STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE

CPNM, INC.

Petitioner

v. No. D-101-CV-2015-00659

N.M. DEPARTMENT OF HEALTH and
RETTA WARD, in her Official Capacity as
Secretary of the N.M. Department of Health,

Respondents.

PETITIONER'S STATEMENT OF REVIEW ISSUES

Jason Marks, Esq.
JASON MARKS LAW, LLC
Attorney for Petitioner
1011 Third Street NW
Albuquerque, NM 87121
(505) 385-4435
lawoffice@jasonmarks.com

Contents

Table of Authorities

Cases

Statutes

PETITIONER'S STATEMENT OF REVIEW ISSUES

COMES NOW Petitioner CPNM, Inc., by and through its attorney, Jason Marks Law, LLC, Jason Marks, Esq., with its Statement of Review Issues pursuant to Rule 1-075(K) NMRA.

I Statement of the Issues

This matter is an appeal of certain Medical Cannabis Program (MCP) administrative rules in 7.34.3 NMAC and 7.34.4 NMAC adopted February 16, 2015 by Secretary Ward of the Department of Health (hereinafter "the Department"). In 2007, the Legislature determined that cannabis is beneficial for patients with certain debilitating medical conditions and should be made available to them within a regulated system. Lynn and Erin Compassionate Use Act, NMSA § 26-2B-1, *et seq.*, at § 26-2B-2. The Legislature provided express direction for patient registration, based upon the diagnosis and certification of the patient's own physician that a patient had a qualifying condition and would likely benefit from the use of medical cannabis. The Department of Health was given very limited authority to craft implementing regulations directly affecting patients, and somewhat broader authority to regulate producers of medical cannabis. The program has evolved since enactment and currently approximately 13,000 New Mexicans benefit from the opportunity to obtain effective relief from their conditions in a legal system.

The Department's Medical Cannabis Program (MCP) regulations were last revised in December 2012. Stakeholders welcomed the idea of reviewing and revising the regulations again in 2015, but soon became frustrated with Department's approach, which lacked transparency and opportunities for dialogue. The manner in which the

rulemaking concluded is emblematic of that approach: In adopting over 50 enumerated rules for MCP patients and producers, running more than 40 pages when printed in 10-point type, the Department's sole formal justification is "The proposed rules are appropriate and consistent with the authorizing law, and are hereby adopted." "Statement of Reasons for the Adoption of Propose Repeal and Replacement," Petition, Exhibit 1 at ¶ 8.

Clearly, the Department falls woefully short of the legal requirement "that the record disclose the Board's reasoning and the basis on which it adopted the regulation." *Rivas v. Bd. of Cosmetologists*, 1984-NMSC-076, ¶8, 101 N.M. 592, 594. Unfortunately, the Secretary's "Statement" is emblematic of the Department's approach to this lengthy and complex rulemaking, in which the Department met its technical obligations to accept public comment, while declining almost every opportunity to apprise the public of its rationales for its desired rules, and failing to demonstrate that it considered much of the critical comment received. *See City of Roswell v. N.M. Water Quality Control Comm'n*, 1972-NMCA-160, ¶16, 84 N.M. 561, 565 (the record must indicate "what facts and circumstances were considered and the weight given to those facts and circumstances").

Petitioner appeals only a handful of the final MCP rules, constituting only a minority of the unresolved issues it contested in the administrative proceeding. Challenged rules illegally burden patient registration, arbitrarily limit patient access to medicine, and increase costs without justification. Although the entirety of the Petition can be granted based on the Department's failure to meet the first order requirement of producing a statement of its reasons for adopting the rules per *Rivas*, *City of Roswell*,

etc., the Court should also reach the merits of the other issues stated herein, which are otherwise subject to repetition.

The issues on review are as follows:

1. Whether the challenged rules must be rejected because the Department did not make a statement of its reasoning and the facts it considered.

2. Whether portions of rules 7.34.3.8(B) NMAC, requiring patient certification by specialist physicians in some cases; .8(C), stating a Department criterion for medical necessity; .7(CC), permitting the medical director to override a patient's own physician; and .10(D), stating certain physician certification requirements and requiring a release of medical information are contrary to express provisions of the Act, and are supported by substantial evidence.

3. Whether rules 7.34.3.11(D), .14 & .16 NMAC, stating various grounds for denial and cancellation of patient registrations based on patient conduct are contrary to express provisions of the Act and are supported by substantial evidence.

