SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1498-20

IN THE MATTER OF
BETSY RUGGIERO,
CAMDEN COUNTY.

Argued March 28, 2022 – Decided June 8, 2022

Before Judges Firko and Petrillo.

On appeal from the New Jersey Civil Service Commission, Docket Nos. 2019-1807, 2021-323 and 2021-807.

Michael J. Miles argued the cause for appellant Camden County Purchasing Department (Brown & Connery, LLP, attorneys; William M. Tambussi, Andrew S. Brown, and Michael J. Miles, on the briefs).

James Katz argued the cause for respondent Betsy Ruggiero (Spear Wilderman, PC, attorneys; James Katz, on the brief).

Matthew J. Platkin, Acting Attorney General, attorney for respondent Civil Service Commission (Pamela N. Ullman, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

Camden County (the County) appeals from three orders of the New Jersey Civil Service Commission (CSC), which reduced a disciplinary sanction for a county employee Betsy Ruggiero to thirty working-days, ordered her reinstatement, and awarded her back pay.[1] Ruggiero was accused of workplace misconduct and the County sought to terminate her. That sanction was first rejected by a hearing officer and then an Administrative Law Judge (ALJ). The ALJ found a six-month suspension, as had been recommended by the hearing officer, to be a more appropriate penalty. Both parties filed exceptions to the ALJ's findings leading to the decisions by the CSC. For the reasons explained, we affirm the CSC in all respects.

I.

The following facts are derived from the record. In October 2018, on a date that no one can recall, Ruggiero, a self-identified woman of color and a fifteen-year employee of the Camden County Purchasing Department, was overheard by Nancy Jeanette and Mary DeFony, two white colleagues, to have

[1] The decisions of the CSC were issued on September 2, 2020, October 23, 2020, and January 22, 2021, and specifically found that removing Ruggiero was not justified, modified discipline to a thirty working-day suspension, and awarded reinstatement and back-pay and front-pay damages.

said the word "nigga."[2] The precise circumstances of the utterance could not be recalled by the witnesses, but they were clear that Ruggiero's use of the word was not directed at either of them or, in fact, to any person.

Immediately after hearing Ruggiero use the word, Jeanette told her that she would appreciate it if Ruggiero would not use that word in her presence. Ruggiero does not dispute that this happened. Whether or not Ruggiero was defiant in response or more muted is disputed, but her defiance, if any, was apparently limited to saying something along the lines of "this is how I talk." This otherwise unmemorable interaction between the three co-workers ended shortly after it had begun.

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[2] The inclusion of this word, repeatedly, in this opinion while understandably jarring to read, is necessary to provide context for the reader and an accurate recitation of the record. The question of how legal discussions should deal with fact patterns that include epithets is a topical one. Randall L. Kennedy & Eugene Volokh, The New Taboo: Quoting Epithets in the Classroom and Beyond, 49 CAP. L. REV. 1, 12 (2021) (How do lawyers and judges deal with this issue? The answer, it turns out, is that they routinely quote the epithets literally and precisely, without euphemisms or expurgation. A Westlaw query for "nigger & date (aft 1/1/2000)" finds over 9,500 Westlaw-accessible opinions (including cases, trial court orders, and administrative decisions). And that does not include the nearly 5,000 such opinions from before the year 2000, plus whatever is present in the vast set of trial court orders that do not appear on Westlaw. A search for "nigga niggaz & date (aft 1/1/2000)" finds over 2,300 opinions. A similar search for "fag" yields over 3,000 references, though a few of those are false positives). Ibid.

It is disputed whether Ruggiero had ever said the word in the workplace before the day in question or said it again afterward.[3] It is, however, undisputed that at no time did either Jeanette, on the one occasion in October 2018, nor DeFony, on the supposedly multiple occasions before and after the October 2018 incident, feel targeted by any such use of the term. Neither woman ever initiated a complaint about Ruggiero's use of the word. No one maintains that Ruggiero ever directed the word towards any employee, vendor, visitor, or member of the public doing business with the County. Nowhere is it asserted that the word was used in connection with County business or, at any time, ever overheard by anyone else other than DeFony and Jeanette.

