

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 12/13/11;  
Decision Issued: 12/26/11; Agency: DBHDS; AHO: Ternon Galloway  
Lee, Esq.; Case No. 9721; Outcome: No Relief – Agency Upheld;  
**Administrative Review: EDR Ruling Request received 01/04/12; EDR  
Ruling No. 2012-3221 issued 02/29/12; Outcome: AHO's decision  
affirmed; Administrative Review: DHRM Ruling Request received  
01/04/12; DHRM Ruling issued 03/06/12; Outcome: AHO's decision  
affirmed.**

**DECISION OF HEARING OFFICER**  
**In the matter of**  
**Case Number: 9721**  
**Hearing Date: December 13, 2011**  
**Decision Issued: December 26, 2011**

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**SUMMARY OF DECISION**

The Agency had found Grievant violated the Standards of Conduct by being disruptive. It therefore issued Grievant a Group I Written Notice. I found Grievant engaged in the conduct alleged and the Agency's discipline was warranted and appropriate.

**PROCEDURAL HISTORY**

On September 21, 2011, the Agency issued Grievant a Group I Written Notice for disruptive behavior.

Grievant timely filed a grievance to challenge the Agency's action. The Grievant was dissatisfied with the Third Resolution Step's outcome and requested a hearing. On November 21, 2011, the Department of Employment Dispute Resolution ("EDR") assigned me as the hearing officer to this appeal. An initial pre-hearing conference ("PHC") was held on November 30, 2011, and subsequently a scheduling order was issued.<sup>1</sup>

I scheduled the hearing for December 13, 2011, the first date available between the parties.

At the hearing both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. Also during the proceeding, the Grievant represented herself and the Agency was represented by its advocate. I admitted Hearing Officer exhibits one through 11; Agency exhibits one through nine; and Grievant's exhibits 1 through 27.<sup>2</sup>

**APPEARANCES**

Attorney Advocate for Agency  
Witnesses for the Agency ( Agency Witness 1)  
Joint Witness (Testified on behalf of both parties)  
Grievant

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<sup>1</sup> A subsequent PHC was held on December 8, 2011, regarding a potential witness and other matters. Subsequent to that PHC I issued an order dated December 10, 2011.

<sup>2</sup> Grievant sought to have admitted an e-mail created on December 12, 2011, which consisted of a directive from the Agency instructing Grievant to not have contact with the facility's medical secretary. The Agency's Advocate objected to the admission of the exhibit on grounds of relevance. After hearing arguments, I sustained the Agency's objection.

Witnesses for the Grievant (3 witnesses, including the Grievant)

### **ISSUE**

Was the Group I Written Notice warranted and appropriate under the circumstances?

### **BURDEN OF PROOF**

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing all the evidence presented and observing the demeanor of each witness who testified in person during the hearing, I make the following findings of fact<sup>3</sup>:

1. The Agency/facility houses individuals who have cognitive deficiencies such as mental retardation and related developmental disabilities. It also provides support services to these persons and their families. (G Exh 14; A Exh. 9; Testimony of Joint Witness).
2. Grievant is essential personnel employed with the Agency as a health nurse/infection control nurse. (G Exh. 14; Testimony of Agency Witness 1).
3. Grievant’s supervisor is the Director of Nursing for the facility. During the week of August 22, 2011, the Executive Committee of the Agency, to include Grievant’s supervisor, met on several occasions for emergency planning. Management had determined that the essential staff would be operating under an emergency schedule effective Friday morning on August 26, 2011, due to the threat of a hurricane. (Testimony of Agency Witness 1; G Exh. K; A Exhs. 5 and 6).
4. On or about July 20, 2011, Grievant’s supervisor, Agency Witness 1, approved medical leave for Grievant which would permit Grievant to attend a medical appointment that Grievant had scheduled for 10:00 a.m. on August 26, 2011. It took Grievant six weeks to schedule the August 26, 2011 appointment. (G Exhs. 2, 3, 4 and 8).
5. The day before Grievant’s scheduled appointment, Grievant’s supervisor, Agency Witness 1, held an emergency nursing meeting and informed those in attendance which included Grievant that the facility would be in emergency status on August 26, 2011, due to a hurricane that was predicted to arrive in the area sometime Saturday, August 27, 2011. Although off shore, on August 25, 2011, the hurricane had been classified as a category 3.

