

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-16-90068

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

MEMORANDUM OPINION

(Filed: February 2, 2017)

PRESENT: SMITH, *Chief Judge*.

This is a complaint filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge (the “Subject Judge”). For the reasons discussed below, the complaint will be dismissed.

The Judicial Conduct and Disability Act provides a remedy if a federal judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a). A chief judge may dismiss a complaint if, after review, he or she finds it is not cognizable under the statute, is directly related to the merits of a decision or procedural ruling, or is frivolous or lacks sufficient evidence to raise an inference of misconduct. 28 U.S.C. §§ 352(b)(1)(A)(i)-(iii).

In November 2015, Complainant, a state prisoner, filed a petition for a writ of habeas corpus. The following month, the Subject Judge directed Complainant to file the petition on the appropriate court form. Complainant complied the next month. About

four months later, in June 2016, the Subject Judge ordered that the petition be served upon the state.

Meanwhile, in May 2016, Complainant filed a petition for a writ of mandamus in the Court of Appeals, claiming undue delay in the resolution of his habeas petition. In June 2016, Complainant voluntarily withdrew the mandamus petition.

After being served with the habeas petition, the state filed a response, observing that Complainant's direct appeal remained pending before the state supreme court. Complainant moved for the Subject Judge's recusal on grounds of undue delay. The Subject Judge then ordered that the petition be stayed pending resolution of Complainant's direct appeal. He also denied the recusal motion, noting that any delay was attributable to Complainant's failure to file the habeas petition on the appropriate court form, and that the petition itself was premature in any event because the state appeal remained pending. Complainant filed objections to the stay order, which the Subject Judge denied.

Complainant appealed. The appeal is pending; the Court of Appeals directed Complainant to file a response concerning whether a final, appealable order has been entered in his habeas proceeding.

In this complaint of judicial misconduct, Complainant contends that the Subject Judge is biased against him. Complainant alleges that the Subject Judge "stall[ed] the initial proceedings for months." In addition, Complainant observes that, when he served a copy of his petition for a writ of mandamus upon the Subject Judge, the mandamus petition "never appears to have been made as a docket entry." Because the Subject Judge

proceeded with ordering service of Complainant’s habeas petition shortly after the mandamus petition was served upon him, Complainant alleges that “[b]y not docketing my mandamus the docket sheet gives the appearance of him merely taking his time to make the order to begin the [habeas] proceedings, hiding the fact that he had to be prompted by my filing.”

Complainant’s contention that the service copy of his mandamus petition should have appeared on the district court docket sheet in his habeas proceeding is incorrect. A mandamus petition in the Court of Appeals is a separate proceeding from the underlying district court matter. There is no procedural requirement that service copies from the mandamus proceeding must be added to the related underlying district court docket. Accordingly, Complainant’s allegations to the contrary are subject to dismissal as frivolous and unsupported by evidence that would raise an inference that misconduct has occurred.¹ 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), (D), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

With regard to Complainant’s allegations of undue delay, delay is not generally cognizable as judicial misconduct because it effectively poses a challenge to merits of official actions by the judge – *i.e.*, the decision to assign a lower priority to a particular case. *See* 28 U.S.C. § 352(b)(1)(A)(ii); Rule 11(c)(1)(B), *Rules for Judicial-Conduct and*

¹ Moreover, a district judge generally does not play a direct role in the docketing process, and there is no indication that the Subject Judge did so here. Docket entries are created by clerk’s office staff members, who are not covered by the Judicial Conduct and Disability Act. *See* 28 U.S.C. §§ 351, 352(b)(1)(A)(i); Rule 4, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Judicial-Disability Proceedings; Rule 3 Commentary, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. A claim of delay in a single case may qualify as cognizable judicial misconduct only if “the allegation concerns an improper motive in delaying a particular decision” Rule 3(h)(3)(B), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

As a factual matter, the record reveals no undue delay in Complainant’s habeas proceeding. A period of four months from filing the petition on the proper forms and the Subject Judge’s order directing service upon the respondent is neither unusual nor excessive. Furthermore, there is nothing in the record to substantiate a claim that any perceived delay is the result of improper motive on the part of the Subject Judge. Accordingly, these allegations are subject to dismissal as unsupported by evidence that would raise an inference that misconduct has occurred. *See* 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Based on the foregoing, the complaint will be dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), (ii), and (iii).

s/ D. Brooks Smith

Chief Judge

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ORDER

(Filed: February 2, 2017)

PRESENT: SMITH, *Chief Judge*.

On the basis of the foregoing opinion entered on this date, it is ORDERED AND ADJUDGED that the written complaint brought pursuant to 28 U.S.C. § 351 is hereby dismissed under 28 U.S.C. § 352(b)(1)(A)(i), (ii), and (iii).

This order constitutes a final order under 28 U.S.C. § 352(c). Complainant is notified in accordance with Rules 11(g)(3) and 18, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*, of the right to appeal this decision by the following procedure:

Rule 18(a) Petition. A complainant or subject judge may petition the Judicial Council of the Third Circuit for review.

Rule 18(b) Time. A petition for review must be filed in the Office of the Circuit Executive within **42 days** after the date of the chief judge's order.

18(b) Form. The petition should be in letter form, addressed to the Circuit Executive, and in an envelope marked "Misconduct Petition" or "Disability

Petition.” The name of the subject judge must not be shown on the envelope. The letter should be typewritten or otherwise legible. It should begin with “I hereby petition the judicial council for review of . . .” and state the reasons why the petition should be granted. It must be signed. There is no need to enclose a copy of the original complaint.

The full text of the *Rules for Judicial-Conduct and Judicial-Disability*

Proceedings is available from the Office of the Circuit Executive and on the Court of

Appeals’ internet site, www.ca3.uscourts.gov.

s/ D. Brooks Smith

Chief Judge

Dated: February 2, 2017