



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

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

Dennis P. Whalen
Executive Deputy Commissioner

January 11, 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David W. Smith, Esq.
Associate Counsel
New York State Department of Health
5 Penn Plaza - 6th Floor
New York, New York 10001

Eugene Schwalben, M.D.
421 Devonshire Road
Baldwin, New York 11510

Ariella M. Colman, Esq.
Nathan L. Dembin & Associates, P.C.
225 Broadway -Suite 1400
New York, New York 10007

RE: In the Matter of Eugene Schwalben, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 00-12) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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:

LC 078443

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: mla

Enclosure

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

COPY

-----X
IN THE MATTER : SUPPLEMENTAL
OF : DETERMINATION
EUGENE SCHWALBEN, M.D. :
AND
ORDER
-----X

ORDER #00-12

A Commissioner's Order and Notice of Hearing, dated October 7, 1996, and a Statement of Charges, dated October 3, 1996, were served upon the Respondent, Eugene Schwalben, M.D. **GERALD M. BRODY, M.D. (Chair), WILLIAM P. DILLON, M.D., and EUGENIA HERBST**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **LARRY G. STORCH, ADMINISTRATIVE LAW JUDGE**, served as the Administrative Officer. The Department of Health appeared by David W. Smith, Esq., Associate Counsel and Michelle Y. Tong, Esq., Assistant Counsel. The Respondent appeared by Irving Anolik, Esq. Evidence was received and witnesses sworn and heard and transcripts of these proceedings were made.

The Hearing Committee issued a Determination and Order, dated April 8, 1998, sustaining the charges in part, and dismissing in part. The Committee revoked Respondent's license to practice medicine in New York State. Thereafter, Respondent, now represented by Nathan L. Dembin & Associates, P.C., Ariella M. Colman, Esq., of counsel, filed an appeal to the Supreme Court, Appellate Division, Third Department pursuant to Article

78 of the CPLR. In a Memorandum and Judgement dated October 14, 1999, the Court sustained the Committee's Determination and Order in part, reversed in part, annulled the determination regarding penalty and remanded the case to the Hearing Committee for a redetermination thereof.

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

STATEMENT OF CASE

By a Commissioner's Order and Notice of Hearing dated October 7, 1996, Respondent's license to practice medicine was summarily suspended pending hearing on a variety of allegations of professional misconduct. Thereafter, Respondent filed a motion in Supreme Court, New York County, seeking to enjoin the Petitioner from proceeding on the basis of certain information obtained during a June 12, 1996 inspection. Following a hearing before a referee appointed by the Court, Justice Walter B. Tolub ruled that portions of the evidence obtained by Petitioner were improperly obtained and ordered their suppression.

Petitioner proceeded with the case, minus the suppressed evidence. Respondent, an obstetrician/gynecologist, was charged with eleven specifications of professional misconduct. More specifically, he was charged with gross

negligence, gross incompetence, negligence on more than one occasion and incompetence on more than one occasion. These charges arose out of Respondent's medical care and treatment of one patient (Patient "A"). Respondent was also charged with three specifications of fraud, two specifications of moral unfitness, one specification of permitting, aiding or abetting an unlicensed person, and one specification of advertising not in the public interest. Respondent filed an Answer denying all of the allegations brought against him.

Following the hearing, the Hearing Committee issued an Interim Determination dated February 16, 1998, pursuant to statute, finding that allowing Respondent to resume his medical practice during the pendency of these proceedings would constitute an imminent danger to the health of the people of this state. The Committee recommended that the Commissioner of Health continue the summary suspension in effect pending the final resolution of this matter. By an Interim Order dated March 6, 1998, the Commissioner ordered that the summary suspension remain in effect pending the conclusion of the proceedings.

In a Determination and Order, dated April 8, 1998, the Hearing Committee sustained the charges of gross negligence, gross incompetence, negligence on more than one occasion, and incompetence on more than one occasion (all concerning Patient A), one specification of fraud, and two specifications of moral

unfitness to practice the profession. The Committee further dismissed the remaining specifications of fraud, advertising not in the public interest, and permitting, aiding or abetting an unlicensed person to perform activities requiring a license. The Hearing Committee then revoked Respondent's license to practice medicine in New York State. A copy of the original Determination and Order (BPMC-98-64) is attached to this Supplemental Determination and Order in Appendix I.

Respondent subsequently filed an appeal with the Appellate Division, Third Department. In a Memorandum and Judgment decided and entered on October 14, 1999, the Court upheld the Committee's determination that Respondent was guilty of gross negligence, gross incompetence, moral unfitness and fraud. The Court further annulled the Committee's determination that Respondent was guilty of negligence on more than one occasion and incompetence on more than one occasion. The Court then annulled the penalty and remanded the case to the Hearing Committee for a redetermination thereof. The Court held that, insofar as the Committee's determination did not specify whether Respondent's license was revoked upon each specification of misconduct or upon the cumulative effect of the sustained charges, a redetermination of the sanction was required. A copy of the Appellate Division decision is attached to this Supplemental Determination and Order in Appendix II.

Both parties were given the opportunity to submit briefs on the issue of the appropriate sanction to be imposed. Both parties filed briefs, which were then considered by the Hearing Committee. Thereafter, the Committee conducted additional deliberations in order to reconsider the penalty to be imposed upon Respondent in accordance with the order of the Court.

FINDINGS OF FACT

The Hearing Committee re-adopts each and every finding of fact as originally set forth in the Determination and Order (BPMC-98-64), which is contained in Appendix I of this Supplemental Determination and Order, and incorporated herein.

CONCLUSIONS OF LAW

The Hearing Committee re-adopts each and every conclusion of law set forth in the original Determination and Order (BPMC-98-64) which is attached to this Supplemental Determination and Order in Appendix I and is incorporated herein, as modified by the decision of the Court, which is set forth in Appendix II.

