

**COMMITTEE ON APPEALS  
EVANGELICAL LUTHERAN CHURCH IN AMERICA**

**In the Matter of Disciplinary Proceedings            )**  
**Against the Rev. Bradley E. Schmeling                )**

**STATEMENT ON BEHALF OF THE REV. BRADLEY E. SCHMELING**

**INTRODUCTION**

**The Heart of This Appeal: A Discipline Hearing Committee’s Freedom to Exercise  
Its Constitutionally Granted Discretion**

The key question raised by this appeal is the following: Is a discipline hearing committee free to exercise its constitutional discretion, or can a policy “guideline” that is not part of the ELCA Constitution divest it of that discretion?<sup>1</sup> The Constitution itself is the supreme governing document of the ELCA, and it compels the Committee on Appeals to conclude that the Constitution’s affirmative grant of discretion to a discipline hearing committee cannot be overridden by a policy subordinate to the Constitution. Therefore, the discipline hearing committee’s conclusion in this case that it was not free to rule as its exercise of constitutional discretion would lead it to rule should be reversed as a violation of due process.

Pastor Schmeling was charged with “conduct incompatible with the character of the ministerial office” under *CBCR* 20.21.01. A “nearly unanimous” discipline hearing committee (“DHC”) concluded that application of the standards for ministerial office and the procedures for discipline found in the Constitution would lead it to find no violation and to impose no discipline. *Decision of the Discipline Hearing Committee (“Decision”)*, RA #61 at p. 12.

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<sup>1</sup> This brief will refer to the *Constitution, Bylaws, and Continuing Resolutions of the Evangelical Lutheran Church in America* as the “Constitution,” and cite its provisions as *CBCR*. Portions of the Constitution appear in the Record on Appeal (“RA”) at #36, Ex. A.

Nevertheless, seven DHC members felt that they were not free to act in accordance with the conclusion to which the exercise of their constitutional discretion led them.<sup>2</sup> Instead they felt “compelled” (*id.*, p. 10) by paragraph b.4) of *Definitions and Guidelines for Discipline*, a document that is not part of the ELCA Constitution, to remove Pastor Schmeling from the clergy roster.<sup>3</sup> Even though the committee concluded with near unanimity that this “bad policy . . . may very well violate the constitution and bylaws of this church” (*id.*, p. 11), seven members interpreted *Definitions and Guidelines* as divesting them of the discretion expressly granted by the Constitution and leaving them “no choice” but to impose the discipline of removal.

Pastor Schmeling does not contend that a discipline hearing committee can never remove a pastor in a homosexual relationship. To reach such a conclusion, however, the Constitution affirmatively requires, in each case, that the committee exercise its discretion to determine (1) whether discipline should be imposed, and (2) if so, what form of discipline to impose. When the committee’s exercise of this discretion leads it to conclude that removal should not be imposed, the Constitution does not permit a non-constitutional “guideline” to divest it of that discretion and to compel removal.

Due process, as defined in *CBCR* 20.12.01., includes the “right to be treated in conformity with the governing documents of the Evangelical Lutheran Church in America.”<sup>4</sup> A

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<sup>2</sup> *CBCR* 20.21.21., RA #36, Ex. A at p. 159 ; *CBCR* 20.21.02., RA #36, Ex. A at p. 156.

<sup>3</sup> Paragraph b.4) of *Definitions and Guidelines* provides: “Practicing homosexual persons are precluded from the ordained ministry of this church.” RA #36, Ex. B at p. 4.

<sup>4</sup> Under *CBCR* 20.12., “due process means . . . the right to be treated with fundamental procedural fairness.” *CBCR* 20.12.01. then defines “[f]undamental procedural fairness” as “the right to be treated in conformity with the governing documents of the Evangelical Lutheran Church in America.” The Rev. Lowell G. Almen, Secretary of the ELCA, notes in the Introduction to the Constitution that “the church’s constitutions, bylaws, and continuing resolutions” are the “governing documents.” “These documents govern our life together as congregations, synods, and churchwide organization.” *CBCR* at p. 9. The governing documents as enumerated in the “Codification Explanation” of the *CBCR* are the Restated Articles of Incorporation, the ELCA constitution, bylaws, and continuing resolutions, the Constitution for Synods, and the Model Constitution for Congregations (*id.* at 17).

violation of due process is grounds for reversal (*CBCR* 20.62.01.b), and requires a remand to the discipline hearing committee (*CBCR* 20.62.02.c.). The Constitution both requires and assumes that a discipline hearing committee will do the pastoral work of discerning how to exercise its constitutional discretion. As Secretary Lowell Almen clearly testified, the Constitution is the supreme authority in the governance of the life of this church:

Q. ...[I]s it correct that the ELCA constitution, much like the United States Constitution, is the supreme statement, at least in a general way, as to the conduct of the life of the church, the responsibility of the church, the doings of the church, the governance of the church?

