STATE OF NEW JERSEY

In the Matter of Betsy Ruggiero
Camden County, Department of Finance

CSC DKT. NO. 2019-1807
OAL DKT. NO. CSV 01778-19

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 2, 2020 NFA

The appeal of Betsy Ruggiero, Keyboarding Clerk 3, Camden County, Department of Finance, removal effective January 3, 2019, on charges, was heard by Administrative Law Judge Carl V. Buck, III (ALJ), who rendered his initial decision on July 29, 2020. Exceptions and replies to exceptions were filed on behalf of the appellant and the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and replies, the Civil Service Commission (Commission), at its meeting on September 2, 2020, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision. However, the Commission does not adopt the recommendation to modify the removal to a six-month suspension. Rather, the Commission imposes a 30 working day suspension.[1]

[1] Further, the Commission rejects the ALJ's recommendation regarding a "last chance agreement." The Commission does not have the authority to impose such a contractual term on the parties. Moreover, when reviewed by the Commission, penalties in disciplinary matters must be based on the incident in question, as well as aggravating or mitigating factors present and should not be **solely** based on any such agreement. In this regard, the Commission cannot determine a disciplinary penalty of a future action, which, in essence, would occur in this matter if such an agreement was sanctioned. It is further noted that, while the Commission is not strictly bound by the terms set forth in such agreements, a last chance agreement can be used by the Commission as a significant factor to be considered, along with the appellant's prior disciplinary history, when determining the appropriate penalty in an appeal. Last chance agreements are construed in favor of appointing authorities because to do otherwise would discourage their use by making their terms meaningless. *See Watson v. City of East Orange*, 175 *N.J.* 442 (2003) (The Supreme Court found an employee's

The facts of this matter need not be repeated as they are clearly laid out in the initial decision. This is a relatively clear-cut case where the appellant has been found guilty of conduct unbecoming a public employee and other sufficient cause for admittedly using a racially inappropriate term in the workplace.

In her voluminous exceptions and response, the appellant initially contends that she should not have been immediately suspended at the time of the incident. She further contends that the term did not adversely impact the workplace and was not initially reported by co-workers. She also argues that she did not violate the County's affirmative action policy. Finally, she contends that the proposed reduction in penalty of a six-month suspension is not in line with the tenets of progressive discipline.

In its exceptions and response, the appointing authority argues that the ALJ's proposed reduction from removal to a six-month suspension is not warranted as the appellant's misconduct was egregious and thus, progressive discipline need not be followed. In this regard, it argues that the utterance of such a racially offensive term cannot be tolerated and is worthy of removal from employment.

In this matter, after its *de novo* review of the entire record, the Commission agrees with the ALJ's determinations regarding the charges. It is clear that the appellant uttered the offensive term in the workplace and that such conduct cannot be countenanced. Regarding the exceptions filed by the appellant, the Commission notes that most do not merit discussion as they do not persuasively demonstrate that the ALJ's determinations were arbitrary, capricious or not based on the credible evidence in the record.[2] However, the Commission is compelled to discuss the penalty imposed in this matter.

In determining the proper penalty, the Commission's review is also *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the

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termination was warranted when that employee did not perform in compliance with a last chance agreement as contemplated by the parties. The Court added that a contrary conclusion would likely chill employers from entering into such agreements to the detriment of future employees).

[2] However, the Commission does note that the argument regarding the immediate suspension should have been made to it at the time of the suspension as a petition for interim relief under *N.J.A.C.* 4A:2-1.2. No such petition was received by the Commission. Regardless, even if the suspension was not warranted, which in this matter does not appear to be the case given the potential incendiary nature of such language, any procedural deficiencies at the departmental level are generally deemed cured by the granting of a *de novo* hearing at the Office of Administrative Law. *See Ensslin v. Township of North Bergen*, 275 *N.J. Super.* 352, 361 (App. Div. 1994), *cert. denied*, 142 *N.J.* 446 (1995); *In re Darcy*, 114 *N.J. Super.* 454 (App. Div. 1971). Moreover, the Commission has found in this matter that the appellant's conduct was worthy of major discipline.

Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). However, where an infraction has not been found to be egregious, the tenets of progressive discipline are generally followed. *See In the Matter of Anthony Stallworth,* 208 *N.J.* 182 (2011).

