

STATE OF HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Boating and Ocean Recreation
Honolulu, Hawai'i 96813

October 28, 2016

Board of Land and Natural Resources
State of Hawai'i
Honolulu, Hawai'i

REQUEST FOR CONTESTED CASE HEARING BY WILLIAM MURTAUGH
RE: NON-RENEWAL OF COMMERCIAL LAUNCH
RAMP PERMIT AT KEAUHOU BAY

William Murtaugh requests a contested case hearing concerning expiration and non-renewal of a commercial ramp permit at Keauhou Bay. After consultation with the Department of the Attorney General, Land and Transportation Division, we recommend that the request be denied.

BACKGROUND:

In June 2014, Mr. Murtaugh applied for a permit to use the commercial launch ramp at Keauhou Bay. The application indicated that Mr. Murtaugh would use an unnamed vessel owned by Shawn Young.

The Division of Boating and Ocean Recreation (DOBOR) approved the application and issued the permit. Pursuant to HAR § 13-231-61 Mr. Murtaugh - like any permittee - was required to generate minimum gross receipts. There is a waitlist for the launch ramp. The gross receipts requirement ensures that the facility is actually used.

From June 2014 through September 2015, Mr. Murtaugh reported monthly gross receipts as follows:

June 2014	0	Feb 2015	\$6,000
July	0	March	\$1,500
Aug	0	April	\$2,000
Sept	0	May	\$1,000
Oct	\$1,000	June	\$1,000
Nov	0	July	\$1,500
Dec	0	Aug	\$2,000
January 2015	0	Sept	\$1,000

These round numbers were a red flag indicating that Mr. Murtaugh might not have been reporting actual gross receipts.

Another potential red flag occurred in June 2014. At that time, Shawn Young (whose vessel Mr. Murtaugh claimed to be using) advised DOBOR that he (Young) intended to transfer the vessel. Mr. Murtaugh told DOBOR that he was not aware of the vessel transfer by Mr. Young.

Based on these red flags, Mr. Murtaugh's permit was one of several selected for a gross receipts audit pursuant to HAR § 13-234-25(d).¹ DOBOR notified Mr. Murtaugh of the audit by certified mail dated September 30, 2015.

In response, Mr. Murtaugh explained that he was having trouble with getting access to the vessel. He indicated that he was not meeting the minimum gross receipts requirement.

Nevertheless Mr. Murtaugh insisted that the numbers provided represented his actual gross receipts. He was unable to provide any support for these numbers. The only document he could provide was a journal of gross receipts.² This document is attached hereto as Exhibit 1 and is simply a piece of paper with a list of numbers. Upon further inquiry, Mr. Murtaugh's accountant explained that:

Mr. Murtaugh does not maintain a separate bank account for the business receipts as all receipts are paid in cash. The journal of Gross receipts for audit was attached and once again that is all that is maintained for record keeping purposes.

DOBOR repeatedly advised Mr. Murtaugh that this documentation was inadequate and that his permit would not be renewed. Mr. Murtaugh continued to insist that the exact figures he provided were accurate but that he had no other documentation to support the figures. By letter dated April 26, 2015, Chair Case advised Mr. Murtaugh that his permit would not be renewed. The permit expired at the end of April 2016. Mr. Murtaugh then requested a contested case hearing.

DISCUSSION

A. Legal framework

A contested case is defined by Hawai'i Revised Statutes (HRS) § 91-1(5) (2012) as "a proceeding in which the legal rights, duties, or privileges of specific persons are required by law to be determined after an opportunity for agency hearing." An "agency hearing" is defined by

¹ "The department may conduct a financial audit of the records of any commercial activity permit account to determine the accuracy of reported gross receipts or inspect any other financial information, to and including Gross Excise Tax records directly related to the enforcement of these rules after providing notice, as described in section 13-230-6, not less than thirty days prior to the audit." HAR § 13-234-25(d).

² Mr. Murtaugh provided his gross excise tax return which also showed exactly \$16,000 in receipts for the fiscal year June 2014 through May 2015.

section 91-1(6) as “such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14.”³

The question of whether a contested case must be afforded in any particular matter may usefully be divided into two parts. First, could anyone be entitled to a contested case, i.e. are rights of any “specific person” “required by law” to be determined after an “agency hearing”?

