THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, N.Y. 12234

OFFICE OF PROFESSIONAL DISCIPLINE
ONE PARK AVENUE, NEW YORK, NEW YORK 10016-5802

July 31, 1991

Guy Denis, Physician
6666 East Quaker Street
Orchard Park, N.Y. 14127

Re: License No. 143323

Dear Dr. Denis:

Enclosed please find Commissioner's Order No. 11592. This Order goes into effect five (5) days after the date of this letter.

If the penalty imposed by the Order in your case is a revocation, surrender, or a actual suspension (suspension which is not wholly stayed) of your license, you must deliver your license and registration to this Department within ten (10) days after the date of this letter. Your penalty goes into effect five (5) days after the date of this letter even if you fail to meet the time requirement of delivering your license and registration to this Department.

If the penalty imposed by the Order in your case is a revocation or a surrender of your license, you may, pursuant to Rule 24.7 (b) of the Rules of the Board of Regents, a copy of which is attached, apply for restoration of your license after one year has elapsed from the effective date of the Order and the penalty; but said application is not granted automatically.

Very truly yours,

DANIEL J. KELLEHER
Director of Investigations
By: Gustave Martine

GUSTAVE MARTINE
Supervisor

DJK/GM/er

CERTIFIED MAIL - RRR

cc: Francis J. Offermann, Jr., Esq.
1776 Statler Towers
Buffalo, N.Y. 14202

REPORT OF THE
REGENTS REVIEW COMMITTEE

GUY DENIS

CALENDAR NO. 11592

The University of the State of New York

IN THE MATTER

of the

Disciplinary Proceeding

against

GUY DENIS **No. 11592**

who is currently licensed to practice
as a physician in the State of New York.

REPORT OF THE REGENTS REVIEW COMMITTEE

GUY DENIS, hereinafter referred to as respondent, was licensed to practice as a physician in the State of New York by the New York State Education Department.

The instant disciplinary proceeding was properly commenced. A copy of the December 15, 1987 statement of charges is annexed hereto, made a part hereof, and marked as Exhibit "A". That exhibit shows the portions of the charges which were amended and withdrawn. Respondent's answer is annexed hereto, made a part hereof, and marked as Exhibit "B".

Between March 4, 1988 and July 13, 1990 a hearing was held in eight sessions before a hearing committee of the State Board for Professional Medical Conduct. The hearing committee rendered a report of its findings, conclusions, and recommendation, a copy of which, without attachments, is annexed hereto, made a part hereof,

and marked as Exhibit "C".

On October 18, 1990, the hearing committee found and concluded that respondent was guilty of the first specification to the extent of paragraphs 4(a)(i), 4(a)(ii), and 4(a)(iii), second specification to the extent of paragraphs 4(b)(ii), 4(b)(iii), and 4(b)(iv), fourth specification to the extent of paragraph 5 repeating paragraphs 4(a)(i) and 4(a)(ii), and the fifth specification to the extent of paragraph 5 repeating paragraphs 4(b)(iii) and 4(b)(iv), and not guilty of the remaining specifications and paragraphs, although the sixth specification to the extent of paragraph 5 repeats paragraph 4(c)(i) was sustained based upon incompetence, and recommended that respondent's license to practice in the State of New York be revoked. Paragraph 4(b)(i) of the second specification and paragraph 5 of the fifth specification to the extent it repeats paragraph 4(b)(i) were withdrawn by petitioner.

On November 30, 1990, the Commissioner of Health recommended to the Board of Regents that the findings, conclusions, and recommendation of the hearing committee be accepted in full. A copy of the recommendation of the Commissioner of Health is annexed hereto, made a part hereof, and marked as Exhibit "D".

On March 27, 1991, respondent appeared before us and was represented by his attorney, Francis J. Offermann, Jr., Esq.

Michael A. Hiser, Esq. presented oral argument on behalf of the Department of Health.

Respondent was granted an opportunity to submit a reply brief within two weeks after our meeting and petitioner was granted an opportunity to then submit a sur-reply brief by April 17, 1991. These post-meeting briefs have been timely received by us.

We have considered the record in this matter as transferred by the Commissioner of Health, including all the briefs and reply briefs submitted by both parties.

Petitioner's written recommendation as to the measure of discipline to be imposed, should respondent be found guilty, was revocation.

Respondent's written recommendation was Censure and Reprimand.

We first address whether respondent has committed negligence/incompetence in the three cases of Patients A, B, and C. Then, we will assess the statement of charges and the requirement under Education Law §6509(2) of "more than one occasion".

NEGLIGENCE/INCOMPETENCE

We agree with the hearing committee and Commissioner of Health that, in the case of Patient A, respondent committed negligence and incompetence based upon paragraphs 4(a)(i) and 4(a)(ii) and respondent did not commit negligence or incompetence based upon paragraphs 4(a)(iv) and 4(a)(v).

As charged in paragraph 4(a)(i), respondent deviated from generally accepted standards of medical practice by failing to prepare a complete and detailed report as to the November 17, 1983 surgery. A reasonably prudent and competent physician would have prepared a much clearer and more precise description of the extent of the tumor, the structures removed and the neck dissection procedure than was prepared by respondent. These significant aspects were not adequately indicated in the operative report. Respondent should have foreseen that a subsequent treating physician would not have been able to understand from the operative report these vital and important aspects of the operation. See transcript pages 102 and 54 (hereinafter T. ____). Not only did petitioner's expert witness testify that the operative report did not sufficiently describe the surgery, but the testimony of both respondent's expert witness and respondent further supports the conclusion that a subsequent treating physician would not have known from the report the aspects itemized in hearing committee findings 6 and 7.

As charged in paragraph 4(a)(ii), respondent committed negligence and incompetence on November 17, 1983 by failing to obtain adequate samples for frozen section during the surgery, in order to determine if the margins were free of disease. The hearing committee's findings show respondent failed to obtain these tissue specimens at the margins of his resection for evaluation by

the pathologist. Such failure constituted a deviation from generally accepted standards of medical practice. Additionally, where the tumor was seen less than 0.1 centimeter from the margin of the specimen removed, respondent's expert witness would, himself, have done a frozen section because he was "(A)bsolutely sure" that doing such section would provide a clear answer. T. 905.

With respect to paragraph 4(a)(iii), petitioner has not proven this allegation by a preponderance of evidence. Contrary to petitioner's assertion, petitioner's only witness conceded that he could not "state that there was any standard or deficiency, according to accepted standards of medical practice, that Dr. Denis violated with respect to consulting with the pathologist" regarding Patient A. T. 184.

Moreover, the opinion by petitioner's expert witness was based on his implying facts not based upon his own knowledge or upon the record. In response to respondent's attorney's objection, the Administrative Officer stated that the witness should be testifying "other than by implication, if possible. Go ahead." T. 71. At that point, petitioner's attorney switched to another allegation. In the absence of sufficient evidence, we will not, as did the hearing committee and Commissioner of Health, draw any inference not supported by the record. Accordingly, respondent is not

guilty of negligence and/or incompetence based upon paragraph 4(a)(iii).

