

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

MICHELLE AUSTER,
Petitioner,

CASE NO.: 2008-CA-26516
WRIT NO.: 08-59

vs.

**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.

Joerg F. Jaeger, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before POWELL, ARNOLD, APTE, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Michelle Auster 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)(1)(C). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. This Court has

carefully reviewed and considered Petitioner's petition and appendix, the Department's response, and Petitioner's reply.

On July 29, 2008, at approximately 2:23 a.m., Deputy Scott of the Orange County Sheriff's Office observed a vehicle enter the highway and cross in front of his lane of travel. Deputy Scott had to take evasive action not to collide with the vehicle. Upon stopping the vehicle, Deputy Scott made contact with the driver, identified as Petitioner, and observed the odor of alcohol on her breath and her unsteady balance. Based on Petitioner's poor performance on the field sobriety exercises, Petitioner was arrested and transported to the testing center. After being read the implied consent warning, Petitioner refused to submit to a breath alcohol test. As a result of Petitioner's refusal, the Department suspended her driving privileges. Petitioner requested and was granted a formal review hearing pursuant to section 322.2615, Florida Statutes.

On August 27, 2008, the hearing officer held a formal review hearing at which Petitioner was represented by counsel. Upon arriving at the formal review hearing, Petitioner's counsel learned that the hearing officer had not issued a subpoena for Osvaldo Caner, the breath test technician. Petitioner proffered that the breath test technician observed Petitioner's condition shortly after the arrest and could testify as to whether Petitioner recanted her refusal to submit to a breath alcohol test. The hearing officer denied Petitioner's motion for continuance. There was no testimony by any witnesses. Petitioner also moved to invalidate the license suspension on two other grounds. On September 5, 2008, the hearing officer entered an order denying Petitioner's motions and sustaining the suspension of Petitioner's 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; that Petitioner refused to submit to a breath-alcohol test after being requested to do so; and that Petitioner was told that if she refused to submit to such test her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months. Petitioner timely seeks certiorari review by this Court.

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).

Our decision is mandated by the case of *Amodeo v. Department of Highway Safety & Motor Vehicles*, Case No. CI 96-3994 (Fla. 9th Cir. Ct. Aug. 20, 1997), affirmed, 711 So. 2d 148 (Fla. 5th DCA 1998), which is squarely on point. *See also Reyes v. Dep't of Highway Safety & Motor Vehicles*, Case No. 2005-CA-9342 (Fla. 9th Cir. Ct. Aug. 1, 2006). In *Amodeo*, the Fifth District Court of Appeal squarely and unequivocally held that a hearing officer has absolutely no discretion whatsoever to refuse to issue a subpoena for a fact witness to attend a formal driver's license suspension hearing.¹ The court said that to do so deprives the petitioner of due process and departs from the essential requirements of the law.

The case of *Department of Highway Safety & Motor Vehicles v. Chamizo*, 753 So. 2d 749 (Fla. 3d DCA 2000), upon which the Department relies, is not controlling because it is a

¹ We note that the rule is otherwise with respect to a subpoena duces tecum.

