

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-09-90062

Before **HENRY**, 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.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.

Complainant has received or has access to a copy of the Misconduct Rules. 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 judge, who has been assigned to handle complainant's underlying habeas application, is both biased and disabled. With one exception discussed below, these claims are based solely on the judge's rulings and on complainant's arguments that the underlying conviction is void and the subject judge failed to recognize the alleged legal errors. 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). 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.

Allegations of bias and disability can state valid claims under these procedures, even when the allegations relate to a judge's ruling, *see* Commentary to Misconduct Rule 3. However, the Misconduct Rules require complainants to support their allegations with "sufficient evidence to raise an inference that misconduct has occurred." *See* Misconduct Rule 11(c)(1)(D). In this instance, the claims fail because they are completely unsupported. Aside from the judge's rulings, and the allegation discussed below, complainant has provided no support for these claims.

Finally, complainant alleges that the judge is biased and has a conflict of interest in ruling on complainant's habeas application because, while a state court judge, this same judge ruled against complainant in an unrelated civil case

involving payment for a car. Assuming this alleged fact to be true, it does not create a conflict of interest or evidence bias on the part of the judge, and therefore does not rise to the level of misconduct. *See* Misconduct Rule 11(c)(1)(A).

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 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 23rd day of November, 2009.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge