

OCT 28 2016

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

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| IN THE MATTER OF |) | Case No. BLNR-CC-16-002 |
| |) | |
| Contested Case Hearing Re Conservation District |) | Minute Order No. 39 (Order |
| Use Application (CDUA) HA-3568 For the |) | Denying Renewed Motions to |
| Thirty Meter Telescope at the Mauna Kea Science |) | Disqualify Hearing Officer |
| Reserve, Ka'oho Mauka, Hamakua, Hawai'i |) | (Doc. 340)); Certificate of |
| TMK (3) 4-4-015:009 |) | Service |
| |) | |
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| |) | |

Minute Order No. 39 (Order Denying Renewed Motions to Disqualify Hearing Officer (Doc. 340))

This order addresses the motion and joinders to disqualify the hearing officer.

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") filed a Renewed Motion to Disqualify Hearing Officer on October 10, 2016. Doc. 340.

2. Temple of Lono ("Lono") filed a Substantive Joinder and Supplement to Petitioners Mauna Kea Anaina Hou et al.'s Renewed Motion to Disqualify Hearing Officer on October 10, 2016. Doc. 343. Lono also filed a Second Supplement and a Third Supplement, both on October 11, 2016 . Docs. 360, 361.

3. Mehana Kihoi ("Kihoi") filed a Joinder to the MKAH parties' motion on October 10, 2016. Doc. 358.

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

4. William Freitas (“Freitas”) filed a Substantive Joinder to the MKAH parties’ motion on October 11, 2016. Doc. 359.

5. The University of Hawai‘i at Hilo (“University”) filed a Statement of Position Regarding the MKAH parties’ Renewed Motion to Disqualify Hearing Officer [Doc. 340] and Notice of Withdrawal of Counsel [Doc. 341] on October 13, 2016. Doc. 369.

6. Lono filed a Response to the University’s Statement of Position on October 17, 2016. Doc. 386.

7. The MKAH parties minus Kahea filed a response to the University’s Statement of Position on October 17, 2016. Doc. 383.

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.

Hawai‘i Administrative Rules (“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.

The standard required for disqualification is the appearance of impropriety. *See Sussell v. City and County of Honolulu Civil Service Comm’n*, 71 Haw. 101, 107, 784 P.2d 867, 870

(1980); *Sifagaloa v. Bd. of Trs. of Emps' Ret. Sys.*, 74 Haw. 181, 189, 840 P.2d 367, 371 (1992).

We address each argument in turn.

a. The MKAH parties rely on arguments previously raised [Docs. 5, 13, 31, 130] and rejected by the Board [Doc. 14, 63, 245]. They also supplement their prior arguments with recent events to argue that, combined, the Hearing Officer should be disqualified. The Board addresses the new arguments.

The MKAH parties argue that the Hearing Officer is biased for failing to timely rule on their Motion to Disqualify the Board of Land and Natural Resources' and Hearing Officer's Counsel, filed on July 1, 2016 [Doc. 95] and their Motion to Strike Conservation District Use Application, HA-2568, Dated September 2, 2010 and/or Motion for Summary Judgment, filed on July 18, 2016 [Doc. 94].² No authority mandates a deadline for issuing orders on motions in contested cases. More than 50 motions and requests have been filed by the parties. The fact that the Hearing Officer has not yet ruled on two motions is not evidence of an appearance of impropriety.

b. The MKAH parties argue that Minute Order No. 18 (Site Visit Designations) "disregarded cultural protocol in accessing [Mauna Kea]." The fact that the Hearing Officer did not follow the MKAH parties' proposed site visit route is not evidence of an appearance of impropriety.

c. The MKAH parties argue that the presence of Department of Land and Natural Resources, Division of Conservation and Resource Enforcement ("DOCARE") officers at the hearings demonstrates bias on the part of the Hearing Officer. The DOCARE officers are there

² Orders have now been filed for both motions. See Minute Order Nos. 37 and 38.

to protect the safety and welfare of everyone present, including the Hearing Officer, staff, the parties, and the public. The presence of DOCARE officers is not evidence of any bias.

d. The MKAH parties argue that during the site visit there was an appearance of impropriety because the Hearing Officer rode in a vehicle with an employee of the Office of Mauna Kea Management (“OMKM”). It was clarified at the October 3, 2016, prehearing conference that she, in fact, did not do so. The Hearing Officer rode in a vehicle driven by a DOCARE officer. OMKM personnel were present at the site visit to guide the group to the sites identified in Minute Order No. 18. The MKAH parties’ allegations are not true and there is no evidence of an appearance of impropriety.

