

**FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
PILOTAGE RATE REVIEW COMMITTEE**

FILED	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	5/10/2016
File #	

In re: Application for a Change in Rates of Pilotage, filed by the Florida Caribbean-Cruise Association, and Alternative Application for a Change in Rates of Pilotage for PortMiami, filed by Biscayne Bay Pilots, Inc.

Case No.: PRRC 2014-1

BISCAYNE BAY PILOTS, INC.’S RESPONSE TO FLORIDA-CARIBBEAN CRUISE ASSOCIATION’S MOTION TO DISQUALIFY

Pursuant to rule 28-106.204, Florida Administrative Code, Biscayne Bay Pilots, Inc. (“BBP”) files this Response to Florida-Caribbean Cruise Association’s Motion to Disqualify and states:

1. On May 5, 2015, the Florida-Caribbean Cruise Association (“FCCA”) filed a motion to “disqualify all port pilot members from participating on the Pilotage Rate Review Committee in this matter and to disqualify committee member Carolyn Kurtz from the Pilotage Rate Review Committee in this matter.” FCCA’s motion is contrary to statute and established case law and should be summarily denied.

2. Section 310.151(1)(b) establishes the structure of the Pilotage Rate Review Committee (“PRRC”) and provides that the PRRC shall consist of the following seven members of the Board of Pilot Commissioners (“BOPC”): “two board members who are licensed state pilots actively practicing their profession, who shall be appointed by majority vote of the licensed state pilots serving on the board; two board members who are actively involved in a professional or business capacity in the maritime industry, marine shipping industry, or commercial passenger cruise industry; one board member who is a certified public accountant with at least 5 years of

experience in financial management; and two board members who are citizens of the state.” (Emphasis supplied).

3. The two pilots appointed to serve on the PRRC are Carolyn Kurtz, a pilot from the Tampa Bay Pilots Association, and James P. Winegeart, a pilot from the St. Johns Bar Pilots Association. Neither of these pilots works in PortMiami, and neither is a member of BBP. Thus, they do not stand to benefit from, or be hurt by, any change in the rates of pilotage in Port Miami, which is the subject of the consolidated hearing scheduled for June 1-3, 2016.¹ Nonetheless, FCCA asserts that by virtue of their profession as pilots, they – and all other pilot members of the BOPC – are inherently biased and prejudiced against FCCA and that the statutory membership requirements of the PRRC should therefore be ignored. Such a position is contrary to the plain language of section 310.151(1)(b), which calls for two pilot members on the PRRC and constitutes a legislative determination that mere employment as a pilot is not grounds for disqualification from that committee.

4. Commissioner Winegeart has been a member of the PRRC for less than a month, and FCCA makes absolutely no factual allegations concerning his alleged bias except to say that no pilots should be allowed to serve on the PRRC because all pilots allegedly “pursue a uniform agenda as it relates to pilotage rates across the state” FCCA Motion at ¶ 23. Concerning Commissioner Kurtz, FCCA quotes some of her comments from the now-invalidated rate hearing on FCCA’s application in 2014 to suggest that she demonstrated “bias and prejudice against the FCCA.” FCCA Motion at ¶ 9. Long-established case law concerning judges provides that comments made by a decision-maker during the course of a proceeding do not provide a basis for

¹ FCCA proposes to reduce the rates of pilotage in PortMiami for passenger vessels by 25 percent. BBP filed an alternative application for an across-the-board increase in the rates of pilotage.

disqualification. *E.g.*, *Mobil v. Trask*, 463 So. 2d 389, 391 (Fla. 1st DCA 1985) (“A judge is not required to abstain from forming mental impressions and opinions during the course of the presentation of evidence.”); *Brown v. Pate*, 577 So. 2d 645, 647 (Fla. 1st DCA 1991) (prior judicial determination by a judge may not serve as a basis for disqualification); *Gieseke v. Grossman*, 418 So. 2d 1055, 1056 (Fla. 4th DCA 1982) (“It is well established that respondent’s adverse judicial rulings alone may not be the basis for disqualification of a judge for bias or prejudice.”) Thus, it is simply irrelevant how Commissioner Kurtz voted in the now-invalidated 2014 proceeding, what motions she made, and what comments she made or questions she asked during the course of that proceeding.²