We agree with the hearing committee and Commissioner of Health that, in the case of Patient B, respondent committed negligence, but not incompetence, based upon paragraph 4(b)(ii), negligence based upon paragraphs 4(b)(iii) and 4(b)(iv), and incompetence based upon paragraph 5 to the extent it repeats paragraphs 4(b)(iii) and 4(b)(iv).

As found by the hearing committee and Commissioner of Health, respondent failed, in regard to Patient B, to obtain a CT scan at least prior to September 22, 1982, unnecessarily explored the neck by attempting a neck biopsy on September 22, 1982, and required nearly 5 hours of surgery during two operative procedures to get a positive biopsy.

The situs of Patient B's tumor was, as respondent's expert testified, not obvious. Respondent's initial impression on the September 7, 1982 examination of the Patient was cancer of the larynx. T. 597. The patient presented with a fullness on the right side of the pharynx, but respondent could not examine the oropharynx well because of Patient gagging. Respondent ordered a barium swallow test which showed a moderate size retropharyngeal mass lesion. This test showed respondent a mass in the parapharyngeal area. T. 598. To diagnose the cancer, a biopsy was necessary, T. 603, and scheduled for September 17, 1982.

Respondent's note admitting Patient B to the hospital did not localize the tumor, even though there were presenting signs for nasopharyngeal tumor. T. 307.

In the absence of the CT scan, the September 17, 1982 procedures, including biopsies, were completed without respondent learning that the tumor was in the nasopharynx, extending down into the right parapharyngeal area, even though the tumor was extremely large in that it was at least 3 or 4 centimeters in size and was on both sides on the muscles. Thereafter, respondent obtained a CT scan on September 22, 1982 which identified the aforesaid tumor location and would have guided respondent to the appropriate area to biopsy in the first place. T. 271. Under all the circumstances, the failure to obtain a CT scan until September 22, 1982 constituted negligence.

Respondent's discharge summary for Patient B contains a final diagnosis of carcinoma right parapharyngeal space and nasopharynx. Exhibit 5 page 2. Respondent interpreted the CT scan to be positive for a tumor in the nasopharynx. T. 702. Therefore, we accept the thirty-third finding, regarding respondent being unsure, within the context that, after obtaining a negative pathological report, respondent ordered a CT scan which should have been obtained previously and would have guided respondent as indicated in said finding number 33.

While we are aware that petitioner's witness indicated that a CT scan was not absolutely required in all cases in 1982, such witness did indicate that a CT scan should have been obtained under the circumstances herein. T. 271.

A second operative procedure was performed on September 22, 1982 at which, after several biopsies were taken, the malignancy was found. Respondent performed two surgeries over nearly 5 hours during which Patient B was under anesthesia. This excessive duration of the surgery was not necessary and should have been performed in one operation. T. 275-276. Furthermore, the invasion of Patient B's neck to biopsy a neck node was both unnecessary and unduly risky. See T. 270.

We agree with the hearing committee and Commissioner of Health that, in the case Patient C, respondent did not commit negligence and/or incompetence based upon paragraph 4(c)(ii) and did not commit negligence based upon paragraph 4(c)(i). We do not agree, however, that respondent committed incompetence based upon paragraph 5 to the extent it repeats paragraph 4(c)(i).

The operative report statement "(I)t looks like the mass involved was infected left submaxillary gland", relied upon by petitioner, does not, as charged, state in that operative report for Patient C that the submaxillary gland was removed. The operative report described the tissue removed as "of node" and referred to a conglomerated node. In fact, petitioner's only

witness testified that nowhere does the operative report state that the excised mass was the submaxillary gland. T. 358. Petitioner has not proven, by a preponderance of evidence, that respondent's terminology, which does not establish negligence, establishes incompetence.

MORE THAN ONE OCCASION

Professional misconduct is defined under Education Law §6509(2) to include negligence on more than one occasion and incompetence on more than one occasion.* Having sustained five acts of negligence and four acts of incompetence, we must next discuss whether such conduct was committed on "more than one occasion".

The conclusions section of the hearing committee report concludes that the first and second specifications of negligence on more than one occasion and the fourth and fifth specifications of incompetence on more than one occasion should be sustained. These conclusions follow the hearing committee's chart showing whether the sustained "acts" constitute negligence and/or incompetence. Under the statute, multiple acts of derelictions do not necessarily constitute the charged definition of professional

*This portion of the statute refers to ordinary negligence and ordinary incompetence. By contrast, another portion of the same statute refers to gross incompetence or gross negligence on a particular occasion.

misconduct unless they were committed on more than one distinct event of some duration. Rho v. Ambach, 74 N.Y.2d 318 (1989).

The hearing committee and Commissioner of Health merely referred to the "acts" and concluded there was more than one occasion without explaining whether and how those "acts" were distinct events of some duration, thereby constituting more than one occasion. We are unclear as to whether the hearing committee and Commissioner of Health have considered and complied with Rho in assuring that Education Law §6509(2) is interpreted correctly. Therefore, we will endeavor to clarify this issue. In the future, it would be preferable to address whether and how the findings constitute a charge requiring more than one occasion.

Respondent contended that under Rho the specifications alleged must be dismissed because the acts of negligence and incompetence sustained should be construed to have occurred on only one occasion per specification. Although respondent correctly stated that each separate specification refers to various acts with respect to the treatment of a particular patient, we disagree with respondent's contention. In our unanimous opinion, respondent may be found guilty consistent with Rho.

Before we develop our conclusions, we must further discuss Rho. In Rho, the administrative determination of guilt, relating to one patient case (Decedent "B"), had been erroneously premised on the statutory interpretation that mere multiple discrete acts

constituted more than one occasion. No showing was made in Rho that respondent's acts occurred during distinct events of some duration. Thus, the Court of Appeals interpreted the statutory requirement as to the necessary showing in order to establish guilt. Here, however, respondent's negligent and incompetent acts, to the extent hereafter indicated, constitute distinct events of some duration. Accordingly, the requirements of Education Law §6509(2) have been satisfied in the instant matter.

In petitioner's reply brief, petitioner claimed that there were two occasions of negligence (Patients A and B) and three occasions of incompetence (Patients A, B, and C). Yet, petitioner asks us to adopt the recommendations of the hearing committee and Commissioner of Health, without adequately responding to respondent's point that none of the four separately stated specifications sustained by the hearing committee and Commissioner of Health refers to more than one patient case. Petitioner, who is responsible for drafting the charges, now, in effect, speaks in terms of two specifications, each involving more than one patient, as compared to the six separate specifications involving one patient each, without suggesting how we may properly find respondent guilty regarding more than one occasion.

Nevertheless, we follow the method the Board of Regents first announced in Matter of Atkinson, Calendar No. 5700. In Matter of Atkinson, the Board of Regents held that it was permissible to look

at the individual paragraphs in the statement of charges that allege negligence and to deem them all grouped together under one specification to find more than one occasion of negligence. This approach would also apply to the individual paragraphs that allege incompetence under another specification. Thus, we are not bound by the particular specification headings, drafted by petitioner, in reviewing the paragraphs in the statement of charges. Matter of Ghosh, Calendar No. 10565. Accordingly, paragraph 4 of the statement of charges and all subparts thereunder are deemed grouped together, under one specification deemed to be the "first" regarding negligence on more than one occasion and paragraph 5 of the statement of charges and all subparts thereunder are deemed grouped together, under one specification deemed to be the "second" regarding incompetence on more than one occasion.

