Conclusion

All things considered, even if *BCO* 40-2.3 is the standard for judging this matter (WESP), it is more reasonable to rule it is **not** "wise, equitable, or suited to promote the welfare of the church" to publicly bestow the title "Minister" on anyone who is not an ordained minister. Sessions should refrain from titling staff as "Ministers" or "Pastors" unless they are ordained teaching elders and members of Presbytery. And Presbyteries should encourage them to exercise this restraint.

/s/ RE Howie Donahoe /s/ RE E. C. Burnett /s/ TE Dewey Roberts
/s/ RE Olin Stubbs

APPEAL OF TE JOHN GRADY
VS
SOUTHWEST FLORIDA PRESBYTERY
SJC 2007-16

I. SUMMARY OF FACTS

In January 2006, TE John Grady had been pastor of Faith Presbyterian Church, Sarasota for 26 years. Over the next 14 months, three senior lay staff people and all nine ruling elders resigned, leaving the Session without a quorum in March 2007. Just prior to the final two RE resignations, the Session invited the Shepherding Committee of Southwest Florida Presbytery to consult. Two months later, at a stated meeting on May 8, Presbytery heard a report from the Shepherding Committee highly critical of TE Grady, which included the committee's judgment that TE Grady needed to repent of sins and errors and resign as pastor. After discussion in executive session for over two hours, Presbytery adopted four recommendations from the Shepherding Committee, including one recommending TE Grady resign. Later in the meeting, he announced his plan to do so and announced this to the congregation two weeks later. He later changed his mind, informed the congregation, and they voted June 11 against petitioning Presbytery to dissolve the call.

At a called meeting June 30, three TEs from different churches presented Presbytery with a four-page document containing charges against TE Grady with a list of potential witnesses and recommended Presbytery indict. On motion and vote, Presbytery: a) appointed a nine-judge

judicial commission for the purpose of appointing a prosecutor and conducting the case per *BCO* 32-3, b) administratively suspended him from his official functions per 31-10, and c) appointed an interim Session for the church per 13-9.

A prosecutor was appointed August 6 and the indictment was finalized by the Commission on September 27 and delivered to the accused October 4. The three charges were: 1) violating 4th ordination vow regarding "subjection" to his brethren, with eight specifications, 2) failure to endeavor to maintain purity, peace and unity of the Church, with three specifications, and 3) not adorning the gospel in his manner of life and not walking with exemplary piety before the flock, with one specification.

The arraignment was October 15 and the accused pled not guilty to all charges. The ten-hour trial was November 10. At a called meeting December 11, Presbytery adopted the Commission's recommended judgment and censure (guilty on all three charges and indefinite suspension from office). TE Grady then filed an eight-page appeal to the SJC. The SJC Panel hearing of the appeal was April 29, 2008. Exercising his option, TE Grady did not testify at trial or speak at the appeal hearing and was represented by TE Brevick as counsel at both.

II. STATEMENT OF THE ISSUES

Shall the following specifications of error be sustained?

1. Did Presbytery err in its judgment by using documents not introduced into evidence?
2. Did Presbytery err in its judgment by committing irregularities and refusing reasonable indulgence to the appellant?
3. Did Presbytery err in its judgment by suspending TE Grady under *BCO* 31-10?
4. Did Presbytery err in its judgment in application of *BCO* 35-3, 35-10, and 32-20?
5. Did Presbytery err in its judgment by manifesting prejudice against the appellant?
6. Did Presbytery err in its judgment in its interpretation of "subjection to the brothers?"
7. Did Presbytery err in its judgment in allowing inappropriate questions?

III. JUDGMENTS

1. No. Specification 1 is answered in the negative.
2. Yes. Specification 2 is answered in the affirmative but the error was not materially prejudicial to the accused.
3. Specification 3 is not properly before the SJC.
4. Relative to Specification 4, no regarding *BCO* 32-20 and 35-3, and yes regarding *BCO* 35-10, but the error was not materially prejudicial to the accused.
5. No. Specification 5 is answered in the negative.
6. Yes. Specification 6 is answered in the affirmative.
7. No. Specification 7 is answered in the negative.

