

**IN THE SUPREME COURT
OF MISSOURI**

SC90937

IN RE:

**THE MATTER OF THE
HONORABLE TIMOTHY J. FINNEGAN**

BRIEF OF THE ATTORNEY GENERAL

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QUESTIONS PRESENTED

The Court asked for briefing on nine questions. Upon holding that commissioners appointed by the circuit courts are not “judges” under Article V of the Missouri constitution, some of those questions become irrelevant. As to others, the Attorney General does not take a position contrary to that of the Commission. Below we state the questions posed by the Court and identify where in this brief the question is addressed.

- I. Is a family court commissioner a judge or member of a judicial commission? I, pp. 8-16.
- III. Does the fact that the position of family court commissioner is created by statute affect whether Mo. Const. Art. V, sec. 24.8 prohibits the Commission on Retirement, Removal and Discipline from seeking discipline against such a commissioner? I(A)-(C), pp. 6-16. If discipline over family court commissioners is permissible, does the Commission also have jurisdiction over administrative law judges or members of the administrative hearing commission, which are also statutory entities? I(D), p. 17.
- IV. Is the determination whether discipline can be imposed determinative of whether disability benefits can be paid or vice versa? Or are these two separate issues that may have different answers? II, p. 19.

- V. Section 487.050.4, RSMo 2000, uses the same language for removal as contained in Mo. Const. Art. V, sec. 24.3. What does this statutory language indicate with respect to whether the Commission has jurisdiction over family court commissioners? What effect did the general assembly intend by the duplication? I(C), pp. 14-15.
- VIII. To what extent, if any, are the funds used to pay disability benefits under the Missouri constitution different from the funds used to pay such benefits under the statutory long-term disability program? If commissioner Finnegan qualifies under the statutory disability program how would his retirement and disability benefits differ from the same type of benefits he would receive under Mo. Const. Art. V, sec. 24.2? Please be specific with dollar values and length of benefits indicated. Assuming he receives benefits under the constitution and his term expires, are statutory benefits then available or do any disability benefits or retirement benefits change? Again, be specific. II, p. 19.
- IX. If a family court commissioner is a judge for purposes of Mo. Const. Art. V, sec. 24, is the court required to revisit its decisions in *Slay v. Slay*, 965 S.W.2d 845 (Mo banc 1998), and *Fowler v. Fowler*, 984 S.W.2d 508 (Mo. banc 1999)? Would these cases have to be revisited

if the commissioner is deemed to be a member of a judicial commission? I(B), pp. 8-11.

ARGUMENT

I. The Commission on Retirement, Removal and Discipline lacks authority to act as to commissioners appointed by the circuit courts.

This matter involves a person appointed by circuit judges, pursuant to statute, to assist – not supplant – an Article V judge. The General Assembly has given that person the title “commissioner.” The key question before the Court is whether a circuit court-appointed commissioner is subject to the authority of the Commission on Retirement, Removal and Discipline, established pursuant to article V, § 24. He is not.

A. The Commission’s authority is limited to judges and members of judicial commissions.

Section 24 defines the scope of the Commission’s authority to include only two categories of persons: judges and members of judicial commissions.

1. ... The commission shall receive and investigate all requests and suggestions for retirement for disability, and all complaints concerning misconduct of all *judges, members of the judicial commissions, and of this commission.* ...

2. Upon recommendation by an affirmative vote of at least four members of the commission, the

supreme court en banc shall retire from office *any judge or any member of any judicial commission or any member of this commission* who is found to be unable to discharge the duties of his office with efficiency because of permanent sickness or physical or mental infirmity. *A judge, except a municipal judge* so retired shall receive one-half of his regular compensation during the remainder of his term of office. Where *a judge* subject to retirement under other provisions of law, has been retired under the provisions of this section, the time during which he was retired for disability under this section shall count as time served for purposes of retirement under other provisions of this constitution or of law.

3. Upon recommendation by an affirmative vote of at least four members of the commission, the supreme court en banc, upon concurring with such recommendation, shall remove, suspend, discipline or reprimand *any judge of any court or any member of any judicial commission or of this commission*, for the commission of a crime, or for misconduct, habitual

drunkenness, willful neglect of duty, corruption in office, incompetency or any offense involving moral turpitude, or oppression in office. No action taken under this section shall be a bar to or prevent any other action authorized by law.

