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

September 26, 1990

David Henry Breen, Physician
2962 Sawdust Road
Wayland, N.Y. 14572

Re: License No. 122238

Dear Dr. Breen:

Enclosed please find Commissioner's Order No. 10976. This Order and any penalty contained therein goes into effect five (5) days after the date of this letter.

If the penalty imposed by the Order is a surrender, revocation or suspension of your license, you must deliver your license and registration to this Department within ten (10) days after the date of this letter. In such a case 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.

Very truly yours,

DANIEL J. KELLEHER
Director of Investigations
By:

Gustave Martine

GUSTAVE MARTINE
Supervisor

DJK/GM/er
Enclosures

CERTIFIED MAIL- RRR
cc: David Brown, Esq.
30 West Broad Street
Rochester, N.Y. 14614

REPORT OF THE
[redacted] REVIEW COMMITTEE

DAVID HENRY BREEN

CALENDAR NO. 10976

The University of the State of New York

IN THE MATTER

of the

Disciplinary Proceeding

against

DAVID HENRY BREEN **No. 10976**

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

REPORT OF THE REGENTS REVIEW COMMITTEE

DAVID HENRY BREEN, 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 properly commenced and on October 12 and December 6, 1989 hearings were held before a hearing committee of the State Board for Professional Medical Conduct. A copy of the statement of charges is annexed hereto, made a part hereof, and marked as Exhibit "A".

The hearing committee rendered a report of its findings, conclusions, and recommendation, a copy of which, without attachment, is annexed hereto, made a part hereof, and marked as Exhibit "B".

The hearing committee concluded that respondent was guilty of the second specification of the charges, and not guilty of the

first specification of the charges. The hearing committee recommended that respondent be Censured and Reprimanded.

The Commissioner of Health recommended to the Board of Regents that the findings of fact of the hearing committee be accepted, that an additional finding of fact be made as set forth in his recommendation, that the conclusion of the hearing committee with regard to the second specification be accepted, that the conclusion of the hearing committee with regard to the first specification be rejected as indicated in his recommendation, and that, in lieu of the recommendation of the hearing committee, respondent's license to practice medicine be suspended for one year and that the suspension be stayed. A copy of the recommendation of the Commissioner of Health is annexed hereto, made a part hereof, and marked as Exhibit "C".

On June 27, 1990 respondent appeared before us in person, but no attorney appeared before us to represent respondent. Respondent elected to proceed without an attorney and presented oral argument on his own behalf. E. Marta Sachey, Esq., presented oral argument on behalf of the Department of Health.

Petitioner's recommendation, which is the same as the Commissioner of Health's recommendation, as to the measure of discipline to be imposed, should respondent be found guilty, was one year suspension, stayed.

Respondent's recommendation as to the measure of discipline

to be imposed, should respondent be found guilty, was Censure and Reprimand.

We have considered the record as transferred by the Commissioner of Health in this matter, as well as respondent's June 11, 1990 letter and petitioner's June 15, 1990 letter.

At the hearing, Regent Carl T. Hayden stated that he knew the attorney who had represented respondent before the hearing committee, but that this would not affect his judgment in any way. Neither party raised any objection to Regent Hayden hearing this case.

We unanimously reject the hearing committee's reasoning regarding its conclusion that the first specification of the charges cannot be sustained. The hearing committee acknowledges that respondent committed physical abuse through inappropriate physical contact which harmed or was likely to harm Patient A. Specifically, respondent struck Patient A in the face several times with a closed fist at a time when the patient was restrained on the floor by other hospital employees (hearing committee fact finding # 11). The hearing committee, however, went on to conclude that respondent's physical abuse was not willful because respondent did not intend to act inappropriately, and because there was no convincing evidence that respondent intentionally engaged in abuse or was aware that his conduct involved a knowing violation of law. The hearing committee relied on People v. Coe, 71 N.Y.2d 852 (1988)

for the proposition that the term "willful" required the prosecution to prove that respondent acted knowingly.

In our unanimous opinion, Coe is clearly distinguishable from the present case, and the rationale behind Coe is not applicable to 8 NYCRR §29.2(a)(2).

Coe dealt with a statute, Public Health Law §12-b(2), that, in creating a misdemeanor charge, defined the crime only by reference to an entire body of other laws. Thus, Public Health Law §12-b(2) provides:

> "A person who wilfully violates any provision of this chapter, or any regulation lawfully made or established by any public officer or board under authority of this chapter, the punishment for violating which is not otherwise prescribed by this chapter or any other law, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars or by both."

