

VIA E-MAIL

July 29, 2020

Craig T. Erickson, Esq.
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RE: Comments from Rule Hearing on Proposed 7.1.30 NMAC

Dear Mr. Erickson:

The Department of Health (Department) is writing to respond to various written and oral public comments received by the Department concerning the proposed rule 7.1.30 NMAC.

Chris Mechels

The Department received several e-mails and oral comments from Mr. Mechels.

Mr. Mechels argued that the rule was erroneously described on the Sunshine Portal as an “emergency rule”. The rule 7.1.30 NMAC was initially adopted as an emergency rule, and the materials concerning that emergency rule are posted on the Sunshine Portal rulemakings website at http://statenm.force.com/public/SSP_RuleHearingSearchPublic. The materials concerning the proposed revised 7.1.30 NMAC are posted in a separate listing on that same website. Both postings include a summary that describes the rule (in part) as having been “created through emergency rulemaking”. This is technically accurate with respect to both postings, given that the current rulemaking is a continuation of a rulemaking process that began with the emergency rule adoption in March.

Mr. Mechels stated that no “explanatory statement” or “related NM Register” publications was posted online, and that those materials must be made available. The “related NM Register publications” for the emergency rule are the transmittal materials, which have been posted online. Included within those transmittal documents is an “Explanatory Statement” section. No such documents have been submitted to Records and Archives for the final rule 7.1.30 NMAC, because the final rule has not yet been adopted.

Mr. Mechels stated that the emergency rule 7.1.30 NMAC was not posted online on the NMDOH website or the Sunshine Portal website, and that this was required pursuant to 14-4-5.6 NMAC [sic]. The emergency rule was posted by the Department on both the Sunshine Portal at http://statenm.force.com/public/SSP_RuleHearingSearchPublic and the NMDOH regulations website at <http://nmhealth.org/about/asd/cmo/rules/>, in accordance with the State Rules Act.

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Mr. Mechels stated that the proposed rule was not available on the Sunshine Portal beginning July 9, 2020. The Department did post the rule on both the NMDOH website and the Sunshine Portal 30 days prior to the rule hearing. Upon information and belief, the rule was accessible via the Sunshine Portal at <http://ssp.nm.gov/> by scrolling to the bottom of the page and clicking “Rule Making Requirements”, which would then direct the user to http://statenm.force.com/public/SSP_RuleHearingSearchPublic, where the rule could be accessed. In any case, the Department did post the rule to both the NMDOH website, and to the Sunshine Portal’s designated website for rule postings, and the Department does not control the Sunshine Portal website, which is operated by the NM Department of Information Technology (DOIT). Questions concerning the functionality of the Sunshine Portal website should be directed to DOIT.

Mr. Mechels repeatedly expressed in written and oral comments that the Department should utilize the Department rule 7.1.2 NMAC for the hearings process in administrative proceedings concerning penalties imposed by the agency under the Public Health Emergency Response Act (PHERA). Rule 7.1.2 NMAC concerns adjudicatory hearings requested by licensed facilities that are the subject of proposed disciplinary actions against their license. Mr. Mechels claimed that 7.1.30 NMAC is based primarily on 7.1.2 NMAC. 7.1.30 NMAC was not based upon 7.1.2 NMAC. However, the Department did borrow from various other rule sources which may themselves have been borrowed from 7.1.2 NMAC, or which may have shared a common source. In any event, the Department does not find 7.1.2 NMAC to be a better rule for purposes of hearings concerning proposed penalties under PHERA. The standards described in the proposed 7.1.30 NMAC are fairly typical hearings procedures, common to most if not all administrative adjudicative hearings, and the Department believes the proposed procedures to be appropriate.

Mr. Mechels recommended that the Department include hand delivery as an option for submittal of a request for hearing. The ongoing COVID-19 pandemic demonstrates why hand delivery is not feasible. NM state government offices are currently closed to the public, and hand delivery cannot be effectuated. Certified mail is a common method of service in both administrative adjudicative hearings and court proceedings, and it ensures the ability to verify when a request for hearing is issued. The Department believes that certified mail is an appropriate and effective method of service.