The judgments of Southwest Florida Presbytery in this case are affirmed in part and reversed in part (*BCO* 42-9), and the case is remanded to Presbytery with the instruction that Presbytery reconsider the censure in light of the following:

- The Standing Judicial Commission sustains three of the appellant's seven specifications of error, but, of those three, only in specification 6 was there an error on the part of Presbytery of such magnitude that it materially prejudiced the outcome of the case. We conclude that Southwest Florida Presbytery had sufficient evidence to find TE Grady guilty of the three charges leveled against him (see *BCO* 39-3 [2, 3]), although not as to all specifications under each charge.
- However, Presbytery's misunderstanding and misapplication in this case of the power granted to Presbytery by *BCO* 13-9.c (which Presbytery argued "necessarily [gives it] the power to *direct* TE Grady to tender his resignation" (emphasis in the original) is of such magnitude, and had such an impact on the outcome and censure in this matter, that we reverse Presbytery on this finding and consequently the matter of censure. The censure of indefinite suspension from office and the dissolution of the pastoral relationship are vacated (*BCO* 34-9). The matter is remanded to Presbytery to determine an appropriate censure in light of the decision of this court.

Pending further judicial proceedings by Presbytery to determine an appropriate censure, the appellant remains suspended from the functions of his office under Presbytery's previous action according to *BCO* 31-10 [an administrative suspension that is not a censure].

IV. REASONING AND OPINION

The issues in this appeal, and the sequence in which they are addressed, mirror their presentation in the written appeal.

1. Did Presbytery err by "using documents not introduced into evidence"? No.

Appellant contends that Presbytery based its judgment in this matter in large part upon a report prepared by the Presbytery Shepherding Committee and presented to Presbytery on May 8, 2007 (the "Shepherding Report"). Since the Shepherding Report was never marked as an exhibit at the trial of this matter and was never entered into evidence, Appellant claims that any reference to it was prejudicial and requires reversal of the Judgment rendered by Presbytery. Appellant's claim that Presbytery based its Judgment on the Shepherding Report is mistaken.

The primary reference made to the Shepherding Report is in the section of the Judgment designated as the "Introduction." This "Introduction" relates the general circumstances giving rise to the citation of the accused. No findings of fact are made in the "Introduction"; those are exclusively set out in subsequent sections of the Judgment. There is no genuine controversy as to (1) the overall chronology set forth in the Shepherding Report, (2) the fact that the Shepherding Report was presented to Presbytery, and (3) the fact that the Indictment references the Shepherding Report. While the Appellant disagrees with assertions concerning him made in the Shepherding Report, the report is not cited in the "Introduction" as proof of the Appellant's guilt – it is cited to explain the circumstances giving rise to the indictment. Appellant's claim that the Judgment relies upon the Shepherding Report cannot be established by the mere fact that the report is referenced in the "Introduction" to the Judgment.

Further, Appellant's claim that the Judgment is based upon the Shepherding Report is not supported by the sections of the Judgment making specific findings of fact regarding the Appellant's guilt. The Indictment against Appellant listed three charges. The first charge carried eight separate specifications of guilt. The Shepherding Report was only referenced as stating facts supporting a finding of guilt as to one specification (No. 7 of 8) of the first charge. No mention of the Shepherding Report is made in the findings of fact showing guilt

under the six remaining specifications listed for the first charge[2]. Thus, even without the finding as to specification seven, there was sufficient evidence of guilt on other matters before the Court to support a finding of guilt as to the first charge. Additionally, direct testimony to facts other than those stated in the Shepherding Report was listed in the Court's discussion of Appellant's guilt as to specification seven of the first charge. Even if all references to facts stated in the Shepherding Report were excluded from the findings of guilt as to specification seven of the first charge, there would still be sufficient evidence of guilt in the record to support the Court's finding of guilt as to specification seven of the first charge.

