



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Barbara A. DeBuono, M.D., M.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

May 20, 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Paul Stein, Esq.
Associate Counsel
New York State Department of Health
Bureau of Professional Medical Conduct
5 Penn Plaza - 6th Floor
New York, New York 10001

Barry Silver, Esq.
Silver, Forrester, Schisano & Lesser, P.C.
328 Route 9W South
New Windsor, New York 12553

Salvatore Gerard Perconte, M.D.
833 Blooming Grove Turnpike
New Windsor, New York 12553

RE: In the Matter of Salvatore Gerard Perconte, M.D.

Dear Mr. Stein, Mr. Silver and Dr. Perconte:

Enclosed please find the Determination and Order (No. BPMC-97-115) 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.

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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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

Office of Professional Medical Conduct
New York State Department of Health
Hedley Park Place
433 River Street - Fourth Floor
Troy, New York 12180

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

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "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.

Request for review of the Committee's determination by the Administrative Review Board stays penalties **other than suspension or revocation** until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

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

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

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
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,



Tyrone T. Butler, Director
Bureau of Adjudication

TTB:lcc
Enclosure

COPY

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

IN THE MATTER

-OF-

SALVATORE GERARD PERCONTE, M.D.

**DECISION
AND
ORDER
OF THE
HEARING
COMMITTEE**

**ORDER NO.
BPMC 97-115**

The undersigned Hearing Committee consisting of **PHILLIP I. LEVITAN, M.D., Chairperson, RALPH J. LUCARIELLO, M.D. and D. MARISA FINN**, was duly designated and appointed by the State Board for Professional Medical Conduct. **JONATHAN M. BRANDES, Esq.**, Administrative Law Judge, served as Administrative Officer.

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

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

RECORD OF PROCEEDING

Notice of Hearing and Statement of Charges:	Dated: January 31, 1997	Served: February 5, 1997
Summary Order:	Signed: February 4, 1997	Served: February 5, 1997
Notice of Hearing returnable:	February 13, 1997 ¹	
Location of Hearing:	5 Penn Plaza, New York, New York	
Respondent's answer :	General Denial, February 25, 1997	
The State Board for Professional Medical Conduct (hereinafter referred to as "Petitioner" or "The State") appeared by:	PAUL STEIN, ESQ. Associate Counsel Bureau of Professional Medical Conduct 5 Penn Plaza Room 601 New York, New York 10001	
Respondent appeared in person and was represented by:	BARRY SILVER, ESQ. Silver Forrester Schisano & Lesser, P.C. 328 Route 9W South New Windsor 12553	
Respondent's present address:	833 Blooming Grove Turnpike New Windsor, New York 12553	
Respondent's License:	Registration Date: January 7, 1983	Number: 152936
Pre-Hearing Conference Held:	February 25, 1997	
Hearings held on:	February 25, March 11, 13, and 21, 1997	
Conferences held on:	February 25, March 11, 13, and 21, 1997	
Closing briefs received:	March 31, 1997	
Record closed:	April 11, 1997	
Deliberations held:	April 11, 1997	

¹ The commencement of this hearing was adjourned by request of Respondent. The adjournment was granted upon two conditions: 1.) Respondent would waive all statutory time frames and 2.) Respondent would not engage in the practice of medicine in this State until all appeals, if any, had been completed. Respondent specifically agreed to cease the practice of medicine during the pendency of any appeals, acknowledging that the Commissioner's Order would remain in full force and effect until lifted by the Commissioner or other higher authority.

SUMMARY OF PROCEEDINGS

The Statement of Charges which accompanies the Commissioner's Order in this proceeding alleges two grounds of misconduct:

1. Respondent is a habitual user (sic) of alcohol or being dependent on or a habitual user of narcotics, barbiturates, amphetamines, hallucinogens, or other drugs having similar effects or having a psychiatric condition which impairs his ability to practice as forth in N.Y. Education Law Section 6530 (8)
2. Respondent has practiced medicine while impaired by alcohol, drugs, physical disability, or mental disability as set forth in N.Y. Education Law Section 6530 (7)

The allegations arise from incidents which occurred on April 7, through November 22, 1993 and February 22, 1995 through January 7, 1997. The allegations are more particularly set forth in the Statement of Charges which is attached hereto as Appendix One.

The State Called These Witnesses:

- | | | |
|----|------------------------------|----------------|
| 1. | Officer (ret) Gary Sherman | fact witness |
| 2. | Larry S. Kirstein, M.D. | expert witness |
| 3. | Officer Donald Neumuller | fact witness |
| 4. | Officer Lawrence Di Gregorio | fact witness |

Respondent testified and called these witnesses:

- | | | |
|----|--------------------------|------------------------|
| 1. | Maryellen Prestano | fact/character witness |
| 2. | Leonard Handelsman, M.D. | expert witness |
| 3. | Burton Allyn, M.D. | fact/character witness |
| 4. | Shirley Gregerson | fact/character witness |

SIGNIFICANT LEGAL RULINGS

- - -
- I. The Administrative Law Judge issued instructions to the Committee with regard to the issues and evidence in this proceeding.
 - II. With regard to the expert testimony herein, including Respondent's, the Committee was instructed that each witness should be evaluated for possible bias and assessed according to his or her training, experience, credentials, demeanor and credibility. The Committee was further instructed that it is not bound to the testimony offered by an expert witness. Notwithstanding the presentation and qualification of a witness as an expert, the Committee is free to find some or all of the testimony

relevant, probative, credible and persuasive. The Committee is equally free to reject some or all the expert testimony herein.

