

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

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IN THE MATTER

OF

REPORT OF

Proceedings by the State Board for Professional :
Medical Conduct to recommend the action to be :
taken with respect to the revocation or suspension :
of the license heretofore granted to ERNEST MILLER, :
R.P.A., to practice medicine in the State of New :
York, or such other penalty as is warranted pursuant :
to Article 2, Title II-A, of the Public Health :
Law of the State of New York :

THE HEARING
COMMITTEE

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TO: THE NEW YORK STATE COMMISSIONER OF HEALTH
Tower Building, 14th Floor
Nelson A. Rockefeller Empire State Plaza
Albany, New York 12237

The undersigned Hearing Committee (hereinafter referred to as the Committee) consisting of Donald Walker, M.D. (Chairman), Stanley Grossman, M.D., Jesse S. Parker, M.D., Jack Manpel, M.D., and Mr. George Couperthwait, having been duly designated, constituted and appointed by the State Board of Professional Misconduct (hereinafter referred to as the Board), pursuant to Public Health Law § 230, Article 2, Title II-A of the Public Health Law of the State of New York, as well as applicable provisions of the Education Law of the State of New York, to preside over and conduct a hearing relative to charges that respondent herein has violated provisions of Section 6509 of the Education Law of the State of New York and to make a recommendation concerning what action should be taken with respect to whether or not a license previously granted to respondent to practice medicine in the State of New York should be suspended or revoked, or whether any other action is warranted, and a Notice of Hearing and Statement of

of Charges dated May 5, 1981 having been duly served upon the respondent Ernest Miller, R.P.A., and the Board having been represented by Peter J. Millock, General Counsel, New York State Department of Health, Peter D. Van Buren, Esq., of Counsel, and the respondent having appeared personally and having been represented by Stewart A. Rosenwasser, Esq., and a hearing having been held at Albany, New York on June 2, 1981 and June 19, 1981, and witnesses having been duly sworn, affirmed, heard, examined and said testimony having been stenographically transcribed and said hearing having been held in accordance with the rules and regulations promulgated by the Department and by the State of New York and in accordance with the Notice of Hearing herein and exhibits having been received in evidence and made a part of the record herein and a full inquiry having been made with respect to the above entitled matter.

NOW, the undersigned Committee, having considered the entire record in the above entitled matter, does hereby report its findings, conclusions, and recommendations to the New York State Commissioner of Health as follows:

PRELIMINARY STATEMENT

Respondent was born September 30, 1954, and is a licensed physician's assistant in the State of New York and was authorized to engage in the practice of medicine on August 19, 1977 by issuance of license number 000720 by the State Education Department subsequent to completing

the Albany-Hudson Valley Physician's Assistant Program of Albany Medical College.

The Notice of Hearing with Statement of Charges containing five Specifications was received in evidence as Department's exhibit "1".

Respondent is charged with violations of Section 6544 subdivision 1(a); Section 6544 subdivision 1(b); Section 6544 subdivision 1(c); Section 6544 subdivision 1(d) and Section 6544 subdivision 1(e); all of which are more specifically hereinafter set forth.

FINDINGS

I. FIRST SPECIFICATION

A. Respondent is charged with fraud or deceit while acting as a physician's assistant within the meaning of Education Law Section 6544 (1)(a) in that: On or about and between 1979 and 1980, the Respondent used his position as a physician's assistant in the office of Dr. H. B. Foote, the Indian Lake Health Center in North Creek, New York to obtain and to divert to his own personal use and possession the substances listed in Appendix A, attached to and made a part of the Statement of Charges herein.

B. To sustain the above charge there must be proof that Respondent both personally used and possessed the substances listed in Appendix A. The Committee finds that although the substances listed in Appendix A were seized while in the possession of Respondent, there was no proof that he personally used those substances.

II. SECOND SPECIFICATION

A. Respondent is charged with being convicted in a court of competent jurisdiction within this state of a crime involving moral turpitude within the meaning of Education Law Section 6544(1)(b) in that: On or about

December 6, 1979 Respondent pleaded guilty to a charge of criminal mischief in the fourth degree (misdemeanor), Penal Law Section 145.00.

B. Criminal mischief in the fourth degree, as it pertains to this matter, is defined in Section 145.00(1) of the Penal Law as intentionally damaging the property of another person.

