

Decision of the Committee on Appeals

The Committee on Appeals met in Chicago, Illinois, on June 9-10, 2007, to consider whether or not the decision of a discipline hearing committee constituted to consider charges against an ordained minister, Pastor Bradley E. Schmeling, (the accused pastor), should be reversed by the Committee on Appeals, and, if so, whether or not the Committee on Appeals shall render its own decision, which decision shall be final and unappealable. The decision the discipline hearing committee rendered with regard to Pastor Schmeling was that the accused pastor “be removed from the clergy roster of the ELCA, effective August 15, 2007.”

In addition to making this decision to remove Pastor Schmeling from the clergy roster, the discipline hearing committee went on in the Determination section of its decision to suggest that two documents of the ELCA, *Definitions and Guidelines for Discipline (Definitions and Guidelines)* and *Vision and Expectations-Ordained Ministers of the Evangelical Lutheran Church in America (Vision and Expectations)*, “may very well violate the constitution and bylaws of this church.” Moreover, at the conclusion of its Determination section, the discipline hearing committee offered three substantive “suggestions to the assemblies of the synods of this church, and to the Churchwide Assembly itself.” These “suggestions” can be summarized as follows: that the synod assemblies memorialize the Churchwide Assembly, and the Churchwide Assembly act to request that the Church Council, the Conference of Bishops, and/or the appropriate churchwide unit, pursuant to the authority granted by the ELCA Constitution and Bylaws, 1) reconsider and revise *Definitions and Guidelines* and *Visions and Expectations* to remove the language precluding practicing homosexuals from service as ordained ministers of this church, and 2) reconsider and revise the policy on reinstatement to permit immediate reinstatement of those pastors who have resigned or have been removed from the rosters of this church solely because they have entered into “a loving, lifelong partnership with another person of the same sex that is mutual, chaste, and faithful.”

Pastor Schmeling appealed the decision of the discipline hearing committee and asked the Committee on Appeals to reverse that decision on the following grounds: the discipline hearing

committee abused its discretion and that due process was not followed. The Rev. Ronald B. Warren, Bishop of the Southeastern Synod (the Bishop), filed a cross appeal and sought a reversal of only that portion of the discipline hearing committee's decision that (1) effectively granted a stay of its decision regarding removal until August, 15, 2007, (2) stated that *Guidelines for Discipline* and *Vision and Expectations* "may very well violate the constitution and bylaws of this church," and (3) made policy suggestions to the synods and Churchwide Assembly.

After careful review of the material contained in the record on appeal, the briefs and other materials submitted by the parties, the relevant governing documents of this church, the prior reports of this committee, and extended discussion, the Committee on Appeals decided as follows:

- (1) by a vote of ten (10) to one (1) (and one (1) abstention) upheld the decision of the discipline hearing committee to remove Pastor Schmeling (the accused pastor) from the clergy roster of the Evangelical Lutheran Church in America (ELCA);
- (2) by a vote of ten (10) to two (2) reversed the discipline hearing committee's decision to stay the effective date of Pastor Schmeling's (the accused pastor's) removal from the roster of ordained ministers of the ELCA until August 15, 2007; and
- (3) by a vote of ten (10) to two (2) determined that the effective date of Pastor Schmeling's (the accused pastor's) removal from the roster of ordained ministers of the ELCA is July 2, 2007, the date the Committee on Appeals issued its written decision.

The Committee on Appeals takes this occasion to make the following comments with regard to its decision:

1. As previously stated by the Committee on Appeals in its decision published in the 1997 Pre-Assembly Report, "While great deference and respect must be given to the decision of a discipline hearing committee, the Committee on Appeals is entrusted with the authority to review and rule upon the substance of such decisions in order to preserve the continuity and

uniformity of this church's disciplinary actions. A discipline hearing committee is in a better position to assess the credibility of witnesses who appear before it and to weigh the evidence. However, the Committee on Appeals has the advantage of being able to study the written record on appeal, in its entirety, to evaluate the written decision of a discipline hearing committee, and to utilize the written briefs submitted on behalf of the parties involved, all over a longer period of time." Additionally, the Committee on Appeals has the opportunity to review and consider the prior decisions of the Committee on Appeals, the precedential authority of the ELCA in disciplinary matters.

