



authority, is the most definitive expression of the principles by which the community has agreed to be governed. As the supreme governing document, the Constitution sets the boundaries for the community's life, and is the most important precedent. The Constitution also authorizes this Committee to reverse a hearing committee's decision if due process has not been followed—*i.e.*, if an accused has not been treated in conformity with the Constitution as the supreme governing document. *CBCR* 20.62.01.b. To enforce the Constitution, as this appeal asks the Committee to do, is not to “establish church policy” (Warren Br. at 2); the Constitution is church policy, and the Committee on Appeals is the judicial body entrusted by the Constitution with the task of upholding the Constitution. As Secretary Almen has testified, in the event of a conflict between *D&G* and the Constitution, the DHC was obligated—and this Committee on Appeals is obligated—to act in accord with the Constitution. Transcript, RA #51 at 109.<sup>1</sup> If, as the Bishop argues, this Committee has no power to adjudicate the constitutionality of *D&G* as applied in this case, then the Constitution's guarantee of due process—the ability to enforce the Constitution as the supreme governing document in this church's life—will be a hollow guarantee.<sup>2</sup>

## **II. A Non-Constitutional Guideline Cannot Divest a Hearing Committee of Options Expressly Made Available by the Constitution.**

The Bishop evades a direct answer to the constitutional question central to this appeal. Implicitly, however, the Bishop contends that a non-constitutional guideline can override the Constitution and can divest a hearing committee of options explicitly granted by the Constitution—*i.e.*, the option of whether to impose

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<sup>1</sup> The church does have a right to set standards for ministry. In its work on *D&G*, the Church Council could have proposed that a standard precluding practicing homosexuals from ordained ministry be placed in the Constitution itself. That course of action would have avoided the question of conflict with the Constitution raised by this appeal. As Bishop Chilstrom testified, however, the Church Council expressly chose not to include these standards in the Constitution. Transcript, RA #51 at 228-229.

<sup>2</sup> The Bishop's position leads to absurd consequences. Assume, for example, that the Church Council chose, through a “validly promulgated and duly enacted” revision of *D&G*, to “explicate” the offense of “conduct incompatible with the ministerial office” with the following provision: “Persons who divorce and remarry are precluded from the ordained ministry of this church.” According to the Bishop, a discipline hearing committee would be “compelled” to remove a divorced pastor who had remarried even if it found that the remarriage had not impeded the effective proclamation of the gospel or right administration of the sacraments. As in this case, such an application of a non-constitutional guideline would violate due process by divesting a hearing committee of its constitutionally granted options to determine, based on the facts, whether discipline should be imposed and whether censure or suspension might be more appropriate than removal. But under the Bishop's “lack of power” argument, this Committee would be required to affirm removal, and would have to leave any corrective action to the “legislative process” rather than rule on the consistency of the guideline with the Constitution.

discipline based on the facts as found (*CBCR* 20.21.21.) and the option to select among three potential remedies (*CBCR* 20.21.02.). The Bishop admits that “[t]he text of *CBCR* § 20.21.02 *provides a hearing committee with a choice of three possible disciplinary actions.*” Warren Br. at 4 (emphasis added). The Bishop then contradicts himself by asserting, without any supporting authority, that “the *CBCR* does not require that every one of the three possible disciplinary actions be available in every case.” *Id.* This position is flatly refuted by (1) the plain language of the Constitution, (2) this Committee’s previously expressed understanding of the constitutional scheme, and (3) the unrebutted testimony of Secretary Almen.

First, *CBCR* 20.21.02. does not state that the hearing committee may consider three options “in some cases,” but not others. One searches the text in vain for any such qualification. Second, this Committee itself has recognized that a discipline hearing committee has three options in all cases:

The Committee on Appeals recognizes that *removal from the roster is but one of three options available in disciplinary proceedings*, depending upon the circumstances, seriousness, and egregiousness of such behavior. *These options allow discretion* as to which type of disciplinary processes and action may best serve the “effective extension of the Gospel,” this church, and the parties involved.

