

CIVIL RIGHTS COMMISSION

October 23, 2020
Via Go to Meeting

1. CALL TO ORDER

The first meeting of the Risk Management Advisory Board called to order at 2:05 pm by Richard Bosson, Chair of the Civil Rights Commission. The meeting was held via GoToMeeting due to the current restrictions.

2. ROLL CALL

Roll call indicated the presence of a quorum as follows:

Commission Members Present:

Richard Bosson, Chair
Mark Baker, Vice Chair
Denise Torres
Zackeree Kelin
Senator Steve Neville
Victor J. Rodriguez
Kim Stewart
Judge Stan Whitaker
Gerald Byers

Members Excused:

Others Present:

Raul Burciaga, Legislative Council Service
Kelly Alzaharna, Director Law Enforcement Academy
Robin Hammer, Sandoval County Attorney
Alexandra Smith, Counsel to the Commission
Abby Bannon-Schneebeck, Law Student Intern
Jacques Chouinard, Law Student Intern

3. APPROVAL OF AGENDA

With all members in agreement the agenda was passed unanimously by voice vote.

4. APPROVAL OF MINUTES

With all members in agreement the minutes were passed unanimously by voice vote.

5. LAW ENFORCEMENT ACADEMY (KELLY ALZAHARNA, DIRECTOR)

Ms. Alzaharna introduced herself to the commission. Resource materials were shared on the screen to the questions that she was given before the meeting.

Ms. Alzaharna discussed the number of referrals the LEA has they received in the last five years for misconduct. They are still manually tracking everything. The department is very short staffed. Based on the last two years, there is a total of 119 referrals. Ms. Alzaharna states the statute controlling them (29-7-6) explains what an allegation of a violation is, the definition of not being of good moral character, and the definition of dishonesty. The vast majority of cases fall under that section. They track it by the section not by the type of behavior. While reviewing the cases there are approximately ten that could be considered civil rights violations- primarily 4th Amendment civil rights violations.

Ms. Alzaharna could not gather the number of actively certified officers who those referrals were about. She stated the allegations could result in suspensions, not just revocations. They could still be under investigation and the cases not adjudicated.

Judge Whitaker asked what the process of the referrals is. Ms. Alzaharna will explain it in a few slides.

Ms. Alzaharna explained as of now, there are 95 active cases that were referrals that have not been resolved. The cases on her list may not show an actual open date and may not be accurate. Ms. Alzaharna stated these are all active cases now. She said there are 128 that have not made it before the Board as of yet. There are 13 cases going before the Board at the next meeting in November.

Ms. Alzaharna explained there is no average time period for a case. The Board's regulations outlines the misconduct case process. If everyone involved took their full amount of time the cases could take over a year to process.

Ms. Alzaharna created a flowchart for their review showing a case from start to finish.

Ms. Alzaharna answered the question of how many referrals resulted in revocations, suspension, order of default of revocation or voluntary surrender of certification over the last two years. In 2019, there were 10 dismissals, 21 suspensions, 2 voluntary relinquishments and 13 revocations. So far in 2020, 11 dismissals, 2 suspensions, 1 voluntary relinquishment and 10 revocations. She could not track if any of the cases had violations of civil rights.

Ms. Alzaharna stated the Attorney General's Office can answer how many prosecutors are assigned to the misconduct cases. Ms. Alzaharna stated she has worked with one prosecutor in the past.

Ms. Alzaharna explained the LEA offers the regulated in-service training for law enforcement officers. There are minimum hours for bi-annual and annual training. There is not a specific topic for training de-escalation. It is part of other topics of training.

Ms. Alzaharna discussed if an officer has had allegations of civil rights violations against them, does the officer stay employed? This depends on the allegation, the only case where there is immediate action is when an officer has been arrested on a felony. The agency can decide to terminate them. The LEA Board still goes through the process.

Ms. Alzaharna discussed the hypothetical question about what happens to the referral after the agency settles on a case- does the board consider the settlement amount when determining the certification? Ms. Alzaharna explained it is a separate process. There are times when the board's decision can come before the case is adjudicated. Not being a member of the board she cannot answer.

Ms. Alzaharna stated the standard is preponderance of the evidence. Her position is in the process is deciding if the case goes forward to the LEA Board.

Ms. Alzaharna doesn't see a single driving force in the totality of police misconduct. The top things she has seen are alcohol, drugs, sexual misconduct and untruthfulness. Outside issues are understaffed departments and training. The basic training they offer is to give the minimum career tools. When they leave, the agency should offer ongoing training to its officers. Some of the training they get at the academy may not be used and may appear after a few years. Department culture plays a big part in all of this. Ms. Alzaharna believes they could have the best trainings and people are going to still make mistakes.

Ms. Alzaharna explained there are 5,100 certified law enforcement officers. She states that there are only eight staff members dealing with training and misconduct for those officers. Ms. Alzaharna states there is no way to know how many are active that are not certified. The way the statute works doesn't require the agencies to report those that are not certified. The statute allows for officers to be hired and work up to a year before becoming certified. Ms. Alzaharna stated there isn't a requirement of certification prior to being hired.

Ms. Alzaharna explained the cost after they meet all requirements and become certified after the next meeting is \$7,625 for a basic entry. It is \$1,400 for an out of state officer who has gone over two years of not working in law enforcement.

Ms. Alzaharna explained the LEA instructors and subject matter experts created the curriculum. The last external formal review of the curriculum was in 2016. She was asked to give an example of the curriculum. It is being reviewed by legal as to what is releasable.

Ms. Alzaharna explained how discipline works, she showed the flowchart. They cannot investigate agencies as a whole, it is hard to investigate the agency head. The way they receive referrals is from the agency head. There is no way for others to make referrals. For the most part, agencies are cooperative.

Ms. Alzaharna discussed the regulations set up to design the agency to file misconduct against its own officers. There are time frames to respond and they have an oral response meeting then she makes her recommendations. Many times they come to an agreement. If not, she sends it to the Attorney General's Office.

Ms. Stewart stated that the LEA process sometimes interferes with her process. While they are waiting for the board's disposition they often times will put the officer on leave.

Ms. Alzaharna explained usually the reported misconduct requires the agency to discipline the officer first while they await the board's decision. Many times agencies call if they feel the officer they are trying to hire has prior misconduct.

Ms. Stewart thanked her and asked how often LEA meets and is that in the statute.

Ms. Alzaharna explained they meet four times a year and that is the minimum stated in the statute. They can meet more if needed.

Mr. Kelin asked if reporting is mandatory.

Ms. Alzaharna explained they shall report within ninety days after the internal affairs referral. Which tells them they are aware and when they are done they can send it to the LEA Board.

Mr. Kelin asked what mechanism they have to enforce that requirement. Ms. Alzaharna stated they do not have one.

Mr. Kelin asked if they don't submit responses they can't force a response either. Ms. Alzaharna stated that is correct.

Mr. Kelin stated there is not a way to enforce the procedures or direction from them to cooperate. Ms. Alzaharna stated that is correct.

Mr. Kelin asked if the LEA is underfunded. Ms. Alzaharna stated one thing is the staffing level hasn't changed in at least ten years. In the last few years, the IPRA's take time for her to complete because there isn't someone designated to work on them.

Mr. Kelin asked if they have their own budget or are they attached to DPS. Ms. Alzaharna explained they are attached administratively by statute. The funds go to DPS and then are dispersed to LEA. She has a good working relationship with them it has never been done formally.

Mr. Kelin asked if the curriculum is different than the other satellite academies.

Ms. Alzaharna explained the satellite academies teach the curriculum that is approved by the board, but the curriculum is not always the same.

Mr. Rodriguez stated Ms. Alzaharna has identified many of the issues in law enforcement training. A lot of this process does not start because it is part of the honor system. If the agency does not report it they cannot fix it. The advanced training bureau chief seat is stills vacant. One of the biggest problems is they are trying to separate from DPS but they are not. He appreciates her work.

