THE EPISCOPAL CHURCH

IN THE COURT OF REVIEW FOR THE FIFTH PROVINCE

The Standing Committee of the Diocese of Milwaukee

Presenter/Appellee

v.

The Rev. Martha Ann Englert

Respondent/Appellant

_____/

OPINION OF THE COURT

Before Gepert, P.J. and Brodie, Carlson, Plews, Rigdon and Wittlinger, JJ.

Opinion by Wittlinger, J.

Respondent appeals of right from a Judgment of the Ecclesiastical Trial Court for the Diocese of Milwaukee finding that she committed the Offense of "Conduct Unbecoming a Member of the Clergy," a presentable Offense pursuant to Canon IV.1.j of the Canons of The General Convention.[1] In her appeal, Respondent raises the following assignments of error.[2]

1. There were insufficient affirmative votes among the judges of the Trial Court serving on this case at the time of the voting on the Judgment to canonically constitute a valid Judgment that the Respondent had committed an Offense, in violation of GC Canon IV.4.20.

2. The actions of the Bishop prior to referral of this matter to the Standing Committee of the Diocese of Milwaukee (acting as the Diocesan Review Committee), and/or the actions of the Church Attorney following referral to the Standing Committee but before issuance of the

[1] Herein, reference to Canons of The General Convention will be in the form "GC Canon ___."

[2] Although not formally designated as an assignment of error, in her brief Respondent suggests that members of the trial court panel who voted on the charges were biased because they (or in one case, a spouse) were "dependent" upon the Bishop "who initiated this prosecution." No evidence was offered of any such alleged bias, no objection on that basis was raised below, and no further claim was raised at oral argument before us. The claim is both unsupported and waived and comes nowhere near the standards for disqualification of a Member of the Court pursuant to GC Canon IV.14.13. This Court admonishes Respondent and her counsel that such unfounded allegations unfairly impugn the integrity and service of those who assist our Church in these matters, and should be avoided. In a civil court such statements would be grounds for sanctions, and they are equally unwelcome and unpersuasive here.

Presentment violated procedural requirements of the Canons and resulted in material and substantial injustice to Respondent and/or had a serious prejudicial effect on the rights of Respondent, thus resulting in the Presentment having been obtained in violation of Canons.[3]

3. The rulings and orders of the Ecclesiastical Trial Court following issuance of the Presentment relating to the issuance of and content of (1) a Protective Order issued in the matter, (2) an Order providing for summaries of anticipated testimony, (3) an Order excluding testimony allegedly supporting the fact that some of the "unbecoming" statements in fact had a positive impact on Respondent's Parish, (4) an Order relating to the scope of evidentiary testimony permitted, (5) an Order relating to the scope of rebuttal testimony, and (6) an Order dated May 25, 2007 designating certain individuals as Victims, were improper and denied Respondent due process and consequently require the Presentment to be dismissed.

4. The Judgment of the Ecclesiastical Trial Court was not supported by sufficient evidence.

Before addressing these assignments of error the question of the appropriate standard of review must be determined. On that issue, this Court is guided by our opinion in *Diocese of Ohio v. L. Peter Beebe*, II White & Dykman – 1981 Revision 1017 (1976). *Beebe* analogizes ecclesiastical proceedings under Title IV to criminal proceedings for the reason that the end result of a proceeding before an Ecclesiastical Trial Court, if the Respondent is found to have committed an Offense, may be to "restrain the Ministry of an ordained person or deprive him [sic] of that ministry in a manner similar to the restraints on life and liberty resulting from sentences imposed in criminal proceedings in the civil courts" (*Beebe* Opinion). While this Court, under the version of the Canon in effect at that time, held that the standard of proof in an Ecclesiastical Trial Court is "beyond a reasonable doubt," a standard of proof which has since been legislatively amended to "clear and convincing evidence" (GC Canon IV.4.18 and IV.14.15), the analogy in *Beebe* between ecclesiastical disciplinary proceedings and criminal cases in the civil context remains. The Canons do not set forth specifically the standard of review to be followed by Provincial Courts of Review. The Canons do provide that an appeal must be heard "upon the Record on Appeal of the Ecclesiastical Trial Court" (GC Canon IV.4. 38) and that certain of the Rules of Appellate Procedure governing civil appeals shall govern (GC Canon IV.4.46). Considering all of the above, the clear mandate and intention of the Canons is that the standard of review to be employed by Provincial Courts of Review shall be the same as employed in criminal appeals, namely that questions of law are reviewed "de novo" and questions of fact are reviewed utilizing a test of "clearly erroneous."