Mr. Mechels expressed concern that the rule does not specify the ability of these cases to be stayed by the hearing officer. Although the proposed rule does not specify the ability for cases to be stayed, the rule permits the parties to submit motions, and permits the hearing officer to rule on motions of the parties. In fact, several of the current administrative hearings have been stayed upon motion of the parties, pending the resolution of an ongoing case before the NM Supreme Court, which is anticipated to address the authority of the Department to impose penalties under PHERA for violation of the agency’s public health orders. The Department acknowledges that a stay may be granted by a hearing officer in these cases.

Mr. Mechels noted that 7.1.30.8(B) NMAC allows appointment of a hearing officer, whereas 7.1.2.17 NMAC allows appointment of an “impartial” hearing officer. The Department agrees

that hearing officers in these proceedings should be impartial, and the Department does not object to including the word “impartial” in this passage of the rule.

Mr. Mechels expressed that allowing a hearing to occur as early as 12 days after receipt of a request for hearing is “oppressive”. As noted, a party may request that a hearing be rescheduled to a later date. The purpose of allowing hearings to occur as early as 12 days after receipt of a request for hearing is to enable hearings to occur quickly, bearing in mind that these cases concern violations of orders issued pursuant to PHERA during a declared public health emergency.

Mr. Mechels commented that the proposed modification of the existing emergency rule at 7.1.30.8 NMAC, to allow the Department 20 calendar days from the receipt of a request for hearing to issue a notice of the hearing, rather than the current 5 working days, is “very oppressive”. The Department has proposed this modification in recognition of the delays that have resulted from the COVID-19 epidemic. State offices are currently closed, and the Department’s offices are only sporadically staffed. This has resulted in delays between the time when mail is received at the Department’s offices, and the time when administrative support staff actually receive that mail. This has made it very difficult for the Department to issue notices within 5 business days. This is not a change that substantially impairs the rights of appellants, and the Department believes that it is reasonable.

Mr. Mechels stated that the proposed modification to the text at 7.1.30.8(B) NMAC, which would permit a hearing to occur via video or telephone upon either party’s request and at the discretion of the hearing officer, would be “very oppressive”. Particularly given the current state of the COVID epidemic, and given the current public health orders regarding mass gatherings, the Department has proposed to change the current rule text in this passage to ensure that hearings can be conducted remotely if needed.

Mr. Mechels argued that the proposed modification to 7.1.30.8(F) NMAC, to allow a hearing officer to require that parties submit proposed findings of fact and conclusions of law, as well as closing arguments, is “quite oppressive”. In fact, this is a standard practice in administrative adjudicative matters, and the Department does not consider it to be especially onerous. In the Department’s experience, even *pro se* litigants are able to create effective proposed findings of fact and conclusions of law when provided basic instruction from a hearing officer. One of the critical purposes of administrative adjudicative hearings is to generate a clear record of the parties’ arguments, and proposed findings and conclusions, as well as closing arguments, are critical to achieving this purpose.

Mr. Mechels commented that 7.1.30.8(M) NMAC does not allow for “Pro Se representation.” “Representation”, as that word is used in this subsection, refers to the representation of a party by a third party. A *pro se* party is not represented, but instead appears on their own behalf. The Department acknowledges that a party may appear *pro se* in these cases, and there is nothing in the rule that would prohibit them from doing so.

Mr. Mechels complained about the description in 7.1.30.8(Y) NMAC of the NMDOH Cabinet Secretary’s decision being a “final decision”. As a general rule, all administrative decisions by a

Cabinet Secretary that are made after an administrative adjudicative hearing are final decisions of the executive agency, as the Secretary is the chief officer of the agency.

Mr. Mechels argued that the rule should provide for judicial review, as is stated in the Department's rule 7.1.2.39 NMAC. Upon information and belief, judicial review of decisions concerning licensed facilities is identified in statute, which is why the right to appeal those decisions is referenced in rule. By contrast, no such statutory right to judicial review exists in the Public Health Emergency Response Act, and so no right to appeal is specified in the rule at 7.1.30 NMAC. This does not mean, however, that a party cannot appeal the final administrative decision that is made after a hearing under 7.1.30 NMAC. Appeals from administrative adjudicative decisions would be governed by the Rules of Civil Procedure for the NM District Courts.

