NEW YORK
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THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, N.Y. 12234

OFFICE OF PROFESSIONAL DISCIPLINE
ONE PARK AVENUE, NEW YORK, NEW YORK 10016-5802

John H. Park, Physician
170 Maple Road
Williamsville, New York 14221

May 20,1994

Re: License No. 110946

Dear Dr. Park:

Enclosed please find Order No. 13636 & 8493. This Order goes into effect five (5) days after the date of this letter.

If the penalty imposed by the Order in your case is a revocation or a surrender of your license, you must deliver your license and registration to this Department within ten (10) days after the date of this letter. Your penalty goes into effect five (5) days after the date of this letter even if you fail to meet the time requirement of delivering your license and registration to this Department.

If the penalty imposed by the Order in your case is a revocation or a surrender of your license, you may, pursuant to Rule 24.7 (b) of the Rules of the Board of Regents, a copy of which is attached, apply for restoration of your license after one year has elapsed from the effective date of the Order and the penalty; but said application is not granted automatically.

Very truly yours,

DANIEL J. KELLEHER
Director of Investigations
By: Gustave Martine

GUSTAVE MARTINE
Supervisor

DJK/GM/er

CERTIFIED MAIL - RRR
cc: Francis J. Offermann, Jr., Esq.
1776 Statler Towers
Buffalo, New York 14202

The University of the State of New York

IN THE MATTER

of the

Disciplinary Proceeding

against

JOHN H. PARK, M.D. **Nos. 13636/8493**

who is currently licensed to practice
as a physician in the State of New York.

REPORT OF THE REGENTS REVIEW COMMITTEE

JOHN H. PARK, hereinafter referred to as respondent, was licensed to practice as a physician in the State of New York by the New York State Education Department. The instant disciplinary proceeding was duly commenced.

The Board of Regents previously voted on June 16, 1989 to remand this matter, insofar as it relates to the charges concerning patients BBB, DDD, and EEE, to: (1) offer respondent an opportunity to cross-examine the expert witnesses against him as to their expert opinions and, in accordance with its determination, the witnesses against him as to their prior statements; and (2) allow the hearing committee and Commissioner of Health to address both the record on remand and the issues framed for further review. Proceedings were conducted on remand and thereafter the record of such remand proceedings was transferred to us.

Prior to the 1989 determination to remand this matter, under Calendar No. 8493, a hearing was held before the hearing committee on 29 sessions starting on June 14, 1983 and ending on November 14, 1986. The lengthy procedural history of this matter preceding such remand is more fully set forth in the following exhibits, a copy of which is annexed hereto and made a part hereof: Exhibit A - statement of charges and amended statement of charges; Exhibit B - respondent's answer and amended answer; Exhibit C - July 13, 1987 ruling of administrative officer; Exhibit D - hearing committee report; Exhibit E - recommendation of the Commissioner of Health; Exhibit F - Regents Review Committee report; Exhibit G - vote of Board of Regents; and Exhibit H - order of Commissioner of Education.

The remand order became effective July 19, 1989. Petitioner, however, did not take any official act for approximately the next two years thereafter. The Health Department first proceeded on remand by requesting, on June 6, 1991, that additional hearing dates be scheduled.

On remand, respondent continued to demand that petitioner produce, for cross-examination of the witnesses who testified at the original hearing, specifically identified materials to which he had been previously denied access. By its July 31, 1991 response, petitioner provided respondent with some undisputed documents. It, however, refused to provide respondent with documents it claimed for the first time to be prohibited from divulging; other documents

it claimed were untimely demanded by respondent; and further documents it claimed for the first time never existed. Petitioner did not, through the time it responded on July 31, 1991 to respondent's demand, produce for in camera inspection by the administrative officer the available documents it refused to provide to respondent.

Respondent rejected petitioner's response to his demands and moved for the administrative officer to impose sanctions on petitioner. Respondent argued that petitioner is bound by Mr. Shea's on-the-record representations, which were not "recanted" through June 1991, that he possessed, but was not turning over to respondent, existing investigators' notes. In view of these alleged "admissions" made by petitioner, respondent asserted that the only appropriate issue for the hearing on remand was the present whereabouts of such notes. Petitioner, on the other hand, opposed respondent's motions for sanctions and argued that Mr. Shea's statements were "not conclusive or binding." In view of its position that these notes never existed, petitioner asserted that a hearing was necessary to determine whether the materials in issue ever existed and, if so, the circumstances of their loss or destruction, and the degree of prejudice to respondent.

On September 18, 1991, the administrative officer issued a ruling: scheduling a hearing to develop a record as to the documents which had not been provided by petitioner to respondent; and directing petitioner to submit to him a list of all documents

which petitioner acknowledged are in existence and were referred to in respondent's demand for their production. The administrative officer, noting that the purpose for the remand was to enable respondent to cross-examine petitioner's witnesses, rejected petitioner's claim that certain documents were untimely demanded by respondent.

On September 19, 1991, petitioner submitted a list of materials it possessed regarding the cases of Patients BBB, DDD, and EEE, and indicated that it was awaiting further instructions. On October 7, 1991, the administrative officer directed petitioner, with respect to the documents it acknowledged possessing, to either: turnover to respondent the documents petitioner did not claim to be privileged; or forward to him, for in camera inspection, the documents petitioner claimed to be privileged along with an affidavit in support of the asserted privilege. In his October 7, 1991 ruling, the administrative officer denied petitioner's request that respondent provide petitioner with "Rosario documents" and reiterated that the remand was for respondent's cross-examination of petitioner's witnesses.

By letter dated October 15, 1991, petitioner sent respondent interview reports regarding Patients BBB and EEE. Notwithstanding that these two documents were not in dispute, they had not been referred to or produced previously by petitioner as part of its July 31, 1991 letter.

Petitioner, in its October 15, 1991 letter to respondent, also

indicated that it declined to provide respondent with the statement of Patient BBB and interview report of Patient DDD. In a separate letter dated October 15, 1991 and in a November 20, 1991 letter, petitioner produced, solely for the administrative officer's review, two other documents it denominated as complaints regarding Patients BBB and EEE as well as an affidavit to this effect. It declined to produce certain other documents.

Over respondent's objection, the administrative officer held a hearing on three sessions from October 10, 1991 to November 7, 1991, without the hearing committee present, regarding the issue of whether the documents petitioner on remand claimed never existed ever existed. Petitioner called three witnesses to testify at this hearing on remand. The administrative officer initially denied petitioner's motion to close that hearing at the conclusion of petitioner's case and declared that respondent's witnesses would be produced for respondent to obtain their testimony. Although respondent subpoenaed various witnesses and indicated his readiness to go forward, the administrative officer, however, terminated the hearing after reviewing the testimony of petitioner's witnesses and the affidavits presented by petitioner. Respondent was thus not permitted to call his own witnesses at the hearing.

On November 26, 1991, the administrative officer issued his ruling concluding that the statements controverted at the hearing before him had never existed. This conclusion by the administrative officer was based upon his findings of fact that Mr.

Shea was unavailable to testify; Mr. Alfes had no recollection of ever writing the statements in issue or of Mr. Shea's representations that Mr. Alfes took notes of conversations with Dr. Yung (hereafter Dr. Y) and Dr. K (in the public documents of this report and the exhibits to this report, an initial is used at this time in referring to the complainant whose name is known to the parties within the confines of this proceeding); and Mr. Alfes belief that he never wrote such statements. A copy of the November 26, 1991 ruling is annexed hereto, made a part hereof, and marked as Exhibit I.

On December 4, 1991, petitioner informed respondent that Patient BBB told petitioner's attorney that she did not believe that she could withstand further testimony and, accordingly, that petitioner did not intend to produce Patient BBB for further cross-examination.

On December 11, 1991, the administrative officer issued various rulings, including that: (1) the two documents denominated by petitioner as complaints appeared to be complaints which, notwithstanding the determination of the Board of Regents, would not be turned over to respondent on constraint of a Health Department regulation; (2) petitioner's November 26, 1991 submission represented the personal trial notes of petitioner's counsel and not Rosario material; and (3) respondent's motion to dismiss was denied and his motion for instructions was reserved for post-hearing submission prior to the hearing committee's

deliberations.

Respondent filed motions with the administrative officer on December 3, 1991 and January 10, 1992 seeking various relief and instructions to the hearing committee. Petitioner and respondent submitted further arguments in support of their positions on these motions and respondent also proposed alternative instructions be given to the hearing committee in the event that his main proposed instructions were denied.

For the hearing scheduled before the hearing committee on December 18, 1991, respondent had requested petitioner to produce, for cross-examination by respondent, Patient BBB, Dr. Y, and Dr. K. Although respondent had "no reason to believe" that Dr. Y and Dr. K would not be produced (he knew petitioner had no intent of producing Patient BBB), respondent's attorney, on December 17, 1991, informed the administrative officer that he elected to forego cross-examining Dr. Y and Dr. K. In spite of his arguments to the Board of Regents, before this matter had been remanded, that he had been denied the opportunity to cross-examine Dr. Y and Dr. K fully, respondent considered further cross-examination of these two physicians to be "superfluous". See, December 17, 1991 conference transcript pages 4-6.

On February 4, 1992, the administrative officer issued an omnibus decision on the outstanding motions and requests for instructions, a copy of said ruling is annexed hereto, made a part hereof, and marked as Exhibit J. The administrative officer denied

respondent's motions and, with two exceptions, declined to instruct the hearing committee as proposed by respondent. The administrative officer did not deliver the instructions requested by respondent that the hearing committee must disregard and not consider the testimony of Patients BBB, DDD, and EEE, the testimony and records of Dr. K and Dr. Y as to Patients BBB and DDD, and the testimony and records of Dr. Atwal (hereafter Dr. A) as to Patient EEE. The above referred exceptions devised by the administrative officer relate to the limited instructions as shown on the last page (see also, page 1) of his ruling regarding respondent's proposed instructions 7 and 8 to the hearing committee about the adequacy of petitioner's evidence.

On remand, respondent (as shown above) was not allowed access to certain documents which petitioner acknowledged on remand are in existence and other documents which petitioner on remand first claimed never existed. No sanctions were imposed on petitioner and no instructions were delivered to the hearing committee by the administrative officer regarding the non-production of documents. Respondent objected to these rulings and filed his written comments and exceptions to the administrative officer's decision.

In a further ruling, the administrative officer, on February 24, 1992, denied respondent's motion to admit respondent's exhibits WWWW and XXXX into the record.

Both parties were sent the affirmations of the replacement hearing committee members, Alvin Rudorfer, D.O. and George C. Simmons, Ed.D., stating that they each read and considered all

evidence and transcripts of the prior proceedings. Both parties submitted written briefs and reply briefs to the hearing committee and respondent submitted a separate proposed findings of fact and conclusions of law. The administrative officer ruled that a "verbal presentation", as requested by respondent to be made to the hearing committee before its deliberations, in addition to the written presentation the parties made, was "unwarranted and unnecessary." (See, Exhibit J to this report). Accordingly, no oral argument was held on remand before the hearing committee.

Between March 18, 1992 and May 20, 1992, the hearing committee, on remand, consisting of three original members and the above two replacement members, deliberated on three sessions. Subsequently, the hearing committee issued a report of its findings of fact, conclusions, and recommendation, a copy of which is annexed hereto, made a part hereof, and marked as Exhibit K.

