

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 482
(No. 01-08-90005)

BEFORE

Selya and Lipez, Circuit Judges
Smith, Woodcock, and Delgado-Colón, District Judges

ORDER

ENTERED: NOVEMBER 24, 2008

Petitioner, a pro se litigant, has filed a petition for review of then Chief Judge Boudin's order dismissing his complaint of judicial misconduct under 28 U.S.C. § 351(a) against a district judge in the First Circuit. This complaint was the third filed by this litigant. On May 28, 2003, the petitioner filed Complaint No. 348 against a magistrate judge, which the Chief Judge dismissed on August 4, 2003 pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), (ii), and (iii). See Boudin, C.C.J., Order, In Re Complaint No. 348, Aug. 4, 2003. By order, dated December 16, 2003, the Judicial Council affirmed the order of dismissal. See Judicial Council of the First Circuit, Order, In Re Complaint No. 348, Dec. 16, 2003.

On September 14, 2004, the petitioner filed Complaint No. 390 against the district judge charged in the present matter. The Chief Judge dismissed Complaint No. 390 on November 24, 2004. See Boudin, C.C.J., Order, In Re Complaint No. 390, Nov. 24, 2004. The petitioner did not file a petition for review. Both complaints alleged impropriety in connection with the

petitioner's criminal prosecution.

In the pending matter, the petitioner originally alleged that the judge retaliated against the petitioner for filing a previous judicial misconduct complaint. The misconduct comprised the alleged mishandling of the two civil cases that the petitioner filed challenging his conviction and sentence. The petitioner asserted that the order of dismissal that the judge issued in each of the cited cases contained "nonsensical phrase[s] that make no sense at all let alone provide . . . reason for the [court's] denial."¹

The petitioner next alleged that the judge improperly neglected to rule on motions for disqualification filed in each of these two proceedings. The petitioner also urged that, as each of his three judicial misconduct complaints related to the same underlying criminal case, they should be considered a "single complaint," and that the rule authorizing the Judicial Council to restrict the filing of repetitive, baseless complaints is unconstitutional.

Then Chief Judge Boudin dismissed the complaint. As an initial matter, the Chief Judge observed that the judicial misconduct statute, 28 U.S.C. § 351 et. seq., and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial Misconduct) do not authorize the consolidation of three complaints (filed over a five-year span against two judicial officers). Nor, the Chief Judge explained, does the judicial misconduct statute provide an avenue for challenging the constitutionality of the Rules of Judicial Misconduct.

Based upon his review of the complaint, the dockets and the pertinent court orders, then Chief Judge Boudin recounted the chronology of the relevant cases. He observed that the

¹The objectionable portions cited from each of the respective orders of dismissal include: "[c]onsequently, the motion is denied without prejudice," from the first matter, and "[i]n accordance with this court's denial of the motion to vacate under 28 U.S.C. Section 2255 filed by the petitioner. . . ," from the order issued in the second case.

petitioner filed the first motion to vacate his sentence under 28 U.S.C. § 2255 in May of 2007.

The judge promptly issued an order explaining that, since the petitioner's criminal conviction was pending on appeal, the district court lacked jurisdiction to consider the matter. Accordingly, the court denied the motion without prejudice.

The Chief Judge further observed that the petitioner filed the subsequent § 2255 motion in January of 2008. In response, the judge issued an electronic order denying the petitioner's motion and an order of dismissal stating that "[i]n accordance with this court's denial of the motion to vacate under 28 U.S.C. Section 2255 filed by the petitioner . . . it is hereby ordered: the above-captioned action is hereby dismissed." The petitioner filed an appeal of this order; the appeal was pending.

The Chief Judge determined that there was no evidence in the reviewed record indicating that the judge sought to retaliate against the petitioner or otherwise harbored any improper motivation in dismissing the cases. Accordingly, the charges to that effect were dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(C).

Then Chief Judge Boudin next noted that the orders to which the petitioner objected did not contain "nonsensical phrases." The order in the first civil case explained the ground for dismissal--the court lacked jurisdiction since the underlying conviction was on appeal. The Chief Judge determined that, on the present facts, the court was not obligated to provide grounds for its denial of the redundant motion filed in the subsequent case. See 28 U.S.C. § 352(b)(1)(A)(i); Rules of Judicial Misconduct, Rule 11(c)(1)(A).

