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CLERK, SUPREME COURT
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IN THE SUPREME COURT
OF FLORIDA

78,852

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

Petitioner,

vs.

Case No. 90-2158
Fifth District Court
of Appeal
Case No.

THEODORE A. HOOD,

Respondent.

PETITIONER`S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii-iii
STATEMENT OF THE CASE AND FACTS	iv-v
SUMMARY OF ARGUMENT	vi
ARGUMENT:	
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	1-8
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF CITATIONS

	Page
FLORIDA CONSTITUTION	
Article V, Section 3(b)(3)	1,8,9
FLORIDA STATUTES	
Section 120.57(1)	iv
120.57(1)(b)9	1
120.57(1)(b)10	2,9
LAWS OF FLORIDA	
Chapter 84-173	1
FLORIDA RULES OF COURT	
Rule 9.030(a)(2)(A)(iv)	1,9
CASES	
Allen v. School Board of Dade County, 571 So.2d 568 (Fla. 3rd DCA 1990)	3,7
Bajrangi v. Department of Business Regulation, 561 So.2d 410 (Fla. 5th DCA 1990)	5,6,7 8
Bernal v. Department of Professional Regulation, 517 So.2d 113 (Fla. 3rd DCA 1987)	2,3,5 6,7
Bradley v. Criminal Justice Standards and Training Commission, 577 So.2d 638 (Fla. 1st DCA 1991)	6,7,8

Britt v. Department of Professional Regulation, 492 So.2d 697 (Fla. 1st 1986) 2,3

Criminal Justice Standards and Training Commission v. Bradley, Florida Supreme Court, Case No. 77, 767 7

Department of Professional Regulation v. Bernal, 531 So.2d 967 (Fla. 1988) 3

Escobar v. Department of Professional Regulation, 560 So.2d 1355 (Fla. 3rd DCA 1990) 3,4,7

Grimberg v. Department of Professional Regulation, 542 So.2d 457 (Fla. 3rd DCA 1989) 3,4,7

Hambley v. Department of Professional Regulation, 568 So.2d 970 16 FLW D2014 (Fla. 2d DCA 1990) 6

Hanley v. Department of Professional Regulation, 549 So.2d 1164 (Fla. 4th DCA 1989) 5

Hood v. Florida Department of Law Enforcement, 16 FLW D2013 (Fla. 5th DCA August 1, 1991) v,6

Jimenez v. Department of Professional Regulation, 556 So.2d 1219 (Fla. 4th DCA 1990) 4,7

Johnson v. School Board of Dade County, 578 So.2d 387 (Fla. 3rd DCA 1991) 3

Lombillo v. Department of Professional Regulation, 537 So.2d 1079 (Fla. 1st DCA 1989) 7

Pages v. Department of Professional Regulation, 542 So.2d 456 (Fla. 3rd DCA 1989) 3

Sakhuja v. Department of Professional Regulation, 568 So.2d 486 (Fla. 1st DCA 1990) 7

Ticktin v. Department of Professional Regulation, 550 So.2d 518 (Fla. 1st DCA 1989) 7

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. Specifically, the Commission alleged that the Respondent Hood had, between February 1986 and June 1987, committed a theft of utilities and had, during the same time period, tampered with or damaged a utility meter. R at 34-35. Upon service of the administrative complaint, the Respondent Hood denied the allegations and petitioned for a formal hearing under 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. On April 4, 1990, Hearing Officer Kilbride entered a recommended order in the case. R at 567-578.

The hearing officer concluded that the Respondent was guilty of the misconduct alleged and was subject to disciplinary action by the Commission. The hearing officer recommended that the Respondent`s officer certification be ordered suspended for six months, to be followed by a one-year probationary period. R at 567-578.

Pursuant to exceptions to the recommended order filed before the Commission, the Commission adopted the findings of fact and conclusions of law as set forth in the recommended order but enhanced the recommended penalty. R at 579-482, 1128-1136. A final order revoking the Respondent Hood`s certification was entered on October 3, 1990. R at 1137-1139.

Pursuant to a timely appeal, the Fifth District Court of Appeal filed an opinion in the case on August 1, 1991. Hood v. Florida Department of Law Enforcement, 16 FLW D2013 (Fla. 5th DCA August 1, 1991). The Court reversed the Commission`s order and directed that the hearing officer`s recommended order be adopted. The Fifth District Court of Appeal entered its order denying certification on September 23, 1991. This petition followed.

SUMMARY OF ARGUMENT

This Court has jurisdiction, under Article V, Section 3(b)(3), of the Florida Constitution to hear this case. An express and direct conflict 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 may 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. The First District acknowledged the existence of conflict on this issue among the district courts of appeal when it certified the conflict to this Court in Bradley v. Criminal Justice Standards and Training Commission, 577 So.2d 638 (Fla. 1st DCA 1991). 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.

