IN THE 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 CRUSE ASSOCIATION,

Appellees,

and

PORT EVERGLADES PILOTS ASSOCIATION,

Appellee/Cross-Appellant.
_____/

DCA CASE NO.: 1D19-2226, 1D19-2241, 1D19-2248
L.T. CASE NO.: PRRC 2014-2

On appeal from the Pilotage Rate Review Committee

PORT EVERGLADES PILOTS ASSOCIATION'S CROSS–REPLY BRIEF

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Straying from the plain language of section 310.151(4)(a), Cross-Appellees Balearia Caribbean, Ltd. ("Balearia") and the Department of Business and Professional Regulation, Pilotage Rate Review Committee (the "Committee") (cumulatively, "Cross-Appellees") urge this Court to adopt an interpretation that renders portions of the statute superfluous. Because section 310.151(4)(a) requires interested parties to file a petition for hearing within 21 days of receiving actual notice, Balearia's petition was untimely filed, and the Committee's ruling should be reversed.

To begin, Cross-Appellees argue that actual notice does not trigger a 21-day window to file a petition for hearing unless the recipient of that notice was an applicant or formally requested placement on a mailing list. *See* Balearia Cross-Answer Brief, at 14; Comm. Cross-Answer Brief, at 6. But the statutory language does not support such an argument.

Section 310.151(4)(a) states: "Within 21 days after receipt or publication of notice, any person whose substantial interests will be affected by the intended committee action may request a hearing pursuant to the Administrative Procedure Act." The statute thus makes clear that "*any person*," not just applicants or those who have requested formal notice, must request a hearing within 21 days of "*receipt or* publication of notice." *See id.* (emphasis added). Under the plain language of the

statute, a person's right to receive notice via certified mail has no bearing on whether the 21-day clock starts once a person receives actual notice. No part of section 310.151(4)(a) states that a person has actual notice only if he or she is an applicant or made a formal request for notice to the agency.

Next, the Committee argues that the statute's use of the word "or" means that a person has 21 days after receipt of notice via email or publication. *See* Comm. Cross-Answer Brief, at 4. But Cross-Appellees fail to acknowledge that section 310.151(4)(a) also uses an "or" in the provision mandating waiver: "The failure to request a hearing within 21 days after *receipt or publication* of notice *shall constitute a waiver* of any right to an administrative hearing and shall cause the order modifying the pilotage rates in that port to be entered." (Emphasis added).

The waiver provision states "receipt *or* publication," not "receipt *and* publication," meaning that missing the 21-day timeframe for *either* event, whichever occurs first, results in a waiver of an administrative hearing. If the conjunction in the notice provision means that publication can trigger a 21-day window even if the person previously had actual notice, then the same conjunction in the waiver provision makes clear that waiver occurs 21 days after the first event—actual notice or publication. Here, that means that Balearia waived its right to an administrative hearing by failing to request one within 21 days of receipt actual notice.

The Committee then argues that section 310.151(4)(a) does not specify that the operative notice (actual or publication) is the one received first, so therefore, both actual notice *and* publication trigger two separate 21-day windows. *See* Comm. Cross-Answer Brief, at 4. The Committee cites *SWS Partnership v. Florida Department of Corrections*, 567 So. 2d 1048 (Fla. 5th DCA 1990), and argues that courts have held that actual notice can trigger a point of entry even if it occurs after publication. But no court has expanded *SWS Partnership* on this point beyond bid protest cases, which involve a shortened 72-hour timeframe, to administrative cases involving a 21-day timeframe. The agency in *SWS Partnership* also had failed to provide the bidder with a notice of protest rights and may have obscured the date of publication. *See id.* at 1049-50.

Two pages later, the Committee appears to argue that actual notice received *after* publication could never allow for a new 21-day window and cites to numerous rulemaking cases for the proposition that "petitions are dismissed if they are not timely filed after publication, regardless of whether the notice was seen." Comm. Cross-Answer Brief, at 6. None of the cited cases, however, has any bearing on section 310.151(4)(a), as they all involve situations where publication is the only type of notice. Moreover, this argument runs contrary to the earlier suggestion that under *SWS Partnership*, actual notice received after publication starts a new 21-day window for requesting an administrative appeal.

