

**BEFORE  
PATRICK HALTER  
ARBITRATOR**

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*In the Matter of  
Controversy Between*

**Union of Physicians of Washington  
Dr. Glenn Morrison  
UPW - Grievant**

**&**

**Department of Social and Health Services  
Washington State  
DSHS - State**

**PERC Case No. 133337-P-21  
PERC Case No. 133338-P-21**

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Appearances

For the UPW - Grievant:

Rhonda J. Fenrich  
Fenrich & Gallagher, P.C.

For the DSHS - State:

El Shon D. Richmond  
Assistant Attorney General

Hearing

September 28, 2021

Briefs

December 3 & 6, 2021

Issue

Discipline

Summary

Grievance Sustained

Award

February 04, 2022

## BACKGROUND

There is a Collective Bargaining Agreement (“CBA”) establishing wages, hours and other terms and conditions of employment between the State of Washington (“Employer” - “State”) and a coalition of exclusive bargaining representatives that includes the Union of Physicians of Washington (“UPW” - “Union”). The classified positions Physician and Psychiatrist are represented by the UPW and covered by the Coalition CBA.

On August 19, 1991, Dr. Glenn S. Morrison (“grievant”) entered on duty at Western State Hospital (“WSH”). There are approximately two thousand eight hundred (2,800) employees at the hospital, an entity within the Behavioral Health Administration (“BHA”), Department of Social and Health Services (“DSHS”). In 2020 grievant encumbered the classified position Psychiatrist 4 assigned to the Center for Forensic Services (“CFS”) with a Monday through Friday schedule and 8:00 a.m. to 4:30 p.m. duty hours plus an additional twenty (20) hours weekly on extra duty assignment.

As a Psychiatrist 4 assigned to CFS, grievant’s responsibilities and duties are providing forensic evaluations for courts and treatment for defendants to restore competency for trial and help them cope with the criminal process. Grievant’s duties involve interacting with a multi-disciplinary team. Treatment is designed to facilitate the patient’s attaining a functional level for reintegration into the community.

On May 1, 2020, the WSH implemented COVID-19 safety protocols and screening procedures that included an identification (“ID”) Scan Attestation Procedure. Upon entering the attestation site, employees were to undergo a temperature assessment and verbally respond to questions on the attestation screening form. Employees with an acceptable temperature and satisfactory responses were asked to display their WSH badge - - or other state-issued ID with a barcode - - for scanning into a software program. The screener offered employees a color-coded sticker for placement on the badge or ID; the sticker signified the employee had been screened for entry on that day. Employees with unacceptable temperature and / or unsatisfactory responses were denied entry. Employees attempting to bypass the screening station were asked whether they had been scanned that day prior to entering the attestation site and employees declining the temperature check or not scanning their badge - ID were to remain in the area until a supervisor or security arrived.

After implementation of the safety protocols and screening procedures, WSH’s Chief Medical Officer (“CMO”) Dr. Katherine Raymer submitted an Administrative Report of Incident (“AROI”) dated June 5, 2020, presenting an alleged policy violation by a “physician not adhering to COVID-19 screening processes” and noting under “Action/Treatment” that the “[a]lleged incident is not patient-related.”

On June 16, 2020, CMO Raymer referred to the Employee Investigations Management System (“EIMS”) an allegation that implicated violations of certain policies and the CBA at Article 19 - Safety and Health.

It is alleged that Dr. Glenn Morrison failed to comply with COVID-19 screening requirements. As of May 15, 2020, there was no record of badge screening for Dr. Glenn Morrison. As of May 18, 2020, there was no record of driver’s license screening for Dr. Glenn Morrison. On May 21, 2020 it was reported that Dr. Morrison proceeded to walk through the screening area without

stopping or making eye contact with the screeners. On May 22, 2020 it is alleged that Dr. Morrison stopped at the screening table, had his temperature taken, his badge scanned, but when asked to take a sticker he replied that he didn't need one.

[Emp. Exh. 2, Tab A]

Prior to creating the AROI (June 5) and invoking the EIMS (June 16) with a referral, WSH's Chief Executive Officer ("CEO") David Holt notified grievant on June 4, 2020, that he was "alternately assign[ed] to teleworking . . . in accordance with the [CBA] and is the result of an investigation into allegation of your failure to keep patients and staff safe at WSH." Grievant was to "remain in this alternate assignment until further notice" and he was "to perform only the department work specifically assigned to [him] by Dr. Ruiz [grievant's supervisor]." CEO Holt informed grievant that he was "suspended from extra duty until further notice."

The notice further advised grievant as follows:

This assignment is not a disciplinary action or presumption that misconduct has occurred. It is being taken as a precautionary step while an investigation is conducted regarding the allegations referenced above. You will be provided an opportunity to respond to the allegation during the course of the investigation.

On July 13, 2020, the UPW presented a formal written grievance - - grievance # 1 - - stating that WSH violated Article 30 - Discipline when it reassigned grievant to telework from his residence and "suspended [him] from all extra duty assignments . . . without due process or just cause. . . . It has been over a month and Dr. Morrison has not been investigated and continues to lose 20 hours per week of extra duty pay. The State's actions are tantamount to discipline without due process."

DSHS issued its Step 3 denial to grievance # 1 on September 8, 2020. It stated that the alternate assignment was not a disciplinary suspension and grievant would remain on that assignment pending completion of the investigation into whether he violated COVID-19 protocols. As for extra duty work, the DSHS noted there was no guarantee of or entitlement to such work under the CBA.

Prior to issuance of the Step 3 decision (September 8, 2020), the BHA's Investigations Department initiated an investigation on June 18, 2020, into the allegation referred by CMO Raymer to EIMS. The BHA Investigator interviewed grievant, among others, and issued a report dated July 24, 2020, stating that grievant acknowledged he did not comply with all safety protocols and screening procedures. Based on the report, Deputy CEO Southerland issued to grievant a Notice of Intent to Discipline dated September 1, 2020, for "failure to adhere to the COVID-19 screening requirements process in place at WSH and putting the safety of patients and staff at risk during the COVID-19 pandemic." Grievant submitted a timely written response to the proposed disciplinary notice for the Deputy's consideration prior to issuance of a decision.

