

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

**CASE NO.: 2008-CA-5438-O
WRIT NO.: 08-23**

BETH SICKINGER,
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,
Mary Varnadore, Hearing Officer.

William R. Ponall, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before TURNER, EVANS, and T. SMITH, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Beth Sickinger (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 January 5, 2008, Officer Ross of the Maitland Police Department conducted a traffic stop after witnessing a vehicle nearly cause a collision. Upon pulling the vehicle over, Officer Ross made contact with the driver, Petitioner, and observed the odor of alcohol emitting from her breath. Officer Ross also observed that Petitioner's eyes were bloodshot and glassy, and her balance was unsteady. Petitioner admitted to consuming alcoholic beverages before driving. Based on Petitioner's performance on the field sobriety exercises, Officer Ross arrested Petitioner and transported her to the Orange County testing facility. Petitioner agreed to submit to a breath test and gave breath-alcohol samples of .199 and .191. 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 January 31, 2008, the hearing officer held a formal review hearing at which Petitioner was not present but was represented by counsel. Petitioner moved to invalidate the license suspension on four grounds: (1) that the hearing officer failed to issue subpoenas for Roger Skipper, Laura Barfield, and Kelly Melville; (2) that the breath test results were obtained at the request of an officer acting outside the jurisdiction of the police department; (3) that there is no guidance in the FDLE rules on how long an individual is supposed to blow into the breath testing machine; and (4) 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 at the time of the accident. Petitioner also moved to strike the results of the horizontal gaze nystagmus exercise as well as the other field sobriety exercises. On February 11, 2008, the hearing officer entered an order denying Petitioner's motions, with the exception of the motion to strike the horizontal gaze nystagmus exercise results, 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, and Laura Barfield. 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 further asserts that the suspension is a

departure from the essential requirements of the law because Officer Ross lacked the authority to read Petitioner the implied consent warning and request that she submit to a breath test.

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 argument, the Department contends that Officer Ross was authorized to inform Petitioner of the implied consent warning and request a breath test because the offense originated within his jurisdiction.

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 hearing officer reviewing license suspension after motorist's refusal to take breath test had authority to consider lawfulness of arrest even though statute providing for such review did not include lawfulness of arrest as one of the issues within the scope of review). 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 §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.

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 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**; 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
__22__ day of _____December_____, 2009.

_____/S/_____
THOMAS W. TURNER
Circuit Judge

_____/S/_____
ROBERT M. EVANS
Circuit Judge

_____/S/_____
THOMAS B. SMITH
Circuit Judge