Judge Whitaker thanked her for working with lacking resources. He asked if she could request more funding.

Ms. Alzaharna stated she came in after the budget was done, the transition was already done. She will be involved to get special appropriations. The website has a tab on the DPS site and they are getting a new vendor to get an update.

Judge Whitaker asked if they had ever seen or heard of misconduct and then never received a referral or contact from that agency.

Ms. Alzaharna explained she has, she experienced it when she first came on. If it is not reported she can initiate it.

Mr. Byers asked if there are 119 cases and are they still open or referred? Ms. Alzaharna explained it is how many were referred and initiated.

Mr. Byers asked about the approximately ten cases that were civil rights violations. Ms. Alzaharna stated it is approximate but was not formally tracked.

Mr. Byers explained there is a specific reason why the commission is convened. The types of misconduct she listed were alcohol, drugs and sex and untruthfulness.

Ms. Alzaharna explained some of the cases may have been from previous years. Some of those were adjudicated that were open from 2012, she would need to dig more.

Mr. Byers asked if she has a percentage of cases referred to her that are associated battery, assault, homicide and those type of issues. Ms. Alzaharna would not want to guess she would need to research.

Mr. Byers explained if the officer misconduct is concerning truthfulness and they are returned to service that taints the officer's credibility at trial. Does that consideration carry any weight with the board?

Ms. Alzaharna explained that one of the first things she did when she started at LEA was tell the board when officers were getting suspension because of untruthfulness, she cautioned them that she would recommend revocation. She did not think they could be untruthful and be in that profession and she wanted them to know when she recommended cases.

Chair Bosson stated they are running short on time and it looks like they could use some help. He suggested when the commission has to do its final report with recommendations it may contain observations on what LEA needs to do a better job. She can contact Alexandra Smith and include it in the report.

6. COUNTY ATTORNEY AND INDEPENDENT REVIEW OFFICER- PERSPECTIVE REVIEW OFFICER (ROBIN HAMMER, SANDOVAL COUNTY ATTORNEY)

Ms. Hammer explained she has been a prosecutor and served on the Judicial Standards Commission and is dedicated to public accountability.

She was the Independent Review Officer of the Police Oversight Commission Board for the City of Albuquerque for over three years. She was a member of the National Association for Civilian Oversight for Law Enforcement Training and Education. She worked on better practices for law enforcement. She is currently the County Attorney for Sandoval County. Her comments today are her own and not that of the County. In her role she helps defend police liability in Sandoval County.

Ms. Hammer stated Phil Davis wrote an editorial to the Albuquerque Journal and stated "New Mexico celebrates diversity and does not fear justice." Ms. Hammer states the New Mexico Counties came before the Commission and explained that 95% of the civil rights cases involve law enforcement claims in a five-year time span.

Ms. Hammer suggested that there should be a New Mexico Civil Rights Act that does not apply to non-law enforcement individuals. They can all be employed by government in New Mexico. Opening up all other public servants creates an unintended consequence. Recently the amendments to 41-4-12 were just implemented. The definition was expanded to corrections officers. She suggests they limit it to law enforcement officers and create a new civil rights law. Based on her trainings and observations she suggests they balance the interests of government agencies and the public.

Ms. Hammer stated that qualified immunity only applies to individual public employees. It can only dismiss the individuals not the underlying government. Most of the time, if applied it does not dismiss the case entirely. Under 41-4-4, the Tort Claims Act, the agency is to pay all fees and damages.

Ms. Hammer stated that eliminating qualified immunity would provide public accountability individually but not hold them accountable. Mr. Davis stated in his article that he and the 52 other attorneys are not calling for change for the current law. If it were to be suggested, it would be problematic with unions. Most law enforcement and correction officers are members of unions.

Ms. Hammer suggests the balancing of the current tort claim act with caps, no attorney's fees, and notice requirements. She suggests they follow that same procedure. Ms. Hammer

recommends against raising the tort claims act cap, there is not enough information. The current cap is well within the top fifteen states. If the legislature wants to raise it they should conduct a study.

