

COMMITTEE ON APPEALS
EVANGELICAL LUTHERAN CHURCH IN AMERICA

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

**BISHOP WARREN’S BRIEF IN RESPONSE
TO PASTOR SCHMELING’S APPEAL**

Bishop Ronald B. Warren, by and through his undersigned representatives, respectfully submits this brief in response to the appeal by Pastor Schmeling in this matter.

Introduction and Summary of Argument

After a full and complete hearing over five days, taking testimony from nineteen witnesses and receiving extensive documentary evidence, the Discipline Hearing Committee of the Southeastern Synod (“DHC”) determined that Pastor Schmeling should be removed from the roster of ordained ministers. The DHC found that the ELCA’s policy precluding partnered gay and lesbian persons from serving as ordained ministers is the “specific juridical authority for this case,” that Pastor Schmeling had violated this policy, and determined that, to be faithful to its duties and the applicable policy, Pastor Schmeling should be removed from the roster. Respondent Bishop Warren asks this Committee to *affirm* these findings, and this determination, by the DHC.¹

On appeal, Pastor Schmeling raises one issue. Did the DHC violate the due process promised the accused in the ELCA’s Constitution, Bylaws and Continuing Resolutions (“CBCR”) by applying the mandatory policy in *Definitions and Guidelines for Discipline* to preclude partnered

¹ The DHC also made certain “suggestions” that are addressed in the cross-appeal.

gay clergy from serving as ordained clergy instead of exercising discretion in deciding whether discipline is warranted, and if so what disciplinary action to impose, as provided under the CBCR? See CBCR § 20.21.022; § 20.21.21

Pastor Schmeling's appeal asks this Committee to reverse the determination of the DHC because it applied what he claims is an invalid policy to reach what the DHC considered to be a mandatory outcome. In so doing, Pastor Schmeling asks this Committee not only to turn the CBCR on its head by having this Committee rather than the legislative bodies of the church establish church policy, but also asks this Committee to ignore the fact that the policy at issue is required by CBCR § 20.71.11, was duly approved by the ELCA Church Council in 1989 and 1993, and has been consistently re-affirmed and applied by this Committee over the past eighteen years. See, e.g., RA# 36, Ex. B (Definitions & Guidelines) fn. 1, at 3; RA# 36, Ex. I (1999 Report) ¶ 13 at 24.²

In contrast, Bishop Warren asks this Committee to affirm the basic determination by the DHC that Pastor Schmeling should be removed from the ELCA roster of clergy. There are three overlapping reasons to affirm the DHC's determination of discipline. First, under the facts presented, the DHC properly followed the valid and binding policy of *Definitions and Guidelines*. Second, the mandatory policy is an expression of long-held beliefs and practices in U.S. Lutheranism, which this Committee should (again) affirm, unless or until the legislative bodies of this church decide to change the policy. Third, application of the mandatory policy is required by the principles of organization for ministry in the ELCA and is consistent with Lutheran ecclesiology.

² Pastor Schmeling's argument on appeal was presented to the DHC at his representative's closing argument, RA# 55 (Tr.) at 1135-44, addressed by Bishop Warren's representative at closing argument, RA# 55 (Tr.) at 1171-80, and rejected by the DHC's decision.

ARGUMENT

I. THE DISCIPLINE HEARING COMMITTEE PROPERLY FOLLOWED THE ELCA'S BINDING, MANDATORY POLICY.

The *Definitions and Guidelines* policy was properly enacted by this church and applied by the DHC consistent with its purpose.

A. The *D&G* Policy Was Duly Enacted By The ELCA Church Council.

One possible issue can be put to rest easily. Pastor Schmeling and Bishop Warren agree that the CBCR “authorized the Church Council to adopt guidelines” for the disciplinary process. Schmeling Brief at 12-13. As Pastor Schmeling also stated in his brief, the “guideline was adopted pursuant to a constitutionally authorized process.” *Id.* at 13 (emphasis in original); see RA# 51 (Almen Tr.) at 73-74; RA# 52 (Chilstrom Tr.) at 367-68; RA# 53 (Fredrickson Tr.) at 659.

