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IN THE SUPREME COURT OF THE STATE OF NEVADA

JENNIFER HENRY,

Case No. 75675

Petitioner,

v.

NEVADA STATE COMMISSION ON
JUDICIAL DISCIPLINE,

Respondent.

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

Henry v. Nevada Commission on Judicial Discipline

NV Supreme Court Case No. 75675

The undersigned counsel certifies that Respondent, the Nevada Commission on Judicial Discipline, is a governmental party and is exempt from NRAP 26.1 Disclosures.

DATED this 4th day of June, 2018.

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I. STATEMENT OF THE ISSUE

Is NRS § 1.428 unconstitutional as applied to Nevada hearing masters?

II. THE PETITIONER HAS ADEQUATE LEGAL REMEDIES

While it is within this Court’s sole discretion to determine whether to issue a writ, Petitioner bears the burden of demonstrating that extraordinary relief is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). As Nevada case law makes clear, “the right to appeal is generally an adequate legal remedy that precludes writ relief.” *Id.* at 228, 843. Significantly, NRAP 3D(b) provides that “[a]ny Supreme Court justice, Court of Appeals judge, district judge, justice of the peace, or municipal court judge or referee, master, commissioner or other judicial officer who is the subject of any disciplinary or removal proceedings instituted before the commission on judicial discipline may appeal to the Supreme Court from the orders set forth in Rule 3D(c).”¹ As a result, Petitioner has a speedy and adequate legal remedy available if she is ultimately aggrieved by the final decision of the Nevada Commission on Judicial Discipline (“Commission”) and may appeal to this Court. *See In re Assad*, 124 Nev. 391, 185 P.3d 1044 (2008).

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¹ NRAP Rule 3D(c) provides: “Appealable Decisions. An appeal may be taken: (1) From an order of suspension from the exercise of office under NRS 1.4675; (2) From an order of censure, removal, retirement, or other form of discipline.”

III. LEGAL ANALYSIS

A. A Writ Of Prohibition Should Not Be Issued

Petitioner Jennifer Henry seeks a writ of prohibition directing the Commission to arrest its proceedings against Petitioner on the grounds that the Commission is acting in excess of its jurisdiction.

On October 10, 2017, the Prosecuting Officer appointed by the Commission filed a “Formal Statement of Charges” against Petitioner. [APP 1-6.] The formal hearing to resolve those charges was scheduled to take place in Reno, Nevada on May 29, 2018, and was scheduled to be completed in one day. [See APP 7.] This Court granted a temporary stay of the Commission proceedings [Doc. 18-19270]; then, on May 24, 2018, this Court granted a stay of the Commission proceedings [Doc. 18-19984]. As a result, the proceedings were halted only five days prior to the scheduled hearing.

The issuance of a writ will only serve to further prevent the Commission from resolving the underlying disciplinary proceeding in a timely manner. Additional delay of those proceedings would serve to undermine the public’s confidence in the integrity of the judicial discipline process and work to prejudice both Petitioner and the Commission. *See Goldman v. Nevada Commission on Judicial Discipline*, 108 Nev. 251, 263, 830 P.2d 107, 115 (1992) (“judicial discipline proceedings are neither civil nor criminal in nature; they are merely an

inquiry into the conduct of a judicial officer the aim of which is the maintenance of the honor and dignity of the judiciary and the proper administration of justice rather than the punishment of the individual.").

B. The Commission Has Jurisdiction Over The Petitioner

In 1997, pursuant to the directives contained in Art. 6, § 21 of the Nevada Constitution, the Nevada Legislature adopted NRS § 1.428 to add “any other officer of the Judicial Branch of this State . . . who presides over judicial proceedings, including, but not limited to, a magistrate, court commissioner, special master or referee” to the persons subject to the jurisdiction of the Commission.

