

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

**IN THE CIRCUIT FOR THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA  
APPELLATE DIVISION**

**REGAN NIEMANN,  
Petitioner,**

**Case No.:21-000009AP-88A  
UCN: 522021A000009XXXXCI**

**v.**

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

\_\_\_\_\_ /

Opinion Filed \_\_\_\_\_

Petition for Writ of Certiorari from  
Decision of Hearing Officer  
Bureau of Administrative Reviews  
Department of Highway Safety and  
Motor Vehicles

E. Michael Isaak, Esq.  
Attorney for Petitioner

Christie Utt, Gen. Counsel  
Mark L. Mason, Asst. Gen. Counsel  
Attorneys for Respondent

**PER CURIAM**

**Facts and Procedural History**

On January 2, 2201, Petitioner was charged by citation with Driving  
Under the Influence (“DUI”), pursuant to Fla. Stat. § 316.193. Petitioner was

also given citations for failure to stop at a steady red light and for driving on the wrong side of the roadway. The DUI citation served as notice of Petitioner's driver license suspension for refusing to submit to a breath test in violation of Florida's implied consent law. Petitioner timely requested an administrative hearing to challenge the lawfulness of her driver license suspension. The request for the formal review hearing was received by the Department on January 11, 2021. The formal review hearing was scheduled for February 3, 2021 and was to be held telephonically and through zoom to allow for the identification of each witness. Petitioner (through counsel) submitted draft subpoenas for three law enforcement witnesses to the Department via email on January 27, 2021 at 10:47a.m. for approval and issuance. Petitioner and Hearing Officer Kathryn Bischoff exchanged emails regarding the form of the subpoenas. Hearing Officer Bischoff sent an email at 10:52a.m. that the subpoenas did not meet the current form and were being rejected. Petitioner responded at 11:21a.m. that the subpoenas were in the correct form. Officer Bischoff approved the subpoenas and returned the executed subpoenas by email to Petitioner at 3:09p.m. Petitioner stated his process server would not be able to serve the subpoenas on the designated witnesses with the St. Petersburg Police Department prior to 4:00p.m. as the subpoenas would not be accepted by the St. Petersburg

Police Department liaison and the witnesses would be served 7 days prior to the hearing as required by Florida Administrative Code Rule 15A-06.012(3) F.A.C. (2007). Petitioner requested a continuance due to the inability to comply with Rule 15A-06.12(3). Hearing Officer Bischoff continued the hearing to February 11, 2021.

The February 11, 2021 hearing date was continued by the Department due to Hearing Officer Bischoff being called out of the office for a family emergency. Petitioner was notified and the hearing was continued to March 10, 2021.

On March 10, 2021, the formal review began; however, only two witnesses testified. At this hearing, Hearing Officer Bischoff entered into evidence the self-authenticated documents submitted by the St. Petersburg Police Department pursuant to § 322.2615(2). Petitioner did not contest the lawfulness of the traffic stop and as such, it is not addressed in this opinion. Other documentation entered into evidence provided the factual basis for Petitioner's refusal to submit to a breath test. The Breath/Urine testing Form indicates that the Petitioner initially refused to submit to a breath test, then agreed to the breath test after being read the implied consent warning. The handwritten notes of the breath test operator state in pertinent part:

“Asked def is she would take the test. Initially agreed, then changed her mind. Read “IC”. Def then agreed to provide

sample. I showed & explained how to properly blow into mouth piece. Def then placed half of her mouth on mouth piece and began blowing. Instrument did not make a tone as def did not blow properly into it. Def then began complaining of her facial paralysis stating she could not wrap her lips around mouth piece. Def continued trying to blow into mouth piece eventually getting the instrument to tone. The she would readjust her mouth which stopped the air flow.”

The Breath Alcohol Test Affidavit reflects that the first sample resulted in “No Sample Provided”. The second sample was “Subject Test Refused.”

After being identified and sworn in, Officer Amanda DeSoto testified that she has been with the St. Petersburg Police Department for 10 years. Officer DeSoto observed Petitioner’s driving and initiated the traffic stop. She stated she observed Petitioner to have some glassy eyes, a small odor of alcohol and she could “detect and I could understand a little bit of her speech to be thick-tongued and mumbled.” In response to Petitioner’s questions Officer DeSoto testified:

A. I could see something was wrong with her face. I did not know what.

Q. Okay

A. She had -- she appeared to be on one side disfigured in sort of a way.

Q. Would you say it was obvious that she had some sort of issue with half of her face?

A. Yes.

Officer DeSoto had no further contact with Petitioner. The second witness was Officer Naomi Wright with the St. Petersburg Police Department. At the

time of the arrest, Officer Wright was assigned to the DUI squad. Based on Officer Wright's conversation with Petitioner it was established that Petitioner is blind in her left eye due to an injury sustained in a car accident. The following exchange occurred between Petitioner's counsel and Officer Wright:

Q: (by counsel) Now, during this time period that you were making these observations you also observed, did you not, that she has a very distinct and noticeable issue with her face?

