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

CASE NO.: 2010-CA-24385-O
Writ No.: 10-97

JANNA COHEN,

Petitioner,

v.

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

Respondent.
_____/

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

Stuart I. Hyman, Esquire,
for Petitioner.

Kimberly A. Gibbs, Assistant General Counsel,
for Respondent.

BEFORE S. KEST, MUNYON, BLACKWELL, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Janna Cohen ("Cohen" or "Petitioner") seeks certiorari review of the Department of Highway Safety and Motor Vehicles' ("Department" or "Respondent") final order sustaining the suspension of her driver's license for driving with an unlawful breath alcohol level. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes and Florida Rule of Appellate Procedure 9.030(c)(3).

Facts and Procedural History

On May 18, 2010, Cohen was arrested for driving under the influence. Cohen provided breath test results of 0.208 and 0.228 and her license was suspended. She requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and a hearing was held on July 8, 2010 and October 8, 2010.

At the hearing, Cohen attempted to introduce documents related to the 2002 approval study of the Intoxilyzer 8000; transcripts of the testimony of FDLE Inspector Roger Skipper from a formal review hearing in other cases in 2006; a letter dated in 2006 from FDLE Custodian of Records Laura Barfield about Intoxilyzer software version 8100.26; numerous breath test results obtained from various Intoxilyzer 8000 machines using software 8100.26 and 8100.27 with testing dates from 2006 and 2007; and subpoenas for Roger Skipper, Laura Barfield, and FDLE Custodian of Records Jennifer Keegan that the hearing officer did not issue. On October 18, 2010, the hearing officer entered a written order sustaining Petitioner's license suspension.

Standard of Review

"The duty of the circuit court on a certiorari review of an administrative agency 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." *Dep't of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. Where the driver license was suspended for driving with an unlawful

blood alcohol level, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

> 1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages 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 § 316.193.

§ 322.2615(7)(a), Fla. Stat. (2010).

Analysis

In the Petition for Writ of Certiorari, Cohen argues that: 1) the hearing officer deprived her of due process of law when her license suspension was not set aside due to the failure of the hearing officer to issue subpoenas for Roger Skipper, Jennifer Keegan and Laura Barfield; 2) the breath test results were not properly approved because they were obtained by use of an unapproved breath testing machine and provided scientifically unreliable results; 3) the breath test results were inadmissible due to the failure of the record to contain the most recent Department inspection; 4) the Intoxilyzer 8000 was improperly evaluated for approval; and 5) the hearing officer failed to remain neutral. This Court denied the Petitions arguments (1) through (4) in *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 2010-CA-19788, Writ 10-70 (Fla. 9th Cir. Ct. Sept. 10, 2012) and *Morrow v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 704a (Fla. 9th Cir. Ct. Feb. 27, 2012).

I. Failure to Issue Subpoenas

As in *Klinker* and *Morrow*, Cohen attempted to introduce documents concerning Intoxilyzer 8000 machines not used to administer her test and documents from tests administered

in 2006 and 2007. Cohen argues that Roger Skipper, Jennifer Keegan and Laura Barfield who were named in the documents she attempted to introduce at the hearing were necessary to establish that the breath test machine upon which she was tested was not approved pursuant to FDLE Rules and the breath test machine was not working in a scientifically reliable manner.

Cohen's breath test was administered on May 18, 2010. Therefore, the documents she attempted to introduce are not relevant to the issue in this case, whether the machine used to test her breath alcohol level on May 18, 2010 was an approved scientifically reliable machine. Cohen is not entitled to present evidence that is not relevant to the issue before the hearing officer. *Lee v. Dep't of Highway Safety & Motor Vehicles*, 4 So. 3d 754, 757 (a driver has the right to present evidence *relevant* to the issues when seeking review of a license suspension pursuant to section 322.2615 (emphasis added)).

