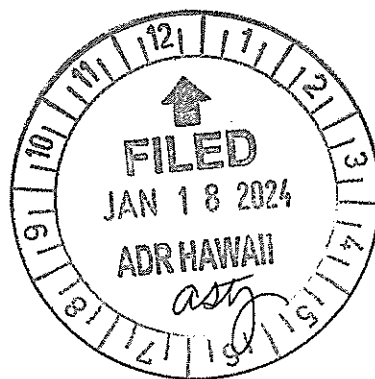


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ARBITRATOR

BEFORE ARBITRATOR
THOMAS E. CROWLEY
STATE OF HAWAII



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

Union,

and

DEPARTMENT OF EDUCATION,
STATE OF HAWAII,

Employer.

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

) **DECISION, ORDER, AND SECOND**
) **PARTIAL FINAL ARBITRATION**
) **AWARD; EXHIBIT "A"; CERTIFICATE**
) **OF SERVICE**

DECISION, ORDER, AND SECOND PARTIAL FINAL ARBITRATION AWARD

I. Introduction

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

Advocacy Chief Stacy Moniz and Union Agent Jesse Sliva¹ represented the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-

¹ On or about July 28, 2023, Governor Green appointed Mr. Moniz as the Employee Member of the

CIO (“Union”) and the Class Grievants in Bargaining Units 02, 03, 04, 06, 09, and 13 (“Class Grievants”). Deputies Attorney General James E. Halvorson, Esq. and Richard H. Thomason, Esq. represent the DEPARTMENT OF EDUCATION, STATE OF HAWAII (“DOE” or “Employer”).

II. The gravamen of the Class Grievance

The gravamen of the Class Grievance alleged the Employer violated the Collective Bargaining Agreements (CBAs) for Bargaining Units 02, 03, 04, 06, 09, and 13 when the Employer denied the Union’s requests for Temporary Hazard Pay (“THP”) for BU members performing essential functions which temporarily exposed them to unusually hazardous working conditions arising from the Coronavirus Disease (COVID-19) and its variants. The “temporary” period of the THP was March 4, 2020 to March 25, 2022, based on Governor Ige’s Emergency Proclamations declaring a state of emergency to support ongoing State and county responses to COVID-19 (the “COVID Emergency Period”).² On March 23, 2020, Governor Ige issued a “Third Supplemental Proclamation” ordering all persons in the State to stay at home except for essential workers.³ Essential workers included DOE employees who still performed essential functions and must report to work.⁴ The Union requested THP for the DOE essential employees who were ordered to report to DOE work sites during the COVID Emergency Period. The Employer denied the Union’s request.

Hawaii Labor Relations Board, and Mr. Sliva thereafter was promoted to his current position as Acting Advocacy Chief.

² See: U-7 through U-35, which are copies of Governor Ige’s Proclamations.

³ U-10 at 002-003.

⁴ U-52 at 002.

III. Background

Bifurcation of the liability and damages issues

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

The Stage 1 Liability Hearing

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

The CBAs for Bargaining Units 02, 03, 04, 09, and 13 each includes an identical article that, among other things, describes the circumstances that trigger the Employer's responsibility to award Temporary Hazard Pay ("THP") wage differentials to qualifying BU members who were temporarily exposed to unusually hazardous conditions.⁵

⁵ See: BU-02 CBA (Blue Collar Supervisors) Article 22 Temporary Hazard Pay (U-1 at 048-049); BU-03 CBA (White Collar Employees) Article 20 Temporary Hazard Pay (U-2 at 046-048; BU-04 CBA (White Collar Supervisors) Article 20 Temporary Hazard Pay (U-2 at 044-046); BU-09 CBA (Registered Professional Nurses) Article 22 Temporary Hazard Pay (U-105 at 044-046; and BU-13 CBA (Professional and Scientific Employees) Article 20 Temporary Hazard Pay (U-6 at 050-051).

The Class Grievance includes BU 06 (Educational Officers).⁶ Unlike Bargaining Units 02, 03, 04, 09, and 13, however, the BU 06 CBA did not include a Temporary Hazard Pay article. At the Stage 1 Hearing, the arbitrator took the issue of whether BU-6 is entitled to THP under advisement, to be determined subsequently.⁷

On December 9, 2022, during the Stage 1 Liability Hearing, Mr. Moniz submitted to the arbitrator and the Employer the “Hawaii Government Employees Association’s Motion for Summary Disposition; Memorandum in Support of the Motion; Declaration of Stacy Moniz; Exhibits “A-B””(Union’s Motion for Partial Summary Disposition).⁸ The Union’s Motion for Partial Summary Disposition did not include BU 06 as part of its Motion. The Union’s Motion stated that partial summary disposition should be granted in

⁶ Union Exhibit 5 (“U-5”) is the BU 06 CBA.

⁷ 12/2/22 Hearing Tr. at 9.

On October 5, 2023, the Union filed “Hawaii Government Employees Association’s Motion for an Award of Temporary Hazard Pay for Bargaining Unit 6 Members” (Union’s Motion for BU-6 THP). On October 5, 2023, the arbitrator acknowledged receipt of the Union’s Motion for BU-6 THP. At that time, counsel agreed that a conference would be scheduled to discuss the procedural arrangements and other deadlines regarding the Union’s Motion for BU-6 THP *after* the parties’ October 31, 2023 submission of post-hearing briefs on the Stage 2 Hearing on the THP wage differentials for BU 02, 03, 04, 09, and 13 members found qualified for THP.

On October 31, 2023, the arbitrator received the DOE’s Post Hearing Brief and the Union’s Post-Hearing Statement on the above Stage 2 Hearing. The deadline for the Arbitration Decision and Award on the Stage 2 Damages is January 19, 2024.

In the meantime, unfortunately, Mr. Thomason encountered multiple family and personal medical emergencies, which resulted in a continuance of the telecom on the Union’s Motion for BU-6 THP until December 6, 2023.

At the December 6, 2023 Scheduling Conference, counsel agreed and the arbitrator ordered that the deadline for the Employer’s response to the Union’s Motion for BU-6 THP would be two weeks after the filing of the Arbitration Decision and Award on the Stage 2 Damages. See: The December 6, 2023 Scheduling Order No. 4.

Because this Decision, Order, and Second Partial Arbitration Award was issued on January 18, 2024, the deadline for the Employer’s response to the Union’s Motion for BU-6 THP is February 1, 2024.

⁸ 12/9/22 Hearing Tr. at 441.

favor of HGEA because there is “no disputed material fact under Section A of the Temporary Hazard Pay Articles of Bargaining Units 2, 3, 4, 9, and 13.”

After setting agreed-upon deadlines for the Employer’s response to the Motion and the Union’s reply to the Employer’s response, the arbitrator recessed the Stage 1 Liability hearing pending the disposition of the Motion for Partial Summary Disposition.⁹

On December 16, 2022, the Employer submitted its response to the Union’s Motion for Partial Summary Disposition. On December 21, 2022, the Union submitted its “Reply Memorandum to the Employer’s Reply to HGEA’s Motion for Summary Disposition.” On February 8, 2023, the arbitrator rendered the Decision, Order, and Partial Final Arbitration Award RE: Hawai’i Government Employees Association’s Motion for Summary Disposition (“2/8/23 Partial Final Award”). For the reasons stated above, the 2/8/23 Partial Final Award did *not* include BU 06.¹⁰

The 2/8/23 Partial Final Award

The 2/8/23 Partial Final Award provided, among other things:¹¹

3. The arbitrator finds and concludes:

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

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

c. The “affected DOE BU 02, 03, 04, 09, and 13 members” (meaning, the HGEA members in those BUs who were required

⁹ 12/9/22 Hearing Tr. at 444.

¹⁰ See: 2/8/23 Partial Final Arbitration Award at 14-15.

¹¹ See: 2/8/23 Partial Arbitration Award at 54-55.

to report to work)¹² were *exposed* to unusually hazardous working conditions, specifically, the highly contagious COVID-19 disease and its variants at DOE facilities.

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

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

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

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

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

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

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

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

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

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

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

¹² Tr. at 360.

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

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

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

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

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

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

The 2/8/23 Partial Final Award is attached hereto as Exhibit "A" and incorporated in this Decision, Order, and Second Partial Final Arbitration Award. The 2/8/23 Partial

Final Award is “final and binding” on the Employer, the Union, and its members pursuant to Section G. “Step 3. Arbitration,” in the “Grievance Procedure” Articles in BU 02, 03, 04, 09, and 13, and also constitutes the “law of the case.”

Pursuant to the 2/8/23 Partial Final Award:

- The “affected DOE BU 02, 03, 04, 09, and 13 members” (meaning, the HGEA members in those BUs who were required to report to work) were awarded THP.
- The THP differential awarded to the affected DOE BU 02, 03, 04, 09, and 13 members’ degree of hazard was “Severe” (15%) or “Most Severe” (25%).
- The Employer was ordered to promptly consult with the Union to determine the hazard pay differentials for the affected BU members (Section B of the THP Articles), including the computation and duration of such differentials.
- The Employer shall provide the Union with any forms the Employer requires for the Union’s submittal of its recommendations for the hazard pay differentials.
- The Employer shall inform the Union of the manner the Employer requires for Union’s submittal of its recommendations for hazard pay differentials.
- After the above consultation, in the event there remained any contested THP wage differentials, the purpose of the Stage 2 Damages Hearing was to determine the amount of any contested THP wage differentials for BU 02, 03, 04, 09, and 13 members found qualified for THP.

The 3/7/23 Scheduling Order No. 2 ordered a June 6, 2023 deadline to complete the consultation required by the 2/8/23 Partial Final Award and the THP Articles in the BU 02, 03, 04, 09, and 13 CBAs

¶ 7 in the above 2/8/23 Partial Final Award¹³ ordered the Employer's Personnel Director to promptly consult with the Union to determine the hazard pay differentials for the affected BU members (Section B of the THP Articles).

Pursuant to the 2/8/23 Partial Arbitration Award, on March 7, 2023, the arbitrator conducted a Status and Scheduling Conference with counsel, and issued Scheduling Order No. 2 (3/7/23 Scheduling Order No. 2), which ordered the following scheduling deadlines and other procedural matters:

- **June 6, 2023:** deadline for the completion of the consultation required by the Temporary Hazard Pay Articles in BU 02, 03, 04, 09, and 13.

- After the above consultation, and in the event there remain any contested THP wage differentials for BU 02, 03, 04, 09, and 13 members found qualified for THP, the following deadlines apply:

- **June 13, 2023:** Deadline for the parties to exchange any Stage 2 Damages Hearing memos, witness lists, and exhibits, and to submit the hearing memos, witness lists and exhibits to the Arbitrator.

- **June 20-23, 2023 and June 26-30, 2023 at 9:00 a.m. each day:** the Stage 2 Damages Hearing.

The 3/7/23 Scheduling Order No. 2 is hereby incorporated into this Decision, Order, and Second Partial Final Arbitration Award.

April 3, 2023: Union's Motion for Sanctions alleging the Employer intentionally refused to consult with the Union, as required by the 2/8/23 Partial Final Award and the THP Articles

¹³ 2/8/23 Partial Final Award at 55.

On April 3, 2023, the Union filed a Motion for Sanctions (Union's 4/3/23 Motion for Sanctions) requesting sanctions against the Employer, alleging the Employer, without justification and in bad faith, had intentionally refused to consult with the Union, as required by the 2/8/23 Partial Arbitration Award and the Temporary Hazard Pay Articles in the BU 02, 03, 04, 09, and 13 CBAs. Initially, the Union requested the arbitrator to "draw an adverse inference that the Employer violated the THP Articles pertaining to the differential and order the Employer to pay the maximum 25% differential to each BU member for each hour they reported to work."

On April 21, 2023, the arbitrator granted in part and denied in part the Union's 4/3/23 Motion for Sanctions (4/21/23 Order) as follows:

1. On or before May 2, 2023, HGEA shall submit its request to the DOE for information for the purpose of the consultation regarding the THP differentials, including employee rosters, job classifications, and job sites for BUs 02, 03, 04, 09, and 13.
2. On or before May 26, 2023, the DOE shall respond to the Union's request, and to the extent the requested information is in the DOE's possession, custody, and control, produce the requested information to the HGEA.
3. Commencing June 5, 2023 and continuing until its completion on or before June 15, 2023, HGEA and the DOE representatives shall meet in consultation to determine THP differentials for individual affected HGEA members in BUs 02, 03, 04, 09, and 13.
4. After the above consultation, in the event there remain any contested THP wage differentials for BU 02, 03, 04, 09, and 13 members found qualified for THP, such contested cases shall proceed to the Stage 2 Damages Hearing on June 20-23, 2023 and June 26-30, 2023 at 9:00 a.m. each day.

The arbitrator denied the Union's requested sanction to order the Employer to pay the maximum 25% differential to each BU member for each hour they reported to work. The arbitrator held in pertinent part:

At this juncture, the granting of such a sanction would constitute an abuse of discretion, especially where, as here, there was justification for the Employer's delayed response to Mr. Moniz' requests to schedule the consultation and his March 24, 2023 letter, there was no bad faith on the Employer's part, and no extreme prejudice to the Union.

...
Although the Union promptly and in good faith attempted consultation with the Employer regarding the determination of THP wage differentials, the imposition of the requested sanctions would effectively dismiss a potentially meritorious defense without a hearing on the merits. To the extent the Union alleges unfair prejudice based on the Employer's delay, the public policy favoring disposition of cases on their merits counter-balances the alleged prejudice to the Union.

The 4/21/23 Order is hereby incorporated into this Decision, Order, and Second Partial Final Arbitration Award.

5/30/23: The Union's Renewed Motion for Sanctions

On May 30, 2023, the Union filed a "Renewed Motion for Sanctions." The Union reported the DOE failed to provide any of the information requested by the Union by the above May 26, 2023 deadline. The Union argued:

- The only equitable remedy for the Employer's above conduct is the full sanction of an award of a 25% differential for each affected HGEA bargaining unit member.
- Without the granting of the above sanction, the DOE's intentional conduct would render the arbitration process, the 2/8/23 Partial Arbitration Award, and the 4/21/23 Decision and Order meaningless.

On June 8, 2023, the arbitrator conducted a hearing on the Union's Renewed Motion for Sanctions. On or about June 14, 2023, at the arbitrator's request, the Union and the Employer submitted supplemental memos regarding pre-judgment interest as an alternative sanction.

June 9, 2023: deadline to complete the consultation extended to Friday, June 16, 2023

On June 9, 2023, following the above June 8, 2023 hearing, Mr. Moniz and Mr. Thomason agreed to extend the deadline for the completion of the consultation from Thursday, June 15, 2023 to Friday, June 16, 2023, and to commence the Stage 2 Damages hearing on any remaining contested cases on June 20, 2023.

On June 9, 2023, via email, the arbitrator approved the commencement of consultation on Thursday, June 15, 2023 and continuing through Friday, June 16, 2023, and commencement of the Stage 2 Damages hearing on any remaining contested cases on June 20, 2023.

The arbitrator's 6/9/23 order is hereby incorporated into this Decision, Order, and Second Partial Final Arbitration Award.

June 15, 2023: The Union's and Employer's two-hour consultation

On June 15, 2023, one 2-hour consultation was conducted between the Union and the Employer.¹⁴

June 16, 2023: the arbitrator denies Union's Renewed Motion for Sanctions

On June 16, 2023, the arbitrator rendered his decision and order denying the Union's Renewed Motion for Sanctions (the 6/16/23 Order) as follows:

- The Employer's 4-day delay in meeting the May 26, 2023 discovery response deadline was not in bad faith.
- The 4-day delay in submitting the Employer's discovery response was caused by an honest mistake, and not based on "some interested or sinister motive."

¹⁴ 6/20/23 Hearing Tr. at 11-24.

- The 4-day delay did not cause “irreparable harm and substantial prejudice to roughly 7,000 HGEA bargaining unit members,” justifying an across-the-board 25% THP differential as the only equitable remedy.

- The Union cited HRCP 37(b)(2) as appropriate sanctions against the Employer, ranging from (A) An order designating that each BU member be paid the maximum 25% THP differential for each hour they reported to work; (B) an order refusing to allow the Employer to oppose the Union’s damages claims, or prohibiting the Employer from introducing designated matters in evidence; or (C) An order striking out the Employer’s pleadings or rendering a judgment by default against the Employer.

- Prohibiting the Employer from presenting evidence and proffering testimony regarding the THP pay differentials at the Stage 2 Damages Hearing is tantamount to the severest of sanctions. The imposition of the requested sanctions would effectively dismiss a potentially meritorious defense without a hearing on the merits.

- Because the Union’s requested sanctions are not commensurate with the alleged offense, the granting of such sanctions would constitute an abuse of discretion. The record does not show evidence of: willful or contemptuous behavior or bad faith on the part of the Employer or Mr. Thomason; or “irreparable harm” to the Union.

- The imposition of the requested sanctions would effectively dismiss a potentially meritorious defense without a hearing on the merits. To the extent the Union alleges unfair prejudice based on the Employer’s delay, the public policy favoring disposition of cases on their merits counter-balances the alleged prejudice to the Union.

- In response to the Arbitrator's request regarding whether pre-judgment interest should be considered as a sanction, the Union requested pre-award interest from March 31, 2020 (the commencement of the COVID-19 Emergency Period), to the date of final payment of the THP differentials. Alternatively, the Union requested pre-award interest from February 8, 2023, the date of the arbitrator's partial decision and award, until final payment is made.

- The arbitrator determined that pre-award interest from either March 2020 or February 8, 2023 would impose an enormous disproportionate and unfair monetary penalty on the Employer where there was no bad faith or intended dilatory conduct by Mr. Thomason or the Employer.

- Accordingly, the arbitrator declined to impose pre-award interest because pre-award interest at the statutory rate of 10% per year is not commensurate with the alleged offense.

- The arbitrator notes that on June 9, 2023, via email, the arbitrator approved counsel's agreement to commence the consultation on Thursday, June 15, 2023 and extend the deadline for the completion of the consultation on Friday, June 16, 2023, and to commence the Stage 2 Damages hearing on any remaining contested cases on June 20, 2023.

- To the extent there remain contested cases after the June 15 and 16 consultation, June 19, 2023 shall be the deadline for the parties to exchange any Stage 2 Damages Hearing memos, witness lists, and exhibits, and to submit the hearing memos, witness lists and exhibits to the arbitrator.

Nothing in the 6/16/23 Order denying the Union's Renewed Motion addressed whether the Employer violated the orders in the 2/8/23 Partial Final Award, the 3/8/23 Scheduling Order No. 2, and the 4/21/23 Order to consult with the Union regarding the THP differentials. The issue of whether the Employer violated the orders to consult is addressed in this Decision, Order, and Second Partial Arbitration Award.

The 6/16/23 Order is hereby incorporated into this Decision, Order, and Second Partial Final Arbitration Award.

June 19, 2023: the Union files its Stage 2 supplemental pre-hearing statement, witness list, and exhibits

On June 19, 2023, pursuant to the 6/16/23 Order, the Union filed its Stage 2 Supplemental Pre-Hearing Statement, Supplemental Witness List, and Supplemental Exhibits.

The Employer filed no supplemental pre-hearing statement, no supplemental witness list, and no supplemental exhibits.

IV. The issues to be arbitrated at Stage 2

At the June 20, 2023 commencement of the Stage 2 Hearing, the arbitrator determined the issues to be arbitrated at Stage 2.

Mr. Moniz, on behalf of the Union, initially articulated the issues as follows:¹⁵

... [T]he result of [the Stage 1] ruling is that hazard pay shall be granted; and that the decision for the second phase is which differential applies based on the contract language, which is either 15 percent or 25 percent.

So the issue for us is, as of right now, ... there's a baseline of people who physically reported to work qualifying for 15 percent, and the issue really is who's eligible or qualified to receive the 25 percent, which is the higher differential.

¹⁵ 6/20/23 Hearing Tr. at 6.

The option of awarding zero to someone who physically reported to work is not an issue as far the Union is concerned, because based on the contract language that's not an option.

Mr. Thomason, on behalf of the Employer, stated:¹⁶

... The contract doesn't have a provision for zero, for reasons which escape me. Our wonderful negotiators decided to forget about that. But ... even if they report to work and it is a hazardous condition on campus if there's people there, but if there's no people there or you're sitting in a mountain somewhere, you're not being exposed to any employees or students or anything else. That person shouldn't get extra hazard pay, and I think it's terminology that trips us up here.

I think there is a provision for zero because of complete mitigation but I understand when they say there is no zero, yes, but there's still the possibility of mitigation for somebody who actually might show up on behalf of DOE to throw some trash away and then get the heck out of there.

Based on the above, the arbitrator initially determined the issues to be arbitrated at Stage 2 were: whether "affected DOE BU 02, 03, 04, 09, and 13 members" (meaning, the HGEA members in those BUs who were required to report to work) should be awarded the "most severe" 25 percent THP differential, or the "severe" 15% percent THP differential.¹⁷

Mr. Moniz requested an additional issue be arbitrated, specifically whether the Employer violated the orders to consult on the THP differentials. Mr. Moniz reported:¹⁸

- On June 15, 2023, one 2-hour consultation was conducted between the Union and the Employer. While multiple representatives of the Employer attended,

¹⁶ 6/20/23 Hearing Tr. at 7.

¹⁷ 6/30/23 Hearing Tr. at 7-8.

¹⁸ 6/20/23 Hearing Tr. at 11-24.

DOE Superintendent Hayashi was on the Mainland and could not be reached, and no one on behalf of the Employer had authority to do anything.

- After the June 15, 2023 2-hour consultation, the Employer made no response to the Union's proposed methodologies regarding the allocation of THP differentials for affected BU members.
- Despite the 2/8/23 Partial Final Award order that the Employer promptly consult with the Union regarding the THP differentials for affected BU members, despite Scheduling Order No. 2's order to complete such consultation by June 6, 2023, despite the 4/21/23 Decision extending the deadline to complete the consultation to Thursday, June 15, 2023, and despite the June 9, 2023 agreement, approved by the arbitrator, to further extend the deadline to Friday June 16, 2023 to complete the consultation, the Employer did not in good faith participate in a meaningful consultation.
- As a result, the Union requests that an additional issue to be arbitrated at the Stage 2 Damages Hearing is the second breach of the duty to consult by the Employer.

On behalf of the Employer, Mr. Thomason objected. Mr. Thomason argued:¹⁹

Mr. Thomason: Well, I think the consultation was very effective. I think Sean [Bacon, the DOE Assistant Superintendent] walked away able to explain what took place that day, because, well, Sean can't agree right then and there. All Sean can do is say those are some good concepts and let me go talk to whoever I need to talk to, maybe including the AG, and that takes time. The Union's in a hurry. I don't understand why it's so relentless. But you're dealing with the DOE, it takes time. We got people doing this, people doing that, we got the AG doing this. There's nothing in the contract says it has to happen in three days. It's not going to happen in three days, and we're wasting our time sitting here. We should have had a follow-on meeting because the first one was good and you [Mr. Moniz] were really excellent.

¹⁹ 6/20/23 Hearing Tr. at 23.

Mr. Moniz: Well, thank you, but that's why I was waiting to hear something back.

Mr. Thomason: Yeah, okay, so it's over the weekend, the guy's off. When he comes back he shows up, you know. It just drives me nuts that there's this big rush and threat, rush and threat, rush and threat, you violated the contract.

Mr. Moniz: Well, we've been asking since February, so there hasn't been no rush.

Mr. Thomason: Well, get over it.

The arbitrator agreed with the Union that an additional issue to be arbitrated at the Stage 2 hearing was the alleged second breach of the duty to consult by the Employer.²⁰

Based on the above and the 2/8/23 Partial Final Award, the issues to be arbitrated at Stage 2 were:

- Whether affected DOE BU 02, 03, 04, 09, and 13 members (meaning, the HGEA members in those BUs who were required to report to work) should be awarded the "most severe" 25 percent THP differential, or the "severe" 15% percent THP differential.
- Whether the Employer violated the orders in the 2/8/23 Partial Final Award, the 3/8/23 Scheduling Order No. 2, the 4/21/23 Order, and the 6/9/23 order to consult with the Union regarding the THP differentials.
- Pursuant to the respective Articles in BU-02, 03, 04, 09, and 13 on Conflict, Maintenance of Rights and Benefits, Rights of the Employer, and Temporary Hazard Pay:

Whether the Employer violated such Articles, and if so, what is the proper remedy.

V. The parties' overall positions at Stage 2

²⁰ 6/20/23 Hearing Tr. at 24.

The Union's overall position is:²¹

The Employer did not perform its duty to award a THP differential in consultation with the Union upon receipt of THP requests from the Union, despite the affected BU members' exposure to COVID-19 and its variants qualifying as *Most Severe* for all affected BU members.

In the alternative, the affected BU Members' exposure was *Severe* for all not qualifying as *Most Severe*.

The Union has met its burden of showing by a preponderance of the evidence that the Employer violated Articles 2, 3, 4, and 5 of the BUs 02, 03, 04, 09, and 13 CBAs, and Article 20 of the BUs 03, 04, and 13 CBAs, and Article 22 of the BUs 02 and 09 CBAs.

The Employer's overall position is:

"[I]f working from home was basically just as hazardous as working at DOE (if not more so during [the COVID Emergency Period]), then hazard pay was not merited."²²

VI. The Stage 2 Hearing Dates, Witnesses, and Exhibits

A. The Stage 2 Hearing Dates

The evidentiary portion of the Stage 2 Hearing was conducted on June 20-23, 2023, June 26-30, 2023, and July 3, 2023 at HGEA'S Office, 888 Mililani Street, 1st Floor Meeting Room, Honolulu, Hawai'i.

B. The Stage 2 Witnesses

The Union called the following ninety-nine (99) witnesses at the Stage 2 Hearing:²³

²¹ Union's Post-Hearing Statement at 151.

²² Employer's 10/31/23 Post-Hearing Brief at 4.

²³ With the parties' agreement, the arbitrator permitted the outer-island witnesses and several Oahu witnesses to testify remotely via ZOOM video-conferencing.

- June 20, 2023: Matthew Woods, Brianne Kanahele, Thomas John Cox, Shantell Carvalho-Toloai, Yvette Nakahiki, Corey Nakamura, Lucia Lulu Cummings, Geralee Kupu, and Keone Tango.
- June 21, 2023: Keith Hayashi, Marlene Leary, Kassie Tanigawa, Lauren Griswold, Brian Hallett, Jasmine Vegas, and Kristie Serizawa.
- June 22, 2023: Fay Lee, Tammi Riley, Kalani Takase, Tumoana Kenessey, Pamela Dumlao, Andrea Moore, Bernadette Denison, Momi Sales, Lovell Kaleikini, Sililo Pale, Jr., Stacy Mizutani-Teixeira, Marcus Punzal, and Shelley Pang.
- June 23, 2023: Joshua Bohnet, Richard Shimabukuro, Francis Judd, James Sunday, Karen Kama, Stacey Arizumi Sergeant, Gabrielle Dikilato, Kelly Sur, Lei Ah Yat, and Denise Holi.
- June 26, 2023: Hilliary Piliialoha, Kauilani Doroha, Ron Okamura, Kristi Quisano, Ashley Tanaka, Wendy Matsuzaki, Lynel Mendiola, Trisha Toyama-Wakumoto, Marissa Ramos, Maureen Lee, Celine Ramos, Jadeleen Aloha Silva, and Derek Minakami.
- June 27, 2023: Timothy Shim, Alicia Viernes, Kevin Pacheco, Karen Walker, Katina Soares, Christopher Keoni Wilhelm, Betty-Jo Sellers, Matthew Dillon, Wailana Purdy, Jaye Arakaki, Deborah Leonhard, and Christine Espiritu.
- June 28, 2023: Cassie Ale, Jemalyn Higgins, Helena Brown, Jennifer Everett, Darran Koyama, Sanford Chun, Jean Morris, and Gaylene Shigematsu.
- June 29, 2023: Antoinette Bello, Mark Akine, Kelcy Koga, Lori Briski, Tiffany Lee-Read, Mahina Anguay, Stacy Pascual, Jasmine Urasaki, Bryan Arbles, Kimberly Cosme, Anna Manalo, Lynn Quinories, Derek Morgado, and Kristie Lee.

- June 30, 2023: Ramona-Ann “Momi” Kaehuaea, Michael McCloskey, Monika Nesser, Tiffany Pratt, Melissa Ann Koga, Jessica Dalhke, Carleen Tolentino, Jason Braun, Thomas Correa, Summer Richards, and Wendy Lindsey.

- July 3, 2023: Rhonda Sanborn and Tammy Muranaka.

The Employer called one (1) witness at the Stage 2 Hearing:

- July 3, 2023: Dr. Sarah Kemble, the Chief Epidemiologist at DOH.²⁴

C. The Stage 2 Exhibits

Subject to the weight the Arbitrator gave them, the following exhibits were received in evidence, in addition to the exhibits previously received at the Stage 1 Hearing:

- Union Exhibits (“U-”): U-107 through U-111.

The Employer proposed no exhibits at Stage 2.

²⁴ The Union objected to the Employer calling Dr. Kemble on the following grounds:

(1) The Employer did not file any supplemental witness list for Stage 2.

(2) Dr. Kemble’s testimony is not relevant to whether the affected BU members get 15 percent or 25 percent. With respect to the Employer’s arguments that it attempted to mitigate the risk of catching COVID at DOE facilities, and that DOE Employees were safer at DOE work-sites compared to those who teleworked, Mr. Moniz stated:

[T]hat ship has sailed, because under the contract language, once temporary hazardous working conditions are established, which they have been in this case, then the Employer shall grant hazard pay. ... Under the qualification of this arbitration and the grievance where the Union limited its claim to people who reported to work, that issue’s been decided, so her testimony... is going to be toward the hazardous condition, whether it existed or didn’t exist, and ... her testimony [will be] it did exist. ... But again that’s not relevant here. We’re past that.”

6/26/23 Hearing Tr. at 490-491. See also: 7/3/23 Hearing Tr. at 1176.

The Employer stated Dr. Kemble’s testimony was relevant to both Stage 1 and Stage 2, because DOE Employees could “get just as sick staying home as ... going to work.” 7/3/23 Hearing Tr. at 1177.

Over the Union’s objection, the arbitrator allowed Dr. Kemble’s testimony, subject to the weight the arbitrator gives her testimony based on the Union’s above objections. 6/26/23 Hearing Tr. at 492-493.

VII. The 2/8/23 Partial Final Award found the Employer violated the duty to consult as required by the THP Article, and the affected DOE BU 02, 03, 04, 09, and 13 members are entitled to THP at the “Severe” or “Most Severe” differential.

At Stage 1, the Union claimed the Employer violated the THP Article by failing to consult with the Union regarding THP, and that the affected BU members were entitled to THP at the “Severe” or “Most Severe” differential. The arbitrator agreed. The 2/8/23 Partial Final Award found in pertinent part:²⁵

3. The arbitrator finds and concludes:

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

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

c. The “affected DOE BU 02, 03, 04, 09, and 13 members” (meaning, the HGEA members in those BUs who were required to report to work)²⁶ were *exposed* to unusually hazardous working conditions, specifically, the highly contagious COVID-19 disease and its variants at DOE facilities.

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

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

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

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

²⁵ 2/8/23 Partial Final Award at 54.

²⁶ Tr. at 360.

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

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

As provided by the 2/8/23 Partial Final Award, the arbitrator finds and concludes:

- The Employer's failure to consult as required by the THP Article violated the THP Articles in BU 02, 03, 04, 09, and 13.
- The affected DOE BU 02, 03, 04, 09, and 13 members are entitled to THP at the "Severe" or "Most Severe" differential.

VIII. The Employer violated the orders in the 2/8/23 Partial Final Award, the 3/8/23 Scheduling Order No. 2, the 4/21/23 Order, and the 6/9/23 Order to consult with the Union regarding the THP differentials

Over the Employer's objection, the arbitrator had agreed with the Union that the issues to be arbitrated at the Stage 2 hearing will include the alleged second breach of the duty to consult by the Employer.²⁷ The second breach of the duty to consult was:

Whether the Employer violated the orders in the 2/8/23 Partial Final Award, the 3/8/23 Scheduling Order No. 2, the 4/21/23 Order, and the 6/9/23 order to consult with the Union regarding the THP differentials.

Unfortunately, the Employer did not address this issue whatsoever in its Post Hearing Brief. As a result, the arbitrator does not have the benefit of the Employer's position regarding the Employer's violations of the orders in the 2/8/23 Partial Final Award, the 3/8/23 Scheduling Order No. 2, the 4/21/23 Order,

²⁷ 6/20/23 Hearing Tr. at 24.

and the 6/9/23 Order to consult with the Union regarding the allocation of the THP differentials between “Severe” and “Most Severe.”

The Union’s Post-Hearing Statement addressed the consultation issue in detail.

The Union summarized the consultation issue as follows:²⁸

The Employer was ordered [by the 2/8/23 Partial Final Award] to consult on the Union’s request [for THP differentials]. Even then, it failed to consult as ordered. Then, once ordered again on the eve of the hearing, the Employer engaged in what amounted to a performative “consultation” which was not meaningful.

The arbitrator disagrees with Employer’s counsel’s characterizations that the Union was ‘relentlessly rushing and threatening’ the consultation, that the Employer was given only “three days” for the consultation, and that the Employer couldn’t respond by June 16, 2023 because “it’s over the weekend.”

Contrary to the Employer’s counsel’s characterization that the Union was ‘relentlessly rushing and threatening,’ the Employer had four months (from February 8, 2023 to June 15 and 16, 2023) to prepare for and participate meaningfully in the consultation. The 2/8/23 Partial Final Award ordered the Employer to “promptly” consult with the Union to determine the hazard pay differentials. “Promptly” means “without delay: very quickly or immediately.”²⁹ Commencing in February 2023, the Union properly requested, multiple times, via telephone, email, and letter, that the Employer consult as ordered. Because the Employer did not respond, the Union properly filed its Motion for Sanctions on April 3, 2023.³⁰

²⁸ Union’s 10/31/23 Post-Hearing Statement at 5.

²⁹ <https://www.merriam-webster.com/dictionary/promptly>

³⁰ Union’s Motion for sanctions Filed April 3, 2023.

Contrary to Employer's counsel's characterization that the Employer had only three days to complete the consultation, the arbitrator, to accommodate the Employer, granted two (2) extensions of the deadline to complete the consultation. The 3/7/23 Scheduling Order No. 2 initially set June 6, 2023 as the deadline for the completion of the consultation. The 4/21/23 Order not only extended the June 6, 2023 deadline, it ordered a ten (10) day period in which to conduct the consultation after it commenced:

Commencing June 5, 2023 and continuing until its completion on or before June 15, 2023, HGEA and the DOE representatives shall meet in consultation to determine THP differentials for individual affected HGEA members in BUs 02, 03, 04, 09, and 13.

Due to the Employer's delay in responding to the Union's discovery request, on June 9, 2023, the arbitrator approved the parties' agreement to again extend the deadline, ordering the consultation commence on Thursday, June 15, 2023 and continue through Friday, June 16, 2023. As a result of the Employer's delay, the ten (10) day period in which to conduct the consultation after it commenced was shortened to two (2) days.

Contrary to Employer's counsel's characterization that the Employer couldn't respond by June 16, 2023 because "it's over the weekend," the arbitrator takes judicial notice pursuant to HRE 201 that Friday, June 16, 2023 was not a holiday. Instead, June 16, 2023 was the agreed-upon and ordered deadline to complete the consultation. Yet the Employer did not utilize that work day to respond or even to request more time. Equally important, the Employer representative at the June 15, 2023 2-hour consultation allegedly stated he could not respond because he had no authority to do so. DOE Superintendent Hayashi did not attend the consultation, was on the Mainland, and could not be reached.

At the Stage 2 Hearing, on June 21, 2023, Superintendent Hayashi testified:

- He was not aware the 2/8/23 Partial Final Award ordered a consultation between the DOE and the HGEA regarding temporary hazard pay differentials.³¹
- He was not aware the THP articles in BU 02, 03, 04, 09, and 13 provided that in the event THP was recommended by either the DOE department head or the Union, the DOE's Personnel Director was required to consult with the Union regarding the granting of THP.³²
- He does not know whether the DOE's Personnel Director, or his designee, ever consulted with HGEA regarding THP, except for the recent June 15, 2023 consultation.³³
- After the 6/15/23 2-hour consultation (which Superintendent Hayashi did not attend), he was not aware whether anything further happened.³⁴
- "No one that he can think of" from the DOE ever asked him after the 6/15/23 2-hour consultation for his input into the consultation.³⁵
- He was not aware whether the DOE provided to HGEA any forms on which the recommendation for hazard pay differentials shall be submitted, or whether the DOE provided to HGEA the manner in which the recommendation for hazard pay differentials shall be submitted.³⁶

³¹ 2/21/23 Hearing Tr. at 150.

³² 2/21/23 Hearing Tr. at 151.

³³ 2/21/23 Hearing Tr. at 154.

³⁴ 2/21/23 Hearing Tr. at 154.

³⁵ 2/21/23 Hearing Tr. at 154-155.

³⁶ 2/21/23 Hearing Tr. at 156. ¶ E of the THP Articles in BU 02, 03, 04, 09, and 13 provides:

In short, there was no “rush and threat” by the Union, the Employer had four months, not three days, to participate meaningfully in the consultation, the Employer Representative had no authority to respond and was unable to obtain such authority at the June 15, 2023 2-hour consultation, and the Employer did not utilize June 16, 2023 to respond to or request more time for the consultation. Employer’s counsel’s response to Mr. Moniz regarding these facts was, “Well, get over it.”³⁷ The arbitrator disagrees. Based on the preponderance of the evidence, the arbitrator finds and concludes:

- The 2/8/23 Partial Final Award, the 3/8/23 Scheduling Order No. 2, and the 4/21/23 Order each provided the Employer with reasonable time in which to prepare for and participate meaningfully in the ordered consultation.
- The 2/8/23 Partial Final Award, the 3/8/23 Scheduling Order No. 2, the 4/21/23 Order, and the arbitrator’s June 9, 2023 approval of the condensed time for consultation each ordered the Employer to consult with the Union regarding the THP differentials.
- These orders, the purpose of which were to enforce the THP Article in the BU 02, 03, 04, 09, and 13 CBAs, were legitimate because they drew their essence from the collective bargaining agreements.³⁸
- These orders could be modified only for good cause and the arbitrator’s consent.

Forms and other requirements. Recommendations for hazard pay differentials shall be submitted on such forms and such manner as the Employer may require.

³⁷ 6/20/23 Hearing Tr. at 24.

³⁸ Rodrigues v. Cnty. of Kaua’i, 135 Haw. 456, 463, 353 P.3d 998, 1005 (Haw. 2015).

- The Employer's delay in responding to the Union's discovery and consultation requests were a substantial cause for the consultation being compressed into the final two available days (June 15 and 16, 2023) before the June 20, 2023 Stage 2 hearing on any remaining contested cases on THP differentials.
- On June 15, 2023, the Employer representatives attended the 2-hour consultation, but no attending Employer representative had authority to respond to the Union, and was unable to obtain such authority, because DOE Superintendent Hayashi did not attend the consultation, was on the Mainland, and could not be reached.
- Necessarily implicit in the orders to consult on the THP differentials was that the Union representative and the DOE representative attending the consultation each have authority to consult on the allocation of THP differentials for affected BU members.
- Mr. Moniz, the Union representative at the consultation, had full authority to consult on behalf of the BU 02, 03, 04, 09, and 13 members.
- The DOE representatives attending the consultation had no authority to respond to Mr. Moniz' proposals.
- The DOE did not show it had good cause for its failure to have a representative authorized to consult at the June 15, 2023 2-hour consultation.
- After the June 15, 2023 2-hour consultation, there still remained an additional day, Friday, June 16, 2023, to complete the consultation, but no further discussion occurred because the Employer:
 - Made no response to the Union's proposed methodologies regarding the allocation of THP differentials for affected BU members.

- According to Superintendent Hayashi's testimony, "no one that he can think of from the DOE" ever asked him after the 6/15/23 2-hour consultation for his input into the consultation.

- Did not request a "follow-on" meeting with the Union to respond, or request an extension of time to complete the consultation.³⁹

- The Employer did not request the arbitrator to: terminate the consultation before its June 16, 2023 completion deadline, or grant additional time for the consultation, or to continue the Stage 2 Hearing.

- On behalf of the Employer, Employer's counsel admitted: "We should have had a follow-on meeting because the first one was good and you [Mr. Moniz] were really excellent."

- On behalf of the Employer, Employer's counsel stated no forms were presented by the Employer to the Union pursuant to ¶ E of the THP Articles.⁴⁰

- While it is true, as Employer's counsel stated, that "consult does not mean settle,"⁴¹ it is also true that the consultation must be conducted in good faith.⁴²

- The duty to consult in good faith does not compel either the DOE or the Union to agree to a proposal or make a concession.⁴³

³⁹ 2/20/23 Hearing tr. at 22-23.

⁴⁰ 2/21/23 Hearing Tr.at 160-161.

⁴¹ 6/20/23 Hearing Tr. at 16,

⁴² Elkouri & Elkouri, *How Arbitration Works*, 8th Ed., at 9-50: "The implied covenant of "good faith and fair dealing" ... is deemed to be an inherent part of every collective bargaining agreement."

⁴³ Cf: Board of Educ. v. Hawaii Pub. Employment Relations Bd., 56 Haw. 85, 86, 528 P.2d 809, 810, (Haw. 1974) (HRS Chapter 89 requires the parties to bargain (negotiate) collectively in good faith).

- The duty to consult, however, does compel the DOE to “make every reasonable effort to consult with [the Union] and consider [its] input.”⁴⁴

- “Consult,” in this context, means “to deliberate together: confer.”⁴⁵

The duty to consult and confer is not satisfied by mere attendance at the consultation without the authority to respond. The duty to consult requires a good faith and reasonable effort to actually confer and explore a mutually agreeable resolution regarding the allocation of the THP differentials.

- The arbitrator agrees with Mr. Moniz’ statement that a 2-hour consultation “is not adequate to discuss the [THP differential] process for over 7,000 bargaining unit members.”⁴⁶

- Moreover, the Employer never responded to the Union after the 2-hour consultation, despite the additional scheduled day ordered for the consultation.

- The Employer’s participation in the 2-hour consultation was “in name only.” Although Employer representatives attended it, the consultation was one-sided, with only the Union proposing how to allocate the THP differentials. The Employer representatives had no authority to respond. The Employer did not prepare or present any forms for hazard pay differentials, as provided by Section E of the THP Articles.

⁴⁴ HRS § 89-9(c) provides:

Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.

⁴⁵ <https://www.merriam-webster.com/dictionary/consult>

⁴⁶ 6/20/23 Hearing Tr. at 19.

The Employer did not tell the Union the “manner” which the Employer required for the hazard pay differentials, as provided by Section E of the THP Articles. The Employer never got back to the Union or requested a follow-on meeting, despite the availability of Friday, June 16, 2023 to complete the consultation. The Employer did not request the Union or the arbitrator for more time for the consultation. In short, the Employer constructively terminated the consultation prematurely and unilaterally. Based on the preponderance of the evidence, the Union proved that the Employer’s attendance at the consultation was not in good faith.

Based on the above, the Employer violated the orders in the 2/8/23 Partial Final Award, the 3/8/23 Scheduling Order No. 2, the 4/21/23 Order, and the arbitrator’s June 9, 2023 order approving the condensed time for consultation, all of which ordered the Employer to consult with the Union regarding the THP differentials, because the Employer did not participate meaningfully and in good faith in the 6/15/23 2-hour consultation, did not respond to the Union’s proposed methodologies for allocating such differentials, and did not utilize the additional extension to Friday, June 16, 2023 to complete the consultation.

IX. The Employer’s violation of the arbitrator’s orders to consult constitutes a violation of the BU 02, 03, 04, 09, and 13 CBAs

The arbitrator’s orders to consult, the purpose of which was to enforce the THP Article in the BU 02, 03, 04, 09, and 13 CBAs, were legitimate because they drew their essence from the collective bargaining agreements.⁴⁷ The 2/8/23 Partial Final Award was final and binding, and ordered the Employer to consult promptly with the Union.

⁴⁷ Rodrigues v. Cnty. of Kaua’i, 135 Haw. 456, 463, 353 P.3d 998, 1005 (Haw. 2015).

Section G, "Step 3 Arbitration," in the Article on Grievance Procedure in the CBAs for BU 02, 03, 04, 09, and 13 contains the following identical sentence:⁴⁸

The decision of the Arbitrator shall be final and binding upon the Union, its members, the employees involved in the grievance and the Employer.

Just as the Employer was required to comply with the THP Articles in the CBAs, the Employer was required to comply with the arbitrator's orders enforcing the THP Article. In other words, the orders to consult were binding because they were part of the THP Articles in the CBAs.

The Employer's violations of the arbitrator's orders to consult also violated Articles 2 (Conflict), 3 (Maintenance of Rights and Benefits), and 5 (Rights of the Employer) in the BU 02, 03, 04, 09, and 13 CBAs.

The Articles on "Conflict" in the BU 02, 03, 04, 09, and 13 CBAs are identical, and provide:

If there is any conflict between the provisions of this Agreement and any of the rules and regulations of any civil service or other personnel regulations applicable to Employees, or any contracts between the Employer and Employees, the terms of this Agreement shall prevail.

The Union states, and the arbitrator agrees, that the Employer unilaterally nullified the arbitrator's orders to consult without obtaining the Union's consent or the arbitrator's approval. The Employer's failure to consult in good faith violated the "Conflict" Articles by attempting to have its failure to consult prevail over the arbitrator's orders to consult.

⁴⁸ See: BU 02 CBA at U-1 015; BU 03 CBA at U-2 016; BU-04 CBA at U-3 016; BU-09 CBA at U-105 014; BU-13 CBA at U-6 014.

The Articles on "Maintenance of Rights and Benefits" in the BU 02, 03, 04, 09, and 13 CBAs are identical, and provide:

Except as modified herein, Employees shall retain all rights and benefits pertaining to their conditions of employment as contained in the departmental and civil service rules and regulations and statutes at the time of execution of this Agreement, but excluding matters which are not negotiable under Chapter 89, HRS.

The Union states that HRS § 89-1(b) is integrated into the BU 02, 03, 04, 09, and 13 CBAs through their Maintenance of Rights and Benefits Article. HRS § 89-1(b) states in part:

- (b) It is the public policy of the State to promote harmonious and cooperative relations between government and its employees. These policies are best effectuated by:
 - (1) Recognizing the right of public employees to organize for the purpose of collective bargaining;
 - (2) Requiring public employers to negotiate with and enter into written agreements with the executive representatives on matters of wages, hours, and other conditions of employment. ...

The Union states, and the arbitrator agrees, that the Employer's breach of its duty to consult on and grant THP failed to promote harmonious and cooperative relations between the Employer and the affected BU members, thereby violating HRS 89-1(b), which was integrated into the Article on Maintenance of Rights and Benefits.

The Articles on "Rights of the Employer" in the BU 02, 03, 04, 09, and 13 CBAs are identical, and provide:

The Employer reserves and retains, solely and exclusively, all management rights, powers, and authority, including the right of management to manage, control, and direct its work forces and operations except those as may be modified under this Agreement.

The Union states, and the arbitrator agrees, that the Employer has the right to

make discretionary management decisions, but such decisions must not be arbitrary, capricious, or taken in bad faith.

As Elkouri states, "The implied covenant of "good faith and fair dealing" ... is deemed to be an inherent part of every collective bargaining agreement."⁴⁹ The obligation prevents any party to a collective bargaining agreement from doing anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, and it applies equally to management and labor.⁵⁰ The implied covenant of good faith and fair dealing is often cited when the issue is "reserved management rights." According to Elkouri:⁵¹

Thus, the covenant serves as the basis for the proposition that managerial discretions will be exercised reasonably and discretionary management decisions will be reviewed to determine if they were arbitrary, capricious, or discriminatory.

The arbitrator finds that based on the preponderance of the evidence, the Employer's failure to consult with the Union on the THP Article was arbitrary, capricious, and in bad faith. The Employer rendered the THP request process a mere formality before the arbitrator was necessarily compelled to enforce the THP Article. Accordingly, the Employer violated the "Rights of the Employer" Article in the BU 02, 03, 04, 09, and 13 CBAs.

Based on all the above, the arbitrator finds the Employer violated the

⁴⁹ Elkouri & Elkouri, *How Arbitration Works*, 8th Ed., at 9-50. See Also: Best Place v. Penn Am. Ins. Co., 82 Haw. 120, 123-124, 920 P.2d 334, 337-338 (Haw. 1996) (every contract contains an implied covenant of good faith and fair dealing that neither party will do anything that will deprive the other of the benefits of the agreement).

⁵⁰ Elkouri & Elkouri, *How Arbitration Works*, 8th Ed., at 9-50.

⁵¹ Elkouri & Elkouri, *How Arbitration Works*, 8th Ed., at 9-51.

Conflict, Maintenance of Rights and Benefits, and Rights of the Employer Articles in the BU 02, 03, 04, 09, and 13 CBAs.

