

HON. E. JOHN MCCONNELL (RET.)
1365 Piipholo Road
Makawao, Hawaii 96768
Telephone: 808-572-08778, 808-250-9205
Email: judgejohnmc@gmail.com

BEFORE THE HONORABLE JUDGE E. JOHN MCCONNELL (RET.)

ARBITRATOR

In the Matter of the Arbitration Between:	)	GRIEVANCE OF BARGAINING UNITS 02, 03
	)	01, 13 AND 15
HAWAI'I GOVERNMENT EMPLOYEES	)	
ASSOCIATION, AFSCME, LOCAL 152,	)	ARBITRATION OF CLASS
AFL-CIO,	)	GRIEVANCES ON BEHALF OF
Union,	)	ALL AFFECTED BARGAINING
	)	UNIT EMPLOYEES
	)	
and	)	
	)	
COUNTY OF HAWAI'I,	)	
	)	
Employer,	)	
	)	
	)	
	)	
	)	

PARTIAL FINAL AWARD OF ARBITRATOR

The undersigned Arbitrator was duly selected by the Hawai'i Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA or Union) and the County of Hawai'i (County or Employer) to conduct a final and binding arbitration of their dispute related to temporary hazard pay.

A hearing was held before the undersigned on May 15, 2023, May 16, 2023, May 17, 2023, May 18, 2023, May 19, 2023, May 22, 2023, May 23, 2023, May 24, 2023, May 25, 2023,

May 26, 2023, and May 30, 2023, at which each of the parties was afforded full opportunity to call and examine witnesses and to offer evidence. Stacy Moniz and Scott Collins appeared for the Union; Ryan K. Thomas, Esq., and Steven K. Idemoto, Esq., appeared for the County.

BACKGROUND AND ISSUES

This is the third arbitration contesting the denial of temporary hazard pay ("THP") to state employees required to work during the period from March 4, 2020 to March 25, 2022 as the result of the pandemic caused by the COVID-19 virus and its variants. Each case concerned the proper construction to be given to identical provisions related to temporary hazard pay. The arbitrators in the Maui and DOE matters included in their awards lengthy and detailed discussions of the history and facts of each matter. The Maui award was 95 pages and the DOE award was 56 pages. Those awards are thorough and well reasoned.

This case, however, is applicable solely to the County of Hawaii and of course involves different facts. Arbitrations related to the County of Maui and the Department of Education resulted in awards in favor of the Union on the issue of liability. Those awards are entitled to precedential value, but only as to the phase 1 or liability issues.

Here the parties agreed to bifurcate the arbitration into Phase 1 and Phase 2. In Phase 1, dealing with liability, the issue to be determined is whether the pandemic caused by the Covid virus and its variants exposed employees to unusually hazardous working conditions, whether the exposure was temporary, whether the degree of hazard was "most severe" or "severe" and whether the hazard had been considered when the amount of the employees class salary range was established. If liability is found, the parties agreed that Phase 2 would thereafter determine the relief to be awarded.

As stated, the CBA provision related to temporary hazard pay is identical in the collective bargaining agreements applicable to each bargaining unit. It states in relevant part:

"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:
 - 1. Most Severe - twenty-five percent (25%)
 - a. Exposure likely to result in serious incapacitation, long period of times 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 judgement 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."

FINDINGS AND AWARD

Commencing on March 4, 2020 and continuing to March 25, 2020, the Governor of Hawaii, David Y. Ige, issued a total of 28 Proclamations concerning COVID 19 and its variants. The Proclamations were issued pursuant HRS Section 127A-2. The findings therein stated in essence that COVID 19 was highly contagious and that based on the actions and directives of the President of the United States, the World Health Organization, and the United States Center for Disease Control and Prevention, the danger posed by COVID 19 is "significant so as to warrant preemptive and protective actions in order to provide for the health, safety, and welfare of the people of ...[Hawaii]". Acting under authority of HRS Section 127A-2, the Governor determined that COVID 19 "may likely result in substantial injury or harm to Hawaii's population" or "may result in loss of life." Pursuant to HRS Section 127A-12(b) the Governor directed "all state agencies and offices to cooperate with and extend their services, materials, and facilities as may be required to assist in all efforts to eliminate the danger "

On February 28, 2020, Harry Kim, the Mayor of the County of Hawaii, issued an initial proclamation essentially implementing the Governor's Proclamation. Supplemental proclamations were issued at both the State and County levels extending the emergency proclamation until March of 2022.

