

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In re: William A. O'Rourke, Jr., M.D.

Docket No. MPN 19-0302

STATE'S PROPOSED FINDINGS OF FACT

NOW COMES the State of Vermont, by and through Attorney General William H. Sorrell and undersigned Assistant Attorney General, James S. Arisman, and submits the following proposed findings of fact in this matter.

I. Background.

1. William A. O'Rourke, Respondent, a Rutland internist, holds Vermont Medical License Number 042-0002399, issued by the Vermont Board of Medical Practice on September 10, 1958.

2. The State of Vermont filed a Specification of Charges in this matter on or about January 24, 2005. The State later filed an amended Specification of Charges in this matter on or about May 13, 2005. A hearing committee of the Vermont Board of Medical Practice received evidence on the State's charges on October 30, 2006 at the Vermont Board of Health in Burlington, Vermont. 26 V.S.A. §1355(b). Board Member Russell P. Davignon, M.D., and Margaret Funk Martin, Board Public Member, served as the hearing committee. Phillip Cykon, Esq., was the presiding officer for this matter. Following completion of the proceedings on October 30, 2006, the hearing committee took this matter under advisement.

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II. Respondent's Practice.

3. The State called Respondent, William A. O'Rourke, Jr., M.D., as its first witness. Respondent graduated from the University of Vermont Medical School in 1957. He interned in 1958 at the Ohio State University College of Medicine in Columbus. He then returned to Vermont for a one-year residency at the DeGoesbriand Hospital. Respondent then served with the Department of Medicine at the 2795th United States Air Force Hospital and later practiced at the Georgetown Medical Center in Washington, D.C., returning to Vermont in 1963. Respondent has held privileges at the Rutland Regional Medical Center since 1963. Respondent has practiced as an internist for almost 50 years.

4. Respondent identified State's Exhibit #1 as the Stipulation and Consent Order that he signed and that the Board approved and ordered on November 5, 2003 (hereinafter referred to as "the November 5, 2003 Stipulation and Consent Order" or "agreement"). Respondent identified his signature on this agreement. State's Exhibit #1 was admitted in evidence. Respondent understood the agreement at the time he signed it. Respondent was represented by counsel at the time he reviewed and signed the November 5, 2003 agreement. Paragraph 14 of the November 5, 2003 Stipulation and Consent Order states that the Board of Medical Practice could adopt certain content within it as "uncontested findings of fact and/or conclusions" in the matter.

A. Patient A.

5. Paragraph 15 of the Stipulation and Consent Order included Respondent's admission that he had prescribed a DEA Scheduled narcotic for Patient A (the wife of a physician colleague) and that "he initially prescribed for Patient A without examining her or taking her medical history". Respondent agreed within the Stipulation and Consent Order

that the patient's medical chart included no entry to reflect that he took a detailed medical history or examined the Patient A on either November 9, 2001 and May 15, 2002 (dates on which he prescribed controlled substances for Patient A).

6. Respondent agreed within the Stipulation and Consent Order that the chart entry for his prescribing for the patient on May 15, 2002 "consists solely of the following unsigned note: Vicodin ES30 as directed three times, Ambien 10 milligrams, 30, one at bedtime times three." Respondent also agreed within the Stipulation and Consent Order that Patient A's medical records for May 15, 2002 included no indication that Respondent actually saw her on that date. Respondent agreed within the Stipulation and Consent Order that his entry for May 15, 2002 in Patient's A's medical records included no substantive information as to her weight, her blood pressure, general physical condition, details as to medical problems, other drugs taken, or allergies. In addition to the dates identified above, Respondent also cared for Patient A on February 20, 2002.

7. Respondent knew Patient A as the wife of a physician colleague in the Rutland area. Patient A's husband was in Respondent's coverage group. Respondent had previously treated the physician and other members of the physician's family. Respondent knew that Patient A had a bad back and was "aware of her complaints, her problems". Respondent testified, "[W]e made a note and, actually, it was in her husband's chart, which we often do if we see more than one person in the family". Respondent testified that "as a courtesy" he had issued a prescription for Vicodin for Patient A. Patient A has not filed a complaint with the Board of Medical Practice regarding Respondent's care. Respondent's Exhibit A, a letter to the Medical Board, dated June 27, 2002 and signed by him, was admitted into evidence during the hearing.

