

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

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

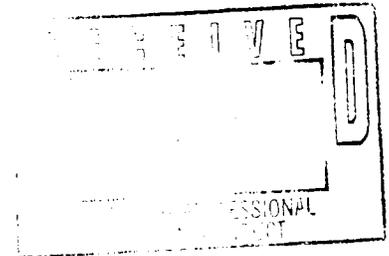
Barbara A. DeBuono, M.D., M.P.H.
Commissioner

Karen Schimke
Executive Deputy Commissioner

February 26, 1996

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Cindy Fascia, Esq.
New York State Department of Health
Bureau of Professional Medical Conduct
Empire State Plaza
Corning Tower - Room 2438
Albany, New York 12237



Johanna Cavender, M.D.
4800 Westfield Drive
Manlius, New York 13104

Effective Date March 4, 1996

RE: In the Matter of Johanna Cavender, M.D.

Dear Ms. Fascia and Dr. Cavender:

Enclosed please find the Determination and Order (No. BPMC-96-30) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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
Corning Tower - Fourth Floor (Room 438)
Empire State Plaza
Albany, New York 12237

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must 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 all action until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

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

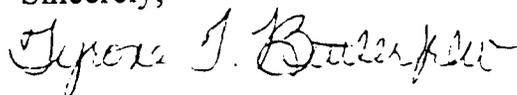
The notice of review served on the Administrative Review Board should be forwarded to:

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

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

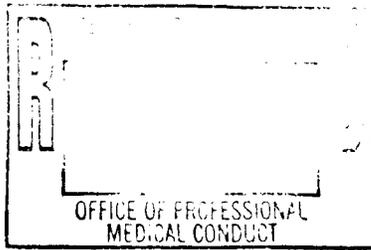
Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,



Tyrone T. Butler, Director
Bureau of Adjudication

TTB:crc
Enclosure



COPY

NEW YORK STATE DEPARTMENT OF HEALTH 1180

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

**IN THE MATTER
OF
JOHANNA CAVENDER, M.D.**

**DETERMINATION
AND
ORDER
BPMC-96- 30**

JOSEPH G. CHANATRY, M.D., Chairperson, PETER B. KANE, M.D. and JOHN T. VERNIEU, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230, subdivision 10(e) and/or Section 230, subdivision 19 of the Public Health Law.

DAVID A. SOLOMON, ESQ., Administrative Law Judge, served as the Administrative Officer.

The Department of Health appeared by **HENRY M. GREENBERG, GENERAL COUNSEL**, by **CINDY M. FASCIA, ESQ.**, of Counsel.

Respondent appeared personally at the Hearing on her own behalf and was not represented by Counsel.

Evidence was received, witnesses were sworn or affirmed and examined. Transcripts of the proceedings were made.

After consideration of the record, the Hearing Committee issues this Determination and Order pursuant to the Public Health Law and the Education Law of the State of New York.

RECORD OF PROCEEDINGS

A. Dates of Proceedings:

Notice of Hearing:	October 16, 1995
Statement of Charges:	October 16, 1995
Service of Notice of Hearing and Statement of Charges:	October 19, 1995
Answer to Statement of Charges:	None Filed
Pre-hearing Conference:	November 13, 1995
Hearing Held:	November 16, 1995 December 28, 1995
Received Petitioner's Brief: Proposed Findings, Conclusions and Recommendations:	December 6, 1995
Received Respondent's Brief: Statement and Conclusions of Fact and Law and Recommendations:	December 12, 1995
Received Petitioner's Supplemental Findings and Conclusions:	January 10, 1996
Respondent's Supplemental Brief:	None Filed
Record Closed:	January 10, 1996
Deliberations conference:	January 15, 1996

B. Witnesses:

Called for the Petitioner:

Debra Hathaway

Impaired Physicians Program
Office of Professional Medical Conduct
Case Coordinator and Acting Program
Director since 11/94.

Susan Ellsworth

Impaired Physicians Program
Office of Professional Medical Conduct
Case Coordinator

Called for the Respondent:

Johanna Cavender, M.D.

Respondent

C. Respondent's Requests:

1. The Respondent left a message that she would not attend the Pre-hearing Conference shortly before 10:00 a.m. on the day of the Conference. She planned to attend the Initial hearing day, November 16, 1995.

2. Shortly before 10:00 a.m. on November 16th, the Respondent left a message that she had car trouble and would not be able to attend the Initial Hearing. The Hearing Committee considered Petitioner's Exhibits 1 through 7 in evidence and unanimously determined that the Hearing proceed. At the conclusion of the presentation of evidence and testimony by the Petitioner, the Committee closed the Hearing record, directed that final briefs be submitted by December 6, 1995, and scheduled a Deliberations Conference. By letter dated November 17, 1995, the Administrative Officer informed the Respondent of the results of the Hearing.

