IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NANCY FLEMING,

Petitioner/Appellee,

v.

N.M. Ct. App. No. 31,907
Dist. Ct. No. CV-11-10285
Bernalillo County

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

Respondent/Appellant.

Appeal from the Second Judicial District Court
Bernalillo County
The Honorable C. Shannon Bacon, District Judge

PETITIONER-APPELLEE'S ANSWER BRIEF

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Table of Contents

Table of Authorities

New Mexico Cases

Statutes

Other Cases

Rules

Law Review Articles

Constitutional Provisions

I. Supplemental Summary of Proceedings

REFERENCES TO RECORD MATERIALS

The December 1, 2011 District Court hearing is in booklet form prepared by the District Court. All citations to the hearing use the [TR page:line] form. All citations to the Record Proper use the Bates number generated by the District Court [RP 0001]. All citations to the Supplemental Record Proper use the [SRP page:paragraph] form.

A. Introduction

This case arose under New Mexico's mandamus statute, NMSA 1978, §§ 44-2-1 – 44-2-14, as the result of Appellant Jacqueline L. Cooper's delay and refusal, in her capacity as New Mexico's chief public defender, to comply with the following mandates imposed on public employers by New Mexico law:

1. A public employer shall provide notice of final disciplinary action within 11 days after receiving an employee's response to the employer's disciplinary allegations. 1. 1.7.11.13(C)(2) NMAC. [SRP 16].

2. A public employer shall not refuse or fail to comply with a collective bargaining agreement. NMSA 1978, § 10-7E-19(H). [SRP 20].

3. A public employer may not notice or impose discipline against an employee more than 45 days after it knows of alleged misconduct unless facts and circumstances exist which require a longer period of time). Article 24, Section 3 of the State's collective bargaining agreement with AFSCME Council 18. [SRP 8].

B. Summary of Facts and Procedural History

Summer 2011 – Fleming Complained About Pay Discrimination

Fleming, employed since January 2000 as an assistant public defender, complained to Cooper about gender based pay discrimination in or about June 2011. [TR 4:19-20, 12/1/11 hearing: "Q: How many years have you been employed there? A: Twelve."]; [TR 17:25 – 18:5, 12/1/11 hearing: ". . . I had complained in writing about pay discrimination . . . . very shortly before the action against me was initiated."]. Fleming's three prior performance evaluation ratings before that had been "exemplary." [SRP 32-¶4, September 6, 2011 response to notice of contemplated termination].

August 19, 2011 – Cooper Issued Notice of Contemplated Termination

Cooper responded to Fleming's discrimination complaint by serving her with a notice of contemplated termination and removing her

from her workplace and her regular duties on August 19th. [SRP 25-30, 8/19/11 notice of contemplated termination]; [TR 8:13-19, December 1, 2011 hearing]. The notice of contemplated termination consisted of alleged infractions spanning 2009, 2010 and 2011. [SRP 25-30, 8/19/11 notice of contemplated termination]. Fleming was not provided progressive discipline notice contemporaneously with those alleged infractions. [TR 8:23 – 9:8, 12/1/11 district court hearing].

The litany of infractions Cooper alleged to justify Fleming's termination notably included asserted noncompliance and/or untimely compliance with bureaucratic rules. [SRP 26-27]. As of August 19th, the staleness of Cooper's allegations against Fleming ranged from 15 days to 698 days. [SRP 86, summary of delay associated with Cooper's allegations]; [SRP 25-30, 8/19/11 notice of contemplated termination amassing allegations spanning 2009, 2010 and 2011].

August 29, 2011 – Fleming Negotiated an Extension to Respond

Because Cooper delayed provision of requisite disclosure, Fleming negotiated an extension to September 6, 2011 of the 1.7.11.13(A) NMAC 11-day time limit to respond to Cooper's allegations. [SRP 22-23, 8/29/11 negotiated response extension]. Cooper's counsel specifically

warned "No further extension will be allowed." [SRP 22-¶4, negotiated response extension].

September 6, 2011 – Fleming Timely Responded to the Allegations

Fleming timely responded in detail to Cooper's allegations on September 6th. [SRP 32-59, 9/6/11 response to notice of contemplated termination]. Fleming refuted the allegations, pointed out their pretextual nature as well as Cooper's failure to investigate them, and also pointed out that as of August 19th most of them violated the 45-day time limit to notice or impose discipline required of public employers by NMSA 1978, § 10-7E-19(H) under Article 24, Section 3 of the State's collective bargaining agreement. [SRP 35-¶2, 36-¶6, 41-¶2, 42-¶4, 45-¶3, 50-¶3, 53-¶1, 55-¶5, 56-¶5, 57-¶7, and 59-¶1, Fleming's 9/6/11 response]; [SRP 86, summary of delay associated with Cooper's allegations].