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determined that Respondent's license to practice medicine as a physician in New York State should be revoked. This determination was reached upon due consideration of the full spectrum of penalties available pursuant to statute, including revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties.

Respondent directly endangered the life of Patient A by his failure to take appropriate action to address her ectopic pregnancy, and by his abandonment of the patient on the street. His treatment of the patient demonstrated both gross negligence (Second Specification) and gross incompetence (Fourth Specification). Each of these specifications, standing alone, warrants revocation. By callously abandoning Patient A, Respondent also violated the moral and ethical standards of the medical profession. As a result, he is also guilty of moral unfitness to practice the profession (Eleventh Specification). This violation, standing alone, also warrants revocation.

Respondent falsely stated that he had called 911, and made false statements to a Department investigator regarding the status of his hospital privileges. This conduct constituted both

fraud (Ninth Specification) and moral unfitness (Tenth Specification). Each violation, standing alone, warrants revocation.

Respondent has no insight whatsoever into his shortcomings as a physician. He has already shown that he is unwilling or unable to respond positively to potential counselling, as shown by his total denial of the restriction of privileges previously imposed by St. John's Episcopal Hospital. It is obvious therefore, that re-training is not a viable option.

In his brief to the Hearing Committee, Respondent argued in favor of leniency, contending that this case essentially involved only one patient over the course of a forty-six year career. However, the Respondent's conduct with regard to that one case was so egregious as to warrant a serious sanction. Moreover, given Respondent's lack of insight, it was apparent to the Hearing Committee that there could be no reasonable expectation that these unfortunate circumstances would not re-occur, were Respondent to be allowed to resume his medical practice. The Hearing Committee unanimously and emphatically believes that revocation is the only sanction that will adequately protect the public from further harm at the hands of this Respondent.

ORDER

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

1. The Second, Fourth, Ninth, Tenth and Eleventh Specifications of professional misconduct, as set forth in the Amended Statement of Charges (Petitioner's Exhibit # 2) are **SUSTAINED**;

2. The Fifth, Sixth, Seventh, Eighth, Twelfth and Thirteenth Specifications are **DISMISSED**;

3. Respondent's license to practice medicine as a physician in New York State be and hereby is **REVOKED** commencing on the effective date of this Determination and Order;

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

DATED: Troy, New York
January 10, 2000


GERALD M. BRODY, M.D. (CHAIR)

WILLIAM P. DILLON, M.D.
EUGENIA HERBST

TO: David W. Smith, Esq.
Associate Counsel
New York State Department of Health
5 Penn Plaza - 6th Floor
New York, New York 10001

Eugene Schwalben, M.D.
421 Devonshire Road
Baldwin, New York 11510

Ariella M. Colman, Esq.
Nathan L. Dembin & Associates, P.C.
225 Broadway -Suite 1400
New York, New York 10007

APPENDIX I

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

GRIC

-----X
IN THE MATTER : DETERMINATION
OF :
EUGENE SCHWALBEN, M.D. : ORDER
-----X

BPMC-98-64

A Commissioner's Order and Notice of Hearing, dated October 7, 1996, and a Statement of Charges, dated October 3, 1996, were served upon the Respondent, Eugene Schwalben, M.D. **GERALD M. BRODY, M.D. (Chair), WILLIAM P. DILLON, M.D., and EUGENIA HERBST**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **LARRY G. STORCH, ADMINISTRATIVE LAW JUDGE**, served as the Administrative Officer. The Department of Health appeared by David W. Smith, Esq., Associate Counsel and Michelle Y. Tong, Esq., Assistant Counsel. The Respondent appeared by Irving Anolik, Esq. Evidence was received and witnesses sworn and heard and transcripts of these proceedings were made.

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

PROCEDURAL HISTORY

Date of Commissioner's Order and Notice of Hearing:	October 7, 1996
Date of Service of Notice of Hearing and Amended Statement of Charges:	December 3, 1997
Answer to Statement of Charges:	December 26, 1997
Pre-Hearing Conference:	January 9, 1998

Dates of Hearings: January 22, 1998
January 23, 1998
February 6, 1998

Received Petitioner's Proposed Findings of Fact, Conclusions of Law and Recommendation: February 27, 1998

Received Respondent's Proposed Findings of Fact, Conclusions of Law and Recommendation: February 25, 1998

Witnesses for Department of Health: Patient A
Bernard Luck, M.D.
David Grice
Cathlena Battle
Rosemary Burke
Peter Moy

Witnesses for Respondent: Lisa Lu
John Hodne
Gregory Guarnaccia, M.D.
Eugene Schwalben, M.D.
Felix McLymont, M.D.

Deliberations Held: March 5, 1998

STATEMENT OF CASE

By a Commissioner's Order and Notice of Hearing dated October 7, 1996, Respondent's license to practice medicine was summarily suspended pending hearing on a variety of allegations of professional misconduct. Thereafter, Respondent filed a motion in Supreme Court, New York County, seeking to enjoin the Petitioner from proceeding on the basis of certain information obtained during a June 12, 1996 inspection. Following a hearing before a referee appointed by the Court, Justice Walter B. Tolub ruled that portions of the evidence obtained by Petitioner were improperly obtained and ordered their suppression.

Petitioner proceeded with case, minus the suppressed

evidence. Respondent, an obstetrician/gynecologist, was charged with eleven specifications of professional misconduct. More specifically, he was charged with gross negligence, gross incompetence, negligence on more than one occasion and incompetence on more than one occasion. These charges arose out of Respondent's medical care and treatment of one patient (Patient "A"). Respondent was also charged with three specifications of fraud, two specifications of moral unfitness, one specification of permitting, aiding or abetting an unlicensed person, and one specification of advertising not in the public interest. Respondent filed an Answer denying all of the allegations brought against him. A copy of the Notice of Hearing and Amended Statement of Charges is attached to this Determination and Order in Appendix I.

Following the hearing, the Hearing Committee issued an Interim Determination dated February 16, 1998, pursuant to statute, finding that allowing Respondent to resume his medical practice during the pendency of these proceedings would constitute an imminent danger to the health of the people of this state. The Committee recommended that the Commissioner of Health continue the summary suspension in effect pending the final resolution of this matter. By an Interim Order dated March 6, 1998, the Commissioner ordered that the summary suspension remain in effect pending the conclusion of these proceedings.

FINDINGS OF FACT

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

1. Eugene Schwalben, M.D. (hereinafter, "Respondent"), was authorized to practice medicine in New York State by the issuance of license number 078443 by the New York State Education Department. (Pet. Ex. #3).

2. Patient A first saw Respondent at his office located at 185 Canal Street, New York in October, 1995 as the result of an advertisement in the World Journal, a Chinese language newspaper. (T. pp. 19-24; Pet. Ex. #4).

3. On November 21, 1995 Patient A returned to Respondent complaining of abdominal pain. (T. pp. 25-27; Pet. Ex. #8).

4. At that visit, Respondent failed to properly evaluate, follow-up, treat or stabilize Patient A's condition. (T. pp. 27-29, 106-107; Pet. Ex. #8).

5. At no time did Respondent perform an adequate physical examination, obtain an adequate patient history, counsel Patient A or take or note vital signs. (T. pp. 76-78, 360-361; Pet. Ex. #8).

6. When Patient A's condition worsened, Respondent caused her to be taken to the street where she was left bleeding

and in a semi-conscious state. (T. pp. 29-31, 135, 209).

7. Sergeant David Grice, New York Police Department ("NYPD") was on patrol on Canal Street on November 21, 1995 when he was flagged down at 185 Canal Street. He found Patient A at the scene. (T. p. 132).

8. When Sergeant Grice arrived on the scene, he found Patient A in pain and barely able to stand. No one at the scene told him what was wrong with Patient A. He immediately radioed for an ambulance and a Chinese-speaking officer. (T. pp. 132-133, 135).

9. When the Chinese-speaking officer, Peter Moy, arrived, Patient A was barely conscious, and had to be helped into the patrol car. (T. pp. 204-205, 209-210).

10. No one at the scene told Officer Moy what was wrong with Patient A. (T. p.205).

11. In her hand, Patient A held a prescription blank of Respondent upon which was written "R/O Ectopic Pregnancy". (T. pp. 205-206; Resp. Ex. F).

12. Neither Respondent nor anyone else representing him ever called an ambulance for Patient A. (T. pp. 153-154, 160-161, 166-167, 180; Pet. Ex. #10).

13. Officer Moy took Patient A directly from the street to the emergency room at Beekman Downtown Hospital. T. p. 205; Pet. Ex. #7).

14. Patient A arrived at the emergency room in shock with severe blood loss and an acute abdomen. (T. pp. 100-102; Pet. Ex. #7).

15. Patient A was diagnosed with a ruptured ectopic pregnancy. (T. pp. 102, 105-106; Pet. Ex. #7).

16. Despite the fact that Respondent performed abortions at the 185 Canal Street office, he had no back-up agreement with any medical facility in the event of an emergency. (T. pp. 344, 346).

17. Bernard Luck, M.D., a board-certified obstetrician/gynecologist, testified as an expert witness on behalf of Petitioner. Dr. Luck testified that Respondent's medical care and treatment of Patient A did not meet minimum acceptable standards of medical practice. Dr. Luck further testified that during the November 21, 1995 office visit, Patient should have been stabilized by Respondent, put on a stretcher, and appropriate arrangements should have been made to take her to the hospital. Moreover, Respondent should have notified the hospital that the patient was coming. (T. pp. 106-107, 123; Pet. Ex. #7).

18. On June 13, 1996, Respondent was interviewed by Rosemary Burke, an investigator from the Office of Professional Medical Conduct. (T. p. 184).

19. During that interview, Respondent was asked if he had been counselled at St. John's Episcopal Hospital about failure to document examination findings, incomplete abortions and inappropriate sterile techniques. Respondent denied this. (T. p. 185).

20. Such denials were false. Petitioner entered into evidence a certified copy of Respondent's credentials file

maintained by St. John's Episcopal Hospital - South Shore. The file demonstrates that Respondent was counselled in 1985 by the chairman of the department of obstetrics/gynecology regarding incomplete abortions, poor medical record documentation, and inappropriate sterile technique in the operating room. (Pet. Ex. #6, pp. 190, 192).

21. During the June 13, 1996 interview, Respondent was asked if he had ever had his privileges restricted at St. John's Episcopal Hospital and whether or not he was required to have a senior attending present during his procedures. (T. p. 186).

22. Respondent answered "no" to both questions. Such answers were false, as documented by the St. John's Episcopal Hospital credentials file. (T. p. 186; Pet. Ex. #6, pp. 67, 86, 192).

23. During the investigation of Patient A's medical care Respondent falsely asserted that he had called 911 to obtain an ambulance for Patient A. (T. pp. 153-157, 160-166, 178-80; Pet. Ex. #8; Pet. Ex. #10).

CONCLUSIONS OF LAW

The following conclusions were made pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee unless noted otherwise.