By letter dated October 20, 2020, DSHS issued notice to grievant that he was suspended for five (5) workdays without pay for not complying with COVID-19 protocols. Three days later (October 23), the UPW filed a formal written grievance - - grievance # 2 - - claiming a violation of Article 30 - Discipline.

On September 28, 2021, a telepresence hearing convened to address the grievances with each party afforded an opportunity to present evidence, to examine and cross-examine witnesses, and to argue its contentions on grievance # 1 and grievance # 2, collectively, the grievance.

On December 3 and 6, 2021, the Arbitrator received post-hearing briefs. Aside from the post-hearing briefs and transcript of the hearing, the record consists of seven (7) DSHS exhibits and fourteen (14) UPW exhibits.

### ISSUES

UPW's Proposed Issues:

1. Whether or not the State violated Article 30 through its suspension of Dr. Morrison?  
  
If so, what is the appropriate remedy?
2. Whether or not the State violated Article 7 and Article 30 by suspending Dr. Morrison from extra duty work while on alternate assignment?  
  
If so, what is the appropriate remedy?

[Br. at 3]

DSHS' Proposed Issues:

- A. Did DSHS "suspend" grievant in violation of Coalition CBA Article 30 when he was alternately assigned to home with pay as a safety precaution during his investigation and could not work "extra duty" when the CBA provides for such alternative assignments and states that "Physicians will not be compensated for "extra duty" that is not worked?"  
  
If so, what remedy, if any, is appropriate?
- B. Did WSH have just cause to discipline grievant when he repeatedly failed to comply with WSH's COVID-19 screening process during a global pandemic and was consequently suspended?  
  
If not, what is the appropriate remedy?

[Br. at 2]

### COLLECTIVE BARGAINING AGREEMENT

Article 7 - Hours of Work

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7.2. - Determination

\* \* \*

D. UPW

Physicians are expected to work as many hours as necessary to accomplish their assignment or fulfill their core responsibilities. Full-time physicians will typically work forty (40) hours a week on a schedule established in collaboration with their supervisor. Flexibility of working hours may be needed for responding to patient and hospital needs.

If a full-time physician is approved to perform an “extra duty assignment”, the physician will receive additional pay at one and one-quarter (1 ¼) times their regular rate of pay for working these “extra duty” hours if the assignment results in the physician working beyond their normally assigned work hours. Physicians will not be compensated for “extra duty” that is not worked.

“Extra Duty” is defined as hospital operational needs identified by the employer that require a physician to work hours that are hours over and above those necessary to accomplish the physician’s regular assignment and fulfill their core responsibility. These “extra duty” hours typically include covering hours/shifts not regularly assigned to any other physician, on-call work, covering patient loads due to vacancies or working hours that are not covered because of leave usage by the regularly assigned physician.

\* \* \*

The employer also retains the right to restrict the number of “extra duty” assignments that any one (1) physician works. The Employer may deny any physician from performing “extra duty” if the physician has any documented performance or attendance issues, which are impacting the ability of the physician to perform their core duties.

Article 30 - Discipline

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30.1 - Just Cause

The Employer will not discipline any permanent employee without just cause.

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30.6 - Alternative Assignments

An employee placed on an alternate assignment during an investigation will be informed of the reason(s) for the alternative assignment, unless it would compromise the integrity of the investigation. Such a reassignment shall not result in the loss of base salary to the employee. The employee will not be prohibited from contacting

his or her union representative(s) unless there is a conflict of interest, in which case the employee may contact another union representative. This does not preclude the Employer from restricting an employee's access to agency premises. Upon completion of the investigation process(es), the employee will be notified.

### SUMMARY OF DSHS' POSITION AND ARGUMENT

The Employer's position and argument are set forth in its opening statement, examination and cross-examination of witnesses, exhibits and post-hearing brief.

Called by the Employer to testify were Charles Southerland, Chief Executive Officer, WSH; and Patricia L. Boettcher, Labor Relations Manager, DSHS.

In March 2020 a patient in the geriatric ward succumbed to COVID-19 thereby confirming the presence of the global pandemic in the WSH workplace. In response to the pandemic and to ensure the health and safety of staff and patients, the WSH implemented safety protocols and screening procedures effective May 1, 2020. The protocols were developed with guidance from the Washington State Department of Health ("DOH") and U.S. Center for Disease Control ("CDC"). WSH also solicited information from its labor partners. Prior to the implementation date, the WSH disseminated information to staff about the safety protocols and screening procedures over its intranet, through e-mail distribution, during supervisory huddles with staff, at shift changes, town hall meetings, management's supervisor meetings and end-of-day messages to staff. The grievant disagreed with the efficacy of some of the protocols and procedures and proceeded to engage in conduct that placed the health and safety of patients and staff at risk as he knowingly and repeatedly chose not to comply with screening procedures and intentionally evaded or skirted the screening process.

The protocols required an employee, upon entering the attestation site, to undergo a temperature check and verbally answer questions posed on a screening form. The screener relied on this information to assess whether the employee was experiencing COVID symptoms. Once the employee passed these screening parameters, they were asked to scan into a software program their WSH badge or other state-issued ID with barcode and were offered a color-coded sticker for placement on their badge - ID indicating they had been screened that day.

In early June 2020 (June 2 or June 4) a labor agent employed by the Washington Federation of State Employees ("WFSE") raised concerns to Labor Relations Manager ("LRM") Boettcher, CEO Southerland and CMO Raymer about grievant's compliance with the screening procedures. CMO Raymer submitted a referral form into EIMS presenting the allegation of grievant's non-compliance with screening procedures and then-CEO Holt placed grievant on alternate assignment effective June 4, 2020, to telework from his residence and suspended grievant from "extra duty" assignment during the investigation of the allegation. According to the DSHS, the alternate assignment and no extra duty is a matter of contract interpretation involving Article 30.6 therefore the burden of proof resides with the UPW, not the WSH.