The licensee was adequately apprised of the conduct attributed to him and was able to prepare and present a defense to the charges against him. The manner in which the charges were brought did not render the charges of negligence or incompetence on more than one occasion to be improper. Widlitz v. Board of Regents of the University of the State of New York, 77 A.D.2d 690 (3rd Dept. 1980). Technical rules of procedure do not have to be complied with in an administrative hearing so long as the fundamentals of a fair hearing are not violated. Rudner v. Board of Regents of the New York State Department of Education, 105 A.D.2d 555 (3rd Dept.

1984). Despite their inexactness as to the numbering of the specifications, the statement of charges provided respondent sufficient notice of the alleged misconduct, Block v. Ambach and Ackerman v. Ambach, 73 N.Y.2d 323 (1989), and was in compliance with Public Health Law §230(10)(b). The dismissal of adequate charges which are supported by the evidence and the findings is not warranted or required by due process.

Under this Atkinson method, there are at least two occasions sustained as to both the negligence and the incompetence alleged in the statement of charges grouped in the manner deemed by us to be two specifications. There is at least one occasion involving Patient A and another separate occasion involving Patient B under each of said two specifications.

By this approach, we do not suggest or determine that the requirement of more than one occasion can only be satisfied in all cases in regard to separate patients. In fact, we note that more than one occasion is found in regard to the negligence committed as to Patient B.

Whereas paragraph 4(b)(ii) relates to obtaining a CT scan pre-operatively, paragraphs 4(b)(iii) and 4(b)(iv) relate to surgery on September 22, 1982. These distinct events occurred at a separate time and place and are not simply discrete acts. The failure to obtain the CT scan involves the period before the September 22, 1982 surgery; the pre-operative nature of the

allegation in paragraph 4(b)(ii) separates it as a distinct event of some duration which represents a different occasion from the nature of the allegations in paragraphs 4(b)(iii) and 4(b)(iv).

Subsequent to Rho, supra, the Board of Regents in Ghosh, supra, accepted the report of the Regents Review Committee which stated that the Rho doctrine is satisfied by utilizing the Atkinson method. That report in Ghosh further stated that "petitioner continues to draft statements of charges in a manner forcing us to resort to the method used in Matter of Atkinson" and petitioner should draft concise charges which are separately stated and numbered so as to "avoid confusion resulting from multiplying specifications" of negligence and incompetence on more than one occasion. Similarly, in Matter of Hopkins, Calendar No. 10114, the Board of Regents in finding respondent guilty where no specification contained more than one occasion, stated that, in view of Matter of Atkinson, "petitioner's artless pleading in the statement of charges" is not fatal under the doctrine of Rho. See also, Matter of Edelman, Calendar Nos. 10005/8837.

FAIRNESS OF PROCEDURES

It is our unanimous opinion that respondent was not denied a fair and proper hearing. See Flores v. New York State Education Department, 146 A.D.2d 881 (3rd Dept. 1989).

In regard to respondent's subpoenaing the Albany Medical Center to produce documents and records and the Appellate

Division's decision regarding the Albany Medical Center's motion to quash respondent's subpoena, respondent did not take and perfect an appeal to the Court of Appeals. Furthermore, respondent has not demonstrated that the documents respondent did not obtain from the Albany Medical Center have a direct bearing on the events at and involving Our Lady of Victory Hospital. It can hardly be said that, under the circumstances herein, the denial of respondent's application, by the Administrative Officer, for an adjournment delaying the final hearing date in order that respondent further appeal the Appellate Division decision, harmed respondent "in any appreciable way." Cf., Amarnick v. Sobol ___ A.D.2d ___ (3rd Dept. May 2, 1991).

As to respondent's contention that petitioner's expert witness testified as to elitist academic standards, we disagree. The hearing committee's findings and conclusions were supported by the full testimony of petitioner's expert witness, both on direct and cross-examination, as to generally accepted medical standards.

MEASURE OF DISCIPLINE

The hearing committee and Commissioner of Health accepted petitioner's characterization that "respondent's failings are multi-faceted and widespread throughout the totality of his practice. Because of these failings he constitutes a danger to his patients." Hearing committee report pages 22-23. We neither accept this characterization nor the revocation recommendation

which flows from it. While such view does not reflect an accurate assessment of the record, it does not evince any bias towards respondent. We also take a serious view of the different events of misconduct committed by respondent regarding Patients A and B which touch various facets of his practice.

An appropriate measure of discipline must be based upon the 5 paragraphs of the charges we have sustained. The negligence on more than one occasion and incompetence on more than one occasion did not arise from the totality of respondent's practice. Respondent contends that revocation would be an excessive, abusive, and unjustly harsh penalty "because it is so disproportionate to the claimed offense... as to be shocking to one's sense of fairness." Nevertheless, a Censure and Reprimand, recommended by respondent, would be inappropriate.

Respondent's misconduct occurred in 1982 and 1983, more than four years before this proceeding was commenced by the Department of Health. Approximately three years were taken from the date of the charges on December 15, 1987 before this matter was transmitted to us. At oral argument, respondent informed us that, since the time of the conduct in issue, respondent has practiced medicine for the last seven years without incident. Petitioner has not rebutted this information.

Subsequent to respondent's last act of misconduct, respondent became board certified in otolaryngology and head and neck surgery

in October 1985. From the time respondent received this certification, no further incident by respondent has been brought to our attention. We also wish to emphasize that, while giving the benefit to petitioner in regard to grouping the charges into two specifications, it should also be kept in mind that, in so doing, the issue of the penalty to be imposed is viewed within the context not only of the aforesaid circumstances but also within the context of the reduction of the number of specifications of which respondent was found guilty from four to two, out of an initial total of six specifications.

We unanimously recommend the following to the Board of Regents:

1. The findings of fact of the hearing committee and the recommendation of the Commissioner of Health as to those findings of fact be accepted as clarified in this report, except findings 15, 16, 43, 46, 47, and 48 not be accepted;
2. The conclusions of the hearing committee and Commissioner of Health be modified;
3. Respondent is, by a preponderance of the evidence, guilty to the extent of the first specification of the statement of charges, as deemed by us, insofar as paragraphs 4(a)(i), 4(a)(ii), 4(b)(ii), 4(b)(iii), and 4(b)(iv) constitute negligence on more than one occasion and to

the extent of the second specification of the statement of charges, as deemed by us, insofar as paragraph 5 repeats paragraphs 4(a)(i), 4(a)(ii), 4(b)(iii), and 4(b)(iv) constitute incompetence on more than one occasion, and not guilty of the remaining paragraphs and specifications; and

4. The measure of discipline recommended by the hearing committee and Commissioner of Health not be accepted and respondent's license to practice as a physician in the State of New York be suspended for five years upon each specification (first and second as deemed by us) of the charges of which we recommend respondent be found guilty, as aforesaid, said concurrent suspensions to run concurrently, that execution of said concurrent suspensions be stayed, and that respondent be placed on probation for five years under the terms set forth in the exhibit annexed hereto, made a part hereof, and marked as Exhibit "E".

