

DECISION 1270

IN RE: Appeal by the Counsel for the Church of the Eastern Pennsylvania Annual Conference of the Decision of the Northeastern Jurisdictional Committee on Appeals in the Matter of Frank Schaefer

DIGEST

The Judicial Council upon careful review of the Decision of the Northeastern Jurisdictional Committee on Appeals in the matter of The Rev. Frank Schaefer and the questions of law presented by the Counsel for the Church finds there are no errors in the application of the church law and judicial decisions. The penalty as modified by the Committee on Appeals stands.

STATEMENT OF FACTS

Following the decision of the Northeastern Jurisdictional Committee on Appeals on June 24, 2014, to modify the penalty imposed by the Trial Court on The Rev. Frank Schaefer for performing the legal marriage of his son to another man in 2007, the Counsel for the Church of Eastern Pennsylvania Annual Conference properly filed notification of appeal to the Judicial Council on July 17, 2014.

The Rev. Frank Schaefer became an ordained deacon in The United Methodist Church in 1996 and was ordained an elder in 1998. A member of the Eastern Pennsylvania Annual Conference, The Rev. Schaefer was appointed to Zion of Iona United Methodist Church in Lebanon, Pennsylvania, in 2002, where he served until November 19, 2013, the date the Trial Court determined the penalty to impose on The Rev. Schaefer for violating the *Discipline*. At that time he was suspended from his ministerial duties.

On April 28, 2007, The Rev. Schaefer officiated at the wedding. The wedding was a small, private affair held in a restaurant in Massachusetts, a jurisdiction where same sex marriage was legal.

On April 2, 2013, a complaint was filed against Rev. Schaefer charging him with violating ¶¶ 2702.1(b) and 2702.1(d) of the *2012 Book of Discipline (2004 Book of Discipline)* by performing a same-sex marriage ceremony. After the parties were unable to reach an agreed-upon just resolution of the charges, the Resident Bishop of the Philadelphia Area appointed the Rev. Dr. Christopher Fisher as Counsel for the Church and referred the matter to him for investigation and, if warranted, to prepare a judicial complaint.

Dr. Fisher presented a formal judicial complaint to Presiding Officer Bishop Warner Brown, Jr., on July 1, 2013. After Bishop Brown recused himself from the case, Bishop Johnson appointed Bishop Alfred W. Gwinn, Jr., as the Presiding Officer. Dr. Fisher presented the Judicial Complaint to Bishop Gwinn on July 15, 2013. Another attempt at just resolution between the parties failed. The Presiding Officer set a trial date of November 18-19, 2013.

The trial began on November 18, 2013, whereupon a Trial Court was selected and testimony was heard. The Presiding Officer limited testimony in this phase of the trial to witnesses whose testimony was deemed to show that the facts in the specifications underlying each charge were “more or less likely” to be true. The Trial Court found The Rev. Schaefer guilty of both charges: 2702.1(b) conducting a same sex marriage and 2702.1 (d) disobedience to the order and discipline of The United Methodist Church.

The penalty phase of the trial began on November 19, 2013. This phase of the trial involved a number of lay and expert witnesses for both parties. After hearing this testimony and arguments from counsel, the Trial Court

announced the following penalty, inscribed on a pre-printed form supplied by the Presiding Officer:

Suspend Rev. Frank Schaefer from all ministerial duties effective immediately for 30 days. If there are any violations of the Discipline during the 30 days, his credentials will be surrendered to the annual conference.

During these 30 days, Rev. Schaefer must take the opportunity to discern his newly discovered calling for the LGBT community. If at the end of the 30 days Rev. Schaefer has determined he cannot uphold the Discipline in its entirety, he must surrender his credentials.

After reviewing the Trial Court's initial formulation of the penalty, the Presiding Officer returned the form to the Trial Court with instructions to clarify how the second stage of the penalty – the steps that were to be taken in the 30 days following the trial – was to be implemented. In response, the Trial Court added the following provision to the penalty:

The District Superintendent of record shall monitor the progress. Rev. Frank Schaefer will provide a written report to and interview with the Board of Ordained Ministry within 30 days regarding his call and his willingness to uphold the Book of Discipline in its entirety.

On December 19, 2013, The Rev. Schaefer met with the Board of Ordained Ministry and provided the written report requested by the Trial Court. In response to the specific questions posed by the Trial Court, The Rev. Schaefer's report stated:

I have been directed to report to you on whether I can uphold the *Book of Discipline* in its entirety. My honest answer has to be: No, I cannot.

In fact, I don't believe anybody can. It's impossible to uphold the *Discipline* in its entirety because it is filled with competing and contradictory statements. It reflects the diversity of convictions we

hold as United Methodists. In the words of Prof. Thomas Frank: “The UMC is a big tent!” And that’s reflected in the *Discipline*.

