

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTH FLORIDA CARGO CARRIERS)
ASSOCIATION, INC.,)
)
Petitioner,)
)
vs.) Case No. 97-3834RX
)
DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
PILOTAGE RATE REVIEW BOARD,)
)
Respondent,)
)
and)
)
FLORIDA STATE PILOTS)
ASSOCIATION, INC.,)
)
Intervenor.)
_____)

FINAL ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on December 9-11, 1997, in Tallahassee, Florida.

APPEARANCES

For Petitioner: William L. Hyde, Esquire
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For Respondent: John J. Rimes, III, Esquire
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For Intervenor: David M. Caldevilla, Esquire
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STATEMENT OF THE ISSUE

The issue presented is whether Rule 61E13-2.012, Florida Administrative Code, is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On August 18, 1997, Petitioner South Florida Cargo Carriers Association, Inc., filed a Petition Seeking an Administrative Determination of the Invalidity of an Existing Rule. On September 9, 1997, this cause was consolidated with DOAH Case No. 97-3656, styled South Florida Cargo Carriers, Petitioner vs. Department of Business and Professional Regulation, Pilotage Rate Review Board, and Port Everglades Pilots' Association, Respondents.

On October 20, 1997, the Florida State Pilots Association, Inc., filed a Petition to Intervene in support of the Rule. That Petition was granted by Order entered November 20, 1997.

A Recommended Order in DOAH Case No. 97-3656 has been entered immediately following entry of this Final Order.

Petitioner's request for official recognition of Rule 61E13-2.012, Florida Administrative Code, and of the Florida House of Representatives Committee on Streamlining Governmental Regulations Final Bill Analysis & Economic Impact Statement for CS/SBs 2290 and 2288 was granted by Order entered on December 8,

1997. The parties also stipulated to certain factual information in the Prehearing Stipulation filed in the consolidated cases. No other evidence was offered by the parties to this proceeding.

All parties filed post hearing proposed orders. Those documents have been considered in the entry of this Final Order.

FINDINGS OF FACT

1. Petitioner South Florida Cargo Carriers Association, Inc., is a Florida not-for-profit corporation with its principal office in Miami, Florida. Petitioner's purpose is to promote, advance, and secure laws, rules and regulations concerning vessels utilizing the navigable waters of the State of Florida, in particular the Port of Miami and Port Everglades, in order that the waters, harbors, and ports of the State and the environment, life, and property of all persons be protected to the fullest extent possible consistent with sound financial principles. Petitioner consists of the following companies: members of the Florida-Caribbean Cruise Association; Maersk, Inc.; Seaboard Marine; Kirk; SeaLand; Zim; Cari Freight; Thompson Shipping, and Burmuth.

2. Intervenor Florida State Pilots Association, Inc., is a Florida not-for-profit corporation. It is a voluntary organization whose membership is comprised of all individual pilot associations serving the various ports of the State of Florida, as well as approximately 100 pilots licensed by the State of Florida. Among other things, Intervenor advances and defends the interests of its membership on the state level.

3. The Port Everglades Pilots' Association (hereinafter "PEPA") is an association composed of present and retired harbor

pilots that is treated as a partnership for tax purposes and which performs the pilotage services at Port Everglades. PEPA and its affiliates Port Everglades Pilots, Inc., and PEP, Inc., are located in Fort Lauderdale. The purpose of PEPA is to provide pilotage services in Port Everglades in a safe and efficient manner and in compliance with the provisions of Chapter 310, Florida Statutes, the rules promulgated thereunder, and any other provisions of law governing the provision of pilotage services. As such, PEPA is entitled to charge pilotage rates as provided in Section 310.151, Florida Statutes, and, as further provided therein, to seek rate changes by filing a petition with the Department of Business and Professional Regulation, Pilotage Rate Review Board.

4. A number of Petitioner's members are affected by the rates of pilotage set for Port Everglades, inasmuch as they are required by Chapter 310, Florida Statutes, to utilize and compensate the pilots whose rates are established by the Board, and they are utilizing and compensating pilots in accordance with the rates currently established for Port Everglades.

5. In January 1997 PEPA submitted to the Board an application for an increase in the pilotage rates for Port Everglades. In February 1997 Petitioner submitted its own application for a decrease in the rates of pilotage for Port Everglades.

6. On May 20, 1997, the Board held a public hearing on both

applications. At the conclusion thereof, the Board preliminarily determined to grant PEPA's application for a rate increase in its entirety and to deny Petitioner's application for a rate

decrease. The Board's preliminary determination was reduced to writing on July 3, 1997.

