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.,	CASE NO. 1D19-2241, 1D19-2226 [1D19-2248, 1D19-2294] On appeal from the Pilotage Rate Review Committee, Case No.: PRRC 2014-2

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.
_____/

THE FLORIDA-CARRIBEAN CRUISE ASSOCIATION'S RESPONSE TO MOTION FOR REHEARING, REHEARING EN BANC AND CERTIFICATION

The Florida-Caribbean Cruise Association ("FCCA"), pursuant to Florida Rules of Appellate Procedure 9.330 and 9.331, files its response to the Balearia Caribbean, Ltd's Motion for Rehearing, Motion for Rehearing En Banc, and motion Certification of Question of Great Public Importance, and states as follows:

A. The FCCA's Response To Balearia's Motion For Panel Rehearing

1. Balearia Seeks Rehearing on Issues Already Addressed by the Court.

In contradiction to Florida Rule of Appellate Procedure 9.330 and Florida law, Balearia's motion for panel rehearing seeks to reargue an issue already *expressly addressed* by this Court in its opinion. While Balearia claims this Court "overlooked" or "misapprehended" its argument – thus warranting rehearing under Rule 9.330 – Balearia's argument is a mischaracterization of this Court's opinion and its motion for panel rehearing must be denied.

Balearia argues that this Court misapprehended its position by determining that Balearia was challenging section 310.151, Florida Statutes, as a whole, and that rational basis review applied. *Balearia's Motion*, p. 6. Balearia argues that it "was not challenging Section 310.151 in its entirety, but only the provisions of Section 310.151(4)(a)." *Id*. Reading Balearia's motion, one is led to believe this Court overlooked, or never addressed, Balearia's section 310.151(4)(a) argument.

This Court's opinion is three pages. Right on page two, after addressing whether section 310.151 was unconstitutional on its face,[1] this Court stated:

> Appellant Balearia also contends that section 310.151(4)(a) is unconstitutional as applied because it did not provide Appellant Balearia with a chapter 120 hearing under Florida's Administrative Procedure Act, thereby denying it due process. However, chapter 120

[1] The FCCA would also note that this Court's facial constitutional review of section 310.151 as a whole necessarily contemplates that this Court also reviewed the facial constitutionality of section 310.151(4)(a), as it is part of the overall statute.

> is not the sole source of due process for parties in an administrative proceeding. *Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1235 (Fla. 2009). Given that the Florida Supreme Court rejected the notion that due process can only be satisfied by compliance with the Administrative Procedure Act, section 310.151(4)(a) is not unconstitutional as applied to Appellant Balearia. Rather, Appellant Balearia received sufficient due process during the pilotage rate proceedings.

Seacor Island Lines, LLC v. Dep't of Bus. & Prof'l Regulation, 1D19-2226, 2020 WL 6815831, at *2 (Fla. 1st DCA Nov. 20, 2020). Simply put, this Court did not overlook Balearia's section 310.151(4)(a) argument, or only address it as challenging section 310.151 as a whole. This Court's opinion *directly and specifically* addressed Balearia's section 310.151(4)(a) argument, and rejected it.

This Court outlined the standard for a motion for rehearing in *Unifirst Corp. v. City of Jacksonville*, 42 So. 3d 247 (Fla. 1st DCA 2009):

> Florida Rule of Appellate Procedure 9.330(1) states that a motion for rehearing shall "state with particularity the points of law or fact in the court's decision that, in the opinion of the movant, the court has overlooked or misapprehended in its decision." This rule has been interpreted to mean that "[a] motion for rehearing shall not reargue the merits of the court's order." *Jacobs v. Wainwright*, 450 So.2d 200, 202 (Fla.1984).
>
> > Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.

> *State ex rel. Jaytex Realty Co. v. Green*, 105 So.2d 817, 818– 19 (Fla. 1st DCA 1958); *see also Ayala v. Gonzalez*, 984 So.2d 523, 526 (Fla. 5th DCA 2008) (reiterating the court's view that the privilege to seek a rehearing is not "an open invitation for an unhappy litigant or attorney to reargue the same points previously presented, or to discuss the bottomless depth of the displeasure that one might feel ... as a result of having unsuccessfully sought appellate relief.").

Id. at 248. On this basis alone, Balearia's motion for panel rehearing must be denied, as it is nothing more than an attempt to reargue the matters already briefed, argued, and considered by this Court.

2. Balearia's Constitutional Due Process Argument Fails on the Merits.

Even if this Court analyzes the merits of Balearia's constitutional and due process argument for a second time, it holds no more muster than the first time it was addressed by the parties and this Court.

