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BOARD OF LAND AND NATURAL RESOURCES
 STATE OF HAWAII

FRANK KAMEHAMEHA TEMEHALOHA)	
ANUUMEALANI NOBRIGA, in)	
his capacity as Kahuna of the Temple of)	
Lono Pro Se and LANNY ALAN SINKIN, in)	
his capacity as Kahuna of the Temple of)	
Lono, Pro Se)	
)	AGENCY DOCKET NO.
Petitioners-Appellants)	BLNR-CC-16-002
)	(Agency Appeal)
vs.)	
)	
BOARD OF LAND AND NATURAL)	
RESOURCES, STATE OF HAWAI'I;)	MEMORANDUM IN SUPPORT
DEPARTMENT OF NATURAL RESOURCES;)	OF NOTICE OF APPEAL;
STATE OF HAWAI'I; SUZANNE D. CASE,)	EXHIBITS "A" - "BB"
in her capacity as Chair of the Board of)	
Land and Natural Resources and Director)	
Of the Department of Land and Natural)	
Resources; and the UNIVERSITY OF)	
HAWAI'I AT HILO,)	
)	
Respondent-Appellees,)	
)	
and)	
)	
MAUNA KEA ANAINA HOU and)	
KEALOHA PISCIOTTA; CLARENCE)	
KUKAUAKAHI CHING; FLORES-CASE)	
'OHANA; DEBORAH J. WARD; PAUL K.)	
NEVES; and KAHEA: THE HAWAIIAN)	
ENVIRONMENTAL ALLIANCE, a)	

Domestic non-profit corporation)
TMT INTERNATIONAL OBSERVATORY,)
LLC; HARRY FERGERSTROM; MEHANA)
KIHOI; C.M. KAHO’OKAHI KANUHA;)
JOSEPH KUELI’I LINDSEY CAMARA; J.)
LEINA’ALA SLEIGHTHOLM; MAELANI)
LEE; KALIKOLEHUA KANAELE;)
PERPETUATING UNIQUE EDUCATIONAL)
OPPORTUNITIES, INC.; STEPHANIE-)
MALIA TABADA; TIFFNIE KAKALIA; GLEN)
KILA; DWIGHT J. VICENTE; BRANNON)
KAMAHANA KEALOHA; CINDY FRIETAS;)
AND WILLIAM FRIETAS,)
))
_____)
Intervenors-Appellees)

TEMPLE OF LONO MEMORANDUM IN SUPPORT OF NOTICE OF APPEAL

I. INTRODUCTION

Because the Temple’s Notice of Appeal relies upon numerous documents, oral rulings, and omissions, the Temple offers this memorandum explaining the nature of the appeal.¹

II. ISSUES ON APPEAL

What we have here is a systematic attempt by the Appellee Board of Land and Natural Resources (“Board”) and the Hearing Officer, appointed by the Board to preside over the proceeding below, to prevent the Temple of Lono from being heard on the following question: Has the Applicant demonstrated a hostility to the Traditional Hawaiian Faith that disqualifies the Applicant from receiving the permit requested?

¹ The Temple also notes that in a related case, the Board filed a motion to dismiss the Notice of Appeal. SCOT-16-0000788 (Appellee Board of Land and Natural Resources, State of Hawaii’s Motion to Dismiss Appeal; Memorandum in Support of Motion; Declaration of Counsel; Exhibit “1”; Certificate of Service. Anticipating a similar response to this Notice of Appeal, the Temple provides a comprehensive explanation regarding the nature of this appeal.

While refusing to take up that question directly, the Board and the Hearing Officer have rejected every attempt by the Temple of Lono to be heard on that question.

The Board and the Hearing Officer have repeatedly denied the Temple's due process right to be heard. By doing so, the Board and the Hearing Officer have essentially denied the Temple's efforts to disqualify the Applicant based on a libelous and bigoted attack by the Applicant on the Temple, without the Temple having an opportunity to be heard and without a ruling on the merits of the Temple's claim.

That consistent blocking of the Temple's efforts to be heard is the equivalent of a final ruling on the question. The ruling is simply *sub silentio*.

