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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
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Wendy F Jones

NANCY FLEMING,

Petitioner-Appellee,

v.

JACQUELINE L. COOPER, in her capacity as the acting New Mexico Chief Public Defender,

Respondent-Appellant.

N.M. Ct. App No. 31,907
Dist. Ct. No. CV-2011-10285
Bernalillo County

RESPONDENT-APPELLANT'S BRIEF-IN-CHIEF

Appeal from the District Court of Bernalillo County
The Honorable Shannon Bacon, District Judge

ORAL ARGUMENT REQUESTED

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Pursuant to Rule 12-213 NMRA, Appellant Jacqueline L. Cooper ("Appellant"), Chief Public Defender of the New Mexico Public Defender Department ("Department"), files her Brief in Chief requesting this Court's reversal of the district court's grant of a Writ of Mandamus.

This appeal presents a question of first impression in New Mexico: Whether an agency that misses the date stated in the State Personnel Board rules for issuance of a final decision on an employee's discipline following the predetermination process, is thereafter banned from taking the action by beginning the process anew, particularly when the employee has not lost any pay or benefits during the process.

Pursuant to Rule 12-214 NMRA, Appellant requests oral argument on this appeal. Because this case involves sections of the Administrative Code and issues involving predetermination due process rights that New Mexico appellate courts have not previously addressed, oral argument would be helpful to a resolution of this case.

II. SUMMARY OF PROCEEDINGS

On October 12, 2011, Appellee Nancy Fleming (Esq. acting *pro se*) ("Fleming") filed a Verified Petition for Writ of Mandamus ("Petition") in the Second Judicial district court seeking to prevent the Department from dismissing her from her employment as an attorney for the Department. RP 1. Fleming's

position was a classified position under the New Mexico State Personnel Act and she was subject to the State Personnel Board ("SPB") rules. 1.7.1.1 to .13.13 NMAC. At the time she filed her Petition, she had been on paid administrative leave since August 19, 2011. RP 3-4. On October 26, 2011, while the Petition was pending, the Department dismissed Fleming from her employment effective October 28th. RP 48. On October 31, 2011, Fleming applied for a temporary restraining order seeking reinstatement of her employment pending the district court's determination on her Petition. RP 59. Appellant timely answered the Petition on November 1, 2011, and responded to the application for a temporary restraining order on November 3rd. RP 14, 22. The district court granted Fleming's application for restraining order on November 14th. RP 59. The Department complied with the court's Order and returned Fleming to paid administrative leave and provided her with back pay for the interim period between her dismissal and the court's order. SRP 98[1].

On November 23, 2011, while Fleming's Petition was pending, Fleming appealed her dismissal to the SPB as provided by the State Personnel Act. SRP

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[1] By this Court's Order on October 25, 2012, Appellant has supplemented the Record Proper with twenty exhibits which the parties presented to the district court and were admitted for consideration by stipulation. The twenty exhibits (nineteen from Fleming and one from Appellant) should be considered by this Court as part of the record on appeal. The exhibits are bates stamped with consecutive page numbers and the date October 23, 2012 (the date of submittal to this Court). Appellant will refer to the supplemental record proper as "SRP" in this brief.

88-89. The SPB accepted and docketed Fleming's appeal. SRP 92, 93. On December 1, 2011, the district court heard Fleming's petition for a writ of mandamus. RP 13; TR 1, 41. The district court entered a letter decision on January 9, 2012, stating that the court intended to grant the Petition. RP 88. The district court granted the Petition and permanently reinstated Fleming as an employee of the Department on February 2, 2012. RP 98. Appellant timely filed this appeal and moved to stay the district court's order pending appeal[2]. RP 104, 115. The district court denied Appellant's motion for stay pending appeal without hearing on March 13, 2012. On April 9, 2012, Appellant timely moved this Court pursuant to Rule 12-207 NMRA to review the district court's denial of her motion for stay pending appeal. In a nine page Order, including a dissent, this Court declined to hold that the district court abused its discretion in denying Appellant's motion for stay pending appeal.

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[2] Although Fleming filed a Motion to Amend the final order (RP 117), and this Court proposed summary reversal for want of a final order on April 5, 2012, Appellant demonstrated that Appellant had filed a Notice of Appeal before Fleming filed her Motion to Amend *and* that the district court denied Fleming's motion on March 28, 2012. *Healthsource, Inc. v. X-Ray Assoc. of N.M.*, 2005-NMCA-097, ¶ 15, 138 N.M. 70, 116 P.3d 861 (concluding that a premature notice of appeal will not prevent an appellate court from taking jurisdiction if a final order is entered during the early pendency of the appeal and "within the time provided for responding to the calendar notice."). Because the district court had entered a final order, this Court properly placed this case on the general calendar.

III. BACKGROUND FACTS & LAW

When a State agency determines that a classified employee's conduct justifies dismissal, the agency issues the employee a notice of contemplated action ("NCA") which serves to: (1) inform the employee of the contemplated discipline; and (2) inform the employee of the facts that form the basis for the contemplated discipline. 1.7.11.13 NMAC. The employee is afforded an opportunity to respond to the notice in writing or orally, and the agency may place the employee on paid administrative leave pending any disciplinary action. 1.7.11.12 and .13(B) NMAC. After considering the employee's response, the agency may determine that the facts justify the employee's discipline, and may dismiss the employee by issuing a notice of final action ("NFA"). New Mexico's State Personnel Board ("SPB") rules provide:

> "If the employee has filed a written response [to an NCA]... *the agency shall issue a notice of final action no later than 11 calendar days from the date of receipt of the response*." 1.7.11.13(C)(2) NMAC (emphasis added).

After a state agency issues a determination of final action dismissing an employee, the employee may appeal the dismissal to the SPB within thirty days and receive an administrative hearing on the merits of the dismissal. 1.7.12.8 NMAC. Pending the administrative hearing, the employee remains unpaid. If the employee's dismissal is reversed, the SPB has authority to award the employee

back pay and benefits from the date of the improper dismissal. 1.7.12.18 to .24 NMAC.

The SPB rules do not address: (1) what happens if the deadline to make a determination is missed; (2) whether an agency may issue a second notice for the same conduct alleged in a previous notice in order to cure a procedural defect (such as missing a determination deadline); or (3) whether missing a determination deadline requires an employer to reinstate an employee and prevents the employer from implementing any future discipline for the conduct alleged in the notice.

