

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

C.C.D. No. 18-02

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT

PROCEEDING IN REVIEW OF THE ORDER AND MEMORANDUM
OF THE JUDICIAL COUNCIL OF THE FOURTH CIRCUIT
J.C. Nos. 04-15-90186, 04-15-90195 – 202, 04-15-90209 – 213

(Filed May 31, 2019)

Present: Judges Anthony J. Scirica, Chair, Sarah Evans Barker, Joel F. Dubina, Joel M. Flaum, Thomas F. Hogan, Jon O. Newman, and James E. Gritzner.

MEMORANDUM OF DECISION

This matter is before the Judicial Conduct and Disability Committee on a petition for review filed by a Complainant. Complainant seeks review of a December 18, 2017, order of the Judicial Council of the Fourth Circuit, attached herewith, unanimously adopting the Special Committee’s unanimous report and dismissing her complaint, as supplemented, against all the judges of a district court under the Judicial Conduct and Disability Act of 1980 (“Act”), 28 U.S.C. §§ 351–64, and the Rules for Judicial-Conduct and Judicial-Disability Proceedings. Complainant — an applicant who was not selected for three magistrate judge positions — alleges that the subject judges engaged in judicial misconduct by selecting magistrate judges based on favoritism and discrimination against the Complainant as an African-American female magistrate judge applicant.

The Judicial Conduct and Disability Committee reviews this petition for review under 28 U.S.C. § 357 and Rules 21(a) and 21(b)(1)(A). For the reasons we explain, we deny this petition for review and affirm the Circuit Judicial Council’s order.

I.

Magistrate judges are selected through a multi-step process. First, a district court appoints a merit selection panel by a majority vote of district judges. 3 *Guide to Judiciary Policy* § 420.30.10. The panel must have no fewer than seven members, none of whom may be district judges or court employees. *Id.* at §§ 420.30.20(a), (c). Each panel member must be a resident of or have significant ties to the district where the appointment will be made, and at least two panel members must be non-lawyers. *Id.* at § 420.30.20(c). The court is also “encouraged to appoint a diverse merit selection panel.” *Id.* at § 420.30.20(e).

Next, the merit selection panel must “examine all applications” for magistrate judge positions and “make an affirmative effort to identify and give due consideration to all qualified applicants without regard to race, color, age (40 and over), gender, religion, national origin, or disability.” *Id.* at § 420.30.30(d). The panel “may, in its discretion, personally interview applicants,” and then must “designate those individuals whom the panel considers best qualified.” *Id.* at §§ 420.30.30(d), (e). The district judges must generally select the new magistrate judge from among the candidates the merit selection panel deems best qualified. *Id.* at § 420.40.10.

Complainant applied for magistrate judge vacancies announced in 2010, 2014, and 2015. For each vacancy that Complainant applied for, members of the merit selection panel reviewed Complainant’s application. In accordance with the *Guide to Judiciary Policy*, at least two members of each nine-member panel were African American and each panel included at least three women,

including at least one African American woman. Two African American women served on the 2010 and 2015 panels, and the 2014 and 2015 panels included an Asian American member. The merit selection panel in each instance did not select Complainant to be interviewed by the panel and did not forward her name to the district court for consideration.

Complainant filed a complaint, as supplemented, against all the district court judges alleging that the judges engaged in judicial misconduct in the appointment of magistrate judges for the district. Specifically, Complainant alleges that the court hired magistrate judges “based on favoritism” and “routinely disregard[ed] well qualified African American female applicants,” including Complainant. She further alleges that the subject judges employed the merit selection panel process used for the hiring of magistrate judges as a sham to conceal the judges’ improper hiring practices.¹

The Circuit Chief Judge referred Complainant’s allegations of improper and discriminatory hiring practices to a Special Committee to conduct an investigation and report findings and recommendations to the Circuit Judicial Council. *See* 28 U.S.C. § 353(c); R. 11(f). Professor Jeffrey Bellin (William & Mary School of Law) was appointed as Special Counsel to assist the Special Committee in its investigation. *See* R. 13(c). The investigation examined the court’s compliance with applicable statutory and regulatory requirements regarding the selection and

