STATE OF NEW YORK DEPARTMENT OF HEALTH

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

Mark R. Chassin, M.D., M.P.P., M.P.H.
Commissioner

Paula Wilson
Executive Deputy Commissioner

October 18, 1994

RECEIVED
OCT 19 1994
OFFICE OF PROFESSIONAL MEDICAL CONDUCT

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Sylvia Finkelstein, Esq.
NYS Department of Health
5 Penn Plaza - Sixth Floor

Ziyad A. Mansur, M.D.
400 Main Street
Oneonta, New York 13820

Walter P. Loughlin, Esq.
Mark D. Beckett, Esq.
Mudge, Rose, Guthrie, Alexander & Ferdon
180 Maiden Lane
New York, New York 10038

Effective Date: 10/25/94

RE: In the Matter of Ziyad Mansur, M.D.

Dear Ms. Finkelstein, Dr. Mansur, Mr. Loughlin & Mr. Beckett :

Enclosed please find the Determination and Order (No. 93-215R) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon 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.

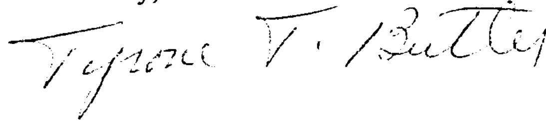
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

Office of Professional Medical Conduct
New York State Department of Health
Empire State Plaza
Corning Tower, Room 438
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.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,



Tyrone T. Butler, Director
Bureau of Adjudication

TTB:

Enclosure

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

IN THE MATTER OF ZIYAD A. MANSUR, M.D.	ADMINISTRATIVE REVIEW BOARD DECISION AND ORDER NUMBER ARB NO. 93-215R

The Administrative Review Board for Professional Medical Conduct (hereinafter the "Review Board"), consisting of **ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D., EDWARD C. SINNOTT, M.D.** and **WILLIAM A. STEWART, M.D.** held deliberations on September 30, 1994 to review the Hearing Committee on Professional Medical Conduct's (Hearing Committee) August 9, 1994 Supplemental Determination, in the case of Dr. Ziyad Mansur (Respondent). The Review Board remanded this case to the Hearing Committee so that tl Committee could conduct additional deliberations and answer eight specific questions, which tł Review Board posed in our Remand Order. James F. Horan served as Administrative Officer to th Review Board. Mark D. Beckett, Esq. filed a submission concerning the Supplemental Determinatioı on September 3, 1994. Sylvia Finkelstein, Esq. filed a reply for the Office of Professional Medical Conduct (Petitioner) on September 16, 1994.

SCOPE OF REVIEW

New York Public Health Law (PHL) §230(10)(i), §230-c(1) and §230-c(4)(b) provide that the Review Board shall review:

- whether or not a hearing committee determination and penalty are consistent with the hearing committee's findings of fact and conclusions of law; and
- whether or not the penalty is appropriate and within the scope of penalties permitted by PHL §230-a.

Public Health Law §230-c(4)(b) permits the Review Board to remand a case to the Hearing Committee for further consideration.

Public Health Law §230-c(4)(c) provides that the Review Board's Determinations shall be based upon a majority concurrence of the Review Board

INITIAL HEARING COMMITTEE DETERMINATION

The Petitioner charged the Respondent with moral unfitness in the practice of medicine, gross negligence, negligence on more than one occasion, practicing the profession fraudulently, ordering excessive tests or treatments and failure to maintain adequate records. The Hearing Committee determined that the Respondent was not guilty of moral unfitness, practicing the profession fraudulently or gross negligence. The Committee found the respondent guilty of negligence on more than one occasion , ordering excessive tests and failure to maintain adequate records. On the moral unfitness charge, the Committee found that the Respondent had committed non-consensual sexual conduct toward a woman, referred to in the record as Student A. The Committee found that the Respondent was not guilty on the charge because the Respondent's conduct did not occur in the practice of medicine. The Committee found the Respondent guilty of negligence, but not guilty of gross negligence, in the treatment of a woman, Patient B, arising from the Respondent's failure to warn the Patient about the possibility of an ectopic pregnancy and the Respondent's failure to perform an adequate examination for ectopic pregnancy. In the treatment of seventeen patients, C through S, the Committee found that the Respondent guilty of negligence on more than one occasion, ordering excessive tests and failure to maintain adequate records arising from laser vaporizations of the cervix in each case. The Committee found that the Respondent was not guilty of gross negligence or fraud in those cases.

The Committee voted to suspend the Respondent's license partially to prevent the Respondent from treating cervical disease, until the Respondent completes a designated course of retraining in that area of medical practice. The Committee placed the Respondent on probation for one year upon entering the training program, and the Committee provided that the Respondent would not be allowed to practice in the area of cervical disease except as related to retraining.

Both the Petitioner and the Respondent requested administrative reviews of the Hearing Committee's Determination.

The Petitioner asked that the Review Board overrule the Hearing Committee and find the Respondent guilty of moral unfitness in the practice of medicine and gross negligence. The Petitioner alleged that the Determination on those charges was not consistent with the Hearing Committee's Findings and Conclusions and that the Determination was due in part to an error by the hearing Committee's Administrative Officer. The Petitioner contends further that the Committee's penalty is inappropriate and that the Respondent's license should be revoked based upon the performance of unnecessary surgical procedures alone.

The Respondent asked that the Review Board vacate certain Findings of Fact concerning the Respondent's sexual conduct with Student A. The Respondent alleged that the Committee lacked jurisdiction to make the Findings once the Committee had determined that Student A was not the Respondent's student and that the conduct did not involve the practice of medicine.

REMAND ORDER

The Review Board voted to remand this case to the Hearing Committee for the limited purpose of conducting additional deliberations, during which the Committee was to answer certain questions and issue a Supplemental Determination. The Remand Order also allowed the parties an opportunity to submit additional comments to the Review Board following receipt of the Supplemental Determination. The Board's questions to the Hearing Committee appear below.

1. Do the Committee's Findings of Fact 3, 4, 5, 7, 8, 10, 11 and 14 in its Order dated December 27, 1993 indicate that Respondent's access to Student A's apartment resulted from his agreement to allow Student A to observe him perform surgical procedures?

2. Was Respondent's failure to perform an adequate evaluation of Patient B for the possibility of ectopic pregnancy (Finding of Fact 34) and/or Respondent's failure to warn Patient B of the possibility of ectopic pregnancy (Finding of Fact 39) negligence that was egregious or conspicuously bad?

3. Was Respondent's failure to warn Patient B of the possibility of ectopic pregnancy a conscious disregard of the consequence of the act or indifference to patient B's rights?

4. Did Respondent's statements in the records of Patients C through S, excluding

Patient G, that the patients were suffering from dysplasia when he knew that the pathologist had not found dysplasia in the biopsy (Finding of Fact 74) demonstrate an indifference to these patients' rights or a conscious disregard of the consequences of this act? Did the statements in the records demonstrate intent to misrepresent a known fact?

5. Does the Committee's penalty limiting Respondent from treating cervical disease, in fact, limit Respondent from any practice as an obstetrician/gynecologist during the period of the suspension?

6. If Respondent is permitted to practice general medicine during the period of the limited suspension, how is the penalty to be enforced?

7. Would Respondent be banned from even performing an examination which could lead to a determination of cervical disease?

8. How does the one year probation relate to the partial suspension regarding the Committee's penalty?

SUPPLEMENTAL HEARING COMMITTEE DETERMINATION

The Hearing Committee rendered their Supplemental Determination on August 9, 1994. The Committee's answers to the Review Board's questions are reprinted below:

" 1. In addition to the Review Board's question 1 above, the Committee is also asked to discuss in greater detail its finding that Student A was not Respondent's student. In response, the Committee submits the following:

" Petitioner's Exhibit 3 makes clear that the agency (BOCES) sponsoring Students A's assignment to spend a day with a health facility or a health care provider considered the assignment to be an 'observational community clinical experience'. BOCES specifically stated that there would 'not be an instructor available that day'(Ex. 3, p.2). Student A's role was to observe Respondent. She had other options such as spending the day with a health facility or a health care provider other than Respondent. She was a student of the BOCES Practical Nursing Program. Respondent had no appointment to the faculty of that program. He did not examine or grade Student A. Respondent had no relationship with BOCES at all except that he agreed to allow Student A to observe him at work. He had no duty to speak with her or to instruct her. The relationship between Respondent and Student

A was similar to that of a high school student who spends a day with a health provider as part of a 'doctor of tomorrow' experience. The student is an observer of the health care provider's work, not that provider's student.

" Regarding the Review Board's question whether the Committee's Findings of Fact 3, 4, 5, 7, 8, 10, 11 and 14 indicate that Respondent's access to Student A's apartment resulted from his agreement to allow her to observe him perform surgical procedures: The short answer to this question is, yes, perhaps Respondent's initial access to Student A's apartment resulted from his agreement to allow her to observe him perform surgical procedures, but the question is not relevant. This would not change the fact that she was not his student which is the issue now being discussed. Those findings of fact indicate that their relationship was virtually exclusively social except for her observational role discussed above. It is important to note that Respondent's visit to Student A's apartment on May 20, 1993 when the incident in question occurred was six days following the BOCES observational experience, and it had no relationship to the observation itself. May 20th was also five days following a brief social encounter during which they had danced together.

" In its Order dated December 27, 1993, the Committee specifically addressed the issue of whether Student A was Respondent's student because it was so alleged in the Statement of Charges. As explained herein, the finding was that there did not exist a student-teacher relationship between them. The Committee wishes to emphasize that aside from the student- teacher relationship question, it separately concluded that the FIRST SPECIFICATION should not be sustained in any event because Respondent's conduct (Findings of Fact 14-17) on May 20, 1993 did not occur within the practice of medicine as required by New York Education Law Section 6530(20) and as defined by New York Education Law Section 6521 in that he was not "diagnosing, treating, operating or prescribing for any human disease, pain injury, deformity or physical condition". This applies even if one accepts, as the Committee does not, that Student A was Respondent's student on May 16, 1993 as alleged.

" 2. and 3. The Committee submits that the answer to the questions posed by the Review Board regarding Patient B in questions 2 and 3 above is no. It was concluded that

Respondent's treatment of Patient B was negligent. Respondent's erroneous diagnosis of incomplete abortion was predicated on interpreting a sonogram report from Dr. Toma in Sidney Hospital that there was "no evidence of (an) ectopic " pregnancy, and on Respondent's belief that Dr. Toma had reported the sonogram indicated an intrauterine sac (Finding of Fact 32). Relying on the sonogram report and ignoring other evidence of ectopic pregnancy constituted negligence, but it did not rise to the level of egregious conduct. Similarly, the failure to warn Patient B of the possibility of an ectopic pregnancy was negligence, but it was not gross negligence because it was not egregious nor did it manifest a conscious disregard of the consequences of the act or indifference to Patient B's rights. This is because Respondent, due to negligence and perhaps incompetence, erroneously thought he had properly ruled out ectopic pregnancy. The necessary element of consciousness was not proved to support a charge of gross negligence. As instructed by the administrative officer, a charge of gross negligence necessitates a showing of egregious conduct which has been defined as 'conspicuously bad' conduct. The dictionary definition of 'conspicuous' incorporates terms such as 'obvious' and 'plainly visible'. Additionally, the legal dictionary definition of gross negligence states that it involves an intentional failure to perform a duty (Black's Law Dictionary, Sixth Edition, 1990, pp. 1033-1034) and the Department of Health has stated in its widely distributed memorandum of February 5, 1992 that consciousness of impending dangerous consequences is a necessary element of gross negligence. Respondent was in error, but the consciousness element was not proved.