All workplace uses of the word, whether one or several, were overheard or spoken in a context that could not be recalled by either woman. The only thing the women were certain of is that they heard it spoken, at least once, and that it was not directed to anyone in particular. Neither indicated that they had any intention of complaining about the comment to anyone. In fact, Jeanette later testified that she simply just did not want to hear it said again and, according to her own testimony, she never did.

[3] DeFony alone says she had heard Ruggiero say it before and afterward. Ruggiero denies this.

In November 2018, approximately one month after the incident, Jeanette and Ruggiero disagreed about some other issue. Anna Marie Wright, the County's Purchasing Agent, overheard the women in the hallway, called them into a conference room, and sternly advised both of them that arguing in the workplace as had just occurred needed to stop immediately and that were it to occur again, they would be written up. Neither Ruggiero nor Jeanette was allowed to speak, and Wright herself had no idea what the conflict had to do with. Apparently, the spontaneous meeting ended as quickly as it had begun and nothing else was said.

Approximately two weeks later, on November 30, 2018, on a day when Ruggiero was out of the office, Wright approached Jeanette to inquire about how she and Ruggiero were getting along since the discussion between the three of them in the conference room earlier in the month. Jeanette responded "[g]ood" but then said, "I just don't like her inappropriate use of the 'N-word.'"

Wright stated that she only heard about this incident at that moment by asking Jeanette about how the two women were getting on in the wake of the hallway conflict she had intervened in. Jeanette testified that if she had not been questioned by Wright, she did not know that she would have mentioned Ruggiero's October 2018 comment. According to Wright, Jeanette stated that

the comment had been made a couple of weeks earlier and she was uncomfortable with it and that was all that she said.

After the discussion between Jeanette and Wright regarding the October comment, Wright contacted her supervisor, David McPeak, and the County's Director of Human Resources, Emeshe Arzon. Thereafter, both Jeanette and DeFony were instructed to provide written statements regarding the October incident. Both did so.

On December 4, 2018, Ruggiero was issued a preliminary notice of disciplinary action that stated that "[t]he County was informed that you used the word 'Nigga' during work and in the office on more than one occasion." Ruggiero was immediately suspended without pay.

A County-appointed hearing officer conducted a departmental hearing on December 20, 2018, and recommended a six-month suspension. This recommendation was overruled by the County. On January 3, 2019, the County issued a final notice of disciplinary action immediately terminating Ruggiero because "[t]he County was informed that you used the word 'Nigga' during work and in the office on more than one occasion." On January 7, 2019, Ruggiero appealed her termination, and the matter was transferred to the Office of Administrative Law.

On July 29, 2020, the ALJ issued his findings. He found that the epithet had been used but was persuaded that how it was used, under all the attendant circumstances, warranted discipline well short of dismissal. The ALJ recommended modification of the discipline from termination to a six-month suspension without pay. Both parties filed exceptions.

A. The First CSC Order.

On September 2, 2020, the CSC issued its first decision. It accepted the ALJ's findings of fact but did not adopt the ALJ's disciplinary recommendation. Instead, the CSC imposed a thirty-day work suspension. The CSC noted the seriousness of the conduct but emphasized that the severity of the discipline, both the termination and the recommended six-month suspension, far exceeded what was reasonable and specifically noted that progressive discipline, while not necessarily etched in stone for all infractions, would have been a more appropriate tact given the totality of the circumstances.

The CSC noted several considerations that supported a reduction of the penalty. These included the modest disciplinary record over the employee's fifteen-year tenure (a single written reprimand, in 2016, that did not involve racially offensive language or conduct); the fact that the slur was not directed to anyone; and the fact that the employee had only been overheard speaking the

word in private conversation. These considerations, according to the CSC, "mitigated the severity of its usage."

The CSC made a point to note that its decision should not be read to imply that "the usage of racially inappropriate language in the workplace would not warrant a penalty more severe than administered in this matter" but that any discipline "must take many factors into account" including "the severity and context of the misconduct and the employee's prior history."

The CSC ordered mitigated back pay, seniority, and benefits pursuant to N.J.A.C. 4A:2-2.10 for thirty working-days from the date of initial separation until reinstatement. As part of that same order, the CSC directed the parties to work towards a resolution of back pay issues but stressed in its order that "under no circumstances" should Ruggiero's reinstatement be delayed during the negotiations of the back pay issues. Despite the fact that back pay was not yet resolved, and the CSC determination was thus still interlocutory, the County filed an appeal of the CSC order with this court on September 30, 2020. The County later withdrew the appeal after notice from the clerk's office questioning its finality.

