IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,497
(TFB CASE NO. 8-20, 938(18A))

THE FLORIDA BAR,

Complainant,

v.

JAMES T. GOLDEN,

Respondent.

______________________________/

FILED
SID J. WHITE
MAY 17 1988
CLERK, SUPREME COURT
By________
Deputy Clerk

RESPONDENT'S INITIAL BRIEF

JAMES T. GOLDEN, ESQUIRE
1600 West Colonial Drive
Suite 117
Orlando, Florida 32805
(407) 422-6117

TABLE OF CONTENTS

Table of Contents....................i

Citation of Authorities....................ii

Statement of Facts and Case....................1

Summary of Argument....................3

Argument:

I. THE EVIDENCE RELIED UPON BY THE REFEREE DOES NOT ESTABLISH THAT RESPONDENT WAS NEGLIGENT AS A MATTER OF LAW OR FACT....................4

II. THE FACTS RELIED UPON BY THE REFEREE ESTABLISHED THAT A PUBLIC REPRIMAND AND PROBATION COULD BE APPROPRIATE DISCIPLINE BUT BECAUSE OF UNDUE DELAY BY THE FLORIDA BAR A PUBLIC REPRIMAND WOULD BE SUFFICIENT....................6

Conclusion....................8

Certificate of Service....................9

CITATION OF AUTHORITIES

CASES PAGE

The Florida Bar v. Fields
482 So.2d 1354 (Fla. 1986)........................ 5

The Florida Bar v. Golden
502 So.2d 891 (Fla. 1987)......................... 1,3,8

The Florida Bar v. Hotaling
454 So.2d 555 (Fla. 1984)......................... 6,7

The Florida Bar v. Lord
433 So.2d 986 (Fla. 1983)......................... 6

The Florida Bar v. Pritikin
259 So.2d 138 (Fla. 1972)......................... 7

Whack v. Seminole Memorial Hospital Incorporated
456So.2d 561 (Fla. App. 5th DCA 1984)............ 1,4,5

Whack v. Seminole Memorial Hospital Incorporated
487 So.2d 1091 (Fla. App. 5 Dist. 1986).......... 4,5

STATEMENT OF THE FACTS AND THE CASE

On April 1, 1986, by letter to Bar Counsel in the Orlando office, The Florida Bar was asked by the Eighteenth Judicial Circuit's representative to the Board of Governors to review an opinion by the Fifth District Court of Appeal to determine if some action should be taken against the Respondent. The opinion which the Board of Governor's representative asked to be reviewed is recorded at Whack v. Seminole Memorial Hospital, Incorporated, 456 So. 2d 561 (Fla. App. 5th DCA 1984).

(In Whack, supra, the Fifth District Court of Appeal decided that the trial judge's ruling was correct when he dismissed with prejudice one of the defendants in that case because the record showed that the plaintiff's counsel had acted "...with willful disregard of the court's authority and gross indifference to an order of the court..." The appellate court concluded that "...that there was no abuse of discretion in imposing the sanction of dismissal...").

The Respondent in this case was not furnished a copy of the above referenced letter until October 15, 1986, approximately five (5) months after The Florida Bar instituted disciplinary proceedings herein. Moreover, the record also reflects that the aforementioned letter was received by The Florida Bar prior to the referee's report in The Florida Bar v. Golden, 502 So. 2d 891 (Fla. 1987), being served upon Respondent and long before this Court imposed discipline in that case by its order of February 5, 1987.

In Golden, supra, this Court determined that the allegations therein warranted a ten (10) day suspension followed by a one (1) year period of bar-supervised probation. The probationary period in that case was completed without further disciplinary activity except for the instant case.

In the case before this Court presently, the Respondent received a notice of receipt of complaint which named Gerald W. Jones, Chairman of the Eighteenth Judicial Circuit Grievance Committee "A", as the complaining party, and not the person who had written The Florida Bar . This notice was received June 16, 1986.

The notice received by the Respondent on June 16th further represented that the complaint was received on May 15, 1986.

It was not until October 28, 1986, that the grievance committee held a hearing and on October 30, 1986, probable cause was found in the case now before this Court.

It was not until May 5, 1987, that Respondent was served with a complaint in the matter presently before the Court.

Although a referee was appointed to hear this matter on May 13, 1987, it was not until December 18, 1987, that the hearing commenced, and that hearing was not concluded until February 5, 1988. The referee's report was served on the Respondent February 29, 1988.

