

1 **DANIELS, Justice.**

2 {1} In this case we address the due process considerations in professional
3 disciplinary proceedings under the New Mexico Uniform Licensing Act (ULA),
4 NMSA 1978, Sections 61-1-1 to -33 (1957) (as amended through 2003). Petitioner
5 appeals a licensing board order revoking his professional counseling license because,
6 among other things, he argues he was denied constitutionally protected due process
7 when the licensing board failed to give him personal notice about the meeting where
8 the board considered the case against him and decided to revoke his license. Because
9 New Mexico precedent already sufficiently addresses the due process requirements
10 applicable in administrative adjudications, we issue this nonprecedential Decision
11 pursuant to Rule 12-405(B)(1) NMRA reversing the Court of Appeals, vacating the
12 board's final order, and remanding to the board for further proceedings consistent with
13 this Decision.

14 **I. BACKGROUND**

15 {2} Petitioner Homer Avalos, a licensed mental health and substance abuse
16 counselor, was the subject of a 2010 New Mexico Counseling and Therapy Practice
17 Board (Board) complaint in which a sixteen-year-old female client (Client) alleged
18 that he sexually assaulted her during a visit to his home office in Chaparral, New
19 Mexico, during the late evening of September 24, 2007.

1 {3} It is undisputed that sometime during the early evening of September 24, 2007,
2 Client's mother called Avalos to ask him to perform a urinalysis test for Client, who
3 was supposed to check in with her juvenile probation officer the following morning,
4 in order to demonstrate that Client had not been using drugs. Later that evening,
5 Client went to Avalos's home office, accompanied by her older sister, to provide a
6 urine sample for testing.

7 {4} The remaining facts are disputed and were addressed in the witnesses'
8 conflicting testimony presented to a Board-appointed hearing officer during a two-day
9 hearing in August 2009. Client alleges that after she provided the urine sample,
10 Avalos took her to a room in the back of his house where he performed a so-called
11 "stress relaxation test." Client said that Avalos placed headphones and special glasses
12 or goggles on her head and then touched her on the arms, back, shoulders, and breasts
13 while asking her to respond to various questions. Client said that Avalos smelled like
14 alcohol and that, even though she was wearing the special glasses, she saw Avalos
15 pull up his pants and heard him adjust or fasten his belt buckle. Client's sister
16 testified that she waited in another room during the procedure. The sister said that at
17 one point she walked into the back room and saw Client sitting in a chair and Avalos
18 kneeling beside her with his pants unbuckled and his hand on Client's breast. The
19 sister also said Avalos smelled of alcohol.

1 {5} When Client's mother heard what happened she called 911 to report the alleged
2 assault. An officer dispatched to Avalos's house on the same night observed that
3 Avalos smelled like alcohol, appeared extremely nervous, slurred his speech, and had
4 bloodshot eyes. Avalos denied performing a stress relaxation test on Client;
5 discussing stress with her; having sexual contact with her; or having consumed
6 alcohol, claiming he had been drinking nonalcoholic beer.

7 {6} Although criminal charges were never filed, in March 2009 the Board issued
8 a notice of contemplated action (NCA) related to the September 2007 encounter and
9 charging, among other matters not relevant to this appeal, that in the September 2007
10 encounter Avalos sexually assaulted Client.

11 {7} On August 18 and 19, 2009, a Board-appointed hearing officer held a hearing
12 where Avalos appeared and was represented by counsel. After hearing the live
13 testimony of eight witnesses and Client's video-recorded deposition testimony, the
14 hearing officer filed a report which included detailed summaries of the testimony of
15 the nine witnesses but did not set forth the hearing officer's findings of fact as
16 required by Section 61-1-7(A). The report did contain a statement specifically noting
17 the hearing officer's "impression that the evidence of sexual touching is insufficient
18 to reach a preponderance in this case."