5. FCCA also attacks Commissioner Kurtz for her comments at a meeting of the BOPC’s legislative committee meeting in January 2016 concerning a proposal by the Florida Harbor Pilots Association (“FHPA”) to amend Florida Statutes to authorize a pilots’ association to request an annual increase in the rates of pilotage to cover inflation. FCCA Motion at ¶ 11. Absolutely nothing in her comments relates either to FCCA’s application for a rate decrease or BBP’s request for a rate increase, which had not even been filed at the time of the Legislative Committee meeting. Instead, she was commenting on proposed legislation relating to pilotage, which is the purpose of the BOPC’s Legislative Committee. In considering whether an agency head should be disqualified pursuant to section 120.665, Florida Statutes, “the practical recognition of the numerous roles played by the agency as well as the agency head (investigator, prosecutor, adjudicator, and political spokesman) must be weighed against a reasonable fear on the part of the

² Notably, the reason the 2014 proceeding is now invalid is because two commissioners who were members of FCCA, the very applicant who filed the application for a rate decrease, refused to recuse themselves at the request of BBP. The First District Court of Appeal, in *Biscayne Bay Pilots, Inc. v. Florida-Caribbean-Cruise Association*, 177 So. 3d 1043, 1045 (Fla. 1st DCA 2015) (*Biscayne Bay Pilots II*), said they should have done so.

movant that it will not receive a fair and impartial hearing.” *Charlotte Cnty. v. IMC-Phosphates Co.*, 824 So. 2d 298, 300 (Fla. 1st DCA 2002). Suggesting that Commissioner Kurtz should disqualify herself because she commented on proposed legislation as part of her duties as a member of the Legislative Committee is ludicrous, particularly as the proposed legislation had nothing to do with any specific application to change pilotage rates in any port.³

6. Commissioner Kurtz’s comments at the Legislative Committee meeting are fundamentally different from those of Commissioner Carlos Trueba at the same meeting, who specifically referenced the pending case in PortMiami and repeatedly stated that he believes the existing pilotage rates in PortMiami are unfair. *See* BBP’s Motion and Suggestion to Commissioner Trueba that he Disqualify Himself from Pilotage Rate Proceedings Involving the Florida-Caribbean Cruise Association and Biscayne Bay Pilots, at p. 3. Commissioner Trueba’s comments left no doubt that he has already decided, without hearing any evidence, the fundamental premise of FCCA’s rate decrease application, i.e., an alleged inequity in the rates charged in PortMiami for passenger vessels verses cargo vessels. He stated in part:

I’ll go to a Miami hearing, in essence, the, the cruise industry is paying for some 65 percent of revenue based on 33, or 30-something percent on handles. I – I can’t – I can’t understand that. That means that the shipping industry, is, is having 65 percent of the handles, and just go at 33 percent of the revenue.

I think there’s something inequitable in, in that rate itself.

³ FCCA suggests that because BBP’s rate application includes an annual cost-of-living adjustment provision that Commissioner Kurtz’s comments on the proposed legislation somehow disqualify her from participating in the hearing on BBP’s application. BBP’s application was not filed until March 24, 2016, more than two months after the Legislative Committee meeting. At the time of the January 2016 Legislative Committee meeting, neither Commissioner Kurtz nor anyone else could have known what BBP might include in any possible rate application, as no decisions had been made and nothing had been drafted. Moreover, the annual cost-of-living increase is just one of many elements of BBP’s application.

(Emphasis supplied). *Id.* (quoting the transcript from the Legislative Committee meeting). Commissioner Trueba was then admonished by the PRRC’s general counsel not to discuss pending cases. *Id.* In contrast, Commissioner Kurtz did not mention any rate application or address existing rates in any port. She simply commented on proposed legislation.

7. Disqualification of a decision maker, such as a judge or an agency head, is not appropriate unless “a disinterested observer may conclude that the (agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” *Port Everglades Pilots Ass’n v. Florida-Caribbean Cruise Ass’n*, 170 So. 3d 952, 956 (Fla. 1st DCA 2015) quoting *Seiden v. Adams*, 150 So. 3d 1215, 1220 (Fla. 4th DCA 2014) (internal citations omitted). Nothing in Commissioner Kurtz’s comments at the Legislative Committee suggests that she has prejudged the case scheduled for June 1-3, as she was not discussing that case. The same cannot be said for Commissioner Trueba.⁴

8. In arguing that all pilot members of the BOPC should be prohibited from serving on the PRRC, contrary to section 310.151(1)(b), FCCA emphasizes that all pilot associations are members of the FHPA, which advocates on behalf of pilots both in the legislative and executive branches of government. FCCA Motion at ¶ 12. The point is irrelevant, however, in that the FHPA is not a party to the consolidated case involving PortMiami. FCCA apparently is trying to equate the pilots’ membership in FHPA with the membership of former Commissioners Thomas Burke and Enrique Miguez in FCCA. The First District Court of Appeal found that the members of FCCA

⁴ FCCA’s staunch defense of Commissioner Trueba in its Response to BBP’s Motion that he disqualify himself from the rate hearing concerning PortMiami is interesting, given that he is supposedly a neutral member of the BOPC serving in a slot reserved for a certified public accountant. As an individual filling that position, Commissioner Trueba “shall not be involved in, or have any financial interest in, the piloting profession, the maritime industry, the marine shipping industry, or the commercial passenger cruise industry.” § 310.011(1), Fla. Stat.

