

MINUTES OF THE GENERAL ASSEMBLY

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| 2016-07 | Complaint of RE John Avery v. Nashville Presbytery |
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| 2017-01 | Complaint of RE Scott Dailey v. Heritage Presbytery |
| 2017-02 | Complaint of RE Charles Postles, et al. v. Heritage Presbytery |

At this time, Cases 2016-06, 2016-13, 2016-15, 2016-16, 2016-17, 2017-01 and 2017-02 are being considered by panels. Case 2016-10 is being considered by the full SJC. The SJC has determined Case 2016-02 is administratively out of order. Case 2016-11 is scheduled to be heard by the full Commission in its October Stated Meeting. The SJC notes Cases 2016-03 and 2016-04 were withdrawn. The SJC has completed its work on Cases 2015-13, 2016-01, 2016-02, 2016-05, 2016-07, 2016-08, 2016-09, 2016-12 and 2016-14.

The report on those cases follows.

III. REPORT OF THE CASES

CASE 2015-13

TE ANDREW BARNES

VS.

HEARTLAND PRESBYTERY

DECISION ON COMPLAINT

October 20, 2016

I. SUMMARY OF THE FACTS

03/10/15 TE Geoff Smith of the Presbytery of the Central United States (OPCUS) of the Orthodox Presbyterian Church (OPC) contacted TE Anthony Felich, Chairman of the Candidates and Credentials Committee of Heartland Presbytery (CC

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Committee), regarding the possibility of transferring his credentials to Heartland Presbytery (Presbytery). In that correspondence, TE Smith submitted his stated differences to the Westminster Standards to the CC Committee.

- 03/13/15 The CC Committee met and considered TE Smith's stated differences.
- 03/16/15 TE Felich reported to TE Smith about the proceedings before the CC Committee, and explained that, due to the complexity of the issues regarding his views, the timeline for TE Smith's transfer would likely be in November 2015.
- 03/19/15 By email, TE Felich advised TE Smith that the CC Committee would send him a list of questions to which TE Smith was to respond in writing.
- 04/21/15 TE Kreg Bryan emailed a copy of TE's Smith's paper "Why Then the Law?" to RE Bill Burns.
- 06/25/15 TE Smith responded in writing to the questions from the CC Committee.
- 08/06/15 TE Felich received the minutes of the OPCUS relating to its treatment of TE Smith's stated differences.
- 08/07-08/15 Presbytery held its 80th Stated Meeting in Manhattan, KS. Presbytery allowed an exception, judging TE Smith's stated differences with WCF 19 ("Of the Law") as "more than semantic but not out of accord with any fundamental of our system of doctrine."
- 09/15/15 Complainant sent a letter to the Stated Clerk of Presbytery expressing Complainant's concern regarding Presbytery's granting an exception to TE Smith based on TE Smith's stated differences with WCF 19.
- 09/16/15 Complainant filed a Complaint with Presbytery.
- 09/28/15 Complainant sent a copy of TE's Smith's paper "Why Then the Law?" to the Stated Clerk of Presbytery.
- 11/06-07/15 Presbytery held its 81st Stated Meeting in Shawnee, KS, during which it denied the Complaint.

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- 11/13/15 Complainant carried his Complaint to the General Assembly.
- 12/02/15 TE Felich sent his e-mail correspondence with Edward Eppinger of OPCUS (see 08/06) to the Stated Clerk of Heartland Presbytery.
- 12/16/15 Presbytery, as the Respondent, appointed RE Bill Burns as its representative before the SJC.
- 12/28/15 The Record of the Case (ROC) was received from the Stated Clerk of Presbytery.
- 01/20/16 Complainant filed his objections to the ROC.
- 01/26/16 RE Burns on behalf of Presbytery filed his objections to the ROC.
- 02/22/16 The Hearing was held on the ROC via GoToMeeting. The hearing was suspended pending corrections to the minutes of the 80th Stated Meeting of Presbytery.
- 04/26/16 The Hearing on the ROC was resumed and the ROC was finalized.
- 06/21/16 The Panel Hearing was held in Mobile, AL, with Panel members TE Robertson (Chairman), TE Greco (Secretary), and RE Neikirk, and alternates RE Carrell, TE Coffin, and RE Pickering. Complainant TE Andrew Barnes was present, along with Complainant's representative, TE Dominic Aquila. RE Bill Burns was present on behalf of Presbytery.