4. Whether rules 7.34.4.7(OO), .4.8(A)(2), and other rules in 7.34.4 NMAC limiting commercial producers of medical cannabis to non-profit corporations are contrary to the Act at NMSA § 26-2B-3(D), and are supported by substantial evidence.

5. Whether rules 7.34.3.9(C) and .4.8(L) NMAC, stating a maximum THC content for Concentrates, are supported by substantial evidence.

6. Whether rules 7.34.4.8(K) & .3.9(A) NMAC, stating maximum quantities that may be purchased and possessed in a 90 day period, are contrary to the Act and are supported by substantial evidence, and are arbitrary and capricious.

7. Whether notice was given of the Department's intent to promulgate rule 7.34.4.9(C)(4) NMAC, requiring routine testing of medical cannabis for heavy metals.

8. Whether rules 7.34.4.9(C)(2) & (4) NMAC, requiring routine testing of medical cannabis for mycotoxins and heavy metals, are supported by substantial evidence.

9. Whether rules 7.34.4.9(C)(6) NMAC, permitting the Department to require unspecified additional testing, and 7.34.4.23(B) NMAC, stating that producers shall submit quarterly reports on a format to be specified later, are contrary to NMSA § 9-7-6(E) requiring notice and hearing before adoption of rules affecting the public, and are unconstitutionally vague.

10. Whether the Department failed to comply with the Small Business Regulatory Relief Act, NMSA § 14-4A-1, *et seq.*,

II Summary of the Proceedings

Nature of the Case: The Department of Health is statutorily charged with issuing regulations to implement the Lynn and Erin Compassionate Use Act (the "Act"), which provides for regulation of possession, production, and distribution of medical cannabis in New Mexico. This appeal challenges selected MCP program rules adopted February 16, 2015. Petitioner contends that the challenged rules are contrary to the express language of the Act and/or are not supported by substantial evidence and are arbitrary and capricious. Petitioner also contends that the Department failed to meet its fundamental burden of supporting its final adoption of new MCP program rules with a meaningful statement of the Department's reasons for adopting the rules and the facts and

circumstances it considered. Petitioner did not seek to stay the implementation of any of the rules.

Course of Proceedings: The course of proceedings is set forth in the Petition, at paragraphs 4 through 9. In addition, prior to the notice of proposed rulemaking and public hearing published on November 29, 2014 that led to the rules adopted February 16, 2015, the Department attempted to repeal and replace the same set of MCP rules with notice published in May 2014 and a public hearing held June 16, 2014. Hundreds of patients and others attended that hearing, almost entirely in opposition to the Department proposals and critical of its procedural approach, in particular, the Department's failure to consult with its MCP Medical Advisory Board prior to proposing rule changes, as required by statute. The Department subsequently set a hearing before the Medical Advisory Board for August 25, 2014 and re-started the rulemaking. The Court may wish to determine whether materials received prior to November 29, 2014 are properly part of the record for review.

Disposition: As previously noted, Secretary Ward adopted the Department's proposed rules in a statement dated February 16, 2015, and the rules were published in the New Mexico Register.

Factual Summary: As stated in the Petition, at paragraph 11, Petitioner appeared at the December 29, 2014 hearing and submitted written comment into record. Petitioner's written comment appears at RP 1605 – 71. All of the issues raised herein contending that a decision is not supported by substantial evidence were preserved in Petitioner's written comments, as follows:

Petitioner provided factual argument in opposition to rules limiting physician certifications (issue 2) based upon the Department's derogation of the traditional doctor-patient relationship and the likely negative impact of the rules on physician's willingness to certify patients. RP 1624-28.

Petitioner provided factual argument in opposition to rules permitting cancellation of patient registrations based on patient conduct (issue 3), demonstrating that it was improper to punish patients through denial of medication. RP 1626-27.

Petitioner provided factual argument in opposition to rules restricting producers to nonprofit entities, noting that neither the IRS nor the NMTRD treats producers as nonprofits. RP 1634.

Petitioner provided factual argument in opposition to any rule stating a maximum THC content for concentrates (issue 5), based on patient needs and industry best-practices. RP 1622-23.

Petitioner provided factual argument in opposition to imposing any maximum 90 purchase limitation, or in the alternative, a higher limit than 230 units (issue 6), based upon published research, the Department's own survey of patient consumption, the recommendations of the Medical Advisory Board, and other matters. RP 1615-22.

Petitioner provided factual argument in opposition to rules requiring routine testing of medical cannabis for mycotoxins and heavy metals (issue 8) based upon the absence of risk under most circumstances and unnecessary cost. RP 1638-39.