X. The Employer's argument at Stage 2, which was the same argument the Employer made at Stage 1, is barred by the 2/8/23 Partial Final Award, which is "final and binding" on the Employer, the Union, and its members, and by the "law of the case"

The Employer's 10/31/23 Post-Hearing Brief made the following arguments (bold and italicized words in original):

- The Employer does not agree its Employees "faced hazardous working conditions that were any worse than what we *all* faced essentially everywhere in the nation for 2 years."⁵²
- "In such a challenging context, the concept of "hazard pay" is a non-sequitur, where the chances of catching COVID at work were no greater than working from home or going to buy food, entertainment, and other necessities."⁵³
- "[T]hough the union consistently distinguished solely between employees who were required to report to work and those school employees who worked from home, it made **no effort whatsoever** to actually **compare** the relative safety of the two contrasting environments from COVID infection."⁵⁴
- Former BOE Chair Catherine Payne and Dr. Sarah Kimble testified that "DOE campuses were likely safer from COVID infection than a typical family domicile and surrounding communities."⁵⁵

⁵² Employer's 10/31/23 Post-Hearing Brief at 2.

⁵³ Employer's 10/31/23 Post-Hearing Brief at 2.

⁵⁴ Employer's 10/31/23 Post-Hearing Brief at 2-3.

⁵⁵ Employer's 10/31/23 Post-Hearing Brief at 3.

- The Union’s witnesses conceded that “no matter where you were at any given place during COVID, no one really knew precisely *where* one caught COVID in any given case.”⁵⁶

- “[I]f working from home was basically just as hazardous as working at DOE (if not more so during this period), then hazard pay was not merited.”⁵⁷

- [T]hose DOE employees who were required to report to work during COVID were not facing unique dangers, rather, they were in the same leaky boat as everybody else during this difficult time. HGEA absolutely did not demonstrate otherwise because there is no evidence in this case supporting the raw *assumption* that the home was such a safe place relative to that *other* DOE workplace, namely its heavily patrolled campuses.”⁵⁸

- “The bottom line is that the union failed to show that working at DOE was less safe, which is not surprising considering that at DOE, there is constant scrutiny, (much of it outside), as well as onsite PPE, an abundant social pressure, resulting self-policing, regulated visitations, and of course, constant testing, and much more.”⁵⁹

- “Another thing we may never know is whether any person actually caught COVID while participating in so-called “grab-and-go” food drives.”⁶⁰

⁵⁶ Employer’s 10/31/23 Post-Hearing Brief at 3.

⁵⁷ Employer’s 10/31/23 Post-Hearing Brief at 4.

⁵⁸ Employer’s 10/31/23 Post-Hearing Brief at 4.

⁵⁹ Employer’s 10/31/23 Post-Hearing Brief at 4.

⁶⁰ Employer’s 10/31/23 Post-Hearing Brief at 5.

- “While it is impossible to eliminate all of the threats that COVID presented during this time, DOE did their best with the limited resources available to them and the job they performed with our schools defending against COVID was amazing and heroic.”⁶¹

- The DOE does not deserve to be financially devastated by a poorly written contract, a worldwide epidemic that no one anticipated, and massive hazard pay awards that are not justified by the evidence where the burden of proof rests with the union.⁶²

The Employer essentially argues that hazard pay is not merited because working from home was allegedly just as hazardous as working at DOE, if not more so. This was the same argument the Employer made at Stage 1 in response to the Union's Motion for Summary Disposition: “[F]ormer BOE Chairperson Catherine Payne testified that it was her belief that employees at the various DOE facilities were actually safer than in the public at large, including at the relevant timeframe.”⁶³

The arbitrator disagrees with the Employer's argument for the following reasons:

**The 2/8/23 Partial Final Award is “final and binding”
on the Employer, the Union, and its members**

The 2/8/23 Partial Final Award, which granted the Union's Motion for Partial Summary Judgment, already decided that the affected BU members were entitled to THP, with the remaining issue being whether each affected member's degree of hazard

⁶¹ Employer's 10/31/23 Post-Hearing Brief at 5.

⁶² Employer's 10/31/23 Post-Hearing Brief at 5.

⁶³ 12/16/22 Employer's Reply to HGEA's Motion for Summary Disposition at 2.

was “Severe” (15% THP) or “Most Severe”(25% THP). The Decision, Order, and Partial Final Arbitration Award stated in pertinent part:⁶⁴

3. The arbitrator finds and concludes:

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

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

c. The “affected DOE BU 02, 03, 04, 09, and 13 members” (meaning, the HGEA members in those BUs who were required to report to work)⁶⁵ were *exposed* to unusually hazardous working conditions, specifically, the highly contagious COVID-19 disease and its variants at DOE facilities.

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

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

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

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

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

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

⁶⁴ See: 2/8/23 Partial Arbitration Award at 54-55.

⁶⁵ 12/6/22 Hearing Tr. at 360.

13.

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

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

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

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

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

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

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

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

The 2/8/23 Partial Final Award is "final and binding" on the Employer, the Union, and its members. The CBAs for BU 02, 03, 04, 09, and 13 contain the following identical sentence in Section G, "Step 3 Arbitration," of their respective Article on Grievance Procedure:⁶⁶

⁶⁶ See: BU 02 CBA at U-1 015; BU 03 CBA at U-2 016; BU-04 CBA at U-3 016; BU-09 CBA at U-105 014; BU-13 CBA at U-6 014.

The decision of the Arbitrator shall be final and binding upon the Union, its members, the employees involved in the grievance and the Employer.

An arbitration award is considered to be final when consideration of the submitted issues has been concluded and a resolution reached.⁶⁷ The 2/8/23 Partial Final Award provided in part that the “arbitrator shall retain jurisdiction to clarify any questions about this Order, Decision, and Partial Final Arbitration Award.”⁶⁸ Employer did not request any clarifications. Nevertheless, the Employer has ignored the finality of the 2/8/23 Partial Final Award, and restates the same argument rejected by the Partial Final Award.

Because the Partial Final Award is “final” with respect to whether the affected BU members were entitled to THP, the Employer cannot re-litigate this issue. As Mr. Moniz correctly observed, “that ship has sailed.”⁶⁹

[T]hat ship has sailed, because under the contract language, once temporary hazardous working conditions are established, which they have been in this case, then the Employer shall grant hazard pay. ... We’re past that.

The 2/8/23 Decision and Order is designated as a “Partial Final Award” because it is final and binding on the issue of whether the Employer shall grant THP. The only remaining issue is whether each affected BU member merits the “Severe” or “Most Severe” THP differential. Unfortunately, the Employer did not address this issue in its Post Hearing Brief.

The 2/8/23 Partial Final award constitutes the “law of the case”

⁶⁷ Brennan v. Stewarts’ Pharmacies, Ltd., 59 Haw. 207, 579 P.2d 673 (1978).

⁶⁸ 2/8/23 Partial Final Award at 56.

⁶⁹ 6/26/23 Hearing Tr. at 490-491. See also: 7/3/23 Hearing Tr. at 1176.

The 2/8/23 Partial Final Award also constitutes the "law of the case."

The "law of the case" refers to "the usual practice of courts to refuse to disturb all prior rulings in a particular case, including rulings made by the judge himself."⁷⁰ According to this doctrine, "unless cogent reasons support the second court's action, any modification of a prior ruling of another court of equal and concurrent jurisdiction will be deemed an abuse of discretion."⁷¹

The Employer did not request any modifications of the 2/8/23 Partial Final Award. Even assuming *arguendo* the Employer did so request, there are no cogent reasons or exceptional circumstances supporting modification of the 2/8/23 Partial Final Award.

The following examples suffice:

Governor Ige ordered all persons in the State to stay at home except for essential workers, such as DOE employees, who were ordered to report to work by the DOE

As noted above, the Employer essentially argues that hazard pay is not merited because working from home was allegedly just as hazardous as working at DOE, if not more so. Based on the arbitral record, the arbitrator disagrees.

The Employer's argument is contrary to Governor Ige's Emergency Proclamations. Governor Ige's March 4, 2020 Proclamation stated that COVID-19 is highly contagious, and the occurrence or threat of COVID-19 may likely result in substantial injury or harm to the population or may likely result in loss of life.⁷² Governor Ige determined these conditions are of such "character and magnitude to constitute an

⁷⁰ *Chun v. Bd. of Trs. of Emps.' Ret. Sys. of State of Hawai'i*, 92 Hawai'i 432, 441, 992 P.2d 127, 136 (2000) (quoting *Wong v. City & Cnty. of Honolulu*, 66 Haw. 389, 396, 665 P.2d 157, 162 (1983)).

⁷¹ *Best Place, Inc. v. Penn Am. Ins. Co.*, 82 Hawai'i 120, 135, 920 P.2d 334, 349 (1996).

⁷² See, for example, U-7, which is a copy of the March 4, 2021 Emergency Proclamation, at 001-004.

emergency or disaster” as contemplated by HRS § 127A-2. On March 23, 2020, Governor Ige issued a “Third Supplemental Proclamation” ordering all persons in the State to stay at home except for essential workers.⁷³ Essential workers included DOE employees who still performed essential functions and must report to work.⁷⁴

In short, the Governor, after consultation with the DOH,⁷⁵ determined it was safer to safer to stay at home than to go to work.

The THP Article is premised in pertinent part on whether the DOE BU member was *exposed* to the unusually hazardous working condition at a DOE facility, not whether the BU member actually caught COVID at the DOE facility

The 2/8/23 Partial Final Award has already decided that the affected BU members were entitled to THP, with the remaining issue being whether each affected member’s degree of hazard was “Severe” (15% THP) or “Most Severe”(25% THP).

The Employer’s Post Hearing Brief nevertheless argues there should be no hazard pay because “The Union’s witnesses conceded that “no matter where you were at any given place during COVID, no one really knew precisely *where* one caught COVID in any given case”⁷⁶ and “Another thing we may never know is whether any person actually caught COVID while participating in so-called “grab-and-go” food drives.”⁷⁷

⁷³ U-10 at 002-003.

⁷⁴ U-52 at 002.

⁷⁵ 7/3/23 Hearing Tr. at 1155-1156.

⁷⁶ Employer’s 10/31/23 Post-Hearing Brief at 3.

⁷⁷ Employer’s 10/31/23 Post-Hearing Brief at 5.

The arbitrator disagrees. For example, an Educational Assistant testified she was exposed to a student who tested positive for COVID-19, caught COVID-19 from the student, and, due to her COVID-19 developing into pneumonia, was hospitalized for a week. While hospitalized, she was required be on oxygen to breathe.⁷⁸ The Employer's counsel asked no questions of this Educational Assistant.⁷⁹

Moreover, the THP Article is premised on whether the DOE BU member was *exposed* to the unusually hazardous working condition at DOE facility, not whether the BU member actually caught COVID at the DOE facility.⁸⁰ Supervisor Hayashi admitted this in his Stage 1 testimony:

- Superintendent Hayashi admitted that COVID-19 and its variants was an unusually hazardous working condition:⁸¹

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

⁷⁸ Tr. at 1187; 1188.

⁷⁹ 7/3/23 Hearing tr. at 1190.

⁸⁰ The THP language is identical for bargaining units 2, 3, 4, 9, and 13,⁸⁰ and states as follows:

Temporary Hazard Pay

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

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

⁸¹ Tr. at 59.

A. Yes.

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

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

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

Q. For the DOE?

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

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

A. Yes.

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

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

- Superintendent Hayashi admitted the THP articles in BUs 2, 3, 4, 9, and 13 require only that the BU member be *exposed* to the unusually hazardous working condition, as opposed to actually suffering injury, in order to qualify for THP:⁸²

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

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

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

⁸² 12/5/22 Hearing Tr. at 57-58.

A. It doesn't say that.

- That the affected BU members were *exposed to* COVID's unusually hazardous working condition at DOE facilities is undisputed. The 2-year COVID Emergency Period was March 4, 2020 to March 25, 2022. For 9 months during the Emergency Period, from July 3, 2021 through March 2022, the DOE, with the assistance of DOH, kept "COVID-19 HIDEOE Case Count" data for all students and staff at DOE schools (not including 347 Complex, District, or State Office employees). **For that 9-month period alone, the DOE COVID-10 Case Count data reported that out of 185,038 total students and staff on campus, 26,306 cumulative positive COVID-19 cases were counted.**⁸³

- DOE Superintendent Hayashi testified that 26,306 was the total number of positive COVID-19 cases for staff and students for the period 7/3/21 through March 2022.⁸⁴

- DOE Board Chairperson Catherine Payne,⁸⁵ who did not testify at the Stage 2 Hearing, testified at the Stage 1 Hearing that there were 26,303 cumulative positive COVID-19 cases at DOE schools from 7/3/21 through March 2022, despite the DOE's mitigation efforts to reduce exposure.⁸⁶

- While the COVID-19 HIDEOE Case Count data made no differentiation where a student or staff person contracted COVID-19, either in the community or at

⁸³ U-103 at 001.

⁸⁴ 12/5/22 Hearing Tr. at 154.

⁸⁵ The arbitrator found DOE Board of Education Chairperson Payne's testimony at the Stage 1 Hearing to be honest and credible.

⁸⁶ 12/5/22 Hearing Tr. at 226-227.

school,⁸⁷ Board Chairperson Catherine Payne testified there was a risk of exposure from that person at school:⁸⁸

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

A. Yes, that's – yes.

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

A. Yes.

- Dr. Sarah Kemble, the DOH Deputy Chief of the Disease Outbreak Control Division and Acting State Epidemiologist during the COVID Emergency Period,⁸⁹ testified at the Stage 2 Hearing that despite the "layered mitigation efforts" to reduce exposure to COVID at DOE facilities, the DOE did not eliminate exposure to the hazard of COVID at DOE facilities.⁹⁰

Q. And all of these mitigation efforts that were done, the layered mitigation that you describes, right, none of these things, or all of them together, prevents COVID-19 infection, right?

A. They're all ways to prevent infection in the sense that you're reducing the risk that you could have transmission in that scenario, but no one thing or even all things together is going to one hundred percent prevent every instance of transmission.

Q. So there's always that risk, correct?

A. MM-hmm.

⁸⁷ 12/5/22 Hearing Tr. at 231.

⁸⁸ 12/5/22 Hearing Tr. at 232.

⁸⁹ The arbitrator finds Dr. Kemble's testimony to be honest and credible.

⁹⁰ 7/3/23 Hearing tr. at 1158-1159.

Q. You have to answer “yes.”

A. Oh, yes.

Q. Thank you. And in the course of your work, specifically with the DOE during the time period you were acting epidemiologist and then full-time epidemiologist, were there reports of clusters of COVID-19 within the schools?

A. Yes.

- The DOE’s own guidance to staff recognized that DOE staff will test positive for SARS-CoV-2 and be diagnosed with COVID-19 infection. On or around December 15, 2021, the DOE issued the “COVID-19 Health and Safety Guidance for School Year 2021-22,”⁹¹ which provided in part (Emphasis added):

- In-person instruction is particularly important for younger children and those with special education needs. ... **Reopening of schools requires the ... risk of exposure to COVID-19.**⁹²

- The more people with whom a student or staff member interacts and the longer that interaction, the higher the risk of COVID-19 spread. ... As the COVID-19 pandemic continues and community spread persists, even when a school carefully prepares, plans, and coordinates, students and staff will test positive for SARS-CoV-2 and be diagnosed with COVID-19 infection.⁹³

- HIDOE recognizes that some of our population may not be able to follow all recommended health and safety guidelines such as the ability to wear a mask or maintain appropriate physical distance from others. ... HIDOE recognizes that some of our population may not be able to follow all recommended health and safety guidelines such as the ability to wear or maintain appropriate physical distance from others.⁹⁴

⁹¹ U-97 at 001-2.

⁹² U-97 at 005.

⁹³ U-97 at 006.

⁹⁴ U-97 at 008, 11.

- Ohana bubbles or cohorting does not eliminate the risk of COVID-19 spread.⁹⁵
- **Cafeterias pose a higher risk of COVID-19 spread because they are indoors.**⁹⁶
- **[A]ll visitors must report to the main administration office to ensure sign-in, wellness checks and proper vetting protocols are completed.**⁹⁷ ...
- **Mixing students from different classes and cohorts within a school and across different schools increases the risk of COVID-19 spread.**⁹⁸
- **Due to increased exhalation that occurs during physical activity, some sports can put players, coaches, trainers, and others who are not fully vaccinated at increased risk for spreading COVID-19. Close contact and indoor sports are particularly high risk. Similar risks might exist for other extracurricular activities, such as band, choir, theater, and other school clubs that meet indoors.**⁹⁹
- **When someone becomes sick, receives a positive diagnosis, or is unvaccinated and identified as a close contact at school ...**
The individuals should be sent home or to a health care facility depending on symptom severity. ...
 - If the persons must wait for pick-up, identify an isolation area, ideally with a dedicated restroom not used by others. Ensure students are isolated in a non-threatening manner, within the line of sight of an adult, and for very short periods of time. If more than one person is in the isolation area, everyone must wear a mask and stay 6 feet apart. Ensure personnel managing students or employees who are potentially infected with COVID-19 are protected from exposure.¹⁰⁰

⁹⁵ U-97 at 014.

⁹⁶ U-97 at 016.

⁹⁷ U-97 at 21.

⁹⁸ U-97 at 21.

⁹⁹ U-97 at 22-23.

¹⁰⁰ U-97 at 29-30.

- The testimony of 96 BU members at Stage 2 belied the DOE's argument that hazard pay is not merited because working from home was allegedly "just as hazardous as working at DOE, if not more so." Not one of the 96 BU witnesses testified he or she was safer at the DOE facility compared to working from home. The Employer's counsel did not ask even one of these 96 BU witness if working from home was as or more hazardous than working at school.

- It should go without saying, but obviously, there were no co-employees, students, parents, or other members of the public physically present at the BU member's home. The DOH State Epidemiologist, Dr. Kemble, testified, "The more people you interact with, the more your risk goes up."¹⁰¹ As the DOE itself advised, "the more people with whom a ... staff member interacts and the longer that interaction, the higher the risk of COVID-19 spread."

- The exposure at home was markedly less for BU members compared to the exposure at school. As discussed below, each BU witness testified regarding the genuine unusually hazardous risks he or she faced at school.

- The testimony of the 96 BU witnesses proved by a preponderance of the evidence that it was *not safer to work at school compared to working from home*.

- If working at school was safer than working from home, ordering essential DOE employees to work at school would be unnecessary. The DOE, however, in response to the COVID-19 pandemic and Governor Ige's Proclamations, designated

¹⁰¹ 7/3/23 Hearing Tr. at 1154.

DOE employees who performed essential functions and ordered them to report to work at school.¹⁰²

- In the 2/8/23 Partial Final Award, the arbitrator found and concluded that
 - While the DOE's mitigation efforts may have made DOE facilities safer compared to the community overall, the DOE's working conditions during the March 4, 2020 through March 25, 2022 period remained "unusually hazardous." The COVID-19 HIDEO Case Count data for all students and staff at DOE schools, reporting 26,306 positive COVID-19 cases for staff and students for the period 7/3/21 through March 2022, indicates the DOE's working conditions remained unusually hazardous.¹⁰³
 - Based on Governor Ige's Emergency Proclamations, the definitions of "emergency," "disaster," and "hazard" in HRS Chapter 127A-2, the DOE directives requiring DOE employees who performed essential functions to report to work, the COVID-19 HIDEO Case Count data for all students and staff at DOE schools, and the genuine risk of exposure from a positive COVID-19 person at school, the arbitrator finds and concludes that the affected DOE BU 2, 3, 4, 9, and 13 members were *exposed* to unusually hazardous working conditions, specifically, the highly contagious COVID-19 disease and its variants at DOE facilities.
 - The "affected DOE BU 02, 03, 04, 09, and 13 members" (meaning, the HGEA members in those BUs who were required to report to work)¹⁰⁴ were *exposed*

¹⁰² U-52 at 002.

¹⁰³ U-103 at 001.

¹⁰⁴ 12/6/22 Hearing Tr. at 360.

to unusually hazardous working conditions, specifically, the highly contagious COVID-19 disease and its variants at DOE facilities.

- The affected DOE BU 02, 03, 04, 09, and 13 members' exposure to unusually hazardous working conditions was temporary, specifically from March 4, 2020 to March 25, 2022.¹⁰⁵

Based on the arbitral evidence, the words of the THP Article are plain and clear, and there is no basis for departing from its plain meaning

The Employer's Post Hearing Brief claims the THP Article was "a poorly written contract." Based on the arbitral evidence, the arbitrator disagrees. Among other things:

- The Governor, on behalf of the Employer, agreed to the language of the THP Article in the respective "Collective Bargaining Agreements."
- The Employer did not claim the THP Article was "poorly written" in its 11/13/20 Step 2 Grievance Response,¹⁰⁶ or its 12/16/22 Reply to the Union's Motion for Summary Disposition. The BU 02, 03, 04, 09, and 13 CBAs provide: "The Arbitrator shall not consider any alleged violations or charges other than those presented in Step 2."¹⁰⁷
- Other than the bald assertion that the THP Article was "poorly written," the Employer provided no analysis or evidence showing the THP Article is ambiguous or any other reason for its non-enforcement or reformation. There was no testimony or

¹⁰⁵ See: 2/8/23 Partial Arbitration Award at 54-55.

¹⁰⁶ See: Exhibit A to Employer's 11/22/22 Pretrial Statement, which was the Employer's November 13, 2020 Step 2 Grievance response.

¹⁰⁷ See: Article 11 – Grievance Procedure, Section G – Arbitration, Paragraph 3 of the BU 2, 3, 4, and 13 CBAs, and Article 14 - Grievance Procedure, Section G – Arbitration, Paragraph 3 of the BU 9 CBA.

exhibits alleging the THP article was ambiguous, and no plausible contention was made that it was susceptible to more than one meaning or for a conflicting interpretation.

- There was no request to admit parol evidence, and no witnesses from the Employer negotiating committee were listed or called to testify regarding the intent of the THP Article or how it should be otherwise interpreted.

- There was no evidence specifying what portion of the THP Article was allegedly ambiguous, and no evidence proposing what the THP language should have been.

- Moreover, the BU 02, 03, 04, 09, and 13 CBAs provide: "The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the terms of the Agreement."¹⁰⁸

Accordingly, based on the arbitral evidence, the arbitrator finds the words of the THP Article are plain and clear, and there is no basis for departing from its plain meaning.

Nothing in the THP Article provides an exception prohibiting THP if the "unusually hazardous working condition" were not anticipated

The Employer claims COVID-19 was "a worldwide epidemic that no one anticipated."

Based on the arbitral evidence, the arbitrator finds that nothing in the THP Article provides an exception prohibiting THP if the "unusually hazardous working condition" were not anticipated. The fact that COVID-19 was a "novel" Coronavirus and not anticipated is a condition which is consistent with and supports granting THP. Section

¹⁰⁸ See: Article 11 – Grievance Procedure, Section G – Arbitration, Paragraph 1 of the BU 2, 3, 4, and 13 CBAs, and Article 14 – Grievance Procedure, Section G – Arbitration, Paragraph 1 of the BU 9 CBA.

A.3 of the THP Article (“The unusually hazardous working conditions have not been considered in the assignment of the class to a salary range”) is one of the three conditions which must be met for granting THP. Superintendent Hayashi admitted the DOE’s unusually hazardous working conditions caused by of COVID-19 had not been considered in the assignment of the affected DOE BU 2, 3, 4, 9, and 13 members to their respective salary range:

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

A. One second. Correct.

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

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

Based on Superintendent Hayashi’s testimony, the arbitrator found and concluded that the DOE’s unusually hazardous working conditions caused by COVID-19 had not been considered in the assignment of the affected DOE BU 2, 3, 4, 9, and 13 members to their respective salary range.¹⁰⁹

Based on the arbitral record, the Employer’s contention that COVID-19 was “a worldwide epidemic that no one anticipated” is without merit.

The arbitrator is required to apply the THP Article according to its clear and unambiguous terms because the Union met its burden of proof, regardless of the amount of the eventual THP awards

¹⁰⁹ 2/8/23 Partial Final Award at 41.

The Employer claims the DOE does not deserve to be financially devastated by “massive hazard pay awards that are not justified by the evidence where the burden of proof rests with the union.”

The arbitrator disagrees. The arbitrator is required to apply the THP Article notwithstanding this equity argument, because the THP Article is clear and unambiguous. As Elkouri states:¹¹⁰

It is widely recognized that if a contract “is clear and unambiguous it must be applied in accordance with its terms despite the equities that may be present on either side.”

The fact that the burden rests with the Union based upon a preponderance of the evidence to prove how the THP differentials should be allocated is entirely distinct from the dollar amount of the THP awarded. As discussed below, the Union met its burden of proof. The Union called 96 witnesses¹¹¹ who testified that as “essential workers,” they were required to be exposed to unusually hazardous working conditions during the two-year Emergency Period (March 2020 to March 2022). As stated herein, the Union proved by a preponderance of the evidence that the affected BU members (meaning, the HGEA members in those BUs who were required to report to work)¹¹² were *exposed* to unusually hazardous working conditions, specifically, the highly contagious COVID-19 disease and its variants at DOE facilities.

