STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
RIO RANCHO PHYSICAL THERAPY
TO DENIAL OF REFUND ISSUED ON JULY 5, 2018

v. **Case Number 18.12-318R**
D&O 19-23

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER GRANTING SUMMARY JUDGMENT

A summary judgment hearing on the above-referenced protest occurred on April 22, 2019, before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Staff Attorney, Mr. Kenneth E. Fladager, Esq., appeared representing the Taxation and Revenue Department ("Department"). Mr. Robert B. Kenney, CPA, appeared representing Rio Rancho Physical Therapy ("Taxpayer") and was accompanied by Mr. Steven Bartlett (Axiom CPAs and Business Advisors, LLC).

The matter came before the Hearing Officer on New Mexico Taxation and Revenue Department's Motion for Summary Judgment (hereinafter "Motion") filed on February 5, 2019 and Taxpayer's Response to New Mexico Taxation and Revenue Department's Motion for Summary Judgment and Taxpayer's Motion for Summary Judgment (hereinafter "Cross Motion") filed on February 26, 2019.

The Department's Motion and Taxpayer's Cross Motion presented brief statements of facts that were principally undisputed. The Hearing Officer also took administrative notice of the separate protest from which the current protest arises: In the Matter of the Protest of Rio Rancho Physical Therapy to Denial of Refund issued under Letter ID No. L2056683056 (2017).

Based on the undisputed facts, the Hearing Officer finds that the Department is entitled to

summary judgment because: (1) Taxpayer's request was not preserved nor properly asserted; and (2) Taxpayer was not the prevailing party in the underlying protest. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On August 22, 2016, Taxpayer filed an Application for Refund claiming an overpayment of Gross Receipts Taxes in the amount of $47,691.76 (hereinafter "2016 Application"). [Taxpayer's Cross Motion, Ex. 1]

2. On October 3, 2016, the Department denied Taxpayer's 2016 Application under Letter ID No. L2056683056 stating as its basis, "you failed to provide the requested documentation to support the refund to be granted." [Taxpayer's Cross Motion, Ex. 2.1]

3. On December 26, 2016, Taxpayer submitted a protest of the denial of its 2016 Application. The protest was received in the Department's Protest Office on December 28, 2016. [Administrative File in the Matter of Letter ID No. L2056683056]

4. On January 6, 2017, the Department acknowledged Taxpayer's protest of the denial of its 2016 Application under Letter ID No. L0237340976. [Administrative File in the Matter of Letter ID No. L2056683056]

5. On January 9, 2017, the Department requested a hearing on the protest of the denial of Taxpayer's 2016 Application with the Administrative Hearings Office. [Administrative File in the Matter of Letter ID No. L2056683056]

6. The Administrative Hearings Office held an initial scheduling hearing on March 3, 2017 and the parties thereafter engaged in various prehearing activities. [Administrative File in the Matter of Letter ID No. L2056683056]

7. On June 8, 2017, the Department moved for partial summary judgment. Taxpayer

responded on July 6, 2017. The Administrative Hearings Office held a hearing on the Department's motion on October 18, 2017. [Administrative File in the Matter of Letter ID No. L2056683056]

8. At the hearing on October 18, 2017, the Department, by and through its counsel stated his expectation that Taxpayer's 2016 Application would be approved if Taxpayer could provide some document to establish that Taxpayer was an eligible health care practitioner under NMSA 1978, Section 7-9-93. The parties agreed that a ruling on the pending motion should be reserved while the parties coordinated efforts to address that issue. [Administrative File in the Matter of Letter ID No. L2056683056 (Record of Hearing 10/18/2017)]

9. On March 30, 2018, the Department and Taxpayer jointly moved to hold the protest on the denial of the 2016 Application in abeyance. The parties indicated they had settled the issues underlying the protest. The request was granted on April 2, 2018. [Administrative File in the Matter of Letter ID No. L2056683056]

10. On April 9, 2018, the Department issued a refund to Taxpayer in the amount of $49,963.39 representing the entire amount claimed in the 2016 Application, plus accrued interest. [Taxpayer's Cross Motion, Ex. 4]

11. On April 9, 2018, Taxpayer withdrew its protest of the Department's denial of its 2016 Application. The Protest Withdrawal was filed in the Administrative Hearings Office on April 13, 2018. [Department's Motion, Ex. A]

12. At no time while the underlying protest was pending did Taxpayer explicitly demand costs or fees provided by NMSA 1978, Section 7-1-29.1. [Administrative File in the Matter of Letter ID No. L2056683056]

13. On June 4, 2018, Taxpayer submitted an Application for Refund seeking

$10,643.10 in costs and fees arising from, or associated with, the protest of the denial of its 2016 Application (hereinafter "2018 Application"). [Department's Motion, Ex. B]

14. Taxpayer's 2018 Application contended that the administrative costs claimed were incurred in pursuit of acquiring the refund subject of the 2016 Application, subject of the prior protest withdrawn on April 9, 2019. [Department's Motion, Ex. B]

15. The Department denied the 2018 Application by letter dated July 5, 2018. [Department's Motion, Ex. C].

16. On October 3, 2018, Taxpayer, by and through Mr. Wryan Capps, CPA, submitted a protest of the Department's denial of its 2018 Application. [Administrative File]

17. On November 5, 2018, the Department acknowledged Taxpayer's protest under Letter ID No. L0344641712. [Administrative File]

18. On December 14, 2018, the Department submitted a Hearing Request in which it requested a scheduling hearing on Taxpayer's protest. [Administrative File]

19. On December 14, 2018, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Hearing that set a hearing for January 11, 2019. [Administrative File]

20. On January 15, 2019, the Administrative Hearings Office entered a Scheduling Order and Notice of Motion Hearing. [Administrative File]

21. On February 5, 2019, the Department filed its Motion. [Administrative File]

22. On February 26, 2019, Taxpayer filed its Cross Motion. [Administrative File]

23. On April 19, 2019, Taxpayer filed Taxpayer's Substitution of Authorized Representative. [Administrative File]

24. On April 22, 2019, a hearing occurred on the Department's Motion and Taxpayer's Cross Motion. [Administrative File; Record of Hearing 4/22/2019]

DISCUSSION

The parties present competing motions on whether, under the unique facts of this protest, Taxpayer should be entitled to an award of costs and fees as the prevailing party in a *prior and separate* protest that was resolved and unconditionally withdrawn by Taxpayer.

In 2016, Taxpayer applied for a refund of gross receipts taxes. The request relied on NMSA 1978, Section 7-9-93 which affords a gross receipts deduction for certain receipts derived from services provided by health care practitioners. Taxpayer's application was denied "because [Taxpayer] failed to provide the requested documentation to support the refund to be granted." [Taxpayer's Cross Motion, Ex. 2] Taxpayer exercised its right to protest the Department's denial and the protest eventually came before the Administrative Hearings Office.

In that protest, the Department moved for partial summary judgment asserting Taxpayer was not eligible to claim a deduction under Section 7-9-93.[1] A hearing on the Department's motion occurred at which time the parties argued their competing positions on the law, but also expressed substantial optimism that the 2016 Application could still be approved, obviating the need for a ruling on the motion or further proceedings, if Taxpayer could provide additional documentation establishing its eligibility to that deduction.

The hearing officer concluded the hearing on the Department's motion specifying that a ruling on the legal issues presented would be reserved while the parties continued to exchange documents that might render the disputed legal issues moot.

Approximately five months later, the parties moved to place the protest in abeyance, explaining that the protest had indeed been resolved, but more time was required to finalize the

[1] The Department's legal position in the previous protest was substantially identical to the position it took in other contemporaneous protests involving the same deduction. *See e.g. In the Matter of the Protests of Golden Services Home Health and Hospice and Unnamed Nursing and Rehabilitation Center*, A-1-CA-36987.

settlement. The presiding hearing officer granted the motion and placed the protest in abeyance. Shortly thereafter, on April 13, 2018, the parties submitted a protest withdrawal executed by the Department's counsel of record and Mr. Steven Bartlett who signed as Taxpayer's representative. The withdrawal was unconditional and did not suggest that any issues had been left unresolved or outstanding. The protest of the denial of the 2016 Application was, therefore, closed.

Approximately two months later, Taxpayer submitted its 2018 Application for refund to the Department, this time seeking reimbursement of costs and fees incurred in the previously withdrawn protest. The Department denied the 2018 Application stating:

> Refund is Denied. Pursuant to Section 7-1-29.1 NMSA 1978, the taxpayer was not the prevailing party in the protest. The department had reasonably applied the law based on the facts of the case. The original refund claim was not valid at the time the denial was issued pursuant to Regulation 3.1.9.8 NMAC. The original claim did not contain information sufficient to allow for processing of the claim. The department advised the taxpayer and requested the missing information be provided within 10 days. The department denied the claim for refund when the information was not provided. This was a reasonable application of the law. Once the requested information was provided during protest, the refund was granted.
>
> [Administrative File; Department's Motion, Ex. C]

Taxpayer once again exercised its right to protest, which is the protest now before the Administrative Hearings Office.

The Department's legal argument in support of its Motion, which occupies no more than half a page, relies primarily on Regulation 22.600.3.13 (C) NMAC which provides:

> A properly executed withdrawal of protest satisfying the requirements of this section shall result in the closing of the protest and the administrative file as of the date of filing. If a withdrawal of protest is insufficient for any reason, the hearing officer may enter an order closing a protest after notice and opportunity to be heard regarding any deficiencies in the withdrawal.

The Department's legal argument makes no reference to Regulation 3.1.9.8 NMAC or the

stated reason for denying the 2018 Application.

In opposition, Taxpayer asserts that Regulation 22.600.3.13 (C) NMAC should not apply because "Taxpayer's properly executed withdrawal of the protest of Letter ID L2056683056 filed with the Administrative Hearings Office on April 13, 2018 did not withdraw Taxpayer's request for costs and fees because Taxpayer had not yet protested this issue until June 4, 2018."[2] *See* Cross Motion Pages 4 – 5.

Taxpayer also argues that it is entitled to summary judgment because it was the prevailing party in the previous protest, directly challenging the explicit basis for the denial of its 2018 Application. Having reviewed the competing arguments and having taken administrative notice of the administrative record in the prior protest, the Hearing Officer finds that the Department is entitled to summary judgment in its favor.

Summary Judgment Standard

Summary Judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to prevail as a matter of law. *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶7, 148 N.M. 713. In controversies involving a question of law, or application of law where there are no disputed facts, summary judgment is appropriate. *See Koenig v. Perez*, 1986-NMSC-066, ¶10-11, 104 N.M. 664.

Even if a nonmoving party does not file its own motion for summary judgment, summary judgment may be granted to the nonmoving party if there is no genuine dispute of fact, it is entitled to judgment as a matter of law, and the moving party was generally on notice of the nonmoving party's position. *See Martinez v. Logsdon*, 1986-NMSC-056, ¶12, 104 N.M. 479.

Consideration of Costs and Fees *After* a Protest Withdrawal

[2] The Administrative File demonstrates that the 2018 Application was denied on July 5, 2018. Taxpayer's protest of that denial then received by the Department's Protest Office on October 3, 2018.

The protest of the denial of the 2016 Application was resolved by mutual agreement of the parties and voluntarily withdrawn by Taxpayer without the need for any decision from the presiding hearing officer. Consistent with Regulation 22.600.3.13 (C) NMAC, the fully executed withdrawal closed the protest on the denial of the 2016 Application and no further action was taken. Cautious review of the protest withdrawal failed to reveal any intention to limit the scope of Taxpayer's withdrawal or preserve other issues that would have properly been addressed in that administrative proceeding, such as claims to costs and fees.

Nonetheless, whether Taxpayer may file a new protest for costs and fees assertedly due from a previously withdrawn protest, demands consideration of the applicable provision of the Tax Administration Act, recognizing that questions of statutory construction begin with the plain-meaning rule. *See Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶12, 149 N.M. 455, 250 P.3d 881. In *Wood*, the Court of Appeals stated "that the guiding principle in statutory construction requires that we look to the wording of the statute and attempt to apply the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Id.* A statutory construction analysis begins by examining the words chosen by the legislature and the plain meaning of those words. *See State v. Hubble*, 2009-NMSC-014, ¶13, 146 N.M. 70, 206 P.3d 579. Extra words should not be read into a statute if the statute is plain on its face, especially if it makes sense as written. *See Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-21, ¶27, 127 N.M. 120, 126, 978 P.2d 327, 333.

The plain language of NMSA 1978, Section 7-1-29.1 (A) advises that the award of costs and fees will arise in the proceeding in which they were incurred, not through a separate protest. The pertinent portions of Section 7-1-29.1 (A) explain, "*In an administrative proceeding … conducted in connection with the determination, collection or refund of a tax or the interest or*

penalty for a tax …, the taxpayer shall be awarded a judgment or a settlement for reasonable administrative costs and reasonable litigation costs and attorney fees *incurred in connection with the proceeding* if the taxpayer is the prevailing party." (Emphases Added)

The statute neither requires nor suggests that costs and fees should be the central issue in a separate, standalone protest representing the solitary issue for consideration. Instead, the issue is to be considered in the administrative proceeding "conducted in connection with the determination, collection or refund of a tax or the interest or penalty for a tax."

Taxpayer disputes this conclusion and directs the Hearing Officer's attention to a Fiscal Impact Report ("FIR") (Taxpayer's Cross Motion, Ex. 5) discussing House Bill 64 of the 46th Legislature of the State of New Mexico (First Session – 2003) where the Department's analyst stated, "In a case where the Department concedes even a portion of its initial case, the protester could apply for attorney's fees, which will be, in turn, subject to a separate protest hearing."

However, the FIR does not insinuate that costs and fees should be subject of *a separate protest*, only that the consideration of the issue might require a *separate hearing*, similar to what occurred in *Helmerich Payne Int'l Drilling Co. v. N.M. Taxation & Revenue Dep't*, No. A-1-CA-36478, 2019 N.M. App. LEXIS 84 (Ct.App.June 27, 2019) in which a hearing was conducted for the single purpose of determining whether the taxpayer was entitled to relief under the statute after all other disputed issues arising in the same protest had been resolved.

The Court in *Helmerich* contemplated the same FIR and observed that the Administrative Hearings Office retains jurisdiction over a protest until the protest is fully resolved, citing 20 Am. Jur. 2d *Courts §* 95 (2019). It said, "[O]nce a court has acquired jurisdiction of a case, its jurisdiction continues until the . . . cause is finally determined or disposed of, or is resolved, subject to appellate review, that is, all the issues of fact and law are determined and a final

judgment is entered."). *See Helmerich*, No. A-1-CA-36478, 2019 N.M. App. LEXIS 84, at *8-9.

As observed in *Helmerich*, the Administrative Hearings Office retained jurisdiction to consider costs and fees *in that protest* because that issue remained after all others were resolved. In fact, the taxpayer in *Helmerich* made *several* prior written demands in its protest for costs and fees which continued to remain outstanding even after the Department abated its assessment.

In contrast, the administrative file in the matter of Letter ID No. L2056683056 revealed no such prior demands for costs and fees arising in that protest. Unlike the facts in *Helmerich*, Taxpayer withdrew its protest knowing that the withdrawal would conclude its protest and the Administrative Hearings Office would close the file and take no further action, consistent with Regulation 22.600.3.13 (C) NMAC. The withdrawal was abundantly clear and specified that the protest should be closed and did not even remotely suggest the possibility of outstanding unresolved issues. Undoubtedly, at the time Taxpayer executed its protest withdrawal, it would have had all information necessary to assert a claim for costs and fees had that been its actual intention, but it did not do so.

There is other support for the conclusion that Taxpayer was not entitled to file a separate protest for costs and fees, when scrutinizing the procedure utilized by Taxpayer in this case. Taxpayer asserted its claim to administrative costs and fees by filing its 2018 Application under Section 7-1-26 which provides in relevant part:

> A. A person who believes that an amount of tax has been paid by or withheld from that person in excess of that for which the person was liable, who has been denied any credit or rebate claimed or who claims a prior right to property in the possession of the department pursuant to a levy made under authority of Sections 7-1-31 through 7-1-34 NMSA 1978 may claim a refund[.]

There is no clear and unambiguous expression of legislative intent for any of those categories to include a "refund" of administrative costs and fees assertedly due under Section 7-1-29.1. Instead,

the statutory refund procedure is applicable only to: (1) tax paid or withheld in excess of a taxpayer's obligation; (2) denial of any credit or rebate claimed; and (3) claims of a prior right to property in the possession of the Department pursuant to a levy.

Therefore, there is no authority to utilize Section 7-1-26 for asserting a claim for costs and fees under Section 7-1-29.1, lending further support to the conclusion that the issue must be raised in the underlying protest, not through an application for refund, or through a protest denying such application, as occurred in this protest.

The Department is entitled to summary judgment.

Taxpayer's Cross Motion for Summary Judgment

Even if Taxpayer could establish the correctness of the procedure it employed for seeking costs and fees, which the Hearing Officer rejected in the prior section, Taxpayer would still not prevail. Taxpayer's claim for costs and fees relies heavily on NMSA 1978, Section 7-1-29.1 (A) which provides the following:

> In any administrative or court proceeding that is brought by or against a taxpayer on or after July 1, 2003 in connection with the determination, collection or refund of any tax, interest or penalty for a tax governed by the provisions of the Tax Administration Act, *the taxpayer shall be awarded a judgment or a settlement for reasonable administrative costs incurred in connection with an administrative proceeding with the department or the administrative hearings office* or reasonable litigation costs incurred in connection with a court proceeding, if the taxpayer is the prevailing party.
>
> (Emphasis Added)

As Taxpayer correctly points out, the word "shall" directs that the provision is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. However, assuming for the sake of argument that Taxpayer is "the prevailing party" as that term is used in Section 7-1-29.1 (A), the mandatory "shall" does not

necessarily guarantee entitlement to costs and fees because Taxpayer may not read Section 7-1-29.1 (A) in isolation from subsequent provisions of the statute.

Section 7-1-29.1 (C) (2) afterwards declares that "the *taxpayer shall not be treated as the prevailing party if*, prior to July 1, 2015, the department establishes or, on or after July 1, 2015, *the hearing officer finds that the position of the department in the proceeding was based upon a reasonable application of the law to the facts of the case*." (Emphases Added)

Taxpayer's Cross Motion omits any reference to Section 7-1-29.1 (C) (2), and Taxpayer's representative seemingly took offense during the hearing when the Hearing Officer inquired about its potential application, stating "I don't believe that the Department's motion for summary judgment … even speaks to that. So, I don't know if the … if, Mr. [Hearing Officer], are you making the case for the Department?" [Record of Hearing dated 4/22/19 – 00:33:36 – 00:33:49]

Although it is accurate that neither party attributed any significance to Section 7-1-29.1 (C) (2), it was Taxpayer who asserted its status as the prevailing party. Providing an opportunity for Taxpayer to address the potential consequence of Section 7-1-29.1 (C) (2) to its claim, when it had not done so up to that point, was not only reasonable and fair, but necessary because the Hearing Officer is not at liberty to disregard a relevant provision of the law merely because a party has chosen to ignore or overlook its consequence.

It is a cardinal rule in construing statutes that the entire act be read together so that every provision may be considered in its relation to every other part. *See Winston v. N.M. State Police Bd.*, 1969-NMSC-066, ¶5, 80 N.M. 310, 454 P.2d 967; *See N.M. Pharm. Ass'n v. State*, 1987-NMSC-054, ¶8, 106 N.M. 73, 738 P.2d 1318 ("In interpreting statutes, we should read the entire statute as a whole so that each provision may be considered in relation to every other part")

The Hearing Officer's inquiry was not about "making the case for the Department." The

inquiry was about assuring Taxpayer's right to be heard on a relevant matter of law. In fact, the New Mexico Court of Appeals has acknowledged that hearing officers and judges may address law or facts that the parties may not have addressed. In *TPL, Inc. v. Taxation & Revenue Dep't,* 2000-NMCA-083, ¶19, 129 N.M. 539, 545, 10 P.3d 863, 869, rev'd on other grounds, 2003-NMSC-007, 133 N.M. 447, 64 P.3d 474, the court stated:

> What the hearing officer did in the case at bar is what we and what all other judges and hearing officers do every day; specifically, decide cases in accordance with the law and the facts as we view them. Neither judges nor hearing officers are limited word-for-word to the parties' arguments.

With respect to the application of Section 7-1-29.1 (C) (2), the Administrative Hearings Office was never required to rule on the legal issues arising in the previous protest, suggesting at the time the protest was withdrawn, that the parties resolved the protest exactly as they anticipated, with the exchange of additional documentation. Comments contained in the record of the hearing occurring on October 18, 2017 demonstrate that counsel for the Department was not merely optimistic, but practically certain that the protest could be resolved in the Taxpayer's favor so long as it could provide one or more documents that he suggested the parties later discuss off the record. [Administrative File in the Matter of Letter ID No. L2056683056 (Record of Hearing 10/18/2017 – 01:01:50 – 01:02:30)]

The refund denial from which the protest arises confirms, at least from the Department's perspective, that it was resolved consistent with the comments on the record of that hearing. It stated "[o]nce the requested information was provided during protest, the refund was granted."

These circumstances demonstrate a reasonable application of the law, particularly in reference to a requirement that a taxpayer satisfy its burden of establishing entitlement to its claimed deduction. It is well established that where a taxpayer's claim for relief relies on the application of an exemption or deduction, then "the statute must be construed strictly in favor of

the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and *the right must be clearly established by the taxpayer*." *See Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649 (internal citation omitted) (Emphasis Added); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-007, ¶9, 133 N.M. 447, 64 P.3d 474

This is precisely what occurred in the underlying protest. The Department determined that Taxpayer had not met its burden. Yet, it continued to work with Taxpayer until it was satisfied that Taxpayer established its entitlement to the refund subject of the 2016 Application, and thereafter issued a refund of the requested amount, plus accrued interest.

Taxpayer's Cross Motion should be denied because the fact that it was eventually awarded its full refund does not inevitably mean that it was also "the prevailing party" under Section 7-1-29.1 (C) (2). In fact, the Hearing Officer finds that the Department is also entitled to summary judgment under Section 7-1-29.1, because the position of the "[D]epartment in the [previous] proceeding was based upon a reasonable application of the law to the facts of the case[,]" particularly with respect to the burden that rests on taxpayers to clearly establish the right to a deduction. *See Wing Pawn Shop*, 1991-NMCA-024, ¶16; *TPL, Inc.*, 2003-NMSC-007, ¶9; *See e.g.* Regulation 3.1.9.8 NMAC. Although the Department did not specifically move for relief on such basis, *Martinez v. Logsdon*, 1986-NMSC-056, ¶12, 104 N.M. 479 is instructive because there is no genuine dispute of fact, the Department is entitled to judgment as a matter of law, and Taxpayer was generally on notice of the nonmoving party's position, as early as July 5, 2018, from the explanation the Department provided for denying Taxpayer's 2018 Application.

Taxpayer's protest should be DENIED.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest of the Department's denial of refund and jurisdiction lies over the parties and the subject matter of this protest.

B. A hearing was held within 90 days of Taxpayer's protest. *See* NMSA 1978, Section 7-1B-6 (D).

C. There is no genuine dispute as to any material fact and summary judgment is appropriate in this matter. *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶7, 148 N.M. 713.

D. NMSA 1978, Section 7-1-26 (2015) does not establish a procedure for asserting claims to administrative costs and fees incurred in administrative proceedings.

E. Taxpayer is not entitled to costs and fees under NMSA 1978, Section 7-1-29.1 because the position of the Department in the previously withdrawn proceeding was based upon a reasonable application of the law to the facts of the case. *See* NMSA 1978, Section 7-1-29.1 (C) (2).

F. Taxpayer is not entitled to assert through a separate and distinct protest a claim for costs and fees arising from another protest under NMSA 1978, Section 7-1-29.1.

For the foregoing reasons, Taxpayer's protest is DENIED.

DATED: September 13, 2019

Chris Romero
Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14-days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

On September 13, 2019, a copy of the foregoing Decision and Order Granting Summary Judgment was mailed to the parties listed below in the following manner:

First Class Mail *Interagency Mail*

INTENTIONALLY BLANK

John D. Griego
Legal Assistant
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502
PH: (505)827-0466
FX: (505)827-9732
john.griego1@state.nm.us