



DAVID Y. IGE
GOVERNOR

SHAN TSUTSUI
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
OFFICE OF INFORMATION PRACTICES

CHERYL KAKAZU PARK
DIRECTOR

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oiip@hawaii.gov
www.oiip.hawaii.gov

The Office of Information Practices (OIP) is authorized to resolve complaints concerning compliance with or applicability of the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes (HRS), pursuant to sections 92-1.5 and 92F-42(18), HRS, and chapter 2-73, Hawaii Administrative Rules (HAR). This is a memorandum decision and will not be relied upon as precedent by OIP in the issuance of its opinions or decisions.

MEMORANDUM DECISION

Requester: Lynn Matusow
Board: Honolulu Liquor Commission
Date: August 13, 2015
Subject: Public Testimony (S INVES-P 13-9)

Request for Decision

Requester asked for an investigation into whether the Honolulu Liquor Commission (Commission) violated the Sunshine Law at its January 31, 2013 meeting (Meeting) by restricting oral testimony on an agenda item concerning a request for reconsideration of a previous decision about a licensee's hours of liquor service at a Mardi Gras Festival on February 2, 2013 (Festival).

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's e-mail correspondence to OIP dated January 31, 2013; the Commission's response to the OIP's Notice of Appeal dated February 19, 2013; an e-mail from Deputy Corporation Counsel Krishna Jayaram on June 29, 2015; and the agendas and minutes of the Commission meetings held on January 3, 17, and 31, 2013. (The minutes were in the form of a transcription of the meetings.)

Decision

Even assuming that the Meeting was subject to the Sunshine Law and was not one in which the Commission was exercising its adjudicatory function, the evidence shows there was no Sunshine Law violation because the public was given an opportunity to testify at the Meeting before the Commission made its final decision.

Statement of Reasons for Decision

The agendas for meetings on January 3, 17, and 31, 2013, provided notice that the Commission would be considering matters related to a liquor license application submitted by The Arts District Merchants Association (Applicant) for a special liquor license authorizing the sale of liquor at the Festival at designated areas on Nuuanu Avenue, Hotel Street, Smith Street, and Pauahi Street (Application). At the January 17, 2013 meeting, the Commission approved Applicant's license application subject to various conditions, including a condition that liquor services end at 8:00 p.m.

Applicant subsequently requested reconsideration of the Commission's decision limiting Applicant's liquor service hours and asked to extend the time for liquor service from 8:00 p.m. to 10:00 p.m. The agenda for the January 31, 2013 meeting included agenda Item 35, which was listed under a major heading entitled "Other Business" and was described as "[r]equesting reconsideration of limitation on liquor sales hours" related to a "Special General license granted on January 17, 2013, with restrictions (Item 35)[.]"¹

After the January 31, 2013 meeting, Requester presented to OIP a "formal complaint" claiming the Commission violated section 92-3, HRS, when the public was not allowed to testify on Item 35 at the Meeting. Requester states in her letter that the Chairperson "asked persons who had testified at the meeting on January 17 or others who had submitted testimony for the January 31 meeting to refrain from speaking or to only bring up new information," and that "at one point [the Chairperson] shut down public testimony, before all present who wished to speak could."

The Commission responded to Requester's claims by stating in a letter dated February 19, 2013 that "[s]ince the special license was an adversarial type of proceeding, involved a request for reconsideration, and determined the legal rights, duties, or privileges of the requester, consideration of Item 35 by the Commission was in the nature of a contested case hearing under HRS Chapter 91." The Commission also stated that "[a]ssuming that Item 35 was not an adjudicatory matter, there was no violation of [section 92-3, HRS,]" because "[e]very person who wanted to testify on the item was allowed to testify" and "no person who wanted to testify was prevented from testifying." The Commission also noted that the Requester sought to be heard after the Commission had already taken action on Item 35.

The minutes of the Meeting indicated that the Chairperson had inquired whether individuals who intended to provide public testimony had previously testified at

¹ A copy of the agenda for the Liquor Commission's Twenty-Seventh Meeting held on January 31, 2013 may be viewed online at <http://www.honolulu.gov/rep//site/bfslq/agendas/2013/agenda20130131.pdf> (last visited May 22, 2015).

the January 17 meeting or had already submitted written testimony. The Chairperson also expressed a desire to limit oral testimony to two minutes and to discuss only the extension of time for liquor service. However, it did not appear from the minutes that the Chairperson actually prohibited any individual from providing testimony at the Meeting or limited the length of any testimony presented at the Meeting. For example, in one instance, a member of the public was allowed to testify after informing the Commission that her testimony would take “two minutes and 40 seconds.” Minutes of the Liquor Commission Twenty-Seventh Meeting, January 31, 2013, at pg. 44.

