

**THE PERMANENT JUDICIAL COMMISSION
OF THE GENERAL ASSEMBLY
OF THE PRESBYTERIAN CHURCH (U.S.A.)**

Presbyterian Church (U.S.A.) by Presbytery of)	
Northern Kansas,)	
Complainant/Appellee,)	DECISION AND ORDER
)	
v.)	
)	Disciplinary Case 216-5
Michael B. Myers,)	
Respondent/Appellant.)	

Headnotes

1. Drafting of Charges: A charge that alleges two separate offenses does not comply with the requirement of D-10.0403 that each charge “shall allege only one offense.”
2. Voting and Judgment on Charges: D-11.0403a and c require that a permanent judicial commission vote on each charge separately and prepare a written decision stating its judgment on each charge.
3. Scope of Review: It is inappropriate for an appellate permanent judicial commission to review the innocence or guilt of an accused on an offense when no determination of innocence or guilt on that particular offense has been made by the governing body conducting the trial.

Arrival Statement

This disciplinary case came before this Commission on an appeal filed by Michael B. Myers, Respondent/Appellant, from a decision of the Permanent Judicial Commission of the Synod of Mid-America dated January 18, 2003.

Jurisdictional Statements

The Permanent Judicial Commission finds that it has jurisdiction, that the Appellant has standing to appeal, that the appeal was properly and timely filed, and that the appeal states one or more of the grounds for appeal set forth in D-13.0106.

Appearances

Appellant Michael B. Myers represented himself. Rodney G. Nitz appeared as counsel for the Appellee.

History

Michael B. Myers (Appellant) is a minister of the Word and Sacrament in the Presbyterian Church (U.S.A.) and a minister member of the Presbytery of Northern Kansas. Cheryl Myers, spouse of Appellant, commenced marriage dissolution proceedings in Shawnee County, Kansas, in September 2000. Having received allegations of misconduct against the Appellant, Presbytery appointed an investigating committee on January 10, 2001.

The investigating committee sent drafts of two charges to the Appellant on September 25, 2001, by certified mail. On December 20, 2001, Appellant met with the investigating committee. At this meeting, a verbal agreement was made to tape record the proceedings, but the tape recording was not to be used in evidence at a subsequent trial.

On January 7, 2002, the investigating committee formally brought two charges against Appellant alleging that he was guilty of misconduct:

“1. Failure to file personal and business tax returns for several years (1996-2000) in violation of scripture (Romans, chapter 13) and G-6.0106a; 2. Failure to live in fidelity within the covenant of marriage between a man and a woman (W-4.9001), or chastity in singleness, in violation of G-6.0106b. You are married to Cheryl Myers, and you have acknowledged under oath that you are living with Jeanette Vicari. Further, the Honorable David E. Bruns found in a letter decision dated May 8, 2001, that you acknowledged to the Office of the Disciplinary Administrator that you have a ‘fiancée.’ Judge Bruns concluded that it is questionable how one can still be married and have a ‘fiancée’.”

The charges were amended on March 26, 2002, to read as follows:

“(1) Failure to file personal and business tax returns for several years (1996-2000) as well as failing to resolve income tax returns in audit with the IRS in violation of scripture (Romans, chapter 13) and G-6.0106a and b; (2) Failure to live in fidelity within the covenant of marriage between a man and a woman (W-4.9001), or chastity in singleness, and permitting the children of a woman to whom you are not married to call you father, in violation of G-6.0106a and b.

You are married to Cheryl Myers, and you have acknowledged under oath that you are living with Jeanette Vicari. Further, the Honorable David E. Bruns found in a letter decision dated May 8, 2001, that you acknowledged to the Office of the Disciplinary Administrator that you have a ‘fiancée.’ Judge Bruns concluded that it is questionable how one can still be married and have a ‘fiancée.’ You have acknowledged that you permit Ms. Vicari’s children to call you ‘father’.”