In August 2011, Appellant received information through supervisors in the Department's Alamogordo office that Fleming had engaged in acts of insubordination, falsifying records, withholding information from the court, and other acts that amounted to misconduct. RP 24; SRP 25. The Department had suspended Fleming for one month without pay for insubordination in 2003 and had recently issued her two written warnings addressing her inappropriate behavior. RP 52; SRP 29-30. To discipline Fleming's new insubordination and misconduct, Appellant (acting through the Department) served Fleming with a notice on August 19, 2011, stating that the Department was planning on dismissing Fleming from her employment. RP 4; SRP 25. On the same day, Appellant also placed Fleming on paid administrative leave. RP 4; SRP 30. As provided under the SPB rules, the Department granted Fleming's request for more time to respond to the notice, and

Fleming then responded to the notice in writing on September 6, 2011. RP 4; SRP 22-23. After considering her response, Appellant decided to dismiss Fleming from her employment. RP 24.

Due to an internal miscommunication, the Department did not serve Fleming with an NFA dismissing her within eleven days of Fleming's response to the NCA. RP 24. To cure its error, the Department re-served Fleming with an identical second NCA on October 3, 2011, while maintaining her on paid administrative leave. RP 24; SRP 12. Fleming responded to the second notice by resubmitting her response to the first notice. SRP 73-74. She simultaneously filed a petition for a writ of mandamus in the Second Judicial district court. RP 1, 24. Fleming sought to prevent her dismissal and argued that the Department's missing of the determination deadline required the Department to abandon all disciplinary action against her for all the conduct alleged in the first notice. Specifically, Fleming claimed that mandamus was appropriate because: (1) the SPB rules require a State employer to issue a determination within eleven days of an employee's response to a notice; (2) due process considerations require compliance with the SPB rules; and (3) that the collective bargaining agreement between the State and the AFSCME union (of which Fleming was a member) requires a State employer to impose disciplinary action within forty-five days of a collective bargaining unit employee's misconduct. RP 1, 6-8. Fleming argued that the Department's failure

to meet the eleven day deadline forever barred the Department from taking disciplinary action in the future based on the facts recited in the first notice. RP 1, 8. Appellant considered Fleming's second response which was identical to the first, and timely served Fleming with an NFA within eleven days, dismissing her from her employment. RP 24, 48.

Following the December 1, 2011 evidentiary hearing on the Petition, the district court ruled that the eleven day deadline was "mandatory" and that missing the determination deadline barred the Department from taking any future disciplinary action against Fleming for the conduct reported in the first NCA. RP 88-89. The court concluded that the Department's attempt to cure the procedural error with a second notice was improper. The district court believed that mandamus was proper because Fleming had no means to appeal an NCA[3]. RP 89. The district court ordered the Department to reinstate Fleming as an assistant public defender. RP 98.

The district court was mistaken in granting mandamus because the Department provided Fleming with notice and an opportunity to respond while maintaining Fleming on paid administrative leave, and therefore it did not deprive

[3] The court may have been confused or mistaken about what a notice of contemplated action is. It is the "notice" of a termination involving constitutionally protected employment. It is not the determination or decision. It is just the initial notice to an employee of a planned decision and the reasons for the planned decision.

her of her due process rights. The purpose of the predetermination process in the SPB rules is to ensure that a state employer affords an employee with due process before the employer takes an action affecting the employee's pay. The SPB rules do not forbid State agencies from issuing a second notice or prohibit agencies from correcting a technical error in the procedure they use to implement employee discipline. Nor do they require a State employer to abandon necessary discipline for insubordination and misconduct because a final action deadline was missed.

This case was inappropriate for mandamus because Fleming had an adequate remedy at law in the form of an appeal of her dismissal to the SPB. Without a positive duty in the SPB rules, the district court did not enforce a clear right but instead created a requirement beyond the plain reading of the rules, which was improper for a mandamus action. The district court's ruling implies that a state employer has only one chance to implement employee discipline and a notice of discipline can never be amended and a procedural error in dismissing an employee can never be cured. Such an interpretation is contrary to New Mexico precedent and would elevate form over substance.

IV. STANDARD OF REVIEW

Whether due process rights were violated presents a question of law that is reviewed *de novo*. *Bass Enters. Prod. Co. v. Mosaic Potash Carlsbad Inc.*, 2010-NMCA-065, ¶ 49, 148 N.M. 516, 238 P.3d 885. The interpretation of an administrative regulation is a question of law that is reviewed *de novo*. *Alliance Health of Santa Teresa, Inc. v. Nat'l Presto Indus., Inc.,* 2007-NMCA-157, ¶ 18, 143 N.M. 133, 173 P.3d 55. Determining what issues may be decided by the SPB under the applicable statutory scheme is a question of law. *Martinez v. N.M. State Eng'r Office,* 2000-NMCA-074, ¶ 20, 129 N.M. 413, 9 P.3d 657. Reviewing courts apply the same rules as used in statutory construction in interpreting the Administrative Code. *State v. Willie,* 2009-NMSC-037, ¶ 9, 146 N.M. 481, 212 P.3d 369. When presented with a question of statutory construction, courts observe the following general principles: (1) the plain language of the statute is the primary indicator of legislative intent; (2) language will not be read into a statute which is not there, particularly if it makes sense as written; (3) persuasive weight will be given to long-standing administrative constructions of statutes by the agencies charged with administering them; and (4) when several sections of a statute are involved, they must be read together so that all parts are given effect. *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599. On review, a court charged with statutory

interpretation will also consider "the practical implications and the legislative purpose of a statute, and when the literal meaning of a statute would be absurd, unreasonable, or otherwise inappropriate in application, [courts will] go beyond the mere text of the statute." *Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶ 11, 146 N.M. 473, 212 P.3d 361.

Three conditions must be present to support the issuance of a writ of mandamus against a government official in New Mexico: (1) the petitioner must be a party that is beneficially interested; (2) there can be no plain, speedy and adequate remedy at law; and (3) the petitioner must not be seeking to control official discretion. *See El Dorado at Santa Fe, Inc. v. Bd. of County Comm'rs*, 89 N.M. 313, 316-17, 551 P.2d 1360, 1363-64 (1976); *see also* Charles T. Dumars & Michael B. Browde, *Mandamus in New Mexico*, 4 N.M. L. Rev. 155, 169 (May 1974) (same); *Cnty. of Bernalillo v. N.M. Pub. Reg. Comm'n (In re Adjustments to Franchise Fees)*, 2000-NMSC-035, ¶ 6, 129 N.M. 787, 14 P.3d 525 (citing Dumars & Browde, *supra* with approval).