A. Yes.

Transcript, RA #51 at p. 111. Because the seven-member DHC majority based its removal decision solely on its interpretation that *Definitions and Guidelines* trumps that exercise of constitutional discretion—while concluding with “near unanimity” that it would have found no violation had it felt free to follow the Constitution—the Committee on Appeals must reverse that decision and remand for further proceedings. Due process requires that when a discipline hearing committee’s exercise of discretion under the Constitution conflicts with a guideline that is separate from the Constitution, the Constitution must govern.

### **THE CONSTITUTIONAL CHARGE AND THE GOVERNING CONSTITUTIONAL PROVISIONS**

Pastor Bradley Schmeling was charged with “conduct incompatible with the character of the ministerial office” under *CBCR* 20.21.01.b. The conduct alleged to be incompatible is Pastor Schmeling’s entry into a loving, lifelong partnership with another man that is mutual, chaste, and faithful.<sup>5</sup> In considering this charge, the DHC looked to chapters seven and twenty of the Constitution. *Decision*, RA #61 at p. 12.

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<sup>5</sup> The parties stipulated that Pastor Schmeling entered into a loving, lifelong partnership with another man that is mutual, chaste, and faithful and that this relationship includes the expression of sexual intimacy. RA #34 at p. 1.

### **A. The Constitutionally Granted Discretion in the Discipline Process**

Chapter twenty of the Constitution outlines the discipline process. The Constitution explicitly grants a discipline hearing committee discretion to make two decisions: (1) whether discipline should be imposed and (2) which of three possible forms of discipline it may impose.

The Constitution specifically requires a discipline hearing committee to find “the relevant facts, that is, what it believes to be the truth of the matter” and to “state *whether*, based upon the facts that it has found, *it believes discipline should be imposed* and, *if so, what discipline* it has chosen to impose.” *CBCR 20.21.21.*, RA #36, Ex. A at p. 159 (emphasis added). The Constitution also explicitly gives the discipline hearing committee discretion to choose among three forms of discipline which it *may* (but is not required to) impose. *CBCR 20.21.02.* provides:

The disciplinary actions which *may* be imposed are:

- a. private censure and admonition by the bishop of the synod;
- b. suspension from the office and functions of the ordained ministry in this church for a designated period or until there is satisfactory evidence of repentance and amendment; *or*
- c. removal from the ordained ministry of this church.

RA #36, Ex. A at p. 156 (emphasis added).

### **B. The Constitutional Standards for Ordained Ministry**

Chapter seven of the Constitution, along with the confessions of faith recognized in chapter two, establish the qualifications for ordained ministers. Under these provisions, the heart of the office of ordained ministry is the effective proclamation of the gospel and the right administration of the sacraments. For example, *CBCR 7.22.* requires “aptness to preach, teach, and witness,” and *CBCR 7.31.12.a.* requires the ability to “preach the Word” and “administer the sacraments.” Moreover, Article V of the Unaltered Augsburg Confession (explicitly made authoritative in *CBCR 2.05.*) defines the office of ministry as “teaching the gospel and administering the sacraments.” RA #46, Ex. 22 at pp. 40-41. As the discipline hearing

committee noted, none of the constitutional provisions forbids a mutual, chaste, and faithful same sex relationship. *Decision*, RA #61 at p. 8.<sup>6</sup>

**THE “NEARLY UNANIMOUS” DHC VIEW THAT APPLICATION OF THE  
CONSTITUTION WOULD LEAD IT TO DISMISS THE CHARGES**

The discipline hearing committee ruled that if this case were “decided under the standards for ministers established by chapter seven *of the constitution* and the procedures for discipline established by chapter twenty *of the constitution*, then . . . this committee would find almost unanimously that Pastor Schmeling is not engaged in conduct that is incompatible with the ministerial office, and would find with near unanimity that no discipline of any sort should be imposed against him.” *Id.* at p. 12 (emphasis added). In other words, the DHC concluded “with near unanimity, that there is nothing about Pastor Schmeling’s acknowledged and stipulated homosexual relationship that would impede the proclamation of the gospel or the right administration of the sacraments.” *Id.* The DHC supported these findings of the “truth of the matter” with more detailed findings of fact. The Bishop has not challenged any of these findings as clearly erroneous. Therefore, this Committee on Appeals must defer to them.

**Pastor Schmeling’s Thriving Ministry at St. John’s**

Pastor Schmeling, a rostered ordained minister of the ELCA since 1989, has served as pastor of St. John’s Lutheran Church in Atlanta since 2000. St. John’s has thrived throughout his

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<sup>6</sup> In fact, the Unaltered Augsburg Confession condemns church regulations forcing clerical celibacy. As established by the undisputed testimony of Lutheran confessional theologian the Rev. Dr. Eric W. Gritsch, the confessions condemn any attempt by the church to bind the conscience of those who do not have the spiritual gift of celibacy, and explicitly regard such a regulation as a matter of *adiaphora*—that is, a matter that is neither divinely commanded nor prohibited. Transcript, RA #53 at pp. 693-694. According to Dr. Gritsch’s testimony, a minister’s loving, lifelong commitment to a person of the same gender is a matter of *adiaphora* and should be judged based upon whether the relationship creates offense in the particular context to which that minister has been called and thus impedes the effective proclamation of the gospel and administration of the sacraments. *Id.* at p. 700. The undisputed testimony of biblical scholar Dr. David E. Fredrickson also established that there is no biblical condemnation of a loving, lifelong commitment between same-gender partners. The frequently cited biblical prohibitions on homosexual practice do not contemplate such a relationship, speaking instead to abusive sexual relationships. Transcript, RA #53 at pp. 613-625. Bishop Chilstrom echoed this understanding of biblical scholars. Transcript, RA #51 at pp. 252-253.

tenure. “Since 2001, St. John’s has grown substantially in membership (a cumulative 52% at the time of the hearing), in attendance at worship (up 31% at the time of the hearing) and in stewardship (up more than 70% at the time of the hearing).” *Id.* at p. 4. During this time, the number of children in the congregation has increased 78%. *Id.* at p. 5.

It is undisputed that Pastor Schmeling is an exceptionally gifted pastor. More than a dozen rostered ELCA pastors, teaching theologians (including the entire Lutheran faculty at Emory University’s Candler School of Theology), and graduate students in theology are members of St. John’s. “Pastor Schmeling is judged by this potentially critical audience to provide consistently high quality sermons and teaching. He is recognized as an innovative worship leader and has been called upon by the synod to plan and organize worship at two synod assemblies.” *Id.*

Pastor Schmeling’s gifts in working with young people are also undisputed. As found by the DHC, “Pastor Schmeling is able to communicate with young people, share the faith in a manner that they find interesting and helpful, and help them develop language for talking about their faith. He possesses the patience and other qualities that are required to walk with” young people struggling with questions of faith. *Id.* Witnesses from his former congregation as well as St. John’s regard Pastor Schmeling as “incredibly gifted” and “the most gifted pastor I’ve ever encountered.” *Id.* The members of St. John’s have overwhelmingly supported Pastor Schmeling throughout this case, and the “congregation’s growth in membership, participation and stewardship have continued even since the charges against Pastor Schmeling were filed.” *Id.* at p. 6.

Under Pastor Schmeling’s leadership, St. John’s has become a congregation known for the breadth of its welcome to all people. As found by the DHC, throughout his pastoral career

“Pastor Schmeling has avoided making ministry to gays and lesbians a specific focus of his work. Instead he has preferred to work to make the congregations he serves known for welcoming everybody. This approach has had the benefit of making gay and lesbian persons feel welcome in his congregation and causing them to renew or reinvigorate their participation in the organized church.” *Id.* at pp. 5-6.

Because of this undisputed evidence concerning Pastor Schmeling’s thriving ministry at St. John’s, the DHC found that Pastor Schmeling’s partnership has not impeded the effective proclamation of the gospel or administration of the sacraments. Again, it concluded that if it were to decide this case based solely on the constitutional standards, it would find that Pastor Schmeling’s partnership is not incompatible with the ministerial office, find no violation, and impose no discipline.

**THE INTERPRETATION OF SEVEN MEMBERS THAT DEFINITIONS AND GUIDELINES MUST OVERRIDE CONSTITUTIONAL DISCRETION**

Notwithstanding these nearly unanimous findings, seven members of the DHC concluded that they were not free to follow the Constitution, and felt “compelled” instead by *Definitions and Guidelines* to remove Pastor Schmeling from the clergy roster. *Id.* at p. 10.

