

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

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

**Headnote**

- 1. Trials in remedial cases ordinarily to be open to the public.** In a remedial case, a permanent judicial commission should not exclude the public from the trial unless it finds by majority vote that proper dignity and decorum cannot be maintained if the public is present.

**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 May 12, 2009.

**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 Lenz was present in person. The Presbytery of the Twin Cities Area (Presbytery) was represented by Barbara Saunders Lutter and Doug Nave.

**History**

Paul Capetz (Capetz) was ordained as a minister of the 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 under G-6.0600a.

After the 217<sup>th</sup> General Assembly (2006) adopted an Authoritative Interpretation from the Report of the Theological Task Force on Peace, Unity, and Purity of the Church (2006 AI), 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.

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).

The Presbytery passed all three motions on January 26, 2008.

Bierschwale, *et al.* initiated a remedial action 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' 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 action for failure to state a claim upon which relief can be granted.

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. On March 2, 2009, this Commission issued a Decision and Order which sustained the specifications in part. The Restoration Motion and Validation Motion were sustained, but the issues involving the Departure Motion were remanded to the SPJC for trial. *Bierschwale v. Presbytery of the Twin Cities Area*, Minutes, 219-08, March 2, 2009 (*Bierschwale I*).

A trial before the SPJC was held on May 11, 2009, based on the Second Amended Complaint filed by Bierschwale, *et al.* on the day of trial, to which Presbytery objected at trial, but to which no issue was raised by Presbytery in this Appeal. The SPJC excluded the public from attendance at the trial because the SPJC claimed the "right and privilege" to exclude "visitors." On May 12, 2009, the SPJC issued a Decision and Order in which it ruled that Capetz did declare a departure from G-6.0106b, that the stated departure did not infringe on the rights and views of others and that the stated departure did not obstruct the constitutional governance of the church. The SPJC further concluded that "[t]he Presbytery took extraordinary care to make it

clear that their decision applied only to the current expression of [Capetz'] departure and was not making policy or setting precedent....”

On June 25, 2009, Bierschwale, *et al.* filed a Notice of Appeal with this Commission. A hearing on the Appeal was held before this Commission on October 30, 2009.

### **Specifications of Error and Decision**

*Specification of Error No. 1. The SPJC erred by closing the trial to the public.*

This specification of error is sustained.

A permanent judicial commission has “full authority and power to control the conduct of the trial” in a remedial or disciplinary case pending before it, including the maintenance of “proper dignity and decorum” (D-7.0303 and D-11.0304). In both remedial and disciplinary cases, the trial shall ordinarily be conducted in open session. As the Open Meeting Policy adopted by the General Assembly states:

The work of the church is strengthened when it is done in a spirit of openness and trust. Church members have a basic right to know about the work done and the decisions made by entities within the church.

In a remedial case, a permanent judicial commission should not exclude the public from a trial unless it finds by majority vote that proper dignity and decorum cannot be maintained if the public is present. In a disciplinary case, “at the request of any party, or on its own initiative, the session or permanent judicial commission may determine at any stage of the proceedings, by a vote of two-thirds of the members present, to exclude persons other than the parties and their counsel” (D-11.0306). However, permanent judicial commissions must exclude the public from their deliberations (D-7.0402 and D-11.0403).

Both parties agreed that the closing of the trial by the SPJC in this remedial case was error, but did not affect the outcome. This Commission concurs.

*Specification of Error No. 2. The SPJC erred in constitutional interpretation by finding that Capetz' departure was not a serious departure from the essentials of the Reformed faith and polity.*

This specification of error is not sustained. See discussion following specification of error No. 5.

*Specification of Error No. 3. The SPJC erred in constitutional interpretation by finding that Capetz' departure did not infringe on the rights and views of others.*

This specification of error is not sustained. See discussion following specification of error No. 5.

*Specification of Error No. 4. The SPJC erred in constitutional interpretation by finding that Capetz' departure did not obstruct the constitutional governance of the church.*

This specification of error is not sustained. See discussion following specification of error No. 5.

*Specification of Error No. 5. The SPJC erred in constitutional interpretation by finding, implicitly, that Capetz' departure was a proper exercise of freedom of conscience under G-6.0108.*

This specification of error is not sustained.

