

LCMS

Commission on Constitutional Matters Minutes – 2001

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MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS
November 1, 2001

209. Call to Order

Chairman Walter Tesch called the telephone conference call meeting to order, noted that all members of the Commission except Gerhard Bode were present, and asked Albert Marcis to offer an opening prayer.

210. Approval of Minutes

The minutes recording the opinions provided by the Commission at the time of the 2001 convention of the Synod were approved as printed.

211. Questions re Convention-Mandated Deaconess Training (01-2232)

In an August 23, 2001 letter to the Commission, the Executive Director of the BHE/CUS Board raised questions regarding Res. 5-06B adopted by the 2001 convention of the Synod. He noted that Bylaw 3.409 c establishes that one of the responsibilities of the BHE/CUS Board is to “review and approve programs, both church work and nonchurch work, both undergraduate and graduate, in the interest of institutions and the constituency.” He further noted that Res. 5-06B resolves that the LCMS “permit” deaconess training to be offered at the seminaries.

In his letter he proposed that the convention resolution “appears to contradict the fundamental responsibility of the BHE/CUS to establish programs in an orderly fashion,” noting that “normally, a new program proposal would be submitted to the BHE/CUS and it would be evaluated in terms of its academic integrity, fiscal viability, and impact on the BHE/CUS school system,” also calling attention to the Preamble of Bylaw 3.409. He reported that the BHE/CUS has in fact denied or postponed approval of requests in past years because a proposal “was inadequate or its effect on the other schools would be unduly negative,” observing that, if the BHE/CUS does not have opportunity to conduct an evaluation process, there is also no opportunity to evaluate the institution’s new fiscal commitments and the programmatic impact on the school system.

Therefore, in order to discuss the implementation of a deaconess program at the seminaries, he asked on behalf of the BHE/CUS board for responses to the following questions.

Question 1: Can the BHE/CUS determine that a seminary’s proposal is inadequate, and withhold approval until the proposal meets the standards that the BHE/CUS applies to all proposals?

Opinion: Bylaw 1.07 a states: “The delegate convention of the Synod is the legislative assembly which ultimately legislates policy, program, and financial direction to carry on the Synod’s work...reserving to itself the right to give direction to all...agencies of the Synod (including the...seminaries, universities and colleges, and other component parts of the Synod).” Therefore, this bylaw is controlling relative to the actions of the BHE/CUS. The elements of the first resolve of Res. 5-06B of the 2001 convention of the Synod are as follows:

- The continued training of deaconesses at Concordia University, River Forest, is encouraged;
- Concordia Theological Seminary, Fort Wayne, and Concordia Seminary, St. Louis, are permitted to offer graduate level deaconess training;

- Concordia University, River Forest; Concordia Theological Seminary, Fort Wayne; and Concordia Seminary, St. Louis, are directed to work with the BHE to establish standards of deaconess education, practice, and placement.

Bylaw 3.409 establishes the functions of the BHE. Those subsections applicable to this question are: “a. develop detailed coordinating policies and procedures for implementing structural arrangements and individual college, university, and seminary roles established by the Synod and be responsible for their implementation;” and “c. review and approve programs, both church work and nonchurch work, both undergraduate and graduate, in the interest of the institutions and the constituency.”

Res. 5-06B permits graduate deaconess training at Concordia Theological Seminary, Fort Wayne, and Concordia Seminary, St. Louis, and thereby the Synod established roles for these two schools. Accordingly, the BHE, in accord with Bylaw 3.409 a, must develop detailed coordinating policies and procedures for implementing the decision of the convention of the Synod. Further, the BHE, in accord with Bylaw 3.409 c, has the duty to review and approve all programs, both undergraduate and graduate, in the interest of the institutions and the constituency, and this includes the program permitted by Res. 5-06B. Therefore, approval by the BHE of the component parts of the proposed program is required before its implementation. However, such approval must be based on standards that do not exceed the standards applied to all other programs.

Question 2: Can the BHE/CUS deny approval of the program at one or both seminaries? Scenario: the feasibility studies might indicate that the student body would be diluted to a level that makes the program untenable at any institution.

Opinion: Res. 5-06B clearly indicates that the Synod wishes to establish graduate level deaconess training. It further indicates that such training is permitted (not mandated) at Concordia Theological Seminary, Fort Wayne, and Concordia Seminary, St. Louis. In adopting this resolution the Synod did not rescind Bylaw 3.409. Those duties remain with the BHE and include the responsibility to determine whether graduate level deaconess training is to take place at one or both schools after taking into consideration all aspects of the program.

Question 3: The resolution refers to “graduate level deaconess training,” but the deaconess certification program is a baccalaureate-level program. Is it referring to initial preparation of deaconess candidates or to advanced-level training for those who are already deaconesses?

Opinion: Res. 5-06B does speak of requests for additional deaconesses, that there is but one synodical school training deaconesses, and that the BHE and the three schools should establish standards of deaconess education, practice, and placement. These are general statements regarding deaconess training, both graduate and undergraduate. However, the specific language of the first resolve is to permit the two seminaries to offer graduate level deaconess training. Therefore, the resolution is only applicable to graduate level deaconess training. However, the resolution does express the need for additional deaconesses and thereby the Synod counsels the BHE to take the necessary steps to respond to the need.

