

STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT COURT
SANTA FE COUNTY

JLG

Carola Kieve, M.D.,
Plaintiff

v.

No. D-101-CV-2014-00140

New Mexico Department of Health,
Defendant.

Complaint for Declaratory Judgments and Jury Demand

COMES NOW Carola Kieve, M.D., by and through her counsel Egolf + Ferlic + Day, LLC, to complain against the Defendant for declaratory judgment pursuant to the New Mexico Declaratory Judgment Act, NMSA 1978 § 44-6-1 *et seq.* The New Mexico Department of Health (“the Department”) and its employees, agents, divisions, units and administrative entities (collectively “the Defendants”) operate the New Mexico Medical Cannabis Program (“the Program”) and promulgate rules for the Program’s operation pursuant to the Lynn and Erin Compassionate Use Act, NMSA 1978 § 26-2B-1 *et seq.* (“the Act”). In adopting rules regarding patient applications for treatment of, among other debilitating diseases, post-traumatic stress disorder, the Defendants have imposed conditions and requirements that are not authorized by law and are outside the Defendants’ statutory authority. Furthermore, the Defendants have employed as a director of the Program a physician who is irreparably conflicted in the performance of his duties and whose employment and official decisions and actions are in violation of the New Mexico Governmental Conduct Act, NMSA 1978 § 10-16-1 *et seq.* (“the GCA”), because of his conflict of interest. Dr. Kieve prays for a declaratory judgment from this Court that 1) the rules, regulations and requirements relating to applications to treat debilitating diseases listed by rule are

invalid to the extent that they impose conditions and requirements not enumerated in the Act and
2) the Defendants have violated the GCA through the hiring of the current part-time executive
director. As grounds for this complain, Dr. Kieve states the following:

Jurisdiction and Venue

1. At all times relevant to this complaint, Dr. Kieve has been a resident of Santa Fe County.
2. At all times relevant to this complaint, the Defendants have been instrumentalities of the government of the State of New Mexico with their principal place of business in Santa Fe County, New Mexico.
3. At all times relevant hereto, the Defendants have made their principal place of activity in Santa Fe County, New Mexico. See NMSA 1978 38-3-1 (G) (1988)
4. Venue in this Court is proper.
5. This Court has jurisdiction over this matter as a court of general jurisdiction in Santa Fe County, New Mexico.

Facts

6. Carola Kieve, M.D. is a psychiatrist who is licensed to practice psychiatry in New Mexico.
7. Dr. Kieve has submitted to the Defendants information in support of a patient's application for medical cannabis to treat the patient's post-traumatic stress disorder ("PTSD").

8. The patient wished to avoid the use of commercial pharmaceuticals in his treatment, and Dr. Kieve advised that medical cannabis could be a helpful alternative.
9. In providing the Defendants with the requested information, Dr. Kieve was at all times using her best medical judgment and undertaking a good-faith effort to comply with the requirements of the Act.
10. The part-time executive director of the Board, Dr. Stephen Rosenberg, contacted Dr. Kieve to inform her that she would be required to submit extensive medical information and records in support of Dr. Kieve's belief that the health benefits of the medical use of cannabis would likely outweigh the health risks for the patient in Dr. Kieve's treatment of the patient's debilitating medical condition (PTSD).
11. Specifically, Dr. Rosenberg, on behalf of the Defendants, demanded that Dr. Kieve provide extensive records on the past administration of commercial pharmaceuticals to the patient as well as a detailed explanation of why commercial pharmaceuticals had failed to adequately treat the patient's PTSD.
12. Dr. Kieve stated that such information would not be provided because it did not exist; in Dr. Kieve's medical opinion there were no commercial pharmaceuticals that would have been appropriate for the patient and therefore none had been attempted.
13. Dr. Kieve further stated that it was inappropriate for Dr. Rosenberg to demand such information in a PTSD case because such information was not demanded by him or the Defendants to support applications for the treatment of other debilitating diseases.
14. Dr. Kieve believed that Dr. Rosenberg's demand exceeded the authority of the Defendants and Dr. Rosenberg.

