August 20, 2020

VIA FEDERAL EXPRESS

Kathyleen M. Kunkel, Cabinet Secretary
New Mexico Department of Health
Office of the Secretary
1190 St. Francis Drive, Room N-4095
Santa Fe, NM 87502

Re: *Rule Promulgation Hearing for Rule 7.1.30 NMAC ("Administrative Hearings for Civil Monetary Penalties Issued Pursuant to PHERA")*

Dear Secretary Kunkel:

Enclosed is the Report and Recommendation of Hearing Officer pertaining to the above-referenced hearing. Also, enclosed is the official file for the hearing which contains all exhibits that were entered into the hearing record.

Thank you for the opportunity to serve as a Hearing Officer in this matter.

Very truly yours,

UTTON & KERY, P.A.

Craig T. Erickson

By: CRAIG T. ERICKSON

CTE:tmm
Enclosures

Copy (via e-mail w/report only): Chris D. Woodward, Esq.

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REPORT AND RECOMMENDATION OF HEARING OFFICER

Public Hearing: New Mexico Department of Health

Actions in Question: Rule Promulgation Hearing for Rule 7.1.30 NMAC ("Administrative Hearings for Civil Monetary Penalties Issued Pursuant to PHERA").

Hearing Date: July 23, 2020

Report Date: August 20, 2020

REPORT OF HEARING OFFICER

INTRODUCTORY MATTERS

A public hearing was held on Thursday, July 23, 2020 via Cisco Webex at 9:23 a.m.[1] The hearing was held for the purpose of considering the Department of Health's (DOH) proposed repeal and replacement of Rule 7.1.30 NMAC ("Administrative Hearings for Civil Monetary Penalties Issued Pursuant to PHERA"). Craig T. Erickson presided as Hearing Officer. The DOH was represented by Chris Woodward, Assistant General Counsel. The Hearing Officer and Mr, Woodward appeared via Cisco Webex from separate offices within the Department of Health.

The proceeding was recorded via Cisco Webex. The original recording is in the possession of the DOH, Office of General Counsel.

The Hearing Officer opened the proceeding by introducing himself and Mr. Woodward. The Hearing Officer provided the following information in his opening remarks:

The Hearing Officer called the proceeding to order and welcomed the participants to the public hearing on the proposed permanent emergency rule 7.1.30 NMAC "Administrative Hearings for Civil Monetary Penalties Issued Pursuant to the Public Health Emergency Response Act."

In particular, the Hearing Officer stated that the Department is proposing to adopt a new rule, 7.1.30 NMAC, titled "Administrative Hearing for Civil Monetary Penalties Issued Pursuant to PHERA." The purpose of the proposed rule is to establish administrative hearing standards for administrative appeals of civil monetary penalties assessed pursuant to Section 12-10A-19, NMSA 1978, for enforcement of provisions of PHERA. A previous version of the proposed rule was adopted as 7.1.30 NMAC on March 20, 2020 via emergency rulemaking, pursuant to NMSA 1978, § 14-4-5.6.

The Hearing Officer further stated that pursuant to the Notice of Public Hearing ("Notice"), this matter was being heard on the 23rd day July, 2020 via Cisco Webex online, and via telephone. The Hearing Officer and counsel for the DOH, Chris Woodward, were physically present at the

[1] The hearing did not begin at 9:00 a.m. because there were technical difficulties with the Cisco Webex live video platform.

DOH's office in Santa Fe located at the Runnels Building, 1190 St. Francis Dr. Suite N4100. Mr. Woodward and the Hearing Officer were in separate rooms so that they could remove their masks to facilitate communication in this live video hearing. Pursuant to the Notice, the public was given the opportunity to comment on the proposed rule via Cisco Webex and telephonically. The opportunity was also given to the public to submit written comments via email messages, through the close of business on the day of the hearing, July 23, at 5: 00 p.m.

The Hearing Officer announced that this proceeding was being held in accordance with NMSA 1978, § 9-7-6(E). The Hearing Officer also stated that the hearing would proceed in the following manner:

- Chris Woodward would provide an introduction regarding the proposed rule.
- Mr. Woodward would then summarize and move to enter the Department's exhibits into evidence
- The Hearing Officer would then take public comments on the proposed rule from those participants at the hearing wishing to offer comments.

The Hearing Officer asked that those giving comments to be aware that the proceeding was being recorded and to please state for the record their full name and announce whether they are appearing on their own behalf as individual or, if they are representing an organization to state who they represent.

The Hearing Officer also stated that Department is not bound by the formal rules of evidence during these proceedings. However, the Hearing Officer further stated that he may, in his discretion, exclude evidence that is incompetent, irrelevant, immaterial or unduly repetitious.

The proceeding then progressed as follows: Mr. Woodward summarized the proposed rule he stated as follows:

Mr. Woodward began by stating that the hearing was being held to receive public comments on the proposed 7.1.30 NMAC – "Administrative Hearing for Civil Monetary Penalties Issued Pursuant to the Public Health Emergency Response Act." He stated that this rule was initially adopted as an emergency rule in March 2020. He stated that the proposed rule is substantially identical to the emergency rule that was adopted, with a few modifications. He noted that PHERA references the adoption of procedural rules for these proceedings. The thought for this rule was to create basic procedures and guidelines for these rules as to how PHERA hearings on civil monetary penalties will be conducted. He stated that these procedures are consistent with the procedures found in other rules. The purpose of this rule is to establish those procedures, not to specify or detail all of the circumstances in which the DOH might issue civil monetary penalties under PHERA.

Mr. Woodward also stated that under the proposed procedures, the Hearing Officer receives evidence, manages the conduct of the hearing, can hear motions from the parties, and ultimately makes a report and recommendations with a recommended decision to the Cabinet

Secretary of the DOH. The Cabinet Secretary then issues a final decision in the quasi-adjudicative type cases.

Mr. Woodward stated that, in short, the proposed rule is a procedural rule related to the hearing process for hearings related to civil monetary penalties under PHERA. The proposed rule does not address the "nuts and bolts" of when penalties will be assessed under PHERA, what the content of public health orders will be, and so forth. He stated that he understands that that is a "hot topic" right now. He noted that there is quite a bit of litigation pending related to public health orders, including a pending hearing before the New Mexico Supreme Court on August 4, related to the question of whether the agency can pursue civil monetary penalties against businesses and individuals under PHERA. He noted that several of the written comments received by the DOH have addressed that. He stated that he did not intend to address those issues at this hearing, especially considering that there is pending litigation on that subject. The proposed rule is more about the procedures for how PHERA hearings will be conducted.

Mr. Woodward stated that this proposed rule was not based on any one particular rule. The DOH borrowed from various sources in drafting the rule. He stated that the content of the proposed rule is pretty standard procedural practice as far as how administrative hearings are conducted. He gave as an example the duty of the hearing officer to submit a report and recommendation to the Cabinet Secretary.

At the conclusion of Mr. Woodward's remarks, the Hearing Officer stated that he wanted to make it clear that he was not being asked to address the question of the authority of the DOH to impose civil monetary penalties in this proceeding, or about the amount of any fines that might be imposed. He stated that the rules that he was being asked to consider just address the procedures that should be implemented for adjudicatory matters on civil monetary penalties, not the authority of the Department to impose fines.

Mr. Woodward then identified and moved for the admission of the exhibits that the DOH was introducing at hearing, which had been posted on the DOH website or were in the process of being posted if just received. The Exhibits he introduced, and his comments regarding the Exhibits, include the following:

DOH Exhibit No. 1: Emergency Rule 7.1.30 NMAC – Adopted 3/20/20

Mr. Woodward stated that this is the currently applicable rule.

DOH Exhibit No. 2: Transmittal Materials for Emergency Rule 7.1.30 NMAC

Mr. Woodward stated that this Exhibit consists of the transmittal documents, including forms that are required to be submitted, along with any rule that is to be submitted to Records and Archives. A letter that describes the circumstances under which the rule was being adopted and the basis for it, signed by the then Deputy Secretary Eric Chenier, was also included. The Exhibit also includes

Executive Orders from the Governor declaring an emergency public health crisis.

DOH Exhibit No. 3: Proposed Rule 7.1.30 NMAC – "Administrative Hearings for Civil Monetary Penalties Issued Pursuant to PHERA"

Mr. Woodward stated that this is the proposed rule that is "on the table" for consideration in this hearing. Mr. Woodward explained what the Department proposes as modifications to the emergency rule in this proposed rule. The modifications are highlighted in the document with underlined and struck-through text, showing what the Department proposes to remove and to add.

The first modification modifies the number of days within which the Department is required to issue notice of a hearing. The current rule requires the Department to issue notice of a hearing within five days of receipt of a request for hearing. The Department proposes to modify and extend that deadline to 20 days. *See* DOH Exhibit No. 3, 7.1.30.8(B)(3) NMAC. The reason for this proposed modification is the ongoing declared emergency related to COVID. When this rule was drafted and adopted in March, the Department had not anticipated the extent to which the business operations of the Department would be impacted by the declaration of an emergency. Stated offices were closed. Virtually all State employees, including DOH employees, are working from home. That has created delays with the processing of mail, as well as the administrative staffing of DOH offices. They are seeing that the date of receipt of a piece of mail can be vastly different from the date of actual receipt when administrative staff actually see a piece of mail. That is the rationale behind that change.

Mr. Woodward stated that the next proposed modification in this proposed rule is to permit hearings to be held in whole or in part by telephone or live video at the request of either party and at the hearing officer's discretion. *See* DOH Exhibit No. 3, 7.1.30.8(B)(4) NMAC. The current rule provides that a hearing by telephone or live video would occur by agreement of the parties. This modification also relates to the current circumstances related to COVID, especially with respect to the orders related to mass gatherings and the closure of government offices. Mr. Woodward stated that it is very difficult if not impossible in many cases to hold in person adjudicative type hearings in the current environment. He noted that that is why this rulemaking hearing was being held via Cisco Webex. This proposed rule would allow either the Department or the appellant to request a hearing telephonically or via live video. Then, it is a matter for the hearing officer to determine whether to

grant the request. He also noted that is possible that the hearings could be "hybridized," using a combination of in person and live video appearances, with, for example, certain witnesses appearing by telephone.

Mr. Woodward stated that the next and last modification appears in 7.1.30.8(F) NMAC. *See* DOH Exhibit No. 3. This proposal related to the powers and duties of the hearing officer. This passage refers to the ability of the hearing officer to require that parties submit proposed findings of fact and conclusions of law, as well as written closing arguments, and to enter the hearing officer's own proposed findings of fact and conclusions of law for consideration by the Secretary. Mr. Woodward stated that the proposed modification is simply to specify that it is within the authority of the hearing officer to require the foregoing written submittals, as opposed to a situation where a party really did not want to submit these documents. He stated that he imagines that a hearing officer would say that is okay. Mr. Woodward stated that ultimately this is a standard practice in administrative proceedings and so the Department thought it was necessary to reference it. Mr. Woodward stated that though it may sound burdensome for *pro se* litigants, generally the hearing officer is able to explain what needs to be submitted, for example, explaining that the proposed findings of fact are simply a list of facts that the parties seek to have the hearing officer incorporate into his report and recommendation as to why they believe they should win the case. The conclusions of law are the legal conclusions that a party thinks are relevant for the same purpose. This proposal is also within the discretion of the hearing officer and is a standard practice within administrative proceedings. It is designed to make sure that all of a party's arguments are on the record.

DOH Exhibit No. 4: Notice of Public Hearing

DOH Exhibit No. 5: Affidavit of Publication in the Albuquerque Journal

DOH Exhibit No. 6: Affidavit of Publication in the New Mexico Register

DOH Exhibit No. 7: Affidavit of Notice to the Public

DOH Exhibit No. 8: Letter Appointing Hearing Officer

DOH Exhibit No. 9: Written Public Comments

DOH Exhibit No. 9 was supplemented with post-hearing written comments dated July 23, 2020 through August 4, 2020. These were permitted by the Hearing Officer.

DOH Exhibit No. 10: NMDOH Letter to Hearing Officer Craig Erickson, dated July 29, 2020

This post-hearing comment was also allowed by the Hearing Officer.

The foregoing exhibits were admitted into and made part of the record for this Public Hearing.

SUMMARY OF WRITTEN COMMENTS

Written comments were received by the Department prior to the public hearing on July 23, 2020 from six different members of the public. *See* DOH Exhibit No. 9. A summary of those comments follows:

The Written Comments of Chris Mechels

Mr. Mechels submitted a total of eight written comments on the proposed rule. Six of the written comments were submitted prior to the public hearing. Mr. Mechels submitted his seventh written comment on the day of hearing, July 23, 2020, after the hearing as a consequence of the Hearing Officer leaving open the submission of additional written comments from the public until 5:00 p.m. on July 23. Subsequent to the hearing, on July 29, 2020, Mr. Woodward submitted a written response to many of the comments submitted by the public. As a consequence of that submittal, the Hearing Officer gave participants to the hearing the opportunity to respond to the July 29 letter from Mr. Woodward. Mr. Mechels submitted a written response to the July 29 letter on August 4, 2020. Thus, Mr. Mechels submitted a total of eight written comments to the Department. All of his written comments were admitted to the record and made part of DOH Exhibit No. 9.

Mr. Mechels *first written comment* was submitted on July 13, 2020. He stated that his first comment concerns procedural issues which he viewed as sufficient to cancel the hearing, for the following reasons:

1. The Sunshine Portal description of the hearing in referencing "this emergency rule" is a "very serious error" as emergency rules have a very different process. Mr. Mechels argued that it appeared to him that the information was erroneously copied from an earlier document, which he argued is not sufficient as those exposed to the error have false information affecting their participation.

2. The hearing description pointed to at the next Sunshine Portal level also has serious errors which compromise the right of the public to be fully informed about the hearing because the description describes the proposed rule as an emergency rule, which he asserts was in error. He also asserts errors occurred because the Rule Explanatory Statement and Related New Mexico Register Publications were listed in the Sunshine Portal as "not available." He asserts these documents are required for the hearing to take place.

Mr. Mechels also asserts that the March 2020 emergency rule, which is being replaced by the current hearing, was not properly posted as required under the rules act, and "thus would appear to be invalid." He argued that this suggests that the whole hearing process, which relies upon the emergency rule, is invalid.

Mr. Mechels asserts that "NMAC 14-4-5.6, 'B'" [sic] and "NMAC14-4-2E" [sic][2] require that an agency must provide the emergency rule to the public by posting it on the agency website and posting it on the Sunshine Portal. He states that the Sunshine Portal has no evidence of the March emergency rule being posted, and "thus it is invalid." He further states that the DOH did four emergency rulemakings in March 2020 and none of them were posted on the Sunshine Portal, as required by law. He argues that a check on the Portal shows that other agencies do post emergency rules on the Portal as required.

Mr. Mechels argues that the foregoing are serious problems which require terminating the current rulemaking process. In addition, he notes that the Sunshine Portal has been updated, with the consequence that since July 9, the rulemaking information is no longer available on the Portal. He argues that the Rule Act requires 30-day notice to the public, and the Portal is a key part of that notice.

In his *second written comment*, submitted on July 16, 2020, Mr. Mechels argues that there are very serious problems in the substance of the hearing procedure proposed in this rulemaking process. His comments are based upon his comparison of 7.1.2 NMCA ("Adjudicatory Hearings for Licensed Facilities") and the proposed 7.1.30 NMAC rule for hearing procedures for PHERA penalties. He argues that this is a fair comparison, because "it is obvious" that the existing procedures in 7.1.2. NMAC could have been "with slight modifications, use for the PHERA hearings." He argues that a majority of the new procedures were directly based on 7.1.2 NMAC.

Mr. Mechels asserts that most of the rights of an appellant found in 7.1.2 NMAC "have been stripped" from 7.1.30 NMAC. He states that this would "demand an explanation, other than malice." In particular, he argues as follows:

1. 7.1.30.8(B) NMAC states that an appellant may request a hearing by mailing a certified letter, return receipt requested, to the NMDOH at the mailing address specified in the notice of contemplated action within five days after service of the notice. He argues this is more restrictive that the requirement found in 7.1.2.13(B) NMAC which requires that the request for hearing shall be addressed to the director of the Division of Health Improvement or to any other department employee indicated in the notice of contemplated action, and that the letter shall be hand-delivered or mailed, return receipt requested.

2. 7.1.2.15(E) NMAC provides for a "stay" upon a request for hearing. 7.1.30 NMAC has no comparable provision "which can work a very real hardship on the appellant at $5,000 a day."

[2] Mr. Mechels appears to be referring to NMSA 1978, § 14-4-5.6(B) and NMSA 1978, § 14-4-2(E).

3. 7.1.30.8(B) NMAC allows the DOH to appoint a hearing officer; 7.1.2.17 allows the appellant a right to seek an impartial hearing officer.

4. 7.1.30.8(B) NMAC allows the hearing to be scheduled no more than 60 days and not less than 12 days after a request for hearing. Mr. Mechels argues that coupled with a failure to allow for a stay," and "this is very oppressive."

5. Mr. Mechels argues that 7.1.30.8(B) NMAC has a deadline of 20 say for notice of hearing details from the Department; he asserts that 7.1.2 NMAC has a deadline of 4 days, and that the 20 day deadline is "again, very oppressive."

6. He further argues that the provision in 7.1.30.8(B) NMAC for holding a hearing via telephone or live video is "very oppressive" and "eliminates the right of appellant in this decision."

7. Mr. Mechels next addresses 7.1.30.8(F) NMAC, which he asserts would "require the parties to submit proposed findings of fact and conclusions of law, as well as written closing arguments." He argues this provision does not appear in 7.1.2 NMAC and imposes a real burden on those who represent themselves, or those who are represented by a law person. He argues that no reason was given for this proposal, which he asserts is "quite oppressive."

8. He argues that 7.1.30.8(M) NMAC does not allow for pro se representation, but 7.1.2 NMAC does.

9. 7.1.2.9 NMAC provides for judicial review, but 7.1.30.8(Y) NMAC makes the DOH Secretary's decision final.

Mr. Mechels argues that the foregoing proposed rule is extremely "punitive," especially because it was imposed as an emergency rule, without public input. He argues that "it should be abandoned as an example of how NOT to govern." He also argues that a simple alternative would be to adapt the 7.1.2 NMAC hearing procedures, which allows for "reasonable appellant rights." He further argues that "[s]tripping those right from 7.1.30 suggests a malevolent intent on the part of the DOH and calls into question their position in New Mexico government. Is seems palpably evil, an attack on our Democracy." Finally, he asserts that adopting the proposed 7.1.30 NMAC as a rule would demand an appeal to the courts and reflect very poorly on the DOH and the Governor.

Mr. Mechels *third written comment* was submitted to the DOH on July 17, 2020. In this comment, Mr. Mechels focuses on whether the proposed rule meets the intent of the Legislature in passing PHERA. He states that the following provisions in PHERA establish the intent of the Legislature:

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.
B. The provisions of the Public Health Emergency Response Act shall not be construed to limit specific enforcement powers enumerated in that act.
C. The enforcement authority provided pursuant to the provisions of the Public Health Emergency Response Act is in addition to other remedies available against the same conduct under the common law or other statutes of this state.

History: Laws 2003, ch. 218, § 19; 2005, ch. 22, § 3.

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.

Mr. Mechels argues that the foregoing statutory provisions support the argument that a penalty can be imposed only after a hearing is held, and after rules have been promulgated. The rules, he asserts based upon Subsection 17 of the statute, must be "reasonable and necessary to implement and effectuate" PHERA. He suggests that altering 7.1.2 NMAC, which has served the Department's hearing process for many years and is well-tested would meet that requirement.

He generally asserts again that the Department has stripped many of the appellant rights found in 7.1.2 NMAC in the proposed rule. He argues that this is an attempt by the Department to "railroad" an appellant through the hearing, by the Department's selection of a hearing officer and the Secretary's decision without appeal. He argues that the proposed rule makes a successful appeal "IMPOSSIBLE," without a right to a judicial appeal. He argues this amounts to a "draconian" hearing process, and that this is the "worst form of hypocrisy, totally out of bounds, in a Democracy." He argues that the parties who suggest this "hearing sham should be disciplined, perhaps terminated."

He again urges the Department to adopt a slightly modified form of 7.1.2 NMAC, and abandon the rulemaking process related to the proposed rule.

Mr. Mechels submitted his *fourth written comment* on July 19, 2020. He states that his focus here is "even more procedural violations of the Rules Act, sufficient to cancel the hearing." In particular, he asserts as follows:

1. Per the Rules Act, the DOH was required to post all written comments on its website, as soon as practicable, and no more than three days following receipt to allow for public review. The written comments are required to be available for public inspection at the main office of the Department as well. Mr. Mechels asserts that his July 13 written comment was posted five days after receipt.

2. He asserts that the Department's notice fails to mention the Sunshine Portal.

3. The purpose of posting the written comments is to inform interested persons, before the rulemaking hearing, and he asserts that purpose has been thwarted.

4. He asserts again that the hearing should be canceled and rescheduled.

In Mr. Mechels' *fifth written comment,* submitted to the Department on July 21, 2020, Mr. Mechels asserts that he is addressing "even more procedural violations of the Rules Act," which he argues are sufficient to cancel the rulemaking hearing. In this written comment, he states that the Department is now posting comments on both the DOH website and the Sunshine Portal. However, he argues that the Department failed to do this "until chided on the matter," and did not meet this requirement within the required three days, and thus violated the Rules Act.

He also addresses the following "further problems":

1. He asserted that the proposed rule is actually an "amended" 7.1.30 NMAC, with the original rule being the emergency rule which was adopted in March 2020. He argued that NMSA 1978, § 14-4-5.2 requires that amendments must be explained, and the Department has failed to offer an explanation, thus violating the Rules Act. He also argues that the original rule was never explained as the law requires.