III. The Committee was concerned about the drafting of the Factual Allegations and Specifications herein. Under one interpretation of Allegation A for instance, it would seem that the Committee was required to find Respondent habitually used narcotics and habitually used drugs having similar effects. However, the allegation would not be sustained if it was found Respondent habitually used either narcotics or drugs having similar effects. The Administrative Law Judge explained that the drafters of the allegations as well as the drafters of the statutes from which the allegations were taken could not have intended such a result. Therefore, the Administrative Law Judge instructed the Committee that if, within the specified time frames, it was found that Respondent was practicing medicine, and Respondent habitually used² alcohol, and or habitually used narcotics and or habitually used drugs having similar effects to narcotics and or barbiturates³, the Factual Allegations could be sustained.

IV. Likewise, the Administrative Law Judge instructed the Committee that the First Specification herein could be sustained if the Committee found that, within the specified time frames:

²Section 6530 (8) of the Education Law states that misconduct occurs when a physician is a "habitual abuser of alcohol, ...or a habitual user of" drugs. The charges herein use a lower standard. The charges state that Respondent need only be a habitual user of alcohol. Apparently neither Respondent nor the State saw this discrepancy. The Administrative Law Judge finds no prejudice occurred. As will be seen, the Committee found Respondent was an abuser of alcohol and drugs. In other words, the Committee found the higher standard. It was Respondent's duty to note any discrepancy in the charges. He did not. As a practical matter, it is difficult to imagine how, even if it had been noted, the wording would have had any significant effect on Respondent's defense.

³For the purposes of this proceeding, the term *inebriate or inebriated* will refer both to the conditions commonly called *drunkenness* and or *high on drugs*. Likewise, the term *inebriating substance* will refer to all the substances alluded to in this proceeding including, alcohol, narcotics, barbiturates, amphetamines, hallucinogens, cocaine and or other drugs or substances having effects similar to alcohol, narcotics, barbiturates, amphetamines, and or hallucinogens.

- a. Respondent was a habitual abuser of alcohol, and or
- b. Respondent was dependent on and or a habitual user of
 1. narcotics, and or;
 2. barbiturates and or;
 3. amphetamines and or;
 4. hallucinogens, and or;
 5. other drugs having similar effects to narcotics, barbiturates, amphetamines and or hallucinogens and or .
- c. had a psychiatric condition which impaired his ability to practice [emphasis supplied]."

V. The Administrative Law Judge instructed the Committee that the Second Specification herein could be sustained if the Committee found that, within the specified time frames, Respondent was practicing medicine while impaired by alcohol, and or drugs and or physical disability and or mental disability.

VI. Finally, the Committee was instructed that under the wording of the charges herein, if they found, in one or more of the specified time frames, that Respondent was under the influence of alcohol and or drugs that would be sufficient to sustain an allegation or specification. It was not necessary for the Committee to distinguish whether Respondent was under the influence of alcohol or drugs or some combination. Furthermore, if the Committee found Respondent was under the deleterious influence of a drug and or some combination of drugs, it was not necessary for the Committee to distinguish which drug or drugs were involved so long as the Committee was satisfied that the drug or drugs was a narcotic, barbiturate, hallucinogen or amphetamine of a drug having similar effects. The key to these findings was impairment caused by the intake of alcohol and or drugs.

FINDINGS OF FACT

The findings of fact which follow, were made after review of the entire record. Evidence or testimony which conflicted with any finding of this Hearing Committee was considered and rejected. Some evidence and testimony was rejected as irrelevant. Petitioner was required to meet the burden of proof by a preponderance of the evidence. All findings of fact made by the Hearing Committee were established by at least a preponderance of the evidence. Unless otherwise stated, all findings and conclusions herein were unanimous. References are to transcript pages (Tr. _) and or exhibits (Ex. _) in evidence.

PART A GENERAL FINDINGS OF FACT

- A.1 Respondent was authorized to practice medicine in New York State on January 7, 1983 by the issuance of license number 152936 by the New York State Education Department. (Ex. 2)
- A.2 From on or about April 7, 1993 through on or about November 22, 1993, Respondent was engaged in the practice of medicine in New York State. (Tr. 423, 475-76 , Ex. 2)
- A.3 From on or about February 22, 1995 through on or about January 5, 1997, Respondent was engaged in the practice of medicine in New York State. (T 423, 475-76, Ex. 2)

PART B FINDINGS OF FACT WITH REGARD TO INCIDENT OF MAY 11, 1996

- B.1 At approximately 10 o'clock on the morning of May 11, 1996, Respondent was drunk and completely naked in the public area behind his condominium at Windsor Crest Condominiums in New Windsor, New York. He was observed to be replacing a piece of fence rail that runs alongside the condominiums and raising his hands up toward the sky. (Tr. 17, 31, 33, 37, Ex. 7)
- B.2 Respondent could be seen from a nearby highway, Route 32. (Tr. 42, 52-53, Ex. 7)

