

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Matter of:

The Honorable Judge TRACY S.
FLOOD, Judge of the Bremerton
Municipal Court.

No. 1 0 3 0 6 5 - 7

**RULING DISMISSING ORIGINAL
ACTION AGAINST STATE OFFICER**

An investigation and proceeding concerning alleged judicial misconduct are solemn matters solely within the jurisdiction of the Commission on Judicial Conduct, and a commission decision imposing discipline upon a judicial officer is subject to de novo review by way of an appeal filed directly in this court. Relying on this court's original jurisdiction under article IV, section 4 of the Washington Constitution and the court's concurrent jurisdiction under RCW 7.16.290, Bremerton Municipal Court Judge Tracy Flood seeks issuance of a writ of prohibition directing the commission to shut down its pending disciplinary proceedings concerning Her Honor and dismiss the case against her. Because a writ of prohibition is not an appropriate means for seeking such relief, the original action is dismissed, as explained below.

The following facts appear to be undisputed. Judge Flood was elected to the Bremerton Municipal Court bench in 2021. She is the only municipal court judge in that community. She is the first Black person elected to that position. In the second half

of 2022, the commission received a series of complaints concerning Judge Flood's behavior toward attorneys appearing before her and court staff. After an investigation by its in-house investigator, the commission initiated disciplinary proceedings against Judge Flood and mailed her a statement of allegations, asserting that Judge Flood violated Canon 1, Rules 1.1 (compliance with the law) and 1.2 (promoting confidence in the judiciary); and Canon 2, Rules 2.5(A) (performing judicial and administrative duties competently and diligently) and 2.8(B) (judge shall be patient, dignified, and courteous toward others) of the Code. Judge Flood denied the allegations generally.

After further consideration of the allegations against Judge Flood and after a meeting of 10 of its members in executive session, the commission made a finding that probable cause existed to believe that Judge Flood violated the above-described provisions of the Code. The commission issued a statement of charges accordingly, advising Judge Flood that she must submit a written answer to the charges or they would be deemed admitted. Judge Flood answered with a written one-sentence denial of all allegations made against her.

Disciplinary counsel moved to strike Judge Flood's denial and deem the charges admitted. The commission denied that motion. Judge Flood moved to disqualify the commission's counsel. The commission denied that motion and partly granted Judge Flood's motion for discovery. The commission denied both of Judge Flood's motions to dismiss the proceeding and denied her objection to a fact-finding before a commission panel (rather than the full commission). The fact-finding hearing was continued multiple times and is now set for October 21, 2024, before nine of the commission's members. The commission has disclosed 25 witnesses who may testify in the matter.

As indicated, Judge Flood filed in this court an amended petition for writ of prohibition.¹ Her Honor suggests she is being targeted because of her race, based in part on the stereotypical racist trope known as the “angry Black woman.” Petition at 5. She further suggests that racial bias affects the commission’s work, noting for instance an alleged lack of diversity, equity, and inclusion (DEI) training at the commission. Judge Flood asserts her disciplinary case has “overtones” of “judicial system racism.” *Id.* at 6. She alleges some commission members are conflicted and challenges the commission’s authority to conduct hearings with less than all of its members and the presence of commission staff at such hearings. Judge Flood alleges she is not being permitted to build a record for a potential appeal. Her Honor further alleges by way of an affidavit that workplace animosity toward her has become more pronounced after the commission lodged misconduct charges against her. The commission filed an answer urging dismissal of the petition on multiple grounds. Judge Flood filed a reply.

The matter was argued before me at a videoconference hearing held on July 10, 2024.² Now before me for determination is whether to refer this original action to the court for further proceedings, refer it to an appropriate superior court, or dismiss it outright. RAP 16.2(d).