The hearing committee on remand concluded unanimously that respondent was guilty, with respect to the remaining cases of BBB, DDD, and EEE, of practicing the profession fraudulently (first specification), gross incompetence (second specification), and gross negligence (third specification); and, with respect to Patients DDD and EEE, negligence and incompetence on more than one occasion (fourth specification)[1]. The hearing committee

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[1]The hearing committee report on the second page 29 refers to "two counts of negligence and incompetence on more than one occasion". As shown on pages 14, 23, and 29 (the first page 29) of its report, the hearing committee clearly sustained the fourth specification to the extent of Patients DDD and EEE and did not sustain the fourth specification to the extent of Patient BBB which it wrote "constitutes only one occasion".

unanimously recommended on remand that respondent's license to practice medicine in New York State be revoked.

Petitioner requested that the Commissioner of Health accept the hearing committee's findings of fact, conclusions, and recommendations with the modification that the conclusion as to the elements of the definition of fraudulent practice not be accepted, as such conclusion was based upon an "erroneous" instruction by the administrative officer. Respondent submitted his comments, exceptions, and recommendations to the Commissioner of Health regarding the hearing committee's report.

The Commissioner of Health, by Harvey Bernard, M.D., recommended to the Board of Regents that the findings, conclusions, and recommendation of the hearing committee on remand be accepted, except the instructions to the hearing committee and the conclusion regarding fraud should not have included a requirement that actual deception be shown. A copy of the recommendation of the Commissioner of Health is annexed hereto, made a part hereof, and marked as Exhibit "L".

On December 11, 1992, by stipulation, the attorneys for both parties together reviewed the record transferred to the Education Department, except for the in camera materials. The parties agreed that 76 documents were organized in sequence in a folder marked "Documents on Remand" and are a part of the record for review.

On March 31, 1993, respondent appeared before us and was represented by Francis J. Offermann, Jr., Esq. who presented oral

argument on behalf of respondent. Kevin C. Roe, Esq. presented oral argument on behalf of the Department of Health. Petitioner and respondent submitted their respective briefs to us before March 31, 1993. At oral argument, petitioner requested and was granted permission for each party to submit a reply brief. Both parties submitted their respective reply briefs. The last submission, petitioner's reply, was received on May 24, 1993. After studying the voluminous record both before and after the remand, deliberations were held on August 25, 1993.

We have considered the record in this matter as transferred by the Department of Health before and after the remand, including the in camera submissions not shown to respondent, the 76 "Documents on Remand" stipulated to by both parties, and the briefs and reply briefs submitted to us by both parties.

Petitioner recommended in writing, as to the penalty to be imposed, should respondent be found guilty, that respondent's license to practice medicine in New York State be revoked.

Respondent, as was his right, did not submit a written recommendation as to the penalty to be imposed should he be found guilty. Respondent instead urged that the charges against him be dismissed on the merits, with prejudice.

Numerous issues were raised by the parties regarding various charges, definitions, patients, documents, procedures, rulings, and otherwise. This report will discuss the main issues to be resolved by this decision.

I. HEARING COMMITTEE PROCEEDINGS ON REMAND

A. DELAY

Respondent contends that he was prejudiced by petitioner taking 22 months before it proceeded in any manner on remand and 28 months before the hearing was scheduled to resume before the hearing committee. It is true that, during these time periods on remand, petitioner did not proceed expeditiously in turning over undisputed witness statements to respondent and in producing disputed witness statements for the administrative officer. The record shows that, under the tragic circumstances of Mr. Shea's disabling injury and the death of the two attorneys who succeeded him in Park Case #2 (Calendar No. 11512) and this matter, the prosecutorial file remained unassigned in Mr. Shea's office after his accident, even when Park case #2 was reassigned. The record also shows that the successor attorney's supervisor told the successor that petitioner had not yet chosen to retry this matter; and that, after the successor attorney's death, it was left unassigned to any lawyer and the file was placed in storage. While this matter remained inactive with the Health Department, other matters, including Park case #2, instead were given prosecutorial attention. As petitioner contends, there is no evidence that respondent requested on remand that this matter be activated. Throughout the proceedings on remand, respondent has not been prohibited, by virtue of this matter, from practicing his profession.

Mere delay may not be the basis for dismissing charges of

professional misconduct. Rojas v. Sobol, 167 A.D.2d 707 (3rd Dept. 1990); see also, Matala v. Board of Regents of the University of the State of New York, 183 A.D.2d 953 (3rd Dept. 1992) (14 year delay in bringing charges did not, standing alone, warrant annulment of disciplinary determination). In the absence of a demonstration by a respondent that the delay by petitioner caused him actual prejudice in the disciplinary proceeding, a respondent would not be entitled to the dismissal he seeks. See, De Paula v. Sobol, 594 N.Y.S.2d 899 (3rd Dept. 1993); and Tjoa v. Fernandez, 598 N.Y.S.2d 868 (3rd Dept. 1993).

Respondent alleges that the charges should be dismissed in their entirety because the delay on remand caused by petitioner prejudiced him in several ways. We disagree. The drastic and extreme action of dismissing all charges is not appropriate under these circumstances and, except as hereafter discussed in part II of this report regarding the one case of Patient BBB[2], respondent has not been prejudiced as a result of delay by petitioner.

B. **HEARING COMMITTEE REPLACEMENTS**

One ground raised by respondent for demonstrating the requisite prejudice in this proceeding is that two hearing committee members and the administrative officer were replaced by substitutes by the time the matter was scheduled before the hearing committee on remand. In our unanimous opinion, no prejudice

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[2]Nevertheless, as will be shown, dismissal of the charges relating to Patient BBB is not warranted.

resulted to respondent from these replacements.

One hearing committee member was incapacitated, in 1988, to serve on the hearing committee on remand by reason of his non-appointment to the State Board for Professional Medical Conduct and, therefore, had to be replaced regardless of when the proceedings ordered by the 1989 remand would have resumed. The administrative officer, who was promptly replaced upon the resumption of the proceedings, is not a voting member of the hearing committee or a signor of the report of the hearing committee. Inasmuch as the time taken by petitioner to prosecute the matter on remand would not entitle respondent to any relief based on these replacements, respondent's arguments regarding the question of delay hinge on the replacement of the second hearing committee member, Mr. Brandt.

Respondent cannot fairly claim prejudice resulted from the replacement of Mr. Brandt due to his ceasing to remain an inhabitant of the state under Public Officers Law §30(1)(d). Mr. Brandt was replaced upon respondent's own motion for the recusal of Mr. Brandt due to the change of his residency. After respondent subsequently insisted on the necessity for Mr. Brandt's recusal, petitioner changed its position and consented to the granting of respondent's motion for recusal. Respondent obtained the relief he sought on this motion without, at that time, additionally seeking the discontinuation of the hearing committee or objecting to the constitution of the hearing committee as a whole. It is noted that

the recusal was obtained by respondent after the other hearing committee member was incapacitated and after he had subsequently deceased. By the time the hearing committee was to meet on December 18, 1991, respondent had not moved timely for the discontinuation of the hearing.

Respondent's second motion to require the substitute members of the hearing committee to read the full record was granted by the administrative officer and those two members signed affirmations indicating that they had read the record. Since the hearing committee, as it was ultimately constituted, made an informed decision, no prejudice to respondent has been established by virtue of the replacement hearing committee members not having been present at the original hearing. Taub v. Pirnie, 3 N.Y.2d 188 (1957); Osher v. University of the State of New York, 162 A.D.2d 849 (3rd Dept. 1990); and Freymann v. Board of Regents of the University of the State of New York, 102 A.D.2d 912 (3rd Dept. 1984).

C. **PROCEEDINGS ON REMAND**

In any event, the administrative officer correctly denied respondent's January 7, 1992 motion to discontinue the hearing because of the death or incapacity of two members of the hearing committee. In his motion, respondent asserted that if one or more hearing committee members cannot serve throughout the matter, the hearing "must be discontinued". Respondent's interpretation of Public Health Law §230(10)(f) is without merit. Respondent's

rights are not infringed by the replacement of more than one committee member. Briggs v. Board of Regents of the University of the State of New York, 590 N.Y.S.2d 949 (3rd Dept. 1992).

We are aware of respondent's separate contention that the two replacement hearing committee members did not hear any testimony or see any of the witnesses including respondent. This matter is similar to Laverne v. Sobol, 149 A.D.2d 758 (3rd Dept. 1989), where the court held that the decision not to discontinue the hearing after the death or incapacity of two hearing committee members was proper. In this matter and in Laverne, one hearing committee member died and the other member moved out of state, and respondent, although offered an opportunity to have a portion of the case heard by the re-constituted committee, chose to rest without further examination of the witnesses. "Although review of a written record is not the best means of judging witness credibility, it does afford a satisfactory basis" for the ultimate resolution by the Board of Regents of credibility issues in professional misconduct proceedings. Briggs, supra.

We disagree with respondent's further contention that the administrative officer on remand impermissibly rejected respondent's request to meet with and orally argue before the hearing committee. The hearing session scheduled for the purpose of gathering evidence on December 18, 1991 was cancelled by respondent and, therefore, no new evidence was received by the hearing committee on remand. Upon the closure of the evidentiary

record, the hearing committee's remaining function was to deliberate and issue a new report. Respondent already argued his position to the hearing committee before the remand and submitted various papers regarding the same evidence which was to be evaluated by the hearing committee on remand. Nevertheless, respondent on remand was permitted to make further written submissions and he submitted to the hearing committee on remand another brief and proposed findings of fact. Thus, both parties were given equal opportunity to present their arguments to the hearing committee in writing. As asserted by petitioner in its opposition to this request by respondent, it was not improper for the administrative officer to consider any oral presentation after the record was closed to be "unwarranted and unnecessary".

Respondent's other grounds for dismissing these charges because of petitioner's delay in proceeding on remand relate to the separate issues of evidence and document production. In our opinion, respondent has not demonstrated, with respect to these other grounds, that substantial prejudice resulting from the delay by petitioner warrants the dismissal of this matter. (The separate issues of evidence and document production shall be addressed in part II, infra.) Respondent's assertion that petitioner allowed much time to pass before proceeding with this remand does not alter our view, expressed by the Court in Stein v. Board of Regents of the University of the State of New York, 169 A.D.2d 857 (3rd Dept. 1991), that we have "considerable discretion", in this instance, in

determining the merits of this matter.

II. OPPORTUNITY FOR CROSS-EXAMINATION

The Board of Regents ordered this matter remanded to the hearing committee to, among other reasons, enable respondent to obtain the opportunity for cross-examination denied him at the original hearing. After the completion of the proceedings on remand, respondent contends that he has still been denied the opportunity to obtain meaningful cross-examination of petitioner's witnesses. This contention relates to the question of respondent's access to attorney's notes, statements, and complaints.

The Board of Regents provided clear instructions for the proceedings which have been held on remand. First, at the hearing for the purpose of cross-examination, petitioner was required by these instructions to provide respondent with access to the requested documents which it did not affirmatively claim either to be confidential or to not relate to the subject matter of the witness' testimony. It can now be determined that, at the hearing before remand, petitioner failed to turn over to respondent various documents which were not arguably confidential[3]. Although petitioner had no basis for resisting respondent's requests and inquiries regarding such documents which were not a complaint by the complainant witness, petitioner turned over those documents to respondent by the time the hearing was scheduled before the hearing

[3]During the original hearing, petitioner withheld from respondent some documents which were not reports of the complaint covered by Public Health Law §230(11)(a) and were not even obtained from the complainant.

committee on remand.

Second, petitioner was required, with respect to any particular requested witness statements to which it raises an objection, to:

> produce those statements for an in camera inspection by the administrative officer who must rule as to whether the burden of proving the existence of the privilege has been met, the privilege has been waived, and the basis for granting or denying an opportunity for cross-examination.

