IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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 REPLY BRIEF

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

ORAL ARGUMENT REQUESTED

MILLER STRATVERT, P.A.
Paula G. Maynes
P.O. Box 1986
200 West DeVargas, Suite 9
Santa Fe, New Mexico 87501
(505) 989-9614
(505) 989-9857 *facsimile*
Attorneys for Respondent-Appellant

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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 this Reply Brief in response to Appellee Nancy Fleming's (Esq. acting *pro se*) ("Fleming") Answer Brief. For the reasons stated below, Appellant requests this Court's reversal of the district court's grant of a Writ of Mandamus.

II. ARGUMENT

A. Whether "just cause" supports the Department's decision to dismiss Fleming is not before this Court.

The State Personnel Board ("SPB") has not reviewed whether the Department's decision to dismiss Fleming from her employment is supported by "just cause", and therefore, the merits of Fleming's dismissal have not yet been litigated. The district court ordered Fleming's reinstatement because it concluded that the SPB rules prohibit State employers from reissuing a notice of contemplated action ("NCA") to cure a procedural error in the disciplinary process. RP 88. Fleming's claim that the Department dismissed her because she complained about gender based pay discrimination is false and pertains to the underlying merits of her dismissal. AB 2-3. The Department welcomes the opportunity to litigate before the SPB whether just cause supports Fleming's dismissal due to her insubordination, falsifying records, withholding information from a district court while working for the Department, and other actions which

amounted to misconduct. The issue before this Court is whether the district court was correct in ordering the Department to reinstate Fleming.

B. The requirement in the SPB rules to issue a notice of final action within eleven days is not a "jurisdictional statute of limitations".

A State employer may reissue or amend an NCA before it takes disciplinary action against an employee. In cases when an employer decides to withdraw or abandon a notice of proposed disciplinary action, the SPB rules do not require the employer to take any action 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). The purpose of the eleven day time requirement in the SPB rules is to ensure that an employer makes a decision on an employee's discipline in close temporal proximity to an employee's response to the allegations. *Benavidez v. City of Albuquerque*, 101 F.3d 620, 626, 627 (10th Cir. 1996) (citing *Cleveland Bd. of Ed.* v. *Loudermill,* 470 U.S. 532 (1985) and discussing the purpose of the predetermination procedure and concluding that it "is not meant to resolve definitively the propriety of the discharge, but only to determine whether there are reasonable grounds to believe the charges are true", and therefore the predetermination procedure acts as a "hedge against erroneous action"); *City of Albuquerque v. Chavez*, 1998-NMSC-033, ¶¶ 9, 12, 14-19, 125 N.M. 809, 965 P.2d 928 (citing *Benavidez* with approval).

Appellant agrees with Fleming that the SPB rules should be interpreted in accordance with their plain meaning, and that all of the relevant provisions should be read together. AB 31-32; *Chatterjee v. King*, 2012-NMSC-019, ¶ 12, ___ N.M. ___, 280 P.3d 283 (stating that statutes should be read "in conjunction with statutes addressing the same subject matter" and that courts should examine how a "specific statute fits within the broader statutory scheme."); *Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶ 11, 146 N.M. 473, 212 P.3d 361 (stating that statutory construction requires review of "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."); *State v. Willie,* 2009-NMSC-037, ¶ 9, 146 N.M. 481, 212 P.3d 369 (reviewing courts apply the same rules as used in statutory construction in interpreting the Administrative Code). However, Fleming cites no case law and no provision of the SPB rules which state that an employer is prohibited from reissuing a notice of proposed discipline (for any reason), or that 1.7.11.13(C)(2) NMAC articulates a "jurisdictional statute of limitations". AB 12, 23, 33.

Fleming argues that the SPB rules and their "related provisions, read together" demonstrate that the time limit to implement discipline is "mandatory and therefore jurisdictional". AB 32-33. Contrary to her assertion, the rules do not require an employer to forever abandon discipline against an employee for the stated reasons in a notice of proposed discipline simply because the employer misses the deadline to implement the discipline, and a fair reading of the rules implies the opposite. The SPB rules state:

> A. *An agency may withdraw a completed disciplinary action* prior to commencement of a personnel board appeals hearing *so long as the appellant is fully restored to pre-disciplinary status* insofar as employment, back pay and benefits are concerned.
>
> B. Upon agency withdrawal of a disciplinary action, the hearing officer may dismiss the appeal without prejudice to the agency, *which may reinitiate disciplinary action.*
>
> 1.7.12.9 NMAC (emphasis added).

