

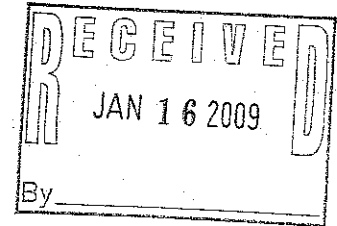
IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA08-1523
DIVISION: 55

NESTOR A. OTERO,
Petitioner,

vs.

DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.



ORDER ON PETITION FOR WRIT OF CERTIORARI

THIS CAUSE came before the Court for oral argument on December 4, 2008, upon the Petition for Writ of Certiorari filed by Petitioner, Nestor A. Otero. The Court has reviewed the briefs of the parties, and has heard and considered the arguments of Counsel for each party. The court, being otherwise fully advised in the premises, finds as follows:

Petitioner seeks review of the Final Order of License Suspension entered by the Department of Highway Safety and Motor Vehicles on June 13, 2008, sustaining the administrative suspension of Petitioner's driver's license for driving with an unlawful breath or blood alcohol level under Section 322.2615, Florida Statutes. This Court has jurisdiction to consider this Petition pursuant to Rule 9.030(c)(3), Florida Rules of Appellate Procedure and Section 322.31, Florida Statutes.

In reviewing an administrative agency decision, the Court must consider: (i) whether procedural due process was accorded to the parties; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings and judgment are supported by competent substantial evidence. Haines City Cmty. Dev. v. Heggs, 658 So.2d 523, 530 (Fla.

1995) (citing City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982)). The Court is not entitled to reweigh the evidence or substitute its judgment for that of the agency. See Dep't. of Highway Safety and Motor Vehicles v. Trimble, 821 So.2d 1084, 1085 (Fla. 1st DCA 2002).

The Department administratively suspended Petitioner's driver's license, and Petitioner requested a formal review of the administrative suspension. A formal review hearing was held on June 11, 2008, and the Hearing Officer upheld the administrative suspension of the Petitioner's driver's license.

The hearing officer found that based on the documentary evidence provided by the Department for purposes of the hearing, there was probable cause to believe that Petitioner 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; Petitioner refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer subsequent to a lawful arrest; and that Petitioner was told that if he refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of one year or, in the case of a second or subsequent refusal, for a period of eighteen months.

Petitioner argues that he was denied procedural due process when Petitioner was denied the opportunity to cross examine the witness and evidence relied on by the Department to administratively suspend his driving privilege, more specifically, the witness to the accident who prepared a sworn affidavit that was submitted to the hearing officer by the Department for purposes of the hearing. Pursuant to Section 322.2615(6)(a), Florida Statutes, a person whose license is suspended is entitled to a formal review hearing before a hearing officer employed by the Department. At the formal review hearing, the driver has the right to present evidence relevant to the issues, cross-examine opposing witnesses, impeach any witness and rebut the evidence presented against the driver. FLA. ADMIN. CODE R. 15A-6.013(5). A hearing officer is

authorized to issue subpoenas for officers and witnesses identified in the documents submitted pursuant to Section 322.2615(2), Florida Statutes. FLA. STAT. ch. 322.2615(6)(b) (2008). In order to prove that Petitioner 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, the Department relied on the sworn affidavit of Charles McVadon, which was submitted by law enforcement to the Department pursuant to Section 322.2615(2). Prior to the hearing, Petitioner requested a subpoena for Charles McVadon for personal appearance and testimony regarding the license suspension at issue in this case. The hearing officer denied Petitioner's request for the subpoena; therefore, Petitioner did not have an opportunity to cross-examine Charles McVadon regarding his affidavit that was made part of the record at the hearing.

Citing Section 322.2615(6)(b), Florida Statutes, the Department argues that the hearing officer properly refused to issue the subpoena because she has no statutory authority to issue a subpoena for a person not identified in any documents identified in Section 322.2615(2). The Department argues that the effect of extending the hearing officer's authority to issue subpoenas for those persons identified within other documents referenced in the specific documents enumerated in Section 322.2615(6)(b) as the Court did in Cragg v. Department of Highway Safety and Motor Vehicles, 14 Fla. L. Weekly Supp. 997a (Fla. Cit. Ct. August 21, 2007), would create results not intended by the Legislature. The Department argues that the effect would be such that if a crash report indicated that a crash occurred in front of the Governor's mansion, the hearing officer would be authorized to issue a subpoena compelling the attendance of the Governor at the administrative suspension hearing.

The Court disagrees with the Department's analogy in this case. The individual for whom the Petitioner sought a subpoena was not just a casual bystander in this case whose name was mentioned in one of the documents. Rather, Mr. McVadon's input, in the form of a sworn

affidavit, was either solicited or accepted by the officer at the scene of the accident, and Mr. McVadon's statement was willfully made a part of the documents submitted by the law enforcement officer to the Department and in turn from the Department to the hearing officer. Therefore, the Court finds that Mr. McVadon was the type of witness contemplated in Section 322.2615(6)(b), Florida Statutes. Mr. McVadon provided pertinent information in the form of an affidavit which was submitted to the hearing officer for purposes of Petitioner's administrative hearing. The Department's failure to issue subpoenas for those witnesses providing information relevant and pertinent to the hearing officer's determination violates Petitioner's due process and confrontation rights. Such failure makes the hearing a travesty. The hearing officer was not justified in relying on this affidavit without the Petitioner's opportunity to cross-examine the witness who prepared the affidavit. Therefore, the Petition must be granted on this issue.

Petitioner also argues that the Department's Order is not supported by competent substantial evidence and did not comport with the essential requirements of law when the hearing officer sustained the suspension of the Petitioner's driving privilege notwithstanding the failure of the Department to comply with the mandatory requirements of Section 322.2615, Florida Statutes. Petitioner argues that the crash report is a document which must be submitted to the hearing officer pursuant to Section 322.2615, and because such document was not submitted to the hearing officer by the Department for consideration at the formal review hearing, the hearing officer did not comport with the essential requirements of the law in upholding Petitioner's driver's license suspension, and the hearing officer's findings were not supported by competent substantial evidence.

Because the Court has already determined that the Order should be quashed and the case remanded, it is unnecessary for the Court to address the issue of the crash report. However, the Court notes that it is unclear whether a crash report exists. If a crash report does exist and the

Department produces the report to the hearing officer upon remand, the Department will be in compliance with Section 322.2615, and there will be no need for this Court to address the matter at a later time. However, if the Petitioner establishes that a report does exist and such report is not produced by the Department to the hearing officer upon remand, the Court will reconsider this issue if raised again by the Petitioner at a later time. Accordingly, it is:

ORDERED AND ADJUDGED that:

- 1.) The Petition for Writ of Certiorari is and the same is hereby GRANTED.
- 2.) The Order suspending Petitioner's driving privilege entered by Respondent on June 13, 2008, is and the same is hereby QUASHED, and this matter is remanded to the Department for proceedings consistent with this Opinion.

DONE AND ORDERED in Chambers, in St. Johns County, St. Augustine, Florida, this

14 day of January, 2009.

/s/ J. MICHAEL TRAYNOR

J. MICHAEL TRAYNOR
Circuit Court Judge

Copies to:

Cheyenne L. Palmer, Esquire
Epstein & Robbins
233 East Bay Street, Suite 1125
Jacksonville, Florida 32202

Douglas D. Sunshine, Esquire
Assistant General Counsel
Department of Highway Safety and Motor Vehicles
Neil Kirkman Building, A-432
Tallahassee, Florida 32399-0504