

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of the Application of
The Honorable Lee L. Holzman,

Petitioner,

**AFFIRMATION IN
OPPOSITION**

-against -

Index No. 108251/11

The Commission on Judicial Conduct

Respondent

ROBERT H. TEMBECKJIAN, an attorney duly authorized to practice in the courts of the State of New York, hereby affirms the following to be true under penalty of perjury:

1. I am the Administrator and Counsel for the New York State Commission on Judicial Conduct ("Commission") and am fully familiar with the facts and circumstances herein.

2. I make this affirmation in opposition to Petitioner's application for a stay pending appeal. As is set forth more fully in the accompanying Memorandum of Law, Petitioner has failed to exhaust his administrative remedies in the Commission's disciplinary proceeding and cannot establish probable success on the merits. A stay pending appeal would seriously threaten the Commission's ability to complete its proceeding before Petitioner's mandatory retirement on December 31, 2012, and deprive the public of a determination on the merits on whether or not misconduct has occurred.

THE COMMISSION'S CREATION AND AUTHORITY

3. The Commission was created in 1978 by amendment of the New York State Constitution, Article VI, § 22. Its enabling statute is Judiciary Law, Article 2-A, §§ 40-48.

4. The Commission is the sole state agency responsible for receiving, initiating and investigating complaints of misconduct or disability against the approximately 3,500 judges and justices of the New York State Unified Court System. The Commission is comprised of 11 members appointed for fixed terms by the Chief Judge, the Governor and Legislative leaders as defined in the Constitution.

5. The current members of the Commission are: Hon. Thomas A. Klonick, Chair; Hon. Terry Jane Ruderman, Vice-Chair; Hon. Rolando T. Acosta; Joseph, W. Belluck, Esq.; Joel Cohen, Esq.; Richard D. Emery, Esq.; Paul B. Harding, Esq.; Professor Nina M. Moore; Hon. Karen K. Peters and Richard A. Stoloff, Esq. One position is currently vacant, pending a gubernatorial appointment.

6. All complaints received from the public or otherwise brought to Commission staff's attention by newspaper articles or other sources are referred to the Commission for an initial determination of whether the complaint should be dismissed or investigated. Commission staff may not investigate a complaint absent authorization of the Commission itself. 22 NYCRR § 7000.3(b).

7. After investigation, when warranted, the Commission may authorize a Formal Written Complaint against a judge and direct, after receipt of the judge's Answer, that a full evidentiary hearing be held. Judiciary Law § 44(4); 22 NYCRR § 7000.6. In the alternative, the Commission may consider an agreed statement of facts submitted by its Administrator and the respondent-judge, or a motion for summary determination where there are no material facts in dispute. Judiciary Law §§ 44(4), 44(5); 22 NYCRR 7000.6(c); *Matter of Petrie v State Commn on Judicial Conduct*, 54 NY2d 807, 808 (1981).

8. After the Commission votes to authorize a Formal Written Complaint, the Commission and its Administrator play separate and distinct roles in judicial disciplinary proceedings. Judiciary Law §§ 41(7), 44(4); 22 NYCRR 7000.6. The Administrator prosecutes the case. An independent Referee appointed by the Commission hears the matter and reports proposed findings of fact and conclusions of law to the Commission. Judiciary Law § 43(2); 22 NYCRR §§ 7000.1(o), 7000.6(l).

9. The Commission then considers the report and makes a final determination as to whether misconduct has occurred. Judiciary Law § 44(7); 22 NYCRR § 7000.7. The Commission has sole authority to render determinations of confidential caution, public admonition, public censure, removal or retirement from office. Judiciary Law § 44; 22 NYCRR §§ 7000.1(m), 7000.7(d).

10. Where the Commission determines to admonish, censure, remove or retire a judge, the determination and the record on review are transmitted to the Court of Appeals and, after service on the judge, are made public. Judiciary Law § 44(7). Any judge who is the subject of a Commission determination may request review as of right in the Court of Appeals. NY Const art VI, § 22(a); Judiciary Law § 44 (7). *See also Matter of Raab*, 100 NY2d 305, 311 (2003). The Court of Appeals has plenary power to review the legal and factual findings of the Commission, as well as the recommended sanction. *Matter of Gilpatric*, 13 NY3d 586 (2009).