September 19, 2011 – Legal Time Limit to Impose Discipline Expired

Cooper did not issue notice of final action by September 19th as mandated by 1. 1.7.11.13(C)(2) NMAC. Because the 11-day time limit under 1.7.11.13(C)(2) NMAC fell on Saturday, September 17th, Cooper had the benefit of 13 calendar days, to Monday, September 19th, to

comply with the statutory time limit and still failed to do so. The District Court specially noted the fact that Cooper made no effort to negotiate an extension of the time limit. [TR 35:19-25, 12/1/11 district court hearing].

September 30, 2011 – Fleming Sought to Return to Work

Fleming sought via her counsel's September 30th letter to be returned to her duties in view of Cooper's inaction and failure to comply with the 1.7.11.13(C)(2) NMAC time limit. [SRP 61-62, 9/30/11 letter of Fleming's counsel to Cooper]. The request pointed out that Fleming would have been automatically terminated for failing to comply with the time limit to respond to Cooper's allegations. [SRP 61-¶4: "If Ms. Fleming had not responded to your notice of contemplated termination by September 6th, she presumably would have been automatically terminated by your Department."].

October 3, 2011 – Cooper Reissued the Same Allegations

Cooper's response to Fleming's September 30th request was that Cooper's subordinate John Stapleton identically reissued the August 19th allegations on October 3rd. [SRP 69: 10/3/11 reissuance of 8/19/11 allegations]; [SRP 25-31, identical 8/19/11 allegations].

Stapleton directed Fleming to respond a second time to the same allegations despite the fact that Fleming's response to them had by then been in Cooper's hands for 28 days. [SRP 69-¶3: ". . . you have fourteen (14) calendar days to respond in writing to this notice . . ."]. Stapleton also revealed that Cooper had not yet considered Fleming's response as of October 3rd. [SRP 69-¶4: "You are directed not to return . . . until a final decision is made in this matter."].

In addition, Stapleton introduced the tactical representation of Cooper's noncompliance with the mandate of 1.7.11.13(C)(2) NMAC as an "administrative oversight." [SRP 64-¶ 2, October 3rd reissuance of Cooper's allegations: "Through an administrative oversight, the Notice of Final Action was not served upon you within eleven (11) days of the date of your response as required by 1.7.11.13(C) NMAC."].

Fleming's counsel immediately requested an explanation of the asserted "administrative oversight," but no response was provided. [SRP 71, 10/3/11 email of Fleming's counsel to the law firm of Cooper's counsel: "This appears to be too late. Please advise of the nature of the administrative oversight."]; [SRP 73-¶4, 10/17/11 letter from Fleming's counsel to Cooper: "I sent an email inquiring about the claimed

administrative error, to which I have still received no response."]; [TR 10:4-21, transcript of December 1, 2011 mandamus hearing].

Upon Stapleton's October 3rd reissuance of the same allegations and demand for Fleming to re-respond to them 28 days after Cooper received Fleming's responses, Fleming called the State Personnel Board adjudication office and was informed that the Board has no jurisdiction until an employer files a notice of final action, and that an employee cannot appeal improper disciplinary procedures to the Board until a notice of final action is filed. [TR 11:18-22, Fleming's testimony at the 12/1/11 mandamus hearing].

By October 3rd all of Cooper's allegations against Fleming exceeded the 45-day time limit to notice or impose discipline mandated by NMSA 1978, § 10-7E-19(H) under Article 24, Section 3 of the collective bargaining agreement. [SRP 86, delay associated with Cooper's allegations was 60-743 days by October 3rd].

October 12, 2011 – Mandamus Petition Filed

Having no ability to seek redress from the State Personnel Board for Cooper's improper delay, as established by the Board, Fleming filed

a verified petition for writ of mandamus on October 12th in the state district court. [RP 0001 – 0009].

October 17, 2011 - Letter to Cooper: "No Second Response & No Waiver"

Fleming's counsel notified Cooper in writing that Cooper's October 3rd attempt to artificially revive expired time limits was impermissible and not waived by Fleming:

> "The compulsory time limits provided by NMAC §1.7.11.13(C)(2) and CBA Article 24 are jurisdictional. Your failure to comply with them annuls your Department's standing to pursue your allegations against Ms. Fleming by operation of law."

[SRP 74-¶3, counsel's October 17th letter to Cooper].

October 26, 2011 – Cooper Issued Notice of Final Action 40 Days Late

Contrary to 1. 1.7.11.13(C)(2) NMAC, on October 26th, Cooper issued a notice of final action 40 days beyond the 11-day statutory time limit to do so and 51 days after receiving Fleming's response to the allegations. [SRP 77-84, October 26, 2011 notice of final action]. As was the case upon their October 3rd reissuance, as of the October 26th final notice all of Cooper's allegations against Fleming violated the 45-day time limit to notice or impose discipline mandated by NMSA 1978,

§ 10-7E-19(H) under Article 24, Section 3 of the collective bargaining agreement. [SRP 86, delay associated with Cooper's allegations was 85-768 days by October 26th].