Moreover, the Union states the Employer has received millions of dollars in funds

¹¹⁰ Elkouri & Elkouri, *How Arbitration Works*, 8th ed., at 9-52.

¹¹¹ The Union also called and examined: DOE Superintendent Hayashi on 6/21/23, DOE Assistant Superintendent Brian Hallett on 6/21/23, and HGEA Executive Assistant for Field Services Sanford Chun on 6/28/23, for a total of 99 witnesses called by the Union.

¹¹² Tr. at 360.

from the federal government to pay for *premium pay*, which is THP by another name.¹¹³

- The American Rescue Plan Act (“ARPA”) approved the distribution of \$350 Billion United States Dollars in Fiscal Recovery Funds to enable local governments to pay Premium Pay to their employees who performed essential work during the COVID-19 public health emergency.¹¹⁴

- The Department of the Treasury defined “essential work” as “work involving regular in-person interactions or regular physical handling of items that were also handled by others.”¹¹⁵

- The intent of the Fiscal Recovery Funds is to “help respond to the needs of essential workers by allowing recipients to remunerate essential workers for the elevated health risks they have faced and continue to face during the public health emergency.”¹¹⁶

- The DOE received Fiscal Recovery Funds through ARPA.¹¹⁷

- The Department of the Treasury described the purpose of Premium pay as being substantially similar to the purpose of THP, as described by the BUs 2, 3, 4, 13, and 14 CBAs. For all intents and purposes, Premium pay was the equivalent of THP.¹¹⁸

¹¹³ U-63 013; U-107 003.

¹¹⁴ U-62 001-5; U-63 001-39; U-107 001.

¹¹⁵ U-63 012-3; U-107 003.

¹¹⁶ U-63 012-3; U-107 003.

¹¹⁷ Tr. at 201; 202.

¹¹⁸ See Ex. U-1 048-9; U-2 046-8; U-3 044-6; U-6 050-1; U-105 044-6; U-63 013; U-107 003.

The Employer never challenged the plain meaning of the THP Article, and never requested that it be modified. Even assuming *arguendo* that the Employer did so request, there are no cogent reasons for doing so, and the arbitrator declines to modify the 2/8/23 Partial Final Award. The Stage 2 Hearing is not a vehicle to re-litigate the 2/8/23 Partial Final Award.

XI. Allocation of the THP differentials for affected BU 02, 03, 04, 09, and 13 members

Introduction

As noted above, the Union called 96 witnesses who as “essential workers” were required to be exposed to unusually hazardous working conditions at school during the two-year Emergency period (March 2020 to March 2022).

In the Employer’s Post Hearing Brief, the Employer’s counsel equated the Union’s witnesses to a “*Red Army*” consisting of HGEA’s “massive armada of witnesses” and trivialized their testimony as “anecdotal” with “very little useful information”:¹¹⁹ (*Italicized words in the original*)

The employer faced a preverbal [sic] “*Red Army*” consisting of HGEA’s massive armada of witnesses, all being asked the same questions about DOE facilities, and generally providing the same anecdotal answers. Very little useful information was gathered during this flood of testimony because it was pretty much *all the same*.

The arbitrator disagrees with the Employer’s counsel’s characterizations. The arbitrator takes judicial notice pursuant to HRE 201 that historically, the “Red Army” was the “Workers’ and Peasants’ Red Army,” established in January 1918 by Leon Trotsky

¹¹⁹ Employer’s Post Hearing Brief at 3. The Employer’s Post Hearing Brief also states in part: “...one might wonder why this brief isn’t 50 plus pages of convoluted arguments, mindless citations, and breathless quotations; ...” Employer’s Post Hearing Brief at 3. It is unknown whether Employer’s counsel was referring to the Union’s witnesses’ testimony as “breathless quotations.” If so, the arbitrator disagrees with this characterization.

to oppose the military forces of the new nation's adversaries during the Russian Civil War.¹²⁰

The 96 BU witnesses were a representative sample of all (approximately 7,800) DOE BU members across the State. It appears the Employer's counsel is implying that these 96 BU witnesses, "providing the same anecdotal answers," were akin to the Workers' and Peasants' Red Army, testifying in mindless conformity to the Union's party line. Moreover, trivializing the BU witnesses' testimony as "anecdotes" implies their testimonies, which were under oath, were amusing but unreliable short stories about their experience.

The Employer's counsel's equating the 96 BU members to a "*Red Army*" and belittling their testimonies as "anecdotes" consisting of "very little useful information" was unfair and untrue. Contrary to the Employer's counsel's implications, the arbitrator finds and concludes:

- The Union's 96 BU members who testified represented a valid and reliable cross section of the different DOE job classifications on Oahu, Maui, the Big Island, and Kauai.
- The 96 BU members' testimony was honest, credible, and compelling.
- The BU witnesses did not give the same scripted testimony.
- The BU witnesses did not enlarge or over-dramatize the truth.
- The BU witnesses' testimonies were not only useful, they provided critical evidence about the real issue at Stage 2, which was the allocation of THP differentials between "Severe" (15%) and "Most Severe" (25%). All 96 BU Members, representing

¹²⁰ https://en.wikipedia.org/wiki/Red_Army.

the various DOE job classifications, testified they were exposed to members of the public as a routine part of their job functions. The Union's position is that each DOE BU 02, 03, 04, 09, and 13 member who had exposure to (i.e., had contact/interaction with) any members of the public at school, including but not limited to students, is entitled to a differential award of 25% from March 4, 2020 through March 25, 2022.

- The BU witnesses' testimonies showed their genuine dedication to their students, their schools, and their community despite the risk of exposure to COVID-19 and its variants.

To gratuitously equate the DOE Employees to a "Red Army" telling useless anecdotes was unpersuasive, and did not serve to "promote harmonious and cooperative relations" between the Employer and the affected BU members, which is the public policy of this State.¹²¹

The remaining issue at Stage 2 is whether the affected DOE BU 02, 03, 04, 09, and 13 members should be awarded the "Severe" (15%) or "Most Severe" (25%) 25 percent THP differential

The only remaining issue at Stage 2 (other than the pending BU 06 Motion for THP) is:

Pursuant to Section B, Hazard Pay Differentials, of the THP Articles, whether affected DOE BU 02, 03, 04, 09, and 13 members (meaning, the HGEA members in those BUs who were required to report to work) should be awarded the "most severe" 25 percent THP differential, or the "severe" 15% percent THP differential.

Unfortunately, the Employer did not address this issue whatsoever in its Post Hearing Brief, other than to repeat the already rejected argument that there should be no hazard pay at all. As a result, the arbitrator does not have the

¹²¹ See: HRS § 89-1(b).

benefit of the Employer's position regarding the allocation of the THP differentials between "Severe" and "Most Severe."

Equally important, the Employer presented *no* credible evidence at Stage 2, via direct or cross examination or exhibits, regarding the allocation of the THP differentials between "Severe" and "Most Severe." The Employer's sole witness, Dr. Kemble, the Department of Health Acting Chief Epidemiologist during the COVID Emergency Period, did not testify regarding what percentages of hazard pay the DOE employees are entitled to, and was not even aware that was the purpose of Stage 2:¹²²

Q. (By Mr. Moniz) ... Do you understand ... [t]hat the purpose of this hearing is to determine what percentages of hazard pay individual DOE employees that belong to HGEA are entitled to?

A. (Dr. Kemble) I'm not aware of the specifics.

As a result, the Employer presented no credible evidence opposing the Union's position regarding the allocation of the THP differentials between "Severe" and "Most Severe."

The Union, on the other hand, addressed the allocation of the THP differentials in comprehensive detail. In summary, the Union proposed that based on the THP Article language, the 2/8/23 Partial Final Award, and the evidence at the Stage 2 Hearing:¹²³

- Each DOE BU 02, 03, 04, 09, and 13 member who reported to work and had no contact with the general public but had contact/interaction with co-employees is entitled to a differential award of 15% from March 4, 2020 through March 25, 2022.

¹²² 7/3/23 Hearing Tr. at 1153.

¹²³ 2/19/23 Union's Pre-Hearing Statement at 4;

- Each DOE BU 02, 03, 04, 09, and 13 member who also had contact/interaction with any members of the public, including but not limited to students, is entitled to a differential award of 25% from March 4, 2020 through March 25, 2022.

As discussed below, all 96 BU Members, representing the various DOE HGEA job classifications, testified they were exposed to (i.e., had contact/interaction with) members of the public as a routine part of their job functions.

The THP differential criteria

Section B, Hazard Pay Differentials, of the THP Article for BU 02, 03, 04, 09, and 13 provides the criteria for the allocation of THP between 15% (Severe) or 25% (Most Severe):

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

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.

The DOE BU 02, 03, 04, 09, and 13 job classifications

The scope of this Class Grievance includes all former¹²⁴ and current DOE BU 2, 3, 4, 9, and 13 Members who worked for any period between March 4, 2020 – March 25, 2022. On behalf of the Union, Mr. Moniz estimated there are approximately 7,800 Class Grievants organized into BUs 2, 3, 4, 6, 9, and 13.¹²⁵

The Union's Supplemental Witness List for Stage 2, filed on June 19, 2023, listed 193 witnesses. From this Supplemental Witness List, the Union called ninety-six (96) BU 02, 03, 04, 06, 09, and 13 Members to testify at Stage 2. At the outset of Stage 2, Mr. Moniz stated on behalf of the Union:¹²⁶

... I don't intend to call 7,800 witnesses to establish each and every person, but at the same time we do intend to call the cross section of all the different job classifications on every island to demonstrate what the work conditions were ...

The Union states:¹²⁷

- The 96 BU Members who testified represented the common experience of all former and current BU members from their respective classifications that worked during the March 4, 2020 through March 25, 2022 Emergency Period.
- These former and current BU members were exposed to the temporary hazardous working conditions resulting from COVID-19 and its variants during the COVID Emergency Period.

The BU witnesses who testified represented the following classifications:

¹²⁴ "Former" BU members means those affected DOE BU 02, 03, 04, 09, and 13 members who may have left government service during March 4, 2020 through March 25, 2022.

¹²⁵ 12/2/22 Hearing Tr. at 80.

¹²⁶ 6/20/23 Hearing Tr. at 28.

¹²⁷ Union Post-Hearing Statement at 88-90.

- Account Clerk ("AC")
- Athletic Health Care Trainer ("AHCT")
- Athletic Health Care Trainer Coordinator ("AHCTC")
- Communication Aide ("CA")
- Education Assistant ("EA")
- DP User Support Tech ("DPUST")
- Library Assistant ("LA")
- Office Assistant ("OA")
- Occupational Therapist ("OT")
- Private Secretary ("PS")
- Physical Therapist ("PT")
- Registered Professional Nurse ("RPN")
- School Administrative Services Assistant ("SASA")
- School Custodian ("SC")
- School Custodian Services Support ("SCSS")
- School Food Service Manager ("SFSM")
- School Health Assistant ("SHA")
- Speech Pathologist ("SP")
- School Safety and Security Officer ("SSSO")
- School Security Attendant ("SSA")
- Social Worker ("SW")

The Union states the scope of the Class Grievance is not limited to the classifications listed above, and those classifications do not constitute the totality of

classifications foreseen, intended, and included in the Union's Step 2 Class Grievance and its request for an award for THP. If any classifications are not included in the lists above, those classifications are also included in the Union's requested remedies.

The Union requests THP at the *Most Severe* differential rate be granted to all the affected BU 02, 03, 04, 09, and 13 Members, or, in the alternative, the *Most Severe* rate for most, and the *Severe* rate for all others by default.

The arbitrator finds and concludes that based on a preponderance of the evidence:

- The Union's 96 DOE BU members who testified represented a valid and reliable cross section of the above HGEA job classifications on Oahu, Maui, the Big Island, and Kauai.
- The 96 BU Members who testified represented the common experience of all former and current BU members from their respective classifications that worked during the March 4, 2020 through March 25, 2022 COVID Emergency Period.
- Similar to the HGEA's Offer of Proof at Stage 1,¹²⁸ if the Union called all member witnesses employed by the Department of Education representing BUs 2, 3, 4, 6, 9, and 13 at Stage 2, their testimony would be that for each day they reported to work:

1. Temporary hazardous working conditions existed at each of their schools from March 4, 2020, through March 25, 2022, due to exposure to the COVID-19 virus and its variants for each of them.
2. They were exposed to those temporary hazardous working conditions while at work.

¹²⁸ U-106, the HGEA Offer of Proof.

3. The exposure was Severe or Most Severe as defined in the CBAs.
4. While circumstances varied from school to school throughout the State of Hawai'i, exposure to the temporary hazardous conditions at all schools created by COVID-19 and its variants remained constant from March 4, 2020 through March 25, 2022.

- All 96 BU Members, representing the various DOE job classifications, credibly testified they were exposed to members of the public as a routine part of their job functions.
- To obviate the needless presentation of cumulative evidence at Stage 2, the arbitrator finds and concludes that the testimony of all BU 02, 03, 04, 06, 09, and 13 members would be the same as the 96 BU witnesses who testified.

The Union's summary of DOE BU Employees who were exposed to the risk of COVID-19 from members of the public

The Union provided, based on the testimony of the BU witnesses, the following accurate summary of the exposure to COVID-19 of BU Members at school from members of the public, which included students:¹²⁹

... [T]he Union DoE EEs reported to work in-person as directed. They were exposed to members of public, which included students, students' parents, and each other. Their exposure to these members of the public ranged from tens to thousands a day. Often, they could not maintain a six-foot distance between themselves and the public to which they were exposed. Layered mitigation methods, including use of PPE, were not always available, and even where they were, they did not eliminate COVID-19 and its variants, meaning that exposure occurred from the moment they arrived at work to the moment they returned home. This was the case for all DoE EEs organized into BUs 2, 3, 4, 9, and 13 that stepped foot on a school campus or a DoE facility and worked during the period at issue. As examples, cafeteria staff, administrative staff, and Educational Assistants ("EAs") were required to serve food to members of the public by the thousands daily. Administrative employees and EAs were required to hand-deliver and hand-receive student belongings, homework packets, and school property. Administrative staff were required to greet

¹²⁹ Union Post-Hearing Statement at 3-4.

the public, take their temperature, and process their paperwork upon arrival. Cafeteria staff and administrative staff were required to receive deliveries. EAs, School Security Officers ("SSOs"), School Security Attendants ("SSAs"), Social Workers ("SWs"), Behavioral Health Specialists ("BHSs"), Physical Therapists ("PTs"), Occupational Therapists ("OTs"), Speech Pathologists ("SPs"), and Speech Aides ("SAs"), among others, and all manner of other instruction and support-oriented DoE EEs, were required to provide in-person instruction and support within six-feet of students, student parents, and other DoE EEs. They were often required to touch them to do their jobs, in many cases for extended periods of time. It was not uncommon for a student to be unable to or refuse to wear a mask. Students also required close supervision when they removed their masks for prolonged periods of time to eat meals, which was a minimum of two (2) times a day. EAs also found themselves responsible for cleaning students' bodily fluids, including nasal discharge and bowel movements. Many of these students showed frequent symptoms of COVID-19 and its variants; some were even knowingly sent to school by parents after testing positive for COVID-19 and/or its variants. For example, exposure to one of these students resulted in an EA being hospitalized for a long period of time. School Health Aides were almost exclusively exposed to students who showed symptoms of COVID-19 and its variants, and, once a student was brought to their office, they were responsible for checking student temperatures, and caring for them while they waited for their parents to retrieve them from school. In most cases, a six-foot distance could not be maintained. Not even SSOs and SSAs went without exposure; they were tasked with retrieving errant students, breaking up physical altercations between them, and, when a student showed symptoms of COVID-19 and its variants or was revealed to be a close contact of someone who tested positive, they were tasked with escorting these students to the School Health Aide's office, and in many instances, supervising them until their parents retrieved them. Administrative staff and EAs also often played the role of supervising such students until their parents could retrieve them. Ultimately, for the 9 months that the DoE kept data, it confirmed that there were approximately 3,000 confirmed cases of COVID-19 and its variants among staff and students. In this context, exposure was guaranteed. How they would be exposed to COVID-19 and its variants each day often varied, but one thing was certain – each day, all DoE EEs who reported for work at DoE schools and facilities were exposed to COVID-19 and its variants through members of the public – students, student parents, delivery people, and fellow colleagues – and that exposure, no matter how long or where in the DoE school or facility, was likely to result in serious incapacitation, long periods of time lost, and possible loss of life. As the Principal of Haiku Elementary School put it: "[I]n the back of your head you're thinking, oh, my gosh, is this it? Is this going to be the day that I get COVID? Is this going to be the day that I take something home to my

family, or it this going to be that day that this child has now spread it to the entire community?”

The arbitrator finds and concludes the above summary accurately reflects the arbitral evidence that each BU member who testified at Stage 2 were exposed to COVID-19 at school from members of the public, which included students.

The computation of THP

The computation of the THP differentials herein shall be as provided in Section C of the THP Article in the BU 02, 03, 04, 09, and 13 CBAs, which provides the following criteria for computing hazard pay:

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.

The payment of the above THP differentials includes all hours that that each affected DOE BU 02, 03, 04, 09, and 13 member worked, with the exception of time spent teleworking, utilizing vacation or sick leave, or otherwise absent from the worksite on approved or unapproved administrative leave.

The Union's evidence that the exposure to unusually hazardous working conditions was *Most Severe* for all DoE EEs and their respective classifications

With respect to the allocation of the THP differentials, the Union asserted, among other things:

- The exposure to the unusually hazardous working conditions was *Most Severe* for all DoE EEs and their respective classifications, both present and past, that worked for any period between March 4, 2020 – March 25, 2022, and that were or are organized into BUs 2, 3, 4, 9, and 13, during the aforementioned period.

- Section B of the THP Article provides 3 different scenarios for which exposure to a temporary hazardous working conditions will qualify as being “Most Severe.” The unusually hazardous working condition need not meet all 3 to qualify as Most Severe. Only one (1) is required. COVID-19 and its variants satisfy all 3 scenarios, which the Union addresses below.

- The first scenario is Section B.1.a.:

Exposure to COVID-19 and its variants was “likely” to result in serious incapacitation, long period of time lost, or possible loss of life.

The Union states the definition of *likely* is having a high probability of occurring or being true: very probable. Probability means insofar as seems reasonably true, factual, or to be expected: without much doubt. Meriam-Webster Dictionary 2022.

The Union states the Employer expected all DoE EEs to be exposed to COVID-19 and/or its variants, and it expected that such exposure would result in DoE EEs testing positive for COVID-19 and/or its variants.¹³⁰ Here, the affected BU members were exposed to COVID-19 and its variants, resulting in hazardous working conditions which were *likely* to result in serious incapacitation, long periods of time lost, and/or possible loss of life.

¹³⁰ U-77 at 002-4; U-97 at 005-6.

Serious Incapacitation

While “serious Incapacitation” is not defined, Dr. Kemble unambiguously admitted that exposure to COVID-19 and/or its variants could lead to serious incapacitation.¹³¹ Consistent with Dr. Kemble’s admission, Governor Ige and Attorney Generals Connors and Kishida also admitted that COVID-19, and later its variants, were likely to, and indeed had, resulted in forms of incapacitation, including and up to hospitalization and death.¹³²

The Union states, accordingly, all DoE EEs and their respective classifications, both present and past, that worked for any period between March 4, 2020 – March 25, 2022, and that were or are organized into BUs 2, 3, 4, 9, and 13, during the aforementioned period, were exposed to COVID-19 and/or its variants, and that exposure to COVID-19 and its variants was likely to result in serious incapacitation.

Long Period of Time Lost

While “long period of time lost” is also not defined, the exposure to COVID-19 and its variants could be expected to, and did, cause long periods of lost time.¹³³

DoE EEs were initially subject to a 14-day mandatory self-quarantine if they were

¹³¹ 7/3/23 Hearing Tr. at 1169.

¹³² U-7 007; U-8 007; U-9 002; U-10 008; U-11 003; U-12 007; U-13 033; U-14 039; U-15 040; U-16 037; U-17 034; U-18 003; U-19 037; U-20 032; U-21 033; U-22 034; U-23 034; U-24 035; U-25 034; U-26 035; U-27 004; U-28 001; U-29 035; U-30 019; U-31 050; U-32 019; U-33 018; U-34 018; U-35 001. See Ex. U-7 001-7; U-8 001-7; U-9 001-2; U-10 001-8; U-11 001-3; U-12 001-7; U-13 001-33; U-14 0-1-39; U-15 001-40; U-16 001-37; U-17 001-34; U-18 001-3; U-19 001-37; U-20 001-32; U-21 001-33; U-22 001-34; U-23 001-34; U-24 001-35; U-25 001-34; U-26 001-35; U-27 001-4; U-28 001; U-29 001-35; U-30 001-19; U-31 001-50; U-32 001-19; U-33 001-18; U-34 001-18; U-35 001.

¹³³ Hearing Tr. at 196; 439; 440; 442; 443.

confirmed as positive for COVID-19 or one of its variants, or if they had close contact with someone who tested positive.¹³⁴ This was later reduced to a 10-day mandatory self-quarantine.¹³⁵ DoE EEs were generally required to use their accrued leave or, if they lacked accrued leave, they were required to go on Leave Without Pay (“LWOP”) during their mandated quarantine.¹³⁶ Each time a DoE EE tested positive for COVID-19 or one of its variants, or was exposed to someone who had, that DoE EE was likely to lose between 10 to 14 days of work and accrued leave, depending on when the DoE EE, or the person the DoE EE was a close contact to, tested positive for COVID-19 or one of its variants.¹³⁷ 10 to 14 days is a long period of time to lose by any objective measure. The DoE EEs testified that they were required to self-quarantine for long periods of time each time they were confirmed to be close contacts that were exposed to others who were confirmed to have been positive for COVID-19 and/or its variants.¹³⁸

For example, once informed that they had been exposed to students who tested positive for COVID-19, Speech Pathologists (SPs) self-quarantined for ten (10) or fourteen (14) days at a time.¹³⁹ An SP who lived in a multi-generation household with medically fragile elderly relatives and children lived in a tent in her front yard during her fourteen (14) day mandatory self-quarantine.¹⁴⁰ That SP tested positive for COVID-

¹³⁴ U-85 at 002.

¹³⁵ U-97 at 030, 34.

¹³⁶ U-99 at 001; U-100 at 001-5.

¹³⁷ U-85 at 002; U-97 at 030.

¹³⁸ Tr. at 196; 439; 439, 440; 442; 443.

¹³⁹ Tr. at 196; 439; 439, 440; 442; 443.

¹⁴⁰ Tr. at 442; 443.

19.¹⁴¹

When exposure led to a DoE EE developing symptoms, the situation could be far more troubling than simply losing long periods of accrued leave or long periods of pay when in LWOP. For example, an Educational Assistant (EA) who was exposed to a student who tested positive for COVID-19, caught COVID-19 from the student, and, due to her COVID-19 developing into pneumonia, was hospitalized for a week. While hospitalized, she was required be on oxygen to breathe.¹⁴² Cases like this are illustrative of the human aspect of *lost time*; exposure not only results in lost leave or pay, it can be expected to result in lengthy periods of time spent hospitalized.

The Union states, thus, all DoE EEs and their respective classifications, both present and past, that worked for any period between March 4, 2020 – March 25, 2022, and that were or are organized into BUs 2, 3, 4, 9, and 13, during the aforementioned period, were exposed to COVID-19 and/or its variants, and that exposure to COVID-19 and its variants was likely to result in long period of time lost due to exposure.

Possible Loss of Life

While “possible loss of life” is not defined, Dr. Kemble admitted that exposure to COVID-19 and its variants could lead to possible loss of life.¹⁴³ Governor Ige, himself a signatory to the BUs 2, 3, 4, 9, and 13 CBAs, proclaimed that exposure to COVID-19 and its variants indeed, were likely to - and had - led to the loss of many lives.¹⁴⁴

¹⁴¹ Tr. at 196.

¹⁴² Tr. at 1187; 1188.

¹⁴³ Tr. at 1169.

¹⁴⁴ U-1 099; U-2 096; U-3 093; U-4 101; U-5 107; Ex. U-7 002; U-12 001; U-13 001; U-14 001; U-15 001; U-16 001; U-17 001; U-18 001; U-19 001; U-20 001-2; U-21 001-2; U-22 001-2; U-23 002; U-24 002; U-25 002; U-27 001; U-29 002; U-30 001; U-31001; U-32 001; U-33 001; U-34 001.

In addition, Governor Ige, and Attorney Generals Connor and Kishida confirmed that the presence of COVID-19 and its variants in the State resulted in what they recognized as a *disaster*, as defined by HRS 127A-2.¹⁴⁵ HRS 127A-2 defined a *disaster* as follows, in relevant part:¹⁴⁶

A disaster is any emergency, or imminent threat thereof, which results or may likely result in loss of life ...

