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STATE OF HAWAII

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STATE OF HAWAI'I

IN THE MATTER OF

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

Case No. BLNR-CC-16-002

UNIVERSITY OF HAWAI'I AT HILO'S
**OPPOSITION TO TEMPLE OF
LONO'S MOTION TO RESTORE
CROSS-EXAMINATION RIGHTS,
FILED NOVEMBER 7, 2016 [DOC. 410];
CERTIFICATE OF SERVICE**

**UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO
TEMPLE OF LONO'S MOTION TO RESTORE CROSS-EXAMINATION
RIGHTS, FILED NOVEMBER 7, 2016 [DOC. 410]**

Applicant UNIVERSITY OF HAWAI'I (“**University**”), by and through its undersigned
counsel, submits its Opposition to the Temple of Lono’s (“**Temple**”) *Motion to Restore Cross-
Examination Rights* (“**Motion**”) filed on November 7, 2016 [Doc. 410].

I. INTRODUCTION

On October 31, 2016, pursuant to her administrative authority under Hawai'i
Administrative Rule (“**HAR**”) § 13-1-32, the Hearing Officer issued an oral ruling setting a
thirty-minute time limit on cross-examination, subject to extensions upon request and a showing

of good cause. To make this showing, the cross-examiner need only show that the information sought is relevant and has not already been adduced in prior cross-examination of that witness.

Contrary to the Temple's Motion, the administrative rules do not guarantee the parties' right to "unfettered cross-examinations." Motion at 3. Rather, HAR § 13-1-32(g) limits the parties' right to cross-examination to only "relevant facts" and "subject to limitations by the presiding officer." The Hearing Officer has broad authority to "limit the number of witnesses, the extent of direct or cross examination or the time for testimony upon a particular issue" to prevent unnecessary and duplicative evidence. *See* HAR § 13-1-32(h). There are 25 parties collectively presenting testimony from at least 88 proposed witnesses.¹ Through seven days of evidentiary proceedings, only three witnesses have completed their testimony. As noted by the Hearing Officer when she made her ruling, the delays have been caused, in part, by duplicative and repetitive questions, attempts by cross-examiners to present their own testimony, and cross-examiners trying to argue with the witnesses and Hearing Officer. The Hearing Officer explained that the purpose of her ruling is to encourage the parties to prepare and focus their cross-examinations and to avoid duplicative and/or unnecessary questioning and arguments with the witnesses. Therefore, the Hearing Officer is clearly within her authority to limit the time for cross-examination.

Furthermore, the Hearing Officer emphasized that the 30-minute time limit was not absolute. The Temple admits that even after the time-limit went into effect, the Hearing Officer allowed parties to exceed the time limit and granted more time when requested. In other words, notwithstanding the title of the Temple's Motion, all parties have enjoyed—and continue to

¹ Despite the fact that the October 11, 2016 deadline to file prehearing materials—including witness lists and written direct testimony—has long since passed, parties have continued to supplement their witness lists and provide additional written testimonies for new witnesses.

enjoy—full rights of cross-examination in this contested case proceeding.

While due process is a right guaranteed in all judicial proceedings, the guarantee of due process is meant to ensure that parties are granted notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *See Sandy Beach Defense Fund*, 70 Haw. at 378, 773 P.2d at 261. However, what was meant to be a shield, the Temple has contorted into a sword. The Motion has demonstrated no prejudice or diminished opportunity to be heard, yet argues that a violation has occurred simply on the grounds that the time-limit imposed will force parties to present their questioning in a focused and efficient manner. Motion at 5-6. Due process is not a *carte blanche* for the parties to, whether intentionally or unintentionally, filibuster or unnecessarily delay the contested case hearing through inefficient and repetitive questioning, arguments with the Hearing Officer and witnesses, and/or disruptive grandstanding. The Temple cannot show otherwise.

As the Motion has not and cannot demonstrate that the imposed time-limitation exceeds the Hearing Officer's authority or violates due process, the University submits the Motion should be denied.

II. ARGUMENT

A. The Hearing Officer Has Authority Under HAR § 13-1-32 to Impose Limits on Cross-Examination

As noted in the Temple's Motion, HAR § 13-1-32(h) states:

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.

