

1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **Opinion Number:** _____

3 **Filing Date: November 19, 2015**

4 **NO. S-1-SC-34,546**

5 **NEW MEXICO DEPARTMENT OF**
6 **WORKFORCE SOLUTIONS,**

7 Petitioner-Appellant,

8 and

9 **ALBERTSONS,**

10 Employer,

11 v.

12 **NANCY GARDUÑO,**

13 Respondent-Appellee.

14 **ORIGINAL PROCEEDING ON CERTIORARI**

15 **Raymond Z. Ortiz, District Judge**

16 New Mexico Department of Workforce Solutions

17 Marshall J. Ray

18 Elizabeth A. Garcia

19 Richard Lawrence Branch

20 Albuquerque, NM

21 for Petitioner-Appellant

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1 **OPINION**

2 **MAES, Justice.**

3 {1} Following a determination that Respondent Nancy Garduño (Garduño) was
4 ineligible for unemployment benefits because her employer terminated her for
5 misconduct connected with her employment, the Cabinet Secretary of the New
6 Mexico Department of Workforce Solutions (the Department) ordered Garduño to
7 repay \$11,256 in overpaid unemployment benefits. The Court of Appeals majority
8 held that due process precluded the Department from collecting the overpaid
9 unemployment benefits from Garduño where she received benefits payments during
10 the ongoing appeals process because she was unaware of her employer’s appeal for
11 130 days. *See N.M. Dep’t of Workforce Solutions v. Garduño*, 2014-NMCA-050, ¶25,
12 324 P.3d 377 (Hanisee, J., concurring in part and dissenting in part), *cert. granted*
13 2014-NMCERT-003. We reverse the Court of Appeals and hold that Garduño’s
14 procedural due process rights were not violated because the Department provided
15 Garduño with constitutionally adequate procedural protections prior to terminating
16 her benefits and ordering her to reimburse the Department for the overpaid benefits.

17 **I. FACTS AND PROCEDURAL HISTORY**

18 {2} On February 5, 2010, Albertsons, a grocery store chain, terminated Garduño
19 from her job as a front-end clerk for violation of the associate-purchase policy, which

1 prohibited giving away “free merchandise of any kind.” This included giving deep
2 discounts, a practice called “sweethearting.” Surveillance cameras recorded Garduño
3 charging a coworker and his wife \$2.82 for merchandise that should have totaled
4 approximately \$17.00. An investigation conducted by Albertsons’ management
5 revealed that an incident that occurred on January 14, 2010, was not an isolated one
6 and that Garduño gave at least one other employee an unauthorized discount.

7 {3} Garduño filed for unemployment insurance benefits on February 14, 2010. The
8 Department’s claims examiner issued a notice of claim determination awarding
9 Garduño \$402 in weekly benefits. The notice stated that the determination was final
10 “unless an appeal is filed within fifteen calendar days from: 03/12/2010.”
11 Additionally, the notice stated, “If your employer challenges a decision allowing
12 benefits to you and the appeal decision is against you, you will be required to repay
13 those benefits.” *See* 11.3.300.308 NMAC (1/1/03) On March 26, 2010, Albertsons
14 appealed the claim determination. The Department continued to pay Garduño benefits
15 during the ongoing appeals process.

16 {4} The Department did not notify Garduño of the Albertsons appeal until August
17 3, 2010, when the Department mailed Garduño a notice of hearing. The notice of
18 hearing stated that “the appeal hearing” in front of the Department’s appeals tribunal

1 was scheduled for August 19, 2010, and listed the legal issues to be addressed. After
2 receiving the notice of hearing, Garduño continued filing weekly claims for benefits,
3 collecting an additional \$2,010 in unemployment benefits. At the appeal hearing on
4 August 19, 2010, an administrative law judge (ALJ) began hearing testimony but
5 ultimately elected to continue the hearing to give Garduño the chance to resubmit
6 documents and request subpoenas. On August 23, 2010, the Department issued a
7 notice stating that the hearing would resume on September 9, 2010. On that day, the
8 ALJ heard testimony from Garduño, the store manager, an employee, and the store's
9 loss prevention investigator, and considered evidence consisting of written
10 statements, policies, receipts, and surveillance video. On September 14, 2010, the
11 ALJ issued a decision disqualifying Garduño from benefits eligibility due to her
12 employee misconduct. That same day, the Department issued an overpayment notice
13 informing Garduño of her disqualification from benefits because she had "claimed
14 and received benefits to which [she was] not entitled," and she was therefore required
15 to refund the overpayment, totaling \$11,256.

