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

NO. D-101-CV-2017-00806

NEW MEXICO TOP ORGANICS-ULTRA HEALTH, INC.,

Petitioner,

v.

NEW MEXICO DEPARTMENT OF HEALTH,

Respondent.

ORDER ON RULE 1-075 APPEAL

THIS MATTER came before the Court on Petitioner New Mexico Top Organics-Ultra Health's ("Ultra Health") Writ of Certiorari and Request for Stay pursuant to NMRA 1-075, regarding the New Mexico Department of Health's ("Department" or "DOH") decision to suspend Petitioner's sales for five (5) days and to fine Petitioner $100.00. A copy of the final decision of the Department of Health, issued by the Secretary of the Department of Health, and the record proper was reviewed, as were all pleadings provided to this Court. The Court ordered a Writ of Certiorari issued according to Rule 1-075G and by separate Order dated April 10, 2017 stayed the Department's ruling. After further consideration of the facts and the record, the Department's findings are AFFIRMED in part and REVERSED in part.

Rule 1-075 states,

> R. Standard of review. The district court shall apply the following standards of review:
> (1) whether the agency acted fraudulently, arbitrarily, or capriciously;
> (2) whether based upon the whole record on review, the decision of the agency is not supported by substantial evidence;
> (3) whether the action of the agency was outside the scope of authority of the agency; or
> (4) whether the action of the agency was otherwise not in accordance with law.

* *

T. District court decision. The district court, in its appellate capacity, shall issue a written decision, which may include:
(1) remanding the case to the administrative agency with specific instructions for further proceedings and determinations; the remand may also include instructions to make the case ripe for judicial review;
(2) reversing the decision under review, with a statement of the basis for the reversal as provided under Paragraph R of this rule; and
(3) affirming the decision under review, with a statement of the basis for affirmance.

Rule 1-075 NMRA

STATEMENT OF THE ISSUES

I. Did the Agency/Hearing Officer Err by Concluding that Temporary Display/Possession Constituted a "Change to Production Plan" and a "Change in Location of Production Facility"?

II. Was DOH's Suspension of Ultra Health Arbitrary, and did the Hearing Officer Err by Disregarding Evidence of Arbitrariness?

III. Is the Suspension Inequitable and Disproportionate?

IV. Did the Hearing Officer Err by Focusing on Ultra Health's State of Mind?

I. SUMMARY OF PROCEEDINGS

The Appellant, New Mexico Top Organics - Ultra Health, Inc., is a New Mexico nonprofit corporation that is licensed by the Appellee New Mexico Department of Health Medical Cannabis Program, to operate as a medical cannabis producer, to grow and distribute cannabis within the New Mexico Medical Cannabis Program for use by qualified patients. UH000262, p. 33; UH000278, p. 97. At all times material to this case, Ultra Health was approved by the Medical Cannabis Program to grow a maximum of 450 cannabis plants in a secured production facility located at 255 Camino Don Tomas in Bernalillo, NM, which approval was initially granted in November of 2014 when Ultra Health moved its production operations from Santa Fe, NM. UH000280, p. 105; UH000279, p. 100; UH000130-000133; 7.34.4.8(A)(2) NMAC.

On September 8, 2016, Ultra Health caused a cannabis plant to be removed from its approved secure production facility for display at the New Mexico State Fair as part of an "educational" event

to promote the company. UH000260, pp. 23-24. The plant was approximately three-and-a-half feet tall. UH000263, pp. 34-35; UH000068-000069 (photographs of cannabis plant and display). The plant was displayed at the State Fair in a tent structure with overhead lighting and a fan. *Id.* The cannabis plant was a "seedling" within the definition at 7.34.4.7, insofar as it was "a cannabis plant that [had] no flowers". UH000262, p. 31. The Court has incorporated the relevant portions of the New Mexico Administrative Code.