e. Petitioners argue that the Hearing Officer’s relationship with the wife of Deputy Attorney General Harvey Henderson, who has had limited involvement in the contested case, is evidence of bias. The Hearing Officer has disclosed that Mr. Henderson’s wife went to the same law school contemporaneously with the Hearing Officer. Doc. 307. She has also disclosed that Mr. Henderson’s wife is a member of the Board of Governors of Maximum Legal Services Corporation, of which she is the Executive Director. *Id.* This attenuated link provides no evidence of bias.

f. The MKAH parties argue that requiring all parties to submit their hearing briefs, witness lists, exhibit lists, and written direct testimonies at the same time as the University is evidence of bias. The Hearing Officer has the authority to set the time for submission of documents and briefs. *See* HAR § 13-1-32(c). Therefore, we find no evidence of bias.

g. Lono argues that the Hearing Officer violated its right to due process when she denied its request to file a late motion [Docs. 179, 356], when she set issues in the contested case hearing that it did not agree with [Doc. 281], and because she did not recuse herself from these

proceedings upon Lono's request [Doc. 262]. The Hearing Officer may rule on motions and "dispose of ... matters that normally properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing." HAR § 13-1-32(c). The Hearing Officer was acting within the scope of her duties when she did all of the foregoing actions.

Lono also argues that the Hearing Officer "allowed rulings to pile up with no written orders." Specifically, Lono argues that the Hearing Officer did not issue an order on its motion by October 10, 2016, as she said she would at the October 3, 2016, prehearing conference. Lono is not correct as the order in question was filed on October 10, 2016. Doc. 356. We do not find that either argument is evidence of an appearance of impropriety.

h. Lono argues that the schedule set by the Hearing Officer is rushed. We do not agree. It has been five months since the Hearing Officer held her first prehearing conference on May 16, 2016. Doc. 16. On July 21, 2016, the parties were put on notice that the contested case hearing would be held in October. Doc. 115 (Minute Order No. 13). At the prehearing conferences held on August 5, 2016 and August 12, 2016, the Hearing Officer verbally reminded the parties that the evidentiary hearing would take place in October. University's Statement of Position at 16, Doc. 369. On September 19, 2016, a notice of hearing was published and served by certified mail on the parties informing them that the evidentiary portion of the contested case hearing would commence on October 11, 2016. Doc. 276. Freitas joins in to argue that the Hearing Officer allowed the "horse to get away from the cart" by disregarding a request by Richard Naiwieha Wurdeman ("Wurdeman"), attorney for the MKAH parties, to continue the contested case hearing. In order to accommodate Wurdeman's trip to a conference in Las Vegas [Doc. 282], the contested case hearing was continued one week to October 18, 2016. Doc. 325.

Despite this accommodation, Wurdeman filed a Notice of Withdrawal on October 10, 2016.

Doc. 341. Following another prehearing conference on October 17, 2016, the commencement date of contested case hearing was continued to October 20, 2016.

Lono defends Wurdeman's alleged scheduling conflict for the entire month of October by arguing that they thought the contested case hearing would only take several days and an attorney could not possibly know what those specific days were going to be. Doc. 386. As anyone who has read the Supreme Court's decision in the prior contested case knows, during that hearing voluminous written direct testimony was admitted, and twenty-six witnesses, under oath, testified and were cross-examined. *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai'i 376, 385, 363 P.3d 224, 233 (2015). The MKAH parties know that the prior contested case hearing took seven days to complete with only themselves and the University as parties. We find it inconceivable that anyone would think that this contested case hearing would only take a few days. We do not find that there has been any rush, nor do we find any evidence of an appearance of impropriety.

i. Kihoi argues that as a party proceeding pro se, she has tried her best to understand the Hearing Officer's orders and deadlines in the case. She is to be commended. This, however, is not evidence of any impropriety.

j. Finally, the Board finds that combined, all of the arguments raised to date do not rise to the level of an appearance of impropriety by the Hearing Officer.

Based on the foregoing, the MKAH parties' Renewed Motion to Disqualify the Hearing Officer and all joinders are HEREBY DENIED.

This order may be executed in counterparts.

DATED: Honolulu, Hawai'i, October __, 2016.

Suzanne Case

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

Stanley H. Roehrig

STANLEY H. ROEHRIG, Member

Keith Keone Downing

KEITH "KEONE" DOWNING, Member

JAMES A. GOMES, Member

Thomas OI

THOMAS OI, Member

Samuel "Ohu" Gon III

SAMUEL "OHU" GON III, Member

CHRISTOPHER YUEN, Member

DATED: Honolulu, Hawai'i, October __, 2016.

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STANLEY H. ROHRIG, Member

KEITH "KEONE" DOWNING, Member



JAMES A. GOMES, Member

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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 Orders 39 and 40

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced documents were served upon the following parties by the means indicated on October 28, 2016:

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