

## **Commission on Law Enforcement Accountability, Community and Transparency**

### **Meeting Minutes for August 17, 2020**

Meeting held via videoconference at the Attorney General's Office in Concord, NH.

Deputy Attorney General Jane Young called the meeting to order at 9:34 a.m. and reminded participants that the meeting was being recorded.

Members were then asked to introduce themselves and state their present location for the record.

**Deputy Attorney General Jane Young** - from the Department of Justice with Kim Schmidt, Annie Gagne, and Nicole Clay

**Robert Quinn, DOS Commissioner** - Concord, NH

**Ahni Malachi, Executive Director, NH Commission for Human Rights** – Penacook, NH

**John Scippa, Director of Police Standards and Training Council** – Exeter, NH

**Rogers Johnson, Chair of the Governor's Advisory Council on Diversity and Inclusion** – Stratham, NH

**James McKim, President of NH NAACP** - Goffstown, NH

**Sawako Gardner, Justice of the NH Circuit Court** – Rye, NH

**Mark Morrison, New Hampshire Police Association** – Londonderry PD

**Charlie Dennis, NH Chief Association** – Hanover, NH

**Ken Norton, Executive Director of NAMI** – Great Cranberry Island, ME

**Joseph Lascaze, NH ACLU representative** – absent (Gilles Bissonnette as designee, Concord, NH)

**Julian Jefferson, Criminal Defense Representative** – Manchester, NH

**Ronelle Tshiela, public member and BLM organizer** – Exeter, NH

**Eddie Edwards, public member** – Booth Bay Harbor, ME

The Deputy Attorney General covered the list of participants today. We will start with Albert Scherr from UNH School of Law, then Matthew Broadhead of the NHAGO.

#### **Professor Albert Scherr, UNH School of Law (testimony on website)**

Recommendations for Commission to adopt:

1. Every prosecutor should have annual implicit bias training
2. Every prosecutor should receive training on racial profiling
  - a. Collaboration with outside agency
3. Prosecutors should be added to list of people who must report police misconduct to proper authorities
4. NH Supreme Court pass rule of professional conduct that require to report misconduct
5. Prosecutors must develop a comprehensive plan to increase diversity in their offices

6. At level of decision making, comprehension data collection to include race and ethnic data
  - Julian Jefferson – why add prosecutors to list of people required to report
    - o Prosecutors are powerful and have a unique relationships with police
  - Julian Jefferson – give an example not a Laurie issue
    - o Defense client bruising, officers changing testimony or lying on police reports
  - Julian Jefferson – because there is this relationship between PDs and prosecutors, danger of too much coziness
    - o It can.
  - Julian Jefferson – would rules help foster that culture that prosecutors have unique role
    - o Agreed.
  - Julian Jefferson – your take on Laurie List, what should this commission do
    - o
  - James McKim – what kind of training do prosecutors go through now
    - o Very dependent on which office: AGO, County Attorney, local and municipal (some police, city solicitor)
  - James McKim – should there be a training for prosecutors
    - o Statewide training, can be funding issues
  - James McKim – is there no procedure or not able for prosecutors to report
    - o There is no formal process
  - James McKim – what can we do to change the culture
    - o County attorney offices need to know when someone has filed a complaint against police for misconduct, need to have an established policy
  - James McKim – pressure to push cases through quickly, how to get rid of that or what does that look like
    - o Overcharging
  - Gilles Bissonnette – what do you mean when you refer to police misconduct that a prosecutor would report
    - o Credibility of an officer and important to develop processes to deal with, officer with too many resisting arrest charges, assaulting police officers, etc., officers cutting and pasting reports
  - Gilles Bissonnette – any utility to legislation banning racial profiling
    - o Yes, in theory.
  - Gilles Bissonnette – how prosecutors should make a plan to flush out racial discrimination
    - o Culture issue, need people inside these offices that understand the struggles
  - Lt. Morrison – fair to say no formal barriers that limit prosecutorial discretion
    - o Prosecutors have tremendous discretion, no barriers on prosecutorial discretion
  - Lt. Morrison – pretextual stop, you’re not saying these are illegal
    - o No.
  - Ken Norton – how many police officers arrested or detained individuals from these pretextual stops

