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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation)
District Use Permit (CDUP) (HA-3568 for) **TEMPLE OF LONO MOTION**
) **TO VACATE MINUTE ORDER NO. 39**
) **OR, ALTERNATIVELY TO PARTIALLY**
The Thirty Meter Telescope at the Mauna) **RECONSIDER MINUTE ORDER NO. 39**
Kea Science Reserve, Kaohe Mauka,)
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

**TEMPLE OF LONO MOTION TO VACATE MINUTE ORDER NO. 39 OR,
ALTERNATIVELY, TO PARTIALLY RECONSIDER MINUTE ORDER NO. 39**

On October 28, 2016, the Hearing Officer issued Minute Order No. 39 (Order Denying Renewed Motion to Disqualify Hearing Officer (DOC-340)).

This Order denied a motion and joinders seeking to disqualify the Hearing Officer.

The Temple of Lono herein moves to strike Minute Order No. 39 as wrongly decided by the Board of Land and Natural Resources or, alternatively, for partial reconsideration of the Order. The Temple accompanies this motion with a memorandum in support of said motion.

Dated: November 4, 2016

_____/s/_____
Lanny Alan Sinkin
Lay representative for Temple of Lono

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FOR THE STATE OF HAWAI'I

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation)
District Use Permit (CDUP) (HA-3568 for) **TEMPLE OF LONO MEMORANDUM**
The Thirty Meter Telescope at the Mauna) **IN SUPPORT OF MOTION TO VACATE**
Kea Science Reserve, Kaohe Mauka,) **MINUTE ORDER NO. 39 OR,**
Hamakua District, Island of Hawai'i,) **ALTERNATIVELY, TO PARTIALLY**
) **RECONSIDER MINUTE ORDER NO. 39**
TMK (3) 4-4-015:009)
_____)

**TEMPLE OF LONO MEMORANDUM IN SUPPORT OF MOTION TO VACATE
MINUTE ORDER NO. 39 OR, ALTERNATIVELY, TO PARTIALLY
RECONSIDER MINUTE ORDER NO. 39**

I. INTRODUCTION

On October 28, 2016, the Board of Land and Natural Resources (hereinafter "Board") issued Minute Order No. 39 (Order Denying Renewed Motions to Disqualify Hearing Officer (DOC-340) (Hereinafter "MO No. 39."))

The Temple of Lono moves to vacate that order as improperly decided by the Board of Land and Natural Resources or, alternatively, for partial reconsideration of that order and provides this memorandum as support for that motion.

As a preliminary matter, there has been some confusion in this proceeding as to whether the Board or the Hearing Officer is the appropriate decision-maker. The

Board clarified that matter in the past and then, it appears, ignored that clarification in deciding the issues addressed in Minute Order No. 39.

Based on the earlier clarification, the Board is not the appropriate decision-maker for the matters addressed in Minute Order No. 39.

For that reason, the Temple moves to vacate Minute Order No. 39.

Should the Board deny that motion, the Temple herein argues for partial reconsideration of Minute Order No. 39.

II. ARGUMENT

A. The Board's involvement in the contested case hearing is very limited and does not extend to deciding the matters decided in Minute Order No. 39.

Mauna Kea Anaina Hou sought to disqualify the hearing officer based on a conflict of interest.. DOC-13.

The Board, not the Hearing Officer, denied that motion. DOC-63 (Minute Order No. 9: Order denying Petitioners' motion for reconsideration of Minute Order No. 4 filed on May 6, 2016 and/or Motion to strike selection process and to disqualify various members and Hearing Officer.)

Intervenor Vicente sought to disqualify the Hearing Officer. DOC-080 (Dwight J. Vicente motion to disqualify Judge Riki May Amano (ret.); State of Hawaii lack of jurisdiction to hear this contested case). That motion was a challenge to the jurisdiction of the agency and its hearing officer, not a challenge to the qualifications of the hearing officer. The Board, not the Hearing Officer, decided that motion. See DOC-124 (Minute Order No. 14: Order denying Dwight J. Vicente's motion to disqualify Judge Riki May Amano (ret.); State of Hawaii lack of jurisdiction to hear the contested case hearing). In its decision, the Board found that

Mr. Vicente makes no specific argument as to the disqualification of Judge Amano as hearing officer. He relies only on his jurisdictional arguments.

Ibid. at 2.

The Board later reiterated its limited involvement in the proceeding.

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)].