Respectfully submitted,

FLOYD S. LINTON

THEODORE M. BLACK, SR.

ARTHUR WACHTEL

Floyd S. Linton
Chairperson

Dated: June 5, 1991

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

----------X

IN THE MATTER : STATEMENT

OF : OF

GUY DENIS, M.D. : CHARGES

----------X

The State Board for Professional Medical Conduct, upon information and belief, charges and alleges as follows:

1. GUY DENIS, M.D. hereinafter referred to as the Respondent, was authorized to engage in the practice of medicine in the State of New York on August 22, 1980 by the issuance of License Number 143323 by the State Education Department.

2. The Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1986 through December 31, 1988 from Southtowns Medical Center, 5285 Chestnut Ridge Road, Orchard Park, New York 14127.

3. The Respondent is charged with professional misconduct within the purview of N.Y. Educ. Law §6509 (McKinney 1985 and Supp. 1987) as set forth in the attached Specifications.

EXHIBIT "I"

FIRST THROUGH THIRD SPECIFICATIONS

4. The Respondent is charged with professional misconduct by reason of his practicing the profession of medicine with negligence on more than one occasion within the meaning of N.Y. Educ. Law §6509(2) (McKinney 1985) in that, among other things and incidents:

(a) The Respondent admitted Patient A (Patient A and all other patients referred to herein are identified in Appendix A) on November 16, 1983 to Our Lady of Victory Hospital in Lackawanna, New York (hereinafter the "Hospital") for a direct laryngoscopy, left radical neck dissection, tracheostomy and supraglottic laryngectomy because of Patient A's squamous cell carcinoma of the supraglottic area of the larynx. The Respondent treated Patient A until December 1, 1983, ~~at which time Patient A directed that the Respondent be replaced as his treating otolaryngologist.~~ The Respondent's care and treatment of Patient A deviated from generally accepted standards of practice in that the Respondent:

(i) failed to prepare a complete and detailed operative report relative to the November 17, 1983 surgery in that the report lacked a clear or precise description of the extent of the tumor, the structures removed and the neck dissection procedure;

(ii) failed to obtain adequate samples for frozen section during the November 17, 1983 surgery in order to determine if the margins were free of disease;

(iii) failed to adequately consult with the pathologist following the November 17, 1983 surgery;

(iv) used poor surgical technique during the November 17, 1983 surgery in that Patient A subsequently developed a pharyngocutaneous fistula; and

(v) failed to examine Patient A, in a timely manner, on November 29, 1983 after being advised at 6:30 a.m. of Patient A's bloody tracheal secretions.

(b) The Respondent admitted Patient B to the Hospital on September 16, 1982 for investigation of possible carcinoma of the pharynx with hemoptysis. The Respondent's care and treatment of Patient B deviated from generally accepted standards of care in that the Respondent:

4(4)(c) Withdrawn by Dept. 3-4-88 G.K.L

(i) failed to adequately evaluate Patient B prior to the surgery on September 17, 1982 in order to determine the extent of Patient B's lesion;

(ii) failed to obtain a CT scan until September 22, 1982;

(iii) unnecessarily explored Patient B's neck by attempting a neck biopsy on September 22, 1982; and

(iv) required nearly five hours of surgery during two operative procedures to get a positive biopsy from the parapharyngeal/retropharyngeal space in a case where there was fairly extensive disease.

(c) The Respondent readmitted Patient C to the Hospital on September 14, 1983 because of a submandibular neck mass following an upper respiratory infection. The Respondent's care and treatment of Patient C deviated from generally accepted standards of practice in that the Respondent:

(i) stated in his operative report that the submaxillary gland was removed when, in fact, a lymph node was removed; and

(ii) failed to consider a diagnosis of cervical adenitis.

FOURTH THROUGH SIXTH SPECIFICATIONS

5. The Respondent is charged with professional misconduct by reason of his practicing the profession of medicine with incompetence on more than one occasion within the meaning of N.Y. Educ. Law §6509(2) (McKinney 1985) in that, among other things and incidents.

The State Board for Professional Medical Conduct repeats the allegations of the First through Third Specifications.

DATED: Albany, New York
December 15, 1987

Peter D. Van Buren

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

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

IN THE MATTER

OF

GUY DENIS, M.D.

ANSWER

Respondent, by his attorneys OFFERMANN, MAHONEY, CASSANO, PIGOTT & GRECO, for his Answer to the charges herein:

FIRST: Denies each and every allegation contained in paragraphs of the Statement of Charges designated "4 (a)(i)", "4 (a)(ii)", "4 (a)(iii)", "4 (a)(iv)" and "4 (a)(v)" thereof.

SECOND: Denies each and every allegation contained in paragraphs of the Statement of Charges designated "4 (b)(i)", "4 (b)(ii)", "4 (b)(iii)" and "4 (b)(iv)" thereof.

THIRD: Denies each and every allegation contained in paragraphs of the Statement of Charges designated "4 (c)(i)" and "4 (c)(ii)".

FOURTH: Denies each and every allegation contained in paragraph of the Statement of Charges designated "5" and insofar as the subparagraph following said paragraph "5" repeats the allegations of the First through Third Specifications, Respondent repeats the denials contained in paragraphs FIRST, SECOND and THIRD herein.

FOR A FIRST SEPARATE COMPLETE AND AFFIRMATIVE DEFENSE TO THE STATEMENT OF CHARGES HEREIN, RESPONDENT ALLEGES:

FIFTH: The allegations contained in the "First through Third Specifications", paragraphs "4 (a), 4 (b) and 4 (c)" thereof do

EXHIBIT "B"

not constitute practicing the profession of medicine with negligence on more than one occasion within the purview and meaning of New York Education Law §6509(2).

FOR A SECOND SEPARATE COMPLETE AND AFFIRMATIVE DEFENSE TO THE STATEMENT OF CHARGES HEREIN, RESPONDENT ALLEGES:

SIXTH: The allegations contained in the "Fourth through Sixth Specifications", paragraph "5" do not constitute practicing the profession of medicine with incompetence on more than one occasion within the purview and meaning of New York Education Law §6509(2).

WHEREFORE, Respondent demands that the Statement of Charges be dismissed in all respects, together with the costs and disbursements of this matter.

DATED: February 18, 1988
Buffalo, New York

OFFERMANN, MAHONEY, CASSANO,
PIGOTT & GRECO
Attorneys for Respondent
Office and P.O. Address
1776 Statler Towers
Buffalo, New York 14202
Tel.No. (716) 856-4800

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

IN THE MATTER	REPORT OF THE
OF	HEARING
GUY DENIS, M.D.	COMMITTEE

TO: The Honorable David Axelrod, M.D.
Commissioner of Health, State of New York

Therese G. Lynch, M.D., Chairperson, Priscilla R. Leslie, and Donald S. Raines, M.D., duly designated members of the State Board for Professional Medical Conduct, appointed by the Commissioner of Health of the State of New York pursuant to Section 230(1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. Gerald H. Liephsutz, Esq., served as Administrative Officer for the Hearing Committee.

