

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

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

v.

Defendant: COLORADO DEPARTMENT OF
REGULATORY AGENCIES

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Case Number: 2008 CV 4924

Div. 2 Ctrm:

**AFFIDAVIT OF MARJORIE DEROZIER,
EXECUTIVE DIRECTOR OF PLAINTIFF**

County of Jefferson)
State of Colorado) ss.

I, Marjorie Derozier, being duly sworn upon my oath, depose and state as follows:

1. I am the executive director of the Impaired Professional Diversion Program d/b/a the Colorado Nurse Health Program ("CNHP"), the Plaintiff in the present action. I have been employed by CNHP since February 28, 2001, and have been its executive director since April 20, 2005.

2. CNHP is a Colorado nonprofit corporation that has qualified for 501(c) status under the Internal Revenue Code. It is my understanding that CNHP was created as a separate corporate entity to be the State of Colorado's diversion program for the nursing profession, pursuant to C.R.S. 12-38-131 as it existed before January 1, 2008 ("Former Statute") (see Exhibit 1 – Former Statute).

3. CNHP's primary function is to monitor nurses who have substance abuse or mental health issues, and optimally facilitate these nurses' recovery to the point that they are able to continue to practice nursing, while protecting the public.

4. Before CNHP was created, nurses with substance abuse or mental health issues were monitored by the State Board of Nursing ("SBON") itself, through its Rehabilitation and Evaluation Committee (REC). This meant that there was always agency knowledge of the nurses' impairment and recovery status (*see* Exhibit 2 - 1994 Sunset Review of the SBON).

5. The Former Statute was enacted so that these nurses would be monitored by a private, separate corporate entity, and there would be no agency knowledge of their impairment or recovery unless or until the nurse was terminated from CNHP for specific reasons listed in the Former Statute and referred back to the SBON. The Former Statute sought to give nurses the incentive of confidentiality in return for compliance. In fact, the Former Statute provided that, if it was determined that a nurse licensee had "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" in subsection (6)(b)(II).

6. As an example, if a nurse had substance abuse or mental health issues, that nurse could contact CNHP and confidentially enter the program. The nurse would be evaluated, and monitored, all confidentially and without disclosure to the SBON, unless that nurse was not compliant with his/her contract requirements. Even then, that nurse would not be referred back to the SBON unless CNHP's Board of Directors ("Committee") felt that public safety could not reasonably be assured. And, pursuant to statute, if the nurse successfully completed his/her contract, the file would be purged and destroyed.

7. When a nurse had a complaint filed against him/her with the SBON which included allegations that appeared to indicate a substance abuse or mental health component, the SBON could offer the nurse an opportunity to admit to a problem by signing an Agreement to Participate in the Colorado Nurse Health Program or proceed through investigations and potential disciplinary action. If accepted by CNHP, the nurse would sign a monitoring contract and begin to demonstrate rehabilitation by meeting the monitoring requirements. If the nurse was not compliant with the contract requirements, the nurse was referred back to the SBON to determine disciplinary action. Upon successful completion of the CNHP contract, the SBON would dismiss the case and the nurse's CNHP was destroyed.

8. CNHP monitored new nurse applicants as part of its regular nurse population throughout the thirteen years of its existence.

9. CNHP, over the years, also took on additional responsibilities as requested by the SBON, and monitored nurses who were involved in disciplinary proceedings and sent to CNHP on a Stipulation and Order from the State. CNHP monitored nurses "post-referral," so that when these nurses were sent to the SBON for disciplinary action, CNHP would continue to monitor their recovery to assure public safety while proceedings were pending.

10. CNHP also monitored “suspension track” nurses, “rule out risk” nurses, and other classes of nurse participants, as requested by the SBON. CNHP provided consultation to the SBON and its agents (the Office of Expedited Settlement, Office of Investigations and Office of Attorney General), in addition CNHP provided expert testimony as requested, *gratis*. These additional duties of CNHP were taken on in excess of its statutory mandate, as an accommodation to the SBON.

11. In 2002, a competitor which handled other peer assistance programs for the State, Peer Assistance Services (“PAS”), found a legislator to introduce a bill to change C.R.S. 12-38-131 to be awarded on a competitive bid basis. That legislation was defeated.

8. Subsequently, the legislation was introduced, and defeated, three more times, in succeeding years. Two years ago, the Defendant, Colorado Department of Regulatory Agencies (“DORA”) invested active lobbying effort to get the bill passed. Last year, HB 07-1102 did pass and was signed into law, and this legislation provided that the Former Statute would be repealed and re-enacted in its current form (“New Statute”) (Exhibit 3 – New Statute), effective January 1, 2008.

