NOT FINAL UNTIL DISPOSITION
OF TIMELY-FILED MOTION FOR
REHEARING OR CLARIFICATION

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE
COUNTY, FLORIDA

APPELLATE DIVISION

CASE NO. 2021-1 AP 01

JORGE LUIS MARTINEZ GONZALEZ,
Petitioner,
v.

STATE OF FLORIDA DEPT. OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.
_____/

OPINION

Opinion filed: February 14, 2022

On a Petition for Writ of Certiorari from a December 10, 2020 final order of a hearing officer affirming the suspension of Petitioner's driver's license by the Florida Department of Highway Safety and Motor Vehicles.

Maria Del Carmen Calzon, Esquire, Maria Del Carmen Calzon, P.A. for Petitioner.

Elana J. Jones, Esquire, Assistant General Counsel, Department of Highway Safety & Motor Vehicles for Respondent.

Before: TRAWICK, WALSH and SANTOVENIA, JJ.

SANTOVENIA, J.

Petitioner, Jorge Luis Martinez Gonzalez ("Petitioner") appeals from a December 10, 2020 final order ("Order") of a hearing officer affirming the suspension of his driver's license by the Florida Department of Highway Safety and Motor Vehicles ("Department"). Petitioner's driver's license was suspended for fraud pursuant to Section 322.27, Fla. Stat. On January 12, 2021, Petitioner filed the instant Petition.

FACTUAL BACKGROUND

On September 5, 2019, a suspected fraud was communicated to the Department involving applications for a Florida driver's license and a Florida identification card by two different individuals using the same name of a third individual. The Department transferred the suspected fraud investigation to the Florida Highway Patrol ("FHP"). FHP conducted an investigation using facial recognition software and identified the Petitioner and another individual as the two individuals who had allegedly submitted fraudulent applications to the Department on August 12, 2019 and September 5, 2019, respectively. FHP transmitted its report and findings to the Department through a "fraud package". The Department suspended the Petitioner's Florida driver's license for one year based on the fraud package.

On December 7, 2020, a formal review hearing ("Hearing") was held at

Petitioner's request. Following the Hearing, Hearing Officer Jeannine George entered the Order sustaining the suspension of Petitioner's Florida driver's license and driving privileges for violation of Section 322.27, Fla. Stat. The Order states that "upon review of the Department's records and information received at the review, this officer finds, that there is competent substantial evidence to find that the Petitioner's driving privilege was properly suspended by the Department."

During the pendency of this case, the Department removed the suspension for fraud from Petitioner's driving record effective September 9, 2021. In its Response to the Petition, the Department requests that the Petition be dismissed as moot based on the removal of the suspension from Petitioner's driving record. In its Reply, the Petitioner argues that the Petition is not moot because the Department has not rendered a written order rescinding the Order that is the subject of this case. Petitioner asks the court to treat the Department's Response as a confession of error and to quash the Order below.

STANDARD OF REVIEW

Circuit court review of the Order upon the Petition is governed by a three-part standard of review: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *See Haines City Comm. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995)

(citing *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 625-626 (Fla. 1982)).

DISCUSSION

Petitioner contends that the Department departed from the essential requirements of law when it concluded that it had competent substantial evidence to suspend the Petitioner's driver's license and driving privileges based upon the fraud package and investigation. Petitioner also argues that he was not accorded procedural due process because he was not provided with the Department's fraud package in advance of the Hearing, despite repeated requests. Indeed, Petitioner avers that the fraud package was provided to Petitioner only after the Order affirming the license suspension.

Petitioner also alleges that the Department denied Petitioner procedural due process and likewise deviated from the essential requirements of the law when it denied Petitioner's request for a copy of the audio-recorded Hearing proceedings absent a court order.

The Department's Response to the Petition neither refutes nor even addresses Petitioner's arguments.

Confession of Error

The Department's Response does not specifically state that the Department is confessing error. However, we elect to treat the Department's Response as a confession of error, finding that the removal of the suspension for fraud from the