DOC-245 [Minute Order No. 17 (Order Denying Motions Objecting to the Hearing Officer and the Hearing Officer Selection Process)] at 3.

The Board also stated:

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.

Id. (emphasis added) The Board further clarifies that "[r]equests for disqualification or recusal of Board members will, of course, be dealt with by the Board or the member, as appropriate." Ibid., n. 2 (emphasis added).

Yet later in the very same order, the Board states:

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.

Ibid. at 6 (emphasis added).

Either "only matters related to the selection and appointment of the hearing officer are properly before the Board" or "motions to disqualify the hearing officer" also "remain within the authority of the Board."

As noted above, the Board in the Vicente rulings made clear that disqualification of the hearing officer was only being considered by the Board because the basis argued for disqualification was an absence of jurisdiction on the part of the agency, not actual disqualifying acts on the part of the hearing officer. If “motions to disqualify the hearing officer” has the limited meaning of disqualification sought on jurisdictional grounds, there is no conflict.

If “motions to disqualify the hearing officer” includes the Board initially addressing such motions, even if not jurisdictionally-based – as opposed to having the hearing officer address such motions with the Board acting in an appellate capacity – then there is a conflict between the two assertions of jurisdiction.

The only way to remove the conflict is to consider the Board as having only appellate jurisdiction when non-jurisdictional or conflict of interest challenges to the hearing officer continuing to preside are presented.

The ruling at issue in this pleading is an order entered by the Board deciding issues far outside the “selection and appointment of the hearing officer” or a challenge to the jurisdiction of the agency.

The Board order addresses allegations of bias on the part of the Hearing Officer, MO No. 39 at 3; disregard for cultural protocols during the site visit, id.; presence of Department of Land and Natural Resources law enforcement personnel in the hearings, id.; appearance of impropriety during site visit, ibid. at 4; relationship of hearing officer to another individual as evidence of bias, id.; requiring submission of Intervenors’ cases simultaneously with the Applicant’s presentation of its case as evidence of bias, id.; denial of opportunity to be heard as

evidence of bias, id.; setting of issues in a manner violating due process, id.; Hearing Officer's refusal to recuse herself when asked to do so, ibid. at 4-5; failure to make rulings on pending motions as evidence of bias, id.; and rushing the schedule as evidence of bias. Ibid at 5.

None of these issues fall within the limits of Board involvement to "only matters relating to the selection and appointment of the hearing officer," involve a jurisdictional challenge, or involve a conflict of interest challenge.

The Board has, therefore, intruded into this contested case proceeding without authority to do so, according to the Board's pronouncement regarding its appropriate role in the hearing.

The appropriate response to this intrusion is to vacate the Board's Order and remand the motion and joinders to the hearing officer for decision.

Should the Board decide that the earlier limitation it pronounced on its involvement is no longer effective, the Board should issue a clarifying order on the precise role of the Board and the Hearing Officer in this proceeding.

B. Based on the introduction of new arguments by the Board, a partial reconsideration of Minute Order No. 39 is warranted.

Should the Board decide that it does have authority to initially address the motion and various joinders identified in Minute Order No. 39 and deny the motion to vacate, the Temple seeks reconsideration of various portions of that order.

The Temple acknowledges that "the purpose of a motion for reconsideration is to allow the parties to present new evidence or arguments that could not have been presented during the earlier adjudication." *Sousaris v. Miller*, 92 Hawai'i 505, 513, 993 P.2d 539, 547 (2000).

In this instance, many of the new arguments arise from false presentations of fact or distortions of law in the order itself. The Temple could not have previously addressed these false statements of fact or distortions of law because they appeared for the first time either in the Applicant's opposition, DOC-369 or in the order itself.

As there was no hearing on the motion and joinders decided in the Order, there was no opportunity for the Temple to correct the false factual presentations or the distortions of the law.

1. In the Order, the Board erroneously equates the hearing officer's authority to set the time for submission of documents and briefs with the authority to require all the Intervenors to file their case simultaneously with the Applicant.

In opposition to the argument that the Hearing Officer demonstrated bias by compelling the Intervenors to put on their case simultaneously with the Applicant, the Applicant argued as follows:

Pursuant to Hawai'i Administrative Rules § 13-1-32(c), the Hearing Officer has broad discretion to set the time for submitting briefs and other documents as "necessary for the orderly and just conduct of a hearing." Therefore, Petitioners' argument fails as a matter of law.

DOC-369 at 10-11.