C. Respondent was convicted of violating Penal Law Section 145.00 (Department's Exhibit # 7).

D. Respondent's conviction arose from his act of shooting out a street light with a .22 caliber rifle.

E. Moral Turpitude is defined as follows:

The act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or society in general, contrary to accepted and customary rule of right and duty between man and man; Act or behavior ~~that~~ gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others; The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita. A term of frequent occurrence in statutes, especially those providing that a witness' conviction of a crime involving moral turpitude may be shown as tending to impeach his credibility. In general it means neither more nor less than "turpitude," i.e., anything done contrary to justice, honesty, modesty, or good morals.

Although a vague term, it implies something immoral in itself, regardless of its being punishable by law. Thus excluding unintentional wrong, or an improper act done without unlawful or improper intent. It is also said to be restricted to the gravest offenses, consisting of felonies, infamous crimes, and those that are malum in se and disclose a depraved mind. (Black's Law Dictionary, Fifth Edition, 1979, pp. 910 and 1359-60).

F. The Committee finds that Respondent's act of shooting out a street light does not constitute a crime of moral turpitude in accordance with the above definition.

III. THIRD SPECIFICATION

A. Respondent is charged with being or having been addicted to the use of narcotic or depressant or stimulant drugs or having become mentally ill within the meaning of the Education Law Section 6544(1)(c) in that, among other things and incidents:

On or about and during 1979, the Respondent became addicted to morphine sulfate and when his supply thereof became depleted, he utilized other controlled drugs such as tranquilizers, sedatives and amphetamines which he had procured from his places of employment and other illegal drugs such as are set forth in Appendix A, hereto attached and made a part hereof culminating in the conviction described in the Second Specification herein.

B. The Committee finds that there was no proof of drug use by the Respondent other than his self-administering of morphine approximately two or three times which does not constitute drug addiction.

C. The Committee finds that it was not proven that Respondent is or had been addicted to the use of any drugs or had become mentally ill.

IV. FOURTH SPECIFICATION

A. Respondent is charged with violating the regulations promulgated by the Commissioner of Health pursuant to Public Health Law, Section 3701 within the meaning of Education Law, Section 6544(1)(d) in that, among other things and incidents: On or about and between February, 1979, and November, 1979, the Respondent in violation of 10 NYCRR 94.2(e)(1), issued prescriptions set forth in Appendix B, attached to and made a part of the Statement of Charges herein, for controlled substances despite his lack of authorization to issue these prescriptions.

B. There is no doubt that Respondent issued prescriptions in violation of 10 NYCRR 94.2(e)(1) as evidenced by Department's Exhibit # 3, the testimony of Respondent and the testimony of Dr. Foote.

C. The Committee takes note of the extenuating circumstances involved in Respondent's issuing of the illegal prescriptions. Due to the unavailability of a physician in a rural area on a regular basis, Respondent was advised that the procedure was for him to issue the prescription and it would be later signed by a physician. However, that procedure violates 10 NYCRR 94.2(e)(1) and Respondent should be held accountable.

V. FIFTH SPECIFICATION

A. The Respondent is charged with being guilty of unprofessional conduct within the meaning of Education Law, Section 6544(1)(e) in that, among other things and incidents: 1. On or about and during 1979 Respondent failed in a willful or grossly negligent manner to comply with substantial provisions of State Laws, rules and regulations governing the practice of the profession of Physician's Assistant as afore-cited as more fully set forth in the First Specification, Paragraph 4, and the Second Specification, Paragraph 5, the Third Specification, Paragraph 6, and the Fourth Specification, Paragraph 7 as set forth in the Statement of Charges.

2. On or about and during 1979 Respondent failed in a willful or grossly negligent manner to comply with substantial provisions of the State Law, rules and regulations governing the practice of the profession of Physician's Assistant by his violation of Public Health Law Section 3335, through his possession of marijuana and the other illegally possessed drugs listed in Appendix A., hereto attached and made a part hereof and by his unlawful use of controlled substances for treatment of his own habitual use in violation of 10 NYCRR 80.61.

B. Regarding V.A.1. above, the Committee finds that the Respondent is guilty of unprofessional conduct within the meaning of Education Law Section 6544(1)(e) relating to his conduct as charged in the Fourth Specification only.

