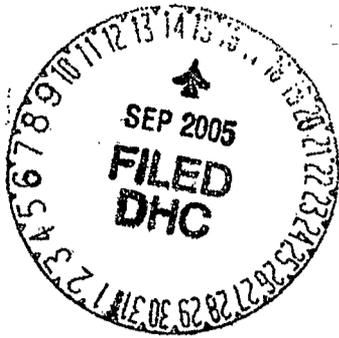


10552

NORTH CAROLINA

WAKE COUNTY



BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 05 DHC 6

The North Carolina State Bar, Plaintiff

v.

Thomas M. Tillett, Attorney, Defendant

Order of Discipline

This matter was heard on the 21st day of July, 2005, before a Hearing Committee of the Disciplinary Hearing Commission composed of the Chair, W. Steven Allen, Sr., and members T. Richard Kane and Donald G. Willhoit, pursuant to North Carolina Administrative Code, Title 27, Chapter 1, Subchapter B, § .0114(h). The plaintiff was represented by David R. Johnson. The defendant was represented by Gary Murphy and Scott Pollard. Based upon the pleadings and the evidence introduced at the hearing, the hearing committee hereby makes the following Findings of Fact by clear, cogent, and convincing evidence:

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, Thomas M. Tillett (hereafter Defendant), was admitted to the North Carolina State Bar on August the 21st of 1982, and is and was at all times referred to herein, attorney at law licensed to practice in North Carolina, subject to the rules, regulations and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

0044

3. During the relevant periods of time, Defendant was actively engaged in the private practice of law in the city of Charlotte, Mecklenburg County, North Carolina.

4. On June 30, 2003, Defendant appeared in Forsyth County District Court in response to an Order to Show Cause why he had not made his personal child support payments for the months of May and June, 2003.

5. At the conclusion of the hearing, Defendant tendered a check drawn on his law office operating account to the Clerk of Superior Court's office to pay his child support obligation arrearage of \$1,300.00. The Clerk of Court's office informed Defendant that it would accept only a certified check. At the time, Defendant knew he had insufficient funds in his operating account to cover the tendered check or to obtain a certified check.

6. Defendant then withdrew \$1,300.00 from his attorney trust account by way of a debit memo to obtain a certified check payable to the Clerk of Court for his personal child support obligation. Defendant then delivered the certified check to the Clerk of Court to pay his personal child support obligation on June 30, 2003. At the time, Defendant was aware that did not have \$1,300.00 in funds in his attorney trust account to which he was then presently entitled and thereby used client funds to pay his personal obligation without client consent.

7. During about November of 2001, Phillip and Pamela Brentwood (hereafter, "the Brentwoods") hired Defendant to represent them in closing the purchase of a residence located in Mecklenburg County from Maria Shinn (hereafter, "Shinn"). The Brentwoods needed a mortgage loan to purchase the property. At the time, Shinn had two mortgages and at least two liens on the property that had to be paid to provide clear and marketable title to the Brentwoods and place the Brentwoods' lender in a first-lien position. The Brentwoods provided Defendant with \$3,134.43 in funds to be held in trust to be used in the closing of the purchase and loan.

8. Over the next few months, there were at least two closings that were scheduled but aborted because the lender either declined or failed to fund the loan to the Brentwoods. Following one of the aborted closings, Defendant refunded the funds he had received from the Brentwoods, less an amount for his fee.

9. In early April, 2002, Defendant received a loan package from a lender, Genesis Lending, Inc., on behalf of the Brentwoods and scheduled a closing for April 4, 2002. Defendant

prepared a HUD-1 settlement statement to show the receipt and disbursements of the funds for the closing transaction on behalf of the Brentwoods. By law, the HUD-1 settlement statement is required to reflect an accurate accounting of the receipts and disbursements from a real estate closing.