Thus, under the rules, the Hearing Officer has clear authority to impose a time limit on testimony on any issue. Implicit in that authority is the Hearing Officer's power to impose a time limit for testimony on all issues to avoid unnecessary and repetitive evidence. In her oral ruling on

October 31, 2016, the Hearing Officer made clear that the intent of the time limit was to eliminate unnecessary and repetitive cross-examination. The hearing began on October 20, 2016. After the start of the sixth day of the hearing—at which point only Messrs. White and Hasinger, had completed their testimony—the Hearing Officer noted that she had given the parties a lot of latitude in how they conducted their cross-examination, but the result was an unwieldy situation where the cross-examiners were arguing with the witnesses, attempting to testify, and asking repetitive questions. Due to the slow progress of the case and the number of anticipated witnesses that have yet to testify, the Hearing Officer imposed the 30-minute time limit to help the parties to focus and organize their cross-examinations. HAR § 13-1-32(h) expressly allows the Hearing Officer to impose limits on testimony under such circumstances.

Nonetheless, the Temple argues in its Motion that HAR § 13-1-32 only allows the Hearing Officer to set time limits for cross-examination on a case-by-case basis, rather than a blanket time limit for all cross-examination. That is precisely what the Hearing Officer has done. In her ruling, the Hearing Officer emphasized that the 30-minute time limit is not inflexible, and that extensions will be granted based on a showing of good cause on a case-by-case basis. Under the Hearing Officer’s ruling, good cause is shown if the cross-examiner is seeking relevant testimony that had not yet been elicited from the witness—*i.e.*, evidence that is not “unnecessary” or “repetitive.” *See* HAR § 13-1-32(h). Indeed, the Temple’s Motion admits that even after she imposed the time limit, the Hearing Officer allowed Mr. Flores to cross-examine for “40 minutes,” and that “Mr. Flores requested and was given additional time to complete his cross-examination.” Therefore, even under the Temple’s arguments, its Motion fails.

B. The 30-Minute Time Limit Does Not Violate Due Process

While due process is a guaranteed right in a contested case proceeding, it is well-established that the specific procedural protections of due process will and must vary from case

to case. See *Sandy Beach Defense Fund v. City Council of the City and County of Honolulu*, 70 Hawai‘i 361, 378, 773 P.2d 250, 261 (1989) (“Due process is not a fixed concept requiring a specific procedural course in every situation.”); see also *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Hawai‘i 217, 243, 953 P.2d 1315, 1341 (1998) (“Determination of the specific procedures to satisfy due process requires a balancing of several factors.”). In order to determine what procedures are necessary to satisfy the requirements of due process in a contested case proceeding, the Hearing Officer must balance several factors.

Determination of the specific procedures required to satisfy due process requires a balancing of several factors: (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.

Korean Buddhist Dae Won Sa Temple of Hawaii at 243, 953 P.2d at 1341 (internal citations omitted). As discussed below, based on the analysis of the above-listed factors, a thirty minute time limit for cross-examination, subject to extension for good cause, clearly satisfies the requirements of due process.

As to the first factor, the private interest affected by the 30-minute time limit is the right to cross-examine witnesses “for a full and true disclosure of the relevant facts... subject to limitations by the presiding officer.” See HAR § 14-1-32(g). Therefore, contrary to the Temple’s Motion, the right to cross-examination is not “unfettered,” and the Hearing Officer may impose reasonable limitations on cross-examinations. See Motion at 2.

For the second factor, there is no risk of an erroneous deprivation of the party’s interest posed by such time limitation in the instant proceeding. As discussed above, the time limit is not inflexible. The Hearing Officer ruled that the parties could seek extensions of time to cross-examine upon a showing of good cause as a procedural safeguard. As conceded in the Temple’s

Motion, the Hearing Officer already has granted such an extension to Mr. Flores. Motion at 2. Rather than allege that any admissible testimony was excluded as a result of the time limit, the Temple's Motion appears to argue that the Hearing Officer's "interruption" of Mr. Flores to ask how much more time he would need—*after* Mr. Flores had already cross-examined the witness for 40 minutes—is in itself a due process violation. The Temple cites to no authority that supports its absurd assertion that a mere question by the Hearing Officer constitutes a due process violation. Moreover, even after the alleged interruption, Mr. Flores was allowed to continue and finish his line of questioning. Thus, there was no diminution of Mr. Flores's—or anyone else's—ability to cross-examine, and the Temple's due process argument fails.

For the third factor, the government—in this case, the Board of Land and Natural Resources ("**Board**")—has a legitimate interest in imposing reasonable limits on cross-examination to prevent undue delay and avoid wasting the Hearing Officer's and the parties' time and resources. Due process considerations apply to all parties, not just the Temple. The Board—through its Hearing Officer—has an interest in making sure that all parties receive a fair hearing, and that certain parties cannot simply drag out the cross-examination, whether unintentionally or for the sake of witness harassment, delay, or showmanship. Where the parties have legitimate issues that warrant further cross-examination, the Hearing Officer has enacted—and employed—a procedural safeguard that allows for extensions of time to ensure that the parties have the full and fair opportunity to elicit the relevant facts through testimony. Based on the analysis of the relevant factors, the Hearing Officer's imposition of a 30-minute time limit, subject to extensions for good cause, does not violate due process.