II. Relevant Provision of Lynn and Erin Compassionate Use Act

> C. If a licensed producer sells, distributes, dispenses or transfers cannabis to a person not approved by the department pursuant to the Lynn and Erin Compassionate Use Act or obtains or transports cannabis outside New Mexico in violation of federal law, the licensed producer shall be subject to arrest, prosecution and civil or criminal penalties pursuant to state law.
>
> § 26-2B-5. Prohibitions, restrictions and limitations on the medical use of cannabis; criminal penalties, NM ST § 26-2B-5
>
> A. No later than October 1, 2007, and after consultation with the advisory board, the department shall promulgate rules in accordance with the State Rules Act to implement the purpose of the Lynn and Erin Compassionate Use Act. The rules shall:
> (1) govern the manner in which the department will consider applications for registry identification cards and for the renewal of identification cards for qualified patients and primary caregivers;
> (2) define the amount of cannabis that is necessary to constitute an adequate supply, including amounts for topical treatments;
> (3) identify criteria and set forth procedures for including additional medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis. Procedures shall include a petition process and shall allow for public comment and public hearings before the advisory board;
> (4) set forth additional medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis as recommended by the advisory board;
> (5) identify requirements for the licensure of producers and cannabis production facilities and set forth procedures to obtain licenses;
> (6) develop a distribution system for medical cannabis that provides for:
> (a) cannabis production facilities within New Mexico housed on secured grounds and operated by licensed producers; and
> (b) distribution of medical cannabis to qualified patients or their primary caregivers to take place at locations that are designated by the department and that are not within three hundred feet of any school, church or daycare center;
>
> Registry identification cards; department rules; duties, NM ST § 26-2B-7

III. Relevant Administrative Code

7.34.4.23 MONITORING AND CORRECTIVE ACTIONS:

A. Monitoring:

(1) The department or its designee may perform on-site assessments of a licensed producer or producer-applicant, an approved manufacturer or manufacturer-applicant, an approved laboratory or a laboratory-applicant, and an approved courier or courier-applicant, to determine compliance with these rules or submissions made pursuant to this rule. The department may enter the premises of a licensed producer, approved manufacturer, approved laboratory, or approved courier at any time to assess or monitor.

(2) 24 hours notice shall be provided to personal production license holders prior to an on-site assessment, except when the department has reasonable suspicion to believe that providing notice will result in the destruction of evidence, or that providing such notice will impede the department's ability to enforce these regulations.

(3) The department may review any and all records of a licensed non-profit producer, a qualified patient or primary caregiver, an approved manufacturer, approved laboratory, and approved courier, and may require and conduct interviews with such persons or entities and persons affiliated with such entities, for the purpose of determining compliance with department rules and applicable laws.

(4) All licensed producers, approved manufacturers, approved laboratories, and approved couriers shall provide the department or the department's designee immediate access to any material and information necessary for determining compliance with this rule.

(5) Failure by a licensed producer, approved manufacturer, approved laboratory, or approved courier to provide the department access to the premises or materials may result in disciplinary action(s), in accordance with this rule.

(6) Any failure to adhere to these rules that is documented by the department during monitoring may result in disciplinary action, in accordance with this rule.

(7) The department shall refer complaints alleging criminal activity that are made against a licensed producer, approved manufacturer, approved laboratory, or approved courier to appropriate New Mexico state or local law enforcement authorities.

.....

C. Corrective action:

(1) If violations of requirements of this rule are cited as a result of monitoring or review of financial records, the licensed producer shall be provided with an official written report of the findings within seven business days following the monitoring visit or the review of financial records.

(2) Unless otherwise specified by the department, the licensed producer shall correct the violation within five calendar days of receipt of the official written report citing the violation(s).

(3) The violation shall not be deemed corrected until the department verifies in writing within seven calendar days of receiving notice of the

corrective action that the corrective action is satisfactory.

(4) If the violation has not been corrected, the department may issue a notice of contemplated action to suspend, revoke, or take other disciplinary action against the producer's license, in accordance with the provisions of this rule.

.....

Q. Amended license: A licensed producer shall submit to the department an application form for an amended license, and shall obtain approval from the department, at least 30 business days prior to implementing any:

(1) change of location of a qualified patient who also holds a personal production license;

(2) change of location of a non-profit producer's production or distribution facilities, change of directors, change of ownership of production or distribution facilities, private entity name, capacity or any physical modification or addition to the facility; and

(3) substantial change to a private entity's production plan or distribution plan, including any change to the type(s) of products produced or distributed, the private entity's method(s) of distribution, and security plan.

7.34.4.24 DISCIPLINARY ACTIONS AND APPEAL PROCESS:

A. Grounds for disciplinary action: Disciplinary action may be taken against a producer-applicant, a licensed producer, a manufacturer-applicant or approved manufacturer, a laboratory applicant or approved laboratory, or an approved courier or courier-applicant. Disciplinary action may include revocation, suspension, or denial of an application, license, or department approval, and other action. Disciplinary action may be imposed for:

(1) failure to comply with or satisfy any provision of this rule;

(2) falsification or misrepresentation of any material or information submitted to the department;

(3) failing to allow or impeding a monitoring visit by authorized representatives of the department;

(4) failure to adhere to any acknowledgement, verification, or other representation made to the department;

(5) failure to submit or disclose information required by this rule or otherwise requested by the department;

(6) failure to correct any violation of this rule cited as a result of a review or audit of financial records or other materials;

(7) failure to comply with the departments requested access to premises or materials;

(8) failure to pay a required monetary penalty;

(9) diversion of cannabis or a cannabis-derived product, as determined by the department;

(10) threatening or harming a patient, a medical practitioner, or an employee of the department; and

(11) any other basis identified in this rule.

B. Fines: Disciplinary actions against a licensed non-profit producer, approved manufacturer, approved laboratory, or approved courier

may include the imposition of monetary penalties, which may be assessed by the department in the amount of:

(1) one-hundred dollars ($100) for the **first** assessed monetary penalty in a calendar year;

(2) five hundred dollars ($500) for the **second** assessed monetary penalty in a calendar year;

(3) one-thousand dollars **($1,000)** for every monetary penalty thereafter assessed in a calendar year.

C. Persons and entities who may request a hearing: The following persons or entities may request a hearing to contest an action or proposed action of the department, in accordance with this rule:

(1) a licensed producer whose license has been summarily suspended or who has received a notice of contemplated action to suspend, revoke, or take other disciplinary action;

(2) a personal production licensure applicant whose application is denied for any reason other than failure to submit a completed application or failure to meet a submittal requirement of this rule;

(3) an approved manufacturer whose approval status has been summarily suspended or who has received a notice of contemplated action to suspend, revoke, or take other disciplinary action;

.....

D. Timing and content of request for hearing: The appellant shall file the request for hearing within 30 calendar days of the date the action is taken or the notice of contemplated action is received. The request shall:

(1) be properly addressed to the medical cannabis program;

(2) state the requestor's name, address, and telephone number(s); and

(3) include a statement of the issue(s) that the appellant considers relevant to the review of the action.

E. Hearing process:

(1) All hearings held pursuant to this section shall be conducted by a hearing officer appointed by the secretary.

(2) Hearings shall be conducted in Santa Fe, NM or, with the consent of the parties, in another location.

.....

L. Burden of proof: The appellant shall bear the burden of establishing by a preponderance of the evidence that the decision made or proposed by the department should be reversed or modified.

O. Recommended action and final decision:

(1) The parties may submit briefs including findings of fact and conclusions of law for consideration by the hearing examiner.

(2) No later than 30 calendar days after the last submission by a party, the hearing examiner shall prepare and submit to the secretary a written recommendation of action to be taken by the secretary. The recommendation shall propose sustaining, modifying, or reversing the action or proposed action of the department.

(3) The secretary shall issue a final written decision

accepting or rejecting the hearing examiner's recommendation in whole or in part no later than 30 calendar days after receipt of the hearing examiner's recommendation. The final decision shall identify the final action taken. Service of the secretary's final decision shall be made upon the appellant by registered or certified mail.

(4) The final decision or order shall be included in a producer's file with the medical cannabis program.
[7.34.4.24 NMAC - Rp, 7.34.4.16 NMAC, 2/27/2015]

Relevant Definitions:

XX. **"Seedling"** means a cannabis plant that has no flowers.

YY. **"Segregate"** means to separate and withhold from use or sale batches, lots, cannabis, usable cannabis, or cannabis-derived products in order to first determine its suitability for use through testing by an approved laboratory.

ZZ. **"THC"** means tetrahydrocannabinol, a cannabinoid that is the primary psychoactive ingredient in cannabis.

AAA. **"Technical evidence"** means scientific, clinical, medical, or other specialized testimony, or evidence, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing.

BBB. **"Testing"** means the process and procedures provided by an approved laboratory for testing of cannabis and cannabis derived products, consistent with provisions of this rule.

CCC. **"Unit"** means a quantity of usable cannabis, concentrate, or cannabis-derived product that is used in identifying the maximum supply that a qualified patient may possess for purposes of department rules.

