2017-01

SCOTT DAILEY
VS.
HERITAGE PRESBYTERY
DECISION ON COMPLAINT
MARCH 1, 2018

I. SUMMARY OF THE FACTS

05/18/16 A member of New Covenant Presbyterian Church (NCPC) met with a TE and an RE from the Session of NCPC. During that meeting, the member was told that she was being removed from the worship team.

07/28/16 The member wrote a letter to the Session of NCPC. In the letter, the member expressed a number of concerns and raised a number of questions regarding her dismissal from the worship team. She stated that her letter was to "appeal to you for you to take action on resolving a situation that is currently at an impasse between myself, a TE, and an anonymous complainer."

08/13/16 The member and the Session of NCPC met. NCPC Session records the minutes of the meeting and the member prepares a summary of the meeting from her notes

09/12/16 The member submitted a document entitled "Complaint;" hereafter (referred to as the "Document") to the Session of NCPC. The Document contained six specifications of error identifying alleged failures of the Session or members of the Session. The list of allegations included actions or failures to act, but none of the allegations were linked to a date that specified when the error took place.

09/23/16 The Session of NCPC responded to the member with the declaration that her Document dated September 12, 2016 did "not meet the criteria for a Complaint as defined by *BCO* 43-1; the Session has taken no action nor rendered any decision in relation to you."

09/30/16 The member sent a letter to Heritage Presbytery (HP). In the letter, she alleged that NCPC "responded to my

complaint by dismissing it" and that "the Session at New Covenant has declined to consider it."

11/12/16 HP considered this matter at the November 12, 2016 stated meeting. HP gave the Moderator authority to appoint a commission to hear the complaint included in the Document.

11/29/16 RE Scott Dailey filed a Complaint against the action taken by HP on November 12, 2016.

01/28/17 HP took up the Complaint filed by RE Dailey and denied the Complaint.

01/16/18 The SJC panel heard the case.

II. STATEMENT OF THE ISSUE

Did Presbytery err on November 12, 2016, when it upheld its Moderator's ruling that Mrs. Hubbard's document was administratively in order as a Complaint arriving via *BCO* 43-3?

III. JUDGMENT

Yes. The Complaint is sustained and any and all actions taken by HP in adjudicating the issues raised in the Document after November 12, 2016 are annulled.

IV. REASONING AND OPINION

The issue in this case involves a matter of interpretation of the Constitution of the Church. Therefore, the higher court has the duty and authority to interpret the Constitution of the Church according to its best abilities and understanding. (*BCO* 39-3.4)

In an explanatory note in the minutes from the HP meeting of November 12, 2016, HP justified the action of giving the moderator authority to appoint a commission to adjudicate the Complaint as follows: "as the lower court had refused to adjudicate the matters complained of, had not responded to affirm or deny her specifications of error, the higher court on notice of complaint through its commission now act as the court of first jurisdiction."

This is an incorrect interpretation of the Constitution. *BCO* 43-3 specifies only two situations where a Complaint can be taken from a lower court to a higher court. 1) If the court that is alleged to be

delinquent denies the complaint or 2) If the lower court fails to consider the complaint against it by the next stated meeting.

In this case, neither situation exists. First, the action taken by the Session of NCPC was to declare that the Document submitted by the member did not meet the criteria of a complaint as defined by *BCO* 43-1; this ruling is not the equivalent of denying the complaint. Second, it is clear from the Record of the Case that NCPC did consider and took action on the Document that was submitted as a complaint in a timely manner; the Document was received on September 12, 2016 and the response, sent "for the Session," was issued on September 23, 2016.

To preserve the rights of the lower court, and in conformity with our Constitution, the proper course would have been for an individual to have filed a complaint with the Session against the Session's action on the communication from Mrs. Hubbard. Such complaint would have allowed the matter to be dealt with under *BCO* 43-2 and thereby, would provide a clear record of the Session's action.

Further, the SJC notes that the Record of the Case includes matters that could be construed as evidencing serious errors with respect to the treatment of Mrs. Hubbard by the Pastor and Session of NCHP. Should Heritage Presbytery desire to address such matters there are avenues available in our Rules of Discipline. With respect to the Pastor:

> *BCO* 31-2. It is the duty of all church Sessions and Presbyteries to exercise care over those subject to their authority. They shall with due diligence and great discretion demand from such persons satisfactory explanations concerning reports affecting their Christian character. This duty is more imperative when those who deem themselves aggrieved by injurious reports shall ask an investigation.