The Hearing Committee concluded that the following Factual Allegations should be sustained. The citations in parentheses refer to the Findings of Fact which support each Factual Allegation:

Paragraph B.4.a.ii (with respect to the claimed call to 911): (12, 23);

Paragraph B.4.a.iii: (12, 23);

Paragraph B.4.b.i, ii and iii: (18-22);

Paragraph B.4.c: (18-22);

Paragraph C.2.a, b, c, and d (except with respect to the claim that Respondent actually performed a termination of pregnancy on or about October 31, 1995: (2-5, 17);

Paragraph C.3.a: (3-5, 17);

Paragraph C.3.c: (6-12, 17)

The Hearing Committee further concluded that the following Specifications should be sustained. The citations in parentheses refer to the Factual Allegations which support each Specification:

Second Specification [Gross Negligence]: (Paragraphs C, C.2a-d, C.3a, and C.3c);

Fourth Specification [Gross Incompetence]: (Paragraphs C, C.2a-d, C.3a, and C.3c);

Fifth Specification [Negligence on More than One Occasion]: (Paragraphs C, C.2a-d, C.3a, and C.3c);

Sixth Specification [Incompetence on More than One Occasion]: (Paragraphs C, C.2a-d, C.3a, and C.3c);

Ninth Specification [Fraudulent Practice]: (Paragraphs B, B.4.a.ii-iii, B.4.b.i-iii, B.4.c);

Tenth Specification [Moral Unfitness]: (Paragraphs B, B.4.a.ii-iii, B.4.b.i-iii, B.4.c);

Eleventh Specification [Moral Unfitness]: (Paragraphs C and C.3.c)

DISCUSSION

Respondent is charged with eleven specifications alleging professional misconduct¹ within the meaning of Education Law §6530. This statute sets forth numerous forms of conduct which constitute professional misconduct, but does not provide definitions of the various types of misconduct. During the course of its deliberations on these charges, the Hearing Committee consulted a memorandum prepared by Henry M. Greenberg, Esq., General Counsel for the Department of Health. This document, entitled "Definitions of Professional Misconduct Under the New York Education Law", sets forth suggested definitions for gross negligence, negligence, gross incompetence, incompetence, and the fraudulent practice of medicine.

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

Fraudulent Practice of Medicine is an intentional misrepresentation or concealment of a known fact. An individual's knowledge that he/she is making a misrepresentation or concealing a known fact with the intention to mislead may properly be inferred from certain facts.

Negligence is the failure to exercise the care that would be exercised by a reasonably prudent licensee under the circumstances.

Gross Negligence is the failure to exercise the care

¹The Amended Statement of Charges contains thirteen Specifications of professional misconduct. The First and Third Specifications were withdrawn by Petitioner at the initial hearing session held on January 22, 1998.

that would be exercised by a reasonably prudent licensee under the circumstances, and which failure is manifested by conduct that is egregious or conspicuously bad.

Incompetence is a lack of the skill or knowledge necessary to practice the profession.

Gross Incompetence is an unmitigated lack of the skill or knowledge necessary to perform an act undertaken by the licensee in the practice of the profession.

Using the above-referenced definitions as a framework for its deliberations, the Hearing Committee unanimously concluded, by a preponderance of the evidence, that Petitioner has met its burden of proof with regard to all but two of the eleven specifications of professional misconduct. The rationale for the Committee's conclusions is set forth below.

At the outset, the Hearing Committee considered the credibility of the various witnesses who testified on behalf of the parties. Petitioner presented six witnesses: Patient A, Bernard Luck, M.D., Sgt. David Grice, NYPD, Cathlena Battle, NYPD, Officer Peter Moy, NYPD and Rosemary Burke, an investigator for the Office of Professional Medical Conduct (OPMC).

Patient A testified regarding her experiences with Respondent. Her testimony was hampered by her language difficulties, requiring the use of an interpreter. Moreover, the patient is not technically sophisticated, and was unable to clearly explain what exactly took place during her encounters with Respondent. The Hearing Committee found her to be generally credible, but discounted her testimony as to the alleged

performance of an actual abortion by Respondent in October, 1995. This testimony was uncorroborated by any other witness or by Respondent's own medical records. The Committee did place credence in her testimony as to the events which took place at Respondent's medical practice on November 21, 1995, when she presented with the ectopic pregnancy.

Sgt. Grice and Officer Moy both testified regarding their recollection of events when they encountered Patient A on the street on November 21, 1995. Their testimony was direct and forthright, and consistent in all major details. The Hearing Committee found them both to be highly credible witnesses.

Petitioner also presented the testimony of Cathlena Battle, a civilian employee of the New York City Police Department. Ms. Battle, who is assigned to the communications division - records and tape unit, testified as to her search of the records of the dispatch and 911 calls for the vicinity of Respondent's office on November 21, 1995. Ms. Battle authenticated and explained the log records submitted as Petitioner's Exhibit #10. These records verify that the only call for an ambulance made in the vicinity on the date in question came from the NYPD officers on the scene, rather than any call made by Respondent. The Committee found Ms. Battle's testimony to be very convincing.

Bernard Luck, M.D., a board-certified obstetrician/gynecologist and Fellow of the American College of Obstetrics/Gynecology, testified as an expert on behalf of Petitioner. Dr. Luck has no stake in the outcome of the

proceedings and gave measured opinions as to the quality of medical care rendered by Respondent. The Committee found him to be a very credible witness.

Lastly, Petitioner presented the testimony of Rosemary Burke, an investigator for OPMC. Ms Burke testified regarding several statements made by Respondent during his June 13, 1996 interview. She testified that Respondent falsely denied ever having any restriction of his privileges at St. John's Episcopal Hospital. She also testified that he falsely denied ever being counselled by the hospital regarding his medical practice. Ms. Burke's testimony was directly corroborated by the credential file regarding Respondent which was maintained by St. John's Episcopal Hospital (Petitioner's Exhibit #6). Moreover, Respondent essentially corroborated Ms. Burke's testimony at the hearing, where he again denied that the Hospital's actions ever took place. Accordingly, the Hearing Committee concluded that Ms. Burke was a credible witness.

Respondent presented the testimony of four witnesses, and also testified on his own behalf. Respondent presented Lisa Lu, John Hodne, Gregory Guarnaccia, M.D. and Felix McLymont, M.D.

Ms. Lu was presented by Respondent, out of sequence, at the January 22, 1998 hearing session. She was present only for direct examination. Counsel for Petitioner requested that the cross-examination of the witness be deferred to the next hearing date, based on Respondent's counsel's understanding that the witness would be available. However, Ms. Lu never returned to complete her testimony. Prior to deliberations, Administrative

Law Judge Storch instructed the Hearing Committee that they had the discretion to consider the weight to be given to Ms. Lu's direct testimony, given the lack of cross-examination. The Committee unanimously determined to discount the testimony in its entirety.

