

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

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, Hamakua, Hawai`i)
TMK (3) 4-4-015:009)
)
)
_____)
Certificate of Service

CASE NO. BLNR-CC-16-002
Minute Order No. 85
(Order Denying Flores-Case
'Ohana's Motion for Full
Disclosure Re: Spoliation of
Evidence (Doc. 676))

MINUTE ORDER NO. 85

**(Order Denying Flores-Case 'Ohana's Motion for Full
Disclosure Re: Spoliation of Evidence (Doc. 676))**

Flores-Case Ohana filed its Flores-Case 'Ohana's Motion for Full Disclosure Re:
Spoliation of Evidence (Doc. 676), on June 2, 2017 (“Motion”). In addition to the Motion, the
following submissions were considered:

Doc. #	Filed	Party	Title
695	6-Jun-17	Ching	Clarence Kukauakahi Ching's Joinder of Flores-Case Ohana's Motion for Full Disclosure re: Spoliation of Evidence and Memorandum in Support of Motion
700	9-Jun-17	UHH	The University of Hawaii at Hilo's Opposition to Flores-Case 'Ohana's Motion for Full Disclosure re: Spoliation of Evidence Filed June 2, 2017 [Doc. No. 676]
702	9-Jun-17	TIO	TMT International Observatory, LLC's Joinder to The University of Hawaii at Hilo's Opposition to Flores-Case 'Ohana's Motion for Full Disclosure re: Spoliation of Evidence Filed June 2, 2017 [Doc. No. 676]
706	11-Jun-17	Kanaele	Kalikolehua Kanaele Joinder with the FLORES-CASE 'OHANA'S MOTIN FO RFULL DISCLOSURE RE SPOILIATION OF EVIDENCE

By this Motion, the Flores-Case `Ohana seeks “full disclosure of the issues surrounding the act of **spoliation of evidence**.” Doc. 676 at page 2. The Flores-Case `Ohana alleges that documents in the custody of the Office of Conservation and Coastal Lands (“OCCL”) were switched with different copies or tampered with. Doc. 676 at page 2. Further, the Flores-Case `Ohana asserts that the record is “tainted and corrupted” because “none of these documents exist in the record for this proceeding as they haven’t been admitted into evidence as noted in Amended Minute Order No. 44 [Doc. No. 649] filed on May 25, 2017.” Id. at page 3.

The Flores-Case `Ohana claims that the failure to address “this issue in a timely manner has now further tainted and corrupted the due process of parties such as the FLORES-CASE `OHANA in this proceeding and have also impacted the filings of findings of facts, conclusions of law, and decision orders.” Finally, the FLORES-CASE `OHANA demands full disclosure of this matter proclaiming, “[f]ailure to provide such a disclosure by the Hearing Officer would give an appearance of unfairness in this proceeding resulting in a prejudicial error that would adversely impact parties such as the FLORE-CASE `OHANA.” Id. at page 5.

UHH argues that this Motion “simply rehashes the same unsuccessful arguments raised in its prior motions.” Doc. 700 at page 1. In addition, “[t]he Flores-Case `Ohana raises no legitimate grounds and cites no rule that would allow it to further reconsider its already-denied motion for reconsideration.” Id. at page 2. UHH contends that there is no good cause reason offered by the Flores-Case `Ohana why the issues raised on re-argument could not have been brought previously.

In the “Relevant Procedural History” portion of its opposition memorandum, UHH sets out in detail why it believes this Motion is an improper request for reconsideration of Minute Order No. 44 (Documentary Evidence) (Doc. 553):

On April 27, 2017, the Flores-Case `Ohana filed its Motion to Reconsider Minute Order No. 44 and Notice of Spoliation of Evidence [Doc. 577] (“**Motion for Reconsideration**”) alleging, *inter alia*, that certain exhibits were improperly denied as duplicative because they are supposedly “alternative copies” of several of the University’s exhibits. Aside from Exhibits A-9 and A-48, the Flores-Case `Ohana did not identify any alleged discrepancy between its purported “alternative copies” and the exhibits filed by the University. *See Id.* at 4. The Motion for Reconsideration also claimed that clerical errors by the Department of Land and Natural Resources (**DLNR**) Office of Conservation and Coastal Lands (“**OCCL**”) when it uploaded exhibits to the Documents Library somehow constituted spoliation of evidence. *Id.* at 6-7.

On May 4, 2017, the University filed its Opposition to the Motion for Reconsideration [Doc. 615], arguing that, *inter alia*, the Motion for Reconsideration failed to explain how “alternative copies” are not duplicative or provide any evidence et support its claims of spoliation. *Id.* at at [sic] 5-6, 8-10.

On May 7, 2017, without seeking leave from the Hearing Officer, the Flores-Case `Ohana filed its Response to Applicant University of Hawai’i at Hilo’s Doc. Nos. 592 & 615 [Doc. 623] (“**Response**”), in which it *inter alia*, made conclusory assertions that the exhibits at issue are material, relevant and not unduly repetitions, and reiterated its vague demand for “full disclosure and corrective action” regarding its spoliation claims. *Id.* at 6.

