



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

March 13, 1991

Richard Swenski, Physician  
Box 118A - RD #1  
Lilly Lake  
Wapwallopen, Pennsylvania 18660

Re: License No. 118078

Dear Dr. Swenski:

Enclosed please find Commissioner's Order No. 11352. This Order and the penalty contained therein 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.

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

DHJ/GM/er

CERTIFIED MAIL - RRR

cc:

**RECEIVED**  
MAR 19 1991  
Office of Professional  
Medical Conduct

**REPORT OF THE  
REGENTS REVIEW COMMITTEE**

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**RICHARD SWENSKI**

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**CALENDAR NO. 11352**



# The University of the State of New York

IN THE MATTER

of the

Disciplinary Proceeding

against

**RICHARD SWENSKI**

**No. 11352**

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

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## REPORT OF THE REGENTS REVIEW COMMITTEE

RICHARD SWENSKI, hereinafter referred to as respondent, was given due notice of this proceeding and informed that he could appear and be represented by an attorney.

On November 7, 1990, respondent appeared before us in person and was not represented by an attorney. Diane Abeloff, Esq., represented the Department of Health.

Petitioner's written recommendation as to the penalty to be imposed, should respondent be found guilty, was that respondent's license to practice as a physician in the State of New York be revoked.

Respondent's written recommendation as to the penalty to be imposed, should he be found guilty, was a suspension for a certain period of time not exceeding two years.

We have reviewed the record in this matter; and our unanimous

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findings of fact, determination as to guilt, and recommendation as to the penalty to be imposed follow:

**FINDINGS OF FACT**

1. Respondent was licensed to practice as a physician in this State by the New York State Education Department.
2. On May 5, 1986, respondent pleaded guilty in the Court of Common Pleas - Criminal Division - County of Luzerne, Commonwealth of Pennsylvania, to five counts of the 46 count information. On July 14, 1986, respondent was sentenced upon his conviction of five counts of the crimes under the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act pursuant to 35 PA. CONS. STAT. §§780-113(a)(13) and 780-113(a)(14).
3. The acts constituting the crimes in Pennsylvania for which respondent was convicted of counts 14, 30, and 32 would, if committed by respondent in New York State, have constituted the crimes under New York law regarding unlawfully dispensing controlled substances pursuant to Public Health Law §§3331(2), 3304(1), 3304(2), 3304(a), 3396(2), and 12-b.
4. On June 15, 1988, the Pennsylvania Bureau of Professional and Occupational Affairs automatically suspended respondent's Pennsylvania license based upon the conviction referred to in finding two of this report.

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5. Petitioner alleges that the conduct upon which respondent was found guilty by the duly authorized professional disciplinary agency of another state would, if committed in New York State, constitute professional misconduct under Education Law §6509(5)(b).

**DETERMINATION AS TO GUILT**

The first specification of the charges contained in the statement of charges, a copy of which is annexed hereto, made a part hereof, and marked as Exhibit "A", has been proven to the extent indicated herein, by a preponderance of the evidence, and respondent is guilty thereof.

The first specification refers to respondent's conviction of "violating five of 13(a)(13) & (14) of the Controlled Substance, Drug, Device and Cosmetic Act of the Commonwealth of Pennsylvania". Said specification was drafted awkwardly and requires clarification. Upon our inquiry, petitioner's attorney informed us that she meant "violating five counts of section 13A, 13 and 14." Transcript page 15. We deem the statement of charges to be so amended. Moreover, the statutes submitted to us by petitioner shows that respondent's convictions in Pennsylvania were pursuant to 35 PA. CONS. STAT. §§780-113(a)(13) and 780-113(a)(14). Although petitioner's reference to "13(a)" conforms to the information and the plea agreement in Pennsylvania, we do not find any section 13(a) in this record. Accordingly, we have only

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considered clauses 13 and 14 of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act (section 780-113 subdivision (a)). Respondent, having pled guilty to and been convicted of these Pennsylvania crimes, had notice of the applicable Pennsylvania statute and is not prejudiced by our interpretation of the statement of charges.

Whereas respondent's Pennsylvania convictions of counts 14, 30, and 32 of the information are based on 35 PA. CONS. STAT. §780-113(a)(14), his convictions of counts 19 and 20 are based on 35 PA. CONS. STAT. §780-113(a)(13).

Respondent was convicted in Pennsylvania, based on his guilty plea to counts 14, 30, and 32, of the crime regarding the dispensing of Demerol (Meperidine) not in good faith in the course of respondent's professional practice. The counterpart New York statutes, Public Health Law §§3331(2), 3304(1), 3304(2), 3304(a), 3396(2), and 12-b, are sufficiently comparable to 35 PA. CONS. STAT. §780-113(a)(14) for determining the issue of respondent's guilt in this proceeding. Respondent's conviction under the applicable Pennsylvania Law is more than sufficient to support a conviction under the applicable New York counterpart had respondent's acts upon which he was convicted in Pennsylvania been committed in New York.

