

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI‘I

IN THE MATTER OF	)	Case No. BLNR-CC-16-002
)	
Contested Case Hearing Re Conservation District	)	Minute Order No. 9 (Order
Use Application (CDUA) HA-3568 For the	)	Denying Petitioners’ Motion
Thirty Meter Telescope at the Mauna Kea Science	)	for Reconsideration of
Reserve, Ka’ohe Mauka, Hamakua, Hawai‘i	)	Minute Order No. 4, Filed on
TMK (3) 4-4-015:009	)	May 6, 2016 and/or Motion
	)	to Strike Selection Process
	)	and to Disqualify Various
	)	Members and Hearing
	)	Officer; Certificate of
	)	Service)
)	

Minute Order No. 9 (Order Denying Petitioners’ Motion for Reconsideration of Minute Order No. 4, Filed On May 6, 2016 and/or Motion to Strike Selection Process and to Disqualify Various Members and Hearing Officer)

I. Introduction

In Minute Order No. 4, filed on May 6, 2016, the Board of Land and Natural Resources (the “Board”) denied Petitioners Mauna Kea Anaina Hou, Kealoha Pisciotta¹, Clarence Kukauakai Ching, Flores-Case Ohana, Deborah J. Ward; Paul K. Neves; and Kahea: The Hawaiian Environmental Alliance’s (together “Petitioners”) objections to the contested case hearing officer selection process and motion to disqualify Judge Riki May Amano (Ret.) (“Judge Amano”) as the hearing officer.

On May 13, 2016, Petitioners filed their Motion for Reconsideration of Minute Order No. 4, Filed on May 6, 2016 and/or Motion to Strike Selection Process and to Disqualify Various Members and Hearing Officer (“Petitioners’ Motion”). Petitioners’

¹ Ms. Pisciotta, individually, is not a party to the contested case, but she is the president and pro se representative of Mauna Kea Anaina Hou.

Motion objected again to the contested case hearing officer selection process and selection of Judge Amano as the hearing officer. In addition, Petitioners' Motion newly objected to (1) the composition of the selection committee, specifically the participation of one committee member, Board Member Christopher Yuen ("Member Yuen"); (2) the State of Hawaii's responses to requests by Petitioners for records; and (3) what Petitioners perceive as favorable treatment towards the Thirty Meter Telescope ("TMT") project by adopting an alleged "fast-tracked" process.

On May 16, 2016, Judge Amano held a pre-hearing conference with Petitioners and Applicant University of Hawai'i at Hilo (the "University") that was open to the public. *See* Minute Order No. 7 (1st Pre-Hearing Conference and Amano Fourth Supplemental Disclosure), filed on May 26, 2016 *and* Minute Order No. 8, filed on May 27, 2016. At the hearing, Judge Amano decided how the prior record before the Board regarding the TMT conservation district use application would be handled. *Id.* Judge Amano also set a schedule to hear applications, motions and requests to intervene as a party, including a June 17, 2016 hearing in Hilo. *Id.* Judge Amano further disclosed that on May 14, 2016, she attended her niece's graduation party at 'Imiloa Center in Hilo. *Id.*

On May 25, 2016, the University filed a statement of position on Petitioner's Motion, in which the University argued that (1) the Board followed the correct procedure upon remand to restart the contested case hearing selection process and appoint a new hearing officer; (2) Petitioners' arguments regarding the disqualification of Member Yuen were baseless; (3) Judge Amano's membership in 'Imiloa was not disqualifying conduct; and (4) the contested case hearing should not be held hostage to Petitioners' improper delay tactics. The University also notified the Board for the first time that

Judge Amano was serving as a mediator in another matter in which the University of Hawai‘i at Manoa was a party (the “UH-Manoa Matter”). Based apparently upon concerns that the Hawai‘i Supreme Court would adopt Petitioners’ “appearance of justice” arguments, the University asked the Board to remove Judge Amano and proceed with a new hearing officer for the contested case hearing.²

On May 25, 2016, Member Yuen filed a response to Petitioners’ Objections to his participation on the Board and the hearing officer selection committee.

On May 26, 2016, a Notice of Filing of Amano[‘s] Fifth Supplemental Disclosure was filed, attaching a letter from Judge Amano dated May 25, 2016, in which Judge Amano, among other updated disclosures, described the UH-Manoa Matter and stated her disclosure was based upon an alleged statement by University lawyers that “UH[-Manoa] and UH-Hilo are part of the same system.” Judge Amano, as she had previously indicated in other disclosures, stated she did not believe a reasonable person would consider her service as a mediator in the UH-Manoa Matter would affect her impartiality as a hearing officer in this contested case hearing.