Respondent also presented the testimony of John Hodne, a retired NYPD detective. Mr. Hodne, who is currently employed as a chauffeur by a friend of Respondent, testified as to certain efforts he made on Respondent's behalf to obtain information about the case from the Police Department. The Hearing Committee found his testimony to be of little relevance to the issues in the case and did not place any credence on his testimony.

Gregory Guarnaccia, M.D. testified on behalf of Respondent as well. Dr. Guarnaccia, a board-certified obstetrician/gynecologist, testified as an expert. However, he had not reviewed the relevant patient records prior to his appearance at the hearing, and was accordingly unfamiliar with the details of Patient A's condition. As a result, the Hearing Committee did not place great weight on his testimony. Felix McLymont, M.D., also a board-certified obstetrician/gynecologist, went through his residency training with Respondent. He testified that Respondent completed his residency training. His testimony was essentially irrelevant and was not given great weight.

Lastly, Respondent testified on his own behalf. He clearly has a stake in the outcome of this case, and the Committee considered that fact in assessing his credibility.

Most troubling to the Committee was the fact that he continued to deny any disciplinary action taken by St. John's Episcopal Hospital, despite the clear evidence to the contrary. Moreover, Respondent falsely asserted that he had called 911 to obtain an ambulance for Patient A, despite clear evidence to the contrary. This negatively impacted upon his credibility.

Respondent's Treatment of Patient A

Respondent's medical care and treatment of Patient A fell far below acceptable medical standards. There was insufficient evidence in the record for the Hearing Committee to conclude that Respondent did perform an elective abortion on Patient A in October, 1995. This was partly due to the fact that his medical record for the patient was woefully inadequate. At no time did Respondent perform or note an adequate physical examination or obtain an adequate patient history. He further failed to take necessary vital signs or note any findings. Respondent also failed to appropriately counsel the patient.

When the patient presented in his office on November 21, 1995 with severe abdominal pain, Respondent failed to adequately evaluate the possibility of an ectopic pregnancy. He failed to obtain vital signs, leaving the patient lying in the office for an extended period. Dr. Luck testified that Respondent should have stabilized the patient, put her on a stretcher and directly arranged for her to be taken to a hospital. Instead, when the patient's condition worsened, Respondent had the patient taken out of the office and brought to the street where she was found by the police. In essence,

Respondent abandoned Patient A on the street when she was in the midst of a ruptured ectopic pregnancy and in great peril. Moreover, he then falsified his medical record to make it appear that he had attempted to summon an ambulance by calling 911, when in fact no such call was made.

The Hearing Committee unanimously concluded that Respondent's treatment of Patient A during the November 21, 1995 visit was so egregious as to constitute gross negligence. Accordingly, the Committee voted to sustain the Second Specification. In addition, the Committee found that Respondent's actions demonstrated an unmitigated lack of the skill or knowledge necessary to practice the profession, leading the Committee to sustain the Fourth Specification (gross incompetence). The Committee further concluded that based upon Respondent's treatment of Patient A at the initial visit in October, 1995 and again on November 21, 1995, the Fifth Specification (negligence on more than one occasion) and Sixth Specification (incompetence on more than one occasion) should be sustained as well.

Respondent falsified his medical record for Patient A to indicate a call for an ambulance that was never made. The Committee inferred from this that Respondent intentionally sought to divert blame away from himself. In addition, Respondent lied to the investigator from OPMC regarding his history at St. John's Episcopal Hospital. The Hearing Committee unanimously concluded that such conduct represented fraud and thus sustained the Ninth Specification of professional misconduct.

Respondent was also charged with two specifications of moral unfitness. The Hearing Committee unanimously concluded that Respondent's abandonment of Patient A and his repeated falsifications demonstrate a severe breach of the moral and ethical standards of the medical profession. Accordingly, the Committee found that his conduct evidenced moral unfitness to practice the profession and sustained the Tenth and Eleventh Specifications.

Petitioner also alleged that Respondent made certain false statements in advertisements in various Chinese language newspapers and business cards, which falsely claimed that he was board certified, and that abortions performed at his office were guaranteed to be safe, reliable, painless and confidential. Petitioner alleged that these statements constituted both fraud and advertising that is not in the public interest (a violation of Education Law §6530(27)(a)(1)).

In support of these allegations, Petitioner presented copies of the Chinese language advertisements, along with translations. None of the advertisements mention Respondent by name. Respondent denied placing any of the advertisements, and denied any knowledge of their contents. He further testified that he was not the only physician practicing at the office located at 185 Canal Street. Under the circumstances, the Hearing Committee concluded that there was insufficient evidence to sustain the allegations regarding these statements. Therefore, the Seventh, Eighth, and Thirteenth Specifications were dismissed.

Respondent was also charged with permitting, aiding or abetting an unlicensed person to perform activities requiring a license. Petitioner presented no evidence in support of this charge. The Hearing Committee therefore dismissed the Twelfth Specification.

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determined that Respondent's license to practice medicine as a physician in New York State should be revoked. This determination was reached upon due consideration of the full spectrum of penalties available pursuant to statute, including revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties.

Respondent directly endangered the life of Patient A by his failure to take appropriate action to address her ectopic pregnancy, and by his abandonment of the patient on the street. His treatment of the patient demonstrated both gross negligence and gross incompetence. He has further demonstrated his moral unfitness to practice the profession.

Respondent has no insight whatsoever into his shortcomings as a physician. He has already shown that he is unwilling or unable to respond positively to potential counselling, as shown by his total denial of the restriction of privileges previously imposed by St. John's Episcopal Hospital. It is obvious therefore, that re-training is not a viable option.

