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. No. 05-14-90120

MEMORANDUM OF DECISION

(Filed July 8, 2016)

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 petition for review of his complaint against Judge Walter S. Smith, Jr. 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). Mr. Clevenger alleges Judge Smith made inappropriate, unwanted physical and non-physical sexual advances toward a court employee in 1998. The Fifth Circuit Judicial Council issued an order dated December 3, 2015, confirming the misconduct alleged by Mr. Clevenger and reprimanding Judge Smith, suspending the assignment of new cases to Judge Smith for one year,

[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 petition for review. R. 21(c) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

and requiring Judge Smith to undergo sensitivity training. In his petition for review, Mr. Clevenger characterizes the Circuit Judicial Council's punishment as "far too lenient," urging the Judicial Conduct and Disability Committee to recommend impeachment. We are unable to complete our review of the record before us because findings were not made by the Circuit Judicial Council on all matters raised in its investigation.

Mr. Clevenger filed his complaint against Judge Smith on September 8, 2014, alleging Judge Smith committed misconduct when he made inappropriate, unwanted physical and non-physical sexual advances toward a court employee in 1998. The Chief Judge of the U.S. Court of Appeals for the Fifth Circuit appointed a Special Committee on October 28, 2014, to conduct an investigation into the allegations raised in Mr. Clevenger's complaint. The Special Committee retained counsel to conduct an investigation, including interviews with and statements from witnesses. It also received testimony under oath from Judge Smith. Following its investigation, the Special Committee submitted its findings and recommendations to the Judicial Council of the Fifth Circuit.

Based on the Special Committee's report, to which Judge Smith filed a response on November 4, 2015, the Circuit Judicial Council issued an order dated December 3, 2015, finding the following:

- "[I]n 1998 Judge Smith made inappropriate and unwanted physical and non-physical sexual advances toward a court employee."
- "Judge Smith does not understand the gravity of such inappropriate behavior and the serious effect that it has on the operations of the courts."

- "Judge Smith allowed false factual assertions to be made in response to the complaint, which, together with the lateness of his admissions, contributed greatly to the duration and cost of the investigation."

The Circuit Judicial Council issued a reprimand to Judge Smith, instructed the Clerk of Court for the Western District of Texas to suspend the assignment of new cases to Judge Smith for one year, and directed Judge Smith to complete sensitivity training. *See* 28 U.S.C. §§ 354(a)(1)(c), (a)(2)(A)(i), (a)(2)(A)(iii).

Mr. Clevenger filed his petition for review to the Committee on Judicial Conduct and Disability on January 18, 2016, in which he requests the Committee "suspend Judge Smith from the bench immediately and recommend impeachment." Mr. Clevenger also notes he submitted "the names of witnesses to other alleged incidents wherein Judge Smith sexually harassed women in the courthouse" and thus he believes "the assault of [the court employee] was [not] an isolated incident." The Circuit Judicial Council neither addressed nor made findings with respect to these additional allegations.

The Judicial Conduct and Disability Committee has reviewed the record and considers this petition for review under Section 357 of the Act and Rule 21. We review circuit judicial council orders for errors of law, clear errors of fact, or abuse of discretion. R. 21(a). Rule 21(d) allows the Judicial Conduct and Disability Committee to return a matter to a circuit judicial council with directions to undertake additional investigation.

Because Mr. Clevenger's petition for review includes the names of individuals who allegedly witnessed other instances of Judge Smith's sexual harassment of women in the

courthouse, it raises the question whether there was a pattern and practice of such behavior.[2] The Circuit Judicial Council's order neither addressed nor made findings on these additional allegations of misconduct or on other matters raised by its investigation. Because we believe that additional findings are essential to the consideration of the petition for review, we are unable to complete our review of the Circuit Judicial Council's order.

Accordingly, we return this matter to the Circuit Judicial Council with directions to undertake additional investigation and make additional findings where appropriate and reconsider the appropriate sanction if there are additional findings. Regarding Judge Smith allowing false factual assertions in response to the complaint, the Committee requests additional findings and recommendations as to the manner in which Judge Smith's conduct adversely impacted or interfered with the inquiry, if at all.

[2] *See, e.g.*, Judicial Conference of the United States, Certificate of Consideration of Impeachment of Former U.S. District Judge Mark E. Fuller (Sept. 9, 2015); Judicial Conference of the United States, Certificate of Consideration of Impeachment of U.S. District Judge Samuel B. Kent (June 9, 2009).