C. Regarding V. A.2. above, the Committee finds that the Respondent is guilty of unprofessional conduct within the meaning of Education Law Section 6544(1)(e) in that he possessed illegal drugs.

D. The Committee finds that there was no evidence to support the charge of habitual use of drugs by the Respondent.

CONCLUSIONS

I. FIRST SPECIFICATION

The Committee concludes by unanimous vote (5-0) that the Respondent is not guilty of the charges contained in the First Specification as set forth in the Statement of Charges.

II. SECOND SPECIFICATION

The Committee concludes by unanimous vote (5-0) that the Respondent is not guilty of the charges contained in the Second Specification as set forth in the Statement of Charges.

III. THIRD SPECIFICATION

The Committee concludes by unanimous vote (5-0) that the Respondent is not guilty of the charges contained in the Third Specification as set forth in the Statement of Charges.

IV. FOURTH SPECIFICATION

The Committee concludes by unanimous vote (5-0) that the Respondent is guilty of the charges contained in the Fourth Specification as set forth in the Statement of Charges in accordance with the findings set forth above.

V. FIFTH SPECIFICATION

The Committee concludes by unanimous vote (5-0) that the Respondent is guilty of the charges contained in the Fifth Specification as set forth in the Statement of Charges in accordance with the findings set forth above.

RECOMMENDATIONS

After due deliberation of the entire record the Committee by unanimous vote (5-0) recommends, pursuant to Education Law Section 6511, that the Respondent's license to practice medicine as a physician's assistant be partially suspended allowing him to be employed as a physician's assistant only in a medical facility under the direct daily supervision of a physician as a course of retraining for a period of at least one year and that following said one year period the partial suspension be vacated.

Dated this 15 day of July, 1981, at Heliand, New York.

Donald Walker, MD

DONALD WALKER, M.D., Chairman

Stanley Grossman, M.D.

Jesse S. Parker, M.D.

Jack Manpel, M.D.

George Couperthwait

C.P.M.C

STATE OF NEW YORK : DEPARTMENT OF HEALTH

STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

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IN THE MATTER	:	<u>NOTICE</u>
OF	:	<u>OF</u>
ERNEST MILLER, R.P.A.	:	<u>HEARING</u>

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TO: Ernest Miller, R.P.A. Indian Lake, New York 14842	288 Hoyt Street P.O. Box 892 Port Ewen, New York 12466
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PLEASE TAKE NOTICE:

A hearing will be held pursuant to the provisions of Section 230 of the New York Public Health Law (McKinney, Supp. 1980) and Article 3 of the New York State Administrative Procedure Act (McKinney, 1976). The hearing will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct on the 2nd day of June, 1981 at 10:00 in the forenoon of that day at the Tower Building, 14th Floor, Empire State Plaza, Albany, New York 12237 and at such other adjourned dates, times and places as the committee may direct.

At the hearing, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the hearing will be made and the witnesses at the hearing will be sworn and examined. You shall appear in person at the hearing and may

be represented by counsel. You have the right to produce witnesses and evidence on your behalf, to have subpoenas issued on your behalf to require the production of witnesses and documents and you may cross-examine witnesses and examine evidence produced against you.

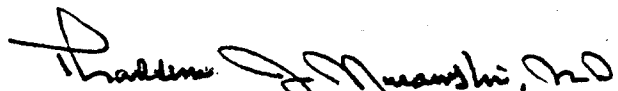
The hearing will proceed whether or not you appear at the hearing. At the conclusion of the hearing, the committee shall make a determination concerning what action should be taken with respect to your license to practice medicine in the State of New York.

Pursuant to the provisions of Section 230 of the New York Public Health Law (McKinney, Supp. 1980), you may file an answer to the Statement of Charges, including affirmative defenses, if any, not less than ten days prior to the date of the hearing. Such answer shall be forwarded to Office of Counsel, Professional Medical Conduct Section, State Department of Health, Tower Building, 12th Floor, Empire State Plaza, Albany, New York 12237.

