STATE OF MICHIGAN

COURT OF APPEALS

ROBERT RAYMOND BEAMAN, Petitioner-Appellee,	UNPUBLISHED February 19, 2004
v	No. 245036 Macomb Circuit Court
SECRETARY OF STATE, Respondent-Appellant.	LC No. 02-003636-AL

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Respondent appeals by leave granted from the circuit court order reinstating petitioner's driver's license without restrictions. We reverse.

Petitioner was represented by counsel when he appeared for an administrative hearing before respondent Secretary of State, Driver's License Appeal Division on June 20, 2002. Before hearing officer Jones, respondent testified that he had not consumed an alcoholic beverage since August 1998. To maintain sobriety, he initially attended individual counseling sessions and attended Alcoholics Anonymous (AA) meetings twice weekly. After a two-year period, he was discharged from therapy and did not "feel the need to go to an A.A. meeting." Petitioner testified that he changed his actions to maintain sobriety. He stopped socializing with the same group of people, stopped engaging in the same activities, and derived support from his sponsor and childhood friend, Ron Urbanczyk. Respondent submitted letters from Urbanczyk,[1] his girlfriend, Denise Rekowski, and another childhood friend Charles Shereda,[2] to address his

[1] Petitioner testified that he stopped associating with the same group of people and stopped engaging in the same activities to maintain sobriety. However, the letter from Urbanczyk contradicted that testimony, by providing: "We still participate in the same activities with the same people as we always did, but we both do them soberly."

[2] The letter from Shereda indicated that he only saw petitioner a couple of times a month. Although Shereda's letter did not set forth any qualifications regarding his assessment of alcoholism, his letter provided: "In regards to his treatment, I know [petitioner] has been required to attend many Alcoholics Anonymous meetings over the past several years. I don't believe these meetings have been overly helpful, specifically because I do not believe he should

(continued…)

sobriety. Although respondent once had an interlock device on his car,[3] he did not have one at that time because he was waiting for the outcome of this hearing. When asked about an interlock report for the period when he did have one on his vehicle, the following colloquy occurred:

> *Q [Hearing Officer]*. Would you have an interlock report to cover that period of time with you today?
>
> *A [Petitioner]*. No, I don't have it with me today.
>
> *Q [Hearing Officer]*. Do you have one at all?
>
> *A [Petitioner]*. Yes. I have one at home.
>
> *Q [Hearing Officer]*. That covers that period of time?
>
> *A [Petitioner]*. Yes. Up until I went to see the judge.
>
> *Q [Hearing Officer]*. Is there some reason why we don't have that today?
>
> *A [Petitioner]*. No. No reason. I just – I totally forgot about it. I didn't think you needed it.
>
> *Q [Hearing Officer]*. That's the whole (inaudible) about this hearing. About the interlock.

The hearing officer agreed to allow petitioner to fax the interlock report within the next two days. Petitioner testified that he had no violations on the interlock when he was using the device.

Petitioner acknowledged that, during his last attempt to obtain full reinstatement of his driver's license, the hearing officer[4] required him to submit proof of weekly participation in a

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(…continued)

have ever been considered to be an alcoholic."

[3] On January 23, 2001, hearing officer Clover did not reinstate petitioner's driving privileges. Rather, he ordered that restrictions, including an interlock, were to continue for an indefinite period. Petitioner filed a claim of appeal to the circuit court and obtained an unrestricted driver's license. This Court peremptorily reversed that determination because the circuit court did not have jurisdiction where petitioner failed to comply with the time for filing requirements of the statute. Unpublished order of the Court of Appeals, entered February 19, 2002 (Docket No. 238727). Apparently, petitioner removed the interlock system after obtaining relief in circuit court and did not reinstall the interlock system when the circuit court's order was reversed by this Court.

[4] Clover's report also provided:

> Mr. Beam should *submit the following document(s)* ***with*** *his request for the next hearing*:

(continued…)

structured substance abuse support group. He further stated that he did not comply with that requirement:

> *Q [Hearing Officer]*. I am curious to know and Hearing Officer Clover's Order that was issued January 23rd he did ask in terms of hearing evidence or documentation that you do have proof of continuous participation in a structured substance abuse support group at least on a weekly basis and from what I'm hearing today from your testimony you have not continued with that.
>
> *A [Petitioner]*. No, I haven't been attending A.A.
>
> *Q [Hearing Officer]*. Uh-huh. And your reason, again, is?
>
> *A [Petitioner]*. I don't feel the need that I need to.
>
> *Q [Hearing Officer]*. Even though it was ordered and the documentation asked for?
>
> *A [Petitioner]*. (No oral response.)
>
> ***
>
> *Q [Hearing Officer]*. And when was your last meeting, sir?
>
> *A [Petitioner]*. I am not even sure.
>
> *Q [Hearing Officer]*. Do you want to take a good guess? Estimated guess – educated guess.
>
> *A [Petitioner]*. Around (inaudible) oh, probably October.

