JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 479
(NO. 01-08-90001)

BEFORE

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

ORDER

ENTERED: SEPTEMBER 18, 2008

Petitioner, a 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. The petitioner originally alleged that the judge engaged in wrongdoing in connection with a civil case filed against the petitioner and others in 1987. The petitioner charged that the judge was responsible for deletions from the trial record. The alleged deletions included segments of the petitioner 's testimony, other "evidence that was favorable to [the petitioner]," comments by the judge at the conclusion of the bench trial (which took place over a span of several weeks in September and October of 1994), a question asked at an unspecified hearing in 1995, and a question and statement directed by the court to the plaintiff at the end of trial.

The petitioner did not indicate when he first learned of the alleged deletions. He stated, however, that in October of 2001 he had a conversation with the court reporter during which she

said that she "was not sure" if she could furnish the petitioner with the audio tapes of his trial as he had requested but that "the deletions in the transcripts 'did not prejudice' [the petitioner's] case." The petitioner added that, later that month, he received a letter from the judge stating that the trial tapes "were erased shortly after the transcriptions were made."

The petitioner further contended that "[s]ometime between 2002 and 2005, [he] made a visit to the court to see the . . . file in the case," but that the file, although represented to be complete by the court reporter, consisted of "motions and replies" without any trial tapes. The petitioner explained that, after this visit, he discovered that court reporters take "steno notes" during proceedings that should have been made available to him absent "wrongdoing by [the judge], . . . even if the tapes were destroyed as claimed." The petitioner surmised that the judge "did not want [the petitioner's] case to be in his court and was willing to take whatever action was necessary to make sure [that the] case was over."

The petitioner added that, in a letter sent in May of 2007, the judge's clerk "wrote that the Steno Notes [sic] had been destroyed." The petitioner claimed that he had "the letters from [the judge] and his clerk if needed . . . ." He concluded that "[d]elays, stonewalling and deception from the court seem to be the rule in this matter, [that the judge] was directly involved in the deletions . . . [and that] if the tapes were destroyed, [the judge] destroyed them when [the petitioner] requested them."

After initial review of the complaint by Circuit Executive's Office staff, the petitioner was asked to provide the "letters from [the judge] and his clerk" referenced in the complaint, as well as any other documents relevant to his charges. In response, the petitioner submitted four letters. The first was from the judge to the petitioner in October of 2001, and read as follows:

Dear Mr. . . . . :

I have discussed your . . . letter with my former court reporter . . . . She informs me that the transcripts that she prepared accurately and completely included the portions of the exhibits that you read into the record. She also informs me that she reused the audiotapes after the transcripts were completed. Therefore, the audiotapes that you requested are no longer available.

The second letter was from the petitioner to the judge later the same month and was apparently written in response to the judge's letter. In that letter, the petitioner noted the alleged deletions from the transcripts and requested a hearing.

The third letter was from the judge's courtroom clerk to the petitioner and was dated in May of 2007. Written in apparent response to a request from the petitioner under the Freedom of Information Act (FOIA) for "all records . . . and any information as to the audio tapes used at [the petitioner 's] trial," the clerk explained that FOIA does not apply to the judiciary and stated that, as indicated by the judge, the tapes "were erased and re-used by the court reporter shortly after she prepared the official transcripts in this matter. Further, the steno notes of the court reporter were destroyed after ten (10) years pursuant to the records disposition schedule set forth in the Guide to Judiciary Policies and Procedures."

The fourth enclosed letter was directed to the judge from the petitioner and was dated later the same month In it, the petitioner reiterated his concern about the alleged destruction of the tapes, noted that he had not received a reply to his inquiry concerning the court's policy regarding the reuse of tapes during the relevant time period, and explained that he had requested the "steno notes" before expiration of the ten-year period during which their preservation was mandated.

Then Chief Judge Boudin dismissed the complaint. Based upon his review of the docket

sheet as well as available pleadings and court orders[1], the Chief Judge summarized the relevant chronology as follows. The case was originally filed in federal court in another circuit in 1987 against the petitioner alleging the misappropriation of trade secrets and copyright infringement. In 1989, the case was transferred to a district court in the First Circuit and consolidated with another related matter. After two of the parties settled and the court terminated the petitioner's counterclaims on summary judgment, a non-jury trial, lasting over two weeks, was held in the fall of 1994. Thereafter, the judge found that the petitioner had been misappropriating the plaintiff's intellectual property for over a decade and had fabricated testimony at trial. The court issued a lengthy published opinion. The district court closed the case in 1995; in 1996, the Court of Appeals affirmed the decision of the lower court.

In 1998, a motion was filed to have the petitioner held in contempt for apparent failure to pay the fees incurred by the monitor retained to ensure compliance with the court's order for injunctive relief. After multiple hearings, the judge granted the motion for contempt and ordered the petitioner to pay costs and attorneys' fees of roughly $20,000, as well as the monitor's fees of roughly $14,000.

Then Chief Judge Boudin further observed that, according to the docket, the court received four letters in October and November of 2001, one of which was presumably the petitioner's letter to the judge, noted above. The docket further demonstrates that, in December of 2001, the court held that, to the extent that the petitioner's correspondence sought reopening of the case, the request was denied. In March of 2003, the petitioner filed, pro se, a motion to vacate all the court's orders because of misconduct by the plaintiff. In March of 2004, the court

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[1]Due to the age of the case, the file itself had been archived in storage and was not accessible.

issued a lengthy opinion denying this motion and allowing the plaintiff's motion for an order barring the petitioner from attacking the validity of the judgment without leave of court. In 2005, the Court of Appeals again affirmed the lower court's decision and also noted that any issue concerning the alleged erasure of the trial tapes was waived because it had not been raised in the district court.