The Court in Coe refused to construe the word "wilfully" to mean that it need only be shown that a defendant acted deliberately and voluntarily, as opposed to accidentally. 71 N.Y.2d 852, 854 (1988). The Court held that the word "wilfully" must be read as modifying the word "violates", and not as modifying the underlying acts. Id. at 854. Otherwise, the statute would have imposed strict criminal liability for any consciously performed act which happened to contravene some provision or regulation of the public health laws, even for seemingly innocuous conduct. Id. at 854-855. The Court further held that "wilfully", as used in Public Health

Law §12-b(2), meant a culpable mental state generally equivalent to that required by the term "knowingly". Id. at 855. It was not necessary to establish any evil motive or intent, or to establish the person knew they were violating a specific statute or regulation, but only to establish the person was aware of the illegality of the conduct. Id. at 855.

8 NYCRR §29.2(a)(2) is very different from Public Health Law §12-b(2). 8 NYCRR §29.2(a)(2) actually defines the underlying conduct that is prohibited; it does not merely reference violations of other provisions of law as does Public Health Law §12-b(2). Thus, 8 NYCRR §29.2(a)(2) provides that unprofessional conduct includes "willfully harassing, abusing or intimidating a patient either physically or verbally". Unlike the situation in Coe, there is no problem of strict liability for innocuous conduct. This is because 8 NYCRR §29.2(a)(2) defines the underlying acts to be harassing, abusing or intimidating a patient physically or verbally. Absent the strict liability problem, there is no reason to construe 8 NYCRR §29.2(a)(2) in the same manner as Coe construed Public Health Law §12-b(2). It is our unanimous opinion that it would be a legal error to construe a regulation defining underlying acts in the same manner as Coe construed a criminal statute which did not define underlying acts.

We agree with the Commissioner of Health that an appropriate definition of the term "willfully" in 8 NYCRR §29.2(a)(2) can be

derived from civil tort law principles. Thus, the Commissioner of Health's definition of "willfully" as being intentional acts of unreasonable character, performed in disregard of a known or obvious risk so great as to make it highly probable that harm will result, Seminara v. Highland Lake Bible Conference, 112 A.D.2d 630, 492 N.Y.S.2d 146, 148 (3d Dep't 1985), is appropriate. Of course, it is well settled that it is not necessary in a professional discipline case to prove actual patient harm in order to establish professional misconduct.

In our unanimous opinion, respondent's conduct herein meets the legal standard for willful conduct. Respondent repeatedly punched a patient who was restrained and quiescent. Respondent had to know that such abusive conduct was improper; it is illogical and unreasonable to construe otherwise from the record. In our opinion, this case would even meet the higher standard set forth in Coe. We cannot agree with the hearing committee that respondent did not intend to act inappropriately. Respondent intentionally punched a patient knowing that such action was professionally improper. That is sufficient for guilt under 8 NYCRR §29.2(a)(2), and the first specification of the charges should be sustained. The hearing committee's view would allow a person to escape a charge of professional misconduct by merely claiming that he thought the physical abuse of a patient was acceptable conduct.

Such a view of 8 NYCRR §29.2(a)(2) is unacceptable and we reject it.

We view respondent's misconduct herein seriously. Therefore, we recommend accepting the penalty suggested by the Commissioner of Health with the addition of a one year period of probation to include psychiatric testing and counseling to address respondent's abusive behavior.

We unanimously recommend the following to the Board of Regents:

1. The hearing committee's 18 findings of fact, and the Commissioner of Health's recommendation as to those findings of fact, be accepted, and the Commissioner of Health's additional finding of fact also be accepted;
2. The hearing committee's conclusion as to the question of respondent's guilt of the second specification of the charges be accepted, and the hearing committee's conclusion as to the question of respondent's guilt of the first specification of the charges not be accepted;
3. The Commissioner of Health's recommendation as to the conclusions of the hearing committee regarding the question of respondent's guilt of the first and second specifications of the charges be accepted;
4. Respondent be found guilty, by a preponderance of the evidence, of the first specification of the charges to

the extent of allegations A, B, and C of the statement of charges as indicated at page 7 of the hearing committee report, and the second specification of the charges, and not guilty of allegation D of the statement of charges as indicated at page 7 of the hearing committee report;

5. The hearing committee's and Commissioner of Health's recommendations as to the measure of discipline be modified; and

6. Respondent's license to practice as a physician in the State of New York be suspended for one year upon each specification of the charges of which we recommend respondent be found guilty, as aforesaid, said suspensions to run concurrently, that execution of said suspensions be stayed, and respondent be placed on probation for one year under the terms set forth in the exhibit annexed hereto, made a part hereof, and marked as Exhibit "D".