After consideration of the entire record, the Hearing Committee submits this report.

SUMMARY OF CHARGES

The Respondent was charged with the following acts of professional misconduct as more fully set forth in a copy of the Statement of Charges attached hereto. A copy of the Respondent's Answer is also attached.

1. Practicing the profession of medicine with negligence on more than one occasion (FIRST THROUGH THIRD SPECIFICATIONS)

2. Practicing the profession of medicine with incompetence on more than one occasion (FOURTH THROUGH SIXTH SPECIFICATIONS)

RECORD OF PROCEEDINGS

Notice of Hearing and Statement of Charges dated:	December 15, 1987
Answer by the Respondent dated:	February 18, 1988
Department of Health (the Petitioner) appeared by:	Paul R. White, Esq. Associate Counsel
The Respondent appeared by:	Pigott, Offermann, Mahoney, Cassano, Greco, Palmer & Whalen 1776 Statler Towers Buffalo, New York 14202 BY: Francis J. Offermann, Jr., Esq., of Counsel
Hearings dates:	March 4, 1988 May 20, 1988 May 27, 1988 June 2, 1988 June 23, 1988 July 21, 1988 October 14, 1988 July 13, 1990

Intra-hearing conference on the record without the presence of the Hearing Committee for legal determinations:	June 2, 1988
Hearing Committee deliberations:	September 5, 1990
Adjournments:	1. July 14, 1988, due to unavailability of Hearing Committee member 2. July 15, 1988, due to unavailability of the Respondent's expert witness 3. October 6, 1988, due to unavailability of Hearing Committee member 4. December 8, 1988 and December 9, 1988, due to pending court litigation regarding subpoena issued by the Respondent 5. March 23, 1990, due to unavailability of the Respondent
Hearing Committee absences:	Priscilla R. Leslie was not present on May 27, 1988, nor during final few minutes of the hearing days of July 21, 1988 and October 14, 1988. Ms Leslie affirms that she has read and considered evidence introduced at, and transcripts of, the times of her absences.

Significant legal determinations:	1. Amendments to Statement of Charges and withdrawal of charge by Department of Health (see Exhibit 1, paragraphs 4(a), 4(a)(iv) and 5(b)(i))
	2. Denial of the Respondent's motion for continued adjournment pending appeal regarding subpoena issued by the Respondent (Letters: Francis J. Offermann, Jr. to Gerald Liepshutz dated January 16, 1990; Paul R. White to Gerald Liepshutz dated January 16, 1990; and Gerald H. Liepshutz to Francis J. Offermann, Jr. and Paul R. White dated January 29, 1990)
Witness for the Petitioner:	Steven M. Parnes, M.D.
Witnesses for the Respondent:	Guy Denis, M.D., Respondent Frank I. Marlowe, M.D. Helen V. Gray, loss prevention coordinator at Albany Medical Center

FINDINGS OF FACT

The following findings of fact were made after a review of the entire record in this matter. Most of the findings were adopted by the Hearing Committee, in whole or in part, from the proposed findings submitted by the parties. Numbers in parentheses refer to transcript pages unless otherwise noted.

These citations represent evidence found persuasive by the Hearing Committee while arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence. All findings were made by unanimous vote.

1. The Respondent was licensed to practice medicine in New York State on August 22, 1980 by the issuance of license number 143323 by the State Education Department (Tr. 425; Respondent's Exhibit C).

2. The Respondent graduated from the University of Zaragoza Medical School in Spain in 1972. The Respondent interned and took his first year of residency training in general surgery at the Brookdale Hospital Medical Center. The Respondent commenced his residency in otolaryngology at the Upstate Medical Center in July 1979. The Respondent completed his otolaryngology training in June 1982 at the Medical College of Georgia and thereafter entered private practice in the Buffalo area. The Respondent was board certified in otolaryngology and head and neck surgery in October 1985 (Tr 423-425; Respondent's Exhibit C).

FIRST AND FOURTH SPECIFICATIONS: PATIENT A

Regarding Patient A generally

3. Patient A, a fifty-six year old male, was admitted to Our Lady of Victory Hospital by the Respondent on November 16, 1983 for a laryngectomy and left radical neck dissection (Tr. 43; Department's Exhibit 3 - pp. 6, 37).

4. Patient A had an exophytic tumor in the left pyriform sinus (Tr. 44, 46; Department's Exhibit 3 - p. 6).

5. The Respondent operated on Patient A on November 17, 1983, performing a direct laryngoscopy, tracheostomy, left radical neck dissection and supraglottic laryngectomy (Tr. 48; Department's Exhibit 3 - pp. 41-42).

Regarding paragraph 4(a)(i) of the Statement of Charges

6. Acceptable standards of practice require that an operative report should accurately describe the significant aspects of an operative procedure (Tr. 101-102). A surgical operative report serves to document what was done by the surgeon at a particular point in time, so that if further care for the same problem or some other problem were to be necessary in this area, either the primary surgeon or a subsequent surgeon would know what had been done before (Tr. 815-816). The Respondent's operative report concerning the November 17, 1983 surgery was neither clear nor precise in its description of the surgical procedures performed. The radical neck dissection, which is a complicated two to three hour procedure, was inadequately

described in five short sentences (Tr. 51-52, 56-57, 119-120, 816). The operative report did not indicate the extent or size of the tumor, the structures which were involved, how the tumor was removed, the structures which were removed, the margins which were obtained, the suturing technique and suturing material for the laryngeal closure, how hemostasis was accomplished, and how the area was reconstructed (Tr. 51-59, 121, 816, 900-903; Department's Exhibit 3 - pp. 41-42).

7. Significant portions of the operative procedure were not described; there was no description as to where the Respondent entered the larynx, i.e. whether the incision was made in the mucosa at the true or false cord level, the area of the resection line, what structures were preserved and what structures were removed, when the jugular vein on the inferior side was ligated, how the carotid artery was managed or protected, how the Respondent proceeded after removing the thyroid cartilage superiorly, whether the right side of the epiglottis was removed, how the s praglottic tumor was removed, and the actual proximation particularly in the lateral aspect of the reconstruction (Tr. 55-57, 59, 104, 113, 121, 163, 165, 901-903).

Regarding paragraph 4(a)(ii) of the Statement of Charges

8. The objective of Patient A's operative procedure was to remove the cancerous tumor and a margin of healthy tissue surrounding the tumor (Tr. 65, 104). Margins are the edges of the tissue that are removed as well as the edges of the tissue that are left in place during surgery for removal of a tumor (Tr. 65, 826).

9. The Respondent failed to obtain tissue specimens at the margins of his resection for frozen section evaluation by the pathologist. A frozen section is a method of examining tissue very rapidly in which the tissue is frozen and put on a slide so that it can be examined in a matter of minutes (Tr. 64-65, 826; Department's Exhibit 3 - pp. 41-46).