In the course of protecting the Applicant from being held accountable for the disqualifying attack by denying the Temple's right to be heard, the Hearing Officer demonstrated an obvious bias against the Temple and in favor of the Applicant. That bias extended to the Hearing Officer's treatment of the Temple's filings.

In addition to preventing the Temple from litigating the implications of the Applicant's attack, the Hearing Officer is refusing to take up motions filed by the Temple. Those refusals constitute an additional, ongoing violation of the Temple's due process rights.

The Temple presents below the history and consequences for the Temple of the systemic denial of the Temple's due process rights in the proceeding below that justify the Temple seeking appellate review at this stage in the proceeding below.

III. FACTS

Appellant Temple of Lono (“Temple”) is an intervenor in the proceeding below.

The Temple sought intervenor status on the following bases:

- (1) Tahuna Frank Kamehameha Tamealoha Anuumealani Nobriga is the Tahuna of the Temple of Lono. As such he has a unique understanding of the traditional Hawaiian faith and the application of that faith to the spiritual issues that are likely to be raised in this case.
- (2) Based on his unique, comprehensive, and relevant knowledge concerning the traditional faith of the Hawaiian Civilization, the Tahuna is entitled to mandatory intervention under HAR § 13-1-31(b)(2) because desecration of Mauna a Wākea will directly affect the Temple of Lono, both as a violation of a sacred space and as an act in furtherance of a long-pursued campaign to suppress the traditional faith of the Hawaiian people.
- (3) Alternatively, the BLNR should grant discretionary intervention pursuant to HAR § 13-1-31(c) because the Temple has a substantial interest in this case and the Tahuna is the only person qualified to represent that interest.

Exhibit “A” {DOC-50 [Request of Temple of Lono to intervene (Motion) at 2]}.

The Temple offered arguments and evidence in support of its motion to intervene. Ibid. (Memorandum and Exhibits thereto).

The Hearing Officer admitted the Temple as an intervenor. Exhibit “B” [DOC-115 (Minute Order No. 13: Order on the hearing on admission or intervention as a party; second prehearing conference)]. See also Exhibit “C” [DOC-074 (Statement of Representation)]; Exhibit “D” [DOC-076 (Declaration of Frank Tamehameha Kamehaloha Anuumealani Nobriga re: Appointment of Lanny Alan Sinkin as an officer of the Temple of Lono)].

On June 21, 2016, the Temple filed its Motion for Partial Summary Judgment. Exhibit “E” [DOC-78 (Temple of Lono motion for partial summary judgment)]. The motion sought partial summary judgment on two factual issues: (1) the summit of

Mauna Kea is held sacred by the traditional Hawaiian faith and (2) the traditional Hawaiian faith is still practiced. Id.

On August 1, 2016, Appellee University of Hawai'i at Hilo, applicant for the conservation district use permit at issue in the proceeding below, ("Applicant") filed its opposition to the Temple's motion. Exhibit "F" {DOC-135 [The University of Hawaii at Hilo's opposition to Temple of Lono's motion for partial summary judgment (DOC-78)]}. In this pleading, the University included a libelous and bigoted attack on the Temple of Lono. Ibid. at 14-15.

On August 3, 2016, the Temple filed a reply bringing the matter of the attack to the attention of the Hearing Officer and challenging the attack as an *ad hominem* attack with no factual basis. Exhibit "G" [DOC-176 (Temple of Lono reply to the University of Hawaii at Hilo's opposition to Temple of Lono motion for partial summary judgement)].

On August 5, at a pre-hearing conference, the Hearing Officer provided an opportunity for oral argument on the Temple's motion for partial summary judgment. The Temple brought up the issue of the attack. Exhibit "BB" (Declaration of Lanny Alan Sinkin) at ¶¶ 4-10.² The Applicant objected to the motion on procedural grounds and offered no response to the Temple's challenge to the attack. Id. The Hearing Officer orally denied the motion for partial summary judgment without mentioning the attack. Id.