19 {8} On October 22, 2009, two weeks after filing his report, the hearing officer filed

1 an addendum containing twenty-two findings of fact. The addendum did not indicate
2 any changes to the hearing officer’s original report. On the same day, the Board
3 issued a public notice of a special Board meeting on November 3, 2009, to discuss
4 Avalos’s case. Neither Avalos nor his attorney received personal notice, and they did
5 not attend the meeting, at which the Board discussed and decided Avalos’s case.
6 Following the hearing, the Board entered a written order substantially adopting the
7 hearing officer’s findings of fact (amending only one finding) and making, in addition,
8 twenty-nine findings of fact and eleven conclusions of law including the conclusion
9 “that there is a preponderance of the evidence to support the allegations [Client]
10 brought forth” against Avalos. The Board ordered that Avalos’s license be revoked,
11 that he pay a fine of \$2,500, and that he pay \$1,632.38 in costs associated with the
12 disciplinary proceedings.

13 {9} Avalos appealed the Board’s order to the district court. The district court
14 affirmed on the basis of “substantial evidence in the record.” Avalos appealed the
15 district court’s decision to the Court of Appeals, which affirmed in an unpublished
16 memorandum opinion. *See Avalos v. N.M. Counseling & Therapy Practice Bd.*, No.
17 30,611, mem. op. at 25 (N.M. Ct. App. Mar. 23, 2012) (nonprecedential). We granted
18 certiorari to review the Court of Appeals memorandum opinion. *See Avalos v. N.M.*
19 *Counseling*, 2012-NMCERT-005, 294 P.3d 446.

1 **II. DISCUSSION**

2 {10} Avalos argues that the Board violated his constitutional due process rights by,
3 among other things, failing to provide a meaningful hearing and procedures to ensure
4 a reliable determination of the facts underlying the charges. Avalos also argues that
5 the Board’s final order is unsupported by substantial evidence because the Board
6 made a contrary determination on the basis of the same testimony the hearing officer
7 heard, disregarding the hearing officer’s determination that there was insufficient
8 evidence to support the allegation that Avalos sexually assaulted Client. Drawing a
9 comparison between relevant provisions of the ULA and the New Mexico rules
10 governing attorney discipline, Avalos relies on New Mexico caselaw involving
11 attorney discipline, including *In re Bristol*, 2006-NMSC-041, ¶ 16, 140 N.M. 317, 142
12 P.3d 905, to argue that the hearing officer’s findings of fact concerning the alleged
13 sexual assault were entitled to deference from the Board.

14 {11} We agree that the Board violated Avalos’s constitutional due process rights by
15 failing to give him personal notice of its November 2009 meeting. Because we
16 determine that the Board’s resulting order must be vacated in its entirety, we do not
17 address Avalos’s remaining claims, which relate to specific portions of the order.

18 **A. Standard of Review**

19 {12} “[This Court] review[s] questions of constitutional law and constitutional rights,

1 such as due process protections, de novo.” *N.M. Bd. of Veterinary Med. v. Riegger*,
2 2007-NMSC-044, ¶ 27, 142 N.M. 248, 164 P.3d 947.

3 **B. The Board Violated Avalos’s Procedural Due Process Rights**

4 {13} The Board provided personal notice to Avalos about its contemplated
5 disciplinary action. The Board also gave Avalos personal notice about the scheduled
6 hearing on the matter before a Board-appointed hearing officer. However, the Board
7 did not provide personal notice to Avalos about the November 2009 meeting where
8 the Board met to consider his case and revoke his license. Therefore, Avalos argues
9 that the Board violated his due process rights by revoking his license without
10 extending the benefit of a meaningful hearing and procedures to ensure a reliable
11 determination of the facts underlying the charges against him. We agree.

12 {14} Avalos maintains that he did not receive notice of the November 2009 meeting
13 where the Board ultimately decided to revoke his license. The issue was also before
14 the Court of Appeals, which held that the Board did not violate the notice
15 requirements of NMSA 1978, Section 10-15-1(D) (1999), of the Open Meetings Act
16 by publishing notice of the meeting in a newspaper of general circulation twelve days
17 prior to the meeting instead of providing Avalos personal notice. *See Avalos*, No.
18 30,611, mem. op. at 8, 16 (“Avalos had already been afforded notice and an
19 opportunity to be heard based on the requirements of the ULA, and we conclude that

1 there was no additional notice requirement based on the Open Meetings Act.”). Thus,
2 we review whether the Board violated Avalos’s due process rights when it failed to
3 provide him personal notice of the November 2009 meeting.

4 {15} The United States and New Mexico Constitutions protect citizens from
5 deprivation of liberty and property without due process of law. *See* U.S. Const.
6 amend. XIV, § 1 (providing, “[N]or shall any State deprive any person of life, liberty,
7 or property, without due process of law.”); N.M. Const. art. II, § 18 (providing
8 similarly that “[n]o person shall be deprived of life, liberty or property without due
9 process of law”). We have long recognized that “professional licenses are considered
10 protected property interests” and therefore that they are subject to due process
11 protections. *See Mills v. State Bd. of Psychologist Exam’rs*, 1997-NMSC-028, ¶ 14,
12 123 N.M. 421, 941 P.2d 502. “Procedural due process requires notice and an
13 opportunity to be heard prior to a deprivation of a protected liberty or property
14 interest.” *Id.*

15 {16} “In general, the right to due process in administrative proceedings contemplates
16 only notice of the opposing party’s claims and a *reasonable* opportunity to meet
17 them.” *Albuquerque Bernalillo Cnty. Water Util. Auth. v. N.M. Pub. Regulation*
18 *Comm’n*, 2010-NMSC-013, ¶ 28, 148 N.M. 21, 229 P.3d 494 (internal quotation
19 marks and citation omitted). “[D]ue process is flexible in nature and may adhere to

1 such requisite procedural protections as the particular situation demands.” *Id.*
2 (internal quotation marks and citation omitted). “Due process does not require the
3 same form of notice in all contexts; instead, the notice should be ‘appropriate to the
4 nature of the case.’” *Maso v. State Taxation & Revenue Dep’t, Motor Vehicle Div.*,
5 2004-NMSC-028, ¶ 10, 136 N.M. 161, 96 P.3d 286 (quoting *Mullane v. Cent.*
6 *Hanover Bank & Trust*, 339 U.S. 306, 313 (1950)). “Actual notice is not required, so
7 long as the notice given is ‘reasonably calculated, under all the circumstances, to
8 apprise interested parties of the pendency of the action and afford them an opportunity
9 to present their objections.’” *Id.* (quoting *Mullane*, 339 U.S. at 314)). “[B]ut when
10 notice is a person’s due, process which is a mere gesture is not due process. The
11 means employed must be such as one desirous of actually informing the absentee
12 might reasonably adopt to accomplish it.” *Uhden v. N.M. Oil Conservation Comm’n*,
13 1991-NMSC-089, ¶ 9, 112 N.M. 528, 817 P.2d 721 (quoting *Mullane*, 339 U.S. at
14 315). Under certain circumstances involving administrative adjudications, this Court
15 has recognized the inadequacy of “notice by publication to those whose identity and
16 whereabouts [are] ascertainable from sources at hand.” *Id.*

17 {17} Because the Board designated a hearing officer to preside over the initial
18 hearing, which Avalos did have an opportunity to participate in, the Board did not
19 meet to consider the evidence and reach a final decision in the matter until eleven

1 weeks later, after the hearing officer prepared a written report. Rather than provide
2 Avalos personal notice of the meeting where the Board would address his case and
3 decide whether to revoke his license and on what grounds, the Board issued a public
4 notice announcing a “Special Board Meeting” to discuss and consider Avalos’s case.
5 At the meeting, without any input from Avalos or his counsel, the Board made its
6 numerous findings and conclusions in addition to the findings and conclusions made
7 by the hearing officer. Specifically, the Board concluded that a preponderance of the
8 evidence supported the sexual assault allegation even though the hearing officer
9 specifically made a contrary determination. Ultimately the Board decided at the
10 November 2009 meeting to revoke Avalos’s license. Neither Avalos nor his counsel
11 was present, and therefore Avalos was unable to challenge the bases for the Board’s
12 additional findings or ensure that the Board adhered to ULA procedures for making
13 a decision based on the contents of the hearing officer’s report.

14 {18} There is no doubt about the adjudicatory nature of the Board’s action in this
15 case. Avalos faced the deprivation of his professional license if the Board found
16 substantial evidence to justify the action; the Board’s decision pertained only to
17 Avalos; his whereabouts were known to the Board, and he was immediately affected
18 by the Board’s decision. *See Uhden, 1991-NMSC-089* (observing that an
19 administrative action is an adjudication where the agency action (1) could only be

1 justified upon a showing of substantial evidence by the party seeking the action, (2)
2 was not of general application but rather pertained to a limited area, and (3)
3 immediately affected a limited number of identifiable persons). Avalos was entitled
4 to personal notice of the date, time, and location of any meeting at which the Board
5 would decide to suspend or revoke his license. *See id.* ¶ 13 (holding that, in an
6 administrative adjudication, if a party’s identity and whereabouts are known or
7 ascertainable, due process requires notice “by personal service to such parties whose
8 property rights may be affected as a result” of the adjudication); *cf. Franco v.*
9 *Carlsbad Mun. Schs.*, 2001-NMCA-042, ¶¶ 6, 14, 130 N.M. 543, 28 P.3d 531
10 (holding that a school district deprived its employee of procedural due process when
11 it gave the employee a written termination notice and a copy of the state regulations
12 on termination but did not tell him he had the right to present evidence at a special
13 school board meeting, planned for that evening, at which the employee’s final
14 termination would be voted on), *recognized by this Court in Lobato v. N.M. Env’t*
15 *Dep’t*, 2012-NMSC-002, ¶ 13, 267 P.3d 65. Notice by publication was insufficient
16 in this case.

17 {19} “[A]ctions to terminate [a constitutionally protected] right must be conducted
18 with scrupulous fairness.” *Ronald A. v. State ex rel. Human Servs. Dep’t*, 1990-
19 *NMSC-071*, ¶ 3, 110 N.M. 454, 797 P.2d 243 (1990) (“Procedural due process

1 requires notice to each of the parties of the issues to be determined and opportunity
2 to prepare and present a case on the material issues.” (internal quotation marks and
3 citation omitted)). The Board “could have informed [Avalos] of the date of the Board
4 meeting . . . and allowed him sufficient . . . opportunity to address the Board, . . . a
5 process which would have provided him with a meaningful opportunity to challenge
6 the grounds for [revocation].” *Franco*, 2001-NMCA-042, ¶¶ 19-20.

7 {20} Thus, the Board violated Avalos’s due process rights by failing to give Avalos
8 personal notice of the date, time, and location of its adjudicative meeting, and its
9 resulting order must be vacated in its entirety, without prejudice to any further action
10 the Board may take on remand. Because of our resolution, it is unnecessary to address
11 the remaining issues raised by Avalos or discussed by the Court of Appeals, including
12 the circumstances in which the Board may deviate from findings made by a hearing
13 officer and the extent to which it must document for judicial review its reasons for
14 doing so.

15 **III. CONCLUSION**

16 {21} The Board failed to adhere to procedures that would allow a meaningful hearing
17 and a reliable determination of the facts underlying the charges against Avalos.
18 Therefore, without prejudice to any further proceedings that may be conducted in
19 accordance with the requirements set forth in this Decision, we reverse the Court of

1 Appeals and the New Mexico Counseling and Therapy Practice Board and remand
2 to the Board for such further proceedings as it may deem appropriate.

3 {22} **IT IS SO ORDERED.**

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CHARLES W. DANIELS, Justice

6 **WE CONCUR:**

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PETRA JIMENEZ MAES, Chief Justice

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RICHARD C. BOSSON, Justice

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EDWARD L. CHÁVEZ, Justice

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MICHAEL E. VIGIL, Judge,
15 **sitting by designation**