IN THE SUPREME COURT
OF FLORIDA

CRIMINAL JUSTICE STANDARDS
AND TRAINING COMMISSION

Petitioner,

vs.

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

ALVIN BRADLEY,

Respondent.

PETITIONER'S INITIAL BRIEF

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ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On April 8, 1988, the Criminal Justice Standards and Training Commission was notified of the Respondent Bradley`s separation from his employment as a correctional officer by the Florida Department of Corrections. The separation from employment was described to be an undesirable separation for misconduct. R at 1. On April 19, 1989, pursuant to notice, the Respondent`s case was presented for a probable cause determination before a Probable Cause Panel of the Criminal Justice Standards and Training Commission. R at 3-14. Upon a finding of probable cause, the Director of the Division of Criminal Justice Standards and Training filed an Administrative Complaint seeking to take disciplinary action against Bradley`s correctional officer certification. The factual allegation of misconduct was that Bradley had committed a battery on Gwendolyn Jones-Holland on September 13, 1987. R at 13, 15-16. The Administrative Complaint was amended on September 21, 1989. The Respondent Bradley was additionally charged with violating correctional officer standards by his improper exhibition of a firearm on December 28, 1986, and by driving under the influence of alcohol on September 13, 1987. R at 17-18.

Bradley responded to the charges by requesting a formal hearing pursuant to Section 120.57(1), Florida Statutes. On September 26, 1989, pursuant to notice, a formal hearing was convened before Hearing Officer Charles C. Adams of the Division of Administrative Hearings in Lake City, Florida. R at 20. The

Commission was represented by the undersigned. The Respondent Bradley was present and represented by his counsel Steven A. Smith. R at 30. The hearing officer heard the testimony of six witnesses and admitted five exhibits. R at 28-140.

On December 6, 1989, Hearing Officer Cave filed a recommended order in the case. R at 141-151. The hearing officer found that the Respondent Bradley had been certified by the Petitioner Commission on December 20, 1985, as a correctional officer. R at 143. On the night of December 27, 1986, the Respondent and a friend, Eddie Goodbread, Jr., went to the American Legion Club in Lake City to socialize. After a time at the club, the Respondent departed with a girlfriend. Goodbread moved the Respondent`s car, parking it on Myrtle Street. Goodbread retained the keys. The Respondent and Goodbread, in the company of two women then went to the home of a friend. Subsequent to this time the two men split up. R at 144.

The Respondent and Goodbread met with one another later in the evening. The Respondent had in his coat pocket a .25 caliber automatic pistol. The Respondent was licensed to carry his weapon. However, his possession of this gun was unrelated to his duties as a correctional officer. R at 144. The Respondent told Goodbread that he (the Respondent) was ready to go home because he had to go to work the next day. Goodbread jokingly told the Respondent that the keys were locked in the Respondent`s car. Although recognizing Goodbread`s jest, the Respondent looked into his car and did not see the keys. Goodbread continued to retain

the keys and persisted in his joking. The Respondent insisted that he was ready to leave and took out his gun, pointing it at Goodbread. Goodbread grabbed the gun unexpectedly and it discharged. Goodbread was shot and died of his wound. R at 145.

As a result of the shooting the Respondent was indicted for exhibition of a firearm in a rude, careless, angry or threatening manner, not in necessary self defense, under Section 790.10, Florida Statutes. The Respondent plead guilty to this charge. He was sentenced to eleven days in jail, fined $176 and placed on probation for one year. The Respondent forfeited his pistol and was forbidden by the court to possess a firearm during his probationary period. R at 145-146.

The hearing officer found that the Respondent Bradley was arrested for driving under the influence of alcoholic beverages on September 13, 1987. R at 146. The Respondent had been stopped by a Columbia County Sheriff`s deputy after driving his car in a reckless manner. The Respondent`s normal faculties had been impaired by his use of alcohol. His breath test results indicated readings of .16% and .15%. R at 147.

The Respondent was taken to the Columbia County Jail as a result of his DUI arrest. While jail Correctional Officer Jones-Holland attempted to fingerprint the Respondent, he twice placed his hand in the area of the officer`s groin. The Respondent had done so knowingly and intentionally. Correctional Officer Jones-Holland did not invite these inappropriate touches. R at 148.

The Respondent was charged with battery on a law enforcement officer a result of his actions. R at 148.

The Respondent entered guilty pleas to DUI and to simple battery. R at 137, 148-149. He was fined $411 and had his driver`s license suspended for six months on the DUI case. The court sentenced the Respondent to a one-year probationary period on the battery charge. R at 149.