II. STATEMENT OF THE ISSUE

Did Heartland Presbytery clearly err on August 8, 2015 at its 80th Meeting when it granted an exception judging TE Geoff Smith's stated differences with WCF 19 as "more than semantic but not out of accord with any fundamental of our system of doctrine," because Presbytery failed to consider critical evidence in examining TE Smith's stated differences and thus failed to develop a sufficient record on which to judge them?

III. JUDGMENT

Yes, and this matter is remanded to Heartland Presbytery for action consistent with this Decision.

IV. REASONING AND OPINION

This case involves a teaching elder of the OPC (TE Smith) who submitted stated differences to *WCF* 19 as part of a request to transfer his credentials to Presbytery. Heartland Presbytery judged these stated differences to be “more than semantic but not out of accord with any fundamental of our system of doctrine” and thus granted an exception for those stated differences (*BCO* 21-4e). The Complainant, in his brief and oral arguments, made it clear that the issue in this case was not whether Presbytery made a proper determination with regard to its evaluation of TE Smith’s differences. Rather, the Complaint deals with an antecedent matter; that is, whether Heartland Presbytery sufficiently explored TE Smith’s views, and, in turn, whether Presbytery had a sufficient basis for reaching any conclusion on TE Smith’s stated differences.

The question of whether Presbytery sufficiently explored TE Smith’s views is a matter of discretion that the higher court can overturn only on a finding of clear error on the part of the lower court (*BCO* 39-3(3)). We conclude that Presbytery’s actions were deficient, and there was a clear error. We come to this conclusion for the following reasons:

The central problem is that the Record contains no evidence that Presbytery, as a whole, was given key information and documents that clearly should have been considered by presbyters as they considered TE Smith’s views (including his stated differences). The Record shows, by way of an e-mail from the Chairman of the CC Committee, that the Committee members knew at the beginning of the process in March 2015 that TE Smith was seeking to transfer from the OPCUS of the OPC, and that “he stated this same exception there and they ordained him with the instruction that he can’t teach his particular position.”¹ The Chairman of the CC Committee sought to confirm this understanding with the Clerk of OPCUS. That Clerk responded on March 10, 2015 by saying “that Mr. Smith is a ministerial member of the Presbytery of the Central United

¹ The Chairman’s e-mail goes on to say “[his] church is well known at (*sic*) a ‘Klinean, Two Kingdom’ teaching church.” He further refers to this view as “a version of ‘Republication.’” It is important to note, however, that TE Smith does not, anywhere in the Record, use these terms to refer to his views. Also, note that the requirement that TE Smith not teach his views was not tied to his ordination (see discussion below).

States, in good standing.” The Clerk went on to make a number of informal, “individual” comments about TE Smith’s good service in the OPC. He finally noted that he was forwarding the message to the two men who most recently served as Chairmen of the Candidates and Credentials Committee of OPCUS. Curiously, he stated “Perhaps one or both of them should speak in a more official capacity for the Presbytery.”

An e-mail from the Chairman of the CC Committee to TE Smith indicates that the CC Committee met on March 13, 2015 (3 days after TE Smith’s statement of possible exceptions was sent to the CC Committee, along with the Chairman’s encouragement that the CC Committee study the issue of “republication,” and the Chairman’s provision of links to resources on that topic. On March 16, 2015, the Chairman e-mailed TE Smith to say that it took the CC Committee “almost 2 hours to go through 75% of your statement.” He further stated “there was some alarm on the part of two committee members and everyone thought your exception was pretty drastic, but collectively agreed we should read and study more on the subject before making a recommendation to you” about whether TE Smith would likely be acceptable to the Presbytery. Later in that same e-mail the Chairman stated “[t]he committee informally agreed the presbytery would not likely accept your exceptions based on our current understanding and info. How the committee recommends you will make a big difference. For perspective, I am not aware of any of our presbyters that hold to a Klinean/2 Kingdom view. So it will take some time for the brothers to get up to speed.”²

TE Smith responded to the CC Committee Chairman by stating that he would be happy to respond to any questions the Committee wished to send him. At some point the CC Committee apparently put together a series of questions. These were forwarded to TE Smith who provided written answers in June 2015. There is no evidence in the Record of when or how the CC Committee dealt with TE Smith’s answers. One may only surmise, as RE Burns does in his brief, that the CC Committee must have been satisfied or they would not have presented TE Smith for examination at the August meeting of Presbytery. This is certainly the course the Chairman recommended in his March 16, 2015 e-mail.

² Note, again, that TE Smith never in the Record refers to himself as holding to a “Klinean/2 Kingdom view.” Moreover, even if it can fairly be concluded that this is his view, whether TE Smith’s view goes beyond what is often thought of as a “Klinean/republication/2 kingdom view” is a question that Presbytery needed to explore.