One of the ancient writs dating from 12th century England, the writ of prohibition is an extraordinary remedy intended to prevent government officials from exceeding their jurisdiction and/or the powers of their positions. *Riddle v. Elofson*, 193 Wn.2d 423, 428-29, 439 P.3d 647 (2019). To obtain such a writ, Judge Flood must establish (1) the commission lacked or exceeded its jurisdiction, *and* (2) she lacks a plain, speedy, and adequate remedy in the ordinary course of legal proceedings. *Riddle*, 193 Wn.2d at 430; *Skagit County Pub. Hosp. Dist. No. 304 v. Skagit County Pub. Hosp. Dist. No. 1*,

¹ The Clerk of the Court granted Judge Flood’s motion for leave to file an overlength petition.

² <https://www.tvw.org/watch/?clientID=9375922947&eventID=2024071056>.

177 Wn.2d 718, 722-23, 305 P.3d 1079 (2013); *Kreidler v. Eikenberry*, 111 Wn.2d 828, 838, 766 P.2d 438 (1989).

In seeking a writ of prohibition, Judge Flood cites RCW 7.16.290, which defines such a writ as follows: “The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.” The commission urges dismissal, asserting it is not a “state officer” for such a writ, citing article IV, section 4 of the constitution and RAP 16.2.

The constitution states that this court “shall have original jurisdiction in ... mandamus as to all state officers[.]” CONST. art. IV, § 4. This constitutional provision applies with equal force to writs of prohibition. *Ladenburg v. Henke*, 197 Wn.2d 645, 650, 486 P.3d 866 (2021); *State v. Taylor*, 101 Wash. 148, 150-51, 172 P. 217 (1918). And while Judge Flood relies mainly on RCW 7.16.290, which applies to all state courts above the limited jurisdiction level without mentioning the requirement that the petition name a state officer, she chose to file her action in this court, where original jurisdiction is controlled by article IV, section 4 of the constitution, not statutes. *Ladenburg*, 197 Wn.2d at 650.³

State officers for purposes of a mandamus or prohibition action filed in this court “are limited to those elected officials from whom the state controls through appointment, salary, and impeachment, and who in turn, wield some state-level authority.” *Id.* at 653. In this instance, the individual commission members are not elected to that body; rather, they are appointed by various authorities (fellow judges, the bar association, and the governor) according to the members’ status as judges, lawyers, and members of the public. RCW 2.64.030. They cannot be impeached but can

³ Neither party has argued that this case should be transferred to a superior court for a decision on the merits. *See* RAP 16.2(d) (commissioner may transfer petition to superior court); RCW 7.16.300 (writ of prohibition may be issued by superior court).

be removed for good cause by the appointing authorities. *Id.* Board members receive no state salary, but rather, as part-time commission members are compensated \$100 per day when participating in the commission's official business. RCW 2.64.040; RCW 43.03.250(2). The commission has jurisdiction over individual judicial officers accused of misconduct, but does not wield state-wide authority over judicial officers generally. CONST. art. IV, § 31(4); RCW 2.64.055. It is highly doubtful the commission and its members are state officers under the rule explicated in *Ladenburg*.

Aside from the "state officer" problem, Her Honor's petition is profoundly flawed in relation to its stated purpose. The commission exists "as an independent agency of the judicial branch." CONST. art. IV, § 31(1); RCW 2.64.120. It has 11 members: one of them is a Court of Appeals judge selected by their colleagues, another is a superior court judge selected by fellow judges, a third member is a judge of a limited jurisdiction court (such as a district or municipal court) selected the same way, two members are practicing lawyers selected by the state bar association, and the remaining six members are nonlawyers selected by the governor. CONST. art. IV, § 31(1); RCW 2.64.020. The constitution directs the commission to "establish rules of procedure for commission proceedings include due process and confidentiality of proceedings." CONST. art. IV, § 31(10). Under the commission's procedural rules, six members—a majority of the commission's members—constitute a "quorum" for purposes of conducting business. Comm'n on Jud. Conduct Rules of Proc. (CJCRP) 3(c).