B. The Second CSC Order.

Despite the CSC order, an impasse on the issues of back pay and reinstatement arose prompting Ruggiero to seek enforcement of the CSC's order. The County opposed the relief, moved for reconsideration, and sought a stay and a final order from the CSC so that the matter might be final for appeal. By decision dated October 23, 2020, the CSC rejected all of the County's requests for relief. The CSC recapped the basis for its earlier decision and restated its belief that the modification of the discipline to a thirty working-day suspension was appropriate for the reasons already explained. The CSC further stated that the County must immediately reinstate Ruggiero. The CSC cautioned the County that further delay would subject it to fines up to $10,000. The CSC again ordered the parties to negotiate a resolution relative to the back pay issues noting that interest would accrue if the CSC determined the County was unreasonable in delaying the resolution of the back pay issue.

C. The Third CSC Order.

When, despite the second CSC order, neither back pay nor reinstatement was forthcoming, Ruggiero again moved to enforce the CSC's order. The County opposed the relief sought. For the first time, the County argued against enforcement relying on our decision in Belleville v. Coppla, 187 N.J. Super. 147

(App. Div. 1992). The County argued that back pay should be reduced by six months even though the suspension was just for thirty working-days. The County's goal at this point appears to have been to secure an enhanced penalty beyond what the CSC had, by this point, twice already rejected.

On January 22, 2021, the CSC once again granted Ruggiero's request for relief, rejecting the County's request for an enhanced penalty. In rejecting the County's arguments for the third time, the CSC found our decision in Coppla distinguishable on its facts. The CSC went further to fix the amount of back pay then owed, ordering gross back pay in the amount of $33,329.17 plus 3.5% interest through September 2, 2020; gross forward pay in the amount of $19,109.16 from September 3, 2020, through January 20, 2021; and gross forward pay in the amount of $197.0976 per working day from January 21, 2021, until reinstatement, with payment to be made within thirty days of its decision. Once again, the CSC warned the County that failure to comply could result in the imposition of the $10,000 penalty previously threatened in its decision of October 23, 2020.

In its decision, the CSC noted that the County "refuses to comply with the Commission's orders" and included in its order direction that any further relief be sought in a judicial forum, this being the third time it had ordered relief and

the second time it had been called upon to enforce its orders. All issues having then been resolved with finality, the County filed this appeal of all three CSC orders on February 8, 2021.

D. The County's Unsuccessful Attempts to Stay the CSC Orders.

Despite the CSC's three unambiguous orders, the County continued to resist compliance and moved before the CSC seeking to have it stay the three orders on appeal dated September 2, 2020; October 23, 2020; and January 22, 2021. On March 5, 2021, the CSC denied the County's request for a stay. This was the fourth consecutive time the CSC had denied the County's request for relief.[4]

On March 12, 2021, the County filed a motion with this court to stay the CSC's decisions pending the resolution of its appeal. We denied the motion on April 12, 2021. One month later, in May 2021, Ruggiero was placed back on the County's payroll with all salary and benefits restored but was not allowed to return to work. At oral argument, counsel for the County informed this court that the ordered back pay has not yet been paid based on an agreement between the parties pending the outcome of the appeal.

[4] As this order is not part of the appeal, we decline to discuss it other than to note that the CSC's decision was forceful and clear in stating the reasons for denying the stay.

On appeal, the County argues that the CSC decision to reduce Ruggiero's penalty from removal to a thirty-day working suspension is arbitrary, capricious, and shocks the conscience. The County further argues that the CSC erred in awarding back pay. We disagree.

II.

The standard of review applicable to determinations of administrative agencies, including the CSC, is whether there has been "a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence, or that it violated legislative policies expressed or implicit in the civil service act." State v. Roth, 95 N.J. 334, 364 (1984) (quoting Campbell v. Dep't of Civ. Serv., 39 N.J. 556, 562 (1963)); see also In re Hendrickson, 235 N.J. 145, 160 (2018).