Ms. Hammer suggests the commission considers the tort claims act on attorney's fees. Last meeting Ms. Sanders stated many cases in federal court involve fees that are more than the damages. All attorneys have the ability to work on a contingency basis. She does not think it will be hard to find attorneys to take on civil rights cases.

Ms. Hammer stated the rules of professional conduct prohibit fee sharing. If they permit attorney's fees it will create further injustice.

Ms. Hammer suggested they revise the LEA board and licensing procedure. There are national models to hold people accountable. There are many revisions that could be implemented. She suggests they create a statewide database to record officer discipline.

Ms. Hammer suggests they write a report and create a balance of justice for victims and public servants.

7. VIDEO-STORIES OF PEOPLE WHOSE CIVIL RIGHTS WERE VIOLATED

This item was removed.

8. COMMITTEE DISCUSSION AND VOTE ON QUESTIONS PRESENTED IN HOUSE BILL 5

Chair Bosson explained how they will discuss and vote using HB 5 as a model.

Mr. Baker stated New Mexico recognized that this topic was important enough to have a commission for it and there is not a mechanism for recovery of state constitutional violations now. At a minimum the commission should suggest that the Legislature should not include qualified immunity and include attorney's fees. Early on he asked if it would be good public policy for the law to allow a person who slips on a sidewalk at a public building to have access to the courts and not have a remedy for someone whose rights were violated.

Mr. Baker said the tort claims act is not a general civil rights statute. He has never seen the focus of this commission as a target for law enforcement. They should be looking at civil rights in all the areas where people interact with government.

Mr. Baker stated people can make similar claims in federal court, the NM Constitution should not be treated as a second class citizen and reinforcement of rights. There are areas where they are the same and different. An enactment of this statute will further the development of the law in these areas. Qualified immunity is a hot button issue. That is already built in to the law that juries are instructed on. There will still be a long series of guiding principles.

Mr. Baker discussed that qualified immunity deals with what happens in normal cases. If they do not include it, it is still available to litigants. He discussed the idea of qualified immunity in cases where the court finds that rights were violated, but there is not a history of the rights being violated in the same way, so they lose. Everyone agrees on the fact that the cases being dismissed are not substantial. It mitigates the argument that it will have a catastrophic financial impact. That does not mean they are a critique of federal court. Mr. Baker suggests New Mexico tries it and sees if there is an overwhelming flow of frivolous cases.

Mr. Baker stated attorney's fees are essential. Indemnification should be there, Colorado is doing an experiment with indemnification. It is where they would have a deterrent on recruitment. Everything else regarding his vote is tied up on costs. He had hoped to have a clearer picture but this is an economics equation.

Mr. Baker hopes to have more precise numbers for the functionality of this. He appreciates the information on reinsurance, they understand the local governments are worried they will lose that insurance. He hopes by the legislature considers their recommendations once they have more financial information.

Senator Neville does not disagree with civil rights causes of action to make sure the people's rights are maintained. If damages are major there is a mechanism in the federal court. He does not disagree with raising or changing the caps on the New Mexico Tort Claims Act, those numbers are outdated. They need to look at the Tort Claims Act to meet the needs of the ones damaged by law enforcement and see if those are going to work, but to reinvent the wheel could cost the small cities and governments their police departments or sheriff's departments and take police off the streets. They need to make sure they maintain the public safety. They should not reduce the police coverage around the state. There are a large number of smaller cities and counties. He does not have an objection, but to go all in could be catastrophic.

Mr. Byers stated this topic carries issues and law enforcement officers carry out an essential function to society. He knows many who have been killed in the line of duty. He knows they are underpaid and under supported and underappreciated nationwide. He has experience where civil rights have been violated. Before they go over the edge, they need to think about the viability of those procedures currently in place. The legislature provided an opportunity under the tort claims act, enough time has not passed to determine the effectiveness. If qualified immunity is removed and indemnification is not available what does the world do when there isn't anyone to work in law enforcement. Honestly the individuals he knew and respect that got in harm's way deserve much better. They deserve a LEA that is better staffed. The majority of law enforcement officers are stellar. The information Ms. Alzaharna provided showed the issues with excessive force are not very numerous. As they know, there is already a means where victims can recover in the civil system.