SINCE THESE PROCEEDINGS MAY RESULT IN A RECOMMENDATION THAT YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE BE REVOKED OR SUSPENDED, YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York

5/5/81


THADDEUS J. MURAWSKI, M.D.
Executive Secretary of State Board
for Professional Medical Conduct

Inquiries should be directed to: Peter Van Buren, Esq.
Senior Attorney

Telephone Number: (518) 474-1785

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

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IN THE MATTER : STATEMENT
OF : OF
ERNEST MILLER, R.P.A. : CHARGES
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The State Board for Professional Medical Conduct, upon information and belief, charges and alleges as follows:

1. Ernest Miller, R.P.A., Respondent, was authorized to engage in the practice of medicine in the State of New York on August 19, 1977 by the issuance of license number 000720 by the State Education Department.
2. Respondent is currently registered with the New York State Education Department to practice medicine for the period of 1980 through 1981 from Indian Lake, New York, 12482. (General Delivery).
3. Respondent is charged with professional misconduct within the meaning of Education Law, § 6509, amended 1980 as set forth in the Specifications attached.

FIRST SPECIFICATION

4. The Respondent is charged with fraud or deceit while acting as a physician's assistant within the meaning of Education Law, § 6544(1)(a) in that:

On or about and between 1979 and 1980, the Respondent used his position as a physician's assistant in the office of Dr. H.B. Foote, the Indian Lake Health Center and/or in North Creek, New York to obtain and to divert to his own personal use and possession the controlled substances listed in Appendix A, hereto attached and made a part hereof.

SECOND SPECIFICATION

5. The Respondent is charged with being convicted in a court of competent jurisdiction with this state of a crime involving moral turpitude within the meaning of Education Law, § 6544(1)(b) in that, among other things and incidents:

On or about December 6, 1979 Respondent pleaded guilty to a charge of criminal mischief in the fourth degree (misdemeanor), Penal Law, § 145.00. He was given a conditional discharge by the Town Justice in the Town Court of Indian Lake.

THIRD SPECIFICATION

6. The Respondent is charged with being or having been addicted to the use of narcotic or depressant or stimulant drugs or having become mentally ill within the meaning of Education Law, § 6544(1)(c) in that, among other things and incidents:

On or about and during 1979, the Respondent became addicted to morphine sulfate and when his supply thereof became depleted, he utilized other controlled drugs such as tranquilizers, sedatives and amphetamines which he had procured from his places of employment and other illegal drugs such as are set forth in Appendix A, hereto attached and made a part hereof culminating in the conviction described in the Second Specification herein.

FOURTH SPECIFICATION

7. Respondent is charged with violating the regulations promulgated by the Commissioner of Health pursuant to Public Health Law, § 3701 within the meaning of Education Law, § 6544(1)(d) in that, among other things and incidents:

On or about and between February, 1979, and November, 1979, the Respondent, in violation of 10 NYCRR 94.2(e)(1), issued the prescriptions set forth in Appendix B, hereto attached and made a part hereof, for controlled substances despite his lack of authorization to issue these prescriptions.

FIFTH SPECIFICATION


8. The Respondent is charged with being guilty of unprofessional conduct within the meaning of Education Law, § 6544(1)(e) in that, among other things and incidents:

a. On or about and during 1979 the Respondent failed in a willful or grossly negligent manner to comply with substantial provisions of State Laws, rules and regulations governing the practice of the profession of Physician's Assistant as afore-cited as more fully set forth in the First Specification, Paragraph 4, the Second Specification, Paragraph 5, the Third Specification, Paragraph 6, and the Fourth Specification, Paragraph 7 above.

ERNEST P. MILLER, R.P.A.

b. On or about and during 1979 Respondent failed in a willful or grossly negligent manner to comply with substantial provisions of the State Law, rules and regulations governing the practice of the profession of Physician's Assistant by his violation of Public Health Law, § 3335, through his possession of marijuana and the other illegally possessed drugs listed in Appendix A, hereto attached and made a part hereof and by his unlawful use of controlled substances for treatment of his own habitual use in violation of 10 NYCRR 80.61.

Date: 5/5/81


THADDEUS J. MURAWSKI, M.D.
Executive Secretary
State Board for Professional
Medical Conduct

Ernest P. Miller, R.P.A.