Thus, if petitioner truly had believed that a witness statement requested during the hearing by respondent did not constitute Rosario material or was required to be kept confidential, it was obligated, if it did not intend to turn over such document to respondent, to raise a specific objection to respondent's demand for production and to submit such document to the administrative officer for an appropriate ruling. Petitioner was not permitted to itself determine, as both prosecutor and judge, to withhold production of requested witness statements without submitting them to the administrative officer for in camera inspection and making a record for subsequent review. Civil Service Employees Association Inc. v. Ontario County Health Facility, 103 A.D.2d 1000 (4th Dept. 1984) ("the simple characterization of a statement or communication as 'privileged' will not suffice"); People v. Adger, 75 N.Y.2d 723 (1989); and People v. Cadby, 75 A.D.2d 713 (4th Dept. 1980). Moreover, the administrative officer was required to inspect the documents produced by petitioner, incorporate them into the record, and

render appropriate rulings as to petitioner's obligations regarding the documents it disputed.

The narrowly drawn instruction crafted by the Board of Regents in remanding this matter did not speak to or require the statements to be admitted into evidence for the truth of the matters asserted therein or particular sanctions to be imposed if petitioner did not comply with its obligations. This determination of the Board of Regents also did not provide respondent with any right to pre-hearing disclosure of any kind, to have access to any and all materials in petitioner's files, or to the production of any documents regarding a complainant who does not testify at the hearing.

It was clear from the Regents' decision remanding this matter that respondent, during cross-examination, was not to be denied from having access to those statements, which petitioner obtained from its witnesses, relating to the subject matter that the witness testified about on petitioner's direct examination. The Public Health Law (§230(10)(c)(4) and the regulations of the Health Department (§10 N.Y.C.R.R. §51.11(d)(3)), which specifically provide for the right of cross-examination, were not to be interpreted, on remand, as a continuing bar to respondent having the opportunity to cross-examine the witnesses who already testified for petitioner. Due process requires that, once petitioner elicited testimony on direct examination of a witness, who had given petitioner a statement, petitioner must permit its

witness to be cross-examined, even if the statement would have been covered by the cloak of confidentiality had petitioner not offered the subject matter of such statement into evidence in the first place. People v. Ramistella, 306 N.Y. 379 (1954); and Canudo, Evidence Laws of New York page 62 (1990).

A. **ATTORNEY'S NOTES**

The first issue to be considered when a respondent requests petitioner to produce the prior statement of a witness is whether the requested document constitutes material covered by the principles enunciated by the courts in matters such as People v. Rosario and other cases. One such request in this matter relates to the handwritten notes of Mr. Shea as to Patients BBB, DDD, and EEE. To constitute Rosario material, the document must contain a pre-hearing statement of a witness who testifies at the hearing regarding the subject matter of the statement. We have examined these personal notes of Mr. Shea and find that, as maintained by petitioner, no witness statement is contained in those notes. These notes instead represent petitioner's work product. On these facts, we accept the administrative officer's ruling that these notes would not "remotely be considered Rosario material". Accordingly, there was no basis for respondent to compel either petitioner to turn these notes over to him or the administrative officer to issue an instruction to the hearing committee regarding their unavailability to respondent.

B. **PATIENT STATEMENTS**

At different times prior to remand, petitioner refused to provide respondent with access to the statements of Patients BBB and EEE[4]. On remand, respondent continued to seek petitioner's production of the statements of these two witnesses for petitioner. The facts surrounding these statements differ in each case.

1. **PATIENT BBB**

Prior to the remand and during the cross-examination of its first witness, Patient BBB, petitioner raised various objections to respondent inquiring about and viewing the prior statements it took from Patient BBB. When Patient BBB referred to her own papers and voluntarily handed to respondent's attorney her statement, petitioner's attorney objected and asked the administrative officer to direct respondent's attorney to return it to the witness forthwith. Petitioner's attorney based this objection on his claim that the document was protected by Public Health Law §230(11) as a complaint from Patient BBB to the Health Department. However, as petitioner knew, Patient BBB was not a complainant about this case, the complaint had been filed over two months earlier by another person, and the statement in question was given at the request of an investigator for the Health Department.

Due to petitioner's claim of confidentiality, the administrative officer serving before the remand directed that this

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[4]Although DDD was not a witness for petitioner, petitioner has provided respondent with a written statement of this patient.

statement of Patient BBB be returned to the patient before respondent's attorney completed reading it. Respondent's attorney objected and pointed out that this document was not examined fully by the administrative officer. Nevertheless, the administrative officer agreed with petitioner that the document should remain confidential. In response, respondent's attorney asked "Why is it confidential? We're at a hearing here... What are we doing here then? How can I defend my client?... I guarantee you 230(11) doesn't say that."

Respondent's attorney, over petitioner's objection, inquired about whether Patient BBB had contacted the Health Department in order to ascertain whether she was a complainant. After Patient BBB testified that it was the Health Department who had contacted her, the administrative officer foreclosed respondent's attorney from asking any further questions regarding her statements. In spite of this answer indicating that Patient BBB was not a complainant, the administrative officer sustained petitioner's objections and prohibited further questions in this regard.

Petitioner never revealed before Patient BBB completed her testimony, and respondent was prevented from ascertaining, that, in addition to the statement written by Patient BBB, petitioner's investigator had typed a document containing another statement by Patient BBB. When Patient BBB left the witness stand, respondent was not given access to this typed statement of Patient BBB and was prohibited from finishing reading the written statement.

Respondent's attorney continued to request, before remand, the

production by petitioner of "any" statements of Patient BBB and to claim that "under a whole host of cases in the Supreme Court and Court of Appeals", respondent is entitled, for the purpose of cross-examination, to the statements of the witnesses who testified against him at the hearing. Petitioner's attorney persisted in maintaining that such statements were confidential[5], that the cases cited by respondent's attorney were not applicable, and that the court had already resolved this issue against respondent. These arguments by petitioner had no basis in law.

During the original hearing, respondent's attorney issued a subpoena demanding petitioner's production of the statements of its witnesses. Also, the original administrative officer specifically told petitioner's attorney to reveal to respondent's counsel "any" statements made by Patient BBB. Before remand, petitioner chose, nevertheless, to rely on its assertion of privilege regarding this witness who was not a complainant. In view of this posture by petitioner, the administrative officer, over petitioner's objection, himself turned over to respondent, almost six months after Patient BBB left the witness stand, the written statement of

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[5]Petitioner claimed, prior to the remand, that even during cross-examination, confidentiality attached to the statements made by a noncomplainant witness while an investigation of someone else's complaint is on-going as well as to the statements made by a complainant subsequent to the filing of the complaint. The administrative officer before remand responded that petitioner is beyond the word "report" used in the statute and that, after the witness testifies, respondent should not be "denied an opportunity to examine those statements" made by the witness.

Patient BBB. At that time before remand, the typed statement of Patient BBB taken by the investigator was neither turned over to respondent nor acknowledged by petitioner to exist. Accordingly, throughout the original hearing, respondent did not obtain access to the typed statement of Patient BBB given to the investigator, Patient BBB was not made available for further cross-examination, and respondent was precluded from cross-examining Patient BBB as to the typed and written statements.

On remand, petitioner initially claimed, on July 31, 1991, that respondent's "new demand for additional statements" by Patient BBB "is untimely". Based on this position, petitioner asserted that respondent could not demand, on remand, the statement of Patient BBB contained in a typed interview. After the replacement administrative officer rejected this assertion, petitioner acknowledged on September 19, 1991 that a report of interview with Patient BBB existed. The administrative officer subsequently directed that petitioner turn over a copy of all the undisputed documents acknowledged by petitioner to exist. Thereafter, on October 15, 1991, petitioner turned over to respondent the typed statement, but refused to turn over the written statement. At that time, petitioner announced that it "will object to any cross-examination of Patient BBB".

By the time petitioner proceeded on remand, Patient BBB informed petitioner that she could not then withstand the "anxiety and emotional trauma of testimony". By letter dated December 4,

1991, petitioner informed respondent and the administrative officer that it "does not intend to call" Patient BBB as a witness. Although respondent requested that Patient BBB be produced for further cross-examination, petitioner did not subpoena its witness and did not make her available to testify on remand. Petitioner's attorney stated that, by December 1991, petitioner would not attempt to recall this witness, who had terminated her telephone conversation with him, in view of her then age, infirmity, and expressed desire not to be recalled.

As a consequence, respondent requested an instruction that the testimony of Patient BBB be disregarded on the grounds that statements by and regarding this witness, as well as the witness herself, were not produced by petitioner. The administrative officer declined to give such proposed instruction.

2. **PATIENT EEE**

Prior to the remand and at the start of his cross-examination of Patient EEE, respondent's attorney requested "the statements from the New York State Department of Health on this patient." Petitioner's attorney objected to respondent obtaining access to Patient EEE's statement and invoked his claim of confidentiality under the Public Health Law. He twice referred to the complaint of Patient EEE and to such witness being the complainant. Respondent's attorney argued that when petitioner's witness has already testified against respondent, petitioner must turnover such statement to respondent. The administrative officer ruled that "as

long as that statement that he made is the complaint", it is confidential and may not be revealed to respondent.

However, Patient EEE had given the Health Department a statement which was not the complaint. Petitioner's attorney did not reveal either that the Health Department documented the complaint by typing the oral discussion it had with Patient EEE on the telephone or that the statement written by Patient EEE was a separate document prepared thereafter at the Health Department's request. This witness for petitioner testified that he wrote his statement complaining to the Health Department and that he did not give them any additional written statements. Based on petitioner's position as to the complaint, respondent, the administrative officer, and apparently Patient EEE were unaware that petitioner had more than one document reflecting Patient EEE's statement. Instead of explaining that petitioner had one document which was the complaint taken from its oral contact with Patient EEE and that the written statement referred to by Patient EEE was not the complaint to the Health Department, petitioner's attorney declared that Patient EEE "said he had a complaint, he came down and filled it out and you can't get beyond that".

In view of the impressions created and of the objections raised by petitioner, the administrative officer foreclosed respondent from seeking to ascertain the nature and extent of the statements Patient EEE made. The administrative officer stated that he was "not going to let you (respondent) cross-examine"

Patient EEE. Accordingly, the hearing before remand ended with respondent not having been provided with access to either Patient EEE's complaint or his subsequent written statement, and not having had a fair opportunity to cross-examine Patient EEE.

On remand, petitioner asserted that respondent was not entitled to one document containing Patient EEE's statement because respondent allegedly did not timely demand said document before he "concluded cross-examination" of Patient EEE. This position was maintained even though the administrative officer before remand had sustained petitioner's objections during respondent's cross-examination and denied respondent access to Patient EEE's complaint while Patient EEE was on the witness stand. In expressing this position in its July 31, 1991 letter, petitioner turned over to respondent the written statement of Patient EEE, but did not specifically refer to the complaint from Patient EEE or produce (to respondent or the administrative officer) a copy of the document it was withholding concerning Patient EEE[6]. In fact, petitioner, in its July 31, 1991 and August 29, 1991 letters, did not then raise an argument of confidentiality regarding any statement concerning Patient EEE and relied upon its claim that respondent's demand for them was untimely. Petitioner notably had not, by the time these letters were submitted, followed the Regents' instructions to

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[6]In contrast, petitioner wrote on July 31, 1991 that Dr. K's statement concerning Patient DDD, previously denominated by Mr. Shea as a complaint, was not a complaint to the Health Department.

produce this document for the administrative officer's in camera inspection.