2. To this end, the Committee on Appeals, governed by 20.60 of the Constitution, Bylaws and Continuing Resolutions of the ELCA (CBCR) and CBCR 20.62.01 in particular, must sustain (uphold) the decision of a discipline hearing committee unless one of four conditions exists:

- a. The discipline hearing committee abused its discretion;
- b. Due process was not followed;
- c. New evidence was submitted after the discipline hearing committee made its decision;
- d. The record of the proceedings before the discipline hearing committee was insufficient to permit the Committee on Appeals to determine whether or not the discipline hearing committee abused its discretion or followed due process.

For purposes of this appeal, subsection a. relating to abuse of discretion is at issue. CBCR 20.62.01.a. provides:

The discipline hearing committee may not be found to have abused its discretion unless at least one of the following is true:

- 1) The discipline hearing committee's Determination was not supported by any evidence in the record.
- 2) One or more of the discipline hearing committee's Findings of Fact is clearly erroneous.

- 3) Although the Findings of Fact are not clearly erroneous, the discipline hearing committee's Determination is nevertheless one with which no reasonable person, acting objectively, could agree. The committee's Determination may not be reversed simply because the Committee on Appeals, had it been the discipline hearing committee, would have reached a different conclusion. The discipline hearing committee's Determination must be sustained if reasonable people can disagree as to its propriety.

3. Although neither removing a pastor from the clergy roster of the ELCA because he/she is engaged in homosexual sexual conduct nor relying on *Definitions and Guidelines* and *Vision and Expectations* as support for removal is new, the specific arguments presented by Pastor Schmeling in his appeal have not been considered in earlier disciplinary hearings or appeals.

4. To understand Pastor Schmeling's arguments in this case, one must be familiar with *Definitions and Guidelines for Discipline*. This is a policy document of the ELCA that was created pursuant to CBCR 20.71.11, which mandated the Committee on Appeals to "establish definitions and guidelines, subject to approval by the Church Council, to enable clear and uniform application of the grounds for discipline." *Definitions and Guidelines* was originally approved by the Church Council on November 19, 1989, and has been in existence ever since.

Definitions and Guidelines provides that one of the grounds for discipline of ordained ministers is engaging in "conduct incompatible with the character of the ministerial office." There are eight (8) sub-categories of behavior that are considered to be conduct incompatible with the character of the ministerial office. The fourth sub-category is what is at issue here, and it is entitled "sexual matters." It provides as follows:

"The biblical understanding which this church affirms is that the normative setting for sexual intercourse is marriage. In keeping with this understanding, chastity before marriage and fidelity within marriage are the norm. Adultery, promiscuity, the sexual abuse of another, or the misuse of counseling

relationships for sexual favors constitute conduct that is incompatible with the character of the ministerial office.

Practicing homosexual persons are precluded from the ordained ministry of this church.” (emphasis added)

The essence of Pastor Schmeling’s arguments is that the discipline hearing committee was in error when it relied solely on Section b.4 of *Definitions and Guidelines* (detailed in bold above) and found that it had only one choice for discipline in this case, removal from the clergy roster of a pastor found to be engaged in homosexual sexual conduct in a committed relationship. Rather, Pastor Schmeling argues than the ELCA Constitution, specifically CBCR 20.21.02, provides for three possible disciplinary choices:

- 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.

Thus, Pastor Schmeling argues that the discipline hearing committee abused its discretion by finding that it had only one disciplinary action to choose from when the ELCA Constitution, in fact, provides for three.

Pastor Schmeling further argued that *Definitions and Guidelines* is a policy guideline that is in conflict with the ELCA Constitution and, to the extent that *Definitions and Guidelines* limits the discretion of a discipline hearing committee, the accused pastor’s due process rights as provided for in Section 20.62.01.b of the ELCA constitution have been violated.

