

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

David Bierschwale, David Lenz, and Carol) Shanholtzer,) Appellants (Complainants),) v.) Presbytery of the Twin Cities Area,) Appellee (Respondent).)		DECISION AND ORDER Remedial Case 219-08
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Arrival Statement

This remedial case came before this Commission on an appeal filed by Appellants, David Bierschwale, David Lenz, and Carol Shanholtzer (Bierschwale, *et al.*), from a Decision of the Permanent Judicial Commission of the Synod of Lakes and Prairies (SPJC) dated August 12, 2008.

Jurisdictional Statement

This Commission finds that it has jurisdiction, Bierschwale, *et al.* have standing to file the Appeal, the Appeal was properly and timely filed and the Appeal states one or more of the grounds for appeal in D-8.0105 of the *Book of Order*.

Appearances

Bierschwale, *et al.* were represented by Charles Shreffler. David Bierschwale and David Lenz were present in person. The Presbytery of Twin Cities Area (the Presbytery) was represented by Douglas Nave and Barbara Saunders Lutter.

History

This case concerns the action of the Presbytery in restoring Paul Capetz, a minister of Word and Sacrament, to the exercise of his ordained office. Capetz was ordained as a minister of Word and Sacrament in 1991, but asked in 2000 to be released from the exercise of ordained office because of his conscientious objection to the then newly adopted section G-6.0106b of the *Book of Order*. The Presbytery granted the requested release. *See* G-6.0600.

After the 217th General Assembly (2006) adopted an Authoritative Interpretation from the Report of the Theological Task Force on Peace, Unity, and Purity of the Church, addressing section G-6.0108 of the *Book of Order*, on August 15, 2007, Capetz requested that he be restored to the exercise of ordained office under the procedure set forth in G-6.0600c. Capetz responded

to questions put to him by the Presbytery's Committee on Ministry, and stated: "I affirm the Constitutional Questions asked of me at my ordination. However, I have to raise a principled objection or scruple. I cannot affirm G-6.0106b. Nor can I affirm the position of the Presbyterian Church (U.S.A.) on the question of the morality of homosexual relationships."

The Presbytery met on January 26, 2008, and, based on the recommendation of the Presbytery's Committee on Ministry, considered three motions:

First, that Capetz's "declared departure from G-6.0106b be found not to constitute a failure to adhere to the essentials of Reformed faith and polity under G-6.0108 of the *Book of Order*" (Departure Motion);

Second, that Capetz "be restored to the exercise of ordained office of minister of Word and Sacrament" (Restoration Motion); and

Third, that the Presbytery validate Capetz's "ministry as member of the faculty of United Theological Seminary" (Validation Motion).

During the debate on the Departure Motion, Capetz answered questions. In response to one question, Capetz stated: "The 2006 GA has recognized a right of candidates for ministry to declare a departure, or scruple. My departure: I refuse to take a vow of celibacy." Capetz was asked whether he was in compliance with the constitutional standards, and responded: "Even if I could look in a crystal ball and know that I would have no future sexual relationships, I would still refuse to be in compliance with the *Book of Order* as it now stands." Capetz was asked in reference to G-6.0106b, whether he would refrain from intimate sexual activity outside the bounds of marriage between a man and a woman, if he were to be restored to exercise of his ordained office. Capetz responded: "I refuse to take a vow of celibacy." The Presbytery passed all three motions on January 26, 2008.¹

Bierschwale, *et al.* filed a complaint on February 27, 2008, alleging that the Presbytery acted irregularly in passing the three motions, and asked the SPJC to order the Presbytery to nullify all three of its actions with respect to Capetz and determine that Capetz's declared departure from G-6.0106b was a failure to adhere to the essentials of the Reformed faith and polity under G-6.0108. The Presbytery moved to dismiss the Complaint for failure to state a claim upon which relief can be granted.

In an April 25, 2008, Preliminary Order, the Moderator and Clerk of the SPJC dismissed the Complaint, finding that granting the relief requested would nullify Capetz's ordination and that such action could be taken only in a disciplinary proceeding. Bierschwale, *et al.* challenged this Preliminary Order on June 4, 2008, and later amended their Complaint to request that, in addition to the relief previously sought, the SPJC admonish the Presbytery and order it to refrain from conducting further irregular ordinations, installations, restorations or validations.

