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

APPELLATE DIVISION (CIVIL): AY
CASE NO. 502013CA011969XXXXMB

LACEY FAITH GORDON,
Petitioner,

v.

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

Opinion filed: JUN 24 2014

Petition for Writ of Certiorari from the Department of Highway Safety and Motor Vehicles.

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PER CURIAM.

We grant Respondent's Motion for Rehearing, withdraw the prior opinion dated September 27, 2013, and substitute the following opinion in its place.

In light of the Court's recent *en banc* decision in the case of *Moya v. DHSMV*, which is attached to this opinion, Petitioner's Petition is **GRANTED** as to the permit issue and **DENIED** in all other respects. Accordingly, the decision of the DHSMV in the proceeding below is **QUASHED** and the matter is **REMANDED** for the DHSMV hearing officer to hold another hearing and make the necessary findings in light of *Moya v. DHSMV*. Petitioner's Motion for Attorney's Fees and Costs is **DENIED**.

BLANC, SASSER and SMALL, JJ., concur.

Fifteenth Judicial Circuit *En Banc* Opinion in the Case of *Moya v. DHSMV*, dated June 17, 2014

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

APPELLATE DIVISION (CIVIL): AY
CASE NO. 50-2013-CA-011295

DANNY ROLANDO MOYA,
Petitioner,

v.

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

Opinion filed: JUN 17 2014

Petition for Writ of Certiorari from the Department of Highway Safety and Motor Vehicles.

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THIS MATTER came before the Court on Petitioner's Petition for Writ of Certiorari, filed on July 6, 2013. After a three-judge panel considered the Petition on October 15, 2013, the panel unanimously voted for one issue in the Petition to be considered *en banc* pursuant to local Administrative Order 8.101(F). We review the Petition *en banc* to reconsider prior precedent of this Court in light of the facts and circumstances of this case.

STATEMENT OF THE CASE AND ANALYSIS

This Petition arises from Respondent the Department of Highway Safety and Motor Vehicles' suspension of Petitioner's driver license. After Petitioner was arrested for driving under the influence, Petitioner consented to a breathalyzer test. The results of the breathalyzer test indicated Petitioner had a breath-alcohol content greater than the legal limit and, as a result, Petitioner's driver license was suspended by the DHSMV.

Petitioner appealed the DHSMV's suspension of his driver license in the proceeding below. At the DHSMV hearing on the matter, Petitioner argued that his license should be reinstated because the technician who performed his breathalyzer test had an expired breathalyzer technician permit. To substantiate his allegations, Petitioner produced a copy of the technician's permit.

Breathalyzer technician permits do not contain an expiration date. Instead, such permits expire approximately four years after issuance unless the technician takes certain continuing education courses. Fla. Admin. Code R. 11D-8.008. In the event a technician takes the necessary continuing education courses, a new permit is not issued. Instead, a permit "remain[s] valid and in full effect until determined otherwise." Fla. Admin. Code R. 11D-8.002(24). Petitioner argued in the proceeding below that because the breathalyzer permit in this case had been issued more than four years prior to Petitioner's arrest, the permit appeared to have expired on its face. Petitioner further argued that the burden to prove the breathalyzer technician had taken the necessary continuing education courses to maintain his permit was placed on the DHSMV.

Petitioner's argument was directly supported by precedent decided in this Court. *See Pasa v. DHSMV*, 20 Fla. L. Weekly Supp. 544b (Fla. 15th Cir. Ct. 2013); *Walker v. DHSMV*, 20

Fla. L. Weekly Supp. 549a (Fla. 15th Cir. Ct. 2013); *Boivin v. DHSMV*, 20 Fla. L. Weekly Supp. 249a (Fla. 15th Cir. Ct. 2012); *Rivera v. DHSMV*, 20 Fla. L. Weekly Supp. 251a (Fla. 15th Cir. Ct. 2012). In one of the original cases that established this precedent, *Rivera v. DHSMV*, this Court held that the submission of a breathalyzer permit which appeared to have expired on its face was sufficient evidence to place a burden on the DHSMV to prove that all necessary continuing education courses were taken. *Rivera*, 20 Fla. L. Weekly Supp. 251a at 1-2.