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On August 6, 2015, one day before the August meeting of Heartland Presbytery, the Chairman of the CC Committee e-mailed three men in the OPC, saying that he had been given their names by the Clerk of OPCUS, noting that the Clerk of OPCUS had said that TE Smith was a member in good standing of OPCUS, but saying “based on his stated exceptions to the Westminster Standards, I understand that your presbytery required him not to teach his exceptions.” The Chairman also asked if these men would send him relevant minutes regarding OPCUS’s action in dealing with TE Smith’s exceptions.³ One of the men addressed in the Chairman’s August 6, 2015 e-mail responded later that same day saying “You should request the official minutes from the clerk. The attached file does not give a complete view.” The Chairman responded by asking how the “file” was not accurate and whether there was “ever a change in Presbytery’s [OPCUS’s] action to restrict Rev. Smith’s teaching of his expressed views?” The response was “no.”

Following this e-mail chain are 38 pages of extracts from the minutes of OPCUS. It is not certain whether these extracts constitute the “attached file” referenced by the individual from OPCUS or whether these came from some other source, but the fact that these are extracts from the minutes of OPCUS was unchallenged. Those minutes begin with an extract from the minutes of January 11, 2003 which sets forth “a procedure whereby Mr. Smith would write his views in more depth for review by the chair [of the Candidates and Credentials Committee of OPCUS], the chair would write a response to Mr. Smith’s views, and the two statements would be sent by July 15, 2003 to the sessions of presbytery for review and would be considered by the presbytery at its Stated meeting of September, 2003.” OPCUS took various actions on these papers between September 2003 and May 2005, including giving TE Smith leave to perfect his paper and directing the Chairman of OPCUS’s Candidates and Credentials Committee to produce another response to the revised paper. In May of 2005 a complaint was filed with OPCUS for their failure to take action with regard to TE Smith’s views. Contained in that complaint is

³ The Record does not indicate positively who these men are, although the one who responded to the Chairman was one who complained about OPCUS’s failure to take timely action on TE Smith’s views. Neither does the Record explain why there was no correspondence with anyone from OPCUS on this matter between March 10 and August 6. The Clerk of Heartland Presbytery states that the Chairman of the CC Committee “has verbally stated to me that he has sent me all the email chains and documents relevant to the complaint.” Therefore, we must conclude that there was no formal contact with OPCUS between March and August. The Record also does not indicate what motivated the Chairman of the CC Committee to contact men in OPCUS on the day before the Presbytery meeting.

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the text of TE Smith's letter to OPCUS from December of 2002 wherein he set forth his "differences with the standards." Many of the points in that December 2002 letter are repeated word-for-word in TE Smith's statement of his stated differences as sent to Heartland Presbytery in March 2015.

In May 2006 the report of the Chairman of the Candidates and Credentials Committee of OPCUS from January 2003 was printed in the minutes of OPCUS. Part of this report noted that TE Smith "wrote a letter to the Presbytery dated December, 2002 in which he stated that he took exceptions to certain parts of the Westminster Standards, particularly Chapter 19 of the Confession of Faith." The report then states "The question whether or not the theology believed by and taught by Mr. Smith stands within the system of doctrine of the Orthodox Presbyterian Church can be argued by anyone, but it is best answered by Mr. Smith himself." The report then summarizes TE Smith's views by way of quotes from TE Smith's 2003 paper. The summary of those views is reflective of TE Smith's statement of his exceptions as sent to Heartland Presbytery in 2015 and of the views contained in his answers to questions from the CC Committee. The report ends with two recommendations:

1. It is moved that Presbytery declare that the system of doctrine delineated in the papers of Mr. Smith and those exceptions stated in Communication J [TE Smith's original statement of his exceptions] . . . do not stand within the system of doctrine contained within the Westminster Standards . . .
2. It is moved that this Presbytery, as the judicatory having direct oversight of the churches under its care ..., require Mr. Smith to confess to all the congregations and members of within this regional church any instances of teaching such doctrines as contained within his writings and Communication J, and seek their forgiveness.