3. On December 6, 1995, the Respondent requested a delay in presenting her brief. During a conference call, on stipulation of the parties, with the concurrence of the Hearing Committee Chairperson, the date of the submission of the brief was scheduled for December 12, 1995. The Respondent's copy of Petitioner's brief was to be retained until the Respondent's brief was received by Petitioner.

4. On December 13, 1995, a conference call was conducted by the Hearing Committee, excluding Dr. Kane, with Dr. Cavender, Ms. Fascia and the Administrative Officer. Dr. Cavender, citing the car trouble that prevented her from attending on November 16, 1995, requested the opportunity to testify before the Committee. Ms. Fascia had no objection to an appearance, but was concerned that an extensive delay was not warranted. The two (2) Hearing Committee members present concurred and selected the date of December 28, 1995. Dr. Cavender appeared pro-se on December 28th to testify.

STATEMENT OF THE CASE

The case was brought pursuant to Section 230 of the Public Health Law. The Respondent, JOHANNA CAVENDER, M.D., is charged with professional misconduct set forth in the Education Law of the State of New York, Section 6530, subdivision 29: "Violating any term of probation or condition or limitation imposed on the licensee pursuant to section two hundred thirty of the public health law." It is alleged Respondent failed to obtain a successor Supervisor since April, 1993; practiced medicine from April, 1993 through February, 1995 without an approved Supervisor; and failed to obtain an approved Supervisor required by Order 94-201. It is also alleged Respondent failed to comply with the sobriety monitoring requirements of the Order 94-201 and the Restoration Order, in that she informed her monitor, Pelion, that she would not have urine screens for a two (2) week period, would not submit to further testing, and did not have the required tests since February, 1995.

A copy of the Statement of Charges is attached to this Determination and Order as Appendix

I.

FINDINGS OF FACT

1. Respondent, on or about October 23, 1991, signed a Temporary Surrender of License and Registration, by which she surrendered her license to practice medicine in New York State. (Pet. Ex. 3; T. 20)¹ In the Temporary Surrender, Respondent admitted that she was "incapacitated for the active practice of medicine due to drug dependence." (Pet. Ex. 3).
2. Respondent, on or about November 3, 1992, appeared before a committee of the State Board for Professional Medical Conduct (hereinafter "Restoration Committee") to request that her license to practice medicine be restored. On or about November 23, 1992, the Restoration Committee issued a Restoration Order. The Order restored Respondent's license to practice medicine under certain conditions which, unless otherwise specified, remains in effect for a period of probation lasting five (5) years from the effective date of the Order. (Pet. Ex. 4; T. 24-25). The Restoration Committee determined that based on Respondent's history, which included an extensive history of chemical dependency as well as mental illness, a five (5) year period of monitoring was necessary. (T. 24-25).
3. The Restoration Order, in pertinent part, required that Respondent be supervised in her medical practice by a licensed physician, and that she submit to random urine testing for the presence of alcohol and drugs. (Pet. Ex. 4).
4. Respondent did not comply with the terms of her Restoration Order. Specifically, despite being informed by the Office of Professional Medical Conduct (hereinafter "OPMC") in April, 1993, that her original practice monitor was no longer approved to serve, Respondent failed to obtain a successor monitor. The terms of Respondent's Restoration Order required

¹(Pet. Ex. __) refers to the number of the Petitioner's Exhibit; (T. __) refers to the page number of the transcript. Appendix II is a copy of the List of Exhibits.

her to obtain a successor monitor within seven (7) days of being informed that her original monitor was no longer approved to serve. In addition to Respondent's practicing medicine without an approved monitor, Respondent had repeatedly violated the urine monitoring requirements of her Restoration Order during the first four (4) months that the Order was in effect. (Pet. Ex. 5; T. 24-29).

5. Respondent's ongoing violations of her Restoration Order resulted in a disciplinary proceeding being instituted against her. The Hearing Committee in that proceeding issued a Determination and Order dated September 27, 1994. The Committee found the Respondent guilty of professional misconduct in that she had failed to obtain a practice monitor, and had violated the urine monitoring requirements of her Restoration Order. (Pet. Ex. 5) Respondent appealed to the Administrative Review Board. The Review Board affirmed the Committee's Determination and Penalty. The Review Board's Order, Order 94-201, was personally served on the Respondent in February, 1995. (Pet. Exs. 5 and 7; T. 29-34)
6. Respondent, during the pendency of her prior disciplinary proceeding before the State Board for Professional Medical Conduct, continued to practice medicine at Syracuse Community Health Center. Respondent remained in violation of her Restoration Order throughout the entire time, as she continued to practice medicine without a practice monitor. (Pet. Ex. 5; T. 29-36)
7. Under the terms of Order 94-201, Respondent's license to practice medicine was suspended for one (1) year, with a minimum three (3) month period of actual suspension. Respondent was required, while on actual suspension, to obtain an approved practice monitor. If

Respondent failed to obtain an approved practice monitor, her license was to remain suspended until such time as she did so. Respondent, during the period of suspension, was required to comply with her Restoration Order, including the requirement that she continue to submit to urine monitoring. (Pet. Exs. 5 and 6; T. 30-42, 55-58)

8. Order 94-201 was personally served on Respondent because Respondent claimed she had never received the certified mail service of the Order, which had been sent to her place of employment. Respondent, until personal service of Order 94-201 upon her, had continued to work at Syracuse Community Health Center. Order 94-201 was personally served on Respondent to make certain that she had actual notice of the terms of the Order, and so that Respondent, whose license had been actually suspended, ceased practicing medicine. (T. 32-34)

9. Ms. Debra Hathaway served as Acting Director of OPMC's Impaired Physicians Program at the time her testimony was given, and had served as case coordinator for that program. Ms. Hathaway had served as Respondent's Case Coordinator, and had been assigned to monitor Respondent's compliance with the terms of her Restoration Order. (Pet. Ex. 5; T. 22-36) After Respondent was personally served with Order 94-201, Ms. Hathaway had a telephone conversation with her on February 22, 1995. (T. 34-36) The purpose of Ms. Hathaway's conversation was to inform Respondent of the terms of Order 94-201. Respondent became very angry and upset and yelled at Ms. Hathaway during the conversation. Respondent said that because of the decision she was going to lose her job, and that she was not going to submit to urine monitoring any more because she was going to lose her health insurance coverage. Respondent accused Ms. Hathaway of personally forcing her to move to another state. When Ms. Hathaway tried to explain that she was only trying to enforce the Board's Order, and that Respondent still had to comply with the terms

of the Restoration Order, Respondent terminated the conversation by hanging up on Ms. Hathaway. (T. 34-36)

10. In March 1995, Ms. Suzanne Ellsworth, a Case Coordinator for the Impaired Physicians Program, was assigned to monitor Respondent. (T. 55-56) Ms. Ellsworth sent an initial contact letter to Respondent on March 9, 1995. The letter identified Ms. Ellsworth as Respondent's Case Coordinator, and described the requirements of Respondent's monitoring. (Pet. Ex. 7, pp. 1-2) The letter, like all OPMC letters to Respondent, was sent by both regular first class mail and certified mail, return receipt requested. (T. 32-33, 58)
11. Throughout the period of time that OPMC has sought to monitor Respondent's compliance with her Restoration Order, Respondent has repeatedly refused to accept or acknowledge correspondence sent to her by the Department of Health. Respondent has refused to accept letters that were sent by certified mail, and has denied receiving letters sent by regular mail. (T. 32-33)
12. The copy of the March 9, 1995 letter that was sent to Respondent by certified mail was returned unclaimed. (Pet. Ex. 7, p. 5) The copy that was sent by regular mail to the same address was not returned by the post office. Both letters were sent to Respondent's residence address. (Pet. Ex. 7; T. 58-59)
13. On April 17 and 18, 1995, Ms. Ellsworth made telephone calls to Respondent. There was no answer, and no method of leaving a message. After her unsuccessful attempts to reach Respondent by telephone, and Respondent's failure to respond to the March 9, 1995 letter, Ms. Ellsworth wrote a follow-up letter on April 19, 1995. The April 19th letter, with a copy of the March 9th letter, was personally served on Respondent on April 19, 1995. (Pet. Ex. 7, pp. 6-7; T. 60-62)

14. The April 19, 1995 letter advised Respondent that if she did not respond to OPMC's correspondence, and if she did not comply with the terms of her monitoring, she would be in violation of Order 94-201. The letters were personally served on Respondent to ensure that she received them and had actual notice of what was required to comply with the terms of the Order. (Pet. Ex. 7; T. 60-61)
15. The Respondent did not respond to the correspondence from OPMC despite:
- a. a 3/9/95 letter from OPMC requesting that several medically related data and the names of the Respondent's proposed Practice, Urine and Therapy Monitors be provided within 30 days; and
 - b. a 4/19/95 letter, notice from OPMC of the failure to respond notified the Respondent of her violation of Order 94-201 and requested the Respondent provide the information requested in an enclosed copy of the 3/9/95 letter within 30 days; and
 - c. a 6/13/95 letter notified the Respondent that the Medical Director and Nurse Practitioner of Pelion, the previous Urine Monitor selected by the Respondent, stated that the Respondent had not been available for drug/alcohol screening since 2/29/95, contrary to the requirements of Order #94-201, and further notified the Respondent that her non-compliance with her drug/alcohol screening requirements placed her in violation of Order #94-201 and that she should contact OPMC immediately; and
 - d. a 7/26/95 letter from OPMC to the Respondent stating that her failure to comply with the terms of Order 94-201 placed her in violation of Order 94-201 and requested that the Respondent contact OPMC immediately; and
 - e. an 8/29/95 letter from OPMC to the Respondent with a copy of the 7/26/95 letter enclosed advised the Respondent of her continued violations of Order 94-201 and requested that the Respondent contact OPMC immediately.