On June 18, 2020, BHA's Investigations Department initiated an investigation into the allegation; grievant and another seven (7) individuals were interviewed. The BHA report, dated July 24, 2020, included evidence that grievant's WSH badge or other state-issued ID, e.g., driver's license, had not been scanned for approximately twenty (20) days after implementation of safety protocols and screening procedures on May 1, 2020, and six (6) witnesses (contract nurse screeners and Clinical Program Administrator Paul French) confirmed that grievant bypassed the

screening station. Grievant acknowledged to the BHA Investigator that he did not comply with the screening process.

On September 1, 2020, CEO Southerland issued to grievant a Notice of Intent to Discipline for his non-compliance with the safety protocols and screening process. After considering grievant's written response, the CEO assessed grievant a 5-day suspension without pay. The DSHS notes that the suspension is a matter of discipline under Article 30.1 with the burden of proof residing with the State.

With respect to grievance # 1 (alternate assignment and no extra duty), the UPW fails to meet its burden of proof that the temporary reassignment of grievant during the BHA investigation of the allegation into non-compliance with screening procedures violates the CBA. The State complied with Article 30.6 because the placement of grievant on administrative assignment and suspending him from extra duty work during the BHA investigation does not constitute discipline without due process (UPW's position). An alternative assignment is a precautionary measure initiated by the DSHS during an investigation; it is not a disciplinary action.

The relevant wording in Article 30.6 states:

An employee placed on an alternate assignment during an investigation will be informed of the reason(s) for the alternative assignment, unless it would compromise the integrity of the investigation. Such a reassignment shall not result in the loss of base salary to the employee.

In accordance with Article 30.6, the Employer's letter, dated June 4, 2020, informs grievant of the reason for the reassignment - - "the result of an investigation into an allegation of [grievant's] failure to keep patients and staff safe at WSH" and was "being taken as a precautionary step while an investigation is conducted regarding the allegations[.]" Also in accordance with Article 30.6, grievant did not suffer a loss in base salary.

Any claim by grievant that he is entitled to or guaranteed "extra duty" work under the CBA is without merit. In this regard, Article 7 - Hours of Work at 7.2.D states that the "employer retains the right to restrict the number of "extra duty" assignments that any one physician works" and the "Employer may deny any physician from performing "extra duty" if the physician has any documented performance or attendance issues, which are impacting the ability of the physician to perform their core duties."

Article 7.2.D emphasizes that a physician "will not be compensated for "extra duty" that is not worked." Grievant testified that the majority of extra duty he performed was direct patient care at the hospital. In 2016 the WSH discontinued allowing "extra duty" work performed off premises. In other words grievant could perform extra duty only at the hospital. Thus, grievant could not and did not perform "extra duty" work during his alternate assignment and is not entitled to any compensation for "extra duty" that he did not perform. Since the DSHS complied with the CBA when it placed grievant on alternate assignment to telework from his residence and suspended him from extra duty and the UPW failed to prove its alleged contract violation, grievance # 1 should be denied.

As for grievance # 2 - - suspension without pay for 5 workdays - - DSHS met its burden of proof by a preponderance of the evidence establishing just cause and any claims of an incomplete investigation or procedural improprieties are affirmative defenses with the responsibility to prove resting with the UPW. The WSH established just cause because it followed required procedures,

established by preponderant evidence grievant's misconduct, assessed a penalty reasonably related to grievant's misconduct and considered grievant's disciplinary record as well as any mitigating or extenuating circumstances.

For example, evidence of misconduct was grievant's acknowledging that he knowingly, willfully and repeatedly breached the protocols. Grievant was aware of the protocols but chose not to comply with them. DSHS conducted a fair and objective investigation. When the allegation surfaced in early June 2020, DSHS placed grievant on alternate assignment while BHA conducted its investigation. Once the investigation was completed, DSHS issued discipline based on relevant policies and procedures, grievant's acknowledgement in his e-mail dated June 4, 2020, to LRM Boettcher and witnesses with first-hand knowledge of his violations. Grievant's repeated violations are undisputed. Grievant's response to the proposed discipline focused on his disagreement with the protocols and rationalizing why he did not comply with them. His failure to comply with the reasonable and work-related protocols and screening procedures warrants discipline.

The 5-workday suspension is reasonable. At the time of grievant's suspension in November 2020, three (3) employees were suspended, another employee was terminated and others have been disciplined post-November 2020. DSHS states that failure to comply with the protocols is a serious infraction imposing risks to health, safety and welfare of staff and patients. CEO Southerland - - the deciding official - - considered the evidence, grievant's work history, prior directives, trainings and his written statement. Grievant's disciplinary record was considered including the feedback on April 10, 2020, by Deputy CEO Joyce Stockwell - Hospital Operations:

Dr Morrison, I respect your view and concerns. We are working closely with DOH, the State Epidemiologist and are in almost daily contact with him or a member of his team. I trust you will do what you need to do to protect yourself. I want to remind you that anyone entering the premises of WSH is required to be screened.  
Thank you.

[Emp. Exh. 2, Tab D at 22]

Mitigating circumstances - - twenty (20) plus years of service - - factored into the decision. Also, grievant's leadership of a multi-disciplinary team and leader of the UPW imposes a higher standard and expectation that he will lead by example rather than evade and skirt procedures. Notwithstanding grievant's reliance on the physician's oath to do no harm, grievant acted contrary to the physician's oath by engaging in conduct placing staff and patients at risk.

