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

----------X

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

Petitioner-Appellant,

-against-

Supreme Court, New York County
Index No. 108251/2011

The Commission on Judicial Conduct,

Respondent-Respondent.

----------X

MEMORANDUM OF LAW ON BEHALF OF THE COMMISSION ON JUDICIAL CONDUCT IN OPPOSITION TO THE APPELLANT'S APPLICATION FOR A STAY PENDING APPEAL.

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for The Commission
on Judicial Conduct
120 Broadway, 24th Floor
New York, New York 10271
(212) 416-8965

MONICA CONNELL
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

United States Constitution

State Constitution

State Statutes

State Regulations

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

----------X

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

Petitioner-Appellant,

-against-

Supreme Court, New York County
Index No. 108251/2011

The Commission on Judicial Conduct,

Respondent-Respondent.

----------X

MEMORANDUM OF LAW ON BEHALF OF THE COMMISSION ON JUDICIAL CONDUCT IN OPPOSITION TO THE APPELLANT'S APPLICATION FOR A STAY PENDING APPEAL.

Preliminary Statement

Petitioner-Appellant the Honorable Lee L. Holzman ("Appellant") brings this motion seeking a stay of a disciplinary hearing against him before the Commission on Judicial Conduct pending the determination of his appeal from the September 21, 2011 denial of his motion to renew in the underlying Article 78 proceeding. His Article 78 petition was denied and dismissed by the September 8, 2011 decision of the Supreme Court, New York County. Appellant has not filed a notice of appeal as to that order.[1] This is Appellant's third stay application to halt the underlying proceedings. By order dated October 5, 2011, this Court granted Appellant an interim stay pending submission of the instant application to a full panel on October 12, 2011. By this stay application, Appellant asserts that his due process

1 Although having only appealed the September 21, 2011 denial of his renewal application, it is presumed that Appellant actually intends to challenge the September 8, 2011 dismissal of his underlying Article 78 proceeding. As set forth below, such proceeding was properly dismissed and thus Appellant has no likelihood of success on the merits here.

rights will be violated should he be forced to proceed with the underlying disciplinary hearing before the Commission. Appellant contends that a witness he may call to offer unspecified testimony in his defense at that hearing will assert his Fifth Amendment privilege and refuse to testify and that on this basis, all proceedings against Appellant should cease until such unspecified time in the future as this witness will agree to testify.

The Commission on Judicial Conduct ("the Commission") submits this memorandum of law in opposition to the continuation of the stay. Appellant's stay application should be denied because he cannot set forth the basis for issuance of a writ of prohibition.

It is clear that the Commission has authority to investigate and discipline judges. To the extent that Appellant contends that a writ of prohibition should lie here because his due process rights have been violated he is in error. Due process does not entitle Appellant to a particular determination or outcome in a judicial or administrative proceeding. Instead, due process entitles him to notice and an opportunity to be heard before being deprived of a protected liberty or property interest. Matter of Quinton A., 49 N.Y.2d 328, 334 (1980); see also Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978); Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

Here, the referee underlying administrative hearing is being held before a referee, retired Supreme Court Justice, Felice K. Shea, who will hear and rule upon any applications made by Appellant when and if he should need to commence a defense to the charges against him, when and if he should need to call the witness in question, and when and if the witness properly refuses to testify. Any determination by Judge Shea will be subject to review by the full Commission and if public discipline is imposed, he will be entitled to review directly by the Court of Appeals. In light of the extensive process available to Appellant, he cannot

credibly deny he will not receive due process in the disciplinary proceedings. Appellant's claim that he is entitled to a writ of prohibition because of a denial of due process is thus without merit. Furthermore, his Article 78 claim is not ripe and he has failed to exhaust his administrative remedies. Thus Appellant cannot demonstrate a likelihood of success on the merits.

Nor can Appellant establish that merely proceeding with the disciplinary hearing will irreparably harm him because there is no legally cognizable injury to be suffered solely from being subjected to the disciplinary hearing even with the possibility of a finding of misconduct. Galin v. Chassin, 217 A.D.2d 446, 447 (1st Dep't 1995), citing Doe v. Axelrod, 71 N.Y.2d 484, 491 (1988); see also Newfield Central School District v. N.Y.S. Division of Homan Rights, 66 A.D.3d 1314, 1316 (3d Dep't 2009); Ashe v. Enlarged City School District, 233 A.D.2d 571, 573 (3d Dep't 1996). Furthermore, to the extent that Appellant alleges he is injured because he must defend such charges and face the public knowledge of the charges against him, this was his choice. Such proceedings were confidential until Appellant voluntarily waived such confidentiality and made these charges public. See Tembeckjian Aff. ¶ 34.