Thus, the Committee appears to be urging this Court to interpret the statute such that if actual notice happens *before* publication, a person has two 21-day windows in which to request an administrative petition. But if actual notice happens *after* publication, the person would receive only the 21-day window from the date of publication. The Committee never discussed this interpretation during the April 2019 hearing (R. 760-61), and it was not described in the Committee's Final Order (R. 785-86). But more importantly, it is not an interpretation that can be derived from a plain reading of the statute.

Cross-Appellees also paint an incomplete picture of the record evidence by suggesting that the PRRC "advised" Balearia that the 21-day window runs from publication. Balearia Cross-Answer Brief at 10, 12, 14; *see also* Comm. Cross-Answer Brief at 1. This argument fails for several reasons.

First, prior to this appeal, Balearia never claimed that it filed the petition for administrative hearing 21 days after publication based upon advice Balearia received from the Committee. (R. 686–92; 735–39). The Committee also did not consider or base its decision on this argument. (R. 760-61, 785–86). Any argument of this nature is therefore waived on appeal. *See, e.g.*, *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978); *Stueber v. Gallagher*, 812 So. 2d 454, 456 (Fla. 5th DCA 2002).

Second, Cross-Appellees' have highlighted only part of the record. On the same transcript page cited by Cross-Appellees, Mr. Jennings responded to Mr.

Pinsky's inquiry, in part, to clarify that "it's 21 days from notice, notice being both direct contact and publication in a newspaper of general circulation and in the FAW – or FAR." (R. 164).

Throughout the course of this litigation, Balearia has conceded that Mr. Pinsky was Balearia's chosen representative in these administrative proceedings. Balearia admits that Mr. Pinsky communicated with Ms. Anne Ahrendt via e-mail in December 2018 about attending and speaking at the Committee's January 2019 meeting. (R. 686). The record shows that Mr. Pinsky attended the January 2019 meeting and opposed the Committee's vote to approve the Notice of Intent. (R. 150-53). Balearia also concedes that Mr. Pinsky sent Ms. Ahrendt emails after the January 2019 meeting. (R. 688).

Despite Mr. Pinsky's numerous email communications with Ms. Ahrendt and his personal representation of Balearia before the Committee, Cross-Appellees now argue that Mr. Pinsky could not have understood the email Ms. Ahrendt sent Mr. Pinsky and others on January 22, 2019. But the email was clear. The subject line of the email read: "Filed Port Everglades Notice of Intent to Modify Rates." (R. 573). The attachment was titled: "Port Everglades – NOTICE OF INTENT TO MODIFY THE PORT OF EVERGLADES RATE OF PILOTAGE." (R. 573). It is also immaterial that the text of the email did not contain a notice of hearing rights because the attached Notice of Intent included that information.

Though it is hard understand how receiving this email four days after the January 2019 meeting could be confusing, at a minimum, any reasonable person would have had an obligation to conduct further due diligence. This is particularly true considering the sender of the email was the same person with whom Mr. Pinsky had been communicating via email for months regarding the Committee's Notice of Intent. *See Symons v. State, Dep't of Banking & Finance*, 490 So. 2d 1322, 1324 (Fla. 1st DCA 1986) ("[A] person has no right to shut his eyes or ears to avoid information and then say he had no notice; it will not suffice the law to remain willfully ignorant of a thing readily ascertainable when the means of knowledge is at hand.").

Furthermore, there is no *evidence* in the record that Mr. Pinsky failed to read Ms. Ahrendt's January 22nd email and attached Notice of Intent or that Mr. Pinsky found the email confusing. Despite having the opportunity to do so, Balearia failed to provide any sworn statements or affidavits from Mr. Pinsky, and Balearia did not ask Mr. Pinsky to testify before the Committee at the April 2019 hearing. All one can find in the record is argument by an attorney who works for the same employer as Mr. Pinsky. Cross-Appellees should thus not be permitted to speculate about matters that are not part of the record on appeal.

CONCLUSION

Because Balearia's filing was submitted to the Committee more than 21 days after Balearia received actual notice of the Committee's Notice of Intent, Balearia's petition for administrative hearing is untimely. Pursuant to section 310.151(4)(a), the Pilots respectfully request that this Court grant the Pilots' cross-appeal and reverse the Committee's ruling because Baleria's petition must be dismissed.

Respectfully submitted on May 29, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 29, 2020, this brief was filed with the Florida First District Court of Appeal by using the Florida Courts e-Filing Portal and a true and correct copy of the foregoing was served by email to:

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