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STATE OF HAWAII

BOARD OF LAND AND NATURAL RESOURCES

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'ohē Mauka, Hāmākua,
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

THE UNIVERSITY OF HAWAI'I AT
HILO'S OPPOSITION TO TEMPLE OF
LONO'S MOTION FOR
RECONSIDERATION OF MINUTE
ORDER 53; CERTIFICATE OF SERVICE

**THE UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO TEMPLE OF
LONO'S MOTION FOR RECONSIDERATION OF MINUTE ORDER 53**

Applicant UNIVERSITY OF HAWAI'I AT HILO ("University") submits its opposition to the *Motion for Reconsideration of Minute Order 53*, filed by the Temple of Lono ("Temple") on June 1, 2017 [Doc. 675] (the "Motion").

I. INTRODUCTION

Minute Order No. 53 denied the Temple's *Motion for Summary Judgment (Desecration)*, filed on September 17, 2016 [Doc. 264] (the "Underlying Motion") on the basis that: (1) it was filed after the deadline for prehearing motions, and was therefore untimely; (2) this tribunal lacks the authority to adjudicate claimed anticipatory violations of Hawai'i Revised Statutes ("HRS")

§ 711-1107, a criminal statute; and (3) the Temple failed to carry its burden to show that it is entitled to judgment as a matter of law and/or that any material facts supporting the Motion are undisputed. Through the Motion, the Temple argues that the Hearing Officer should vacate Minute Order No. 53 because: (1) the Hearing Officer purportedly can no longer be objective given the claimed delay in addressing the Underlying Motion; (2) the Hearing Officer purportedly did not find that the Motion was untimely when the Motion was filed; (3) the Hearing Officer purportedly misrepresented the Temple as arguing that other parties could not oppose the Motion; and (4) the Hearing Officer is purportedly competent to recognize illegality (notwithstanding the absence of admissible evidence to support such a finding) when illegality is present. These arguments, however, are plainly red herrings, intended to create the appearance of error, but without any support or showing of relevance to or error in the actual rulings by the Hearing Officer. Indeed, the Motion utterly fails to even address the specific deficiencies in the Underlying Motion and underlying bases of the ruling in Minute Order No. 53. Those deficiencies exist regardless of when the Underlying Motion was ruled upon and the other arguments asserted by the Temple. Despite the Temple's attempt to attribute the denial of its Underlying Motion to the unsubstantiated, hypothetical bad faith or bias on the part of the Hearing Officer, the record clearly demonstrates that the Underlying Motion was not only procedurally improper, but also lacking in merit, both factually and legally. Accordingly, the Motion should be denied.

II. ARGUMENT

A. THE TEMPLE'S EFFORTS TO DISTRACT FROM THE UNTIMELINESS OF ITS UNDERLYING MOTION DO NOT PROVIDE A BASIS FOR RECONSIDERATION OF MINUTE ORDER NO. 53

Minute Order No. 53 was abundantly clear that one of the fatal deficiencies of the Underlying Motion was that it was untimely. Indeed, in an "effort to engage an orderly process

for this contested case hearing,” following a hearing on June 17, 2016, the Hearing Officer held a second prehearing conference, at which time she expressly set July 18, 2016 as the deadline for all prehearing motions. See Minute Order No. 53, Minute Order No. 13. The Temple did not file the Underlying Motion until September 17, 2016¹—two full months *after* the filing deadline. Nor did the Temple seek or obtain leave from the Hearing Officer for the Underlying Motion, or make any showing of good cause for its tardiness. As such, the Underlying Motion was plainly untimely and procedurally improper.

The Motion does not dispute its lateness. Indeed, apparently mindful of that fatal deficiency, the Temple does not even address that fact in its Motion.² Instead, the Temple attempts to distract from that deficiency by arguing—*remarkably*—that (notwithstanding the *untimeliness* of its own filing) it was somehow prejudiced by the *timing* of the issuance of the Hearing Officer’s decision. The Temple’s arguments, however, are unsubstantiated diversions that do not cure the fundamental deficiencies of its Underlying Motion, or provide any basis for reconsidering or vacating Minute Order No. 53. The Temple’s arguments plainly do not support the relief requested by the Motion.