Although directed by the Constitution to find the “truth of the matter” and determine “whether discipline should be imposed,” and vested by the Constitution with discretion to choose among three forms of discipline that it “may” impose, these seven members felt that they could not rule as their exercise of constitutional discretion would lead them to rule. Why? They focused instead on the language of paragraph b.4) in *Definitions and Guidelines*, which states “Practicing homosexual persons are precluded from the ordained ministry of this church,” and interpreted the phrase “are precluded” to eliminate all constitutional discretion, to leave them “no choice,” and to mandate only one outcome: removal of Pastor Schmeling.

This interpretation and application of the phrase “are precluded” conflicts with the express language of the ELCA Constitution in two ways.

First, as interpreted, this guideline divests a discipline hearing committee of the discretion constitutionally vested in it under *CBCR* 20.21.21. to determine whether there has been a violation meriting discipline. The Constitution makes a discipline hearing committee the finder of facts: “the committee shall set forth what *it has found* to be the relevant facts, that is, what *it believes* to be the truth of the matter.” *CBCR* 20.21.21.a., RA #36, Ex. A at p 159 (emphasis added). The Constitution then charges the committee to “state *whether*, based upon the facts that it has found, *it believes* discipline should be imposed . . .” *CBCR* 20.21.21.b., *id.* (emphasis added). As noted above, in this case the DHC found with near unanimity that the “truth of the matter” is that Pastor Schmeling’s partnership has not impeded the faithful performance of the ministerial office.

The sole determinant leading seven members of the DHC to vote contrary to these nearly unanimous findings was their interpretation of *Definitions and Guidelines* as mandatory:

If relieved of the specific *requirements* of *Definitions and Guidelines* and permitted to decide this case under the standards of constitution chapters seven and twenty, this committee would find almost unanimously that Pastor Schmeling is not engaged in conduct that is incompatible with the ministerial office, and would find with near unanimity that no discipline of any sort should be imposed against him.

*Decision*, RA #61 at p. 12 (emphasis added). Thus, as construed by seven members, paragraph b.4) improperly divests the discipline hearing committee of the discretion constitutionally vested in it as the finder of facts. In other words, as interpreted by the seven, the language “are precluded” in *Definitions and Guidelines* mandates a finding of violation in all cases when the Constitution requires a discipline hearing committee to find in each case whether or not discipline should be imposed.

Second, as interpreted by seven DHC members, the language “are precluded” in paragraph b.4) removes the constitutionally granted discretion under both *CBCR* 20.21.21.b. and 20.21.02. to choose among three potential remedies for a violation, and mandates only one form of discipline, namely removal. The Constitution directs that, if a discipline hearing committee has determined that discipline should be imposed, it must state “*what discipline* it has chosen to impose.” *CBCR* 20.21.21.b., RA #36, Ex. A at p. 159. *CBCR* 20.21.02 outlines the three available remedies: private censure and admonition, suspension from office, or removal from ordained ministry. *Id.* at p. 156. The “only one option” interpretation of paragraph b.4) by the seven-member majority is in direct conflict with the Constitution. As set forth more fully at pp. 11-12 below, Secretary Almen himself clearly rejected this “only one option” interpretation.

**DEFINITIONS AND GUIDELINES WAS INTENDED TO BE  
SUBORDINATE TO THE CONSTITUTION**

The Rev. Dr. Herbert W. Chilstrom, the first presiding bishop of the ELCA, was personally involved in the development and adoption of *Definitions and Guidelines* during his tenure in 1989.

As Bishop Chilstrom testified, the Churchwide Assembly itself never debated or voted on the content of these guidelines. Rather their adoption was delegated to the Church Council. RA #51 at p. 227. The authority of *Definitions and Guidelines*, therefore, rests solely on its status as an action of the Church Council. It is undisputed that the Church Council made an intentional decision not to make these guidelines part of the Constitution, but to publish them as a separate document.<sup>7</sup> According to Bishop Chilstrom, “there was great concern [during the Council’s

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<sup>7</sup> In the minutes of the Church Council, Bishop Dennis A. Anderson responded to a question about whether it was consequential that *Definitions and Guidelines* be published “as a separate document” rather than as part of the constitution. He stated he preferred approval “as a separate document apart from the constitution” because “discipline is exercised better in a pastoral rather than a legalistic manner . . .” RA# 46, Ex. 1 at p. 47. Bishop E.

deliberations] that it . . . *not* be in the constitution because . . . some measure of discretion was needed” in order to deal with discipline matters pastorally on a case-by-case basis, rather than legalistically. RA #51 at pp. 228-229.<sup>8</sup>

Indeed, the introductory language in the document signals this intention that its contents not be treated as mandates but, as the name implies, as “guidelines” for the exercise of pastoral judgment: “These definitions and guidelines describe the grounds for which ordained ministers *may* be subject to discipline according to the practice of the church.” RA #36, Ex. B at p. 3. Secretary Almen explained that this use of the word “may” in *Definitions and Guidelines* was intended to highlight the importance of following the orderly process for imposing discipline outlined in chapter twenty of the Constitution.

