Government Ethics

The Local Government Ethics Law (LGEL) was enacted to provide local government officials and employees with uniform, state-wide ethical guidance. To further this objective, a statutory code of ethics (the “Code”) was enacted within the LGEL.

In *Mondsini v. Local Fin. Bd.*, 458 N.J. Super. 290 (App. Div. 2019) the Appellate Division considered whether the Executive Director of a regional sewerage authority, in the wake of an epic storm emergency caused by Superstorm Sandy, violated the LGEL section prohibiting the use of one’s official position to secure unwarranted privileges. N.J.S. 40A:9-22.5 does not clearly state whether a violation of the statute may be predicated on public perception of impropriety, or whether a violation requires proof that the public official intended to use their office for a specific purpose.

Jennifer Weitz explained that in the aftermath of Superstorm Sandy, the Rockaway Valley Regional Sewerage Authority lost electrical power and was forced to maintain its operations through the use of diesel-powered generators. To prevent millions of gallons of untreated sewerage from being discharged into the Rockaway River, the Executive Director of the Sewerage Authority asked a member of the Board of Commissioners to commandeer a gas station and obtain food to feed essential personnel. Unbeknownst to the Executive Director, the Commissioner fueled two personal vehicles with the Authority’s gasoline.

A complaint was filed against the Executive Director by an unknown informant alleging that she violated subsection c. of N.J.S. 40A:9-22.5. The Local Finance Board (LFB) found that

the Executive Director violated subsection c., assessed, and simultaneously waived, a \$100 fine against her. The Executive Director appealed the decision to the Office of Administrative Law. After a review of the matter, the Administrative Law Judge (ALJ) concluded that the Executive Director had not violated the LGEL because a violation of subsection c. requires a showing of intent that was absent in this case. The LFB reinstated the violation and penalty but waived its enforcement. The Executive Director appealed the LFB's decision.

Rejecting the argument that the public perception of impropriety can serve as the basis for a violation of subsection c., the *Mondsini* Court concluded that “a public official or employee only violates [subsection c.] if she uses or attempts to use her official position **with the intent** to secure unwarranted advantages or privileges for herself or another.”

Commissioner Bunn expressed his support for this project, suggesting that the element of intent necessary to violate the LGEL should be clearly set forth in the statute. Commissioner Rainone observed that these fact patterns can become complicated and agreed that the statute should be clear. Chairman Gagliardi stated that this was a great project for the Commission. Commissioner Bell agreed with the Chairman but cautioned against completely jettisoning the appearance of impropriety standard.

The Commission authorized Staff to engage in additional research and outreach to determine whether the statute would benefit from modification.

School District of Residence

In New Jersey, the Commissioner of Education approves charter schools under the Charter School Program Act, or CSPA. The CSPA mandates that the school district of residence shall pay the charter school for each student enrolled. The meaning of the term “district of residence” was disputed in the recent Appellate Division case *Board of Education of Piscataway v. New Jersey Department of Education*, 2019 WL 2402545 (App. Div. Jun, 07, 2019). Chris Mrakovic discussed this subject with the Commission.

In that case, the Piscataway Township Public School District did not contain any charter schools. A number of Piscataway's resident students, however, attended charter schools in other districts. Piscataway sought a determination from the New Jersey Commissioner of Education that would relieve it of any obligation to pay for out-of-district student placements, arguing that the phrase “district of residence” referred to a charter school's physical location, noting that the Administrative Code defines “district of residence” as the district in which a charter school is physically located. The Department of Education disagreed, arguing that district of residence referred to the student's residence.

The Administrative Law Judge determined that the meaning of this phrase was ambiguous but concluded that the mandate that a school district fund its students' attendance at charter schools regardless of location was consistent with the overall purpose of the CSPA. The Commissioner adopted the decision of the Administrative Law Judge.

Following the holding in the earlier case *Highland Park Board of Education v. Hesper (Highland Park I)*, No. A-3890-14 (App. Div. Jan. 24, 2018), the Appellate Division agreed with the Commissioner, finding that the Department properly implemented the funding requirements by obligating Piscataway to provide funding for its students enrolled in charter schools located outside its school district. The Court made a specific finding that the definition in the Administrative Code is not applicable to student funding, and that “district of residence” refers to the student’s residence.

Commissioner Bell expressed concern about the school district’s argument in this case and Chairman Gagliardi observed that the issue of school funding is a genuine issue that is worthy of further examination.

Staff was authorized to conduct further research and outreach on this subject.

Miscellaneous

Laura Tharney advised the Commission that on October 29, 2020, the Uniform Voidable Transactions Act was passed by the Assembly by a vote of 71-0-0. In addition, on November 5, 2020, the bill was received by the Senate and referred to the Senate Commerce Committee. An identical bill, S3171, was introduced in the Senate on November 12, 2020, by Senator Nellie Pou.

In addition, she also explained that Assemblyman Benjie E. Wimberly and Assemblyman Jamel C. Holley had introduced A1926, which would require the New Jersey Law Revision Commission to identify statutes containing racially discriminatory language. Ms. Tharney advised the Commission that she had reached out to the sponsors, and that Christopher Mrakovcic and Benjamin Cooper have begun a preliminary investigation of this subject matter to assess its potential scope by examining a Virginia Commission Report on the same subject matter. The Commission unanimously agreed that this is a worthwhile expenditure of Commission resources, noting that recent Commission projects have addressed issues in this area.

Ms. Tharney also advised the Commission that Staff recently completed work on an article for the Seton Hall Legislative Journal. The article focuses on some of the Commission’s work in the area of criminal law, specifically five recent projects.

Finally, a draft of the Annual Report was distributed to the Commission. Ms. Tharney noted that an updated final draft will be provided in advance of the January 2021 meeting in anticipation so that the Commission can consider and authorized the release of the Report in advance of before the statutory deadline for its submission to the Legislature.

Adjournment

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

The next Commission meeting is scheduled to be held on January 21, 2021, at 4:30 p.m.