

JUDICIAL COUNCIL  
OF THE FIRST CIRCUIT

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IN RE  
COMPLAINT NO. 01-18-90017

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BEFORE  
Torruella, Thompson, AND Barron, Circuit Judges  
Delgado-Hernández AND Talwani, District Judges

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ORDER

ENTERED: JULY 7, 2020

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Petitioner has filed a petition for review of Chief Judge Howard's order dismissing petitioner's misconduct complaint, under 28 U.S.C. § 351(a), against a district judge in the First Circuit. Petitioner alleged judicial misconduct in connection with petitioner's two civil cases over which the subject judge presided. Chief Judge Howard dismissed the complaint as unsupported and as not cognizable.

Petitioner alleged that the judge violated multiple provisions of Canon 3 of the Code of Conduct for United States Judges (Code of Conduct) by delaying and ultimately failing to refer petitioner's attorney to an assistance program or disciplinary authority before dismissing petitioner's cases. See Code of Conduct, Canons 3B(6) (requiring judges to "take appropriate action upon receipt of reliable information indicating the likelihood . . . that a lawyer violated applicable rules of professional conduct"); 3A(2) (requiring a judge to "maintain order and decorum in all judicial proceedings"); 3A(3)

(requiring judges to be "patient, dignified, respectful, and courteous" and requiring "similar conduct by those subject to the judge's control, including lawyers . . . "); and 3B(1) (requiring a judge to "diligently discharge administrative responsibilities" and "maintain professional competence in judicial administration . . . ").<sup>1</sup> Petitioner asserted that the "judge should have seen that the merits of [the] case deserved a disciplinary review from the [board overseeing attorney conduct]."

Petitioner further alleged that the judge was biased in presiding over petitioner's cases and wrongfully denied his requests to seal his cases and to reopen his second case. Finally, petitioner contended that the public availability of the orders and filings in his cases had prevented him from securing employment and requested that the court "prevent and block the contents of [his] court documents [from being] seen on the internet or any social media."

In dismissing the complaint, Chief Judge Howard first explained that the judicial misconduct procedure does not provide an avenue for obtaining relief in a case, including the sealing of a case. See 28 U.S.C. § 351, *et seq.* and Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rules 11, 19, and 20.

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<sup>1</sup> Petitioner also cited to the Code of Conduct for United States Judges (Code of Conduct), Canon 3B(5), requiring that "[a] judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively." Chief Judge Howard determined that the reference to this provision required no further discussion, as petitioner neither alleged nor offered any information suggesting that the judge failed to comply with the provision. The Chief Judge further noted that, while petitioner also cited to the Model Code of Judicial Conduct (presumably the American Bar Association Model Code of Judicial Conduct), it is the Code of Conduct that applies to the federal judiciary.

Chief Judge Howard determined that the reviewed record, including the misconduct complaint (and attachments), the dockets of the proceedings, and the court's orders, did not support petitioner's conclusory allegations of bias or other wrongdoing by the subject judge. Chief Judge Howard observed that petitioner, represented by counsel, filed an employment discrimination case over a decade ago, which the subject judge dismissed, without prejudice, for failure to file return of service. Several months later, petitioner filed, pro se, a letter requesting that the case be reopened, explaining that he had been unable to reach his attorney since the case was dismissed and that he believed that service had been effected. Several weeks later, petitioner's attorney filed a motion to vacate the dismissal, explaining that counsel had timely returned the service documents to the court in hardcopy and had been unaware that the documents also needed to be filed electronically, and the judge granted the motion and reopened the case.

Chief Judge Howard further observed that several months later, the judge directed petitioner's attorney to file a status report. The attorney complied and, in the report, indicated that service had been completed and that defendants had yet to file an answer in the case. Defendants then filed a motion to dismiss arguing that petitioner failed to complete proper service and exhaust administrative remedies. Petitioner did not respond to the motion, and the judge dismissed the case.