Q. . . . “These definitions and guidelines describe the grounds for which ordained ministers may be subject to discipline.” . . . It does not say they must be subject to discipline, does it?

A. No. And the reason why that language was drafted in that way is that it didn’t represent a rush to judgment. The system requires establishment of facts before discipline is imposed. . . . To allow those provisions of – of Chapter 20 to – to be followed in an orderly way.

Transcript, RA #51 at p. 116.

Again, the policy itself states that its purpose is not to mandate certain outcomes, but “to assist” those involved in pursuing the pastoral aims of the “disciplinary processes of counseling, admonition, and correction, with the objective of forgiveness, reconciliation, and healing.” RA

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Harold Jansen “concurred” with this observation, and Chair Howe likewise affirmed the wisdom of “adopting the guidelines as a separate document . . .” *Id.* at 47-48.

<sup>8</sup> Bishop Chilstrom also described the climate of fear within which these guidelines were developed. The brand new ELCA had two or three pending matters involving gay seminarians or candidates and was experiencing a financial crisis and low morale. Chilstrom described it as “a church that is just barely standing up and it wouldn’t take much to tip it over.” Transcript, RA #51 at p. 239. The Council also engaged in “very little” biblical or theological study to inform its decision. *Id.* at p. 240. At trial Bishop Chilstrom described his own “metamorphosis,” concluding, “now I am absolutely convinced that if someone is qualified on all other grounds, and is in a faithful same-gender relationship, they should not be prevented from being pastors in our church.” *Id.* at pp. 242-243.

#36, Ex. B at p. 3. The Constitution itself protects the ability to pursue these pastoral aims by requiring a discipline hearing committee to exercise discretion in each case.

During the Church Council deliberations, Dr. Robert Marshall warned that inclusion of the phrase “are precluded” in paragraph b.4) of *Definitions and Guidelines* could lead to “legalism”—something the Council wanted to avoid. RA #46, Ex. 1 at p. 64. As Bishop Chilstrom testified, Marshall’s concern proved “prophetic” (Transcript, RA #51 at p. 242), because Bishop Warren urged, and seven DHC members agreed, that the phrase “are precluded” removes all constitutional discretion.

**DEFINITIONS AND GUIDELINES CANNOT BE USED  
TO OVERRIDE THE CONSTITUTION**

**A. Secretary Almen: The Constitution is the Supreme Authority**

It is undisputed that the Constitution is the supreme authority in the governance of the life of the church. The Rev. Lowell G. Almen, the Secretary of the ELCA, testified:

Q. ...[I]s it correct that the ELCA constitution, much like the United States Constitution, is the supreme statement, at least in a general way, as to the conduct of the life of the church, the responsibility of the church, the doings of the church, the governance of the church?

A. Yes.

Transcript, RA #51 at p. 111.

**B. Secretary Almen: To the Extent There is Conflict, the Constitution Governs**

The interpretation by seven DHC members that *Definitions and Guidelines* left them with “no choice but” removal of Pastor Schmeling is inconsistent with the testimony of Secretary Almen.

Secretary Almen was called to testify on behalf of Bishop Warren. In a series of questions, the Bishop’s counsel tried to get Secretary Almen to endorse the Bishop’s interpretation (now adopted by seven DHC members) that *Definitions and Guidelines*

“compelled” the DHC to remove Pastor Schmeling from the roster. But Secretary Almen refused to do so.

More specifically, Secretary Almen would not agree, at the behest of the Bishop’s counsel, that the established fact of a minister being a practicing homosexual would give a discipline hearing panel “only one option.” Indeed, not only did Secretary Almen refuse to endorse this interpretation. He also pointed to the constitutional discretion granted in *CBCR* 20.21.02., and stated that the discipline hearing committee would be required to “act in accord with the bylaw.”