RA #36, Ex. H (1997 Report) at 37, ¶ 7 (emphasis added). The Bishop confuses the constitutional availability of the three options with a judgment concerning the appropriateness of a particular option based on the facts of an individual case. The latter judgment can be reviewed on appeal for an abuse of discretion.<sup>3</sup> But a non-constitutional guideline cannot completely eliminate from a hearing committee’s consideration in the first instance the availability of the constitutionally granted options. At the Bishop’s urging, seven DHC members interpreted paragraph b.4) to do just that: to eliminate from the outset any option but removal of Pr. Schmeling, without regard to whether Pr. Schmeling’s partnership impaired his ministry and without regard to whether censure or suspension would serve “the ultimate ‘objective’ of disciplinary processes and action [namely] ‘forgiveness, reconciliation, and healing’” (*id.*) more appropriately than would removal.

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<sup>3</sup> Contrary to the Bishop’s mischaracterization, Pr. Schmeling is not arguing that a hearing committee’s discretion cannot be abused. Pr. Schmeling argues that it violates due process to prevent the discipline hearing committee from even considering in the first instance the range of constitutional options in *CBCR* 20.21.21. and 20.21.02. (censure, suspension, or removal), which (as Secretary Almen testified) a discipline hearing committee must consider. Transcript, RA #51 at 107. The guideline in paragraph b.4) violates due process if construed to mandate only one option (the most extreme: removal) when the Constitution permits other options, just as it would violate due process if a jury were instructed that a death sentence was the only option when a state’s constitution granted the options of life without parole or death. In this case, the hearing committee had no chance to abuse its discretion because it was told, and 7 members concluded, that it had no discretion.

Third, Secretary Almen expressly refuted the Bishop’s contention that a guideline can divest a hearing committee of its constitutionally granted 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 107 (emphasis added).)
- If a hearing committee finds that a minister is a practicing homosexual, then *it does not have “only one option” but must “connect that [fact] with 20.21.02, and act in accord with the bylaw.”* (*Id.* at 109.)
- “[T]he [Church] *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 the plain reading of Definitions and Guidelines and the plain reading of the applicable bylaws,” including 20.21.02. (*Id.* at 118-119.)

The Bishop makes no attempt to address Secretary Almen’s unrebutted testimony.<sup>4</sup>

### **III. There Is No Controlling Committee on Appeals Decision Precluding Reversal.**

The Bishop attempts to convey the inaccurate impression that this Committee has repeatedly upheld the disputed language of paragraph b.4). This Committee has reviewed only one case involving a gay pastor. That 1999 decision is not controlling because, as the Bishop admits, the Committee was not asked to address and did not rule on the specific constitutional question presented by Pr. Schmeling—namely, whether paragraph b.4) as interpreted and applied by 7 DHC members conflicts with the Constitution: “*The Committee did not ‘look behind’ the policy to determine . . . whether it conflicted with the CBCR.*” Warren Br. at 10 (emphasis added). Contrary to the Bishop’s argument, the pastor in the 1999 case made different due process arguments those the one Pr. Schmeling makes. Those different due process arguments were that the hearing committee had violated both (1) his due process right under *CBCR* 20.12. “to remain silent,” and (2) the “secular legal system” definition of due process. RA #36, Ex. I (1999 Report) at 24, ¶¶ 10-11. Nothing in the 1999 decision indicates that the pastor argued, as does Pr. Schmeling, that the “are precluded”

