STATE OF NEW YORK
DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Mark R. Chassin, M.D., M.P.P., M.P.H.
Commissioner

Paula Wilson
Executive Deputy Commissioner

December 27, 1993

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Fredrick Zimmer, Esq.
NYS Department of Health
Corning Tower - Room 2429
Empire State Plaza
Albany, New York 12237

Anthony Z. Scher, Esq.
Wood and Scher
The Harwood Bldg.
14 Harwood Court
Scarsdale, NY 10583

Nathan Ionascu, M.D.
8 Grant Street
Pleasantville, New York 10570

RE: In the Matter of Nathan Ionascu, M.D.

Dear Mr. Zimmer, Mr. Scher and Dr. Ionascu:

Enclosed please find the Determination and Order (No. BPMC-93-208) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon receipt **or** seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct
New York State Department of Health
Corning Tower - Fourth Floor (Room 438)
Empire State Plaza
Albany, New York 12237

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must than be delivered to the Office of Professional Medical Conduct in the manner noted above.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "(t)he determination of a committee on professional medical conduct may be reviewed by the administrative review board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays all action until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

All notices of review must be served, by **certified mail**, upon the Administrative Review Board **and** the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Corning Tower - Room 2503
Empire State Plaza
Albany, New York 12237-0030

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Very truly yours,

Tyrone T. Butler/crc

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:crc
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER OF NATHAN IONASCU, M.D.	DETERMINATION AND ORDER OF THE HEARING COMMITTEE ORDER NO. BPMC-93-208

The undersigned Hearing Committee consisting of MS. CAROLYN C. SNIPE, Chairperson, BERNARD P. LEONARD, M.D., and DANIEL A. SHERBER, M.D., was duly designated and appointed by the State Board for Professional Medical Conduct. JONATHAN M. BRANDES, Esq., Administrative Law Judge, served as Administrative Officer.

The hearing was conducted pursuant to the provisions of section 230(10) of the New York State Public Health Law and sections 301-307 and 401 of the New York State Administrative Procedure Act to receive evidence concerning alleged violations of provisions of Section 6530 of the New York Education Law by NATHAN IONASCU, M.D. (hereinafter referred to as "Respondent"). Witnesses were sworn or affirmed and examined. A stenographic record of the hearing was made. Exhibits were received in evidence and made a part of the record.

The Committee has considered the entire record in the above captioned matter and hereby renders its decision with regard to the charges of medical misconduct.

RECORD OF PROCEEDING

Original Notice of Hearing and Statement of Charges:	May 19, 1993
Notice of Hearing returnable:	June 23, 1993
Place of Hearing:	New Rochelle, New York New York, New York
Respondent's answer served:	None
The State Board for Professional Medical Conduct appeared by:	Frederick Zimmer, Esq. Assistant Counsel Bureau of Professional Medical Conduct Room 2429 Corning Tower Empire State Plaza Albany, New York
Respondent appeared in person and was represented by:	Anthony Z. Scher, Esq. Wood and Scher The Harwood Building 14 Harwood Court Scarsdale, New York 10583
Respondent's present address:	8 Grant St. Pleasantville, New York 10570
Hearings held on:	June 23, 1993 October 6, 1993
Conferences held on:	June 23, 1993
Closing briefs received:	October 20, 1993
Record closed:	October 20, 1993
Deliberations held:	September 14, 1993

SUMMARY OF PROCEEDINGS

The Statement of Charges alleges Respondent has committed conduct in the practice of medicine which evidences moral

unfitness to practice medicine as set forth in N.Y. Education Law Section 6530 (20). The allegations arise from two incidents, one in 1987 and one in 1989. The allegations are more particularly set forth in the Statement of Charges which is attached hereto as Appendix I.

Respondent denied each of the charges.

The State called one witness:

Mrs. B	Fact Witness

Respondent testified in his own behalf and called this witness:

Lewis M. Bloomingdale, M.D.	Expert Witness

SIGNIFICANT LEGAL RULINGS

The Administrative Law Judge issued instructions to the Committee with regard to the definitions of medical misconduct as alleged in this proceeding. The Committee was instructed that to sustain its burden of proof, the State must show Respondent committed acts which "evidence moral unfitness." It was explained to the Committee that there is a distinction between a finding that an act "evidences moral unfitness" and a finding that a particular person is in fact morally unfit. Here, the Committee is asked to decide if certain alleged conduct is suggestive of or would tend to prove moral unfitness. They were not called upon to make an overall judgement regarding Respondent's moral character.