A: Yes, I wouldn't say extremely noticeable, but yes.

Q: I noticed in your report, you explain – or you – noted as she had face paralysis as a physical defect.

A: Well, one of the health questions that I Ask if they have any physical defects, and her response was, 'Yes, I have face paralysis.'"

Q: Now, how close were you standing to her when you were having this conversation with her about her – her personal information?

A: I would say roughly one to two feet.

Q: Could you see yourself that there's an issue with her face?

A: I could, yes.

Q: Okay, was it obvious to you?

A: Not extremely obvious, no.

Q: Okay, Did you notice that she had an issue with her face before she told you about it?

A: No, not really. No, I didn't.

At the close of the testimony, Petitioner moved to invalidate the driver license suspension due to the failure of Officer Lamour to appear. Hearing Officer Bischoff denied the motion as failure of the breath officer to appear was not an automatic invalidation. Hearing Officer Bischoff ruled that she would allow Officer Lamour 48 hours to provide just cause for his failure to appear at the March 10, 2021 hearing. Petitioner requested that she be allowed to testify

at a later hearing, either after Officer Lamour testified or a motion to enforce the subpoena was ruled on. The Petitioner's temporary driving permit was extended allowing the Petitioner to hold a restricted driving privilege throughout the remained of the administrative process.

At the March 24, 2021 hearing, Officer Lamour testified that he had attempted to contact the BAR office to call in for the hearing but was not able to get through on the telephone at the time of the hearing. The hearing officer found this explanation constituted just cause for his nonappearance. In response to counsel's questioning, Officer Lamour testified that he was not able to tell that Petitioner had facial paralysis. He stated that Petitioner had no difficulty communicating with him and he had no knowledge of a facial paralysis until informed by Petitioner when she was "giving the breath test." Officer Lamour testified that the breath test operator, not the individual taking the test, holds the mouthpiece. The individual must wrap their lips around the mouthpiece to create a seal to push deep-lung air into the breath test tube which then goes into the air chamber. The breath test machine emits an audible tone when the individual submits a correct air sample. Petitioner's counsel asked:

Q: So as I understand it, she put the mouth piece in her mouth and was trying to find a position where she was able to create a seal, but was incapable of doing that?

A: No, she did find a seal at one point, because the instrument did tone. As soon as she heard that tone going off, she then readjusted the mouthpiece out of her mouth causing the instrument to no longer take in anymore air which then gave us the no sample provided, so it seemed like to me as soon as she heard the tone on the instrument go off, she would then readjust the mouthpiece intentionally.

Petitioner's testimony was via video, to allow the hearing officer to visually observe Petitioner's facial movements. Petitioner explained her facial paralysis was due to being ejected from a car as a result of a drunk driving accident. Petitioner was not the driver in the accident. Petitioner explained that she could not form a seal for the breath test because her nerves attached to the wrong muscles as a result of her injury. Petitioner stated she could not hold a seal for a long time without her muscles tiring and giving out. Petitioner stated she was given approximately four to five opportunities to submit to a breath sample. Petitioner opined that Officer Lamour was not able to observe her difficulty in forming a seal because he was on the right side of her, but her facial paralysis affects the left side of her face. Petitioner submitted limited medical records explaining that because the accident had occurred over 10 years ago, the treating hospital had destroyed the records. Petitioner's records were dated November 8, 2013 and May 22, 2014. Petitioner testified that she had consumed alcohol prior to her driving that evening, although she takes drinking and driving very

seriously as she believes the accident that caused her injuries was the result of an impaired driver.

Hearing Officer Bischoff issued her Findings of Fact, Conclusions of Law and Decision April 2, 2021. Hearing Officer Bischoff found that Petitioner's failure to provide breath samples constituted a refusal and was not due to a physical inability to do so based upon her facial paralysis. The Findings of Fact state:

"I observed the Petitioner closely on video during the hearing, including her testimony. Facial paralysis was not obviously apparent with the exception that the Petitioner's left eye does not appear completely open. During the testimony of Officer Soto and Officer Wright a slight dimple would appear at times to the left of Petitioner's mouth. The Petitioner's speech was clear during her testimony and she did not appear to have any difficulty speaking or moving her lips."