By declaring that the presence of COVID-19 in the State of Hawai'i had resulted in a *disaster*, as defined by HRS 127A-2, Governor Ige, and Attorneys General Connors and Kishida admitted that the presence of COVID-19 and its variants in the State resulted or was likely to result in loss of life.¹⁴⁷ This finding establishes that loss of life was not just possible as a result exposure to COVID-19 and its variants, it was likely and actually occurred. It's an undisputed fact that at least 1,149 State of Hawai'i residents died as a result of exposure to COVID-19 and its variants between March 4, 2020, and March 25, 2022.¹⁴⁸

The Union states, thus, all DoE EEs and their respective classifications, both present and past, that worked for any period between March 4, 2020 – March 25, 2022,

¹⁴⁵ U-7 004; U-8 001; U-9 001-2; U-13 001-2; U-14 001, 33; U-15 001,34; U-16 001,37; U-17 001,28; U-18 001-2; U-19 001,32; U-20 001,32; U-21 001,33; U-22 001,34; U-23 001,34; U-24 001,35; U-25 001,35; U-26 001, 35; U-27 001,4; U-29 001,35; U-30 001,19; U-31 001,3,20; U-32 001, 19; U-33 001; U-34 001-18.

¹⁴⁶ U-36 001.

¹⁴⁷ U-7 004; U-8 001; U-9 001-2; U-13 001-2; U-14 001, 33; U-15 001,34; U-16 001,37; U-17 001,28; U-18 001-2; U-19 001,32; U-20 001,32; U-21 001,33; U-22 001,34; U-23 001,34; U-24 001,35; U-25 001,35; U-26 001,35; U-27 001,4; U-29 001,35; U-30 001,19; U-31 001,3,20; U-32 001, 19; U-33 001; U-34 001-18; U-36 001.

¹⁴⁸ U-34 001.

and that were or are organized into BUs 2, 3, 4, 9, and 13, during the aforementioned period, were exposed to COVID-19 and/or its variants, and that exposure to COVID-19 and its variants was likely to result in possible loss of life.

The DOE HGEA Employees were directly exposed to members of the public as part of their job functions

All 96 BU Members, representing the various DOE HGEA job classifications, testified they were exposed to members of the public as a routine part of their job functions. Specifically, **each BU witness testified that, as part of their job functions in their respective job classifications, directly exposed them to members of the public, which included students, during the COVID Emergency Period, from March 2020 to March 25, 2022.** The Union provided the following accurate examples from each job classification:

- **Account Clerk (“ACs”)**

ACs were exposed to students and students’ parents, guardians, and caregivers. ACs distributed homework packets and computers to students and students’ parents, guardians, and caregivers. They distributed these to each student on campus.¹⁴⁹ ACs also were exposed to students and students’ parents, guardians, and caregivers while rendering their services as part of the Grab-and-Go program.¹⁵⁰ Students at those locations tested positive for COVID-19 and its variants.¹⁵¹ ACs were also exposed to other DoE EEs. ACs were exposed to other DoE EEs throughout the period at issue,

¹⁴⁹ Tr. at 820; 991; 992; 993.

¹⁵⁰ Tr. at 1029; 1030.

¹⁵¹ Tr. at 814; 900.

including School Administrative Services Assistants (SASAs) and Office Assistants (OAs) who also worked with them in each respective school's front office.¹⁵² DoE EEs at those locations tested positive for COVID-19 and its variants.¹⁵³ One Principal recalled that a school campus where ACs had contact with students had as many as ten (10) students test positive for COVID-19 per day.¹⁵⁴ Another Principal recalled that there were "too many [COVID cases] to count."¹⁵⁵

Based on the Section B.1.a.'s criteria in the THP Article, the Union states the ACs' exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **Athletic Health Care Trainers & Athletic Health Care Trainer Coordinators ("AHCTs & AHCTCs")**

AHCTs & AHCTCs ran the Athletic Department of each school, which included assisting with DoE-sponsored athletic events.¹⁵⁶

Athletics resumed in fall of 2020.¹⁵⁷ AHCTs and AHCTCs working in Athletic Rooms were required to clean wrestling mats and strength-training equipment, and disinfect mats and other high-use equipment at least daily.¹⁵⁸ The Athletic Departments of each respective school, which include AHCTs and AHCTCs, administered COVID-

¹⁵² Tr. at 813; 1094; 1095; 1096.

¹⁵³ Tr. at 814; 900.

¹⁵⁴ Tr. 1099.

¹⁵⁵ Tr. at 1050.

¹⁵⁶ Tr. at 181.

¹⁵⁷ Tr. at 1120.

¹⁵⁸ U-66 002.

testing and COVID vaccination for athletes that participated in DoE-sponsored athletic events.¹⁵⁹ It was a DOE requirement that all students be tested or vaccinated prior to participating in DoE-sponsored athletic events. Because this requirement fell under the purview of athletic activities, this task seemingly fell on the AHCTs and AHCTCs.¹⁶⁰ AHCTs & AHCTCs were exposed to students and students' parents, guardians, and caregivers at the DoE-sponsored athletic events. Students and DoE EEs tested positive as a result of participating in these DoE-sponsored athletic events. The largest cluster contained 34 students and several DoE EEs.¹⁶¹ While they utilized layered mitigation methods to protect themselves from COVID-19 and its variants, these were not sufficient to eliminate exposure to COVID-19 and its variants.¹⁶²

Based on the Section B.1.a.'s criteria in the THP Article, the Union states the AHCTs' & AHCTCs' exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **Communication Aides ("CAs")**

CAs rendered in-person support and assistance to Speech Pathologists (SPs) as they provide care for intellectually disabled students.¹⁶³ The DOE recognized SPs and CAs as "health related positions" that expose them to sufficient risk to justify use of

¹⁵⁹ Tr. at 550.

¹⁶⁰ Tr. at 1038.

¹⁶¹ Tr. at 181.

¹⁶² Tr. at 751; 752.

¹⁶³ Tr. at 193.

valuable KN95 masks.¹⁶⁴ CAs were exposed to students.¹⁶⁵ Students on campus locations tested positive for COVID-19 and its variants. CAs were exposed to other members of the public, including the students' caregivers, such as parents and guardians.¹⁶⁶

CAs were also exposed to other DoE EEs. From March to May, 2020, CAs met with other DoE EEs in-person, face-to-face, to prepare equipment and packets for students.¹⁶⁷ While rendering these services, they often were exposed to colleagues such as SPs, Occupational Therapists (OTs), Social Workers (SWs), and Physical Therapists (PTs) because their services often had to be rendered in tandem in the same room.¹⁶⁸ DoE EEs that worked face-to-face with CAs tested positive for COVID-19 and its variants.¹⁶⁹ While they utilized layered mitigation methods to protect themselves from COVID-19 and its variants, these were not sufficient to eliminate exposure to COVID-19 and its variants.¹⁷⁰

Based on the Section B.1.a.'s criteria in the THP Article, the Union states the CAs' exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

¹⁶⁴ U-95 001.

¹⁶⁵ Tr. at 196; 439; 440; 193.

¹⁶⁶ Tr. at 196; 439; 440.

¹⁶⁷ Tr. at 194; 195.

¹⁶⁸ Tr. at 193.

¹⁶⁹ Tr. at 196.

¹⁷⁰ Tr. at 751; 752.

- **Data Processing User Support Techs (“DPUSTs”)**

DPUSTs were responsible for managing each respective school’s technological assets, and coordinating how all of those assets, including laptops and other equipment, were maintained and provided to both students and staff.¹⁷¹ Technical staff, including DPUSTs, were required to distribute instructional packets and computers to students and their guardians.¹⁷² They frequently came into contact with members of the public when distributing and retrieving electronic equipment to and from students and students’ parents, guardians, and caregivers.¹⁷³ All students not attending class in-person were required to retrieve electronic equipment from the school either themselves or with their students’ parents, guardians, and caregivers. The students or students’ parents, guardians, and caregivers then returned them to school campus as necessary.¹⁷⁴ Students and students’ parents, guardians, and caregivers also came in to meet with the DPUSTs when they had technical issues. The DPUSTs would then fix the problem or replace the electronic equipment.¹⁷⁵ According to one DPUST, “as the point person for dealing with the actual technology itself, we were the first in contact with an event.”¹⁷⁶ The interactions were face-to-face.¹⁷⁷ It was “impossible” to maintain a

¹⁷¹ Tr. at 1110.

¹⁷² Tr. at 753; 754; 820.

¹⁷³ Tr. at 1111; 1112.

¹⁷⁴ Tr. at 1115.

¹⁷⁵ Tr. at 1113.

¹⁷⁶ Tr. at 1116.

¹⁷⁷ Tr. at 1111; 1112; 1114.

six-foot distance between themselves and students and parents.¹⁷⁸ Once the electronic equipment was returned, the DPUSTs cleaned the electronic equipment by hand.¹⁷⁹ Tech coordinators, including DPUSTs, also assisted with distributing meals to students and parents via the Grab-and-Go program.¹⁸⁰ Students at schools that participated in Grab-and-Go tested positive for COVID-19 and its variants.¹⁸¹ DPUSTs were also exposed to other DoE EEs while rendering their services in support of the Grab-and-Go program.¹⁸² DoE EEs tested positive for COVID-19 and its variants at schools where this exposure occurred.¹⁸³ While they utilized layered mitigation methods to protect themselves from COVID-19 and its variants, these were not sufficient to eliminate exposure to COVID-19 and its variants.¹⁸⁴

Based on the Section B.1.a.'s criteria in the THP Article, the Union states the DPUSTs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **Education Assistants (“EAs”)**

EAs, who were directed to return to work in March 2020,¹⁸⁵ were responsible for

¹⁷⁸ Tr. at 1112.

¹⁷⁹ Tr. at 1116.

¹⁸⁰ Tr. at 847; 848.

¹⁸¹ Tr. at 852.

¹⁸² Tr. at 847; 848.

¹⁸³ Tr. at 852.

¹⁸⁴ Tr. at 751; 752.

¹⁸⁵ Tr. at 702.

working with Community Based Instruction ("CBI") students.¹⁸⁶ CBI students were those that are intellectually disabled, requiring specialized and intensive supervision and assistance throughout the day, which includes assistance with eating, hygiene, and changing their clothes and diapers.¹⁸⁷ CBI students could not care for themselves.¹⁸⁸ EAs also were required to perform sanitary care on the CBI student, including wiping the student's body after the student uses the bathroom or has their diaper changed.¹⁸⁹

CBI students have a statutory right to be in school.¹⁹⁰ So, CBI students were among the first to return to school; even while schools were not accepting students from the general population back on campus, CBI students returned immediately.¹⁹¹ EAs returned with them.¹⁹²

EAs are also responsible for multiple classrooms of students. For example, one EA was assigned to render her services to students in 12-14 classrooms.¹⁹³

EAs were exposed to their CBI students. EAs render their services one-on-one.¹⁹⁴ EAs retrieved the CBI students from the school bus when they arrived at school

¹⁸⁶ Tr. at 67; 68; 69.

¹⁸⁷ Tr. at 69; 928; 1106.

¹⁸⁸ Tr. at 70; 71.

¹⁸⁹ Tr. at 1106.

¹⁹⁰ Tr. at 69.

¹⁹¹ Tr. at 77.

¹⁹² Tr. at 68.

¹⁹³ Tr. at 615.

¹⁹⁴ Tr. at 367; 368.

and escorted them to their classroom.¹⁹⁵ EAs brushed students' teeth.¹⁹⁶ EAs hand-fed CBI students.¹⁹⁷ Many CBI students could not wear masks at all.¹⁹⁸ EAs also changed the CBI students' clothes and diapers throughout the day.¹⁹⁹ EAs also assisted the CBI students and, where necessary, general education non-CBI students, in completing their lessons, which EAs could only do while close to the student.²⁰⁰ It was not possible to maintain a six-foot distance while feeding, changing CBI students' clothes or diapers, or helping any students with their lessons.²⁰¹ Accordingly, due to the need to feed and change students, EAs were exposed to bodily fluids – including, but not limited to, spit, saliva, and feces.²⁰² It was impossible to maintain a six-foot distance.²⁰³

CBI students that EAs cared for tested positive for COVID-19.²⁰⁴ EAs working with those CBI students then tested positive for COVID-19 or one of its variants.²⁰⁵ One (1) EA recalled an instance where a fellow EA tested positive for COVID-19 and was required to take an extended period of unpaid leave as a result.²⁰⁶ Another was

¹⁹⁵ Tr. at 109.

¹⁹⁶ Tr. at 78; 369.

¹⁹⁷ Tr. at 69; 78; 109; 369.

¹⁹⁸ Tr. at 69; 802; 1107; 1180.

¹⁹⁹ Tr. at 70; 78; 109; 369.

²⁰⁰ Tr. at 621.

²⁰¹ Tr. at 70; 71; 802; 806; 1180.

²⁰² Tr. at 802; 1106 1107.

²⁰³ Tr. at 621; 1106; 1187.

²⁰⁴ Tr. at 71; 80; 449; 1107.

²⁰⁵ Tr. at 80; 81; 879; 910.

²⁰⁶ Tr. at 468.

hospitalized for a week as a result.²⁰⁷

In addition to students, EAs were also exposed to the general public while rendered their services by participating in the Grab-and-Go program.²⁰⁸ Grab-and-Go was a program that provided two daily meals to students.²⁰⁹ Any student attending any school under 18, including those who home schooled, was eligible to retrieve two daily meals via the Grab-and-Go program.²¹⁰ To retrieve their food, students had to come in person or with a parent in a vehicle.²¹¹ Grab-and-Go schools served both breakfast and lunch daily.²¹² EAs were among those that rendered their services by participating in the Grab-and-Go program.²¹³ While rendering their services, they had direct contact with both students and parents.²¹⁴ To distribute meals to students via the Grab-and-Go program, schools set up meal distribution centers in front of the main office on each respective school campus.²¹⁵ DoE EEs participating in the Grab-and-Go program, including EAs, were required to place the meal in the vehicle if asked.²¹⁶ Otherwise, they handed the meal directly to the student or the parent driving by their student in a

²⁰⁷ Tr. at 1188; 1189.

²⁰⁸ Tr. at 291; 463; 874; 888.

²⁰⁹ Tr. at 225.

²¹⁰ U-71 001; U-72 001. Tr. at 225; 359; 360; 1018.

²¹¹ U-71 001; U-72 001; U-76 002. Tr. at 359; 360; 674.

²¹² U-71 001; U-72 001; U-76 002. Tr. at 222.

²¹³ Tr. at 226; 888.

²¹⁴ Tr. at 339.

²¹⁵ Tr. at 37; 38.

²¹⁶ Tr. at 40; 41; 888; 889.

vehicle.²¹⁷ It was not possible to maintain a six-foot distance while doing so.²¹⁸

Rather, the distance between the DoE EE was usually reduced to one or two feet.²¹⁹

Parents retrieving meals did not always wear masks.²²⁰ Some parents loitered and attempted to converse with those handing out the meals.²²¹ While rendering their services at schools like Castle High School and Waiakea High School, EAs distributed around 1200 and 1300 meals per day, respectively.²²² EAs also had to deliver food to the homes of students who couldn't drive.²²³ While rendering their services, they had contact with both students and parents.²²⁴ There was no way of knowing if any of the students or parents they were exposed to were sick.²²⁵

When students arrived on campus each day, if the EAs were on campus, they conducted temperature tests and wellness checks of each student.²²⁶ The EA then affixed a bracelet on the student's wrist to show that they had had their temperature checked that day.²²⁷ EAs could not maintain a six-foot distance while taking

²¹⁷ Tr. at 222; 223; 888; 889.

²¹⁸ Tr. at 223; 291; 875; 887; 888; 889.

²¹⁹ Tr. at 892.

²²⁰ Tr. at 223.

²²¹ Tr. at 892.

²²² Tr. at 339; 901.

²²³ Tr. at 927.

²²⁴ Tr. at 339.

²²⁵ Tr. at 38.

²²⁶ Tr. at 322; 615; 616; 751.

²²⁷ Tr. at 616.

temperatures and affixing bracelets to students' wrists.²²⁸

If a student showed up to school with symptoms of COVID-19 or its variants, the EA would then escort the student to the SHA's office.²²⁹ EAs were exposed to these symptomatic students.²³⁰ Students tested positive for COVID-19 or its variants.²³¹

EAs were required to distribute instructional packets and computers to students and students' parents, guardians, and caregivers.²³² EAs were exposed to their own students and the general student population.²³³ There were also COVID-19 cases among their students and the general student population.²³⁴

Teachers did not render services to students in-person, face-to-face.²³⁵ Rather, they taught from another room. EAs were doing so in their place.²³⁶ The teacher would then direct the EA to render their services with specific students in the classroom.²³⁷ Sometimes these classrooms would have upwards of 100 students.²³⁸ EAs render their services one-on-one.²³⁹ It was *never* possible for EAs to render these services while

²²⁸ Tr. at 322; 616.

²²⁹ Tr. at 71; 72.

²³⁰ Tr. at 72; 322.

²³¹ Tr. at 81; 110; 294; 322.

²³² Tr. at 447; 649; 753; 754; 812; 813; 877; 1071; 1183.

²³³ Tr. at 459; 604; 908.

²³⁴ Tr. at 608; 609; 618; 807; 1128; 1188.

²³⁵ Tr. at 337.

²³⁶ Tr. at 337; 794.

²³⁷ Tr. at 337; 338.

²³⁸ Tr. at 605.

²³⁹ Tr. at 676.

maintaining a six-foot distance.²⁴⁰ Those EAs were exposed to their own respective classes containing 15-20 students.²⁴¹ Students tested positive for COVID-19 and its variants.²⁴² EAs were also exposed to the public. This included students' parents, guardians, and caregivers.²⁴³ EAs could rarely maintain a six-foot distance while exposed to the public, including students' parents, guardians, and caregivers.²⁴⁴

EAs were also exposed to other DoE EEs.²⁴⁵ For example, when School Safety and Security Officers ("SSSOs") were called to correct behavior or retrieve students to escort them to the office, EAs were also exposed to them.²⁴⁶ They were also exposed to School Administrative Services Assistants ("SASAs") when they entered the front office on school campuses each day.²⁴⁷ Physical Therapists ("PTs") also rendered their services at numerous different schools between June, 2020 to March 25, 2022.²⁴⁸ One PT was responsible for rendering services to students at 18 different schools.²⁴⁹ When PTs arrived at each school, they signed in the office. While on campus, they exposed

²⁴⁰ Tr. at 337; 338.

²⁴¹ Tr. at 336.

²⁴² Tr. at 449; 450; 465; 618; 1128; 1181.

²⁴³ Tr. at 71; 110; 320; 460; 803; 909.

²⁴⁴ Tr. at 803; 909.

²⁴⁵ Tr. at 80; 110; 292; 320; 607; 615; 619; 803; 908.

²⁴⁶ Tr. at 337.

²⁴⁷ Tr. at 660.

²⁴⁸ Tr. at 586.

²⁴⁹ Tr. at 589.

to the teachers, EAs, and administrative and office staff at each school.²⁵⁰ DoE EEs at schools where this exposure occurred tested positive for COVID-19 or one of its variants.²⁵¹

Schools also occasionally acted as testing sites. OAs, EAs, SASAs, and security personnel assisted at the testing sites.²⁵²

EAs tested positive for COVID-19 and its variants.²⁵³ While they utilized layered mitigation methods to protect themselves from COVID-19 and its variants, these were not sufficient to eliminate exposure to COVID-19 and its variants.²⁵⁴

Based on the Section B.1.a.'s criteria in the THP Article, the Union states the EAs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **Library Assistants (“LAs”)**

LAs were directed to return to work in March 2020.²⁵⁵

LAs were exposed to the public.²⁵⁶ Among other things, LAs organized and participated in the collection and return of student belongings.²⁵⁷ Students at the schools where LAs were exposed to students tested positive for COVID-19 and its

²⁵⁰ Tr. at 590.

²⁵¹ Tr. at 111; 112; 322; 372; 449; 450; 468; 609; 805; 806; 910; 1108; 1128; 1135; 1182; 1189.

²⁵² Tr. at 664; 609; 665.

²⁵³ Tr. at 84; 85; 196; 370.

²⁵⁴ Tr. at 751; 752.

²⁵⁵ Tr. at 702.

²⁵⁶ Tr. at 649; 650.

²⁵⁷ Tr. at 649; 650.

variants.²⁵⁸

LAs were also exposed to other DoE EEs.²⁵⁹ DoE EEs followed safety protocols and guidelines.²⁶⁰ While they utilized layered mitigation methods to protect themselves from COVID-19 and its variants, these were not sufficient to eliminate exposure to COVID-19 and its variants.²⁶¹ DoE EEs at the locations where they were exposed tested positive for COVID-19 and its variants.²⁶²

Based on the Section B.1.a.'s criteria in the THP Article, the Union states the LAs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **Office Assistants (“OAs”)**

OAs were directed to return to work in March 2020.²⁶³

OAs acted as registrar of students.²⁶⁴ They also processed attendance enrollments, attendance, and other duties related to the front office.²⁶⁵ The front office never closed.²⁶⁶ Rather, the front offices remained opened to the general public.²⁶⁷

²⁵⁸ Tr. at 648.

²⁵⁹ Tr. at 650.

²⁶⁰ Tr. at 648.

²⁶¹ Tr. at 751; 752.

²⁶² Tr. at 648.

²⁶³ Tr. at 702.

²⁶⁴ Tr. at 183; 538; 856.

²⁶⁵ Tr. at 183; 18; 495; 538.

²⁶⁶ Tr. at 184; 1013.

²⁶⁷ Tr. at 184; 983; 996.

While the front office was open, OAs were the “first contact person” or “first line of contact” with the public.²⁶⁸ When members of the public came to a school campus to ask questions or express their concerns, they entered the front office where the OA was located first.²⁶⁹ OAs were tasked with directing anyone who needed assistance on campus.²⁷⁰ Even before students returned to campus, OAs registered and deregistered students, which required students’ parents, guardians, and caregivers to come into the office to provide paperwork for processing by the OA.²⁷¹ To register or de-register a student, the students’ parents, guardians, and caregivers must fill out a registration form, provide proof of residency, immunization records, and TB clearance. OAs had to handle and process the documents provided.²⁷² OAs then had to provide the students’ parents, guardians, and caregivers with paperwork regarding the registration or deregistration.²⁷³ This continued even after students returned to campus.²⁷⁴ This resulted in direct contact with the public.²⁷⁵ It was not always possible to maintain a six-foot distance during this exposure.²⁷⁶ At schools where the student population contained a large number of dependents of military personnel, this required daily and

²⁶⁸ Tr. at 184; 537; 719.

²⁶⁹ Tr. at 184.

²⁷⁰ Tr. at 537.

²⁷¹ Tr. at 544; 983; 984.

²⁷² Tr. at 187; 856; 983; 984.

²⁷³ Tr. at 984.

²⁷⁴ Tr. at 983.

²⁷⁵ Tr. at 495; 538.

²⁷⁶ Tr. at 538.

prolonged contact with those had recently traveled.²⁷⁷ These families were not subject to the same travel restrictions as civilian families. However, OAs could not turn them away.²⁷⁸

OAs were also exposed to the general public while rendered their services by participating in the Grab-and-Go program.²⁷⁹ Any student attending any school under 18, including those who were home schooled, could retrieve a meal via the Grab-and-Go program.²⁸⁰ OAs acted as record-keepers of how many meals were served per day.²⁸¹ They also passed meals directly to students and students' parents, guardians, and caregivers.²⁸² To retrieve their food, students had to come to a school campus in person or with a student's parent, guardian, and caregiver in a vehicle.²⁸³ Grab-and-Go schools served both breakfast and lunch daily.²⁸⁴ While rendering their services, OAs had contact with both students and students' parents, guardians, and caregivers.²⁸⁵ At times, 10 to 15 members of the public would converge on the front office where the Grab-and-Go meal retrieval site was located on foot.²⁸⁶ In order to distribute meals to

²⁷⁷ Tr. at 495; 496; 537.

²⁷⁸ Tr. at 496; 997.

²⁷⁹ Tr. at 118; 119; 540; 672; 827; 860; 990; 1016; 1029; 1030.

²⁸⁰ U-71 001; U-72 001. Tr. at 225; 359; 360; 1018.

²⁸¹ Tr. at 827.

²⁸² Tr. at 674; 860.

²⁸³ U-71 001; U-72 001; U-76 002. Tr. at 359; 360; 674.

²⁸⁴ Tr. at 222.

²⁸⁵ Tr. at 339.