Based on the above, the Hearing Committee unanimously concluded that there could be no reasonable expectation that these unfortunate circumstances would not re-occur, were Respondent to be allowed to resume his medical practice. The Committee unanimously determined that revocation is the only sanction that will adequately protect the public from further harm at the hands of this Respondent.

ORDER

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

1. The Second, Fourth, Fifth, Sixth, Ninth, Tenth and Eleventh Specifications of professional misconduct, as set forth in the Amended Statement of Charges (Petitioner's Exhibit # 2) are **SUSTAINED**;
2. The Seventh, Eighth, Twelfth and Thirteenth Specifications are **DISMISSED**;
3. Respondent's license to practice medicine as a physician in New York State be and hereby is **REVOKED** commencing on the effective date of this Determination and Order;

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

DATED: Troy, New York

April 8, 1998


GERALD M. BRODY, M.D. (CHAIR)

WILLIAM P. DILLON, M.D.
EUGENIA HERBST

TO: David W. Smith, Esq.
Associate Counsel
New York State Department of Health
5 Penn Plaza - 6th Floor
New York, New York 10001

Eugene Schwalben, M.D.
421 Devonshire Road
Baldwin, New York 11510

Irving Anolik, Esq.
225 Broadway - Suite 1902
New York, New York 10007

(12)

APPENDIX I

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

IN THE MATTER
OF
EUGENE SCHWALBEN, M.D.

NOTICE
OF
HEARING

TO: Eugene Schwalben, M.D.
421 Devonshire Road
Baldwin, New York 11510

PLEASE TAKE NOTICE:

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 January 15, 1998, at 10:00 a.m., at the Offices of the New York State Department of Health, 5 Penn Plaza, Sixth Floor, New York, New York, and at such other adjourned dates, times and places as the committee may direct.

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

The hearing will proceed whether or not you appear at the hearing. Please note that requests for adjournments must be made in writing and by telephone to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Hedley Park Place, 433 River Street, Fifth Floor South, Troy, NY 12180, ATTENTION: HON. TYRONE BUTLER, DIRECTOR, BUREAU OF

ADJUDICATION, (henceforth "Bureau of Adjudication"), (Telephone: (518-402-0748), upon notice to the attorney for the Department of Health whose name appears below, and at least five days prior to the scheduled hearing date.

Adjournment requests are not routinely granted as scheduled dates are considered dates certain. Claims of court engagement will require detailed Affidavits of Actual Engagement. Claims of illness will require medical documentation.

Pursuant to the provisions of N.Y. Pub. Health Law §230(10)(c), you shall file a written answer to each of the charges and allegations in the Statement of Charges not less than ten days prior to the date of the hearing. Any charge or allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health whose name appears below. Pursuant to §301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person. Pursuant to the terms of N.Y. State Admin. Proc. Act §401 (McKinney Supp. 1997) and 10 N.Y.C.R.R. §51.8(b), the Petitioner hereby demands disclosure of the evidence that the Respondent intends to introduce at the hearing, including the names of witnesses, a list of and copies of documentary evidence and a description of physical or other evidence which cannot be photocopied.

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

THESE PROCEEDINGS MAY RESULT IN A

DETERMINATION THAT YOUR LICENSE TO PRACTICE
MEDICINE IN NEW YORK STATE BE REVOKED OR
SUSPENDED, AND/OR THAT YOU BE FINED OR
SUBJECT TO OTHER SANCTIONS SET OUT IN NEW
YORK PUBLIC HEALTH LAW §§230-a (McKinney Supp.
1997). YOU ARE URGED TO OBTAIN AN ATTORNEY TO
REPRESENT YOU IN THIS MATTER.

DATED: New York, New York
November 25, 1997



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct

Inquiries should be directed to: DAVID W. SMITH
Associate Counsel
Bureau of Professional
Medical Conduct
5 Penn Plaza, Suite 601
New York, New York 10001
(212) 613-2617

IN THE MATTER
OF
EUGENE SCHWALBEN, M.D.

AMENDED
STATEMENT
OF
CHARGES

EUGENE SCHWALBEN, M.D., the Respondent, was authorized to practice medicine in New York State in or about 1956, by the issuance of license number 078443 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. Respondent practices obstetrics and gynecology. As of June of 1996, Respondent maintained the following unsafe conditions at his office located at 112 Main Street, East Rockaway, New York. Inappropriately missing from this office were:

1. Adequate quantities of unexpired medication including:
 - a. Blood pressure medication for shock
 - b. Medication for lung complications
 - c. IV calcium
 - d. IV Lidocaine
 - e. Ephedrine
 - f. Plasma expanders

*withdrawn
by
Ret. paper
JES*

with the
Ref. 1/2/13.
JLS

2. ~~Equipment including:~~
- ~~a. Emergency devices with which to intubate a patient~~
 - ~~b. Cardiac monitoring equipment~~
 - ~~c. Pulse oximeter~~
 - ~~d. Naso-gastric suction machine~~

B. Respondent has knowingly engaged in the following behavior, with the intent to deceive:

1. Although he is not board certified, he has falsely held himself out as such by means of a newspaper advertisement in the Chinese language section of the World Journal;
2. He has asserted, by means of a printed card distributed to patients that abortive procedures performed at the office are "absolutely guaranteed to be safe, reliable, and confidential".
3. He has asserted, by means of newspaper advertisement in the Chinese language section of the World Journal, that abortions at his offices are painless.
4. When subject to investigation by the State Board for Professional Medical Conduct, through the Office of Professional Medical Conduct, he:

- a. With regard to Patient ^A Q (The identity of patients is set forth in Appendix "A". The circumstances of Respondent's care and treatment of Patient ^A Q is set forth in Paragraph C, below):
- i. Falsely asserted that he had not performed an abortive procedure on Patient ^A Q.
 - ii. Created and submitted to the Office of Professional Medical Conduct a false medical record regarding Patient ^A Q;
 - iii. Falsely asserted that when Patient ^A Q's condition became life threatening, he had called "911" and that he had not abandoned her.
- b. Falsely denied having been counseled during or after 1985, by the Chief of Ob/Gyn at St. John's Episcopal Hospital regarding:
- i. Incomplete abortions;
 - ii. Deficient sterile technique; and
 - iii. Unacceptable histories and physical examinations.