16 {5} Garduño appealed the ALJ's decision. The board of review, which provides a
17 second-tier administrative review of Department decisions, affirmed Garduño's
18 disqualification on November 23, 2010. Garduño did not seek review of the board's

1 decision. However, she did appeal to the appeals tribunal the Department's decision
2 to recoup the \$11,256 overpayment. The tribunal held a hearing on December 29,
3 2010, on the issue of the overpayment and issued a decision the next day affirming
4 the Department's decision to recoup the overpayments. On January 13, 2011,
5 Garduño appealed the tribunal's decision to the Department's cabinet secretary.
6 Citing NMSA 1978, Section 51-1-38 (1993), the cabinet secretary affirmed the
7 decision of the tribunal on January 28, 2011, and ordered Garduño to repay the
8 Department for the overpaid benefits.

9 {6} Having exhausted her administrative remedies, Garduño appealed the cabinet
10 secretary's decision to state district court. Garduño asserted that the Department
11 should be equitably estopped from pursuing collection of overpayments because the
12 Department failed to comply with federal timeliness standards for processing appeals.
13 Garduño also argued that the Department violated her right to notice and hearing
14 under the Due Process Clause of the Fourteenth Amendment. In an order reversing
15 the cabinet secretary's decision, the district court held that (1) the appeals tribunal's
16 hearing, conducted six months after Garduño started receiving benefits, violated the
17 timeliness requirements for processing appeal claims under state and federal law; (2)
18 the doctrine of equitable estoppel barred the Department from claiming and collecting

1 an overpayment from Garduño; and (3) the overpayment claims process violated
2 Garduño’s due process rights by failing to provide Garduño with timely notice and
3 hearing. The Department appealed the district court’s order to the Court of Appeals.

4 {7} At the time of the Department’s appeal, the Court of Appeals had another
5 pending case with similar facts. *See Millar v. N.M. Dep’t of Workforce Solutions*,
6 2013-NMCA-055, 304 P.3d 427. Despite the Department’s motion to consolidate this
7 case with *Millar*, the Court of Appeals decided them separately. *See Garduño*,
8 2014-NMCA-050, ¶ 28 n.1 (Hanisee, J., concurring in part and dissenting in part). In
9 *Millar*, the Court of Appeals rejected the claimant’s equitable estoppel and federal
10 timeliness regulation arguments, holding that the claimant did not have “a right to
11 unemployment compensation benefits to which he was not entitled and which [the
12 Department] has a statutory obligation to recover.” 2013-NMCA-055, ¶¶ 16, 23.
13 Procedural due process was not at issue in *Millar*. *See id.* ¶ 1.

14 {8} After the *Millar* opinion was filed, a majority of a different Court of Appeals
15 panel held that Garduño’s federal and state timeliness and equitable estoppel
16 arguments lacked merit for the same reasons set forth in *Millar*. *See Garduño*, 2014-
17 NMCA-050, ¶ 13. The majority concluded, however, that the Department’s failure to
18 provide Garduño with timely notice of the employer’s appeal from the notice of claim

1 determination awarding Garduño benefits violated her right to procedural due process
2 so as to preclude the Department from collecting the overpaid benefits. *Id.* ¶¶ 21, 26.
3 Judge Hanisee did “not agree that Garduño’s due process rights were violated, even
4 assuming she ha[d] a legitimate property interest,” because the “proceeding was
5 conducted ‘in a reasonable time and manner.’” *Id.* ¶ 34 (Hanisee, J., concurring in
6 part and dissenting in part). The Department appealed to this Court. We granted
7 certiorari to consider whether the Court of Appeals erred by (1) holding that Garduño
8 had a constitutionally protected property interest in unemployment benefits she
9 received before being found ineligible for such benefits, (2) holding that Garduño’s
10 procedural due process rights were violated, and (3) providing Garduño with a
11 remedy contrary to law and the public interest in preserving the unemployment fund.

12 **II. STANDARD OF REVIEW**

13 {9} Generally, we review “an administrative order to determine if it is arbitrary,
14 capricious, or an abuse of discretion; not supported by substantial evidence in the
15 record; or, otherwise not in accordance with law.” *N.M. Att’y Gen. v. N.M. Pub.*
16 *Regulation Comm’n*, 2013-NMSC-042, ¶ 9, 309 P.3d 89 (internal quotation marks
17 and citations omitted). Because Garduño did not appeal the Department’s eligibility
18 determination, the only issue on appeal is the constitutionality of the Department’s

1 procedures leading to the administrative order. The constitutionality of the
2 Department’s procedures presents this Court with a question of law, which we review
3 de novo. *See Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation*
4 *Comm’n*, 2010-NMSC-013, ¶ 19, 148 N.M. 21, 229 P.3d 494 (citations omitted).

5 **III. DISCUSSION**

6 {10} The Due Process Clauses of the United States and New Mexico Constitutions
7 require the government to afford certain procedural protections prior to depriving any
8 person of a constitutionally protected interest in life, liberty, or property. *See* U.S.
9 Const. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or
10 property, without due process of law.”); N.M. Const. art. II, § 18 (“No person shall
11 be deprived of life, liberty or property without due process of law.”). Accordingly,
12 “[a]dministrative hearings that affect a property or liberty interest must comply with
13 due process.” *Archuleta v. Santa Fe Police Dep’t ex rel. City of Santa Fe*,
14 2005-NMSC-006, ¶ 31, 137 N.M. 161, 108 P.3d 1019.

