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 REPLY BRIEF

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SUMMARY OF ARGUMENT

In his Answer Brief, the Respondent Bradley advanced the theory that the decisions of the Third District Court of Appeal which uphold and agency`s proper rejection of a hearing officer`s recommended penalty establish a rule that the agency must first reject or modify "de facto" a factual finding or legal conclusion. A review of the opinions cited by the Respondent, together with other decisions on this issue demonstrate that the Respondent`s theory is unsupported in the law.

The Respondent Bradley also asserted that the hearing officer below was cognizant of the facts of the case. As a result, the Respondent submitted, it must be presumed that the hearing officer specifically considered all the facts when he made his penalty recommendation. In his recommended order entered below, the hearing officer failed to articulate any reasons for his recommended penalty. In the absence of any listed reasons for the recommendation, it is highly speculative to conclude that the hearing officer specifically considered the grounds relied upon by the Petitioner Commissioner to enhance the penalty, merely because the hearing officer knew the facts of the case. This Court should refuse to engage in such conjecture. In the absence of any reasoned penalty recommendation from a hearing officer, an agency should be permitted to utilize its discretion to impose a lawful penalty dictated by its expertise.

I. THE DECISIONS OF THE THIRD DISTRICT COURT OF APPEAL DO NOT SUPPORT A THEORY THAT AN AGENCY MUST REJECT "DE FACTO" A HEARING OFFICER'S FINDING OF FACT OR CONCLUSION OF LAW IN ORDER TO LAWFULLY INCREASE THE RECOMMENDED PENALTY.

The Respondent Bradley in his Answer Brief, did not dispute the Petitioner Commission's position that this Court has jurisdiction to hear this case due to a conflict among the district courts of appeal. Petitioner's Initial Brief at pp. 1-7; Respondent's Answer Brief at pp. 7, 10. Additionally, the Respondent Bradley raised no argument in opposition to the Petitioner Commissioner's theory that the precondition to an agency's rejection of a hearing officer's recommended penalty established by the First and Fifth District Courts of Appeal was unsupported by the plain meaning of the controlling statute. Petitioner's Initial Brief at pp. 8-11; Respondent's Answer Brief.

Curiously, although allowing in his brief that conflict exists among the districts on the salient issue in this case, the Respondent Bradley proceeded to attempt to harmonize decisions of the Third District Court of Appeal with those of the First and Fifth Districts. Respondent's Answer Brief at pp. 8-11. Specifically, the Respondent Bradley appeared to argue that the decisions of the Third District in 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), can be reconciled with the opinions of the First and Fifth Districts in Bradley v. Criminal Justice Standards and Training, 577 So.2d 638 (Fla. 1st DCA 1991) and Bajrangi v.

Department of Business Regulation, 561 So.2d 410 (Fla. 5th DCA 1990). The Respondent submitted that in Allen (supra) and Grimberg (supra), the agencies had rejected "de facto" a factual finding or legal conclusion prior to rejecting the hearing officer`s recommended penalty. This, the Respondent implied, was consistent with the prerequisite to penalty rejection set forth by the Bradley and Bajrangi courts.

The Respondent argued that in the Allen case, the school board had implicitly rejected a finding of fact. This finding, the Respondent submitted, was that the teacher could be returned to an assignment isolated from students. The opinion suggests otherwise. The court stated that the school board adopted and approved the hearing officer`s findings of fact and conclusions of law. 571 So.2d at 569. A reading of the opinion suggests that the hearing officer made no findings of fact regarding the board`s ability to place the teacher in a position which did not put him in daily contact with students. The hearing officer merely recommended that the teacher be so assigned upon returning to work. Accordingly, no "de facto" rejection of a finding of fact occurred in the Allen case.

The Respondent argued that in Grimberg, the agency had rejected a conclusion of law by the hearing officer. The opinion reveals no indication that a legal conclusion of the hearing officer was rejected expressly or tacitly by the board`s action. On the contrary, the only justification given by the agency for its rejection of the penalty was the hearing officer`s lack of appreciation for the gravity of a physician`s inability to make

an accurate diagnosis. The opinion does not specify what penalty was recommended by the hearing officer. It is apparent that the recommended penalty was more lenient than that imposed by the board. The enhanced penalty ordered by the board, a suspension of conditional duration, was acknowledged by the court to be within the lawful range permitted under the controlling statute. Section 458.331(3), Florida Statutes (1987). The language of the opinion does not disclose, as the Respondent herein argued, that the board disagreed with the hearing officer`s construction or application of the cited statute.