There is no evidence that grievant was treated differently than any other similarly-situated physician or employee. The DSHS suspended others such as a mental health technician, management analyst, registered and licensed practical nurses as well as dismissed an employee. Some staff assessed a 5-day suspension subsequently had it reduced to a 3-day suspension through mediation. The rules and policies were applied fairly and even-handedly without discrimination or retaliation against grievant. Grievant was held to a higher-standard than the nurse screeners; CEO Southerland understood their reluctance to engage with grievant as they reported him rude and argumentative. The UPW's assertion of disparate treatment based on no discipline issued to physicians or staff not wearing a mask is not relevant as masking was not part of the screening process.



In accordance with Article 30 - Discipline, the DSHS assessed grievant a suspension based on just cause. Thus, grievance # 2 should be denied.

### SUMMARY OF UPW's POSITION AND ARGUMENT

The UPW's position and argument are set forth in its opening statement, examination and cross-examination of witnesses, exhibits and post-hearing brief. Called to testify by the UPW was Dr. Glenn Morrison, Psychiatrist 4 - the grievant,

For nearly thirty (30) years grievant has served as a Psychiatrist at WSH with responsibilities for patient admissions and leader of a multi-disciplinary team managing the diagnosis and treatment of patients with criminal competency concerns. During his decades of service grievant has performed work on a weekly basis (core responsibilities plus extra duty) that is the equivalent of one point five (1.5) fulltime positions. In 2020, grievant earned \$3,200.00 to \$3,500.00 weekly from his extra duty assignment.

In addition to performing his core responsibilities and extra duty for years, since 2015 grievant has served as the UPW President. In that capacity he presented the UPW members concerns about the safety protocols and screening procedures to WSH. CEO Southerland, the deciding official, acknowledged that grievant was held to a higher standard because of his UPW position. Grievant testified he has been a long-time vocal advocate not only for physicians but for all employees as well as the hospital.

In May 2020 WSH implemented screening procedures in response to COVID-19. Employees answered questions, received a temperature check, and were handed a color-coded sticker from the nurse screener to place on their badge or ID which signified they had been screened that day. The safety protocols and screening procedures changed over time. Grievant raised a concern that some of the processes increased an employee's exposure to COVID-19 rather than reduced exposure. For example, the nurse screener was ungloved when offering an employee the color-coded sticker and when performing a temperature check. Employees queued for screening without maintaining six (6) feet social distance.

Grievant and other employees did not follow all the safety protocols and screening procedures all the time and neither did the screeners. In this regard, screeners never stopped grievant from entering the facility when he did not accept the sticker or did not complete the screening process. Clinical Program Administrator Paul French observed grievant during the screening process on May 21 and 22, 2020, but did not stop grievant from entering the facility even though Mr. French knew grievant had not cleared screening. The BHA Investigator did not include information in the investigative report that screeners failed to follow protocols.

On June 4, 2020, DSHS placed grievant on alternate assignment to telework from his residence and suspended him from any extra duty thereby causing grievant to suffer a monetary loss of \$3,500.00 weekly. Grievant performed no work during his telework assignment although physicians had performed duties by telework during the pandemic. The suspension from extra duty occurred without any investigation whether grievant breached protocols and without counseling him to follow screening procedures. DSHS maintains that its policy for non-compliance with screening procedures was (1) counsel an employee for the initial failure to comply and (2) suspend an employee for 5 workdays when non-compliance persisted. Grievant was the only employee suspended for 5 workdays; other employees suspended received a reduced suspension of 3 workdays.

Before imposing the 5-day suspension on grievant, DSHS consumed over four (4) months investigating whether he failed to follow procedures. During this 4-month investigation, grievant suffered a loss of approximately \$80,000 in extra duty pay. Loss of extra duty pay was aggravated by WSH refusing to return grievant to duty after he completed the 5-day suspension. That is, UPW requested that grievant's work schedule be changed on the fifth workday of his suspension to allow him to perform extra duty but WSH refused thereby depriving grievant of working extra duty on Saturday and Sunday after his suspension had been completed on Friday.

According to UPW, the State did not have just cause to suspend grievant from extra duty when he was reassigned without due process to an alternate assignment (grievance # 1) and the State did not have just cause to suspend grievant for 5-workdays (grievance # 2). The burden of proof resides with the State for both grievances. DSHS did not investigate nor disclose the proof relied upon in suspending grievant from extra duty in June 2020 nor disclose evidence relied upon for the 5-workday suspension in November 2020. DSHS must establish its position by clear and convincing evidence given the significant monetary loss caused to grievant.

Applying the seven tests of just cause articulated by Arbitrator Daugherty in *Enterprise Wire Company*, 46 LA 359 (1966) shows that the grievance must be sustained.

1. Notice

Did the Employer give the Employee forewarning or foreknowledge of the possible or probable consequences of the Employee's disciplinary conduct?

On May 1, 2020, DSHS implemented the COVID-19 attestation screening process. The Employer acknowledges that it did not enforce the screening procedures. An employee not completing the screening process was to be denied access to the facility with the employee's supervisor or security notified; however, the screeners did not follow those procedures with grievant or other staff. Grievant did not complete screening but gained access to the facility and a supervisor or security never were notified.

A supervisory official - - Clinical Program Administrator Paul French - - observed grievant not complying with the protocols on May 20, May 21 and May 22, 2020, but he did not intervene. CEO Southerland's testimony that the State attempted to hold employees accountable in an equitable manner is not confirmed by Mr. French's inaction. Grievant and other employees never were stopped by the screeners for not following the protocols. DSHS alleges that grievant's badge and driver's license was not scanned for twenty (20) days in May 2020 yet it never counseled or advised grievant to follow scanning procedures.

DSHS failed to provide notice of the probable or potential consequences of grievant's failure to comply with the protocols. DSHS concluded that grievant violated the protocols before affording him an opportunity to defend himself in the investigation. Even after the State was advised that (1) grievant had not been counseled and (2) the Employer was relying on e-mail communications to employees which were not available to grievant without access to email during telework, the disciplinary letter remained unchanged. DSHS acted on a preconceived notion of guilt.

