

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
BOARD OF PILOT COMMISSIONERS
PILOTAGE RATE REVIEW COMMITTEE**

FILED	
Department of Business and Professional Regulation AGENCY CLERK	
CLERK	Ronda L. Bryan
Date	2/27/2019
File #	

IN RE: APPLICATION FOR A CHANGE IN RATES OF PILOTAGE FOR PORT EVERGLADES, FILED BY THE FLORIDA CARIBBEAN CRUISE ASSOCIATION, AND ALTERNATIVE APPLICATION FOR A CHANGE IN RATES OF PILOTAGE FOR PORT EVERGLADES, FILED BY PORT EVERGLADES PILOTS

CASE NO.: PRRC 2014-2

FCCA's MOTION TO STRIKE BALEARIA CARIBBEAN, LTD's PETITION FOR HEARING, OR IN THE ALTERNATIVE TO DETERMINE THAT NO DISPUTED ISSUE OF MATERIAL FACT EXIST.

COMES NOW, the Florida-Caribbean Cruise Association and hereby files this, its Motion to Strike Balearia Caribbean, Ltd's ("Balearia"), Petition for Formal Administrative Hearing, and in support thereof state as follows:

On January 22, 2019, a Notice of Intent to Modify the Port Everglades Rate of Pilotage was issued by the Pilotage rate Review Committee ("PRRC"). Pursuant to that Notice, an interested party could seek review of the Order pursuant to Sections 120.569 and 120.57, Florida Statutes, by filing a petition with the Executive Director of the Committee at the Department of Business and Professional Regulation within 21 days of receipt of the Order. Further, if any interested party disputed any material facts upon which the PRRC's decision was based, that party could request a hearing before an administrative law judge pursuant to Section 120.57(1), Fla. Stat.

Balearia Caribbean Ltd filed a petition for administrative hearing on February 13, 2019. Balacria's petition is devoid of any disputed issues of material fact, and the PRRC should determine same and not designate it for a formal section 120.57(1) hearing. *Schafer v. Dep't of Bus. & Prof'l Regulation*, 844 So. 2d 757, 758 (Fla. 1st DCA 2003) ("When material facts are not

in dispute, an agency need not refer a matter to the Department of Administrative Hearings for a formal hearing, even if such a hearing is requested by a party.”); *Cambas v. Dep't of Bus. & Prof'l Regulation*, 6 So. 3d 668, 670 (Fla. 5th DCA 2009), *cause dismissed sub nom. Cambas v. Florida Dept. of Bus. & Prof'l Regulation*, 20 So. 3d 848 (Fla. 2009) (“However, when no material facts are in dispute, an agency is not required to hold a formal hearing.”). Although Balearia sets forth no disputed issues of fact, the FCCA attempted to glean issues from Balearia’s petition it may contend are disputed issues.¹

I. Balearia’s Pension Fund Argument Fails For the Same Reason as Crowley Liner and King Ocean Services.

Balearia twice alleges that the “Committee failed to determine the value of the pilots pension fund.” *Petition*, p. 4, ¶12. The exact same faulty argument was raised by Crowley Liner Services and King Ocean in their petition, and Balearia’s petition fails for the exact same reasons.

Balearia provides no support for this contention, and there is no reference to any record evidence in the petition demonstrating that the Committee failed to determine the value of the pension fund. Regardless, Balearia is arguing that the PRRC failed to determine the value of the pension fund under section 310.151, Florida Statutes. That is not a disputed issue of fact, it is, at best, a legal argument that the PRRC failed to fulfill its statutory obligations.