V. ARGUMENT

A. Appellant did not violate Fleming's due process rights.

The Department did not violate Fleming's due process rights. The district made no finding of a violation of Fleming's due process rights in its Order granting the Petition or in its letter decision. RP 88, 98. Instead, the district court stated that "as there is no right to appeal from the [f]irst *NCA*, mandamus is proper to avoid the denial of Fleming's fundamental rights." RP 89 (emphasis added). However, employees are not entitled to appeal a notice of contemplated discipline because their employer has not yet taken an action which affects their pay and has not yet made a determination on the employee's discipline. Fleming argued that "[d]ue process in the NMAC context requires scrupulous compliance by employers in Respondent's shoes as well as employees in Petitioner's position with compulsory deadlines." RP 6. This single cursory statement was her only mention of her due process right in the Petition. *Schreiber v. Baca*, 58 N.M. 766, 276 P.2d 902 (1954) ("The only pleadings to be considered on a petition for the writ [of mandamus] are the alternative writ and the answer thereto."); NMSA 1978, § 44-2-11 (1941) ("No other pleading or written allegation is allowed than the writ and answer"). Although it is unclear to what extent the district court relied on Fleming's due process "argument" in granting her Petition, there is nothing in the

record from which to conclude that the Department denied Fleming's due process rights.

"Due process is a flexible concept whose essence is the right to be heard at a meaningful time and in a meaningful manner." *Bass Enters. Prod. Co.,* 2010-NMCA-065, ¶ 53. Due process in an administrative context requires notice and an opportunity to be heard. *TW Telecom of N.M., L.L.C. v. N.M. Pub. Regulation Comm'n*, 2011-NMSC-029, ¶ 17, 150 N.M. 12, 256 P.3d 24. Reviewing courts apply the balancing test developed in *Mathews v. Eldridge,* 424 U.S. 319 (1976) to determine what process is due in the administrative context. *Id.* ¶ 51. This requires a balancing of: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. *Id.; City of Albuquerque v. Chavez*, 1998-NMSC-033, ¶ 13, 125 N.M. 809, 965 P.2d 928 (applying the *Mathews* test as a useful framework for determining the amount of process appropriate to protect a liberty or property interest as a matter of constitutional right in the context of an employee's predetermination proceedings). In balancing these factors, reviewing courts consider the administrative

proceedings as a whole. *In re Comm'n Investigation Into 1997 Earnings of U.S. West Commc'ns, Inc.*, 1999-NMSC-016, ¶ 26, 127 N.M. 254, 980 P.2d 37.

An employee with a protected property interest in employment is entitled to a predetermination process that "need not be elaborate" but that must amount to notice of the charges against her and an opportunity to respond before her paycheck is stopped. *Cleveland Bd. of Ed.* v. *Loudermill,* 470 U.S. 532, 542, 545-48 (1985); *Krentz v. Robertson,* 228 F.3d 897, 902-03 (8th Cir. 2000) (explaining that under *Loudermill*, an employee is entitled to notice of termination, a predetermination opportunity to respond, a post-termination process which is usually a hearing, and that "extensive post-termination proceedings may cure inadequate pretermination proceedings."). There is no question that Fleming knew her rights and had notice of the Department's plan to dismiss her from her employment. After receiving the first notice, Fleming contacted the Department and requested additional time to respond to the notice as allowed by the SPB rules. RP 4; SRP 22-23; 1.7.11.13(B)(2) NMAC (providing that an employee may request additional time to respond to the notice of contemplated discipline). Fleming responded to the first and second notice and Appellant considered Fleming's response before taking any action affecting her paycheck. *See Zamora v. Vill. of Ruidoso Downs*, 120 N.M. 778, 781-83, 907 P.2d 182, 185-87 (1995) (interpreting *Loudermill* to require only limited predetermination due process).

After the eleven day deadline for issuing a final action on the first notice passed, the Department started the proceedings again. Fleming's interest in her continued government employment and paycheck did not run the risk of "erroneous deprivation". Instead, Fleming had several extra weeks of paid administrative leave and a second opportunity to respond to the Department's plan to dismiss her.

Other courts have concluded that a due process violation does not occur when an employer corrects a procedural error in the employee's dismissal. *Dep't of Natural Res. v. Sheffield*, 420 So. 2d 892, 894 (Fla. Dist. Ct. App. 1st Dist. 1982) (concluding that the failure of a department to have the correct signature on a notice of proposed action was a technical error and it did not impact the employee's substantive or procedural rights to notice of the proposed action and the opportunity to respond); *Ticeson v. Dep't of Soc. & Health Servs.*, 19 Wn. App. 489, 490-91, 494 (Wash. Ct. App. 1978) (stating that even though an employee received two notices of termination and two hearings before a personnel board (for the same alleged conduct), and even though the second hearing was held more than thirty days after the employee's appeal (contrary to statute), the employee's due process rights were not violated because the employee was afforded with notice and an opportunity to respond); *Kirkpatrick v. Civil Service Com.*, 77 Cal. App. 3d 940, 945 (Cal. App. 2d Dist. 1978) (holding that an employee is afforded only minimal due process rights prior to discharge in anticipation of the full rights

which an employee may exercise after discharge when the employee has the right to a hearing). Fleming did not explain below how the Department erroneously deprived her of her property interests without due process by issuing her a second NCA.

The Department promptly cured the technical error of missing the determination deadline by restarting the process and allowing Fleming an opportunity to respond to the second notice. Under the "comprehensive" SPB administrative scheme, Fleming had the right to extensive post-termination proceedings including discovery, the ability to subpoena witnesses, and an on-the-record hearing presided over by a hearing officer who could take evidence and submit summaries and recommendations to the SPB. *Barreras v. N.M. Corr. Dep't,* 2003-NMCA-027, ¶ 12, 133 N.M. 313, 62 P.3d 770 (concluding that "the SPB administrative scheme is comprehensive" and provides employees with the opportunity for full review of "any adverse employment action appealed"); 1.7.12.12 and .14-15 NMAC (outlining adjudication procedures and powers of the SPB). Fleming's right to extensive post-determination proceedings taken in conjunction with the fact that she had notice and an opportunity to respond to the notice while she was getting paid, demonstrates that Appellant did not violate Fleming's due process rights.

