

**From:** [Chris Mechels](#)  
**To:** [Apodaca, Sheila, DOH](#)  
**Cc:** [stcyr. peter](#)  
**Subject:** [EXT] Mechels comment #2 on NMAC 7-1-30 Rules Hearing  
**Date:** Thursday, July 16, 2020 4:36:07 PM  
**Attachments:** [7.1.30-Admin-Hearings-for-Civil-Monetary-Penalties-Issued-Pursuant-to-PHERA-REV.pdf](#)  
[7.1.2 NMAC.pdf](#)

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Dear Ms. Apodaca,

This is the second of a number of comments on this hearing. I have attached two files for convenience in directing comments to text.

These comments concern the substance of the hearing procedure proposed in the rulemaking. There are very serious problems there.

My comments are based on a comparison between NMAC 7.1.2, the hearing procedure commonly used ADJUDICATORY HEARINGS at the Department of Health (DOH), and the NMAC 7.1.30 hearing procedure proposed for PHERA penalties. This seems a fair comparison, as it is obvious that the existing 7.1.2 procedure could have been, with slight modifications, used for the PHERA hearings. In fact, an examination shows that a majority of the new procedure was directly based on 7.1.2.

A cursory comparison of the two NMACs shows that most of the rights accorded the appellant in 7.1.2 have been stripped from 7.1.30. This would seem to demand an explanation, other than malice.

1) at 7.1.30.8.A An appellant may request the hearing by mailing a certified letter, return receipt requested, to the New Mexico department of health at the mailing address that is specified on the notice of contemplated action within five days after service of the notice of the contemplated action, is more restrictive than 7.1.2.13.B which reads; B. Delivery: 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 department's notice, and it shall be hand delivered or mailed, return receipt requested

2) 7.1.2.15..E makes provision for a "Stay" upon Request for Hearing. 7.1.30 has no such provision, which can work a very real hardship on the appellant at \$5,000 per day.

3) 7.1.30.8.B 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 allows the hearing to be scheduled "not more than 60 days and not less than 12 days" after request. Coupled with a failure to allow for a "Stay", this is very oppressive.

5) 7.1.30.8.B has a proposed change, from 5 to 20 days, for notice of hearing details. Again, very oppressive, as 7.1.2 has 4 days.

6) Hearing Venue: A proposed change, at 7.1.30.8.B would allow the DOH, and the DOH appointed Hearing Officer, to hold the hearing via telephone or live video. The proposed change eliminates the right of appellant in this decision. Very oppressive.

7) at 7.1.30.8.F a proposed change would: "require the parties to submit proposed findings of fact and conclusions of law, as well as written closing arguments;". This is not required in 7.1.2 and it imposes a very real burden on those who represent themselves, or are represented by a lay person. No reason given for this change, which is quite oppressive.

8) 7.1.30.8.M does not allow for Pro Se representation; [7.1.2.20](#) does. No reason given.

9) [7.1.2.39](#) provides for Judicial Review; 7.1.30.8.Y has the DOH Secretary's decision as final.

In summary, the DOH proposes an extremely oppressive hearing procedure, where they appoint the Hearing Officer, they can choose to have a video hearing, they allow for no Stay, and they allow very long deadlines which, coupled with the lack of a Stay, could make the appellant's position impossible. It also makes the DOH decision final.

This seems extremely punitive, esp as it was imposed as an Emergency Rule, without public input. I suggest that it should be abandoned, as an example of how NOT to govern.

The clear alternative is simply to adapt the existing, well used, 7.1.2 hearing procedure, which allows for reasonable appellant rights. Stripping those rights from 7.1.30 suggests a malevolent intent on the part of the DOH, and calls into question their position in New Mexico government. It seems palpably evil, an attack on our Democracy.

Installing the proposed 7.1.30 as a Rule would demand an appeal to the Courts, and reflect very poorly on the DOH and our Governor.

Regards,

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