DDD. **"Usable cannabis"** means the dried leaves and flowers of the female cannabis plant and cannabis-derived products, including concentrates, but does not include the seeds, stalks, or roots of the plant.
[7.34.4.7 NMAC - Rp, 7.34.4.7 NMAC, 2/27/2015; A, 2/29/2016]

By a Notice of Contemplated Action issued 9/16/16, the New Mexico Department of Health, Medical Cannabis Program proposed to suspend all sales and distribution of Ultra Health for a period of five consecutive days. UH000128-000129. Ultra Health timely appealed the proposed action, and an evidentiary hearing was ultimately held January 6, 2017 at the offices of the New Mexico Department of Health in Santa Fe, NM. UH000005.

Leigh Jenke is the Director of Operations and a member of the board of directors for Ultra Health, and testified at the administrative hearing in this matter. UH000257, p.13. Ms. Jenke testified that Ultra Health displayed the cannabis plant at the State Fair for approximately seven

hours on September 8, 2016. UH000260, p. 24. However, Ms. Jenke testified that Ultra Health originally intended to display the cannabis plant for the entire week of the Fair, returning the plant to Ultra Health's approved secure production facility at the end of each day. UH000265, pp. 42-43. Ms. Jenke testified that cannabis plants are "very finicky", and require the proper amount of lighting and proper amount of water at certain times. UH000262, p.30. She testified that Ultra Health had to take care of the cannabis plant in the morning, and nurse the cannabis plant back to health when it was returned to Ultra Health's grow facility in the evening. *Id.*

The hearing officer at the hearing, Craig T. Erickson, Esq., recommended in favor of the proposed five-day suspension of Ultra Health's sales and distribution. In support, the hearing officer found that statutory expressions must be given their plain meaning, absent legislative intent to the contrary, and that

> "Production," according to the Merriam-Webster Dictionary (on-line), means "the act or process of producing; the creation of utility; especially, the making of goods available for use." Clearly, the production of medical cannabis for sale the medical cannabis patients is not limited to what happens with the plants after they reach maturity. Production includes the entire process, a fact supported by the emphasis on the risks of survival when plants are outside the facility, as stated by Ms. Jenke.

UH000030. The hearing officer concluded that "production" in the context of the statute and rule "naturally and reasonably means the production of medical cannabis from germination to a mature plant." UH000031. The Department ultimately ruled that Top Organic's decision to take a plant to the State Fair required a closure of their business for five days.

II. ANALYSIS

A. Standard of Review

Rule l-075(R) provides that a district court shall apply the following standards of review:

> (1) whether the agency acted fraudulently, arbitrarily, or capriciously;
> (2) whether based upon the whole record on review, the decision of the agency is not supported by substantial evidence;
> (3) whether the action of the agency was outside the scope of authority of the agency; or

(4) whether the action of the agency was otherwise not in accordance with law.

The Petitioner claims that the agency's decision was not supported by substantial evidence and was not in accordance with law, and that the suspension was arbitrary and capricious. The Petitioner bears the burden of proof to make this showing. *Sw. Research & Info. Ctr. v. New Mexico Env't Dep't*, 2014-NMCA-098, ¶ 21, 336 P.3d 404, 410 (internal citation omitted). Appellant has met its burden.

"'Substantial evidence' is evidence that a reasonable mind would regard as adequate to support a conclusion." *Fitzhugh v. NM Dep't of Labor, Emp't Sec. Div.*, 1996-NMSC-044, ¶ 24, 122 N.M. 173 (internal citation omitted). "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." *Gila Res. Info. Project v. NM Water Quality Control Comm'n*, 2005-NMCA-139, ¶ 16, 138 N.M. 625 (internal quotation marks and citation omitted). A district court that reviews an agency decision under Rule 1-075 acts in an appellate capacity, rather than as a fact finder; and although a reviewing district court engages in a whole record review it "will not disturb any of an agency's factual findings that are supported by substantial evidence." *Llena v. Montoya*, 2013- NMCA-048, ¶ 9, 299 P.3d 456, 459 (internal citation omitted). Reviewing courts give deference to findings supported by substantial evidence, and will not substitute judgment for that of an administrative agency. *Id at* ¶ 19, 299 P.3d at 461-62.

A. <u>The Court will address the stated issues for appeal in turn.</u>

I. "Did the Agency/Hearing Officer Err by Concluding that 'Temporary Display/Possession' Constituted a 'Change to Production Plan' and a 'Change in Location of Production Facility'?"

The Petitioner argues that "[t]he discipline against Ultra Health and the decision to uphold the discipline were not supported by substantial evidence and were not in accordance with law." In support, the Petitioner first argues that the Petitioner did not engage in production outside of its

secured production facility (within the terms of the Department rule 7.34.4.8 NMAC) because it "did not transport its drying/curing room, its extraction equipment, its trimming machine, its curing equipment, or its light and water infrastructure to State Fair premises, and Ultra Health personnel did not do any drying of cannabis plant parts, any extraction, or any trimming on State Fair premises." Statement of Review Issues ("Statement") at 4. The Petitioner next contends that, because the plant that was transported to the State Fairgrounds was not flowering, and because Ultra Health did not transport usable cannabis to the State Fairgrounds, it did not engage in "production" for purposes of the Department's rules.

As a general rule, courts will not construe a statute "to defeat its intended purpose or to achieve an absurd result", but rather, they interpret statutes "in order to facilitate their operation and the achievement of their goals." *Padilla v. Montano*, 1993-NMCA-127, ¶ 23, 116 N.M. 398, 403 (internal citations omitted). To adopt the Petitioner's argument concerning the meaning of "production" would both defeat the statute's evident purpose and achieve an absurd result. The Lynn and Erin Compassionate Use Act at NMSA 1978, § 26-2B-7 requires that the Department of Health "develop a distribution system for medical cannabis that provides for: (a) cannabis production facilities within New Mexico housed on secured grounds and operated by licensed producers...." According to the Petitioner's reasoning, the statutory requirement that production must occur within secured grounds only becomes effective when a plant has flowers. Neither the statute nor the rule express an intention to lessen security requirements applicable to non-budding cannabis plants (i.e., immature plants or "seedlings"); and as the hearing officer concluded, there is "no viable basis" in the law for distinguishing security requirements for cannabis plants based on whether the plants possess flowers. UH000030.

The Petitioner complains that the word "production" is not defined by rule. When a term is not defined in a statute, courts construe it according to its ordinary meaning, absent clear and express

legislative intention to the contrary. *State v. Tsosie*, 2011-NMCA-115, 150 N.M. 754. The hearing officer relied upon a definition from Merriam-Webster Dictionary, which defined "production" to mean "the act or process of producing; the creation of utility; especially, the making of goods available for use." The definition used is consistent with the ordinary meaning of production, and, contrary to the Petitioner's arguments, the use of the definition was reasonable and appropriate. The hearing officer concluded that "[c]learly, the production of medical cannabis for sale [to] medical cannabis patients is not limited to what happens with the plants after they reach maturity", and that "[p]roduction includes the entire process, a fact supported by the emphasis on the risks of survival when plants are outside the facility, as stated by Ms. Jenke." UH000030. The hearing officer thus rightly concluded that the evidence presented at the hearing, including the testimony of the Petitioner's witnesses, supported the Department's interpretation of the term "production" as it is used in the statute at NMSA 1978, § 26-2B-7(A)(6)(a). The Court affirms the Agencies decision in this regard.

II. "Was DOH's Suspension of Ultra Health Arbitrary, and Did the Hearing Officer Err by Disregarding Evidence of Arbitrariness?"

Although Ultra Health removed only one 3 1/2 foot cannabis plant to the State Fair on this occasion, it was unrefuted at the hearing in this matter that Ultra Health stated in a press release that it intended to remove many more cannabis plants from its production facility in the future, and that it anticipated having a "sea of green" at the Fair in the future. UH000280, p. 102. Although the plant was at the Fair for only a matter of hours, the testimony further demonstrates that Ultra Health intended to display the plant at the Fair for the entire week of the Fair. UH000265, pp. 42-43. As the testimony demonstrated, Ultra Health also did not log the removal of the cannabis plant in the BioTrack software tracking system and did not generate a travel manifest to keep track of the plant. UH000280, p. 105. As the hearing officer also emphasized, Ultra Health's representatives never gave "any recognition ... that there may be a problem with simply removing a plant from a secure facility

in the context of a highly-regulated industry." UH000030. While it is clear that DOH and Ultra Health view the medical cannabis program differently, their differences cannot be expressed by violating the Departments rules regarding the handling of cannabis. While the Department showed lack of flexibility in its finding, it was not arbitrary as both rule and statute prohibited the display conducted by Ultra Heath in this case. The finding that the off-site display of the seedling was not arbitrary is upheld.

