

Judge Michael Broderick (Ret.)
Principal
Broderick Dispute Resolution
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**IN THE MATTER OF THE ARBITRATION BEFORE
JUDGE MICHAEL F. BRODERICK (RET.)
STATE OF HAWAII**

In the Matter of the Arbitration By and
Between

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION (HGEA), AFSME LOCAL
152, AFL-CIO,

Union,

and

COUNTY OF KAUA'I,

Employer.

ARBITRATOR'S DECISION
AND AWARD

Bifurcated Hearing on the Merits:
February 6, 2023-February 17, 2023; July
10, 2023-July 28, 2023

ARBITRATION DECISION AND AWARD

I. Introduction

The undersigned Arbitrator was duly appointed by the parties. The parties considered the detailed, written disclosure of the Arbitrator, and there was no objection to the Arbitrator's service. Mr. Stacy Moniz represented the Hawaii Government Employees Association ("Union") and Mr. Charles Foster represented the County of Kaua'i ("the County").

1 A seventeen (17) day hearing was held on the following days: February 6, 2023;
2 February 7, 2023; February 8, 2023; February 9, 2023; February 10, 2023; February 13,
3 2023; February 14, 2023; February 15, 2023; February 16, 2023; February 17, 2023; July 10,
4 2023; July 11, 2023; July 12, 2023; July 24, 2023; July 25, 2023; July 26, 2023, and July 28,
5 2023.
6
7

8 The parties were afforded a full opportunity to submit evidence, and to examine and
9 cross-examine the witnesses. Credibility and demeanor of the witnesses have been duly
10 evaluated and weighed. The record of the proceedings was preserved by stenographic
11 transcript. Subsequent to the hearing, Mr. Brennen Carvalho replaced Mr. Moniz as the
12 representative for the Union. Mr. Carvalho and Mr. Foster submitted Post-Hearing Briefs.
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14
15

16 Through the entire arbitration process, beginning with the parties' Pre-Arbitration
17 Statements through the submittal of their Post-Hearing Briefs, Mr. Moniz, Mr. Carvalho and
18 Mr. Foster were highly professional, and exceedingly competent. The Arbitrator wishes to
19 thank, and commend, Mr. Moniz, Mr. Carvalho and Mr. Foster.
20
21

22 The Arbitrator has considered the stipulations, and reviewed the admitted exhibits, as
23 well as the transcript, and Post-Hearing Briefs. Having carefully considered the totality of
24 the credible evidence and contentions of the parties, and being fully apprised, the Arbitrator
25 hereby AWARDS as follows:
26
27
28

1 **II. Opening Observations**

2 By any standard, or measurement, this was an incredibly extensive arbitration, which
3
4 was factually intensive. There were seventeen (17) days of hearing, 157 witnesses, more
5
6 than 225 exhibits, and 2,875 pages of transcript. In addition, the Arbitrator decided
7
8 numerous motions prior to, and subsequent to, the first ten days of hearing. Consistent
9
10 therewith, both the Union and the County submitted lengthy Post-Hearing Briefs. And for
11
12 obvious reasons, the Arbitrator devoted a tremendous amount of time to this case.

13 Yet, when all is said and done, the case boils down to four (4) questions: (1) Did the
14
15 Union properly request Temporary Hazard Pay (THP); (2) if the answer is yes, did the
16
17 County fail to consult with the Union about the Union's request for THP; (3) if the answers
18
19 to (1) and (2) above are yes, then was COVID-19 and its variants an unusually hazardous
20
21 working condition which was temporary; and (4) if the answers to (1), (2) and (3) above are
22
23 yes, then (4) which Union job classifications were exposed to the temporary hazard. The
24
25 arbitrator will address these questions in the sequence noted above.

26 The Union has the burden of proof in this case.

27 **III. Did the Union follow the proper procedure for requesting THP?**

28 On April 3, 2020, Ms. Kualana Finn, HGEA Kaua'i Division Chief, sent a letter to all
29
30 Department heads. (See Union 147-001 through 018) The letter provided as follows:

1 *Each collective bargaining agreement (CBA) that covers the HGEA bargaining unit*
2
3 *employees within the County of Kaua‘i allows for the Department Head or Union to*
4
5 *recommend/request Temporary Hazard Pay for affected employees who are temporarily*
6
7 *exposed to unusually hazardous working conditions and where the following conditions are*
8
9 *met:*

- 10 1) *The exposure to unusually hazardous working conditions is temporary;*
11
12 2) *The degree of hazard is “Most Severe” or “Severe”; and*
13
14 3) *The unusually hazardous working conditions have not been considered in the*
15
16 *assignment of the class to a salary range.*

17 *In response to the COVID-19 pandemic and Governor David Ige’s Emergency*
18
19 *Proclamation on March 5, 2020, this letter serves as the Union’s official temporary hazard*
20
21 *pay request for all affected Department of Kaua‘i County employees included in Bargaining*
22
23 *Unit’s 02, 03, 04, 09, 13, and 14 that have been designated to perform essential functions.*
24
25 *This temporary hazard pay request would be from the period March 5, 2020 until the matter is*
26
27 *resolved.*
28

1 *This COVID-19 pandemic, indeed, poses an unusually hazardous working condition*
2
3 *never before seen in the state of Hawaii, which we all hope will be temporary. The degree of*
4
5 *hazard is most severe as Governor Ige has issued an emergency proclamation. Death can be a*
6
7 *result of COVID-19 exposure! Lastly, this unusually hazardous working condition has not*
8
9 *been considered in the assignment of the classes to the salary ranges.*

10 *Please provide a response by Friday, April 10, 2020. Failure to respond by this date*
11
12 *will be treated as a denial and the Union will take all necessary action(s) as allowed under*
13
14 *each respective collective bargaining agreement.¹*

15
16 In response to Ms. Finn's April 3, 2020 letter, Ms. Annette Anderson, County Human
17
18 Resources Director, wrote an April 8, 2020 letter to Ms. Finn. (See Union 148) The letter
19
20 reads as follows:

21
22
23
24 ¹ Astonishingly, almost no Department Head could even recall receiving this letter and many
25 testified that they did not even know that HGEA had requested THP for its employees. Also,
26 County Attorney Bracken said he was not even sure if he knew that HGEA had even filed a
27 THP request for its employees.

1 *Re: Response to April 3, 2020 Letter to County of Kaua‘i Department Heads—Temporary*
2 *Hazard Pay Request*

3 *Dear Ms. Finn:*

4 *This will acknowledge receipt of your letter dated April 3, 2020 sent to me and to other*
5 *Department Heads in the County of Kaua‘i (COK) wherein the Hawaii Government Employees*
6 *Association (HGEA) makes an “official temporary hazard pay request for all affected*
7 *Departments of Kaua‘i County employees included in Bargaining Unit’s 02, 03, 04, 09, 13 and*
8 *14 that have been designated to perform essential functions” from the “period March 5, 2020*
9 *until the matter is resolved.”*

10 *This letter is submitted to HGEA on behalf of all COK Departments for which temporary*
11 *hazard pay is requested by HGEA on behalf of its bargaining unit members who are COK*
12 *employees designated to perform essential functions during the COVID-19 pandemic.*

13 *The COK Human Resources Department, through its Director, will review individual requests*
14 *for considerations of Temporary Hazard Pay in accordance with the County’s Administrative*
15 *Policies and Procedures dated November 2010, Section A4.501, Temporary Hazard Pay. We*
16 *enclose the relevant pages of these Policies and Procedures for your information. We also*
17 *enclose the Request for Hazard Pay form (HR-302, Rev. 1/15) for your information.*

18 *Upon review of the individual requests for Temporary Hazard Pay a determination will be*
19 *made thereafter as to whether to grant Temporary Hazard Pay. Thank you for your courtesies*
20 *and cooperation during these unprecedented times.*

21 *Sincerely,*

22 *Annette L. Anderson*

23 *Human Resources Director*

24 *Enclosures (2)*

25 *C: Derek S.K. Kawakami, Mayor*

26 *Michael A Dahilig, Managing Director*

27 *All Department Heads*

28 At the hearing, Ms. Anderson said that the procedures referenced in her April 8, 2020
letter were implemented prior to her coming to work for the County. (Tr. at 1704) She further
testified that she “assumed” that the procedures she was relying on were consistent with the

1 Collective Bargaining Agreements (CBAs). (Tr. at 1704) She further testified that before she
2
3 sent her April 8, 2020 letter, she did not recall reviewing the THP article in the Collective
4
5 Bargaining Agreement. (Tr. at 1705)

6
7 On July 6, 2021, Mr. Christopher Nii, the Union Kaua'i Division Chief, sent the
8
9 following letter (Union 149-001) to Ms. Anderson:

10
11 *Subject: Temporary Hazard Agreement*

12 *Director Anderson,*

13 *Each collective bargaining agreement (CBA) that covers the HGEA bargaining unit employees*
14 *within the County of Kaua'i, allows for the Department head or Union to recommend/request*
15 *Temporary Hazard Pay for affected employees who are temporarily exposed to unusually*
16 *hazardous working conditions and where the following conditions are met:*

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

21 *In response to the COVID-19 pandemic and Governor David Ige's Emergency Proclamation*
22 *on March 4, 2020, do we have an agreement that hazardous working conditions existed and*
23 *may continue to exist for all affected Departments of Kaua'i County employees included in*
24 *Bargaining Unit's 02, 03, 04, 09, 13, and 14 that have been designated to perform essential*
25 *functions? This hazardous working condition would be from the period March 4, 2020 until it*
26 *is resolved.*

27 *If yes, please provide the Temporary Hazard Pay request forms and we will advise our*
28 *members to fill out and submit.*

If no, we will file a Step 2 grievance on that issue in accordance with Article 11, Grievance
Procedure.

Please provide a response by Wednesday, July 14, 2021. Failure to respond by this date will
be treated as a denial and the Union will take all necessary action as allowed under each
respective collective bargaining agreement.

1 In a July 14, 2021 letter (Union 150-001), Ms. Anderson responded to Mr. Nii's July 6,
2
3 2021 letter as follows:

4
5 *Re: Response to July 6, 2023 Letter, Temporary Hazard Agreement*

6 *Dear Mr. Nii:*

7 *This will acknowledge receipt of your July 6, 2021 letter. Please be advised that HGEA union*
8 *representative Kaulana Finn sent a letter to me on April 3, 2020 addressing hazard pay as*
9 *related COVID-19. I replied to Ms. Finn by letter dated April 8, 2020. The County's position*
10 *remains the same as stated in our letter of April 8, 2020.*

11 *Thank you.*

12 Significantly, Ms. Anderson did not raise any objection, or concern, about the timing of
13 the Union's July 6, 2021, letter. At the hearing, Ms. Anderson concedes that she did not
14 consult with Mr. Nii. (Tr. at 1843)

15
16 In an August 11, 2021 letter (Union 151-00), Mr. Brennen Carvalho, Union Agent,
17 HGEA Kaua'i Division, wrote to Ms. Anderson that HGEA is filing a Step 2 Class Grievance.
18
19 Mr. Carvalho's letter reads as follows:

20
21
22 *To: Annette Anderson, Director, County of Kauai Human Resources*

23 *From: Brennen Carvalho, Union Agent, HGEA*

24
25 *SUBJECT:* *Step 2 Class Grievance on behalf of all affected members of Bargaining Units,*
26 *2,3,4,13 and 14/15 (Grievants) employed by the County of Kauai (Employer).*

27 *In accordance with Article 11-Grievance Procedure of Bargaining Units 2, 3, 4, 13 and 14/15*
28 *of the Collective Bargaining Agreement (CBA), the Hawaii Government Employees*
Association, AFSCME Local 152, AFL-CIO (Union) is filing a Step 2 Class Grievance.

