IN THE SUPREME COURT
OF FLORIDA

CRIMINAL JUSTICE STANDARDS AND TRAINING COMMISSION,

Petitioner,

v.

ALVIN BRADLEY,

Respondent.

Case No: 77,767
First District Court of Appeal
Case No: 90-2366

ANSWER BRIEF OF RESPONDENT

STEPHEN A. SMITH
STEPHEN A. SMITH, P.A.
FLA. BAR #: 184438
101 EAST MADISON STREET
P.O. BOX 1792
LAKE CITY, FL 32056-1792
(904) 752-7191

ATTORNEY FOR RESPONDENT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

CASES

STATUTES AND OTHER CITATIONS

STATEMENT OF THE CASE AND FACTS

The Criminal Justice Standard and Training Commission was the petitioner below. Alvin D. Bradley was the respondent. In this brief, the parties will be referred to as they stood at the administrative hearing.

The following symbols will be used in this brief:

"R" for Record-on-Appeal.

Because the petitioner's Statement of the Case and Facts paints the respondent's actions as being darker and more sinister than they really were and omits facts essential to an accurate understanding of what occurred, respondent cannot adopt petitioner's Statement of the Case and Facts, but submits the following:

Petitioner, Criminal Justice Standards and Training Commission, filed an Amended Administrative Complaint on September 21, 1989 seeking "an appropriate penalty" against the respondent, ALVIN D. BRADLEY, a correctional officer. The allegations of the wrongdoing in the Amended Complaint were that the respondent had exhibited a firearm in a careless manner, had driven a vehicle while under the influence of alcohol, and had committed simple battery by touching another person, all of which were and are misdemeanor offenses. (R 17, 18)

The unlawful exhibition of the dangerous weapon charge arose out of an unfortunate incident wherein the respondent's handgun

accidentally discharged, killing his best friend, Eddie Goodbread. The respondent and Mr. Goodbread had driven to downtown Lake City in the respondent's car. That night when the respondent was ready to go home, Mr. Goodbread jokingly refused to surrender the keys to the respondent's car saying he wasn't ready to go. The respondent, who was licensed to carry a firearm, and who did so for his protection because sometimes he encountered ex-prisoners who had been under his custody, took the gun from his coat pocket and held it up stating in a joking manner "You're going to make me put this on you. Come on, let's go." At that point Mr. Goodbread unexpectedly grabbed the gun, causing it to accidentally discharge. (R 85-89)

The incident was thoroughly investigated by the Lake City Police Department and it was determined that the shooting was a complete and total accident, and that there was no malice between the men. (R 87)

The hearing officer found, and it was uncontroverted, that Mr. Goodbread grabbed the gun unexpectedly. The respondent never intended to injure Goodbread in any way. The incident was witnessed by eight to ten people and the respondent cooperated fully in the investigation by the Lake City Police Department, including turning over the pistol to the Police and giving a voluntary statement about the incident. (R 145)

Mr. Goodbread was like a brother to respondent and his family. (R 98) The psychological fall out from the incident was so

painful to the respondent that he began to drink heavily and this behavior eventually culminated in the respondent's arrest for DUI. (R 102, 103)

It was during his arrest for the DUI, at which time the respondent registered .16 and .15 on the breathalyzer and was still quite drunk that he twice touched the side of the leg of the female deputy sheriff who was booking him. (R 36)

Trooper Bellamy of the Florida Highway Patrol testified that the respondent was cooperative and polite and was not a troublemaker the night of his arrest. (R 50)

The respondent eventually began counselling session with the North Florida Mental Health Institution to help him with his drinking problems, attending alcoholics anonymous, and no longer drinks. (R 102-104)

Other than traffic infractions, the defendant has been in no other trouble (R 112) and always had good service ratings as a correctional officer. (R 96)

A hearing was held on September 26, 1989, before the Honorable Charles C. Adams, Hearing Officer, Division of Administrative Hearings. (R 20) After considering all the evidence and exhibits offered by the parties (R 29-140), the Hearing Officer entered a Recommended Order making certain findings of fact, conclusions of law, and recommending that respondent's correctional officer's certificate be suspended for a period of six months. (R 141-151)

