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Judge Karl Sakamoto (Ret.)
Arbitrator

IN THE MATTER OF THE ARBITRATION BEFORE
JUDGE KARL K. SAKAMOTO (RET.)

HAWAII GOVERNMENT EMPLOYEES	)	Arbitration of Class
ASSOCIATION, AFSCME, Local 152,	)	Grievance
AFL-CIO on behalf of ALL AFFECTED)	
BARGAINING UNIT EMPLOYEES	)	ARBITRATOR’S
	)	FINDINGS OF FACT,
Union/Petitioner	)	CONCLUSIONS OF LAW,
	)	AND ORDER-RENEWAL
v.	)	OF HAZARD PAY
)	
COUNTY OF MAUI	)	Hearing: July 1, 2022 –
	)	July 8, 2022
)	
Employer/Respondent	)	Arbitrator: Judge Karl K.
_____	)	Sakamoto (Ret.)

ARBITRATOR’S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER- RENEWAL OF HAZARD PAY

This Findings of Fact, Conclusions of Law, and Order, includes and incorporates all previous Findings of Fact and Conclusions of Law previously provided in this Arbitrator’s February 11th, 2022, Findings of Fact, Conclusions of Law, and Decision and Order.

I. PROCEDURAL BACKGROUND

This grievance came before this Arbitrator in the first of two arbitration hearings pertaining to arbitration of this grievance, which was held from September 27, 2021 – October 3, 2021. The moving party, Hawaii Government Employees Association (“HGEA” or “Union”), asserted claims of violations of Articles 2, 3, 4, and 5, of the Bargaining Units (“BUs”) 2, 3, 4, 13, and 14 Collective Bargaining Agreements (“CBAs”), and Article 20 of the BUs 3, 4, and 13 CBAs, Article 22 of the BU 2 CBA, and Article 30 of the BU 14 CBA. The parties filed their briefs regarding the term “temporary” as defined and applied in Article 20 of the BUs 3, 4, and 13 CBAs, Article 22 of the BU 2 CBA, and Article 30 of the BU 14 CBA, and their Findings of Fact and Conclusions of Law on January 7, 2022.

On or around February 11, 2022, this Arbitrator issued the Arbitrator’s Findings of Fact, Conclusions of Law, and Decision and Order concluded that the Union met its burden of proof in showing by preponderance of the evidence that COVID-19 and its variants constituted a temporary hazard, as defined by the aforementioned contractual provisions of the aforementioned CBAs. This Conclusion of Law resulted in a hazard pay award of a 15% or 25% differential, in accordance with the aforementioned contractual provisions of the CBAs, for qualifying employees of the CoM.

Following the Decision and Order, the parties entered into a settlement agreement wherein all remaining claims for 25% were settled. The settlement agreement allowed CoM Employees (“EEs”) to receive a 15% wage differential where their temporary exposure to the hazardous working condition was Severe, or a 25% wage differential where their temporary exposure to the hazardous working condition were Most Severe. The CoM raised the remaining issue relating to the

duration of the hazard pay award under the CBA, Section D of the Temporary Hazard Pay section for the second arbitration hearing.

This grievance came before this Arbitrator in the second arbitration hearing on the issue of the duration of the award for THP arising from the CBA, Section BU 02, Article 20; BU 03, Article 20; BU 04, Article 20; BU 13, Article 20; and BU 14, Article 30. The arbitration was held between July 1, 2022 – July 8, 2022 on the island of Maui. The moving party, Hawaii Government Employees Association (“HGEA” or “Union”), continued to assert claims of violations of Articles 2, 3, 4, and 5, of the Bargaining Units (“BUs”) 2, 3, 4, 13, and 14 Collective Bargaining Agreements (“CBAs”), and Article 20 of the BUs 3, 4, and 13 CBAs, Article 22 of the BU 2 CBA, and Article 30 of the BU 14 CBA.

HGEA asserted that the duration of this Arbitrator’s ordered award of THP is not limited to six (6) months as asserted by the Employer, and the appropriate duration of this Arbitrator’s award is the period spanning the length of Governor David Ige’s Emergency Proclamations establishing the duration of the emergency period, which by virtue of numerous proclamations by Governor Ige, extended from March 4, 2020, to March 25, 2022.

Having reviewed the transcripts, evidence, and parties’ submissions, this Arbitrator now makes the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

If it should be determined that any of these Findings of Fact should have been set forth as Conclusion of Law, then they will be deemed as such. Likewise, if any Conclusion of Law should have been set forth as Finding of Fact, then it will be deemed as such.

(1) Michael Victorino is the Mayor (“Mayor Victorino”) of the County of Maui (“CoM” or “Employer”). Tr. Vol. I, at 10-18; 11, lines 4-7. He has held that position since January 2019, and through the relevant period of time of this issue of the duration of hazard pay award.

(2) Sanada “Sandy” Baz (“Managing Director Baz” or “Baz”) is the Managing Director of the CoM’s Department of Management. Tr. Vol. I at 366, lines 13-25; 367, line 1. He has held the position since January 2019. Id.

(3) Alton Watanabe (“Watanabe”) was a Human Resources Specialist employed by the CoM’s Department of Personnel Services. Tr. Vol. I. at 525, line 25; 526, lines 1-7. One of Watanabe’s supervisors was Personnel Director David Underwood (“Personnel Director Underwood” or “Underwood”). Tr. Vol. I. at 526, lines 8-11.

(4) Underwood is the Personnel Director of the CoM’s Department of Personnel. Tr. Vol. I. at 153, lines 20-5; 154, lines 1-5. He has held that position since July 2016. Id. In his role as Personnel Director, Underwood has acted as Mayor Victorino’s representative in negotiations with CoM EEs, including those represented by the Union. Tr. Vol. I. at 154, lines 3-5; 155, lines 18-25; 156, lines 1-4, 18-20; 157, lines 3-13.

(5) Moana Lutey is the Corporation Counsel of the CoM, and the department head in charge of the Department of the Corporation Counsel (“Corporation Counsel Lutey” or “Lutey”). at 30, lines 13-6.

(6) Toni Rust is the Maui Island Division Chief of HGEA (“MID Chief Rust” or “Rust”). Tr. Vol. II. at 538, lines 21-5; 539, lines 1-6.

(7) Sanford Chun is the Executive Assistant (“Executive Assistant Chun” or “Chun”) for Field Services at HGEA. Tr. Vol. II. at 473, lines 22-5.

(8) The BUs 2, 3, 4, 13, and 14 CBAs memorializes the EEs’ rights and Employer’s responsibilities related to wages, hours, and other conditions of work.

See Ex. JT-1 001-106; JT-2 001-112; JT-3 001-109; JT-4 001-108; JT-5 001-114. Every article contained therein codifies the condition of wages, hours, or other conditions of work. Id. Mayor Victorino and Underwood, among others including Governor Ige, were signatories to the BUs 2, 3, 4, 13, and 14 CBAs on behalf of the CoM, and Executive Director Perreira was the sole signatory on behalf of the Union. Ex. JT-1 099; JT-2 096; JT-3 093; JT-4 101; JT-5 107. Mayor Victorino and Underwood uniformly confirmed that, as a signatory, the Mayor, on behalf of the CoM, is bound to follow the terms and conditions therein. Tr. Vol. I. at 18, lines 21-5; 161, lines 7-12.

(9) Among other rights and responsibilities, the aforementioned CBAs include articles that describe the circumstances that trigger the CoM's responsibility to award a Temporary Hazard Pay ("THP") wage differential to qualifying CoM EEs. Ex. JT-1 048-9; JT-2 046-8; JT-3 044-6; JT-4 050-1; JT-5 061-3. The relevant articles are Article 20 of the BUs 2, 3, and 4 CBAs, Article 22 of the BU 2 CBA, and Article 30 of the BU 14 CBA. Ex. JT-1 048-9; JT-2 046-8; JT-3 044-6; JT-4 050-1; JT-5 061-3. Underwood did not reference any other limitation on the duration of the award.

(10) Executive Assistant Chun has participated in negotiations of collective bargaining agreements on behalf of HGEA for over 30 years, including Temporary Hazard Pay. Tr. Vol. II. at 485, lines 22-5.

(11) Temporary Hazard Pay is intended to compensate employees for exposure to hazardous conditions that employees are exposed to while working. Id. Customarily, where THP was granted as a result of a finding of exposure to hazardous working conditions, and those working conditions remained upon expiration of the initial six (6) month period, the THP was customarily extended beyond the initial six (6) month period. This has been a custom and past practice.

Tr. Vol. II. at 480, lines 1-12. Chun’s testimony was unrebutted and undisputed. See Tr. Vol. II. At 473, line 6 to 504, line 3.

(12) Mayor Victorino and Personnel Director Underwood are signatories to the BUs 2, 3, 4, 13, and 14 CBAs. Ex. JT-1 099; JT-2 096; JT-3 093; JT-4 101; JT-5 107. As signatories to the BUs 2, 3, 4, 13, and 14 CBAs, Mayor Victorino and Personnel Director Underwood were asked to interpret Article 20, D. Duration of Hazard Pay Award, of the BUs 3, 4, and 13 CBAs, 22.D. of the BU2 CBA, and 30. D. of the BU 14 CBA at this arbitration hearing, and both agreed that, pursuant to the plain text of those articles, an award for THP wage differential can be awarded by renewal, which Underwood erroneously referred to as “extension”, every six (6) months. Tr. Vol. I. at 147, lines 14-4.

(13) The award for THP wage differential may continue indefinitely because, while possibly “each one would have an end, but there’s no limit, no stated limit on extensions.” See, Underwood, Tr. Vol. I. at 246, lines 22-5.; 247, lines 1-2. The CoM agreed that while THP wage differentials are generally awarded in increments of six (6) months, they acknowledged the six (6) month increments can be renewed indefinitely if work conditions and duties remain the same. See Tr. Vol. I. at 280, lines 20-5; 281, lines 1-3.

(14) The arbitrator refers and incorporates his previous Findings and Conclusions, and his set forth findings herein as they relate to and establish the unusual hazardous working conditions arising from the covid pandemic which are relevant to the determination of the duration of the hazard pay award.¹

¹ On January 30, 2020, the World Health Organization (“WHO”) declared that the outbreak of a novel coronavirus identified as “2019-nCoV” (“COVID-19”) was cause for a Public Health Emergency of International Concern. See Ex. U-47 001-7.

On January 31, 2020, Secretary Alex Azar II of the U.S. Department of Health

and Human Services (“U.S. D.H.H.S.”) determined that confirmation of the first case of COVID-19 in the United States of America (“U.S.A.”) provided sufficient cause to confirm that a Public Health Emergency existed at that time and had existed in the U.S.A. since January 27, 2020. Ex. U-45 001.

Pursuant to HRS § 127A-14(a), Governor Ige and Mayor Victorino may issue proclamations wherein they declare the existence of a state of emergency in the SoH and a local state of emergency in the CoM, respectively, if each independently finds that an emergency or disaster has occurred or that there is imminent danger or threat of an emergency or disaster in any portion of their respective jurisdictions. Ex. U-3 001; U-6 001. The proclamations have the force and effect of law. See, Mayor Victorino, Tr. Vol. II. At 13, lines 10-25; 1-4; lines 14-21. See Ex. JT-6 001-7; JT-30 001-4. U-3 001; U-4 001; U-6 001. Governor Ige stated clearly and unambiguously with his Proclamations (See, Ex. JT-9 008) that they also had the force and effect of law as authorized pursuant to HRS Chapter 127A. (See, §127A-25(a)). Any violation of the Governor’s Proclamations were subject to criminal penalties. JT-6 001-7; JT-7 001-7; JT-8 001-3; JT-9 001-8; JT-10 001-3; JT-11 001-7; JT-12 001-39; JT-13 001-33; JT-14 001-40; JT-15 001-31; JT-16 001-34; JT-17 001-3; JT-18 001-31; JT-19 001-32; JT-20 001-33; JT-21 001-34; JT-22 001-34; JT-23 001-35; JT-24 001-034; JT-25 001-35; JT-26 001-4; JT-27 00; JT-28 001-35; JT-29 001-29; U-58 001-34; U-63 001-2. Each time the aforementioned right is exercised, the exercise necessarily produces a finding of law that a condition exists for the duration of the life of that law. See Id.

Pursuant to HRS §127A-14©, the governor or mayor shall be the sole judge of the existence of a state of emergency in the state or a local state of emergency in the county, as applicable. This section shall not limit the power and authority of the governor under HRS §127A-13(a)(5). Ex. U-6 001.

On March 4, 2020, citing, among other things, the determinations by WHO and U.S.D.H.H.S., Governor Ige issued a proclamation wherein he stated for the first time that COVID-19 was of “of such character and magnitude to constitute an emergency or disaster as contemplated by sections 127A-2 and 127A-14, Hawaii Revised Statutes” and “the danger ... so significant so as to warrant preemptive and protective actions in order to provide for the health, safety, and welfare of the people and the State.” Ex. JT-6 001-2. The proclamation defined

emergency as “any occurrence, or imminent threat thereof, which result or may result in substantial injury or harm to the population or substantial damage to or loss of property.” Ex. JT-6 002. The proclamation also defined disaster as “any emergency, or imminent threat thereof, which results in or may likely result in loss of life ...” Id. Therein Governor Ige acknowledged, among other things, that, as an emergency and disaster, COVID-19 was “highly contagious”, “spreading from person-to-person”, and “expected to spread” despite efforts to contain it. He also acknowledged that exposure to COVID-19 had “proven to be fatal.” Ex. JT-6 001-2. “[T]his occurrence”, determined, designated, and proclaimed Governor Ige, “of a severe, sudden, and extraordinary event has the potential to cause damages, losses, and suffering of such character and magnitude to affect the health, welfare, and living conditions of a substantial number of persons ... this occurrence, or threat thereof, may likely result in substantial injury or harm to the population or may likely result in loss of life or property ...” Ex. JT-6 003. Governor Ige then proclaimed an emergency period which was to last from March 4, 2020, to April 29, 2020, or by a separate proclamation, whichever occurred first. Ex. JT-6 004, 7. This remained Governor Ige’s position through March 25, 2022. Ex. U-63 001-2.