212. Approval of LCEF Articles of Incorporation and Bylaws

After review and discussion, the Commission gave its approval to the changes proposed to the LCEF Articles of Incorporation and Bylaws. As a result of its review, the Commission also noted one or more areas of concern elsewhere in the documents and will offer suggestions in a future letter to LCEF.

213. 2001 Convention Actions

The Commission reviewed the Secretary's recommended changes to the *Handbook* to bring it into harmony with 2001 convention resolutions and changes. The following additional changes were made:

- The sixth resolve of Res. 2-02A will be added as a footnote to Bylaw 14.03;
- A footnote will be added to the end of Chapter VII indicating that the chapter will be removed from the Bylaws immediately prior to the 2004 convention of the Synod, as resolved by Res. 7-13A;
- Bylaw 3.961 a will be changed to read, "In the event of a tie for the final candidate position, all names involved in the tie shall be listed as candidates," this change to include a footnote explaining that additional changes have been made beyond those specifically mandated by convention Res. 8-02 to bring the entire section into harmony with the changes adopted by the convention.

With these changes, the Commission gave its approval to the revisions to the *Handbook*. In the course of its review of convention actions, the Commission also determined the following:

- In Res. 7-09, in which the convention approved the Amended Articles of Concordia Publishing House, the Commission noted that Art. VIII is confusing in its second line after the word "Synod" and instructed the Secretary to bring this error to the attention of CPH via a letter on the Commission's behalf.
- In view of Res. 7-22A, the Commission adopted a motion to amend the October 26, 2000, minutes of the CCM to make note of this resolution at entry 177 (00-2212).

214. Question re Disciplinary Process of a Non-Member Faculty Member (01-2233)

In a September 28 letter the President of a university of the Synod, in preparation for his role as facilitator of the actions described by Bylaw 6.47 a, asked the following questions regarding the final outcome of the process described by Bylaw 6.47:

Question: **What if the complaint is brought under Bylaw 6.43 c 5 or 6, but the respondent (i.e., the accused faculty member) is not a member of the Synod (i.e., a rostered ordained or commissioned minister of religion)? Does the matter end with the decision of the Board of Regents? Or does the ecclesiastical disciplinary process of Bylaw 2.27 have some role to play (and, if so, what is it, given that membership in the Synod is not at issue)?**

Response: Bylaw 6.23 c requires that, as with rostered members of the Synod, when laypersons are employed in full-time teaching positions, "they shall pledge to perform their duties in harmony with the Holy Scriptures as the inspired Word of God, the Lutheran Confessions, the Synod's doctrinal statements, and the policies of the Synod." Accordingly, in a previous opinion (99-2142) the Commission ruled:

In the case of both categories of persons, doctrinal resolutions and statements "are to be honored and upheld until such time as the Synod amends or repeals them" (Bylaw 1.09 b). If there is disagreement, "dissent from doctrinal resolutions and statements shall be governed by Bylaw 2.39 c."

In the same prior ruling the Commission also ruled:

If a person is hired after pledging full compliance with the stated positions of the Synod and fails to honor that commitment, one of the causes for which members of a faculty may be removed from office is “advocacy of false doctrine (Constitution, Art. II) or failure to honor and uphold the doctrinal position of the Synod as defined further in Bylaw 1.09” (Bylaw 6.43 c 6).

In other words, the Bylaws of the Synod and prior rulings of the Commission establish that rostered and lay members of faculties are held to the same standard of conduct. Accordingly, Bylaw 6.47, as it describes the process to be followed when a board of regents receives a complaint against a member of a school faculty or administration, does not distinguish between rostered and lay faculty members: “If the Board of Regents receives a complaint against that institution’s faculty or administration concerning any matter...,” a commonality that continues throughout the process until the Review Committee issues its decision and the Board of Regents takes appropriate action.

The action of the board is final in most cases. However, Bylaw 6.47 g provides that when the complaint involves “5. Conduct unbecoming a Christian; 6. Advocacy of false doctrine (Constitution, Art. II) or failure to honor and uphold the doctrinal position of the Synod as defined further in Bylaw 1.09” (Bylaw 6.43 c), the complainant “may take the complaint to the District President.” If the Review Committee finds grounds to establish a violation of Bylaw 6.43 c 5-6, Bylaw 6.47 h requires that it “must refer the complaint to the District President” in order that “the procedure set forth in Bylaw 2.27” may be followed prior to final action by the Board of Regents. Bylaw 2.27 deals with action to terminate an individual’s membership in the Synod. If the person in question is not a member of the Synod, that bylaw is inapplicable. It is not possible to terminate a membership that does not exist in the first instance.

