

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

**CASE NO.: 2007-CA-10976-O  
WRIT NO.: 07-49**

**JESSICA WERTHEIMER,**  
Petitioner,

v.

**STATE OF FLORIDA, DEPARTMENT  
OF HIGHWAY SAFETY AND MOTOR  
VEHICLES,**  
Respondent.

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

Stuart I. Hyman, Esquire,  
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,  
for Respondent.

Before J. ADAMS, THORPE, and PERRY, J.J.

PER CURIAM.

**FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI**

Petitioner Jessica Wertheimer (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 June 28, 2007, Deputy Lockman of the Orange County Sheriff's Office observed a vehicle weaving within the lane and crossing the dividing lines several times. Upon pulling the vehicle over, Deputy Lockman made contact with the driver of the vehicle, Petitioner, and observed the odor of alcohol emitting from her breath. Deputy Lockman also observed that Petitioner's eyelids were heavy, her eyes were bloodshot and glassy, and her speech was slurred. Based on Petitioner's performance on the field sobriety exercises, Deputy Lockman 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 .138 and .137. 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 7, 2007, 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 five grounds: (1) that the hearing officer failed to issue subpoenas for Roger Skipper, Laura Barfield, Tanya Shrum, and Kelly Melville; (2) that there was no probable cause to stop Petitioner; (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 arrest or require Petitioner to submit to field sobriety exercises. On August 7, 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.

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) an affidavit stating the officer's grounds for belief that a driver was under the influence of alcohol; (2) the results of a breath test or an affidavit stating that a breath test was requested by the officer and the person refused to submit; (3) the officer's description of a person's field sobriety test, a notice of suspension, or a copy of crash report; and (4) a videotape of field sobriety test. 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 the record evidence at the formal review hearing established that the breath test was conducted pursuant to sections 316.1931 and 316.1934, Florida Statutes, and in compliance with the FDLE rules.

Following the briefing phase of this appeal, the Second District issued an opinion 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). 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 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 witnesses at issue were named in the documents presented by the Department. 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 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** and the hearing officer's Final Order of License Suspension is **QUASHED**.

**DONE AND ORDERED** in Chambers, at Orlando, Orange County, Florida on this  
\_\_18\_\_ day of \_\_November\_\_, 2009.

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/s/  
**JANET C. THORPE**  
Circuit Judge

\_\_\_\_\_  
/s/  
**JOHN H. ADAMS, SR.**  
Circuit Judge

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/s/  
**BELVIN PERRY, JR.**  
Chief Judge

