

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

**CASE NO.: 2007-CA-13640-O
WRIT NO.: 07-61**

DEBRA STEELE,
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.

Stuart I. Hyman, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before LATIMORE, ROCHE, and KOMANSKI, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Debra Steele (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 August 23, 2007, Trooper Rush of the Florida Highway Patrol was dispatched to a traffic crash involving Petitioner. Trooper Rush made contact with Petitioner, driver of the fourth vehicle, and observed the odor of alcohol emitting from her breath. Trooper Rush also observed that Petitioner's movements were unsteady and her eyes were watery. Petitioner completed four field sobriety exercises: walk and turn, one-leg stand, finger to nose, and horizontal gaze nystagmus. Based on Petitioner's performance on the field sobriety exercises, Trooper Rush arrested Petitioner and transported her to the Orange County testing facility. Petitioner first refused to submit to a breath test but later agreed and gave breath-alcohol samples of .141 and .136. 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 September 20, 2007, the hearing officer held a formal review hearing at which Petitioner was represented by counsel. Petitioner moved to invalidate the license suspension on five grounds: (1) that the hearing officer failed to issue subpoenas for Roger Skipper, Laura Barfield, Tanya Shrum, and Kelly Melville; (2) that the hearing officer deprived Petitioner of the ability to be able to present evidence by releasing the witness, Kelly Melville; (3) that the breath test machine used was unapproved for use in the State of Florida; (4) that there was no competent evidence that Petitioner was driving or in actual physical control of a motor vehicle; and (5) that there was no probable cause to believe that Petitioner was under the influence of alcohol to the extent that her normal faculties were impaired. Petitioner also moved to strike the accident report and the horizontal gaze nystagmus exercise. On September 26, 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 the agency inspector. 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 argues 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. Lastly, Petitioner asserts that the Department failed to present competent substantial evidence to establish that she was driving or in actual physical control of an automobile.

With respect to Petitioner's argument regarding the hearing officer's failure to issue subpoenas, the Department argued that there was no departure from the essential requirements of the law because the hearing officer lacked authority to issue the subpoenas. The Department also asserted that Petitioner was permitted to submit substantial evidence, including document evidence and other witnesses. However, after the Department filed its answer brief, it filed a motion to abate and remand, as to the subpoena issue, 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). This motion to abate and remand is still pending. With respect to Petitioner's other arguments, the Department contends that it established substantial compliance with the FDLE rules to render Petitioner's breath test results admissible and that the hearing officer's finding that Trooper Rush had probable cause to believe that Petitioner was operating a motor vehicle while under the influence is also supported by competent substantial evidence.

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.

In the instant case, the department entered the breath-alcohol test affidavit, the agency inspection report, and the department inspection report into evidence. 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. It should also be noted that the agency inspector, Kelly Melville, was permitted to testify but only as to her capacity as breath test operator. The hearing officer prohibited any questioning as to the agency inspection report and her duties as an agency inspector.

Based on the foregoing, the Court finds that the hearing officer was authorized under 322.2615(6)(b), Florida Statutes, to issue subpoenas to persons identified in the documents 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 18, 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 17 day of November, 2009.

/S/
ALICIA L. LATIMORE
Circuit Judge

/S/
RENEE A. ROCHE
Circuit Judge

/S/
WALTER KOMANSKI
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**, Stuart I. Hyman, P.A., 1520 East Amelia Street, Orlando, Florida 32803 and **Heather Rose Cramer, Assistant General Counsel**, DHSMV-Legal Office, Post Office Box 540609, Lake Worth, FL 33454-0609, on the 17 day of November, 2009.

/S/
Judicial Assistant