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Elizabeth A. Brown
Clerk of Supreme Court

7 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

8 JENNIFER HENRY,

Case No. 75675

9 Petitioner,

10 v.

11 NEVADA STATE COMMISSION ON
12 JUDICIAL DISCIPLINE,

13 Respondent.
14 _____/

15 **OPPOSITION TO EMERGENCY MOTION FOR STAY**

16 **UNDER NRAP 27(e)**

17 COMES NOW Respondent, the Nevada Commission on Judicial Discipline,
18 by and through its appointed Prosecuting Officer, Thomas C. Bradley, and hereby
19 opposes Petitioner Jennifer Henry's *Emergency Motion For Stay Under NRAP*
20 *27(e)*. Respondent's Opposition is made and based on the following Memorandum
21 of Points and Authorities.

22 DATED this 22nd day of May, 2018.

24 /s/ Thomas C. Bradley

25 Prosecuting Officer Thomas C. Bradley, Esq.
26 *Sinai, Schroeder, Mooney,*
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1 **POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Petitioner Henry is a hearing master with the Eighth Judicial District Court in
4 Clark County, Nevada. On October 10, 2017, Respondent Nevada State
5 Commission on Judicial Discipline (“Commission”) filed a Formal Statement of
6 Charges against Petitioner. The formal hearing to resolve those charges is
7 scheduled to take place in Reno, Nevada on May 29, 2018 and is scheduled to be
8 complete in one day. On April 27, 2018, Petitioner filed a *Petition For Writ Of*
9 *Prohibition* against the Commission in which she claims the Commission is without
10 constitutional authority to hold a disciplinary proceeding against her. [NV S.Ct.
11 Doc. 18-16078.] On May 18, 2018, this Court ordered Respondent to file an
12 Answer within 15 days. [NV S.Ct. Doc. 18-19054.] On May 18, 2018, Petitioner
13 Henry filed an *Emergency Motion for Stay Under NRAP 27(e)* [NV. S.Ct. Doc. 18-
14 19175] in which she asks this Court to stay the May 29th public hearing until such
15 time as this Court decides her *Petition For Writ Of Prohibition*. On May 21, 2018
16 this Court issued an Order stating, “[H]aving considered the petitioner’s motion, we
17 conclude that a temporary stay is warranted pending our receipt and consideration
18 of any opposition from respondent.” [NV S.Ct. Doc. 18-19270.]

19 **II. ARGUMENT**

20 **A. Governing Standards**

21 When determining whether to issue a stay, courts consider the following four
22 factors:

- 23 1. Whether the object of the appeal or writ petition will be defeated if
24 the stay is denied;
25 (2) Whether appellant/petitioner will suffer irreparable or serious
26 injury if the stay is denied;
27 (3) Whether respondent/real party in interest will suffer irreparable or
28

1 serious injury if the stay is granted; and

2 (4) Whether appellant/petitioner is likely to prevail on the merits in the
3 appeal or writ petition.

4 *See Hansen v. Eighth Judicial District Court*, 116 Nev. 650, 657, 6 P.3d 982, 986
5 (2000); *see, also, United States v. Bogle*, 855 F.2d 707, 708 (11th Cir. 1988)
6 (describing the showing necessary under Rule 8 of the Federal Rules of Appellate
7 Procedure, the federal counterpart to NRAP 8, as a “heavy burden.”)

8 As explained below, none of the stay factors listed in *Hansen* support the
9 issuance of a stay, and Petitioner’s request should be denied.

10 **B. Application Of The NRAP 8 Factors Warrants The Denial Of Petitioner’s**
11 **Motion To Stay**

12 **1. Petitioner Not Likely To Prevail On The Merits**

13 Petitioner asserts that this Court should issue a writ of prohibition pursuant to
14 NRS 34.330 because under Article 6, Section 21 of the Nevada Constitution, the
15 Commission’s authority is limited to a justice of the Supreme Court, a judge of the
16 court of appeals, a district judge, a justice of the peace, and a municipal judge. Nev.
17 Const. Art. 6 § 21(1). Petitioner notes hearing masters are not specifically
18 mentioned in that list.

19 Petitioner further claims that although the legislature adopted NRS § 1.428 in
20 1997, which specifically adds “[a]ny other officer of the Judicial Branch of this
21 State . . . including . . . a magistrate, court commissioner, special master or referee,”
22 to the persons subject to the jurisdiction of the Commission, when NRS § 1.428
23 was adopted, the Nevada Legislature acted outside its authority, and that “[t]he only
24 way it could expand the jurisdiction of the Commission is by constitutional
25 amendment.” *Petition For Writ* at p. 10.

