

DEPARTMENT OF HEALTH

STATE OF HAWAII

DEPARTMENT OF HEALTH, STATE OF
HAWAI'I,

Complainant,

vs.

UNITED STATES DEPARTMENT OF
THE NAVY,

Respondent.

Docket No. 21-UST-EA-02

RESTATED AND SUPPLEMENTAL
DISCLOSURE OF HEARINGS OFFICER

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This proceeding concerns the Emergency Order of Complainant Department of Health ("DOH"), signed by Deputy Director for Environmental Health, Kathleen Ho, to the Respondent United States Department of the Navy ("Navy"), Docket No. 21-UST-EA-02, dated December 6, 2021, regarding "Emergency Change-In-Service and Defueling of 20 Underground Storage Tanks, Red Hill Bulk Fuel Storage Facility." On December 7, 2021, the Navy filed a letter that contests the Emergency Order.

At the Monday, December 13, 2021 status conference, I, the undersigned Hearings Officer, made an oral disclosure of facts concerning my ability to serve as hearings officer in this proceeding. Counsel for the parties, DOH and the Navy, did not object to my participation as the hearings officer on the grounds that I should be disqualified or should recuse myself either pursuant to HAR § 11-1-25, or because I was biased.

Since that time, two proposed intervenors filed motions to intervene in this proceeding—Sierra Club and the Honolulu Board of Water Supply (“BWS”). While the proposed intervenors’ motions remain pending, time is of the essence in this proceeding, and there is an evidentiary hearing scheduled to begin on Monday, December 20, 2021, at 8:00 a.m.

Because of this, the Hearings Officer makes this disclosure. DOH, the Navy, Sierra Club, or BWS may file a motion to disqualify or recuse the Hearings Officer no later than by today, Thursday, December 16, 2021, at 4:00 p.m., with a statement of the legal and factual bases for disqualification or recusal of the Hearings Officer, with citation to authority. If any party or proposed intervenor has no objection to my participation as hearings officer in this proceeding, said party or proposed intervenor shall promptly file a statement to that effect.

Disclosure

Outside of my current role as Hearings Officer in this proceeding, I am a Deputy Attorney General in the Complex Litigation, Fraud, and Compliance Unit (“CLFCU”) of the Department of the Attorney General (“Department”). I have served in that capacity from approximately late December 2019 to today. For reasons wholly unrelated to this proceeding, as of tomorrow, Friday, December 17, 2021, I will hold the position of Deputy Solicitor General in the Appellate Division of the Department. Prior to my work in CLFCU, I was a Deputy Attorney General in the Land/Transportation Division since approximately November 2015, where I primarily represented the Department of Land and Natural Resources.

A conflict wall has been placed between myself and Deputy Attorney General Wade Hargrove III, counsel for DOH, the Attorney General, the First Deputy Attorney General, Health Division, Appellate Division, and others within the department who may become involved in representing the State in this matter.

My work in this proceeding is not subject to supervision or review by any deputy attorney general.

Outside of this record, I have not read any government documents concerning the current Red Hill situation and have not been briefed.

With respect to the instant proceeding, and pursuant to HAR § 11-1-25, I state:

(1) I do not have a substantial financial interest as defined by HRS § 84-3, in a business or other undertaking that will be directly affected by the decision of the contested case;

(2) I am not related within the third degree by blood or marriage to any party (or proposed intervenor) to the proceeding or any party's (or proposed intervenor's) representative or attorney;

(3) I have not participated in the investigation preceding the institution of the contested case proceeding and have not participated in the development of the evidence to be introduced in the hearing;

(4) I have not participated whatsoever in making the decision or action contested; and

(5) I believe that I am a fair and impartial with respect to this proceeding and lack any personal bias concerning any party (or proposed intervenor) or matter that will prevent a fair and impartial decision.

In an abundance of caution and in full disclosure, I also state that based upon a search of my records, I am unaware of any instance where I represented the DOH as a party in litigation. As noted at the December 13, 2021 status conference, I have defended the State and state officials in litigation challenging COVID-19 restrictions. One case where I was one of the counsel of record involved consideration of the work of DOH in combatting the pandemic: *Kelley O’Neil’s Inc., et al. v. Ige, et al.*, Civ. No. 1:20-cv-449-LEK-RT (U.S. District Court) (case dismissed on March 4, 2021). I also disclose that I was one of the counsel of record in the following COVID-19 cases: *For Our Rights, et al. v. Ige, et al.*, CAAP-21-0000024 (Intermediate Court of Appeals), and 5CCV-2-0091 (Circuit Court) (currently pending before the ICA); and *Lomma v. Connors, et al.*, Civ. No. 1:20-cv-00456-JAO-RT (U.S. District Court) (case stayed by order of the court as of May 17, 2021). The case of *Jeffrey-Steven of the House of Jarrett, as the united States [sic] in rem v. Ige, et al.*, CV 21-00272 LEK-RT, involves a pro se complaint that names dozens of state and county officials including “All Members of the Hawaii House of Representatives” and “All Members of the Hawaii Senate.” One individual listed in an appendix as a defendant is DOH Director Elizabeth Char. I was not counsel of record in the U.S. District Court’s Pacer system, but my name was placed on the caption of at least one filing. I had no contact with Director Char concerning the *Jeffrey-Steven* case. The case was dismissed on November 12, 2021, with judgment entered on November 19, 2021. I state my belief that my work on COVID-19 related litigation does not affect my ability to be fair and impartial.

I do not have a personal relationship with any counsel for the parties or proposed intervenors.

Over approximately six years at the Department, my recollection is that Deputy Attorney General Hargrove has provided assistance on two separate matters concerning parcels of state-owned land on outer islands that have no connection with Red Hill. I state my belief that Deputy Hargrove's assistance does not affect my ability to be fair and impartial. I do not recall ever speaking with Deputy Hargrove about Red Hill at all prior to my appointment.

I am aware that Deputy Attorney General James Paige is performing work on some aspect(s) of Red Hill, which I discovered when, prior to my appointment as hearings officer, both he and I were working over the weekend, and I inquired why he was working on a weekend. Prior to my appointment, on a few occasions, we spoke briefly about Red Hill only in general terms, mostly relating to the fact that he was working on a Red Hill related matter over weekends. Deputy Paige did not show me any documents. I do not recall Deputy Paige telling me anything specific about what he was doing. To this date, I do not know precisely what Deputy Paige's involvement with the Red Hill situation was or is. I state my belief that my conversations with Deputy Paige prior to my appointment do not affect my ability to be fair and impartial.

I was a Deputy Corporation Counsel for the City and County of Honolulu for approximately four months in 2015, where I mostly litigated civil-rights and employment cases. I do not recall ever working on a matter concerning BWS.

I have never worked for the Navy or Sierra Club.

To create this disclosure, I searched my email for any reference to "Red Hill." The search revealed one document sent prior to my appointment in which one paragraph concerned "Red Hill." I do not recall reading that paragraph previously, and state that once I found it, I did not read it. I noted its existence for purposes of this disclosure.

Prior to my appointment, my knowledge of the current Red Hill situation was based largely on Star-Advertiser headlines. I can only recall actually reading a handful of articles about the Red Hill situation. I do not recall watching any television programs about the Red Hill situation.

DATED: Honolulu, Hawai'i, December 16, 2021.

/s/ David D. Day
David D. Day
Hearings Officer