Mayor Victorino believed that all statements in Governor Ige’s March 4, 2020, proclamation were true, to the best of his knowledge, at the time. Tr. Vol. I. at 36, lines 15-25; 37, lines 1-4. This was also the case through March 25, 2022. Ex. U-63 001-2.

On March 4, 2020, Mayor Victorino also issued a Proclamation entitled “PUBLIC HEALTH EMERGENCY PROCLAMATION” wherein he determined, designated, and proclaimed that there was an “imminent danger or threat of a state of emergency or disaster in all or any part of the County of Maui, as of the date and time of this proclamation; and ... employees of the county ... may be ordered and directed as I deem necessary to carry out emergency management functions under Haw. Rev. Stat. chapter 127A...”. Ex. JT-30 001-3. Mayor Victorino cited HRS §127A-14(b) as the authority for his determination and declaration. Ex. JT-30 002. HRS §127A-14(b) empowers Mayor Victorino to declare a state of emergency in the County of Maui, but only if he personally determines that an emergency or disaster exists or that there is an imminent danger or threat of emergency or disaster. Ex. JT-30 002. Mayor Victorino described this as a “Proclamation of Emergency or Disaster”. Ex. JT-30 003. Despite the absence of any cases of COVID-19 in the County of Maui at the time, Mayor Victorino

confirmed that he found that there was an imminent danger or threat of the emergency or disaster as of March 4, 2020, giving rise to the declaration of a state of emergency. Id. Tr. Vol. I. at 33, lines 22-5; 40, line 25; 41, lines 1-12.

Emergency and Disaster are defined by HRS §127A-2. Ex. U-1 001. HRS §127A-2 defines emergency in relevant part, as being “any occurrence ...which may result in substantial injury or harm.” Id. HRS §127A-2 defines disaster, in relevant part, as being “any emergency ... which [is] likely [to] result in loss of life” Id. Thus, even before a single case of COVID-19 was detected in the County of Maui, Mayor Victorino acknowledged that COVID-19 was a condition that may result in substantial injury or harm and was likely to result in loss of life. See Ex. JT-30 001-3. U-1 001. Mayor Victorino further determined that there was an emergency condition, and that that emergency condition could be articulated as, among other things, “the potential effects of COVID-19 have created an imminent threat to life, health, and safety of residents ... (“the emergency condition”). Ex. JT-30 001-4. The Proclamation of Emergency or Disaster was scheduled to terminate upon either sixty (60) days after the date of issue or issue of a Declaration of Termination of Emergency. Ex. JT-30 003. The proclamations issued by Governor Ige and Mayor Victorino are herein referred to jointly as the “March 4th Proclamations.” According to Mayor Victorino and Governor Ige, these proclamations, and all that follow, have the force and effect of law. Tr. Vol. I. at 13, lines 10-25; 1-4; lines 14-21.

The March 4th Proclamations, as well as all that would follow, were exercises of Governor Ige’s and Mayor Victorino’s respective rights to issue proclamations wherein they declared states of emergency in the SoH and CoM, respectively, from March 4, 2020, onward. Ex. JT-6 001-7; JT-30 001-4. Their March 4th Proclamations recognized COVID-19 as the hazardous condition that was the cause for the states of emergency. See Id. Ex. JT-30 002. Governor Ige and Mayor Victorino have subsequently exercised that right dozens of times since March 4, 2020, by issuing subsequent successive COVID-19-related proclamations wherein they, among other things, declare states of emergency and recognize COVID-19 and its variants as the conditions that are the cause for each respective subsequent successive state of emergency. Ex. JT-6 007; JT-7 007; JT-8 002; JT-9 008; JT-10 003; JT-11 002; JT-12 039; JT-13 033; JT-14 040; JT-15 037; JT-16 034; JT-17 003; JT-18 037; JT-19 032; JT-20 033; JT-21 034; JT-22 034; JT-23 035; JT-24 034; JT-25 035; JT-26 004; JT-27 001; JT-28 035; JT-29 019; JT-30 003-4;

(15) On March 12, 2020, Mayor Victorino issued Mayor’s Directive 2020-2 wherein he directed the CoM Ees in the Executive Branch to ensure that “there shall be no curtailment of critical services and offices shall remain open to the public” JT-46 002. Healthy employees were asked to report to work and, if needed, work overtime. Ex. JT-46 001. Those who refused to comply with the directive would be considered insubordinate and faced disciplinary action accordingly. Ex. JT-46 002. It was recommended that CoM Ees not come to work if they were sick, but those who were sick were not precluded from coming to work. Id.

(16) The Mayor’s Directive 2020-2 impact on HGEA workers was that CoM Ees identified as performing *essential services* were expected and required to work, and he identified and directed subordinate CoM Ees in his department to report to work for that purpose. See, Managing Director Baz, Tr. Vol. I. at 366, lines 13-25; 367, line 1; 438, 21-5; 439, lines 1-25; 440, lines 1-2. CoM Ees, including those organized into Bus represented by the Union, remained designated as those performing essential services, and were expected to work accordingly, through March 25, 2022. See U-63 001-2.

(17) On March 19, 2020, Mayor Victorino issued Mayor’s Directive 2020-3 wherein he, among other things, directed “Executive Department and Agency Heads” to uniformly implement and effectuate his directive throughout the CoM’s Executive Branch that “[a]ll necessary services *must* [emphasis added] continue Hours that the public can access County offices shall be from 8:30 am to 3:30 pm.” Ex. JT-47 003. Healthy employees were asked to report to work and, if needed, work overtime. Ex. JT-47 001. Those who refused to comply with the

JT-32 003-4; JT-33 003-4; JT-36 004; JT-41 004; JT-44 003. Thus, COVID-19 and its variants are a condition whose existence is recognized as a matter of law by and through proclamations that are, for all intents and purposes, *laws*.

directive would be considered insubordinate and faced disciplinary action accordingly. Ex. JT-47 002. It was recommended again that CoM workers who were sick not come to work, but those who were sick still were not precluded from coming to work. Id.

(18) On March 22, 2020, Mayor Victorino issued a Proclamation entitled “PUBLIC HEALTH EMERGENCY RULES, AMENDED MARCH 22, 2020” wherein he ordered all people presently in the CoM to “stay at home or in place of lodging ...” Ex. JT-31 001. The reason for the order, according to Mayor Victorino, was that “the virus that causes Coronavirus 2019 Disease (‘COVID-19’) is easily transmitted, especially in group settings ... the dangerous conditions caused by the risk of the rapid spread of the virus and the need to protect residents and visitors to Maui County. Ex. JT-31 001. Despite these “dangerous conditions”, those performing “certain *essential activities* [emphasis added] ...” *were exempted from the order* and were not expected to “stay home or in place of lodging ...” Id. *Essential activities* included “performing work related to operation of an essential business or essential government function”. Ex. JT-31 002. Operation of Essential Business included essential infrastructure, including operation of public transportation and utilities ... [and] [c]onstruction and maintenance, public and private ...” Id. Government functions included “all services needed to ensure the continuing operation of the government agencies and provide for the health, safety, and welfare of the public.” Ex. JT-31 003.

(19) The rules went on to specify that “all first responders, emergency management personnel, emergency dispatchers, and law enforcement personnel, as well as others working to support essential government or essential business functions are categorically exempt from these rules.” Ex. JT-31 005-6. Those who failed to comply with the proclamation faced a misdemeanor charge, and upon

conviction, a fine of \$5,000 or imprisonment of more than year, or both. Ex. JT-31 001.

(20) All CoM Ees, unless otherwise stated, including those organized into bargaining units represented by the Union, were among those performing *essential governments functions*. Ex. JT-31 001-6; JT-46 001-3. These CoM Ees were ordered to CoMe to work. Ex. JT-46 001-3. See Ex. Tr. Vol. I. at 439, lines 6-8. Those that did not comply with the directive faced disciplinary action. Ex. JT-002. The worker's presence was deemed so essential that even those that were sick were not automatically precluded from coming into work. JT-46 001.

(21) The CoM acknowledged that COVID-19 is a hazard. See, Underwood. Tr. Vol. I. at 197, lines 20-5; 198, lines 3-8.

(22) On March 31, 2020, the HGEA submitted memos articulating requests for THP to all known department heads in the CoM, including Personnel Director Underwood, wherein it requested an award of a THP wage differential for all qualified CoM Ees. Ex. U-9 001-17. JT-70 001. It was standard practice for the Union to submit a memo to the Personnel Director whenever it made a request for THP. Tr. Vol. I. at 187, lines 18-20; 219, lines 13-5; 272, lines 21-3.

(23) Each request described the duration for the request for THP as being "from the period March 5, 2020, until the matter is resolved." Ex. U-9 001-17. JT-70 001. It was on every form submitted. Ex. U-9 001-17. JT-70 001.

(24) Underwood confirmed that all departments received these requests for THP by March 31, 2021. Tr. Vol. I. at 174, lines 22-5; 175, lines 1-2.

(25) On April 7, 2020, Personnel Director Underwood, on behalf of the CoM, responded to the Union's requests for THP by requiring the Union to submit the requests on a THP request form. Ex. JT-71 001. The form had not been consulted upon with the Union pursuant to Article 4 of the CBAs.

(26) On the form, MID Chief Rust requested THP for all employees in all of the various bargaining units represented by the Union in the CoM. Tr. Vol. II. At 582, lines 24-5; 583, lines 1-2. See JT-72 001-2.

(27) MID Chief Rust referred to the exposure being continuous and in the “dates/Period” section of the form as being from March 5th, 2020, to the present. It is ongoing.” Ex. JT-72 002. Tr. Vol. II. At 540, lines 16-9. Rust intended for the request to cover the entire pandemic period. Tr. Vol. II. At 540, lines 11-25.

(28) On April 22, 2020, the Union submitted its THP request to Personnel Director Underwood on the new form, as required by the CoM. Ex. JT-72 001-2. The THP request was submitted on behalf of all CoM Ees organized into Bus 2, 3, 4, 13, and 14. Ex. JT-72 001-2.

(29) On June 4, 2020, a CoM department head independently submitted and supported written recommendations for THP to Personnel Director Underwood. Ex. U-56 001-6. Tr. Vol. I. at 173, lines 8-23. Those recommendations contained no end date for the THP.

(30) Personnel Director Underwood received those recommendations. Tr. Vol. I. at 173, lines 8-23.

(31) Personnel Director Underwood only intended to consult the Union on recommendations for THP if ordered in Arbitration. See Tr. Vol. I. at 352, lines 11-25; 354, lines 6-18. Such a position is in direct conflict with the plain language of the CBAs and contractually breached the CBA.

(32) On June 16, 2020, Director Underwood issued a response on behalf of all department heads in the CoM that received the Union’s requests. Tr. Vol. I. at 174, lines 3-6. The CoM denied the Union’s request for award of a THP wage differential on the grounds that the CoM did “not believe that HGEA employees who were designated to perform essential functions were temporarily exposed to unusually hazardous working conditions.”. Ex. U-11 001. This was a denial of

THP for all CoM Ees organized into Bus represented by HGEA, including, but not limited to, Bus 2, 3, 4, 13, and 14 who were performing essential functions. See Tr. Vol. I. at 207, lines 16-23; 211, lines 7-12; 351, lines 23-5; 352, lines 1-4. This includes both the department heads' recommendations and the Union's request. See Ex. U-11 001. Tr. Vol. I. at 331, lines 21-5; 332, lines 1-2.

(33) The CoM denial was for the entire time period of the THP request which was until the end of the pandemic. Tr. Vol. II. At 583, lines 11-25; 584, lines 1-4.

(34) Underwood and Mayor Victorino admit that COVID-19 and its variants are a hazard. Tr. Vol. I. at 68, lines 23-5; 69, lines 1; 197, lines 20-5; 198, lines 3-8.

(35) Underwood acknowledged that the CoM viewed COVID-19 as a *temporary* hazard at the time of his denial of the Union's request on June 16, 2020. Tr. At 243, lines 17-25; 244, lines 1-12. By this time, the CoM had been aware of the hazard for nearly four (4) months. Id.

(36) Personnel Director Underwood acknowledged that CoM Ees were required to CoMe to work and that the exposure to COVID-19 resulted from that directive. Tr. Vol. I. at 195, lines 21-4. See Tr. At 196, lines 12-21.

(37) Underwood acknowledged that if those same employees have contact with the general public, the potential for exposure to COVID-19 increases. Tr. Vol. I. at 192, lines 16-9.

(38) CoM's attempted to mitigate exposure to COVID-19 through the use of PPE, distancing, and sanitizers, the CoM mitigation efforts did not eliminate the hazard of COVID-19 exposure in the workplace. Tr. Vol. I. at 59, lines 1-14; 67, lines 18-23; 68, lines 23-5; 69, lines 1-9; 197, lines 1-2, 4-9, 14-25. See Tr. Vol. I. at 198, lines 3-8.

