STATE OF NEW JERSEY

In the Matter of Kimberly Herron	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket. No. 2019-3691	:	Hearing Denied

ISSUED: SEPTEMBER 11, 2019 (NFA)

Kimberly Herron, a Director of Parks and Recreation with Dennis Township, represented by Robert F. O'Brien, Esq., requests a hearing regarding her five working day suspension.

The record in this matter shows the following. On September 26, 2018, Herron received a Preliminary Notice of Disciplinary Action (PNDA) on various charges. The specifications underlying the charges indicated that she engaged in inappropriate actions on September 5 and September 6, 2018. The proposed discipline was a 25 working day suspension. Thereafter, on December 14, 2018, Herron received another PNDA on various charges. The specifications underlying the charges indicated that she engaged in inappropriate actions on October 16, 2018. The proposed discipline was not specified. The two matters were heard in a consolidated departmental hearing and two Final Notices of Disciplinary Action (FNDA) were issued on June 10, 2019. The first FNDA regarding the September incidents indicated a penalty of a five working day suspension and the second FNDA regarding the October incident indicated a penalty of a 15 working day suspension. Herron timely appealed both suspensions to the Civil Service Commission (Commission) and requested a hearing regarding both matters.

In her request for a hearing regarding the five working day suspension,[1] Herron acknowledges that in most cases, the Commission does not grant hearings for minor disciplinary actions levied against local government employees. However,

[1] As the 15 working day suspension, a major discipline under *N.J.A.C.* 4A:2-2.2(a), was timely filed, a hearing was granted as a matter of right pursuant to *N.J.S.A.* 11A:2-14 and *N.J.A.C.* 4A:2-2.9(b). That matter is currently pending at the Office of Administrative Law.

she argues that since the suspensions were "considered at all relevant times, as one case" and the FNDAs were both issued on the same date, that the she is entitled to a hearing on the five working day suspension per relevant parts of *N.J.A.C.* 4A:2-2.9(b), which provides hearings for minor disciplinary suspensions where an employee has received more than 15 suspension days in a calendar year.

CONCLUSION

N.J.A.C. 4A:2-2.9(b) states, in pertinent part, that:

> Minor discipline matters will be heard by the Commission or referred to the Office of Administrative Law for a hearing before an administrative law judge for an employee's **last suspension** or fine for five working days or less where the aggregate number of days the employee has been suspended or fined in a calendar year, **including the last suspension or fine**, is 15 working days or more . . . . (emphasis added)

Based on the above provisions and the record in this matter, it is clear that Herron is not entitled to a hearing regarding her five working day suspension. The regulation above clearly indicates that hearings for minor disciplines that surpass an aggregate of over 15 suspension days in a calendar year pertain only to such disciplines that ***create*** the condition where the 15-day threshold is surpassed. In other words, only minor disciplines which occur after 15 suspension days in a calendar year have been served or cause an individual to surpass the 15-day threshold are entitled to hearings. This is the **only** logical interpretation of this regulation. In this regard, the **last** disciplinary action is looked at to determine whether the threshold is met. In Herron's case, since the record indicates that the initial PNDA was issued in September 2018 for misconduct earlier that month and the second PNDA was issued in December 2018 for misconduct that occurred in October 2018, it can only be concluded that, notwithstanding that the hearings were conducted concurrently, and the penalties meted out together, *that Herron would be required to serve the five working day suspension prior to serving the 15 working day suspension.* Such a conclusion comports both with the facts of this matter as well as the tenets of progressive discipline. As such, the five working day suspension cannot be considered the last suspension and does not serve as the trigger for surpassing the 15-day threshold.

Instructive in this matter is *In the Matter of Shardawn McRae,* Docket No. A-4885-99T1 (App. Div. June 12, 2001). In that case, the Appellate Division affirmed the former Merit System Board's (Board) denial of a hearing of a five working day suspension. The relevant facts of that case were as follows: On July 2, 1999, McRae was served with a Notice of Minor Disciplinary Action for an attendance infraction. Subsequently, she was served with a PNDA on similar charges. To accommodate the parties, the departmental hearings on both sets of charges were heard on the same day, and the resultant FNDA on the second set of charges

carrying a 20-day suspension was served. McRae appealed both suspensions to the Board which denied her request for a hearing on the five working day suspension. McRae appealed that determination to the Appellate Division, which rejected her argument that, since the matters were considered at the same time, the 15-day threshold had been met. In doing so, the Appellate Division agreed with the Board's reasoning and interpretation of the rules and stated that the fact that the hearings for both disciplinary matters were considered at the same time is merely "an accommodation to the parties, and not a basis for departing from the statutory scheme of rights of appeal."

Moreover, the Commission rejects Herron's contention that these matters are, essentially, one case. As indicated in *McRae, supra*, the mere fact that the matters were consolidated and decided together is not a basis, absent evidence to the contrary, to find that the minor discipline satisfied the 15-day threshold.[2] However, to be clear, the Commission is **not** stating that an employee is never entitled to a hearing for a minor disciplinary suspension that is consolidated at the departmental level with another suspension or issued on the same day as another suspension. Rather, and as demonstrated in this case, the timing of both the incident underlying the minor discipline and the actual imposition of the suspension days must be considered. In this regard, there are potential variations which can result in different outcomes. Regardless, in this case, the only conclusion that can be reached based on the circumstances is that the five working day suspension does not satisfy the 15-day threshold. Further, there is no information indicating that Herron served 15 or more suspension days between January 2019 and the imposition of the five working day suspension later in 2019 that would have allowed the five working day to meet the threshold requirements in *N.J.A.C.* 4A:2-2.9(b). Finally, as the Commission has no other jurisdiction to review appeals of minor disciplinary actions taken against county or municipal government, if there is no mechanism available for Herron to challenge the minor disciplinary action under standards and procedures established by the jurisdiction or by a negotiated labor agreement, she may seek relief through the Law Division of the Superior Court of New Jersey. *See N.J.S.A.* 11A:2-16 and *Romanowski v. Brick Township,* 185 *N.J. Super.* 197 (Law Div. Ocean County 1982).

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[2] The Commission also notes that in one of Herron's more specious arguments, she contends that her matter is distinguishable from *McRae, supra,* since, unlike McRae, she was never first served with a Notice of Minor Disciplinary Action, apparently intimating that Herron's five working day suspension was not the "first" suspension, but should be either combined with or considered to be after the 15 working day suspension. In Herron's case, her initial *misconduct* in September 2018 was noticed to her on a PNDA indicating a proposed penalty of a 25 working day suspension, a major discipline. The fact that the misconduct was later only deemed worthy of a five working day suspension, a minor discipline, does not somehow negate the fact that the underlying misconduct for that suspension occurred *before* the misconduct underlying the 15 working day suspension. Nor does it negate the fact that logically, she would be required to serve the five working day suspension prior to the 15 working day suspension. Thus, the imposition of those five suspension days would not be considered to exceed the 15-day threshold found in *N.J.A.C.* 4A:2-2.9(b).

ORDER

The Civil Service Commission denies Kimberly Herron's request for a hearing regarding her five working day suspension.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 10TH DAY OF SEPTEMBER, 2019

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