5. The arguments advanced by the parties to this appeal required the Committee on Appeals to consider several provisions of CBCR and policy documents of the ELCA in relation to each other.

- CBCR 20.21.02 provides for three disciplinary actions which may be imposed by a discipline hearing committee: private censure, suspension for a period of time, and removal from the ordained ministry of this church.
- CBCR 7.22, 7.31 and the accompanying bylaws establish the standards for becoming and remaining an ordained minister of this church. None of these provisions include language precluding practicing homosexuals from ordination. CBCR 7.31.11, however, provides: “Persons admitted to and continued in the ordained ministry of this church shall satisfactorily meet and maintain the following, *as defined by this church in its governing documents and in policies developed by the appropriate churchwide unit, reviewed by the Conference of Bishops, and adopted by the Church Council:...*” (emphasis added)
- Similarly, CBCR 20.21.01 provides the grounds which subject an ordained minister to discipline in this church, but does not specifically list engaging in homosexual sexual conduct as a ground for discipline. CBCR 20.21.01.b., however, sets forth one of the grounds for discipline as engaging in “*conduct incompatible with the character of the ministerial office.*” (emphasis added) Examples of conduct that is considered to be incompatible with the character of the ministerial office is more fully described in section b. of *Definitions and Guidelines*.
- Two policy documents of this church do speak directly to homosexual sexual conduct. Section III of *Vision and Expectations of Ordained Ministers in the ELCA* (The Ordained Minister As Persons and Example) has a section that deals with sexual conduct and provides as follows: “**Ordained ministers who are homosexual in their self-understanding are expected to abstain from homosexual sexual relationships.**” (emphasis added) Similarly, *Definitions and Guidelines for Discipline* sets forth in paragraph b. “conduct incompatible with the character of the ministerial office.” Under this heading, there is a paragraph regarding “Sexual

Matters,” that provides “[p]racticing homosexual persons are precluded from the ordained ministry of this church.” (emphasis added)

6. Policy documents of this church that are adopted in conformity with the processes and authority provided for in the CBCR come with a presumption of their constitutional validity. Any individual who argues during the disciplinary process that said policy documents of this church are unconstitutional, or in conflict with the CBCR, has an enormous burden of proof to demonstrate the unconstitutionality¹ of said policies. Additionally, individual provisions contained in the CBCR can not be read in isolation of each other; rather, the document must be read together as a whole. Moreover, policy documents of the ELCA that have been adopted in conformity with the processes specified in the CBCR must also be read in connection with the CBCR, such that the CBCR and these policy documents must not be considered in isolation but as a whole set of complimentary documents.

7. CBCR 20.71.11 mandates that the Committee on Appeals “establish definitions and guidelines, subject to approval by the Church Council, to enable clear and uniform application of the grounds for discipline” in each category enunciated in CBCR 20.21.01. *Definitions and Guidelines* was recommended by the Committee on Appeals and adopted by the Church Council in November 1989. The Committee on Appeals notes that this document, including the clause precluding practicing homosexual persons from the ordained ministry, has been in existence for more than seventeen years.

Vision and Expectations was reviewed by the Conference of Bishops and adopted by the Church Council in October 1990. As the Committee on Appeals stated in its decision published in the 1999 Pre-Assembly Report: “[w]hile Definitions and Guidelines and Vision are used in different settings, they reflect consistently the same policy position of this church insofar as homosexual sexual conduct by ordained ministers is concerned. Thus each of these policy

¹ Even if a duly adopted policy appears to be in conflict with the ELCA Constitution, the CBCR does not expressly grant authority to a discipline hearing committee to ignore such policies, nor is it apparent that even the Committee on Appeals would have such authority to do more than identify and recommend to an appropriate legislative body of the ELCA that it address the perceived conflict. However, since this Committee does not find any such conflict in this case, we need not decide this issue.

documents informs the other.” Paragraph 2 of the same report notes that *Definitions and Guidelines* “explicates ‘conduct incompatible with the character of the ministerial office’ as well as other grounds for discipline.”