III. "Is the Suspension Inequitable and Disproportionate?"

Petitioner is a licensed non-profit producer of medical cannabis products. Petitioner has been licensed as a non-profit producer by the Department of Health pursuant to regulations set out at NMAC 7.34.4. In September 2016, Petitioner applied for and was awarded a display space at the New Mexico State Fair. Part of Petitioner's display at the Fair was a single specimen, a seedling, of the plant species *cannabis sativa*. A seedling is a cannabis plant that has no flowers. 7.34.4.7 NMAC.

The Department of Health ("DOH") alleged that Petitioner's display of the plant specimen at the State Fair constituted a "change of location of a non-profit producer's production or distribution facilities," constituted a "substantial change to a private entity's production plan or distribution plan," that the "removal of a cannabis plant to an off-site location constituted both a change of location for the non-profit producer's production and substantial change to the entity's production plan," and that Petitioner failed to inform DOH of the changes. DOH then imposed the disciplinary action of "suspension of all sales and distribution by New Mexico Top Organics–Ultra Health for a period of five days". In addition, DOH fined Petitioner $100.00. The September 2016 letter attached indicates suspension of all sales and distributions, not simply retail sales. While the decision to suspend was appropriate the suspension itself was inequitable and disproportionate.

NMAC 7.34.4.24 governs "Disciplinary Actions and Appeal Process." Under that section, the target of discipline by DOH may request a hearing before a hearing examiner to appeal the

proposed discipline (NMAC 7.34.4.24), the hearing examiner holds a hearing at which the non-DOH party must bear the burden of proof (7.34.4.24(G-L)), the hearing examiner makes a "written recommendation of action to be taken by the secretary" (7.34.4.24(O)), and the Secretary of Health issues a final decision "accepting or rejecting the hearing examiner's recommendation (7.34.4.24(O)).

DOH has asserted that Ultra Health displayed a medical cannabis seedling specimen at the State Fair while the Fair was in session and while watched over by Ultra Health representatives. DOH asserts that by doing this, Ultra Health failed to inform DOH of a "change of location of a non-profit producer's production or distribution facilities" and failed to inform DOH of a "substantial change to a private entity's production plan or distribution plan" (Notice of Contemplated Action, page 2).

That is, DOH considers the display of a single medical cannabis seedling at the State Fair to constitute "production or distribution" and to constitute part of a "production plan or distribution plan." NMAC 7.34.4.8(J) states, "A licensed non-profit producer shall conduct its production operations at a single, physical location approved by the department". This section indicates that "production" means "production operations."

Upon full review, the question before this Court is whether the Department errored in its application of NMAC and the Department acted arbitrarily in its decision, to sanction Ultra Heath in the manner provided. The Court finds it did.

To begin, the following findings from the Hearing Officer's report, and later incorporated in the final Order, are accepted and incorporated. The Report reads in relevant part:

> The limitations on the licensed nonprofit producers of medical cannabis must be taken seriously, and considered in the wider context of the MCP's regulations. In particular, in analyzing the issues presented by this case, it is important to consider the following for retail sales for a week:
>
> - The regulations envision and require a secure production facility in which a set

number of medical cannabis plants will be grown;

- The regulations include no provisions allowing licensed non-profit producers to remove plants while the plants are growing, and prior to harvesting them;

and

- There is nothing in the regulations to support the idea that plants may be removed from the secured production facility during production for educational or promotional purpose.

The Court also accepts and incorporates the following Findings of Fact:

1. The Appellant, New Mexico Top Organics-Ultra Health and Ultra Health, Inc., is a nonprofit corporation that is licensed by the Appellee New Mexico Department of Health Medical Cannabis Program, to operate as a medical cannabis producer, to grow and distribute cannabis within the New Mexico Medical Cannabis Program for use by qualified patients. Hearing Record ("HR") (Kenny Vigil).

2. At all times material to this case, Ultra Health was approved by the Medical Cannabis Program to grow a maximum of 450 cannabis plants in a secured production facility located at 255 Camino Don Tomas in Bernalillo, NM, which approval was initially granted in November of 2014 when Ultra Health moved its production operations from Santa Fe, NM. HR (Vigil); DOH Exhibit Nos. 3, 4; Appellant's Exhibit Gat 2.