PROCEDURAL HISTORY OF THE COMMISSION'S DISCIPLINARY PROCEEDING

11. Petitioner has been a Judge of the Surrogate's Court, Bronx County, since 1988. He may serve through December 31, 2012, at which time he will be required to retire because he will have reached the mandatory retirement age of 70.¹

12. Petitioner was served with a Formal Written Complaint ("Complaint") dated January 4, 2011, containing four charges. The Complaint is attached to Petitioner's motion to this Court, as part of Exhibit B. The Commission opened its investigation into Petitioner's conduct based on newspaper reports and the complaints of six individuals who alleged undue delays, excessive legal fees or irregularities in procedure in matters pending in Petitioner's court.

13. Charge I alleged that from 1995 to 2009, in specific cases set forth in Schedule A of the Complaint, Petitioner approved legal fees for Michael Lippman, Counsel to the Bronx Public Administrator's Office: (1) based on boilerplate affidavits of legal services that did not comply with the requirements of SCPA § 1108(2)(c) and (2) fixed the fees without considering the statutory factors set forth in SCPA § 1108(2)(c).

14. Charge II alleged that in 2005 and 2006, Petitioner failed to report Michael Lippman to law enforcement authorities or to the Departmental Disciplinary Committee upon learning that Lippman took unearned advance legal fees and/or fees that exceeded the amount prescribed by the Administrative Board Guidelines, and that he continued to award Lippman the maximum legal fee recommended in the Guidelines and/or awarded the fees without considering the statutory factors set forth in SCPA § 1108(2)(c).

¹ When the Commission is unable to render a final determination in a pending matter before a judge's term expires, both the Commission and the Court of Appeals lose jurisdiction. *Matter of Scacchetti v. New York State Commission on Judicial Conduct*, 56 NY2d 98 (1982).

15. Charge III alleged that from 1997 to 2005, Petitioner failed to adequately supervise and/or oversee the work of court staff and appointees, which resulted in:

(1) Michael Lippman taking advance fees without filing an affirmation of legal services in the cases set forth in Schedule B of the Complaint, and/or taking advance fees that exceeded the maximum amount recommended in the Administrative Board Guidelines in the cases set forth in Schedule C and Schedule D of the Complaint, (2) delays in the administration of the estates set forth in Schedule E of the Complaint, (3) individual estates with negative balances, (4) the Public Administrator placing estate funds in imprudent and/or unauthorized investments, and (5) the Public Administrator employing her boyfriend who billed estates for services that were not rendered and/or overbilled estates.

16. Charge IV alleged that in 2001 and 2003, Petitioner failed to disqualify himself from cases in which Michael Lippman appeared, notwithstanding that Lippman raised more than \$125,000 in campaign funds for Petitioner's 2001 campaign for Surrogate.

17. Petitioner filed an Answer dated January 21, 2011, in which he denied the material allegations of the Complaint and asserted three affirmative defenses: (1) that the Complaint failed to state a cause of action, (2) that the factual allegations in the Complaint were unconstitutionally vague, and (3) that the Complaint violated his Due Process rights.

18. On January 25, 2011, the Commission designated the Honorable Felice K. Shea as Referee to hear and report findings of fact and conclusions of law. On February 2, 2011, prior to Judge Shea's selection of a hearing date, Petitioner filed a motion with the Commission to dismiss the Complaint and/or for a stay of the Commission proceedings. Given the anticipated time that it would take for the parties to file briefs with the Commission with respect to the issues raised by Petitioner's motion to disimss, the time that it would take

for the Commission to decide the motion, the voluminous discovery that was to be exchanged by the parties prior to the commencement of the hearing, as well as to provide the parties with sufficient time to prepare for the hearing, Judge Shea scheduled a five-day hearing for May 9, 2011.

19. Pursuant to Judiciary Law § 44(4) and 22 NYCRR § 7000.6(h), Commission staff was required to provide Petitioner discovery at least ten days prior to the hearing, including a list of witnesses the Commission intended to call, copies of any written statements made by those witnesses, copies of any documents the Commission intended to introduce at the hearing and any exculpatory material. As a matter of practice, discovery schedules are set in a conference call with the Referee and discovery materials are generally exchanged earlier than the statute and regulations require.

20. In this case, Commission counsel supplied Petitioner with copies of the transcripts of eleven witness statements, including that of Michael Lippman, on February 9, 2011. On February 10, 2011, Commission counsel supplied Petitioner with copies of other written witness statement and copies of documents that Commission counsel intends to present at the hearing.

21. On February 10, 2011, and on dates thereafter, Commission counsel also supplied Petitioner with copies of relevant documents from the case files of every estate listed in Schedules A through E of the Formal Written Complaint.