With respect to the Session:

> *BCO* 40-5. When any court having appellate jurisdiction shall receive a credible report with respect to the court next below of any important delinquency or grossly unconstitutional proceedings of such court, the first step shall be to cite the court alleged to have offended to appear before the court having appellate jurisdiction, or its commission, by representative or in writing, at a specified time and place, and to show what the lower court has done or failed to do in the case in question.

This decision was written by the Panel and amended and approved by the SJC on the following roll call vote:

Bankson, *Concur*	Duncan, *Absent*	Neikirk, *Concur*
Bise, *Concur*	Evans, *Concur*	Nusbaum, *Concur*
Cannata, *Concur*	Fowler, *Dissent*	Pickering, *Concur*
Carrell, *Dissent*	Greco, *Concur*	Terrell, *Dissent*
Chapell, *Concur*	Jones, *Concur*	Waters, *Concur*
Coffin, *Concur*	Kooistra, *Concur*	White, *Concur*
Donahoe, *Dissent*	McGowan, *Concur*	Wilson, *Concur*
Dowling, *Dissent*	Meyerhoff, *Concur*	

DISSENTING OPINION

ON CASE 2017-01

RE Howie Donahoe, joined by RE Dan Carrell, RE Steve Dowling, TE Paul Fowler, and RE Bruce Terrell

I respectfully disagree with the SJC Judgment in this Case. The Complaint should have been denied because Presbytery legitimately received Mrs. Hubbard's filing via *BCO* 43-3 after the Session had failed to consider what she contends was a complaint. But this Dissent does not address the merits of the Session's out-of-order ruling or her underlying Complaint. It only addresses whether the Presbytery properly accepted the matter for review.[30]

> *BCO* 43-3. If, after considering a complaint, the court alleged to be delinquent or in error is of the opinion that it has not erred, and denies the complaint, the complainant may take that complaint to the next higher court. If the lower court fails to consider the complaint against it by or at its next stated meeting, the complainant may take that complaint to the next higher court. (Emphasis added).

In his October 2016 email to the Presbytery Clerk, a month after Hubbard carried her complaint to Presbytery, Session Clerk Webster said the Session "never acted on a complaint." He reported the Session did not regard

[30] I also dissented in a Case two years ago that involved the interpretation of *BCO* 43-3, for the same reasons, but declined to file a Dissenting Opinion – Case 2015-12: *Wills v. Metro Atlanta*, *M44GA*, Mobile, AL, p. 554-555.

anything in Hubbard's July or September letters as a *BCO* 43-1 complaint because it purportedly did not *"point to or refer to any action taken by the NCPC Session (the church court) alleging that a certain action was constitutionally or procedurally an error."* But the Record indicates Hubbard was at least seeking review of her dismissal from the worship team, notice of which she received on May 18, 2016, and which she apparently assumed was an action approved by the Session (at least implicitly). Her September Complaint was against the Session's August 13 alleged failure to remedy what she believed were Session errors.

In such a case, if a session's procedural ruling is correct and a complaint is indeed administratively out-of-order ("AOO"), the session has nothing to fear. When a presbytery accepts a complaint via *BCO* 43-3, after a session has ruled it AOO, the presbytery would first review the AOO ruling, (administrative review) and if it sustains that ruling, the presbytery would decline to go further and would not consider the underlying complaint. But if the presbytery judged the session's AOO ruling to be an error, the presbytery would either proceed to adjudicate the underlying complaint (judicial review) or remand to the session to do so, whichever the presbytery deemed most appropriate.

This present Decision precludes that scenario, and instead, rules that a complainant would need to file a new and separate complaint with the session solely against the AOO ruling. But this somewhat narrow interpretation of *BCO* 43-3 could create unfair situations and extensive delays.

Let's say a session receives a document, which the member titles as a complaint, but rules it AOO on the ground that the member lacks standing to file a *BCO* 43-1 complaint. (Let's say the session mistakenly thinks a communicant child cannot file a complaint.) Then, per the ruling in *Dailey*, the member files a new and separate complaint against the AOO ruling. But the session would presumably rule the new complaint also AOO for lack of standing. Thus, the member could be caught in a procedural whirlpool, unable to get higher court review, even on the issue of standing. (The whirlpool scenario could also exist, for example, if a presbytery mistakenly ruled an honorably retired minister lacked standing to file a *BCO* 43-1 complaint.)