15 {11} In New Mexico state courts, “[t]he *Mathews* test is the appropriate analytical
16 framework for a due process issue.” *Archuleta*, 2005-NMSC-006, ¶ 31 (citation
17 omitted). The *Mathews* test evaluates the following factors: (1) “the private interest
18 that will be affected by the official action;” (2) “the risk of erroneous deprivation of

1 such interest through the procedures used, and the probable value, if any, of
2 additional or substitute procedural safeguards;” and (3) “ the Government’s interest,
3 including the function involved and the fiscal and administrative burdens that the
4 additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*,
5 424 U.S. 319, 334-35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

6 **A. New Mexico’s Unemployment Compensation Law creates a**
7 **constitutionally protected property interest in unemployment benefits**

8 {12} The first factor of the *Mathews* test requires considering the private property
9 interest affected by state action. *See Mathews*, 424 U.S. at 335, 340-43.
10 “[C]onsideration of what procedures due process may require under any given set of
11 circumstances must begin with a determination of the precise nature of . . . the private
12 interest that has been affected by governmental action.” *Cafeteria & Rest. Workers*
13 *Union, Local 473 v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230
14 (1961). The Department argues that Garduño does not have a property interest in
15 overpaid benefits because she failed to appeal the question of her eligibility. The
16 Department agrees that an individual can have a constitutionally protected property
17 interest in unemployment benefits that are improperly denied, but here, Garduño was
18 deemed ineligible for the benefits and has never challenged that determination.

1 Garduño contends that the interest of an individual in continued receipt of
2 governmentally created benefits is a constitutionally protected “property” interest.
3 Garduño argues that, once the Department issued a notice finding her eligible for
4 unemployment benefits, she had a protected property right in the those benefits. We
5 hold that Garduño acquired a constitutionally protected property interest in
6 unemployment benefits when she began receiving payments and that Garduño’s
7 retention of those benefits cannot be terminated without due process.

8 {13} Property interest in a benefit was defined by the United States Supreme Court
9 in *Board of Regents of State Colleges v. Roth*:

10 To have a property interest in a benefit, a person clearly must have more
11 than an abstract need or desire for it. He must have more than a
12 unilateral expectation of it. He must, instead, have a legitimate claim of
13 entitlement to it. It is a purpose of the ancient institution of property to
14 protect those claims upon which people rely in their daily lives, reliance
15 that must not be arbitrarily undermined.

16 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Property interests “are
17 created and their dimensions are defined by existing rules or understandings that stem
18 from an independent source such as state law—rules or understandings that secure
19 certain benefits and that support claims of entitlement to those benefits.” *Id.*

20 {14} A statutory scheme providing for the receipt of government benefits may give

1 rise to property interests protected by the due process clause. In *Mathews*, the United
2 States Supreme Court determined that the private interest affected by state action was
3 the claimant's continued receipt of benefits, which was a source of income, pending
4 a final decision on his claim for Social Security disability benefits. *See* 424 U.S. at
5 339-40. Similarly, a private interest affected by state action is a claimant's continued
6 receipt of welfare benefits. *See Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct 1011,
7 25 L.Ed.2d 287 (holding that "the pre-termination hearing has one function only; to
8 produce an initial determination of the validity of the welfare department's grounds
9 for discontinuance of payments in order to protect a recipient against an erroneous
10 termination of his benefits." (citations omitted)); *Roth*, 408 U.S. at 576 ("a person
11 receiving welfare benefits under statutory and administrative standards defining
12 eligibility for them has an interest in continued receipt of those benefits that is
13 safeguarded by procedural due process." (citations omitted)); *see also Wilkinson v.*
14 *Abrams*, 627 F.2d 650, 664 (3d Cir. 1980) ("State statutes providing for the payment
15 of unemployment compensation benefits create in the claimants for those benefits
16 property interests protected by due process." (citation omitted)).