We are mindful of differences between these Pennsylvania and New York statutes which are not here relevant or material. While

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Pennsylvania, but not New York Law, would also apply to a delivery or gift, both Laws apply to the dispensing in issue here. Moreover, while New York Law applies only to substances listed in Schedules II, III, IV, AND V and Pennsylvania Law applies to any Controlled Substance, Demerol (Meperidine) falls within both statutes as it is a Schedule II Controlled Substance under New York Public Health Law §3306 - Schedule II (c)(16) and a Schedule II Narcotic Controlled Substance under counts 14, 30, and 32 in Pennsylvania. See, Matter of Pershing Yee-Shing Lo, Cal. No. 8522.

By counts 14, 30, and 32 of the Pennsylvania information, respondent pled guilty to dispensing Demerol in violation of law. Under New York Law, the violation of Public Health Law §3331(2) is unlawful (Public Health Law §3304) and is punishable as an unclassified misdemeanor pursuant to Public Health Law §12-b. People v. Lipton, 54 N.Y.2d 340 (1981). Thus, respondent's conviction in Pennsylvania may be equated with the specified crime under New York Law. De Pasquale v. Board of Regents of University, 7 A.D.2d 692 (3rd Dept. 1958) (conviction in sister state for unlawfully dispensing narcotic drug of Demerol warranted revocation of license). Accordingly, in our unanimous opinion, respondent is guilty of the first specification pursuant to Education Law §6509(5)(a)(iii) to the extent that respondent was convicted in Pennsylvania on the basis of counts 14, 30, and 32 of the Pennsylvania information. We note that these convictions are

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considered felonies in Pennsylvania. 35 PA. CONS. STAT. §780-113(f).

On the other hand, PA. CONS. STAT. §780-113(a)(13) is not essentially similar to the provisions cited by petitioner under the New York Public Health Law. This Pennsylvania statute applies to the dispensing to any person known to the practitioner to be or whom the practitioner has reason to know is a "drug dependent person." Counts 19 and 20 of the Pennsylvania information involve the dispensing of a non-narcotic controlled substance to such a person. In comparison, Public Health Law §3331(1) relates to the dispensing to an addict or habitual user. Under New York Law, an "addict" is a person who uses a narcotic drug, Public Health Law §3302(1), and "habitual user" is a person who is in danger of becoming dependent upon a controlled substance, Public Health Law §3302(17). Furthermore, with respect to "habitual user", under New York Law, Pennsylvania and New York Law are not sufficiently comparable because the person to whom respondent dispensed the non-narcotic controlled substance in Pennsylvania may not be the same person required to be involved under New York Law. In New York, a habitual user has to be in danger of becoming dependent rather than known to the practitioner to be or whom such practitioner has reason to know is drug dependent.

We cannot find in this direct referral proceeding that the Confidential Police Informant was necessarily an "addict" or



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"habitual user" under New York Law. Accordingly, petitioner has failed to prove that the acts upon which respondent was convicted in Pennsylvania under counts 19 and 20 would, if committed in New York, have constituted a crime under New York Public Health Law §3331(1).

With respect to the second specification contained in the statement of charges, petitioner has not proven this specification, and respondent is not guilty thereof.

Petitioner alleges that respondent committed professional misconduct under Education Law §6509(5)(b) based on respondent's automatic suspension in Pennsylvania which resulted from his felony conviction in the Court of Common Pleas of Luzerne County, Pennsylvania. Education Law §6509(5)(b) requires proof of an alleged definition of professional misconduct under the Education Law which would have been met if the conduct, upon which the finding of the duly authorized sister state disciplinary agency was based, had been committed in New York. Petitioner has failed to allege any such analogue under the Education Law. The mere reference to the charge under Education Law §6509(5)(b) without regard to a definition of professional misconduct which would have been met if the conduct had been committed in New York is insufficient. See Matter of Kailash C. Pani, Cal. Nos. 9885/8413. The correct analogue of Education Law §6509(5)(a)(iii), which, might have been, but as merely a duplication of the first

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specification, was not alleged in the second specification. Accordingly, the second specification, as presently pleaded and tried, is deficient. Matter of Eui Don Joo, Cal. No. 10711; and Lo, supra. We note that the second specification also does not specify which duly authorized professional disciplinary agency of Pennsylvania allegedly found respondent guilty.

Moreover, the second specification does not allege that any New York criminal counterpart statute exists and does not specify any criminal provision of the Public Health or other New York Law. Thus, petitioner has failed to prove that respondent's conduct alleged in the second specification would have constituted professional misconduct under the laws of New York had respondent's conduct been committed in New York.

In any event, petitioner has not proven the requisite elements as to the "finding." Education Law §6509(5)(b) requires both that there be a finding of guilt and that the finding be in regard to respondent's conduct. Petitioner argued before us that after the Pennsylvania agency met without respondent and without holding a hearing, it converted the prior conviction into an automatic suspension. 63 PA. CONS. STAT. §271.14(b) does not provide for any hearing or any right for respondent to be heard. Such meeting does not constitute an adjudicatory proceeding to render findings as to the underlying conduct committed by respondent. The charge, pursuant to Education Law §6509(5)(b), may not be automatically

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sustained where its elements have not been established. We note that Education Law §6509(5)(d), which was not charged by petitioner, does not require such "finding."