Finally, the balance of the equities is not with Appellant. Although Appellant has sought repeated and indefinite stays of the disciplinary hearing, he cannot show that he will suffer prejudice if the hearing proceeds. However, the interests of the People of the State of New York will be prejudiced if the instant stay is continued. Appellant is currently a sitting judge in the Surrogate's Court. 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. See Tembeckjian Aff., ¶¶ 37-51. 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 N.Y.2d 98 (1982). If the pending proceedings are dismissed or stayed, the Commission will almost certainly be rendered unable to proceed on the charges against the Appellant. Further, granting a stay here would suggest that any jurist may delay a Commission investigation by filing a frivolous article 78 proceeding. And particularly if it turns out that the Appellant should be disciplined, the public suffers from the delay of the investigation. All are best served when serious allegations of judicial misconduct are resolved promptly, whether they are sustained or refuted.

STATEMENT OF THE CASE

The relevant legal and factual background of this case are set forth in the papers previously filed by the Commission in opposition to Appellant's second order to show cause in the underlying which are annexed as Exhibit 1 to the accompanying Affidavit of Robert Tembeckjian ("Tembeckjian Aff"), dated October 7, 2011. For the Court's convenience, however, they are summarized herein.

Statutory Background

The Commission is authorized by the New York State Constitution to "receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the Unified Court System." See New York State Constitution, art. 6, § 22; see also Judiciary Law, article 2-A, §§ 40-48.

When warranted, the Commission may initiate an accusatory instrument ("formal written complaint") against a judge and direct that a full evidentiary hearing be held or, in

lieu of a hearing, it may consider an agreed statement of facts submitted by its Administrator and the respondent-judge. See Judiciary Law §§ 44(4), 44(5), 44(6). During a hearing, the Administrator prosecutes the case and an independent Referee, appointed by the Commission, hears the matter and reports proposed findings of fact and conclusions of law to the Commission. See Judiciary Law § 43(2); 22 NYCRR §§ 7000.1(o); 7000.6(l).The Commission then considers the report and makes a final determination as to whether misconduct has occurred. See Judiciary Law § 44(7); 22 NYCRR § 7000.7.

At the end of such proceedings, the Commission has authority to render determinations of confidential caution, public admonition, public censure, removal or retirement from office. See Judiciary Law § 44; 22 NYCRR §§ 7000.1(m), 7000.7(d). Any judge or justice who is the subject of a public determination is entitled to review in the Court of Appeals. See Judiciary Law § 44 (7). 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. See Judiciary Law § 44(7).

Underlying Proceedings Before the Commission on Judicial Conduct

Appellant Lee L. Holzman has been a Judge of the Surrogate's Court, Bronx County, since 1988. On January 4, 2011, the Commission served a formal written complaint ("Complaint") upon Appellant, alleging four separate charges against him. See Tembeckjian Aff. ¶¶ 12-16 (see also formal written complaint, included as part of Exhibit B to Appellant's Stay Application). In brief, the Complaint alleged that:

- from 1995 to 2009, in specified cases then before the Surrogate's Court, Appellant approved legal fee applications submitted by attorney Michael Lippman, Counsel to the Bronx Public Administrator's Office in violation of the requirements of the Surrogates Court Procedures Act § 1108(2)(c);

- in 2005 and 2006, Appellant 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 excessive fees;

- from 1997 to 2005, Appellant failed to adequately supervise and/or oversee the work of court staff and appointees, which resulted in fee abuses by Michael Lippman, delays in the administration of certain specified estates, individual estates with negative balances, the Public Administrator placing estate funds in imprudent and/or unauthorized investments, and the Public Administrator employing her boyfriend who billed estates for services that were not rendered and/or overbilled estates;

- in 2001 and 2003, Appellant failed to disqualify himself from cases in which Michael Lippman appeared, notwithstanding that Lippman raised more than $125,000 in campaign funds for Appellant's 2001 campaign for Surrogate.