In this case, while the appellant's infraction is serious, the Commission does not find it worthy of the penalty imposed by the appointing authority, nor does it find that the reduction in penalty recommended by the ALJ is supported. Rather, the Commission finds several factors that warrant a further reduction of the penalty. The facts of this matter demonstrate that, while the appellant did utilize the offensive term, it was in the context of a personal telephone conversation and not directed at any employee, but was rather overheard. Certainly, utilizing the term was inappropriate in the workplace, but the severity of its usage is mitigated by the fact that it was not directed at anyone in the workplace. Further, the appellant was a 15-year employee at the time of the incident. Her prior disciplinary history only consisted of an official written reprimand in 2016. While that discipline was for using inappropriate language in the workplace, it did not include the usage of any racially derogatory language. Of course, the Commission finds that the usage of any inappropriate language in the workplace is unacceptable, but when looking at the current matter in the context of utilizing progressive discipline, the fact that this is the first time the appellant has been found to have used racially offensive language in the workplace is an important distinction. Moreover, the prior discipline only carried a minor penalty and her current infraction does not warrant, under the tenets of progressive discipline, an increase in penalty to removal or a six-month suspension. Accordingly, based on the above, the Commission finds that the appropriate penalty in this matter is a 30 working day suspension. In making this determination, the Commission is in no way minimizing the appellant's misconduct, and cautions her that future similar infractions may subject her to more severe disciplinary penalties, up to and including removal. Further, this determination is not to be interpreted to mean that the usage of racially inappropriate language in the workplace would not warrant a penalty more severe than administered in this matter. As noted above, the calculation of an appropriate penalty must take many factors into account, including the severity and context of the misconduct, and the employee's prior history.

As the removal has been modified, the appellant is entitled to mitigated back pay, seniority and benefits pursuant to *N.J.A.C.* 4A:2-2.10 from 30 working days

after her initial date of separation to the date of her actual reinstatement.[3] *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield,* 282 N.J. *Super.* 121,128 (App. Div. 1995): *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, the charges were sustained and major discipline has been imposed. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies the removal to a 30 working day suspension. The appellant is entitled to mitigated back pay, seniority and benefits pursuant to *N.J.A.C.* 4A:2-2.10 from 30 working days after her initial date of separation to the date of her actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as per *N.J.A.C.* 4A:2-2.10. An affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative

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[3] The initial date of separation is defined as the first day the appellant was out of work without pay based on her misconduct.

determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2nd DAY OF SEPTEMER, 2020

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 01778-19
AGENCY DKT. NO. 2019-1807

IN THE MATTER OF
BETSY RUGGIERO, CAMDEN COUNTY,
DEPARTMENT OF FINANCE.[1]

James Katz, Esq., for appellant, Betsy Ruggiero (Spear Wilderman, P.C., attorneys)

Catherine Binowski, Assistant County Counsel, for respondent, Camden County, Department of Finance (Christopher A. Orlando, County Counsel, attorney)

Record Closed: November 18, 2019 Decided: July 29, 2020

BEFORE **CARL V. BUCK III,** ALJ:

STATEMENT OF THE CASE

Appellant Betsy Ruggiero (Ruggiero), an employee of Respondent Camden County Department of Finance, Purchasing Department (Camden) appeals her removal by respondent Camden County, on charges of conduct unbecoming a public employee, discrimination that affects Equal Employment Opportunity, other sufficient cause and violation of the Camden County Affirmative Action Policy, Policy 2.0. These charges are detailed in a Preliminary Notice of Disciplinary Action (PNDA) dated December 4, 2018 (R-9). Following a departmental hearing, the charges were sustained by a Final Notice of Disciplinary Action (FNDA) dated January 3, 2019

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[1] The parties stated that although this is the caption of the case transmitted to the Office of Administrative Law, the respondent is actually "Camden County, Purchasing Department." For purposes of this Initial Decision, the caption as transmitted shall be used.

(R-8). A Notice of Appeal was filed on January 7, 2019 and the Civil Service Commission (CSC) transmitted the matter to the Office of Administrative Law (OAL), where it was filed on February 1, 2019 as a contested case.

PROCEDURAL HISTORY

The hearing was held on October 2, 2019 and the record remained open for closing briefs. Subsequent to the hearing the appellant raised an issue regarding a respondent submission which issue was addressed in a telephone conference on November 14, 2019. The record closed on November 18, 2019. Extensions were requested for issuance of this initial decision and were granted. The impact of COVID-19 closures within the State of New Jersey further delayed issuance of this initial decision.

The issue is whether Ruggiero engaged in conduct per the charges detailed above and whether Camden's imposition of a penalty of removal was warranted.