II. Breath Test Results Were Not Properly Approved
IV. Intoxilyzer 8000 Was Improperly Evaluated For Approval

The Department entered into the record the breath alcohol test affidavit indicating a breath alcohol level greater than 0.08 which is presumptive proof of the results. § 316.1934(5), Fla. Stat. (2010). Pursuant to Rule 11D-8.003(2), the Intoxilyzer 8000 is an approved instrument if it is used with software evaluated by FDLE in accordance with Instrument Evaluation Procedure FDLE/ATP Form 34. *Dep't of Highway Safety & Motor Vehicles v. Berne*, 49 So. 3d 779, 784 (Fla. 5th DCA 2010). Cohen did not present any evidence that software version 8100.27 was not evaluated by FDLE in accordance with FDLE/ATP Form 34. In addition, only an evaluation of the software is required, not approval. *Id.* at 780. Therefore, Cohen failed to overcome the presumptive proof of impairment. *See Gurry v. Dept. of Highway Safety*, 902 So.2d 881, 884 (Fla. 5th DCA 2005); *Dep't of Highway Safety & Motor Vehicles v. Mowry*, 794 So. 2d 657, 659 (Fla. 5th DCA 2001).

III. Record Failed To Contain The Most Recent Department Inspection

Rule 11D-8.004(2) requires annual inspection of the breath test instruments. Rule 11D-8.006(1) requires inspection of the breath test instruments once each calendar month. Section 316.1934(5) states that the breath test affidavit is admissible without further authentication and is presumptive proof of the results of an authorized test to determine alcohol content of the breath if the affidavit discloses: "…… (e) If the test was administered by means of a breath testing instrument, the date of performance of the most recent required maintenance on such instrument." The "most recent required maintenance" can be either the monthly or annual inspection, whichever is most recent. *State v. Buttolph*, 969 So. 2d 1209 (Fla. 4th DCA 2007).

Cohen's breath test was conducted on May 18, 2010. The date of the last agency inspection on the breath test affidavit is May 12, 2010. Cohen did not present any evidence to demonstrate that the May 12, 2010 inspection was not the most recent inspection prior to the date of Cohen's breath test. Therefore, the hearing officer properly admitted the breath test results.

V. Hearing Officer Failed to Remain Neutral

Petitioner argues that the hearing officer failed to remain neutral because she relied on a document submitted by the Department personnel. Cohen argues that the Agency Inspection Report was date stamped as received by the Department on May 12, 2010, before her arrest date on May 18, 2010. Cohen argues that the report was submitted by the Department's personnel and not law enforcement in violation of section 322.2615 of the Florida Statutes.

Pursuant to section 322.2615(2), a law enforcement officer shall forward materials to the department after issuing the notice of suspension. These materials "submitted to the department by a law enforcement agency" are self-authenticating and shall be in the record for consideration by the hearing officer. § 322.2615(2), Fla. Stat. (2010). The hearing officer stated that the agency inspection reports are submitted to the Department by the agency inspector after the

inspections are complete. The agency inspector is an employee of the Orange County Sheriff's Office, a law enforcement agency. Therefore, the agency inspection report was properly submitted by a law enforcement agency and the hearing officer did not depart from the essential requirements of law by admitting the report. *See Dept. of Highway Safety & Motor Vehicles v. Meeham*, 787 So. 2d 221 (Fla. 2d DCA 2001). Furthermore, the agency inspector was a witness at the hearing and Cohen had the opportunity to question the agency inspector about the report.

Based on the foregoing, there was competent substantial evidence to support the hearing officer's findings and Petitioner was not deprived of due process.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that The Petition for Writ of Certiorari is **DENIED.**

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this _4th_ day of _October, 2012.

_/S/_____
SALLY D.M. KEST
Circuit Judge

_/S/_____
LISA T. MUNYON
Circuit Judge

_/S/_____
ALICE L. BLACKWELL
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Stuart I. Hyman, Esq.,** Stuart I. Hyman, P.A., 1520 East Amelia St., Orlando, Florida 32803 and to **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this _5th_ day of _October_, 2012.

_/S/_____
Judicial Assistant