With regard to surrendering his credentials, The Rev. Schaefer’s December 19, 2013, written report to the Board stated, “I also cannot in good conscience surrender my credentials voluntarily....” Indicating that he had “received hundreds of petitions from LGBT members, colleagues, and even bishops, not to surrender my credentials,” The Rev. Schaefer’s written report stated, “By surrendering my credentials, I feel as though I would abandon those under my spiritual care and especially those I feel called to advocate for.”

The Rev. Schaefer’s written report concluded with the statement, “I look forward to continuing as a clergy person in the United Methodist Church, committed to working together with my clergy colleagues, providing a ministry to all people under my care, continuing to advocate for our LGBT community within the UM Church while using proper channels toward changing the discriminatory language and provisions in our Book of Discipline.”

After The Rev. Schaefer read the entire written statement to the Board, the Chair asked whether he agreed to uphold the *Discipline* in its entirety, to which he responded “I cannot, unfortunately.” The Chair then asked The Rev. Schaefer to surrender his credentials. The December 19, 2013, Board of Ordained Ministry minutes reflect that The Rev. Schaefer replied that he would not voluntarily surrender his credentials. The Board’s Chair then replied that The Rev. Schaefer’s credentials “will be taken from him and he will no longer be deemed as clergy in The United Methodist Church.”

The Rev. Schaefer filed his Notice of Appeal of the penalty with the Presiding Officer of the Trial Court in a timely manner. This Notice was forwarded to the Northeastern Jurisdictional Committee on Appeals on January 22, 2014. The Committee on Appeals met on February 20, 2014, at which time the Committee set the date and time for the hearing and so notified the parties (*Discipline*, ¶ 2716.3). Both parties filed timely briefs,

and on June 20, 2014, the Committee heard arguments from the parties.

The Questions asked on Appeal were as follows:

1. Whether the penalty imposed was illegal because Church law prohibits trial courts from conditioning reinstatement of a suspended elder on his proof of good conduct.
2. Whether the penalty imposed was illegal because Church law prohibits trial courts from imposing a penalty based on what a pastor may intend to do in the future.
3. Whether the penalty is illegal because, even if it were legal to make a penalty dependent in some respect on what a pastor intends to do in the future, this penalty was framed in language that was impossibly vague, overly broad, and disconnected from the offense for which the Appellant was convicted.

The Committee on Appeals is only authorized to answer two questions: *a)* Does the weight of the evidence sustain the charge or charges? *(b)* Were there such errors of Church law as to vitiate the verdict and/or the penalty? (*Discipline*, ¶ 2715.7) As The Rev. Schaefer did not appeal the Trial Court’s verdict, the only decision the Committee was authorized to review was whether there were “such errors of Church law as to vitiate . . . the penalty” the Trial Court imposed on The Rev. Schaefer (¶ 2715.7). The Committee’s resolution of that question was to be based on “the records of the trial and the argument of counsel.”

The Committee made the decision to include the above cited material from the Board of Ordained Ministry meeting on December 19, 2013 as part of the “records of the trial” based on the disciplinary statement that the “trial court shall be a continuing body until the final disposition of the charge.” *Discipline* ¶ 2711.1 By extending the penalty phase to December 19, 2013, the Trial Court instructed the Board of Ordained Ministry to complete its role on that date.

The stated decision of the Committee on Appeals was to modify the penalty

of the Trial Court. The Committee based its conclusion that the penalty fashioned by the trial court was illegal based on the clear directives for a distinct penalty provided by ¶ 2711.3 of the *Discipline* regarding penalties following a conviction in a trial and on prior Judicial Council decisions. See Decisions 204 and 725. The Committee on Appeals set aside the penalty imposed by the Trial Court and exercised its power under ¶ 2715.8 of the *Discipline* to “determine what penalty, not higher than that affixed at the hearing or trial may be imposed.” The decision of the Committee on Appeals, dated June 24, 2014, stated:

The compound penalty the Trial Court fashioned for purposes of this judicial proceeding – a 30-day suspension, to be followed by a mandatory surrender of credentials if the Respondent failed to satisfy the Board of Ordained Ministry that he would henceforth uphold the *Book of Discipline* “in its entirety” – is not within the range of penalties authorized by ¶ 2711.3 of the *Discipline*. Trial Courts have ample latitude to select an appropriate penalty from among the alternatives listed in ¶ 2711.3, but those penalty provisions are to be strictly construed and do not allow the mixing and matching of penalties that are designed to be distinct. Judicial Council Decision No. 240. Nor may the imposition of any penalty, let alone the enhanced penalty of a withdrawal of credentials, be predicated on “a future possibility, which may or may not occur, rather than a past or present act.” Decision No. 725.

Consequently, errors of Church law vitiate the penalty imposed by the Trial Court and the penalty imposed on Respondent shall be modified as follows: The Respondent is suspended, without compensation, from the exercise of all duties and functions of a pastor, and from the enjoyment of all privileges of a member in full connection of the Annual Conference, for a period of 30 days, which suspension shall be deemed to have commenced on November 19, 2013 and ended December 18, 2013. Pursuant to ¶ 2711.3 of the *Discipline*, the Eastern Pennsylvania Annual Conference shall restore Respondent’s credentials and compensate Respondent for all lost salary and benefits dating from December 19, 2013.