The DHSMV argued in *Rivera*, and has continued to argue in subsequent litigation, that (1) the burden to prove continuing education courses have been taken should not be placed upon the DHSMV because the Petitioner provided no proof that the technician failed to take any continuing education courses and (2) even if the burden was shifted, the DHSMV had competent and substantial evidence to support a finding the technician's permit was valid because of a sworn statement, signed by the technician, that his permit was valid. *See id.* Both of these arguments were rejected by this Court in *Rivera*. *See id.* We now reexamine our decision in *Rivera* in light of the litigation that has followed our holding in that case.

In *Rivera*, counsel for the driver (who is also counsel for Petitioner in the instant case) subpoenaed a breathalyzer technician and elicited testimony from the technician on the subject of the validity of his permit. *Id.* It is unclear from the text of the *Rivera* opinion whether the technician's testimony definitively established that he had failed to take the necessary continuing education courses.[1] *See id.* at 3-4. This Court held, however, that the petitioner's submission of a breathalyzer permit (which was over four years old) was sufficient evidence to shift a burden onto the DHSMV to prove the permit remained valid *even without any testimony from the technician*. *See Boivin*, 20 Fla. L. Weekly Supp. 249a at 2-3. After this Court so held, driver's

[1] Although the *Rivera* opinion discusses the technician's testimony in the context of burden shifting, the text of the opinion does not clearly indicate whether the technician's testimony established that he had failed to take continuing education courses. *See Rivera*, 20 Fla. L. Weekly Supp. 251a at 2-3.

counsel in subsequent litigation frequently elected not to subpoena breathalyzer technicians whose permits were being challenged. Instead, counsel challenged the validity of the permits based only upon the age of the permit and the lack of evidence that the necessary continuing education courses had been taken to maintain the permit's validity.

At a license suspension hearing, upon a claim that the permit of a breathalyzer technician had expired, without the technician present, the DHSMV was essentially left with two alternatives. The DHSMV could suspend the hearing, issue its own subpoena, and then secure evidence of continuing education. These actions by the DHSMV would be proper under *Rivera*. Alternatively, the DHSMV could choose not to suspend the hearing and proceed to rule on documentary evidence alone. Without any documentary evidence of continuing education, however, any decision by the DHSMV upholding a license suspension directly contradicted *Rivera*. The DHSMV's reluctance to stay proceedings and issue subpoenas appears to have been motivated by its continued insistence that *Rivera* was wrongly decided.[2]

The DHSMV's position appears to be related to the manner in which petitioners have applied our *Rivera* precedent. Not only have petitioners elected not to subpoena breathalyzer technicians accused of expired permits, but petitioners have also made the same type of allegations as to agency inspector permits and law enforcement officer certificates. In several recent cases before this Court,[3] petitioners essentially argued that four law enforcement officers made false arrests as illegal officers for many years and that their false arrests included the arrests of the petitioners. These allegations were based, as in this case, solely upon the

[2] The DHSMV's opinion of the *Rivera* decision is easily inferred from its arguments before the Court.
[3] *Fagu v. DHSMV*, No. 2013CA011968 (Fla. 15th Cir. Ct. Oct. 7, 2013); *Chiavetta v. DHSMV*, No. 2013CA011967 (Fla. 15th Cir. Ct. Sep. 27, 2013); *Gordon v. DHSMV*, No. 2013CA011969 (Fla. 15th Cir. Ct. Sep. 27, 2013); *Hernandez v. DHSMV*, No. 2013CA011966 (Fla. 15th Cir. Ct. Sep. 27, 2013).

submission of the officers' original law enforcement training certificates.[4] Applying *Rivera*, petitioners argued that the burden was upon the DHSMV to prove that the arresting officers had taken the necessary continuing education courses by suspending proceedings, issuing its own subpoenas, and gathering evidence on continuing education.