For these reasons, we reject the Appellant's claim that the Judgment of Presbytery was based upon the Shepherding Report. In the absence of clear error by the lower court, we cannot set aside findings of fact made by the trial court (*BCO* 39-3.2), and we find no such error here.

2. Did Presbytery err in its judgment by "committing irregularities and refusing reasonable indulgence" to the appellant? Yes, but the error did not materially prejudice the appellant.

   BCO 32-14. On all questions arising in the progress of a trial, the discussion shall first be between the parties, and when they have been heard, they may be required to withdraw from the court until the members deliberate upon and decide the point.

   At the arraignment on October 15 when TE Grady pled not guilty, his counsel presented a dozen "motions, notations and objections" (hereafter "MNO's). He contends the trial court was required to rule on these MNO's at the arraignment or sometime soon thereafter. Presbytery's judicial commission eventually addressed each of these MNO's either at trial or in its Judgment.

   Presbytery rightly observes the *BCO* does not require a pre-trial ruling or hearing on such matters. A pre-trial procedural hearing can sometimes be prudent, but it is not constitutionally mandated. And Presbytery rightly asserts it would have been premature for the court

[2] The Judgment found Appellant "not guilty" of one specification, number four, of the eight asserted under the first charge.

to rule on some of these MNO's when they were first presented October 15.

Nonetheless, the disposition of these MNO's should have occurred at the beginning of the trial on November 10, rather than during or after. However, the appellant did not demonstrate that the timing of the court's rulings on his MNO's resulted in actual harm to his defense. None were of such weight to materially jeopardize the preparation of his defense prior to November 10 or the conduct of his defense on November 10.

3. Did Presbytery err in its judgment suspending TE Grady under *BCO* 31-10? This matter is not properly before the SJC.

BCO 31-10. When a member of a church court is under process, all his official functions may be suspended at the court's discretion; but this shall never be done in the way of censure.

Appellant asserts Presbytery erred on June 30 when they invoked 31-10 and administratively suspended him from his official functions (without censure). He contends he was not "under process" until September 27 when the language and specifications of the indictment were finalized. Presbytery contends process began June 30 when it received allegations, directed the appointment of a prosecutor, and appointed a judicial commission to proceed to trial in accord with *BCO* 32-3.

In this instance, the arguments of the parties are not relevant because this matter is not properly before the SJC. Appellant's claim that the Presbytery erred when it acted under *BCO* 31-10 is not a matter of appeal, but a complaint against an act of Presbytery governed by *BCO* 43. The administrative suspension under *BCO* 31-10 was a distinct, non-judicial act of Presbytery. Since the matter complained of occurred on June 30, 2007, a timely complaint as to that matter would have to have been filed within 30 days, i.e. not later than July 30, 2007 (*BCO* 43-2). As Presbytery argued in its brief, no such complaint was filed with Presbytery, and in the absence of a timely filed complaint there is nothing for the SJC to act upon. (For similar decisions in which the SJC has held that the 30 day window is firm, even when the complaining party is bringing an appeal, see Case 94-6 Appeal of RE McDade v. Susquehanna Valley, *M23GA* 1995 & Case 2004-9 RE Robar v. Central Carolina, *M33GA* 2005, p. 144).

4. Did Presbytery err in its judgment in application of *BCO* 35-3, 32-20 and 35-10? No as to *BCO* 35-3 and 32-20; Yes as to *BCO* 35-10, but the error did not materially prejudice the appellant.

> 35-3. The testimony of more than one witness shall be necessary in order to establish any charge; yet if, in addition to the testimony of one witness, corroborative evidence be produced, the offense may be considered to be proved.