The Chief Judge further observed that approximately two months later, petitioner, represented by the same attorney, filed a second case, which was also assigned to the

subject judge, alleging the same causes of action as in the first case but with additional facts. When no proof of service was timely filed, the judge ordered that the action would be dismissed without prejudice unless proof of service was filed or good cause was shown why service had not been made. Although petitioner's counsel then filed an acknowledgement of service, defendants moved to dismiss for failure to exhaust administrative remedies and for failure to effect timely service. After both parties briefed the service of process and exhaustion issues, the judge issued a multi-page order dismissing the case on both grounds. Petitioner filed a motion for reconsideration, which the judge denied.

Chief Judge Howard further observed that, nearly a year later, petitioner, pro se, filed motions to seal filings in his cases, which the judge denied. Almost three years after the judge denied the motions to seal, petitioner filed, pro se, a motion to reopen his second case, alleging inadequate representation by his attorney, including, but not limited to, counsel's failures to: include relevant facts in presenting petitioner's claims, allow petitioner to review his pleadings, properly effect service, and respond to petitioner's communications. The judge denied the motion.

The Chief Judge additionally observed that approximately five years later, petitioner filed, pro se, motions to seal his cases, attaching a then recent state court order

disbarring his former attorney for various misconduct.<sup>2</sup> The subject judge granted the motions but cautioned that the court had no control over information previously made available on the internet. In response to a subsequently filed motion to intervene, the judge limited the order to seal to pleadings containing substantive information regarding petitioner's claims against the defendants.

Chief Judge Howard determined that the misconduct complaint was without merit, concluding that the misconduct complaint and the reviewed record failed to indicate that the subject judge violated the Code of Conduct, let alone engaged in misconduct. See Code of Conduct, Rule 1 Commentary (While the Code of Conduct may "provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364), [n]ot every violation of the Code should lead to disciplinary action."); Rules of Judicial-Conduct, Commentary to Rule 4 ("While the Code [of Conduct's] Canons are instructive, ultimately the responsibility for determining what constitutes cognizable misconduct is determined by the [Judicial Conduct and Disability] Act and these Rules . . . .").

Chief Judge Howard explained that the Code of Conduct provides that a judge "should take *appropriate action* upon receipt of *reliable information* indicating the likelihood that . . . a lawyer violated applicable rules of professional conduct." See Code

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<sup>2</sup> The Chief Judge noted that, although petitioner suggested that his attorney's mishandling of his case was a basis, in part, for his attorney's disbarment, it was not clear from the order of disbarment that petitioner's case was among the referenced matters.

of Conduct, Canon 3B(6) (emphasis added). He further explained that "the question what constitutes 'appropriate action' in a particular case, like the question of what evidence reliably indicates unprofessional conduct, depends on the circumstances in the particular case and the exercise of judgment" and that "such a judgment would have to be quite unreasonable to constitute a violation of the Canons [and would have to be] willful or a part of a pattern of habitual conduct" to rise to the level of violating the misconduct statute. See Boudin, C.C.J., Order, In re: Complaint No. 400, March 3, 2005 at 3.

Chief Judge Howard determined that there was no indication that the judge exercised any such willful, habitual, or unreasonable judgment. The Chief Judge observed that, to the contrary, only once during the pendency of both cases did petitioner raise concerns about his attorney's conduct (when petitioner requested that his first case be reopened and stated that he had not been able to reach his attorney), to which the judge responded by reopening the case and ordering counsel to file a status report. The Chief Judge further observed that petitioner did not raise any additional concerns about his attorney's performance until more than three and a half years after the dismissal of petitioner's second case, when he asked for the case to be reopened on the basis of inadequate representation, a request that judge denied.<sup>3</sup> Thus, Chief Judge Howard

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<sup>3</sup> Chief Judge Howard noted that the allegations raised in the misconduct complaint concerned conduct that was approximately a decade old and that, while not determinative of the matter, such delayed allegations, that depend upon events occurring years ago, prejudice the ability to conduct any meaningful investigation. See Boudin, C.C.J., Order, In re: Complaint No. 400, March 3, 2005 at 2-3 (dismissing a judicial misconduct complaint alleging failure to report attorney misconduct, filed nearly eight years after the issue of attorney misconduct was first raised in the underlying case). See Rules for Judicial-Conduct and Judicial-Disability Proceedings, (Rules of Judicial-Conduct),

determined that the judge's handling of the proceeding with respect to petitioner's counsel -- in response to petitioner's belated concerns and based on the underlying record of the case -- did not demonstrate the type of willful, habitual, or unreasonable judgment that would indicate a violation of Canon 3, let alone suggest cognizable misconduct under the governing statute or rules.

