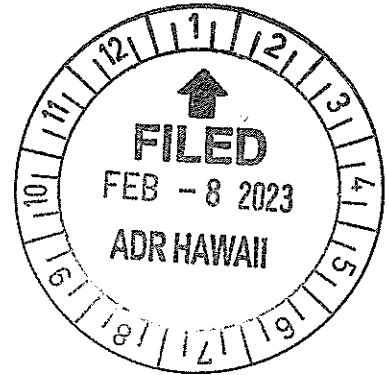


Thomas E. Crowley, III 1753-0
Dillingham Transportation Building
735 Bishop Street, Suite 205
Honolulu, Hawaii 96813
Telephone: (808) 531-6789

ARBITRATOR

BEFORE ARBITRATOR
THOMAS E. CROWLEY
STATE OF HAWAII



HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO,

Union,

and

DEPARTMENT OF EDUCATION,
STATE OF HAWAII,

Employer.

) Arbitration of Class Grievance on Behalf
) of HGEA Bargaining Units 02, 03, 04,
) 06, 09, and 13 RE: Temporary Hazard
) Pay

) **DECISION, ORDER, AND PARTIAL**
) **FINAL ARBITRATION AWARD RE:**
) **HAWAI'I GOVERNMENT EMPLOYEES**
) **ASSOCIATION'S MOTION FOR**
) **SUMMARY DISPOSITION FILED**
) **DECEMBER 9, 2022;**
) **CERTIFICATE OF SERVICE**

DECISION, ORDER, AND PARTIAL FINAL ARBITRATION AWARD RE:
HAWAI'I GOVERNMENT EMPLOYEES ASSOCIATION'S
MOTION FOR SUMMARY DISPOSITION FILED DECEMBER 9, 2022

I. Introduction

The undersigned arbitrator was mutually selected by the parties to arbitrate the above-captioned Class Grievance regarding Temporary Hazard Pay ("THP"). The Arbitrator disclosed in writing all potential conflicts, and the parties waived any objections to having the Arbitrator serve.

Advocacy Chief Stacy Moniz and Union Agent Jesse Sliva represent the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO

("Union") and the Class Grievants in Bargaining Units 02, 03, 04, 06, 09, and 13 ("Class Grievants"). Deputies Attorney General James E. Halvorson, Esq. and Richard H. Thomason, Esq. represent the DEPARTMENT OF EDUCATION, STATE OF HAWAII ("DOE" or "Employer").¹ The Arbitrator commends Mr. Moniz, Mr. Sliva, Mr. Halvorson, and Mr. Thomason for their superior representation of their respective clients.

II. The gravamen of the Class Grievance

The gravamen of the Class Grievance alleges the Employer violated the Collective Bargaining Agreements (CBAs) for Bargaining Units 02, 03, 04, 06,² 09, and 13 when the Employer denied the Union's requests for an award of a Temporary Hazard Pay ("THP") wage differential for BU members performing essential functions which temporarily exposed them to unusually hazardous working conditions arising from the Coronavirus Disease (COVID-19) and its variants. The alleged temporary hazardous working conditions at DOE locations were from March 4, 2020 to March 25, 2022.³

The CBAs for Bargaining Units 02, 03, 04, 09, and 13 each includes identical articles that, among other things, describe the circumstances that trigger the Employer's

¹ Deputy Attorney General Claire W.S. Chinn, Esq. represented the Employer on December 9, 2022, because Mr. Thomason was ill and Mr. Halvorson was unavailable on that day. Arbitration Hearing Transcript ("Tr.") at 438.

² The Class Grievance includes BU 06 (Educational Officers). Union Exhibit 5 ("U-5") is the BU 06 CBA. Unlike Bargaining Units 02, 03, 04, 09, and 13, however, the BU 06 CBA did not include a Temporary Hazard Pay article. Article 15.I. of the BU 06 CBA, Grievance Procedure, provides in pertinent part that "the arbitrator shall have no jurisdiction to alter, amend, or modify the terms of the Agreement." U-5 at 013. As discussed *infra*, this Decision, Order, and Partial Final Arbitration Award on the Union's Motion for Summary Disposition does not include BU 06.

³ Tr. at 36.

responsibility to award a Temporary Hazard Pay ("THP") wage differential to qualifying BU members who are temporarily exposed to unusually hazardous conditions.⁴

III. Factual background

A. Governor Ige's Emergency Proclamations Related to COVID-19

Commencing March 4, 2020, and continuing through March 25, 2022, Governor David Y. Ige issued twenty-eight (28) Emergency and/or Supplemental Proclamations Related to COVID-19 or its variants.⁵ The Emergency Proclamations were pursuant to HRS Chapter 127A (Emergency Management). In general, the Emergency Proclamations stated that COVID-19 is highly contagious, and the occurrence or threat of COVID-19 may likely result in substantial injury or harm to the population or may likely result in loss of life.⁶ Governor Ige determined these conditions are of such "character and magnitude to constitute an emergency or disaster" as contemplated by HRS § 127A-2.⁷

⁴ See: BU-02 CBA (Blue Collar Supervisors) Article 22 Temporary Hazard Pay (U-1 at 048-049); BU-03 CBA (White Collar Employees) Article 20 Temporary Hazard Pay (U-2 at 046-048); BU-04 CBA (White Collar Supervisors) Article 20 Temporary Hazard Pay (U-2 at 044-046); BU-09 CBA (Registered Professional Nurses) Article 22 Temporary Hazard Pay (U-105 at 044-046); and BU-13 CBA (Professional and Scientific Employees) Article 20 Temporary Hazard Pay (U-6 at 050-051).

⁵ See: U-7 through U-35, which are copies of Governor Ige's Proclamations.

⁶ See, for example, U-7, which is a copy of the March 4, 2021 Emergency Proclamation, at 001-004.

⁷ HRS § 127A-2, Definitions, provides in pertinent part:

"Disaster" means any emergency, or imminent threat thereof, which results or may likely result in loss of life, property, or environment and requires, or may require, assistance from other counties, states, the federal government, or from private agencies.

"Emergency" means any occurrence, or imminent threat thereof, which results or may likely result in substantial injury or harm to the population or substantial damage to or loss of property or substantial damage to or loss of the environment.

"Emergency period" means the dates covered by a proclamation issued by the governor declaring a state of emergency or by a mayor declaring a local state of emergency.

Governor Ige's Emergency Proclamations declared a state of emergency to support ongoing State and county responses to COVID-19. On March 23, 2020, Governor Ige issued a "Third Supplemental Proclamation" ordering all persons in the State to stay at home except for essential activities or to engage in essential businesses or operations. With respect to essential businesses or operations, the Third Supplemental Proclamation included "Educational institutions:"⁸

4. Educational institutions. Educational institutions – including public and private pre-K-12 schools, colleges, and universities – for purposes of implementing appropriate learning measures, performing critical research, or performing essential functions, provided that the social distancing requirements identified herein are maintained to the greatest extent possible; ...

The Third Supplemental Proclamation further ordered criminal penalties for violation of its provisions:⁹

D. Criminal Penalties

Any person who intentionally or knowingly violates any provisions set forth in this Section I shall be guilty of a misdemeanor, and upon conviction, the person shall be fined not more than \$5,000, or imprisoned not more than one year, or both.

Governor Ige's Emergency Proclamations and/or Supplemental Proclamations declared successive "Emergency Periods" which commenced on March 4, 2020 and

"Hazard" means an event or condition of the physical environment that results or may likely result in damage to property, injuries or death to individuals, or damage to the environment that may result in an emergency or disaster.

"State of emergency" means an occurrence in any part of the State that requires efforts by state government to save lives and protect property, environment, public health, welfare, or safety in the event of an emergency or disaster, or to reduce the threat of an emergency or disaster, or to supplement the local efforts of the county.

⁸ U-10 at 002-003.

⁹ U-10 at 008.

ended on March 25, 2022.¹⁰ Despite mandatory quarantines, vaccinations, social distancing, and other mitigation measures, however, the number of COVID cases and deaths continued to increase at a significant rate. As of January 26, 2022, Governor Ige reported:¹¹

Whereas, despite our mitigation efforts, the recorded number of cases and deaths has continued to increase at a significant rate, with more than 208,000 documented cases of COVID-19 and 1,149 death attributed to this disease in the State.

The last “Emergency Proclamation Related to COVID-19 (Omicron Variant)” (U-34), which was issued by Governor Ige on February 5, 2022, provided that the disaster emergency relief period continued through March 25, 2022:

... [T]his Proclamation supercedes all prior proclamations issued by me related to the COVID-19 emergency, and that the disaster emergency relief period shall continue through March 25, 2022, unless terminated or superseded by a separate proclamation, whichever shall first appear.

B. DOE-designated employees who perform essential functions and must report to work

In response to the COVID-19 pandemic and Governor Ige’s Proclamation, the Department of Education stopped traditional, in-school instruction during the fourth quarter of the 2019-2020 school year, and instead instituted various forms of distance learning.¹² During this period and thereafter, however, the DOE designated DOE

¹⁰ For example, Governor Ige’s March 4, 2020 Proclamation declared the disaster emergency relief period continued through April 29, 2020 (U-7 at 007), the March 16, 2020 Supplementary Proclamation declared the emergency period “shall continue through May 15, 2020 (U-8 at 007). The successive Proclamations continued the Emergency Periods through March 25, 2022 (U-34 at 018). See: U-7 through U-35.

¹¹ U-34, Emergency Proclamation Related to COVID-19 (Omicron Variant) dated January 26, 2022 at 001.

¹² U-90 at 001.

employees who still performed essential functions and must report to work.¹³ For example, on March 19, 2020, DOE Assistant Superintendent Cynthia Covell issued a directive to DOE Complex Area Superintendents and Principals Re: “COVID-19 – Personnel Who Perform Essential Duties for School Facilities and School Food Services,” stating in part:¹⁴

The identification of personnel who perform essential duties and functions is critical to school and office operations. Once a supervisor notifies an employee that they are deemed necessary to perform essential functions, that employee may work consistently at his/her identified worksite or may be asked to return to his/her identified worksite intermittently.

On March 30, 2020, DOE Superintendent Christina Kishimoto issued a directive to Principals, Complex Area Superintendents and Assistant Superintendents Re: “COVID-19 Designating Employees who Perform Essential or Non-Essential Functions at Schools, Complex Area and State Offices,” stating in part:¹⁵

[E]ssential functions to maintain critical Department operations must continue at schools, complex area offices and state offices.

...

- Who is an essential function employee?

Employees who perform/provide essential services and may need to be physically present at the worksite as determined by the supervisor.

Examples of essential function employees:

Leadership Functions:

Superintendent, Deputy Superintendent, Assistant Superintendents, Complex Area Superintendents, Executive Assistants, Principals and Vice-Principals

¹³ U-52 at 002.

¹⁴ U-68 at 001-002.