The first recommendation was carried by voice vote. The second recommendation was ruled out of order. The Chairman of the OPCUS Candidates and Credentials Committee then moved "that this Presbytery, as the judicatory having direct oversight of the churches under its care..., require Mr. Smith to cease teaching such doctrines as contained in communication J" The motion was carried by voice vote. These extraordinary actions regarding a currently serving teaching elder, taken by a Presbytery of a sister NAPARC denomination, should have caused

greater depth of investigation and consideration by the CC Committee, and Heartland Presbytery itself, than is evidenced in the Record. The failure to consider this key information is a matter of concern in and of itself. It is magnified, however, by (a) the extraordinary action of OPCUS in determining that TE Smith's views "do not stand within the system of doctrine contained within the Westminster Standards" and (b) the breadth of TE Smith's differences on the law, regarding an entire chapter of the Confession and large sections of the Catechisms.⁴

The minutes of the August 7-8, 2015 meeting of Heartland Presbytery indicate that Presbytery was given TE Smith's five-page statement of differences, including the statement that this statement was "an abbreviated explanation." There is no evidence in the Record that the members of Presbytery were given TE Smith's answers to the questions posed to him by the CC Committee, although during the hearing both parties stipulated that had happened. Even more strikingly, there is no evidence in the Record that Presbytery, as a whole, was told that OPCUS had expressed serious concerns about TE Smith's views or that they had prohibited him from teaching those views. Moreover, there is no evidence in the Record that the paper expressing a more extensive statement of TE Smith's views was made known to Presbytery, or that Presbytery was made aware of how OPCUS had evaluated the views contained in that paper. This is particularly striking given that the Record contains an e-mail exchange between two members of the CC Committee stating that one of those men had sent a copy of TE Smith's longer paper to the other on April 21, 2015. That e-mail also stated "[TE Smith] said he has not changed his views on the main points and texts on the law, since he wrote this ...but is more open to a broadening of the law under some circumstances to be more than simply Torah (Sinai covenant only with Israel) that's something we may want to flesh out."⁵

At its August meeting, Heartland Presbytery sustained most of TE Smith's examination for transfer. As part of its actions on the examination, Presbytery ruled that TE Smith's stated differences, including those that

⁴ There is evidence in the Record that at least some in Presbytery saw their task as one of assessing the validity of "republication" as that concept is developed in the writings of others. That may be an important consideration. But it is not what is critical here. The crucial question is whether/how the particular views and formulations of TE Smith fit with the fundamentals of the system of doctrine. (See case 2014-01 for more on this.)

⁵ It is clear that the Chairman of the CC Committee had information that should have made him aware of TE Smith's longer paper, but the Record does not indicate whether he actually had the paper or had read it. Similarly, the Record does not show whether other members of the CC Committee knew of, much less read, the longer paper.

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are at the heart of this case, were exceptions that were “more than semantic but not out of accord with any fundamental of our system of doctrine.” The examination for transfer was not, however, complete at this point because TE Smith had not preached before Presbytery and Presbytery had not received from OPCUS “his written credentials and dismissal of him.”

On September 9, 2015 Complainant wrote an “unofficial” letter to the whole of Heartland Presbytery asking that they study TE Smith’s views further, particularly given debates about similar views in OPC presbyteries, and because he did not think he or others in Presbytery sufficiently understood the implications of TE Smith’s views at the time he was examined. The letter further stated “Mr. Smith’s current OPC Presbytery has forbidden him from teaching his view, that also should give us pause.” Finally, Complainant’s letter stated that he had reached out to a friend in OPCUS, that friend had given him a 153-page paper that TE Smith had written in 2003 concerning his view of the law, and that he was told that another man in OPCUS had another paper TE Smith had authored on the subject. The letter concluded “I also believe we need to go deeper and think through the implications, so that we ourselves may understand sufficiently how Mr. Smith’s views measure up to the Holy Scriptures and the *Westminster Standards*.” From the information provided in the Record, this letter was the first time the actions of OPCUS and the paper(s) of TE Smith were made known to Presbytery as a whole (or at least to those members who read the letter).

On September 16, 2015, Complainant filed his Complaint with Presbytery. Included in that Complaint were a series of topics about which Complainant alleged Presbytery should have sought further information from TE Smith. On September 28, 2015, Complainant sent to the Stated Clerk of Heartland Presbytery the 2003 paper by TE Smith and “a paper against his by an OPC minister” (apparently the response of the Chairman of the OPCUS Candidates and Credentials Committee). There is no evidence in the Record that the Stated Clerk made these papers available to members of Presbytery, or even that he informed members of Presbytery of their existence.