Respectfully submitted,

EMLYN I. GRIFFITH

CARL T. HAYDEN

JANE M. BOLIN

Chairperson

Dated: August 15, 1990

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

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IN THE MATTER	:	STATEMENT
OF	:	OF
DAVID HENRY BREEN, M.D.	:	CHARGES

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DAVID HENRY BREEN, M.D., the Respondent, was authorized to practice medicine in New York State on October 18, 1974 by the issuance of license number 134916 by the New York State Education Department. The Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1989 through December 31, 1991 from 5929 Robinson Road, Sodus, New York 14551.

FACTUAL ALLEGATIONS

A. Respondent, on or about April 8, 1988 at approximately 3:00 a.m., while on duty at the Emergency Department of the Genesee Hospital, 224 Alexander Street, Rochester, New York 14607, intervened in efforts to detain and restrain Patient A (identified in the Appendix), a psychiatric patient.

Addition Stipulated by parties 12-6-89 GKL

B. Respondent straddled and/or knelt beside Patient A and struck the Patient in the face several times with a closed fist, at a time when the Patient was restrained on the floor by other Hospital employees.

Deletion Stipulated to by parties 12-6-89 GKL

C. Respondent was instructed [redacted] by one of the Hospital employees who was restraining the Patient to get off the Patient but Respondent did not do so.

D. Respondent finally was pulled off the Patient by a Hospital employee.

E. Respondent, in a registration application, dated December 11, 1988, which was filed with the New York State Education Department, falsely answered No to the question "Since you last registered, has any hospital or licensed facility restricted or terminated your professional training, employment, or privileges, or have you ever voluntarily or involuntarily resigned or withdrawn from such association to avoid imposition of such action?"

FIRST SPECIFICATION

PHYSICAL ABUSE OF A PATIENT

1. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(9) (McKinney 1985) and 8 NYCRR §29.2(a)(2) (1987) by reason of his willfully abusing a patient physically, in that Petitioner charges the facts in Paragraphs A and B and/or C, and/or D.

SECOND SPECIFICATION

FILING A FALSE REPORT

2. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(9) (1985) and 8 NYCRR 29.1(b)(6) (1987) by reason of his willfully making or filing a false report, in that Petitioner charges the facts in Paragraph E.

DATED: Albany, New York
August 28, 1989

Peter D. Van Buren

PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical
Conduct

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT
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IN THE MATTER	:	REPORT OF
OF	:	THE HEARING
DAVID HENRY BREEN, M.D.	:	COMMITTEE

----------X

TO: The Honorable David Axelrod, M.D.
Commissioner of Health, State of New York

Msgr. Peter J. Owens, Chairperson, Glenda D. Donoghue, M.D. and Clay E. Phillips, M.D., duly designated members of the State Board for Professional Medical Conduct, appointed by the Commissioner of Health of the State of New York pursuant to Section 230(1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. Gerald H. Liepshutz, Esq., served as Administrative Officer for the Hearing Committee.

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

SUMMARY OF CHARGES

Respondent was charged with the following acts of professional misconduct as more fully set forth in the Statement of Charges attached hereto:

1. Willfully abusing a patient physically (FIRST SPECIFICATION)
2. Willfully making or filing a false report (SECOND SPECIFICATION)

EXHIBIT "A"

SUMMARY OF PROCEEDINGS

Notice of Hearing and Statement of Charges dated:	August 28, 1989
Department of Health (Petitioner) appeared by:	E. Marta Sachey, Esq. Associate Counsel Bureau of Professional Medical Conduct
Respondent appeared by:	Martin, Ganotis & Brown, P.C. By: David E. Brown, Esq. 30 West Broad Street Suite 400 Rochester, NY 14614
Hearing dates:	October 12, 1989 December 6, 1989
Hearing Committee deliberations:	February 1, 1990
Adjournments:	None
Hearing Committee absences:	None
Witnesses for Petitioner:	Betty Cannon, M.S.W. Robert Douglas, security officer Ross Stuckless, Jr., emergency department technician Robert Graff, outpatient ambulatory representative
Witnesses for Respondent:	David Henry Breen, M.D., Respondent Melvin K. Pisetzner, M.D.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Many of the findings were adopted by the Hearing Committee, in whole or in part, from the proposed findings submitted by the parties. Citations in

parentheses refer to transcript pages or exhibits. These citations represent evidence found persuasive by the Hearing Committee while arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence. All findings were made by unanimous vote.