B. <u>This case was inappropriate for mandamus.</u>

This case was inappropriate for a mandamus action because Fleming had a plain, speedy and adequate remedy at law and because the Petition sought to control Appellant's discretion. Appellant raised these issues in the answer to the Petition and at the hearing on the Petition, and, therefore, these issues have been preserved for appellate review. RP 22-30; TR 28-38.

1. Fleming had a plain, speedy and adequate remedy at law.

"Mandamus is a drastic remedy to be invoked only in extraordinary circumstances." *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 12, 128 N.M. 154, 990 P.2d 1277. A writ of mandamus "shall not issue in any case where there is a plain, speedy and adequate remedy". *Id.*; NMSA 1978, § 44-2-5 (1953). Fleming had the remedy of appealing her dismissal to the SPB, and therefore mandamus was inappropriate. This reason alone is sufficient to warrant reversal.

New Mexico courts have held that mandamus is appropriate to compel an agency to hold an administrative hearing, but is inappropriate when an individual has not exhausted available administrative remedies. In *Lovato v. City of Albuquerque*, 106 N.M. 287, 742 P.2d 499 (1987) our Supreme Court articulated when an individual has *no* plain, speedy or adequate remedy at law. Lovato's employer removed him from "assignment status" which resulted in a five percent reduction in his pay. 106 N.M. at 288, 742 P.2d at 500. Lovato requested a

personnel board hearing to grieve his pay reduction and the personnel board declined to grant him a hearing. *Id.* Lovato filed a petition for writ of mandamus which the district court granted. *Id.* On review, the Court concluded that mandamus was appropriate, in part because Lovato did *not* have any remedy at law because the personnel board refused to accept his appeal and hear his grievance. 106 N.M. at 289, 742 P.2d at 501; *see also Stapleton v. Huff,* 50 N.M. 208, 173 P.2d 612 (1946) *superseded by statute as stated in Atencio v. Board of Education of Penasco Independent School District,* 99 N.M. 168, 169-70, 655 P.2d 1012, 1013-14 (1982) (concluding that mandamus was appropriate when the State Board of Education declined to give a tenured teacher a hearing which it was statutorily required to provide before refusing to renew his contract); Dumars & Browde, *supra* at 176 (concluding that "[a]lthough mandamus will not lie before administrative remedies have been exhausted, it is the appropriate remedy to compel a state agency to provide administrative remedies it has failed to make available.").

In *Shepard v. Bd. of Educ. of Jemez Springs Mun. Schools*, 81 N.M. 585, 586, 470 P.2d 306, 307 (1970), the New Mexico Supreme Court reversed a district court's grant of mandamus because the employee had not exhausted available administrative remedies. There, the district court had granted a writ of mandamus to a tenured teacher who the local education board "involuntarily retired". *Id.* The

Court reversed the district court because the employee/teacher and had not appealed the local board's adverse decision to the State Board of Education. 81 N.M. at 586-87, 470 P.2d at 307-08. Because the employee had failed to exhaust her administrative remedies, she could not demonstrate that she did not have a plain, speedy, and adequate remedy at law. *Id.*; *see also U.S. Xpress, Inc. v. N.M. Taxation & Revenue Dep't,* 2006-NMSC-017, ¶ 12, 139 N.M. 589, 136 P.3d 999 (citing *Shepard* with approval and noting that mandamus is only proper after a petitioner for mandamus has exhausted her administrative remedies); Dumars & Browde, *supra* at 177 (stating that "after an adverse decision of a state agency, the petitioner must attempt to invoke *whatever administrative review is available...* [If] an opportunity for a hearing is provided by the agency, the petitioner is *obligated* to seek review by way of available administrative and judicial appeals.") (emphasis added).

On November 23, 2011, while Fleming's Petition was pending, Fleming actually availed herself of her statutory remedy by appealing her dismissal to the SPB. SRP 88. In her SPB notice of appeal, she argued, among other things, that her dismissal was not in accordance with the law because the Department did not timely serve her with an NFA within eleven days of her response to the first notice. SRP 89 ("My Notice of Appeal concerns the disciplinary action of a dismissal... My termination was/is not in accordance with law... [because of the Department's]

failure or refusal to comply with the statutory 11-day post-response time restriction"). The SPB accepted and docketed Fleming's appeal of her dismissal on November 23rd, and scheduled the matter for administrative hearing on February 14, 2012[4]. SRP 92, 93. Fleming's appeal was tacit acknowledgement that the SPB *could* address the merits of her termination *as well as* the procedure the Department implemented to dismiss her. The SPB's acceptance of Fleming's appeal demonstrated that it *would* address all the "facts pertinent to the appeal". NMSA 1978, § 10-9-18(A) (2009).

After the hearing on the Petition, the district court concluded that because Fleming was not capable of appealing from the first notice "as it did not result in an NFA", Fleming "had no right to appeal"[5] and therefore mandamus was proper. RP 89. This was error.

The district court was correct in concluding that the SPB rules only allow an employee to appeal an employer's "final action". RP 89; *see also*

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[4] On January 9, 2012, Fleming requested the SPB to continue her appeal of her dismissal and vacate the scheduled administrative hearing set for February 14, 2012 and suspend all discovery and motion deadlines until the district court ruled on her Petition. The SPB's Administrative Law Judge granted Fleming's motion on January 11, 2012. Because of this appeal, the SPB has continued its stay of Fleming's appeal of her dismissal.

[5] Of course, Fleming had no reason or right to appeal an NCA. An NCA is not a decision; it is notice of a proposed action. The NCA did not alter Fleming's employment status, pay or benefits. It merely provided notice of a plan to take disciplinary action, and the employee's corresponding right to a predetermination meeting or to make a written response.

1.7.11.13(C)(4)(b) NMAC (stating that an employee may appeal a "final disciplinary action to the [SPB]"); 1.7.12.8(A) NMAC (limiting the right to a SPB appeal to employees who have been demoted, dismissed, or suspended without pay). However, the district court was incorrect in concluding that Fleming was entitled to an avenue to address a *notice* of a *contemplated* action, and that the SPB would not address Fleming's timeliness argument.

