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5-8

IN THE SUPREME COURT
OF FLORIDA

FLORIDA DEPARTMENT OF LAW
ENFORCEMENT, CRIMINAL JUSTICE
STANDARDS AND TRAINING COMMISSION,

Petitioner,

vs.

THEODORE A. HOOD,

Respondent.

Case No.: 78,852
Fifth District Court
of Appeal
Case No.: 90-2158

RESPONDENT'S ANSWER BRIEF

JOSEPH MORRELL, ESQUIRE
Morrell & Williams, P.A.
P.O. Box 540085
Orlando, Florida 32854-0085
Florida Bar No.: 243299
(407) 425-1639

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The Respondent, Theodore A. Hood, resided at 326 Ventura Avenue, Orlando, Florida, from 1979 to present. (R-566)

Respondent has been employed in law enforcement for twenty-five (25) years. (R-507,508) In 1981, Respondent was employed with the Orange County Sheriff's Office, Orange County, Florida, and his employment with Orange County Sheriff's Office terminated on August 18, 1987. (R-1)

The Respondent's termination from Orange County Sheriff's Office was based on allegations that Respondent had tampered with his electric meter to reduce his utility bill (R-6); and he was cited also for his failing to comply with laws, ordinances and rules of the United States, State of Florida, and its subdivisions, i.e., section 812.014 of Florida Statutes. (R-2)

Sometime in 1987, the Respondent was charged with Altering and Tampering with Meter or Apparatus and Theft of utilities, in the County Court of Orange County, Florida under case number MO87-7924. (R-5 and R-25).

On April 20, 1988, Respondent entered a plea of Nolo Contendere to Count II of the Information and Count I of the Information was Nolle Prosequi and the Court withheld adjudication on Count II and it placed Respondent on one (1) year of unsupervised probation for a term of one (1) year. (R-25) Respondent was also ordered to pay restitution, but this is not indicated in the Order of Disposition. (R-25 and 352)

On February 14, 1989, Respondent received a letter from Florida Department of Law Enforcement, Division of Criminal Justice and Training, notifying him of a probable cause hearing regarding revocation of Respondent's Law Enforcement Certification, to be held on April 19, 1989. (R-3) The Respondent submitted his written response for the aforesaid probable cause hearing. (R28-31) On April 29, 1989, Florida Department of Law Enforcement made a finding of probable cause against Respondent. (R-33)

On or about the 9th day of June, 1989, Respondent was served with an Administrative Complaint alleging the following:

> A. "On or about dates between February, 1986 and June, 1987, Respondent, Theodore A. Hood, did then unlawfully use or receive the direct benefit from the use of a utility knowing that such benefits were the result from tampering with a utility meter, for the purpose of avoiding payment." (R-34)
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> B. "On or about dates between February, 1986 and June, 1987, Respondent, Theodore A. Hood, did then unlawfully and willfully alter, tamper with, injure or knowingly suffer to be injured a meter belonging to the Orlando Utilities Commission, in such a manner as to cause loss or damage." (R-34)

The Administrative Complaint further alleges in paragraph three (3) that:

> "The actions of Respondent did violate the provisions of Section 943.1395(5), (6), Florida Statutes and Rule 11B-27.0011(4)(b), Florida Administrative Code, in that Respondent has failed to maintain the qualifications established in Section 943.13(7), Florida Statutes, which require that a law enforcement officer in the State of Florida have good moral character." (R-35)

Respondent submitted his election of rights wherein he denied paragraphs two (2) and three (3) of the Administrative Complaint and requested a formal hearing. (R-36)

The formal hearing requested by Respondent commenced on January 5, 1990. (R-36)

At the hearing below, the parties herein entered into a prehearing stipulation wherein they agreed only that Respondent was certified by Petitioner as a Law Enforcement Officer on August 31, 1971, and he was issued certificate number GF 8215. (R-47)

At the hearing below the Petitioner called as witnesses to testify Robert E. Carney, a trouble shooter for Orlando Utilities, John Minervini who was a first class meter tester with Orlando Utilities, Johnny Wayne Jackson who was then employed as Superintendent of Revenue Protection for Orlando Utilities, Leonard C. Massey, employed by Orlando Utilities as a meter tester, John Tucker who refurbish electric utility meters and Frank Scaletta who is an investigator with the Revenue Protection Section of Orlando Utilities and Edward Mullis who was employed at Orange County Sheriff's Office. (R-51-281) All of these witnesses testified as to the condition of the subject meter and to the probability as to whether or not the subject meter had been tampered with by someone. (R-51-352)