FACTUAL DISCUSSION

Appellant was employed as a senior clerk typist with the Camden County Purchasing Department. She had been with that department for five years and with Camden County in other positions since 2003. In or about October or November 2018, appellant was in her office on a personal telephone call using her cellular telephone. She was called by Mary DeFoney (DeFoney) into DeFoney's office to assist her in showing another employee, Nancy Jeannette, how to do a change order. As the appellant was walking into DeFoney's office she was finishing the call on her cellular telephone and said the word "Nigga." Jeanette turned and said to appellant, "That wasn't very nice." Appellant continued to approach DeFoney to see why she had been called into the office. Appellant then demonstrated how to do a change order.

A second, alleged, use of the word by appellant was testified to. This use allegedly occurred a month or so before the incident in October or November 2018. No written documentation of this incident was presented.

The Preliminary Notice of Disciplinary Action (PNDA) and the Final Notice of Disciplinary Action (FNDA) described the underlying incident as follows:

> The County was informed that you used the work [sic] 'Nigga' during work and in the office on more than one occasion.
>
> [R-8, R-9.]

Respondent's Policy #2.0 promulgated by the Human Resources Department details, inter alia, that:

> It is the policy of the County of Camden to ensure equal employment opportunity to all citizens, regardless of race, creed, color, national origin, nationality, ancestry, age, sex/gender, sexual or at section all, orientation, religious, marital or domestic partnership or civil union status, disability, liability for military service, a typical cellular or blood traits, or genetic information (including the refusal to submit to genetic testing), liability for services in the Armed Forces of the United States, or mental or physical disability including AIDS, HIV and HIV-related illnesses, family leave status, subject only to conditions and limitations applicable alike to all persons. To this end, the County shall appoint an affirmative action/equal employment opportunity officer to carry out the policy and set forth herein.
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> [R-3.]

The policy further states in section E. SANCTIONS that "Employees determined to have committed any offenses outlined in this AA/EEO policy will be subject to disciplinary action up to and including termination. The nature and severity of the offense will determine the severity of the disciplinary action." The policy does not provide details of disciplinary action, examples of offenses and resultant categorization of discipline, or other examples or documentation of violation categories.

I **FIND** as **FACT** the above undisputed evidence.

Testimony for Respondent

Anna Marie Wright (Wright) has been working in the Purchasing Department for fifteen years, and has been employed with the County for twenty-five years. (Tr. p. 13, lines 17-25 through p. 14, lines 1-4). Wright is the Purchasing Agent for the County and is the supervisor for all the Purchasing Department employees. (Tr. p. 13, lines 20-21, and p. 14, lines 5-8.) She hired Ruggiero as an employee of the Purchasing Department in 2013, and as part of a shared services agreement, Ms. Ruggiero would work at the Camden County Technical School (Technical School) four days a week, and work in the County Purchasing Department one day a week. (Tr. p. 14, lines 12-25, and Tr. p. 15, lines 14-15.) While Ruggiero was working at the Technical School she was an employee of the County Purchasing Department, she was on the Purchasing Department's payroll and Wright was appellant's supervisor. (Tr. p. 15, lines 13-16; Tr. p. 18, lines 13-14; Tr. p. 19, lines 1-5.)

In January 2016, Ruggiero was issued a written reprimand from the Technical School's Business Administrator for using inappropriate language to a co-worker. (Exhibit R-7.) As Ruggiero's supervisor, Wright was notified of the incident, was copied on and received the written reprimand. (Exhibit R-7; Tr. p. 15, lines 17-25 through p. 16, lines 1-18.) Ruggiero worked at the Technical School four days a week from 2013 until April 2016. (Tr. p. 15, lines 1-4.) In April 2016, the Purchasing Department had a retirement and Wright gave Ruggiero the choice to work in the Camden Purchasing Department permanently or to stay working at the Technical School. Ruggiero chose to work in Camden Purchasing Department permanently. (Tr. p. 15, lines 3-7.)

On November 30, 2018, Wright was informed by the Purchasing Department employee Nancy Jeannette that Ruggiero used the "N" word in the workplace. (Tr. p. 20, lines 11-25 through p. 21, lines 1-15.) Wright informed her supervisor, Mr. McPeak, and the Director of Human Resources. (Tr. p. 21, lines 18-23.) Ms. Jeannette and Mary DeFoney, another Purchasing Department employee, were instructed to write a statement and the statements were provided to the Human Resources Director. (Tr. p. 21, lines 21-25 through p. 22, lines 1-4.)