APPENDIX A

1. Six (6) pink and red capsules marked "...Lederle...". Capsules contain the controlled substance DEXTRO-PROPOXYPHENE.
2. One (1) orange-red oblong film coated half scored tablet marked "...Lilly C63...". Tablet contains the controlled substance DEXTRO-PROPOXYPHENE.
3. Ten (10) round tan tablets marked "... CIBA SAMPLE..." and pieces. Tablets and pieces contain the controlled substance METHYLPHENIDATE, a stimulant. (less than 1 gram)
4. Sixty eight (68) round yellow half scored tablets and pieces. Tablets and pieces contain the controlled substance METHAMPHETAMINE. (less than 1/2 ounce)
5. One (1) oblong orange-red half scored film coated tablet marked "...Lilly C63...". Tablet contains the controlled substance DEXTRO-PROPOXYPHENE.
6. One (1) vial marked "...SEDATIVE-HYPNOTIC Each tablet contains: Secobarbital Sodium, Butabarbital Sodium, Phenobarbital..." containing seventy one (71) round white half scored tablets. Tablets contain the controlled substances SECOBARBITAL, a dangerous depressant, BUTABARBITAL, a dangerous depressant, PHENOBARBITAL, a dangerous depressant. (all less than 10 ounces) (all derivatives of BARBITURIC ACID)
7. One (1) vial marked "...LIBRITABS...CHLORDIAZEPOXIDE..." containing twenty three (23) blue film coated tablets marked "...ROCHE 14...". Tablets contain the controlled substance CHORDIAZEPOXIDE, a depressant. (less than 2 pounds)
8. One (1) vial marked "...LIBRITABS...CHLORDIAZEPOXIDE..." containing eighty eight (88) round blue film coated tablets marked "...ROCHE 14...". Tablets contain the controlled substance CHLORDIAZEPOXIDE, a depressant. (less than 2 pounds)
9. One (1) round tan tablet marked "...CIBA SAMPLE...". Tablet contains the controlled substance METHYLPHENIDATE, a stimulant. (less than 1 gram)
10. Eleven (11) round yellow half scored tablets marked "...ROCHE (R) 5

Ernest P. Miller, R.P.A.

-2-

- VALIUM..." and pieces. Tablets and pieces contain the controlled substance DIAZEPAM, a depressant. (less than 2 pounds)
11. Five (5) round yellow half scored tablets. Tablets contain the controlled substance METHAMPHETAMINE. (less than 1/2 ounce)
 12. One (1) round yellow half scored tablet marked "...ROCHE 5...". Tablets contains the controlled substance DIAZEPAM, a depressant. (less than 2 pounds)
 13. Two (2) round tan tablets marked "...CIBA SAMPLE...". Tablets contain the controlled substance METHYLPHENIDATE, a stimulant. (less than 1 gram)
 14. Thirteen (13) round yellow half scored tablets. Tablets contain the controlled substance METHAMPHETAMINE. (less than 1/2 ounce)
 15. One (1) vial marked "...SODIUM DICLOXACILLIN MONOHYDRATE..." containing seven (7) red and blue capsules marked "...LILLY F65...". Capsules contain the controlled substances AMOBARBITAL, a dangerous depressant, and SECOBARBITAL, a dangerous depressant. (Derivatives of BARBITURIC ACID) (both less than 10 ounces)
 16. One (1) needle and cap sealed in plastic marked "...B-D...DISPOSABLE...".
 17. One (1) plastic bag containing 21.2 grams of seeds. Seeds contain MARIJUANA. Seeds are viable.
 18. One (1) bone pipe bowl containing a charred residue. Pipe bowl contains the residue of MARIJUANA.
 19. One (1) metal smoking pipe containing a charred residue. Pipe contains the residue of MARIJUANA
 20. One (1) metal and plastic pipe containing a charred residue. Pipe contains the residue of MARIJUANA.
 21. One (1) wooden pipe stem containing a charred residue. Pipe stem contains the residue of MARIJUANA.
 22. One (1) wooden pipe stem containing a charred residue. Pipe stem contains

Ernest P. Miller, R.P.A.

-3-

the residue of MARIJUANA.

23. One (1) vial containing two (2) homemade cigarette butts. Analyzed as (1) sample due to cross contamination. Butts contain MARIJUANA.