¹⁵ U-82 at 001-002. In addition to the listed examples of essential function employees, HGEA Educational Assistants (BU 03) providing services in special education and assisting in Grab-N-Go breakfast and lunch food services were designated as essential employees who may need to be physically present at the worksite. Tr. at 50, 91-92, 109, 112

Safety and Security Functions:
Safety and Security Personnel

Facilities and Operations Functions:
Food Services, transportation, custodial services

Business Functions:
Payroll and vendor payment, critical budget, communications,
human resources, and information technology service

C. The Union's Request for Temporary Hazard Pay

On March 31, 2020, the Union wrote to then-DOE Superintendent Christina Kishimoto, requesting temporary hazard pay for all affected HGEA bargaining unit employees:¹⁶

Each collective bargaining agreement that covers the HGEA bargaining unit employees within the Department of Education allows for the Department head or Union to recommend/request Temporary Hazard Pay for affected employees who are temporarily exposed to unusually hazardous working conditions and where the following conditions are met:

1. The exposure to unusually hazardous working conditions is temporary;
2. The degree of hazard is "Most Severe" or "Severe"; and
3. The unusually hazardous working conditions have not been considered in the assignment of the class to a salary range.

In response to the COVID-19 pandemic and Governor David Ige's Emergency proclamation on March 5, 2020, this letter serves as the Union's official temporary hazard pay request for all affected HGEA bargaining unit employees employed by the Department of Education statewide that have been designated to perform essential functions. The temporary hazard pay request would be from the period March 5, 2020 until the matter is resolved.

This COVID-19 pandemic, indeed, poses an unusually hazardous working condition never before seen in the State of Hawaii, which we all hope will be temporary. The degree of hazard is most severe as Governor Ige has issued an emergency proclamation. Death can be the result of COVID-19 exposure! Lastly, this unusually hazardous working condition has not been considered in the assignment of the classes to the salary ranges.

¹⁶ U-45 at 001.

D. DOE's initial response to HGEA's request for temporary hazard pay

On April 7, 2020, DOE Assistant Superintendent Cynthia Covell initially responded that HGEA must submit "Temporary Hazard Pay Request forms" to justify the THP request, which the DOE will then review to determine whether THP is warranted.¹⁷

On April 30, 2020, HGEA wrote to DOE Superintendent Kishimoto, stating the Temporary Hazard Pay Request form has not gone through the proper consultation as required by Article 4 – Personnel Policy Changes of the various CBAs. In the interest of the Union's members, however, HGEA filled out and submitted the form, stating in part:¹⁸

- For all complex areas Statewide and all schools Statewide: ALL worksites where employees were required to report to work during the COVID-19 pandemic.
- Period: March 5, 2020 until matter resolved.
- Classes of employees exposed to the unusually hazardous conditions: ALL employees that were deemed essential by the employer and required to report to a worksite.

E. Step 2 Class Grievance Re: Temporary Hazard Pay

On September 18, 2020, the Union filed this Class Grievance regarding the non-payment of Temporary Hazard Pay, stating in part:¹⁹

BACKGROUND

Since March 5, 2020, the date of the Governor's initial emergency proclamation, until present the affected employees covered by the various CBA's who have been declared essential by the employer and required to

¹⁷ U-46 at 001.

¹⁸ U-48 at 002-004.

¹⁹ U-49 at 001-002.

report to work have not been awarded temporary hazard pay (THP) as entitled by the contract. Additionally, the employer has presented a Temporary Hazard Pay Request form which the Union believes has not gone through the proper consultation process.

UNION'S POSITION

The Union contends that the employer's refusal to grant THP is in violation of the following articles of the CBA's:

Conflict
Maintenance of Rights and Benefits
Rights of the Employer
Temporary Hazard Pay

REMEDY

1. Immediately grant THP to all essential DOE employees retroactive to march 5, 2020, the date of the Governor's proclamation.
2. Refrain from any retaliatory action against the Grievants for the filing of this grievance.

F. The DOE's Step 2 Response denying the Class Grievance request for THP

On October 22, 2020, the Step 2 meeting regarding the Class Grievance was convened in accordance with the applicable CBAs (Article 11 (Grievance Procedure) Section F, of Units 02, 03, 04, and 13; and Article 14 (Grievance Procedure), Section F, of Unit 09).

On November 13, 2020, the Employer mailed its Step 2 Grievance Response to HGEA from Michele Mitra, the DOE Superintendent's Designated Representative, stating, among other things:

- The intent of the Temporary Hazard Pay Articles in the Bus 2, 3, 4, 9, and 13 CBAs is to address hazardous conditions which may temporarily occur as a result of

the type of work performed by the HGEA-represented employees in their respective classes.

- A pandemic such as COVID-19 was never contemplated before in the negotiations, interpretation, and implementation of any collective bargaining agreements with the HGEA, including but not limited to, it never being contemplated as a working condition that would trigger temporary hazard pay.

- COVID-19 is not a temporary issue.
- COVID-19 is potentially ever-present currently in the world – whether at home, at work or anywhere else.

- Exposure to COVID-19 is not exclusively limited to the worksite.

Employees performing daily living tasks such as going to the grocery store, gas station, and medical appointments, and attending to other necessities, can also expose themselves to COVID-19.

- The Governor's proclamation addresses the dangers of COVID-19 to the community-at-large.

- The Class Grievance and the demanded remedies must be denied.²⁰

G. The Union's notice to proceed to arbitration

On November 16, 2020, the Union provided written notice to the Employer of the Union's intent to proceed to arbitration.²¹

H. The Union's October 2021 requests for additional compensation in the form of THP

²⁰ See: Employer Exhibit E-A.

²¹ U-53 at 001.

On October 1, following a September 27, 2021 joint meeting among the DOE, HGEA, UPW, and HSTA and October 19, 2021, the unions sent a joint letter to then-DOE Interim Superintendent Keith Hayashi discussing the DOE's responses at the September 27, 2021 joint meeting regarding COVID-19 issues, one of which was "Consideration for additional pay:"²²

- **Consideration for additional pay.** Unions' request for consideration of additional compensation in the form of temporary hazard pay and/or differentials for the added time and effort to ensure our schools can remain open for in-person learning.

- Response: the HIDOE is researching the request and will get back to the unions.

On October 19, 2021, following a further October 11, 2021 joint meeting among the unions and the DOE, the unions sent another joint letter to Interim Superintendent Hayashi, stating the DOE's responses at the October 11, 2021 joint meeting, one of which was again "Consideration for additional pay:"²³

- **Consideration for additional pay.** Unions' request for consideration of additional compensation in the form of temporary hazard pay and/or differentials for the added time and effort to ensure our schools can remain open for in-person learning.

- Response: the HIDOE is researching the request and will get back to the unions.

Superintendent Hayashi subsequently testified he was unaware of any research done by the DOE relating to this request and did not believe he or anyone on his behalf got back to the unions.²⁴

²² U-94 at 003.

²³ U-95 at 003.

²⁴ Tr. at 83-88.

On May 27, 2022, this arbitrator was mutually selected by the parties.

IV. Bifurcation of the liability and damages issues

On behalf of the Union, Mr. Moniz estimated there are approximately 7,800 Class Grievants organized into BUs 2, 3, 4, 6, 9, and 13.²⁵

The June 14, 2022 Scheduling Order No. 1 herein ordered that the arbitration proceedings be bifurcated into two stages, a Stage 1 Liability Hearing and a Stage 2 Damages Hearing:

For procedural efficiency, the Employer and the Union agreed that these arbitration proceedings be bifurcated into two (2) sequential stages:

- Stage 1 Liability Hearing: to determine whether the Employer violated the respective CBAs when the Employer denied the Union's requests for an award of a THP wage differential for BU members performing essential functions which temporarily exposed them to unusually hazardous working conditions arising from COVID-19 and its variants. The Stage 1 Liability Hearing was set for November 29, 2022 through December 16, 2022.

In the event the arbitrator determines there were no violations of the respective CBAs, the Stage 2 Damages Hearing below is obviated. In the event the arbitrator determines there were violations of one or more of the respective CBAs, the arbitrator shall proceed to schedule and conduct the Stage 2 Damages Hearing below.

- Stage 2 Damages Hearing: to determine the amount of any contested THP wage differential for BU members found qualified for THP.

After the Stage 1 Liability Hearing:

- a. The Parties shall simultaneously submit written Post Hearing Briefs within 30 days after receipt of the final volume of arbitration hearing

²⁵ Tr. at 80.

transcript, or as otherwise extended by agreement of the Parties with notice to the Arbitrator.

- b. The arbitrator shall render his Decision and Partial Award within 30 days after receipt of the Parties' Post Hearing Briefs unless otherwise extended with notice to the Parties.
- c. In the event the arbitrator determines there were no violations of the respective CBAs, the Stage 2 Damages Hearing shall be obviated. In the event the arbitrator determines there were violations of one or more of the respective CBAs, the arbitrator shall proceed to schedule and conduct the Stage 2 Damages Hearing.

V. The issues to be arbitrated and arbitrability

A. The issues to be arbitrated

The Union and the Employer differed in their respective articulation of the issues to arbitrated in this Class Grievance. The Union's position on the issues to be arbitrated was stated on the record²⁶ and on page 7 of its Pre-Hearing Statement as follows:

- A. Whether the DOE violated Article 2 (BUs 2, 3, 4,9, and 13 CBAs) and 3 (BU 6 CBA only) – Conflict, Article 3 – Maintenance of Rights and Benefits (BUs 2, 3, 4, 9 and 13 CBAs), Article 4 – Maintenance of Rights, Benefits, and Privileges (BU 6 CBA only), Article 4 (BUs 2, 3, 4, 9 and 13) and 8 (BU 6 CBA only) – Rights of the Employer, and Articles 20 (BUs 3, 4, and 13 CBAs only, 22 (BUs 2 and 9 CBAs) – Temporary Hazard Pay and provisions of ARPA [American Plan Rescue Act] as it relates to BU 06, when it rejected Grievants'/Union's THP requests.
- B. If so, what is the proper remedy?

The Employer's position on the issues to be arbitrated was stated on the record²⁷ and on page 2 of its Pretrial Statement as follows:

Whether the hazard pay provisions of the various HGEA contracts apply to a permanent global pandemic, and if so, what the appropriate rate should be for qualifying employees (basically HGEA members who were required

²⁶ Tr. at 8.

²⁷ Tr. at 9.

to come to work while the “stay at home” provisions of the Governor’s proclamations were in effect).

To resolve the parties’ differing positions on the issues to be arbitrated, the arbitrator approved the Union’s articulation of the issues, except for BU-06 ((Educational Officers). At the December 2, 2022 arbitration hearing, the arbitrator stated:

I’m going to accept the Union’s articulation of the issues to be arbitrated except for BU-06. And what I want to do with respect to BU-06, because it appears there was not a temporary hazard pay provision in BU-06, I want to take that matter under advisement and the attorney or counsel for the parties can tackle that later so that we can move forward this afternoon with testimony.

So I’m taking BU-06 under advisement but I’m accepting the Union’s articulation of the issues to be arbitrated except for that.

