

BOARD OF LAND AND NATURAL RESOURCES
FOR THE STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation) J. LEINA'ALA SLEIGHTHOLM'S
District Use Permit (CDUP) HA-3568 for) MEMORANDUM IN SUPPORT OF
) TEMPLE OF LONO MOTION TO
The Thirty Meter Telescope at the Mauna) FILE MOTION OUT OF TIME; COS
Kea Science Reserve, Kahohe Mauka,)
Hamakua District, Island of Hawaii,)
TMK (3) 4-4-015:009)
_____)

J. LEINA'ALA SLEIGHTHOLM'S MEMORANDUM IN SUPPORT OF
TEMPLE OF LONO MOTION TO FILE MOTION OUT OF TIME

I. INTRODUCTION

On August 8, the Temple of Lono filed DOC-179 requesting permission of the Hearing Officer to file a motion out of time.

On August 9, TMT filed DOC-183 that contained objections to the request made in DOC-179.

On August 12, the Hearing Officer set a schedule of August 22 for all responses to the Temple's motion and August 29 for the hearing on the motion.

This memorandum is filed in support of the Temple motion.

II. ARGUMENT

A. The Temple Motion is filed in a timely manner.

TMT objects because the "deadline to file pre-hearing motions passed on July 18" and the "deadline for filing responses to pre-hearing motions passed on August 1." DOC -183 at 2.

The objection ignores the fact that the motion is a motion to file out of time. DOC-179. To object that the motion should be denied because it is filed out of time makes no sense.

The Temple requested permission to file out of time because the time for pre-hearing motions ran out. That the time for pre-hearing motions has run out does not mean the Hearing Officer cannot allow a new motion to be filed, if there are good reasons for allowing the motion to be filed. The Hearing Officer has the discretion to allow the filing of a motion out of time.

The TMT opposition based on timeliness is frivolous.

The University opposes the Temple motion as an attempt to file a further response to the University's opposition to the Temple's earlier motion for partial summary judgment. DOC-194 at 1-4.

The Temple Motion to File Motion Out of Time is clearly a request to file a new motion, not to reply further to an earlier filed motion.

The University opposition based on timeliness is also frivolous.

**B. The seriousness of the issues raised
requires the Hearing Officer grant the motion.**

The motion that the Temple seeks to file, DOC-179, Exhibit 2, raises very serious issues regarding an attack on the Temple by the Applicant for the permit. See also DOC-176 at 6-9.

The Temple seeks permission to file a motion arguing that the attack disqualifies the University from being granted the permit sought in this proceeding.

The seriousness of the issues raised and their relevance and materiality to the ultimate decision the Hearing Officer will make on whether to recommend the granting of the permit or not compels permitting the filing of the motion to dismiss out of time.

C. The protection of the University requires granting the motion.

The attack by the University arose in the context of a motion for partial summary judgment filed by the Temple. DOC-78.

The University launched the attack as part of their opposition to the Temple's motion. DOC-135 at 14-15.

The Temple filed a reply to the opposition that included criticism of the attack as an *ad hominem* attack without basis and irrelevant to the motion for partial summary judgment. DOC-176 at 6-9.

The Temple also criticized the attack as a "full scale assault on the Temple that is both unsupported by the facts and beyond the bounds of decency." Ibid. at 7.

Calling the Temple a fundamentalist organization, characterizing the Temple's objections to the telescope as an attempt to impose religious hegemony on the entire mountain, and accusing the Temple of bringing harm to society are all assertions designed to portray the Temple as indistinguishable from ISIL or ISIS.

Ibid. at 8.

The Temple described the attack as an "attempt to characterize the Temple as essentially terrorists." Id.

The motion for a partial summary judgment then came before the Hearing Officer on August 5, 2016.

The Temple again directed the attention of the Hearing Officer to the libelous remarks made by the University.

Again, the Hearing Officer had no response.

At the pre-hearing conference, the University chose to stand on their papers opposing the motion for partial summary judgment and offered no defense for the remarks to which the Temple objected.

Having failed to defend the University at the pre-hearing, the same lawyers now seek to prevent the filing of a motion to dismiss that would require them to defend the University from the Temple position that the attack in question demonstrates a disqualifying animus towards the Traditional Hawaiian Faith.