24. One (1) vial marked "...QUAALUDE..." containing a white residue. Residue contains the controlled substance METHAQUALONE, a dangerous depressant. (less than 1.0 ounces)

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

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IN THE MATTER : COMMENTS UPON
OF : REPORT OF THE
ERNEST P. MILLER, R.P.A. : HEARING COMMITTEE

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TO: NEW YORK STATE COMMISSIONER OF HEALTH
Tower Building, 14th Floor
Nelson A. Rockefeller
Empire State Plaza
Albany, New York 12237

Upon reviewing the Report of the Hearing Committee and the findings, conclusions and recommendations contained therein, the Department by Peter D. Van Buren, Esq., of Counsel, would submit the following comments upon this report:

FINDINGS - FIRST SPECIFICATION

In the First Specification the Respondent Physician's Assistant was charged with the following:

"4. The Respondent is charged with fraud or deceit while acting as a physician's assistant within the meaning of Education Law, §6544(1)(a) in that:

On or about and between 1979 and 1980, the Respondent used his position as a physician's assistant in the Office of Dr. H.B. Foote, the Indian Lake Health Center and/or in North Creek, New York to obtain and to divert to his own personal use and possession the controlled substances listed in Appendix A, hereto attached and made a part hereof."

In the Report of the Hearing Committee, Findings, I. First Specification, B, it is stated as a standard of proof:

"B. To sustain the above charge there must be proof that Respondent both personally used and possessed the substances listed in Appendix A. The Committee finds that although the substances listed in Appendix A were seized while in the possession of the Respondent, there was no proof that he personally used those substances."

The Department contends that the evidence with respect to the charge in this Specification is clear and uncontroverted. The Respondent is charged with fraud or deceit while acting as a Physician's Assistant in the sense that he utilized his position as a P.A. and the access to controlled substances which it gave him to obtain these substances and to accumulate them. The Respondent had accumulated a large amount of controlled substances in his own possession at his personal residence.

In its findings the Committee has set up a standard that "there must be proof that Respondent both personally used and possessed the substances listed in Appendix A." Such a standard is legally incorrect in the sense that this specification does not charge the Respondent with "use" in the sense of consumption of the controlled substances. The Respondent is charged with the use of his position to "obtain and to divert to his own personal use and possession the controlled substances...".

As utilized in this Specification, the operative words are that the Respondent "used" his position "to obtain" and "to divert" the controlled substances. To employ a contorted standard focusing on the words "to his own personal use and possession" creates legal error in this Finding due to the application of the wrong standard of proof.

In considering the charge arising out of this Specification it would appear that the proper definition of the word "use" is that appearing in N.Y. Jur, Words and Phases 776, which states:

"Use

* * *

The ordinary interpretation of the word "use" is the exercise of possessory interest in property for some length of time and anything less than this, such as merely giving another person the right to reproduce property, is not a use that will render the transactions subject to tax. 51 NY Jur, Sales and Use Taxes §4.

The Broad definition of the term "use" includes the exercise of any right or power over tangible personal property by the purchases thereof. 51 NY Jur, Sales and Use Taxes §13."

* * *

Said definition of the word "use" is further supported by Blacks Law Dictionary [5th ed.], wherein the word is defined as in part:

"Use, v. To make use of, to convert to one's service, to avail one's self of, to employ."

Use, n.

* * *

Non-technical sense. The "use" of a thing means that one is to employ, hold, occupy, or have some manner of benefit thereof.

* * *

In this case it can be seen from the evidence that this Respondent used his position as a Physician's Assistant to obtain and to divert the controlled substances in evidence in this matter to his own personal use and possession. That these substances were in his possession remains uncontroverted. That these substances had been obtained and diverted to Respondent's exercise of possessory interest for some length of time and exercise of right or power over them can readily be seen. Respondent converted to his service, availed his self of, held and occupied these controlled substances. That these controlled substances were obtained and diverted to Respondent's "personal use" is further shown by their being located in Respondent's residence as part of a cache of other controlled substances and illegal substances and were no longer available to the original medical offices and patients or to future ones.

FINDINGS - SECOND SPECIFICATION

In the Second Specification the Respondent was charged with the following:

"5. The Respondent is charged with being convicted in a court of competent jurisdiction within this state of a crime involving moral turpitude within the meaning of Education Law, §6544 (1)(b) in that, among other things and incidents:

On or about December 6, 1979 the Respondent pleaded guilty to a charge of criminal mischief in the fourth degree (misdemeanor), Penal Law, §145.00. He was given a conditional discharge by the Town Justice in the Town Court of Indian Lake."