Unlike Bargaining Units 02, 03, 04, 09, and 13, the BU 06 CBA does not include a Temporary Hazard Pay article. On April 14, 2020, HGEA Field Services Officer Joy Bulosan wrote to then-DOE Superintendent Kishimoto regarding BU 6, stating in part:²⁸

The Collective Bargaining Agreement (CBA) for Bargaining Unit 6 – Educational Officers does not have a temporary hazard pay provision.

The absence of a THP article in BU 06 would constitute a disputed material fact regarding THP for BU 06 members. In addition, Article 15.I. of the BU 06 CBA, Grievance Procedure, provides in pertinent part that “the arbitrator shall have no jurisdiction to alter, amend, or modify the terms of the Agreement.”²⁹

The Union’s Motion for Partial Summary Disposition does not include BU 06 as part of its Motion. The Union’s Motion for Partial Summary Disposition Filed December 9, 2022 argues at page 5 that there is “no disputed material fact under Section A of the

²⁸ U-47 at 001.

²⁹ U-5 at 013.

Temporary Hazard Pay Articles of Bargaining Units 2, 3, 4, 9, and 13.” Accordingly, with respect to the Union’s Motion for Partial Summary Disposition, the arbitrator does not include BU 06 in this Order and Partial Final Arbitration Award.

B. Arbitrability.

Arbitrability is not disputed with respect to the BU 02, 03, 04, 09, and 13 CBAs.³⁰ Paragraph B.3 of each of the THP articles in the BU 02, 03, 04, 09, and 13 CBAs states in pertinent part that any disagreement on the granting of Temporary Hazard Pay or the differential granted shall be subject to the grievance procedure in the subject CBA:³¹

3. Any disagreement on the granting of Temporary Hazard Pay or the differential granted shall be subject to the grievance procedure and in accordance with Step 2 of Article 11, Grievance Procedure.

Paragraph 1 of the arbitrator’s Scheduling Order No. 1 herein provided that Mr. Thomason, on behalf of the Employer, will provide notice by June 20, 2022 to the Union and the arbitrator whether arbitrability is in issue. The Employer did not thereafter challenge arbitrability of this Class Grievance.

³⁰ The CBAs for Bargaining Units 02, 03, 04, 09, and 13 were each effective from July 1, 2019 through June 30, 2021. With respect to duration of the CBAs, Bargaining Units 02, 03, 04, 09, and 13 each provide that the Agreement “shall be renewed thereafter in accordance with statutes unless either party hereto gives written notice to the other party of its desire to modify, amend, or terminate the ... Agreement.” SEE: BU-02 CBA (Blue Collar Supervisors) Article 54 Duration (U-1 at 097-098); BU-03 CBA (White Collar Employees) Article 56 Duration (U-2 at 095); BU-04 CBA (White Collar Supervisors) Article 54 Duration (U-2 at 092); BU-09 CBA (Registered Professional Nurses) Article 60 Duration (U-105 at 101; and BU-13 CBA (Professional and Scientific Employees) Article 54 Duration (U-6 at 100). Neither party has challenged the duration of the CBAs. There being no evidence of termination, BU 02, 03, 04, 09, and 13 are deemed by the arbitrator to remain in full force and effect at all times relevant to this Class Grievance.

³¹ See: BU-02 CBA (Blue Collar Supervisors) Article 22 Temporary Hazard Pay (U-1 at 049); BU-03 CBA (White Collar Employees) Article 20 Temporary Hazard Pay (U-2 at 047); BU-04 CBA (White Collar Supervisors) Article 20 Temporary Hazard Pay (U-2 at 045); BU-09 CBA (Registered Professional Nurses) Article 22 Temporary Hazard Pay (U-105 at 045; and BU-13 CBA (Professional and Scientific Employees) Article 20 Temporary Hazard Pay (U-6 at 051).

Accordingly, with respect to the Union's Motion for Partial Summary Disposition, this arbitration has jurisdiction over the Class Grievance for the BU 02, 03, 04, 09, and 13 CBAs.

VI. The Stage 1 Liability Hearing dates, the witnesses, the exhibits, the HGEA Offer of Proof, and the subpoena of former Governor David Y. Ige.

A. The Stage 1 Liability Hearing Dates

The evidentiary portion of the Stage 1 Liability Hearing has been thus far conducted on December 2, 5, 6, 7, and 9, 2022 at HGEA'S Office, 888 Millilani Street, 1st Floor Meeting Room, Honolulu, Hawai'i.

B. Witnesses

The following witnesses have thus far testified in the Stage 1 Liability Hearing:³²

Keith Hayashi, the Superintendent of the Hawai'i State Department of Education.

Sanford Chun, HGEA Executive Assistant for Field Services.

Catherine Payne, the former Chairwoman of the Board of Education.

Joy Bulosan, HGEA Field Services Officer.

Michelle Mitra, DOE Personnel Specialist.

James Sunday, Principal, Radford High School.

Scott Collins, HGEA Field Services Officer for the Member Services Center and Advocacy Sections.

C. Exhibits

Subject to the weight the Arbitrator gave them, the following exhibits were received in evidence:

³² With the parties' agreement, the arbitrator permitted Ms. Mitra and Mr. Sunday to testify remotely via ZOOM video-conferencing.

Employer Exhibit ("E-"): E-A.

Union Exhibits ("U-"): U-1 through U-106.

D. The Union's Offer of Proof

The Union's Witness List, filed on November 22, 2022, listed 175 witnesses.

On December 7, 2022, during the Stage 1 Liability Hearing, the Union submitted the

"HGEA Offer of Proof," which was both read into the record and marked as U-106.³³

The HGEA Offer of Proof provides:

That if the HGEA would call its member witnesses employed by the Department of Education representing bargaining units 2, 3, 4, 6, 9, and 13 their testimony would be that for each day that they reported to work that:

1. Temporary hazardous working conditions existed at each of their schools from March 4, 2020, through March 25, 2022, due to exposure to the COVID-19 virus and its variants for each of them.
2. They were exposed to those temporary hazardous working conditions while at work.
3. That the exposure was severe or most severe as defined in the CBAs.
4. That the hazard of COVID-19 and its variants have not been considered in the assignment of the class to a salary range.
5. That while circumstances varied from school to school throughout the State of Hawai'i, exposure to the temporary hazardous conditions at all schools created by COVID-19 and its variants remained constant from March 4, 2020 through March 25, 2022.

On behalf of the Employer, Mr. Thomason stated the HGEA Offer of Proof is not an admission by the DOE, and not a stipulated fact by the DOE, but merely the

³³ Tr. at 4-5 of the 12/7/22 arbitration hearing.

recognition that if these HGEA witnesses were called they would testify as stated in the offer of proof:³⁴

I just want to make it really, really clear on the record that this is not a stipulation, this is not an admission of anything, and that it's merely an offer of proof stating that [if] these HGEA member witnesses are called by HGEA about this issue, they are going to say ... what was just read into the record, which was an offer of proof. ... That doesn't mean we agree with what they say but that's what they are all going to say.

In light of the Union's 175 listed witnesses, and the parties' recognition that the HGEA member witnesses would each testify as stated in the HGEA Offer of Proof, the arbitrator determined it to be appropriate, for a fair and expeditious disposition of the proceeding, to receive U-106 in evidence subject to the weight the arbitrator gives it.³⁵ In reliance on the HGEA Offer of Proof's reception into evidence, the Union elected not to call additional bargaining unit members because "it would literally be a parade of witnesses ... testifying to exactly what" is stated in the Offer of Proof.³⁶

VII. The Union's Motion for Partial Summary Disposition

On December 7, 2022, during the Stage 1 Liability Hearing, Mr. Moniz provided notice that the Union intended to file a motion for partial summary disposition regarding liability based on Superintendent Hayashi's testimony:³⁷

Mr. Moniz: On behalf of the Union, ... we intend to file ... a motion for ... [partial] summary disposition of this phase of the case based on Mr.

³⁴ Tr. at 5 of the 12/7/22 arbitration hearing.

³⁵ Tr. at page 15 of the December 7, 2022 arbitration hearing. HRS § 658A-15.] Arbitration process. (a) An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

³⁶ Tr. at 7 of the 12/7/22 arbitration hearing.

³⁷ 12/7/22 Tr. at 11-13.

Hayashi's testimony... I have communicated with Richard [Thomason] to ... give him notice of that. [W]e do have authority ... in an arbitration proceeding [which] allows that type of motion even in the middle of hearing.

On December 9, 2023, during the Stage 1 Liability Hearing, Mr. Moniz submitted to the arbitrator and the Employer the "Hawaii Government Employees Association's Motion for Summary Disposition; Memorandum in Support of the Motion; Declaration of Stacy Moniz; Exhibits "A-B""(Union's Motion for Partial Summary Disposition).³⁸ After setting agreed-upon deadlines for the Employer's response to the Motion and the Union's reply to the Employer's response, the arbitrator recessed the Stage 1 Liability hearing pending the disposition of the Motion for Partial Summary Disposition.³⁹

A. The Union's Motion for Partial Summary Disposition

The Union's Motion for Partial Summary Disposition states: "[A]ll conditions to establish temporary hazardous working conditions for all affected HGEA bargaining members employed by the Department of Education have been conclusively proven by and through the exhibits and sworn testimony of Superintendent Keith Hayashi."⁴⁰

In addition to its Memo in Support, the Union's Motion is supported by two exhibits. Exhibit "A" is a copy of excerpts of Superintendent Hayashi's testimony during the Stage 1 Liability Hearing. Exhibit "B" is a copy of BU 03 CBA Article 20 – Temporary Hazard Pay. Mr. Moniz' Declaration states the BU 03 THP "language is identical for bargaining units 2, 4, 9, and 13."⁴¹

³⁸ Tr. at 441.

³⁹ Tr. at 444.

⁴⁰ Union's Motion at 1.

⁴¹ Declaration of Stacy Moniz, ¶ 3 on page 1.

The Union's Memo in Support of the Motion states in part:⁴²

- A grant of summary judgment is "appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Ross v. Stouffer Hotel Co., 76 Haw. 454, 457, 879 P.2d 1037, 1040 (1994).
- A fact is material if proof of that fact would have the effect of establishing one of the essential elements of a cause of action. Hulsman v. Hemmeter Development Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982).
- When reviewing a motion for judgment as a matter of law, "the evidence and the inferences which may fairly be drawn therefrom must be considered in the light most favorable to the nonmoving party and [the] motion may be granted only where there can be but one reasonable conclusion as to the proper judgment."
- The arbitrator has discretion to hear and grant motions for partial summary disposition.
- There is no dispute as to the elements regarding liability that:⁴³
 1. HGEA made requests for temporary hazard pay for all affected bargaining units employed by the DOE (2, 3, 4, 6, 9, and 13). No forms from the Employer were necessary based on the language of the CBAs, specifically Section E of the temporary hazard pay articles. See Testimony of Keith Hayashi attached hereto as Exhibit 'A'.
 2. The CBAs require that once a recommendation is received by the Employer from the Union a consultation was to occur. There is no evidence that such a consultation occurred. See Testimony of Keith Hayashi attached hereto as Exhibit 'A'.
 3. Three elements are necessary to warrant temporary hazard pay when a bargaining unit member is faced with unusually hazardous conditions:

⁴² SEE: Union Memorandum in Support of Motion at 5.