The Hearing Officer Cave concluded that the Respondent was guilty of violations of officer standards, as set forth in Section 943.13(7), Florida Statutes, for committing improper exhibition of a firearm and for battery. He concluded that DUI, while reprehensible, was not a violation of officer standards. R at 149-151. The hearing officer recommended a six-month suspension of Bradley`s certification. R at 151.

Both parties filed exceptions to the Hearing Officer`s recommended order. R at 154-158. The Respondent challenged the penalty recommendation as too harsh although he did not propose a specific penalty alternative. R at 154-155. The undersigned likewise took exception to the hearing officer`s recommended penalty and specified three grounds for the exception. The undersigned argued that revocation of certification was the appropriate penalty. R at 156-158.

On April 19, 1990, the Criminal Justice Standards and Training Commission convened to consider the recommended order filed in the Respondent`s case and the exceptions thereto. The Commission adopted the findings of fact and conclusions of law set forth in the recommended order, but rejected the recommended

penalty. The Commission voted to revoke the Respondent Bradley's certification for the reasons set forth in the undersigned's exceptions. The Respondent's exceptions were rejected. R at 160-166. A final order was rendered on July 11, 1990. The Respondent filed a notice of appeal on August 8, 1990. R at 168-171.

On March 1, 1991, the First District Court of Appeal entered its opinion in this cause. Bradley v. Criminal Justice Standards and Training Commission, 16 F.L.W. D617 (Fla. 1st DCA March 1, 1991). The court reversed the Commission's order of revocation of Bradley's certificate and remanded the case with instructions to adopt the hearing officer's recommended penalty.

On March 27, 1991, the First District entered an order granting the "appellant's (sic) motion for certification." (The Appellee Commission had moved for certification.) The Court also withdrew its opinion of March 1 and substituted the March 27 opinion. Bradley v. Criminal Justice Standards and Training Commission, 16 F.L.W. D853 (Fla. 1st DCA March 27, 1991). The court held that the Commission had erred by rejecting the six-month suspension recommended by the hearing officer and revoking Bradley's certification. The court found that the specified grounds for penalty enhancement had been considered by the hearing officer and the Commission's disagreement was only based on the hearing officer's assessment of the seriousness of the offense. Noting that the Commission had adopted the hearing officer's findings of fact and conclusions of law, the court held

that an agency should not reject a hearing officer`s recommended penalty without first properly rejecting, amending or substituting at least one recommended finding of fact or conclusion of law.

The Court certified that its decision was in conflict with decisions of the Third District Court of Appeal. The Third District had allowed agencies to increase the penalty recommended by the hearing officer even though the factual findings and legal conclusions had been fully adopted by the agency. The court opined however that if an agency has no quarrel with a hearing officer`s findings of fact and conclusions of law, any rejection of a recommended penalty must be solely based on the invalid ground of mere disagreement with the hearing officer regarding the assessment of the seriousness of the offense. 16 F.L.W. D853.

On April 17, 1991, the Commission filed its Notice to Invoke Discretionary Jurisdiction before the First District Court of Appeal.

SUMMARY OF ARGUMENT

This Court has jurisdiction, under Article V, Section 3(b)(4), of the Florida Constitution to hear this case. A conflict, certified by the First District Court of Appeal, exists between the First and Fifth Districts on the one hand and the Third and Fourth Districts on the other. The First and Fifth Districts have held that an agency should not reject a hearing officer`s recommended penalty under Section 120.57(1)(b)10., unless it first properly rejects, modifies, or substitutes at least one of the hearing officer`s findings of fact or conclusions of law. The Third and Fourth Districts have permitted agencies to reject a hearing officer`s recommended penalty although the agency adopted fully the hearing officer`s findings of fact and conclusions of law. The Third and Fourth Districts have held this to be proper where the agencies specified reasons which were not duplicative of the hearing officer`s rationale for making the penalty recommendations, which were grounded in the agencies` expertise and discretion and which were supported in the record. In light of the disparity in the decisions of the district courts of appeal on the issue and the frequency of appellate litigation on the issue, this Court should accept this case and resolve the conflict.

The plain meaning of the controlling statute, Section 120.57(1)(b)10., Florida Statutes, reveals no indication that the Legislature intended a precondition to an agency`s lawful rejection of a recommended penalty which was tied to a rejection

of a finding of fact or conclusion of law. This Court has held that legislative intent controls statutory construction and that the intent is primarily determined by the language of the statute. A court should not invoke a limitation or add words which were not placed in the statute by the Legislature.

The First District held that once an agency adopts a hearing officer`s findings of fact and conclusions of law in toto, a rejection of a recommended penalty must necessarily be based solely on improper mere disagreement with the hearing officer`s assessment of the seriousness of the violation. This holding ignores the agency`s ability, based on its expertise in the regulated profession, to recognize significant factors bearing on the penalty which were either omitted by the hearing officer in weighing the penalty or were misapprehended by the hearing officer. In the case at bar, the Commission relied upon factors which were not considered by the hearing officer in reaching his penalty recommendation. Indeed, the hearing officer listed none of the factors which may have given rise to his penalty suggestion in his recommended order. The Commission`s rejection of the penalty recommendation was supported by competent substantial evidence in the record and based on the Commission`s expertise in the profession. This Court has recognized, in attorney discipline cases, the wisdom of a policy which allows a degree of discretion in reviewing recommended penalties, even where no error in the recommended factual findings and legal conclusions is apparent. A similar approach,

in conformance with the criteria set forth in Section 120.57(1)(b)10., should be endorsed by this Court for use by agencies.

ARGUMENT

I. THE SUPREME COURT HAS JURISDICTION TO DECIDE THIS CASE BECAUSE A DIRECT CONFLICT EXISTS BETWEEN THE DISTRICT COURTS OF APPEAL IN THE INTERPRETATION AND APPLICATION OF SECTION 120.57(1)(b)10., FLORIDA STATUTES.

Article V, Section 3(b)(4), Florida Constitution, and Rule 9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure, specify that the Court has discretionary jurisdiction to review a decision of a district court of appeal which is certified by it to be in direct conflict with a decision of another district court of appeal. In the case at bar, the First District Court of Appeal has certified to the Court a matter involving the propriety of an administrative board`s rejection of a hearing officer`s recommended penalty in an administrative disciplinary case. Bradley v. Criminal Justice Standards and Training Commission, 16 F.L.W. D853 (1st DCA March 27, 1991). The First and Fifth Districts have held that an agency generally may not reject a hearing officer`s recommended administrative penalty unless the agency lawfully rejected a finding of fact or conclusion of law as well. The Third and Fourth Districts have approved imposition of enhanced penalties even though the agency adopted the hearing officer`s findings of fact and conclusions of law in toto.

For the reasons discussed herein, the Petitioner would urge the Court to find that the First District Court of Appeal correctly certified a conflict among the district courts of appeal and that the Court has jurisdiction to decide this case.

In 1984, the Legislature amended Section 120.57(1)(b)9., Florida Statutes (1983). Chapter 84-173, Laws of Florida. The amendments regarding an agency's acceptance or rejection of a hearing officer's recommended order specified:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order, but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept ~~or reduce~~ the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

The subparagraph was renumbered 120.57(1)(b)10., in 1986.

The First District Court of Appeal applied the cited statute, as amended, in Britt v. Department of Professional Regulation, 492 So.2d 697 (Fla. 1st DCA 1986). The Board of Medical Examiners' rejected a hearing officer's recommended penalty as "too lenient based on the gravity of the offenses" noting the "potential for harm" and that "the offenses constitute a breach of trust which the patient places with his physician." The court held that the statute permitted agency disagreement as to the penalty recommended by the hearing officer, provided specific reasons for the penalty increase were stated by the agency. The court further held that the board had complied with

the statute in its enhancement of the recommended penalty.

The Third District Court of Appeal, in Bernal v. Department of Professional Regulation, 517 So.2d 113 (Fla. 3rd DCA 1987), held that the statute did not permit, as Britt had held, an agency to merely disagree with the hearing officer in assessment of the appropriate penalty. The Third District certified the conflict with the First District Court of Appeal on this issue.

This Court resolved the conflict in Department of Professional Regulation v. Bernal, 531 So.2d 967 (Fla. 1988). The Court approved the Third District`s construction of the statute and disapproved the First District`s interpretation of the law in Britt.

Since this Court`s 1988 decision in Bernal, the district courts of appeal have again diverged on the application of this statute. The Third District Court of Appeal has decided Pages v. Department of Professional Regulation, 542 So.2d 456 (Fla. 3rd DCA 1989), Grimberg v. Department of Professional Regulation, 542 So.2d 457 (Fla. 3rd DCA 1989), Escobar v. Department of Professional Regulation, 560 So.2d 1355 (Fla. 3rd DCA 1990), Allen v. School Board of Dade County, 571 So.2d 568 (Fla. 3rd DCA 1990), and Johnson v. School Board of Dade County, 16 F.L.W. D1023 (3rd DCA April 16, 1991). In three of these cases, Grimberg, Escobar, and Allen, the Third District affirmed agency actions in which the hearing officer`s recommended penalty was rejected and a greater penalty imposed. In all three, the agencies had fully adopted the hearing officer`s findings of fact and conclusions of law. In each of the three, the Third District

found that the agency had complied with this Court's decision in Bernal. The agencies' reasons for departure were affirmed because they were not duplicative of, nor mere disagreement with, the hearing officer's reasoning, were supported in the record and demonstrated the agencies' expertise and insight into the regulated profession.