- B.3 Respondent admitted to New Windsor Police Officer, Lawrence Di Gregorio, that he had been drinking and had been outside naked. (Tr. 45-46, 51-52)
- B.4 New Windsor Police Officer Lawrence Di Gregorio personally observed Respondent naked inside Respondent's condominium shortly after Respondent had been outside. Respondent was drunk at the time of the observation. (Tr. 42-46, 48-49, P's Ex. 7)
- B.5 At this time, the officer also observed several cases of wine with several empty wine bottles on the counter inside Respondent's condominium. (Tr. 48, P's Ex. 7)

PART C
FINDINGS OF FACT
WITH REGARD TO
ARREST OF JUNE 27, 1996

- C.1 On June 27, 1996, Respondent was arrested in Hamburg, New Jersey, for driving under the influence of alcohol. (P's Ex. 5)
- C.2 When arrested on June 27, 1996, Respondent was observed to be "confused and disoriented". (Ex. 5, p. 2)
- C.3 On June 27, 1996, Respondent's blood alcohol level was tested at 5:24 a.m. The result was .17%. At 5:34 a.m. Respondent's blood alcohol was again tested. The results reported were .16%. (Ex. 5, p. 5)
- C.4 On October 1, 1996, Respondent pled guilty to having driven under the influence of alcohol on June 27, 1996 in Hamburg, New Jersey. He was sentenced to a fine and the suspension of his driver's license for 6 months. (Ex. 6)
- C.5 Effective November 28, 1996, Respondent's New York State driver's license was revoked for at least 90 days. This revocation came as a result of the October 1, 1996 conviction in New Jersey for driving under the influence of alcohol. (Ex. 8)

- C.6. At the time of his arrest for driving under the influence of alcohol in New Jersey, a bong (a pipe used to smoke illegal drugs) was found under the seat of Respondent's car. It was ascertained that the said pipe had contained marijuana. (Ex. 5, pp. 3, 9-11, Tr. 501)
- C.7 Respondent told the arresting officer that he was scheduled to see patients later that day, at 11:00 o'clock in the morning. (Ex. 5, p. 3)

PART D
FINDINGS OF FACT
WITH REGARD TO
ARREST OF JANUARY 5, 1997

- D.1 On January 5, 1997, Respondent was arrested on the corner of East 9th Street and 1st Avenue in New York City. He was charged with criminal possession of cocaine. (Ex. 4, Tr. 57-65)
- D.2 Respondent was arrested in possession of two bags of cocaine. (Ex. 4, Tr. 63)
- D.3 One of the two bags of cocaine found in Respondent's possession was tested, and the test result was reported positive for cocaine on January 6, 1997. (Ex. 4, Tr. 63-65)
- D.4 The place of Respondent's arrest, the corner of East 9th Street and 1st Avenue in New York City, is known by law enforcement officers to be a "high drug area." (Tr. 67)

PART E
FINDINGS OF FACT
WITH REGARD TO
SUBSTANCE ABUSE

- E.1 Stadol is a synthetic opiate agonist/antagonist. It has effects similar to narcotics and barbiturates. (Tr. 87-91, Ex. ALJ 101)
- E.2 The known effects of narcotics and barbiturates include analgesia, and sedation. Eventually, there may be physical dependence, tolerance, and withdrawal when the drug is stopped. (Tr. 91)
- E.3 Stadol has been found to have deleterious effects similar to those described for narcotics and barbiturates. (Tr. (Tr. 90-91, Ex. ALJ 101))

E.4 Caution must be exercised when Stadol is used in patients with a history of substance abuse. In its monograph regarding Stadol, Bristol-Myers Squibb, the manufacturer of Stadol, warns, under the heading "DRUG ABUSE AND DEPENDENCE":

Although the mixed agonist-antagonist opioid analgesics, as a class, have lower abuse potential than morphine, all such drugs can be and have been reported to be abused. Chronic use of STADOL (butorphanol tartrate) injectable has been reported to result in mild withdrawal syndromes, and reports of overuse and self-reported addiction have been received.

Among 161 patients who used STADOL NS [nasal spray] for 2 months or longer approximately 3% had behavioral symptoms suggestive of possible abuse. Approximately 1% of these patients reported significant overuse. Symptoms such as anxiety, agitation, and diarrhea were observed. Symptoms suggestive of opioid withdrawal occurred in 2 patients who stopped the drug abruptly after using 16 mg a day or more for longer than 3 months.

Special care should be exercised in administering butorphanol to emotionally unstable patients and to those with a history of drug misuse [emphasis supplied]. When long-term therapy is necessary, such patients should be closely supervised. (ALJ Ex. 101)

- E.5 Petitioner's expert has personally treated three patients for habitual use of Stadol or Stadol misuse. (Tr. 93, 149)
- E.6 Respondent ordered "large quantities"⁴ of Stadol Nasal Spray from three drug supply companies and two pharmacies. Virtually all of the "large quantities" were self-prescribed, from April 7 through October 22, 1993 and from February 22 through October 17, 1995. (Ex. 9A, 9B, 10, 11, 12, 13, 17, 18, Tr. 507)
- E.7 Respondent used most of the Stadol he ordered for self treatment. (Tr. 455-56, 514-15)
- E.8 In 1993, Respondent used free samples of Stadol in addition to the amounts he ordered. (Tr. 500-501)

⁴At page 507 of the transcript, during questioning, Respondent accepted, as accurate, the characterization of "large quantities" in reference to the amount of Stadol he ordered and self-prescribed.

- E.9 Respondent was familiar with the Physician's Desk Reference (PDR) monograph regarding Stadol (quoted in part above). He was also familiar with the complete package insert supplied by the manufacturer of Stadol. The said package insert contains virtually the same information as set forth in the PDR monograph. He was specifically aware of the warnings regarding drug abuse and dependence (Tr. 507)
- E.10 At the time Respondent was ordering "large quantities" of Stadol and self-prescribing the substance to himself, he did not have any reservations that such activity might be inappropriate or dangerous. (Tr. 507)
- E.11 The term "denial" as used herein, is a recognized psychological phenomenon. When a person exhibits (is in) denial, that person is addicted to or habituated to, and in trouble with, a substance. Nevertheless, the individual in denial but rejects the assertion he or she is in any sort of difficulty. The person in denial typically minimizes any complications, physical or otherwise. The person in denial refuses to see the severity of the problem. A person in this form of denial tends to believe that he or she is not addicted or habituated to the substance. Such persons believe that he or she is in control of his or her life and the substance. However, persons in this form of denial usually lead lives that are out of control. Such persons and the lives they lead are actually under the control of the substance. A person in this form of denial tends to minimize the effects the substance is having on his or her performance. Such persons tend to believe that the addiction or habituation and difficulties arising from it is not noticed or recognized by others. (Tr. 120-121)
- E.12 Self-prescription is a common characteristic of those medical practitioners who are abusing drugs. Not all self-prescribers have a drug problem but many medical practitioners who have a drug problem support their addiction or habituation by self-prescribing. (Tr. 121-122)
- E.13 One of the known characteristics of persons who have drug abuse problems includes ordering a drug that is subject to abuse, such as Stadol, from several different suppliers during the same time period (Tr. 109-110, 115).

- E.14 Ordering large quantities of a drug known to have a high abuse potential from several sources, within the same time period, is consistent with a suspicion that the person ordering the drug is trying to make it less likely that the total amount being ordered will be discovered. Such behavior is common amongst people who have drug abuse problems. (Tr. 109-110, 115)
- E.15 If one continues to take Stadol on a regular basis, he runs the risk of developing tolerance to it. When one develops tolerance, larger and larger doses of the drug is needed to get the desired effect. (Tr. 113)
- E.16 People who are abusers of drugs tend to lie or cover up in relation to issues of substance abuse. (Tr. 259-260)
- E.17 Where a person presently has a problem with addiction or is known to have a history of substance abuse, it is contraindicated to prescribe an addictive substance for that person. There is a recognized exception in an emergency. However, even in an emergency prescriptions must be for a reduced dose and for an abbreviated period of time. (Tr. 124-25)
- E18. People with a history of addiction and substance abuse exhibit a high risk of relapse into substance abuse. Substance abuse is a chronic disease. (Tr. 131-132)
- E19. Generally recognized medical literature has published reports of habituation among people using Stadol. (Tr. 149, ALJ 101)
- E20. If an individual is abusing a particular drug, the fact that the drug is believed to have a low abuse potential is of no significance. (Tr. 154-155, Tr. 507, Ex. ALJ 101)
- E21. Stadol does not require an Official New York State Prescription (triplicate) form. Triplicate prescriptions are subject to greater level of scrutiny by the authorities than non-triplicate prescriptions (Tr. 155-156)
- E22. Stadol is not part of a routine urine toxicology screen for substance abuse. A urine test for Stadol must be specifically designated in a special order. (Tr. 156, 166-68)

- E23. The total amount of Stadol obtained by Respondent in 1993 and 1995, is in excess of the amount consistent with accepted standards of medicine for therapeutic uses. (Tr. 174-175, Ex. 17)
- E.24 Both sedation and withdrawal from the use of Stadol would impair cognition and have a deleterious influence on the judgment of a physician treating patients. (Tr. 178-179)

PART F
FINDINGS OF FACT
WITH REGARD TO
SUBSTANCE ABUSE TREATMENT

- F.1 In 1985 Respondent was hospitalized at Northern Westchester Hospital Center, in part, for treatment of abuse of Xanax. (Tr. 490-493)
- F.2 Following his 1985 hospitalization at Northern Westchester Hospital Center, Respondent entered the substance abuse program of the Medical Society of the State of New York (MSSNY) and remained in the program for two years. (Tr. 493, Ex. 3, pp. 27, 29, 42)
- F.3 While in the MSSNY substance abuse treatment program, Respondent received treatment at Concept Associates, a chemical dependence treatment program in Lynbrook, New York. He was also active in Alcoholics Anonymous. (Tr. 519-20, Ex. 3, p. 42)
- F.4 At the end of November 1993, Respondent was admitted as an inpatient to New York Hospital in Westchester for treatment of substance abuse, including abuse of Stadol. (Tr. 493-94)
- F.5 In December 1993, following his discharge from New York Hospital in Westchester, Respondent rejoined the substance abuse program of MSSNY, the Committee for Physicians Health, and remained until June of 1996. (Tr. 494-5)
- F.6 Respondent participated in Alcoholics Anonymous in 1994. (Tr. 519-20)
- F.7 During Respondent's second participation in the MSSNY substance abuse program, part of the original plan was that Respondent's urine would be screened for Stadol, beginning at the outset of treatment. (Tr. 498)