10. Defendant provided a copy of the HUD-1 settlement statement to the lender for approval as one of the lender's conditions for closing the loan and releasing the loan proceeds. The HUD-1 settlement statement prepared by Defendant and approved by the lender showed that the Brentwoods were providing \$26,907.83 in cash at the closing. The settlement statement also showed that \$21,570.20 of the seller's proceeds was being paid to the Clerk of Superior Court for a release of a lien, and that two other seller liens, the Brentwoods' hazard insurance premium of \$642.00, and two prior seller mortgages were also being paid from the proceeds collected at the closing.

11. The \$21,570.20 of the seller's proceeds shown as a payment to the Clerk of Court was in fact simply a credit against the seller's proceeds and no actual disbursement of proceeds to the Clerk of Court was made or contemplated.

12. Further, the Brentwoods paid no cash to Defendant at the closing. Even after deducting the \$21,570.20 seller credit from the amount due at closing from the Brentwoods, Defendant was required to collect at least \$5,337.63 from the Brentwoods. Defendant collected no funds from the Brentwoods at the closing.

13. Before closing the loan, Defendant obtained a certified check from his bank on behalf of the Brentwoods in the amount of \$26,907.83 using a trust account check written to his law firm on funds held in his trust account. At the time, there were no funds in Defendant's trust account provided by the Brentwoods or to which the Brentwoods were entitled. Defendant knew that the Brentwoods had provided no funds at the closing. Defendant then immediately deposited the certified check back into his trust account.

14. The lender's closing instructions required Defendant to pay existing liens on the property from the proceeds collected at closing such that the lender would be in a first-lien position after closing. The lender's closing instructions also required Defendant to provide a

copy of the certified funds check showing the collection of funds from the Brentwoods as shown on the HUD-1 settlement statement.

15. Defendant closed the loan transaction and paid Shinn's first mortgage on or about April 4, 2002. Defendant then recorded the deed and deed of trust in favor of Genesis Lending. Defendant did not pay Shinn's second mortgage, the other seller liens, the buyer's hazard insurance, the title insurance premium, or the mortgage broker's commission of \$6,200 at that time. Defendant paid the mortgage broker's commission before the end of April 2002.

16. The Defendant then provided the lender with a copy of the certified check he had procured from the bank using the check drawn on his trust account. Defendant did not disclose the source of the funds used to procure the certified check to the lender. By providing the copy of the certified check to the lender and other documentation to the lender as well as recording the deed of trust on behalf of the lender, the Defendant represented to the lender that the closing instructions had been followed and he had collected funds from the Brentwoods as shown on the HUD-1 settlement statement.

17. Between the time of closing in April 2002 and September 2002, the Brentwoods tried to get the Defendant to make the unpaid disbursements on their behalf, including their hazard insurance premium and Shinn's second mortgage. Defendant did not disburse any funds on their behalf and failed to respond to the Brentwoods on several occasions.

18. By September 2002, Defendant had still not paid Shinn's second mortgage, the other seller liens, the buyer's hazard insurance or the title insurance premium. Defendant had still not collected sufficient funds from the Brentwoods to cover all required disbursements and the lender was not in a first-lien position. At that time, the title insurance company received a complaint from the Brentwoods, contacted Defendant, collected the balance of the funds being held by the Defendant, and completed the closing transaction by making the required disbursements. The Brentwoods' lender was not in a first lien position until after those disbursements were made by the title insurance company.

19. During or about May 2002, Dr. Carolyn Hart (hereafter "Hart") engaged Defendant to represent her in a dispute with tenants who lived on rental property owned by Hart. Defendant informed Hart that he would require a \$2,500 retainer against which he would bill his

fee at an hourly rate. Hart paid the retainer to Defendant on or about May 29, 2002 and Defendant deposited the retainer to his trust account. In early June 2002, Defendant prepared and sent a lease termination agreement to Hart's tenants, but the tenants declined to voluntarily sign the agreement or remove themselves from the premises.

20. Hart repeatedly attempted to communicate with Defendant during July and August 2002 concerning further action but Defendant would not respond. Hart eventually discharged Defendant on or about September 7, 2002, and demanded a refund of \$2,200 from the initial retainer she paid to Defendant.