And unless clarified by the SJC, the *Dailey* Decision could also result in prolonged delays for higher court review of the underlying complaint. Let's say a presbytery sustains the ordination exam of a candidate at a meeting on May 1, 2018. On June 15, TE John Calvin files a complaint with presbytery,

alleging the exam shouldn't have been sustained due to the candidate's view on a theological matter. The presbytery dockets Calvin's complaint for its next stated meeting, and in September 2018, rules it AOO on the (mistaken) grounds that there was a 30-day filing deadline for his *BCO* 43-1 complaint. At that point, Calvin would prefer to carry a *single* complaint to the SJC against presbytery's AOO ruling and its sustained ordination exam. But the *Dailey* Decision requires Calvin to first file a new and separate procedural complaint with presbytery against the AOO ruling. So, Calvin files the AOO complaint, presbytery considers it at its next stated meeting in January 2019 and denies it. He then carries the AOO complaint to the SJC. In June 2019, an SJC Panel holds a hearing on the AOO complaint *only*, and at the SJC meeting in October 2019, the SJC sustains his complaint against Presbytery's AOO ruling. That resets the matter back 13 months to September 2018 when Presbytery mistakenly ruled the original complaint AOO. Then, respecting the SJC's October 2019 annulment of its AOO ruling, Presbytery hears the theological complaint at its stated meeting in January 2020, but denies it on its merits. Calvin is then, in late January 2020, finally allowed to carry the original theological complaint to the SJC. But by then, it's 16 months after presbytery mistakenly ruled it AOO in September 2018.

In this fictional-but-realistic scenario, Calvin should have been allowed to take *both* his AOO and his original complaints to the SJC immediately after presbytery ruled it AOO in late September 2018. (As an alternative, perhaps the SJC could have specified in its *Dailey* Decision that if an AOO complaint is filed with and denied by the original court, the complainant can carry both his AOO *and* his underlying complaint to the next higher court, and not just the AOO complaint.)[31]

A broader interpretation of the phrase "fails to consider" would avoid such problems, and I believe the broader interpretation would more accurately reflect how the phrase is understood elsewhere in our governing documents.

In our PCA rules, the verb "fails to" is synonymous with "does not." This seems clear from the 10 instances where the phrase appears in the *BCO*

[31] Perhaps the SJC might consider clarifying the *Dailey* ruling this way if it adopts an answer to this Dissent.

(along with 5 in the *RAO* and 6 in the SJC Manual).[32] Below are two examples, with underlining added.

> 25-2. Upon such a proper request, if the Session cannot act, fails to act or refuses to act, to call such a congregational meeting within thirty (30) days from the receipt of such a request, then any member or members in good standing may file a complaint in accordance with the provisions of *BCO* 43.
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> 40-5. When any court having appellate jurisdiction shall receive a credible report with respect to the court next below of any important delinquency or grossly unconstitutional proceedings of such court, the first step shall be to cite the court alleged to have offended to appear before the court having appellate jurisdiction, or its commission, by representative or in writing, at a specified time and place, and to show what the lower court has done or failed to do in the case in question.

More importantly, the verb "to consider" should be understood as synonymous with "evaluate" or "assess" or "weigh the merits of." This seems clear from 9 instances where the *BCO* uses the verb (plus 10 in the *RAO* and 11 in the SJC Manual.)[33] Below are a few examples.

> 15-1 A commission differs from an ordinary committee in that while a committee is appointed to examine, consider and report, a commission is authorized to deliberate upon and

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[32] Twenty-one instances of *"fails to"* - *BCO* 23-1, 24-7, 25-2, 31-9, 34-10, 40-1, 40-5, 42-11, 43-3 & 43-7. *RAO* 14-9g, 15-3, 15-8e, 16-4e & 16.5e. *OMSJC* 9.2c, 9.2e 17.6, 18.6, 18.7, & 18.8b.

11 instances of *"failure"*- *BCO* 26-6, 42-11 & 43-7. *RAO* 14-11d.1 & 19.4b. *OMSJC* 7.4c, 8.5, 10.6, 18.7, 18.8c & 18.12c.

[33] Thirty instances of *"consider"* - *BCO* 5-9f.1, 15-1, 15-5c.4, 41-6, 42-5, 43-2, 43-3, 43-6 & 43-9. RAO 7-3a, 7-5d, 11-2, 13-3, 13-5, 14-6b, 14-6c, 14-6d, 14-7 & 15-1. SJC Manual: 2.10c, 2.10c.3, 10.3d, 13.4b, 14.4b, 15.5, 16.3, 17.8a, 17.9a, 17.9b & 18.12.c.

Twenty-four instances of *"considered"* - *BCO* 13-6, 15-5c.2, 34-5 & 34-10. RAO 4-1, 7-5d, 8-2b.3, 9-5, 11-6, 11-9, 11-10, 14-7a, 14-9e, 14-9f, 15-6c, 15-7a, 15-8c, 15-8d, 15-8e, 19-3 & 19-3d. SJC Manual 4.1, 4.2 & 7.4.