<sup>3</sup> Grievant Witness 2 testified by telephone.

The facility was considered safe only for a category 1 hurricane. The emergency nursing meeting concluded about 3:00 p.m. (Testimony Agency Witness 1; G Exh. 2)

6. Immediately following the meeting, Agency Witness 1 continued planning for the emergency. This phase of the planning included Agency Witness 1 giving directives to the medical secretary. Once received, the medical secretary was instructed to distribute the emergency planning information to nurses whose work shifts precluded them from attending the meeting.

7. When Agency Witness 1 was in the process of instructing the medical secretary, Grievant approached Agency Witness 1 and reminded Agency Witness 1 that Grievant had a medical appointment at 10:00 a.m. on August 26, 2011. A dialogue ensued between Grievant and her supervisor. Basically, the parties agree that the gist of this conversation between Grievant and her supervisor was as reported by Joint Witness. This witness provided the following testimony and written statement regarding the conversation:

At about 3:00 p.m. on 8/25/11 I went to ask [Director of Nursing] a question in the OTC regarding the planned evacuation as she was speaking with [medical secretary]. While I was waiting to ask her my question [Grievant] came to her and told her that she had a doctor's appointment on 8/26/11 at the same time they were scheduled to evacuate to CGH. [The Director of Nursing] told her she needed to change it and [Grievant] said no that it took 6 weeks to get the appointment. [The Director of Nursing] then told her that we were in an emergency situation and she had to be at CGH at that scheduled time. [Grievant] said so you are telling me I need to cancel my appointment that I have waited 6 weeks to get. [The Director of Nursing] responded yes. [Grievant] said she was not going to cancel her appointment while walking out of the room.

[Joint Witness]  
August 31, 2011

(G Exh. 2; Testimony of Joint Witness).

8. This dialogue lasted no more than five minutes. Joint Witness described the tone of it as "firm." (Testimony of Joint Witness).

9. Witnesses present during the verbal exchange between Grievant and her supervisor were the medical secretary and Joint Witness. (Testimonies of Joint Witness and Agency Witness 1).

10. The Agency issued Grievant a Group I Written Notice for the incident. The

Notice described the incident as follows:

Unprofessional and disruptive behavior which interfered with the work environment in preparing for the Hurricane State of Emergency. An emergency nurse meeting was held at 2:00 p.m. in preparation for evacuating (sic) Friday to ... (CRMC). [Grievant] was scheduled to cover CRMC which was to depart Friday morning between 9:00 a.m. and 10:00 a.m. After the meeting the Director of Nursing was discussing evacuation procedures with medical secretary .... [Grievant] stated to the Director of Nursing as a reminder that she had a 10:00 A.M. Doctor's appointment on Friday. The Director of Nursing stated that as told in the meeting Friday the emergency schedule begins on Friday and that she would have to cancel her appointment and reschedule. [Grievant] stated "I had this appointment for a long time and you cannot tell me I cannot go." Combatively [Grievant] stated "Are you telling me that I cannot go," to which the Director of Nursing stated "Yes, you cannot leave one nurse alone at the hospital and tomorrow we [Agency] are in a state of emergency mode." Beligerently (sic) [Grievant] began to state as she was walking away that she was going to go and that I (Director of Nursing) can't tell her to cancel. [Grievant] grabbed her cell phone off the desk and hurriedly left the ...[OTC].

(A Exh. 1 ;G Exh. 16).

11. Departmental Instruction No. 607 (EM)10 that is titled "Facility Emergency Management" applies to the Agency/facility. This policy notes, among other things, that protecting the health and safety of everyone in the facility is the first priority during an emergency
12. Grievant has no prior disciplinary history.
13. Grievant's most recent evaluation rated her a "contributor." (G Exh. 14).
14. While Grievant's supervisor was planning the evacuation on August 25, 2011, she permitted another nurse to change her August 29, 2011, schedule so that nurse could take an examination previously scheduled for August 29, 2011. (G Exh. 6).
15. Sometime after the verbal exchange between Grievant and her supervisor, Grievant rescheduled her August 26, 2011, medical appointment and reported to work as scheduled for the emergency evacuation on August 26, 2011. (Testimonies of Agency Witness 1 and Grievant).