B. Coursework Required by the November 5, 2003 Agreement.

8. The November 5, 2003 Stipulation and Consent Order signed by Respondent imposed terms and conditions on his Vermont medical license. Paragraphs 26 through 28 of the November 5, 2003 agreement required that Respondent attend and complete "as soon as reasonably practicable" the intensive course in controlled substance management at the School of Medicine of the Case Western Reserve University in Cleveland. The Stipulation and Consent Order expressly required that Respondent complete this course within one year of approval of the agreement by the Board of Medical Practice.

9. The State identified its Exhibit #2 as an affidavit from Gail Phipps, Financial Administrator for the Continuing Medical Education (CME) Program of Case Western Reserve University. The affidavit, based on records of the CME Program, listed the dates on which the Intensive Course in Controlled Substance Management had been held in recent years. State's Exhibit #2 was admitted into evidence.

10. The first offering of the Case Western Intensive Course in Controlled Substance Management following Board approval of the November 5, 2003 agreement was December 10-13, 2003. Respondent did not attend the December 10-13, 2003 Intensive Course in Controlled Substance Management at Case Western Reserve University when it was offered.

11. Respondent did not attend the May 19-22, 2004 Intensive Course in Controlled Substance Management at Case Western Reserve University when it was offered.

12. In fact, Respondent did not attend the Intensive Course in Controlled Substance Management at Case Western Reserve University within one year of the Board's approval of the November 5, 2003 Stipulation and Consent Order. The hearing committee

finds that Respondent's failure to do so constitutes non-compliance with the requirements of Paragraphs 26-28 of his November 5, 2003 agreement with the Board regarding remedial education.

13. At hearing, Respondent expressly admitted that his non-attendance on the above dates did not comply with the time requirements set forth in Paragraphs 26-28 of the November 5, 2003 Stipulation and Consent Order that he attend the course within one year of the Board's approval of the agreement.

14. Moreover, the period of Respondent's non-attendance of the required coursework was protracted. He did not attend the December 15-18, 2004 Intensive Course in Controlled Substance Management at Case Western Reserve University when it was offered.

15. Respondent did not attend the May 11-14, 2005 Intensive Course in Controlled Substance Management at Case Western Reserve University when it was offered.

16. Respondent did not attend the December 7-10, 2005 Intensive Course in Controlled Substance Management at Case Western Reserve University when it was offered.

17. When Respondent eventually attended the Intensive Course in Controlled Substance Management at Case Western Reserve University, it was not until 10-13, 2006. As such, Respondent failed to attend the required course for a full 30 months following the Board's approval of the November 5, 2003 agreement.

18. Respondent by his own admission knew how to find out the dates when the required Case Western Reserve coursework would be offered and how to arrange his attendance. Respondent's sources of information regarding the coursework included correspondence he had received from the Medical Practice Board, information received from

the University of Vermont continuing education department, and his conversations with individuals who had taken the course.

19. The hearing committee finds that Respondent offered no credible explanation for his failure to attend in a timely manner the CME coursework at the Case Western Reserve University that was expressly required by his agreement with the Board of Medical Practice. The hearing committee does not credit Respondent's testimony that he failed to attend the CME coursework as required because (a) he wanted to attend other coursework (in infectious disease) as an alternative;¹ and (b) his brother, Joe, had been badly injured in an automobile accident in March 2004. These claims were offered vaguely, with minimal detail and in no way establish that Respondent was unable to comply with the CME coursework requirement within one year, as he had agreed to do in writing. Review of the record provides no indication that Respondent ever raised claims of that the coursework requirement was unreasonable or impossible to fulfill. Nor did he ever formally and properly petition the Board to have this requirement eliminated or revised.