On or about January 21, 2011, Appellant answered the charges. See Tembeckjian Aff., ¶ 17. The Commission assigned the Honorable Felice K. Shea as Referee to hear and report findings of fact and conclusions of law. Judge Shea scheduled a five-day hearing for May 9, 2011. See Tembeckjian Aff., ¶ 18.[2]

In the course of the proceeding, and in compliance with Judiciary Law § 44(4) and 22 NYCRR § 7000.6(h), the Commission provided discovery to Appellant, 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 material that would be exculpatory. Appellant was also given copies of relevant documents from the case files of every estate included in the charges in the Complaint.

2 Appellant alleges that because the staff of the Commission initially consented to commence the hearing in May, 2011, the Commission cannot object if the hearing is delayed until May, 2012. This argument is frivolous. First, as a matter of fairness, the Commission consented to the May hearing date to permit Appellant to prepare for the hearing after receiving voluminous discovery from the Commission. That does not mean that the Commission is bound to consent to any and all subsequent adjournments sought by Appellant. Additionally, Appellant makes no showing, nor could he, that Michael Lippman will agree not to assert his Fifth Amendment privilege in May, 2012 or at any particular time in the future.

Among the witness statements Appellant was given was the transcript of the statement given to the Commission by Michael Lippman. See Tembeckjian Aff., ¶ 21.

Michael Lippman ("Lippman") is currently facing criminal charges in New York Supreme Court, Bronx County. On July 7, 2010, Lippman was indicted on charges of fraud and grand larceny. Upon information and belief, his criminal case is next scheduled on the calendar in Supreme Court, Bronx County, Part 60, on November 1, 2011, but the case is unlikely to go to trial until 2012. See September 21, 2011 Order (Annexed as Exhibit G to the Appellant's Stay Application).

On February 2, 2011, Appellant made a motion before the Commission which sought dismissal of the Complaint without prejudice to re-file or, in the alternative, for a stay of the Commission's proceeding. Appellant argued that he cannot defend himself against the disciplinary charges without the testimony of Michael Lippman and provided a letter from Lippman's counsel stating he had advised his client, if called to testify, to assert his Fifth Amendment privilege against self-incrimination. See Tembeckjian Aff., ¶¶ 23.

By a memorandum of law, dated February 25, 2011, Commission staff opposed Appellant's 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 Appellant's case; and 3) it had not yet been determined whether Lippman waived his privilege by testifying under oath during the Commission's investigation. Commission staff also argued that Lippman's testimony was irrelevant to the proceeding because the allegations in the Complaint addressed Appellant's conduct, not Lippman's. They further argued that the allegations at issue were largely based on documents filed in the Surrogate's

Court which had been provided to Appellant, and that Appellant had failed to show why it was that Lippman's alleged criminal conduct could excuse Appellant's own failure to act based on statutory requirements and the documentary evidence before him in Surrogate's Court. See Tembeckjian Aff., ¶¶ 23-27.

By determination dated March 21, 2011, the Commission denied Appellant's motion and referred the matter back to the Referee for the hearing. See Verified Petition, Exhibit A. The Referee adjourned the hearing until the week of September 12, 2011. See Tembeckjian Aff., ¶¶ 28. On July 13, 2011, during a pre-hearing telephone conference with Appellant's counsel and the Referee Shea, when the Fifth Amendment issue was raised, Referee Shea stated and Appellant's counsel concurred that: 1) the Fifth Amendment issue was premature, 2) she would review and rule on the matter 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 would be considered after Commission counsel had presented its case during the September hearing. See Tembeckjian Aff., ¶ 30.

Appellant's Article 78 Proceeding and First Stay Application

By order to show cause and verified petition, dated July 19, 2011, Appellant commenced the underlying Article 78 proceeding in the Supreme Court, New York County. By that proceeding, Appellant sought to stay or dismiss the pending charges against him. Appellant alleged, based upon a statement from Lippman's attorney, that if subpoenaed to testify at Appellant's disciplinary hearing, attorney Michael Lippman will assert his Fifth Amendment privilege and refuse to testify. Appellant contended that Lippman is a critical witness to the disciplinary hearing and under these circumstances proceeding with the disciplinary hearing would deprive Appellant of the ability to mount a defense in violation of

Appellant's constitutional right to due process. The Commission opposed Appellant's application on the basis that such claims are not ripe, Appellant has not exhausted his administrative remedies and could not set forth the basis for a writ of prohibition. See Tembeckjian Aff., ¶¶ 32-36; Appellant's Stay Application, Exhibit D (September 8th Order).