November 23, 2011 – Right to State Personnel Board Appeal Preserved

1.7.12.8(B) NMAC gives public employees only 30 days to appeal a notice of final action. Fleming therefore complied with the 30-day time limit to preserve her right to a State Personnel Board appeal while her mandamus petition remained pending by filing a State Personnel Board notice of appeal on November 23rd. [SRP 88-90, 11/23/11 State Personnel Board Notice of Appeal Form].

Fleming's hearing testimony established that it was strictly to preserve the right to an administrative appeal pending the outcome of her mandamus petition:

"Q: Do you feel that by having filed that appeal you've elected that as a remedy in lieu of mandamus?

A: No, sir.

Q: Why?

A: I have no option but to file the appeal within 30 days, otherwise I lose the right to appeal.

Q: But you still are persisting in your mandamus - -

A: Yes."

[TR 14:22 - 15:4, Fleming's testimony at the December 1st hearing].

November 23, 2011 – Memorandum of Law Preserving Claims Filed

On November 23rd, Fleming filed a memorandum of law in the District Court record detailing the reasons that mandamus is proper in this case, including to protect Fleming's fundamental right of due process under the federal and state constitutions. [RP 61-77, Memo of Law filed in the record 11/23/11]; [RP 75].

December 1, 2011 – District Court Mandamus Hearing

The District Court held an evidentiary hearing on Fleming's Petition for Writ of Mandamus on December 1st that was noticed to all parties on October 18, 2011. [TR 1-43, December 1st hearing; [RP 0013, 10/18/11 notice of December 1st hearing]. Cooper, a highly experienced lawyer running what amounts to the state's largest law firm, elected not to appear at the hearing to explain and be cross examined under oath as to her noncompliance with the law or as to how and why she went about piling on impermissibly stale disciplinary allegations against Fleming. [TR 3:7-11, appearances at December 1st hearing].

Cooper's counsel did not put in any testimony or other record evidence to substantiate Cooper's factual claim of an "administrative oversight" as the basis for noncompliance with mandatory time limits:

"Q: . . . does the Respondent intend to call any witnesses?

A: No, Your Honor."

[TR 18:23-25, December 1st hearing]; [TR 29:4-5, argument of Cooper's counsel: "However, due to an internal miscommunication in the department, Ms. Fleming was not served with a notice."].

As also detailed above, Fleming's un-rebutted testimony on the record at the December 1st hearing established that she filed the mandamus petition only after and because the State Personnel Board established that she had no other remedy to address Cooper's refusal to comply with applicable mandatory time limits:

"Q: Why did you seek mandamus at that point?

A: I had no remedy at that point. I had contacted the State Personnel Board and they said they have no jurisdiction until an employer files a notice of final action and they would not do anything without a notice of final action."

[TR 11:18-22, December 1st hearing].

January 10, 2012 – District Court's Letter Ruling Granting Mandamus

On January 10th, the District Court entered its January 9th letter ruling and granted Fleming's petition. [RP 0088-0089]. The District Court held that the 1. 1.7.11.13(C)(2) NMAC time limit for imposition of noticed disciplinary action is mandatory and therefore consequential if missed:

> "The deadline . . . which provides that 'the agency shall issue a notice of final action no later than 11 calendar days from the date of receipt of the response' is mandatory language. . . . failure to comply with the mandatory 11 day deadline must be of some consequence or what purpose would it serve?"

[RP 0088, ¶1, January 9th letter ruling].

The District Court also held that Cooper's failure to comply with the statutory time limit amounted to violation of a jurisdictional statute of limitations or statute of repose barring imposition of discipline for Cooper's August 19, 2011 allegations. [RP 0088, ¶2, January 9th letter ruling].

The District Court's finding of fact pursuant to Fleming's unrebutted testimony was that Fleming had no avenue of appeal in the circumstances of this case:

> "Under the circumstances, mandamus . . . is proper. Mandamus lies here because there is no right of appeal from the First NCA as it did not result in an NFA. See NMAC 1.7.11.13(C)(4)(b) (providing for appeal to State Personnel Board after final action). As represented at the hearing on this matter, this absence of a right of appeal was acknowledged by the State Personnel Board."

[RP0089, ¶1, January 9th letter ruling].

The District Court also held mandamus is proper in this case to protect Fleming's fundamental rights since there exists no avenue to appeal from a notice of contemplated action and Fleming is entitled to relief on the merits. [RP 0089, ¶1, January 9th letter ruling]. The District Court therefore held that Fleming should be reinstated as an assistant public defender. [RP 0089, ¶2, January 9th letter ruling].

The District Court did not rule on Fleming's claim under the collective bargaining agreement. [RP 0088 – 0089, January 9th letter ruling].