20. In sum, the required CME coursework at Case Western Reserve University was offered on (a) December 10-13, 2003; (b) May 19-22, 2004; (c) December 15-18, 2004; (d) May 11-14, 2005; and (e) December 7-10, 2005, and Respondent has no credible explanation for his failure to attend the required coursework on any of these dates.

C. Ex Parte Communication by Respondent with Board Member.

21. Respondent identified State's Exhibit #3 as a letter that he sent directly to Board Member Patricia King, M.D., PhD. State's Exhibit #3, the letter, was admitted into evidence. Respondent sent the letter directly to Dr. King at her office at Fletcher Allen

1. Respondent testified at hearing that he had attended the infectious disease course in question for "Eight, ten, maybe more" years.

Health Care. Respondent's letter to Dr. King, dated July 15, 2004, requested her "intercession" to permit Respondent to attend coursework in pain management in Texas, rather than attend the Intensive Course in Controlled Substance Management at Case Western Reserve University that was required by his agreement with the Board.

22. Respondent wrote to Dr. King of the North Investigative Committee when he became "frustrated" because he could not find an "alternate course". Respondent testified that he wrote to Dr. King to "make sure someone heard my plea." However, Respondent was fully aware that Dr. King is a Board member and chairs the North Investigative Committee of the Board of Medical Practice when he wrote his letter to her. Respondent sent his letter directly to Dr. King at her office, rather than addressing it to her care of the Board of Medical Practice in Burlington.

23. The hearing committee finds that Respondent improperly communicated *ex parte*² with Dr. King by writing directly to her and asking her to intervene with the Board of Medical regarding his coursework requirement. Thus, Respondent communicated about a pending matter with a single member of the Board, and not with the Board of Medical Practice as a whole (or with all of the members of the North Investigative Committee.

24. Respondent asked a single Board member to act on his behalf without notice to other interested parties. Respondent did not send a copy of his letter to the undersigned Assistant Attorney General or any other agent of the State. Respondent did not send a copy

1. "Ex parte. On one side only; by or for one party; done for, in behalf of, or on the application of, one party only." Black's Law Dictionary 517 (5th ed 1979). See also Vermont Secretary of State, Administrative Rules for Office of Professional, Part III, Procedures Generally Applicable Rule 3.1(D) Ex parte communications. "(1) Prohibited communications. Unless required for the disposition of *ex parte* matters authorized by law, upon filing of a complaint, petition, application, notice of appeal, or other filing which a hearing authority has treated as the same, no member, employee, or agent of a hearing authority may communicate directly or indirectly, in connection with any issue of fact, with any party or interested person, or, in connection with any issue of law, with any party or employee, agent, or representative of any party, except with the consent of all parties or upon notice and opportunity for all parties to participate."

of the letter to his own attorney, Joseph O'Rourke, Esq., and only informed his attorney after the fact. The hearing committee finds that such *ex parte* communication and Respondent's failure to seek advice and counsel from his own attorney on this point demonstrate a heedlessness or indifference on Respondent's part to the ethical implications of his actions.

25. Moreover, Respondent never petitioned the Board of Medical Practice with a request to change the express terms and conditions imposed on his medical license by the November 5, 2003 Stipulation and Consent Order. Similarly, Respondent never asked his attorneys to petition the Board on his behalf in this regard.

26. Respondent identified State's Exhibit #4, a letter, dated August 4, 2004, that Respondent's then-attorney had sent to the undersigned Assistant Attorney General. Respondent received a copy of this letter from his attorney. State's Exhibit #4 was admitted into evidence. The first sentence of the August 4, 2004 letter states, "Without my knowledge, my brother wrote directly to a member of the Medical Practice Board concerning the requirements of his attendance at the Ohio seminar." The letter stated that henceforth Respondent would be "representing himself on all issues in this matter [MPN 19-0302], so you can correspond directly with him."

27. Respondent identified State's Exhibit #5 as a letter sent to him by the undersigned Assistant Attorney General. Respondent received this letter. State's Exhibit #5 was admitted into evidence. The letter, dated September 9, 2004 and addressed to Respondent, states in part:

You asked that [Dr. King] intercede on your behalf and permit you to attend CME coursework other than that expressly required by your Stipulation and Consent Order with the Board of Medical Practice. Because you have signed this agreement and the Board has approved it, Dr. King cannot unilaterally

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alter the terms that you have agreed to. Thus, you must comply with all requirements of the Stipulation and Consent Order as written, including the specific CME coursework that is identified therein.