²⁸⁶ Tr. at 360.

students via the Grab-and-Go program, schools set up meal distribution centers in front of the main office on campus.²⁸⁷ DoE EEs participating in the Grab-and-Go program, including OAs, were required to place the meal in the vehicle if asked.²⁸⁸ Otherwise, they handed the meal directly to the student or the student's parent, guardian, and/or caregiver driving by their student in a vehicle.²⁸⁹ It was a "hand-to-hand exchange."²⁹⁰ It was not possible to maintain a six-foot distance while doing so.²⁹¹ Rather, the distance between the DoE EE was usually reduced to one (1) or two (2) feet.²⁹² Students' parents, guardians, and caregivers retrieving meals did not always wear masks.²⁹³ Some students' parents, guardians, and caregivers loitered and attempted to converse with those handing out the meals.²⁹⁴ While rendering their services at schools, like Castle High School and Waiakea High School, OAs distributed around 1200 and 1300 meals per day, respectively.²⁹⁵ OAs also had to deliver food to the homes of students who couldn't drive.²⁹⁶ While rendering their services, they had contact with both students and students' parents, guardians, and caregivers.²⁹⁷ There

²⁸⁷ Tr. at 37; 38.

²⁸⁸ Tr. at 118; 119.

²⁸⁹ Tr. at 222; 223 540; 888; 889.

²⁹⁰ Tr. at 360.

²⁹¹ Tr. at 119; 540; 673; 861.

²⁹² Tr. at 892.

²⁹³ Tr. at 223.

²⁹⁴ Tr. at 892.

²⁹⁵ Tr. at 339; 901.

²⁹⁶ Tr. at 927; 1018.

²⁹⁷ Tr. at 339.

was no way of knowing if any of the students or the students' parents, guardians, and caregivers they were exposed to were sick.²⁹⁸

When students arrived on campus each day, office staff, including OAs, conducted temperature tests and wellness checks of each student. OAs could not maintain a six-foot distance while taking student temperatures.²⁹⁹

If a student showed symptoms of COVID-19, OAs were required to escort the student to the School Health Aide (SHA).³⁰⁰ The SHA's office was attached the front office.³⁰¹ Once the SHA processed the student, OAs supervised the student until their parents retrieved them.³⁰² If the school did not have a SHA, the student would be brought to the front office where the OA had to supervise the student until their parents retrieved them.³⁰³

OAs were also exposed to students in the classroom. Tr. at 187. When teachers were not on campus, OAs occasionally had to cover classes when EAs were not available. Id. OAs were also exposed to students outside the classroom. Tr. at 71. It was not always possible to maintain a six-foot separation from others. Tr. at 858. "Many" students tested positive for COVID-19 and its variants. Tr. at 121; 185; 497; 498; 539; 721; 858; 998. A Principal recalled that a school campus where SASAs had

²⁹⁸ Tr. at 38.

²⁹⁹ Tr. at 999; 1000.

³⁰⁰ Tr. at 122; 858; 859.

³⁰¹ Tr. at 500.

³⁰² Tr. at 122; 123; 186; 719; 720.

³⁰³ Tr. at 675.

contact with students when as many as ten (10) students test positive for COVID-19 per day. Tr. 1099. Another Principal recalled that there were “too many [COVID cases] to count. Tr. at 1050.

In addition to students, OAs were exposed to the general public. Tr. at 199; 495; 537; 543; 544; 857. Schools also occasionally acted as testing sites. Tr. at 542; 664; 665. OAs, EAs, SASAs, and security personnel assisted at the testing sites. Id. OAs also received deliveries from vendors. Tr. at 119; 543; 862; 1006; 1082; 1083. They were exposed to delivery people from the public while receiving deliveries. Tr. at 862. OAs were also required to leave campus to send mail at the post office. Tr. at 672. OAs encountered members of the general public at the post office. Tr. at 673. The OAs then delivered mail to students. Tr. at 673; 674; 1006. OAs also distributed homework packets and computers to students and parents. Tr. at 120; 672; 679; 812; 813; 820; 854; 991; 1004; 1005; 1013; 1014; 1082. They had to distribute these to each student on campus. Tr. at 991; 992; 1004. That included students and their families who were known to then be COVID-positive. Tr. at 1014. For example, at one school where there were 380-400 students, they had to distribute 380-400 laptops and homework packets. Tr. at 992; 1004. They then had to retrieve the laptops from students and parents throughout the school year. Tr. at 992; 993; 1005. OAs also occasionally had to deliver homework packets or food to students’ homes. Tr. at 927; 1015; 1016.

OAs were also had daily exposure to other DoE EEs. Tr. at 119; 185; 495; 497; 537; 539; 857; 862; 997. OAs had daily exposure to the SASAs that supervised them in each respective front office. Tr. at 673. It was not always possible to maintain a six-foot distance when being exposed to other DoE EEs. Tr. at 539; 858; 997. For example,

PTs rendered their services at numerous different schools from June 2020 to March 25, 2022. Tr. at 586. One PT was responsible for rendering services to students at 18 different schools. Tr. at 589. When PTs arrived at each school, they signed in the office. Tr. at 590. While on campus, they were exposed to the teachers, EAs, and administrative and office staff at each school. Id. OAs were also required to administer COVID tests for other DoE EEs, students, and parents. Tr. at 1086; 1087. DoE EEs, students, and parents took their respective tests, then they handed them to the OAs, who then carried them in a Ziplock bag to the appropriate person for processing. Tr. at 1086; 1087. DoE EEs where these forms of exposure happened tested positive for COVID-19 and its variants. Tr. at 121; 122; 185; 498; 540; 677; 721; 814; 858; 998; 1009; 1019; 1020. While they utilized layered mitigation methods to protect themselves from COVID-19 and its variants, these were not sufficient to eliminate exposure to COVID-19 and its variants. Tr. at 751; 752.

Based on the Section B.1.a.'s criteria in the THP Article, the Union states the OAs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **Occupational Therapists (“OTs”)**

Among other things, OTs rendered in-person assistance and support to SPs, SWs, and PTs as they provided care for intellectually and/or physically disabled students. Tr. at 193.

In addition to students, OTs were exposed to the public. Tr. at 194; 441. While rendering their services, OTs were also exposed to the students' caregivers, which included parents and guardians. Id.

OTs were exposed to students. Tr. at 196; 439; 440; 193. Students at those locations tested positive for COVID-19 and its variants. Tr. at 196; 439; 440.

OTs were also exposed to other DoE EEs. Tr. at 193. While rendering these services, they often were exposed to colleagues such as SPs, SWs, and PTs because their services often had to be rendered in tandem in the same room. Tr. at 193. DoE EEs at those locations where OTs worked tested positive for COVID-19 and its variants. Tr. at 196, lines 1-2. While they utilized layered mitigation methods to protect themselves from COVID-19 and its variants, these were not sufficient to eliminate exposure to COVID-19 and its variants. Tr. at 751; 752.

Based on the Section B.1.a.'s criteria in the THP Article, the Union states the OTs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **Physical Therapists (“PTs”)**

PTs were directed to return to work in March 2020. Tr. at 702, lines 15-8.

PTs worked with students with special mobility needs, many of whom qualified as students in special education (SPED). Tr. at 587. They helped students become more mobile. Tr. at 587. They also rendered assistance and support to classifications that rendered in-person support to OTs, SWs, and PTs as they provided care for intellectually and/or physically disabled students. Tr. at 193.

PTs rendered their services at numerous different schools between June 2020 to March 25, 2022. Tr. at 586. For example, a PT was responsible for rendering services to students at 18 different schools. Tr. at 589. When PTs arrived at each school, they signed in inside the front office. Tr. at 590. While in the front office and on other parts of

campus, they were exposed to the teachers, EAs, and administrative and office staff at each school. Id.

PTs rendered their services daily in-person, face-to-face with students and their parents, guardians, and/or caregivers. Tr. at 104; 587; 588; 599. According to one PT, full physical contact with the students while rendering services was “basically the entirety of my job.” Tr. at 587. In addition to mobility needs, these students had developmental and behavioral needs. Tr. at 587; 588. Their lessons were one-on-one. Tr. at 104. It was not possible to maintain a six-foot distance while rendering services to the students. Tr. at 587. Due in part to those developmental and behavior needs, not all students could wear masks while PTs rendered their services. Tr. at 104; 588; 589. Sometimes, students would put their hands in their mouths, then pull the PT’s mask off their faces with their hands. Tr. at 588; 589; 591. Consequently, it was “very common” for PTs to be exposed to students’ saliva and bodily fluids via spitting and drooling. Tr. at 591. While rendering these services, they often were exposed to colleagues such as OTs, SWs, and SPs because their services often had to be rendered in tandem. Tr. at 193.

Students who the PTs serviced tested positive for COVID-19. Tr. at 590. PTs were exposed to these students. Tr. at 586; 587; 588; 589.

PTs, SPs, CAs, OTs, and SWs rendered their services in substantially similar environments. Tr. at 193; 194; 195. They were on campus as well. Tr. at 342; 343.

In addition to students, PTs were frequently exposed to the public. Tr. at 751. PTs rendered their services daily in-person, face-to-face with students and their caregivers, which included students’ parents, guardians, and caregivers. Tr. at 104;

587; 588; 599. Students' parents or caregivers were required to be present in the same room as the student and PT during the entire therapy session. Id. While they utilized layered mitigation methods to protect themselves from COVID-19 and its variants, these were not sufficient to eliminate exposure to COVID-19 and its variants. Tr. at 751; 752.

Based on the Section B.1.a.'s criteria in the THP Article, the Union states the PTs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **Private Secretaries ("PSs")**

PSs were directed to return to work in March 2020. Tr. at 702.

PSs were exposed to the public, including students and students' parents, guardians, and caregivers. Tr. at 753; 754; 812; 813. Office staff, including PSs, distributed instructional packets and computers to students and their guardians. Id. Students tested positive for COVID-19 and its variants. Tr. at 814.

PSs also interacted with DoE EEs in the front office on a daily basis, including administrative and office staff. Tr. at 750; 753; 754. Other DoE EEs at their worksites were noted to have tested positive for COVID-19 and its variants. Id. While they were provided with layered mitigation methods, these were not sufficient to eliminate exposure to COVID-19 and its variants. Tr. at 750; 752; 814.

Based on the Section B.1.a.'s criteria in the THP Article, the Union states the PSs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **Registered Professional Nurses ("RPNs")**

RPNs were directed to return to work in March 2020. Tr. at 702.

Students returned to campus in June 2020. Tr. at 595. With the exception of a small group of students who lived in dormitories on campus, all students were bussed to campus from communities. Tr. at 598; 599. It was not possible for students to maintain a six-foot distance on the bus. Tr. at 599.

RPNs were exposed to students who tested positive for COVID-19. Tr. at 599; 600. The RPNs' exposure to such students was on campus. Tr. at 594; 595; 596; 597; 599. When a student showed symptoms of COVID-19 or its variants, the student was sent to the RPN in their office. Id. It was not possible to maintain a six-foot distance between the RPN and students in their office. Tr. at 599. Often, the RPN could not maintain more than a three-foot distance. Tr. at 599. When a student showing symptoms of COVID-19 arrived in the RPN's office, the RPN administered a temperature check and brought the student into the RPN's office. Tr. at 596. There were times when neither the RPN nor the students they cared for had any PPE. Tr. at 596. The RPN then would contact the symptomatic students' parents, guardians, and caregivers to retrieve their children. Tr. at 596. However, the students' parents, guardians, and caregivers did not always retrieve their children in a timely manner. Id. Many students were bussed to school from isolated communities that were far from the school. Id. Consequently, students' parents, guardians, and caregivers might not have a car to retrieve the student. Id. So, students could remain in the RPN's office for "a pretty long time." Tr. at 596. It was not unusual for the RPN to spend hours in their office with a student who showed symptoms of COVID-19 and its variants. Tr. at 596. It also was not unusual for the RPN's office to contain several students at one time. Tr. at 597. The RPN was required to supervise the students until their students' parents,

guardians, and caregivers retrieved them, so the RPN was required to stay in the office with them. Tr. at 597.

RPNs were also exposed to students' parents when they came to campuses to retrieve them. Tr. at 597.

DoE EEs who showed symptoms of COVID-19 also came to the RPN for care. Tr. at 599. Many of those DoE EEs tested positive for COVID-19 and its variants. Tr. at 600. At one RPN's school, at least 10 of the 60 DoE EEs at her school tested positive for COVID-19 between March 4, 2020, and March 25, 2022. Tr. at 600; 601.

Based on the Section B.1.a.'s criteria in the THP Article, the Union states the RPNs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **School Administrative Services Assistants (“SASAs”)**

SASAs were directed to return to work in March 2020. Tr. at 702.

SASAs oversaw operational functions of the school; for example, they processed student and staff absences, they performed payroll duties to ensure that staff were paid, and they also handled other functions that might otherwise be considered “human resources” functions. Tr. at 976; 657; 117. They also tended to parents at the front desk, received purchase orders for supplies for the school, including those used by SCs & SCSSs, the office, and classrooms. Tr. at 117. SASAs were the “face of the school,” because they “see everybody that comes into the school.” Tr. at 352. They were also responsible for supervising OAs and SHAs, among others. Tr. at 352; 230.

Offices remained open to the public throughout the period at issue. Tr. at 983;

353. Even before students returned to campus, SASAs registered and deregistered students, which required parents to come into the office to provide paperwork for processing by the SASA. Tr. at 983. SASAs had to handle the documents provided. Tr. at 983; 984. SASAs then had to provide the parents with paperwork regarding the registration or deregistration. Tr. at 984. This continued even after students returned to campus. Tr. at 983. Accordingly, they were exposed to the public. Tr. at 353.

SASAs were also required to leave campus to retrieve mail from the post office. Tr. at 984. SASAs encountered “a lot” of members of the public while at the post office. Tr. at 984; 985; 986; 987.

SASAs also received deliveries from vendors and the postal services throughout the period at issue. Tr. at 657; 658. SASAs were exposed to those vendors and postal services personnel. Id.

When students arrived on campus each day, the office staff, including SASAs and OAs, conducted temperature tests and wellness checks of each student as they arrived. Tr. at 751; 976.

In addition to students, SASAs were also exposed to the general public from March to May 2020 because SASAs were directed to distribute homework packets to students and their parents, guardians, and caregivers. Tr. at 663; 664; 820; 979; 980; 1094; 1095; 1096. While distributing these packets, SASAs were required to obtain the student's name, verify the student's identity, then hand the packet directly to the parent of the student. Tr. at 980. The student or their parents, guardians, and caregivers was then required to return the homework packet to the front office in-person at the end of the week. Id. Every student who was not in school was

required to do this. Id.

SASAs were also exposed to the public from March to May 2020 because SASAs were also directed to distribute computers to students and students' parents, guardians, and caregivers. Tr. at 820; 979; 980; 664.

SASAs were also exposed to the public while rendering their services by participating in the Grab-and-Go program. Tr. at 235; 658; 978; 979. Grab-and-Go was a program that provided food to students under the age 18. Tr. at 225. Any student attending any school under 18, including those who home schooled, could retrieve a meal via the Grab-and-Go program. U-71 001; U-72 001. Tr. at 225; 359; 360; 1018. To retrieve their food, students had to come in person or with a parent, guardian, or caregiver in a vehicle. Ex. U-71 001; U-72 001; U-76 002. Tr. at 359; 360; 658. Grab-and-Go schools served both breakfast and lunch daily. Tr. at 222. While rendering their services, they had contact with both students and students' parents, guardians, and caregivers. To distribute meals to students via the Grab-and-Go program, schools set up meal distribution centers in front of the main office on campus. Tr. at 37; 37; 38. Prior to providing the students and their parents, guardians, and/or caregivers with the student's meal, the DoE EE needed to confirm the identity of the student and confirm their preferences in meal options. Tr. at 669. At times, 10 to 15 members of the public would converge on the front office where the Grab-and-Go meal retrieval site was located on foot. Tr. at 360. Otherwise, SASAs handed the meal to the student or the student's parent, guardian, or caregiver driving by with their student in a vehicle. Tr. at 102; 979. DoE EEs participating in the Grab-and-Go program, including SASAs, were required to place the meal in any vehicle if

asked. Tr. at 659. It was a “hand-to-hand exchange.” Tr. at 360. It was not possible to maintain a six-foot distance while doing so. Tr. at 659; 102. Rather, the distance between the DoE EE was usually reduced to one (1) or two (2) feet. Students’ parents, guardians, and caregivers retrieving meals did not always wear masks. Tr. at 979. Some parents, guardians, and caregivers loitered and attempted to converse with those handing out the meals. Tr. at 892. While rendering their services at schools like Castle High School and Waiakea High School, SASAs handed out around 1200 and 1300 meals per day, respectively. Tr. at 339; 901. There was no way of knowing if any of the students or students’ parents, guardians, and caregivers they were exposed to were sick. Tr. at 38.

Schools also occasionally acted as testing sites. Tr. at 664; 665. OAs, EAs, SASAs, and security personnel assisted at the testing sites. Id.

SASAs interacted with students. Tr. at 978; 982; 983. Some schools did not have security personnel. Tr. at 978. At those schools, the SASA or other administrative staff escorted students who showed symptoms of COVID-19 or its variants to the SHA’s office. Tr. at 982. If a school did not have a SHA, the SASA and other DoE EEs assigned to the office were responsible for taking the temperatures and supervising students who had exhibited symptoms of COVID-19 or its variants. Tr. at 661; 665. Students were not always picked up immediately once they were contacted. Tr. at 662; 103. Students tested positive for COVID-19 and its variants. Tr. at 235; 356; 983; 662. One Principal recalled that a school campus where SASAs had contact with students had as many as ten students test positive for COVID-19 per day. Tr. 1099.

Even where a school did have a SHA, SASAs were exposed to students who

showed symptoms of COVID-19 and its variants. Tr. at 354; 355. Students would sometimes report symptoms of COVID-19 upon arrival at school when the SASA inquired. Id. Student showing symptoms of COVID-19 and its variants would also be sent to the office. Id. Once a student was determined to be showing symptoms of COVID-19, the student had to sign in with the SASA, who would then send them to the SHA. Id.

SASAs also interacted with DoE EEs. Tr. at 99; 100; 982. Their exposure was primarily to the office staff, administrative staff, School Custodians (“SCs”) and School Custodian Services Support (“SCSS”), and others. Tr. at 660; 353. SASAs could not always maintain a six-foot distance from themselves and DoE EEs while in their offices. Tr. at 100; 353; 354. All of those DoE EEs, in turn, had been exposed to the students on campus. Tr. at 356; 660; 661. DoE EEs tested positive for COVID-19 and its variants. Tr. at 234; 235; 354; 663; 983. COVID-19 positives were so common that it occasionally led to situations where schools were “really short staffed”. Tr. at 663. According to one SASA, “one got sick, and of course everybody else tested ... There was a point where it would just be me running the office and nobody else because everybody else was positive ... “. Tr. at 663.

Based on the Section B.1.a.’s criteria in the THP Article, the Union states the SASAs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **School Custodians (SCs) &
School Custodial Services Supports (SCSSs)**

SCs & SCSSs were directed to return to campus in March of 2020. See Tr. 340; 348; 702; 923; 924. They returned even before other DoE EEs, such as EAs, returned

to campus. Tr. at 230; 231. They were on campus rendering their services throughout the entire period at issue. Tr. at 49; 643; 644; 645.

Among other things, SCs & SCSSs cleaned and sanitized school campuses. Tr. at 923; 924. For example, SCs & SCSSs were tasked with sanitizing and cleaning school campuses both on a regular basis and after a student tested positive in a respective room on school campus. Tr. at 944; 1033.

On March 16, 2020, Assistant Supervisor (AS) Tanaka sent a memo entitled “COVID-19 – Enhanced Cleaning and Disinfecting of Schools and Offices During Spring Break 2020 and Beyond” to SCs & SCSSs, among others. U-66 001-4. AS Tanaka stated that schools and offices were tasked with cleaning and disinfecting their schools and offices, in particular classrooms and common use areas, which included, but was not limited to, cleaning trash cans, cleaning restrooms, and cleaning high contact surfaces that are touched by many different people, such as light switches, handrails, and doorknobs/handles. U-66 001.

Elementary schools do not have security personnel, only SCs and/or SCSSs. Tr. at 123. SCs & SCSSs serve in the role of security personnel. Tr. at 576; 577. So, SCs & SCSSs escorted students to the SHAs office when they showed symptoms of COVID-19 and its variants. Id. Students at schools where SCs & SCSSs did this tested positive for COVID-19 and its variants. Tr. at 814; 932; 945.

During this period, SCs & SCSSs worked with and were exposed to DoE EEs on campus, including administrative staff such as the OAs, DPUSTs, SASAs, PSs, and Principals. Tr. at 230; 231; 334; 335; 353; 497; 643; 644; 645; 660; 683; 684; 727; 932; 982; 1080. They could not always maintain a six-foot distance between themselves and

other DoE EEs. Id. DoE EEs at schools where this happened tested positive for COVID-19 or one of its variants. Tr. at 729; 730; 814; 932; 945.

SCs & SCSSs were also exposed to the public, including students and students' parents, guardians, and caregivers in various ways. Tr. at 664; 727; 728; 932; 978. SCs & SCSSs participated in Grab-and-Go. Tr. at 725; 726; 978; 991; 1029; 1030. SCs & SCSSs were also required to help return all student property to all students or their parents, guardians, or caregivers at the end of the year. Tr. at 664. SCs & SCSSs also helped distribute homework packets and computers to students and students' parents, guardians, and caregivers. Tr. at 820; 991; 993. It was not always possible to maintain a six-foot distance. Tr. at 646. SCs & SCSSs tested positive for COVID-19 and its variants. Tr. at 796. While they utilized layered mitigation methods to protect themselves from COVID-19 and its variants, these were not sufficient to eliminate exposure to COVID-19 and its variants. Tr. at 751; 752.

Based on the Section B.1.a.'s criteria in the THP Article, the Union states the SCs & SCSSs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **School Food Service Managers ("SFSMs")**

SFSMs were directed to return to work in March 2020. Tr. at 702. A Vice Principal recalled telling his SFSMs after directing them to return to work, "I'm going to ask you guys to risk your lives, because ... it really was Russian Roulette." Tr. at 531. Cafeterias remained open and active throughout the period at issue. Tr. at 222; 359.

SFSMs ensured that the school cafeteria operated. Tr. at 35; 36. SFSMs often operate several kitchens at several schools. Tr. at 36. They supervised cafeteria staff

at those schools. Tr. at 360; 361. SFSMs served both breakfast and lunch daily. Tr. at 222. This required them to be in multiple kitchens at multiple schools each day. Tr. at 36. They were exposed to other DoE EEs at each school where they rendered their services daily because, in order to render their services, they were in constant contact with other DoE EEs in each respective cafeteria. Tr. at 37; 361. Many of these DoE EEs tested positive for COVID-19 and its variants, leading SFSMs to work perpetually short-handed throughout the period at issue. Tr. at 39; 362; 828.

SFSMs were also exposed to the public from March to May 2020, because SFSMs were also occasionally directed to distribute homework packets to students and students' parents, guardians, and caregivers. Tr. at 812; 813; 820; 886; 887. While distributing these packets, SFSMs were required to obtain the student's name, then hand the packet directly to the students' parent, guardian, or caregiver. Tr. at 892.

SFSMs were also exposed to the public in other ways. Tr. at 37; 361. SFSMs accepted daily deliveries from members of the public. Tr. at 37; 223; 361; 829; 1039. In order to receive an order, the vendor entered the cafeteria, and the SFSM was required to sign for the delivery. Tr. at 223; 224. It was not possible to maintain a six foot distance from the vendor while receiving deliveries. Tr. at 223; 224; 829. Deliveries like these happened daily throughout the day during the entire period from March 2020 to March 25, 2022. Tr. at 37.

SFSMs were also exposed to the general public while rendered their services by participating in the Grab-and-Go program. Tr. at 222; 361; 827. SFSMs supervised meal preparation at cafeterias where the meals were prepared, and distribution at Grab-and-Go sites. Tr. at 826; 827; 889. Grab-and-Go was a program that provided food to

students under the age 18. Tr. at 225. Any student attending any school under 18, including those who home schooled, could retrieve a meal via the Grab-and-Go program. U-71 001; U-72 001. Tr. at 225; 359; 360; 1018. To retrieve their food, students had to come in person or with a parent, guardian, or caregiver in a vehicle. U-71 001; U-72 001; U-76 002. Tr. at 359; 360. Grab-and-Go schools served both breakfast and lunch daily. Tr. at 222. While rendering their services, they had contact with both students and students' parents, guardians, and caregivers. Tr. at 339. DoE EEs participating in the Grab-and-Go program, including SFSMs, were required to place the meal in the vehicle if asked. Tr. at 40; 41; 888; 889. Otherwise, they handed the meal to the student or the student's parent, guardian, and caregiver driving by with their student in a vehicle. Tr. at 222; 223; 888; 889. It was a "hand-to-hand exchange." Tr. at 360. It was not possible to maintain a six-foot distance while doing so. Tr. at 223; 360; 827; 887; 888; 889. Rather, the distance from the DoE EE was usually reduced to one or two feet. Tr. at 892. Parents, guardians, and caregivers retrieving meals did not always wear masks. Tr. at 223. Some parents, guardians, and caregivers often loitered and attempted to converse with those handing out the meals. Tr. at 892. While rendering their services at schools like Castle High School and Waiakea High School, SFSMs distributed around 1200 and 1300 meals per day, respectively. Tr. at 339; 901. While rendering their services, they had contact with both students and students' parents, guardians, and caregivers. Tr. at 339. There was no way of knowing if any of the students or parents they were exposed to were sick. Tr. at 38.

