

WAKE COUNTY

NORTH CAROLINA



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
05 DHC 48

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

GAREY M. BALLANCE, Attorney,

Defendant

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER OF DISCIPLINE

This matter was heard on April 26-27, 2007 before a hearing committee of the Disciplinary Hearing Commission composed of the Chair, F. Lane Williamson, and members Sharon B. Alexander and H. Dale Almond. William N. Farrell, Jr. and D. Thomas Lambeth, Jr. represented the Plaintiff, the North Carolina State Bar. Defendant, Garey M. Ballance, was represented by Irving L. Joyner. The hearing committee found by clear, cogent, and convincing evidence the findings of fact and conclusions of law recited in this order after conducting a hearing in this matter. Based upon the pleadings, the evidence presented at the hearing, and the stipulations of the parties, 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. Defendant, Garey M. Ballance ("Ballance"), was admitted to the North Carolina State Bar in 1995, 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 of the periods relevant hereto, Ballance was engaged in the practice of law in Warren County, North Carolina in the law office of his father, Frank Ballance ("Frank Ballance") and/or served as a district court judge in Warren and Vance Counties.
4. Ballance 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. In 1985, a non-profit entity called the John A. Hyman Memorial Youth Foundation, Inc. ("Hyman Foundation") was formed.

6. The Hyman Foundation helped to provide substance abuse education, prevention and rehabilitation services for indigent citizens of Halifax, Warren and Hertford Counties.

7. Ballance's father, Frank Ballance, served as Chairman of the Hyman Foundation from 1985 until at least March 2000.

8. As Chairman, Frank Ballance maintained authority over the manner in which funds received by the Hyman Foundation were disbursed.

9. In or about 1995, Greenwood Baptist Church ("GWB") created an auxiliary church group called the Young Black Men of Greenwood ("YBMG") to provide an opportunity for young male members of Greenwood Baptist Church to attend sporting and cultural events and engage in other voluntary activities.

10. Beginning in approximately 1995, Ballance volunteered his time as director of YBMG to organize basketball games, trips and other events for YBMG members[DRJ1].

11. On Oct. 16, 1996, Ballance opened a bank account at Branch Banking & Trust Co. ("BB&T") under the name of "Young Black Men of Greenwood c/o Garey M. Ballance." Although not specifically designated as a trust or fiduciary account, this account was intended for the receipt and disbursement of funds for use by YBMG as a group.

12. Between 1998 and February 2000, Ballance's financial situation was precarious. Among other things, he was delinquent on his payments for a timeshare unit in Florida and had obtained substantial loans from Frank Ballance to pay down his credit card debt.

13. Despite his financial circumstances, in early 2000 Ballance decided to purchase a new Lincoln Navigator. Ballance discussed his planned purchase with his father, who suggested to Ballance that he should be paid for his volunteer efforts on behalf of YBMG and should submit a grant application to the Hyman Foundation on behalf of YBMG.

14. By letter dated February 25, 2000, Ballance requested a grant from the Hyman Foundation for the stated purpose of assisting YBMG members to "boost their self esteem and keep them away from drugs, crimes and other negative aspects of life." The letter did not disclose or provide that any portion of the grant would be used to personally benefit Ballance. The grant request was submitted to Ballance's father for consideration on behalf of the Hyman Foundation.

15. Between February 26 and February 28, 2000, Ballance learned that his grant application had been allowed.

16. On February 29, 2000, Frank Ballance issued two \$10,000 checks drawn on the Hyman Foundation accounts made payable to YBMG, which Frank Ballance gave to Ballance for the benefit of YBMG to fulfill the grant request of February 25, 2000.

17. On March 1, 2000, Ballance deposited the two \$10,000 Hyman Foundation checks into YBMG's BB&T account.

18. Ballance owed a fiduciary duty to GWB, YBMG and/or their members.

19. On March 1, 2000, Ballance wrote and signed a check on YBMG's BB&T account for \$19,500 made payable to himself. Thereafter, he deposited the proceeds of the \$19,500 check into his personal bank account at BB&T.

20. On March 2, 2000, Ballance purchased a new 2000 Lincoln Navigator for \$49,233.96. He made a down payment of \$19,233.96, using a check written on his personal BB&T checking account and financed the remaining \$30,000 purchase price.

21. The \$19,233.96 down payment was covered using Hyman Foundation funds that had been funneled through the YBMG account into Ballance's personal checking account.

22. The Hyman Foundation had a rule that no more than 25% of any grant could be used for salary or other administrative expenses.

23. Ballance did not have proper authority to use the \$19,500 from the YBMG account for his personal benefit and in doing so, he violated his fiduciary duty to GWB, YBMG and/or their members to use this money for the benefit of the group.

24. Ballance did have apparent authority from his father, Frank Ballance, to use this \$19,500.00 for salary for his work with YBMG, but this use of this money for that purpose violated Ballance's fiduciary duty to GWB, YBMG and/or their members. The use of these funds for salary to Ballance also violated the rules of the Hyman Foundation concerning the use of grant funds and was not described as an intended purpose in Ballance's grant request to the Hyman Foundation.

25. On March 15, 2000, Ballance wrote and signed a \$1,000 check on the YBMG's BB&T account payable to himself. He used at least \$500.00 of the proceeds for his personal benefit without proper authority, in violation of his fiduciary duty to GWB, YBMG and/or their members.

26. Ballance contends that he was entitled to \$500 of the \$1,000 he obtained from YBMG's BB&T account on March 15, 2000 to reimburse himself for expenses incurred while serving the interests of YBMG. Ballance nevertheless used a minimum of \$500 of the \$1,000.00 he obtained from YBMG without proper authority in violation of his fiduciary duty to GWB, YBMG and/or their members.

27. The \$20,000.00 Ballance used for his personal benefit as purported salary on March 1, 2000 and March 15, 2000 represented 100% of the grant awarded from the Hyman Foundation on February 29, 2000.

28. The \$20,000.00 taken as purported salary by Ballance represented approximately 78% of the total monies ever received by YBMG over the previous five years of its history.

29. Ballance acknowledged in testimony that the receipt of the \$20,000.00 grant was not announced in church services, where good news regarding YBMG was customarily reported, and that Ballance did not want to publicize the fact that he took this \$20,000.00 for himself as salary.

30. On Jan. 6, 2001, Ballance was sworn in as a district court judge and ended his association with and duties for YBMG.

31. Ballance knowingly failed to file his personal state and federal tax returns for calendar years 1998 and 1999 on a timely basis.

32. On February 20, 2001, Ballance sought the assistance of a certified public accountant Tyrone Cox ("Cox") to prepare his federal income tax return for the year 2000, which was due on April 16, 2001.

33. Ballance did not tell Cox that he had failed to file his 1998 tax returns.

34. On or shortly after February 20, 2001, Ballance provided Cox with some of the information needed to file his 2000 tax returns. He promised to contact Cox again the following week, but failed to do so.

35. On May 18, 2001, the Internal Revenue Service ("IRS") mailed notice to Ballance concerning his delinquent federal income tax return for 1998 and requested a response by June 22, 2001. On July 23, 2001, the IRS mailed notice to Ballance concerning his delinquent federal income tax return for 1999.

36. On July 20, 2001, Cox received a letter from Ballance enclosing the IRS notices for his delinquent 1998 and 1999 returns, copies of W-2 wage statements for those two years and copies of records relating to a payment of \$7,500 which he received while working with Mike Easley's gubernatorial campaign in 2000.

37. Although Cox asked Ballance whether he had received income in addition to his law firm salary and the funds paid to him by the Easley campaign during calendar year 2000, Ballance did not tell Cox at any time in 2001 about the funds he obtained from the YBMG BB&T account in early 2000.

38. On Aug. 4, 2001, Ballance met with Cox and received completed copies of his 1998, 1999 and 2000 income tax returns.

39. Shortly thereafter, Ballance filed the tax returns for 1998 and 1999 but willfully failed to file his 2000 federal tax return.

40. Ballance also willfully failed to file his 2001 tax return on a timely basis.

41. Shortly before April 15, 2003, Ballance again contacted Cox and asked him to file an extension for the filing of Ballance's 2002 return. Ballance told Cox that he was also delinquent on filing his 2001 return but did not tell Cox that he had failed to file the 2000 return.

42. On May 16, 2003, Ballance executed his completed 2001 and 2002 income tax returns. He also revealed to Cox, for the first time, that he had not filed the 2000 return.

43. In late May or early June, 2003, at Cox's urging, Ballance filed his 2000, 2001 and 2002 federal returns.

44. Ballance knowingly and willfully omitted from the income reported on his state and federal income tax returns for calendar year 2000 the \$20,000 that he obtained from YBMG in early 2000 in violation of state and federal laws.