Next, we consider the distinction between a question of fact and a question of law in the context of a Title IV disciplinary proceeding. While the details of the actions of a Member of the Clergy are clearly questions of fact, whether such actions rise to "Conduct Unbecoming a Member of the Clergy" becomes a question of law, which this Court reviews de novo. The term "Conduct Unbecoming a Member of the Clergy" is defined in GC Canon IV.15 as:

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[3] See GC Canon IV.14.27.

"any disorder or neglect that prejudices the reputation, good order and discipline of the Church, or any conduct of a nature to bring material discredit upon the Church or the Holy Orders conferred by the Church"

However, there is precious little authority as to the level of conduct of a Member of the Clergy required in order to meet this definition. It is clear that the standard of conduct required to substantiate a presentable offense under this Canon is less than the commission of a crime, engaging in immorality, violating a Canon or conduct in violation of an Ordination vow, as each of these events constitutes an independent ground to issue a Presentment. If "conduct unbecoming" is nothing more than these situations, there would be no need to list it as an independent presentable offense. Hence this Court must look further for guidance as to the level of conduct which is required to be presentably unbecoming.

A Member of the Clergy should be held to the highest ethical and moral standards, standards ultimately dictated by the Gospels. But as the Gospels also state, no person is perfect and while all are called to perfection, all are lacking in perfection to one extent or another. Recognizing that this Court is itself not perfect, the burden still falls upon us to make a reasoned determination as to whether the conduct of Respondent, considered with all of the circumstances surrounding it, is so unbecoming as to require possible forfeiture of the privileges of Ordination. We must balance that reasoned determination with a degree of vigilance to assure that an ecclesiastical trial for "conduct unbecoming" is not misused as a political ploy.

Other professions face the same dilemma. The Model Rules of Professional Conduct, applicable to attorneys and adopted (with slight modifications) by all states, codify what behavior can be considered sufficient to require forfeiture of the privileges of a Member of the Bar. Making a material misstatement of fact to a tribunal or revealing a confidence or secret of a client can result in attorney professional discipline. The underlying principle is whether the attorney can maintain the respect, trust and confidence of the public. The same principle holds true in connection with matters coming before this Court. Can the particular Member of the Clergy involved maintain the respect, trust and confidence of the general public or of individual parishioners? Disagreements between a Member of the Clergy and his or her Bishop may be grounds for Presentment under a different section of the Canon, but such does not rise to Conduct Unbecoming a Member of the Clergy. On the other hand, conduct of a Member of the Clergy which causes a parishioner to have serious doubts about the Gospels, serious doubts about the Episcopal Church, serious doubts about the wisdom of seeking pastoral help from the clergy of the Episcopal Church, or to question whether the Episcopal Church emulates, by the behavior and actions of its clergy, the redemption promised to all by Christ Jesus, can rise to the level of a presentable offense under this Canon.

In addition to the above, the interpretation of the word "conduct" includes the concept of a pattern. While a single act can be so egregious as to constitute in and of itself "conduct unbecoming," a series of acts, each in and of themselves insufficient to rise to the level of "conduct unbecoming" can, taken together, rise to that level.

We are compelled at this point to comment on the use of this opinion, or for that matter, any opinion of a Provincial Court of Review as precedent in the Ecclesiastical Trial Courts of the various dioceses of the respective Province, and as persuasive in other courts. Issues such as the level of behavior needed to rise to "conduct unbecoming," while various dioceses may have differing opinions, are not issues where there is a substantial theological or moral dispute within the Episcopal Church. On such issues, it is expected that the opinions (including this opinion) issued by Provincial Courts of Review would have precedential value, certainly within the Province where the Court sits, and presumably, although not necessarily, in other Provinces. However, there are other issues about which there exists a substantial theological or moral dispute within the Episcopal Church. In this day, certain questions concerning human sexuality clearly fall within this arena. We do not intend, nor expect, that the opinions of Provincial Courts of Review addressing issues in these areas should be given precedential effect insofar as they relate specifically to any theological or moral question about which there is substantial disagreement among the Church. Such questions are better left to other fora, including The General Convention. We do expect that Provincial Court of Review opinions would be given precedential effect insofar as they address procedural issues, due process issues or construction of the Canons, even though such issues may arise in the context of a case centered around a controversial theological or moral subject. We so hold, not being unmindful of the legislative history of GC Canon IV.3. As originally adopted in 1903,[4] that Canon contained a proviso which read:

> "*Provided, however,* that until after the establishment of an ultimate Court of Appeal as permitted by Article IX of the Constitution, no Court of Review shall determine any question of doctrine, faith, or worship."