Under the CBCR, this Committee was directed to draft *Definitions and Guidelines* for approval by the Church Council. CBCR § 20.71.11. *Definitions and Guidelines* was deliberately drafted so that the grounds for discipline it detailed would correspond directly to the five categories of conduct which the CBCR specified would make ordained ministers “subject to discipline.” CBCR § 20.21.01. Or, as this Committee more succinctly put it, *D&G* “explicates” the Bylaws standards. RA. # 36, Exhibit I (1999 Report) ¶ 2 at 23; *Rules Governing Disciplinary Proceedings* (approved by the Church Council on April 9, 2005) at Rule B2. The clarity and uniformity in *D&G* are intended to and actually provide “fairness in the application of discipline.” RA# 51 (Almen Tr.) at 67.

The specificity and mandatory nature of the policy at issue was no accident. The ELCA Church Council, in adopting *Definitions and Guidelines* in November 1989, manifestly intended the effect of the guideline at issue to be to create a clear, uniform and unequivocal standard for ELCA ordained ministers. As the Minutes of that Church Council meeting indicated:

Bishop Chilstrom urged that, if the substitute motion were to prevail, the council reaffirm the previous understanding of the Conference of Bishops that “this church cannot and will not include among its ordained ministers practicing homosexual persons.”

RA# 46, Ex. 2 (11/89 Minutes) at 64; *cf.* RA# 51 (Chilstrom Tr.) at 237 (“I supported the adoption of *D&G*”), 239 (“... so that we give the church some confidence that we are going to – going to abide by some standards”). Bishop Chilstrom agreed that “the language [of *D&G*] relative to the conduct at issue in this case was particularly emphatic in prohibiting it.” RA# 52 (Chilstrom Tr.) at 351.

There is no dispute that the policy was duly enacted by the Church Council and that it was intended to direct one disciplinary result: preclusion from service on the roster of ordained ministers of this church.

B. Appellant Misconstrues “Discretion”.

Despite the clarity of the language and the firmness of the Church Council’s intent, Pastor Schmeling contends that under the CBCR the DHC must have unlimited “discretion” to choose the disciplinary result. But the concept of “discretion” advanced by Pastor Schmeling bears no relation to the concept of “discretion” as found in the ELCA’s Constitution and Bylaws, nor as applied by this Committee, nor any ordinary understanding of the term.

The language of the CBCR itself contemplates that a hearing committee’s discretion can be limited regarding the disciplinary actions it can impose. The text of CBCR § 20.21.21.b allows a DHC “based upon the facts it has found” to state “whether ... it believes discipline should be imposed and, if so, what discipline ... to impose.” The possible “disciplinary actions” related to ordained ministers are in turn specified by CBCR § 20.21.02. The text of CBCR § 20.21.02 provides a hearing committee with a choice of three possible disciplinary actions. The CBCR does not require that every one of the three possible disciplinary actions be available in every case. The

text merely says that three possible disciplinary actions “may be imposed” by a hearing committee. CBCR § 20.21.02. Plainly, there are circumstances where the CBCR contemplate that all three disciplinary actions might be appropriate; but there are also circumstances where all three disciplinary actions would not be appropriate. For example, in the CBCR, the disciplinary action of “suspension” is allowed for a designated period of time or “until there is satisfactory evidence of repentance and amendment.” CBCR § 20.21.02.b. Thus, “suspension” might be an appropriate disciplinary action for a minister found to have been “preaching or teaching in conflict with the faith confessed by this church” if that minister provided “evidence of repentance and amendment.” See RA# 36, Ex. B (Definitions & Guidelines) ¶ a, at p. 3 (specifying this conduct as a ground for discipline). But clearly suspension would not be an appropriate disciplinary action if that minister converted to another religion and refused to repent or amend the complained of conduct.

