



STATE OF NEW YORK
DEPARTMENT OF HEALTH

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

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

Karen Schimke
Executive Deputy Commissioner

March 14, 1995

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Ann Hroncich, Esq.
Associate Counsel
NYS Department of Health
Bureau of Professional Medical Conduct
5 Penn Plaza-Sixth Floor
New York, New York 10001

Patti E. Evans, Esq.
299 Broadway-Suite 902
New York, New York 10007

Kenneth B. Gross, M.D.
100 Manetto Hill Road
Plainview, New York 11803

RECEIVED
MAR 15 1995
OFFICE OF MEDICAL CONDUCT

RE: In the Matter of Kenneth B. Gross, M.D. EFFECTIVE DATE 3/21/95

Dear Ms. Hroncich, Ms. Evans and Dr. Gross:

Enclosed please find the Determination and Order (No. 95-58) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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

Office of Professional Medical Conduct
New York State Department of Health
Coming Tower - Fourth Floor (Room 438)
Empire State Plaza
Albany, New York 12237

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

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays all action until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

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

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

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

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

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Tyrone T. Butler".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm
Enclosure

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

**IN THE MATTER
OF
KENNETH B. GROSS, M.D.**

**DETERMINATION
AND
ORDER**

BPMC-95-58

A Notice of Hearing and Statement of Charges, each dated May 19, 1994, was served upon the Respondent, **KENNETH B. GROSS, M.D.** **BENJAMIN WAINFELD, M.D.**, Chairperson, **LINDA LEWIS, M.D.**, and **KENNETH KOWALD**, duly designated members of the State Board for Professional Medical Conduct, appointed by the Commissioner of Health of the State of New York pursuant to Section 230(1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Sections 230(10)(e) of the Public Health Law. **JEFFREY ARMON, Esq.** served as Administrative Officer for the Hearing Committee.

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

SUMMARY OF PROCEEDINGS

Notice of Hearing and Statement of Charges:	May 19, 1994
Prehearing Conference:	June 7, 1994
Dates of Hearing:	June 14, 1994 June 15, 1994 June 20, 1994 June 21, 1994 July 19, 1994 September 12, 1994 September 14, 1994 November 14, 1994

**Department of Health
appeared by:**

Peter J. Millock, Esq.
General Counsel
NYS Department of Health

BY: Ann Hroncich, Esq.
Associate Counsel

Respondent Appeared By:

Patti E. Evans, Esq.
299 Broadway - Suite 902
New York, NY 10021

Leigh R. Isaacs, Esq.
325 East 79th Street
New York, NY 10021

Witnesses for Department of Health:

Patient A
Patient B
Technician D
Det. Lloyd Doppman
Mitchell J. Scher

Witnesses for the Respondent:

Patient D.M.
Mitchell J. Scher
Edward S. Orzac, M.D.
Michael Ira Weintraub, M.D.
Allison Smilowitz
Louise C. Starrantino
Neil S. Hibler, Ph.D.,
FAClinP.
Det. Lloyd Doppman
Edward Sun
Patti E. Evans, Esq.
Stuart Kleinman, M.D.
Richard Campo
Arthur Nascarella

FINDINGS OF FACT

Numbers in parenthesis refer to transcript pages or exhibits, and they denote evidence that the Hearing Committee found persuasive in determining a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the evidence cited. All Hearing Committee findings were unanimous unless otherwise specified.

NOTE: Petitioner's Exhibits are designated by Numbers.
 Respondent's Exhibits are designated by Letters.
 T. = Transcript

GENERAL FINDINGS

The Respondent was authorized to practice medicine in New York State on August 7, 1981 by the issuance of license number 147301 by the New York State Education Department. The Respondent was registered with the New York State Education Department to practice medicine through the period ending December 31, 1994. (Ex. 2)

FINDINGS RELATED TO PATIENT A

1. Respondent treated Patient A, a 50 year old female at that time, at his medical office on or about January 17, 1994. (Ex. 3, T. 22-3)
2. Patient A sought medical treatment from Respondent for complaints of head, neck and back pain caused as a result of her fall on a patch of ice on or about January 6, 1994.
(T. 21-3, 935-6)
3. Respondent conducted a physical examination of Patient A in an examination room at his medical office on or about January 17, 1994. During the course of this examination, Respondent stood facing Patient A, placed both of his hands on her shoulders and began massaging her shoulders and neck. He continued to massage the patient as he lowered his hands down her back to her buttocks. While massaging her buttocks, Respondent pulled Patient A's body against him in a manner in which she could feel his erect penis pressing against the lower area of her stomach. (T. 28, 34-7, 149-51)