Specifications of Error 2 through 5 deal with G-6.0108a, which provides:

It is necessary to the integrity and health of the church that the persons who serve in it as officers shall adhere to the essentials of the Reformed faith and polity as expressed in *The Book of Confessions* and the Form of Government. So far as may be possible without serious departure from these standards, without infringing on the rights and views of others, and without obstructing the constitutional governance of the church, freedom of conscience with respect to the interpretation of Scripture is to be maintained.

Both parties agreed that the Presbytery's actions and the subsequent judicial proceedings applied only to Capetz. The SPJC found that the Presbytery took extraordinary care to make it clear that the Presbytery's decision applied only to Capetz' expression of departure and was not making policy or setting precedent. This Commission concurs.

While the SPJC found that Capetz declared a departure from G-6.0106b, it did not determine that it was a "serious departure" from the essentials of the Reformed faith and polity. Nevertheless, the SPJC determined that the departure did not infringe on the views of others and did not obstruct the constitutional governance of the church.

The departure, according to the SJPC Decision and Order, quoting Capetz, was: "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."

G-6.0106b requires "fidelity in a marriage between a man and a woman ... or chastity in singleness," not celibacy. The Presbytery concluded that Capetz did not fail to "adhere to the essentials of the Reformed faith and polity" by refusing to take a vow of celibacy. This Commission concurs.

Capetz was asked if he was in compliance with the constitutional standards and he 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." He was also asked if he would refrain from intimate sexual activity outside the bounds of marriage between a man and a woman. He responded, "I refuse to take a vow of celibacy." This

Commission held in *Bierschwale I*: “[T]here is nothing in the record to show that he [Capetz] has taken any action that could be deemed to be an act in violation of G-6.0106b.” *Bierschwale I* at p. 5. The SPJC trial record does not change the factual findings upon which the *Bierschwale I* holding was based. Capetz’ statements about his possible *future* conduct do not provide a foundation for finding a *present* violation of G-6.0106b.

Although both parties have once again implored this Commission to rule as to the continued authority of *Bush v. Presbytery of Pittsburgh* (GA Minutes, 218-10, p 319) (*Bush*), in light of the 2008 Authoritative Interpretation on G-6.0108b (GA Minutes, 2008, pp. 42,43, 370, Item 05-12), this Commission declines to do so in this case. As this Commission held in *Bierschwale I*:

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.

*Specification of Error No. 6. The SPJC erred by finding that the Presbytery did not waive the provisions of G-6.0106b as to future conduct of Capetz.*

This specification of error is not sustained.

This Commission reaffirms what it previously held in *Bierschwale I* that Capetz’ future conduct is not at issue in this case:

**Effect on Capetz.** Capetz’s past, present or future conduct is not at issue in this remedial case. 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 a particular church officer. *Wier v. Second Presbyterian Church*, (2002 minutes. p. 339).... Capetz may still 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.

*Specification of Error No. 7. The SPJC erred by unduly deferring to the Presbytery’s decision to grant the Departure Motion.*

This Specification of Error is not sustained.

Acts of lower governing bodies are subject to review by higher governing bodies (G-4.0301f and G-9.0103). Factual determinations by examining bodies are entitled to deference by higher governing bodies in any review process (*Bush* at p. 7). Questions of constitutional interpretation are not subject to the same deference (*Presbyterian Church (U.S.A.) through the Presbytery of the Redwoods v. Spahr*, Minutes, 218-07, pg. 314). After reviewing the record, briefs, and arguments of counsel, this Commission finds that the SPJC applied the proper legal standards in its review of both the facts and the law.

### **Order**

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

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 this 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 this Decision and Order be sent to the Stated Clerk of the General Assembly.

### **Absences and Non-participants**

Commissioners Angel Casaus-Urrutia, Yun Jin Kim and Rebecca New were 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 Indianapolis, IN on November 2, 2009

Dated this 2<sup>nd</sup> day of November, 2009.

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

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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 mail at Indianapolis, IN on November 2, 2009.

Charles Shreffler, Counsel for Appellant  
Doug 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 November 2, 2009.

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

Dated at Indianapolis, IN on November 2, 2009.

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C. Laurie Griffith  
Manager of Judicial Process and Social Witness