The CBCR further limits a hearing committee’s discretion by providing a method for reversing a hearing committee determination when it constitutes an abuse of discretion. CBCR § 20.62.01. In this fashion, the CBCR recognizes that the discretion provided to hearing committees is not unfettered, that discretion is *not* the same as “absolute freedom.” If it were, then a hearing committee could not abuse its discretion, nor could its determination be reversed for abusing its discretion. But the CBCR do specify limits on hearing committee discretion, and detail the circumstances when that determination should be reversed because that limited discretion was abused. Indeed, the ELCA Bylaws provide detailed guidance for this Committee in determining what constitutes an “abuse of discretion.” CBCR § 20.62.01.a.³ There would be no point in having a Committee on Appeals review, nor any appellate process, if a disciplinary hearing committee’s discretion were absolute, unfettered and final. Pastor Schmeling’s position would make the “abuse

³ The Bylaw defining “abuse of discretion” is co-equal with the Bylaw stating grounds for discipline as “conduct unbecoming the ministerial office” as well as with the Bylaw defining the types of disciplinary actions that “may” be imposed. CBCR §§ 20.62.01.a, 20.21.01.b, 20.21.02.

of discretion” standard in CBCR § 20.62.01.a meaningless. The CBCR text simply does not support Pastor Schmeling’s argument on appeal.

Moreover, this Committee too has limited the discretion of hearing committees. Specifically, in the disciplinary case reported by this Committee in 1997, the Committee reversed the determination of the discipline hearing committee for abuse of discretion. RA# 36, Ex. H (1997 Report) ¶ 13, at 39. The charge in that matter was conduct unbecoming the ministerial office, based on sexual misconduct several years earlier. The discipline hearing committee determined that discipline was appropriate and imposed the disciplinary action of suspension from ordained ministry (provided in CBCR § 20.21.02.b) until the pastor’s bishop was satisfied with evidence of the pastor’s repentance and amendment of life. With detailed analysis of the meaning of “abuse of discretion” in this context, this Committee held that the hearing committee abused its discretion by not imposing the disciplinary action of removal from the clergy roster (provided in CBCR § 20.21.02.c). As this Committee explained,

In this case, the Committee on Appeals concludes that the circumstances and facts involve conduct on the part of the accused pastor serious and egregious enough to demand the final option available for disciplinary action, removal from the roster.

Ex. H (1997 Report) ¶ 7, at 37. If Pastor Schmeling’s argument on appeal were correct that the ELCA disciplinary process requires unfettered discretion for the hearing committee’s determination of the appropriate discipline, this Committee could not have reversed the 1997 discipline hearing committee’s decision to impose a lesser disciplinary action under § 20.21.02 for abuse of its discretion based on facts “serious and egregious enough to demand the final option.” *Id.* (emphasis added).

In its 1997 Report, this Committee also observed that the discretion of a hearing committee is also constrained by precedent.

This concept of precedent is a principle of great magnitude and importance. It is necessary to the formation and permanence of any system of pastoral discipline for the [ELCA]. 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. * * *

Precedent provides a mooring for the [ELCA], so that the church may conduct itself with confidence. Recognition of this will lead in the future to more stability for the church. Precedent will constitute a strong tie which the church in the future will have with the church of the past.

Id. ¶ 8, at 37. In this context, the Committee commented that the circumstances of the matters reported in 1993 and 1995 were similar to those involved in the 1997 report. *Id.* In both of the previous reported decisions, this Committee affirmed hearing committee determinations that the ordained ministers involved should be removed from the clergy roster. *Id.* Nonetheless, the discipline hearing committee involved in the 1997 matter had determined that a lesser disciplinary action was warranted. In making its decision to reverse the hearing committee, this Committee “determined that the Discipline Hearing Committee, when rendering its Determination, either was ignorant of or chose to ignore these [1993 and 1995] reports of the Committee on Appeals and, as such, ignored the important and valuable precedent so established.” *Id.* This ignorance of precedent (willful or otherwise) mandated reversal of the disciplinary action imposed as an abuse of discretion. As this Committee noted, hearing committees “must be thoroughly knowledgeable of, and faithful to, the governing documents, the established policies and procedures and the prior decisions and precedents of the [ELCA] and the Committee of Appeals of the [ELCA]. *Id.* ¶ 5 (emphasis added).

