

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

APPELLATE DIVISION (CIVIL): AY  
CASE NO: 2016CA006844XXXXMB

LETRON T. KELLY,  
Petitioner,

v.

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

Opinion filed: Feb 01, 2017

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

For Petitioner: Ira D. Karmelin, Esq.  
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For Respondent: Natalia Costea, Esq.  
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**ON REHEARING**

Petitioner's Motion for Rehearing as to Attorney's Fees and Costs is denied; however, we grant Respondent's Motion for Rehearing and or Clarification and to Remand for Further Proceedings, withdraw our prior opinion, and replace it with the following.

Petitioner, Letron T. Kelly, filed the instant Petition for Writ of Certiorari, seeking a review of an order of the Florida Department of Highway Safety and Motor Vehicles ("DHSMV") sustaining a suspension of his driver license for one (1) year based on Petitioner's refusal to submit to a breath alcohol test. At a formal administrative review of his license

suspension, Petitioner moved to recuse DHSMV Hearing Officer Donna George. In denying the motion to recuse, Hearing Officer George stated, in pertinent part:

All right. I have reviewed it, you did ask me to recuse myself on the grounds that you did not feel that I would give a fair and impartial hearing. I am a fair and impartial - - I am a fair and impartial Hearing Officer, I've always weighed the evidence, Counsel. Your motion is denied.

Petitioner then orally amended his motion to recuse, on the grounds that Hearing Officer George challenged the motion rather than simply address the legal sufficiency of the motion. Hearing Officer George denied this amended motion, which is the basis for the instant Petition.

A driver may appeal a DHSMV hearing officer's order sustaining a suspension of his or her driver's license through a petition for writ of certiorari to the circuit court. § 322.31, Fla. Stat. (2015); Fla. R. App. P. 9.030(c)(2). In evaluating such a petition, the circuit court's review is limited to a three-prong determination: (1) whether DHSMV afforded the petitioner procedural due process; (2) whether DHSMV observed the essential requirements of law; and (3) whether DHSMV's findings and judgment are supported by competent, substantial evidence. *DHSMV v. Sarmiento*, 989 So. 2d 692, 693 (Fla. 4th DCA 2008); *DHSMV v. Cherry*, 91 So. 3d 849, 854 (Fla. 5th DCA 2011). In the context of a motion to disqualify or recuse a DHSMV hearing officer, the circuit court's standard of review remains limited to the same three-pronged determination, and the circuit court must evaluate whether procedural due process was afforded by determining whether the motion to recuse or disqualify was legally sufficient. *See Anderson v. DHSMV*, 20 Fla. L. Weekly Supp. 221a (Fla. 9th Jud. Cir. Ct., Nov. 5, 2012); *Perez v. DHSMV*, 18 Fla. L. Weekly Supp. 354a (Fla. 11th Jud. Cir. Ct., Feb. 3, 2011).

It is well-established that a judge or hearing officer presented with a motion for his or her disqualification or recusal "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." *Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978). Where a judge or

hearing officer “attempts to refute the factual assertions in a motion for disqualification, he or she is deemed to have taken an adversarial role in the matter, which itself warrants disqualification.” *Frost v. Ward*, 622 So. 2d 597, 598 (Fla. 4th DCA 1993) (citations omitted). We find that, while Petitioner’s allegations in the initial motion to recuse were insufficient to establish a reasonable fear of bias, Hearing Officer George took an adversarial role by attempting to refute Petitioner’s allegations. Thus, the hearing officer exceeded the proper scope of inquiry and did not afford Petitioner procedural due process by denying his orally amended Motion to Recuse. On this basis alone, we find that Petitioner is entitled to relief.

Accordingly, the Petition for Writ of Certiorari is GRANTED. The matter is remanded for a new hearing held before a different hearing officer. Petitioner’s Motion for Attorney’s Fees and Costs is DENIED.

CARACUZZO, BLANC, and OFTEDAL, JJ., concur.

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Opinion/Decision filed: *Feb. 01, 2017*

v.

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

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

Petition filed: June 18, 2016

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DATE OF PANEL: OCTOBER 17, 2016

PANEL JUDGES: CARACUZZO, BLANC, OFTEDAL

GRANTED/DENIED/OTHER: PETITION GRANTED

PER CURIAM OPINION/DECISION BY: PER CURIAM

DATE CONCURRING:	)	DISSENTING:	)	CONCURRING SPECIALLY:	)
	)	With/Without Opinion	)	With/Without Opinion	)
<i>[Signature]</i> <i>11/25/17</i>	)		)		)
J.	)	J.	)	J.	)
<i>[Signature]</i> <i>11/27/17</i>	)		)		)
J.	)	J.	)	J.	)
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J.	)	J.	)	J.	)