Wright testified that the County Purchasing Department is open to the public and to County employees. (Tr. p. 22, lines 19-25 through p. 23, lines 1-9.) Visitors are generally coming to the Purchasing Department unannounced, without an appointment, and without the Purchasing Department employees knowing that they are coming. (Tr. p. 23, lines 10-20.) There is no employee at the front door to the Purchasing Department, but there is a bell for visitors to ring to alert employees that someone is there. (Tr. p. 23, lines 21-25 through p. 24, lines 1-4.) Wright testified that use of the "N" word in the office is offensive, not appropriate and not acceptable. (Tr. p. 22, lines 5-12.) She also testified that there is no situation nor any context where the use of the "N" word is ever permissible in the workplace. (Tr. p. 24, lines 5-8.)

On cross examination Wright said she had learned of the incident from speaking with Jeannette (who had had a problem with appellant in the office a few weeks before).

Nancy Jeannette (Jeannette) testified that the first time she heard Ruggiero use the "N" word was in the conference room. (Tr. p. 41, lines 19-20.) Jeannette said that she was in the conference room, Ruggiero was on the phone and came into the conference room, and Jeannette heard Ruggiero say the "N" word in a conversation Ruggiero was having on the phone. (Tr. p. 41, lines 19-25.) Jeanette said that she was not sure if she heard her (Ruggiero) correctly so she did not say anything to Ruggiero. (Tr. p. 42, lines 1-2.) About a month or so later, Jeannette and Nancy DeFoney (DeFoney) were in DeFoney's office, DeFoney was training Jeannette and Ruggiero came in DeFoney's office and started talking to Jeannette and DeFoney about somebody or something and Ruggiero referred to someone as using the "N" word. (Tr. p. 42, lines 2-9.) Jeannette said that Ruggiero said the "N" word to them and that she (Jeannette) told Ruggiero not to use that word. (Tr. p. 42, lines 10-13.) Jeannette said that when Ruggiero was leaving DeFoney's office, Ruggiero said something to the effect "That's how I speak" or "Nobody's going to tell me what to say." (Tr. p. 42, lines 15-19.)

Jeannette testified that on November 30, 2018, she informed her Supervisor Ms. Wright, of Ruggiero's use of the "N" word, and that on the same date she (Jeannette) wrote a statement identified as Exhibit R-1. (Tr. p. 38, lines 21-25 through p. 39, line 1; Tr. p. 40, lines 8-25 through p.

41, lines 1-8; and Exhibit R-1.) Jeanette testified that Ruggiero's use of the "N" word was derogatory and that she was offended by her use of the "N" word. (Tr. p. 43, lines 16-21.)

On cross examination, Jeannette was asked about her testimony at the departmental hearing below. The line of questioning was objected to by Ms. Binowski. The parties briefed the issue and for purposes of this initial decision, I will only take into consideration that Jeannette testified at the prior hearing; not to what she testified.

Nancy DeFoney (DeFoney) testified she was training Jeannette and they were in DeFoney's office. Ruggiero came in her office and was talking, Ruggiero said something about the "N" word. (Tr. p. 73, lines 3-8.) DeFoney told Ruggiero that she should not use that kind of language, that it was inappropriate and offensive. (Tr. p. 73, lines 17-20.) DeFoney said that when Ruggiero walked out of her office, Ruggiero said that she can speak the way she wanted to speak. (Tr. p. 73, lines 21-25 through p. 74, line 1.) DeFoney also testified that prior to the incident in her office, she was in the conference room and Ruggiero was speaking to someone in her own office and she heard Ruggiero say the "N" word. (Tr. p. 74, lines 2-15.) DeFoney stated that she has heard Ruggiero say the "N" word on other occasions. (Tr. p. 74, lines 22-25 through p. 75, lines 1-5.) DeFoney also heard Ruggiero say the "N" word after the incident in DeFoney's office when Ruggiero used the "N" word and was told not to use that word. (Tr. p. 75, lines 6-19.) DeFoney said that Ruggiero was in her own office and DeFoney could hear Ruggiero speaking and she heard Ruggiero say the "N" word. (Tr. p. 75, lines 6-11.) DeFoney testified that Ruggiero's use of the "N" word was derogatory and that she was offended by Ruggiero's use of the "N" word. (Tr. p. 75, lines 20-25.) DeFoney also stated that there is no circumstance or context where the use of the "N" word is permissible in the workplace. (Tr. p. 91, lines 11-14.) DeFoney wrote a statement on December 3, 2018 concerning Ruggiero's use of the "N" word and she identified her statement as Exhibit R-2. (Tr. p. 72, lines 7-19.)