After the administrative officer rejected petitioner's argument regarding the timeliness of respondent's demand for the statements of Patient EEE, petitioner, on September 19, 1991, asserted that the disputed document concerning Patient EEE was privileged and provided the administrative officer with the document. In his supporting affidavit dated November 19, 1991, petitioner's attorney referred to Mr. Shea's identification of Patient EEE as a complainant and to the disputed document as an initial complaint received by the Health Department.

Respondent sought an instruction from the administrative officer that the hearing committee must disregard the testimony of Patient EEE because of petitioner's refusal to turn over this document to him for the cross-examination of that witness. Petitioner opposed this instruction and again asserted its claim that respondent's request for production of this document was untimely. Petitioner also argued that, even after a complainant has testified against a respondent, the administrative officer is prohibited by 10 N.Y.C.R.R. §51.11(d)(8) from ordering the production of a complaint and from instructing the hearing committee to disregard testimony based on the failure to produce a complaint.

On December 11, 1991, the administrative officer ruled that the document in question concerning Patient EEE was a complaint,

hence, it would not be turned over to respondent under the constraint of "10 NYCRR 51.11(8)." He concluded that, notwithstanding the Regents' decision in this matter, this Health Department regulation removed the issue he was ordered to address from being considered and prohibited him from ordering petitioner to turn over to respondent, during cross-examination, the requested documents. In this ruling, the administrative officer reserved decision on respondent's motion for instructions. On February 4, 1992, the administrative officer declined to issue any sanctions or curative instructions regarding petitioner's withholding from respondent of these documents during cross-examination. This ruling was based upon the administrative officer's post-remand view that the Board of Regents lacked authority to render its decision and that "the prosecution is acting according to an extant regulation".

Petitioner chose, based on its claim of privilege, to deny respondent access, during cross-examination, to statements by Patients BBB and EEE which related to the subject matter of the testimony petitioner elicited from those witnesses in respondent's presence. Respondent was thus prevented from utilizing these prior statements to impeach and confront the witnesses. By his rulings, the administrative officer declined to either provide respondent with any relief or the hearing committee with any instructions relating to these statements.

In our unanimous opinion, the administrative officer's rulings

concerning the statements of Patients EEE and BBB were erroneous for several reasons.

The Regents' directions for the remand were clear and were ordered to be followed. At one point on remand, the administrative officer indicated that he intended to "carry out the clear intent of the Regents' determination". Yet, by ruling that he was prohibited by Health Department regulation from carrying out the Regents' decision and from considering the merits of respondent's motions and other legal objections regarding the statements of Patients BBB and EEE, the administrative officer failed to comply with the order issued upon the Regents' decision.

The administrative officer was responsible under the order issued on July 14, 1989 and under Public Health Law §230(10)(e) for ruling on "all motions, procedures and other legal objections." By concluding that he was "unable to enforce" the order issued upon the Regents' determination regarding witness complaints, the administrative officer failed to exercise his responsibilities and to resolve the merits of this dispute between respondent and the Health Department. We note that the administrative officer expressed his "personal agreement with the Regents' decision regarding the waiver of confidentiality, for the purpose of cross-examination, once a witness testified on direct examination as to the subject matter of the complaint. November 20, 1991 transcript page 85.

In remanding this matter, after having reviewed the original

hearing proceedings and the arguments of the parties, the Board of Regents framed the scope of the remand and directed the administrative officer to follow certain instructions[7]. The administrative officer was required to inspect the witness statements petitioner refused to provide respondent, find whether the statements related to the subject matter the witnesses had testified about on petitioner's direct examination, and if he found such a relationship existed, assure that respondent was not unfairly deprived of the opportunity to use, in his defense at the hearing, those portions of the statements which petitioner was obliged to produce for respondent. However, the administrative officer instead considered whether he was prohibited by Health Department regulation from complying with these directions. After the Regents had rendered its decision that respondent may not be denied access to certain kinds of statements, no issue was submitted to the administrative officer on remand, or remained to be resolved in this administrative proceeding, as to the subject of the law governing access to witness statements. Therefore, the administrative officer erroneously acted beyond the scope of the remand proceedings when he determined that 10 N.Y.C.R.R.

[7]The proceedings on remand were also to consist of other steps. Upon respondent being afforded the opportunity to complete his cross-examination of petitioner's witnesses, the recommendations of the hearing committee and Commissioner of Health, along with this report, were to be forwarded to the Regents for final determination. Thus, all these steps were to be reviewed by the Board of Regents in determining this matter after a full and fair record was developed.

§51.11(d)(8) prohibited him from exercising his authority on remand and that the requirements established by the Regents for his conduct of the remand were unenforceable.

The Health Department did not appeal the 1989 determination and order. Respondent contended that since an appeal had not been taken, the Health Department was "bound", in this matter, to abide by the Regents' decision. He argued that the Health Department had the opportunity to have the matter reviewed in court before proceedings were conducted on remand, but instead chose not to take such appeal[8]. The administrative officer should have decided the issues in accordance with the unappealed directions of the Regents and his statutory responsibilities. We agree with respondent that the unappealed decision of the Regents was binding and could not be "ignored" or overridden by the Health Department.

We reject the administrative officer's reasoning that the Health Department's regulation controls the decision-making function of the Board of Regents. The regulations of the Health Department are not promulgated by or binding on the Board of Regents. The administrative officer's reasoning was inconsistent

[8]Petitioner's claim (see, Mr. Roe's August 29, 1991 letter) that no appeal could have been taken rings hollow, considering the various appeals which were taken from a similar determination in another case relying on the decision remanding this matter. In Axelrod v. Sobol, 78 N.Y.2d 112 (1991), the Commissioner of Health not only immediately appealed the question of the authority of the Regents' decision remanding the matter so that the hearing could be reopened after the complaints had been made available to respondent, but asserted the position and obtained a decision from the Court of Appeals that he had standing to maintain such appeal.

on this point. On one hand, he concluded that a separate agency cannot bind another agency and, on the other hand, he concluded that the agency prosecuting this matter (Health Department) could regulate the decision rendered by the agency ultimately adjudicating this matter (Board of Regents). One party in this quasi-judicial proceeding cannot resolve a contested issue in favor of itself.

The administrative officer further erred, on remand, by relying on a regulation which was not in existence at any time relevant to this matter. Current 10 N.Y.C.R.R. §51.11(d)(8) had not yet been promulgated when this proceeding was commenced in 1983. The administrative officer's rulings did not consider whether 10 N.Y.C.R.R. §51.11(d)(8) was in effect for this proceeding or whether it might have been effective retroactively. Moreover, we would not give retroactive effect to a regulation which impacts on the substantial right of cross-examination. In any event, the relied upon regulation was not in effect until long after the statements in question were given to petitioner and the two witnesses who gave those statements were cross-examined. The regulation, filed after respondent had requested petitioner to produce the statements of its witnesses, was not even in effect when petitioner rested its case before the remand or when the last witness called by both parties was heard by the hearing committee.

Furthermore, the regulation invoked by the administrative officer, which does not even mention cross-examination, should not be read to contravene statutory authority or to deprive a party of due process. The view espoused by petitioner and the

administrative officer contravenes Public Health Law §§230(10)(c) and 230(10)(e) and State Administrative Procedure Act §306(3), which specifically provide that respondent is entitled to cross-examine witnesses. We agree with respondent that the judicial and Regents' precedents regarding due process of law and cross-examination govern this proceeding and the Regents may not be prevented from applying such "law of our land".

Petitioner's contention that the confidentiality provided by Public Health Law §230(11)(a) must always bar a respondent from having access at the hearing to the complaint, even when the complainant has already testified about the allegations stated in the complaint, is misplaced[9]. Those courts which have considered this statute in this hearing context have held, on the merits, that, in appropriate instances when the complainants have testified, the confidentiality of these reports must yield to respondent's constitutional right to due process. McBarnette v. Sobol, 190 A.D.2d 229 (3rd Dept. 1993) (affirming the decision of

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[9]Confidentiality statutes are strictly construed because they obstruct the search for the truth. See, e.g., Priest v. Hennessey, 51 N.Y.2d 62 (1980). Public Health Law §230(11)(a) specifically authorized the use of reports of professional misconduct "to develop further information" and does not prohibit the waiver of this confidentiality. This statute, which does not specifically refer to cross-examination, must also be read in harmony with other statutes, within the same section of the Public Health Law and elsewhere, which assured the opportunity for cross-examination and with Public Health Law §230(11)(b). In our opinion, the statute was not intended by the Legislature to be used as a sword to prohibit impeachment of petitioner's complainant-witness at a disciplinary hearing once said complainant has testified. If petitioner seeks to prevail through the evidence it adduces from its own witness, it should provide respondent with the opportunity to seek to obtain favorable testimony from the witness on cross-examination.

Supreme Court, Albany County, July 3, 1992, that the licensee was entitled to obtain and use the documents in his cross-examination). In Matter of the Application in State Board for Professional Medical Conduct Case No. A85-01-06, Albany County, Supreme Court, October 27, 1989 rev'd on other grounds, Anonymous v. State Department of Health, 173 A.D.2d 988 (3rd Dept. 1991), the Court held, in the limited circumstance presented, that respondent must be accorded the opportunity to cross-examine the complainants upon the production of the Health Department's reports regarding these witnesses. These controlling principles were established before the instant remand proceeded: in physician discipline cases by the Regents in Matter of Dunlop, Calendar No. 5560; in administrative disciplinary cases by the courts (see, the cases cited by the Regents Review Committee before remand, including Doe v. Axelrod, supra); and in a legion of other cases by the courts applying People v. Rosario, supra.[10]

The right to the fair opportunity to confront and cross-

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[10]The courts have long held that, in disciplinary proceedings and other matters where due process must be provided, the confidentiality which is otherwise accorded must yield, in these limited circumstances, to the need for the decision-making process to ensure justice, and to the fundamental right of the defense to the opportunity to adequately cross-examine the witness. Davis v. Alaska, supra; Jencks v. United States, supra; Board of Education of the Island Trees Union Free School District v. Butcher, 61 A.D.2d 1011 (2nd Dept. 1978); Camacho v. Iafrate, 66 A.D.2d 799 (2nd Dept. 1978)(patient records); Day v. Board of Regents of the University of the State of New York, 266 A.D. 888 (3rd Dept. 1943)(investigator's report); People v. Price, 100 Misc.2d 372 (Bronx County, Supreme Court, 1979)(see, cases cited therein); and People v. Campbell, 186 A.D.2d 212 (2nd Dept. 1992)(the complainant's patient hospital records in the prosecution's possession, which contained the complainant's statements relating to the subject matter of her testimony, were required to be turned over to the defense).

examine witnesses has long been recognized in administrative disciplinary proceedings. Friedel v. Board of Regents of the University of the State of New York, 296 N.Y. 347 (1947); Waddell v. New York State Racing and Wagering Board, 97 A.D.2d 955 (4th Dept. 1983); and Epstein v. Board of Regents of the University of the State of New York, 267 A.D. 27 (3rd Dept. 1943). Once petitioner obtains the testimony of a witness at a hearing, the licensee is to be accorded his basic constitutional and statutory right of cross-examining the adverse witness. Determinations in administrative disciplinary proceedings have been annulled where respondents were denied cross-examination concerning certain prior statements of the state's witness. Inner Circle Restaurant, Inc. v. New York State Liquor Authority, 30 N.Y.2d 541 (1972); Garabendian v. New York State Liquor Authority, 33 A.D.2d 980 (4th Dept. 1970); Waddell, supra; and Rothenberg v. Board of Regents of University of State of New York, 267 A.D. 24 (3rd Dept. 1943).