⁴³ Union Memorandum in Support of Motion at 2.

- a. The exposure to unusually hazardous working conditions is temporary;
- b. The degree of hazard is "Most Severe" or "Severe"; and
- c. The unusually hazardous working conditions have not been considered in the assignment of the class to the salary range.

(See Exhibit "B," Article 20 from the BU 3 CBA. All applicable CBAs contain the identical language and all are in evidence).

- All three of these issues have been admitted to through sworn testimony by DOE Superintendent Keith Hayashi. The admissions are as follows:

Q (By Mr. Moniz): Do you believe that COVID-19 and its variants created a temporary hazardous working conditions at the DOE locations that you're familiar with from March 4, 2020 to March 25, 2022?

A (Keith Hayashi): I can agree that Covid created a temporary hazard globally, temporary hazardous working condition.

Q. For the DOE?

A. Yes. [p. 36, lines 15-18; p.37, lines 1-6.]

Q. ... [W]hen you say ... globally it's a hazard, ... that includes the DOE facilities, right?

A. Yes.

Q. Okay. And so the hazard exists in your mind during that time period and at every DOE facility?

A. Yes. [p.37, lines 23-25; p. 38, lines 1-5]

...

Q. The second condition says that the degree of hazard is most severe or severe?

A. Yes. [p. 60, lines 12-14]

...

Q. Okay. And if you look on the next page of U-2 [047] under heading B which is entitled Hazard Pay Differentials, number 1 and 2 below that give general definitions of most severe and severe, correct?

A. Yes.

Q. ... [Y]ou can go ahead and take a look at that, number 1 and number 2, and then my question will be ... in your opinion was the COVID-19 hazard most severe or severe, one or the other, during that two-year period?

A. Maybe depending on the situation, I think.

Q. Okay. But the degree of the hazard COVID-19 would be one or the other, severe or most severe?

A. Yes. [p. 60, lines 15-25; p. 61, line 1-5]

...

Q. So again, my question is, is the unusually hazardous working condition of COVID-19, it was not considered in the assignment of a class to a salary range, correct?

A. One second. Correct.

Q. And that would be for all the bargaining units except – setting aside Bargaining Unit 6 for now?

A. Yes, yes. [p.62, lines 5-13]

- A judicial admission is a formal statement by a party in the course of a judicial proceeding that removes an admitted fact from the field of controversy. It is a voluntary concession of fact by a party during judicial proceedings.
- Case law supports the arbitrator's authority to grant summary disposition.
- The purpose of arbitration is to permit parties to agree to a more expedited and less costly means to resolve disputes than litigation in the courts. Summary judgment by an arbitrator is consistent with purpose. South City Motors, Inc. v. Auto. Industry Person Trust Fund, 2018 U.S. Dist. LEXIS 88452 (N.D. Cal. May 25, 2018).
- It is clear from the testimony of Keith Hayashi, Superintendent of the Department of Education that all elements to satisfy Section A of each temporary

hazard pay article for bargaining units 2, 3, 4, 9, and 13 that are in evidence have been met by his admissions under oath. ...

- The sworn testimony of Superintendent Keith Hayashi leaves no disputed material fact under Section A of the Temporary Hazard Pay Articles of Bargaining Units 2, 3, 4, 9, and 13. Therefore partial summary disposition should be granted forthwith in favor of HGEA.

B. Employer's response to the Union's Motion for Partial Summary Disposition

On December 16, 2022, the Employer submitted its response to the Union's Motion for Partial Summary Disposition. The Employer states:⁴⁴

- The honest and credible testimony of DOE Superintendent Keith Hayashi speaks for itself specifically with regard to his conclusions concerning the impact COVID had upon working conditions at DOE facilities for affected HGEA members during the two-year period at issue in this matter.

- Mr. Hayashi was Superintendent for only six months of the two-year period.

- Former BOE Chairperson Catherine Payne testified it was her belief that employees at the various DOE facilities were actually safer than in the public at large, including the relevant timeframe.

- Whether the Union's hazardous working conditions claim is "conclusively proven" by the Superintendent's testimony seems questionable. Even the Governor's March 4, 2020 Proclamation conclusively proves nothing about *actual* working

⁴⁴ SEE: Employer Reply to HGEA's Motion for Summary Disposition at 2.

conditions in Hawaii at the time it was issued, since a single COVID case had yet to be reported here.

- At any time, the arbitrator can certainly evaluate the merits and weight to be given to competing testimony on the crucial issue of working conditions at DOE facilities during the period in question, but DOE is nevertheless obligated to oppose this aspect of HGEA's motion.

- DOE agrees that the Union's claims numbered 1, 2, and 3 on page 2 of their motion are not in dispute.

C. The Union's reply to the Employer's response

On December 21, 2022, the Union submitted its "Reply Memorandum to the Employer's Reply to HGEA's Motion for Summary Disposition. The Union states:⁴⁵

- The further admissions by the Employer contained in its response are dispositive.
- The Employer admits that Superintendent Hayashi's conclusions speak for themselves.
- Superintendent Hayashi's conclusions demonstrate no ambiguity that from March 4, 2020 to March 25, 2022 all affected HGEA bargaining unit members who reported to work were subjected to temporary hazardous working conditions as a result of COVID-19 and its variants.
- Superintendent Hayashi was the Superintendent for approximately eight (8) months, beginning on August 1, 2021.

⁴⁵ Union's 12/21/22 Reply Memo at 2-3.

- Superintendent Hayashi had also been the Principal at Waipahu High School from the beginning of the pandemic until August 1, 2021. As Principal, he had to address concerns regarding COVID-19 and its variants on a daily basis and was very familiar with its effects on schools.

- Governor Ige's Emergency proclamations make crystal clear the emergency, danger, and hazard caused by COVID-19 and its variants. Contrary to the Employer's representation, Governor Ige's Proclamations actually conclusively prove the hazard and the working conditions thereunder. They apply to every walk of life in the State, which includes the DOE facilities.

- BOE Chairperson Catherine Payne's testimony, as asserted by the Employer, is of no weight. Chairperson Payne's testimony concluded with her statement that while the BOE had information regarding the students who were positive on DOE's campuses, it did not have information where they contracted COVID-19:⁴⁶

Q: And if you can recall, as the statistics or numbers, case counts that you were aware of or made aware of, was there any type of differentiation in the case counts between people contracting COVID-19 and its variants on campus as compared to off campus?

A: I don't think we had that information. We only had information of the positive – students who were positive on campus, but where they got the – where they [contracted], we don't know.

- All that is necessary to prove under the CBA Articles concerning temporary hazard pay is that the HGEA bargaining unit members were **exposed** to the hazard. There is no dispute in the evidence as to this issue.

- The Employer admits that claims numbered 1, 2, and 3 in the Union's motion are **undisputed**. Those are the three items necessary to prove exposure to

⁴⁶ Tr. at 185-186.

temporary hazardous working conditions for HGEA bargaining unit members to receive temporary hazard pay. Therefore summary disposition is appropriate.

- By evidence and admissions from the employer it is proven that the HGEA bargaining unit members were exposed to temporary hazardous working conditions, that those conditions were “severe” or “most severe” as defined in the CBAs, and the hazard of COVID-19 and its variants were not taken into account in the bargaining unit members’ salary ranges. Thus an Award should be issued forthwith in favor of HGEA in the first phase of this hearing.

VIII. The arbitrator’s findings and conclusions on the Union’s Motion for Partial Summary Disposition

After carefully reviewing the exhibits, the testimonies of the witnesses, and the arguments of the parties, the arbitrator makes the following findings and conclusions on the Union’s Motion for Partial Summary Disposition.

In making this Decision and Order, the Arbitrator recognizes that Article 11 – Grievance Procedure, Section G – Arbitration, Paragraph 1 of the BU 2, 3, 4, and 13 CBAs provides: “The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the terms of the Agreement.” Article 14 - Grievance Procedure, Section G – Arbitration, Paragraph 1 of the BU 9 CBA has the identical provision.

A. Pursuant to HRS § 658A-15(b), the arbitrator may decide the Union’s request for summary disposition of the THP issues herein.

The arbitrator agrees with the Union that the arbitrator has discretion to hear and decide motions for partial summary disposition.

As held by the Hawai'i Intermediate Court of Appeals in 2011:⁴⁷

The arbitrator may consider a request for summary disposition under HRS § 658A-15(b)(2) (Supp. 2010), which provides that, with notification to the other parties, a party may ask an arbitrator to "decide a request for summary disposition of a claim or particular issue."

HRS § 658A-15, entitled "Arbitration process," provides in pertinent part:

(a) An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) If all interested parties agree; or

(2) Upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding, and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. ... The arbitrator may hear and decide the controversy upon the evidence produced ...

(d) At a hearing under subsection (c), a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

Here, consistent with §658A-15(b)(2), the Union gave notice to the Employer of its request for summary disposition of the liability portion of its claim for temporary hazard pay, the Employer had a reasonable opportunity to respond, and the Employer did so respond. On December 7, 2022, during the Stage 1 Liability Hearing, Mr. Moniz

⁴⁷ United Pub. Workers, AFSCME, Local 646 v. County of Hawai'i-Holiday Pay, 125 Haw. 476, 486, 264 P.3d 655, 665, 2011 Haw. App. LEXIS 1072, *27-28

provided notice on the record that the Union intended to file a motion for partial summary disposition regarding liability based on Superintendent Hayashi's testimony, and reported he had communicated with Mr. Thomason about it.⁴⁸ On December 9, 2023, during the Stage 1 Liability Hearing, the arbitrator set previously agreed-to deadlines for the Employer's response to the Motion.⁴⁹

In an arbitration, whether a motion is denominated as a motion for summary judgment or a motion for summary disposition, the arbitrator agrees with the Union that the arbitrator may take guidance from Hawai'i case law on Rule 56 of the Hawai'i Rules of Civil Procedure ("HRCP") regarding motions for summary judgment. Rule 81(b)(12) of the HRCP specifies that proceedings under HRS Chapter 89 relating to collective bargaining and labor disputes may be governed procedurally by the HRCP, except to the extent they are inconsistent with specific statutes of the State relating to such proceedings.

Using case law on HRCP Rule 56 as a guideline, the arbitrator reviewed the evidence and the inferences which may fairly be drawn therefrom relating to the Union's Motion for Partial Summary Disposition in the light most favorable to the Employer. Winfrey v. GGP Ala Moana LLC, 130 Haw. 262, 271, 308 P.3d 891, 900 (2013) (On a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party); Pioneer Mill Co. v. Dow, 90 Hawai'i 289, 295, 978 P.2d 727, 733 (1999) ("[T]he court is permitted to draw only those inferences of which the evidence is reasonably susceptible and it may not resort to speculation").

⁴⁸ 12/7/22 Tr. at 11-13.

⁴⁹ Tr. at 444.

