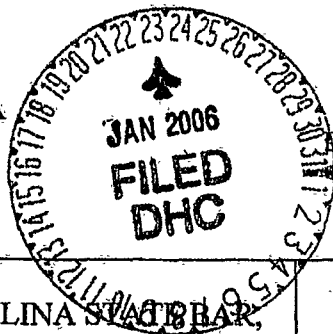


NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
04 DHC 18

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

Theodore F. Cummings, III, Attorney,

Defendant

MODIFIED ORDER
OF DISCIPLINE

This matter came before a hearing committee of the Disciplinary Hearing Commission composed of F. Lane Williamson, Chair, and members Carlyn G. Poole and Marguerite P. Watts on January 5, 2006. Jennifer A. Porter represented the Plaintiff, the North Carolina State Bar. Ernest (Jay) Reeves, Jr. represented the Defendant, Theodore F. Cummings, III. Based upon the stipulation of the parties and the evidence presented at hearing, the hearing committee hereby finds by clear, cogent, and convincing evidence the following

FINDINGS OF FACT

1. The Plaintiff, the North Carolina State Bar, is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.
2. The Defendant, Theodore F. Cummings, III ("Cummings") was admitted to the North Carolina State Bar in 1978 and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the laws of the State of North Carolina, the Rules and Regulations of the North Carolina State Bar and the Revised Rules of Professional Conduct.
3. During all or part of the relevant periods referred to herein, Cummings was engaged in the practice of law in the State of North Carolina and practiced from a law office located in his residence in Lenoir, Caldwell County, North Carolina and from a law office in Hickory, Catawba County, North Carolina.
4. Cummings was properly served with process, a hearing in this matter was set, and the matter came before the hearing committee with due notice to all parties.

5. On August 2, 2004 this hearing committee of the Disciplinary Hearing Commission entered an order finding that Cummings had violated the Rules of Professional Conduct by failing to timely file and pay his federal and state income taxes for a number of years, failing to comply with a State Bar subpoena, and failing to timely respond to an inquiry of the State Bar.

6. The August 2, 2004 Order of Discipline suspended Cummings's license to practice law for two (2) years and stayed the suspension for two (2) years, on condition that Cummings comply with the requirements set out in the order.

7. On November 15, 2005, the State Bar filed a Motion for Order to Show Cause alleging Cummings had not complied with certain provisions of the stay of his suspension set out in the 2004 Order of Discipline.

8. The Disciplinary Hearing Commission retained jurisdiction of this matter pursuant to 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0114(x) of the North Carolina State Bar Discipline and Disability Rules throughout the period of the stayed suspension and this matter is properly before this hearing committee.

9. The August 2, 2004 Order of Discipline required Cummings to submit to the State Bar copies of all tax returns filed during the stay and proof of payment of the taxes due during the stay, to be filed with the State Bar contemporaneously with filing with the Internal Revenue Service or North Carolina Department of Revenue.

10. Cummings was required to provide the State Bar with a copy of his 2004 federal and state income tax returns upon filing such returns. Tax returns for 2004 were due to be filed by April 15, 2005 unless an extension was obtained. Cummings was also required to provide the State Bar with proof of payment of his 2004 taxes upon payment of those taxes, which was due by April 15, 2005.

11. Cummings did not provide the State Bar with a copy of his 2004 federal or state individual income tax returns, nor did he provide the State Bar with any documentation of an extension, prior to or on April 15, 2005. Cummings also did not provide the State Bar with any proof of payment of his 2004 federal or state taxes prior to or on April 15, 2005.

12. Counsel for the North Carolina State Bar sent Cummings a letter dated June 2, 2005 notifying him that he was not in compliance with the conditions of his stayed suspension and requiring him to submit a copy of his tax returns and proof of payment of his taxes to the State Bar. The State Bar required his response with the tax returns and proof of payment or documentation of an extension to be delivered to the State Bar within two weeks.

13. Cummings did not provide copies of his 2004 tax returns, proof of payment of his 2004 taxes, documentation of an extension, or any other response to the State Bar's June 2, 2005 request for information.

14. On August 22, 2005, State Bar Counsel sent Cummings another letter again calling his attention to his non-compliance with the August 2, 2004 Order of Discipline and requiring his response and the outstanding tax returns, proof of payment, or extension within 10 days of that letter.

15. Cummings did not provide copies of his 2004 tax returns, proof of payment of his 2004 taxes, documentation of an extension, or any other response to the State Bar's August 22, 2005 request for information.

16. Cummings filed his 2004 federal and state income tax returns in October 2005. Cummings paid his 2004 federal and state income tax in December 2005.

17. Cummings provided documentation of his filing of his 2004 federal and state income tax returns and of his payment of his 2004 federal and state income taxes through counsel for the hearing in this matter on January 4, 2006.

18. The August 2, 2004 Order of Discipline also required Cummings to respond to all letters of notice and requests for information from the North Carolina State Bar by the deadlines stated in the communication.

19. Cummings was served with a letter of notice in file 05G0879 on September 22, 2005. The letter of notice stated he had fifteen (15) days from receipt of the letter to respond. Accordingly, Cummings' response was due by October 7, 2005.

