

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

### **Meeting Minutes for August 20, 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, Nicole Clay (remotely)

**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** – Concord, 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** – absent

**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** – Ipswich, MA

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

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

**Eddie Edwards, public member** – Dover, NH

Minutes from August 18<sup>th</sup> and 19<sup>th</sup> will be addressed at next week's meeting on August 25<sup>th</sup>, 2020.

The Deputy Attorney General covered the agenda for today. We will have public testimony from the following individuals: Tonya Tyler, Rebecca Brown and Cynthia Mousseau, Attorney Larry Vogelmann, Laura Kelly, Rick Van Wickler, Nancy West, Attorney Chuck Douglas, Attorney Greg Sullivan, Attorney Stacy Ober, Sam Katz. Speakers will have 3 minutes to speak and will be held to that limit to get through all the testimony.

#### **Tonya Tyler, New Roads Project (testimony on website)**

Decade of law enforcement in Florida. PSTC should mandate all law enforcement agencies know how to investigate sex crimes and child abuse. Should be a state-wide policy on child abuse and sex crimes investigations.

**Rebecca Brown and Cynthia Mousseau, The Innocence Project (testimony is on website)**

- Joseph Lascaze – police accountability, given secrecy of Laurie List and disciplinary files, is there a way for the public to verify whether law enforcement is living up to exceptionalism
  - o The trend in wrongful convictions we find is officer did have issues
- Joseph Lascaze – when you work on NH cases, how many amount in misconduct if they were believed
  - o Hard to counsel clients when accused of lying, not infrequent
- Julian Jefferson – retaining records for 20 years, what are your thoughts
  - o Support as long as possible
- James McKim – alternative to Laurie List at all
  - o Now is the time to explore the option of committees
- James McKim – what might some of the pitfalls may be if we pursue
  - o Need to be a board representative of committee at large
- Joseph Lascaze – are you saying it’s potential a claim of misconduct could be unsubstantiated because investigator not given proper information
  - o Yes

**Rick Van Wickler, Retired Superintendent of Cheshire County Department of Correction (testimony on website)**

Why does Laurie List exist if no one can access? Board of nursing has availability, but why can't we have information on officers? Public servants should not fear examination or feedback from public. EES made public in the way medical personnel is monitored, personnel files retained 20 years post termination, any perception that police is above accountability is problematic.

- James McKim – do you have any data that supports that most training not used
  - o Not immediately available, witnessed in own institution
- James McKim – what might we recommend to address community connectivity
  - o 8 hours in-service not enough, give PSTC more opportunity to train Chiefs
- Joseph Lascaze – culture and chief law enforcement, up to Chief to enforce culture, in your time did you ever recommend individuals to Laurie List
  - o At least 5 times, send info to county attorney but not sure what happened
- Joseph Lascaze – aimed at preserving culture community would have faith in, that’s what you’re speaking about
  - o Yes
- Julian Jefferson – value in making recommendation about statewide agency to investigate police misconduct
  - o Does have merit and value

## **Attorney Lawrence Vogelmann, Shaheen & Gordon (testimony is on website)**

Specific examples in testimony. Civilian accountability for law enforcement violating rules. Kroll audit report for Salem Police Department. AGO oversight of officer involved shootings, found very few basis for lawsuit. Not clear whether officer should be disciplined, found civilly liable or should be charged. Needs civilian oversight. Thin blue line issues.