Hearing Officer Bischoff ruled:

I find the Petitioner failed to prove she was physically unable to provide a valid breath test. The petitioner only told Officer Lamour she had facial paralysis and could not wrap her lips around the mouthpiece during the first breath sample. The Petitioner had a conversation with Officer Lamour prior to the breath test during which Officer Lamour explained the test. The Petitioner did not mention facial paralysis at that time or voice any concern about her ability to follow the instructions for a valid breath test. The Petitioner was able to obtain a tone, indicating she was pushing air into the machine, but then moved her mouth causing the tone to stop. Thereafter, the Petitioner continued to move her mouth and not follow Officer Lamour's instructions resulting in no breath sample provided. I find Officer Lamour's opinion this behavior on the part of the Petitioner was intentional to be credible. The evidence is clear the Petitioner only mentioned her facial



paralysis one time despite multiple attempts to provide a breath sample. The evidence does not show the Petitioner objected to her failure to provide a breath sample being a refusal. The Petitioner did not request to provide a blood sample, despite her position she was unable to provide a breath sample and her belief a breath test would have exonerated her.

This Hearing Officer's observations of the Petitioner are the same as those of Officer Wright and Officer Lamour-facial paralysis is not immediately apparent. The Petitioner's speech was clear during her testimony and she did not appear to have any issues with her face or lips while speaking.

The order of suspension of the driving privilege of Petitioner was affirmed. Petitioner subsequently filed the instant Petition for Writ of Certiorari.

### **Standard of Review**

Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: (1) whether procedural due process has been accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *State, Dep't of Highway Safety & Motor Vehicles v. Sarmiento*, 989 So. 2d 692, 693 (Fla. 4th DCA 2008). This Court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supports the hearing officer's findings and Decision. *Dep't of Highway Safety & Motor Vehicles v. Stenmark*, 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006).

Where the driver's license was suspended for refusing to submit to a breath, blood, or urine test, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended 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.
2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§ 322.2615, Fla. Stat.

"The preponderance of the evidence standard [is] evidence which as a whole shows that the fact sought to be proved is more probable than not . . . . Substantial evidence has been defined as evidence which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *State v. Edwards*, 536 So. 2d 288, 292 (Fla. 1st DCA 1988). The hearing officer is the sole decision maker as to the weight, relevance and credibility of any evidence presented. Rule 15A-6.013(7), Fla. Admin. Code.

### **Discussion**

Petitioner incorrectly argues that the hearing officer departed from the essential requirement of law by failing to hold the formal review hearing within 30 days of Petitioner's request as required by Fla. Stat. 322.2615(6)(a). Petitioner's application was deemed received by the

Department of January 11, 2021. *Sloas v. State, Dep't of Highway Safety & Motor Vehicles*, 5 Fla. L. Weekly Supp. 570A (Fla. 9<sup>th</sup> Cir. Ct May 26, 1998). The initial hearing was scheduled within thirty days of that date, specifically February 3, 2021. The hearing was continued because Petitioner was unable to timely serve the subpoenas on the police officers. Petitioner argues that the delay in subpoenaing the officers was due to the delay in the hearing officer approving the subpoenas and therefore any continuance was “foisted upon the Petitioner”. Petitioner sent draft subpoenas to the hearing officer on January 27, 2021. The subpoenas had to be served by the close of business on January 27, 2021 as required by Fla. Admin. Code 15A-60.12(3)(c). The hearing officer originally found the subpoenas to be incorrect, but after emails between Petitioner and hearing officer, the subpoenas were issued that day. Petitioner argues that his process server would have been unable to drive the subpoenas to the St. Petersburg Police Department within the 51 minutes remaining before 4:00p.m. deadline set by the police department to accept the subpoenas.

At this point, Petitioner could have proceeded to the formal review hearing without the testimony of the officers or he could request a continuance for service of the subpoenas. The Petitioner requested a continuance for service of the subpoenas. The hearing was reset February 11, 2021. On February 11, 2021, Petitioner was informed that the hearing officer had a family emergency and the hearing would need to be continued. Even assuming arguendo that the continuance of the February 3, 2021 was due to the hearing officer not timely approving the subpoenas sent to her the morning of January 27, 2021, Petitioner’s argument is incorrect.