Therefore, an employer may unilaterally reinstate a dismissed employee and reinitiate disciplinary proceedings for the same offense(s) originally alleged. Surely, if a State employer can cure a procedural technicality and begin disciplinary proceedings anew *after dismissal* by reinstating an employee and providing her with back pay and benefits, then an employer can amend or reissue its *notice* to an employee *before a dismissal* when the employee has not yet been deprived of any pay or benefits.

Under the SPB rules, after missing the eleven day deadline to issue a Notice of Final Action ("NFA"), the Department could have dismissed Fleming, reinstated her with full pay and benefits, and then began the disciplinary proceedings anew. 1.7.12.9 NMAC; *see also Summers v. City of Cathedral City*, 225 Cal. App. 3d 1047, 1053-54, 1060-61 (Cal. App. 4th Dist. 1990) (concluding that there was no due process violation when an employer corrected an improper dismissal by reinstating an employee and providing him with back pay and simultaneously issuing a second notice of proposed action which began the termination proceedings anew). By keeping Fleming on uninterrupted paid administrative leave with full benefits from August 19, 2011 until her dismissal on October 26, 2011, the Department complied with the SPB rules and ensured that she was not deprived of her property interests (pay and benefits) without following the rules' required procedures. After missing the NFA deadline, the Department issued her a second notice on October 3, 2011 (RP 24; SRP 12) which she responded to on October 17, 2011 (SRP 73-74). After considering her second response, the Department issued her "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; RP 48. When read together, the SPB rules demonstrate that an employer may withdraw, amend, or reissue a notice of proposed disciplinary action to an employee, and that the time limits are not jurisdictional statutes of limitations.

C. The Department did not violate Fleming's due process rights.

After the Department missed the eleven day deadline to implement discipline, the Department restarted the process in order to ensure that Fleming's due process rights were not violated. Fleming received several extra weeks of paid administrative leave and a second opportunity to respond to the Department's notice of contemplated discipline. Fleming chose to reassert her response to the first notice. SRP 74. In her Answer Brief, Fleming claims that her due process right to a predetermination decision encompasses a timeliness element (AB 29) and that the predetermination procedure was a "sham" because the Department "pre-determined Fleming's termination and never intended to meaningfully consider" her response (AB 30). The Department will address these issues in turn.

1. The Department did not deprive Fleming of her rights during the predetermination process.

Fleming argues that "timely action is an element of the fundamental right of due process" and that the Department's second predetermination procedure "did not cure the delay... but in fact aggravated it." AB 29. Essentially, Fleming argues that the Department violated her due process rights by delaying in implementing her discipline. However, she cites no law which stands for the proposition that an employer's delay in implementing discipline, *before an employee is deprived of any property rights*, is a due process violation.

Loudermill divides procedural due process claims into three stages. First, in the predetermination process, an employee receives notice of discipline and is given an opportunity to respond. The next stage is when the employer actually implements the discipline. The final stage is the post-determination process when an employee is usually afforded with a hearing before a neutral third party. *Loudermill*, 470 U.S. at 546-48; *see also Krentz v. Robertson,* 228 F.3d 897, 902-03 (8th Cir. 2000) (explaining the same). 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 and an opportunity to respond before the employer implements discipline. *Loudermill,* 470 U.S. at 52, 545-48. Extensive post-determination proceedings may cure inadequate predetermination proceedings. *Id.* 470 U.S. at 546-48.

Before an employee is deprived of a property interest, the employee is only entitled to notice and an opportunity to respond. *Merrifield v. Board of County Com'rs for County of Santa Fe,* 654 F.3d 1073, 1078 (10th Cir. 2011); *see also* AB 28 (admitting that "[i]n this case, Fleming received notice and timely responded to [the] allegations."). Due process does not require a delay between the employer's notice and the employee's opportunity to respond, and an employer may inform an employee of proposed discipline and simultaneously provide the employee with an opportunity for response. *Id; see also Wright v. Keokuk County Health Center,*

399 F. Supp.2d 938, 961 (S.D. Iowa 2005) ("[N]o delay between the "notice" and "opportunity to respond" is constitutionally required, and a face-to-face meeting confronting the employee with the charges is satisfactory.").