4. Respondent repeated this massaging procedure a second time, whereafter he then took her hand and placed it on his penis outside his trousers and moved her hand up and down in a stroking motion. During this time, Respondent's other hand was on the patient's buttocks or lower back area. (T. 38-9, 150-3, 204)
5. Respondent then requested that the patient lie on the examining table. Respondent stood on the right side of Patient A and rubbed his erect penis on her right arm by sliding his body back and forth. (T. 39-41, 155-6)
6. While Patient A lay on the examining table, Respondent fondled or massaged both of her breasts with the palms and fingers of both of his hands. (T. 41-2, 52-3)
7. Respondent then massaged Patient A's vaginal area by rubbing the palm and fingers of one or both hands on the outside of her clothing. (T. 41-2, 161-2)
8. Respondent thereafter instructed Patient A to remove her jacket and cotton tee shirt. The patient removed her jacket, but not her shirt. (T. 43-4, 164-5, 204-5)
9. Respondent then assisted Patient A in having her assume a sitting position on the examination table while he was on her right side. Respondent moved his hands from behind the patient to her front and again began to massage her breasts with his palms and fingers. (T. 43-5, 53, 165-7)
10. Respondent then instructed Patient A to stand near the examination table. He stood close to the patient, facing her and began massaging her shoulder and neck while asking her if it hurt. He repeated his earlier actions lowering his hands to massage the patient's back and buttocks and then pressed her against the lower part of his body until she could feel his erect penis. (T. 45-6)
11. Respondent recorded the results of Patient A's physical examination in a medical record in which he included findings of a heart-lung examination. (Ex. 3, p. 4)
12. Dr. Weintraub testified that the manner of an examination of a patient by a stethoscope varies by practitioner and stated that it is an acceptable practice to place a stethoscope on bare skin. (T. 719-720)

13. Patient A filed a report with the Nassau County Police Department on the day following her treatment by Respondent in which she related the details of the physical examination conducted by him on January 17, 1994. (Ex. A; T. 63)

FINDINGS RELATED TO PATIENT B

14. Respondent treated Patient B, a 29 year old female at that time, at his medical office on or about August 12, 1992. (Ex. 4; T. 316-7)
15. Patient B sought medical treatment from Respondent for complaints of back, neck, leg, abdomen and hip pain and weakness, blurred vision and dizziness caused by a fall on or about November 29, 1991. (Ex. 4; T. 316-7, 340-1)
16. Respondent conducted a physical examination of Patient B in an examination room at his medical office on or about August 12, 1992. Respondent instructed Patient B to lay down on the examination table. Patient B was wearing a knee-length dress and was told by Respondent that she would not need to put on a gown. (T. 318-9, 322)
17. Respondent rubbed a stick or sticks up and down the patient's legs while repeatedly asking if she could feel such rubbing sensations. He then pushed her dress up with his hand, thereby exposing her underwear, and rubbed the stick or sticks on the inside and outside of her thighs. (T. 322-5, 348-50, 384-5)
18. Respondent then instructed Patient B to get off the examination table. While standing directly in front of the patient, with her back against the table, Respondent put his hands behind her neck and began massaging the back of her neck. He proceeded to lower his hands along her back while continuing to massage the patient and repeatedly ask whether it felt good. The patient's arms were against her body, at her sides, while Respondent's arms were around her. (T. 325-7)
19. Patient B testified that while Respondent had his arms around her and was standing extremely close to her that she believed he was going to kiss her. (T. 328-9, 373-4)

20. Respondent continued to lower his hands behind the patient until they were on her buttocks, at which point he pressed her body against his erect penis. (T. 329-30, 374-6, 391)
21. Patient B filed a report with the Nassau County Police Department on or about February 10, 1994 in which she related the details of the physical examination conducted by the Respondent on or about August 12, 1992. In such report, Patient B stated that she originally reported the incident to the Nassau County Police Department a few days after she was treated by the Respondent. (Ex. E)

