STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Antonia C. Novello, M.D., M.P.H., Dr.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

Public

November 14, 2005

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Eli Milch, M.D.
114 E. 71st Street
New York, New York 10021

Robert Bogan, Esq.
NYS Department of Health
433 River Street – Suite 303
Troy, New York 12180

Michael S. Kelton
Lippman, Krasnow & Kelton, LLP
380 Lexington Avenue
New York, New York 10168

RE: In the Matter of Eli Milch, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 05-188) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt **or** seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

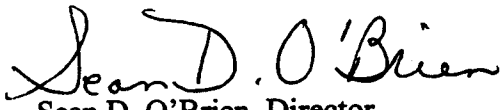
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

Office of Professional Medical Conduct
New York State Department of Health
Hedley Park Place
433 River Street-Fourth Floor
Troy, New York 12180

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

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

Sincerely,



Sean D. O'Brien, Director
Bureau of Adjudication

SDO:cah
Enclosure

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

In the Matter of **Eli Milch, M.D. (Respondent)** **A proceeding to review a Determination by a Committee (Committee) from the Board for Professional Medical Conduct (BPMC)**	**Administrative Review Board (ARB)** **Determination and Order No. 05-188** COPY

Before ARB Members Grossman, Lynch, Pellman, Wagle and Briber
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): **Robert Bogan, Esq.**
For the Respondent: **Michael S. Kelton, Esq.**

In this proceeding pursuant to N.Y. Pub. Health Law (PHL) § 230-c (4)(a)(McKinney 2005), the ARB considers the penalty to impose against the Respondent's License to practice medicine in New York State (License) following the Respondent's New York State criminal conviction for engaging in sexual conduct with a patient during a post operative examination. After a hearing below, a BPMC Committee determined that the Respondent engaged in professional misconduct and the Committee placed the Respondent's License on probation, with the requirement that the Respondent treat patients only in the presence of a chaperone. On review, the Petitioner asks that the ARB overturn the Committee and revoke the Respondent's License. Upon reviewing the hearing record and the review submissions from the parties, the ARB votes to overturn the Committee and revoke the Respondent's License.

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges with BPMC alleging that the Respondent violated N. Y. Educ. Law (EL) § 6530(9)(a)(i) due to the Respondent's conviction for committing a crime under New York State Law. A BPMC Committee conducted a hearing on those charges under the expedited hearing procedures (Direct Referral Hearing) in PHL §230(10)(p). In a Direct Referral Proceeding, the statute limits the Committee to considering whether a criminal conviction occurred, and if the Committee determines a conviction occurred, the Committee then determines the nature and the extent of the penalty to impose against the licensee, Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The evidence before the Committee demonstrated that the Respondent has held his License in New York since 1973. In March 2005, the Respondent entered a guilty plea in the City Court of the City of New York for Attempted Criminal Sexual Act in the Third Degree, a Class A Misdemeanor. The Committee found that the Respondent, a plastic surgeon, performed breast augmentation surgery on Patient R. G. in January 2004. The Respondent testified at the hearing that, during a post-operative examination, the Patient's conversation became sexually charged. The Respondent testified that he asked the Patient to kiss the Respondent, the Patient did and then the Patient performed fellatio on the Respondent, in response to the Respondent's request. The Respondent testified further that he requested the Patient to stop after about twenty seconds, the Patient did and the Patient later reported the encounter to the police. The City Court sentenced the Respondent to six months probation and ordered the Respondent to register as a Level One Sexual Offender for ten years.

The Committee concluded that the Respondent committed professional misconduct, but the Committee rejected the Petitioner's request that the Committee revoke the Respondent's License. The Committee found the Respondent's conduct serious, but found several mitigating factors in the record that made revocation appear harsh as a penalty. The Committee found the Respondent's conduct an isolated occurrence, with no prior sexual impropriety in practice, criminal charges or disciplinary proceedings. The Committee also found the Respondent shaken

and remorseful. In their decision, the Committee also relied on a psychiatric evaluation of the Respondent by Richard B. Krueger, M.D., which Dr. Krueger performed for the Respondent's probation officer. Dr. Krueger concluded that the Respondent suffered no mental health or personality disorders and presented as a candidate with a low risk of recidivism for any further improprieties and at an even lower risk with a chaperone. The Committee also noted that testimony at the hearing and several letters in evidence at the hearing portrayed the Respondent as a physician who conducted a high quality practice and as a physician devoted to his patients. The Committee concluded that revocation would deprive patients of a skillful and caring physician. The Committee voted to place the Respondent on probation for the remainder of his registration as a sex offender. The probation terms include the requirement that the Respondent treat patients only in the presence of a chaperone.

