

LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
NICOLE M. YOUNG, ESQ.
Nevada State Bar No. 12659
610 South Ninth Street
Las Vegas, Nevada 89101
(702) 386-0536; FAX (702) 386-6812
Attorneys for Petitioner

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Elizabeth A. Brown
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IN THE SUPREME COURT OF THE STATE OF NEVADA

JENNIFER HENRY,

Case No. 75675

Petitioner,

vs.

NEVADA STATE COMMISSION
ON JUDICIAL DISCIPLINE,

Respondent.

_____ /

REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3-4
I. FACTUAL BACKGROUND	5-7
II. LEGAL ANALYSIS	7-16
A. The Constitution only provides the Commission jurisdiction to discipline elected judges under Article 6.	9-11
B. The legislature cannot change the meaning of the Constitution by ordinary enactment of legislation.	12-16
III. CONCLUSION	17
VERIFICATION	18
CERTIFICATE OF COMPLIANCE	19
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

Cases

In re A.B.

128 Nev. 764, 770, 291 P.3d 122, 127 (2012)9

Clean Water Coal. v. The M Resort, LLC

127 Nev. 301, 309, 255 P.3d 247, 253 (2011)12

Cote H. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark

124 Nev. 36, 39, 175 P.3d 906, 907 (2008)7

Galloway v. Truesdell

83 Nev. 13, 20, 422 P.2d 237 (1967)15

Matter of Davis

113 Nev. 1204, 946 P.2d 1033 (1997)13-14

Landreth v. Malik

127 Nev. 175, 184, 251 P.3d 163, 168 (2011)9, 12

In re Contested Election of Mallory

128 Nev. 436, 438, 282 P.3d 739, 741 (2012)17

Paschall v. State

116 Nev. 911, 914, 8 P.3d 851 (2000)15

Ramsey v. City of N. Las Vegas

392 P.3d 614, 615 (2017)10, 13

Thomas v. Nev. Yellow Cab Corp.

130 Nev. Adv. Op. 52, 327 P.3d 518, 521 (2014)12

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Statutes

NRS 1.428	12
NRS 1.440	14-15
NRS 1A.160	10-11
NRS 2.030	9
NRS 2A.030	9
NRS 4.020	9
NRS 5.020	9
EDCR 1.46	9-11

Constitutional Provisions

Article 6 of the Nevada Constitution	6, 9-17
Article 7 of the Nevada Constitution	14

I. FACTUAL BACKGROUND

On October 10, 2016, a hearing was held in the juvenile court of the Eighth Judicial District Court (hereinafter "EJDC") where Petitioner Jennifer Henry (hereinafter "Ms. Henry") was the court hearing master. At that hearing, an attorney complained of Ms. Henry's conduct before she was able to give her recommendation in that case. That attorney then made a complaint to Judge William Voy. On October 14, 2016, Judge Voy provided Ms. Henry a letter stating:

After reviewing the JAVS recording of the hearing held on October 10, 2016 in the above referenced case, I consulted with Presiding Judge Charles Hoskin and Chief Judge Dave Barker. It was determined that your actions as a judicial officer were improper, specifically as it relates to the facts and details surrounding the decision to increase the length of the probationary period and the constitutional rights of the defendant.

As such, you are being administered a 1-week suspension without pay for conduct unbecoming a judicial officer of the court. Your 1-week suspension without pay will be effective October 17-21, 2016.

If any further incidents occur, you will be subject to more severe discipline up to and including termination.

(See Petitioner's Supplemental Appendix to Petition for Writ of Prohibition (hereinafter "Supp"), at 1.)

That same day, Judge Voy reassigned Ms. Henry to handle arraignment matters for the criminal division of the EJDC. This reassignment required Ms.

Henry to clean-out her office, while she was suspended without pay, and then move her belongings to her new office, at the Regional Justice Center, the day she returned from her suspension. In the memorandum notifying Ms. Henry of her reassignment, she was reminded that she is still an "At-Will" employee. (*See* Supp 2.)