Q. [By Bishop’s Counsel] And so, based upon the guideline, if – if the Discipline Hearing Committee were to find that that fact has in fact been established, then pursuant to the constitution, it would have *only one option* as far as the action that could be taken; is that correct?

A. In my opinion, a discipline hearing panel, if such a fact were established *would need to connect that statement with 20.21.02, and act in accord with the bylaw.*”

Transcript, RA #51 at p. 109 (emphasis added).

As Secretary Almen testified earlier, *CBCR* 20.21.02 grants a discipline hearing committee a range of options: “If it finds cause for discipline, then the discipline hearing panel needs to deal with 20.21.02 as the – the *range of its determination.*” Transcript, RA #51 at p. 107 (emphasis added). In other words, the bylaw governs over the guideline, and the hearing committee would need to “act in accord with the bylaw.” The seven members did not heed this view that the Constitution must govern.

### **THE BISHOP’S “CONSTITUTIONAL PROCESS” ARGUMENT IS UNAVAILING**

**Adoption of Guidelines Pursuant to a Constitutionally Authorized Process is Not the Same as Consistency of the Guidelines’ Content with the Constitution**

The Bishop has argued that *Definitions and Guidelines* was approved pursuant to the Constitution. There is no dispute that the Constitution authorized the Church Council to adopt

guidelines. *CBCR 20.71.* directs the Committee on Appeals to “establish definitions and guidelines, subject to approval by the Church Council . . .” But this “constitutional process” argument does nothing to avoid the due process violation in the DHC’s interpretation for one simple reason. The fact that a guideline was adopted pursuant to a constitutionally authorized process does not necessarily mean that the content of that guideline is consistent with the Constitution in every case, without regard to the specific facts.

Again, the Bishop’s “constitutional process” argument contradicts the testimony of his own witness, Secretary Almen. *Definitions and Guidelines* only has authority through the action of the Church Council. Secretary Almen explicitly testified that all delegated authority, including that delegated to the Church Council by *CBCR 20.71.*, is circumscribed by the Constitution.

The Constitution grants the Church Council “interim legislative authority.” Explaining the express limitations upon that authority enumerated in *CBCR 14.13.*, Secretary Almen stated, “the council could not act contrary to the actions and policies established by the Churchwide Assembly, and *could not act in a way that would circumvent the constitution or bylaws of this church.*” Transcript, RA #51 at p. 61 (emphasis added). Elsewhere he affirmed that “the actions of the Church Council itself are to be guided and informed by the constitution itself.” *Id.* at p. 112. Indeed, *CBCR 14.21.04.* positively requires that Church Council actions be “in accord with this church’s constitutions, bylaws, and continuing resolutions.”

These limitations on Church Council action apply to *Definitions and Guidelines.* As noted above, a nearly unanimous DHC concluded that following the constitutional standards for discipline and ministry would lead it to impose no discipline, but seven members interpreted paragraph b.4) of *Definitions and Guidelines* to supersede the Constitution, remove all

constitutional discretion, and mandate only one remedy: removal of Pastor Schmeling. Asked about the three remedies made available in the Constitution in light of this “one remedy”

interpretation of *Definitions and Guidelines*, Secretary Almen testified as follows:

Q. [D]o you concede that *to the extent that “Definitions and Guidelines ...” could be read as inconsistent with the constitution, the constitution would govern?* That is, the Church Council is not free to adopt policies inconsistent with the constitution?

A. No. That -- *that’s stated in Chapter 14.*

Q. So the answer to my question is, *it is not free, under 14.13, to adopt policies inconsistent with the constitution?*

A. *That’s correct.*

*Id.* at pp. 114-115.

Hence, the Bishop’s constitutional process argument is unavailing. Even Secretary Almen agrees that such a “process” argument cannot eliminate the due process problem with an interpretation that *Definitions and Guidelines* divests a discipline hearing committee of its constitutionally vested discretion.<sup>9</sup>

Secretary Almen also testified that any policy that purports to remove the discretion granted to a discipline hearing committee by the Constitution is constitutionally defective. In 2006 the Church Council was asked by the Metropolitan New York Synod (“MNYS”) to respond to a resolution it had drafted dealing with the subject of partnered gay clergy. As Secretary Almen testified, the Church Council expressed its concern that the MNYS resolution could be read as constitutionally defective precisely because the mandatory language of that resolution would improperly “preempt decisions of any duly constituted discipline hearing committee.” RA #36, Ex. F at p. 1. Secretary Almen testified:

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<sup>9</sup> The Churchwide Assembly is the “highest legislative authority” (*CBCR* 12.11.) and has “sole authority to amend the constitution and bylaws.” *CBCR* 12.12.h. If this Committee on Appeals affirms the conclusion that the language of paragraph b.4) can supersede the constitutional provisions on discipline, then it will have effectively permitted the Church Council to amend the Constitution in violation of the constitutional process for amendments—that is, without the required 2/3 vote of the Churchwide Assembly. *CBCR* 22.11.a., *CBCR* 22.21. As noted above, it is undisputed that the Churchwide Assembly never debated or voted on the content of *Definitions and Guidelines*.

