

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-20-90005

BEFORE
Thompson, Barron, and Gelpí, Circuit Judges
Mastroianni and Arias-Marxuach, District Judges

ORDER

ENTERED: JANUARY 14, 2022

Petitioner, an incarcerated defendant and pro se litigant, has filed a petition for review of Chief Judge Howard's order dismissing petitioner's 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 criminal case, over which the judge presided. Chief Judge Howard dismissed the complaint as not indicative of misconduct and as baseless.

In the original complaint, petitioner alleged that the judge engaged in improper ex parte communication in violation of the Code of Conduct for United States Judges (Code of Conduct). Specifically, petitioner alleged that, a number of years after petitioner's conviction and sentencing, the judge engaged in improper and "prejudicial" ex parte communication with staff of the U.S. Probation Office, by clarifying a condition of petitioner's supervised release. Petitioner also alleged that the judge engaged in "biased, dishonest, and prejudicial behavior" because the supervised release condition in the

written judgment differed from that included in the judge's oral order at the sentencing hearing. Petitioner concluded that the judge should be removed from any cases involving petitioner or the victim in the petitioner's criminal case.¹

Chief Judge Howard determined that, as an initial matter, the judicial misconduct complaint process did not provide an avenue for removing a judge from pending or future cases, as petitioner requested. See Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rules 11, 19, and 20.

Chief Judge Howard further determined that the reviewed record, including the misconduct complaint, the dockets of the relevant proceedings, and the courts' orders, provided no evidence of improper ex parte communication, bias, dishonesty, or any other judicial wrongdoing. The Chief Judge observed that petitioner was convicted after a jury trial, and the judge sentenced petitioner to a term of imprisonment and imposed a term of supervised release. At the sentencing hearing, the judge orally imposed a number of special conditions of release. The judge subsequently issued a written judgment in which the relevant condition of supervised release was phrased differently than in the oral order.

Chief Judge Howard also observed that, subsequently, petitioner brought a pro se civil rights suit against various prison officials in state court, arguing that defendants' interpretation and enforcement of the relevant special condition of release had violated petitioner's constitutional rights. Defendants removed the case to a federal court not in the

¹ Petitioner also made various allegations against the prosecutors in the underlying criminal case. As the judicial misconduct complaint procedure applies only to current federal judges, these allegations were 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).

First Circuit and moved to dismiss. In support of the motion to dismiss, the warden of the institution in which the petitioner was incarcerated filed an affidavit stating that, in enforcing the special condition, the warden had been advised that U.S. Probation Office staff had clarified the intended scope of the condition of release with the sentencing court.

Chief Judge Howard further observed that petitioner moved pro se to amend the judgment issued in the criminal case to conform the relevant special condition to that imposed orally at petitioner's sentencing, and the government assented to the motion. The judge granted the motion and, subsequently, amended the judgment accordingly.

Chief Judge Howard determined that the misconduct complaint and the reviewed record offered no indication that the judge violated the Code of Conduct, let alone engaged in misconduct.² The judge's communication with staff of the U.S. Probation Office, as proffered in the complaint and averred in the warden's affidavit, did not constitute improper ex parte communication under either the Code of Conduct or the Rules of Judicial-Conduct, as neither prohibits a judge from communicating with court staff.³ See Code of Conduct, Canon 3(A)(4) and Commentary ("[While], a judge should

² Chief Judge Howard explained that a violation of the Code of Conduct for United States Judges (Code of Conduct) may inform consideration of a judicial misconduct complaint but does not necessarily constitute judicial misconduct under the statute. See Code of Conduct, Canon 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 [of Conduct] should lead to disciplinary action."); and 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 Act [28 U.S.C. § 351, et seq.] and these Rules . . .").