¹ This Commission issued its decision in *Bush, et al. v. Presbytery of Pittsburgh, GAPJC (218-10)*, on February 11, 2008. The 2008 Authoritative Interpretation was adopted by the 218th General Assembly in June, 2008.

After a hearing on August 12, 2008, the SPJC issued a final Decision and Order dismissing the Amended Complaint for failure to state a claim upon which relief can be granted. Bierschwale, *et al.* filed a Notice of Appeal to this Commission on September 23, 2008. A hearing was held before the GAPJC on February 27, 2009.

Specifications of Error

Bierschwale, *et al.* alleged that they were wrongfully denied an opportunity to present evidence and be heard when the SPJC dismissed their Amended Complaint because it did not state a claim upon which relief could be granted. Specifically, Bierschwale, *et al.* alleged the following Specifications of Error in the Notice of Appeal:

Specification of Error No. 1: The SPJC failed in its responsibility to warn or bear witness against error in doctrine or immorality in practice in the area of its jurisdiction, citing G-12.0102m.

This Specification of Error is not sustained.

Specification of Error No. 2: The SPJC erred by failing to issue a Stay of Enforcement.

This Specification of Error is not sustained.

Specification of Error No. 3: The SPJC erred in characterizing the claim of Bierschwale, et al. as seeking to nullify Capetz's ordination, rather than challenging his restoration to the exercise of ordained office.

This Specification of Error is not sustained. This Commission understands from Bierschwale, *et al.* that they are not seeking to revoke Capetz's ordination. In light of the discussion below, this Specification of Error is not sustained because it is moot.

Specification of Error No. 4: The SPJC erred by not conducting a trial to determine whether there are facts that show: (a) Capetz stated a departure from G-6.0106b and (b) if so, whether that departure was a failure to adhere to the requirements of G-6.0108; and if the facts show that (a) and (b) occurred, whether the Presbytery's action was irregular.

This Specification of Error is sustained.

Specification of Error No. 5: The SPJC erred by not conducting a trial to determine whether there are facts that would show the Presbytery waived the "fidelity and chastity" requirement of G-6.0106b in considering Capetz as a candidate or applicant for membership in the Presbytery; and if so, whether that action by the Presbytery was irregular.

This Specification of Error is sustained. This case is not remanded for a determination in the abstract as to whether any presbytery may decide that the "fidelity and chastity" requirement of G-6.0106b can be waived for any candidate or applicant for membership in a presbytery.

Rather, the SPJC shall decide only on the basis of the facts of what the Presbytery did with respect to Capetz, and whether that particular action was irregular.

Specification of Error No. 6: The SPJC erred in ruling implicitly that compliance with requirements in G-6.0106b for “those who are called to office” is not a continuing obligation.

This Specification of Error is not sustained. There was no such implication in the ruling of the SPJC.

Specification of Error No. 7: The SPJC erred by not determining whether the Presbytery’s action was irregular in restoring Capetz to the exercise of his ordained office even after he expressed a refusal to comply with the fidelity and chastity requirement of G-6.0106b.

This Specification of Error is not sustained.

Specification of Error No. 8: The SPJC erred by determining that a presbytery’s action to deny restoration to exercise of ordained office would not in effect nullify an individual’s ordination.

This Specification of Error is not sustained.

Specification of Error No. 9: The SPJC erred by not determining whether any decision that would affect the ordination status of any individual must be addressed in a disciplinary and not a remedial action.

This Specification of Error is not sustained.

Specification of Error No. 10: The SPJC erred by not determining whether granting a departure from compliance with G-6.0106b is the same as exempting the minister from any future disciplinary charges related to sexual practice contrary to the terms of G-6.0106b.

This Specification of Error is not sustained.

Specification of Error No. 11: The SPJC erred in failing to admonish the Presbytery to refrain from future irregular ordinations, installations or restorations of anyone who refuses to comply with the requirements of G-6.0106b.

