

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI‘I

IN THE MATTER OF)	Case No. BLNR-CC-16-002
)	
Contested Case Hearing Re Conservation District)	Minute Order No. 17 (Order
Use Application (CDUA) HA-3568 For the)	Denying Motions Objecting
Thirty Meter Telescope at the Mauna Kea Science)	to the Hearing Officer and
Reserve, Ka‘ohe Mauka, Hamakua, Hawai‘i)	the Hearing Officer Selection
TMK (3) 4-4-015:009)	Process; Certificate of
)	Service)
)	
)	
)	

Minute Order No. 17 (Order Denying Motions Objecting to the Hearing Officer and the Hearing Officer Selection Process)

I. INTRODUCTION AND BACKGROUND

This order addresses all pending motions objecting to the hearing officer and the hearing officer selection process. We have grouped the motions together as follows:

1. Mauna Kea Anaina Hou, Kealoha Pisciotta¹, Clarence Kukauakahi Ching, Flores-Case Ohana, Deborah J. Ward, Paul K. Neves, and Kahea: The Hawaiian Environmental Alliance (collectively, the “MKAH parties”) objected to the hearing officer and the hearing officer selection process on April 15, 2016 [Doc. 5] and again on May 2, 2016 [Doc. 13]. The Board of Land and Natural Resources (the “Board”) denied the objections by Minute Order No. 4 [Doc. 14].

The MKAH parties subsequently filed a motion to reconsider Minute Order No. 4 (hereinafter “second motion”) [Doc. 31]. The second motion also objected to the hearing officer

¹ Ms. Pisciotta, individually, is not a party to the contested case, but she is the president and representative of Mauna Kea Anaina Hou.

and the hearing officer selection process. In addition, the second motion objected to (1) the composition of the hearing officer selection committee, specifically the participation of one committee member, Board Member Christopher Yuen; (2) the State of Hawai‘i’s responses to requests by the MKAH parties for public records; and (3) what the MKAH parties perceived as favorable treatment towards the Thirty Meter Telescope project by adopting an alleged “fast-tracked” process. The second motion was denied by Minute Order No. 9 [Doc. 63].

The MKAH parties have filed a motion: (1) renewing their objection to the hearing officer and the hearing officer selection process; and (2) supplementing the arguments made in their motion to disqualify the Board and the hearing officer’s counsel (hereinafter “MKAH Motion”) [Doc. 130]. The Board now addresses portions of the MKAH Motion that relate to the hearing officer and the hearing officer selection process.

2. Harry Fergerstrom filed three motions (collectively, the “Fergerstrom Motions”), which include a motion to remove the hearing officer, a deputy attorney general, and the custodian of records for the Office of Conservation and Coastal Lands from this contested case [Doc. 96]. Kalikolehua Kanaele [Doc. 123] and Richard L. DeLeon [Doc. 122] filed joinders with the Fergerstrom Motions. TMT International Observatory, LLC (“TIO”) filed an opposition to the Fergerstrom Motions [Doc. 144]. The Board now addresses the portion of the Fergerstrom Motions and responses that relate to the hearing officer.

3. Dwight J. Vicente filed a motion to disqualify the hearing officer and the State of Hawai‘i for lack of jurisdiction (hereinafter, the “Vicente Motion”) [Doc. 80]. By Minute Order No. 14, the Board denied the Vicente Motion [Doc. 124].

The Temple of Lono subsequently filed a motion (hereinafter, the “Lono Motion”) to vacate Minute Order No. 14 and for additional time to respond to the Vicente Motion [Doc. 127].

The Temple of Lono also filed a statement in support of the Vincent Motion [Doc. 132]. Mr. Vicente filed a statement in support of the Lono Motion [Doc. 169]. Stephanie-Malia Tabbada filed a motion in support of the Lono Motion and in support of Mr. Vicente's statement in support [Doc. No. 174]. TIO filed an opposition to the Lono Motion [Doc. 150] and the Temple of Lono filed a reply to the opposition filed by TIO [Doc. 177]. The Board now addresses portions of the Lono Motion, statements, and responses that relate to the hearing officer.

We want to make clear that Minute Order No. 14 [Doc. 124] only addresses Mr. Vincentes's motion to disqualify the hearing officer on the basis that the State of Hawai'i lacks subject matter jurisdiction to hear the contested case. The Board delegated the conduct of the contested case hearing to the hearing officer and authorized the Chairperson to engage the services of the hearing officer [Doc. 3]. Pursuant to Hawai'i Administrative Rule ("HAR") 13-1-32(c),

The presiding officer shall have the power to give notice of the hearing, administer oaths, compel attendance of witnesses and the production of documentary evidence, examine witnesses, certify to official acts, issue subpoenas, rule on offers of proof, receive relevant evidence, hold conferences before and during hearings, rule on objections or motions, fix times for submitting documents, briefs, and dispose of other matters that normally and properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing.

Until the hearing officer submits her proposed decision and order to the Board, only matters relating to the selection and appointment of the hearing officer are properly before the Board.²

After reviewing the record and following deliberations on August 12, 2016, the Board DENIES the motions for the reasons set forth in this minute order.

² Requests for disqualification or recusal of Board members will, of course, be dealt with by the Board or the member, as appropriate.