1 ISSUE: Temporary Hazard Pay

2 BACKGROUND:

3 *Hawaii Government Employees Association (HGEA) sent letters to all County of Kauai*
4 *Department Heads on April 3, 2020 officially requesting Hazard Pay for Employees within the*
5 *County of Kauai (COK) who are temporarily exposed to unusually hazardous working*
6 *conditions. HGEA received a response on April 8, 2020 from COK Human Resources*
7 *Director, Annette Anderson submitted on behalf of all COK Departments for which temporary*
8 *hazard pay is requested by HGEA on behalf of its bargaining unit members who are COK*
9 *employees designed to perform essential functions during the COVID-19 pandemic. COK*
10 *Human Resources Department, through its Director, would review individual requests for*
11 *considerations of Temporary Hazard Pay. COK provided relevant pages of County*
12 *Administrative Policies and Procedures and also the Request for Hazard Pay form. To date,*
13 *the COK has not offered any formal determination on any Temporary Hazard Pay requests.*

14 *Please have your representative contact me at (808) 241-5361 to schedule the Step 2 meeting.*

15 In an August 30, 2021 three page letter (Union 152-001-003), Ms. Anderson responded to
16 Mr. Carvalho's August 11, 2021 letter. The letter includes the County's response to HGEA's
17 Information Request, asking for any and all documents showing authority on what constitutes
18 hazard pay conditions. Ms. Anderson's answers to that question were as follows:

- 19 • *Hazard Pay Articles of the various HGEA Agreements, which are in the possession of*
20 *HGEA.*
- 21 • *Department of Personnel Services County of Kaua'i Administrative Policies and*
22 *Procedures revised November 2010, Section A4.501, Temporary Hazard Pay, which*
23 *was provided to HGEA in the COK's letter to HGEA dated on April 8, 2020.*
- 24 • *Request for Hazard Pay form (HR-302, Rev. 1/15), which was provided to HGEA in*
25 *the COK's letter to HGEA dated on April 8, 2020.*

1 In that same letter, Ms. Anderson wrote that in the last ten years, there were two (2)
2
3 instances when the County granted temporary hazard pay.
4

5 In a December 27, 2021 letter, Ms. Anderson denied the Union's Step 2 Grievance
6
7 (Union 153-001). Ms. Anderson wrote that "The Union and the alleged affected members
8
9 have not complied with the terms of the THP articles nor have they met the requirements of the
10
11 THP articles." She notes that "no THP forms were submitted as required by the CBA", citing
12
13 "Section E of the THP Article" of the respective CBAs which provides as follows:

14 E. Forms and Other Requirements, Recommendations for hazard pay differentials shall
15
16 be submitted on such forms and such manner as the Employer may require.
17

18 In that same letter, Ms. Anderson wrote that "The THP forms serve an important and
19
20 valuable purpose i.e., to determine through review and investigation if THP is warranted and
21
22 the amount of the THP differential, if any. A description of the hazardous working conditions,
23
24 including the dates, length of exposure, and location, among other things is obtained by
25
26 completion of the requested form. Without such information, it is impossible to determine if
27
28 an individual employee has been exposed to COVID-19 while at work."

1 On January 4, 2022, Mr. Nii notified the County that the Union intended to arbitrate the
2
3 THP grievance.

4
5 With the above history in mind, the Arbitrator concludes that the County required the
6
7 Union to have individual employees fill out the THP form (Employer 4) before consulting with
8
9 the Union. The bases for this conclusion include the following, all established by the credible
10
11 record testimony and the exhibits:

- 12 1) Article 22 of the Collective Bargaining Agreement, the Temporary Hazard Pay article,
13
14 reads as follows:

15
16 *ARTICLE 22 – TEMPORARY HAZARD PAY*

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

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

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

- 28 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 representative upon showing by the department head that the working conditions and duties remain the same.*

1 *E. Forms and Other Requirements. Recommendations for hazard pay differentials shall*
2 *be submitted on such forms and such manner as the Employer may require.*²

3
4 Section A does not reference a requirement to submit any forms. Section A provides that
5
6 a THP request can come from a Department Head or the Union. It does not say an
7
8 individual employee can submit a THP request. Section A further provides that upon such a
9
10 recommendation, “the Personnel Director, in consultation with the Union, shall grant hazard
11
12 pay to employees who are temporarily exposed to unusually hazardous working conditions and
13
14 where the following conditions are met” (where the Union initiates a request, the request shall
15
16 be addressed to the affected Department Head with a copy to the Personnel Director)
17 (Emphasis added.):

- 18
19 1) The exposure to unusually hazardous working conditions is temporary;
20
21 2) The degree of hazard is “most severe” or “severe” and,
22
23
24
25

26 ² Until the morning that he testified, County Attorney Bracken said he had never read Article
27 22.
28

1 3) The unusually hazardous working conditions have not been considered in the
2
3 assignment of the class to a salary range.

4
5 (Section A does not use the word differential)

6 Section B. Hazard Pay Differentials defines what the differentials are. Section B
7
8 presumes an affirmative answer to Section A. That is, you would need to answer yes to
9
10 Section A before you get to Section B. In other words, you do not pay THP differentials unless
11
12 you first determine there are temporary hazard conditions. Once a temporary hazard is
13
14 established, under Section A, the Personnel Director “shall” grant hazard pay. The “shall” is
15
16 mandatory.

17 Section B (3) provides that any disagreement on the granting of THP or of the differential
18
19 granted shall be subject to the grievance procedure and in accordance with Step 2 of Article II,
20
21 Grievance Procedure.

22
23 Thus, either step, the granting or not granting of THP, or disagreement about the
24
25 differential, is grievable. The Arbitrator finds that one would not grieve the differential (and
26
27 thus there would be no need to submit forms for the differential) if THP had not been granted.
28

1 In other words, it is a two (2) step process. First you determine if hazard pay will be granted,
2
3 and second you determine the differential. You only get to the differential question if THP is
4
5 granted.

6
7 Section E. Forms and Other Requirements, provides that “Recommendations for hazard
8
9 pay differentials shall be submitted on such forms and such manner as the Employer may
10
11 require.” (Emphasis added) Section E does not provide that recommendations for the award
12
13 and approval of THP shall be submitted on such forms. (Tr. at 1843) Rather, Section E only
14
15 talks about a form for hazard pay differentials.

16 1) The record evidence is clear that the County never consulted with the Union about the
17
18 form. (Tr. at 1843) The obvious reason is because the form clearly was intended to be
19
20 completed by a supervisor, and was therefore an internal document and hence there was
21
22 no need to consult with the Union.

23
24 a) The questions on the form are clearly intended for a supervisor, not an
25
26 employee, to answer.

1. An employee would not know “what safety precaution(s) have already been taken.”
2. An employee would not know “what HOSHL Standard is violated.”
3. On the form, the section after the HOSHL line is all in plural: “Nameses and classificationses of employeeses involved, dates and lengths (per day) of exposure.” (Emphasis added) It is inconceivable that one employee would have such information about other employees, and be able to submit the form for other employees.
4. The form calls for a “recommendation.” It is hard to imagine that an employee would be making a recommendation for themselves, and/or for other employees.
5. The signature line on the form is clearly for the supervisor to sign because the form asks for the “Printed name and signature of Official submitting request”. (Emphasis added)
 - a. On the form, there is no signature line for the employee.

1 Ms. Anderson testified that she never said that an individual must fill out
2
3 and sign the form. That testimony is entirely inconsistent with what Ms.
4
5 Anderson wrote to the Union. In her April 8, 2020 letter, she wrote in
6
7 pertinent part, “The COK Human Resources Department, through its
8
9 Director, will review individual requests...” *** “Upon review of the
10
11 individual requests...” (Emphasis added). Moreover, in Ms. Anderson’s
12
13 August 30, 2021 letter to Mr. Carvalho, she states as follows: “The COK
14
15 has not received any temporary hazard pay requests from individual
16
17 bargaining unit members and thus, no formal determination can be made.”
18
19 (Emphasis added)

20 Ms. Anderson testified that the Union “misconstrued” her words, and that
21
22 “there must be confusion.” (See P. 1814-1815) To the extent there was
23
24 confusion, Ms. Anderson acknowledges that she created it. Ms. Anderson
25
26 admitted twice on the record that her August 30, 2021 letter “is poorly
27
28 worded” when she wrote the above sentence, and that in retrospect, she
“would have worded the letter differently.” (See P. 1835-1837) Ms.

1 Anderson had many months to tell the Union she did not mean what she
2
3 wrote. She never did so, and the Union cannot presume to know that Ms.
4
5 Anderson did not mean what she said.

6 2) County Attorney Bracken said there was no language requiring that a recommendation
7
8 for THP be submitted on forms, and that §E says forms are only required for hazard pay
9
10 differentials. (Tr. at 292)

11
12 3) Virtually every person who testified, including almost every Department Head, said
13
14 unequivocally that they had no knowledge that an employee needed to fill out a form to
15
16 request THP.

17
18 4) The CBA was never modified, even after the most recent CBA negotiations which
19
20 occurred after the instant dispute. And in these most recent CBA negotiations, the
21
22 County did not raise the issue of forms.

23 Based on the above analysis, the Arbitrator finds that the union properly requested THP.
24
25
26
27
28

1 **IV. Did the County fail to consult with the Union regarding the Union's request for**
2
3 **THP?**
4

5 All along, the County's position has been that until the Union properly requested THP,
6
7 the County had no obligation to consult with the Union regarding its request for THP. In other
8
9 words, the County asserts it was premature to consult with the Union, thereby admitting that it
10
11 never did so. (See Ms. Anderson's testimony at P. 1843) Having found that the Union properly
12
13 requested THP, the Arbitrator concludes that the County violated the CBA when it failed to
14
15 consult with the Union.