The Respondent did not comply with the requirements of Order 94-201, as set forth in the correspondence and findings summarized above and/or in subsequent findings. (Pet. Ex. 7; T. 55-69)

- 16. OPMC's Ms. Ellsworth contacted the Impaired Physicians Committee of the Medical Society of the State of New York (hereinafter "MSSNY") and spoke to Ms. Susan Stanton. Ms. Stanton advised Ms. Ellsworth that Respondent had withdrawn from MSSNY's program, and was no longer being monitored by MSSNY in any way. (T. 37-38, 62-63)

- 17. On May 15, 1995, Ms. Ellsworth received a letter from Pelion, Respondent's sobriety monitor. Ms. Ellsworth had spoken on May 9, 1995 to Ms. Jennifer Mayo, a Nurse Practitioner at Pelion, regarding Respondent's sobriety monitoring. Both Ms. Mayo and Ronald J. Dougherty, M.D., the Medical Director of Pelion, had been involved in Respondent's sobriety monitoring. Respondent, on February 28, 1995, left an after-hours message on Pelion's answering machine indicating that she would not be available for urine screens for the next two (2) weeks. Ms. Mayo attempted to contact Respondent at Syracuse Community Health Center and was advised Respondent was no longer employed there. Ms. Mayo then contacted Respondent at her residence. Respondent told Ms. Mayo that her medical license was suspended, and that she no longer had insurance and she would not submit to further urine testing. Ms. Mayo encouraged the Respondent to come in and speak to Dr. Dougherty about the situation. Respondent made an appointment for March 24, 1995, which she subsequently cancelled and did not reschedule. Ms. Mayo called Respondent again, and Respondent scheduled an appointment for April 11, 1995. Respondent subsequently cancelled the April 11, 1995 appointment, and rescheduled for April 18, 1995. Respondent did not show up for her appointment on April 18, 1995 at Pelion. Pelion has had no further contact with Respondent. (Pet. Ex. 6; T. 63-65, 102)

18. The last urine screen obtained from Respondent was on February 23, 1995. (Pet. Ex. 6)
19. After receiving the correspondence from Pelion regarding Respondent's refusal to submit to further sobriety monitoring, Ms. Ellsworth sent a letter to Respondent on June 13, 1995 by both certified and regular mail again informing Respondent that she was in violation and that she must comply with her monitoring requirements, including sobriety monitoring. The Respondent signed for the certified copy of the letter. The copy, sent by regular mail was not returned. (Pet. Ex. 7, pp. 11-13; T. 65-66)
20. Respondent did not contact Ms. Ellsworth after receiving the June 13, 1995 letter. Ms. Ellsworth then sent another letter to Respondent on July 26, 1995, again informing the Respondent that she was in violation, and that she must comply with the terms of her monitoring. The July 26th letter was sent to the Respondent by certified and by regular mail. (Pet. Ex. 7, pp. 11-15; T. 66-67)
21. Respondent did not claim the copy of the July 26, 1995 letter sent by certified mail, and it was returned to OPMC by the Postal Service. The copy sent by regular mail to the same address was not returned. (Pet. Ex. 7, pp. 16-18; T. 67)
22. On August 29, 1995, Ms. Ellsworth sent another letter to the Respondent informing her that she was in violation and that she must comply with her monitoring requirements. With the April 19, 1995, June 13, 1995 and July 26, 1995 letters, the August 29, 1995 letter was the Respondent's fourth Notice of Violation from OPMC. The letter was again sent by both certified mail and regular mail. (Pet. Ex. 7, pp. 19-20; T. 68) The certified copy was claimed by someone at Respondent's residence. The copy sent by regular mail was not returned to OPMC. (Pet. Ex. 7, p. 21; T. 68-69)

- 23. Respondent did not respond to any of the letters sent by Ms. Ellsworth. On September 14, 1995, Ms. Ellsworth made a telephone call to Respondent's residence and spoke to Respondent. Ms. Ellsworth advised Respondent that her case was being referred to an Investigative Committee due to Respondent's noncompliance with Order 94-201. She advised Respondent that now was her opportunity to speak about this issue. Respondent stated she had been through this before with Ms. Hathaway. Respondent said that the Department of Health had suspended her license and caused her to lose her job and health insurance; therefore, Respondent said, she was unable to afford urine screening and would not continue to have it. Respondent stated that she was thinking of leaving New York State, and asked if the Department of Health could stop her from doing that. (T. 70-71, 101-103)

- 24. During the September 14, 1995 telephone conversation with Ms. Ellsworth, Respondent placed the blame for her situation on the Department of Health, and was very angry and upset with Ms. Hathaway. Respondent became increasingly agitated during the course of the telephone call. By the end of the conversation, Respondent was shouting at Ms. Ellsworth. Ms. Ellsworth did not raise her voice to Respondent during the conversation. She tried to convey to Respondent the seriousness of Respondent's situation. (T. 72-73)

