

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

C.C.D. No. 22-01

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT

PROCEEDING IN REVIEW OF THE ORDER AND MEMORANDUM
OF THE JUDICIAL COUNCIL OF SECOND CIRCUIT
J.C. Nos. 02-21-90142; 02-21-90143

MEMORANDUM OF DECISION

(Filed July 8, 2022)

Present: Judges William B. Traxler, Jr., Chair, Phyllis J. Hamilton, Thomas F. Hogan, M. Margaret McKeown, Jon O. Newman, Carl E. Stewart, and Sarah S. Vance

MEMORANDUM OF DECISION

The Judicial Conduct and Disability Committee considers this matter under the Judicial Conduct and Disability Act of 1980 (“Act”), 28 U.S.C. § 357, and Rule 21(b)(2) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings (“Rules”), which permit this Committee to review a judicial council order affirming a chief judge’s dismissal of a complaint and then determine whether a special committee should be appointed. For the reasons provided below, we return this matter to the Second Circuit Judicial Council with directions to refer it to the Chief Circuit Judge for the appointment of a special committee under Section 353 of the Act.

I. Procedural History

On November 19, 2021, the Acting Chief Circuit Judge of another circuit identified a complaint under Rule 5(a) against each of the Subject Judges based on information in a November 10, 2021 letter from seven members of Congress, and after considering responses

from the Subject Judges.¹ The letter alleged that the Subject Judges committed misconduct by hiring a law clerk (“the candidate”) who, according to press reports, had engaged in extreme racist and hateful conduct, including sending racist text messages and making other racist remarks, prior to attending law school and while she was employed by a nonprofit organization.

The Subject Judges’ responses to the Acting Chief Circuit Judge explain that they reviewed the media reports describing the accusations against the candidate, they examined the candidate’s credentials, references, and academic record, and they determined that the allegations were false. After interviewing the candidate, each Subject Judge felt that his original conclusion about the allegations being false was correct and each offered her a clerkship position. One of the Subject Judges explained that, after deciding to hire the candidate, he spoke to an attorney who had advised the candidate and the Judge had learned that the candidate had signed a non-disclosure agreement, which explained why she had not publicly denied the allegations. He also received a letter from the candidate’s former employer at the nonprofit organization who spoke highly of the candidate and stated that the candidate had been the victim of a smear campaign.

In an email notifying the Subject Judges that a request for transfer had been made, the Acting Chief Circuit Judge stated his belief that there were reasonably disputed issues of fact that precluded an immediate dismissal of the complaints and required the appointment of a special committee to resolve them. On December 9, 2021, the Chief Justice of the United States transferred the proceeding to the Second Circuit, pursuant to the Acting Chief Circuit Judge’s

¹ The allegations in the letter from Congress implicate Canons 1 (A Judge Should Uphold the Integrity and Independence of the Judiciary) and 2 (A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities). In relevant part, Canon 1 provides that “A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved.” Canon 2A provides that a judge “should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

request for transfer. On December 22, 2021, the Second Circuit Chief Judge chose not to appoint a special committee and entered an order dismissing the matter pursuant to Rule 11(c)(1)(D) because “the record lacks any evidence supporting the allegation that the Judges engaged in misconduct.” The Chief Circuit Judge found that the Subject Judges “performed all of the due diligence that a responsible Judge would undertake.” On January 13, the Circuit Judicial Council affirmed the Chief Circuit Judge’s dismissal of the matter. The Circuit Judicial Council reviewed the Chief Circuit Judge’s order and decided that the Subject Judges had exercised appropriate due diligence in assessing the merits of hiring the candidate, whether the information the Subject Judges elicited and received was accurate or not.²

On March 8, 2022, the participating members of Congress sent a follow-up letter to the Second Circuit Judicial Council and the Judicial Conduct and Disability Committee, requesting that the Circuit Judicial Council vacate its dismissal order and appoint a special committee to investigate the issues. On June 3, the Chief Circuit Judge informed the Chair of this Committee that the Circuit Judicial Council had reviewed the letter from Congress and had agreed to take no further action. The Circuit Judicial Council reported that it found no new evidence in the second submission from Congress to suggest that the Subject Judges had not undertaken an appropriate level of due diligence in their hiring decision or that the Subject Judges had done anything to warrant a sanction for misconduct.³

² The order explicitly stated that “In rendering this decision to affirm, we need not and do not consider whether the information the Judges elicited and received regarding their hiring decisions was accurate, but only that they committed no misconduct in performing due diligence and then determining to hire the candidate based on the information before them.” Judicial Council Order at 1.

