STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Antonia C. Novello, M.D., M.P.H., Dr.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

July 30, 2004

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Amy B. Merklen, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2509
Albany, New York 12237

Joseph S. Testa, M.D.
23 Hiler Avenue
Kenmore, New York 14217

Ann M. Campbell, Esq.
Thomas M. Prato, Esq.
Brown & Tarantino, LLP
1500 Rand Building
14 Lafayette Square
Buffalo, New York 14203

RE: In the Matter of Joseph S. Testa, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 04-171) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the 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.

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), "the 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.

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
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

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.

Sincerely,

Sean D. O'Brien

Sean D. O'Brien, Director
Bureau of Adjudication

SDO:cah

Enclosure

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

COPY

IN THE MATTER	:	DETERMINATION
	:	
OF	:	AND
	:	
JOSEPH S. TESTA, M.D.	:	ORDER
		BPMC #04-171

A Notice of Hearing and Statement of Charges, both dated April 5, 2004, were served upon the Respondent, Joseph S. Testa, M.D. **MARGARET McALOON, M.D. (CHAIR), DEBRA M. OMIATEK, M.D., AND PETER S. KOENIG, SR.,** duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(Executive) of the Public Health Law. **LARRY G. STORCH, ADMINISTRATIVE LAW JUDGE,** served as the Administrative Officer. The Department of Health appeared by Amy B. Merklen, Esq., Assistant Counsel. The Respondent appeared by Brown & Tarantino, LLP, Ann M. Campbell, Esq., and Thomas M. Prato, Esq., of Counsel. Evidence was received and witnesses sworn and heard and transcripts of these proceedings were made. Hearings were held on June 3 and 4, 2004. Deliberations were held on July 15, 2004.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

STATEMENT OF CASE

Petitioner has charged Respondent with four specifications of professional misconduct. The charges relate to Respondent's medical care and treatment of one patient. The charges include allegations of gross negligence, gross incompetence, negligence on more than one occasion, and incompetence on more than one occasion. Respondent denied the allegations.

A copy of the Notice of Hearing and Statement of Charges is attached to this Determination and Order in Appendix I.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers in parentheses refer to transcript page numbers or exhibits. These citations represent evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence.

1. Joseph S. Testa, M.D. (hereinafter "Respondent"), was authorized to practice medicine in New York State by the New York State Education Department's issuance of license number 154759 on July 1, 1983. (Ex. #3).

2. Respondent waived personal service and authorized his attorney to accept service on his behalf. (Ex. #2).

3. Ian M. Frankfort, M.D., testified on behalf of Petitioner. Dr. Frankfort has been board-certified in family practice since 1975. He maintains both an office and hospital practice. Dr. Frankfort sees approximately 90 to 100 patients per week in his office along with patients in the hospital. (Ex. #6; T. 13-14).

4. Patient A, a 72 year old male, presented at the Kenmore Mercy Hospital emergency room on November 15, 2002. He presented with shortness of breath. The patient was diagnosed with pneumonia, respiratory insufficiency, and questionable heart failure. He was admitted to the hospital's intensive care unit ("ICU"). (Ex. #4; T. 16-17).

5. Respondent was Patient A's primary care physician, and the attending physician of record during this hospitalization. (Ex. #4; T. 80-81).

6. Patient A's sodium level rose consistently from 126 meq/ml on November 15, 2002 to 161 meq/ml on November 23, 2002. (Ex. #4; T. 19-27).

7. The reference range for sodium at Kenmore Mercy Hospital was 134-145. (Ex. #4; T. 20).

8. On November 22, 2002, Patient A's sodium level was 153 meq/ml. At the time, he was receiving an intravenous infusion (IV) of 5% dextrose in normal saline (D5NS) at a rate of 60 cc/hr. (Ex. #4, p. 24; T. 23).

9. On November 22, 2002, Respondent increased the flow rate of Patient A's IV to 125 cc/hr for 8 hours, and then to 75 cc/hr, despite his abnormally high sodium level. (Ex. #4, p. 24; T. 23).