By decision and order dated September 8, 2011, the Supreme Court (Jaffe, J.) denied Appellant's request for a stay and dismissed Appellant's special proceeding, holding, inter alia, that "[g]enerally, a witness may only invoke the privilege against self-incrimination when asked a potentially incriminating question, and thus the privilege may not be invoked in advance". See Tembeckjian Aff., ¶¶ 32-36; Appellant's Stay Application, Exhibit D (September 8, 2011 Order). The Court noted that Appellant had not shown that Lippman will refuse to testify when called and the application was premature. Id. at p. 4. The Court also held, citing precedent, that a disciplinary or administrative hearing need not be stayed pending the conclusion of even a related criminal proceeding and held that in light of the foregoing, it need not reach the parties' remaining arguments. See Id. at pp. 4-5.

Following dismissal of the Appellant's Article 78 proceeding, the disciplinary proceedings against Judge Holzman commenced as scheduled on September 12, 2011.

Appellant's Renewal Application and Second Stay Application

By order to show cause dated September 12, 2011, Appellant sought to renew his prior claims. Appellant' asked the court to vacate or modify its order dismissing the proceeding based entirely upon a two paragraph affidavit from Michael Lippman which states "I have been subpoenaed by counsel to Surrogate Holzman to testify in [the disciplinary proceedings]....I am electing to and will assert my constitutional right to remain silent and not answer questions under the Fifth Amendment to the United States Constitution

and under the relevant provisions of the Constitution of the State of New York." See See Tembeckjian Aff., ¶¶ 32-36. By order dated September 12, 2011, the Supreme Court (Jaffe, J.) stayed the disciplinary proceedings until September 20th, pending the outcome of the proceedings against Lippman which were then scheduled to take place on September 20, 2011. The Commission filed opposition.

By order dated September 21, 2011, the Supreme Court denied Appellant's renewal application and a further stay of the underlying proceedings. See Tembeckjian Aff., ¶¶ 32-36; Appellant's Stay Application, Exhibit A (September 21st Order).

Appellant's Appeal and Third Stay Application

By Notice of Motion dated October 4, 2011, but not provided to the Commission until argument on October 5, 2011, Appellant filed the instant application for a stay of the disciplinary hearing pending the resolution of the Appeal. As set forth below, Appellant is not entitled to such relief.

ARGUMENT

Standard

A stay is a drastic remedy requiring the movant to make "a clear showing of likelihood of ultimate success on the merits, that the movant will suffer irreparable injury unless the relief sought is granted and that the balancing of the equities lies in favor of the movant." Faberge International, Inc. v. DiPino, 109 A.D.2d 235, 240 (1st Dep't 1985); See also Scotto v. Mei, 219 A.D.2d 181, 182 (1st Dep't 1996). Such relief is to be granted sparingly and only after the movant has satisfied its heavy burden of establishing each of the required elements. See Scotto, 219 A.D.2d at 183. The "[p]roof establishing these elements must be by affidavit and other competent proof, with evidentiary detail. If key facts are in

dispute, the relief will be denied. [citation omitted]." Faberge International, Inc., 109 A.D.2d at 240.

POINT I

APPELLANT IS NOT ENTITLED TO A STAY BECAUSE HE CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. Appellant Is Not Likely To Succeed on This Appeal Because There is No Basis for Issuance of a Writ of Prohibition.

Appellant would be entitled to relief in the nature of prohibition only if the Commission lacked jurisdiction to proceed with a disciplinary hearing against him. See C.P.L.R. 7803(2); Matter of Nicholson v. State Commission on Judicial Conduct, 50 N.Y.2d 597, 605-06 (1980); Matter of Doe v. Axelrod, 71 N.Y.2d 484, 490 (1988); Neal v. White, 46 A.D.3d 156, 159 (1st Dep't 2007). But the Commission is acting within its constitutional and statutory jurisdiction here. The Commission has statutory authority to commence disciplinary proceedings against the Appellant. See N.Y. Const. Article 6, § 22; see also Judiciary Law, Article 2-A, §§ 40-48.