Here, at the Stage 1 Liability Hearing, the Union called seven witnesses, and the Union and the Employer had a full opportunity to examine the witnesses called. In light of the Union's 175 listed witnesses, and the parties' mutual recognition that the HGEA member witnesses would each testify as stated in the HGEA Offer of Proof (U-106), the arbitrator determined it to be appropriate, for a fair and expeditious disposition of the proceeding, to receive U-106 in evidence subject to the weight the arbitrator gives it.⁵⁰ On behalf of the Employer, Mr. Thomason stated the HGEA Offer of Proof is not an admission by the DOE, and not a stipulated fact by the DOE, but merely the recognition that if these HGEA witnesses were called they would testify as stated in the offer of proof.⁵¹ In reliance on the HGEA Offer of Proof's reception into evidence, the Union elected not to call additional bargaining unit members because "it would literally be a parade of witnesses ... testifying to exactly what" is stated in the Offer of Proof.⁵²

HRS § 658A-15(a) provides that an arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. § 658A-15(b) provides that an arbitrator may decide a request for summary disposition of a claim or particular issue. § 658A-15(c) provides that if an arbitrator orders a hearing, the arbitrator may hear and decide the controversy upon the evidence produced. § 658A-15(d) provides that at a hearing under subsection (c), a party has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

⁵⁰ Tr. at page 15 of the December 7, 2022 arbitration hearing.

⁵¹ Tr. at 5 of the 12/7/22 arbitration hearing.

⁵² Tr. at 7 of the 12/7/22 arbitration hearing.

Together, § 658A-15 permits an evidentiary hearing on a motion for summary disposition. Here, the evidentiary portion of the Stage 1 Liability Hearing was conducted on December 2, 5, 6, 7, and 9, 2022. On December 9, 2022, the arbitrator recessed the Stage 1 Liability hearing pending the disposition of this motion for partial summary disposition.⁵³

B. The Temporary Hazard Pay Article in the BU 2, 3, 4, 9, and 13 CBAs

The THP language is identical for bargaining units 2, 3, 4, 9, and 13,⁵⁴ and states as follows:

Temporary Hazard Pay

A. Award and Approval. Upon recommendation of a department head or the Union, the Personnel Director, in consultation with the Union, shall grant hazard pay to Employees who are temporarily exposed to unusually hazardous working conditions and where the following conditions are met (where the Union initiates a request, the request shall be addressed to the affected department head with a copy to the Personnel Director):

1. The exposure to unusually hazardous working condition is temporary;
2. The degree of hazard is “Most Severe” or “Severe”; and
3. The unusually hazardous working conditions have not been considered in the assignment of the class to the salary range.

B. Hazard Pay Differentials. Hazard pay differentials shall be based on the minimum step of the Employee’s salary range and shall be prorated as follows:

⁵³ Tr. at 444.

⁵⁴ See: BU-02 CBA (Blue Collar Supervisors) Article 22 Temporary Hazard Pay (U-1 at 048-049); BU-03 CBA (White Collar Employees) Article 20 Temporary Hazard Pay (U-2 at 046-048; BU-04 CBA (White Collar Supervisors) Article 20 Temporary Hazard Pay (U-2 at 044-046); BU-09 CBA (Registered Professional Nurses) Article 22 Temporary Hazard Pay (U-105 at 044-046; and BU-13 CBA (Professional and Scientific Employees) Article 20 Temporary Hazard Pay (U-6 at 050-051). See Also: Declaration of Stacy Moniz, ¶ 3 on page 1.

1. Most Severe – twenty-five percent (25%).
 - a. Exposure likely to result in serious incapacitation, long period of time lost, or possible loss of life.
 - b. Accidents occur frequently in spite of reasonable safety precautions.
 - c. Frequent exposure to hazard where failure to exercise extreme care and judgment might cause an accident which would result in total disability or fatality.
 2. Severe – fifteen percent (15%).
 - a. Frequent injuries likely but serious accidents rare.
 - b. Exposure leads to possible eye injuries, loss of fingers, or serious burns.
 - c. Might cause incapacitation.
 - d. Moderate periods of compensable lost time result.
 3. Any disagreement on the granting of Temporary Hazard Pay or the differential granted shall be subject to the grievance procedure and in accordance with Step 2 of Article 11, Grievance Procedure.
- C. Computing Hazard Pay. The basic unit for computing such payments shall be the hour provided that:
1. A fraction of an hour shall be considered an hour.
 2. A half day's pay at hazard rates shall be allowed for one (1) or more but less than four (4) hours of hazard work per day.
 3. A full day's pay at hazard rates shall be allowed for four (4) or more hours of hazard work per day; and
 4. This pay is in addition to any other rate that may apply to the job.
- D. Duration of Hazard Pay Award. Such hazard pay award shall remain in effect for a period not to exceed six (6) months but may be renewed by the Personnel Director or the Director's designated representative upon showing by the department head that the working conditions and duties remain the same.

E. Forms and Other Requirements. Recommendations for hazard pay differentials shall be submitted on such forms and such manner as the employer may require.

- C. **Because there are no genuine issues as to the material facts proving all elements of Section A of the Temporary Hazard Pay Articles in BU 2, 3, 4, 9, and 13, the Class Grievants are entitled to partial summary disposition in their favor.**

For the following reasons, the arbitrator the arbitrator finds and concludes there are no genuine issues as to the material facts proving all elements of Section A of the Temporary Hazard Pay Articles in BU 02, 03, 04, 09, and 13.

1. **The testimony of DOE Superintendent Keith Hayashi was honest and credible**

- The arbitrator agrees with the Employer that the testimony of DOE Superintendent Keith Hayashi was honest and credible. Superintendent Hayashi holds the highest position within the DOE, and served as Interim Superintendent from August 1, 2021, and permanent Superintendent since August 2, 2022.⁵⁵
- The arbitrator further agrees with the Employer that Superintendent Hayashi's testimony "speaks for itself specifically with regard to his conclusions concerning the impact COVID had upon working conditions at DOE facilities for affected HGEA members during the two-year period at issue in this matter."
- Because Superintendent Hayashi is the head of the DOE, the Employer is bound by Superintendent Hayashi's factual admissions.⁵⁶ A judicial

⁵⁵ Tr. at 18-19.

⁵⁶ International Bhd. of Elec. Workers, Local 1357 v. Hawaiian Tel. Co., 68 Haw. 316, 320, 713 P.2d 943, 949, 1986 Haw. LEXIS 65, *4 (It is well established that a party's factual allegation in a complaint or other pleading is a judicial admission which binds the party).

admission is a formal statement, either by a party or his or her attorney, in the course of a judicial proceeding that removes an admitted fact from the field of controversy.⁵⁷

2. The affected DOE BU 2, 3, 4, 9, and 13 members were exposed to unusually hazardous working conditions, specifically, the highly contagious COVID-19 disease and its variants at DOE facilities

- Governor Ige's Emergency Proclamations stated that COVID-19 is highly contagious, and the occurrence or threat of COVID-19 may likely result in substantial injury or harm to the population or may likely result in loss of life.⁵⁸

- Governor Ige determined these conditions are of such "character and magnitude to constitute an emergency or disaster" as contemplated by HRS § 127A-2.

- HRS § 127A-2 provides in pertinent part:

"Emergency" means any occurrence, or imminent threat thereof, which results or may likely result in substantial injury or harm to the population or substantial damage to or loss of property or substantial damage to or loss of the environment.

"Disaster" means any emergency, or imminent threat thereof, which results or may likely result in loss of life, property, or environment and requires, or may require, assistance from other counties, states, the federal government, or from private agencies.

"Hazard" means an event or condition of the physical environment that results or may likely result in damage to property, injuries or death to individuals, or damage to the environment that may result in an emergency or disaster.

⁵⁷ Lee v. Puamana Cmty. Ass'n, 109 Hawai'i 561, 573, 128 P.3d 874, 886 (2006) (A judicial admission is a formal statement, either by a party or his or her attorney, in the course of a judicial proceeding that removes an admitted fact from the field of controversy. It is a voluntary concession of fact by a party or a party's attorney during judicial proceedings.").

⁵⁸ See, for example, U-7, which is a copy of the March 4, 2021 Emergency Proclamation, at 001-004.

- “Educational institutions” were exempted from Governor Ige’s stay-at-home Proclamations.⁵⁹

- In response to the COVID-19 pandemic and Governor Ige’s Proclamation, the Department of Education designated DOE employees who performed essential functions and must report to work.⁶⁰ For example, on March 19, 2020, DOE Assistant Superintendent Cynthia Covell issued a directive to DOE Complex Area Superintendents and Principals Re: “COVID-19 – Personnel Who Perform Essential Duties for School Facilities and School Food Services,” stating in part:⁶¹

The identification of personnel who perform essential duties and functions is critical to school and office operations. Once a supervisor notifies an employee that they are deemed necessary to perform essential functions, that employee may work consistently at his/her identified worksite or may be asked to return to his/her identified worksite intermittently.

- Superintendent Hayashi testified Governor Ige declared educational workers as essential and HGEA bargaining unit members were ordered to work during the Emergency Period:⁶²

Q. [D]o you recall the governor declaring educational workers as essential?

A. Yes.

Q. And so basically by the governor’s own hand, HGEA bargaining unit members were ordered to work during the emergency period?

A. I believe they would have to be deemed essential.

⁵⁹ U-10 at 002-003.

⁶⁰ U-52 at 002.

⁶¹ U-68 at 001-002.

⁶² Tr. at 91.

- By the phrase “affected DOE BU 02, 03, 04, 09, and 13 members,” the arbitrator means the HGEA members in those BUs who were required to report to work.⁶³

- Superintendent Hayashi admitted that COVID-19 and its variants was an unusually hazardous working condition:⁶⁴

Q. ... Would you agree or disagree that COVID-19 and its variants was an unusually hazardous working condition?

A. Yes.

- Superintendent Hayashi had personal knowledge that COVID-19 and its variants was an unusually hazardous working condition. In addition to being Interim Superintendent for approximately eight (8) months (commencing August 1, 2021) of the March 4, 2020 through March 25, 2022 time period, Superintendent Hayashi had also been the Principal at Waipahu High School from the beginning of the pandemic until August 1, 2021.⁶⁵ As Principal, he had to address concerns regarding COVID-19 and its variants at Waipahu High School, on a daily basis.⁶⁶ Moreover, during his first year as Superintendent, he visited over 80 schools to learn, among other things, what was going on at the schools regarding COVID-19;⁶⁷

Q. [Y]ou went to visit schools because you needed to learn what was going [on] at the schools regarding COVID-19, right?

⁶³ Tr. at 360.

⁶⁴ Tr. at 59.

⁶⁵ Tr. at 18-19.

⁶⁶ Tr. at 36-37.

⁶⁷ Tr. at 113-114.

A. Yes.

- The THP articles in BUs 2, 3, 4, 9, and 13 only require that the BU member be exposed to the unusually hazardous working condition, as opposed to actually suffering injury, in order to qualify for THP.⁶⁸

Q. (by Mr. Moniz): ... [M]y question is: That [the language of the THP Article] doesn't require that you actually suffer some type of injury, right, to qualify for hazard pay? It's only exposure, correct?