Similarly, the Fourth District Court of Appeal, in Jimenez v. Department of Professional Regulation, 556 So.2d 1219 (Fla. 4th DCA 1990), upheld a disciplinary action by the Board of Medical Examiners in which the Board fully adopted the hearing officer's findings of fact and conclusions of law, but imposed a more severe penalty than that recommended by the hearing officer. The court found the reasons cited by the Board to be both supported in the record and valid under this Court's decision in Bernal. However, the Fourth District reversed a disciplinary action ordered by the Board of Nursing in Hanley v. Department of Professional Regulation, 549 So.2d 1164 (Fla. 4th DCA 1989). In Hanley, the district court held that the factors cited by the Board to justify penalty enhancement were all specifically considered by the hearing officer when he made his recommendation. The court held these to be invalid reasons under the Bernal decision. In his dissent, Judge Gunther disagreed and stated his view that the reasons relied upon by the Board were valid.

Conflict between the district courts of appeal emerged when the Fifth District decided Bajrangi v. Department of Business Regulation, 561 So.2d 410 (Fla. 5th DCA 1990). There, the

Department of Business Regulation had rejected a hearing officer's recommended penalty of a three-day suspension of a beverage license and imposed a twenty-day suspension. The agency adopted the hearing officer's findings of fact that the licensee had unlawfully sold an alcoholic beverage to a minor and that this misconduct subjected the licensee to an administrative penalty. However, the agency rejected the hearing officer's conclusion of law that there were no penalty guidelines in such cases.

The court found the rejection of this conclusion of law to be erroneous. The court held that the agency's stated reasons for enhancing the penalty were legally insufficient under the Bernal case. The court then went on to state:

> Given that the hearing officer and the agency should always be working from the same record, the circumstances under which the agency would be justified in substituting its judgment concerning the appropriate penalty for that of the hearing officer should not arise except where 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. We cannot say that no valid reason for deviation from the recommended penalty would ever be possible otherwise, but such instances are likely to be rare. The hearing officer's penalty recommendation in this case should be sustained.

The Fifth District's decision, in Bajrangi, established a virtual prerequisite to an agency's rejection of hearing officer recommended penalties. The Third District's decisions in Grimberg (supra), Escobar (supra), and Allen (supra), as well as the Fourth District's decision in Jimenez (supra) illustrate that, in those districts, an agency is not required to first

properly reject a hearing officer's factual finding or legal conclusion in order to legally enhance the recommended penalty.

The First District Court of Appeal embraced the Fifth District's rule in Bajrangi in its decision in the instant case:

> An agency should not reject the recommended penalty without properly rejecting, amending or substituting at least one recommended finding of fact or conclusion of law. 16 F.L.W. at D853.

The First District had decided three other post-Bernal cases prior to its adoption of the Bajrangi rule. Lombillo v. Department of Professional Regulation, 537 So.2d 1079 (Fla. 1st DCA 1989); Ticktin v. Department of Professional Regulation, 550 So.2d 518 (Fla. 1st DCA 1989); Sakhuja v. Department of Professional Regulation, 568 So.2d 486 (Fla. 1st DCA 1990).

While the decisions of the Second District Court of Appeal do not clearly align it with either of the two divergent schools of thought on this issue, Judge Altenbernd's dissent in Hambley v. Department of Professional Regulation, 568 So.2d 970 (Fla. 2nd DCA 1990), suggests that the Second District has gravitated toward the approach taken by the Fifth District in Bajrangi and the First District's view in the case at bar. See also: O'Connor v. Department of Professional Regulation, 566 So.2d 549 (Fla. 2nd DCA 1990); Pluto v. Department of Professional Regulation, 538 So.2d 539 (Fla. 2nd DCA 1989).

In light of the conflict among the district courts of appeal on the application of the cited statute and the proliferation of appellate litigation on the issue, this Court should find that it has jurisdiction to hear this case under Article V, Section

3(b)(4), Florida Constitution, and should resolve the conflict.

II. THE FIRST AND FIFTH DISTRICT COURTS OF APPEAL HAVE ESTABLISHED A PREREQUISITE TO AN AGENCY`S PROPER REJECTION OF A RECOMMENDED PENALTY WHICH IS UNSUPPORTED BY THE PLAIN MEANING OF THE CONTROLLING STATUTE.

