

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE
JUDICIAL CONDUCT AND
DISABILITY ACT

No. 10-11-90006

Before **BRISCOE**, Chief Judge.

ORDER

Complainant has filed a complaint of judicial misconduct against a district 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 claims bias by the subject judge. First, complainant alleges that bias is shown by the judge's failure to rule on a pending motion to recuse in an underlying civil rights case. However, my review of the docket sheet in the case indicates that the subject judge recently granted complainant's motion. Further, claims of delay may constitute misconduct only if there is evidence of improper motive as to an individual determination or "habitual delay in a significant number of cases." Misconduct Rule 3(h)(3)(B). Complainant has not presented evidence in support of either factor here.

Next, complainant contends that the judge's bias is shown by a statement made by a prison warden, who reportedly told complainant that the prison staff "had nothing to worry about" in cases assigned to the subject judge. This allegation does not involve conduct by the subject judge or provide evidence supporting a reasonable inference that the subject judge is biased against complainant. *See* Misconduct Rule 11(c)(1)(D).

Finally, complainant points to the judge's rulings in two separate civil rights cases. Complainant contends that one ruling violates federal case law, and argues that a second decision "defies logic." Complainant asserts that these decisions demonstrate the judge's bias against prisoners. This claim is not

cognizable as misconduct because it is “directly related to the merits of a decision or procedural ruling.” Misconduct Rule 11(c)(1)(B). 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 23rd day of February, 2011.

/s/ Mary Beck Briscoe

Honorable Mary Beck Briscoe
Chief Circuit Judge