- 25. Ms. Ellsworth told Respondent that because of her noncompliance, Respondent could be charged with professional misconduct again. (T. 72-73)

- 26. If Respondent had complied with Order 94-201, she would have been able to return to the practice of medicine after three (3) months of actual suspension. If Respondent had complied with the required monitoring, and complied with the terms of Order 94-201, she would not now be subject to another disciplinary action. (Pet. Ex. 5; T. 69-70)

27. The Hearing Committee in the prior disciplinary proceeding against Respondent found that the Respondent "has not cooperated, and at times has been obstructive, with agencies and/or individuals assigned to monitor or aid her during the required period of probation, as set forth in the Restoration Order." In this matter, the Respondent has refused to respond to correspondence from her monitors, and refused to meet with her monitors at Pelion. (Pet. Ex. 5, HC Report, p. 10)
28. Respondent has refused many offers of assistance, preferring to blame her situation on others, particularly the staff of the Impaired Physicians Program. (T. 35-42, 71-73)
29. On the morning of the November 16, 1995 initial hearing date in this matter Respondent telephoned OPMC. She reported she was having car trouble, and would not attend the hearing. After requesting the message be given to Ms. Hathaway, the Acting Director of the Impaired Physicians Program, and before the call could be transferred to Ms. Hathaway, Respondent hung up the phone. (T. 5-9, 106-107, 143)
30. Subsequently, Respondent called the Administrative Officer to request on December 6, 1995 that an extension of time be given for her written submission. (T. 108)
31. In a conference call on December 13, 1995 between the parties, the Administrative Law Judge, Dr. Chanatry and Mr. Vernieu, the Respondent stated she had been on her way to attend the November 16th hearing, but had car trouble. She stated she had tried to reach Judge Solomon and then called OPMC. When questioned by the Chairperson, Dr. Chanatry, as to her whereabouts when she made the telephone calls to Judge Solomon and OPMC, Respondent stated she had called from a rest area on the Thruway, and that she had abruptly hung up the phone because the repair person was there to tow her car. (T. 104-107)

STATE OF GEORGIA
DEPARTMENT OF REVENUE
COMMUNICATIONS SECTION

32. The Committee re-opened the record of this hearing to give Respondent a second opportunity to appear. Respondent appeared before the Committee on December 28, 1995, pro-se. Prior to giving testimony, Respondent was duly sworn, taking an oath that she would give truthful testimony before the Committee. (T. 100)
33. Respondent testified that on the morning on November 16, 1995, she was on the way to attend the hearing when she had car trouble. (T. 104-109) She testified she called Judge Solomon and OPMC from a Thruway Rest Area. (T. 105-107) Respondent further testified she paid for the calls in cash:
- Q. (Ms. Fascia) How did you pay for the call?
- A. (Respondent) I had some change. I usually carry change because, of course, the Thruway has tolls, and I usually carry a lot of change with me. (T. 107)
34. Respondent, after being confronted with her telephone records at the hearing, altered her prior testimony. She stated she might have charged the calls to her home number. (T. 113, 143-148) Had Respondent made these calls from a pay phone and charged them to her home number, the calls would not appear in her telephone bill as "direct dial" calls. Only calls actually dialed from the telephone in Respondent's residence, her home telephone, would appear in her telephone bill as "direct dial" calls. (Pet. Ex. 9; HC Ex. I)
35. Respondent testified that she stopped submitting to urine monitoring in February, 1995, because she lost her job at Syracuse Community Health Center, and therefore, lost her health insurance and could not afford the tests' costs. (T. 101-103, 115-122) Respondent's husband is a full time employee of New York State with an Empire Plan health insurance policy for himself, the Respondent and their dependent children under a family plan policy. (T. 116-117) Respondent did not know if drug or alcohol rehabilitation services were

covered under the policy. (Pet. Ex. 10, T. 117) Respondent testified that her husband had told her that she could not use his insurance for the services because he did not want there to be a record of her drug and alcohol problems. (T. 119-120) On further examination, the Respondent refused to look at an exhibit she was asked to review, and refused to answer questions posed by the Petitioner. (T. 119-121)

36. Respondent also testified that she did not think it was necessary for her to continue to undergo urine monitoring if she was not practicing medicine despite the requirements clearly spelled out in her Disciplinary Order and Restoration Order. (Pet. Exs. 4 and 5; T. 103)

37. Respondent testified she stopped urine testing because she could not afford it; and, the testing cost \$300 per month, rather than the \$126 monthly charge by Pelion. (T. 102, 167, 168) She discontinued testing at Pelion without an explanation. Pelion's staff made efforts to make alternate arrangements with the Respondent. The Respondent did not return telephone calls, cancelled appointments and failed to show up for a scheduled appointment. (Pet. Ex. 6; T. 63-64) There are numerous facilities in Syracuse where Respondent could have the required urine monitoring on a sliding fee scale; the Respondent failed to pursue the options. (T. 167-168)

The preceding Findings of Fact were made after a review of the entire record; they represent evidence and testimony found persuasive by the Hearing Committee in each Finding. Conflicting evidence or testimony, if any, was considered and rejected. Unless noted, all Findings and Conclusions herein were unanimous.