Whenever the commission receives a complaint about a judge, it investigates the matter and then conducts "initial proceedings for the purpose of determining whether probable cause exists for conducting a public hearing or hearings to deal with the complaint" and notifies the judge of those proceedings. CONST. art. IV, § 31(2). "A finding of probable cause shall require the concurrence of six members of the

commission.” CJCRP 3(c). In Judge Flood’s case, 10 members of the commission presided over the probable cause determination.

If the commission concludes, based on the initial proceeding, that there is probable cause that the judge has violated the code of judicial conduct, the commission shall conduct a public hearing on the matter and make public related records. CONST. art. IV, § 31(3). “At least six members, or their alternates, must continually be present during presentation of testimony at the hearing.” CJCRP 24(b)(9). As indicated, the fact-finding hearing scheduled for October will be heard by a nine-member panel. The presiding officer for that hearing is a Court of Appeals judge. The other members of the panel are a superior court judge, two lawyers, and five members of the public. The nonparticipating members are one judge from a limited jurisdiction court and one member of the public. The panel also exceeds a quorum as defined under the commission’s rules. CJCRP(3)(c). After the public hearing, the commission in open session “shall either dismiss the case, or shall admonish, reprimand, or censure” the judge, and if censuring the judge, recommend to this court that the judge be suspended, removed, or recommend that the judge be forced into retirement. CONST. art. IV, § 31(4). As indicated, it requires the concurrence of six members—a majority—“to make a decision in a proceeding.” CJCRP 3(c).

If the commission admonishes, reprimands, or censures a judge, the judge may timely seek de novo review in the supreme court. CONST. art. IV, § 31(6). As indicated in this matter, the commission has made a probable cause determination and has set a date for a fact-finding hearing. Judge Flood now asks this court to exercise its power to issue a writ of prohibition to command dismissal of the commission’s case “for violation of her constitutional rights to due process and for failure to comply with Washington Constitution art. IV, § 31.” Petition at 22.

This court has the power to issue a writ of prohibition, “but in so doing it must be guided by the rules of law applicable to such extraordinary proceedings, and must not in any case overstep the bounds of necessity, in any spirit of zeal for the redress of what it deems an injustice.” *State ex re. Nooksak River Boom Co. v. Superior Court of Whatcom County*, 2 Wash. 9, 13-14, 25 P. 1007 (1891). Of particular relevance here, a writ of prohibition is preventative, not corrective, in effect, intended to “arrest execution of a future, specific act and not to undo an action already performed.” *Riddle*, 193 Wn.2d at 429 (citing *County of Spokane v. Local No. 1553, Amer. Fed’n of State, County & Mun. Emps.*, 76 Wn. App. 765, 769-70, 888 P.2d 735 (1995)). “A writ of prohibition will not issue to prevent the commission of error, take the place of an appeal, or serve as a writ of review for the correction of an error.” *Riddle*, 193 Wn.2d at 429 (citing *State ex rel. N.Y. Cas. Co. v. Superior Court*, 31 Wn.2d 834, 838-39, 199 P.2d 581 (1948)).

In this instance, Judge Flood seeks a writ to prevent the commission from doing work that falls within its constitutional and statutory jurisdiction and is central to its purpose: investigating and determining the validity of allegations of judicial misconduct. CONST. art. IV, § 31; chapter 2.64 RCW. The petition is based largely on claims of procedural irregularities in the disciplinary proceeding, such as the number of commission members sitting on the panel, the presence of commission staff at meetings and hearings, and a claim that Judge Flood is being prevented from developing a record for appeal. But as noted, a writ of prohibition is not a proper vehicle for error correction or judicial review of past actions. *Riddle*, 193 Wn.2d at 429. As for future actions, Her Honor contends a nine-member panel for the fact-finding hearing would be “ultra vires” and unconstitutional. But the commission’s procedural rules allow for such a panel, the constitution is silent on whether all members of the commission must sit on the panel deciding a fact-finding hearing, and there is no authority that I am aware of supporting

