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April 21, 2016

Suzanne Case, Chairperson  
and Members of the Board of Land & Natural Resources  
Department of Land & Natural Resources, State of Hawai'i  
Administrative Proceedings Office  
1151 Punchbowl Street, Room 130  
Honolulu, HI 96813

Subject: Case No. BLNR-CC-16-002: Response to Petitioners' Objections to Selection Process and to Appointment of Hearing Officer Made Pursuant to Minute Order No. 1, Dated March 31, 2016, Filed on April 15, 2016

Dear Chairperson Case and Members of the Land Board:

As you are aware, we represent the University of Hawai'i at Hilo (the "University") in the above-referenced matter before the Board of Land & Natural Resources (the "Board"). On April 15, 2016, in response to Minute Order No. 1 and Minute Order No. 2, entered on April 1, 2016 and April 8, 2016, respectively, Richard N. Wurdeman filed Petitioners' Objections to Selection Process and to Appointment of Hearing Officer Made Pursuant to Minute Order No. 1, Dated March 31, 2016 ("Petitioners' Objections"), which details various objections to the Board's process in appointing a hearing officer in this matter. In response, we write on behalf of the University to address the issues raised by Mr. Wurdeman. For the reasons set forth herein, the University believes that Mr. Wurdeman's objections lack merit, and that the Board acted consistent with applicable laws in its delegation of authority to a hearing officer pursuant to Section 13-1-32(b) of the Hawai'i Administrative Rules ("HAR"), and the subsequent selection of Judge Ricki May Amano pursuant to Hawai'i Revised Statutes ("HRS") Chapter 103D. Nonetheless, the University believes it would be helpful if a status conference or similar proceeding were held pursuant to the Board's contested case rules to allow the parties to present their objections directly to the Board, while allowing the Board an opportunity to clarify the process that it followed or otherwise respond to the issues raised by the parties in this contested case proceeding.

A. **MR. WURDEMAN'S ARGUMENTS REGARDING THE HEARING OFFICER SELECTION PROCESS LACK MERIT**

1. The Board Properly Issued the "Solicitation Notice" Prior to Delegation of the Conduct of the Contested Case to a Hearing Officer

In Petitioners' Objections, Mr. Wurdeman argues that the Board improperly issued the Notice to Attorneys Interested in Providing Legal Services to the Department of Land and Natural Resources as the Hearing Officer in the Thirty Meter Telescope CDUP Permit Contested Case, originally published on January 29, 2016 ("Solicitation Notice), prior to the delegation of the conduct of the contested case hearing to a hearing officer at the Board's February 26, 2016 meeting. *See* Petitioners' Objection at 7. This argument is without merit.

First, Mr. Wurdeman does not cite to any legal authority supporting the proposition that the delegation of the conduct of the contested case must precede the issuance of the Solicitation Notice. We were likewise unable to find any authority supporting this argument.

Second, HRS § 103D-304, which provides the authority for the procurement of professional services by state agencies, does not specifically require formal acts of delegation prior to publishing a notice. In fact, the statute requires that the Board publish a notice at the beginning of each fiscal year for "professional services the agency **anticipates** needing," demonstrating the intent that such notices be published prior to the definite/concrete need for the professional services – *i.e.*, the delegation of the conduct of the contested case to a hearing officer. HRS § 103D-304(b) (emphasis added). Moreover, HRS §§ 103D-304(b)(1)-(3) specifically provides authority for supplemental notices, such as the Solicitation Notice published in this case, where the initial response is inadequate or new needs for professional services arise. These sections likewise do not contain a requirement that the notice must be published after a formal delegation. Therefore, it appears that such notices are an anticipatory precursor to the formal delegation of the conduct of a contested case hearing. Accordingly, the Solicitation Notice is not invalid simply because it was published prior to the Board's formal delegation at the February 26, 20216 meeting.

2. The Board's February 26, 2016 Meeting Falls Under the "Adjudicatory Functions" Exception to the "Sunshine Law"

Mr. Wurdeman's also argues that the February 26, 2016 Board meeting, whereat the Board delegated the conduct of the contested case to a hearing officer and authorized Chairperson Case to select a hearing officer, should have been conducting in an open meeting pursuant to HRS Chapter 92 (the "Sunshine Law"). *See* Petitioners' Objections at 7-8. In support of this argument, Mr. Wurdeman contends that the "adjudicatory functions" exception under HRS § 92-6(a)(2) does not apply to "preliminary procedural" matters such as the delegation of the conduct of a contested case hearing.<sup>1</sup> *Id.* at 8.