CONCLUSIONS

1. Under the terms of her Restoration Order dated November 23, 1992, Respondent is required to have a supervisor to act as a practice monitor. Respondent's failure to obtain a successor supervisor since on or about April, 1993, when OPMC notified her that her original supervisor was no longer approved, constitutes a violation of the terms of her Restoration Order. Accordingly, it constitutes professional misconduct under N.Y. Education Law, Section 6530, subd. 29, in that Respondent has violated a term of probation, condition or limitation. (Pet. Ex. 4; Findings 1, 2, 3 and 4)
2. Respondent practiced medicine from on or about April, 1993 through on or about February 17, 1995 without being supervised by an approved supervisor, a violation of Respondent's Restoration Order constituting professional misconduct under N.Y. Education Law, Section 5430, subd. 29. (Pet. Ex. 4; Finding 4)
3. Respondent's failure to obtain an approved supervisor, in part, resulted in the issuance of BPMC Order 94-201. Order 94-201 requires the Respondent obtain an approved supervisor. Her failure to do so constitutes violations of the Restoration Order and Order 94-201. Such constitutes professional misconduct under N.Y. Education Law, Section 6530, subd. 29. (Pet. Exs. 4 and 5; Findings 5, 6, 7 and 8)
4. Respondent, under the terms of her Restoration Order and Order 94-201, is required to submit to random, supervised, unannounced urine tests for the presence of alcohol and other drugs. Respondent's unilateral, unapproved notice to her sobriety monitor, Pelion "that she would be unavailable" for urine screens for two (2) weeks is a violation of both Orders' specific requirements that Respondent comply with sobriety monitoring. Such constitutes professional misconduct under N.Y. Education Law, Section 6530, subd. 29. Respondent

left a message at Pelion and did not speak to its staff despite their offers of assistance.

(Pet. Exs. 4 and 5; Findings 17, 18)

5. Respondent, when contacted at her home by Pelion on or about March 16, 1995, informed Pelion that she would not be submitting to further urine testing. Such was a clear violation of both Orders under which Respondent was required to continue urine monitoring, even during any periods of actual suspension under the latter Order 94-201. As such, it constitutes professional misconduct under N.Y. Education Law, Section 6530, subd. 29. (Pet. Exs. 4 and 5; Findings 17, 19; Resp. Brief, Rcd. 12/12/95, p.1)
6. Respondent has failed to submit to and/or make herself available for the required sobriety monitoring since on or about February 28, 1995. Such constitutes a clear violation of both Orders, and constitutes professional misconduct under N.Y. Education Law, Section 6530, subd. 29. No one at Pelion or OPMC excused Respondent from further monitoring. Further, she used the loss of her employment as an excuse to avoid further urine monitoring, cutting herself off from all efforts to assist her in compliance. (Findings 17 through 24)
7. The explanation Respondent gave for her failure to appear at the November 16, 1995 hearing was less than candid. Respondent misrepresented the truth to induce the Hearing Committee to reopen the Hearing in this matter. The dishonesty and disrespect that Respondent has shown to the OPMC process and the requirements of the Respondent's Restoration Order and Order 94-201 demonstrate that she is not a candidate for further monitoring or rehabilitation. (Pet. Ex. 9; HC Ex. I; Findings 28, 29, 30, 31, 32, 33, 34)
8. Respondent ceased the required urine monitoring when she clearly had options to continue it. **Respondent seized on an excuse to discontinue compliance with the terms and provisions of her Restoration Order.** the Respondent was informed several times of her obligation to

continue urine monitoring. Her actions since the suspension of her license and the loss of her job are not those of an individual committed to staying in recovery and eventually returning to responsible, unrestricted practice. Respondent has demonstrated that she is not a candidate for further monitoring or rehabilitation. She has shown that she has no intention of complying with the terms of her two (2) previous Orders, and accepts no responsibility for staying in compliance. (Pet. Exs. 4 and 5; Findings 5, 7, 9, 15, 17, 18, 22, 23, 27, 28, 36, 37)

- 9. In her previous disciplinary action less than one (1) year ago, Respondent was given the equivalent of a final opportunity by the Hearing Committee and the Administrative Review Board (ARB). The reports give a clear, unmistakable warning to Respondent that further violations will not be tolerated. Instead of complying, Respondent promptly compounded her violations by ceasing her urine monitoring. Respondent has demonstrated that she is not able to follow any monitoring program that OPMC is authorized to impose. (Pet. Ex. 5, ARB Order, p. 4; BPMC Order 94-201, Appendix II, Terms of Probation, par. 8)

CONCLUSIONS OF LAW

The Hearing Committee unanimously makes the following conclusions pursuant to the Findings of Fact set forth above.