Ms. Stewart stated that she came from another state. When she got here New Mexico was about thirty years behind in law enforcement. The LEA staff is computing by hand, the training modules used are forty years old. Repetitively suing and not making changes does not bring change. There needs to be some changes to the outlook of policing. As a Sheriff, she cannot

control her human resources and fiscal resources. When they sue, the assumption is that they can do something when the County is in control. The only way they can change is start with best practices in the beginning. In time there will be measurable change.

Mr. Rodriguez believes in the accountability of law enforcement officers who do wrong. The reason the commission was formed, it is about law enforcement. Mr. Rodriguez read aloud the press release from the Governor's website. On the same press release the speaker of the House was quoted discussing the need for police reform. He agrees with Commissioner Stewart and Commissioner Neville that NM already has procedures in place. This would not create change. Better training will lead to change.

Mr. Kelin explained that the Commission should not rely on the Tort Claims Act which only applies in the law enforcement context and it does not apply outside. The Commission's charge is broader than just law enforcement. Some people have shown overreliance on the Tort Claims Act, but it only applies to law enforcement and the scope of liability is limited to personal injury, bodily harm and wrongful death. He appreciates the concern regarding cost. He found it striking that there was not more data readily available for that conclusion.

Mr. Kelin does not think they need to consider a private right of action *or* invest in changing bad policies as it exists. They are not mutually exclusive. Cases that result in large verdicts lead to loss prevention. Part of the focus helps improve the availability for insurance. It helps decrease the deprivations that they should see. Both are required and from the presentations they saw both are needed in the state. He also thinks it's important to talk about New Mexico being first in the nation for fatal police shootings per capita and that they rank second by people killed by police and they have seen civil rights cases increase and it is well recorded. That does not cover the scope of the problem for the state.

Ms. Torres discussed that she has family that are police officers and has some that have committed crimes who have family members that are addicts and have mental health issues. She wants them all to get home safely, they are tasked to make New Mexico better. The New Mexico Constitution should mean something. The Tort Claims Act is a problem where child rape is considered negligent operation of a building. She does not know that it is understood and makes it easier for normal people. They need to make things better and have better training for the police to work with people who have mental health issues. She was frightened to call the officers to help with her family member who has mental illness because they do not have the proper training. The recommendation is not going to be perfect.

Judge Whitaker states the commission is taking this seriously. His career was in the DA's office and he worked with wonderful officers and federal agents and he has high regard for them. The focus seems to be law enforcement. How can they provide justice for the citizens of New Mexico if there is no way for them to have vindication for violations of those rights.

Judge Whitaker asked should they have a standalone statute without limitations without the baggage that they see occurring in the federal system. He feels there is a need and New Mexico

is in a place that they can do something that will have a positive impact on the citizens. One concern that there is a check and balance and mechanism to avoid frivolous lawsuits. There is a great judicial system in New Mexico. He thinks a standalone statute is needed and should encompass all, not just law enforcement.

Chair Bosson agrees while he spent time on the Supreme Court he was astounded that there were rights with no remedy. There would not be any way to resolve them. He does not see where it is limited, that is unfair for all citizens. There is some overlap and the tort claims act has been improved. That does not mean they will get double recovery, they only get one. That was the most misunderstood concept they received in the letters and forms for public comment.

Chair Bosson stated qualified immunity does not work, it is not in the constitution or the legislature. It has metastasized like a cancer that knocks out cases because there is not a case for defendants to claim what they want to claim. Officers are trained to do what they were trained to do. Those are all fair points. He thinks they have unlocked the need for additional funding for police and the need more staff. The fact that the LEA is still doing research by hand can be included in the report and this may be a vehicle to get that funding. He believes that is part of the process and so is litigation. It occurs for a reason if someone may have done something wrong there should be consequences.