FINDINGS RELATED TO PATIENT C

22. Respondent treated Patient C, a 24 year old female at the time of the initial visit, at his medical office on or about October 26, 1992, November 11, 1992 and March 31, 1993 for complaints of vertigo and numbness on the left side. (Ex. 5)
23. On or about February 23, 1994, Patient C filed a report with the Nassau County Police Department in which she alleged that Respondent treated her in an inappropriate manner while conducting physical examinations of her on October 26, 1992 and on March 31, 1993. (Ex. 6, T. 447)
24. Patient C was personally served with a subpoena to testify at this proceeding by the Department on June 14, 1994, but failed to comply with the directives of said subpoena and did not appear or testify. (Ex. 7)
25. Patient C executed a sworn affidavit, dated June 13, 1994, in which she indicated a desire to withdraw her allegations against Respondent and to not appear to give testimony against Respondent at this proceeding (Ex. J)

FINDINGS RELATED TO TECHNICIAN D

26. Technician D, a female aged 31 at the time, was employed as a CAT Scan technician at the Good Samaritan Hospital in West Islip, New York during the period of February through May 1991. (Ex. M; T. 252-55)
27. Between 11:00 a.m. and 2:00 p.m. on a Saturday during the period of February through May, 1991, Respondent came to the CAT Scan suite where Technician D was working to inquire about a diagnostic test performed on one of his patients (T. 255-6)
28. Respondent sat in an armless chair with his legs spread open on either side of the chair while he waited for Technician D to review her records. She was seated in another chair about one and a half feet from the Respondent. (T. 259-261)
29. Technician D responded several times to Respondent's inquiry about his patient by indicating that the test results were in another room. As she stood up from her chair to exit the room by walking past the Respondent, he reached out and grabbed her left wrist. He thereafter grabbed her right wrist and pulled both wrists down to his hips while he remained seated. Technician D's pelvis was pressed against Respondent's chair with his face very close to hers while he held her wrists tightly for about two minutes until he released her wrists. (T. 263-9)
30. Patient D testified that when Respondent entered the CAT Scan suite she had been testing another patient who was lying on an examination table in a portion of the room divided by a lead wall. (T. 256-8, 275-6)

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.

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:

<u>Paragraph A.:</u>	(1-2);
<u>Paragraph A.1.a.:</u>	(3);
<u>Paragraph A.1.b.:</u>	(4);
<u>Paragraph A.1.c.:</u>	(5);
<u>Paragraph A.1.d.:</u>	(6);
<u>Paragraph A.1.e.:</u>	(7);
<u>Paragraph A.1.f.:</u>	(9);
<u>Paragraph A.1.g.:</u>	(10);
<u>Paragraph B.:</u>	(14-15);
<u>Paragraph B.1.a.:</u>	(20);
<u>Paragraph B.1.c.:</u>	(18);
<u>Paragraph B.1.d.:</u>	(16-17);
<u>Paragraph C.:</u>	(22);
<u>Paragraph D.:</u>	(27-28);
<u>Paragraph D.1.:</u>	(28-30).

The Hearing Committee concluded that the following Factual Allegations should **NOT** be sustained:

- Paragraph A.2.a.:**
- Paragraph B.1.b.:**
- Paragraph C.1.a.:**
- Paragraph C.1.b.:**

Paragraph C.1.c.:

Paragraph C.2.a.

The Hearing Committee concluded that the following Specifications of Charges should be sustained. The citation in parentheses refers to the Factual Allegations which support each Specification:

First Specification: (A., A.1.a. through and including A.1.g.);

Second Specification: (B., B.1.a., B.1.c. and B.1.d.);

Fourth Specification: (D. and D.1.);

Fifth Specification: (A., A.1.a, through and including A.1.g.);

Sixth Specification: (B., B.1.a., B.1.c. and B.1.d.);

Eighth Specification: (A., A.1.a. through and including A.1.g.);

Ninth Specification: (B., B.1.a., B.1.c. and B.1.d.).

The Hearing Committee concluded that the following Specifications of Charges should **NOT** be sustained:

Third Specification;

Seventh Specification;

Tenth Specification.

DISCUSSION

Respondent was charged with multiple Specification of Charges alleging professional misconduct within the meaning of Education Law §6530. This statute sets forth numerous forms

of actions which constitute professional misconduct, but does not provide definitions of such categories of misconduct. During the course of its deliberations on these charges, the hearing Committee consulted a memorandum prepared by Peter J. Millock, 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 certain types of professional misconduct, including practicing the profession fraudulently.