II. Argument

A. Issue Presented

The issue in this case is whether the trial court properly granted mandamus to remedy Cooper's refusal to comply with the statutory mandate of 1.1.7.11.13(C)(2) NMAC, where the State Personnel Board established that Fleming had no plain, speedy or adequate remedy at law under circumstances Cooper created and imposed in this case.

B. Applicable Standards of Review

1. De Novo Review of Statutory Interpretation

The District Court interpreted 1.7.11.13(C)(2) NMAC to impose a mandatory time limit akin to a jurisdictional statute of limitations. [RP 0088, ¶2, January 9th letter ruling]. Interpretation of a statute is a question of law which the appellate court reviews de novo. *Edmonds v. Martinez*, 2009-NMCA-072, ¶ 8, 146 N.M. 753, 215 P.3d 62. The goal is to give effect to the plain, ordinary meaning of statutory language, and all relevant provisions are to be read together. W*ood v. State of N.M. Educational Retirement Bd.*, 2011-NMCA-020, 149 N.M. 455, 250 P.3d 881; *AMREP SW, Inc. v. Sandoval County Assessor*, 2012-NMCA-082, 284 P.3d 1118.

2. Deference to Facts Found by the Trial Court

The District Court found the fact that Fleming had no avenue of appeal/remedy at law when Cooper refused or failed to comply with 1.7.11.13(C)(2) NMAC was established in the record at the December 1st mandamus hearing. [RP0089, ¶1, January 9th letter ruling]. An appellate court is deferential to facts found by the trial court. *Edmonds v. Martinez*, 2009-NMCA-072, ¶ 8, 146 N.M. 753, 215 P.3d 62.

3. De Novo Review - Violation of Fundamental Right of Due Process

The District Court concluded that mandamus is proper in this case to avoid denial of Fleming's fundamental rights and to provide relief on the merits. [RP0089, ¶1, January 9th letter ruling]. Violation of the fundamental right of due process is a question of law which an appellate court reviews de novo. *Skowronski v. The N.M. Public Education Dept.*, N.M.App. No. 31,119, November 8, 2012.

4. Mandamus

Mandamus is appropriate to redress delay or inaction by a public official, as in this case, where the petitioner is beneficially interested, where there is no plain, speedy and adequate remedy at law, and where

the official's delay or refusal to act violates a mandatory duty. NMSA 1978, §§ 44-2-4 — 44-2-5.

C. Contentions and Preservation

1. Cooper's Key Factual Assertion is Not Substantiated in the Record

Given every opportunity to do so below, Cooper studiously avoided substantiating her persistent factual assertion that she violated the mandate of 1.7.11.13(C)(2) NMAC inadvertently due to "administrative oversight" and/or "internal miscommunication." [SRP 64-¶ 2, 10/3/11 reissuance of allegations]; [TR 29:4-5, counsel's 12/1/11 hearing argument]; [BIC 6, counsel's assertion of "background facts"].

Fleming's counsel requested substantiation of this key factual assertion, but none was provided. [SRP 71, 10/3/11 email]; [SRP 83, 10/17/11 correspondence, last sentence: "I sent an email inquiring about the claimed administrative error, to which I have still received no response."].

Cooper also chose not to appear at the district court hearing and testify under oath to substantiate it in the record, and her counsel put on no other witnesses to establish it in the record. [TR 3:5-11,

appearances at 12/1/11 hearing]; [TR 18:8-25, respondent calls no witnesses].

Cooper's brief in chief cites to "RP24" as record proof of the "internal miscommunication," but it is merely the same unsubstantiated factual assertion in Cooper's answer to the mandamus petition. [BIC 6, ¶ 1: "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."].

Though the assertion was by design obscure and unsubstantiated in the record below, it is the factual bedrock of Cooper's appellate arguments that her noncompliance with a mandatory statutory time limit is a mere procedural technicality that is correctible at Cooper's unilateral discretion: ". . . 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." [BIC 31-32].

Cooper also invites this Court to accept her unsubstantiated factual assertion as a spur to far-fetched speculation that is irrelevant to this case: "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. . . . weather reasons . . . decision maker . . . ill or injured . . . new or additional facts could come to light. . . . an internal miscommunication in the department . . . ." [BIC 33].

There is no credible evidence anywhere in the record that Cooper violated the mandatory 1.7.11.13(C)(2) NMAC time limit due to weather, illness or injury, the development of new or additional facts, or any bona fide inadvertency. As the District Court did, this Court should decline to consider all of Cooper's various arguments rooted in the purposefully unsubstantiated factual assertion that noncompliance with the mandate of 1.7.11.13(C)(2) NMAC resulted from unintentional and therefore remediable "oversight" or "miscommunication." *Skowronski v. The N.M. Public Education Dept.*, N.M.App. No. 31,119, November 8, 2012 (appellate court should decline to consider arguments based on factual assertions not supported in the record).