17 {15} New Mexico's Unemployment Compensation Law articulates the great
18 importance of this source of income to unemployed claimants. *See* NMSA 1978,

1 Section 51-1-3 (1936) (“[The purpose of the statute is to] lighten [the] burden which
2 now so often falls with crushing force upon the unemployed worker and [the
3 worker’s] family.”). Lacking independent resources, a claimant’s “need to concentrate
4 upon finding the means for daily subsistence . . . adversely affects his ability to seek
5 redress from the [state’s] bureaucracy.” *Goldberg*, 397 U.S. at 264. Unemployment
6 benefits are significant to the recently unemployed worker because they “give prompt
7 if only partial replacement of wages to the unemployed, to enable workers to tide
8 themselves over, until they get back to their old work or find other employment,
9 without having to resort to relief.” *Cal. Dep’t of Human Res. Dev. v. Java*, 402 U.S.
10 121, 131, 91 S.Ct. 1347, 28 L.Ed.2d 666 (1970) (internal quotation marks, citation,
11 and footnote omitted) (discussing the legislative purpose behind the Federal
12 unemployment insurance scheme). Further, “[u]nemployment benefits provide cash
13 to a newly unemployed worker at a time when otherwise he would have nothing to
14 spend, serving to maintain the recipient at subsistence levels” *Id.* at 131-32
15 (internal quotation marks, citation and footnote omitted). The security provided by
16 unemployment benefits during a period of unemployment is also important in
17 “assisting a worker to find substantially equivalent employment . . . [because] [t]hey
18 should not be doing anything else but looking for a job.” *Id.* at 132 (internal quotation

1 marks omitted).

2 {16} Because New Mexico’s unemployment compensation scheme provides for the
3 payment of unemployment compensation benefits, *see generally* NMSA 1978, §§ 51-
4 1-1 to -59 (1936, as amended through 2013); 11.3.300 NMAC (07/15/1998, as
5 amended through 07/31/2013) (specifying the administration of unemployment
6 benefits claims), claimants for such benefits possess a property interest protected by
7 due process. *See Wilkinson*, 627 F.2d at 664 (“State statutes providing for the
8 payment of unemployment compensation benefits create in the claimants for those
9 benefits property interests protected by due process.” (citation omitted)); *Roth*, 408
10 U.S. at 576 (“The Fourteenth Amendment’s procedural protection of property is a
11 safeguard of the security of interests that a person has already acquired in specific
12 benefits.”).

13 {17} The Court of Appeals majority concluded that “Garduño has a property right
14 in receiving unemployment benefits by virtue of the Unemployment Compensation
15 Law.” *Garduño*, 2014-NMCA-050, ¶ 17 (citations omitted). Judge Hanisee disagreed
16 that Garduño had a legitimate property interest because she “abandon[ed] any
17 challenge to the Tribunal’s determination that she was substantively ineligible for
18 unemployment benefits.” *Id.* ¶ 31 (Hanisee, J., dissenting in part). Judge Hanisee

1 wrote that, “Garduño’s desire to keep—and not repay to [the Department]—the
2 overpaid benefits does not give rise to a ‘legitimate claim of entitlement.’ Rather, her
3 interest is of the type disallowed by *Roth*: that for which a claimant has an ‘abstract
4 need or desire’ or a ‘unilateral expectation.’” *Id.* (citations omitted).

5 {18} The characterization of Garduño’s claim makes little difference when
6 determining the existence of a protected property interest. Whether Garduño is
7 seeking to keep her benefits—benefits she was initially found eligible for—or
8 whether she is seeking continued receipt of those benefits is irrelevant. Garduño’s
9 constitutionally protected property interest in the benefits arose when the claims
10 examiner made the initial eligibility determination and she began receiving benefit
11 payments. Once this property interest arose, procedural due process protections began
12 protecting the security of that interest, and the Department could neither discontinue
13 payments nor recoup earlier payments based on a disqualification and termination of
14 benefits without affording Garduño due process. Indeed, the United States Supreme
15 Court has held that “[r]elevant constitutional restraints apply as much to the
16 withdrawal of public assistance benefits as to disqualification for unemployment
17 compensation.” *Goldberg*, 397 U.S. at 262 (citations omitted); *see also Wilkinson*,
18 627 F.2d at 664–65 n.18 (“Our conclusion that claimants for state unemployment

1 compensation benefits have a protected property interest applies no less to claimants,
2 like the Wilkinson class, seeking to establish eligibility in the first instance, than to
3 claimants . . . seeking to establish continued eligibility.” (citation omitted)).

4 {19} We affirm the Court of Appeals’ holding that “Garduño has a property right in
5 receiving unemployment benefits by virtue of the Unemployment Compensation
6 Law.” *Garduño*, 2014-NMCA-050, ¶ 17 (citations omitted). Judge Hanisee is correct
7 that Garduño did not challenge the substantive determination that she was ineligible
8 for benefits. But that alone does not give the Department authority to terminate and
9 recoup her unemployment benefits without affording Garduño due process. The next
10 step in our procedural due process analysis is to determine whether the Department
11 employed constitutionally adequate procedures in depriving the claimant of that
12 interest. *See Tri-State Generation & Transmission Ass’n, Inc. v. D’Antonio*, 2012-
13 NMSC-039, ¶ 38, 289 P.3d 1232.

14 **B. There was no due process violation where there was neither erroneous**
15 **procedural deprivation of the private interest nor probable value in the**
16 **additional or substitute procedural safeguards**

17 {20} The second *Mathews* test requires examining both the risk that the private
18 interest will be erroneously deprived with the procedures used and any probable value
19 of additional or substitute procedural safeguards. *See Mathews*, 424 U.S. at 335.