Respondent, also, at the hearing below called as witnesses to testify Malone Stewart, a Lieutenant with the Orange County Sheriff's Office, Lieutenant John Henry Fields, who was a Law Enforcement Officer for thirtythree (33) years at Winter Park Police Department, Daisy W. Wyman, who was a curriculum resource teacher for Orange County Public School System and James Williams, Mayor of Eatonville, Florida. (R-438-454) All of these witnessess testified as to Respondent's good character and reputation in the community. (R-438-456)

In addition, Respondent called as witnessess to testify at the

hearing below were Charles W. McMillian, Jr., who was the electrician called to service Respondent's meter. (R-473-508)

Respondent, in summary, testified at the hearing below he had not tampered with his meter and any damage to his meter was the result of it being burnt and smoking and that his low utility consumption resulted from him working overtime in excess of $10,000.00 during that time period and that his son was in school; further Respondent testified at the hearing below that during the time his utility consumption increase resulted from his use of his spa to assist in healing a cyst near his rectum. (R-507-526)

Moreover, Respondent while under cross examination at the hearing below testified that he entered a plea of Nolo Contendere because he had exhausted his funds paying attorney's fees, he was being ridiculed by the media, his mother was ill, and he wanted to keep his son in college and he didn't want to risk losing his home and he was told by his trial attorney that his plea would not effect his certification. (R-526-536)

The Hearing Officer in his Recommended Order, recommended that Respondent be found guilty of failure to maintain good moral character as required by subsection 943.13(7), Florida Statutes, (1989) and that Respondent's certification be suspended for a period of six (6) months, followed by probationary period of one (1) year, subject to the successful completion of such career development training and counseling as the Commission may impose. (R-596)

The transcript of the Commission's final hearing reveals that Sheriff Doebeck stated:

"...when you take all of that into consideration, I

think that we should go against the Commission's recommendation and I, for one, back the staff's recommendation for revocation. I make a Motion." (R-1134)

This Motion was seconded by Mr. Berg. (R-1134) The Motion passed unanimously. (R-1134)

However, in the Final Order by the Commission, it adopted and incorporated the finding of facts by the Hearing Officer and it adopted the Hearing Officer's conclusion of law, Exceptions to Recommended Order and the penalty recommended by the Hearing Officer was rejected. (R-1137-1138)

From this Final Order the Respondent on October 25, 1990, filed a timely Notice of Appeal to the Fifth District Court of Appeal, State of Florida.

On August 1, 1991, the Fifth District Court of Appeal entered an opinion in Hood v. Florida Department of Law Enforcement, 585 So.2d 957 (Fla. 5th DCA 1991). This Court reversed the Petitioner Commission's order of revocation of Respondent's certification; and held per curiam that "an Administrative agency may not reject the penalty recommended by the Hearing Officer without properly rejecting amending, or substituting for, at least one of the Hearing Officer's findings of fact or conclusions of law."

On September 23, 1991, the Court denied the Commission's motion to certify its decision to this Court as being in direct conflict with the decisions of other district courts.

The instant case was appealed to this Court pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's opinion in the instant case should be affirmed because of the Petitioner Commission's noncompliance with Section 120.57(1)(b)(10), Florida Statutes.

Petitioner argues, rightfully so, that an agency is not required to reject or take exceptions to hearing officer's findings of fact or conclusions of law prior to rejecting the hearing officer recommended penalty and increasing the penalty.

However, Petitioner's argument fails to mention that under Section 120.57(1)(b)(10) it failed to satisfy two requirements of this statute prior to increasing the penalty, to wit: 1) Conduct a complete review of the record and 2) State with particularity it reasons therefor in the order, by citing to the record in justifying its action of increased penalty.

Petitioner Commission in increasing the penalty imposed on Respondent only relied upon the Exceptions to Recommended Order and such exceptions and the final order of the commission made no cite to the record in support of its increase in penalty in contravention of Section 120.57(1)(b)(10), Florida Statutes.

ARGUMENT

WHETHER OR NOT THIS COURT SHOULD AFFIRM THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE BECAUSE OF PETITIONER'S NONCOMPLIANCE WITH SECTION 120.57(1)(b)(10), FLORIDA STATUTES.