(39) CoM Ees started testing positive for COVID-19 and its variants in 2020, and they have continued to test positive into 2022. Ex. U-17 001-3; U-18 001-3; U-19 001-3; U-20 001; U-30 001.

(40) On June 18, 2020, the Union responded to the June 16, 2020, denial by filing a Step 2 grievance. Ex. JT-73 001-2. The Step 2 class grievance was filed on behalf of “All Members of Bargaining Unit 2, 3, 4, 13, and 14 (Grievants) Employed In All Departments of the COUNTY OF Maui (Employer)”. Ex. JT-73 001-2; JT-74 001-2. The duration of the requested remedy was for the entire life of the pandemic. *Id.*

(41) The grievance was addressed to the Step 2 designee, Personnel Director Underwood. *Id.* Personnel Director Underwood assigned Watanabe to act as his Step 2 designee. Tr. Vol. I. at 221, lines 10-7; 221, lines 22-4.

(42) Personnel Director Underwood admits that, long before the Step 2 meeting ever occurred, he reviewed the forms that MID Chief Rust submitted, discussed them with her, and understood that the intent of the requests was to cover THP for all employees for every day they actually reported for work during the pandemic. Tr. Vol. II. At 582, lines 4-12; 583, lines 16-23. CoM understood that the claim asserted by the Union inherently meant that there was no end date to the request. *Id.*

(43) On June 22, 2020, Personnel Director Underwood received another recommendation for THP from a CoM department head. Ex. U-57 001-2. Tr. At 173, lines 8-23; 361, lines 9-13. Underwood acknowledged that this recommendation for THP was independently submitted by the aforementioned CoM department head. Tr. Vol. I. at 336, line 25; 337, lines 1-4. The recommendation contained no end date. Ex. U-57 001-2.

(44) As of September 28, 2021, Personnel Director Underwood admitted that he had not responded or made a decision regarding any of recommendations

he received from CoM department heads on June 4 and June 22, 2020. Tr. Vol. I. at 351, lines 11-6. See Tr. Vol. I. 151, lines 11-6; 152, lines 3-7.

(45) On October 1, 2020, the Union amended its Step 2 grievance. Ex. JT-74 001-2.

(46) On October 1, 2020, the Union held a Step 2 meeting with Step 2 Designee Watanabe. See Ex. JT-71 001-2. MID Chief Rust argued that the CoM had violated the articles of the CBAs alleged in the amended Step 2 grievance, which included the CoM's decision not to award a THP differential to CoM Ees. Tr. Vol. I. at 580, lines 17-25; 581, lines 1-3.

(47) MID Chief Rust repeated the duration of the Union's requested remedy to Step 2 Designee Watanabe of this during the Step 2 meeting. During the Step 2 meeting, MID Chief Rust and Step 2 Designee Watanabe discussed the grievance, and Step 2 Designee Watanabe asked about the duration of the requested remedy contained therein. Tr. Vol. II. At 544, lines 8-21.

(48) MID Chief Rust presented the grievance and the requested remedy therein as covering the period from March 4, 2020, until the future date at which CoM Ees represented by the Union were "are no longer exposed to the hazard." Id.

(49) Step 2 designee Watanabe did not take issue with the presentation of the grievance and the intended duration of the requested remedy contained therein, nor did he have any questions about the intended duration of the grievance or the requested remedy. Id.

(50) The CoM did not raise the issue of limiting any future decision and award to a maximum duration of six (6) months. Tr. Vol. II. At 543, lines 4-9; 582, lines 4-12; 583, lines 16-23; 596, lines 15-8.

(51) Step 2 Designee Watanabe then drafted his response to the Step 2 grievance, wherein he denied the grievance at Step 2. Tr. Vol. I. at 553, lines 19-24. See Ex. JT-75 002. Personnel Director Underwood claims that he did not

review Step 2 Designee Watanabe’s draft before it was sent to Mayor Victorino. Tr. Vol. I. at 223, lines 10-3. Step 2 Designee Watanabe never discussed the Step 2 Grievance with Mayor Victorino. Tr. Vol. I. at 554, lines 9-11. Mayor Victorino then signed the Step 2 response denying the grievance Step 2 and sent it to the Union. Ex. JT-75 002.

(52) On November 6, 2020, Mayor Victorino denied the Union’s grievance at Step 2 on behalf of the CoM. Ex. JT-75 002. The Department of Personnel Services and Corporation Counsel advised Mayor Victorino to deny the grievance at Step 2, and he followed their advice. Tr. Vol. I. at 83, lines 17-25; 84, lines 5-9.

(53) There was no mention of any limitation to duration referenced in Mayor Victorino’s denial letter. Ex. JT-75 001-2.

(54) On November 18, 2020, the Union notified the CoM of its intent to arbitrate this grievance. Ex. JT-76 001.

(55) On May 7, 2021, Mayor Victorino issued Mayor’s Directive 2021-2 wherein, for the first time, he directed all Executive Department and Agency Heads to ensure that no symptomatic CoM Ees be at work. Ex. JT-63 001-3.

(56) On May 7, 2021, Mayor Victorino issued Mayor’s Directive 2021-3 wherein, for the first time, he reiterated his recommendation that all healthy employees CoMe to work, and his directive that “[a]ll essential services must continue...” Ex. JT-64 001-2. Mayor Victorino acknowledged that a facially healthy person can still be an asymptomatic carrier of COVID-19. Tr. Vol. I. at 113, lines 23-5; 114, 1-2.

(57) On August 5, 2021, Governor Ige issued a Proclamation entitled “EMERGENCY PROCLAMATION RELATED TO THE COVID-19 RESPONSE” wherein he determined, designated, and proclaimed, among other things, that “COVID-19 continues to endanger the health, safety, and welfare of the people of Hawaii and a response requires the serious attention, effort, and

sacrifice of all people in the State to avert ... catastrophic impacts to the State” Ex. JT-29 001. Governor Ige further determined, acknowledged, and declared that, “despite the success of our mitigation and vaccination efforts”, the recorded number of cases and deaths has continued to increase, with more than 44,617 documented cases of COVID-19 in the State and 538 deaths attributed to the disease. Id. Governor Ige further declared that this Proclamation superseded all prior proclamations issued by him related to what he acknowledged as the “COVID-19 emergency” and declared that a disaster emergency relief period shall exist from the date of issue through October 4, 2021, unless terminated by separate proclamation, whichever occurred first. Ex. JT-28 035.

(58) On August 2, 2021, The Maui News reported that Mayor Victorino asked state officials to delay the return of students to public school classrooms, citing new Centers for Disease Control and Prevention data showing that the DELTA variant ‘*can spread as easily as chickenpox.*’” Ex. U-41 001.

(59) Vaccines related to COVID-19 became available between late 2020 to early 2021. Tr. Vol. II. At 612, lines 12-5.

(60) On August 10, 2021, Mayor Victorino issued Mayor’s Directive 2021-7 wherein he directed all CoM Ees to show proof of vaccination or be subject to periodic testing. Ex. JT-68 001-2. See Tr. Vol. II. At 592, lines 2-7; 612, lines 15-9. On August 20, 2021, Mayor Victorino issued a follow-up memo wherein he attempted to justify the vaccination requirement by saying that “a strong response is necessary ... the Delta variant has caused a significant increase in cases statewide and here within Maui County ... This situation affects all of us, both within our work lives and at home. Our kupuna are no longer the only ones at risk.” Ex. JT-69 001.

(61) Vaccinations and vaccination requirements did not eliminate the covid-19 virus or the exposure to HGEA workers.

(62) Vaccinations and vaccination requirements did not change the existent HGEA workers working conditions or duties. COM covid-19 mitigation policies and procedures remained the same for the workers during the period of the availability of vaccinations and the relevant renewal period.

(63) Managing Director Baz and Personnel Director Underwood both retroactively admit that the vaccine that the CoM mandated did not prevent anyone, including CoM Ees, from catching COVID-19 or its more deadly variants, Delta and Omicron. Tr. Vol. II. At 118, lines 17-8; 119, lines 1-9; 613, lines 3-7.

(64) This directive was enforced by department heads across the CoM. Tr. Vol. II. At 116, line 25; 117, lines 1-10; 118, lines 2-23; 119, lines 7-9.

(65) The Delta and Omicron variants of COVID-19 swept through the State of Hawaii, including the CoM, immediately after vaccination, or testing in lieu of vaccination, were mandated for State and CoM Ees. See Tr. Vol. I. at 104, lines 14-5. Vol. II. At 592, lines 17-25; 593, lines 9-13.

(66) The CoM recognized that the Delta variant of COVID-19 was far more contagious and deadly than the initial iteration of COVID-19. Ex. JT-6 003; JT-7 001; JT-19 001-2; JT-20 001-2; JT-21 001-2; JT-22 001-2; JT-23 001-2; JT-24 001-2; JT-25 001-2; JT-29 001; JT-34 001-3,10; JT-35 001-3,11; JT-36 001-4; JT-37 001-2,12; JT-38 001-13; JT-39 001; JT-40 001; JT-41 001-2,4; JT-42 001,14; JT-42 001,14; JT-44 002. U-1 001; U-22 001. Tr. At 36, lines 15-25; 37, lines 1-4; 45, lines 15-21; 56, lines 1-3. See JT-7 007; JT-16 028; JT-17 002-3; JT-18 031; JT-19 032; JT-21 033; JT-22 001-2; JT-23 035; JT-23 035; JT-25 035; JT-28 035; JT-32 001-3; JT-33 001-3; JT-41 004; JT-42 014; JT-44 003. U-1 001-3; U-2 001-2; U-3 001; U-4 001-8; U-5 001-4; U-6 001; U-7 001. Tr. Vol. I. at 56, 103; 79, lines 2-10. Tr. Vol. I. at 56, lines 103; 79, lines 2-5; 133, lines 4-10.

(67) On August 24, 2021, the rapid spread of the Delta variant prompted Mayor Victorino to suggest a “21-day break period for non-essential activities.” Tr.

Vol. I. at 104, lines 10-3. He made this suggestion because the Delta variant was surging throughout the County of Maui. Tr. Vol. I. at 104, lines 14-5.

(68) A new variant of COVID-19 known as the “Omicron” variant arrived in the State and joined the Delta variant as the dominant variants of COVID-19 in the State, sweeping through the State and the CoM between late 2021 and March 25, 2022. See Ex. JT-63 001-2. U-58 001-2.

(69) Between August 2021 and March 25, 2022, cases increased five-fold in the State from 44,617 to more than 208,000, and they increased from 4,903 to approximately 27,000 in the CoM. JT-29 001-20; 44 001-4; U-58 001-34; 60 001-11; 63 001-2. During the same period, the number of deaths doubled, increasing from 538 to at least 1,149 in the State, which included the CoM. Id.

(70) On September 3, 2021, the CoM was found to have the largest number of active COVID clusters in the State. Ex. U-44 001-3.

(71) On January 26, 2022, Governor Ige issued a Proclamation entitled “EMERGENCY PROCLAMATIONS RELATED TO COVID-19 (OMICRON VARIANT)” wherein he determined, designated, and proclaimed, among other things, that “COVID-19 continues to create considerable risk of infection for members of our community, and continues to endanger the health, safety, and welfare of Hawaii such that it requires the serious attention, effort, and sacrifice of all people in the State to avert catastrophic impacts to the State...”. Ex. U-58 001-2. Governor Ige further determined, designated, and proclaimed, that “the highly contagious SARS-CoV-2 virus Omicron continues to cause high case numbers, hospitalizations, and deaths around the world, in the United States of America, and in our State...”. Ex. U-58 001. Governor Ige further also determined, acknowledged, and declared that, as of January 26, 2022, the recorded number of cases and deaths had “continued to increase at a significant rate, with more than 208,000 documented cases of COVID-19 and 1,149 deaths attributed to his disease

in the State...”. Id. Governor Ige further declared that this Proclamation superseded all prior proclamations issued by him related to what he acknowledged as the “COVID-19 emergency”, and that a disaster emergency relief period shall exist from the date of issue through March 25, 2022, unless terminated by separate proclamation, whichever occurred first. U-58 018. This was Governor Ige’s final Emergency Proclamation. See Ex. U-62 001-2.

(72) On January 26, 2022, Governor Ige issued a Proclamation in the form of an amendment entitled “AMENDMENT EMERGENCY PROCLAMATIONS RELATED TO COVID-19 (OMICRON VARIANT)” wherein he Amended the Proclamation dated January 26, 2022, but reaffirmed the previous determinations, designations, and proclamations contained therein. See Ex. U-59 001. Governor Ige further declared that the January 26, 2022, Emergency Proclamation otherwise remained “as issued on January 26, 2022” and continued “through March 25, 2022, unless terminated by separate proclamation, whichever occurred first. Ex. U-59 001. This was Governor Ige’s final amendment to an Emergency Proclamation. See Ex. U-59 001.

(73) On or around February 11, 2022, this Arbitrator issued the ARTBITRATOR’S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, wherein, among other things, this Arbitrator found that the Union met its burden of proof, showing by a preponderance of the evidence that the CoM contractually violated Articles 2, 3, 4, and 5, of the Bus 2, 3, 13, and 14 CBAs, and Articles 20 of the Bus 3, 4, and 13 CBAs, 22 of the BU2 CBA, and 30 of the BU 14 CBA. Additionally, this Arbitrator ordered that the CoM was to consult with the Union fully and completely and that a further hearing would be held for the damages, temporary hazard pay differentials, for the contested job classifications.