16 **V. Having concluded that the Union followed the proper procedure for requesting**
17
18 **THP, and that the County was required to, but failed to, consult with the Union on**
19
20 **the question of THP, the next question is whether COVID-19 and its variants**
21
22 **created an unusually hazardous working condition that was temporary.**

23
24 A) Was COVID-19 and its variants a hazard?
25

26 During the relevant time period from March 4, 2020 to March 25, 2022, then Governor
27
28 David Ige issued a series of Emergency Proclamations (EPs), which included Kaua'i, wherein

1 he stated, unequivocally, that COVID-19 was “of such character and magnitude to contemplate
2
3 an emergency or disaster as contemplated by Sections 127 A-2 and 127 A-14, Hawaii Revised
4
5 Statutes” and “the danger...so significant so as to warrant preemptive and protective actions in
6
7 order to provide for the health, safety, and welfare of the people and the State.” (Ex. U-6 001-
8
9 2) (Emphasis added.) The EP cited HRS Section 127 A-2’s definition of *emergency*, which
10
11 was defined as “any occurrence, or imminent threat thereof, which results, or may result, in
12
13 substantial injury or harm to the population or substantial damage to or loss of property.” (Ex.
14
15 U6-002) ³

16 The Governor’s EP also cited HRS 127 A-2’s definition of *disaster* as “any emergency,
17
18 or imminent threat thereof, which results, or may result, in loss of life or property and requires,
19
20 or may require, assistance from other counties or states or from the federal government.” (Ex.
21
22 U6-002) (Emphasis added)

23
24
25 ³ In its Closing Argument Brief, the County says “imminent” does not necessarily equate with
26
27 “immediate”. (P.37) For purposes of this case, the Arbitrator finds this is a distinction without
28
a difference.

1 Governor Ige acknowledged, among other things, that, as an emergency and disaster,
2
3 COVID-19 was “highly contagious”, “spreading from person-to-person”, and “expected to
4
5 spread” despite efforts to contain it. (Ex. U-6 001-2) The Governor also acknowledged that
6
7 exposure to COVID-19 had “proven to be fatal.” Id. “[T]his occurrence,” proclaimed Governor
8
9 Ige, “of a severe, sudden, and extraordinary event has the potential to cause damages, losses,
10
11 and suffering of such character and magnitude to affect the health, welfare, and living
12
13 conditions of a substantial number of persons...this occurrence, or threat thereof, may likely
14
15 result in substantial injury or harm to the population or may likely result in loss of life or
16
17 property...” (Ex. U-6 002-003) (Emphasis added.) Governor Ige then proclaimed an
18
19 emergency period which was to last from March 4, 2020 to April 29, 2020, or by a separate
20
21 proclamation, whichever occurred first. (Ex. U-6 004-7)

22 Mayor Kawakami testified that all Governor EPs and Supplemental Proclamations were
23
24 binding on Kaua‘i. Mayor Kawakami also testified that at the time of the Governor’s first EP,
25
26 there were no COVID cases in the State. So, the Governor deemed the situation critical
27
28 enough to issue an EP, even with no cases. Moreover, Dr. Sarah Kemble, State Epidemiologist

1 and Chief of the Disease Outbreak Control Division, said she agreed with the health issues
2
3 noted in the Governor’s EPs. ⁴

4
5 On March 4, 2020, the same day of Governor Ige’s first EP, Mayor Kawakami issued his
6
7 own EP. The Mayor noted that “the Kaua‘i Emergency Agency (KEMA) anticipates that the
8
9 most likely impacts resulting from COVID-19 will include causing a threat to human health,
10
11 safety and welfare that may result in the need to quarantine and/or evacuate residents from
12
13 some areas...” (Emphasis added.) (State District Health Officer, Dr. Janet Berreman said she
14
15 agreed with this statement.)The Mayor then said that he “hereby determines that an imminent
16
17 danger or threat as contemplated by Section 127 A-14, Hawaii Revised Statutes, threatens the
18
19 County of Kaua‘i and do hereby proclaim these areas to be disaster areas for the purpose of
20
21 implementing the emergency management functions as allowed by law...(Emphasis added.)
22
23
24
25

26 ⁴ Mr. Foster objected to Ms. Kemble being called as a witness. But Mr. Foster sites Ms.
27
28 Kemble’s testimony multiple times in the County’s Closing Argument Brief.

1 (U 35-002) Mayor Kawakami testified that he agreed that he would not issue something as
2
3 drastic as an EP unless it was absolutely necessary. (Tr. at 203)

4
5 In the context of the Mayor's EPs, County Attorney Bracken testified he understood that
6
7 when one follows the statutory scheme, words have meaning as provided by the statute through
8
9 the KEMA Incident Management Team (IMT). Elton Ushio, the Emergency Management
10
11 Administrator, testified that Mayor Kawakami is the sole judge for the existence of the danger,
12
13 threat or circumstances giving rise to the declaration of a state of emergency on Kaua'i.

14
15 Based on Mayor Kawakami's March 4, 2020 EP, County employees were deemed
16
17 "emergency workers" and were required to report to work as directed by the Department Head,
18
19 regardless of availability or any type of leave. Mayor Kawakami referred to "emergency
20
21 workers" as "essential workers" and "essential workers" included those workers organized into
22
23 BU 2, 3, 4, 13, 14 and later 15. (Tr. at 215)

24
25 Dr. Berreman was the IMT co-incident commander. She testified that COVID-19 was
26
27 the emergency condition referenced in Mayor Kawakami's EP and that COVID posed a threat
28
to human health, safety and welfare. She also admitted that if she did not feel this was the

1 case, it was her responsibility to say so. She never did. County Attorney Bracken also said if
2
3 he had disagreed with the Mayor's assessment, he would have said so. He never did.
4

5 From April 1, 2020 through June 30, 2020, Mr. Solomon Kanoho was the Interim Chief
6
7 of the County Fire Department. Mr. Kanoho was one of two unified commanders on the IMT
8
9 that participated at KEMA for the COVID-19 response. Mr. Kanoho testified that the IMT
10
11 never recommended that the EP should be lifted.
12

13 Managing Director Dahilig admitted that Mayor Kawakami declared an emergency. He
14
15 further testified that the potential threat was serious enough, even with zero (0) cases, for
16
17 Mayor Kawakami to declare an emergency. Equally significant, Mr. Dahilig agreed that the
18
19 period of March 4, 2020 to March 25, 2022, constituted the emergency period for COVID-19
20
21 and its variants because there was an unbroken chain of Mayor Kawakami's EPs during that
22
23 period.
24

25 Between March 4, 2020 and March 25, 2022, both Governor Ige and Mayor Kawakami
26
27 issued numerous EPs. For each renewal or extension of these EPs, there was a new declaration
28

1 that the emergency continued to exist. County Attorney Bracken testified that Mayor
2
3 Kawakami did not rescind or suspend any of the EPs he issued. (TR. 271)

4
5 Under §127 A-2, “Hazard” is defined as “an event or condition of the physical
6
7 environment that results or may likely result in damage to property or injuries or death to
8
9 individuals and which may result in an emergency disaster.” (U157-002) Although Mayor
10
11 Kawakami did not use the word “hazard” in his proclamations, the definitions of “emergency”
12
13 and “hazard” are very similar. Moreover, at the hearing, Mayor Kawakami did not object to
14
15 COVID-19 and its variants being labeled a hazard. (Tr. at 216 and 260) The same is true of
16
17 Managing Director Dahilig. (Tr. at 28) Similarly, County Attorney Bracken testified that
18
19 between March 4, 2020 and March 25, 2022, the time of the emergency proclamations,
20
21 COVID-19 posed a health risk to the community and that a health risk “can be” a hazard. (P.
22
23 275)

24
25 Between March 4, 2020 and March 25, 2022, Mayor Kawakami, Managing Director
26
27 Dahilig and others, including the IMT, met regarding the Mayor’s subsequent EPs. At these
28
meetings, they discussed whether COVID-19 continued to be an emergency or hazard.

1 (TR. 28) Each time, they decided it was, which is supported by Mayor Kawakami's issuing
2
3 subsequent EPs. (TR. 28-29) As noted above, each renewal or extension of the Mayor's EPs
4
5 was a new declaration and evaluation that the emergency continued to exist, and that there was
6
7 an imminent danger or threat of an emergency or disaster concerning COVID-19. (TR. 158)
8
9 And for each renewal, the IMT (of which Mayor Kawakami was a member) decided to
10
11 continue in the emergency mode and that an emergency or hazard still existed.

12 Starting March 4, 2020 and ending March 25, 2022, both Governor Ige and Mayor
13
14 Kawakami issued numerous EPs and supplemental emergency proclamations. A cursory
15
16 review of just some of those EPs and supplemental emergency proclamations shows just how
17
18 dangerous Governor Ige and Mayor Kawakami viewed COVID-19 and its variants. Consider
19
20 the following examples:

- 21 • On March 23, 2020, Governor Ige issued a stay-at-home order. (U9)
- 22
23 • Through the Governor's 4th supplemental proclamation, the Governor imposed a
24
25 mandatory self-quarantine for 14 days for inter-island travel. (U10) At the hearing,
26
27
28

1 Managing Director Dahilig said this is an extreme measure and he agrees that it is a
2
3 “heavy decision whenever you want to restrict somebody’s liberty.”

- 4
5 • In a supplemental EP (U11), for the first time the Governor noted that the World
6 Health Organization “has indicated that COVID-19 is spread primarily by respiratory
7 droplets produced when an infected person coughs or sneezes and that droplets also
8 can be generated by talking, laughing or exhaling.” The supplemental EP also notes
9 that the Center for Disease Control and Prevention now recognizes that a “significant
10 portion of persons” with COVID are asymptomatic and that pre-symptomatic persons
11 can transmit the virus to other persons before exhibiting symptoms. Later, the
12 Governor says that the “dangers of COVID continue to require the serious attention,
13 effort and sacrifice of all people in the State to avert unmanageable strains on our
14 healthcare system and other catastrophic impacts to the State.”
15
16 • The Governor’s 13th proclamation (U19) notes that just one month later (August 21,
17 2020 to September 22, 2020) cases more than doubled. (By this time, vaccines were
18 available to County employees and the County was providing PPE.)
19
20
21
22
23
24
25
26
27
28

- 1 • The Governor’s 15th EP (U21) (covering November 16, 2020 through December 31,
2
3 2020) notes that the State has now had more than 16,600 cases and 222 deaths.
4
5 (Significantly, Managing Director Dahilig admits that at this point, COVID-19 was a
6
7 hazardous condition.) (P. 134-135)
- 8 • In the Governor’s 20th EP (U26), covering May 7, 2021-June 8, 2021, Governor Ige
9
10 references the August 6 EP about the Inter-Island quarantine from Oahu to the
11
12 neighbor islands: “because it was necessary to avoid overwhelming the health care
13
14 systems in certain vulnerable areas of the state, including on the island of Kaua‘i...”
- 15 • In the Governor’s 22nd EP (U29), the Governor says “Delta, a highly contagious
16
17 SARS-COV-2 virus strain, has resulted in spiking cases...and continues to spread at
18
19 an alarming rate in our State.”
- 20
21 • In the Governor’s 25th EP (U32), the Governor references all the mitigation efforts
22
23 employed, yet he notes the number of cases has continued to increase at a “significant
24
25 rate.”
- 26 • The Governor’s 26th EP (U33), notes that by January 26, 2022, the State has more
27
28 than 208,000 cases and 1,149 deaths.