While we agree with the Committee Report's findings presented in the Findings, II. Second Specification, B, with respect to the definition of Criminal Mischief in the Fourth Degree as being "intentionally damaging the property of another person" and the definition of moral turpitude as defined in Findings, II. Second Specification, E, we argue that neither the Statute nor the Second Specification of these charges requires that the Respondent be convicted of a crime defined as moral turpitude. Once again we feel that a legally incorrect standard of proof has been applied.

We argue that this crime "involved" moral turpitude as defined in these Committee findings. This construction of N.Y. Educ. Law §6544(1)(b) is further supported by its companion statute in professional discipline, N.Y. Educ. Law §6509, amended 1980, Professional Misconduct is defined in N.Y. Educ. Law, §6509(5)(a)

as "Being convicted of committing an act constituting a crime under: (i) New York State law". This section, N.Y. Educ. Law §6509 (5)(a), is applicable to any licensee licensed by the Education Department.

Here, the language of the law has been given a contorted application and definition in the face of its obvious intent. The language of the Second Specification's charge has likewise been given a contorted application. We would argue against such interpretations both on the basis of law and on the basis of reason. It is customary in professional misconduct proceedings of this nature regarding physicians and other licensees under N.Y. Educ. Law §6509 to go under a criminal conviction and allow the committee on professional conduct to inquire into the underlying acts which had formed the basis for the conviction. To do otherwise would render these committees powerless and forced to stumble through this area with blinders on where there have been pleas to reduced charges in the criminal case. In this case, testimony has clearly shown that while in an inebriated condition this Respondent beat his girlfriend, tore out or cut off her hair, forced her to seek refuge in the bottom of a closet in a neighboring dwelling in fear of her life, and fired a rifle out the windows and in his dwelling. Applying the definition that is

cited in the Findings, II. Second Specification, E, we find that the Committee has partially defined moral turpitude as follows:

"The act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man;..."

The Department contends that the acts involved in the abuse of his girlfriend and in the firing of a deadly weapon throughout his residence and out of the windows would certainly "involve" moral turpitude by the Committee's own definition.

We would request that the Commissioner make a finding of fact supporting the charge in this case. To do otherwise would reinforce a construction of the law which renders Committees and the Commissioner forced to turn a blind eye in cases where Respondent has plead guilty to a lesser charge than that actually warranted by the acts which he committed.

We would likewise object to the Findings, II. Second Specification, F, portion of this Committee Report in the sense that the Committee has made a finding that the "Respondent's act of shooting at a street light does not constitute a crime of moral turpitude in accordance with the above definition." The standard which has been applied by the committee is legally incorrect and is inconsistent with the language of the law and the Specification's charge. The conviction, according to N.Y. Educ. Law

§6544 (1)(b) must be "of a crime involving moral turpitude" not "constituting a crime of moral turpitude." We contend that the crime of which this Respondent was convicted did indeed "involve" moral turpitude when considered together with the facts involved in the incident out of which this conviction arose.

FINDINGS - THIRD SPECIFICATION

In this Specification Respondent was essentially charged with:

"... being or having been addicted to the use of narcotic or depressant or stimulant drugs or having become mentally ill within the meaning of Education Law, §6544 (1)(c)."

The facts in this case, including the Respondent's own testimony, indicate that he misappropriated three vials of morphine from the office in North Creek (Transcript pp. 101 & 102). According to Respondent's testimony these were 30cc. to 50cc. vials (p. 119). While he admitted using the morphine two or three times, he claimed that he had thrown the bottles away (pp. 102, 103, 119, 120). Respondent testified that the last time he used the morphine was approximately one month before the October 29, 1979 incident (p. 102). Trooper Tabor testified that at the time of the Respondent's arrest, he believed Respondent to be intoxicated or under the influence of a drug (p.44). The Trooper

also testified that at the time of his arrest Respondent had stated that he had been taking drugs and that he had been taking morphine (pp. 52,53).

