

administrative act.

CLSA.
 ADVISORY
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OPINIONS

David R. Perkin [1991]

CANON 1686

NECESSARY COMPETENCE IN ORDER TO
USE THE DOCUMENTARY PROCESS

A Columbian couple (the man is in the USA but the woman is still in Columbia) approached their parish priest in Columbia, gave him the equivalent of one hundred dollars for him to prepare them for marriage, and eventually to witness their marriage. However, the priest repeatedly delayed the marriage. When pressured by the couple to prepare them for marriage, or to give the money back, the priest decided to witness the marriage at that moment in the sacristy with no witnesses, except perhaps an altar server. There was no record made of the marriage either in the parish or the civil register.

Clearly, this is a defect of form case and comes under the canon allowing for the use of the documentary process. The question is: Is the USA tribunal competent to use this procedure since the respondent (the woman) is outside the territory of the conference of bishops?

OPINION

In my opinion the answer has to be "no." Traditionally, a "neglect of form" case was considered to be a part of the preliminary investigation prior to marriage which established the parties' freedom to marry (cf., W. Doheny, *Canonical Procedure in Matrimonial Cases*, Vol. I, *Formal Judicial Procedure*, second edition [Milwaukee: Bruce Publishing Co., 1948] 1062-1064). "Lack of form" cases, then, would need no semblance of judicial procedure and could be processed by a pastor or someone else preparing the couple for marriage (cf., W. Doheny, *Canonical Procedure in Matrimonial Cases*, Vol. II, *Informal Procedure* [Milwaukee: Bruce Publishing Co., 1944] 582-584). Doheny is quite clear in stating that if there is any doubt about the neglect of form, the case is to be handled by way of a judicial process.

In the past we have been tempted to view any case in which a duly delegated priest (minister) and two witnesses was lacking as a "defect of form" or "lack of form" case and thus part of the marital preparation (cf., cc. 1066-1067). However, we need to be more nuanced in our phrasing. Indeed, a "lack of

form" case continues to be handled as part of the process of establishing freedom to marry. But a "defect of form" case, as canon 1686 notes, requires the citation of the defender of the bond and in my opinion falls under the jurisdiction of canon 1673 (cf., Lawrence G. Wrenn, "Book VII: Processes [cc. 1400-1752]," in *The Code of Canon Law: A Text and Commentary*, ed. James A. Coriden et al. [New York/Mahwah: Paulist Press, 1985] 764).

Royce R. Thomas [1992]

CANON 1722

IMPOSITION OF ADMINISTRATIVE LEAVE AGAINST AN ACCUSED

Canon 1722 permits an ordinary to impose "administrative leave" on someone accused of a canonical transgression: "To preclude scandals, to protect the freedom of witnesses and to safeguard the course of justice, having heard the promoter of justice and having cited the accused, the ordinary at any stage of the process can remove the accused from sacred ministry or from any ecclesiastical office or function, can impose or prohibit residence in a given place or territory, or even prohibit public participation in the Most Holy Eucharist; all these measures must be revoked once the reason for them ceases." The question is: May the ordinary impose such administrative leave during the investigative phase of the process (cc. 1717-1719) or during an administrative penal process (cc. 1720; 1342-1350), or is the imposition of such "leave" only permissible during the judicial penal process (c. 1721)?

OPINION

Canon 17 gives the hermeneutical rules for interpreting canon law:

The primary hermeneutical rule attends to *text* and *context*.

"Ecclesiastical laws are to be understood in accord with the proper meaning of the words considered in their text and context" (c. 17a).

The secondary hermeneutical rule attends to *parallel* passages, *purpose* and *circumstances* of the law and the *mind of the legislator*:

"If the meaning remains doubtful and obscure, recourse is to be taken to parallel passages if such exist to the purpose and circumstances of the law, and to the mind of the legislator" (c. 17b).

There are two schools of thought among canonists on the application of these rules to canon 1722.

