

Issue: Separation from State due to continued poor performance; Hearing Date: 09/07/18; Decision Issued: 09/30/18; Agency: NSU; AHO: Ternon Galloway Lee, Esq.; Case No. 11200; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 11200

Hearing Date: September 7, 2018

Decision Issued: September 30, 2018

HISTORY

On January 12, 2018, the Agency issued Grievant a letter which informed Grievant that the Agency had terminated her employment with the University as a Law Enforcement Officer II. The effective date of the termination was the letter's date. Moreover, the Agency's letter noted that because Grievant was a probationary employee, she did not have access to the grievance procedure.

On February 12, 2018, Grievant submitted her grievance to The Office of Equal Employment Dispute Resolution ("EEDR") contending that she was discriminated against and wrongfully terminated. Upon reviewing the grievance, EEDR determined that the grievance was timely. Also, EEDR decided Grievant had access to the grievance procedure.¹

Then, EEDR appointed the undersigned as the Hearing Officer in this matter effective April 17, 2018. The Hearing Officer held a pre-hearing conference ("PHC") by telephone on May 7, 2018.² Thereafter, by order dated May 8, 2018, she issued a scheduling order that set forth in writing the rulings made and matters discussed during the PHC. Subsequently, the Hearing Officer held a PHC on May 25, 2018. As a consequence, she issued an order instructing the Agency to produce certain documents for the Grievant. Then both parties requested, with stated reasons, a continuance of the hearing date. Finding good cause, the hearing was rescheduled for August 16, 2018. Thereafter, the Agency learned that a material witness was unavailable to testify on the new hearing date. The Agency then requested a continuance which was not objected to by the Grievant. Accordingly, the hearing was rescheduled for September 7, 2018.³

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Officer. The Agency moved orally and in writing to dismiss the grievance asserting that the Grievant was on probation when she was fired and therefore did not have access to the Grievance procedure. The Grievant argued that the Agency failed to follow proper procedures and consequently, Grievant's probationary period had expired, her termination was invalid, and she had access to the grievance procedure. The Hearing Officer took the motion under advisement.⁴

¹ EEDR Ruling Number 2018-4683

² This was the first date that the parties were available.

³ The parties agreed to this new date.

⁴ By issuing the decision in this matter the Hearing Officer has not granted the Agency's motion to dismiss the grievance. Moreover, as referenced above, in Ruling Number 2018-4683, EEDR determined that Grievant had

Also, during the hearing, the Hearing Officer admitted, without objection, the Agency's Exhibits 1 through 15. In addition, the Hearing Officer admitted, without objection, Grievant's Exhibits 1 through 12.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witness presented by the opposing party.

During the proceeding, the Agency was represented by its advocate. Grievant was represented by her advocate.

APPEARANCES

Advocate for Agency
Agency's Representative
Witnesses for the Agency (3 witnesses)
Advocate for Grievant
Grievant
Witnesses for Grievant (2, including the Grievant)

ISSUE

Was the probationary period properly extended?
Was Grievant's termination warranted and appropriate under the circumstances?

BURDEN OF PROOF

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(2). 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 at the hearing, the Hearing Officer makes the following findings of fact:

1. The Agency is an institution of higher learning and known here as the University. The University is a Historically Black University. On July 25, 2016, the Agency employed Grievant to work as a Law Enforcement Officer in the University's Police Department (Department). Hence, under applicable policy mentioned below, Grievant's initial 12 month probationary period was from July 25, 2016, to July 25, 2017. (A Exh. 4; G Exh. 4 at 3; G Exh. 8).

access to a hearing. Under *Grievance Procedure Manual* (GPM) the access ruling is final. GPM §§2.3 and 4.3.

Inherent in the duties of police officers, including one of the Department, is the expectation that they will perform their duties in a professional, respectful, and courteous manner. Further, it is expected that police officers with the department will promote cohesiveness in the department. Making a disparaging racial comment in the workplace is not professional or respectful. Neither does it promote cohesiveness in the department. (A Exh. 4; Testimony of Deputy Chief). Making such remarks affects the manner in which an employee performs her duty. In this case in a disrespectful, non-cohesive, and unprofessional manner.

2. At the conclusion of Grievant's first six (6) months with the Agency, she received a "Fully Successful" performance rating. (A Exh. 4 at 1).