1 The Arbitrator concludes that the Governor's, and Mayor Kawakami's, EPs in
2
3 themselves establish that COVID-19 and its variants were a hazard. But, based on the credible
4
5 testimony and the exhibits, there are many additional reasons the Arbitrator reaches this
6
7 conclusion. These reasons include the following:

- 8
9 1) The IMT was convened in February, 2020, because nationally it was determined that
10
11 COVID was a serious health issue, and because according to Mr. Kanoho, COVID had
12
13 the potential to cause severe illness or death. (P.1362)
- 14
15 2) The IMT was activated on March 4, 2020.
- 16
17 3) Even during the time the County says there were no cases on Kaua'i, the Mayor's EP was
18
19 in effect, and so the Mayor still declared an emergency and Kaua'i a disaster area.
- 20
21 4) On March 12, 2020, Mayor Kawakami said "This is a new unique situation, a new virus
22
23 has reached pandemic level." (Union 175)
- 24
25 5) By March 13th of 2020, COVID-19 cases were reported on Kaua'i. (This directly refutes
26
27 the County's argument in its Closing Argument Brief that the Union wants THP "during
28
 a period when exposure was simply not possible.") (See Brief at P.2)

- 1 6) As early as March 20, 2020, the Mayor established a night-time curfew. (Union 59)
- 2
- 3 7) In Ms. Anderson’s April 3, 2020 letter to Ms. Finn, Ms. Anderson noted they were in
- 4
- 5 “unprecedented times.” (See Union 148)
- 6
- 7 8) Managing Director Dahilig testified that by April 25, 2020, emergency proclamations
- 8
- 9 were no longer to prepare for COVID-19, but to prevent COVID-19. He further testified
- 10
- 11 that the County was taking remedial efforts, even though Kaua‘i had no cases.
- 12
- 13 9) August 27, 2020, Mayor Kawakami announced that the most recent case on Kaua‘i had
- 14
- 15 no known travel connection and has been categorized community spread. Mayor
- 16
- 17 Kawakami said, “This is not our first case of community transmission on Kaua‘i.” Dr.
- 18
- 19 Berreman said, “Community transmission happens when people gather closely with
- 20
- 21 people other than their household members. The risk is high right now.” (Emphasis
- 22
- 23 added.) (Union 180) (Despite these statements, in its Closing Argument Brief, the
- 24
- 25 County sites Mayor Kawakami’s testimony, “We are aware of County employees and
- 26
- 27 associates getting COVID, but I will say it was not happening at the workplace.” With
- 28
- all due respect to Mayor Kawakami, it is impossible to know where the employees caught
- COVID. The record evidence bears this out. In fact, as noted in the County’s Closing

Argument Brief, there was one work cluster and Dr. Berreman and Mr. Ushiro both said it was not possible to know the source of the exposure.)

10) November 13, 2020: Dr. Berreman said, “It is clear that...COVID-19 is now rapidly increasing in our community.” “Since travel restrictions were lifted, we have seen a dramatic rise in cases.” (Union 182)

11) November, 2020, Kaua‘i had their first COVID-related fatality.

12) November 23, 2020, the Mayor said that the case count was increasing “dramatically” and “is threatening to restrict our activities. If our daily cases continue at the current rate, it could quickly drive us to Tier 3 or even Tier 4.” (Union 183)

13) November 25, 2020. Mayor Kawakami said, “...we also have increased community transmission, meaning the disease is spreading within our community, among our friends and neighbors.” (Union 187) (This statement refutes the argument in the County’s Closing Argument Brief that not until the Delta variant was COVID “prevalent enough to reasonably be said to pose a hazard in the County workplace.”) (44)

14) November 27, 2020: Governor Ige grants Mayor Kawakami’s request for Kaua‘i to opt out of the pre-travel testing program because, according to Governor Ige, “the

1 unprecedented surge of cases on the mainland and the rise in community spread on

2
3 Kaua‘i are of significant concern for the Garden Isle.” (Emphasis added.) (Union 188)

4
5 (Dr. Berreman advised the Mayor regarding this request.)

6 15) May 4, 2021: Due to a rise in coronavirus cases, Kaua‘i moves into Tier 3. (Union 191)

7
8 16) May 4, 2021, Dr. Berreman said that “Many of the new cases are associated with local

9
10 residents who have traveled and community spread.” (Union 190)

11
12 17) May 7, 2021: Kaua‘i now has the highest weekly average of new cases per 100,000

13
14 people among all island counties, and nearly all new cases have been acquired within the

15
16 community. (Union 192) This fact alone, but certainly in conjunction with numbers 5, 7,

17
18 9, 10, 11, 12, 13, 14, 15 and 16 above, refutes the County’s statement in its Closing

19 Argument Brief that “Kaua‘i was different than the rest of the State.” (P.3) It also refutes

20
21 the County’s statement in its Closing Argument Brief that “we know with a high degree

22
23 of certainty that at least until the Delta surge, COVID-19 was not present in the County

24 workplace.”

25
26 18) May 11, 2021, Mayor Kawakami sent a memo to all County employees—“...with the

27
28 uptick in cases in our community, employees are concerned about co-workers and others

1 whom may have been in close contacts to confirmed cases...” (Emphasis added.) (Union
2
3 133)

- 4
5 19) On August 6, 2021, Mayor Kawakami sent a memo to all County employees entitled
6 “COVID-19 ADVISORY #2021-5 VACCINATION TESTING PROGRAM.” Ex. U-
7
8 135 001. The Mayor stated the following therein:

9
10 “I am sure that many of you have heard and seen our growing number of COVID-
11
12 19 cases statewide. The cases are growing at such an alarming rate that we are at a
13
14 point necessitating changes to ensure that the health and safety of our workforce is
15
16 protected.” (Emphasis added.)

- 17 20) On September 13, 2021, Mayor Kawakami issued Emergency Rule #26, noting the Delta
18
19 variant creates considerable risk of infection to vaccinated members of the community.
20
21 (U112)

- 22
23 21) On September 15, 2021, Mayor Kawakami sent a memo to all County employees entitled
24 “COVID-19 ADVISORY #2021-7 EMPLOYEE TESTS POSITIVE FOR COVID-19.”
25
26 Wherein he declared the following:
27
28

1 “As the Delta variant continues to circulate in our community and testing efforts are
2
3 ramped up, more and more of our own employees are testing positive for COVID-

4 19. This Advisory provides information to our employees on when it is safe to
5
6 return to the workplace after testing positive for COVID-19.” (Emphasis added.)
7

8 Ex. U-140 001.
9

10 22) The County felt the need to provide the essential workers with PPE.
11

12 23) Despite the County taking numerous mitigation measures, including sanitizers, plexiglass
13
14 windows, masks and enforcing six-foot distances, and vigorous case investigation and
15
16 contract tracing, no mitigation measures eliminated the risk of COVID-19 and its
17
18 variants. In fact, Managing Director Dahilig said that they knew Kaua‘i would have
19
20 COVID-19 infections, regardless of what steps the County took. (Tr. at 70)

21 24) Dr. Kemble said that COVID-19 was a novel virus that had never been seen before.
22

23 In its Closing Argument Brief, the County equates COVID with a hurricane because (1) a
24
25 hurricane might never materialize and (2) “You can carry on with otherwise normal duties in
26
27 sunshine and calm weather.” The arbitrator finds this an inaccurate, and unfair, analogy.

28 Unlike a hurricane, which might never materialize, the record evidence is clear that County

1 leadership knew that COVID-19 would materialize. And of course, they were correct, with
2
3 more than 11,000 cases and 26 deaths on Kaua‘i during the relevant time period. As for
4
5 working in sunshine and calm weather, one can see a hurricane, know it is coming, stop
6
7 working, and take shelter. On the other hand, County employees could not see COVID-19
8
9 coming and even if they could, they were required to work and were not permitted to take
10
11 shelter.

12 B) Having established that COVID-19 and its variants were a hazard, were some County
13
14 employees exposed to the hazard?

15
16 The Arbitrator answers this question in the affirmative. Some of the reasons for this
17
18 conclusion include the following, all taken from the credible record evidence, including the
19
20 testimony of Dr. Berreman and Dr. Kemble:

21
22 1) In the first part of 2020, case counts were under counted. (Dr. Kemble, P. 129)

23
24 2) As noted above, early on (March 20, 2020) Mayor Kawakami issued a night-time
25
26 curfew, which is unusual.

- 1 3) The “more people you came in contact with, the more your risk of contracting
2
3 COVID-19 would go up.” (Dr. Kemble, P. 130)
4
- 5 4) Vaccinations were not available for County employees until December, 2020, nine
6
7 months after essential workers were required to report to work. And Mayor
8
9 Kawakami felt the need to prioritize County employees to get the vaccines.
- 10 5) Even though vaccines had been available for 6-9 months, in the summer of 2021, the
11
12 Delta variant caused a spike on Kaua‘i.
- 13
14 6) Even though by August 2021, County employees had to get vaccinated, or tested
15
16 weekly, Omicron still caused a spike in cases in the later part of 2021.
- 17
18 7) The County never imposed a vaccine mandate, and certain segments of the County
19
20 population refused to get vaccinated.
- 21
22 8) For essential workers who worked in an office or at a job site open to the public, the
23
24 employee could not know if the person from the public they were interacting with
25
26 was vaccinated.
- 27
28 9) Despite all the mitigation efforts, case counts, including deaths, continued to rise on
Kaua‘i. Consistent with this, Mayor Kawakami testified that the only way to prevent

- 1 exposure and positive cases would have been for the County to have “been like China
2
3 where things were locked down for years and years on end.” (Tr. at 281)
4
- 5 10) Dr. Kemble agreed that none of the mitigation efforts completely eliminated the risk
6 of COVID-19. (P.127)
7
- 8 11) Managing Director Dahilig testified that for an employee to get THP, the employee is
9 not required to actually suffer an injury. The test is, was the employee exposed to the
10 hazard.
11
- 12 12) Vaccines do not eliminate the risk of infection from COVID-19 and no vaccine was
13 100% effective at preventing contracting COVID.
14
- 15 13) COVID-19 was airborne and thus it had the potential to be everywhere.
16
- 17 14) Dr. Kemble testified that keeping a six-foot distance is “not necessarily going to
18 prevent airborne transmission”. (P.125)
19
- 20 15) A person could have COVID and interact with a person for less than 15 minutes and
21 stand more than six-feet apart and still transfer the virus.
22
- 23 16) Dr. Kemble testified that there is not sufficient evidence to show that plexiglass
24 decreases transmissions of SARS-COV-2. (VOL. 5, 124)
25
26
27
28

1 17) A low case count does not mean there is no risk of contracting COVID.

2
3 18) Despite mitigation measures, many County employees caught COVID-19, some more
4
5 than once. In the Wastewater Division on the maintenance side, all 30 crew members
6
7 caught COVID-19. (Tr. 1666-1667) At the hearing, the County attorney asked a
8
9 handful of employee witnesses how they approached their non-work time in light of
10
11 COVID-19 and its variants. All of them indicated they were extremely cautious,
12
13 limiting outings to purchasing groceries and only having immediate family
14
15 gatherings. The Arbitrator believed the witnesses. It is inconceivable to the
16
17 Arbitrator that not one HGEA employee who caught COVID-19 or one of its variants
18
19 contracted the virus at work. Also, the County did not keep separate statistics
20
21 regarding the infection rate of County employees, and the State never reported any
22
23 such numbers to Mayor Kawakami. Further, between March 5, 2020 and March 25,
24
25 2022, case counts were only reported cases. So, if a person tested positive and did
26
27 not report it, that positive result was not included in the case count. Again, as noted
28
the actual number of cases.