- c. Falsely denied having been subjected to a requirement, in approximately 1987 at St. John's Episcopal Hospital, that a senior staff physician be present at all procedures performed by Respondent.
- C. in or about late October and November of 1995, Patient ^A C, an approximately 30 year old woman, was under the care of Respondent at his Canal Street medical office.
- 1. Respondent delegated responsibilities and activities requiring medical expertise and licensure to individuals lacking one or both of these qualifications.
 - 2. Respondent performed an elective termination of pregnancy on Patient ^A C on or about October 31, 1995.
 - a. Respondent failed to perform an adequate physical examination, or note such examination, if any.
 - b. Respondent failed to obtain an adequate patient history, or note such history, if any.
 - c. Respondent failed to adequately rule out the possibility of an ectopic pregnancy, or to note such rule out, if any.

- d. Respondent failed to appropriately counsel the patient prior to the abortion or note such counseling, if any.
 - e. Respondent failed to take vital signs or note such signs, if any.
3. On or about November 21, 1995, Patient ^AC returned to Respondent's office complaining of abdominal pain and "swollen face".
- a. Respondent failed to adequately evaluate and follow-up on Patient ^AC's condition, in a timely fashion or note such evaluation and follow-up, if any.
 - b. Respondent inappropriately applied pressure to Patient ^AC's abdomen.
 - c. When Patient ^AC's condition worsened, Respondent caused Patient ^AC to be removed from the office to the street, and failed to make appropriate arrangements for the prompt transfer of Patient ^AC to adequate care.

D. [On or about April 19, 1996 at his East Rockaway office, Respondent performed an elective T.O.P. on Patient D.

withdrawn
by Pet.
1/22/98
JES

withdrawn
By Pet
1/22/98
JES

- 1. Respondent failed to appropriately counsel the patient, both before and after the procedure or note such counseling, if any.
- 2. Respondent failed to take vital signs or note such vital signs, if any.
- 3. Respondent failed to assess the patient's condition in the recovery room or note such assessment, if any.
- 4. Respondent failed to adequately evaluate or follow-up Patient D's possible ectopic pregnancy or note such evaluation or follow-up, if any.

SPECIFICATION OF CHARGES

FIRST AND SECOND SPECIFICATION

GROSS NEGLIGENCE

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(4)(McKinney Supp. 1997) by practicing the profession of medicine with gross negligence as alleged in the facts of the following:

- withdrawn by Pet. 1/22/98 JJB*
1. ~~Paragraphs A and A1-2.~~
 2. Paragraphs C and C1-3.

THIRD AND FOURTH SPECIFICATION

GROSS INCOMPETENCE

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(6)(McKinney Supp. 1997) by practicing the profession of medicine with gross incompetence as alleged in the facts of the following:

- withdrawn by Pet. 1/22/98 JJB*
3. ~~Paragraphs A and A1-2.~~
 4. Paragraphs C and C1-3.

FIFTH SPECIFICATION
NEGLIGENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(3)(McKinney Supp. 1997) by practicing the profession of medicine with negligence on more than one occasion as alleged in the facts of two or more of the following:

5. *withdrawn by Ret. 1/22/98* *withdrawn by Ret. 1/22/98 JJS*
~~Paragraphs A and A1-2; C and C1-3; and/or D and D1-4.~~

SIXTH SPECIFICATION
INCOMPETENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(5)(McKinney Supp. 1997) by practicing the profession of medicine with incompetence on more than one occasion as alleged in the facts of two or more of the following:

6. *withdrawn by Ret. 1/22/98* *withdrawn by Ret. 1/22/98 JJS*
~~Paragraphs A and A1-2; C and C1-3; and/or D and D1-4.~~

SEVENTH THROUGH NINTH SPECIFICATIONS

FRAUDULENT PRACTICE

Respondent is charged with committing professional misconduct as defined by N.Y. Educ. Law §6530(2)(McKinney Supp. 1997) by practicing the profession of medicine fraudulently as alleged in the facts of the following:

7. Paragraphs B and B1.
8. Paragraphs B, B2-3.
9. Paragraphs B, B4, a-c.

TENTH AND ELEVENTH SPECIFICATIONS

MORAL UNFITNESS

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(20)(McKinney Supp. 1997) by engaging in conduct in the practice of the profession of medicine that evidences moral unfitness to practice as alleged in the facts of the following:

10. Paragraph B and B1-4.
11. Paragraphs C and C1-3.

TWELFTH SPECIFICATION

PERMITTING, AIDING OR ABETTING AN UNLICENSED PERSON

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6509(11)(McKinney Supp. 1997) by permitting, aiding or abetting an unlicensed person to perform activities requiring a license as alleged in the facts of the following:

12. Paragraphs C and C1.

THIRTEENTH SPECIFICATION

ADVERTISING NOT IN PUBLIC INTEREST

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(27)(a)(i) and/or (McKinney Supp. 1997) by advertising or soliciting for patronage that is not in the public interest, in that it is false, fraudulent, deceptive, misleading, sensational or flamboyant and/or that it guarantees any service as alleged in the facts of:

13. Paragraphs B1-3.

DATED: November 25, 1997
New York, New York



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct

APPENDIX II

**Supreme Court - Appellate Division
Third Department**

Decided and Entered: October 14, 1999

82846

In the Matter of EUGENE
SCHWALBEN,

Petitioner,

v

MEMORANDUM AND JUDGMENT

BARBARA DE BUONO, as
Commissioner of Health,
et al.,

Respondents.

Calendar Date: August 31, 1999

Before: Cardona, P.J., Crew III, Spain, Graffeo and Mugglin, JJ.

Nathan L. Dembin & Associates P.C. (Nathan L. Dembin of
counsel), New York City, for petitioner.

Eliot Spitzer, Attorney-General (Barbara K. Hathaway of
counsel), New York City, for respondents.

Crew III, J.

Proceeding pursuant to CPLR article 78 (initiated in this
court pursuant to Public Health Law § 230-c [5]) to review a
determination of the Hearing Committee of the State Board for
Professional Medical Conduct which revoked petitioner's license
to practice medicine in New York.

In December 1997 petitioner, a licensed physician engaged
in the practice of obstetrics and gynecology, was served with an
amended statement of charges setting forth various specifications

of misconduct stemming from his care and treatment of a patient on October 31, 1995 and November 21, 1995. At the conclusion of the administrative hearing that followed, during the course of which certain specifications of misconduct were withdrawn, a Hearing Committee of the State Board for Professional Medical Conduct found that petitioner had practiced the profession with gross negligence and gross incompetence based upon, inter alia, his failure to adequately evaluate and diagnose the patient's ectopic pregnancy during the course of the November 21, 1995 office visit. Additionally, the Hearing Committee determined, based upon the foregoing incident and petitioner's treatment of the patient during the initial October 31, 1995 office visit, that petitioner had practiced with negligence and incompetence on more than one occasion. Finally, after finding that petitioner had, among other things, lied to a State investigator regarding his privileges at a local hospital, the Hearing Committee sustained the specifications charging petitioner with practicing medicine fraudulently and moral unfitness to practice the profession. The Hearing Committee thereafter revoked petitioner's license to practice medicine, and this proceeding pursuant to CPLR article 78 to challenge that determination ensued.

As a starting point, we reject petitioner's assertion that the record as a whole does not contain substantial evidence to support the determination that he practiced the profession with gross negligence and gross incompetence with respect to the November 21, 1995 office visit. Even accepting that petitioner, after examining the patient, indeed summoned an ambulance to transport her to a local hospital and, further, crediting petitioner's testimony regarding the length of time that elapsed between his initial examination of the patient on that date and her eventual transport to a local hospital by a member of the New York City Police Department, the record nonetheless makes plain that petitioner failed to adequately stabilize the patient prior to transport.

In this regard, petitioner acknowledged that the patient presented in his office on November 21, 1995 with "exquisite" abdominal pain and some vaginal staining or bleeding, as a result of which he suspected that the patient was suffering from an

ectopic pregnancy. Additionally, petitioner testified that the patient experienced momentary dizziness during this visit, which indicated to him the possibility that the ectopic pregnancy had indeed ruptured. On this point, petitioner testified, "If she ruptured an ectopic, she was hemorrhaging internally: If she lost enough blood, she would go into shock." Despite this realization, petitioner placed the patient in a police cruiser without establishing an intravenous line or making any effort to stabilize her condition prior to transport. Under such circumstances, we find that the record is sufficient to support the finding that petitioner practiced with gross negligence and gross incompetence with regard to the November 21, 1995 office visit.

We reach a contrary conclusion, however, with respect to the finding that petitioner practiced with negligence and incompetence on more than one occasion. Simply stated, the record is devoid of any evidence regarding the adequacy of the care or treatment rendered by petitioner to the patient during the course of the October 31, 1995 office visit which, according to petitioner, consisted of a brief pelvic examination, at the conclusion of which he declined to terminate the patient's pregnancy. Although the patient testified that petitioner indeed performed an abortion on that date, the Hearing Committee expressly discounted the patient's testimony in this regard and found that petitioner did not terminate the patient's pregnancy during this office visit. As the testimony offered by the physician appearing on behalf of the State Board for Professional Medical Conduct was premised upon the fact that such an abortion indeed occurred, it necessarily follows that such testimony cannot be sufficient to sustain the charges at issue. Moreover, although petitioner conceded that he did not provide counseling to the patient during this initial office visit and that no real records of such visit were maintained, there was no expert testimony adduced at the hearing to establish that these admitted deficiencies constituted negligence and/or incompetence under the circumstances. Accordingly, the Hearing Committee's findings that petitioner practiced with negligence and incompetence on more than one occasion cannot stand.

The remaining arguments advanced by petitioner do not warrant extended discussion. Based upon a review of the dispatch tapes and corresponding testimony, the Hearing Committee could properly conclude that petitioner falsely stated that he summoned an ambulance via 911 when the patient's condition deteriorated during the November 21, 1995 office visit. Additionally, there was more than sufficient evidence in the record to establish that petitioner made false statements to a State investigator regarding the status of his hospital privileges. Accordingly, we decline to disturb the Hearing Committee's findings as to the charges of moral unfitness and practicing the profession fraudulently. Nor are we persuaded, based upon our review of the record as a whole, that petitioner was denied due process and/or a fair hearing. As to the issue of penalty, the Hearing Committee's determination does not specify whether petitioner's license to practice medicine was revoked upon each specification of misconduct or upon the cumulative effect of the sustained charges. Under such circumstances, we have no choice but to annul the penalty and remit this matter to respondents for a redetermination thereof (compare, Matter of Gold v Chassin, 215 AD2d 18, 24, lv denied 87 NY2d 805, with Matter of Sharma v Sobol, 188 AD2d 833, 836).

Cardona, P.J., Spain, Graffeo and Mugglin, JJ., concur.

ADJUDGED that the determination is modified, on the law, without costs, by annulling so much thereof as found petitioner guilty of practicing medicine with negligence on more than one occasion (fifth specification) and practicing medicine with incompetence on more than one occasion (sixth specification); petition granted to that extent and such specifications dismissed, penalty annulled and matter remitted to respondents for further proceedings not inconsistent with this court's decision; and, as so modified, confirmed.

ENTER:

/s/ Michael J. Novack

Michael J. Novack
Clerk of the Court