7. On July 28, 1997, Petitioner filed with the Board a Petition for Formal Administrative Hearing challenging the Board's decision to grant PEPA's application and to deny Petitioner's application. The Board thereafter transmitted that Petition to the Division of Administrative Hearings.

8. The Board's transmittal letter filed August 7, 1997, cautioned the Division not to carry out its full statutory functions because:

it is the Board's position , as expressed in rule 61E13-2.012(3), F.A.C., that the resolution of any disputed issue of fact by an [Administrative Law Judge] cannot result in a recommendation from that ALJ as to what the rate should be. The ALJ's recommendation should only extend to resolving the disputed issues of material fact. Subsequently, and based upon the resolved issues of fact, the Pilotage Rate Review Board will set the appropriate rates.

9. On August 18, 1997, Petitioner filed its Petition Seeking an Administrative Determination of the Invalidity of an Existing Rule, challenging Rule 61E13-2.012(3), Florida Administrative Code, pursuant to Section 120.56(3), Florida Statutes.

10. Petitioner has standing to file and maintain this rule challenge proceeding.

11. Intervenor has standing to intervene in this rule challenge proceeding.

12. Rule 61E13-2.012(3), Florida Administrative Code, was adopted before October 1, 1996. It was included on a list submitted by the Pilotage Rate Review Board in accordance with Section 120.536(2), Florida Statutes. It was subsequently amended by the Board, effective October 14, 1997, so as to delete all portions of the Rule except for Subsection (3) which is now the entire Rule.

CONCLUSIONS OF LAW

13. Rule 61E13-2.012, Florida Administrative Code, effective October 14, 1997, provides as follows:

Determination of Disputed Issues of Material Fact; Formal or Informal Hearings. Since the determination of the actual rate of pilotage to be imposed at any port is a quasi-legislative act, the resolution of any disputed issue of material fact by a hearing officer [administrative law judge since October 1, 1996] assigned by the Division of Administrative Hearings shall not result in a recommendation from the hearing officer as to the appropriate rate to be imposed at any port area in question. The hearing officer's recommendation shall only extend to resolving disputed issues of material fact which result from a party's disputing the underlying facts upon which the Board has suggested intended rates for the port area in question. (See Rule 61E13-2.010, F.A.C.). Specific authority 310.151(1)(c) FS. Law Implemented 310.151, 120.57 FS. History--New 8-8-95, Amended 10-14-97.

14. Section 310.151(1)(c), Florida Statutes, the Board's cited authority for the Rule, authorizes the Board "to adopt such rules as are consistent with law".

15. Subsection (4) of Section 310.151, Florida Statutes,

provides that the Board shall afford an administrative proceeding to any person substantially affected by a Board decision as to a change in rates. Subsection (4) specifies in two places that

there shall be a "hearing in accordance with the Administrative Procedure Act." Subsection (4) further provides that:

If the board concludes that the petitioner has raised a disputed issue of material fact, the board shall designate a hearing, which shall be conducted by formal proceeding before an administrative law judge assigned by the Division of Administrative Hearings pursuant to ss. 120.569 and 120.57(1), unless waived by all parties.

No further description of the hearing the Board is required to afford is contained in Section 310.151, Florida Statutes.

16. Section 120.536, Florida Statutes, provides, in part, as follows:

(2) By October 1, 1997, each agency shall provide to the Administrative Procedures Committee [of the Legislature] a listing of each rule, or portion thereof, adopted by that agency before October 1, 1996, which exceeds the rulemaking authority permitted by this section. . . .

(3) . . . A rule adopted before October 1, 1996, and included on a list submitted by an agency in accordance with subsection (2) may not be challenged before July 1, 1999, on the grounds that it exceeds the rulemaking authority or law implemented as described by this section.

17. The Board reported Rule 61E13-2.012, Florida Administrative Code, to the Administrative Procedures Committee, thereby admitting that it has no authority for the existence of its Rule and shielding it from attack until July 1, 1999, only on the grounds that the Rule exceeds the Board's rulemaking authority. Although it is questionable whether a Rule amended subsequent to October 1, 1996, is entitled to be shielded from attack on the ground that it exceeds rulemaking authority,

Petitioner has not challenged the Rule on that basis.

18. Section 120.57(1) governs proceedings before the Division of Administrative Hearings. Subsection (1)(i) provides, in part, as follows:

The presiding office shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order. All proceedings conducted pursuant to this subsection shall be de novo.

Subsection (1)(j) provides, in part, as follows:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction.