3. Ultra Health's approved production location utilizes a video/security system with 50 separate cameras positioned within the interior and perimeter of the facility, as well as motion detectors, ground sensors, glass breakage alarms, and on-site personnel, and a security monitoring company that notifies local law enforcement in the event of an alarm. DOH Exhibit No. 3 at 5; Appellant's Exhibit Gat 4-5.

4. Ms. Jenke testified that Ultra Health displayed the cannabis plant at the State Fair for approximately seven hours on September 8, 2016. HR (Jenke).

5. Mr. Salgado testified that the proposed five-day suspension of Ultra Health's sales and distribution could result in financial loss to the company, and that Ultra Health ordinarily makes between $100,000 and $150,000 in revenue in a five-day timespan. HR (Salgado).

6. No citations were issued and no arrests were made by law enforcement related to the removal of the cannabis plant to the State Fair. HR (Jenke, Salgado).

7. Ultra Health contends that the word "production" is not defined by Department rule and that it therefore could not anticipate that the approved production plan would limit where it could transfer or possess cannabis plants.

The Court finds that in implementing a five day closure the Department acts arbitrarily, capriciously and not in accordance with the law (1-075R) as to both its sanction as petitioner and its

obligation to the patients.

Patients typically do not have available funds to make a 10-day purchase or a bulk purchase. Thus, the closure of the business would directly impact patients. *Id.* Further, the amount of medical product a patient can purchase is capped as is the production quota of Petitioner. Because of this cap, patients cannot make a bulk purchase prior to closure and there is irreparable injury to the Petitioner for the loss of sales and to the patient.

NM Top Organics prepare a specific product for specific patients. The sanction of closing the retail part of the business is in essence a fine equal to $100,000 to $150,000. See Finding of Facts above. This is grossly disproportionate to the ($100) fine for a first penalty. 7.34.3.23 The loss is compounded by a consecutive five day closure because (1) the production and sale of medical cannabis is on a schedule; and (2) even if all of the retail business was diverted to wholesale, this would result in a loss profit of 50%. Therefore, inventory unsold during the closure period could be lost. If that inventory is diverted to wholesale, the economic impact is irreparable.

As stated:

> The Plaintiff charterers will have their businesses severely disrupted, absent travel agencies to provide them passengers on the charters, and will likely close their business if faced with the possibility of third degree felonies and other significant administrative fines and penalties for minor infractions. Aral Aff. ¶ 6. As Ms. Aral states in her sworn affidavit, "[m]y company, my employees, and I will live under the immediate threat of criminal prosecution ... if the company violates 'federal law restricting or prohibiting commerce with terrorist states,' including OFAC regulations. Even minor errors of law may constitute OFAC violations, including allowing even inadvertently, a passenger to take travel with excess luggage or with the wrong license or someone who has traveled more than one time in three years as a Cuban–American visiting relative." Aral Aff. ¶ 6(a). Moreover, even if Ms. Aral and the company were willing to live with this unreasonable threat of criminal prosecution for even minor infractions, the economic harm resulting from the Travel Act will cause severe hardship and possibly result in closure of the business. As Ms. Aral states in her Affidavit, "[b]ecause the legislation does not specify the terms that may limit the exposure under the bond my bonding company has stated it is not willing to provide the bond until the limits of its obligations are established." Aral Aff. ¶ 6(b).

ABC Charters, Inc. v. Bronson, 591 F.Supp.2d 1272, 1307–08 (S.D.Fla., 200).

Ultra Health has several dispensaries. However in rural parts of the State, it is the only

dispensary. Therefore, patient choice for healthcare and access is limited and restricted by the Department's order to shut the business. Finally, Ultra Health runs a large operation that serves 300 patients.

It is now clear that Petitioner will not prevail on the merits of their appeal regarding the Department's determination that moving a "seedling" for display at the State Fair did not violate a rule or statute. The Court certainly agrees the Department has a justified purpose in ensuing seedlings that are part of a capped inventory are not marketing ploys but medicine. Top Organics decision to display the seedling was at the very best misguided and the Department is rightly concerned. While the display was promptly removed the record shows Top Organics intended a longer display.

That said, the Court finds that the Petitioner prevails on the merits of their argument that the sanction imposed is excessive, arbitrary and without much support in law or regulation.