That proviso was stricken by the General Convention of 1937, which did not establish an ultimate Court of Appeal.

Having set the above framework, we can now turn to the merits of this specific case. Today, we hold, as a matter of law, that the allegations of the Presentment, if proven, constitute Conduct Unbecoming a Member of the Clergy. We note that many of the acts found by the Ecclesiastical Trial Court here to have been committed by Respondent would, if taken alone, not rise to the required level of an Offense. But we believe that all of them, taken together, constitute a pattern of behavior unbecoming a Member of the Clergy. Reference to consecrated communion wine as "Hemlock" when distributing it to certain parishioners, discussing certain parishioners (in conversations with others) utilizing words and phrases such as "bitch," "serious jail time," "big alcoholic," "incompetent" and "gossipper," all of which having been found to have occurred by the Trial Court, prejudice the reputation, good order and discipline of the Church, and bring material discredit upon the Church and the Holy Orders conferred by the Church. They rise above the threshold which we believe would cause a parishioner (or a visitor to the Parish) to have serious doubts about the Gospels, serious doubts about the Episcopal Church, serious doubts about the wisdom of seeking pastoral help from the clergy of the

[4] Interestingly, the primary proponent of the establishment of Courts of Review was the Diocese of Milwaukee.

Episcopal Church, and to question whether the Episcopal Church emulates, by the behavior and actions of its clergy, the redemption promised to all by Christ Jesus.

Respondent's first assignment of error claims that there were insufficient votes in the Ecclesiastical Trial Court to support a Judgment that the Respondent committed an Offense. We review that question de novo. At the time of the Presentment the Trial Court consisted of three clergy and two lay judges. Two of the clergy and one layperson either recused themselves or were recused between the time of the Presentment and the time of trial. They were replaced by judges in the same Order as the recused judges.[5] During the course of the multi-day trial, one of the lay judges died. At a hearing at which all parties were present and represented, the Presiding Judge raised the issue and requested the parties to state their positions. Both parties agreed that the trial should proceed with four judges, although Respondent preserved the argument that under GC Canon IV.4.20, the affirmative vote of all four judges would be necessary for a finding that Respondent had committed an Offense. At the conclusion of the trial, there were three votes finding that Respondent had committed an Offense and one vote for dismissal of the Presentment.

We start with reference to GC Canon IV.4.2 and Canon 33.2 of the Canons of the Diocese of Milwaukee, both of which deal with the composition of the Court. These Canons relate to the election of Members of the Court and do not specifically relate to the required composition of the Court at the time of any trial. The conduct of the trial without all five judges being present is contemplated by GC Canon IV.4.20 which requires a vote of two thirds of the judges then serving for that trial in order to render a Judgment (emphasis supplied). Nothing in either the Canons of The General Convention or the Diocese of Milwaukee requires that all five judges sit during the full proceedings of any trial. Canon 33.3 of the Canons of the Diocese of Milwaukee provides that if a vacancy occurs in the Court, the vacancy shall be filled only until the next Diocesan Convention. Thus it is possible in an extended trial that a succession of as many as three judges may occupy the same seat and hear only parts of the trial. Also, GC Canon IV.4.6 provides that if a lay judge of an Ecclesiastical Trial Court becomes ordained during the course of a trial, that judge will continue to sit on the trial even though the composition of the Court will no longer provide for only a single person majority of clergy over lay judges, a requirement imposed upon the initial composition of the Court by GC Canon IV.4.2. Consequently, the situation that there may be only four members of the Court serving at the time of judgment, or that the "one person majority" of clergy over lay judges may be disrupted, is contemplated by the Canons and is not grounds to overturn a Judgment valid in all other respects. Therefore, the judgment can be overturned only if the serving judges at the time of judgment failed to vote by a two thirds majority that Respondent had committed an Offense. Since there were four judges serving at that time, the affirmative vote of three of those judges, pursuant to GC Canon IV.4.20, is sufficient to constitute a valid judgment that the Respondent has committed an Offense. Respondent's first assignment of error is rejected.

