From: Chris Mechels
To: Apodaca, Sheila, DOH
Cc: Chris Goad; stcyr, peter
Subject: [EXT] Mechels comment #3 on NMAC 7-1-30 Rules Hearing
Date: Friday, July 17, 2020 2:43:34 PM

Dear Ms. Apodaca,

This is the third of a number of comments on this hearing.

It concerns whether the proposed Rule meets the intent of the Legislature in passing the PHERA Act. Following are portions of the Act which serve to establish that intent.

12-10A-19. Enforcement; civil penalties.
A. The secretary of health, the secretary of public safety or the director may enforce the provisions of the Public Health Emergency Response Act by imposing a civil administrative penalty of up to five thousand dollars ($5,000) for each violation of that act. A civil administrative penalty may be imposed pursuant to a written order issued by the secretary of health, the secretary of public safety or the director after a hearing is held in accordance with the rules promulgated pursuant to the provisions of Section 12-10A-17 NMSA 1978.

12-10A-17. Rulemaking.
The secretary of public safety, the secretary of health, the state director and, where appropriate, other affected state agencies in consultation with the secretaries and state director, shall promulgate and implement rules that are reasonable and necessary to implement and effectuate the Public Health Emergency Response Act.

History: Laws 2003, ch. 218, § 17; 2007, ch. 291, § 24.

At 12-10A-19 the Legislature that the penalty could be imposed only "after a hearing is held". They "could" have simply not allowed for a hearing, and simply imposed the penalty on a written order, but they didn't, and they refer to 12-10A-17 "rules promulgated pursuant to the provisions".

Looking then to 12-10A-17 Rulemaking it seems that the promulgated rules must be "reasonable and necessary to implement and effectuate the Public Health Emergency Response Act". The rules must be "reasonable and necessary".

I suggest that a standard for "reasonable and necessary" for the Dept of Health, would be their existing NMAC 7.1.2, which has served define their hearing process for many years and is well tested.

By direct comparison of NMAC 7.1.2 with the proposed NMAC 7.1.30, we find that many of the appellant rights defined within 7.1.2 have been stripped out of 7.1.30. The result seems to be that the Dept of Health can "railroad" an appellant through the hearing, be their selection of the Hearing Officer, their sole definition of the hearing format, and the Secretary's decision without appeal.

In effect the proposed 7.1.30 may well make a successful appeal IMPOSSIBLE, should the DOH Secretary choose to do so, with no Judicial Appeal at the end. The intent seems to be the imposition of such a draconian hearing process, as to totally discourage appeals, even though such appeals are allowed in the statute, and are the intent of Legislature.

This is the worst form of hypocrisy, totally out of bounds, in a Democracy. The parties who suggest this outrageous hearing sham should be disciplined, perhaps terminated.

The obvious "solution" to this problem is to simply use a slightly modified version of 7.1.2 as a hearing procedure for complaints under NMSA 12-10A-19.

This is SO obvious, that I suggest the current Rules Hearing be abandoned, esp as it has many procedural violations

of the Rules Act, as I detailed in my Comment #1.

The Legislative intent that the Hearing Rule be "reasonable and necessary" has clearly not been met.

Regards,

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