Balearia argues that both its procedural and substantive due process rights were violated. *Balearia's Motion*, pp. 6-7. Yet, Balearia's motion contains neither a meaningful procedural or substantive due process analysis, nor does it address the scope of due process afforded in agency proceedings.[2] Simply put, not only has Balearia sought the exceptional remedy of *en banc* review – which has required the time and attention of every First District Court of Appeal judge – but Balearia

[2] Balearia also makes a general allegation that its "fundamental rights" were violated, but does not allege any specific fundamental right that was violated. Moreover, Balearia offers no strict scrutiny analysis. The FCCA presumes that the fundamental right Balearia is referring to is the constitutional right of due process.

expects this Court to construct a due process argument on Balearia's behalf. This type of use of a motion for rehearing and rehearing *en banc* should not be tolerated.

To the best the FCCA can discern, the crux of Balearia's argument is that there exists a set of universal process rights that apply to every single proceeding, whether before a court of law, administrative agency, or other tribunal. This includes the rights to a "full and fair" hearing and to only have a judgment rendered "after proper consideration of issues advanced by adversarial parties." *Balearia's Motion*, p. 7. Arising out of these rights Balearia claims exist the due process rights to "advance all its arguments" and the right to challenge the legal conclusions contained in an agency's final order. *Id.* Because section 310.151(4)(a) does not provide for an informal hearing under section 120.57(2), Florida Statutes, Balearia argues it was denied its due process rights to advance all its arguments and challenge the PRRC's legal conclusions. Balearia's argument fails for multiple reasons.

First, as this Court stated in its opinion, Chapter 120 is not the sole source of due process available to a party. *Seacor Island Lines*, WL 6815831, at *2. Under section 310.151, the PRRC's action was subject to judicial review pursuant to section 120.68, Florida Statutes. § 310.151(4)(a), Fla. Stat. Judicial review under section 120.68 includes review of, among other things, whether:

> (c) The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure;

> (d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action;

§ 120.68(7), Fla. Stat. Thus, Balearia was a clearly afforded process by which it can challenge the PRRC's legal conclusions, and yet Balearia continually fails to address why section 120.68 fails to provide Balearia due process.[3] Moreover, the Florida Supreme Court has stated that while Chapter 120 "is generally applicable" to all forms of agency decision-making, agency action can be "specifically exempted" from Chapter 120. *Sch. Bd. of Palm Beach County v. Survivors Charter Sch., Inc*., 3 So. 3d 1220, 1230–31 (Fla. 2009). Balearia points to no legal authority to support its argument that its opportunity to challenge the PRRC's legal conclusions *must* be through section 120.57(2) hearing, or that the Legislature's decision to exempt pilotage-rate making proceedings from the scope of section 120.57(2) was impermissible or creates a due process issue.

Second, Balearia argues that its participation in the PRRC proceedings below was not required, and that the process was merely "investigatory" in nature and not "adjudicatory." *Balearia Motion,* pp. 8-9.[4] The point Balearia tries to be making – it appears – is that because the PRRC proceedings are purportedly investigative in

[3] In fact, Balearia's argument, although legally incorrect, seems to be that due process as provided in judicial proceedings is the gold standard of process that must be afforded in all other proceedings. If that is the case, then Balearia should find judicial review under section 120.68 to more than adequately protect its rights.

[4] This is a new argument that is also being posited by Crowley for the first time in its request for rehearing as well.

nature, Balearia can only be afforded due process rights through full Chapter 120 adjudicatory proceedings. Balearia's argument is dubious at best.

Foremost, the PRRC's rate-making function is not investigative in nature. The FCCA addressed this issue at length in its response to Crowley's motion for rehearing, and respectfully refers this Court to its Response to Crowley's Motion for Rehearing. Moreover, after providing a page-long explanation of the rate-making process, Balearia refuses to acknowledge the nature of the PRRC's rate-making determination as agency action. Balearia is silent on this issue because it contradicts Balearia's mischaracterization of the process as purely "investigatory."

Balearia's mischaracterization of the PRRC process is also inconsistent with decades of Florida law establishing that due process in agency proceedings does not require all the same protections as in the judicial model. As this Court has stated:

> Nevertheless, "[t]he manner in which due process protections apply vary with the character of the interests and the nature of the process involved." *Real Property,* 588 So.2d at 960. "There is no single, inflexible test by which courts determine whether the requirements of procedural due process have been met." *Id.* As the Florida Supreme Court has explained, "the formalities requisite in judicial proceedings are not necessary in order to meet the due process requirements in the administrative process." *Hadley,* 411 So.2d at 187. *See Dixon v. Love*, 431 U.S. 105, 115, 97 S.Ct. 1723, 1729, 52 L.Ed.2d 172 (1977) ("[P]rocedural due process in the administrative setting does not always require application of the judicial model."); *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 909, 47 L.Ed.2d 18 (1976) ("[D]ifferences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of the

> courts.' The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances." (citation omitted)).