This paragraph stipulates that a single witness cannot alone "establish any **charge**." But Presbyterian polity has long understood the following:

> The testimony of more than one witness is necessary in order to establish any charge; yet if several credible witnesses bear testimony to different similar acts, belonging to the same general charge, the crime shall be considered as proved. – 1821 *Presbyterian Church USA Book of Discipline* (Paragraph VI.VI-underlining added).

The second allegation pertained to the *BCO* "statute of limitations":

> 32-20. Process, in case of scandal, shall commence within the space of one year after the offense was committed, unless it has recently become flagrant…

This paragraph contains the caveat that the one-year window does not apply if the offense "has recently become flagrant." Presbytery judged it had, and explained the reasons for this judgment, some of which is excerpted below from the 29-page report of the trial commission:

> The Commission concludes that the matters set forth in Specifications 2 and 3 have only recently become flagrant. The nature of TE Grady's offenses only became conspicuously offensive or obvious to Presbytery at its May 8, 2007 meeting … The Indictment's overarching charge is that TE Grady engaged in a "pattern" of conduct. Patterns can only be observed over the course of time, and it may take more than a year to observe a pattern in a man's conduct . . . The events surrounding TE Grady's attempted termination of [the witness] without consent of the Session and the tumultuous Session meeting of May 16, 2006 were significant and integral precursors to the

> implosion of FPC's leadership. If these events were considered in and of themselves, they might be overlooked, but in such a case as this, the collective effect of TE Grady's offending conduct, including the above events, has greater disciplinary significance than its particular expressions.

We find that Presbytery exercised appropriate discretion in their determination (*BCO* 39-3).

SJC does, however, sustain the appellant's assertion that Presbytery misapplied *BCO* 35-10 (and 32-13) regarding telephonic testimony. Appellant asserts there is no provision in the *BCO* for testimony to be taken by telephone and that if any witness is at a distance, a commission or coordinate court must take that testimony. Even though the defense was able to cross-examine these out-of-state witnesses on the phone (husband and wife), their testimony should have been taken by a coordinate court (a local Session or commission appointed by another Presbytery at the request of Southwest Florida's judicial commission).

> 32-13. In order that the trial may be fair and impartial, the witnesses shall be examined in the presence of the accused, or at least after he shall have received due citation to attend. Witnesses may be cross-examined by both parties, and any questions asked must be pertinent to the issue.
>
> 35-10. When it is not convenient for a court to have the whole or perhaps any part of the testimony in any particular case taken in its presence, a commission shall be appointed, or coordinate court requested, to take the testimony in question, which shall be considered as if taken in the presence of the court. Due notice of the commission or coordinate court, and of the time and place of its meeting, shall be given to the opposite party, that he may have an opportunity of attending. If the accused shall desire on his part to take testimony at a distance for his own exculpation, he shall give notice to the court of the time and place at which it shall be taken, in order that a commission or coordinate court, as in the former case, may be appointed for the purpose. Testimony may be

> taken on written interrogatories by filing the same with the clerk of the court having jurisdiction of the case, and giving two weeks' notice thereof to the adverse party, during which time he may file cross-interrogatories, if he desire it. Testimony shall then be taken by the commission or coordinate court in answer to the direct and cross-interrogatories, if such are filed, and no notice need be given of the time and place of taking the testimony.

However, the defense was able to cross-examine these two witnesses and the court's procedural error did not materially prejudice the appellant.

5. Did Presbytery err in its judgment by "manifesting prejudice against the appellant?" No.

Appellant alleges "the court believed [the appellant] was manifesting an impenitent spirit by not admitting he was wrong and the court held this against appellant to the point of manifesting prejudice." He alleges the court "believed that the mere filing of the charges was *prima facie* evidence that they were true…" Presbytery asserts it never held such beliefs and its answers to these allegations are satisfactory.

Appellant cites two examples from the trial commission's 29-page report:

TE Grady never owned a single sentence of the indictment. Since the institution of these proceedings, he has not admitted any wrongdoing raised in the Indictment. In fact TE Grady has consistently and vehemently maintained, through his counsel, that the actions of Presbytery and this Commission are without justification . . . (pp. 1-2 of the judgment, footnote 1).