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<sup>4</sup> The Bishop erroneously states (Warren Br. at 10-11) that the Church Council’s only constitutional concern in 2006 with the Metropolitan New York Synod resolution was the lack of synod authority to set standards for ministry rather than the Churchwide Assembly. As the Church Council explained, an additional constitutional defect was the effort to preempt a discipline hearing committee’s exercise of discretion: “[S]ynods do not have the authority to adopt their own policies and guidelines for discipline, *nor . . . authority to preempt decisions of any duly constituted discipline hearing committee.* . . . The resolution may be read as attempting to limit the basis for filing charges and to preempt any future decision of a discipline hearing committee . . . It may be read as seeking to preempt or add new standards for bringing charges or for decisions of discipline hearing committees.” RA #36, Ex. F at 1, 5, 7, 9 (emphasis added).

phrase in paragraph b.4) conflicts with the Constitution when construed to remove the constitutional options specifically granted in *CBCR* 20.21.21. and 20.21.02. The constitutional question presented by Pr. Schmeling is a question of first impression for this Committee.

The Bishop also erroneously contends that this Committee's 1997 decision "control[s] the outcome here." Warren Br. at 10. The 1997 decision does not even involve the disputed language of paragraph b.4), but an "abuse of a position of power and trust for sexual purposes" by a married pastor who engaged in adultery with an intern he supervised. RA #36, Ex. H (1997 Report) at 37, ¶ 6. The Committee found an abuse of discretion for two reasons: (1) the hearing committee treated the case as involving only adultery, ignoring the abuse of trust and two prior cases removing pastors who pursued sexual relationships with minors (1993) and with parishioners being counseled (1995) (*id.* ¶ 7), and (2) it ignored the Committee's 1993 ruling that the Constitution "has no statute of limitations" on sexual abuse charges. *Id.* at 38, ¶ 9. Pr. Schmeling was not charged with sexual abuse. As the DHC found: "Those cases [of abusive or exploitative behavior] are as different from the case of Bradley E. Schmeling as night is from day." RA #61 at 14.

#### **IV. Pr. Schmeling Has Not Argued for "Unlimited Discretion" or Challenged the Entire *D&G* Policy As "Invalid."**

Bishop Warren also sets up "straw man" arguments. First, Pr. Schmeling does not contend that a discipline hearing committee has "unlimited" or "unfettered discretion." Warren Br. at 4, 6. The Constitution itself sets the boundaries of the committee's discretion. Pr. Schmeling merely asks that the committee be permitted to exercise (rather than be prevented from exercising) its discretion within those boundaries; that decision can then be reviewed for abuse of discretion. Second, Pr. Schmeling has not attacked the entirety of *D&G* as an "invalid policy." *Id.* at 2. As stated in his opening brief at 2, "Pastor Schmeling does not contend that a discipline hearing committee can never remove a pastor in a homosexual relationship."<sup>5</sup> Pr. Schmeling's argument is narrower: that it violates due process to apply this guideline to mandate removal when, applying chapters 20 and 7 of the Constitution, the DHC as fact finder has found that

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<sup>5</sup> A discipline hearing committee could constitutionally apply paragraph b.4), for example, to remove a homosexual pastor found to have engaged in a series of promiscuous "one-night stands." In legal parlance, Pr. Schmeling's challenge is not that the policy is unconstitutional on its face (that is, that there are no circumstances under which it can be constitutionally applied), but unconstitutional as applied under the facts as found in this case.

the relationship has not impeded effective ministry and that removal is not an appropriate remedy under those facts.

### CONCLUSION

As construed and applied by 7 DHC members, paragraph b.4) of *D&G* divests a hearing committee of the constitutionally granted options to determine whether discipline should be imposed (*CBCR* 20.21.21.) and whether censure, suspension, or removal (*CBCR* 20.21.02.) best serves the pastoral aims of discipline. Because the Constitution is the supreme governing document in the life of this Church and the actions of every church body are constrained by that document, this Committee must *reverse* the hearing committee's conclusion that it had "no choice" but removal of Pr. Schmeling and must *remand* for further proceedings. *CBCR* 20.62.02.c.

Respectfully submitted this 1<sup>st</sup> day of June, 2007.

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