

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

SCOTT DAVID TUCKER,

Petitioner,

APPELLATE DIVISION (CIVIL) "AY"
CASE NO.: 502013CA001846XXXXMB

v.

STATE OF FLORIDA
DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,

Respondent.

Opinion filed: **MAY - 6 2013**

Appeal from the State of Florida Department of Highway Safety and Motor Vehicles.

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This case involves a Petition for Writ of Certiorari seeking review of an order entered by the Florida Department of Highway Safety and Motor Vehicles, Bureau of Administrative Reviews (DHSMV) suspending Scott David Tucker's (Tucker) license. Tucker argues that since he did not receive notice of the formal review hearing within the requisite thirty days, his suspension is invalid. When reviewing a decision of an administrative body which comes before the court on a petition for writ of certiorari, the circuit court must determine whether (1) the parties were afforded procedural due process, (2) the essential requirements of law were

observed, and (3) the administrative findings of judgment were supported by competent substantial evidence. *Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *Vichich v. Dep't of Hwy. Safety and Motor Vehicles*, 799 So. 2d 1069, 1075 (Fla. 2d DCA 2001). “[I]n such review, the circuit court functions as an appellate court, and, among other things, is not entitled to reweigh the evidence or substitute its judgment for that of the agency.” *Haines*, 658 So. 2d at 530.

At issue in the Petition is the invalidity of Tucker’s license suspension for failure to receive notice of the formal review hearing within thirty days and the hearing was not held within the thirty day period, as required by statute. Tucker was arrested for DUI on October 5, 2012. On November 1, 2012, DHSMV sent an Order of License Suspension to Tucker’s home address notifying him that his license was suspended for six months, effective November 21, 2012. The order also stated that Tucker had ten calendar days from the date of the order to request a formal review or informal review. On November 9, 2012, Tucker timely requested a formal review of his suspension and was issued a temporary driving permit.¹

On December 10, 2012, a Final Order of License Suspension was entered by Hearing Officer Aisha Westcarth (“Wescarth”) and mailed to Tucker’s home address. The order stated that Tucker failed to appear for his formal review hearing scheduled for 1:00 p.m. on December 5, 2012. As a result, Tucker waived his right to a formal review and the suspension was sustained pursuant to section 322.2615(6)(b), Florida Statutes (2012). On December 19, 2012, an Order Continuing Formal Review Hearing was entered by Westcarth which rescheduled the

¹ On the copy provided by Tucker of the form requesting the formal review hearing, some fields are filled in by hand and the attorney information is typed. Since there are different time stamps and fax number headings, it is also unclear whether this was a copy that Tucker’s counsel kept or was a copy of the form provided by DHSMV after it was received. At the bottom of the form, there is a handwritten note which states “12/5 1:00 AW” which could be a notation made by DHSMV after it was received from Tucker’s counsel. This notation matches the date and time of the scheduled hearing.

hearing until January 8, 2013 at 3:00 p.m. Notably, this order was sent to Tucker's attorney's address.

At the formal review hearing held on January 8, 2013, Tucker objected to the hearing being held outside of the thirty-day statutory period. Tucker argued that his request for the hearing was timely and did not receive notice of a hearing to be held within the thirty-day period. Wescarth reserved ruling on the objection. In the "Findings of Fact, Conclusions of Law and Decision" entered on January 9, 2013, Wescarth issued a one word denial with regards to Tucker's argument that the hearing was held outside the thirty-day window.

Tucker argues that DHSMV deprived him of procedural due process when it failed to schedule a formal review hearing and give proper notice of the same, within the thirty day period as required by statute and administrative code. DHSMV counters that although Tucker's counsel did not receive notice of the hearing held on December 5, 2012, the hearing was *scheduled within thirty days* and that is what is required by the statute. Both Tucker and DHSMV rely on the language of section 322.2615, Florida Statutes (2012) which states, in relevant part:

(6)(a) If the person whose license was suspended requests a formal review, **the department must schedule a hearing to be held within 30 days after such request is received by the department and must notify the person of the date, time, and place of the hearing.**

...

(9) A request for a formal review hearing or an informal review hearing shall not stay the suspension of the person's driver's license. **If the department fails to schedule the formal review hearing to be held within 30 days after receipt of the request therefor, the department shall invalidate the suspension.** If the scheduled hearing is continued at the department's initiative, the department shall issue a temporary driving permit that shall be valid until the hearing is conducted if the person is otherwise eligible for the driving privilege. Such permit may not be issued to a person who sought and obtained a continuance of the hearing. The permit issued under this subsection shall authorize driving for business or employment use only.

§ 322.2615, Fla. Stat. (2012) (emphasis added).