- Ken Norton – use of deadly force investigations, recommendations on how to revise that definition or how to address criminal investigations
  - o Impact on hiring and supervision of officers, mental health response, broader criminal investigation
- Ken Norton – should that be public, OIS investigation to make learning situation
  - o If investigation not shared, the public will demand information and is entitled
- Ken Norton – so there should be an investigation that goes beyond standard OIS
  - o Absolutely, any serious allegations should be more broad
- Joseph Lascaze – qualified immunity
  - o Two methods to litigation police misconduct, federal 1983 and state law, should have cause of action to address qualified and official immunity
- Joseph Lascaze – have you had to turn away client or case dismissed because of qualified immunity defense
  - o Have lost cases and turned away possible clients with civil rights violation issues
- Joseph Lascaze – have your clients expressed that suing law enforcement is more about accountability than monetary gain
  - o It's mixed
- James McKim – culture change, how do we address and what are your thoughts about that
  - o Thin blue line mentality has to change, top down effect
- James McKim – how might we check agencies for that, civilian review board, audits
  - o Encourage municipalities to stop hiring Chiefs at the end of their careers that have been thrown out of previous positions
- James McKim – are there many Chiefs out there or is this a challenge we face
  - o I don't know
- Commissioner Quinn – mental illness and where they intersect with police, recommendations towards improvement in mental health response
  - o Don't send officers in alone, send in trained professionals with mental health experience

## **Attorney Chuck Douglas (testimony on website)**

Represented many chiefs, officers, etc. Litigation is helpful. Strong believer in those rare cases where suits against officers or departments to hold them accountable. Advocates no immunity in state court and recommends to Commission:

1. Two state statutes that indemnify officers RSA 31:105 and 106 in the case of local officers, and RSA 99-D for State troopers.
  2. The State self-insures and covers those verdicts and expenses while the counties, towns, etc. have coverage through the mutual risk pool known as PRIMEX
  3. There are limits or caps on recovery of \$325,000 in cases against local officers or departments (507-B:4, I) and \$475,000 against the State (RSA 541-B:14, I)
  4. No claim can succeed if the employee whose conduct gives rise to the claim reasonably believes, at the time of the acts or omissions complained of, that his conduct was lawful, and provided further that the acts complained of were within the scope of official duties of the employee for the state
- James McKim – municipalities have insurance through PRIMEX, DAG Young said most if not all do, if we eliminate immunity, would be subject to pay out, how do we weigh small municipalities that are not insured vs. immunity
    - o Some towns and cities have commercial policies but if the town doesn't have capability, may not make sense going forward, greater good should prevail and get rid of official immunity
  - James McKim – make sense for state assistance to support towns without funds
    - o PRIMEX can tell you how expansive their network is, would use that
  - James McKim – based on four protection you laid out, why official immunity created in the first place, were they not in place when law was created
    - o Problem with *Everett* case, omits reference to RSA 31:106, appears that they didn't look at indemnity situation. Cites 31:104 and not 31:106, goes on about indemnity but since 1971 we've had indemnification statute for cities, towns, etc. for civil rights. They missed a key indemnity statute that is on the books and has been on the book for decades
  - Julian Jefferson – official immunity and how it came to be
    - o Been on the books since 1985, NH decided we needed something similar to federal immunity
  - Julian Jefferson – RSA 541 does create immunity, can you comment, and is RSA 541 itself immunity
    - o Judicially created official immunity is additional hurdle in police litigated cases
  - Ken Norton – investigations of OIS, recommendations
    - o Outside expert to review, does not help department review protocols that may have been violated in current review
  - Ken Norton – should public have some role in oversight
    - o Yes.
  - Ken Norton – if there was an investigatory body, should it be weighted toward police officers
    - o ADO has plenty of lawyer, so you don't want only police or only citizens
  - Joseph Lascaze – complaints of misconduct, do they come from community or incarcerated individuals