In the EJDC, Court Hearing Masters are hired by Clark County. (*See* Supp 3-5.) That position is included in the Management Compensation Plan, Category 3. (*See* Supp 3.) That position is also subject to the Personnel Policies of the Clark County Merit Personnel System, including "Personnel Policy X," which covers employee discipline. (*See* Supp 62.) When Ms. Henry was disciplined by Judge Voy on October 14, 2016, she was disciplined pursuant to that policy.

One year later, on October 10, 2017, Respondent Nevada Commission on Judicial Discipline (hereinafter "the Commission") filed a "Formal Statement of Charges" against Ms. Henry. (*See* Appendix to Petition for Writ of Prohibition (hereinafter "App"), at 1-6.) The Commission alleges it filed those charges pursuant to the authority granted to the Commission under Article 6, section 21 of the Nevada Constitution. (*See* App 1-6.)

Ms. Henry notified the Commission that she had already been disciplined for the incident at issue in the Commission's "Formal Statement of Charges." Despite having already been disciplined by district court judges, including Judge William

Voy, Chief Judge David Barker, and Presiding Family Court Judge Charles Hoskins, the Commission is still seeking to discipline Ms. Henry through its disciplinary process.

II. LEGAL ANALYSIS

Extraordinary relief, via a writ of prohibition, is warranted in this case because the issue presented by Ms. Henry challenges the Commission's subject-matter jurisdiction, specifically its constitutional authority to discipline court hearing masters even though the Nevada Constitution does not include court hearing masters under the Commission's jurisdiction.

The Commission argues that Ms. Henry "has a speedy and adequate legal remedy available if she is ultimately aggrieved by the final decision of the [Commission] and may appeal to this Court." (*See* Respondent's Answering Brief, filed on June 5, 2018, at p.1.)

This Court has held that "[a] writ of prohibition is appropriate when a district court acts without or in excess of its jurisdiction." *Cote H. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 124 Nev. 36, 39, 175 P.3d 906, 907 (2008). This Court has found that it will intervene on a writ of prohibition

under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition.

Id.

In this case, the Commission is acting without and in excess of its jurisdiction by attempting to subject Ms. Henry to discipline even though the Constitution does not provide the Commission with constitutional authority to discipline court hearing masters. In addition, the Commission is acting against judicial economy by attempting to discipline Ms. Henry for an incident that she has already been disciplined. This is not "sound judicial economy" and is ultimately a waste of tax payer money.

The Commission argues that it must discipline Ms. Henry to serve the public's confidence in the integrity of the judicial discipline process. However, this argument is without merit. Ms. Henry was disciplined for the incident at issue four (4) days after the incident. The Commission waited one (1) year before it filed a charge against Ms. Henry. It is unclear how waiting a year to file a formal charge would restore the public's confidence in the judicial system. The public's confidence in the judicial system was ensured when she was disciplined four (4) days later pursuant to her employment with Clark County and/or the EJDC.

As such, it is appropriate for this Court to intervene in this case and issue of writ of prohibition that the Commission cannot discipline Ms. Henry because it is without constitutional authority to discipline court hearing masters. The Commission's lack of constitutional authority to discipline court hearing masters is discussed below.

A. The Constitution only provides the Commission jurisdiction to discipline elected judges under Article 6.

Article 6, section (6)(1) of the Constitution creates the judiciary's power and "authority to act and determine justiciable controversies." *Landreth v. Malik*, 127 Nev. 175, 184, 251 P.3d 163, 168 (2011). That section grants that power to the Supreme Court, the court of appeals, the district court, the justice court, and the municipal court. Nev. Const. Art. 6, §1 (2017). This power "includes the power to make and enforce final decisions." *Id.* at 183. This power cannot be "diminished by legislatively enacted jurisdictions." *Id.* at 184. Accordingly, this power may only be exercised by a judge whose position was created under Article 6 of the Constitution. *In re A.B.*, 128 Nev. 764, 770, 291 P.3d 122, 127 (2012). It cannot "be delegated to a master or other subordinate official of the court." *Id.* This is why a master may only make findings and recommendations. *Id.* Those findings and recommendations can only turn into an actual court order by an Article 6 judge, such as a district court judge. *Id.* at 770; *see* EDCR 1.46(g)(9).