The *Loudermill* Court recognized that there is a point at which a delay in completing the post-determination proceeding would be a constitutional violation, but it did not address a delay in a predetermination proceeding. 470 U.S. at 547 (holding that a nine month delay in post-determination proceedings, *after* the employee was deprived of his property rights, was not unreasonably long or unconstitutionally lengthy). Later, in *Federal Deposit Insurance Corp. v. Mallen*, the Supreme Court rephrased the three factors comprising the *Matthews* balancing test to clarify at what point a delay becomes unconstitutional. 486 U.S. 230, 242 (1988). First courts examine the importance of the private interest and the harm to this interest occasioned by the delay. Second, the justification offered by the Government for delay and its relation to the underlying governmental interest. Third, the likelihood that the interim decision may have been mistaken. *Id.*

In *Ulmer v. Fort Wayne Cmty. Schs*, the court examined the *Mallen* factors in reviewing whether a delay was unconstitutional when an employee was suspended *without pay* for nearly five months *before* her employer made a predetermination decision on her discipline. 2005 U.S. Dist. LEXIS 14476, 31-35 (N.D. Ind. July 18, 2005). The court concluded that although the employee's harm

increased due to the length of her suspension without pay, and the government's decision to delay the predetermination process was "misplaced", the third factor (the likelihood of a mistaken interim decision) "swamps the first two factors in favor of the [employer]" because the employee "had two opportunities to tell her story before the pre-termination hearing" and she could not show that the delay increased the likelihood that her employer made a mistaken decision on her discipline. *Id.* at 34-35; *see also State ex rel. Children, Youth & Families Dep't v. Maria C.*, 2004-NMCA-083, ¶ 37, 136 N.M. 53, 94 P.3d 796 (citing *Loudermill* and examining whether CYFD employed procedures that would risk the erroneous deprivation of a mother's parental rights, and concluding that the mother must show that the ultimate outcome "might have been different" in order to show a risk of erroneous deprivation which weighed in her favor).

On balance, all of the factors weigh in the Department's favor. Unlike in *Ulmer*, Fleming did not show to the district court that "harm has increased due to the extended length of her suspension" because Fleming was on paid administrative leave with benefits during the entire predetermination process. *Ulmer*, 2005 U.S. Dist. LEXIS 14476, at 34. Under the second *Mallen* factor, the Department delayed taking action after missing the deadline in order to comply with the SPB rules and ensure that Fleming's due process rights were not violated. *Wood v. Summit County Fiscal Office*, 579 F. Supp. 2d 935, 960 (N.D. Ohio 2008)

(concluding that an employee's "suspension with pay" was "harmless beyond a reasonable doubt" and therefore was not a due process violation). Under the final factor, there is no likelihood that the Department's decision may have been mistaken due to the delay. Like in *Ulmer*, Fleming had two opportunities to respond to the Department's notice of proposed discipline, and Fleming did not demonstrate or argue to the district court that the additional four weeks of paid administrative leave deprived her of a defense to the Department's allegations or demonstrated that the Department's decision was mistaken.

Fleming argues that she had a fundamental right to have the Department dismiss her within eleven days of her response to the first notice. AB 29. She claims that any delay in her dismissal, even if she suffered no constitutionally protected property loss, was a failure to comply with mandatory time limits to impose discipline. Citing to *Redman v. Bd. of Regents of the N.M. Sch. for the Visually Handicapped*, 102 N.M. 234, 693 P.2d 1266 (Ct. App. 1984), Fleming claims that the "failure to comply with mandatory statutory time restrictions on the power to review *and impose discipline* precludes such a decision from being in accordance with law". AB 29 (emphasis added). *Redman* does not stand for this proposition.

In *Redman*, this Court concluded that a statute requiring the State Board of Education to hold a *post-determination* hearing within sixty days evidenced the

Legislature's intent to provide a "prompt hearing", and that expeditious review "protects teachers from monetary injury." 102 N.M. at 239, 693 P.2d at 1271. This Court held that the time limit for the Board to review the school's decision on an employee's discipline was a mandatory requirement that could only be extended on a showing of good cause or written waiver of the employee. 102 N.M. at 238-39, 240, 693 P.2d at 1270-71, 1272.

Redman did not address the power of an employer to "impose discipline" as Fleming suggests. AB 29. The question in this case does not involve the authority, jurisdiction, or timeliness of the SPB to review Fleming's discipline after she had been deprived of her property rights, but instead, the ability of an agency to impose discipline before any deprivation of property rights has occurred. Because the Department did not deprive Fleming of her pay and moved promptly to remedy the procedural error, Fleming was not deprived of her due process rights.