1. The Temple’s Assertion of Bias by the Hearing Officer is Entirely Unsubstantiated and Refuted by the Merits of the Hearing Officer’s Rulings

Although termed a Motion for Reconsideration, the Temple’s Motion does not actually

¹ Minute Order No. 53 contains a typographical error, stating that the Underlying Motion was filed on September 17, 2015; however, the record clearly establishes that the filing date for that motion was September 17, 2016.

² The mere fact that the Hearing Officer did not immediately issue a ruling finding the Underlying Motion to be untimely did not somehow cure this fatal defect, or amount to a waiver of the requirement for motions to be timely—as the Temple appears to suggest. The Temple cites to no authority whatsoever for its contention that Minute Order No. 53 should be vacated because the Hearing Officer did not find that the Motion was untimely when the Motion was filed—because no such authority supports the Temple’s position.

request that the Hearing Officer reconsider Minute Order No. 53 on one of the proper basis for reconsideration. *See Sousaris v. Miller*, 92 Hawai‘i 505, 513, 993 P.2d 539, 547 (2000) (“[T]he 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.”) Rather, the Temple requests that “Minute Order 53 . . . be withdrawn” because the Hearing Officer purportedly “failed to rule on the Temple’s motion in a timely fashion[.]” Motion at 5. According to the Temple, the claimed delay in ruling on the Underlying Motion somehow rendered the Hearing Officer incapable of making an unbiased determination on the Underlying Motion.

Here, the Temple provides nothing other than unsubstantiated argument and conjecture to support its Motion. The Temple does not actually show through admissible evidence, precedential legal argument, or otherwise, that the Hearing Officer actually erred in ruling that the Underlying Motion was untimely or that the Underlying Motion failed to meet the burden for summary judgment.³ Clearly, the Temple cannot make that showing. Instead, the Temple attempts to manufacture a claim of bias out of thin air in an effort to create the appearance of error where none exists. Such arguments are wholly improper, do not support reconsideration, and should be rejected.

³ Although the Temple argues that the Hearing Officer erred in its conclusion that this tribunal could not adjudicate the validity of the Temple’s claimed violations of the criminal desecration statute, its arguments are flawed in many respects, not the least which is its willful ignorance of the fact that the Temple did not provide the Hearing Officer with any admissible evidence to establish that any of the factual assertions underlying its claims of criminal desecration were undisputed or to otherwise support any finding of illegality.

2. The Temple Had No Right to an Earlier Ruling on its Untimely Underlying Motion and Has Shown No Prejudice by the Timing of the Hearing Officer's Ruling

The Temple also seems to assert that it was somehow prejudiced by the timing of Minute Order No. 53 because—according to the Temple— had the Hearing Officer timely ruled that the Underlying Motion was untimely, “the Temple would have had the option to re-file the motion when the hearing began.” Motion at 3. The Temple’s argument fails in two respects. First, it unilaterally imposes a time limit on the Hearing Officer’s disposition of an untimely motion. As previously briefed, however, the Hearing Officer was under no obligation to review the merits of the Temple’s prehearing motions that were filed without leave and well beyond the established deadline. *See generally* 60 C.J.S. Motions and Orders § 9 (noting that in typical litigation unauthorized motions are inoperative for any purpose). The Hearing Officer was under no obligation to immediately dispose of the Underlying Motion and was operating well within her discretion to issue Minute Order No. 53.

Second, the Temple posits that an earlier ruling would have somehow enabled the Temple to re-file the Underlying Motion during the evidentiary hearing. While this contention paradoxically acknowledges the appropriateness of denying untimely motions, it also assumes without authority that it would be proper to file its same (denied) motion again when or after the hearing began. This argument is illogical and contradicts well established civil litigation rules and practices where analogous dispositive motions like a motion for summary judgment must be made *prior* to trial. *See* Haw. R. Civ. P. 56(a) (requiring that any motion for summary judgment must generally be served and filed no less than 50 days before the date of the trial). For these reasons, the Temple has failed to show any prejudice or rationale supporting error to reconsider Minute Order No. 53.