During its deliberations, the Hearing Committee utilized the following definition of the fraudulent practice of medicine:

Fraudulent practice of medicine is an intentional misrepresentation or concealment of a known fact.

The Committee utilized this definition in its consideration of the Fifth through Seventh Specifications of Charges. The rationale for its determination is set forth below.

Because no witnesses were present at the time of the four alleged separate acts of professional misconduct committed by Respondent, the Committee recognized that it was essential that it evaluate the credibility of each of the complainants. The members of the Hearing Committee closely examined the testimony and demeanor of Patients A and B and Technician D, each of whom personally appeared at this proceeding, to consider the consistency and persuasiveness of their allegations. Patient C did not personally appear and give testimony, which made the Committee's responsibilities more difficult as addressed below. The Committee noted that the Respondent did not testify on his own behalf, but found such fact to have no influence on its determinations as it found it unnecessary to make any adverse inferences based upon such failure to testify.

The Committee also reviewed the testimony presented on behalf of the Respondent by three medical experts; Dr. Michael J. Weintraub, Dr. Neil S. Hibler and Dr. Stuart Kleinman. Their collective professional abilities and expertise in their specialties were recognized by the Hearing Committee. However, their testimony was not considered to be persuasive and did not alter the conclusions of the Committee that the testimony of Patient A, Patient B and Technician D were credible and consistent.

CONCLUSIONS AS TO PATIENT A

The Hearing Committee considered the testimony of Patient A, as it related to the essential elements of the physical examination performed by the Respondent on or about January 17, 1994 to be direct, persuasive and most credible. The Committee believed that those issues not related to the physical exam did not affect the credibility of Patient A's testimony concerning Respondent's actions during such exam. It considered the details and extent of the patient's injury which led to her seeking medical treatment from Respondent to be irrelevant to the issue of Respondent's conduct during the physical exam. Therefore, the testimony of the owner of the property where Patient A fell on or about January 6, 1994, while determined to be credible, was viewed as addressing issues not considered to be relevant to Patient A's testimony about Respondent's conduct eleven days later. In fact, that witness testified that she assumed Patient A had fallen when she saw the patient sitting on the ground and further testified that Patient A told her that she (Patient A) had indeed fallen on the ice. (T. 934-6) The Committee concluded that the extent of any injury suffered as a result of such fall was irrelevant in its assessment of the credibility of Patient A. Factual Allegations A.1.a., b., c., d., e., f. and g. were each sustained based upon the unanimous view of the Hearing Committee that Patient A's testimony remained consistent, reasonable and believable throughout this proceeding as it related to the detailed description of Respondent's conduct during the physical exam.

The Committee believed that the testimony of Patient A was also consistent with the statement she made to the Nassau County Police Department on the day following Respondent's physical examination. (Ex. A) Both that statement and her testimony set out details of Respondent's initial massaging of her back and shoulders and subsequent massage of her buttocks, his press against her until she felt his erect penis, his placing of her hand on his erect penis and his fondling of her breasts. The prompt filing of a complaint with the police was considered to add to the credibility of the witness.

Patient D.M. testified for the Respondent as to what he observed while waiting in Respondent's office during the time in which Patient A was being examined. The Committee felt that

his testimony, based on what he observed Patient A's demeanor to be at the conclusion of Respondent's exam, was subjective and not dispositive of issues of her credibility. The Committee observed Patient A's presence at this hearing and believed it quite possible for her to exhibit no outward signs of emotion following the abusive conduct of Respondent in the examination room. The Committee did not conclude that Patient A's credibility was diminished by the testimony of Patient D.M. that Patient A did not appear to be upset at the time she left Respondent's office.

(T. 417-8)

Factual Allegation A.2.a. was not sustained because the Committee believed that there could have been an appropriate medical purpose for Respondent to request that the patient remove her shirt. Patient A did not testify as to whether Respondent did, in fact, use a stethoscope in examining her. However, a medical record was created in which Respondent noted findings of an examination of her heart and lungs. Dr. Weintraub testified that it is an acceptable practice to place a stethoscope on bare skin. The Committee reasoned that Respondent may have had an appropriate motive for his request and concluded that the Department did not prove this charge by a preponderance of the evidence.

