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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**
The Thirty Meter Telescope at the Mauna) **RESTORE CROSS-EXAMINATION**
Kea Science Reserve, Kaohe Mauka,) **RIGHTS; MEMORANDUM IN**
Hamakua District, Island of Hawai'i,) **SUPPORT; COS**
TMK (3) 4-4-015:009)
_____)

TEMPLE OF LONO MOTION TO RESTORE CROSS-EXAMINATION RIGHTS

On October 31, 2016, the Hearing Officer announced that she was imposing a thirty-minute limit on cross-examination subject to being extended for "good cause."

Numerous parties, including the Temple of Lono, objected to the imposition of such a limit.

The Hearing Officer stated that the limit would begin "tomorrow."

The next hearing day, however, was November 2, 2016.

On November 2, 2016, Intervenor Deborah Ward entered a renewed objection to the imposition of the time limit based on the fact that the Hearing Officer had not entered a minute order imposing the limit and allowed time for a motion for reconsideration to be filed and decided. Based on the absence of that process, Ms. Ward argued that the ruling was not final and should not be implemented.

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During the hearing, the Hearing Officer interrupted the cross-examination of Intervenor E. Kalani Flores after 40 minutes. The Hearing Officer inquired as to how much more cross-examination Mr. Flores had.

Mr. Flores requested and was given additional time to complete his cross-examination.

At the end of the hearing on November 2, 2016, the Temple of Lono noted the interruption of Mr. Flores' cross-examination renewed its objections to the limitation on time for cross-examination.

The Temple also inquired as to when the Minute Order would be issued for the limitation ruling, so that the Temple could file a motion for reconsideration.

The Hearing Officer replied that there would be no minute order and stated that the Temple could file a motion.

The Temple of Lono herein moves to restore full rights of cross-examination to all parties. This motion is supported by the accompanying memorandum.

Dated: November 7, 2016

_____/s/_____
Lanny Alan Sinkin
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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**
Kea Science Reserve, Kaohe Mauka,) **RESTORE FULL CROSS-**
Hamakua District, Island of Hawai'i,) **EXAMINATION RIGHTS**
TMK (3) 4-4-015:009)
_____)

**TEMPLE OF LONO MEMORANDUM IN SUPPORT OF
MOTION TO RESTORE FULL CROSS-EXAMINATION RIGHTS**

I. INTRODUCTION

On October 31, 2016, the Hearing Officer announced that she was imposing a thirty-minute limit on cross-examination subject to being extended for “good cause.”

Numerous parties, including the Temple of Lono, objected to the imposition of such a limit.¹

The Hearing Officer stated that the limit would begin “tomorrow.”

The next hearing day, however, was November 2, 2016.

¹ As with all the other individuals and organizations that intervened to contest the application, the Temple of Lono lacks the funds to purchase a transcript. The Hearing Officer has consistently and repeatedly refused to make arrangements allowing those contesting the permit to review the transcripts. The Temple is, therefore, unable to provide citations or excerpts of the record to support factual statements made herein.

On November 2, 2016, Intervenor Deborah Ward entered a renewed objection to the imposition of the time limit based on the fact that the Hearing Officer had not issued a minute order imposing the limit and allowed time for a motion for reconsideration to be filed and decided. Based on the absence of that process, Ms. Ward argued that the ruling was not final and should not be implemented.

During the hearing, however, the Hearing Officer interrupted the cross-examination by Intervenor E. Kalani Flores after 40 minutes. The Hearing Officer inquired as to how much more cross-examination Mr. Flores had.

Mr. Flores requested and was given additional time to complete his cross-examination.

At the end of the hearing on November 2, 2016, the Temple of Lono noted the interruption of Mr. Flores' cross-examination and renewed its objections to the limitation on time for cross-examination.

The Temple also inquired as to when the Minute Order would be issued for the limitation ruling, so that the Temple could file a motion for reconsideration.

The Hearing Officer replied that there would be no minute order² and stated that the Temple could file a motion.