This well-known standard has engrained within it a degree of deference that commands we do not substitute our judgment in place of the agency's merely because we might have come to a different outcome. See Hendrickson, 235 N.J. at 150. While we need not defer to factual findings "out of step" with public policy, In re N. Haledon Sch. Dist., 363 N.J. Super. 130, 139 (App. Div. 2003), "[s]o long as reasonable minds might differ about the appropriateness of the

disciplinary sanction, we have no charge to second-guess the call." Hendrickson, 235 N.J. at 150.

This analysis requires that in review we ask, "was the discipline imposed by the [CSC] so disproportionate that it shocks the conscience or one's sense of fairness?" Id. at 149. In answering this question, we are called to consider whether the discipline "falls within a continuum of reasonable outcomes" and if so, deference is our only option. Id. at 161.

In applying this standard to this appeal, the question presented can be articulated thusly: is a thirty working-day suspension for the use of the word "nigga," spoken by a person of color in her county-government workplace, directed towards no one, and only known for sure to have been overheard once by two white colleagues, neither of whom ever felt targeted by it, and neither of whom initiated a complaint about it, so out of step with public policy and so shockingly disproportionate and unfair that reasonable minds could not differ about the propriety of the discipline? We are satisfied that the answer to this question is no, both as to the duration of the suspension and the back pay.

III.

The CSC is the New Jersey State agency authorized to render "the final administrative decision on appeals concerning permanent career service

employees" facing suspension or removal. N.J.S.A. 11A:2-6(a). By law, the CSC is empowered to "increase or decrease the penalty imposed by the appointing authority." N.J.S.A. 11A:2-19. This is exactly what happened in this case.

In rendering its decisions, the CSC is guided by the principle of progressive discipline. The Supreme Court first expressed approval of the notion of progressive discipline in W. New York v. Bock, 38 N.J. 500, 520 (1962). In In re `, the Court described the Bock decision as satisfying "the necessary desire to promote proportionality and uniformity in the rendering of discipline of public employees." Stallworth, 208 N.J. 185, 195 (2011) (citing Bock, 38 N.J. at 523).

In the six decades since Bock was decided, progressive discipline has been implemented in public sector workplaces countless times in one of two ways: "(1) to ratchet up or support imposition of a more severe penalty for a public employee who engaged in habitual misconduct; and (2) to mitigate the penalty for an employee who has a record largely unblemished by significant disciplinary infractions." Stallworth, 208 N.J. at 196 (quoting In re Herrmann, 192 N.J. 19, 30-33 (2007)).

Despite its long history and enduring use as a methodology for determining employee penalties for workplace infractions, progressive discipline is not a "fixed and immutable rule to be followed without question." Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). Egregious conduct, as the County alleges occurred here, or when application of progressive discipline would be contrary to the public interest, allows progressive discipline to be dispensed with and permits a more severe penalty to be meted out immediately, despite what might be an otherwise untarnished disciplinary record. See Herrmann, 192 N.J. at 33.

As is evident on this record by the County's years-long refusal to comply with the CSC's orders, it is convinced that its decision to terminate Ruggiero was correct, that the hearing officer, the ALJ, and the CSC were all wrong, and that to apply progressive discipline is not only legally incorrect but morally indefensible. It is obvious that the County disagrees, stridently, with the six decisions that found termination to be excessive. The County's disagreement with the decisions, no matter how principled, is wholly beside the point.

It is the CSC, not the County, that enjoys the statutory prerogative to do exactly as it did here: decide what punishment suffices for workplace misconduct. In doing so, the CSC may not be arbitrary or capricious and is

obliged to offer a sensible and balanced rationale in support of its decision. In this case, the CSC did so four times.

The CSC meticulously considered the event of October 2018 and the ALJ's findings of fact and revisited its determination multiple times. No honest assessment of the record below can conclude that the CSC was anything other than precise and methodical.

In its decision, the CSC noted that while Ruggiero's "infraction is serious" it did not find it "worthy of the penalty imposed by the appointing authority" or the reduction recommended by the ALJ. The CSC addressed factors it deemed relevant in deciding what penalty was warranted. The CSC specifically considered that the word was used "in the context of a personal telephone conversation and not directed at any employee but was rather overheard." These facts are not in dispute. The record amply supports the ALJ's findings that the word was not used as an epithet, a threat, or a derogatory statement towards a co-worker or anyone else in the workplace. The CSC found that this context "mitigated the severity of its usage." The CSC was also swayed by the fact that Ruggiero is a fifteen-year employee whose entire disciplinary history consisted of a single written reprimand from 2016 that did not involve "usage of any racially derogatory language."

