

APPENDIX T

Further, even if one agrees that OVP did fulfill its responsibilities to create a sufficient Record, the 2014-01 Complaint with respect to the TE's views must now be addressed on its merits. Finally, we note that nothing in the SJC's decision in this case prevents anyone with standing from filing charges against the teaching elder should that be deemed necessary. We share this not to advocate the filing of charges, but to point out that what we judge to be an erroneous conclusion on the part of the SJC does not preclude further action with regard to the TE and his views.

/s /REs John Bise, Dan Carrell, Sam Duncan, and Frederick Neikirk
/s/ TEs Brad Evans and Fred Greco

CASE 2016-02

TE ARNOLD ROBERTSTAD
VS.
NORTH TEXAS PRESBYTERY

DECISION ON COMPLAINT
October 20, 2016

The Standing Judicial Commission (SJC) finds the above-named Complaint Administratively Out of Order and that it cannot be put in order for failure to comply with the filing requirements of *BCO* 43-3. The case is administratively out of order because it was initially filed via e-mail rather than by hard copy. It was filed by hard copy after the thirty-day deadline. The Fortieth General Assembly gave initial approval to amendments to *BCO* 42-4 and 43-3 to clarify how and when notification of a court's decision could be given to parties to a case (*M40GA*, pp. 72-73, 697-698). After receiving the required affirmative votes of Presbyteries, the Forty-first General Assembly gave final approval to the proposed amendments to *BCO* 42-4 and 43-3 (*M41GA*, p.17). An examination of the minutes of the Fortieth General Assembly indicate that the purpose of the amendments was only to change the time frame for carrying a case to a higher court, from the date of the lower courts action to the date at which parties were notified of the action. Though many are not aware of the historical context of the amendment, the meaning is clear from the context of the wording used. Both *BCO* 42-4 and 43-3 state "within thirty (30) days of notification of the last court's decision" and then go on to state how the lower court may notify parties. The language of notification of a decision was drawn from *OMSJC* 18.10.c, which also relates to courts' notifying parties. Neither *BCO* 42-4 nor 43-3, understood in historical or literary context, provide for

MINUTES OF THE GENERAL ASSEMBLY

parties filing cases with a higher court electronically. *OMSJC* 18.10.b is clear that "Neither facsimiles nor E-mail will be allowed for purposes of filing."

The SJC approved this decision on the following roll call vote (21 Concur, 3 Absent):

Bankson, <i>Concur</i>	Dowling, <i>Concur</i>	Meyerhoff, <i>Concur</i>
Barker, <i>Concur</i>	Duncan, <i>Concur</i>	Neikirk, <i>Concur</i>
Bise, <i>Concur</i>	Evans, <i>Concur</i>	Nusbaum, <i>Concur</i>
Cannata, <i>Concur</i>	Fowler, <i>Absent</i>	Pickering, <i>Concur</i>
Carrell, <i>Concur</i>	Greco, <i>Concur</i>	Robertson, <i>Concur</i>
Chapell, <i>Absent</i>	Jones, <i>Concur</i>	Terrell, <i>Concur</i>
Coffin, <i>Concur</i>	Kooistra, <i>Concur</i>	White, <i>Absent</i>
Donahoe, <i>Concur</i>	McGowan, <i>Concur</i>	Wilson, <i>Concur</i>

CONCURRING OPINION ON CASE 2016-02

RE Howard Donahoe, joined by TE Will Barker and RE Dan Carrell

We concur with the SJC's ruling, but believe further explanation for the ruling is warranted. The question is whether a complainant can file notice of his complaint, with the higher court, via e-mail. TE Robertstad mistakenly (but perhaps understandably) thought *BCO* 43-3 allows such (reformatted below for emphasis).

43-3. If, after considering a complaint, the court alleged to be delinquent or in error is of the opinion that it has not erred, and denies the complaint, the complainant may take that complaint to the next higher court.

If the lower court fails to consider the complaint against it by or at its next stated meeting, the complainant may take that complaint to the next higher court.

Written notice thereof shall be filed with both the clerk of the lower court and the clerk of the higher court within thirty (30) days of notification of the last court's decision.

Notification shall be deemed to have occurred on the day of mailing (if certified, registered or express mail of a national postal service or any private service where verifying receipt is utilized), the day of hand delivery, or the day of confirmed receipt in the case of e-mail or facsimile.

APPENDIX T

Furthermore, compliance with such requirements shall be deemed to have been fulfilled if a party cannot be located after diligent inquiry or if a party refuses to accept delivery.

The word “Notification” that begins the fourth sentence, only applies to the lower court notifying the complainant of the court’s action on his complaint. It means the same thing as “notification of the last court’s decision” near the end of the previous sentence. It does not refer to the “written notice” filed by a complainant (referenced in the beginning of the third sentence).

Granted, *BCO* 43-3 could be worded more clearly. Perhaps the simplest solution would be to add three words to the fourth sentence: “Notification *by the court . . .*” Regardless, SJC Manual 18-10.b clearly specifies the allowable ways to file notice with the PCA.

Documents required or permitted to be filed by a party shall be filed with the [PCA] Stated Clerk. Such filing shall not be timely unless the documents are received in the office of the Stated Clerk within the time fixed for such filing, except that papers shall be deemed filed on the day of mailing if certified, registered or express mail of the United States Postal Service or any private service where verifying receipt is utilized. Neither facsimiles nor E-mail will be allowed for purposes of filing. Interested parties should be aware that responsibility for such filings rests with them and that delays in delivery or non-delivery are the sole responsibility of the filing party. (Underlining added.)

At this point, an understanding of how recent changes were made to *BCO* 43-3 might be helpful.