10. Frozen section evaluation should have been performed intraoperatively so as to ensure that the Respondent removed all of the tumor and a margin of healthy tissue (Tr. 65, 123, 170-171, 208-210; Department's Exhibit 3 - pp. 41-46).

11. If the frozen section evaluation revealed that the margins were not free of disease, the Respondent would have needed to remove additional tissue until a clear margin was obtained. The pathology report indicates that the tumor was less than 0.1 centimeter from the margin of the specimen removed (Tr. 124, 203, 208-210; Department's Exhibit 3 - pp. 41-46).

12. The Respondent's failure to obtain tissue at the margins for frozen section evaluation constituted a deviation

from generally accepted standards of practice (Tr. 67, 123-126, 128, 170-171; Department's Exhibit 3 - pp.41-46).

Regarding paragraph 4(a)(iii) of the Statement of Charges

13. It is the surgeon's responsibility to assist the pathologist in orienting tissue specimens which are submitted for pathologic examination (Tr. 69, 132, 135).

14. Dr. Bhattacharyya, who was the pathologist who examined Patient A's tissue specimens, had difficulty in judging the lines of resection because of the loss of anatomical orientation of the specimen submitted by the Respondent (Tr. 68-69, 140-141; Department's Exhibit 3 - p. 45).

15. It is also necessary to consult with the pathologist to aid in determining what post-operative treatment is necessary, e.g., radiation therapy (Tr. 204).

16. There was no consultation between the Respondent and the pathologist following Patient A's surgery. The pathologist's description of the section taken through one vocal cord makes it apparent that the pathologist was confused due to the lack of orientation of the specimen. According to the Respondent and his operative report, the vocal cords were never removed from the patient (Tr. 69-70, 134; Department Exhibit 3 - p. 45).

Regarding paragraph 4(a)(iv) of the Statement of Charges

17. Fistulas are well known complications after cancer surgery of the neck, and they are inherent in this type of surgery. A fistula can even occur with the most prudent surgeon who employs the most meticulous technique. It cannot be determined whether there was a relationship between the Respondent's surgical technique and the formation of the fistula in Patient A (Tr. 844-846).

Regarding paragraph 4(a)(v) of the Statement of Charges

18. On November 29, 1983, at 6:00 a.m., the nursing staff at Our Lady of Victory Hospital, which was overseeing Patient A, observed a bright, bloody tracheal secretion (Tr. 76; Department's Exhibit 3 - p. 222).

19. The Respondent was notified at 6:30 a.m. about the bloody tracheal secretion and he informed the nursing staff that he would be checking the patient later in the morning (Tr. 76; Department's Exhibit 3 - p. 222).

20. Bright red bleeding from the trachea in a patient such as patient A is an indication that the area should be examined by a physician within a reasonable amount of time (Tr. 80).

21. The Respondent went to Our Lady of Victory Hospital on November 29, 1983 between 7:00 and 7:30 a.m. to

check Patient A, at which time he made a note in the progress notes of the hospital medical chart (Tr. 434; Department's Exhibit 3 - p. 222 - reverse side).

22. At that time, the Respondent removed the number 10 tracheal tube, changed the packing and inserted a number 6 tracheal tube (Tr. 436; Department's Exhibit 3 - p. 222).

23. On November 29, 1983 at 9:30 a.m., Patient A was taken to the operating room for a surgical procedure by Drs. Michalek, Tomaka and Sullivan (Department's Exhibit 3 - pp. 49, 223).

SECOND AND FIFTH SPECIFICATIONS: PATIENT B

Regarding Patient B generally

24. The Respondent saw Patient B on September 7, 1982 when he presented himself with a history of soreness of the throat for four months on the right side (Tr. 596; Department's Exhibit 6).

25. On that date, Patient B had difficulty swallowing and he had some pain referred to the right ear (Department's Exhibit 6).

26. Following that examination, the Respondent sent Patient B for a barium swallow at Our Lady of Victory Hospital (Department's Exhibit 6 - x-ray report: 9-11-82).

27. The report of the radiologist with respect to the barium swallow showed that there was a "moderate size retropharyngeal mass lesion" (Department's Exhibit 6 - x-ray report: 9-11-82).

28. The Respondent operated on Patient B on September 17, 1982. He performed a direct laryngoscopy, a bronchoscopic and esophagoscopic examination, and he took biopsies labeled "A: Right side pharyngeal wall B: Pyriform sinus (lateral wall) C: Pharyngeal wall D: Right lateral pharyngeal wall" on the pathology report (Tr. 256-257; Department's Exhibit 5 - pp. 14-15).

29. The operation on September 17, 1982 took approximately two hours (Tr. 256; Department's Exhibit 5 - p. 14). During this operative procedure, the Respondent failed to examine or biopsy Patient B's nasopharynx (Tr. 258-259, 282-283, 308-309).

30. The Respondent should have examined Patient B's nasopharynx while this patient was under general anesthesia on September 17, 1982. It was important to examine the nasopharynx because of the x-ray findings on September 11, 1982 (Tr. 258-264; Department's Exhibit 6).

31. The pathologic report for the September 17, 1982 biopsies were negative for malignancy (Department's Exhibit 5 - p. 15).

Regarding paragraph 4(b)(ii) of the Statement of Charges

32. After receiving the pathological report dated September 21, 1982, the Respondent ordered a CT scan of the cervical area for September 22, 1982. The September 22, 1982 CT scan revealed that there was an extensive infiltrating mass in the retropharyngeal and right parapharyngeal core extending up to the base of the skull. The mass revealed by the CT scan was extremely large in that it was at least three or four centimeters in size, and it was on both sides on the muscles (Tr. 265-266, 305; Department's Exhibit 5 - p. 31).

33. Since the Respondent was unsure of the location of Patient B's tumor, the CT scan should have been obtained prior to the first operation on September 17, 1982. The CT scan could have guided the Respondent to the appropriate location for biopsy (Tr. 271).

Regarding paragraph 4(b)(iii) of the Statement of Charges

34. A second exploratory operation was performed by the Respondent on September 22, 1982 following the CT scan. The first two biopsies taken by the Respondent on September 22, 1982 were from the pharynx identified as specimens "A" and "B" in the pathologist's report and numbered "1" and "2" by the nursing

staff on page eighteen of the record. These two biopsies were reported as negative by the pathologist (Tr. 267-269; 300-301; Department's Exhibit 5 - pp. 18, 20).

35. While awaiting the report from the pathologist on the frozen section evaluation of the two biopsies taken from the pharynx, the Respondent opened Patient B's neck and biopsied the neck node. This specimen, identified as specimen "C" by the pathologist and numbered "3" by the nursing staff, was reported as negative (Tr. 267, 269-270; Department's Exhibit 5 - pp. 18-19).

36. It was improper for the Respondent to explore and biopsy Patient B's neck. The Respondent should have thoroughly explored and biopsied the suspected primary site of the tumor, the nasopharynx, before invading Patient B's neck. Evidence from the barium swallow and CT scan indicated a lesion in the nasopharynx. The nurses numbered the specimens in the order obtained. It is clear from the record that the neck mass biopsy was taken prior to any biopsy of the nasopharynx. This contradicts the description given by the Respondent in his operative report (Tr. 269-270, 296, 303-304; Department's Exhibit 5 - pp. 18-20).