10. Respondent did not attempt or consider any other intravenous solution at the time. (T. 129-130).

11. Isotonic solutions, such as normal saline, contribute to a rising sodium level. (T. 123, 197).

12. Respondent should have reduced the amount of sodium in Patient A's IV solution when confronted with his increasingly high sodium level. (T. 54-55).

13. Respondent's management of Patient A's sodium level, once it reached 153 meq/ml, deviated from generally accepted standards of medical practice. (T. 30, 32, 33).

14. On November 23, 2002, Respondent ordered a free water IV for Patient A, to be administered at a rate of 100 cc/hr. This was contraindicated for the patient's condition. (Ex. #4, p. 24; T. 33, 209).

15. Patient A received between 500 and 600 cc's of intravenous free water. (T.34).

16. Prior to the intravenous administration of free water, Patient A's condition was improving. A chest x-ray indicated that his lungs were clearing, and he was extubated. (Ex. #4, p. 87; T. 115-116).

17. There was a serious deterioration in Patient A's clinical status after the infusion of intravenous free water ordered by Respondent. (Ex. #4, p. 8; T. 58).

18. Ultimately, Patient A expired on November 25, 2002. (Ex. #4).

19. Respondent's order for intravenous free water was a significant deviation from generally accepted standards of practice. (T. 56).

CONCLUSIONS OF LAW

Respondent is charged with four specifications alleging professional misconduct within the meaning of Education Law §6530. This statute sets forth numerous forms of conduct which constitute professional misconduct, but does not provide definitions of the various types of misconduct. During the course of its deliberations on these charges, the Hearing

Committee consulted a memorandum prepared by the General Counsel for the Department of Health. This document, entitled "Definitions of Professional Misconduct Under the New York Education Law" sets forth suggested definitions for gross negligence, negligence, gross incompetence, incompetence, and the fraudulent practice of medicine.

The following definitions were utilized by the Hearing Committee during its deliberations:

Negligence is the failure to exercise the care that a reasonably prudent physician would exercise under the circumstances. It involves a deviation from acceptable standards in the treatment of patients. Bogdan v. Med. Conduct Bd., 195 A. D. 2d 86, 88-89 (3rd Dept. 1993). Injury, damages, proximate cause, and foreseeable risk of injury are not essential elements in a medical disciplinary proceeding, the purpose of which is sole to protect the welfare of patients dealing with State-licensed practitioners. Id.

Gross Negligence may consist of "a single act of negligence of egregious proportions, or multiple acts of negligence that cumulatively amount to egregious conduct..." Rho v. Ambach, 74 N.Y. 2d 318, 322, 546 N.Y.S. 2d 1005 (1989). Multiple acts of negligence occurring during one event can amount to gross negligence on a particular occasion (Rho, *supra*

at322). No single formula has been articulated to differentiate between simple negligence and errors that are viewed as gross. While some courts have referred to gross negligence as negligence which is "egregious" or "conspicuously bad", articulation of these words is not necessary to establish gross negligence. There is adequate proof of gross negligence, if it is established that the physician's errors represent significant or serious deviations from acceptable medical standards that present the risk of potentially grave consequences to the patient. Post v. State of New York Department of Health, 245 A.D. 2d 985, 986, 667 N.Y.S. 2d 94 (3rd Dept. 1997). There is no need to prove that a physician was conscious of impending dangerous consequences of his or her conduct. Minielly v. Commissioner of Health, 222 A.D. 2d 750, 751-752, 634 N.Y.S. 2d 856 (3rd Dept. 1995).

Incompetence is a lack of the requisite knowledge or skill necessary to practice medicine safely. Dhabuwala v. State Board for Professional Medical Conduct, 225 A.D.2d 209, 213 (3rd Dept. 1996).

Gross Incompetence is a lack of the skill or knowledge necessary to practice medicine safely which is significantly or seriously substandard and creates the risk of potentially grave

consequences to the patient. Post, *supra*, at 986; Minielly, *supra*, at 751.