The resolution of this case is principally an exercise in statutory construction. The statute in question, Section 120.57(1)(b)10., Florida Statutes, sets forth the criteria under which an administrative agency may reject, in whole or in part, a hearing officer`s recommended order. The statute provides that the agency may reject or modify conclusions of law and specifies no prerequisite for doing so. Regarding rejection of findings of fact, the Legislature requires the agency to determine from a complete review of the record, and to state with particularity, that the factual findings were either not based on competent substantial evidence or that the proceedings upon which the findings were based did not comply with the essential requirements of law. With respect to recommended penalties, the statute provides:

> The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

In St. Petersburg Bank and Trust v. Hamm, 414 So.2d 1071 (Fla. 1982), this Court restated the rule that, although legislative intent controls statutory construction, the intent is primarily determined from the language of the statute. The court said "The plain meaning of the statutory language is the first consideration." 414 So.2d at 1073. The purpose of the "plain

meaning" rule of statutory construction was explained in Thayer v. State, 335 So.2d 815 (Fla. 1976). The Court said that the Legislature must be assumed to be aware of the meaning of the words it selected and to have conveyed its intent by the use of those words. 335 So.2d at 815. In the absence of ambiguity in a statute, a court will not examine matters extrinsic to the statute. Shelby Mutual Insurance Company v. Smith, 556 So.2d 393, 395 (Fla. 1990).

In Chaffee v. Miami Transfer Company, 288 So.2d 209 (Fla. 1974), the Court stated that it cannot invoke a limitation or add words to a statute which were not placed there by the Legislature. Accord: Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984). Finally, the courts have held that the use of different terms in different portions of the same statute is strong evidence that the Legislature intended different meanings. Department of Professional Regulation v. Durrani, 455 So.2d 515, 518 (Fla. 1st DCA 1984); Ocasio v. Bureau of Crimes Compensation, 408 So.2d 751 (Fla. 3rd DCA 1982); 49 Fla. Jur. 2d Statutes, Section 133. Here, the statute in question contains different terms to describe an agency's proper rejection of the three components of a recommended order.

A reading of Section 120.57(1)(b)10, discloses that the criteria for an agency's rejection of a conclusion of law is distinctly different from that applicable to the rejection of a finding of fact. Likewise, the requirements of a proper rejection of a recommended penalty are distinguished from the manner in which facts or legal conclusions may be rejected.

The Fifth and First Districts have construed the statute to essentially require a proper rejection of a finding of fact or a conclusion of law as a prerequisite to rejection of a recommended penalty. This is erroneous. The plain meaning of the words used by the Legislature discloses no intent to create such a linkage. In the legislative language regarding rejection of a penalty, neither the phrase "its reasons therefor" nor "justifying the action," by their plain meaning, suggest a predicate reference to the preceding language in the statute regarding findings of fact or conclusions of law. One might imagine any number of words or phrases which the Legislature could have chosen, had the prerequisite for penalty rejection set forth in the Bajrangi and Bradley decisions been its intention. Just as the plain meaning of the statute does not require proper rejection of a conclusion of law in order for an agency to lawfully reject a factual finding, its plain meaning establishes no prerequisite of rejection of facts or legal conclusions as a predicate to rejection of a recommended penalty.

The Fifth District`s rule as set forth in Bajrangi as well as the First District`s adoption of the rule in Bradley are grounded upon a misplaced reliance on this Court`s decision in Bernal. This Court`s decision in Bernal does not support the Bajrangi court`s rule. In Bernal, this Court said:

> While we approve the [Third] district court of appeal`s decision in this case, we are mindful that the medical board has great expertise and discretion. Reviewing courts cannot substitute their judgment for a board`s determination if valid reasons for the board`s order exist in the record and reference is made thereto. See Florida Real

Estate Commission v. Webb, 367 So.2d 201 (Fla. 1978). 531 So.2d at 968.

If this Court had intended by this statement that the board could only use its expertise and discretion in cases where the hearing officer had committed error in the formulation of the facts or conclusions of law, the Court would have so stated. Little purpose would be served by acknowledging the board's discretion and insight into the regulated profession if that discretion and insight could be so rarely brought to bear.

By adopting the prerequisite to penalty rejection set forth in the Bajrangi and Bradley decisions, the Fifth and First Districts have invoked a limitation which was not placed in the statute by the Legislature. The rule expressed by this Court in Chaffee (supra), prohibits this. Accordingly, this Court should hold that the cited decisions of the district courts contradicted the plain meaning of the controlling statute and represented a departure from the principles articulated by this Court in Bernal.

III. THE PETITIONER COMMISSION ACTED LAWFULLY IN REJECTING A HEARING OFFICER`S RECOMMENDED PENALTY WHERE THE PETITIONER COMMISSION RELIED ON REASONS WHICH WERE NOT CONSIDERED BY THE HEARING OFFICER IN FORMULATING THE PENALTY RECOMMENDATION BUT WHICH WERE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD AND WERE GROUNDED IN THE PETITIONER COMMISSION`S EXPERTISE AND DISCRETION.