- F.8 From December of 1993 through the end of May 1995 no urine screens of Respondent included a test for Stadol. (R's Ex. A, Ex. 16)
- F.9 Sometime after the commencement of Respondent's second period of participation in the MSSNY substance abuse program began, his urine was, on occasion, screened for Stadol. (R's Ex. A)
- F.11 The urine screens for Stadol performed on Respondent's urine did not give accurate results. (Tr. 470-74, 499-500, R's Ex. A, Ex. 16, 17)
- F.10 From the middle of July 1995, through October 19, 1995, Respondent admitted taking "large" quantities of Stadol. (Tr. 470-74, 499-500, Ex. A, Ex. 16, 17)
- F.11 From the middle of July 1995, through October 19, 1995, Respondent participated in properly conducted, random urine screens for Stadol. (Tr. 470-74, 499-500, Ex. A, Ex. 16, 17)
- F.12 From the middle of July 1995, through October 19, 1995, none of Respondent's urine studies tested positive for Stadol. (Tr. 470-74, 499-500, Ex. A, Ex. 16, 17)

CONCLUSIONS
WITH REGARD TO
FACTUAL ALLEGATIONS

The Committee now turns its attention to the four Factual Allegations in this proceeding. In summary, the allegations in this proceeding charge that within the referenced time frames⁵, Respondent:

1. was engaged in the practice of medicine in New York State, and;
2. habitually used narcotics, ***and or*** other drugs having similar effects to narcotics ***and or*** other drugs having similar effects to barbiturates;

⁵The period **included** in this proceeding is April 7, 1993 through November 22, 1993 and February 22, 1995 through January 5, 1997. The Period **excluded** November 23, 1993 through February 21, 1995.

- and or;*
4. during the period February 22, 1995 through January 5, 1997 only, habitually abused [used (sic)] alcohol.

Respondent does not deny that during each of the periods in issue, he was engaged in the practice of medicine. Furthermore, Respondent admits that at various times he obtained and self prescribed "large quantities" of Stadol. The Committee concludes that Stadol is a synthetic opiate agonist and antagonist. The Committee further concludes that Stadol is a drug which has similar effects to narcotics and barbiturates. The Committee further concludes that Respondent was a habitual user of Stadol during the cited period. The Committee also concludes Respondent was a habitual abuser⁶ of alcohol during the period referenced in this proceeding. Finally, the Committee concludes Respondent habitually used narcotics, specifically, cocaine during the period cited.

As a basis for finding Respondent to be a habitual user, the Committee points to the common usage of the terms as well as the testimony of Dr. Larry Kirstein. The evidence in this proceeding shows without compromise that Respondent was not an occasional or "recreational user" of drugs and or alcohol. The combination of drunk driving, plus the incident of public nakedness plus the amount of Stadol purchased by Respondent plus the arrest for cocaine possession combined with the other factors mentioned herein, point to a person with a severe substance abuse problem and a person who is a danger to himself and all others around him. The testimony by Dr. Kirstein which forms the primary basis for findings of fact F.13 through F. 20 provide the definitions and criteria upon which these conclusions rest.

In drawing the conclusions set forth herein, the Committee finds Respondent to have virtually no credibility as a witness. The Committee further finds Respondent is in denial about a significant substance abuse problem. The Committee concludes that Respondent's activities in association with his substance

⁶Allegation B states "Respondent habitually used alcohol." This Committee finds that Respondent not only habitually used alcohol, he habitually abused alcohol. The habitual use of alcohol might support a finding of impairment. By finding habitual abuse, the Committee finding is consistent with the wording of § 6530 (8) of the Education Law and sets a higher standard of proof which the State has met. The State not only established that Respondent habitually used alcohol, the State showed Respondent had a pattern of clear alcohol abuse.

abuse make him an imminent danger to himself, the community at large, and specifically, to his patients. That there was no evidence of patient harm to this point, is primarily the result of good fortune rather than the responsible medical activities of Respondent.

The Committee acknowledges that the State's case was based upon circumstantial evidence. That is, there was no testimony to the effect that Respondent was seen by a patient or a colleague to be inebriated⁷ or visibly under the influence of drugs or alcohol while actually practicing. However, the circumstantial evidence that Respondent was using drugs and, at times alcohol, alone or in concert, during periods of time in which he was actively engaged in the practice of medicine is clear and convincing. Here are some of the circumstantial facts, established by the State and relied upon by the Committee in forming its conclusions.

1. Respondent has a *history of substance abuse*;
2. Respondent has been *hospitalized for substance abuse*;
3. Respondent has *participated in outpatient substance abuse programs* including Alcoholics Anonymous
4. Respondent admits he *bought and used "large quantities"* of a narcotic-like substance (Stadol);
5. Respondent *self-prescribed "large quantities"* of a narcotic-like substance (Stadol);
6. Respondent *purchased and obtained Stadol from more than one source* to hide the amount of Stadol he was obtaining;
7. Respondent's *urine screens for Stadol were consistently negative*;
8. Respondent *possessed, and was arrested for possession of, cocaine*, an illegal substance;
9. Respondent has *engaged in dangerous conduct to obtain substances of abuse*;
10. Respondent lost his driver's license for *driving while intoxicated*;
11. Respondent was in *possession of drug paraphernalia* on the occasion of his arrest for driving while intoxicated;
12. Respondent was inebriated to the extent that he was *naked outdoors, in full public view*;
13. Respondent took *no action to treat or diagnose the cause of his pain* other than the use of Stadol;
14. Respondent *minimizes and obfuscates* regarding his use of alcohol and drugs;
15. Respondent *completely denies* he now has, or has ever had, a *substance abuse problem*;

The Committee recognizes that any one or even some of the above factors, taken alone, would not be sufficient to form the basis for its conclusions. However, all the above factors, combined with

Respondent's demeanor during testimony, unite to convince the Committee, beyond the requisite standard, that Respondent has committed the acts alleged and is therefore an imminent danger to the people of this state.