Second, does the particular person requesting a contested case have standing, i.e. is the requestor one of the specific persons at issue in the first part of the inquiry? *Cf.* HAR § 13-1-29.1 (distinguishing “a subject that is not within the adjudicatory jurisdiction of the board” from “a petitioner [who] does not have a legal right, duty, or privilege entitling one to a contested case proceeding”); *Kaleikini v. Thielen*, 124 Hawai‘i 1, 17, 237 P.3d 1067, 1083 (2010) (noting separate requirements that the contested case must have been “required by law and determined the rights, duties, and privileges of specific parties” and “the claimant’s legal interests must have been injured- *i.e.*, the claimant must have standing to appeal”) (internal punctuation and citation omitted).

1. Whether a contested case is required by law to determine the legal rights, duties, or privileges of specific persons

A contested case hearing is “required by law” if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency’s decision-making, or if a hearing is mandated by due process. *Bush v. Hawaiian Homes Com’n*, 76 Hawai‘i 128, 134, 870 P.2d 1272, 1278 (1994).

As to due process, the Hawai‘i Supreme Court has said, “[I]n order to assert a right to procedural due process, [a party] must possess an interest which qualifies as ‘property’ within the meaning of the constitution.” *Sandy Beach Defense Fund v. City Council of City and County of Honolulu*, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989). *Accord Brown v. Thompson*, 91 Hawai‘i 1, 10, 979 P.2d 586, 595 (1999):

a claim of a due process right to a hearing requires a two[-] step analysis: (1) is the particular interest which the claimant seeks to protect by a hearing “property” within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is “property” what specific procedures are required to protect it.

Citations omitted.

³The Board’s sunshine meeting is not an “agency hearing” as that term is used in these definitions. *Simpson v. Department of Land and Natural Resources, State of Hawai‘i*, 8 Haw.App. 16, 25, 791 P.2d 1267, 1273 (1990), overruled on other grounds, *Kaniakapupu v. Land Use Com’n*, 111 Haw. 124, 139 P.3d 712 (2006) and *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai‘i 64, 69, 881 P.2d 1210, 1215 (1994) (holding that a Board sunshine meeting is “a public hearing required by law” but not “a contested case hearing”).

Property rights are protected by the federal and State Constitution. They are not, however, “created by the [federal] Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *In re Robert’s Tours & Transp., Inc.*, 104 Hawai‘i 98, 106, 85 P.3d 623, 631 (2004) (quoting *Board of Regents*).

2. Standing

The question of whether a particular person has standing involves a three part test:

(1) whether the person “has suffered an actual or threatened injury as a result of the defendant’s wrongful conduct,” (2) whether “the injury is fairly traceable to the defendant’s actions,” and (3) whether “a favorable decision would likely provide relief for [the person’s] injury.”

E & J Lounge Operating Co., Inc. v. Liquor Com’n of City and County of Honolulu, 118 Hawai‘i 320, 346, 189 P.3d 432, 458 (2008). *See also* HAR § 13-1-31(b).

Obviously, whether a particular person has standing can overlap with whether a contested case is required. When a hearing determines the legal rights, duties, or privileges of a specific person, that person will have standing. When the contested case is required by due process, a person with a protectable property interest will have standing.

B. Application of the law to this specific petition

1. A contested case is not required by law

No statute or rule requires a contested case in the context of revoking a permit.

Without a statute or rule requiring the Board to hold a contested case hearing, the remaining question is whether constitutional due process requires a contested case hearing. *Bush*, 76 Hawai‘i at 135, 870 P.2d at 1279. To establish a due process right to a contested case hearing, the claimant must first show that “the particular interest which claimant seeks to protect by a hearing [is] ‘property’ within the meaning of the due process clauses of the federal and state constitutions[.]” *Sandy Beach Def. Fund v. City Council of Honolulu*, 70 Haw. 361, 376, 773 P.2d 250, 260 (1989).

In this case, Mr. Murtaugh provided patently false numbers as to actual gross receipts. At first he seemed to admit the numbers were false but later he insisted they were accurate. Mr. Murtaugh admittedly has no evidence whatsoever that the numbers represent his actual gross receipts. It is in fact literally impossible that the reported numbers could be accurate.