Petitioner now claims that when the Legislature adopted NRS § 1.428 it acted outside its authority, and that “[t]he only way it could expand the jurisdiction of the Commission is by constitutional amendment.” *Petition For Writ* at p. 10. However, in Art. 6, § 6(2)(a) of the Nevada Constitution, the Legislature had already been granted the authority to create referees, who perform the same functions as hearing masters with respect to hearing evidence and making recommendations and are therefore defined the same as hearing masters.

Further, as described below, relevant Nevada law simply does not support Petitioner’s assertion.

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1. Article 6, § 21

In 1976, “Nevada’s voters approved the creation of the Commission on Judicial Discipline . . . through constitutional amendment to provide for a standardized system of judicial governance.” *Ramsey v. City of N. Las Vegas*, 133 Nev. ___, ___, 392 P.3d 614, 615 (2017). That Amendment, Art. 6, § 21(1) of the Nevada Constitution, as enacted, states, in relevant part:

A justice of the Supreme Court, a district judge, a justice of the peace or a municipal judge may, in addition to the provision of Article 7 for impeachment, be censured, retired, removed or otherwise disciplined by the Commission on Judicial Discipline.²

As described by the *Ramsey* Court, “[t]he legislative history [of Art. 6, § 21] demonstrates that . . . the Commission was viewed as . . . providing a means by which all judges would be held to objective, established standards enforced in a consistent manner.” *Ramsey*, 392 P.3d at 619 (emphasis added).

Art. 6, § 21(5) further requires the Legislature to establish the forms of disciplinary action the Commission may impose, the grounds for such actions, the standards for investigations, and the confidentiality/nonconfidentiality of Commission proceedings.

In addition, Art. 6, § 21 provides that “[t]he Commission shall adopt rules of

² Art. 6, § 21 was amended in 2015 to include judges on the newly created court of appeals.

procedure for the conduct of its hearings and any other procedural rules it deems necessary to carry out its duties.” Art. 6, § 21(7). The Amendment further provides that: “The Commission may: . . . (d) Exercise such further powers as the Legislature may from time to time confer upon it.” Art. 6, § 21(11). In other words, the Nevada Constitution requires the Commission to adopt the rules it deems necessary to carry out its duties, and further provides that the Commission may exercise additional powers the Legislature decides to confer upon it.

These constitutionally granted powers, enacted through the Legislature, include disciplining hearing masters, such as the Petitioner. NRS § 1.428 was enacted to comply with the constitutional mandate of Art. 6 § 21 to provide for a standardized system of judicial governance. NRS § 1.428 meets this constitutional objective by conferring jurisdiction over any judicial officer who presided over judicial proceedings, such as the Petitioner.

2. Article 6, § 6(2)

Petitioner argues that hearing masters are not subject to the Commission’s jurisdiction because hearing masters are not mentioned in NRS § 1.428 or in the Constitution. However, the Nevada Constitution permits for the creation of hearing masters. Art. 6, § 6(2) provides that the Legislature may provide by law for:

(a) Referees in district courts.

Nevada Constitution, Art. 6, § 6(2)(a)

Although that section did not specifically define “referees”, the legislative history indicates that referees and masters are synonymous.

During the first legislative hearing on the issue, “Senator Hernstadt explained that once the referee hears the matter, they then go back to the sitting trial judge, who has the final authority in the case, and the referee’s report has to be adopted by the sitting trial judge before it becomes effective.” *Minutes of the Nevada State Legislature, Assembly Committee on Judiciary, May 12, 1983, p. 11.*

During the March 13, 1985 hearing that put the issue to the voters of Nevada, Nevada Senator Sader “explained that the concept of a referee is a trier of fact who hears the case, hears the witnesses, and then makes a recommendation to the judge. Only the judge can sign the legal orders. It is a very cost-effective tool to make the courts more efficient. It should reduce the time to get the process through.”