The Temple is filing its motion to restore full cross-examination rights and providing this memorandum in support of that motion.

² Previously, when the Hearing Officer made oral rulings on procedural matters, those rulings were memorialized in a minute order. See e.g. DOC-115 (Minute Order No. 13). Parties then had a period of time in which to file motions for reconsideration. See e.g. DOC-281 (Minute Order No. 19 at 5-6).

II. ARGUMENT

A. There is no basis in the statutes or rules for imposing a blanket time limit on cross-examination.

The Hearing Officer has turned the rules applicable to limiting cross-examination upside down.

The general statute governing cross-examination is HRS §91-10(3), which states:

(3) Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence.

The general rule governing cross-examination in this proceeding is HAR §13-1-32(g), which states:

(g) Each party shall have the right to conduct such cross-examinations of witnesses as may be required for a full and true disclosure of the relevant facts and shall have the right to submit rebuttal evidence, subject to limitations by the presiding officer.

This right “to conduct such cross-examinations of witnesses as may be required for a full and true disclosure of the relevant facts” is an essential element in providing due process to all parties.

This right is subject to limitation by the presiding officers in very specific circumstances.

The one exception to that right to unfettered cross-examination is found in HAR §13-1-32(h), which states:

(h) **To avoid unnecessary or repetitive evidence**, the presiding officer may limit the number of witnesses, the extent of direct or cross examination or the time for testimony upon a particular issue.

(emphasis added).

The Hearing Officer orally cited “HAR 13-1-32” as the basis for her authority to limit cross-examination without citing a section.

As sections (g) and (h) demonstrate, the general rule is unlimited cross-examination with an exception when limitation is allowed “[t]o avoid unnecessary or repetitive evidence.”

Invocation of section (h) requires the pre-requisite that the cross-examination being limited involves unnecessary or repetitive evidence. That determination is made on a case-by-case basis.

A blanket limitation of all cross-examination to thirty minutes assumes the Hearing Officer has general authority to limit cross-examination, whether there is a need to avoid unnecessary or repetitive evidence or not. Under the blanket limitation, there is no need for the Hearing Officer to first find that unnecessary or repetitive presentation of evidence is occurring.

There is no authority for imposing such a limitation.

Certainly the evidence being elicited by Mr. Flores at the time the Hearing Officer interrupted him, based on his having exceeded the thirty-minute limit, was not unnecessary or repetitive.

The Hearing Officer made no such finding. The only reason for the interruption was Mr. Flores’ exceeding the thirty-minute limit.

B. The time limit violates the due process rights of the parties.

A contested case is “a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.” Hawaii Revised Statutes (HRS) § 91-1(5).

The United States Supreme Court found that "a denial of cross-examination without waiver * * * would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *State v. Adrian*, 453 P.2d 221 (1969) *citing* *Smith v. Illinois*, 390 U.S. 129, 131, 88 S. Ct. 748, 750, 19 L. Ed. 2d 956 (1968), *quoting* *Brookhart v. Janis*, 384 U.S. 1, 3, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966).

Limiting cross-examination to thirty minutes denies the right to fully cross-examine. While the Supreme Court ruling just cited addresses the right to confront witnesses, the opinion on the importance of cross-examination applies equally to an administrative contested case where "legal rights, duties, or privileges of specific parties are required by law to be determined." HRS §91-10(3) and HAR §13-1-32(g) confirm that applicability.

C. The time limit unduly burdens the due process rights of the parties.

Besides being unauthorized by any statute or rule, the imposition of the thirty-minute limitation on all cross-examination is unduly burdensome on the party pursuing the cross-examination.

While the Hearing Officer stated that more time beyond the thirty-minute limit could be granted, based on a showing of "good cause," that extension is discretionary. With no certainty about securing an extension, the cross-examiner is required to prepare for cross-examination within the thirty-minute limit.