On July 17, 2014, the Secretary of the Judicial Council received a Notice of

Appeal from the Counsel for the Church of the Eastern Pennsylvania Conference of The United Methodist Church appealing the Northeastern Jurisdictional Committee on Appeals Decision of June 24, 2014.

The grounds for appeal centered on five issues as presented by Counsel for the Church:

1. The Respondent voided his right to appeal, pursuant to ¶ 2715.3 of the *2012 Book of Discipline*.
2. The Appeal Decision misapplied and is at variance with the *Discipline* and Judicial Council Decisions related to the penalty.
3. The Appeal Decision is at variance with the North Central Jurisdictional Committee on Appeals' Decision in the case of Rev. Gregory Dell on September 17, 1999.
4. The Committee on Appeals wrongly crafted its own penalty rather than remanding it back to the trial court to determine the penalty.
5. It was error for the Committee on Appeals to accept an amicus brief which was based on issues not raised on appeal.

The Counsel for the Church, Eastern Pennsylvania Conference, submitted a Brief in Chief in a timely fashion. The specific questions of law asked and argued by the Counsel for the Church are as follows:

Question 1: Based on the Respondent-Appellant's actions that disobeyed the directions of the Trial Court, did he void the right to appeal by misconduct, namely by disobeying the penalty, pursuant to the provisions of ¶ 2715.3?

Question 2: Does the *2012 Book of Discipline* and relevant Judicial Council and Appellate Court Decisions forbid the imposition of a conditional penalty of termination of orders upon a clergy person following a time for discernment of ministry? The Trial Court imposed a penalty requiring Rev. Schaefer to re-affirm his willingness to uphold the Discipline after 30-days of discernment. The penalty did not ask if he intended to commit violations in the future. Did the Appellate Court Decision rule in error that the Trial Court's penalty was based on the possibility of a future action?

Question 3: Can a Jurisdictional Committee on Appeals substitute its own penalty for the penalty created by a duly constituted Trial Court that was present to see and hear the respondent's testimony and the Presiding Officer's rulings, thus usurping the disciplinary role of the Trial Court by overreaching its powers?

Question 4: Was it error for the NEJ Committee on Appeals to accept an amicus brief which was based on issues not raised on appeal?

Question 5: Can a jurisdictional Committee on Appeals undo in its revised penalty the vote of Annual Conference in its official Clergy Session which affirms a clergy member's conference membership has been terminated?

A brief was submitted by the Respondent, The Rev. Frank Schaefer, as was a second brief in reply to the original brief submitted by the Counsel for the Church. The Counsel for the Church also submitted a Church Reply Brief to those two briefs submitted by The Rev. Schaefer and to two *amicus curiae* briefs. A further *amicus curiae* rebuttal to the Brief in Chief was received.

An oral hearing was held on October 22, 2014. The Rev. Dr. Christopher L. Fisher spoke on behalf of the Eastern Pennsylvania Annual Conference and The Rev. Scott Campbell represented The Rev. Frank Schaefer.

JURISDICTION

The Judicial Council has jurisdiction under ¶¶ 51 and 56.3 of the Constitution and ¶ 2609 of the *2012 Discipline* as modified by Decision 1244.

ANALYSIS AND RATIONALE

Under ¶ 2609.8 of the *2012 Discipline*, this matter is properly before the Judicial Council, since the law of the Church provides that the Judicial Council has

...power to review an opinion or decision of a committee on appeals of a jurisdictional or central conference if it should appear that such opinion or decision is at variance with the Book of Discipline, a prior decision of the Judicial Council, or an opinion or decision of a committee on appeals of another jurisdictional or central conference on a question of church law.

Several of those elements are present in this case. Some details in the procedures used by the Northeastern Jurisdictional Committee on Appeals differ from those used by another jurisdictional committee. Although ¶ 2609.8(a) grants permission for any party the right to appeal, and thus appears to give an annual conference the right to appeal an action of the jurisdictional committee on appeals, it appears to be in conflict with Decision 595, which says “The Church does not have the right to initiate an appeal.” It is, therefore, within the power of the Judicial Council to review the action of the Committee on Appeals in this instant case.

The Judicial Council will review each of the questions of law raised by the Counsel for the Church. The authority to examine these questions of law also rests in ¶¶ 2715.9 and 2716.1. Only questions of law pertaining to the penalty phase are under consideration. The Judicial Council reviewed the transcripts of the trial, penalty phase, and the meeting of the Board of Ordained Ministry of The Rev. Frank Schaefer on November 18– 19, 2013, and December 19, 2013, and the transcript of the appeal hearing of the Northeastern Jurisdictional Committee on Appeals, June 20, 2014, and the decision issued by that body on June 24, 2014. The Judicial Council abides by the admonition in ¶ 2715.6: “The records and documents of the trial, including the evidence, and these only, shall be used in the hearing of any appeal.” The Judicial Council agrees with the Committee on Appeals’ arguments that the minutes of the hearing before the Board of Ordained Ministry must be included in the record of the Trial Court. The prolonged penalty phase falls under ¶ 2711.1 in that the “trial court shall be a continuing body until final disposition of the charge”.

