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DISTRICT COURT OF APPEAL, FIRST DISTRICT
STATE OF FLORIDA

SEACOR ISLAND LINES, LLC, BALEARIA CARIBBEAN, LTD., CROWLEY LINER SERVICES, INC., KING OCEAN SERVICES, LTD., and KING OCEAN AGENCY, INC.,

Appellants,

v.

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, BOARD OF PILOT COMMISSIONERS, PILOTAGE RATE REVIEW COMMITTEE, AND FLORIDA CARIBBEAN CRUISE ASSOCIATION,

Appellees,

PORT EVERGLADES PILOTS ASSOCIATION,

Appellee/Cross-Appellant.
_____/

CASE NO. 1D19-2241, 1D19-2226
[1D19-2248, 1D19-2294]

On appeal from the Pilotage Rate Review Committee,
Case No.: PRRC 2014-2

APPELLANTS, CROWLEY LINER SERVICES, INC., KING OCEAN SERVICES, LTD., AND KING OCEAN AGENCY, INC.'S MOTION FOR REHEARING and CERTIFICATION of QUESTION of GREAT PUBLIC IMPORTANCE

Appellants, Crowley Liner Services, Inc., King Ocean Services, Ltd., and King Ocean Agency, Inc. ("Crowley and King Ocean"), by and through the undersigned counsel, pursuant to Fla. R. App. P. 9.330, file this Motion for

Rehearing and Certification of Question of Great Public Importance, and in support state as follows:

Background

In this appeal, Appellants challenged a Final Order of the Pilotage Rate Review Committee ("PRRC"). Crowley and King Ocean raised various arguments as to why the Final Order should be vacated and the matter remanded to the PRRC to either close the proceedings or order a hearing. This Court's November 20, 2020 Opinion denied all requested relief.

Crowley and King Ocean file this Motion to assert two requests:

1. Appellants request rehearing as to that part of the Opinion that found that there was no disputed issue of fact raised below. As explained, *infra*, that finding necessarily misapprehends or overlooks an important principle of Florida law.

2. Appellants further request that this Court certify the following question of great public importance:

> May an administrative agency approve a settlement entered into during the agency's investigation and preliminary to agency action, absent express or implicit authority in the agency's statutes or rules?

Motion for Rehearing

Motions for rehearing are governed by Florida Rule of Appellate Procedure 9.330, which provides in relevant part: "A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in the proceeding." Appellants file this Motion for Rehearing because the portion of the Opinion that holds that there was no disputed fact necessarily overlooks or misapprehends a point of law, as explained below.

Appellants contended in part that the PRRC committed material error by taking final agency action without affording Crowley and King Ocean a hearing under the Administrative Procedure Act. A formal hearing is required under Florida Statute § 120.57(1) if a Petition raises disputed issues of material fact.

In this case, Appellants contested the asserted fact underlying the Final Order that the Pilots incurred a $721 cost-per-handle. In their Petition, Crowley and King Ocean asserted, instead, that the cost was most likely $285 or less. (R197 at IV.a. and V.a.).

This Court held that there was no disputed material fact. While the Opinion does not specifically reference the cost-per-handle as one of the putative facts, it is presumed that the Court considered this point. *State ex rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817, 819 (Fla. 1st DCA 1958) ("Counsel should not draw

conclusion from…fact [that opinion does not mention a certain point briefed] that the matters not discussed were not considered.").

The factual allegations of Crowley/King Ocean's Petition had to be "accept[ed] as true" when determining whether there was a disputed issue of fact. *Save Our Creeks v. State of Fla. Fish and Wildlife Conservation Com'n*, 112 So. 3d 128, 130 (Fla. 1st DCA 2013). If that legal principle is applied, it is clear that there *was* a disputed material fact because the Port Everglades Pilots Association had submitted materials contending that the average cost-per-handle was $721 and Crowley/King Ocean's Petition alleged that the average cost-per-handle was about $285. Relying extensively on the $721 cost-per-handle, the Pilots claimed to be operating at a significant loss when moving Appellants' vessels, (*e.g.*, 10/24 Tr, 71:21–72:6, 188:16–189:6), which claimed losses were the basis for the PRRC implementing the new rate changes requested in the settlement (including deliberate rate increases on Appellants). (*E.g.*, R 191; 10/25 Tr, 10:11–13, 14:18–23, 19:23–25). However, if it costs the Pilots $285 or less to conduct a handle, the Pilots' claimed losses would be either *de minimis* or non-existent. (Appellants did not have the benefit of discovery before serving their Petition). And the basis for this rate increases would fall away. This is clearly a dispute about the facts underlying the Final Order.

Thus, the portion of the Opinion (p. 4) that holds that "the remaining issues raised in Appellants' petitions do not constitute disputed issues of material fact" necessarily overlooks or misapprehends the applicable law requiring the facts alleged in Appellants' Petitions to be accepted as true.

Motion for Certification of a Question of Great Public Importance

Appellants also request that this Court certify the follow question as being of great public importance:

> May an administrative agency approve a settlement entered into during the agency's investigation and preliminary to agency action, absent express or implicit authority in the agency's statutes or rules?

This question is critically important not only in cases involving the PRRC, but in any case involving an agency that conducts investigations preliminary to agency action.

