

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

APPELLATE DIVISION (CIVIL)
Case No.: 502011CA017422XXXXMB
Division: 'AY'

DOMINIC CHARLES BOIVIN,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES,

Respondent.

Opinion filed: **SEP** - 5 2012

Appeal from the Department of Highway Safety and Motor Vehicles.

For Petitioner: Ira D. Karmelin, Esq.
3897 Haverhill Road North, Suite 127
West Palm Beach, FL 33417

For Respondent: Peter N. Stroumbelis, Esq.
Department of Highway Safety and Motor Vehicles
P.O. Box 540609
Lake Worth, FL 33454-0609

PER CURIAM.

Dominic Charles Boivin seeks review of the order sustaining the suspension of his driver's license. We find that the breath test results were inadmissible due to the invalidity of the Agency Inspector's permit and the Hearing Officer erred in allowing the results of the breath test into evidence. Therefore, the Hearing Officer's decision was not based on competent substantial evidence and the case is remanded to the hearing officer so that the Department of Highway

Safety and Motor Vehicles (“DHSMV”) may submit evidence showing compliance with the applicable rules.

Statement of the Case

On August 13, 2011, Boivin’s driver’s license was suspended after he was arrested for driving with an unlawful blood alcohol level. Boivin’s formal review hearing was held on September 20, 2011 and October 4, 2011, pursuant to section 322.2615, Florida Statutes (2011). At the hearing, counsel for Boivin entered Agency Inspector Gregory Croucher’s permit into evidence and moved to invalidate the suspension, arguing that any documents containing the breath test results are inadmissible because Croucher did not hold a valid permit to conduct the monthly inspection of the machine used to administer the breath test. Croucher did not testify at the hearing.

On October 11, 2011, the Hearing Officer entered the “Findings of Fact, Conclusions of Law and Decision,” overruling Boivin’s objections to all documents pertaining to the breath test and denying Boivin’s motion to invalidate the suspension due to an expired Agency Inspector certificate. The Hearing Officer found that all elements necessary to sustain the suspension for driving with an unlawful breath or blood alcohol level under section 322.2615, Florida Statutes, were supported by a preponderance of the evidence and affirmed the suspension.

Standard of Review

Circuit court certiorari review of an administrative agency decision is governed by a three-prong test: first, whether procedural due process is afforded; second, whether the essential requirements of the law have been observed, and lastly, whether the administrative findings and judgment are supported by competent substantial evidence. *See Haines City Cmty. Dev.v. Heggs*, 658 So. 2d 523 (Fla. 1995). The circuit court is not permitted to reweigh the evidence or

substitute its judgment for that of the agency. *Educ. Dev. Ctr., Inc. v. City of W. Palm Beach Zoning Bd. of Appeals*, 541 So. 2d 106, 108 (Fla. 1989).

The Petition and Response

At the formal review hearing, Boivin presented into evidence Croucher's permit to conduct agency inspections, dated August 30, 2006. Boivin argues that Croucher's permit was valid until June 30, 2011,¹ and there is no evidence in the record to show that Croucher completed a renewal course by that date. Boivin asserts that he presented evidence showing a lack of compliance with the appropriate rules, which shifted the burden to DHSMV to prove substantial compliance with the rules, yet it presented no evidence to show completion of the required renewal course. Therefore, Boivin argues that DHSMV failed to carry its burden of proving that the breath test was lawfully conducted, and as such, there is no competent substantial evidence to support the suspension of Boivin's license.

In its response to the petition, DHSMV raises two arguments. First, it contends that the permits do not contain an expiration date and that there is no evidence that Croucher did not meet his permit renewal requirements. It should be noted that DHSMV does not contest Boivin's computation of time required by Florida Administrative Code Rule 11D-8.008(3) for the renewal of permits. Rather, DHSMV asserts only that the permits contain no expiration date.

Second, DHSMV argues that Boivin failed to rebut the documentary evidence reflecting that the renewal requirements *were* met. DHSMV refers to the most recent Agency Inspection Report concerning the subject machine, signed by Croucher on August 12, 2011. DHSMV asserts that the Agency Inspection Report is a sworn document wherein Croucher attested that he held a valid permit to perform the particular function and that the inspection was performed in

¹ The fourth anniversary of the agency inspector's August 30, 2006 issued permit was August 30, 2010; thus, pursuant to Rule 11D-8.008(3), Boivin argues that the agency inspector was required to complete a renewal course by June 30, 2011.

accordance with the provisions of Florida Administrative Code Chapter 11D-8. Therefore, DHSMV argues that Boivin failed to present proof of non-compliance with the applicable rule.

