IN THE
SUPREME COURT OF FL

DEPARTMENT OF PROFESSIONAL
REGULATION,

Petitioner,

vs. CASE NO. _____

PEDRO F. BERNAL, M.D.,

Respondent.
_____/

On Review of a Petition to Invoke
the Discretionary Jurisdiction
of the Florida Supreme Court
to Review
A Decision of the Third District Court of Appeal

PETITIONER'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

Although Respondent continues to assert that the Board abused its discretion in increasing the penalty from that recommended by the hearing officer, he does not address the conflict of decisions which must be resolved by this Court. Although Dr. Bernal believes that the Board's actions were motivated by some sort of ethnic bias, the record simply does not support this contention. The issue which must be resolved by this Court is the proper interpretation of section 120.57(1)(b)(10), Florida Statutes (Supp. 1986), and the scope of appellate review of penalties imposed in administrative disciplinary proceedings. The Department asserts that the decision of the First District in Britt v. Department of Professional Regulation, 492 So.2d 697 (Fla. 1st DCA 1986) represents the correct interpretation of section 120.57(1)(b)(10) as a procedural requirement.

ARGUMENT

I.
THE SCOPE OF APPELLATE REVIEW IN ADMINISTRATIVE PENALTY DETERMINATIONS

Respondent argues that the Department's interpretation of section 120.57(1)(b)(10), Florida Statutes (Fla. 1986) "extends to the Board a free road ahead to arbitrarily impose whichever penalty it deems, regardless of due process requirements and whether or not justified, as long as it explains its reasons. More simply stated, that the Board is empowered to abuse its

discretion." (Respondent's brief at 5). This is simply not the case. The Board can only impose those penalties authorized by the Legislature in section 458.331, Florida Statutes. The appellate courts have the power to review the substantive issue of penalties imposed in those instances where the imposition of penalty is an exercise of discretion which is outside the range of discretion delegated to the agency by law; which is inconsistent with agency rule, officially stated agency policy or prior agency practice with no explanation for the deviation; or which violates a constitutional or statutory provision. Section 120.68(12), Florida Statutes. The amendment to section 120.57(1)(b)(10) adding to the procedural requirements of imposing a penalty other than that recommended by a hearing officer does not enlarge the scope of review beyond that enunciated in section 120.68 and interpreted by this Court in Florida Real Estate Commission v. Webb, 367 So.2d 201 (Fla. 1979). Hutson v. Casey, 484 So.2d 1284 (Fla. 1st DCA 1986). Interestingly enough, Respondent does not even acknowledge this Court's decision in Florida Real Estate Commission v. Webb; nor does he attempt to harmonize the Third District's decision with the scope of review enunciated in that case. In light of this omission, the Respondent apparently concedes that the Third District exceeded the scope of review enunciated in Webb for penalties imposed in administrative disciplinary proceedings.

II.
THE SEVERITY OF THE OFFENSE

This Court's jurisdiction is based upon the Third District's certification of its conflict with the First District's decision in Britt v. Department of Professional Regulation. However, Respondent does not attempt to explain why the Britt decision does not satisfy the statutory requirements of section 120.57(1)(b)(10). The Board's disagreement in this case was more than a "mere disagreement" with the hearing officer. In Hutson v. Casey, the only reference in the record was a statement by a board member that she disagreed with the penalty. Here, the Board stated clearly why they disagreed with the hearing officer's recommendation, citing the seriousness of the offense as one of their reasons. The First District cited their own decision in Hutson when deciding Britt; obviously the court's decision recognized that the Board's stated reason constituted more than a mere disagreement with the hearing officer.

Although the Respondent insists that the Board's revocation of his license to practice medicine is tantamount to "cruel and unusual punishment and deprives Respondent of due process of law in violation of the VIII and XIV amendments to the Constitution of the United States," he never says how, either before this Court or before the Third District. He complains that the Board refused to hear his case when they rejected the proposed stipulation; yet it is clear that the Secretary of the Department

of Professional Regulation and the administrative boards created within the Department cannot hear disputed issues of fact. Sections 120.57(1)(a)1; 455.225(4), Florida Statutes (1985). Upon rejection of the settlement stipulation the Board appropriately terminated the proceedings so that the matter could proceed to a formal hearing on the merits.

Respondent does not dispute that a formal hearing was held and that the hearing officer concluded that Respondent had violated sections 458.331(1)(g) & (t), Florida Statutes. Although license disciplinary proceedings are penal in nature, the Department clearly proved that Respondent had violated the Medical Practice Act and revocation of Respondent's license to practice medicine is clearly within the discretion which the Legislature has delegated to the Board of Medicine.

Respondent asserts that the Department is "now acting against its own stipulation and against its motion to increase the penalty." However, once the stipulation was rejected by the Board, -- acceptance of which was totally within the discretion of the Board -- it was no longer an option. Further, the Department asserts that in administrative proceedings as in any other type of litigation, information is discovered in the discovery process which will change a party's recommendation of what constitutes a proper remedy. Finally, the Department asserts that notwithstanding the particular penalty requested by the Department as opposed to the penalty imposed by the Board,

the issue here is not limited to the actual penalty imposed. What this Court must decide is what constitutes compliance with section 120.57(1)(b)(10), Florida Statutes (Supp. 1986), in those instances that an administrative agency wants to impose a penalty different from that recommended by a hearing officer.

III.
THE FIRST REASON STATED FOR INCREASE (LACK OF CANDOR)

Respondent asserts that the Third District's holding that the Board erred in basing its increase in penalty partly on Dr. Bernal's lack of candor before the hearing officer is not in conflict with any decision of another district court of appeal. The Department respectfully suggests, as it did in its initial brief on the merits, that once this Court has accepted review of this case, it has jurisdiction over the entire controversy and can address any other error committed by the court below. The Department asserts that it was error to apply a criminal standard to the imposition of an administrative proceeding. Any error committed by the Board with respect to this reason stated should have been raised before the Board and before the Third District; it was not.

IV.
THE THIRD DISTRICT ERRED IN DECIDING THE APPROPRIATE PENALTY TO BE IMPOSED

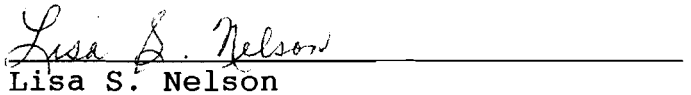
Finally, the Respondent asserts that since the Board adopted the findings of fact and law, the hearing officer's penalty, by operation of law, could not be disturbed and had to become firm.

Appellant cites no authority for this astounding statement and continues to ignore this Court's decision in Florida Real Estate Commission v. Webb. This Court specifically stated that it was error for the Third District to do what that they did in this case. Clearly this Court's decision in Webb requires the Third District to remand to the Board for reconsideration of the penalty. Inasmuch as the decision of the Third District mandates that the Board impose the recommended penalty of the hearing officer as the penalty of the Board with no further consideration, the Third District's decision is clearly in error and should be quashed.

CONCLUSION

Based on the foregoing and those arguments presented in the Department's initial brief on the merits, the Department respectfully requests that this Court quash the decision of the Third District Court of Appeal and reinstate the final order of the Florida Board of Medicine revoking Dr. Bernal's license to practice medicine. In the alternative, the Department requests that this case be remanded to the Board of Medicine for reconsideration of the penalty to be imposed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to Frank Diaz Silveira, Esquire, DIAZ SILVEIRA AND ASSOCIATES, P.A., 1313 Ponce de Leon Boulevard, Suite 301, Coral Gables, Florida 33134 this 25 day of April 1988.

Lisa S. Nelson

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