A pretrial conference between the Moderator and Clerk of the Permanent Judicial Commission of the Presbytery of Northern Kansas (PPJC) and the Appellant was held on March 7, 2002. During that conference, the Moderator of the PPJC issued an Order setting forth a variety of rulings and setting March 29, 2002, as the date by which all motions were to be made,

ordering Appellant to provide a list of anticipated witnesses and exhibits, and setting April 20, 2002, as the date for trial on the charges. During the pre-trial conference, the Moderator denied Appellant's motion to dismiss regarding standing, reasoning that Appellant's spouse, who initiated the allegations, remained either an active or inactive member of a Presbyterian church and thus was a person under the jurisdiction of a governing body of the Presbyterian Church (U.S.A.). At trial, Appellant did not meet his burden of showing that his spouse was not a member of a Presbyterian church, even though given an opportunity to do so.

On March 31, 2002, and again on April 10, 2002, Appellant filed a request with the Moderator of the PPJC for additional time in which to file his list of witnesses and documents. These requests were denied.

The trial before the PPJC was held on April 20, 2002. The oral decision was rendered on April 20, 2002, and the written decision was issued on April 25, 2002. The evidence at the trial consisted of testimony by the clerk of the investigating committee and testimony by Appellant. The evidence also included five documents presented by the prosecution. These included a letter dated May 8, 2001, from Kansas District Court Judge David E. Bruns to counsel for Appellant and counsel for Appellant's wife regarding a procedural matter in their divorce proceeding; a letter dated April 19, 2001, from Gene Wheeler to the Appellant regarding Appellant's use of the word "fiancée" during a telephone conversation; a letter dated April 17, 2001, from C. Brooks Wood to Appellant regarding the Appellant's introduction of his assistant as his "fiancée"; and letters dated June 8, 2001, and September 29, 2001, from Appellant to the Moderator of the investigating committee.

The PPJC found Appellant guilty on both charges:

"We, the Permanent Judicial Commission, find the accused guilty of the first Amended Charge, failure to file income tax returns. We, the Permanent Judicial Commission, find the accused guilty of the second Amended Charge, failure to live in fidelity within the covenant of marriage between a man and a woman, or chastity in singleness."

The PPJC censured Appellant to a rebuke on the first charge of failure to file income tax returns and to temporary exclusion from the exercise of ordained office for two years on the second charge. The PPJC further ordered that Appellant submit a report to the Committee on Ministry of the Presbytery of Northern Kansas through the stated clerk every six months "and shall address such conditions, including that: (1) you shall move out of the home of Jeanette Vicari in which you are now living, and (2) you shall not live with any woman without benefit of marriage."

Appellant appealed the decision to the Synod of Mid-America Permanent Judicial Commission (SPJC), which heard the appeal and issued its decision on January 18, 2003. The SPJC sustained the action of the PPJC in regard to amended charge number 2 that Appellant was in violation of "G-6.0101a" (*sic*), but did not find sufficient evidence to warrant a finding that he violated "G-6.0101b" (*sic*).

Determination to Remand

Because of significant deficiencies in the PPJC and SPJC proceedings, this Commission is compelled to remand the matter to the SPJC for corrective action.

Charge number 2 of the amended charges, as tried by the PPJC, alleged that Appellant violated both G-6.0106a and b by his alleged “failure to live in fidelity within the covenant of marriage,” by his permitting Ms. Vicari’s children to call him “father,” and by referring to Ms. Vicari as his fiancée. By combining two alleged offenses in one charge, the charge appears to violate the requirement of D-10.0403 that each charge “shall allege only one offense.”

Moreover, in its “Verdict,” the PPJC found the Appellant guilty of “failure to live in fidelity within the covenant of marriage between a man and a woman, or chastity in singleness,” which cites a violation of G-6.0106b only. The PPJC decision makes no mention of its determination on the alleged violation of G-6.0106a. By citing only G-6.0106b, the PPJC appears in violation of the requirements of D-11.0403a and c that a PJC vote on each charge separately and prepare a written decision stating its judgment on each charge. Finally, the decision does not indicate whether the assertions regarding the Appellant’s use of the term “fiancée” and his permitting the children to call him “father” were included in its finding of guilt on G-6.0106b.

These deficiencies in the trial proceedings regarding charge number 2 were exacerbated when the SPJC “sustained” the decision of the PPJC. In its decision, the SPJC stated, “the PPJC did not err in finding Appellant in violation of G-6.0106a, but did not find sufficient grounds to support the application of G-6.0106b.” This Commission’s reading and understanding of the PPJC decision differs from that of the SPJC in that the “Verdict” of the PPJC refers only to language from G-6.0106b and makes no mention of G-6.0106a. It is inconsistent with principles of due process and fundamental notions of fairness to find the accused guilty on appeal of a violation, which had not been addressed in the PPJC decision.