The County argues that this is an impossible outcome because "the N-word" is a loathsome racial epithet, the use of which is deserving of the most severe sanction. That the "N-word" is a coarse and vile word with no redeeming social value can hardly be debated. But the word "nigger" was not the word used here. The word used here was "nigga" and, like it or not, that is a distinction that makes a difference.

While this court need not wade into the precise contours of the two terms, nor offer its opinions as to the various arguments made in popular culture and academia as to the differences between the two and who may or may not use one or the other, to ignore that a difference exists throughout large swaths of American culture would be to stick our head in the sand. In short, as the CSC found, context matters a great deal.[5]

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[5] Rebecca Carroll, When Larry Wilmore said the N-Word to President Obama, I felt Black Pride, GUARDIAN, May 2, 2016, (Perhaps the most famous instance of context mattering as to the term used in this case occurred in the spring of 2016 at the White House Correspondents Dinner when, at the end of his remarks, comedian Larry Wilmore addressed then President of the United States Barack Obama as "my nigga." The President showed no sign of upset at the moment or later when his press secretary said that Mr. Obama "appreciated the sentiment that Mr. Wilmore expressed in his speech" and that "the personal view that Mr. Wilmore was expressing came from a genuine place.") https://www.theguardian.com/commentisfree/2016/may/02/larry-wilmore-n-word-i-felt-black-pride

In support of its argument that "the N-word" is unspeakable, the County provided us with a supplement to its appendix that included an article from the New York Times entitled "How the N-Word Became Unsayable" by John McWhorter, an associate professor of English and comparative literature at Columbia University.[6] In its reply brief, the County makes reference to the premise of the article in further support of its arguments.

In the essay provided and relied on by the County, the author uses the word "nigger" repeatedly and describes its use from its origin through today. McWhorter concludes the word is so incendiary that its use has come to be forbidden not only as a slur but even when referred to. The word "nigga," on the other hand, is not addressed in the essay at all.

Overlooked by the County is another article by Professor McWhorter, written for TIME magazine, entitled "Stop Policing the N-Word."[7] In this

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[6] John McWhorter, How The N-Word Became Unsayable, N.Y. TIMES, May 2, 2021, (Professor McWhorter is the author of more than a dozen books and is a regular contributor to magazines, newspapers, and academic journals. His area of expertise is linguistics, and he is, by most measures, highly regarded). https://www.nytimes.com/2021/04/30/opinion/john-mcwhorter-n-word-unsayable.html

[7] John McWhorter, Stop Policing the N-Word, TIME, May 3, 2016, https://time.com/4316322/larry-wilmore-obama-n-

article, the author addresses in some detail the differences in use and history between the words "nigger" and "nigga." McWhorter recounts how the latter word came to emerge in defiance of the former, and how its use for over 100 years has, for those who use it, often been a term of colloquial affection. The professor goes to some lengths to differentiate the two words and argues that "policing language prevents needed discourse"[8] and further asserts that "[o]utlawing a slur is one thing. Pretending that a different word that sounds like it is the same one and insisting no one use it will never attract a consensus."[9]

Ultimately this author, the very one whose New York Times essay is relied on by the County as a form of persuasive authority, concludes that using the first of these words is a disgrace to be condemned, but not the second. McWhorter writes, "Let's police the use of the N-word as a slur, but not a word that started from it but now means 'friend'"[10]

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word/?utm_source=email&utm_medium=email&utm_campaign=email-share-article&utm-term=ideas_language.

[8] Ibid.

[9] Ibid. (Emphasis added).

[10] Ibid.

Our Supreme Court has held that if there exists a difference of opinion among reasonable people as to an outcome below in a situation such as the one presented by this case then deference requires that we stand down. In re Hendrickson, 235 N.J. at 150. In considering the facts here, we are of the mind that a better example of reasonable minds differing on an issue could not easily be found. The County's own cited linguist sees the issue other than how the County does.