Minutes of the Nevada State Legislature, Assembly Committee on Judiciary, March 13, 1985, p. 6. Essentially, the testimony illustrated that the role, duties, and power of a referee are the same as the role, duties, and powers of hearing masters like Petitioner.

Likewise, attorney Peter Neumann testified during the legislative hearing that the term referee is “from the federal system.” *Id.* at p.7 (emphasis added). Earlier versions of Federal Rule of Civil Procedure 53 provided that the word “master” includes referees. For example, in *United States v. Manning*, 215 F. Supp.

272 (W.D. La. 1963), the Court stated that “Rule 53 of the Federal Rules of Civil Procedure allows a district court to appoint a ‘standing’ master for its district or a ‘special master’. ‘As used in (the) rules the word ‘master’ includes a referee” *Id.* at 293; *see also Mullinax v. Willett Lincoln-Mercury, Inc.*, 381 F. Supp. 422, 422–23 (N.D. Ga. 1974) (“As used in these rules the word ‘master’ includes a referee....”).

The fact that the terms “referee” and “master” have the same meaning is made clear in the current version of Nevada Rule of Civil Procedure 53(a)(1), which provides that the word “master” includes a referee. Nevada Court Rules also provide that referees and masters are synonymous. For example, Eighth Judicial District Court Rule 1.12 provides that: “Wherever the term ‘master’ appears in these rules it is interchangeable with the term ‘referee’ as used in the Constitution of the State of Nevada and the Nevada Revised Statutes and vice versa.”

It should be noted that Petitioner, as a hearing master with the Eighth Judicial District Court is a “judge” according to the rules of the Family Division of the Eighth Judicial District Court. *See* Eighth Judicial District Court Rule 5.102(f) (“Unless the context indicates otherwise, the term ‘judge’ or ‘court’ means the presiding judicial officer, whether a district court judge, hearing master, commissioner, or similar presiding officer.”).

Similarly, the Nevada Supreme Court drafted and adopted Rule 3D of the

Nevada Rules of Appellate Procedure which governs appeals from judicial discipline cases and broadly defines judges subject to the Commission's jurisdiction:

“Respondent” means any Supreme Court justice, Court of Appeals judge, district judge, justice of the peace, or municipal court judge or referee, master, or commissioner who is the subject of any disciplinary or removal proceedings instituted before the commission on judicial discipline.

(2)(b) Who May Appeal. Any Supreme Court justice, Court of Appeals judge, district judge, justice of the peace, or municipal court judge or referee, master, commissioner or other judicial officer who is the subject of any disciplinary or removal proceedings instituted before the commission on judicial discipline may appeal to the Supreme Court from the orders set forth in Rule 3D(c). (underscoring added).

The Petitioner argues that because district judges must approve recommendations by hearing masters, hearing masters are not really acting as judges. This argument is without merit. Clearly, hearing masters and referees are performing judicial functions by hearing testimony, evaluating documentary evidence, and making legal determinations even if their decisions are not final.

Thus, Art. 6, § 6(2)(a) grants additional legislative authority to enact NRS § 1.428 to include subordinate judicial officers. The Constitution recognized a need for such subordinate judges. In that same vein, the Commission has a constitutional duty to oversee all judges. To exclude subordinate judges fails to promote public confidence in the judiciary. The public is not aware who is an Article 6 judge and who is a court-appointed hearing master, such as the Petitioner. The importance of

having a fair and impartial judiciary does not end with Article 6 judges but extends to all who perform judicial functions, such as the Petitioner. To argue for less disciplinary authority over those who perform judicial functions violates the constitutional mandate that created the Commission.

3. *In re Davis*

Art. 6 § 6(2)(a) created the ability for the judiciary to have subordinate judges, referees, and hearing masters. NRS § 1.428 was enacted to bring the subordinate judges under the Commission's jurisdiction pursuant to the powers created through Art. 6 § 21(11)(d).