In his discussion of the complaint, then Chief Judge Boudin first noted that the Rules of the Judicial Council of the First Circuit Governing Complaints of Judicial Misconduct or Disability (Rules of Judicial Misconduct) require misconduct complaints to be filed "promptly." Rules of Judicial Misconduct, Rule 1(d).[2] The Chief Judge observed that the misconduct alleged concerned a trial that had taken place over thirteen years before the complaint was filed. By the petitioner's own admission, he only first raised these issues with the court in late 2001, still seven years after the trial and four years after the conclusion of the first appeal (for which the transcripts had been produced). The petitioner did not offer any explanation for this extraordinary delay, nor did he offer any indication of a current problem with either the judge or with the court. See Rules of Judicial Misconduct, Rule 1(d).

Then Chief Judge Boudin further determined that neither the complaint, the docket, the reviewed pleadings and court orders, nor the supplementary letters, offered any information supporting the charges that the judge harbored any illicit motivation in connection with the petitioner's case or was otherwise involved in the mishandling of trial transcripts, audio tapes, or stenographer's notes. To the contrary, the reviewed record indicated that the judge presided over

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[2]Revised Rules of Judicial Misconduct took effect shortly after issuance of the Chief Judge's order. See Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial Misconduct). The revised rules do not affect the disposition of the present matter.

the proceeding for over fourteen years, held a lengthy trial, issued a published opinion that was upheld on appeal, and ruled on numerous post-trial motions before ultimately barring the petitioner from further challenges to the court's judgment. On these facts, the Chief Judge concluded that the charge that the judge "did not want" the petitioner's case in his court was baseless. To the extent that the judge's last order reflected the court's interest in obtaining finality in the proceeding, the Chief Judge opined that it was not suggestive of judicial animus. Accordingly, the complaint was dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii).

Then Chief Judge Boudin further explained that, insofar as any clerical or administrative error may have resulted in omissions from the record--a claim for which the petitioner provided no support--any such errors would not alone demonstrate judicial misconduct within the meaning of the statute. See Order, Judicial Council of the First Circuit, In Re: Complaint No. 406, December 22, 2005, at 4; see also 28 U.S.C. § 352(b)(1)(A)(i). Finally, to the extent that the complaint reflected disagreement with orders issued in the case, it was dismissed as not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii).

In the petition for review, the petitioner reiterates the original charges. He contends that he "attempted to solve these issues" concerning the "deletions of [his] testimony and other proceedings" but the "long delays in answering the questions, lack of openness and the lack of truthfulness came from [the judge] . . . ." The petitioner states that the "existence of the steno notes [was] not made available to [him] on any occasion" until he was told that they too had been destroyed. He restates that the tapes were required by law to be kept for a minimum of ten years and that he "proceeded as expeditiously as possible under the circumstances [he] had at the time." The petitioner concludes that obtaining "the truth" requires the judge and the court reporter to

testify under oath as "to what exactly went on with the erasure of the tapes, deletions in the transcripts of testimony crucial to this case, and other proceedings."

The petition for review is without merit. As explained by the Chief Judge, the available record demonstrates that the judge presided over the petitioner's case for over fourteen years--from its inception in November of 1989 until the court's resolution of final motions in March of 2004. The transcripts at issue were prepared in March and May of 1996, many years before the petitioner first raised his claims of alleged irregularities or omissions in the record. As also noted by then Chief Judge Boudin, the petitioner offers no rational explanation for the excessive delay. Nor does the petitioner suggest what "circumstances" prevented him from raising the issues in a more timely manner. While a judicial misconduct complaint may be brought "at any time, . . . the passage of time" (especially when as excessive as here) seriously undermines the ability to obtain information from both court records and personnel. See Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial Misconduct), Rule 9.

More importantly, the petition, like the original complaint, contains no facts demonstrating wrongdoing of any kind by the judge. As observed by the Chief Judge, the court's lengthy memoranda and orders suggest a patient and reasoned handling of the case. Nor does the correspondence submitted by the petitioner provide any indication of judicial deception or wrongdoing. As the complaint, the petition for review, and the reviewed record contain no evidence that the judge sought prematurely to terminate the petitioner's case, alter the record or engaged in any other impropriety, the complaint was properly dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(D). To the extent that the complaint reflected the petitioner's disagreement with the court's rulings, it was also properly

dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(B).

Finally, as also determined by the Chief Judge, any clerical error or malfeasance in the compilation of the record--of which there is no evidence--would not, without more, be indicative of judicial misconduct.[3] Therefore, the complaint also was appropriately dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial Misconduct, Rule 11(c)(1)(A).

For the reasons stated herein, the order of dismissal issued in Judicial Misconduct Complaint No. 479 is affirmed. See Rules of Judicial Misconduct, Rule 19(b)(1).

Gary H. Wente

Gary H. Wente, Secretary

[3]While this includes the alleged destruction of the "steno notes," it should be remarked that the petitioner provides no information suggesting that they were destroyed before the time indicated in the court's May 2007 letter.