From:	Chris Mechels
To:	Woodward, Chris, DOH; Kunkel, Kathy, DOH; Apodaca, Sheila, DOH
Cc:	craig; Chris Goad; aimfull; jbetatum; zach; carter
Subject:	[EXT] A Response to Mr. Woodward"s letter of July 29, 2020
Date:	Tuesday, August 4, 2020 12:58:22 PM

Dear Mr. Erickson,

Forward: This addition is added after I had an opportunity today to examine the hearing video. It explains why Woodward sent the letter to you, which seemed odd. From your comments on the video your role included "making a recommendation to the Secretary" concerning the proposed rule. This was a surprise, as 1.24.25 does not allow that role. It defines a more impartial role, which involves create a hearing record. It also requires that the Secretary "shall familiarize themselves" with that hearing record before rendering a decision.

From the video record, it seems that the procedure used for this hearing, over my objections, was simply ad hoc, as it was not provided on my request. It has Woodward bringing forth the proposal, to this undocumented hearing procedure, which supported your making a "recommendation" to the Secretary. for her approval. Woodward's letter was to "assist" you, with his very adversarial analysis, in preparing the recommendation. As you were chosen as Hearing Officer, by the Secretary, we must assume that you could be relied upon to produce a "satisfactory" recommendation. Why else choose you?

This whole scheme is obviously corrupt, and undermines the whole purpose of having a Rules Hearing. Sadly, it is also common across the State Agencies, including the Law Enforcement Academy Board, which on my first encounter, also used an ad hoc procedure. A lawsuit changed that.

How could there be a better argument for the 2017 HB58 Rules Act Reforms, which includes 1.24.25?

Now that it is established, beyond argument and acknowledged by DOH Counsel, Mr. Woodward, that the 1.24.25 MUST be the Hearing Procedure, and that you failed to do this, in spite of being cautioned, on the record, of that fact, is there any reason NOT to cancel this hearing, and reschedule it? Persisting in violation of 1.24.25 would seem to expose Woodward and the Secretary to charges of Malfeasance, and to what end? I trust you will make the right decision.

End of Forward.

I am pleased to have an opportunity to respond to Mr. Woodward. As would be expected in our adversarial legal system, he represents only part of the argument, and leaves out inconvenient facts, leaving it up to me to complete the picture.

For clarity, I will proceed to address his letter from the top, which should make the arguments easier to follow.

His first paragraph refers to my Comment #1. In response to my comment, he does dispute my claim, because it is true. Examine it. He simply tries to distract us. An examination of all the listed Department of Health (DOH) rules information on the Portal shows other instances of Emergency Rule Making, followed by a Rules Hearing, and none of those, including the 5/5/2020 hearing on 7.9.2, with you as Hearing Officer, made the error of calling a Rules Hearing for an "Emergency Rule". It seems a clerical error, but a significant one, as it could easily mislead. DOH shows bad faith in not simply correcting the error when it was identified, on 13 July, as this extended the effect of the error. Woodward also shows bad faith in attempting distraction.

His second paragraph also refers to my Comment #1. He falsely states my concern, at 2.b. My claim was that the hearing announcement posted was incorrect, and I even provided material copied directly from the document. A simple examination supports this. He didn't understand my comment, so his reply to it is useless.

His third paragraph, also concerning Comment #1, is wrong on its face. I made no claim that the Rule was not posted on the DOH website, as it clearly was. My concern was with the posting on the SunshinePortal. My concern with Portal posting of Emergency Rules is well taken, as the Comment details at some length.

His fourth paragraph, related to Comment #1, is also factually incorrect. His "information and belief" is simply wrong. From 9 July to 13 July, the Portal had NO Rules information shown on their webpage. My 9 July email to Sheila Apodaca produced NO results on that score. I was finally able to reach Lorenzo Ornelas (505-670-2839) and advised him that the Rules Act, and other laws, required posting data on the SunshinePortal, and they could not just "leave it off", as they had done. The current situation, with links at the bottom of the Portal webpage, resulted. Note this has little in common with Woodward's description, which it seems he just "made up". Please note that the Rules Act requires "posting it on the sunshine portal", not "near" the Portal. The Portal webpage (https://ssp.nm.gov/) clearly lists Rule Making as "Outside the Portal", and "Launching the Portal" results in no sign of Rule Making. Clearly this Rules Hearing does not comply with the Rules Act requirement, and is thus illegal. Woodward's dismissal of any DOH responsibility to resolve that problem seems quite irresponsible.

Woodward's fifth paragraph addresses my Comment #2, and it consists of unsupported argumentation. These arguments could have been useful, and interesting, if brought up at the Rules Hearing, which is intended to air the various positions and examine them. Woodward chose NOT to make these arguments at the hearing, and the comment window closed on the 23rd. This letter is thus an ex parte communication, which is not allowed for in 1.24.25, and is thus illegal. Ignore it. It also shows ignorance of the Rule Making process, which does not have the Hearing Officer making recommendations, only as a neutral gatherer of input, and preparation of the record. Approaching him with arguments is inappropriate, and seems to be an attempt to undermine the Rules Act. But perhaps the earlier "ad hoc" DOH hearings allowed such interference?

His sixth paragraph concerns 'hand delivery" of notice. He claims this a problem with Covid. Why is it NOT a problem with 7.1.2, which is used more often?