1. David Henry Breen, M.D., Respondent, was authorized to practice medicine in New York State on October 18, 1974 by the issuance of license number 134916 by the New York State Education Department (uncontested).

2. Respondent is currently registered with the State Education Department to practice medicine for the period January 1, 1989 through December 31, 1991 from 5329 Robinson Road, Sodus, New York 14551 (uncontested).

FIRST SPECIFICATION: Willfully abusing a patient physically

3. Respondent was on April 8, 1988 employed as an emergency room physician at The Genesee Hospital in Rochester, New York on the 11 p.m. to 7 a.m. shift (T. 147-148).

4. In the early morning of April 8, 1988 Patient A was brought to the emergency room under mental health arrest (T. 22, 62; Ex. 4). The patient had been threatening suicide (T. 22; Ex. 4). The patient was not under Respondent's care at any time (T. 36).

5. Patient A was seen by Ms. Cannon, the psychiatric assignment officer, in Room 25. She was alone with the patient. A security officer, Mr. Douglas, was stationed outside the door

as is the routine when there is a patient who has been brought in under mental health arrest (T. 24-25).

6. The door to Room 25 was open or partially open (T. 25, 79). The security officer stood across the hall from Room 25 (T. 79).

7. The need to restrain patients arose fairly frequently (at least several times a month) at the Genesee Hospital emergency room (T. 104, 108). Physicians did not participate in restraining patients as that was not a part of their duties. Security personnel and emergency room technicians dealt with that problem (T. 81, 108).

8. Patient A was demanding medication and threatening to kill himself if he did not get medication (T. 22). After the psychiatric assignment officer consulted with the psychiatrist on duty, she returned to Room 25 and the patient. The patient became angry that he was not going to get medications. He became very loud, agitated and threatened to leave (T. 23-24, 63; Ex. 4).

9. As the patient was becoming loud and threatening to leave, Respondent passed the security officer in the hallway and asked him if there was a problem. The security guard replied that everything was under control. Respondent continued walking up the hallway (T. 63-64).

10. Respondent subsequently intervened in efforts to detain and restrain Patient A (T. 64, 149-158).

11. Respondent straddled and/or knelt beside Patient A and struck the patient in the face several times with a closed fist

at a time when the patient was restrained on the floor by other hospital employees (T. 28-29, 67, 91-92, 94, 106, 109).

12. Respondent was instructed by one of the hospital employees who was restraining the patient to get off the patient, but Respondent did not do so (T. 29, 67, 94, 117, 124, 163).

13. Respondent finally removed himself off the patient (T. 124-125, 203-204; Ex. 6).

SECOND SPECIFICATION: Willfully making or filing a false report

14. As a result of the incident on April 8, 1988 involving Respondent and Patient A, the Genesee Hospital in April and May, 1988 terminated Respondent's employment as a physician with the hospital's emergency division. As a result of the same incident, in May 1988, Respondent withdrew his application for medical staff privileges in pediatrics at the Genesee Hospital (Ex. 5; T. 186, 188).

15. Respondent, in a subsequent registration application dated December 11, 1988, which was filed with the New York State Education Department, answered "No" to question 1(c): "Since you last registered, has any hospital or licensed facility restricted or terminated your professional training, employment, or privileges, or have you ever voluntarily or involuntarily resigned or withdrawn from such association to avoid imposition of such action?" Respondent's registration application prior to the one dated December 11, 1988 was dated December 18, 1985, prior to the incident involving Respondent and Patient A (Ex. 3).

16. Question 1(c) on the December 11, 1988 registration application is prefaced by the words FOR HEALTH PROFESSIONALS ONLY. These words are underlined and they are in larger type than the text which comprises the other questions on the application. Question 1(c) is a recent question. It appears only on Respondent's December 11, 1988 application and not on the other applications (Ex. 3).

17. Respondent signed the December 11, 1988 application, made the check marks which respond to the questions, and knew to fill out question 1(c) because that question was prefaced by the words FOR HEALTH PROFESSIONALS ONLY.

