STATE OF NEW YORK

8815

IN SENATE

July 20, 2020

Introduced by Sen. BAILEY -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the judiciary law, in relation to the state commission on prosecutorial conduct

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 499-a of the judiciary law, as amended by chapter 23 of the laws of 2019, is amended to read as follows:

§ 499-a. Establishment of commission. There is hereby created within the executive department a state commission of prosecutorial conduct. The commission shall have the authority to review **and investigate** the conduct of prosecutors upon the filing of a complaint with the commission to [~~determine~~] **examine** whether [~~said~~] **a prosecutor or prosecutors has committed** conduct [~~as alleged departs from the applicable~~] **in the course of his or her official duties or under color of state law potentially violative of** statutes, **the legal rights of private persons, whether statutory, constitutional or otherwise;** case law[~~,~~]**; or court rules, including, but not limited to the** New York Rules of Professional Conduct, 22 NYCRR 1200, **or any subset thereof or successor thereto,** including but not limited to Rule 3.8 (Special Responsibilities of Prosecutors and Other Government Lawyers).

§ 2. Section 499-b of the judiciary law, as amended by chapter 23 of the laws of 2019, is amended to read as follows:

§ 499-b. Definitions. For the purposes of this article the following terms have the following meanings:

1. "Commission" means the state commission on prosecutorial conduct.

2. "Prosecutor" means a district attorney or any assistant district attorney of any county of the state in an action to exact any criminal penalty, fine, sanction or forfeiture.

3. "Hearing" means a proceeding under subdivision four of section four hundred ninety-nine-f of this article.

4. "Member of the bar" means a person admitted to the practice of law in this state for at least five years.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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5. [~~"Presiding justices of the appellate division" shall mean, collectively, the presiding justices of the appellate division of the supreme court of each judicial department. The chief administrative judge shall, by rule, establish an appropriate mechanism, not inconsistent with law, for persons and entities interacting with the presiding justices of the appellate division pursuant to this article to file papers and communicate with such body.~~

~~6.~~] "Retired judge" shall mean a former judge or justice of the unified court system who was qualified as an attorney during such service and served as such a judge or justice for at least five years.

§ 3. Subdivision 6 of section 499-c of the judiciary law, as amended by chapter 23 of the laws of 2019, is amended to read as follows:

6. For any action taken pursuant to subdivisions four through [~~nine~~] **seven** of section four hundred ninety-nine-f or subdivision two of section four hundred ninety-nine-e of this article, eight members of the commission shall constitute a quorum of the commission and the concurrence of six members of the commission shall be necessary. Two members of a three member panel of the commission shall constitute a quorum of the panel and the concurrence of two members of the panel shall be necessary for any action taken.

§ 4. Section 499-f of the judiciary law, as amended by chapter 23 of the laws of 2019, is amended to read as follows:

§ 499-f. Complaint; investigation; hearing and disposition. 1. The commission shall receive, initiate, investigate and hear complaints with respect to the conduct[~~, qualifications, fitness to perform,~~] or performance of official duties of any prosecutor[~~, and may determine that a prosecutor be admonished, or censured~~]; and **may** make a recommendation to the governor that a prosecutor be removed from office for cause, for, including, but not limited to, misconduct in office, as evidenced by his or her departure from his or her obligations under appropriate statute, case law, and/or New York Rules of Professional Conduct, 22 NYCRR 1200, **or any subset thereof or successor thereto,** including but not limited to Rule 3.8 (Special Responsibilities of Prosecutors and Other Government Lawyers), persistent failure to perform his or her duties, conduct prejudicial to the administration of justice, or that a prosecutor be retired for mental or physical disability preventing the proper performance of his or her prosecutorial duties. A complaint shall be in writing and signed by the complainant and, if directed by the commission, shall be verified. Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit. If the complaint is dismissed, the commission shall so notify the complainant. If the commission shall have notified the prosecutor of the complaint, the commission shall also notify the prosecutor of such dismissal. Pursuant to paragraph a of subdivision four of section ninety of this chapter, any person being an attorney and counselor-at-law who shall be convicted of a felony as defined in paragraph e of subdivision four of section ninety of this chapter, shall upon such conviction, cease to be any attorney and counselor-at-law, or to be competent to practice law as such.

2. The commission may, on its own motion, initiate an investigation of a prosecutor with respect to his or her [~~qualifications,~~] conduct[~~, fitness to perform~~] or the performance of his or her official duties. Prior to initiating any such investigation, the commission shall file as part of its record a written complaint, signed by the administrator of

the commission, which complaint shall serve as the basis for such investigation.