<u>ARGUMENT</u>

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)(3), Florida Constitution, and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, specify that the Court has discretionary jurisdiction to review a decision of a district court of appeal which is expressly and directly in conflict with a decision of another district court of appeal. The instant case involves the propriety of an administrative board`s rejection of a hearing officer`s recommended penalty in an administrative disciplinary case. The First and Fifth Districts have held that an agency 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 <u>in toto</u>.

For the reasons discussed herein, the Petitioner would urge the Court to find that an express and direct conflict among the district courts of appeal exists on this issue and that the Court therefore 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, 578 So.2d 387 (Fla. 3rd DCA 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 Allen v. School Board County, 571 So.2d 568 (Fla. 3rd DCA 1990), the Third District Court of Appeal affirmed a school board order dismissing an employee. A hearing had been held below in which a hearing officer found that Allen was guilty of

inappropriate conduct with students and subject to discipline. The hearing officer recommended that Allen be suspended without pay. The board adopted the hearing officer`s findings of fact and conclusions of law but rejected the penalty recommendation and ordered Allen terminated. The court affirmed the board`s order, concluding that the board had complied with the requirements of Section 120.57(1)(9b)10., Florida Statutes.

Likewise, in Escobar v. Department of Professional Regulation, 560 So.2d 1355 (Fla. 3rd DCA 1990) the Medical Board rejected the hearing officer`s recommended penalty of suspension and imposed the penalty of revocation of the physician`s license. Here too, the Court permitted this action by the Board even though the Board had adopted the hearing officer`s findings of guilt.

In Grimberg v. Department of Professional Regulation, 542 So.2d 457 (Fla. 3rd DCA 1989), the court stated that the facts as found by the hearing officer were undisputed. Additionally, nothing in the opinion suggests any disagreement regarding the conclusions of law. On the contrary, the court specified the single issue presented was the propriety of the Medical Board`s rejection of the hearing officer`s penalty recommendation. Notwithstanding the parity between the hearing officer`s and the Board`s findings and conclusions, the court upheld the Board`s rejection of the recommended penalty.

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. 561 So.2d 415.

The Fifth District reaffirmed this view in the case at bar. Hood v. Florida Department of Law Enforcement, 16 FLW D2013 (Fla. 5th DCA August 1, 1991). The court noted that the Commission had properly adopted the hearing officer`s findings of fact and conclusions of law. However, the court found the Commission`s rejection of the recommended penalty to be reversible error. The court said:

> 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. Bradley v. Criminal Justice Standards and Training Commission, 577 So.2d 638 (Fla. 1st DCA 1991); Bajrangi v. Department of Business Regulation, 561 So.2d 410 (Fla. 5th DCA 1990); Hambley v. Department of Professional Regulation, 568 So.2d 970 16 FLW D2014 (Fla. 2d DCA 1990).

The First District Court of Appeal embraced the Fifth District`s rule in Bajrangi with its decision in Bradley v. Criminal Justice Standards and Training Commission 577 So.2d 638 (Fla. 1st DCA 1991). There, the First District held:

> 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.

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).

The First District in the Bradley case, acknowledged that the rule it had adopted from the Fifth District`s holding in Bajrangi was in conflict with the Third District`s decisions on the issue. Accordingly, the First District certified the conflict. Criminal Justice Standards and Training Commission v. Bradley, case number 77,767 is now pending before this Court upon the existence of precisely the same conflict as is advocated in the case at bar.

The inherent rule common to the Third and Fourth Districts` decisions in Allen, Escobar, Grimberg, and Jimenez is that an agency need not properly reject, amend or substitute any of the hearing officer`s findings of fact or conclusions of law in order to lawfully reject the hearing officer`s penalty recommendation. This is in express and direct conflict with the rule set forth by

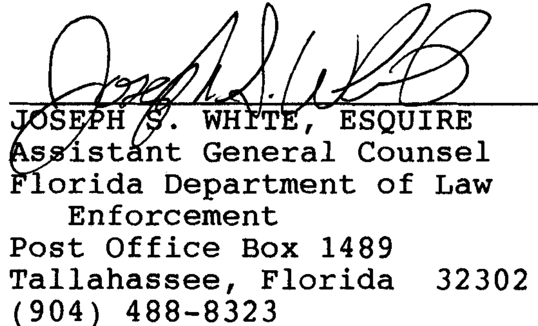
the Fifth and First Districts which have held in Bajrangi, Bradley, and most recently in the instant case that such a rejection, amendment or substitution is a prerequisite to penalty enhancement.

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

CONCLUSION

This Court should hold that an express and direct conflict exists among the district courts of appeal on the application of Section 120.57(1)(b)10., Florida Statutes. The Court should find that it has jurisdiction to hear this case pursuant to Article V, Section 3(b)(3), Florida Constitution and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

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, MORRELL & WILLIAMS, P.A., Post Office Box 540085, Orlando, Florida 32854-0085, this 24th day of October 1991.

JOSEPH S. WHITE