

MINUTES OF COMMISSION MEETING

November 20, 2014

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 Bunn, and Commissioner Virginia Long (participating by telephone). Professor Ahmed I. Bulbulia, of Seton Hall Law School, attended on behalf of Commissioner Patrick Hobbs.

Minutes

The Minutes of the October Commission meeting were unanimously approved, with the correction of the spelling of the name of a commenter in attendance, Paul Maticera, on motion of Commissioner Bunn, seconded by Commissioner Bulbulia.

Driver's Licenses - Penalties, N.J.S. 39:3-10

Shani Sarjeant briefly summarized the Report in *State v. Carreon*, and requested authorization to release the Tentative Report. Commissioner Long asked whether an appeal had been taken, noting that the Commission would likely want to refrain from taking action in this area of the law if the New Jersey Supreme Court were going to consider the case. Since Staff was not certain whether or not an appeal had been filed, Chairman Gagliardi directed that discussion of the matter be held until the December 2014 meeting, to afford Staff the opportunity to determine the status of any appeal.

Judgments and Enforcement

John Cannel requested that the Commission release a Final Report relating to Judgments and Enforcement. Mr. Cannel explained that, as directed by the Commission at the last meeting, the Final Report contained revisions to the homestead exemption contained in Section C-15. Chairman Gagliardi stated that, based on his review of the Minutes from the October meeting, the homestead exemption modification was the only outstanding issue on this project. Mr. Cannel confirmed that was the case. Chairman Gagliardi asked whether the Commissioners had any additional issues or concerns, and none were raised. Commissioner Long made a motion to release the Final Report, which was seconded by Commissioner Bunn.

Juvenile Sentencing N.J.S. 2A:4A-44d.(3)

Jayne Johnson presented for release the Draft Final Report concerning N.J.S. 2A:4A-44, a provision addressing extended term sentences for juveniles. The Report recommends adding the word "previously" to subsection d.(3) to codify the Supreme Court of New Jersey decision in *State in Interest of K.O.* The Court held in *K.O.* that in order for a juvenile to receive an extended sentence, the juvenile must have been previously adjudged guilty on at least two separate

occasions for a crime that would constitute one of the first or second degree if committed by an adult, and have been committed to an adult or juvenile facility as a result. The Commission's goal was to clarify the statute by adding the word "previously" to align with the Legislature's intent. The Commission approved the release of a Final Report on motion of Commissioner Bulbulia, seconded by Commissioner Bunn.

Clarification of Tenure Issues

Vito Petitti presented a Draft Tentative Report regarding the Clarification of Tenure issues and requested authorization to release it informally in order to conduct preliminary outreach. The Report addresses issues regarding tenure of non-teaching school board employees and that its language is intended to reflect the language of the decisions in this area of the law.

Mr. Petitti explained his concern regarding the concept of abandonment of a tenured position and asked whether the Commission thought that this issue should be more clearly defined. Chairman Gagliardi said that a statute doing so exists for school superintendents. He mentioned also that superintendent positions are not tenurable at this time, but that tenure rights for positions held below that of a superintendent remain intact and are retained by the individual. If a superintendent loses that position, he or she is may resume a lower tenured position. The Chairman recommended that Staff review the statute to which he referred, suggesting that it may serve as a model.

John Cannel also provided an example from earlier years when individuals who held tenured positions in the Office of the Public Defender were notified by letter that if they accepted another non-tenured position, they would lose all tenure rights in their present position. Chairman Gagliardi asked whether subsection d.2. was designed to preserve tenure rights and Mr. Petitti said that the subsection was intended to make clear that tenure is limited to the current position an individual holds, not the new position he or she is entering, and that tenure rights in the new position are not automatically granted as a result of the tenure achieved in the prior position.

