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The Facts, Issues, and Judgments were written by Samuel J. Duncan. The Reasoning and Opinion was written by Samuel J. Duncan and John B. White Jr.

The vote on SJC 2007-1, 2007-6, and 2007-7 was:

TE Dominic A. Aquila, Concur	TE John M. McArthur Jr., Concur
TE Howell A. Burkhalter, Concur	RE J. Grant McCabe, Absent
TE Alton Craig Chapman, Concur	TE Charles E. McGowan, Concur
TE Stephen M. Clark, Concur	TE D. Steven Meyerhoff, Concur
RE M. C. (Cub) Culbertson, Concur	RE Frederick (Jay) Neikirk, Concur
RE Perry Denniston, Disqualified	RE Steven T. O'Ban, Disqualified
RE J. Howard Donahoe, Concur	RE Calvin Poole, Concur
RE Samuel J. (Sam) Duncan, Concur	TE G. Dewey Roberts, Absent
TE Paul B. Fowler, Concur	TE Michael F. Ross, Concur
TE William W. Harrell Jr., Concur	RE Olin L. Stubbs, Concur
RE Thomas F. Leopard, Concur	RE John Tolson, Disqualified
TE William R. (Bill) Lyle, Concur	RE John B. White Jr., Concur
19– Concur; 2 -Absent; 3-Disqualified	

**COMPLAINT OF TE PATRICK MALONE  
VS.  
METROPOLITAN NEW YORK PRESBYTERY  
SJC 2007-02**

TE Malone brought this Complaint pursuant to *BCO* 38-1 against a judgment and censure rendered against him without process by a commission of Metropolitan New York Presbytery. The action of the commission was approved by the presbytery and gave rise to the complaint.

### I. SUMMARY OF THE FACTS

1. On May 13, 2006, at a Stated Meeting of Metropolitan New York Presbytery (“Presbytery”) the Session of Redeemer Montclair Presbyterian Church (“Session”) brought a motion before Presbytery to dissolve its call to TE Patrick Malone as an assistant pastor. (ROC 45). In support of this motion, the session provided Presbytery with a five-page summary of alleged misconduct by TE Malone. (ROC 46-50).
2. Presbytery voted to dissolve the call to TE Malone and further voted to “give the Chairman of the Shepherding Team, TE Ellis, the power

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- to name the members of a Judicial Commission *to investigate the charges of the Redeemer Montclair Church Session against TE Malone.*" (ROC 10, emphasis added).
3. On June 26, 2006, the members appointed to the commission met and elected TE Matt Brown as chairman. The commission heard from members of the Redeemer Montclair Session and TE Malone. (ROC 29-30, 32-33, 35-36). The commission appointed a sub-committee of its members to summarize the allegations into specific issues and to determine whether TE Malone "assents." (ROC 30).
  4. On August 1, 2006, TE Matt Brown sent a letter to TE Malone seeking to "offer a brief statement of the facts as presented to us on Monday, June 26, 2006." The letter recounted allegations of misconduct, then stated, "It is the hope of this commission that our account is an accurate statement of the situation that developed during your employment at Redeemer Montclair. If you have any question, or need clarification, please do not hesitate to call me. If you believe we have misrepresented this situation in any way, we would be happy to meet with you at a time convenient for all of us." (ROC 38-39).
  5. In a letter dated August 10, 2006, TE Malone responded, stating that, "As I read your letter of, 1 August 2006, I was grieved and saddened by its contents and findings, yet as I reflected I was also struck by its accuracy." TE Malone acknowledged sinful patterns in his life and stated, "I am grieved over this whole affair and once again ask forgiveness from you, the members of the commission, the presbytery and the Montclair Session." (ROC 40).
  6. On September 20, 2006, the commission met and made the following decisions:
    - a. "Given the nature of The Reverend Malone's response [letter of August 10, 2006], *the commission determined this matter was to be conducted as a case without process, according to chapter 38 of the BCO.*" (emphasis added)
    - b. "the commission agreed that *BCO 34-7* [regarding confession of base and flagitious matters] applied to this case, *and suspension from ministry was deemed appropriate.*" (emphasis added)
    - c. "it was moved, seconded and carried unanimously that *an indefinite suspension of at least two years* would be most beneficial for the Reverend Malone ... this period of time would allow the Presbytery to see evidence of repentance in Pastor Malone's life – *in steps determined by the commission.*" (emphasis added). (ROC 41).