Article 6 mandates that judges serving in the Supreme Court, the court of appeals, the district court, the justice court, and the municipal court in the State of Nevada be elected. Nev. Const. Art. 6, §§ 3, 3a, 5, 18 (2017). The election requirement for these judges is also codified in the Nevada Revised Statutes. NRS 2.030; NRS 2A.030; NRS 4.020; and NRS 5.020. Additionally, based on this

esteemed position that is created by the Constitution, these judges receive the benefit of the Judicial Retirement Fund. *See* NRS 1A.160.

The Commission was created in 1976 "amid growing concern that no central administrative authority existed to unify Nevada courts and that this state's judges were not being held to uniform and consistent standards." *Ramsey v. City of N. Las Vegas*, 392 P.3d 614, 615 (2017). The Commission was created because there was no way to discipline or remove judges elected under Article 6. *Id.* at 615-16. The Constitution was amended in 1976 to create the Commission. *Id.*

The Commission's authority is limited to the following individuals:

1. A justice of the Supreme Court;
2. A judge of the court of appeals;
3. A district judge;
4. A justice of the peace; or
5. A municipal judge.

Nev. Const. Art. 6, § 21(1) (2017). This provision was recently amended in 2013 to include judges on the court of appeals. Noticeably absent from that amendment is the inclusion of hearing masters.

In this case, Ms. Henry was a juvenile hearing master. In that position she served "at the pleasure of the district court judges." EDCR 1.46(a)(1). She was not elected to that position. Instead, she had to apply for that position through Clark

County. (*See* Supp 3-5.) Because she is not an elected judge, she does not have judicial power. She cannot make court orders. Instead, she is only permitted to make findings and recommendations. In order for her findings and recommendations to become a court order, a district court judge would have to adopt those findings and recommendations. EDCR 1.46(g)(9).

Because she is an employee of Clark County and/or the EJDC, she is subject to discipline and removal through her employers' internal processes. (*See* Supp 62.) Article 6 judges are not subject to these internal processes of discipline or removal because their authority stems from the Constitution and the electorate. In addition, unlike Article 6 judges, Ms. Henry is an "at-will" employee, meaning she can be terminated at any time by her employers subject to their disciplinary procedures. (*See* Supp 1-2.) Article 6 judges are not "at-will" employees because their position is set by a term of years by the Constitution. Nev. Const. Art. 6 (2017). Finally, because Ms. Henry is not an Article 6 judge, she is not entitled to receive the benefit of the Judicial Retirement Fund set forth under NRS 1A.160. Instead, she receives PERS and other employee benefits like all other category 3 employees under the Clark County Management Compensation Plan. (*See* Supp 12.)

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B. The legislature cannot change the meaning of the Constitution by ordinary enactment of legislation.

"The Nevada Constitution is the 'supreme law of the state' which control[s] over any conflicting statutory provisions." *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518, 521 (2014) (quoting *Clean Water Coal. v. The M Resort, LLC*, 127 Nev. 301, 309, 255 P.3d 247, 253 (2011)). It may not be construed according to a statute. *Landreth*, 127 Nev. at 181, fn 2. Instead, "statutes must be construed consistent with the constitution." *Id.*

The Commission argues that NRS 1.428 provides it jurisdiction to hold disciplinary hearings over hearing masters because subsection 6 includes:

Any other officer of the Judicial Branch of this State,
whether or not the officer is an attorney, who presides
over judicial proceedings, including, but not limited to, a
magistrate, court commissioner, special master or referee.

The Commission argues that Article 6, section 6(2)(a) of the Constitution, which allows the legislature to enact laws allowing for referees in district courts, expands the jurisdiction of the Commission. Such an interpretation is not harmonious with the constitutional purpose of the Commission. Ms. Henry agrees that referees and hearing masters essentially serve the same purpose. However, if referees were meant to be included under the Commission's jurisdiction, then they would have been included with the other enumerated judges listed under Art. 6, section 21(1). Those judges include: "[a] justice of the Supreme Court, a judge of the court of

appeals, a district judge, a justice of the peace or a municipal judge." Nev. Const. Art. 6, §21(1) (2017). The constitutional intent that these enumerated judges are the only individuals subject to the Commission's jurisdiction is further supported by the fact that this section was recently amended in 2013 to include judges on the court of appeals. Referees and hearing masters are not included.