Such a preparation constraint perforce limits the number of questions a cross-examiner can allot to a given topic, with pressure to ask only yes or no questions to prevent a witness from running out the clock. The cross-examiner is

pressured to forego “a full and true disclosure of the relevant facts,” HRS §91-10(3), in order to save time for adducing evidence on other topics.

The constraint limits both the depth of cross-examination and the number of topics that can be covered.

The cross-examiner must also choose whether to pursue a new line of questioning emerging from a witness’ testimony or not pursue that new line of questioning in order to pursue the topics chosen for inclusion in the thirty-minute limit. This burden is particularly acute in a proceeding where no discovery is allowed because the likelihood of new information appearing in response to cross-examination is that much higher.

The cross-examiner is forced to prioritize and limit the issues to be pursued, when many of those issues eliminated may be just as important as those included.

The cross-examiner is offered the opportunity to pursue additional questions or topics, if “good cause” is shown. Because the Hearing Officer is outside the boundaries of the applicable statutes and rules, what constitutes “good cause” is left to the arbitrary and capricious determinations of the Hearing Officer. There is no better cause than seeking a “full and true disclosure of the facts.” That is the good cause protected by the statutes and rules.

III. CONCLUSION

The statutes or rules applicable to this proceeding nowhere permit the blanket thirty-minute limit.

That limitation unconstitutionally limits and chills the due process rights of the parties “to conduct such cross-examination as may be required for a full and true disclosure of the facts.” HRS §91-10(3).

For the above and foregoing reasons, the Temple of Lono moves the Hearing Officer to vacate the imposed limitation and restore full cross-examination rights to all parties. In doing so, the Hearing Officer will not be relinquishing the right to limit cross-examination when “unnecessary or repetitive evidence” is being adduced by the cross-examination. HAR §13-1-32(h)

Dated: November 7, 2016

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

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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)
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 RESTORE FULL CROSS-EXAMINATION RIGHTS** was served on the following parties by eMail on November 7, 2016:

Michael Cain <michael.cain@hawaii.gov>, Kealoha Pisciotta-Keomailani Von Gogh <keomaivg@gmail.com>, Clarence Ching <kahiwaL@cs.com>, Uncle Kalani Flores <ekflores@hawaiiantel.net>, Pua Case <puacase@hawaiiantel.net>, cordylinicolor@gmail.com, kealiikea@yahoo.com, Bianca Isaki <bianca@kahea.org>, Ian Sandison <isandison@carlsmith.com>, tluikwan@carlsmith.com, John P. (Pete) Manaut <jpm@carlsmith.com>, Lindsay N. McAneeley <lmcaaneeley@carlsmith.com>, T. Shinyama' <RShinyama@wik.com>, douging@wik.com <douging@wik.com>, mehana kihoi <uhiwai@live.com>, Kahookahi Kanuha <kahookahi@gmail.com>, Joseph Camara <kualiic@hotmail.com>, lsa@torkildson.com <lsa@torkildson.com>, njc@torkildson.com <njc@torkildson.com>, leina'ala s <leinaala.mauna@gmail.com>, Maelani Lee <maelanilee@yahoo.com>, Lanny Sinkin <lanny.sinkin@gmail.com>, akulele@yahoo.com <akulele@yahoo.com>, s.tabbada@hawaiiantel.net <s.tabbada@hawaiiantel.net>, tiffniekakalia <tiffniekakalia@gmail.com>, Glen Kila <makakila@gmail.com>, Brannon Kealoha <brannonk@hawaii.edu>, hanahanai@hawaii.rr.com <hanahanai@hawaii.rr.com>, pohaku7@yahoo.com <pohaku7@yahoo.com>, Ivy McIntosh <3popoki@gmail.com>, Kealamakia Jr. <mkealama@yahoo.com>, Patricia Ikeda

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and will be served by first class mail on November 7, 2016 to:

1. Dwight J. Vicente
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2. Harry Fergerstrom
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3. Michael Cain, Custodian of Records
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1151 Punchbowl, Room 131
Honolulu, Hawai'i 96813

Dated: November 7, 2016

_____/s/_____
Lanny Alan Sinkin