(Emphasis added.) By repetition, the Constitution emphasizes the limitation on the Commission's authority to judges and members of judicial commissions. So unless a family court commissioner is either a judge or a member of a judicial commission, he is not not subject to the authority of the Commission on Retirement, Removal and Discipline.

B. Commissioners appointed by the circuit courts are not judges under Article V.

In response to the General Assembly's efforts to assist the courts and litigants obtain efficient resolution of disputes without adding new judgeships, this Court has repeatedly and definitively defined who is a judge under Article V of the Missouri Constitution as amended in 1976. The key decision was *Slay v. Slay*, 965 S.W.2d 845 (Mo. banc 1998). The question there was whether a commissioner's decision constituted a final appealable judgment. The court held that it did not because a commissioner was not a judge:

Article V, section 1 of the state constitution vests the judicial power of this state in this Court, the court of appeals, and the circuit courts. These courts are composed of judges. Mo. Const. art. V, sections 2, 13, 15, and 16. Although the documents filed in these cases are denominated “judgment,” they are not signed by a judge. Because the documents are not signed by a person selected for office in accordance with and authorized to exercise judicial power by article V of the state constitution, no final appealable judgment has been entered, and this Court is without jurisdiction.

Ever since, this Court has acted consistent with the *Slay* holding. *E.g.*, *York v. Daughterty*, 969 S.W.2d 223 (Mo. banc 1998); *Fowler v. Fowler*, 984 S.W.2d 508 (Mo. banc 1999); *Dabin v. Director of Revenue*, 9 S.W.3d 610 (Mo. banc 2000) (traffic commissioners); *State ex rel. Hilburn v. Staeden*, 91 S.W.3d 607, 611 (Mo. banc 2002) (“*Slay* and *Fowler* held that a family court commissioner—a judicial branch officer who is not an article V judge ...”).

The *Slay* holding makes sense. There is no basis for belief that when the people of the State of Missouri adopted the current version of Article V, they expanded the concept of “judges” to include a person who is selected by

and assist judges but is not constitutionally authorized to render judgments. There was nothing in the proposition presented to the voters that suggested that the authority of the Commission would extend to some new form of “judge,” with a different title, subject to a very different selection process, and without any constitutionally recognized existence, authority, or status.

The methods of selection of judges under Article V were apparent in the proposed Article V. Two were defined. Appellate judges were to be selected by the governor pursuant to the nonpartisan court plan. Art. V, § 25(a). Circuit and associate judges were to be either selected by the governor pursuant to the court plan or elected by the people. Art. V, §§ 16, 25(a). The Article did not itself establish the method for selection of judges in the municipal division of the circuit courts; it assigned that responsibility to the legislature and the charter cities. Art. V, § 23. But nothing suggested that the Article contemplated some new, non-judge judge, selected by other judges.

Both before and after the replacement of Article V, litigation over the Commission’s authority centered on municipal judges. But the decisions handed down in such litigation do not help the analysis as to commissioners or others appointed by circuit judges to assist with the judicial process. Since 1976, there has been no doubt that under Article V the Commission’s authority includes municipal judges, for two reasons.

First, Article V makes it clear that municipal courts are courts of the state – divisions of the circuit courts. Art. V, § 27.2(d). If the municipal courts are courts of the state, judges on those courts must be judges for purposes of Article V, regardless of how or by whom they are appointed.

Second, Article V itself expressly recognizes municipal judges, and addresses how they are to be appointed. Art. V, § 23.

Third, § 24 itself demonstrates the inclusion of municipal judges by expressly excluding them in one respect: “A judge, *except a municipal judge* so retired shall receive one-half of his regular compensation during the remainder of his term of office.” Art. V, § 24.2 (emphasis added). If municipal judges were not judges for purposes of § 24, the exclusion would be unnecessary.