Finally, the bounds and guides on discretion created by the *D & G* policy are consistent with civil legal definitions of discretion. For example, a court may be said to have “discretion” to sentence a criminal defendant within a legislatively-determined set of guidelines, say “five to ten years.” If the court orders a sentence less than five years or more than ten years in length, it may be

reversed on appeal for abuse of discretion. Similarly, that discretion can be limited by precedent. The simple fact that a decision maker is given discretion to determine the sanction under appropriate circumstances does not mean that all circumstances may be appropriately addressed with unfettered discretion. The body authorizing a decision maker may provide guidelines that effectively limit discretion under pre-defined circumstances. In this sense, the ELCA Bylaws appear to borrow from the civic legal understanding of “discretion” by providing detailed guidance to the Committee on Appeals as to what constitutes an “abuse of discretion.” This Committee has explicated this in significant detail.⁴

The duly enacted policy was faithfully applied by the DHC to Pastor Schmeling. The DHC did not have “discretion” to decide otherwise. The DHC’s determination of removal should be affirmed.

II. THE D&G POLICY IS ONE EXPRESSION OF LONG-HELD BELIEFS AND PRACTICES IN U.S. LUTHERANISM, DEVELOPED THROUGH ESTABLISHED CHURCH PROCEDURES FOR POLICY MAKING.

As this Committee has stated, both this Committee and disciplinary hearing committees are obligated to be “faithful to the governing documents, the established policies and procedures, and the prior decisions and precedents of the ELCA and of the Committee on Appeals.” Ex. H (1997 Report) ¶ 5, at 36. This Committee should affirm the DHC’s basic determination in order to enforce the “clear and uniform” guidelines for ordained ministry required by the ELCA Constitution. CBCR § 20.71.11. This is required by the Committee’s precedents, and the Committee’s statements regarding the importance of precedents for this church.

The mandatory policy in *Definitions and Guidelines* was not new to the ELCA, but has a long history in this and the predecessor churches. D&G was approved by the ELCA in 1989, at the

⁴ This Committee explained the “abuse of discretion” standard more fully in its 1997 Report at ¶ 5; see Cross-Appellant Bishop Warren’s Opening Brief at 19-20.

outset of the life of the ELCA. It was wholly consistent with the policy applied by each of the predecessor church bodies that came together to form the ELCA. Initially, in early 1988, the ELCA Conference of Bishops issued a consensus statement declaring this policy, Bishop Chilstrom stating at the time, “The decision of the bishops affirms what has been the pattern in the three church bodies that united on January 1 to form the [ELCA].” RA# 52 (Chilstrom Tr.) at 337, *quoting* RA# 39, Ex. Q (Conference of Bishops Statement). The next year the Church Council approved *Definitions and Guidelines* prepared pursuant to CBCR § 20.71.11 as the juridical guide for processes of consultation, discipline and appeals. RA# 36, Ex. B (Definitions & Guidelines) fn. 1, at 3.

This Committee has consistently applied the mandatory policy to uphold removal of pastors from the roster of the church. *See* RA# 36, Ex. I (1999 Report) ¶ 14, at 24. There is no dispute in this case that the policy remains properly promulgated today. RA# 52 (Chilstrom Tr.) at 317-18; RA# 51 (Almen Tr.) at 91-92, 106, 135-36; RA# 51 (Warren Tr.) at 180.

The long history of the ELCA’s mandatory policy and its imposition in other identical cases provides a powerful precedent that is important in the life of the church. Just such a precedent, regarding the same policy and similar facts, is provided in this Committee’s 1999 report. In that Report, this Committee affirmed the mandatory removal policy in the case of a partnered gay pastor who asked the Committee to reverse removal, among other reasons, because the Committee “should reject this church’s policy of precluding practicing homosexuals from its ordained ministry.” RA# 36, Ex. I (1999 Report) ¶ 1, at 23 (emphasis added). Instead, this Committee affirmed that it is obligated to follow and apply this church’s policy. Moreover, although not addressed in the text, the Committee’s 1999 Report states in a footnote that the accused pastor appealed, among other reasons, on grounds that he “was not treated in conformity with the governing documents of this

church.” *Id.* fn 1. This is precisely the grounds for Pastor Schmeling’s appeal. This Committee summarily rejected this argument. *Id.* ¶ 13, at 24.⁵