The resolution of the instant case shall be born from the rebirth of Criminal Justice Standards and Training Commission vs. Alvin Bradley, No. 77, 767 (Fla. S. Ct. 1992). In Bradley this court has adopted and approved Judge's Alterbernd's dissent in Hambley v. Department of Professional Regulation, Division of Real Estate, 568 So. 2d 970 (Fla. 2d DCA 1990), which provides:

> The majority's opinion and the Fifth District's recent decision in Bajrangi v. Department of Business Regulation 561 So. 2d 410 (Fla. 5th DCA 1990), essentially prohibit an administrative board from altering the recommended penalty unless the board also rejects one of the hearing officer's findings of fact or conclusions of law. Such a rule is not required by section 120.57(1)(b)(10), Florida Statutes (1987)...
>
> Although hearing officers are entitled to substantial deference, they are judicial generalist 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....
>
> Section 120.57(1)(b)(10) merely requires that an agency which chooses to increase or decrease a recommended penalty must: 1) Conduct a review of the complete record, and 2) State with particularity its reasons therefor in the order, by citing to the record in justifying the action. While other povisions of this statute prohibit an agency from modifying a finding of fact which is supported by competent substantial evidence, nothing in the Statute compels the agency to reject a finding of fact or a conclusion of law before it states with particularity its reasons for imposing a different penalty. Id. at 971-74

Apparently, this Court has relied heavily on Judge Alterbernd's dissent in Hambley, supra, and Section 120.57(1)(b)(10), Florida

Statutes, in determining the propriety of an agency's action in increasing or decreasing a recommended penalty.

Pursuant to Section 120.57(1)(b)(10), Petitioner Commission could not have reduced or increased the recommended penalty without a review of the complete record and without stating with particularity its reason therefor in the order, by citing to the record in justifying its action to increase the penalty.

When the Petitioner Commission rejected the recommended order in the instant case, and increased the recommended penalty to revocation of certification it had to review the complete record. The record on appeal is absent of any mention that the Petitioner Commission reviewed the complete record. In the absence of a complete review of the record the Petitioner Commission's final order is in contravention of Section 120.57(1)(b)(10), Florida Statutes.

Moreover, the Petitioner Commission did not state with particularity its reasons in its final order why the recommended penalty was increased other than it adopted Petitioner's Exceptions to Recommended Order. Petitioner Commission did not make any cite to the record, other than reference to the Exceptions to Recommended Order, to justify its action. Again we believe this omission on the part of Petitioner Commission was in contravention of Section 120.57(1)(b)(10), Florida Statutes.

Respondent strongly contends that to allow Petitioner Commission to justify its actions by relying exclusively on the Exceptions to Recommended Order without making any other citation to the record reduces this entire proceeding to a mockery of justice. This contention is illuminated further to the extent the Petitioner Commission's staff,

i.e., its attorney who prosecuted Respondent prepared the Exceptions to Recommended Order. Even if this court finds that the Exceptions to Recommended Order is sufficient to constitute the record for purposes of interpreting Section 120.57(1)(b)(10) it still must scrutinize the absence of any citation to the record in the Exceptions to Recommended Order. In the absence of any citations to the record in the Exceptions to Recommended Order, which was relied on exclusively by the Petitioner Commission, reduces such reliance to a reliance on an opinion without any basis in fact to support it.

In Bernal v. Department of Professional Regulation, Board of Medicine, 517 So. 2d 113 (Fla 3rd DCA 1987) the District Court enunciated that:

> Board of Medicine's stated belief that patients were endangered by fact that unlicensed persons practiced medicine did not justify increasing penalty imposed on licensed physician administratively charged with several counts of assisting practice of medicine by unlicensed persons beyound penalty recommended by hearing officer; stated ground for increasing penalty did not cite record in justifying the action, but simply reflected Board's difference of opinion or disagreement with assessment of seriousness of offense by hearing officer a disagreement which could not justify substitution of judgment of Board for that of hearing officer. Id. at 115 and 116.

In Bernal, supra, the hearing examiner found licensed physician administratively charged with several counts of assisting practice of medicine by unlicensed persons guilty of three counts of complaint filed against him and recommended penalty of 90 days suspension of license followed by one year probation. Department of Professional Regulation filed exceptions to recommended penalty seeking one-year suspension and Appellant, physician excepted to conclusions of guilty. The Board of Medicine rejected physicians exceptions, but found recommended penalty

too lenient, and revoked physician's medical license outright. The Board also rejected the hearing officer recommended penalty as being too lenient under the circumstances for the reasons set forth in the Exceptions filed by the Petitioner, Department of Professional Regulation.

The Bernal case is very similiar to the instant case in these particulars: (1) the respondent had an administrative hearing, (2) respondent was found guilty, (3) the hearing officer recommended a penalty, (4) the Petitioner filed exceptions to recommended penalty, and (5) the Petitioner/Agency rejected the hearing officer recommended penalty based on exceptions filed by administrative counsel and the Petitioner Commission enhanced the penalty from a lesser recommended penalty to revocation.

The court in Bernal held that the Petitioner's in Bernal stated ground for increasing penalty did not cite to record in justifying the action, but simply reflected the Board's difference of opinion or disagreement with that of hearing officer regarding seriousness of offense, a disagreement which can not justify substitution of judgment of Board for that of hearing officer.

