

IN THE MISSOURI SUPREME COURT

STATE EX. REL. KARLA)	
ALLSBERRY,)	
)	
Relator,)	
)	
vs.)	Case No. SC97935
)	
THE HONORABLE PATRICK S.)	
FLYNN,)	
)	
Respondent.)	

**RESPONDENT’S SUGGESTIONS IN OPPOSITION TO THE PETITION
FOR WRIT OF PROHIBITION**

Pursuant to Rule 84.24 (c) and 97.07 of the Missouri Rules of Civil Procedure, Respondent, the Honorable Patrick S. Flynn, as Presiding Judge of the 45th Judicial Circuit submits his Suggestions in Opposition to the Petition for Writ of Prohibition filed by Relator, Karla Allsberry (hereinafter “Relator”). For the reasons set forth herein, the Court should deny the Writ Petition.

Background Facts

Relator is the elected circuit clerk of Lincoln County, Missouri, who took office January 1, 2019. Respondent is the elected Presiding Judge of the 45th Judicial Circuit which is comprised of Lincoln and Pike counties. Respondent took office January 1, 2019.

After taking office, the Presiding Judge became aware of information and conduct of Relator, Karla Allsberry, as the circuit clerk where she had knowingly and willfully failed to perform certain duties of her office and committed acts of

misfeasance and malfeasance in the performance of her duties which conduct constitutes a “misdemeanor in office” under §483.165 RSMo. Respondent, as Presiding Judge, had personal knowledge of Relator’s failure to perform numerous duties required of her by law including but not limited to the following:

A. Relator failed over a four and a half month period beginning January 1, 2019, the day she took office, to remit fines for numerous municipal ordinance violations which were due to several municipalities. The cities of Old Monroe, Silex, Foley and Hawk Point were owed sums totaling \$45,559.52. Despite numerous calls from the municipalities, Relator failed to transfer the funds collected by her office to the cities. Even though Relator was aware that her office had not remitted the fines which were due to the various municipalities, she willfully withheld the municipal funds and failed to correct the problem.

B. Relator established a private email, “circuitclerklc@gmail.com” and used the private email account instead of her designated secured court email to set up access to the circuit court’s bank accounts, receive statements and correspond with People’s Bank & Trust who was the depository of Lincoln County funds in violation of Court Operating Rule 1, which adopted Security Guideline 400.01. Relator had all financial records of the court transferred to her private email account. Relator’s actions resulted in the Office of the State Court Administrator revoking her access to the Court Automation System.

C. Relator, in the course of a dispute over the appointing authority approval by the Circuit Court Budget Committee refuses to participate in meetings on court administration with the Presiding Judge on the “FTR Gold”, despite being directed to do so by the Circuit Court Budget Committee the Office of State Court Administrator and Betsy Aubuchon, Clerk of the Supreme Court.

D. Relator has created a hostile and dysfunctional atmosphere in the Office of the Circuit Clerk of Lincoln County by being belligerent to personnel of the Circuit Court.

Relator has failed to faithfully demean herself in office and failed to cooperate in court directives.

Relator has also contested the decision of the Circuit Court Budget Committee approving the 45th Judicial Circuit Court’s *en banc* vote and plan to adopt an amended court consolidation plan on January 11, 2019. The amended consolidation plan makes the Presiding Judge of the 45th Judicial Circuit the appointing authority for all deputy circuit clerks and division clerks per the Supreme Court’s 2009 administrative order. Relator has filed a “Petition for Declaratory Judgment and Injunctive Relief and for Judicial Review” in the Circuit Court of Cole County, Missouri, Cause No. 19AC-CC00224. (See Exhibit B, attached). The Circuit Court Budget Committee members as well as Respondent and the Hon. James Beck and the Hon. Milan Berry are named as defendants in Relator’s suit which seeks to set aside and void the approval of the

Circuit Court Budget Committee of the 45th Judicial Circuit *en banc* action to amend the consolidation and enjoin all defendants from giving effect to the amended consolidation plan. Respondent is being represented by the Attorney General's office in that matter.

But apart from the dispute giving rise to the declaratory judgment action, Relator's ongoing misfeasance and malfeasance in office continued as set forth above. Prior to May 28, 2019, Respondent met with the Lincoln County Prosecutor, Mike Wood, to discuss charges against Relator under §483.165, §483.170 and §483.175 RSMo. Given the fact that Relator is the wife of Lincoln County Associate Circuit Judge, Gregory Allsberry, it was determined that the matter should be referred to the Attorney General for prosecution of the charge of misdemeanor in office under the statutes. Respondent was already expecting a call from legal counsel with the Attorney General regarding Cause No. 19AC-CC00224 because Catherine Zacharias legal counsel at the Office of State Courts Administrator had informed him that counsel from Attorney General's office would be contacting him and entering on the Cole County matter.