The letter urged Respondent to "make the necessary arrangements to attend the December [sic] Case Western program in December 2004" and added, "[s]hould you fail to do so, you will be subject to charges of unprofessional conduct". In closing, the letter added, "Please take this matter seriously and immediately make arrangements to attend and complete the required coursework."

28. Respondent read and understood the contents of the letter. Respondent, however, did not attend the Intensive Course in Controlled Substance Management when it was offered in December 2004.

29. Respondent spoke by telephone with a Medical Board investigator, Philip Ciotti, in December 2004 as to whether he had yet attended the required coursework. Respondent testified that he told the Board investigator that he would attend "the next scheduled course." According to State's Exhibit #2, the Phipps Affidavit, we find that the "next" offering of the Intensive Course in Controlled Substance Management at Case Western University would have been May 11-14, 2005. However, Respondent did not attend the "next" available offering of the required course. In fact, Respondent did not actually attend the CME course until 17 months after his representations to the Board investigator. Respondent's handwritten notes of his conversation with the Board investigator were admitted in evidence as Exhibit B.

30. Medical Board Investigator Ciotti recalled speaking by telephone with Respondent in December 2004. Respondent told Investigator Ciotti that he had "made it quite clear that he did not intend to take the class" and that he did not know when he might

take it. Respondent mentioned no specific dates or plans regarding attendance. Moreover, Respondent offered no specific reason for not attending, stating only that the course "didn't work with his schedule".

31. The hearing committee does not credit Respondent's testimony or notes to the effect that he told the Board investigator during the December 2004 telephone conversation that he would attend the "next" offering of the Intensive Course in Controlled Substance Management at Case Western University. See Paragraph 29, above. Rather, the hearing committee credits Investigator Ciotti's recall on this point as it is consistent with Respondent's actual failure to attend the course at the next offering on May 11-14, 2005.

32. Respondent admitted at hearing that for nearly 30 months after signing his Stipulation and Consent Order with the Board of Medical Practice that he did nothing about attending the required coursework at Case Western Reserve University. Respondent conceded that his failure to attend coursework in a timely manner does not demonstrate respect for his peers in the medical community or for the Board of Medical Practice.

III. Other Testimony of Witnesses.

A. Investigator Ciotti.

33. Investigator Ciotti was the lead investigator assigned to Board matter involving Dr. O'Rourke. As an offshoot of another investigation in Rutland, the investigator served a subpoena at Respondent's office in February 2002 for the medical records of Patient A. Investigator Ciotti went to the office in February 2002 to review the content of the patient's medical chart and to note whether certain narcotic prescribing for Patient A by Respondent appeared to have an appropriate basis in the record.

34. Respondent's office bookkeeper, Linda Lewis, met with the investigator and told him that Patient A did not have a medical chart. However, Ms. Lewis later checked the medical chart for Patient A's husband and then produced a single page representing Patient A's entire medical record within the office. This page indicated that an area pharmacist had asked that a different doctor (other than Patient A's own husband) prescribe Vicodin ES for the patient. The content of the page was very brief and simply noted that the drug prescribed was Vicodin. The note included no discussion of the patient's condition and no indication that a medical history had been taken from her or that she had been examined before Respondent prescribed for her.

35. On or about March 16, 2005, Investigator Ciotti again went to Respondent's office for the purpose of reviewing records that Respondent was required to record and maintain, pursuant to Paragraphs 22 through 25 of the November 5, 2003 Stipulation and Consent Order. Under the express terms of the agreement Respondent was required to prepare for all patients for whom he prescribed controlled substances a current diagnostic assessment and treatment plan. Moreover, patient records and the treatment plans were required to be made available to the Board for review promptly, at any time, and forthwith upon request. Most pertinently, Respondent was also required by the agreement to copy and retain in duplicate all prescriptions ordered by him for DEA controlled substances. One copy of each prescription for a controlled substance was to be placed in a chronologically-ordered file that was to be made available for Board review "at any time and without prior notice, upon request." The other prescription was to be placed in the patient's chart.