³ In light of this communication from the Circuit Judicial Council, this Committee concludes that it is not necessary to invite the judicial council to explain why it believes that the appointment of a special committee is unnecessary, as the Circuit’s reasons for not appointing a special committee are clearly stated in the communication. *See* Rule 21(b)(2).

II. Discussion

This Committee, in its sole discretion, may review any judicial council order entered under Rule 19(b)(1) and determine whether a special committee should be appointed. *See* Rule 21(b)(2). We review circuit judicial council orders in judicial conduct and disability matters for errors of law, clear errors of fact, or abuse of discretion. Rule 21(a); *see also 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).

The question before this Committee is whether a special committee should be appointed to investigate the complaints. Both the Act and the Rules provide that a chief judge cannot make factual findings about a matter that is reasonably in dispute. *See* 28 U.S.C. § 352(a) (“The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute.”); 28 U.S.C. § 352(b)(1)(B) (dismissal is appropriate “when a limited inquiry . . . demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence.”); Rule 11(b) (“In conducting [a limited] inquiry, the chief judge must not determine any reasonably disputed issue. Any such determination must be left to a special committee appointed under Rule 11(f) and to the judicial council that considers the committee’s report.”). The Commentary to Rule 11 notes that “if potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute.” *Id.*

In dismissing the complaints, the Chief Judge of the Second Circuit was not bound by the opinion of the Acting Chief Judge of the Eleventh Circuit that a special committee would be required and concluded that the Subject Judges “performed all of the due diligence that a responsible Judge would undertake.” Order at 5. The Chief Judge based this conclusion on the

finding that the Subject Judges “carefully reviewed the allegations in the media, thoroughly considered the candidate’s record, received strong references attesting to the candidate’s qualifications and character, and interviewed the candidate to assess the candidate’s temperament, judgment, and abilities.” *Id.*

With great respect for the Chief Judge and the Circuit Judicial Council, we are of the view that an appropriate evaluation of the judges’ conduct cannot be accomplished without findings of fact as to: (1) whether the candidate made the statements attributed to her (or the substance of them); and (2) what the candidate told the Subject Judges about them. These facts, which are reasonably disputed, must be established before the matter can be concluded. In other words, whether the candidate made the alleged statements and what she told the Subject Judges about the allegations against her must be determined first, because the answers would determine the nature and extent of any further inquiries the Subject Judges would be required to conduct.

According to media reports, the candidate has never publicly denied the allegations, and when the allegations were first publicized, the candidate was reported to have said that she had “no recollection of these messages and they do not reflect what I believe or who I am and the same was true when I was a teenager.”⁴ At this point, it is unclear what the Subject Judges asked the candidate about the allegations and what she told them.

In addition, it appears that there are numerous individuals with first-hand knowledge of the candidate’s alleged conduct. The reporting referenced in Footnote 4 relied on two named sources – the candidate’s supervisor at the non-profit (her former employer) and a former co-worker who claimed to have received the offensive messages. The reporting also named another

⁴ Jane Mayer, *A Conservative Nonprofit that Seeks to Transform College Campuses Faces Allegations of Racial Bias and Illegal Campaign Activity*, THE NEW YORKER, Dec. 21, 2017, available at: <https://www.newyorker.com/news/news-desk/a-conservative-nonprofit-that-seeks-to-transform-college-campuses-faces-allegations-of-racial-bias-and-illegal-campaign-activity>

former employee who alleged that she was the only African-American employee of the non-profit and was fired by the candidate on Martin Luther King Day. Contemporaneous reporting by another news source named two other former co-workers who had allegedly received and exchanged racist messages with the candidate.⁵ Additionally, reporting from earlier this year contained a statement from the spokesperson for the candidate's supervisor confirming that the candidate had indeed been terminated after the offensive messages were discovered.⁶ It is unclear whether the Subject Judges spoke to any of these individuals with first-hand knowledge of the alleged statements and conduct. As a result, key issues are reasonably in dispute and must be resolved.