21. At the time of discharge, Defendant had already transferred the entire Hart retainer from his trust account to his office operating account for his business or personal use. The first transfer was for \$1,500 on May 29, 2002, the day the retainer was deposited. Defendant later transferred \$500 on or about June 17, 2002 and the balance of \$500 on or about June 20, 2002. Defendant did not provide any accounting to Hart for these payments. Defendant had not earned the entire retainer fee before he transferred the funds to his operating account.

22. Defendant failed to refund any amount from the retainer after he was discharged by Hart.

23. During on or about November 2002, Wendy McLean (hereafter "McLean") engaged Defendant to close a series of six mortgage loan refinances on six properties she owned in Gaston County. Each of the properties had an existing mortgage secured by a Deed of Trust on the property. McLean intended to receive surplus funds from the refinancing of the properties to pay other debts and receive cash proceeds for her own use from the loans. McLean and the Defendant prepared a schedule for the disbursement of the proceeds from these loans before closing.

24. Defendant conducted four of the six closings on behalf of McLean on or about November 20, 2002.

25. Defendant prepared the HUD-1 settlement statements for each of McLean's loan closings on or about November 20, 2002.

26. Defendant received funds from McLean's new lender on November 20, 2002. The funds received were short, but were sufficient to cover disbursements to satisfy all existing liens on the properties, including the prior mortgages. Defendant chose to close the loans without waiting for the balance of the loan proceeds and disbursed some amounts, including his fees, on November 22, 2002. However, he did not disburse funds to pay the prior mortgages at that time. The balance of the funds from the lender were received by Defendant on November 29, 2002.

27. On or about December 5, 2002, Defendant issued three checks and a wire transfer to McLean's prior mortgage lenders to pay the prior mortgages on the properties for which the new loans had been closed on November 20, 2002.

28. The pay-offs tendered by Defendant for two of the prior mortgages from the same lender were insufficient and the lender rejected the payments without crediting McLean's account and notified Defendant immediately after receipt in December 2002.

29. Defendant did not take any steps to make the correct payment to the lender until January 3, 2003, by which time additional interest and charges had accrued because of the delay caused by Defendant's neglect. Defendant paid the additional charges without collecting or depositing any additional funds in his trust account to cover those charges.

30. Defendant did not make other payments from the McLean loan proceeds as required from the closing and as indicated on the HUD-1 settlement statements, including but not limited to payments for property taxes, title insurance and for hazard insurance.

31. In late January 2003, Defendant had insufficient funds in trust to pay the remaining items due to be paid from these closings for McLean because the funds had been used to pay for the additional charges by the prior mortgage holders. Defendant paid the balance of the funds remaining in his trust account that he had received from the closings to McLean. Defendant informed McLean at the time that he would cover the shortfall in funds caused by his delay, but made no further effort to do so.

32. The North Carolina State Bar conducted an audit of Defendant's trust account in 2004. At the conclusion of the audit, there appeared to be approximately \$12,000 in unaccounted funds in the account. Defendant informed an investigator for the Bar that these were funds that should have been disbursed for payment of title insurance premiums on past real

estate closings Defendant could not identify the proper parties for whom these funds should have been disbursed or offer any reason for failing to disburse these funds. Defendant has been unable to account for those unidentified proceeds to date.

Based upon the foregoing **Findings of Fact**, the Hearing Committee enters the following:

Conclusions of Law

1. All parties are properly before the hearing committee and the committee has jurisdiction over Thomas M. Tillett 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) in that the conduct violated the Revised Rules of Professional Conduct in effect at the time of the conduct as follows:
 - (a) By knowingly and willfully converting funds held in a fiduciary capacity in his attorney trust account for payment of his personal child support obligation, Defendant committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b); engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c); and used funds held in trust for his own personal benefit in violation of Rule 1.15-2 (j);
 - (b) By preparing and presenting a false HUD-1 settlement statement to the lender in the transaction involving the Brentwoods, Defendant knowingly made a false statement of material fact in violation of Rule 4.1; engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c); and in criminal conduct that adversely reflected upon his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b);
 - (c) By withdrawing the \$26,907.83 from his trust account on behalf of the Brentwoods when Defendant knew the Brentwoods did not have any funds in his trust account belonging to them at the time, Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);

(d) By failing to respond to Dr. Hart's requests for information, the Defendant failed to adequately communicate with his client in violation of Rules 1.4(a) and (b);

(e) By paying the entire retainer received from Dr. Hart to himself as fees before they were earned and by failing to refund any amount of the retainer paid by Dr. Hart, Defendant collected or retained an excessive or unearned fee in violation of Rules 1.5(a) and 1.16(d).