The maxim *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another") has been long adhered to in this state. *Ramsey*, 392 P.3d at 619. This maxim instructs us to view the failure to include referees and hearing masters under the jurisdiction of the Commission pursuant to Art. 6, §21(1) as intent to not include such individuals under the Commission's jurisdiction.

This intent is based on the fact that the Commission was created for the sole purpose of having a mechanism to discipline and remove elected judges because there was no other way to hold these individuals accountable in their positions and ensure consistency in the law. *See Ramsey*, 392 P.3d at 615-16. Hearing masters, like Ms. Henry, are "at-will" employees that can be disciplined by their employer. (*See Supp 1-2.*)

This Court has previously addressed the jurisdiction prescribed to the Commission in the *Matter of Davis*, 113 Nev. 1204, 946 P.2d 1033 (1997). In that case, the Commission's jurisdiction over municipal judges was at issue. The issues

raised included whether NRS 1.440 was unconstitutional and whether a municipal judge could be disciplined for pre-1994 conduct since the Constitution was amended in 1994 to include municipal judges within the jurisdiction of the Commission. *Id.* at 1211. This Court ultimately found that the Commission had constitutional authority to remove and/or discipline a municipal judge by reading article 6, section 21(9)(d) and article 7, section 4 of the Constitution together. At that time, article 6, section 21(9)(d) stated that the Commission may "[e]xercise such further powers as the legislature may from time to time confer upon it." *Id.* at 1211-12. "[A]rticle 7, section 4 of the constitution gave the legislature the mandate to provide for the removal from office any civil officer other than those in 'this article previously specified' for malfeasance or nonfeasance in the performance of official duties." *Id.* at 1212-13. "This court has interpreted article 7, section 4 as authorizing the legislature to provide by statute for the removal of district, county and township officers." *Id.* at 1213.

Davis is distinguishable from the instant case. *Davis* deals with a municipal judge that was elected to his position. In 1994, Art. 6, section 21(1) was amended to include municipal judges under the Commission's jurisdiction. *Davis*, 113 Nev. at 1211. Ms. Henry is a hearing master, not an elected judge under Article 6.

In addition, the reason why Art. 6, section 21(9)(d), which is now known as Art. 6, section 21(11)(d), was at issue in that case is because this Court was

determining the constitutionality of NRS 1.440 as it relates to municipal judges. *Id.* at 1211-12. Municipal judges are Article 6 judges because they are elected. This Court was correct when it held that municipal judges are subject to the Commission's jurisdiction because their inclusion goes directly to the purpose of why the Commission was created in the first place: to hold elected judges accountable for their actions.

While it is true that Art. 6, §21(11)(d) creates a catch-all that the Commission may "[e]xercise such further powers as the Legislature may from time to time confer upon it," those further powers cannot enlarge its jurisdiction beyond what is expressed in the Constitution. *See Paschall v. State*, 116 Nev. 911, 914, 8 P.3d 851 (2000)¹. These further powers must be within the confines of the power provided by the constitution. *See Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237 (1967). The specific powers granted to the legislature with regard to the Commission are enumerated in Article 6, section 21(5) of the Constitution.

To hold otherwise would create the absurd result where a hearing master can be disciplined by their employer and then one (1) year later disciplined by the Commission for the same incident. This is a colossal waste of taxpayer and judicial

¹ The Commission cites *Paschall* claiming that case supports their position that hearing masters are included within the Commission's jurisdiction. However, that case is inapposite to the instant case as it deals with sentencing guidelines for DUI's.

resources. Article 6 judges are not subject to discipline by two (2) different governmental entities. The reason the Commission exists is because Article 6 judges do not have an "employer." Their "employer" is the public, and the Commission is the only way to hold Article 6 judges accountable to the public.