Question 1: Based on the Respondent-Appellant's actions that disobeyed the directions of the Trial Court, did he void the right to appeal by misconduct, namely by disobeying the penalty, pursuant to the provisions of ¶ 2715.3?

The Counsel for the Church argues that The Rev. Schaefer engaged in misconduct by stating he could not uphold the *Discipline* in its entirety and by not "voluntarily" surrendering his credentials on December 19, 2013, after the 30-day discernment period prescribed by the Trial Court. Counsel stated The Rev. Frank Schaefer disobeyed the findings of the Trial Court thus nullifying his right to appeal under ¶ 2715.3. Paragraph 2715.3 states in part:

Appeals shall be heard by the proper appellate body unless it shall appear to the said body that the appellant has forfeited the right to appeal by misconduct, such as refusal to abide by the findings of the trial court.

A careful reading of the penalty imposed by the Trial Court requires that The Rev. Schaefer surrender his credentials only if he cannot uphold the *Discipline* in its entirety.

Suspend Rev. Frank Schaefer from all ministerial duties effective immediately for 30 days. If there are any violations of the Discipline during the 30 days, his credentials will be surrendered to the annual conference.

During these 30 days, Rev. Schaefer must take the opportunity to discern his newly discovered calling for the LGBT community. If at the end of the 30 days Rev. Schaefer has determined he cannot uphold the Discipline in its entirety, he must surrender his credentials.

The District Superintendent of record shall monitor the progress. Rev. Frank Schaefer will provide a written report to and interview with the Board of Ordained Ministry within 30 days regarding his call and his willingness to uphold the Book of Discipline in its entirety.

The Rev. Schaefer's answer to the process of discernment is not misconduct or disobedience to the penalty. The use of the word "voluntary" does not

appear as a requirement in the decision of the Trial Court. The respondent *stated* (emphasis added) in his required report to the Board of Ordained Ministry that he would not “voluntarily” surrender his credentials, but there is no place in the record that indicated that he did or did not surrender his credentials. They were taken from him; his withdrawal from the ordained ministry was not a voluntary withdrawal. Nor is there anywhere in the trial or appeal record that indicated that he engaged in any sort of flagrant disobedience to the trial court penalty.

There is no evidence to support the claim of misconduct by The Rev. Frank Schaefer by disobeying the penalty of the Trial Court.

Question 2: Does the *2012 Book of Discipline* and relevant Judicial Council and Appellate Court Decisions forbid the imposition of a conditional penalty of termination of orders upon a clergy person following a time for discernment of ministry? The Trial Court imposed a penalty requiring Rev. Schaefer to re-affirm his willingness to uphold the Discipline after 30-days of discernment. The penalty did not ask if he intended to commit violations in the future. Did the Appellate Court Decision rule in error that the Trial Court's penalty was based on the possibility of a future action?

The Counsel for the Church presented five distinct arguments to support his position on this question of law. The Judicial Council reviewed the Decision of Northeastern Jurisdictional Committee on Appeals and the arguments presented in the Brief in Chief and the Reply Brief submitted by the Counsel for the Church and the Brief and Reply Brief of Counsel for The Rev. Frank Schaefer.

The Northeastern Jurisdictional Committee on Appeals Decision stated that it found the penalty fashioned by the Trial Court to be unlawful based on the specific directives provided to the Trial Court by the *Discipline* in ¶ 2711.3.

Penalties — If the Trial Results in Conviction. Further testimony may be heard and arguments by counsel presented regarding what the penalty should be. The trial court shall determine the penalty, which shall require a vote of at least seven members. The trial court shall have the power to remove the respondent

from professing membership, terminate the conference membership, and revoke the credentials of conference membership, commissioning, ordination, or consecration of the respondent, suspend the respondent from the exercise of the functions of office, or to fix a lesser penalty. The penalty fixed by the trial court shall take effect immediately unless otherwise indicated by the trial court. Should any penalty fixed by a trial court be altered or reduced as a result of the appellate process, the respondent shall be restored and/or compensated as appropriate.