1 19) As of February 17, 2022, Kauai, with a resident population of 72,000 and 95,000 with
2
3 tourists at any time, had 11,190 reported cases and 26 deaths. This is a high number
4
5 especially considering that as noted above, the record testimony is clear that the
6
7 number of reported cases was less than the number of actual cases.

8 Although the Arbitrator concludes that some Union employees were exposed to the
9
10 hazard at work, for the record the Arbitrator wants to be clear that the record evidence shows
11
12 that the County tried hard to protect its employees. The Arbitrator does not doubt the County's
13
14 good intentions. Unfortunately, the stark reality was that no matter what measures the County
15
16 took, it was impossible for the County to prevent some of its employees from being exposed to
17
18 COVID-19 and its variants.

19 The Arbitrator also believes it is self-evident that the hazard created a hazardous
20
21 "working condition." But to the extent this is not self-evident, the Arbitrator takes note of
22
23 some of Mayor Kawakami's internal memoranda to County employees, some of which the
24
25 Arbitrator discussed above. (See Union Ex. 116, 117, 118, 121, 123 and 129) Also, Mayor
26
27 Kawakami and Chief Kemble acknowledged that while the County tried to mitigate exposure
28

1 to COVID, the mitigation measures did not, and could not, eliminate exposure in the work
2
3 place.

4
5 The Arbitrator also finds that COVID-19 and its variants were an “unusually” hazardous
6
7 working condition. As early as April 3, 2020, Ms. Anderson wrote that they were in
8
9 “unprecedented times.” (Union 148) Mayor Kawakami called it a “new virus that has reached
10
11 pandemic proportions” and that posed “a unique situation.” (Union 175) Dr. Kemble
12
13 acknowledged that it was a novel virus that has never been seen before. (Tr. 119)

14 C) Having established that COVID-19 and its variants were a hazard, and that some County
15
16 employees were exposed to the hazard, was the hazard temporary?

17
18 COVID-19 and its variants still exist. But the Arbitrator finds this does not automatically
19
20 mean that COVID-19 and its variants are still a hazard.

21
22 Article 22, Temporary Hazard Pay, indirectly addresses the question whether COVID-19
23
24 and its variants could be temporary, and still last for the period March 4, 2020 through March
25
26 25, 2022. Section D, Duration of Hazard Pay Award, provides as follows: “such hazard pay
27
28 award shall remain in effect for a period not to exceed six (6) months but may be renewed by

1 the Personnel Director or the representative upon showing by the Department head that
2
3 working conditions and duties remain the same.” (Emphasis added.) Moreover, at no time did
4
5 the County initiate an assignment of any job class to a different salary range based on COVID-
6
7 19 and its variants being a permanent condition. Also, a strong argument can be made that
8
9 once Governor Ige and Mayor Kawakami stopped issuing EPs, they stopped viewing COVID
10
11 as an emergency or disaster, which meant that COVID-19 and its variants were no longer a
12
13 hazard. This is consistent with the fact that each EP found that COVID-19 was present
14
15 throughout the sixty (60) day life of each respective proclamation, which the Arbitrator finds
16
17 means in effect that the Governor and Mayor Kawakami considered the nature of COVID to be
18
19 temporary. Finally, it is undeniable that the State, the County and the world view COVID-19
20
21 and its variants entirely differently today than they did between March 5, 2022 and March 25,
22
23 2022. It is easy to forget that for a long period of time, nobody, including the best medical
24
25 minds in the world, even knew what COVID-19 was, or how it was transmitted, let alone how
26
27 to minimize the spread, or how to treat those infected. And until vaccinations were available,
28
1918, more than 100 years ago. Today, we understand COVID much better. Today, we have

1 vaccines, medicines to shorten the sickness, and reduce the chances of hospitalization, and
2
3 death. Today, the State and the County have returned to a sense of normalcy. This is a far
4
5 different culture, and climate, than existed in this State between March, 2020 and March 25,
6
7 2022, when fear and uncertainty were the dominant emotions of many of Hawaii’s residents.
8
9 For all of these reasons, the Arbitrator finds that COVID-19 and its variants were temporary.

10 D) Were the temporary unusually hazardous working conditions considered in the
11
12 assignment of a class to a salary range of a class otherwise eligible for COVID-19
13
14 temporary hazard pay?

15
16 Mayor Kawakami testified that to his knowledge, there are no HGEA employees who
17
18 have had COVID-19 specifically incorporated into their salary range (Tr. at 260). In its Closing
19
20 Argument Brief, the County says that “because exposure to hazardous conditions was
21
22 considered in the assignment of the Ocean Safety Officer positions to their salary range, those
23
24 positions are not entitled to additional pay.” (See p.40)

25
26 The County is basing its argument on the testimony of Janine Rapozo, HR Manager. Ms.
27
28 Rapozo, who oversees classification and pay, testified that when the Ocean Safety Officer

1 position was looked at, the fact that with the position there is “exposure to hazardous
2
3 conditions” was considered in the pricing of the class. Ms. Rapozo said this means that Ocean
4
5 Safety Officers already get Hazard Pay. She further testified that the hazards Ocean Safety
6
7 Officers are exposed to include coming into contact with people that have COVID-19. But
8
9 later in her testimony, Ms. Rapozo admitted that the hazardous conditions are not specified,
10
11 and that there are circumstances when Ocean Safety Officers are entitled to THP. For
12
13 example, in 2015, Ocean Safety Officers received THP for a particular training. But Ms.
14
15 Rapozo said that’s because the training was “something totally different from what they would
16
17 normally be doing.” In contrast, she said encountering COVID-19 and its variants is
18
19 something Ocean Safety Officers would normally encounter because it is “just a virus.” Yet,
20
21 Ms. Rapozo admits that Employer exhibits 7-10 and Employer exhibits 30-33 do not mention a
22
23 virus, and that Employer Exhibit 30 was approved by the Director of HR on July 20, 2021,
24
25 when COVID-19 and its variants already were known to the County. Ms. Rapozo further
26
27 admits that Employer Exhibit 30 says, “Environmental and physical demands, hazards, and/or
28
unusual isolation involved in the performance of the work must be identified for each duty or
group of duties.” (Emphasis added) Ms. Rapozo agreed that “must” means mandatory. Ms.

1 Rapozo further admitted that in Section 1, 2, 3 and 4, there is no mention of COVID-19 or its
2
3 variants. In fact, there is not even a mention of a virus.
4

5 COVID-19 was not included in the position description when approved in 2021. Clearly
6
7 the County did not consider COVID-19 to be a hazard for purposes of the job description. The
8
9 same analysis applies to Employer exhibits 31, 32, and 33. Further, Ms. Rapozo conceded that
10
11 the class specifications for the Ocean Safety Officer, approved August 5, 2021, do not mention
12
13 COVID-19 or its variants. Finally, as noted earlier, Dr. Kemble acknowledged that COVID
14
15 was a novel virus and that the strain had never been seen before.
16

17 Based on the credible hearing testimony, and the exhibits, the Arbitrator finds that no
18
19 HGEA employee who is eligible for THP is in a job classification in which COVID-19 and its
20
21 variants was considered in the assignment of the position to their salary range. This includes
22
23 OSOs.
24

25 To summarize, the Arbitrator finds the following: The Union properly requested THP for
26
27 its employees. The County failed to consult with the Union, in violation of the CBAs.
28

1 COVID-19 and its variants exposed some HGEA employees to unusually hazardous working
2
3 conditions which were temporary.

4
5 E) Was the degree of hazard “Most Severe” or “Severe”?

6
7 In its Post-Hearing Statement, the Union asks the Arbitrator to find that the exposure to
8
9 the unusually hazardous working conditions was *most severe*. The Arbitrator finds that it is
10
11 premature to address whether for a particular job classification, the exposure was Most Severe
12
13 (25%) or Severe (15%).

14
15 At the September 6, 2022 Pre-Arbitration Conference, both counsel agreed that the case
16
17 would be bifurcated into two phases. Phase one would address whether COVID-19 caused a
18
19 temporary hazardous condition, and if so, for which HGEA employees. If after the first phase
20
21 of the arbitration, the Arbitrator found that COVID-19 did cause a temporary hazardous
22
23 condition, and for which employees, then the second phase of the arbitration would address
24
25 what percentage award each job classification would get, 15% or 25%.

26
27 Consistent with what counsel agreed to on September 6, 2022, all of the Union’s
28
pleadings up to May 21, 2023, reference a “Bifurcated Hearing on the Merits.” Similarly, the

1 Union declarations also reference a “Bifurcated Hearing on the Merits.” Moreover, in each of
2
3 the Arbitrator’s decisions on the various motions, the Arbitrator used the words, “Bifurcated
4
5 Hearing on the Merits.” At no time did the Union or the County object to the use of those
6
7 words, or question them in any way.

8
9 In addition, in Mr. Moniz’s opening statement on day one of the arbitration, he stated as
10
11 follows: “This is a two-phased process which is recognized by the bifurcation of this hearing.
12
13 The issue is whether the temporary hazardous working condition existed, and the criteria is met
14
15 in Section A. If the answer to that is yes, then you get to what the hazard pay differentials are,
16
17 whether 15 percent or 25 percent.” (Emphasis added.) (See P.15-16)

18 As for the County’s position on the question of bifurcation, on May 21, 2023, Mr. Foster
19
20 wrote in pertinent part as follows: “I am agreeable with Judge Broderick’s resolution
21
22 concerning the bifurcation issue.” Similarly, on May 23, 2023, Mr. Foster wrote in pertinent
23
24 part as follows: “He (Judge Broderick) would make decisions based on the evidence and the
25
26 parties’ arguments in their Closing Briefs, and if in the end differentials were in order for some
27
28 or all members, then phase 2 would address the applicable differentials.”

1 The Arbitrator does recognize that Article 22 is clear that to be awarded THP, the
2
3 following condition must be met: “The degree of hazard is “most severe” or “severe.” While
4
5 preserving the question of which job classifications faced a “most severe” or “severe”
6
7 temporary hazard for phase two of the arbitration, the Arbitrator finds that both tests, “most
8
9 severe” and “severe” are met here.

10 Under Article 22, “Most Severe” is defined as follows: (a) exposure likely to result in
11
12 serious incapacitation, long period of time lost, or possible loss of life. (Emphasis added.) The
13
14 record evidence is clear that COVID-19 and its variants can result in death. (Dr. Kemble at P.
15
16 138) In fact, as of March 25, 2022, 26 Kaua‘i residents died from COVID-19 and its variants.
17
18 Moreover, exposure to COVID could lead to long periods of lost time at work. (Dr. Kemble at
19
20 P. 138)

21 Under Article 22, “Severe” is defined in pertinent part as: (d) moderate periods of
22
23 compensable lost time result. Again, the record evidence is clear that COVID-19 and its
24
25 variants could cause a person to quarantine a minimum of 14 days, which certainly constitutes
26
27 a moderate period of compensable lost time.
28

1 Thus, for the reasons noted above, the Arbitrator finds that HGEA has satisfied its burden
2
3 to establish that some of its class members faced COVID exposure in the categories “most
4
5 severe” or “severe” to move forward to the determination of damages.