After review of the record, including the various statements and arguments described above, and following deliberations on May 27, 2016, for reasons set forth in this minute order, the Board DENIES Petitioners’ Motion.

II. Discussion

A. Motion for Reconsideration of Minute Order No. 4

For the Board to reconsider a decision it has made, Petitioners must show that:

² On May 26, 2016, TMT International Observatory, LLC (“TIO”), in a supplemental memorandum in support of its motion to be admitted as a party to the contested case hearing, also asked the Board to replace Judge Amano, based upon similar concerns raised by the University regarding the Hawai‘i Supreme Court.

- (1) New information not previously available would affect the result;
or
- (2) A substantial injustice would occur.

Hawaii Administrative Rule (“HAR”) § 13-1-39(a).

As the Supreme Court has often stated,

“the 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.*

Sousaris v. Miller, 92 Hawai‘i 505, 513, 993 P.2d 539, 547 (2000) (internal brackets and citations omitted; emphasis added). Petitioners twice objected to the selection process and appointment of the hearing officer, on April 15, 2016 and May 2, 2016, before the Board issued Minute Order No. 4. To the extent Petitioners’ Motion repeats what was previously stated and does not present new evidence or arguments that could not have been presented earlier or show that a substantial injustice would occur, the Board denies Petitioners’ motion to reconsider Minute Order No. 4.

B. Hearing Officer Selection Process

Petitioners, once again, object to the selection process for the hearing officer. A solicitation notice, which complies with the State Procurement Code, was properly published based on an anticipatory need for a hearing officer. *See* Hawaii Revised Statutes (“HRS”) § 103D-304. HAR § 13-1-32(b) sets forth who may conduct a contested case hearing, either the Board or a hearing officer if delegated by the Board. No law required the Board’s delegation of the contested case to a hearing officer prior to publication of the solicitation notice.

Neither the Board's delegation of the contested case hearing to a hearing officer, nor the authorization for the Board Chairperson to appoint the hearing officer mandated a public meeting under the Sunshine Law, HRS chapter 92 ("Chapter 92"). On December 2, 2015, in *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai'i 376, 363 P.3d 224 (2015), the Hawai'i Supreme Court remanded the captioned matter to the circuit court to further remand to the Board "for proceedings consistent with this opinion, so that a contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with this opinion." The Board has construed these instructions to mean that upon remand, the contested case that was initiated in 2011 resumed, and no Chapter 92 public meeting was required to start up the contested case, including delegating the contested case to a hearing officer and authorizing the Chairperson to appoint one.

The Board disagrees with Petitioners' argument that sections 91-9 and 91-9.5, HRS, require that notice of the contested case hearing be published immediately upon remand. These statutes require that notice be given to the parties of, among other things, the date, time and place of the contested case hearing, and that if notice cannot be given to the parties, that it be published in a newspaper. Notice of the contested case is not an issue. Notice to the parties is not yet required, and in any event the Board has already received 34 new applications from individuals and entities interested in becoming a party. The pre-hearing conference held by Judge Amano on May 16, 2016, to discuss procedural issues, was not a contested case hearing. In the contested case hearing the parties will have an opportunity to present evidence and arguments on all issues involved.

See HRS § 91-9(c). The date for the contested case hearing has not been set, and notice by publication is not yet required.

C. Member Yuen

Petitioners claim Member Yuen should recuse himself from the Board in this matter and should not have served as a member of the selection committee for the hearing officer because of statements he made in a 1998 interview. The Board finds that a statement made by one of its members over a decade before the Thirty Meter Telescope (“TMT”) conservation district use application was filed is not evidence of bias or prejudgment regarding the TMT project. In his written response to Petitioners’ objections, Member Yuen considers whether he should recuse himself despite the lack of legal grounds to do so and states:

I think that the policy for board members is similar to that for judges: there is a duty to serve when you are not legally disqualified, just as there is a duty to disqualify yourself when good cause exists. This may be especially true in my case because I was appointed to be the member on the [Board] statutorily required to have a background in “conservation and natural resources.” H.R.S. sec. 171-4(b). To disqualify one’s self because a party to a contested case thinks that comments the member has expressed in some point in the past imply a predisposition on a particular application means that individuals who, for example, have expressed strong opinions on the need to preserve coastal open space should not vote on a CDUA for a house on the shoreline if the applicant objects. Board members should not be selected for the absence of opinions: they have to know how to review facts and decide particular cases on their merits given the legal criteria.