It was pointed out that an otherwise moral individual could commit an act "evidencing moral unfitness" due to a lapse in judgement or other temporary aberration.

The Committee was instructed that the standard for moral unfitness in the practice of medicine is twofold: First, there may be a finding that the accused has violated the public trust which is bestowed upon one by virtue of his licensure as a physician. It was explained that patients are asked to place themselves in potentially compromising positions with physicians, such as when they disrobe for examination or treatment. Hence, it is expected that a physician will not violate the trust the public has bestowed upon him by virtue of his professional status. This leads to the second aspect of the standard: The Committee was instructed that moral unfitness could be seen as a violation of the moral standards of the medical community which they, as delegated members of that community, represent.

The following findings of fact were made after review of the entire record. Numbers in parentheses (T.) refer to transcript pages or numbers of exhibits (Ex.) in evidence. These citations represent evidence and testimony found persuasive by the Hearing Committee in arriving at a particular finding. Evidence or testimony which conflicted with any finding of this Hearing Committee was considered and rejected. Some evidence and testimony was rejected as irrelevant. The State was required to meet the burden of proof by a preponderance of the evidence. All findings of fact made by the Hearing Committee were established by

at least a preponderance of the evidence. Unless otherwise stated, all findings and conclusions herein were unanimous.

GENERAL FINDINGS OF FACT

1. Respondent is a licensed physician in New York State and is currently registered with the New York State Education Department to practice medicine through December 31, 1994 (Exhibit No. 2).

2. Respondent was born in Rumania and attended medical school in Bucharest, Rumania, from 1952 to 1958 (T. 48).

3. Respondent received postgraduate training in Rumania including a rotating internship in infectious diseases and in adult and child internal medicine (T. 48).

4. In June 1964, Respondent emigrated to the United States (48).

5. Once here, Respondent performed a second internship at Jewish Memorial Hospital in Manhattan (T. 48-49).

6. Thereafter, from 1967-1969, Respondent received training in pediatrics at a residency program at Columbia Presbyterian Hospital (T. 49).

7. In June 1971, after serving two years in the United States Army, Respondent opened a private medical practice in pediatrics in Pleasantville, New York, where he has practiced for the last twenty-two years (T. 49).

FINDINGS OF FACT WITH REGARD TO MRS. A AND PATIENT 1

1. Mrs. A did not testify because Respondent stipulated that the acts alleged in the Statement of Charges had, in fact, occurred.

2. Mrs. A's second child (Patient 2) died tragically shortly after she was born (T. 96).

3. Thereafter, Respondent and his office staff spent a great deal of time with Mrs. A and her husband in an effort to help them cope with the loss of their second child (T. 96).

4. Respondent recommended a support group of parents who had suffered a similar loss (T. 96).

5. Sometime prior to November 10, 1989, Respondent suggested to Mrs. A that she and Mr. A join him for lunch. The purpose of this meeting was to provide counseling for Mr. and Mrs. A to get on with their lives -- to make sure that their other child was not neglected while they were continuing to grieve. Respondent wanted Mr. and Mrs. A to emerge from their severe depressive state (T. 96,99).

6. In the morning of November 10, 1989, Mrs. A called Respondent to confirm the luncheon appointment. At that time, she advised Respondent that she was coming with her daughter but that her husband would be unable to attend (T. 98).

7. Mrs. A arrived at Respondent's office with her daughter

and they drove to a nearby pizza restaurant for lunch (T. 98).

8. During lunch, Respondent and Mrs. A discussed, among other things, a bereavement group (T. 100).

9. After lunch, Respondent, Mrs. A and her daughter returned to the office. During the drive back, Respondent and Mrs. A realized that Mrs. A's daughter had soiled her diaper (T. 100). Respondent invited Mrs. A inside to use his facilities to change her daughter (T. 100).