Petitioner alleges the Department failed to adhere to the thirty day hearing requirement under § 322.2615(6) when it rescheduled her proceeding; therefore, her suspension should be invalidated. The Court finds this argument without merit. § 322.2615(6)(a) states: “if the person arrested requests a formal review, the Department must schedule a hearing to be held within 30 days after such request.” However, § 322.2615(9) outlines the procedure for staying a person’s driver license after a request for a formal review, when the Department should invalidate the suspension and when the Department should issue a temporary driving permit. The Florida Legislature specifically amended the section in 1991 changing the language from “if the department fails to conduct the formal review hearing within 30 days” to “if the department fails to schedule the formal review to be held within 30 days” Chapter 91-255, § 20, Laws of Florida. If the hearing must be conducted within 30 days, there would be no purpose of any rules outlining continuance procedures under § 322.2615(9) or Fla. Admin. Code 15A-6.015(2). *Vodar v. State of Florida, Dep’t of Highway Safety and Motor Vehicles*, 15 Fla. L. Weekly Supp 226a (Fla. 13th Cir. Ct. Jan. 11, 2008); *Collard v. State of Florida, Dep’t of Highway Safety and Motor Vehicles*, 4 Fla. L. Weekly Supp. 749b (Fla. 9th Cir. Ct. June 2, 1997)

Fla. Stat. § 322.2615(9) states in relevant part:

If the schedule hearing is continued at the department’s initiative or the driver enforces the subpoena as provided in subsection (6), the department shall issue a temporary driving permit that shall be valid until the hearing is conducted if the person is otherwise eligible for the driving privilege.

Petitioner argues that a due process violation occurred when Hearing Officer Bischoff was unavailable to conduct the February 11, 2021 hearing and it was continued rather than being assigned to another hearing officer. Petitioner states: “It is inconceivable that no one was available anywhere in the State of Florida to preside in the absence of the hearing officer assigned to the Petitioner’s case.” Hearing officers are not widgets. In *Wolk v. State of Florida, Dep’t of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly. Supp. 136a (Fla. 17th Cir. Ct. Dec. 11, 2006) the assigned hearing officer was unavailable for the hearing. The Court held that the Department did not violate the due process rights of the Petitioner. The hearing was continued by the Department and held on August 16, 2006 and during that time, the Petitioner was given a temporary driving permit during the continuance as per Fla. Stat. § 322.2615(9).

Petitioner’s formal review hearing was set within the 30-day requirement. Petitioner moved to continue the February 3, 2021 hearing. The hearing was reset to February 11, 2021, which was still within the 30-day window. The February 11, 2021 hearing date was continued at the request of the Department and Petitioner’s temporary permit was continued in compliance with § 322.2615(9). Petitioner was issued a temporary driving permit January 13, 2021 and the permit was continued throughout the administrative review hearing. The Court finds Petitioner is not entitled to relief on this claim. There has been no due process violation.

Petitioner’s second argument is the hearing officer departed from the essential requirements of law by failing to invalidate the Petitioner’s suspension as a result of her facial paralysis causing her inability to provide a sufficient breath sample. Petitioner posits that the hearing officer’s

determination that the Petitioner willfully refused is a legal conclusion and as such the court has the authority to reverse the decision.

In reviewing the record, the court may not reweigh the evidence nor substitute its judgment for that of the hearing officer. *Educ. Dev. Ctr., Inc. v. City of W. Palm Beach Zoning Bd. of Appeals*, 541 So. 2d 106, 108 (Fla. 1989). The court's task is to review the record for evidence that supports the agency's decision, not that which rebuts it. See *Broward Cnty. V. G.B.BV. Int'l, Ltd.*, 787 So. 2d 838, 846 (Fla. 2001). The circuit court is not entitled to reweigh the evidence; it may only review the evidence to determine whether is supported the hearing officer's findings. *Dep't of Highway Safety & Motor Vehicles v. Stenmark*, 942 So. 2d 1247, 1249 (Fla. 2d DCA 2006). "Clearly, this Court is in no position to reweigh the evidence or to substitute its judgment for that of the agency. The Hearing Officer was the trier of fact and was in the best position to evaluate the evidence and the credibility of the witnesses in making her determination about the circumstances under which Santiago submitted to the tests." *Santiago v. Dep't of Highway Safety and Motor Vehicles*, (3 Fla. L. Weekly Supp. 43b (Fla. 20th Cir. Ct. March 1 1995). Based upon the competent substantial evidence standard, this Court must only decide "whether the record contains the necessary quantum of evidence." *Lee County v. Sunbelt Equities II, Ltd. Partnerships*, 619 So. 2d 996, 1003 Fla. 2d DCA 1993).