We believe in Bernal, as is in the instant case, that the Petitioner Commission's decision to increase penalty constituted no more than a disagreement with the hearing officer recommended penalty, in the absence of any citation to the record in its final order justifying its action. Again, the only thing relied upon by Petitioner Commission in the instant case was administrative counsel exceptions to hearing officer recommended penalty. The Petitioner in Bernal relied upon similiar exceptions but the Court did not consider this to be a cite to

the record justifying the Petitioner's action of rejecting a recommended penalty without any justification in the record.

On the other hand, the hearing officer in the instant case, did make cites to the record where he referenced Respondent's twenty five years record in law enforcement and Respondent's favorable reputation in the community. (R-572-576) These citations to the record were made to justify the hearing officer recommended penalty.

Petitioner argues aggravating circumstances against Respondent by virtue of Respondent being found guilty of multiple counts. Respondent, however, contends that these multiple counts stemmed from the same criminal episode, i.e., meter tampering which should abrogate the multiple count agrument as grounds for enhancement. Petitioner then argues that Respondent committed the offenses for which he was charged scores of times. We beg the Petitioner to demonstrate via the evidence in the record where Respondent committed the charged offenses scores of time between February 1986 and June of 1987.

Petitioner, also argues that the impact on victim by Respondent's commission of the offenses charged. Respondent contends that any in criminal violation there is an impact on a victim but we must weigh that impact by degree and not by whether an impact on the victim existed or not as a result of Respondent's actions. Seemingly, that the degree Respondent argues of impact was minimal and by Respondent's payment of restitution reduced such impact to something less than minimal.

The third aggravating factor argued by Petitioner is no more than a rehashing of the agrument for its first aggravating factor.

Petitioner further argues that Respondent:

"quietly and methodically, month after month, year after year, stole thousands of dollars worth of electricity.

Again, Respondent argues now as he did at the hearing below that he was charged with committing the offenses charged in the Administrative Complaint from February 1986 through June of 1987 which totally abrogates Petitioner's "year after year" argument.

Petitioner's last and fourth aggravating circumstance centers on Respondent's alleged untruthful testimony at the formal hearing. Respondent reiterates the Court's position in the Bernal Case that Respondent's lack of candor could not form the basis for an increased penalty.

It appears that the Petitioner Commission has the authority to revoke Respondent's certification. See, Section. 943.1395 (5), Florida Statutes.

Also, Section 943.1395 (6), Florida Statutes provides for other disciplinary action in lieu of revocation of certification by Petitioner Commission.

In accordance with Section 943.1395 (7), Florida Statutes the Petitioner Commission is given the authority, to adopt procedures by rule, pursuant to Chapter 120 for implementing the penalties provided in subsection (5) and (6) of Section 943.1395.

Moreover, Petitioner Commission under Title 11B-27.005, F.A.C., (Revocation or Disciplinary Actions; Disciplinary Guidelines; Range of Penalties; Aggravating and Mitigating Circumstances), has been provided with guidelines to assist them in imposing a penalty.

The significance of Sections 943.1395 (5) (6) and (7), Florida

Statutes and Rules is not to support an argument of severity of a permissible penalty but to highlight the importance of Petitioner Commission's need to make cites to the record in justifying its action regarding penalty so as to develop a track record of how it imposes penalties under various statutory laws and rules thereby creating a body of law with precedental value. Otherwise, Petitioner Commission or any other agency can be very capricious, whimsical and discriminatory in the imposition of its penalties under Chapter 943, Florida Statutes, inspite of judicial review.

Consequently, we urge this Court to hold the Petitioner Commission's feet to the fire with regard to its adherence to the prescriptions of Section 120.57 (1)(b)(10), Florida Statutes, when it reviews and changes a hearing officer recommended penalty.

CONCLUSION

The reason supporting the opinion of the Fifth District Court of Appeal in the instant case can not be supported under the recent decision of Bradley.

However, the decision of the District Court should be affirmed by this Court not for the rationale given by the Court but for the reason Petitioner Commission failed to comply with two (2) requirements of Section 120.57(1)(b)(10), prior to increasing the penalty imposed on Respondent, to wit: 1) it failed to conduct a complete review of the record and 2) it failed to state with particularity its reason therefor in the order, by citing to the record to justify its action in increasing the penalty imposed on Respondent and rejecting the hearing officer recommended penalty.

Consequently, this Court should affirm the District Court's opinion rendered in the instant case but substitute its rationale for the rationale provided by the District Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed via U.S. Mail to Joseph S. White, Attorney for Petitioner, Assistant General Counsel, Florida Department of Law Enforcement, P.O. Box 1489, Tallahassee, Florida 32302, this 13th day of April 1992.

JOSEPH MORRELL, ESQUIRE