

COMMITTEE ON APPEALS  
EVANGELICAL LUTHERAN CHURCH IN AMERICA

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

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**CROSS-APPELLANT BISHOP WARREN'S REPLY BRIEF**

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In his cross-appeal, Bishop Warren respectfully asks the Committee on Appeals to fulfill its adjudicatory role in this case, as it has for the past eighteen years in applying and enforcing ELCA policies. Exercising its supervisory role over the disciplinary processes of this church, this Committee should provide guidance concerning the scope and limits of the authority of hearing committees, limits that were exceeded by the Discipline Hearing Committee (“DHC”) in this case.

Contrary to Pastor Schmeling’s assertions, Bishop Warren does not seek to muzzle anyone in this church on the issues of faithful discipleship but, for the reasons stated in his opening brief, this adjudicatory process is not the forum for making or advocating policy change. As individuals, members of the DHC are encouraged to participate fully in this church’s policy-making processes, but when they sit as a discipline hearing committee they do not have a legislative role and should not insert themselves into the church’s legislative processes. This is implicit in this Committee’s repeated statements that hearing committees must be “faithful to” this church’s governing documents and policies, and eschew policy arguments properly directed to the legislative bodies. *See* RA# 36 Ex. H (1997 Report) ¶ 5; RA# 36 Ex. I (1999 Report) ¶ 13. Accordingly, Bishop Warren asks this Committee to exercise its CBCR-granted supervisory authority over ELCA disciplinary processes to ensure that hearing committees properly fulfill their duties within the structure of decision making to which we, as a church, have agreed.

In the CBCR, Discipline hearing committees are directed to complete two and only two tasks: to make Findings of Fact and to make a Determination whether discipline is warranted and if so, what discipline to impose. CBCR § 20.21.21. The DHC's actions exceeded this limited charge insofar as the DHC made *suggestions* for church legislative action, *challenged* the propriety of the church's policy, and *effectively stayed* its Determination. RA# 61 (DHC Decision) at 11-14. None of these three issues involves a Finding of Fact or a Determination, as those tasks are defined in the CBCR. It should be no surprise, then, that the grounds for appeal/reversal defined in the CBCR focus solely on Findings of Fact and Determinations, and do not expressly address the conduct and comments by the DHC that fall outside CBCR-prescribed form of decision. CBCR § 20.21.21. These actions by the DHC, unanticipated under the CBCR, are subject to review by this Committee in the exercise of its authority to direct the discipline hearing processes of this church to conform to the limitations on the powers of discipline hearing committees. Under a proper understanding of this Committee's adjudicatory role, the DHC's suggestions for policy changes should be reversed, as an abuse of discretion, because in so doing the DHC exceeded its authority under the CBCR as an adjudicative body of this church.

Under this same understanding of this Committee's adjudicatory powers, the DHC's challenge to the wisdom and constitutionality of "this church's policy" expressed in *Definitions and Guidelines* should also be reversed. Under the precedents of this Committee, a discipline hearing committee "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 on Appeals of the [ELCA]." See RA# 36 Ex. H (1997 Report) at ¶ 5 (emphases added). The DHC here did not follow this directive, instead challenging "this church's policy" as "bad policy" and "quite possibly" unconstitutional.

In his briefing, Pastor Schmeling repeatedly attempts to have obvious statements (e.g. the supremacy of the ELCA Constitution) support to unfounded conclusions (e.g., that *D&G* violates the ELCA Constitution). In this manner, Pastor Schmeling attempts to distort Secretary Lowell Almen’s straightforward testimony. Secretary Almen never testified (or implied) that *Definitions and Guidelines* is suspect, let alone unconstitutional. Quite the contrary, Secretary Almen reaffirmed that *D&G* is a statement of church policy and that discipline hearing committees must follow that policy. RA # 51, Tr. at 106, 135-136. Similarly, Secretary Almen never testified that the CBCR allowed every DHC to impose any disciplinary action (or none at all), irrespective of the facts established in a hearing. Instead, Secretary Almen testified that if a hearing committee were to find cause for discipline then CBCR 20.21.02 provides “the range of its determination,” and when the policy as applied to the facts narrows the “range,” the hearing committee must “connect” one to the other (i.e. apply the policy to the facts in reaching its determination). RA # 51, Tr. at 107, 109. This testimony – not surprisingly -- is entirely consistent with this Committee’s precedents stating that hearing committees must follow “this church’s policy” and preclude persons from serving as ordained ministers when they have been found to violate certain church policies, including the one at issue in this case, among others. See RA# 36 Ex. H (1997 Report) (reversing hearing committee that failed to apply preclusion policy for abuse of discretion); RA#36 1999 Report ¶¶ 4, 5, 14. That is, the CBCR and this Committee recognize that Findings of Fact in the light of established church policy may limit the “range” of the disciplinary actions that are appropriate in the hearing committee’s Determination of the disciplinary action to be imposed.