3. Grievant is a Caucasian. On or about May 22, 2017, Grievant used the word "Nigga" in the workplace when she was conversing with a co-worker. The co-worker, an African American, found Grievant's diction offensive. At the time Grievant used this term, she was in a relationship with a minority.⁵ (A Exhs. 3 and 4; Testimonies of Grievant and Grievant's Witness 1).

4. An allegation of "Making Disparaging Racial Remarks in the Workplace" was then made against Grievant. An investigation followed. As a result, Grievant's superior – Deputy Chief-determined the allegation was substantiated. Accordingly, in a letter issued to Grievant on May 31, 2017, Deputy Chief stated in pertinent part the following:

After a thorough Internal Affairs Investigation and careful consideration of the evidentiary record, I find the Charge against you, "Making Disparaging Racial Remarks," to be sustained. Specifically, your behavior and actions and the use of the word "Nigga" in the workplace. The allegations are substantiated by your own admissions. This is a violation of [Agency] Police Department Code of Conduct, Rules and Regulations (Unbecoming Conduct).

(A Exh. 4 at 1).

5. Deputy Chief's letter also informed Grievant that she would be sanctioned for use of the term. One sanction identified in the letter was extending Grievant's probationary period for 6 months. (A Exh. 4; G Exh. 4).

6. Further, in the May 31, 2017 letter, Deputy Chief noted that during Grievant's extended probationary time, she would be "evaluated on her performance as a police officer, responsible for but not limited to: properly enforcing the laws and regulations of the State of Virginia, Rules and Regulations of the University, communicating effectively, and interacting positively with [her] colleagues and the public." (A Exh. 4 at 2; G Exhs. 4 at 2).

Probationary Progress Review Form

7. On June 27, 2017, the Agency provided Grievant with a Probationary Progress Review

⁵ Grievant indicated she was in a relationship with a African-American. However, Grievant's Witness 1 testified the relationship was with a Hispanic person.

form. Contents of the form included, among other statements, a declaration that Grievant's probationary period had been extended for performance reasons until January 25, 2018. In the section of the form titled "**Comments on Overall Progress**" the Agency noted the following:

[Grievant] is currently making progress towards the targeted performance level. Her performance to date is at an acceptable level, however additional time is needed to obtain an adequate assessment of her performance as a police patrol officer. Our expectation is that each officer will be exemplary in obeying departmental policies and procedures and enforcing the laws, rules and regulations of the United States Constitution, the Commonwealth of Virginia, the City of Norfolk, Norfolk State University and this department. In order to properly evaluate you on your performance as a police officer you are required to work as a police officer on independent patrol under observation, performing primary duties of a State sworn law enforcement officer. Therefore, it is prudent that we extend your probationary period to do an appropriate evaluation of your performance.

(A Exh. 4 at 3).

8. The Probationary Review Form informed Grievant that her probation was extended for performance reasons for 6 months, specifically until January 25, 2018. The form also documented the reason for the extension and the areas of deficiencies. It also informed Grievant of the level of performance expected from her.

9. Grievant signed the form and received a copy of it. Grievant did not object to the form's content when she signed it. Neither did she object to it during the period July, 2017, through December, 2017 (A Exh. 4 at 3; Testimony of Deputy Chief).

No one forced Grievant to sign the Probationary Review Form. (Testimony of Grievant).

Failure to attend Mandatory Meeting

10. On June 22, 2017, several days before acknowledging the extended probationary period, Grievant was informed that a mandatory staff meeting was scheduled for July 10, 2017. (Testimony of Deputy Chief; A Exh. 5; G Exh. 5). The night before the meeting, Grievant informed the Agency by email that she was unable to attend the meeting due to a family emergency. Specifically, she noted that she had out of town relatives visiting her unexpectedly. Their vehicle became inoperable and she was assisting them in repairing it. She further stated that her cousins (who by Grievant's account were in their thirties) could not be left alone at her residence with her roommate because the two parties were unacquainted. Even so, Grievant's superior informed Grievant that she was expected to attend the meeting. Grievant failed to do so. (A Exh. 5; G Exh. 5; Testimonies of Chief Deputy and Grievant).

Accordingly, Grievant's performance fell short because she did not accomplish attending the mandatory meeting.