The Commission rules, therefore, that complaints against lay members of a faculty are to be handled in the same manner as complaints against rostered workers, except that the process ends with action by the Board of Regents, since it is not possible to apply Bylaw 2.27 to one who is not a member of Synod. The action of the Board of Regents will be final as to one who is not a member of Synod. However, that action is subject to review by the Synod’s President under Bylaw 3.101, subsections 2 and 5, which allow the President to visit the Synod’s educational institutions, call up for review any action that may violate the Constitution, Bylaws or resolutions of the Synod and request that it be reversed. The President is to report an unsatisfactory response to the Board of Directors, this Commission, or the Synod in convention, as appropriate, for further action.

215. Question re District Membership and Ecclesiastical Supervision of Rostered Workers Called or Appointed by Recognized Service Organizations (01-2234)

An executive director of a program board of the Synod in a letter dated October 17, 2001, brought forward a question that arose in his conversations with a District President regarding District membership and ecclesiastical supervision of two pastors called by a Recognized Service Organization.

Question: **When a pastor accepts a call from a Recognized Service Organization, to which District will he belong and from which District President will he receive his ecclesiastical supervision?**

Response: A church worker who is called by a Recognized Service Organization (RSO) remains an active member of the Synod (Bylaw 2.15 j) so long as the following requirements are met:

- He or she must be a communicant member of a congregation which is a member of the Synod (Bylaw 2.15) and must be regularly performing the duties of an executive or professional staff member of the RSO (Bylaw 2.15 j).

- He or she remains accountable to the Synod for teaching and practice and is to be supervised by the appropriate District President according to Bylaws 2.21ff. (CCM Ag. 2115 – August 24, 1998).
- Ecclesiastical supervision is provided by the President of the District through which membership in the Synod is held (Bylaw 2.41 i), who is responsible for overseeing the doctrine and life of that member (Art. XII 7).

The Commission notes that “the District through which an individual holds membership and the District through which a member is ecclesiastically supervised will not be determined in any case on the basis of District membership of the congregation to which the individual belongs” (Bylaw 2.41 j). Church workers called or appointed by recognized service organizations may therefore hold membership in any LCMS congregation, since such membership does not affect District membership or ecclesiastical supervision.

Regarding the specific question posed to the Commission, it rules that District membership and ecclesiastical supervision are to be determined by the geographic location of the RSO. The geographic District in which an RSO is physically located will be the District through which church workers who have accepted an executive or staff position will hold synodical membership and from which District’s president they will receive ecclesiastical supervision. This decision is consistent with Bylaw 2.43 which, while it addresses the responsibility of District Presidents for maintaining the roster of the Synod, specifically mentions workers called by “institutions which relate to” a District as holding membership in that particular District. While an RSO formally relates to “the board of the Synod to which the organization desires to relate” (Bylaw 14.03 c), the Commission assumes that it will also relate most closely to that District to which it is geographically most proximate. Non-geographic Districts are excluded from consideration by Bylaw 2.41 d, which allows membership in non-geographic Districts by persons serving entities other than a congregation or District only under specific conditions.

(Note: The Commission instructed that its secretary write a letter to the Commission on Structure calling its attention to the need for further clarification in the Bylaws in this regard.)

216. Questions re Dispute Resolution Process (01-2235)

In an October 25, 2001 letter a pastor involved in a dispute resolution process asks for “an official understanding of certain questions” that pertain to the process, explaining that two of the questions “cover a further explanation of terms used in Bylaw VIII” and that the other two “may or may not be an unwritten part of every Constitution calling upon all parties to deal with one another in an atmosphere of fairness.”

Question 1: I ask for your understanding of the term “informal” as used in Bylaw 8.05. A further extrapolation on this point would be that if a party in a matter of dispute will not meet without witnesses, then has the matter gone from “informal” to “formal”?

Opinion: Bylaw 8.05 differentiates between “the formal reconciliation process” which is delineated in succeeding bylaws and “Informal Efforts toward Reconciliation” referred to in its title. It defines informal efforts as “meet(ing) together, face to face, in a good-faith attempt to settle (the) dispute.” The parenthetical biblical reference to a specific verse of the Matthew 18 process further supports this understanding: “If your brother sins against you, go and show him his fault, just between the two of you. If he listens to you, you have won your brother over” (Matt. 18:15 NIV). When such informal, face to face efforts have been inadequate, the parties are to be directed to engage in further such efforts before the formal reconciliation process that involves other persons, e.g., witnesses, can begin (Bylaw 8.07 c).

Question 2: Bylaw 8.21 b calls on members and agencies of Synod to participate in reconciliation efforts. If a person does not participate, does the reconciler have power to act upon that refusal? What, if any, action or actions can be taken in such a matter?

Opinion: Bylaw 8.21 b requires that “any member of the Synod, officer of a congregation, or officer of any organization owned or controlled by the Synod shall, when called upon by the Dispute Resolution Panel or Review Panel to do so, testify or produce records related to the dispute.” In doing so, it speaks specifically to dispute resolution panels and does not include the preceding reconciliation process *per se*.