On May 28, 2019, Respondent notified Relator that he was placing her on administrative leave with pay and suspending her access to the Justice Center pursuant to his authority under §483.170.1 RSMo. which is the statutory authority to instigate removal, and §478.240 RSMo which gives the Presiding Judge general administrative authority over court personnel and officials in the 45th Judicial Circuit. Respondent appointed Diane Doll as the temporary acting circuit clerk

pursuant to §483.170.2 and §478.240 pending resolution of the charges against Relator being referred to the Attorney General's office.

The Respondent was contacted on May 31, 2019 by Assistant Attorney General, Denise McElvein. In that conversation, McElvein was made aware of the allegations against Relator and a meeting was set for June 7, 2019. Respondent then met with an Assistant Attorney General McElvein in St. Louis on June 7, 2019 to relay more specific information constituting Relator's "misdemeanor in office" and requested the Attorney General's office to prosecute the same under §483.170 and §483.175 RSMo. This meeting lasted more than six hours.

On May 31, 2019, Relator filed a Writ of Prohibition Petition in this Court which was denied without prejudice. On June 5, 2019, Relator filed a Petition for Writ of Prohibition in the Eastern District Appellate Court which was denied without opinion on June 6, 2019. On June 7, 2019, Relator filed this Petition for Writ of Prohibition and the Court has directed Respondent to file these Suggestions in Opposition.

The facts and allegations stated herein are restated under oath in the attached Affidavit of the Hon. Patrick S. Flynn and marked Exhibit A.

Legal Analysis

A. Writ of Prohibition Standard

"The writ of prohibition, an extraordinary remedy, is to be used with great caution and forbearance and only in cases of extreme necessity." *State ex rel. Gardner v. Boyer*, 561 S.W. 3d 389, 394 (Mo. banc 2018). Prohibition is a

powerful writ, divesting the body against whom it is directed to cease further activities and for this reason is fairly rare. *State ex rel. Riverside Joint Venture v. Missouri Gaming Commission*, 696 S.W. 2d 218, 221 (Mo. banc 1998). “The extraordinary remedy of a writ of prohibition is appropriate only in three narrow circumstances: 1) to prevent the usurpation of judicial power when the court lacks jurisdiction; 2) to remedy an excess of jurisdiction or abuse of discretion when the lower court lacks the power to act as intended; or 3) where a party may suffer irreparable harm if relief is not made available in response to the trial court’s order.” *State ex rel. Nothum v. Walsh*, 380 S.W. 3d 557, 561 (Mo. banc 2012). A court should only exercise its discretionary authority to issue a writ of prohibition when the facts and circumstances of the particular case demonstrate unequivocally that there exists an extreme necessity for preventative action. *State ex rel. Phillips v. Eighmy*, 513 S.W. 3d 422, 425 (Mo. App. S.D. 2017). Absent such conditions, the court should decline to act. *Id.* Prohibition cannot be used to adjudicate grievances that may be adequately redressed in the ordinary course of administrative or judicial proceedings. *Id.*

Relator’s Petition for Writ of Prohibition does not state which of the three narrow circumstances stated above apply to her Petition for Writ of Prohibition. However, based on the Suggestions filed in support, it appears that Relator is claiming Respondent as Presiding Judge exceeded his statutory authority under §483.170 RSMo and §478.240 RSMo. Relator states that Respondent’s letter notifying her of her suspension does not clearly invoke the statutory procedures set

forth to remove a circuit clerk from office pursuant to §483.165 through §483.185 RSMo. Relator also argues that the Presiding Judge's general administrative authority over all judicial personnel and court officials under §478.240, standing alone, does not authorize the indefinite suspension of an elected circuit clerk.

The facts in this case do not support Relator's argument. Both Respondent and Relator have filed affidavits. Respondent has acted under the statutory procedures in §483.165 et seq. RSMo and initiated proceedings under §483.170 et seq. to prosecute and remove Relator for misdemeanor in office. But in addition, Relator has failed to allege that she has no administrative or judicial remedy because she is afforded the statutory due process procedures set forth in §483.170 through §483.195 RSMo. Relator may not contest her suspension by writ because it can be adequately redressed in judicial proceeding. Simply put, Relator has failed to state grounds for a writ of prohibition in her Petition and Suggestions in Support.

B. Statutory Process for Removing an Elected Clerk of Court for Nonfeasance or Misfeasance

Sections 483.165 through 483.195 RSMo provide a judicial process for removal of an elected court clerk for "nonfeasance or misfeasance" which is a "misdemeanor in office." Section 483.165 RSMo states:

"If any clerk shall knowing and willfully do any act contrary
to the duties of his office, or shall knowingly or willfully fail

to perform any act or duty required of him by law, he shall be deemed guilty of a misdemeanor in office.”

A “misdemeanor in office” is not the equivalent of a criminal misdemeanor but includes “malfeasance, that is misconduct in the performance of official duties.” *State ex rel. Nixon v. Russell*, 45 S.W. 3d 487, 493 (Mo. App. W.D. 2001). A willful act is more than a mere mistake but includes an intentional failure to act, contrary to a known duty. *Id.* A clerk of a circuit court may be removed or fined for malfeasance or misfeasance in office under §483.165 RSMo. *State v. Hampton*, 653 S.W. 2d 191, 192 (Mo. banc 1993).