2. 1.7.11.13(C)(2) NMAC is Not an Ancillary Procedural Technicality

1.7.11.13(C)(2) NMAC mandates that "If the employee has filed a written response or has been provided an opportunity for oral response,

the agency shall issue a notice of final action no later than 11 calendar days from the date of receipt of the response."

Cooper attempts at length to transform the substantive mandate of 1.7.11.13(C)(2) NMAC into a flexible and fixable procedural technicality by shoehorning this case into New Mexico precedents establishing that Open Meetings Act (OMA) violations in disciplinary actions by public boards or commissions may be correctible. [BIC 26-34]. OMA procedures apply only to the actions of public boards, commissions, policy making bodies, and political subdivision agencies. NMSA 1978, § 10-15-1(B). Fleming's counsel preserved the inapplicability of the OMA cases at the December 1, 2011 hearing. [TR 20:17 – 26:5, transcript of December 1st hearing].

OMA cases invoked by Cooper include *Bd. of Ed. of Santa Fe Public Schools v. Sullivan*, 106 N.M. 125, 740 P.2d 119 (N.M. 1987), *Kleinberg v. Bd. of Ed. of Albuquerque Public Schools*, 107 N.M. 38, 751 P.2d 722 (Ct.App. 1988), and *Palenick v. City of Rio Rancho*, 2012-NMCA-018, 270 P.3d 1281. [BIC 28-30].

Sullivan at 106 N.M. 125, 740 P.2d 119 (N.M. 1987) and *Kleinberg* at 107 N.M. 38, 751 P.2d 722 (Ct.App. 1988) hold that OMA violations

in public board discharge proceedings are correctible procedural technicalities which may be rectified by promptly reopening termination proceedings. Consistent with those cases, *Palenick* at 2012-NMCA-018, 270 P.3d 1281, 1284 invalidated retroactive post-termination correction by public boards of OMA procedural technicalities. (*Palenick* is on appeal to the New Mexico Supreme Court, NMSC No. 33, 380.)

OMA cases do not meet the issue of an employer's refusal to comply with substantive mandatory time limits to impose discipline, thus they are inapplicable here. OMA procedures do not apply to Cooper's actions in this case because she does not head a publicly constituted board or commission, and OMA cases have not been extended outside the context of open meeting requirements for public boards and commissions, and nor should they be.

Further, the purpose of the OMA distinctly differs from the purpose of the NMAC personnel rules at issue in this case. The purpose of the OMA is to provide for public scrutiny of decisions made by publicly constituted boards or commissions. NMSA 1978, § 10-15-1(A); *Gutierrez v. City of Albuquerque*, 96 N.M. 398, 631 P.2d 304 (N.M.

1981). In view of that purpose, the kind of do-over Cooper attempted in this case is appropriate in cases governed by the OMA.

Conversely, the purpose of 1.7.11.13(C) NMAC and other rules promulgated under the New Mexico State Personnel Act is the furtherance of economy and efficiency in state government. NMSA 1978, § 10-9-2; *Montoya v. Dep't of Fin. & Admin.*, 98 N.M. 408, 649 P.2d 476 (Ct.App. 1982). Cooper's flagrantly untimely disciplinary allegations and contrived do-over to revive the expired statute of limitations undercut rather than further the purposes of economy and efficiency in state government.

Cooper also cites three inapplicable cases from other jurisdictions for the erroneous proposition 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." [BIC 30-31].

As with all arguments rooted in Cooper's unsupported factual assertion that amorphous inadvertence caused her noncompliance with statutorily mandated time limits, and the Court should decline to

consider this one. *Skowronski v. The N.M. Public Education Dept.*, N.M.App. No. 31,119, November 8, 2012.

Further, the cases from other jurisdictions relied on by Cooper do not meet the issue in this case: Cooper's noncompliance with substantive time limits to impose employee discipline. *Summers v. City of Cathedral City*, 225 Cal. App. 3d 1047 (Cal. App. 4th Dist. 1990), [BIC 30], involved an improper summary dismissal without notice and opportunity to respond and is not relevant here.

Moore v. Defense Logistics Agency, 670 F.Supp. 800 (N.D. Ill. 1987), [BIC 30-31], involved issuance of amended disciplinary allegations after Moore responded to the initial allegations. *Moore* is irrelevant here not only because it doesn't involve employer noncompliance with a statutorily mandated time limit, but also because Cooper in this case did not issue amended allegations against Fleming. Rather, Cooper demanded that Fleming respond to the same allegations twice as a contrivance to artificially revive the missed substantive time limit.

Wollerson v. Department of Agriculture, 436 So. 2d 1241, 1242-44 (La. App. 1st Cir.) (La. 1983), [BIC 31], is not applicable here because it

concerned the effect of the employer's serial issuance of two identical termination letters on the timeliness of Wollerson's appeal and not the employer's machination to revive an expired statutory time limit by ordering Wollerson to re-respond to the employer's allegations.