Moreover, the PRRC *is not statutorily required* to determine the precise amount of the Pilots’ retirement plan. Section 310.151(5)(b) states that the PRRC “shall also *give consideration* to the following factors,” which include the cost of retirement and medical plans and the value of benefits derived from being a pilot. The PRRC was required only to “give consideration” to the Pilots’ retirement plan; not precisely define the value of the plan. Balearia does not dispute that

¹ The Balearia petition is missing a page 3, although the FCCA believe it unlikely to affect the existence of disputed issues of material fact. Those allegations appear to be later in the petition.

the PRRC “gave consideration” to the Pilots’ retirement plan, only that the PRRC allegedly did not place a precise value on it. Even taking Balearia’s allegations as true, it is unclear how the PRRC’s alleged failure to perform a task it was never required to perform constitutes a disputed issue of material fact. Balearia’s dissatisfaction with the PRRC’s alleged decision not to precisely value the pension fund is not a disputed issue of fact.

II. The Purported Failure By the PRRC to Give Specific Consideration to a Single Ferry Operator Is Not A Disputed Issue of Fact.

Balearia also argues that the PRRC allegedly failed “to consider the size and frequency of Balearia’s vessel (ferry) entering and departing Port Everglades...” which purportedly resulted in the rates not being fair, just and reasonable. *Petition*, p. 4, ¶13. This does not constitute a disputed issue of fact for a multitude of reasons.

First, this is not a fact in dispute, it is a legal argument that the PRRC did not carry out its statutory duty properly in failing to consider the rate change impact on small vessels. That legal argument, however, must fail given that there is no statutory requirement for the PRRC to specifically consider the impact of a rate change on a single ferry, **particularly when that entity did not participate in the rate change proceedings.**²

Second, even if Balearia’s allegation was a factual allegation (which it is not), there is no evidence of any dispute over the impact of the rate change on Balearia. Thus, the rate change’s impact on Balearia is, at worst, a fact *not in dispute* and, at best, an *agreed upon fact*. Regardless, it is not a *disputed material fact*, so the matter cannot be transferred for a section 120.57(1) hearing.

Third, Balearia argues that the purported absence of an event occurring (the PRRC

² Balearia’s contention is also baseless given that this Committee received extensive information from its investigators, the parties and public on the impact of the rate change on ships of all sizes, small, medium and large. The notion that the PRRC did not consider the impact of the rate change on small vessels is baseless.

consideration of the specific impact on Balearia's ferry, based on its size and frequency of calls) is sufficient to constitute a disputed issue of fact. It is not. Thousands of vessels call on Port Everglades every year. The PRRC is not statutorily obligated to take every single vessel on a case-by-case basis and analyze its size and frequency and the impact of a rate change. Certainly, if Balearia had wanted the PRRC to give it specific consideration, it could have filed an application for rate change or response at any time during the four years of proceedings. Balearia cannot, however, create a disputed issue of fact by interjecting itself into a proceeding and raising a questions it believes the agency did not resolve. If that were the case, every single agency action would automatically be subject to 120.57(1) hearing and the whole requirement for a disputed issue of fact to exist would be rendered a nullity.

III. Balearia's Contention That The PRRC Improperly Considered A Trend Towards Larger Cruise Vessels Is Not A Disputed Issue of Fact, At Best It's A Value Judgment.

Finally, Balearia argues that the PRRC considered the "trend toward larger cruise vessels" being used in the cruise industry, and that consideration of this "trend" was in error. This contention: 1) is not a disputed issue of fact; 2) is an absolute contradiction to the other allegations in Balearia's petition; and 3) is wholly inconsistent with section 310.151, Florida Statutes.

Before addressing why Balearia's contention is not a disputed factual issue and contradicts the statute, it is important to point out the glaring contradiction in Balearia's petition. On one hand, Balearia argues that the PRRC "inappropriately" considered the trend towards larger cruise vessels operation in Port Everglades [*see Petition*, pp. 4-5, ¶¶12-13], and Balearia firmly believes the PRRC erred in setting a pilotage rate that accounted for the growing size of cruise vessels. Yet, in the same breath, Balearia argues that the PRRC's "failure...to consider the size and frequency of Balearia's vessel" resulted in the rates not being fair, just and reasonable. *Petition*, p. 4, ¶13. In fact, Paragraph 13 of Balearia's petition begins with back-to-back sentences which simultaneously

argue that the PRRC *should have* given consideration to the smaller size of Balearia’s vessels, and yet *should not have* given consideration to the larger size cruise vessels. Regardless of this inherent contradiction, these allegations do not constitute disputed issues of fact.