Grievant was suspended from extra duty without an opportunity to present an explanation and he was suspended for 5 workdays based on an unsubstantiated assertion he had been counseled by Deputy CEO Stockwell - Hospital Operations. The Deputy was not in grievant's chain-of-command; there is no documentation or testimony from the Deputy to prove the counseling occurred. The State promoted compliance with the screening procedures by counseling an

employee for an initial offense prior to issuing discipline. Grievant, however, was held to a higher standard not based on his actions but based on his role as UPW President.

2. Reasonable Rules and Orders

Was the Employer's rule or managerial order reasonably related to (a) the orderly and safe operation of the Employer's business and (b) the performance the Employer might expect of the Employee?

The screening procedures changed over time; grievant challenged the efficacy of certain protocols and procedures. DSHS attempts to differentiate between screening procedures and other protocols - - masking - - to minimize the spread of COVID-19. LRM Boettcher testified that masks were required and employees were not disciplined in the same manner for refusal to wear a mask as they were for refusing to take a sticker from an ungloved nurse's hand.

The Employer's application of its rules was not reasonable but biased and opinionated, not fact based. Grievant informed management that the screening procedures increased the spread of COVID-19 because transmission of the virus occurred through touching surfaces as well as through the air. The protocols allowed ungloved nurses to hand stickers to employees, there was no social distancing for unmasked employees in line for screening and nurses were checking temperatures with thermometers they had touched with their ungloved hands. CEO Southerland acknowledged that grievant raised these issues in accordance with the CBA.

There was no reasonable rule because the State did not consistently enforce the protocols as written or take action against any screener not following them. CEO Southerland and LRM Boettcher testified that an employee's first non-compliance resulted in counseling to provide an opportunity for the employee to correct behavior. Grievant was not provided the opportunity to comply with protocols as they were changed when he was on alternative assignment. Based on no counseling for grievant, inconsistent enforcement and protocol shortfalls, the application of the rule was not reasonable.

3. Investigate Allegation

Did the Employer, before administering the discipline to the Employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Investigative Process

Was the Employer's investigation conducted fairly and objectively?

The Employer did not conduct a full, fair and objective investigation. DSHS violated grievant's right to due process because it did not investigate the allegation lodged against grievant prior to placing him on alternate assignment and suspending him from extra duty. Under the CBA grievant can be removed from extra duty only for documented performance or disciplinary reasons which were not proven by WSH. CEO Southerland believed that the investigation, itself, was sufficient to establish grievant's guilt. DSHS assumed grievant had been counseled but that did not occur. According to the UPW, CEO Southerland acknowledged that without counseling grievant would not have been suspended from extra duty or suspended for 5 workdays. [Tr. 41, 49, 66-68, 90]

5. Proof

At the investigation did the company “judge” obtain substantial evidence or proof that the Employee was guilty as charged?

DSHS failed to find any misconduct by grievant prior to suspending him from extra duty without just cause or due process. DSHS never confirmed its assertion that grievant received counseling from Deputy Stockwell on April 10, 2020. Grievant was economically sanctioned without counseling.

DSHS relies on misinformation for its decision. DSHS asserts grievant’s badge was not scanned from May 1, 2020 through May 22, 2020 but it does not address his approved leave during this period of time. Grievant acknowledged his non-compliance because complying with screening procedures increased the risk of spreading COVID-19 rather than decreasing it. Given this context, DSHS acted unreasonably by assessing discipline to an employee refusing to (1) accept a sticker from an ungloved nurse, (2) use a communal pen to sign the screening form or (3) undergo a temperature check from an unmasked nurse. Even with grievant’s non-compliance, he never acted in a manner that placed himself or others at risk of health and safety. DSHS recognized and validated grievant’s concerns by changing certain screening procedures. At the same time DSHS offers no proof that WSH ever validated its implemented protocols.

6. Even-handed

Has the Employer applied its rules, orders and penalties even-handedly and without discrimination to all Employees?

The Employer did not treat all employees the same. Without a valid reason for different treatment, there is disparate treatment. The investigation shows other employees did not accept the sticker from the screener nor were they signing the screening form using the communal pen; screeners did not report these employees to supervision or security. CEO Southerland testified that management was aware employees were not disciplined for refusing to take stickers. Screeners were not held accountable; they increased the risk of spreading COVID-19 by not wearing gloves or masks and allowed entry into the building for those employees not screened. The equity and efficacy of the process was problematic. No employee lost \$80,000 in compensation as grievant did nor was any employee suspended for 5 workdays as grievant. Other employees received a 3 day suspension whereas grievant received a 5-day suspension because he was the UPW President. This is an unfair labor practice by the State of Washington.

7. Penalty

Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the Employee’s proven offense and (b) the record of the Employee in his service with the Employer?

The Employer’s assessment of discipline was inconsistent notwithstanding testimony by officials that, from the onset of implementing the protocols, all employees would be treated the same. To avoid disparate and unjust treatment, labor relations requires consistency in penalties imposed for like or similar offenses under similar or like circumstances.

Nothing in the record justifies the level of discipline imposed on grievant. Discipline was based on his union status and unrelated to his record as an employee. The State subjected grievant to discipline by suspending him from extra duty; DSHS cannot claim that its use of the word “suspended” in the Notice of Intent to Discipline merely reflects a poor choice of words. Suspension carries its plain meaning in employment actions, e.g., grievant was suspended from extra duty. His suspension was confirmed when the DSHS refused to allow grievant to return to extra duty on the weekend after he completed his 5-day suspension on Friday. The 5-day suspension specified a certain number of days but did not include extra duty. At arbitration the State claimed that extra duty could not be assigned to grievant upon completion of his 5-day suspension on Friday due to the Fair Labor Standards Act (“FLSA”) but at the time of the UPW’s request to reinstate grievant to extra duty the State made no reference to FLSA.