In this matter, petitioner employed various tactics for its own advantage in keeping non-confidential documents cloaked in claims of confidentiality and in objecting to respondent's inquiring about and obtaining for cross-examination the statements of its witnesses Patients BBB and EEE. It thus obtained these witness' statements, called witnesses to testify on its behalf (thereby voluntarily placing their credibility in question), and asked them questions about the subject matter of their statements, and then denied respondent the same opportunity for meaningful

cross-examination.[11] Since the "state has no interest in interposing any obstacle to the disclosure of the facts" and since due process and "a right sense of justice entitles the defense to examine a witness' prior statement", the state should not improperly deny the defense with requested witness statements in its possession or control. People v. Rosario, 9 N.Y.2d 286 (1961); Jencks v. United States, 353 U.S. 657 (1957); Davis v. Alaska, 415 U.S. 308 (1973); and Hecht v. Monaghan, 307 N.Y. 461 (1954). Subject to appropriate rulings, the defense should be given the benefit of this category of "information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence". People v. Rosario, supra.

The rulings by the administrative officer did not consider or remedy the prejudice to respondent resulting from the absence of an opportunity for adequate cross-examination. Patient BBB was not produced for cross-examination on remand and should have been produced because her statement had first been turned over to respondent on remand and her other statement had been returned to

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[11]Even where the administrative officer makes an in camera inspection of the disputed documents and does not require that they be made accessible to the defense, petitioner is not relieved of its obligations as to documents which it improperly failed to deliver to respondent. Cf., People v. Rothman, 69 N.Y.2d 767 (1987) aff'g, 117 A.D.2d 535 (1st Dept. 1986); People v. Campbell, 186 A.D.2d 212 (2nd Dept. 1992); Fenimore Circle Corp v. State Liquor Authority, 27 N.Y.2d 716 (1970); and Garabendian v. New York State Liquor Authority, 33 A.D.2d 980 (4th Dept. 1970). The administrative officer's rulings herein are clearly subject to further review and petitioner does not seek a remand in the event of a reversal of these rulings.

her before the remand as a result of petitioner's motion. Respondent was prejudiced by Patient BBB not being produced to testify when the proceeding resumed on remand. One statement of Patient EEE was never turned over to respondent. The purpose of the document production sought by respondent during the hearing was "not to disseminate any information regarding complainants, but rather to obtain information solely within the confines of the hearing." Doe v. Axelrod, 123 A.D.2d 21 (1st Dept. 1986) rev'd on other grounds, 71 N.Y.2d 484 (1988)[12]. Accordingly, the administrative officer also erred by ruling that this regulation prohibited him "from ordering dissemination of complaints".

We unanimously conclude that, under all the circumstances, including petitioner's course of conduct, respondent was improperly denied meaningful cross-examination of Patients BBB and EEE, and thus, the testimony of these two witnesses must be precluded. Therefore, we have disregarded and not considered the testimony of Patients BBB and EEE.

The ruling herein agreeing with respondent that the testimony of Patients BBB and EEE must be precluded does not necessarily mean that the cases involving these patients must be dismissed for this

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[12]The Appellate Division in Doe wrote that the licensee wanted to know if the complainant, having already testified, had made a more timely complaint with regard to the allegations. According to this court, there "is no attempt to dampen the incentive for a complainant to come forward." In this "confidential proceeding", the complaining witness has "waived so much of the veil of confidentiality, within the context of the hearing," as concerns prior complaints about respondent.

reason (see, page 52-58 and 60-63, infra). Although petitioner may not rely on evidence which has been precluded, it has submitted other evidence for our consideration. Should the remaining evidence for consideration be sufficient, petitioner may still meet its burden of proof. Gleason v. New York State Racing & Wagering Board, 98 A.D.2d 964 (4th Dept. 1983); and Day, supra; see also, Fenimore Circle Corp. v. State Liquor Authority, 27 N.Y.2d 716 (1970).

C. **DR. K's COMPLAINT**

Petitioner did not provide respondent with the complaint of Dr. K in the case of Patient BBB. The circumstances surrounding this complaint are significantly different from the statements of Patients BBB and EEE.

Petitioner has consistently identified the document in question as the complaint of Dr. K. Also, petitioner produced Dr. K's records as to Patient BBB and a medical summary signed by Dr. K. Respondent had these documents when he extensively cross-examined Dr. K before the remand. On remand, petitioner provided the administrative officer with the complaint of Dr. K and prepared an affidavit indicating that such document represented a complaint.

Prior to the date the hearing committee was scheduled to reconvene on remand, respondent's attorney was sent, by Dr. K's attorney, a copy of Dr. K's complaint to the Health Department. Petitioner's attorney then claimed that respondent already had possession of all previous statements made by Dr. K to the Health

Department regarding Patient BBB. Respondent's attorney, without admitting or denying his receipt of the document sent to him by Dr. K's attorney, elected, the day before the hearing committee was to reconvene, to forego cross-examining Dr. K. At the time of this election, respondent was aware of the adverse findings and determination of the hearing committee before remand and of the statements of Patient BBB and EEE which he had been given. Although the Board of Regents had ordered that respondent, on remand, be given the opportunity he was previously denied to cross-examine Dr. K both as an expert and regarding his statements to the Health Department, respondent's attorney stated that further cross-examination of Dr. K would be "superfluous". In so doing, respondent chose not to inquire further of Dr. K and relied instead on his claim that expert testimony was lacking.

In our unanimous opinion, respondent has waived any claim regarding petitioner's failure to produce Dr. K's complaint. He deliberately did not pursue any further cross-examination of Dr. K, even though he was apparently aware of the contents of the complaint. Having been afforded the opportunity to cross-examine, respondent may not now raise this claim about his not having had such opportunity. Moreover, in view of the position upon which he relies, respondent did not seek to further cross-examine Dr. K.

Aside from any waiver resulting from respondent's conduct or position, we do not find that, under these circumstances, respondent's rights were violated regarding his cross-examination

of Dr. K. Respondent did not seek to use the complaint of Dr. K to cross-examine him at the hearing before the hearing committee on remand and, in relying on the claimed lack of the sufficiency of petitioner's evidence, did not seek to impeach Dr. K's testimony. Respondent has obtained Dr. K's statements and an adequate opportunity to cross-examine Dr. K. Even if we were to find that respondent did not waive this claim and that petitioner inappropriately failed to produce Dr. K's complaint, we would find that, under the circumstances, respondent was not harmed "in any appreciable way". Denis v. Board of Regents of the University of State New York, 596 N.Y.S.2d 914 (3rd Dept. 1993). Accordingly, respondent has failed to demonstrate that the administrative officer erred in refusing to give a curative instruction or in declining to preclude Dr. K's testimony.

D. **UNAVAILABLE NOTES**

During the hearing before remand, petitioner's then attorney, Mr. Shea, on several occasions and at different sessions, represented on the record that he was in possession of various notes taken by the Health Department after discussions with Drs. K, Y, and A. Mr. Shea specifically referred to the existence of these notes which he said were not the statements of these physician witnesses. Before remand, petitioner confirmed its hearing position, in one memorandum to the administrative officer and in another to the Regents, that it had properly refused to produce the existing notes. In all arguments and memoranda preceding the

Regents' remand decision and for a substantial period post-remand, petitioner did not disavow or withdraw these representations which were against its interest.

When this case was originally decided in 1989, there was no question that the notes in question existed since 1984. However, on July 31, 1991, petitioner's current attorney, Mr. Roe, who was not present during the proceeding before remand, asserted that the notes sought by respondent never existed. He stated on the record that he made a diligent search of the Park files and did not, in 1991, find such notes. Respondent claimed that the representations of Mr. Shea constituted admissions binding on petitioner and that, by this time, when Mr. Shea was unavailable to shed any light on this issue, petitioner should be estopped from raising its current claim that the notes never existed.

The administrative officer terminated the hearing before him on remand without giving respondent the opportunity, he had said he would provide, to call any witnesses for respondent. At the close of petitioner's presentation, he found that "Mr. Alfes never wrote the documents referred to by Mr. Shea". The administrative officer also found that, other than Mr. Shea, Mr. Alfes was the only other "actual party" to these documents. In fact, Mr. Alfes was not the only Health Department employee who had a role in the discussions with the physician witnesses petitioner presented at the hearing. Therefore, the administrative officer did not determine whether Mr. Shea, Ms. Pulera (Investigator), or anyone else actually had

written the notes in question. His determination was limited to Mr. Alfes and was based upon his finding that Mr. Alfes, in 1991, had no recollection of certain information, including Mr. Shea having represented that Mr. Alfes took notes regarding his conversations with Dr. Y and Dr. K. In this ruling, the administrative officer stated that "the statements in controversy" never existed.

The administrative officer denied the motion of respondent to dismiss the charges on the ground that he was deprived of access to the notes which Mr. Shea indicated were in petitioner's possession. The administrative officer also denied respondent's requests for the imposition of the sanction that the testimony and records of Drs. K, Y, and A be disregarded and not considered on the same ground asserted in respondent's motion to dismiss.

We reject the administrative officer's findings, determination, and statement regarding the statements in controversy having never existed. Petitioner has not shown that the representations its former counsel made at various points before remand, as to the existence of the notes, were mistaken or untrue. The fact that the notes could not be found or recalled years later does not prove that they never existed in the first place. Due to the period of time petitioner took to proceed on remand and the condition in which petitioner's current attorney found the file in this matter, petitioner could not identify the documents which Mr. Shea viewed and believed to be the notes in

question and could not explain the reason why Mr. Shea made his representations of record. In our opinion, the evidence produced by petitioner on remand does not adequately or fairly support this aspect of the ruling by the administrative officer.

Nevertheless, we conclude that error was not committed by the denial of respondent's motion to dismiss and requests for sanctions regarding the non-production of the notes Mr. Shea possessed during the original hearing. We disagree with respondent's assertion that "the only appropriate remedy here is for dismissal of the charges." Petitioner is correct that, even if the notes existed at the time of the original hearing, a dismissal of the charges would not be warranted. Where the prosecution has totally failed to turn over available Rosario material in its possession, which as will be shown has not been proven herein regarding the notes, the remedy for such "per se" Rosario violation is a new hearing rather than a dismissal of the charges. See, People v. Ranghelle, 69 N.Y.2d 56 (1986). However, respondent does not now seek a new hearing in this matter.

Moreover, respondent has not established that the notes in question contained Rosario material. Mr. Shea did not represent, and respondent has not proven, either that the personal notes contained the witnesses' statements or that, if such statements were recorded, they related to the subject matter of the witnesses' direct testimony. Rather, Mr. Shea described the notes as not being the witnesses' statements. We note that Mr. Shea did not

clearly indicate that the notes related to both Dr. K and Dr. Y as to both Patients BBB and DDD. To the extent Mr. Shea referred to notes concerning Drs. K, Y, and A, the record does not show that the notes were taken contemporaneous with the discussions with the witnesses and were recordings of the witnesses' statements. The notes could have instead reflected the writer's impressions, strategy, or synopsis regarding the case and/or a mere intra-agency communication showing that a conversation was held on a particular date, the witness was informed of the scheduling of his testimony, and the matter was prepared for the hearing[13]. Therefore, respondent has not established that any of the notes represent Rosario material which must have been produced by petitioner for cross-examination.