¹ Complainant also alleged that the subject judges retaliated against her by not selecting her for a magistrate judge vacancy after she complained about her non-selection for two previous vacancies and that the judges deprived her of a remedy by excluding magistrate judge applicants from coverage under the district’s Employment Dispute Resolution Plan. The Circuit Chief Judge dismissed Complainant’s allegations of retaliation because she was excluded as a candidate from the third position before she sought to challenge her non-selection for the first two positions. The Circuit Chief Judge also dismissed her allegations of misconduct with respect to the district’s Employment Dispute Resolution Plan because coverage under the district’s plan was modeled after the Judicial Conference’s Model Employment Dispute Resolution Plan, which also excludes magistrate judge applicants.

appointment of magistrate judges and looked for any evidence of preselection or discrimination in the 2010, 2014, and 2015 hiring processes. *See* 28 U.S.C. § 631(b)(5); 3 *Guide to Judiciary Policy* §§ 420.10–420.40. As part of the investigation, Professor Bellin interviewed 28 witnesses, including the Complainant, Complainant’s suggested witnesses, the chief district judge, the district clerk, the district human resources administrator, the attorney members of the merit selection panels, and all the judges named in the complaint (with the exception of two retired judges and a senior judge who did not participate in any of the selections). He also reviewed the documentary records, including written documentation regarding the magistrate judge hiring process.

The Special Committee afforded Complainant and the subject judges an opportunity to present any additional written argument they wished the Committee to consider. *See* R. 15(d), 16(c). The judges rested on their earlier response to the complaint, while Complainant filed a supplemental statement.

Upon review of these interviews and related documentary evidence, as well as Complainant’s supplemental statement, the Special Committee found that the subject judges complied with the law governing magistrate judge selection, did not preselect candidates, and did not engage in discrimination. Special Comm. Rep. 11–19. According to the Special Committee, “[t]he judges adhered to the design of this system in all its aspects” and “[a]ll participants in the process demonstrated a commitment to performing their responsibilities in accordance with the letter and spirit of the law and acted in a manner that promoted public confidence in the integrity and impartiality of the judiciary.” *Id.* at 17. Furthermore, the Special Committee found “no evidence” to support Complainant’s claim of preselection and “no evidence of discrimination.” *Id.* at 18–19. The Special Committee unanimously recommended dismissal of the complaint, finding

no evidence to support Complainant's assertion that the merit selection process was a sham used to conceal judicial preselection of candidates based on favoritism or discrimination.

On review of the Special Committee's findings and recommendations, the Circuit Judicial Council agreed, concluding "the subject judges did not engage in preselection, discrimination, or any other misconduct in the selection of magistrate judges" and dismissed the complaint for failure to establish facts upon which the claims of misconduct were based. Jud. Council Order 3; *see* 28 U.S.C. § 354(a)(1)(B); R. 20(b)(1)(A)(iii).

II.

We review circuit judicial council orders for errors of law, clear errors of fact, or abuse of discretion. R. 21(a); *see also In re Complaint of Judicial Misconduct*, 747 F.3d 869, 872 (U.S. Jud. Conf. 2014) (finding that circuit judicial council did not abuse its discretion); *In re Complaint of Judicial Misconduct*, 664 F.3d 332, 334–35 (U.S. Jud. Conf. 2011) (deferring to findings of circuit judicial council and overturning them only if clearly erroneous). Our review necessarily depends on the record before us and gives deference to the circuit judicial council's consideration of the special committee's review of the evidence. *See In re Mem. of Decision of Jud. Conference Comm. on Jud. Conduct & Disability*, 517 F.3d 563, 569 (U.S. Jud. Conf. 2008) ("[W]e will defer to the findings of the Judicial Council and the special committee, and will overturn those findings only if, upon examination of the record, they are clearly erroneous.").

Complainant reasserts her claim of racial discrimination in magistrate judge hiring, but her primary argument is that she was denied due process "[b]ecause there was no notice or meaningful opportunity to be heard." Pet. for Review 8. Specifically, Complainant argues that she was denied the opportunity to "be heard in a hearing on the merits," *id.* at 4, including the ability to "present credible evidence, including her expert witnesses," *id.* at 3, "present and cross examine any

witnesses,” *id.* at 4, and “respond to any results of the investigation or rebut any evidence obtained from the investigation,” *id.* We find Complainant received all the process she was due under the Judicial Conduct and Disability Act and Rules, including multiple opportunities to present evidence for consideration by the Special Committee and Circuit Judicial Council.