² The Temple does not have access to the transcripts and is providing the Declaration of Lanny Alan Sinkin to document facts related to prehearing conferences and the Contested Case Hearing relevant to this appeal. The Temple has every expectation that all parties will stipulate to the facts set forth in that Declaration.

Pursuant to a schedule set by the Hearing Officer, the time for pre-hearing motions expired on August 1. The Applicant filed its attack on August 1. Exhibit “F” supra.

On August 8, 2016, the Temple filed its Motion to File Motion out of Time. Exhibit “H” [DOC-179 (Temple of Lono motion to file motion out of time)].

The Temple sought permission of the Hearing Officer to file a motion out of time seeking to dismiss the application on the grounds that the attack demonstrated that the Applicant has a disqualifying animus against the traditional Hawaiian faith. Ibid., Exhibit 2 (Memorandum at 2-4, 9-10). The Temple argued that the animus was disqualifying because the Applicant would be constitutionally required to protect that faith, should the permit application be granted. Id.

Two intervenors filed joinders to the Temple’s motion. Exhibit “I” [DOC-193 (Leina`ala Sleightholm joinder to Temple of Lono motion to file motion out of time) and Exhibit “J” [DOC-221 (Glen Kila memorandum in support of Temple of Lono motion to file motion out of time)].

The Applicant opposed the Temple’s motion solely on timeliness grounds. Exhibit “K” [DOC-194 (The University of Hawaii at Hilo Opposition to Temple of Lono’s motion to file out of time)]. The only other opposition was also on timeliness grounds. Exhibit “L” [DOC-183 (TMT International Observatory LLC’s objections to ... (2) Temple of Lono motion to file out of time)].

On August 29, 2016, the Temple’s motion to file motion out of time came before the Hearing Officer. Exhibit “BB” at ¶¶ 11-16. In the hearing, the Applicant did not offer any defense of or explanation for the attack. Id.

After hearing argument, the Hearing Officer orally denied the motion to file a motion out of time without mentioning the attack. Id.

On September 17, 2016, the Temple filed its Motion for Summary Judgment (Disqualification) arguing that the Applicant's attack was an undisputed fact that disqualified the Applicant from receiving the permit. Exhibit "M" {DOC-263 [Temple of Lono motion for summary judgment (disqualification)]}.

On September 17, 2016, the Temple also filed its Motion to Recuse Hearing Officer. Exhibit "N" [DOC-262 (Temple of Lono motion to recuse Hearing Officer)]. The basis for recusal was primarily the refusal of the Hearing Officer to permit the Temple to even file a motion challenging the Applicant's attack as disqualifying. Id.

On September 17, 2016, the Temple also filed its proposed issues for the Hearing. Exhibit "O" [DOC-265 (Temple of Lono proposed issues)]. The issues proposed by the Temple included a category titled "Character" and in that category included the following: "Has the Applicant demonstrated a hostility toward the Traditional Hawaiian Faith that disqualifies the Applicant from receiving the permit requested?" Ibid. Exhibit "A" at 1.

On September 23, 2016, the Hearing Officer issued an order setting the issues for the hearing. Exhibit "P" [DOC-281 (Minute Order 19: Order granting Perpetuating Unique Educational Opportunities, Inc.'s motion to set the issues)]. That order excluded the character issue the Temple sought to litigate. Id. passim.

On September 26, 2016, the Temple filed its Motion for Reasoned Explanations and Extension of Time. Exhibit "Q" [DOC-286 (Temple of Lono motion for reasoned explanations and extension of time)]. That motion sought explanations

for the Hearing Officer's exclusion of many issues identified by the Temple as relevant and material to this case, including the character issue discussed above. Id. The absence of such explanations denied the Temple the opportunity to file motions for reconsideration regarding the excluded issues, including the character issue.

On October 6, 2016, the Temple filed its Motion to Schedule Pending Motions. Exhibit "R" [DOC-324 (Temple of Lono motion to schedule pending motions)]. This motion sought to have thirteen pending pre-hearing matters raised by the Temple scheduled for resolution, including two motions to recuse the Hearing Officer; two motions for summary judgment that would be dispositive of the entire case, if successful; and the motion mentioned above seeking reasoned explanations for excluding issues, including the character issue. Id.