B. THE HEARING OFFICER PROPERLY DENIED THE MOTION ON THE MERITS

1. The Hearing Officer Properly Found that the Temple Failed to Carry its Burden

In its Motion, the Temple does not address the Hearing Officer's ruling that the Temple failed to "carry its burden that it is entitled to judgment as a matter of law and/or any material facts supporting the [Underlying Motion] are undisputed." Minute Order No. 53 at 4. That burden has still not been satisfied. It is well established that a dispositive motion for summary judgment must be decided only on the basis of *admissible evidence*. See *Sierra Club v. Hawai'i Tourism Auth.*, 100 Hawai'i 242, 255 n.19, 59 P.3d 877, 890 n.19 (2002) (quoting *Takaki v. Allied Mach. Corp.*, 87 Hawai'i 57, 69, 951 P.2d 507, 519 (App. 1998)). The Underlying Motion here contained no supporting declaration or accompanying admissible evidence to establish the absence of genuine issues of material facts with respect to the essential elements of a HRS § 711-1107 violation. Instead, the Underlying Motion attempts to manufacture facts solely through reference to a Supreme Court concurring opinion and two website links that do not support a request or finding of judicial notice. These efforts were plainly insufficient to establish, by admissible evidence, the absence of genuine issues of material fact with respect to the Temple's heavily disputed factual and legal assertions. See Underlying Motion at 2-4. Thus, the Hearing Officer properly found that the Underlying Motion failed to meet the well-established burden for summary judgment.

2. The Hearing Officer Properly Found that the Hearing Officer Lacked Jurisdiction

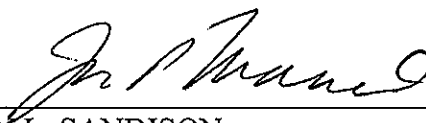
While the Temple claimed that its Underlying Motion was not seeking an adjudication of a criminal statute, the Underlying Motion itself argues for its imposition to bar the permit. See Underlying Motion at 5 ("The Board of Land and Natural Resources does not have the authority

to grant a permit to engage in illegal activity. To the contrary, granting such a permit would make the Board complicit in conspiracy to violate the law.”) The Underlying Motion sought summary judgment on the basis of an alleged anticipatory violation of the Hawai‘i Penal Code, specifically HRS § 711-1107. Contrary to the rhetorical arguments by the Temple, the Underlying Motion presented no evidence of clear illegality for the Hearing Officer to consider. Rather, the facts necessary to establish the elements of a criminal desecration statute are fundamentally and heavily disputed in this case. The validity of the Temple’s claim of desecration would need to be adjudicated in a separate criminal court, not his contested case proceeding. As set forth in the University’s *Opposition to Temple of Lono’s Motion for Summary Judgment*, filed February 22, 2017 [Doc. 473] (the “**Opposition**”), this contested case hearing is not the proper forum to adjudicate a criminal statute. Opposition at 3. The Underlying Motion failed to cite any authority that would transform this contested case proceeding, related to the permit application, into a criminal court or otherwise authorize the Hearing Officer to rule on alleged criminal violations under HRS § 711-1107, prospective or otherwise. In the prior ruling, the Hearing Officer here properly found that this contested case proceeding is an improper venue to adjudicate criminal law violations.

III. CONCLUSION

For these reasons, the University respectfully submits that the Motion has failed to establish any grounds for reconsideration of Minute Order No. 53 and therefore requests that the Motion be denied.

DATED: Honolulu, Hawai'i, June 9, 2017.

A handwritten signature in black ink, appearing to read "John P. Manaut", is written above a horizontal line.

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CERTIFICATE OF SERVICE

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The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

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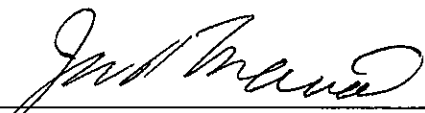
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