The Hearing Committee concludes that the following Factual Allegations from the October 16, 1995 Statement of Charges are **SUSTAINED**:

- Paragraph A : Findings 1, 2, 3, 4, 16.
- Paragraph B : Findings 5, 6, 7, 8, 16.
- Paragraph C : Findings 6, 7, 9, 10, 14, 15, 20, 22, 25.
- Paragraph C.1 : Findings 5, 6, 11, 12, 13, 14, 15, 20, 23.
- Paragraph C.2 : Findings 5, 6, 14, 15, 20, 23.
- Paragraph C.3 : Findings 8, 15, 20, 23.
- Paragraph D : Findings 15, 16, 17, 18, 19, 20, 22, 23, 25.
- Paragraph D.1 : Findings 17, 18.
- Paragraph D.2 : Findings 9, 15, 16, 17, 18, 19, 20, 22, 23, 37.

Based on the above, the Hearing Committee concludes that the following Specifications of Charges are **SUSTAINED**:

FIRST SPECIFICATION:

The facts in Paragraphs A, B, C and C.1 and C.2 and C.3.

SECOND SPECIFICATION:

The facts in Paragraphs A, B, D and D.1 and D.2 and D.3.

PENALTY

For the better part of three (3) years the Respondent has been before the State Board for Professional Medical Conduct. Respondent appeared before a Restoration Committee in November, 1992 to request a restoration of her medical license. The Restoration Committee, which had before it detailed information on the Respondent and the nature of her impairment, determined it was necessary to place certain terms and conditions on Respondent's practice of medicine for five (5) years. (Pet. Exs. 4 and 5) The Restoration Committee lawfully and reasonably imposed these conditions, including the requirements of a practice monitor and a sobriety monitor. The conditions were a means to protect the public, to assure that Respondent would not practice while impaired and to detect any resumption of the substance abuse that had led to the surrender of her license.

From April, 1993, when OPMC disapproved Dr. Franklin Johnson as the Respondent's practice monitor, the Respondent resisted all efforts by the OPMC staff to bring her into compliance with this monitoring provision. (Pet. Ex. 5) In order to assist Respondent to select a practice monitor, OPMC agreed to accept a non-physician monitor to comply. Despite the offer, the Respondent resisted several efforts made in her behalf. Her ongoing, flagrant violation of the practice monitor provision of the Restoration Order gave OPMC no choice but to charge her with misconduct. In March, 1994, Respondent was served with a Notice of Hearing and Statement of Charges charging violations of the terms of her Restoration Order. Respondent was found guilty of misconduct. Pursuant to Order 94-201, her license was suspended for one (1) year. (Pet. Ex. 5) The suspension was to remain in effect for a minimum term of three (3) months. The Respondent was to obtain a practice monitor and comply with the terms of her Restoration Order, including sobriety monitoring, prior to returning to the practice of medicine. If Respondent had obtained a practice monitor and otherwise remained in compliance, she would have been able to return to the practice of medicine in three (3) months.

Respondent not only failed to obtain the necessary practice monitor, but refused to submit to further urine monitoring. Respondent has been in flagrant, ongoing violation of the Restoration Order since April, 1993, less than six (6) months after her license was restored. (Pet. Exs. 4 and 5) She has been in violation of Order 94-201 from its inception. (Pet. Exs. 5, 6, 7; T. 60-73)

The Administrative Review Board sustained the Hearing Committee's September 20, 1994 Determination finding the Respondent guilty of professional misconduct. The Board also specifically warned the Respondent that a failure to comply with, and cooperate in, her probation could lead to the permanent loss of her license. (Pet. Ex. 5, ARB Order, p. 4.)

As Respondent's history of non-compliance starkly demonstrates, no penalty other than revocation is adequate to protect the public. Respondent has willfully refused to comply with two (2) previous Orders of the Board, and there is no hope that she can be brought into compliance. Revocation of the Respondent's license to practice medicine is the only acceptable penalty.

NEW YORK STATE DEPARTMENT OF HEALTH

ORDER

IT IS HEREBY ORDERED, in accordance with the provisions of Section 230, subdivisions 10(e) and 19, and Section 230-a, subdivision 4 of the Public Health Law, and Section 6530, subdivision 29 of the N.Y. Education Law, that the Hearing Committee unanimously ORDERS that License No. 136100 issued to JOHANNA CAVENDER, M.D. to practice medicine in the State of New York be and hereby is REVOKED.