The State suspended grievant from extra duty and, at the same time, claims that the CBA precludes paying grievant for extra duty because he did not perform it. This is a circular argument. Without proof of disciplinary or performance issues - - the only reasons in the CBA to deny extra duty - - DSHS suspended grievant from performing it. Arbitrators have found that when an employer prevents an employee from working, the employer risks receiving an award reinstating overtime pay for the aggrieved employee even when the employee has not worked the time. DSHS essentially disciplined grievant twice for the same conduct. By subjecting grievant to double jeopardy, WSH failed to meet its due process obligation for the suspension of grievant from extra duty. Therefore, WSH should be required to pay grievant for extra duty during his alternate assignment. Arbitrators consider an employee’s historic overtime hours along with any assignment pay as integral in any consideration of discipline. Plus, prior grievances where grievant has been placed on alternative assignment and removed from extra duty have been resolved with the Employer paying grievant for extra duty.

As a remedy for the DSHS violation of the CBA, the UPW requests that grievant receive a make whole remedy which is compensation or payment for all lost wages, including extra duty compensation, and restoration of benefits.

### FINDINGS AND CONCLUSIONS

The Union presented the grievance and advanced it to arbitration in accordance with the terms in the Coalition CBA.

The UPW and DSHS did not stipulate to the issues for arbitration; however, they authorized the Arbitrator to frame the issues. [Tr. 11] Based on the record, the Arbitrator frames the issues as follows:

Did the Employer violate the CBA in 2020 when it reassigned grievant to home-based telework, suspended grievant from extra duty and assessed grievant a five (5) day suspension?

If so, what is the appropriate remedy?

There are two formal, written grievances - - July 13, 2020 and October 23, 2020 - - consolidated and joined as the grievance for the purpose of hearing and adjudication cumulating with the Award. The grievance arises from the COVID-19 attestation safety protocols and screening procedures implemented May 1, 2020, and grievant’s response to and / or compliance with those protocols and procedures.

Effective June 4, 2020, then CEO Holt placed grievant on alternative assignment to telework from his residence and suspended him from extra duty pending an investigation. The CEO stated grievant's conduct failed to maintain or secure the safety of staff and patients. Grievant's placement on alternative assignment and simultaneous suspension from extra duty pending an investigation occurred as a result of CEO Holt and CMO Raymer meeting on June 2 or June 4 with an agent employed by the WFSE. The agent relayed to these officials concerns presented to that agent by WFSE represented employees whether grievant was following or complying with safety protocols and screening procedures.

On June 5, 2020, CMO Raymer created an AROI identifying April 15, 2020, as the incident date for grievant's unsafe conduct; the CMO recommended closure of the AROI on the date it was created:

I supervise the supervisor of the physician about whom this allegation has been made. WSH leadership and BHA Investigations are involved in the follow-up of this allegation; therefore, closure of this AROI is recommended.

[Emp. Exh. 2, Tab A at 2]

When grievant was reassigned and suspended from extra duty on June 4, 2020, there was no allegation pending investigation. The AROI was "created" and closed on the same date - - June 5 - - and the EIMS referral occurred eleven (11) days later (June 16). The specifics or particulars of the WFSE agent's disclosure to CEO Holt and CMO Raymer is not in the record because the CEO and CMO did not testify. The record shows only that CMO Raymer reported April 15, 2020, as an incident date for grievant misconduct; CEO Southerland testified April 15 was a "guessestimate" by the CMO. Regardless, once the AROI was closed, any allegation that grievant was non-compliant on April 15, 2020, was no longer subject to investigation because the threshold date for the WSH's actions in this proceeding is identified by the Employer as May 1, 2020.

The State asserts that it complied with Article 30.6 - Alternative Assignment when it reassigned grievant to home-based telework. An alternative assignment is not disciplinary, therefore due process and just cause do not apply. The UPW asserts that just cause in Article 30.1 applies to the alternate assignment, suspension from extra duty and 5-workday suspension. To support a finding that the Employer violated Article 30.1 the UPW presents Arbitrator Carroll Daugherty's seven tests for just cause: (1) notice, (2) reasonable rules, (3) investigate allegation, (4) fair and objective investigation, (5) proof, (6) even-handedness and (7) penalty. The State's advocacy covers topics presented by the seven tests and it notes that the burden of proof resides with the UPW to establish disparate treatment, procedural improprieties or an Article 30.6 contract violation.

Article 30.1 - Just Cause states that "[t]he Employer will not discipline any permanent employee without just cause." The term or phrase "just cause" is an elastic standard embracing a notion of corrective measures promoting rehabilitation of a workplace offender. Just cause encompasses process or procedure and substance. Process or procedure such as notice, forewarning, fairness, equal protection and substance includes establishing the misconduct levied against the employee. For discipline assessed the substantive record must reflect just cause for the imposition of discipline for the particular wrongdoing and just cause for the penalty imposed on grievant. Each party addresses these matters and the Arbitrator, having considered the record established by the parties in this proceeding, renders the following findings and conclusions.

The safety protocols and screening procedures are reasonably related to the safe, orderly and efficient operation of the WSH. The protocols and procedures were designed and intended to maintain the safety of patients and staff from risk associated with COVID-19. They were formulated with guidance from health professionals at DOH, CDC and the State Epidemiologist along with consideration of information and concerns obtained in COVID forums with staff and labor representatives. As the knowledge about and understanding of the virus developed and expanded over time, the protocols and procedures evolved and changed. For example, the screening process changed to require screeners to wear gloves when using the thermometer to check an employee's temperature and when placing the sticker on the employee's badge. Wearing only DSHS-issued surgical masks became mandatory after May 1, 2020. These evolving procedures were focused on eliminating the risk of transmitting the virus through the air or frequently-touched surfaces.