3. In the course of an investigation, the commission may require the appearance of the prosecutor involved before it, in which event the prosecutor shall be notified in writing of his or her required appearance, either personally, at least three days prior to such appearance, or by certified mail, return receipt requested, at least five days prior to such appearance. In either case a copy of the complaint shall be served upon the prosecutor at the time of such notification. The prosecutor shall have the right to be represented by counsel during any and all stages of the investigation in which his or her appearance is required and to present evidentiary data and material relevant to the complaint. A transcript shall be made and kept with respect to all proceedings at which testimony or statements under oath of any party or witness shall be taken, and the transcript of the prosecutor's testimony shall be made available to the prosecutor without cost. Such transcript shall be confidential except as otherwise permitted by section four hundred ninety-nine-g of this article.

4. If in the course of an investigation, the commission determines that a hearing is warranted it shall direct that a formal written complaint signed and verified by the administrator be drawn and served upon the prosecutor involved, either personally or by certified mail, return receipt requested. The prosecutor shall file a written answer to the complaint with the commission within twenty days of such service. If, upon receipt of the answer, or upon expiration of the time to answer, the commission shall direct that a hearing be held with respect to the complaint, the prosecutor involved shall be notified in writing of the date of the hearing either personally, at least twenty days prior thereto, or by certified mail, return receipt requested, at least twenty-two days prior thereto. Upon the written request of the prosecutor, the commission shall, at least five days prior to the hearing or any adjourned date thereof, make available to the prosecutor without cost copies of all documents which the commission intends to present at such hearing and any written statements made by witnesses who will be called to give testimony by the commission. The commission shall, in any case, make available to the prosecutor at least five days prior to the hearing or any adjourned date thereof any exculpatory evidentiary data and material relevant to the complaint. The failure of the commission to timely furnish any documents, statements and/or exculpatory evidentiary data and material provided for herein shall not affect the validity of any proceedings before the commission provided that such failure is not substantially prejudicial to the prosecutor. The complainant may be notified of the hearing and unless he or she shall be subpoenaed as a witness by the prosecutor, his or her presence thereat shall be within the discretion of the commission. The hearing shall not be public unless the prosecutor involved shall so demand in writing. At the hearing the commission may take the testimony of witnesses and receive evidentiary data and material relevant to the complaint. The prosecutor shall have the right to be represented by counsel during any and all stages of the hearing and shall have the right to call and cross-examine witnesses and present evidentiary data and material relevant to the complaint. A transcript of the proceedings and of the testimony of witnesses at the hearing shall be taken and kept with the records of the commission.

5. Subject to the approval of the commission, the administrator and the prosecutor may agree on a statement of facts and may stipulate in writing that the hearing shall be waived. In such a case, the commission

shall [~~make its determination upon the pleadings and~~] rely upon the agreed statement of facts in forming the commission's findings of fact.

6. If, after a formal written complaint has been served pursuant to subdivision four of this section, or during the course of or after a hearing, the commission determines that no further action is necessary, the complaint shall be dismissed and the complainant and the prosecutor shall be so notified in writing.

7. [~~After a hearing, the commission may determine that a prosecutor be admonished or censured, or may recommend to the governor that a prosecutor be removed from office for cause.~~] The commission shall transmit its [~~written determination, together with its~~] findings of fact and [~~conclusions of law~~] recommendations and the record of the proceedings upon which [~~its determination is~~] such findings and recommendations are based, to the [~~presiding justices of the~~] attorney grievance committee of the appellate division [~~who~~] in the department where the prosecutor was admitted to practice, which shall cause a copy thereof to be served either personally or by certified mail, return receipt requested, on the prosecutor involved. Upon completion of service, the [~~determination of the commission, its~~] commission's findings and [~~conclusions~~] recommendations and the record of its proceedings shall be made public and shall be made available for public inspection at the principal office of the commission and at the office of the clerk of the appellate division in the department in which the [~~alleged misconduct occurred~~] record was filed. If the commission's findings and recommendations include any recommendation that any prosecutor should be removed or retired, the commission shall simultaneously transmit its findings, recommendations, and record of its proceedings to the governor. Records of a prosecuting agency provided by the agency to the commission pursuant to this article shall not be subject to disclosure by the commission under article six of the public officers law. [~~The prosecutor involved may either accept the determination of the commission or make written request to the presiding justices of the appellate division, within thirty days after receipt of such determination, for a review thereof by the presiding justices of the appellate division. If the commission has determined that a prosecutor be admonished or censured, and if the prosecutor accepts such determination or fails to request a review thereof by the presiding justices of the appellate division, the commission shall thereupon admonish or censure him or her in accordance with its findings. If the commission has recommended that a prosecutor be removed or retired and the prosecutor accepts such determination or fails to request a review thereof by the presiding justices of the appellate division, the presiding justices of the appellate division shall thereupon transmit the commission's findings to the governor who will independently determine whether the prosecutor should be removed or retired.~~]