There is no way to harmoniously read Art. 6, section 21(1) with Art. 6, sections 6(2)(a) and 21(11)(d) to come to the conclusion that hearing masters are included under the Commission's jurisdiction. Such an interpretation disregards the intent behind the creation of the Commission to be able to hold Article 6 elected judges accountable to the public.

As a hearing master employed by Clark County and/or the EJDC, Ms. Henry is already subject to discipline, up to and including termination at any time, by her employers. (*See* Supp 1-2.) Ms. Henry was already disciplined in this case for the incident at issue, and she was also notified that "[i]f any further incidents occur, [she] will be subject to more severe discipline up to and including termination." (*See* Supp 1.) Therefore, the public interest the Commission is concerned about has already been vindicated by the actions of Clark County and/or the EJDC.

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III. CONCLUSION

The plain language of Article 6, section 21 lists who is subject to the jurisdiction of the Commission: a justice of the Supreme Court, a judge of the court of appeals, a district judge, a justice of the peace or a municipal judge. Nev. Const. Art. 6, § 21(1) (2017). The language is clear and unambiguous, and the plain language must be accorded its plain meaning. *See In re Contested Election of Mallory*, 128 Nev. 436, 438, 282 P.3d 739, 741 (2012).

Based on the foregoing, this Court should issue a writ of prohibition against the Commission to arrest its proceedings against Ms. Henry because it is acting without and/or in excess of its jurisdiction.

DATED this 19 day of June, 2018.

LAW OFFICES OF DANIEL MARKS



DANIEL MARKS, ESQ.

Nevada State Bar No. 002003

NICOLE M. YOUNG, ESQ.

Nevada State Bar No. 12659

610 South Ninth Street

Las Vegas, Nevada 89101

Attorneys for Petitioner

VERIFICATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

JENNIFER HENRY, being first duly sworn under penalty of perjury,
deposes and says:

That I am the Petitioner in the above-entitled action; that I have read the
foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF**
PROHIBITION and know the contents thereof; that the same is true of my own
knowledge, except as to those matters therein contained stated upon information
and belief, and as to those matters, I believe them to be true.

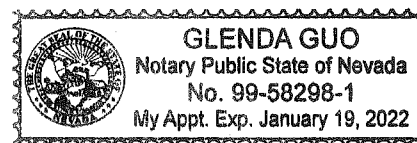


JENNIFER HENRY

SUBSCRIBED AND SWORN to before
me this 19th day of June, 2018.



NOTARY PUBLIC in and for said
COUNTY AND STATE

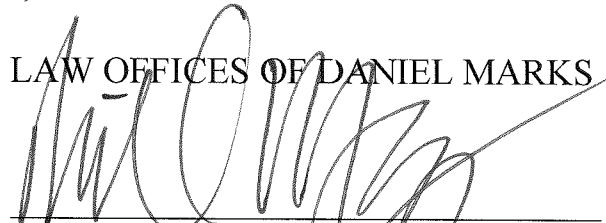


CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.
2. Finally, I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellant Procedure.

DATED this 11 day of June, 2018.

LAW OFFICES OF DANIEL MARKS



DANIEL MARKS, ESQ.

Nevada State Bar No. 002003

NICOLE M. YOUNG, ESQ.

Nevada State Bar No. 12659

610 South Ninth Street

Las Vegas, Nevada 89101

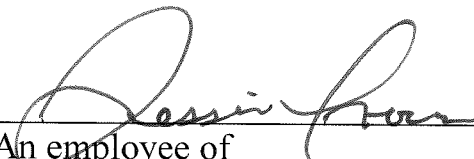
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS, and that on the 19 day of June, 2018, I did serve by way of electronic filing, a true and correct copy of the above and foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION** on the following:

Thomas C. Bradley, Esq.
Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace
448 Hill Street
Reno, Nevada 89501
Prosecuting Officer

Paul C. Deyle
Executive Director
State of Nevada Commission on Judicial Discipline
P.O. Box 48
Carson City, Nevada 89702



An employee of
LAW OFFICE OF DANIEL MARKS