19. Chapter 120 is not a law over which the Pilotage Rate Review Board has substantive jurisdiction, and the Board's interpretation of its provisions is entitled to no deference. It is the Legislature which can determine what entities and activities are subject to Chapter 120, not the Board.

20. It is axiomatic that Chapter 120, Florida Statutes, applies to all agency proceedings. Exemptions therefrom appear in Sections 120.80 and 120.81, Florida Statutes. There is no provision within those Sections which exempts the Department of Business and Professional Regulation or any of its boards or, specifically, its Pilotage Rate Review Board from the provisions of Section 120.57(1)(i).

21. The only exemption from the requirements of Chapter 120 as to the content of recommended orders and the extent of an

administrative proceeding pursuant to Sections 120.569 and 120.57 appears in Section 120.80(3)(b), which specifically provides that in certain cases involving the Department of Banking and Finance, administrative law judges shall submit a written report consisting only of findings of fact and rulings on evidentiary matters rather than a recommended order. The Legislature has given the Pilotage Rate Review Board no such exemption.

22. Accordingly, a recommended order in a case involving the Pilotage Rate Review Board must comply with the requirements of Section 120.57(1)(i). The effect of the Rule under challenge in this proceeding is that the Board has given itself an exemption from part of Section 120.57(1), something which the Legislature chose not to do.

23. Section 120.52(8), Florida Statutes, provides, in part, as follows:

'Invalid exercise of delegated legislative authority' means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

* * *

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

* * *

(e) The rule is arbitrary and capricious. . . .

24. Petitioner correctly argues that the Board's Rule is invalid because, by limiting the role of an administrative law

judge in entering a recommended order, the Board's Rule specifically contravenes both provisions of law it purports to implement, i.e., Section 120.57 and Section 310.151, Florida Statutes. Petitioner further correctly argues that by contravening both Sections 120.57 and 310.151, the Rule is arbitrary and capricious.

25. Rule 6E13-2.012, Florida Administrative Code, expressly conflicts with the authority vested in an administrative law judge pursuant to Section 120.57(1), Florida Statutes, to issue a recommended order, containing findings of fact and conclusions of law, and to make a recommended disposition. The Rule also expressly conflicts with Section 310.151(4) which requires the administrative hearing to conform to Chapter 120 and with Section 310.151(1)(c) which requires the Board to promulgate only rules that are consistent with law. Further, nothing in Sections 120.57 or 310.151 authorizes the Board to promulgate rules for conducting administrative proceedings.

26. In its proposed final order, the Board argues that Petitioner has no standing to maintain this proceeding. Since the Board stipulated in the prehearing stipulation filed in this cause that Petitioner does have standing, the Board's argument is without merit.

27. In its proposed final order, the Board also argues that the Rule is valid because it is reasonably related to legislative intent. Chapter 120, Florida Statutes, was substantially

amended, effective October 1, 1996. In two distinct places, the Legislature added the following language:

No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy.

Sections 120.52(8) and 120.536(1), Florida Statutes. Further, the Final Bill Analysis for amended Chapter 120 specifically sets forth the Legislature's intent to overrule case law relied upon by the Board which permits agencies to promulgate rules that are reasonably related to the purpose of the enabling legislation. See, for example, page 23.

28. The Board also argues that rate-setting is quasi-legislative and that, therefore, courts cannot set rates. In support of that argument, the Board cites case law involving constitutional agencies, legislative agencies, and independent commissions and cases decided prior to Florida's Administrative Procedure Act. The Division of Administrative Hearings is not a court; it is an agency within the executive branch of government, just like the Department of Business and Professional Regulation. The Board is merely one of the many boards housed within that Department.

29. It is true, as argued by the Board, that the Legislature may delegate the authority to set rates to an

administrative agency, and it has done so with the Board. However, it has also directed that when there are disputed facts involved with rate setting, the Board shall refer the matter to the Division of Administrative Hearings, and the Division shall exercise the power and responsibility given to it in Sections 120.569 and 120.57(1) to enter a recommended order containing findings of fact, conclusions of law, and a recommended disposition. The Board's characterization of its function as quasi-legislative does not authorize the Board to ignore legislative directives.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED THAT Petitioner's Petition Seeking an Administrative Determination of the Invalidity of an Existing Rule be and the same is hereby granted, and Rule 61E13-2.012 be and the same is hereby determined to be an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 24th day of February, 1998, in Tallahassee, Leon County, Florida.

LINDA M. RIGOT
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 24th day of February, 1998.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.