Review History and Issues

The Committee rendered their Determination on August 26, 2005. This proceeding commenced on or about September 7, 2005, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and the Respondent's reply brief. The record closed when the ARB received the reply brief on October 24, 2005.

The Petitioner argues that the sanction the Committee imposed provides insufficient protection for the public against a Level One Sex Offender. The Respondent argues further that no Level One Sex Offender deserves a medical license in New York State. The Petitioner notes that the Respondent's misconduct occurred with a patient, while the Respondent provided care. The Petitioner requests that, if the ARB selects as a sanction any penalty other than revocation, that the ARB require the Respondent to notify all his patients that he is a sex offender, so the patients may make an intelligent choice about receiving treatment from the Respondent.

In reply, the Respondent contends that the Petitioner's brief, at page 3, misrepresents testimony by the Respondent. The Respondent asks the ARB to affirm the Committee's Determination and calls our attention to Dr. Krueger's testimony concerning the Respondent's low risk for recidivism and to the hearing testimony and letters in evidence attesting to the Respondent's high standard of care and manner free of any suggestion of sexual impropriety. The Respondent also argues that a criminal conviction does not require revocation and that the penalty the Committed imposed is a penalty consistent with the outcome in certain cases, involving sexual misconduct, that ended in consent orders.

ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law and whether the Penalty is appropriate and within the scope of penalties which PHL §230-a permits. The ARB may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3rd Dept. 1993); in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS 2d 759 (3rd Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3rd Dept. 1995). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may

consider both aggravating and mitigating circumstances, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3rd Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the Respondent's criminal conduct constituted professional misconduct. Neither party challenged the Committee's Determination on the charge. We vote unanimously to overturn the Committee's Determination to place the Respondent's License on probation. We vote to revoke the License.

The ARB concludes that the Committee concentrated too much on whether the Respondent might commit further misconduct and ignored the misconduct that the Respondent did commit. We also reject the Respondent's suggestion that the penalties that the parties construct in consent agreements should in any way bind the ARB in our deliberations.

The Respondent engaged in sexual conduct with a vulnerable patient during an examination. The Respondent violated the public's trust in the medical profession and his conduct demonstrates a fundamental ethical failure. The Respondent's criminal conduct demonstrates his unfitness to practice medicine in New York State.

ORDER

NOW, with this Determination as our basis, the ARB renders the following **ORDER:**

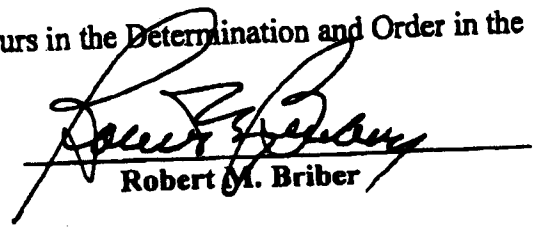
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB overturns the Committee's Determination to place the Respondent's License on probation.
3. The ARB revokes the Respondent's License.

Robert M. Briber
Thea Graves Pellman
Datta G. Wagle, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.

In the Matter of Eli Milch, M.D.

Robert M. Briber, an ARB Member, concurs in the Determination and Order in the Matter of Dr. Milch.

Dated: November 12, 2005

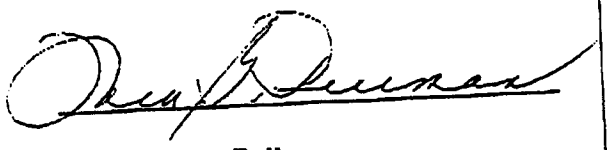


Robert M. Briber

In the Matter of Eli Milch, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the Matter of Dr. Milch.

Dated: Nov. 2, **2005**



Thea Graves Pellman

In the Matter of Eli Milch, M.D.

Datta G. Wagle, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Milch.

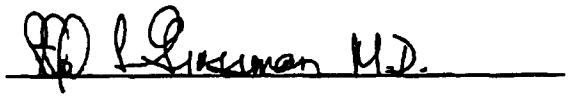
Dated: 11/1/, **2005**

Datta G. Wagle, M.D.

In the Matter of Eli Milch, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the Matter of Dr. Milch.

Dated: November 1, **2005**



Stanley L Grossman, M.D.

In the Matter of Eli Milch, M.D.

Therese G. Lynch, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Milch.

Dated: October 31, 2005

Therese G. Lynch M.D

Therese G. Lynch, M.D.