CONCLUSIONS AS TO PATIENT B

The Committee considered Patient B to be a very credible witness and her testimony to be consistent and persuasive. It noted that she promptly filed a complaint with the Nassau County Police Department within a few days of the August, 1992 physical examination conducted by Respondent. The fact that there was no immediate action taken by the police to arrest the Respondent based upon Patient B's 1992 complaint was considered to be completely irrelevant in the evaluation of her credibility. The Committee rejected, as being unproven speculation, those contentions by Respondent that the police failed to act because it considered the complaint to be false. The Committee concluded that Patient B was truthful in her description of Respondent's

conduct and considered its responsibility to make such determination to be independent and unrelated to any action or inaction by the police.

Patient B's testimony was consistent with the police report prepared on February 10, 1994. (Ex. E) In both cases, the patient described being pinned against the examination table with Respondent's hands initially on her neck and upper back and than lowering to her buttocks. The patient credibly testified that he massaged her buttocks and then pressed her body against his until she could feel his erect penis. The Committee believed her testimony remained uncontradicted in all essential and relevant details throughout extensive cross-examination. It concluded that the description of Respondent's massaging of her head and neck while repeatedly asking if it felt good was inappropriate. The Committee reasoned that if the purpose of the massage was to determine the extent of her feeling in the neck area, asking whether or not it felt good was not appropriate. It also noted that the patient testified that she answered the Respondent by telling him that it did not "feel good" but that he continued to lower his hands behind her back and pull her closer to him while massaging her. (T. 327) Patient B described their position as being a close embrace with Respondent's arms around her while her arms were against her body. The Hearing Committee determined Respondent's actions were not for a proper medical purpose and sustained Factual Allegations B.1.a and B.1.c.

The Committee considered Respondent's use of sticks on Patient B's legs during the course of the physical examination to be appropriate in evaluating the extent of the feeling in her legs. However, the patient credibly testified that he pushed her dress up to a level which exposed her underwear while she was lying on the examination table. The Committee believed Respondent's failure to offer the patient a covering gown under such circumstances to be clearly improper, particularly in light of the fact that she testified that she asked whether she should put a gown on and was told "no" by the Respondent. (T. 319) Factual Allegation B.1.d. was sustained.

The Committee determined to not sustain Factual Allegation B.1.b. because there was no evidence in the record to show that Respondent did, in fact, attempt to kiss Patient B. The patient testified that she "thought he was going to kiss me." (T. 328) She did not testify that he actually

attempted to do so. The Factual Allegation was solely based on the patient's perception and was not supported by the evidence in the record.

CONCLUSIONS AS TO PATIENT C

Patient C filed a complaint with the police on February 23, 1994 in which she alleged Respondent treated her inappropriately during his physical examinations of her on or about October 26, 1992 and March 31, 1993. The patient executed a sworn affidavit which recanted such allegations and failed to appear to testify at this proceeding. The Department went forward with the allegations of misconduct against Respondent in relation to his treatment of Patient C by calling as witnesses a police detective and a Senior Medical Conduct Investigator, each of whom had interviewed the complainant. The Committee concluded that absent her personal testimony, and in light of the actual recantation of the complaint, it could not sustain the Factual Allegations related to Patient C, notwithstanding the testimony of the two witnesses who had interviewed her. The charges were such that it was considered essential that Patient C testify to enable the Committee to evaluate her appearance and demeanor and establish a level of credibility. Her failure to testify made it impossible for the Hearing Committee to undertake such an evaluation. The fact that Patient C submitted a sworn affidavit withdrawing her charges made it impossible for the Committee to conclude that the Department had proven its charges by a preponderance of the credible evidence. All Factual Allegations related to Patient C were not sustained.

CONCLUSIONS AS TO TECHNICIAN D

Respondent raised two legal issues in alleging that the charges related to Technician D did not constitute professional misconduct. The first contention was that the alleged misconduct occurred prior to the enactment of Section 6530(20) of the New York Education Law, effective July, 1991, and that the Respondent could not be charged with violating such statute when the alleged

misconduct occurred sometime during the period of February through May, 1991. However, the enactment of Section 6530 served to consolidate definitions of professional misconduct previously set forth in Education Law Section 6509 and Title 8 of the New York Code of Rules and Regulations (NYCRR). Prior to enactment of Section 6530(20), 8 NYCRR 29.1(b)(5) included as a definition of professional misconduct "conduct in the practice of a profession which evidences moral unfitness to practice the profession." This regulation, adapted by the Board of Regents or by the Commissioner of Education with approval by the Board of Regents, was made effective in 1977 and continued in effect thereafter. As accurately set forth in the Department's proposed conclusions of law, Respondent was on notice at the time the incident with Technician D took place that conduct evidencing moral unfitness could constitute professional misconduct. Any failure by the Department to refer to Section 6509 of the Education Law and 8 NYCRR 29.1 in its charges was of a technical nature and was not a fatal defect to the Fourth Specification of Charges.

