

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman Street, Denver, CO 80203	
Colorado Physician Health Program Petitioner,	▲ COURT USE ONLY ▲
vs.	
Department of Regulatory Agencies Respondent.	<b>CASE NUMBER:</b> <b>DPA 2020-0002</b>
<b>NOTICE OF ORDER ISSUANCE</b>	

The attached Agency Decision was issued November 10, 2020 in the above referenced case.

Dated: November 10, 2020

*/s/ Mariela Flores*

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Mariela Flores  
Court Clerk

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman Street, 4 <sup>th</sup> Floor, Denver, Colorado 80203	
<b>COLORADO PHYSICIAN HEALTH PROGRAM,</b> Petitioner,  vs.  <b>COLORADO DEPARTMENT OF REGULATORY AGENCIES,</b> Respondent.	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> <p><b>CASE NUMBER:</b>  <b>DPA 2020-0002</b></p>
<b>AGENCY DECISION</b>	

On August 18, 2020, Petitioner, Colorado Physician Health Program (CPHP), filed an appeal with the Executive Director of the Department of Personnel and Administration (DPA) of a procurement officer’s decision denying its protest regarding the award of a contract to a peer health assistance provider under Request for Proposal (RFP) No. SJAA 2020-52. The matter was initially referred to State Procurement Appeals Administrator Leila Boulton. In accordance with § 24-109-202(1), C.R.S. and Procurement Rule R-24-109-202-03(c), Ms. Boulton conducted an informal hearing on September 16, 2020. Prior to the issuance of Ms. Boulton’s decision, under § 24-109-201(1), C.R.S., DPA’s Executive Director transferred the appeal to the Office of Administrative Courts (OAC) for a determination of Petitioner’s appeal. The case was assigned to Administrative Law Judge (ALJ) Michelle A. Norcross on September 28, 2020. The ALJ held a status conference with counsel on October 21, 2020. Petitioner was represented by Michelle Harden, Esq. and Kendra Beckwith, Esq. Respondent, the Department of Regulatory Agencies (DORA), was represented by Ashley Moller, First Assistant Attorney General, Christopher Beall, Deputy Attorney General, and Christopher Diedrich, Assistant Attorney General.

The purpose of the October 21 status conference was for the ALJ to determine if the parties believed that the record was complete or if further proceedings were necessary. DORA’s position was that the record was complete and ready for a decision. DORA objected to further proceedings. CPHP requested a week to respond. At the conference, the ALJ also requested counsel to submit an agreed upon electronic record. On October 28, 2020, CPHP provided the Court with a copy of the record and requested that the ALJ schedule a merits hearing to determine if DORA has the authority to select the peer health assistance provider. DORA reiterated its objection to further proceedings. On October 30, 2020, the ALJ denied CPHP’s request for a merits hearing. The basis for the ruling is that the challenge to DORA’s selection authority is a question of law, not of fact, and the record contains a full briefing of the issue.

## ISSUE PRESENTED

In its protest and on appeal, CPHP raises several challenges to the procurement and the selection process.<sup>1</sup> The threshold issue on appeal, however, is whether DORA is authorized under state law to select the peer health assistance program provider or whether the Medical Practice Act (MPA) mandates that only the Medical Board has the authority to select the peer health assistance program provider.

## FINDINGS OF FACT

For purposes of the threshold issue on appeal, the following facts are undisputed:

1. On August 21, 2019, DORA's Office of Accounting and Purchasing on behalf of the Division of Professions and Occupations (DPO) solicited bids through RFP SJAA 2020-0052 for a peer health assistance provider.
2. The MPA authorizes the creation of a peer health assistance program for the provisioning of services to the medical health professions regulated by the Colorado Medical Board (Board or Medical Board) as set forth in the MPA. § 12-240-101, *et seq.*, C.R.S.
3. The authorization for the peer health assistance program is located in § 12-240-131, C.R.S.
4. The bid solicitation was opened on November 8, 2019. Two organizations submitted timely responses: CPHP and Peer Assistance Services (PAS).
5. CPHP has been the peer health assistance provider for many years.
6. After opening the bids, DORA/DPO selected members for the evaluation committee (Committee) whose purpose was to score the bids and select the provider based on the bids and the evaluation factors set out in the RFP.
7. The Committee did not include a physician, a physician assistant, an anesthesiologist assistant or any member of the Medical Board.

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<sup>1</sup> In its August 18, 2020, appeal CPHP raises the following challenges: DORA's recommendation fails to comply with the MPA's statutory mandate that a peer be involved in both the selection of a designated provider and provision of peer assistance services; DORA's recommendation fails to fulfill the most basic purpose of a peer health assistance program – healthy physicians who provide safe patient care; DORA's Evaluation Committee's scoring was unreasonable and CPHP's bid was responsive; and, the cumulative effect of these issues prejudices the procurement's outcome. None of these issues can be determined without first answering which agency has the legal authority to select the provider.

8. On December 5, 2019, the Committee met. At the December 5 meeting, the Committee members reviewed and scored the proposals and the budget/cost submissions.
9. The Committee met again on December 10, 2019 to review and discuss the final scoring requirements.
10. Approximately six months following its December 10, 2019 meeting, the Committee, on behalf of DORA, recommended that the peer health assistance contract be awarded to PAS.
11. The selection of PAS as the new peer health assistance provider was made exclusively by DORA. The Board played no role in the procurement or selection process.
12. CPHP filed a formal protest of the selection with DORA's Procurement Officer, John Weber.
13. On August 4, 2020, Mr. Weber issued a written decision denying CPHP's protest on all counts.
14. On August 18, 2020, CPHP appealed Mr. Weber's decision to the Executive Director of DPA. DPA's Executive Director referred the appeal to OAC on September 24, 2020 for a determination.
15. DORA is a principal executive department established under the Colorado Administrative Organization Act of 1968.
16. The Board is a type 1 agency under DORA.
17. DPO is a type 2 agency under DORA.

## **CONCLUSIONS OF LAW AND DISCUSSION**

CPHP is an aggrieved party under the state's procurement code, which is codified at § 24-101-101, *et seq.*, C.R.S. An aggrieved party is defined as "any actual or prospective bidder, offeror, or contractor who believes that he or she has suffered a denial of legal rights under this code in connection with the solicitation or award of a contract." § 24-109-101.1 (1), C.R.S. CPHP filed an appeal with the Executive Director of DPA following the denial of its protest from DORA's Procurement Officer. In accordance with the procurement code:

Unless an action has been initiated previously in the district court of the city and county of Denver pursuant to this article 109, the executive director shall have the authority to review and determine any appeal by an

aggrieved party from a decision of the procurement official or his or her designee rendered pursuant to section 24-109-107. The executive director is authorized to designate another person to exercise his or her powers pursuant to this part 2. The executive director or his or her designee may refer an appeal to the office of administrative courts to review and determine any appeal pursuant to section 24-30-1001.

§ 24-109-201 (1), C.R.S.

In its protest and resulting appeal, CPHP challenges, among other things, DORA's authority to select the peer health assistance provider. CPHP argues that the Medical Board, and not DORA, has the delegated statutory authority to select the peer health assistance program provider. For the following reasons, the ALJ agrees.

DORA was established as a principal executive department in 1968 under the Administrative Organization Act of 1968 (Act). § 24-1-110 (I), C.R.S. As a principal department, DORA oversees several offices and divisions, many of which are governed by statutorily created boards and commissions. The Medical Board is one of the boards housed under DORA. When the legislature placed the Board under the umbrella department of DORA, the legislature designated the Board as a type 1 transfer. See, § 24-1-122 (3)(m)(I), C.R.S. Administrative agencies are classified as either type 1, type 2 or type 3 transfers. The transfer classification (i.e., type 1, 2 or 3) determines the level of autonomy and independence the agency has from its principal department to perform its delegated powers, duties and functions. For type 1 transfers, the legislature prescribed the following powers and duties:

When any department, institution, or other agency, or part thereof, is transferred to a principal department under a **type 1** transfer, that department, institution, or other agency, or part thereof, shall be administered under the direction and supervision of that principal department, but it shall exercise its prescribed statutory powers, duties, and functions, including rule-making, regulation, licensing, and registration, the promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications, independently of the head of the principal department. Under a **type 1** transfer, any powers, duties, and functions not specifically vested by statute in the agency being transferred, including, but not limited to, all budgeting, purchasing, planning, and related management functions of any transferred department, institution, or other agency, or part thereof, shall be performed under the direction and supervision of the head of the principal department.

§ 24-1-105 (1), C.R.S. (emphasis in original).

The Medical Board is a creation of the legislature and derives its authority from its enabling statutes in the MPA. *Smith v. People*, 51 Colo. 270, 117 P. 612, 36 L.R.A.

(n.s.) 158 (1911). (The general assembly under the police power of the state could create the state board of medical examiners and fix its powers and duties. The law is settled that the general assembly may control the practice of medicine.) The Colorado Supreme Court held “the legislature created the Board and authorized it” to carry out the specific delegations of authority in the act. *Colorado Med. Bd. V. McLaughlin*, 2019 CO 93, ¶ 35. The Board consists of seventeen members, appointed by the governor. § 12-240-105 (1)(a), C.R.S. Its general powers are set out in § 12-240-106, C.R.S.

The MPA also establishes a peer health assistance program. § 12-240-131, C.R.S. For many years, CPHP has been the provider of the peer health assistance program. In 2019, DORA issued a RFP seeking bid solicitations for a peer health assistance program provider. CPHP and PAS submitted proposals. At the conclusion of the process, PAS was selected as the new peer health assistance program provider. DORA with the assistance of DPO, a type 2 agency under DORA’s direction, made the selection. The Board was never involved in the process or in the selection of the provider. The ALJ concludes that DORA’s exclusion of the Board violated the MPA and is in direct conflict with the Board’s specific grant of authority conferred by the General Assembly. The MPA grants the Board, a type 1 agency, the authority to select the peer health assistance provider. “The board shall select one or more peer health assistance programs as designated providers.” § 12-240-131 (1)(b) (emphasis added). The Board’s authority to select the provider is further established by the following language:

To be eligible for designation by the board, a peer health assistance program must:

- (I) Provide for the education of physicians, physician assistants, and anesthesiologist assistants with respect to the recognition and prevention of physical, emotional, and psychological problems and provide for intervention when necessary or under circumstances that may be established by rules promulgated by the board;
- (II) Offer assistance to a physician, physician assistant, or anesthesiologist assistant in identifying physical, emotional, or psychological problems;
- (III) Evaluate the extent of physical, emotional, or psychological problems and refer the physician, physician assistant, or anesthesiologist assistant for appropriate treatment;
- (IV) Monitor the status of a physician, physician assistant, or anesthesiologist assistant who has been referred for treatment;
- (V) Provide counseling and support for the physician, physician assistant, or anesthesiologist assistant and for the family of any physician, physician assistant, or anesthesiologist assistant referred for treatment;

(VI) Agree to receive referrals from the board;

(VII) Agree to make their services available to all licensed Colorado physicians, licensed Colorado physician assistants, and licensed Colorado anesthesiologist assistants.

§ 12-240-131 (1)(b), C.R.S. (emphasis added).

CPHP challenged DORA's selection authority in its protest. DORA's Procurement Officer rejected the argument on the basis that only DORA has the authority to enter into contracts with vendors and since the Board cannot enter into a contract with a vendor, the Board does not have the authority to select the provider. (August 4, 2020 Written Decision, pp. 1-2). The Procurement Officer also found that the procurement code, and not the MPA, controls in this instance and that the Administrative Organization Act gives DORA both direction and supervision of the Board. (*Id.*, at pp. 1-2). In support of these conclusions, the Procurement Officer quotes the following language found in § 24-1-105 (1), C.R.S. "While the Board is a type 1 board, it is housed within DORA, which retains administrative oversight for administration of the program. See § 24-1-105(1), C.R.S. (stating that type 1 boards 'shall be administered under the direction and supervision of that principal department')." Written Decision, p. 1. The Procurement Officer's application of § 24-1-105 (1) to this matter is misplaced and incorrect as he relied on only one a portion of the statute and disregarded the pertinent language. When read in its entirety, the statute provides:

Under this article, a **type 1** transfer means the transferring intact of an existing department, institution, or other agency, or part thereof, to a principal department established by this article. When any department, institution, or other agency, or part thereof, is transferred to a principal department under a **type 1** transfer, that department, institution, or other agency, or part thereof, shall be administered under the direction and supervision of that principal department, but it shall exercise its prescribed statutory powers, duties, and functions, including rule-making, regulation, licensing, and registration, the promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications, independently of the head of the principal department. Under a **type 1** transfer, any powers, duties, and functions not specifically vested by statute in the agency being transferred, including, but not limited to, all budgeting, purchasing, planning, and related management functions of any transferred department, institution, or other agency, or part thereof, shall be performed under the direction and supervision of the head of the principal department.

§ 24-1-105 (1), C.R.S. (emphasis in original) (underlined emphasis added).

Excluding the above underlined language fails to give meaning to the entire statute and renders an erroneous result. The basic principles of statutory construction

mandate that an entire statute is intended to be effective. See, § 2-4-201 (1)(b), C.R.S. See, also *People v. Phillips*, 652 P.2d 575 (Colo. 1982); *In re Estate of Hill*, 713 P.2d 928 (Colo. App. 1985) (A well-established rule of statutory construction is that the entire statute is intended to be effective.) In this case, the legislature prescribed specific statutory powers on the Board, including the power to select the peer health assistance provider. In accordance with § 24-1-105 (1), as a type 1 transfer, the Board retains this power independent of the duties and powers of the head of the principal department. The plain and unambiguous language of §§ 12-240-131(1) (b) and 24-1-105 (1), C.R.S. gives the selection authority to the Board, and not to DORA.

The ALJ disagrees with the Procurement Officer's determination that the procurement code preempts the specific delegated grant of statutory authority given to the Board by the legislature to select the peer health assistance provider. The plain language in § 12-240-131 (1)(b) makes this clear. A statute's plain language is afforded its "plain and ordinary" meaning. § 2-4-101, C.R.S. A court should look first to the plain language of the statute, and the words used should be given effect according to their plain and ordinary meaning. *Farmers Group, Inc. v. Williams*, 805 P.2d 419 (Colo. 1991). If the language of a statute is plain and its meaning clear, it must be applied as written. *Heagney v. Schneider*, 677 P.2d 446 (Colo. App. 1984); *In Interest of A.R.W.*, 903 P.2d 10 (Colo. App. 1994); *Catholic Health Initiatives Colo. v. City of Pueblo*, 207 P.3d 812 (Colo. 2009).

In rejecting CPHP's challenge to DORA's selection authority, the Procurement Officer also relied, in part, on DORA's past practice of signing contracts with CPHP. The ALJ finds this discussion unpersuasive and irrelevant. The language in the MPA is clear and unambiguous. "If a statute is clear and unambiguous on its face, then we need not look beyond the plain language and we must apply the statute as written." *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004) (internal citations omitted.) Additionally, there is no challenge to DORA's contracting authority or its administrative task of procuring the contract. The issue is who is authorized to select the provider.

CPHP contends that the Procurement Officer erroneously conflated DORA's contracting authority with its authority to select the provider. The ALJ agrees. The two are separate and distinct concepts, which the legislature intended to remain separate when it delegated the selection authority to the Board. It is presumed that the general assembly has knowledge of the legal import of the words it uses and that it intends each part of the statute to be given effect. *Longbottom v. State Bd. of Cmty. Colls.*, 872 P.2d 1253 (Colo. App. 1993). Again, basic principles of statutory construction mandate that statutes addressing the same subject matter should be harmonized. *Subsequent Injury Fund v. Trevethan*, 809 P.2d 1098 (Colo. App. 1991) (Statutes addressing the same subject matter must, if possible, be construed together to give full effect to the legislative purpose of each statute.) When construing a statute, the statute must be read and considered as a whole, so as to ascertain the intent of the general assembly in passing it. *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972); *People v. District Court*, 713 P.2d 918 (Colo. 1986); *Longbottom v. State Bd. of Cmty. Colls.*, 872 P.2d 1253 (Colo. App. 1993); *Kittinger v. City of Colo. Springs*, 872 P.2d 1265 (Colo. App. 1993). The

meaning of any one section must be gathered from a consideration of the entire legislative scheme. *State Hwy. Comm'n v. Haase*, 189 Colo. 69, 537 P.2d 300 (1975). The ALJ concludes that a harmonious reading of §§ 12-204-131 (1)(b) and 24-1-105 (1) leads to one result: The Board has the delegated statutory authority to select the peer health assistance program provider independent of DORA's contracting and administrative authority.

It is the decision of the ALJ that DORA exceeded its statutory authority and violated the procurement code by unilaterally selecting the peer health assistance provider. Only the Board has the authority to select the provider. "The duties and powers of an administrative agency are determined and limited by the statutes under which is created, and actions of an administrative agency that exceed the scope of those delegated duties and powers are void." *Denver Local 2-477; Oil, Chem. & Atomic Workers' Int'l Union v. Metro Wastewater Reclamation Dist.*, 7 P.3d 1042, 1045 (Colo. App. 1999).

### **AGENCY DECISION**

If the executive director or his or her designee determines that the solicitation or award is in violation of this code in any material respect, the executive director or his or her designee may cancel or terminate such solicitation or award, direct the purchasing agency to modify such solicitation or award to eliminate any violations. § 24-109-504 (1), C.R.S.

It is the Agency Decision of the ALJ that DORA does not have the legal authority to select the peer health assistance program provider. DORA's actions constitute a material violation of the procurement code because DORA lacks the authority to select the provider. In accordance with § 24-109-504 (1), the ALJ directs the purchasing agency to void the prior selection and modify the process to include the Board who is the only agency authorized to select the peer health assistance provider. Because the award is void, the ALJ has not addressed any of the other issues raised by CPHP in its protest.

**DONE AND SIGNED** this 10<sup>th</sup> day of November 2020

MICHELLE A. NORCROSS  
Administrative Law Judge

