

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-19-90033

BEFORE
Howard, Chief Circuit Judge

ORDER

ENTERED: JULY 16, 2020

Complainant, a pro se litigant, has filed a complaint under 28 U.S.C. § 351(a) against a district judge in the First Circuit. Complainant alleges judicial misconduct in connection with complainant's petition for writ of habeas corpus over which the judge presided. The misconduct complaint is baseless, is not cognizable, and is not indicative of misconduct.

Complainant alleges that the district judge exhibited bias against complainant by lifting a stay in complainant's proceeding. Complainant contends that the judge was biased because the judge did not raise the issue of complainant's failure to exhaust state remedies - the basis for the lifting of the stay - sua sponte, but only following respondent's filings. Complainant adds that the judge improperly lifted the stay and "arbitrarily and capriciously" dismissed complainant's case before the expiration of the

deadline that the court had set for complainant to indicate whether he wished to proceed with the exhausted claims or to dismiss the petition.¹

The reviewed record, including the misconduct complaint, the docket of the underlying proceeding, and the court's orders, provides no evidence in support of complainant's allegations of bias or other judicial misconduct against the judge. The record indicates that complainant filed a petition for writ of habeas corpus, raising various claims challenging a state court conviction, including two ineffective assistance of counsel claims that the district court recognized as potentially meritorious, but as-yet unexhausted. The district judge originally assigned to the case - who is not a subject of this complaint - entered an order denying respondent's motion to dismiss, staying the case pending exhaustion of the ineffective assistance of counsel claims, and requiring complainant to provide evidence that he had exhausted these claims within six months. The day after the expiration of this deadline, complainant filed a letter stating that he was still in the process of pursuing the state claims and requesting permission to submit periodic status reports. The court did not respond to this request, but complainant proceeded to file numerous status reports over the next several years.

The record shows that the case was randomly reassigned to the subject judge, and two years later, the court held a status conference at which it ordered that the stay would remain in place and complainant should continue to file periodic status reports. Over the

¹ Complainant includes allegations against the institution where he is incarcerated. As the judicial misconduct process applies only to complaints against federal judges, these claims are not addressed. See 28 U.S.C. § 351, et seq., and Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 1(b).

next four and a half years, the district judge presided over numerous additional status conferences to review the progress of complainant's state litigation.

The judge then entered a multi-page order that complainant show cause why the stay should not be lifted. The judge observed that, while complainant had made efforts to establish his innocence and obtain a new trial, it was unclear what, if any, efforts complainant had undertaken, in over seven years, to exhaust the ineffective assistance of counsel claims for which the case had been stayed. Complainant filed a lengthy response to the show cause order describing his attempts to obtain the evidence that he contended his trial counsel had failed to obtain.

The district judge then lifted the stay, explaining that the intent of the procedure was to permit exhaustion of potentially meritorious claims, and not to provide an indefinite extension of time for exploring varieties of claims. The judge initially gave complainant approximately one month to indicate whether he would dismiss the petition or proceed solely on the exhausted claims, but subsequently granted complainant multiple extensions of this deadline.

The record reflects that, before the expiration of the last deadline, the clerk's office erroneously entered an electronic order dismissing complainant's proceeding, which the judge subsequently vacated, explaining that the dismissal order had been entered without the court's knowledge and in error. Complainant filed a pleading indicating that he intended to proceed solely on the exhausted claims, and subsequently moved for relief from the order lifting the stay. In addition to vacating the court's erroneous dismissal

order, the judge denied complainant's motion for relief from the order lifting the stay² and set a briefing schedule, allowing the parties a second opportunity to brief the claims which had originally been briefed nine years earlier. Respondent filed a motion for judgment on the pleadings and complainant filed numerous miscellaneous pleadings. The judge dismissed the petition in a lengthy order, finding some claims barred by the procedural-default rule and that a state court's rejection of the other claims was entitled to deference under federal law.³

Complainant's allegation that the judge exhibited bias against him is baseless. A review of the lengthy record offers no support for complainant's claim that the judge was improperly motivated in lifting the stay in complainant's proceeding or that doing so was somehow indicative of bias. To the contrary, the record reflects that the judge gave complainant over seven years to exhaust state claims, during which the judge presided over numerous status hearings, and ultimately issued a lengthy and carefully-reasoned show cause order acknowledging complainant's efforts but distinguishing them from those necessary to exhaust state claims or allow maintenance of the stay. The court also fully explained its basis for lifting the stay, repeatedly extended the deadline for complainant to decide how he wished to proceed, and carefully considered complainant's remaining arguments in its lengthy final ruling.

² The Court of Appeals dismissed complainant's interlocutory appeal of the denial of the motion for relief from the order lifting the stay for lack of diligent prosecution.

³ Complainant's appeal of the dismissal of the petition is pending.

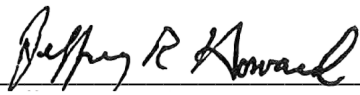
Nor does the clerical error prematurely dismissing the case, which the court duly corrected, suggest judicial bias or wrongdoing. See Lynch, C.C.J., Order, *In Re Judicial Misconduct Complaint No. 01-13-90015*, December 18, 2013, at pp. 3 - 4 (possible clerical error of court reporter or other court staff not attributable to presiding judge nor indicative of misconduct), citing Boudin, C.C.J., Amended Order, *In Re Judicial Misconduct Complaint No. 406*, September 5, 2005, at p. 3. Accordingly, the misconduct complaint is dismissed as baseless, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii), and as not indicative of misconduct, pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rules 11(c)(1)(D) and 11(c)(1)(A), respectively.

Because there is no evidence of bias or improper judicial motive, complainant's objections to the court's decisions -- lifting the stay and dismissing complainant's petition -- are not cognizable. These claims amount to nothing more than a challenge to the substance of orders with which complainant disagrees. 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 If the decision or ruling is alleged to be the result of an improper motive, . . . the complaint is not cognizable to the extent that it calls into question the merits of the decision."); see also *id.*, Commentary on Rule 4 ("Rule 4(b)(1) . . . preserves the independence of judges in the exercise of judicial authority by ensuring that the complaint procedure is not used to collaterally call into question the substance of a judge's decision or procedural ruling."). Accordingly, the

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

For the reasons stated, Complaint No. 01-19-90033 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii), and 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(A), 11(c)(1)(B), and 11(c)(1)(D).

July 16, 2020
Date



Chief Judge Howard