We recount the anecdotes that we do and cite the writings of Professor McWhorter not to endorse or commend any of these points of view, but rather, and more importantly, to highlight that the issue presented by Ruggiero's conduct and distinct word choice, the central fact of this case, is as unsettled a matter of American ethos and principles as any. Books have been written on the topic.[11] Theses have been written on the topic.[12] College courses have been

[11] JABARI ASIM, The N Word: Who Can Say It, Who Shouldn't & Why (Houghton Mifflin Co. ed. 2008).

[12] Shaquille Sinclair, You Can't Say That! A Semantic and Historical Analysis of Nigger and Nigga, (Apr. 2017) (Senior Honors Thesis, New York Univ.) https://as.nyu.edu/content/dam/nyu-as/linguistics/documents/Sinclair%20Thesis%202017.pdf

taught on the topic.[13] Scientific journal articles have been written on the topic.[14] Seminars have been offered on the topic.[15] Experts have been called to testify on the topic in criminal hate crime trials.[16]

IV.

We disagree with the County's position that the CSC's decision may somehow be construed as a license to use all manner of offensive and vulgar racial and ethnic slurs in the workplace. It conveys no such message. The CSC stated plainly that the "usage of any inappropriate language in the workplace is unacceptable" and emphasized that its decision, in this case, should not be understood to imply that "the usage of racially inappropriate language would not

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[13] Sean Price, Straight Talk About the N-Word, 40 LEARNING FOR JUST., Fall 2011.

[14] Keith Allan, Contextual determinants on the meaning of the N word, 5 SPRINGER, July 20, 2016. Contextual determinants on the meaning of the N word (nih.gov)

[15] Seminar, Everybody wants to be a Nigga, but No One Wants to be a Nigger: The Mis-Education of Nigger, TRUMAN STATE. UNIV., Everybody Wants to be a Nigga, but No One Wants to be a Nigger: The Mis-Education of Nigger - Center for Diversity and Inclusion (truman.edu) (last visited Apr. 5, 2022).

[16] Gregory S. Parks & Shayne E. Jones, Nigger: A Critical Race Realist Analysis of the N-Word Within Hate Crimes Law, 98 J. CRIM. L. & CRIMINOLOGY 1305, 1312-13 (2008) (A Black hip-hop producer, Gary Jenkins, and Randall Kennedy, a Rhodes Scholar, were introduced to testify that the use of the N-word had been morphed away from being an insult and epithet among the younger generations).

warrant a penalty more severe than administered in this matter." The CSC was careful to explain that in reducing Ruggiero's penalty it was not minimizing the wrongness of her conduct and specifically stated that "future similar infractions may subject her to more severe penalties, up to and including removal." The CSC was guided by the idea that in determining employee discipline it "must take many factors into account," which must include "the severity and context of the misconduct and the employee's prior history."

Rather than demeaning the County's non-discrimination policy as the County argues, the CSC was unambiguous in stating that the "penalty sends a strong message indicating that if an employee uses offensive language, even if not used as an epithet and not directed at another person at the place of business, such language is not acceptable and is subject to major discipline."

Contrary to the County's argument, the CSC could not have been clearer that workplace language can and should be policed and that when untoward language is used, the circumstances of its usage shall be examined under the totality of the circumstances and the offender shall be subject to whatever discipline is warranted. Rather than impose a bright-line rule or adopt the County's "zero tolerance" policy, the CSC makes clear that a case-by-case analysis will be required in such instances and requests there be no limits to the

discipline it can impose. We discern no reason to disturb this sensible and balanced approach applying progressive discipline under the facts of this case.

The County maintains a steadfast and singular position: zero tolerance for this term, or a form of it, requires termination. Period. In taking up that narrow position as forcefully as it has, the County has failed to explain why context should be disregarded. Other than insistence that context, in the use of this slur, does not, should not, and simply cannot, be allowed to matter, there has been nothing offered, other than vigorous disagreement, to explain why Ruggiero, who was overheard making a comment not directed at anybody in the workplace, not involving an epithet or derogatory statement, and not said in public but on a personal telephone call having nothing to do with work, deserves more severe discipline than what the CSC ordered.

V.