the proposition that a nine-member panel deprives the commission of jurisdiction over a fact-finding hearing. Judge Flood cites an attorney general's opinion cautioning against the use of separate investigative and adjudicatory panels on the basis they might not include a balance of representatives of the different communities mandated by the constitution and because such panels might not include a quorum of members. 1999 Op. Att'y Gen. No. 4; [Auth. of Comm'n on Judicial Conduct to separate investigative & adjudicatory functions | Wash. State](#). That will not be the situation when the commission conducts the fact-finding hearing in this case, as the panel will include two members of the judiciary, two of the legal profession, and five of the public, well exceeding the requirement of a quorum. Judge Flood has not shown that a writ of prohibition is an appropriate mechanism for shutting down a proceeding falling squarely within the commission's jurisdiction.

As indicated, Judge Flood argues with some force that she is the victim of racial animus or actual or implied racial bias. These are serious allegations and not to be taken lightly, and they bring to mind this court's powerful and unprecedented letter of June 4, 2020, addressing racial injustice, which Her Honor cites in her petition. But Judge Flood's assertions of bias do not establish that the commission lacks or exceeds its jurisdiction in this disciplinary proceeding. Rather, they are issues that can be explored during the fact-finding hearing and potentially on de novo review in this court in the event of an adverse commission decision. Stated another way, Her Honor's assertions of racial bias go to the merits of the allegations against her and the disciplinary proceedings arising from them. Again, there is no showing here that the commission has acted without or beyond its jurisdiction as to justify a writ of prohibition.

Looking aside from Judge Flood's failure to show that the commission is acting without or beyond its jurisdiction, Her Honor still must show that she has no plain, speedy, and adequate remedy at law in the ordinary course of legal procedure. *Riddle*,

193 Wn.2d at 433; *Eikenberry*, 111 Wn.2d at 838; RCW 7.16.300. This inquiry turns on the unique facts of each case, resting in the sound discretion of the court. *Riddle*, 193 Wn.2d at 433-34; *State ex rel. O'Brien v. Police Court of Seattle*, 14 Wn.2d 340, 348, 128 P.2d 332 (1942). “A remedy is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship.” *Riddle*, 193 Wn.2d at 434 (citing *O'Brien*, 14 Wn.2d at 347-48). “Something in the nature of the action must make it apparent that the rights of the litigants will not be protected or full redress will not be afforded without the writ.” *Riddle*, 193 Wn.2d at 434 (*O'Brien*, 14 Wn.2d at 347-48). The adequacy of the alternative remedy is of particular importance in this inquiry, depending on the facts of the case. *Riddle*, 193 Wn.2d at 434.

Judge Flood has an alternative remedy available to few litigants: direct review in this court should the commission impose discipline. CONST. art. IV, § 31(5)-(7); *see generally In the Matter of Keenan*, 199 Wn.2d 87, 502 P.2d 1271 (2022). Such review is de novo and has the potential to address and remedy the procedural questions Judge Flood raises in her petition for a writ, as well as the thorny issues of racial bias asserted by Her Honor. *See id.* at 94. It is the only appropriate forum for adjudicating these issues. Such judicial review will necessarily take time to resolve, but not nearly as much time as litigating through the superior court and the Court of Appeals, which is the route the vast majority of aggrieved litigants must trek.

In light of the foregoing observations, there is no persuasive showing that Judge Flood is entitled to a writ of prohibition, or that transferring this matter to a superior court or referring it to the justices of this court for a resolution on the merits is justified. The better use of judicial resources is to dismiss the petition pursuant to RAP 16.2(d). If the commission ultimately imposes discipline, Judge Flood may exercise her right to direct de novo review in this court.

The original action is dismissed.


COMMISSIONER

July 16, 2024