Although this Court holds, as a matter of law, that a vote of three of the four judges is sufficient to render a valid judgment that Respondent has committed an Offense, for the reasons set forth above,

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[5] One clergy position was replaced twice.

there is a further reason why Respondent's first assignment of error is rejected, and that is waiver. Reference is made to communications from the Trial Court dated November 28, 2006 and November 29, 2006 (Ra – 758-758a)[6] advising the parties of the death of Judge Greene and requesting the parties to advise the Court if they would consent to proceed with the trial before a four judge court. Both of those communications also state that if both parties do not so consent, the Court would declare a mistrial and a new trial would commence before the Court as it would be composed following the election of new members at the Diocesan Convention of the Diocese of Milwaukee held the preceding month. Respondent argues that this was not a reasonable choice and that she had really no alternative but to agree to proceed with a four judge court. However Respondent ignores the colloquy between Respondent's Counsel and Presiding Judge Carroll contained on page 731 of the transcript, thus:

> "JUDGE CARROLL: Well, first of all, are you requesting that the Court fill the fifth vacancy?
> MR. REHILL: Well, I've been told that that's not a realistic possibility.
> JUDGE CARROLL: It is a realistic possibility. We can do it. We'd have to adjourn today, but we could do it?
> MR. REHILL: I'm not making a request."

Therefore, Respondent had three choices: (1) proceed with four judges, (2) have the Court declare a mistrial and begin anew, or (3) adjourn the trial and replace the fifth judge, permitting that new judge to review the transcript of the trial until that point. Respondent made the election to proceed with four judges and was not prejudiced. As stated above, under GC Canon IV.4.20, three of those four judges were sufficient to render a valid judgment.

Respondent's second assignment of error relates to certain alleged procedural deficiencies prior to the issuance of the Presentment. GC Canon IV.14.27 provides that noncompliance with procedural requirements of the Canon shall not be grounds for the dismissal of a Presentment unless there exists a material and substantial injustice to the Respondent or such procedural irregularity had a serious prejudicial effect on the rights of a Respondent. We need not reach the issue of injustice or prejudice as we believe that no procedural defects occurred. The arguments of Respondent relate to events both before referral to the Standing Committee (acting as the Diocesan Review Committee ("DRC") pursuant to the Canons of the Diocese of Milwaukee), and events after such referral. Concerning the actions prior to such referral, the Bishop of the Diocese conducted an internal review and inquiry as to whether facts and information brought to his attention were sufficient, pursuant to GC Canon IV.3.5, to refer the matter to the DRC.[7] That Canon does not provide much guidance as to what a diocesan bishop may do in order to make a decision that he or she has "sufficient reason" to believe that an Offense has been committed and the interests and good order and discipline of the Church require investigation by the

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[6] Pages of the Record on Appeal are designated herein as "Ra ___."

[7] There are two methods by which a matter may come before the DRC. First, if a Verified Charge against a Priest or Deacon is made, that Verified Charge shall be transmitted promptly to the DRC (GC Canons IV.3.2 and IV.3.8). Second, if the Bishop has sufficient reason to believe that a Priest or a Deacon has committed an Offense and the interests and good order and discipline of the Church require investigation, the Bishop shall advise the DRC, and the DRC shall proceed *as if* a Charge had been filed. No verified Charge, or for that matter, no Charge at all, was involved in this matter. It proceeded pursuant to GC Canon IV.3.5, *as if* a Charge had been filed.

DRC. To conclude that the Bishop must make this decision without investigative assistance from his or her staff or others is unreasonable. The Canons cannot be held to so severely restrict a Bishop in his or her investigative role prior to referral of a matter to the DRC pursuant to GC Canon IV.3.5 as Respondent argues here. The rights of the Respondent are more fully protected by permitting a full investigation by the Bishop, with the assistance of other professionals, before arbitrarily sending every complaint to the DRC. The gravamen of Respondent's argument appears to be that the Bishop had passed judgment on the allegations concerning the Respondent in violation of GC Canon IV.3.5. However this position is belied by the penultimate paragraph of the Bishop's submission to the DRC which reads:

> "I have made no judgment and offer no comment on these allegations, but I believe that, if true, such acts and conduct constitute Conduct Unbecoming a Member of the Clergy ."

The Bishop merely reported the allegations that had been made to his inquiry team, and left the DRC to proceed to fulfill its further investigative and other obligations under the Canons.

Respondent next alleges that the Bishop proceeded to charge the Respondent with a canonical violation. Respondent confuses the Bishop's letter to the Standing Committee with a Charge, as that term is defined in GC Canon IV.15, namely a "formal and Verified [sic] accusation." There was no Charge issued in this case as discussed in detail above. The procedure employed in this case was that set forth in GC Canon IV.3.5, which applies whenever a Bishop has sufficient reason to believe that a Member of the Clergy has committed an Offense. In that case, the Bishop "shall" inform the Diocesan Review Committee. Upon receipt of such information from the Bishop, the Diocesan Review Committee (the Standing Committee in the case of the Diocese of Milwaukee) "shall proceed as if a Charge had been filed." Consequently, the Standing Committee in this case proceeded in the same manner that it would have had a Charge been filed. Respondent's second assignment of error, as it relates to activities prior to referral to the Standing Committee, is rejected.