18. Respondent conceded that the accurate response to question 1(c) would have been "yes" (T. 208).

CONCLUSIONS

The following conclusions were reached pursuant to the Findings of Fact herein. All conclusions resulted from a unanimous vote of the Hearing Committee.

FIRST SPECIFICATION: Willfully abusing a patient physically

Findings of Fact 3 through 13 herein relate to this Specification. The Hearing Committee reached the following conclusions regarding the factual allegations in the Statement of Charges:

FACTUAL ALLEGATION	CONCLUSION
paragraph A	sustained (Findings of Fact 3, 4, 9 and 10)
paragraph B	sustained (Finding of Fact 11)
paragraph C	sustained (Finding of Fact 12)
paragraph D	not sustained (Finding of Fact 13)

It is concluded that the charge of willfully abusing a patient physically should not be sustained, even though the primary factual allegations regarding Respondent's underlying acts were found by the Hearing Committee to be true as listed above.

Inasmuch as willful abuse has not been specifically defined by law for purposes of this proceeding, the Committee looked to 10 NYCRR 81.1(a) for guidance on the definition of abuse. The Committee realizes that it is not bound by Section 81.1 which was promulgated pursuant to proceedings other than medical misconduct matters. However, the Committee considers Section 81.1 to be persuasive in defining abuse, because it is used in another type of health related proceeding and it is consistent with the ordinary dictionary meaning of the word.

10 NYCRR 81.1(a), in relevant part, defines abuse as follows:

> . . . inappropriate physical contact . . . which harms or is likely to harm . . . Inappropriate physical contact includes, but is not limited to, striking, pinching, kicking, shoving, bumping and sexual molestation.

The Committee concludes that Respondent's actions (Findings of Fact 9-12) constituted abuse or "inappropriate physical contact which harmed or was likely to harm" Patient A.

However, Respondent is charged with violating 8 NYCRR 29.2(a)(2) which, unlike 10 NYCRR 81.1(a), expressly adds the element of willfulness to the act of abuse. The Department's position, as set forth in its post-hearing memorandum is that willfulness is proved if it is shown that Respondent acted voluntarily and intentionally as opposed to accidentally or involuntarily. This view would be persuasive if the issue involved describing Respondent's willfulness regarding his underlying acts. Clearly, however, the word "willfully" modifies "abusing" in 8 NYCRR 29.2(a)(2). The record does not support a conclusion directly or by inference that Respondent willfully abused Patient A in that there was no convincing evidence that he intentionally engaged in abuse or "inappropriate physical contact." It was not his intent to be inappropriate.

Again, the inappropriate physical contact which harmed or was likely to harm (abuse) was proved, but it was not shown that Respondent engaged in conduct known by him to be inappropriate or abusive. The Committee was not convinced that Respondent was aware that his conduct involved a knowing violation of law. The Committee was advised by the administrative officer that this standard is consistent with the law in the State of New York.[1]

The Hearing Committee emphasizes that it does not condone Respondent's conduct, while it concludes that this charge

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[1] People v. Coe, 71 NY2d 852.

should not be sustained. That conclusion is reached due to a lack of proof that Respondent intended to act inappropriately. The Committee would have concluded that medical misconduct had occurred if 8 NYCRR 29.2(a)(2) prohibited abuse as defined in 10 NYCRR 81.1 rather than having added the element of willfulness which mandates a different conclusion.

SECOND SPECIFICATION: Willfully making or filing a false report.

Findings of Fact 14 through 18 herein relate to this Specification. The Hearing Committee reached the following conclusion regarding the factual allegations in the Statement of Charges:

FACTUAL ALLEGATION	CONCLUSION
paragraph E	sustained (Findings of Fact 14-18)

The Committee concludes that this Specification should be sustained. Respondent's response on the registration application was incorrect beyond question. The sole inquiry is whether the incorrect entry was made willfully or due to carelessness as proposed by Respondent.

The question was prefaced by the underlined capitalized words FOR HEALTH PROFESSIONALS ONLY. It is very unlikely that one would overlook this question on a physician's registration application. Furthermore, the subject matter of the question dealt with important events that had occurred only approximately seven months previously and which could, obviously, affect

Respondent's application. It is inferred from these facts and circumstances that Respondent intentionally and knowingly falsified the registration application and that he knew that it was a violation of law to make and file said application.