2. He also argues that, having examined other concluded DOH rules hearings, for example, 7.9.2 NMAC, a concise explanatory statement (citing 1.24.25.14 NMAC) was never submitted by the DOH, and consequently, that hearing could be legally challenged. He questions whether the Department is aware of the "Default Procedural for Rulemaking, 1.24.25 NMAC, which he asserts the Department must use, and has not been doing so, claiming that other unnamed hearings are compromised.

3. Mr. Mechels states that since July 20, 2020, he has been able to find the March 2020 DOH emergency rule on the Sunshine Portal. He states again that his experience is that it was not there prior to that date.

4. He asserts that the DOH has never incorporated the 2017 HB58 requirements into its procedures, which has led "to many violations of the Rules Act, Rule Hearings, and Emergency Rulemaking, with some attendant legal exposure."

5. He again states that the current rulemaking process should be canceled and rescheduled.

Mr. Mechels' *sixth written comment* was submitted to the Department on July 22, 2020. He asserted "even more procedural violations of the Rules Act" in this set of written comments, as follows:

1. He stated that the Rules Act information if no longer in the Sunshine Portal since they "took down" the Portal on July 8, 2020. He asserts that he reported this to the Department, which he states did nothing in response. He then contacted someone at the Sunshine Portal and told them that "Posting" rules information was required under the Rules Act. He asserts that a couple of days later, they "patched together" a link to the rules information but this is not part of the Portal. *See* ssp.nm.gov.

   Thus, Mr. Mechels asserts that even though the Department began posting information on the Portal again after about a 5-day lapse, it was not posting on the Portal as required. He acknowledges that this error was not of the Department's making, but he asserts that the New Mexico Government has made it impossible to comply with the Rules Act. He states that "this is NOT an act of God, [it] was a failure of governance."

2. Mr. Mechels begins the second section of this set of written comments by asserting that the actions of Secretary Kunkel "seem deplorable, and illegal." He asserts that she took advantage of the March 2020 declaration of a "State of Emergency" to create four "Emergency" rules, with no input from the public and no notification. He asserts the result is "very ugly," referring to 7.1.30 NMAC.

   He asserts again that the only way to determine what is fair and reasonable is to compare the proposed rule to 7.1.2 NMAC, which could be used for PHERA. He asserts again that the proposed rule is a "stripped down" version of 7.1.2 NMAC, removing all of the appellants' rights, and leaving the appellant no chance to prevail. He asserts that this reflects very poorly on Secretary Kunkel "who has chosen an illegal process, which bars public input. He further states that he believes "Ms. Kunkel is guilty of Malfeasance, and that she should be prosecuted, and should forfeit her performance bond, for violating our laws, and willfully depriving her 'constituents' of their rights."

   He further asserts that Ms. Kunkel's "criminal behavior" is not unusual, referring to her four emergency rule makings in March. He references two rule making processes related to changing the minimum age to hire from 18 to 17 years of age. He also asserts that Secretary Kunkel has engaged in six emergency rulemaking processes in 2020.

   He then states: "Extending these tendencies of Ms. Kunkel, it should make us wonder about her leading the COVID efforts. Her penchant for operating 'in the dark,' with Emergency Rulemakings, and creating a 7.1.20 which denies all right to the appellant, when 7.1.2 could have been used, with slight modifications. All these tendencies seem on display with her handling of Covid [sic] also."

Mr. Mechels also states he has a long history with NM Rulemaking, since 2014, mostly at the LEA Board.

He closes his sixth written comments, the day before the rulemaking hearing, by stating: "Now we are left to wonder about the integrity of the Hearing Officer, who was, after all, chosen by Kunkel. We will soon find out."

Mr. Mechels submitted his *seventh written comment* on July 23, 2020, the afternoon of the rulemaking hearing that took place during the morning of July 23, 2020. The Hearing Officer expressly left open the submission of written comments through close of business on July 23, up to 5:00 p.m.

In his seventh set of written comments, Mr. Mechels begins by noting that prior to the hearing, on July 22, in his sixth written comment, he closed his comments by "wondering about the integrity of the Hearing Officer who chosen by Kunkel." [sic] He asserts that his question about integrity was answered on the record, and states: "he [the Hearing Officer] has none." He also asserts that the Hearing Officer showed little to no knowledge of the Rules Act and the 2017 changes in HB58. He asserts that the Hearing Officer was "utterly unprepared for the hearing."

Mr. Mechels stated that he questioned the Hearing Officer about the procedure for the Rules Hearing, and "he provided none." Mr. Mechels states that he advised the Hearing Officer that New Mexico law requires the use of the "Default Procedure," 1.24.25 NMAC, and it should be used to guide the hearing. He claims that the Hearing Officer refused that request and asserts that the Hearing Officer "seemed to have no knowledge of 1.24.25 NMAC."

Mr. Mechels next asserts that the Hearing Officer illegally was intent on restricting the comments to proposed amendments to 7.1.30 NMAC. He acknowledges that this would be "normal" if 7.1.30 NMAC had been established in a normal rulemaking hearing with public input. However, he asserts it was established in an emergency rulemaking procedure, without public input. Consequently, he argues that public comment should have been taken on the whole rule, in detail. He asserts that this was not allowed. He asserts that the public was never allowed a proper rules hearing "due to [the Hearing Officer's] ignorance."

Mr. Mechels asserts that he offered to address the rule point by point, which he asserts would have been the correct procedure, but claims the Hearing Officer would not allow that. He states that the Hearing Officer was a "very poor choice as a Hearing Officer, esp as he has no respect for the law, though he's sworn to uphold it." [sic]

Mr. Mechels next asserts in his written comments that "we are left with a very ugly picture." He asserts that the Hearing Officer was "blocking" public input and adopted in an "illegal" Emergency Rulemaking. He asserts the calls the Secretary's "excessive" use of emergency rulemaking into question and argued that changing the hiring age from 18 to 17 years of age is not an emergency.

He then claims again that the Hearing Officer has no knowledge of or interest in "the legal requirements of the Rules Act, esp since HB58, and the Default Procedure." [sic] He repeats that he believes prior hearings should be called into question.

He next asserts that the current hearing on 7.1.30 NMAC "shows how NOT to run a Rules Hearing and could be used to instruct potential hearing officers on what NOT to do." He argues that "it shows why we rank LAST in the nation in most measures. Our government won't follow the law, and the result is mayhem."

Mr. Mechels' eighth written comment is summarized in "The Hearing Officer's Recommendation," below.

The Written Comment of Amy Dunlap

Ms. Dunlap offered a written comment on July 16, 2020, stating that the hearing on the proposed rule should be postponed until the Legislature has time "to weigh in, via developing their own proposed changes and then holding committee hearings, and adoption by the full House and Senate." She argued that to make the emergency rule permanent is "quite severe," asserting that there has been no public debate and almost not dissemination to the public or the media about the proposed changed. She argues that the Governor and her current administration have "seized too much power during this public health situation and it is time to dial back that power, not add to it."

The Written Comment of Jeanne Tatum

Jeanne Tatum submitted a written comment on July 21, 2020. She stated that she disagrees with the proposed rule amendments (other than correcting a typographical error to capitalize the reference to New Mexico in 7.1.30.8(Q) NMAC.

She opposes the language of 7.1.30.8(B)(3) NMAC, which gives the Department 20 days instead of 5 days to give notice of certain details related to the hearing. She argues that the appellant has 5 days to send a request for an appeal hearing, and there is no reason the Department should more than five days to give notice of the date, time, and place of the hearing, as well as to identify the hearing officer.

Ms. Tatum opposes 7.1.30.8(B)(4) NMAC, which provides that the venue for the hearing will be Santa Fe, or via live video or telephone. She appears to be opposed to the latter portion of this rule, as Santa Fe was established in the original emergency rule as the venue for hearings. Thus, she appears to argue that there is no reason for hearings via telephone or live video.

She opposes 7.1.30.8(F) NMAC, which adds new language to the rule related the powers of the hearing officer by including among those powers the power to require parties to submit findings of fact and conclusions of law, as well as written closing arguments. She argues this addition puts more burdens on the appellant, who is likely a lay person who cannot afford counsel. She argues that the burden of proof is on the Department, and these new requirements would contradict Subsection O, which establishes the burden of proof requirement.

Finally, she states that she agrees with the comments of Ms. Dunlap, summarized above. She adds that she agrees with Ms. Dunlap because, she asserts, PHERA is currently being abused.

The Written Comment of Dana Dunlap

Ms. Dunlap asserts that the proposed rule amounts to "BLANTANT overreach by the Governor and her staff." She further asserts that "this is a LEGISLATIVE action, period." She also argues that executive and judicial entities making up laws, "for ANY excuse, is "UNCONSTITUTIONAL and a VIOLATION OF OUR CIVIL AND VOTING RIGHTS."

She urges the Department to stop the hearing and let the legislature consider this next season. She states as follows: "The onslaught of Shenanigans pulled by Governor Grisham and her Cohorts are UNACCEPTABLE." Finally, she asserts that this "Secret" hearing is "more evidence of rampant corruption in Michelle's State Government."

The Written Comment of Zach Cook, Esq.

Zach Cook is an attorney from Ruidoso. Mr. Cook states that he is submitting his comments on behalf of his clients, Papa's Pawn, LLC and Anaheim Jacks, LLC. Both entities are involved in pending administrative appeals against the Department, which are stayed pending the outcome of cases before the New Mexico Supreme Court.

Mr. Cook submitted two separate comments, one on behalf of each of his two clients. However, other than references specific to each of his clients, the written comments are identical and focus on his argument that the requirements of PHERA should not be applied to his clients. Those arguments may be appropriate in another context, but they have no bearing on this rulemaking process, which focuses solely on the proposed 7.1.30 NMAC, which addresses only the procedures to be used in administrative appeal hearings involving civil monetary penalties imposed by the Department under PHERA.

SUMMARY OF ORAL COMMENTS AT HEARING

The Cisco Webex List of Participants for this hearing included the Hearing Officer, Chris Woodward, Billy Jimenez (DOH General Counsel), Chris Mechels, Christopher Goad, Scott Wyland, and "Call-in User_8 (901230****0.) The Call-in User was Carter Harrison, Esq., who appear on behalf of the Republican Party of New Mexico. Mr. Goad and Mr. Jimenez did not offer any public comments. offer.

The Public Comments of Chris Mechels

Mr. Mechels began his comments by asking if there is agreement regarding what hearing procedure was being used for this rulemaking hearing. The Hearing Officer responded by stating that the focus of the hearing is the proposed rule found in DOH Exhibit No. 3, 7.1.30 NMAC – Administrative Hearings for Civil Monetary Penalties Issued Pursuant to PHERA. The Hearing Officer stated that the entire focus of what he would be looking at are the proposed rule in DOH

Exhibit No. 3, and stated that he would make a recommendation to the Secretary as to whether she should adopt those rules, or not.