DATED: Albany, New York

February 23, 1996

Joseph G. Chanatry, M.D.
JOSEPH G. CHANATRY, M.D.
Chairperson

PETER B. KANE, M.D.
JOHN T. VERNIEU



APPENDIX I

STATEMENT OF CHARGES

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

-----X

IN THE MATTER : STATEMENT
OF : OF
JOHANNA CAVENDER, M.D. : CHARGES

-----X

JOHANNA CAVENDER, M.D., the Respondent, was authorized to practice medicine in New York State on October 20, 1978 by the issuance of license number 136100 by the New York State Education Department. Respondent's registration, which was current, has been placed on inactive status by the New York State Education Department, due to the suspension of Respondent's medical license by the New York State Department of Health pursuant to BPMC Order 94-201.

FACTUAL ALLEGATIONS

A. Respondent's license to practice medicine in New York State was restored by a Restoration Order issued on or about November 23, 1992 by the State Board for Professional Medical Conduct. The Restoration Order restored Respondent's license to practice medicine under certain conditions which, unless otherwise specified, remain in effect for a period of probation lasting five years from the effective date of said Order.

B. Respondent's license to practice medicine in New York

State was suspended on or about February 6, 1995 pursuant to Administrative Review Board Decision and Order Number BPMC 94-201, In the Matter of Johanna Cavender, M.D. (hereinafter Order 94-201). Pursuant to said Order, Respondent's license to practice medicine was suspended for twelve months, with the last nine months of the suspension stayed contingent on Respondent's compliance with the terms of Order 94-201, the terms of the Restoration Order, and the terms of probation imposed pursuant to Order 94-201. Respondent, during the three months of active suspension, was required to comply with the terms and conditions contained in Paragraphs 1, 2, 4, 5, 6 and 7 of the Restoration Order.

C. Respondent, during the three month period of active suspension imposed by Order 94-201, was required to propose and have approved by OPMC a practice monitor or supervisor. If Respondent did not have an approved monitor or supervisor at the conclusion of the three month period of active suspension, her active suspension was to continue until she obtained an approved practice monitor or supervisor. Pursuant to the Restoration Order, Respondent is required to be supervised in her medical practice by a Supervisor approved by the Office of Professional Medical Conduct [hereinafter OPMC]. Respondent is further required to obtain a successor Supervisor subject to the approval of OPMC within seven days of becoming aware that the original supervising physician will no longer serve in that capacity. Respondent has failed to comply with the required supervision in violation of the Restoration Order and/or Order 94-201, in that:

1. Respondent has failed to obtain a successor Supervisor since on or about April 1993.
2. Respondent practiced medicine from on or about April 1993 through on or about February 17, 1995 without being supervised by an approved Supervisor.
3. Respondent has failed to obtain an approved Supervisor despite the terms and conditions of Order 94-201, which was personally served on Respondent on February 27, 1995.

D. Respondent, pursuant to the Restoration Order, is required to be monitored by a "Sobriety Monitor" approved by OPMC. The Sobriety Monitor is to cause to be performed random supervised, unannounced blood, breathalyzer and/or urine tests for the presence of alcohol and/or other drugs. Respondent has failed to comply with the required monitoring in violation of the Restoration Order and/or Order 94-201, in that:

1. Respondent, on or about February 28, 1995, left an after-hours message on the telephone answering machine of Pelion, the designated Sobriety Monitor, informing Pelion that she would not be available for urine screens for the next two weeks.
2. Respondent, when contacted at her home by Pelion on or about March 16, 1995, informed Pelion that she would not be submitting to further urine testing.
3. Respondent has failed to submit to and/or make herself available for the required sobriety monitoring since on or about February 28, 1995.

SPECIFICATION OF CHARGES

FIRST AND SECOND SPECIFICATIONS

VIOLATING A TERM OF PROBATION
CONDITION OR LIMITATION

Respondent is charged with professional misconduct under N.Y. Educ. Law §6530(29) (McKinney Supp. 1995) by reason of her having violated a term of probation or condition or limitation imposed on her pursuant to section two hundred thirty of the public health law, in that Petitioner charges:

1. The facts in Paragraphs A, B, C and C.1, and/or C.2, and/or C.3.
2. The facts in Paragraphs A, B, D and D.1 and/or D.2, and/or D.3.

DATED: *October 16*, 1995
Albany, New York

Peter D. Van Buren

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

APPENDIX II

LIST OF EXHIBITS

LIST OF EXHIBITS

Petitioner's Exhibit 1:	Notice of Hearing Statement of Charges
Petitioner's Exhibit 2:	Affidavit of Service
Petitioner's Exhibit 3:	Temporary Surrender of License and Registration
Petitioner's Exhibit 4:	Restoration Order
Petitioner's Exhibit 5:	Hearing Committee and Administrative Review Board Orders: MPMC Order 94-201
Petitioner's Exhibit 6:	Report from Pelion
Petitioner's Exhibit 7	Correspondence from Impaired Physicians Program to Respondent
Petitioner's Exhibit 8:	Airborne Express Receipt
Petitioner's Exhibit 9:	Telephone Records from Alltel
Petitioner's Exhibit 10:	Health Care Choices Booklet
Hearing Committee's Exhibit I:	Alltel Explanation of Toll System

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