The 1997 and 1999 precedents from this Committee control the outcome here, for three reasons. First, the Committee emphasized that it is “subject to” the mandatory policy enacted by the legislative body of this church. This is consistent with the Committee’s understanding of the importance of consistent precedent in this church’s disciplinary processes. The same mandatory policy applies here. Second, the Committee referred to the policy at issue as “this church’s policy.” The Committee did not “look behind” the policy to determine if it had been validly enacted or whether it conflicted with the CBCR. The Committee uniformly applied the policy. Third, the Committee emphasized that this is the policy of this church, not the policy of a particular congregation, or synod, or disciplinary hearing committee. This church’s policy should be applied here.

This third point bears amplification. Pastor Schmeling misunderstands the import of the Church Council’s recent response to the Metropolitan New York Synod (“MNYS”). RA# 36, Ex. F. MNYS adopted a resolution calling for a process of exceptions to the mandatory *D&G* policy, within and only within the MNYS, similar in substance to Resolution #3 that had been rejected by the 2005 ELCA Churchwide Assembly.⁶ Pastor Schmeling’s brief characterizes the MNYS’s

⁵ Although Pastor Schmeling’s brief purports to recount the arguments raised by that accused pastor, Schmeling Br. at 17, he omits the fact that that pastor had raised the same “due process” grounds for reversal as here.

Pastor Schmeling’s original Notice of Appeal stated two grounds to appeal: both that the DHC violated his due process rights and that it abused its discretion. The latter ground has been dropped in his briefing, perhaps because the CBCR-defined standards for abuse of discretion would undermine the notion of “discretion” now being advanced. See CBCR § 20.62.01.a (abuse of discretion defined); 1997 Report at ¶ 5 (further explicating abuse of discretion).

⁶ Resolution #3 is quoted in full in the Church Council’s response to the MNYS. RA # 36, Ex. F fn 3. One cannot necessarily determine the intent of a legislative body in voting down a resolution, but here it is at least clear that the most recent Churchwide Assembly rejected creating any exceptions to the mandatory policy that the Churchwide Assembly plainly presupposed was “this church’s policy.” Resolution #3 would have been superfluous if the theory advanced in Pastor Schmeling’s brief were correct.

“problem” being addressed by the Church Council as “interference with a discipline hearing committee’s constitutionally granted discretion.” Schmeling Br. at 15 n.10. On the contrary, the issue is not problematic limitations on DHC discretion but one synod making policy that affects the churchwide roster of ordained clergy. See RA # 36 Ex. F; RA# 51 (Almen Tr.) at 93-106.

Responding to the MNYS, the Church Council focused on the importance of “clear and uniform standards” for discipline, standards which neither one synod nor one DHC is authorized to alter.

The proper forum for efforts to change the mandatory policy is not this adjudicative process but the legislative process culminating in deliberation and action (if any) by the Churchwide Assembly. Addressing the arguments of a pastor removed under the same mandatory policy in 1999, this Committee stated:

The pastor advanced a number of arguments why this church’s policy of precluding practicing homosexuals from its ordained ministry should not be honored by this committee. The Committee on Appeals is not a legislative body in this church. Accordingly, the Committee on Appeals is subject to this policy and is obligated to uphold it.

RA# 36, Ex. I (1999 Report) ¶ 13, at 24. Bishop Warren has discussed the important distinction between adjudicative and legislative processes in his Opening Brief in support of his cross appeal, at pages 7 – 16, which discussion is incorporated here.

To accept Pastor Schmeling’s argument would be to fundamentally change the organization of the ELCA, asking the Committee on Appeals to repudiate the duly-enacted policy and its own precedents, and dictate policy for this church. But this church’s structure empowers only the legislative processes to make such decisions, recognizing that legitimacy and support for making and reforming church policy requires participatory structures for deliberation. This is especially true when, as here, the legislative bodies of this church have so recently considered and rejected a change in the very policy at issue. Put differently, “Reformation” through appellate fiat invites schism.

