

DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO
1437 Bannock Street
Denver, Colorado 80202

Plaintiff: COLORADO DEPARTMENT OF
REGULATORY AGENCIES

v.

Defendant: IMPAIRED PROFESSIONAL
DIVERSION PROGRAM d/b/a COLORADO
NURSE HEALTH PROGRAM, a Colorado
nonprofit corporation,

Counsel for Defendant:
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EFILED Document
CO Denver County District Court 2nd JD
Filing Date: Jul 1 2008 7:18AM MDT
Filing ID: 20464604
Review Clerk: Orathay Khiem

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Case Number: 2008 CV 5592

Div. Ctrm:

**DEFENDANT'S RESPONSE TO MOTION FOR TEMPORARY RESTRAINING
ORDER AND TO MOTION FOR PRELIMINARY INJUNCTION**

The Impaired Professional Diversion Program, d/b/a Colorado Nurse Health Program (CNHP), Defendant, by and through undersigned counsel, responds to the motion of the Colorado Department of Regulatory Agencies (DORA) for a temporary restraining order and for a preliminary injunction as follows:

DORA DOES NOT MEET THE REQUIREMENTS FOR THE RELIEF REQUESTED

DORA's motion states that it meets the requirements of Rule 65, C.R.C.P. and *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982)¹ necessary to support its motion. However, a

¹ Under Colorado law, a party is entitled to preliminary injunctive relief upon a showing that (1) there is a reasonable probability of success on the merits; (2) there is a danger of real, immediate, and irreparable injury

review of each of these requirements in light of the facts and law applicable to this case will show that DORA clearly does not meet the requirements for the relief it requests.

I. CNHP’s records are legally insulated from State control, so there is no reasonable probability of success on the merits

CNHP is a private, nonprofit Colorado corporation in good standing. It is not a state agency, nor does it have any contract with DORA.² Consequently, DORA has no legal basis on which to base its request that this Court to take any action with respect to CNHP’s files.

CNHP was created after the Sunset Review of the SBON in 1994. Before the Sunset Review, nurses with substance abuse or mental health issues were monitored by a committee of the SBON, called the Rehabilitation and Evaluation Committee, or REC. The Sunset Review found that the fact that the REC was part of the SBON “could be discouraging nurses from applying as they see it as part of the disciplinary process.” (1994 Sunset Review of the SBON, p. 17). Subsequently, CNHP was incorporated as a nonprofit Colorado corporation, a separate legal entity from the SBON, and CNHP was designated as the nurses’ diversion program for the state. The Board of Directors of CNHP was required to have the experience and credentials for “the committee” as defined in C.R.S. § 12-38-131 prior to January 1, 2008. Subsections of that statute which also show that CNHP is separate legal entity and that its records are insulated from State control or scrutiny include:

(4)(a) A licensee may apply to [CNHP] without being referred [to the SBON] for a violation of this article due to an addiction to or abuse of alcohol or drugs or due to a psychiatric, psychological, or emotional problem. . .

which may be prevented by injunctive relief; (3) there is no adequate remedy available at law; (4) granting a preliminary injunction would not disserve the public interest; (5) the balance of equities favors the injunction; and (6) the injunction would preserve the status quo pending trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982).

² See DORA’s Motion, p. 2, ¶1.

(6)(b)(I) Records of a proceeding pertaining to the rehabilitation of a licensee pursuant to the impaired professional diversion program shall be confidential *and shall not be subject to subpoena* except if a licensee has been referred to the [SBON] for disciplinary action by the committee.

(II) If the committee has determined that a licensee has been rehabilitated through the completion of the impaired professional diversion program, *the committee shall purge and destroy all records pertaining to the licensee's participation in the program.*

(emphasis added).

CNHP is governed by 42 C.F.R. 2.19 regarding confidentiality of alcohol and drug abuse patient records which provides, in part:

42 CFR 2.19 Disposition of records by discontinued programs.

(a) General. If a program discontinues operations or is taken over or acquired by another program, it must purge patient identifying information from its records or destroy the records unless--

(1) The patient who is the subject of the records gives written consent (meeting the requirements of § 2.31) to a transfer of the records . . . ; or

(2) There is a legal requirement that the records be kept for a period specified by law which does not expire until after the discontinuation or acquisition of the program.

Clearly, in the present instance, there is a legal mandate that the records be purged upon discontinuation of the program, unless there are written consents to transfer meeting the requirements of 42 C.F.R. 2.31. As DORA has precipitately cut off funding to CNHP and has refused to disburse funds to CNHP that have been collected for it over the past thirteen years, DORA is forcing the imminent dissolution of CNHP. Consequently, there is no reasonable likelihood of DORA prevailing on the merits of this case. To do so would require a decision contrary to law.

II. DORA has manufactured this “emergency,” so cannot honestly assert that there is a danger of real, immediate, and irreparable injury

C.R.S. § 12-38-131 was repealed and reenacted effective January 1, 2008 to provide,

inter alia, as follows:

(3) (a) The board shall select one or more recognized peer health assistance organizations or nurse alternative to discipline programs as designated providers. For purposes of selecting designated providers, ***the board shall use a competitive bidding process*** that encourages participation from interested vendors. . .

(emphasis added). CNHP won the award of this program as the successful proposal for RFP SJN 0801 on October 22, 2007. In reliance on this award, CNHP provided the program, as well as enhancements required by the SBON, into 2008; however, despite numerous requests, DORA never gave CNHP the written contract. Unbeknownst to CNHP, DORA was meeting with CNHP's competitor, Peer Assistance Services (PAS), and gave PAS the entire bid submitted by CNHP (including its sealed financials marked as confidential). On January 8, 2008, CNHP received a notice that DORA has cancelled the RFP SJN 0801 and its award to CNHP³; it then issued an almost identical RFP, designated RFP SJN 0803, for this program on February 6, 2008. PAS copied CNHP's first bid and submitted an offer that was just under CNHP's first confidential bid amount. CNHP continued to provide the program and all services required by the SBON through May, 2008. On May 5, 2008, CNHP learned that the program would be awarded to PAS.

Although CNHP waited for almost three months after its award for its contract from DORA⁴ (which, clearly, was never going to be forthcoming, because DORA wanted to award the program to PAS and was pursuing maneuvers to implement that objective), DORA

³ The basis for the cancellation of RFP SJN 0801 and its award to CNHP was, according to DORA's Motion, p. 2, ¶3: "The rationale for the cancellation was that the RFP identified nurse renewal applicants as the population requiring services but omitted new applicants for nursing licenses." DORA was well aware that CNHP had been providing services to new applicants for nursing licenses for the previous thirteen years, and intended to continue these services under the award. CNHP fully expected to continue these services to new applicants under the pending contract. However, DORA ignored this history and, if the provision of these services was even in doubt, DORA never contacted CNHP to clarify that these services would continue to be provided before cancelling the award.

reportedly signed a contract with PAS already in May, during the pendency of CNHP's appeal process.

So, in sum, DORA led CNHP to believe that it would be the provider of this program, from the initial award letter of October 22, 2007, into January, 2008, when DORA announced that it would cancel and reissue the RFP, and then through May, 2008, when it finally announced the decision that the award would instead be given to PAS. CNHP submitted its protest of the RFP award with seven business days of the notice of award, and filed its district court action within ten business days after receiving notice of DORA's final decision on its protest.

C.R.S. § 24-103-203(7) provides, in part, that "[a] contract resulting from a competitive sealed proposal is not awarded until any protest made in connection with the proposal has been resolved pursuant to 24-109-102." Due to the failure of due process notice in the decision letter from D. Rico Munn, executive director of DORA, as required by C.R.S. § 24-109-107(1), a request for clarification was sent on May 30, 2008⁵; however, the fact that this was purportedly a final agency decision was not conveyed by DORA until June 4, 2008. According to the executive director of the State Board of Nursing (SBON), Mark Merrill, the contract with PAS was signed prior to May 30, 2008.

For DORA to have already signed a contract with PAS, and cut off CNHP's funding to accelerate its dissolution, and then to ask this Court to force CNHP to maintain files post-dissolution, contrary to law, is unfathomable.

⁴ C.R.S. 24-103-202(7) provides, in part: "The contract shall be awarded with reasonable promptness by written notice to the low responsible bidder . . ."

⁵ C.R.S. 24-109-202 states: "The executive director shall adopt rules of procedure which, to the fullest extent possible, provide for the expeditious resolution of appeals of controversies." Per C.R.S. 24-109-107(1), DORA's decision was required to "give notice to the protestor, prospective contractor, or contractor of his or her right to administrative and judicial reviews as provided for in this article." It didn't.

III. DORA has the ability to postpone CNHP's dissolution by paying to CNHP the monies which have been collected for it over the past thirteen years, but refuses to do so

During the thirteen years since CNHP was incorporated to provide the diversion program, the SBON collected funds specifically earmarked for CNHP pursuant to C.R.S. § 12-38-131(8) (as it existed prior to January 1, 2008):

(c) As a condition of licensure in this state, every applicant shall pay to the administering entity that has been selected by the board pursuant to the provisions of paragraph (a) of subsection (9) of this section, an amount set by the board not to exceed twenty-eight dollars per nursing licensee for each renewal, which amount shall be used to support the professional diversion committee and the impaired professional diversion program to provide assistance to nurses needing help in dealing with psychiatric, psychological, or emotional problems or excessive alcohol or drug use or addiction that may be detrimental to their ability to practice nursing.

These funds were not all disbursed to CNHP; upon information and belief, there is at least \$50,000 to \$100,000 that has not been paid but that was collected for CNHP over this period. The SBON has only funded CNHP through June 30, 2008; however, if the SBON disbursed the monies which were collected for CNHP, it would not be forced to discontinue operations precipitously. The SBON has refused to forward these monies, and the AG's office has represented that the SBON has applied these funds to other projects, contrary to the basis on which the funds were collected.

IV. The granting of an injunction would disserve the public interest

DORA has no legal ownership in or right to control these files. An injunction which would mandate action contrary to federal law (42 C.F.R. 2.19), by forcing CNHP to somehow maintain files post-dissolution, or by forcing CNHP to transfer files without consents to transfer which meet the requirements of the federal law (42 C.F.R. 2.31), would clearly disserve the public interest.

V. The balance of equities does not favor an injunction

It goes without saying that there are clearly personal liaisons that must have prompted this Herculean effort to intentionally compromise CNHP's confidential bid and financial information, hold secret meetings with the PAS and its counsel, rescind a legitimate award, and reimplement the process, just to give the program to a crony. Certainly, there is enough here to establish inequities in the process.

VI. An injunction for action contrary to federal law in no way preserves the status quo

The status quo is that CNHP is funded with the monies collected by the SBON and held in the administering entity for the provision of the diversion program for the nurses of Colorado. DORA is refusing to pay to CNHP the monies earmarked and collected for it over the past thirteen years, DORA has cancelled the award of the RFP to CNHP, compromised confidential bid information, and given CNHP's competitor the opportunity to use that information by reissuing the RFP in substantially similar form. DORA has done everything possible to change the status quo. This attempt to force CNHP to dissolve, yet to also maintain files after the entity is dissolved, or to give up files contrary to law, does not meet the requirements for injunctive relief.

WHEREFORE, CNHP asks that DORA's request for a temporary restraining order and a preliminary injunction be denied. DORA's concluding paragraph for relief requests that this Court order that CNHP's files be released to PAS; there is absolutely no legal authority for that request, as DORA's Exhibit 4 is not fully signed⁶ and CNHP is not a party to any such

⁶ C.R.S. § 24-30-202 requires that the State Controller approve all contracts. There is a signature block on page 13 of DORA's Exhibit 4, the purported contract between DORA and PAS, which states, in bold, in significant part: "This contract is not valid until the State Controller, or such assistant as he may delegate, has signed it. The

contract, regardless. DORA has not, to date, even made a service attempt on CNHP pursuant to Rule 4, C.R.C.P., but has proceeded, ex parte, on a motion on which it knows it is unable to meet its burden as proponent, in order to bury CNHP with litigation costs as it is on the cusp of dissolution. CNHP asks that this Court consider DORA's actions in determining such other and further relief as may be appropriate.

DATED this 1st day of July, 2008.

Respectfully submitted,
LESLIE J. RANNIGER, P.C.

/s/ Leslie J. Ranniger
Original signature on file
By: Leslie J. Ranniger, #15202
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I did, on this 1st day of July, 2008, serve a true and correct copy of the foregoing on the following via LexisNexis:

Linda Comer, Esq.
Senior Litigation Counsel
Office of Attorney General
1525 Sherman St., 7th floor
Denver, CO 80203
Counsel for Defendant, Colorado
Department of Regulatory Agencies

/s/ Leslie J. Ranniger
Original signature on file

contractor is not authorized to begin performance until the contract is signed and dated below. If performance begins prior to the date below, the State of Colorado may not be obligated to pay for the goods and/or services provided." This language, in bold, and the accompanying signature block are not only unexecuted, but the entire section has an "X" through it.