From August 19, 2011 until her dismissal on October 26, 201, Fleming remained on paid administrative leave. Before Fleming received an NFA she was not demoted, dismissed, or suspended, and she suffered no constitutionally recognized property loss. Neither the Legislature nor the SPB have granted classified service employees with the right to appeal a *notice* of proposed action and such a conclusion is not supported by the State Personnel Act, the SPB rules, or case law. Until an employer takes an action against an employee affecting her pay, an employee has nothing to appeal. In addition, a State employer is not required to take any action to withdraw or abandon a notice. In cases when an employee's response to an NCA explains "his or her side of the story" (1.7.11.13(B) NMAC) and convinces the State employer to abandon the contemplated discipline, the SPB rules do not require the employer to do anything further, and the notice essentially expires. *See generally* 1.7.11.1 to .13 NMAC (outlining procedures for implementing discipline and stating no procedure or

requirements for a State employer to abandon or withdraw contemplated discipline); *see also Cal. Teachers Ass'n v. Butte Cmty. College Dist.*, 48 Cal. App. 4th 1293, 1304-05 (Cal. App. 3d Dist. 1996) (concluding that a premature notice of an employee's termination that occurred before a hearing on the termination was a "nullity" and void as a matter of law because the employer was statutorily required to hold a hearing before a final decision to terminate, and therefore a second notice of termination issued after the hearing was valid); *Bolton v. Board of School Comm'rs*, 514 So. 2d 820, 824, (Ala. 1987) (holding under Alabama's Fair Dismissal Act (repealed) that because an employee was obligated by statute to respond to a notice of termination and state whether he intended to contest his termination or else suffer dismissal "without the right of appeal", that a school board's failure to follow through with a termination following a notice of termination, amounted to an abandonment of the discipline in light of the "counterbalancing duties and responsibilities" of the parties in the termination process).

Fleming did not seek review of the Department's action placing her on *paid administrative leave* (which employers are clearly entitled to do under the SPB rules (1.7.11.12 NMAC)), but instead sought to prevent her *dismissal*. The district court's grant of mandamus is necessarily premised on the conclusion that Fleming had no available avenue to address the missed deadline, and therefore mandamus

was appropriate. RP 89. However, as Appellant argued below, the SPB has the authority to interpret its own rules which include the procedure the Department implemented in dismissing Fleming from her employment.

Fleming had the burden to establish that mandamus was proper. *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶¶ 12-13, 128 N.M. 154, 990 P.2d 1277. It was not the Appellant's duty to demonstrate that this case was inappropriate for mandamus or that the SPB would address Fleming's timeliness argument, but rather it was Fleming's burden to establish that this case was appropriate for mandamus and that the SPB *would not* address her timeliness argument and therefore she did not have an adequate remedy via SPB appeal. The record does not demonstrate that Fleming carried this burden because, as a matter of law, the SPB may address whether an employee's conduct warranted dismissal *and* may address whether the procedure an agency implemented to dismiss an employee was in accordance with the SPB rules.

Under the SPB rules, a state employer may discipline an employee if the employer has "just cause" for implementing the discipline. 1.7.11.10 NMAC. The SPB rules define "just cause" to include behavior such as misconduct, insubordination, inefficiency, absence without leave, etc. *Id.* Whether an employee's conduct merits discipline is a question of fact which is initially left to the judgment of the disciplining agency. If the employee appeals the agency's

discipline, the SPB reviews the employee's conduct and the agency's reasons for implementing the discipline, and may affirm or reverse the agency's decision. 1.7.12.23 NMAC. If the SPB reverses an agency's implementation of discipline, it may reinstate the employee and provide back pay and benefits from the time of the wrongfully implemented discipline. *Id.* These issues present questions of fact which are within the unique purview of the SPB. *AFL-CIO v. Udall,* 111 N.M. 432, 434, 806 P.2d 572, 574 (1991) (recognizing that termination of employment is expressly placed within the purview of the SPB's authority); *West v. San Jon Bd. of Educ.,* 2003-NMCA-130, ¶¶ 13-15, 134 N.M. 498, 79 P.3d 842 (observing that questions of fact are inappropriate to adjudicate in a mandamus action and whether an employee's conduct warranted dismissal was a question for the factfinder in an administrative hearing); *State ex rel. State Highway Comm'n v. Quesenberry*, 72 N.M. 291, 294, 383 P.2d 255, 257 (1963) ("Furthermore, rights may not be adjudicated between the parties by mandamus. It is only a method of enforcing an existing right.").

The SPB may also address whether the *procedure* that an agency used to implement discipline was in accordance with the SPB rules. *Martinez,* 2000-NMCA-074, ¶ 37 (concluding that the SPB may address whether an agency followed the procedures in the SPB rules and that a "public employee may be entitled to relief if the procedures mandated by the Board Rules… are not

followed."); *N.M. Regulation & Licensing Dep't v. Lujan*, 1999-NMCA-059, ¶¶ 20-21, 127 N.M. 233, 979 P.2d 744 (affirming the administrative law judge's determination that the agency did not "conform to the termination procedures outlined [in the SPB rules] prior to dismissing" an employee). The SPB's administrative scheme is comprehensive. *Barreras,* 2003-NMCA-027, ¶ 12. The State Personnel Act (NMSA 1978, §§ 10-9-1 to -25 (1961, as amended through 2009)) established the SPB and provided it with both policy-making and quasi-judicial authority. *Id.*; NMSA 1978, § 10-9-10 (1983) (stating that the SPB shall "promulgate regulations to effectuate the Personnel Act" and "hear appeals"). The rules promulgated by the SPB are required to provide for the "dismissal or demotion *procedure* for employees... including... appeals to the [SPB]". NMSA 1978, § 10-9-13(H) (1983) (emphasis added). A dismissed employee may appeal to the SPB within thirty days after the dismissal and has the right to present all "facts pertinent to the appeal". NMSA 1978, § 10-9-18(A) (2009).

After an agency dismisses an employee, the employee may "request a hearing [before the SPB] in which to present evidence *challenging a dismissal for lack of jurisdiction.*" 1.7.12.8(C) NMAC (emphasis added). If an employee makes such a challenge, the SPB will review the employee's argument and issue a decision as to whether the agency lacked the jurisdiction to implement the employee's dismissal. *Id.* Put another way, an employee may appeal her dismissal

to the SPB and claim that the agency did not have the authority to dismiss her. Accordingly, an aggrieved employee who wishes to enforce the administrative rights created by the State Personnel Act and the SPB rules is expressly permitted to raise those issues before the SPB in an administrative appeal. *Barreras,* 2003-NMCA-027, ¶¶ 20-21 (holding that two plaintiffs' seeking to vindicate their rights granted by the State Personnel Act and attendant rules, regulations, and policies, were capable of making their claims before the SPB). This is a plain, adequate and speedy remedy.

