

United States Court of Appeals for the Federal Circuit

~~UNDER SEAL (NON-PUBLIC ORDER)~~

IN RE COMPLAINT NO. 23-90015

Before the Judicial Council of the Federal Circuit

PER CURIAM.

ORDER

By order of March 24, 2023, Chief Judge Moore appointed a special committee (the Committee) to investigate and report its findings and recommendations with respect to a complaint identified against Judge Newman pursuant to Rule 5 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. The complaint was based, *inter alia*, on a concern that Judge Newman may be “unable to discharge all the duties of office by reason of mental or physical disability.” 28 U.S.C. § 351(a).

Prior to the formation of that Committee, on March 8, 2023, the Judicial Council met to consider concerns raised about Judge Newman’s mental fitness by court staff and Judge Newman’s abnormally large backlog in cases and her apparent inability to issue opinions in a timely fashion. The Judicial Council voted unanimously to preclude the assignment of new cases to Judge Newman. In the course of the proceedings before the Committee, Judge Newman requested that she immediately be restored to the rotation of new case assignments. *See* May 25, 2023 Letter from G. Dolin to The Special Committee at 3. The Committee

referred that request to the Judicial Council and, construing it as a request for reconsideration of the Council's prior decision, the Council has reconsidered, based on currently available information, whether Judge Newman should be precluded from receiving new case assignments. As explained below, having considered the matter *de novo*, under the facts as they currently stand, the Council has determined that Judge Newman should not be allowed new case assignments.

The Circumstances at the Time of the Council's March 8 Order

When the Council met on March 8, significant concerns had been raised about Judge Newman's backlog of cases and her apparent inability to issue opinions in a timely fashion. Concerns had also been raised by court staff about her mental fitness to continue to perform the work of an active judge. At that point in time, Judge Newman had nine opinions pending, four of which were over 120 days old and one of which was 454 days old. Judge Newman had already been foreclosed from assignment to any panel for the April sitting because, when cases were being assigned for April in February, her backlog had placed her in violation of Federal Circuit Clerical Procedures #3, ¶ 15. Pursuant to that provision, new cases will not be assigned to any judge with four or more opinions over six months old or two or more opinions over one year old.

In addition, Judge Newman's backlog of cases would have been even larger if there had not been several interventions over the previous 18 months in which cases had been reassigned from her to another judge following unnecessary delay and the circulation of draft opinions that no other member of the panels would join. These instances are described in the order of March 24. *See* March 24, 2023 Order at 4–5. To give just a few examples: (1) [REDACTED] ([REDACTED]), a pro se submitted case, was reassigned after it had

been pending 374 days; (2) [REDACTED] ([REDACTED]), a pro se submitted case, was reassigned after it had been pending 624 days; and (3) [REDACTED] ([REDACTED]), a pro se submitted case, was reassigned after it had been pending 302 days.

The backlog was a source of even greater concern for the Council because Judge Newman had accumulated this backlog despite taking on significantly less work than other active judges on the Court. Judge Newman had not participated in motions panels since January 2021 and she was already on a significantly reduced rotation for panel assignments. From June 2022 through March 2023, the average active judge on the Court participated in 116 cases, while Judge Newman participated in only 60.

***De Novo* Consideration of Barring Judge Newman from New Case Assignments**

Based on the information available to the Council today, the Council has now considered *de novo* whether there are grounds to preclude Judge Newman from receiving new case assignments and whether an order should issue precluding her from receiving such assignments.

Unfortunately, the Council's concerns about Judge Newman's abnormally large backlog of cases and her apparent inability to issue opinions in a timely fashion have not abated. To the contrary, they have increased. Since the Council's March action, Judge Newman has issued only two of her majority opinions. She still has a backlog of seven opinions, three of which have been pending for over 200 days and all of which have been pending for over 100 days. Four of them, moreover, are cases submitted without argument that are generally among the most expeditiously resolved. These are all opinions which she assigned to herself yet has been unable to circulate to the panels for vote.

The Council is particularly concerned that Judge Newman has been unable to make any significant progress on

addressing her opinion backlog despite having three law clerks, having no new cases assigned for April, May, June, or July, and not sitting on motions panels since January 2021.