Specifically, the Committee noted that Decision 240 stated that the delineations of penalties in ¶ 2711.3 must be “strictly construed”. Citing Decision 1201, the Committee found that although the Trial Court “has the authority to set a penalty... it must do so within the range of options specified by the *Discipline* (Emphasis added by the Committee.) (¶ 2711.3).” They noted that Decision 240 emphasized the discrete nature of the penalties – with each of the “alternative penalties” having a “different severity.” Decision 240 was clear that it was improper to mix and match or meld the penalties. This decision stated “when punishment is imposed under one of the alternative procedures, that particular punishment should be applied justly without added penalty or onerous condition borrowed from the other alternatives which were not invoked.” Based on an extensive written analysis of these decisions as the grounds for their decision, the Committee found that there was “not a materially different situation” between Decision 240 and the present case. As stated in the rationale for the decision:

Rev. Schaefer was suspended for 30 days, and his ability to resume his ministry – or, more precisely, his ability to avoid having his credentials removed entirely – was expressly conditioned on his presenting himself to the Board of Ordained Ministry at the end of that 30 days, delivering a written report and submitting to an interview, all with the objective of assuring the Board that, *going forward*, (emphasis added) Rev. Schaeffer would uphold the Discipline in its entirety. Based on the plain terms of ¶ 2711.3 of the *Discipline*, and consistent with the Judicial Council’s longstanding and appropriately strict construction of those provisions, a penalty of that nature is simply not among the options the General Conference has authorized a Trial Court to impose on a clergy member convicted of a chargeable offense.

The Counsel for the Church argues differently, stating that the clergy in question in Decision 240 was willing to submit to the Annual Conference

through procedures set by the *Discipline* as opposed to The Rev. Schaefer's "unwillingness to uphold the *Discipline* in its entirety," a condition that was set not by the procedures of the *Discipline* as in Decision 240, but by the Trial Court itself.

The Counsel for the Church also argues that the penalty by the Trial Court "should be regarded as one seamless single penalty: a termination which could be avoided, depending on his willingness to submit to the *Discipline*. He was simply given a 30-day opportunity to keep his orders if he changed his mind."

This interpretation is not supported by the actual words in the penalty statement. The Trial Court made no reference to termination in calling for a 30-day suspension. The first paragraph of the penalty reads:

Suspend Rev. Frank Schaefer from all ministerial duties effective immediately for 30 days. If there are any violations of the Discipline during the 30 days, his credentials will be surrendered to the annual conference.

As noted above the second paragraph asks The Rev. Schaefer to enter into a time of discernment about his changing call to ministry. The record in the penalty phase in the provided transcript did not indicate that the Trial Court actually terminated the credentials of The Rev. Schaefer on November 19, or offered him a way to earn them back as argued by the Counsel for the Church.

The Counsel for the Church provides support for his position by noting that The Rev. Schaefer was paid during the 30-day period of "discernment" and that this was not a punishment for the conviction by the Trial Court. The trial record clearly indicates that the Trial Court did not specify in the penalty statement that the suspension would be paid. The decision for payment was made in a sidebar conversation after the Trial Court had announced the penalty. Neither was there any indication of restoration of credentials if some condition or conditions were met. The Judicial Council must depend on the actual words of the Trial Court and not some interpretation of their intention.

However one construes the understanding of submission to the “conditions” to the penalty, the point of the finding of the Committee on Appeals is that the penalty of the Trial Court was not among the options offered in ¶ 2711.3.

The Committee on Appeals offered a second reason for considering the penalty “unlawful” for what they termed an “additional and independent reason.” They stated that by revoking The Rev. Schaeffer’s credentials in the manner stipulated, the Trial Court violated the principle that clergy can only be “punished for what they have been convicted of doing in the past, not for what they may or may not do in the future.” Citing Decision 725, where a bishop’s decision of law was overturned regarding a statement that contained a definition of “self-avowed practicing homosexual” which included the phraseology “engages in or intends to engage in physical sexual behavior with a person of the same gender” the Judicial Council held in this decision that the underlined phrase is a future possibility which may or may not occur, rather than a present act. The Committee concluded that “any punishment imposed on a clergy person convicted of a chargeable offense for which he or she was actually tried and convicted” must not be based on something that might or might not happen in the future.

The Counsel for the Church argues that Decision 725 is not applicable in this case as the penalty refers to a present reality, not a future possibility. The counsel for The Rev. Frank Schaefer argues that the stipulation by the Trial Court in the second paragraph of the penalty stipulates a process of discernment. This process of discernment involves a future orientation. The Trial Court, in providing for the discernment time, may have been worried about any future behavior of the respondent. This position is supported by Decision 725.

The Counsel for the Church raises in his brief the decision by the North Central Jurisdictional Committee on Appeals issued on September 17, 1999.

The *Discipline* gives the Judicial Council power:

To review an opinion or decision of a committee on appeals of a jurisdictional or central conference if it should appear that such opinion or decision is at variance

with the Book of Discipline, a prior decision of the Judicial Council, or an opinion or decision of a committee on appeals of another jurisdictional or central conference on a question of Church law. In the event the committee on appeals decision appears to be at variance with the decision of another committee on appeals, then the following procedure should be followed:

a) Any party to the opinion or decision may appeal the case to the Judicial Council on the ground of such conflict of decision;... (§§ 2609.8 & 2609.8a)

The Judicial Council has reviewed that decision and finds the argument in the Brief in Chief does not reflect a variance of opinion given the facts of this instant case. Indeed, the Northeastern Jurisdictional Committee on Appeals acknowledged the same in its decision statement. “The Committee notes that, in another case involving different facts, a majority of its members might well have concluded that a different penalty better serves the cause of achieving a just resolution.”