Rucker v. City of Ocala, 684 So. 2d 836, 841 (Fla. 1st DCA 1996) (emphasis added). Contrary to Balearia's argument, the fact that the PRRC proceedings do not have all the hallmarks of a traditional judicial proceeding does not mean that procedural due process was not afforded to the Balearia.

Rather, "[t]he right of procedural due process entails 'fair notice and a real opportunity to be heard' in a meaningful time and manner." *Carlisle v. Dep't of Health*, 101 So. 3d 883, 885–86 (Fla. 1st DCA 2012) (quoting *Crosby v. Florida Parole Comm'n*, 975 So. 2d 1222, 1223 (Fla. 1st DCA 2008)). The PRRC proceedings outlined in section 310.151 meet this standard. Balearia's voluntary decision not to participate in the proceedings below is not tantamount to a due process violation under Florida law. Balearia's motion should be denied.

B. <u>The FCCA's Response to Balearia's Motion for Rehearing *En Banc.*</u>

Even if Balearia's due process argument was meritorious – and the FCCA believes it is not – Balearia's motion fails to demonstrate that the issue is one of "exceptional importance," as required by Florida Rule of Appellate Procedure 9.331(d). Accordingly, Balearia's motion for rehearing *en banc* also must be denied.

Various Florida District Courts of Appeal have interpreted the "exceptional importance" standard under Rule 9.331(d). Cases that have warranted *en banc*

review under this standard "have to do with the issues that impact a larger share of the community or the jurisprudence of the state." *In re Doe,* 973 So. 2d 548, 555–56 (Fla. 2d DCA 2008); *see also In Interest of D.J.S.*, 563 So. 2d 655, 657 (Fla. 1st DCA 1990) (granting *en banc* review where the case "affect[ed] the rights of parents and children in this State and the interpretation of Chapter 39, Florida Statutes…as applied to a noncustodial, biological father and proceedings to terminate parental rights based on abuse and neglect."); *Bujarski v. Bujarski*, 530 So. 2d 953, 953 (Fla. 5th DCA 1988) (granting *en banc* review of a case impacting pension benefits in dissolution of marriage cases); *Brannon v. Boldt*, 958 So. 2d 367, 369 (Fla. 2d DCA 2007) (granting *en banc* review because the issue could impact "many neighborhoods" in the State of Florida); *Ortiz v. State*, 24 So. 3d 596, 597 (Fla. 5th DCA 2009) (granting *en banc* review to address the "feared medical emergency exception to the warrant requirement articulated by the Florida Supreme Court…and the now well-recognized community caretaking function of police officers.").[5]

Here, Balearia's motion for rehearing *en banc* impacts neither a larger share of the community or the jurisprudence of this state. Balearia's very motion states as

[5] *En banc* review "must be the exception and not the rule [because an] en banc proceeding engages the attention of every active judge and consideration of a case en banc drains judicial resources while burdening the litigants with added expense and delay." *State v. Petagine*, 290 So. 3d 1106, 1111–12 (Fla. 1st DCA 2020), *review denied*, SC20-519, 2020 WL 4524716 (Fla. Aug. 5, 2020) (Tannenbaum, J. concurring) (citing *Church of Scientology of Cal. v. Foley*, 640 F.2d 1335, 1341 (D.C. Cir. 1981) (en banc) (Robinson, J., dissenting)).

much. Regarding the purported due process limitation contained in section 310.151(4)(a), Florida Statutes, Balearia states:

> No such limitation is placed on any of the other businesses and professions licensed and regulated by the Florida Department of Business & Professional Regulation. The provisions of Section 310.151(4)(a), Florida Statutes…*is unheard of* in Florida administrative law, or indeed, in Florida jurisprudence.

Balearia's Motion, p. 15 (emphasis added). Thus, Balearia acknowledges that: 1) the issue arising out of section 310.151(4)(a) does not arise in *any other area* of Florida administrative law or jurisprudence; and 2) outside of parties seeking to challenge a final order of the PRRC (and who cannot raise a disputed issue of material fact), *no other individual or business* regulated in the state is impacted by the interpretation and application of section 310.151(4)(a), Florida Statutes. As a result, Balearia's motion falls far short of the "exceptional importance" standard.

