

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

JAVIER ROMAGUERA,

Petitioner,

CASE NO.: 2007-CA-009009-O

WRIT NO.: 07-42

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, DIVISION OF DRIVER
LICENSES,**

Respondent.

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

William R. Ponall, Esquire,
for Petitioner.

Heather Rose Cramer, Esquire,
for Respondent.

Before McDonald, Adams, J., O' Kane, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner, Javier Romaguera ("Petitioner" or "Romaguera"), timely filed this petition seeking certiorari review of a Final Order of License Suspension of the Florida Department of Highway Safety and Motor Vehicles ("the Department"). The Order under review sustained the suspension of Petitioner's driving privileges, pursuant to section 322.2615, Florida Statutes, for

operating a motor vehicle while under the influence of an alcoholic beverage and with an unlawful blood-alcohol level. This Court has jurisdiction. §§ 322.2615 (13), 322.31, Fla. Stat. (2005); Fla. R. App. P. 9.030(c)(3); 9.100. We dispense with oral argument. Fla. R. App. P. 9.320.

Romaguera's license was administratively suspended and he requested a hearing pursuant to section 322.2615, Florida Statutes, and chapter 15A-6, Florida Administrative Code. A hearing was held before Hearing Officer Reginald Owes at which the following documents were admitted into evidence:

DDL-1 Florida Uniform Traffic Citation #4597-XAT;
DDL-2 Petitioner's Florida Driver's License;
DDL-3 Breath Alcohol Test Affidavit;
DDL-4 Florida DLE Inspection Report for Intoxilyzer #80-001257 signed and dated April 18, 2007 by Roger Skipper;
DDL-5 Florida DLE Inspection Report for Intoxilyzer #80-001257 signed and dated April 17, 2007 by Kelly Melville;
DDL-6 Orange County Charging Affidavit; and
DDL-7 Witness Interview.

Petitioner offered the following exhibits which were also moved into evidence:

DE-1 Section 322.2615, Florida Statutes;
DE-2 Final Order (Mareike Schultz); and
DE-3 Final Order (Austin Corder).

Petitioner also provided to the Hearing Officer letters from Laura Barfield of the Florida Department of Law Enforcement to various local law enforcement officials and a copy of the breath test operator's renewal course materials.

Following the conclusion of the hearing, the Hearing Officer rendered a written decision in which he concluded that “all elements necessary to sustain the suspension for driving with an unlawful breath or blood alcohol level under section 322.2615 of the Florida Statutes are supported by a preponderance of the evidence.” (Pet. Cert. Ex. B at 3.)

STANDARD OF REVIEW

A circuit court’s review of the decisions of lower tribunals “is limited to a determination of whether procedural due process has been accorded, whether the essential requirements of law have been observed, and whether the decision is supported by substantial competent evidence.” *Campbell v. Vetter*, 392 So. 2d 6, 7-8 (Fla. 4th DCA 1980).

PARTIES’ ARGUMENTS

Petitioner advances two arguments.

First, he contends that his license suspension should be invalidated because “the record before the Hearing Officer failed to contain the crash report as required by Fla. Stat. § 322.2615(2).” (Pet. Cert. 5.)

Romaguera next argues that he was denied due process because the Hearing Officer refused to issue three subpoenas which Petitioner requested.

The Department responds that it had no obligation to make the crash report, if there was one, part of the record and that Petitioner had no right to subpoenas for the three individuals he sought to question at the hearing.

DISCUSSION

Crash Report

Section 322.2615(2), Florida Statutes provides, in part, that:

[T]he law enforcement officer shall forward to the department, within 5 days after issuing the notice of suspension, the driver's license; an affidavit stating the officer's grounds for belief that the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances; the results of any breath or blood test or an affidavit stating that a breath, blood, or urine test was requested by a law enforcement officer or correctional officer and that the person refused to submit; the officer's description of field sobriety tests, if any; the notice of suspension; *and a copy of the crash report, if any.*

§ 322.2615(2), Fla. Stat. (2006) (emphasis added).¹

The word "shall," Petitioner argues, is mandatory and requires that the crash report be made part of the record at a license suspension hearing.

The Department counters by citing the next sentence of section 322.2615(2) which provides that "the failure of the officer to submit materials within the 5-day period specified in this subsection and in subsection (1) does not affect the department's ability to consider any evidence submitted at or prior to the hearing." §322.2615 (2), Fla. Stat. (2006). According the Department, this provision means that section 322.2615(2) "is not a mandate that all of the listed documents must be in every record in every case." (Resp. Pet. Cert. 6.) The Petitioner answers that the provision relied upon by the Department does not excuse the non-production of

¹ Law enforcement officers are required to make written report - either formal or informal - of a crash involving a violation of the DUI statute. §316.066(3)(a)(2), (3)(b), Fla. Stat. (2006).

documents listed in that statute, but rather merely “permits documents submitted to the Department after the 5-day period but prior to the conclusion of the formal review hearing to be considered by the Department hearing officer in making his or her decision to sustain or invalidate an individual's license suspension.” (Reply to Resp. Pet. Cert. 3.)

We agree with the Petitioner. “The legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended.” *State v. Bradford*, 787 So. 2d 811, 819 (Fla. 2001); *Dep’t of Prof’l Regulation v. Durrani*, 455 So. 2d 515, 518 (Fla. 1st DCA 1984). In section 322.2615(2), the Legislature has used the word “shall” in relation to the obligation of the law enforcement officer to forward specific documents to the Department but has used the word “may” with regard to the videotape of the investigation. The use of these different terms in this section has been construed by the Second District Court of Appeal in *Department of Highway Safety and Motor Vehicles v. Snelson*, 817 So. 2d 1045, 1048 (Fla. 2d DCA 2002). There, the court of appeal held that word “may” in section 322.2615(2) is “clearly optional” and “patently permissive” language in regard to the forwarding of videotape. *Id.* at 1047-48. It follows, conversely, that “shall,” as used in this same statutory provision, must be mandatory. We “are bound to give effect to clear words the Legislature has chosen to use in a statute.” *City of Orlando v. Wilkinson*, 624 So. 2d 799, 800 (Fla. 1st DCA 1993). As a result, we find that the failure to place the crash report into the record at the administrative hearing was a departure from then essential requirements of the law. To hold otherwise would countenance the Department bestowing upon itself the authority to place into the administrative record whichever of the specified documents it wished. We think it clear that the Legislature did not intend such a result when it directed that certain documents, including crash reports, “shall” be

placed into the record at license suspension hearings.² The Petition for a Writ of Certiorari is granted.

Subpoenas

Petitioner requested the Hearing Officer issue subpoenas for Kelly Melville, Roger Skipper, and Laura Barfield, pursuant to section 322.2615, Florida Statutes. The Hearing Officer refused. This, Petitioner claims, constituted a violation of his right to due process. The Hearing Officer acknowledged on the record that he had received requests for subpoenas for those individuals but had refused to issue them. Kelly Melville prepared the Agency Inspection Report and Roger Skipper prepared the Department Inspection Report, both of which were in the record. Laura Barfield is the Florida Department of Law Enforcement Alcohol Testing Program Manager who, Petitioner advised, “has sent letters to officials all over the state indicating that there is a problem with the Intoxilyzer 8000 software.” (Pet. Cert. 4.)³

We saw in the foregoing part of this Order that 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

² Inasmuch as section 322.2615(2) uses mandatory language and “requires that the crash report be placed into evidence, regardless of prejudice, a proffer as to how the Petitioner is prejudiced by its absence is unnecessary.” *Glasser v. Dep’t Highway Safety & Motor Vehicles*, 16 Fla. L. Weekly Supp. 1a (Fla. 4th Cir. Ct. Sept. 4, 2008).

³ In support of this assertion, Petitioner provided the Hearing Officer with copies of six letters from Ms. Barfield to various law enforcement officials. The first sentence of each of these letters refers to “an issue regarding the Intoxilyzer 8000 which the Florida Department of Law Enforcement Alcohol Testing Program has discovered.” (Pet. Cert., Ex. E.) The Intoxilyzer 800 was the device utilized on Mr. Romaguera. (Pet. Writ. Cert. Exs. DDL-3, DDL-4.)

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,” several letters submitted by Petitioner at the hearing, the Hearing Officer should have subpoenaed her.

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.

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

- 1) The Petition for Writ of Certiorari is **GRANTED** and the Hearing Officer’s Final Order of License Suspension is **QUASHED**; and
- 2) This matter is **REMANDED** for further proceedings consistent with this opinion. On remand the Hearing Officer shall issue subpoenas for Kelly Melville, Roger Skipper and Laura Barfield; and
- 3) On remand, it shall be the Department’s burden to enter the crash report into evidence or demonstrate that no crash report was created; and
- 4) Should the Department fail to allow the subpoenas of Melville, Skipper and Barfield or fail to enter the crash report (if there is one) into evidence, the Petitioner’s suspension should be invalidated.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this

the 29th day of January, 2010.

/S/
ROGER J. McDONALD
Circuit Court Judge

/S/
JOHN H. ADAMS, SR.
Circuit Court Judge

/S/
JULIE H. O' KANE
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this 29th day of January, 2010, to the following:

1) William R. Ponall, Esq., Kirkconnell, Lindsey, Snure and Yates, P.A.,
P.O. Box 2728, Winter Park, Florida 32790-2728; and

2) Heather Rose Cramer, Esq., Department of Highway Safety and Motor Vehicles,
Legal Department, 6801 Lake Worth Road, Lake Worth, Florida 33467.

/S/
Judicial Assistant