1 **1. Erroneous procedural deprivation**

2 {21} In examining the potential risk of erroneous deprivation, we look to the
3 procedures as a whole. *See In re Comm'n Investigation Into 1997 Earnings of U.S.*
4 *West Commc'ns, Inc.*, 1999-NMSC-016, ¶ 26, 127 N.M. 254, 980 P.2d 37 (citations
5 omitted). To prevent erroneous deprivation in the administrative context, due process
6 requires “reasonable notice and opportunity to be heard and present any claim or
7 defense’.” *Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm.*,
8 2014-NMSC-006, ¶ 20, 319 P.3d 639 (citation omitted); *see also Mullane v. Cent.*
9 *Hanover Bank & Tr. Co.*, 339 U.S. 306, 31-14, 70 S.Ct. 652, 94 L.Ed 865 (1950)
10 (requiring that an adjudication for deprivation of property “be preceded by notice and
11 opportunity for hearing appropriate to the nature of the case”). However,
12 “constitutional due process does not require an agency to afford a petitioner all
13 elements of a traditional judicial proceeding.” *Archuleta* , 2005-NMSC-006, ¶ 32
14 (citing *Miller v. County of Santa Cruz*, 796 F. Supp. 1316, 1319 (N.D. Cal. 1992),
15 *aff'd*, 39 F.3d 1030 (9th Cir. 1994)).

16 {22} Because Garduño did not challenge the substantive determination that she was
17 ineligible for benefits, this is not the usual procedural due process case involving a
18 prehearing deprivation of benefits. Garduño does not argue that she was deprived of

1 her benefits by a lack of process provided in the hearing. The essence of her
2 deprivation is that she continued to receive the benefits during the ongoing appeals
3 process unaware of her employer’s appeal for 130 days and that she was actually
4 incurring a debt. According to Garduño, “[d]ue process requires *prompt* notice with
5 the opportunity to be heard *at a meaningful time* and in a meaningful manner.” She
6 points to an alleged deficiency in notice and hearing and argues that she should have
7 received an earlier notice and hearing.

8 {23} We are therefore called to assess the significance of prompt notice and
9 disposition of first-level appeals on a claimant’s interest in unemployment benefits
10 when the initial determination found the claimant eligible and the claimant received
11 benefit payments through the first level of administrative appeal. The New Mexico
12 Unemployment Compensation statute provides that upon appeal by any party of a
13 initial determination of eligibility, the Department must provide a “reasonable
14 opportunity for a fair hearing.” NMSA 1978, Section 51-1-8(D) (2013, amended in
15 2015). The Department’s regulations further provide that “[o]nce an initial
16 determination is made and payment of benefits is begun, payments shall not be
17 stopped without prior notice and an opportunity to be heard” 11.3.300.308(E)
18 NMAC (1/1/2003).

1 {24} Notice is important to due process because the “right to be heard has little
2 reality or worth unless one is informed that the matter is pending and can choose for
3 himself whether to appear or default, acquiesce or contest.” *Mullane*, 339 U.S. at 314.
4 “Due process does not require the same form of notice in all contexts; instead, the
5 notice should be appropriate to the nature of the case.” *Rayellen*, 2014-NMSC-006,
6 ¶ 19 (internal quotation marks and citations omitted). Put simply, we must determine
7 whether the notice was “reasonably calculated, under all the circumstances, to apprise
8 interested parties of the pendency of the action and afford them an opportunity to
9 present their objections.” *Mullane*, 339 U.S. at 314 (citations omitted).

10 {25} The goal of the Unemployment Compensation Law, and the importance behind
11 unemployment benefits, centers around promptly providing support for the innocent
12 workers who have become unemployed through no fault of their own. *See* Section 51-
13 1-3. The Court of Appeals in *Millar* observed that this system “necessarily results in
14 some payments being made upon an initial determination of eligibility that are
15 subsequently overturned. As a result, the [Department] advises the claimant that if the
16 appeal decision is against him, he will be required to repay the benefits received.”
17 2013-NMCA-055, ¶ 8.

18 {26} We agree with the Court of Appeals in *Millar* that “prompt payment is not the

1 only consideration of procedural fairness to a claimant[;] prompt notice of benefits
2 being in jeopardy must be [considered] as well.” 2013-NMCA-055, ¶ 17. However,
3 the importance in avoiding administrative delay is of less significance where the
4 initial determination is one of eligibility and the claimant is receiving payments
5 during the appeal process. Here, the claims examiner’s initial determination
6 concluded that Garduño was eligible, and she continued to receive benefits until the
7 ALJ’s determination following the hearing at the first level of appeal. We do not hold
8 that *any* claim of late notice of an appeal or *any* late timing of the hearing cannot
9 result in a due process violation. Instead, our holding requires weighing a claimant’s
10 deprivation of an important private interest, such as unemployment benefits, relative
11 to procedures used in such a deprivation. *See Welch v. Thompson*, 20 F.3d 636, 639
12 (5th Cir. 1994) (requiring that if there is a deprivation, “we must determine whether
13 the procedures relative to that deprivation were constitutionally sufficient.” (citation
14 and footnote omitted)).