(…continued)

An Interlock Final report,

1) a current substance abuse evaluation from a certified substance abuse counselor,

2) current, dated community proofs to verify the Petitioner's claims of abstinence from all substances from a minimum of three sources who know the Petitioner's drinking and substance use habits, who can attest to the Petitioner's length of abstinence, indicate how they know this information, how often they see the Petitioner, and indicate their address and a return phone number,

3) proof of continuous participation in a structured substance abuse support group at least once weekly. [Emphasis in original.]

Q [Hearing Officer]. Of last year.

A [Petitioner]. Yes.

Q [Hearing Officer]. October 2001. You said that Mr. Urbanczyk is pretty much considered you're A.A. sponsor. Is he in the A.A. program too?

A [Petitioner]. He hasn't been attending –

Q [Hearing Officer]. Okay.

A [Petitioner]. – regularly.

Q [Hearing Officer]. How would he be considered you're A.A. sponsor if he's not active in the A.A. program, sir?

A [Petitioner]. He was.

Q [Hearing Officer]. Uh-huh. Until?

A [Petitioner]. I don't know. I don't follow his dates. I don't control his life. I don't run his life. …

At that time, the hearing officer offered to take a break to allow petitioner to compose himself after becoming hostile, noting that legitimate questions were being asked to which legitimate answers should be given. After the break, petitioner did not know whether he stopped attending AA meetings before his sponsor stopped attending. When asked if he had documented his attendance at AA meetings through October 2001, petitioner had not because he "didn't think [he] had to" despite the prior order of the hearing officer. Petitioner testified that he had read the order of the prior hearing officer. When asked to name the steps of the AA program, petitioner named one. At the prior hearing, petitioner could not recite the serenity prayer. Petitioner testified that he had maintained steady employment since October 2001.

The hearing officer waited more than thirty days for an interlock final report, but it was not received. Petitioner's request for reinstatement of full driving privileges was denied, with the hearing officer concluding:

> Petitioner is appealing for a full, unrestricted driver's license. His appeal is denied in that he has failed to provide clear and convincing evidence to justify the same. Firstly, petitioner did not submit a Final Report from the interlock company verifying the fact that he had the device installed in his vehicle beginning 01/23/2001 until the order was set aside by order of circuit court. The circuit court order was entered approximately 12/14/2001. A continuance for more than a month should have been ample time to secure a copy of the Final Report. Mr. Beaman did provide a favorable substance abuse evaluation indicating a diagnosis of Alcohol Abuse in Remission and a good prognosis and 3 testimonial letters vouching for his claim of abstinence. One of the testimonial letters was from his current girlfriend whom he met, September 2001. On the basis of the evidence submitted, petitioner has shown cause to continue the

> restricted license. But without the interlock report, he has now shown compliance with the previous SOS order.
>
> After considering the testimony, evidence and any legal arguments, and for the reasons indicated above, the Hearing Officer finds that Petitioner failed to meet the standards indicated above for modification of the action of the Secretary of State.

Petitioner then filed a claim of appeal to the circuit court. Therein, petitioner asserted that he contacted the interlock agency and was advised that "unless there is [a] problem with the interlock device or the person that has been ordered to use the interlock has an abnormal reading, no final report is generated." Furthermore, it was alleged that respondent could request a final report if it wished from the company. Therefore, respondent's decision was "an abuse of discretion," violated petitioner's "due process rights," and was "arbitrary and capricious." Lastly, petitioner challenged the drug screen requirement to obtain his driver's license as a violation of due process. However, at the hearing, petitioner did not raise these allegations, including the due process violation. Rather, petitioner alleged that the interlock requirement was, essentially, a matter of "form over substance" because he had no "Breathalyzer [sic] violations" and had not had any new contacts with criminal authorities. The circuit court granted petitioner full reinstatement of his driver's license, stating:

> Well, I think the Secretary of State just kind of dropped the whole ball on this thing.
>
> ***
>
> The conclusion is without the interlock report they're not going to give him his license. It makes no sense to me, but a lot of things the higher ups do make no sense to me, and it's us low-lives [sic] that end up getting beat up. Your motion is granted.

We granted respondent's application for leave to appeal.

Petitioner's license was revoked as a habitual offender, having been convicted of three alcohol violations in a ten-year period. The Secretary of State has valid rulemaking authority, *Bunce v Secretary of State*, 239 Mich App 204, 213-214; 607 NW2d 372 (1999), and a petitioner "shall" submit the interlock report to the hearing officer at the next hearing. 1999 AACS, R 257.313a(9). The use of the term "shall" denotes mandatory, not discretionary action. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 59; 642 NW2d 663 (2002); *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982). "[A]n individual who files a petition for reinstatement of driving privileges has the burden of proving by clear and convincing evidence that he is entitled to reinstatement of his driver's license." *Bunce, supra*. The circuit court's

review of the hearing officer's decision was limited to the criteria set forth in MCL 257.323(6). See MCL 257.320e.[5]

MCL 257.323(6) provided:

> In reviewing a determination resulting in a denial or revocation under section 303(1)(d) or (e) or 303 (2)(c), (d), or (e), the court shall confine its consideration to a review of the record prepared pursuant to section 322 or the driving record created under section 204a, and shall not grant relief pursuant to subsection (3). The court shall set aside the determination of the secretary of state only if substantial rights of the petitioner have been prejudiced because the determination is any of the following:
>
> (a) In violation of the Constitution of the United States, of the state constitution of 1963, or of a statute.
>
> (b) In excess of the statutory authority or jurisdiction of the secretary of state.
>
> (c) Made upon lawful procedure resulting in material prejudice to the petitioner.
>
> (d) Not supported by competent, material, and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.
>
> (f) Affected by other substantial and material error of law.

This Court must examine the lower court's review of agency action to determine whether the lower court "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996).[6]

The respondent has rule making authority in this area, and the final report requirement involving the interlock is mandatory. The fact that the requirement "makes no sense" to the trial court is not the appropriate inquiry or standard of review. Petitioner should have known from

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[5] Because of legislative amendments to the statute, this provision can now be found at MCL 257.323(4), however, the law in effect at the time governs. MCL 257.320e.

[6] Petitioner contends that this issue is not preserved for appellate review because the prosecutor failed to raise these issues in the circuit court. We may address an issue that presents a legal question where all necessary facts have been presented. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). All necessary facts have been preserved in the agency record, and our review of the trial court's decision examines application of correct legal principles. Therefore, we may address the issue. See also MCR 7.216(A)(7).

the prior proceeding that he was required to produce this documentation in order to obtain the relief he requested. He testified that he read the prior order written by hearing officer Clover. Initially, he testified that he left the document at home. Ultimately, he did not fax the document to hearing officer Jones.

Furthermore, the issue of the interlock device and any violations was not a matter of form over substance. At the hearing before officer Clover, it was revealed that the interlock device registered blood alcohol levels of .079 and .098 on two different occasions While petitioner attributed those readings to malfunctioning devices which he had replaced, the hearing officer concluded that only one reading could be attributed to machine error, therefore, an interlock report was necessary. If the interlock device was functioning properly, the interlock device was the only objective method for respondent to determine whether petitioner's claim of sobriety was accurate. The accuracy of the interlock device was particularly important where letters of sobriety submitted by petitioner's friends contradicted his testimony regarding his alcoholism and his change in behavior and associates. Petitioner did not meet his burden of demonstrating entitlement to an unrestricted driver's license by clear and convincing evidence,[7] *Bunce, supra*, and the trial court erred in concluding that it could waive requirements imposed by respondent for obtaining a driver's license reinstatement. *Id*.

Reversed.

/s/ Jessica R. Cooper
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood

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[7] We note that in the narrative portion of petitioner's appellate brief, it is alleged that petitioner was told that final reports are not prepared by the interlock company, but respondent could obtain a final report if it inquired. The burden of proof of clear and convincing evidence rests with petitioner. *Bunce, supra*. Petitioner did not submit an affidavit delineating those alleged facts and did not obtain an affidavit from the representative of the interlock company that purportedly provided that information. Thus, the burden of clear and convincing evidence is not established by blanket assertions. Moreover, the contention that an interlock company does not provide final reports is contrary to the administrative rules mandating such a report. Lastly, petitioner's contention, that the imposition of the screening requirement by hearing officer Jones was a violation of due process, is without merit. The interlock device was an objective measure of petitioner's claimed sobriety. He had questionable readings which were not explained by the interlock company through a final report. He had the system removed, but did not reinstall it when the circuit court's order was reversed. Under the circumstances, the exercise of discretion by the hearing officer with regard to the requirements for the privilege of a restricted license was proper. The hearing officer could have denied petitioner all privileges under the circumstances, but chose to maintain restrictions.