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IN THE SUPREME COURT
OF FLORIDA

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

Petitioner,

vs.

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

THEODORE A. HOOD,

Respondent.

PETITIONER'S INITIAL BRIEF

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ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On June 9, 1989, the Petitioner, Criminal Justice Standards and Training Commission, filed an administrative complaint alleging that the Respondent Hood, a certified law enforcement officer, had committed misconduct which would subject him to disciplinary action by the Commission. The Administrative Complaint alleged that the Respondent Hood had, between February 1986 and June 1987, committed a theft of utilities by tampering with a utility meter. During the same time frame, the Respondent was also accused of having tampered with a utility meter so as to cause loss or damage to the meter. R at 34-35. Upon service of the administrative complaint, the Respondent Hood denied the allegations and petitioned for a formal hearing pursuant to Section 120.57(1), Florida Statutes. R at 36.

On January 5, 1990 and January 18, 1990, a formal hearing was conducted before Daniel M. Kilbride, a hearing officer assigned to hear the case by the Department of Administration, Division of Administrative Hearings. R at 42-566. The Commission`s theory at the formal hearing in the case was that the Respondent, during the time frame alleged, monthly unplugged the utility meter at his residence. (Such meters are installed by the utility company to measure consumption of electricity.) Then, in much the same way an unscrupulous car dealer might "roll back" the mileage on a used car`s odometer, the Respondent would reinsert the utility meter in the meter base in an inverted position, allowing the meter to run backwards for a time. Prior to the meter reader`s monthly visits, however, the Respondent

would re-orient the utility meter to its proper position. In so doing, the Respondent obtained substantially reduced utility bills by fraudulently decreasing the number of kilowatt hours reflected on the meter. R at 135-139, 548. The Commission asserted that this pattern of tampering had damaged the utility meter by causing excessive wear and fire damage.

No witness at the formal hearing testified that they had directly observed the Respondent tampering with the utility meter. Accordingly, the Commission`s case was largely circumstantial.

The Commission introduced evidence that the meter bore physical indications of having been removed and reinserted into its base scores of times. R at 73, 90, 141, 155, 157-158, 208-209, 213, 253, 294, 337, 357, 493, 556-562. There was evidence that the burnt electrical connections present on the utility meter base on February 25, 1986, were consistent with a poor connection having occurred while the meter was in the inverted position. R at 51-52, 56, 209, 257, 260-262, 278-279, 291-292, 294, 478, 490-491, 493, 554-555. The meter was observed installed in an inverted position during an inspection by a utility company employee on June 11, 1987. R at 282-283.

The Commission introduced testimony and exhibits at the formal hearing regarding the Respondent`s purported electrical consumption over a period of several years. This included evidence of the Respondent`s apparent electrical consumption before the repair from the electrical fire in the Respondent`s utility meter box on February 25, 1986. Evidence of the

Respondent`s electricity utilization from February 1986 to June 11, 1987, was admitted. The Respondent`s utility consumption records were also compared with those of other Orlando single residence homes during 1984-1986. R at 307, 312,-313, 328-331, 566. Additionally, the records of the Respondent`s electricity usage after June 11, 1987 (the date utility company employees discovered the meter installed upside down, installed a new meter and locked it into place with a tamper-proof lock) was also introduced. R at 287-288, 293.

The evidence showed that, during the Respondent`s first two months of occupancy at the residence in 1978, his electricity consumption was consistently higher than the previous owner. R at 297-298, 376-378. Then, in November 1978, his apparent electrical consumption dropped to less than half of his rate of usage during the first two months at the residence. R at 298-300. Over the next eight years, his apparent electricity use remained at this diminished level. Then, on June 11, 1987, the Respondent`s utility meter was replaced by the utility company. Readings from this new tamper-proof meter showed an abrupt and substantial increase in the Respondent`s electricity consumption during the period from June 11, 1987 through 1989, when compared with the Respondent`s apparent electricity usage from the previous several years. R at 314-315, 323-324, 566.

The evidence also showed that in 1985, the Respondent`s meter had obviously run in the inverted position a bit too long resulting in the total kilowatt hours on the meter actually being a lower number in November than in October. (The record does

not, however, reflect what sort of utility bill was forwarded to the Respondent in November 1985 for having used -115 kilowatt hours of electricity.) R at 299, 301-306, 327, 564-566. Finally, the evidence indicated that during the years 1984-1986, the Appellant`s apparent electricity usage was almost one-half that of the average single residence in Orlando. R at 312-313, 566.