This court is guided by two relevant Supreme Court decisions, In re Hendrickson and Kairns v. City of Atlantic City, 152 N.J. 532 (1998), both of which dealt with atrocious language spoken by one public employee towards another in a work-related context. In both cases, the offending employee directed his comments toward another employee and used vulgarity purposefully to target the other person. See Hendrickson 235 N.J. at 152; see also Kairns,

152 N.J. at 536. In neither case was the employee terminated. See Hendrickson 235 N.J. at 152-53; see also Kairns, 152 N.J. at 539, 563. To the contrary, in both cases, the Supreme Court endorsed progressive discipline as the appropriate means to address wayward employees. See Hendrickson, 235 N.J. at 162; see also Kairns, 152 N.J. at 563.

In our Hendrickson opinion, we imposed harsher discipline than had been imposed below, stating that the incident "violated the State's anti-discrimination policy and societal norms." Hendrickson, 451 N.J. Super. 262, 275 (App. Div. 2017). This is akin to what the County asks us to conclude here. The County asks that we find, as we did in Hendrickson, that "the doctrine of progressive discipline should be bypassed" and the suspension reversed in favor of termination. Ibid. To do so, however, would be folly. The County overlooks, though we do not, that the Supreme Court reversed this court and reinstated the suspension and the application of progressive discipline. Hendrickson, 235 N.J. at 152.

In Kairns, before reinstating a forty-eight-day suspension and noting that progressive discipline was the appropriate means to address the conduct, the court noted the corrosive effect of the kind of speech at issue stating "[h]ate conduct or speech harms the individual who is the target[;] it perpetuates

negative stereotypes [and] promotes discrimination by creating an atmosphere of fear, intimidation, harassment, and discrimination." Kairns, 152 N.J. at 562. (Citations omitted).

Relying on the logic of these two holdings, it would be impossible for this court to hold that the use of progressive discipline on these facts is arbitrary and capricious. Here, unlike Hendrickson and Kairns, there was no target and no one felt intimidated, harassed, or discriminated against. While Jeanette rightly expressed to Ruggiero her desire not to have to hear the word spoken again, nothing more was ever alleged or found to have occurred other than that exchange.

As Ruggiero points out, there are several other published instances of this court and the Supreme Court affirming the use of progressive discipline to reduce a workplace penalty from termination to some lesser sanction. This line of cases goes back more than sixty years. While none of these cases involved the use of crude language, every one involved serious transgressions by the public employee. See, e.g., Thurber v. City of Burlington, 191 N.J. 487, 492-93, 502 (2001) (affirming the Merit System Board's reduction of termination to a six-month suspension for reckless driving committed by deputy municipal-court administrator, concluding that in "light of plaintiff's unblemished record

and long period of service (ten years) there is nothing arbitrary or capricious in the Board's decision that a penalty short of termination would be appropriate"); N.J. Dep't. of Corr. v. Torres, 164 N.J. Super. 421, 428-29 (App. Div. 1978) (affirming CSC's reduction of correction officer's sanction from removal to a fifty-day suspension for sleeping on duty, concluding reduction warranted in light of Torres' unblemished work record, and mitigating factors, including physical conditions of mess hall cage area), aff'd sub. nom. Henry, 81 N.J. at 580 (1980) ("holding the Commission properly considered such mitigating factors and concluded that dismissal was an excessive punishment."); Borough of E. Paterson v. Dep't. of Civ. Serv., 47 N.J. Super. 55, 69 (App. Div. 1957) (affirming CSC order which reduced removal of patrolman to sixty-day suspension, determining that modification of penalty was a reasonable exercise of its statutory authority supported by the record).

At bottom are the conclusions of the ALJ that Ruggiero never directed a racial slur at anyone in the workplace. The ALJ concluded that this case does not encompass the use of an epithet or threat by one person towards another. No one was targeted. No one felt targeted. Neither of the two witnesses felt that the work environment was hostile nor became hostile by Ruggiero's conduct. No one felt the ability of her work was interfered with by Ruggiero's comment.

Ruggiero admitted that she used the word, and offered a bland explanation, supported by a witness, of the meaning of her use, but was remorseful. Ruggiero recognized that she should not have used the word, that to do so was inappropriate, and that she would not do so again. Ruggiero's fifteen years of employment have been unremarkable from a disciplinary perspective save a single written reprimand in 2016.