8. “Due process” as defined in CBCR 20.12 means “...the right to be treated with fundamental procedural fairness.” “Fundamental procedural fairness,” defined in CBCR 20.12.01, means and includes “...the right to be treated in conformity with the governing documents” of this church. The “governing documents” of this church include the CBCR and policy documents adopted pursuant to and in conformity with the grant of authority of the CBCR. The Committee on Appeals sees no conflict between these policy statements and the provisions of the CBCR. Although 20.21.02 provides in general for three possible disciplinary actions, that provision relates to a wide range of conduct subject to disciplinary processes and does not mean that all three actions are appropriate in every situation. *Guidelines for Discipline* and *Vision and Expectations* restate the position of this church and the predecessor church bodies.

9. To the extent that the discipline hearing committee followed the policy guidelines set forth by this church in its governing documents—CBCR, *Vision and Expectations*, and *Definitions and Guidelines*, it did not abuse its discretion nor was due process denied Pastor Schmeling. To hold otherwise would leave this church with no “clear and uniform application of the grounds for discipline.” (CBCR 20.71.11) Though the Committee on Appeals recognizes that members of this church have differing views regarding the wisdom of this policy, it is nonetheless the current policy of this church and must be upheld so that all clergy and other rostered persons know what behavior is and is not permissible in this church.

10. Even though the discipline hearing committee’s decision was issued on February 7, 2007, the discipline hearing committee chose to set August 15, 2007, as the effective date of its determination that Pastor Schmeling be removed from the clergy roster. CBCR 20.21.22 and 20.61.B95 authorizes the **Committee on Appeals** to grant a stay of a discipline hearing

committee's decision pending an appeal to the Committee on Appeals by either party to the disciplinary proceedings. Nowhere in the CBCR is a discipline hearing committee authorized to stay its own decision.

Three CBCR provisions are relevant to this issue. First, CBCR 20.21.21 requires the discipline hearing committee to render its decision in writing in two parts: Findings of Fact and Determination. Second, CBCR 20.21.21.b provides that, with respect to the Determination section, "...the committee shall 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." Third, CBCR 20.21.22 sets forth that **"the decision of the Discipline Hearing Committee shall be final on the date it is issued by the committee."** (emphasis added)

The determination by the discipline hearing committee in the instant case was that Pastor Schmeling be removed from the clergy roster of the ELCA. By setting the effective date of its decision to August 15, 2007, in contemplation of action at the 2007 ELCA Churchwide Assembly and well beyond the February 7, 2007 issuance date of the discipline hearing committee's decision, the discipline hearing committee effectively granted a *de facto* stay. Having done so, the discipline hearing committee acted beyond the scope of its authority to make Findings of Fact and a Determination of discipline in light of those facts. In this regard, the Committee on Appeals determines that the effective date of Pastor Schmeling's removal from the clergy roster of the ELCA, without more,² should have been February 7, 2007.³

Therefore, in accordance with the requirements of CBCR 20.62.02.b., the Committee on Appeals has rendered its own decision determining the effective date of Pastor Schmeling's

² In his Notice of Appeal, Pastor Schmeling requested that the briefing schedule for his appeal begin after the 2007 Churchwide Assembly. Bishop Warren requested a briefing schedule that began prior to the 2007 Churchwide Assembly. Pursuant to CBCR 20.61.A92.h, the chair of the Committee on Appeals set a briefing schedule that differed from the request of either party. Pastor Schmeling also requested that his removal date from the roster be stayed while his appeal remained pending. That request was not addressed by the Committee on Appeals, as it was moot due to the fact that the discipline hearing committee had already improperly granted him a stay.