Appellant argues that proceeding with the disciplinary hearing while Lippman may assert his Fifth Amendment privilege violates his due process rights and thus he is entitled to a writ of prohibition. He is mistaken. First, his due process rights are not violated because he has access to notice of the charges and an opportunity to be heard. See Matter of Quinton A., 49 N.Y.2d 328, 334 (1980); see also Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978); Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The Commission provided Appellant with a Formal Written Complaint setting out the charges against him, extensive discovery including a list of all witnesses the Commission intends to call, copies of any written statements made by those witnesses including Lippman's statement, copies of

any documents the Commission intends to introduce at the hearing and any material that would be exculpatory. See Tembeckjian Aff., ¶ 19. Thus, the Commission has provided Appellant with the "basic requisites" of due process: notice and an opportunity to be heard. See Velella v. New York City Conditional Release Com'n, 13 A.D.3d 201, 202 (1st Dep't 2004)(noting that there is no constitutional guarantee of any particular form of procedure). As set forth above, Appellant may address his Fifth Amendment argument to the Referee at the proper time, if displeased with her resolution of such argument, to the Commission, and then to the Court of Appeals.[3] Thus, Appellant has recourse to ample remedies in the administrative context rendering his due process claim without merit and Article 78 relief inappropriate. Matter of Veloz v. Rothwax, 65 N.Y.2d 902, 903 (1985); State v. King, 36 N.Y.2d 59, 65 (1975).

Furthermore, "[a] constitutional claim that may require the resolution of factual issues reviewable at the administrative level should not be maintained without exhausting administrative remedies." See Schulz v. State, 86 N.Y.2d 225, 232 (1995); Town of Oyster Bay v. Kirkland, 81 A.D. 3d 812, 816 (2d Dep't 2011). Appellant's constitutional claim does not involve a purely legal question. Instead, his challenge focuses on the resolution of a factual issue, specifically what Lippman will testify to and how that testimony can aid in his defense at the disciplinary hearing. See Matter of East 51st Street Crane Collapse Litigation, 30 Misc.3d 521, 530-31 (Sup. Ct. N.Y. Co.)("determining whether the [Fifth Amendment]

---

3 In the event that Appellant disagrees with any ruling the Referee makes with regard to Lippman, Appellant can make his arguments to the full Commission. The Commission may agree and remand the matter to the Referee, or it may decide that Appellant has not committed judicial misconduct. In either of those situations, Appellant's claim would become moot. In the event that Appellant disagreed with the Commission's determination and that determination imposed any public discipline, Appellant would have a review, or appeal, as of right in the Court of Appeals. See Judiciary Law § 44(7). So in the event Appellant is aggrieved by the Commission's final determination, he has the right to plenary review in the Court of Appeals. See Judiciary Law § 44(7); Matter of Gilpatric, 13 N.Y.3d 586 (2009).

privilege is available in given circumstances ... involves a factual inquiry). This issue is reviewable at the administrative level and judicial intervention should not be maintained before Appellant exhausts all of the remedies available to him.

Appellant's argument that he would be harmed merely by being subject to proceedings wherein a witness he may wish to call may refuse to testify is meritless because there is "no legal cognizable injury to be suffered from being subjected to [a] disciplinary hearing with the possibility of a subsequent finding of professional misconduct." See Galin, 217 A.D.2d at 447; see also Doe, 71 N.Y.2d at 491(Simons, J., concurring)(noting that an agency's decision that ultimately affects the permissible scope of cross-examination in a hearing does not implicate the exception to the exhaustion doctrine).[4]

Appellant has no clear legal right to the relief he is seeking because, as a general principle, "...courts are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency." See Galin v. Chassin, 217 A.D.2d 446, 447 (1st Dep't 1995). Appellant has cited no authority justifying the courts' intrusion into the underlying administrative proceeding. Appellant cites to

---

4 To the extent that Appellant argues that he cannot defend himself without Lippman's testimony (but fails to outline what such testimony would be), this claim must be rejected. The Complaint against the Appellant properly focuses on Appellant's own conduct rather than that of Lippman. For example, the Complaint charges Petitioner with conduct such as his approval of fees based on a "boilerplate" affidavits of legal services without consideration of statutory factors, failure to report Lippman to the appropriate authorities, approval of Lippman's fee requests even after learning that Lippman had taken unearned advance and/or excessive legal fees, and failure to disqualify himself in cases in which Lippman appeared. See Tembeckjian Aff. ¶¶ 13-16. Given the charges, Appellant may put forth a defense without Lippman's testimony by testifying to his own conduct regarding each specific charge. Appellant certainly has not made any offer of proof as to the testimony he would reasonably expect Lippman to offer to refute the charges against Appellant. See, e.g., Allen v. Rosenblatt, 5 Misc.3d 1014 (Civ. Ct. N.Y. Co. 2004) (refusing to stay contempt proceedings despite respondent's claim that a "key witness" would plead the Fifth Amendment, because the Court held that the witness' guilt in the criminal proceedings wasnot determinative of whether the respondents failed to carry out the court order). Nevertheless, Appellant's rights would be fully protected because Referee Shea, a former justice of the Supreme Court, is present to hear and rule on any application Appellant may make.