If the motion to file motion out of time is denied, the record on the matter of the attack will then contain the following: (1) the attack on the Temple by the University; (2) the Temple's responses in the reply and at the pre-hearing conference, which included serious charges against the University based on the attack; (3) the Temple's motion to dismiss, DOC-179, Exhibit 2, never litigated; (4) the University's argument that the Temple motion to file motion out of time is an attempt to "restate the relevancy of its creed that has been challenged fairly and firmly as unconstitutional in the University's opposition brief."^[1] DOC-194 at 3 (emphasis added). The one direct defense of the attack offered is a single-sentence footnote which stated:

The Temple (falsely) characterizes the University's opposition as "libelous diatribe." See Temple Mot., Ex. 2 [Mem] at 1

DOC-194 at 3.

The Temple argues that the University's attack is false, DOC-179, Exhibit 2, Mem. at 2-3, 5-6, 8-9; malicious, ibid. at 7; made with no evidentiary support, id.; and irreparably harmful to the Temple. ibid. at 10, n. 7, 11. [2]

The Temple's motion to dismiss argues that the University is responsible for the actions of its attorneys. DOC-179, Exhibit 2, Mem. at 10-11.

What will be missing from the record is any substantive attempt to defend the University from all these charges leveled by the Temple.

Granting the Temple's motion requesting permission to file a motion to dismiss based on the attack would force the University attorneys to defend their client.

D. The conflict of interest between the University's attorneys and the University calls for the attorneys

to disqualify themselves from further representation.

As just noted, the attorneys representing the University did not use the opportunity presented by the pre-hearing conference on August 5 to provide a defense of their client to the charges by the Temple. Instead, they chose to stand on their papers, which did not address the charges.

Now they oppose the Temple's motion to file a motion to dismiss out of time that would provide them with a second opportunity to defend their client. They prefer to leave their client defenseless by avoiding that opportunity.

There is an obvious conflict of interest in the attorneys currently representing the University continuing to do so. Instead of defending their client, the attorneys for the University are defending themselves from being held accountable for the attack at issue.

By leaving themselves in the position of making the decision on whether to defend their client or protect themselves from accountability, the lawyers continue a conflict of interest that arose when the Temple challenge to the attack made their conduct an issue in the proceeding.

The Hearing Officer should grant the motion to file the motion to dismiss and address the obvious conflict of interest that continued representation of the University by the same attorneys would represent.

E. The strategy of the attorneys is to have blame for the results of their misconduct fall on the Hearing Officer.

The strategy of the attorneys is to have the Hearing Officer deny the Temple's motion to file out of time because such a ruling would be clearly reversible error.

If the motion to dismiss is not heard, the permit is granted, and litigation ensues, the probability of a reversal based on not the Hearing Officer not allowing the issues raised by the Temple's motion to dismiss to be heard is quite high. The first reversal in this proceeding resulted from a failure to give opponents of the application an opportunity to be heard prior to granting the permit.

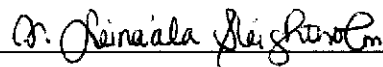
If there were such a reversal, however, the blame would fall on the Hearing Officer for denying the Temple the opportunity to be heard on a potentially dispositive motion, not on the attorneys who created the potentially dispositive issues.

III. CONCLUSION

The Temple of Lono is seeking to put before the Hearing Officer evidence of disqualifying behavior on the part of the Applicant for the permit at issue in this proceeding. The motion to file motion out of time should be granted to ensure that evidence and argument that the Temple seeks to place before the Hearing Officer is considered in all its implications.

If the motion is denied, the University will lose its opportunity to defend itself and the attorneys will shift blame away from themselves and on to the Hearing Officer.

The Hearing Officer should protect the University from its attorneys failures and reject the attempt to set up the Hearing Officer to take the fall.



J. Leina'ala Sleightholm

Dated: August 22, 2016

[1] The University attempts to argue that the motion to dismiss that the Temple seeks to file is an effort to re-litigate the Temple's motion for partial summary judgment. DOC-194 at 3 ("The Temple

wants to respond, **yet again**, to the University's opposition [to the motion for partial summary judgment]." (emphasis in original). Instead, the Temple seeks to file a motion to dismiss that argues the Applicant is disqualified from receiving the permit based on animus shown towards the Traditional Hawaiian Faith. That issue has never been litigated.

[2] Such conduct violates the Hawai'i Rules of Professional Conduct 8.4(c) ("It is professional misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.")

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