Failure to Use the University Police Department Forms

11. Thereafter, on December 8, 2017, it came to the attention of Grievant's superior that while Grievant was performing her duties as a University police officer, she used the police forms of another entity - the City. Particularly, even though the University's police department had its own forms for its patrol officers to complete when a driver was involved in an accident on campus, Grievant used the City's "Crash Exchange Sheet." When using the City's form, Grievant would cross out its name and then write the University's name. Although this city form was comparable to the University's "Accident Information Exchange Sheet," rules governing the University's police department did not authorize a University police officer to use another entity's forms even if they were similar to the University's forms.

Grievant was aware that she was required to use the University's "Accident Information Exchange Sheet." Even so, Grievant's superiors received documentation showing Grievant violated this rule on November 17, 2017. Moreover, when asked about her using the City's forms, Grievant admitted she did so even though the University's police department had a similar form available for use. Grievant then promised to refrain from doing so in the future. (G Exh. 6; Testimonies of Lieutenant and Deputy Chief).

Using the appropriate forms to perform the work of the University's police department is a performance matter. Grievant failed to do so. The Probationary Review Form explicitly noted that Grievant was expected to obey the Department's rules and policies. (A Exh. 4; Testimony of Lieutenant).

Also, on November 18, 2017, Grievant inappropriately used another City form in the performance of her duties at the University. Specifically, Grievant completed the City's witness subpoena form. This caused the individual to whom Grievant issued the form to wrongly appear in the City's traffic court. This individual waited needlessly to appear as a witness in a case that was not before that court. The unnecessary waiting by the individual at the City's courthouse was exasperated by the fact that the residence of this individual was in a jurisdiction that was at least a three (3) hour drive from the City. (G Exh. 6 at 5).

Grievant's erroneous use of the City's forms for University work reflected poorly on Grievant's performance and the University. (Testimonies of Deputy Chief and Lieutenant).

12. The Department may permit its patrol officers to utilize a form of the City if the Department does not have a comparable form. For example, the University uses the City's form pertaining to drug matters because the University does not have such a form. (Testimony of Grievant Witness 1).

Order to Clean Vehicle

13. On January 9, 2018, Grievant's immediate supervisor, Sergeant, instructed her to clean a state vehicle. The vehicle was not a patrol car. However, the vehicle was one of several that had been loaned to the police department for usage during a snow storm. Grievant's supervisor had received an order from his superior to clean the vehicles. As a result, the supervisor was

responsible for making sure the job of cleaning the vehicles was completed. In fact, the supervisor assisted his subordinates in cleaning the vehicles.

In response to the Sergeant instructing Grievant to clean the vehicle, Grievant initially stated words to the effect of “this is not acceptable.” When instructed again to clean the vehicle, Grievant commented with words to the effect of “No, I will assess the situation and determine what to do.” Grievant’s supervisor then advised her that she was being insubordinate. Before the January 9, 2018 incident, on two previous occasions, Sergeant had verbally counselled Grievant about her displaying insubordination. (Testimony of Sergeant; A Exh. 8; G Exh. 7).

The task given to Grievant by her supervisor on January 9, 2018, was not contrary to her work profile. The order to clean the vehicle was not demeaning. Eventually, Grievant cleaned the vehicle on January 9, 2018. The incident involved the manner in which Grievant did her job. Accordingly, Grievant’s actions affected her performance. (G Exh. 7 at 3; Testimony of Sergeant).

Grievant’s Witness 1 did not work the same shift as Grievant on January 9, 2018. Accordingly, this witness was unable to observe the January 9, 2018 incident regarding the order to clean a vehicle. (Testimony of Grievant’s Witness 1).

Termination

14. On January 12, 2018, The Agency issued Grievant a letter terminating Grievant’s employment with the Agency. The termination letter noted that Grievant was a probationary employee and did not have access to the grievance procedure. Hence, the Agency did not issue Grievant a Group Notice. (A Exh. 9; G Exh. 1).