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<sup>1</sup> Under HRS § 92-6(a)(2), the Sunshine Law does not apply to boards exercising adjudicatory functions, such as conducting a contested case hearing pursuant to HRS § 91-8. *See Outdoor Circle v. Harold K.L. Castle Trust*

Again, Mr. Wurdeman does not cite legal authority in support the proposition that “preliminary procedural” matters do not fall under the “adjudicatory exception,” other than the dictionary definition of “adjudicatory process” and “adjudicatory hearing.” *Id.* Additionally, Mr. Wurdeman neglects to address the fact that the State of Hawai‘i Office of Information Practices (the “OIP”) has previously opined that the definition of “adjudicatory functions” includes the contested case hearing as a whole, not just the deliberative process. Ex. --, OIP Opinion Letter No. 04-14 at 3 (August 27, 2004). Therefore, it appears the “adjudicatory functions” exception should apply to actions related to the contested case hearing itself, including the decision to delegate authority to a hearing officer, as well as the selection of a hearing officer.<sup>2</sup>

3. The Board Did Not Fail to Give Notice to Commence the Contested Case Process Prior to the February 26, 2016 Meeting

Mr. Wurdeman argues that, even if the February 29, 2016 meeting was properly held outside of the Sunshine Law pursuant to the “adjudicatory functions” exception, the Board failed to provide prior notice to commence the contested case hearing process as required under HRS § 91-9. Again, this argument is without merit.

Under the plain language of HRS § 91-9, there is no requirement that the Board publish notice of the commencement of the contested case hearing process as a whole. Instead, the statute requires notice of contested case hearing itself, not for matters ancillary to the hearing, such as the decision to delegate authority to a hearing officer. This is evidenced by the fact that the statute requires the notice to include, amongst other things, a statement of the date, time, place, and nature of the hearing, demonstrating the intent that the notice is specific to the hearing itself, not the commencement of the process as a whole or for matters such as decision to delegate authority. *See* HRS § 91-9(b)(1).

Moreover, even if notice is required for the commencement of the process as a whole, such notice was provided at the commencement of the 2011 contested case proceedings, and remains applicable to the instant proceedings because the Third Circuit Court’s remand order, in

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*Estate*, 4 Haw.App. 633, 641, 675 P.2d 784, 790 (1983) (noting that the Sunshine Law does not apply to adjudicatory functions of administrative agencies other than the Land Use Commission).

<sup>2</sup> As previously noted in the University’s Response to Minute Orders Nos. 1 and 2 dated April 15, 2016, in OIP Opinion Letter No. 04-14 the OIP opined that the “adjudicatory functions” exception encompasses a staff briefing for a board regarding a pending contested case, even though the briefing occurred before the hearing itself. OIP Opinion Letter No. 04-14 at 5 (August 27, 2004). In so doing, the OIP held that the Hawai‘i statute does not specifically limit the exception to deliberations. *Id.* at 3. Moreover, the legislative history of the Sunshine Law indicates that the contested case process as a whole includes sufficient safeguards of the public interest, making the application of the Sunshine Law unnecessary in these types of situations. *Id.* (citing Senate Stand. Comm. Rep. No. 878, 8th Haw. Leg., 1st Sess., S.J. 1177, 1178 (1975)). For the foregoing reasons, the “adjudicatory functions” exception should apply to actions related to the contested case hearing itself, including the decision to delegate authority to a hearing officer, as well as the selection of a hearing officer. Therefore, from the information available, it appears that the Board properly exercised its discretion to delegate the conduct of a contested case hearing to a Hearing Officer without first holding a public hearing.

effect, caused the parties to essentially resume the contested case hearing process that commenced prior to the appellate proceedings here. *See Kepoo v. Kane*, 106 Haw. 270, 282, 103 P.3d 939, 951 (2005) (“It was concluded that ‘a remand order . . . does not terminate the administrative proceedings, but is instead only one stage of a single process which may continue to include a second agency hearing and appeal therefrom.’”).

**B. PROPOSED STATUS CONFERENCE**

Although the University believes the Board acted properly in the hearing officer selection process, we believe that it would be beneficial for the Board to hold a status conference to allow the parties in the contested case the opportunity to present their objections directly to the Board, while allowing the Board to clarify or respond to the procedural issues raised by the parties. In connection with this status conference, the Board may wish to explore alternative means to resolve any disputed issues. The Board could consider one or more of the following: First, the Board could appoint a special master pursuant to its authority under HRS 92-16(a)(3) to resolve the procedural issues that have and will arise in the proceeding including the selection process for a hearing officer. Second, in an abundance of caution, the Board may elect to pursue a service contract with the second ranked candidate on the list prepared by the selection committee pursuant to HRS § 103D-304(g). Third, the Board may decide to conduct the contested case hearings themselves or through a smaller subset of the Board, which would eliminate any issues regarding the selection of an outside hearing officer. The University strongly encourages the Board and the parties to expeditiously resolve the outstanding procedural issues in moving the current contested case proceedings forward.

Thank you for your consideration and the opportunity to comment on this matter.

Respectfully submitted,



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cc: Richard N. Wurdeman