Even if the notes existed and contained witness statements regarding each of the cases of Patients BBB, DDD, and EEE, respondent would still not obtain the relief he seeks. We agree with the contention of petitioner's current attorney that there has

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[13]A document merely reflecting the prosecution's strategy and not containing witness statements is not Rosario material. People v. Jenkins, 168 A.D.2d 315 (1st Dept. 1990); and People v. Lebron, 184 A.D.2d 784 (2nd Dept. 1992). A mere synopsis written after all interviews were conducted which does not attribute information to any particular individual is also not Rosario material. People v. Mills, 142 A.D.2d 653 (2nd Dept. 1988). Similarly, a prosecutor's notes which consisted of catch words designed to jog the prosecutor's memory and drafts of questions intended to be asked the witness were not Rosario material, as they did not capsulize witnesses' responses to questions relating directly to material issues raised at the trial. People v. Roberts, 178 A.D.2d 622 (2nd Dept. 1991).

been no showing that the prior attorney made any knowing or intentional misrepresentations as to these notes or that any deliberate conduct occurred which has prevented them from being located. Had any deception been intended as to these notes, Mr. Shea would not likely have represented against his interest that the notes existed; or have placed himself in the difficult position, should he be required to produce the notes, of having to admit that he did not possess them.

The unique circumstances of the unexpected and sudden death of two prosecuting attorneys who handled the various Park cases and the disability of a third prosecuting attorney affected petitioner's ability to account for the complete file in this matter. These events further suggest that the unavailability, on remand, of the documents referred to by Mr. Shea years earlier was not caused by intentional conduct by petitioner. We agree with the administrative officer's assessment that there is no reason to believe that Mr. Roe "acted improperly or in bad faith". Moreover, no evidence indicates that the notes became unavailable in order to frustrate respondent's right to cross-examination. People v. Vasquez, 141 A.D.2d 880 (2nd Dept. 1988); and People v. Jones, 130 A.D.2d 943 (4th Dept. 1987).

After the remand and before his accident, Mr. Shea requested that a search be made to locate the notes. Mr. Roe also undertook his own search and produced for respondent's review all the documents he found, including Mr. Alfes' memorandum of a

conversation with Dr. K concerning Patient DDD. Respondent's attorney stated that he would not suggest that Mr. Roe did not give Mr. Alfes what Mr. Roe thought was the file in this matter or that Mr. Roe made any misrepresentation to Mr. Alfes. Accordingly, the record demonstrates that inasmuch as petitioner made a good faith effort to search for these notes and could not now produce any documents it was unable to find, petitioner has not, on remand, refused to turn over available notes to respondent.

The most plausible theory respondent could have advanced is that the notes were, by July 31, 1991, lost or destroyed. Under such theory, which differs from respondent's claim that the notes might continue to exist and petitioner's claim on remand that the notes never existed, the Court of Appeals has "rejected the suggestion that the only alternative is dismissal of the charges". People v. Banch, 80 N.Y.2d 610 (1992). Dismissal of the charges is a drastic sanction which "should not be invoked where less severe measures can rectify the harm done by the loss" of the material. People v. Kelly, 62 N.Y.2d 516 (1984); and People v. Haupt, 71 N.Y.2d 929 (1988).

An exception to the Rosario rule exists when Rosario material cannot be produced because it has been lost or destroyed. People v. Martinez, 71 N.Y.2d 937 (1988). In instances covered by this exception, a sanction is not required to be imposed where respondent has not been prejudiced, even though the non-production of the material through inadvertence is not excused by the loss or

destruction of the material. In the event such prejudice is demonstrated, there is an "overriding need to eliminate prejudice" to respondent (Martinez, supra) and, where there is also a failure by the prosecution to preserve Rosario material, an appropriate sanction must be imposed. People v. Wallace, 76 N.Y.2d 953 (1990).

When a document is unavailable to be reviewed, its contents or its relationship to the defense cannot be ascertained with precision. Therefore, we have considered the type of document that was lost, the type of information that it was likely to contain, and its relationship to the issues to be determined. People v. Nelson, 188 A.D.2d 67 (1st Dept. 1993). The type of document involved here was not written and signed by the physician witnesses whose testimony was the subject of respondent's requests. Assuming that these notes contained the statements of each of these physicians, such documents would be subject to the understanding, interpretation, and ability of the investigator who wrote it. It is noted that Mr. Alfes could not be expected to testify in verifying or clarifying a document he does not remember preparing. Moreover, if available, such notes prepared by the Health Department would probably be given less weight than the statements (summaries) prepared by the physicians themselves, especially since we do not have other information to assure us that any references in the notes were not preliminary, out of context, or limited in purpose or scope.

The relationship of the document to the issues to be

determined further reveals that respondent was not prejudiced in his defense by the non-production of these notes. If respondent's claim is correct that the hearing record is insufficient to establish the elements of the alleged professional misconduct, respondent would not, and at the December 17, 1991 session did not, rely on the separate question of whose testimony is entitled to be accorded greater weight. The investigator's or prosecuting attorney's notes would not likely affect our determination as to the sufficiency of the hearing record. Further, respondent opted not to cross-examine these witnesses further because he believed it would have been "superfluous" to do so. He also objected, at the Rosario hearing, to testimony regarding the substance of any conversations with Drs. K and A. It is noted that respondent had access to the physicians' records and signed "summaries".

The totality of all these considerations lead us to the view that the notes in question were either not Rosario material or were of little or no value to respondent. After considering "the proof available at trial, the significance of the missing evidence and whether the loss was intentional or inadvertent" (People v. Haupt, supra) as well as all the foregoing, we find that respondent was not prejudiced by petitioner's non-production of the notes as to the discussions with its experts, Drs. K, Y, and A.

In any event, we have considered the comments of respondent's attorney regarding these notes not having been produced for respondent. Petitioner had a duty to preserve requested documents.

However, petitioner's attorney, believing that he was justified in withholding the notes, did not produce these requested documents while they were in his possession before the remand. Also, the administrative officer did not then receive and include the notes in the record for further review. We recommend that petitioner be sanctioned for failing to preserve and produce the notes previously declared by Mr. Shea to be in existence. Consequently, in the event a penalty is to be assessed upon respondent, we shall consider these failures by petitioner in prosecuting this matter to be a circumstance in mitigation of penalty. We note that the determination of what sanction is appropriate to be imposed is committed to the "sound discretion" of the decision-maker. Cf. People v. Martinez, supra. Assuming arguendo that, in disagreement with this opinion, it were to be found that respondent was prejudiced by the non-production of these notes, the sanction we have imposed would adequately remedy that claimed prejudice.

III. DEFINITION OF PROFESSIONAL MISCONDUCT

A. STANDARDS OF PROOF

The hearing committee on remand indicated, on page 4 of its report, that to establish fraud petitioner needed to have proven, by substantial evidence, that respondent intentionally deceived his patients. It did not otherwise state the standard of proof it applied. Respondent contends that petitioner should have been required to prove its case by the higher standard of preponderance of the evidence.

Before the remand, the hearing committee applied the preponderance of the evidence standard. On remand, the administrative officer instructed the hearing committee that to sustain the charges as to Patients DDD, petitioner must prove them by a preponderance of the evidence. We have not been shown that petitioner raised any objection to this instruction. Both parties thus understood that the appropriate standard of proof in this matter was a preponderance of the evidence. Accordingly, we conclude that, during the remand proceedings initiated in 1991, petitioner should have been held to the preponderance of the evidence standard it claimed before remand to have met.

B. **GROSS NEGLIGENCE AS TO PATIENT BBB**

In our unanimous opinion, respondent's scheduling of cataract removal surgery with intra-ocular lens implant for Patient BBB on both of her eyes, when respondent should have known that such surgery was not medically indicated, constitutes gross negligence. We conclude that respondent is guilty of the third specification to the extent of Patient BBB and we reject respondent's third affirmative defense insofar as it relates to Patient BBB.

As shown in our findings of fact and in the portions of the hearing committee report we accept, the record demonstrates that respondent's negligent conduct was "egregious" or "conspicuously bad". Rho v. Ambach, 74 N.Y.2d 318 (1989); Loffredo v. Sobol, 600 N.Y.S.2d 507 (3rd Dept. 1993); Gandianco v. Sobol, 171 A.D.2d 965 (3rd Dept. 1991); and Spero v. Board of Regents of University of

State of New York, 158 A.D.2d 763 (3rd Dept. 1990).

Respondent acknowledged that the medical benefit to Patient BBB of having cataract extraction combined with intra-ocular lens implant in the left eye "would be nil" and that there was no medical indication for this surgery. Although respondent disputes that this surgery was scheduled for Patient BBB's left eye, the consents signed by Patient BBB and the chart maintained by respondent demonstrate that respondent scheduled surgery for Patient BBB's left eye. Moreover, the patient's statements to Drs. K and Y, and the reference by respondent to the fee of $5,100, which reflects the charge of $2550 for each surgery on each eye, also support the conclusion that surgery on Patient BBB's left eye was scheduled by respondent. Respondent's scheduling slip for both the left eye and the right eye surgeries was completed (Exhibit 11) and such non-indicated surgeries remained scheduled until cancelled by the patient.

With respect to the surgery respondent scheduled for Patient BBB's right eye, the hearing committee wrote that "[C]learly, as well, surgery to the right eye was also not medically indicated since this eye had an irreparable macular hole." Hearing committee report page 9. We agree. In view of the insignificant or mild nuclear sclerosis in Patient BBB's right eye and the "serious risk" posed to Patient BBB, respondent, in scheduling Patient BBB for cataract extraction with intra-ocular lens implant, "demonstrated an egregious deviation from accepted standards of care and

diligence." Hearing Committee report page 14.

We disagree with respondent's contention that insufficient expert testimony supports the conclusion that respondent is guilty of gross negligence as to Patient BBB. In accordance with the administrative officer's proper instruction, the hearing committee was required to assess whether petitioner had proven that respondent deviated from standards of ophthalmological practice. Drs. K and Y testified about the standards accepted for performing cataract surgery and the consensus in the ophthalmological community against doing the surgeries under these circumstances. They characterized respondent's recommendation of surgery as being incorrect and testified that, while there was essentially no benefit to performing the recommended surgeries, a substantial risk existed from such surgeries. Petitioner has adequately established that when respondent scheduled cataract surgeries for Patient BBB which were not medically indicated, he deviated from the standards accepted in the profession by qualified, competent ophthalmologists.

Our conclusion as to respondent's gross negligence in the case of Patient BBB is not based on the hearing committee's definition of the term "medically indicated". See, hearing committee report page 8. Regardless of the reasonableness of such definition developed by the hearing committee after the record was closed, we have considered only the evidence adduced by both parties. Such evidence, showing that the surgery scheduled by respondent was not

medically indicated, includes respondent's agreement that there was no indication for the left eye surgery and Dr. Y's specific testimony that the surgery on either the left or the right eye of Patient BBB was not indicated. Dr. K's testimony also showed that a reasonably prudent ophthalmologist would not have scheduled either surgery.

In arriving at our decision, we have considered the evidence of the anterior segment slides and photographs made by respondent and the testimony of respondent's experts based upon those slides and photographs. We do not accept the hearing committee's conclusion that this evidence ought not be considered. The record does not support its view that the evidence lacks independent corroboration and was produced improperly by respondent during the hearing after petitioner's witnesses could be examined. The Regents had specifically directed that, on remand, the hearing committee was to consider such evidence and to address the weight it should be given. Nevertheless, we agree with the hearing committee's alternative conclusion that such evidence, when considered, is not dispositive of the issues before us.

