

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

NICOLAS GENEMARAS,

**CASE NO.: 2010-CA-16827- O
WRIT NO.: 10-59**

Petitioner,

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, BUREAU OF DRIVER
IMPROVEMENT,**

Respondent.

ORDER GRANTING MOTION FOR REHEARING

THIS MATTER came before the Court for consideration of Petitioner, Nicolas Genemaras' "Motion for Rehearing" filed on August 1, 2012. This Court having reviewed the motion, the Final Order Denying Petition for Writ of Certiorari entered on July 20, 2012, the court file, and being otherwise fully advised in the premises, finds as follows:

This Court's review of the Petition for Writ of Certiorari in the instant case is limited to three components: whether procedural due process was followed; whether there was a departure from the essential requirements of law; and whether the administrative findings and judgment were supported by competent substantial evidence. Upon reconsideration of Petitioner's first argument that the Affidavit of Probable Cause and the Affidavit of Refusal to Submit to Breath Test ("Breath Affidavit") were legally insufficient, this Court finds that this argument has merit because the third component, the support by competent substantial evidence, appears to be lacking as to the affidavits.

It is important to note that from review of the transcript, no testimonial evidence was presented at the formal review hearing. Section 322.2616(7)(b), Florida Statutes, allows for the taking of testimony in addition to the review of records. The arresting officer did not appear to testify, nor did the person who supposedly “notarized” the affidavits. Therefore the record, for purposes of review, is primarily limited to the Affidavit of Probable Cause and the Breath Affidavit. It is those affidavits that the Petitioner challenges in this Petition and in this Motion for Rehearing. More specifically, it is the notarizations, or lack thereof, that serves as the basis for these challenges.

Section 322.2616(3), Florida Statutes, provides that the document setting forth the grounds for the license suspension must be submitted to the Department of Highway Safety and Motor Vehicles by the law enforcement officer. The statute does not state that an acknowledgment may be submitted in lieu of an affidavit. An acknowledgement is when a person merely declares that he executed and signed the document, but an affidavit requires that a person swearing before the notary must under oath assert that the facts set forth in the document are true. *Pina v. Simon-Pina*, 544 So. 2d 1161, 1162 (Fla. 5th DCA 1989). As continuously held by the courts, “[w]here an affidavit is called for, an acknowledgment will not suffice.” *Pina* at 1162, citing to *Hammond v. Eastmoore*, 513 So. 2d 770 (Fla. 5th DCA 1987); *McGibney v. Smith*, 511 So. 2d 1083 (Fla. 5th DCA 1987).

In this matter, the statute required an affidavit. Therefore, the question centers on whether a proper affidavit was presented to the hearing officer. Further, since there was no testimony for the hearing officer to consider, do the documents themselves confirm that in fact the signature was notarized? If the document was not sworn to before a proper notary or another law enforcement officer, the document was not an affidavit as required by the statute.

Upon review of the Affidavit of Probable Cause, the name “PFC Darrell” appears to be written in before the phrase “hereby swear or affirm” in the top portion of the affidavit. There is a signature on the line in the middle portion of the affidavit (above the notary/attesting portion) that reads “signature of law enforcement officer”, but the signature is difficult, if not impossible, to read. Without the officer’s testimony to confirm that it was his or her signature, this Court can only assume that the signature was his or hers (Assumption #1). Also, the number 6097 is included in the lower left portion of the affidavit. However, there was no testimony to confirm whether the number was a badge number nor to identify the officer for whom the badge number was assigned. This Court can, at best, only assume that the badge number was assigned to Officer Darrell or to another officer (Assumption #2).

Further, directly below the signature line in the Affidavit of Probable Cause, there is language stating “This affidavit must be notarized or attested to” and it cites to section 117.10, Florida Statutes, that provides that law enforcement officers are permitted to administer oaths when engaged in the performance of official duties. The statute concludes with the statement, “[a]n officer may not notarize his or her own signature.” Therefore, if the notarizing officer is Officer Darrell, the affidavit would be invalid. If the signature was not Officer Darrell’s and was not an individual that was a notary, again it would be invalid. On the other hand, if the signature was from a fellow officer it would be a valid notarization, but the signature was illegible and lacked testimony from the person notarizing the affidavit to identify the signature. Therefore, the hearing officer would have to assume that the signature on the notary form was from a fellow officer (Assumption #3) and that the number 6097 was the badge number assigned to a fellow officer and not the badge number assigned to Officer Darrell. In fact, the number may not even be a badge number (Assumption #4).