Chairman Gagliardi noted that subsection d.1. is clear, but suggested that d.2. is ambiguous regarding which tenured position is at issue. Mr. Petitti explained that he tried to stay as true as possible to the court's language from the case, noting that the time period constituting abandonment of tenured positions remains uncertain. When asked by Commissioner Long whether there is a solution to that issue, Chairman Gagliardi explained the current procedures relating to clerks and secretaries, adding that there is no seniority without tenure.

Commissioner Bunn mentioned the use of collective bargaining agreements ("CBAs") and asked about the interplay between the statutory provisions and any applicable CBAs. Chairman Gagliardi explained that CBAs could help enforce seniority and, when Commissioner

Bunn said that at least one county has a CBA in conflict with the rules, Chairman Gagliardi explained the dynamic between contracts and CBAs in that situation.

Mr. Petitti asked whether Staff should add anything about CBAs in the statutory draft language. In response, Chairman Gagliardi suggested Staff could do so and indicated that various statutes, such as the superintendent statute mentioned earlier, have language that Staff could use for reference and as a model. Chairman Gagliardi suggested that careful consideration and drafting would be required in this area since the Court decision under consideration was very narrow and did not readily lend itself to codification.

Commissioner Long noted that, according to the decided cases, there is a problem when a person tries to reacquire a tenured job after having been removed from it, and Commissioner Bunn agreed, explaining that if an individual gains tenure in position A, then that person has tenure; but when that person is promoted to position B, then that person needs to earn tenure in that new position. If the person loses position B, the person retains tenure in position A. Chairman Gagliardi added that the structure of the statutes was designed not to inhibit tenured employees from pursuing a promotion.

Commissioner Long asked whether the changes were likely to create problems with the school board and Chairman Gagliardi said that he did not think that would be the case since the statutory language is not currently as clear as it could be, the effort to revise the statute is useful, and reaching out to commenters could shed more light on a possible solution.

Commissioner Long asked whether the tenure rights for a position the employee no longer holds could be limited. Chairman Gagliardi said that a limit may be appropriate, and that during the outreach phase, Staff would have the opportunity to determine if there is a consensus of support for it. Chairman Gagliardi suggested that Staff review other statutes in this area as well as their legislative history. Commissioner Bunn asked whether there should be certain instances where a time limit is set on the retention of tenure for a position the employee no longer holds. Chairman Gagliardi answered in the affirmative and gave the example of an individual changing school jurisdictions.

Staff will continue work in this area and conduct outreach to stakeholders in order to prepare an updated Report for submission to the Commission.

Expungement

Adam Lipps presented a Memorandum to the Commission resulting from Staff's review of the recent Appellate Division decision, *In the Matter of the Expungement Application of P.H.*, 436 N.J. Super. 427 (App. Div. 2014). In that case, the Appellate Division addressed the issue of whether an individual is eligible for an expungement under circumstances where an individual

admits to a civil violation in exchange for the dismissal of the criminal complaint. Although civil penalties cannot be expunged, the question is whether the records relating to the original criminal charges are eligible for expungement under N.J.S. 2C:52–6a. The Appellate Division held that “the more reasonable common-sense interpretation favors expungement in this instance” because the defendant’s criminal charges were “discharged without a conviction or finding of guilt” and “dismissed.” Mr. Lipps presented the issue to the Commission to determine if revisions to N.J.S. 2C:52–6a. would clarify the statute.

The members of the Commission and Mr. Cannel expressed concern about the difficulty associated with trying to categorize those situations in which an expungement would be appropriate. Justice Long suggested that Staff continue to monitor this area of the law. Chairman Gagliardi stated that the Commission will take no action on this project but requested that Staff continue to monitor the case law in this area.