This Specification of Error is not sustained.

Specification of Error No. 12: The SPJC erred by ruling that Bush, et al. v. Presbytery of Pittsburgh, 2008 minutes, p. 314, applies only to ordinations and is not applicable to restorations to exercise of ordained office.

This Specification of Error is not sustained. The SPJC was correct that *Bush* did not address restorations to exercise of ordained office. The Specification of Error misstates the SPJC decision.

Decision

The Departure Motion. Bierschwale, *et al.* did not allege that there was any procedural irregularity in the manner in which the Presbytery took action on any of the three motions, including the Departure Motion. Any alleged irregularity in the process by which motions such as the Departure Motion are adopted is reviewable by the SPJC under the holding of *Bush*. In this case, Bierschwale, *et al.* complained that the Presbytery acted irregularly in adopting the Departure Motion because Capetz's statements to the Presbytery were a serious departure from essentials of Reformed faith and polity and not a proper exercise of freedom of conscience under G-6.0108b.

This Commission finds that Bierschwale, *et al.* have stated a claim upon which relief may be granted, and the SPJC should determine whether Capetz's statements and the Presbytery's adoption of the Departure Motion are in violation of G-6.0108. The SPJC should address whether Capetz's statements were a proper exercise of freedom of conscience under G-6.0108, and whether the Presbytery properly approved them in the Departure Motion. The standards for determining whether departures from essentials of Reformed faith and polity are permitted include whether a departure deviates from the standards in the Book of Confessions and the Form of Government, infringes the rights and views of others, or obstructs the constitutional governance of the church. (G-6.0108 a, b.) The trial of this case should include a presentation of evidence to determine whether these three requirements of G-6.0108 have been met.

The Restoration Motion. The primary issue in this case is whether the Restoration Motion was valid. Capetz's restoration required the approval of the Presbytery, but did not require that he be reordained. (G-6.0600c.) Nor did Capetz's restoration require the Presbytery to adopt the Departure Motion. However, having elected to adopt the Departure Motion, there will now be a determination of the propriety of the Departure Motion as discussed above.² Bierschwale, *et al.*'s challenge to the Restoration Motion is based on their contention that Capetz's statements were in fact a refusal to comply with G-6.0106b. The undisputed record shows that Capetz did not go that far, and there is nothing in the record to show that he has taken any action that could be deemed to be an act in violation of G-6.0106b. There was no irregularity in the Presbytery's action with respect to the Restoration Motion, and no relief upon which this claim can be granted.

To the extent that Bierschwale, *et al.*'s challenge to the Restoration Motion is based on G-6.0108b, it also fails to state a claim upon which relief may be granted. The Presbytery was not ordaining Capetz, but was acting to restore him to the exercise of the office of minister of Word and Sacrament as provided for in G-6.0600c. Noncompliance with any ordination standard or constitutional requirement by one who has already been ordained may only be addressed in a disciplinary proceeding.

² The question of whether the type of examination contemplated by G-11.0402 is required for restoration has not been raised in this case, is not before this Commission, and need not be addressed by the SPJC on remand.

The Validation Motion. Having properly restored Capetz to the exercise of the office of minister of Word and Sacrament, there was no irregularity in validating Capetz’s ministry under G-11.0408 and G-11.0411.

Effect on Capetz. Capetz’s past, present or future conduct is not at issue in this remedial action. If there is any question about Capetz’s conduct, including whether he has led a life in obedience to Scripture and in compliance with historic confessional standards of the church, he, like any other officer of the church, may be held accountable for his conduct under the Rules of Discipline. A remedial case may not be used to challenge the actions of an individual church officer. *Weir v. Second Presbyterian Church*, (2002, *minutes*. p.339). Thus, specifications of error alleged by Bierschwale, *et al.* that rest on the past, present or future conduct of Capetz fail to state a claim upon which relief may be granted in this remedial case. Any contention that disciplinary action may never be brought against Capetz is erroneous. If the SPJC finds that the Departure Motion was proper under G-6.0108, Capetz still may be subject to disciplinary action based on his conduct. Having been restored to the exercise of the office of Minister of Word and Sacrament, Capetz is fully accountable under all standards and requirements for ministers of Word and Sacrament to abide by the Constitution of the PC(USA), including G-6.0106b.

