

## **MINUTES OF COMMISSION MEETING**

**February 16, 2017**

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Commissioner Andrew O. Bunn, Commissioner Anthony R. Suarez, and Commissioner Virginia Long (participating via telephone). Professor Bernard W. Bell, of Rutgers Law School, attended on behalf of Commissioner Ronald K. Chen; Professor Edward A. Hartnett, of Seton Hall University School of Law, attended on behalf of Commissioner Kathleen M. Boozang; and Grace C. Bertone, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner Michael T. Cahill.

### **Minutes**

The Minutes of the January 2017 Commission meeting were approved on motion of Commissioner Hartnett, seconded by Commissioner Long; Commissioner Suarez abstained.

### **Uniform Asset Preservation Orders Act**

Jayne Johnson discussed the Draft Final Report relating to the Uniform Asset Preservation Orders Act (UAPOA). Ms. Johnson explained that the Draft Final Report reflects the Commission's discussion of the UAPOA during the January 2017 NJLRC meeting. She noted that the Report reflects the Commission's consideration of the comments provided by a member of the ULC Drafting Committee, the ULC's comments to the UAPOA, and the comments provided by the Administrative Office of the Courts (AOC) and the defense bar.

The Report identifies the Commission's concern that although the UAPOA is an Act for which uniformity among the states is significant, no other state has enacted the uniform law, in any form, in the years since the ULC first released it as the Uniform Asset-Freezing Orders Act in 2012. The Report also reflects the Commission's recommendation that the UAPOA not be enacted in New Jersey at this time in light of the potential conflicts with *Winberry v. Salisbury*, and the totality of the concerns presented by both the AOC and the defense bar. Ms. Johnson indicated that Commission Staff will continue to monitor this area of the law and give further consideration to the UAPOA as future developments warrant.

Justice Long observed that the Report thoroughly presented the Commission's careful consideration of the UAPOA. The Commission voted unanimously to release the Final Report, on motion of Commissioner Suarez, seconded by Commissioner Bell.

## Clarification of Tenure Issues

Vito Petitti discussed a Memorandum and Revised Draft Tentative Report regarding the Clarification of Tenure Issues. He stated that the newly proposed revisions were intended to clarify certain provisions of Title 18 and create a uniform statutory scheme that reconciles the potentially disparate statutory treatment of tenure involving teaching and non-teaching employees.

Commissioner Long inquired about the scope of the term “termination” in the proposed revision, specifically, she asked whether the term was intended to include situations where an individual is fired, as well as situations where jobs are eliminated, for example, in a workforce reduction that eliminates a position. Mr. Petitti replied that the revisions contemplated both scenarios. A question was raised as to whether a reduction in force is a termination and whether or not an individual terminated pursuant to such a reduction automatically goes back to his or her last position. Commissioner Bunn added that if the term “termination” is defined to indicate the “end of employment” that may address all of the aforementioned circumstances. The Commission requested that Staff determine whether the term “termination” is defined under the chapter, and whether the proposed language should define the term or clarify an existing definition.

Commissioner Hartnett inquired about the circumstances under which tenure may be preserved if a person is fired for cause, and whether that is what the Legislature intended. Commissioner Bell suggested a hypothetical in which an individual promoted to a managerial or supervisory position may not be a good fit in the new position, but may return to a previous position where the individual was an asset to the staff. Justice Long noted that the proposed revision to N.J.S. 18A:17-2d.3 may produce a harsh result for individuals who are not terminated “for cause.” Commissioner Hartnett suggested that the revisions may benefit from further resolving the issues arising from individuals moving across job categories in subsections d.2 and d.3 of the proposed revisions.

Commissioner Hartnett also suggested rephrasing the sentence in the paragraph of the Report immediately preceding the Commission’s Recommendation discussing Legislative intent. Commissioner Hartnett added that the Commission seeks to fill a gap in the statutory scheme that has led to inconsistent judicial decisions. Commissioner Bell added that the proposed language seeks to clarify the provision, and provide better guidance for school administrators when implementing the provisions governing tenure. Ms. Tharney stated that the language will be revised to state that the Commission seeks to reconcile the disparities highlighted by the Court in *DiNapoli v. Board of Education of the Township of Verona*, within the statutory scheme for determining tenure for nonteaching positions and for teaching positions.

Commission Bunn suggested adding the phrase “other than for cause” in subsection d.(3), so that the proposed language reads, “but is terminated, other than for cause.” Commissioner Bell acknowledged that the context of the phrase is understood for the purposes of the discussion, but inquired whether a statutory definition existed for the phrase “for cause.” Commissioner Bunn agreed and added that if the phrase was not defined in the statute, the phrase should be added only in a manner that provides greater clarity.

Mr. Petitti stated that he would continue to research the issues discussed and present the findings of his research at an upcoming meeting.

### **Hand-held Devices**

Vito Petitti discussed a Memorandum providing the findings of his research and outreach pertaining to hand-held devices. He stated that when this project was discussed at the October Commission meeting, Staff was directed to conduct outreach to municipal prosecutors, chiefs of police, and municipal defense attorneys to determine whether the language of N.J.S 39:4-97.3 maybe clarified without imposing policy, and, in response, he obtained feedback from individuals in those positions.

Commissioner Hartnett raised questions about the meaning and possible interpretations of the terms used in N.J.S 39:4-97.3, particularly “moving,” “operating,” and “driving.” He observed that while, in his view, the term “moving” is unambiguous, it may be helpful to look at the usage of this term and the other similar terms, and to review any model statutory language such as that provided by the National Highway Traffic Safety Administration (NHTSA). Commissioner Hartnett further observed that while the NHTSA Sample Texting While Driving Law features language specifying the “operation of a motor vehicle” rather than while using the term “moving,” he identified an option contained within the same subsection permitting states to cover only motor vehicles in motion. He noted that it may be useful to review similar state statutes and further review the treatment throughout Title 39 of the terms “moving”, “driving”, or “operating.” It was discussed that an underlying consideration for the statute seemed to be that if you are manipulating a device while your vehicle is moving, you should not be.

Mr. Petitti stated that he would continue to research the issues discussed and present the findings of his research at the March meeting.

### **Meaning of “conviction” in N.J.S. 2C:7-2(f)**

John Cannel discussed a Memorandum which considers the case of *In re J.S.*, in which the New Jersey Appellate Division held that the term “conviction,” as used in N.J.S. 2C:7-2(f), refers to the judgment of conviction or to the entry of a judgment of conviction, rather than to the

plea of guilty. The Commission, at the January 2017 meeting, requested that Staff examine the manner in which the term “conviction” is used throughout New Jersey’s statutory body of law, to assist consideration of the project’s scope and potential impact.

Mr. Cannel detailed the results of Staff’s research, notably that the term “conviction” is used in at least 748 statutes, with some provisions using the term multiple times. He also observed that the most common use of the term “conviction” occurs in penalty provisions. Mr. Cannel noted that while the prevailing view among practitioners interprets the term “conviction” to mean a “judgment of conviction,” the statutes do not use the term consistently.

Mr. Cannel stated that under the prevailing view it is much easier to establish a bright line when determining the date of conviction, and the inconsistencies in interpretation may have significant impact in certain contexts, particularly statutes governing expungements. Commissioner Hartnett added that another area where the interpretation of the term “conviction” is implicated involves sex offender registration, particularly in circumstances involving convictions imposed in other jurisdictions. In response, the Commission suggested indicating that the date of conviction for an offense occurring in a jurisdiction other than New Jersey should be determined by the law of that jurisdiction. Mr. Cannel noted that in this context determining when the proverbial “clock starts” is key.

Commissioner Hartnett suggested that as Staff considers draft language, it would be beneficial to look at the statutory provisions governing expungements and Megan’s law. It was suggested that Staff look at the federal Sex Offender Registration and Notification Act (SORNA), as well as state and federal regulations to see what guidance they may offer.

Commissioner Bell asked whether it would be beneficial to apply the proposed draft language throughout Title 2C, in each instance where the term “conviction” is used. Commissioner Long also suggested the consideration of a comprehensive approach, beginning by culling through all of the statutory references and identifying where the interpretation of the term “conviction” poses an issue or conflict. Commissioner Hartnett noted that it might be more well-received if the Commission pursues a more modest revision, applying only in the contexts of Megan’s Law and expungement. Licensing statutes were also identified as an area for review, in response to a question posed by Commissioner Hartnett concerning circumstances where it is of significant consequence if the interpretation of the term “conviction” implies a time later than the actual date of conviction.

During the course of the discussion, the following language was suggested for inclusion in the proposed N.J.S. 2C:7-2(f) draft language, “this subsection shall apply to provisions outside of this code unless the provision clearly provides otherwise.” It was also suggested that the draft

include language indicating that if a person is convicted in another state, the date of conviction is controlled by the law of that state.

Commissioner Bunn noted that the interpretation of the term “conviction” is important for purposes of calculating time and further research is needed to determine the scope of the project. The Commission requested Staff to further research the statutory provisions where the interpretation of the term “conviction” poses an issue or conflict and to prepare statutory language that may resolve the conflicts identified by the Appellate Division and those raised by the Commission.

### **Miscellaneous**

Ms. Tharney provided brief legislative updates regarding the bills pertaining to the Overseas Residents Absentee Voting Law and Bulk Sales.

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