At its November stated meeting, Heartland Presbytery defeated, by a vote of 7-12-4, a motion to rescind its action in judging TE Smith’s views as being “more than semantic but not out of accord with any fundamental of

our system of doctrine.”⁶ Presbytery then defeated a motion seeking the erection of a study committee to consider the implications of TE Smith’s views, and requesting that Presbytery postpone further action on TE Smith’s examination until the Study Committee report had been considered. Finally, Presbytery denied Complainant’s Complaint by a vote of 12-3-9.⁷ There is no evidence in the Record that Presbytery considered the action of OPCUS regarding TE Smith nor that they considered his longer paper. Later in the meeting Presbytery acted to “receive the written credentials from Rev. Mark T. Harrington, Stated Clerk, Presbytery of the Central United States.” The letter from Rev. Harrington is included in the minutes, but it is not dated. In spite of the comment in the August minutes that Presbytery would need to request TE Smith’s credentials, the letter reproduced in the November meeting is simply the March 10 e-mail from Rev. Harrington, forwarded by the Chairman of the CC Committee to the Clerk of Heartland Presbytery on October 1, 2015.⁸ There is no evidence that Presbytery took notice of the previously noted actions from OPCUS that restricted TE Smith from teaching his views on the matter of his exceptions.

In sum, there is no evidence in the Record to indicate that the members of Presbytery were given key information regarding the existence and content of TE Smith’s longer paper, or the actions of OPCUS regarding TE Smith’s views prior to the August meeting of Presbytery. Similarly, there is no evidence that the CC Committee formally reported these matters to Presbytery at or before the November meeting at which Presbytery considered the Complaint, nor that Presbytery had any discussion of this information. Given the gravity of the actions of OPCUS and the content of TE Smith’s views (see below) those were critical and fatal omissions.

⁶ Strikingly, one of those who asked that his affirmative vote be recorded on the motion to rescind was one of the two members of the CC Committee who had clearly had TE Smith’s longer paper prior to the August 2015 stated meeting.

⁷ The vote of the Presbytery itself, with only half of the 24 in attendance favoring a denial of the Complaint (with three opposed and nine abstentions), gives some indication of the uncertainty on this issue in the Presbytery.

⁸ We note that nothing in the Record shows that Heartland Presbytery sought or received attestation that OPCUS voted to dismiss TE Smith to Heartland Presbytery. Thus there is some ambiguity as to whether TE Smith’s reception was pending such action by OPCUS. If the action was pending receipt of attestation from OPCUS and no such attestation has been received, then that impacts our advice in the concluding section of this opinion. If Presbytery did not seek this attestation or did receive it and did not include it in the Record, then this is additional evidence of Presbytery’s failure to “keep an accurate record.” See page 8 *infra* for more on the matter of the nature of the Record.

HP argued that we should assume that both the CC Committee and Presbytery must have taken all the appropriate actions and considerations because TE Smith was presented to Presbytery and approved by Presbytery. But the only official action of what a court has done is what is contained in its minutes. In the absence of information in the Record all we are left with is speculation, and that is not sufficient. Further, asserting that a higher court must always assume, in the absence of any information in the Record, that the lower court has done all that it should have done and considered all that it should have considered would vitiate any ability of the higher court to review the records of the lower court and anyone to complain against the actions of the lower court. Indeed, the implication of such a view would be that the best course for the lower court would be to include the bare minimum of information in its Record since that would make it essentially immune to challenge.

The *BCO* does not provide specific mechanisms with regard to the process by which a Presbytery is to go about its task of determining whether an examinee's views are out of accord with any fundamental of our system of doctrine (*BCO* 13-6; 21-4.e,f). That does not mean, however, that a higher court need not or cannot be concerned with how a lower court goes about this task. *BCO* 40-2(2-3) mandates that higher courts must determine whether actions of lower courts are "regular and in accordance with the Constitution" and whether "they have been wise, equitable and suited to promote the welfare of the Church." This responsibility of review, whether through "General Review and Control" (*BCO* 40) or complaint (*BCO* 43) is of particular import when the action (or inaction) of a lower court may allow "heretical opinions" to make their way into the Church (*BCO* 40-4). The General Assembly has particular responsibility in these areas as it is charged to "bear testimony against error in doctrine" (*BCO* 14-6.a) and to "suppress schismatic contentions and disputations" (*BCO* 14-6.g).

Higher courts, and especially the General Assembly (through its Standing Judicial Commission), can carry out the responsibilities noted above only if the lower court provides a clear and sufficient record.⁹

⁹ See the reasoning in Case 2014-01 (*Aven and Dively vs. Ohio Valley Presbytery*) for further discussion of why courts must include some analysis of stated differences from the Constitutional documents when the stated differences appear to be ones that are not immediately familiar to the court or are likely not to be familiar to the higher court or are based on reasoning that is not "typical."