The Board adopted this argument as a basis for concluding that the compulsion imposed by the Hearing Officer was not evidence of bias. MO No. 39 at 4.

Both the Applicant and the Hearing Officer stretch the meaning of §13-1-32(c) beyond its appropriate boundaries. There is a major difference in setting "the time for submitting briefs and other documents" and requiring an Intervenor contesting an application to put on its entire case simultaneously with the Applicant.

The moving party has the “initial burden of going forward.” *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593 (1968).

This proceeding is an application for a permit. The Applicant is the moving party. In this proceeding, the Applicant has the burden of proof. HAR §13-1-35(k)

This proceeding is now in the contested case phase of the process. Those seeking the permit must prevail over those contesting the application. The posture of the opposing parties is not unlike that of a plaintiff and defendant. In the case of a plaintiff and defendant, the plaintiff has the burden of proof and is required to put on the plaintiff's case first. The defendant is then free to move for a directed verdict or a summary judgment without putting on any case.

That the judge in such a case has the authority to set the time for submission of documents and briefs does not give the judge the authority to require the defendant to put on her case at the same time as the plaintiff.

That is essentially what the Hearing Officer did in requiring simultaneous submissions.

That ruling was highly burdensome on the Intervenors, who objected repeatedly. With no knowledge of what the Applicant intended to present to meet its burden of proof, the Intervenors were required to prepare the case for not granting the permit. Without knowing who the final witnesses for the Applicant were to be or the pre-filed testimony that such witnesses would present, the Intervenors had to select their witnesses and prepare their pre-filed testimony. The Intervenors were required to prepare as if the Intervenors had the burden of proof.

HAR §13-1-32(c) does not permit the Hearing Officer to modify the burden of proof to be equally imposed on the Applicant and the Interveners.

This error on the part of the Hearing Officer is fundamental and seriously violated the due process rights of the Interveners.

That error produced a hearing process that is neither orderly nor just.

2. In the Order, the Board supports the Hearing Officer's denial of the Temple's Motion to File Motion Out of Time because it was "necessary for the orderly and just conduct of the hearing."

The Board acknowledges that the Temple of Lono considered the refusal of the Hearing Officer to permit the Temple to file a motion seeking dismissal of this proceeding to be a violation of the Temple's due process rights. MO No. 39 at 4.

The Board justifies that ruling as "necessary for the orderly and just conduct of a hearing." MO No. 39 at 4-5 *citing* HAR §13-1-32(c).

The oppositions to the Temple's motion did not make that argument. DOC-183 at 2-3; DOC-194. The Temple did not, therefore, have an opportunity to respond to that argument.

Nor did the Hearing Officer include that reason in her earlier ruling. DOC-356.

The denial of the Temple's motion was not "necessary for the orderly ... conduct of a hearing." HAR §13-1-32(c) (emphasis added). The motion was made on August 8, 2016. DOC-179. At that time, there was no hearing scheduled, let alone underway. See DOC-276.

Nor was that denial "necessary for the ... just conduct of a hearing." HAR §13-1-32(c) (emphasis added). To the contrary, the Temple was the party seeking

justice in the face of a libelous attack by the Applicant that the Temple considered as disqualifying the Applicant from receiving the permit. The motion at issue simply sought permission to file a motion raising the issue of the attack and the implications for whether the Applicant was disqualified and the application should be dismissed.

The Hearing Officer refused to grant the Temple permission to file a motion, solely because the motion was offered outside the time frame that the Hearing Officer had set for filing pre-hearing motions.

The Temple's basis for seeking recusal is the Hearing Officer's refusal to allow the Temple's motion to dismiss to be heard, not on an adverse ruling on the motion.

"Few situations more severely threaten trust in the judicial process than the perception that the litigant never had a chance" due to "some identifiable potential bias."

Mauna Kea Anaina Hou et al. v. Board of Land and Natural Resources, 136 Hawai'i 376, 363 P.3d 224, 238 (2015) citing Redish & Marshall, *Adjudicatory Independence*, 95 Yale L.J. at 483 (emphasis in original).

As a measure of the justice interest, see *Williams-Yulee v. Florida Bar*, ___ U.S. ___, 135 S.Ct. 1656, 1666, 191 L.Ed.2d 570 (2015) (stating that "public perception of judicial integrity" is a governmental interest of "the highest order") (quotations omitted).

