

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

STEPHANIE HARRELL,

Petitioner,

v.

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

CASE NO.: 2007-CA-11979-O

WRIT NO.: 07-52

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

Stuart I. Hyman, Esquire,
for Petitioner.

Jason Helfant, Esquire,
Assistant General Counsel,
for Respondent.

Before LUBET, EVANS, and RODRIGUEZ, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

Petitioner, Stephanie Harrell (“Petitioner” or “Harrell”), timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’

(“Respondent” or “Department”) Final Order of License Suspension, sustaining the suspension of her 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).

FACTS

In June 2007, Petitioner was arrested for drunk driving. Her driver’s license was suspended and she requested a formal review hearing. The Hearing Officer, Reginald Owes (“Hearing Officer”) found, among other things, that on the night of her arrest, Ms. Harrell “agreed to take a breath test and gave samples of .190 and .187.” (Pet. Cert. Ex. Q.) The Intoxilyzer machine used to test Ms. Harrell’s blood alcohol content was serial number 80-0963, an Intoxilyzer 8000 with software version 8100.27 in it.

Petitioner requested the Hearing Officer issue subpoenas for Kelly Melville, Roger Skipper, Laura Barfield and Tanya Shrum pursuant to section 322.2615, Florida Statutes. The Hearing Officer refused. This, Petitioner claims, constituted a violation of her right to due process.

Kelly Melville was an Agency Inspector with the Orange County Sheriff’s Department (“FDLE”) and author of a report of an inspection of the Intoxilyzer 8000 on June 13, 2007. This report was admitted into evidence at the hearing.

Roger Skipper was an Inspector with the Florida Department of Law Enforcement (“FDLE”) and author of the inspection report for the Intoxilyzer 8000 on April 18, 2007. This report was admitted into evidence at the hearing.

Laura Barfield was the Florida Department of Law Enforcement Alcohol Testing Program Manager. Petitioner asserts that she wrote two FDLE evaluation reports for Intoxilyzer 8000. The Department does not deny this assertion. The reports were admitted into evidence at the hearing. Also admitted in evidence was a letter which Ms. Barfield wrote Kelly Melville concerning “an issue regarding the Intoxilyzer 8000 that the Florida Department of Law Enforcement has discovered.” (Pet. Writ Cert. Ex. L.) This issue related to “missing instructions in the Intoxilyzer 8000 software version 8100.26.” (Pet. Writ Cert. Ex. L.)

Tanya Shrum was an FDLE records custodian.

At the hearing, Petitioner’s counsel moved to set aside the suspension on several grounds including the failure of the Hearing Officer to issue subpoenas and subpoenas duces tecum for Melville, Skipper, Barfield and Shrum. In the end, the Hearing Officer sustained the suspension of Petitioner’s driving privileges. On October 2, 2008, the Hearing Officer entered a Final Order of License Suspension denying the Petitioner’s motions and sustaining the suspension of his driver’s license.

STANDARD OF REVIEW

“The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed; whether there was a departure from the essential requirements of law; and whether the administrative findings and judgment were supported by competent substantial evidence.” *Dep’t of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

DISCUSSION

In her Petition for Writ of Certiorari, Harrell argues that the Hearing Officer's failure to issue subpoenas deprived her of procedural due process. She also argues that the breath test results were inadmissible because the samples were obtained by using an unapproved and unreliable breath testing machine.

The Department contends that the Hearing Officer properly denied Petitioner's request for subpoenas for persons not specifically identified in the statute that provides the hearing officer the power to subpoena witnesses. Additionally, the Department contends that the Order sustaining Petitioner's suspension conforms to the essential requirements of the law and is supported by competent substantial evidence.

At issue in this case is whether the Hearing Officer departed from the essential requirements of the law by refusing to issue the requested subpoenas. We conclude that he did, grant the writ and quash the order of suspension.

Section 322.2615(2) sets forth certain documents, including "the results of any breath or blood test," which must be forwarded by the law enforcement officer to the Department. Section 322.2615(6)(b) permits the hearing officer to issue subpoenas for the police officers and witnesses identified in those documents. §322.2615(6)(b), Fla. Stat. (2006). The statute does not specify which documents constitute "the results of any breath or blood test." In *Yankey v. Dep't of Highway Safety and Motor Vehicles*, 6 So. 3d 633 (Fla. 2d DCA 2009), the Second District Court of Appeal held that

when the officer who administratively suspends a person's license 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.

The *Yankey* court concluded that section 322.2615(6)(b), Florida Statutes (2007), and related statutory and administrative provisions require the Department to issue a subpoena to the agency inspector when the agency inspector is identified in documents submitted to the Department to validate the breath test results. *Id.* See also *Dep’t of Highway Safety and Motor Vehicles v. Escobio*, 6 So. 3d 638 (Fla. 2d DCA 2009); *Lee v. Dep’t of Highway Safety and Motor Vehicles*, 4 So. 3d 754 (Fla. 1st DCA 2009) and *Dep’t of Highway Safety and Motor Vehicles v. Maffett*, 1 So. 3d 1286 (Fla. 2d DCA 2009).

These recent district court authorities compel the conclusion that the Hearing Officer departed from the essential requirements of the law when he did not issue subpoenas for Kelly Melville and Roger Skipper who were identified in inspection reports. With respect to Laura Barfield, we likewise conclude that the Hearing Officer should have issued a subpoena commanding her presence at the hearing even though she is not identified in a document specifically enumerated in section 322.2615(2). That provision

unambiguously contemplates that a hearing officer may issue subpoenas for the officers and witnesses identified not only in the documents actually named in [section 322.2615(2)], but also in “any documentary evidence submitted at or prior to the hearing.” Any other interpretation would, indeed, constitute a denial of petitioner’s due process right to challenge his license suspension.

Lee v. Dep’t of Highway Safety and Motor Vehicles, 4 So. 3d at 758.

Inasmuch as Barfield was the author of, and thus “named in,” a letter submitted by Petitioner at the hearing, the Hearing Officer should have subpoenaed her.¹

Therefore, when he refused to issue subpoenas for Melville, Skipper and Barfield, the Hearing Officer failed to comply with the essential requirements of the law and failed to afford Petitioner due process. The Petition for a Writ of Certiorari is granted.²

Accordingly, it is hereby **ORDERED AND ADJUDGED** that:

- 1) The Petition for Writ of Certiorari be and hereby is **GRANTED** and
- 2) The Hearing Officer’s Final Order of License Suspension be and hereby is

QUASHED.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the 15th day of March, 2010.

/S/

MARC L. LUBET
Circuit Court Judge

/S/

ROBERT M. EVANS
Circuit Court Judge

/S/

JOSE R. RODRIGUEZ
Circuit Court Judge

¹ Barfield was also the author of two approval studies submitted at the hearing. (Pet. Writ Cert. Ex. G, H.)

² We need not address the other arguments raised by the parties.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **Stuart I. Hyman, Esq.**, Stuart I. Hyman, P.A., 1520 East Amelia St., Orlando, FL 32803; and to **Jason Helfant, Esq.**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, DHSMV-Legal Office, P.O. Box 540609, Lake Worth, FL 33454-0609, on this 15th day of March, 2010.

/S/
Judicial Assistant