Petitioner directs the Court to *Counts v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp.1001a (Fla. 15th Cir. Ct. Sept. 5, 2012) and *Brass v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. Weekly Supp. 5a (Fla. 15th Cir. Ct. Oct. 5, 2011) wherein the findings of the hearing officers that the petitioners' failure to comply with a breath or urine

test was a refusal were reversed and the court found that the petitioners were unable to comply with the required tests. In *Counts*, the driver had asthma and provided medical records that proved the diagnosis. Additionally, *Counts* while in the presence of the officer breath heavily, coughed repeatedly and requested a blood test. In *Brass*, the petitioner was unable to submit a urine sample. In that case, the officer testified that the petitioner could not provide a sample and additional evidence was that the petitioner had a prostate issue. Hearing Officer Bischoff distinguished the cases cited by Petitioner in her Findings. In *Counts*, the petitioner had noticeable physical signs of difficulty breathing. In *Brass*, the petitioner repeatedly requested additional water and time to be able to submit to a urine sample.

In *Dep't of Highway Safety & Motor Vehicles v. Cherry*, 91 So. 2d 349 (Fla. 5<sup>th</sup> DCA 2011), the petitioner kept biting the mouthpiece and would barely blow into it. Law enforcement deemed this action as an "implied refusal." *Id.* at 853. The circuit court found that Ms. Cherry's actions did not constitute a refusal, but on second tier certiorari review, the Fifth DCA held that "although Ms. Cherry did not expressly refuse to submit to a breath alcohol test, she did so by purposely avoiding the submission of valid samples." *Id.* at 855. The Fifth DCA also held that the circuit court had improperly reweighed the evidence before the hearing officer and applied the wrong law by engaging in its own review of the evidence to reach a different conclusion. *Id.* at 856.

Petitioner may argue that *Cherry* is distinguishable because Petitioner offered a credible excuse of why she did not submit valid breath samples; however, Hearing Officer Bischoff made a specific finding that "Based on my observations of the Petitioner and the evidence presented, I find it more

credible than not the Petitioner willfully failed to provide two valid breath samples.”

Petitioner presented medical records of a physical therapy initial plan of care dated November 18, 2013 and a physical therapy plan of care progress report dated November 27, 2014. The un rebutted testimony of Petitioner is that she suffered facial paralysis. Officer Soto testified that it was obvious to her that there was something wrong with Petitioner’s face. Officer Wright testified that she did not at first notice anything about the Petitioner’s face until she was told of the facial paralysis. Officer Lamour testified he did not notice the facial paralysis while he was speaking with Petitioner prior to the breath test and that he had no difficulty communicating with her. Petitioner did not tell Officer Lamour she suffered from facial paralysis until she was requested to take the breath test. Hearing Officer Bischoff observed Petitioner on a video while the witnesses and Petitioner testified. Hearing Officer Bischoff stated “Facial paralysis was not obviously apparent with the exception that the Petitioner’s left eye does not appear completely open. During the testimony of Officer Soto and Officer Wright a slight dimple would appear at times to the left of Petitioner’s mouth. The Petitioner’s speech was clear during her testimony and she did not appear to have any difficulty speaking or moving her lips.”

“The hearing officer is the sole decision maker as to the weight, relevance and credibility of any evidence presented.” Fla. Admin. Code R15-6.013(7)(c). A hearing officer is not required to believe the testimony of any witness, even if that testimony is un rebutted. *State of Florida, Dep’t of Highway Safety and Motor Vehicles v. Luttrell*, 983 So. 2d 1215 (Fla. 5th



DCA 2008); *Dep't of Highway Safety and Motor Vehicles v. Marshall*, 848 So. 2d 482 (Fla. 5<sup>th</sup> DCA 2003).

There was competent substantial evidence to support the findings of Hearing Officer Bischoff.

### **Conclusion**

The Court must determine only whether the administrative findings and judgment are supported by competent substantial evidence, and we find that it is. Procedural due process was accorded, the essential requirements of law have been observed, and the Hearing Officer's findings of fact and decision are supported by competent substantial evidence. Petition for Writ of Certiorari is denied.

**DONE AND ORDERED** in Chambers at Clearwater, Pinellas County, Florida this \_\_\_\_\_ day of \_\_\_\_\_, 2022.

Original Order entered on October 21, 2022, by Circuit Judges Sherwood Coleman, Keith Meyer, and George M. Jirotko.

Copies to:

Eilam Isaak, Esq.  
306 East Tyler Street  
Second Floor  
Tampa, FL 33602

Mark L. Mason, Esq.  
Assistant General Counsel  
Department of Highway Safety & Motor Vehicles  
2900 Apalachee Parkway, A-432  
Tallahassee, FL 32399