The petitioner, which had never requested revocation or any

other particular penalty, either in its' Amended Petition or at the hearing, and which never submitted a proposed Recommended Order to the Hearing Officer, filed "Exceptions to Proposed Order" which basically said it agreed with the Findings of Fact and Conclusions of Law of the Hearing Officer, but disagreed with his recommended penalty, stating that revocation should be the penalty as opposed to suspension. (R 156-158)

A hearing was held before the full Commission on April 19, 1990, at which time there was no discussion whatsoever between the Commission members about the facts of Mr. Bradley's case. The Commission noted that its' "staff" disagreed with the proposed penalty and was recommending that the Hearing Officer's Recommended Order be accepted "in toto" with the exception of the penalty. A motion to adopt its' staff's recommendations was made, seconded, and approved with no discussion or comment by any of the Commission members. (R 159-164)

A Final Order adopting the Hearing Officer's Findings of Fact and Conclusions of Law and imposing a penalty of revocation of respondent's correctional officer's certificate was entered on July 9, 1990. (R 165-167)

*Respondent timely filed a Notice of Administrative Appeal on August 7, 1990. (R 168) On March 1, 1991, the First District Court of Appeal reversed the Commission's Order of Revocation of respondent's certificate and remanded the case with instructions to adopt the Hearing Officer's recommended penalty. (**Bradley v.***

Criminal Standards and Training Commission, 16 F.L.W. D-617 (Fla. 1st DCA 1991). On March 27, 1991, the First District withdrew its' earlier Opinion of March 1, 1991, and substituted a new Opinion which, in addition to reversing the Commission's Order of Revocation and remanding for instructions to adopt the Hearing Officer's recommended penalty, certified conflict of its' decision with that of the Third District Court of Appeal in **Allen v. School Board of Dade County**, 571 So.2d. 568 (Fla. 3rd DCA 1990).

On April 17, 1991, the petitioner filed its' Notice to invoke discretionary jurisdiction before the First District Court Of Appeal.

SUMMARY OF ARGUMENT

The Decision of the First District Court of Appeal in ***Bradley v. Criminal Justice Standards and Training Commission****, 16 FLW D-617 (Fla. 1st DCA 1991) should be affirmed for the following two reasons, each of which is sufficient in and of itself to support the District Court's ruling:*

1. The First District Court of Appeal is correct in its' ruling that an administrative agency which adopts "in toto" a Hearing Officer's Findings of Fact and Conclusions of Law, and which does not reject, substitute or amend any of the Hearing Officer's recommended findings of fact or conclusions of law, may not increase the penalty recommended by the Hearing Officer; and

2. Where an administrative agency adopts "in toto" the Findings of Facts and Conclusions of Law of a Hearing Officer, it may not increase the recommended penalty where the factors which are the expressed grounds for rejecting the recommended penalty were specifically considered by the Hearing Officer, and the agency merely disagreed with the assessment of the seriousness of the offense by the Hearing Officer, made not as a general proposition, but tailored to the situation of the offender in particular.

ARGUMENT

I.

WHERE AN ADMINISTRATIVE AGENCY ADOPTS "IN TOTO" THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF AN IMPARTIAL HEARING OFFICER, AND DOES NOT REJECT, SUBSTITUTE OR AMEND ANY OF THE HEARING OFFICER'S RECOMMENDED FINDINGS OF FACT OR CONCLUSIONS OF LAW, MAY THE AGENCY REJECT THE HEARING OFFICER'S RECOMMENDED PENALTY AND IMPOSE A MORE SEVERE PENALTY?

The above issue is the only point on which there is any conflict among the District Courts of Appeal for the State of Florida. There is no disagreement or conflict among any of Florida's Appellate Courts on the issue of whether an agency may increase a recommended penalty simply because of a disagreement with the assessment of the seriousness of an offense by the Hearing Officer. This Court and all the District Courts of Appeal which have ruled on the issue have all held that a mere disagreement of that kind does not, under ***F.S. §120.57(1)(b)(10)****, justify a substitution of the Judgment of the agency for that of the Hearing Officer.*

