



Clerk of the Circuit Court

Brevard County, Florida

400 SOUTH ST., P.O. Box 999, Titusville, Florida 32781

<http://www.brevardclerk.us>

Scott Ellis, Clerk

March 30th, 2007

Honorable Scott Ellis
Clerk of Courts
400 South Street
Titusville, FL 32781

Mr. Ellis:

Pursuant to your request, I have conducted a review of invalidations of motor vehicle driver license administrative suspensions by the local Bureau of Administrative Reviews (BAR), Division of Driver Licenses, Florida Department of Highway Safety and Motor Vehicles (DHSMV). The report of findings and recommendations follows.

PURPOSE

The purpose of the review was to analyze the reasons for motor vehicle driver license suspension invalidations and make recommendations, based on findings, for implementation by affected agencies.

BACKGROUND

The DHSMV under chapter 322, Florida Statutes (F.S.), administratively suspends motor vehicle driver licenses for arrests for violations of s.316.193, F.S. or as authorized by s.316.1932, F.S. It has come to our attention that the agency subsequently invalidates many of these suspensions.

SCOPE

Reports¹ of January 2005 through July 2006 driver license suspension invalidations in Brevard County commonly referred to as Invalidation Logs (Log), were requested from the DHSMV and then reviewed. This Log is formatted with columns for Agency, Date of Hearing, Location, Driver License Number, Results of Hearing, Agency Type, Arresting Officer's Last Name, and Reason for Invalidation. Since the Log only lists invalidations, statistical inferences or patterns can only be made for the invalidation subset of total suspensions.

Additionally, a summary of selected changes of 2006 legislation affecting traffic and motor vehicle laws was reviewed for impact on the suspension/invalidation process, and inquiries were made to several police departments for information on how they manage the subpoena process.

FINDINGS AND RECOMMENDATIONS

Finding 1: 55% of suspensions invalidated in the Log are because a subpoenaed law enforcement officer (arresting, breath test, other critical) failed to appear (FTA) at the driver license suspension administrative formal review hearing.

Each suspension invalidation should be logged by the DHSMV along with a reason obtained off a list² of seventeen reasons for invalidation. Three of the seventeen invalidation reasons listed are categories of FTA – of the arresting officer, breath technician, or other critical witness (e.g. law enforcement agency equipment inspector). In the Log examined, 55% (175 of 315) of invalidations with a reason identified are for FTA. By category the 175 is comprised of: 166 FTA of the arresting officer, 3 FTA of the breath technician, and 6 FTA of (an) other critical witness.

The suspensions can be invalidated for the subpoenaed officers' FTAs because under due process and case law, a defendant has the right to confront an arresting officer and other critical/relevant witnesses (e.g. breath technician and agency equipment inspector, but not a stopping officer if the arresting officer establishes the probable cause).

The effect of invalidations by BAR hearing officers of administrative license suspensions, because of subpoenaed law enforcement officer FTAs at BAR driver license suspension administrative formal review hearings, is that defendants' driver licenses are reinstated; subject to, of course, the outcome of any associated criminal case being prosecuted by the state attorney.

Recommendation: A law enforcement agency, upon learning of an invalidation of a suspension for reason of their officer's FTA (through a form adopted as recommended under Finding 2 below), should appeal the decision under s.322.2615(13), F.S. effective 10/01/2006: *A law enforcement agency may appeal any decision of the department invalidating a suspension by a petition for writ of certiorari to the circuit court in the county wherein a formal or informal review was conducted.*

Finding 2: *Law enforcement officers failed to appear at these driver license suspension administrative formal review hearings despite being issued administrative subpoenas by the BAR of the DHSMV.*

A driver must request a review, whether informal or formal, within ten days of the later of the date of the arrest or issuance of the notice of suspension. An informal review hearing consists solely of an examination by the BAR of written materials submitted by the arresting agency and driver. At a formal review, however, testimony may be taken, evidence may be received, and witnesses/officers examined. Additionally, for formal hearings the BAR may issue, on its own initiative or at the request of the driver, administrative subpoenas to relevant witnesses (*limited to those persons named in reports filed by the arresting agency, s.322.2615(6)(b), F.S. effective 10/01/2006*). Unless waived by the driver, the BAR must schedule a formal review hearing within thirty days after receipt of a request for such service. Should a properly subpoenaed witness fail to appear at the scheduled hearing but submit within two days to the BAR hearing officer a written statement showing just cause for such FTA, the hearing can be continued with notice given (usually for two weeks following the original hearing date); however, a hearing cannot be continued because of a second FTA. The notice of continuance to a witness currently is in the form of a cc (copy) of an Order Continuing Formal Review Hearing addressed to the driver. This form states that a subpoena served on a witness remains in effect and that the witness is required to appear on the new date, etc. The enforcement of the order on a witness is mitigated by the fact it is sent without proof of mailing or receipt.