Petitioner is the trade association for licensed non-profit producers of medical cannabis in New Mexico, and is affected by each of the contested rules.

III Argument

Standard of Review

The Court shall "set aside a regulation only if it is found to be (1) arbitrary, capricious, or an abuse of discretion; (2) contrary to law; or (3) against the clear weight of substantial evidence of the record." *Wilcox v. N.M. Bd. of Acupuncture and Oriental Medicine*, 2012 -NMCA-106, ¶ 7, 288 P.3d 902.

1. The Department failed to produce a statement of its reasons and the basis on which it adopted the regulations.

New Mexico "case law is clear that the record must disclose the Board's reasoning and the basis on which it adopted the regulations." *Wilcox v. N.M. Bd. of Acupuncture and Oriental Medicine*, 2010 WL 4684756 at *1 citing *Rivas*, 101 N.M. at 594. The reason for this is that a court "cannot effectively perform the review authorized by statute unless the record indicates what facts and circumstances were considered and the weight given to those facts and circumstances. *Id.*, citing *City of Roswell*, 84 N.M. at 565. When the record fails to explain what evidence the agency relied upon in adopting its regulations, those regulations should be reversed and set aside. *Id.; City of Roswell*, 1972-NMCA-160, ¶ 16.

Secretary Ward's February 16, 2015 Statement of Reasons, with its single conclusory sentence, is obviously insufficient. Notably, Secretary Ward did not expressly adopt the Recommendations of Hearing Examiner Susan Hapka or otherwise incorporate by reference any document that would tend to provide a statement of reasons and facts relied upon. On this basis, the Court should reverse and set aside all of the rules challenged in the Petition. But even assuming the lowest conceivable standard, which

would credit the Department with anything produced by it that found its way into the record that mentions reasons, the Department still falls short. Inspection of the Hearing Officer's Report and Recommendations, RP 1183-89, discloses that this document does not go beyond reciting which rules should be adopted and does not mention specific factual support for any recommendation.[1] The only other potentially relevant document is the letter dated February 6, 2015 from Department General Counsel Chris Woodward to the Hearing Officer. RP 1195-1200.

Without waiving its objection to this letter being considered as the Department's statement of reasons, Petitioner notes that this document does not address rules regarding physician certifications of patients (issue 2), cancellation of registration based on patients' conduct (issue 3), restriction of producers to non-profit entities (Issue 5), or testing for mycotoxins and heavy metals (issue 8). The two issues on appeal that are addressed in Mr. Woodward's letter, maximum quantities ("adequate supply") and the THC concentration limit, are addressed without any reference to record facts or testimony supporting the Department's position. For example, with respect to THC concentrations, Mr. Woodward writes "In proposing the THC limit, the Department intends to address concerns that extremely high concentrations of THC in cannabis-derived products may lead to negative outcomes." RP 1196. Whose concerns? And what are they? Most critically, there is no citation to any material in the factual record, which presumably closed on January 4, 2015, for support.[2]

In *Regents of Univ. of California v. N.M. Water Quality Control Comm'n*, 2004-NMCA-073, ¶¶ 11-13, 136 N.M. 45, 48, the Court of Appeals considered a rulemaking

[1] It is apparent that the only changes from the proposed rules that are recommended by the Hearing Officer are the changes that Department staff informed her that it agreed to make.
[2] Petitioners object to consideration of Mr. Woodward's letter as record evidence.

with an extremely brief, conclusory statement of reasons. The Court found that the statements in that case (which are more substantive than in the case at bar) were barely adequate, and only because the record otherwise *thoroughly* demonstrated agency staff positions and the Commission's deliberations:

> The record shows that the Department's staff presented to the Commission substantial explanations of the purposes of the regulations, a section-by-section analysis, including 20.6.4.10.G NMAC, and twenty-one exhibits. The Commission heard Regents' cross-examination of the Department's staff, Regents' own testimony, and the Department's cross-examination of that testimony. Furthermore, on direct examination, the Department presented to the Commission a point-by-point rebuttal of Regents' arguments. Regents also presented written testimony and exhibits. As a result of the hearing, the Department proposed additional changes to certain portions of the proposed amendments; Regents submitted comments on those changes.

Id. at ¶ 14.

The Department's approach to the MCP rulemaking could not be more different. In the two rule makings and the hearing before the Medical Advisory Board, Department staff declined to present their rationales for the proposed rules. Mr. Woodward's letter, even if it is considered, surely cannot be compared to the extensive record in *Regents*. Based on the record filed by Respondent, neither the Court nor Petitioner has any real idea of why the Department rejected Petitioner's positions (and that of numerous other rulemaking commenters). The Court should strike the rules challenged herein on grounds of lack of substantial evidence.