II. DISCUSSION

A. Standard of Review

For the Board to reconsider a decision it has been made, the party filing the motion must show that:

- (1) New information not previously available would affect the result; or
- (2) A substantial injustice would occur.

HAR § 13-1-39(a).

As the Supreme Court has often stated,

“the purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion.” *Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding.*

Sousaris v. Miller, 92 Hawai‘i 505, 513, 993 P.2d 539, 547 (2000) (internal brackets and citations omitted; emphasis added). To the extent that the motions repeat what was previously stated and do not present new evidence or arguments that could not have presented earlier or show that a substantial injustice would occur, the Board DENIES the motions.

B. The MKAH Motion

The MKAH parties claim foul because the deadline set by the Board for filing comments and objections to the hearing officer’s appointment (April 15, 2016) was after the Board had entered into a contract with the hearing officer (March 31, 2016). The hearing officer’s redacted contract was provided to the MKAH parties on April 14, 2016. Tax numbers, the hourly and total compensation amount, and a list of special conditions were the only redactions made at that time. Otherwise, the MKAH parties received the entire contract. There is no new information that the MKAH parties did not have in their possession when they filed their objections to the hearing officer on April 15, 2016 [Doc. 5], May 2, 2016 [Doc. 13], and May 13, 2016 [Doc. 31],

and before the Board issued Minute Order No. 4 on May 6, 2016, and Minute Order No. 9 on June 3, 2016. The MKAH parties do not satisfy HAR § 13-1-39(a).

As to the MKAH parties' due process allegations, the Board followed the State Procurement Code in engaging the services of the hearing officer. *See* HRS § 103D-304. Although the procurement code does not require the Board to provide an opportunity for the public to comment on a contract for professional services, the Board solicited the parties' comments after informing them that a hearing officer had been selected. Entering into the contract was not a presumption that the hearing officer could not be disqualified. Had the Board been satisfied after reviewing all comments that there was sufficient reason to not proceed with the hearing officer, there is nothing in the hearing officer's contract that would have precluded the Board engaging another hearing officer. The MKAH Motion has no merit. The MKAH Motion is DENIED in part as it relates to the hearing officer and the hearing officer selection process.

C. The Fergerstrom Motions

The Fergerstrom Motions allege a conspiracy between "The TMT, TIO and PUEO" as the basis for his request to remove the hearing officer. Mr. Fergerstrom, however, provides no facts to support his allegation. The Fergerstrom Motions are DENIED in part as they relate to the hearing officer.

D. The Lono Motion

The Lono Motion seeks to vacate Minute Order No. 14 and requests additional time to respond to the Vicente Motion. In support, the Temple of Lono claims that the Board issued Minute Order No. 14 before the deadline to respond to the Vicente Motion had expired. The deadline referred to by the Temple of Lono was the deadline for responses to pre-trial motions

set by the hearing officer [Doc. 115]. That deadline is not applicable to a motion to disqualify the hearing officer. Although the Board delegated the conduct of the contested case hearing to the hearing officer, the selection and appointment of the hearing officer and the task of addressing motions to disqualify the hearing officer clearly remain within the authority of the Board.

The Vicente Motion alleges that the hearing officer is disqualified or cannot serve because she lacks subject matter jurisdiction over the contested case hearing because Hawai'i is not a state of the United States [Doc. 80]. The Temple of Lono filed a response to the Vicente Motion [Doc. 132] without waiting for the Board (or the hearing officer) to rule on its motion. The Temple of Lono's response repeats the Vicente Motion. As we stated in Minute Order No. 14, the State's title to ceded land is "unclouded." See *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009). See also *State v. Kaulia*, 128 Hawai'i 479, 487, 291 P.3d 377, 385 (2013):

we reaffirm that "[w]hatever may be said regarding the lawfulness" of its origins, "the State of Hawai'i ... is now, a lawful government." *State v. Fergerstrom*, 106 Hawai'i 43, 55, 101 P.3d 652, 664 (App.2004), *aff'd*, 106 Hawai'i 41, 101 P.3d 225 (2004). Individuals claiming to be citizens of the Kingdom and not of the State are not exempt from application of the State's laws.

State v. Kaulia, 128 Hawai'i 479, 487, 291 P.3d 377, 385 (2013).

The hearing officer is not disqualified for lack of subject matter jurisdiction or on any other basis. The Lono Motion is DENIED in part as it relates to the hearing officer.

III. CONCLUSION

The MKAH Motion, the Fergerstrom Motions, and the Lono Motion are HEREBY DENIED IN PART as they relate to the hearing officer and the hearing officer selection process. This order may be executed in counterparts.

DATED: Honolulu, Hawai'i, August 26, 2016.

SUZANNE D. CASE, Chairperson
Board of Land and Natural Resources

STANLEY H. ROEHRIG, Member

KEITH "KEONE" DOWNING, Member

JAMES A. GOMES, Member

THOMAS OI, Member

CHRISTOPHER YUEN, Member

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568
for the Thirty Meter Telescope at the Mauna
Kea Science Reserve, Ka'ohē Mauka,
Hāmākua, Hawai'i, TMK (3) 4-4-015:009

BLNR Contested Case HA-16-02
Document title: **Minute Order 17**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced document was served upon the following parties by the means indicated:

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