

JUDICIAL COUNCIL  
OF THE FIRST CIRCUIT

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IN RE  
COMPLAINT NOS. 01-16-90026 and 01-16-90032

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BEFORE

Lynch and Kayatta, Circuit Judges  
Laplante, McConnell, and Levy, District Judges

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ORDER

ENTERED: SEPTEMBER 18, 2017

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Petitioner has filed a petition for review of Chief Judge Howard's order dismissing his complaint, under 28 U.S.C. § 351(a), against a First Circuit district judge and a judge who was a magistrate judge at the time in question. Petitioner alleges bias and judicial misconduct in connection with a miscellaneous proceeding that resulted in petitioner's disbarment. Chief Judge Howard dismissed the misconduct complaint as baseless and not cognizable.

Petitioner originally alleged that the district judge and the magistrate judge were motivated by personal bias against petitioner and violated the Code of Conduct for United States Judges (Code of Conduct) and the Judicial Conduct and Disability Act in

presiding over a miscellaneous proceeding.<sup>1</sup> Specifically, petitioner objected to: the magistrate judge's failure to recuse and the district judge's failure to order recusal; denials of petitioner's requests for emergency disbursements of disputed settlement funds for his personal use; and the court's orders distributing the disputed funds and disbaring petitioner. Petitioner further alleged that there were unreasonable delays in the proceeding.

Petitioner alleged that, during evidentiary hearings, the magistrate judge demonstrated "excessive rudeness" and "humiliating sarcasm" towards the petitioner and that the magistrate judge was "excessive[ly] suggestive[]" when questioning witnesses, while precluding petitioner's examination of those witnesses. He also alleged that the magistrate judge had improper ex parte communications with witnesses while the proceeding was pending.

Petitioner further asserted that the district court failed to provide him with adequate notice of the nature of the ethical allegations lodged against him or the scope of the proceeding, maintaining that he was not informed that disbarment was at issue. He claimed that the magistrate judge's factual findings included multiple misrepresentations, and that both judges applied the wrong legal standard and failed to give full faith and credit to a decision of the state supreme court dismissing related misconduct allegations

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<sup>1</sup> The miscellaneous proceeding arose from objections filed by a number of petitioner's former clients in a civil matter concerning petitioner's deductions from settlement proceeds.

against petitioner. Finally, the petitioner alleged that the district court record of the proceeding was incomplete; that certain documents were missing; and that a transcript omitted a rude comment made by the magistrate judge to petitioner.

Because the district judge had retired from service and because, after reviewing the record, the Chief Circuit Judge found no special circumstances to justify proceeding with the allegations against the judge, Chief Judge Howard dismissed the allegations against the district judge as moot. See Lynch, C.C.J., Order, In Re: Judicial Misconduct Complaints Nos. 01-14-90008 and 01-14-90009, July 10, 2014, at 2, citing Boudin, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 387, October 7, 2004, at 2. See also 28 U.S.C. § 352(b)(1)(A)(i); Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 11(c)(1)(A).

Chief Judge Howard conducted a limited inquiry, pursuant to Rule 11(b) of the Rules of Judicial-Conduct, and found no information in the misconduct complaint or in the lengthy records of the relevant cases suggesting that the magistrate judge was biased against petitioner or otherwise engaged in wrongdoing. The Chief Judge noted that, while a violation of the Code of Conduct may inform consideration of a judicial misconduct complaint, a violation of the Code does not necessarily constitute judicial misconduct under the statute. See Rules of Judicial-Conduct, Commentary on Rule 3. Moreover, Chief Judge Howard found no evidence suggesting that the magistrate judge violated the Code of Conduct, let alone engaged in misconduct.

Chief Judge Howard determined that the allegations concerning the magistrate judge's handling of the court proceedings, including the judge's allegedly rude or inappropriate comments were wholly unsupported and did not evidence improper judicial motive or other wrongdoing. The Chief Judge also thoroughly reviewed petitioner's allegations of ex parte communications in the context of the record, and determined that any such communications were not improper and did not amount to a violation of the Code of Conduct.

The Chief Judge further found that, despite petitioner's contentions to the contrary, the petitioner had complete access to the district court record, including the submissions of his former clients, and that he had been given sufficient notice of the nature and scope of the proceeding. Chief Judge Howard determined that the complaint was based exclusively on petitioner's disagreement with: the substance and timing of the district court's orders on the petitioner's motions for recusal and requests for emergency disbursements, its orders concerning the settlement proceeds, and the magistrate judge's report and recommendation; the court's factual findings and treatment of a related state supreme court decision, and the legal standard applied; and the ultimate disbarment order. Finally, the Chief Judge concluded that, even if the record was incomplete or the district court had made docketing errors, such errors or omissions would not be attributable to the presiding judge or indicative of misconduct. See Lynch, C.C.J., Order, *In Re Complaint No. 01-12-90015*, July 11, 2012, at 3-4, citing Boudin, C.C.J., Amended Order, *In Re Judicial Misconduct Complaint No. 406*, September 5, 2005, at 3.