As a matter of law, the PRRC is entitled to consider “[a]ny other factors the committee deems relevant in determining a just and reasonable rate.” §310.151(5)(b)12, Florida Statutes. Thus, the PRRC would be well within its statutory and legal rights to consider the growing size of cruise ship vessels. It is unclear how the PRRC’s performance of its statutorily approved duties constitutes a disputed issue of fact, and Balearia’s petition is devoid of any explanation. Moreover, section 310.151(6) states that pilotage rates shall be set using certain characteristics of a vessel, such a length, draft, beam, or different types of tonnage, which are all measurements of size of a vessel. Thus, consideration of the size of vessels calling on port is absolutely necessary.

Balearia also doesn’t allege that the PRRC made a factual finding it disagrees with or believes is in dispute, it just does not like the fact that the PRRC considered – even though it would be consistent with its statutory duties – the growing size of cruise vessels. Put otherwise, Balearia’s opinion that it was “inappropriate” to consider a trend towards larger cruise ships is irrelevant. There is no disputed issue of fact, simply a party that is unhappy the PRRC gave consideration to an issue it was well within its legal rights to consider.

Perhaps most importantly, the PRRC’s purported consideration of whether the trend towards larger cruise ships was “appropriate” or justified a certain pilotage rate is a value judgment, not a disputed issue of fact, that falls solely within the PRRC’s rate making province. . . In the interest of brevity, the FCCA respectfully refers this Committee to its motion filed with respect to Crowley Liner Service and King Ocean for its legal argument demonstrating why such a value judgment determination is not within the province of an administrative law judge, and can

only be determined pursuant to the PRRC's quasi-legislative rate-making authority.

Based on the above, the FCCA does not believe Balearia has raised any disputed issue of material fact that warrants a section 120.57(1) hearing. As a result, the FCCA respectfully believes the PRRC should conclude no disputed issues of material fact exist, should not designate the petition for a final hearing, and should deem the order final agency action for the purposes of section 120.68, Florida Statutes. *See Fla. Stat.* 310.151(4)(a).

IV. Balearia's Request For Relief Cannot Be Provided And Seeks To Eliminate Five Years of the PRRC's Work

In its request for relief, Balearia "request[s] that the Committee direct the applicants to file revised applications and, thereafter, allow Balearia to intervene in the proceedings and submit an alternative application or other documentation, and that the Committee thereafter fix pilotage rates that are fair, just and reasonable as applied to the small vessels that enter and depart Port Everglades daily."

This request for relief is notable for two reasons. First, it cannot be afforded under a section 120.57(1) hearing. The only point of such a hearing would be to resolve disputed factual issues, and have the PRRC subsequently determine whether those factual findings warranted changing the rate of pilotage. In that regard, it is clear that a section 120.57(1) hearing is neither necessary or appropriate. Balearia, as with the other petitioners, simply wants to find a way to completely restart the pilotage rate change proceedings, so that it can seek to correct for its failure to participate for the preceding five years. A 120.57(1) hearing would not provide the relief Balearia seeks.

Balearia also was not a participant, in any manner, in the underlying proceedings. Despite its decision not to actively participate in the proceedings while they unfolded over four years, Balearia now seeks to completely eviscerate this Committee and the parties' good faith efforts over those years to reach a fair and just pilotage rate at Port Everglades. Balearia had every opportunity to participate in the proceedings below, and deliberately elected not to. Balearia cannot now raise disputed issues of fact in a

proceeding to which it was not a party and for which it cannot show its substantial interests have been affected.

WHEREFORE, the FCCA respectfully requests that this Committee strike Balearia's Petition for Hearing, or in the alternative find that no disputed issues of material fact exist and enter the Final Order in the above styled case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served by electronic delivery on the 27th day of February upon the following:

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