Mr. Mechels stated that his question was focused on what procedures would be used for today's rulemaking hearing. The Hearing Officer responded that, as he indicated at the beginning of the hearing, the hearing would be conducted pursuant to certain statutes that govern the procedures for the hearing.

Mr. Mechels then stated that the hearing procedure he was talking about is a default hearing procedure in this state, found at 1.24.25 NMAC. He stated that this procedure states that unless you have a rule governing procedure for rulemaking, you are bound to use the default hearing procedure. The Hearing Officer informed Mr. Mechels that he would consider the default hearing procedure (contrary to Mr. Mechels' claim that the Hearing Officer refused to follow 1.24.25 NMAC) and also indicated that he would follow the standard procedures he has always used in rulemaking hearings.

The Hearing Officer also told Mr. Mechels that he had an opportunity to make written comments, and he was being given an opportunity to make oral comments, but the Hearing Officer would not be engaging in answering a lot of questions.

Mr. Mechels stated that he referenced in his first written comment a suggestion the hearing procedure to be used be made available. He said if the Hearing Officer is not familiar with the Default Hearing Procedure, and many departments are not familiar with it and do not use it, that the Hearing Officer is bound by law to use that procedure. The Hearing Officer reiterated that he was not going to turn this hearing into a question and answer session and reminded Mr. Mechels that this was his opportunity to make an oral comment on the proposed rule.

Mr. Mechels then moved on to address his written comments that the appropriate document to compare the proposed hearing procedures to is 7.1.2 NMAC. He argued that 7.1.30 NMAC is "drawn from" 7.1.2 NMAC. He argued that 7.1.2 NMAC is the "normal hearing procedure used by the Department." He argued that you cannot understand the proposed procedures in 7.1.30 NMAC without referencing 7.1.2 NMAC. He argued that 7.1.2 NMAC should be an exhibit so that it could be compared to 7.1.30 NMAC.

He argued that the proposed rule has only shown up as an emergency procedure back in March 2020, and now the public is expected to comment on it. He argued that if it had been done properly originally, it should have been done by comparison to 7.1.2 NMAC, which he again claimed was the basis for the proposed rule. He said the Hearing Officer should stop the hearing and introduce 7.1.2 NMAC as an exhibit for a fair comparison of the basis for the proposed rule.

The Hearing Officer stated that he would not stop the hearing, and that Mr. Mechels comments were duly noted. He also advised Mr. Mechels again that if he would like to make comments on the proposed rule he could proceed with that. Mr. Mechels responded by asking again was "what is your procedure going to be?" He wanted to know if the Hearing Officer was going to work his way through the whole proposed rule one section at a time, or if he wanted all the comments right now. The Hearing Officer answered that he would not be going through the

rule section by section, and if Mr. Mechels had any public comments on any aspect of the proposed rule he could make those now. Mr. Mechels stated he would be happy to do that and stated that he was prepared to do that.

Mr. Mechels stated that, starting at the top, what he was going to do was to compare 7.1.30 NMAC to 7.1.2 NMAC. The Hearing Office noted that we had already heard from Mr. Woodward that 7.1.2 NMAC was not the basis for the proposed rule, but rather the DOH had drawn from a variety of rules. The Hearing Officer informed Mr. Mechels that he would be given a reasonable amount of time to make his public comment but he should use his time judiciously. Mr. Mechels responded by stating "okay."

He then began to address the three proposed changes to the rule that Mr. Woodward had addressed. He first addressed 7.1.30.8(F) NMAC, which addresses the powers of the hearing officer. He commented on the proposed modification to require parties to submit proposed findings of fact and conclusions of law, as well as written closing arguments. He argued that if a party is not represented by counsel, submitting proposed findings of fact and conclusions of law is very burdensome. He argued that if you are going up against an attorney, who is quite familiar with these written submissions, and you have the appellant, who is unfamiliar with any of this, it is very unfair and burdensome. He further argued that the proposed language does not appear in 7.1.2 NMAC. He argued that all other hearings that are conducted by the DOH are conducted through 7.1.2 NMAC, and there is no reason that the PHERA hearings could not have been done under 7.1.2 NMAC.

Mr. Mechels referred to 7.1.2.33 NMAC, which he asserts requires the hearing officer to produce findings of fact and conclusions of law. He argued that that is perfectly reasonable. He argues that to demand this of an appellant is very burdensome and "unheard of." He objects very strongly to this proposed rule.

Mr. Mechels argued that the three changes to the rule were presented in a very confused manner. First, he argued that the whole hearing procedure the whole hearing procedure should involve examining each part of the rule section by section, because, as far as the law is concerned, it's a new proposed rule. He argued that the Department is taking an emergency rule, which is presented as if it was an existing rule, when it was an emergency rule, enacted with no public input, and it should be examined in detail, top to bottom. He said that the whole thing has been "highly irregular."

Mr. Mechels then argued that 7.1.30.8 NMAC should be compared to 7.1.2.14 NMAC, because that is the "normal" hearing procedure used by the DOH. He said the proposed rule has to be weighed against some reasonable standard, which he asserts is 7.1.2 NMAC.

He next argued that in the PHERA statute at NMSA 1978 § 12-10A-19, the Legislature "weighs down" on the hearing procedures; he stated that's what we're about today. He noted that Subsection 19 also refers to Subsection 17 of the statute, which he notes that hearing procedures are bound by law to be reasonable. He argued that for 7.1.30 NMAC to be reasonable, you need something to compare it against. He argued that comparison to 7.1.2 NMAC is "crucial."

The Hearing Officer then commented that in most rulemaking hearings, there is a time limit of three to five minutes for each public commenter. The Hearing Officer noted that he had already given Mr. Mechels much more time than that, and he would give Mr. Mechels another five minutes, but then he would need to conclude his comments. The Hearing Officer noted that there was a great deal of repetition in Mr. Mechels' comments, and if he would like to address other issues go ahead, but the Hearing Officer does not need to hear the same issue several times over.

Mr. Mechels then argued again that the proposed rule should be worked through one section at a time and that was not being done. He then argued that the Hearing Officer was "greatly reducing" the comments of the public, because he was not doing a section by section review of the proposed rule one section at a time. He again argued that the proposed rule is a new document which he argues requires a section by section review. The Hearing Officer informed that he was not going to argue with Mr. Mechels about the procedure for the hearing. Mr. Mechels then claimed he was being cut off. The Hearing Officer then told Mr. Mechels he was not being cut off, but that he had four minutes of time remaining for his public comment.

Mr. Mechels turned to the rule on scheduling hearings. He argued that the proposed rule differs from 7.1.2 NMAC in that the proposed rule (at 7.1.30.8(B)(1) NMAC) says that the Department will appoint a hearing officer. He argues that 7.1.2 NMAC says that the hearing officer has to be impartial, which he asserts is a key difference. Because of that difference, he argues that the proposed rule is unreasonable.

Mr. Mechels also argues that there is no proposal for a stay of the hearing in the proposed rule. He argues that 7.1.2 NMAC includes language that allows for staying the proceeding. He argues that that language was "removed" for "no good reason."

Mr. Mechels argues that the Department has "stripped out" all the language that protects the appellant. He argues again that "you could have just used 7.1.2." He said that there is no choice regarding the selection of the hearing officer, which he asserts is "very unreasonable." In contrast, he notes that the "order of presentation" rule is exactly the same in both rulemaking frameworks.

He also argued that giving the Secretary 45 days to produce a final decision, asserting it is 15 days in 7.1.2 NMAC. Worst of all, he states, 7.1.2 allows for judicial review and the proposed rule does not. Now, he says, "you have the Secretary making a final decision with no appellate review." He asserted that is "outrageous."

The Public Comment of Scott Wyland

Scott Wyland is a reporter for the Santa Fe New Mexican. He stated that he was mainly monitoring the hearing to see what was going to be discussed. He sought clarification of the rule about the proposed 20-day deadline for the Department to issue a notice of hearing after a request for hearing has been made. Mr. Woodward explained that that is a modification of the current 5-day rule. He explained that the current rule requires that the Department must issue a notice of the hearing, identifying the hearing officer and the time and date of the hearing in what is effectively

5 business days of the Department's receipt of the appellant's request for hearing. The proposed rule revising that deadline to 20 calendar days after receipt of the request for hearing.

Mr. Woodward stated that the reason for that relates to the current declared emergency on COVID in which government buildings are closed and all of the government employees are working from home. They have experienced pretty sporadic staffing of administrative positions as a consequence of that. There have been delays with administrative staffing and the agency's mailroom. The delays are such that the time that the US Postal Service drops off the mail at the agency's building is sometimes very different from the time that the administrative staff actually see the request for hearing and can act from that. The proposed rule would make the deadline 20 days after the postal service delivers the request to the office.

Mr. Wyland then asked whether the DOH is establishing an administrative process in this proceeding, and whether there was a process before this. Mr. Woodward explained that this is a new rule. The emergency rule that was adopted in March was a brand-new rule. Prior to this, the PHERA was never really utilized, as far as Mr. Woodward knows, prior to COVID. It was adopted many years ago, perhaps 20 years ago. With the declaration of the COVID public heath emergency, they realized that this was something they were likely going to need to utilize. PHERA recognizes the creation of rules for this purpose to lay out what the hearing process looks like. This is a continuation of the emergency rule adopted in March. The purpose of both rules is to identify the process by which administrative hearings in this context occur.

The Public Comment of Carter Harrison, Esq.

Carter Harrison is an attorney from Albuquerque. He appeared telephonically at the hearing. He appeared on behalf of the Republican Party of New Mexico.

Mr. Harris stated that PHERA was modeled after the Emergency Powers Health Act, which was a creation in the wake of the 2001 terrorist attack on the World Trade Center and the Pentagon, and which was heavily opposed by the ACLU and others. It was heavily modified from its original state into what we call PHERA. He asserted that virtually all of the modifications are in the direction of giving procedural protection to individuals subject to the Act. He asked that we take that spirit into the rulemaking procedures for the penalty provision.

He commented on two of the proposed deadline changes and one thing that he thinks is "conspicuously missing."

Mr. Harris argued that requiring proposed findings of fact is not in keeping with an administrative process which is a process to likely be used largely by *pro se* litigants. He stated that he thinks Mr. Erickson implied that there are other administrative processes that require this. He stated that he is not familiar with that. He also stated he knows that there are administrative hearing procedures that do not require the submission of proposed findings and conclusions. He suggested that the hearing office may solicit proposed findings and conclusions but cannot penalize a litigant, particularly a *pro se* litigant, for the failure to submit proposed findings and conclusions. He argued that the one virtue of the administrative process is that it is supposed to be a "useable process."

