

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-11-90026

BEFORE

Torruella, Lipez, Thompson, Circuit Judges
O'Toole and Besosa, District Judges

ORDER

ENTERED: FEBRUARY 22, 2012

Petitioner, a pro se litigant, has filed a petition for review of Chief Judge Lynch's order dismissing his complaint, under the Judicial Conduct and Disability Act, 28 U.S.C. § 351(a), against a district judge in the First Circuit. The petitioner originally alleged that two incidents of police misconduct, both unrelated to petitioner's conviction and sentence, undermined the judge's impartiality in presiding over the petitioner's proceedings.

The first incident occurred the year before petitioner's indictment when the judge allegedly testified as an alibi for someone who had been wrongfully accused of selling narcotics. Second, petitioner charged that, several years after petitioner's conviction and sentencing, the judge learned that one of the police agents who had been involved in petitioner's arrest and prosecution was successfully sued for civil rights violations in an unrelated police misconduct matter.

The petitioner concluded that the judge's awareness of these two instances of alleged police misconduct - one prior to petitioner's trial and one after concerning a witness involved in

petitioner's prosecution - created a "conflict of interest" that necessitated the judge's recusal from petitioner's proceedings. The petitioner added that, in addition to impacting his original sentence, this conflict caused the judge to improperly deny all of petitioner's post-trial motions and pleadings.

Chief Judge Lynch dismissed the complaint as baseless. The Chief Judge observed that the reviewed record - consisting of the misconduct complaint, and the dockets, pleadings and orders in the petitioner's numerous proceedings - demonstrated that petitioner had, over the years, repeatedly sought to challenge his conviction and sentence. Chief Judge Lynch noted that, although petitioner obtained modification of his initial conviction, he was less successful in subsequent challenges to his sentence.

The Chief Judge determined that the reviewed record provided no indication of any relationship whatsoever between either of the two alleged instances of police misconduct and the petitioner's case(s). Chief Judge Lynch further noted that, in addressing the latter incident, the court observed that the alleged police misconduct was "remote and irrelevant to the [petitioner's] conduct," and that the officer(s) subsequently charged with wrongdoing had been one of many to testify against the petitioner at trial.¹

As there was no information suggesting that the judge was influenced in handling the petitioner's case(s) by either of the two cited instances of alleged police misconduct, Chief Judge Lynch dismissed the misconduct complaint as unfounded, pursuant to 28 U.S.C. § 352(b)(1)(B). See Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct),

¹In the original misconduct complaint, petitioner identifies one such officer. The court's orders and the petition for review refer to two testifying officers. The distinction is not relevant to the resolution of the present matter.

Rules 11(c)(1)(D).

Since the judge's alleged testimony before petitioner's trial in a wholly unrelated matter was not remotely indicative of wrongdoing on the part of the judge, the complaint was also dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i), and Rules of Judicial-Conduct, Rule 11(c)(1)(A). Finally, as there was no evidence of bias, insofar as the misconduct complaint was based upon petitioner's disagreement with the substance of the court's rulings, Chief Judge Lynch dismissed it as not cognizable, pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(B).

In the petition for review, the petitioner restates the original claim that the judge's knowledge of police misconduct before petitioner's trial undermined the judge's impartiality and necessitated his recusal from the petitioner's proceedings. The petitioner includes citations to case law and apparent legislative history interpreting the disqualification statute, 28 U.S.C. § 455(a).

With respect to the other alleged incident of police misconduct, the petitioner contends that the two officers who testified against him, see note 1, *supra*, and against whom a civil action was later successfully pursued, were the only ones "directly involved" in petitioner's case. The petitioner infers that the judge "knew about the illegal conduct of the police agents," and concludes that his "due process right to . . . a fair and impartial trial . . . [were] violated by the Judge's conduct."

The petition for review is without merit. As an initial matter, the judicial misconduct complaint procedure, 28 U.S.C. § 351, *et. seq.*, does not provide an avenue for obtaining a judge's recusal or otherwise modifying an order in a pending or closed case. See Rules of

Judicial-Conduct, Rules 11 and 19.

Moreover, as concluded by Chief Judge Lynch, the petitioner offers no facts indicating that the judge was biased against the petitioner in presiding over his initial prosecution or any of the petitioner's subsequent challenges to his conviction and sentence. As the Chief Judge explained, neither of the two cited instances of alleged police misconduct suggest that the judge harbored a conflict of interest. There is no information suggesting any connection between the alleged police misconduct and petitioner's cases that might impute the judge with some improper motivation. Therefore, the Chief Judge appropriately dismissed the misconduct complaint as unfounded, pursuant to 28 U.S.C. § 352(b)(1)(B), and as not indicative of misconduct, pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rules 11(c)(1)(D), and 11(c)(1)(A), respectively.

Because there was no evidence of bias or illicit judicial motivation, to the extent that the complaint reflected the petitioner's dispute with the substance of the judge's rulings, it was also properly dismissed as not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B).

For the reasons stated herein, the order of dismissal issued in Judicial Misconduct Complaint No. 01-11-90026 is affirmed. See Rules of Judicial-Conduct, Rule 19(b)(1).



Gary H. Wente, Secretary