Concerning actions following referral to the Standing Committee, Respondent criticizes the manner in which the Church Attorney conducted his canonical investigation, which is provided in GC Canon IV.3.12-13. The Canons do not address the manner in which a Church Attorney may conduct his or her investigation. As an attorney, the Church Attorney must conform his or her activities to those permitted by the Model Rules of Professional Conduct. For example, in conducting the investigation, the Church Attorney would not be permitted to speak with a person known to be represented in the matter by counsel. GC Canon IV.3.13 specifically provides that the conduct of the investigation and the report of the investigation prepared by the Church Attorney "shall be confidential for all purposes as between the Church Attorney and the DRC." A review of the record in this case indicates that no aspect of the investigation conducted by the Church Attorney in this matter was in violation of any Canon. Respondent's second assignment of error, as it relates to activities following referral to the Standing Committee, is rejected.

Respondent's third assignment of error relates to a number of procedural matters following issuance of the Presentment. Notwithstanding GC Canon IV.14.27 providing that procedural irregularities shall not be the cause of dismissal of a Presentment, a review of the record indicates that

all of the matters now complained of by Respondent were either waived by Respondent or adequately considered and disposed of by the Trial Court in a manner that did not result in any material or substantial injustice to Respondent.

Specifically, with regard to the Orders complained of by Respondent:

1. The Protective Order was a standard order generally utilized in civil litigation. It did not restrict the ability of Respondent to prepare its case nor did it prohibit Respondent from contacting any potential witness. Although it prohibited revelation of designated confidential information to third parties, it did provide that such information could be revealed to "any person with respect to whom counsel of record determines disclosure must be made as part of counsel's good-faith efforts to prepare the case for trial."[8] Should Respondent's trial preparation have been compromised by virtue of the Order, Respondent was free to request the Court to modify the terms of the Order upon a showing of good cause, at any time. No such request to the Court was ever made.

2. Respondent argues that the submission of "witness summaries" to the Court provided the Court with inadmissible evidentiary material and that permitting certain rebuttal witnesses to testify provided the Court with evidentiary material which the Respondent was unable to rebut as such was introduced as "rebuttal." We hold that the actual testimony presented at trial during Presenter's case in chief was sufficient to sustain a finding that Respondent committed the Offense without consideration of "witness summaries" or rebuttal testimony, and hence Respondent suffered no prejudice by reason of the Orders in question.

3. Concerning the May 25, 2007 Order designating certain individuals as Victims, such order was entered following the close of proofs and following the vote of the Trial Court finding that Respondent had committed an Offense. In essence, by this argument Respondent is requesting this Court to address the Sentence. This Court does not have jurisdiction to address any issues relating to the Sentence. Contrary to the Court of Review of the Trial of a Bishop, which provides that such Court may review the Sentence adjudged by the Trial Court in connection with the trial of a Bishop (GC Canon IV.6.19(a)), the Canon relating to Courts of Review for the Trial of a Priest or Deacon contains no such language. Further, other than complaining of the issuance of the May 25, 2007 Order, the issue of the Sentence was not raised in this appeal. This Court will not address matters not raised on appeal or briefed by the parties.

Respondent's third assignment of error is rejected.

Finally, Respondent raises as its fourth and last assignment of error that the evidence presented at trial did not support a judgment of conviction. This Court reviews this assignment of error on a "clearly erroneous" basis. The Ecclesiastical Trial Court for the Diocese of Milwaukee was in the best position to view the witnesses, observe their demeanor, and judge their credibility. This Court cannot

[8] Protective Order, paragraph 7(f), Ra-85.

substitute its judgment for that of the Trial Court on factual evidentiary matters. We find that the findings of the Ecclesiastical Trial Court were supported by the testimony of witnesses and other evidence and were not clearly erroneous. Respondent's fourth assignment of error is rejected.

For the above reasons, the Judgment of the Ecclesiastical Trial Court for the Diocese of Milwaukee is affirmed, and this matter remanded to the Diocese of Milwaukee for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

Timothy D. Wittlinger, Esq.
Judge of the Court of Review for the Fifth Province

The Rt. Rev. Robert Gepert, the Rev. Wayne Carlson, the Rev. Robert Brodie, George Plews, Esq. and Jay Rigdon, Esq. join in this opinion.