Response to Petitioners’ Objections to Christopher Yuen, filed on May 25, 2016, p. 5.

The Board sees no reason to disqualify Member Yuen in either capacity based upon the evidence presented and concurs with Member Yuen’s statement that it is his duty to participate in this process.

Petitioners also contend Member Yuen could not serve as a member of the selection committee because HAR § 3-122-69(b) prohibits department deputy directors or their “equivalent appointed positions” from serving in this capacity. Petitioners’ contention is not supported by any legal authority.

Under general rules of statutory construction, “[t]he words of a law are generally to be understood in their most known and usual signification. ...” HRS § 1-14. Moreover, the Hawai‘i Supreme Court has stated that the “rules of statutory construction require us to reject an interpretation of [a] statute [or an ordinance] that renders any part of the statutory language a nullity.” *Coon v. City & County of Honolulu*, 98 Hawai‘i 233, 250, 47 P.3d 348, 366 (2002), citing *Potter v. Hawai‘i Newspaper Agency*, 89 Hawai‘i 411, 423-24, 974 P.2d 51, 63-64 (1999) (citations omitted); *Konno v. County of Hawai‘i*, 85 Hawai‘i 61, 71, 937 P.2d 397, 407 (1997).

Applying the rules of statutory construction, the “appointed position” referred to in section 3-122-69(b), HAR, must be the “equivalent” to a deputy director position. The Board has not found any legal authority stating or even implying that board and commission members are the equivalent to deputy directors. The prohibition of deputy directors or equivalent appointed positions from sitting on selection committees is presumably to prevent the department director, through the director’s deputy, from controlling the selection and the order of the top three ranked qualified applicants. The Board notes that, unlike deputy directors and equivalent appointed positions who are tasked with supporting the department directors, board and commission members are independent and not subject to the control or direction of the department director. The Board’s Members are not under the control or direction of the Board’s Chairperson.

Accordingly HAR § 3-122-69(b) did not prohibit Member Yuen from sitting on the selection committee for the procurement of the hearing officer in this case.

D. HRS Chapter 92F Requests³

Petitioners' counsel sent a request for documents to the Board's Chairperson and deputy attorneys general who represent the Board on April 1, 2016. The State has responded and will continue to respond to the request in a timely manner consistent with the requirements of HRS chapter 92F.

E. Judge Amano's 'Imiloa Membership

Petitioners' Motion revisits Judge Amano's membership in 'Imiloa to argue that she must be removed. As discussed at length in Minute Order No. 4, Hawai'i follows an "appearance of impropriety" standard for the disqualification of decision-makers in an administrative adjudication. *Sussel v. City & County of Honolulu*, 71 Haw. 107, 784 P.2d 867 (1989). Upon further reconsideration and review of the record since Minute Order No. 4 was filed on May 6, 2016, the Board finds no reason for disqualifying Judge Amano just because she and her husband paid \$85 per year so that they could view exhibits and displays at a museum that showcases – among other issues of interest to the community – astronomy, Mauna Kea and Hawaiian culture.

F. Appointment of a New Hearing Officer

Due specifically to Judge Amano's 'Imiloa membership, Petitioners have asked the Board to appoint a new hearing officer. In its position statement dated May 25, 2016, the University notified the Board for the first time that Judge Amano is a mediator in the UH-Manoa Matter. While maintaining that Judge Amano is "eminently qualified" to

³ Contrary to Petitioners' statement, its requests are not based upon the federal Freedom of Information Act to the extent federal law does not apply to the State.

serve as the hearing officer, the University has joined the Petitioners in asking for a new one.

From April 1, 2016 through today, Judge Amano has made six public disclosures, including but not limited to these:

- On or about January 21, 2016, Judge Amano agreed to mediate an employment dispute involving the University of Hawai‘i at Hilo, Civil No. 14-1-0176 (3rd Circuit), *Ian Seely v. University of Hawai‘i* (the “UH-Hilo Matter”) (1st Supplemental Disclosure, filed on April 8, 2016)
- From April 2008 through May 24, 2016, Judge Amano had a family membership at ‘Imiloa Astronomy Center of Hawai‘i (2nd Supplemental Disclosure, filed on April 25, 2016).
- Approximately November 2015, Judge Amano agreed to mediate the UH-Manoa Matter. The UH-Manoa Matter is also an employment dispute, Civil No. 14-1-1963-09 KTN, *Ralf I. Kaiser and Brant Jones v. The University of Hawai‘i*, (5th Supplemental Disclosure, filed on May 26, 2016).

