

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA**

**CASE NO.: 2007-CA-000042-O
WRIT NO.: 07-01**

GREGORY ANDERSON,
Petitioner,

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES,**
Respondent.

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
Reginald Owes, Hearing Officer.

William R. Ponall, Esquire,
for Petitioner.

Jason Helfant, Assistant General Counsel,
for Respondent.

Before KIRKWOOD, MACKINNON, and LEBLANC, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Gregory Anderson (Petitioner) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' (Department) Final Order of License Suspension, sustaining the suspension of his driver's license pursuant to section 322.2615, Florida Statutes. This Court has jurisdiction pursuant to sections 322.2615 and 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

On October 10, 2006, Sergeant Mangan of the University of Central Florida Police Department observed a vehicle driving with a faulty headlight. Upon pulling the vehicle over, Sergeant Mangan made contact with the driver of the vehicle, Petitioner, and observed the odor of alcohol emitting from the vehicle. Sergeant Mangan also observed that Petitioner's speech was slurred. Based on Petitioner's performance on the field sobriety exercises, Officer Samuel Gonzalez of the University of Central Florida Police Department arrested Petitioner and transported him to the Orange County testing facility. Petitioner agreed to submit to a breath test and gave breath-alcohol samples of .230 and .240. As a result, the Department suspended Petitioner's driving privileges.

Pursuant to section 322.2615(6), Florida Statutes, Petitioner requested a formal review of his license suspension. On November 16, 2006, the hearing officer held a formal review hearing at which Petitioner was represented by counsel. Petitioner moved to invalidate the license suspension on eight grounds: (1) that section 322.2615, Florida Statutes, is unconstitutional to the extent it permits a license suspension where the breath test was obtained following an illegal stop or arrest of a driver; (2) that section 322.2615, Florida Statutes, is unconstitutional to the extent it permits the Department to preclude the driver from obtaining subpoenas for relevant witnesses; (3) that the hearing officer's refusal to issue subpoenas for Roger Skipper, Laura Barfield, Tanya Shrum, and Kelly Melville, was a violation of due process; (4) that there is no crash report in the record as required by section 322.2615(2), Florida Statutes; (5) that the record does not contain a breath test result affidavit form and an agency inspection checklist form in compliance with rule 15A-6.013, Florida Administrative Code; (6) that there is insufficient evidence to prove that the breath test was conducted in compliance with the operating manual for the Intoxilyzer 8000; (7) that there is insufficient evidence that any officer had probable cause to

believe Petitioner was driving the motor vehicle at the time of the accident; and (8) that there is no agency inspection report for October 2006 in the record. Petitioner also moved to strike any statements made by him to the officers under the accident report privilege. On November 30, 2006, the hearing officer entered an order denying Petitioner's motions and sustaining the suspension of his driver's license finding that the law enforcement officer had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances and that he had an unlawful breath-alcohol level of 0.08 or higher.

The Court's review of an administrative agency decision is governed by a three-part standard of review: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the decision was supported by competent, substantial evidence. City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982). "It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum." Dep't of Highway Safety & Motor Vehicles v. Allen, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

In cases where the individual's license is suspended for an unlawful breath-alcohol level, "the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension." § 322.2615(7), Fla. Stat. (2007). The hearing officer's scope of review is limited to the following issues:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
2. Whether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

§ 322.2615(7)(a), Fla. Stat. (2007).

At issue in the instant case is whether the hearing officer departed from the essential requirements of the law in interpreting section 322.2615(6)(b) to prohibit the issuance of subpoenas for the agency inspector and other witnesses. Petitioner argues that the hearing officer's failure to issue subpoenas violated his right to full discovery concerning the breath test machine upon which he was tested and precluded him from challenging the reliability of the breath test results. He also asserts that the record before the hearing officer was incomplete because it failed to contain the breath test result affidavit and agency inspection checklist required by rule 15A-6.013, Florida Administrative Code. Lastly, Petitioner asserts that the record before the hearing officer failed to contain the traffic crash report required by section 322.2615(2), Florida Statutes.

With respect to Petitioner's argument regarding the hearing officer's failure to issue subpoenas, the Department filed a motion to dismiss and abate and reserved the right to respond pending the Court's disposition of the motion. This Court originally granted the Department's motion to dismiss in full and ordered that Petitioner's argument as to the subpoenas be stricken. However, this Court later vacated the order granting the motion to dismiss and entered a revised order granting in part the Department's motion to dismiss by striking the following sentences from the Petition: (1) "To the extent the amended version of Fla. Stat. §322.2615 actually permits the hearing officer to refuse to issue these subpoenas, the statute is unconstitutional on its face and as applied to the Petitioner" and (2) "Since the hearing officer's refusal to issue those subpoenas is actually permitted by the amended version of Fla. Stat. 322.2615, the statute is unconstitutional on its face and as applied to the Petitioner." The Department did not seek to file any further argument following the Court's disposition of the motion to dismiss. With respect to

Petitioner's other arguments, the Department contends that the record evidence entered at the formal review hearing established that the breath test was conducted pursuant to sections 316.1932 and 316.1934, Florida Statutes, and in compliance with FDLE rules, and no violation of fundamental fairness occurred to warrant invalidation of the suspension. The Department further contends that there is competent substantial evidence to support the hearing officer's finding that Petitioner was in actual physical control of an automobile while under the influence of alcohol.

We find the appellate court's decision in Yankey to be dispositive of the instant case. Yankey v. Department of Highway Safety and Motor Vehicles, 6 So. 3d 633 (Fla. 2d DCA 2009)(finding that when the department relies upon a document prepared by an agency inspector to properly validate the breath test results, section 322.2615, Florida Statutes, permits the driver to subpoena the inspector identified in that document); see Hendeles v. Sanford Auto Auction, Inc., 364 So. 2d 467, 468 (Fla. 1978)(disposition of a case on appeal should be made in accord with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed was rendered).

In Yankey, the petitioner filed a petition for writ of certiorari seeking to quash a circuit court order affirming the department's suspension of her license for driving with an unlawful breath-alcohol level. Id. at 634. The petitioner asserted that the hearing officer and the circuit court departed from the essential requirements of the law in interpreting section 322.2615(6)(b), Florida Statutes, to prohibit the department's issuance of a subpoena for the agency inspector responsible for testing the breath test machine and signing the agency inspection report. Id. Pursuant to section 322.2615(6)(b), Florida Statutes, a driver in a formal review hearing "may subpoena those witnesses who are identified in documents submitted by the arresting officer,

which documents include the results of any breath test.” Yankey, 6 So. 3d at 637; see also §622.2615(2), Fla. Stat. The Second District acknowledged that law enforcement had established a practice of routinely providing the department with a breath-alcohol analysis report, a breath test affidavit, and an agency inspection report, in order to report the results of the breath test and support the license suspension. Yankey, 6 So. 3d at 637. Based on the statutory and administrative code provisions regarding the procedures to establish the validity of breath test results, the Second District concluded that when an officer suspends a person’s license and “submits breath test results pursuant to section 322.2615(2) that include the breath alcohol analysis report, a breath test affidavit, and an agency inspection report, and those documents identify specific persons, the hearing officer is authorized under section 322.2615(6)(b) to issue a subpoena to any person ‘identified in’ those documents.” Id. at 638.

Below, the Department entered the breath-alcohol test affidavit, the agency inspection report, and the department inspection report into evidence. The agency inspection report was completed by Kelly Melville and the department inspection report was completed by Roger Skipper. Like in Yankey, the hearing officer below refused to issue the subpoenas asserting that section 322.2615(6)(b), Florida Statutes, did not authorize him to do so.

Based on the foregoing, the Court finds that the hearing officer was authorized under 322.2615(6)(b), Florida Statutes, to issue a subpoena to Kelly Melville and the hearing officer’s failure to do so constituted a departure from the essential requirements of the law. In light of this conclusion, the Court finds it unnecessary to address the additional arguments made by Petitioner and the Department.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED** and the hearing officer’s Final Order of License Suspension is

QUASHED. We **DISPENSE** with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this
__7__ day of _____ January _____, 2010.

_____/S/_____
LAWRENCE R. KIRKWOOD
Circuit Judge

_____/S/_____
CYNTHIA Z. MACKINNON
Circuit Judge

_____/S/_____
BOB LEBLANC
Chief Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to **William R. Ponall, Esquire**, Kirkconnell, Lindsey, Snure & Yates, P.A., 1150 Louisiana Avenue, Suite 1, Post Office Box 2728, Winter Park, Florida 32790 and **Jason Helfant, Assistant General Counsel**, DHSMV-Legal Office, Post Office Box 540609, Lake Worth, FL 33454-0609, on the __7__ day of _____ January _____, 2010.

_____/S/_____
Judicial Assistant