Accordingly, Chief Judge Howard dismissed the complaint against the magistrate judge pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii), and 352(b)(1)(B). See also Rules of Judicial-Conduct, Rules 11(c)(1)(A), 11(c)(1)(B), and 11(c)(1)(D).

In his lengthy petition for review, petitioner repeats the allegations of personal bias and wrongdoing by the magistrate judge and the district judge, including the contention that the judges were responsible for the incomplete district court record and that the magistrate judge's conduct towards petitioner was rude and hostile. Petitioner complains that he did not have sufficient time to file the petition, and he requests de novo review of his allegations and an evidentiary hearing. Petitioner alleges that, in the order dismissing the complaint, Chief Judge Howard failed to address specific allegations of bias, mischaracterized petitioner's claims, made false statements, and became an "advocate" on behalf of the judges. Petitioner claims that Chief Judge Howard's investigation was inadequate, that the Chief Judge's conduct should be investigated, and that he should recuse or resign.

The petition has been reviewed in accordance with the governing statute and the Rules of Judicial-Conduct. See 28 U.S.C. § 352(c), and Rules of Judicial-Conduct, Rules 19 and 20. There is no evidence of bias by the magistrate judge. As an initial matter, the judicial misconduct complaint procedure does not provide an avenue for petitioner's requested relief, including the resignation of the reviewing judge, additional time for the

filing of a petition for review beyond the extension he was granted<sup>2</sup>, de novo review, or an evidentiary hearing where, as here, the complaint has not warranted the appointment of a special committee. See 28 U.S.C. § 351, *et seq.*; see also Rules of Judicial-Conduct, Rules 11, 19, and 20.

The petition for review is meritless. First, petitioner presents no facts whatsoever supporting the allegations that Chief Judge Howard was biased or improperly motivated in his review of the misconduct complaint. The Chief Judge's order demonstrates a thorough review of the complaint and the underlying record and more than suffices to dispel each of petitioner's allegations. Petitioner's assertions of impropriety by the Chief Judge amount to nothing more than a challenge to the correctness of the Chief Judge's order of dismissal and, therefore, are not cognizable. See Rules of Judicial-Conduct, Commentary to Rule 3 ("Any allegation that calls into question the correctness of a judge -- without more -- is merits-related . . . . Thus, a [claim] challenging the correctness of a chief judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related. . . .").

As to the retired district judge, the petition, like the original complaint, fails to demonstrate "special circumstances in which the public interest justify[s] proceeding with [a] complaint [against a retired judge]." See In Re: Judicial Misconduct Complaints Nos. 01-14-90008 and 01-14-90009, supra, at 2, citing In Re: Judicial Misconduct

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<sup>2</sup> Petitioner was granted a 30-day extension of the 42-day deadline (from the date of the Chief Judge's order) allotted by Rule 18(b) of the Rules of Judicial-Conduct for filing the petition for review.

Complaint No. 387, supra, at 2. Therefore, Chief Judge Howard appropriately dismissed the complaint against the district judge pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A).

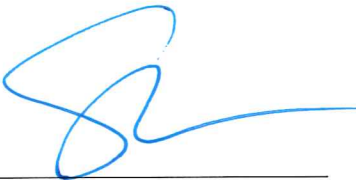
Furthermore, petitioner provides no evidence of improper judicial motive or other wrongdoing that would undermine Chief Judge Howard's determinations on the claims against the magistrate judge. Petitioner's reiterative allegations concerning the judge's treatment of petitioner during court proceedings do not offer any indication of bias or other judicial misconduct. Where, as here, there is no indication of improper judicial motive, petitioner's continued objections to the court's rulings do not constitute cognizable misconduct. Accordingly, Chief Judge Howard properly dismissed the complaint pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B), and Rule 3(h)(3)(A) ("Cognizable misconduct . . . does not include . . . an allegation that is directly related to the merits of a decision or procedural ruling. An allegation that calls into question the correctness of a judge's ruling . . . , without more, is merits-related."). As these allegations are factually unsupported, the complaint was also properly dismissed pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial-Conduct, Rule 11(c)(1)(D).

With regard to petitioner's allegations concerning the district court record, Chief Judge Howard correctly found no information demonstrating that any error or omission from the record would be attributable to the presiding judge. See, e.g., In Re Judicial

Misconduct Complaint No. 01-13-90015, supra, at 3-4, citing In Re Judicial Misconduct Complaint No. 406, supra, at 3. Accordingly, Chief Judge Howard properly dismissed these allegations pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A).

For the reasons stated herein, the order of dismissal issued in Judicial Misconduct Complaint Nos. 01-16-90026 and 01-16-90032 is affirmed. See Rules of Judicial-Conduct, Rule 19(b)(1).

9/18/17  
Date

  
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Susan Goldberg, Secretary