Respondent contends that the anterior segment slides and photographs taken by respondent documented the existence of the cataracts. However, respondent's expert, Dr. B, testified that "the mere presence of a cataract does not dictate surgical removal". Petitioner's witnesses testified convincingly that Patient BBB had mild or insignificant nuclear sclerosis, as part of

the aging process, and that its presence did not mean that cataract surgery was medically indicated. Respondent's slides and photographs do not demonstrate that Patient BBB had surgically operable moderately severe or severe nuclear sclerosis. On the contrary, this evidence was shown by respondent's witnesses to have had a limited field of depth and to have been limited in several other respects. It did not, among other things, provide information regarding the degree of density of an opacity and did not provide a basis for determining whether a cataract significantly affected vision. Accordingly, this evidence had limited utility and was not dispositive on the issue of the indication for the surgeries in question. The record as a whole, including such evidence, proves that respondent is guilty, by a preponderance of the evidence, of gross negligence as to Patient BBB.

We also have considered respondent's claims that petitioner's witnesses were biased against him. The mere facts that a physician filed a complaint against another physician or maintained a consistent opinion regarding the appropriateness of professional practices do not, by themselves, demonstrate any bias. In our opinion, the only motive of the physicians who testified for petitioner was the appropriate concern for the well-being of the patients involved. It is admirable that they came forward to aid the determination of the merits of the charges.

We agree with petitioner that respondent was not unfairly

restricted from exploring possible bias of the witnesses for petitioner. Proper questions geared to attempting to show the bias of witnesses were allowed. Respondent's disallowed questions were improper (see, petitioner's response pages 16-17), not appropriately raised at the administrative level, or were denied within the discretion of the administrative officer. We note that the affirmative defenses based on selective prosecution, discriminatory enforcement, or deprivation of the equal protection of the laws are not within the province of the agency to determine. DiMaggio v. Brown, 19 N.Y.2d 283 (1967); Bell v. New York State Liquor Authority, 48 A.D.2d 83 (3rd Dept. 1975); and Cannon v. Urlacher, 155 A.D.2d 906 (4th Dept. 1989).

C. **GROSS INCOMPETENCE AS TO PATIENT BBB**

In our unanimous opinion, petitioner has proven, by a preponderance of the evidence, that respondent is guilty of gross incompetence as to Patient BBB.

As previously shown, respondent should have known that Patient BBB would not benefit from the surgery he scheduled. A competent ophthalmologist would not have recommended cataract surgery on Patient BBB's right eye because her decreased visual acuity in that eye could not be improved with lenses. The hole in the macular area of the retina would have continued after surgery to affect her visual acuity. Similarly, a competent ophthalmologist would not have recommended cataract surgery on Patient BBB's left eye because her visual acuity in that eye was already 20/20 with correction.

Contrary to respondent's belief that surgery could have improved Patient BBB's vision in her right eye, the surgery respondent scheduled was clearly not medically indicated and it presented unacceptable risks to the patient. Respondent's knowledge and skills were grossly inadequate in scheduling surgery for Patient BBB.

We have found an egregious deviation by respondent in the case of Patient BBB from the standard of competence expected of a licensed physician in New York. In sustaining the charge of gross incompetence as to Patient BBB, we disagree with the hearing committee's conclusion that respondent had actual knowledge that the surgery he scheduled was not medically indicated. This inconsistent conclusion by the hearing committee cannot be accepted.

D. **FRAUD AS TO PATIENT BBB**

Fraud pursuant to Education Law §6509(2) is the intentional misrepresentation or concealment of a known fact. Brestin v. Commissioner of Education, 116 A.D.2d 357 (3rd Dept. 1986); and Amarnick v. Sobol, 173 A.D.2d 914 (3rd Dept. 1991). Inasmuch as respondent did not know, as he should have known, that the surgery he scheduled for patient BBB was not medically indicated, the charge of fraud has not been established. The hearing committee's conclusion that respondent committed fraud was based on the lower standard of proof of substantial evidence, Patient BBB's now precluded testimony, and considerations of other patient cases and

conduct beyond the charged scheduling of surgery in the case of Patient BBB. In our unanimous opinion, petitioner has not demonstrated that there is sufficient proof of each of the elements of fraud. As petitioner acknowledged in the response it submitted to us, respondent cannot be found guilty of fraud on the mere ground that he should have known that surgery was not medically indicated.

E. PATIENT DDD

The gravamen of the charge concerning Patient DDD is that respondent advised said patient that cataract surgery in the right eye was required. This charge brought and adjudicated differed from the charge made in the other patient cases that the surgery was not indicated. In our opinion, petitioner has not proven that the charged advice actually was given by respondent to Patient DDD.

Patient DDD did not testify at the hearing. Respondent specifically denied giving this advice and maintained that he never said that this surgery was required. Although the hearing committee was free to reject respondent's testimony, it was required to resolve this factual issue on the basis of the evidence. A review of the record reveals that the hearing committee's conclusion to sustain each specification of the charges regarding Patient DDD is not supported by evidence that respondent committed the alleged conduct.

The hearing committee report on remand, like the report before

remand, does not contain findings of fact[14] as to the specific words spoken by respondent in discussing cataract surgery with Patient DDD. Other than a general reference to the fact that there was a discussion of the pros and cons of surgery, the findings of fact are silent regarding the specific advice respondent allegedly gave Patient DDD about surgery. At the same time, the hearing committee concluded, from inferences it drew from respondent's records, that respondent committed the alleged misconduct. We do not accept this conclusion since respondent's records do not show that he gave the alleged advice to Patient DDD. The mere reference in respondent's records to an intumescent lens and narrow angle-glaucoma does not, in our opinion, demonstrate whether these conditions were discussed with and explained to Patient DDD and, if they were discussed, whether respondent said anything to Patient DDD beyond the nature of these conditions.

F. **PATIENT EEE**

The hearing committee accepted the testimony of petitioner's expert, Dr. A and concluded that the surgery performed on Patient EEE in April 1982 was "needless". The hearing committee's conclusion in this case was premised on the false assumption that

[14]The Regents, in accepting the recommendation of the Regents Review Committee and in pointing out that certain important issues were to be addressed on remand, indicated before the remand that no finding had been made as to the charge that respondent advised patient DDD that surgery was required. On remand, petitioner requested that the hearing committee issue a finding that the charged advice was given.

Dr. A, who had last seen Patient EEE prior to this surgery in June, 1980, was testifying about Patient EEE's condition at the time he underwent cataract surgery.

In June 1980, Dr. A found that Patient EEE's right eye had no cataracts. Dr. A testified that it was unlikely that "within a few months" of June, 1980 Patient EEE would have developed a significant cataract to warrant surgery in the presence of severe macular degeneration. This few month period was presumed by Dr. A to be from eight months to a year. However, as Dr. A admitted, he had no idea that cataract surgery was performed by respondent in April 1982, around 22 months after Dr. A had last examined Patient EEE. Another ophthalmologist testified, on behalf of petitioner, that it was possible for a cataract to be fully formed in a two year period. This witness further testified that he had no idea whether Patient EEE had a cataract in the right eye in April, 1982. On the other hand, respondent's experts confirmed respondent's testimony that it was not possible for Dr. A to have known whether there was a cataract in Patient EEE's right eye at the relevant time in April, 1982 and that it was possible for a significant cataract to develop, in a 22 month period, so as to warrant surgery in the presence of macular degeneration. Accordingly, we conclude that Dr. A's testimony, regarding his opinion based on his June 1980 observations, did not provide probative evidence that, by the time the surgery was performed by respondent, a sufficiently significant cataract was not then present in Patient EEE's right

eye.

The hearing committee referred to the testimony of respondent's expert, Dr. B, that if the cataract were "somewhat advanced" there could be some significant improvement in the patient's peripheral vision from the surgery performed by respondent. In our opinion, petitioner failed to prove its charge that the surgery performed by respondent, in April 1982, was not medically indicated.

Moreover, the hearing committee relied on other aspects of respondent's conduct in the case of Patient EEE which were not alleged by petitioner in the charges. Although there is no allegation in this proceeding as to the words spoken by respondent in advising Patient EEE, the hearing committee report finds that respondent "induced" Patient EEE to consent to the surgery by stating that if the cataract was not removed Patient EEE would go blind. Further falsehoods were found by the hearing committee in respondent's record for Patient EEE. Inasmuch as our decision is limited to resolving the charge which was brought by petitioner, we do not pass upon the propriety of any conduct not alleged in the charges. Nor do we pass upon the question of the credibility to be accorded to Patient EEE's now precluded testimony, which was credited by the hearing committee over that of respondent.

G. **MORE THAN ONE OCCASION**

The only charge remaining for our consideration relates to the fourth specification of negligence or incompetence on more than one

occasion. We have already indicated that petitioner has not proven any negligence or incompetence in the cases of Patients DDD and EEE. Thus, the issue presented is whether respondent's negligent and incompetent conduct in the case of Patient BBB was committed on more than one occasion.

The charge regarding Patient BBB alleges in singular terms that surgery was scheduled by respondent in this case. Respondent's request for a more definite statement as to when the alleged misconduct was committed was denied before this matter was transferred by the Health Department. Thus, the charge brought in paragraph IV(2) and the findings recommended by the hearing committee do not refer to a second occasion when this surgery was scheduled.

In any event, the hearing committee concluded that respondent's conduct in the case of Patient BBB "constitutes only one occasion". Therefore, respondent's conduct as to Patient BBB, relating to the surgery scheduled on one day for one patient, was not committed on more than one occasion. Accordingly, we conclude, in view of no negligence or incompetence being found in the cases of Patients DDD and EEE and of only one occasion being found in the case of Patient BBB, that respondent be found not guilty of the fourth specification.

IV. PENALTY

On remand, respondent again moved for Exhibits WWWW and XXXX to be received in evidence. These exhibits consist of letters from

more than 500 patients, all in praise of respondent and his treatment of their eyes. Petitioner objected to their admission. The administrative officer denied respondent's motion on the ground that the proposed exhibits had no direct bearing on the specific facts in this matter.

Petitioner asserted, in its response to us, that evidence as to the good reputation of a witness is not admissible unless his character for truth and veracity has been attacked by the other party. Respondent asserted that petitioner attacked his credibility as a witness in various ways and that, therefore, he may properly offer evidence in rebuttal to sustain his character or to corroborate testimony which has been discredited. Richardson on Evidence, 10th Ed., §517. The hearing committee concluded that respondent's credibility was destroyed and that respondent's focus was not on the welfare and best interests of his patients. We conclude that, under the circumstances, respondent's motion to admit these two exhibits as rebuttal evidence should have been granted. Although they are not received as direct evidence that the conduct charged in the specific cases of Patients BBB, DDD, and EEE did not occur, they are received for the purposes of considering: respondent's rebuttal to the claims against his character and credibility; and mitigation of penalty.

Based on all the evidence, we take a serious view of the misconduct committed by respondent. In our opinion, the penalty hereinafter set forth, involving an actual suspension of licensure,

a course of training, and lengthy probation, is warranted in light of respondent's gross incompetence and gross negligence in the case of Patient BBB. Nevertheless, we do not believe that the penalty recommendation of revocation of licensure is appropriate for the following reasons: all charges concerning four of the five patient cases which were the subject of the original charges have been dismissed; the fraud and ordinary incompetence and negligence on more than one occasion charges concerning Patient BBB have been dismissed; the misconduct found to have occurred in one patient case took place over 11 years ago; the length of time petitioner took to prosecute this matter, the unavailability on remand of the investigator's notes; and the other mitigating circumstances advanced by respondent.

We unanimously recommend the following:

1. Findings of fact BBB 9 (first two sentences only) and 10, DDD 1, 2, 7, 8, and 17, and EEE 1, 3, 7, 8, and 9 of the hearing committee and the recommendation of the Health Commissioner's designee as to those findings of fact be accepted and the remaining findings of fact of the hearing committee and the recommendation of the Health Commissioner's designee as to those findings of fact not be accepted, except insofar as they are in any part consistent with the additional findings of fact of the Regents Review Committee;
2. The following additional findings of fact, referable to

Patient BBB, be accepted:

BBB11 Patient BBB was examined by respondent on October 8, 1982 and October 27, 1982. Respondent's impression was Patient BBB had bilateral senile cataracts worse in the right eye than the left eye (T. 2808, 2810, and 2811; Exhibit 6).

