BEFORE THE ARKANSAS JUDICIAL DISCIPLINE AND DISABILITY COMMISSION

IN THE MATTER OF:	)	
	)	
Honorable Fred D. Davis, III	)	**Commission Case No. 04-227**
Circuit Judge for the	)	
Eleventh Judicial District-West	)	

FINAL DECISION AND ORDER

Pursuant to the authority granted by Amendment 66 to the Arkansas Constitution, A.C.A. 16-10-410, et seq., and the Rules of Procedure of the Arkansas Judicial Discipline and Disability Commission promulgated by the Arkansas Supreme Court, the Commission issues this Final Decision and Order.

FINDINGS OF FACT

1. Fred D. Davis, III (hereinafter "Respondent") is an Arkansas attorney who was the circuit judge for the Fifth Division of the Eleventh Judicial District (West) until his retirement on March 31, 2005, a position he held since January 1989. Respondent has resided in Jefferson County, Arkansas and has been a resident of Arkansas as defined by A.C.A. 27-14-204 at all times material to this proceeding.

2. On or about October 30, 2002, respondent purchased a new 2002 Chevrolet Avalanche truck ("Avalanche") from Petrus Chevrolet-Oldsmobile in Lonoke, Arkansas for $35,029.91. Under Arkansas law, respondent should have registered the vehicle and paid the sales tax due thereon within thirty days, since he did not sell any of his other vehicles within forty-five days from the time he bought the Avalanche. He owed approximately $1,795.28 in gross receipts (sales) tax on that purchase, which would have been due and payable when respondent registered his vehicle. Respondent did not register the truck nor pay the state sales tax due on it until June 21, 2004, which

was after his being cited for "Failure to Register Vehicle" and for "Misuse of Dealer License Plate" by Arkansas State Trooper Russ Rhodes on June 10, 2004.

3. Respondent arranged to have a temporary "dealer's tag" placed on the vehicle in late 2002 and that tag remained on the Avalanche through mid-June 2004. The dealer's tag was issued to an Arkansas automobile dealer, Larry Heinrich ("Heinrich"). There was no automobile business arrangement between respondent and Heinrich.

4. On or about June 10, 2004, respondent, driving the Avalanche bearing the afore-mentioned dealer tag, was stopped at approximately 9:01 p.m. by Arkansas State Trooper Russ Rhodes on Highway 270, east of Hot Springs, Arkansas. There was an open container of beer in the vehicle, which respondent admitted was his.

5. As a result of the June 10, 2004 stop, Respondent was charged with Driving While Intoxicated, First Offense ("DWI 1"), a misdemeanor, in addition to his being cited for "Failure to Register Vehicle" and for "Misuse of Dealer License Plate" (also misdemeanors, which were later dismissed). Respondent was convicted of DWI 1 in the Hot Springs District Court November 8, 2004. Respondent presently is appealing that conviction.

6. Also as a result of the June 10, 2004 stop, Respondent, on August 24, 2004, was charged with violating Ark. Code Ann. 26-18-201(a), "Evading or Defeating a State Tax," a class C felony under the laws of Arkansas. According to the felony charge, on or about the period between October 30, 2002 and June 10, 2004, Respondent, with the aid of Heinrich, allegedly did unlawfully and feloniously evade or defeat the payment of Arkansas State sales tax, penalty or interest due under Arkansas tax laws in violation of A.C.A. 26-18-201(b). Respondent was found guilty of violating A.C.A. 26-18-201(b)

by a jury on January 20, 2005 and the court accepted the jury's recommendation that imposition of sentence be suspended for three (3) years. The Court entered a judgment and disposition order accordingly. Respondent contends that such disposition is not a "felony conviction."

CONCLUSIONS OF LAW AND FINAL DECISION[1]

The above constitutes violations of A.C.A. 16-10-410 (b) (1) (conviction of an offense punishable as a felony under the laws of Arkansas); of A.C.A. 16-10-410 (b) (3) (commission of conduct involving dishonesty, fraud, deceit, or misrepresentation); of A.C.A. 16-10- 410 (b) (4) (commission of conduct that is prejudicial to the administration of justice); and of A.C.A. 16-10-410 (b) (5) (willful violation of the Code of Judicial Conduct, specifically Canons 1 and 2A).

Respondent claimed that his retirement from office divested the Commission of jurisdiction to proceed against him. He based that argument upon a partial reading of Commission Rule 6 ("Jurisdiction") in conjunction with the definition of "judge" contained in A.C.A. 16-10-401, which defines "judge" in the present tense. He argued that, since he no longer was a "judge" in the present tense of that word, the Commission had no jurisdiction over him. That argument not only is contrary to a plain reading of Commission Rule 6, but also ignores and contradicts a substantial body of precedent.

The Supreme Court established the Commission's jurisdiction in Commission Rule 6, which is entitled "Jurisdiction."[2] In addition to the language emphasized by respondent, Commission Rule 6 also provides: "Allegations regarding *conduct* of a judge

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[1] Three Commission members dissented from this Final Decision. Their Dissenting Opinion is attached at the end of this Final Decision and Order.

[2] There is no jurisdictional provision contained in A.C.A. 16-10-401, et seq., the legislation relating to the Judicial Discipline and Disability Commission.

or justice occurring...*during service in judicial office...are within the jurisdiction of the Commission* and *shall* be considered by it." (Emphasis supplied). It is the "*conduct* of a judge or justice occurring...*during service in judicial office*" that triggers the Commission's jurisdiction, not the status of the individual. Because words used in the judicial canons are to be interpreted using their ordinary and usually accepted meaning, *Griffen v. Arkansas Judicial Discipline and Disability Commission*, 355 Ark. 38, 49, 130 S.W.3d 524, ___ (2003), a plain reading of Commission Rule 6 compels the conclusion that the Commission has jurisdiction of this matter despite respondent's having retired because the conduct in issue occurred during respondent's service in judicial office. This conclusion is in accord with the majority of cases from other jurisdictions that have addressed similar situations. *See, e.g., In re Johnstone*, 2 P.3d 1226 (Alaska 2000); *In re Weeks*, 658 P.2d 174 (Ariz. 1983); *Kennick v. Commission on Judicial Performance*, 787 P.2d 591 (Cal. 1990); *In re Hapner*, 718 So. 2d 785 (Fla. 1998); *In re Cox*, 658 A.2d 1056 (Maine 1995); *In re Anderson*, 541 So. 2d 232 (Miss. 1984); *Petition of Thayer*, 761 A.2d 1052 (N. Hampshire 2000); *In re Backal*, 660 N.E.2d 1104 (N.Y. 1995); *In re Peoples*, 250 S.E.2d 890 (N. Carolina 1978); *Judicial Inquiry & Review Board v. Snyder*, 523 A.2d 294 (Penn. 1987); *In re Fuyat*, 578 A.2d 1387 (R.I. 1990); *In re Wheel*, 533 A.2d 1194 (Vt. 1987); *West Virginia Judicial Hearing Board v. Romanello*, 336 S.E.2d 540 (W. Va. 1985); *In re Sterlinske*, 365 N.W.2d 876 (Wis. 1985).

A contrary interpretation would be improper in light of the Legislature's direction that "Any judge removed from office pursuant to this subchapter cannot be appointed or elected to serve as a judge." A.C.A. 16-10-410 (d). The legislative prohibition against a removed judge ever being appointed to serve in a judicial capacity indicates that the

legislature was not only concerned with removing unethical judges from judicial service, but also with prohibiting them from ever obtaining a judicial office in the future. If a judge could escape the consequences of unethical behavior and avoid the Commission's jurisdiction simply by resigning, then there would be no mechanism through which to implement the Legislature's expressed desire to prohibit unethical judges from holding judicial office in the future. Generally speaking, a statute should not be given an interpretation that thwarts its intended effect. *Stephens v. State*, 328 Ark. 570, 572, 944 S.W.2d 836, ___ (1997) ("When interpreting statutes, this court adheres to the basic rule of statutory construction that gives effect to the intent of the legislature, making use of common sense."). Therefore, respondent's contention that the Commission lost jurisdiction over him to address the unethical acts he committed while in office was rejected.

ORDER

It is, therefore, ordered that the respondent, Fred D. Davis, III, be censured and found not to be qualified to seek or hold judicial office in the future.

Respondent is hereby censured and found not to be qualified to seek or hold judicial office in the future.

By direction of the Arkansas Judicial Discipline and Disability Commission.

6/9/05
Date

James A. Badami
Executive Director
Judicial Discipline & Disability Commission

BEFORE THE ARKANSAS JUDICIAL DISCIPLINE AND DISABILITY COMMISSION

IN RE: JUDGE FRED DAVIS

DISSENTING OPINION

Commissioners Stephen Routon, John Everett, and William Storey dissenting.

On March 10, 2005, Judge Fred Davis applied for medical retirement to the Arkansas Judicial Retirement System, which was approved by the Board of Trustees on March 29, 2005. Subsequently, Judge Davis sent Governor Huckabee his resignation letter effective March 31, 2005. Thus, as of March 31, 2005, Judge Davis no longer held judicial office. A formal disciplinary hearing was held May 20th, 2005. At the conclusion of the hearing a majority of the Commission recommended that Judge Davis be censured. We conclude the Commission is without jurisdiction to recommend that the Supreme Court discipline a person who no longer holds judicial office, and therefore dissent.

Section (f) of Amendment 66 to the Arkansas Constitution vested authority in the Supreme Court to make procedural rules for the Judicial Discipline and Disability Commission. Under Rule 6 of the Arkansas Rules of Procedure of Judicial Discipline and Disability, the Commission's jurisdiction "extends to judges and justices *in office*." Rule 6(A), Rules of Procedure, Ark. J.D.D.C. (emphasis added). The rule further provides that "[a]llegations regarding conduct of a *judge or justice* occurring prior to or during service in judicial office, including the service of a retired judge who has been recalled, are within the jurisdiction of the Commission." Rule 6(A), Rules of Procedure, Ark. J.D.D.C. (emphasis added). The rule, however, does not state that the jurisdiction of the Commission extends to former judges, such as Judge Davis, who no longer hold judicial office and are no longer serving in any judicial capacity, regardless of whether the conduct occurred while the individual was a judge. The

jurisdictional statement only applies to "a judge or justice." Furthermore, Arkansas Code Annotated § 16-10-401 defines a "judge" as "anyone, whether or not a lawyer, who *is* an officer of the judicial system performing judicial functions, including an officer such as a referee, special master, court commissioner, or master, whether full-time or part time." Ark. Code Ann § 16-10-401 (Repl. 1999) (emphasis added).

The reading of the jurisdictional rule is supported by an analysis of the range of discipline the Commission is empowered to impose upon a judge or justice in office. The Commission has the power to reprimand or censure a judge or justice, the purpose of which is to correct judicial conduct, but here, Judge Davis no longer holds office. See In re Probert, 411 Mich. 210, 244 (Mich. 1981) (Levin, J. dissenting). Thus, the purpose of such a sanction cannot be served since he will no longer be acting in a judicial capacity. The remaining types of discipline that the Commission and the Court may impose – suspension and removal – each involve separating the "judge or justice" from any judicial authority that he or she holds. See id. Here, Judge Davis is no longer on the bench, making suspension or removal superfluous. Further, in Arkansas, Judge Davis' felony conviction prevents him from holding judicial office in the future, and thus, removal proceedings to prevent him from holding judicial office in the future are unnecessary. Article 5, Section 9, of the Arkansas Constitution provides: "No person hereafter convicted of embezzlement of public money, bribery, forgery or other infamous crime, shall be eligible to the General Assembly or capable of holding any office of trust or profit in this State." Arkansas courts have consistently recognized that a person convicted of a felony is disqualified from holding public office. See Campbell v. State, 300 Ark. 570, 573, 781 S.W.2d 14, 15 (1989) (affirming removal of a county judge under Article 5, § 9 of the Arkansas Constitution). Additionally, if somehow Judge Davis were to regain judicial office in the future, the

Commission's jurisdiction over Judge Davis would be restored, and the proceedings could take place based upon his prior conduct. Because Judge Davis is not longer a threat to the judiciary and the public as a public official, pursuing further discipline is needless, even if the Commission had jurisdiction to proceed.

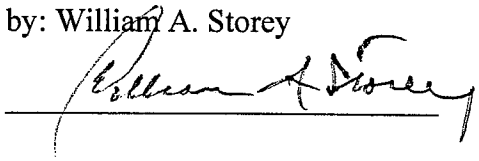
Several states and the federal government "allow a judge the option of voluntary resignation to avoid investing resources in disciplinary proceedings and to avoid a public spectacle." In re Johnstone, 2 P.3d 1226, 1233 (Alaska 2000) (citing In re Dempsey, 101 Ill. Dec. 58, 498 N.E.2d 240, 240 (Ill. 1986); In re Moroney, 259 Kan. 636, 914 P.2d 570, 574 (Kan. 1996); In re Naccari, 657 So. 2d 91, 91 (La. 1995); In re De Lucia, 76 N.J. 329, 387 A.2d 362, 365 (N.J. 1978) (holding that a judge is no longer subject to discipline as a judge and is only before the court as a member of the bar); In re Fienberg, 139 Vt. 511, 430 A.2d 1282, 1283 (Vt. 1981) (Hill, J., concurring) (holding that a judge is no longer subject to judicial discipline after he leaves judicial office); see also Emily Field Van Tassel, Resignations and Removals: A History of Federal Judicial Service-- And Disservice--1789-1992, 142 U. Pa. L. Rev. 333, 348, 364 (1993)). For example, the Rhode Island Supreme Court held that the Commission on Judicial Tenure and Discipline no longer had jurisdiction to conduct removal proceedings against Fuyat because he resigned rendering such proceedings moot. In re Proceedings before the Commn. on Judicial Tenure & Discipline, 578 A.2d 1387, 1388-89 (R.I. 1990) ((citing In the Matter of Vasser, 75 N.J. 357, 363-64 (1978), as suggesting a similar outcome in dicta) (holding that the former judge was only before the court as a member of the bar because his election not to seek reappointment was not motivated by his misconduct and thus does not influence the disciplinary proceedings as it might if he had resigned due to his misconduct)). Accordingly, we would respectfully urge that the Arkansas Supreme Court adopt the rule obtaining in other

jurisdictions by finding that the Commission does not have the authority to proceed with a judicial disciplinary action against a person who no longer holds judicial office.

Dated May 31, 2005.

Respectfully submitted,

Stephen Routon

John C. Everett

by: William A. Storey