

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

---

J.C. No. 03-20-90033

---

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT  
OR DISABILITY

---

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

---

MEMORANDUM OPINION

---

(Filed: June 23, 2021)

PRESENT: SMITH, *Chief Judge*.

This complaint is 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).

Complainant is the parent of a criminal defendant who is pursuing a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 before the Subject Judge. In this complaint of judicial misconduct, Complainant alleges that the Subject Judge

engaged in improper ex parte communications with the Government in the course of the § 2255 proceeding, “which resulted in a clear advantage to the United States.”

Based upon the same alleged ex parte communications, the son moved in the § 2255 proceeding for the Subject Judge’s recusal and also filed a petition for a writ of mandamus in the Court of Appeals seeking to compel the Subject Judge’s recusal. The Court of Appeals recently denied the mandamus petition. Among other things, the Court concluded that “there is no indication that substantive advice was either solicited or offered” during any ex parte communications and there is “no evidence of bias in the record.” The underlying § 2255 motion and recusal motion remain pending before the Subject Judge.

Complainant’s allegations presume that the alleged ex parte communication between the Subject Judge and the Government constituted “improper discussions with parties or counsel for one side in a case” as described in Rule 3(h)(1)(C), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. Under appropriate circumstances, however, a judge is authorized to initiate, permit, or consider ex parte communication “for scheduling, administrative, or emergency purposes,” so long as the communication “does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result. . . .” Canon 3(A)(4)(b), Code of Conduct for United States Judges.<sup>1</sup>

---

<sup>1</sup> The Code of Conduct for United States Judges is designed to provide guidance to judges, but is not a set of disciplinary rules. “Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the

Here, the Court of Appeals expressly determined that there is no evidence that any ex parte communication involved the exchange of substantive advice or demonstrates bias on the part of the Subject Judge. Rather, it appears that the communications in question involved a procedural oversight on the part of the Government. Accordingly, these allegations are subject to dismissal as unsupported by evidence that would raise an inference that misconduct has occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Moreover, to the extent the allegations of the complaint present a challenge to the Court of Appeals' denial of the son's mandamus petition, the allegations are merits-related. Merits-related allegations do not constitute cognizable misconduct. Rule 4(b)(1), *Rules for Judicial-Conduct and Judicial-Disability Proceedings* ("Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse."). Such allegations are therefore subject to dismissal. *See* 28 U.S.C. § 352(b)(1)(A)(ii); Rules 4(b)(1), 11(c)(1)(B), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

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

---

circuit subject to such review and limitations as are ordained by the statute and by these Rules." Commentary on Rule 3, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

s/ D. Brooks Smith  
\_\_\_\_\_  
Chief Judge

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

---

J.C. No. 03-20-90033

---

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT  
OR DISABILITY

---

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

---

ORDER

---

(Filed: June 23, 2021)

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)(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](http://www.ca3.uscourts.gov).

s/ D. Brooks Smith

Chief Judge

Dated: June 23, 2021