³ See 18 U.S.C. § 3602 (providing that probation officers are appointed by and serve the district court in which they are appointed); 18 U.S.C. § 3603 (establishing the duties of probation officers as including, among other things, supervising and instructing probationers on conditions of release imposed by the sentencing court, reporting probationers' conduct to the sentencing court, and "perform[ing] any other duty that the court may designate"); and

not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers . . . [, a] judge may consult with other judges *or with court personnel* whose function is to aid the judge in carrying out adjudicative responsibilities." (emphasis added)); and Rules of Judicial-Conduct, Rule 4(a)(1)(C) ("Cognizable misconduct includes . . . engaging in improper ex parte communications *with parties or counsel for one side in a case.*" (emphasis added)). Accordingly, Chief Judge Howard determined that the communication as described between the judge and probation office staff was not "improper ex parte communication," as it took place between the judge and "court personnel," as opposed to with "[a] part[y] or counsel for one side in a case." See Code of Conduct, Canon 3(A)(4) and Commentary; and Rules of Judicial-Conduct, Rule 4(a)(1)(C).

Chief Judge Howard further determined that the record failed to support petitioner's allegation that either the discrepancy between the supervised release condition in the written judgment and that included in the judge's oral order or the court's subsequent order amending the written judgment was remotely indicative of bias or dishonesty. To the contrary, the record was devoid of any indication of improper judicial motivation, and the judge promptly resolved the inconsistency between the initial oral and written orders in accordance with petitioner's request. Accordingly, Chief Judge Howard dismissed the misconduct complaint as not indicative of misconduct and as

43 Stat. 1259, ch. 521 (Probation Act of 1925) (establishing probation as a sentence in the federal courts and empowering courts to appoint probation officers).

baseless, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i) and 352(b)(1)(A)(iii), respectively. See also Rules of Judicial-Conduct, Rules 11(c)(1)(A) and 11(c)(1)(D).

In the petition for review, petitioner alleges that Chief Judge Howard "misapprehend[ed], misconstrue[d], and misstate[d]" the "facts" in the misconduct complaint in the order of dismissal. Petitioner states that the "gravamen" of the initial complaint was that, when the judge informed the Probation Office of the court's intent with respect to the relevant condition of supervised release, the judge "lied to cause Federal Bureau of Prisons [] officials to interfere with and to prevent" petitioner from engaging in permitted conduct.

The petition for review is meritless. Petitioner offers and the record provides no information to support the allegations that Chief Judge Howard misunderstood or misrepresented the claims in petitioner's misconduct complaint. To the contrary, the order of dismissal demonstrates that Chief Judge Howard thoroughly reviewed both the misconduct complaint and the underlying records of petitioner's proceedings. See Rules of Judicial-Conduct, Commentary to Rule 4 ("Any allegation that calls into question the correctness of an official action of a judge -- without more -- is merits-related . . . [A] complaint challenging the correctness of a chief judge's determination to dismiss a prior misconduct complaint would be properly dismiss as merits-related. . . .").


There is likewise no information that would undermine the Chief Judge's dismissal of the misconduct complaint. As Chief Judge Howard determined, the judge's communication with court staff did not constitute improper ex parte communication

under either the Code of Conduct or the Rules of Judicial-Conduct. See supra pp. 3-4. Nor do the discrepancy between the original oral and written supervised release condition and the judge's subsequent revision to the latter, evidence judicial impropriety. See supra pp. 4-5. Finally, petitioner offers and the record provides no indication that the judge "lied" or engaged in any other wrongdoing with regard to amending petitioner's condition of release or otherwise.

Therefore, Chief Judge Howard properly dismissed the misconduct complaint as not indicative of misconduct and as baseless, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i) and 352(b)(1)(A)(iii), respectively. See also Rules of Judicial-Conduct, Rules 11(c)(1)(A) and 11(c)(1)(D).

For the reasons stated, the order of dismissal issued in Judicial Misconduct Complaint No. 01-21-90005 is affirmed. See Rules of Judicial-Conduct, Rule 19(b)(1).

January 14, 2022
Date



Susan Goldberg, Secretary