10. When they first entered the office after lunch, there was nobody present. Respondent showed Mrs. A to the examining room and provided her with a diaper, a paper towel and wipes. He left her there to change her daughter and then went back to his office where he resumed his work. His nurses returned from lunch and the afternoon patients began to come in (T. 101).

11. Either Respondent or one of his staff told Mrs. A to wait before leaving because Respondent had a surprise for Mrs. A's daughter -- a balloon. Respondent frequently gives such gifts to his patients (T. 101-102).

12. Mrs. A waited for Respondent in his office. When Respondent went over to her he gave her a kiss on the mouth. He put his tongue in Mrs. A's mouth (T. 102). Mrs. A left quickly (T. 102).

FINDINGS OF FACT

WITH REGARD TO

MRS. B AND PATIENT 2

1. On or about August 16, 1987, Mrs. B called Respondent and informed him that Patient 2 was sick and had been up all night (T. 50).

2. Respondent advised Mrs. B to bring the child to the office (T. 50).

3. Mrs. B brought Patient 2 to the office on August 16, 1987. Respondent took a history of a cough of 48 hours duration; no fever; no vomiting; presenting signs of a marked post nasal drip and a dry cough. His examination revealed that the lungs were clear; there was an accelerated heart rate; no swollen cervical or submandibular nodes (T. 52-53; Exhibit No. 3).

4. Respondent treated Patient 2 with a cough suppressant and Proventil which is a bronchodilator (T. 53).

5. Respondent's examination was performed while Mrs. B was holding Patient 2 in her arms. It was at this time that Respondent was attempting to listen to the axillary space. Initially this was difficult because Patient 2's hand and arm were in the way.

6. Respondent placed Patient 2's hand on the breast area of Mrs. B. Mrs. B considered this contact to be inadvertent (T. 40-41, 54).

7. Respondent was concerned about the number of infections

for which Patient 2 had been brought in for over the last two years and suggested to Mrs. B that she return at a later date to review the case when he would have more time (T. 56).

8. Mrs. B returned to Respondent's office on a Saturday sometime after August 16, 1987 and prior to September 11, 1987. She provided Respondent with a complete allergy history. Respondent wrote the history on a piece of paper as Mrs. B was speaking (T. 56-57); Exhibit C).

9. As the medical interview was concluding, Respondent began to ask Mrs. B questions about her work and how Mrs. B was doing in such a manner as to make Mrs. B feel "uncomfortable." Mrs. B started to leave. She was walking down a corridor, accompanied by Respondent who was giving her instructions regarding the care of the patient. She turned toward him briefly and, as she did so, Respondent took hold of Mrs. B's arms. He said "let me just give you a kiss good-bye" and leaned forward frontally, as if to kiss Mrs. B on the mouth. She turned, pushed him away and said "no, please don't do this" (T. 16, 30-31, 35).

10. Respondent repeated his attempt to give Mrs. B a kiss. Mrs. B again said "no" pushed Respondent and turned away. As Mrs. B was pushing Respondent away, he made contact with her shoulder and kissed her there (T. 16-17, 35-36).

11. Respondent then kissed Mrs. B's hand and said "Now, see, that wasn't so bad, was it?" (T. 17).

12. Sometime after this Saturday visit, Mrs. B directed that Patient 2's medical records be forwarded to another physician.

This request was received at Respondent's office on September 11, 1987 (T. 67; Exhibit D).

FINDINGS OF FACT

REGARDING

MEDICAL TREATMENT RECEIVED BY RESPONDENT

1. Since December 1987, Dr. Louis Bloomingdale had been Respondent's treating psychiatrist (T. 140-141). Dr. Eileen Bloomingdale is the wife of Dr. Louis Bloomingdale. Dr. Eileen (as referred to by her husband) is a psychologist who has performed psychological tests and evaluations of Respondent as part of the care of Respondent.

2. Dr. Louis Bloomingdale has diagnosed Respondent as having a mixed personalty disorder and adult attention deficit disorder (T. 177-179); Exhibit No. 5).

3. Dr. Eileen Bloomingdale, in her evaluation, used the term "sly sexual gratification" to describe Respondent (T. 206 ff).