The 1.7.11.13(C)(2) NMAC time limit which Cooper failed to comply with in this case is a substantive statute of limitations and not a procedural technicality. The government, which had control of every aspect of this case, established the time limit and failed to meet it or even attempt to negotiate an extension. The District Court correctly granted mandamus for that reason.

3. The Collective Bargaining Agreement Violation is a Key Context

Article 24 of the state's collective bargaining agreement provides that a public employer may not notice or impose discipline against an employee more than 45 days after it knows of alleged misconduct unless facts and circumstances exist which require a longer period of time. [SRP 7-9, Article 24 of the collective bargaining agreement].

Although the District Court's decision did not reach them, Cooper's numerous violations of the time limit to notice or impose discipline specified in the collective bargaining agreement nonetheless

establish a factual context demonstrating that Cooper's noncompliance with the mandate of 1.7.11.13(C)(2) NMAC arose from a systematic, intentional pattern and practice of disregarding requisite employee discipline time limits. [TR 12:10 – 13:14, Fleming's December 1, 2011 testimony establishing Cooper's multiple violations of the 45-day time limit to notice or impose discipline specified in Article 24 of the collective bargaining agreement]; [SRP 7-9, Article 24 of the collective bargaining agreement]; [SRP 86, summary of delay associated with Cooper's allegations].

What is most instructive is that although Fleming's response to Cooper's allegations pointed out each of Cooper's Article 24 violations with particularity, Cooper's notice of final action ignored them. [SRP 35-¶2, 36-¶6, 41-¶2, 42-¶4, 45-¶3, 50-¶3, 53-¶1, 55-¶5, 56-¶5, 57-¶7, and 59-¶1, Fleming's 9/6/11 response]; [SRP 77-84, 10/26/11 notice of final action]. Further Cooper presented no evidence of a bona fide circumstance justifying her noncompliance with Article 24.

Nothing permits the government to entirely ignore contractual discipline procedures to which it agreed. In view of Cooper's unyielding noncompliance with mandated procedures, any sort of grievance about

it would certainly have been futile. Discipline based on stale offenses counters any assertion or inference that Fleming is an unacceptable employee and shows Cooper's pretext. Cooper's dual violation of statutory and contractual time limits to impose employee discipline is a factual circumstance showing that the District Court correctly ruled that the merits justified mandamus and that Fleming had no plain, speedy or adequate remedy for Cooper's refusal to comply with 1.7.11.13(C)(2) NMAC.

4. Lip Service is Not Due Process

Fleming preserved the issue of due process in the verified petition and in her November 23, 2011 memorandum of law filed in the record:

> "Due process in the NMAC context requires scrupulous compliance . . . with compulsory deadlines."

[RP 0006, verified petition].

> "Failure to comply with statutory time limits to render disciplinary decisions creates important issues of jurisdiction, due process of law and equal protection of the law."

[RP 0068, memorandum of law].

> "Petitioner Was Denied Fundamental Due Process ..."

[RP 0075, memorandum of law].

Fleming's memorandum of law also asserted and preserved the issue of the sham due process provided in this case by Cooper:

> "Extreme pre-termination irregularities imposed by Respondent in this case including her personal orchestration of some of the matters upon which she premised Petitioner's termination and her refusal to comply with the statutory time limit on her power to impose the contemplated termination evinced Respondent's intent not to give Petitioner's responses any consideration and deprived Petitioner of fundamental due process . . . Article II, Section of the New Mexico constitution affords greater due process protections than its federal counterpart."

[RP 0069, memorandum of law].

The District Court properly held that mandamus is proper in this case "to avoid denial of Fleming's fundamental rights." [RP 89]. Due process is a fundamental right pursuant to Article II, Section 18 of the New Mexico Constitution, [RP 0069], as well as the Fifth and Fourteenth Amendments to the United States Constitution.

The elements that comprise due process in disciplinary investigations are notice of the specific accusations, a meaningful pre-determination opportunity to respond, fairness of the process and timely action. *City of Albuquerque v. Ernest B. Chavez*, 123 N.M. 258, 939 P.2d 1066 (Ct.App. 1997); *Pablo Franco v. Carlsbad Municipal Schools*, 130 N.M. 543, 28 P.3d 531, 2001-NMCA-42, *Jacinto Lopez v. N.M. Bd. of Medical Examiners*, 107 N.M. 145, 754 P.2d 522 (N.M. 1988).

Cooper cites three inapplicable cases from other jurisdictions for the proposition that "a due process violation does not occur when an employer corrects a procedural error in the employee's dismissal. [BIC 14, line 6]. None of those cases meets the pre-determination due process issues arising in this case from Cooper's noncompliance with substantive time limits in the disciplinary process. *Dep't of Natural Res. v. Sheffield*, 420 So. 2d 892 (Fla. Dist. Ct. App. 1st Dist. 1982) is a Florida case in which the wrong signature on a notice of proposed action issued by an employer was deemed a technical error which did not violate due process. [BIC 14].