While Balearia makes the generalized claim that "[d]ue process is a fundamental right of all parties in any civil or administrative proceeding," Balearia's motion *only* address a very narrow due process argument specific to pilotage rate change proceedings, and not the due process rights of "all parties in any civil or administrative proceeding." *Balearia's Motion*, p. 6 ("Balearia challenged only the constitutionality of Section 310.151(4)(a), Florida Statutes…") (emphasis added). Balearia's motion fails entirely to demonstrate how this Court's interpretation of

section 310.151(4)(a) impacts any other Florida statutory or administrative scheme or the due process rights of any individual or entity in any other agency proceeding.

Finally, simply raising the specter of a due process violation should not be sufficient to create an issue of "exceptional importance" that triggers *en banc* review. If that were the case, Florida's District Courts of Appeal would be inundated with *en banc* review, turning the exception into the rule. Basic due process arguments do not warrant the full attention, and corresponding drain on resources, of every District Court of Appeal judge. Balearia's motion for rehearing *en banc* falls far short of meeting Rule 9.331(d)'s "exceptional importance" standard, and must be denied.

C. <u>The FCCA's Response to Balearia's Motion for Certification</u>

Before addressing the merits of Balearia's motion for certification, it is notable that both Balearia and Crowley have filed separate motions for certification on *wholly unrelated issues*. Appellants would like this Court to believe that its opinion raised not one, but two, distinct issues of such great public importance that the Florida Supreme Court's intervention is required, in addition to a third issue that Balearia claims necessitates *en banc* review. These motions represent continued efforts by Appellants to overturn proceedings they elected not to participate in until the eleventh hour and four years too late. They should be denied.

Regarding the merits of Balearia's motion for certification, its motion directly conflicts with its motions for rehearing and rehearing *en banc*, demonstrating that it

has failed to raise an issue of great public importance. In arguing its question to be one of great public importance, Balearia makes the following statement:

> It is of great public importance for this Court to determine whether or not the legislature of Florida can enact a law that effectively precludes a party substantially affected by an agency action from challenging the legal conclusions and reasoning of the agency when rendering its Final Order. Any person with business before an agency or that is licensed or regulated in any way by an agency in Florida is affected by this Court's ruling. The question presented must be conclusively ruled upon and resolved.

Balearia's Motion, pp. 16-17 (emphasis added). Balearia's sweeping claim that "any person with a business before an agency" is impacted by this Court's opinion directly conflicts with Balearia's earlier statements in support of its motions for rehearing and rehearing *en banc* that "[n]o such limitation is placed on any of the other businesses and professions and businesses licensed and regulated by the Florida Department of Business and Professional Regulation". *Balearia's Motion*, p. 15; *see also Balearia's Motion*, p. 13 ("[A]ll of the businesses and professions under the regulation of the [DBPR] are provided the right to challenge agency action by challenging the legal conclusions of the specified board or division within the [DBPR]."). In fact, Balearia's counsel states they have never seen this issue arise in 50 years of practicing "administrative/government/regulatory law." *Id.*

Thus, Balearia's motions simultaneously argue that this issue is one uniquely limited to pilotage rate change cases, but also that resolution of the issue will impact every individual or entity with business before any Florida state agency. Balearia's

position is patently untenable. The flaw in Balearia's position is further underscored by the fact that Balearia emphasizes in its motion for panel rehearing that is only challenging the constitutionality of the very specific statutory scheme in section 310.151(4)(a). *Balearia's Motion*, p. 6 ("Balearia challenged only the constitutionality of Section 310.151(4)(a), Florida Statutes…"). Unsurprisingly, Balearia's motion is devoid of any even reasonably specific allegations regarding how this Court's ruling regarding section 310.151(4)(a) impacts any other person or business regulated by any other Florida state agency.[6] Certification of questions of great public importance must demand more. Balearia's motion for certification does not raise a question of great public importance, and should be denied.

WHEREFORE, the Florida-Caribbean Cruise Association respectfully requests that this Honorable Court **DENY** Balearia Caribbean, Ltd's Motion for Rehearing, Motion for Rehearing En Banc, and Motion Certification of Question of Great Public Importance.

[6] It is also worth mentioning that this Court's opinion and the PRRC's position – that section 310.151(4)(a) does not provide the right to a section 120.57(2) hearing – is not novel to 2020. The PRRC has been clear about its position on this issue for years, and it has been discussed in other rate-making cases.

Respectfully submitted this 22nd day of December 2020.

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CERTIFICATE OF SERVICE

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