26 Petitioner is very much mistaken.

27 In a nearly identical case, *In re Davis*, 113 Nev. 1204, 946 P.2d 1033 (1997),
28 *Davis*, who was a municipal court judge, claimed, in part, that the Commission

1 lacked jurisdiction to impose discipline on municipal court judges. *Davis*, 113 Nev.
2 at 1210, 946 P.2d at 1038. At that time, the constitutional provision that had
3 created the Commission provided, in part, that: “[a] justice of the supreme court or
4 a district judge may . . . be censured, retired or removed by the Commission on
5 judicial discipline.” *Davis*, 113 Nev. at 1211, 946 P.2d at 1038 (quoting Nev.
6 Const. Art. 6, §21(1)). A year later, in 1997, the legislature enacted NRS § 1.1440.
7 That statute, in pertinent part, provided that the Commission would have “exclusive
8 jurisdiction over the censure, removal and involuntary retirement of justices of the
9 peace and judges of municipal courts which is coextensive with its jurisdiction over
10 justices of the supreme court and judges of the district courts . . .”. NRS § 1.440(1).

11 Davis claimed that the Commission lacked jurisdiction over the municipal
12 court judges prior to the 1994 constitutional amendment and therefore could not
13 discipline him for conduct that occurred prior to 1994. *Id.*

14 The Nevada Supreme Court rejected Davis’ claim, explaining that
15 “[a]lthough the 1994 amendment . . . facially expand[ed] the scope of the
16 Commission’s powers to include municipal court judges and justices of the peace,
17 in actuality, the amendment simply clarified the legislature’s then existing authority
18 to render these judicial officers subject to Commission discipline. Thus, the
19 promulgation of NRS 1.440(1) by the 1997 Nevada legislature was within its
20 constitutional prerogatives.” *Davis*, 113 Nev. at 1212, 946 P.2d at 1039; *see, also,*
21 *Ramsey v. City of N. Las Vegas*, 133 Nev. Adv. Rep. 16, 392 P.3d 614, 618
22 (2017)(“[T]he NCJC was intended to further the Legislature’s goals of unifying the
23 court system in . . . which all judges were held to the same standards . . .”).¹

24 In addition, the Court stated that when Article 7, §4 of the Nevada

25 ¹ NRS § 1.428 furthers the legislature’s goals of unifying the court system by
26 defining a judge as “[a]ny other officer of the Judicial Branch of this State, whether
27 or not the officer is an attorney, who presides over judicial proceedings, including,
28 but not limited to, a magistrate, court commissioner, special master or referee[.]”
See NRS § 1.428(6).

1 Constitution, which provides the legislature with “the mandate to provide for the
2 removal from office any civil officer other than those in ‘this article previously
3 specified’ is read together with article 6, section 21(9)(b) “it is apparent that the
4 legislature was free to utilize the Commission as a medium for that purpose.²
5 Because the power of removal in this particular context also implies authority in the
6 Commission to impose lesser sanctions, we hold that the Commission did have
7 jurisdiction to either remove or impose any measure of discipline, including
8 removal, in this matter.” *Davis*, at 1213.

9 Similarly, when the legislature adopted NRS 1.428 to include magistrates,
10 court commissioners, and special masters or referees to the persons subject to the
11 jurisdiction of the Commission, that amendment “simply clarified the legislature’s
12 then existing authority to render these judicial officers subject to Commission
13 discipline” and “was within its constitutional prerogatives.” *Davis*, 113 Nev. at
14 1212, 946 P.2d at 1039.

15 Based on this Court’s decision in *Davis*, it is clear that Petitioner’s assertion
16 that the Nevada Legislature acted outside its authority when it adopted NRS 1.428
17 is simply not a correct statement of Nevada law, and as a result, Petitioner is highly
18 unlikely to prevail on the merits of her claim. For that same reason, the object of
19 Petitioner’s *Petition For Writ Of Prohibition* – an arrest of the Commission’s
20 proceedings until a determination can be made regarding the jurisdiction of the
21 Commission-- is unnecessary, and as a consequence, the denial of the requested
22 stay will not defeat the object of her Petition.

23 The *Hansen* court stated that "when moving for a stay pending an appeal or
24 writ proceedings, a movant does not always have to show a probability of success
25

26 ² Article 7, §4 currently provides that: “Provision shall be made for the
27 removal from Office of any Civil Officer other than those in this Article previously
28 specified, for Malfeasance, or Nonfeasance in the Performance of his duties.”

1 on the merits, the movant must ‘present a substantial case on the merits when a
2 serious legal question is involved and show that the balance of equities weighs
3 heavily in favor of granting the stay.’ *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th
4 Cir.1981)." *See Hansen*, 116 Nev. at 659, 6 P.3d at 987 (2000) (underscoring
5 added).

6 Here, Petitioner Henry failed to demonstrate that her writ petition even raises
7 a substantial legal question given this Court's decision in *Davis*. Moreover, as
8 discussed below, the Petitioner also failed to show that the balance of equities
9 weighs heavily in favor of granting the stay.