Judge Amano has also disclosed that she attended both UH-Hilo and UH-Manoa as a student, that she was a former deputy attorney general and circuit court judge, and that in her role as judge and post-retirement as a mediator/arbitrator/neutral, she has worked with various attorneys for Petitioners, the University, the State and with members of the Board. In each disclosure, Judge Amano states it is part of her “duty to make ongoing disclosures as information continues to unfold in the course of this case” and notwithstanding the disclosure, does not believe a reasonable person would consider her impartiality to be affected.

The Supreme Court in *Mauna Kea Anaina Hou* stated that “in the justice system, justice can perform its high function in the best way only if it satisfies the *appearance of justice*.” *Mauna Kea Anaina Hou*, 136 Hawai‘i at 389, 363 P.3d at 237 (internal quotation marks omitted). “This means that the manner in which the justice system

operates must be fair and must also appear to be fair.” *Id.* Here, the Board has explicitly been tasked by the Supreme Court with ensuring not only that the contested case process operates fairly, but also that it “appears to be fair.” *See id.* Indeed, rarely has the public’s perception of a contested case hearing been under greater scrutiny. Within this context, Petitioners call for Judge Amano’s removal, to which the University (and TIO) join, out of a purported concern that Judge Amano’s selection might not survive appellate review.

The Board is concerned that, taken to its logical extreme, ensuring a contested case process that subjectively “appears to be fair” to every possible person who takes an interest in the TMT project would likely necessitate not only the disqualification of Judge Amano but of every potential hearing officer who otherwise possessed the acumen to hear this case. No qualified hearing officer candidate is likely to satisfy all spectators and remove all fears of reversal. The Board will not go down this rabbit hole. Instead, the Board adopts the objective standard cited by the unanimous Supreme Court in *Mauna Kea Anaina Hou*: “... [T]he commitment to an *objective* ‘appearance of fairness’ test is consistent throughout Hawai‘i judicial decisions.” *Mauna Kea Anaina Hou*, 136 Hawai‘i at 395, 363 P.3d at 243.

Judge Amano was selected by a three-person committee as the most qualified applicant after a procurement process mandated by law in HRS § 103D-304. Following an initial disclosure of possible conflicts to the parties, either regularly on her own or immediately upon a concern being raised to her attention, Judge Amano has submitted five separate updates. She is entitled to a “presumption of honesty and integrity.” *Sifagaloa v. Board of Trustees of Employment Retirement System*, 74 Haw. 181, 193, 840 P.2d 367, 372 (1992). That presumption remains intact. The Board finds that the

circumstances here, viewed objectively, do not give rise to an appearance of unfairness, whereby Judge Amano's impartiality might reasonably be questioned. *See Mauna Kea Anaina Hou*, 136 Hawai'i at 396, 363 P.3d at 244 (citing the analysis followed in *Sifagaloa*).

The Board further finds that it does not give rise to an objective appearance of unfairness simply because Judge Amano did not disclose her 'Imiloa family membership and involvement in the UH-Manoa Matter, instead doing so in supplemental disclosures. These disclosures have been made even before the contested case hearing has even begun. In *Noel Madamba Contracting LLC v. Romero*, 137 Hawai'i 1, 364 P.3d 518 (2015), the Hawai'i Supreme Court vacated the decision of a neutral arbitrator based upon the Hawai'i Uniform Arbitration Act, codified at HRS chapter 658A, due to "evident partiality." That finding arose from the arbitrator's disclosure – several months *after* the hearing concluded and an award was issued – of an attorney-client relationship with one of the parties' counsel's law firm. Though *Madamba* correctly held the arbitrator in that case to a high standard, as indicated in Minute Order No. 4, the Board respectfully distinguishes several details in *Madamba* from the ones here. HRS chapter 658A does not control this proceeding, Judge Amano's potential connections to the University are objectively less severe, and Judge Amano has not yet decided the case.