I. The Argument from Immediate Causes

Canon 1722 is contained in Chapter II "The development of the process" and immediately follows canon 1721 on the beginning of the judicial process. The words in canon 1722 must, therefore, be understood in accord with the proper meaning considered in the light of the entire canon and its immediate context.

Therefore:

1. The ordinary referred to in canon 1722 who may impose administrative leave is the ordinary in canon 1721 who decrees that a judicial penal process is to be begun.
2. The promoter of justice in canon 1722 who must be consulted is the promoter of justice in canon 1721 who submits a bill of complaint to the judge.
3. The "stage of the process" referred to in canon 1722 is the judicial penal process of canon 1721 and not the administrative process of canon 1720 or the investigative process of canons 1717-1719.
4. The citation of the accused referred to in canon 1722 must either accompany the citation to respond to the accusatory *libellus* or may follow it but not precede it.

Canon 1728, §1 states that the canons on trials in general and an ordinary contentious trial must be applied to the penal trial:

1. with due regard for the special norms of the "title" on penal procedure;
2. unless the nature of the matter is opposed;
3. observing the special norms for cases that refer to the public good.

Hence, canons 1507-1512 on citations are generally applicable. If the petition is accepted the judge must cite the respondent to join issue within twenty days (c. 1507, §2). The accusatory *libellus* or charge is ordinarily attached to the summons, although this is at the discretion of the judge (c. 1508, §2).

The summons mentioned in canon 1722 is a summons by the ordinary to hear the reasons for administrative leave and to show cause why such leave should not be imposed and is to be distinguished from the summons to respond to the bill of complaint.

Nevertheless, it may not be issued until the judicial penal process has begun, certainly after the presentation of the bill of complaint to the judge, and probably not before the citation to join issue, at which time prescription is interrupted and litigation begins to be pending (c. 1512).

The context, therefore, demands the following interpretation.

1. Administrative leave may not be imposed during the investigative phase of the penal process.
2. Nor may administrative leave be imposed during an administrative penal

process.

3. Such leave may only be imposed by the ordinary after presentation of the bill of complaint by the promoter of justice to the trial judge.
4. The administrative leave must be revoked when the reasons cease and is automatically revoked by the judicial sentence which decides the case and which has become a *res judicata* in accordance with canon 1642, or after two concordant sentences in cases of the status of persons (e.g., dismissal from the clerical state) if appeal to a higher tribunal is not made or the appeal is rejected in accord with canon 1644.

II. An Alternative Interpretation Based on a Wider Context and the Secondary Hermeneutical Rule of the Purpose of the Law

Most civil institutions, police departments, schools, charitable organizations, place employees on administrative leave as soon as a sensitive accusation is made and during the investigation. Civil lawyers are urging the church to follow the same procedure when a cleric is accused of a transgression which could involve vicarious liability for the Church. Is this canonically possible?

A. Argument for the purpose of the canon;

Canon 1722 states that the purpose of the institute of temporary "administrative leave" is threefold:

1. To preclude scandals;
2. To protect the freedom of witnesses;
3. To safeguard the cause of justice.

But it is precisely during the investigative phase when such purposes can be met by administrative leave. Witnesses are heard during the investigative phase and their evidence presented to the accused after citation to join issue and respond to the bill of complaint of the promoter of justice. It is precisely during this investigative phase when their freedom must be protected. Once the fact of transgression has been proved, the witnesses do not appear in court personally except at the discretion of the judge. Nor are they cross-examined by the defense attorney or the accused, but only by the judge on the basis of questions presented by the accused. Hence, this purpose of the law cannot be accomplished if imposition of administrative leave is only permitted after the witnesses have been examined.

Although the investigative phase should be conducted in confidentiality with care not to endanger anyone's good name (c. 1717, §2), there are situations where the accusation is already public, or there is danger that it will become public. Scandal can only be *avoided* by placing the accused on administrative leave during the investigation. Once the investigation is complete and the bill of complaint presented to the court, the possibility of "precluding scandal" has

long passed. In such cases, the purpose of canon 1722 would be frustrated by preventing the ordinary from imposing administrative leave until after the presentation of the bill of complaint and citation of the accused.

