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FILED
SID J. WHITE
MAY 4 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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 REPLY BRIEF

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SUMMARY OF ARGUMENT

The Petitioner and Respondent are in agreement that, by virtue of this Court's recent decision in Criminal Justice Standards and Training Commission v. Bradley, 17 FLW S193 (Fla. March 26, 1992), the rationale of the Fifth District in the instant case was rendered erroneous. Despite this, the Respondent argued that the Fifth District should be affirmed.

The Respondent suggested that the Commission violated the law by failure to review the complete record prior to taking final action. The record belies this. The Respondent complains that the Commission's adoption of its own staff's exceptions as its reasons for penalty rejection is inadequate. However, this procedure was upheld by this Court in Bradley. Further, the Respondent submits that the reasons for penalty enhancement were impermissibly superficial. Nearly identical grounds were labeled "clearly articulated" by this Court in Bradley. Finally, the Respondent claimed that the Commission omitted any citation to the record justifying its action in the final order. The record demonstrates precisely the opposite. The Commission's rejection of the penalty recommended by the hearing officer below complied with the requirements set forth in Bradley.

ARGUMENT

THE PETITIONER COMMISSION LAWFULLY REJECTED THE HEARING OFFICER`S PENALTY RECOMMENDATION AFTER CONDUCTING A REVIEW OF THE COMPLETE RECORD AND STATING WITH PARTICULARITY ITS REASONS THEREFOR IN THE FINAL ORDER, BY CITING TO THE RECORD IN JUSTIFYING ITS ACTION.

During the pendency of this cause before the Court, the Court decided Criminal Justice Standards and Training Commission v. Bradley, 17 FLW S193 (Fla. March 26, 1992). In Bradley, this Court reversed the First District`s decision that an agency could not increase a hearing officer`s recommended penalty if it fully adopted the hearing officer`s findings of fact and conclusions of law. In recognition of this Court`s holding in Bradley the Respondent candidly concedes that the Fifth District`s rationale in the instant case cannot be supported. Respondent`s Answer Brief at pp. 6, 14. The Fifth District`s opinion in the case at bar had utilized the identical rule relied upon by the First District in Bradley and indeed cited with approval the First District`s holding Bradley. Hood v. Florida Department of Law Enforcement, 585 So.2d 957, 958 (Fla. 5th DCA 1991). Consequently, the Petitioner and Respondent are in agreement that the rationale of the Fifth District below is erroneous.

However, the Respondent contended that the Fifth District`s decision should be affirmed. The Respondent advanced two arguments in support of his position. First, the Respondent argued that the Petitioner Commission failed to conduct a review of the complete record. Second, the Respondent argued that the Petitioner Commission failed to state with particularity the

reasons for penalty enhancement by citing to the record in justifying its action. Thus, the Respondent concluded that the Petitioner Commission had failed to comply with the requirements of Section 120.57(1)(b)10., Florida Statutes. The Petitioner Commission would urge the Court to reject these assertions as either unsupported by the record or by the controlling case law.

The Respondent argued that the Commission failed to review the complete record prior to voting, on July 27, 1990, to take final action. The appellate record demonstrates precisely the opposite. The index of the appellate record, prepared by the agency clerk and filed with the Court, describes in detail the documentation submitted for review by the Commission. The index provides, in pertinent part:

> Information submitted to the Commission for consideration at the July 27, 1990 Final Hearing:
>
> 1. Administrative Complaint - Page 584
> 2. Election of Rights - Page 586
> 3. Recommended Order from DOAH - Page 587
> 4. Exceptions to Recommended Order - 599
> 5. Transcripts of DOAH hearing, Volume I, II & III - Page 603

During the final hearing, Sheriff Dobeck observed:

> And I`m sure all of you have read the file and the transcript . . . R at 1134.

Commission members were even provided with the original photographic exhibits admitted at the hearing before the hearing officer for their review. R at 1130. The final order entered by the Commission stated, in relevant part, the following:

> Upon a complete review of the transcript of the record of hearing held on January 5 & 18, 1990, in Orlando, Florida, the Report, Findings, Conclusions and Recommendations of the Hearing Examiner dated April 4, 1990, all exceptions filed to said items and being otherwise fully advised in the premises, the Commission makes the following findings and conclusions . . . R at 1137.

Thus, despite the Petitioner`s argument to the contrary, the complete record was submitted to the Petitioner Commission and reviewed by them prior to voting to reject the penalty recommended by the hearing officer.

The Respondent next contended that the Commission violated Section 120.57(1)(b)10., by a failure to state with particularity its reasons for penalty departure, citing to the record to justify its action. The Respondent argued that something beyond adoption of and reliance upon the reasons articulated in staff counsel`s exceptions was required. The Commission had adopted these exceptions as its reasons for penalty enhancement in the case. R at 579-582, 1133-1134, 1137-1138.

This is precisely the action taken by the Commission in Bradley (supra). There, as here, the Commission adopted the hearing officer`s findings of fact and conclusions of law, but rejected the recommended penalty for the reasons set forth in the staff`s exceptions. Nothing in the cited statute or in Bradley suggests that before a board may adopt its staff`s exceptions as its reasons for penalty rejection, it must some how augment these stated reasons. The Respondent cited Bernal v. Department of Professional Regulation, 517 So.2d 113 (Fla. 3rd DCA 1987) aff`d.

531 So.2d 967, in support his theory. While it is true that the board in Bernal adopted staff`s exceptions as its reasons for penalty departure, this was not the basis for the court`s ruling. Rather, it was the content of the reasons relied upon by the board, not their source, which led to the reversal of the board`s action. There is simply no authority to support the Respondent`s contention that a board`s adoption of its staff`s exceptions constitutes a "mockery of justice." Respondent`s Brief at p. 8.

Next, the Respondent argued that the content of the reasons set forth in the exceptions and adopted by the Commission as its reasons for penalty enhancement were woefully inadequate both in terms of specificity and in citation to the record. An examination of the first three of the four exceptions adopted below demonstrates a striking similarity to the exceptions adopted by the Commission in Bradley (supra). This fact is owing less to coincidence and more to commonality of authorship.

The first three reasons for penalty enhancement relied upon by the Petitioner Commission were stated in the instant case as follows:

> 2. The correct penalty in this cause would be revocation of certification. This penalty is appropriate for the following reasons:
>
> a. Multiple moral character standard violations. The record demonstrated that the Respondent committed multiple violations of officer standards as set forth in Section 943.13(7). The record shows that the Respondent repeatedly damaged and tampered with his utility meter between fifty to one hundred times with the

intention of avoiding utility charges.

b. Severity of the misconduct. The record reflects that the Respondent`s misconduct caused the unavailability of some $6,247.93 in revenue to the Orlando Utilities Commission from 1978 to June 1987. This revenue was not repaid by the Respondent until being sentenced to do so on April 20, 1988 by the Orange County Court.

c. Lack of respect for the law. The record establishes that the Respondent committed the crimes of tampering with a utility meter and damage to a utility meter, in violation of Section 812.14(2), Florida Statutes. The commission of crimes which violate the moral character standard suggest a pattern of lawlessness and contempt for right conduct on the Respondent`s part. R at 579-580.

In Bradley (supra), the court found the following reasons sufficiently specific to permit penalty enhancement by the Commission:

> The correct penalty in this cause would be revocation of certification. This penalty is appropriate for the following reasons:
>
> a) Multiple moral character standard violations. The record demonstrates that the Respondent committed two violations of officer standards as set forth in Section 943.13(7). These violations were committed on December 27, 1986 and September 13, 1987[,] according to the record occurring less than one year apart.
>
> b)Severity of the misconduct. The record reflects that the first act of misconduct led to the death of another person. The second act of misconduct, according to the record, was committed by

> victimizing a fellow officer. These acts, when viewed individually or together are most egregious.
>
> c)Lack of respect for the law. The record establishes that the Respondent committed the crimes of improper exhibition of a firearm, driving under the influence of alcoholic beverages, and battery on a correctional officer. The commission of three crimes, two of which concurrently violated the moral character standard and a third which was found by the hearing officer to be reprehensible, suggest a pattern of lawlessness and contempt for right conduct on the Respondent`s part. 17 FLW S193.

This Court held that the quoted reasons were "clearly articulated" and that the penalty departure was lawful under Section 120.57(1)(b)10. In terms of specificity, the reasons for penalty enhancement in the instant case are virtually indistinguishable from those approved by the Court in Bradley. Accordingly, the Respondent`s argument that the reasons relied upon by Petitioner Commission were insufficiently specific should be rejected.

Finally, the Respondent argued that the Petitioner Commission violated Section 120.57(1)(b)10., by failure to cite to the record in justifying its increase in the penalty recommended by the hearing officer. The Respondent does not, however, appear to suggest that the Commission relied upon factors which were extraneous to the record. Each of the exceptions adopted by the Commission as its reasons for penalty enhancement cite to the record. (e.g., "The record demonstrates that . . .," "The record shows that . . .," "The record

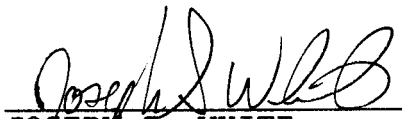
reflects that . . ., " "The record establishes that . . ." R at 579-580.) These references to the record, together with the balance of the exceptions, were incorporated by reference in the final order. R at 1138. The citations to the record in the instant case parallel those approved in Bradley. Even so, the Respondent appears to imply in his brief that something more is required. Presumably, the Respondent does not advocate that the Commission's final order must recite the precise pages in the record which correspond to the reasons given for penalty. Neither this Court's decision in Bradley nor Section 120.57(1)(b)10., require such specificity.

The Respondent's arguments that the Petitioner Commission's final order was entered in violation of the requirements of Section 120.57(1)(b)10., Florida Statutes, should be rejected as unsupported by the record and this Court's decision in Bradley.

CONCLUSION

The Petitioner, Criminal Justice Standards and Training Commission, urges this Court to reverse the decision of the Fifth District Court of Appeal and hold that the Commission's rejection of the recommended penalty below was lawful and conformed to the requirements for such action set forth in this Court's decision in Bradley.

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., 1401 West Colonial Drive, Suite 6, Post Office Box 540085, Orlando, Florida 32854-0085, this 4th day of May 1992.

JOSEPH S. WHITE