Ante-Mortem Probate

Susan Thatch presented to the Commission an update regarding the project considering whether ante-mortem probate might be appropriate for New Jersey and if so, what form such a law might take. The authorization for this project was based largely upon the New Jersey Law Journal article entitled “Ante-Mortem Probate: Why Wait Until It’s Too Late” which described a policy approach adopted in four States (Alaska, Ohio, Arkansas and North Dakota). Since the Commission’s authorization, Staff has reached out to the Administrative Office of the Courts, the New Jersey State Bar Association, and legal practitioners in the area of trust and estates to determine whether this type of proposal would make sense for New Jersey. Ms. Thatch said that this project will also be the subject of a forthcoming Journal article discussing the benefits and potential pitfalls of ante-mortem probate.

Chairman Gagliardi asked about the nature of the responses resulting from the outreach. Ms. Thatch replied that to this time the informal comments reflect a mix review of support and criticism, adding that she anticipates formal comments from many of the entities at the conclusion of the comment period.

Collateral Consequences of Conviction

Mark Leszczyszak presented to the Commission an update regarding the Rehabilitated Convicted Offenders Act, the first part of the Commission’s ongoing Collateral Consequences of Conviction project. Staff’s most recent research revealed a continuing interest in this area. The American Bar Association’s Criminal Justice Section, prompted by a provision in the Court Security Improvement Act of 2007, created a national, interactive internet resource called the “National Inventory of the Collateral Consequences of Conviction,” or NICCC. Further, Staff

found that two new books were published recently regarding Collateral Consequences – one focusing nationally, the other with a focus solely on New Jersey.

Recently introduced New Jersey legislation also indicates the Legislature's interest in the challenges faced by those with a criminal history. The proposed legislation does not directly affect the RCOA, but appears to compliment or work in conjunction with it since the legislation makes references to certain sections of the RCOA. No new case law that would affect the RCOA has been decided since Staff's last work in this area. Finally, in addition to State-wide research for anything affecting the RCOA, Staff conducted a search for similar provisions enacted by other States. This search revealed that only seventeen states have enacted similar provisions to date. Of those, only four enacted RCOA-like provisions before New Jersey enacted the RCOA in 1968; the earliest being California in 1943, and the most recent enactment of a similar provision was made by Washington, D.C. in 2013.

Chairman Gagliardi asked whether Staff needed guidance on a particular issue. Mr. Leszczyszak explained that he would be happy to hear any comments or suggestions the Commission might have, but he simply wanted to update the Commission because of the time elapsed since the last presentation regarding this project, and in anticipation of his presentation of a DTR at an upcoming meeting.

Highlands Water Protection and Planning Act

Laura Tharney provided an update relating to the proposed project discussed at the July 17, 2014, Commission meeting regarding the Highlands Water Protection and Planning Act. Pursuant to the Commission's request for information from the Highlands Council, Ms. Tharney spoke with Andrew Davis, Chief Counsel for the New Jersey Highlands Council. Mr. Davis is an attorney with nearly 30 years of practice experience focusing in the land use, environmental and regulatory law areas. He has worked in both the private and public sectors, and his public sector work includes not only his current position, but time spent as the Director of Land Use Management and Legal Affairs at the New Jersey Meadowlands Commission, Assistant Counsel to New Jersey Governor C. Whitman, and a DAG in the Division of Law, Environmental Section.

Mr. Davis indicated that the NJLRC may not wish not undertake a project in this area, explaining that: (1) the statutory provisions in question are not found in an area of the statutes that the general public is called upon to interpret; (2) this may not be an area in which repeated litigation is to be anticipated since there are a finite number of industry participants, and they are aware of (and have been cooperating with) the expectations of the Council and the State; (3) the Highlands Act is a controversial and policy-laden area of the law; and (4) the issue raised by the case that brought this area of the law to the Commission's attention – while a legitimate issue – may not justify the expenditure of time that would be required to go through the process of

attempting to modify the statute in light of the concerns identified above, and there may not be legislative will to address the issue in light of the myriad other issues that compete for the attention of the Legislature in this area.

In light of this information, Ms. Tharney recommended no further action on this project and the Commission agreed.

Miscellaneous

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