But again, § 24 says nothing to suggest that a circuit court commissioner or any other court-appointed assistant is a “judge.” Instead, they fall within the category of positions the legislature can create in the judicial branch: “Personnel to aid in the business of the circuit court shall be selected as provided by law or in accordance with a governmental charter of a political subdivision of this state.” Art. V, § 15.4. And again, this Court has consistently held that commissioners – presumably like others appointed to

“aid in the business of the circuit court” – are not “judges” as that term is used in Article V.¹

C. Circuit court commissioners are not members of judicial commissions.

The Commission’s authority also includes “members” of “judicial commissions.” Art. V, § 24. The Constitution establishes such commissions, Article V, § 5(d), and the Commission on Retirement, Removal and Discipline certainly may act with regard to members of those commissions. We need not address here whether the Commission could act with regard to a member of a judicial commission established by statute for a simple reason: though they are given the title “commissioner,” commissioners in the family court and other divisions of the circuit courts are not members of any commission.

A “commission” is a “body of persons acting under lawful authority to perform certain public services.” Black’s Law Dictionary (7th Ed. 1999) at 264. *See also* Webster’s Third New International Dictionary (1993) at 457 (“a: a group of persons directed to perform some duty or execute some trust:

¹ The Attorney General agrees with the Commission that administrative law judges in the executive branch would logically be treated as outside of the Commission’s authority even if the Court were to reverse *Slay*.

a body of commissioners ... b: a government agency having administrative, legislative, or judicial powers”). In addition to the “judicial commissions” created by the Constitution, Missouri has other commissions, such as the Labor and Industrial Relations Commission. In each instance, the Commission acts as a “body” or “agency” to perform statutorily defined functions.

Missouri does use the title “commissioner” for some officials who are not members of “commissions,” such as the commissioners of Administration (Mo. Const. Art. IV, § 50) and Education (Art. IX, § 2(b)). Dictionaries recognize, appropriately, that “commissioner” is used as a title for such persons although they are not members of commissions. Black’s at 265 (“commissioner: 1. A person who directs a commission; a member of a commission. 2. The administrative head of an organization, such as a professional sport.”); Webster’s (“1: a person who has received a commission or has been delegated to perform some service or carry out some business ...”). The family court commissioner has been commissioned to act, so giving him the title “commissioner” is semantically appropriate. But using that title – or any other – does not bring him into realm of Commission authority.

The language of the constitution is unambiguous. It gives the Commission authority not over commissioners, but only over members of judicial commissions. Indeed, the Commission itself implicitly recognizes

that limitation on its authority by omitting from its brief any claim that court-appointed commissioners such as family court commissioners fall within the Commission's authority if they are not "judges" per Article V. Commissioner Finnegan adopted the Commission's arguments, and thus implicitly agreed that he is subject to action by the Commission only if the Commission prevails on its argument that he is a "judge."

Reading the circuit court commissioners out of Article V, § 24 is consistent with the General Assembly's assignment of removal authority to the circuit court, rather than to the Commission:

4. A commissioner may be removed from office during a term *by a majority of the circuit and associate circuit judges en banc* upon proof at a hearing before such judges of crime, misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency or any offense involving moral turpitude or oppression in office or unsatisfactory performance of duties.

§ 487.050.4, RSMo 2000.

In its Question 5, the Court pointed out that this language parallels the constitutional language pertinent to the Commission. With regard to the bases for action, that is correct. The General Assembly apparently intended

that commissioners and judges be subject to action on the same bases. But as to who takes that action, the General Assembly's intent to define a difference between commissioners and judges seems apparent. The General Assembly did not (indeed, as discussed in I.D., below, could not) assign responsibility for commissioners to the Commission as the Constitution does for judges. Instead it left that authority – logically – in the hands of the same entities that appoint commissioners and supervise their work: the circuit judges. That does not mean that this court and the court of appeals are unable to become involved in the process. The appellate courts can use their supervisory authority to direct action by a circuit court where necessary. (Art. V, § 4.1)

The General Assembly could not reasonably assign responsibility for retirement, removal, or discipline of circuit, associate circuit, and appellate judges to the person or body that appointed and supervises them. After all, the appointing authority for those judges is not an individual or a small group that could be assigned responsibility for retirement and discipline. Outside of the nonpartisan court plan counties, circuit and associate circuit judges are chosen by popular vote, and it is hardly surprising that the General Assembly (and those who voted for Article V) would want removal decisions to be made before and independent of a subsequent election. Nor could the General Assembly logically insert the appellate and circuit judicial

commissions and the governor into the removal or discipline process for appellate judges.

