JUDICIAL COUNCIL OF THE
TENTH CIRCUIT

IN RE: COMPLAINT UNDER THE JUDICIAL CONDUCT AND DISABILITY ACT	No. 10-10-90058

Before **BRISCOE**, Chief Judge.

ORDER

Complainant has filed a complaint of judicial disability against a magistrate judge in this circuit. My consideration of this complaint is governed by 1) the misconduct rules issued by the Judicial Conference of the United States, entitled *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (the "Misconduct Rules"); 2) the federal statute dealing with judicial misconduct, 28 U.S.C. § 351 *et seq.*, and 3) the "Breyer Report," a study by the Judicial Conduct and Disability Act Study Committee, headed by Supreme Court Justice Stephen Breyer, entitled *Implementation of the Judicial Conduct and Disability Act of 1980*. The Breyer Report may be found at: http://www.supremecourt.gov/publicinfo/ breyercommitteereport.pdf. To the extent that there are any relevant prior decisions of the full Judicial Council of this circuit which are consistent with those authorities, they may also govern my consideration of this complaint.

Complainant has been provided with a copy of the Misconduct Rules, and the Rules are also accessible on the Tenth Circuit's web page at:

http://www.ca10.uscourts.gov/misconduct.php. In accord with those rules, the names of the complainant and subject judge shall not be disclosed in this order. *See* Misconduct Rule 11(g)(2).

Complainant contends that the subject magistrate judge "may be suffering some sort of mental impairment." The main basis for this claim of disability is complainant's challenge to the judge's characterization of the facts and complainant's claims and arguments in an underlying habeas case. Complainant contends that the judge has misstated the facts, confused the issues, and contradicted statements made in the habeas application. Complainant also points to the judge's filing of a report and recommendation adverse to complainant's case shortly after complainant had filed an affidavit contending that the judge was biased, again on the basis of the judge's rulings. These claims are not cognizable as misconduct because they are "directly related to the merits of a decision or procedural ruling." Misconduct Rule 11(c)(1)(B). Without more, the timing of a report and recommendation does not support a reasonable inference of bias. *See* Misconduct Rule 11(c)(1)(D).

Complainant takes pains to explain that the purpose of this misconduct complaint is not to challenge the merits of the judge's rulings, but to demonstrate how the alleged errors and mischaracterizations in those rulings demonstrate disability. Nonetheless, the Misconduct Rules are clear that the merits of a judge's rulings may not form the sole basis of a misconduct claim. "Any

allegation that calls into question the correctness of an official action of a judge – without more – is merits-related." Commentary to Misconduct Rule 3. As explained in the Breyer Report, this exclusion of matters related to the merits of underlying cases protects the independence of the judges deciding those cases. *See* Breyer Report, App. E., ¶ 2.

Accordingly, this complaint is dismissed pursuant to Misconduct Rule 11(c). The Circuit Executive is directed to transmit this order to complainant and copies to the subject judge and the Judicial Conference Committee on Judicial Conduct and Disability. *See* Misconduct Rule 11(g)(2). To seek review of this order, complainant must file a petition for review by the Judicial Council. The requirements for filing a petition for review are set out in Misconduct Rule 18(b). The petition must be filed with the Office of the Circuit Executive within 35 days of the date of the letter transmitting this order. *Id.*

So ordered this 24th day of January, 2011.

/s/ Mary Beck Briscoe

Honorable Mary Beck Briscoe
Chief Circuit Judge