The SPB has the authority to address Fleming's argument that the Department did not comply with the procedures established by the SPB rules. Holding otherwise would necessarily imply that the SPB could not address or interpret the SPB rules which it promulgated. Further, the SPB's interpretation would have been capable of being appealed to district court. NMSA 1978, § 10-9-18(G) (2009) (stating that a party aggrieved by a determination of the SPB may appeal to district court for review). Agencies' interpretations of statutes that govern them are given deference by reviewing courts. *Marbob Energy Corp.,* 2009-NMSC-013, ¶ 6, 146 N.M. 24, 206 P.3d 135. "Rules, regulations, and standards that have been enacted by an agency are presumptively valid and will be upheld if reasonably consistent with the authorizing statutes." *N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n,* 2007-NMCA-010, ¶ 11, 141 N.M. 41, 150

P.3d 991 (filed 2006). Fleming had a remedy available to her to address whether the Department's actions necessitated her reinstatement, and mandamus prevented the SPB from having the opportunity to interpret and apply its own regulations. *Sanchez v. Bd. of Educ.*, 68 N.M. 440, 445, 362 P.2d 979, 983 (1961) (concluding that a petitioner for mandamus who had not exhausted his administrative remedies "cannot seek to enforce a right under the statute and in the same breath fail to utilize the procedures allowed him thereunder."); *see also New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶¶ 13-14, 149 N.M. 42, 243 P.3d 746 (recognizing that the Legislature has frequently delegated specific powers to administrative agencies to review areas within their field of expertise); *Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe*, 2005-NMSC-006, ¶¶ 17-18, 28, 137 N.M. 161, 108 P.3d 1019 (stating that the SPB has expertise in reviewing disciplinary actions). Fleming failed to exhaust her administrative remedies after perfecting her administrative appeal, and therefore this case was inappropriate for mandamus.

2. It is within Appellant's discretion to issue a second notice.

"Mandamus lies to compel the performance of a ministerial act or duty that is clear and indisputable." *New Energy Econ., Inc. v. Martinez*, 2011-NMSC-006, ¶ 10,149 N.M. 207, 247 P.3d 286. A ministerial act is one in which an officer performs under a given set of facts, in a prescribed manner, in obedience to a

requirement of legal authority without exercising his or her own judgment on the appropriateness of the act being done. *Id.* An officer has discretion in performing an act "when it may be performed in one of two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it should be performed." *State ex rel. Reynolds v. Board of County Commissioners*, 71 N.M. 194, 198-99, 376 P.2d 976, 979 (1962). When a "positive duty" requires an action to be performed in only one way, then an official has no discretion. *Id.* "[M]andamus will not lie to correct or control the judgment or discretion of a public officer". *Id.*; *see also Lease v. Board of Regents of New Mexico State University*, 83 N.M. 781, 782, 498 P.2d 310, 311 (1972) (stating that mandamus requires "a clear legal right sought to be enforced.").

The SPB rules do not contain a positive duty or a clear legal command which required the Department to reinstate Fleming when the determination deadline was missed or which prevented the Department from issuing a second notice. The SPB rules are silent as to what happens when a determination deadline is missed and silent as to whether a state employer may reissue a notice to cure a procedural defect. The SPB rules simply state that "the agency shall issue a notice of final action no later than 11 calendar days from the date of receipt of the response." 1.7.11.13(C) NMAC. This is the only mandatory provision of the SPB rules relevant in this case and the Department *complied* with this provision and

issued an NFA within eleven days of Fleming's response to the second notice. *Schreiber,* 58 N.M. at 770, 276 P.2d at 905 ("It is a well-established doctrine in the law relating to mandamus that only clear legal rights are subject to enforcement by the writ."). By engaging in statutory construction when the SPB rules were silent on the subject, the existing rights of the parties were not enforced, but instead were adjudicated. The district court did not recognize and enforce a clear, indisputable, and positive duty in the SPB rules, but instead read requirements into the SPB rules and granted the Petition based on the district court's own interpretation of the rules. This was improper for a mandamus action. *Sanchez,* 68 N.M. at 444-45, 362 P.2d at 983 (observing that the district court's interpretation of a statute when administrative remedies had not been exhausted resulted in a decision that "completely by-pass[ed] the administrative portions of the act and, after by-passing the same, [] substitute[d] the court's judgment for that of the board or the state board", which was improper for mandamus).

Without a clear directive in the law, it was within Appellant's discretion to determine how to proceed when the determination deadline had passed. Appellant could have lawfully abandoned all discipline against Fleming or issued her a second notice to cure the procedural error. Two cases are informative. In *Palenick v. City of Rio Rancho*, this Court concluded that an employee's procedurally improper termination in violation of the Open Meetings Act (NMSA 1978, §§ 10-

15-1 to -4 (1974, as amended through 2009)) could not be ratified or corrected a year after city officials terminated an employee. 2011-NMCA-018 ¶¶ 1-9, __ N.M. __, 270 P.3d 1281. In that case, the City dismissed an employee from his employment in violation of the Open Meetings Act. City officials, after realizing the error, passed a resolution eleven months after the dismissal in an attempt to retroactively cure the violation. *Id.* ¶¶ 1, 4. This Court summarily concluded that no authority "support[ed] the City's attempt to retroactively make the prior invalid action valid and effective as of the date it was taken." *Id.* ¶ 9.