In finding Respondent to be without credibility, the Committee takes note that Respondent obfuscated and related outright falsehoods in his testimony. Respondent tried to deny that his hospitalization in 1985 was for substance abuse. (Tr. 490-91) Respondent tried to minimize his New Jersey arrest and conviction for driving while under the influence of alcohol. Respondent testified that he was driving 45 miles per hour in a 35 mile per hour zone. In fact however, according to the arresting officer's report, Respondent was driving 58 miles per hour in a 35 mile per hour zone (cf. Tr. 435 & Ex. 5).

In a similar vein of obfuscation and denial, Respondent asserted his arrest in New York City was not related to drug possession. According to Respondent, he was arrested because he attempted to aid his female companion when he thought she was being attacked. Respondent's effort to make the incident an unfortunate mistake is belied by the entirely credible testimony of the New York City police officer who arrested him as well as the arrest report and supporting documents. The more credible evidence indicates that Respondent was not arrested for assault or resisting arrest. Rather, he was arrested because packets of cocaine fell from his hands when he was told to put his hands up by the arresting officer. (Tr. 57 ff. and Ex. 4.)

Respondent's lack of truthfulness was demonstrated to the Committee during the proceedings. At one point, Respondent lost his temper and threw an object. When admonished by the Administrative Law Judge, Respondent asserted the object had slipped. Clearly, Respondent had intentionally propelled the object. (Tr. 383)

Respondent continued his fabrication and false testimony by characterizing the report by his neighbor that he was naked in full public view as the biased creation of a racist who wanted Respondent and his friends (people of color) out of the neighborhood. When reminded that he had also been seen naked and in a state of inebriation by a police officer with whom Respondent had a good relationship, Respondent asserted that if such an incident occurred, he had no memory of it. Furthermore, according to Respondent, if he engaged

in such aberrant behavior it was not the result of inebriation, but rather because Respondent was suffering from asthma, bronchitis and a fever at the time. Respondent summarized his situation with regard to the incident of nakedness, the loss of his driver's license, and his arrest for cocaine possession as follows:

I don't want to insult you, your intelligence. It seems like a lot of things happened to me this last year. I mean it. It was almost an inordinate amount of things that happened to me, and anybody with sense would say there is something going on with this guy. But sometimes people just have a bad year. [...] (Tr. 438-9)

As part of his defense, Respondent repeatedly referred to urine analyses which sought evidence of Stadol but which were entirely negative for the substance. Given Respondent's admission that the urine tests were conducted with scrupulous attention to the security of the sample; and given Respondent's admission that he was taking large quantities of Stadol, the Committee concludes that the test results were compromised by the acts of Respondent. It is simply impossible for a person to take the amount of Stadol supported by the objective records of purchases, prescriptions and Respondent's subjective admissions while at the same time producing urine without even trace amounts of the substance. This body will not speculate as to the method employed in the compromise of the results and will simply conclude that it required significant and premeditated intervention by Respondent.

In drawing the conclusions set forth herein, the Committee not only rejects Respondent's testimony as fabricated, the Committee also relies upon the State's expert witness. The opinion of the State's expert witness was entitled to greater weight than that of Respondent because, the State's expert had specific experience with regard to Stadol habituation and abuse. Dr. Larry S. Kirstein, M.D. testified that he had engaged in the treatment of three cases of Stadol habituation and abuse. Dr. Kirstein also demonstrated significant familiarity with reports of Stadol in the medical literature. Respondent's expert was entitled to less weight because he testified that he had no experience in treating patients for Stadol abuse or habituation. It is noteworthy that Respondent's expert did not accept the published warning of Stadol's manufacturer, Bristol-Myers Squibb, that Stadol has abuse potential.

Respondent has produced most of the evidence which establishes that he habitually used narcotics and narcotic like drugs. The State's expert provided significant interpretation, definitions and guidelines.

Therefore,

Factual Allegation A is SUSTAINED.

Factual Allegation B is SUSTAINED

Factual Allegation C is SUSTAINED

Factual Allegation D is SUSTAINED

CONCLUSIONS
WITH REGARD TO
THE FIRST SPECIFICATION

The Hearing Committee concludes that the First Specification is sustained. As set forth in the instructions issued by the Administrative Law Judge, and based upon the discussion of the allegations above, the Committee finds Respondent guilty of professional misconduct as defined in N.Y. Education. Law §6530(8). More specifically, the Committee finds that during the period February 22, 1995 through January 5, 1997, Respondent was a habitual abuser of alcohol. The Committee further finds that during the period April 7, 1993 through November 22, 1993 as well as during the period February 22, 1995 through January 5, 1997, Respondent was dependant on and a habitual user of narcotics. Moreover during the period April 7, 1993 through November 22, 1993 as well as during the period February 22, 1995 through January 5, 1997, Respondent was dependent on and a habitual user of drugs which had effects similar to narcotics and barbiturates.

