**Petition for Writ of Certiorari to Review Quasi-Judicial Action, Department of Highway Safety and Motor Vehicles:** DRIVER'S LICENSE—The breath-test machine used in this case was in substantial compliance with the Fla. Admin. Code, and there is no indication that the breath-test results were unreliable. Petition denied. *Dawn Colette Kewitz v. State of Florida, Dep't of Highway Safety and Motor Vehicles*, No. 14-CA-2485-WS (Fla. 6th Cir. App. Ct. June 15, 2015).

**NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED**

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT**
**OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY**
**APPELLATE DIVISION**

**DAWN COLETTE KEWITZ,**
**Petitioner,** **UCN: 512014CA002485CAAXWS**

**v.**

**STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,**
**Respondent.**
_____/

Petition for Writ of Certiorari,

Todd Thurow, Esquire,
for Petitioner,

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

## ORDER AND OPINION

We find it was not a departure from essential requirements of law for the hearing officer to sustain Petitioner's driver's license suspension, relying on results from a breathalyzer test to demonstrate Petitioner's breath-alcohol content, and find the order is supported by competent, substantial evidence.

## STATEMENT OF THE CASE AND FACTS

Petitioner was arrested for driving under the influence in violation of § 316.193, Fla. Stat. Petitioner requested a formal administrative review of the license suspension

pursuant to § 322.2615, Fla. Stat. An evidentiary hearing was held before a hearing officer who found sufficient evidence to sustain the suspension. The hearing officer's findings of fact included:

> Trooper Trouton responded to the scene of an accident where two victims of the accident identified Petitioner as a driver involved in the accident.
>
> The Trooper made contact with Petitioner and detected a strong odor of alcoholic beverage, bloodshot, watery eyes, slurred speech, and that Petitioner was extremely emotional.
>
> Petitioner made post-Miranda statements to the Trooper that she had been driving at the time of the crash and had been drinking prior to the crash. Petitioner agreed to perform field sobriety tests, but then refused and began to walk away.
>
> Petitioner was arrested for DUI and submitted to a breath alcohol test with results of .224, and .227.

The hearing officer found Petitioner was lawfully arrested for DUI and found the evidence sufficient to sustain Petitioner's suspension. Petitioner introduced evidence that the machine used for the breath-alcohol test was inspected at the agency in Pasco County on January 27, 2014; that Petitioner's test was performed on February 1, 2014; and, that the instrument was transferred to Tallahassee for annual FDLE inspection on February 13, 2014. The testimony was that at all times the instrument was determined to be in compliance. A former FDLE inspector testified that the failure to inspect the instrument at the agency after Petitioner's breath test, prior to transporting the instrument for annual testing, was in violation of Fla. Admin. Code Ch. 11D-8, and that there could have been problems with the instrument on February 1, 2014, but there was no way of knowing due to lack of compliance with the Administrative Rule. The hearing officer found the evidence insufficient to demonstrate the results of the breath test were unreliable, and affirmed the suspension.

## STANDARD OF REVIEW

In proceedings conducted pursuant to § 322.2616, Fla. Stat., a hearing officer must determine whether sufficient cause exists to sustain a suspension of driver's license. When the suspension results from a refusal to submit to a breath test, the officer's review is limited to the following issues:

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 was lawfully arrested for violation of § 316.193, Fla. Stat.; and,
3) Whether the person had an unlawful blood alcohol level pursuant to § 316.193, Fla. Stat.

§ 322.2615(7)(a), Fla. Stat. The findings on these issues must be supported by a preponderance of the evidence. This Court's review is "limited to a determination whether procedural due process was accorded, whether the essential requirements of law had been observed, and whether the administrative order was supported by competent substantial evidence." *State of Fla., DHSMV v. Cherry*, 91 So. 3d 849, 854 (Fla. 5th DCA 2011). *See Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm'rs*, 794 So. 2d 1270, 1275–76 (Fla. 2001); *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

## LAW AND ANALYSIS

Petitioner contends it was a departure from essential requirements of law for the hearing officer to place the burden on Petitioner to demonstrate the breath-alcohol test results were unreliable, and that it is a question of law whether the test results were admissible as evidence due to alleged non-compliance with the Administrative Rule.