Bylaw 8.07 e, however, does provide also to reconcilers the authority to obtain the participation of persons who have a contribution to make to a reconciliation effort: “The reconciler may draw upon persons and resources which the reconciler deems necessary to assist in the reconciliation process.” Failure or refusal to participate on the part of members of the Synod, officers of a congregation, or an officer of any organization owned or controlled by the Synod falls short of the stated intent and spirit of the dispute resolution process to be “the exclusive and final remedy for those who are in dispute” (Chapter VIII Preamble, paragraph 2), a ministry of reconciliation that is “one of the church’s foremost priorities” (Preamble, paragraph 4). In the interest of this process and “for the sake of the Gospel, the church should spare no resource in providing assistance” (Preamble, paragraph 1). Failure on the part of members or officers of the Synod or its organizations would also be a failure of membership responsibility in the Synod, whose “Constitution, Bylaws, and all other rules and regulations...apply to all congregational and individual members of the Synod” (Bylaw 2.39 a).

Question 3: Is there any understanding among us that circumstances are placed on hold while a dispute is in the process of being reconciled or resolved? What if a distribution of funds and/or a monetary reward are at issue? May one party take action during the process that makes a recovery of funds unlikely or impossible?

Opinion: There is no bylaw that deals with this issue directly. The Commission notes, however, that Bylaw 8.01, by prohibiting termination of membership in the Synod in order to render the provisions of the dispute resolution process inapplicable, speaks indirectly to this issue. In addition, the 1995 convention of the Synod directed that *Rules of Procedure* be developed to enhance the operation of the Dispute Resolution Process. Rule 45, “Decisions,” reads in part:

b. The panel may award any remedy or relief that it deems scriptural, just, and equitable, and within the scope of the issues defined by the panel, including, but not limited by the remedies requested by the parties. Any monetary award in a decision should clearly set forth the party that is obligated to pay such monetary award and the manner in which it is to be paid.

In the event that a congregation is a party to the dispute, Rule 6, “Congregation’s Right of Self-Government,” provides:

The congregation’s right to self-government shall be recognized. However, when a decision of a congregation is at issue, a Dispute Resolution Panel may review the decision of the congregation according to Holy Scriptures and shall either uphold the action of the congregation or advise the congregation to review and revise its decision. If the congregation does not revise its decision, the other congregations of the Synod shall not be required to respect this decision, and the District involved shall take action with respect to the congregation as it may deem appropriate.

Question 4: When a matter goes to dispute resolution, may a party that has heard a confidential statement disclose same? May one use confidential statements to clear his own name? If confidential matters may be disclosed, is there someone who has the power to judge if they are germane to the matter in dispute? If the Synod follows its procedure and places records with the Concordia Historical Institute, is not the Synod also indirectly disclosing a confidence?

Opinion: Bylaw 8.21 h provides that all Dispute Resolution Panel or Review Panel records of disputes in which a final decision has been rendered by the Dispute Resolution Panel or Review Panel shall be placed in the custody of Concordia Historical Institute. It further provides that all such records shall be sealed and shall be opened only for good cause shown and only after permission has been granted by a Dispute Resolution Panel, selected by blind draw for that purpose.

In addition, Rule 26 of the *Rules of Procedure*, “Confidentiality, Publication of Decisions, and Records of Panels” addresses the question. It reads as follows:

26. Confidentiality, Publication of Decisions, and Records of Panels.

a. Because of its biblical nature, Christian conflict resolution encourages parties to openly and candidly admit their offenses in a particular dispute. Thus, Christian conflict resolution requires an environment where parties may speak freely, without fear that their words may be used against them in a subsequent legal proceeding. Moreover, because of the Synod's commitment to keep parties out of court, reconcilers serving on behalf of the Synod would not do so if they believed that any party might later try to force them to testify in any legal proceeding regarding a synodical dispute. Therefore, all communications that take place during the dispute resolution process shall be treated as settlement negotiations and shall be strictly confidential and inadmissible for any purpose in a court of law, except as provided in this Rule.

b. This Rule extends to all oral and written communications made by the parties or by the reconcilers and panels, and includes all records, reports, letters, notes, and other documents received or produced by the reconcilers and panels as part of the conciliation process, except for those documents that existed prior to the synodical dispute resolution process and were otherwise open to discovery apart from this process. It is understood that the parties shall not compel the reconcilers or the panel members to divulge any documents or to testify in regard to the dispute resolution process in any judicial or adversarial proceeding, whether by personal testimony, deposition, written interrogatory, or sworn affidavit....

....d. Reconcilers and panels may divulge appropriate and necessary information under the following circumstances, and the parties agree to waive confidentiality and hold the Synod, reconcilers, panels, and panel members harmless for doing so: (1) when, as part of its normal office operations, the Synod and its representatives consult with its staff members or outside experts regarding particular issues or problems related to a case; (2) when compelled by statute or by a court of law; (3) when an agreement or decision has been contested or appealed; (4) when an action has been brought against the Synod or its representatives as a result of its participation in a dispute resolution case; (5) when the Synod or its representatives deem it appropriate to discuss a case with the church leaders of parties; and (6) when the Synod or its representatives deem it necessary to contact appropriate civil authorities to prevent another person from being harmed....