On February 12, 2018, Grievant submitted her grievance to EEDR contending that she was discriminated against and wrongfully terminated. Upon reviewing the grievance, EEDR determined that the grievance was timely. Also, EEDR decided Grievant had access to the grievance procedure. At the time EEDR issued its ruling, it had not received the Agency’s Probationary Progress Review form provided to Grievant on June 27, 2017.⁶

Probationary Period Policy 1.45

15. Agency policy 1.45 defines an employee’s probationary period as an

[i]ntroductory period of employment that allows the employee and agency to determine if the employee is suited for the job. During the probationary period, employees may be terminated at the pleasure of the appointing authority, without access to the State Grievance Procedure. The normal probationary period is 12 months; however, it can be extended as described in this policy for up to 18 months for performance reasons, if an employee is absent for an extended period of time, or if an employee moves to another position within the last 6 months of the 12-month period.

⁶ EEDR Ruling Number 2018-4683

(A Exh. 2 at 1).

16. As referenced above, Policy 1.45 permits the probationary period to be extended. The applicable provision provides the following:

Probationary periods may be extended for up to 6 additional months for performance reasons. The reasons for the extensions must be documented on a Probationary Progress Review form (see Attachment A) or an alternate form designed by the agency. Reviewers must approve extensions of the probationary period for performance reasons.

Documentation used by the agency to support extending the probationary period must provide information to the employee about the performance deficiencies, expected level of performance and the period for which the probationary period is extended.

(A Exh. 2 at 2; Testimony of Deputy Chief).

Other Facts

17. “NIGGA” is a term used to refer to or address a black person.

See, Dictionary.com Unabridged based on the Random House Unabridged Dictionary, Random House, Inc. 2018

18. Also, *Dictionary.com Unabridged* provides the following usage alert regarding the term:

NIGGA is used mainly among African Americans, but also among other minorities and ethnicities, in a neutral or familiar way and as a friendly term of address. It is also common in rap music. **However, NIGGA is taken to be extremely offensive when used by outsiders. Many people consider this word to be equally as offensive as NIGGER. The words NIGGER and NIGGA are pronounced alike in certain dialects, and so it has been claimed that they are one and the same word.**

Id. (emphasis added).

19. Grievant received a certificate for employee of the quarter on April 27, 2017. (G Exh. 8 at 2)

Grievant received a certificate of appreciation from the Chief of Police on February 14, 2017 (G Exh. 8 at 3)

20. Grievant attended the City’s police academy and received state law enforcement certification. Hence, it was unnecessary for Grievant to attend the University’s police academy to obtain such certification. Grievant was a police officer with the City for three years prior to

becoming a University police officer. (Testimonies of Grievant and Sergeant; G Exh. 8 at 4).

21. *The Random House College Dictionary*, defines CONDUCT as “personal behavior; a way of acting; deportment.”

22. In addition, *The Random House College Dictionary*, defines PERFORMANCE as “the execution or accomplishment of work, feats, or acts...” It also defines the term as “the manner of performing or functioning.”

An act or certain behavior of an employee can involve both conduct and performance.

23. Statements from several former co-workers of Grievant who are African-American state that Grievant is not a racist. (G Exh. 3).

24. The evidence fails to show that the Agency discriminated against Grievant due to her race.

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900 et seq., (the Act) 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).

Even though the *Act* provides for a grievance procedure, it is inapplicable to an employee’s introductory period of employment which is considered the probationary period.⁷ Moreover, during this period, the employee may be terminated at the pleasure of the hiring Agency.⁸

In the case before this Hearing Officer, the Agency contends that when the employee was terminated, she was on probationary status and did not have access to the grievant procedure. Accordingly, the Agency did not issued Grievant a Group Notice to which she could grieve. The Grievant avers, she had completed her probationary period, and her termination was discriminatory and invalid. She contends the grievance procedure is applicable.

Below, the Hearing Officer examines these claims.

I. Analysis of Issue before the Hearing Officer

A. Is the Probation Extension Valid?

⁷ DHRM Policies and Procedures, Policy 1.45 at 1.

⁸ *Id.*

The Agency's policy addressing the probationary period of a new hire is **Policy 1.45**

This policy defines an employee's probationary period as an

[i]ntroductory period of employment that allows the employee and agency to determine if the employee is suited for the job. During the probationary period, employees may be terminated at the pleasure of the appointing authority, without access to the State Grievance Procedure. The normal probationary period is 12 months; however, it can be extended as described in this policy for up to 18 months for performance reasons, if an employee is absent for an extended period of time, or if an employee moves to another position within the last 6 months of the 12-month period.⁹

As referenced above, Policy 1.45 permits the probationary period to be extended if certain conditions are met. With respect to the extension, the policy provides the following:

Probationary periods may be extended for up to 6 additional months for performance reasons. The reasons for the extensions must be documented on a Probationary Progress Review form (see Attachment A) or an alternate form designed by the agency. Reviewers must approve extensions of the probationary period for performance reasons.