CONCLUSIONS WITH REGARD TO FACTUAL ALLEGATIONS

Respondent admitted the factual allegations concerning Mrs. A and Patient 1. Thus, the Committee first turns its attention to the allegations regarding Mrs. B and Patient 2. The allegations may be summarized as follows: Respondent made contact with Mrs. B's breast; he attempted to kiss her on the face; he was able to kiss her shoulder. With regard to the first allegation, it was admitted by Mrs. B that the contact with her breast was incidental

and did not constitute inappropriate conduct. Thus, while sustained as factually accurate, Allegation B.1 will not form the basis for a finding of professional misconduct.

Factual Allegation B.2 is contested. The State alleges that Respondent attempted to kiss Mrs. B on the face but was thwarted by Mrs. B. He was however able to kiss her shoulder. Respondent asserts that he merely intended a continental custom; an innocent kiss to the hand of a patient's mother, which was misunderstood by the recipient. The Committee does not believe Respondent. Rather, the Committee finds that Respondent engaged in forcible contact with Mrs. B which was clearly against her will and hence a violation of basic moral principles.

The Committee found Mrs. B to be credible in her demeanor and presentation. She showed no evidence of hostility toward Respondent. There was no suggestion of a hidden agenda on her part. Indeed, she was sufficiently forthright to admit that the contact to her breast was incidental and without inappropriate intent. Thus, she demonstrated openness and a desire to speak the truth rather than an inclination toward vendetta. Her answers on direct examination and cross-examination as well as during panel questioning were without evasion or attempted artifice.

Respondent, on the other hand, was not nearly as credible. The Committee found him evasive and contradictory in his answers. Of particular note is the exchange between Respondent and the Chairperson beginning at page 76 and continuing through page 82. It was the perception of the Committee that during this part of

the questioning, Respondent changed his answers regarding the nature of the patient record and particularly his "habit" of kissing the hand of patient mothers, several times. He appeared to be creating the facts as he proceeded.

Finally, Respondent's defense to this incident is belied by the rest of his defense and the testimony of his own treating expert. Respondent would have the Committee forgive his contact with Mrs. A because Respondent suffers from adult attention deficiency disorder which leads him to act impulsively. Yet, on the other hand, he denies impulsively trying to kiss Mrs. B. The account given by Mrs. B makes far more sense in the context of Dr. Bloomingdale's testimony that Respondent exhibited a tendency toward "sly sexual gratification" and the rest of Respondent's defense, than the account Respondent would have the Committee believe.

Therefore, based upon the above conclusions and admissions:

FACTUAL ALLEGATION A.1 IS SUSTAINED
FACTUAL ALLEGATION B.1 IS SUSTAINED
FACTUAL ALLEGATION B.2 IS SUSTAINED

CONCLUSIONS WITH REGARD TO SPECIFICATIONS

Two of the Factual Allegations having been admitted or sustained, (Allegation B.1 while sustained will not be used to support a specification of misconduct) the Committee now turns its attention to the Specifications. Respondent is charged with two Specifications of moral unfitness. The Committee sustains both Specifications and finds that Allegations A.1 and B.2 would each

support a finding that Respondent acted in a manner which evidences moral unfitness. In so finding, the Committee concludes that Respondent acted in a manner which both betrays the trust conferred upon him by virtue of his licensure as a physician and violates the moral standards of the community which the panel represents.

The Committee finds that there is a theme in the two events established in this proceeding. On both occasions, Respondent forced his attentions upon the mothers of his patients. Furthermore, with reference to both events, the Committee finds the main issue to be one of power versus powerlessness: In both cases the mothers were relatively powerless in that they were in Respondent's office and thus, to a large degree isolated. Also, given that the purpose of visits concerned the illness of their children, it is logical to believe that both mothers would have been pre-occupied and at an emotional disadvantage. Respondent on the other hand was in his own office. He was there as advisor and healer. As such, he had a clear position of power over the two mothers. Such a situation where the physician is in a position of power and authority over patients and family is common to the practice of medicine. Patients and family are encouraged to place their well-being and that of their children into the hands of physicians, who are otherwise strangers to the patients. Hence, patient trust of the physician is based primarily on the fact that they are physicians. The trust arises by virtue of the licensure.