Accordingly, we unanimously determine that the second specification of the charges be dismissed.

**RECOMMENDATION AS TO THE  
PENALTY TO BE IMPOSED**

Respondent's license to practice as a physician in the State of New York be revoked upon the first specification of the charges of which we recommend respondent be found guilty. Respondent has seriously abused his license by virtue of his misconduct.

Respectfully submitted,

GERALD J. LUSTIG, M.D.

MELINDA AIKINS BASS

PATRICK J. PICARIELLO

Dated:

*January 25, 1991*

*Melinda Aikins Bass*  
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MELINDA AIKINS BASS

Dated:

*January 25, 1991*

*Patrick J. Picariello*  
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PATRICK J. PICARIELLO

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

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IN THE MATTER : STATEMENT  
OF : OF  
Richard Swenski, D.O. : CHARGES

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Richard Swenski, D.O., the Respondent, was authorized to practice medicine in New York State on September 10, 1973 by the issuance of license number 118078 by the New York State Education Department. The Respondent is not currently registered with the New York State Education Department.

FIRST SPECIFICATION

1. Respondent is charged with professional misconduct within the meaning of New York Educ. Law Section 6509 (5)(a)(iii) in that he was convicted of committing an act constituting a crime under the law of another jurisdiction and which, if committed within this state, would have constituted a crime under New York State law, specifically a violation of N.Y. Pub. Health Law Sections 3304 and 3331:
  - A. On or about July 14, 1986, Respondent pled guilty to and was convicted of violating five

of 13 (a) (13) & (14) of the Controlled Substance, Drug, Device & Cosmetic Act of the Commonwealth of Pennsylvania, specifically:

- i. On May 8, 1984, Respondent knowingly, willfully, and intentionally dispensed to a Confidential Police Informant (CPI) six vials of Demerol 30 ml., not in good faith and not in the course of his professional practice;
- ii. On May 16, 1984, Respondent knowingly, willfully, and intentionally sold and dispensed to a CPI 60 Biphedamine 12.5 mg. capsules for the sole purpose of maintaining the CPI's drug dependency, and without any legitimate medical need;
- iii. On May 22, 1984, Respondent knowingly, willfully, and intentionally sold and dispensed to a CPI ninety Valium, 10 mg. tablets for the sole purpose of maintaining the

CPI's drug dependency, and without any legitimate medical need;

iv. On June 12, 1984, Respondent knowingly, willfully, and intentionally dispensed to a CPI six vials of Demerol 30 ml. not in good faith and not in the course of his medical practice;

v. On June 27, 1984, Respondent knowingly, willfully, and intentionally dispensed to a CPI twelve vials of Demerol 30 ml. not in good faith and not in the course of his medical practice.

B. Respondent was sentenced to a minimum of 11 1/2 months and a maximum of 23 1/2 months in jail. Respondent was paroled in March 1987.

#### SECOND SPECIFICATION

2. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law Section 6509 (5)(b) (McKinney 1985)

in that he was found guilty of professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state, specifically:

On or about June 15, 1988, pursuant to section 14(b) of the Osteopathic Medical Practice Act of October 5, 1978, P.L.1109, added December 20, 1985, P.L. 398, (the Osteopathic Act), 63 P.S. section 271.14(b), Respondent's license to practice medicine in Pennsylvania was automatically suspended based upon his felony conviction in the Court of Common Pleas of Luzerne County, Pennsylvania, in that he was found guilty of violating Section 13(a) (14) of the Controlled Substance, Drug, Device and Cosmetic Act of the Commonwealth of Pennsylvania.

DATED: New York, New York  
Oct 4, 1990

*Chris Stern Hyman*

Chris Stern Hyman  
Counsel  
Bureau of Professional Medical  
Conduct



ORDER OF THE COMMISSIONER OF  
EDUCATION OF THE STATE OF NEW YORK

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RICHARD SWENSKI

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CALENDAR NO. 11352



# The University of the State of New York

IN THE MATTER

OF

**RICHARD SWENSKI**  
(Physician)

**DUPLICATE  
ORIGINAL  
VOTE AND ORDER  
NO. 11352**

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Upon the report of the Regents Review Committee, a copy of which is made a part hereof, the record herein, under Calendar No. 11352, and in accordance with the provisions of Title VIII of the Education Law, it was

**VOTED (February 21, 1991):** That the record herein be accepted; that the findings of fact, determination as to guilt, and recommendation as to the penalty to be imposed rendered by the Regents Review Committee in the matter of RICHARD SWENSKI, respondent, be accepted; that respondent is guilty of the first specification of the charges, to the extent indicated by the Regents Review Committee, by a preponderance of the evidence and not guilty of the second specification of the charges and said second specification is dismissed; that respondent's license and registration to practice as a physician in the State of New York be revoked upon the first specification of the charges of which respondent was found guilty; and that the Commissioner of Education 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

RICHARD SWENSKI (11352)

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, Thomas Sobol, Commissioner of Education of the State of New York, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 4<sup>th</sup> day of

March 1991.

*Thomas Sobol*

Commissioner of Education