The minutes also show that of the 11 individuals from the public who provided oral testimony at the Meeting, four individuals testified about the granting of the Application and did not specifically address Applicant’s request to extend the time period for liquor sales. Requester and two other public individuals provided oral testimony at both the Meeting and at the January 17 meeting on an agenda item concerning the Festival.

The minutes did not reflect that any individual was actually denied an opportunity to provide any testimony prior to the Commission’s final decision-making. Instead, the minutes indicated that two individuals identified as “Woman #1” and “Woman #2” made unsolicited statements after the Commission had already unanimously approved Applicant’s request to extend the hours of liquor sales to 10:00 p.m. It was only then that the Chairperson advised the public that no further public testimony would be taken on Item 35 and the Commission would be moving on to the next agenda items.

In light of the facts of this case, it is unnecessary for OIP to determine whether the Meeting was a contested case proceeding at which the Commission was exercising its adjudicatory functions. See, e.g., E & J Lounge Operating Co. v. Liquor Com’n., 118 Hawaii 320, 189 P.3d 432 (2008) (applying a two-prong test to determine whether a hearing was a contested case hearing that was not subject to the Sunshine Law). Even assuming that the Commission was not exercising its adjudicatory functions in reconsidering the conditions for granting Applicant a temporary liquor license and that the Sunshine Law applied to the Meeting, the facts are clear that the Commission did not violate section 92-3, HRS, because all persons, including Requester, were afforded an opportunity to present oral testimony prior to the Commission making its final decision.

Under the Sunshine Law, all boards shall conduct meetings that are “open to the public” and must “afford all interested persons an opportunity to present oral testimony on any agenda item.” HRS § 92-3 (2012). The boards “may also provide for reasonable administration of oral testimony by rule.” Id.; see, OIP Op. Ltr. No. 02-02 (concluding that a board may impose restrictions on the length of oral testimony by members of the public so long as these restrictions are reasonable and comport with the constitutional protections for the exercise of free speech).

However, a board may not prohibit the presentation of testimony on any agenda item even though the same agenda item was stated on the agenda for a prior meeting. See OIP Op. Ltr. No. 01-06 (opining that the Liquor Commission violated the Sunshine Law when it refused to accept public testimony on an agenda item that was also presented at a prior meeting). Although the Sunshine Law does not preclude a board from accepting testimony after it had made a final decision, the law does not require the board to accept such testimony. See OIP Op. Ltr. No. 06-01 at n. 2 (noting that a board would have failed to comply with the Sunshine Law if it only allowed the presentation of testimony after it had already acted on an agenda item).

In this case, the minutes of the Meeting clearly indicate that all interested persons were afforded an opportunity to present oral testimony on Item 35 and no restrictions were actually imposed upon the individuals who had provided oral testimony before the Commission made its final decision. Consequently, OIP concludes that the Commission did not violate the Sunshine Law requirement under section 92-3, HRS, to provide the public “an opportunity to present oral testimony on any agenda item.”

Right to Bring Suit to Enforce Sunshine Law and to Void Board Action

Any person may file a lawsuit to require compliance with or to prevent a violation of the Sunshine Law or to determine the applicability of the Sunshine Law to discussions or decisions of a government board. HRS § 92-12 (2012). The court may order payment of reasonable attorney fees and costs to the prevailing party in such a lawsuit. Id.

Where a final action of a board was taken in violation of the open meeting and notice requirements of the Sunshine Law, that action may be voided by the court. HRS § 92-11 (2012). A suit to void any final action must be commenced within ninety days of the action. Id.

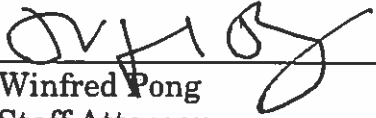
This opinion constitutes an appealable decision under section 92F-43, HRS. A board may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with section 92F-43. HRS §§ 92-1.5, 92F-43 (2012). The board shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id.

The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-43(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR.

This letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES



Winfred Pong
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director