

Constitutional Musing # 22 Standard of Pleading in a Remedial Complaint

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Recently, the General Assembly Permanent Judicial Commission (GAPJC) has issued a string of decisions that have clarified the Standard of Pleadings necessary in Remedial Complaints in order to state a claim upon which relief may be granted under D-6.0305d.

1. When deciding whether or not a Complaint has stated a claim upon which relief may be granted under D-6.0305, the PJC must assume that the facts alleged in the Complaint are all true. GAPJC #218-1 (*Colonial*), GAPJC #217-11 (*Kuipers*), GAPJC #216-6 (*Hope*), and GAPJC #215-5 (*McKittrick*).

Where there are factual allegations that, if proved true, would entitle the complainant to some relief, “a dismissal is only appropriate after thorough examination of the record and opportunity for all parties to be heard.” (GAPJC #216-6 (*Hope*) quoting *GA Minutes*, 1990, p. 139.)

2. The PJC has declaratory power even if it does not have the power to remedy the irregular act. If a Complaint asks for relief that the PJC does not have the power to grant, the PJC may still hear a case for purposes of declaratory relief only.

For example, in a Remedial Case filed against a session alleging that the session committed an irregular act that resulted in an ordination of an elder in violation of G-6.0106b, the PJC has the power to admonish the session (declaratory) for the irregular act and order the session to refrain from future irregular ordinations even though the irregular ordination could not be set aside through the remedial proceeding. GAPJC #215-5 (*McKittrick* – although *McKittrick* also seems to suggest that a failure to conduct a proper examination could become moot), GAPJC #211-2 (*Weir I*). (A PJC has the power to set aside an installation if the installation was a result of an irregular or delinquent action on the part of the session: GAPJC #215-5 (*McKittrick*). A PJC does not have the power to nullify an ordination: GAPJC #215-5 (*McKittrick*), GAPJC #211-2 (*Weir I*).

3. There is a heightened standard for pleading in remedial cases alleging that a session irregularly ordained a candidate for office who was unrepentant of self-acknowledged behavior which the confessions call sin.

a. If the complaint alleges that a lower governing body irregularly ordained and installed a candidate for ministry or officer, the complaint must state **factual allegations of how, when, where and under what circumstances the individual candidate was self-acknowledging a practice which the confessions call sin and that the governing body had reasonable cause to know about the self-acknowledged behavior of the candidate.**

In April, 2002, the GAPJC interpreted D-6.0305d and G-6.0106b together to mandate a higher standard of Pleading in remedial cases that allege that a governing body has committed an

irregular ordination based solely upon allegations that the irregularly ordained person committed an offense in violation of G-6.0106b (unrepentant of self-acknowledged behavior which the confessions call sin). The GAPJC stated in *Weir II*, GAPJC #214-5 that such an allegation should be brought against the individual in a disciplinary case, rather than against the governing body in a Remedial Complaint. The decision followed earlier GAPJC decisions that dismissed similar Remedial cases as more properly a disciplinary complaint against an individual.

If, however, the complaining party wanted to file a remedial complaint against the governing body, alleging that the governing body committed an irregular action by ordaining a person who was a “practicing homosexual”, the GAPJC stated that the complaining party also needed to state factual allegations of how, when, where and under what circumstances the individual was self-acknowledging a practice which the confessions called sin and that the governing body had reasonable cause to know about the self-acknowledged behavior of the candidate.

The *Weir II* case additionally stated that if the governing body had **reasonable cause** for further inquiry based on its knowledge of the life and character of the candidate, then the governing body had the **positive obligation to make due inquiry**. Implied in the decision was that a governing body could be held accountable for failing to make due inquiry if it had reasonable cause for further inquiry based upon the knowledge of the individual.

In *Colonial v. Grace Covenant*, GAPJC #218-01, the GAPJC decided that a complaint in a Remedial case filed against a session for committing irregular and delinquent actions in the examination, ordination and installation of its elders-elect did not have to plead specific knowledge of the individual’s behavior as in *Weir II*, but did have to plead that **the governing body had reasonable cause to make further inquiry**. The lower PJC’s dismissal of the complaint for failure to state a claim as required by *Weir II* (including factual allegations of how, when, where and under what circumstances the individual was self-acknowledging a practice which the confessions call sin and that the governing body had reasonable cause to know about the self-acknowledged behavior of the candidate) was reversed, not on the issue of the alleged irregular ordination and installation, but only on the issue of whether the session conducted a sufficient examination of one or more elders-elect prior to ordination and installation.