On cross examination the issue of prior testimony again arose in the context of what DeFoney stated during the departmental hearing. The result of which is that this matter is heard de novo, the departmental testimony had no bearing on DeFoney's testimony at the time of this hearing.

Emeshe Arzón, Esquire (Arzón), has been the Human Resources Director for the County for almost two years. Prior to that, she worked for Camden County Counsel's Office since January of 2015. (Tr. p. 92, lines 20-25 through p. 93, lines 1-7.) She previously worked for Cherry Hill Township as the Associate Solicitor for almost ten years. (Tr. p. 93, lines 8-14.) As the Director of Human Resources she is involved in discipline, and on November 30, 2018 she was informed by Wright and Wright's supervisor that Ruggiero used the "N" word in the workplace. (Tr. p. 93, lines 15-25 through Tr. p. 94, lines 1-2.) Arzón stated that after being informed, both Jeannette and DeFoney were asked to write a statement, and that the statements were provided to Human Resources. (Tr. p. 94, lines 3-25.) Arzón testified that use of the "N" word is offensive in and of itself and it is not appropriate or acceptable in the workplace. (Tr. p. 95, lines 6-11 and Tr. p. 115, lines 4-9.) She stated that there is no circumstance or context where the use of the "N" word is permitted in the workplace. (Tr. p. 95 lines 12-15.)

Arzón testified that the County has a zero tolerance for the use of the "N" word and that the use of the "N" word has been consistently a terminable offense. (Tr. p. 95, lines 26-29 and Tr. p. 117, lines 7-8.) She further stated that the County's Affirmative Action/Equal Employment Opportunity Policy 2.0 addresses discriminatory activity and it is the County's position that Ms. Ruggiero's use of the "N" word falls under the prohibited activity. (Tr. p. 95, lines 20-25 through p. 96, line 1-9; Exhibit R-3.) She also testified that the County has a Mandatory Training Policy 312 that requires all employees to complete training sessions on various topics annually and that Ms. Ruggiero completed the required training. (Tr. p. 96, lines 10-25 through p. 97, lines 1-10; Exhibits R-4 and Exhibit R-5.)

Opposing counsel objected to the purpose for which Exhibit R-5 was being introduced and the lack of supporting documentation for what the required training consisted. The Court allowed Respondent to submit additional documentation regarding the training courses (Tr. p. 131, lines 5-12), which were subsequently submitted. (Training courses taken by Ruggiero include Diversity in the Workplace on May 20, 2014, April 7, 2015, January 6, 2016, and January 10, 2017, and Respect in the Workplace Test on April 8, 2015 and January 6, 2016.)

Ruggiero also successfully completed the training sessions on the Camden County Policies and Procedures annually, which includes certifying that she read and understands the policies, and her training certificates are attached as Exhibit R-6. (Tr. p. 97, lines 23-25 and p. 99, lines 1-3.)

Arzón testified that in January 2016, Ruggiero received a write-up for using inappropriate language in the workplace and that subsequent to the write-up Ms. Ruggiero used inappropriate language in the workplace when she used the "N" word. (Tr. p. 101, lines 10-22 and Tr. p. 103, lines 14-25 through p. 104, lines 1-3.)

On cross-examination, Arzón was questioned on the County policy and its references to racially derogatory terms.

Testimony for Appellant

Kevin McGahey (McGahey), Purchasing Supervisor for the Gloucester Township Board of Education, and previously the Director of Materials Management for the Camden County Health Services Center, testified that Ruggiero worked for him for approximately ten years. (Tr. p. 135, lines 15-18; Tr. p. 136, lines 21-25 through p. 137, lines 1-3.)

On cross examination, McGahey testified that he thinks the use of the "N" word is inappropriate and offensive. (Tr. p. 139 lines, 15-19.) When asked if he would agree that the use of the "N" word is not acceptable in the workplace, Mr. McGahey said "absolutely." (Tr. p. 139, lines 20-22.) On re-cross-examination, McGahey was specifically asked "is there any circumstance or context where the use of the 'N' word is permissible in the workplace?" and he said "No. No. It's inappropriate for the workplace." (Tr. p. 141, lines 8-13.)

Rochelle Aquaah Harrison (Harrison), is an employee with PNC Bank for almost twenty years. (Tr. p. 154, lines 1-6.) Harrison has known Ruggiero for around twenty years. (Tr. p. 154, lines 16-18.)