Documentation used by the agency to support extending the probationary period must provide information to the employee about the performance deficiencies, expected level of performance and the period for which the probationary period is extended.¹⁰

A review of the evidence indicates the Agency properly extended Grievant's probation.

Specifically, the evidence demonstrates that Grievant had been hired as a Law Enforcement Officer with the Agency. While in the work place on May 22, 2017, Grievant used the term "Nigga" in conversation with a co-worker, an African American. The co-worker was offended by Grievant's usage. Management became aware of the incident and then conducted an investigation. At its conclusion, Deputy Chief of the University's Police Department determined that Grievant had used disparaging racial comments in the workplace in violation of the University Police Department Code of Conduct, Rules and Regulations.

Among other consequences for Grievant's action, her probation was extended for 6 months. Deputy Chief notified Grievant of this decision in his letter dated May 31, 2017. Then on June 27, 2017, Grievant met with Deputy Chief and received the completed Probationary Progress Review form which explicitly stated the extension was for performance reasons.

Here, the Hearing Officer takes judicial notice that the term "Nigga" is often considered synonymous with the term "nigger." Further, both terms are extremely offensive and

⁹ Policy 1.45

¹⁰ *Id.*

inflammatory, especially to African-Americans.¹¹ The egregiousness of their usage is underscored by the fact that often when there is a legitimate need to reference the word(s), the term(s) is only referred to as “the ’N’ word.” This usage - by initial only - is an attempt to lessen the extreme offensive nature of the word(s). The Hearing Officer finds that inherent in Grievant’s performance duties as a University Police Officer is the requirement to act in a professional manner in the workplace. This entails displaying courtesy and respect and operating in a nondiscriminatory manner. By using the offensive term on May 22, 2017, Grievant acted in a manner that was disrespectful and nonprofessional. Accordingly, her performance at work was affected.¹²

Now, returning to the contents of the Probationary Progress Review form, the form explicitly noted that Grievant’s probationary period was extended until January 25, 2018, and that the extension was due to her performance. Moreover, the completed form documented the reasons for the extension. Reasons set forth indicated time was needed

- (i) to obtain an adequate assessment of Grievant’s performance as a police officer;
- (ii) to determine if Grievant is exemplary in obeying departmental policies and procedures and enforcing the laws, rules and regulations of the United States Constitution, the Commonwealth of Virginia, the City, the University, and the University Police Department;
- (iii) to have Grievant work as a police officer on independent patrol under observation, performing primary duties of a State sworn law enforcement officer; and
- (iv) to conduct an appropriate evaluation of Grievant’s performance.

After the form was reviewed by Grievant with Deputy Chief, she signed it. Grievant now claims she felt she had no choice but to sign it. Contrarily, the evidence clearly shows Grievant did not object to the form. Neither was she forced to sign it.

Considering the above, the Hearing Officer finds that the extended probationary period comports with Policy 1.45. Particularly, the extension was for no more than 6 months, the reasons for the extension were documented in the form as noted above. Of note, the hearing officer finds a reasonable person would conclude that at a minimum, the second listing above notifies Grievant that her probationary period was extended, in part, to assess whether Grievant is following departmental rules, policies, and procedures. Those departmental procedures implicate, among others, showing respect and promoting cohesiveness at work. Neither respect nor cohesiveness in the workplace is/was demonstrated by using disparaging racial comments.

In addition, on the completed form, the Agency provided information to the Grievant about her performance deficiencies. For example, the Agency noted that there was inadequate information to evaluate Grievant because, Department needed to observe Grievant working on

¹¹ See Findings of Fact ## 17 and 18 defining “NIGGA” and its usage.

¹² See *The Random House College Dictionary*, defining “PERFORMANCE” as “the manner of performing or functioning.”

independent patrol so that it could observe Grievant performing her primary duties. The level at which Grievant was expected to perform was also explicitly stated. To this point, the form states in pertinent part the following:

our expectation is that each officer will be **exemplary** in obeying departmental policies and procedures and enforcing the laws, rules and regulations of the United States Constitution, the Commonwealth of Virginia, the [City], [the University] and this department.

