

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p>	
<p>THE PEOPLE OF THE STATE OF COLORADO, ex rel. THE COLORADO DEPARTMENT OF REGULATORY AGENCIES,</p> <p>Plaintiff,</p> <p>v.</p> <p>IMPAIRED PROFESSIONAL DIVERSION PROGRAM , D/B/A COLORADO NURSE HEALTH PROGRAM</p> <p>Defendant.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>JOHN SUTHERS, Attorney General LINDA S. COMER, Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 (303) 866-5513 Registration Number: 11267 *Counsel of Record</p>	<p>Case No.: 2008 CV _____</p> <p>Div.</p>
<p>MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION</p>	

The Colorado Department of Regulatory Agencies (“DORA”), through the Office of the Attorney General, pursuant to Rule 65 C.R.C.P., moves for the issuance of a temporary restraining order prohibiting Defendant from destroying records of impaired nursing clients, and a mandatory preliminary injunction requiring Defendant to release records to a nurse client or to Peer Assistance Services (PAS), the current contractor with DORA for the provision of diversion services to nurses with alcohol and mental health issues, upon receipt of an executed release that meets the requirements of 42 C.F.R. § 2.31 and as grounds therefore states:

1. Prior to June 1, 2008, Defendant provided diversion services to nurses with alcohol and mental health issues pursuant to C.R.S. § 12-38-131. Defendant had no written contract for the provision of services to impaired nurses.

2. C.R.S. § 12-38-131 was repealed and reenacted in 2007, effective January 1, 2008, to require, among other things, competitive bidding for the right to provide services pursuant to the statute.

3. DORA issued Request for Proposal (RFP) SJN 0801 on August 7, 2007. (A copy of the RFP is attached hereto as Exhibit 1.) Defendant and PAS responded to RFP SJN 0801. Defendant was the successful bidder and DORA issued a Notice of Intent to Award Contract on October 22, 2007. The contract was never drafted and the RFP was cancelled on January 8, 2008. The rationale for the cancellation was that the RFP identified license renewal applicants as the population requiring services but omitted new applicants for nursing licenses. (A copy of the cancellation notice is attached hereto as Exhibit 2.) A portion of the licensing fee for both types of applicants is used to fund the program and both are entitled to services. The RFP information was incomplete, necessitating the issuance of a second RFP.

4. DORA issued a second RFP SJN 0803, identifying the new applicants as part of the population to be served on March 10, 2008. (A copy of that RFP is attached hereto as Exhibit 3.) Defendant and PAS submitted proposals in response to RFP SJN 0803. PAS was the successful bidder, and a contract was executed effective June 1, 2008. (A copy of the contract is attached hereto as Exhibit 4.) Defendant filed a protest to the award of the contract to PAS on May 14, 2008. The protest was denied by D. Rico Munn, Executive Director of DORA, on May 23, 2008. (A copy of the letter denying the protest is attached as Exhibit 5.)

5. Defendant filed an appeal of the denial of the protest in this court on June 9, 2008 (08-CV-4924). Defendant did not seek a stay of the agency action, nor has it filed a motion for preliminary injunctive relief. Defendant also asserts a claim for violation of the State Administrative Procedures Act, C.R.S. § 24-4-101. The complaint contains a claim for misappropriation of trade secrets pursuant to C.R.S. § 7-72-101. Defendant filed a notice of dismissal of that claim on June 25, 2008, so it is no longer at issue.

6. PAS has a valid and enforceable contract with the State to provide services to impaired nurses. Defendant has no contract with the State. All new nurse clients are being referred to PAS, but Defendant is refusing to release the records of existing clients to the client or PAS when presented with a fully executed release that meets the requirements of 42 C.F.R. § 2.31. All payments to Defendant terminate on June 30, 2008.

7. Pursuant to 42 C.F.R. § 2.19, Defendant is required to purge identifying patient information or destroy client records when it discontinues operations, unless the patient gives written consent in compliance with the requirements of § 2.31 to transfer the records. The regulation does not specify a time frame for the destruction of the records. Defendant has notified its clients that it will destroy the records if it ceases operations on June 30, 2008, unless the client executes a release on or before the cessation of operations. (A copy of the letter is attached as Exhibit 6). The letter is vague as to when the records will be destroyed, but Plaintiff has not given any formal assurances that it will not destroy the records on July 1, 2008.

8. It is obvious the existing nurse clients will suffer irreparable harm if the records are destroyed. It is also obvious that the nurse clients will suffer irreparable harm if Defendant refuses to accept properly executed releases for the records, as they cannot be assured of continuity of care and treatment that the State is obligated to provide pursuant to C.R.S. § 12-38-131. Defendant has no legal basis to refuse to honor a release that meets the federal requirements.