On cross-examination Harrison was asked if she thinks use of the "N" word in the workplace is appropriate. Harrison said that she thinks it depends on the workplace. (Tr. p. 165, lines 18–25 through Tr. p. 166, line 1.) The Court stated that the workplace in this instance is a professional office setting, a government building, a county building, and a purchasing office in which members of the public and government employees go in and out. (Tr. p. 166, lines 16-22.) Harrison was then asked again on cross-examination if she thinks that the use of the "N" word in the workplace as defined by the Court is appropriate. (Tr. p. 169, lines 17-22.) After objection, the Court overruled the objection and instructed that Harrison can ask for clarification or if she does not know, she can say she does not know. (Tr. p. 169, lines 24-25 through p. 171, lines 1-23.) Harrison responded "I'm going to say I don't know." Harrison was subsequently asked if use of the "N" word is acceptable at PNC Bank, which is a professional office setting, she stated that they do not use it where she works. (Tr. p. 172, lines 1-3.)

Appellant Betsey Ruggiero (Ruggiero) testified that she has been employed in the County Purchasing Department for five years and her position is Senior Clerk Typist. (Tr. p. 173, lines 10-19.) Ruggiero admitted to saying the "N" word in the workplace, and initially stated that she made the comment when she was walking into Ms. DeFoney's office. Ruggiero said "I was in my office. Mary had called me over to assist her on how to show Nancy how to do something. So as I'm walking into her office, I'm hanging up my phone, and I had made the comment." (Tr. p. 175, lines 1-5.) Then Ruggiero stated that she said the "N" word when she was in her own office and then she walked into Ms. DeFoney's office. Appellant's counsel asked her "when you made the comment, were you in a private office?" and Ruggiero responded with "I was in my office." Ruggiero testified that then she walked into Ms. DeFoney's office. (Tr. p. 175, lines 20-25.) Ms. Ruggiero confirmed that after she said the "N" word, Jeannette asked her to refrain from using the "N" word. (Tr. p. 177, lines 15-18.) On cross-examination, Ruggiero admitted that use of the "N" word in the workplace is inappropriate and not acceptable. (Tr. p. 186, lines 12-17.) Ruggiero also stated that she thinks that the use of any type of derogatory language is inappropriate in the workplace. (Tr. p. 190, lines 13-15.)

Appellant acknowledged that she completed the Camden County Policies and Procedures training and that she read and understands the policies and procedures. Ruggiero said that as

part of the policies and procedures training session, employees are required to certify that they read and understand the policies and procedures. Appellant indicated that she certified that she read and understands the policies and procedures and she acknowledged her certificates marked as Exhibit R-6. (Tr. p. 186, lines 24-25 through p. 88, lines 1-12.) Ruggiero also successfully completed several other training sessions on various topics annually as required. (Exhibit R-5.)

Ms. Ruggiero was issued a written reprimand in January 2016 from the Camden County Technical School. At that time, Ms. Ruggiero was an employee in the County Purchasing Department and the County Purchasing Agent, Wright, was her supervisor. (Tr. p. 184, lines 14-24.) Appellant testified that she had been employed in the County Purchasing Department for five years. (Tr. p. 173, lines 17-19.) The written reprimand was for using inappropriate language to a co-worker and specifically warned Ruggiero that her conduct was not acceptable, and if it continued, may result in future discipline. (Exhibit R-7.) Ruggiero's supervisor, Ms. Wright, was copied on the written reprimand and a copy was placed in appellant's personnel file. (Exhibit R-7.)

Summary of Testimony

Here appellant admits using the word in question during the initial encounter with Mary DeFoney and Nancy Jeanette. During direct examination she stated that she did not intend to offend anybody in using the word. Further, she denied making the statement, "Nobody is going to tell me what to say." Appellant also denies using the word prior to this incident as testified to by Jeanette or DeFoney.

Based upon the testimony and exhibits, as well as the opportunity to observe the appearance and demeanor of the witnesses, I further **FIND AS FACT:**

1. Appellant began her employment with Camden County in June 2013. From 2013 to 2016 she worked for the Camden County Technical School as part of a shared services agreement. In 2016 she was transferred to the Camden County purchasing department.

2. While at the technical school, appellant had received a memorandum from Scott Kipers, Business Administrator, on January 19, 2016, titled "Inappropriate Staff Conduct," the subject being discipline due to inappropriate comments. The discipline was detailed in that memorandum and stated:

> It was reported on January 19, 10216 [sic], that you used inappropriate language to a co-worker, which was also witnessed by another school employee. After the co-worker told you that her supervisor had stated that she return a requisition back to you that you had given to her on January 14, 2016, you stated the following: 'Are you fucking kidding me? I don't come up here to get fucking aggravated. What does he think I am, his fucking secretary? If this order doesn't get put in, it's not my fucking problem. He's a fucking asshole.'