Twenty instances of *"consideration"* - *BCO* 14-7, 24-7, 32-12, 32-18, 37-8 & 41-4. RAO 9-5, 11-5, 13-4, 14-7b, 14-9h.2, 15-6n, 15-8g.2, 15-9c & 17-3d. SJC Manual 2.5b, 2.12e, 4.2, 17.3 & 17.8d.

> conclude the business referred to it, except in the case of judicial commissions of a Presbytery appointed under *BCO* 15-3.
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> 41-6. When a court makes a reference, it ought to have all the testimony and other documents duly prepared, produced and in perfect readiness, so that the higher court may be able to fully consider and handle the case with as little difficulty or delay as possible.
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> 43-9. ... After the hearing has been concluded, the court or the commission should go into closed session and discuss and consider the merits of the complaint.

Ruling a complaint AOO is a procedural decision on its admissibility. While it is an action regarding the *filing*, it is not a consideration of the complaint itself. And a brief historical review sheds some light on the original intent of the debated phrase in *BCO* 43-3. It seems a 1992 revision was intended to require "consideration" by the original court, and not just undefined "action." Thirty-seven years ago, in 1991, the SJC recommended some *BCO* changes, including a clarifying change to *BCO* 43-3. Below was the SJC's recommendation, along with its reason.

> "4. Amend *BCO* 43-3 by deleting from the first sentence the words "or fails to act on the complaint" and add as the second sentence the following: "If the court fails to consider the complaint by or at its next stated meeting, the complainant may make complaint to the next higher court." (Emphasis added.)
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> "Reason: We have found a great deal of confusion to what the words "fails to act on the complaint" in *BCO* 43-3 actually mean. The above proposed amendment would tie to the language of *BCO* 43-2 making it mandatory that the court consider the complaint at its next stated meeting or at a called meeting prior to its next stated meeting. This would set a time frame under which the complainant would have a right to complain to a higher court if the lower court failed to consider the complaint within this time frame." (*M19GA*, 1991, p. 112)

The 1991 Birmingham Assembly adopted the recommendation. The following year, Presbyteries voted 44-3 to affirm the change, and the 20th GA in Roanoke also affirmed, and thus codified, the change in 1992. (The

dissenting Presbyteries were Potomac, Westminster and New River. *M20GA*, 1992, p. 53)[34]

When Heritage Presbytery rightfully acted as the higher court per *BCO* 43-3, it simply did what the SJC routinely does, that is, receive a document the filer asserts is a complaint, and then take steps to determine if it's administratively and judicially in order. And presumably, the administrative question would have been the first matter addressed by Heritage Presbytery *after* it received the Record of the Case. In the 18 years between June 1997 and June 2015, the SJC rendered out-of-order rulings in 94 cases, i.e., in 36% of the 257 cases it received. Heritage Presbytery should have been afforded the same opportunity to do that kind of initial, higher court procedural review.

Case Precedents - The *Dailey* Decision seems to rely on a rather narrow reading of *BCO* 43-3, but that paragraph should be understood more broadly. For example, let's say a presbytery dockets and considers a *BCO* 43-1 complaint. But a motion to deny fails, as does a subsequent motion to sustain. Where does that leave the complainant? It is hard to argue that the presbytery "failed to consider" the complaint, but it is also hard to argue that the presbytery denied the complaint. So, a narrow reading of *BCO* 43-3 might not allow the complainant any remedy. But a broader understanding of *BCO* 43-3 would prudently allow the complainant to carry that complaint immediately to the SJC, and the SJC has ruled this way in two previous Cases.[35]

A more recent example of this broader understanding of the phrase "failed to consider" is seen in the Decision in a case where a minister filed a complaint with Great Lakes Presbytery, which the Presbytery ruled out-of-order. He

[34] The first SJC was elected at the 17th GA in 1989. In 1990-91 the SJC included TEs Aquila, Bolus, Clements, Codling, L. Ferguson, R. Ferguson, Hall, Ragland, Roberts, M. Smith, Stanway and Stuart, with REs Allen, Belz, H. Brown, W. Brown, Friedline, Horton, Lane, Peacock, Spencer, Wells, White and Williamson.