22. On March 7, 2011, Petitioner wrote to the Referee and requested an adjournment of the hearing until January 2012 in order to permit him sufficient time to review the discovery materials and to prepare for the hearing. On or about March 18, 2011, after

conferring with counsel, the Referee adjourned the hearing until the week of September 12, 2011.

PETITIONER'S MOTION TO THE COMMISSION SEEKING
DISMISSAL OF THE FORMAL WRITTEN COMPLAINT OR A
STAY OF THE HEARING.

23. On February 2, 2011, Petitioner made a motion to the Commission seeking the same relief requested in this proceeding: dismissal of the Formal Written Complaint without prejudice to re-file or, in the alternative, for a stay of the Commission's proceeding.

24. Petitioner argued, as he does again here, that he could not get a fair hearing without calling Michael Lippman, former counsel to the Bronx Public Administrator, as a witness. Lippman is currently under indictment and Petitioner provided a letter from Lippman's counsel stating he had advised his client, if called, to assert his Fifth Amendment privilege against self-incrimination.

25. Petitioner also argued that the Formal Written Complaint was vague and lacked specificity. Petitioner has abandoned that argument in this proceeding.

26. On February 25, 2011, Commission counsel filed a memorandum in opposition to the motion, arguing that the motion was premature because: (1) Lippman could not exercise his Fifth Amendment privilege in advance, (2) the Referee had not yet had a chance to hear the Commission's case and to rule on whether Lippman's testimony would be relevant to Petitioner's case and (3) it had not yet been determined whether Lippman waived his privilege by testifying under oath during the Commission's investigation.

27. Commission counsel also argued that Lippman's testimony was not material or necessary to the Commission's proceeding because the allegations in the Formal Written Complaint were tailored to address Petitioner's conduct, not Lippman's, and the allegations

are largely based on documents filed in the Surrogate's Court that had already been turned over to respondent's counsel during discovery. Commission counsel maintained that Petitioner had failed to show how Lippman's alleged criminal conduct could excuse Petitioner's own failure to act based on statutory requirements and the documentary evidence before him in his court.

28. On March 21, 2011, the Commission denied Petitioner's motion and referred the matter back to the Referee for a hearing. A copy of the Commission's determination is attached to the Verified Petition as Exhibit A (the Verified Petition itself is attached as Exhibit B to Petitioner's motion to this Court).

29. On July 13, 2011, Mark Levine, Deputy Administrator for the Commission's New York office and Alan Friedberg, Special Counsel to the Commission, participated in a pre-hearing telephone conference with Petitioner's counsel and the Honorable Felice K. Shea, Referee in the Commission proceeding. During that conference, when the Fifth Amendment issue was raised, Judge Shea stated, and Petitioner's counsel concurred that: (1) the Fifth Amendment issue was premature, (2) she would deal with it at the hearing if Lippman were called and asserted the privilege, and (3) a ruling on the relevancy of Lippman's testimony was also premature and she would consider it after Commission counsel had presented its case during the September hearing.

30. At no time has Petitioner made an offer of proof as to what Michael Lippman would say if he testified on the merits of the matter, or how such proffered testimony would assist his defense.

31. Upon information and belief, and my review of the Unified Court System's "eCourts" information services, the case of People v. Michael Lippman is next on the

calendar in Supreme Court, Bronx County, Part 60, on November 1, 2011. It is my understanding that defense counsel has indicated that he will not be not available and that trial is not likely to commence until January, 2012.

PETITIONER'S ARTICLE 78 PROCEEDING

32. On July 29, 2011, Petitioner filed a petition pursuant to CPLR Article 78 in Supreme Court, New York County, before the Honorable Barbara Jaffe. The petition was premised on the claim that his Due Process rights would be compromised at the Commission hearing because Michael Lippman indicated, through counsel, that he would assert his Fifth Amendment rights, if called to testify as a witness at the hearing. The Commission opposed Petitioner's application on the basis that his claims were not ripe, that petitioner had failed to exhaust his administrative remedies and that he had not set forth grounds sufficient to warrant issuance of the extraordinary writ of prohibition.

33. On September 8, 2011, the petition was denied by the Judge Jaffe on ripeness grounds. A copy of Judge Jaffe's decision is appended to Petitioner's application to this Court as Exhibit D.