15. The patient's application was not approved.
16. Dr. Rosenberg has informed Dr. Kieve that all of her future applications will be subjected to medical records requirements.
17. By imposing the regulations challenged in this case, the Defendants have harmed – and will continue to harm – Dr. Kieve's medical practice by, among other things:
 - a. reducing the number of patients she can serve,
 - b. limiting the types of treatment she may provide to her patient,
 - c. invading the doctor-patient relationship,
 - d. imposing unreasonable requirements that are costly and time-consuming, and
 - e. reducing the ability of Dr. Kieve to earn a living by charging fees for her services.
18. By imposing the regulations challenged in this case, the Defendants have harmed – and will continue to harm – Dr. Kieve's patients by, among other things:
 - a. limiting the type of treatment that they may receive from Dr. Kieve,
 - b. preventing Dr. Kieve's patients from receiving the medicine Dr. Kieve believes her patients need, and
 - c. forcing Dr. Kieve's to undergo treatment that Dr. Kieve believes not to be in the best interests of her patients.
19. Dr. Rosenberg has also threatened to take actions against the medical license of Dr. Kieve on the basis of her belief that she need not submit medical records to the Defendants in support of applications for medical cannabis to treat PTSD.

20. The information Dr. Rosenberg demanded is not required for applications for medical cannabis to treat the debilitating medical conditions that are listed in the Lynn and Erin Compassionate Use Act, NMSA 1978 § 26-2B-1 *et seq.*; the information is only requested and required when medical cannabis is to be used for the treatment of debilitating conditions added to the statutory list by regulation.
21. The Lynn and Erin Compassionate Use Act, NMSA 1978 § 26-2B-1 *et seq.*, (“the Act”) is the statute that creates the New Mexico Medical Cannabis program.
22. The Act defines seven “debilitating medical condition[s],” which are eligible for treatment with medical cannabis upon an application being filed by a patient. NMSA 1978 § 26-2B-3.
23. In addition to the seven specifically enumerated conditions found in the Act, the law gives Defendants the authority to add, after an application and hearing process, additional conditions that are eligible for treatment with medical cannabis. NMSA 1978 § 26-2B-3(8).
24. The Department has exercised its authority to promulgate rule pursuant to the Act, as recommended to the Department by the Board. The rules, among other things, have added PTSD as a debilitating medical condition. NMAC 7.34.3.8(B)(7).
25. The Act requires that applications for medical cannabis certification shall be granted when an applicant submits four items in support of his application: 1) a written certification from a physician; 2) the patient’s name, address and date of birth; 3) the physician’s name, address and phone number; and 4) the name, address and birth date

- of a patient's primary caregiver, if any. NMSA 1978 § 26-2B-7(B). There are no other items to be submitted and no other requirements for approval provided in the Act.
26. The only basis on which the Defendants may deny an application is if an application fails to contain the information referred to above or if the information provided is false. NMSA 1978 § 26-2B-7(C).
 27. The "written certification" referred to above is defined in the Act as "a statement in a patient's medical records or a statement signed by a patient's practitioner that, in the practitioner's professional opinion, 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 1978 § 26-2B-3(H).
 28. There is no provision in the Act requiring the submission of medical records with an application, and there is no requirement in the act that other treatments or medications be attempted prior to the granting of a medical cannabis license.
 29. There is no requirement in the Act requiring the submission of medical records to support a physician's "written certification" submitted with a patient's application.
 30. These rules state that "each individual applying to the program for enrollment shall submit medical records that confirm the diagnosis of PTSD based upon the evaluation of a psychiatrist or psychiatric nurse practitioner and meeting the diagnostic criteria of the current diagnostic and statistical manual of mental disorders." *Id.* Nowhere in the regulations is there a requirement that evidence be submitted to prove that therapies

- other than medical cannabis have been attempted. Furthermore, the only regulatory requirement for medical records is limited to records confirming a diagnosis.
31. The Defendants' imposition on Dr. Kieve of requirements for extensive medical records and for evidence of failed treatment of PTSD with commercial pharmaceuticals are in violation of both the Act and the Defendants' rules allegedly promulgated pursuant thereto.
32. The Defendants' requirement for records is not found in the Act, and there is no grant of authority in the Act to impose such a requirement.
33. The Governmental Conduct Act ("the GCA"), NMSA 1978 § 10-16-1 *et seq.*, is the law in New Mexico that, among other things, governs the conduct of state employees, defines conflicts of interest, prohibits certain transactions, and prohibits state employees' ownership of certain financial interests.
34. Dr. Rosenberg, in addition to serving as a part-time executive director of the Program, is an owner of Albuquerque Integrative Medicine, a clinic in Albuquerque that, according to its website, is "a medical practice solely dedicated to the evaluation and certification of patients' eligibility for enrollment in the New Mexico Medical Cannabis Program."
35. On his clinic's website, Dr. Rosenberg states that he "is available to evaluate [a patient's] eligibility for the New Mexico Medical Cannabis Program either by referral from [a] primary care physician when a signature from a specialist for chronic pain is needed, OR to provide primary certification for all other eligible conditions."