In re Davis, 113 Nev. 1204, 946 P.2d 1033 (1997), supports the legislative power to do the same. In *Davis*, complaints were filed with the Commission against Davis, a municipal court judge. The Commission subsequently filed a statement of charges against him. *Id.* at 1207, 1036. After a formal hearing, the Commission concluded that the facts established violations of the Nevada Code of Judicial Conduct, constituting grounds for discipline. *Id.* at 1209-10, 1037.

Davis appealed, in part claiming that the Commission lacked jurisdiction to impose discipline on municipal court judges for actions that occurred prior to the 1994 constitutional amendment that added municipal judges to the list of judicial officers over whom the Commission had exclusive jurisdiction. *Id.* at 1211, 1038. Davis further asserted that NRS § 1.440, which had added municipal court judges

to the list of judges under the jurisdiction of the Commission in 1977, was unconstitutional. *Id.*

The Court stated that when Art. 7, § 4 of the Nevada Constitution, which provides the Legislature with “the mandate to provide for the removal from office any civil officer other than those in ‘this article previously specified’ is read together with Art. 6, § 21(9)(b) “it is apparent that the legislature was free to utilize the Commission as a medium for that purpose.³ Because the power of removal in this particular context also implies authority in the Commission to impose lesser sanctions, we hold that the Commission did have jurisdiction to either remove or impose any measure of discipline, including removal, in this matter.” *Id.* at 1213, 1039.

The Nevada Supreme Court rejected Davis’ claim, explaining that “[a]lthough the 1994 amendment . . . facially expand[ed] the scope of the Commission’s powers to include municipal court judges and justices of the peace, in actuality, the amendment simply clarified the legislature’s then existing authority to render these judicial officers subject to Commission discipline. Thus, the promulgation of NRS § 1.440(1) by the 1997 Nevada legislature was within its constitutional prerogatives.” *Id.* at 1212, 1039. Therefore, the Petitioner is subject

³ Art. 7, § 4 currently provides that: “Provision shall be made for the removal from Office of any Civil Officer other than those in this Article previously specified, for Malfeasance, or Nonfeasance in the Performance of his duties.”

to the jurisdiction of the Commission.

4. Paschall v State

A similar argument was likewise rejected by this Court in *Paschall v. State*, 116 Nev. 911, 8 P.3d 851 (2000). In that case, the Appellant had received two DUI citations in 1997 and 1998 after which the justice court suspended both jail sentences. *Id.* at 912, 852. Less than seven years later, Appellant was convicted of two additional DUI's, and pursuant to NRS § 484.3792(1)(c), the district court enhanced the 1997 and 1998 convictions to felonies.⁴

Seeking to invalidate the two earlier suspended sentences, Appellant argued on appeal that NRS § 4.373, which granted suspension power to the justice courts, was unconstitutional because Art. 5, § 14 of the Nevada Constitution expressly limited the authority to suspend sentences to district courts. *Paschall*, 116 Nev. at 913, 8 P.3d at 852.

Although Art. 5, § 14 provides that “[t]he legislature is authorized to pass laws conferring upon the district courts authority to suspend the execution of sentences, fix the conditions for, and to grant probation . . .”, this Court rejected the Appellant’s argument and found NRS § 4.373 to be constitutional.

⁴ “NRS 484.3792(1)(c) provides that: [A person who drives under the influence for] a third or subsequent offense within 7 years, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and shall be further punished by a fine of not less than \$2,000 nor more than \$5,000.” *Paschall*, 116 Nev. at 912, fn 1, 8 P.3d at 852, fn 1.

In so finding, the Court cited Art. 6, § 8(1), which states:

The Legislature shall determine the number of Justices of the Peace ... and shall fix by law their qualifications, their terms of office and the limits of their civil and criminal jurisdiction, according to the amount in controversy, the nature of the case, the penalty provided, or any combination of these.