³ The Committee on Appeals does not suggest that a discipline hearing committee's determination that a pastor be removed from the clergy roster automatically happens upon the date the discipline hearing committee issues its decision (unless, of course, there is no appeal or no request to the Committee on Appeals for a stay). Clearly, CBCR and the rules promulgated there under for filing and prosecuting appeals specify the time for perfecting an appeal, contemplates a request for stay of a decision, submission of briefs, a hearing by the Committee on Appeals, as well as the preparation and issuance of the Committee on Appeals' decision, which is final and unappealable.

removal from the clergy roster of the Evangelical Lutheran Church in America. That date shall be July 2, 2007, the date the Committee on Appeals issues its written decision, which is final and unappealable.

11. Finally, though the legislative “suggestions” that the discipline hearing committee made at the conclusion of its Determination section did not affect the decision made by the discipline hearing committee, the Committee on Appeals nevertheless feels compelled to comment on the appropriateness of a discipline hearing committee making substantive policy “suggestions” to the legislative bodies of the church. The Committee on Appeals takes no position regarding the particular content of the legislative or policy suggestions at issue here. Rather, the Committee on Appeals is simply addressing the appropriateness of a discipline hearing committee making legislative or policy suggestions in general.

As previously stated, CBCR 20.21.21 requires that a discipline hearing committee’s written decision contain two parts: 1) Findings of Fact, and 2) Determination. In the Findings of Fact section, the discipline hearing committee is to detail, after hearing all of the evidence, what it has found to be the relevant facts, or what it believes to be the truth of the matter. In the Determination section, the discipline hearing committee is 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.” Discipline hearings committees and the Committee on Appeals serve as judicial bodies. The legislative authority to change policies rests with the Churchwide Assembly and the Church Council. Nothing in the CBCR allows a discipline hearing committee to make any particular policy recommendations to the legislative bodies of this church urging them to take a specific policy action. By doing so in this case, the discipline hearing committee exceeded the authority granted to it by the ELCA Constitution.

Moreover, the discipline hearing committee seemed to think that a prior decision of the Committee on Appeals (printed in the 1995 Pre-Assembly Report) gave them the authority to make such policy suggestions. However, the policy suggestions made in this prior case related to the development of policy guidelines to help guide congregations, bishops, consultation committees and synod councils. These suggestions grew out of facts for which there was

uncertainty as to how to proceed. These suggestions did not attempt to set the direction for the policy guidelines, as do the suggestions in this case. Moreover, the suggestions in the prior case related to non-existing policy guidelines, as opposed to clearly developed policies that have been in existence for many years and represent the long standing policy of the ELCA and its predecessor church bodies.

Additionally, the policy suggestions made in the prior case were set forth by the Committee on Appeals, not the discipline hearing committee. The CBCR requires the *Committee on Appeals* to submit a summary of its decisions to the churchwide assembly. “The Committee on Appeals serves this church as it reviews and rules upon the substance of discipline hearing committee decisions in order to preserve the continuity and uniformity of this church’s disciplinary actions. Because the Committee on Appeals reports to the Churchwide Assembly, its decisions become part of the record of this church and thus provide valuable guidance both to future discipline hearing committees and to the Committee on Appeals itself. While a decision of the Committee on Appeals is always final with respect to the particular matter being adjudicated, the report to the Churchwide Assembly provides the opportunity for revision of the Constitution, Bylaws and Continuing Resolutions by the Churchwide Assembly or of the other documents governing the discipline process by the Church Council, if such be the will of this church.” (1997 Pre-Assembly Report of the Committee on Appeals.)

12. In conclusion, after careful review of the material contained in the record on appeal, the briefs and other materials submitted by the parties, the relevant governing documents of this church, the prior reports of this committee, extended discussion, and the opinion and rationale detailed above, the Committee on Appeals decides as follows:

Pastor Schmeling shall be removed from the clergy roster of the Evangelical Lutheran Church in America (ELCA), effective July 2, 2007, the day the Committee on Appeals issues its written decision, which is final and unappealable.

Dated: July 2, 2007

Signed: /s_____

COMMITTEE ON APPEALS

The Rev. Glenn Nycklemoe, Chair