

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

**CASE NO.: 2008-CA-24632
WRIT NO.: 08-54**

MEGHAN MOIST,

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,
Jim Kuritz, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before JOHNSON, WHITEHEAD, and THORPE, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Meghan Moist (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 25, 2008, at approximately 2:36 a.m., Deputy Williams of the Orange County Sheriff's Office conducted a traffic stop on a vehicle driving without headlights illuminated. Upon pulling the vehicle over, Deputy Williams made contact with the driver of the vehicle, Petitioner, and observed the odor of alcohol emitting from the vehicle. At the time the vehicle was pulled over, there were three passengers in addition to Petitioner in the vehicle. Deputy Williams observed that Petitioner's eyes were bloodshot and watery, her speech was slurred, and she was stumbling and staggering. Based on Petitioner's performance on the field sobriety exercises, Deputy Williams 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 .177 and .187. 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 28, 2008, the hearing officer held a formal review hearing at which Petitioner was represented by counsel. Petitioner moved to invalidate the license suspension on four grounds: (1) that the hearing officer's refusal to issue subpoenas for Roger Skipper, Laura Barfield, Jennifer Keegan, and Kelly Melville was a violation of due process; (2) that Deputy Williams did not have probable cause to stop or arrest Petitioner; (3) that the breath test machine used was unapproved for use in the State of Florida; and (4) that there are no uniform procedures for administering a breath test. Petitioner also moved to strike the horizontal gaze nystagmus test. On September 3, 2008, the hearing officer entered an order denying Petitioner's motions, with the exception of the motion to strike the horizontal gaze nystagmus test, 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 subpoenas for the agency inspector and other witnesses. 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 and precluded her from challenging the reliability of the

breath test results. She also asserts that the breath test results were inadmissible because the samples were obtained by using an unapproved and unreliable breath testing machine. Lastly, Petitioner contends that the FDLE rules are insufficient to provide an accurate breath test result due to the failure to provide a uniform time or volume for an individual to be required to stop blowing into the breath testing machine.

With respect to Petitioner's argument regarding the hearing officer's failure to issue subpoenas, the Department filed a motion to dismiss but reserved its right to respond pending the Court's disposition of the motion. On October 19, 2009, this Court entered an order denying the Department's motion to dismiss. 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 there is competent substantial evidence in the record that the Department substantially complied with FDLE rules to render Petitioner's breath test admissible.

We find the Second District's decision in Yankey to be dispositive of the instant case. Id.; 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. Like in Yankey, the hearing officer below refused to issue the subpoena 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 ___3rd__ day of ___February_____, 2010.

_____/S/_____
ANTHONY H. JOHNSON
Circuit Judge

_____/S/_____
REGINALD WHITEHEAD
Circuit Judge

_____/S/_____
JANET C. THORPE
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 on this ___8th___ day of ___February_____, 2010, to the following: **Stuart I. Hyman, Esquire**, 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.

_____/S/_____
Judicial Assistant