Mr. Harris stated that the Republican Party opposed the changes to the in person hearing requirement in the proposed rule. They asked that the current red-line be replaced by language allowing either side to upon request to obtain leave for their own personal attendance, provided that for anyone who seeks personal attendance, if the State wishes to appear via video or telephonically, that would be fine. Likewise, if the appellant wished to appear via video or telephone, that would also be fine under his proposal. He argued that forcing video or telephonic hearings on appellants who have been dragged into this process against their will is not consistent with "normal due process" requirements in any other context that he is aware of. Even now, in judicial proceedings, he argued that the final merits hearing is in person.

Finally, he said that would appreciate the inclusion of some language, or if not that, a statement if the Hearing Officer in the report to the Secretary, that the hearing office in an adjudicatory proceeding has the authority to lower the amount of the fine, while still finding the individual responsible. He stated that his understanding is that the Secretary has been issuing fines at the $5,000 cap, when the statute says fines may be up to $5,000.00. He states he understands the Secretary understands it to be a $5,000.00 per day fine. He argued that it should be clear that, for example, an individual who is fined for not wearing a mask in the Bosque while jogging is not a $5,000.00 offense and may fine that person $150.00. he argued that language like that should be explicitly included, or an interpretation of the rule by the Hearing Officer would be appreciated.

An Additional Oral Comment from Mr. Mechel

Mr. Mechels asked to offer an additional comment after all other public comments had been offered. Initially, the Hearing Officer told him he was not going to take any additional comments. Mr. Mechels argued that the Hearing Officer had limited comments to five minutes and would not allow additional comments. Although Mr. Mechels first round of comments were not limited to five minutes, the Hearing Officer nevertheless allowed Mr. Mechels to make an additional comment.

Mr. Mechels argued again that the proposed rule had been offered as if it were in place, with modifications to it. He argued that is not the case. He argued, again, that the rule was a result of an emergency hearing, with no public input. To treat it as an existing rule that is now being modified is absurd. He argued it should be treated as a newly presented document working very carefully through the document section by section. He argued that this approach directly violates that the Hearing Officer should be doing.

The other point he wanted to make, again, was that the default hearing procedure was not being used and he accused the Hearing Officer of being unaware of that procedure. The Hearing Officer stated that Mr. Mechels was repeating his earlier comments and that the Hearing Officer was closing the comments at that point (as there were no additional comments from other members of the public to be made.)

The Hearing Officer then explained the process to follow the hearing. He stated that he would review the oral and written comments that had been made and make written

recommendation to the Secretary regarding the proposed rules. He stated that he anticipated having that done by August 21, 2020.

Mr. Woodward added that written comments would be received through the close of business that day, July 23, 2020.

The Hearing Officer then thanked the participants to the hearing and closed the hearing.

Following the hearing, additional post-hearing comments were allowed by the Hearing Officer. The Department submitted a letter to the Hearing Officer on July 19, 2020, and the participants to the hearing were allowed to provide post-hearing comments in response to the Department's July 29 letter by August 4, 2020. The post-hearings comments, for efficiency and avoiding duplication within this Report, are summarized in the "Hearing Officer's Recommendation" section below.

HEARING OFFICER'S RECOMMENDATION

In this Report, the Hearing Officer summarized the pre-hearing written comments and the public comments offered at the public hearing in his "Summary of Proceeding" above. The post-hearing comments are summarized in this section, below.

Application of the Attorney General's Default Procedural Rule for Rulemaking

Chris Mechels, a retired employee of the Los Alamos National Lab, who appeared on behalf of himself, raised most of the challenges to the process, as described in detail above. Mr. Mechels submitted eight written comments and had the opportunity to offer oral comments twice during the public hearing.

Mr. Mechels argued that the rulemaking process was governed by the Default Procedural Rule for Rulemaking, found at 1.24.25 NMAC, and issued by the New Mexico Attorney General's Office in 2018. In his July 29, 2020 letter to the Hearing Officer, Mr. Woodward responded to Mr. Mechels' comments that it was not clear what rulemaking procedure the Department was following in its rulemaking. *See* DOH Exhibit No. 10 at page 4. He stated that the Hearing Officer identified the statues and regulatory bases for the rule hearing in his opening remarks. He also stated that the Department acknowledges that it is governed 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.* He further stated that the application of those legal authorities is a matter of law and is not in dispute. Thus, the Department expressly agreed in its written submission to the Hearing Officer dated July 29, 2020 that the AG's Default Procedural Rule for Rulemaking of the AG's office does apply to this proceeding. The Hearing Officer also agrees that the Default Procedural Rule applies. The Hearing Officer also believes that the foregoing Rule was in not violated in this proceeding, and that a full and fair opportunity was given to all participants to be heard.

The key provisions relevant to the issues in this case are summarized here as follows:

- "The purpose of the hearing is to provide all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing on the proposed rule." 1.24.25.13(A) NMAC.

- "The hearing officer may ask questions or provide comments for clarification purposes only, but should *refrain from providing opinions or engaging in discussion regarding the merits of the proposed rule or any public comment presented*." 1.24.25.13(B) NMAC.

- "Any individual who provides public comment at the hearing may be questioned by the agency or hearing officer or, at the discretion of the agency or hearing officer, or as otherwise provided by law, by other persons at the hearing." 1.24.25.13(D) NMAC.

- "The hearing officer shall be conducted in a fair and equitable manner. The agency or hearing officer may determine the format in which the hearing is conducted (e.g. introduction of each part or section one at a time for comment), but the hearing should be conducted in a simple and organized manner that facilitates public comment and a clear rulemaking record." 1.24.25.13(E) NMAC.

- "The rules of evidence do not apply to public rule hearings and the agency or hearing officer may, in the interest of efficiency, exclude or limit comment or questions deemed irrelevant, redundant, or unduly repetitious." 1.24.25.13(F) NMAC.

This rulemaking hearing was conducted within the parameters set forth in 1.24.25.13 NMAC. Mr. Mechels was given a reasonable opportunity to submit data, views, and arguments orally and in writing.[3] Indeed, he had a substantial opportunity to do so. He submitted eight detailed written comments expressing his views. He was allowed to offer oral comments at the hearing twice and was allowed a total of over 25 minutes to offer public comment.

Mr. Mechels' written comments in particular address many of the specific sections of the proposed rule, confirming his opportunity to offer comments on the entire rule, not just the modifications to the emergency rule made by the Department in the proposed rule.

Mr. Mechels began his oral comments by questioning the Hearing Officer. The Hearing Officer answered a few of his questions but declined to answer further questions. Notably, nothing in the AG's Default Procedural Rule requires a hearing officer to allow himself to be questioned. The Default Procedures do allow a hearing officer to *ask* questions but they do not require a hearing officer to allow himself or herself to become the subject of the questioning, as Mr. Mechels clearly attempt to do in this hearing. The Default Procedural Rule allows a hearing officer to provide comments for clarification purposes only, but state that provide that the hearing officer should refrain from providing opinions or engaging in discussion regarding the merits of the proposed rule. Thus, while the Hearing Officer allowed Mr. Mechels to ask a few questions of him, it was appropriate to direct Mr. Mechels to focus on offering his comments on the proposed rule.

[3] The State Rules Act also provides that at the public rule hearing, members of the public shall be given a reasonable opportunity to submit data, views or arguments orally or in writing. NMSA 1978, § 14-4-5.3(B).

Mr. Mechels argued repeatedly that the hearing should be conducted in a manner in which the Hearing Officer addressed each section of the rules section by section. He argued that the failure to do so was a violation of the AG's Default Procedural Rule. As noted above, the Default Procedural Rule expressly states that the agency or hearing officer may determine the format in which the hearing is conducted, and expressly gives the example that the format may include an introduction of each part or section one at a time for comment. However, the rule also provides that the hearing should be conducted in a "simple and organized manner" that facilitates public comment and a clear rulemaking record.

Thus, while a hearing officer "may" chose in his or her discretion to introduce a proposed rule by part or section for public comment, the hearing officer is not required to do so under the Default Procedural Rule. Notably, the proposed 7.1.30 NMAC only has one "part" and it is just over three pages long. Mr. Mechels was told that he had the opportunity to comment on anything in the rule that he wanted to address, and he acknowledged that he was prepared to do that. However, he chose not to do so and repeatedly returned to the same themes.

When the procedures for this hearing were announced by the Hearing Officer at the beginning of the hearing, no time limits were imposed. In many rulemaking hearings, time limits are announced at the beginning of the hearing. Time limits were only imposed on Mr. Mechels because his oral comments were both unduly repetitious standing on their own and were unduly repetitious of his written comments, which are also unduly repetitious. He written comments were all admitted into the record. His oral comments were limited, consistent with 1.24.25.13(F) NMAC, because they were unduly repetitious. Mr. Mechels was informed by the Hearing Officer that his comments were repetitious, and that he should use his time judiciously, but even after those comments, he continued to be unduly repetitious in the comments he offered. A review of the summaries of Mr. Mechels' written and oral comments above makes that clear. It is also worth nothing that the Hearing Officer advised the public at the beginning of the hearing that the Rules of Evidence do not apply, but the Hearing Officer may in his discretion exclude evidence that is incompetent, irrelevant, immaterial, or unduly repetitious.

Mr. Mechels claims that the Hearing Officer limited comments to three minutes, which the Hearing Officer then extended by five minutes for him. This is incorrect. Initially, no time limit was imposed at all. As Mr. Mechels' comments became unduly repetitious the Hearing Officer informed him that in many rulemaking proceedings, public comments are limited to three to five minutes. No time limit was imposed at that point, but the Hearing Officer urged Mr. Mechels to use his time judiciously and told him he would have a reasonable amount of time. It was only after he continued to repeat himself repeatedly that a five-minute limit was imposed. This was after he had already spoken for 15 minutes. The Hearing Officer also told him that he should keep in mind that he should use his time well, and not engage in a lot of repetition of the same points. He then proceeded to repeat the same themes regarding 1.24.25 NMAC and his argument that a thorough comparison with 7.1.2 NMAC should occur. After an additional five minutes (a total of 20 minutes at that point), the Hearing Officer told him his time was up. However, at the close of public comments Mr. Mechels was given an additional five minutes to comment a second time. In total, he was given 25 minutes to make his comments.

Mr. Woodward also responded to Mr. Mechels' oral comments and written comments that the Department should have received public comments regarding the entire 7.1.30 NMAC, rather than only portions. He states that the Department did in fact grant members of the public the opportunity to comment on the entire rule, as demonstrated by Mr. Mechels' comments. *See* Exhibit No. 10 at page 4.

The Department also noted that Mr. Mechels' oral comments were duplicative of his written comments and were unduly repetitious. The Department sites 1.24.25(F) NMAC which authorizes hearing officers to exclude or limit comment that is deemed unduly repetitious. The Department asserts that the 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.

Comparison of 7.1.2 NMAC to the Proposed 7.1.30 NMAC

Mr. Mechels' second major focus was his argument that the rulemaking process should include a comparison of 7.1.2 NMAC and the proposed 7.1.30 NMAC. Mr. Mechels argues that PHERA, at NMSA 1978, § 12-10A-17, requires that Department promulgate rules that are reasonable and necessary to implement and effectuate PHERA, and that no hearing can be held until that occurs. He argues that 7.1.2 NMAC would serve that purpose. He appeared argue that either the DOH or the Hearing Officer should make certain that that comparison, on a line-by-line basis, should take place. The Hearing Officer declined to take that approach but did not preclude Mr. Mechels from making the comparison himself which he did at length in his written comments, and in his oral comments at the hearing.