Petitioner's driving record is tantamount to an admission that the suspension was incorrectly entered. *See Crews v. Crews*, 629 So. 2d 1094, 1095 (Fla. 5th DCA 1994) (stipulation in appellee's brief to reversal of order on appeal treated as confession of error); *Barfield v Dept. of State, Division of Licensing*, 568 So. 2d 493, 494 (Fla. 1st DCA 1990) (Department's motion to dismiss appeal as moot treated "as in the nature of a confession of error"). *See also I.J.-L. v. Dept. of Children and Family Services*, 990 So. 2d 1266, 1267 (Fla. 3d DCA 2008) (appellee's motion for relinquishment treated as a confession of error); *Boggs v. Farm Credit Bank of Columbia*, 545 So. 2d 516, 517 (Fla. 3d DCA 1989) (appellee's motion to dismiss appeal treated as a confession of error); *Olsten Staffing Services v. Cooks*, 694 So. 2d 52 (Fla. 1st DCA 1997) (appellee's motion to dismiss treated as a confession of error); *Barber v. Farcas*, 615 So. 2d 820 (Fla. 1st DCA 1993) (motion for remand treated as a confession of error); *Hudson v. Singletary*, 614 So. 2d 13 (Fla. 1st DCA 1993) (motion for relinquishment treated as a confession of error); *Lambrix v. Dugger*, 586 So. 2d 1071, 1072 (Fla. 1st DCA 1991) (motion for remand treated as a confession of error); *Wiley v. State,* 578 So. 2d 903 (Fla. 1st DCA 1991) (motion to relinquish jurisdiction for resentencing, agreeing with appellant that he is entitled to the relief he seeks, treated as a confession of error); *In the Interest of T.S.,* 504 So. 2d 61 (Fla. 1st DCA 1987) (motion to relinquish jurisdiction construed as a confession of error).

Petitioner also requests full reinstatement of his driver's license examination/CDL driver license examination results, medical clearances and application information which were previously deleted by the Department upon imposition of the suspension hold. However, on certiorari review, this court lacks authority to direct the Department to take those actions. *See Miami-Dade Cnty. v. Snapp Industries, Inc*., 319 So. 3d 739 (Fla. 3d DCA 2021) ("As an appellate court granting a petition for certiorari, the circuit court could only quash the special magistrate's findings, conclusions, and order. A direction to the administrative agency to dismiss the enforcement action exceeds that authority.") (citing *Monroe Cnty. v. Carter*, 41 So. 3d 954, 958 n.6 (Fla. 3d DCA 2010)).

Attorney's Fees

Petitioner's Motion for Attorney's Fees was filed contemporaneously with his Reply. Petitioner asserts entitlement to attorney's fees under two statutes, Section 120.595(5), Fla. Stat. and Section 57.111, Fla. Stat., the "Florida Equal Access to Justice Act".

Section 120.595(5), Fla. Stat. provides, in relevant part, that:

> When there is an appeal, the court in its discretion may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that **the agency action which precipitated the appeal was a gross abuse of the agency's discretion**…

(emphasis added). There is no record here or showing by Petitioner of gross abuse of the Department's discretion which would justify an award of attorney's fees to Petitioner pursuant to Section 120.595(5), Fla. Stat.

Section 57.111(4)(a), Fla. Stat., states:

> Unless otherwise provided by law an award of attorney's fees and costs shall be made to a prevailing small business party[1] in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

Petitioner fails to show how he is a small business party or prevailing small business party for purposes of entitlement to attorney's fees under Section 57.111. *See Daniels v. Florida Dept. of Health*, 898 So. 2d 61, 69 (Fla. 2005) (individual not a "small business party" where agency's complaint brought against individual and not her corporation); *Florida Real Estate Commission v. Shealy*, 647 So. 2d 151, 152 (Fla. 1st DCA 1994) (appellee individual was not a qualifying small business party under Section 57.111, which must be a corporation, a partnership, or a sole proprietor of an unincorporated business).

[1] Fla. Stat. 57.111(d)(1)(c) defines "small business party" as "an individual whose net worth did not exceed $2 million at the time the action is initiated by a state agency when the action is brought against that individual's license to engage in the practice or operation of a business, profession, or trade..." Section 57.111(c), Fla. Stat. defines a "small business party" as a "prevailing small business party" when "[a] final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired."

Here, Petitioner has shown no cognizable contractual or statutory basis for the award of fees. *See State Dept. of Highway Safety & Motor Vehicles v. Trauth*, 41 So. 3d 916, 918 (Fla. 3d DCA 2010) ("the Department's persistence, even obduracy, involves a close question of law…[that] is not one that lacks any plausible factual and legal basis, and its actions have not abused the judicial process") (distinguishing *Moakley v. Smallwood*, 826 So.2d 221, 226-227 (Fla. 2002) (held that "a trial court possesses the inherent authority to impose attorneys' fees against an attorney for bad faith conduct"; "must be based upon an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees."). There is no record here of the bad faith required for an award of attorney's fees pursuant to *Moxley*.

For the foregoing reasons, the Petition for Writ of Certiorari is GRANTED and the Order is QUASHED. Petitioner's Motion for Attorney's Fees is DENIED.

TRAWICK and WALSH, JJ. concur

COPIES FURNISHED TO COUNSEL
OF RECORD AND TO ANY PARTY
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