Once students returned to campus in 2020, they served meals to students. Tr. at 39; 40. While preparing and serving meals, SFSMs were required to stand shoulder-to-

shoulder with other DoE EE staff in the cafeteria. Tr. at 224. It was not possible to maintain a six-foot distance. Tr. at 829. While doing so, the SFSM was exposed to every student and DoE EE who retrieved a meal from the cafeteria at each respective school. *Id.* For example, at Kapaa Middle school 600 students ate breakfast and lunch daily. Tr. at 361; 362. When students ate, they ate in the cafeteria, and they removed their masks while eating. Tr. at 362; 828; 829. Positive cases of COVID-19 and its variants among these students and staff were numerous and “constant”. Tr. at 41; 224; 890; 891; 362; 828. SFSMs had to self-quarantine due to being close contacts with students or staff who tested positive for COVID-19 or one of its variants. Tr. at 362. In one school cafeteria, the entire staff, including the SFSM, tested positive for COVID-19. Tr. at 224; 225.

Based on the Section B.1.a.’s criteria in the THP Article, the Union states the SFSMs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **School Health Assistants (“SHAs”)**

SHAs were directed to come to work. Tr. at 50; 570; 702.

SHAs were responsible for caring for students who are sick or injured. Tr. at 46; 243; 472; 778; 779. SHAs also found themselves responsible for caring for DoE EEs who fell sick or injured on campus. Tr. at 573.

SHAs rendered their services in-person, face-to-face. Tr. at 788.

On March 16, 2020, Assistant Superintendent (AS) Tanaka sent a memo entitled “COVID-19 – Enhanced Cleaning and Disinfecting of Schools and Offices During Spring Break 2020 and Beyond” to Principals, Custodians, and School Health

Aides, among others. U-66 001-4. Therein, he directed those in the health office to clean and disinfect health cots and other furniture after each student use, cover treatment tables and used pillow protectors, and discard or launder coverings after each use. U-66 002.

SHAs were exposed to students and their students' parents, guardians, and caregivers. Tr. at 48; 478; 789. When students showed symptoms of COVID-19 and its variants, they were brought to the SHA. Tr. at 473; 547; 571; 752; 753; 769; 779. Some of these students were vomiting. Tr. at 246. The SHA's office was attached the front office. Tr. at 500. The SHA's offices were often small. Tr. at 795. Several SHAs' offices could only safely accommodate ten people at a time pre-COVID. Tr. at 247; 473. However, one SHA estimated that she once had 20 students in her care at one time. Tr. at 246. A six-foot distance could not be maintained in SHA's offices. Tr. at 51; 246; 476; 551; 573; 796.

The students SHAs encountered had symptoms of COVID-19. Tr. at 48; 793. When a student was brought to the SHA's office, the SHAs took their temperature and record the student's symptoms. Tr. at 248; 249; 551; 571; 769; 779; 792; 796. Once a student was brought to the SHA, the SHA then contacted the student's parents, guardians, or caregivers to ask them to retrieve the student, have them tested, and provide a note from a physician confirming that they were not positive for COVID-19 or one of its variants. Tr. at 48; 779. "A lot" of those students tested positive for COVID-19 and its variants. Tr. at 48; 50; 246; 476; 572; 768; 781; 789; 790. SHAs were exposed to those students. Tr. at 572; 573. Once the SHA processed the student, the SHA then often supervised the student until a parent, guardian, or caregiver retrieved

them. Tr. at 475; 769; 780. Parents did not always come in a timely fashion. Tr. at 345; 474; 548; 572; 753. Some parents, guardians, or caregivers took an hour or more to respond. Tr. at 548. Others waited until the end of the school day. Tr. at 572. Some parents, guardians, or caregivers actively avoided answering the SHA's phone calls because they did not believe COVID-19 was real or they did not want to retrieve the student from school. Tr. at 475. Some parents, guardians, or caregivers sent their students to school knowing that their child had tested positive for COVID-19 or one of its variants. Tr. at 789. SHAs attempted to prevent parents, guardians, and caregivers from bringing their COVID-positive students to school. Tr. at 789; 790; 791. Some students were brought to school several days in a row despite having been COVID-positive and their parents having been asked to keep them at home. Tr. at 790. One student had to be taken to the hospital due to a parents, guardian, or caregiver failing to retrieve them from school in a timely manner. Tr. at 572.

SHAs were frequently exposed to students' parents, guardians, and caregivers. Tr. at 49; 478; 550; 551; 770; 782; 783; 791. For example, students' parents, guardians, and caregivers confronted a SHA over their disagreement with DoE policies, which culminated in the parent yelling at the SHA in close proximity to her face. Tr. at 789; 790. A parent, guardian, or caregiver of a student also told a SHA "F you this, you don't work for Department of Health, you know, I have a right to bring my child" after a SHA told a parent, guardian, or caregiver that they could not continue to bring a student to school who had tested positive for COVID-19 or one of its variants. Tr. at 791. During this interaction, the parent, guardian, or caregiver did not maintain a six-foot distance. Tr. at 789; 790. The problem became so severe that a SHA

contacted the police to request assistance in restraining parents, guardians, and caregivers from bringing their COVID-positive students to school. Tr. at 789; 791.

At another school, the front office and SHA's office had to be shut down for a week due to threats from parents, guardians, or caregivers who were upset about the DoE's testing and/or vaccine mandate for athletics. Tr. at 243; 244; 245. SHAs assisted athletic departments in COVID testing for athletics, so they tended to be the targets of this kind of harassment. Tr. at 479; 480.

SHAs were also exposed to DoE EEs. Tr. at 573. SHAs could not maintain a six-foot distance from DoE EEs at all times. Tr. at 573. DoE EEs occasionally came directly to SHAs if they had symptoms of COVID-19 or its variants. Tr. at 780. DoE EEs tested positive for COVID-19 or its variants. Tr. at 49; 50; 246; 549; 571; 768; 769; 781.

Not surprisingly, SHAs tested positive for COVID-19 or one of its variants. Tr. at 247. A SHA is certain that she was exposed to and caught COVID-19 or one of its variants in the SHA's office while exposed to students. Tr. at 252; 253.

Based on the Section B.1.a.'s criteria in the THP Article, the Union states the SHAs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **Speech Pathologists ("SPs")**

SPs were directed to return to work in March 2020. Tr. at 702.

SPs helped students with developmental and behavioral needs learn to communicate. Tr. at 437; 438. The DoE recognized DoE EEs that were part of what is known as the Speech Language Pathway, which included SPs and CAs, as being among the few DoE EEs that hold "health related positions" that expose them to

sufficient risk to justify use of valuable KN95 masks. U-95 001.

From March to May 2020, SPs met with other DoE EEs in-person, face-to-face, to prepare equipment and packets for students. Tr. at 194; 195. Those DoE EEs included CAs, among others. Id.

In March to May 2020, SPs made visits to students' homes where they dropped off equipment that the students could use until in-person, face-to-face assistance and instruction could resume. Tr. at 194; 195.

In June 2020, SPs returned to campus to render their services. Tr. at 195. SPs rendered their services at numerous different schools from June 2020 to March 25, 2022. Tr. at 190; 193; 437. SPs rendered their services daily in-person, face-to-face with students. Tr. at 104; 191; 438; 443. These students had developmental and behavioral needs. Tr. at 194. Sometimes the offices where these services were rendered were not large enough to maintain a six-foot distance. Tr. at 193. Even where the office was larger than six feet, it was not always possible to maintain a six-foot distance while rendering services due to the students developmental and behavioral needs. Tr. at 192; 193; 438. Due in part to those developmental and behavior needs, not all students could wear masks while SPs rendered their services. Tr. 104; 437; 438; 439. Consequently, it was "very common" for SPs to be exposed to students' saliva and bodily fluids via coughing and sneezing. Tr. at 197; 442.

While rendering their services, SPs were also exposed to the students' parents, guardians, or caregivers. Tr. at 194; 441. While rendering these services, they were often exposed to DoE EEs such as OTs, SWs, and PTs because their services often had to be rendered in tandem. Tr. at 193. Accordingly, SPs, CAs, OTs, SWs, and PTs

rendered their services in substantially similar environments. Tr. at 193; 194; 195. They were all on campus together as well. Tr. at 342; 343.

Students who the SPs serviced tested positive for COVID-19. Tr. at 196; 439; 440. SPs were exposed to these students. Tr. at 196; 439. Some SPs were exposed multiple times. Tr. at 439; 440; 441. Once informed that they had been exposed to students who tested positive for COVID-19, SPs self-quarantined for ten (10) or fourteen (14) days at a time. Tr. at 196; 439; 440; 442; 443. A SP who lived in a multigenerational household with medically fragile elderly relatives and children lived in a tent in her front yard during her fourteen (14) day quarantine. Tr. at 442; 443.

Based on the Section B.1.a.'s criteria in the THP Article, the Union states the SPs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **School Safety and Security Officer (“SSSOs”)**

SSSOs supervise School Security Attendants (SSAs). Tr. at 334. They also work alongside them, performing the same duties and responsibilities as those they supervise. Tr. at 339.

SSOs were directed to return to campus in March of 2020. Tr. 340; 702. According to one SSSO, they returned because “[w]e had no choice.” Tr. at 348.

During the first two months after their return to campus, there were a record number of fights between students. Tr. at 271; 272. SSSOs, and their subordinates SSAs, were required to intervene. Id. They could not maintain a six-foot distance between themselves and students while intervening. Id.

In Spring of 2020, they worked with and were exposed to their colleagues who

had also been called back, including administrative staff such as the OAs, SASAs, Secretaries, and Principals, but there were also “Head Custodians”, otherwise known as SCs & SCSSs. Tr. at 334; 335.

Each day, all DoE EEs that were not teachers, including SSSOs, were required to clock in by signing in the front office. Tr. at 342. While there, they were exposed to DoE EEs, who themselves were exposed to members of the public and other DoE EEs that also worked in or passed through the front office. Tr. at 334; 335.

In March 2020, SSSOs patrolled their campuses. Among other things, every morning, they cleared the campus of homeless squatters that occupied the school grounds on the weekend and in the evening. Tr. at 335; 336. This continued from March 2020 to March 25, 2022. Tr. at 335.

Not long thereafter, students and staff returned to campus. Tr. at 336. SSSOs were exposed to students. Tr. at 336. SSSOs were tasked with assisting in running learning hubs on campus. Tr. at 336. Each learning hub contained 15-20 students. Tr. at 336. They were tasked with ensuring that they behaved, which included retrieving them from bathrooms and correcting behavior. Tr. at 336.

When called to correct behavior or retrieve students to escort them to the office, SSSOs also were exposed to EAs. Tr. at 337. Those EAs were exposed to their own respective classes containing 15-20 students. Tr. at 336. Teachers were not rendering services in-person, face-to-face at this time. Tr. at 337. EAs were doing so in their place. Id.

When a student showed symptoms of COVID-19 and its variants, the SSSO was required to escort them to SHA in the office. Tr. at 343; 665; 253; 254; 474; 475; 551.

These students often could not walk, due to their symptoms, so the SSSO had to put them on a golf cart with them to escort the student to the SHA in the office. Tr. at 343; 344; 355; 356.

Once a student arrived at the office, the SSSO and School Security Officers would supervise the students showing symptoms until their parents arrived to retrieve them. Tr. at 344; 345; 665. They also had contact with the students' parents at that time. Tr. at 344. Parents did not always come in a timely fashion. Tr. at 345; 753. Many students tested positive for COVID-19 and its variants. Tr. at 340; 356.

SSSOs were exposed to the general public while rendered their services by participating in the Grab-and-Go program. Tr. at 339. Among other things, SSSOs directed traffic. Tr. at 828. They also served food to those who came to retrieve meals. U-71 001; U-72 001; U-76 002. Tr. at 339. To retrieve their food, students had to come in person or with a parent, guardian, or caregiver in a vehicle. U-71 001; U-72 001; U-76 002. Tr. at 359; 360; 674. Grab-and-Go schools served both breakfast and lunch daily. Tr. at 222. While rendering their services, they had contact with both students and students' parents, guardians, and caregivers. Tr. at 339. At times, 10 to 15 members of the public would converge on the office where the Grab-and-Go and meal retrieval site was located on foot. Tr. at 360. In order to distribute meals to students via the Grab-and-Go program, schools set up meal distribution centers in front of the main office on campus. Tr. at 37; 38. DoE EEs participating in the Grab-and-Go program, including SSSOs, were required to place the meal in the vehicle if asked. Tr. at 40; 41. Otherwise, they handed the meal to the student or student's parent, guardian, or caregiver driving by their student in a vehicle. Tr. at 222; 223. It was a "hand-to-hand

exchange.” Tr. at 360. It was not possible to maintain a six-foot distance while doing so. Tr. at 223; 360; 827. Rather, the distance between the DoE EEs was usually reduced to one (1) or two (2) feet. Tr. at 892. Parents retrieving meals did not always wear masks. Tr. at 223. Some parents, guardians, or caregivers loitered and attempted to converse with those handing out the meals. Tr. at 892, lines 6-14. Parents, guardians, and caregivers retrieving meals did not always wear masks. Tr. at 223. While rendering their services at schools like Castle High School and Waiakea High School, SSSOs distributed around 1200 and 1300 meals per day, respectively. Tr. at 339; 901. While rendering their services, they had contact with both students and students’ parents, guardians, and caregivers. Tr. at 339. There was no way of knowing if any of the students or students’ parents, guardians, and caregivers they were exposed to were sick. Tr. at 38.

SSSOs also had daily exposure to the public. Tr. at 336; 661. For example, schools occasionally acted as testing and vaccination sites. Tr. at 664; 665; 701; 702. SSSOs assisted with both. *Id.* There were also DoE EEs who tested positive for COVID-19 and its variants. Tr. at 340.

In rendering their services to both students and the public, it was *never* possible to maintain a six-foot distance. Tr. at 338. According to one SSSO, “we never have a choice like teachers, you know, they stay away from ... we had to be around people.” Tr. at 341.

Based on the Section B.1.a.’s criteria in the THP Article, the Union states the SSSOs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **School Security Attendant (“SSAs”)**

SSAs provided security on campus, which included clearing the school campus of homeless squatters, escorting students to and from class, retrieving truant students, and breaking up fights between students. Tr. at 271; 272; 335; 336; 336.

SSAs were directed to return to work in March 2020. Tr. at 702.

During the first two months after their return to campus, there were a record number of fights between students. Tr. at 271; 272. SSSOs, and their subordinates SSAs, were required to intervene. Id. They could not maintain a six-foot distance between themselves and students while intervening. Id.

When a student showed symptoms of COVID-19 and its variants, the SSA was required to escort them to SHA in the office. Tr. at 253; 254; 343; 474; 475; 551; 665. These students often could not walk, due to their symptoms, so the SSSO had to put them on a golf cart with them to escort the student to the SHA in the office. Id.

SSAs rendered their services as part of the Grab-and-Go program. Tr. at 339. SSAs were also exposed to the general public while rendered their services by participating in the Grab-and-Go program. Tr. at 339; 828. Among other things, SSAs directed traffic. Tr. at 828. They also served food to those who came to retrieve meals. Tr. at 339. To retrieve their food, students had to come in person or with a parent, guardian, or caregiver in a vehicle. Ex. U-71 001; U-72 001; U-76 002. Tr. at 359; 360; 674. Grab- and-Go schools served both breakfast and lunch daily. Tr. at 222. While rendering their services, SSAs had contact with both students and parents. Tr. at 339. DoE EEs participating in the Grab-and-Go program, including SSAs, were required to place the meal in the vehicle if asked. Tr. at 40; 41. Otherwise, they handed the meal to

the student or the student's parent, guardian, and caregiver driving by with their student in a vehicle. Tr. at 222; 223. It was a "hand-to-hand exchange." Tr. at 360. It was not possible to maintain a six-foot distance while doing so. Tr. at 223; 360; 827. Parents, guardians, and caregivers retrieving meals did not always wear masks. Tr. at 223.

SSAs were exposed to the public. Schools also occasionally acted as testing sites. Tr. at 664; 665; 701; 702. SSAs assisted the testing sites. Id.

According to an SSSO, speaking about himself and his subordinate SSAs, "we never have a choice like teachers ... we had to be around people." Tr. at 341.

Based on the Section B.1.a.'s criteria in the THP Article, the Union states the SSAs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

- **Social Worker ("SWs")**

SWs rendered their services throughout the period at issue. SWs were directed to return to work in March 2020. Tr. at 702.

Among other things, SWs rendered in-person support and assistance to OTs, SWs, and PTs as they provided care for intellectually and/or physically disabled students. Tr. at 193.

SWs were exposed to the public. Tr. at 194; 441. While rendering their services, SWs were exposed to the students' caregivers, which included parents and guardians. Id.

SWs were also exposed to students. Tr. at 196; 439; 440; 193. Students at those locations tested positive for COVID-19 and its variants. Tr. at 196; 439; 440.

SWs were also exposed to other DoE EEs. While rendering these services, they

were exposed to colleagues such as SPs, OTs, and PTs because their services often had to be rendered in tandem in the same room. Tr. at 193.

Based on the Section B.1's criteria in the THP Article, the Union states the SWs exposure was *Most Severe*, because it was likely to result in serious incapacitation, long periods of time lost, and possible death.

Based on all the above, and using these classifications as representative examples of the class, the Union states that exposure to COVID-19 and its variants was *Most Severe* for all DoE EEs and their respective classifications, both present and past, that worked for any period between March 4, 2020 – March 25, 2022, and that were or are organized into BUs 2, 3, 4, 9, and 13, during the aforementioned period, as defined by option 1.a. of Articles 20.B. of the BU 3, 4, and 13 CBAs, and 22 B. of the BUs 2 and 9 CBAs because exposure to them is likely to result in Serious Incapacitation, Long Period of Time Lost, and Possible Loss of Life.

Exposure to COVID-19 and its variants was likely to result in accidents that occurred frequently in spite of reasonable safety precautions

The Union next addressed the second “Most Severe” scenario under Section B of the THP Articles. Section B.1.b provides:

b. Accidents occur frequently in spite of reasonable safety precautions.

U-1 048-9; U-2 047; U-3 045; U-6 050-1; U-105 045. The Union states the term *frequent* as it relates to option b. means happening at short intervals: often repeated or occurring: acting or returning regularly or often. Merriam-Webster Dictionary 2022. Ex. U-55 079-84.

Chief Kemble admitted that the reasonable safety precautions intended to

mitigate the results of exposure to COVID-19 and its variants, including, but not limited to, use of masks, barriers, spacing, vaccines, and other safety procedures, could not - and did not - prevent a person from testing positive for COVID-19 or its variants. Tr. at 1158; 1159; 1169; 1157; 1158; 1159.

DoE EEs tested positive for COVID-19 and its variants. U-103 001; Tr. at 1173. Chief Kemble admits that DoE statistics confirm that there were close to 3,000 confirmed cases of COVID-19 and/or its variants per month among students and staff at DoE facilities between July 1, 2021 – March 25, 2022. Tr. at 1173. The DoE did not keep statistics during the period between March 4, 2020 – June 31, 2021. U-103 001. However, DoE EEs were exposed to COVID-19 and its variants throughout that period of time, and unfortunately, a DoE EE died as a result of exposure to COVID-19 or one of its variants during that period. U-A at 038, 41. Tr. at 149.

Testing positive for COVID-19 and its variants, and indeed dying as a result of that exposure, despite the use of all mitigating measures available, is not intentional – for all intents and purposes, it is an accident. Thus, exposure to COVID-19 and its variants wasn't just likely to result in accidents that occurred frequently in spite of reasonable safety precautions – it actually did result in what was likely tens of thousands of accidents, as many as 3,000 per month, in spite of reasonable safety precautions.

The Union thus states that exposure to COVID-19 and its variants was *Most Severe* for all DoE EEs and their respective classifications, both present and past, that worked for any period between March 4, 2020 – March 25, 2022, and that were or are organized into BUs 2, 3, 4, 9, and 13, during the aforementioned period, as defined

by option b. of Articles 20.B. of the BU 3, 4, and 13 CBAs, and 22 B. of the BUs 2 and 9 CBAs because exposure to COVID-19 and its variants results in accidents that occur frequently in spite of use of reasonable safety precautions such as use of PPE, spacing, and safety procedures.

Frequent exposure to COVID-19 and its variants where failure to exercise extreme care and judgment might cause an accident which would result in total disability or fatality

The Union next addressed the third “Most Severe” scenario under Section B of the THP Articles. Section B.1.c provides:

Frequent exposure to the unusually hazardous working condition where failure to exercise extreme care and judgment might cause an accident which would result in total disability or fatality.

Ex. U-1 048-9; U-2 047; U-3 045; U-6 050-1; U-105 045. The Union states the term *frequent* as it relates to option c. means happening at short intervals: often repeated or occurring: acting or returning regularly or often. Merriam-Webster Dictionary 2022. Ex. U-55 079-84.

Chief Kemble admitted that frequent exposure to COVID-19 and/or its variants where failure to exercise extreme caution in carrying out layered mitigation could result in serious illness and fatality. Tr. at 1169. Governor Ige, and Attorneys General Connors and Shikada collectively admitted that exposure to COVID-19 or/its variants regularly resulted in fatalities. U-7 002; U-12 001; U-13 001; U-14 001; U-15 001; U-16 001; U-17 001; U-18 001; U-19 001; U-20 001-2; U-21 001-2; U-22 001-2; U-23 002; U-24 002; U-25 002; U-25 002; U-27 001; U-29 002; U-30 001; U-31 001; U-32 001; U-33 001; U-34 001. Even before there was a single confirmed case of COVID-19 in the SoH, Governor Ige and Attorney General Connors recognized and admitted that

exposure to COVID-19 had proven to be fatal. Ex. U-7 002.

Unfortunately, that proved to be true. U-7 002; U-12 001; U-13 001; U-14 001; U-15 001; U-16 001; U-17 001; U-18 001; U-19 001; U-20 001-2; U-21 001-2; U-22 001-2; U-23 002; U-24 002; U-25 002; U-25 002; U-27 001; U-29 002; U-30 001; U-31 001; U-32 001; U-33 001; U-34 001. Many SoH residents, in areas both urban and rural where DoE facilities were present, died from exposure to COVID-19 and its variants. With each new Emergency Proclamation, usually issued approximately one month apart, Governor Ige announced exponential increases in the number of deaths among SoH residents who had been exposed to COVID-19 and its variants, in areas both rural and urban where DoE facilities were present. *Id.* In one month alone, the number of deaths resulting from exposure to COVID-19 or its variants actually doubled. U-20 001-2. A DoE EE was among those counted as having died as a result of exposure to COVID-19. Tr. at 149.

As previously stated, Governor Ige, and Attorney Generals Connors and Kishida, confirmed that COVID-19 and its variants resulted in what they recognized as an *emergency*, as defined by HRS 127A-2. U-7 004; U-8 001. U-9 001-2; U-10 001; U-11 001; U-12 001; U-13 001-2; U-14 001,33; U-15 001,34,59; U-16 001,37; U-17 001,28; U-19 001,32; U-20 001,32; U-21 001,33; U-22 001,34; U-23 001,34; U-24 001,35; U-25 001,35; U-26 001,34-5; U-27 001,4; U-28 001; U-29 001,35,37,63; U-30 001,19; U-31 001,3,20,24, 43,46, 50; U-32 001,19,23,34; U-33 001; U-34 001-18; U-35 001. HRS 127A-2 defines *emergency* as follows, in relevant part:

Any occurrence, or imminent threat thereof, which results or may likely result in substantial injury or harm to the population...

U-36 001. In declaring that the presence of COVID-19 in the SoH had resulted in an

emergency, Governor Ige, and Attorneys General Connors and Kishida admitted that the presence of COVID-19 and its variants in the SoH was an occurrence, or imminent threat thereof, which resulted or was likely to result in substantial injury. U-7 004; U-8 001; U-9 001-2; U-10 001; U-11 001; U-12 001; U-13 001-2; U-14 001,33; U-15 001,34,59; U-16 001,37; U-17 001,28; U-19 001,32; U-20 001,32; U-21 001,33; U-22 001,34; U-23 001,34; U-24 001,35; U-25 001,35; U-26 001,34-5; U-27 001,4; U-28 001; U-29 001,35,37,63; U-30 001,19; U-31 001,3,20,24, 43,46, 50; U-32 001,19,23,34; U-33 001; U-34 001-18; U-35 001; U-36 001. For all intents and purposes, substantial injury can, and should, be read to include injuries up to and including total disability.