Staff compliance with protocols and procedures remained problematic into late October 2020. Non-compliance by staff consisted of refusing a temperature check, not signing the log-in, not accepting the sticker, improper masking, not maintaining social distance. When non-compliance persisted, the front-line interceptors - - contract travel nurse screeners - - did not notify security or the employee's supervisor. Infrequently a screener notified the screener's supervisor of non-compliant conduct; there is no record of the screeners' supervisor reporting non-compliance to the non-compliant employee's supervisor or to any other official. The contract travel-nurse screeners did not engage non-compliant staff (including grievant) and labeled comments and/or actions by staff and grievant as argumentative, rude. The WSH Licensed Practical Nurse ("LPN") on duty with screeners was familiar with grievant and advised contract travel-nurse screeners not to be bothered by grievant's statements or conduct. In this environment, Clinical Program Administrator French observed one occasion (May 20, 2021) where a screener engaged a recalcitrant employee in a "solution focused approach" that resulted in the employee complying with the temperature-check procedure. [Emp. Exh. 2, Tab B at 1] Regardless, unless established that the safety protocols and screening procedures violate the CBA or law (which is not proven) the Employer's expectation that employees follow the protocols and procedures is reasonable for the safe, orderly and efficient operation of the WSH.

According to the Employer, the grievant violated the safety protocols and screening procedures in May 2020. Grievant evaded and skirted protocols by not completing all or part of the screening procedures. The evidence shows the following:

- 1) Grievant acknowledged not always complying with all procedures, e.g., not using the communal pen to sign-in; not accepting the sticker after the screener checked his temperature and scanned his badge as occurred on May 22, 2020;
- 2) Walking through the screening area without comment to or response from those present as occurred on May 21, 2020;
- 3) The CEO acknowledged awareness of non-compliance and inconsistent, lax enforcement of the procedures;
- 4) May 1, 2020, marks the start of scanning WSH badges or other state-issued IDs and May 21, 2020, is the first recordation of grievant's badge scanned at the screening station in his building;

- 5) Grievant used his WSH badge for scanning; he did not use his his driver's license;
- 6) Grievant was compliant with protocols and procedures before June 4, 2020, the date of his alternative assignment.

CEO Southerland testified that "early on" (date unknown but prior to grievant's 5-day suspension notice dated October 20, 2020) a decision was made to address non-compliance with screening procedures using a two-tier process. An employee's initial or first infraction of non-compliance would result in counseling with a discussion to correct the errant conduct and comply and another or subsequent infraction of non-compliance would result in a 5-day suspension. This two-tier process applied, CEO Southerland testified, whether the employee failed to comply with the entire screening process or failed to comply only with an element of the process. The CEO stated the two-tier intervention or process represented a consistent response to address infractions and achieve compliance. [Tr. 60-65] This two-tier process embodies the "just cause" standard in Article 30.1 with a progressive disciplinary approach of a low-level intervention for a first infraction followed by a more stringent measure or intervention for continuing non-compliance.

LRM Boettcher testified that first-tier counseling with the employee was conducted by the employee's supervisor and "there was an agreement and understanding that the initial violation would typically result in a discussion of some sort happening with the employee in most situations [and] if the violations continued, reassignment and formal just cause investigation would occur." LRM Boettcher stated that when screeners were "acutely aware" that an employee was not compliant, they were to report the employee to the screeners supervisor and the screeners supervisor would notify the employee's supervisor. The LRM noted that in June 2020 or July 2020 supervisors received training to document counseling with a communication record - - "if they [supervisors] saw or were made aware of anybody engaging in any of these alleged violations, they were to address them immediately and contact their supervisory chain." [Tr. 139-145]

Within the framework of this testimony, the record shows the following. As of May 20, 21 and 22, 2020 Clinical Program Administrator French knew that screeners were "acutely aware" of transgressions they attributed to grievant because the screeners informed him during his monitoring on those dates. The record shows that nothing was reported until June 10, 2020, when Mr. French responded to an email from CMO Raymer requesting information about the screening process and grievant. [Emp. Exh. 2, Tab B at 1-2]

The WSH LPN witnessed everyone's anger with screening when it started. The LPN was the only screener notifying the screeners supervisors of non-compliance concerns. Regarding grievant, "[i]t was like there was no telling on him because everyone knew and then he finally came around and was nice. I'm used to Dr. Morrison so him being him doesn't faze me." The LPN instructed contract travel nurses not "to let it get to you, that's just who he is. It's who he is, he's been that way since he's been here. They let people get away with people being themselves all the time." [Emp. Exh. 2, Tab C at 47-48]

The two-tier process applied solely to COVID compliance procedures. The record does not establish whether it was communicated to staff in the same manner as other information about safety protocols and procedures in March 2020 and April 2020 (intranet, town hall, etc.). The "COVID-19 Staff Attestation/Screening Process" document in the record does not provide forewarning to the consequences for non-compliance. [Un. Exh. 5] Sharing and disseminating information among staff at all levels is the responsibility of the WSH, the distributor of



information and custodian for operations. The two-tier intervention was not communicated in the same fashion as the WSH communicated other measures to alert staff to the perils posed by the virus. Also not communicated to staff was the Employer's decision that an employee occupying a leadership position in the workplace or in the employee's bargaining unit would be held to a higher-standard than other employees. The Employer maintains it was treating all staff the same. The record shows otherwise.

By applying the two-tier process to grievant's situation, this confirms that the WSH considered grievant's actions and conduct as falling within the "typical" scenario subject to, first, counseling followed by discipline for continuing infractions after a formal just cause investigation. CEO Southerland testified that grievant received counseling from Deputy CEO Joyce Stockwell - Hospital Operations. The CEO refers to an email dated April 10, 2020, from Deputy Stockwell to grievant:

Dr Morrison, I respect your view and concerns. We are working closely with DOH, the State Epidemiologist and are in almost daily contact with him or a member of his team. I trust you will do what you need to do to protect yourself. I want to remind you that anyone entering the premises of WSH is required to be screened.  
Thank you.