9. The New Statute provides that a competitive bidding process is mandatory for selection of the diversion program which is presently being provided exclusively by CNHP. It states, in section (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.” The New Statute was effective on January 1, 2008.

10. On August 7, 2007, the Colorado Department of Regulatory Agencies (DORA) issued RFP SJN 0801 (Exhibit 4 – RFP SJN 0801). That RFP solicited proposals from vendors interested in providing the State’s diversion program for nurses. The due date for submission of a proposal to the RFP was September 6, 2007.

11. CNHP timely submitted a proposal to RFP SJN 0801 (Exhibit 5 – CNHP Proposal to RFP SJN 0801). It was later learned that PAS had also submitted a proposal (Exhibit 6 – PAS Proposal to RFP SJN 0801). CNHP and PAS were the only two vendors to bid on this RFP.

12. On October 22, 2007, CNHP received notice that it was the sole successful vendor for RFP SJN 0801 (“CNHP Award Letter”) (*see* Exhibit 7 – CNHP Award Letter Dated 10-22-07). There was also a decision letter issued by the independent evaluators of the RFP which articulated the reasons that CNHP’s proposal “was the most advantageous to the state based upon the evaluation criteria set forth in the RFP.” (“Decision Memorandum”) (*see* Exhibit 8 – RFP SJN 0801 Decision Memorandum).

13. It was later learned that PAS was also notified that it was unsuccessful on that same date. (Exhibit 9 – Notice to PAS of Unsuccessful Proposal Dated 10-22-07).

14. CNHP actively pursued the written contract for this award. Assurances were made that the documentation was taking time, but was forthcoming. CNHP continued to provide services for the diversion program in reliance on the award, for almost three months, into January,

2008, after the New Statute became effective. If, instead, CNHP had been notified that it was unsuccessful, it would have had this time to wind up affairs and arrange for releases to transfer files. But, again, CNHP had received notification that it was the successful vendor, for a number of reasons stated by the independent evaluators, and CNHP justifiably relied on this award, especially as the months went by without notice otherwise.

15. CNHP was given no notice, whatsoever, that, during these months after the award, DORA had given CNHP's proprietary and confidential bid information to PAS, and that DORA had been holding meetings with PAS in order to set aside the award to CNHP.

16. RFP SJN 0801 had provided that information could be designated as confidential. Pursuant to the stated requirements in the RFP, CNHP had included a paragraph at the end of its proposal asserting that its financials were to be held confidential, and CNHP further separated its financials from the body of its proposal, and submitted the financials in separate envelopes from the body of its proposal. CNHP also listed its internally-generated forms as confidential, and included this in its confidentiality paragraph in its proposal, along with the statutory basis for the assertion. (*See page 38 of Exhibit 5 - CNHP's Proposal to RFP SJN 0801*).

17. CNHP was unaware that its entire proposal, including its confidentially-designated forms and financial information, had been compromised by DORA and given, completely, by DORA to PAS.

18. CNHP was also unaware of any meetings between DORA staff and PAS' counsel during the time that CNHP was being assured that its contract was being finalized.

19. In January, 2008, CNHP received a letter, dated January 8, 2008 ("Cancellation Letter") that purported to cancel RFP SJN 0801 and its award purportedly because "the RFP failed to include new applicants for registered nursing or licensed practical nursing licenses . . ." and vaguely stating that "the final decision of the evaluation committee was based on incomplete information." (*Exhibit 10 - Cancellation Letter to CNHP Dated 1-8-08*).

20. CNHP already provided services in excess of its statutory mandate to nurses without active licenses at the behest of the SBON, including monitoring of nurses that were suspended, nurses that were previously terminated from the program for non-compliance and awaiting disciplinary action and awaiting a hearing – even nurses that had no complaint or established problem, for whom the SBON wanted to "rule out risk" of addiction. So, the SBON was aware that CNHP had been providing services to new nurse applicants for over a decade, and could be relied upon to continue same.

21. However, CNHP was not contacted or asked if its proposal would include services for new nurse applicants, or if there would be any additional cost or charge to provide services to new nurse applicants over and above CNHP's proposal bid.

22. In addition, the New Statute (*Exhibit 3*), in subsection (1), was clear that fees were only to be collected from renewal licenses – not new nurse applicants. Consequently, it appeared

that this basis for canceling the contract was contrived and not even based upon the statute which was the basis for the RFP.

23. The Cancellation Letter also did not articulate what new information would be sought in another RFP.

24. CNHP was not asked for any additional new or other information which might have been needed to clarify its proposal.

25. CNHP had always provided independently-verified quality service to the SBON. Under Chapter XII of the Rules and Regulations which had been promulgated for CNHP (Chapter XII - Rules and Regulations for the Impaired Professional Diversion Program), subsection (E)(11), CNHP had obtained an external review of its program, at its own expense, usually by a program director from another state's program, every three years, commencing in 1999. (See Exhibit 11 - SBON Rules). CNHP's reviews had always been complimentary and positive. The SBON had never articulated a concern or question regarding CNHP's provision of or scope of services. Again, CNHP had historically provided services far in excess of the statutory scope required. Consequently, there was no conceivable basis for which quality of scope of services could have been an issue.

26. In addition, the testimony in the legislature was consistent that CNHP had been providing quality service, and the sole basis for the legislative change was to allow for competitive bidding for this program.

27. Consequently, the Cancellation Letter, and the stated reason which ignored the actual practice between the DORA and CNHP (that CNHP would need to provide services to new nurse applicants, which it already did), was a complete surprise to CNHP, and CNHP made an appointment to review the State's file on the matter.

28. Upon meeting with the State's contracting office, CNHP learned that its entire bid, even its sealed financials, had been given to PAS shortly after the original CNHP Award Letter had been issued.

29. In its review of the file, CNHP saw that PAS had submitted a protest of the award of RFP SJN 0801 to CNHP ("PAS Protest"), and that this protest included a discussion of CNHP's confidential financial information. This PAS Protest was dated November 20, 2007, which was more than seven business days after the award had been made to CNHP (which has occurred on October 22, 2007). (See Exhibit 12 - PAS Protest Dated 11-20-2007).

30. CNHP saw no decision on this untimely protest by PAS. However, CNHP also saw documentation in the State's file of a meeting between DORA staff, PAS, and its counsel on December 20, 2007. This documentation was in the form of a "thank you" letter, informing PAS' counsel that the RFP SJN 0801 and its award to CNHP was being cancelled (Exhibit 13 - Thank You Letter to PAS Dated 1-8-08). Interestingly, this letter was dated January 8, 2008 - the same date as the Cancellation Letter to CNHP.

31. As the Cancellation Letter received by CNHP did not state how, if at all, the cancellation of RFP was or could be in the state's best interests, as CNHP's quality and scope of services had never been in issue, as there was no legal basis to collect fees from new nurse applicants, as a protest had been untimely filed referencing CNHP's confidential information, among many things, CNHP wrote to D. Rico Munn, the executive director of DORA, to request his intervention and scrutiny of the cancellation ("CNHP's Letter Regarding Cancellation"). (Exhibit 14 – CNHP's Letter Regarding Cancellation Dated 1-22-08).

32. On February 6, 2008, Mr. Munn, on behalf of DORA, summarily denied CNHP relief on its Letter Regarding Cancellation, and insisted the follow-on RFP would be issued. ("DORA's Response to CNHP's Letter Regarding Cancellation") (Exhibit 15 – DORA's Response to CNHP's Letter Regarding Cancellation). This response included no notice of CNHP's due process or appeal rights regarding the cancellation, or information on whether this was a final agency decision.

33. RFP SJN 0803 was also issued on the same date as DORA's Response to CNHP's Letter Regarding Cancellation – February 6, 2008 (Exhibit 16 – RFP SJN 0803). Consequently, CNHP focused its efforts on responding to this RFP, which was almost identical to RFP SJN 0801.

34. Both CNHP and PAS submitted proposals to RFP SJN 0803. PAS' proposal was significantly different from its first proposal (Exhibit 6), as it had copied substantially from CNHP's successful proposal to RFP SJN 0801 (Exhibit 5). (See Exhibit 17 – PAS Proposal to RFP SJN 0803).

35. On May, CNHP was notified that it was not the successful vendor for RFP SJN 0803 (Exhibit 18 – Notice to CNHP of Unsuccessful Proposal Dated 5-5-2008). The program had been awarded to PAS.

36. In preparing its protest of the award of RFP SJN 0803, CNHP saw that there were also significant advantages given by DORA to PAS in RFP SJN 0803. For instance, in the Decision Memorandum on RFP SJN 0801 (Exhibit 8), the evaluators stated: "[T]he deciding rationale for selection was contained in the Technical section. With respect to the technical requirements, the most important factor, the proposal from Peer Assistance Services, Inc. had two areas of concern for the committee. They were sections 4.1.b and 4.1.f."

37. In RFP SJN 0803, although item 4.1.b (Staff) was still included, the scoring template given to the evaluators (Exhibit 19 – Scoring Template) specifically directed that 4.1(b) "should not be considered in your overall scoring of technical . . ."

38. The other important area listed in the Decision Memorandum on RFP SJN 0801 was 4.1(f), because, according to the evaluators, "CNHP met the standards of reporting and offered solutions to develop weighted guidelines with the Board. PSA [*sic*] agreed to meet the proposal standards, however stated that 'regardless of non-compliance, the licensee will continue to be monitored and not terminated from the program.'" The evaluators felt that PAS had an internal

conflict of interest. In RFP SJN 0803, the requirement of 4.1(f) was omitted (a different requirement was put in this section instead).

39. CNHP filed its protest within seven business days as required by statute (“CNHP’s Protest Letter”) (Exhibit 20 – CNHP Protest of Award of RFP SJN 0803). Its protest listed substantial instances of PAS’ copying and use of CNHP’s bid information from its first proposal, including PAS’ financial bid which would intuitively have been higher to address the additional new nurse applicant population to be served, but instead was lower – not only lower than its first bid on RFP SJN 0801, but lower than CNHP’s first bid on RFP SJN 0801, since it had CNHP’s confidential financial information from its first bid.

40. CNHP’s Protest Letter also listed other fundamental scoring errors, including the inappropriate weighting and consideration of components, and failure to consider other RFP components, under the “Management” section of RFP SJN 0803.

41. In addition, CNHP’s Protest Letter listed other clear advantages written into RFP SJN 0803 to benefit PAS.

42. There was no significant new information sought in RFP SJN 0803 over that requested in RFP SJN 0801. In fact, less information was evaluated, since the two sections deemed significant to the evaluators of RFP SJN 0801 were either not graded in RFP SJN 0803 or omitted from RFP SJN 0803.

43. Finally, CNHP’s Protest Letter asserted that RFP SJN 0803 should be cancelled as fundamentally flawed and consequently not in the best interests of the State, and that RFP SJN 0801 and its award to CNHP should be reinstated.

44. CNHP received a decision from D. Rico Munn on its protest dated May 23, 2008, which denied all relief requested by CNHP (“Decision Letter”) (Exhibit 21 – Decision Letter to Protest of RFP SJN 0803). That response did not meet certain statutory requirements, so a follow-up e-mail was sent by CNHP to Mr. Munn requesting a response on same (Exhibit 22 – E-Mail to Munn Requesting Clarification in Decision Letter). For instance, the Decision Letter gave no notice of rights to administrative or judicial relief as required by C.R.S.24-109-107(1), among other things.

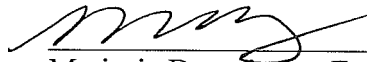
45. Mr. Munn responded by e-mail on June 4, 2008 with another letter which still failed to give notice of rights to administrative or judicial relief as required, and instead asserted that DORA’s actions were exempt from statutory provisions (Exhibit 23 – Letter from Munn Dated 6-4-08).

46. In the interim, CNHP received an e-mail from Mark Merrill, executive director of the SBON, on May 30, 2008 that a contract had already been signed for the diversion program with PAS (Exhibit 24 – E-Mail from Merrill Dated 5-30-08).

47. CNHP timely filed this action for relief in the District Court of the City and County of Denver on June 9, 2008.

I swear and affirm that all statements in this Affidavit are true, correct, and complete to the best of my knowledge and belief.

Dated: June 30, 2008.



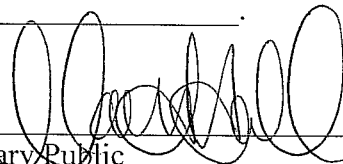
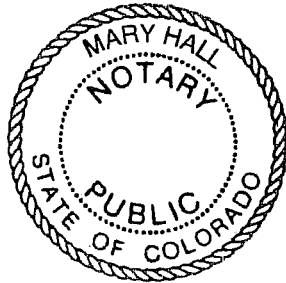
Marjorie Derozier, as Executive Director
of the Impaired Professional Diversion
Program, doing business as the Colorado
Nurse Health Program

State of Colorado)
County of Jefferson) ss.

Subscribed and sworn to before me this 30th day of June, 2008, by Marjorie Derozier.

Witness my hand and official seal.

My commission expires: My Commission Expires
April 27, 2011



Notary Public