- No concrete data, on anecdotal
- Ken Norton – how would the reporting occur at county attorney level
  - Complaint form on PD websites, county attorney’s office, courthouse, reporting system needs to be organized
- Ken Norton – PSTC doesn’t have ability to hold department accountable
  - Data collection is lacking, comprehensive collection about issues within PDs
- Ken Norton – all civil court proceedings resulting in payment should be made public
  - Very strong advocate of transparency, the public needs to be clear what it is costing them.
- Eddie Edwards – systemic racism in NH, do you believe that exists in NH and law enforcement
  - Yes
- Eddie Edwards – by what you described, that would make you a participant in systemic racism in NH
  - Yes, I tried to explain in my testimony my shortfalls
- Eddie Edwards – if you believe that, what should we do about defense attorneys that are complicit
  - Public defenders need implicit bias training, need to listen to communities of color, independent of those they represent
- Eddie Edwards – you believe that if the system hires more POC, issue would be addressed
  - No, it would be part of the culture of change and the problem addressed more explicitly
- Eddie Edwards – no actual data of prosecutorial overcharging
  - There is, Office of Cost Containment, between 25-35% of cases with appointed counsel, charges dismissed
- Eddie Edwards – what evidence are you leaning on for saying POC are stopped more often in pretextual stops
  - Part of the reason for this commission is to determine what is going on, my information is anecdotal, data needs to be collections in honest and thorough way
- Chief Dennis – training consistent for prosecutors
  - Training varies from prosecutor office to office and police department. Too many offices don’t have system in place to handle
- Chief Dennis – State. v. Ernest Jones, police had no reason to detain, so must be racial profiling
  - Hard pressed to figure out reason other than implicit bias
- Gilles Bissonnette – pretextual stops, nothing prohibits this commission from aborting that practice
  - I would agree completely
- Jane Young – this starts and ends with leadership, prosecutors are here to do justice, you have to be taught at an early age that you stand up to police when they do something right and something wrong

**Senior Assistant Attorney General Matthew Broadhead, NH Attorney General's Office  
(testimony is on website)**

Lawsuit against officer, file a claim under federal law (section 1983 claim) or state law (RSA 541-B and 507-B). Federal law, alleged violation of constitutional right (ex. 4<sup>th</sup> amendment). State law, intentional tort (ex. malicious prosecution, assault, battery). LEO may assert immunity, not a mere defense. Determined at earliest possible stage.

Federal: if no dispute, constitutional violation occurred and right was established such that a reasonable officer would have known the right was violated.

State: official immunity, officer is immune if acts within duties, not made in reckless manner; immunity under RSA 541-B, what was the intent; discretionary function immunity, deciding whether to conduct training or deploy resources.

Defense and indemnification: the State will defend and indemnify a State Trooper provided that the employee acted within the scope of his or her official duty.

- James McKim – unconscious implicit bias, how an act is rated as reasonable or unreasonable for police
  - o OIS, subjectively believed in fear of car being driven at him, court has to disregard that fear. Court will look at it objectively.
- James McKim – what recommendations would you give the commission
  - o Qualified immunity would need act of Congress to remove, state immunity provides harbor for officers that may make a bad guess in a gray area. Outside of that, no opinions and would defer to legislature and this commission to make recommendations
- James McKim – where could we go to get recommendations for this
  - o Officers themselves
- Eddie Edwards – NH NAACP stated they wanted to eliminate qualified immunity, but you support it (to James McKim)
  - o Believe there is a valid reason to have it, needs to be revised to address issues surrounding it
- Rogers Johnson – in talking with NAACP on Seacoast, national NAACP approach was directed towards national issues and larger communities, not direct to NH.
- Rogers Johnson – have heard there is effort to replace officers with community response team, would those people be protected by qualified immunity
  - o Would need to do more research to answer. As long as statute allows person to take action, they would fall under qualified immunity. Under state law, more unclear, always better when spelled out in law than trying to read between the lines.
- Rogers Johnson – should be recommendation of committee that the wording is clear to afford them qualified immunity
  - o Bystanders are not subject to liability by helping other bystanders
- Gilles Bissonnette – would you agree qualified immunity not enshrine in federal statute but that the courts came up with