The Respondent Bradley`s theory that a "de facto" rejection, substitution or amendment of a finding of fact or conclusion of law exists in the case law as a precondition to the rejection of a hearing officer`s recommended penalty is further eroded by the decisions in Escobar v. Department of Professional Regulation, 560 So.2d 1355 (Fla. 3rd DCA 1990) and Jimenez v. Department of Professional Regulation, 556 So.2d 1219 (Fla. 4th DCA 1990). In these cases, to an even greater degree than in Allen and Grimberg, there is no suggestion that the agencies, expressly or implicitly, rejected any of the hearing officer`s factual findings or conclusions of law prior to increasing the recommended penalty. Consequently, the Respondent Bradley`s "de facto" rejection theory must fail. What remains is a prerequisite to an agency`s rejection of a hearing officer`s recommended penalty, established in Bajrangi and embraced in Bradley, which is unsupported by the plain meaning of the controlling statute.

II. WHERE A HEARING OFFICER MAKES PENALTY RECOMMENDATION TO AN AGENCY DEVOID OF ANY STATED GROUNDS FOR THE PENALTY RECOMMENDATION, A REVIEWING COURT SHOULD DECLINE TO SPECULATE AS TO THE GROUNDS RELIED UPON BY THE HEARING OFFICER.

The Respondent Bradley in his Answer Brief did not dispute the Petitioner Commission`s assertion that the hearing officer below failed to articulate any reasons for the penalty recommendation in the recommended order. R at 141-153; Petitioner`s Initial Brief at p. 14; Respondent`s Answer Brief at pp. 12-21. Citing the First District`s opinion in the instant case, the Respondent Bradley maintained, however, that each of the factors relied upon by the Petitioner Commission for penalty enhancement was specifically considered by the hearing officer. Respondent`s Answer Brief at p. 13; Bradley v. Criminal Justice Standards and Training Commission, 577 So.2d 638, 639 (Fla. 1st DCA 1991).

The Respondent Bradley`s argument suggests that since the facts underlying the grounds cited by the Commission for penalty enhancement were known to the hearing officer, this Court must presume that the hearing officer properly considered all these grounds in arriving at the penalty recommendation. Respondent`s Answer Brief at pp. 14-17. The Respondent Bradley`s argument calls for a substantial leap of faith. This Court should decline to engage in conjecture and speculation concerning how the hearing officer arrived at his penalty recommendation.

The Respondent Bradley attempts to equate the hearing officer`s cognizance of the facts of the case with proper examination of aggravating and mitigating circumstances in

arriving at a penalty recommendation. However, awareness of a fact and application of that fact as a mitigating or aggravating circumstance are two entirely different processes.

The Respondent Bradley correctly points out that the hearing officer was aware of the dates upon which the misconduct was committed. Respondent`s Answer Brief at p. 14; R at 144-149. However, this Court, like the Commission, is left to guess how, if at all, the timing of Bradley`s misconduct influenced the hearing officer`s penalty recommendation. Perhaps the hearing officer considered the passage of almost nine months between the instances of misconduct favorably as being so long a period of time as to effectively dissipate any cumulative effect and mitigate the penalty. On the other hand, maybe the hearing officer viewed nine months as an unacceptably short time between instances of misconduct, considering it an aggravating factor. Alternatively, the hearing officer may have felt that the timing of Bradley`s instances of misconduct was innocuous and had no bearing on the formulation of the penalty.

Similarly, this Court is left to wonder whether the hearing officer considered Bradley`s officer training in firearms safety and proficiency in evaluating the gravity of the fatal consequences of Bradley`s improper exhibition of a firearm. R at 108-109. It is possible that hearing officer, like the Commission, viewed such cavalier handling of a loaded gun by one specifically trained to know better as an egregious aggravating circumstance. It is equally possible that the hearing officer saw no linkage between Bradley`s firearms training and the

penalty recommendation.

Clearly, the hearing officer knew that the victim of the Respondent`s September 13, 1987, misconduct was, like the Respondent Bradley, a correctional officer. R at 147. What remains unknown is whether the hearing officer considered Bradley`s inappropriate touching of another person`s groin area to be more or less egregious because that person was a professional peer engaged in the performance of their official duties. One could easily presume that the status of the victim as a correctional officer played no part in the hearing officer`s assessment of the appropriate penalty.