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7. On September 20, 2006, the commission further adopted a decree of judgment alleging TE Malone's confession to specific charges, imposing judgment and an indefinite suspension of office against him and listing specific steps by which Presbytery would evaluate TE Malone's repentance in this matter. (ROC 42).
8. TE Brown contacted TE Malone and verbally informed him of the commission's action, but did not provide him with minutes from the meeting or a copy of the judgment adopted by the commission. TE Malone later learned that the matter would be heard by presbytery at its Stated Meeting on November 3, 2006. On October 30, 2006, TE Malone wrote the Stated Clerk of Presbytery asking that the matter be deferred to Presbytery's Stated Meeting in January, 2007, because he would not be able to attend the November meeting and wished to respond to the commission's report. (ROC 51).
9. Presbytery met on November 3, 2006, and denied TE Malone's request to defer hearing the report of the commission. After hearing the report, "In accord with *BCO* 15-3, Presbytery proceeded to vote without discussion on the judgment." Presbytery subsequently voted to "approve the report of the Judicial Commission in the matter of TE Patrick Malone, including its judgment and censure." It further appointed TE Brown to write TE Malone to inform him of presbytery's actions in the matter. (ROC 18-19).
10. TE Malone filed a complaint against the actions of Presbytery at the November 3, 2006 meeting on or about November 22, 2006. The complaint alleged, among other things, that the commission formed by presbytery was not given judicial powers when it was formed, that the judgment and censure imposed by the commission and approved by presbytery erred in several different ways, and that presbytery acted improperly in hearing this matter without TE Malone being present. (ROC 43-44).
11. Presbytery, at its January 13, 2007, Stated Meeting heard and denied TE Malone's Complaint. (ROC 25-26). TE Malone filed his Complaint against Presbytery with the Stated Clerk of the General Assembly on February 12, 2007. (ROC 59-60).

## II. STATEMENT OF THE ISSUES

1. Did the presbytery, at its meeting on May 13, 2006, authorize its commission to fully adjudicate matters related to TE Malone?

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2. Could the presbytery, on the basis of the record prepared by the commission, proceed against TE Malone in a case without process under *BCO* 38?
3. Where a judgment and censure are properly imposed, does a presbytery exceed its authority and improperly bind the conscience or conduct of an offending member by stating actions the offending member must undertake in order to demonstrate true repentance?

### **III. JUDGMENTS**

1. No.
2. No.
3. No.

TE Malone's Complaint is sustained in part, and the judgment and censure of the Presbytery are vacated, without prejudice to further proceedings consistent with the Reasoning and Opinion set out below (*BCO* 43-10).

### **IV. REASONING AND OPINION**

Although nothing in the record suggests that Presbytery "rushed to judgment" in this matter, and much in the record manifests the Presbytery's desire to minister to TE Malone, it is apparent that Presbytery failed to follow our Constitutional processes in its handling of TE Malone's case. Those failures significantly prejudiced TE Malone and require that the judgment and censure in this matter be vacated. If Presbytery intends to proceed further against TE Malone, it must begin its process anew.

Briefly stated, Presbytery's Constitutional failures are as follows:

1. Presbytery failed to clearly establish the purpose and authority of the commission it formed on May 13, 2006. The minutes describe the commission as a "Judicial Commission." However, the stated purpose of the commission was to "investigate charges against TE Malone."

While *BCO* 15-3 authorizes reference of pending judicial cases to commissions, on May 13, 2006, there was no pending judicial case to assign to a commission. Allegations had been made against TE Malone, and investigation of those allegations was necessary in order to determine whether or not process would be instituted (*BCO* 31-2). The only Constitutionally appropriate action by the commission under these circumstances would have been to investigate the charges and

determine whether there was a “strong presumption of guilt.” It had no Constitutional power to render a judgment or censure on behalf of presbytery.

2. Cases under *BCO* 38-1 are extraordinary remedies and require a clear record demonstrating that the offending party has come forward with the intent of having presbytery render judgment on the basis of his confession. The letters exchanged between the commission’s chairman and TE Malone are insufficient to make a showing of TE Malone’s intent to have the commission, or presbytery, render judgment against him without process.

*A commission may not act beyond the powers given it by the presbytery.*

*BCO* 15 authorizes church courts to appoint commissions to act on their behalf in many matters. One such matter is the conduct of a judicial case pending before the court (*BCO* 15-3). However, the record in this matter does not establish that a judicial case was pending at the time the commission was formed. Instead, it establishes that the commission, while called a “Judicial Commission,” was formed to *investigate* allegations against TE Malone – the step that necessarily precedes a judicial case.

