

WARNING LETTER

VIA E-MAIL TO MR. SCOTT SEU

August 25, 2022

Mr. Scott Seu
President
Hawaiian Electric Company, Inc.
1001 Bishop Street
Honolulu, HI 96813

CPF 5-2022-048-WL

Dear Mr. Seu:

From March 20, 2022, to June 2, 2022, representatives of the Pipeline and Hazardous Materials Safety Administration (PHMSA), pursuant to Chapter 601 of 49 United States Code (U.S.C.), inspected the Hawaiian Electric Company, Inc. (HECO) PHMSA Drug and Alcohol (D&A) program virtually, by internet, and by other electronic means.

As a result of the inspection, it is alleged that HECO has committed probable violations of the Pipeline Safety Regulations, Title 49, Code of Federal Regulations (CFR). The items inspected and the probable violations are as follows:

1. § 199.105 Drug tests required.

...

(c)

(7) Each operator shall ensure that random drug tests conducted under this subpart are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

HECO did not ensure that the dates for administering the random tests were spread reasonably throughout the calendar year.

PHMSA's inspection of the HECO PHMSA random drug test program revealed that the dates for administering the random drug tests were not spread reasonably throughout calendar year 2021. HECO administered a total of 177 random drug tests, of which 8 were administered in a period of six months and the remaining 169 were conducted in the other six months.

2. § 199.105 Drug tests required.

Each operator shall conduct the following drug tests for the presence of a prohibited drug:

...

(f) Follow-up testing.

A covered employee who refuses to take or has a positive drug test shall be subject to unannounced follow-up drug tests administered by the operator following the covered employee's return to duty. The number and frequency of such follow-up testing shall be determined by a substance abuse professional (SAP) but shall consist of at least six tests in the first 12 months following the covered employee's return to duty. In addition, follow-up testing may include testing for alcohol as directed by the substance abuse professional, to be performed in accordance with 49 CFR part 40¹.

HECO had several covered employees who refused to take or had a positive drug test which subjected them to unannounced follow-up drug tests to be administered by HECO following the covered employee's return to duty. The number and frequency of the follow-up drug testing was determined by a substance abuse professional (SAP) and consisted of at least 6 drug tests in the first 12 months following the covered employees' return to duty. In addition, the SAP specified follow-up alcohol testing. HECO failed to conduct both drug and alcohol follow-up testing in accordance with the SAP's recommendations.

In reviewing HECO's D&A program records for the follow-up testing plans, PHMSA inspectors identified three employees who failed previous random drug tests. HECO failed to carry out the scheduled follow-up testing prescribed by the SAP on three of these employees. Specifically, two employees were prescribed drug and alcohol tests, and one was required to take drug tests as part of their SAP required follow-up testing plan.

The documentation provided by HECO included the employees' SAP prescribed follow-up testing plans and the spreadsheets with the entries for the dates and frequencies of the prescribed testing. All the plans had missing entries, some of the missing entries had remarks for the reasons for not completing the tests while others had no remarks. The missing tests ranged from February 2019 through February 2022. When questioning HECO about the required tests, HECO provided several explanations, such as issues during the pandemic, employees' leave, problems with testing sites, availability, and the lack of enough staff to administer the plans.

Under 49 U.S.C. § 60122 and 49 CFR § 190.223, HECO is subject to a civil penalty not to exceed \$239,142 per violation per day the violation persists, up to a maximum of \$2,391,142 for a related series of violations. For violations occurring on or after May 3, 2021, and before March

¹ § 40.309 (a)As the employer, you must carry out the SAP's follow-up testing requirements. You may not allow the employee to continue to perform safety-sensitive functions unless follow-up testing is conducted as directed by the SAP.

21, 2022, the maximum penalty may not exceed \$225,134 per violation per day the violation persists, up to a maximum of \$2,251,334 for a related series of violations. For violations occurring on or after January 11, 2021, and before May 3, 2021, the maximum penalty may not exceed \$222,504 per violation per day the violation persists, up to a maximum of \$2,225,034 for a related series of violations. For violations occurring on or after July 31, 2019, and before January 11, 2021, the maximum penalty may not exceed \$218,647 per violation per day the violation persists, up to a maximum of \$2,186,465 for a related series of violations. For violations occurring on or after November 27, 2018, and before July 31, 2019, the maximum penalty may not exceed \$213,268 per violation per day, with a maximum penalty not to exceed \$2,132,679. For violations occurring on or after November 2, 2015, and before November 27, 2018, the maximum penalty may not exceed \$209,002 per violation per day, with a maximum penalty not to exceed \$2,090,022.

We have reviewed the circumstances and supporting documents involved in this case and have decided not to conduct additional enforcement action or penalty assessment proceedings at this time. We advise you to correct the items identified in this letter. Failure to do so will result in HECO being subject to additional enforcement action.

No reply to this letter is required. If you choose to reply, in your correspondence please refer to **CPF 5-2022-048-WL**. Be advised that all material you submit in response to this enforcement action is subject to being made publicly available. If you believe that any portion of your responsive material qualifies for confidential treatment under 5 U.S.C. 552(b), along with the complete original document you must provide a second copy of the document with the portions you believe qualify for confidential treatment redacted and an explanation of why you believe the redacted information qualifies for confidential treatment under 5 U.S.C. 552(b).

Sincerely,

Dustin Hubbard
Director, Western Region, Office of Pipeline Safety
Pipeline and Hazardous Materials Safety Administration

cc: PHP-60 Compliance Registry