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In conclusion, the Complaint is sustained, and the matter is remanded to Presbytery with instructions to ensure that obviously germane and important documentation with respect to the question of whether TE Smith’s views are “out of accord with any fundamental of our system of doctrine” is included in the minutes of Presbytery. This would include, at a minimum, the action of OPCUS in declaring “that the system of doctrine delineated in the papers of Mr. Smith ... [does] not stand within the system of doctrine contained within the Westminster Standards ...,” its action to restrict TE Smith’s teaching of such doctrines, and TE Smith’s paper “Why Then the Law?”.

In addition, the Record before us contains no documentation that TE Smith was released by OPCUS. If such has been received that, too, must be included in the minutes of Presbytery.

Finally, we remind the parties that if Presbytery has received attestation that TE Smith was released and Presbytery has received him, that action cannot be undone. If there is a desire for further action on this matter, it could come only as a result of a *BCO* 31-2 investigation or someone filing charges.

This opinion was written jointly by RE Frederick Neikirk and TE Fred Greco and adopted, as amended by the Panel. This opinion was amended and approved by the SJC on October 20, 2016 on the following roll call vote (18 Concur, 4 Dissent, 2 Absent):

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| Bankson, <i>Concur</i> | Dowling, <i>Concur</i> | Meyerhoff, <i>Concur</i> |
| Barker, <i>Concur</i> | Duncan, <i>Concur</i> | Neikirk, <i>Concur</i> |
| Bise, <i>Concur</i> | Evans, <i>Concur</i> | Nusbaum, <i>Dissent</i> |
| Cannata, <i>Dissent</i> | Fowler, <i>Absent</i> | Pickering, <i>Concur</i> |
| Carrell, <i>Concur</i> | Greco, <i>Concur</i> | Robertson, <i>Concur</i> |
| Chapell, <i>Concur</i> | Jones, <i>Dissent</i> | Terrell, <i>Concur</i> |
| Coffin, <i>Concur</i> | Kooistra, <i>Concur</i> | White, <i>Absent</i> |
| Donahoe, <i>Dissent</i> | McGowan, <i>Concur</i> | Wilson, <i>Concur</i> |

**CONCURRING OPINION ON CASE 2015-13
RE Jack Wilson**

I concur in the judgment of the Commission. I write separately to address the standard of review applicable in this case. Issues related to the applicable standard of review arise frequently in the Commission’s review of complaints

from presbytery actions on stated difference with our standards. The following provisions of our *Book of Church Order* address these matters:

While our Constitution does not require the candidate's affirmation of every statement and/or proposition of doctrine in our Confession of Faith and Catechisms, it is the right and responsibility of the Presbytery to determine if the candidate is out of accord with any of the fundamentals of these doctrinal standards . . . *BCO* 21-4(e)

The court may grant an exception to any difference of doctrine only if in the court's judgment the candidate's declared difference is not out of accord with any fundamental of our system of doctrine because the difference is neither hostile to the system nor strikes at the vitals of religion. *BCO* 21-4(f)

A higher court should ordinarily exhibit great deference to a lower court regarding those matters of discretion and judgment which can only be addressed by a court with familiar acquaintance of the events and parties. Such matters of discretion and judgment would include, but not be limited to: the moral character of candidates for sacred office, the appropriate censure to impose after a disciplinary trial, or judgment about the comparative credibility of conflicting witnesses. Therefore, a higher court should not reverse such a judgment by a lower court, unless there is clear error on the part of the lower court. *BCO* 39-3(3).

BCO 21-4(f) specifically calls upon the presbytery to exercise its judgment to determine whether the candidate's stated difference is out of accord with any of the fundamentals of our doctrinal standards. Since presbytery is exercising its discretion and judgment, under *BCO* 39-3(3), the decision of the lower court should not be reversed unless there is clear error. "Clear error" has been defined as an unquestionably erroneous judgment by a trial court. *Black's Law Dictionary* (9th ed. 2009, Bryan A. Garner, ed.). In this case, the Commission determined that HP clearly erred in failing to distribute and weigh information that should have been considered in evaluating the stated differences.

A different standard of review would apply if the proceedings below presented issues involving the interpretation or application of the Constitution of the Church.

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The higher court does have the power and obligation of judicial review, which cannot be satisfied by always deferring to the findings of a lower court. Therefore, a higher court should not consider itself obliged to exhibit the same deference to a lower court when the issues being reviewed involve the interpretation of the Constitution of the Church. Regarding such issues, the higher court has the duty and authority to interpret and apply the Constitution of the Church according to its best abilities and understanding, regardless of the opinion of the lower court. *BCO* 39-3(4).