Lastly, the Chief Judge stated that, in the absence of evidence of improper judicial

motivation--of which there was none-- the petitioner's disagreement with rulings entered by the court did not provide grounds for a cognizable complaint of judicial misconduct. See 28 U.S.C. § 352(b)(1)(A)(ii); Rules of Judicial Misconduct, Rule 11(c)(1)(B). Nor, the Chief Judge added, would the pendency of the petitioner's motions for disqualification alone suggest judicial misconduct within the meaning of the statute. See 28 U.S.C. § 352(b)(1)(A)(i).

In the petition for review, the petitioner first states that he filed a "motion to revoke a magistrate detention order" in an unidentified case that the judge "had been sitting on for 10 months without ruling." The petitioner contends that the Chief Judge stated that the "petitioner was arguably entitled to have his motion ruled [on] promptly"

The petitioner then reiterates the claim that the judge's order of dismissal in his first civil proceeding lacked sufficient "reason or explanation" and was "nonsensical." The petitioner asserts that the judge deprived the petitioner of access to the court's decision in this matter which the petitioner only "discovered . . . approximately 3 [sic] months later." The petitioner then argues that the judge was wrong to dismiss the matter on the ground that the criminal case was pending on appeal because the issue on appeal was not "part of the criminal case."

As to his second proceeding, the petitioner contends that, since the appeal was decided before the "refiled § 2255 [petition] was ruled on," the Chief Judge incorrectly determined that the issue was "redundant" when raised in the petitioner's second matter and dismissed by the court. The petitioner concludes that the district judge "has reduced himself to personality games and failed to live up to his constitutional responsibility."

The petition for review is without merit. First, the "motion to revoke a magistrate detention order" to which the petitioner refers was apparently a filing in his criminal proceeding

that was at issue in Judicial Misconduct Complaint No. 390. The petitioner cites a statement from the dismissal order in Complaint No. 390 that the petitioner was "arguably entitled to prompt review of the detention order by the district judge." Boudin, C.C.J., Order, In Re Complaint No. 390, Nov. 24, 2004. This statement has no bearing on the pending misconduct complaint.

Moreover, neither the complaint, the reviewed record, or the petition for review contain any facts suggesting that the judge engaged in misconduct while presiding over the petitioner's § 2255 cases. As explained by the Chief Judge, the judge's order of dismissal of the petitioner's first § 2255 matter succinctly stated the grounds for the court's ruling-- absence of jurisdiction because the underlying case was on appeal. There was nothing in this order that suggested judicial impropriety.

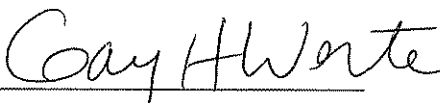
The petitioner correctly notes that his appeal had been resolved by the time he filed his second § 2255 motion.² While then Chief Judge Boudin described this motion to be "redundant" of the first § 2255 petition, the district judge relied upon the judgment of the court of appeals (affirming the district court's decision in the criminal case) in denying this motion. There was likewise no information either in this order or in the remainder of the reviewed record suggesting that the judge sought to retaliate against the petitioner or harbored any improper motive. Accordingly, the complaint was appropriately dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii).

As there was no evidence of judicial bias or animus, the charges arising from the petitioner's disagreement with the court's orders were properly dismissed pursuant to 28 U.S.C. §

²The petitioner filed the second § 2255 action five days after the Court of Appeals issued its mandate in the petitioner's appeal.

352(b)(1)(A)(ii). Finally, any delay in the petitioner's receipt of the order of dismissal of the first § 2255 petition would be at most administrative and is not, therefore, automatically attributable to the judge. See 28 U.S.C. § 352(b)(1)(A)(i); see also Boudin, C.C.J., Amended Order, In Re Complaint No. 344, June 26, 2003. Nor is there any indication that any such delay actually occurred.

For the reasons stated herein, the order of dismissal issued in Judicial Misconduct Complaint No. 482 is affirmed. See Rules of Judicial Misconduct, Rule 19(b)(1).



Gary H. Wenté, Secretary