On October 5, pursuant to an order from the Hearing Officer, the Applicant filed a proposed order denying the Temple's motion to file a motion out of time. Exhibit "S" {DOC-318 [University of Hawaii at Hilo proposed Minute Order No. ___ denying Temple of Lono motion to dismiss out of time (Doc. 179)]}

On October 7, 2016, the Temple filed its response to the Applicant's proposed order. Exhibit "T" {DOC-336 [Temple of Lono response to University of Hawai'i at Hilo (proposed) Minute Order No. ___ denying Temple of Lono motion to dismiss out of time (Doc-179)]}

On October 11, 2016, the Hearing Officer issued a written Order denying the Temple's motion to file motion out of time. Exhibit "U" {DOC-356 [Minute Order No. 33, Order denying Temple of Lono's motion to dismiss out of time (Doc. 179)]}. The only basis for the denial was that the Temple had not provided good cause for

allowing a motion to be filed out of time. *Id.* The Hearing Officer did not identify any cause that she considered or otherwise explain the ruling on the absence of good cause. *Id. passim.* The ruling made no mention of the Applicant's attack filed in response to the Temple's motion for partial summary judgment. *Id. passim.*

On October 14, 2016, the Temple filed its Temple of Lono; Unresolved Matters identifying 13 pre-hearing matters on which the Hearing Officer had yet to take action on the eve of the Contested Case Hearing beginning, including the Motion for Summary Judgment (Disqualification). Exhibit "V" [DOC-371 (Temple of Lono: Unresolved matters)].

On October 17, at a pre-hearing conference, the Temple representative brought the unresolved matters to the attention of the Hearing Officer again. Exhibit "BB" at ¶¶ 17-19.

The Hearing Officer offered no response as to when, if ever, those items would be addressed. *Id.*

The Contested Case Hearing began without those matters being resolved.

On October 28, 2016, the Board of Land and Natural Resources issued Minute Order No. 39 (Order Denying Renewed Motion to Disqualify Hearing Officer). Exhibit "W" [DOC-406 (Minute Order No. 39, Order denying renewed motions to disqualify Hearing Officer)].

As reflected in Minute Order No. 39:

2. Temple of Lono ("Lono") filed a Substantive Joinder and Supplement to Petitioners Mauna Kea Anaina Hou et al.'s Renewed Motion to Disqualify Hearing Officer on October 10, 2016. DOC. 343. Lono also filed a Second Supplement and a Third Supplement, both on October 11, 2016. Docs. 360, 361.

Exhibit “W” at 1.³

In Minute Order No. 39, the Board attempted to characterize DOC-262 (Exhibit “N”) – the Temple’s motion to recuse the Hearing Officer – as a decided matter being given reconsideration. In fact, no decision had ever been made on that motion.

The treatment of DOC-242 (Exhibit “N”) as already decided comes on page 4 of the Minute Order:

Lono argues that the Hearing Officer violated its right to due process when she denied its request to file a late motion [DOCs. 179, 356], when she set the issues in the contested case hearing that it did not agree with [DOC. 281], and because she did not recuse herself from these proceedings upon Lono's request [DOC. 262].

Exhibit “W” at 4-5 (emphasis added).

The first two items in that paragraph refer to actual rulings.⁴ The third item listed does not.

As noted above, the Temple participated directly in the litigation leading up to the issuance of Minute Order No. 39 by filing a joinder and three supplements.

Exhibits “X,” “Y,” and “Z.”

³ [DOC-343 (Temple of Lono substantive joinder and supplement to petitioners Mauna Kea Anaina Hou, et al.'s renewed motion to disqualify hearing officer)] is Exhibit “X”; [DOC-360 (Temple of Lono second supplement to petitioners Mauna Kea Anaina Hou et al.'s renewed motion to disqualify Hearing Officer is Exhibit “Y”]; [DOC-361 (Temple of Lono third supplement to petitioners Mauna Kea Anaina Hou et al.'s renewed motion to disqualify Hearing Officer)] is Exhibit “Z”.