The Commission introduced evidence that the Respondent had entered a plea of nolo contendere to the charge of theft of utilities in Orange County Court on April 20, 1988. The Court accepted the plea, placed the Respondent on a one year term of probation, ordered the Respondent to perform 50 hours of community service and withheld adjudication of guilt. R at 563. The Respondent paid $6,247.93 in restitution to the utility company. R at 332, 548.

The Respondent called several character witnesses who testified favorably for the Respondent. R at 437-464, 500-505. The Respondent called as a witness an electrician who had performed repairs on the Respondent`s utility meter base on February 25, 1986. The Respondent attempted to raise the possibility that the observable damage to the Respondent`s utility meter was the result of an electrical fire, and not from the Respondent`s tampering. R at 481. The Respondent testified that he had only removed his utility meter from its base twice. R at 510-513, 547.

The Respondent denied the allegations of the Administrative Complaint. R at 526-527, 548. He suggested that the fluctuation

in his utility bills was attributable to his frequent absences from home and his use of a spa. R at 519-521, 523-524, 533-535, 544-546. The Respondent characterized his nolo contendere plea to the criminal charge as a plea of convenience, entered despite his innocence to the crime. R at 527-530.

On April 4, 1990, Hearing Officer Kilbride filed his recommended order. R at 567-578. The hearing officer found that there was clear and convincing evidence that the Respondent committed the misconduct alleged in the Administrative Complaint. R at 574-575. The hearing officer concluded that the misconduct committed by the Respondent subjected him to disciplinary action by the Commission. R at 575. Recognizing the Respondent`s longevity in law enforcement and his good reputation in the community, the hearing officer recommended that the Respondent`s certificate be suspended for a period of six months to be followed by a one year probationary period. R at 576.

On June 15, 1990, the undersigned filed exceptions to the recommended order. The exceptions sought the Commission`s rejection of the recommended penalty and the imposition of the penalty of revocation of certification. The grounds for this proposed action were the presence of four aggravating factors. R at 579-582.

Pursuant to notice, the case came before the Petitioner Commission for final hearing on July 27, 1990. R at 583, 1128. The Commission voted to adopt the hearing officer`s findings of fact and conclusions of law, but to reject the recommended penalty. The Commission adopted as its final action the penalty

of revocation. R at 1133-1134. The Commission filed its final order on October 3, 1990.

On October 25, 1990, the Respondent filed a timely appeal before the Fifth District Court of Appeal. 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). The Court reversed the Commission's order of revocation and held that an agency may not reject the penalty recommended by a hearing officer without properly rejecting, amending, or substituting for, at least one of the findings of fact or conclusions of law. Because the Commission had adopted the hearing officer's findings of fact and conclusion of law in toto, the Court remanded the case back to the Commission with instructions to adopt the hearing officer's recommended penalty. 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.

On February 12, 1992, this Court accepted jurisdiction in this cause pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

The Fifth and First 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, on the other hand, 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.

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 Fifth 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 considered unlawful. 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 either not considered or were erroneously perceived by the hearing officer in reaching his penalty recommendation. 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.

I. THE FIFTH AND FIRST DISTRICT COURTS OF APPEAL HAVE ESTABLISHED A PREREQUISITE TO AN AGENCY'S PROPER REJECTION OF A RECOMMENDED PENALTY WHICH IS UNAUTHORIZED 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 condition 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 entirely different terms to describe an agency`s proper rejection of each 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 finding of fact is distinctly different from that applicable to the rejection of a conclusion of law. 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.

In 1990, the Fifth District set the precedent upon which the decision below is founded. Bajrangi v. Department of Business Regulation, 561 So.2d 410 (Fla. 5th DCA 1990). In Bajrangi, 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. 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. 561 So.2d 415 [Emphasis supplied]

The Fifth District's decision in Bajrangi established a virtual prerequisite to an agency's rejection of hearing officer recommended penalties. Subsequent decisions have seen this

prerequisite, which began as a strong presumption in Bajrangi, evolve into an absolute.