Listing all the reasons for law enforcement officer FTAs at DHSMV BAR driver license suspension administrative formal review hearings is beyond the scope of this report, but most could be determined by individual law enforcement agencies through a review of their own subpoena, hearing attendance, and duty attendance records in conjunction with officer interviews. Two reasons that did surface in

this review, however, are: (1) that the BAR only notifies the officer and not the law enforcement officer's agency in continuance situations, and (2) some law enforcement agencies poorly manage the total subpoena process.

Again, the effect of subpoenaed law enforcement officer FTAs at BAR driver license suspension administrative formal review hearings is that BAR hearing officers invalidate the administrative license suspensions, and reinstate the defendants' driver licenses; subject to, of course, the outcome of any associated criminal case being prosecuted by the state attorney.

Recommendation: The DHSMV should create a HSMV form for subpoenaed law enforcement officer FTAs at a driver license suspension administrative formal review hearing or continuance thereto. (Currently the DHSMV uses a form for the driver, but not for an officer.) This form would be transmitted by the BAR immediately to the non-complying law enforcement officer's agency for appropriate action, which could include a focus on replying within two days with a statement of just cause for its officer's FTA as a request for a continuance. Should this form be submitted due to a FTA at a continuance, it should incorporate the results of the hearing in order that the agency may appeal, as recommended under Finding 1 above, the decision invalidating a suspension. Receipt of this form for FTA at either a hearing or continuance may trigger disciplinary action at the non-complying officer's agency depending on the circumstances, but at least should become part of that officer's performance evaluation.

Also Recommended: The BAR, as a procedure, should officially re-subpoena any relevant officers to a continuance hearing instead of sending copies of Orders Continuing Formal Hearings solely to the officers, so that law enforcement agencies can document the new appearance commanded of their officers in their subpoena management systems. Alternatively, as a minimum, copies of the orders should be sent to the agencies in addition to the officers.

Also Recommended: Each law enforcement agency should adopt a subpoena management system, incorporating accountability beyond just subpoena receipt in a log, in order to coordinate and document notification, acknowledgement, schedules, changes, dismissals, attendance, supervisor monitoring, etc. These systems are commercially available - one example is Orion Communication's *CourtNotify*, which has been recently deployed by the Gainesville and Homestead Police Departments, and is scheduled for deployment by Miami-Dade County in April 2007.

Finding 3: *Noncompliance with a subpoena, administrative or judicial, constitutes failure to report for duty under a law enforcement department's general orders for professional conduct and responsibilities.*

Law enforcement agencies have written policy and procedure directives for DUI traffic enforcement as well as for officer professional conduct and responsibilities.

Agencies have officers failing to comply with these directives because the agencies do not maintain a proper system of internal controls over the receipt of subpoenas in conjunction with officer hearing attendance records.

The effect is that without proper documentation it is difficult at best to assess compliance with approved procedures. This lack of documentation weakens the ability of agencies to hold their officers accountable, such as for the responsibility to appear to witness as subpoenaed. This in turn lessens the overall positive impact on society that a well-intentioned policy directive, such as that for seeking out and removing alcohol or substance impaired drivers from the streets, may have.

Recommendation: Law enforcement agencies should verify officer compliance with subpoenas. This may be accomplished by reviewing records such as each officer's schedules, duty attendance, and hearing attendance versus citations issued, subpoena logs, and DHSMV FTA forms (if adopted as recommended under Finding 2 above) or Quarterly Invalidation Logs³ as currently available from the BAR of the DHSMV. This auditing process will be much easier if a subpoena management system, as recommended under Finding 2 above, has been deployed.

I am available to answer any questions that you may have on any of the foregoing issues.

Submitted by:

Eric Munzenmayer
Internal Auditor
Brevard County Clerk of Courts Office

¹ DHSMV License Suspension Invalidation in Brevard County, January 2005 Through March 2006 and April Through July 2006, ten pages total including Suspension Code Table, is available upon request.

² Suspension Code Table

³ Quarterly Invalidation Logs can routinely be obtained, formatted as a Word document attachment to an e-mail, from a Florida DHSMV, Division of Driver Licenses, Bureau of Administrative Reviews regional office, which for Brevard is at (attention: Ms. Debbie Bush) 4101 Clarcona-Ocoee Road, Orlando, Florida 32810, phone 407-445-5549.