- Often letters from inmates, it's a mixed bag though, credibility assessment is important
- Joseph Lascaze – if immunity removed, there will be a floodgate of lawsuits but before litigation starts, you are vetting complaints, fair to say
  - There would be no floodgate, nor were there any before *Everett* case
- Lt. Morrison – RSA 541-B, does that not apply to just state
  - Correct, does only apply to state, RSA 507-B applies to everyone else
    - *Hawkins v. Sweeney* applied 541-B to the towns because there would be a problem otherwise,
- Lt. Morrison – 99-D applies to the state?
  - Only the state
- Lt. Morrison – 105 allows local select people can vote not to indemnify people, correct?
  - Prior to PRIMEX, almost every town uses 105. If municipality has PRIMEX, can use that, RSA 105 has been adopted by several municipalities. Cap of \$325,000
- Lt. Morrison – *Everett* case states that officers like me should be afforded same protections that the state has, is that where qualified immunity ties back in?
  - No, qualified immunity is the one in federal, if you don't bring federal case, not raised. In state cases, official immunity. If both counts brought, both issues raised.
- Lt. Morrison – It was also a way to incorporate protections for people who didn't work for the state, who didn't fall into these other statutes that applied only to state officers
  - *Everett* never mentioned state immunities or statutes, only deals with 507-B, don't think they even get into what happens if state, do mention 99-D but they don't really deal with state immunities as such, deals with municipal figures in the opinion itself
- Lt. Morrison – are you suggesting that AGO wouldn't be able to impartially investigate use of force cases
  - No malice intended, just perception (less so with municipal and county) of working with State troopers, etc and then investigating and (as mentioned by Deputy Attorney General Young) is limited to whether a crime was committed. Standard should be whether force was necessary (i.e. shooting at moving vehicles tactic).
- Lt. Morrison – Didn't alleviate concerns, but specific tactics are dissipating across the country because of effectiveness and departments are taking care of improvements themselves. Interviewing an officer post major event and need to do immediately or close to incident, physiological things that happened that may not make your statement as accurate, officers need time to recover, need to be careful when we start suggesting things like that. Will leave disagreements with some of your contentions as they are to have a complete picture.
  - Agreed, only concerns was waiting several weeks before speaking with officers. Page 847 of *Everett* just to clarify courts says, "because today we adopt for the first time, official immunity for municipal police officers."
- Jane Young – ways around the cap correct
  - Under section 1983, there is no state law that can cap that

- Rogers Johnson – contact with incarcerated individuals regarding looking for representation on misconduct, there would be a rush of individuals if immunity removed
  - o Incarcerated individuals are part of criminal justice system and Douglas works in civil justice system, there would be the difference
- Eddie Edwards – panel not leaning towards law enforcement individuals
  - o Doesn't have an issue with majority being law enforcement
- Eddie Edwards – in criminal justice system, police go through biggest vetting process
  - o Agreed. Issue he can see is not seeing VA file for officers who are veterans.
- Eddie Edwards – Bigger process for police than with judge and lawyers
  - o There is character and fitness but knows larger departments have deeper backgrounds, but don't know if can give answer
- Eddie Edwards – of all individuals in CJS, aren't they making decisions based on all facts they have, but officers are responding with limited facts
  - o I agree

\*Joseph Lascaze and Rogers Johnson continued discussion about reports received from incarcerated individuals and how best to assist

**Attorney Greg Sullivan, Malloy & Sullivan (testimony on website)**

Recommendations:

1. Repeal immunity for government employees
2. Amend 91-A to make all charges of law enforcement public
3. Civilian accountability board
  - a. Could consider putting it under PSTC (12 law enforcement officers and 2 citizens)

**Attorney Stacy Ober, American Kennel Club (testimony on website)**

The American Kennel Club's recommendation is that any uniform statewide system for the reporting, investigation, and punishment of "police misconduct" include any third-party or organization under contract or agreement with a law enforcement agency to assist with law enforcement responsibilities.

**Sam Katz (testimony on website)**

Racialized policing and misconduct regarding traffic tickets. Would like to see responsibility and accountability for disparity. Clear penalties for officer misconduct. Oversight board needed for police misconduct.

As a reminder, recommendations for this section are due Monday at noon. Please send to Nicole Clay and Kim Schmidt and we will compile for review on Tuesday. As a note, Director Scippa and Judge Gardner will be in and out on Tuesday due to scheduling conflicts.

The Deputy Attorney General requested a motion to adjourn. So moved by Mr. Joseph Lascaze and seconded by Director Ahni Malachi. 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 – absent  
Justice Sawako Gardner – absent  
Lt. Mark Morrison – Y  
Chief Charlie Dennis – absent  
Director Ken Norton – Y  
Mr. Joseph Lascaze – Y  
Attorney Julian Jefferson – Y  
Mr. Eddie Edwards – Y  
Ms. Ronelle Tshiela – Y

The meeting was adjourned at 1:22 p.m.