Each affidavit contains defects in the section for an acknowledging party's signature and an attesting party's signature. In the Affidavit of Probable Cause the signature is missing for an officer attesting that Officer Darrell has been sworn or that his affidavit was given under oath. In the Breath Affidavit, there is a signature of the party who is the attesting officer and it is the same as the signature of the law enforcement officer. While included in the bottom left portion of both affidavits there is some writing above the line for the signature of the notary public, it is no more than an "acknowledgement." It reads, in both affidavits, "[t]he foregoing instrument was acknowledged before me" The acknowledgement information located in the bottom left portion of the affidavits appears to be completed with a date, year, and the number 6097 along with some writing that is illegible. Also, below the portion where the line for the signature of the notary public is located, initials and the number 6097 are included. Since there is no evidence to provide clarification as to the information contained in the affidavits, it must be presumed that the hearing officer assumed that the number 6097 was in fact, a badge or shield number assigned to someone other than Officer Darrell. This assumption could be true, but just as possible, the badge number may have been assigned to Officer Darrell (Assumption #5).

The lack of testimony at the formal review hearing to address the illegible and incomplete affidavits, makes it impossible to determine if the affidavits were notarized, and if notarized, whether they were notarized by someone allowed to do so. Stated more simply, based solely on the record, there was no record evidence that the person who completed the affidavits, had in fact sworn under oath that the facts were true and correct. To reach a conclusion as the hearing officer did, assumptions need to be stacked upon assumptions. Such staking of assumptions to develop competent substantial evidence is not permissible.

While formalities as to the submission of evidence are relaxed in the context of an administrative hearing, in this case, there was no competent evidence as to whether or not the affidavits were properly notarized. If the affidavits were not notarized, they were not sufficient under the statute. Further, the omissions in the affidavits were not minor technical defects as referenced in *Gupton v. Department of Highway Safety & Motor Vehicles*, 987 So. 2d 737 (Fla. 5th DCA 2008). In *Gupton*, there was no question that the affidavit was signed by both the arresting officer and the attesting officer. In this case, while the arresting officer signed the affidavits, there was no clear evidence that the affidavits were notarized by someone authorized to do so, or for that matter, there was no clear evidence to confirm that the affidavits were notarized at all. When there is an issue concerning the officer's identity, the defect can be relevant.

The difficulty presented to the hearing officer was a lack of evidence. She was not provided with sufficient evidence at the hearing that she could consider and accept or reject. Had testimony been presented as to the affidavits, it would have been within the hearing officer's discretion to accept or not accept the testimony. The totality of the evidence available to the hearing officer is the same evidence that is available to this reviewing court. The evidence is lacking to show that the affidavits were notarized. Also, there is no evidence to determine that the affidavits were signed by another law enforcement officer or by Officer Darrell. Therefore, not only was competent evidence lacking, substantial evidence was lacking as well.

Accordingly, Petitioner's motion for rehearing should be granted as to his first argument. Petitioner also seeks rehearing as to his third argument, but this Court finds no reason to reconsider its ruling on his third argument nor on his second argument.

Accordingly, based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Nicolas Genemaras', Motion for Rehearing is **GRANTED** as to his first argument and the hearing officer's Final Order of License Suspension is **QUASHED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 21st day of September, 2012.

/S/

BOB LEBLANC
Circuit Court Judge

/S/

JOHN MARSHALL KEST
Circuit Court Judge

/S/

F. RAND WALLIS
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Stuart I. Hyman, Esquire**, Stuart I. Hyman, P.A., 1520 East Amelia Street, Orlando, FL 32803 and to **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, DHSMV-Legal Office, P.O. Box 570066, Orlando, FL 32857, on this 21st day of September, 2012.

/S/

Judicial Assistant