Ticeson v. Dep't of Soc. & Health Servs., 19 Wn. App. 489, (Wash. Ct. App. 1978) is a state of Washington case subsequently invalidated by *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985). *Ticeson* held, contrary to *Loudermill*, that a government employee has no protected property interest in her employment and no due process interest in statutory time limits for discipline, and it is not applicable here. [BIC 14].

Kirkpatrick v. Civil Service Com., 77 Cal. App. 3d 940 (Cal. App. 2d Dist. 1978) is a California case in which a discharged chief probation officer petitioned for a writ of mandamus because he was not provided with notice and an opportunity to respond prior to dismissal. In this case, Fleming received notice and timely responded to Cooper's allegations. [BIC 14-15].

Cooper urges by analogy to these inapplicable cases that "Fleming's right to extensive post-termination proceedings taken in conjunction with the fact that she had notice and opportunity to respond to the notice while she was getting paid, demonstrates that Appellant did not violate Fleming's due process rights." [BIC 15].

However, merely going through the motions of providing a pre-termination opportunity to be heard as Cooper did in this case is not due process. The essence of pre-termination due process is notice and the opportunity to be heard at a meaningful time in a meaningful manner. *State ex rel. CYFD v. Maria C.*, 2004-NMCA-83, 94 P.3d 796, 136 N.M. 53.

The District Court did not err in understanding that timely action is an element of the fundamental right of due process that could only be upheld in this case by granting mandamus, given Cooper's refusal to comply with the substantive time limit governing her power to impose discipline. *Redman v. Bd. of Regents of the NM School for the Visually Handicapped*, 102 N.M. 234, 693 P.2d 1266 (Ct.App. 1984) (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 and requires its reversal).

In this case, the "second" pre-termination procedure imposed by Cooper did not cure the delay her actions caused in the first place, but in fact aggravated it. This Court should also not overlook the paradox that Cooper alleged Fleming's noncompliance and/or untimely

compliance with bureaucratic rules to justify Fleming's termination. [SRP 26-27].

The "meaningful manner" component of pre-termination due process is the opportunity to be heard in a meaningful manner. *State ex rel. CYFD v. Maria C.*, 2004-NMCA-83, 94 P.3d 796, 136 N.M. 53. A sham pre-termination hearing violates this component of pre-termination due process: "Due process requires that, prior to termination, an employee be given the chance to tell her side of the story, and that the agency be willing to listen. Otherwise, the 'opportunity to respond' required by Loudermill is no opportunity at all." *Ryan v. Illinois Dept. of Children and Family Services*, 185 F.3d 751 (7th Cir. 1999).

Procedures mandated by NMAC employee discipline rules are the mechanism for affording notice and meaningful opportunity to be heard. Indicia in this case that Cooper pre-determined Fleming's termination and never intended to meaningfully consider Fleming's side of Cooper's allegations include but are not limited to the impermissibly stale allegations showing pretext and that Fleming was not an unacceptable employee, [SRP 86, summary of delay associated with Cooper's

allegations], Cooper's demand that Fleming re-respond to the same allegations 28 days after receiving Fleming's response to them, [SRP 64, 10/3/11 reissuance of 8/19/11 allegations and demand for second response], and Cooper's refusal to comply with the statutorily and contractually mandated procedures for employee discipline.

The "opportunity to respond" component of pre-termination due process was in this case no opportunity at all. The District Court did not err in understanding that meaningful pre-termination consideration of Fleming's response to the allegations is an element of the fundamental right of due process that could only be upheld in this case by granting mandamus, given both Cooper's refusal to comply with procedures provided to make the opportunity to be heard meaningful and her manipulation of those procedures in an effort to artificially revive the time limit to impose discipline.

5. Mandatory Time Limits are Unambiguous in the Statutory Scheme

The goal in applying statutes is to give effect to the plain, ordinary meaning of statutory language. *Wood v. State of N.M. Educational Retirement Bd.*, 2011-NMCA-020, 149 N.M. 455, 250 P.3d 881. So as to

give effect to all relevant provisions, they are read together. *AMREP SW, Inc. v. Sandoval County Assessor*, 2012-NMCA-082, 284 P.3d 1118.

1. 1.7.11.13(A)(1) NMAC provides that a public employee has 11 calendar days from receipt of a notice of contemplated discipline to respond in writing or request an opportunity to respond orally.

1. 1.7.11.13(C)(2) NMAC provides that "A public employer shall provide notice of final disciplinary action within 11 days after receiving an employee's response to the employer's disciplinary allegations."

1. 1.7.11.13(C)(4) NMAC provides that a public employee may appeal a final disciplinary action no later than 30 calendar days from the effective date of the final disciplinary action.

