STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

GEORGE PRESTON,
Petitioner,

vs

File No. 93-11442-AL
HON. THOMAS G. POWER

SECRETARY OF STATE,
Defendant.
Inre:
Tamara Jo Perry,
10817 Grandview,
Traverse City, MI 49684
Mich. Operator's Lic. P600-785-420-116

DECISION AND ORDER

This is an appeal from a determination by Secretary of State Hearing Officer, W. M. Conklin, granting the appeal of Tamara Jo Perry of an Order from the Secretary of State suspending her license for six months for failure to take a breathalyzer test in connection with her arrest for an alcohol driving offense on May 24, 1993. Because the appeal was granted, no license sanction was issued to Ms. Perry as a result of her refusal to take the breathalyzer test.

The case is before this Court on a appeal by Officer George Preston of the Traverse City Police Department who was the arresting officer in connection with the alcohol driving offense. Officer Preston is represented by the Grand Traverse County Prosecuting Attorney's Office, and his appeal is authorized by MCLA 257.625f(4)(a). Hearings in this Court were held September 29 and November 5, 1993. No briefs have been filed by either party, and the Court has reviewed Hearing Officer Conklin's order dated July 19, 1993, and a transcript of the hearing conducted before Hearing Officer Conklin on July 9, 1993.

In an appeal of this kind, the Court is to confine its consideration to a review of the record to determine whether the Hearing Officer properly determined the four issues set forth in MCLA 257.625f(2)(a)-(d). Additionally, the Court may also determine whether to order issuance of a restricted license as provided in MCLA 257. 323c. MCLA 257.323(4).

Of the four issues set forth in MCLA 257.625f(2)(a)-(d), the Appellant Officer Preston prevailed on three of the four. But, according to Hearing Officer Conklin's order,

> Due to the confusion of arrested (OUIL) persons and the booking personnel's sometime hurried treatment of individuals while important rights are being explained to them, this Hearing Officer must conclude that perhaps too many other things were being done at the time that the Rights were read to her. There is not sufficient evidence to establish that her refusal was unreasonable by a preponderance of the evidence. Although it could have been due to her intoxication, the Petitioner did not unreasonably refuse to submit to the BREATH test. She did not know that her license was going to be suspended and six points would be added to her MDR. It is not because the arresting Officer failed to fulfill his duty, it is rather due to the booking procedure and the Rights being commingled "which normal does not occur". If it happened in this instance as she testified, then she would not have heard the Rights and she would not have unreasonably refused the test.

MCLA 257.625f(2)(c) states one of the issues that the Hearing Officer is to determine in the following language, "(c) If the person refused to submit to the test upon the request of the officer, whether the refusal was reasonable." As indicated above, Hearing Officer Conklin concluded that Ms. Perry "did not unreasonably refuse to submit to the BREATH TEST," because there was confusion at the time she was being read her rights respecting chemical tests as she was being booked at the same time. She, therefore, may not have understood her rights and the refusal was reasonable according to Hearing Officer Conklin.

The standard of review in appeals from decisions by Secretary of state hearing officers, following implied consent hearings, is "whether the hearing officer's findings were supported by substantial, material, and competent evidence on the whole record and were not contrary to law, the standard of review provided by Const 1963, art. 6, sec. 28 and MCL 24.306, MSA 3.560(206)." Kester v Sec. of State, 152 Mich App 329, 335 (1986); Johnson v

Sec. of State, 171 Mich App 202, 207 (1988). Both Kester and Johnson hold that the review of the hearing officer's decision is not a "de novo" review but, rather, is the more limited review quoted above. Simlilarly, Walters v SecretarY of State, 170 Mich App 466 (1968).

After a review of the transcript of hearing held by the Secretary of State, this Court, constrained by the limited scope of review described above, affirms the Hearing Officer's decision and adopts the following from the Court of Appeals decision in Kester v Sec. of State, supra .

> While we might not have reached the same result had we been in the hearing officer's position, our review of the record indicates that the hearing officer's decision was supported by competent, material, and substantial evidence on the whole record and was not contrary to law. 152 Mich App at 335.

The Hearing Officer's decision is affirmed.

In view of this result, it is not necessary to proceed to the question of granting Ms. Perry a restricted license, as provided for in MCLA 257. 323c, though it was agreed to by the Prosecutor.

HONORABLE THOMAS G. POWER
Circuit Court Judge
Dated: 4/8/94