" 4. Regarding Respondent's statements in patients' records that the patients were suffering from dysplasia when he knew that the pathologist had not found dysplasia in the biopsy: The Committee believes this was based on incompetence, but it was not gross negligence or fraud as charged because the consciousness element of gross negligence and the intentional deception element of fraud were not proved. Respondent's statements in the records did not demonstrate an indifference to the patients' rights or a conscious disregard of the consequences of the act. Furthermore, the statements did not demonstrate an intent to misrepresent a known fact. The Committee found that Respondent had erroneously stated in the records that the patients were suffering from dysplasia (Finding of Fact 74). It was not found that he had done so knowing it was false, or to intentionally misrepresent or conceal a fact known to him. It was not proved that Respondent did not believe that

the patients suffered from dysplasia. He misinterpreted the findings on colposcopic examination, on cervical cytology and on biopsy.

It is noted that all the patients in question, except Patients M and O, had indication for colposcopy. In patients C through R., Respondent made diagnoses of dysplasia through incompetent interpretation of colposcopic findings. Despite a lack of tissue confirmation, he erroneously believed he was treating cervical dysplasia.

5. Respondent is not totally limited from practicing obstetrics/gynecology. He may do visual inspection, palpation and obtain pap smears of the cervix. Any abnormalities of the cervix must be referred to a consultant. Respondent may not perform any other procedure on the cervix including, but not limited to, colposcopy, cervical biopsy, endocervical curettage, cervical cautery by any modality, cervical ablation, cervical conization by any modality, cryosurgery, LEEP (Loop Endocervical Excision Procedure) procedures and laser therapy.

6. The penalty of imposing a partial suspension of a respondent's license to a specified area or type of practice is legally permissible pursuant to Public Health Law Section 230-a. Enforcement of the penalty is within the purview of OPMC and/or BPMC, not this Committee. The Committee suggests, however, that the penalty be enforced by notifying all facilities at which Respondent has privileges and by audits of his office records.

7. Addressed in answer No. 5 above.

8. The Committee clarifies the one year probation requirement as follows: The one year probation is to commence after Respondent completes the retraining ordered by the Committee. Respondent cannot currently treat cervical disease, except as related to his retraining. Following his successful retraining, Respondent will be allowed to treat cervical disease, but he will be placed on probation for a one year period as contemplated by Section 230-a(9) of the Public Health Law to allow monitoring of this area of his practice by the New York State Department of Health through periodic record inspections if deemed necessary. The condition that Respondent complete the retraining program within a one year probation period as stated on page 28 of the Committee's Order is vacated.

REQUESTS FOR REVIEW

In response to the Hearing Committee's Supplemental Determination, the Respondent reiterated his request that the Review Board strike the Hearing Committee's superfluous Factual Findings concerning the moral unfitness charge and deny the Petitioner's request that the Board make additional findings of guilt and revoke the respondent's license to practice medicine. The Respondent contended that in light of the Hearing Committee's clear responses to the Review Board's questions there is no basis for the Review Board to conclude that the Committee's Findings or Penalty are inconsistent. The Respondent states that the Review Board may take notice of the fact that the Respondent was acquitted of criminal charges based upon the Respondent's conduct toward Student A four days after the Remand Order.

In reply to the Respondent's letter the Petitioner asserts that the Review Board may not take notice of the Respondent's acquittal.

REVIEW BOARD DETERMINATION

The Review Board has considered the record below and the briefs which counsel have submitted.

By three votes to two, the Review Board sustains the Hearing Committee's Determination that the Respondent was not guilty of moral unfitness in the practice of medicine. None of the members of the Review Board accept the Committee's Determination, based on Education Law Section 6530(2), that moral unfitness in the practice of medicine is restricted only to the clinical setting in which a Physician examines a patient, diagnoses a condition, prescribes treatment or provides care. A physician can be guilty of moral unfitness in the practice of medicine for conduct in situations in which a physician is in a position of authority or control due to his licensure as a physician, such as when the physician is a teacher in a teacher-student relationship. The teacher-student relationship is a common accompanying part of the practice of medicine and can not be separated from the practice of medicine. The majority of the Review Board sustains the Hearing Committee's Determination on the unfitness charge because the Determination was consistent with the Hearing Committee's Conclusion that a teacher-student relationship did not exist and that the Respondent and Student A had a social relationship at the time of the sexual conduct.