(74) This Decision and Order resulted in an award of a 15% or 25% differential to qualified employees, in accordance with the aforementioned contractual provisions of the CBAs, with all remaining disputed claims for 25% to be settled at a subsequent arbitration hearing.

(75) Mayor Victorino was notified of the decision. Tr. Vol. II. At 509, lines 4-8. As of the date of his testimony in the second part of the bifurcated arbitration hearing, he had not ordered any action and he had not decided whether he would pay THP as ordered. Tr. Vol. II. At 510, lines 1-2. See Tr. Vol. II. At 509, lines 4-25; 510, lines 1-2.

(76) Upon receiving this Arbitrator's award in the first part of this bifurcated arbitration hearing, Personnel Director Underwood proceeded to consult with the Union pursuant to this Arbitrator's order. Tr. At 591, lines 18-25; 592, line 1. See 598, lines 2-6. During this consultation, Personnel Director Underwood agreed that the THP award was justified for the period March 4, 2020, to August 16, 2021. Tr. Vol. II. At 591, lines 18-25; 617, lines 3-7. Underwood's acknowledgment was the result of a finding made during an internal consultation between Personnel Director Underwood, Managing Director Baz, and attorneys that represent the CoM. Tr. Vol. II. At 599, lines 1-6; 611, line 25; 612, lines 1-4.

(77) While the Personnel Director did not grant the initial THP award for the first six (6) months, Underwood, Managing Director Baz, and the Corporation Counsel recognized and acquiesced to this Arbitrator's order in the first of this bifurcated arbitration hearings as constituting a valid grant under Section D Duration of Hazard Pay Award of THP for the initial six-month period. They acknowledged that extensions to the award of THP were justified, to a minimum of August 16, 2021. Tr. Vol. II. At 617, lines 3-7.

(78) Personnel Director Underwood's acknowledgment of a renewal period was made during consultation with the Union over the duration of a granting of

THP and during his testimony under oath. Id. Underwood found that the appropriate duration of that award was, by his calculation, at a minimum from March 4, 2020, to August 16, 2021. Id. The acknowledgment was in his consultation letter to the Union. Tr. Vol. II. at 591, lines 18-25; 617, lines 3-7.

(79) On February 21, 2022, Mayor Victorino also issued Emergency Rules entitled “PUBLIC HEALTH EMERGENCY RULES, EFFECTIVE FEBRUARY 21, 2022” wherein he acknowledged, among other things, that “[t]he virus that causes Coronavirus 2019 Disease (‘COVID-19’) is a novel severe acute respiratory illness that is easily transmitted.” Ex. U-60 001. As of February 17, 2022, there were more than 419 million cases and nearly 5.85 million deaths globally, and the United States continues to record the highest numbers of cases, with 78 million cases and nearly 920,000 deaths To date, there are 230,000 cases and 1,200 deaths in the State of Hawaii with 27,000 confirmed and probable cases in Maui County. Statewide, in the past 14 days, there were 9,317 new cases...” Id. He then declared that the rules would take effect on February 21, 2022, at 12:01 a.m. and, upon that date, would repeal the Emergency Rules promulgated February 7, 2022. Ex. U-60 007. The Emergency Rules would be repealed upon either issue of a subsequent proclamation or termination of the Proclamation of Emergency for Maui County, whichever occurred first. Id. Governor Ige reviewed and signed the Proclamation on February 21, 2022. Id. This was Mayor Victorino’s final Public Health Emergency Rules. See Ex. U-60 001-7; U-61 001.

(80) Sometime after February 21, 2022, Mayor Victorino also issued Emergency Rules entitled “PUBLIC HEALTH EMERGENCY RULES REPEALED EFFECTIVE MARCH 1, 2022” wherein he repealed the Emergency Rules entitled “PUBLIC HEALTH EMERGENCY RULES, EFFECTIVE FEBRUARY 21, 2022” that he previously issued on February 21, 2022. Ex. U-61 001. He then declared that the repeal would take effect on March 1, 2022, at 12:01

a.m. and, upon that date, would repeal the Emergency Rules promulgated February 21, 2022. Ex. U-61 001. Therein, he also acknowledged that, while he was repealing the Public Health Emergency Rules for the CoM, “Governor David Y. Ige’s Statewide Emergency Proclamation related to COVID-19 remains in effect.” Id. Accordingly, Governor Ige did not sign this document, unlike all of the others. Id.

(81) Mayor Victorino’s Public Health Emergency Rules was repealed, as scheduled, on March 1, 2022, at 12:01 a.m. See Ex. U-61 001. COVID-19 and its variants continued to be recognized as a hazard in the CoM until March 25, 2022, because Governor Ige’s Emergency Proclamations superseded those of Mayor Victorino, and Governor Ige’s final Emergency Proclamation remained in effect until March 25, 2022. U-58 018; U-59 001. See Ex. U-61 001.

(82) On March 23, 2022, Governor Ige sent an email to State government personnel wherein he stated the following: “I am allowing the current emergency proclamation to expire on March 25. ... I want to be very clear: the pandemic is not over yet. .” Ex. U-62 001-2. He signed the email “David Y. Ige Governor, State of Hawai’i.” Ex. U-62 001-2.

(83) The final 7 months of the emergency period were statistically a dangerous and deadly period of the entire emergency period. See Ex. U-63 001-2. The aggregate number of cases and deaths resulting from COVID-19 and its variants Delta and Omicron, among others, increased exponentially from August 17, 2021, to March 25, 2022, reaching their height after mandatory vaccination or periodic testing was mandated for government employees. See Ex. U-63 001-2. During this period, the number of cases rose nearly five-fold in the SoH from at least 44,617+ to 208,000+, to an increase from 4,903 to approximately 27,000 in the CoM during the same period. Ex. JT-29 001-20; 44 001-4. U-58 001-34; 60 001-11; 63 001-2.

(84) On March 24, 2022, Personnel Director Underwood raised an issue for the first time that the Bus 2, 3, 4, 13, and 14 CBAs limit this Arbitrator's decision award to a maximum duration of six (6) months. See Tr. Vol. II. At 543, lines 4-9; 582, lines 4-12; 583, lines 16-23; 596, lines 15-23.

(85) This was the first time that Personnel Director Underwood, or anyone acting as a representative of the CoM, raised the issue of a renewal period termination of temporary hazard pay under Section D of the Temporary Hazard Pay section of the CBA. Tr. Vol. II. At 596, lines 19-23. This defense was not raised until after this Arbitrator ordered the CoM to consult with the Union prior to the second phase of this bifurcated arbitration hearing. Id.

(86) Governor Ige's Emergency Proclamation expired on March 25, 2022, as scheduled. See Ex. U-58 017-8; U-59 001; U-61 001; U-62 001-2.

(87) Pursuant to HRS § 127A-14©, the governor is the sole judge of the existence of a state of emergency in the state. Ex. U-6 001.

(88) Pursuant to Governor Ige's Emergency Proclamations, the duration of the emergency period, and therefore the period of ordered exposure to COVID-19 and its variants, was March 4, 2020, to March 25, 2022. JT-6 001-7; JT-7 001-7; JT-8 001-3; JT-9 001-8; JT-10 001-3; JT-11 001-7; JT-12 001-39; JT-13 001-33; JT-14 001-40; JT-15 001-31; JT-16 001-34; JT-17 001-3; JT-18 001-31; JT-19 001-32; JT-20 001-33; JT-21 001-34; JT-22 001-34; JT-23 001-35; JT-24 001-034; JT-25 001-35; JT-26 001-4; JT-27 00; JT-28 001-35; JT-29 001-29; U-58 001-34; U-63 001-2.

(89) As stated in the initial Award, the State's imposition of Emergency Proclamations essentially ordered the pertinent essential HGEA workers to continue to go to workplaces where they faced exposure to the Covid-19 virus. The governmental orders deprived these workers of the ability to control the nature and degree of exposure to the deadly virus. The workers who could work from

home could control who they would be exposed to in their homes, and the frequency or duration of the exposure.

(90) Prior to the second phase of this arbitration, the parties entered into a settlement agreement wherein all claims for 25% and 15% were agreed to and it was placed on the record and approved by this Arbitrator. The sole issue of duration of the award of temporary hazard pay damages for the forthcoming second part of this two-part bifurcated arbitration hearing, was scheduled to begin on July 1, 2022.

(91) The second part of the bifurcated arbitration hearing began on July 1, 2022. The hearing continued through July 8, 2022.

(92) In the process of holding the arbitration hearing, the Union called a department head from each respective department to testify regarding their subordinate employees' job duties and working conditions between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 10, lines 3-22; 203, lines 3-20; 317, lines 3-20.

(93) Department of Corporation Counsel Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. See Tr. Vol. II. 13, lines 22-5; 14, lines 1-15; 17, lines 19-25; 18, lines 1-9; 13-25; 19, lines 1-22; 20, lines 17-25; 21, lines 1-25; 22, lines 1-2; 27, lines 7-25; 28, lines 1-25; 29, lines 1-12; 35, lines 1-21; 36, lines 10-25; 37, lines 1-21; 47, lines 19-25; 48, lines 1-5, 20-5; 49, lines 1-25; 50, lines 1-25; 51, lines 1-25; 52, lines 1-7. Their Ees' job duties did not change between March 4, 2020, and March 25, 2022. See Tr. Vol. II. At 31, lines 17-20; 35, lines 16-21; 36, lines 10-6, 20-3; 37, lines 7-18. Corporation Counsel Moana Lutey admitted that her department took mitigating measures in response to COVID-19. Tr. At 30, lines 13-6. Ees continued to be provided with PPE, measures were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16, 2021. Tr. Vol. II. At 37,

lines 10-8; 50, lines 1-9. These measures were not in place prior to March 4, 2020. Tr. Vol. II. At 43, lines 24-5; 44, lines 1-2.

(94) Corporation Counsel Lutey's description of working conditions between March 4, 2020 and March 25, 2022 indicates that, while working conditions included loosening and tightening of restrictions as case counts and deaths rose and fell, ultimately COVID-19 and its variants remained an ever-present hazard. CoM Ees continued to work, they continued to be exposed to COVID-19 and its variants at work, and mitigation measures continued to be implemented to mitigate the effects of exposure to COVID-19 and its variants while they were at work. Tr. Vol. II. At 33, lines 18-21; 24-5; 34, lines 14-25; 35, lines 1-9; 36, lines 10-23; 39, lines 24-5; 40, lines 1-2; 46, lines 5-8; 47, lines 19-23; 48, lines 2-5. See Tr. Vol. II. At 51, lines 22-5.

(95) Department of the Prosecuting Attorney Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. Tr. Vol. II. At 68, lines 2-4. Their job duties did not change between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 61, lines 12-16. See Tr. Vol. II. At 81, lines 17-24. Prosecuting Attorney department responded to COVID-19 by implementing measures intended to mitigate the risks associated with exposure to COVID-19. Tr. Vol. II. At 61, lines 12-16; 66, lines 9-12; 77, lines 3-17. Ees continued to be provided with PPE, measures were taken to social distance, and cleaning supplies were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16, 2021. See Tr. Vol. II. At 75, lines 14-21; 77, lines 11-7. These measures were not in place prior to March 4, 2020. Tr. Vol. II. At 77, lines 3-17. Despite these measures to mitigate the risks associated with exposure to COVID-19, around a dozen CoM Ees employed by the department caught COVID-19 and/or one of its variants between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 67, lines 8-14. See Tr. Vol. II. At 75, lines 12-3. Working

conditions did not change between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 71, lines 15-7. See Tr. At 66, lines 9-17.

(96) Department of Environmental Management Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. Tr. Vol. II. At 87, lines 14-23; 97, lines 9-25. Their job duties did not change between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 85, lines 13-23; 86, lines 9-12; 89, lines 16-20; 108, lines 9-18; 115, lines 11-1, 19-25. Director Eric Nakagawa (“Director Nakagawa”) of the Department of Environmental Management acknowledged that his department responded to COVID-19 by implementing measures intended to mitigate the risks associated with exposure to COVID-19. Tr. Vol. II. At 85, lines 13-23; 92, lines 11-3; 110, lines 24-5; 11, lines 1-21; 132, lines 2-8. Ees continued to be provided with PPE, measures were taken to social distance, and cleaning supplies were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16, 2021. Tr. Vol. II. At 90, lines 2-5, 18-25; 91, lines 1-9; 95, lines 21-5. These measures were not in place prior to March 4, 2020. See Tr. Vol. II. At 88, lines 16-20; 90, lines 2-5, 18-25; 91, lines 1-9; 91, lines 12-25; 92, lines 1-10. Despite the measures to mitigate the risks associated with exposure to COVID-19, no less than two (2) CoM Ees employed by the department and represented by HGEA caught COVID-19 and/or one of its variants between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 95, lines 3-10, 16-20; 96, lines 3-7. Director Nakagawa acknowledged that working conditions did not change between March 4, 2020, and March 25, 2022. See Tr. Vol. II. At 90, lines 2-5; 97, lines 1-25.

(97) Department of Water Supply Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. See Tr. Vol. II. At 138, lines 23-5; 139, lines 1-25; 140, lines 1-14; 144, lines 10-8; 152, line 25; 153, lines 1-5. Their job duties did not change between March 4, 2020, and March 25, 2022. Tr.

Vol. II. At 137, lines 14-8; 152, line 25, 153, lines 1-5. The department responded to COVID-19 by implementing measures intended to mitigate the risks associated with exposure to COVID-19. Tr. Vol. II. At 133, lines 23-5; 134, lines 4-5, 14-8. See Tr. At 138, lines 23-5; 139, lines 1-25; 140, lines 1-5, lines 15-8, 23-5; 141, lines 1-2; 149, lines 6-12. Ees continued to be provided with PPE, measures were taken to social distance, and cleaning supplies were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16, 2021. See Tr. Vol. II. At 138, lines 23-5; 139, lines 1-25; 140, lines 1-5; 141, lines 2-12; 142, lines 6-8, 14-7; 144, lines 2-5. These measures were not in place prior to March 4, 2020. Tr. Vol. II. At 140, lines 6-12, 15-8. Despite these measures to mitigate the risks associated with exposure to COVID-19, no less than five (5) CoM Ees employed by the department and represented by HGEA caught COVID-19 and/or one of its variants between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 147, lines 6-13; 151, lines 1-5. One of those CoM Ees was hospitalized as a result. Tr. Vol. II. At 147, lines 10-3. Director Kau acknowledged that working conditions did not change between March 4, 2020, and March 25, 2022. See Tr. Vol. II. At 138, lines 23-5; 139, lines 1-25; 140, lines 1-5; 141, lines 2-12; 142, lines 6-8, 14-7; 144, lines 2-5.

(98) Department of Parks and Recreation Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. Tr. Vol. II. At 170, lines 2-6; 163, lines 1-22. Their job duties did not change between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 158, lines 19-25; 159, line 1-3. The department responded to COVID-19 by implementing measures intended to mitigate the risks associated with exposure to COVID-19. Tr. Vol. II. At 158, lines 19-25; 193, lines 2-5. Ees continued to be provided with PPE, measures were taken to social distance, and cleaning supplies were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16,

2021. Tr. Vol. II. At 193, lines 2-25; 194, lines 1-8, 14-24. See Id. Director Peters ultimately acknowledged that working conditions did not change between March 4, 2020, and March 25, 2022. See Tr. Vol. II. 162, lines 4-25; 163, lines 1-25; 164, lines 1-25; 165, lines 1-25; 166, lines 1-25; 167, lines 1-25; 168, lines 1-25; 169, lines 1-25; 170, lines 1-6.

(99) Department of Transportation Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. Tr. Vol. II. At 206, lines 16-22; 207, lines 22-5; 208, lines 1-14; 209, lines 2-16. Their job duties did not change between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 209, lines 3-15; 218, line 25; 219, lines 1-6. The department responded to COVID-19 by implementing measures intended to mitigate the risks associated with exposure to COVID-19. Tr. Vol. II. At 204, lines 18-25; 205, lines 1-4; 209, lines 14-25; 210, lines 1-3. See 215, lines 2-13; 226, lines 3-15.; See Tr. 219, lines 7-18. Ees continued to be provided with PPE, measures were taken to social distance, and cleaning supplies were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16, 2021. Tr. Vol. II. At 209, lines 3-15; 217, lines 4-19; 220, lines 6-14; 221, lines 16-22. These measures were not in place prior to March 4, 2020. Tr. Vol. II. At 226, lines 3-15. Despite these measures to mitigate the risks associated with exposure to COVID-19, at least one CoM EE employed by the department and represented by HGEA caught COVID-19 and/or one of its variants between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 223, lines 19-25; 224, line 1. Director Takamori acknowledged that working conditions did not change between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 217, lines 4-19.

(100) Department of Housing and Human Concerns Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. See Tr. Vol. II. At 240, lines 5-25; 241, lines 1-3. Their job duties did not change between

March 4, 2020, and March 25, 2022. Tr. Vol. II. At 244, lines 10-4. The department responded to COVID-19 by implementing measures intended to mitigate the risks associated with exposure to COVID-19. At 233, lines 15-7; 244, lines 23-5; 245, lines 1-7. See Tr. Vol. II. At 250, lines 23-5; 251, lines 1-25; 252, lines 1-25; 253, lines 1-6; 254, lines 6-25; 255, lines 1-2, 24-5; 256, lines 1-25; 257, lines 1-7. Ees continued to be provided with PPE, measures were taken to social distance, and cleaning supplies were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16, 2021. Tr. Vol. II. At 240, lines 5-25; 241, lines 1-3. See Tr. Vol. II. At 250, lines 23-5; 251, lines 1-25; 252, lines 1-25; 253, lines 1-6; 254, lines 6-25; 255, lines 1-2, 24-5; 256, lines 1-25; 257, lines 1-7. Despite these measures to mitigate the risk of exposure to COVID-19, CoM Ees employed by the department and represented by HGEA caught COVID-19 and/or one of its variants between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 245, lines 8-22. These measures were not in place prior to March 4, 2020. Tr. At 240, lines 5-25; 241, lines 1-3. Deputy Director Munsell's description of working conditions during between March 4, 2020, and March 25, 2022 indicate that, while working conditions included loosening and tightening of restrictions as case counts and death rose and fell, ultimately COVID-19 and its variants remained an ever-present hazard. CoM Ees continued to work, they continued to be exposed to COVID-19 and its variants at work, and mitigation measures continued to be implemented to mitigate the effects of exposure to COVID-19 and its variants while they were at work. See Tr. Vol. II. At 250, lines 23-5; 251, lines 1-25; 252, lines 1-25; 253, lines 1-6; 254, lines 6-25; 255, lines 1-2, 24-5; 256, lines 1-25; 257, lines 1-7.

(101) Department of Planning Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. Tr. Vol.II at 263, lines 11-17; 268, lines 5-10. Their job duties did not change between March 4, 2020, and

March 25, 2022. Tr. Vol. II. At 263, lines 11-7. The department responded to COVID-19 by implementing measures intended to mitigate the risks associated with exposure to COVID-19. Tr. Vol. II. At 258, lines 12-21; 263, lines 11-25; 264, lines 1-25. Ees continued to be provided with PPE, measures were taken to social distance, and cleaning supplies were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16, 2021. See Id. Despite these measures to mitigate the risk of exposure to COVID-19, no less than eight (8) CoM EEs employed by the department and represented by HGEA caught COVID-19 and/or one of its variants between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 265, lines 17-25; 266, lines 1-19. These measures were not in place prior to March 4, 2020. Tr. Vol. II. At 276, line 25; 277, lines 1-10.

(102) Director Takakura's description of working conditions during between March 4, 2020 and March 25, 2022 indicate that, while working conditions included loosening and tightening of restrictions as case counts and death rose and fell, ultimately COVID-19 and its variants remained an ever-present hazard. CoM Ees continued to work, they continued to be exposed to COVID-19 and its variants at work, and mitigation measures continued to be implemented to mitigate the effects of exposure to COVID-19 and its variants while they were at work during the pertinent period at issue. See Tr. Vol. II. At 273, lines 20-5; 274, lines 1-25; 275, lines 1-17; 276, lines 5-16.

(103) Department of Liquor Control Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. Tr. Vol. II. At 282, lines 23-5; 283, lines 1-7; 285, lines 2-9. Their job duties did not change between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 283, lines 1-7. The department responded to COVID-19 by implementing measures intended to mitigate the risks associated with exposure to COVID-19. Tr. Vol. II. At 278, lines 8-15. These

measures were not in place prior to March 4, 2020. See Tr. Vol. II. At 283, lines 19-24; 284, lines 1-22; 291, lines 1-25; 292, lines 4-10. Director Silva acknowledged that working conditions remained “very similar” throughout the period spanning March 4, 2020 and March 25, 2022, but his description of working conditions during that period indicate that, while working conditions included loosening and tightening of restrictions as case counts and death rose and fell, ultimately COVID-19 and its variants remained an ever-present hazard, CoM Ees continued to work, they continued to be exposed to COVID-19 and its variants at work, and mitigation measures continued to be implemented to mitigate the effects of exposure to COVID-19 and its variants while they were at work. See Tr. Vol. II. At 283, lines 19-24; 284, lines 1-22; 291, lines 1-25; 292, lines 4-10. Ees continued to be provided with PPE, measures were taken to social distance, and cleaning supplies were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16, 2021. Tr. Vol. II. At 283, lines 19-24; 284, lines 1-22.

(104) Department of Fire and Public Safety Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. Tr. Vol. II. At 306, lines 1-7. Their job duties did not change between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 301, lines 7-20. The department responded to COVID-19 by implementing measures intended to mitigate the risks associated with exposure to COVID-19. Tr. Vol. II. At 294, lines 11-23; 302, lines 1-18; 303, 11-25; 304, lines 1-10, 14-17; 305, lines 11-17, 23-5. Ees continued to be provided with PPE, measures were taken to social distance, and cleaning supplies were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16, 2021. See Tr. Vol. II. At 302, lines 1-18; 303, 11-25; 304, lines 1-10, 14-17; 305, lines 11-17, 23-5. These measures were not in place prior to March 4, 2020. See Tr. Vol. II. At 302, lines 1-18; 303, 11-25; 304,

lines 1-10, 14-17; 305, lines 11-17, 23-5. Despite these measures to mitigate the risk of exposure to COVID-19, a couple of dozen CoM Ees employed by the department and represented by HGEA caught COVID-19 and/or one of its variants between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 300, lines 21-5; 1-6. Fire Chief Ventura's description of working conditions between March 4, 2020 and March 25, 2022 indicates that, while working conditions included loosening and tightening of restrictions as case counts and death rose and fell, ultimately COVID-19 and its variants remained an ever-present hazard, CoM Ees continued to work, they continued to be exposed to COVID-19 and its variants at work, and mitigation measures continued to be implemented to mitigate the effects of exposure to COVID-19 and its variants while they were at work. See Tr. Vol. II. At 302, lines 1-18; 303, 11-25; 304, lines 1-10, 14-17; 305, lines 11-17, 23-5.

(105) Department of Finance Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. Tr. Vol. II. At 327, lines 2-25; 328, lines 1-11. Their job duties did not change between March 4, 2020, and March 25, 2022. Tr. At 327, lines 9-17. The department responded to COVID-19 by implementing measures intended to mitigate the risks associated with exposure to COVID-19. Tr. Vol. II. At 318, lines 20-1; 327, lines 9-25; 328, lines 1-25; 329, lines 1-15; 332, lines 3-13; 337, lines 3-25; 338, lines 1-8. Ees continued to be provided with PPE, measures were taken to social distance, and cleaning supplies were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16, 2021. Tr. Vol. II. At 327, lines 9-25; 328, lines 1-25; 329, lines 1-15. The mitigation measures were not in place prior to March 4, 2020. Tr. Vol. II. At 337, line 25; 340, lines 1-15. Despite these measures to mitigate the risk of exposure to COVID-19, a minimum of between twenty (20) and twenty-five (25) CoM Ees employed by the department caught COVID-19 and/or one of its variants between March 4, 2020, and March 25, 2022. Tr. Vol. II.

At 331, lines 2-7. Deputy Director Alibin's description of working conditions between March 4, 2020 and March 25, 2022 indicates that, while working conditions included loosening and tightening of restrictions as case counts and death rose and fell, ultimately COVID-19 and its variants remained an ever-present hazard, CoM Ees continued to work, they continued to be exposed to COVID-19 and its variants at work, and mitigation measures continued to be implemented to mitigate the effects of exposure to COVID-19 and its variants while they were at work. Tr. Vol. II. At 328, lines 12-25; 329, lines 1-15.

(106) Maui Emergency Management Agency Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. Tr. Vol. II. At 347, lines 14-7. Their job duties did not change between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 360, lines 17-23. The department responded to COVID-19 by implementing measures intended to mitigate the risks associated with exposure to COVID-19. Tr. Vol. II. At 347, line 25; 348, lines 1-25; 249, line 1. Ees continued to be provided with PPE, measures were taken to social distance, and cleaning supplies were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16, 2021. Tr. Vol. II. At 347, line 25; 348, lines 1-25; 349, line 1; 357, lines 5-25; 358, lines 1-9. These measures were not in place prior to March 4, 2020. Tr. Vol. II. At 349, lines 2-14; 359, lines 19-24. Despite these measures to mitigate the risk of exposure to COVID-19, a minimum of two (2) CoM Ees employed by the department caught COVID-19 and/or one of its variants. Tr. Vol. II. At 359, lines 3-14. Administrator Andaya's description of working conditions between March 4, 2020 and March 25, 2022 indicates that, while working conditions included loosening and tightening of restrictions as case counts and death rose and fell, ultimately COVID-19 and its variants remained an ever-present hazard, CoM Ees continued to work, they continued to be exposed to COVID-19 and its variants at work, and mitigation

measures continued to be implemented to mitigate the effects of exposure to COVID-19 and its variants while they were at work. See Tr. Vol. II. At 357, lines 5-25; 358, lines 1-9; 360, lines 24-5; 361, lines 1-9.

(107) Maui Police Department Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. Tr. Vol. II. At 372, lines 10-3. Their job duties did not change between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 371, lines 5-11. The department responded to COVID-19 by implementing measures intended to mitigate the risks associated with exposure to COVID-19. Tr. Vol. II. At 364, 13-25; 365, line 1; 369, lines 19-25; 370, lines 1-9. Ees continued to be provided with PPE, measures were taken to social distance, and cleaning supplies were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16, 2021. Tr. At 369, lines 19-25; 370, lines 1-9. These measures were not in place prior to March 4, 2020. Tr. Vol. II. At 370, lines 10-2. Despite these measures to mitigate the risk of exposure to COVID-19, a minimum of ten (10) CoM Ees employed by the department caught COVID-19 and/or one of its variants between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 368, lines 21-5; 369, lines 1-4. Business Administrator Magonigle's description of working conditions between March 4, 2020 and March 25, 2022 indicates that, while working conditions included loosening and tightening of restrictions as case counts and death rose and fell, ultimately COVID-19 and its variants remained an ever-present hazard, CoM Ees continued to work, they continued to be exposed to COVID-19 and its variants at work, and mitigation measures continued to be implemented to mitigate the effects of exposure to COVID-19 and its variants while they were at work. Tr. Vol. II. At 364, 13-25; 365, line 1; 369, lines 19-25; 370, lines 1-9; 371, lines 12-24; 372, lines 5-9; 374, lines 17-24; 375, lines 1-20.

(108) Office of the County Clerk Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. Tr. Vol. II. At 405, lines 10-2. Their job duties did not change between March 4, 2020, and March 25, 2022. See Tr. Vol. II. At 404, lines 23-5; 405, lines 1-16, 24-5; 406, lines 1-25; 407, lines 1-25; 408, line 1. The department responded to COVID-19 by implementing measures intended to mitigate the risks associated with exposure to COVID-19. Tr. Vol. II. At 405, lines 24-5; 406, lines 1-13, 17-9. Ees continued to be provided with PPE, measures were taken to social distance, and cleaning supplies were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16, 2021. Id. These measures were not in place prior to March 4, 2020. Tr. Vol. II. At 406, lines 14-6. Clerk Kaohu's description of working conditions between March 4, 2020 and March 25, 2022 indicates that, while working conditions included loosening and tightening of restrictions as case counts and death rose and fell, ultimately COVID-19 and its variants remained an ever-present hazard, CoM Ees continued to work, they continued to be exposed to COVID-19 and its variants at work, and mitigation measures continued to be implemented to mitigate the effects of exposure to COVID-19 and its variants while they were at work. See Vol. II. Tr. At 405, lines 10-2, 24-5; 406, lines 1-13, 17-9; 409, lines 9-14; 409, lines 20-5; 410, lines 1-6, 17-25; 411, lines 1-25; 412, lines 1-10; 412, lines 20-5; 417, lines 9-17.

(109) Department of Public Works Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. See Tr. Vol. II. At 387, lines 11-4; 20-5; 388, lines 1-7. Their job duties did not change between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 389, line 25; 390, lines 1-3. The department responded to COVID-19 by implementing measures intended to mitigate the risks associated with exposure to COVID-19. Tr. At 386, lines 20-3. Ees continued to be provided with PPE, measures were taken to social distance, and cleaning supplies

were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16, 2021. Tr. Vol. II. At 388, lines 8-23. These measures were not in place prior to March 4, 2020. Tr. At 389, lines 2-4. See Tr. Vol. II. At 386, lines 20-3. Despite these measures to mitigate the risk of exposure to COVID-19, CoM Ees employed by the department caught COVID-19 and/or one of its variants between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 390, lines 14-7. Director Molina's description of working conditions between March 4, 2020 and March 25, 2022 indicates that, while working conditions included loosening and tightening of restrictions as case counts and death rose and fell, ultimately COVID-19 and its variants remained an ever-present hazard, CoM Ees continued to work, they continued to be exposed to COVID-19 and its variants at work, and mitigation measures continued to be implemented to mitigate the effects of exposure to COVID-19 and its variants while they were at work. See Tr. Vol. II. At 387, lines 11-4; 20-5; 388, lines 1-7; 390, lines 4-13; 393, lines 6-25; 394, lines 1-3.

(110) Department of Management Ees represented by HGEA did not stop working from March 4, 2020, to March 25, 2022. See Tr. Vol. II. At 437, lines 23-5; 438, lines 1-25; 439, lines 1-25; 440, lines 1-5. Their job duties did not change between March 4, 2020, and March 25, 2022. Tr. Vol. II. At 437, lines 20-5; 438, lines 1-6. The department responded to COVID-19 by implementing measures intended to mitigate the risks associated with exposure to COVID-19. Tr. Vol. II. At 438, lines 19-25; 439, lines 1-25; 440, lines 1-5; 443, lines 18-25; 444, lines 1-20; 446, lines 6-25; 447, lines 1-2. Ees continued to be provided with PPE, measures were taken to social distance, and cleaning supplies were readily available from August 16, 2021, to March 25, 2022, just as they were previously from March 4, 2020, to August 16, 2021. Id. These measures were not in place prior to March 4, 2020. See Tr. Vol. II. At 438, lines 19-25; 439, lines 1-25; 440,

lines 1-5; 443, lines 18-25; 444, lines 1-20; 446, lines 6-25; 447, lines 1-2. Managing Director Baz’s description of working conditions between March 4, 2020 and March 25, 2022 indicates that, while working conditions included loosening and tightening of restrictions as case counts and death rose and fell, ultimately COVID-19 and its variants remained an ever-present hazard, CoM Ees continued to work, they continued to be exposed to COVID-19 and its variants at work, and mitigation measures continued to be implemented to mitigate the effects of exposure to COVID-19 and its variants while they were at work. See Tr. Vol. II. At 438, lines 19-25; 439, lines 1-25; 440, lines 1-5; 443, lines 18-25; 444, lines 1-20; 446, lines 6-25; 447, lines 1-2.

(111) In addition to testifying regarding their subordinate employees’ job duties and working conditions between March 4, 2020, and March 25, 2022, Prosecuting Attorney Martin and Director Silva provided their opinions and interpretation of the THP provision. Tr. Vol. II. At 80, lines 6-13; 293, lines 7-12. Prosecuting Attorney Martin correctly interpreted the THP provision’s reference to “working conditions ... remain the same” as a reference to the “unusually hazardous working conditions” that prompt and justify the original award of THP. Tr. Vol. II. At 80, lines 6-13. Director Lane Silva of the Department of Liquor Control echoed Prosecuting Attorney Martin’s interpretation. Tr. Vol. II. At 293, lines 7-12.

(112) For purposes of Section D, Duration of Hazard Pay Award, the working conditions and duties of HGEA workers remained the same during the period of March 4, 2020, to March 25, 2022.

(113) The Department heads failed to objectively and fairly determine whether the working conditions and duties of the subject workers were the same for renewals of hazard pay.

(114) The Department heads failed to show the Personnel Director or representative that the working conditions and duties of the subject workers were the same for renewals of hazard pay.

(115) The Department heads failed to submit to the Personnel Director or the representative objective evidence or information to make a determination of a renewal of hazard pay.

(116) The Director of Personnel Underwood informed the Department heads that Personnel Department would be responsible for the THP and Duration of THP issue.

(117) The Personnel Department failed to obtain evidence or information from the Departments to be able to make a fair and objective determination that a renewal of temporary hazard pay was warranted.

(118) No evidence that the Personnel Department sufficiently discussed or evaluated with the Department heads the issue of a determination of the renewal of hazard pay award.

(119) The Personnel Department interfered with the Department heads fulfilling their contractual duty to show that the working conditions and duties remained the same for a renewal of their hazard pay award.

(120) The unusually hazardous working conditions were present during the period of March 4, 2020, to March 25, 2022.

(121) CoM's mandated policies and procedures to mitigate the Covid-19 virus exposure to its Departments and were implemented and in force during the period of March 4, 2020, and March 25, 2022.

(122) The Covid-19 virus contagion was variable, with susceptibility to exposure and harm variable with the mutating virus.

(123) CoM's utilization of its viral mitigation policies and procedures were variable due to the variability of the Covid-19 virus.

(124) HGEA workers working conditions and duties remained the same for the period of March 4, 2020, and March 25, 2022.

(125) CoM contractually failed to award a renewal of hazard pay up to the time the emergency proclamations terminated on March 25, 2022, and the HGEA workers were no longer ordered to be essential workers.

(126) As of July 7, 2022, the CoM still had not paid THP to its Ees (organized into Bus represented by the Union) for exposure to COVID-19 and/or its variants. Tr. Vol. II. At 509, lines 3-25; 510, lines 1-2.

III. DISCUSSION AND CONCLUSIONS OF LAW

Having found that the Union met its burden of showing by preponderance of the evidence that the CoM violated Articles 2, 3, 4 and 5 of the Bus 2, 3, 4, 13, and 14 CBAs, and Articles 20 of the Bus 3, 4, and 13 CBAs), 22 of the BU 2 CBA, and 30 of the BU 14 CBA in first of this two-part bifurcated arbitration hearing, the issues before Arbitrator focus on the duration of this Arbitrator's previous ordered award.

A. THE UNION HAS MET ITS BURDEN OF PROVING BY PREPONDERANCE OF THE EVIDENCE THAT THE DURATION OF THIS ARBITRATOR'S AWARD IS MARCH 4, 2020, TO MARCH 25, 2022

1. THE BURDEN OF PROOF IS ON THE UNION

The Union is the moving party that has alleged violations of Articles 2, 3, 4, and 5 of the Bus 2, 3, 4, 13, and 14 CBAs, Article 20 of the Bus 2, 3, and 4 CBAs,

Article 22 of the BU 2 CBA, and Article 30 of the BU 14 CBA. Where the Union is moving party in a case that does not alleged violations of the Bus 2, 3, 4, 13, and 14 CBAs related to disciplinary action or de-facto disciplinary action, the burden is on the Union to prove the allegations at issue.

2. THE BURDEN OF PROOF TO BE APPLIED IS PREPONDERANCE OF THE EVIDENCE

The burden of proof to be applied in cases not involving disciplinary action or de-facto disciplinary action is “Preponderance of the Evidence.” As previously mentioned, here, the Employer took actions that HGEA alleges violated Article 20 of the Bus 2, 3, and 4 CBAs, Article 22 of the BU 2 CBA, and Article 30 of the BU 14 CBA, which are not related to disciplinary action or de-facto disciplinary action. The Union is the moving party. Thus, the burden of proof to be applied is preponderance of the evidence. Proof by preponderance of the Evidence “means to prove by evidence which, [in the Arbitrator’s] opinion, convinces you that something is more probably true than not true. ... Upon consideration of all the evidence, if you find that a particular claim ... or fact is more likely true than not true, then such claim ... or fact has been proven by a preponderance of the evidence.” Hawaii Courts, Standard Civil Jury Instruction. No. 33 in pertinent part. Thus, the Union has the burden of proving that it is more probably true than not true that the duration of the arbitration award is March 4, 2020, to March 25, 2022.

B. COM BREACHED THE CBA, SECTION D. DURATION OF HAZARD PAY

This award on the issue of the duration of temporary hazard pay renewal is an issue of contract.² In determining a term or condition of contained in the language of a CBA, “past interpretations and applications, and past practices, as part of the common law of the shop, may be considered.” See, *Gealon v. Keala*, 60 Haw. 513, 521, 591 P.2d 621, 626 (1979) (citing, *inter alia*, *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578-79 (1960) (“The [CBA] states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.”)).

When the party’s contract to resolve their disputes by arbitration, the arbitrator has the power to decide any questions of contract interpretation, including historical fact or general law necessary, in the arbitrator’s understanding of the case, to reach a decision. See Article 10 G. 1. & 2 of the BU 14 CBA; *Kendall Mills*, 8 LA 306, 309 (Lane, 1947); *Borg-Warner Corp.*, 3 LA 423, 428-29 (Gilden, 1944); Garrett, “*The Interpretive Process: Myths and Reality.*” Proceedings of the 38th Annual Meeting of NAA, 121, 143 (BNA Books, 1986). The Arbitrator’s “objective is to ascertain and effectuate the intention of the parties as manifested by the contract in its entirety.” *Provident Funding Associates v. Gardner*, 488 P.3d 1267, 1277 (Haw. 2021), citing *Hawaiian Association of Seventh-Day Adventists v. Wong*, 130 Hawai‘i 36, 45, 305 P.3d 452, 461 (2013). A de-novo review of the totality of the circumstances and evidence is required and the award must draw its essence from the collective bargaining agreement. See,

² HGEA has the burden of proof by showing by a preponderance of the evidence that COM breached the terms of the contract. COM did not assert an affirmative defense or plead an affirmative defense as set-forth in Hawaii Rules of Civil Procedure, Rule 8(c). HGEA has not shown the basis for a shifting of the burden of proof to COM or a legal basis for imposing an affirmative defense upon COM on the issue of an alleged contractual breach.

Hawaii Teamsters, Local 996 v. United Parcel Service, 241 F.3D 1177, 1180-1181 (9th Cir. 2001).

When the party's contract to resolve their disputes by arbitration, the Arbitrator has the power to decide any questions of contract interpretation, including historical fact or general law necessary, in the Arbitrator's understanding of the case, to reach a decision. See Article 10 G. 1. & 2 of the BU 14 CBA; Ex. JT-1 014-5; JT-2 016-17; JT-3 015-16; JT-4 015-6; JT-5 020-21.

Kendall Mills, 8 LA 306, 309 (Lane, 1947); Borg-Warner Corp., 3 LA 423, 428-29 (Gilden, 1944); Garrett, "The Interpretive Process: Myths and Reality."

Proceedings of the 38th Annual Meeting of NAA, 121, 143 (BNA Books, 1986). A de-novo review of the totality of the circumstances and evidence is required, and the award must draw its essence from the collective bargaining agreement. See, Hawaii Teamsters, Local 996 v. United Parcel Service, 241 F.3D 1177, 1180-1181 (9th Cir. 2001). Thus, the Arbitrator owes the Employer's decisions no deference and is obligated to conduct a de-novo review of the totality of the circumstances and evidence. United Paperworks International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 37-38 (1987).

The relevant provisions of the BU 02, Article 20; BU 03, Article 20; BU 04, Article 20; BU 13, Article 20; and BU 14, Article 30, are contained in the joint exhibits admitted into evidence and reproduced in pertinent part below. Ex. JT-1 013-5, 048-9; JT-2 014-17, 046-8; JT-3 014-16, 044-6; JT-4 013-6, 050-1; JT-5 018-21, 061-3. The pertinent issue of the duration of the arbitrator's hazard pay award for HGEA members is found in the CBA 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 the 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 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.

D. Duration of Hazard Pay Award. Such hazard pay award shall remain in effect for a period not to exceed six (6) months but may be renewed by the Personnel Director or the representative upon showing by the department head that the working conditions and duties remain the same.

The Section D language for the duration of a hazard pay award contractually obligated both the Personnel Director or representative, and the department heads to objectively, timely, fairly, and reasonably determine the renewal of hazard pay awards. A worker’s contractual qualification for a hazard pay award necessitates a contractual process where the respective Department heads must show the

Personnel Director or the representative that a renewal is warranted if there is objective evidence supporting the renewal. The process requires the Department heads to determine if the Covid-19 working conditions and duties remained the same during the relevant period of time.

The CoM cannot arbitrarily choose not to grant a renewal but must affirmatively determine if the hazard pay awardees arising from the exposure to the unusually hazardous working conditions of Covid-19 should have a renewal of their award following the six-month period if their working conditions and duties remain the same. The reference to the “working conditions and duties” relates to the working conditions and duties relative to the hazardous exposure to covid virus on which the hazard pay award is based.

The CoM, as set forth in the Findings and Conclusions of the first hearing, contractually failed to award temporary hazard pay arising from HGEA workers involuntary designation of essential workers status which exempted them from stay home orders and ordered workers to continue in their respective workplaces. In this case, the hazard pay award contractually obligated COM to fairly and objectively determine the workers contractual right to a renewal of their hazard pay award. In the instant hearing, COM failed to timely, fairly, and reasonably determine if the awardees hazard pay could be renewed. COM failed to award a hazard pay renewal for the duration of the emergency declaration imposed on the HGEA workers.

First, the COM delegated decision-making on issues relating to the issue of the duration of hazard pay at issue to the Department of Personnel Services (“DPS”). The award and approval of any renewal of hazard pay for HGEA workers was in the sole discretion of DPS. DPS, however, did not allow the

Departments to fulfill their contractual determination of a renewal. DPS did not have the Departments determine if a renewal was warranted. The Departments of COM did not do an analysis or determination of whether a renewal of the temporary hazard pay award should be renewed if the working conditions and duties remained the same within their respective departments. DPS did not request the Departments to conduct a determination of renewal. The departments had the contractual duty to show that the HGEA workers working conditions and duties remained the same in this renewal of hazard pay award process, not DPS.

Second, DPS did not fully and fairly analyze and determine whether a renewal beyond the initial 6-month period of temporary hazard pay was contractually justified. DPS did not ask for input from the respective Departments on this issue of renewal. DPS did not attempt to gather data, evidence, or information from the Departments on changes to the workers working conditions and duties following the initial 6-month period of temporary hazard pay. Instead, DPS informed all Departments that it would be solely responsible for the determination of the temporary hazard pay award and renewal issue and failed to gather any objective evidence of changes to the workers working conditions and duties. As a result, the Departments failed to submit requests to show a renewal even though they may have believed the working conditions and duties of the workers remained the same during the pandemic period in question. DPS did not apprise the Departments of their contractual duty to make a determination of a hazard pay renewal to DPS.

Third, the Departments failed to perform their contractual duty to show the Personnel Director or the representative that a renewal of the hazard pay award should be renewed as the HGEA workers working conditions and duties were the

same during the relevant periods.³ The department heads did not show or submit to the Personnel Director or representative that the awardees working conditions and duties remained the same. The department heads did not gather objective evidence to show the working conditions and duties from the covid pandemic were changed after the six-month period. Many Departments believed that the working conditions of the HGEA workers remained the same during the pandemic period at issue.⁴ The few Departments that believed that the working conditions were not

³ Both Personnel Director Underwood and Step 2 Designee Watanabe were aware that the hazard pay request was for the entire pandemic period, which would include a need for a Section D renewal of any hazard pay award. Personnel Director Underwood admits that, long before the Step 2 meeting ever occurred, he reviewed the forms MID Chief Rust submitted, discussed them with her, and understood that the intent of the requests was to cover THP for all employees for every day they actually reported for work during the pandemic. Tr. Vol. II. At 582, lines 4-12; 583, lines 16-23. He understood that the Union's request meant that there was no end date to the request. Id.

MID Chief Rust repeated the duration period of the Union's requested remedy to Step 2 Designee Watanabe of this during the Step 2 meeting. During the Step 2 meeting, MID Chief Rust and Step 2 Designee Watanabe discussed the grievance, and Step 2 Designee Watanabe asked about the duration of the requested remedy contained in the grievance. Tr. Vol. II. At 544, lines 8-21. In response, MID Chief Rust presented the grievance and the requested remedy therein as covering the period from March 4, 2020, until the future date at which CoM Ees represented by the Union were "are no longer exposed to the hazard." Id. Step 2 designee Watanabe did not take issue with the presentation of the grievance and the intended duration of the requested remedy contained therein, nor did he have any questions about the intended duration of the grievance and the request remedy. Id. Ultimately, the Employer denied the grievance at Step 2. Ex. JT-75 002.

⁴ Departments acknowledged that the working conditions during the renewal period at issue did not change. Tr. Vol. II. At 33, lines 18-21; 24-5; 34, lines 14-25; 35, lines 1-9; 36, lines 10-23; 39, lines 24-5; 40, lines 1-2; 46, lines 5-8; 47, lines 19-23; 48, lines 2-5; 71, lines 15-7; 217, lines 4-19. See Tr. Vol. II. At 51, lines 22-5; 66, lines 9-17; 90, lines 2-5; 97, lines 1-25; 138, lines 23-

the same- erroneously based their conclusion on the fluctuations of the virus and the corresponding intensity of the use of mitigating measures for covid-mitigation without a full and fair analysis being conducted.⁵ Minimally, once the department heads learned that there was an award for THP, they had the contractual obligation to make a determination of whether any renewal period was warranted. The Departments made no such determination. The department heads failed to make a showing to the Personnel Director or the representative that the working conditions and duties remained the same.

The covid pandemic working conditions and duties of HGEA workers remained the same during the relevant period of the renewal of hazard pay at issue. The unusually hazardous working conditions arose from the Covid-19 pandemic virus. The Covid-19 virus and pandemic by its nature was continually evolving and mutating. The virus by its nature was variable in severity and contagiousness during the period at issue. The corresponding working conditions and policies established by COM were chosen to mitigate the exposure to this virus but could not eliminate the risk.⁶ COM imposed personal protection polices and changes to

5; 139, lines 1-25; 140, lines 1-5; 141, lines 2-12; 142, lines 6-8, 14-7.; 144, lines 2-5; 162, lines 4-25; 163, lines 1-25; 164, lines 1-25; 165, lines 1-25; 166, lines 1-25; 167, lines 1-25; 168, lines 1-25; 169, lines 1-25; 170, lines 1-6.

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⁶ Departments took measures to mitigate the hazard posed by COVID-19 and its variants during the renewal period in question. Tr. Vol. II. At 30, lines 13-6; 61, lines 12-16; 66, lines 9-12; 77, lines 3-17; 85, lines 13-23; 92, lines 11-3; 110, lines 24-5; 11, lines 1-21; 132, lines 2-8; 133, lines 23-5; 134, lines 4-5, 14-8. See Tr. At 138, lines 23-5; 139, lines 1-25; 140, lines 1-5, lines 15-8, 23-5; 141, lines 1-2; 149, lines 6-12; 158, lines 19-25; 193, lines 2-5; 204, lines 18-25; 205, lines 1-4; 209, lines 14-25; 210, lines 1-3; 215, lines 2-13; 219, lines 7-18; 226, lines 3-15; 233, lines 15-7; 244, lines 23-5; 245, lines 1-7; 250, lines 23-5; 251, lines 1-25; 252, lines 1-25; 253, lines 1-6; 254, lines 6-25; 255, lines 1-2, 24-5; 256, lines 1-25; 257, lines 1-7; 258, lines 12-21; 263, lines 11-25; 264, lines 1-25; 283, lines 19-24; 284, lines 1-22.; 291, lines 1-25; 292, lines 4-10; 294, lines 11-23; 302, lines 1-18; 303, 11-25; 304, lines 1-10, 14-17; 305, lines 11-17, 23-5; 318, lines 20-1; 327, lines 9-25; 328, lines 1-25; 329, lines 1-15; 332, lines 3-13; 337, lines 3-25; 338, lines 1-8; 347, line 25; 348, lines 1-25; 249, line 1; 364, 13-25; 365, line 1; 369, lines 19-25;

the HGEA worker conditions, including but not limited to masks, cleaning solutions, distance requirements, worker congregation prohibitions, furniture rearrangements, plexiglass use.⁷ The degree in which the various mitigation conditions were variable through the period at issue, were directed by the variability of the virus.⁸ The covid virus has not been eliminated, and the

370, lines 1-9; 405, lines 24-5; 406, lines 1-13, 17-9; 386, lines 20-3; 438, lines 19-25; 439, lines 1-25; 440, lines 1-5; 443, lines 18-25; 444, lines 1-20; 446, lines 6-25; 447, lines 1-2.

⁷COM instituted for all Departments covid mitigating measures including, but were not limited to, making PPE available, attempting social distancing, and cleaning of frequently touched surfaces. Tr. Vol. II. At 37, lines 10-8; 50, lines 1-9; 90, lines 2-5, 18-25; 91, lines 1-9; 95, lines 21-5; 193, lines 2-25; 194, lines 1-8, 14-24; 209, lines 3-15; 217, lines 4-19; 220, lines 6-14; 221, lines 16-22; 240, lines 5-25; 241, lines 1-3; 283, lines 19-24; 284, lines 1-22; 327, lines 9-25; 328, lines 1-25; 329, lines 1-15; 369, lines 19-25; 370, lines 1-9; 388, lines 8-23. See Tr. At 75, lines 14-21; 77, lines 11-7; 138, lines 23-5; 139, lines 1-25; 140, lines 1-5; 141, lines 2-12; 142, lines 6-8, 14-7.; 144, lines 2-5; 250, lines 23-5; 251, lines 1-25; 252, lines 1-25; 253, lines 1-6; 254, lines 6-25; 255, lines 1-2, 24-5; 256, lines 1-25; 257, lines 1-7; 258, lines 12-21; 263, lines 11-25; 264, lines 1-25; 302, lines 1-18; 303, 11-25; 304, lines 1-10, 14-17; 305, lines 11-17, 23-5; 357, lines 5-25; 358, lines 1-9; 360, lines 24-5; 361, lines 1-9; 405, lines 10-2, 24-5; 406, lines 1-13, 17-9; 409, lines 9-14; 409, lines 20-5; 410, lines 1-6, 17-25; 411, lines 1-25; 412, lines 1-10; 412, lines 20-5; 417, lines 9-17; 438, lines 19-25; 439, lines 1-25; 440, lines 1-5; 443, lines 18-25; 444, lines 1-20; 446, lines 6-25; 447, lines 1-2.

⁸ Some Departments acknowledged that, while working conditions included loosening and tightening of restrictions as case counts and death rose and fell, ultimately working conditions did not change during that entire period. See Tr. Vol. II. At 250, lines 23-5; 251, lines 1-25; 252, lines 1-25; 253, lines 1-6; 254, lines 6-25; 255, lines 1-2, 24-5; 256, lines 1-25; 257, lines 1-7; 273, lines 20-5; 274, lines 1-25; 275, lines 1-17; 276, lines 5-16; 283, lines 19-24; 284, lines 1-22; 291, lines 1-25; 292, lines 4-10; 302, lines 1-18; 303, 11-25; 304, lines 1-10, 14-17; 305, lines 11-17, 23-5; 328, lines 12-25; 329, lines 1-15; 357, lines 5-25; 358, lines 1-9; 360, lines 24-5; 361, lines 1-9; 387, lines 11-4; 20-5; 388, lines 1-7; 390, lines 4-13; 393, lines 6-25;

unusually hazardous working conditions were not eliminated- the mitigation protocols were never eliminated during the relevant renewal period.⁹

Fourth, COM's assertion that the working conditions and duties were not the same following a period of the initial temporary hazard award is rejected. The conduct of the CoM surrounding the renewal supports a finding of a renewal. COM's failure to timely reject the duration period beyond the initial six-month period and their attempt to discuss with HGEA a renewal period up to August 16, 2021, bolster the finding that the Covid-19 working conditions remained the same for purposes of Section D renewal of temporary hazard pay.¹⁰ The COM position

394, lines 1-3; 405, lines 10-2, 24-5; 406, lines 1-13, 17-9; 409, lines 9-14; 409, lines 20-5; 410, lines 1-6, 17-25; 411, lines 1-25; 412, lines 1-10; 412, lines 20-5; 417, lines 9-17; 438, lines 19-25; 439, lines 1-25; 440, lines 1-5; 443, lines 18-25; 444, lines 1-20; 446, lines 6-25; 447, lines 1-2.

⁹ Those mitigating measures remained in place from September 1, 2021, to March 25, 2022. Tr. Vol. II. At 90, lines 2-5, 18-25; 91, lines 1-9; 95, lines 21-5; 193, lines 2-25; 194, lines 1-8, 14-24; 209, lines 3-15; 217, lines 4-19; 220, lines 6-14; 221, lines 16-22; 240, lines 5-25; 241, lines 1-3; 258, lines 12-21; 263, lines 11-25; 264, lines 1-25; 283, lines 19-24; 284, lines 1-22; 327, lines 9-25; 328, lines 1-25; 329, lines 1-15; 347, line 25; 348, lines 1-25; 349, line 1; 357, lines 5-25; 358, lines 1-9; 369, lines 19-25; 370, lines 1-9; 405, lines 24-5; 388, lines 8-23; 406, lines 1-13, 17-9; 438, lines 19-25; 439, lines 1-25; 440, lines 1-5; 443, lines 18-25; 444, lines 1-20; 446, lines 6-25; 447, lines 1-2. See Tr. Vol. II. At 75, lines 14-21; 77, lines 11-7; 138, lines 23-5; 139, lines 1-25; 140, lines 1-5; 141, lines 2-12; 142, lines 6-8, 14-7; 144, lines 2-5; 250, lines 23-5; 251, lines 1-25; 252, lines 1-25; 253, lines 1-6; 254, lines 6-25; 255, lines 1-2, 24-5; 256, lines 1-25; 257, lines 1-7; 302, lines 1-18; 303, 11-25; 304, lines 1-10, 14-17; 305, lines 11-17, 23-5.

¹⁰ Internal consultation between Personnel Director Underwood, Managing Director Baz, and attorneys that represent the CoM discussed a renewal period up to August 26, 2021, a date

that the working conditions and duties were changed during the Covid pandemic was pretextual.¹¹ CoM understood their contractual obligations of the CBA allowed a rejection of a renewal at any moment from the period of September 2021 onward. At any time, six months after March 4, 2021, CoM, if they believed the working conditions and duties had changed and were not the same, CoM could have asserted that a renewal was not contractually warranted. CoM did not raise

when Covid vaccinations were to be available (which, as previously stated may have included Corporation Counsel Lutey). Tr. Vol. II. At 599, lines 1-6; 611, line 25; 612, lines 1-4.

¹¹ The Delta and Omicron variants of COVID-19 swept through the State of Hawaii, including the CoM, from fall 2021 to March 25, 2022. See Tr. Vol. II. At 592, lines 17-25; 593, lines 9-13. Case and death numbers provided in the Emergency Orders and Rules from that period establish a consistent and explosive rise in cases and deaths. JT-29-001-20; 44-001-4. U-58-001-34; 60-001-11; 63-001-2. Accordingly, the measures implemented by the CoM intended to mitigate the risks associated with exposure to COVID-19 remained in effect throughout this period as well, even after Mayor Victorino's Emergency Order expired on March 1, 2022, and the CoM remained subject to Governor Ige's Emergency Order that remained in effect until March 25, 2022. Tr. Vol. II. At 587, lines 14-8. During the relevant renewal of hazard pay period, the number of cases and deaths caused by COVID-19 and its variants increased exponentially. U-63 001-2. Tr. Vol. II. At 593, lines 1-13. Many of those cases were CoM Ees represented by the Union. See Tr. Vol. II. At 250, lines 23-5; 251, lines 1-25; 252, lines 1-25; 253, lines 1-6; 254, lines 6-25; 255, lines 1-2, 24-5; 256, lines 1-25; 257, lines 1-7; 273, lines 20-5; 274, lines 1-25; 275, lines 1-17; 276, lines 5-16; 283, lines 19-24; 284, lines 1-22; 291, lines 1-25; 292, lines 4-10; 302, lines 1-18; 303, 11-25; 304, lines 1-10, 14-17; 305, lines 11-17, 23-5; 328, lines 12-25; 329, lines 1-15; 357, lines 5-25; 358, lines 1-9; 360, lines 24-5; 361, lines 1-9; 387, lines 11-4; 20-5; 388, lines 1-7; 390, lines 4-13; 393, lines 6-25; 394, lines 1-3; 405, lines 10-2, 24-5; 406, lines 1-13, 17-9; 409, lines 9-14; 409, lines 20-5; 410, lines 1-6, 17-25; 411, lines 1-25; 412, lines 1-10; 412, lines 20-5; 417, lines 9-17; 438, lines 19-25; 439, lines 1-25; 440, lines 1-5; 443, lines 18-25; 444, lines 1-20; 446, lines 6-25; 447, lines 1-2.

the issue of a renewal until March 2022. Moreover, in declaring its rejection, COM failed to gather evidence and supporting testimony from its Departments at any point to support a rejection of a renewal. The CoM does not have a viable explanation for rejecting a renewal of hazard pay in light of the many Departments acknowledging that the workers working conditions and duties remained the same. The CoM's discussions with HGEA acknowledging a renewal up to August 2021, together with the conduct discussed herein reflects the pretextual nature of the CoM's rejection of any renewal period.

Fifth, the COM contractually breached their obligation to find with objective evidence whether a renewal of THP period was warranted. The Departments had the contractual obligation to determine if the working conditions and duties of the workers were the same. The Departments were respectively in the best position to have the information to make a determination and showing of whether their workers work conditions and duties changed through the renewal hazard pay period in question. DPS instructed the Departments that they would handle the determination of renewal but failed go through a fair and reasonable process to make their determination. DPS failed to allow or request the Departments to contractually make a "showing by the department head that the working conditions and duties remain the same." Section D, Duration of Hazard Pay. CoM has no explanation why it failed to have a full and fair determination with its Departments to gather evidence or information about the workers working conditions and duties, especially in light of the Departments believing the working conditions and duties remained the same in the relevant period.

DPS and the Departments failed to fairly and reasonably collect objective evidence, records, and documents to make a determination. DPS did not ask the Departments for a report or evidence to allow it to make a determination of whether the workers work conditions and duties were the same arising from the

covid pandemic virus. The CoM, through DPS and the respective Departments did not meet and discuss the merits of a renewal of hazard pay. No documentation reflects an analysis or articulates which work condition or conditions changed. The CoMs imposition of Covid-19 mitigating measures and policies which changed the covid working conditions for all HGEA workers, was never eliminated.¹² No documentation of COM changing or eliminating the covid-19 mitigating policies and measures for HGEA workers during the renewal period at issue has been shown. The variability of some of the measures because of the variability of the severity of the virus did not change the workers work conditions and duties. All Departments found that the job duties remained the same.¹³ The risks to workers of an unusually hazardous working condition remained during the renewal period in question.

Finally, past practices and customs of renewal of hazard pay awards support the granting of a renewal of hazard pay award in this case. Sanford Chun is the

¹² Despite attempts to mitigate the hazard posed by COVID-19 and its variants, CoM Ees represented by the Union caught COVID-19 or one of its variants. Tr. Vol. II. At 67, lines 8-14; 95, lines 3-10, 16-20; 96, lines 3-7; 147, lines 6-13; 151, lines 1-5; 223, lines 19-25; 224, line 1; 245, lines 8-22; 265, lines 17-25; 266, lines 1-19; 300, lines 21-5; 1-6; 331, lines 2-7; 359, lines 3-14; 368, lines 21-5; 369, lines 1-4; 390, lines 14-7. See Tr. Vol. II. At 75, lines 12-3.

¹³ Departments agreed that the job duties did not change during the relevant period. Tr. Vol. II. At 61, lines 12-16; 85, lines 13-23; 86, lines 9-12; 89, lines 16-20; 108, lines 9-18; 115, lines 11-1, 19-25; 137, lines 14-8; 152, line 25, 153, lines 1-5; 158, lines 19-25; 159, line 1-3; 209, lines 3-15; 218, line 25; 219, lines 1-6; 244, lines 10-4; 263, lines 11-7; 283, lines 1-7; 301, lines 7-20; 327, lines 9-17; 360, lines 17-23; 371, lines 5-11; 389, line 25; 390, lines 1-3; 405, lines 10-2; 437, lines 20-5; 438, lines 1-6. See Tr. Vol. II. At 31, lines 17-20; 35, lines 16-21; 36, lines 10-6, 20-3; 37, lines 7-18; 81, lines 17-24.

Executive Assistant for Field Services at HGEA. Tr. At 473, lines 22-5. Executive Assistant Chun has participated in negotiation of CBAs on behalf of HGEA for over 30 years, including Temporary Hazard Pay. Tr. At 485, lines 22-5. According to Executive Assistant Chun, Temporary Hazard Pay is intended to CoMpensate employees for exposure to hazardous conditions that employees are exposed to while working. Id. Customarily, where THP was granted as a result of a finding of exposure to hazardous working conditions, and those working conditions remained upon expiration of the initial six (6) month period, the THP was customarily extended beyond the initial six (6) month period. Tr. At 480, lines 1-12. This was a past practice. A renewal based on the existence of the same covid-19 virus mitigating work conditions and duties during the renewal period in question is consistent with the past practices and customs of a renewal of an award of hazard pay.

HGEA met its burden of proof, that the duration of this Arbitrator's ordered award is March 4, 2020, to March 25, 2022, the duration of the emergency declared and recognized by Governor Ige.¹⁴ As set-forth in the first Award, the HGEA workers were involuntarily ordered through the governmental proclamations and orders to return to their workplaces to be subjected to unusually hazardous working conditions created by the deadly covid-19. The workers could not control who they could be exposed to as they had other co-workers that were ordered to return to the workplace. They could not control how long they needed to be near other workers during the period they had to work. The workers were involuntarily ordered to share their workspace in confined enclosed offices. Some

¹⁴ The Arbitrator does not apply principles of judicial estoppel for the inclusion of evidence of any alleged agreement between the CoM and UPW, as a sufficient legal remedy exists in this matter. The application of equity is not necessary when a legal remedy exists. The Arbitrator has found a legal breach of contract in favor of HGEA.

workers duties involved multiple contacts with the public. COMs mitigation protocols and procedures did not eliminate the workers risk of exposure to the deadly virus. The proclamations imposing the involuntary risk to workers ended on March 25, 2022.¹⁵

¹⁵ The availability of covid-19 vaccines did not eliminate the risk of covid-19 in the HGEA workers' workplaces. Managing Director Baz and Personnel Director Underwood both retroactively acknowledge that the mandated vaccine did not prevent anyone, including CoM Ees, from catching COVID-19 or its more deadly variants, Delta and Omicron. Tr. Vol. II. At 118, lines 17-8; 119, lines 1-9; 613, lines 3-7. The aggregate number of cases and deaths resulting from COVID-19 and its variants Delta and Omicron, among others, increased exponentially from August 17, 2021, to March 25, 2022, only reaching their height after mandatory vaccination or daily testing in lieu of vaccination were mandated for government employees on around August 16, 2021. See Ex. U-63 001-2. Tr. Vol. II. At 592, lines 2-7; 612, lines 15-9. It's worth noting that, during this period, the period of mandated vaccination or daily testing in lieu of vaccination, the number of cases rose at least five-fold in the SoH from at least 44,617 to more than 208,000, to an increase from 4,903 to approximately 27,000 in the CoM during the same period. Ex. JT-29 001-20; 44 001-4. U-58 001-34; 60 001-11; 63 001-2.

Despite all attempts to mitigate the hazard, including vaccination and testing in lieu of vaccination, by all metrics, which were produced and released by the Employer itself, the number of cases and deaths increased at least nearly five-fold during a short 7 ¾ month period, indicating that working conditions got measurably *worse* between August 17, 2021, and March 25, 2022. See Ex. U-63-001-3. The threat of exposure to COVID-19 statistically increased in the County of Maui, which included the worksites where CoM Ees were directed to work. Id. During this period, the CoM acquired the dubious distinction of having the largest number of active COVID clusters in the SoH. Ex. U-44 001-3. The availability of vaccines did not alter the fact that the HGEA workers' working conditions and duties remained the same during the renewal of hazard pay award period.

For the reasons discussed herein this Arbitrator concludes that the Union has met its burden of producing evidence proving by preponderance of the evidence that COM contractually breached the CBA, specifically TEMPORARY HAZARD PAY, Section D. Duration of Hazard Pay Award, by failing to pay a hazard pay to include the duration of the time period of March 4, 2020, through March 25, 2022.

IV. CONCLUSION

In light of the Findings of Fact and Conclusions of Law described herein, and the Findings of Fact and Conclusions of Law published in the first of this two-part bifurcated arbitration hearing, this Arbitrator finds that the Union met its burden of proving by preponderance of the evidence that the Employer contractually violated Articles 2, 3, 4, and 5 of the Bus 2, 3, 4, 13, and 14 CBAs, Article 20 of the Bus 3, 4, and 13 CBs, Article 22 of the BU 2 CBA, and Article 30 of the BU 14 CBA, and grants the Union's Amended Grievance filed on October 1, 2020.

The Arbitrator concludes that the duration of this Arbitrator's ordered grant of hazard pay award is March 4, 2020, to March 25, 2022. This grievance is now closed, and the order and award shall be fully effectuated immediately in consultation with the Union.

V. ORDER

Effective immediately, the CoM shall award all eligible former and current CoM Ees a THP wage differential at the Severe or Most Severe rate of compensation, pursuant to the terms of its previous settlement agreement, retroactive from March 4, 2020, to March 25, 2022. This award shall also include all qualifying CoM Ees who were subsequently reorganized into BU 15 between March 4, 2020, and the date of this decision, and those qualified HGEA employees

who may have left government service during March 4, 2020, through March 25, 2022.

DATED: Honolulu, Hawaii, October 30, 2022.

KARL K SAKAMOTO

Arbitrator