With the denial of the request to file a motion to dismiss, the Temple "never had a chance" to have its concerns addressed. Given that the Temple was prepared to argue that the Applicant was disqualified from receiving the permit, the

“identifiable potential bias” is the Hearing Officer protecting the Applicant from facing that potential consequence of its actions.

Such a ruling, not the Temple’s motion, is detrimental to “the orderly and just conduct of the hearing” now underway because the Hearing Officer has left the clear violation of the Temple’s right to be heard uncorrected on the record. That error leaves the entire proceeding at risk of being declared void.

3. The Order falsely characterizes the Temple’s argument regarding the setting of issues.

The Order characterizes the Temple as objecting to Hearing Officers setting of issues in the contested case hearing because she set issues that the Temple “did not agree with.” MO No. 39 at 4.

That characterization is false and was never argued by the Temple. The Temple objected to the Hearing Officer’s failure to provide reasoned explanations for the issues she excluded from the contested case. DOC-286 (Temple Of Lono Motion For Reasoned Explanations And Extension Of Time) at 3-4.

To this day, the Hearing Officer has never ruled on the Temple’s motion requesting reasoned explanations, foreclosing the Temple’s seeking reconsideration. The Hearing Officer thereby denied the Temple’s due process rights.

4. The Order acknowledges that the Temple sought to recuse the Hearing Officer and then misrepresents the results.

In the Order, the Board states that the Temple argues that the Hearing Office violated the Temple’s due process “because she did not recuse herself from these proceedings upon Lono’s request.” MO No. 39 at 4-5.

The clear implication is that the Hearing Officer refused to recuse herself. That is a false characterization of the facts.

That factual inaccuracy is followed by a ruling that the hearing officer “may rule on motions” pursuant to HAR 13-1-32(c) and included the issue of the Temple’s request for recusal in that ruling, as if the Hearing Officer had ruled on the motion to recuse. MO No. 39 at 4-5.

The Order simply ignores the fact that the Hearing Officer never ruled on the Temple’s motion requesting recusal. That motion was made on September 17, 2016, before the hearings began. DOC-262. On October 5, 2016, again before the hearings began, the Temple filed a motion requesting the Hearing Officer schedule pending motions that included the motion to recuse. DOC-324. The Hearing Officer has continued to preside over these proceedings without addressing a motion that could have disqualified her from doing so.

The attempt to slip this unscheduled and unresolved motion into an order portraying the motion as somehow ruled upon is transparent. The arguments and evidence presented in the motion to recuse have never been addressed. DOC-262.

5. The Temple did not present evidence of a failure to perform as primarily evidence of bias.

The Board’s Order presents the Temple’s objection to the Hearing Officer allowing oral rulings to accumulate without written orders as an argument for an appearance of bias. MO No. 39 at 5.

The Temple presented the issue under the heading “Failure to Perform,” DOC-360 at 3, and characterized the absence of written orders as “a general failure to perform.” The Temple cited other examples of that failure. *Ibid* at 3-4. The

Temple's argument was that the failure to perform is disqualifying on performance grounds.¹

III. CONCLUSION

The Board concludes that "combined, all of the arguments raised to date do not rise to the level of an appearance of impropriety by the Hearing Officer." MO No. 39 at 6.

Such a conclusion is easy to reach when the facts are falsified or ignored and the law distorted. For the Temple, the legitimacy of this proceeding and this Hearing Officer ended when the Temple was denied an opportunity to be heard on a fundamental challenge to the application at issue in this proceeding. See e.g. DCO-262; DOC-343.

Dated: November 4, 2016.

_____/s/_____
Lanny Alan Sinkin
Lay representative for Temple of Lono

¹ The Temple did argue that leaving the preparation of such orders until the time when Intervenors were burdened with preparing for the imminent hearing did constitute evidence of bias. Ibid. at 3, n. 3.

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FOR THE STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation)
District Use Permit (CDUP) HA-3568 for) **CERTIFICATE OF SERVICE**
The Thirty Meter Telescope at the Mauna)
Kea Science Reserve, Kaohe Mauka,)
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the **TEMPLE OF LONO MOTION TO VACATE MINUTE ORDER NO. 39 OR, ALTERNATIVELY, TO PARTIALLY RECONSIDER MINUTE ORDER NO. 39** was served on the following parties by eMail on November 4, 2016:

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and will be served by first class mail on November 5, 2016 to:

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Dated: November 4 , 2016

_____/s/_____
Lanny Alan Sinkin