6
7 To summarize, our first seventeen days of hearing were phase one of a two phase
8
9 arbitration, assuming, as the Arbitrator now has, that COVID-19 and its variants exposed some
10
11 HGEA employees to unusually hazardous working conditions that were temporary.

12
13 This means that the only remaining issue for the Arbitrator to decide in Phase 1, is which
14
15 HGEA job classifications were exposed to the temporary and unusually hazardous working
16
17 conditions.

18 In its Post-Hearing Statement, the Union asserts that the scope of the class grievance
19
20 “includes all county HGEA employees and their respective classifications, both present and
21
22 past, that worked for any period between March 4, 2020-March 25, 2022, and that were
23
24 organized into BUs 2, 3, 4, 13, 14 and 15 during the aforementioned period.” (Emphasis in the
25
26 original.)
27
28

1 I will not award THP to any job classification that was not adequately covered in the
2
3 hearing to allow the Arbitrator to make a reasoned decision. To fully understand the bases for
4
5 this decision, the Arbitrator will review the pertinent procedural history.

6
7 For the reasons noted above at pages 45-48, this hearing covered Phase 1 of a two phase
8
9 bifurcated arbitration. During the first phase, the Arbitrator is to decide if the Union followed
10
11 the proper procedures to request temporary hazard pay and if it did, did the County fail to
12
13 consult with the Union. If so, then the Arbitrator is to decide if a temporary hazard existed. If
14
15 the arbitrator finds that a temporary hazard existed, then the Arbitrator is to decide which
16
17 Union employees were exposed to the temporary hazard. That is Phase 1.

18 Phase 2 of the bifurcated arbitration is to address whether those Union employees who
19
20 were exposed to a temporary hazard should receive a 15 percent, or 25 percent, pay
21
22 differential.

23
24 After the first ten days of hearing, and in anticipation of receiving the Post-Hearing
25
26 briefs, on May 18, 2023, the Arbitrator wrote to Mr. Stacy Moniz, at the time the advocate of
27
28 record for the Union. The Arbitrator asked that in his Post-Hearing Brief, Mr. Moniz clearly

1 identify within each department or agency which job classifications he was requesting
2
3 temporary hazard pay. Mr. Moniz responded, “Got it”. But then Mr. Moniz wrote that the
4
5 only issue in the first phase is whether or not a temporary hazardous working condition existed
6
7 for HGEA members. Mr. Moniz continued: “Specifically, which members will be awarded
8
9 temporary hazard pay and what percentage will be issued is for the second phase of the
10
11 bifurcated hearing.” This statement, that the second phase would include which members
12
13 would be awarded temporary hazard pay, is different than what was agreed at the Pre-Hearing
14
15 Conference—at Phase 1, the Arbitrator would decide which job classifications should receive
16
17 temporary hazard pay and at Phase 2, the Arbitrator would decide which employees would
18
19 receive 15%, and which employees would receive 25%.

20 Mr. Moniz asked for a Status Conference, which the Arbitrator set for May 23, 2023. On
21
22 May 21, 2023, the Arbitrator sent counsel a communication which read in pertinent part as
23
24 follows:
25
26
27
28

1 “At our September 6, 2022 Pre-Arbitration Conference I took detailed notes which I kept.
2
3 I reviewed those notes and they are very clear that you both agreed the case would be
4
5 bifurcated into two phases.

6
7 At Phase 1, the Arbitrator would address whether temporary hazard conditions existed,
8
9 and if so, for which HGEA member employees. If, at the first phase of the arbitration, the
10
11 Arbitrator found that temporary hazard conditions did exist and for which employees, then the
12
13 second phase of the arbitration would address what percentage award each HGEA member
14
15 employee would get, 15 or 25 percent. My notes are crystal clear.”

16 At the May 23rd Status Conference, the Arbitrator addressed some apparent confusion.
17
18 Mr. Moniz said that the Arbitrator had said that only the 35 employees who had testified at our
19
20 first ten days of hearing would be eligible for temporary hazard pay. The Arbitrator clarified
21
22 that that was not what the Arbitrator said. Rather, what the Arbitrator said was that if the
23
24 Arbitrator found that a witness in a job classification was exposed to a temporary hazard, then
25
26 the Arbitrator would find that all employees in that job classification had been exposed to the
27
28 temporary hazard.

1 Mr. Moniz then said he understood that to be the Arbitrator's position, and that he agreed
2
3 with the Arbitrator.

4
5 Mr. Moniz then said that in light of that clarification the issue was, "cleared up", and that
6
7 he now, "understood."

8
9 But Mr. Moniz then took the position that if the Arbitrator finds a temporary hazard
10
11 existed, all HGEA employees required to report to work were necessarily exposed to the
12
13 temporary hazard and were automatically entitled to temporary hazard pay and that the only
14
15 question left for the second phase is whether the employees should get a 15 percent or 25
16
17 percent differential.

18 After the May 23rd Status Conference, the Arbitrator again closely read Judge
19
20 Sakamoto's decision, a decision that from the outset, Mr. Moniz argued that the Arbitrator
21
22 must consider as precedent in our case.

23
24 The Arbitrator then wrote a May 23rd communication to counsel which reads, in pertinent
25
26 part, as follows: "Judge Sakamoto made the following statements and/or observations which I
27
28 believe are relevant for the issue before me."

- 1) “The Union presented 12 of these County of Maui employees [of the approximately 940 HGEA employees] at this arbitration hearing. Their experiences are representative of their job classification.” (P.4) (Emphasis added.)
- 2) “In the determination of whether an HGEA worker should be granted temporary hazard pay under the totality of circumstances, the arbitrator considers various factors which include but are not limited to...” The Judge then lists 18 factors including the job classification and job duties. (P.66-67)
- 3) “As a result of County of Maui orders, the HGEA workers in job classifications identified above, are temporarily exposed to unusually hazardous conditions.” (P.78) (Emphasis added.)
- 4) “ HGEA has satisfied its burden of proof establishing that some of its class members as identified above and have testified have faced COVID exposure in the categories entitled most severe and severe to move forward the determination of damages...” (P.79) (Emphasis added)
- 5) “HGEA has proven that the class members of the job classifications identified as testified above are qualified for temporary hazard pay...” (P.93) (Emphasis added)

1 6) “The damages hearing shall be conducted per the determination of the days and hours
2
3 of any contested hazard pay for the job classifications identified herein and that have
4
5 been proven as identified above.” (Emphasis added.) (P.94)

6 The Arbitrator then wrote the following, “So Judge Sakamoto limited his decision to
7
8 those class members of the job classifications identified and as testified. This is very different
9
10 than ruling that because there was a temporary hazard condition, all approximately 940 HGEA
11
12 employees are automatically entitled to temporary hazard pay. In fairness to Stacy, Judge
13
14 Sakamoto also said that, quote, “It is undisputed that the order to have the county employees
15
16 perform certain duties at their workplace exposed them to risk from the harmful COVID-19
17
18 virus compared to workers allowed to work at home.” (P.70) But this statement does not
19
20 overcome the fact that Judge Sakamoto limits his decision to those employees in the job
21
22 classifications covered in his hearing. That creates serious doubts for me that if I decide a
23
24 temporary hazard condition existed that all HGEA members are automatically entitled to
25
26 temporary hazard pay.”
27
28

1 In a May 24th email, Mr. Moniz wrote if the Arbitrator took the position that in Phase 1,
2
3 the Arbitrator is to decide which HGEA employees were exposed to the temporary hazard,
4
5 assuming the Arbitrator found one existed, that he “is renewing his request to reopen the case
6
7 to receive evidence from additional witnesses.”

8
9 Later in that same communication, Mr. Moniz said he was “making a formal request to
10
11 reopen the case to present additional evidence based upon the recent developments and
12
13 statements.”

14
15 Later that day, in a May 24th communication to counsel, the Arbitrator wrote that, “I have
16
17 decided to reopen the hearing for the sole, and narrow, purpose of Stacy getting to call as
18
19 witnesses, any person representing a job classification that was not covered in our first ten
20
21 days, and for whom Stacy believes is entitled to temporary hazard pay.” (Emphasis added.)

22 The Arbitrator granted Mr. Moniz’s request to reopen the hearing so that his client was
23
24 not prejudiced in any way.

25
26 Finally, the Arbitrator notes that as recently as July 3, 2023, in Mr. Moniz’s
27
28 Supplemental Pre-Hearing Statement, Mr. Moniz continued to assert that it was the

1 Arbitrator's position that, "Only individuals who have testified at this point in the proceeding
2
3 are eligible for temporary hazard pay." (Emphasis added.)
4

5 Again, the Arbitrator had stated multiple times that any job classification addressed in the
6
7 first ten days of hearing is what the Arbitrator would address regarding eligibility for
8
9 temporary hazard pay.
10

11 With that backdrop, the Arbitrator reopened the hearing so that Mr. Moniz could call as
12
13 witnesses, persons representing a job classification not covered in the first ten days of hearing,
14
15 which job classifications Mr. Moniz believes are entitled to temporary hazard pay.
16

17 At the outset of the reopened hearing, the Arbitrator reviewed with counsel the history
18
19 the Arbitrator has reviewed above. The Arbitrator wanted the record to be very clear how we
20
21 arrived at reopening the hearing.
22

23 After the Arbitrator reviewed with counsel what the Arbitrator just noted above, Mr.
24
25 Moniz reviewed his objections. But he ended his remarks as follows: "So I agree that there
26
27 was confusion. And there was misunderstanding, but I also believe that if one were to read the
28
transcript of our conference that occurred in May, and then the subsequent emails they are

1 somewhat different. And I think there's been a lot of twists and turns as far as this is
2
3 concerned and I think the only way to try and remedy it is to call the witnesses that I believe
4
5 have relevant testimony. (Emphasis added)

6
7 And if that is going to be denied, than I would simply ask that the specific reasons be
8
9 placed on the record.

10
11 So we are ready to proceed. I appreciate the arbitrator granting our motion to reopen the
12
13 case under the circumstances that transpired.”

14
15 The Arbitrator notes that at the reopened hearing, which lasted seven days, Mr. Moniz
16
17 was permitted to call as a witness every single person that he believed had relevant testimony.
18
19 This included Dr. Kemble, who was not a Union employee and hence would not be offering
20
21 any testimony for the sole reason the Arbitrator reopened the hearing, which was to allow Mr.
22
23 Moniz to call Union employees in job classifications not covered in the first ten days of the
24
25 hearing, and for whom Mr. Moniz believes are entitled to temporary hazard pay. Nevertheless,
26
27 over Mr. Foster's objection, the Arbitrator allowed Mr. Moniz to call Dr. Kemble as a witness,
28
and Mr. Moniz did so.