(f) By failing to account to Dr. Hart for the transfer of fees from his trust account to his operating account at any time, Defendant failed to provide his client with a complete and accurate accounting of funds held in trust in violation of Rule 1.15-3(d).

(g) By failing to timely make the proper disbursements to pay McLean's prior mortgages and taxes, Defendant failed to promptly pay client funds to third parties as directed by the client in violation Rule 1.15-2(m) and failed to act with reasonable diligence and promptness in representing a client in violation of Rule 1.3.

(h) By being unable to identify the parties whose funds remain in his trust account, Defendant failed to maintain proper records, reconcile his trust account on a quarterly basis and provide complete and accurate accountings to his clients for the receipt and disbursement of client funds in violation of Rule 1.15-3.

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

Findings of Fact Regarding Discipline

1. The Defendant has no prior disciplinary record.
2. Defendant was admitted to a treatment facility in Kentucky during the late winter and early spring of 2003 for treatment of severe depression and adult attention deficit disorder. He continues in treatment with a physician and is receiving medication for his ailments. His conduct with respect to the Brentwoods, Dr. Hart, and McLean occurred during the time when his depression began to manifest itself. Defendant personally believes that his judgment during

his representation of the Brentwoods, Dr. Hart, and McLean was significantly impaired by his untreated depression.

3. Defendant was cooperative with the investigation by the North Carolina State Bar and made full disclosure of his conduct to the Hearing Committee.

4. Defendant had previously been jailed for contempt for failure to pay his child support obligation. Defendant's misappropriation of funds in his trust account appears motivated by a momentary panic to assure that he was not held in contempt of court with the possibility of jail after learning that his operating account check would not be accepted. He intended to replenish the trust account before the end of the day. Additionally, his judgment may have been impaired by changes in his anti-depressant medication at the time of his conduct.

5. Although Defendant did not fully reimburse the trust account for the funds that he had misappropriated for payment of his child support obligation until he was aware that the State Bar was completing its audit of his trust account, Defendant appeared to be uncertain with respect to the requirements of the Rules of Professional Conduct with respect to the handling of trust account funds, particularly the prohibitions of commingling of his personal funds. This uncertainty contributed to his failure to reimburse the account earlier.

6. Defendant's misappropriation was an isolated instance. The State Bar's audit of his trust account uncovered no other misappropriations and could not identify any loss to any client. No client complained of any misappropriation.

7. Defendant's conduct with respect to the closing of the Brentwoods' loan was motivated by a sincere belief that it was necessary to assist the Brentwoods to prevent foreclosure of the property because of the seller's conduct with a substantial financial loss to the Brentwoods. The Brentwoods were pleased with his efforts at the time of closing.

8. Defendant has made no effort to refund or reimburse the Brentwoods or McLean for any of the shortfalls in payments he should have made on their behalf from their respective loan closing transactions nor has he made any effort to refund any of the unearned fee he collected from Dr. Hart.

9. Defendant engaged in multiple violations of the Rules of Professional Conduct involving representation of multiple clients.