(such as the employers of Commissioners Burke and Miguez) constituted the applicant itself and that it would be improper for an applicant to sit in judgment of its own application. *Port Everglades Pilots*, 170 So. 3d at 956; *Biscayne Bay Pilots II*, 177 So. 3d at 1045. FHPA is not a party to any pending rate case, so the pilots' membership in that association is unlike the membership of PRRC members in FCCA, which has applied for a decrease in the rates of pilotage for passenger vessels in both PortMiami and Port Everglades.

9. FCCA also attacks the pilots because they have designated an alternate member of the PRRC to serve when a regular pilot member of the PRRC cannot serve. FCCA Motion at ¶ 16. The primary purpose for designating an alternate is so that a commissioner will not be put in a conflict of interest situation when an application is filed concerning rates in the port where that pilot works.⁵ This situation arose in connection with the 2014 hearing on FCCA's application, when the PRRC general counsel asked PRRC member John Fernandez, who works as a pilot with BBP, to recuse himself from the hearing involving Port Miami. *See* FCCA Motion at Exh. D, pp. 4-5. Commissioner Kurtz, then the alternate PRRC member, was asked to serve in Captain Fernandez's place, as she is a pilot in Tampa Bay, and would not be affected by the FCCA application. This was done with the knowledge and input of the PRRC general counsel in order to avoid a conflict of interest yet still adhere to the statutory requirement relating to the makeup of the PRRC. While FCCA sees something wrong with the pilots seeking to avoid a conflict of interest, FCCA fought bitterly through multiple court proceedings to keep Commissioners Burke and Miguez on the PRRC, even though they were part and parcel of FCCA itself.

⁵ Notably, pursuant to section 310.151(1)(b), the two pilot members of the PRRC are "appointed by majority vote of the licensed state pilots serving on the board." Thus, the Legislature gave the pilots serving on the BOPC the sole authority to determine which of them should serve on the PRRC. The 10-member BOPC itself includes five active, state-licensed pilots. § 310.011(1), Fla. Stat.

10. Regardless of the FCCA's objections to the identification of an alternate pilot, the issue is irrelevant in the upcoming case involving PortMiami, as neither pilot member of the PRRC serves PortMiami. There is no need to designate an alternate pilot to serve on the committee in this case.

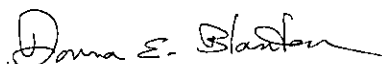
11. Finally, in its efforts to discredit the pilots in any way possible, FCCA stoops to misrepresentation concerning former Commissioner David Ulrich, who was a pilot member from Port Everglades. In Paragraph 18 of its Motion, FCCA states: "Just recently, former Commissioner David Ulrich was removed from the Board." (Emphasis supplied). Nothing could be further from the truth. Commissioner Ulrich served his full term on the Board and did not apply for reappointment. Commissioner Ulrich actually served beyond his term, staying in the position until the Governor appointed another pilot, Bruce Cumings, earlier this year. Even though Commissioner Ulrich is no longer on the BOPC (and therefore, not on the PRRC), FCCA spends the better part of two pages in its Motion attacking his comments at the now-invalid 2014 rate hearing. Such comments are completely irrelevant, given that Commissioner Ulrich will not be hearing the case on June 1-3. Moreover, his comments were made in the course of the public hearing and could not serve as a basis for disqualification even if he were still on the PRRC. *E.g., Mobil v. Trask*, 463 So. 2d at 391; *Brown v. Pate*, 577 So. 2d at 647; *Gieseke v. Grossman*, 418 So. 2d at 1056.

12. FCCA's Motion further illustrates what has been apparent since FCCA filed its rate decrease application more than two years ago: FCCA dislikes the legislatively determined role for pilots both in the state's deep-water ports and on the PRRC. FCCA would have Commissioners Kurtz and Winegeart disqualify themselves from the hearing involving Port Miami simply because FCCA does not respect the Legislature's determination that two pilots should serve on the PRRC.

FCCA has cited literally no facts to suggest that Commissioner Winegeart is biased, and all of the allegations concerning Commissioner Kurtz are meritless, for the reasons stated above.

For the reasons expressed, Commissioners Kurtz and Winegeart should deny FCCA's Motion.

Respectfully submitted,



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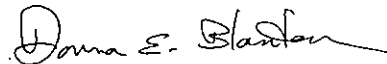
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