9. The Colorado Supreme Court set forth a six-part test for issuance of an injunction under Colo.R.Civ.P. 65:

- a) a reasonable probability of success on the merits;
- b) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief;
- c) that there is no plain, speedy, and adequate remedy at law;
- d) that the granting of a preliminary injunction will not disserve the public interest;
- e) that the balance of equities favors the injunction; and
- f) that the injunction will preserve the status quo pending a trial on the merits.

Rathke v. MacFarlane, 648 P.2d 648, 653-54 (Colo. 1982) (internal citations omitted).

10. DORA has a reasonable probability of success on the merits with respect to all of Defendant's claims. First, with respect to the appeal of the agency action, Defendant has a heavy burden. The standard of review for agency action is reasonableness. Under this standard, a court must ensure that the agency action is the product of reasoned decision-making and fairly defensible in light of the data considered by the agency at the time the action or decision was made. However, the court may not substitute its judgment for that of the agency. Agency actions are presumed to be valid and the agency is afforded deference. *Brown v. Colorado Ltd. Gaming Control Commission*, 1 P.3d 175 (Colo.App. 1999), *Colorado Ground Water Com'n v. Eagle Peak Farm, Ltd.*, 919 P.2d 212 (Colo. 1996). A

commission's construction of its own governing statute is entitled to great weight. *Mile High Greyhound Park, Inc. v. Colorado*, 12 P.3d 351 (Colo.App. 2000). In order to succeed on an appeal, a party has to prove the action was arbitrary and capricious (no basis in law or fact), violated statutory law, exceeded statutory authority, or lacked a basis in the record. *Colorado Ground Water Com'n*, at 217. RFP SJN 0801 states that the RFP may be withdrawn at any time without penalty so Defendant was on notice. (See Exhibit 1, p.1, section 1.4.) Defendant's protest was based in part on a claimed breach of confidentiality as to financial information submitted in its proposal in response to RFP SJN 0801. As demonstrated by Exhibit 5, Defendant failed to comply with the requirements of the RFP as to identifying confidential information and assuring confidentiality. The interpretation of the scoring of the proposals to RFP SJN 0803 is subject to a reasonable standard and arguably a matter of professional judgment. Pursuant to the RFP's, the standard for the award of the contract was "most advantageous to the state of Colorado." (See Exhibit 1, p.1, section 1.5, and Exhibit 3, p.1, section 1.5.) The PAS bid was lower than that of Defendant, and thus it is difficult to argue that it was not most advantageous to the State of Colorado.

Although DORA took the position in the RFPs that the procurement code, C.R.S. § 24-109-101, et seq. did not apply, it followed procurement code procedure with respect to RFP SJN 0803. DORA allowed for formal protest of the award under RFP SJN 0803, and Defendant filed a protest, so the provisions of the procurement code are informative. What is at issue is a state contract. As in the RFP, the standard for the award under the procurement is "most advantageous to the state of Colorado." This is a broad standard. It will be very difficult, if not impossible, for Defendant to prove DORA's award of the contract to PAS was arbitrary and capricious or in violation of the procurement code.

11. A mandatory preliminary injunction directing Defendant to honor a release for records that meets the federal requirements will also preserve the status quo. The status quo is that Defendant does not have a contract to provide services to impaired nurses and PAS does. The status quo is that the records exist. Destroying the records does not preserve the status quo.

12. The issuance of the temporary restraining order and mandatory injunction will also serve the public interest because it will assure that impaired nurses will continue to receive the care required, thus protecting the public. The statutory mandate to provide services to impaired nurses is compromised if the authorized provider does not have access to the records of prior and ongoing treatment. DORA has no adequate remedy at law to prohibit CNHP from destroying the records and no adequate remedy at law to compel Defendant to honor an appropriate release. Defendant has no proprietary interest in the records, as the records are the property of the nurse clients, and Defendant has no contract to provide services to impaired nurses.

13. The balance of the equities favors the injunction.

WHEREFORE, the Department moves this Court to enter a mandatory preliminary injunction ordering the Defendant to release the records of existing nurse clients to PAS.

DATED this 26th day of June, 2008.

JOHN SUTHERS
Attorney General

E-filed pursuant to C.R.C.P. 121 1-26. A duly signed original is on file at the Colorado Department of Law.

/s/Linda S. Comer

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Attorneys for Plaintiff
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CERTIFICATE OF SERVICE

I do hereby certify that on the 26th of June 2008, a copy of the foregoing **MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** was mailed, First Class U.S. postage prepaid, as follows:

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E-filed pursuant to C.R.C.P. 121 1-26. A
duly signed original is on file at the Colorado
Department of Law.

/s/ _____