Finally, it is obvious that the hearing officer recognized that Bradley committed three crimes. R at 149-150. But, there is no indication by the hearing officer as to how many crimes one must commit before one`s respect for the law becomes suspect. Perhaps the hearing officer, unlike the Petitioner, considered the commission of three crimes to be an insufficient number to establish a pattern of lawlessness and contempt for right conduct. R at 157, 166. Conversely, the hearing officer may have viewed a person who committed three crimes to be a scofflaw. Whether Bradley`s status as an officer influenced the hearing officer`s assessment process is unknown. Lacking any discussion by the hearing officer in his recommended order, it is unclear whether the hearing officer considered repeated criminality to be more or less egregious if committed by an officer. Possibly, the fact that Bradley was an officer at the time of his misconduct may not have been viewed at all as factor in arriving at the

recommended penalty.

Acceptance of the Respondent Bradley`s argument requires that this Court assume that the hearing officer specifically considered each of these factors, in the context of penalty assessment, as either a mitigating circumstance or an aggravating circumstance. The Court must also dismiss the possibility that the hearing officer may have failed to consider any of these factors in arriving at his penalty recommendation because he viewed them as neutral and therefore having no bearing on the penalty. The Respondent Bradley would have this Court require the Criminal Justice Standards and Training Commission to blindly adopt a hearing officer`s penalty recommendation in total ignorance of its premise. Even the Fifth District`s decision in Bajrangi v. Department of Business Regulation, 561 So.2d 410 (Fla. 5th DCA 1990), cited by the Respondent, does not require such an abdication of a board`s responsibility for professional discipline to a hearing officer. Similarly, this Court`s decision in Department of Professional Regulation v. Bernal, 531 So.2d 967 (Fla. 1988) does not require a board to adopt a hearing officer`s recommended penalty which is devoid of any explanation or rationale, to presume that the hearing officer must have properly considered all pertinent factors in reaching the proposed penalty and to further assume that the hearing officer did not omit nor misconstrue any of the factors which related to the evaluation of the appropriate penalty. Nor does this Court`s decision in Bernal require a board to set its expertise aside when critical factors bearings on the penalty are ignored or

treated innocuously by the hearing officer.

The better approach, advocated by the Petitioner Commission, would be to recognize that a professional licensing board should not be compelled to adopt a recommended penalty on its face, in the absence of errors in the hearing officer`s findings of fact or conclusions of law. The board should be allowed to examine the reasons cited by the hearing officer to support the penalty recommendation. The board should be permitted, if valid reasons exist which are supported by the record, to reject the penalty recommendation and substitute an appropriate penalty based on the board`s expertise and discretion. Bernal (supra), Allen v. School Board of Dade County, 571 So.2d 568 (Fla. 3rd DCA 1990); Escobar v. Department of Professional Regulation, 560 So.2d 1355 (Fla. 3rd DCA 1990); Grimberg v. Department of Professional Regulation, 542 So.2d 457 (Fla. 3rd DCA 1989). Where the hearing officer gives no reasons for the penalty recommended, the board should not be constrained to a presumption of hearing officer infallibility. If valid aggravating circumstances which are supported in the record require the board to impose a greater penalty, the board`s discretion to do so should be recognized. See: Florida Real Estate Commission v. Webb, 367 So.2d 201 (Fla. 1978).

In his brief, the Respondent Bradley cites the brevity of the record of the final hearing before the Commission as indicative of a lack of thoughtful consideration by the Commission prior to the adoption of the undersigned`s exceptions. Respondent`s Answer Brief at p. 17; R at 159-163. First, the

abbreviated nature of the final hearing is owed in part to the Respondent`s failure to appear at the hearing. R at 159-160. Second, contrary to the Respondent`s assumption, the lack of discussion and controversy among Commission members on the penalty issue demonstrates the Commission`s expertise and insight in the profession, not the absence of it. Put simply, there was no need to debate the obvious.

Finally, the Respondent Bradley argued that any comparison between this Court`s modification of recommended penalties in Bar discipline cases and a board`s rejection of a hearing officer`s recommended penalty is invalid. Respondent`s Answer Brief, at pp. 18-19. While certain procedural distinctions may be drawn between the two, there can be no denying that in each, cases will arise in which the referee`s or the hearing officer`s views on the penalty should not be accepted. This is one of those cases.

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 has been mailed this 19th day of June 1991, via U.S. Mail to Stephen A. Smith, Esquire, Post Office Box 1792, 101 East Madison Street, Lake City, Florida 32056-1792.

JOSEPH S. WHITE