36. Upon arrival at Respondent's office on March 16, 2005, Investigator Ciotti spoke with Linda Lewis, the office bookkeeper. Respondent was not himself present in the

office at this time. The investigator introduced himself and asked to see the file or list of duplicate prescriptions that Respondent was required to maintain under Paragraph 24 of the November 5, 2003 Stipulation and Consent Order. However, Ms. Lewis replied that there was no such file in the office that she was aware of. Later, Ms. Lewis was able to find some copies of prescriptions for controlled substances that had been placed within some individual patient medical records. However, during the visit to Respondent's office on March 16, 2005 Ms. Lewis never was able to produce the chronological file of prescriptions that Investigator Ciotti had requested pursuant to the terms of the November 5, 2003 Stipulation and Consent Order. Investigator Ciotti's report on his March 16, 2005 visit to the office was entered in evidence as Respondent's Exhibit D.

37. Investigator Ciotti subsequently asked Respondent's attorney, Ritchie Berger, Esq., to produce the requested prescription file. At hearing, Investigator Ciotti identified State's Exhibit 6 as correspondence from Respondent's attorney, Ritchie E. Berger, Esq., and attached copies of prescriptions for controlled substances that Respondent had ordered for his patients. Exhibit 6 was admitted in evidence. Mr. Berger in a letter, dated June 13, 2005 and addressed to the undersigned Assistant Attorney General, wrote, "I have received from William O'Rourke, Jr., M.D. his file reflecting narcotic prescriptions per your request."

38. The hearing committee finds that the prescription records from Respondent that Investigator Ciotti had asked to review on March 16, 2006 were not made available to the Board for review until June 13, 2006, nearly three months after being requested. The hearing committee finds that such untimely production by Respondent does not comply with the requirements of Paragraphs 22 through 25 of the November 5, 2003 Stipulation and Consent Order. Investigator Ciotti would have used the requested records as "a starting

point", and as "a map to know what patient files to look at" in reviewing the medical basis for Respondent's prescribing of controlled substances. Without the file of prescriptions it would have been very difficult for the investigator to identify which patient medical records to review in an effort to monitor whether Respondent's was maintaining his patient records in compliance with the requirements of the Stipulation and Consent Order.

B. Linda Lewis, Office Bookkeeper.

39. Linda Lewis is the office bookkeeper for Respondent. She has worked for Respondent for 15 years. She prepares accounts payable, accounts receivable, and reconciles bank statements for the office. She also is responsible for interacting with insurance companies regarding payments, documentation, coding and other "insurance issues". She has access to patient records in the office, works closely with the office nurse, and understands the office system for filing records and documentation. The hearing committee finds that Ms. Lewis is responsible and knowledgeable regarding the record keeping and operations of Respondent's medical office.

40. Investigator Ciotti identified himself during his visit on March 16, 2005 and showed Ms. Lewis the November 5, 2003 Stipulation and Consent Order, pointing out the pertinent paragraph within it. The investigator stated that he wanted to examine the prescription file that was to be maintained by Respondent under the terms of his agreement with the Medical Board. Ms. Lewis told Mr. Ciotti that she did not know of any such file. Respondent had never mentioned any such file to her. Ms. Lewis, however, knew from her own work that some duplicate prescriptions had been placed in individual patient charts. She had "run across" duplicate prescriptions in patient charts but did not know which patient records were likely to contain these duplicates. Ms. Lewis, however, from memory was able

to retrieve some individual patient records and showed a few duplicate prescriptions to Investigator Ciotti. However, the office had no comprehensive list of its "pain patients".