The policy at issue has been applied uniformly by this Committee. The DHC's application of the ELCA's long-standing mandatory policy in its determination to remove Pastor Schmeling from the roster should be affirmed here.

III. BOUND TO BE FREE

The Committee on Appeals should affirm the basic determination by the DHC based on straightforward application of controlling authority, including the policy enacted by the Church Council pursuant to the Churchwide Assembly's directive in CBCR § 20.71.11, the precedents of this Committee, and the importance of fair and uniform application of discipline throughout the ELCA. This result is also supported by Lutheran ecclesiology and understanding of the ministry. In particular, this result is consistent with the Lutheran understanding of Christian freedom in community, and the role of the community of faith in authorizing ordained pastoral ministry.

As a basic theological matter, Christian freedom is not absolute license to do what one chooses to do (even if, in a secular context, one has a "right" to so choose), but is subject to testing in the community of faith, even where the person exercising freedom is a prophet. *See* I Cor. 14:29 ("Let two or three prophets speak, and let the others weigh what is said."). As Bishop Chilstrom stated in his first introduction to *Vision and Expectations*, and reaffirmed at the hearing in this matter, the distinction between law and gospel is critical, "Yet, whenever we bring ourselves into community, it is necessary to agree on how we shall live within the community, and to set out what we expect of one another." RA# 39, Ex. S (Vision & Expectations) at 1 (*quoted* in RA#52 (Chilstrom Tr.) at 347). "Disciplinary" guidelines should be understood in this context as an aspect of discipleship in community. The focus is not on what one can, may or should do in isolation; the focus is on reflecting the new life in Christ to others, which includes "avoiding that which would make them stumbling blocks to others." RA# 36, Ex. B (Definitions & Guidelines) at 3; *cf.* RA# 53

(Gritsch's Tr.) at 686, 695-96; RA# 55 Closing Tr.) at 1173. "To that end, this church recognizes that there is behavior that is deemed to be incompatible with ordained ministry, and that calls for disciplinary action." RA# 36, Ex. B (Definitions & Guidelines) at 3 (emphasis added). The determination of appropriate discipline is a different matter than ascertaining the "heart of the ministry" as Pastor Schmeling asks this Committee to do on this appeal. See Schmeling Br. at 4.⁷

The community of faith called the ELCA, formed by the CBCR, has chosen to establish limits on the discretion of a discipline hearing committee for persons who can be pastors at the present time. The ELCA's Churchwide Assembly, Church Council, and this Committee on Appeals have stated clearly and repeatedly one such limit: partnered gay and lesbian persons are precluded from serving as ordained clergy. That limit is under active deliberation throughout the church – but there is no question that it is a limit, and (unless or until the policy is changed) the DHC was required to and did faithfully apply that limit.⁸

The ELCA has chosen, in the CBCR, to trust the guidance of the Holy Spirit in the church's participatory processes (chiefly the CWA) to "weigh what is said" and to reform rules as appropriate. Alternative arrangements are conceivable. The ELCA could have chosen to vest rulemaking power for church life in the Conference of Bishops, or the Presiding Bishop, or a seminary faculty, or a convention of ordained clergy, or this Committee on Appeals. Or the ELCA could have chosen to have no wider rules than those made by and for each congregation. But the ELCA chose to trust the broad lay/clergy participatory process of the Churchwide Assembly (and

⁷ At trial, Pastor Schmeling acknowledged that "the ordained ministry is a public office" and that "there is a relational accountability that is inherent in the church." Tr. at 473. He also agreed that "the way to change the [D&G mandatory] policy within the ELCA is through the Churchwide Assembly." Tr. at 478. He was present at the 2005 Churchwide Assembly in Orlando and was part of the "silent protest" that advocated for change in the ELCA's mandatory policy. Tr. at 478-79.