The course of justice includes not only the judicial process itself, but the entire concern of the Church for justice toward the accused, the possible victim and the church community. In some cases, the Church has an obligation in justice to protect a victim from the accused. Certainly after the ordinary receives information that seems to be true of an offense which involves danger to a third party, the course of justice can only be served by isolating the accused from further contact with the possible victim until the case is resolved. Civil law could hold the Church liable for failure to protect the alleged victim or potential victims. A strict interpretation of canon 1722 prevents the Church from adequately protecting the course of justice.

B. What about the context?

The context of canon 1722 should not be so rigidly interpreted as to prevent the purpose of the law from being accomplished. The context of canon 1722 is not limited to canon 1721, but includes the entire *Part IV* on Penal Procedure (cc. 1717-1731). Hence:

1. The ordinary referred to in canon 1722 who may impose administrative leave is the ordinary of canon 1717, §1 who receives information which at least seems to be true of an offense.
2. The promoter of justice in canon 1722 who must be consulted is the promoter of justice appointed in accordance with canon 1430; "a promoter of justice is to be appointed in a diocese . . . for penal cases." In the 1917 code the promoter of justice received accusations and denunciations prior to the investigative phase of the penal process. The 1983 code omits reference to this function. Nevertheless, the 1983 promoter is responsible for providing for the public good and is available for consultation prior to completion of the investigative process.
3. The "stage in the process" referred to in canon 1722 is the entire process mentioned in the title to *Part IV*, "Penal Procedure," and includes Chapter I, the prior investigation; Chapter II, the development of the process; and even Chapter III, action for reparation of damages.
4. The summons of the accused mentioned in canon 1722 has no relationship to the summons of the judge to join issue implied in canon 1721 (in light of the canon that penal trials generally include the norms for contentious trials if applicable). The ordinary may at any time of this entire process, from the receipt of an accusation and his decree to open an investigation, to the completion of the process by decree or sentence legitimately communicated and executed, impose administrative leave.

Hence, the ordinary may impose administrative leave as soon as he has reason to believe, on the basis of information he has received, that scandal is possible and must be avoided, that the freedom of witnesses is in jeopardy and must be protected and/or that the justice concerns of the Church must be safeguarded, including not only the process itself, but possible victims, the community and for that matter the accused.

As soon as these reasons cease, the measures *must* be revoked. They automatically end by the law itself when the penal process ceases and becomes a *res judicata* or at least in the case of dismissal from the clerical state and dismissal from a religious institute (situations concerning the status of persons) the sentence may be executed.

III. Conclusion

In any event, the *dubium juris* raised by canonists on this issue leaves the ordinary free to impose administrative leave whenever necessary during *any* stage of the penal process, until such time as the legislator grants an authentic interpretation to the contrary, or until recourse in a particular case decides that such administrative leave was illegitimate. Accused clerics, other ministers or religious may always petition revision of such a decision and may demand hierarchic recourse. (Administrative leave is not a penalty; hence, recourse against such a decree does not suspend execution.) Hence, administrative leave remains in force unless the immediate superior to whom hierarchic recourse is made grants a suspension.

Finally, a compromise position distinguishes two administrative leaves:

1. As soon as a reasonable accusation is made, the ordinary may place the cleric on administrative leave until the investigation is complete, in virtue of the diocesan bishop's general vigilance over clerical continence in canon 277. He may place the cleric under precept to avoid persons who could endanger continence or to avoid places where there would be scandal. He can also require evaluation, and if recommended, treatment. During the extent of such precepts and treatment, the priest is on temporary leave from his assignment (for pastoral reasons). Such leave should not be protracted longer than necessary. A decision needs to be made by the bishop whether to initiate penal procedures, to extend sick leave for additional treatment if professionals recommend it, to declare the cleric impeded from ministry for psychological reasons or to return the cleric to full or part-time ministry as recommended by professional therapists.

2. If the decision is made to set a penal procedure in motion, canon 1722 can then be invoked during the penal trial and until its conclusion.

Bertram F. Griffin (1988, revised 1993)