Presumably the *Weir II* standard for a remedial complaint alleging a lower governing body irregularly ordained and installed a candidate still stands in that the complaint must state factual allegations of how, when, where and under what circumstances the individual candidate was self-acknowledging a practice which the confessions call sin and that the governing body had reasonable cause to know about the self-acknowledged behavior of the candidate.

- b. If the complaint alleges that a governing body failed in its positive obligation to make due inquiry based upon the lower governing body’s knowledge of the life and character of a candidate, the complaint may do so without stating factual allegations of a candidate self-acknowledging a practice which the confessions call sin. The complaint must allege that **the governing body had reasonable cause to make further inquiry** and failed to do so.

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4. When does a session have a positive obligation to make further inquiry? What is the standard used by the trial PJC in evaluating the facts of such a case?

The GAPJC did not clarify in *Colonial*, GAPJC #218-01, just how much knowledge of individual behavior gives rise to the positive obligation for lower governing bodies to make due inquiry. This is important since several GAPJC cases have distinguished that a lower governing body may not inquire into a particular candidate's personal life without at least reasonable cause to believe the candidate is in violation of G-6.0106b unless the lower governing body makes it a practice to ask all candidates about their personal life. (GAPJC #215-8 *Hart v. Pby of Redwoods*, GAPJC #214-5 *Weir II*).

At one point the *Colonial* decision quotes the *Weir II* decision, GAPJC #214-5, as stating that if the governing body has reasonable cause for inquiry based on its knowledge of the life and character of the candidate, it has a positive obligation to make due inquiry. Then the GAPJC *Colonial* decision quoted a more recent case, *Hart v. Pby of Redwoods*, GAPJC #215-8 (erroneously attributing the quote to the *Weir II* case), stating that the governing body must have direct and specific knowledge that such a person is in violation of the ordination and installation standards...to make further inquiry.

Since *Colonial* is the latest GAPJC decision on this issue, it is clear that a complainant may simply allege in a complaint that a session failed to conduct sufficient inquiry consistent with the *Weir II* standard (that if the session had reasonable cause for inquiry based on its knowledge of the life and knowledge of the candidate, then it had a positive obligation to make due inquiry) in order to get over the preliminary issues hurdle of D-6.0305d. It is not clear what standard the trial PJC must use to determine whether the session had a positive obligation to make further inquiry. The latest GAPJC decision that states a standard is *Hart v. Pby of Redwoods*, GAPJC Case #215-8, and that standard is that the session must have direct and specific knowledge that the candidate is in violation of the ordination and installation standards in order to make further inquiry. In fact, in *Hart*, the GAPJC specifically defined reasonable grounds (or cause) as factual allegations of how, when, where and under what circumstances the individual was self-acknowledging a practice which the confessions call sin. Therefore, although the GAPJC did not apply this definition in the *Colonial* case for purposes of the pleading in the Complaint, it should still be applicable to a session or presbytery as the standard needed before the positive obligation to inquire further is applied.

Colonial Presbyterian Church v. Session of Grace Covenant Presbyterian Church, #218-01, 2010 Minutes.

Kuipers v. Session, Elkton Presbyterian Church, #217-11, 2006 Minutes, p. 490.

Hope, et. al. v. Pby of San Francisco, #216-6, 2004 Minutes, p. 455.

Hart v. Presbytery of Redwoods, #215-08, 2003 Minutes, p. 277.

McKittrick v. Session of West End Presbyterian Church, # 215-05, 2003 Minutes, p. 272.

Weir (II) v. Session of 2nd Church, Ft. Lauderdale, #214-05, 2002 Minutes, p. 339.

Weir (I) v. Session of 2nd Church, Ft. Lauderdale, #211-2, 1999 Minutes, p. 831.