Indeed, the case law is clear that an imposition of a time-limit on cross-examination alone is not a violation of due process. In *Martin v. C. Brewer & Co., Ltd.*, the Intermediate Court of

Appeals (“ICA”) held that “[t]he Circuit Court did not abuse its discretion by imposing time limits on the presentation of evidence and cross-examination of Defendant’s witnesses.” 2013 WL 639320, at *6 (Ct. App. Feb. 21, 2013). Although the court noted that appellant had failed to object to when the time limitation was imposed, it declined to find that such imposition was clearly erroneous. *Id.* (“Use of [appellate discretion to address plain error] would be misplaced in this case as the Circuit Court did not clearly err in limiting testimony.”). Thus, the mere imposition of a time limitation is not in and of itself a violation of due process.

In attempting to argue the contrary position, the Motion attempts to rely on *State v. Adrian*, 51 Hawai‘i 125, 453 P.2d 221 (1969). Motion at 5. Such reliance is misplaced. The Motion acknowledges that the Hawai‘i Supreme Court² in *Adrian* found that “a denial of cross-examination without waiver” was improper. Motion at 5. In *Adrian*, the Supreme Court addressed the situation in which a criminal defendant was completely denied the right to cross-examine witnesses against him. *Id.* at 132, 453 P.2d at 226 (“One is hard put to find a more extreme case than the present one in which a defendant was denied the right to be confronted with the witnesses against him.”). In other words, *Adrian* stands for the proposition that a complete denial of cross-examination without waiver in a criminal case is improper. The Motion cites no authority to support its extension of the *Adrian* decision to the imposition of any time limits in any proceeding, regardless of the procedural safeguards in place to obtain additional time when appropriate.

Indeed, other courts have found time limits on cross-examinations are acceptable in certain circumstances, such as when the cross-examiner had exceeded the scope of the direct or asked repetitive questions. For example, in *United States v. Vest*, the Seventh Circuit

² The Motion erroneously credits the holding of *State v. Adrian*, 51 Hawai‘i 125, 453 P.2d 221 (1969), to the United States Supreme Court, rather than the Hawai‘i Supreme Court.

acknowledged its past explicit approval of time limitations in civil trials and ultimately affirmed the lower court's imposition of a time limit on cross-examination. 116 F.3d 1179, 1187 (7th Cir. 1997) (internal quotations and citations omitted). The Seventh Circuit noted that

the District Court gave Vest an extra-half-hour after the initial time expired, thereby giving Vest a total of over seven hours to cross-examine a witness the Government questioned in one-third that time. When even the extended time ran out, the District Court noted that defense counsel had asked questions about tests the Government had not even mentioned on direct and that many of the questions on cross had been repetitive. *The trial judge stated his suspicion that Vest was "setting this thing up on a grounds for appeal because if I gave you till the rest of the day, I don't think you would be through."* For the other expert, the Government used less than two hours on direct, and Vest was initially given six hours for cross. *The District Court, however, extended that time to seven hours and twenty minutes, but refused to extend it further because Vest had asked repetitive questions and questions regarding matters not brought out on direct.*

Id. (emphasis added). Similarly, the Fourth Circuit affirmed limiting cross-examination in *United States v. Midgett*, noting that "a trial court possesses broad discretion to control the mode of interrogation of witnesses[.]" 488 F.3d 288, 300 (4th Cir. 2007).

For all the above reasons, the Motion's due process arguments lack merit.

III. CONCLUSION

HAR § 13-1-32 allows the Hearing Officer to impose time limits on cross-examination. As demonstrated above, such limits are appropriate under the circumstances of this case to curb cross-examination that is duplicative, cumulative and/or not relevant to the issues properly the subject of this proceeding. The Hearing Officer's time limit is not rigid and allows for additional cross-examination if the parties can show the additional cross-examination will elicit relevant, non-duplicative testimony. That procedural safeguard satisfies the requirements of the administrative rules and due process. Therefore, the Temple has demonstrated no actual

prejudice resulting from the 30-minute time limit. As such, the Motion should be denied.

DATED: Honolulu, Hawai'i, November 16, 2016.



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CERTIFICATE OF SERVICE

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