8. [~~If the prosecutor requests a review of the determination of the commission, in its review of a determination of the commission, the presiding justices of the appellate division shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. After such review, the presiding justices of the~~] The attorney grievance committee of the appellate division that receives the commission's report may accept or reject the [~~determined~~] recommended sanction; impose a different sanction [~~including admonition or censure, recommend removal or retirement for the reasons set forth in subdivision one of this section~~]; or impose no sanction. [~~However, if the presiding justices of the appellate division recommend removal or retirement, they~~

~~shall, together with the commission, transmit the entire record to the governor who will independently determine whether a prosecutor should be removed or retired.~~]

9. [~~(a) The presiding justices of the appellate division may suspend a prosecutor from exercising the powers of his or her office while there is pending a determination by the commission for his or her removal or retirement, or while he or she is charged in this state with a felony by an indictment or an information filed pursuant to section six of article one of the constitution. The suspension shall terminate upon conviction of a felony resulting in such prosecutor's disbarment pursuant to paragraph a of subdivision four of section ninety of this chapter. If such conviction becomes final, he or she shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument.~~

~~(b) Upon the recommendation of the commission or on its own motion, the presiding justices of the appellate division may suspend a prosecutor from office when he or she is charged with a crime punishable as a felony under the laws of this state, or any other crime which involves moral turpitude. The suspension shall terminate upon conviction of a felony resulting in such prosecutor's disbarment pursuant to paragraph a of subdivision four of section ninety of this chapter. The suspension shall continue upon conviction of any other crime which involves moral turpitude and, if such conviction becomes final, he or she shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument.~~

~~(c) A prosecutor who is suspended from office by the presiding justices of the appellate division shall receive his or her salary during such period of suspension, unless the court directs otherwise. If the court has so directed and such suspension is thereafter terminated, the presiding justices of the appellate division may direct that he or she shall be paid his or her salary for such period of suspension.~~

~~(d) Nothing in this subdivision shall prevent the commission from determining that a prosecutor be admonished or censured or prevent the commission from recommending removal or retirement pursuant to subdivision seven of this section.~~

~~10.~~] If during the course of or after an investigation or hearing, the commission determines that the complaint or any allegation thereof warrants action, other than in accordance with the provisions of subdivisions seven [~~through nine~~] **and eight** of this section, within the powers of: (a) a person having administrative jurisdiction over the prosecutor involved in the complaint; or (b) [~~an~~] **the attorney grievance committee of the** appellate division [~~of the supreme court~~] **in the department where the prosecutor was admitted to practice**; or (c) [~~a presiding justice of an appellate division of the supreme court; or (d) the chief judge of the court of appeals; or (e)~~] the governor pursuant to subdivision (b) of section thirteen of article thirteen of the constitution; or [~~(f)~~] **(d)** an applicable district attorney's office [~~or other prosecuting agency~~], the commission shall refer such complaint or the appropriate allegations thereof and any evidence or material related thereto to such person, agency or court for such action as may be deemed proper or necessary.

[~~11.~~] **10.** The commission shall notify the complainant of its disposition of the complaint.

[~~12. In the event of removal from office of any prosecutor, pursuant to subdivision seven or eight or paragraph (a) or (b) of subdivision~~

~~nine of this section, a vacancy shall exist pursuant to article three of the public officers law.~~]

§ 5. Section 499-i of the judiciary law, as amended by chapter 23 of the laws of 2019, is amended to read as follows:

§ 499-i. Resignation not to divest commission [~~or presiding justices of~~] **and** the appellate division of jurisdiction. The jurisdiction of the [~~presiding justices of the~~] appellate division and the commission pursuant to this article shall continue notwithstanding that a prosecutor resigns from office after a recommendation by the commission that the prosecutor be removed from office has been transmitted to the [~~presiding justices of the appellate division~~] **governor**, or in any case in which the commission's recommendation that a prosecutor should be removed from office shall be transmitted to the [~~presiding justices of the appellate division~~] **governor** within one hundred twenty days after receipt by the chief administrator of the courts of the resignation of such prosecutor. Any determination by the governor that a prosecutor who has resigned should be removed from office shall render such prosecutor ineligible to hold any other prosecutorial office.

§ 6. Section 499-j of the judiciary law, as amended by chapter 23 of the laws of 2019, is amended to read as follows:

§ 499-j. Effect. [~~1.~~] The powers, duties, and functions of the state commission on prosecutorial conduct shall not supersede the powers and duties of the governor as outlined in section thirteen of article thirteen of the New York state constitution.

[~~2. Removal or retirement of a prosecutor pursuant to this article shall be considered a removal from office pursuant to section thirty of the public officers law.~~]

§ 7. Legislative intent. It is hereby declared to be the intent of the legislature that, if any clause, sentence, paragraph, subdivision, section or part of article 15-A of the judiciary law shall be adjudged by any court of competent jurisdiction to be invalid, that such article would have been enacted even if such invalid provisions has not been included therein.

§ 8. Severability. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

§ 9. This act shall take effect immediately.