Using the above-referenced definitions as a framework for its deliberations, the Hearing Committee made the following conclusions of law pursuant to the factual findings listed above. All conclusions resulted from a unanimous vote of the Hearing Committee unless noted otherwise.

The Hearing Committee first considered the credibility of the various witnesses, and thus the weight to be accorded their testimony. Ian M. Frankfort, M.D. testified on behalf of the Petitioner, Dr. Frankfort is board-certified in family practice, and has nearly 30 years of practice experience. He is also a clinical associate professor of family medicine at the SUNY Buffalo School of Medicine. (Ex. #6; T. 12-13).Dr. Frankfort has no stake in the outcome of the case. He gave a thoughtful, measured evaluation of Respondent's medical treatment of Patient A. Dr. Frankfort willingly conceded areas where Respondent's treatment of the patient did meet accepted standards. This gave even greater credence to his criticism of Respondent's judgment in other areas. The Hearing Committee placed great weight on Dr. Frankfort's testimony.

Petitioner also presented testimony by Patient A's son. His account of the events surrounding his father's care

appeared factually correct, but ultimately had little bearing on the outcome of the case.

Respondent presented testimony by Denise M. Callari, M.D. Dr. Callari is board-certified in internal medicine, rather than in family practice. She is a clinical assistant professor of internal medicine at SUNY Buffalo. Dr. Callari has twelve years of medical practice experience. However, under her current practice arrangement, she only manages hospital patients one weekend out of every six. (Ex. A; T. 192-193).

Dr. Callari was not fully familiar with all of the details of Patient A's hospital course, and tended to be overly dogmatic in her opinions. As a result, the Hearing Committee gave less weight to her opinions.

Lastly, Respondent testified on his own behalf. He has an obvious stake in the outcome of the hearing. However, his re-statement of the facts was unquestionably honest and straightforward. Still, the Hearing Committee was very troubled by Respondent's failure to acknowledge full responsibility for his actions. Respondent admitted ordering a free water IV for Patient A, and that this demonstrated both a lack of knowledge and an error of judgment. Nevertheless, he insisted that he bore only fifty percent responsibility for what followed. He

sought to pass blame onto the pharmacy department and nursing staff. (Ex. #5; T. 131, 132, 135, 153). This was unacceptable.

The basic facts surrounding Patient A's hospital course are not in dispute. Patient A was seriously ill at the time of his admission to the hospital on November 15, 2002. Over the next several days, his condition did appear to be improving, despite rising sodium and glucose levels. Both of the experts agreed that Respondent's management of the patient's sodium levels from admission through November 21, 2002, met the accepted standards of practice.

On November 22, the patient's sodium level reached 153 meq/ml - clearly outside the normal range. He had been receiving D5NS at a rate of 60 cc/hr. A reasonably prudent and competent physician would have moved aggressively to reduce the patient's sodium levels, or bring in a specialist to assist. Rather than act aggressively to reduce his sodium levels, Respondent *increased* the flow rate of his IV to 125 cc/hr for eight hours, and then cut back to 75 cc/hr. Respondent apparently did not consider using an IV solution other than normal saline, nor did he consider hydrating Patient A using his nasogastric tube.

The Hearing Committee unanimously concluded that Respondent's management of Patient A's medical care once his

sodium levels rose to 153 meq/ml demonstrated both negligence and incompetence, as defined above.

By November 23, 2002, Patient A's sodium level had risen to 161 meq/ml. Respondent ordered an intravenous infusion of free water. Thereafter, Patient A's condition began to seriously deteriorate. After Patient A received close to 600 cc's of water, the IV was discontinued by the registered nurse on the next shift. Patient A spiked a temperature of over 104 degrees. A chest x-ray revealed increasing fluid. Patient A's family was notified (by Respondent), and a Do Not Resuscitate (DNR) order was signed. Shortly thereafter, Patient A expired.

Both expert witnesses agreed that free water was contraindicated for intravenous use, and represented a significant deviation from generally accepted standards of medical practice. The Hearing Committee unanimously concluded that Respondent's use of intravenous free water was a serious and especially egregious deviation from generally accepted standards of medical practice. We need not determine whether its use was the direct cause of Patient A's demise. It is clear that the use of intravenous free water posed a grave risk to the patient. The Committee further concluded that Respondent's use of a free water IV demonstrated both gross incompetence and gross negligence, and voted to sustain the First and Second

specifications of professional misconduct set forth in the Statement of Charges.

The Hearing Committee further concluded that Respondent's conduct with respect to Patient A demonstrated both incompetence on more than one occasion, as well as negligence on more than one occasion. The Committee found Respondent's mismanagement of the sodium levels on November 22, 2002, and his order for a free water IV to be separate acts of misconduct, notwithstanding the fact that they occurred during the same hospitalization. (*See*, Corines et al. v. SBPMC, 267 A.D.2d 796 (3rd. Dept. 1999). Accordingly, the Hearing Committee voted to sustain the Third specification (incompetence on more than one occasion) and Fourth specification (negligence on more than one occasion).

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determined that Respondent's license to practice medicine as a physician in New York State shall be suspended for a period of one year. The first thirty days shall be actually suspended, with the remaining eleven months of the suspension stayed. In addition, Respondent shall be placed on probation for a period

of three years, and a permanent limitation shall be placed on his medical license. His license shall be limited to preclude the management of patients in either an intensive care unit (ICU) or coronary care unit (CCU). Lastly, Respondent shall be required to successfully complete 300 hours of continuing medical education programs during the three year period of probation. The full terms of probation are attached to this Determination and Order in Appendix II and incorporated herein. This determination was reached upon due consideration of the full spectrum of penalties available pursuant to statute, including revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties.

The Hearing Committee does not doubt that Respondent is a caring physician. However, his use of free water for Patient A showed an extreme lack of both medical knowledge and judgment. The Committee was also bothered by Respondent's persistent failure to accept full responsibility for his actions. It is true that the pharmacy filled the order for free water, and that a nurse hung the bag. Nevertheless, it was Respondent who decided to order a clearly inappropriate IV solution. His demonstrated lack of insight into his shortcomings merits a significant sanction.

The Hearing Committee considered the possibility of revoking Respondent's medical license, but instead determined that a period of actual suspension, followed by a lengthy period of probation would be a more appropriate sanction. The Committee also took note of the fact that this case involved the management of a critically ill patient. Respondent was clearly in over his head in the management of Patient A's hospital course. However, no evidence was presented which indicates that he cannot successfully manage his office-based patients, or handle routine hospital care. Accordingly, the Committee determined that Respondent's medical license should be limited to preclude the management of critically ill patients in either an ICU or CCU.

Nonetheless, this case raised concern about the level of Respondent's overall medical knowledge and ability. As a result, the terms of probation include a requirement that Respondent's medical practice be monitored during the period of probation.

Lastly, the Hearing Committee determined that Respondent should undertake and successfully complete 300 hours of continuing medical education during his period of probation. This is double the amount that a board-certified family practitioner is normally required to take over a three year

period. The Hearing Committee unanimously determined that the total sanction outlined above strikes the appropriate balance between the need to punish Respondent, protect the public, and provide the opportunity for Respondent's rehabilitation.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED THAT:**

1. The First through Fourth Specifications of professional misconduct, as set forth in the Statement of Charges, (Petitioner's Exhibit #1) are **SUSTAINED**;

2. Respondent's license to practice medicine as a physician in New York State be and hereby is **SUSPENDED** for a period of **ONE (1) YEAR**. The final eleven months of the suspension shall be stayed, and the Respondent shall be placed on probation for a period of three years. The complete terms of probation are contained in Appendix II of this Determination and Order, and incorporated herein;

3. Respondent's license to practice medicine shall be permanently limited to preclude the care and management of patients in intensive care/coronary care units;

4. Respondent shall successfully complete 300 hours of continuing medical education during the three year period of

probation, as set forth more specifically in the terms of probation;

5. This Determination and Order shall be effective upon service. Service shall be either by certified mail upon Respondent at Respondent's last known address and such service shall be effective upon receipt or seven days after mailing by certified mail, whichever is earlier, or by personal service and such service shall be effective upon receipt.