The Opinion holds, essentially, that there is a "settlement exception" to the process required by Chapter 310 and the Administrative Code provisions in 61G14 for requesting, evaluating and setting pilotage rates. *See Opinion,* p. 3 ("…parties that enter into settlement agreements are not required to submit new applications.") (*citing Citizens of State v. Fla. Pub. Serv. Comm'n*, 146 So. 3d 1143 (Fla. 2014)). *Citizens* involved a settlement during adversarial proceedings before the Public Services Commission ("PSC"), which proceedings were subject to Florida Statute §

120.57. The Florida Supreme Court found that the PSC had the *statutory* authority to approve a settlement agreement. *Citizens*, 146 So. 3d at 1149–50, 1155 (explaining that the plain language of Sections 366.04, 366.05, and 366.06 allowed the PSC to independently propose and prescribe rate structures for utilities, and that Section 120.57(4) authorized the PSC to set rates through settlement). Our case involves a settlement that precedes the applicability of Section 120.57. No statutory authority exists for the PRRC to approve a settlement agreement as it did in this case.

Chapter 310 does not provide the PRRC with authority to approve a settlement preliminary to agency action or to independently determine and fix pilotage rates. Florida Statute § 120.57, on which *Citizens* relied, does not support our Opinion's holding. Section 120.57(4) allows for "informal disposition…of any proceeding by…agreed settlement…." But Section 120.57(5) cautions that "[t]his section does not apply to agency investigations preliminary to agency action." Agency action in PRRC rate review proceedings occurs when the PRRC issues a notice of intent to modify the pilotages rates in a port ("NOI"). *See* § 310.151(4)(a), Fla. Stat. The PRRC's proceedings before the NOI is issued, including the public hearing, is the investigation preliminary to agency action. *See* § 310.151(3), Fla. Stat.; *Biscayne Bay Pilots, Inc. v. Fla. Caribbean-Cruise Ass'n*, 160 So. 3d 559, 563 n.7 (Fla. 1st DCA 2015) (recognizing that a motion considered by the PRRC at the public hearing

was not subject to the uniform rules of procedure because the rules did not apply to an agency's investigation preliminary to agency action). The settlement at issue in this case was entered into before the NOI was issued and therefore during the investigation preliminary to agency action.

Historically, Florida agencies have only had the authority and jurisdiction conferred by the Legislature via statute. *WHS Trucking LLC v. Reemployment Assistance Appeals Comm'n*, 183 So. 3d 460, 462 (Fla. 1st DCA 2016). And an agency is bound to follow its own rules. *See Marrero v. Dep't of Prof'l Regulation, Bd. of Psychological Examiners*, 622 So. 2d 1109, 1112 (Fla. 1st DCA 1993). But here, the Opinion announced a "settlement exception" that is disconnected from the agency's statute or any applicable statutory authority. And the agency's rules are silent on the issue of settlements.

With the current Opinion as precedent, interested parties may attempt to file a misleading application for a rate change that does not disclose the party's intentions and then, during the investigative phase, "settle" the proceeding in an undisclosed and unexpected way to the detriment of third parties, and bar those third parties from exercising their rights – rights expressly provided under the agency's own rules. *Cf.* Fla. Admin. Code R. 61G14-22.007(4). Indeed, that is precisely what happened here.

Beyond the particular rate decided for this Port, the current opinion will have long-lasting effect on future rate proceedings for the PRRC and for agencies that conduct investigations preliminary to agency action. The question transcends the particular facts of this case. And, even considering only the PRRC, the question is critically important. There are Ports throughout the State of Florida and pilotage rates are fixed for each Port by the PRRC. Every Port has at least two categories of interested parties: the pilots and the operators of the vessels they bring in and out of the Port. During the PRRC's investigation preliminary to agency action (*i.e.*, before the PRRC issues the NOI) there will often be the opportunity for interested parties to enter into a settlement agreement. Thus, this question will be relevant in many other instances. Moreover, pilotage rates affect cargo rates, which in turn affect the cost of consumer goods ranging from groceries to clothing. Pilotage issues are critically important in the State of Florida, given the State's great financial interest in cargo operations and the cruise industry. *See, e.g.*, § 910.006, Fla. Stat. (recognizing that Florida "is a major center for international travel and trade by sea"). Given the number of people this issue affects and the lack of controlling cases, the question should be certified. *Star Cas. v. U.S.A. Diagnostics, Inc.*, 855 So. 2d 251, 252 (Fla. 4th DCA 2003) ("one general guide is that a question should be

certified where our decision will affect a large segment of the public and the extant decisional law may not coalesce around a single answer to the question posed.").

WHEREFORE, Appellants, Crowley Liner Services, Inc., King Ocean Services, Ltd., and King Ocean Agency, Inc., respectfully request that this Court to grant this Motion for Rehearing, vacate the Final Order and remand with directions to designate Crowley and King Ocean's Petition for a hearing at DOAH under Section 120.57(1). Further, Appellants ask this Court to grant the Motion for Certification of Question of Great Public Importance and certify the question of great public importance to the Florida Supreme Court.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy hereof has been filed and electronically served via Florida ePortal on this 7th day of December, 2020, to all counsel on the attached service list.

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