There appear to be no differences in church law between the decisions of the two committees on appeals.

The Judicial Council, after reviewing the material presented determines that, in general, a trial court may stipulate conditions for ending the suspension as part of the discrete penalty of suspension. See Decision 240. However, in this instant case, the Trial Court combined aspects of two discrete and distinct alternatives, suspending The Rev. Schaefer for 30 days and then crafting a subsequent proceeding, in which the another body, namely the Board of Ordained Ministry, was given the power to change the suspension to termination by the surrendering of his credentials, depending on what assurances The Rev. Schaefer was able to provide regarding his future conduct. This resulted in a violation of § 2711.3 of the *Discipline*. This is the primary basis for changing the penalty of the Trial Court.

Question 3: Can a Jurisdictional Committee on Appeals substitute its own penalty for the penalty created by a duly constituted Trial Court that was present to see and hear the respondent’s testimony and the Presiding Officer’s rulings, thus usurping the disciplinary role of the Trial Court by overreaching its powers?

The Counsel for the Church argues that the Northeastern Jurisdictional

Committee on Appeals overreached its authority by crafting its own penalty and did not pay full attention to the material presented in the penalty phase of the trial because they were not present for the trial. Counsel for the Church argues at this point that the Committee on Appeals should have remanded the penalty back to the Trial Court for remedy.

Counsel for the Church cites Decision 1201 as the basis for his argument that it is *only* the role of the trial court to set the penalty.

The clear meaning of the *Discipline* is that only a trial court has the power to set a penalty in a Church trial which results in a conviction and that the full legislated range of options must be available to a trial court in its penalty phase.

However, this decision was based on a resolution passed in the Northern Illinois Annual Conference that attempted to dictate a maximum penalty to be imposed in the situation in which a clergy person was convicted of performing a same-sex wedding or union. It dealt only with an annual conference's lack of power to set or influence a trial court's discretion in setting a penalty for a conviction. This decision has no relevance to this instant case other than as noted "that the full *legislated* range of options must be available to a trial court in its penalty phase" (emphasis added).

The Constitution of The United Methodist Church provides for the privileges of clergy for a trial and appeal as found in the Restrictive Rules, ¶ 20. Article 20. In arguing against the decision the Committee on Appeals chose in this case, the Counsel for the Church is in error. The *Discipline* ¶ 2715.8 gives the specific authority to the Committee on Appeals to make such a decision to modify the penalty imposed by the Trial Court. This paragraph states:

In all cases where an appeal is made and admitted by the appellate committee, after the charges, findings, and evidence have been read and the arguments conclude, the parties shall withdraw, and the appellate committee shall consider and decide the case. It may reverse in whole or in part the findings of the committee on investigation or the trial court, or it may remand the case for a new trial to determine verdict and/or penalty. *It may determine what penalty, not higher than that affixed at the hearing or trial, may be imposed.* (Emphasis added.)

The Committee on Appeals has been granted the authority by the *Discipline* to modify or change the penalty of the Trial Court. Based on its careful study of the trial and testimony presented around the specific situation that resulted in the conviction of The Rev. Schaefer and their findings regarding ¶ 2711.3 of the *Discipline*, the Committee on Appeals modified the penalty of the Trial Court.

The Counsel for the Church also argues that there was inherent bias and prejudice on the part of the Committee on Appeals. This argument, as developed specifically in the Counsel for the Church’s reply brief, adds material to the case that is not part of the trial and appeal record upon which the Judicial Council must base its decision. The Committee on Appeals decision document was clear in articulating its process of decision-making including the acknowledgement that the members of the Committee held diverse views related to human sexuality. They stated:

Having determined that the *Discipline* precludes the penalty imposed by the Trial Court, the Committee has two options: (1) it may “remand the case for a new trial” to establish a new penalty; or (2) the Committee itself “may determine what penalty, not higher than that affixed at the hearing or trial, may be imposed.” *Discipline*, ¶ 2715.8 . . .

The Committee believes that the objective of securing a just resolution of these already protracted judicial proceedings will be better served if the Committee retains jurisdiction and modifies the penalty, rather than remanding the case and re-convening the Trial Court to determine a new penalty. The Committee has reviewed the ample record already developed at the trial court level and believes it to be more than adequate to ascertain all the facts needed to identify an appropriate penalty. The Committee is not aware of, nor has any party identified, any advantage that might be gained or any good purpose served by sending the case back, rather than finishing the job now, based on a fully developed record.

The Committee has also determined that it is important to name for the Church the factors that have informed the Committee’s choice of an appropriate penalty, as well as the considerations the Committee members have done their best to put to the side. The factors that informed the Committee’s decision are simply these and no others: (1) the provisions in the *Discipline* that animate and govern the Church’s judicial process and the responsibility given to the Committee on Appeals in particular; and (2) the particular facts of this case. The corollary is that the Committee dedicated itself to the principle that deciding upon an appropriate penalty should **not** be informed by the Committee members’ personal viewpoints on whether the Discipline should or should not

countenance same-sex marriages.