Under the circumstances set out at length above, we also do not believe that these qualities are manifested in TE Grady, particularly when he has refused categorically to admit any of the allegations of the Indictment (p. 27 of the judgment).

Presbytery contends the appellant's first citation is out of context, and the full footnote is shown below. The portion in italics is the portion quoted by the appellant:

> TE Grady's counsel argued in closing that TE Grady was "not a perfect pastor," and that "his sins are not judicially chargeable sins," but are simply things that "happen in the pastorate." Putting aside for a moment the theological question of whether any sin enjoys an exception from judicial charges, TE Grady's counsel's assertions were in fact contradicted by Grady's posture in this case. *TE Grady never owned a single sentence of the indictment. Since the institution of these proceedings, he has not admitted any wrongdoing raised in the Indictment. In fact TE Grady has consistently and vehemently maintained, through his counsel, that the actions of Presbytery and this Commission are without justification*, and that he intends to appeal these proceedings to General Assembly and is supremely confident that any negative outcome will be overturned.

In its brief, Presbytery responds that the purpose of the footnote was to point out the inconsistent position that TE Grady, through his counsel, had asserted during the closing arguments on the day of the trial.

Whereas TE Grady had previously denied all charges, his counsel in closing made the remarkable assertion that TE Grady's sins "are not judicially chargeable sins." The Commission was merely noting the inconsistency of TE Grady's favorable shading of his wrongdoings after he had, *as was his right,* consistently and categorically denied all allegations of any wrongdoing.

Regarding the appellant's second quote cited above, Presbytery responds:

> Contrary to TE Grady's assertion, TE Grady's plea of "not guilty" was categorically *not* a reason that he was found guilty. Once the Commission had determined, based on its review of the evidence, that the allegations were true, it was completely appropriate to take into account TE Grady's refusal to admit any of the allegations . . . Therefore TE Grady's refusal "categorically to admit any allegations of the indictment" is *relevant* to the judgment and, more specifically the appropriate censure.

Neither the footnote nor the citation from page 27 of the judgment substantiates the allegation that Presbytery's commission believed that "the mere filing of the charges was *prima facie* evidence that they are true and Appellant should have just admitted them." Therefore, this allegation of prejudice is without merit.

6. Did Presbytery err in its judgment in its interpretation of "subjection" to the brothers? Yes.

Presbytery erred in its interpretation of *BCO* 13-9.c and subsequently misapplied *BCO* 21-5 in relation to Grady's June 15 decision to rescind his resignation.

> 13-9.c [Presbytery has the power] to establish the pastoral relation and to dissolve it at the request of one or both parties, *or where the interest of religion imperatively demands it.* (Emphasis added.)
>
> 21-5 Do you promise subjection to your brethren in the Lord? (Question 4)

It appears some members of Southwest Florida held the view that a Presbytery can administratively dissolve a minister's call, against the wishes of both him and the congregation, relying on the second clause of *BCO* 13.9.c. And so, if Presbytery directs a minister to resign but he declines, he has apparently failed to be in subjection to his brethren because Presbytery has the power to demand it. This misapplication of our Constitution has so thoroughly permeated the Presbytery's actions in this matter, especially its censure, that we are setting aside the censure with directions to the Presbytery that it conduct further judicial proceedings to determine what censure may be appropriate.

In its written brief and in the report of its trial commission, Presbytery states its interpretation of *BCO* 13.9.c when it writes (italics original; underlining added):

> The question raised in this case is whether Presbytery possesses the power to demand the resignation of a minister *without censure*, and whether the minister's *failure to comply with the direction to resign is itself a censurable offense*.

We would like to note that *BCO* 13-9 grants Presbytery the power "to establish the pastoral relation and to dissolve it at the request of one or both of the parties, or *where the interests of religion imperatively demand it*." If Presbytery possessed the power to dissolve the pastoral relation, it necessarily possessed the power to *direct* TE Grady to tender his resignation.