It follows then, that patients and the mothers of patients have the right to visit the doctor, allow themselves to be in a relatively powerless position and not have to concern themselves with inappropriate and unwanted advances. Respondent's violation of the trust bestowed upon him by Mrs. A and Mrs. B is a violation of the fiduciary responsibility conferred upon all physicians by virtue of their professional status. Hence, the violation constitutes an act which evidences moral unfitness as intended by the statute.

With regard to Respondent's defenses, the Committee finds that the diagnosis of Adult Attention Deficiency Disorder may provide a reason for the acts sustained in Allegation A.1, it does not insulate Respondent from the consequences of a serious act of assault. With regard to Respondent's assertion that he only intended to kiss the hand of Mrs. B, assuming for the sake of argument that Respondent was merely engaging in a European custom, Mrs. B made it clear, not once but twice, that she did not wish the intended contact to take place. Thus, the issue here was not the act itself, but rather the imposition of that act over the will of Mrs. B. While the Committee believes that in this case Respondent attempted to kiss Mrs. B, the act involved might just as well have been a handshake. The point is that Mrs. B stated unequivocally, on two occasions that the contact was unwelcome. Yet, Respondent persisted.

In addition to the violation of the trust bestowed upon Respondent, the Committee finds that Respondent's acts violate the

moral standards of the medical community which they represent. The Committee finds that respect for the rights of patients and their families is essential to the standards of the community. By virtue of his inappropriate and unwanted contact with these mothers, Respondent showed contempt for their rights to avoid unwarranted contact and, in the case of Mrs. B, the right to be heard and heeded when unacceptable conduct is perceived.

Therefore, based upon the above conclusions;

The FIRST SPECIFICATION IS SUSTAINED
The SECOND SPECIFICATION IS SUSTAINED

CONCLUSIONS WITH REGARD TO PENALTY AND ORDER

This Committee has found that on two occasions Respondent disregarded the trust bestowed upon him by virtue of his licensure as a physician in this state and violated the moral standards of the medical community. The violations were very serious in that they involve clearly inappropriate and unwelcome contact. Respondent allowed his will to overcome his position as healer and advisor to these mothers. Such conduct is reprehensible, inexcusable and intolerable.

Nevertheless, the Committee was split two votes to one on the stringency of the penalty. The majority voted for revocation on the grounds that not only has Respondent committed the acts alleged, but during the hearing showed signs of continuing problems. The majority concluded both from the testimony of Respondent and Dr. Bloomingdale that Respondent has not resolved

all the issues that brought about this proceeding. He continues to be in a state of denial. He has a need to externalize responsibility. Indeed, the defense of Adult Attention Deficit Disorder can be seen as an externalization of the cause: The majority concludes that Respondent's position is that the disease or disorder is responsible for what happened rather than Respondent himself. The Majority found it particularly noteworthy that Dr. Bloomingdale testified Respondent was angry at the state prosecutor (albeit he was losing this anger), as if the prosecutor was responsible for the situation rather than Respondent. Even the dissenting vote favored revocation. The dissenting position was that the License of Respondent should be revoked, the revocation stayed in lieu of continued treatment and monitoring. The dissenting view gave great weight to the fact that Respondent has stayed in therapy and is attempting to cope with his problems. It was the opinion of the majority that revocation was the appropriate sanction, noting that in one year, Respondent could re-apply for licensure. However, in the interim, the public will be protected. Furthermore, at the time of application for re-licensure, the burden would then be on Respondent to show he was fully fit to practice.

Therefore, it is hereby **ORDERED:**

That Respondent's license to practice medicine in the State of New York shall be immediately **REVOKED.**

Dated: New York, New York
Dec 23, 1993

CAROLYN C. SNIPE
Chairperson

BERNARD P. LEONARD, M.D.
DANIEL A. SHERBER, M.D.

APPENDIX I

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

----------X

IN THE MATTER	:	STATEMENT
OF	:	OF
NATHAN IONASCU, M.D.	:	CHARGES

----------X

NATHAN IONASCU, M.D., the Respondent, was authorized to practice medicine in New York State on September 16, 1968 by the issuance of license number 102272 by the New York State Education Department. Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1993 through December 31, 1994 with a registration address of 8 Grant Street, Pleasantville, New York 10570.