The Commentary to Rule 11 provides a useful illustration of how a similar factual dispute should be resolved:

For example, consider a complaint alleging that the subject judge said X, and the complaint mentions, or it is independently clear, that five people may have heard what the judge said. The chief judge is told by the subject judge and one witness that the judge did not say X, and the chief judge dismisses the complaint without questioning the other four possible witnesses. In this example, the matter remains reasonably in dispute. If all five witnesses say the subject judge did not say X, dismissal is appropriate, but if potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute. Commentary to Rule 11, citing to The Judicial Conduct and Disability Act Study Committee, IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980, 239 F.R.D. 116, 243 (2006) (internal citations omitted).

Although not an exact match for the present complaints, this example is instructive, as it demonstrates that a matter is still reasonably in dispute where reasonably available potential

⁵ See Caleb Ecarma, *Clarence Thomas's Wife Hired Ex-TPUSA Staffer Known for Saying 'I Hate Blacks'*, MEDIA-ITE, Sept. 6, 2018, available at: <https://www.mediaite.com/online/exclusive-clarence-thomas-wife-hired-ex-tpusa-staffer-known-for-saying-i-hate-blacks/>

⁶ See Ruth Marcus, *Opinion: The Curious Case of the Clerk and the Racist Texts*, THE WASHINGTON POST, Jan. 18 2022, available at: <https://www.washingtonpost.com/opinions/2022/01/18/clerk-texts-appeals-court-clanton/>.

witnesses have not been questioned. Here, the reporting on the allegations prior to the decision to hire the candidate named multiple individuals with first-hand knowledge of the events in question. As those individuals were not interviewed at any point during this proceeding, the matter remains reasonably in dispute and, instead of being dismissed, should have been referred to a special committee for investigation.

Because a special committee was not appointed to investigate the complaints, there is not enough information in the record to determine how the matter should be concluded.

Accordingly, the Circuit Judicial Council erred in affirming the Chief Circuit Judge's dismissal of the complaints. Pursuant to the standards provided by Section 352 of the Act and Rule 11, the appointment of a special committee to thoroughly investigate the facts of the complaints is necessary. We note that our conclusion as to the necessity of the appointment of a special committee should not be taken as a comment on the merits of the underlying complaints. Once the special committee has completed a comprehensive investigation, it will then be the responsibility of the Second Circuit Judicial Council to evaluate the merits of the complaints in light of the evidence and the standards provided by the Rules and the Act.

III. Conclusion

For these reasons, we return this matter to the Second Circuit Judicial Council with instructions to refer it to the Chief Circuit Judge for the appointment of a special committee under Section 353 of the Act and Rule 11(f).⁷ At a minimum, the special committee should attempt to interview the candidate and the witnesses identified in the media reports we have cited

⁷ Rule 24(c) provides that orders of this Committee constituting final action on a complaint must be made publicly available. Although this order does not constitute final action on the complaints, Rule 21(f) gives the Committee Chair the authority to direct the distribution of decision by the Committee. Pursuant to this authority, and in the interests of transparency and the importance of the judiciary's responsibility to investigate allegations of misconduct, the Chair has directed that this order be made publicly available.

as having first-hand knowledge of the events in question. From there, the special committee's investigation should be guided by the evidence that it receives, including but not limited to any additional witnesses and relevant documents or records, in order to thoroughly and carefully investigate the complaints. The investigation should be conducted as expeditiously as possible, without compromising the thoroughness of the investigation.