### **DETERMINATIONS AND OPINION**

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §§2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. GPM § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

On September 21, 2011, Agency management issued Grievant a Group I Written Notice for "unprofessional and disruptive" behavior which interfered with the work environment in preparing for the Hurricane State of Emergency.

I examine the evidence to determine if the Agency has met its burden.

**I. Analysis of Issue before the Hearing Officer**

**A. Did the employee engage in the behavior described in the Group I Written Notice and did that behavior constitute misconduct?**

Both parties agree that a dialogue ensued after Grievant reminded her supervisor of Grievant's scheduled medical appointment on August 26, 2011. The date and time of the appointment coincided with the beginning of the emergency evacuation schedule that management had established. The evidence shows that Grievant questioned whether her supervisor had the authority to instruct Grievant to cancel or reschedule her appointment after she had been previously approved for leave to attend it.<sup>4</sup> The parties agree that Grievant also informed her supervisor that it took Grievant some time to get the appointment. Further, the evidence shows that after Grievant's supervisor instructed Grievant to reschedule or cancel her appointment, Grievant stated she would not.

Having considered all oral and written statements about what occurred during the incident,<sup>5</sup> I now focus on the perspectives of the crucial witnesses - the Director of Nursing, Grievant, and Joint Witness. These are individuals who I find testified at the hearing and were present in the room where the dialogue happened. The Director of Nursing described Grievant as belligerent and combative during the exchange; Grievant viewed her supervisor as abrasive; and Joint Witness stated the situation was "firm and uncomfortable." I give great weight to Joint Witness' description. This is so because I find Joint Witness was neutral, present when the verbal exchange happened between the Grievant and her supervisor, and provided a written statement of what occurred soon after the incident. That written statement mirrored her testimony. Joint Witness' testimony and statement establish that the dialogue lasted for several minutes, but not more than five. Further it was uncomfortable for those present and listening. What is more, it showed that Grievant informed her supervisor that Grievant would not follow her supervisor's instruction to reschedule or cancel the appointment. Moreover, even after Grievant was reminded that the Agency was in emergency mode on the date of her appointment and she was needed, Grievant informed her supervisor that she would not cancel the appointment while walking out of the room.

Next, I examine the evidence to determine if Grievant's actions constituted disruptive behavior. The evidence shows Grievant was shocked to learn her leave for August 26, 2011, was being rescinded due to the emergency situation. But, I can not condone Grievant's behavior due to her experiencing this unpleasant surprise. This is so especially when I consider the context; that is,

- (i) A category 3 hurricane was threatening the area;
- (ii) Residents of the Agency included those with impaired cognitive functioning, and evacuation of residents was scheduled to take place in less than 24 hours;

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<sup>4</sup> Grievant presented her Exhibits 22, 23, and 24 to support her position that the supervisor did not have the authority to rescind Grievant's pre-approved leave. The Agency presented evidence refuting Grievant's claim. Having considered this evidence, I am not persuaded by Grievant's argument.

<sup>5</sup> Several employees of the Agency, including Grievant, wrote statements about the verbal exchange between the Grievant and her supervisor. They are found in Agency Exhibits 7 and 8 and Grievant's Exhibits 2, 3, 4, 5, and 7. I have reviewed all of them.

- (iii) Emergency planning was underway when the verbal exchange took place;
- (iv) Others were waiting to receive instructions about the evacuation from the supervisor;
- (v) Other employees were present during the dialogue between Grievant and her supervisor;
- (vi) Several minutes passed before the supervisor could resume planning for the emergency due to Grievant's admitted interruption;
- (vii) Under Departmental Instruction No. 607 (EM)10 Facility Emergency Management, protecting the health and safety of everyone in the facility is the first priority during an emergency;

Considering the above, I find Grievant's behavior was disruptive and in violation of the Standards of Conduct.<sup>6</sup>

**B. Was the Agency's Discipline consistent with law and policy?**

Now, I consider whether the discipline was consistent with law and policy. Under the Standards of Conduct, disruptive behavior is considered a Group 1 offense. Management issued Grievant a Group 1. Thus, I find the discipline consistent with law and policy.