⁴ The Temple did not, however, object to the Hearing Officer “when she set the issues in the contested case hearing that it did not agree with.” The Temple sought a reasoned explanation for why the Hearing Officer excluded some issues, Exhibit “Q”, so that the Temple could exercise its due process right to seek reconsideration of issues it wished to have included that were excluded. HAR §13-1-39.

On November 4, 2016, the Temple filed its Motion to Vacate Minute Order No. 39 or, Alternatively, to Partially Reconsider Minute Order No. 39. Exhibit “AA” [DOC-409 (Temple of Lono motion to vacate Minute Order No. 39 or, alternatively to partially reconsider Minute Order No. 39)]. That motion contains a direct challenge to the veracity of the Minute Order’s treatment of DOC-262 (Exhibit “N”). Exhibit “AA” at 10-11.

IV. ARGUMENT

Minute Order No. 39 (Exhibit “W”) is worded to make it appear that the Hearing Officer had previously ruled on DOC-262 (Exhibit “N”), when the Hearing Officer had not; omits a schedule for reconsideration to make it appear that all the rulings in the Order were already reconsiderations, when they were not⁵; attempts to discourage a motion to reconsider by not including a schedule for such a motion, see Note 5; and both gives the overall impression and explicitly states that the motion to recuse – DOC-262 – was denied as an appropriate exercise of the Hearing Officer’s authority. Exhibit “W” at 5 (“The Hearing Officer may rule on motions and ‘dispose of ... matters that normally properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing.’ HAR §13-1-32(c).”)

The false and misleading nature of this pleading are all part of a consistent and persistent attempt on the part of the Hearing Officer and Board to avoid the implications of the Applicant’s attack on the Temple of Lono in Exhibit “F” at 14-15.

⁵ In a related case Notice of Appeal, see Note 1 infra, at 2, there are three minute orders as exhibits. Exhibit “A” in that Notice is the same as Exhibit “W” in this Notice. Exhibit “B” at 5 and Exhibit “C” at 5 contain the usual schedule for motions for reconsideration missing from Minute Order No. 39.

The facts presented above document that the Board and the Hearing Officer have engaged in a systematic effort to prevent the Temple of Lono from having an opportunity to argue that the attack on the Temple disqualifies the Applicant from receiving the permit at issue in this proceeding.

Those facts support a conclusion that the Temple will never be allowed to raise the disqualification issue, so the obstruction by the Board and the Hearing Officer is the equivalent of a final order.

That “order” constitutes a profound violation of the Temple’s due process right to be heard.

The violation of the Temple’s due process rights is compounded by the Hearing Officer’s refusal to take up numerous relevant and material motions filed by the Temple. See Exhibit “V.” The continuation of such refusals despite repeated efforts by the Temple to have those matters taken up is also sufficient to support a conclusion that there is, in effect, a final order denying consideration of those matters.

Alternatively, these violations of the Temple’s due process rights support accepting this appeal as falling within the collateral order doctrine.

The Temple’s claims of rights are “separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” *Abrams v. Cades, Shutte, Fleming & Wright*, 88 Hawai’i 319, 322, 966 P.2d 631, 634 (1998) (quotation marks and citation omitted).

The Applicant bears the burden of proof, including on any challenge to the Applicant's character. In *N.M. Ranchers Ass'n v. ICC*, 702 F.2d 227 (D.C. Cir. 1983) (per curiam), the court remanded an Interstate Commerce Commission (ICC) decision to grant a permit for a railroad line. The court found that the ICC erred in failing to consider evidence of bad faith tending to show that the rail line developer would not fulfill its promises to preserve sacred and historical Native American sites along the right-of-way. *Id.* at 232-33.

In putting on its case for a conservation district use permit, the Applicant would normally not be required to present evidence of character. As *N.M. Ranchers Ass'n*, *supra.*, demonstrates, however, bad behavior can raise the issue of character where no such issue existed before.

In this case, the Applicant has raised the issue of the Applicant's character by its attack on the character of the Temple. Exhibit "F" at 14-15.