The First District Court of Appeal for the State of Florida in ***Bradley v. Criminal Justice Standards and Training Commission****,* ***16 F.L.W. D-853 (Fla. 1st DCA 1991)*** *and the Fifth District in* ***Bajrangi v. Department of Business Regulation, Division of Alcoholic Beverages and Tobacco****,* ***561 So.2d. 410 (Fla. 5th DCA 1990)****, have specifically held that unless an agency rejects, substitutes or amends one or more of the Hearing Officer's*

Recommended Findings of Fact or Conclusions of Law, it may not substitute its' judgment concerning the appropriate penalty for that of the Hearing Officer. The rationale for the rulings by the First and Fifth District Courts of Appeal is explained by the First District in the last paragraph of its' Decision where it states

> *"However, if an agency has no disagreement with the Hearing Officer's Conclusions of Law and Findings of Fact, any remaining differences of opinion must a priori reflect a mere "disagreement with the assessment of the seriousness of the offense by the Hearing Officer, made not as a general proposition, but as tailored to the situation of [the offender] in particular".* ***Bradley v. Criminal Justice Standards and Training Commission, 16 F.L.W. D-853 (Fla. 1st DCA 1991)***

The Fifth District in ***Bajrangi*** *said more or less the same thing when it noted that given the fact the Hearing Officer and the agency should always be working from the same record, there should be no justification for changing the penalty recommended by the Hearing Officer unless one or more of the Hearing Officer's Recommended Findings of Fact or Conclusions of Law are properly rejected, substituted or amended by the agency.*

The Third District Court of Appeal in cases such as ***Allen v. School Board of Dade County, 571 So.2d. 568 (Fla. 3rd DCA 1990)*** *and* ***Grimberg v. Department of Professional Regulation, 542 So.2d. 457 (Fla. 3rd DCA 1989)*** *has approved an increase in the penalty recommended by a Hearing Officer even though the agencies in those cases adopted the Hearing Officer's Findings of Fact and Conclusions of Law. However, in those cases the Third District*

Court of Appeal found that there was more than a mere disagreement regarding the seriousness of the offense between the Hearing Officer and the agency. For example, in ***Allen v. School Board of Dade County****, supra, the Hearing Officer's recommended penalty was based in part upon the proposition that the respondent could be returned to work in a position that did not put him in contact with students on a daily basis. The School Superintendent filed a motion to amend the exceptions to the Hearing Officer's Recommended Order and gave three specific reasons why the penalty should be increased. The School Board adopted the Superintendent's amended Motion and by doing so, took into consideration the School Boards inability to comply with the Hearing Officer's recommendation that Allen not come into daily contact with students.*

In ***Grimberg v. Department of Professional Regulation****, supra, the Hearing Officer found the physician was not competent to make a diagnosis. The Third District Court of Appeal affirmed the Board's increase of the penalty recommended by the Hearing Officer and imposing a license suspension because it found Florida Law,* ***F.S. {458.331(3), (1987)*** *"obligated" the Board to suspend his license until it was satisfied he was capable of safely engaging in the practice of medicine.*

It appears that the Third District Court of Appeal found that even though the agencies in those cases stated they were adopting the Hearing Officer's Findings of Fact and Conclusions of Law, there had been a "de facto" rejection, substitution or amendment

of a Finding of Fact or Conclusion of Law. In ***Allen****, it was the fact of whether the respondent could be returned to work without having contact with the students on a daily basis. In* ***Grimberg****, it was the conclusion of law that* ***F.S. §458.331(3)*** *mandated the suspension of the respondent's medical license in light of the fact the Hearing Officer found he was not competent to make a diagnosis, and therefore, not capable of safely engaging in the practice of medicine.*

There is obviously a conflict between the decisions of the First and Fifth District Courts of Appeal and those of the Third above cited on the issue of whether there must be a rejection, substitution or amendment of findings of fact or conclusions of law before an agency may increase a recommended penalty.

Respondent respectfully suggests that the reasoning of the First and Fifth District Courts of Appeal is the more sound and should be adopted by this Honorable Court. However, even if this Court rejects the rulings of the First and Fifth District Courts of Appeal, the Order of the First District Court of Appeal in the case sub judice that the Order revoking Bradley's certificate be reversed and remanded with instructions to approve the Hearing Officer's recommendation should stand, because unlike ***Allen v. School Board of Dade County****, supra, and* ***Grimberg v. Department of Professional Regulations****, supra, and the other decisions of the Third District Court of Appeal, there is no "de facto" rejection, substitution or amendment of a Finding of Fact or Conclusion of*

Law, but instead a mere disagreement between the Commission and the Hearing Officer regarding the seriousness of Mr. Bradley's offenses.