**II. Mitigation**

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."<sup>7</sup> EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to

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<sup>6</sup> In addition, I note Grievant's Employee Work Profile ("EWP") informed her that she was designated as essential personnel and required to work during declared emergency situations or closings. Moreover, staff, including Grievant, had been made aware the day before the verbal exchange that the Agency was expected to be in emergency status on Friday, August 26, 2011. I note the evidence shows that Grievant had only planned to miss the beginning of her work shift on this Friday to attend her medical appointment. However, information provided to staff about the evacuation the day before the verbal exchange indicated the evacuation could start as early as Friday morning. Thus, I find Grievant knew or should have known that there was a possibility that her pre-approved leave would be rescinded due to the emergency.

<sup>7</sup> Va. Code Section 2.2-3005 (c)(6)



be consistent with law and policy.”<sup>8</sup> More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency’s discipline was consistent with law and Policy, the agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>9</sup>

Thus the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

I have found the Grievant engaged in the behavior described in the Written Notice, that behavior constituted misconduct, and the Agency’s discipline was consistent with law and policy. A focus on whether the discipline was reasonable is now undertaken.

Grievant contends she is being unfairly treated by her supervisor. One example she gives involves another nurse who was scheduled to take an examination on August 29, 2011. Grievant contends that her supervisor allowed this nurse to switch her August 29, 2011 work schedule with another employee to permit this nurse to take the examination. Having considered all the evidence and the arguments of the parties, I find the Grievant and the nurse scheduled to take the examination were not similarly situated. This is so because Grievant’s scheduled medical appointment coincided with the emergency evacuation of Agency residents. It also pre-dated the arrival of the hurricane. The work schedule of the other nurse was not within the emergency time period and post dated the hurricane’s arrival. Thus, I find the supervisor permitting this other nurse to change her August 29, 2011 schedule so that this other nurse could take her examination does not show Grievant has been treated unfairly by her boss. Also, I have considered other evidence submitted that the Grievant asserts shows her supervisor treats Grievant unfairly.<sup>10</sup> Having considered this evidence I am not persuaded.

Further in determining whether mitigation is due in this case, I have reviewed and studied Grievant’s evaluations submitted, all evidence submitted regarding Grievant’s character<sup>11</sup>, that Grievant rescheduled her appointment, Grievant’s arguments and any evidence presented to support them as well as all other evidence of record. Having done so, I find no reason to disregard the Agency’s assessment regarding mitigating the

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<sup>8</sup> *Rules for Conducting Grievance Hearings VI(A)*

<sup>9</sup> *Rules for Conducting Grievance Hearing VI(B)*

<sup>10</sup> Grievant describes her Exhibit Q as “Collection of Documents Substantiating Unfair Treatment of [Grievant] by [Director of Nursing]. As noted above, I have considered this exhibit as well as all other evidence of record, to include but not limited to G Exh. S.

<sup>11</sup> This evidence includes testimony of any character witness such as Grievant Witness 1.

discipline and find the Agency's discipline did not exceed reasonableness.

The evidence in this case does show Grievant is a good worker and has no prior disciplinary history. Unfortunately the incident occurred on August 25, 2011, and the orderly progress of work was halted for several minutes. Accordingly, I find management has met its burden.

### **DECISION**

Hence, for the reasons noted here, the Agency's discipline is upheld.

### **APPEAL RIGHTS**

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This review is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision.

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decisions is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Request should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> floor Richmond, VA 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure that the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decisions so that it complied with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no

further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:** Within thirty days of final decisions, a party may appeal on the ground that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Directory before filing a notice of appeal.

ENTERED this 26<sup>th</sup> day of December, 2011.

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Ternon Galloway Lee, Hearing Officer

cc: Agency Attorney Advocate  
Agency Representative  
Grievant  
EDR's Hearings Program Director

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of  
The Department of Behavioral Health  
and Developmental Services

March 6, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9720. For the reasons stated below, we will not interfere with the application of this hearing decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review. In her PROCEDURAL HISTORY, the hearing officer stated the following:

On September 21, 2011, the Agency issued Grievant a Group I Written Notice for disruptive behavior.