It is for these reasons that this matter is remanded to the SPJC for whatever corrective action it deems appropriate to comply with this Decision and Order. This shall include further remand to the PPJC for the purpose of modifying its decision, to indicate the Appellant’s innocence or guilt on the alleged violation of G-6.0106a, and to indicate the Appellant’s innocence or guilt on the alleged violation of G-6.0106b. Charge number 1 was not appealed and is therefore not before this Commission.

To facilitate subsequent proceedings, this Commission has made determinations on those specifications of error that pertain to events that occurred prior to the issuance of the PPJC’s written decision.

Specifications of Error

Specification of Error Number 1: The SPJC erred in sustaining the determination of guilt regarding charge number 2 in violation of D-13.0106f and g as follows:

- a. *that Appellant's use of the term "fiancée" on a handful of occasions under oath or in private communications did not violate G-6.0106a and*
- b. *that Appellant's permitting the children of a woman to whom he was not married to call him "father" did not violate G-6.0106a.*

In view of the determination to remand, consideration of this specification of error is premature.

Specification of Error Number 2: *The SPJC erred in affirming the PPJC's refusal to permit Appellant to supplement the record under D-13.0106a, b, c, d, e, f, and g.*

This specification of error is not sustained. The matters that Appellant wants to supplement are already in the record.

Specification of Error Number 3: *The SPJC erred in affirming the PPJC's denial of Appellant's motion to dismiss before trial and his oral motion for directed verdict after submission of the Presbytery's case pursuant to D-13.0106f and g.*

This specification of error is not sustained. Appellant has not shown that the person who made the original allegations herein does not have standing. The Rules of Discipline do not provide for motions for directed verdicts. *Presbyterian Church (U.S.A.) v. Murdock and Woodard, Minutes 1991, p. 183.*

Specification of Error Number 4: *The SPJC erred in affirming the PPJC's decision to deny Appellant the ability to call witnesses and submit exhibits pursuant to D-13.0106a, b, c, d, and f.*

This specification of error is not sustained. The Appellant did not submit a list of witnesses and documents by March 29, 2002, as was required by the pretrial order dated March 7, 2002. Therefore, the Moderator's ruling was correct in that Appellant had not timely complied with the previous order.

Specification of Error Number 5: *The SPJC erred in affirming the PPJC's decision to allow the prosecuting committee to use one of its own members as its sole testimony at trial pursuant to D-13.0106a, c, e, and f.*

This specification of error is not sustained. There is nothing in the record that indicates that the parties entered into a confidentiality agreement during the meeting of December 20, 2001, between Appellant and the investigating committee, which would have precluded members of the investigating committee from testifying regarding what transpired at that meeting. If this were a mutual intent of the parties, it should have been memorialized in the form of a written agreement. The record is sufficient to show that the agreement extended only to the use of any tape recordings made during the meeting. As an experienced trial attorney, Appellant knew, or should have known, that a written agreement was necessary to prevent any misunderstandings on this arrangement. Moreover, the member of the prosecuting committee did not testify to anything substantial, but primarily introduced into evidence documents submitted by Appellant himself.

Members of a prosecuting committee may testify regarding the procedures used during the investigation of allegations of misconduct. Unlike this case, when the underlying factual allegations involve a third party, it is preferable to use the third party as the witness to those facts, especially when the third party is available.

Specification of Error Number 6: The SPJC erred in affirming the PPJC's decision to allow questions of the Appellant at trial beyond the compass of the amended charges and in violation of the accused's right to remain silent regarding questions not related to the amended charges pursuant to D-13.0106a, b, e, f, and g.

This specification is not sustained. This specification of error is not sustained on the basis that the SPJC already ruled that such questioning was not appropriate. This Commission would suggest that while not prohibited, it may not be wise for respondents in disciplinary cases to represent themselves.

Specification of Error Number 7:

- A. The SPJC erred in upholding the severity of censure.*
- B. The SPJC permitted the PPJC to impose a censure without conducting a censure hearing pursuant to D-13.0106b, c, d, f, and h.*

Consideration of Specification of Error Number 7A would be premature in view of our determination on remand.