Attorney's fees are a problem, what if you prove substantial loss, where do they get paid? The injured party gets left behind. He insists on indemnification for police officers. When it comes to punitive damages and RMD or the New Mexico Counties it gets difficult to prove. The government can only provide so much since they have limited pockets. In the meantime they can't say what the costs will be for premiums. Should there be for counties of course there should.

Chair Bosson explained that they will ask the questions in HB 5 and get each commissioner's vote.

Question: Should the legislature adopt a civil rights statute following 42 U.S.C. Section 1983 with changes and provide a right of action for the violations of rights secured by the New Mexico Constitution?

Vote: Commissioners Neville, Rodriguez and Stewart voted in opposition. Commissioners Baker, Bosson, Byers, Kelin, Torres and Whitaker voted in favor, which passed (6-3).

Question: Should qualified immunity be used as a defense to liability by an employee of a public body for a claim that would be brought either under 42 U.S.C. Section 1983 or pursuant to the right of action we create?

Vote: Commissioners Byers, Neville, Rodriguez, and Stewart voted in favor. Commissioners Baker, Bosson, Kelin, Torres, and Whitaker voted in opposition, which passed (5-4).

Question: Should there be indemnification for public employees of a public body sued under the right of action we create?

Vote: All commissioners voted in favor (9-0).

Question: The commission shall consider whether such right of action shall provide for compensatory damages.

Vote: All commissioners voted in favor (9-0).

Question: The commission shall consider whether such right of action shall provide for including injunctive relief.

Vote: All commissioners voted in favor (9-0).

Question: The commission shall consider whether such right of action shall provide for punitive damages.

Vote: Commissioners Baker, Byers, Kelin, and Torres voted in favor. Commissioners Bosson, Neville, Rodriguez, Stewart and Whitaker vote in opposition. (5-4)

Question: The commission shall consider whether attorney's fees shall be mandated for a prevailing plaintiff.

Vote: Commissioners Byers, Neville, Rodriguez, and Stewart voted in opposition. Commissioners Baker, Bosson, Kelin, Torres and Whitaker voted in favor which passed (5-4).

Chair Bosson stated there was no mention of statute of limitations. Mr. Baker suggests when staff is writing the report, perhaps they can look at the current statutes.

Chair Bosson stated they were also asked to look at additional costs but were not able to quantify it.

Chair Bosson will be out for surgery and Mr. Baker will be out at a trial the next Friday they could meet on November 3, 2020. They may need about two more meetings to discuss the report and they need to meet to discuss modifications and have a formal approval as it will go to the legislature. They have a deadline of November 9, 2020 but asked Mr. Burciaga if it was possible to push it out. Mr. Burciaga explained as long as they are done by Thanksgiving it should be ok.

They could possibly meet November 13, 2020 and finally November 20, 2020. That will give them enough time to review a draft.

Mr. Rodriguez asked if they want a dissenting report there are several areas where commissioners may want to explain why they voted that way they did.

Chair Bosson they do not have policies or procedures if they want to put together an opinion they can do that.

Ms. Stewart has the same interest, although they could use assistance from staff putting them together because she does not have the time if they could summarize the comments that would be appreciated.

Ms. Torres mentioned they discussed having a section in the report about the needs for the LEA.

Mr. Baker explained it is hard to ask the same staff to do that, perhaps Mr. Burciaga to help get an opinion from the presenters as well. Mr. Kelin agrees part of the report should track the discussion as it highlights the summary of discussion that they dealt with that incorporates their decision.

Ms. Smith states that will be time consuming to write, it may be difficult. That can go in or be its own report. Mr. Burciaga thinks they can talk offline to see how they can address it and see what staff they have available.

Chair Bosson thanked the Commission, it has been constructive.

9. OTHER BUSINESS

None.

10. NEXT MEETING

It was decided the next meeting will be on November 13, 2020 and a final meeting will be November 20, 2020.

11. ADJOURN

With all business concluded the meeting was adjourned at 5:02p.m.

Signed and approved:

/s/ Justice Bosson, Chair