DATED: Troy, New York
July 26 **,2004**

Margaret McAloon MD
MARGARET McALOON, M.D. (CHAIR)

DEBRA M. OMIATEK, M.D.
PETER S. KOENIG, SR.

TO: Amy B. Merklen, Esq.
Assistant Counsel
New York State Department of Health
Corning Tower Building - Room 2509
Empire State Plaza
Albany, New York 12237

Joseph S. Testa, M.D.
23 Hiler Avenue
Kenmore, New York 14217

Ann M. Campbell, Esq.
Thomas M. Prato, Esq.
Brown & Tarantino, LLP
1500 Rand Building
14 Lafayette Square
Buffalo, New York 14203

APPENDIX I

EXHIBIT
Dept. 1

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

IN THE MATTER

OF

JOSEPH S. TESTA, M.D.

NOTICE

OF

HEARING

TO: Joseph S. Testa, M.D.
23 Hiler Avenue
Kenmore, New York 14217

PLEASE TAKE NOTICE:

A hearing will be held pursuant to the provisions of N.Y. Pub. Health Law §230 and N.Y. State Admin. Proc. Act §§301-307 and 401. The hearing will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct on May 13 and 14, 2004, at 10:00 a.m., at the Park Plaza Hotel, 4343 Genesee Street, Buffalo, and at such other adjourned dates, times and places as the committee may direct.

At the hearing, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the hearing will be made and the witnesses at the hearing will be sworn and examined. You shall appear in person at the hearing and may be represented by counsel. You have the right to produce witnesses and evidence on your behalf, to issue or have subpoenas issued on your behalf in order to require the production of witnesses and documents, and you may cross-examine witnesses and examine evidence produced against you. A summary of the Department of Health Hearing Rules is enclosed.

The hearing will proceed whether or not you appear at the hearing. Please note that requests for adjournments must be made in writing and by telephone to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Hedley Park Place, 433 River Street, Fifth Floor South, Troy, NY 12180, ATTENTION: HON. SEAN D. O'BRIEN, DIRECTOR, BUREAU OF ADJUDICATION, (henceforth "Bureau of Adjudication"), (Telephone: (518-402-

0748), upon notice to the attorney for the Department of Health whose name appears below, and at least five days prior to the scheduled hearing date. Adjournment requests are not routinely granted as scheduled dates are considered dates certain. Claims of court engagement will require detailed Affidavits of Actual Engagement. Claims of illness will require medical documentation.

Pursuant to the provisions of N.Y. Pub. Health Law §230(10)(c), you shall file a written answer to each of the charges and allegations in the Statement of Charges not less than ten days prior to the date of the hearing. Any charge or allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health whose name appears below. Pursuant to §301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person. Pursuant to the terms of N.Y. State Admin. Proc. Act §401 and 10 N.Y.C.R.R. §51.8(b), the Petitioner hereby demands disclosure of the evidence that the Respondent intends to introduce at the hearing, including the names of witnesses, a list of and copies of documentary evidence and a description of physical or other evidence which cannot be photocopied.

At the conclusion of the hearing, the committee shall make findings of fact, conclusions concerning the charges sustained or dismissed, and in the event any of the charges are sustained, a determination of the penalty to be imposed or appropriate action to be taken. Such determination may be reviewed by the Administrative Review Board for Professional Medical Conduct.

THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT YOUR LICENSE TO PRACTICE

MEDICINE IN NEW YORK STATE BE REVOKED OR SUSPENDED, AND/OR THAT YOU BE FINED OR SUBJECT TO OTHER SANCTIONS SET OUT IN NEW YORK PUBLIC HEALTH LAW §§230-a. YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York
April 5, 2004

Peter D. Van Buren
Deputy Counsel
Bureau of Professional
Medical Conduct

Inquiries should be directed to: Amy B. Merklen
Assistant Counsel
Professional Medical Conduct
2512 Corning Tower
Empire State Plaza
Albany, New York 12237
(518) 473-4282

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

IN THE MATTER

OF

JOSEPH S. TESTA, M.D.