- That it my understanding it is tied to the court
- Gilles Bissionnette – not limited in situations where officers make split second decisions
  - Officers obtaining GJ indictments, due process claims, etc.
- Gilles Bissionnette – understand rationale of doctrine, qualified immunity is federal construct, nothing bars this commission recommending state cause of action where qualified immunity is not a defense
  - The legislature can do what they'd like
- Gilles Bissionnette – would you agree that need to find case similar to defeat immunity
  - I don't know the case you're talking about and isn't the law in 1<sup>st</sup> Circuit. (Belsito Communications, Inc. v. James Decker 845 F.3d 13 (2016) )
- Gilles Bissonnette – if qualified immunity doesn't exist, can't argue at trial
  - It's a defense, every time there's a pending charge, officer shouldn't be subject to separate lawsuit to pressure dropping charges. Intended to protect government officials that engage in conduct that may touch upon constitutional rights.
- Gilles Bissionnette – when officer sued, even if invokes immunity, they're indemnified, if we didn't have qualified immunity, would be wonton and reckless
  - Correct. Pretty rare to not extend and defend officer.
- Gilles Bissionnette – qualified immunity, raised in every case
  - Raised in most cases
- Gilles Bissionnette – can be indemnified if acted in wonton and reckless way
  - Correct.
- Jane Young – officer conviction of crime, would immunity be raised
  - If our office prosecuting, we have made decision that criminal conduct, but would be considered wonton and reckless and would not be indemnified
- Director Malachi – if DOJ representing LEO, would it be logical that using qualified immunity to defend someone
  - Yes, ethically required to defend our clients
- Director Malachi – if LEO had done something criminal and DOJ was representing them, would you still use qualified immunity
  - It would be an uphill battle for officer making immunity argument
- Director Malachi – clear on what is reasonable for NH
  - Rogers Johnson – doesn't agree with Cofield's position
  - James McKim – working with Cofield to make recommendations specific to NH
- Ronelle Tshiela – make sure we are thinking about victims; qualified immunity can be a barrier to transparency, how do we ask police officers about qualified immunity when they are protected by it? Would like a more clear answer.
- Lt. Morrison – just because officer is immune, does that mean a victim or someone who was effected negatively has no one to sue
  - Under federal law, respondeat superior considers departments/municipality as responsible party
- Lt. Morrison – would you agree LEO are not regular people in the sense of the decisions they have to make and positions they are in
  - Agree, authorized to take custody

- Director Scippa – qualified immunity, examples of other types of positions that are allowed this
  - o Corrections officers, ICE, would need to look into others
- Director Scippa – school teachers
  - o Don't know the answer, have seen a case against a teacher or principal about not printing photo in yearbook, not sure if immunity applied
- Director Scippa – DOT officer or hearing officer
  - o Would have to be operating under color of law, would have to be constitutional violation
- Ken Norton – when is immunity raised
  - o Any time after complaint is filed
- Ken Norton – how does this come into play with deadly force
  - o Justification statute, OIS is special off-shoot of law
- Judge Gardner – Conrad case, could you touch upon that
  - o Officer who was behaving erratic in domestic situation involving his wife, detained by officers, resigned on the spot. Later brought unlawful detainment suit and granted sizeable ruling. Courts state should rule on immunity as early on as possible.

The Deputy Attorney General noted the schedule for tomorrow which will include Attorney Brian Moushegian, Attorney Gilles Bissonnette and Attorney Jake Krupski. Wednesday, August 19<sup>th</sup> will be a presentation from the Attorney General's Office on OIS and EES items. Public testimony will be Thursday, August 20<sup>th</sup>. Any testimony should be provided ahead of time and sent to [LEACT@doj.nh.gov](mailto:LEACT@doj.nh.gov), as well as anyone wishing to testify should contact us ahead of time.

The Deputy Attorney General requested a motion to adjourn. So moved by President James McKim and seconded by Director Ken Norton. A roll call vote was taken on the motion to adjourn and the votes were recorded as follows:

Deputy Attorney General Jane Young – Y  
 Commissioner Robert Quinn – Y  
 Director Ahni Malachi – Y  
 Director John Scippa – Y  
 Chairman Rogers Johnson – Y  
 President James McKim – Y  
 Justice Sawako Gardner – Y  
 Lt. Mark Morrison – Y  
 Chief Charlie Dennis – Y  
 Director Ken Norton – Y  
 Gilles Bissonnette – Y  
 Attorney Julian Jefferson – Y  
 Mr. Eddie Edwards – Y

Ms. Ronelle Tshiela – Y

The meeting was adjourned at 1:36 p.m.

DRAFT