34. On September 12, 2011, the hearing in this matter commenced. Petitioner waived confidentiality, thereby making the proceedings and papers public, and Commission counsel's first witness, Esther Rodriguez, the former Public Administrator for Bronx County, began her testimony. Simultaneously, Petitioner filed a motion to renew and reargue before Judge Jaffe and again asked for an interim stay of the hearing. Judge Jaffe granted a ten-day interim stay until September 20, 2011. At the time the stay was issued, Rodriguez had testified for about two hours. Judge Shea, based on the volume of evidence that was to be

presented at the hearing, determined that more than five trial days would be necessary for the completion of the hearing. Thus, she ruled that the hearing would continue on October 11, 12, 13, 14, 2011 and November 2, 3, 4, 7, 8, 9 and 10, 2011.

35. On September 21, 2011, Judge Jaffe denied Peititoner's motion to renew and reargue and denied a further stay of the Commission proceedings. Accordingly, the disciplinary hearing was scheduled to resume before Judge Shea on October 11, 2011. For the Court's convenience, a set of the papers filed by the Commission in opposition to Petitioner's application to renew and reargue and for a second stay is attached as Exhibit 1.

36. On October 5, 2011, Petitioner applied for a third stay of the Commission's proceeding, pending resolution of his appeal from Judge Jaffe's September 21, 2011 decision and order. He also sought an interim stay of the hearing. On that same date, a Justice of this Court, the Honorable Sheila Abdus-Salaam, granted an interim stay of the hearing pending consideration, by a full panel of this Court, of Petitioner's application for a stay pending appeal. Justice Abdus-Salaam also granted an expedited briefing schedule.

A STAY PENDING APPEAL WOULD COMPROMISE THE
COMMISSION'S ABILITY TO COMPLETE THE
DISCIPLINARY HEARING BEFORE LOSING JURISDICTION.

37. I respectfully refer the Court to the accompanying Memorandum of Law for the Commission's argument that this Court should deny Petitioner's application for a stay pending appeal. I wish to explain the impact a stay pending appeal would have on the Commission's disciplinary proceeding.

38. Petitioner will turn 70 next year and therefore will face mandatory retirement by December 31, 2012. Unless the Commission has transmitted a final determination to the Court of Appeals by that date, the Commission's jurisdiction, and that of the Court of

Appeals, will end when petitioner leaves the bench. *See Matter of Scacchetti v. New York State Commission on Judicial Conduct*, 56 NY2d 98 (1982).

39. Given the amount of time needed to complete the disciplinary process – which involves the hearing, the preparation of transcripts, post hearing briefs, the Referee’s report, briefs to the Commission, oral argument and finally a determination by the Commission – delaying the process for any length of time creates a serious risk that the disciplinary proceeding will not be concluded before Petitioner’s retirement. Based on our experience in numerous proceedings, especially ones such as this, which involve a lengthy hearing with voluminous and complex documents, the process, even if conducted in an expedited manner, could take seven months or longer to complete.

40. Petitioner’s argument in the court below that Commission counsel previously agreed to a May 2011 hearing date when we erroneously believed Petitioner would leave the bench on December 31, 2011,² is a diversion. Had the Commission hearing commenced on May 9, 2011, and concluded as scheduled at the end of that week, it would have been difficult, but possible, to conclude the matter before the end of this year. Transcripts would likely have been ready in three to four weeks, and the ordinary briefing schedule would have permitted the matter to be heard at the Commission’s October meeting.

41. Changed circumstances have now expanded that timeline. What was originally scheduled by agreement of counsel as a five-day hearing to be completed in one week is now scheduled by agreement of counsel as an 11-day hearing over the course of a month. Because this Court’s October 5th temporary stay required cancellation of the four hearing days scheduled for next week, it is likely that the hearing will not be concluded until early to mid-

² The confusion over Petitioner’s birthdate was caused by an erroneous entry in an Office of Court Administration database. Commission staff did not learn that Petitioner turns 70 in 2012, until March 7, 2011.

December, even absent a further stay. The expanded number of hearing days will extend the time necessary to complete transcripts. And any schedule going forward must contemplate the possibility of further litigation, after the Lippman issue is developed at hearing and Judge Shea has ruled. Given these facts, a stay pending resolution of Petitioner's non-meritorious appeal would seriously jeopardize the Commission's ability to reach a determination on the merits before Petitioner leaves the bench.

42. Petitioner's argument is designed to divert this Court's attention from his deliberate and repeated attempts to delay the disciplinary proceedings, based on the filing of meritless motion and petitions, so that the Commission will be unable to complete the proceedings prior to the date of his mandatory retirement.