Respondent also contended that the incident with Technician D did not constitute conduct in the practice of medicine and that he therefore could not be found to have committed unprofessional misconduct within the meaning of Section 6530(20), even if the events occurred in the manner to which she testified.

The incident occurred in a hospital in which both Technician D and Respondent were engaged in their regular course of business as a CAT Scan Technician and physician, respectively. Respondent sought out Technician D in relation to the treatment of his patient and then abused his position as a physician to engage in conduct for his sexual gratification. The Hearing Committee considered Respondent's actions to represent a violation of professional trust. It concluded that his actions toward Technician D evidenced moral unfitness to practice medicine and constituted professional misconduct within the meaning of the statute.

The Committee determined that Technician D was a very credible witness based upon her clear and concise testimony in recalling Respondent's actions in the CAT Scan suite of Good Samaritan Hospital. It considered any failure to intervene by a patient being tested in the adjoining room of the CAT Scan suite to be irrelevant in its' evaluation of Technician D's testimony. She was

viewed as having an excellent recollection of the incident which remained consistent during her cross-examination. The Committee determined to sustain Factual Allegation D. 1.

MORAL UNFITNESS TO PRACTICE MEDICINE

The Committee concluded that Respondent's actions regarding the physical examinations of Patients A and B and the incident with Technician D clearly constituted conduct in the practice of medicine which evidenced the moral unfitness to practice. These actions included the massaging of the buttocks of Patients A and B, pressing the bodies of both patients against his erect penis, moving Patient A's hand up and down his penis outside his pants, rubbing Patient A's vaginal area outside her clothing, exposing Patient B's underwear and grabbing Technician D's wrists and pulling her toward him. The Hearing Committee determined these actions of Respondent to be outside the scope of the practice of medicine and performed expressly for his sexual gratification. Specification of Charges One, Two and Four were sustained.

PRACTICING THE PROFESSION FRAUDULENTLY

As set out above, the Committee utilized the definition of the fraudulent practice of medicine as being an intentional misrepresentation or concealment of a known fact. Applying this definition, it reasoned that the Respondent could be found as having practiced fraudulently if his actions in treating Patients A and/or B were determined to be not for any proper medical purpose related to their diagnosis and treatment. The Committee concluded that his conduct when examining Patient A in the inappropriate manner as set forth in Allegations A.1.a. through and including A.1.g., each of which was sustained, was not undertaken for any proper medical purpose. It also determined that certain conduct exhibited by Respondent during his examination of Patient B, including the massaging of her buttocks and pressing of her body against his erect penis, the massaging of her head and neck while repeatedly asking if it felt good and the pushing of her dress to a level which

exposed her underwear was also undertaken for no proper medical purpose. The Committee determined Respondent to have intentionally misrepresented his actions and therefore to have practiced the profession fraudulently in his treatment of both patients. It sustained the Fifth Specification of Charges, as it was based on facts sustained in Factual Allegations A.1.a. through A.1.g. and the Sixth Specification, based on those facts sustained in Factual Allegations B.1.a., B.1.c. and B.1.d.

WILLFULLY HARASSING, ABUSING OR INTIMIDATING PATIENTS

The Hearing Committee determined that the Department established by a preponderance of the credible evidence that Respondent's conduct in his treatment of Patient A and Patient B constituted the willful abuse of both patients. As detailed above, his actions were considered to be clearly not for any proper medical purpose and could only be considered as physical and sexual abuse of both women for Respondent's own gratification. Specification of Charges Eight and Nine were sustained, based upon those Factual Allegations which were also sustained.

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 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.

The Committee was emphatic in its determination that revocation was the only appropriate penalty in this matter. It strongly felt that Respondent constituted a serious threat to the public by his actions and believed that there was no possibility of rehabilitation which could mitigate the imposition of the most stringent penalty available. The Committee also noted that Respondent's

defense, based upon witnesses presented and the cross-examination of the three complainants, comprised a denial of any misconduct and absence of any remorse. His actions were viewed as a serious breach of the professional trust and ethics placed in a physician and no penalty other than license revocation was considered to be appropriate for his breach of such trust and ethics.

ORDER

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

1. The following Specifications of Charges, as set forth in the Statement of Charges (Ex. 1) are **SUSTAINED:**
 - a. First Specification, as it relates to the facts in paragraphs A. and A.1.a. through and including A.1.g.;
 - b. Second Specification, as it relates to the facts in paragraphs B. and B.1.a., B.1.c. and B.1.d.;
 - c. Fourth Specification;
 - d. Fifth Specification, as it relates to the facts in paragraphs A. and A.1.a. through and including A.1.g.;
 - e. Sixth Specification, as it relates to the facts in paragraphs B. and B.1.a., B.1.c. and B.1.d.;

f. Eighth Specification, as it relates to the facts in paragraphs A. and A.1.a. through and including A.1.g.;

g. Ninth Specification, as it relates to the facts in paragraphs B. and B.1.a., B.1.c. and B.1.d.

2. Respondent's license to practice medicine in New York State be and hereby is **REVOKED.**

DATED: Albany, New York

3/13 1995



BENJAMIN WAINFELD, M.D. (CHAIRPERSON)

**LINDA LEWIS, M.D.
KENNETH KOWALD**

TO: Ann Hroncich, Esq.
Associate Counsel
NYS Department of Health
Bureau of Professional Medical Conduct
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Kenneth B. Gross, M.D.
100 Manetto Hill Road
Plainview, New York 11803

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

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IN THE MATTER : STATEMENT
OF : OF
KENNETH B. GROSS, M.D. : CHARGES
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KENNETH B. GROSS, M.D., the Respondent, was authorized to practice medicine in New York State on August 7, 1981, by the issuance of license number 147301, by the New York State Education Department. The Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1993 to December 31, 1994, at 100 Manetto Hill Road, Plainview, New York 11803, and at 107-21 Queens Boulevard, Forest Hills, New York 11375.

FACTUAL ALLEGATIONS

- A. Respondent treated Patient A, a 50 year old female, at his office, which at the time was located at 40 East Merrick Road, Suite 101, Valley Stream, New York, on or about January 17, 1994. (The identities of Patient A, the other patients, and Technician D are disclosed in the attached Appendix.) Patient A's chief complaints were pain in her neck, shoulders and lower back following a fall.

1. In the course of a purported physical examination, but not for a proper medical purpose, Respondent touched Patient A inappropriately as follows:
 - a. While Patient A was standing beside the examining table facing Respondent, he first massaged her neck and shoulders and then lowered his hands to her buttocks and massaged Patient A's buttocks; while in this position, Respondent pulled Patient A toward him and pressed his erect penis against her abdominal area.
 - b. Respondent then repeated this entire procedure. As Patient A attempted to remove Respondent's hands from her buttocks, he grabbed her hand and placed it upon his erect penis and moved her hand up and down his penis outside his pants, while keeping his other hand on her buttocks.
 - c. After instructing Patient A to lie down on the examining table,

Respondent rubbed his erect penis against her right arm.

- d. Also while Patient A was lying on the examining table, Respondent squeezed her breasts.
 - e. While Patient A was still lying on the examining table, Respondent massaged her vaginal area until Patient A removed his hands.
 - f. After instructing Patient A to sit up on the examining table, Respondent massaged her breasts and nipples while asking her if it hurt.
 - g. After instructing Patient A to stand up near the examining table, Respondent again grabbed her buttocks with both hands and pulled her toward him against his erect penis until the patient removed his hands.
2. Respondent engaged in inappropriate conduct as follows:

a. While Patient A was seated on the examining table, Respondent told her to remove her tee shirt for no appropriate medical purpose.

B. Respondent treated Patient B, a 29 year old female, at his office, which at the time was located at 100 Manetto Hill Road, Plainview, New York, on or about August 12, 1992. Patient B's chief complaint was an injury to her back following a fall.