Q. . . . [I]sn't it correct that nowhere in the Church Council's response to the New York Synod resolution does the Church Council say, "Definitions and Guidelines..." is conclusive on this matter, there is only one option when a pastor, in a committed same-gender relationship, is in such a relationship; that is, the option being removal even if effective pastoral ministering is occurring?

A. The response of the Council does not address speculative elements of any particular cases dealing with the process.

Q. Again, because of the desire not to bind, preempt, or limit discretion?

A. That's consistent, *the council would not have the authority to direct any discipline hearing panel to a particular conclusion. That – that's the responsibility of a discipline hearing panel in relation to both the plain reading of "Definitions and Guidelines..."*, and the plain reading of the applicable bylaws.

Q. *Meaning 20.21.02, which we've just been examining?*

A. *Yes.*

Transcript, RA #51 at pp. 118-119. Again, Secretary Almen pointed to the constitutional discretion of a committee under *CBCR* 20.21.02 to decide which of three possible forms of discipline it "may" impose if it finds a violation.<sup>10</sup>

### **DECISIONS BY THE COMMITTEE ON APPEALS MUST COMPLY WITH THE CONSTITUTION**

Just as actions of the Church Council must comply with the Constitution, so too must the decisions of the Committee on Appeals. Again, Secretary Almen affirmed that "the actions of churchwide committees are to be guided and informed by the constitution . . . and bylaws."

Transcript, RA# 51 at p. 113. He further testified: "Q. And that would be true of the Committee on Appeals as a churchwide committee; is that correct? A. Yes." *Id.*

#### **A. Pastor Schmeling Asks This Committee to Act as a Judicial Body, Not as a Legislative Body**

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<sup>10</sup> The Church Council's response to the MNYS resolution makes clear that the key constitutional problem is interference with a discipline hearing committee's constitutionally granted discretion. It does not matter whether that interference is in the direction of adding standards (as in the MNYS resolution) that purport to prohibit discipline from being imposed upon partnered gay clergy or in the direction of adding standards (as in paragraph b.4) of *Definitions and Guidelines*) that purport to compel that only one form of discipline (removal) be imposed.

In its decision in this case, the discipline hearing committee referred to a 1999 Committee on Appeals decision dealing with a “similar” case. The paragraph of that decision to which the DHC referred states as follows: “The Committee on Appeals is not a legislative body in this church. Accordingly, the Committee on Appeals is subject to this policy [*Definitions and Guidelines*] and is obligated to uphold it.” RA #36, Ex. I at p. 24.

This 1999 decision does not preclude the Committee on Appeals from reversing the decision of the DHC in this case. Pastor Schmeling is not asking the Committee on Appeals to act as a legislative body, to make legislative policy, or to repeal *Definitions and Guidelines*. In fact, he is asking the Committee to perform its role as the highest judicial body and to apply the existing Constitution.

The Churchwide Assembly is the highest legislative authority (*CBCR* 12.11.) and has sole authority to amend the constitution and bylaws (*CBCR* 12.21.h.). The Constitution expressly directs the Committee on Appeals to determine whether a discipline hearing committee has acted in “conformity with the governing documents” (*CBCR* 20.12.01.). Pastor Schmeling asks this Committee to apply the legislative policy reflected in the Constitution and to do what Secretary Almen testified that it must do—namely, affirm that to the extent that a guideline is interpreted or applied in a way that is inconsistent with the Constitution, then the Constitution, as the supreme authority, must govern over a guideline that is not part of the Constitution. The DHC clearly noted the conflict between what their “nearly unanimous” decision would be if they followed the provisions of the Constitution on discipline and ministry (no violation and no sanction) and the decision seven members felt “compelled” to make by their interpretation that *Definitions and Guidelines* removes all constitutional discretion and mandates only one outcome (removal of Pastor Schmeling).