(emphasis added)

Also, the evidence clearly shows that Grievant endorsed the extension of her probationary period.

Accordingly, for all the reasons stated here, the Hearing Officer finds the Agency properly extended the probationary period.

B. Was the Termination Appropriate

Grievant contends her termination was improper. Under Policy 1.45, during the probationary period, an employee may be terminated at the pleasure of the appointing authority, without access to the State Grievance Procedure.¹³

The evidence shows that under the extension, Grievant's probationary period ended January 25, 2018. The Agency terminated Grievant on January 12, 2018. Accordingly, it acted consistent with applicable policy. Hence, the Hearing Officer finds the termination was appropriate.

Of note also, even though Policy 1.45 permitted the Agency to terminate Grievant at its pleasure, the Hearing Officer finds the Agency's decision was not arbitrary.

For one, even after Grievant was aware that her probation had been extended, she failed to attend a mandatory staff meeting during the extended probationary period. A meeting that the evidence shows she had been notified of several weeks in advance. The evidence shows that at 11:56 p.m. the night before the meeting, Grievant sent an email to her superior alleging a family emergency that precluded her from attending. A review of the facts fails to substantiate this claim. As presented there was an inoperative vehicle that needed to be fixed. Nothing presented indicated that immediate attention was needed to fix the vehicle such that it necessitated Grievant missing the meeting. Of note also, the evidence shows that all the relatives supposedly involved were adults in their thirties. Nothing was presented to show why they were incapable of handling the situation, especially since the disabled vehicle belonged to them and not Grievant.

In addition, the evidence shows while on extended probation, Grievant was using another entity's police forms instead of the comparable forms of the Department. Agency policy required officers to use the Department's forms. She knew better, but used incorrect forms

¹³ Policy 1.45 at 1.

anyway. Moreover, even evidence presented by a witness testifying on behalf of Grievant 1 supported the Agency's position.

Then on January 9, 2018, the evidence shows Grievant was ordered to clean a car. Even though Grievant eventually cleaned the vehicle, initially she was uncooperative and defiant. Grievant's supervisor deemed those initial actions as insubordinate. Twice before, he had counselled Grievant about such.

The Agency then determined Grievant was not suited for the job. She was then terminated prior to the expiration of her extended probationary period.

In all three cases, the Agency found Grievant's actions reflected on the performance of her job. After careful consideration, the Hearing Officer agrees. Grievant did not act and attend a meeting. She revolted before cleaning the car. Contrary to Agency policy and rules, she issued forms of another entity.

The hearing officer finds the Agency properly terminated Grievant during her extended probationary period. Of note, the Agency could have removed Grievant from employment simply at its pleasure. Although the Agency had the authority to do so, the evidence shows the Agency had sufficient reasons to find Grievant's performance deficient during the extended probationary period.

Further, the Hearing Officer has also considered Grievant's claim of reverse discrimination. Grievant alleges that African American employees also used the term "Nigga" in the work place. She also avers other patrol officers have used the City's forms while performing work for the Department. After examining evidence Grievant presented in support of these accusations, the Hearing Officer finds the evidence is insufficient to show reverse discrimination.

In addition, the Hearing Officer is cognizant of EEDR's Ruling 2018-4683. The Hearing Officer notes EEDR had not received (i) the Probationary Progress Review Form at the time the decision was issued and (ii) other evidence now of record in this case. In addition, the Hearing Officer is not required to agree with any factual findings of EEDR in its decision. Instead, the Hearing Officer must determine the facts based on the evidence admitted and testimony of witnesses presented under oath at the hearing.¹⁴ Further, in its decision, EEDR noted that the Agency was permitted to make any arguments it deemed appropriate during the Grievant's hearing regarding the appropriateness of the termination. The averred the extension was proper. After a thorough review of all the evidence, the Hearing Officer finds the evidence shows the probationary extension was proper.

II. Decision

For the reasons noted above, the Hearing Officer finds Grievant was on extended probation when she was terminated and the termination was proper.

¹⁴ *GPM* §4.3

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

ENTER NUNC PRO TUNC: September 30, 2018

ENTER: _____
Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate/Agency Representative
Grievant's Advocate
Grievant
EDR's Director of Hearings Program

October 12, 2018

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.