The total elapsed time from receipt by The Florida Bar of the letter dated April 1, 1986, until the service of the referee's report on February 29, 1988, was twenty three (23) months.

During the pendency of the proceedings now before this court, the Respondent has completed the ten (10) day suspension and the one (1) year probation in the case which was still pending at the time the present case was begun.

On April 2, 1988, the Respondent filed a Petition For Review of the referee's report served on February 29, 1988.

SUMMARY OF ARGUMENT

It would be grossly unfair to the Respondent, to his clients, and would serve none of the purposes given for imposing discipline to suspend the Respondent for 90 days and in essence extend his probation for another year on the facts relied upon by the Referee.

The case which is the basis for these disciplinary procedures is still active and ongoing against the remaining defendant. To suspend the Respondent at this time would only add to the delay that The Florida Bar is accusing the Respondent of being negligent in avoiding in the first place.

Indeed to suspend the Respondent at all in light of the undue delay by The Florida Bar in prosecuting this matter would be an egregious departure from the standards of discipline usually imposed in cases of this type.

WHEREFORE, the Respondent asks this Court to enter a public reprimand in this cause and a one year probationary period to run concurrent nunc pro tunc with the probationary period already completed in The Florida Bar v. Golden, 502 So.2d 891 (Fla. 1987).

ARGUMENT I

THE EVIDENCE RELIED UPON BY THE REFEREE DOES NOT ESTABLISH THAT RESPONDENT WAS NEGLIGENT AS A MATTER OF LAW OR FACT

The Respondent argues that none of the facts relied upon by the Referee established neglect. These proceedings were precipitated by a concern over two Appellate opinions. Whack v. Seminole Memorial Hospital Incorporated, 456 So.2d 561 (Fla. App. 5th DCA 1984) concluded that a dismissal of one of the multiple defendants must be affirmed. While the Appellate Court did posit that Respondent had acted "...with a willful disregard of the Court's authority and gross indifference to an order of the Court" it made no determination as to whether these actions were negligent. Indeed, the sanction of dismissal was imposed as punishment for failure to abide by the rules of procedure with no factual determination as to why such failure occurred. As stated in Whack supra:

> "Appellant made no showing that he either attempted to comply with the discovery order or communicated any explanation or excuse to the court by the time of the hearing".

Whack v. Seminole Memorial Hospital Incorporated, 487 So.2d 1091 (Fla. App. 5 Dist. 1986) concluded that a summary judgment against one of the remaining defendants must be affirmed insofar as the Respondent had not demonstrated any judicial abuse in granting same because "...there was no clerical error,brief delay,or inexcusable inadvertance in Plaintiff's failure to respond to Request to Admit for in excess of two (2) years". The court in this case affirmed the judgment but specifically noted that:

> "The hearing at which the Plaintiff's attorney had the opportunity and presumably did offer his reasons for not filing the answers was not recorded so we have no knowledge in that regard. The trial judge's ruling is presumptively correct, so we have no choice but to affirm his findings and the order".

It is apparent from the record that the Referee could only rely upon the language found in Whack v. Seminole Memorial Hospital Incorporated 456 So.2d 561 (Fla. App. 5th DCA 1984) and Whack v. Seminole Memorial Hospital Incorporated, 487 So.2d 1091 (Fla. App. 5 Dist. 1986) as well as the testimony of the Respondent as the factual basis for his recommendations.

The Florida Bar Integration Rule, Article XI, 11.06(9)(a) establishes that a Referee's findings shall have the same presumption of correctness as the judgment of the trier of facts in a civil proceeding. This Court has established that such a presumption will not be overturned absent a clear showing that they are clearly erroneous or lacking evidentiary support, The Florida Bar v. Fields, 482 So.2d 1354, 1359 (Fla. 1986). In this case the record clearly demonstrates the absence of clear and convincing evidence of neglect and moreover specifically contains no evidentiary support for the conclusion reached by the Referee that the facts in the record legally and ethically constitute neglect. Indeed, it appears that the Referee has made a determination on the facts before him that neither the trial court nor the appellate court was able to arrive at from a review of the same facts. Moreover, it does not appear from the record that either the trial judge nor any of the appellate judges voiced any concern over any breach of ethics with respect to the handling of this case.