20. Cummings did not respond to the letter of notice by October 7, 2005.

21. The State Bar sent Cummings a letter dated October 17, 2005 noting that he had not responded and asking for his response by October 24, 2005.

22. Cummings called the State Bar and made arrangements to provide a response by October 28, 2005. Cummings provided a response on October 28, 2005.

CONCLUSIONS OF LAW

1. All the parties are properly before the hearing committee and the committee has jurisdiction over the Defendant, Theodore F. Cummings, III, and the subject matter.

2. The Defendant's conduct, as set out in the Findings of Fact above, is in violation of the conditions of the stay of the suspension previously imposed by this hearing committee in its 2004 Order of Discipline, as follows:

a. By failing to provide the State Bar with documentation of the filing of his 2004 federal and state income tax returns and of the payment of his 2004

federal and state income taxes contemporaneously with such filing and payment; and

b. By failing to timely respond to the letter of notice he received from the State Bar in file 05G0879.

Based upon the evidence presented at hearing, the hearing committee hereby makes additional

FINDINGS OF FACT REGARDING DISCIPLINE

1. Cummings has shown a pattern of failing to timely respond to inquiries of the State Bar.

2. Cummings has failed to treat his obligation to respond to the State Bar and to participate in the State Bar's regulation of the profession as the professional obligation it is.

3. Cummings' failure to comply with his obligations to respond to inquiries of the State Bar and to comply with the conditions of the stay of his suspension show a troubling lack of respect for the State Bar's regulation and its orders.

4. Cummings' failure to participate as required in the State Bar's regulation of the profession compromises the State Bar's ability to regulate the profession and undermines respect for the State Bar's system of self-regulation.

5. Cummings has not engaged in conduct that harmed the clients he represents.

6. Cummings is currently representing thirteen clients in murder cases assigned to him by the Office of the Capital Defender for North Carolina, several of which are capital murder cases.

7. Cummings has been appointed to numerous cases over the years by the Office of the Capital Defender, based on his diligence, his ability, and his willingness to travel to counties outside his judicial district. Cummings has achieved good results for his clients over the years in capital and first degree murder cases. The Office of the Capital Defender places great value on Cummings' abilities and testified that Cummings would be extremely difficult to replace.

8. Activating Cummings' suspension would require replacing Cummings as counsel in those cases and would create great risk of prejudice to those clients.

9. Balancing the harm Cummings' conduct caused to the profession against the harm activating Cummings' suspension would have on his clients, at this time the hearing committee has decided not to activate Cummings' suspension.

Based upon the foregoing findings of fact and the arguments of the parties, the hearing committee hereby enters the following

MODIFIED ORDER OF DISCIPLINE

1. The stay of the two year suspension of the license of the Defendant, Theodore F. Cummings, III imposed in the 2004 Order of Discipline in this case is hereby extended for an additional two years. The additional two years will run consecutively to the two year stay previously imposed, making the total period of stayed suspension four years with an end date of September 5, 2008. The stay of the two year suspension is conditioned upon Cummings' compliance with the terms and conditions set out in the 2004 Order of Discipline and additional terms and conditions hereby imposed, as set forth below.

2. Terms and conditions imposed in the 2004 Order of Discipline:

- a. Comply with the terms of all agreements with the Internal Revenue Service and the North Carolina Department of Revenue in existence during the stay;
- b. Provide the State Bar with documentation from the Internal Revenue Service (IRS) showing compliance with the terms of any agreements with the IRS, documenting compliance from the date of the entry of this order through sixty (60) days prior to the expiration of the two year stay and filed with the State Bar no later than fifteen (15) days prior to expiration of the two year stay;
- c. File and pay all future taxes in a timely manner;
- d. Provide the State Bar with copies of all tax returns filed during the stay and proof of payment of taxes due during the stay, filed with the State Bar contemporaneously with filing with the Internal Revenue Service or the North Carolina Department of Revenue;
- e. Not violate any laws of the State of North Carolina or of the United States;
- f. Not violate any provision of the Revised Rules of Professional Conduct;
- g. Pay the costs of this proceeding [the 2004 hearing] as assessed by the Secretary of the North Carolina State Bar within 30 days of notice of the costs being served upon him.

h. Pay all Membership dues and Client Security Fund assessments and comply with all Continuing Legal Education requirements on a timely basis; and

i. Keep his address of record with the North Carolina State Bar current, accept all certified mail from the North Carolina State Bar, and

j. Respond to all letters of notice and requests for information from the North Carolina State Bar by the deadlines stated in the communication.