A breath test is admissible as evidence if performed in substantial compliance with the requirements of the FDLE as put forth in the Fla. Admin. Code. *See* § 316.1932(1)(b)(2), Fla. Stat; *State of Fla., DHSMV v. Alliston*, 813 So. 2d 141, 144 (Fla. 2d DCA 2002). FDLE has adopted rules implementing the implied consent law in Chapter 11-D, Fla. Admin. Code, specifically rules 11D-8.002 to 8.007, which provide rules as to how breath test machines shall be approved, maintained and tested. Rule 11D-8.006(3) provides that when "an instrument is taken out of evidentiary use, the agency shall conduct an inspection." Although Respondent met the initial burden

required to establish Petitioner's unlawful alcohol level by admitting the breath-alcohol test affidavit and agency inspection report, Petitioner alleges that the failure to comply with the rule requiring testing shifted the burden to the Respondent to demonstrate substantial compliance with the administrative rules. *See State of Fla., DHSMV v. Mowry*, 794 So. 2d 657 (Fla. 5th DCA 2001); *State of Fla., DHSMV v. Dehart*, 799 So. 2d 1079 (Fla. 5th DCA 2001). The affidavit is presumptive proof pursuant to § 316.1934(5), Fla. Stat., of the results of the breath-alcohol test, and pursuant to § 316.1934(2)(c), a test result of .08 or higher is prima facie evidence a person was impaired. The burden then shifts to Petitioner to rebut the presumption with evidence of non-compliance. *See Mowry*, 794 So. 2d 657. If the driver can present such evidence, the burden then shifts back to the Department to prove substantial compliance.

Petitioner contends the evidence that the machine was not inspected prior to being removed from evidentiary use met the burden of rebutting this presumption, and that the purpose of this Administrative Rule is ensuring scientific reliability of breath tests. The former FDLE employee testified that the machine used in Petitioner's case was not in substantial compliance with the rule. Without citation to authority, Petitioner contends this evidence shifted the burden to the Respondent, who provided no additional evidence following this testimony, and that this demonstrated a lack of substantial compliance and the suspension should therefore be quashed.

The order did not amount to an essential departure from the requirements of law, and the hearing officer's determination of substantial compliance is supported by the evidence. The reviewing court may not reweigh the evidence. *See State of Fla., DHSMV v. Favino*, 667 So. 2d 305, 308–09 (Fla. 1st DCA 1995). The evidence demonstrates substantial compliance with the applicable rules, and supports the finding that Petitioner failed to rebut the presumption of reliability or otherwise demonstrate the breath test results were unreliable. The machine was inspected on January 27, 2014, and deemed to be in compliance with all requirements prior to being used for Petitioner's breath test on February 1, 2014. Further, Petitioner incorrectly asserts that this evidence was uncontroverted, because the hearing officer may weigh the evidence

and disregard any evidence or testimony that is unpersuasive. *See State of Fla., DHSMV v. Luttrell*, 983 So. 2d 1215 (Fla. 5th DCA 2008).

The cases cited by Petitioner in support of the arguments on appeal are distinguishable, and in this case there was no evidence presented that the machine in question was unreliable. *See Wissell v. State*, 691 So. 2d 507 (Fla. 2d DCA 1997); *Alliston*, 813 So. 2d at 145. We find the challenged order is supported by competent, substantial evidence, and find no departure from essential requirements of law. The Petition is therefore DENIED.

## CONCLUSION

The record demonstrates competent, substantial evidence to support the order sustaining the suspension, and that it was not a departure from essential requirements law to rely on the results from the breath-alcohol test. The Petition is denied.

It is ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DENIED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 15th day of June, 2015.

Original order entered on June 15, 2015, by Circuit Judges Daniel Diskey, Susan Gardner and Shawn Crane.