Again, the Court reviewed the findings of the Agency in an effort to determine the basis for the sanction imposed, namely closing the business for a week. Below are the relevant findings by DOH:

> The Appellant has argued that the proposed 5-day suspension period is inconsistent with past DOH actions concerning discipline of licensed nonprofit medical cannabis producers, citing Appellant's Exhibits K through N.
>
> However, Program management has changed since the dates of the violations cited, and it is apparent that there is no precedent for the removal of a cannabis plant from an approved secure production facility for a promotional event.
>
> Considering the significance of the violation, considering the change in management of the Medical Cannabis Program, and considering the Department's significant interest in enforcing program rules, the proposed disciplinary action is appropriate.
>
> The Appellant has raised certain Constitutional arguments in a written motion to dismiss and in closing arguments, contending that the Department has violated the Appellant's Constitutional rights by 1) requiring that the Appellant bear a burden of proof pursuant to 7.34.4.24(L) NMAC, and 2) by not providing a "post-deprivation hearing".
>
> There is scant support under 7.34.4.24 for such a punitive fine. As applied, the fine or

monetary sanction by closure is one thousand times that allowed under 7.34.4.24B. The Department appears to have administered such a severe sanction due to "the significance of the violation" and "considering the change in the Medical Cannabis Program." The Court could not find anything in the record, the NMAC or the statute supporting such a sanction based on "changes in the Medical Cannabis Program." As to the significance of the violation, again the Court agrees the Department should be concerned with Petitioners actions. The Department is right to want to ensure that cannabis is treated as a medicine under the Act and not a road show prop. That said, accepting the Department's finding, the seedling was in a secure box for a period of 7 hours only before they left the State Fair. There was no citation issued and nothing to show that the seedling was distributed or sold or that usable cannabis was involved. See 7.34.4.23(7). While it was a violation it was not significant and the fact that the basis for the punishment was arbitrary, capricious and lacks foundation, in the NMAC.

The Court would be concerned with this prong if it appeared from the facts of this case that Petitioner was attempting to divert its inventory of medical cannabis for distribution at locations not "designated by the department." See NMSA 26-2B-7. The Court assumes other licensees have a better sense than to take their product on the road to the State Fair. The Court hereby reverses and remands to the agency on this appellate issue.

IV. "Did the Hearing Officer Err by Focusing on Ultra Health's State of Mind?"

The Petitioner claims that the hearing officer erred by making findings regarding the reasonableness of Ultra Health's conduct. For example, in Conclusion of Law no. 22, the hearing officer stated that "[t]he Appellant's interpretation of Department rule and statute is unreasonable; and given the content of the statute and Department rule, it would be apparent to a reasonable person that this was not a correct interpretation or application of Department rule." UH000039. The hearing officer's discussion of reasonableness related to Ultra Health's arguments concerning the meaning of

the rule, and specifically, its argument that the rule did not require that it ensure the security of the plant or contact the Department before transporting it to the State Fair. The hearing officer's findings concerning the reasonableness of Ultra Health's actions repudiate Ultra Health's argument, continued in this appeal, that the case concerns a "regulatory gap", and further illustrate the flagrant nature of Ultra Health's violation. Based on the findings of the hearing officer, Ultra Health knew or should have known of its legal obligations under rule and statute, a subject that was at issue at the hearing and relevant to the decision.

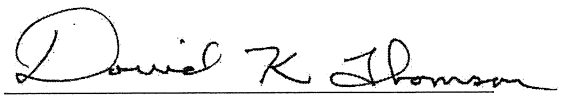
Thus the Court DENIES appellant's appeal and AFFIRMS the agency as to Appellants I, II and IV and GRANTS appellant's appeal and REVERSES and remands to the Department on Issue III.

THE COURT ORDERS:

1. In accordance with Rule 1-075 the agency decision as described in Issue III is reversed.

2. The Department sanction Orders the Closure of Top Organics Ultra Health for a period of April 17 to April 21, 2017 forward is vacated and the five day suspension is reduced to 2 days. The suspension may be over eight weeks with one-half day closure or full day closure at appellant's discretion, upon notice to the Department for verification.

SO ORDERED.



DAVID K. THOMSON
DISTRICT COURT JUDGE
5MIX

CERTIFICATE OF SERVICE

I certify that I served the foregoing document on the following person(s) via the New Mexico E-Filing system, which caused the following counsel of record to be served electronically as more fully reflected in the notice of filing:

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