Some parties before the Commission have taken the position that the evaluation of any stated difference with our standards presents issues involving the interpretation of the Constitution of the Church, in which the higher court would owe no deference to the lower court. That position is at odds with the plain language of *BCO* 21-4 and 39-3(3).

If the Church wishes to modify the applicable standard of review or to create a uniform procedure to be followed in evaluating stated differences, then the *BCO* could be amended to provide such rules. Such an amendment could benefit the Church by providing guidance to presbyteries and credentialing committees in evaluating differences with our standards and bringing some uniformity in this important work. The process could include benchmarks for examining the exegesis that prompts the difference, evaluation of the stated difference with one part of the standards in relationship to the overall system, a period of time for study, reflection by the candidate and examination by the presbytery prior to a final vote on the difference, a distinct standard of review for complaints related to differences, and other matters. Until such a uniform process is adopted and implemented, *BCO* 21-4(e) and (f) afford considerable discretion to our presbyteries in the manner and method of these evaluations, and the exercise of that discretion may only be reversed where the record demonstrates “clear error” as described in *BCO* 39-3(3).

/s/ RE Jack Wilson

DISSENTING OPINION ON CASE 2015-13

RE Howard Donahoe

Joined by TE Ray Cannata, RE E.J. Nusbaum, and RE Terry Jones

We respectfully dissent from this Decision. In short, while some may argue Heartland’s examining committee should have shared more information with the Presbytery, there was not clear error on the Presbytery’s part.

While a higher court is on solid footing to review the question, “Did the lower court err in its judgment of a man’s confessional difference?” (*BCO* 21.4.f), it moves onto less stable ground if it attempts to ask, “Did the lower court “sufficiently explore” the confessional difference?” In other words, if a presbytery’s judgment on a man’s difference is not in question, then why bother with how presbytery “explored” it?

The SJC Decision does not say Heartland’s judgment on the minister’s confessional difference was an error, nor did the Complainant allege such. He simply claimed Heartland didn’t consider sufficient information when it rendered its August judgment. Furthermore, he didn’t even assert that if Presbytery had considered the twelve-year old paper, and the teaching restriction from the OPC presbytery, it would have rendered a different judgment.

The SJC Decision directs a remedy that is likewise pretty nominal. It simply directs Heartland (1) to attach his twelve-year old paper to a set of minutes, and (2) to note in its minutes that the Minister had previously had a teaching restriction from a presbytery in another denomination.

So why bother with a Dissenting Opinion?

1. Deference to the Lower Court - *BCO* 39.3.3 begins, “A higher court should ordinarily exhibit *great* deference to the lower occur regarding those matters of discretion and judgment that can only be addressed by a court with familiar acquaintance with the events and parties . . .” (Emphasis added.) Unfortunately, the SJC Decision does not exhibit the great deference. It is a mistake for an appellate court to declare that a lower court has “clearly” erred by not considering information the lower court did not know existed at the time of the alleged error. The single Issue, as stated in the SJC Decision, is directly tied to a Heartland action on August 8, 2015.

As a review, there were two meetings where Presbytery acted. In August 2015, they judged the transferring Minister's confessional difference as being "more than semantic, but not out of accord with any fundamental of our system of doctrine." Three months later, in November, Presbytery denied the Barnes Complaint against their August action. But Heartland, as a whole, was unaware of the paper and the restriction at the August meeting. So, the Complainant essentially alleged Heartland erred by not considering something that Presbytery, as a whole, did not know existed at the time of the action complained against.

The SJC Decision says the absence of this information was a "fatal omission." But how can it reach that conclusion? One would assume it could only be fatal if the information would obviously have resulted in a different judgment. But since the SJC was not reviewing that question (and has not read the paper), such a statement is perplexing.

2. Committee Functioning – The way any presbytery committee functions, including how much of its material should be provided to fellow presbyters, and how much of its deliberations should be reported to fellow presbyters, is a matter of each presbytery's discretion. Each presbytery is free to stipulate whatever committee policies it wants, within the confines of the *BCO*. And most, if not all, presbytery exam committees see written material and hear answers from examinees that their fellow presbyters never see or hear. That's simply the nature of committee work. And such decisions are an internal matters of discretion for each presbytery. The SJC is not responsible to review the internal workings of presbytery committees. It is to review presbytery actions. With all due respect, but frankly, two pages of the Decision's reasoning read more like investigative journalism than an appellate court decision, as it delves into committee emails, etc.
3. Standard of Review - Near the end of its reasoning, the SJC quotes *BCO* 40-2.3 as part of the basis for its Decision: "In reviewing records of a lower court the higher court is to examine... [w]hether they have been wise, equitable, and suited to promote the welfare of the Church." But that's not the standard of review for the SJC. Our standard is specified in the prior chapter, *BCO* 39-3, which stipulates:

. . . To insure that this Constitution is not amended, violated or disregarded in judicial process, any review of the judicial

proceedings of a lower court by a higher court shall be guided by the following principles: . . .”