It should come as no surprise (not to any United Methodist, at any rate) that this Committee's members have diverse views on issues related to human sexuality, and for many those views are evolving. Regardless – and even while knowing that our bishops have taught that we should “not see the *Discipline* as sacrosanct or infallible” – every member of this Committee appreciates and takes seriously that the *Discipline* represents the “*current* statement of how United Methodists agree to live their lives together,” and that it “defines what is *expected* of its laity and clergy as they seek to be effective witnesses in the world as a part of the whole body of Christ.” *Discipline*, Episcopal Greetings at v (emphasis added)

Most importantly, the Committee is profoundly united in the belief that the objective this Committee has been charged to pursue in this case is nothing less than a resolution that is *just*. *Discipline*, ¶2701. As a result, and being mindful of our differing perspectives, the Committee understood that reaching consensus on an appropriate penalty in this challenging context required that, with all humility and seeking God's grace at all times, we keep our focus on the *Discipline's* core teaching that a “just resolution is one that focuses on repairing any harm to people and communities, achieving real accountability by making things right in so far as possible and bringing healing to all the parties.” *Id.*, ¶ 2701.5

The Judicial Council views these statements by the Committee on Appeals as an indication of the serious intention to focus without bias or prejudice on the instant case and circumstances.

The Committee on Appeals is fully authorized by the *Discipline* to amend or modify the penalty of the trial court as long as the penalty is “not higher than that affixed at the hearing or trial.” The Northeastern Jurisdictional Committee on Appeals modified penalty does not violate the *Discipline*. There is no violation of any question of law involved in this question.

Question 4: Was it error for the NEJ Committee on Appeals to accept an *amicus* brief which was based on issues not raised on appeal?

The *Discipline* in ¶ 2715.7 is clear that the record on appeal is confined to the record developed at the trial court level.

The appellate body shall determine two questions only: (a) Does the weight of the evidence sustain the charge or charges? (b) Were there such errors of Church law as to vitiate the verdict and/or the penalty? These questions shall be

determined by the records of the trial and the argument of counsel for the Church and for the respondent. The appellate body shall in no case hear witnesses. It may have legal counsel present, who shall not be the conference chancellor for the conference from which the appeal is taken, for the sole purpose of providing advice to the appellate body.

The directives to the appellate body do not name the ability to receive *amici curiae* briefs. In this instant case, an *amicus curiae* brief was filed with the Committee on Appeals by someone with no standing in the case. The Respondent asked specifically that the “Committee confine its review to the issues presented by the parties alone, which the Committee has determined provide a sufficient basis for its disposition of the appeal.” (Footnote 1, page 5 in the Appeal Decision) Counsel for the Church did not present evidence that the brief influenced the Committee or was used in the fashioning the decision. The *Discipline* is silent regarding the receiving of *amici curiae* briefs at the appeal level. Any document that is submitted at the appeal level shall pertain to matters raised during the trial procedure only (§ 2715.6). Any other directives on *amici curiae* briefs await General Conference legislation.

The question of law raised here had no significant effect on the decision of the Committee of Appeals. The Counsel for the Church did not present any concrete evidence that the submission of an *amicus* brief had any impact upon the decision of the Committee on Appeals. Paragraph 2715.8 of the *Discipline* specifies that the Committee on Appeals “shall not reverse judgment nor remand the case for a new hearing or trial on account of errors plainly not affecting the result.” The question of law is moot.

Question 5: Can a Jurisdictional Committee on Appeals undo in its revised penalty the vote of Annual Conference in its official Clergy Session which affirms a clergy member’s conference membership has been terminated?

Question 5 is improperly before the Judicial Council as it was not included in the notice of appeal submitted by the Counsel for the Church. Paragraph 2715.1 states the following:

In all cases of appeal, the appellant shall within thirty days give written notice of appeal and at the same time shall furnish to the officer receiving such notice and

to the counsel a written statement of the grounds of the appeal, and the hearing in the appellate body shall be limited to the grounds set forth in such statement.

Memorandum 826 supports this particular rule:

The disciplinary requirement that within thirty days of the close of a trial the presiding officer of the Trial Court must be notified of the intention to appeal together with grounds for appeal was not met. There can be no deviation from this requirement.

This question is improperly presented for consideration and will not be answered.

Although the Judicial Council affirms the judicial process and reasoning of the Northeastern Jurisdictional Committee on Appeals and its right to modify the penalty of the Trial Court, it recognizes that some within the Church do not support this outcome today. Some may see a flagrant disregard for parts of the *Discipline* as reflected in the Decision of the Committee on Appeals. Some may have wished the trial court's penalty had been differently constructed so as to meet the requirements of the *Discipline* and impose a harsher penalty. Others support the decision. We are mindful of the divisions within the Church. Our task is review the process and decisions of the trial court and the appellate process in order to determine if any parts of the *Discipline* were violated or were interpreted in error.