Regarding paragraph 4(b)(iv) of the Statement of Charges

37. The Respondent should have known by virtue of the CT scan where the tumor was located prior to the September 22, 1982 operation. The Respondent should have aggressively gone after the tumor at the suspected primary site in the nasopharynx and peripharyngeal space with proper biopsy technique until a positive biopsy was obtained. The invasion of Patient B's neck was both unnecessary and unduly risky (Tr. 293, 296, 303-304).

38. With a tumor as extensive as Patient B's, it should not have been necessary to perform two separate operations and subject Patient B to nearly five hours of anesthesia in order to make the diagnosis (Tr. 272, 275-276, 305-306).

THIRD AND SIXTH SPECIFICATIONS: PATIENT C

Regarding Patient C generally

39. The Respondent first saw Patient C in his office on September 6, 1983 with a thirteen day history of a left submaxillary mass which had been treated with Keflex without a response (Tr. 712; Department's Exhibit 8).

40. On September 6, 1983, Patient C was admitted to Our Lady of Victory Hospital and she was given IV antibiotics, and various tests including an x-ray, a blood profile and a PPD (Tr. 714).

41. Patient C was discharged from the hospital on September 10, 1983 (Tr. 715) and she was readmitted to Our Lady of Victory Hospital on September 14, 1983 for an excisional biopsy of a left submandibular mass which had been present for four weeks (Tr. 347; Department's Exhibit 7 - p. 2).

Regarding paragraph 4(c)(i) of the Statement of Charges

42. The Respondent performed an excisional biopsy of the mass on September 15, 1983 (Tr. 348; Department's Exhibit 7 - p. 9).

43. The Respondent, in his operative report, described the mass as an infected left submaxillary gland (Tr. 348; Department's Exhibit 7 - p. 9).

44. A submaxillary gland, also known as a submandibular gland, is not the same thing as a lymph node. A lymph node is a structure which produces white blood cells and has a structure and function which is different from a submaxillary gland which is one of the major salivary glands in the head and neck area (Tr. 349).

45. The mass which was excised by the Respondent on September 15, 1983 was subsequently examined by a pathologist. The pathologist identified the specimen as a lymph node and diagnosed the specimen as compatible with toxoplasma

lymphadenitis, which is a viral infection (Tr. 350-351; 357; Department's Exhibit 7 - p. 10).

46. In his operative report, the Respondent misidentified the structure which he removed from Patient C as a submaxillary gland when it was, in fact, a lymph node (Tr. 352).

47. In the operative report, the Respondent stated that he ligated the duct to remove the mass and then tied the duct. Since the submaxillary gland has a duct and a lymph node does not, the Respondent apparently believed that he was removing the submaxillary gland and not a lymph node (Tr. 352, 380, 384-385).

48. The submaxillary gland in this case should have been readily distinguishable from the lymph node (Tr. 381).

Regarding paragraph 4(c)(ii) of the Statement of Charges

49. Patient C's mass developed acutely thirteen days prior to her first visit to the Respondent's office on September 6, 1983 (Tr. 354-355; Department's Exhibit 8 - p. 2).

50. The Respondent performed an excisional biopsy of the mass because he was concerned that it might have been a tumor (Tr. 353).

51. Patient C's mass should not have been surgically removed unless it persisted for at least two or three months,

because the likelihood of tumor was so small and the incidence of infection so high (Tr. 356-357, 368, 369).

52. The mass was not cancerous, but it probably was caused by a viral infection (Tr. 357). Viral infections do not respond to antibiotic therapy. Antibiotics are effective against bacteriological infections, not viral infections (Tr. 367).

CONCLUSIONS

The following conclusions were reached pursuant to the findings of fact herein. All conclusions resulted from a unanimous vote of the Hearing Committee.

The Hearing Committee, for purposes of its conclusions, defined negligence as a failure to exercise the care that would be exercised by a reasonably prudent physician under the circumstances. Incompetence was defined as a lack of the skill or knowledge necessary to practice medicine.

Patient A (FIRST AND FOURTH SPECIFICATIONS)

Findings of Fact 3 through 23 herein relate to these Specifications. The Hearing Committee reached the following conclusions regarding the factual allegations in the Statement of Charges:

Factual Allegations	Conclusions as to Factual Allegations
paragraph 4(a)(i)	sustained (Findings of Fact 6-7)
paragraph 4(a)(ii)	sustained (Findings of Fact 8-12)
paragraph 4(a)(iii)	sustained (Findings of Fact 13-16)
paragraph 4(a)(iv)	not sustained (Finding of Fact 17)
paragraph 4(a)(v)	not sustained (Findings of Fact 18-23)

Conclusions regarding commission of medical misconduct:

paragraph 4(a)(i)	The sustained acts constituted negligence and incompetence as defined herein.
paragraph 4(a)(ii)	The sustained acts constituted negligence and incompetence.
paragraph 4(a)(iii)	The sustained acts constituted negligence, but not incompetence.
paragraph 4(a)(iv)	The factual allegations were not sustained, so neither negligence nor incompetence should be sustained.
paragraph 4(a)(v)	The factual allegations were not sustained, so neither negligence nor incompetence should be sustained. The Respondent did not fail to examine the patient in a timely manner.

Based on the above conclusions, the FIRST SPECIFICATION (negligence on more than one occasion regarding Patient A) and the FOURTH SPECIFICATION (incompetence on more than one occasion regarding Patient A) should be sustained.

Patient B (SECOND AND FIFTH SPECIFICATIONS)

Findings of Fact 24 through 38 herein relate to these Specifications. The Hearing Committee reached the following conclusions regarding the factual allegations in the Statement of Charges:

Factual Allegations	Conclusions as to Factual Allegations
paragraph 4(b)(i)	withdrawn by Department of Health
paragraph 4(b)(ii)	sustained (Findings of Fact 32-33)
paragraph 4(b)(iii)	sustained (Findings of Fact 34-36)
paragraph 4(b)(iv)	sustained (Findings of Fact 37-38)

Conclusions regarding commission of medical misconduct:

paragraph 4(b)(i)	withdrawn by Department of Health
paragraph 4(b)(ii)	The sustained acts constituted negligence, but not incompetence.
paragraph 4(b)(iii)	The sustained acts constituted negligence and incompetence.
paragraph 4(b)(iv)	The sustained acts constituted negligence and incompetence.

Based on the above conclusions, the SECOND SPECIFICATION (negligence on more than one occasion regarding Patient B) and the FIFTH SPECIFICATION (incompetence on more than one occasion regarding Patient B) should be sustained.