[Emp. Exh. 2, Tab D at 22]

Since Deputy Stockwell did not testify, the email dated April 10, 2020, remains open for the Arbitrator's interpretation and determination. The date April 10 obviously is prior to the May 1 implementation date for screening procedures; unknown is whether April 10 was prior to the WSH decision to address infractions with a two-tier process. If that process was in effect, the Deputy's email does not identify or attribute to grievant any non-compliant conduct with all or part of screening procedures that placed staff and patients at risk and required correction. The record does not establish that the Deputy was grievant's supervisor, the WSH designated official with the responsibility to counsel an errant employee. The email is not the standard or customary communication record in effect in April 2020 to document counseling. The Deputy is responding to grievant's statements or concerns. CEO Southerland confirmed that grievant's statements and concerns were presented to the WSH in accordance with the CBA. The Deputy's email is considered in that context and not considered as counseling which would arise only after knowing of an employee's non-compliance. The WSH does not assert in this proceeding that grievant was non-compliant prior to May 1, 2020. Given these findings, the Arbitrator concludes that the email dated April 10, 2020, does not constitute counseling.

Whether former CEO Holt knew of the email when he issued his letter to grievant dated June 4, 2020, notifying him of reassignment to telework for the duration of a formal just cause investigation is unknown since he did not testify and that June 4 letter makes no mention or reference to the email. [Emp. Exh. 2, Tab D at 1-2] Whether CMO Raymer informed CEO Holt of the email prior to grievant's reassignment and investigation is unknown since the CMO did not testify. What is established and known is that the typical response in the two-step process was an alternative assignment and a formal just cause investigation after an employee had been counseled about non-compliance by the employee's supervisor.

Based on the evidence in this record, the Arbitrator finds that former CEO Holt was unaware of the asserted counseling by email when he decided to reassign, suspend and investigate grievant. LRM Boettcher testified there was no documented record of counseling grievant or pending

allegation of non-compliance reported prior to May 1, 2020, and the BHA Investigator did not know of the email until June 18, 2020, when it was forwarded to the Investigator by an official within the BHA Investigations Department. Former CEO Holt did not follow the two-tier process. He placed grievant on alternative assignment, suspended him from extra duty and referenced an investigation when there was no allegation before EIMS to investigate and no prior counseling of grievant. Failure to follow the just cause two-tier process is different treatment of grievant without a justifiable basis for imposing different treatment.

Any discussions, feedback or performance review issued to grievant in prior years that are referenced in the investigative report and the proposed disciplinary notice do not substitute for the asserted counseling attributed to Deputy Stockwell. The progressive disciplinary two-tier scheme was specific to the safety protocols and screening process. There was no testimony that counseling on any matter prior to May 1, 2020, counted as first-tier counseling and elevated the employee to second-tier discipline.

The Employer's failure to establish counseling shows that it assessed grievant a 5-day suspension as the first-tier. Grievant is the only employee treated in this manner. This is disparate treatment based on an unnoticed criterion that his leadership in the workplace and with UPW warranted a higher-standard or expectation of, essentially, strict compliance with the protocols and procedures. This strict scrutiny standard applied only to grievant. This is disparate treatment without justifiable cause and renders the 5-day suspension as an abuse of discretion by the Employer and imposed in violation of Article 30.1 - Just Cause.

Just cause in Article 30.1 cannot be sustained when the foundation for the imposed discipline is an abuse of discretion related to or connected with an employee's labor status. The Employer violated Article 30.1 when it imposed discipline on grievant with a 5-workday suspension when others at WSH were afforded an opportunity to correct conduct with a non-disciplinary counseling. The appropriate remedy for grievant's infractions of the protocols and screening process, under the Employer's progressive disciplinary scheme, is counseling. The 5-workday suspension is rescinded and grievant is assessed counseling.

But for the violation of Article 30.1, grievant would have remained in the workplace performing his core responsibilities and extra duty assignment. He remained available, willing and ready to perform his core responsibilities and extra duty. The extra duty he would have performed was performed by someone else; the extra duty work continued to exist. The Employer states it complied with Article 30.6 and Article 7.2.D because there is no guarantee of or entitlement to extra duty, grievant incurred no loss of base salary and the Employer reserved its right to restrict extra duty assignments; however, to apply Article 30.6 and Article 7.2.D to grievant, the Employer violated another provision in the CBA (Article 30.1). The Employer's reserved right is not unfettered and cannot be exercised to deny another contract right to grievant. A contract is not interpreted in a manner where a violation of one provision (Article 30.1) serves as the foundation to sanction and sustain an action taken under other provisions (Article 30.6 and Article 7.2.D).

Pay for extra duty "is a specific entitlement . . . negotiated related to our historically overtime exempt positions." [Tr. 108] This negotiated economic benefit is subject to a monetary remedy when it was removed for reasons other than those specified in the CBA. Unquestionably, grievant would have worked extra duty but for the Employer's violation of the CBA. A make-whole remedy includes compensation for wrongfully denied extra duty work. *See, e.g., Northville Psychiatric Hospital*, 117 LA 122 (Brodsky 2002) (holding that an employee suspended with pay while investigated for alleged wrongdoing entitled to overtime pay).

In short, the Arbitrator finds and concludes that the UPW established a violation of Article 30.1 - Just Cause, Article 30.6 - Alternative Assignment and Article 7.2.D - Hours of Work - Determination. In rendering these findings and conclusions, the Arbitrator considered all testimony and arguments including those not specifically referenced in the text of this opinion.

The Award below sets forth the remedy for these contract violations.

Award

1. The grievance is sustained.
2. Grievant's 5-day suspension is rescinded.
3. Grievant is assessed counseling.
4. Grievant is made whole for the extra duty and 5-day suspensions.
5. The Arbitrator retains jurisdiction over the remedy.

Patrick Halter /s/  
Patrick Halter  
Arbitrator

Signed on this 4th day  
of February 2022