Mr. Mechels stated that one of his written comments was not posted to the Sunshine Portal website within 3 days after the Department's receipt, but was instead posted 5 days after the Department's receipt (received Monday, July 13, 2020 and posted Saturday, July 18, 2020). Mr. Mechels also complained that the comment was not posted on the NMDOH website. The Attorney General's default procedural rule for rulemaking at 1.24.25.12 NMAC requires that agencies post public comments to the agency website within three business days after receipt. The Department did submit the comment to both the Sunshine Portal and to the agency website on Friday, July 17, 2020, four business days after receiving the comment. The Department apologizes for the delay in posting this comment. However, the delay was minor and of no practical consequence. The rulemaking substantially complies with the requirements of the AG rule on rulemaking and the State Rules Act.

Mr. Mechels complained that the rule hearing notice did not mention the Sunshine Portal. The Department is not aware of any legal requirement that a rule hearing notice reference the Sunshine Portal, and Mr. Mechels has not cited to any such authority. In any case, the notice did reference the Department's regulations webpage, where all of the same materials posted at the Sunshine Portal are posted.

Mr. Mechels stated in written comment and at the rule hearing that it was not clear what rulemaking procedure the Department was following in its rulemaking. The Hearing Officer identified the statutory and regulatory bases for the rule hearing in his introduction at the hearing. The Department acknowledges that it is bound by the AG rule on rulemaking at 1.24.25 NMAC, as well as the State Rules Act at NMSA 1978, § 14-4-1 *et seq.* The application of those legal authorities is a matter of law and is not in dispute.

Mr. Mechels argued, in his oral comments at the hearing and in written comment submitted after the rule hearing, that the Department should have received public comments regarding the entire rule 7.1.30 NMAC, rather than only portions. The Department did in fact grant members of the public the opportunity to comment on the entire rule, as demonstrated by Mr. Mechels' comments.

Mr. Mechels alleged in his written comments after the hearing that the Hearing Officer blocked adequate comments regarding the rule. The Hearing Officer limited the time for participants'

comments, but nevertheless allowed a substantial period of time for commenters to speak. The Department notes that Mr. Mechels' oral comments were duplicative of his written comments. Also, as noted by the Hearing Officer at the rule hearing, Mr. Mechels' oral comments were unduly repetitious. The Attorney General's rule on rulemaking at 1.24.25.13(F) NMAC authorizes hearing officers to exclude or limit comment that is deemed unduly repetitious. The Department believes that the rule hearing was conducted in a fair and equitable manner, and that all participants were given a full and fair opportunity to submit comment regarding the proposed rule.

Carter Harrison, Esq.

Mr. Harrison commented, in oral comment at the rule hearing, that requiring proposed findings of fact and conclusions of law of *pro se* litigants is not appropriate. He suggested that the rule clarify that hearing officers may solicit proposed findings of fact and conclusions of law, but may not penalize litigants for not submitting them. Once again: in the experience of the Department of Health, such requirements are not unduly burdensome for *pro se* litigants. Regarding a hearing officer's ability to "penalize" a party, the Department responds that hearing officers in these proceedings will be limited in their ability to actually penalize any party for failure to submit findings and conclusions. By the terms of the proposed rule, hearing officers do not act as judges, but submit recommendations to the Cabinet Secretary, who then renders a final decision.

Mr. Harrison disagreed with the proposed modifications to 7.1.30.8(B) NMAC, and recommended that the rule instead provide that either party may request leave to attend a hearing remotely and present that party's witnesses remotely. The Department agrees in principle with Mr. Harrison's comment. However, as noted, all of these hearings will likely be conducted during a declared public health emergency. It is impossible to anticipate the standards that may apply to gatherings during public health emergencies, and the Department believes it is important to reserve the ability for either party to request that hearings be conducted via remote means in their entirety, when warranted or as required by an applicable public health order. The Department notes that all civil cases before the NM district courts are currently being conducted remotely, by order of the NM Supreme Court. As seen in the district courts, it is possible for hearings to be conducted effectively by remote means without substantially impairing the ability of either party to present their case.

Mr. Harrison requested that text be included in the rule stating that hearing officers have the ability to lower the amount of a proposed fine. The Department does not believe it is necessary to include such a specific statement in the rule. However, the Department acknowledges that administrative hearing officers in these proceedings implicitly have the ability to recommend a different penalty than what has been proposed by the agency. Again, hearing officers in these proceedings make recommendations for consideration by the Cabinet Secretary, and accordingly, a hearing officer may recommend that a proposed penalty be upheld, denied, or modified.