....f. While a matter in dispute is still undecided or while an appeal is contemplated or pending, publicity shall not be given to the issues in the matter by any of the parties involved, the reconcilers or panel members, or the Synod. The reconciler or panel shall bring any violation of this Rule to the attention of the parties.

g. All Dispute Resolution Panel or Review Panel records of disputes in which a final decision has been rendered by the Dispute Resolution Panel or Review Panel shall be placed in the custody of Concordia Historical Institute. All such records shall be sealed and shall be opened only for good cause shown and only after permission has been granted by a Dispute Resolution Panel, selected by blind draw for that purpose.

217. Question re the Right of the President to Appoint Representatives to Commissions (01-2236)

In an October 26, 2001 memorandum, the President of the Synod requested an opinion regarding his right to appoint a representative to attend meetings of the Commission on Ministerial Growth and Support and the Commission on Worship. To support his right to do so, he called the attention of the CCM to Bylaws 3.101 B 1, 3.101 C 3, and 3.51.

Question: **Do the Bylaws of the Synod prohibit the President of the Synod from appointing a representative to attend meetings of the Synod’s Commission on Ministerial Growth and Support and Commission on Worship?**

Opinion: The Commission notes that prior to the 2001 convention of the Synod, Bylaw 3.913 designated the President of the Synod or his designee as an advisory member of the Commission on Ministerial Growth and Support. All advisory members of the Commission were removed by Res. 7-30 of the 2001 convention of the Synod for the stated reason of making more effective use of advisory input and use better stewardship of time by not requiring advisory members to sit through entire commission meetings but by calling upon their advisory function when their area of expertise comes into view and by allowing flexibility to solicit advice as the needs dictate.

The following sections of the Constitution and Bylaws of the Synod are pertinent to the question at hand:

Article XI A 1: The officers of the Synod must assume only such rights as have been expressly conferred upon them by the Synod....

Bylaw 3.101 B 1: [The President shall] oversee the activities of all agencies of the Synod to see to it that they are in accordance with the Constitution, Bylaws, and resolutions of the Synod (each commission is an agency of the Synod according to Bylaw 3.51).

Bylaw 3.101 B 5: [The President shall] call up for review any action by an...agency which, in his view, may be in violation of the Constitution, Bylaws, and resolutions of the Synod and, if he deems appropriate, request that such action be altered or reversed....

Bylaw 3.101 C 3: [The President shall] personally, or by way of a representative, have the option to attend all meetings of the Synod’s program boards, the boards of all synodwide corporate entities, and Worker Benefit Plans, including executive sessions. The President’s representative shall normally be a member of the Administrative Team. The President shall, in reasonable time, receive notice of such meetings, the proposed agenda, and minutes thereof.

Bylaw 3.179: The Administrative Team consists of the President, First Vice-President, Chief Financial Officer, Chief Administrative Officer, and the Secretary and shall be under the leadership of the President. The team shall assist the President and the Board of Directors of the Synod in carrying out their respective responsibilities for oversight, supervision, management, and coordination as set forth in the Constitution, Bylaws, and resolutions of the Synod.

Bylaw 3.175: The Chief Administrative Officer shall

a. meet regularly with the executive officers of program boards, commissions, and synodwide corporate entities as the liaison with the Board of Directors and the President of the Synod;

b. provide leadership to assure that the mission and ministry activities of the church are being carried out in a coordinated, cooperative and efficient manner.

Bylaw 3.51 (Definitions) b: *Commission*: A group of persons, elected or appointed as prescribed in the Bylaws, rendering a precisely defined service function of the Synod and responsible, as the case may be, to the Synod in convention, to the President of the Synod, or to the Board of Directors of the Synod....

Bylaw 1.07 d: Each...commission that serves the Synod in a specific area of program or ministry...adopts programs in its assigned area of responsibility; administers the programs and resources as provided or authorized by the Constitution and applicable Bylaws, or as assigned by the respective convention or board; and proposes modifications thereto....It shall report its activities to the respective convention, president, and board.

Bylaw 3.101 C 3 provides that the President, or his representative, has the option to attend all meetings of three specific agencies of the Synod: (1) its program boards; (2) the boards of all synodwide corporate entities; and (3) Worker Benefit Plans. This bylaw addresses the very issue that is the subject of the question. It makes no mention of commissions and this omission leads the Commission to conclude that the President does not have the authority to personally or by his representative attend all meetings of the Commission on Ministerial Growth and Support or the Commission on Worship.

The President does appoint the members of these two commissions. However, his appointees are not his representatives. The duty of a board or commission is to carry out the functions of that board or commission as enumerated in the Bylaws of the Synod and not to represent the appointing authority, except when specifically provided in the Bylaws.

How then does the President interact with the Commission on Ministerial Growth and Support and the Commission on Worship? These commissions are responsible to the President (Bylaw 3.51 b). These commissions are required to report their activities to the President (Bylaw 1.07 d). The Chief Administrative Officer is required to meet regularly with the executive officer of each of these commissions as liaison with the President (Bylaw 3.175). The President has the duty to oversee the activities of each of these commissions to see to it that they are in accordance with the Constitution, Bylaws, and resolutions of the Synod and has the authority to call up for review any action by either of these commissions and request that such action be altered or reversed if he is of the opinion that such action is in violation of the Constitution, Bylaws, or resolutions of the Synod. In addition, the President always has the right to address these commissions in person, by his representative, or by written communication to express his concerns, but he does not have the authority to have his representative attend their meetings as a quasi nonvoting member of the commission.

218. Questions re Appointment of Interim Directors (01-2237)

The President of the Synod, in an October 26, 2001 memorandum, asked two related questions pertaining to the appointment of interim executive directors or interim chief executive officers by entities of the Synod. The Commission discussed at length an initial draft response and agreed to consider at a later date a second draft prepared by its chairman.

219. Inquiry re Delegation of a University President's Authority (01-2238)

In a September 20, 2001 letter, the Secretary of the Synod responded to a BHE request for an interpretation of the first paragraph of Bylaw 6.12 and the role of the President of an educational institution as the “spiritual, academic, and administrative head of the institution.” The Board specifically asked “if the president of an institution may delegate the responsibility of academic head to a Provost (chief academic officer), may the president also delegate the role of spiritual head to the campus pastor or Dean of Theology?” Because the BHE expressed interest in a timely response, the Secretary replied on the basis of prior CCM opinions.

The Commission reviewed the Secretary's response and decided to add further clarification. A member of the Commission was asked to provide a draft to be considered at the Commission's next meeting.

220. Nature of Secretary's Responses to Inquiries

During its discussion of the previous item of business the Commission also discussed the role of the Secretary when answering the many questions he receives as part of the routine business of his office. It was agreed that his responses should indicate that they are his personal opinion and that, when a formal opinion is desired, such questions should be submitted to the CCM in writing.

221. Appointment to Commission on Structure

The adoption of Res. 7-01 by the 2001 convention established a permanent Commission on Structure to “serve the members of the Synod in convention by providing direction for ongoing maintenance and management of the *Handbook*” and to “assist the convention in maintaining the *Handbook* of the Synod by identifying and recommending modifications to areas of concern in the *Handbook* and for promotion of its ease of use, thereby to enable the Synod most effectively to accomplish its mission.” The membership on the Commission on Structure includes “a voting member of the Commission on Constitutional Matters selected by that commission who shall serve as an advisory member of the Commission on Structure.”

After brief discussion, the Commission took the following action:

Resolved, That Walter Tesch, chairman of the Commission on Constitutional Matters, serve as an advisory member of the Commission on Structure.

222. Questions re Duties of District Presidents Related to Bylaw 2.27 and Dispute Resolution (01-2239)

A pastor of the Synod, in an October 2, 2001 letter, requested “an interpretation of the duties of a District President related to his responsibilities in Bylaw 2.27, and also related to the purposes and objectives, and procedures of the Synodical Dispute Resolution.” Because the request included many pages of documentation, the Commission agreed to table this matter until its next meeting.

223. Adjournment

Due to technical difficulties with the telephone system and because the hour was late, the meeting was adjourned with prayer.

Raymond L. Hartwig, Secretary

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS
December 9, 2001

224. Call to Order

Chairman Walter Tesch called the telephone conference call meeting to order and asked Secretary Raymond Hartwig to open the meeting with prayer. All members of the Commission responded to the roll call.

225. Ecclesiastical Supervision of the Synodical President (01-2240)

A District President has questioned the correctness of this Commission's opinion in 98-2122, dated September 30, 1998, which opined that the President of the Synod is under the ecclesiastical supervision of the President of the Missouri District. He has pointed out that pursuant to Article XI B 1 d of the Synod's Constitution the Synod President is the ecclesiastical supervisor of all District Presidents. He has also pointed out that this Commission has previously issued an opinion on January 10-11, 1992, Ag. 1915, which found that the Missouri District President *did not* have ecclesiastical supervision of the synodical President. Can these two conflicting opinions be reconciled? The Commission finds that they cannot. Which opinion is correct? For the reasons stated below, the Commission withdraws the pertinent paragraphs of its 1998 opinion, 98-2122, and reaffirms its 1992 opinion, Ag. 1915.

Because of the importance of this question, both prior opinions are reproduced herein. The 1992 opinion reads as follows:

69. Supervision of Synodical President (Ag. 1915)

A pastor had asked the question of the Commission on Constitutional Matters whether on the basis of Bylaw 3.533, d the President of The Lutheran Church—Missouri Synod was excluded from the responsibility placed upon the President of the Missouri District in 4.73 of the *Handbook* of the Synod. The further question was asked, "If he is excluded, to whom does a brother bring his concern when personal admonition to have the President of the Synod carry out the responsibilities of his office as defined by the *Handbook*?" The Secretary had prepared a possible response for consideration by the Commission on Constitutional Matters which stated:

[The pastor's] question is not easy to answer. I would assume that in some instances, such as if a synodical President were serving as a pastor of a congregation in the district, the district president would have responsibility for supervision.

However, if someone disagrees with the supervisory activity of the synodical President, it would not seem that the district president is in a position to exercise supervisory responsibility over the synodical President. Article XI of the Constitution is quite clear in that the synodical President has supervision of a district president, an officer of the Synod (XI,B,1,d). It is the Synod which has a right to call its officers to account and to remove them from office in accordance with Christian procedure. (XI,A,2). This is supported by Bylaw 3.103, c which states, "Any member of the Synod shall have the right to appeal to the convention of the Synod from his [the President's] action."

It would seem that the only recourse is an appeal to the convention of the Synod “when personal admonition fails to have the President of the Synod carry out the responsibilities of his office as defined by the *Handbook*.” If the matter cannot wait until a regularly scheduled convention of the Synod, a request can be made to the district presidents for the calling of a special convention. If three-fourths of them agree, such a convention can be called. (VIII, B).

The one bylaw which may appear to contradict the above is 4.73. The question, however, is whether the President of the Synod is “subject to his [the district president’s] ecclesiastical supervision.” The previous argumentation provided would say that he is not.

The 1998 opinion reads in pertinent part as follows:

3. District President Fellowship and Discipline Questions (98-2122)

...The District President finally also asked several questions relating to Bylaw 2.41, d:

You also posed several questions to the Commission relating to Bylaw 2.41, d, and the District membership and ecclesiastical supervision of the President of the Synod.

“Must the President of the Synod be a member of a District of the Synod under the provisions of Bylaw 2.41 d? Under the provisions of the same Bylaw, does the President of the Missouri District have the right (and in certain circumstances, the duty) to apply the provisions of Bylaws, Chapter II, D. and E. (Bylaws 2.21 through 2.33) to the President of the Synod?”

In answering these questions, the Commission first observes that the President of the Synod is under the ecclesiastical supervision of the President of the Missouri District under Bylaw 2.41, d, since the synodical President serves the Synod at its headquarters in St. Louis, Missouri. Nothing in the bylaw indicates any intent that the synodical President (or anyone else) be excepted from this provision. Bylaw 4.73 requires that the President of the Missouri District supervise the doctrine, life and official administration of those who are subject to his ecclesiastical supervision. As part of that supervision, the President of the Missouri District is held to apply the provisions of Bylaws 2.21 through 2.33 when necessary.

The Commission further notes that these provisions do not apply to all grievances which might be brought against the synodical President, but only those listed in Bylaws 2.23, a. 1-3, and 2.27, a. Furthermore, given the importance of the responsibilities of the synodical President and the disruption of the administration of Synod affairs which would result from the application of these procedures to the indocile President, it is to be expected that the President of the Missouri District would exercise the utmost caution, discretion and good judgment in exercising his responsibilities under these sections.

The 1992 opinion of this Commission was overlooked when the 1998 opinion was written. The 1998 opinion discusses Bylaws 2.41 d and 4.73. It does not discuss any provisions of the Synod’s Constitution.

The 1992 opinion discusses provisions of the Synod’s Constitution and Bylaw 4.73, but does not mention Bylaw 2.41 d.

The Commission observes that the 1992 opinion is primarily based on the Synod’s Constitution, whereas the 1998 opinion is based on the Bylaws, without reference to the Constitution. A general rule of construction holds that where a constitution and its related bylaws conflict, the provisions of the constitution will control.

The Commission further observes that Bylaw 3.915 d (1989 Bylaw 3.533 d) provides that “[a]n opinion rendered by the Commission shall be binding on the question decided unless and until it is overruled by a synodical convention.” The 1992 opinion was issued prior to the 1992 synodical convention. There have been four synodical conventions since that opinion was issued, and no action has been taken to overrule it. The 1998 opinion was issued after the 1998 convention, and thus there has only been one synodical convention at which it might have been overruled, but no action was taken to do so at the 2001 convention of the Synod.

Bylaw 2.41 d has changed slightly since 1992. Where the bylaw in the 1989 *Handbook* reads, “An individual member of the Synod who is serving an **entity** other than a congregation or District...shall be subject to the ecclesiastical supervision of the President of the geographical District in which the **entity** is located” (emphasis added), the version of that same bylaw in the 1998 *Handbook* reads, “An individual member of the Synod who is serving an **agency** other than a congregation or District...shall be subject to the ecclesiastical supervision of the President of the geographical District in which the **agency** is located” (emphasis added). Furthermore, 1998 *Handbook* Bylaw 3.51 a defines an “Agency of the Synod” as “[a]n instrumentality other than a congregation, whether or not separately incorporated, which the Synod in convention or its Board of Directors has caused or authorized to be formed to further the Synod’s objectives.” Subsection 1 of that same bylaw separately defines “Synod” as “the association of self-governing Lutheran congregations initially incorporated on July 3, 1894, and presently named The Lutheran Church—Missouri Synod, and all agencies of the Synod as defined in Bylaw 3.51 a.” Clearly, the Synod is not an agency of itself, but includes its agencies under its larger umbrella. This change is significant. It could be argued that this Commission’s 1992 opinion was weakened by its failure to consider Bylaw 2.41 d, based on the rationale that the synodical President was serving an entity other than a congregation or a District and thus should be under the ecclesiastical supervision of the President of the geographical District in which the International Center is located (i.e., Missouri). It would seem that the change in the bylaw has eliminated this argument, since the synodical President is not serving an agency of the Synod as that term is used in the present Bylaw 2.41 d, but rather is serving the Synod itself, an entity that is separately defined in Bylaw 3.51 l.

After due consideration of both its prior opinions and of the past and present wording of the Synod’s Constitution and Bylaws, this Commission is of the opinion that its 1992 ruling is the correct one. First, that ruling is grounded primarily in the Constitution, rather than the Bylaws. Second, one bylaw that might have been seen to undermine that opinion has been changed and would no longer have that effect. Third, the 1992 opinion has stood the test of time in that four synodical conventions have been held since it was issued, and it has not been overruled. Fourth, this interpretation resolves the conundrum created by the 1998 opinion where the District President would exercise ecclesiastical supervision over the synodical President, who would in turn exercise ecclesiastical supervision over that same District President.

This interpretation also answers the concern expressed in the Commission’s 1998 opinion that the synodical President might be harassed and hampered in carrying out his duties by constant scrutiny of his actions through complaints made to the Missouri District President. This interpretation does not make the synodical President a law unto himself, exempt from accountability for his actions. According to the

1992 opinion, there is a mechanism for the Synod in convention to exercise authority over the synodical President.

There are other bylaws that are implicated by the question of ecclesiastical authority, including the dispute resolution provisions of Chapter VIII of the Bylaws. That chapter is clearly intended to apply to all members of the Synod. The provisions of the Constitution and Bylaws interpreted in this opinion are far from clear and definitive on the issue presented. This commission respectfully recommends that the Synod's Commission on Structure give consideration to this issue to attempt to bring greater clarity to the intention of the Constitution and Bylaws.

226. The Binding Nature of CCM Opinions (01-2241)

In a memorandum dated December 6, 2001, the President of the Synod indicated that he is aware that the Commission has been “asked to render an opinion regarding the question of the accountability of the President of the Synod and whether or not he is under the ecclesiastical supervision of the President of the Missouri District, specifically in light of the apparent conflict on this matter between two previous CCM opinions, that of 1992 and that of 1998.” In connection with this matter, he asked a series of related questions.

QUESTION 1: Bylaw 3.905 d states, in part: “An opinion rendered by the commission shall be binding on the question decided unless and until it is overruled by synodical convention.” Has the 1992 opinion of the CCM been in fact overruled by a synodical convention? If so, at which convention and in which resolution did this occur? If not, then on what constitutional basis would the 1998 opinion of the CCM become more authoritative than the 1992 opinion, which preceded the 1998 opinion and is, therefore, still “binding on the question decided”?

Opinion: As noted in the Commission's preceding opinion 01-2240, 1992 opinion Ag. 1915 was not overruled by any of the conventions that followed. The Commission also recognized that the 1992 opinion and a portion of 1998 opinion 98-2122 are in conflict. It concluded that the 1992 opinion “is the correct one” for reasons given and, therefore, to be regarded as authoritative.

CCM records indicate numerous cases in which the Commission has agreed to reconsider its opinions. On rare occasion it has also withdrawn or changed an opinion on the basis of further study and consideration of the question presented.

QUESTION 2: If the CCM renders an opinion that, in fact, the 1992 opinion of the CCM is still “binding on the questions decided,” what then happens to a synodical member's official charges under Bylaw 2.27 that have been filed against the synodical President with the Missouri District President?

Opinion: The Commission has rendered the opinion (01-2240) that the 1992 opinion of the CCM “is the correct one” and, therefore, binding on the questions decided. According to the 1992 opinion, “[i]t would seem that the only recourse [for a synodical member's charges] is an appeal to the convention of the Synod ‘when personal admonition fails to have the President of the Synod carry out the responsibilities of his office as defined by the *Handbook*’” (Ag. 1915).

QUESTION 3: Since both the Constitution and the Bylaws clearly state that the President of the Synod has supervision of all District Presidents and of all officers of the Synod, including the Vice-Presidents, under what constitutional authority would either a District President or the synodical Vice-Presidents be charged with the

responsibility of determining the continuation of the roster status of the President of the Synod under Bylaw 2.27?

Opinion: The Commission in its preceding opinion (01-2240), by deciding that 1992 opinion Ag. 1915 “is the correct one,” has ruled, based upon the Constitution (Art. XI A 2), that only the Synod in convention has the right to call the President of the Synod to account and to determine the continuation of his roster status. There is no constitutional authority that gives a District President or synodical Vice-President such responsibility.

227. Adjournment

The business of this special meeting of the Commission having been addressed, the meeting was closed with the Benediction.

Raymond L. Hartwig, Secretary