A. (By Superintendent Hayashi): Temporarily exposed, yes.

Q. Right, so you don't have to actually suffer an injury, right?

A. It doesn't say that.

- The COVID-19 HIDEOE Case Count data for all students and staff at DOE schools (not including 347 Complex, District, or State Office employees) for the period 7/3/21 through March 2022 (9 months during the "Emergency Period" of March 4, 2021 through March 25, 2022) reported that out of 185,038 total students and staff on campus, 26,306 cumulative positive COVID-19 cases were counted.⁶⁹

- DOE Superintendent Hayashi testified that 26,306 was the total number of positive COVID-19 cases for staff and students for the period 7/3/21 through March 2022. Tr. at 156.

- DOE Board Chairperson Catherine Payne⁷⁰ agreed there were 26,303 cumulative positive COVID-19 cases at DOE schools from 7/3/21 through March 2022, despite the DOE's mitigation efforts to reduce exposure. Tr. at 226-227.

⁶⁸ Tr. at 57-58.

⁶⁹ U-103 at 001.

⁷⁰ The arbitrator found DOE Board of Education Chairperson Payne's testimony honest and credible.

- While the COVID-19 HIDOE Case Count data made no differentiation where a student or staff person contracted COVID-19, either in the community or at school (Tr. at 231), Board Chairperson Catherine Payne testified there was a risk of exposure from that person at school:⁷¹

Q.(by Mr. Moniz): [A]ssuming for a second that someone contracts COVID-19 in the community, a student or staff member, ... [that person could] be COVID-19 positive with no symptoms for at least a few days?

A. Yes, that's – yes.

Q. ... [A]ssuming in the hypothetical that they contract COVID-19 in the community and then go to school because they don't have symptoms, isn't there a risk of exposure to infection from that person at school?

A. Yes.

- The Employer points out that Chairperson Catherine Payne also testified it was her belief that employees at the various DOE facilities were actually safer than in the public at large, including the relevant timeframe:⁷²

A (By Catherine Payne): ... I would say that the risk of exposure [for DOE employees] is there; but the schools were strict about the mitigation and the mask-wearing, whereas in the community probably not so much. So that was one of the reasons we felt it was safer in school, because of the mitigating actions that were taken.

- The arbitrator finds and concludes that while the DOE's mitigation efforts may have made DOE facilities safer compared to the community overall, the DOE's working conditions during the March 4, 2020 through March 25, 2022 period remained "unusually hazardous." The COVID-19 HIDOE Case Count data for all

⁷¹ Tr. at 231-232.

⁷² Tr. at 232.

students and staff at DOE schools, reporting 26,306 positive COVID-19 cases for staff and students for the period 7/3/21 through March 2022, indicates the DOE's working conditions remained unusually hazardous.⁷³

- Based on Governor Ige's Emergency Proclamations, the definitions of "emergency," "disaster," and "hazard" in HRS Chapter 127A-2, the DOE directives requiring DOE employees who performed essential functions to report to work, the COVID-19 HIDOE Case Count data for all students and staff at DOE schools, and the genuine risk of exposure from a positive COVID-19 person at school, the arbitrator finds and concludes that the affected DOE BU 2, 3, 4, 9, and 13 members were *exposed to* unusually hazardous working conditions, specifically, the highly contagious COVID-19 disease and its variants at DOE facilities.

3. The affected DOE BU 2, 3, 4, 9, and 13 members' exposure to unusually hazardous working conditions was temporary, specifically from March 4, 2020 to March 25, 2022

- Governor Ige's Emergency Proclamations and/or Supplemental Proclamations declared successive "Emergency Periods" which commenced on March 4, 2020 and ended on March 25, 2022.⁷⁴ Each subsequent Emergency Period within the March 4, 2020 through March 25, 2022 time period, was temporary.

- With respect to Governor Ige's series of proclamations declaring a state of emergency in response to the Covid-19 pandemic, the Hawai'i Intermediate Court of Appeals held in February, 2022 that the Governor is authorized to declare such

⁷³ U-103 at 001.

⁷⁴ For example, Governor Ige's March 4, 2020 Proclamation declared the disaster emergency relief period continued through April 29, 2020 (U-7 at 007), the March 16, 2020 Supplementary Proclamation declared the emergency period "shall continue through May 15, 2020 (U-8 at 007). The successive Proclamations continued the Emergency Periods through March 25, 2022 (U-34 at 018). See: U-7 through U-35.

a state of emergency regardless of whether a prior emergency proclamation had been issued based on the same, continuing, and/or otherwise related circumstances:⁷⁵

Hawai'i's Emergency Management Act authorizes the Hawai'i Governor to declare the existence of a state of emergency *whenever*, in his or her sole judgment, the Governor finds that circumstances giving rise to a declaration of a state of emergency have occurred (or that there is imminent danger or threat of an emergency), regardless of whether a prior emergency proclamation has been issued based on the same, continuing, and/or otherwise related circumstances.

- Superintendent Hayashi admitted that Covid-19 created temporary hazardous working conditions at every DOE facility from March 4, 2020 to March 25, 2022.

Q (By Mr. Moniz): Do you believe that COVID-19 and its variants created a temporary hazardous working conditions at the DOE locations that you're familiar with from March 4, 2020 to March 25, 2022?

A (Keith Hayashi): I can agree that Covid created a temporary hazard globally, temporary hazardous working condition.

Q. For the DOE?

A. Yes. [p. 36, lines 15-18; p.37, lines 1-6.]

Q. ... [W]hen you say ... globally it's a hazard, ... that includes the DOE facilities, right?

A. Yes.

Q. Okay. And so the hazard exists in your mind during that time period and at every DOE facility?

A. Yes. [p.37, lines 23-25; p. 38, lines 1-5]

- Based on Governor Ige's successive Emergency Proclamations

⁷⁵ For Our Rights v. Ige, 151 Haw. 1, 2, 507 P.3d 531, 532 (Haw. App. 2022); HRS § 127A-14(d).

and Superintendent Hayashi's testimony, the arbitrator finds and concludes that the affected DOE BU 2, 3, 4, 9, and 13 members' exposure to unusually hazardous working conditions was temporary, specifically from March 4, 2020 to March 25, 2022.

4. The affected DOE BU 2, 3, 4, 9, and 13 members' degree of hazard was "Severe" or "Most Severe"

- Superintendent Hayashi admitted that the degree of the hazard

COVID-19 at DOE facilities was severe or most severe:

Q. The second condition [in the THP Articles] says that the degree of hazard is most severe or severe?

A. Yes. [Tr. 60, lines 12-14]

...

Q. Okay. And if you look on the next page of U-2 [BU 02 CBA at 047] under heading B which is entitled Hazard Pay Differentials, number 1 and 2 below that give general definitions of most severe and severe, correct?

A. Yes.

Q. ... [Y]ou can go ahead and take a look at that, number 1 and number 2, and then my question will be ... in your opinion was the COVID-19 hazard most severe or severe, one or the other, during that two-year period?

A. Maybe depending on the situation, I think.

Q. Okay. But the degree of the hazard COVID-19 would be one or the other, severe or most severe?

A. Yes. [Tr. at 60, lines 15-25; Tr. at 61, line 1-5]

- Based on Superintendent Hayashi's testimony, the arbitrator finds

and concludes that the affected DOE BU 2, 3, 4, 9, and 13 members' degree of the hazard COVID-19 and its variants at DOE facilities was severe or most severe from March 4, 2020 to March 25, 2022.

5. The affected DOE BU 2, 3, 4, 9, and 13 members' unusually hazardous working conditions had not been considered in the assignment of the class to the salary range

- Superintendent Hayashi admitted the DOE's unusually hazardous working conditions caused by of COVID-19 had not been considered in the assignment of the affected DOE BU 2, 3, 4, 9, and 13 members to their respective salary range:

Q. So again, my question is, is the unusually hazardous working condition of COVID-19, it was not considered in the assignment of a class to a salary range, correct?

A. One second. Correct.

Q. And that would be for all the bargaining units except – setting aside Bargaining Unit 6 for now?

A. Yes, yes. [Tr.at 62, lines 5-13]

- Based on Superintendent Hayashi's testimony, the arbitrator finds and concludes that the DOE's unusually hazardous working conditions caused by of COVID-19 had not been considered in the assignment of the affected DOE BU 2, 3, 4, 9, and 13 members to their respective salary range.

6. The Union made requests for temporary hazard pay for all affected bargaining units employed by the DOE, and no forms from the Employer were necessary for the Union's request for THP

- The THP articles provide in part that the Union may initiate a request for Temporary Hazard Pay:⁷⁶

A. Award and Approval. Upon recommendation of a department head or the Union, the Personnel Director, in consultation with the Union, shall grant hazard pay to Employees who are temporarily exposed to unusually hazardous working conditions and where the following conditions are met (where the Union initiates a request, the request shall be addressed to the affected department head with a copy to

⁷⁶ See, for example, U-2 at 046.

the Personnel Director): ...

- On March 31, 2020, the Union wrote to then-DOE Superintendent Christina Kishimoto, requesting temporary hazard pay for all affected HGEA bargaining unit employees.⁷⁷

- Superintendent Hayashi admitted the Union made requests for temporary hazard pay for all affected bargaining units employed by the DOE.⁷⁸

Q. So on March 31, 2020, the Union made a request for temporary hazard pay for all of its affected employees, right?

A. Yes.

Q. And this was for everybody, all affected employees?

A. Yes.

- Section E of the THP articles provides:⁷⁹

Forms and Other Requirements. Recommendations for hazard pay differentials shall be submitted on such forms and such manner as the employer may require.

- On April 7, 2020, the DOE Assistant Superintendent, Cynthia Covell, initially responded to the Union's request for THP that the Union must submit "Temporary Hazard Pay Request forms" to justify the THP request, which the DOE will then review to determine whether THP is warranted.⁸⁰

⁷⁷ U-45 at 001.

⁷⁸ Tr. at 73.

⁷⁹ See, for example, U-2 at 048.

⁸⁰ U-46 at 001.

- Superintendent Hayashi, however, admitted no forms from the Employer were necessary based on Section E of the THP articles.⁸¹

Q. ... To get to the hazard pay differential [Section B of the THP articles] of 25 [percent] to 15 [percent], you would have had to have satisfied Section A, that the temporary hazard working condition existed and there was exposure to it, correct?

A. To be able to get the 15 – request 15 and 25 percent, yes.

Q. Yes.

A. Okay.

Q. And so subsection E only talks about an application to determine the hazard pay differential, not whether a temporary hazardous working condition existed or not, correct?

A. You're right. Correct.

- The DOE does not dispute the Union's claim that HGEA made requests for temporary hazard pay for all affected bargaining units employed by the DOE, and that no forms from the Employer were necessary based on Section E of the THP articles.

- The Employer's Reply to the Union's Motion for Partial Summary Disposition stated in part that the DOE does not dispute the Union's claim numbered 1 on page 2 of the Union's motion.