The Union states that based on all the above, including the data published by both Governor Ige and the DoE, DoE EEs were frequently exposed to COVID-19 and its variants, and failure to exercise extreme care and judgment, even with the use of mitigating measures, caused accidents which resulted in serious injury, including and up to total disability, or fatality.

The Union thus states exposure to COVID-19 and its variants for all DoE EEs and their respective classifications, both present and past, that worked for any period between March 4, 2020 – March 25, 2022, and that were or are organized into BUs 2, 3, 4, 9, and 13, during the aforementioned period, was *Most Severe* as defined by option c. of Articles 20.B. of the BU 2, 3, 4, and 13 CBAs, and 22 B. of the BUs 2 and 9 CBAs because DoE EEs were frequently exposed to the COVID-19 and its variants, which constituted an unusually hazardous working condition wherein failure to exercise extreme care and judgment might cause an accident which would result in total disability or fatality.

Using the foregoing classifications as examples, the Union asserts all DoE EEs and their respective classifications, both present and past, that worked for any period between March 4, 2020 – March 25, 2022, and that were or are organized into BUs 2, 3, 4, 9, and 13, during the aforementioned period, were temporarily exposed to unusually hazardous working conditions and exposure to the unusually hazardous working conditions was *Most Severe*.

The Union asserts that in the alternative, when DoE EEs' temporary exposure to unusually hazardous working conditions was not *Most Severe*, it was *Severe* by default

The Union notes this arbitrator found and concluded that the affected DoE BU 2, 3, 4, 9, and 13 members' degree of exposure to the hazard COVID-19 and its variants at DOE facilities was *Severe* or *Most Severe* from March 4, 2020, to March 25, 2022. U-A at 041. If a DoE EE's respective classification's exposure to COVID-19 and its variants was not found by this Arbitrator to be *Most Severe*, it necessarily then qualifies as *Severe* based on that finding, which itself, was supported by the evidence produced in Phases I and II of this hearing.

XII. The arbitrator's determination of the THP differential award

The only remaining issue at Stage 2 (other than the pending BU 06 Motion for THP) is:

Pursuant to Section B, Hazard Pay Differentials, of the THP Articles, whether affected DOE BU 02, 03, 04, 09, and 13 members (meaning, the HGEA members in those BUs who were required to report to work) should be awarded the "most severe" 25 percent THP differential, or the "severe" 15% percent THP differential.

As the arbitrator noted, the Employer did not address this issue whatsoever in its Post Hearing Brief, other than to repeat the already rejected argument that there should

be no hazard pay at all. As a result, the arbitrator did not have the benefit of the Employer's position regarding the allocation of the THP differentials between "Severe" and "Most Severe." Equally important, the Employer presented *no* credible evidence at Stage 2, via direct or cross examination or exhibits, regarding the allocation of the THP differentials between "Severe" and "Most Severe." As a result, the Employer presented no credible evidence opposing the Union's position regarding the allocation of the THP differentials between "Severe" and "Most Severe."

The Union, on the other hand, and as shown above, addressed the allocation of the THP differentials in comprehensive detail, specifying the evidence in support of its position that the affected BU 02, 03, 04, 09, and 13 members are entitled to a THP differential award of 25% from March 4, 2020 through March 25, 2022.

As noted above, the arbitrator found and concluded that based on a preponderance of the evidence:

- The Union's 96 DOE BU members who testified represented a valid and reliable cross section of the above HGEA job classifications on Oahu, Maui, the Big Island, and Kauai.
- The 96 BU Members who testified represented the common experience of all former and current BU members from their respective classifications that worked during the March 4, 2020 through March 25, 2022 COVID Emergency Period.
- Similar to the HGEA's Offer of Proof at Stage 1,³⁰⁴ if the Union called all member witnesses employed by the Department of Education representing BUs 2, 3, 4,

³⁰⁴ U-106, the HGEA Offer of Proof.

6, 9, and 13 at Stage 2, their testimony would be that for each day they reported to work:

1. Temporary hazardous working conditions existed at each of their schools from March 4, 2020, through March 25, 2022, due to exposure to the COVID-19 virus and its variants for each of them.
2. They were exposed to those temporary hazardous working conditions while at work.
3. The exposure was Severe or Most Severe as defined in the CBAs.
4. While circumstances varied from school to school throughout the State of Hawai'i, exposure to the temporary hazardous conditions at all schools created by COVID-19 and its variants remained constant from March 4, 2020 through March 25, 2022.

- All 96 BU Members, representing the various DOE job classifications, credibly testified they were exposed to members of the public, which includes students, as a routine part of their job functions.

- To obviate the needless presentation of cumulative evidence at Stage 2, the arbitrator finds and concludes that the testimony of all BU 02, 03, 04, 06, 09, and 13 members would be the same as the 96 BU witnesses who testified.

Section B of the THP Article provides 3 different scenarios for which exposure to a temporary hazardous working conditions will qualify as being "Most Severe." The arbitrator agrees with the Union that exposure to COVID-19 and its variants satisfy all 3 scenarios. The arbitrator finds and concludes that the affected BU members' exposure to the public at school was:

- Likely to result in serious incapacitation, long period of time lost, or possible loss of life. Section B.1.a of the THP Articles.

- Likely to result in frequent accidents in spite of reasonable safety precautions. Section B.1.b of the THP Articles.
- Constituted frequent exposure to the unusually hazardous working condition where failure to exercise extreme care and judgment might cause an accident which would result in total disability or fatality. Section B.1.c of the THP Articles.

As a result, the arbitrator finds and concludes that all the affected BU members are entitled to a hazard pay differential award of 25% from March 4, 2020 through March 25, 2022, based on the minimum step of the affected Employee's salary range, pursuant to Section B.1. of the THP Articles in BU 02, 03, 04, 09, and 13.

The computation of the above THP differentials shall be as provided in Section C of the THP Article in the BU 02, 03, 04, 09, and 13 CBAs, which provides the criteria for computing hazard pay.

The payment of the above THP differentials includes all hours that that each affected DOE BU 02, 03, 04, 09, and 13 member worked from March 4, 2020 through March 25, 2022, with the exception of time spent teleworking, utilizing vacation or sick leave, or otherwise absent from the worksite on approved or unapproved administrative leave.

XIII. Decision, Order, and Second Partial Final Arbitration Award

Pursuant to the June 14, 2022 Scheduling Order No. 1 herein, these arbitration proceedings were bifurcated into two sequential stages, a Stage 1 Liability Hearing and a Stage 2 Damages Hearing. The Stage 1 Liability Hearing was to determine whether the Employer violated the respective CBAs when the Employer denied the Union's requests for a Temporary Hazard Pay (THP) wage differential for BU members

performing essential functions which temporarily exposed them to unusually hazardous working conditions arising from COVID-19 and its variants. In the event the arbitrator determined there were violations of one or more of the respective CBAs, the Stage 2 Damages Hearing was to determine the amount of any contested THP wage differentials for BU members found qualified for THP.

Based on a careful review of the record, including the relevant provisions of the BU 02, 03, 04, 09, and 13 CBAs, and all of the testimony, exhibits, and briefs submitted by the parties, the arbitrator finds, concludes, and orders:

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

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

3. Based upon the 2/8/23 Partial Final Award, which is attached hereto and incorporated herein:

a. The Employer violated its duty to consult with the Union whether to grant THP as required by Section A of the THP Articles in BU 02, 03, 04, 09, and 13.

b. The Employer violated the duty to grant hazard pay as required by Section A of the THP Articles in BU 02, 03, 04, 09, and 13.

c. The “affected DOE BU 02, 03, 04, 09, and 13 members” (meaning, the HGEA members in those BUs who were required to report to work)³⁰⁵ were *exposed* to unusually hazardous working conditions, specifically, the highly contagious COVID-19 disease and its variants at DOE facilities.

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

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

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

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

h. The affected DOE BU 02, 03, 04, 09, and 13 members are entitled to THP at the “Severe” or “Most Severe” differential.

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

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

³⁰⁵ Tr. at 360.

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

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

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

4. The Union met its burden of proving by preponderance of the evidence that the Employer violated the orders in the 2/8/23 Partial Final Award, the 3/8/23 Scheduling Order No. 2, the 4/21/23 Order, and the arbitrator's June 9, 2023 order approving the condensed time for consultation, all of which ordered the Employer to consult with the Union regarding the THP differentials, because the Employer did not participate meaningfully and in good faith in the 6/15/23 2-hour consultation, did not respond to the Union's proposed methodologies for allocating such differentials, and did not utilize the additional extension to Friday, June 16, 2023 to complete the consultation.

5. Because the Employer violated the above orders to consult, the Employer also violated Article 2 – Conflict in BUs 02, 03, 04, 09, and 13 CBAs, Article 3 – Maintenance of Rights and Benefits in BUs 02, 03, 04, 09 and 13 CBAs, and Article 5 – Rights of the Employer in BUs 02, 03, 04, 09 and 13 CBAs.

6. The Union met its burden of proving by a preponderance of the evidence

that the Employer violated its duty to grant the THP differentials as required by Section B of the THP Articles in BU 02, 03, 04, 09, and 13.

7. All 96 BU Members, representing all other BU Members in the DOE HGEA DOE job classifications, credibly testified they were exposed to members of the public, which includes students, as a routine part of their job functions.

8. To obviate the needless presentation of cumulative evidence at Stage 2, the arbitrator finds and concludes that the testimony of all BU 02, 03, 04, 06, 09, and 13 members would be the same as the 96 BU witnesses who testified.

9. Section B of the THP Article provides 3 different scenarios for which exposure to a temporary hazardous working conditions will qualify as being "Most Severe." The arbitrator agrees with the Union that exposure to COVID-19 and its variants satisfy all 3 scenarios.

10. The arbitrator finds and concludes that the affected BU members' exposure to the public at school was:

a. Likely to result in serious incapacitation, long period of time lost, or possible loss of life. Section B.1.a of the THP Articles.

b. Likely to result in frequent accidents in spite of reasonable safety precautions. Section B.1.b of the THP Articles.

c. Constituted frequent exposure to the unusually hazardous working condition where failure to exercise extreme care and judgment might cause an accident which would result in total disability or fatality. Section B.1.c of the THP Articles.

11. As a result, the arbitrator finds and concludes that all the affected BU members are entitled to a hazard pay differential award of 25% based on the minimum

step of the affected Employee's salary range, pursuant to Section B.1. of the THP Articles in BU 02, 03, 04, 09, and 13.

12. Effective immediately, the Employer shall award all affected former³⁰⁶ and current DOE BU 02, 03, 04, 09, and 13 members the "Most Severe" (25%) THP differential from March 4, 2020 through March 25, 2022.

13. The computation of the above THP differential shall be as provided in Section C of the THP Article in the BU 02, 03, 04, 09, and 13 CBAs, which provides the criteria for computing hazard pay.

a. The payment of the above THP differentials includes all hours that that each affected DOE BU 02, 03, 04, 09, and 13 member worked, with the exception of time spent teleworking, utilizing vacation or sick leave, or otherwise absent from the worksite on approved or unapproved administrative leave.

14. This Decision, Order, and Second Partial Arbitration Award is in full and final determination of all claims by the Union in the Class Grievance for BU 02, 03, 04, 09, and 13.

15. The deadline for the Employer's Memo in response to the Union's Motion for BU-6 THP is February 1, 2024, pursuant to the December 6, 2023 Scheduling Order No. 4 herein.

16. The arbitrator shall retain jurisdiction to: determine the Union's Motion for BU-6 THP; and clarify any questions about this Order, Decision, and Second Partial Final Arbitration Award.

³⁰⁶ "Former" BU members means those affected DOE BU 02, 03, 04, 09, and 13 members who may have left government service during March 4, 2020 through March 25, 2022.

DATED: Honolulu, Hawaii: January 18, 2024.

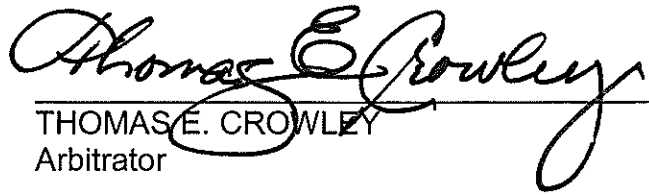

THOMAS E. CROWLEY
Arbitrator

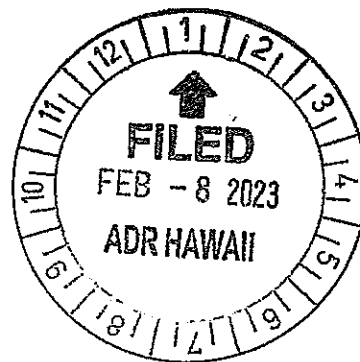
EXHIBIT A

**Decision, Order, and Partial Final
Arbitration Award Re: Hawai'i
Government Employees Association's
Motion for Summary Disposition Filed
December 9, 2022 issued February 8,
2023**

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

ARBITRATOR

BEFORE ARBITRATOR
THOMAS E. CROWLEY
STATE OF HAWAII



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

Union,

and

DEPARTMENT OF EDUCATION,
STATE OF HAWAII,

Employer.

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

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

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

I. Introduction

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

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

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

II. The gravamen of the Class Grievance

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

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

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

² The Class Grievance includes BU 06 (Educational Officers). Union Exhibit 5 ("U-5") is the BU 06 CBA. Unlike Bargaining Units 02, 03, 04, 09, and 13, however, the BU 06 CBA did not include a Temporary Hazard Pay article. Article 15.1. of the BU 06 CBA, Grievance Procedure, provides in pertinent part that "the arbitrator shall have no jurisdiction to alter, amend, or modify the terms of the Agreement." U-5 at 013. As discussed *infra*, this Decision, Order, and Partial Final Arbitration Award on the Union's Motion for Summary Disposition does not include BU 06.

³ Tr. at 36.

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

III. Factual background

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

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

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

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

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

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

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

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

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

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

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

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

D. Criminal Penalties

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

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

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

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

⁸ U-10 at 002-003.

⁹ U-10 at 008.

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

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

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

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

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

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

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

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

¹² U-90 at 001.

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

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

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

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

...

- Who is an essential function employee?

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

Examples of essential function employees:

Leadership Functions:

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

¹³ U-52 at 002.

¹⁴ U-68 at 001-002.

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

Safety and Security Functions:

Safety and Security Personnel

Facilities and Operations Functions:

Food Services, transportation, custodial services

Business Functions:

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

C. The Union's Request for Temporary Hazard Pay

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

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

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

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

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

¹⁶ U-45 at 001.

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

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

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

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

E. Step 2 Class Grievance Re: Temporary Hazard Pay

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

BACKGROUND

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

¹⁷ U-46 at 001.

¹⁸ U-48 at 002-004.

¹⁹ U-49 at 001-002.

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

UNION'S POSITION

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

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

REMEDY

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

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

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

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

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

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

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

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

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

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

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

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

G. The Union's notice to proceed to arbitration

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

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

²⁰ See: Employer Exhibit E-A.

²¹ U-53 at 001.

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

- **Consideration for additional pay.** Unions' request for consideration of additional compensation in the form of temporary hazard pay and/or differentials for the added time and effort to ensure our schools can remain open for in-person learning.
 - Response: the HDOE is researching the request and will get back to the unions.

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

- **Consideration for additional pay.** Unions' request for consideration of additional compensation in the form of temporary hazard pay and/or differentials for the added time and effort to ensure our schools can remain open for in-person learning.
 - Response: the HDOE is researching the request and will get back to the unions.

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

²² U-94 at 003.

²³ U-95 at 003.

²⁴ Tr. at 83-88.

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

IV. Bifurcation of the liability and damages issues

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

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

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

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

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

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

After the Stage 1 Liability Hearing:

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

²⁵ Tr. at 80.

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

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

V. The issues to be arbitrated and arbitrability

A. The issues to be arbitrated

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

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

- B. If so, what is the proper remedy?

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

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

²⁶ Tr. at 8.

²⁷ Tr. at 9.

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

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

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

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

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

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

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

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

²⁸ U-47 at 001.

²⁹ U-5 at 013.

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

B. Arbitrability.

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

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

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

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

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

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

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

A. The Stage 1 Liability Hearing Dates

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

B. Witnesses

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

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

Sanford Chun, HGEA Executive Assistant for Field Services.

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

Joy Bulosan, HGEA Field Services Officer.

Michelle Mitra, DOE Personnel Specialist.

James Sunday, Principal, Radford High School.

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

C. Exhibits

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

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

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

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

D. The Union's Offer of Proof

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

On December 7, 2022, during the Stage 1 Liability Hearing, the Union submitted the "HGEA Offer of Proof," which was both read into the record and marked as U-106.³³

The HGEA Offer of Proof provides:

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

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

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

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

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

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

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

VII. The Union's Motion for Partial Summary Disposition

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

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

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

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

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

³⁷ 12/7/22 Tr. at 11-13.

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

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

A. The Union's Motion for Partial Summary Disposition

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

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

³⁸ Tr. at 441.

³⁹ Tr. at 444.

⁴⁰ Union's Motion at 1.

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

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

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

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

⁴³ Union Memorandum in Support of Motion at 2.

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

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

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

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

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

Q. For the DOE?

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

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

A. Yes.

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

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

...

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

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

...

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

A. Yes.

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

A. Maybe depending on the situation, I think.

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

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

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

A. One second. Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- The further admissions by the Employer contained in its response are dispositive.

- The Employer admits that Superintendent Hayashi's conclusions speak for themselves.

- Superintendent Hayashi's conclusions demonstrate no ambiguity that from March 4, 2020 to March 25, 2022 all affected HGEA bargaining unit members who reported to work were subjected to temporary hazardous working conditions as a result of COVID-19 and its variants.

- Superintendent Hayashi was the Superintendent for approximately eight (8) months, beginning on August 1, 2021.

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

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

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

- BOE Chairperson Catherine Payne's testimony, as asserted by the Employer, is of no weight. Chairperson Payne's testimony concluded with her statement that while the BOE had information regarding the students who were positive on DOE's campuses, it did not have information where they contracted COVID-19.⁴⁶

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

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

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

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

⁴⁶ Tr. at 185-186.

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

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

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

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

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

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

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

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

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

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

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

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

(1) If all interested parties agree; or

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

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

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

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

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

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

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

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

⁴⁸ 12/7/22 Tr. at 11-13.

⁴⁹ Tr. at 444.

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

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

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

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

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

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

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

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

Temporary Hazard Pay

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

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

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

⁵³ Tr. at 444.

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

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

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

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

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

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

- The arbitrator agrees with the Employer that the testimony of DOE Superintendent Keith Hayashi was honest and credible. Superintendent Hayashi holds the highest position within the DOE, and served as Interim Superintendent from August 1, 2021, and permanent Superintendent since August 2, 2022.⁵⁵

- The arbitrator further agrees with the Employer that Superintendent Hayashi's testimony "speaks for itself specifically with regard to his conclusions concerning the impact COVID had upon working conditions at DOE facilities for affected HGEA members during the two-year period at issue in this matter."

- Because Superintendent Hayashi is the head of the DOE, the Employer is bound by Superintendent Hayashi's factual admissions.⁵⁶ A judicial

⁵⁵ Tr. at 18-19.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Yes.

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

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

⁵⁹ U-10 at 002-003.

⁶⁰ U-52 at 002.

⁶¹ U-68 at 001-002.

⁶² Tr. at 91.

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

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

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

A. Yes.

- Superintendent Hayashi had personal knowledge that COVID-19 and its variants was an unusually hazardous working condition. In addition to being Interim Superintendent for approximately eight (8) months (commencing August 1, 2021) of the March 4, 2020 through March 25, 2022 time period, Superintendent Hayashi had also been the Principal at Waipahu High School from the beginning of the pandemic until August 1, 2021.⁶⁵ As Principal, he had to address concerns regarding COVID-19 and its variants at Waipahu High School, on a daily basis.⁶⁶ Moreover, during his first year as Superintendent, he visited over 80 schools to learn, among other things, what was going on at the schools regarding COVID-19.⁶⁷

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

⁶³ Tr. at 360.

⁶⁴ Tr. at 59.

⁶⁵ Tr. at 18-19.

⁶⁶ Tr. at 36-37.

⁶⁷ Tr. at 113-114.

A. Yes.

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

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

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

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

A. It doesn't say that.

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

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

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

⁶⁸ Tr. at 57-58.

⁶⁹ U-103 at 001.

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

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

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

A. Yes, that's – yes.

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

A. Yes.

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

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

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

⁷¹ Tr. at 231-232.

⁷² Tr. at 232.

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

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

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

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

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

⁷³ U-103 at 001.

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

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

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

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

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

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

Q. For the DOE?

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

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

A. Yes.

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

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

- Based on Governor Ige's successive Emergency Proclamations

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

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

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

- Superintendent Hayashi admitted that the degree of the hazard

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

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

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

...

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

A. Yes.

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

A. Maybe depending on the situation, I think.

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

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

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

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

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

- Superintendent Hayashi admitted the DOE's unusually hazardous

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

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

A. One second. Correct.

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

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

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

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

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

- The THP articles provide in part that the Union may initiate a

request for Temporary Hazard Pay:⁷⁶

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

⁷⁶ See, for example, U-2 at 046.

the Personnel Director): ...

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

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

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

A. Yes.

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

A. Yes.

- Section E of the THP articles provides:⁷⁹

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

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

⁷⁷ U-45 at 001.

⁷⁸ Tr. at 73.

⁷⁹ See, for example, U-2 at 048.

⁸⁰ U-46 at 001.

- Superintendent Hayashi, however, admitted no forms from the

Employer were necessary based on Section E of the THP articles:⁸¹

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

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

Q. Yes.

A. Okay.

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

A. You're right. Correct.

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

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

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

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

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

⁸¹ Tr. at 64-65.

⁸² Union Memorandum in Support of Motion at 2.

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

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

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

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

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

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

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

⁸³ See, for example, U-2 at 046.

⁸⁴ Tr. at 53, 55-56.

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

A. No, I'm not aware.

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

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

...

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

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

...

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

A. I would – I would say yes.

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

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

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

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

⁸⁵ U-94 at 003.

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

- **Consideration for additional pay.** Unions' request for consideration of additional compensation in the form of temporary hazard pay and/or differentials for the added time and effort to ensure our schools can remain open for in-person learning.
 - Response: the HIDOE is researching the request and will get back to the unions.

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

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

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

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

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

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

⁸⁶ U-95 at 003.

⁸⁷ Tr. at 83-88.

⁸⁸ Union Memorandum in Support of Motion at 2.

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

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

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

IX. The subpoena of former Governor David Y. Ige

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

XI. Decision, Order, and Partial Final Arbitration Award

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

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

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

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

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

3. The arbitrator finds and concludes:

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

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

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

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

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

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

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

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

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

⁹⁷ Tr. at 360.

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

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

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

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

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

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

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

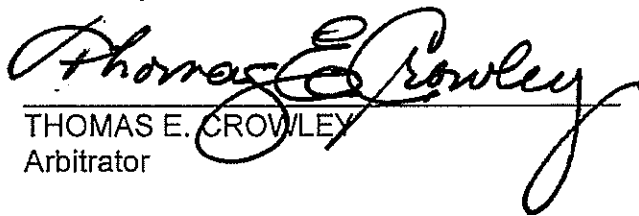
8. The arbitrator shall promptly conduct a status and scheduling conference with counsel for the parties to discuss the procedural arrangements and deadlines for the Stage 2 Damages Hearing, which is to determine the amount of any contested THP wage differentials for BU 02, 03, 04, 09, and 13 members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

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

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

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

DATED: Honolulu, Hawaii: February 8, 2023.


THOMAS E. CROWLEY
Arbitrator

BEFORE ARBITRATOR
THOMAS E. CROWLEY
STATE OF HAWAII

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

CERTIFICATE OF SERVICE

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

Advocacy Chief Stacy Moniz
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Dated: Honolulu, Hawaii, February 8, 2023.


THOMAS E. CROWLEY
Arbitrator

BEFORE ARBITRATOR
THOMAS E. CROWLEY
STATE OF HAWAII

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

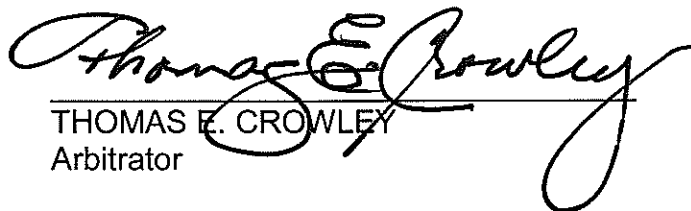
CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2024, a true and accurate copy of the Decision, Order, and Second Partial Final Arbitration Award; Exhibit "A" was duly mailed and emailed to the parties listed below at his/her last known address as follows:

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