On May 15, 2017, the Flores-Case `Ohana, again without seeking leave from the Hearing Officer, filed yet another motion for reconsideration of Minute Order No. 44: *Motion for Clarification or, in the Alternative, Reconsideration Re: Minute Orders No. 43 and 44*, (“**Second Motion for Reconsideration**”) [Doc. 634], in which the Flores-Case `Ohana reiterated, among other things, its claim that the clerical error relative to Exhibit R-7 amounted to spoliation. *Id.* at 2-3. That second motion for reconsideration was filed well past the April 27, 2017 deadline and is therefore, untimely.

In Minute Order No. 51 [Doc. 647], the Hearing Officer rejected the Flores-Case `Ohana’s “broad accusations” of spoliation and due process violations. *Id.* at 8. Specifically, the Order noted that “the Flores-Case `Ohana fails to identify specific exhibits excluded by the Hearing Officer in violation of law, **except** for those exhibits that the Flores-Case `Ohana believes are inappropriately excluded as “duplicative” of exhibits A-9 [and] A-49.” *Id.* (emphasis in original). Therefore, the Hearing Officer received those exhibits related to alleged discrepancies in Exhibits A-9 and A-48---*i.e.*, B.28, B.37a, B.37b, and B.38---to preserve the arguments set forth by the Flores-Case `Ohana, but upheld “all other rulings on the Flores-Case `Ohana’s exhibits [as] consistent with HAR § 13-1-35(a).” *Id.* The Hearing Officer also refused to consider the Flores-Case `Ohana’s Response because “responses to oppositions are not part of the process established for moving exhibits in to evidence.” *Id.* at 9. The Hearing Officer did not consider the Flores-Case `Ohana’s late Second Motion for Reconsideration [Doc. 634] in Minute Order No. 51.

On May 26, 2017, the Hearing Officer issued Amended Minute Order No. 44 [Doc. 649], which reflected the Hearing Officer’s rulings on the parties’

respective motions for reconsideration. Amended Minute Order No. 44 stated very clearly that ‘no further reconsideration of this Amended Minute Order No. 44 (Documentary Evidence) is appropriate.’ *Id.* at 8.

Doc. 700 at pp. 2-4.

UHH also opposes the Motion on the merits. Specifically, UHH writes: “...the Flores-Case `Ohana fails to provide *any* evidence of an intentional destruction of evidence or impairment in the Flores-Case `Ohana’s ability to prove its claims. Alleged clerical errors, without more, are insufficient to support a claim for spoliation of evidence.” *Id.* at page 2.

Moreover, UHH reasons:

While the Flores-Case `Ohana goes into detail into its theory regarding the purported “switch” of certain exhibits, the Flores-Case `Ohana provides no actual evidence of any *intent* by OCCL to tamper with or corrupt evidence. Nor does it attempt to make *any* showing that the purported switch in exhibits hinders its ability to support its case. Though the Flores-Case `Ohana mischaracterizes R-7 as a “totally different copy” of the OCCL staff report it concedes that the only difference between Exhibit A-7 and R-7 are the approval stamp and a four-page correspondence attached to the staff report. Motion at 3. The Flores-Case `Ohana offers no explanation as to how these differences prevent it from making its case. Instead, the Flores-Case `Ohana’s argument rests on the fact that the University and TIO cited to R-7 for the proposition that the OCCL recommended approval of the CDUA in their joint proposed finds of fact. *See* Motion at 4. However, whether the OCCL recommended approval of the CDUA in its staff report is not in dispute. The Flores-Case `Ohana’s own witness, Mr. Samuel Lemmo, confirmed that OCCL did, in fact, recommend approval of the CDUA, and that he himself signed the OCCL staff report making that recommendation. Ex. A. Tr. 2/27/17 at 220:6-15; 221:24-222:22; 222:23-ss3:5. Because the Flores-Case `Ohana provides no other explanation as to how the alleged exhibit discrepancy would hinder its ability to prove its claims, its spoliation claims fail as a matter of law. *See Matsuura v. E.I du Pont de Nemours & Co.*, 102 Hawai`i 149, 166-67, 73 P.3d 687, 704-05 (2003).”

Doc. 700 at page 7.

The Ching, TIO and Kanaele Joinders (Docs. 695, 702 and 706, respectively) do not offer legal or factual additions to the substance of the Motion and/or UHH’s opposition.

This Motion is a thinly veiled request to reconsider Minute Order No. 44 (Documentary Evidence) (Doc. 553); in that regard, it is untimely. In addition, there are no good cause reasons offered to support the request for reconsideration. Furthermore, the Motion fails as a matter of law because movants fail to provide evidentiary support for their allegations of spoliation.

Based upon the Motion, all related submissions from counsels and/or parties, all applicable law, the entire record having been considered by the Hearing Officer,


IT IS HEREBY ORDERED that the Motion is DENIED.