2. The Department did not "pre-determine" Fleming's discipline.

Fleming cites to *Ryan v. Illinois Dep't of Children & Family Servs.*, 185 F.3d 751 (7th Cir. 1999) and summarily claims that the Department "pre-determined" her discipline and "never intended to meaningfully consider Fleming's side of [the] allegations." AB 30. She claims that her opportunity to respond was really "no opportunity at all" and the predetermination process was "a sham" because the

agency was unwilling to listen to her. AB 30-31. Fleming's reliance on *Ryan* is misplaced.

In *Ryan,* the plaintiffs, in response to a motion for summary judgment, offered evidence that their employer manufactured reasons for their termination, that an outside attorney hired to review the plaintiffs' terminations believed that the employer had made up its mind to discharge the plaintiffs before they received a hearing, and that one of the individuals hired to investigate the plaintiffs believed that the employer intended to terminate the plaintiffs regardless of the evidence against them. The court held that the plaintiffs "scraped together enough to defeat the defendants' right to summary judgment" on their procedural due process claims. 185 F.3d at 762; *see also Riggins v. Goodman*, 572 F.3d 1101, 1114-1115 (10th Cir. 2009) (recognizing that the mere showing that a supervisor recommended discipline and was subsequently unconvinced to abandon the discipline does not show a flaw in the predetermination procedure because "it is often assumed that the supervisor who best knows the charges (and who perhaps has even brought them) is the most appropriate initial decision-maker.") (internal quotations and citations omitted); *West v. San Jon Bd. of Educ.,* 2003-NMCA-130, ¶ 8, 134 N.M. 498, 79 P.3d 842 ("[D]ue process does not require a neutral tribunal at the pre-termination stage.").

Fleming's argument is far less compelling than the evidence offered in *Ryan* and does not amount to a showing of a due process violation. She claims that the Department never intended to consider her response, as evidenced by the fact that: (1) the allegations in the notice were "stale"; (2) the Department demanded that Fleming re-respond to the same allegations after she already responded to them; and (3) that the Department refused to comply with the statutory requirements for employee discipline. AB 30-31. However, the allegations against Fleming were not stale because, as discussed more fully below and in the BIC (at 31-37), the Department is permitted to implement discipline for actions occurring more than forty-five days after it acquires knowledge of an employee's misconduct. Secondly, the Department provided an opportunity for Fleming to respond to the second notice, and did not demand or force her to provide a response. Fleming could have reasserted her first response (which she did), could have submitted a different response, could have requested a meeting to respond orally, or could have decided not to respond at all. 1.7.11.13(B) NMAC. Finally, as discussed above, the Department complied with the SPB rules and dismissed her within eleven days of her response to the second notice and there is no statute of limitations to a predetermination procedure.

D. <u>There is no right to "appeal" a notice of contemplated action.</u>

The district court concluded that "[m]andamus lies here because there is no right to appeal from the First NCA as it did not result in an NFA... Further as there is no right to appeal from the First NCA, Mandamus is proper to avoid the denial of [Fleming's] fundamental rights." RP 89. In her Answer Brief, Fleming adds that mandamus was proper because she had no access to a plain, speedy and adequate remedy before the SPB to appeal the Department's first notice. AB 34-36.

The district court's statement underscores its confusion. Employees cannot appeal a notice. A notice informs an employee of its employer's plan and allows the employee to respond and present "his or her side of the story" which may convince the employer not to proceed with discipline *before discipline is implemented.* 1.7.11.13(B) NMCA. Following an employee's response, an employer may lawfully act in two ways: either proceed with discipline or abandon/withdraw/modify the contemplated discipline. *State ex rel. Reynolds v. Board of County Commissioners*, 71 N.M. 194, 198-99, 376 P.2d 976, 979 (1962) (explaining that mandamus is inappropriate when it seeks to control an official's discretion which "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."). The SPB rules do not allow

employees to appeal a notice and there is no requirement that an employee must receive notice of a notice. *Merrifield,* 654 F.3d at 1078 ("Nothing in *Loundermill* suggests, nor do we hold, that a public employee is entitled to some type of 'pre-notification notice' of the charges against her or him."); *see also Mills v. State Bd. of Psychologist Exam'rs*, 1997-NMSC-028, ¶ 10-11, 123 N.M. 421, 941 P.2d 502 (stating that courts may not review an action of an administrative agency until its actions are final and ripe for review).