1. 1.7.12.8(B) NMAC specifies that an appeal of a final disciplinary action not filed within 30 calendar days shall be dismissed by the hearing officer for lack of jurisdiction.

In this case, Fleming had to comply with the time limits specified for responding to Cooper's allegations and for preserving an appeal of Cooper's final action, while Cooper simply ignored the time limit placed on her and argued that her violation of it was cured by ordering Fleming to respond a second time. Cooper argued in circular fashion

that "It is within Appellant's discretion to issue a second notice," [BIC 27], and that by doing so she ultimately complied with the mandate to issue final notice. [BIC 27]. No reasonable reading of the NMAC employee discipline rules or application of New Mexico's statutory interpretation tenets will support Cooper's contention.

The plain, unambiguous meaning of these related provisions, read together, is that the specified time limits in the statutory scheme governing this case are mandatory and therefore jurisdictional. Fleming preserved this contention in the November 23, 2011 memo of law filed in the District Court record, [RP 0069 – 0073], and on the record at the December 1, 2011 mandamus hearing, [TR 22:16 - 28:5].

The District Court correctly concluded the same. [RP 0088, ¶2: "It is my conclusion that Respondent's failure to comply with the mandatory deadline for filing its NFA is tantamount to a statute of limitations (or possibly statute of repose)."].

6. Mandamus is the Proper Remedy in This Case

Fleming preserved this contention in the November 23, 2011 memo of law filed in the District Court record, [RP 0064 – 0076], and on

the record at the December 1, 2011 mandamus hearing, [TR 19:3 – 41:4, transcript of December 1st hearing].

Mandamus is the proper remedy where, as here, a public official refuses or delays to act and the law requires the official to act one way or another. *Lovato v. City of Albuquerque*, 106 N.M. 287, 742 P.2d 499 (1987). Mandamus properly lies notwithstanding the existence of a right of appeal (1) where the process of appeal will result in unnecessary delay and expense, *State ex rel. Cardenas v. Swope*, 58 N.M. 296, 270 P.2d 708 (1954); (2) to protect fundamental constitutional rights, *Flores v. Federici*, 70 N.M. 358, 374 P.2d 119 (1962); (3) where petitioner is clearly entitled to relief, *Sender v. Montoya*, 73 N.M. 287, 387 P.2d 860 (1963); and, (4) where the issue would be moot on appeal, *Montoya v. Blackhurst*, 84 N.M. 91, 500 P.2d 176 (1972). Charles T. Dumars & Michael Browdie, *Mandamus in New Mexico*, 4 N.M. L. Rev. 155, 174 (May 1974).

As Fleming established on the record in the November 23, 2011 memo of law filed with the District Court, all four of those contingencies merit mandamus in this case. [RP 0066 – 0070]. However, the District Court hung its hat on two of them.

The District Court properly held that, as confirmed by the State Personnel Board, mandamus lies in this case because Fleming had no right of appeal from Cooper's refusal to comply with 1. 1.7.11.13(C)(2) NMAC. [RP 0089: "Mandamus lies here because there is no right of appeal from the first NCA as it did not result in an NFA."].

Cooper argues at length and contrary to the District Court's fact finding that Fleming had access to a plain, speedy and adequate remedy before the State Personnel Board when Cooper failed to comply with the mandatory time limit to impose final action. The District Court found it was established as a fact that Fleming had no avenue of appeal/remedy at law when Cooper refused or failed to comply with 1.7.11.13(C)(2) NMAC. [RP0089, ¶1, January 9th letter ruling]. This Court should defer to the District Court's fact finding. *Edmonds v. Martinez*, 2009-NMCA-072, ¶ 8, 146 N.M. 753, 215 P.3d 62.

The District Court also properly granted mandamus to protect Fleming's fundamental right of due process and because Fleming was entitled to relief on the merits.

". . . as there is no right of appeal from the First NCA, mandamus is proper to avoid the denial of Petitioner's fundamental rights.

Finally, mandamus is proper as Petitioner is entitled to relief on the merits."].

[RP 0089, District Court's letter ruling].

Simply put, mandamus was Fleming's only avenue of relief when Cooper refused to comply with the mandate of 1.7.11.13(C)(2) NMAC, and Fleming was entitled to relief on the merits and on due process grounds because Cooper improperly refused to comply with what amounts to a statute of limitations.

III. Conclusion

Appellee Nancy Fleming respectfully prays that the District Court's order in this matter be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

Counsel certifies, pursuant to Rule 12-213 that the body of this answer brief is typed using 14-point Century typeface and that the word count does not exceed 11,000 words as calculated by the word count tool provided by Microsoft Word 2010.

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CERTIFICATE OF SERVICE

A true copy of this document was emailed to opposing counsel Paula Maynes on February 4, 2013.

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