Analysis

The issue of whether a breath test operator or agency inspector holds a valid permit to administer a breath test or conduct monthly inspections of the machines is a question of law, not of fact. *See Dep't of Hwy. Safety & Motor Vehicles v. Stevens*, 820 So. 2d 322, 323 (Fla. 5th DCA 2001) (holding that whether the agency inspector had a valid agency inspector permit was a question of law, not of fact and therefore, the circuit court did not reweigh the evidence when it determined that the inspector did not have a valid permit); *see also Young v. Dep't of Hwy. Safety & Motor Vehicles*, 18 Fla. L. Weekly Supp. 1084a (Fla. 6th Cir. Ct. August 24, 2011), *cert. denied*, 2012 WL 1138971, 2D11-4693 (Fla. 2d DCA 2012) (holding that invalidity of breath test operator's permit rendered the results of the breath test invalid, quashing the hearing officer's order affirming license suspension); *Barton v. Dep't of Hwy. Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 163b (Fla. 4th Cir. Ct. November 10, 2011) *cert. denied*, 1D11-6627 (Fla. 1st DCA 2012) (wherein the court quashed the petitioner's administrative license suspension based upon the breath test operator's failure to timely complete a renewal course). Therefore, this Court's decision must be based on an interpretation of the applicable rule, and not on the weight of the evidence. *Stevens*, 820 So. 2d at 323.

Pursuant to Administrative Code Rule 11D-8.008(3), in order to maintain valid permits, breath test operators and agency inspectors must complete a renewal course by June 30 following the fourth permit anniversary date, and during each subsequent four-year cycle. Any breath test operator or agency inspector who fails to satisfy the continuing education requirements *shall not* perform any duties authorized by the permit until successful completion of the applicable

renewal course. Fla. Admin. Code R. 11D-8.008(4) (2011) (emphasis added). Subsection (5) further provides that the permits remain valid *until such permits expire* or otherwise become invalid. Fla. Admin. Code R. 11D-8.008(5) (2011) (emphasis added). As articulated in *Stevens*, this Court's decision is based on an interpretation of the applicable rule, and it is clear that the regulations governing the breath test operator and agency inspector permits contemplate an expiration of those permits. Further, because the validity of the permit is determined as a matter of law, the mere fact that DHSMV had not invalidated the breath test operator's permit does not render the permit valid. *See Young*, 18 Fla. L. Weekly Supp. 1084a.

Moreover, DHSMV is initially afforded a presumption of compliance with the applicable breath testing rules. However, once a driver presents evidence showing a lack of substantial compliance with the appropriate regulations, the burden shifts to DHSMV to prove substantial compliance with the rules. *See Donaldson v. State*, 561 So. 2d 648 (Fla. 4th DCA 1990); *Dep't of Hwy. Safety & Motor Vehicles v. Farley*, 633 So. 2d 69, 71 (Fla. 5th DCA 1994) (holding that state had burden of showing that testing procedure was in substantial compliance with rules once licensee challenged breath alcohol test results on basis of lack of compliance with HRS rules); *Dep't of Hwy. Safety & Motor Vehicles v. Wejebe*, 954 So. 2d 1245, 1249 (Fla. 3d DCA 2007) (finding that DHSMV must prove substantial compliance with regulations once a driver submits proof that intoxilyzer machine was not in compliance).

In the present case, Croucher's permit that was entered into evidence at the formal review hearing was produced in response to a subpoena duces tecum to the manager of the Palm Beach County Sheriff's Office. That permit contains a certification date of August 30, 2006. Based on Rule 11D-8.008(3), Croucher was required to complete a renewal course by June 30, 2011. When Boivin presented evidence that Croucher's certification lapsed, the burden shifted to

DHSMV to prove substantial compliance with the rule. DHSMV did not put forth any evidence to show that Croucher attended a renewal course, extending his certification date beyond June 30, 2011. Thus, there is no evidence that Croucher held a valid permit to conduct the monthly agency inspection of the machine on August 12, 2011, the same machine used to administer Boivin's breath alcohol test. If Croucher lacked a valid permit, then the results of the breath alcohol test are invalid.

The Petition for Writ of Certiorari is **GRANTED** because the Hearing Officer failed to shift the burden of demonstrating substantial compliance with the applicable administrative rules to DHSMV, therefore the breathalyzer test results were not competent, substantial evidence to support a finding that Boivin was driving with an unlawful blood alcohol level. The final order dated October 11, 2011 is **QUASHED**. This matter is remanded to the Hearing Officer so that DHSMV may submit evidence showing that Croucher was properly certified on August 12, 2011, in accordance with Rule 11D-8.008(3). If DHSMV fails to meet this burden, the Hearing Officer shall reverse Boivin's driver's license suspension and his driving privilege shall be reinstated if he is otherwise eligible.

Phillips, Smith, and G. Keyser, JJ., concur.