Prior to the 2012 GA in Louisville, Pacific NW Presbytery filed Overture 13, and the PCA Clerk titled it “Amend *BCO* 43-3 to Change the Start of the Thirty-day Filing Period for a Complaint to the Next Higher Court” (*M40GA*, p. 697.) The Overture and its rationale are below:

43-3. If, after considering a complaint, the court alleged to be delinquent or in error is of the opinion that it has not erred, and denies the complaint, the complainant may make complaint to the next higher court. . . . Written notice of complaint, together with supporting reasons, shall be filed

MINUTES OF THE GENERAL ASSEMBLY

with both the clerk of the lower court and the clerk of the higher court within thirty (30) days following the meeting of the lower court of the date the complainant receives a copy of the last court's decision on his complaint.

Pacific NW Rationale - The start of the 30-day period for filing a complaint with the higher court should be directly tied to the date the complainant receives a copy of the lower court's decision on his complaint, rather than starting on the date of the lower court's meeting where it considered his complaint. For example, it would be unfair to start the 30-day clock on the date of the meeting where a Session denied a complaint if the complainant didn't get a copy of the Session's decision until two weeks after the meeting.

The Louisville Overtures Committee recommended adopting Overture 13, with several amendments, shown underlined below. (GA Moderator Ross ruled some of the other OC amendments out-of-order as not germane.) Below is the final version presented to, and adopted by, the 40th GA in Louisville, along with the Grounds submitted by the OC.

43-3. If, after considering a complaint, the court alleged to be delinquent or in error is of the opinion that it has not erred, and denies the complaint, the complainant may make complaint to the next higher court. If the court fails to consider the complaint by or at its next stated meeting, the complainant may make complaint to the next higher court. Written notice of complaint, together with supporting reasons, shall be filed with both the clerk of the lower court and the clerk of the higher court within thirty (30) days following the meeting of the lower court of notification of the last court's decision. Notification shall be deemed to have occurred on the day of mailing (if certified, registered or express mail of a national postal service or any private service where verifying receipt is utilized), the day of hand delivery, or the day of confirmed receipt in the case of e-mail or facsimile. Furthermore, compliance with such requirements shall be deemed to have been fulfilled if a party cannot be located after diligent inquiry or if a party refuses to accept delivery.

OC Grounds: The change provides a bright line for when the

APPENDIX T

clock begins for the filing of a complaint with a next higher court. Rather than having the clock begin potentially before notification of a court's decision becomes available to a complainant, the clock begins in relation to notification of the decision. Provision is made for various forms of proof of notification, with language adapted from *OMSJC* 18:10.

In the following year, Presbyteries voted 66-3 to make this change, and the 2013 GA in Greenville adopted the change (*M41GA*, p. 114. North Texas, South Texas, and Western Carolina voted against.)

Prior to the 2014 GA in Houston, James River Presbytery filed Overture 37 proposing a further change to *BCO* 43-3, as shown below (*M42GA*, p. 838). This language is what the Louisville Moderator had ruled as being a non-germane amendment two years prior, because it originated in the OC and not a Presbytery.

43-3. If, after considering a complaint, the court alleged to be delinquent or in error is of the opinion that it has not erred, and denies the complaint, the complainant may ~~make take that~~ complaint to the next higher court. If the lower court fails to consider the complaint against it by or at its next stated meeting, the complainant may ~~make take that~~ complaint to the next higher court. Written notice thereof ~~of complaint, together with supporting reasons,~~ shall be filed with both the clerk of the lower court and the clerk of the higher court within thirty (30) days of notification of the last court's decision.

James River offered three reasons for its wise proposal:

- *BCO* 43-3 reads as if a new complaint is to be filed with a higher court in order to have that court review the denial of a complaint in the lower court; and
- What is intended is for the higher court to provide what amounts to appellate review of the same complaint based on the record in the lower court; and
- The current wording of the *BCO* typically gives rise to confusion and unnecessary additional labors and paperwork for both courts;

So, in other words, James River sought to clarify that a complainant doesn't file a *new* complaint with the higher court. He simply files a "notice" that he

MINUTES OF THE GENERAL ASSEMBLY

is carrying the original complaint to the higher court. The “notice” doesn’t require supporting reasons, because they’re already in the complaint filed with, and denied by, the lower court. And the same complaint document that was filed with the lower court will be included in the Record of the Case sent up by the clerk of the lower court.

The Houston OC recommended adoption of the James River overture, and the GA adopted the change (*M42GA*, p. 65), and presbyteries voted 62-3 to approve. (Voting against were Central Georgia, Gulf Coast, and Siouxlands.) Then in 2015, the 43rd GA in Chattanooga gave final approval (*M43GA*, 2015 Chattanooga, p. 96 and 114-116).

Accordingly we believe that *BCO* 43-3 should be clarified by amendment offered through an Overture.

/s/ RE Howie Donahoe, RE Dan Carrell, TE Will Barker

CASE 2016-05

TE THOMAS E. TROXELL
VS.
THE PRESBYTERY OF THE SOUTHWEST

DECISION ON COMPLAINT
October 20, 2016

I. SUMMARY OF THE FACTS

04/25/2013 At the Stated Meeting of The Presbytery of the Southwest (PSW), PSW voted to ". . . erect a small committee to shepherd a Teaching Elder (TE) and recommend any actions they deem necessary during his crisis in Roswell." This action followed an executive session for which no minutes were produced.

June 2013 The TE resigned.

09/19/13 PSW received a "Status of Redeemer Christian Fellowship" noting that the TE "resigned in June 2013." Later, it was further reported, "TE Shelby Moon gave report of the shepherding committee for TE [name redacted]. . . It was