His paragraphs 7,8,9, and 10 share a common concern, which he does not identify. The concern is related to having a fair hearing, with a hostile Hearing Officer, such as Mr. Woodward. My use of the word "oppressive", which he makes light of, relates, as clearly identified in my comments, to lack of a provision to "stay" the penalty. With a stay provision, the lengthy times are not oppressive. Woodward offers that inserting "impartial" would not be a problem. Perhaps because it would have no effect? Needed, at minimum, such language as 7.1.2 has; though even that is rather weak. The problem is dealing with a HOSTILE hearing officer, and getting a fair hearing. The Secr of Health imposes the $5,000 fine, for ignoring her mandates. She is not likely to be fair minded enough to appoint a neutral Hearing Officer. The evidence is before us, an extremely unbalanced 7.1.30. All fairness has been stripped out. Brought in an Emergency Hearing with no public input. We must assume Hostility.

His 11th paragraph deals with video hearings. No problem with consent "of the parties". The consent of "either party", with Hearing Officer approval, simply allows the DOH to do as they please, as they "own" the hearing officer.

His 12th paragraph relates to the proposed amendment for "findings of fact". His "reasons" conceal his hostile intent. We must assume a hostile Hearing Officer, such as Mr. Woodward, who can create a very real burden for the appellant, further blocking access to a fair hearing. I represented six terminated LANL employees in 1995 grievance hearings, and I assure you it is very intimidating, even for Phds, to go up against attorneys, in a strange venue. Woodward downplays this, of course, because his whole intent is to make the appellant's lot worse. Note that 7.1.2 has no such provision.

At the 13th paragraph, if Pro Se is not a problem, put it in the Rule; to avoid having a hostile hearing officer MAKE it a problem. 7.1.2 allows Pro Se.

His 14th and 15th paragraph deal with the "final decision" and judicial review. 7.1.2 allows, by Statute, for Judicial Review. It 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. As Woodward states, appeal of the final decision to the courts is possible, but very difficult and expensive. That is WHY the statutes established Judicial Review at 7.1.2.39. The New Mexico Legislature, not the Dept of Health, saw fit to impose these rights on the DOH hearing process, 7.1.2. For PHERA we have, at NMSA 12-10A-17, a Legislative requirement that rules be "reasonable and necessary", to implement NMSA 12-10A-19. Having found it necessary to impose standards on DOH, leading to 7.1.2, I suggest that "reasonable and necessary" is defined by this rule, well tested in long use. With 7.1.30 being established for a much more HOSTILE environment, as well exhibited in Woodward's letter. such safeguards are even more necessary.

Much of the above, concerning the "content" of the proposed rule, is inappropriate for

this venue, and arguably illegal. But, after Woodward's "out of channels" letter to the Hearing Officer, there's no way to ignore its content, thus my response. But, remember, this whole exchange is illegal under the Rules Act, and 1.24.25, and that suggests a new hearing.

The Hearing Officer, per 1.24.25, does not make recommendations, simply gathers the materials and builds the hearing record.

What may be of more concern to the Hearing Officer, and open to his action, are the legal issues, which are many;

The Hearing was NOT held in compliance with the Default Hearing Procedure 1.24.15, though Woodward agrees that DOH must comply "this is a matter of law and not in dispute", that simple fact, which he does not acknowledge, is that 1.24.25 WAS NOT followed, even though I raised this issue with the Hearing Officer, as the record will show. He very carefully states that the Hearing Officer identified the laws governing the hearing, but 1.24.25 WAS NOT one of those laws, as he refused my advice. Woodward clearly withholds that key information. In fact AFTER the hearing the Attorney General's office contacted DOH counsel and informed them that 1.24.25 is required. The Hearing Officer, it seems, was not properly advised by DOH concerning the law, which had changed in 2018.

The fact that 1.24.25 was NOT followed compromised the hearing greatly, as it, in my direct experience, allows a much more productive exchange, with the parties able to question testimony, and get answers, on the record. Woodward claims this is "duplicative", but that is false. The written comments simply "set up" the hearing process. Going though the proposal, in detail, allows for a dialogue to fully develop the issue. That is WHY HB58 was passed by the Legislature, to allow fully informed Rules Hearings. By simply taking comments, without exchange, the whole purpose of HB58 and 1.24.25 is blocked, as Woodward seems to prefer.

Woodward claims that I was offered "substantial" time to speak, and that was extended. He fails to mention that "substantial" was 3 minutes, with a 5 minute extension when I complained. What I requested, and was denied, was enough time to approach the proposal "De Novo", as is commonly done, comparing it against 7.1.2, a well established standard in use at DOH, to establish whether 7.1.30 was indeed "reasonable", as required by statute. This should have been allowed, under 1.24.25, but we didn't use 1.24.25, so the Hearing Officer cut me off. By way of contrast, the same Hearing Officer, at the 7.9.2 Rules Hearing on 5/6/2020, sat with an open mike, awaiting input, for some 45 minutes. I could have made good use of those 45 minutes. It appears that they are "open for testimony" if no one wishes to testify, but will "cut you off" if you actually have substantive input that they oppose. Sad.

This whole, rather sad, affair is far too typical of our State Government. As clearly seen in Woodward's letter, he adopts an "adversarial" stance, which involves picking some points to attack, and concealing others which do not support his argument. Not uncommon for attorneys. However, Woodward, as a government attorney, has a duty

to act "in the public interest", and a duty to the law. It is unclear that his letter meets that "duty". The other looming issue is that many other State Agencies, also fail to follow the Rules Act, which violates their duty to the law and the public interest.

I suggest that the current Rules Hearing, with its far too numerous legal issues, can best be terminated. That would allow time to proceed with a legal hearing, and an improved proposal, within the 180 days allowed for the Emergency Rule.

I hope this is taken as a chance to clean up the Rule Making at the Dept of Health, esp involving their use, and overuse, of Emergency Rulemaking.

Regards,

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