45. Ballance knowingly and willfully failed to file his tax returns for the calendar years 1998 – 2001 on a timely basis and knowingly and willfully failed to pay amounts owed to the taxing authorities for calendar year 2000 on a timely basis, in violation of state and federal laws.

46. By April 2003, North Carolina State Auditor Ralph Campbell ("Campbell") had begun an audit of the Hyman Foundation.

47. Shortly thereafter, Ballance learned that the funds totaling \$20,500 he obtained from the Hyman Foundation to YBMG might become an issue in the audit.

48. In mid-September 2003, about a month before the anticipated release of Campbell's audit report, Ballance contacted Cox and stated that he had recently discovered some documents that reminded him that he had received \$20,000 of income in 2000 in addition to the \$48,603 actually reported on his return.

49. Ballance first told Cox that he had forgotten that he had received the income, but later stated that, since the money was in payment for work performed for YBMG over a five-year period, he wondered whether he needed to report all of the income in one year.

50. On Oct. 1, 2003, Ballance filed amended state and federal tax returns for calendar year 2000. The amended returns included the \$20,000 in funds he obtained from the YBMG account in Ballance's income for calendar year 2000.

51. In an attachment to his amended returns that was sent to the IRS, Ballance stated that "I had an agreement with an organization to receive compensation in the amount of \$4000 per year for a five-year period of 1996 to 2000. In 2000, I received two lump sum payments of

\$19,500.00 and \$500.00 for a total of \$20,000.00 for all past services rendered. This payment was inadvertently not included in my 2000 tax return, because I did not realize that it was not already included in my tax return for the years that I actually performed the services.”

52. Ballance signed the following statement in the amended federal tax return: “Under penalties of perjury, I declare that I have filed an original return and that I have examined the amended return, including accompanying schedules and statements, and to the best of my knowledge and belief, this amended return is true, correct and complete.”

53. Ballance knew when he signed the amended federal tax return that it contained false statements and that it was not true, complete and accurate.

54. In the amended tax return that was sent to the North Carolina Department of Revenue, Ballance falsely stated that “I had an agreement with an organization to receive compensation in the amount of \$4000 per year for a five-year period of 1996 to 2000. In 2000, I received two lump sum payments of \$19,500.00 and \$500.00 for a total of \$20,000.00 for all past services rendered. This payment was inadvertently not included in my 2000 tax return, because I did not realize that it was not already included in my tax return for the years that I actually performed the services.”

55. Ballance signed the following statement in the amended state tax return: “I certify that, to the best of my knowledge, this return is accurate and complete.”

56. Ballance knew when he signed the amended state tax return that it contained false statements and that it was not accurate and complete.

57. Ballance pled guilty to and was convicted of one count of failure to file a federal income tax return, a violation of 26 U.S.C. § 7203, on March 29, 2005. Ballance was sentenced to a nine month term of imprisonment, a \$5,000.00 fine, and supervised release for a term of one year from his release from imprisonment.

58. The offense of which Ballance was convicted is a criminal offense showing professional unfitness within the meaning of 27 NCAC 1B .0115(c) of the Discipline & Disbarment Rules of the N.C. State Bar.

59. Ballance tendered his resignation from his judicial office to the Governor of North Carolina on October 14, 2005 and he was thereafter removed from the bench.

60. Based upon the foregoing criminal conviction, Ballance's law license was put under interim suspension in this cause on November 3, 2005.

Based upon the foregoing Findings of Fact, the hearing committee hereby makes, based on clear, cogent and convincing evidence, the following

CONCLUSIONS OF LAW

1. All of the parties are properly before the hearing committee and the committee has jurisdiction over the Defendant, Garey M. Ballance, and the subject matter.

2. The Defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline as follows:

(a) Pursuant to N.C. Gen. Stat. § 84-28(b)(1), for his conviction of misdemeanor failure to file his federal income tax return for the year 2000, a criminal offense showing professional unfitness;

(b) Pursuant to N.C. Gen. Stat. § 84-28(b)(2), for engaging in conduct in violation of the Revised Rules of Professional Conduct in effect at the time of his actions as follows:

- (1) By obtaining \$20,000 in funds from the Hyman Foundation, depositing the funds into the YBMG account and using the proceeds for his personal benefit in violation of his fiduciary obligations, Ballance engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);
- (2) By willfully and knowingly failing to file income tax returns to the taxing authorities on a timely basis for calendar years 1998-2001 and by failing to timely pay amounts owed to the taxing authorities for the calendar year 2000, Ballance engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c) and engaged in criminal conduct that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b) ;
- (3) By knowingly and willfully failing to report on his original federal income tax return for calendar year 2000 the \$20,000 income that he obtained from the Hyman Foundation via the YBMG account, Ballance engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c); and
- (4) By making false representations to the IRS and to the North Carolina Department of Revenue in 2003 with regard to the reasons for amending his 2000 income tax return, Ballance engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c).

Based upon the foregoing Findings of Fact and Conclusions of Law, the hearing committee hereby makes by clear, cogent, and convincing evidence the following additional

CONCLUSIONS REGARDING DISCIPLINE

1. Ballance's misconduct is aggravated by the following factors:
 - a. Dishonest or selfish motive;
 - b. A pattern of misconduct;
 - c. Multiple offenses;
 - d. A refusal to acknowledge the wrongful nature of his conduct as it relates to the receipt of the \$20,000.00;
 - e. Vulnerability of an institutional victim as to Greenwood Baptist Church and the Young Black Men of Greenwood.
2. Ballance's misconduct is mitigated by the following factors:
 - a. Absence of a prior disciplinary record;
 - b. Full and free disclosure to the hearing committee or cooperative attitude toward proceedings;
 - c. Inexperience in the practice of law;
 - d. Good character or reputation, including the good works and long hours spent on behalf of the Young Black Men of Greenwood;
 - e. Imposition of other penalties or sanctions as to his serving a 9 month prison sentence and losing his judgeship;
 - f. Remorse as to filing his taxes late.
3. Neither the aggravating factors nor the mitigating factors outweigh the other.
4. Ballance's conduct has resulted in substantial harm to the legal profession for the following reasons:
 - (a) Ballance obtained \$20,000 in a deceptive and secretive manner and in violation of his fiduciary duties to YBMG and Greenwood Baptist Church.
 - (b) Ballance initially did not include this \$20,000.00 that he claims was salary from YBMG on his 2000 tax returns and then made false statements on his amended tax returns as to his reasons for not including this \$20,000 on his initial tax returns.

(c) Ballance evidenced a disregard for his legal obligations by failing to file his tax returns in a timely manner over several years time.

(d) Ballance was convicted of misdemeanor failure to file his federal tax return for the year 2000.

(e) Ballance was removed from the bench for committing a crime of moral turpitude, and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

5. The hearing committee has considered lesser sanctions and finds that a public censure or reprimand would not be sufficient discipline because of the gravity of the harm caused by the conduct of the Defendant to the reputation of the profession and the administration of justice. The hearing committee further finds that a five year suspension is the only appropriate discipline in this case. The hearing committee finds that this suspension is the only sanction that can adequately serve to protect the public from potential future transgressions by this attorney given the factors discussed above. The hearing committee finds that imposing lesser discipline would fail to acknowledge the seriousness of the offenses committed and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar of this State.

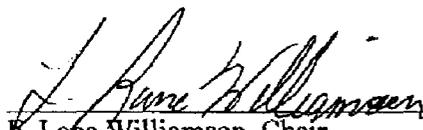
Based upon the foregoing Findings of Fact, Conclusions of Law, and Conclusions Regarding Discipline, the hearing committee hereby enters the following

ORDER OF DISCIPLINE

1. The law license of defendant, Garey M. Ballance, is hereby suspended for five years, effective from the date of his interim suspension, November 3, 2005.
2. The costs of this action are taxed to Ballance, including, but not limited to, the costs of depositions taken in this matter and the costs of securing copies of transcripts from federal court hearings. He must pay the costs within one year of service of the statement of costs by the Secretary unless the time period is extended in writing by the State Bar.
3. During the period of the suspension, Defendant shall
 - b. not violate any state or federal laws, including the timely filing of all federal and state tax returns that are true and accurate;

- c. not violate any provisions of the Revised Rules of Professional Conduct during the period of the suspension;
- d. respond to all State Bar requests for information by the deadline stated in the communication or within 30 days, whichever is earlier, as required by Rule 8.1(b) of the Revised Rules of Professional Conduct;
- e. timely comply with all State Bar membership and Continuing Legal Education requirements as if licensed as an active attorney; and
- f. notify the State Bar of any change of address within ten days of his changing addresses.

Signed by the Chair with the consent of the other hearing committee members, this the 6th day of July, 2007.


F. Lane Williamson, Chair
Disciplinary Hearing Committee