

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-09-90057

Before **HENRY**, Chief Judge.

ORDER

Complainant has filed a complaint of judicial misconduct against a senior 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.supremecourtus.gov/publicinfo/breyercommitteereport.pdf>. To the extent that any relevant prior decisions of the full Judicial Council of this circuit consistent with those authorities exist, they may also govern my consideration of this complaint.

I have provided complainant 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.pdf>. 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 alleges that, during a court hearing in an underlying case, the subject judge used the word “squaw” in reference to Native Americans the judge had observed as a child. Complainant contends that the term constitutes a racial slur. Complainant also alleges that the judge fell asleep during a separate court proceeding in that same case.

Because these allegations alleged matters which, if proven, could constitute misconduct or disability on the part of the subject judge, *see* Misconduct Rule 3(e) & (h)(3)(A), I pursued a limited inquiry in this matter which ultimately resulted in an letter to the judge requesting a response to the complaint. The judge responded in writing, essentially admitting to the facts underlying these two claims. Accordingly, there are no facts in dispute, *see* Commentary on Misconduct Rule 11.

As to the claim about the use of the word “squaw,” the judge’s response states that the judge did not believe it to be an offensive word prior to this complaint, but understands now that it may be considered offensive. The judge has pledged never to use the word again. Complainant did not allege that the judge’s use of the word was intentional or the result of ill motive, and there is no evidence of bias here. Therefore, I conclude that this response constitutes

voluntary corrective action which also acknowledges and remedies this particular claim. *See id.*

Addressing the claim of sleeping while on the bench, the response indicates that the judge has adopted a severely limited caseload by taking a lesser draw of criminal cases, by declining all trials and lengthy hearings, and by cutting working hours. The judge also noted that an exhausting family health emergency, now resolved, could have played a part in the judge's falling asleep on the bench. Regardless of its cause, however, I conclude that the curtailing of the judge's workload as described constitutes voluntary corrective action which "acknowledges and remedies" the conduct underlying this disability claim. Misconduct Rule 11(d)(2).

The emphasis of the judicial misconduct procedures is to correct judicial conduct that is the subject of a valid complaint. *See* Commentary on Misconduct Rule 11. "[V]oluntary self-correction is preferable to sanctions." *Id.* This complaint is hereby dismissed pursuant to Misconduct Rule 11(d). The Circuit Executive is directed to transmit this order to complainant and copies to the respondent 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 30th day of April, 2010.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge