

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

**CASE NO.: 2007-CA-13260
WRIT NO.: 07-59**

PAMELA WHITMORE,
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,
Linda Labbe, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

Damaris E. Reynolds, Assistant General Counsel,
for Respondent.

Before MCDONALD, WHITEHEAD, and MUNYON, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Pamela Whitmore (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 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).

On July 17, 2007, Officer Meade of the Edgewood Police Department stopped a vehicle for failure to maintain a single lane and following too closely to another vehicle. Upon making contact with the driver, identified as Petitioner, Officer Meade observed that Petitioner's eyes were bloodshot and watery, her speech was slurred, and she was unsteady on her feet. Officer Meade also observed an odor of alcohol emitting from Petitioner's breath. Petitioner stumbled over her own feet upon exiting the vehicle and used the door for support. Petitioner admitted to drinking two glasses of wine. Based on Petitioner's poor performance on the field sobriety exercises, Officer Meade arrested Petitioner and transported her to the breath testing facility. Petitioner agreed to submit to a breath test and gave breath-alcohol samples of .121 and .123. As a result, the Department suspended Petitioner's driving privileges.

Pursuant to section 322.2615(6), Florida Statutes, Petitioner requested a formal review of her license suspension. On August 23, 2007, September 7, 2007, and September 13, 2007, 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) the hearing officer failed to issue subpoenas for Roger Skipper, Laura Barfield, Kelly Melville, and Tanya Shrum; (2) the breath test machine was not approved for use in the State of Florida; (3) failure of the record to contain a maintenance report for July or August; (4) Officer Meade's failure to bring the field sobriety testing manuals to the review hearing violated Petitioner's due process rights; (5) no affidavit for July 17, 2007; (6) lack of probable cause to believe that Petitioner was impaired or under the influence of alcohol; (7) presence of FDLE rules and breath test operator do not ensure accuracy of test results; and (8) instrument malfunctioned and was not sent to authorized service dealer for repair. Petitioner also moved to strike the results from the horizontal gaze nystagmus exercise. On September 17, 2007, the hearing officer entered an

order denying Petitioner's motions and sustaining the suspension of her 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 she 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 a

subpoena for Kelly Melville, Roger Skipper, Laura Barfield, and Tanya Shrum. Petitioner argues that the hearing officer's failure to issue subpoenas violated her right to full discovery concerning the breath test machine upon which she was tested. She also asserts that the breath test results were inadmissible because the samples were obtained by using an unapproved and unreliable breath testing machine. Petitioner further asserts that the breath test results should have been excluded because the breath test regulations are insufficient due to the lack of a uniform method of administration.

With respect to Petitioner's argument regarding the hearing officer's failure to issue subpoenas, the Department asserts that there was no departure from the essential requirements of the law because the hearing officer lacked authority to issue the subpoenas. The Department contends that under section 322.2615(6)(b), Florida Statutes, a hearing officer may only issue subpoenas for witnesses identified in the following documents: (1) the driver's license; (2) an affidavit stating the officer's grounds for belief that a driver was under the influence of alcohol; (3) the results of any breath test or an affidavit stating that a breath test was requested by the officer and that person refused to submit; (4) the officer's description of a person's field sobriety test, if any; (5) the notice of suspension; and (6) a copy of the crash report, if any. Because the witnesses at issue are not named in the above described documents, the Department asserts that the hearing officer did not have authority to issue the subpoenas. With respect to Petitioner's other arguments, the Department asserts that the hearing officer's order sustaining Petitioner's suspension conforms to the essential requirements of the law and is supported by competent substantial evidence. Further, the Department contends that its methods of administration of the breath test are uniform and comply with section 316.1932, Florida Statutes.

Following the briefing phase in this appeal, the Department filed a motion to abate and remand for further proceedings citing the Second District's decision in 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). The Department's motion to abate and remand is still pending.

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 §22.2615(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.

We find the Yankey decision to be dispositive of the instant case. 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 that the time the judgment appealed was rendered). 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 her 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**; the Department’s Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings, filed March 12, 2009, is **DENIED**; and the hearing officer’s Final Order of License Suspension is **QUASHED**.

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

_____/S/_____
ROGER J. MCDONALD
Circuit Judge

_____/S/_____
REGINALD WHITEHEAD
Circuit Judge

_____/S/_____
LISA T. MUNYON
Circuit 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 **Stuart I. Hyman, Esquire**, 1520 East Amelia Street, Orlando, Florida 32803 and **Damaris E. Reynolds, Assistant General Counsel**, DHSMV-Legal Office, Post Office Box 540609, Lake Worth, FL 33454-0609, on the __6__ day of ____ April _____, 2010.

_____/S/_____
Judicial Assistant