FACTUAL ALLEGATIONS

A. Respondent, for approximately two and a half years prior to November 17, 1989, was Mrs. A's family pediatrician. Respondent was the pediatrician for Mrs. A's daughter, Patient 1, who was born on September 6, 1989 and died approximately 24 hours later. (Mrs. A and Patient 1 are identified in the attached Appendix).

1. Respondent, on or about November 10, 1989, invited Mrs. A to lunch to discuss a bereavement group which Mrs. A had begun attending following the death of Patient 1. Immmediately after having lunch with Respondent on or about November 17, 1989, Mrs. A stopped at Respondent's office at 8 Grant Street, Pleasantville, New York, to change her daughter's diaper. Respondent, as Mrs. A was leaving his office, grabbed the back of Mrs. A's head, kissed Mrs. A on the lips and stuck his tongue into Mrs. A's mouth.

B. Respondent, on or about August 16, 1987, treated Mrs. B's daughter, Patient 2, at his office at 325 Manville Road, Pleasantville, New York. Respondent had been Patient 2's pediatrician between late 1986 and August 16, 1987. (Mrs. B and Patient 2 are identified in the attached Appendix).

1. Respondent, during his examination of Patient 2, on August 16, 1987, placed his hand and Patient 2's hand on Mrs. B's breast.

2. Respondent, on August 16, 1987, as Mrs. B was leaving his office, firmly took hold of Mrs. B's arms and attempted to kiss her. When Mrs. B resisted, twice said no and attempted to turn away, Respondent tightly held Mrs. B's lower arms and kissed her shoulder and hand.

FIRST AND SECOND SPECIFICATIONS

MORAL UNFITNESS

Respondent is charged with conduct in the practice of medicine which evidences moral unfitness to practice medicine, under N.Y. Educ. Law Sec. 6530 (20) (McKinney's Supp., 1992), in that the Petitioner charges:

1. The facts in Paragraphs A and A.1.

2. The facts in Paragraphs B and B.1 and/or B and B.2.

DATED: Albany, New York
May 19, 1993

Peter D. Van Buren

PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical
Conduct

SUMMARY OF DEPARTMENT OF HEALTH HEARING RULES

(Pursuant to Section 301 SAPA)

The following items are addressed by the Uniform Hearing Procedures Rules of the New York State Department of Health:

Applicability

Definitions

Notice of Hearing

Adjournment

Answer or Responsive Pleading

Amendment of Pleadings

Service of Papers

Discovery

Hearing Officer/Pre-Hearing Conference

Pre-Hearing Conference

Stipulations and Consent Orders

The Hearing

Hearing Officer's Report

Exceptions

Final Determination and Order

Waiver of Rules

Time Frames

Disqualification for Bias

The exact wording of the rules is found at 10 NYCRR Part 51 of Volume 10 of the New York Code of Rules and Regulations. Each of the above items may be summarized as following:

51.1 Applicability. These regulations apply to most hearings conducted by the Department of Health.

51.2 Definitions.

1. "Commissioner" means Commissioner of the New York State Department of Health.

2. "CPLR" means Civil Practice Law and Rules.

3. "Department" means New York State Department of Health.

4. "Hearing Officer" means the person appointed to preside at the hearing or the person designated as administrative officer pursuant to Public Health Law Section 230.

5. "Party" means all persons designated as petitioner, respondent or intervenor.

6. "Report" means the Hearing Officer's summary of the proceeding and written recommendation or the findings, conclusions and determination of the hearing committee pursuant to Public Health Law Section 230.

51.3 The Department's Notice of Hearing and/or Statement of Charges should be served at least 15 days prior to the first hearing date, specify time, place and date(s) and should contain the basis for the proceeding.

51.4 Adjournment. Only the Hearing Officer may grant an adjournment and only after he/she has consulted with both parties. In hearings pursuant to Public Health Law Section 230, an adjournment on the initial day may be granted by the hearing committee.

51.5 Answer to Responsive Pleading. A party may serve a response to the allegations of the Department.

51.6 Amendment to Pleadings. A party may usually amend papers if no substantial prejudice results by leave of the Hearing Officer.

51.7 Service of Papers. Except for the Notice of Hearing and/or Statement of Charges, all papers may be served by ordinary mail.