various cases but none of them establish a due process violation or the basis for a writ of prohibition where an administrative proceeding is not stayed during the pendency of a related criminal trial. In fact, the cases demonstrate that a civil proceeding will not necessarily be stayed for the outcome of even a related criminal proceeding or even where a "key witness" indicates that he or she will refuse to testify based upon the Fifth Amendment privilege. For example, Appellant cites Walden Marine, Inc. v. Walden, 266 A.D.2d 933, 934 (4th Dep't 1999), but in that case, the court affirmed the denial of a stay pending the outcome of a related criminal proceeding. Similarly, in Access Capital, Inc. v. DeCiccio, 302 A.D.2d 46 (1st Dep't 2002), this Court denied a stay of a civil proceeding based upon a party's related criminal proceedings. In Matter of Mountain, 89 A.D.2d 632, 633 (3rd Dep't 1982), the court affirmed the denial of the District Attorney's request for a writ of prohibition and a stay of an administrative proceeding until completion of a related criminal proceeding. See also Chaplin v. New York City Dept. of Educ., 48 A.D.3d 226, 227 (1st Dep't 2008) (Denial of stay of public employment termination proceedings during pendency of related criminal proceedings did not violate employee's constitutional rights); Watson v. City of Jamestown, 27 A.D.3d 1183 (4th Dep't 2006)(Criminal defendant has no right to stay disciplinary proceeding pending outcome of related criminal trial). Petitioner's reliance on Britt v. International Bus. Servs., 255 A.D.2d 143 (1st Dep't 1998) and is misplaced. Britt involved a bus accident where the driver of the bus faced criminal charges and the bus company was sued in a tort action. The Court there specifically found that the testimony of the driver was "critical and necessary" and the bus company would be completely unable to present a defense to a tort action arising from the accident without the driver. Here, by contrast, Appellant has failed to show what Lippman's testimony would be, how that

testimony is "critical and necessary" and that he will be completely unable to defend his own actions as a judge without Lippman's testimony.

At most, Appellant alleges the possibility of a future error of law. But even were such error to occur, he has an adequate remedy in his ability to appeal the administrative determination. See Doe, 71 N.Y.2d at 490. Consequently, the extraordinary remedy of prohibition is not available in this case.

B. Additionally, Appellant Cannot Establish a Likelihood of Success on the Merits Because His Claim is Not Ripe.

Administrative actions are not ripe for judicial review unless and until they impose an obligation or deny a right as a result of the administrative process. See Gordon v. Rush, 100 N.Y.2d 236, 242 (2003); see also Essex County v. Zagata, 91 N.Y.2d 447, 453 (1998). This occurs only when the decision maker arrives at a final and definitive position-on the relevant issue-that inflicts an actual, concrete harm to the Appellant. See Gordon, 100 N.Y.2d at 242. Further, judicial review can only take place when this harm cannot be "prevented or significantly ameliorated by further administrative action ... available to the [Appellant]." See id. (internal quotation marks and citation omitted); Galin v. Chassin, 217 A.D.2d 446, 447 (1st Dep't 1995)("courts are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency.")

Here, there has been no final agency action. Instead, Appellant's stay application rests upon numerous assumptions and hypothetical situations. The Commission's staff has only initiated and not completed its case against Appellant. Appellant assumes that when that is done, he will need to mount a defense and will need to call Lippman to testify on his behalf. He assumes that Lippman will be asked questions to which he could properly assert his Fifth Amendment privilege and that Lippman's refusal to testify in regard to these

hypothetical matters would be so substantive that they would justify the dismissal or a stay of the proceedings. Appellant assumes that if this occurs, the Referee will not rule in his favor on any applications that Appellant may make at that time. Appellant assumes that if dissatisfied with the proceedings before the Referee, his rights of appeal within the administrative scheme established by the Legislature, which includes a review as of right to the Court of Appeals, will be insufficient to vindicate his rights.