Similarly, Pastor Schmeling misconstrues Secretary Almen’s testimony that the ELCA Church Council “would not have authority to direct any discipline hearing panel to a particular conclusion.” RA # 51, Tr. at 119, quoted in Schmeling’s Opp. at 10. Secretary Almen was not

addressing the subject of a discipline hearing committee’s “constitutional discretion.” He was instead discussing the Church Council’s response to the resolution of the Metropolitan New York Synod setting up a system of exceptions to the policy for ordained clergy within one Synod. *Id.* at 106-21 and RA #36, Ex. F. Secretary Almen’s main point was that one synod could not set up a one-synod-only policy that prevented a discipline hearing committee from following ELCA churchwide policy for ministers on the ELCA churchwide roster. *See id.* at 106, 135. At the same time, Secretary Almen recognized that policymaking bodies cannot invade the province of a hearing committee by prejudging a “particular conclusion” before the hearing committee has engaged in fact finding. But this does not mean, as discussed in detail above, that once certain facts have been found (or stipulated), certain policy conclusions may be necessary. *See e.g.* RA# 36 Ex. H (1997 Report).

Finally, the *de facto* stay provided by the DHC delaying the implementation of its decision for over six months plainly exceeded the DHC’s authority. Pastor Schmeling contends that the CBCR is silent on mandating the effective date for imposition of discipline, implying that a hearing committee may select any date it wishes. He contends further that the CBCR provision making a hearing committee decision “final on the date it is issued” refers only to finality as “being appealable,” not intended to mean “effective” on the date issued. To support this twisted reading of the plain language (“final” ≠ “final”), Schmeling parses this clause out of context. Schmeling Opp. Br. at 12. The full text of the Bylaw makes clear that “final” means “final and effective.” *See* CBCR § 20.21.22. In fact, Pastor Schmeling’s own definition of a “stay” – “A stay, by definition, *halts* the imposition of discipline” (Schmeling Opp. at 11, *emph. in original*) – shows that this is precisely what the DHC did here. It halted imposition of the discipline of removal from the ordained roster. But the authority to grant stays is within the exclusive power given by the CBCR

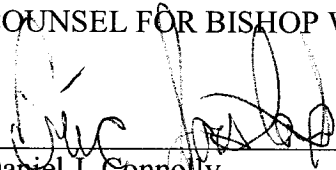
to the Committee on Appeals, not a discipline hearing committee. “Final” does mean “final.” Indeed, the same bylaw also states that, “[t]he decisions of the Committee on Appeals shall be final” with respect to stays. If “final” in this bylaw meant, as Pastor Schmeling contends, “appealable,” this second use of the word “final” in CBCR § 20.21.22 would be nonsensical, as there is no appeal from decisions of this Committee. The bylaw establishes a straightforward system of: (1) hearing committee decision, (2) request for stay to Committee on Appeals, (3) final decision by this Committee. In this case, the DHC went beyond its powers by effectively staying its own decision without any stay being requested (and granted) by this Committee. Bishop Warren asks this Committee to reverse this action by the DHC and to provide guidance to future discipline hearing committees.

In conclusion, Bishop Warren respectfully asks the Committee on Appeals to reverse the actions of the DHC that exceeded its authority under the CBCR, pursuant to this Committee’s supervisory power over the disciplinary processes of this church. This fulfills the Committee’s adjudicatory role, consistent with precedent, and leaves policy making to the participatory legislative process established by the church.

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Respectfully submitted,

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