Based on the **Findings of Fact and Conclusions of Law** above and the additional **Findings of Fact Regarding Discipline**, the Hearing Committee makes the following:

Conclusions with Respect to Discipline

1. Defendant's misconduct is aggravated by the following factors:
 - (a) Substantial experience in the practice of law;
 - (b) multiple offenses involving multiple clients;
 - (c) a dishonest or selfish motive;
 - (d) a refusal to acknowledge the wrongfulness of his conduct; and
 - (e) an indifference to making restitution.
2. Defendant's misconduct is mitigated by the following factors:
 - (a) No prior disciplinary record;
 - (b) personal or emotional problems;
 - (c) full and free disclosure to the Hearing Committee;
 - (d) a cooperative attitude toward the proceedings;
 - (e) physical or mental disability or impairment; and
 - (f) interim rehabilitation.
3. The mitigating factors outweigh the aggravating factors.
4. The Defendant's conduct has caused, and had the potential to cause, significant harm to his clients. Further, Defendant's conduct or misconduct has harmed the standing of the legal profession by undermining trust and confidence in lawyers and the legal system

5. To that end, the Hearing Committee has carefully considered all of the different forms of sanction available to it and finds that any sanction of less than suspension of Defendant's license would not be appropriate in this case. Further, an Order of Discipline less than suspension would not sufficiently protect the public because of the violations of public trust in this case and because the conduct involved the taking of money belonging to others to whom Defendant had a fiduciary duty. Entry of any Order imposing lesser discipline than suspension would fail to acknowledge the seriousness of the offense that the Defendant has committed and sends the wrong message to attorneys and the public regarding the conduct expected of members of the Bar. The only sanction in this case that can adequately protect the public is suspension of the Defendant's license for a period of time.

6. Disbarment ordinarily is the appropriate discipline imposed in cases involving attorney misappropriation of client funds. The Committee's decision in this matter is based upon the unique facts involved in this case and should not be viewed as an indication that future embezzlement cases will be dealt with lightly. The isolated nature of the taking, coupled with the Defendant's mental condition at the time of the misconduct and interim proof of rehabilitation, convinced the Committee that, in this particular instance, a suspension of license was sufficient to protect the public.

Based upon the foregoing **Findings of Fact, Conclusions of Law and the Findings of Fact Regarding Discipline, and the Conclusions with Respect to Discipline**, the Hearing Committee enters the following:

Order of Discipline

1. The Defendant's license to practice law in the State of North Carolina is hereby suspended for three years, effective thirty days after service of this Order of Discipline on the Defendant.
2. Defendant shall submit his license and membership card to the Secretary of the North Carolina State Bar no later than 30 days following service of this order upon Defendant.
3. Defendant shall comply with the wind down provisions contained in 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124(b), the North Carolina State Bar Discipline &

Disability Rules. Defendant shall file an affidavit with the Secretary of the North Carolina State Bar within 10 days of the effective date of this Order of Discipline certifying he has complied with the wind down rule.

4. After serving one year of the active suspension of his license, Defendant may apply for a stay of the balance of the suspension upon filing a motion with the Disciplinary Hearing Commission in this matter at least thirty days before any proposed effective date of the stay and demonstrating the following by clear, cogent, and convincing evidence:

(a) That during the period of suspension of his law license he has continued with all prescribed medical treatments as determined by his psychiatrist or other mental health professional for his depression, attention deficit disorder, and any other mental health problems that have been diagnosed by such medical care providers at Defendant's sole expense.

(b) That he has received a medical evaluation from a qualified psychiatrist approved by the Office of Counsel of the North Carolina State Bar made within 30 days before the filing of his motion to stay the balance of his suspension that has determined that Defendant has no current mental or psychological impairment that would affect his ability to comply with the Rules of Professional Conduct or cause harm to the public if he is allowed to resume the practice law. The medical evaluation shall be obtained at Defendant's expense. Defendant will serve a copy of such evaluation on the Office of Counsel of the North Carolina State Bar with his motion to stay the balance of the suspension.

(c) That Defendant has served the Office of Counsel of the North Carolina State Bar with his motion to stay the balance of the suspension with all necessary and appropriate releases and medical authorizations for the Office of Counsel to review all of his medical reports, medical records, psychological evaluations or mental health evaluations and interview all of his treating medical care providers, including but not necessarily limited to those persons who provided his care as described in (a) above. The Defendant may not revoke the releases or authorizations. Any charges by the medical

care providers for providing the reports and responding to information requests by the Office of Counsel of the North Carolina State Bar will be at Defendant's expense.

