

First Report of the Agreement Monitoring Panel

(Chatman, et al. v. Otani, USDC Hawaii Civil No. 21-00268 JAO-KJM)

October 10, 2021

Judge Daniel Foley (ret.)

Chair

Dr. Homer Venters

Dr. Kim Thorburn

Tommy Johnson

Gavin K. Takenaka

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## I. Introduction.

This is the First Report of the Agreement Monitoring Panel (AMP) established by the Settlement Agreement and General Release (Settlement Agreement) filed on September 2, 2021, in *Chatman, et al. v. Otani* (USDC Hawaii Civil No. 21-00268 JAO-KJM).

## II. Background.

The Settlement Agreement arises out of a class action lawsuit that alleged conditions in Hawaii's prisons and jails contributed to multiple COVID-19 outbreaks in violation of inmates' Eighth and Fourteenth Amendment rights under the United States Constitution (See July 13, 2021 Order of Judge Jill A. Otaki). Plaintiffs contended Defendant (the Department of Public Safety headed by Max Otani) mishandled the COVID-19 pandemic throughout Hawaii's jails and prisons, specifically failing to implement the State of Hawaii Department of Public Safety Pandemic Response Plan COVID-19 (May 28, 2021 Revision). Plaintiffs sought injunctive relief requiring Defendant to implement protocols and adhere to procedures to prevent COVID-19 transmission.

After finding that the Department of Public Safety (DPS) had consistently failed to comply with and implement its Pandemic Response Plan, Judge Otaki issued a preliminary injunction (July 13, 2021 Order) ordering Defendant to fully comply with its Pandemic Response Plan focusing on the following:

- Section 3.a (Good Health Habits);
- Section 3.b (Environmental Cleaning);
- Section 3.c (Social Distancing Measures);
- Section 3.d (Encourage the use of Masks and other No-Contact Barriers);
- Section 6 (New Intake Screening);
- Section 8 (Personal Protective Equipment (PPE));
- Section 10 (Medical Isolation/Cohorting (Symptomatic Persons));
- Section 12 (Quarantine (Asymptomatic Exposed Persons)) – with an emphasis on the provisions concerning the (1) identification of inmates who are at increased risk for severe illness and (2) single cell and available housing prioritization of inmates with increased risk of severe illness from COVID-19; and
- Section 13 (Surveillance for New Cases).

Judge Otaki further ordered Defendant to provide sanitary living conditions to all inmates in DPS custody, i.e., regular access to a working toilet, sink, and drinking water, and prohibit DPS employees from restricting access to inmate grievance forms or from preventing the submission of grievances with respect to COVID-19 issues.

Judge Otaki gave oversight of compliance with her order to Magistrate Judge Mansfield and directed the parties to attend status conferences and file status reports with Judge Mansfield.

Defendant filed subsequent motions for reconsideration and clarification with Judge Otaki which were denied. Defendant also filed an appeal and motion for stay of Judge Otaki's July 13 Order which was not adjudicated prior to the Settlement Agreement and subsequently withdrawn pursuant to the terms of the Settlement Agreement.

This background has been set forth to give context to the Settlement Agreement which is the governing document for AMP.

### III. Settlement Agreement.

The purpose of the Settlement Agreement was to resolve the case of *Chatman v. Otani* and provide reasonable and appropriate measures for the health and safety of inmates and staff. DPS agreed to make its best efforts to implement the Pandemic Response Plan (PRP) and adapt it to the Centers for Disease Control and Prevention (CDC) guidelines for the management of COVID-19 based on best practices and recommendations from the Hawaii Department of Health (DOH), and based on the individual facilities' physical space, staffing, population, operations, and other resources and conditions.

The Settlement Agreement established AMP to be composed of five persons with appropriate knowledge and expertise in correctional health care and managing infectious disease in a correctional setting or in the management of correctional systems (two chosen by Plaintiffs – Dr. Homer Venters and Dr. Kim Thorburn, two by Defendant – Tommy Johnson and Gavin K. Takenaka and one chosen jointly – Judge Daniel Foley (ret.)). This five-member panel was chosen the same day the Settlement Agreement was signed and was required by the Agreement to be operational by September 17, 2021.

AMP is an advisory panel, providing non-binding, informed guidance and recommendations to aid DPS in its continuing efforts to implement the PRP, as well as evolving health guidance that may require change to DPS's COVID-19 response. The Settlement Agreement limits AMP's areas of focus to the following:

- a. Quarantining/cohorting/isolation of inmates (including developing strategies and proposing guidelines to assist DPS in the identification and housing of inmates who are at "high risk" due to age and/or underlying medical conditions as defined in the Settlement Agreement;
- b. Sanitation/sanitization;
- c. Social distancing strategies;

- d. Testing (subject to the availability of resources and in coordination with DOH and/or Hawaii National Guard;
- e. Providing inmate information to DOH for contact tracing; and
- f. Inmate vaccination and health hygiene education.

AMP is directed to devise procedures for the monitoring of the Settlement Agreement and standards for developing its guidance and recommendations, applying professionally acceptable public health, epidemiological, and correctional health care and security standards for correctional facilities in responding to COVID-19. AMP is to have the full and complete cooperation of DPS in carrying out its duties, including access to facilities and information.

AMP is required to file monthly reports (except as otherwise agreed by the parties) to Defendant and Plaintiffs' counsel describing the steps taken by DPS to implement its PRP and/or AMP's guidance and recommendations. The reports shall be in a format agreed to by the parties and AMP but shall not include ultimate findings of fact or conclusions. The reports are to address each facility's efforts to follow the PRP and identify areas needing improvement.

Finally, the Settlement Agreement directed DPS to take actions in the areas of quarantine and isolation, vaccination and testing, and sanitation. Other provisions in the Settlement Agreement are not addressed here as they are not directly related to the mandate and work of AMP.

#### IV. AMP Organizational Meeting.

AMP convened via Zoom on September 10, 2021, for its organizational meeting. Prior to its meeting AMP members were supplied copies of the Settlement Agreement, the Pandemic Response Plan, Judge Otaki's July 13, 2021 Order in *Chatman v. Otani*, and status reports filed by the parties with Judge Mansfield. AMP agreed on plans and procedures in gathering and reviewing information and documents, touring facilities in October, and filing this first report.

#### V. Meetings with Wardens, Tour of Facilities, Record Gathering and Review.

After its organizational meeting, AMP selected Daniel Foley to act as Chair of AMP. AMP scheduled Zoom meetings with wardens and staff of the various facilities for the week of October 4 and tours of the facilities for the week of October 11.

After its first meeting and the execution of confidentiality agreements, AMP began requesting, receiving and reviewing various documents from the Department of Public Safety including, but not limited to, revised pandemic response plans for each facility (HCF, WCF, KCCC, HCCC, KCF,

MCCC, OCCC, and WCCC), inmate and staff test results, vaccination statistics for each facility, mortality reports, Pandemic Response Plan and information regarding Saguaro Correctional Center in Arizona, inmate screening and testing procedures, intake and treatment forms and records.

Meetings with wardens and staff covered, but were not limited to, authorized and current levels of staffing, as well as efforts to fill vacancies, facility design and operational capacities, inmate counts and classifications (pre-trial, sentenced misdemeanants, sentenced felony probationers and sentenced felons), operational budgets, construction and repair projects, requests for funding, services and programs provided and unique challenges. The Department of Public Safety directed wardens and staff to be open and honest with AMP regarding all issues AMP chose to discuss, and to give AMP unfettered access to facilities, staff and inmates during scheduled visits.

VI. Second AMP Report.

AMP held its second meeting on October 8 via Zoom and discussed documents gathered to date, meetings with wardens and staff, upcoming tours of facilities, format, content and writing of second AMP report due November 10, and set its next meeting for November 15, 2021.

VII. Conclusion.

This report has been adopted by AMP members and its Chair Daniel Foley has been instructed to sign and file this report on behalf of AMP with Defendant and counsel for the parties pursuant to the Settlement Agreement.

A handwritten signature in black ink that reads "Daniel R. Foley". The signature is written in a cursive, flowing style with a large, stylized 'F' and a long, sweeping tail.

October 10, 2021