43. At the time Judge Shea was assigned to be the referee in this matter in January 2011, Commission counsel sought an expedited schedule in an effort to complete the hearing process prior to December 31, 2011. Before a hearing schedule could be set however, petitioner filed a motion before the Commission to dismiss the complaint based on the same non-meritorious grounds that he now raises before this Court. Based on the need to allow the Commission to decide the petitioner's motion, petitioner's counsel's claim that he needed additional time to review the discovery that was to be provided to him, and the time necessary to prepare for the hearing, the matter was scheduled for a five-day hearing commencing May 9, 2011.

44. On March 7, 2011, two weeks before the Commission eventually ruled on his motion to dismiss, Petitioner's counsel advised Commission counsel and Judge Shea that Petitioner's retirement date was actually December 31, 2012. Petitioner requested that Judge Shea adjourn the matter until January 12, 2012, on the ground that he needed additional time

to review the discovery materials and to prepare for the hearing. Commission counsel objected to the long delay and, on or about March 18, 2011, after conferring with counsel, Judge Shea adjourned the hearing until the week of September 12, 2011.

45. On July 13, 2011, Judge Shea presided over a conference call in which Petitioner's counsel acknowledged to Judge Shea that: (1) the Fifth Amendment issue with respect to Lippman was premature, (2) Judge Shea would deal with it at the hearing of Lippman were called and asserted the privilege, and (3) a ruling on the relevancy of Lippman's testimony was also premature and Judge Shea would consider that question after Commission counsel had presented its case during the September hearing.

46. Petitioner's pattern of delay continued on July 29, 2011, when he filed his CPLR Article 78 in New York County Supreme Court. Notwithstanding counsel's agreement during the July 13th conference call that a ruling on the Lippman 5th Amendment issue was premature and that Judge Shea would consider that issue at the appropriate point in the Commission's proceeding, Petitioner based his Article 78 on the same meritless grounds that he now raises before this Court.

47. Although Petitioner was aware of a potential issue regarding Mr. Lippman's testimony for months – he briefed the identical issue in his February 2, 2011 motion to dismiss – he delayed the filing of his CPLR Article 78 petition until shortly before the long-planned September 12th hearing. The matter was heard by the Honorable Barbara Jaffe, who issued her decision dismissing the Petitioner's petition on September 8, just four days before the hearing was scheduled to begin.

48. The Petitioner continued his dilatory tactics when he filed his motion to reargue and/or renew his CPLR Article 78 petition before Judge Jaffe on the very day that the hearing

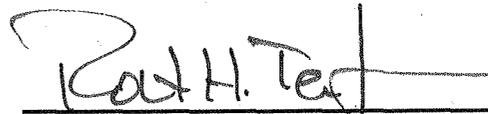
was scheduled to begin, September 12, 2011. Indeed, due to the timing of Petitioner's motion practice, the hearing was temporarily stayed while the Commission's first witness was in the midst of her testimony. Ultimately, Judge Jaffe lifted the temporary stay and correctly dismissed the petition on ripeness grounds. The damage, however, was done and Petitioner once again succeeded at delaying the proceedings in this matter until October 11, 2011.³

49. Petitioner now seeks to use this Court to further delay the Commission's proceeding. Although Judge Jaffe's final order dismissing his petition was issued on September 21, 2011, Petitioner waited until October 5, 2011, just five days before the disciplinary hearing was scheduled to re-commence, to once again raise his meritless claims—claims that have already been rejected both by the Commission and Judge Jaffe.

50. As set forth in accompanying Memorandum of Law, Petitioner cannot show probable success on the merits of his appeal. As numerous courts have held, a requirement to proceed with an administrative hearing does not constitute irreparable harm.

51. A stay pending Petitioner's appeal of Judge Jaffe's clearly correct order would seriously jeopardize the Commission's ability to render a determination on the merits before December 2012, when Petitioner's tenure as a judge expires. Accordingly, I respectfully request that Petitioner's application for a stay pending this appeal be denied.

Dated: New York, New York
October 7, 2011


ROBERT H. TEMBECKJIAN

³ Moreover, although almost all of the evidence Commission counsel seeks to introduce at the hearing are certified copies of court records from Petitioner's own court, Petitioner has refused to stipulate to the admission of such evidence, contrary to the customary practice in these proceedings. Petitioner's refusal will add many days to the hearing schedule and is additional indication of his true aim to delay the proceedings long enough to moot them in view of Petitioner's looming retirement.