

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE
JUDICIAL CONDUCT AND
DISABILITY ACT

No. 10-15-90013

Before **TYMKOVICH**, 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 the misconduct rules issued by the Judicial Conference of the United States, entitled *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (the “JCD Rules”), the federal statutes addressing judicial conduct and disability, 28 U.S.C. § 351 *et seq.*, and relevant prior decisions of the full Judicial Council of this circuit that are consistent with those authorities.

The JCD Rules and this circuit’s local misconduct rules are available to complainants on the Tenth Circuit’s web page at: <http://www.ca10.uscourts.gov/ce/misconduct>. Paper copies are also furnished by the Circuit Executive’s Office upon request. In accordance with those rules, the names of the complainant and subject judge shall not be disclosed in this order. *See* JCD Rule 11(g)(2).

Complainant, an attorney who appeared before the subject judge in a civil matter, alleges the subject judge engaged in misconduct during the pendency of that matter.

Specifically, complainant alleges the judge: 1) pressured authorities to investigate and act against one of the parties in the case; 2) communicated with the press about the case and about in-chambers meetings with attorneys; and, 3) engaged in ex parte communications with agents of one of the parties in the case, which complainant contends resulted in the judge's interference with complainant's employment relations.

Pursuant to JCD Rule 11(b), I conducted a limited inquiry. *See* JCD Rule 11(b) (“[i]n determining what action to take . . . [t]he chief judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter, and may obtain and review transcripts and other relevant documents.”). As part of my inquiry, I obtained statements and additional documentation from those individuals who I understood to have knowledge of the matter. Further, I reviewed relevant documents, including internal communications, the docket, transcripts, and orders.

First, complainant alleges the subject judge “pressured federal authorities to investigate and act against” one of the parties in the case over which the judge was presiding. Consequently, complainant appears to question the subject judge's impartiality in the matter. The subject judge admits to having reported the party's conduct to federal authorities. The subject judge asserts he had a professional obligation to report the conduct based on evidence presented during a hearing.

Although a judge is required to “disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned,” Code of Conduct for United States Judges Canon 3(C)(1), “opinions formed by the judge on the basis of facts

introduced or events occurring in the course of the current, or of prior proceedings, do not constitute a basis for . . . bias or partiality.” *Liteky v. United States*, 510 U.S. 540, 555 (1994). Thus, a showing of bias warranting recusal generally must be based on extra-judicial conduct and not conduct that arises in a judicial context. *See id.*; *see also* Judicial Conference Committee on Codes of Conduct, Advisory Opinion, No. 66 (“When a judge files a complaint of unprofessional conduct . . . either in compliance with a state law or Canon 3B(5), and the lawyer is before the judge as counsel in the case giving rise to the unprofessional conduct . . . , the judge is not required to recuse on grounds of bias . . . simply because the complaint was filed.”).

Here, the judge’s opinion was formed by facts introduced and events occurring during a hearing and, as a result of that opinion, the judge reported the party’s conduct to authorities. Accordingly, this allegation does not constitute cognizable misconduct because the conduct is not “prejudicial to the effective and expeditious administration of the business of the courts.” JCD Rule 3(h)(1) (providing the definition of misconduct).

Second, complainant alleges the subject judge communicated to the press about the case and in-chambers meetings with attorneys. In support of his allegation, complainant provides news articles. The substance of those articles, however, can be found in orders and transcripts on the public docket. Accordingly, this allegation is unsupported by “sufficient evidence to raise an inference that misconduct has occurred.” *See* JCD Rule 11(c)(1)(D).

Finally, complainant alleges the subject judge engaged in *ex parte* communications with agents of one of the parties in the case. Specifically, complainant

contends the subject judge put pressure on the party (complainant's employer), which ultimately affected complainant's employment relationship.

While a "chief judge may not resolve a genuine issue concerning a material fact when . . . conducting a limited inquiry," the material facts here are not reasonably in dispute. *See* JCD Rule 11(b); *see also* Commentary to JCD Rule 11(b). The subject judge admits the conversations took place, but, at the time, did not believe the individuals with whom the conversations took place to be agents of the party in the matter. Rather, the subject judge states he believed that complainant had engaged in sanctionable conduct and that he thought he was giving a statement to independent investigators looking into that conduct. The subject judge also admits telling those individuals that he felt he had a professional obligation to take action against the complainant if the party in the case did not. The statements obtained from those individuals having direct knowledge of the conversations support these facts.

The results of my inquiry raise concerns under JCD Rules 3(h)(1)(C) and 3(h)(1)(I). The judge's conversations might be considered *ex parte*, pursuant to Code of Conduct for United States Judges Canon 3A(4), which can constitute cognizable misconduct in accordance with JCD Rule 3(h)(1)(I) (including as cognizable misconduct "violating other specific, mandatory standards of judicial conduct"), or "improper discussions," pursuant to JCD Rule 3(h)(1)(C).

Additionally, the subject judge's actions might implicate Code of Conduct for United States Judges Canon 2B, prohibiting a judge from "lend[ing] the prestige of the judicial office to advance the private interests of the judge." The commentary to Canon

2B emphasizes, “[a] judge should be sensitive to possible abuse of the prestige of office.” Here, evidence presented suggests the party may have tried to use the judge’s statements to its advantage.

The subject judge has indicated that he did not believe his actions to be improper at the time the discussions took place; however, upon further reflection, the subject judge has indicated in writing that he recognizes the communications could be perceived as intending to have an effect on complainant’s employment relationship, and he regrets this. Consequently, the subject judge voluntarily concluded or vacated all pending orders affecting the complainant and recused from the matter in its entirety.

“Where a subject judge’s conduct has resulted in identifiable, particularized harm to the complainant . . . [,] the Act authorizes the chief judge to conclude the complaint proceedings if ‘appropriate corrective action has been taken.’” Commentary to JCD Rule 11. Appropriate corrective action acknowledges and remedies the harm raised by the complainant, to the extent possible, “such as by . . . recusal from a case.” *Id.*

“Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or redress of misconduct . . . is preferable to sanctions.” *Id.*

The subject judge has acknowledged his conduct in writing and stated his regret. The subject judge has also voluntarily taken steps to remedy the harm by concluding or vacating court orders affecting complainant and recusing from the case to avoid future involvement in the matter. The subject judge has attempted to correct the harm caused to the extent the harm can reasonably be remedied. Accordingly, I conclude that the subject

judge has taken appropriate corrective action and the allegation can be dismissed, pursuant to JCD Rule 11(d)(2).

This complaint is dismissed pursuant to JCD Rules 11(c) and (d). 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* JCD 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 JCD Rule 18(b). The petition must be filed with the Office of the Circuit Executive within 42 days of the date of the letter transmitting this order. *Id.*

So ordered this 14th day of March, 2016.

/s/ Timothy M. Tymkovich

Honorable Timothy M. Tymkovich
Chief Circuit Judge