Specification of Error Number 7B is not sustained. The Commission notes that in this case the Moderator created the impression in Appellant's mind that a censure hearing would be held. However, the Rules of Discipline do not require that a censure hearing be held. D-11.0403e.

Specification of Error Number 8: The SPJC erred in affirming the PPJC's decision to permit the admission of the Presbytery's exhibits pursuant to D-13.0106c and f.

This specification of error is not sustained. Determinations regarding the admissibility of evidence are within the discretion of the PPJC. This Commission does not find that the PPJC abused or improperly exercised its discretion in admitting the referenced exhibits. Absent a showing by Appellant that the PPJC improperly exercised its discretion, this Commission will not substitute its judgment for that of the PPJC, which thoroughly considered the admissibility of these exhibits during the pre-trial and trial proceedings.

Decision

The decision is to remand this case to the SPJC for further proceedings, informed by the determinations on the specifications of error above.

In reaching this determination, this Commission is mindful that the censure imposed upon the Appellant will be completed in May 2004, if the conditions of the censure have been fulfilled. Therefore, this Commission urges prompt attention to and disposition of this matter.

The record reveals extreme confusion on the part of the Appellant, the prosecuting committee, and the PPJC on the relationship between civil law and the judicial process of the Presbyterian Church (U.S.A.) in attempting to apply concepts of secular law to church law and process. While there may be similarities between the two, they are not to be confused with one another.

Order

IT IS THEREFORE ORDERED by this Commission that the decision of the Permanent Judicial Commission of the Synod of Mid-America is remanded to the Synod Permanent Judicial Commission for further proceedings consistent with this Decision and Order.

IT IS FURTHER ORDERED that the Stated Clerk of the Synod of Mid-America report this decision to the Synod at its first meeting after receipt and that the Synod enter the full Decision and Order upon its minutes.

IT IS FURTHER ORDERED that the Stated Clerk of the Presbytery of Northern Kansas report this decision to the presbytery at its first meeting after receipt, that the presbytery enter the full Decision and Order upon its minutes, and that an excerpt from those minutes showing entry of the Decision and Order be sent to the Stated Clerk of the Synod of Mid-America.

The following member of the Commission was not present and took no part in the deliberations or decision of the Commission on this case: Leon Fanniel. Jesse Butler recused himself from any participation in the case.

Dated this 12th day of October, 2003.

Certificate

We certify that the foregoing is a full and correct copy of the decision of the Permanent Judicial Commission of the General Assembly of the Presbyterian Church (U.S.A.) in Disciplinary Case 216-5 made and announced at Louisville, KY, on October 13, 2003.

Jane E. Fahey, Moderator
Permanent Judicial Commission of the General Assembly
of the Presbyterian Church (U.S.A.)

Ernest E. Cutting, Clerk
Permanent Judicial Commission of the General Assembly
of the Presbyterian Church (U.S.A.)

I certify that I did transmit a certified copy of the foregoing to the following persons by United States mail, return receipt requested, at Louisville, KY, on October 13, 2003.

Michael B. Myers, Appellant
Rodney Nitz, Counsel for the Appellee
Dian McCall, Stated Clerk, Presbytery of Northern Kansas
S. Kim Leech, Stated Clerk, Synod of Mid-America
General Assembly Permanent Judicial Commission

I certify that I did transmit a certified copy of the foregoing to the following persons by UPS Next Day Air, directing C. Laurie Griffith to deposit it in the mail at Louisville, KY, on October 13, 2003.

Ernest E. Cutting, Clerk
Permanent Judicial Commission of the General Assembly
of the Presbyterian Church (U.S.A.)

I certify that I received a certified copy of the foregoing, that it is a full and correct copy of the decision of the Permanent Judicial Commission of the General Assembly of the Presbyterian Church (U.S.A.), sitting during an interval between meetings of the General Assembly at Bloomington, MN, on October 12, 2003, in Disciplinary Case 216-5, Presbyterian Church (U.S.A.) by Presbytery of Northern Kansas, v. Michael B. Myers and that it is the final judgment of the General Assembly of the Presbyterian Church (U.S.A.) in the case.

Dated at Louisville, KY, on October 12, 2003.

C. Laurie Griffith
Manager of Judicial Process and Social Witness Policy