

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

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

MICHAEL MOLITERNO,

Petitioner,

REF: 21-00000011AP-88A

UCN: 522021AP000011XXXXCI

-vs-

**STATE OF 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

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

PER CURIAM

ORDER AND OPINION

Petitioner, Michael Moliterno, seeks certiorari review of the Department of Highway Safety and Motor Vehicles Hearing Officers' Final Order entered April 23, 2021 which affirmed the Department's order revoking the Petitioner's driving privilege for ten years. For the reasons set forth below, the Petition for Writ of Certiorari is denied.

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).

BRIEF PROCEDURAL HISTORY

Petitioner has three prior convictions involving substance-related impaired driving. All three are from New York. On April 10, 2019, Petitioner received an order from the DHSMV informing him that his Florida driver's license was revoked, effective January 16, 2019, for a period of six months. The order referenced only one of the New York convictions. Petitioner did not seek review of that revocation. Subsequently, Petitioner received a separate order of revocation dated July 11, 2019, still with an effective date of January 16, 2019, informing him of the revocation of his license for a period of 10 years based on the three New York convictions. Petitioner asked for a review of that order.

After an administrative hearing, the revocation was upheld and Petitioner filed the first Petition for Writ of Certiorari, 19-000062AP-88B. The opinion was rendered October 26, 2020 and upheld the 10 year driver's license revocation. Petitioner did not seek second tier certiorari review of the October 26, 2020 opinion which affirmed the findings of the hearing officer.

Subsequent to October 26, 2021, Petitioner retained new counsel and again requested a show cause hearing before the Department which was held March 21, 2021. In the pending petition, Petitioner raises two new challenges to his 10 year driver's license suspension. The first is whether Respondent is statutorily authorized to suspend the driving privilege if Florida received notice of the of the out of state convictions pursuant to Fla. Stat. 322.44,

the second is whether the applicable period of suspension should be for one year rather than ten years. The hearing officer affirmed the order revoking the Petitioner's driving privileges for 10 years. This second Petition for Writ was timely filed.

DISCUSSION

The Petitioner's first argument is that the State of Florida was not on notice as to the Petitioner's out of state substance-related convictions until Petitioner provided a copy of his New York driving record to staff at the DUI school Petitioner attended and completed in June of 2019. Petitioner states he was asked to obtain a copy of his lifetime New York driving history which he then provided to the school. Petitioner later asked for a copy of the driving history he had presented and noticed that there were hand written notations next to the DUI convictions in 2017 and 2000. After providing the New York driving history, Petitioner received the July 11, 2019 order of the 10 year revocation.

Petitioner argues that because there is no evidence that the State of New York complied with the Driver's License Compact, the State of Florida could not suspend his driving privileges. The Driver's License Compact is an agreement amongst member states that convictions reported by a foreign state will be treated as though the offense occurred in the driver's home state.

There is no substantial competent evidence that the State of New York did not comply with the Driver's License Compact. Petitioner asserts that Florida only became aware of his out of state

convictions when he provided a copy of his New York driving history. There is no evidence that the state of New York did not report the convictions to Florida pursuant to the Driver's License Compact. The transcript from the March 29, 2021 show cause hearing reflects that the hearing officer had before her the "Department's Exhibit number 1 and that is the property of Michael T. Moliterno's driving transcript". There is no dispute from either party that Petitioner's Florida driving record lists three out of state substance-related convictions.

The purpose of a show cause hearing is for the petitioner to "present evidence showing why their driving privilege should not have been cancelled, suspended or revoked." Fla. Admin Code R. 15A-1.0195. Mere assertions or argument or counsel do not meet an evidentiary burden. *Brady v. State, Dep't of Highway Safety & Motor Vehicles*, 15 Fla. L. Weekly Supp. 1145a (Fla. 9th Cir. Ct. Sept. 11, 2008). This Court held in *Beiningen v. State, Dep't of Highway Safety & Motor Vehicles*, 27 Fla. L. Weekly Supp. 917a (Fla. 6th Cir. Ct. Aug. 8, 2019) that a person can offer evidence at a show cause hearing to establish that an entry on the driver record is incorrect, but cannot simply assert legal argument that the driving record is wrong and the Department has to prove the accuracy of the record. There was no evidence before the hearing officer that the Petitioner's driving history was not reported to Florida by the state of New York in compliance with the Driver's License Compact.

Petitioner's second argument is that the length of the revocation is limited to one year by Fla.Stat. 322.28(1). Petitioner

does not contest the suspension of his driving privileges but argues that the out of state substance-related convictions limit the period of suspension to one year. Petitioner argued in his first Petition that the ten year revocation “violates the Petitioner’s protection pursuant to the sixth amendment of the United States Constitution and article 1 section 9 of the Florida Constitution since, in the 2011 [New York] action, . . . Petitioner was not represented by an attorney but rather by a paralegal.” This Court found the argument without merit. Petitioner now argues that the length of the suspension is limited by Fla. Stat. 322.28(1) and in order for the Department to order a 10 year revocation of his driving privileges based on three substance-related convictions one of the convictions must be in Florida. This argument also has no merit. Fla. Stat. 322.24 provides:

“The department is authorized to suspend or revoke the license of any resident of the state, upon receiving notice of the conviction of such person in another state or foreign country of an offense therein which, if committed in this state, would be grounds for the suspension or revocation of his or her license.”

322.24 must be read *in pari materia* with Fla. Stat. 322.28(2)(a)(3) which states in pertinent part:

“Upon a third conviction for an offense that occurs within a period for 10 years after the date of a prior conviction . . . , the driver license or driving privileges shall be revoked for at least 10 years.” and section 322.28(2)(a) provides: “for the purposes of this

paragraph, a previous conviction outside this state for driving under the influence . . . will be considered a previous conviction for violation of s. 316.193.”

and Article IV of the Driver License Compact which states that “the licensing authority in the home state, for the purposes of suspension, revocation, or limitation of the license to operate a motor vehicle, shall give the same effect to the conduct reported, pursuant to article III, as it would if such conduct had occurred in the home state.” 322.44, Art.IV(1).

Florida statutes do not require an in-state DUI conviction to in order to impose a ten year revocation of driving privileges if a driver has had three convictions for DUI within a ten year period. Petitioner does not dispute that he has been convicted of substance-related or DUI offenses on three separate occasions, with the latest offense occurring within ten years of the prior conviction, as Petitioner has been convicted in 2000, 2011 and 2017.

CONCLUSION

The Court must determine only whether the administrative findings and order are supported by competent substantial evidence, and we find that they are. Procedural due process was accorded, the essential requirements of law have been observed and the Hearing

Officer's findings and order are supported by competent substantial evidence. Based on the facts and analysis set forth above, it is

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

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida this ____ day of November, 2021.

TRUE COPY

Original Order entered on November 15, 2021, by Circuit Judges Sherwood Coleman, Patricia A. Muscarella and George M. Jirotko.

Copies furnished to:

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