While the Department's failure to provide a legally-sufficient statement of its reasons is sufficient grounds for the Court to also reject rules Petitioner challenges on legal grounds, the Court should reach and address Petitioner's arguments of law. Most of these complained of rules were in effect in similar form prior to the recent rulemaking. If

the legality of these rules is not addressed by the Court, the Department will likely continue to attempt to enforce them on that basis. These specific disputes over statutory interpretation between the parties are also clearly capable of repetition. Finally, Petitioner is entitled to declaratory relief on these issues as a matter of law. *Hanosh v. N.M. Environmental Impr. Bd.*, 2008-NMCA-0156, ¶13, 145 N.M. 269 (district court must hear declaratory judgment action focusing on whether an agency's rules were within its statutory authority).

2. Challenged rules regarding patient certification procedures are contrary to law and not supported by substantial evidence.

A state agency's rulemaking authority is "limited to the power and authority expressly granted or necessarily implied by [its] statutes." *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 13, 289 P.3d 1232, 1237 (internal quotation marks and citations omitted). The Department may not modify existing statutory law or "create new law on its own." *Id.* The Department also may not "create a rule or regulation that is not in harmony with its statutory authority." *Wilcox*, 2012-NMCA-106 at ¶ 7 quoting *Rivas*, 1984-NMSC-076, 101 N.M. at 593.

The Department's final rules that require patient certification by specialist physicians for chronic pain, PTSD, inflammatory autoimmune-mediated arthritis. *See* 7.34.3.8(B) NMAC. The Act, which elsewhere states that the Department shall issue a patient registration based upon a valid "written certification," defines "written certification" as a "statement signed by a patient's practitioner" and further defines practitioner as "a person licensed in New Mexico to prescribe and administer drugs that are subject to the Controlled Substances Act." NMSA §§ 26-2B-7(E) & (H).

When the Legislature's clear intent in the plain language of the Act is that any licensed physician can certify a patient for medical cannabis registration, Department rules restricting certifications to specialist physicians in some circumstances are contrary to law and should be struck. *Wilcox, 2*012-NMCA-106 at ¶ 7. As shown in Petitioner's comments to the Department, the Legislature crafted physician cannabis certifications to be consistent with traditional parameters of medical practice permitting physicians to use their own judgment in determining the scope of conditions they will treat and medicines they will prescribe. RP 1624. The Department's more restrictive approach is not only *ultra vires*, it subjects patients to serious financial and logistical barriers to effective care. RP 1624.

Next, the Act expressly provides the standard for physician certification as "the patient has a debilitating medical condition and the practitioner believes that the potential health benefits of the medical use of cannabis would likely outweigh the health risks for the patient." NMSA § 26-2B-7(H). The Department attempts to impose a different standard: "that standard treatments have failed to bring adequate relief, unless the practitioner determines that standard treatments would be harmful to the patient's health." 7.34.3.8(C)(3) NMAC. This rule is contrary to express statutory language and must be struck. *Wilcox, supra.*

The Department asserts in rule that its medical director can second-guess the diagnosis of the patient's own physician and deny a registration. 7.34.3.7(CC) & .11(D) NMAC . This is clearly contrary to the Act's definition of "written certification," *supra*, and statutory direction to the Department that it "shall" issue a patient registration upon the submission of a "written certification" and identifying information. NMSA § 26-2B-

7(B). "The department may deny an application *only* if the applicant did not provide the information required pursuant to Subsection B of this section or if the department determines that the information provided is false." NMSA § 26-2B-7(C) (emphasis added). The rule permitting the medical director to overrule a patient's own physician's diagnosis should be struck as it provides for a grounds for denial not allowed by statute.

Rules requiring certifying physicians to disclose the length of time a patient has been under the doctor's care, and patients to routinely provide medical records releases, 7.34.3.10(D)(1)(l) & (n) NMAC, similarly state criteria for registration contrary the Act's express language defining certifications and the documents the Department is to review in issuing a registration. Outside even its promulgated rules, the Department goes further yet into impermissible territory, purporting to require certifying physicians to supply additional diagnostic and treatment information in its application form. Exhibit 2 to the Petition at page 3. The Court should enjoin the Department from imposing its illegal certification requirements on patients and their physicians through its forms.

3. Rules permitting denial or cancellation of patient registrations based on patient conduct are contrary to express provisions of the Act and not supported by substantial evidence.

Challenged rules permit the Department to deny or cancel the registration of a patient who threatens or harms someone involved in administration of the MCP (7.34.3.11(D) NMAC), to engage in monitoring and inspection of patients in their own homes for compliance with the Department's rules (7.34.3.14(A)), and to deny or cancel patient registration based on a patient's failure to cooperate with home inspections or violation of administrative rules (7.34.3.14(C) & .16). This is all contrary to express

statutory language in the Act which states that the *only* reasons for the Department to withhold registration is failure of a patient to provide the statutorily-specified documentation or to forge or falsify that documentation. NMSA § 26-2B-7(C).

These provisions are not only contrary to express language, they are contrary to the obvious legislative intent of the Act, which gives the Department a largely ministerial role with respect to registering patients, while expressly providing that registered patients who engage in activities beyond permissible use under the Act are subject to traditional law enforcement investigations and criminal penalties. NMSA § 26-2B-5. Moreover, the patient monitoring expressly conflicts with section 26-2B-7(F) of the Act, stating that the fact of patient registration shall not constitute probable cause for any government agency to search the person or property of a person, and violates constitutional protections on search and seizure, when by its own terms, the rule does not require the Department to have probable cause to conduct an inspection.

4. Rules limiting commercial producers of medical cannabis to non-profit corporations are contrary to the Act at NMSA § 26-2B-3(D), and are supported by substantial evidence.

The Lynn and Erin Compassionate Use Act neither requires that producers of medical cannabis be nonprofit entities, nor authorizes the Department to enact such a requirement. The Act instead defines "licensed producer" as "any person or association of persons." NMSA § 26-2B-3(D). "Any" in the definition of producer is incompatible with the Department's attempt to restrict producers to nonprofit corporate entities. Moreover, although "person" may ordinarily refer to either a natural person or a legal entity such as a corporation, in this instance, the Legislature chose to use the words

"person or association of persons." In that context, it could have only intended the first clause to mean natural persons. *State v. Javier M.*, 2001-NMSC-030, ¶ 32, 131 N.M. 1, 15 ("a statute must be construed so that no part of the statute is rendered surplusage or superfluous"). The only possible construction of the definition is that the Legislature intended natural persons; i.e., sole-proprietors, to be included among the business entities eligible for licensure. As a natural person cannot be a nonprofit corporation, it is impossible to construe the producer definition as authorizing the Department to restrict licensure to nonprofit corporations. In sum, the Department may impose reasonable criteria for producer licenses, but such criteria may not include a restriction on type of business entity.

The rule restricting producers to nonprofit entities must be reversed because it is not in harmony with statute. *Wilcox*, 2012 -NMCA-106 at ¶ 7. There is of course, also no evidence, substantial or otherwise, in the record supporting this limitation, nor any rationale provided by the Department for such a restriction.

5. Rules stating a maximum THC content for concentrates are not supported by substantial evidence.

The Department initially proposed a prohibition on retail distribution of concentrates with THC concentrations greater than 60% (which it increased to 70% in its final rule). In response, Petitioner introduced material into the record demonstrating that high-THC concentrates, which can provide strong and immediate symptomatic relief, are therapeutically useful for some patients, and even safer. RP 1622-23. Use of proper extract manufacturing practices results in extracts with up to 90% THC, and dilution is not practical for solid forms. RP 1622. No known scientific evidence supports a

percentage limit on THC in concentrates. RP 1108, Comments of the Drug Policy Alliance. This was also the finding of the Department's own Medical Advisory Board, which urged that THC limits not be adopted. RP 1571 ("the MAB is not aware of any clinical adverse effects associated with high-potency concentrates"), 1572, ¶ 6 (MAB "strongly urge" Secretary to reject maximum THC concentration rule).

The Department's only justification for this limit is the conclusory statement of its associate general counsel regarding unspecified "concerns" held by unspecified persons about high-THC concentrates discussed on page 8, *supra*. There is no attempt in Mr. Woodward's explanation to address any of Petitioner's or other commenters' *specific* concerns with a THC percentage limit. *See also* RP 1571 (MAB finding that Department presented no support for its position.) To all indications, the numbers 60% and 70% appear to be arbitrarily chosen. In sum, the Department's decision to impose a THC limit at 70% in rule is supported by *no* evidence, much less substantial evidence. *In re PNM Elec.*, 1998–NMSC–017, ¶ 23, 125 N.M. 302 ("Substantial evidence is relevant evidence that a reasonable person might accept as adequate to support a conclusion"). Both the policy of limiting concentrations and the limits selected are also arbitrary and capricious. *Rio Grande Chapter of the Sierra Club*, 2003-NMSC-005, ¶ 17, 133 N.M. 97("A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record"). The rule must be reversed.