1 At the outset of the re-opened hearing, Mr. Foster, counsel for the County, said the
2
3 following regarding the Arbitrator's decision to reopen the case to allow Mr. Moniz to call
4
5 HGEA employees in job classifications not covered in the first ten days of hearing, and for
6
7 whom Mr. Moniz believes are entitled to temporary hazard pay, "So, I think the arbitrator's
8
9 approach is proper and makes the most sense to me."

10 The Arbitrator also notes that prior to resting its case at the close of the hearing, Mr.
11
12 Moniz did not say that the Arbitrator had exceeded his authority and is not authorized to decide
13
14 which job classifications were exposed to the temporary hazard and thus are eligible for THP.

15
16 Equally significant, on July 28, 2023, the last day of hearing, after both counsel had
17
18 rested and we addressed the subject of the Post Arbitration Briefs, the Arbitrator stated as
19
20 follows:

21
22 "And, Stacy, it's very important to me whoever ends up writing the post hearing brief
23
24 [for the Union] that they list every job classification, including department and division
25
26 or section, if there is one for which you are seeking temporary hazard pay. Every job
27
28 classification for which you're seeking temporary hazard pay, and note which witnesses

1 testified about that job classification, either an employee who works in that job
2
3 classification, or a supervisor who oversees that job classification, okay?"

4
5 This would have been the time for Mr. Moniz to argue that the Arbitrator had exceeded
6
7 his authority and is not authorized to decide which job classifications were exposed to the
8
9 temporary hazard and thus eligible for THP. Instead, Mr. Moniz responded affirmatively when
10 he said, "Got it."

11
12 The Arbitrator also wishes to point out that later on that same day, July 28, 2023, the
13
14 Arbitrator wrote an email to counsel, which provided in pertinent part as follows:
15
16 "Stacy, based on what you shared today, it seems that you will not be involved in drafting
17
18 HGEA's Post Hearing Brief. If that is the case, please communicate to whoever will write the
19
20 Brief what I communicated to you at the end of our hearing today. That is, the Union's Brief
21
22 must clearly list and identify every job classification, including the Department and the
23
24 division or section if there is one, for which the Union is seeking Temporary Hazard Pay.

25 Also, the Union's Brief should note which witness(es) testified about that job classification,
26
27
28

1 whether it was the employee who works, or worked, in that job classification, the supervisor
2
3 who oversaw that job classification etc.”

4
5 * * *

6
7 “Please note that I have copied Brennan in case Stacy’s appointment has been announced,
8
9 and he [Mr. Moniz] is precluded from responding to this communication.”

10
11 Brennen Carvalho was copied on the email because he had attended the hearing on behalf
12
13 of HGEA and in light of Mr. Moniz leaving HGEA, Mr. Carvalho was responsible for writing
14
15 the Union’s Post Hearing Brief.

16
17 On September 2, 2023, the Arbitrator wrote to Mr. Carvalho in pertinent part as follows:

18
19 “I am back in the office today, and wanted to send you the email I sent previously noting
20
21 what I need to be covered in HGEA’s brief.

22
23 Please see the July 28 email below.

24
25 Please confirm receipt of the July 28 email, and that you are clear what it is I need from
26
27 whoever writes the HGEA Brief.”

1 On September 12, 2023, the Arbitrator sent an email to Mr. Carvalho asking him to
2
3 respond to the Arbitrator's September 2 email, which the Arbitrator included. On September
4
5 12, 2023, Mr. Carvalho responded in pertinent part as follows: "I am confirming the receipt of
6
7 your July 28th email and confirming that we are clear on what you are asking for in the briefs."

8
9 Based on the procedural history of this case, as covered on pages 49-61 above, the
10
11 Arbitrator only will consider those job classifications adequately covered in the hearing so as
12
13 to allow the Arbitrator to make a reasoned decision whether they were exposed to COVID-19
14
15 and its variants and hence are eligible for THP. Any job classification not adequately covered
16
17 in the hearing is not eligible for THP.

18 **VI. Which Union job classifications adequately covered in the hearing were exposed to**
19
20 **the temporary hazardous condition, COVID-19 and its variants?**

21
22 Based on the record testimony and exhibits in this case, the Arbitrator developed a list of
23
24 factors to consider in deciding if a particular job classification was exposed to the temporary
25
26 hazardous condition, COVID-19 and its variants.
27
28

The Factors are as follows

- 1) The extent the employee(s) in the job classification interacted with the public, which includes (1) the frequency of the interaction, (2) the length of interaction, (3) the type of interaction (e.g. was it face-to-face); (4) which type of member of the public the interaction was with (for e.g. was it with someone who had traveled from off-island, such as a construction worker), and (4) whether the interaction was indoors or outdoors.
- 2) Whether the employee(s) in the job classification could maintain a six-foot distance from the public.
- 3) Whether members of the public, who interacted with the employee, were required to wear a mask, and if they always did so.
- 4) The extent the employee(s) in the job classification interacted with fellow employees, which includes the (1) number of people in the office, (2) the frequency of the interaction, (3) the length of the interaction, (4) the type of interaction, (5) the degree to which the employee(s) in the job classification's co-workers had interacted with

1 the public, and if so, which members of the public (e.g. people staying in homeless
2
3 encampments), and (6) if the co-workers conducted work together which took them
4
5 away from the office. (e.g. drove together in a car to job sites.)

6 5) How much time the employees in the job classification spent in the office, verses out
7
8 with the public.

9
10 6) Whether the employee(s) in the job classification could maintain a six-foot distance
11
12 from fellow (co)employees.

13
14 7) Whether the employees in the job classification were provided PPE.

15
16 8) Whether the employee(s) in the job classification could always wear a mask when
17
18 performing their job.

19 9) The number of employees who contracted COVID-19 in a particular office,
20
21 regardless of whether the employee themselves contracted COVID.

22
23 (The Arbitrator notes that in applying these criteria, there are no minimum number of criteria
24
25 that need to be satisfied for the Arbitrator to find that an employee(s) in a particular job
26
27 classification was exposed to the hazard. For example, the interaction with the public could be
28
so significant that that one indicia alone constitutes exposure. Similarly, there are no

1 maximum number of criteria that will automatically lead the Arbitrator to find that the
2
3 employee(s) in that job classification was exposed to the hazard.)
4

5 Before listing those job classifications that the Arbitrator finds were exposed to the
6
7 temporary hazard, COVID-19 and its variants, and those that the Arbitrator finds were not, the
8
9 Arbitrator thinks it is instructive to apply the factors to a few of the job classifications so that
10
11 counsel can better understand the analysis the Arbitrator employed.
12

13 The Arbitrator found certain job classifications were clearly exposed to the COVID-19
14
15 and its variants. One such job classification was Ocean Safety Officer (OSO). OSOs had
16
17 frequent, and sometimes lengthy, interactions with the public, the interactions were face-to-
18
19 face, and could include administering CPR, sometimes the interactions were with the homeless
20
21 and others likely in need of medical care, the OSO often could not maintain a six-foot distance
22
23 from each other and from the public, they were not always able to wear a mask, and a number
24
25 of OSOs caught COVID-19 or one of its variants.
26

27 The Arbitrator found certain job classifications clearly were not exposed to COVID-19
28
and its variants. One such job classification was the Field Operations Clerk, Roads Division,

1 Public Works. Nichelle Obar testified. She said all her work was clerical, that she was always
2
3 able to maintain six-feet from her co-workers, that her only interaction with the public was
4
5 with construction workers who were working on the Hanalei Baseyard, and who sometimes
6
7 had questions, that she could maintain a six-foot distance in those interactions, that those
8
9 interactions were mostly outside, and that the construction workers were always wearing
10
11 masks.

12 Finally, the Arbitrator wants to describe a job classification which seemingly was not
13
14 exposed, but for one significant reason the Arbitrator concludes there was exposure.

15
16 Community Pool Lifeguards work outside, and their contact with the public was for short
17
18 durations. For example, a temperature check took no more than 15 seconds, asking health
19
20 related questions took 15-30 seconds. Consequently, the entire interaction process took only 1-
21
22 2 minutes. However, on occasion, Community Pool Lifeguards had to perform first aid which
23
24 could include mouth-to-mouth resuscitation. From the Arbitrator's view point, that duty alone
25
26 warrants finding exposure.
27
28

1 Before listing those job classifications that the Arbitrator finds were exposed to COVID-
2
3 19 and its variants, and those job classifications that were not exposed to the variant, the
4
5 Arbitrator also wants to note that neither the Union, in its Post Hearing Statement, nor the
6
7 County, in its Closing Argument Brief, devoted any time addressing which job classifications
8
9 were or were not exposed to COVID-19 and its warrants. The only exception was that the
10
11 County said that OSOs should not get THP because the County said exposure to hazardous
12
13 conditions was considered in the assignment of the OSO positions to their salary range.

14 Considering that the majority of the 2,875 pages of testimony was solicited from
15
16 employees in job classifications so that the Arbitrator could decide if those job classifications
17
18 were exposed to COVID-19 and its variants, the Arbitrator expected the Union and the County
19
20 to spend a considerable amount of time in their Post-Hearing Briefs arguing those issues. For
21
22 whatever reason, neither the Union nor the County did so.

23 The Arbitrator also notes that the Union made clear in its Post-Hearing Statement that it
24
25 is not seeking THP when an employee teleworked, was on vacation or sick leave, or on
26
27 approved or unapproved administrative leave. (P.94)
28

1 Finally, no HGEA employee is entitled to THP when the office was closed, with those
2
3 limited exceptions when an employee was still required to make site visits. At the hearing, it
4
5 was agreed that the Union and the County can determine when an office was closed, and that
6
7 the Arbitrator would not try to make that determination.

8
9 The Arbitrator finds that the following job classifications were exposed to COVID-19
10
11 and its variants and thus should receive THP. Please note that in all instances, the Arbitrator
12
13 ends with the words “job classification,” because with certain positions it was unclear if there
14
15 was more than one person in the job classification. If so, the Arbitrator wanted to make sure
16
17 they were included.