12 Patient BBB separately saw Dr. K and Dr. Y in January 1983 and separately told them that she saw respondent in October 1982, that respondent told her she had cataracts in her eyes, and that respondent advised her to have cataract extraction surgery on both of her eyes (T. 263, 265, 266, 298, 849, 850, 2823, and 2828).

13 On October 27, 1982, respondent discussed with Patient BBB the surgery he recommended. Patient BBB was given and she signed a consent form in the morning of October 27, 1982 for cataract surgery to be performed on her right eye with an intra-ocular lens implant. Patient BBB was also given and she signed a separate consent form in the afternoon of October 27, 1982 for cataract surgery on her left eye with an intra-ocular lens implant. The chart for Patient BBB also contains an FDA clinical investigation consent form signed by Patient BBB for the left eye and another such form

for the right eye (T. 2811, 2813, 2815, and 2816; Exhibit 6).

14 Patient BBB was given a scheduling slip for cataract surgery to be performed one week apart by respondent on each eye at the Park Center Surgical Suite. This scheduling slip shows the dates the surgeries and post-op visits were scheduled. It also showed respondent's charges of $2,550 for each eye for a total of $5,100 (Exhibit 11).

15 Respondent's own handwriting on his flow sheet refers to surgery on both eyes of Patient BBB. Respondent could not explain adequately the reason he referred to surgery on the left eye (T. 2816, 2817, 2916, 2934, 2935, and 2949).

16 Patient BBB was scheduled for surgery by respondent for cataract removal with intra-ocular lens implant on both eyes (see, above findings of fact 11-15 and T. 3916, 3918, 4378, and 4379).

17 Dr. K first saw Patient BBB as a patient in January 1981 when she complained of blurred vision in her left eye. Patient BBB saw Dr. K in January 1983 because of respondent's diagnosis of cataracts and recommendation of surgery (T. 261, 263, 265, and 266).

18 Between 1981 and 1983, Patient BBB did not

complain that her vision affected her life style (T. 375).

19 Dr. K performed an examination of Patient BBB in January 1983. His examination indicated that with appropriate eyeglasses Patient BBB had 20/20 vision in her left eye. He concluded that Patient BBB's visual acuity in her right eye was no better correctable than 20/400. He noted that Patient BBB continued to have a macular hole in the right eye (T. 267 and 330; Exhibit 7).

20 Dr. K is a Board certified ophthalmologist. He has staff privileges in the field of ophthalmology at various hospitals. He has practiced general ophthalmology and performed a gamut of procedures from individual eye examinations to eye surgery (T. 256, 257, and 386).

21 On referral from Dr. K, Dr. Y examined Patient BBB in January 1983 in order to render a third opinion as to the necessity for cataract surgery on Patient BBB. Dr. Y is a Board certified ophthalmologist (T. 836, 837, 498; Exhibit 32).

22 Dr. K was able to see the fundus in Patient BBB's right eye nice and clear, direct and indirect, and was able to see the characteristics of the macular hole in Patient BBB's right eye. The macular hole

in the right eye affected Patient BBB's central vision (T. 376 and 337).

23 Because Patient BBB's right eye had a minimal or an insignificant nuclear sclerosis, the benefit to her, if the surgery respondent scheduled on her right eye were performed, would be "zero" (T. 384 and 909).

24 Nearly all patients over 60 years of age have an opacity of the crystalline lens. Nuclear sclerosis can be a normal aging change in the lens of the eye. It may still yield 20/20 vision. The mere presence of a cataract is not an indication for surgery. Some degrees of nuclear sclerosis represent a cataract, but do not necessarily interfere with vision and warrant cataract surgery (T. 325, 326, 543, 544, 3936, 3937, 3945, and 4586).

25 If the surgery respondent scheduled on Patient BBB's right eye were performed there would be multiple risks to Patient BBB, ranging from worsening vision, hemorrhage, complete blindness, to death. Patient BBB was at greater risk than usual from such procedures due to her retinal problem (T. 384, 385, 901, and 911; Exhibit 6).

26 There was no benefit to be gained if the surgery

respondent scheduled on Patient BBB's left eye were performed. The risks for such surgery on Patient BBB's left eye were anything from infection, hemorrhage, loss of vision, or death (T. 385).

27 Although reasonably prudent ophthalmologists could differ as to whether a patient may benefit from surgery in the presence of severe or moderately severe nuclear sclerosis, a reasonably prudent ophthalmologist would not find a benefit from surgery in the presence of a minimal or mild nuclear sclerosis. There is a consensus in the ophthalmological community that "mild nuclear sclerosis is just not operated on. People don't benefit from removing it" (T. 338-341).

28 Examination of Patient BBB's lenses for cataracts revealed mild or minimal nuclear sclerotic changes consistent with her age (T. 334, 341, 362, and 384; Exhibit 32).

29 Respondent told Patient BBB that she could have her left eye "done in future if all goes well" with the right eye (Exhibit 6).

30 In view of her 20/20 visual acuity in her left eye with correction, Patient BBB did not have significant visual changes in her left eye.

Respondent believed the cataract in Patient BBB's left eye was insignificant (T. 336, 837, and 2879).

31 Patient BBB did not complain about any difficulty with her left eye. Respondent acknowledged that the medical benefit to Patient BBB of having cataract extraction combined with intra-ocular lens implant in the left eye "would be nil" (T. 2926 and 2927).

32 Cataract removal with an intra-ocular lens implant on Patient BBB's left or right eye was not indicated to be performed. Patient BBB would not have benefitted from these surgeries. The surgeries scheduled by respondent for Patient BBB's left and right eyes were not medically correct. Respondent should have known that, under the circumstances of Patient BBB's case and under the applicable standards accepted in the profession, he should not have recommended the surgeries on Patient BBB's eyes. (T. 291, 292, 299, 333, 377, 384, 838, and 909).

33 Cataract surgery for Patient BBB was not only unnecessary, it was quite dangerous to her well being (Exhibit 32).

34 Patient BBB cancelled the surgeries respondent had

scheduled (T. 5080; Exhibit 32).

35 Cataract extraction surgery on each eye of a patient within one week apart is unacceptable to respondent's witness Dr. C (T. 4670 and 4671).

36 Neither Dr. K nor Dr. Y were biased against respondent. Their testimony was reliable, knowledgeable, credible, and accurate in assessing the patient cases in issue. They persuasively set forth the standards of the profession and applied those standards in rendering an opinion.

3. The conclusions of the hearing committee and the recommendation of the Health Commissioner's designee as to those conclusions be modified;

4. Respondent be found guilty, by a preponderance of the evidence, of both gross incompetence and gross negligence (second and third specifications respectively) to the extent of the charge as to Patient BBB involving respondent's scheduling surgery for cataract removal with intra-ocular lens implant on both eyes of Patient BBB when he should have known that such surgery was not medically indicated, and respondent be found not guilty of the remaining specifications and charges;

5. The recommendation of the hearing committee and the recommendation of the Health Commissioner's designee as to the recommendation of the hearing committee not be

accepted and, that upon the second and third specifications charged of which respondent was found guilty, as aforesaid, respondent be required to pursue a course in the indications of ophthalmological surgery, said course of training to be at respondent's own expense, selected by respondent, and previously approved in writing by the Executive Director of the New York State Education Department, Office of Professional Discipline, One Park Avenue - Sixth Floor, New York, New York 10016-5802 and respondent's license to practice medicine in the State of New York be suspended for five years, said suspensions to be imposed concurrently, and that execution of the last four years of said concurrent suspensions be stayed, and that respondent be placed on probation for said five years in accordance with the terms of probation set forth in Regents Review Committee Exhibit "M", which is annexed hereto and made a part hereof.

Respectfully submitted,

FLOYD S. LINTON

THEODORE M. BLACK, SR.

ROBERT E. DONNELLY

Floyd S. Linton
Chairperson

Dated: 3/31/94

VOTE AND ORDER

JOHN H. PARK

CALENDAR NOS. 13636/8493

The University of the State of New York

IN THE MATTER

OF

JOHN H. PARK, M.D.
(Physician)

DUPLICATE ORIGINAL
VOTE AND ORDER
NOS. 13636/8493

Upon the report of the Regents Review Committee, a copy of which is made a part hereof, the record herein, under Calendar Nos. 13636/8493, and in accordance with the provisions of Title VIII of the Education Law, it was

VOTED (May 20, 1994): That, in the matter of JOHN H. PARK, M.D., respondent, the recommendation of the Regents Review Committee be accepted as follows:

1. Findings of fact BBB 9 (first two sentences only) and 10, DDD 1, 2, 7, 8, and 17, and EEE 1, 3, 7, 8, and 9 of the hearing committee and the recommendation of the Health Commissioner's designee as to those findings of fact be accepted and the remaining findings of fact of the hearing committee and the recommendation of the Health Commissioner's designee as to those findings of fact not be accepted, except insofar as they are in any part consistent with the additional findings of fact recommended by the Regents Review Committee;
2. The additional findings of fact, referable to Patient BBB (BBB 11-36), set forth at pages 66 through 72 of the Regents Review Committee report be accepted:
3. The conclusions of the hearing committee and the recommendation of the Health Commissioner's designee as to those conclusions be modified;

4. Respondent is guilty, by a preponderance of the evidence, of both gross incompetence and gross negligence (second and third specifications respectively) to the extent of the charge as to Patient BBB involving respondent's scheduling surgery for cataract removal with intra-ocular lens implant on both eyes of Patient BBB when he should have known that such surgery was not medically indicated, and respondent is not guilty of the remaining specifications and charges; and

5. The recommendation of the hearing committee and the recommendation of the Health Commissioner's designee as to the recommendation of the hearing committee not be accepted and, that upon the second and third specifications charged of which respondent was found guilty, as aforesaid, respondent be required to pursue a course in the indications of ophthalmological surgery, said course of training to be at respondent's own expense, selected by respondent, and previously approved in writing by the Executive Director of the New York State Education Department, Office of Professional Discipline, One Park Avenue - Sixth Floor, New York, New York 10016-5802 and respondent's license to practice medicine in the State of New York be suspended for five years, said suspensions to be imposed concurrently, and that execution of the last four years of said concurrent suspensions be stayed, and that respondent be placed on probation for said five years in accordance with the terms of probation set forth in Regents Review Committee Exhibit "M";

That it is noted that the decision in McBarnette v. Sobol, 190 A.D.2d 229 (3rd Dept. 1993) cited on page 35 of the Regents Review Committee report was, subsequent to its deliberations, affirmed by the Court of Appeals in a decision dated March 24, 1994 and that

the Deputy Commissioner for the Professions be empowered to execute, for and on behalf of the Board of Regents, all orders necessary to carry out the terms of this vote;

and it is

ORDERED: That, pursuant to the above vote of the Board of Regents, said vote and the provisions thereof are hereby adopted and **SO ORDERED**, and it is further

ORDERED that this order shall take effect as of the date of the personal service of this order upon the respondent or five days after mailing by certified mail.

IN WITNESS WHEREOF, I, Daniel W. Szetela, Deputy Commissioner for the Professions, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand, at the City of Albany, this 20th day of May, 1994.

DANIEL W. SZETELA
DEPUTY COMMISSIONER
FOR THE PROFESSIONS