Mr. Woodard addressed Mr. Mechels' concerns about conducting a comparison of 7.1.2 NMAC to the proposed rule in his July 29 letter. *See* DOH Exhibit No. 10 at page 2. He first notes that 7.1.2 NMAC relates to adjudicatory hearings requested by licensed health facilities [such as nursing homes] that are the subject of proposed disciplinary actions against their license. He states that 7.1.30 NMAC was not based upon 7.1.2 NMAC, but was drawn from various other rules, which may themselves have borrowed from 7.1.2 NMAC. However, he states that the Department does not find 7.1.2 NMAC to be a better rule for hearing concerning proposed civil penalties under PHERA. He also notes that the standards described in the proposed 7.1.30 NMAC are typical hearing procedures, common to most if not all administrative adjudicative hearings, and the proposed procedures are appropriate.

Other Procedural Issues and Issues Arising Out of the Proposed 7.1.30 NMAC

In addition to his argument about the application of the AG's Default Procedural Rule, Mr. Mechels raised concerns about a number of other procedural issues. He raised concerns about whether materials related to the hearing were properly posted on the Department's website and on the Sunshine Portal website. Those concerns are summarized in detail in the summaries of Mr. Mechels' written and oral comments above. Mr. Woodward also responded in detail to those concerns in his July 29 letter, and argues that the Department substantially complied with the requirements it must follow in the required posting of materials related to the rulemaking hearing on the DOH website and the Sunshine Portal website, pursuant to the State Rules Act and the Default Procedural Rule for Rulemaking. *See* DOH Exhibit No. 10 at pages 1-2.

Mr. Mechels argued that his July 13 written comments were posted five days after the Department received them when they should have been posted three days after receipt pursuant to the Default Procedural Rule. In his July 29 letter, Mr. Woodward addressed Mr. Mechels' written comment that states that one of his written comments was not posted on the Sunshine Portal within 3 days after the Department's receipt, but was instead posted 5 days after the day of receipt, (received Monday, July 13, 2020 and posted on Saturday, July 18, 2020). *See* DOH Exhibit 10 at page 4.

Mr. Mechels also complained that the comment was not posted on the DOH website. Mr. Woodward notes that 1.24.25.13 NMAC requires that agencies post public comments to the agency website within three business days after receipt. Mr. Woodward states that the Department did submit the comment to both the Sunshine Portal and to the agency website on Friday, July 17, four days after receipt of the comment. The Department apologized for the delay but asserts that the delay was minor and had no practical consequence. It asserts that the Department substantially complied with the requirements of the AG rule on rulemaking and the State Rules Act.

Mr. Mechels also objected to references to "this emergency rule" which requires a different process than standard rulemaking and asserts that the rule was erroneously described on the Sunshine Portal as an "emergency rule."

Mr. Woodward responded in his letter of July 29 at the third and fourth paragraphs of his letter[4] to Mr. Mechels' concerns by explaining that 7.1.30 NMAC was originally adopted as an emergency rule, and the materials concerning the emergency rule were posted on the Sunshine Portal rulemaking website. *See* DOH Exhibit No. 10 at page 1. He states that the materials related to the proposed revision of 7.1.30 NMAC were posted in a separate listing on the same website, and both postings describe the rule in part as having been "created through emergency rulemaking, which, he states, is technically accurate, given that the process that began with the original rule has been continued in this rulemaking process.

Mr. Mechels responded in his August 4 comment that an examination of all the listed DOH rules information on the Sunshine Portal shows other instances of DOH rulemaking and none made the error of calling a rules hearing an "emergency rule" hearing. He assumes it was a clerical error, but a significant one because it could mislead people. He argues that Mr. Woodward is trying to "distract us," and "shows bad faith in attempting distraction."

Mr. Woodward's response is a reasonable explanation for the references to "emergency" rule, and do not have a substantive bearing on the question of whether or not this proposed rule should be adopted or not. Given the fact that Mr. Mechels filed eight pre-hearing post-hearing written comments totaling 17 pages of comments, and was allowed to offer oral comments twice

[4] Mr. Mechels' in his August 4, 2020 written comments, included in DOH Exhibit No. 9, responds to Mr. Woodwards' July 29 letter by reference to Mr. Woodward's first paragraph, second paragraph, and so forth through the fifteenth paragraph of Mr. Woodward's letter. The "first paragraph" is the first substantive paragraph under the heading "Chris Mechels" in Mr. Woodward's July 29 letter, on page 1. In order to be consistent and avoid confusion, the Hearing Officer refers to the paragraphs of Mr. Woodward's letter in the same manner as Mr. Mechels. For example, reference to the "fourth paragraph" of Mr. Woodward's letter refer to the fourth substantive paragraph of his letter, at the top of page 2 of the letter.

during the public hearing for total of more than 25 minutes, it is clear that Mr. Mechels had more than an adequate opportunity to offer comments on the propose rule. Even if there were troubles with the Sunshine Portal, which appear not to have been out of the Department's control, Mr. Mechels clearly had time to fully prepare and present comments on the proposed rule.

Mr. Woodward also responded to Mr. Mechels claim that the emergency rule 7.1.30 NMAC was not posted online on the DOH website or the Sunshine Portal website, and that this was required pursuant to "NMAC 14-4-5.6, 'B'" [sic]. Mr. Woodward states that the emergency rule was posted on both the DOH and the Sunshine Portal websites in accordance with the State Rules Act and provides the websites for each. *See* DOH Exhibit No. 10 at page 1.

Mr. Woodward also responds to Mr. Mechels' comment that the proposed rule was not available on the Sunshine Portal beginning July 9, 2020 in his July 29 letter. *See* DOH Exhibit No. 10 at page 2. Mr. Woodward states that the Department did post the rule on both the DOH website and the Sunshine Portal 30 days prior to the rulemaking hearing. He provides details information regarding the location in the websites for each website. He also notes that the Department does not control the Sunshine Portal website, which is operated by NM Department of Information Technology, and states that questions regarding to that site should be directed to that agency.

Mr. Mechels asserts that Mr. Woodward's claims in the fourth paragraph of his letter are incorrect. He asserts that from July 9 to July 13 the Sunshine Portal had no rules information on their webpage. He asserts that the contacted Sheila Apodaca at the DOH with no results, and then contacted Lorenzo Ornelas, without identifying who he is. He states that he advised Mr. Ornelas that the Rules Act and other laws required posting on the Sunshine Portal. He claims that the links at the bottom of the Portal page resulted. He claims Mr. Woodward just "made up" the link he described. He also argues that the Portal webpage (http://ssp.nm.gov) lists rulemaking as "outside of the Portal and "Launching the Portal" results in no sign of rule-making. He argues that Mr. Woodward's "dismissal" of any DOH responsibility is "quite irresponsible."

Mr. Woodward's responses to Mr. Mechels claims about posting materials on the DOH website and the Sunshine Portal are reasonable. It is clear that ultimately Mr. Mechels had access to all the materials prior to the rulemaking hearing, and he had a full and fair opportunity to address issues arising out of those materials prior to, during, and after the public hearing.

Mr. Mechels also raised concerns that no "explanatory statement" or "related NM Register" publications were posted online. Mr. Mechels argues that the DOH failed to submit a concise explanatory statement as required in 1.24.25.14 NMAC in the notice process.

Mr. Woodward explained in his July 29 letter that the "related NM Register" publications are the transmittal materials, which were posted online. *See* DOH Exhibit No. 10 at page 1. He further explains that the transmittal documents include an "Explanatory Statement" section. He notes that these documents have not yet been submitted to Records and Archives for the final rule 7.1.30 NMAC because the final rule has not yet been adopted.

Mr. Woodward's response to Mr. Mechels' concern about the Explanatory Statement and related NM Register materials are reasonable and resolves the issue.

Mr. Mechels also argued again in his August 4 written comment that most of the rights of an appellant found in 7.1.30.8(B) NMAC have been "stripped" from the appellant in the proposed 7.1.30 NMAC. He presented argument regarding of handful of specific rules.

Mr. Mechels argued that the proposed 7.1.30.15(E) NMAC is flawed because it does not provide for a "stay" upon a request for hearing, as appears in 7.1.2.15(E) NMAC. Mr. Woodward responds to this issue in the seventh paragraph of his letter. *See* DOH Exhibit No. 10 at page 2. Mr. Woodward addresses Mr. Mechels' concern that the proposed rule does not address the ability of the hearing office to issue an order staying a proceeding brought under the rules. He acknowledges that there is no specific reference to motions to stay in the proposed rule, but notes that the rule does provide that parties may submit motions to the hearing officer, and permits the hearing officer to rule on them. He further notes that several pending COVID administrative cases have currently been stayed, pending resolution of a case before the New Mexico Supreme Court, which relates to the issue of whether the Department has the authority to impose penalties under PHERA. He expressly acknowledges on behalf the Department that hearing officers have the authority to issue an order staying proceedings in COVID cases.

Thus, is it clear that the general rule related to a hearing officer having the authority to hear and decide motions would include motions to stay, and there is no need for a specific reference to that type of motion.

Mr. Mechels argued that 7.1.30(B) NMAC, which addresses the appointment of a hearing officer, should include the word "impartial" before the reference to "hearing officer." By contrast, a similar provision in 7.1.2.17 NMAC includes the word "impartial." Mr. Woodward, in the eighth paragraph of his July 29 letter, responds to Mr. Mechels' argument that the reference to appointment of a hearing officer in 7.1.30.8(B) NMAC does not include the word "impartial." *See* DOH Exhibit No. 10 at pages 2-3. Mr. Woodward states that the Department does not object to inserting the word "impartial" in the proposed rule.

The request to use the phrase "impartial hearing officer" is a reasonable modification of the proposed rule, and the Hearing Officer recommends that the Secretary make that modification.

Mr. Mechels argues that the provision in 7.1.30.8(B) NMAC which requires that a request for hearing be sent to the Department by certified mail, return receipt requested, should provide for hand-delivery instead of requiring certified mail. Mr. Mechels responds by noting that Mr. Woodward states that hand delivery is a problem as a consequent of the COVID pandemic, and asking "why is it NOT a problem with 7.1.2.13 NMCA, which is used more often?" Mr. Woodward explains that, given the challenges of receiving mail in the current pandemic, with State offices closed, state employees working from home, and no one at the DOH offices to receive mail that is hand-delivered, it is no longer practical to provide that service. This puts this practice in an distinctly different situation than the situation that existed when 7.1.2 NMAC was promulgated, without the limitations of a declared public health emergency.