In order to find Respondent guilty of this form of misconduct, the proof must establish that Respondent used the substances listed with regularity and in significant quantities such that he developed a physical or psychological need for ever increasing amounts of the substances. The facts adduced in this proceeding show that Respondent used a sufficient quantity of inebriating substances such that he lost his driver's license and was seen naked in public. Furthermore, the Committee must conclude that Respondent was willing to go to the most extreme lengths imaginable to produce Stadol-negative urine screens during a period he admits he was obtaining and using significant quantities of Stadol. In addition, Respondent went

through the difficulty of using more than one supply house and more than one pharmacy to obtain Stadol. All these factors paint the picture of an individual so desperate for inebriating substances that he would risk his career and his medical license. Based upon the evidence presented, Respondent was willing to risk arrest, and was indeed arrested in an effort to obtain an illegal inebriating substance. At the time of his arrest for cocaine possession, Respondent had been through the ignominy associated with his arrest for driving while impaired. He knew the risks of arrest and the consequences of arrest, yet he proceeded. The magnitude of the effort displayed by Respondent to obtain inebriating substances and hide his use of them leads inescapably to the conclusion that Respondent was habituated to and dependant upon alcohol, narcotics and or drugs having a similar effect to narcotics barbiturates, amphetamines and or hallucinogens.

Therefore,
The First Specification is **SUSTAINED**.

CONCLUSIONS
WITH REGARD TO
THE SECOND SPECIFICATION

The Administrative Law Judge instructed the Committee that to sustain the Second Specification herein the State must show that, within the specified time frames, Respondent was practicing the profession [of medicine] while impaired by alcohol, ***and or*** drugs....[emphasis supplied]." The Committee notes that while the provision cited in this specification, § 6530 (7) of the Education Law also refers to "physical disability" and "mental disability," neither of these concepts are necessary to sustain the charge, nor did the State offer any proof regarding these concepts. Based upon the proof that was adduced, the Committee sustains this specification.

In so finding, the Committee notes there was no evidence that Respondent appeared at his work site in an obviously inebriated condition. However, the logical interpretation of §6530(7) of the Education Law does not require one to practice while obviously intoxicated. Clearly, the intention of this provision is to cite

both physicians who are obviously drunk or "high" on drugs while practicing as well as those whose use of substances is more subtle.

The question presented is whether a preponderance of the evidence establishes that Respondent's ability to act as a physician was compromised by the use of alcohol and or drugs during the periods in issue? The Committee answers this question in the affirmative. One simply cannot use cocaine and or Stadol and or alcohol in the quantities reported without impairment of one's clinical ability and judgment. One cannot be convicted of driving while intoxicated or found to be inebriated to the point of exposing himself publicly and within a day or days practice medicine without impairment. Furthermore, while there is no direct evidence that Respondent used alcohol and or drugs on the days he was in the office, the circumstantial evidence is overwhelming. The amount of Stadol Respondent admitted he obtained and used would be inconsistent with any sort of functioning and possibly life itself, if consumed only on weekends and days off. Therefore, the Committee finds by a preponderance of the evidence that Respondent practiced while impaired, as charged.

Therefore,
The **Second Specification** is **SUSTAINED**.

CONCLUSIONS
WITH REGARD TO
PENALTY

Respondent has been untruthful to this Committee. Worse, in terms of possible rehabilitation, he is in a state of self deception. Respondent has deluded himself into thinking that his substance abuse is not a problem and, if it is, no one has noticed or will notice. This state of self-delusion and denial makes rehabilitation and recovery impossible. It is to be noted that Respondent has already participated in both in patient as well as out patient substance abuse programs.

Therefore, it is the conclusion of this Committee that the continued practice of medicine in the State of New York by Respondent constitutes an imminent danger to the health and safety of the people of this state, and that Respondent's license to practice medicine in New York State must be revoked.

ORDER

WHEREFORE, Based upon the foregoing facts and conclusions,

It is hereby **ORDERED** that:

1. The Factual Allegations found in the Statement of charges (Appendix One) are **SUSTAINED**

Furthermore, it is hereby **ORDERED** that;

2. The Specifications of Misconduct contained within the Statement of Charges (Appendix One) are **SUSTAINED**;

Furthermore, it is hereby **ORDERED** that;

3. The Summary Order signed by the Commissioner of Health on February 4, 1997 shall be affirmed and shall continue unmodified;

Furthermore, it is hereby **ORDERED** that;

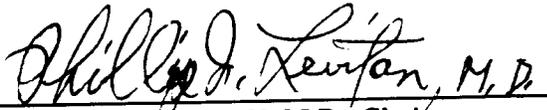
4. The license of Respondent to practice medicine in the State of New York is **REVOKED**

Furthermore, it is hereby **ORDERED** that;

5. This order shall take effect **UPON RECEIPT** by Respondent or his Attorney or **SEVEN (7) DAYS** after mailing of this order by Certified Mail.