Jeanne Tatum

Ms. Tatum submitted written comment concerning the proposed rule 7.1.30 NMAC. Ms. Tatum opined that there was no legitimate reason to allow NMDOH 20 days to issue a notice of hearing, and expressed that if the period for issuance of the notice of hearing is increased, the period for requesting a hearing should likewise be increased. As stated, the Department is proposing to increase the number of days after receipt of a request for a hearing within which the agency can issue a notice of hearing. This modification is proposed based on circumstances unique to governmental agencies during a declared public health emergency, and the Department is not aware that persons who receive notices of contemplated action to impose monetary penalties under PHERA face similar difficulties; and none of the public comments have suggested that. Accordingly, the Department does not endorse increasing the period in which a person may request a hearing.

Ms. Tatum disagreed with the proposed modification at 7.1.30.8(B)(4) NMAC, stating that it is unfair. Again, this modification to the existing text of the rule is proposed to allow either party to request that a hearing be conducted remotely, an option that is needed to address circumstances in which hearings cannot be conducted in person either in whole or in part.

Ms. Tatum opposed requiring parties to submit proposed findings of fact and conclusions of law, for reasons expressed in the other comments discussed above. The Department's response is as described above.

Ms. Tatum expressed that the rule procedure for 7.1.30 NMAC is "being rushed through without enough public notification". The Department disagrees with this comment. The public notice given in this case is consistent with the requirements of the State Rules Act at NMSA 1978, § 14-4-5.2 and the AG rule on rulemaking at 1.24.24.11 NMAC. The Department has provided sufficient public notice to enable the receipt of public comment, consistent with these laws.

Dana Dunlap

Ms. Dunlap complained that this rulemaking is a "BLANTANT [sic] overreach by the Governor and her staff", and stated that this is "LEGISLATIVE action, period." The Department responds that, while rulemaking is indeed an exercise of legislative power, the New Mexico Legislature delegates to all state executive agencies the authority to adopt rules, as expressed in those agencies' authorizing statutes. *See, e.g.*, NMSA 1978, § 9-7-6(E). New Mexico courts have repeatedly acknowledged that this type of delegation is lawful. The Department also responds that the rule at issue in this rulemaking is purely procedural, and simply concerns the procedures by which administrative adjudicative hearings will be conducted. The Department recognizes Ms. Dunlap's comments to be a commentary on whether the Department of Health can or should impose monetary penalties for violations of public health orders, which (as noted) is the subject of a pending case before the New Mexico Supreme Court, and not relevant to the pending rulemaking.

Ms. Dunlap described the rule hearing as “Secret”. As stated, the Department provided significant opportunity for public input, and has complied with the notice requirements of applicable laws. The rule hearing in this matter was not a secret.

Zach Cook, Esq.

Mr. Cook is an attorney who represents two businesses, Anaheim Jack’s, LLC and Papa’s Pawn, LLC, in pending litigation against NMDOH related to penalties imposed pursuant to PHERA at NMSA 1978, § 12-10a-19. Mr. Cook submitted identical comments on behalf of both Anaheim Jack’s, LLC and Papa’s Pawn, LLC. Mr. Cook argued that the Department of Health lacks statutory authority to impose monetary penalties under PHERA at NMSA 1978, § 12-10a-19 for violations of public health orders. The Department does not deem these comments germane to the pending rulemaking, and the Department notes that these comments concern pending litigation. Whether the Department lacks legal authority to impose penalties under PHERA for violation of public health orders is a matter to be decided by the New Mexico Supreme Court, which is scheduled to hear arguments on this subject on August 4, 2020. That case does not concern the substance of the proposed 7.1.30 NMAC, and the outcome in that case is not anticipated to impact the content of this proposed rule, which (as noted) concerns only the procedure by which administrative adjudicative hearings in these cases will be conducted.

Thank you for the opportunity to respond to public comments concerning the proposed rule 7.1.30 NMAC.

Sincerely,

Chris D. Woodward 7/29/20

Chris D. Woodward

Assistant General Counsel