If Fleming sought to "appeal" the entire predetermination procedure the Department implemented (two notices and an action), she could have (and in fact did) appeal her dismissal to the SPB for administrative review. SRP 88; *see also* 1.7.12.8(C) NMAC (stating that an employee may "request a hearing [before the SPB] in which to present evidence challenging a dismissal for lack of jurisdiction" and the SPB's hearing officer may then submit a recommended decision on the employees challenge based on jurisdiction). This is an adequate and speedy remedy.

Fleming's petition for a writ of mandamus sought to prevent her dismissal before it occurred. RP 8 (requesting mandamus directed at the Department requiring it "to immediately withdraw with prejudice [the] NCA and all underlying allegations against [Fleming]"). The Department had discretion in re-issuing the notice, in considering Fleming's response, and in deciding whether to dismiss

Fleming after the predetermination procedure. Fleming's premature petition and the district court's grant of the writ gave Fleming an avenue to "appeal" a notice and denied the SPB of the opportunity to interpret its own rules.

E. The Department did not violate the Collective Bargaining Agreement.

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). 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 (observing that questions of fact are inappropriate to adjudicate in a mandamus action). Fleming's claim that the Department systematically disregarded the forty-five day time limit (AB 24) is an attempt to read behind un-litigated facts on appeal and circumvent the question of whether this case was appropriate for mandamus. The CBA does not articulate a positive duty that required the Department to abandon all discipline and reinstate her employment nor does it prohibit an employer from implementing discipline after forty-five days.

Fleming did not follow the procedures outlined in the CBA to pursue a remedy for her claimed violation of the CBA and therefore she failed to exhaust

her remedies. RP 34; SRP 101-02; BIC 34-37; *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). To the extent that Fleming claims that her discipline based on "stale offenses" shows the Department's "pretext", and therefore the "factual circumstances" show the district court correctly ruled that mandamus was necessary, Fleming is mistaken. AB 25. The SPB can address "whether the reasons offered by the employer for a termination are pretext" for an ulterior motive, and therefore can determine whether Fleming was dismissed for the Department's stated reasons or whether she was dismissed for improper reasons and therefore without just cause. *Martinez v. New Mexico State Eng'r Office,* 2000-NMCA-074, ¶¶ 28-29, 129 N.M. 413, 9 P.3d 657. Although Fleming does not state what ulterior motive the Department may have had for her dismissal, that issue along with the underlying merits of her dismissal are not before this Court.

III. CONCLUSION

The SPB rules allow a State employer to reissue or amend a notice of contemplated discipline and the time limits for acting on a disciplinary action are not jurisdictional or a statute of limitations. The Department complied with SPB rules when it issued Fleming an NFA within eleven days of her second response.

The Department did not violate her due process rights because Fleming was not deprived of her property interest in her pay before the predetermination procedure was complete. State employees are not entitled to appeal a notice because a notice merely informs an employee of a contemplated disciplinary action and the right to respond. A notice does not alter employment status, pay, or benefits. Fleming had the right to appeal her dismissal to the SPB where she could address the procedure the Department employed to implement her discipline. The collective bargaining agreement does not prohibit discipline in excess of forty-five days and Fleming did not follow the procedure in the agreement to allege a violation of that agreement, and therefore cannot raise those issues in collateral proceedings.

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,

MILLER STRATVERT P.A.

By: _____

PAULA G. MAYNES
Miller Stratvert P.A.
200 West DeVargas, Suite 9
Post Office Box 1986
Santa Fe, NM 87504-1986
Phone: 505-989-9614
Fax: 505-989-9857
Attorney for Respondent-Appellee

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 5th day of March, 2013, via e-mail and via United States first class mail, postage prepaid:

VIA U.S. MAIL AND EMAIL
Nancy Fleming, *pro se*
P. O. Box 1943
Las Cruces, NM 88004
Telephone: (575) 523-6342
nancyf516@gmail.com

VIA U.S. MAIL ONLY
Yvonne Baca Marquez
Court Monitor
P.O. Box 488
Albuquerque, NM 87103

VIA U.S. MAIL ONLY
Honorable Judge Shannon Bacon
Second Judicial District
Post Office Box 488
Albuquerque, NM 87103

VIA U.S. MAIL
Court Clerk (Special Services Division)
Second Judicial District
Post Office Box 488
Albuquerque, NM 87103

_____
Paula G. Maynes
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