15 {27} In New Mexico, the distinguishing factor used to determine whether there was
16 or was not a violation of due process rights depends on whether the defective notice
17 deprived the claimant of the ability to participate in the proceeding. *See Franco v.*
18 *Carlsbad Mun. Schs.*, 2001-NMCA-042, ¶¶ 6, 14, 130 N.M. 543, 28 P.3d 531

1 (holding that a notice recommending termination of an employee to the board without
2 notice to the employee of employee's right to attend and dispute the claims violated
3 due process), *recognized in Lobato v. N.M. Env't Dep't*, 2012-NMSC-002, ¶ 13, 267
4 P.3d 65. There is at least one instance when *eventual* notice was deemed
5 constitutionally sufficient in the administrative context because claimant was not
6 deprived of an opportunity to be heard by participating in the proceeding. In *Uhden*
7 *v. N.M. Oil Conservation Commission* a lessee of oil and gas interests provided notice
8 by publication of two adjudications purporting to increase well spacing on a
9 landowner's property, which the landowner did not receive, and subsequently the
10 landowner did not attend or participate in the hearing. 1991-NMSC-089, ¶¶ 4,5, 112
11 N.M. 528, 817 P.2d 721. However, three months later the lessee notified the
12 landowner of two resulting orders and retained subsequent royalty payments to offset
13 the overpayments. *Id.* ¶ 5 The landowner filed an application for a hearing to obtain
14 relief from the two orders. *Id.* The landowner attended and participated in that hearing
15 and a third order was issued denying her application for relief. *Id.* ¶ 5. In the
16 subsequent appeal to this Court, we declared the first two orders void reasoning that
17 service by publication in that context violated due process requirements of reasonable
18 notice. *Id.* ¶ 13. As to the third order, this Court stated, "We do find that Uhden

1 eventually had notice and an opportunity to be heard on the issue of spacing . . .” *Id.*
2 The Court determined that eventual notice coupled with the ability to participate in
3 the proceedings met the requirements of due process. *See Id.* ¶¶ 10, 13.

4 {28} Even though Garduño did not receive notice of her employer’s appeal for 130
5 days, we cannot conclude that the risk of erroneous deprivation of unemployment
6 benefits is unnecessarily high as a consequence of the procedures utilized by the
7 Department. In this case, the Department completely adhered to the protocols outlined
8 in the Unemployment Compensation statutes and accompanying regulations as
9 described in *Millar*, including not ceasing payments without prior notice and an
10 opportunity to be heard. *See Millar*, 2013-NMCA-055, ¶¶ 7-9; *see also*
11 11.3.300.308(E) NMAC (1/1/2003) (“Once an initial determination is made and
12 payment of benefits is begun, payments shall not be stopped without prior notice and
13 an opportunity to be heard.”). The erroneous deprivation that Garduño alleges would
14 occur during the delay in the decision of a second-tier appeal which could reverse the
15 initial determination. But prior to and during the appeal, Garduño was receiving her
16 benefits and was deprived of nothing. Moreover, during the appeals process, Garduño
17 was afforded abundant process that included a hearing and opportunities to obtain
18 counsel, present evidence, and confront and cross-examine adverse witnesses.

1 **2. Probable value of earlier notice or of additional or substitute procedural**
2 **safeguards**

3 {29} We next examine any possible value of the additional safeguards proffered by
4 Garduño. Garduño argues that she should have received an earlier notice and
5 hearing. Inherent in this question is whether the outcome would have been different
6 if the Department had provided the additional process Garduño requests. *Cf. State ex*
7 *rel. Children, Youth & Families Dep't v. Christopher B.*, 2014-NMCA-016, ¶ 7, 316
8 P.3d 918 (“[I]n order to show a denial of due process, we do require the [claimant]
9 to ‘demonstrate that there is a reasonable likelihood that the outcome *might* have been
10 different[]’ had the denied procedure been afforded.” (Third alternation and emphasis
11 in original) (internal quotation marks and citation omitted)).

