

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

C.C.D. No. 16-01

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT

PROCEEDING IN REVIEW OF THE ORDER AND MEMORANDUM
OF THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT
J.C. Nos. 05-14-90120, 05-14-90121

MEMORANDUM OF DECISION

(Filed January 26, 2017)

Present: Judges Anthony J. Scirica, Chair, Sarah Evans Barker, Joel F. Dubina, Joel M. Flaum, Thomas F. Hogan, Kathryn H. Vratil, and James E. Gritzner.¹

MEMORANDUM OF DECISION

This matter is before the Judicial Conduct and Disability Committee on attorney Ty Clevenger’s October 26, 2016, petition for review of his complaint against Judge Walter S. Smith, Jr. and Judge Harry Lee Hudspeth filed 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 (“Rules”) (U.S. Jud. Conf. Sept. 17, 2015). The Fifth Circuit Judicial Council concluded Mr. Clevenger’s complaint against Judge Smith and Judge Hudspeth by orders dated September 28, 2016, and October 21, 2016, respectively. The Circuit Judicial Council determined Judge Smith and Judge Hudspeth were “no longer subject to the disciplinary

¹ This panel was comprised of six members of the seven-member Judicial Conduct and Disability Committee. One member was disqualified, and the Chief Justice selected an additional judge to join the qualified members to consider the matter. R. 21(c) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

procedures of [the Act] and the remedies they prescribe” because both judges had retired under 28 U.S.C. § 371(a) and are no longer judicial officers.

Mr. Clevenger now argues in his petition for review that “nothing in the rules prevents a judicial council from investigating, censuring and/or reprimanding a judge following his or her retirement.”² The Judicial Conduct and Disability Committee reviews Mr. Clevenger’s petition under 28 U.S.C. § 357 and Rule 21(a) and 21(b)(1)(A).

The Act provides that any person may file a complaint “alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts,” 28 U.S.C. § 351(a), and provides actions if a complaint is not dismissed, *id.* § 354(a)(2). A circuit judicial council may conclude a conduct and disability proceeding after it has been initiated if “intervening events have made the proceeding unnecessary.” R. 20(b)(1)(B). Resignation from judicial office constitutes an intervening event rendering a conduct and disability proceeding unnecessary because the judicial officer ceases to exercise judicial functions. *See In re Complaint of Judicial Misconduct*, 10 F.3d 99, 99–100 (3d Cir. 1993) (“Inasmuch as a judge who retired under 28 U.S.C. § 371(a) by giving up his or her judicial office is no longer exercising judicial duties, he or she can no longer prejudice the ‘effective and expeditious administration of the business of the courts.’”); *In re Charge of Judicial Misconduct*,

² Mr. Clevenger supports this argument with reference to footnote 2 in this Committee’s Memorandum of Decision filed July 8, 2016, which references Judicial Conference of the United States, Certificate of Consideration of Impeachment of Former U.S. District Judge Mark E. Fuller (Sept. 9, 2015). That case is inapplicable because it involved a determination by the circuit judicial council that a “district judge may have engaged in conduct that might constitute ground for impeachment.” R. 20(b)(2)(A). *See* 28 U.S.C. § 355(b)(1). Though considered, no such determination was ever made by the Judicial Council of the Fifth Circuit in the matter now under consideration, which would have required rather than permitted further action.

782 F.2d 181, 181 (9th Cir. 1986) (“When the subject of the complaint is no longer a judicial officer, he is beyond the reach of these procedures and the remedies they prescribe.”).

The Circuit Judicial Council properly concluded the conduct and disability proceeding was unnecessary because Judge Smith and Judge Hudspeth retired under 28 U.S.C. § 371(a). For that reason, we deny Mr. Clevenger’s petition for review and affirm the Circuit Judicial Council’s orders concluding the complaint against Judge Smith and Judge Hudspeth.