Mr. Mechels complains that the provision in 7.1.30.8(B) NMAC which allows for a hearing as soon as 12 days after a request for hearing is "very oppressive." In the ninth paragraph of his letter at page 3, Mr. Woodward responds to Mr. Mechels' argument that allowing a hearing to occur as early as 12 days after receipt of a request for hearing is "oppressive." Mr. Woodward noted that a party may request that a hearing be schedule at a later date. He stated that 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."

This hearing officer can say from his many years of conducting administrative adjudicative hearings in a variety of contexts that requests to extend the time for an adjudicative hearing are routinely granted. This rule is not oppressive, and there are times appellants want a hearing as soon as possible. There may also be situations where an early hearing is warranted. This should be left to the discretion of the hearing officer.

Mr. Mechels argues that the modification of the deadline for the Department to issue a notice of hearing after receipt of a request for hearing from 5 days following the receipt of a request for hearing to 20 days is, again, very oppressive. He argues that 7.1.2 NMAC has a four-day deadline. He claims 20 days is also very oppressive. Mr. Woodward responds to Mr. Mechels' argument in the tenth paragraph of his July 29 letter. *See* DOH Exhibit No. 10 at page 3. Mr. Woodward summarizes again his arguments related to the need for the change from the 5-day rule to the 20-day rule The Department has provided a reasonable basis for this rule.

Mr. Mechels argues that the provision in 7.1.30.8(B) which addresses the option of holding a hearing by live video or telephone is oppressive an eliminates the right of an appellant in this decision. In his eleventh paragraph of the July 29 letter, Mr. Woodward responded to Mr. Mechels' argument that the text in 7.1.30.8(B) NMAC which would permit the hearing to occur via live video or telephone upon either party's request and the discretion of the hearing officer would be "very oppressive." *See* DOH Exhibit No. 10 at page 3. Mr. Woodward notes the current state of the COVID epidemic and the current public health orders related to mass gatherings, and the need to ensure that hearings can be conducted remotely if necessary. Mr. Mechels responds by stating that he has no problem with the consent "of the parties." However, he argues that the consent of "either party" with hearing officer approval "simply allows the DOH to do as they please, as they 'own' the hearing officer. The use of video and telephonic procedures in the context of this pandemic is just beginning to be explored. Parties should be allowed to address the issue via motions, and hearing should be allowed to use their discretion to determine the best and safest way to conduct a hearing, whether it is by video, telephone, in person, or some combination thereof.

Mr. Mechels argues that the proposed 7.1.30.8.(F) NMAC which would allow a hearing officer to order the submission of proposed written findings of fact, conclusions of law, and closing arguments does not appear in 7.1.2 NMAC and imposes a real burden on appellants who represent themselves. Mr. Woodward addresses this argument, in the twelfth paragraph of his letter, at page 3. Mr. Mechels' argument was that the requirements of the proposed Rule 7.1.30.8(F) NMAC related to the hearing officer having the power to require proposed written findings of fact, conclusions of law, and written closing arguments, a provision that Mr. Mechels argues is "quite oppressive." Mr. Woodward argues that the proposed rule reflects standard practice in

administrative adjudicative matters, and the requirement is not "especially onerous." He further argues that 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." He also argues that a critical purpose of an administrative adjudicative hearing is to generate a clear record of the parties' arguments and proposed findings and conclusions, as well as closing arguments, are critical in achieving that purpose.

Mr. Mechels argues that Mr. Woodward's argument "conceal[s] his hostile intent." He argues that "[w]e must assume a hostile Hearing Officer, such as Mr. Woodward [sic], who can create a very real burden for the appellant, further blocking access to a fair hearing." He notes that he represented six terminated LANL employees in 1995 grievance hearings and it was very intimidating, even for a Ph.D. to go up against attorneys. He argues that Mr. Woodward downplays this because "his whole intent is to make appellant's lot worse." He also notes that 7.1.2 has no such provision.

Mr. Harrison also argued against this proposed rule. In his July 29, 2020 letter, at page 5, Mr. Woodward also responded to the oral comments of Carter Harrison, Esq. In particular, he responded to Mr. Harrison's comments on the provision in the proposed rule allowing the hearing officer to require the submission of written findings of fact, conclusions of law, and closing arguments, and the position the Republican Party of New Mexico has taken that imposing that requirement on *pro se* litigants is not appropriate. Id. at 5. Mr. Woodward responds also to Mr. Harrison's comment that the rule should be clarified to state that hearing officers may solicit proposed findings and conclusion but may not penalize them for not submitting the requested documents.

Mr. Woodward reiterated that in the Department's experience such requirements have not been unduly burdensome for *pro se* litigants. *See* DOH Exhibit No. 10 at page 5. He also argues that hearing officers are limited in their ability to "penalize" any party for failing to submit findings and conclusions. He notes that under the terms of the proposed rule, hearing officers do not act as judges, they submit recommendations to the Cabinet Secretary, who then renders a final decision.

This Hearing Officer has extensive experience with soliciting proposed findings of fact, conclusions of law, and written closing arguments from the parties, whether they are represented by counsel or not. As a regular practice, this Hearing Officer explains at the beginning of each administrative adjudicatory hearing in detail what findings of fact and conclusions of law are, and how they should be drafted. At the close of the hearing, this Hearing Officer instructs the parties again on how to draft the proposed findings and conclusions. *Pro se* litigants routinely provide proposed findings of fact and conclusions of law. For most of those individuals, this task does not appear to be unduly burdensome. If a *pro se* party chooses not to submit proposed findings and conclusions, in the experience of this Hearing Officer, the party is not penalized as a consequence of that failure.

Written closings are required in the experience of this Hearing Officer and occur with much less frequency. Most of the time, when they are required, it is at the request of one party and the other agrees, or both parties. Many times when written closings are requested, it is because the parties want more time to put together their thoughts for closing, rather than having to make an

oral closing argument at the close of evidence. It should be noted that "required" in this context in practical terms means that in the discretion of the hearing officer, if a party is going to file a written closing, an order is issued that it is due by a date certain.

It also said that it is of great assistance to a hearing officer to have the parties provide proposed written findings of fact and conclusions of law. It provides great insight into how they see their case. The Department's proposed rule is reasonable for the foregoing reasons.

Mr. Mechels argues that 7.1.30.8(M) NMAC does not allow for *pro se* representation, but 7.1.2 NMAC does. Mr. Woodward's thirteenth paragraph at page 3 of his July 29 letter addresses Mr. Mechels' concern that 7.1.30.8(M) NMAC does not allow for "Pro Se representation, as that word is used in this subsection refers to the representation of a party by a third party. Mr. Woodward notes that 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 nothing in the rule precludes them from doing so. The Hearing Officer agrees.

Mr. Mechels argues that 7.1.2.9 NMAC provides for judicial review after the decision of the Secretary, but the proposed 7.1.30.8(Y) NMAC does not. In the fourteenth paragraph of his July 29 letter, Mr. Woodward responds to Mr. Mechels' complaints about the description in 7.1.30.8(Y) NMAC of the DOH Cabinet Secretary's decision being a "final decision." *See* DOH Exhibit No. 10 pages 3-4. He notes that, 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.

In the fifteenth paragraph of his letter, Mr. Woodward addresses Mr. Mechels' argument that the rule should provide for judicial review, as stated in 7.1.2.39 NMAC. *See* DOH Exhibit No. 10 pages 4. Mr. Woodward argues that judicial review of decisions concerning licensed facilities governed by 7.1.2 NMAC is identified in statute, which is why the right to judicial appeal of those decisions is referenced in the rule. By contrast, he argues, no statutory right to judicial review exists in the Public Health Emergency Response Act, and consequently no right to appeal is specified in the proposed 7.1.30 NMAC. However, Mr. Woodward acknowledges that this does not mean that a party cannot appeal the final administrative decision that is made after a hearing governed by 7.1.30 NMAC; appeals from administrative adjudicative decisions would be governed by the New Mexico Rules of Civil Procedure for the District Courts.

Mr. Mechels responds in his August 4 written comment to Mr. Woodward's paragraphs 14 and 15 together. He argues that 7.1.2 NMAC provides for judicial review and judicial review is "even MORE important for 7.1.30 where the assumption MUST BE a hostile environment. For 'justice' to be even possible, oversight must be available to offset the hostility." He argues again that PHERA requires that rules be "reasonable and necessary" to implement the statute and argues that "reasonable and necessary" is defined by 7.1.2 NMAC. He argues that 7.1.30 NMAC is "being established for a much more HOSTILE environment, as well exhibited in Woodward's letter," so "such safeguards are even more necessary.

The Department has provided a reasonable basis for why the proposed rule does not address judicial review of a final decision by the Secretary. Further, it is clear that no party who disputes a final decision is precluded from pursing an appeal in the District Courts of New Mexico.

Mr. Mechels complains in his August 4 comment that the Notice of Hearing for this rulemaking hearing fails to mention the Sunshine Portal. Mr. Woodward argues that Mr. Mechels provides no legal authority for his assertion that Notices of Hearing must refer to the Sunshine Portal, and he is aware of no such requirement. Mr. Woodward's July 29 letter at page 4, paragraph 17. *See* DOH Exhibit No. 10. The Department argues that there is no legal requirement that they do so, and Mr. Mechels has cited no legal authority that would require it. Nevertheless, Mr. Woodward notes that the notice of hearing referenced the Department's website, where all the same materials as were posted on the Sunshine Portal were also posted.

Mr. Mechels' Additional Challenges to the Department's July 29, 2020 Letter

Mr. Mechels argues that Mr. Woodward is engaging in "unsupported argumentation" in his July 29 letter. He argues that Mr. Woodward should have made these arguments at hearing, and "the comment window closed on the 23rd." He also argues that the letter is an *ex parte* communication and not allowed by 1.24.25 NMAC. He also claims Mr. Woodward's comments show ignorance of the rulemaking process "which does not have the Hearing Officer making recommendations, only as a neutral gatherer of input, and preparation of the record." He argues that approaching the Hearing Officer with arguments is "inappropriate" and seems to be an attempt to undermine the Rules Act.

The Hearing Officer received Mr. Woodward's July 29 letter on that date and directed Mr. Woodward to post it on the DOH website that date, which he did. The Hearing Officer also, in the interests of fairness, on July 29, through an email message, let the participants to the hearing know that they could file written responses to the July 29, and were given until close of business on August 4, 2020 to submit their responses. Other participants to the public hearing also submitted responses to the July 29 letter. *See* DOH Exhibit No. 9. The July 29 letter was not an *ex parte* communication as it was posted on the DOH website and made available to all participants to the hearing, with the opportunity to provide additional post-hearing comments on the letter. Mr. Mechels actively participated in that process.

Mr. Mechels also argues that the "whole exchange" is illegal under the Rules Act and 1.24.25 NMAC. He argues that pursuant to 1.24.25 NMAC, the hearing officer does not make recommendations and "simply gathers the materials and builds the hearing record." He argues that the Hearing Officer did not mention 1.24.25 NMAC in his opening remarks and argues that because of that fact 1.24.25 NMAC was not followed. He further argues that after the hearing the Attorney General's office contact DOH counsel and informed them that 1.24.25 is required. He also argues that the Hearing Officer was not properly advised by DOH counsel concerning the law, which had changed in 2018.