The Department would argue that the facts in this case as shown by this testimony show that the morphine in the vials had been utilized by this Respondent and that Respondent had been addicted to it. This conclusion is further supported by the Respondent's behavior on October 29, 1979 as would also be a finding of mental illness. The Department would request the Commissioner to make a different finding with respect to the Findings, III. Third Specification, B & C, because the testimony and evidence in this proceeding minimally would indicate that the Respondent is or had been addicted to the use of drugs or maximally had become mentally ill.

FINDINGS - FIFTH SPECIFICATION

With regard to the finding in the Findings, V. Fifth Specification, D, we feel that the testimony and evidence in this matter would serve as evidence to support the charge of habitual use of drugs by the Respondent, and would request a finding consistent with the testimony, evidence and Specification's charge herein.


CONCLUSIONS

Due to our arguments set forth above with respect to the Findings of Fact, we would request conclusions of guilt from the Commissioner of Health with respect to the First Specification, Second Specification, the Third Specification and the entire Fifth Specification.

RECOMMENDATION

As a recommendation, the Department would suggest that the Commissioner recommend to the Board of Regents that the Respondent's Registration as a Physician's Assistant be suspended or revoked. Should the Commissioner desire to dictate a probationary or rehabilitation period for the Respondent, the suspension or revocation could be stayed. The stay could be made contingent upon Respondent's successful completion of this probationary or rehabilitation period so as to assure this Respondent's continued participation in such program and compliance with the terms of probation. We feel that this change would be appropriate because the "partial suspension" recommended in the Committee Report would be difficult to administer or enforce.

Albany, N.Y.
August 7, 1981


PETER D. VAN BUREN
Senior Attorney
Division of Legal Affairs

Approved January 19, 1982

No. 2262

Upon the report of the Regents Review Committee, under Calendar No. 2262, the prior proceedings had herein pursuant to Article 2, Title II-A of the Public Health Law, and in accordance with the provisions of Title VIII of the Education Law, it was

Voted: That the findings and conclusions of the Hearing Committee on Professional Conduct of the State Board for Professional Medical Conduct as well as the recommendation of the Commissioner of Health with respect thereto in the matter of ERNEST P. MILLER, respondent, be accepted; that, with respect to the measure of discipline to be imposed, the recommendation of the Hearing Committee as well as the recommendation of the Commissioner of Health be modified; that the recommendations of the Regents Review Committee be accepted; that respondent is guilty of the fourth and fifth specifications of the charges as set forth in the report of the Hearing Committee and not guilty of the first, second, and third specifications of the charges; that respondent's license and registration to practice as a registered physician's assistant in the State of New York be revoked upon each specification of the charges of which respondent was found guilty, as aforesaid; 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. 6



The University of the State of New York

IN THE MATTER

OF

Proceedings by the State Board for Professional Medical Conduct to determine the action to be taken with respect to the revocation or suspension of the license heretofore granted to ERNEST P. MILLER, R.P.A. to practice medicine in the State of New York, or such other penalty as is warranted, pursuant to Article 2, Title II-A of the Public Health Law of the State of New York.

No. 2262

Upon the report of the Regents Review Committee, under Calendar No. 2262, the prior proceedings had herein pursuant to Article 2, Title II-A of the Public Health Law, and the vote of the Board of Regents on January 19, 1982, which report and vote are incorporated herein and made a part hereof, it is

ORDERED that the findings and conclusions of the Hearing Committee on Professional Conduct of the State Board for Professional Medical Conduct as well as the recommendation of the Commissioner of Health with respect thereto in the matter of ERNEST P. MILLER, respondent, be accepted; that, with respect to the measure of discipline to be imposed, the recommendation of the Hearing Committee as well as the recommendation of the Commissioner of Health be modified; that the recommendations of the Regents Review Committee be accepted; that respondent is guilty of the fourth and fifth specifications of the charges as set forth in the report of the Hearing Committee and not guilty of the first, second, and third specifications of the charges; and that respondent's license and registration to practice as a registered physician's assistant in the State of New York be revoked upon each specification of the charges of which respondent was found guilty, as aforesaid.

IN WITNESS WHEREOF, I, Gordon M. Ambach,
Commissioner of Education of the State
of New York, for and on behalf of the

ERNEST P. MILLER (2262)



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
8th day of February , 1982.

Ernest P. Miller
Commissioner of Education