The Review Board finds unanimously that we lack the authority to strike Findings of Fact from the Hearing Committee's Determination for the reasons the Respondent has requested. Whether the Hearing Committee had jurisdiction to make certain Findings is a legal issue which is beyond the review Board's expertise and which is a matter for the courts.

The Review Board unanimously sustains the Hearing Committee's Determination that the Respondent was not guilty of gross negligence in his treatment of Patient B. The Committee's Determination on that charge was consistent with the Committee's Conclusion, that the Respondent's negligence in the care of Patient B did not rise to the level of egregious or conspicuously bad conduct. The Review Board again states, as we have in previous cases, that the consciousness of impending dangerous consequences is not the defining or sole defining element of negligence.

The Review Board unanimously sustains the Hearing Committee's Determination finding the Respondent not guilty of gross negligence or fraud arising from the treatment of Patients C through S. The Determination on the charges was consistent with the Committee's Findings that the Respondent's mistakes in those cases was the result of Respondent's errors in judgement or in record keeping, but that the Respondent's conduct was not egregious or conspicuously bad and was not the result of the Respondent's intent to misrepresent or conceal a fact known to him.

The Review Board sustains the Hearing Committee's Determination that the Respondent was guilty of negligence on more than one occasion, failure to maintain adequate records and ordering excessive tests or treatment not warranted by the patients' condition. The Determination on those charges was consistent with the Hearing Committee's Findings of Facts and conclusions concerning the Respondent's repeated errors in judgement and in record keeping.

The Review Board sustains the Hearing Committee's Penalty in part and modifies the Penalty in part. We feel that the modification is necessary to assure greater protection to the public following the Respondent's retraining. The Review Board finds that the Respondent's continued acts of negligence and his performance of procedures, which were unwarranted and which placed patients at risk, require a severe penalty that must correct that pattern of poor practice and protect the public health. In the absence of a viable means of correcting that pattern of practice, revocation or permanent limitation of the Respondent's license would be the only appropriate penalties that would

assure the public's protection.

In this case, the Hearing Committee has determined that the Respondent is candidate for retraining in the treatment of cervical disease and the Committee has determined that following the successful completion of that retraining, the Respondent will be able to return to practice under conditions of probation that will allow monitoring of his practice. The Committee has also ordered that the Respondent shall not treat cervical disease during the retraining period. The Review Board feels that the retraining, with limits on the Respondent's practice during the retraining period, may be the appropriate penalty to correct the deficiencies in the Respondent's medical skills and judgements. The Review Board worries, however, whether errors in judgements can be corrected reliably through formal retraining. To assure that the retraining has permanently corrected the Respondent's problems and assure that his patients will not be placed at further risk from unwarranted cervical procedures, the Review Board finds that a longer period of probation than that ordered by the Hearing Committee will be necessary, with greater controls in place in the terms of probation.

The Review Board modifies the Committee's Penalty, as to the post-retraining probation, to place the Respondent on probation for five years following retraining, rather than one year. The Board does not feel that one year is a sufficiently long enough period of time to assure that the Respondent has permanently corrected his poor practice skills and judgement. We also find that record review, which the Hearing Committee recommended in their Supplemental Determination, will not be an adequate protection to the public, because the review would at best only identify a return to the Respondent's past practice of negligence and placing patients at risk unnecessarily, after that negligence has occurred. The Review Board believes that the Respondent should be reviewed prior to the time that he performs any procedure on the cervix, in order to prevent any unwarranted procedures from occurring at all. The Review Board orders that during the period for which he is on probation, the Respondent shall obtain a second opinion prior to commencing any procedure on the cervix, in order to confirm the need for that procedure. Such second opinion shall be in the form of the Chief of Service's approval to go forward with a planned procedure. The term procedure on the cervix shall mean those procedures which the Hearing Committee listed at Paragraph No. 5, in their Supplemental Determination (see above), as the procedures which the Respondent is barred from

performing during his retraining.

ORDER

NOW, based upon this Determination, the Review Board issues the following **ORDER**:

1. The Administrative Review Board unanimously **sustains** the Hearing Committee for Professional Medical Conduct's Determination finding Dr. Ziyad A. Mansur guilty of negligence on more than one occasion, failure to maintain adequate records and performing tests or procedures which were unwarranted by the condition of the patient. The Review Board also unanimously **sustains** the Hearing Committee's Determination that the Respondent was not guilty of fraud in the practice of medicine and gross negligence.

2. By three votes to two, the Review Board **sustains** the Hearing Committee's Determination that the Respondent was not guilty of moral unfitness in the practice of medicine.

3. The Review Board **sustains** that portion of the Hearing Committee's Penalty that orders that the Respondent undergo retraining in cervical disease, either through ACOG or SUNY Syracuse, and which limits the Respondent, during the retraining period, from treating cervical disease, as defined in the Hearing Committee's Supplemental Determination.

4. The Review Board **modifies** that portion of the Hearing Committee's Penalty that places the Respondent on probation following the successful completion of retraining program.

5. The Review Board **places the Respondent on probation** for a period of five years following the successful completion of the Respondent's retraining. As a condition of probation, the Respondent is **prohibited** from performing any cervical procedure as defined in this Determination, until he first obtains a second opinion confirming the need for the procedure.

ROBERT M. BRIBER

SUMNER SHAPIRO

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

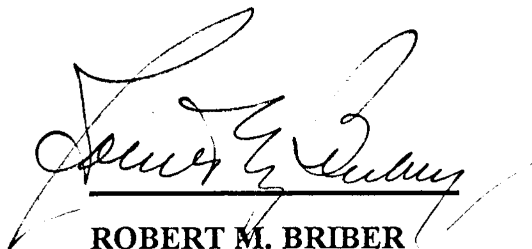
WILLIAM A. STEWART, M.D.

IN THE MATTER OF ZIYAD A. MANSUR, M.D.

ROBERT M. BRIBER, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Mansur.

DATED: Albany, New York

October 18, **1994**



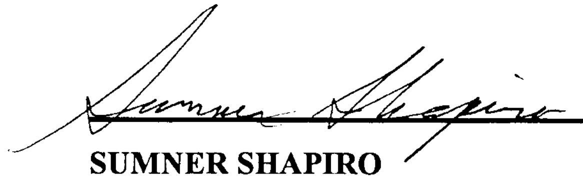
ROBERT M. BRIBER

IN THE MATTER OF ZIYAD A. MANSUR, M.D.

SUMNER SHAPIRO, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Mansur, except as the Determination on the charge of moral unfitness in the practice of medicine.

DATED: Delmar, New York

October 6, **1994**



SUMNER SHAPIRO

IN THE MATTER OF ZIYAD A. MANSUR, M.D.

WINSTON S. PRICE, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Mansur.

DATED: Brooklyn, New York

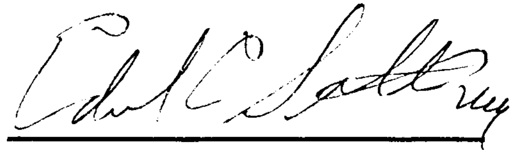
___________, 1994

WINSTON S. PRICE, M.D.

IN THE MATTER OF ZIYAD A. MANSUR, M.D.

EDWARD C. SINNOTT, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Mansur.

DATED: Roslyn, New York
October 9, **1994**



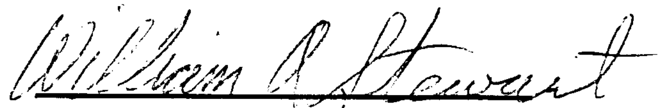
EDWARD C. SINNOTT, M.D.

IN THE MATTER OF ZIYAD A. MANSUR, M.D.

WILLIAM A. STEWART, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Mansur, except as to the Determination on the charge of moral unfitness in the practice of medicine.

DATED: Syracuse, New York

17 Oct , **1994**



WILLIAM A. STEWART, M.D.