However, in *Kleinberg v. Bd. of Educ. of Albuquerque Pub. Sch.*, this Court recognized that "procedural defects in the Open Meetings Act may be cured by taking prompt corrective action." 107 N.M. 38, 44, 751 P.2d 722, 728 (Ct. App. 1988). There, the local board dismissed an employee by written decision in violation of the Open Meetings Act. Four days later the board recognized its error and after appropriate notice, convened an open meeting at which the employee was present. 107 N.M. at 41-42, 751 P.2d at 725-26. In the open meeting the board voted to discharge the employee in accordance with the Open Meetings Act. *Id.* This Court concluded that the practical effect of the board's action was to "re-open" the termination proceedings and issue a "procedurally corrected decision" which was "prompt, appropriate and effective." 107 N.M. at 44, 751 P.2d at 728. This Court concluded that "procedural defects... may be cured by taking prompt

corrective action", and accordingly held that the board "successfully cured its prior error." *Id.*; *see also Bd. of Educ. of Santa Fe Pub. Sch. v. Sullivan,* 106 N.M. 125, 126, 740 P.2d 119, 120 (1987) (stating that the board was "entitled" to correct a procedural defect in dismissing an employee in order to comply with the Open Meetings Act); *compare* Open Meetings Act Section 10-15-1(A) and (H)(2) (stating that "[a]ll meetings [including final actions on personnel matters]... shall be public meetings") *with* 1.7.11.13(C) NMAC (stating that "the agency shall issue a notice of final action no later than 11 calendar days from the date of receipt of the response.").

The teaching of *Palenick* and *Kleinberg* taken together is that a procedural defect in dismissing an employee may be cured, even after dismissal, if the offending entity promptly moves to correct its error and "re-opens" the dismissal proceedings. *See also Summers v. City of Cathedral City*, 225 Cal. App. 3d 1047, 1053-54, 1060-61 (Cal. App. 4th Dist. 1990) (holding that "inadequate terminations can be validated and corrected after the fact" and that an employer's issuance of a second "Notice of Proposed Disciplinary Action" to an employee corrected a defect in the first notice because "[t]here [was] no reason why a city should be prevented from terminating an employee merely because its first attempt to do so was procedurally defective")(internal quotations omitted); *Moore v. Defense Logistics Agency,* 670 F.Supp. 800, 807 (N.D. Ill. 1987) (holding that a

federal agency's issuance of an amended notice of proposed removal to an employee which contained charges in addition to those already alleged, after the employee had already responded to the initial notice, was not a procedural error); *Wollerson v. Department of Agriculture*, 436 So. 2d 1241, 1242-44 (La. App. 1st Cir.), *writ denied*, 441 So. 2d 1222 (La. 1983) (holding that an employee who received two separate notices of termination was entitled to appeal his termination from the date of the second notice which specified "essentially the same causes for removal as the first letter", and agreeing that that the first letter was rendered "ineffective" by the second letter and therefore the employee's appeal was timely).

The purpose of the State Personnel Act is to address allegations against an employee in close temporal proximity to the employee's response, and satisfy an employee's due process interests in her job. *Montoya v. Dep't of Fin. & Admin.*, 98 N.M. 408, 413, 649 P.2d 476, 481 (Ct. App. 1982) (concluding that the purpose of the Personnel Act was to foster desirable standards and qualifications for employees, and to provide employees with the right of an administrative hearing and judicial review); *Loudermill,* 470 U.S. 532, 542, 545-48 (stating that an employee with a protected property interest in employment is entitled to a predetermination process). Appellant promptly corrected the procedural error in Fleming's dismissal in order to ensure that Fleming's due process rights were protected and that the procedural requirements in the SPB rules were followed.

Appellant did not violate the SPB rules and New Mexico case law specifically allows for the correction/cure of procedural errors in dismissing employees.

Although there is no ambiguity in the SPB rules which would require statutory interpretation, a review of the SPB rules and the legislative intent behind the State Personnel Act supports the Department's position. *Tafoya v. New Mexico State Police Board*, 81 N.M. 710, 713, 472 P.2d 973, 976 (1970) ("Furthermore, techniques in aid of construction of a statute are used to resolve an ambiguity, not to create one."). The plain language of the State Personnel Act and SPB rules do not state what happens when a determination deadline is missed. No weight can be given to the SPB's construction of its own procedural rule when it has been denied the opportunity to interpret the rule's meaning and intent. The SPB rules allow "administrative leave pending disciplinary action" for a period up to 160 consecutive work hours during a disciplinary action proceeding or investigation. *See* 1.7.11.12 NMAC. Further, agencies may place an employee on "[a]dministrative leave *in excess* of 160 consecutive work hours", with approval by the director. *Id.* (emphasis added). Therefore, the SPB rules specifically contemplate that there may be situations when an agency must place an employee on administrative leave in excess of one month pending disciplinary proceedings. *Compare with* 1.7.11.13(B) NMAC (providing an employee with eleven days to respond to a NCA) *and* 1.7.11.13(C) NMAC (providing an employer with eleven

days to issue an NFA after receiving an employee's response to a NCA). If courts interpret the determination deadline to mean that an agency has only one chance within an eleven day window to discipline an employee for her misconduct, it would render unreasonable results.

There are many factors beyond the control of an agency which might prevent it from issuing a determination by the deadline and require reissuance of an NCA. State government could close for weather reasons; the decision maker could be ill or injured preventing a signature; or new or additional facts could come to light requiring a new statement of the charges. If an employee could forever escape discipline for unsatisfactory work performance, insubordination, or misconduct, simply because the mail did not run, the human resources department got stomach flu, the employee hid from service of the notice, the department wanted to amend the notice or add additional charges, an investigation was pending, or there was an internal miscommunication in the department, it would render unjust results.

Citizens often depend on the conscientious and capable performance of a civil servant's duties. It would be unreasonable to force the public and a state employer to excuse an employee's egregious behavior and require the employee's continued employment on a procedural technicality, especially when the state employer took substantial efforts to protect the employee's interests and adhere to

the proper procedures. Such an interpretation would be a reading of requirements into the SPB rules beyond their plain language, would deny the SPB the opportunity to interpret their own rules in the first instance, would be contrary to precedent, and would elevate procedure over purpose.

C. The collective bargaining agreement did not mandate reinstatement.

Fleming claimed in her Petition that the collective bargaining agreement ("CBA") between the State and the AFSCME union (of which Fleming was a member) requires a state employer to impose disciplinary action within forty-five days of a collective bargaining unit employee's misconduct. RP 7. Appellant answered that the district court lacked jurisdiction to enforce provisions of the CBA because claimed violations of the CBA must be adjudicated in accordance with the CBA's terms and that the CBA stated that an employer may implement discipline in excess of forty-five days. RP 28-29. The district court did not address this issue in its letter decision or in its Order. To the extent the district court relied on this argument to grant the Petition, it was not appropriate to do so.