On April 7, 2020, the Union filed a formal request for THP for "all affected employees." On April 14, 2020 the County of Hawaii's Resources Manager acknowledged the Union's request but required individual requests for THP by each affected employee using a form which had not been provided to the Union. The Union was not consulted prior to the issuance of the form or the adoption of the procedure. All employees seeking THP were required to execute the form.

It is not disputed that the matter constituted a class grievance on behalf of those employees required to work during the period of the pandemic.

The Employer contends that the emergency proclamations issued by the Governor and Mayor do not in and of themselves create "unusually hazardous working conditions" necessary to an award of THP. The Arbitrator disagrees. The findings of the President, the Governor and the appropriate federal agencies should not be abrogated by a collective bargaining agreement made in different circumstances.

The County argues that the applicable provisions of the CBA were never intended to apply to employees reporting for work during any respiratory illness such as the flu. The County offered no evidence to support this contention other than THP awards have not been made in the past in such circumstances. That may be true, but the starting point is the plain language of the THP article. Under that plain and unambiguous language, exposure to "any unusually hazardous working condition" entitles an employee to THP. There is therefore no need to speculate as to the parties' underlying intent here; the language of the THP article controls. Applying that language to the facts of this case follows below.

There can be little doubt that the COVID 19 pandemic was both unusual and hazardous. It had not occurred in the past and certainly was "unusual" as that word is normally defined. COVID 19 admittedly was hazardous in that severe illness or death could result from exposure. The assertion of the Employer that there has never been an award of THP for respiratory illnesses does not change the unusual nature of this pandemic.

The Employer argues that COVID 19 was not "unusually hazardous" because it was ubiquitous. This argument appears to be that since anyone can be exposed to COVID 19, it is not unusual. This contention lacks merit. The fact that COVID 19 is ubiquitous simply does not negate its unusual character. Indeed, it apparently was unknown in Hawaii before the instant outbreak.

Finally, Employer argues that since it provided various measures to make workplaces safer (such as masks, social distancing, hand washing, temperature checks, the use of disinfectants, and requiring those exposed or who have symptoms to be isolated) the resulting working conditions were not "unusually hazardous". The Arbitrator disagrees. None of these measures necessarily prevented exposure to the virus. While they may have reduced the risk to some degree, the hazard nonetheless remained. It was not eliminated by any of the mitigation measures implemented by the County. The substantial improvements in the years since the period at issue followed the availability of vaccines and certain medications.

For these reasons, the plain language of the hazardous pay provision in the CBA merely requires exposure and that such exposure be unusually hazardous, temporary, "most severe" or "severe" as those terms are defined and that the employee's working conditions were not considered in determining the salary range.

Accordingly, the Arbitrator concludes that under the plain language of the CBA those employees required to work during the applicable period are eligible for temporary hazard pay should they otherwise meet the requirements of the CBA.

While the Arbitrator concludes that potential liability exists, it is noted that the hearing herein took 11 days during which numerous witnesses were called. The Arbitrator has reviewed the testimony of these witnesses and concludes that their testimony is immaterial to a determination of liability in Phase 1 of this matter. It is enough that some employees required to work were exposed to this ubiquitous virus. That conclusion is simply beyond question. It matters not how many employees did or did not contract COVID 19. The numerous steps taken may have reduced the risks but admittedly did not eliminate them. Certainly, the County's requirements to use face masks, maintain social distancing, wash hands, use disinfectants, undergo temperature checks, and isolate those with symptoms were prudent and indeed

necessary. The County deserves credit for these actions which lessened the risk of contraction. But under the parties stipulation to bifurcate the matter, none of the steps taken avoided the risk of exposure. Phase 2 of this proceeding, however, will consider the severity of risk to protected classes of employees. The lengthy testimony of the witnesses in Phase 1 may be relevant to the issue of the appropriate remedy to be awarded. An analysis in a quasi-judicial hearing of the risk faced by each exposed employee, as is apparently the Union's position, would be extremely time consuming requiring weeks if not months of testimony. Accordingly, the Arbitrator urges the parties to negotiate a resolution of the Phase 2 issues.

ORDER

On or before March 19, 2024 the parties shall submit their proposals setting forth a protocol for the conduct of Phase 2 of this arbitration. The Arbitrator will thereafter set a conference to reduce any differences and establish a schedule. The Arbitrator retains jurisdiction to clarify any questions concerning this Partial Final Award and to schedule and conduct a Phase 2 damages award.

The instant grievance is DENIED.

So ORDERED this 5th day of March, 2024.


E. JOHN MCCONNELL, Arbitrator