(d) That Defendant has satisfactorily completed a law office trust account management course approved by the Office of Counsel of the North Carolina State Bar at his own expense and has paid the costs thereof.

(e) That Defendant has satisfactorily cooperated with the Office of Counsel to identify and appropriately disburse the balance of the funds still in Defendant's trust account.

(f) That Defendant has made restitution to the Brentwoods, McLean, and Dr. Hart, for such amounts as those parties may agree or as determined by any mediation, arbitration or civil proceeding with respect to such claims.

(g) That he has participated in good faith in the North Carolina State Bar's fee dispute resolution process for any petition received after the effective date of this order, participated in good faith and refunded all fees that were determined to be subject to refund by the mediation process.

(h) That he has kept the North Carolina State Bar Membership Department advised of his current business and home address.

(i) That he has responded to all communications from the North Carolina State Bar within 30 days of receipt or by the deadline stated in the communication, whichever is sooner.

(j) That he has not violated the Revised Rules of Professional Conduct or the laws of the United States or any state during his suspension.

(k) That he properly wound down his law practice and complied with the terms of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124 of the State Bar Discipline & Disability Rules.

(l) That he has paid all Membership dues and Client Security Fund assessments and complied with all Continuing Legal Education (CLE) requirements on a timely basis as if still in practice during the suspension.

(m) That he paid the costs of this proceeding within 90 days of service of the statement of costs upon him.

(n) That if he proposes to practice as a solo practitioner if the stay is granted, he has asked a member of the North Carolina State Bar who is in good standing who practices law in county where he proposes to practice, and who has been approved by the North Carolina State Bar, to serve as his monitor and that the selected monitor has agreed to so serve and agreed to the requirements set forth in paragraph 5 of this Order. Defendant will pay the cost, if any, charged by the monitor for this supervision. If the monitor requires a fee to be paid in advance or a retainer to be paid at the inception of this monitoring relationship, Defendant will have paid that prior to submitting his petition for a stay or for reinstatement.

5. If Defendant successfully seeks a stay of the suspension of his law license, such stay will continue in force only as long as he complies with the conditions set out in paragraphs 4(a), (e), and (g) through (n) above and with the following additional conditions:

(a) That he provide reports at his own expense consistent with the requirements of paragraphs 4(b) and (c) to the Office of Counsel of the North Carolina State Bar by the 15th day of the month following each calendar quarter (i.e. January 15, April 15, July 15, and October 15) during the period of the stay.

(b) That he meet once a month with his monitoring attorney to whom he will report the status of all current client matters, cooperate with the mentor attorney and provide any information the mentor attorney deems reasonably necessary to ensure that Defendant is handling all client matters in a timely fashion and is responding promptly to his clients. The Defendant will be solely responsible for any cost of this arrangement.

(c) That the monitoring attorney submits monthly reports to the Office of Counsel of the State Bar by the 10th of each month.

(d) That Defendant will permit the North Carolina State Bar to conduct random audits of his trust account, and any other business and personal bank accounts necessary to complete such audits, during the period of the stay.

6. If an order staying any period of this suspension is entered and the Defendant fails to comply with any one or more of the conditions referenced in Paragraph 5, 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.

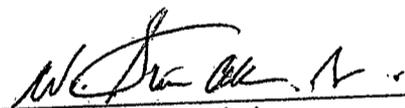
7. If Defendant does not seek a stay of the active portion of the suspension of his law license or if some part of the suspension is stayed and thereafter the stay is revoked, Defendant must comply with the conditions set out in paragraphs 4(a) – (n) above before seeking reinstatement of his license to practice law.

8. 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.

9. The Defendant will pay all costs of this proceeding permitted by law within ninety (90) days of service of notice of the amount of costs as assessed by the Secretary.

Signed by the undersigned Chair with the full knowledge and consent of the other members of the Hearing Committee.

This the 21~~st~~ day of September, 2005



W. Steven Allen, Sr., Chair
Disciplinary Hearing Committee