And per a requirement in the SJC Manual, *BCO* 39-3 is read aloud at every SJC Panel Hearing. *BCO* 40-2 is not.¹⁰

4. Due Diligence (?) – The SJC Decision poses procedural questions like, “whether Presbytery sufficiently explored,” and “whether Presbytery had a sufficient basis for reaching a conclusion,” and uses phrases like, “greater depth of investigation” and “failed to consider.” And in his Brief, the Complainant used the phrase “due diligence” 25 times, and the phrase “sufficiently clear record” 20 times. (We note the “due diligence” phrase never appeared in his original Complaint, and the second phrase appeared only once.) However, there is no “due diligence” standard in the *BCO*. And even if compliance with some explicit “due diligence” standard was under review by this higher court, the following facts do not support the Complainant’s contention that there was clearly a failure of “due diligence.”
 - 1) The transferring Minister’s statement of difference with *WCF* 19 comprised five pages in Presbytery’s Minutes.
 - 2) His floor exam was two-and-a-half hours long.
 - 3) He was transferring in good standing from a NAPARC Presbytery.
 - 4) He had been in good standing in the OPC for 22 years.
 - 5) He received his M.Div. from a respected seminary (Gordon-Conwell).
 - 6) The Credentials Committee (CC) interacted with the minister at reasonable length, even postponing the date of the transfer floor exam for fuller interaction.
 - 7) The Credentials Committee included seven members, in a Presbytery that usually had no more than 23 voting members at a stated meeting. In other words, the Committee was almost 1/3 of the Presbytery’s usual voting attendance.
 - 8) Prior to the August meeting, the CC received and discussed an additional 11 pages of committee-to-minister Q&A on the Minister’s difference. And the SJC Decision indicates the parties stipulated this Q&A document was distributed to the presbyters.
 - 9) Some CC members apparently also read a copy of his 153-page paper from 2003.
 - 10) The Complainant asked questions during floor exam.

¹⁰ In the last 20 years of SJC cases, *BCO* 40-2 is never cited as a standard of review.

One could reasonably argue this was actually a pretty thorough transfer exam for a minister with lengthy experience in a NAPARC denomination. We wonder how many of our presbyteries would conduct a two-and-a-half hour floor exam for a transferring OPC minister with 22 years' experience.

5. Post-Exam Discovery - After an exam is sustained, and no complaint is filed against the *BCO* 21.4.f *judgment* on the man's difference, if someone later discovers information he believes raises concern, his primary judicial options are to make a motion to commence a *BCO* 31-2 investigation, or for that person to file formal allegations against the minister and seek an indictment. And it doesn't matter much whether the discovered material was published or preached before or after the sustained exam. In this Case, the Complainant should have considered this route instead of the more-confusing one he chose. (There are obviously other pastoral and private options that might be more prudent. And a presbytery, per *BCO* 34-5, should always consider whether the alleged problematic view is being "industriously spread.")
6. Conclusion - It would be unfortunate if PCA presbyteries now mistakenly inferred they are required to comply with some undefined "sufficiently explored" standard in exams. In exams, our *BCO* does not require presbytery minutes to record anything other than:
 - a. the required parts of an exam were conducted (*RAO* 16.3)
 - b. the examinee's statement of "the specific instances in which he may differ with the Confession of Faith and Catechisms in any of their statements and/or propositions" (*BCO* 21.4.f), and
 - c. presbytery's judgment on each difference (*RAO* 16-3.e.5).

The *BCO* does not require committee minutes to be attached to presbytery minutes. It doesn't require a committee to distribute all the material it considered. It doesn't require a presbytery to record its rationale for judging a confessional difference a certain way. It doesn't require a record of how long the exam took, what specific questions were asked, or what answers were given. Therefore, if the PCA wants to specify additional exam procedures or requirements, the PCA should consider adopting amendments to the exam paragraphs of the *BCO* (i.e., 13-6 transfer, 14-1.14 TEC, 18-3 candidacy, 19-2 licensure, 19-9 internship, and 21-4 ordination).

/s/ RE Howard Donahoe

/s/ RE EJ Nusbaum

/s/ TE Ray Cannata

/s/RE Terry Jones