Grievant timely filed a grievance to challenge the Agency's action. The Grievant was dissatisfied with the Third Resolution Step's outcome and requested a hearing. On November 21, 2011, the Department of Employment Dispute Resolution ("EDR") assigned me as the hearing officer to this appeal. An initial pre-hearing conference ("PRC") was held on November 30, 2011, and subsequently a scheduling order was issued.

I scheduled the hearing for December 13, 2011, the first date available between the parties. At the hearing both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. Also during the proceeding, the Grievant represented herself and the Agency was represented by its advocate. I admitted Hearing Officer exhibits one through 11; Agency exhibits one through nine; and Grievant's exhibits 1 through 27.2

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ISSUE

Was the Group I Written Notice warranted and appropriate under the circumstances?

The relevant FINDINGS OF FACT, as per the hearing officer, are as follows: After reviewing all the evidence presented and observing the demeanor of each witness who testified in person during the hearing, I make the following findings of fact:

1. The Agency/facility houses individuals who have cognitive deficiencies such as mental retardation and related developmental disabilities. It also provides support services to these persons and their families.

(G Exh 14; A Exh. 9; Testimony of Joint Witness).

2. Grievant is essential personnel employed with the Agency as a health nurse/infection control nurse. (G Exh. 14; Testimony of Agency Witness 1).

3. Grievant's supervisor is the Director of Nursing for the facility. During the week of August 22, 2011, the Executive Committee of the Agency, to include Grievant's supervisor, met on several occasions for emergency planning. Management had determined that the essential staff would be operating under an emergency schedule effective Friday morning on August 26, 2011, due to the threat of a hurricane. (Testimony of Agency Witness 1; G Exh. K; A Exhs. 5 and 6).

4. On or about July 20, 2011, Grievant's supervisor, Agency Witness 1, approved medical leave for Grievant which would permit Grievant to attend a medical appointment that Grievant had scheduled for 10:00 a.m. on August 26, 2011. It took Grievant six weeks to schedule the August 26, 2011 appointment. (G Exhs. 2, 3, 4 and 8).

5. The day before Grievant's scheduled appointment, Grievant's supervisor, Agency Witness 1, held an emergency nursing meeting and informed those in attendance which included Grievant that the facility would be in emergency status on August 26, 2011, due to a hurricane that was predicted to arrive in the area sometime Saturday, August 27, 2011. Although off shore, on August 25, 2011, the hurricane had been classified as a category 3. The facility was considered safe only for a category 1 hurricane. The emergency nursing meeting concluded about 3:00 p.m. (Testimony Agency Witness 1; G Exh. 2)

6. Immediately following the meeting, Agency Witness 1 continued planning for the emergency. This phase of the planning included Agency Witness 1 giving directives to the medical secretary. Once received, the medical secretary was instructed to distribute the emergency planning information to nurses whose work shifts precluded them from attending the meeting.

7. When Agency Witness 1 was in the process of instructing the medical secretary, Grievant approached Agency Witness 1 and reminded Agency Witness 1 that Grievant had a medical appointment at 10:00 a.m. on August 26, 2011. A dialogue ensued between Grievant and her supervisor. Basically, the parties agree that the gist of this conversation between Grievant and her supervisor was as reported by Joint Witness. This witness provided the following testimony and written statement regarding the conversation:

At about 3:00 p.m. on 8/25/11 I went to ask [Director of Nursing] a question in the OTC regarding the planned evacuation as she was speaking with [medical secretary]. While I was waiting to ask her my question [Grievant] came to her and told her that she had a

doctor's appointment on 8/26/11 at the same time they were scheduled to evacuate to CGH. [The Director of Nursing] told her she needed to change it and [Grievant] said no that it took 6 weeks to get the appointment. [The Director of Nursing] then told her that we were in an emergency situation and she had to be at CGH at that scheduled time. [Grievant] said so you are telling me I need to cancel my appointment that I have waited 6 weeks to get. [The Director of Nursing] responded yes. [Grievant] said she was not going to cancel her appointment while walking out of the room.

[Joint Witness] August 31, 2011  
(G Exh. 2; Testimony of Joint Witness).

8. This dialogue lasted no more than five minutes. Joint Witness described the tone of it as "firm." (Testimony of Joint Witness).

9. Witnesses present during the verbal exchange between Grievant and her supervisor were the medical secretary and Joint Witness. (Testimonies of Joint Witness and Agency Witness 1).

10. The Agency issued Grievant a Group I Written Notice for the incident. The Notice described the incident as follows:

Unprofessional and disruptive behavior which interfered with the work environment in preparing for the Hurricane State of Emergency. An emergency nurse meeting was held at 2:00 p.m. in preparation for evacuating (sic) Friday to ... (CRMC). [Grievant] was scheduled to cover CRMC which was to depart Friday morning between 9:00 a.m. and 10:00 a.m. After the meeting the Director of Nursing was discussing evacuation procedures with medical secretary.... [Grievant] stated to the Director of Nursing as a reminder that she had a 10:00 A.M. Doctor's appointment on Friday. The Director of Nursing stated that as told in the meeting Friday the emergency schedule begins on Friday and that she would have to cancel her appointment and reschedule. [Grievant] stated "I had this appointment for a long time and you cannot tell me I cannot go." Combatively [Grievant] stated "Are you telling me that I cannot go," to which the Director of Nursing stated "Yes, you cannot leave one nurse alone at the hospital and tomorrow we [Agency] are in a state of emergency mode." Beligerently (sic) [Grievant] began to state as she was walking away that she was going to go and that I (Director of Nursing) can't tell her to cancel. [Grievant] grabbed her cell phone off the desk and hurriedly left the ... [OTC}.

(A Exh. 1 ;G Exh. 16).

11. Departmental Instruction No. 607 (EM)10 that is titled "Facility Emergency Management" applies to the Agency/facility. This policy notes, among other things, that protecting the health and safety of everyone in the facility is the first priority during an emergency.

12. Grievant has no prior disciplinary history.

13. Grievant's most recent evaluation rated her as "contributor." (G Exh. 14).

14. While Grievant's supervisor was planning the evacuation on August 25, 2011, she permitted another nurse to change her August 29, 2011, schedule so that nurse could take an examination previously scheduled for August 29, 2011. (G Exh. 6).

15. Sometime after the verbal exchange between Grievant and her supervisor, Grievant rescheduled her August 26, 2011, medical appointment and reported to work as scheduled for the emergency evacuation on August 26, 2011. (Testimonies of Agency Witness 1 and Grievant).

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On September 21, 2011, Agency management issued Grievant a Group I Written Notice for "unprofessional and disruptive" behavior which interfered with the work environment in preparing for the Hurricane State of Emergency.

I examine the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

A. Did the employee engage in the behavior described in the Group I Written Notice and did that behavior constitute misconduct?

Both parties agree that a dialogue ensued after Grievant reminded her supervisor of Grievant's scheduled medical appointment on August 26, 2011. The date and time of the appointment coincided with the beginning of the emergency evacuation schedule that management had established. The evidence shows that Grievant questioned whether her supervisor had the authority to instruct Grievant to cancel or reschedule her appointment after she had been previously approved for leave to attend it. The parties agree that Grievant also informed her supervisor that it took Grievant some time to get the appointment. Further, the evidence shows that after Grievant's supervisor instructed Grievant to reschedule or cancel her appointment, Grievant stated she would not.

Having considered all oral and written statements about what occurred during the incident, I now focus on the perspectives of the crucial witnesses - the Director of

Nursing, Grievant, and Joint Witness. These are individuals who I find testified at the hearing and were present in the room where the dialogue happened. The Director of Nursing described Grievant as belligerent and combative during the exchange; Grievant viewed her supervisor as abrasive; and Joint Witness stated the situation was "firm and uncomfortable." I give great weight to Joint Witness' description. This is so because I find Joint Witness was neutral, present when the verbal exchange happened between the Grievant and her supervisor, and provided a written statement of what occurred soon after the incident. That written statement mirrored her testimony. Joint Witness' testimony and statement establish that the dialogue lasted for several minutes, but not more than five. Further it was uncomfortable for those present and listening. What is more, it showed that Grievant informed her supervisor that Grievant would not follow her supervisor's instruction to reschedule or cancel the appointment. Moreover, even after Grievant was reminded that the Agency was in emergency mode on the date of her appointment and she was needed, Grievant informed her supervisor that she would not cancel the appointment while walking out of the room.