Most incredibly, Appellant asks this court to indefinitely stay the proceedings because there may be some unspecified time in the future wherein Lippman will not assert his Fifth Amendment rights when questioned about his conduct before the Surrogate's Court. It is respectfully submitted that this, alone is an insupportable assumption. The resolution of the criminal proceedings before the Supreme Court, Bronx County at the present time will not preclude Lippman from asserting the Fifth Amendment privilege before the Commission because his testimony could implicate himself in other or further criminal charges arising out of his conduct.[5] Appellant cannot assert with certainty that Lippman will not attempt to assert his Fifth Amendment right indefinitely in fear of additional criminal prosecution. See Matter of East 51st Street Crane Collapse Litigation, 30 Misc.3d at 530-31(noting that the

---

5 As set forth in the accompanying affirmation of Robert Tembeckjian, a trial date how apparently not even been set in Michael Lippman's criminal case. It appears that the case of People v. Michael Lippman is next on the calendar in Supreme Court, Bronx County, Part 60, on November 1, 2011 but that it is unlikely it will even proceed to trial until 2012. There is no evidence that this criminal case is almost over, or that if it ended in a conviction, an appeal would not ensue. Furthermore, even if the current pending prosecution ended, if Lippman's proposed testimony before the Commission is likely to incriminate him, there is no evidence that Lippman would not assert his Fifth Amendment privilege out of concern of other or further prosecution. The indictment against Lippman involves only five underlying Surrogates Court matters. See Appellant's Stay Application, Exhibit B (Lippman's indictment included as Exhibit C thereto). The formal charges against Appellant encompass more than 80 underlying Surrogate's Court proceedings. See Tembeckjian Aff., ¶¶ 13-16; Appellant's Stay Application, Exhibit B (Formal Complaint as Exhibit B thereto). Appellant has not presented an affidavit from Lippman stating if and when Lippman will agree to testify. Thus the current criminal charges against Lippman will not necessarily prevent Lippman from invoking his Fifth Amendment privilege.

right to assert one's Fifth Amendment privilege only depends on the *possibility* of prosecution); Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc., 553 F.Supp. 45, 49 (S.D.N.Y. 1982); In re Master Key Litigation, 507 F.2d 292, 293 (9th Cir.1974).

These assumptions are highly speculative and demonstrate that Appellant's claim is not justiciable because it is not yet ripe. See Matter of Tahmisyan v. Stony Brook University, 74 A.D.3d 829, 831 (2d Dep't 2010)(holding that an Article 78 proceeding, before the commencement of a disciplinary hearing, to prohibit the introduction of certain audiotape recordings into evidence was premature).

This premature claim is not ripe on several grounds. The Fifth Amendment cannot properly be asserted until a question has been asked. See Figueroa v. Figueroa, 160 A.D.2d 390, 391 (1st Dep't 1990)(noting that the privilege against self-incrimination may not be asserted or claimed in advance of questions actually propounded). In fact, Lippman, in his first appearance during the Commission's investigation, "answered questions under oath about the affirmations of [the] legal services he submitted in [Appellant's] court, when he collected fees, whether he collected fees before filling an affirmation of legal services, and whether [Appellant] was aware when he collected fees." See Petition, Exhibit H. Therefore, it is unclear what questions, if any, Lippman would refuse to answer. Furthermore, Appellant has not submitted any affidavits to advise the Commission as to the substance of Lippman's testimony and how that testimony is critical or necessary to his defense. See Allen v. Rosenblatt, 2004 WL 2589739 * 2 (Civ. Ct. N.Y. Co. 2004) (holding that, absent an affidavit in support of what the witness' testimony might be, the court could not determine whether the witness' testimony is critical or necessary).

Here, the Referee, the decision maker for the disciplinary hearing, has not made a

final determination on this issue. Thus there is no decision for the Appellant to challenge in an Article 78 proceeding and his claim is not ripe. Although a witness may invoke his Fifth Amendment right, a decision maker has wide discretion in fashioning the appropriate corrective response once this right is invoked. See People v. Visich, 57 A.D.3d 804, 805-06 (2d Dep't 2008). As Lippman has yet to invoke his Fifth Amendment privilege and the Referee has yet to rule on the issue, the decision maker in the administrative process has not inflicted any actual or concrete harm to the Appellant. At most, the disciplinary hearing has been commenced without Appellant knowing if he will ultimately be able to call Lippman as a witness at the time when he will be required to present his defense. In light of the foregoing, Appellant's underlying Article 78 claim is not ripe.