The judicial process for removing a court clerk may be instituted by the presiding judge. §483.170 RSMo. Section 483.170 RSMo states:

“When any court shall believe from its own knowledge or from information secured from others given to the court under oath or affirmation, that the clerk of the court has committed some act or acts constituting a misdemeanor in office, the court shall give notice of the charges against such clerk to the attorney general of the state or the prosecuting attorney of the county requiring him to prosecute the same; and such court may by order of record suspend such clerk from office until a trial upon such charge or charges can be had.”

In accordance with §483.170.1, Respondent upon personal knowledge and after several instances of malfeasance and misfeasance by Relator initiated the procedures under §483.170 through §483.195 RSMo to seek removal from office. Respondent met with the Lincoln County prosecutor to discuss charges. Because Relator's husband is an Associate Circuit judge in Lincoln County, a decision was made to refer the matter to the Attorney General's office.

In accordance with his statutory authority, Respondent notified Relator that he was suspending her from office and appointing a temporary clerk during the suspension pursuant to §483.170.2. Relator's is suspended with pay pending charges and the disposition of any charges under §483.175 through §483.190 RSMo.

In accordance with his statutory obligations and authority under §483.170, Respondent notified the Attorney General of the information supporting charges against Relator in both a phone call and at a meeting in the St. Louis office. Under §483.175 the Attorney General "shall be required to prosecute charges against any clerk" and he "shall make out each charge in due form" giving notice to the clerk. §483.175 RSMo. Respondent, as Presiding Judge, cannot file charges against the circuit clerk but the statute obligates the Attorney General to proceed with any prosecution of charges against the clerk. Notice to Relator of the charges against her is the duty of the Attorney General under §483.175 RSMo. Relator has a right to 30-day notice and a copy of the charges filed, if any, by the Attorney General and has a right, if she denies the charges, to a trial by jury. §483.190 RSMo. If

found guilty, she is subject to removal from office and the fine not to exceed One Thousand Dollars (\$1,000.00). §483.195 RSMo. This is the statutory judicial process for removal of a circuit clerk and a writ of prohibition cannot be used to adjudicate grievances which must be addressed in the course of judicial proceedings outlined by the statute. *State ex rel. Phillips v. Eighmy*, 513 S.W. 3d 422 at 425. The proceeding outlined in the statute affords due process and is the available remedy for Relator. Relator also cannot show irreparable harm as she has a statutory process under §483.170 through §483.190. Respondent is aware of the bonding provisions in §483.170.3 RSMo but such bond would be set when the attorney general files charges under §483.175 in the circuit court.

C. A Presiding Judge's General Administrative Authority Under §478.240.2 RSMo

Respondent, as Presiding Judge of the 45th Judicial Circuit also has “general administrative authority over all judicial personnel and court officials in the circuit.” §478.240.2 RSMo. The Presiding Judge’s general administrative authority over judicial personnel and court officials is the “subject to the authority of the Supreme Court and the chief justice under Article V of the Constitution.” §478.240.2 RSMo. Under his general administrative authority, Respondent can suspend court personnel limited by any existing Supreme Court Rule. *State ex rel. Helms v. Moore*, 694 S.W. 2d 502, 504 (Mo. App. S.D. 1985). In fact, Respondent must exercise his supervisory authority in conformity with applicable

Supreme Court Rules and Article V, §15.3 of the Missouri Constitution. *Gregory v. Corrigan*, 685 S.W. 2d 840, 843 (Mo. banc 1985).

There is no Supreme Court Rule preventing Respondent from suspending Relator for malfeasance or misfeasance in her duties as circuit clerk pending further due process. In fact, it is Respondent's job to ensure all court personnel including Respondent are complying with all Supreme Court Rules and Court Operating Procedures. Respondent in creating a private email to conduct court banking business violated Court Operating Rule 1, Security Guideline 400.1. She has continually refused to meet with the Presiding Judge over court administration and has mishandled municipal court fines. Respondent's statutory duty is to ensure the smooth operation of the 45th Judicial Circuit in compliance with Supreme Court Rules and Operating Rules and the Office of State Courts Administrator requirements. Relator's suspension with pay pending further proceeding on charges under §483.175 RSMo is within the Presiding Judge's sound discretion under §478.240.2 RSMo.

WHEREFORE, as Relator has wholly failed to state sufficient grounds for a Writ of Prohibition, Respondent respectfully requests the Court to deny the Petition for Writ of Prohibition.

BRUNTRAGER & BILLINGS, P.C.

/s/ Charles H. Billings

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June, 2019 the foregoing
**Respondent's Suggestions in Opposition to the Petition for Writ of
Prohibition** was filed electronically with the Clerk of Court to be served by
operation of the Court's electronic filing system upon all attorneys of record.

/s/ Charles H. Billings