CONCLUSIONS AND RULING

Having now had the benefit of further reflection on our decision in *Rivera* and its effect on subsequent cases, we recede from our holding in that case. In some circumstances, it may be appropriate to shift a burden of proof to the DHSMV because of the underlying difficulty a petitioner may have in proving a particular fact. *See Donaldson v. State*, 561 So. 2d 649, 649-50 (Fla. 4th DCA 1990). In the context of breathalyzer permits, agency inspector permits, and law enforcement officer certificates, however, we conclude that burden shifting based *solely* upon the submission of an original permit is not appropriate because the validity of such permits can be definitively established by the driver simply subpoenaing the individual accused of possessing an invalid permit—just as the petitioner did in *Rivera*. We also hold that the submission of an original permit, particularly when the permit was issued many years in the past, without more, is not sufficient evidence that the permit was invalid *at the time of arrest or testing*. Moreover, although it may be a question of law whether the completion of certain continuing education courses satisfies the administrative rule that requires such courses, we conclude that the DHSMV may make a factual determination, based upon the evidence presented at the hearing,[5] as to whether continuing education courses were taken. *See DHSMV v. Stevens*, 820 So. 2d 322, 323

[4] Law enforcement officer training certificates expire according to an administrative scheme similar to that of breathalyzer permits. Fla. Admin. Code. R. 11B-27.00212. For the sake of simplicity, we occasionally refer to breathalyzer technician permits, agency inspector permits, and law enforcement training certificates collectively as permits.

[5] A sworn statement by a breathalyzer technician, agency inspector, or law enforcement officer that a permit or certificate is valid is competent and substantial evidence the DHSMV may consider when making a finding of fact as to whether education courses have been taken.

(Fla. 5th DCA 2001). This Court may review such factual determinations according to the standards of review proscribed by law. *See Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995). Accordingly, to the extent that *Rivera, Pasa, Boivin, Walker* and other opinions of the Court contradict our findings above those cases are hereby **OVERRULED**.

We next consider the instant Petition in light of our decision. 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 id.* 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).

Although Petitioner has alleged that the breathalyzer technician in the instant case did not possess a valid permit and that the DHSMV therefore lacked competent and substantial evidence to support its decision, the only evidence in the record to support such a claim is the technician's original permit. Because Petitioner did not subpoena the breathalyzer technician and did not secure any additional evidence to substantiate his allegation, we cannot conclude the DHSMV lacked the necessary competent and substantial evidence to support its decision. The limited amount of evidence in the record is likely based, however, upon Petitioner's reliance upon our prior precedent. In order to avoid any injustice to Petitioner that would result from evaluating the instant Petition in light of our reversal of prior precedent, Petitioner should have an opportunity to substantiate his allegations under the standard delineated in this opinion. We therefore **GRANT** the Petition, **QUASH** the decision of the DHSMV in the proceeding below,

and **REMAND** for the DHSMV hearing officer to hold another hearing and make the necessary findings in light of this opinion. *See DHSMV v. Bailey*, 870 So. 2d 47, 49 (Fla. 2d DCA 2003).

BROWN, BRUNSON, J. MARX, BLANC, CROW, GILLEN, J. KEYSER, G. KEYSER, FINE, COX, SASSER, SMALL, JJ., concur.

With respect to the second issue raised in the Petition, we find that this issue does not necessitate *en banc* review, is without merit, and is **DENIED**. With respect to Petitioner's Motion for Attorney's Fees and Costs, we find that the DHSMV's defense in this matter does not merit an award of attorney's fees and the motion is **DENIED**.

BROWN, COX, J. MARX, JJ., concur.