1. In the course of a purported physical examination, but not for a proper medical purpose, Respondent touched Patient B inappropriately as follows:

a. While Patient B was standing near the examining table, Respondent placed his hands on her buttocks, and pulled her against his erect penis.

b. Also while Patient B was standing near the examining table, Respondent, while massaging her back, attempted to kiss her.

c. Also while Patient B was standing near the examining table, Respondent massaged the back of her head and neck and repeatedly asked whether it felt good.

d. While Patient B was lying on the examining table, Respondent rubbed sticks up and down Patient B's legs and pushed her dress up to a level just above her waist, exposing her underwear.

C. Respondent treated Patient C, a 24 year old female, at his office, which at the time was located at 100 Manetto Hill Road, Plainview, New York, on or about October 26, 1992, November 11, 1992, and March 31, 1993. Patient C's chief complaints were numbness and vertigo.

1. In the course of a purported physical examination, but not for a proper medical purpose, Respondent touched Patient C inappropriately as follows:

a. On or about October 26, 1992, while Patient C was standing near the

examining table, Respondent, after explaining that he would stand behind Patient C and pull her backwards and then catch her, stood behind her and did so approximately eight times; beginning on approximately the fourth time, and continuing on each of the remaining repetitions, he pushed his erect penis against her buttocks.

b. After instructing Patient C to sit on the examining table, Respondent leaned over her, touching his penis to her knee repeatedly.

c. On or about November 11, 1992, while Patient C was lying on the examining table, Respondent lowered her pants and underwear to just below her pubic hair line, touched her abdomen, and asked her inappropriate questions about her sexual history.

2. Respondent engaged in inappropriate conduct as follows:

a. In approximately April 1993, Respondent picked Patient C up in his car to interview her for a position in his office; he drove to a dark, deserted area and, while there, he placed his right hand on her left thigh.

D. In the course of his medical practice, Respondent visited Technician D, age 31, in the CAT Scan Suite at Good Samaritan Hospital which is located at 1000 Montauk Highway, West Islip, New York, in early 1991.

1. After asking Technician D for a CAT Scan which he had previously ordered, and after she told him that it was in another room, Respondent, while seated with his legs spread widely on a chair near the door, grabbed both of Technician D's wrists as she was attempting to exit the room, pulled her toward his hips, and held her there until she broke free.

SPECIFICATION OF CHARGES

FIRST THROUGH FOURTH SPECIFICATIONS

MORAL UNFITNESS

Respondent is charged with conduct in the practice of medicine which evidences moral unfitness to practice medicine, under N.Y. Educ. Law Section 6530(20) (McKinney Supp. 1994), in that Petitioner charges:

1. The facts contained in paragraphs A., A.1., A.1.a.-g. and/or A.2. and A.2.a.
2. The facts contained in paragraphs B., B.1. and B.1.a.-d.
3. The facts contained in paragraphs C., C.1., C.1.a.-c. and/or C.2. and C.2.a.
4. The facts contained in paragraphs D. and/or D.1.

FIFTH THROUGH SEVENTH SPECIFICATIONS

PRACTICING FRAUDULENTLY

Respondent is charged with practicing the profession fraudulently, under N.Y. Educ. Law Section 6530(2) (McKinney Supp. 1994), in that Petitioner charges:

5. The facts contained in paragraphs A., A.1., A.1.a.-g. and/or A.2. and/or A.2.a.
6. The facts contained in paragraphs B., B.1. and B.1.a.-d.
7. The facts contained in paragraphs C., C.1., C.1.a.-c. and/or C.2. and C.2.a.

EIGHTH THROUGH TENTH SPECIFICATIONS

WILLFULLY HARASSING, ABUSING OR INTIMIDATING PATIENTS

Respondent is charged with willfully harassing, abusing or intimidating patients either physically or verbally, under N.Y. Educ. Law Section 6530(31) (McKinney Supp. 1994), in that Petitioner charges:

8. The facts contained in paragraphs A., A.1., A.1.a.-g. and/or A.2. and/or A.2.a.

9. The facts contained in paragraphs B., B.1. and B.1.a.-d.

10. The facts contained in paragraphs C., C.1., C.1.a.-c.
and/or C.2. and C.2.a.

DATED: New York, New York
MAY 17, 1994

Chris Stern Hyman, Dep. Comm. & Dep. Dir. OPNC For:

CHRIS STERN HYMAN
Counsel
Bureau of Professional Medical
Conduct