In recognition that special committee proceedings are primarily inquisitorial rather than adversarial, *see* R. 14 cmt.; *In re Mem. of Decision of Jud. Conference Comm. on Jud. Conduct & Disability*, 517 F.3d at 567 (“Fundamentally, . . . misconduct proceedings are inquisitorial and administrative.”), the Judicial Conduct and Disability Act and Rules provide special committees with substantial discretion to determine the nature and scope of their investigations. A special committee is tasked with conducting an investigation “as extensive as it considers necessary” and presenting a report including its findings and recommendations for consideration by the circuit judicial council. 28 U.S.C. § 353(c); *see also* R. 13(a) (“A special committee should determine the appropriate extent and methods of its investigation in light of the allegations in the complaint and the committee’s preliminary inquiry.”). As part of its investigation, a special committee may — but is not required to — hold hearings to take testimony, receive evidence, or hear arguments. R. 14(a). A complainant does not have “the rights of a party to litigation” and “the complainant’s role [is left] largely to the discretion of the special committee.” R. 16 cmt.

We find no error of law or abuse of discretion in the Special Committee’s investigatory process. The Special Committee conducted a thorough investigation. The Special Committee interviewed 28 witnesses, including the Complainant, Complainant’s suggested witnesses, the chief district judge, the district clerk, the district human resources administrator, all attorney members of the merit selection panels, and all the judges named in the complaint (with the exception of two retired judges and a senior judge who did not participate in any of the selections).

The Special Committee also reviewed documentary evidence, including the applicable statutory and regulatory requirements for magistrate judge selection.

The Special Committee afforded Complainant all the rights to which she was entitled under the Judicial Conduct and Disability Act and the Rules, as well as additional opportunities to present evidence in support of her complaint. Complainant submitted a complaint, which she supplemented. As noted, Special Counsel interviewed Complainant and two witnesses suggested by Complainant. In addition, the Special Committee provided Complainant an opportunity to present any additional written argument she wished the Committee to consider, and Complainant filed a supplemental statement. *See* R. 16(c). Despite multiple opportunities to present information to the Special Committee, the Special Committee concluded — and the Judicial Council affirmed — that Complainant provided no evidence of preselection or discrimination in the merit selection process.

In addition to challenging the process she was afforded, Complainant also argues that she “has . . . proven her case” and should have been granted the magistrate judge position, including back pay and employment benefits. *Pet. for Review* at 4. The Committee must disagree.

The merit selection panels reviewed dozens of applications, and the finalists they recommended all “possessed impressive qualifications in terms of academic background and relevant experience.” *Special Comm. Rep.* 10. The Special Counsel’s interviews revealed “[n]one of the merit selection panelists believed race or gender discrimination played any role in the process.” *Id.* at 15. “An African-American female panelist who served on all three panels saw it as part of her duty to make sure that women and people of color were not being overlooked based on implicit bias or on the ground that they were not part of the club. Other panelists confirmed that race and gender played no role in their deliberations.” *Id.* at 18. Further, “[n]one of the judges

observed any signs” of discrimination, either in the merit selection panels or the district judge selection process, and “many judges indicated they were conscious of the need for a diverse bench.” *Id.* at 15–16. The judges, including female judges and judges who are themselves members of racial minority groups, uniformly described the process as fair, effective, and nondiscriminatory. *Id.* at 16. The Special Committee then adopted the Special Counsel’s thorough findings, concluding “[t]he investigation failed to disclose any evidence of discrimination in the selection process.” *Id.* at 18.

In light of our review for errors of law, clear errors of fact, or abuse of discretion, *see* R. 21(a), and deference to the circuit judicial council’s consideration of the special committee’s review of the evidence, *see In re Memorandum of Decision*, 517 F.3d at 569, we affirm the Circuit Judicial Council’s unanimous decision to dismiss the complaint based on the unanimous findings of the Special Committee that the subject judges did not deviate from procedural requirements and did not engage in preselection or discrimination in the selection of magistrate judge applicants.

III.

