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Licensing -- Driver's license -- Suspension -- Driving with unlawful breath or blood alcohol level -- Hearing -- Telephonic testimony -- Licensee was denied due process where hearing officer was not able to observe demeanor of department inspector who was allowed to testify by telephone over licensee's objection -- Hearing officer -- Departure from neutrality -- Hearing officer departed from neutrality by admitting into record an agency inspection report not submitted to hearing officer by agency inspector or other law enforcement officer, but filed at central location and retrieved by hearing officer or other person with bureau of administrative review for licensee's hearing -- Final order of license suspension is quashed

JOHN SCHWARTZ, Petitioner, vs. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for St. Johns County. Case No. CA09-1924, Division 55. November 4, 2009. Counsel: Cheyenne L. Palmer, Epstein & Robbins, Jacksonville. Jason Helfant, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, Lake Worth.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(Traynor, Judge.) THIS CAUSE came before the Court for oral argument on October 7, 2009, upon the Petition for Writ of Certiorari filed by Petitioner, John Schwartz. 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 May 15, 2009, 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. Heggys*, 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 April 15, 2009, and was continued to May 13, 2009, and the Hearing Officer upheld the administrative suspension of the Petitioner's driver's license.

Petitioner raised three issues in his Petition for Writ of Certiorari. Issue Three was withdrawn by Petitioner, through Counsel, at the oral argument as to the Petition.

Petitioner first argues that he was denied procedural due process when the hearing officer allowed Matthew Malhiot, the Department Inspector, to appear by phone over the Petitioner's objection. Rule

15A-6.013(5) of the Florida Administrative Code provides that “[t]he driver shall have the right to present evidence relevant to the issues, to cross-examine opposing witnesses, to impeach any witness, and to rebut the evidence presented against the driver.” Petitioner argues that in an effort to exercise this right, Petitioner requested and received a subpoena duces tecum for Mr. Malhiot prior to the formal review hearing. The record shows that the formal review hearing was continued once because Mr. Malhiot could not attend. At the second hearing, Mr. Malhiot was again unable to attend due to a scheduling conflict; however, over Petitioner's objection, the hearing officer proceeded with the hearing and took testimony from Mr. Malhiot telephonically.

Pursuant to Rule 15A-6.013(7)(c) of the Florida Administrative Code, “[t]he hearing officer is the sole decision maker as to the weight, relevance and credibility of any evidence presented.” The Florida Standard Jury Instructions for civil cases provide:

In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

Though the civil jury instructions are not applicable in this type of hearing, they show that in determining the believability of the witness and the weight to be given the witness' testimony the witness' demeanor should be considered by the trier of fact. It follows that in order to evaluate witness testimony, especially for credibility purposes, the hearing officer must have the opportunity to observe the witness' demeanor. The Petitioner did not realize the full extent of her rights under Rule 15A-6.013 (5) when, over objection, Mr. Malhiot was permitted to appear telephonically.

Furthermore, Mr. Malhiot's subpoena required personal appearance, and Mr. Malhiot did not file a motion for protective order or put the Petitioner on notice that he would not be able to appear in person for the hearing. If Mr. Malhiot was unable to attend due to a scheduling conflict, the hearing should have been continued, as had previously been done, instead of proceeding over Petitioner's objection. Petitioner was denied procedural due process when Mr. Malhiot was permitted to testify telephonically, and therefore, the Petition will be granted as to this issue.

Petitioner also argues that the hearing officer departed from the essential requirements of the law when he failed to remain a neutral magistrate by allowing the Department to rely upon evidence submitted by the Department of Formal Reviews. Petitioner argues that in order to ensure the reliability of the breath test used to suspend the Petitioner's driver's license the Department relied upon an Agency Inspection document at the formal review hearing which had been submitted to the Bureau of Administrative Review by Paul Beasley, the Agency Inspector, on February 27, 2009, almost two weeks before Petitioner was arrested. Petitioner claims that as a result someone at the Bureau of Administrative Review entered the inspection document into the Petitioner's formal review record on behalf of the Department.

The hearing transcript shows that at the beginning of the hearing the hearing officer introduced the agency inspection report dated February 27, 2009, into the record. Mr. Beasley testified that the inspection report was submitted the day of the inspection, February 27, 2009, and the agency inspection report introduced into the record shows a fax stamp dated February 27, 2009. When asked how the document actually gets to the hearing once it is faxed, Mr. Beasley stated “all I know is it's posted on

line and people pull it off line, but how it actually, physically gets here, I do not know.”

Hearing officers “must take extraordinary care to be as impartial and neutral as the members of the judiciary are required to be.” *Department of Highway Safety and Motor Vehicles v. Griffin*, 909 So.2d 538 (Fla. 4th DCA 2005). It is clear from the record that the agency inspection was not submitted to the hearing officer by the agency inspector or other law enforcement officer for purposes of Petitioner's review hearing because the report was submitted well before Petitioner's arrest. The Court will not speculate as to what procedure was followed to obtain the document, but it is clear that the hearing officer or someone with the Bureau of Administrative Review took steps to make this report a part of Petitioner's file rather than remaining neutral and waiting for such submission of this document by law enforcement as contemplated by Rule 15A-6.013(2) of the Florida Administrative Code. While Rule 15A-6.013(2) allows the hearing officer to consider any report that has been filed prior to or at the review without extrinsic evidence of authenticity; in order for the hearing officer to remain neutral, such report must be filed for purposes of the specific hearing for which it is admitted. The report cannot be filed in a central location and then retrieved by the hearing officer for all relevant hearings. See *Griffin*, 909 So.2d at 542-43; *Aaron v. Department of Highway Safety and Motor Vehicles*, 13 Fla. L. Weekly Supp. 327b (Fla. Cir. Ct. January 5, 2006). The Court finds that the hearing officer departed from the essential requirements of the law when he failed to remain a neutral magistrate, and therefore, the Petition will be granted as to this issue as well.

The Court's notes do not reflect that the Department requested that the case be remanded to the hearing officer in the event this Petition was granted. Therefore, given the fact that the Petitioner was denied the opportunity to confront a witness and the hearing officer chose not to avail himself of the opportunity to consider the demeanor of the witness, and further that the hearing officer departed from the position of a neutral magistrate, the Court determines that the Order affirming Petitioner's license suspension should be quashed and the matter should not be remanded. 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 May 15, 2009, is and the same is hereby QUASHED.
3. Respondent shall forthwith reinstate Petitioner's driving privilege, if Petitioner is otherwise eligible, for the suspension period referenced in its Order suspending Petitioner's driving privilege, entered May 15, 2009.
4. Respondent shall forthwith remove from Petitioner's permanent driving record any entry which reflects the administrative suspension that was sustained by Respondent's Order suspending Petitioner's driving privilege, entered May 15, 2009.

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