A judicial case arises if, and when, an investigation initiated under *BCO* 31-2, “result[s] in raising a strong presumption of the guilt of the party involved....” At that point, “the court shall *institute process*, and shall appoint a prosecutor to prepare the indictment and conduct the case.” (*BCO* 31-2, emphasis added).

On May 13, 2006, the Session of Montclair Church brought allegations before presbytery regarding TE Malone. Those allegations did not constitute a judicial case, so there was no pending judicial case to commit to a commission at that time. The work that did lay before presbytery on May 13, 2006, was conducting a *BCO* 31-2 investigation to determine whether there was cause to initiate a judicial case. The record in this case is clear that the commission was authorized to “investigate the charges of the Redeemer Montclair Session against TE Malone.” (ROC 10). However, the Presbytery’s minutes do not clearly confer any further authority to the commission. A commission may not undertake action not entrusted to it by the Presbytery. (*BCO* 15-2, 15-3).

In spite of this omission in the minutes, the Presbytery’s representative maintains that Presbytery intended to cloak the commission with responsibility for the full adjudication of this matter and that full judicial

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powers could be “inferred” from the Presbytery’s May 13, 2006 motion, thereby allowing the commission to conclude the case with full judicial powers. The only basis by which we may judge that intent is the record maintained by the Presbytery in its minutes. (*BCO 13-11 presbytery to keep a “full and accurate record of its proceedings”*). We cannot “infer” the power to fully adjudicate TE Malone’s case – a clear record that the power was given must be before us. The Minutes of the Presbytery simply do not show a clear intent to authorize the commission to do anything beyond investigating the allegations. (ROC 10-11). Without specific evidence in the record establishing Presbytery’s alleged “intent”, Presbytery is bound by what is clearly stated in its own records.

A presbytery may, under *BCO* 15-2 and 15-3, form a commission to (1) investigate pending charges, (2) decide whether or not to institute process, and (3) prosecute that process to judgment and censure. However, in order to do so, the presbytery must make that intent clear on its records through a statement such as, “the commission has authority to investigate allegations made against the member, and, if necessary, to commence and adjudicate all necessary process regarding the member against whom allegations have been made.” Similarly, a presbytery could, in its standing rules, state that all judicial commissions formed would have full power to investigate, proceed to indictment if necessary, and adjudicate matters assigned to them. In this case however, Metropolitan New York Presbytery did not take either step. Therefore, the purported judgment and censure entered by the commission exceeded its authority and had no binding effect.

*The proceedings of the commission are not sufficient to warrant proceeding against TE Malone under BCO 38-1.*

Although the commission’s judgment and censure exceeded its authority, the argument remains that the materials it gathered comprise a record sufficient to warrant proceeding against TE Malone under *BCO* 38-1, as a case without process. If this were correct, the report of the commission would constitute grounds sufficient for the presbytery to impose judgment and censure against TE Malone. However, the “evidence” gathered by the commission fails to reach this necessarily high threshold of proof.

*BCO* 38 provides for cases to be conducted where an offender comes forward, fully confesses his offenses, and expresses his intent to be bound by that confession. “In handling the confession of guilt, it is essential that

*the person intends to confess and permit the court to render judgment without process.” (BCO 38-1, emphasis added). Only in such circumstances is the court authorized to proceed immediately to judgment against the offending party.*

The record in this matter does not show a clear confession by TE Malone to specific charges, nor does it show intent to allow the court to proceed against him without process. The Session of Montclair Church made numerous allegations against TE Malone. Although TE Malone acknowledged fault in his relationship with these elders, the commission’s notes show it was unclear whether TE Malone admitted committing the wrongs alleged. (ROC 35). The commission determined to condense its understanding of the contentions of the Montclair Church Session and submit them to TE Malone to see if he agreed with the facts as the commission perceived them,

“We decided that [3 commission members] will come up with a list of issues. Commission will decide on this assessment and then determine whether Pat assents, to decide whether we go to process.” (ROC 30).

The apparent product of that “condensation” was TE Brown’s letter of August 1, 2006, stating the “facts” as the commission saw them. Although the letter does make reference to BCO 38-1, nothing in that letter informed TE Malone that he was being asked to confess to specific charges or that he was being asked whether he intended in so confessing to allow presbytery to proceed to judgment against him without process. TE Malone’s response dated August 10, 2006, generally acknowledges patterns of sinfulness and regret, including his statement that he was “struck by the accuracy” of the August 1, 2006 letter and the acknowledgement that his “sin has caused many difficulties.” (ROC 40). That cannot, however, be construed as a willing confession of specific sin and a clear manifestation of intent to waive process. Instead, the record clearly shows that TE Malone was confused by the commission’s actions, that he wanted to be heard as to its actions (ROC 51), and that the presbytery did not heed his requests (ROC 18).