3. The result of that action being a statement in the memorandum of January 16, 2016, "Your conduct toward another school employee is unacceptable. If this conduct continues, it may result in future disciplinary measures." (R-7.);

4. No discipline was imposed as a result of the letter of January 16, 2016.

5. Appellant was required complete tests on policies and procedures related to requirements of the human resources department. Such courses included (with result scores noted), but were not limited to:

   a. "Ethics in the Workplace" taken on January 10, 2017, with a result score of 92 percent;

   b. "Ethics in the Workplace" taken on January 6, 2016, with a result score of 92 percent;

   c. "Ethics in the Workplace" taken on May 20, 2015, with a result score of 75 percent;

   d. "Ethics in the Workplace" taken on May 20, 2014, with a result score of 92 percent;

   e. "Respect appellant was served in the Workplace" taken on March 27, 2018, with a result score of 92 percent;

f. "Respect in the Workplace" taken on March 27, 2018, with a result score of 92 percent;

g. "Respect in the Workplace" taken on January 6, 2016, with a result score of 92 percent;

h. "Respect in the Workplace" taken on April 8, 2015, with a result score of 92 percent;

i. "Respect in the Workplace" taken on May 20, 2014, with a result score of 92 percent.

(R-6.)

6. Appellant was served with a PNDA on December 4, 2018 (R-9) and FNDA on January 3, 2019. (R-8.)

7. Appellant filed a timely appeal and the CSC transmitted the contested case to the OAL where it was filed on February 1, 2019.

LEGAL ANALYSIS AND CONCLUSIONS

Disciplinary Charges

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, N.J.S.A. 11A:2-6, including conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). In this instance other sufficient cause being discrimination that affects equal employment opportunity and violation of the County Affirmative Action Policy, Policy #2.0. Major discipline for such infractions may include removal, disciplinary demotion, or suspension or fine for more than five working days at any one time. N.J.A.C. 4A:2-2.2(a). On appeal from the imposition of such discipline, the appointing authority has the burden of proving justification for the action, N.J.S.A. 11A:2-21, N.J.A.C. 4A:2-1.4(a), and the employee's guilt by a preponderance of the competent, credible evidence. Atkinson

v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Preponderance may be described as the greater weight of the credible evidence. State v. Lewis, 67 N.J. 47 (1975).

"Conduct unbecoming a public employee" encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for government employees and confidence in the operation of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Id. at 555 (citation omitted). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (citation omitted). Using profanity towards another employee has been found to be conduct unbecoming a public employee. In re Garcia, Hudson Cnty., Dep't of Family Servs., CSV 10202-12, Final Decision (May 21, 2014), <http://njlaw.rutgers.edu/collections/oal/>.

Here, appellant engaged in utterance of the word "Nigga."

The word not being used in the context of an epithet. The word not being used in the context of a threat. The word not being used as a derogatory statement against one of appellant's coworkers nor any other individual in appellant's place of business. However, it is a word that is not one to be used in the ordinary course of business in a governmental/business office setting. The word was said on at least one occasion. Although appellant was not disciplined for the alleged original use of the word, there is a disciplinary charge from January 2016 evidencing the use of other language not acceptable in a government/business setting.

> Are you fucking kidding me? I don't come up here to get fucking aggravated. What does he think I am, his fucking secretary? If this order doesn't get put in, it's not my fucking problem. He's a fucking asshole.

Appellant received no discipline other than a warning as contained in that memorandum.

As the matter at hand, the use of the word "Nigga" may be seen as offensive or as a trigger to other employees, specifically those individuals who overheard appellant, accidentally or intentionally, use that word. The witnesses testified as such, stating that there is no place for the use of that word in a business or office setting. As such, the use of the word "Nigga" had the clear potential to adversely affect the morale and/or efficiency of Camden's operations. I therefore **CONCLUDE** that Camden has proved by a preponderance of the credible evidence that appellant did engage in conduct unbecoming a public employee.

I further **CONCLUDE** that Camden has proved that Appellant Ruggiero's behavior constitutes other sufficient cause, namely, a violation of Camden County Affirmative Action Policy, Policy 2.0.

PENALTY

In West New York v. Bock, 38 N.J. 500, 522 (1962), our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, 38 N.J. 523–24.