Patient C (THIRD AND SIXTH SPECIFICATIONS)

Findings of Fact 39 through 52 herein relate to these Specifications. The Hearing Committee reached the following conclusions regarding the factual allegations in the Statement of Charges:

Factual Allegations	Conclusions as to Factual Allegations
paragraph 4(c)(i)	sustained (Findings of Fact 42-48)
paragraph 4(c)(ii)	not sustained (Findings of Fact 39-41, 49-52)

Conclusions regarding commission of medical misconduct

paragraph 4(c)(i)	The sustained acts constituted incompetence, but not negligence.
paragraph 4(c)(ii)	The factual allegations were not sustained, so neither negligence nor incompetence should be sustained. The Hearing Committee concluded that the Respondent considered a diagnosis of cervical adenitis as evidenced by his prescribing of antibiotics. The element in the charge of failing "to consider" was not proved.

Based on the above conclusions, the THIRD SPECIFICATION (negligence on more than one occasion regarding Patient C) and the SIXTH SPECIFICATION (incompetence on more than one occasion regarding Patient C) should not be sustained, inasmuch as only one act of incompetence was sustained in relation to the patient.

RECOMMENDATIONS

Pursuant to the findings of fact and conclusions herein, the Hearing Committee unanimously recommends that the following specifications be sustained: FIRST AND SECOND SPECIFICATIONS (practicing the profession with negligence on more than one occasion); and the FOURTH AND FIFTH SPECIFICATIONS (practicing the profession with incompetence on more than one occasion). The Hearing Committee further unanimously recommends that the remaining Specifications (THIRD AND SIXTH SPECIFICATIONS) not be sustained.

It is unanimously recommended that the Respondent's license to practice medicine be revoked. The Hearing Committee's view of the matter is accurately reflected in the following paragraph found on page 20 of the Petitioner's Proposed Findings of Fact, Conclusions of Law and Recommendation:

> This Respondent has demonstrated himself to be both negligent and incompetent not only in his surgical technique but also in his medical and diagnostic skills. Because this Respondent deviates not only in surgery but also in medicine, his failings are multi-faceted and widespread throughout the totality of his practice. Because of these

failings, he constitutes a danger to his patients.

DATED: Buffalo, New York
October 15, 1990

Respectfully submitted,

Therese G. Lynch M.D.
THERESE G. LYNCH, M.D., Chairperson

PRISCILLA R. LESLIE
DONALD S. RAINES, M.D.

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

IN THE MATTER :

OF :

GUY DENIS, M.D. :

COMMISSIONER'S RECOMMENDATION

TO: Board of Regents
New York State Education Department
State Education Building
Albany, New York

A hearing in the above-entitled proceeding was held on March 4, 1988, May 20, 1988, May 27, 1988, June 2, 1988, June 23, 1988, July 21, 1988, October 14, 1988, July 13, 1990. Respondent, Guy Denis, M.D. appeared by Francis J. Offerman, Jr., Esq. The evidence in support of the charges against the Respondent was presented by Paul R. White, Esq.

NOW, on reading and filing the transcript of the hearing, the exhibits and other evidence, and the findings, conclusions and recommendation of the Committee,

I hereby make the following recommendation to the Board of Regents:

A. The Findings of Fact and Conclusions of the Committee should be accepted in full;

B. The Recommendation of the Committee should be accepted; and

C. The Board of Regents should issue an order adopting and incorporating the Findings of Fact and Conclusions and further adopting as its determination the Recommendation described above.

The entire record of the within proceeding is transmitted with this Recommendation.

DATED: Albany, New York
December 30, 1990

DAVID AXELROD, M.D., Commissioner
New York State Department of Health

EXHIBIT "E"

TERMS OF PROBATION
OF THE REGENTS REVIEW COMMITTEE

GUY DENIS

CALENDAR NO. 11592

1. That respondent shall make quarterly visits to an employee of and selected by the Office of Professional Medical Conduct of the New York State Department of Health, unless said employee agrees otherwise as to said visits, for the purpose of determining whether respondent is in compliance with the following:

   a. That respondent, during the period of probation, shall be in compliance with the standards of conduct prescribed by the law governing respondent's profession;

   b. That respondent shall submit written notification to the New York State Department of Health, addressed to the Director, Office of Professional Medical Conduct, Empire State Plaza, Albany, NY 12234 of any employment and/or practice, respondent's residence, telephone number, or mailing address, and of any change in respondent's employment, practice, residence, telephone number, or mailing address within or without the State of New York;

   c. That respondent shall submit written proof from the Division of Professional Licensing Services (DPLS), New York State Education Department (NYSED), that respondent has paid all registration fees due and owing to the NYSED and respondent shall cooperate with and submit whatever papers are requested by DPLS in regard to said registration fees, said proof from DPLS to be submitted by respondent to the New York State Department of Health, addressed to the Director, Office of Professional Medical Conduct, as aforesaid, no later than the first three months of the period of probation; and

   d. That respondent shall submit written proof to the New York State Department of Health, addressed to the Director, Office of Professional Medical Conduct, as aforesaid, that 1) respondent is currently registered with the NYSED, unless respondent submits written proof to the New York State Department of Health, that respondent has

advised DPLS, NYSED, that respondent is not engaging in the practice of respondent's profession in the State of New York and does not desire to register, and that 2) respondent has paid any fines which may have previously been imposed upon respondent by the Board of Regents; said proof of the above to be submitted no later than the first two months of the period of probation;

2. If the Director of the Office of Professional Medical Conduct determines that respondent may have violated probation, the Department of Health may initiate a violation of probation proceeding and/or such other proceedings pursuant to the Public Health Law, Education Law, and/or Rules of the Board of Regents.

ORDER OF THE COMMISSIONER OF
EDUCATION OF THE STATE OF NEW YORK

GUY DENIS

CALENDAR NO. 11592

The University of the State of New York

IN THE MATTER

OF

GUY DENIS
(Physician)

DUPLICATE
ORIGINAL
VOTE AND ORDER
NO. 11592

Upon the report of the Regents Review Committee, a copy of which is made a part hereof, the record herein, under Calendar No. 11592, and in accordance with the provisions of Title VIII of the Education Law, it was

VOTED* (July 26, 1991): That, in the matter of GUY DENIS, respondent, with regard to the language about the grouping of the charges into two specifications out of a total of six specifications addressed on page 17 of the Regents Review Committee report, the language be interpreted to mean that the hearing committee and the Commissioner of Health may have relied upon the artificially higher number of specifications; that the recommendation of the Regents Review Committee be accepted as follows:

1. The findings of fact of the hearing committee and the recommendation of the Commissioner of Health as to those findings of fact be accepted as clarified in the Regents Review Committee report, except findings 15, 16, 43, 46, 47, and 48 not be accepted;
2. The conclusions of the hearing committee and Commissioner of Health be modified;
3. Respondent is, by a preponderance of the evidence, guilty to the extent of the first specification of the statement

*Regent Jorge L. Batista dissented as to the measure of discipline.

Regents, said vote and the provisions thereof are hereby adopted and SO ORDERED, and it is further

ORDERED that this order shall take effect as of the date of the personal service of this order upon the respondent or five days after mailing by certified mail.

IN WITNESS WHEREOF, I, Thomas Sobol, Commissioner of Education of the State of New York, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 26th day of July, 1991.

Thomas Sobol

Commissioner of Education