41. After Investigator Ciotti left the office, without having to have been able to review the required chronologically-order file of prescriptions, Ms. Lewis contacted Respondent by telephone regarding the investigator's visit. Ms. Lewis spoke with Respondent by telephone every day or every few days when he was away. Ms. Lewis told Respondent why the investigator had come to the office. Respondent seemed to understand what information the investigator was seeking to review. However, Respondent did not volunteer anything about any such a file being within the office or where it might be located. Ms. Lewis, for her part, had no knowledge of such a file. Nor did she ask Respondent during their telephone conversation where the prescription file might be or whether it existed.

42. In light of Ms. Lewis' knowledge and familiarity with the operation of Respondent's medical office and its records and filing systems, the hearing committee finds that Ms. Lewis' failure to produce the required prescription file when requested by the investigator and the subsequent delay by Respondent in producing the purported records to the Board of Medical Practice establish that the records were not made available for review "at any time and without prior notice, upon request" as required.

IV. Express Findings of Fact As Related to State's Charges Against Respondent: Counts 1 through 7.

43. The hearing committee finds as set forth below that the State has established the factual predicate(s) for each count of its allegations of unprofessional conduct, as set forth in the Amended Specification of Charges filed against Respondent.

Count 1: 26 V.S.A. §1354(25)

44. The State alleged in Count 1 of its Amended Specification of Charges that Respondent knowingly failed to attend remedial CME educational coursework within one year of the Board's approval of the November 5, 2003 Stipulation and Consent Order. See Paragraphs 26-28 of the agreement.

45. The hearing committee finds by a preponderance of the evidence adduced in this matter that Respondent knowingly failed to attend the required remedial educational coursework within one year of approval of the November 5, 2003 Stipulation and Consent Order. See, e.g., Paragraphs 4, 9-13, 18-32, as set forth above.

Count 2: 26 V.S.A. §1398

46. The State alleged in Count 2 of its Amended Specification of Charges that Respondent (a) failed to attend the required remedial educational coursework within one year of entry of the November 5, 2003 Stipulation and Consent Order (see Paragraphs 26-28 of the agreement); and (b) that such conduct by Respondent was a knowing failure to honor legal and professional obligations he had agreed to in writing.

47. The hearing committee finds by a preponderance of the evidence adduced in this matter that Respondent in fact (a) failed to attend required remedial educational coursework within one year of entry of the November 5, 2003 Stipulation and Consent Order; and (b) thereby knowingly failed to honor legal and professional obligations he had agreed to in writing. See, e.g., Paragraphs 4, 9-13, and 18-32, as set forth above.

48. Alternatively, the State alleged in Count 2 that Respondent's agreed to attend remedial coursework set forth in Paragraphs 26-28 of the November 5, 2003 Stipulation and Consent Order and later intentionally failed to honor this agreement.

49. The hearing committee finds by a preponderance of the evidence adduced in this matter that (a) Respondent agreed to attend remedial coursework set forth in Paragraphs 26-28 of the November 5, 2003 Stipulation and Consent Order; and (b) that Respondent later intentionally failed to attend this coursework contrary to his agreement with the Board. See, e.g., Paragraphs 4, 9-13, and 18-32, as set forth above.

Count 3: 26 V.S.A. §1354(a)(7)

50. The State alleged in Count 3 of its Amended Specification of Charges that Respondent knowingly and willfully disregarded the required remedial educational coursework expressly identified in Paragraphs 26-28 of the November 5, 2003 Stipulation and Consent Order.

51. The hearing committee finds by a preponderance of the evidence adduced in this matter that Respondent in fact knowingly and willfully disregarded the required remedial coursework set forth in Paragraphs 26-28 of the November 5, 2003 Stipulation and Consent Order. See, e.g., Paragraphs 4, 9-13, and 18-32, as set forth above.

Count 4: 26 V.S.A. §1398

52. The State alleged in Count 4 that Respondent communicated *ex parte* with a member of the Board of Medical Practice, in an effort to influence the member's actions and avoid attending the required remedial educational coursework that he had agreed to attend in writing in the November 5, 2003 Stipulation and Consent Order.

53. The hearing committee finds by a preponderance of the evidence adduced in this matter that Respondent communicated *ex parte* with a member of the Board of Medical Practice, in an effort to influence the member's actions in an official matter and avoid attending the specific required remedial educational coursework that he had agreed to attend

in writing in the November 5, 2003 Stipulation and Consent Order. See, e.g., Paragraphs 21-27, as set forth above.

Count 5

54. The State moved for dismissal of Count 5 prior to the beginning of the hearing in this matter.

Count 6: 26 V.S.A. §1354(25)

55. The State alleged in Count 6 that Respondent failed to timely produce, upon request, documentation that he was required to maintain under Paragraphs 22 through 25 of the November 5, 2003 Stipulation and Consent Order, with regard to his prescribing and dispensing of controlled substances, and did so on one or more occasions.

56. The hearing committee finds by a preponderance of the evidence adduced in this matter that Respondent failed to timely produce on March 16, 2005 and thereafter, following request, documentation that he was required to maintain under Paragraphs 22 through 25 of the November 5, 2003 Stipulation and Consent Order, with regard to his prescribing and dispensing of controlled substances. See, e.g., Paragraphs 33-42, as set forth above.

Count 7: 26 V.S.A. §1398 and/or §1354(a)(7)

57. The State alleged in Count 7 that Respondent (a) failed to maintain and/or timely produce, upon request, documentation that he was required to maintain under Paragraphs 22 through 25 of the November 5, 2003 Stipulation and Consent Order, with regard to his prescribing and dispensing of controlled substances, and did so on one or more occasions; and (b) that such conduct by Respondent constitutes a failure to honor legal and professional obligations he had agreed to in writing.

58. The hearing committee finds by a preponderance of the evidence adduced in this matter that Respondent (a) knowingly failed to timely produce, upon request, documentation that he was required to maintain under Paragraphs 22 through 25 of the November 5, 2003 Stipulation and Consent Order, with regard to his prescribing and dispensing of controlled substances on March 16, 2005 and thereafter; and (b) that that such conduct by Respondent constitutes a failure to honor legal and professional obligations he agreed to in writing. See, e.g., Paragraphs 33-42, as set forth above.

59. Alternatively, the State alleged in Count 7 that Respondent failed to maintain and/or timely produce, upon request, documentation that he was required to maintain under Paragraphs 22 through 25 of the November 5, 2003 Stipulation and Consent Order, with regard to his prescribing and dispensing of controlled substances.

60. The hearing committee finds by a preponderance of the evidence adduced in this matter that Respondent failed to timely produce, upon request, documentation that he was required to maintain under Paragraphs 22 through 25 of the November 5, 2003 Stipulation and Consent Order, with regard to his prescribing and dispensing of controlled substances. See, e.g., Paragraphs 33-42, as set forth above.

61. In sum, the hearing committee finds by a preponderance of the evidence adduced in this matter that the State has established the factual predicate for each count of its allegations of unprofessional conduct, as set forth by the Amended Specification of Charges filed against Respondent on May 13, 2005.

V. Testimony Related to Possible Sanction.

62. Respondent presented the testimony of several witnesses who are patients of Respondent. The hearing committee finds that these witnesses were not presented as "fact

witnesses". They had no information relevant to the merits of the State's charges against Respondent. Rather, their testimony was directed to their opinion of Respondent's character and skill as a physician. Such testimony relates only to determination of any sanction that may be imposed on Respondent.

63. The witnesses testifying on behalf of Respondent were James Wallace, M.D.; Thomas Salmon, Esq.; Mary Fregosi; Mark K. Foley; and Steven Stein, M.D. None had personal knowledge regarding any of the State's allegations. Based on their interactions as patients with Respondent, each expressed high regard for him as an individual and as a physician.

WHEREFORE, the State of Vermont moves the Board of Medical Practice hearing committee in this matter to accept the above-proposed findings as supported by the evidence presented at hearing as to the unprofessional conduct of Respondent O'Rourke. The State urges that the Board of Medical Practice enter conclusions of law and an order consistent with the allegations and authority set forth in Counts 1 through 7 of the Amended Specification of Charges in this matter.

Dated at Montpelier, Vermont, this 10th day of November, 2006.

STATE OF VERMONT

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by:


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