This is a misapplication of the second clause of *BCO* 13.9.c. Presbytery's conclusion that because it has the power to dissolve a pastoral relation it has the power to direct a minister to resign on pain of discipline for violation of his vow of submission to his brethren does not follow.

While a Presbytery can recommend to a minister that he resign (or a Session to a ruling elder), a minister or elder does not automatically violate TE ordination vow 4 or RE vow 5 if he does not follow that recommendation. Southwest Florida is correct when they assert:

> A Presbytery may conclude that it is in the interest of religion that a man's call to a particular church be dissolved, not because it has adjudicated him to have engaged in censurable conduct, but because, for example, the church's Session has disintegrated under his leadership, and it appears in Presbytery's best judgment that the preservation of the church requires new leadership.

But they may not translate that conclusion into an edict and then convict and censure a man on the basis of his refusal to follow it.

In this case we are taking the unusual step of sustaining the conviction but setting aside the censure imposed because this Constitutional error may have played a substantial role in the censure imposed by the Presbytery. Further, since TE Grady's call could only have been dissolved under *BCO* 34-9 in light of the censure of suspension from office, we are vacating the order dissolving his call. We are thus affording the Presbytery the opportunity to revisit the issue of censure and any subsequent action as to TE Grady's call in light of this opinion. TE Grady remains under the suspension from office under *BCO* 31-10 (without censure) imposed on June 30, 2007, pending further action by Presbytery.

7. Did Presbytery err in its judgment in "allowing inappropriate questions"? No

Appellant complains that "as a number of witnesses for the prosecution were concluding their testimony, a member of the judicial commission asked. . . . Do you believe that TE Grady is fit for pastoral ministry?" He asserts this question is out of order in a judicial proceeding since the personal opinion of a witness is irrelevant to the case before the court. Appellant cited *BCO* 35, and the most pertinent paragraph is below:

> 35-5. No question shall be put or answered except by permission of the moderator, subject to an appeal to the court. The court shall not permit questions frivolous or irrelevant to the charge at issue.

Presbytery reports that neither TE Grady nor his counsel objected or "appealed to the court" when this question was asked. Furthermore, the transcript shows Grady's counsel asked this question of three defense witnesses. Presbytery contends it was not an inappropriate, frivolous or irrelevant question when the accused was "alleged to have (1) demonstrated a consistent pattern of violating the fourth ordination vow regarding his "subjection" to his brethren, (2) did not endeavor to maintain the purity, peace, and unity of the church and (3) did not adorn the gospel in his manner of life and did not walk with exemplary piety before the flock." SJC does not find this question violated *BCO* 35-5.

Adopted and approved by the full SJC, December 10, 2008

The vote on SJC 2007-16 was:

TE Dominic A. Aquila, Disqualified	TE William R. Lyle, Disqualified
TE Howell A. Burkhalter, Concur	TE John M. McArthur, Jr., Concur
RE E. C. Burnett, Concur	RE J. Grant McCabe, Concur
TE David F. Coffin Jr., Concur	TE Charles E. McGowan, Disqualified
RE Marvin C. Culbertson, Concur	TE D. Steven Meyerhoff, Concur
RE J. Howard Donahoe, Absent	RE Frederick Neikirk, Concur
RE Samuel J. Duncan, Concur	RE Steven T. O'Ban, Absent
TE Paul B. Fowler, Dissent	RE Calvin Poole, Concur
TE Grover E. Gunn III, Concur	TE G. Dewey Roberts, Absent
TE William W. Harrell Jr., Concur	RE Olin L. Stubbs, Concur
RE Terry L. Jones, Dissent	RE John B. White, Jr., Absent
RE Thomas F. Leopard, Absent	

13-Concur, 2-Dissent, 0-Abstain, 3-Disqualified, 5-Absent