RECOMMENDATION

Pursuant to the Findings of Fact and Conclusions herein, the Hearing Committee unanimously recommends that the FIRST SPECIFICATION (willfully abusing a patient physically) not be sustained and that the SECOND SPECIFICATION (willfully making or filing a false report) be sustained.

The Hearing Committee further unanimously recommends that Respondent be censured and reprimanded for his act of willfully making or filing a false report.

DATED: Johnson City, New York
~~February~~ MARCH 8, 1990

Respectfully submitted,

Peter J. Owens

MSGR. PETER J. OWENS, Chairperson

GLENDA D. DONOGHUE, M.D.
CLAY E. PHILLIPS, M.D.

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

IN THE MATTER :

OF :

DAVID HENRY BREEN, M.D. :

COMMISSIONER'S RECOMMENDATION

TO: Board of Regents
New York State Education Department
State Education Building
Albany, New York

A hearing in the above-entitled proceeding was held on October 12, 1989 and December 6, 1989. Respondent, David Henry Breen, M.D., appeared by David E. Brown, Esq. The evidence in support of the charges against the Respondent was presented by E. Marta Sachey, Esq.

NOW, on reading and filing the transcript of the hearing, the exhibits and other evidence, and the findings, conclusions and recommendation of the Committee,

I hereby make the following recommendation to the Board of Regents:

A. The Findings of Fact of the Committee should be accepted in full and the following additional Finding of Fact made:

> At the time Respondent struck Patient A, Patient A was not touching Respondent in any way (T. 106).

B. The Conclusion of the Committee with regard to the Second Specification (false report) should be accepted. The Conclusion of the Committee with regard to the First Specification (willful abuse) should be rejected. The Committee states that the Respondent's actions (repeatedly hitting a restrained patient with a closed fist) were inappropriate and cannot be condoned, but were not willful and, therefore, not misconduct.

EXHIBIT "C"

The disposition of this charge turns on the meaning of "willful". The term willful is not defined in law or regulation, but it has been defined in case law in several contexts and, in that case law, we must divine some sense of the meaning of the term. The context that seems to me most analogous to this misconduct proceeding is a civil proceeding based on "willful misconduct."

In Seminara v. Highland Lake Bible Conference, 112 A.D.2d 630 (3rd Dept. 1985), the Third Department citing Prosser on Torts (5th Ed. 1984) defined willful misconduct under General Obligations Law #9-103 as follows:

> "Intentional acts of unreasonable character, performed in disregard of a known or obvious risk so great as to make it highly probable that harm will result." 112 A.D.2d at 633.

Applying this definition to the facts in this case, it is clear that Respondent acted willfully. He disregarded the obvious risk that repeatedly punching a fully restrained patient with a closed fist would harm the patient.

This evaluation seems more meaningful and relevant than Petitioner's definition of the term (which requires only that a person intend to do what he did) or Respondent's definition of the term (which requires that a person knew he was doing something inappropriate or illegal).

While I am mindful that emergency room physicians are often under stress and required to react instantaneously, Respondent's conduct cannot be explained or excused on that basis.

C. In lieu of the recommendation of the Committee, I recommend that Respondent's license to practice medicine be suspended for one year and that suspension be stayed.

D. The Board of Regents should issue an order adopting and incorporating the Findings of Fact and Conclusions and further adopting as its determination the Recommendation as described above.

The entire record of the within proceeding is transmitted with this Recommendation.

DATED: Albany, New York
May 14, 1990

DAVID AXELROD, M.D.
Commissioner of Health
State of New York

EXHIBIT "D"

TERMS OF PROBATION
OF THE REGENTS REVIEW COMMITTEE

DAVID HENRY BREEN

CALENDAR NO. 10976

1. That respondent shall make quarterly visits to an employee of and selected by the Office of Professional Medical Conduct of the New York State Department of Health, unless said employee agrees otherwise as to said visits, for the purpose of determining whether respondent is in compliance with the following:

   a. That respondent, during the period of probation, shall act in all ways in a manner befitting respondent's professional status, and shall conform fully to the moral and professional standards of conduct imposed by law and by respondent's profession;