The Petitioner Commission adopted fully the hearing officer`s findings of fact and conclusions of law. The Petitioner Commission, however, rejected the hearing officer`s penalty recommendation of a six-month suspension. Instead, the Petitioner Commission revoked Bradley`s officer certification. The Petitioner Commission adopted the undersigned`s exceptions to the recommended penalty as its reasons for rejection of the penalty suggested by the hearing officer. R at 165-166. The reasons relied upon by the Petitioner Commission were in conformance with the requirements of Section 120.57(1)(b)10. The reasons adopted by the Petitioner Commission for penalty enhancement were stated with particularity, and the justifications set forth referenced the record. R at 156-158. Further, the Petitioner Commission`s decision was in keeping with this Court`s ruling in Bernal.

In Department of Professional Regulation v. Bernal, 531 So.2d 967 (Fla. 1988), this Court addressed the issue of an agency`s rejection of a hearing officer`s recommended penalty under Section 120.57(1)(b)10., for the first time since the amendment of the statute in 1984. The Court upheld the Third District`s decision in Bernal v. Department of Professional

Regulation, 517 So.2d 113 (Fla. 3rd DCA 1987). In Bernal, the Department of Professional Regulation, Board of Medicine had filed an administrative complaint against a physician, seeking disciplinary action. After a formal hearing, the hearing officer filed a recommended order which found the physician, guilty of three violations. The district court of appeal found that the hearing officer gave "full consideration of the relevant factors" in reaching a penalty recommendation. The Bernal hearing officer`s recommended order stated:

> In determining the appropriate penalty, I have given particular consideration to the nature of the violations; to the fact that although unlicensed practice of medicine was permitted, there was no evidence of harm to any patient; and to the fact that Respondent appears to be an elderly man who is not in the best of health . . . Bernal at 517 So.2d 114-115, footnote 1.

The board rejected the hearing officer`s recommend penalty of a ninety-day suspension and probation, and entered an order of revocation. The board specified two reasons for this action. The first was that the Respondent had been untruthful during his testimony before the hearing officer. The court found an enhanced penalty based upon this ground to be unlawful. As a second justification for rejection of the penalty recommendation, the board, without citing to the record, specified its difference of opinion with the hearing officer as to the seriousness of the offense, by stating that patients had been endangered by the fact that unlicensed persons were practicing medicine. The Third District found that a mere disagreement of this kind could not justify the board`s substitution of penalty.

This Court, while approving the Third District's holding, cautioned that the agency's expertise and discretion should be acknowledged by a reviewing court. If valid reasons exist in the record and the agency makes reference to such reasons in its order, a reviewing court should not substitute its judgment for that of the agency on matters of penalty.

Unlike the recommended order reviewed in Bernal (supra), the portion of the recommended order in the instant case which specified the penalty to be applied contains no discussion of the rationale upon which it is based. R at 151. No aggravating or mitigating circumstances were set forth or assessed by the hearing officer in making the penalty recommendation. This Court should decline to engage in conjecture and make presumptions about what factors were considered and how they may have been reconciled by the hearing officer. Rather, this Court should hold that, the Petitioner Commission correctly reevaluated the recommended penalty based on factors not considered by the hearing officer but supported by competent substantial evidence in the record.

The Petitioner Commission, by adopting the undersigned's exceptions to the penalty set forth in the recommended order, considered three aggravating factors. R at 156-158, 165-167. As previously discussed, neither these factors, nor any others, were referenced or discussed by the hearing officer in his formulation of the proposed sanction.

The first aggravating factor relied upon by the Commission was the existence of two violations of officer minimum standards

and their significance in light of the amount of time, less than one year, between their respective occurrences. The dates of the incidents of the Respondent Bradley`s misconduct, December 27-28, 1986, and September 13, 1987, are supported in the record. R at 24, 44, 52-43, 68, 111, 135, 140. The Petitioner Commission`s expertise and discretion in evaluating the number and frequency of these violations in the context of the correctional officer profession should be given great weight by the court.

The second aggravating factor relied upon by the Commission dealt with two issues: the consequences of the misconduct, in the case of the fatal shooting of another person; and the import of Respondent Bradley`s victimization of a professional colleague, in the case of the second incident. The hearing officer provided no indication in his recommended order that these issues were examined in arriving at a recommended order.