DECISION

The Judicial Council upon careful review of the Decision of the Northeastern Jurisdictional Committee on Appeals in the matter of The Rev. Frank Schaefer and the questions of law presented by the Counsel for the Church finds there are no errors in the application of the church law and judicial decisions. The penalty as modified by the Committee on Appeals stands.

Kabamba Kiboko was absent.

Timothy K. Bruster, first clergy alternate, took part in this decision.

William B. Lawrence, President

F. Belton Joyner, Jr., Secretary

October 25, 2014

CONCURRING OPINION

We fully concur with the decision of the Judicial Council in Decision 1270, including the response to Question 5 asked by the Counsel for the Church. However, as the Counsel for the Appellee points out in the brief to the Judicial Council and referred to in oral argument, the claim in this question requires a careful understanding of church polity and church and precedential law. Much of this concurring opinion comes directly from that brief.

Clergy sessions do not vote on Question 46(e). This question is simply a part of the full Board of Ordained Ministry's report presented during the Clergy Session of Annual Conference. The clergy session receives the response as information. The response by the clergy session to Question 46, dealing with the termination of conference membership, is no different than the response to Question 48 that addresses those who have died during the past year. The clergy session does not vote on who died. The names are simply reported for the record. This stands in contrast to Question 18, which requires actual votes on candidates for various forms of membership. Thus, no vote takes place to terminate anyone listed in Question 46(e). The names are received as the action taken by the clergy session.

The argument cites the Annual Conference's constitutional authority over all matters relating to the character and conference relations of its clergy

members, enshrined in Article II, ¶ 33. What this argument does not do, however, is to recognize that the Annual Conference's powers under ¶ 33 are not all-encompassing; they must be exercised in accordance with other constitutional provisions.

Specifically, clergy sessions, exercising their authority pursuant to ¶ 33, have long been known to run afoul of the Fourth Restrictive Rule, found in ¶ 20, which enshrines a member's right to a trial and appeal. In 1972 the Judicial Council issued a ruling, Decision 351, affirming the bedrock principle of the right of clergy to fair treatment, pursuant to the Fourth Restrictive Rule. In particular, this principle applies when the clergy session is exercising its powers under ¶ 33 to vote on the conference relations of its members. In the situation of a clergy session wishing to vote to terminate a clergy member's membership—outside of a trial—the decision required that the administrative fair process procedures be followed first.

In support of the argument that the imagined vote on Question 46(e) would have had the effect of terminating, or affirming the termination of, The Rev. Schaefer's membership, the Appellant cited a concurring opinion in Decision 534. In this Decision, the concurring opinion asserts that the trial and appeal process, enshrined as noted above in the Fourth Restrictive Rule, is secondary to what the Annual Conference does when exercising its powers to vote on conference relations of its clergy members pursuant to ¶ 33. This opinion specifically references an instance where a clergy member is listed as being on suspension in the Board of Ordained Ministry report to the 1983 clergy session of the Alabama-West Florida Annual Conference and asserts that the vote to receive that report had the effect of placing that clergy member on suspension, superseding any act by the appeals process that the clergy member was then engaged in.

That concurring opinion stands in direct conflict with Decision 351 and countless decisions since, including the more recent Decision 1226 which reaffirmed security of appointment and the right to trial and appeal when a clergy session votes on conference relations. The part of the premise that relates to the power to vote on conference relations enshrined in ¶ 33 superseding, and thus not being limited or controlled by, the right to trial and appeal enshrined in the Fourth Restrictive Rule, ¶ 20, was invalid the moment it was written, which is probably why the rest of the Council declined to sign on to it and include it in the main Decision. Furthermore, the second part of the premise, that a vote to ratify the original decision of the trial court (in the case of Decision 534 to affirm a clergy person's suspension, and in the case of The Rev. Schaefer, to affirm the termination of his membership) superseded any action by the appeals committee, was explicitly repudiated in Decision 799. This Decision stated in part, *"It is improper and unconstitutional to allow the executive session to ratify or not ratify a decision arrived at in the trial process..."* (Emphasis added.) Language in the *Discipline* added by the 1996 General Conference to the contrary, stating that penalties could be ratified by the clergy session, was struck down as unconstitutional.

Further, if the clergy session could take a vote to "ratify" a trial court decision in this way, as a final disposition of the case, then the appeals process would become worthless. Or, to state that another way, exercising the powers invested in the clergy session pursuant to ¶ 33 in such a way would render meaningless General Conference's exercise of its power to legislate over all matters distinctively connectional under ¶16 when it established the provisions of the appeals process. Such a position stands in conflict with foundational principles about how such constitutional powers must be exercised consistently with General Conference's legislative actions that go all the way back to Decision 96 in 1953 and have been affirmed repeatedly in Decisions 313, 318, and 823, among others, in cases that relate to other instances of voting on conference relations of clergy members.

Katherine Austin Mahle

Timothy K. Bruster

F. Belton Joyner, Jr.

Beth Capen

October 25, 2014