STATEMENT

OF

CHARGES

JOSEPH S. TESTA, M.D., the Respondent, was authorized to practice medicine in New York State on or about July 1, 1983, by the issuance of license number 154759 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. Joseph S. Testa, M.D. (Hereinafter "Respondent") provided care and treatment to Patient A, a 72 year old male, from on or about November 15, 2002 until Patient A's death on November 25, 2002 at Kenmore Mercy Hospital, Kenmore, New York. Respondent's care and treatment of Patient A failed to meet accepted standards of medical care, in that:

1. Respondent failed to adequately manage Patient A's blood sodium level once Patient A's sodium level reached 153.
2. Respondent, on or about November 23, 2002, ordered a free water IV for Patient A which was contraindicated.

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

Gross Incompetence

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(6) by practicing the profession of medicine with gross incompetence as alleged in the facts of the following:

1. The allegations specified in paragraphs A, A1 and A2.

SECOND SPECIFICATION

Gross Negligence

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(4) by practicing the profession of medicine with gross negligence on a particular occasion as alleged in the facts of the following:

2. The allegations specified in paragraphs A, A1 and A2.

THIRD SPECIFICATION

Incompetence on More than One Occasion

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(5) by practicing the profession of medicine with incompetence on more than one occasion as alleged in the facts of two or more of the following:

3. The allegations specified in paragraphs A, A1 and A2.

FOURTH SPECIFICATION

Negligence on More than One Occasion

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(3) by practicing the profession of medicine with negligence on more than one occasion as alleged in the facts of two or more of the following:

4. The allegations specified in paragraphs A, A1 and A2.

DATED: April 5 ,2004
Albany, New York

Peter D. Van Buren
Deputy Counsel
Bureau of Professional
Medical Conduct

APPENDIX II

TERMS OF PROBATION

1. Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession.

    1. Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office of Professional Medical Conduct (OPMC), Hedley Park Place, 433 River Street Suite 303, Troy, New York 12180-2299; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.

    2. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.

    3. Any civil penalty not paid by the date prescribed herein shall be subject to all provisions of law relating to debt collection by New York State. This includes but is not limited to the imposition of interest, late payment charges and collection fees; referral to the New York State Department of Taxation and Finance for collection; and non-renewal of permits or licenses [Tax Law section 171(27)]; State Finance Law section 18; CPLR section 5001; Executive Law section 32].

    4. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.

    5. Respondent's professional performance may be reviewed by the Director of OPMC. This review may include, but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his/her staff at practice locations or OPMC offices.

6. Respondent shall maintain legible and complete medical records which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.

7. Respondent shall enroll in and complete 300 hours of continuing medical education during the period of probation. Said continuing education program shall be subject to the prior written approval of the Director of OPMC and be completed within the term of probation.

8. Within thirty (30) days of the effective date of the Order, Respondent shall practice medicine only when monitored by a licensed physician, board certified in an appropriate specialty, ("practice monitor") proposed by Respondent and subject to the written approval of the Director of OPMC.

9. Respondent shall make available to the monitor any and all records or access to the practice requested by the monitor, including on-site observation. The practice monitor shall visit Respondent's medical practice at each and every location, on a random unannounced basis at least monthly and shall examine a selection (no less than 12) of records maintained by Respondent, including patient records, prescribing information and office records. The review will determine whether the Respondent's medical practice is conducted in accordance with the generally accepted standards of professional medical care. Any perceived deviation of accepted standards of medical care or refusal to cooperate with the monitor shall be reported within 24 hours to OPMC.

10. Respondent shall be solely responsible for all expenses associated with monitoring, including fees, if any, to the monitoring physician.

11. Respondent shall cause the practice monitor to report quarterly, in writing, to the Director of OPMC.

12. Respondent shall maintain medical malpractice insurance coverage with limits no less than $2 million per occurrence and $6 million per policy year, in accordance with Section 230(18)(b) of the Public Health Law. Proof of coverage shall be submitted to the Director of OPMC prior to Respondent's practice after the effective date of this Order