Dated: _____
New York, New York

May 19, 1997


PHILLIP I. LEVITAN, M.D., Chairperson

RALPH J. LUCARIELLO, M.D.
D. MARISA FINN

TO:

PAUL STEIN, ESQ.
Associate Counsel
Bureau of Professional Medical
Conduct
New York State Department of Health
5 Penn Plaza
New York, New York 10001

BARRY SILVER, ESQ.
Silver, Forrester, Schisano & Lesser, P.C.
328 Route 9W South
New Windsor, NY 12553

SALVATORE GERARD PERCONTE
833 Blooming Grove Turnpike
New Windsor, New York 12553

MAIL PAYMENT TO:

New York State Department of Health
Bureau of Accounts Management
Corning Tower Building --Room 1245
Empire State Plaza
Albany, N.Y. 12237

APPENDIX ONE

IN THE MATTER
OF
SALVATORE GERARD PERCONTE, M.D.

COMMISSIONER'S
ORDER AND
NOTICE OF
HEARING

TO: SALVATORE GERARD PERCONTE, M.D.
833 Blooming Grove Turnpike
New Windsor, NY 12553

The undersigned, Barbara A. DeBuono, M.D., M.P.H.,
Commissioner of Health of the State of New York, after an
investigation, upon the recommendation of a Committee on
Professional Medical Conduct of the State Board for Professional
Medical Conduct, and upon the Statement of Charges attached hereto
and made a part hereof, has determined that the continued practice
of medicine in the State of New York by SALVATORE GERARD PERCONTE,
M.D., the Respondent, constitutes an imminent danger to the health
of the people of this state.

It is therefore:

ORDERED, pursuant to N.Y. Pub. Health Law §230(12) (McKinney
Supp. 1997), that effective immediately SALVATORE GERARD PERCONTE,
M.D.;-the Respondent, shall not practice medicine in the State of
New York. This Order shall remain in effect unless modified or
vacated by the Commissioner of Health pursuant to N.Y. Pub. Health
Law §230(12) (McKinney Supp. 1997).

PLEASE TAKE NOTICE that a hearing will be held pursuant to the
provisions of N.Y. Pub. Health Law §230 (McKinney 1990 and Supp.
1997), and N.Y. State Admin. Proc. Act §§301-307 and 401 (McKinney
1984 and Supp. 1997). The hearing will be conducted before a

committee on professional conduct of the State Board for Professional Medical Conduct on February 13, 1997 at 10:00 a.m., at the offices of the New York State Health Department, 5 Penn Plaza, Sixth Floor, New York, NY 10001, and at such other adjourned dates, times and places as the committee may direct. The Respondent may file an answer to the Statement of Charges with the below-named attorney for the Department of Health.

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. The Respondent shall appear in person at the hearing and may be represented by counsel. The Respondent has the right to produce witnesses and evidence on his behalf, to issue or have subpoenas issued on his behalf for the production of witnesses and documents and to cross-examine witnesses and examine evidence produced against him. A summary of the Department of Health Hearing Rules is enclosed. 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.

The hearing will proceed whether or not the Respondent appears at the hearing. Scheduled hearing dates are considered dates certain and, therefore, adjournment requests are not routinely granted. Requests for adjournments must be made in writing 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. TYRONE BUTLER,

DIRECTOR, BUREAU OF ADJUDICATION, and by 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. Claims of court engagement will require detailed affidavits of actual engagement. Claims of illness will require medical documentation.

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 or sanction 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 FORTH IN NEW YORK PUBLIC HEALTH LAW §230-a (McKinney Supp. 1997). YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York
February 4, 1997


BARBARA A. DeBUONO, M.D., M.P.H.
Commissioner of Health

Inquiries should be directed to:

Paul Stein
Associate Counsel
N.Y.S. Department of Health
Division of Legal Affairs
5 Penn Plaza, Suite 601
New York, New York 10001
(212) 613-2617

IN THE MATTER

OF

SALVATORE GERARD PERCONTE, M.D.

STATEMENT

OF

CHARGES

SALVATORE GERARD PERCONTE, M.D., the Respondent, was authorized to practice medicine in New York State on or about January 7, 1983, by the issuance of license number 152936 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. From on or about April 7, 1993 through on or about November 22, 1993, Respondent habitually used narcotics and habitually used drugs having similar effects to narcotics or barbiturates.
- B. From on or about February 22, 1995 through on or about January 5, 1997, Respondent habitually used alcohol, habitually used narcotics, and habitually used drugs having similar effects to narcotics or barbiturates.
- C. From on or about April 7, 1993 through on or about November 22, 1993, Respondent was engaged in the practice of medicine in New York State.
- D. From on or about February 22, 1995 through on or about January 5, 1997, Respondent was engaged in the practice of medicine in New York State.

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

BEING AN HABITUAL USER OR HAVING A PSYCHIATRIC CONDITION
WHICH IMPAIRS THE ABILITY TO PRACTICE

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(8) (McKinney Supp. 1997) by being a habitual user of alcohol, or being dependent on or a habitual user of narcotics, barbiturates, amphetamines, hallucinogens, or other drugs having similar effects, or having a psychiatric condition which impairs the licensee's ability to practice as alleged in the facts of the following:

1. Paragraphs A and B.

SECOND SPECIFICATION

PRACTICING WHILE IMPAIRED

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(7) (McKinney Supp. 1997) by practicing the profession while impaired by alcohol, drugs, physical disability, or mental disability as alleged in the facts of the following:

2. Paragraphs A, B, C, and D.

DATED: New York, New York
January 31, 1997



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct