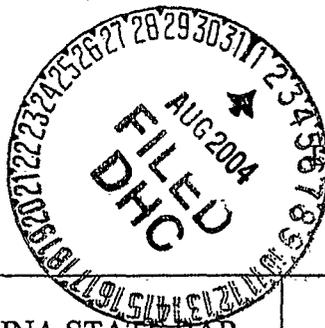


8237

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

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

This matter came before a hearing committee on the 21<sup>st</sup> day of July, 2004, before a hearing committee of the Disciplinary Hearing Commission composed of F. Lane Williamson, Chair, Carlyn G. Poole, and Marguerite P. Watts. Jennifer A. Porter represented the Plaintiff, the North Carolina State Bar. Ernest (Jay) Reeves, Jr. represented the Defendant, Theodore F. Cummings, III. Both parties stipulate and agree to the findings of fact and conclusions of law recited in this consent order and to the discipline imposed. Based upon the consent of the parties, the hearing committee hereby enters 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. Cummings unlawfully failed to file state individual income tax returns and/or pay state individual income taxes for some or all of the tax years from 1986 through 2002 as required by N.C. Gen. Stat. §§ 105-152 and 105-157.

6. Cummings acknowledges and admits his failure to file his state individual income tax returns and failure to pay his state individual income taxes violated the Rules of Professional Conduct and constitute grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2).

7. As a result of his failure to pay state individual income taxes, Cummings owed the North Carolina Department of Revenue \$81,000.97.

8. Cummings unlawfully failed to file federal individual income tax returns and/or pay federal individual income taxes for tax years 1997 and 1998 as required by 26 U.S.C. §§ 6012, 6072 and 6151.

9. Cummings acknowledges and admits his failure to file his federal individual income tax returns and failure to pay his federal individual income taxes violated the Rules of Professional Conduct and constitute grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2).

10. On September 29, 2003 the Secretary of the North Carolina State Bar issued a subpoena to appear and produce documents or objects to Cummings, commanding him to appear on October 30, 2003 before The North Carolina State Bar to testify in a confidential grievance investigation and to bring any and all pertinent files and documents.

11. Cummings was served with the subpoena by certified mail on October 8, 2003.

12. Cummings failed to appear at The North Carolina State Bar on October 30, 2003 and did not comply with the subpoena or the State Bar's request for information.

13. On February 24, 2004, Cummings was served with a Letter of Notice from the Chair of the Grievance Committee requesting a response to the allegation that Cummings had failed to pay state and federal individual income taxes.

14. Pursuant to the terms of the Letter of Notice and Rule .0112(c) of the Discipline and Disability Rules of the North Carolina State Bar (27 N.C. Admin. Code, 1B § .0112(c)), Cummings was obligated to respond to this Letter of Notice within fifteen (15) days of receipt.

15. Cummings failed to respond to this Letter of Notice within fifteen (15) days of receipt.

16. Cummings acknowledges and admits his failure to comply with the State Bar's subpoena and his failure to respond to the State Bar's Letter of Notice within fifteen (15) days of receipt violated the Rules of Professional Conduct and constitute grounds for discipline pursuant to N.C. Gen. Stat. §§ 84-28(b)(2) and (3).

#### 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, constitutes grounds for discipline pursuant to N.C. Gen. Stat. §§ 84-28(b)(2) and (3) as follows:

a. By unlawfully failing to file and/or pay state income taxes when those taxes were due, Cummings committed criminal acts that reflect adversely on his honesty, trustworthiness, or fitness in other respects in violation of Rule 8.4(b) and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);

b. By unlawfully failing to file and/or pay federal income taxes when those taxes were due, Cummings committed criminal acts that reflect adversely on his honesty, trustworthiness, or fitness in other respects in violation of Rule 8.4(b) and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);

c. By failing to appear and produce documents in response to the State Bar's subpoena, Cummings failed to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b) and engaged in contempt of the State Bar in violation of N.C. Gen. Stat. § 84-28(b)(3); and

d. By failing to respond to the letter of notice issued by the Chair of the Grievance Committee within the deadline established in the letter of notice and by the rules, Cummings failed to timely respond to an inquiry by the Bar in violation of Rule 8.1(b) of the Revised Rules of Professional Conduct and N.C. Gen. Stat. § 84-28(b)(3).

Based upon the consent of the parties, the hearing committee hereby makes additional

#### FINDINGS OF FACT REGARDING DISCIPLINE

1. Cummings' misconduct is aggravated by the following factors:
  - a. Cummings received a letter of warning from the State Bar dated April 30, 2002 for failing to timely respond to the State Bar;
  - b. Pattern of misconduct;
  - c. Multiple offenses; and
  - d. Substantial experience in the practice of law.
2. The Defendant's misconduct is mitigated by the following factors:
  - a. Absence of a dishonest or selfish motive;
  - b. Personal or emotional problems stemming from divorce and difficult financial times, contributing to his misconduct;
  - c. Timely good faith effort to make restitution or to rectify the consequences, including having fully satisfied the agreement between him and the North Carolina Department of Revenue to pay his overdue state taxes, having entered into an agreement with the Internal Revenue Service (IRS) to repay his overdue federal taxes, and being in compliance with his agreement with the IRS;
  - d. Full and free disclosure to the hearing committee and a cooperative attitude toward the proceedings;
  - e. Good character and reputation;
  - f. Interim rehabilitation;
  - g. Remorse.
3. The mitigating factors outweigh the aggravating factors.

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

#### ORDER OF DISCIPLINE

1. The license of the Defendant, Theodore F. Cummings, III, is hereby suspended for two (2) years and that suspension is stayed for two (2) years upon the following terms and conditions. During the stayed suspension, the Cummings shall:

- 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 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.

2. If during the stay of the two (2) year suspension Cummings fails to comply with any one or more of the conditions stated in Paragraph 1(a) through 1(j) above, 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.

3. 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:

a. Cummings will have 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. Cummings will not have violated any of the Revised Rules of Professional Conduct;

c. Cummings will not have violated any laws of the State of North Carolina or of the United States;

d. Cummings will have paid all costs of this proceeding as assessed by the Secretary;

e. Cummings will show that he is not then suffering from any disability that would impair his ability to practice law;

f. Cummings will have complied with the terms of any installment payment agreements with the Internal Revenue Service and the North Carolina Department of Revenue during the suspension period;

g. Cummings will have provided the State Bar with documentation from the Internal Revenue Service and the North Carolina Department of Revenue showing compliance with the terms of any payment agreements with these entities during the suspension period;

h. Cummings will have timely filed and paid any state or federal taxes coming due during the period of the suspension;

i. Cummings will have provided the State Bar with copies of all tax returns filed during the suspension and proof of payment of any taxes coming due during the suspension, filed with the State Bar contemporaneously with filing with the Internal Revenue Service or the North Carolina Department of Revenue;

j. If the suspension was activated for Cummings' failure to timely file and/or pay state and/or federal individual income tax, Cummings will have

rectified the deficiency by filing and/or paying as appropriate the income tax(es) at issue and will have provided proof of such to the State Bar;

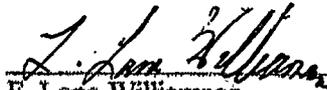
k. Cummings will have paid all Membership dues and Client Security Fund assessments and will have complied with all Continuing Legal Education requirements on a timely basis as if still in practice during the suspension; and

l. Cummings will have kept his address of record with the North Carolina State Bar current, will have accepted all certified mail from the North Carolina State Bar, and

m. Cummings will have responded to all letters of notice and requests for information from the North Carolina State Bar by the deadlines stated in the communication.

4. 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 29<sup>th</sup> day of July, 2004. *inure pro tunc*

  
F. Lane Williamson  
Chairman, Disciplinary Hearing Committee

CONSENTED TO BY:

  
Jennifer A. Porter  
Deputy Counsel  
Attorney for Plaintiff

  
Ernest (Jay) Reeves, Jr.  
Attorney for Defendant

  
Theodore F. Cummings, III  
Defendant