⁸ Pastor Schmeling's argument says, in effect, that if the DHC were not a committee of the ELCA bound to follow the ELCA's duly-enacted policies, but were simply a thoughtful group of Lutheran-trained Christians, it would reject the policy at issue in its own exercise of Christian conscience. This does not accurately describe the character, authority or duties of the DHC.

Church Council between assemblies) as the supreme rulemaking (and rule-reforming) body for this community of faith.

If adopted, Pastor Schmeling's appeal would turn this participatory process on its head.⁹ Having failed (to date) at changing the policy at issue in the ELCA Churchwide Assembly, this appeal seeks change through an adjudicatory revolution that would change the authority structure of this church. The ELCA, from its founding, has been structured to give expression to the belief that the Holy Spirit guides this church through the participatory legislative processes of the Churchwide Assembly, and between assemblies by the Church Council (itself elected by the CWA for this purpose). Pastor Schmeling's appeal contends that this Committee on Appeals should invalidate an action by the legislative branch, the Church Council as expressly authorized by the CWA, because that action is "trumped" by the ELCA Bylaws.

Bishop Warren respectfully asks this Committee to *reject* Pastor Schmeling's appeal and affirm the basic decision by the DHC. The limited nature of the ecclesiastical "due process" rights put forward by Pastor Schmeling does not require that the Committee on Appeals "go behind" properly adopted church policies.¹⁰ Pastor Schmeling mistakenly contends that he has a right to be an ELCA pastor even though he conceded he is in violation of the mandatory policy in *Definitions and Guidelines*. RA# 52 (Schmeling Tr.) at 461-462. This is not how the ELCA understands the nature of ministry.¹¹ As Professor George Forell stated at the Church Council meeting that approved the *D&G* policy at issue in November 1989: "It is not an inalienable right to be a pastor

⁹ Ironically, although Pastor Schmeling dismisses Bishop Warren's argument that the mandatory policy was duly enacted as "mere process" not addressing the "substantive" validity of the policy, the one issue on appeal is a due *process* argument that does not even address the substance of the policy itself.

¹⁰ The Committee on Appeals has repeatedly stated that its role is to apply duly-enacted policies to the facts of particular cases, with reports to the Churchwide Assembly that provide "the opportunity for revision of the [governing document] if such be the will of this church." RA# 36, Ex. H (1997 Report) ¶ 8.

¹¹ This Committee has emphasized that "due process" under the CBCR should not be understood in the same manner as "due process" in secular judicial proceedings. *See, e.g.*, RA# 36, Ex. G (1993 Report) at ¶ 5; 1995-1 Report at ¶ 4; RA# 36, Ex. I (1999 Report) at ¶¶ 10 – 11.

in the [ELCA].” RA# 46, Ex. 2 (11/89 Minutes) at 60. This is echoed by the current ELCA Presiding Bishop, Mark Hanson, in his introduction to *Vision and Expectations*: “*Vision and Expectations* makes clear that ordained ministry is a privilege granted by God through the call of the church. It is not an individual right.” RA# 36, Ex. C at 1.

As this Committee has stated repeatedly, it is obligated to be “faithful to the governing documents, the established policies and procedures, and the prior decisions and precedents of the ELCA and of the Committee on Appeals.” RA# 36, Ex. H (1997 Report) ¶ 5, at 36. This Committee should affirm the DHC’s basic determination in order to enforce the “clear and uniform” guidelines for ordained ministry required by the ELCA Constitution. CBCR § 20.71.11. This is required by the Committee’s precedents, and the Committee’s understanding of the importance of precedents for this church, and it is supported by the historic Lutheran understanding of the ordained ministry.

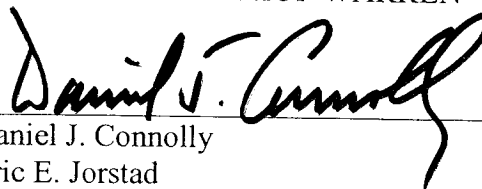
Conclusion

For all these reasons, Bishop Warren respectfully asks the Committee on Appeals to *affirm* the determination by the Southeastern Synod Discipline Hearing Committee to remove Pastor Schmeling from the roster of ordained ministers in this church.

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Respectfully submitted,

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