Any further action by the Metropolitan New York Presbytery on this matter may not constitutionally rely on the letters between TE Brown and TE Malone, or the notes and recollections of the commission, as evidence

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adequate to show a confession by TE Malone nor as evidence of intent by TE Malone to consent to imposition of judgment on the basis of that confession. While the presbytery could constitutionally conclude these materials satisfy the necessary “strong presumption of guilt” as to certain charges required to initiate process under *BCO* 31-2, they fall far short of the more stringent express requirements of *BCO* 38-1.

A presbytery’s statements as to necessary “evidence” of repentance do not bind the conduct or behavior of an offending party

Should this matter proceed again to judgment, TE Malone has claimed that a court may not assert specific actions as necessary evidence of repentance in order to lift a censure of indefinite suspension. This claim is simply without merit.

Any court is charged with determining the standards expected of those who participate in it. (Preliminary Principle No. 2). The court may neither infringe upon the conscience of the individual if so doing (Preliminary Principle No. 7), nor may it usurp for itself the power of the magistrate in seeking to regulate its membership (Preliminary Principle No. 8). However, a court does not do so by offering pious advice to an offending member as to what fruits will serve as evidence of repentance by that member.

It may be true in this matter that, by including a list of specific actions in the judgment and censure, Metro New York Presbytery appeared to make satisfaction of these criteria a “judgment” imposed by the Presbytery. For that reason, if such criteria are to be stated, it would be better form to include them as a part of a separate “pastoral letter” to the offending party. However, this mistake of form does not create a power clearly excluded by our *Book of Church Order*.

Nothing in our *Book of Order* may be construed as giving a court civil power to compel a member of the church to specific actions. In imposing an indefinite suspension from office, the court would be informing the offending party of its judgment that significant and damaging sin existed in his life. That is its duty. In seeking reinstatement to his office, the offending party is obliged to show evidence of repentance. (*BCO* 30-3). That is his right and duty. Pastoral advice as to what would constitute repentance is the expression of the court at one point in time as to what a showing of repentance would require. After diligent and humble acts on

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his part, the court might or might not agree with an offending party that the court's initial advice had been overly burdensome. Conversely, refusal to heed the advice of the court may well be perceived as persevering in the sins at issue. In any case, the lifting of a censure is not an issue of whether specific steps have occurred, or an issue of the offending party's repeated assertion of good intent. It is a judgment, *made at the time a motion is brought to lift the censure*, as to whether or not the court is satisfied as to the reality of the repentance of the offending party. (*BCO* 37-3). That decision is left to the sound discretion of the court of original jurisdiction. (See, e.g., *BCO* 39-3(3)).

Metropolitan New York Presbytery has no civil power to compel TE Malone to follow any prescribed list of actions it deems necessary to show evidence of repentance, nor did it seek to assert any in this case. It merely informed him of what acts it would deem consistent with a repentant heart. TE Malone's contention that Metropolitan New York Presbytery seeks to compel him to specific acts is without merit.

/s/TE Howie Burkhalter, Convener  
/s/RE Terry Jones

/s/TE Steven Meyerhoff, Secretary

The vote on SJC 2007-02 was:

TE Dominic A. Aquila, Concur  
TE Howell A. Burkhalter, Concur  
TE Alton Craig Chapman, Recused  
TE Stephen M. Clark, Concur  
RE M. C. (Cub) Culbertson, Concur  
RE Perry Denniston, Concur  
RE J. Howard Donahoe, Concur  
RE Samuel J. (Sam) Duncan, Concur  
TE Paul B. Fowler, Concur  
TE William W. Harrell Jr., Concur  
RE Thomas F. Leopard, Concur  
TE William R. (Bill) Lyle, Concur  
19– Concur; 1 -Absent; 1 -Recused; 3-Disqualified

TE John M. McArthur Jr., Concur  
RE J. Grant McCabe, Absent  
TE Charles E. McGowan, Concur  
TE D. Steven Meyerhoff, Concur  
RE Frederick (Jay) Neikirk, Concur  
RE Steven T. O'Ban, Concur  
RE Calvin Poole, Concur  
TE G. Dewey Roberts, Disqualified  
TE Michael F. Ross, Concur  
RE Olin L. Stubbs, Disqualified  
RE John Tolson, Disqualified  
RE John B. White Jr., Concur