The consequence of a driver failing to appear at a scheduled hearing is outlined in Florida Administrative Code Rule 15A-6.015. First, formal review is waived and DHSMV shall inform the driver using Form 78064 and include a final order. Fla. Admin. Code R. 15A-6.015(1). A driver “may submit to the hearing officer a written statement showing just cause for such failure to appear within two (2) days of the hearing.” Fla. Admin. Code R. 15A-6.015(2). “Just cause” is defined by “extraordinary circumstances beyond the control” of the driver, the driver’s attorney or a witness. Fla. Admin. Code R. 15A-6.015(3). Once just cause is shown, the hearing shall be continued and notice given. Fla. Admin. Code R. 15A-6.015(4). If a driver hires an attorney, the attorney’s request for a formal review hearing or files any document with DHSMV is deemed to be counsel of record for the proceeding and service on counsel constitutes service on the driver. *See* Fla. Admin. Code R. 15A-6.007.

The effect of a failure to notify a driver of a hearing that was in fact scheduled within the thirty-day time frame was recently addressed in *Morales v. DHSMV*, 20 Fla. Weekly Supp. 24b (Fla. 11th Jud. Cir. Oct. 5, 2012). In *Morales*, the DHSMV originally scheduled the hearing to take place within thirty days of the date of the driver’s demand for one, but sent notice of the hearing to the wrong address. DHSMV subsequently rescheduled the hearing and affirmed his suspension. The driver argued that the license suspension had to be set aside when a driver is not given proper notice of a hearing set within thirty days.

The *Morales* court held there was a violation of the driver’s procedural due process and a departure from the essential requirements of law when a hearing is merely scheduled but a driver receives no notice. “Considering a hearing to be ‘scheduled’ when DHSMV has not complied with the basic due process requirement of notifying the affected party of the hearing would

render the scheduling deadline of section 322.2615(9) meaningless.” The court noted that if the notification requirement is not enforced, the DHSMV could schedule hearings internally to meet the statutory requirement and then later “reschedule.” The result was to quash the order sustaining the suspension. The holding of *Morales* was based on *Diaz v. State of Fla., Dept. of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 516b (quashing order sustaining suspension because driver was denied due process of law when he was not given reasonable notice of the hearing since due to a typographical error he believed his hearing was in the evening instead of the morning). *Georgiev v. State of Fla., Dept. of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 783b (quashing suspension order because DHSMV’s failure to schedule the suspension hearing in the correct venue deprived driver of procedural due process and was a departure from the essential requirements of law).

Here, DHSMV essentially argued that as long as the hearing is *scheduled* within thirty days of the request, it has met its obligation under the statute. DHSMV states that although the hearing was continued past the thirty-day period, it still complied with its obligations by extending Tucker’s temporary driving privileges. This alone, however, is insufficient to cure the notice requirement, especially when DHSMV admitted that “Counsel for Tucker was not noticed of the first hearing,” The purpose of extensions beyond the thirty days is typically to the benefit of the driver who was unable to compel the attendance of a key witness, or to address a situation of “just cause.” See Fla. Admin. Code R. 15A-6.015(2)(a). Here, the hearing was “extended” only after Tucker or his attorney contacted DHSMV. Although it is not clear that Tucker himself received notice of the hearing held on December 5, 2012, there is no competent substantial evidence before this Court to show that he was in fact notified.

The cases relied on by DHSMV in its brief are not relevant to the facts presented here since they focus on the validity of hearings continued by DHSMV past the original thirty day period to accommodate the needs of the driver-petitioner. *See, e.g., Donohue v. State of Fla., Dept. of Highway Safety & Motor Vehicles*, 20 Fla. L. Weekly Supp. 338a (17th Jud. Cir. 2013) (subpoena enforcement); *Wolk v. State of Fla., Dept. of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 136a (17th Jud. Cir. 2006) (subpoena enforcement) ; *Collard v. State of Fla., Dept. of Highway Safety & Motor Vehicles*, 4 Fla. L. Weekly Supp. 749b (9th Jud. Cir. 1997) (subpoena enforcement); *Rosa v. State of Fla., Dept. of Highway Safety & Motor Vehicles*, 20 Fla. L. Weekly Supp. 235a (17th Jud. Cir. 2012) (incorrect venue). The key distinguishing fact of all the cases provided by DHSMV is that the petitioner in each case had received notice of the hearing, whether it was the original hearing or one continued past the thirty-day window. In contrast, here there is no clear indication in the appendices provided by either side that Tucker or his counsel received notice before December 5, 2012 of the first scheduled hearing. Therefore, the Petition for Writ of Certiorari is **GRANTED** and the order of suspension is **QUASHED**.

Kelley, Small, and Rosenberg JJ., concur.