VI.

After thoroughly reviewing the record in light of the relevant legal principles and standard of review, we are satisfied that the CSC's decision to impose a thirty working-day suspension was not arbitrary, capricious, or unreasonable, and the decision is supported by sufficient credible evidence. See Stallworth, 208 N.J. at 194. To meet its burden on appeal, the County must show that (1) the CSC's decision did not follow the law; (2) the record did not contain substantial evidence to support the decision; or (3) the Commission's decision could not reasonably have been made based on the relevant factors. See ibid. The County has not met this burden.

In applying the first prong, the record reveals that the CSC gave careful consideration to the severity of Ruggiero's conduct. After considering the mitigating factors, such as her lack of discriminatory intent, the CSC ultimately concluded that

"usage of any inappropriate language in the workplace is unacceptable" and deserved major disciplinary action pursuant to N.J.A.C. 4A:2-2.2(a)(3).

The record further reveals that the CSC carefully considered Ruggiero's employment history and found that the 2016 written reprimand was an insufficient disciplinary event to weigh in favor of termination. See Stallworth, 208 N.J. at 195. The CSC has the statutory authority to determine the appropriate penalty. N.J.S.A. 11A:2-19. (Statute also states that the CSC cannot substitute removal for a lesser penalty). We are satisfied that the CSC's decision was premised upon a thorough consideration of all the relevant factors and that the decision does not violate any express or implied legislative policies. See Stallworth, 208 N.J. at 194.

As to the second prong, the record demonstrates that the CSC decisions were based upon sufficient credible evidence. Ibid. The County does not contend that the CSC erroneously accepted the ALJ's findings about the incident. There is ample evidence in the record to support the ALJ's findings particularly given the testimony of the witnesses as to their reaction to hearing what Ruggiero said, how they knew it was not directed to them, and how it did not affect the work environment. Thus, after reviewing the record, we are satisfied that the CSC's decision was based upon sufficient credible evidence. Ibid.

Lastly, in applying the third prong, it is clear from the record that the CSC could reasonably determine that Ruggiero's misconduct warranted a penalty less than termination, based upon an assessment of the severity of her conduct in light of her lack of prior major discipline and lack of discriminatory intent. The CSC's decisions are not "so wide of the mark as to justify this court's substitution of its judgment." Herrmann, 192 N.J. at 36. After considering the record in light of our standard of review, we find no reason to interfere with the CSC's sanction of a thirty working-day suspension as set forth in its three orders dated September 2, 2020; October 23, 2020; and January 22, 2021.

VII.

Finally, as to the County's argument that the back pay should be limited, we find its reasoning as unpersuasive on this point as we did its argument as to progressive discipline. The CSC considered the County's argument that back pay should be limited, and rejected it, explaining as follows:

> [T]he Commission notes that the Appellate Division has affirmed numerous cases where the Commission modified penalties and the back pay award was not modified by the Appellate Division to only begin after six months from the separation period. Further, in Coppla, the Appellate Division limited the back pay award where it found that the employee was intentionally insubordinate to their superiors. As such, this case is distinguishable as Ruggiero made a racial slur while at work, but it was only on a personal telephone call that was not made to anyone

> at work but was overheard. In essence, had the Commission believed that Ruggiero should have been deprived of six months of back pay, it would have found that the proper penalty was a six-month suspension.

Having reviewed and rejected the County's argument as to the duration of the suspension, the CSC found no basis to conclude that the employee should be financially penalized for wages in excess of the wages for the time ordered suspended. The fact that so much time has now passed that there exists substantial back pay to dock, despite a decision that a suspension of more than thirty working-days went too far, is of no moment. A thirty working-day suspension was ordered. That suspension has now been upheld. The CSC has in all respects determined the appropriate penalty as allowed by law. For the same reasons already expressed, the CSC decision as to the amount of back pay, including interest, is affirmed.

VIII.

To the extent Ruggiero's current status is anything less than fully reinstated as ordered by the CSC, she shall be reinstated forthwith and the County shall allow plaintiff to return to her workplace. All back pay with interest as ordered by the CSC shall be paid within thirty days. The CSC's orders are affirmed. We do not retain jurisdiction.