12 {30} Garduño relies on *Waters-Haskins v. Human Services Department, Income*
13 *Support Division* to argue that DWS’s late notice of the pending appeal amounted to
14 “a false representation or concealment of material facts,” which implied
15 “‘representations that are contrary to the essential facts to be relied on, even when
16 made innocently or by mistake’.” 2009-NMSC-031, ¶ 24, 146 N.M. 391, 210 P.3d
17 817 (citation omitted) (holding that because the agency clearly knew of claimant’s
18 ineligible status but continued to pay her food stamp benefits for eight years while the
19 claimant had no way of knowing she was ineligible, the agency was estopped from

1 later attempting to recoup the paid benefits). In that case, this Court applied a theory
2 of equitable estoppel, an issue which Garduño does not argue on appeal. Further, the
3 *Waters-Haskins* holding is not dispositive because Garduño was made aware of the
4 possibility of appeal and of the possibility of having to pay back benefits should she
5 lose on appeal. The notice to Garduño stated, “If your employer challenges a decision
6 allowing benefits to you and the appeal decision is against you, you will be required
7 to repay those benefits.” Garduño appears to be making an equitable estoppel
8 argument couched in procedural due process; however, because Garduño did not
9 cross-appeal the Court of Appeals’ adverse equitable estoppel determination, the
10 issue is not before us.

11 {31} Here, the delayed notice of appeal Garduño received is more analogous to the
12 eventual notice received in *Uhden*. Despite the delay, Garduño still received notice
13 of the hearing and appeal prior to the hearing, and the delay did not prevent Garduño
14 from attending and participating in the DWS appeal hearing. *See* 11.3.500.10(A)(1)
15 NMAC (1/1/2003). At the appeal hearing, the ALJ heard testimony from Garduño,
16 the store manager, an employee, and the store’s loss prevention investigator; and the
17 ALJ considered evidence consisting of written statements, policies, receipts, and
18 surveillance video. Like *Uhden*, Garduño was not deprived of an opportunity to be

1 heard on the issue of repayment of unemployment benefits.

2 {32} The Minnesota Court of Appeals considered a due process argument similar
3 to Garduño’s and added another element requiring notice of the interest at stake. In
4 *Schulte v. Transportation Unlimited, Inc.*, a discharged employee received notice of
5 a hearing requested by his employer to challenge the unemployment benefits he had
6 already received. 354 N.W.2d 830, 831 (Minn. 1984). Because the employee was
7 reemployed before the hearing and was not informed of the potential requirement of
8 repayment upon reversal of the initial decision to award benefits, the employee did
9 not attend the hearing. *Id.* at 831-32. The Minnesota Court held that the notice was
10 “affirmatively misleading” and resulted in a denial of due process because it failed
11 to communicate the interest at stake. *Id.* at 835; *see also Dilda v. Quern*, 612 F.2d
12 1055, 1057 (7th Cir. 1980) (holding a due process violation for lack of notice of the
13 possible decrease in a food stamp allotment because notice did not meaningfully
14 inform persons so they could protect their interest)).

15 {33} Garduño’s case is more like cases from the Court of Appeals of Minnesota that
16 distinguish *Schulte* where the Court ultimately held that there was no constitutional
17 violation when the employee *did* participate in the hearing. *See Comm’r of Nat. Res.*
18 *v. Nicollet Cty. Pub. Water/Wetlands Hearings Unit*, 633 N.W.2d 25, 30 (Minn. Ct.

1 App. 2001) (affirming an appellate denial of the appellant’s due process claim based
2 on constitutionally valid notice of the hearing because the appellant knew the
3 potential consequences of a reversal of the initial decision and participated in the
4 appeal with counsel); *see also Aubin v. Family Dollar, Inc.*, No. A14-0483, 2014 WL
5 6724937, at *4-5 (Minn. Ct. App. Dec. 1, 2014) (holding that online system of
6 appeals did not violate due process rights because it “was not affirmatively
7 misleading” and it adequately explained the “potential consequences” of failing to file
8 a timely appeal (citations omitted)); *Koch v. Sheldahl*, No. A03-1562, 2004 WL
9 1878786, at *4 (Minn. Ct. App. Aug. 19, 2004) (determining that employee was not
10 entitled to notice of consequences of losing an unemployment benefits appeal until
11 she received notice that the employer had, in fact, appealed and concluding that when
12 faced with the decision of whether to participate in the appeal, the employee also had
13 notice of the consequences of losing an appeal thus there was no due process
14 violation). In Garduño’s case, like the *Nicollet* case, the late notice did not prevent
15 Garduño from participating in the appeal hearing. The facts also indicate that
16 Garduño, like *Nicollet* was given notice of the potential consequences of losing an
17 appeal. Garduño’s participation in the appeal hearing coupled with her notice of the
18 potential consequences was not “affirmatively misleading.”

1 {34} Even though Garduño was unaware of her employer’s appeal for a substantial
2 time, Garduño’s argument overlooks that the notice of claim determination dated
3 March 12, 2010 stated that “[i]f your employer challenges a decision allowing
4 benefits to you and the appeal decision is against you, you will be required to repay
5 those benefits.” Further, the August 3, 2010, notice of hearing the Department mailed
6 to Garduño informed Garduño of the issues to be addressed, including the issue of
7 whether she left her employment without good cause or was discharged for
8 misconduct. The notice contained references to the legal and regulatory bases related
9 to those issues. The notice included information required by the regulations meant
10 to inform Garduño of the issues to be addressed so she could prepare for the hearing.
11 *See* 11.3.500.9(D) NMAC; 11.3.500.9(D)(1), (3) NMAC.