ARGUMENT II

THE FACTS RELIED UPON BY THE REFEREE ESTABLISHED THAT A PUBLIC REPRIMAND AND PROBATION COULD BE APPROPRIATE DISCIPLINE BUT BECAUSE OF UNDUE DELAY BY THE FLORIDA BAR A PUBLIC REPRIMAND WOULD BE SUFFICIENT

In The Florida Bar v. Lord, 433 So.2d 986(Fla. 1983), the three stated purposes of any proposed discipline are:

> " First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become in like violations."

In the Referee's report there is no finding of fraud, deceit, nor prejudice to the client in the resolution of their cases and the only record of prior discipline was (1) a public reprimand in 1981 and (2) a ten day suspension plus one year bar supervised probation which began and ended during the pendency of these proceedings.

The instant case is similar to The Florida Bar v. Hotaling, 454 So.2d 555 (Fla. 1984) where the Court held that a public reprimand with a two year bar supervised probationary period was appropriate discipline. In Hotaling the Referee recommended that the Respondent be suspended for eighteen (18) months and be placed on bar supervised probation for two (2) years after readmittance and reinstatement. The Court stated:

> "...Our review of prior disciplinary cases reflects that the discipline recommended by the referee for this offense is inappropriate, particularly where the conduct was not dishonest or deceitful, there was no prior disciplinary proceeding against respondent and the clients suffered no prejudice in the final resolution of their cases. ... Under the facts of the instant case, the proper penalty is a public reprimand together with a two-year period of bar-supervised probation, during which time the respondent shall quarterly report to the Bar an inventory of her pending cases. ..."

The record reflects there are no aggravating factors that would justify the discipline recommended by the Referee nor are there any facts that would make the discipline recommended in Hotaling inappropriate in this case.

Additionally, the Respondent posits that in light of the undue delay in prosecuting this matter by The Florida Bar and the Referee it would be manifestly unjust to suspend Respondent again for allegations of negligence which were similar to those causing the previous ten day suspension and further to place Respondent on probation again for a period of time equal to the probation already completed.

This situation is somewhat analogous to The Florida Bar v. Pritikin, 259 So.2d 138 (Fla. 1972), where it was determined that tardy prosecution justified a nunc pro tunc determination that a two year suspension should run concurrently with a prior three-year suspension based on conduct arising out of the same general scheme of transaction.

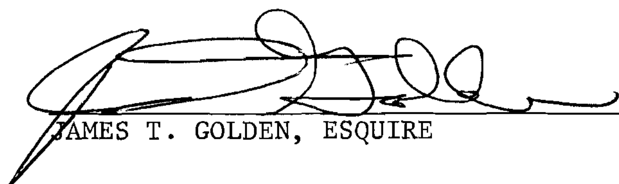
The record clearly reflects that Respondent's problem arose during a period of time when he was a full time seminary student commuting to a graduate school of theology in Atlanta, Georgia on a weekly basis. Since this time he has completed his Masters of Divinity Degree and the circumstances which gave rise to his present involvement with the Florida Bar no longer exist.

The Respondent concedes that perhaps the two years that it has taken the Bar to prosecute this matter may not be sufficient to justify dismissal of same. However, fundamental facts require that it likewise be conceded that the time frame for the conduct complained of is at least five years old and could not in any way be indicative of the present state of Respondent's practice. Indeed, the one year probationary period has been completed without any further disciplinary record being made.

CONCLUSION

The recommended discipline of a 90 day suspension plus one year probation is excessive and should be rejected in favor of a public reprimand and a one year probationary period to run concurrent nunc pro tunc with the probationary period already completed in The Florida Bar v. Golden, 502 So.2d 891 (Fla. 1987).

Respectfully submitted,

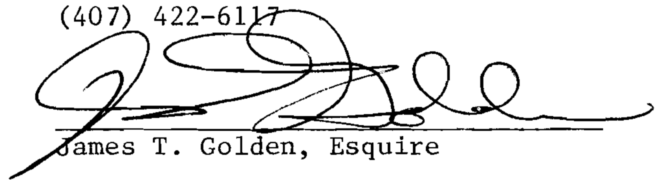


JAMES T. GOLDEN, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 16th day of May, 1988 to John B. Root, Jr., Esquire, Bar Counsel, The Florida Bar, 605 East Robinson Street, Orlando, Florida 32805 by United States Mail.

THE LAW OFFICES OF JAMES T. GOLDEN
1600 W. Colonial Dr.
Suite 117
Orlando, Fl 32805
(407) 422-6117



James T. Golden, Esquire

PRO SE