The Commission requires all persons entering the certified correctional officer field to demonstrate proficient and safe use of firearms as part of their basic training. See: Sections 943.13(9), 943.131(1)(a), 943.17(1)(a), Florida Statutes; Rule 11B-29.002(3)(b)2., Florida Administrative Code. In the record, Bradley conceded that his own correctional officer training in 1984 had included forty hours of training in the use of firearms with emphasis on firearms safety and the treatment of these weapons with the respect their use demands. R at 108-109. The hearing officer`s recommended order contains no discussion of Bradley`s training in the use of firearms or of how this factor should be viewed in the selection of the proper penalty in the

case.

The Petitioner Commission cited the Respondent Bradley`s misconduct involving a firearm and its deadly consequences for another person as being egregious and forming a partial basis for penalty enhancement. Not only was Bradley`s use of his pistol on December 27, 1986, criminally improper, it represented a complete lapse on his part with regard to a basic tenet of his profession. Stated simply, had he observed the rudiments of firearm safety taught to him in the corrections academy only two years before, Eddie Goodbread, Jr., would not have been shot to death on December 27, 1986. The severity of this lapse is a matter for which the Petitioner Commission, which established the professional standards regarding officer firearm skills and use, has unique insight and expertise.

Similarly, the hearing officer failed to consider the professional implications of Bradley`s victimization of another correctional officer. His touching of Correctional Officer Jacklyn Jones-Holland twice in the groin area without her consent is amply borne out in the record. R at 33, 36, 38, 138-140. In addition to being a criminal act, the Petitioner Commission found this misconduct by Bradley to be most egregious. The Petitioner Commission`s expertise in the corrections profession provided insight into the gravity of a correctional officer having subjected a professional peer to a demeaning affront.

The third reason cited by the Petitioner Commission for enhancing the penalty in this case was the Respondent`s lack of respect for the law as demonstrated by his having committed three

crimes. R at 136-138. This, the Petitioner Commission found, suggests 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.

Correctional officers are responsible for the "supervision, protection, care, custody, and control, or investigation, of inmates within a correctional institution." Section 943.10(2), Florida Statutes. Those who maintain the incarceration of criminals in Florida's prisons must not themselves become repeated violators of the criminal law. There can be few forms of hypocrisy more repugnant to the public conscience. Of law enforcement officers, whose professional standards under Section 943.13 mirror those of the correctional profession, the Fifth District Court of Appeal said:

> . . . police officers who are sworn to enforce the laws lose credibility and public confidence if they violate the very laws they are sworn to enforce. The City therefore has a right to insist that its law enforcers not be law breakers. City of Palm Beach v. Bauman, 475 So.2d 1322, 1326 (Fla. 5th DCA 1985)

Absent any consideration of this ground in the formulation for the recommended enhancement of penalty by the hearing officer, the Petitioner Commission should be permitted to assess it, apply their expertise, and impose the proper penalty.

The Petitioner Commission's reasons for increasing the penalty in this case are sustainable on the same grounds as those approved in Grimberg v. Department of Professional Regulation, 542 So.2d 457 (Fla. 3rd DCA 1989), Escobar v. Department of

Professional Regulation, 560 So.2d 1355 (Fla. 3rd DCA 1990), Allen v. School Board of Dade County, 571 So.2d 568 (Fla. 3rd DCA 1990) and Jimenez v. Department of Professional Regulation, 556 So.2d 1219 (Fla. 4th DCA 1990). In each of those cases, as here, the grounds cited for penalty enhancement were specific, were not duplicative of the hearing officer`s reasoning in reaching his or her penalty recommendation and were based on the agency`s expertise in the regulated profession--an expertise and insight not shared by the hearing officer. In a dissent in Hambley v. Department of Professional Regulation, 568 So.2d 970, 971 (Fla. 2nd DCA 1990), critical of the Fifth District`s decision in Bajrangi, Judge Altenbernd observed:

> Although hearing officers are entitled to substantial deference, they are judicial generalists who are trained in the law but not necessarily in any specific profession. The various administrative boards have far greater expertise in their designated specialties and should be permitted to develop policy concerning penalties within their professions.

If the approach adopted in the Fifth and First Districts were to become the law of Florida, an agency would be effectively compelled to accept a hearing officer`s recommended penalty at face value without any explanation as to why the penalty was considered appropriate by the hearing officer, so long as no error in the hearing officer`s fact finding or legal conclusions was apparent. The Legislature surely did not intend to confer carte blanche to the hearing officer in setting administrative penalties and thereby wrest from the boards the primary responsibility for professional discipline.