Mr. Murtaugh's permit expired by its own terms at the end of April 2016. The department declined to renew the permit because Mr. Murtaugh failed to meet gross receipts requirements.

Mr. Murtaugh has no property interest in any permit because the permit expired by its own terms. HAR § 13-231-5(a) states in relevant part that "[t]he department may issue or renew a use permit for any period up to, but not exceeding, one year. Upon expiration of the period stated therein, the permit and all rights of the permittee thereunder shall automatically terminate." Emphasis added.

Case law also makes clear that no property right is at issue. In *Cassidy v. State of Hawaii, Dept. of Transp., Harbors Div.*, 915 F.2d 528 (9th Cir. 1990) the Ninth Circuit specifically rejected a claimed property interest in renewal of a permit. Cassidy held a regular mooring permit that, under applicable rules, "*automatically expires if the permit-holder leaves his slip for more than fourteen days.*" 915 F.2d at 530 (emphasis in original). Cassidy was absent for more than fourteen days. His permit therefore automatically expired. He sued, claiming a property interest in his continued use of the slip and renewal of the permit, which property interest could be terminated only after due process.

For the reasons discussed above, the court noted the threshold issue was whether Cassidy had a property interest at all.

In order to prove a due process violation, Cassidy must first demonstrate that he has a protected property interest in the mooring permit. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law..." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

915 F.2d at 530. The court rejected Cassidy's claim, because (like Mr. Murtaugh's permit) Cassidy's permit had automatically terminated pursuant to State law. Cassidy had no remaining right in the terminated permit and no right to renew the permit. Hence he had no property interest entitled to due process. "Cassidy's permit, and thus his property interest, expired when he left his slip for more than fourteen days." *Id.* at 530.⁴ *Cf. Federal Lands Legal Consortium*

⁴ The court rejected Cassidy's assertion that the State "generally renews permits under section 19-62-11, and that this custom created an understanding that would justify a legal entitlement to have his permit renewed:"

Not all customs create a property right, however. "A constitutional entitlement cannot 'be created-as if by estoppel-merely because a wholly and expressly discretionary state privilege has been granted generously in the past.'" *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465, 101 S.Ct. 2460, 2465, 69 L.Ed.2d 158 (1981) (emphasis in original), quoting *Leis v. Flynt*, 439 U.S. 438, 444 n. 5, 99 S.Ct. 698, n. 5, 58 L.Ed.2d 717 (1979) (per curiam); see also *Punikaia v. Clark*, 720 F.2d 564, 570 (9th Cir.1983) (state's continuous

ex rel. Robart Estate v. U.S., 195 F.3d 1190, 1199-1200 (10th Cir. 1999) (“Regardless, ‘in the absence of a statutory or contractual right to renewal, a person ... can claim no property interest in the indefinite renewal of his or her contract.’”). *And see Fielder v. Gehring*, 110 F.Supp.2d 1312, 1319 (D.Haw. 2000) (Mollway J.) (“before Fielder can claim that he had such a property interest [in a claimed mooring permit], he must demonstrate that he was entitled to the mooring permit under Hawai‘i law.”).

In the absence of any protected interest, there is no due process requirement to provide a contested case.⁵

RECOMMENDATION:

Staff recommends that, pursuant to HAR § 13-1-29.1, the Board deny Mr. William Murtaugh’s petition for a contested case hearing.⁶

Respectfully submitted,


for Edward R. Underwood
Administrator

APPROVED FOR SUBMITTAL:


Suzanne D. Case
Chairperson and Member

(Exhibit 1)

provision of care at nursing home for 30 years did not create a property right in continued care for residents), *cert. denied*, 469 U.S. 816, 105 S.Ct. 83, 83 L.Ed.2d 30 (1984). The state expressly disavowed any intention to create such a right to renewal and Cassidy has shown no more than a unilateral expectation of renewal.

915 F.2d at 531.

⁵ We do not discuss standing other than to note that if Mr. Murtaugh had a property interest, then standing would not be an issue.

⁶ “The board without a hearing may deny a request or petition or both for a contested case when it is clear as a matter of law that the request concerns a subject that is not within the adjudicatory jurisdiction of the board or when it is clear as a matter of law that the petitioner does not have a legal right, duty, or privilege entitling one to a contested case proceeding.” HAR § 13-1-29.1.