In Bradley v. Criminal Justice Standards and Training Commission, 577 So.2d 638 (Fla. 1st DCA 1991) the First District Court of Appeal embraced the Bajrangi court's view:

> 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. 577 So.2d 639. [Emphasis supplied.]

The Bradley case is now pending before this Court. Criminal Justice Standards and Training Commission v. Bradley, case number 77,767.

Less than five months after the First District decided Bradley, the Fifth District had occasion to re-address this issue when it heard the instant case. Hood v. Florida Department of Law Enforcement, 585 So.2d 957 (Fla. 5th DCA 1991). The Fifth District, in deciding the case at bar stated the rule:

> 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. 585 So.2d 958 [Emphasis supplied]

As is apparent that the rule was changed from one which instructs agencies when they should not reject a recommended penalty to one which specifies when they may not do so.

The First District, in two recent decisions, has followed the Fifth District's ruling in the case at bar and embraced the view that rejection of a finding of fact or conclusion of law is a mandatory prerequisite to an agency's rejection of a hearing officer's recommended penalty. Short v. Florida Department of

Law Enforcement, 589 So.2d 364 (Fla. 1st DCA 1991); Bogart v. Florida Department of Law Enforcement, 17 F.L.W. 599 (Fla. 1st DCA February 25, 1992).

The Fifth and First Districts have construed the statute to require a proper rejection, amendment or substitution of a finding of fact or a conclusion of law as an obligatory 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 cited 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 and the case at bar as well as the First District`s adoption of the rule in Bradley, Short, and Bogart are predicated upon a misplaced reliance on this Court`s decision in Department of Professional Regulation v. Bernal, 531 So.2d 967 (Fla. 1988). This Court`s

decision in Bernal does not support the rule developed by the Fifth and First Districts. 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 the Court had intended 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. See: Freeze v. Department of Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990); B. B. v. Department of Health and Rehabilitative Services, 542 So.2d 1362 (Fla. 3rd DCA 1989); Ferris v. Austin, 487 So.2d 1163 (Fla. 5th DCA 1986); Forehead v. School Board of Washington County, 481 So.2d 953 (Fla. 1st DCA 1986); Holmes v. Turlington, 480 So.2d 150 (Fla. 1st DCA 1985). Likewise, had this Court intended the scope of the "mere disagreement," rule set forth in Bernal to encompass any penalty rejection which was not prefaced with a rejection of a factual finding or legal conclusion, the Court would have specified this.

By adopting the prerequisite to penalty rejection set forth in the case at bar, Bajrangi, as well as the Bradley, Short, and Bogart 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 this Court`s construction of the statute as articulated in Bernal.

II. 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 followed by a probationary period of one year, subject to the successful completion of such career development training and counseling as the Commission may impose. R at 576. Instead, the Petitioner Commission revoked Hood`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 579-581, 1137-1139. 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 579-581. Further, the Petitioner Commission`s final 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.

The hearing officer in the instant case mentioned two factors in formulating his penalty recommendation. R at 576. The first, the Respondent`s twenty five year record in law enforcement was viewed by the hearing officer as a mitigating factor. R at 572, 576.

The hearing officer also considered the factor of the Respondent`s reputation in the community. Presumably, the hearing officer considered the Respondent`s reputation as favorable, and therefore a mitigating circumstance. This is curious in light of the hearing officer`s factual finding that the Respondent`s criminal prosecution for the theft of utilities drew "high media attention." R at 572. Indeed, the Respondent himself testified "But as it [the criminal case] drug on the news media was killing me. They were publicizing on the front page, second page. And the radio stations were making jokes about it." R at 527. On cross-examination, the Respondent conceded that the news accounts of his case were widely reported in the Orlando area, portrayed him as a thief and had an adverse impact on his reputation in the community. R at 539-540.

The hearing officer failed to cite nor to elaborate on any aggravating factors which he may have considered in arriving at his penalty recommendation. Due to the absence of any explanation by the hearing officer as to what, if any, aggravating factors bore on his penalty recommendation, the Commission was at liberty to view the penalty in light of the factors set forth in the exceptions.