This Committee must forthrightly address this conflict between explicit constitutional discretion and a guideline interpreted to remove all discretion. Seven members did not feel free to follow the Constitution. It is this Committee's constitutional responsibility to make clear to discipline hearing committees that they have both the freedom and the duty to follow the Constitution. The Constitution both requires and allows a discipline hearing committee to engage in fact-finding and prayerful discernment about whether discipline should be imposed and, if so, which of three forms of discipline to impose.

To sustain the decision of seven that a guideline can supersede the Constitution would be a clear violation of due process. Indeed, a decision by this Committee on Appeals to sustain a hearing committee's conclusion that a policy in conflict with the Constitution can override the Constitution would itself effectively amend the Constitution, without that amendment occurring by the required 2/3 vote of the Churchwide Assembly. *CBCR 22.21*.

**B. The "Due Process" Pastor Schmeling Seeks is the Constitution's Definition of "Due Process"**

In this case, the DHC stated that "the Committee on Appeals [in the 1999 case] did not set out the arguments that the pastor in that case made, so that this committee has no way to know whether they are the same as or different from the arguments made in this case." *Decision*, RA #61 at p. 11. The 1999 Committee on Appeals decision does, however, explicitly state that the pastor argued on appeal "that the DHC abused its discretion because there was *no evidence* to support the findings and determination of the DHC or because the DHC (and by extension this Committee on Appeals) *should reject this church's policy ....*" RA #36, Ex. I at p. 23, par. 1 (emphasis added). His due process arguments were based on the DHC's alleged violation of his right to remain silent (*id.* at p. 24, par. 10) and "based on the term 'due process' as used in the secular legal system" rather than as defined in the ELCA Constitution (*id.*, par. 11).

These are not Pastor Schmeling’s arguments. As set forth above, Pastor Schmeling is not asking the Committee on Appeals to repeal *Definitions and Guidelines*. Moreover, the due process argument here is based on the express definition of due process in the ELCA Constitution as “the right to be treated in conformity with the governing documents”—that is, the Constitution itself as the highest authority. Hence, the 1999 decision is not controlling.

**THE COMMITTEE ON APPEALS MUST REVERSE THE DECISION  
AND REMAND THIS MATTER TO THE DHC**

The Committee on Appeals is required to reverse or set aside the decision of the discipline hearing committee when “[d]ue process has not been followed.” *CBCR* 20.62.01.b. Seven members of the DHC have said they did not feel free to follow the Constitution. Exercising their constitutionally granted discretion as factfinders to determine the “truth of the matter” and determine “whether discipline should be imposed,” they found with near unanimity that Pastor Schmeling’s partnership did not interfere with his ministerial office. Applying chapters seven and twenty of the Constitution, they concluded with near unanimity that they would have found no violation and, exercising their constitutionally granted discretion to decide which, if any, of three forms of discipline to impose, they would have imposed no discipline. But, turning from the Constitution to the “are precluded” phrase in a “guideline,” seven felt “compelled” and left with “no choice” but to remove Pastor Schmeling. This decision to apply a guideline over the Constitution reflects just such a violation of due process.

Under *CBCR* 20.62.02.c., the Committee on Appeals is directed to “return the matter to the discipline hearing committee for further proceedings” when it determines that due process has been violated. Accordingly, this Committee should remand this matter with the instruction that the DHC is free to exercise its constitutional discretion, which *Definitions and Guidelines* cannot be used to override.

## CONCLUSION

Contrary to the conclusion of a seven-member majority that it was “compelled” and had “no choice” but to remove, the Constitution does give the discipline hearing committee two choices about Pastor Schmeling’s fate: a choice to determine whether discipline should be imposed and, if so, to decide which of three possible forms of discipline to impose. To the extent that it interpreted *Definitions and Guidelines* to eliminate its constitutionally granted exercise of discretion, its decision reflects an unconstitutional application of *Definitions and Guidelines*. Such an interpretation effectively amends the constitutional scheme for discipline when the Constitution can be amended only by a 2/3 vote of the entire Churchwide Assembly. The Constitution is the supreme authority. Neither the Church Council nor this Committee on Appeals can, by action or decision, effectively amend or supersede the Constitution to remove the discretion it expressly grants.

Respectfully submitted this 7<sup>th</sup> day of May, 2007.

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The Rev. Jane E. Fahey  
Counsel for the Rev. Bradley E. Schmeling

**CERTIFICATE OF SERVICE**

I hereby certify that I have served the foregoing Statement on Behalf of the Rev. Bradley E. Schmeling upon the following persons via email and via overnight mail this 7<sup>th</sup> day of May, 2007.

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