II.

WHERE AN ADMINISTRATIVE AGENCY ADOPTS "IN TOTO" THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF AN IMPARTIAL HEARING OFFICER, MAY THE AGENCY INCREASE THE RECOMMENDED PENALTY WHERE THE FACTORS WHICH ARE THE EXPRESSED GROUNDS FOR REJECTING THE RECOMMENDED PENALTY WERE SPECIFICALLY CONSIDERED BY THE HEARING OFFICER?

As was eluded to in the argument on Issue I above, this Court and all the District Courts of Appeal which have ruled on the issue, have held that mere disagreement with the Hearing Officer's assessment of the seriousness of the offense will not justify an increase in a Hearing Officer's recommended penalty. This Court in ***Department of Professional Regulation v. Bernal, 531 So.2d. 967 (Fla. 1988)*** *approved the holding of the Third District Court of Appeal in* ***Bernal v. Department of Professional Regulation, 517 So.2d. 113 (Fla. 3rd DCA 1987)*** *that "a mere disagreement of this kind does not, under our statute, justify a substitution of the judgment of the Board for that of the Officer." Just as in the case at bar, the administrative agency in* ***Bernal*** *filed exceptions to the recommended penalty stating that the recommended penalty was rejected as being too lenient because the Hearing Officer had misjudged the seriousness of the respondent's offenses. The Court in* ***Bernal v. Department of Professional Regulation, 517 So.2d. 113 (Fla. 3rd DCA 1987)*** *at Page 115, stated that such a ground does not "cite to the record in justifying the action" as required by* ***F.S. {120.57(1)(b)(10)*** *and more importantly "simply reflects the Board's*

difference of opinion or disagreement with the assessment of the seriousness of the offense by the Hearing Officer, made not as a general proposition, but as tailored to the situation of Dr. Bernal in particular."

The Fourth District Court of Appeal in ***Hanley v. Department of Professional Regulation****, 549 So.2d. 1164 (Fla. 4th DCA 1989) held likewise. The Court in that case noted with approval the opinion of its' sister Court in* ***Bernal v. Department of Professional Regulations****, supra, that a mere disagreement with the recommendation of a Hearing Officer may not form the basis of an increased penalty. The Fourth District Court of Appeal went on to hold that the Board of Nursing's decision in* ***Hanley****, which rejected the proposed penalty as being inadequate for the potentially dangerous behavior in which the respondent had engaged, does not satisfy the Mandate of F.S. {120.57(1)(b)(10), where "the only reasons which the Board stated for increasing the penalty were factors which the Hearing Officer had already specifically considered in making his recommendations." The respondent Bradley would respectfully point out that the First District Court of Appeal in his case specifically found that the exceptions filed by the Criminal Justice Standards and Training Commission by its' Assistant General Counsel, were "based on factors specifically considered by the Hearing Officer and cannot justify an increase in the recommended penalty.* ***Hanley v. Department of Professional Regulation****, 549 So.2d 1164 (Fla. 4th DCA 1989)."*

In the case sub judice, the agency attempted to end-run the clear mandates of all of Florida's Appellate Courts that it could not increase the recommended penalty simply because it disagreed with the Hearing Officer's assessment of the seriousness of the offense, by citing three "aggravating factors" listed in the Commission's "Exceptions to Recommended Order" which were (1) the two violations occurred in less than a year, (2) the consequences of the conduct, and (3) appellee's lack of respect for the law.

Obviously it is preposterous to argue the Hearing Officer wasn't aware that two of the violations occurred within a year, when he put the dates of the violations in his proposed Order. It is an equally empty argument by the Commission that the Hearing Officer didn't consider the consequences of the violation when it is obvious from the proposed Order that the Hearing Officer was well aware that respondent's friend was accidentally killed when he unexpectedly grabbed petitioner's gun, and the Hearing Officer described in detail in his proposed Order the events which occurred at the Columbia County Jail when the petitioner was being finger printed for DUI.