The first aggravating circumstance was the existence of multiple officer standards violations. The Administrative Complaint alleged two charges, theft of utilities and tampering with a utility meter so as to cause damage. The hearing officer found that the Respondent had committed both. R at 575. The Commission`s disciplinary guidelines specify that multiple counts of violations of Section 943.13(7) will be grounds for penalty enhancement. Rule 11B-27.005(2), Florida Administrative Code. Compounding the fact that the Respondent committed two types of violations was the additional factor that the Respondent committed both types of violations scores of times. R at 571. There is no suggestion in the hearing officer`s formulation of the penalty recommendation that he weighed this aggravating circumstance in the context of formulating the penalty he recommended. In the absence of any discussion of this factor by the hearing officer in his penalty recommendation, neither the Court nor the Commission should speculate about whether the factor was considered in the penalty formulation or how the hearing officer viewed it. The Petitioner Commissioner`s expertise and discretion in evaluating the number and frequency

of these violations in the context of the law enforcement officer profession should be given great weight by the court.

The second aggravating factor considered by the Commission but not discussed by the hearing officer was the adverse impact the Respondent`s misconduct had on his victim. R at 580. While it is true that the victim in this case was a utility company, the obvious collateral victims were utility customers in Orlando. The cost of such thefts is borne by the consumer. Only when the Respondent`s misdeeds were discovered did he pay restitution. A law enforcement officer should endeavor to prevent thefts and to aid the victims of thefts in the prompt recovery what is rightly theirs. The Respondent did neither, choosing instead to steal often from the utility company and to enjoy the fruits of his crimes for as long was possible. Again, one must resort to conjecture to conclude that the hearing officer accessed this factor in reaching his recommendation. The Commission`s expertise in the law enforcement profession provided insight into the gravity of an officer`s victimization of others in this way.

The third aggravating factor cited by the Commission for enhancing the penalty in this case was the Respondent`s lack of respect for the law as demonstrated by his having committed two crimes. R at 580. 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.

A law enforcement officer`s primary responsibility is the prevention and detection of crime as well as the enforcement of the law. Section 943.10(1), Florida Statutes. Those who enforce the criminal laws must not themselves become repeated violators of the criminal law. There can be few forms of hypocrisy more repugnant to the public conscience. In City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla. 5th DCA 1985), the court 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. 475 So.2d 1326

The hearing officer considered the Respondent`s twenty-five year tenure in law enforcement as a mitigating factor. The Commission, utilizing its insight and expertise in the profession, viewed this as having precisely the opposite effect on the gravity of the Respondent`s lack of respect for the law. At final hearing, Commission member Sheriff Richard Dobeck explained the Commission`s view of this issue:

> I submit that the mitigating circumstances the Hearing Officer used to reach his decision is exactly the reason why I think he should be revoked; because he was a 25-year veteran, a captain of the sheriff`s department, and Chief of Police with the Municiple Department right in the Orange County area. R at 1133.

The Commission recognized that the Respondent`s misconduct was not the product of youthful inexperience and indiscretion. Rather, the Respondent was a seasoned veteran who most assuredly knew better. Despite this, the Respondent quietly and

methodically, month after month, year after year, stole thousands of dollars worth of electricity. This, the Commission held, showed a pattern of lawlessness and contempt for right conduct.

In Grimberg v. Department of Professional Regulation, 542 So.2d 457 (Fla. 3rd DCA 1988) the Third District Court of Appeal affirmed an agency's proper rejection of a recommended penalty where the board recognized that the hearing officer had misapprehended a factor in reaching a penalty recommendation. The same approach should be approved in the instant case.

The fourth aggravating circumstance centered on the Respondent's untruthful testimony at the formal hearing. The Petitioner must candidly concede that this was an inappropriate factor to rely upon under the Bernal case. The Petitioner would, however, submit that this improperly considered factor should be set aside, as the court did in Escobar v. Department of Professional Regulation, 560 So.2d 1355 (Fla. 3rd DCA 1990). The remaining three reasons relied upon by the Commission constitute more than sufficient legal grounds for penalty enhancement.

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, (supra), Escobar v. Department of Professional Regulation, (supra), 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 with little or no 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, 576 So.2d 1318 (Fla. 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 Fifth and First Districts.

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 Fifth District Court of Appeal and find that the proposition that an agency must 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 via U.S. Mail to Joseph Morrell, Attorney for Respondent, MORRELL & WILLIAMS, P.A., 401 West Colonial Drive, Suite 6, Post Office Box 540085, Orlando, Florida 32854-0085, this 9th day of March 1992.

Joseph S. White

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