

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

DEPARTMENT OF HIGHWAY SAFETY
AND MOTOR VEHICLES,

Petitioner,

v.

Case No. 5D14-2096

HERBERT CLAY,

Respondent.

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Opinion filed December 19, 2014

Petition for Certiorari Review of Order from
the Circuit Court for Orange County,
Jose R. Rodriguez, Judge.

Stephen D. Hurm, General Counsel, and
Kimberly A. Gibbs, Assistant General
Counsel, of Department of Highway Safety
and Motor Vehicles, Orlando, for Petitioner.

Rebecca Sonalia, of Musca Law, Naples,
for Respondent.

PER CURIAM.

Petitioner, Department of Highway Safety and Motor Vehicles ("DHSMV"), seeks second-tier certiorari review of a circuit court order granting Herbert Clay's ("Clay") first-tier petition for writ of certiorari.¹ The circuit court quashed DHSMV's administrative order

¹ We have jurisdiction pursuant to Fla. R. App. P. 9.030(b)(2)(B). See also Art. V, § 4(b)(3), Fla. Const.

affirming the suspension of Clay's driver's license, concluding that the suspension violated the motorist's due process rights. In so ruling, the circuit court declined to remand the case to the hearing officer for further proceedings, deeming the remand futile and burdensome. DHSMV argues that the circuit court departed from the essential requirements of law when it ordered the department to reinstate Clay's license rather than remand the matter to the hearing officer for further proceedings.² We agree and grant the petition.

This court has consistently held that when a circuit court quashes an order issued by a hearing officer on due process grounds, the matter is to be remanded to the administrative agency for further proceedings. See, e.g., Dep't of Highway Safety & Motor Vehicles v. Futch, 142 So. 3d 910, 915-16 (Fla. 5th DCA 2014) (concluding that the circuit court misapplied the law when it directed the Department to set aside the suspension and reinstate the motorist's driver's license rather than remand the matter for further proceedings); Dep't of Highway Safety & Motor Vehicles v. Corcoran, 133 So. 3d 616, 623 (Fla. 5th DCA 2014) (granting the Department's petition for certiorari and explaining that remand for a new hearing is required when a subpoenaed breath test operator's failure to appear is found to have caused a due process violation); Dep't of Highway Safety & Motor Vehicles v. Icaza, 37 So. 3d 309, 312 (Fla. 5th DCA 2010) ("We conclude that the circuit court applied the wrong law when it refused to remand the case to the

² Although the circuit court's order granting Clay's petition for writ of certiorari effectively reinstated Clay's driver's license, the order did not specifically direct DHSMV to do so. Indeed, such an order would be improper. See Park v. City of West Melbourne, 927 So. 2d 5, 9 (Fla. 5th DCA 2006) ("[A]fter review by certiorari, an appellate court can only quash the lower court order; it has no authority to direct the lower court to enter contrary orders." (quoting Gulf Oil Realty Co. v. Windhover Ass'n, Inc., 403 So. 2d 476, 478 (Fla. 5th DCA 1981))).

hearing officer."); Tynan v. Dep't of Highway Safety & Motor Vehicles, 909 So. 2d 991, 995 (Fla. 5th DCA 2005) ("[H]aving failed to accord Tynan due process in the first hearing, the Department had the right to conduct a hearing which met due process requirements."); Lillyman v. Dep't of Highway Safety & Motor Vehicles, 645 So. 2d 113, 114 (Fla. 5th DCA 1994) ("When an evidentiary error is made in an administrative hearing, the remedy is to remand for further proceedings."). Because binding precedent provides an opportunity to cure a due process violation, we conclude that the circuit court departed from the essential requirements of law when it failed to remand the case for a new hearing.

Accordingly, we grant the petition for writ of certiorari and quash the order of the circuit court.

PETITION GRANTED.

ORFINGER and BERGER, JJ., concur.
COHEN, J., concurring specially, with opinion.

COHEN, J., concurring specially.

I agree that our precedent provides an opportunity to cure a due process violation in this context. I write separately to express concern about an apparent fundamental unfairness in these administrative proceedings. The transcripts reflect that at least some hearing officers exhibit a palpable predisposition. This is improper. Whether a proceeding is administrative or judicial, the parties are entitled to an impartial arbiter, and the record in this case—and in many that we see on appeal—does not reflect that. A neutral arbiter is the linchpin of due process and the foundation upon which the system of justice is built.

For years, we have instructed hearing officers that citizens are entitled to subpoena and present witnesses at hearings. See Klinker v. Dep't of Highway Safety & Motor Vehicles, 118 So. 3d 835, 839 (Fla. 5th DCA 2013); Dep't of Highway Safety & Motor Vehicles v. Auster, 52 So. 3d 802, 804-05 (Fla. 5th DCA 2010); Lee v. Dep't of Highway Safety & Motor Vehicles, 4 So. 3d 754, 757 (Fla. 1st DCA 2009); see also Dep't of Highway Safety & Motor Vehicles v. Pitts, 815 So. 2d 738 (Fla. 1st DCA 2002). And yet, time after time, these decisions are ignored.

In the instant case, the circuit court recognized that remand would in all likelihood constitute a futile act. Not only is the officer involved no longer employed by the police agency, he now resides out of state. However, our precedent provides for the opportunity to correct the order entered in this case, which did not begin to comport with any semblance of due process.