10 **2. Remaining Factors**

11 Petitioner argues that the expenses involved in the hearing justify a stay.
12 *Hansen* is once again on point. Echoing Petitioner Henry here, the petitioner in
13 *Hansen* argued that it was entitled to a stay under NRAP 8 so that it would “not be
14 required to participate ‘needlessly’ in the expense of lengthy and time-consuming
15 discovery, trial preparation, and trial” because the petitioner was challenging the
16 issue of jurisdiction. *Id.* at 658, 6 P.3d at 986-987. This Court rejected the
17 petitioner’s argument and denied the stay, declaring “[s]uch litigation expenses,
18 while potentially substantial, are neither irreparable nor serious.” Here, the
19 Petitioner’s expenses will not be substantial. The May 29th hearing in Reno, Nevada
20 is expected to last only one day, and Petitioner can easily travel from Clark County
21 to Reno in a single day.

22 Petitioner also asserts that irreparable harm could be done to her reputation if
23 this Court subsequently determines that the Commission lacked jurisdiction over
24 her. In light of controlling case law, namely the *Davis* decision, such a result is
25 highly unlikely. Further, the “judicial discipline proceedings ‘are neither civil nor
26 criminal in nature; they are merely an inquiry into the conduct of a judicial officer
27 the aim of which is the maintenance of the honor and dignity of the judiciary and
28 the proper administration of justice rather than the punishment of the

1 individual.’” *Goldman v. Nevada Comm'n on Judicial Discipline*, 108 Nev. 251,
2 264 n.10 (Nev. 1992) (quoting *In re Diener*, 304 A.2d 587 (Md. 1973), *cert. denied*,
3 415 U.S. 989 (1974)). Therefore, Petitioner will not suffer irreparable harm.

4 Moreover, the Respondent will suffer harm with any delay. This Court has
5 acknowledged that “unnecessar[y] delay” of the “underlying proceedings” supports
6 the denial of a stay under NRAP 8. *See Hanson*, 116 Nev. at 658, 6 P.3d at 987.
7 Here, such a delay will be unnecessary because Petitioner is not likely to prevail on
8 the merits.

9 In a similar case, the Nevada Supreme Court found that a delay of the
10 Commission proceedings would undermine the public's confidence in the integrity
11 of the judicial discipline process and work to prejudice the Commission. *See Jones*
12 *v. Nevada Commission on Judicial Discipline*, 2013 WL 4436476 (2013)
13 (unpublished decision). The Court stated:

14 Ultimately, our exercise of jurisdiction over this petition, which was
15 filed on the eve of the scheduled NCJD hearing regarding the
16 disciplinary complaint against petitioner, would serve only to prevent
17 the NCJD from resolving the underlying disciplinary proceeding in a
timely manner.³ Moreover, the continued delay of those proceedings
would undermine the public's confidence in the integrity of the judicial
discipline process and work to prejudice both petitioner and the NCJD.

18 *Id.* at *1.

19 Finally, the object of the Petitioner’s writ will not be defeated because any
20 result of the hearing will ultimately be reviewed by this Court. *See In re Assad*, 124
21 Nev. 391, 185 P.3d 1044.

22 ///

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24 _____
25 ³ The Petitioner implied that the Commission failed to act on the Complaint because
26 Formal Statement of Charges were not filed until approximately one year after the
27 Complaint was filed. During that year, the Commission performed its statutory
28 duties to investigate the Complaint, send interrogatories to Petitioner, and
determine whether formal charges should be filed.

1 **III. CONCLUSION**

2 Nevada case law makes clear that Petitioner is unlikely to prevail on the
3 merits of her claim. In addition, Petitioner has not demonstrated that the purpose of
4 her *Petition For Writ Of Prohibition* will be defeated if a stay is denied, nor has she
5 shown that she will suffer irreparable or serious injury if her request for stay is
6 denied. As a result, Petitioner’s request for an emergency stay under NRAP 27(e)
7 should be denied and this Court should vacate the temporary stay order. [NV S.Ct.
8 Doc. 18-19270.]

9 DATED this 22nd day of May, 2018.

10
11 /s/ Thomas C. Bradley
12 Prosecuting Officer Thomas C. Bradley, Esq.
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Response complies with the typeface requirements of NRAP 32(a)(5)-(6) because this Response was prepared in Word 2016 using Times New Roman in a 14-point font.

I further certify that this Response complies with the page limitations of NRAP 27(d)(2) because, exclusive of this Certificate of Compliance, this Response does not exceed ten (10) pages.

I also certify that I have read this Response, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I can be subject to sanctions in the event the accompanying Response is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22nd day of May, 2018.

/s/ Thomas C. Bradley
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CERTIFICATE OF SERVICE

I certify that on the 22nd day of May, 2018, I served a true and correct copy of this *Response to Emergency Motion for a Stay* via the Nevada Supreme Court’s E-Flex filing system to the following :

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Paul C. Deyhle
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DATED this 22nd day of May, 2018.

/s/ Thomas C. Bradley
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