

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

APPELLATE DIVISION (CIVIL)  
Case No.: 502011CA017424XXXXMB  
Division: 'AY'

FRANCESKA RIVERA,

Petitioner,

v.

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

Respondent.

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Opinion filed: **SEP - 5 2012**

**✓Appeal from the Department of Highway Safety and Motor Vehicles.**

✓For Petitioner: Ira D. Karmelin, Esq.  
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West Palm Beach, FL 33417

✓For Respondent: Damaris E. Reynolds, Esq.  
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PER CURIAM.

Franceska Rivera seeks review of the order sustaining the suspension of her driver's license. We find that the breath alcohol test results were inadmissible due to the invalidity of the Breath Test Operator and Agency Inspector's permits and the Hearing Officer erred in allowing the results of the breath alcohol test into evidence. Therefore, the Hearing Officer's decision was not based on competent substantial evidence and the order sustaining the suspension is quashed.

### Statement of the Case

On August 26, 2011, Rivera's driver's license was suspended after she was arrested for driving with an unlawful blood alcohol level. Rivera challenged the suspension at a formal review hearing on October 5, 2011, pursuant to section 322.2615, Florida Statutes (2011). At the hearing, counsel for Rivera entered both Breath Test Operator Gary Parent and Agency Inspector Gregory Croucher's permits into evidence and moved to invalidate the suspension, arguing that any documents containing the breath test results are inadmissible because Parent did not hold a valid permit to conduct the breath test and Croucher did not hold a valid permit to conduct the monthly inspection of the machine used to administer the breath test. Parent testified at the formal review hearing and stated that the permit entered into evidence was the "only one" that he had. Croucher did not testify at the hearing.

On October 10, 2011, the Hearing Officer entered the "Findings of Fact, Conclusions of Law and Decision," overruling Rivera's objections to all documents pertaining to the breath test and denying Rivera's motions to invalidate the suspension due to expired Agency Inspector and Breath Test Operator certificates. 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. This Petition for Writ of Certiorari followed.

### 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, Rivera presented into evidence Parent's permit to conduct breath alcohol testing, dated July 20, 2005 and Croucher's permit to conduct agency inspections, dated August 30, 2006. Rivera argues that Parent's permit was valid until June 30, 2010,<sup>1</sup> and Croucher's permit was valid until June 30, 2011,<sup>2</sup> and there is no evidence in the record to show that either Parent or Croucher completed a renewal course by those dates. Parent also testified at the formal review hearing, stating that the permit entered into evidence was the "only one" that he had. Rivera asserts that she presented evidence showing a lack of compliance with the appropriate rules, which shifted the burden to the Department of Highway Safety and Motor Vehicles ("DHSMV") to prove substantial compliance with the rules, yet it presented no evidence to show completion of the required renewal courses. Therefore, Rivera 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 Rivera's license. Rivera next argues that, if this Court does not find merit in her first argument, that this Court should quash the final order of license suspension and direct DHSMV to reduce the length of suspension from one year to six months because there is no competent substantial to support a one year suspension.

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<sup>1</sup> The fourth anniversary of the breath test operator's July 20, 2005 issued permit was July 20, 2009; thus, pursuant to Rule 11D-8.008(3), Rivera argues that the breath test operator was required to complete a renewal course by June 30, 2010.

<sup>2</sup> 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), Rivera argues that the agency inspector was required to complete a renewal course by June 30, 2011.

In its response to the petition, DHSMV raises two arguments. First, it contends that the breath test operator and agency inspector's permits do not have an expiration date and there is no evidence that they did not meet their permit renewal requirements. Pointing to the Florida Administrative Code's definition of "permit,"<sup>3</sup> DHSMV asserts that a permit remains valid and in full effect until determined otherwise by the Department. It should be noted that DHSMV does not contest Rivera'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 Rivera failed to rebut the documentary evidence reflecting that the renewal requirements *were* met. DHSMV refers to the Breath Alcohol Test Affidavit, signed by Parent on the date of Rivera's arrest and containing the results of Rivera's breath test samples, and the most recent Agency Inspection Report concerning the subject machine, signed by Croucher on August 12, 2011. DHSMV asserts that each is a sworn document wherein Parent and Croucher attested that they held a valid permit to perform the particular functions and that the test was administered or the inspection was performed in accordance with the provisions of Florida Administrative Code Chapter 11D-8. Therefore, DHSMV argues that Rivera 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

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<sup>3</sup> Administrative Code Rule 11D-8.002(24) defines "permit" as follows:

Permit – when issued by the Department, certifies that the holder has met all necessary qualifications, remains in full compliance with these rules and is authorized to perform all related duties. A permit is issued only to a qualified applicant and remains valid and in full effect until determined otherwise by the Department.

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, the permits entered into evidence at the formal review hearing were produced in response to a subpoena duces tecum to the manager of the Palm Beach County Sheriff's Office. Parent's permit contains a certification date of July 20, 2005, and Croucher's permit contains a certification date of August 30, 2006. Based on Rule 11D-8.008(3), Parent was required to complete a renewal course by June 30, 2010 and Croucher was required to complete a renewal course by June 30, 2011. When Rivera presented evidence that Parent and Croucher's certification lapsed, the burden shifted to DHSMV to prove substantial compliance the rule. DHSMV did not put forth any evidence to show that either Parent or Croucher attended a renewal course, extending their certification dates beyond June 30, 2010 and June 30, 2011, respectively. Thus, there is no evidence that Parent held a valid permit to conduct the breath test on August 26, 2011, or 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 Rivera's breath test. Significantly, Parent testified at the formal review hearing that the July 20, 2005 issued permit was the "only one" that he had. Even if the Hearing Officer did not formally shift the burden to DHSMV on this issue, Parent's testimony conclusively establishes that the results of the breath test are invalid.

The Petition for Writ of Certiorari is **GRANTED** because DHSMV failed to meet its burden of demonstrating substantial compliance with the applicable administrative rules, there the breathalyzer test results were not competent, substantial evidence to support the administrative Hearing Officer's finding that Rivera was driving with an unlawful blood alcohol level. The final order dated October 10, 2011 is **QUASHED**. The Department of Highway Safety and Motor Vehicles shall reinstate Franceska Rivera's driving privilege if she is otherwise eligible. Accordingly, we decline to reach the merits of Rivera's second argument regarding the length of her license suspension.

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