

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Boating and Ocean Recreation
Honolulu, Hawaii 96813

February 27, 2015

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

DENIAL OF REQUEST FOR CONTESTED CASE BY JACQUELINE GARDNER REGARDING
TRANSFER OF AN OFFSHORE MOORING PERMIT (PERMIT NO. RMO10837)

BACKGROUND:

Earl Edwards held an offshore mooring permit, Permit No. RMO10837 (permit), until his death in April 2014. By its terms, the permit expired on May 31, 2014. Ms. Gardner wants the permit transferred to her. She asked staff at Department of Land and Natural Resources Division of Boating and Ocean Recreation (DNLN/DOBOR) to approve a transfer of the permit. Staff believes that the requested transfer is not allowed by DOBOR's rules and so informed Ms. Gardner. Staff also recognized that this decision is up to the Board. The matter is now pending before the Board.

Without waiting for the Board's decision, Ms. Gardner requested a contested case hearing regarding staff's response to her request.

DISCUSSION:

No decision has been made by the Board as to Ms. Gardner's request to transfer the regular mooring permit to her. Ms. Gardner's request for a contested case is therefore premature.

Additionally, Ms. Gardner is not entitled to a contested case under Hawaii Revised Statutes Chapter 91. A contested case hearing is one where the "legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." Hawaii Revised Statutes (HRS) § 91-1(5). A contested case is "required by law" if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency's decision, or if mandated by due process.¹ E & J Lounge, 118 Haw. at 330, 189 P.2d at 442 (quoting Bush v. Hawaiian Homes Comm'n, 76 Haw. 128, 870 P.2d 1272 (1994)).

Ms. Gardner has not cited, nor could we find, any rule or statute that requires a contested case hearing for the denial of a request for the transfer of an offshore mooring permit. Furthermore, due process does not mandate a contested case hearing based on the facts above. "[I]n order to assert a right to procedural due process, [a plaintiff] 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, cert. denied, 528 U.S. 1010 (1999):

¹ The Fourteenth Amendment of the United States Constitution provides, in part that, "nor shall any state deprive any person of life liberty, or property, without due process of law." Article I, section 4 of the Hawaii State Constitution provides, in part, that "[n]o person shall be deprived of life, liberty or property without due process of law."

At the outset, 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.

Ms. Gardner cites Article I, Section 5 of the Hawaii State Constitution and the Fifth and Fourteenth Amendments of the United States Constitution as authority for her contention that a hearing is required by due process.

However, although property rights are protected by the Constitution, they are not “created by the 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). Ms. Gardner has no property interest in the permit which is expired and was held by Mr. Edwards prior to its expiration.

Ms. Gardner is, therefore, not entitled to due process and not entitled to a contested case.

RECOMMENDATION:

1. That the Board of Land and Natural Resources deny the petition for a contested case hearing filed by Jacqueline Gardner.

Respectfully submitted,



Edward R. Underwood
Administrator

APPROVED FOR SUBMITTAL



Carty S. Chang
Interim Chairperson and Member