3. Additional terms and conditions of the stay of the suspension:

a. Pay his 2005 state and federal income taxes no later than April 15, 2006;

b. Provide the State Bar with proof of payment of any federal or state income taxes paid during the period of the stay, including but not limited to withheld taxes, estimated taxes, and annual income taxes, within ten (10) days of mailing or otherwise making such payment;

c. Provide the State Bar with any communication with any taxing authority regarding his income taxes during the stay, including but not limited to a letter from the IRS or the North Carolina Department of Revenue, an application for extension to file, the filing of any tax return, a payment, or a payment voucher, at the time of such communication and no later than ten (10) days after such communication;

d. Provide written notification to the State Bar of any oral communications with any taxing authority regarding his income taxes during the stay, including but not limited to oral communications regarding payment of his income taxes, within ten (10) days of such communication;

e. Provide the State Bar with copies of any federal or state income tax returns filed during the period of the stay. A copy of each such tax return will be provided to the State Bar at the time of filing and no later than ten (10) days after such filing;

f. Establish procedures in his office to treat his obligations to respond to the State Bar and to comply with this Order as professional obligations with which his staff provides assistance, including but not limited to drawing Cummings' attention to any mail received from the State Bar, tracking the pertinent deadlines, and prompting him to comply;

g. Provide written notification to the State Bar describing the procedures he establishes in his office to treat his obligations to respond to the

State Bar and to comply with this Order as professional obligations within twenty days (20) of service of this Order upon him;

h. Pay the cost of this Show Cause proceeding within thirty (30) days of service of the notice of costs upon him. Such costs will include payment of attorney's fees to the State Bar for the attorney time spent on this matter from service of the Show Cause Order upon Cummings through the date of the hearing. Counsel for the State Bar will prepare an affidavit of attorney time, which will be reviewed by Counsel for Cummings and then approved by the Chair of this hearing committee and incorporated into the notice of costs; and

i. Waive any hearing otherwise provided for under 27 N.C. Admin. Code, Chapter 1, Subchapter B § .0114(x) of the North Carolina State Bar Discipline and Disability Rules, should the State Bar file a verified motion supported by affidavits that Cummings has violated any of the terms and conditions of this Paragraph 3 or the immediately preceding Paragraph 2. Cummings will be mailed such motion at his address of record with the Membership Department of the State Bar and will have twenty (20) days from the date of mailing within which to provide any written response. After the expiration of the twenty (20) day period, a hearing committee appointed to consider the motion will decide the motion based upon the written materials.

4. In addition to the provisions of Paragraph 3(i) above, if during the stay of the two (2) year suspension Cummings fails to comply with any one or more of the conditions stated in the immediately preceding Paragraphs 2 and 3, then the stay of the suspension of his law license may be lifted as provided in § .0114(x) of the North Carolina State Bar Discipline and Disability Rules.

5. If the stay of the suspension is lifted and the suspension is activated for any reason, Cummings will comply with each of the following conditions precedent to reinstatement and provide proof by clear, cogent, and convincing evidence of such compliance with any application for reinstatement:

a. Submitted his license and membership card to the Secretary of the North Carolina State Bar no later than 30 days from the effective date of the order activating his suspension;

b. Did not violate any of the Revised Rules of Professional Conduct;

c. Did not violate any laws of the State of North Carolina or of the United States;

d. Paid all costs of this Show Cause proceeding as assessed by the Secretary, including the approved attorney's fee described above;

e. Paid his 2005 state and federal income taxes no later than April 15, 2006;

f. Provided the State Bar with proof of payment of any federal or state income taxes paid during the period of the suspension, including but not limited to withheld taxes, estimated taxes, and annual income taxes, within ten (10) days of mailing or otherwise making such payment;

g. Provided the State Bar with any communication with any taxing authority regarding his income taxes during the period of suspension, including but not limited to a letter from the IRS or the North Carolina Department of Revenue, an application for extension to file, the filing of any tax return, a payment, or a payment voucher, at the time of such communication and no later than ten (10) days after such communication;

h. Provided written notification to the State Bar of any oral communications with any taxing authority regarding his income taxes during the period of suspension, including but not limited to oral communications regarding payment of taxes, within ten (10) days of such communication;

i. Provided the State Bar with copies of any federal or state income tax returns filed during the period of the suspension. A copy of each such tax return will have been provided to the State Bar at the time of filing and no later than ten (10) days after such filing;

j. Established procedures in his office to treat his obligations to respond to the State Bar and to comply with this Order as professional obligations with which his staff provides assistance, including but not limited to drawing Cummings' attention to any mail received from the State Bar, tracking the pertinent deadlines, and prompting him to comply;

k. Provided written notification to the State Bar describing the procedures he established in his office to treat his obligations to respond to the State Bar and comply with this Order as professional obligations within twenty days (20) of service of this Order upon him;

l. If the suspension was activated for Cummings' failure to timely file and/or pay state and/or federal individual income tax, that Cummings rectified the deficiency by filing and/or paying as appropriate the income tax(es) at issue and provided proof of such to the State Bar;

m. Paid all Membership dues and Client Security Fund assessments and complied with all Continuing Legal Education requirements on a timely basis as if still in practice during the suspension;

n. Kept his address of record with the North Carolina State Bar current and accepted all certified mail from the North Carolina State Bar, and

o. Responded to all letters of notice and requests for information from the North Carolina State Bar by the deadlines stated in the communication.

6. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0114(x) of the North Carolina State Bar Discipline and Disability Rules throughout the period of the stayed suspension.

Signed by the Chair with the consent of the other hearing committee members, this the 23rd day of January, 2006.



F. Lane Williamson

Chair, Disciplinary Hearing Committee