[35] Case 92-9a *Antioch Session vs. Eastern Carolina*, M22GA Atlanta 1994, p. 88. http://pcahistory.org/ga/ 22nd_pcaga_1994.pdf

Case 1997-07: *Black v. Eastern Carolina*, M29GA, Dallas 2001, p. 98. http://pcahistory.org/ga/ 29th_pcaga_2001.pdf

immediately carried it to the SJC, which received and adjudicated it without requiring him to file a new/separate complaint with Presbytery against its out-of-order ruling.[36]

These citations simply highlight that in at least four cases where a presbytery ruled a complaint out-of-order, and the complainant then carried it directly to the SJC, the SJC received and adjudicated it *without* requiring the complainant to first file a separate complaint with presbytery against the out-of-order ruling. (This is what Heritage Presbytery tried to do and what RE Dailey complained against.) This less-rigid interpretation of *BCO* 43-3 would allow a person to carry his complaint to the higher court immediately after the lower court rules it AOO. Then, the higher court would review the AOO ruling (referring to whatever record the lower court sends up), and if it sustains the complaint against that ruling, the higher court would either adjudicate the underlying complaint following the sequence and procedures in *BCO* 43-3 through *BCO* 43-10, or remand to the lower court for proper consideration.

But this *Dailey* Decision would not allow such a review. And yet, surprisingly, while the Decision *sustains* the Complaint of Session member Dailey, the Reasoning concludes with a serious and rather abrupt comment about the Pastor and the Session.

> Further, the SJC notes that the Record of the Case includes matters that could be construed as evidencing serious errors with respect to the treatment of Mrs. Hubbard by the Pastor and Session of [New Covenant Presbyterian Church]. Should Heritage desire to address such matters there are avenues available in our Rules of Discipline.

Granted, the caveat softens the comment, but expressing such an opinion seems beyond the court's purview when it has ruled the Presbytery erred in even accepting Mrs. Hubbard's complaint for review, and especially when the SJC has not received a brief or heard arguments from the Session regarding her assertions. A broader interpretation of *BCO* 43-3 would have allowed Heritage to review the Session's AOO ruling, and if the Presbytery found it to be in error, it could have proceeded to adjudicate Hubbard's underlying complaint. This would have afforded the Session and the

[36] Case 2011-02: *Gonzales v. Great Lakes,* M40GA, Louisville 2012, p. 551. http://pcahistory.org/ga/ 40th_pcaga_2012.pdf

See also Case 2011-14: *Reese & Belch v. Philadelphia*, M42GA, Houston 2014, page 528. http://pcahistory.org/ ga/42nd_pcaga_2014.pdf

complainant an opportunity to present their arguments on those matters directly to Presbytery. But instead of allowing that more prudent and arguably-permissible course, the above comment seems to jump over Presbytery, and back to the *underlying* matter, and seems to imply the Pastor and the Session could be, and perhaps should be, formally investigated via *BCO* 31-2 and *BCO* 40-5. Ironically, a narrow interpretation of "fails to consider" in *BCO* 43-3 has delayed review of the underlying matter and any "serious errors" for many months. Presbytery tried to address these matters at its November 2016 meeting. It is now 17 months later. The process in *BCO* 43-5 thru 43-10 would have been a more timely and prudent course for handling these things.

Again, this Dissent does not comment on any of the matters in the underlying Hubbard complaint or the Session's AOO ruling. It only addresses the procedural and interpretive question of *BCO* 43-3.[37]

I'll conclude by mentioning a fear lingering in the back of my mind. Two years ago, in the first of two *Wills v. Metro Atlanta* cases, the Presbytery had ruled a minister's complaint AOO simply for lack of a signature. The SJC's interpretation of *BCO* 43-3 in that Case was the same as its interpretation in *Dailey*, which resulted in an 18-month delay before the SJC reviewed Will's underlying complaint in *Wills 2*. Given the interpretation employed in the first *Wills* Case, and now in *Dailey*, I fear some in our lower courts might begin viewing AOO rulings as way to squash complaints, at least for several months.[38]

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[37] At the same time, any session's staffing decision involving non-ordained staff (paid or volunteer) is a matter of discretion and judgment, and as such, the higher courts "should ordinarily exhibit great deference" to the lower court and only reverse such a decision if there is "clear error," per *BCO* 39-3.3. The Evangelical Presbyterian Church addresses this directly in their Book of Discipline, Chapter 1, Section 3: *Church Members Who Are Also Employees*: " The employer/employee relationship is not within the scope of the Book of Discipline. Church members who are also employees of the church shall be subject to discipline as an employee under whatever procedures may be established by the church for employees. They may also be subject to discipline as a member under the Book of Discipline."

[38] Cases 2015-12 and 2016-14, *Wills v. Metro Atlanta*, M45GA, pp. 543-554 and M46GA, pp. 554-555. Rev. Wills' underlying complaint was against Presbytery's dissolving a PCA church without its consent. Eventually, the SJC unanimously denied his underlying complaint, in Case 2016-14.