   b. That during the first month of probation respondent shall submit to an examination, at respondent's expense, by a psychiatrist chosen by respondent and previously approved, in writing, by the Director of the Office of Professional Medical Conduct, and respondent shall supply, within the first month of probation, a written report from said psychiatrist, said report to state whether or not respondent is fit to practice as a physician in the State of New York; that respondent must be fit to practice as a physician in the State of New York in order to be in compliance with this term of probation, such fitness to be demonstrated by said report from the psychiatrist; and that if information is received by the New York State Department of Health from said psychiatrist indicating that respondent is unfit to practice respondent's profession, such information shall be processed to the Board of Regents for its determination in a violation of probation proceeding initiated by the New York State Department of Health and/or such other proceedings pursuant to the Public Health Law, Education Law, and/or Rules of the Board of Regents;

   c. That respondent shall submit written notification to the New York State Department

of Health, addressed to the Director, Office of Professional Medical Conduct, Empire State Plaza, Albany, NY 12234 of any employment and/or practice, respondent's residence, telephone number, or mailing address, and of any change in respondent's employment, practice, residence, telephone number, or mailing address within or without the State of New York;

d. That respondent shall submit written proof from the Division of Professional Licensing Services (DPLS), New York State Education Department (NYSED), that respondent has paid all registration fees due and owing to the NYSED and respondent shall cooperate with and submit whatever papers are requested by DPLS in regard to said registration fees, said proof from DPLS to be submitted by respondent to the New York State Department of Health, addressed to the Director, Office of Professional Medical Conduct, as aforesaid, no later than the first three months of the period of probation; and

e. That respondent shall submit written proof to the New York State Department of Health, addressed to the Director, Office of Professional Medical Conduct, as aforesaid, that 1) respondent is currently registered with the NYSED, unless respondent submits written proof to the New York State Department of Health, that respondent has advised DPLS, NYSED, that respondent is not engaging in the practice of respondent's profession in the State of New York and does not desire to register, and that 2) respondent has paid any fines which may have previously been imposed upon respondent by the Board of Regents; said proof of the above to be submitted no later than the first two months of the period of probation;

f. That respondent shall, at respondent's expense, enroll and participate in a counseling program during the period of probation, said counseling program to be selected by respondent and previously approved, in writing, by the Director of the Office of Professional Medical Conduct; proof of the satisfactory completion of said counseling program to be submitted, in

writing, to said Director of the Office of Professional Medical Conduct within 10 days after such successful completion. Respondent shall undertake said counseling program even if he passes the psychiatric examination required in probation term 1b;

2. If the Director of the Office of Professional Medical Conduct determines that respondent may have violated probation, the Department of Health may initiate a violation of probation proceeding and/or such other proceedings pursuant to the Public Health Law, Education Law, and/or Rules of the Board of Regents.

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

DAVID HENRY BREEN

CALENDAR NO. 10976

The University of the State of New York

IN THE MATTER

OF

DAVID HENRY BREEN
(Physician)

DUPLICATE ORIGINAL VOTE AND ORDER NO. 10976

Upon the report of the Regents Review Committee, a copy of which is made a part hereof, the record herein, under Calendar No. 10976, and in accordance with the provisions of Title VIII of the Education Law, it was

VOTED (September 14, 1990): That, in the matter of DAVID HENRY BREEN, respondent, the recommendation of the Regents Review Committee be accepted as follows:

1. The hearing committee's 18 findings of fact, and the Commissioner of Health's recommendation as to those findings of fact, be accepted, and the Commissioner of Health's additional finding of fact also be accepted;
2. The hearing committee's conclusion as to the question of respondent's guilt of the second specification of the charges be accepted, and the hearing committee's conclusion as to the question of respondent's guilt of the first specification of the charges not be accepted;
3. The Commissioner of Health's recommendation as to the conclusions of the hearing committee regarding the question of respondent's guilt of the first and second specifications of the charges be accepted;
4. Respondent is guilty, by a preponderance of the evidence, of the first specification of the charges to the extent

of allegations A, B, and C of the statement of charges as indicated at page 7 of the hearing committee report, and the second specification of the charges, and not guilty of allegation D of the statement of charges as indicated at page 7 of the hearing committee report;

5. The hearing committee's and Commissioner of Health's recommendations as to the measure of discipline be modified; and

6. Respondent's license to practice as a physician in the State of New York be suspended for one year upon each specification of the charges of which respondent is guilty, as aforesaid, said suspensions to run concurrently, that execution of said suspensions be stayed, and respondent be placed on probation for one year under the terms prescribed by the Regents Review Committee;

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

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 24th day of September, 1990.

Thomas Sobol

Commissioner of Education