In addition, the publicly available May 16 order details substantial data from the Clerk's office demonstrating that Judge Newman, despite issuing dramatically fewer opinions than other judges on the court, takes much longer to do it. Between October 1, 2021 and March 24, 2023, Judge Newman authored only 10 majority opinions. The average for other active judges was 58. *See* May 16 Order at 13. If dissents and concurrences are accounted for, the average active judge authored 61 opinions while Judge Newman authored 28. *See id.* Despite the lower opinion load, Judge Newman was dramatically slower. The average time to issuance after assignment for other judges was 58 days; for Judge Newman it was approximately 199 days. *See id.* Such lengthy delays are a disservice to the litigants before the Court, who have a right to have their matters resolved expeditiously. The Council is concerned that assigning additional cases to Judge Newman now will only interfere with her ability to clear her current backlog and exacerbate delays in her already long-delayed opinions.

In light of Judge Newman's continued backlog of cases, and her inability to clear the backlog despite the absence of new cases assignments demanding her attention, the Council concludes upon *de novo* consideration that Judge Newman is not expeditiously carrying out the work of the Court, that assigning her new cases will only further interfere with expeditious execution of the work of the Court, and that an order precluding Judge Newman from new case assignments is warranted.

This action is warranted under the Council's statutory authority to "make all necessary and appropriate orders for the effective and expeditious administration of justice

within its circuit.” 28 U.S.C. § 332(d)(1). Under section 332(d), the Council has broad authority to suspend the assignment of new cases, or to reassign pending cases, to a given judge to address delays that interfere with the “expeditious administration of justice.” *See, e.g., U.S. v. Colon-Munoz*, 318 F.3d 348, 354–55 (1st Cir. 2008) (“An order of the Judicial Council reassigning cases . . . to address judicial delay falls within the broad mandate of § 332(d).”). Indeed, the Supreme Court has expressly recognized that rules imposed by a judicial council suspending the assignment of new cases until a judge resolves a backlog of existing cases “are reasonable, proper, and necessary rules, and the need for [their] enforcement cannot reasonably be doubted.” *Chandler v. Jud. Council of Tenth Cir. of U. S.*, 398 U.S. 74, 85 (1970). The same authority extends to suspending a judge from case assignments by order of the judicial council. The Council concludes that Judge Newman’s backlog of cases and her delays outlined above provide a complete and sufficient basis for an order barring her from the assignment of new cases. This is not a censure but rather a decision made for the effective and expeditious administration of the business of the court.

In addition, although not necessary for its decision, the Council notes that its action is further buttressed by the substantial information that has been described in the publicly available orders. The Council is not required to blind itself to that information in carrying out its duties under section 332(d). The information the Committee has detailed in its order of May 16 raises, at a minimum, a reasonable concern that Judge Newman may suffer from a disability that renders her incapable of carrying out the duties of her office and thus incapable of issuing her opinions more promptly. That information tends to confirm the Council’s concern that, if Judge Newman were restored to the rotation of new case assignments, the addition of new work to her load would exacerbate the delays in her current

cases and simply add a new set of cases into Judge Newman's backlog where they will linger unresolved for months if not years. That would further interfere with the expeditious administration of justice in this Court and do a disservice to litigants.

Beyond that, the information the Committee has publicly detailed may raise a legitimate concern that Judge Newman may suffer from a cognitive impairment that affects her ability to decide cases. The Council believes that ensuring the "effective and expeditious administration of justice," 28 U.S.C. § 332(d)(1), may justify refraining from assigning litigants to a judge when there are substantial grounds (made public at the judge's request) to doubt the judge's fitness to decide cases. We need not reach at this time whether concerns about mental fitness alone can justify Council action of the present sort pursuant to 28 U.S.C. § 332(d)(1) or 28 U.S.C. §§ 351-364 prior to action by the Council on a finding of disability under § 354.

Accordingly,

IT IS ORDERED THAT:

Judge Newman shall be excluded in the rotation for new case assignments at this time based on the facts described above pending further order of the Judicial Council.

SO ORDERED: June 5, 2023.