Effect on Future Actions of the Presbytery and Others. The questions raised in this case about the individual exercise of freedom of conscience, restoration to the exercise of ordained office and validation of a particular ministry are by their very nature matters that must be considered in the context of the ministry and circumstances of the individual at issue. These questions require case-by-case consideration. The SPJC did not err in finding that Bierschwale, *et al.* failed to state a claim upon which relief may be granted as to their request for an admonition to the Presbytery with respect to future ordinations, installations or restorations.

The SPJC did not rule (even implicitly) that compliance with requirements in G-6.0106b for “those who are called to office” is not a continuing obligation. In making this allegation, Bierschwale, *et al.* confused ordination requirements with the process for restoration to exercise of ordained office and obscured the differences between remedial and disciplinary cases.

This Commission cannot reach the questions raised by the parties in this appeal as to the validity and effect of the 2008 Authoritative Interpretation (AI) on G-6.0108b or whether *Bush* has effectively been overruled by the 2008 AI. The 2008 AI and *Bush* do not address restoration of officers to the exercise of church office. There is no ordination at issue in this case. Questions as to the validity and application of the statement in the 2008 AI that the requirements of G-6.0108 “apply equally to all ordination standards” of the PC(USA) are not properly raised in this appeal.

Finally, the parties and the SPJC are reminded that this order concerns only the preliminary question of failure to state a claim upon which relief may be granted as to Specifications of Error Nos. 4 and 5.

Order

IT IS THEREFORE ORDERED that the Decision of the Permanent Judicial Commission of the Synod of Lakes and Prairies is hereby affirmed in part and reversed in part.

IT IS FURTHER ORDERED that this case is remanded to the Synod Permanent Judicial Commission for trial as to Specifications of Error Nos. 4 and 5 consistent with this Decision and Order.

IT IS FURTHER ORDERED that the Stated Clerk of the Presbytery of the Twin Cities Area report this Decision and Order 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 General Assembly.

IT IS FURTHER ORDERED that the Stated Clerk of the Synod of Lakes and Prairies report this Decision and Order to the Synod at its first meeting after receipt, that the Synod 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 General Assembly.

Absences and Non-participants

Angel Casaus-Urrutia was not present and took no part in this case.

Certificate

We certify that the foregoing is a true and correct copy of the decision of the Permanent Judicial Commission of the General Assembly of the Presbyterian Church (U.S.A.) in Remedial Case 219-08, *David Bierschwale, David Lenz, and Carol Shanholtzer, Appellants (Complainants), v. The Presbytery of Twin Cities Area, Appellee (Respondent)*, made and announced in San Diego, CA on March 2, 2009

Fred L. Denson, Moderator
Permanent Judicial Commission of the General Assembly

Gregory A. Goodwiller, Clerk
Permanent Judicial Commission of the General Assembly

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 United States mail at San Diego, CA on March 2, 2009.

Charles Shreffler, Counsel for the Appellants
Douglas Nave, Counsel for Appellee
Stated Clerk, Synod of Lakes and Prairies
Stated Clerk, Presbytery of Twin Cities Area
General Assembly Permanent Judicial Commission (regular mail)

I further certify that I did transmit a certified copy of the foregoing to the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) by delivering it in person to C. Laurie Griffith, on March 2, 2009.

Gregory A. Goodwiller, Clerk
Permanent Judicial Commission of the General Assembly

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, in San Diego, CA on March 2, 2009, in Remedial Case 219-08, *David Bierschwale, David Lenz, and Carol Shanholtzer, Appellants (Complainants Below), v. The Presbytery of Twin Cities Area, Appellee (Respondent Below)*, and that it is the final judgment of the General Assembly of the Presbyterian Church (U.S.A.) in the case.

Signed in San Diego, CA, on March 2, 2009.

C. Laurie Griffith
Manager of Judicial Process and Social Witness