18 1) Department of Public Works

19
20 ○ Waste Water Division

- 21 • Waste Water Treatment Plant superintendent job classification
- 22
- 23 • Sanitary Chemist job classification
- 24

25 ○ Solid Waste Division

- 26
- 27 • Field Operations Clerk job classification
- 28

- Landfill Supervisor job classification
- Solid Waste Work Site Supervisor job classification
- Solid Waste Project Manager job classification
- Recycling Specialist job classification
- Solid Waste Work Supervisor for the transfer stations job classification
- Solid Waste Work Supervisor for the landfill job classification
- Building Division
 - Building Plan Examiner job classification
 - Building Permit Clerk job classification
 - Senior Building Inspector job classification
 - Plumbing Inspector job classification
 - Building Inspector job classification
 - Electrical Inspector job classification
 - Code Enforcement and Permit Operation Clerk job classification

1 ○ Roads Division

- 2
- 3 • District Road Overseer job classification
- 4

5 ○ Engineering Division

- 6 • Construction Inspector job classification
- 7
- 8 • Supervising Construction Inspector job classification
- 9
- 10 • Emergency Support Technician job classification
- 11
- 12 • Administrative Support Assistant job classification
- 13
- 14 • Engineering Support Technician job classification
- 15

16 ○ Signs and Painting Division

- 17 • Traffic Signs and Markings Supervisor job classification
- 18

19 2) Department of Parks and Recreation

- 20
- 21 ○ Assistant Program Coordinator job classification
- 22
- 23 ○ Program Specialist job classification
- 24
- 25 ○ Recreation Coordinator job classification
- 26
- 27 ○ Site Manager for Waimea Community Neighborhood Center job classification
- 28

- Senior Pool Guard job classification
- Golf Course Starter job classification
- Park Permitting Security Officer job classification
- Permitting Clerk job classification
- Golf Course Cashier job classification
- Recreation Worker job classification

3) Department of Finance

- Office of Department of Motor Vehicles
 - Driver's License Examiner job classification
 - Senior Clerk Dispatcher job classification
 - Bus Clerk Dispatcher job classification
 - Clerk job classification
 - Drivers Licensing Clerk job classification
 - Senior Clerk job classification
 - Motor Vehicle Control Inspector job classification

- DMV Tech job classification
- Financial Responsibility Clerk job classification
- Senior Financial Responsibility Clerk job classification
- Operations Supervisor job classification
- Chief Examiner and Motor Vehicles Inspector job classification

- Real Property Assessment Office

- Tax Relief Support Technician job classification

- Information Technology Division

- Information Technology Specialist job classification
- Computer Support technician job classification

- Real Property Tax Collector

- Tax Map Abstractor job classification
- Agricultural Land Use Valuation Specialist job classification

4) Planning Office

- Enforcement Division Inspectors job classification

1 ○ Planner job classification

2
3 ○ Coastal Zone Management Enforcement Officer job classification

4
5 5) Kauai Emergency Management Agency

6 ○ Staff Specialist job classification

7
8 6) Office of the County Clerk

9
10 ○ Senior Elections Clerk job classification

11
12 ○ Warehouse Supervisor for Elections job classification

13
14 ○ Elections Assistant job classification

15
16 7) Department of Liquor Control

17 ○ Liquor Control Investigator job classification

18
19 ○ Departmental Staff Assistant job classification

20
21 8) Kauai Police Department

22 ○ Dispatcher job classification

23
24 ○ Cell Block (Detention Facility) job classification

25
26 ○ Police Records Technician job classification

27
28 ○ Program Support Technician job classification

- Domestic Violence Intervention Coordinator job classification
- Police Evidence Custodian job classification
- Criminalist job classification
- Administrative Support Assistant job classification
- Account Technician job classification
- Fleet Coordinator job classification
- Public Information Specialist job classification

9) Office of the Prosecuting Attorney

- Legal Clerk job classification
- Senior Special Investigator job classification
- Process Server job classification
- Victim Witness Advocate job classification

10) Fire Department

- Ocean Safety Officer job classification

11) Transportation Department

- Repair Shop Supervisor job classification

- Administrative Support Assistant job classification
- Fixed Route Operations Manager job classification
- Automotive Storekeeper job classification

(Please note that the Union lists Field Operations Clerk, Tr. at 1517-1527, but pages 1517-1527 only covers the Automotive Storekeeper which the Arbitrator finds above to have been exposed.)

12) Housing Agency

- Housing Assistant Clerk job classification
- Housing Quality Standard Inspector job classification
- Housing Assistance Specialist job classification
- Public Housing and Development Program Specialist job classification

13) Department of Water

- Account Clerk job classification
- Customer Service Representative job classification
- Customer Relations Assistant job classification
- Meter Reader and Field Collection Representative job classification

- Water Operations Field Superintendent job classification
- Water Services Supervisor job classification
- Repair Shop Supervisor job classification
- Water Works Inspector job classification
- Waste Water Plant Superintendent job classification
- Water Works Program Technician job classification
- Civil Engineer job classification
- Commission Support Clerk job classification
- Assistant Chief of Operations job classification
- Water Service Supervisor job classification
- Water Service Investigator job classification
- Superintendent job classification

14) Agency on Elderly Affairs

- Account Technician job classification
- Program Coordinator job classification
- Aging and Disabilities Service Technician job classification

- Program Specialist job classification

15) Department of Human Resources

- Equipment Operator Trainer job classification
- Safety and Driver Improvement Coordinator job classification

The record evidence shows that the County received more than 20 million dollars of ARPA funds which in part, the County could use to give THP to its essential workers. (U167, 168, 169 and 170). The records is equally clear that none of the money went to any employee for THP. In deciding whether COVID-19 and its variants are a temporary hazard to which many HGEA employees were exposed, the Arbitrator did not consider the availability of the ARPA funds. Nevertheless, for the record, the Arbitrator wishes to note the availability of the ARPA funds.

1 The Arbitrator finds that the following job classifications were not exposed to COVID
2
3 and its variants, and thus are not eligible for THP.
4

5 1) Department of Public Works

6
7 ○ Waste Water Division

- 8
9 • Civil Engineer job classification

10 ○ Solid Waste Division

- 11
12 • Officer Manager job classification
13
14 • Solid Waste Operations supervisor job classification
15
16 • Solid Waste Work Supervisor for Refuse Collection job classification
17

18 ○ Building Division

- 19
20 • Code Enforcement Officer job classification

21 ○ Roads Division

- 22
23 • Field Operations Clerk job classification
24

25 ○ Automotive Division

- 26
27 • Program Support Technician job classification
28

1 ○ Fiscal Division

- 2
- 3 • Budget Fiscal Specialist job classification
- 4

5 2) Department of Parks and Recreation

- 6 ○ Custodial Services Supervisor job classification
- 7

8 3) Department of Finance

9

10 ○ Real Property Assessment Office

11

- 12 • Real Property Assessor job classification
- 13

14 ○ Accounting Division

- 15 • Accountant job classification
- 16

- 17 • Marisa Bettencourt testified that she worked for the Accounting
- 18

19 Division, but she did not state her title. The Arbitrator finds that her

20

21 job classification was not exposed.

22

- 23 ○ Finance Division (Note, it was unclear from the testimony if this is the same
- 24

25 Division as the Accounting Division. Because it is unclear, the Arbitrator

26

27 made it a separate Division.)

- 28 • Accountant job classification

1 ○ Information Technology Division

- 2
- 3 • Administrative Support Assistant job classification

4

5 4) Planning Office

- 6 ○ Supervising Inspector job classification

- 7
- 8 ○ Commission Support Clerk job classification

9

10 5) Kauai Emergency Management Agency (there was only one job classification and the

11 Arbitrator found exposure)

12

13

14 6) Office of the County Clerk

- 15 ○ Records Management Analyst job classification

16

17 7) Department of Liquor Control (there were only two job classifications and the

18 Arbitrator found exposure)

19

20

21 8) Kauai Police Department

- 22 ○ Accountant job classification

- 23
- 24 ○ Program Support Assistant job classification

25

26 9) Office of the Prosecuting Attorney

- 27 ○ Administrative Support Assistant job classification
- 28

1 10) Fire Department (there was only one job classification and the Arbitrator found
2
3 exposure)

4
5 11) Transportation Department

- 6 ○ Clerk Dispatcher job classification
7

8 12) Housing Agency

- 9
10 ○ Housing Services Worker job classification
11

12 13) Department of Water

- 13 ○ Senior Account Clerk job classification
14
15 ○ Information and Education Specialist job classification
16
17 ○ Engineering Program Assistant job classification
18
19 ○ Contracts Officer job classification
20
21 ○ Auto Shop Supervisor job classification
22
23 ○ Water Works Program Assistant job classification
24
25 ○ Clerk job classification
26
27 ○ Accountant job classification
28 ○ Engineering Support Technician job classification

1 ○ Program Support Technician job classification

2
3 ○ Water Quality Lab Manager/Water Microbiologist job classification

4
5 14) Agency on Elderly Affairs

6
7 ○ RSVP Director job classification

8
9 15) Department of Human Resources (There were only two job classifications and the

10 Arbitrator found exposure.)

11
12
13 The Arbitrator finds that after an exhaustive review of the record transcript in this case,
14
15 there was either no evidence, or insufficient evidence, to find that any other job classification is
16
17 eligible for THP, including those listed on pages 100-104 of the Union's Post-Hearing
18
19 Statement, with two exceptions. Those exceptions are the Pool Guard job classification under
20
21 Parks and Recreation, and the five positions which the Union lists under the Kaua'i Emergency
22
23 Management Agency, which are as follows: (1) Accountant job classification; (2) County
24 Telecommunications Officer job classification; (3) Emergency Management Senior Staff
25 Officer job classification; (4) Emergency Management Staff Specialist job classification; and
26 (5) Project Management Compliance Assistant job classification. Consequently, the Arbitrator
27
28

1 denies THP, to any job classification not covered above on pages 67 to 76, with the exceptions
2
3 of the six positions listed above on the previous page.
4

5 At the outset of the re-opening of the hearing, Mr. Moniz stated as follows, “And I think
6
7 there’s been a lot of twists and turns as far as this is concerned and I think the only way to try
8
9 and remedy it is to call the witnesses that I believe have relevant testimony. And if that is
10 going to be denied, then I would simply ask that the specific reasons be placed on the record.”
11
12 (Emphasis added) (Tr. Vol. 1 at 17) Mr. Moniz then proceeded to call an additional ninety
13
14 seven (97) witnesses. The Arbitrator allowed Mr. Moniz to call every single witness he wished
15
16 to. Mr. Moniz chose to not call as witnesses the persons working in the job classifications
17
18 listed on P. 100-104 of the Union’s Post-Hearing Statement. That was entirely Mr.
19 Moniz’s decision. The Arbitrator was prepared to listen to as many witnesses as Mr. Moniz
20
21 wished to call.
22

23 **VII Final Thoughts**

24

25 Phase 2 of the bifurcated process will be to determine whether the differential that
26
27 eligible employees should receive are severe or most severe. It is the Arbitrator’s sincere hope
28

1 that the Union and the County can reach agreements on those questions. The Arbitrator
2
3 believes that sufficient evidence was solicited over the 17 days of hearing to enable both sides
4
5 to reach agreements. Failure to do so will significantly further delay a process that already has
6
7 been very protracted, and squander the Union's and the County's precious resources, both in
8
9 staff and in money.

10 **VIII Decision and Award**

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12 After carefully reviewing the record, including the relevant provisions of the Collective
13
14 Bargaining Agreement, and all stipulations, testimony, admitted exhibits, the transcript and all
15
16 briefs, the Arbitrator finds that the Union has met its burden of showing that the County
17
18 violated Articles 4, 5 and 20 (BUs 3, 4 and 13), Article 22 (BU2) and Article 30 (BU14/15) of
19
20 the CBAs. The Arbitrator hereby grants the following remedies:

- 21
22 1) THP to those County employees whom the Arbitrator has found were exposed to
23
24 the temporary hazard, for the period March 4, 2020 through March 25, 2022.
- 25
26 2) That the County refrain from any, and all, retaliatory action against the grievants
27
28 for the filing of this grievance.

1
2
3 DATED: Honolulu, Hawaii: October 20, 2023
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7 Judge Michael F. Broderick
8 Arbitrator
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