Chief Judge Howard further determined that there was no evidence for the conclusory allegation that the judge was biased or improperly motivated in presiding over petitioner's cases. The Chief Judge concluded that the judge considered the substance of the claims presented by the parties and ruled accordingly, including issuing orders in petitioner's favor and providing multiple opportunities for petitioner to cure deficiencies. As the complaint and reviewed record did not support petitioner's claims of judicial wrongdoing, Chief Judge Howard dismissed the misconduct complaint pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(D).

As there was no evidence of improper judicial motivation, Chief Judge Howard dismissed petitioner's challenges to the court's orders -- including those dismissing petitioner's cases and denying petitioner's motions -- as not cognizable, and determined that the same held true for any claim that the judge improperly delayed in referring petitioner's counsel to a disciplinary authority. See Rules of Judicial-Conduct, Rule

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Rule 9 (Where "the passage of time has made an accurate and fair investigation of a complaint impracticable, the complaint must be dismissed . . .").

4(b)(1) ("Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling . . ."); id., Commentary to Rule 4 ("Any allegation that calls into question the correctness of an official decision or procedural ruling of a judge — without more — is merits-related."); and id., Rule 4(b)(2) ("Cognizable misconduct does not include an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive. . ."). Therefore, Chief Judge Howard 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).

In his petition for review, petitioner recounts the chronology of his proceedings and reiterates the allegation that the judge violated Canon 3 of the Code of Conduct for United States Judges by failing to refer petitioner's attorney to the disciplinary board.<sup>4</sup>

The petition for review is meritless and offers no information that would undermine Chief Judge Howard's determinations. There remains no evidence indicating that the subject judge was improperly motivated in presiding over petitioner's proceedings or that the judge exhibited the type of willful, habitual, or unreasonable judgment that would indicate a violation of Canon 3, let alone suggest cognizable misconduct under the governing statute or rules. See Code of Conduct, Canon 3B(6), and

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<sup>4</sup> Petitioner makes vague claims that another judge's orders unsealing petitioner's cases were entered in retaliation against petitioner for petitioner's filing of the misconduct complaint against the subject judge and that judges of the First Circuit Court of Appeals should have referred petitioner's attorney to the disciplinary board in connection with the appeal of petitioner's second case before the subject judge. Petitioner provides no more evidence in support of the conclusory claims against these judges than he provided in the complaint against the subject judge. Regardless, these claims are not addressed in the present context because these judges were not named in the misconduct complaint.




Boudin, C.C.J., Order, In re: Complaint No. 400, March 3, 2005 at 3, supra at p. 6.

Absent any such evidence, Chief Judge Howard properly concluded that petitioner's challenges to the substance and timing of the court's orders are not cognizable. See Rules of Judicial-Conduct, Rule 4(b)(1) ("Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling . . ."); id., Commentary to Rule 4 ("Any allegation that calls into question the correctness of an official decision or procedural ruling of a judge — without more — is merits-related."); and id., Rule 4(b)(2) ("Cognizable misconduct does not include an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive. . . .").

Therefore, Chief Judge Howard appropriately dismissed the complaint as unsupported and as not cognizable, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(iii) and 352(b)(1)(A)(ii), respectively. See also Rules of Judicial-Conduct, Rules 11(c)(1)(D), and 11(c)(1)(B).

For the reasons stated herein, the order of dismissal issued in Judicial Misconduct Complaint No. 01-18-90017 is affirmed. See Rules of Judicial-Conduct, Rule 19(b)(1).

July 7, 2020  
Date

  
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Susan Goldberg, Secretary