As the Supreme Court explained in In re Herrmann, 192 N.J. at 30, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct. . . .

> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions. . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Hermann, 192 N.J. at 30–33 (citations omitted).]

In the matter of In re Stallworth, 208 N.J. 182 (2011), a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the administrative law judge imposed removal. The Commission modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." In re Stallworth, 208 N.J. at 193. Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the Court modified and affirmed (as modified) the lower court and remanded the matter to the CSC for reconsideration.

Here, I **FIND** as **FACT** that Ruggiero had one prior disciplinary action in January 2016 comprised of a written reprimand. This was issued by Scott Kipers, at the Camden County Technical School where she was assigned.

In applying progressive discipline, I weigh appellant's time with Camden with one instance of discipline—albeit that that discipline carried no penalty beyond the warning contained in the memorandum. I further weigh the fact that there was no testimony to show that appellant used the word against a supervisor, against a coworker, against any individual in the business setting. She did nonetheless use the word at her place of employment which is a

government/business office. It is noteworthy, given the allegations, that no charges were brought as a result of the alleged first instance of use of the word. Nor was she subject to disciplinary charges for the incident as detailed in the memorandum of January 2016. Further, the Court does not find appellant's argument that utilization of the word is a common and accepted in appellant's social strata to be persuasive. Considering appellant's time spent working for the County, completion of many courses dealing with issues of respect in the workplace, and presentation in a government/business setting for a period of several years, there can be no excuse nor any equivocation about use of the word "Nigga" or any variation while in a government office - whether appellant thought it was a private utterance or not, particularly in this case a place of business open not only to other employees but also to the public.

Accordingly, I **CONCLUDE** that a six-month suspension without pay is the appropriate penalty in this particular case, with an acknowledgement that a return to service should constitute a last chance for appellant for any major infraction. I further note that should a greater time of suspension been available to the Court, that a suspension period greater than six months would have been imposed to acknowledge the severity and gravity of the use of such an offensive word and term. A term exceeding six months, but short of termination, is not available. Therefore the Court is constrained while acknowledging the severity and gravity of the use of such an offensive word and term to impose a period of a six-month suspension even though arguably a greater time of suspension is justifiable. Acknowledging this, I also impose a last chance agreement be entered into by appellant and that appellant be given adequate training in the area of business and societal norms in the workplace.

DECISION AND ORDER

Based upon the foregoing, respondent justifiably charged appellant with conduct unbecoming a public employee, and other sufficient cause; however, for the reasons stated above, the penalty should be modified as indicated. Accordingly, I **ORDER** that the charges of conduct unbecoming a public employee, and other sufficient cause are hereby **AFFIRMED,** but the penalty is **MODIFIED** to a six-month suspension without pay, together with imposition of a

last chance agreement, and the requirement of training in the area of business and societal norms in the workplace.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 29, 2020
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

CVB/nd

APPENDIX

WITNESSES

For Appellant:

Rochelle Aquaah Harrison

Kevin McGahey

Betsey Ruggiero

For Respondent:

Emeshe Arzón, Esq.

Nancy DeFoney

Nancy Jeannette

Anna Marie Wright

EXHIBITS

For Appellant:

A-1 Agreement Between Camden County Board of Chosen Freeholders and CWA Local 1014 (Large Unit), January 1, 2013 to December 31, 2018

A-2 Diversity in the Workplace Test Results

For Respondent:

R-1 Email from Emeshe Arzón to Molly Brown, Fwd: Statement from Nancy Jeannette, dated December 3, 2018

R-2 Email from Emeshe Arzón to Molly Brown, FW: Document 1, from Mary DeFoney, dated December 3, 2018

R-3 Camden County Policy and Procedure, Department: Human Resources, Affirmative Action/Equal Employment Opportunity, Policy Number: 2.0, Effective Date: February 18, 2016, Superscedes [sic] Policy Dated: March 20, 2003

R-4 Camden County Policy and Procedure, Department: Administration, Mandatory Training Sessions, Policy Number 312, Effective Date: June 17, 2011

R-5 Exams Taken by Ruggiero, Betsy, esafety.com, dated December 17, 2018

R-6 Certificates of Training

R-7 Memo from Scott Kipers, Business Administrator, to Betsy Ruggiero, Purchasing Assistant, Re: Inappropriate Staff Conduct (Violation of District Policy 4351), dated January 19, 2016,

R-8 Final Notice of Disciplinary Action, dated January 3, 2019

R-9 Preliminary Notice of Disciplinary Action, dated December 4, 2018