6. Rules stating maximum quantities that may be purchased and possessed in a 90-day period, are contrary to the Act and are not supported by substantial evidence.

The purpose of "adequate supply" in the Lynn and Erin Compassionate Use Act is to establish the amount of cannabis a patient may possess at any one time for personal medical use; presumably, possession of greater amounts could be indicative of an intent to distribute cannabis to persons outside the medical system:

> "A qualified patient shall not be subject to arrest, prosecution or penalty in any manner for the possession of or the medical use of cannabis if the quantity of cannabis does not exceed an adequate supply."

NMSA § 26-2B-4(A). The Department is authorized to determine this possession limit:

> "adequate supply" means an amount of cannabis, in any form approved by the department, possessed by a qualified patient or collectively possessed by a qualified patient and the qualified patient's primary caregiver that is determined by rule of the department to be no more than reasonably necessary to ensure the uninterrupted availability of cannabis for a period of three months and that is derived solely from an intrastate source;

NMSA § 26-2B-3(A).

The Department has attempted to turn this possession limit into a purchase and consumption limit, in the absence of any statutory language authorizing the Department to limit patients' consumption of medicine to the "adequate supply" amount. The rule should be reversed on that basis. *Tri-State Generation,* 2012-NMSC-039 at ¶ 13 (agency may not "create new law on its own").

Next, Petitioner presented substantial evidence for a 90-day consumption limit greater than 230 units based on published scientific reports, policies of other states with medical cannabis programs, usage reported in the Department's own survey of patients'

consumption, and policy considerations. RP 1615-22. The Medical Advisory Board, hearing similar evidence, agreed with Petitioner's position.

Mr. Woodward's letter, which again is the sole justification for the Department's decision to impose a 90-day consumption and sales limit of 230 units (8 ounces of dried cannabis), solely addresses the legal arguments. The Department has no evidence, much less substantial evidence, supporting the selection of 230 units as a reasonable limit, nor any evidence refuting the evidence put forward by Petitioner. Should the Court not agree with Petitioner on statutory construction, it still must reverse the rule for being arbitrary and not supported by substantial evidence.

7. The Department did not provide notice of its intent to promulgate rule 7.34.4.9(C)(4) NMAC, routine heavy metal testing.

The Department originally proposed, in its May 2014 proposed rules, routine testing of all commercially produced medical cannabis for potency, microbiological contamination, solvent residues, pesticide residues, and heavy metals. Presumably, based on comment at the June 16 hearing in opposition by Petitioner and others, the Department left routine pesticide and heavy metal testing out of the proposed rules noticed for comment on November 29, 2014. See RP 1369, ¶ 19. Despite not noticing the public with its intent to promulgate a rule for routine heavy metal testing prior to the December 29, 2014 hearing (and actually noticing the public that it would not do so), the Department adopted such a rule in its final action on February 16, 2015.

An agency is "required to give notice of proposed action regarding the adoption, amendment or repeal of any rule." *Rivas,* 1984-NMSC-076 at ¶ 8; *see also* NMSA § 9-7-6(E) (Department's organic act requiring notice and hearing before adoption of rules

affecting the public). On this basis, the heavy metal testing rule must be struck. *Rivas,* 1984-NMSC-076 at ¶ 13.

8. Rules 7.34.4.9(C)(2) & (4) NMAC, requiring routine testing of medical cannabis for mycotoxins and heavy metals, are not supported by substantial evidence.

Petitioner presented material against routine mycotoxin testing in the record. RP 1638-39. (Petitioner and others also presented evidence against routine heavy metal testing at the June hearing. RP 303, 499-500.)[3] The Department fails to provide *any* rationale or cite to *any* evidence in support of its promulgation of these rules. These rules must be reversed.

9. The Department may not reserve the power to create and enforce rules without notice and hearing.

The Department attempts to promulgate two rules that reserve to itself the power to require new routine tests of medical cannabis (7.34.4.9(C)(6) NMAC) and quarterly reporting of information by producers (7.34.4.23(B) NMAC) without going through a rulemaking process. This is contrary to the Department's organic act, at NMSA § 9-7-6(E), which requires notice and hearing before adoption of rules affecting the public. The Department cannot promulgate rules that are in conflict with its statutory authority.

Moreover, the void-for-vagueness doctrine applies to administrative regulations. *Chairez v. James Hamilton Const. Co.*, 2009-NMCA-093, ¶ 34, 146 N.M. 794, 803. Producers cannot be held to compliance with rules that fail to specify the required conduct.