Unlike ***Allen v. School Board of Dade County****, supra, where the agency's exceptions to the proposed Order were founded on a substantial fact which had been misapprehended by the Hearing Officer, to-wit, the School Board's inability to insure no contact between the respondent and the students, and* ***Grimberg v. Department of Professional Regulation****, supra, which dealt with a significant*

conclusion of law overlooked by the Hearing Officer, to-wit: a Florida Statute requiring the suspension of the physician's license in light of the Hearing Officer's Findings of Fact, the exceptions of the Commission in the case before this Court are without true substance. Since all of the factors which form the basis of the exceptions filed by the Criminal Justice Standards and Training Commission were considered by the Hearing Officer in Mr. Bradley's case, we are left with no possible conclusion other than the Commission simply disagreed with the Hearing Officer's assessment of the seriousness of the offense. The petitioner's statement in his brief that "in the case at bar the Commission relied upon factors which were not considered by the Hearing Officer in reaching his penalty recommendation" simply is not true, and was found to be so by the First District Court of Appeal.

The petitioner argues at Page 14-17 that since the "three aggravating factors" listed in its' exceptions were not "referenced or discussed by the Hearing Officer in his formulation of the proposed sanction" that they were not taken into consideration by the Hearing Officer in deciding upon an appropriate penalty. This argument was addressed by the Fifth District Court of Appeal in ***Bajrangi v. Department of Business Regulation, 561 So.2d. 410 (Fla. 5th DCA 1990)*** *when, at Page 414, the Court queried:*

> *"Suppose the Hearing Officer does not catalog exhaustively all the facts that form the basis for his or her penalty recommendation? What if the agency changes the penalty by the simple expediency of adding a factor that does not expressly appear in the recommended Final*

Order, such as, in the present case, the need to protect minors from the "evils of alcohol"?"

After a careful analysis of ***Department of Professional Regulation v. Bernal****, 531 So.2d. 967 (Fla. 1988) and several other pertinent cases, the Fifth District concluded that such an approach would not justify changing a recommended penalty where the bottom line is the agency and the Hearing Officer simply disagree about the appropriate penalty. It is important to keep in mind that the First District Court of Appeal has rejected the Commission's argument that the Hearing Officer failed to consider the "three aggravating factors" cited in the Commission's exceptions.*

When all is said and done, there is no escaping the fact that the bottom line in this case is that the Commission and the Hearing Officer simply disagreed about the assessment of the seriousness of Mr. Bradley's offenses. This fact becomes clear when you consider the Commission's statements at Page 16 and 17 of its' brief that the Commission concluded that Mr. Bradley's actions suggested "a pattern of lawlessness and a contempt for right conduct. Unlike the Hearing Officer, the petitioner Commission considered this repeated criminality in evaluating the proper penalty." All of the facts which form the basis of the charges against Mr. Bradley were discussed in detail by the Hearing Officer in his proposed Order. The fact that the petitioner Commission considered the facts to suggest a "pattern of lawlessness", whereas the Hearing Officer apparently did not, can be nothing more than

a disagreement about the seriousness of the offenses.

*Counsel for the petitioner argues that the Commission is somehow imbued with some special power that enables it to evaluate "the number and frequency" of Mr. Bradley's violations, "the consequences" in the case of a fatal shooting of another person, and "the import of Mr. Bradley's "victimization of a professional colleague". First of all, it's an insult to the Hearing Officer's intelligence to argue that he is not competent to assess that type of information which is certainly not of a specialized or technical nature and all of which was duly noted in his findings of fact. Additionally, **F.S. {120.57(1)(b)3** requires that "the division shall assign a Hearing Officer with due regard to the expertise required for the particular matter." Finally, whatever expertise the Commission has in assessing such matters was certainly not evident in the proceeding in which they "rubber stamped" their "staff's" recommendations without the least bit of thought, discussion or reasoned consideration. As the First District Court of Appeal noted in **Hutson v. Casey, 484 So.2d. 1284, (Fla. 1st DCA 1986), F.S. {120.57(1)(b)9,** since renumbered **120.57(1)(b)10:***