36. In his official capacity, Dr. Rosenberg evaluates applications for patient certification submitted by patients and physicians from throughout New Mexico.
37. As a consequence, Dr. Rosenberg performs essentially the same function in his private practice as well as in his state-employee position.
38. As a consequence of his dual roles - one private and one public - Dr. Rosenberg is routinely placed in the position of approving or denying applications submitted by his economic competitors, namely other physicians whose patients did not choose Dr. Rosenberg for certification.
39. The GCA states that a state employee “shall be disqualified from engaging in any official act directly affecting the public officer’s or employee’s financial interest...” NMSA 1978 § 10-16-4(B).
40. Each time Dr. Rosenberg denies an application submitted by a competitor’s patient, he takes an official action that affects his own personal financial interest.
41. The GCA states that “[n]o public employee during the period of employment shall acquire a financial interest when the public officer or employee believes or should have reason to believe that the new financial interest will be directly affected by the officer’s or employee’s official act.” NMSA 1978 § 16-16-4(C)
42. Dr. Rosenberg possesses a financial interest that is directly affected by his official actions and decisions.

Count One: Declaratory Judgment as to the Act

43. All allegations found in paragraphs 1-42 are realleged and incorporated here by reference.

44. The Act provided limitations on the ability of the Defendants to deny patients' applications and provides a mandate to the Defendants that applications shall be accepted unless specific criteria are met.
45. The Act allows the Defendants to add new forms of debilitating diseases to the list of those that may be treated with medical cannabis, but the Act does not allow for the application criteria to change when patients seek treatment for the newly-added conditions.
46. By imposing new criteria on patients' applications (medical records and evidence of past failed treatments with other medicines) and by denying applications for reasons that are not permitted under the Act (a failure to supply additional records), the Defendants are exceeding their authority under the Act.
47. There exists an actual case and controversy between Dr. Kieve and the Defendants regarding the Defendants' enforcement of rules promulgated by the Department and the injuries caused thereby.
48. Dr. Kieve has standing to bring this claim on her own behalf and on behalf of her patients.
49. This controversy is ripe for a decision by the Court because the rule at issue has been enforced against Dr. Kieve and her patients and because the Defendants have informed Dr. Kieve of their intent to continue to impose these requirements on all future applications.
50. The administrative action that resulted in the challenged rule has concluded.

51. The Court may declare, on purely legal grounds, that the Defendants lacks the authority to have issued the challenged rules.
52. No specialized fact-finding will be required for the Court to make that determination.
53. There is no exclusive statutory remedy available to the Plaintiffs in this matter.
54. “The authority of an administrative agency ‘to promulgate rules and regulations must be found in and is limited by statute.’” *Howell v. Heim*, 118 N.M. 500, 503 (N.M. 1994) (citing *Winston v. New Mexico State Police Bd.*, 80 N.M. 310, 311, 454 P.2d 967, 968 (1969) and *Foster v. Board of Dentistry*, 103 N.M. 776, 777, 714 P.2d 580, 581 (1986) (applying the rule that "where rulings by administrative agencies are not in accord with the basic requirements of the statutes relating to those agencies, the decisions of the agencies are void.).”
55. Because the rules at issue in this case were issued without the statutory authority to do so, they are void.

Count Two: Declaratory Judgment as to the Governmental Conduct Act

56. All allegations found in paragraphs 1-55 are realleged and incorporated here by reference.
57. There exists an actual case and controversy between Dr. Kieve and the Defendants regarding the Defendants’ employment of Dr. Rosenberg in violation of the GCA.
58. This controversy is ripe for a decision by the Court because the hiring decision at issue has affected Dr. Kieve.
59. The hiring decision that resulted in the violation of the GCA has concluded.

60. The Court may declare, on purely legal grounds, that the Defendants' hiring decision violates the GCA.

61. No specialized fact-finding will be required for the Court to make that determination.

62. There is no exclusive statutory remedy available to the Plaintiffs in this matter.

WHEREFORE, Dr. Kieve respectfully requests, pursuant to NMSA 1978 § 44-6-1, that the Court enter judgment in her favor and against the Defendants finding that 1) the rules and requirements being enforced against her and her patients regarding medical records and proof of exhaustion of alternatives to medical cannabis are void and unenforceable, 2) the employment of Dr. Rosenberg violates the GCA, 3) the Defendants may not add criteria for the approval of applications that are not expressly found in the Act, and 4) the Defendants may not deny an application for any reason that is not expressly found in the act. Furthermore, Dr. Kieve respectfully requests, pursuant to NMSA 1978 § 44-6-9 that the Court award her costs and reasonable attorneys' fees as well as any other relief to which she may be entitled.

Respectfully Submitted,

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