For these reasons, we deny Complainant’s petition for review and affirm the Circuit Judicial Council’s order.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JUDICIAL COUNCIL

In the Matter of	*	Nos. 04-15-90186
		04-15-90195
		04-15-90196
Judicial Complaints	*	04-15-90197
		04-15-90198
		04-15-90199
Under 28 U.S.C. § 351	*	04-15-90200
		04-15-90201
		04-15-90202
		04-15-90209
		04-15-90210
		04-15-90211
		04-15-90212
		04-15-90213

ORDER

Complainant filed these judicial complaints against all the district judges in a district, alleging they engaged in judicial misconduct by selecting magistrate judges based on favoritism and by discriminating against the complainant as an African-American female candidate. Complainant alleged that the subject judges employed the merit selection panel process as a sham to conceal their improper hiring practices. She further alleged that the judges retaliated against her by not selecting her for a third magistrate judge vacancy after

she complained about her non-selection for two previous vacancies and that the judges deprived her of a remedy by excluding magistrate judge applicants from coverage under the district's Employment Dispute Resolution Plan.

Complainant's allegations of retaliation were dismissed at the initial review stage under 28 U.S.C. § 352(b)(1)(A) because complainant was excluded as a candidate for the third position before she sought to challenge her non-selection for the first two positions. Her allegations of misconduct with respect to the district's Employment Dispute Resolution Plan were also dismissed at the initial review stage because coverage under the district plan was modeled after coverage under the Model Employment Dispute Resolution Plan promulgated by the Judicial Conference of the United States, which also excluded magistrate judge candidates.

Complainant's allegations of improper and discriminatory hiring practices were referred to a Special Committee, composed of Chief Judge Gregory, Circuit Judge Diaz, and District Judge Brinkema, to conduct an investigation and report findings and recommendations to the Judicial Council. *See* 28 U.S.C. § 353(c). Professor Jeffrey Bellin, of William & Mary School of Law, was appointed as Special Counsel to assist the Committee in its investigation.

Professor Bellin interviewed the complainant, complainant's suggested witnesses, the district judges, the attorney members of the merit selection panels, the district clerk, and the district human resources administrator. Based on these interviews and related documentary evidence, the Special Committee found that the judges complied with the law governing

magistrate judge selection, did not preselect candidates, and did not engage in discrimination. The Committee found no evidence to support complainant's claims that the merit selection process was a sham used to conceal judicial preselection of candidates based on favoritism or discrimination and unanimously recommended dismissal of the complaints.

The subject judges were provided with a copy of the Special Committee Report and advised of their right to respond. *See* Rule 20(a), Rules for Judicial-Conduct and Judicial-Disability Proceedings. The chief district judge, responding on behalf of the subject judges, stated that there was no objection to the Report.

The complainant was notified that the Special Committee Report had been filed and, upon her request, was provided with a copy of the Report. *See* Rule 16(a), Rules for Judicial-Conduct and Judicial-Disability Proceedings (complainant must be notified of the filing of the Report; Judicial Council may, in its discretion, provide a copy of the Report to complainant).

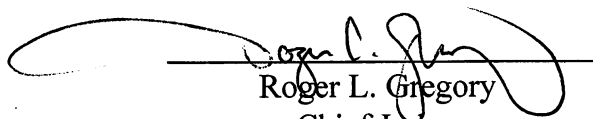
Upon due consideration, the Judicial Council now finds and concludes, for the reasons stated by the Special Committee, that the subject judges did not engage in preselection, discrimination, or any other misconduct in the selection of magistrate judges. The Report of the Special Committee is adopted in full and attached as an Appendix to this Order. The complaints are dismissed for failure to establish the facts upon which the claims of misconduct were based. *See* 28 U.S.C. § 354(a)(1)(B); Rule 20(b)(1)(A)(iii), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

The Clerk shall send copies of this Order and Appendix to the subject judges, the complainant, and the Committee on Judicial Conduct and Disability. A petition for review may be filed with the Committee on Judicial Conduct and Disability within 42 days of the date of this Order. *See* Rules 21 & 22, Rules for Judicial-Conduct and Judicial-Disability Proceedings.

This Order and Appendix shall be made available to the public after final action has been taken and the complaints are no longer subject to review. *See* Rule 24, Rules for Judicial-Conduct and Judicial-Disability Proceedings.

IT IS SO ORDERED.

FOR THE COUNCIL:


Roger L. Gregory
Chief Judge