Next, I examine the evidence to determine if Grievant's actions constituted disruptive behavior. The evidence shows Grievant was shocked to learn her leave for August 26, 2011, was being rescinded due to the emergency situation. But, I cannot condone Grievant's behavior due to her experiencing this unpleasant surprise. This is so especially when I consider the context; that is,

- (i) A category 3 hurricane was threatening the area;
- (ii) Residents of the Agency included those with impaired cognitive functioning, and evacuation of residents was scheduled to take place in less than 24 hours;
- (iii) Emergency planning was underway when the verbal exchange took place;
- (iv) Others were waiting to receive instructions about the evacuation from the supervisor;
- (v) Other employees were present during the dialogue between Grievant and her supervisor;
- (vi) Several minutes passed before the supervisor could resume planning for the emergency due to Grievant's admitted interruption;
- (vii) Under Departmental Instruction No. 607 (EM) 1 0 Facility Emergency Management, protecting the health and safety of everyone in the facility is the first priority during an emergency;

Considering the above, I find Grievant's behavior was disruptive and in violation of the Standards of Conduct.

B. Was the Agency's Discipline consistent with law and policy?

Now, I consider whether the discipline was consistent with law and policy. Under



the Standards of Conduct, disruptive behavior is considered a Group 1 offense. Management issued Grievant a Group 1. Thus, I find the discipline consistent with law and policy.

## II. Mitigation

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution. EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and Policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Thus the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

I have found the Grievant engaged in the behavior described in the Written Notice, that behavior constituted misconduct, and the Agency's discipline was consistent with law and policy. A focus on whether the discipline was reasonable is now undertaken.

Grievant contends she is being unfairly treated by her supervisor. One example she gives involves another nurse who was scheduled to take an examination on August 29, 2011. Grievant contends that her supervisor allowed this nurse to switch her August 29, 2011 work schedule with another employee to permit this nurse to take the examination. Having considered all the evidence and the arguments of the parties, I find the Grievant and the nurse scheduled to take the examination were not similarly situated. This is so because Grievant's scheduled medical appointment coincided with the emergency evacuation of Agency residents. It also pre-dated the arrival of the hurricane. The work schedule of the

other nurse was not within the emergency time period and post dated the hurricane's arrival. Thus, I find the supervisor permitting this other nurse to change her August 29, 2011 schedule so that this other nurse could take her examination does not show Grievant has been treated unfairly by her boss. Also, I have considered other evidence submitted that the Grievant asserts shows her supervisor treats Grievant unfairly. Having considered this evidence I am not persuaded.

Further in determining whether mitigation is due in this case, I have reviewed and studied Grievant's evaluations submitted, all evidence submitted regarding Grievant's character, that Grievant rescheduled her appointment, Grievant's arguments and any evidence presented to support them as well as all other evidence of record. Having done so, I find no reason to disregard the Agency's assessment regarding mitigating the discipline and find the Agency's discipline did not exceed reasonableness.

The evidence in this case does show Grievant is a good worker and has no prior disciplinary history. Unfortunately the incident occurred on August 25, 2011, and the orderly progress of work was halted for several minutes. Accordingly, I find management has met its burden.

In her DECISION, the hearing officer stated:

Hence, for the reasons noted here, the Agency's discipline is upheld.

### **DISCUSSION**

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the instant case, the hearing officer concluded, "I have found the Grievant engaged in the behavior described in the Written Notice, that behavior constituted misconduct, and the Agency's discipline was consistent with law and policy..."

This Department has determined that the hearing officer's decision is consistent with relevant human resource management policy. It appears that the grievant is challenging the hearing officer's findings and conclusions, not related to any policy issue. Therefore, this Department has no basis to intercede with the application of this decision.

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Ernest G. Spratley, Assistant Director  
Office of Equal Employment Services