12 {35} We are not persuaded that there was probable value to Garduño ’s proffered
13 additional procedural protection in receiving earlier notice. The requested additional
14 procedures would not have changed the outcome of the final eligibility determination.
15 Garduño was discharged from employment for her own misconduct, and no amount
16 of time would have permitted her to show otherwise. Indeed, before the district court,
17 Garduño’s counsel acknowledged that the Department’s eligibility decision was
18 probably correct. Additionally, Garduño cannot prove that earlier notice would have

1 led to a smaller overpayment debt where, even after she received actual notice of the
2 appeal, she continued to collect benefits voluntarily increasing the risk that she would
3 have a higher overpayment debt.

4 {36} There would be no added value in a speedier notice and hearing where it would
5 not have afforded additional protections from an erroneous deprivation of the
6 continuation of benefits or from a wrongful order to repay benefits. The Court of
7 Appeals in this case failed to view the process as a whole by focusing on the lack of
8 a specific type of notice and not considering the abundant process and safeguards
9 afforded to Garduño. Accordingly, the late notice did not violate due process.

10 {37} We also note that the Department has the legal right to recoup overpaid
11 benefits, even those benefits mistakenly overpaid by the Department. *See, e.g.,*
12 *Ellender v. Schweiker*, 575 F. Supp. 590, 593, 600 (S.D.N.Y. 1983) (“We do not
13 question the Government’s legal right to collect back all legitimate overpayments of
14 [Federal Supplemental Social Security Income] benefits from recipients who are
15 presently able to repay their debts after they obtain their full [Social Security]
16 checks.”); *see generally* Section 51-1-38 (describing a claimant’s liability for
17 unemployment benefit overpayment).

18 **C. The Government’s interest includes the function involved and the fiscal**

1 **and administrative burdens that the additional or substitute procedural**
2 **requirement entails**

3 {38} The third factor of the *Mathews* test is “the Government’s interest, including
4 the function involved and the fiscal and administrative burdens that the additional or
5 substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335. *Mathews*
6 described this factor as a consideration of “the public interest” which includes “the
7 administrative burden and other societal costs” associated with providing the
8 proposed additional procedural safeguards. *Id.* at 347. In discussing this test,
9 *Mathews* looked both to the financial burden on the administration and to the effect
10 the costs of additional procedures for undeserving recipients may have on deserving
11 recipients. *Id.* at 347-48. The Department argues that the government’s interest at
12 issue here is in recouping benefits erroneously paid to claimants who did not deserve
13 them. We disagree. The added procedural safeguards Garduño requests are more
14 timely notice and hearing. Thus, we must determine the added burden on the
15 Department to provide a more timely notice and hearing. It appears to us that the
16 added burden of notifying claimants of an employer’s appeal sooner is minimal.
17 Significantly, the Department does not contest our conclusion. In fact, at oral
18 argument before this Court, the Department stated that claimants are currently

1 provided with notice of appeal and an appeal hearing much sooner than occurred in
2 Garduño's case.

3 {39} While the private interest in the continuation of benefits is important, there is
4 a very low risk of erroneous deprivation under the procedures utilized by the
5 Department. The interest in the continuation of benefits was attenuated where
6 Garduño received benefits through the first level of administrative appeal.
7 Unemployment benefits hearings must comport with due process and be conducted
8 in such a manner as to ascertain the substantial rights of parties; fundamental fairness
9 is the essence of due process. More specifically, a claimant is entitled to a full, fair,
10 and impartial hearing which conforms to the fundamental principles of due process
11 and which includes the right to confront and cross-examine witnesses. In this case,
12 the Department provided and Garduño received adequate notice and a fundamentally
13 fair, full, and impartial hearing.

14 **IV. CONCLUSION**

15 {40} Garduño was not deprived of a protected property interest where she continued
16 to receive benefits up until it was determined that she was ineligible for the benefits.
17 The Department's late notice of a pending appeal did not deprive Garduño of due
18 process of law where the late notice neither prejudiced her ability to defend against

1 the employer's assertion that she had been fired for misconduct nor prejudicially
2 delayed her merits hearing.

3 {41} **IT IS SO ORDERED.**

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5

PETRA JIMENEZ MAES, Justice

6 **WE CONCUR:**

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BARBARA J. VIGIL, Chief Justice

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EDWARD L. CHÁVEZ, Justice

11
12

CHARLES W. DANIELS, Justice

13
14

RICHARD C. BOSSON, Justice, Retired
15 **Sitting by Designation**