The wisdom of a policy in which a professional licensing board may be permitted to adopt a hearing officer`s findings of fact and conclusions of law, yet retain some ability to impose a penalty greater than that recommended by the hearing officer is borne out by this Court`s decisions in attorney discipline cases. It is true that procedurally the instant case is governed by Chapter 120, Florida Statutes, whereas procedure in attorney discipline cases is regulated by Rule 3-7, Rules Regulating the Florida Bar. However, the means by which this Court and the Criminal Justice Standards and Training Commission decide disciplinary matters regarding instances of professional misconduct in their respective professions are quite similar. This Court receives a referee`s report which contains recommended findings of fact and conclusions of law and, if the attorney is found guilty of a violation, a recommended penalty. The Commission is forwarded a Department of Administration, Division of Administrative Hearings hearing officer`s recommended order, which is composed of the same elements. Both referees in attorney discipline cases and hearing officers in Commission cases make their recommendations upon the evidence and testimony presented at the hearing below.

An additional similarity lies in the fact that this Court, like the Commission, may find itself in agreement with the recommended factual findings and legal conclusions, in a given case, but find fault with the recommended penalty. This Court has recognized that in such situations it bears the ultimate responsibility for discipline of the members of the legal

profession in Florida. The Florida Bar v. Anderson, 538 So.2d 852, 854 (Fla. 1989). Accordingly, this Court is not bound by the referee's recommendation for discipline. The Florida Bar v. Weaver, 356 So.2d 797, 799 (Fla. 1978).

In a number of recent cases, the Court has found it necessary to impose upon an attorney a penalty of greater severity than that recommended by the referee. In each of these cases, the Court concurred with the referee's findings of fact and conclusions of law. The Florida Bar v. Kaplan, 16 F.L.W. S212 (Fla. March 14, 1991); The Florida Bar v. Richardson, 574 So.2d 60 (Fla. 1990); The Florida Bar v. Farbstein, 570 So.2d 933 (Fla. 1990); The Florida Bar v. Price, 569 So.2d 1261 (Fla. 1990); The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990); The Florida Bar v. Golden, 566 So.2d 1286 (Fla. 1990); The Florida Bar v. Kirkpatrick, 567 So.2d 1377 (Fla. 1990); The Florida Bar v. Blunt, 564 So.2d 129 (Fla. 1990); The Florida Bar v. Roth, 564 So.2d 130 (Fla. 1990); The Florida Bar v. Kickliter, 559 So.2d 1123 (Fla. 1990).

The Court's decisions in these cases assured that the discipline imposed was fair and was consistent with previous disciplinary action imposed on others for similar misconduct. The penalties imposed by the Court also reflected a degree of severity sufficient to serve as a deterrent to others. The Florida Bar v. Anderson (supra). In taking these actions, the Court assumed its responsibility under Article V, Section 15, of the Florida Constitution. The Court recognized that it, not the referee, must make the final decision.

The Commission, like this Court, is charged with the responsibility for admission and discipline of members of a profession. Section 943.12(3), Florida Statutes. The Legislature declared its intent in Section 943.085(3).

> It is the further intent of the Legislature that the Criminal Justice Standards Training Commission, in the execution of its powers, duties, and functions, actively provide statewide leadership in the establishment, implementation, and evaluation of criminal justice standards and training for all law enforcement officers, correctional officers, and correctional probation officers.

The course charted by the First and Fifth Districts would require the Commission to abdicate, in substantial measure, the responsibility for professional discipline to the hearing officers of the Department of Administration, Division of Administrative Hearings. The Petitioner Commission in no wise suggests that the Division of Administrative Hearings utilizes any but learned and experienced attorneys. However, like this Court the Petitioner Commission recognizes that a hearing officer or a referee lacks expertise and insight into the standards of the regulated profession. Sound policy dictates that the Petitioner Commission be permitted to impose disciplinary action in a manner consistent with this Court`s decision in Bernal, yet unfettered by an overly restrictive rule as proposed by the Bajrangi and Bradley courts.

This Court should hold that the Petitioner Commission acted within its discretion in rejecting the recommended penalty of the hearing officer and imposing the penalty of revocation and, in so

doing, conformed to the requirements of Section 120.57(1)(b)10., and Bernal.

CONCLUSION

The Petitioner, Criminal Justice Standards and Training Commission, urges this Court to reverse the holding of the First District Court of Appeal and find that the proposition that an agency should first properly reject, modify, amend or substitute a finding of fact or conclusion of law in order to reject a recommended penalty is erroneous and is unsupported by Section 120.57(1)(b)10., or this Court's decision in Bernal. The Petitioner Commission asks this Court to affirm the Commission's rejection of the recommended penalty in this case as a proper exercise of discretion and agency expertise in conformance with this Court's decision in Bernal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed overnight delivery by Federal Express to Stephen A. Smith, Esquire, Post Office Box 1792, 101 East Madison Street, Lake City, Florida 32056-1792.

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