Motion to Reconsider. A party, who believes it appropriate, may file a motion to reconsider using the procedure set out herein. Any Motion for Reconsideration shall not be used to reargue the motion or set out positions of a purely repetitious nature or to present factual or legal grounds that could or should have been presented at the original hearing. AMFAC, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114 (1992).

The deadline for submission of any **motion** to reconsider this minute order is no later than **5 business days** after the date this Minute Order is filed in the Documents Library. Any **responses to motions to reconsider**, shall be submitted no later than **10 business days** after the order is filed in the Documents Library; essentially 5 business days after the deadline for motions to reconsider.

Any Motion to Reconsider shall be considered a non-hearing motion unless otherwise designated by the Hearing Officer.

DATED: Honolulu, Hawai`i, June 20, 2017.



Judge Riki May Amano (Ret.)
Hearing Officer

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 Order 85**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced documents were served upon the following parties by email (when indicated) on June 19, 2017 and by regular mail on June 19, 2017:

Carlsmith Ball LLP
Ian Sandison, John P. Manaut, Lindsay N. McAneeley
1001 Bishop Street
ASB Tower, Suite 2200
Honolulu, HI 96813
isandison@carlsmith.com
jpm@carlsmith.com
lmcaneley@carlsmith.com
Counsel for the Applicant University of Hawai'i at Hilo

Law Offices of Yuklin Alulu
415-C Uluniu Street
Kailua, HI 96734
yuklin@kailualaw.com
Co-Counsel for Kahea

Dexter K. Kaiama
111 Hekili Street, #A1607
Kailua, HI 96734
cdex@hotmail.com
Co-Counsel for Kahea

Kealoha Pisciotta and Mauna Kea Anaina Hou
PO Box 5864
Hilo, HI 96720
keomaivg@gmail.com

Clarence Kukauakahi Ching
64-823 Mamalahoa Hwy
Kamuela HI 96743
kahiwaL@cs.com

Flores-Case 'Ohana
E. Kalani Flores, B. Pualani Case
PO Box 6918
Kamuela, HI 96743
ekflores@hawaiiantel.net

Deborah J. Ward
PO Box 918
Kurtistown, HI 96760
cordylinicolor@gmail.com

Paul K. Neves
380 Nahale-a Avenue
Hilo, HI 96720
kealiikea@yahoo.com

Watanabe Ing LLP
J. Douglas Ing, Ross T. Shinyama, Summer H. Kiawe
First Hawaiian Center 999 Bishop Street, 23rd Floor
Honolulu, HI 96813
rshinyama@wik.com
douging@wik.com
Counsel for TMT International Observatory, LLC

Harry Fergerstrom
P.O. Box 951
Kurtistown, HI 96760

Mehana Kihoi
PO Box 393
Honaunau, HI 96726
uhiwai@live.com

C. M. Kaho'okahi Kanuha
77-6504 Maile St
Kailua Kona, HI 96740
kahookahi@gmail.com

Joseph Kualii Lindsey Camara
kualiic@hotmail.com
(email only)

Torkildson, Katz, Moore, Hetherington & Harris
Attn: Lincoln S. T. Ashida
120 Pauahi Street, Suite 312
Hilo, HI 96720-3084
lsa@torkildson.com
nic@torkildson.com
*Counsel for Perpetuating Unique Educational
Opportunities (PUEO)*

J. Leina'ala Sleightholm
P.O. Box 383035
Waikoloa, HI 96738
leinaala.mauna@gmail.com

Lanny Alan Sinkin
1429 North 17th Street
Bismarck, North Dakota 58501-2858
lanny.sinkin@gmail.com
Representative for The Temple of Lono

Kalikolehua Kanaele
4 Spring Street
Hilo, HI 96720
akulele@yahoo.com

Stephanie-Malia:Tabbada
P O Box 194,
Naalehu, HI 96772
s.tabbada@hawaiiantel.net

Tiffnie Kakalia
549 E. Kahaopea St.
Hilo, HI 96720
tiffniekakalia@gmail.com

Glen Kila
89-530 Mokiawe Street
Waianae, HI 96792
makakila@gmail.com

Dwight J. Vicente
2608 Ainaola Drive
Hilo, Hawaiian Kingdom

Brannon Kamahana Kealoha
89-564 Mokiawe Street
Nanakuli, HI 96792
brannonk@hawaii.edu

Cindy Freitas
PO Box 4650
Kailua Kona, HI 96745
hanahanai@hawaii.rr.com

William Freitas
PO Box 4650
Kailua Kona, HI 96745
pohaku7@yahoo.com

Wilma H. Holi
P. O. Box 368
Hanapepe, HI 96716
w_holi@hotmail.com
Hearing Officer's witness

Moses Kealamakia Jr.
1059 Puku Street
Hilo, HI 96720
mkealama@yahoo.com
Hearing Officer's witness

Signature:

Name: Michael Cain

Date: June 19, 2017