There is nothing that precludes the Hearing Officer from making a recommendation to the Secretary. Indeed, it is standard practice in the vast majority of administrative hearings and is addressed in many rulemaking frameworks. The fact that the AG's Default Procedural Rule does

not address this topic does not preclude the Department from having a hearing officer make a recommendation to the Secretary regarding whether to adopt a proposed rule or not.

Mr. Mechels further argues that by way of contract, at the rulemaking hearing on 7.9.2 NMAC on May 6, 2020, this same Hearing Officer allowed the hearing to sit "with an open mike" for 45 minutes. He argues that it appears that the Department is open for testimony if not one wishes to testify but will "cut you off if you actually have substantive input that they oppose. Sad."

Mr. Mechels' comments regarding the rules hearing on May 6, 2020 have no bearing. The hearing was conducted via live video. It was the first rulemaking hearing to be conducted via live video. When that hearing bean, there were no members of the public who signed on to participate in the hearing. The Department decided that the hearing should be left open for an hour to see if anyone called in to participate. No one called in.

Mr. Woodward also responded in his July 29 letter to Mr. Harrison's comments on 7.1.30.8(B) NMAC in which he recommended that the rule provide that either party may request leave to attend a hearing remotely and present that party's witnesses remotely. *See* DOH Exhibit No. 10 at page 5. Mr. Woodward stated that the Department agrees in principle with that comment. However, he noted, the hearings at issue will likely be conducted during a declared public health emergency and it is impossible to anticipate that standards that may apply to gatherings during a public health emergency. Mr. Woodward also argued that the Department believes that 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 a given public health order.

The Department also notes that all civil cases before the NM District Courts are currently being conduct remotely by order the NM Supreme Court. Mr. Woodward argues that 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. Woodward also responded to Mr. Harrison's request that the proposed rule include text that provides that hearing officers have the ability to lower the amount of the proposed fine. The Department asserts that is unnecessary. 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. This Hearing Officer has conducted adjudicatory hearings for 17 years and he never seen any restriction in any set of rules that precluded the hearing officer from recommending a lesser penalty than the Department has recommended. Thus, it does not appear to be necessary to address that issue in the rule.

Mr. Woodward also responded in his July 29 letter to the written comment of Jeanne Tatum. Ms. Tatum argued against the extension of the 5-day deadline for the Department to issue notices of hearing after receiving a request for hearing to 20 days. Mr. Woodward reiterated the position of the Department as to the justification for that change. *See* DOH Exhibit No. 10 page 6.

Ms. Tatum also opposed the proposed revision of 7.1.30.8(B)(4) NMAC to allow either party to request a hearing that will be conducted remotely. Mr. Woodward reiterated the position of the Department described above as to that issue as well. *Id.*

Ms. Tatum opposed requiring parties to submit written findings of fact and conclusions of law. Mr. Woodward again reiterated the Department's position on that proposed rule.

Finally, Ms. Tatum argued that the rule procedure for 7.1.30 NMAC was being "rushed through without enough public notification." Mr. Woodward asserted that the Department had fully complied with the State Rules Act, and 1.24.25 NMAC, and the Department had provided sufficient public notice to enable the receipt of public comment consistent with the foregoing laws.

The issues raised by Ms. Tatum echo the comments of Mr. Mechels and have been addressed above.

Mr. Woodward also addressed the comments of Dana Dunlap in his July 29, 2020 letter. *Id.* He responded to Ms. Dunlap's argument that this rulemaking process was a blatant overreach by the Governor and a improper "legislative" action. Mr. Woodward responded by citing the statutory authority giving the Department the express authority to adopt rules in NMSA 1978, § 9-7-6(E). He further argued that courts have repeatedly acknowledged that this type of delegation is lawful.

Similarly, the issues raised by Dana Dunlap echo the comments of Mr. Mechels and have been addressed above.

Mr. Woodward noted that Ms. Dunlap's comments regarding whether the Department can or should impose monetary penalties are not the subject of this hearing, and not relevant to this rulemaking process for procedural rules.

Finally, Mr. Woodward responded to Ms. Dunlap's claims that the rulemaking hearing was "Secret." He pointed to the Department's actions which provided sufficient opportunity for public input and complied with the notice requirements of applicable laws. He stated the "rulemaking hearing in this matter was not a secret." The Hearing Officer agrees that this was not a "secret" proceeding.

The last comments addressed in Mr. Woodward's July 29, 2020 letter are the two written comments made by Zach Cook, Esq. on behalf two different businesses in New Mexico. Both of his clients have pending appeals related to penalties under PHERA. Mr. Cook's comments address the issue of whether the Department has the authority to impose monetary penalties. Mr. Woodward states that that issue was pending at the time in the New Mexico Supreme Court, and not the subject of this rulemaking hearing.

Dana Dunlap submitted additional written comment on August 4, 2020. She responded to Mr. Woodward's July 29 letter. In her response, she asked "if rulemaking is indeed an exercise of legislative power," as Mr. Woodward stated at page 6 of his letter, then why not let the legislature do its job? She argued the timing of this process is "highly suspect."

She also asked, if the rule at issue is purely procedural, then why bother doing it? She accused the Department of wasting taxpayer dollars if this is "merely a procedural hearing" and the legislature can do the work. She said the whole process "smells of corruption, misrepresentation and is NOT NECESSARY."

She argued that Mr. Woodward's assertion that this is not a secret process and there has been "significant opportunity for public input" is meaningless. She argued that the word "significant" has no tangible value and "reeks of DECEPTION." She argued that Mr. Woodward's letter "did not outline specific requirements for public notification, such as 20 day comment period, and associated item-by-item compliance." [sic]

She closed by arguing that to deny the link between this procedural rule hearing and the DOH is "hogwash." She accused the Department of "political gamesmanship" and "autocracy."

Amy Dunlap also responded to Mr. Woodward's July 29 letter. She stated that she had a hard time finding the public notice for this hearing. She asserts that she found the emergency rule not on the website indicated by Mr. Woodward, but on another one. She states she found nothing on the DOH website under "Newsroom," "Events" or "Public Meetings." She said she could not find anything until Chris Mechels sent her a link to the Sunshine Portal on July 19, 2020. She was able to find the hearing information at that time. She said asserts that the manner of notice violates the notice requirement. She questions the use of the Albuquerque Journal and the NM Commission of Public Records. She asserted that she could not find the notice in the Albuquerque Journal online.

Amy Dunlap also complains that the proposed 7.1.30 NMAC has no avenue for further appeal after the Secretary issues a final decision. She argues that there should always be an avenue for appeal to "a higher body that may be more impartial than the Secretary of Health over a public health ruling."

Ms. Dunlap does not see the need to make any of these changes at this time, and "certainly not without significant public input in the process."

The issues raised by Amy Dunlap have also been addressed above.

The Hearing Officer's recommendation regarding the issues presented in this rulemaking process are informed by basic principles articulated in New Mexico case law. Guidance in determining whether a rule adopted by an administrative agency will be upheld can be found in *New Mexico Mining Ass'n v. New Mexico Mining Com'n*, 1996-NMCA-098, 122 N.M. 332, which states as follows:

> Rules adopted by an administrative agency will be upheld if they are in *harmony* with the agency's express statutory authority or *spring from those powers that may be fairly implied therefrom.* [*Citations omitted.*] Similarly, regulations adopted by an agency are presumed to be valid if they are shown to be *reasonably consistent* with the statutory purposes of the agency. [*Citation omitted.*] [Emphasis added.]

See also Rio Grande Chapter of Sierra Club v. New Mexico Mining Com'n, 2003-NMSC-005, 133 N.M. 97 at ¶ 25.

In addition:

> "The court will confer a heightened degree of difference to legal questions that 'implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function.'"

Id., quoting *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 120 N.M. 579 (1995).

The purposes of the Public Health Emergency Response Act are expressed in NMSA 1978, § 12-10A-2, which states as follows:

> The purposes of the Public Health Emergency Response Act are to:
>
> A. provide the State of New Mexico with the ability to manage public health emergencies in a manner that protects civil rights and the liberties of individual persons;
>
> B. prepare for a public health emergency; and
>
> C. provide access to appropriate care, if needed, for an indefinite number of infected, exposed or endangered people in the event of a public health emergency.

History: Laws 2003, ch. 218, § 2.

The proposed rules are consistent with the foregoing purposes. They are clearly designed to provide New Mexico with the ability to manage public health emergencies by providing procedures for managing public health emergencies. They do not infringe on the civil rights and liberties of individual persons; rather, they provide a reasonable and necessary approach to conducting the hearing process when individuals or individual entities are the subject of penalties imposed under PHERA when they have requested an appeal of the Department's decision to penalize them.

The New Mexico Legislature has given the New Mexico Department of Health the authority to enforce the provisions of PHERA and impose civil penalties for violations of PHERA in NMSA 1978, § 12-10A-19. PHERA states that "[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."

NMSA 1978, § 12-10A-17, the statute which give the DOH the authority to promulgate rules, states as follows:

> 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.

Thus, it is clear that the Legislature has give the Department of Health the authority to promulgate rules to enforce the provisions of PHERA, and PHERA specifically provides for the promulgation of rules related to hearings for the enforcement of the provisions of PHERA. In promulgating such rules, the Department is required to ensure that the rules are "reasonable and necessary" as stated in Subsection 17 of PHERA. The rules also must be "in *harmony* with the agency's express statutory authority or *spring from those powers that may be fairly implied therefrom.*" [*Citation omitted.*] Similarly, regulations adopted by an agency are presumed to be valid if they are shown to be *reasonably consistent* with the statutory purposes of the agency. [*Citation omitted.*]" [Emphasis added.] *See New Mexico Mining Ass'n v. New Mexico Mining Com'n, supra.*

The proposed rules are procedural rules designed to provide rules for conducting hearings on the enforcement of civil monetary penalties that have been imposed under PHERA. PHERA *requires* that the Department promulgate rules for this purpose.

The challenges to specific provisions of the proposed rule have been outlined above. The Hearing Officer has considered those challenges, and the Department's response to the challenges, and recommends that the Secretary find that the Department has shown that the proposed rules are reasonable and necessary, that they are in harmony with the agency's express statutory authority , or spring from those powers that may be fairly implied therefrom. The Hearing Officer also recommends that the Secretary find that the proposed rules have been shown to be reasonably consistent with the statutory purposes of the agency.

The Hearing Officer also recommends that the Secretary find that this rule promulgation process meet the requirements of the State Rules Act and the AG's Default Procedural Rule for Rulemaking.

The Hearing Officer recommends that the phrase in 7.1.30.8(B)(1) NMAC which refers to the appointment of a "hearing officer" be altered to refer to an "impartial hearing officer," as recommended by Mr. Mechels.

Craig T. Erickson

Craig T. Erickson

8/20/20

Date