The *Paschall* Court explained that "[b]ecause 'district courts' alone are mentioned, Paschall argues that by negative implication the legislature has no authority to vest justice courts with the power to suspend sentences. However, this view ignores the broad grant of power in article 6, section 8 of the Nevada Constitution and our duty to interpret statutes 'in harmony with the Constitution' when reasonably possible. Accordingly, we conclude that that language of article 5, section 14 of the Nevada Constitution does not control the matter." *Paschall*, 116 Nev. at 915, 8 P.3d at 853-54 (internal citations omitted).

Here, Petitioner is asking this Court to find, based on Art. 6 § 21(1), that NRS § 1.428 is unconstitutional. By so requesting, Petitioner is also implicitly asking this Court to ignore Art. 6, § 21(11)(d), which provides that the Commission may "[e]xercise such further powers as the Legislature may from time to time confer upon it," and Art. 6 § 21(5), which requires the Legislature to establish guidelines regarding judicial discipline. *See* Art. 6, § 21(11)(d) and Art. 6, § 21(5)(a)-(d). Furthermore, Petitioner is insisting that this Court disregard Art. 6, § 6(2)(a), where the Legislature was specifically given the authority to provide for

referees in district courts.

As this Court has previously observed, such a broad grant of power to the Legislature cannot be read in isolation, and when Art. 6, §§ 6(2)(a), 21(11)(d), and 21(5) are read in conjunction with § 21(1) and its legislative history, it is clear that the promulgation of NRS § 1.428 by the 1997 Nevada Legislature was within its constitutional prerogatives. *Ramsey*, 392 P.3d at 619 (“[T]he Commission was viewed as . . . providing a means by which all judges would be held to objective, established standards enforced in a consistent manner.”)(emphasis added).

IV. CONCLUSION

It is important to note that this case has significant implications. Should this Court find that NRS § 1.428 is unconstitutional, the system for disciplining hearing masters would become a bureaucratic nightmare. Instead of having an independent commission dedicated to the investigation and resolution of judicial complaints, that responsibility would fall upon district judges.

Thus, district judges who are already dealing with crowded calendars, would be required, on a case by case basis, to review, investigate, hear evidence, and make disciplinary determinations for all hearing master complaints. These disciplinary decisions by the district judges would then be subject to review by the Commission following a complaint that the district judges failed to properly supervise the hearing masters. Moreover, in districts where there are Chief Judges,

the Chief Judge’s supervision of the district judges could also be implicated.

Moreover, the Supreme Court would then be responsible to evaluate the many layers of supervision and determine whether the investigations and disciplinary determinations by the supervising judges were appropriate because the Nevada Supreme Court “has the ultimate administrative authority over the functioning of Nevada's court system.” *Halverson v. Hardcastle*, 123 Nev. 245, 252, 163 P.3d 428, 434 (2007). In short, the disciplinary review of hearing masters would be extremely burdensome to the Nevada judiciary and would likely cause significant delays in the administration of justice.

The Commission is an independent disciplinary authority that was created by the Nevada Constitution to ensure that the judicial system is fair and impartial. The Commission serves an important role in disciplining hearing masters as it promotes ethical consistency that is necessary to ensure the administration of justice. If the discipline of hearing masters was left solely to court administration, consistency would be significantly diminished as well as the public’s confidence in the Nevada judicial system.

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For the reasons stated above, this Court should find that NRS § 1.428 is constitutional and that the Commission has jurisdiction over hearing masters, including Jennifer Henry.

DATED this 4th day of June, 2018.

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CERTIFICATE OF COMPLIANCE

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

I further certify that this Answer complies with the page limits of NRAP 32(a)(7)(A)(i), because this Answer is under 30 pages.

I finally certify that I have read this Answer, 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 Answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 4th day of June, 2018.

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CERTIFICATE OF SERVICE

I certify that on the 4th day of June, 2018, I served a true and correct copy of this *Answer to Petition for Writ of Prohibition* via the Nevada Supreme Court's E-Flex filing system to the following :

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