[3] Petitioner does not object to testing that furthers patients' interests, but contends that routine mycotoxin testing of cannabis that has already passed a microscopic analysis for mold spores is an unnecessary expense, as is heavy metal testing for cannabis grown using only food-grade inputs.

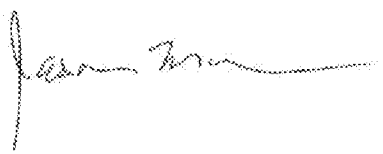
10. The Department failed to comply with the Small Business Regulatory Relief Act, NMSA § 14-4A-1, *et seq.*

The Small Business Regulatory Relief Act required the Department to provide any rule that may have an adverse effect on small business to the state's Small Business Regulatory Advisory Commission. NMSA §14-4A-4. The Act also requires that "Prior to the adoption of a proposed rule that the agency deems to have an adverse effect on small business, the agency shall consider regulatory methods that accomplish the objectives of the applicable law while minimizing the adverse effects on small business." There is nothing in the record to indicate that the Department made a finding that its proposed rules would not have an adverse impact upon small business, nor took any other steps to comply with its obligations under the Act. Petitioner's members, who are adversely affected by the rules challenged, are small businesses within the meaning of the Act. NMSA §14-4A-3(E).

IV Petitioner's Entitlement to Relief

Petitioner requests that the Court declare each of the rules challenged in the Petition void and unenforceable, and further enjoin the Department from enforcing a prior version of any specific rule challenged that has substantially the same effect as a voided rule.

Respectfully submitted,

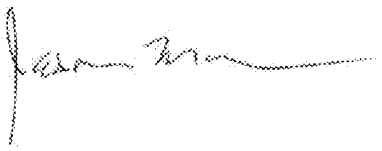


Jason Marks, *Attorney for Petitioner*
Jason Marks Law, LLC
1011 Third Street NW
Albuquerque, NM 87102

(505) 385-4435
lawoffice@jasonmarks.com

CERTIFICATE OF SERVICE

On this day, June 12, 2015, I caused the foregoing Statement of Issues on Review to be filed in the Court's Odyssey system and causing a copy to be served electronically upon counsel for Respondent.



Jason Marks, *Attorney for Petitioner*

2010 WL 4684756
Only the Westlaw citation is currently available.

Court of Appeals of New Mexico.

Glenn WILCOX, Plaintiff-Appellant,
v.
NEW MEXICO BOARD OF ACUPUNCTURE AND ORIENTAL MEDICINE, Defendant-Appellee.

No. 30,010. | July 23, 2010.

Appeal of the Administrative Rules Adopted by the New Mexico Board of Acupuncture and Oriental Medicine, Anita Villegas, Board Administrator.

Attorneys and Law Firms

Glenn Wilcox, Placitas, NM, Pro Se Appellant.

Gary K. King, Attorney General, John Adrian Terry, Assistant Attorney General, Santa Fe, NM, for Appellee.

Opinion

MEMORANDUM OPINION

FRY, Chief Judge.

***1** The opinion filed on May 11, 2010, is hereby withdrawn, and the following opinion is submitted in its place. Appellant's July 9, 2010, motion to correct the opinion is granted.

Glenn Wilcox, Appellant, appeals the promulgation of a number of regulations[1] by the New Mexico Board of Acupuncture and Oriental Medicine (the Board). In our notice, we proposed to reverse and set aside those regulations as not having been adopted in accordance with law. The Board has timely responded. We have considered its arguments and, not being persuaded, we reverse. Appellant's Second Motion to Amend the Docketing Statement to correct a typographical error is granted.

First, the Board argues that summary disposition is inappropriate in this case. It argues that because of the factual complexity of this case, it is inappropriate for the summary calendar. In fact, our review does not rely on the complexities of the facts here. Rather, we proposed to conclude that legal error occurred requiring reversal. We did not even attempt to review the record for sufficiency of the evidence because, as we pointed out in our notice, we could not engage in a proper review where the Board had not indicated what facts and circumstances it considered in adopting the regulations. This appeal concerns the complexity of the facts only as an underlying basis for proposing to reverse here. Further, we point out that the entire record from the administrative agency is before the Court at this time. Thus, there would be no other facts available to us if we were to assign it to the general calendar. Finally, there is nothing in the record that prevents the Board from responding to our proposal to reverse on legal grounds. Therefore, we conclude that this case is appropriate for decision on the summary calendar.