Article 14, Section 1(C) of the CBA provides that an employee who has been dismissed from her employment has the right to an appeal "decided by the State Personnel Board in accordance with the SPB Regulations or may make an irrevocable election to have the appeal decided by an Arbitrator, but not both." RP 34. Article 24, Section 3 of the CBA provides that an employer may impose

disciplinary action "no later than forty-five (45) days after it acquires knowledge of the employee's misconduct... *unless facts and circumstances exist which require a longer period of time*." RP 36 (emphasis added). Article 14 of the CBA allows an employee to pursue a remedy for an alleged violation of the CBA by engaging the employer in the negotiated "grievance procedure" in the CBA by filing a grievance within thirty days. RP 34; SRP 101-02.

When the determination deadline passed, Fleming did not file a grievance claiming a violation of the terms of the CBA. Instead, Fleming filed her Petition and argued in district court that under the CBA, "an employer may not impose any disciplinary action or issue an [NCA] more than 45 days after it knows of alleged misconduct." RP. 7. Fleming also claimed that the Department's "refusal to comply with the compulsory 45-day time limit imposed by the CBA... leaves [Fleming] without a plain, speedy and adequate remedy". RP 7. Because Fleming failed to exhaust her administrative remedies and because the CBA did not require the Department to implement discipline within forty-five days, these arguments have no merit.

A plain reading of the CBA states that Fleming had the right to appeal her dismissal to the SPB *and* had the right to file a grievance. Fleming elected to appeal her termination to the SPB (SRP 88) and she never filed a grievance. *State Board of Parole v. Lane,* 63 N.M. 105-06, 314 P.2d 602-03 (1957) (holding that

when a petitioner fails to exhaust an available remedy by appeal, he forecloses his right to mandamus even thought the right of appeal no longer exists). Similar to the SPB rules, the CBA does not mandate reinstatement or the abandonment of all discipline. The CBA specifically states that some facts or circumstances may allow the employer to implement discipline in excess of forty-five days. Whether this case justified discipline in excess of forty-five days is a question of fact that required a determination by the fact finder in accordance with procedure set forth under the CBA. *West,* 2003-NMCA-130, ¶¶ 13-15 (stating that because an employee had not exhausted her administrative remedies, the question of whether her conduct required "work conferences" before her employer could terminate her employment was a factual issue and was not a proper subject for consideration in a mandamus action).

The failure to exhaust administrative remedies constitutes a jurisdictional defect requiring dismissal. *Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶ 20, 127 N.M. 282, 980 P.2d 65. As a general rule, a party must exhaust her administrative remedies. *Callahan v. N.M. Fed'n of Teachers—TVI*, 2006-NMSC-010, ¶ 24, 139 N.M. 201, 131 P.3d 51. The duty to exhaust contract remedies is treated as analogous to the duty to exhaust administrative remedies under New Mexico law. *In re Application of Angel Fire Corp.*, 96 N.M. 651, 652, 634 P.2d 202, 203 (1981). New Mexico courts have held that an employee's failure to

exhaust available grievance procedures in an employee contract, handbook, manual, or bargaining agreement, will bar an employee from bringing an action asserting a violation of rights or procedures granted to the employee in the same document. *Lucero v. Bd. of Regents of the Univ. of N.M.*, 2012-NMCA-055, ¶¶ 10-13 __ N.M. __ 278 P.3d 1043 (observing that an employee's rights are limited by the terms that gave them birth); *Jones v. Int'l Union of Operating Eng'rs,* 72 N.M. 322, 331, 383 P.2d 571, 575 (1963) (observing that the grievance procedures provided by a collective bargaining agreement bars suits by individual employees against the employer for an alleged violation of the agreement). The grievance process allows an employer to redress wrongs without burdening the courts with unnecessary litigation and "not requiring an employee to exhaust internal grievance procedures allows the employee to choose which employment policies are binding." *Lucero*, 2012-NMCA-055, ¶ 13.

Fleming had the burden to demonstrate that mandamus was appropriate. She did not demonstrate that the plain terms of the CBA articulated a positive duty that required the Department to abandon all discipline or reinstate her employment. Fleming did not demonstrate that she had exhausted all administrative remedies and she did not demonstrate that she had no remedy available to her at law to address the alleged violation. Because the CBA specifically allows for employers

to implement discipline outside of forty-five days and because Fleming did not comply with grievance procedure in the CBA, mandamus was inappropriate.

VI. CONCLUSION

The Department did not violate Fleming's due process rights by issuing a second notice of contemplated action while maintaining her on paid leave. If this Court reverses the district court, the parties will resume this case at Fleming's appeal before the SPB, which will also be subject to district court review applying appellate standards. Fleming is guaranteed full due process in a hearing on the merits of her dismissal, then district court review of the SPB's decision. State employees in the classified service do not have a right to appeal their employer's notice of *contemplated* disciplinary action. Unless an employee is demoted, dismissed, or suspended without pay, an employee's property interest in her pay have not been affected and she has nothing to appeal. The Department complied with the SPB procedures for implementing discipline.

The district court's ruling that a State employer has only one chance to issue an NFA reads language into the rules and implies that a notice can never be amended and that a missed deadline can never be cured. The purpose of the SPB administrative scheme is to fairly review the merits of an employee's discipline and ensure that they are afforded with due process. These are issues that are squarely within the purview of the SPB's expertise and purpose. Fleming had

notice of the contemplated discipline, an opportunity to respond, and the right to an administrative hearing. There was no risk that the Department or the SPB would erroneously deprive her of her property interest in her continued employment without due process. Fleming's failure to follow the agreed upon procedures in the CBA forecloses any argument that she had no remedy to address a violation of that agreement. The CBA's plain language allows employers who are parties to the agreement to implement discipline in excess of forty-five days, which also demonstrates that mandamus was inappropriate in this case.

For the above reasons, Appellant respectfully requests this Court to reverse the district court and remand this case to district court for dismissal of the Petition, thereby allowing the personnel board appeal to proceed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be served on the following parties or counsel of record this 19th day of November, 2012, via e-mail and via United States first class mail, postage prepaid:

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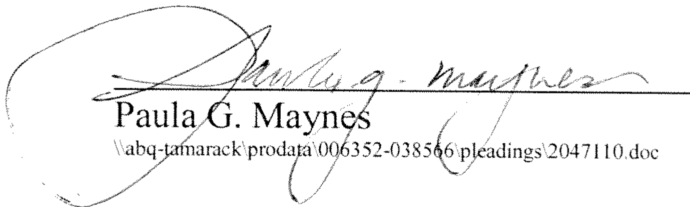

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