51.8 Disclosure. Generally, there is no disclosure of any kind and the Hearing Officer cannot require it, unless all parties agree. If agreed to, the Hearing Officer will ensure all parties proceed in accordance with their agreement. However, in a hearing in which revocation of a license or permit is sought or possible, a party may demand in writing that another party disclose the names of witnesses, documents or other evidence such other party intends to offer at the hearing. A demand for such disclosure must be served at least 10 days prior to the first scheduled hearing date. Disclosure or a statement that the party has nothing to disclose must be made at least 7 days before the first scheduled hearing date. A party that determines to present witnesses or evidence not previously disclosed must supplement its disclosure as soon as practicable. The Hearing Officer may, upon good cause shown, modify the times for demands for and response to disclosure or allow a party not to disclose or limit, condition or regulate the use of information disclosed and may preclude the introduction of evidence not disclosed pursuant to a demand.

51.9 Hearing Officer. He/she presides over the hearing and has the authority to ensure it is conducted in an orderly fashion. He/she may also order the parties to meet before the hearing to discuss the procedure. He/she does not have the authority to remove testimony from the transcript and/or dismiss charges unless authorized by delegation.

51.10 Stipulation and Consent and Surrender Orders. At any time prior to a final order, parties may resolve all or any issues by stipulation. An order issued pursuant to a stipulation has the same force and effect as one issued after hearing.

51.11 The Hearing. A party may have an attorney represent him or her. Failure to appear may result in an adverse ruling. A hearing may be combined with or separated from another hearing depending on whether such action will result in delay, cost or prejudice. While the rules of evidence as applied in a courtroom are not observed, witnesses must be sworn or give an affirmation

and each party has the right to present its case and to cross-examine. The Department has broad discretion to place documents into evidence. A record of the proceeding must be made. In enforcement cases, the Department has the burden of proof and of going forward. In matters relating to neglect or abuse of patients under Public Health Law Section 2803-d, the Hearing Officer may not compel disclosure of the identity of the person making the report or who provided information in the investigation of the report.

Complaints relating to Public Health Law Section 230 may not be introduced into evidence by either party and their production cannot be required by the Hearing Officer.

Claims that a hearing has been unreasonably delayed is treated as an affirmative defense (Section 51.5) or as part of claimant's case. The burden of going forward and of proof are on the claimant.

A verbatim record of the proceeding shall be made by any means determined by the Department. The record shall include notice of hearing and any statement of charges, responsive pleadings, motions, rulings, transcript or recording, exhibits, stipulations, briefs, any objections filed, any decision, determination, opinion, order or report rendered.

51.12 Hearing Officer's Report. In matters governed by Public Health Law Sections 230, 230-a and 230-b, the final report should be submitted not more than 52 days after completion of the hearing if service is effectuated by mail and not more than 58 days of service if effectuated personally. In all other matters, the Hearing Officer, within 60 days of the completion of the hearing, should submit a report.

51.13 Filing of Exceptions. Within 30 days of the date of a copy of the report of the Hearing Officer and proposed order or, within 15 days of a date a report of the hearing committee and proposed recommendation for hearings conducted pursuant to Public Health Law Section 230 is sent to the parties, any party may submit exceptions to said report and proposed order to the Supervising Administrative Law Judge. On notice of all parties, a party may request, before the expiration of the exception period, the Supervising Law Judge to extend the exception period. All parties have the opportunity to state their position on the extension on the record. Extensions may be granted on good cause shown; however, they are not granted to allow a party to respond to exceptions already filed.

51.14 Final Determination Order. The hearing process ends when an order is issued by the Commissioner or his designee or the appropriate board of council. The order should state a basis for the decision. Each party receives a copy of the order.

51.15 Waiver of Rules. These rules and regulations may be dispensed with by agreement and/or consent.

51.16 Establishment, Construction, Rate Hearings. Hearings involving any of these issues have time limits concerning the issuance of notices of hearing of 365 days of receipt by the Department of a request for hearing.

51.17 Disqualification for Bias. Bias shall disqualify a Hearing Officer and/or a committee member in hearings governed by Public Health Law Section 230. The party seeking disqualification must submit to the hearing officer an affidavit pursuant to SAPA Section 303. Mere allegations are insufficient. The Hearing Officer rules on the request.

DATED: Albany, New York
February 7, 1992

PETER J. MILLOCK
General Counsel