Certainly the issue of the Temple of Lono's character is totally irrelevant to the issues in the contested case. The testimony and exhibits presented in the case by the Temple will be judged on their merits, not by who submitted them.

The Applicant's attack came in response to a simple motion for partial summary judgment, which contained nothing justifying the attack. Exhibit "E".

The *ad hominem* attack, however, did raise a serious question about the Applicant's qualifications to receive a permit from the State of Hawai'i.

Denying the Temple the opportunity to both defend its reputation and identify implications of the attack for the fitness of the Applicant to receive the

permit requested created issues that are independent of the contents of the application itself.

The Temple's due process rights are "too important to be denied review." In this case, the Temple has been essentially excluded from the proceeding both by being denied the right to raise relevant and material issues, such as disqualification, and by having its motions ignored. That exclusion is "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

Furthermore, being prohibited from raising a relevant and material issue and from having motions considered is tantamount to revoking the intervenor status given to the Temple. Had the Hearing Officer simply denied intervention status in the beginning, the Temple would have had the right to an immediate appeal. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997); *Petrol Stops Northwest v. Continental Oil Co.*, 647 F.2d 1005, 1009 (9th Cir. 1981).

The actions of the Board and the Hearing Officer documented herein support a conclusion that the Temple's intervenor status has been substantially circumscribed without the Temple being given an opportunity to challenge the piecemeal revocation of its full party status.

V. CONCLUSION

After the Applicant filed its libelous and bigoted attack on the Temple, the Temple repeatedly sought to be heard on the Temple's contention that the attack was disqualifying. Those attempts included and were not limited to:

- A request to file a motion to dismiss out of time, Exhibit "H";
- A motion for summary judgment on the disqualification issue, Exhibit "M";
- A motion to recuse the Hearing Officer based on her refusal to permit the Temple to be heard on the disqualification issue, Exhibit "N";
- Requesting inclusion of the character issue in the issues to be heard during the contested case hearing, Exhibit "O";
- Requesting reasoned explanations for blocking the Temple's attempts to have the disqualification issue heard as part of the contested case hearing, so the Temple could pursue reconsideration, Exhibit "Q"; and
- Requesting consideration of motions ignored, Exhibit "V".

All of these attempts resulted in denials of the Temple's motions, refusal to even consider the Temple's motions, and, finally, an attempt to make the Temple's disqualification issue disappear through legal slight of hand. Exhibit "W" at 4-5 (portraying DOC-262 as decided).

The Temple exhausted every possible avenue to have its concerns heard and never had an opportunity to argue its claim. The denial of due process has been systemic.

The Board and the Hearing Officer essentially decided the disqualification issue without the Temple's participation in that decision. That process is similar to the process that led the Hawai'i Supreme Court to vacate the first permit: BLNR voted to grant the permit and then held the contested case. *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai'i 376, 363 P.3d 224 (2015).

That failure to provide an opportunity to all parties to be heard before a decision was reached was a due process violation that the Supreme Court found to be fatal to the proceeding.

Here the denial of the Temple's motion to file a motion out of time amounted to a ruling denying the Temple's disqualification motion with no opportunity for the Temple to be heard. Unlike the earlier due process violation, the Temple never had even a constitutionally-late opportunity to be heard.

Given that the initial event triggering the events chronicled in this memorandum was an attack on the traditional Hawaiian faith, the application of the earlier ruling in this proceeding addressing the protections provided to that faith is particularly appropriate. *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, supra at 251 (Justice Pollack concurring).

Given that the Temple sought to raise a challenge that could have potentially led to dismissal of the proceeding based on disqualification of the Applicant and/or the recusal of the Hearing Officer based on her complicity in protecting the Applicant from facing the consequences of its actions, the due process violation of denying an opportunity to be heard is that much more serious.

The Temple is entitled to an appeal in order to have these fundamental issues finally addressed by a fair and impartial appellate court.

DATED: November 13, 2016.

/s/FRANK KAMEHAMEHA TAMEALOHA ANUUMEALANI NOBRIGA
Frank Kamehameha Tamehaloha Anuumealani Nobriga
Lanny Alan Sinkin

Pro Se Representatives for the Temple of Lono