Moreover, in terms of disability retirement, claiming Commission authority by virtue of the title “commissioner” would not accomplish what Commissioner Finnegan presumably hopes. The Constitution does not authorize the Commission – or this Court – to ensure retirement compensation for a commissioner, only for a judge:

Upon recommendation by an affirmative vote of at least four members of the commission, the supreme court en banc shall retire from office any judge or any member of any judicial commission or any member of this commission who is found to be unable to discharge the duties of his office with efficiency because of permanent sickness or physical or mental infirmity. A judge, except a municipal judge so retired shall receive one-half of his regular compensation during the remainder of his term of office.

Article V, § 24.2. The only authority given to the Commission and this court with regard to members of judicial commissions is to remove or retire them.

D. Court rules, such as those relied on before 1976 in considering municipal judges, have not extended and cannot extend the Commission’s authority to cover commissioners appointed by the circuit courts.

As noted above, prior to the replacement of Article V, this Court held that the Commission could act with regard to municipal judges, even though they were not expressly mentioned in the provisions creating the Commission nor were they selected in a manner defined by Article V. A key element of the Court’s analysis was its own rules, which generally treated commissioners as they treated judges. *See In re Fullwood*, 518 S.W.2d 22 (Mo. banc 1975) and Supreme Court rules cited therein. But that analytical tool is not available now.

In the revised Article V, the people of Missouri expressly barred this Court and even the General Assembly from enlarging the Commission’s authority by rule: “8. Additional duties shall not be imposed by law or supreme court rule upon the commission on retirement, removal and discipline.” Art. V, § 24. Certainly if the Court cannot expressly extend the Commission’s authority to cover circuit court commissioners, it cannot do so by deriving an extension from its rules covering other subjects.

That does not necessarily mean that the Commission is barred from assisting the circuit court or this court² in evaluating a circuit court-appointed commissioner, as the Commission proposes on page 11 of its brief. The Commission and its staff have developed expertise in such evaluations. There is nothing in the Constitution or statutes expressly barring the Commission from providing such assistance. But the assistance would have to be voluntary – *i.e.*, for this Court or a circuit court to order the Commission to investigate would make that task an additional “duty,” which Article V, § 24 prohibits.

* * *

Because commissioners appointed by the circuit courts to assist Article V judges are themselves neither judges nor members of judicial commissions, their removal, retirement, and discipline fall outside the scope of authority of the Commission on Retirement, Removal and Discipline.

² The Commission specifically suggests that this Court could ask the Commission to consider the status of Commissioner Finnegan and make a recommendation to this Court. But because the responsibility for acting with regard to Commissioner Finnegan resides in the circuit court, such a request would more appropriately come from that court.

II. Commissioners are entitled to disability benefits as are other judicial employees.

That the Commission on Retirement, Removal and Discipline lacks authority to recommend that a commissioner be retired for disability does not mean, of course, that a commissioner is ineligible for disability benefits. A commissioner's "compensation and retirement benefits ... shall be the same as that of an associate circuit judge, payable in the same manner and from the same source as that of an associate circuit judge." § 487.020.3. That does not deprive the commissioner of benefits otherwise due to judicial employees under Chapter 476.

Section 104.518 authorizes MOSERS to provide "disability income benefits for ... an employee covered pursuant to the provisions of subdivision (4) of subsection 1 of section 476.515, RSMo." Section 476.515, in turn, covers as a "judge" "any person who has served or is serving as a judge... of any circuit court... or as commissioner or deputy commissioner of the circuit court appointed after February 29, 1972." That definition includes family court commissioners. A family court commissioner who may be disabled should apply with MOSERS for long term disability benefits pursuant to statute. The Commission addresses the specifics with regard to such benefits; the Attorney General will not reiterate the Commission's discussion.

CONCLUSION

For the reasons stated above, the Court should hold that the authority of the Commission on Retirement, Removal and Discipline does not extend to commissioners appointed by the circuit courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed, postage prepaid, via United States mail, on August 27, 2010, to:

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CERTIFICATION OF COMPLIANCE WITH RULE 84.06(b) AND (c)

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains - 3,465 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

Solicitor General