

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

JASEN GENNINGER,

Petitioner,

v.

CASE NO.: 2007-CA-5882-O

Writ No.: 07-29

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

Respondent.

_____ /

Petition for Writ of Certiorari.

Stuart I. Hyman, Esquire,
for Petitioner.

Heather Rose Cramer, Esquire,
for Respondent.

BEFORE LAUTEN, G. ADAMS, and THORPE, JJ.

PER CURIAM.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Jasen Genninger (“Petitioner”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (“Department”) Final Order of License Suspension. Pursuant to section 322.2615, Florida Statutes, the order sustained the suspension of his driver’s license for driving with an unlawful alcohol level. This Court has jurisdiction under sections 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

On January 31, 2007, Petitioner was placed under arrest for DUI and transported to the breath testing facility. Petitioner submitted breath samples of .137 and .136. Petitioner's driver's license was suspended for driving with an unlawful blood alcohol level of .08 or higher.

The Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and hearings were held on March 1 and April 27, 2008. At the hearings, Petitioner moved to set aside the suspension on numerous grounds, arguing: 1) that there was no 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 substance; 2) that the hearing officer refused to issue subpoenas for Roger Skipper, Laura Barfield, Jennifer Keegan, and Kelly Melville; 3) that the breath test machine used was unapproved for use in the State of Florida; and 4) that the breath test regulations are insufficient due to the lack of a uniform method of administration. On May 1, 2007, the hearing officer entered a Final Order of License Suspension denying the Petitioner's motions and sustaining the suspension of his driver's license.

“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's 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. (2007).

In the Petition for Writ of Certiorari, Petitioner argues that the hearing officer's failure to issue subpoenas deprived Petitioner of procedural due process and that the breath test results were inadmissible because the samples were obtained by using an unapproved and unreliable breath testing machine. Conversely, in its motion to dismiss, the Department argues that Petitioner's argument regarding the failure of the hearing officer to issue subpoenas improperly challenges the constitutionality of a statute. Additionally, the Department contends that the Department established substantial compliance with FLDE rules to render Petitioner's breath test results admissible.

At issue in the instant case is whether the hearing officer departed from the essential requirements of the law in interpreting section 322.2615(6)(b) to prohibit the issuance of subpoenas for specific persons identified in the breath test result documents submitted by the Department. The Department filed a Motion to Dismiss and Response to the Petitioner for Writ of Certiorari arguing that the constitutionality of a particular statute may not be raised in a certiorari proceeding. The court granted the motion in part, striking the language in

Petitioner's first argument that mentioned the unconstitutionality of section 322.2615. After the Department filed its Response to the Petition for Writ of Certiorari, it filed a motion to abate and remand the case, as to the subpoena issue. As a basis for the motion to abate, the Department cited the Second District's decision in *Yankey v. Dep't of Highway Safety & Motor Vehicles*, 6 So. 3d 633 (Fla. 2d DCA 2009) (finding that when the department relies upon a document prepared by an agency inspector to properly validate the breath test results, section 322.2615, Florida Statutes, permits the driver to subpoena the inspector identified in that document). The motion to abate is currently pending along with the Petition.

In *Yankey*, the petitioner filed a petition for writ of certiorari seeking to quash a circuit court order affirming the department's suspension of her license for driving with an unlawful breath-alcohol level. *Id.* at 634. The petitioner asserted that the hearing officer and the circuit court departed from the essential requirements of the law in interpreting section 322.2615(6)(b), Florida Statutes, to prohibit the department's issuance of a subpoena for the agency inspector responsible for testing the breath test machine and signing the agency inspection report. *Id.* Pursuant to section 322.2615(6)(b), Florida Statutes, a driver in a formal review hearing "may subpoena those witnesses who are identified in documents submitted by the arresting officer, which documents include the results of any breath test." *Id.* at 637; *see also* § 322.2615(2), Fla. Stat. The court noted that law enforcement had established a practice of routinely providing the department with a breath alcohol analysis report, a breath test affidavit, and an agency inspection report, in order to report the results of the breath test and support the license suspension. *Yankey* at 637. Based on the statutory and administrative code provisions regarding the procedures to establish the validity of breath test results, the court concluded that when an officer suspends a person's license and "submits breath test

results pursuant to section 322.2615(2) that include the breath alcohol analysis report, a breath test affidavit, and an agency inspection report, and those documents identify specific persons, the hearing officer is authorized under section 322.2615(6)(b) to issue a subpoena to any person ‘identified in’ those documents.” *Id.* at 638.

In the instant case, the Department entered the breath alcohol test affidavit, the agency inspection report, and the department inspection report into evidence. Prior to the hearing, the Petitioner requested that subpoenas be issued for specific persons identified in those documents submitted by the Department. Like *Yankey*, the hearing officer refused to issue the requested subpoenas asserting that section 322.2615(6)(b), did not authorize the issuance of the subpoenas.

Based on the holding in *Yankey*, the Court finds that the hearing officer was authorized under section 322.2615(6)(b), Florida Statutes, to issue subpoenas to persons identified in the breath alcohol analysis report, the breath test affidavit, and the agency inspection report. Thus, the hearing officer’s decision to deny the issuance of the subpoenas departed from the essential requirements of the law. In light of this conclusion, the Court finds it unnecessary to address the additional arguments made by Petitioner and the Department.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Genninger’s Petition for Writ of Certiorari is **GRANTED**; the Department’s Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings, filed March 18, 2009, is **DENIED**; and the hearing officer’s Final Order of License Suspension is **QUASHED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this
__12th__ day of __February_____, 2010.

_____/S/_____
FREDRICK J. LAUTEN
Circuit Court Judge

_____/S/_____
GAIL A. ADAMS
Circuit Court Judge

_____/S/_____
JANET C. THORPE
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **Stuart I. Hyman, Esq.**, Stuart I. Hyman, P.A., 1520 East Amelia St., Orlando, FL 32803; and to **Heather Rose Cramer, Esq.**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, DHSMV-Legal Office, P.O. Box 540609, Lake Worth, FL 33454-0609, on this __12th__ day of _____February_____, 2010.

_____/S/_____
Judicial Assistant