As to the most recent UH-Manoa Matter identified by the University on May 25, 2016 and disclosed by Judge Amano, the Board observes that as of today neither Petitioners nor the University ever objected to Judge Amano's April 8, 2016 disclosure that she was a mediator in the UH-Hilo Matter – which is arguably more closely connected to the Applicant in this proceeding – nor did either party ask for her removal

due to that matter. At her first pre-hearing conference on May 16, 2016, among other decisions, Judge Amano ruled *against* a request by the University, in the interest of saving time, to take judicial notice of prior TMT proceedings. *See* Minute Order No. 7. It appears to the Board that the University has known of the UH-Manoa Matter since November of 2015 but did not inform the Board nor ask for Judge Amano's removal until *after* her adverse ruling. *See In re Sawyer*, 41 Haw. 270, 274-275 (1956) ("The plunge into the pool of litigation with an affidavit disqualifying the trial judge must be made on a belief of prejudice theretofore entertained, and not on any subsequent discovery of such belief or prejudice resulting from an adverse ruling."). Instead, the Board is more persuaded by Petitioners and the University's universal lack of interest in the UH-Hilo Matter when Judge Amano disclosed it on April 8, well before she conducted the pre-hearing conference on May 16.

Lastly, the late request by the University to remove Judge Amano, even though she is "eminently qualified" to hear the contested case, out of a *fear* that retaining her *might* be overturned on appeal, invites the Board to subvert its own independent judgment. The Board expressly rejects this invitation. With due respect and consideration to the parties' various interests and reasons for asking the Board to replace Judge Amano, the Board cannot and will not sidestep its own administrative responsibility to exercise judgment and common sense regarding whether the selection process up until now has objectively appeared to be fair. Common sense must prevail. Upon reconsideration and after further deliberation, the Board stands by its decision to keep Judge Amano.

G. Ensuring a Fair Process

The Board respectfully disagrees with Petitioners' characterization that the Board has "fast-tracked" the process so that TMT's developers do not move the telescope project somewhere else. Rather, the Board is committed to a process that is efficient, fair, and provides an ample opportunity to be heard.

III. Conclusion

Petitioners' motion for reconsideration is HEREBY DENIED. This order may be executed in counterparts.

DATED: Honolulu, Hawaii, June 3, 2016.

SUZANNE D. CASE, Chairperson
Board of Land and Natural Resources

STANLEY H. ROEHRIG, Member

KEITH "KEONE" DOWNING, member

/s/ James A. Gomes
JAMES A. GOMES, Member

/s/ Thomas Oi
THOMAS OI, Member

/s/ Ulalia Woodside
ULALIA WOODSIDE, Member

CHRISTOPHER YUEN, Member

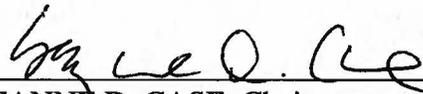
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STANLEY H. ROEHRIG, Member

KEITH "KEONE" DOWNING, Member

JAMES A. GOMES, Member

THOMAS OI, Member

G. Ensuring a Fair Process

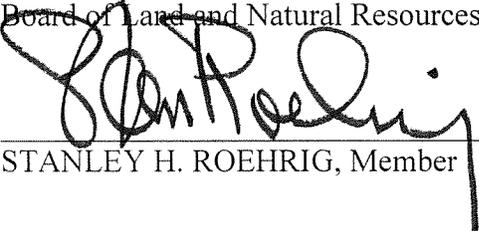
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Board of Land and Natural Resources



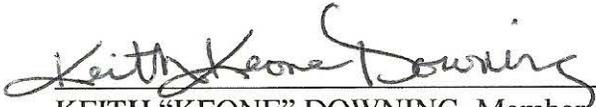
STANLEY H. ROEHRIG, Member

KEITH "KEONE" DOWNING, Member

JAMES A. GOMES, Member

THOMAS OI, Member

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KEITH "KEONE" DOWNING, Member

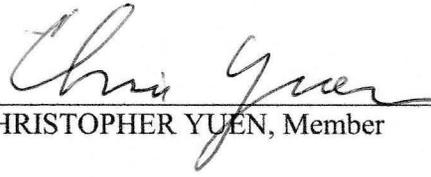
JAMES A. GOMES, Member

THOMAS OI, Member

ULALIA WOODSIDE, Member

CHRISTOPHER YUEN, Member

ULALIA WOODSIDE, Member

A handwritten signature in cursive script, appearing to read "Chris Yuen", written in dark ink. The signature is positioned above a horizontal line.

CHRISTOPHER YUEN, Member

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Minute Order 9, Order denying petitioners' motion for reconsideration of Minute Order No. 4 filed on May 6, 2016 and/or Motion to strike selection process and to disqualify various members and Hearing Officer, dated June 3, 2016,, was served upon the following parties via email and regular mail on June 3, 2016, addressed as follows:

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'Ohana, Deborah J. Ward, Paul K. Neves, and
Kahea: The Environmental Alliance*

Dated: Honolulu, Hawai'i, June 3 2016



Michael Cain
Department of Land & Natural Resources
State of Hawai'i