> *"the apparent purpose of the above statute, as amended, is to provide some assurance that the agency has gone through a thoughtful process of review and consideration before making any determination to change the recommended penalty."*

*In this case, the Commission simply rubber stamped its' own staff's recommendation that its' [the staff's] exceptions be adopted. Like the Court said in **Bajrangi v. Department of Business Regulations,***

supra:

> *"agencies are strong believers in their own authority. Under **Chapter 120, Florida Statutes,** however, the independent Hearing Officer is an important protection for citizens involved in transactions with the State".*

*The Fifth District Court of Appeal remarked that it realized Hearing Officers sometimes make serious errors and that any mechanical rule that may hamper an agency from correcting such errors is risky. However, the Court concluded that under the statutory scheme set up in **Chapter 120, Florida Statutes,** "the virtue of neutrality is greater than the virtue of expertise." This case is a perfect example of why statutory protections guaranteed by **Chapter 120, Florida Statutes** are needed.*

*No comfort can be gained by the petitioner through its' attempt to analogize **Chapter 120, Florida Statute** proceedings with Florida Bar grievance proceedings. **F.S. {120.57(1)(b)10** sets forth specific criteria for an administrative agency to follow in order to change the recommended penalties of the Hearing Officer. On the other hand, **Fla. Bar Rule of Discipline 3-7.7(c)(6)** simply provides "after review, the Supreme Court of Florida shall enter an appropriate Order or judgment." **Fla. Bar Rule of Discipline 3-7.6(k)(1)** provides that there is a presumption of correctness only as to a referee's findings of fact. There is no presumption of correctiveness as to his recommendations concerning disciplinary measures to be applied.*

*Comparing **Chapter 120, Florida Statutes,** proceedings to*

Florida Bar Grievance proceedings is like comparing apples to oranges.

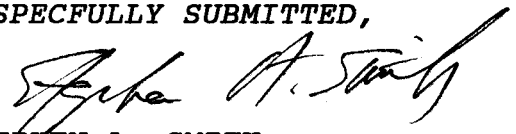
CONCLUSION

If this Court rules that an administrative agency may not increase or decrease a Hearing Officer's recommended penalty unless one or more of the Hearing Officer's Findings of Fact or Conclusions of Law are properly rejected, substituted or amended by the agency, then the First District Court of Appeal's decision in ***Bradley v. Criminal Justice Standards and Training Commission, 16 FLW D-583*** *should be approved and the Order revoking Bradley's certificate should be reversed and remanded with instructions to approve the Hearing Officer's Recommendation.*

Even if this Court finds that one or more of the Hearing Officer's Findings of Fact or Conclusions of Law do not have to be rejected, substituted or amended by the agency in order to justify a change in the recommended penalty, the decision of the First District Court of Appeal in ***Bradley*** *should still be affirmed since all of the factors upon which the Commission's "exceptions" were based were considered by the Hearing Officer and the Commission's decision simply reflects its' difference of opinion or disagreement with the assessment of the seriousness of the offense by the Hearing Officer, made not as a general proposition, but as tailored to the situation of Mr. Bradley in particular. See* ***Bernal v. Department of Professional Regulation, 517 So.2d. 113 (Fla. 3rd DCA 1987)*** *app'd.;* ***Department of Professional Regulation v. Bernal, 531***

So.2d. 967 (Fla. 1988); ***Hanley v. Department of Professional Regulation****, 549 So.2d. 1164 (Fla. 4th DCA 1989).*

RESPECFULLY SUBMITTED,



STEPHEN A. SMITH
STEPHEN A. SMITH, P.A.
FLA. BAR #: 184438
P.O. Box 1792
Lake City, FL 32056-1792
(904) 751-7191

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing has been furnished to the HON. SID J. WHITE, CLERK, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1925 and that a copy has been furnished to JOSEPH S. WHITE, Assistant General Counsel, FDLE, P.O. Box 1489, Tallahassee, FL 32302, by US Mail on this 28 day of May, 1991.

STEPHEN A. SMITH, P.A.

BY: _____
STEPHEN A. SMITH
FLA. BAR #: 184438
P.O. Box 1792
Lake City, FL 32056-1792
(904) 752-7191

ATTORNEY FOR RESPONDENT