Second, the Board contests our legal conclusions. In particular, it argues that there is nothing in the law requiring it to provide reasoning for adopting regulations. It argues that we did not recognize the distinction between legislative and adjudicatory functions of an administrative agency. It argues that the law requiring the statement of reasons does not apply to legislative functions, such as rule-making. In our calendar notice, we cited several cases in which the administrative agency was required to state its reasons for adopting regulations. *See* *N.M. Mun. League v. N.M. Envtl. Improvement Bd.*, 88 N.M. 201, 539 P.2d 221 (Ct.App.1975); *City of Roswell v. N.M. Water Quality Control Comm'n*, 84 N.M. 561, 505 P.2d 1237 (Ct.App.1972). The Board argues that those cases do not apply because they involved specialized agencies, whose authorizing statutes require them to consider a number of factors in making their regulations. *See* NMSA 1978, §§ 74-1-9(B) (1985), -6-4(E) (1993) (amended 2009).

The cases we cited, however, did not rely on those statutes as the basis for requiring the agency to give an indication of its reasoning or as the basis upon which the regulations were adopted. Rather, the reason we require reasons supporting the regulations is that we cannot effectively perform the review authorized by statute unless the record indicates what facts and circumstances were considered and the weight given to those facts and circumstances. *City of Roswell*, 84 N.M. at 565, 505 P.2d at 1241. Thus, the requirement does not come

from the authorizing statute, but rather from the need to facilitate the review of the regulations that is authorized by law. We are unpersuaded that professional licensing agencies do not need to provide reasoning for adoption of their regulations. *See* *Rivas v. Bd. of Cosmetologists*, 101 N.M. 592, 594, 686 P.2d 934, 936 (1984). Our case law is clear that the record must disclose the Board's reasoning and the basis on which it adopted the regulations. *Id.* As we pointed out in our notice, our review of the record does not disclose the Board's reasoning or the basis on which it adopted these regulations. [CN 3] The Board's response does not point us to the reasoning, but rather argues that it does not have to provide it. We disagree. There must be something in the record to which we can point as explanation for why the Board deemed it necessary to amend its regulations. This is especially true where the regulations as amended appear to conflict with NMSA 1978, Section 61-14A-8.1(C) (2007).

***2** The Board also argues that due process requirements do not apply to the Board in its adoption of regulations. Again, we disagree. The Uniform Licensing Act itself sets out certain due process requirements, including **notice** and **opportunity** to be heard. NMSA 1978, Section 61-1-29(B), (C), (D) (1981). The Act provides that all interested persons shall be given a reasonable opportunity to submit data, views or arguments, as well as to examine witnesses testifying at the hearing. Section 61-1-29(D). Thus, although there is no fundamental right to due process before an agency adopts a **rule**, *Livingston v. Ewing*, 98 N.M. 685, 688, 652 P.2d 235, 238 (1982), the general notions of **notice** and **opportunity** to be heard have been made applicable by statute. Any failure to comply with these requirements results in adoption of a regulation in violation of law.

As we noted in our calendar notice, we could find nothing in the record suggesting that interested persons, including Appellant, were denied the right to question testifying witnesses. We did note that Appellant was not allowed to question the Board member who was the proponent of the regulations. However, it was not clear whether she was a witness presenting testimony in support of the regulations.

Finally, the Board argues that there was substantial evidence to support the adoption of the regulations. It points to the nearly 800 pages of record and the public hearing as support for that assertion. However, we did not make any determination on the sufficiency of the evidence in our calendar notice. As we pointed out in our notice, there is a good deal of information in the record, but we have no way of knowing why the Board relied on some of the evidence and not other. The record is replete with conflicting points of view, but nowhere does the Board explain how it resolved those conflicts. We recognize that a number of meetings and a good deal of discussion preceded the public hearing and adoption of the regulations. However, there is nothing in the record explaining the Board's reasons for adoption of the regulations in the face of what appears from the record to be some strong opposition.

CONCLUSION

For the reasons stated herein and in the notice of proposed disposition, we reverse and set aside the regulations listed in footnote one.

IT IS SO ORDERED.

WE CONCUR: LINDA M. VANZI and ROBERT E. ROBLES, Judges.

Footnotes

[1] 16.2.20 NMAC, 16.2.1.7(B)(8) NMAC, 16.2.1.7(B)(9) NMAC, 16.2.1.7(B)(35) NMAC, 16.2.4.13 NMAC, 16.2.9.9(B) NMAC, 16.2.10.9(C)(15), (16), (17), (28), and (29) NMAC.