- The Union's claim numbered 1 on page 2 of the Union's motion stated:⁸²

There is no dispute as to the elements regarding liability that:

1. HGEA made requests for temporary hazard pay for all affected bargaining units employed by the DOE (2, 3, 4, 6, 9, and 13). No

⁸¹ Tr. at 64-65.

⁸² Union Memorandum in Support of Motion at 2.

forms from the Employer were necessary based on the language of the CBAs, specifically Section E of the temporary hazard pay articles. See Testimony of Keith Hayashi attached hereto as Exhibit 'A'.

- Based on the plain language of the THP Articles in BUs 2, 3, 4, 9, and 13, the Union's March 31, 2020 request to then-DOE Superintendent Kishimoto requesting temporary hazard pay for all affected HGEA bargaining unit employees, Superintendent Hayashi's testimony, and the Employer's admission that the DOE does not dispute this claim, the arbitrator finds and concludes that the Union made requests for temporary hazard pay for all affected bargaining units employed by the DOE, and no Employer-mandated forms were necessary for the Union's request for THP.

7. Section A of the THP Articles in BU 2, 3, 4, 9, and 13 provide that upon recommendation by the Union for THP, the DOE Personnel Director shall consult with the Union whether to grant THP, but there is no evidence that no such consultation occurred

- Section A of the THP articles provide in part that upon recommendation by the Union for THP, the DOE Personnel Director shall consult with the Union whether to grant THP:⁸³

A. Award and Approval. Upon recommendation of a department head or the Union, the Personnel Director, in consultation with the Union, shall grant hazard pay to Employees who are temporarily exposed to unusually hazardous working conditions and where the following conditions are met ...

- Superintendent Hayashi admitted he was unaware of consultation by the DOE Personnel Director after the Union's request for THP:⁸⁴

Q. ... Are you aware that once the request was made by the union for temporary hazard pay, if there was any consultation between Ms.

⁸³ See, for example, U-2 at 046.

⁸⁴ Tr. at 53, 55-56.

Covell [Personnel Director/head of the DOE's Office of Talent Management] or anyone from the DOE and the union?

A. No, I'm not aware.

Q. So as far as you know, there was no consultation, right?

A. I'm not aware of any consultation. I'm aware there was something submitted, I'm not aware of anything, any consultation related to Dr. Covell, Ms. Covell.

...

Q. ... So my question again to you, Mr. Hayashi, is once the request was made by the union as provided for in the article, did the Office of talent Management have a consultation with the union regarding the request?

A. I don't know about that, no. I don't know ... if there was a consultation.

...

Q. ... And my question to you was if there was no consultation, wouldn't it violate the plain language of the article?

A. I would – I would say yes.

- On October 1, following a September 27, 2021 joint meeting among the DOE, HGEA, UPW, and HSTA and October 19, 2021, the unions sent a joint letter to then-DOE Interim Superintendent Keith Hayashi discussing the DOE's responses at the September 27, 2021 joint meeting regarding COVID-19 issues, one of which was "Consideration for additional pay."⁸⁵

- **Consideration for additional pay.** Unions' request for consideration of additional compensation in the form of temporary hazard pay and/or differentials for the added time and effort to ensure our schools can remain open for in-person learning.

- Response: the HIDOE is researching the request and will get back to the unions.

On October 19, 2021, following a further October 11, 2021 joint meeting among

⁸⁵ U-94 at 003.

the unions and the DOE, the unions sent another joint letter to Interim Superintendent Hayashi, stating the DOE's responses at the October 11, 2021 joint meeting, one of which was again "Consideration for additional pay."⁸⁶

- **Consideration for additional pay.** Unions' request for consideration of additional compensation in the form of temporary hazard pay and/or differentials for the added time and effort to ensure our schools can remain open for in-person learning.

- Response: the HDOE is researching the request and will get back to the unions.

Superintendent Hayashi subsequently testified he was unaware of any research done by the DOE relating to this request and did not believe he or anyone on his behalf got back to the unions.⁸⁷

- The DOE does not dispute the Union's claim that the THP Articles in BU 2, 3, 4, 9, and 13 provide that upon recommendation by the Union for THP, the DOE Personnel Director shall consult with the Union whether to grant THP, but there is no evidence that no such consultation occurred.

- The Employer's Reply to the Union's Motion for Partial Summary Disposition stated in part that the DOE does not dispute the Union's claim numbered 2 on page 2 of the Union's motion.

- The Union's claim numbered 2 on page 2 of the Union's motion stated:⁸⁸

There is no dispute as to the elements regarding liability that: ...

2. The CBAs require that once a recommendation is received by the

⁸⁶ U-95 at 003.

⁸⁷ Tr. at 83-88.

⁸⁸ Union Memorandum in Support of Motion at 2.

Employer from the Union a consultation was to occur. There is no evidence that such a consultation occurred. See Testimony of Keith Hayashi attached hereto as Exhibit 'A'.

- Based on the language of the THP Articles in Bus 2, 3, 4, 9, and 13, Superintendent Hayashi's testimony, and the Employer's admission that the DOE does not dispute this claim, the arbitrator finds and concludes that the THP Articles in BU 2, 3, 4, 9, and 13 provide that upon recommendation by the Union for THP, the DOE Personnel Director shall consult with the Union whether to grant THP, but there is no evidence that no such consultation occurred.

Based on all of the above, the arbitrator finds and concludes there are no genuine issues as to the material facts proving all elements of Section A of the Temporary Hazard Pay Articles in BU 2, 3, 4, 9, and 13. Accordingly, the affected Class Grievants in BU 2, 3, 4, 9, and 13 are entitled to partial summary disposition in their favor with respect to the Stage 1 Liability phase of these arbitration proceedings.

IX. The subpoena of former Governor David Y. Ige

A. Governor Ige's Emergency Proclamations Related to COVID-19

One of the witnesses listed by the Union was former Governor David Y. Ige. Of the Union's 106 exhibits received into evidence, 28 of those exhibits, designated as U-7 through U-35, are copies of Governor Ige's Emergency Proclamations Related to COVID-19 or its variant from March 4, 2021 (U-7) through March 25, 2022.

B. The Subpoena issued to Governor Ige to testify at the arbitration hearing

On November 15, 2022, pursuant to HRS § 658A-17(a)⁸⁹ and the Union's request, the arbitrator issued a subpoena of Governor Ige to appear at the arbitration hearing, to testify on behalf of the Union. On December 7, 2022, Mr. Moniz represented to the arbitrator:⁹⁰

MR. MONIZ: ... [The subpoena] was served through the attorney general's office as we were instructed by the governor's office on November 18, 2022, and it was for appearance on November 29, 2022. And the subpoena contains my name, my address, the identification of HGEA, along with my telephone number.

... [I]t was by agreement that we would wait until December 5th to call Mr. Ige as a witness when he was no longer the sitting governor to avoid various issues that could be raised. And this was by agreement between the union and the employer.

We have made numerous attempts to try and contact him. He has not contacted us since the service of November 18th. We have been unsuccessful to contact him because the response we're getting from the governor's office is pretty much nobody knows where he disappeared to

MR. THOMASON: ... [T]he subpoena was served on us, the AG's office, and we sent that subpoena to the chief of staff of the governor's office, along with the HGEA's written agreement they would not call him until after December 5th, which was his last day in office.

The Union requested the arbitrator to set a specific date by which Governor Ige would have to contact one of the parties to schedule his appearance to testify, and if he does not make such contact, an order to show cause should enter.⁹¹ Over the objection

⁸⁹ HRS § 658A-17, entitled "Witnesses; subpoenas; depositions; discovery," provides that an arbitrator may issue a subpoena for the attendance of a witness at any hearing:

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena shall be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

⁹⁰ Tr. at 7-10 of the 12/7/22 arbitration hearing.

⁹¹ Tr. at 10 of the 12/7/22 arbitration hearing.

of Employer, the arbitrator took under advisement the request for an order to show cause, and set December 9, 2022 at 9:00 a.m. as the deadline for Governor Ige to schedule his appearance to testify.⁹²

On December 9, 2022, at 9:17 a.m., the arbitrator reconvened the arbitration hearing. Deputy Attorney Claire Chinn appeared on behalf of Mr. Thomason, who was ill that day. The arbitrator first addressed the subpoena of ex-Governor Ige:

The Union requested the arbitrator to issue an order to show cause because Governor Ige had been served with a subpoena. Additional time was extended for his appearance at the arbitration hearing because of the inauguration ceremonies.

No motion to quash the subpoena has been submitted to the arbitrator and, as a result, the arbitrator determined that further time would be provided to Governor Ige to this morning, Friday, December [9th] at 9:00 a.m.

And Stacy, on behalf of the Union, could you report whether you received any further communication with respect to the subpoena of Governor Ige?

MR. MONIZ: We have received no response or contact from David Ige.

ARBITRATOR CROWLEY: And what is the Union now requesting the arbitrator to do?

MR. MONIZ: We're requesting the arbitrator issue an order to show cause to David Y. Ige, the former Governor of the State of Hawaii.

...

The arbitrator then requested the Union to submit a Proposed Order to Show Cause.

C. The Subpoena of Governor Ige and the Proposed Order to Show Cause is moot.

⁹² Tr. at 10-11 of the 12/7/22 arbitration hearing.

On December 9, 2022, the Union submitted to the arbitrator, copied to Mr. Thomason, a Proposed Order to Show Cause, which the arbitrator took under advisement.

On December 12, 2022, the arbitrator emailed Mr. Moniz and Mr. Thomason, noting that the Proposed Order to Show Cause provided for a to-be-determined date for Governor Ige to appear at the arbitration hearing, and a to-be-determined date for service of the Order to Show Cause upon Governor Ige prior to the scheduled hearing date. The arbitrator asked Mr. Moniz and Mr. Thomason whether the scheduling of the to-be-determined dates be set before or after the arbitrator's decision on the Union's Motion for Partial Summary Disposition. On December 12, 2022, Mr. Moniz and Mr. Thomason each responded that the to-be-determined dates be set after the arbitrator's decision on the Union's Motion for Summary Disposition. The arbitrator thereupon kept the Proposed Order to Show Cause under advisement pending his decision on the Union's Motion for Summary Disposition.

In light of the arbitrator's Decision, Order, and Partial Final Arbitration Award herein, further proceedings regarding the subpoena of Governor Ige, and the Proposed Order to Show Cause, have been mooted.⁹³ Governor Ige's twenty-eight (28) Emergency and/or Supplemental Proclamations Related to COVID-19 or its variants were received in evidence.⁹⁴ The arbitrator's decision herein on the Union's Motion for Partial Summary Disposition leaves nothing further to be litigated regarding the

⁹³ For Our Rights v. Ige, 151 Haw. 1, 12, 507 P.3d 531, 542 (Haw. App. 2022) (A case is moot if it has lost its character as a present, live controversy of the kind that must exist if courts are to avoid advisory opinions on abstract propositions of law).

⁹⁴ See: U-7 through U-35, which are copies of Governor Ige's Proclamations.

Governor's Emergency Proclamations. The subpoena of Governor Ige has lost its character as a present, live controversy because Governor Ige's appearance at the Liability Stage is no longer material to the issue of liability.⁹⁵

X. HGEA's Motion Concerning the Precedential Value of Arbitrator Sakamoto's Partial Decision and Award Issued on 02/11/2022

On behalf of the Union, and to provide context for this Class Grievance, Mr. Moniz submitted to the arbitrator and Mr. Thomason a copy of the Arbitrator's Findings of Fact, Conclusions of Law, Order and Partial Award Filed February 11, 2022 in HGEA v. County of Maui (Arbitrator Judge Karl K. Sakamoto) ("2/11/22 Partial Award in HGEA v. COM"). Subsequently, the Union submitted to the arbitrator and Mr. Thomason a copy of Arbitrator Sakamoto's Final Award, entitled "Findings of Fact, Conclusions of Law, and Order – Renewal of Hazard Pay" dated October 28, 2022 ("10/28/22 Final Award in HGEA v. COM").⁹⁶

Pursuant to Scheduling Order No. 1 herein, on July 15, 2022, the Union filed the HGEA'S Motion Concerning the Precedential Value of the Partial Decision and Award Issued on February 11, 2022. On August 12, 2022, the Employer filed the Employer's Opposition to HGEA's Motion Concerning Precedential Value of the Partial Decision. On August 31, 2022, the arbitrator notified Mr. Moniz and Mr. Thomason via email that the arbitrator took the Union's Motion and the Employer's Opposition to the Union's Motion "under advisement," and that the arbitrator shall proceed with the first phase of

⁹⁵ Wong v. Board of Regents, 62 Haw. 391, 396-397, 616 P.2d 201, 205 (Haw. 1980).

⁹⁶ U-55 is a copy of the 2/11/22 Partial Award in HGEA v. COM; U-56 is a copy of Arbitrator Sakamoto's Findings of Fact, Conclusions of Law, and Order – Renewal of Hazard Pay (Final Award) dated October 28, 2022.

the bifurcated hearing on the merits, then scheduled for November 29, 2022 through December 16, 2022 (the “Stage 1 Liability Hearing”).

In the determination of the instant Class Grievance, this arbitrator reviewed but did not rely upon Arbitrator Sakamoto’s 2/11/22 Partial Award in HGEA v. COM or his 10/28/22 Final Award in HGEA v. COM. This arbitrator’s Decision, Order, and Partial Final Arbitration Award herein is entirely independent of Arbitrator Sakamoto’s partial or final awards. In light of the arbitrator’s Decision, Order, and Partial Final Arbitration Award herein, this arbitrator makes no finding or conclusion regarding whether or not Arbitrator Sakamoto’s partial or final awards were entitled to precedential value, including whether the issue preclusion doctrine would apply, to the instant Class Grievance.

XI. Decision, Order, and Partial Final Arbitration Award

Pursuant to the June 14, 2022 Scheduling Order No. 1 herein, these arbitration proceedings were bifurcated into two sequential stages, a Stage 1 Liability Hearing and a Stage 2 Damages Hearing. The Stage 1 Liability Hearing was to determine whether the Employer violated the respective CBAs when the Employer denied the Union’s requests for a Temporary Hazard Pay (THP) wage differential for BU members performing essential functions which temporarily exposed them to unusually hazardous working conditions arising from COVID-19 and its variants. In the event the arbitrator determined there were violations of one or more of the respective CBAs, the Stage 2 Damages Hearing was to determine the amount of any contested THP wage differentials for BU members found qualified for THP.

The evidentiary portion of the Stage 1 Liability Hearing thus far has been conducted on December 2, 5, 6, 7, and 9, 2022. On December 9, 2023, during the Stage 1 Liability Hearing, Mr. Moniz submitted to the arbitrator and the Employer the Union's Motion for Partial Summary Disposition. On December 9, 2022, the arbitrator recessed the Stage 1 Liability hearing pending the disposition of this motion for partial summary disposition.

With respect to the Union's Motion for Partial Summary Disposition, the Arbitrator decides and orders as follows:

1. Jurisdiction. The arbitrator has jurisdiction over this Class Grievance pursuant to Article 11 – Grievance Procedure, Section G – Arbitration, of the BU 02, 03, 04, and 13 CBAs, and Article 14 - Grievance Procedure, Section G – Arbitration, of the BU 09 CBA.

2. Arbitrability. Arbitrability is not disputed with respect to the BU 02, 03, 04, 09, and 13 CBAs. Paragraph B.3 of each of the THP articles in the BU 02, 03, 04, 09, and 13 CBAs states in pertinent part that any disagreement on the granting of Temporary Hazard Pay or the differential granted shall be subject to the grievance procedure in the subject CBA.

3. The arbitrator finds and concludes:

a. Pursuant to HRS § 658A-15(b), the arbitrator may decide the Union's request for summary disposition of the THP issues herein.

b. The testimony of DOE Superintendent Keith Hayashi was honest and credible, and the Employer is bound by Superintendent Hayashi's factual admissions.

c. The “affected DOE BU 02, 03, 04, 09, and 13 members” (meaning, the HGEA members in those BUs who were required to report to work)⁹⁷ were *exposed* to unusually hazardous working conditions, specifically, the highly contagious COVID-19 disease and its variants at DOE facilities.

d. The affected DOE BU 02, 03, 04, 09, and 13 members’ exposure to unusually hazardous working conditions was temporary, specifically from March 4, 2020 to March 25, 2022.

e. The affected DOE BU 02, 03, 04, 09, and 13 members’ degree of hazard was “Severe” or “Most Severe.”

f. The affected DOE BU 02, 03, 04, 09, and 13 members’ unusually hazardous working conditions had not been considered in the assignment of the class to the salary range.

g. The Union made requests for temporary hazard pay for all affected bargaining units employed by the DOE, and no forms from the Employer were necessary for the Union’s request for THP.

h. Section A of the THP Articles in BU 02, 03, 04, 09, and 13 provide that upon recommendation by the Union for THP, the DOE Personnel Director shall consult with the Union whether to grant THP, but there is no evidence that no such consultation occurred.

4. Based on all of the above, the arbitrator finds and concludes there are no genuine issues as to the material facts proving all elements of Section A of the Temporary Hazard Pay Articles in BU 02, 03, 04, 09, and 13.

⁹⁷ Tr. at 360.

5. Accordingly, the affected Class Grievants in BU 02, 03, 04, 09, and 13 are entitled to partial summary disposition in their favor with respect to the Stage 1 Liability phase of these arbitration proceedings.

6. Consistent with the above findings and conclusions, the Union's Motion for Partial Summary Disposition is granted.

7. Pursuant to Section A of the Temporary Hazard Pay Articles in BU 02, 03, 04, 09, and 13, the Employer's Personnel Director shall promptly consult with the Union to determine:

- a. the hazard pay differentials for the affected BU members (Section B of the THP Articles);

- b. the computation of hazard pay for the affected BU members (Section C of the THP Articles);

- c. the duration of the hazard pay awards for the affected BU members (Section D of the THP Articles), consistent with the finding and conclusion herein that the affected BU members' exposure to unusually hazardous working conditions was temporary, specifically from March 4, 2020 to March 25, 2022; and

- e. the forms and other requirements regarding the Union's recommendations for hazard pay differentials for the affected BU members (Section E of the THP Articles).

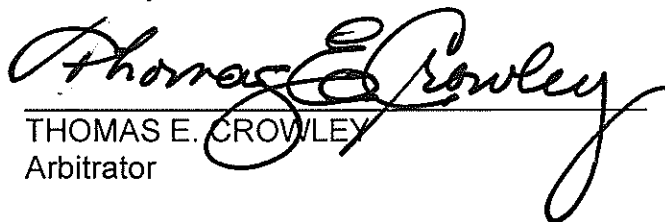
8. The arbitrator shall promptly conduct a status and scheduling conference with counsel for the parties to discuss the procedural arrangements and deadlines for the Stage 2 Damages Hearing, which is to determine the amount of any contested THP wage differentials for BU 02, 03, 04, 09, and 13 members found qualified for THP.

8. This Decision, Order, and Partial Final Arbitration Award is limited to the issue presented by the Union's Motion for Partial Summary Disposition, which is whether the Employer violated Section A of the Temporary Hazard Pay Article in Article 20 of the BU 03, 04, and 13 CBAs, and Article 22 in the BU 02 and 09 CBAs. This Decision, Order, and Partial Final Arbitration Award obviates additional determinations of whether the Employer also violated Article 2 – Conflict (BUs 02, 03, 04, 09, and 13 CBAs), Article 3 – Maintenance of Rights and Benefits (BUs 02, 03, 04, 09 and 13 CBAs), Article 4 – Personnel Policy Changes (BUs 02, 03, 04, 09 and 13), and Article 5 – Rights of the Employer (BUs 02, 03, 04, 09 and 13 CBAs).

9. This Decision, Order, and Partial Arbitration Award is in full and final determination of all claims by the Union in its Motion for Partial Summary Disposition, which was submitted during the Stage 1 Liability phase of this Class Grievance.

10. The arbitrator shall retain jurisdiction to: clarify any questions about this Order, Decision, and Partial Final Arbitration Award; conduct further arbitration proceedings relating to the Stage 1 Liability phase, if any; schedule and conduct the Stage 2 Damages Hearing; and render an Order, Decision, and Final Arbitration Award following the Stage 2 Damages Hearing.

DATED: Honolulu, Hawaii: February 8, 2023.


THOMAS E. CROWLEY
Arbitrator

BEFORE ARBITRATOR
THOMAS E. CROWLEY
STATE OF HAWAII

HAWAII GOVERNMENT EMPLOYEES	)	HGEA No. GRV 20-0298
ASSOCIATION, AFSCME, LOCAL 152,	)	Class Action on Behalf of Bargaining
AFL-CIO,	)	Units 02, 03, 04, 06, and 13
Union	)	RE: Temporary Hazard Pay
	)	
and	)	
	)	
DEPARTMENT OF EDUCATION,	)	
STATE OF HAWAII,	)	CERTIFICATE OF SERVICE
	)	
Employer.	)	
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2023, a true and accurate copy of the Decision, Order, and Partial Final Arbitration Award RE: Hawai'i Government Employees Association's Motion for Summary Disposition Filed December 9, 2022 was duly mailed and emailed to the parties listed below at his/her last known address as follows:

Advocacy Chief Stacy Moniz
Union Agent Jesse Sliva
HGEA
888 Mililani Street, Suite 401
Honolulu, HI 96813-2991
Email:
smoniz@hgea.org

James E. Halvorson, Esq.
Richard H. Thomason, Esq.
Deputies Atty. General
235 Beretania Street, Fl. 15
Honolulu, Hawaii 96813
Email:
james.e.halvorson@hawaii.gov
richard.h.thomason@hawaii.gov

Dated: Honolulu, Hawaii, February 8, 2023.


THOMAS E. CROWLEY
Arbitrator