C. Appellant Cannot Evade the Requirement that He Exhaust All Available Administrative Remedies before Seeking Judicial Review of Administrative Determinations.

It is a well settled principle of administrative law that Appellant must exhaust all available administrative remedies before obtaining judicial review of this agency's actions. See e.g., Doe, 71 N.Y.2d at 490; DiBlasio v. Novello, 28 A.D.3d 339, 341 (1st Dep't 2006); Galin, 217 A.D.2d at 447. The focus of the exhaustion doctrine is not on the administrative action itself, but on whether administrative procedures are in place to review the action and whether Appellant has exhausted these procedures. Church of St. Paul and St. Andrew v. Barwick, 67 N.Y. 2d 510, 521 (1986).

As set forth above, it is undisputed that even if the Referee ultimately rules adversely as to Appellant's Fifth Amendment argument, there are several administrative procedures in place to review that decision, including a legal right to a review of the Commission's decision before the Court of Appeals. See Judiciary Law § 44. Prohibition does not and

cannot lie as a means of seeking collateral review for errors of law in the administrative process, however grievous and "however cleverly the error may be characterized by counsel as an excess of jurisdiction or power." See Doe, 71 N.Y.2d at 490.

POINT II

APPELLANT CANNOT DEMONSTRATE IRREPARABLE INJURY.

Appellant asks that the Court stay the disciplinary proceedings pending resolution of his appeal but has failed to show that he will suffer irreparable injury should the hearing proceed. Appellant suffers no irreparable harm from being subjected to a disciplinary hearing. See Galin, 217 A.D.2d at 447; see also Newfield Central School District v. N.Y.S. Division of Homan Rights, 66 A.D.3d 1314, 1316 (3d Dep't 2009)(finding no irreparable harm from proceeding with a hearing prior to a judicial determination on the agency's jurisdictional authority to adjudicate the matter); Ashe v. Enlarged City School District, 233 A.D.2d 571, 573 (3d Dep't 1996). The law affords the Appellant several adequate remedies for any wrong he contends he will suffer from the Commission's determination to proceed with the disciplinary hearing and thus he cannot demonstrate irreparable harm. See pp. 3-4, 17, supra; Kane, 295 N.Y. at 205-06 (denying injunctive relief when there are adequate legal remedies for the contemplated wrong).

POINT III

THE BALANCING OF THE EQUITIES WEIGHS AGAINST A STAY.

It is respectfully submitted that the balance of the equities does not favor Appellant. It should be noted, in weighing the equities here, that a preliminary injunction would cause the People of the State of New York irreparable harm. They are entitled both to finality of decisions (subject only to appeals therefrom) as well as to a judiciary devoid of corruption.

Since an indefinite stay would almost certainly mean that the inquiry into the Appellant's judicial conduct will end, the equities weigh against such a stay. Appellant will turn 70 next year and will face mandatory retirement by December 31, 2012. Given the amount of time needed to complete the disciplinary process, which involves the hearing, post hearing briefs, the Referee's report, briefs to the Commission, oral argument and finally a determination by the Commission, see Tembeckjian Aff., ¶¶ 38-51, delaying the process for any length of time increases the risk that the disciplinary proceeding will be rendered moot as it may not conclude before Appellant leaves his position on the bench.

"Administrative proceedings are mandated to proceed expeditiously to protect ... public interest." (emphasis added). See Galin, 217 A.D.2d at 447. Thus, the balancing of equities lies in favor of the respondent. Appellant cannot be allowed to stall disciplinary proceedings against him until the matter is rendered moot based on a speculative belief as to what a potential witness may or may not say and when he will or will not say it.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that Appellant's application for a stay pending appeal be denied and that the Court issue such other and further relief as may be just, proper and appropriate.

Dated: New York, New York
October 7, 2011

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Respondent
By:

_____

MONICA CONNELL
Assistant Attorney General
120 Broadway, 24th Floor
New York, New York 10271
(212) 416-8965

MONICA CONNELL
Assistant Attorney General
of Counsel