



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

August 15, 2005

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Richard Jay Apple, M.D.
25 Seaside Drive
Port Jefferson, New York 11777

Anthony Z. Scher, Esq.
Wood & Scher
222 Bloomingdale Road
White Plains, New York 10605

Paul Stein, Esq.
Associate Counsel
NYS Department of Health
Division of Legal Affairs
90 Church Street - 4th Floor
New York, New York 10007-2919

RE: In the Matter of Richard J. Apple, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 05-60) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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,

A handwritten signature in black ink that reads "Sean D. O'Brien". The signature is written in a cursive style with a large initial "S" and "O".

Sean D. O'Brien, Director
Bureau of Adjudication

SDO:djh

Enclosure

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

In the Matter of

Richard J. Apple, 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. 05-60

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):

Paul Stein, Esq.

For the Respondent:

Anthony Z. Scher, Esq.

After a hearing below, a three-member BPMC Committee determined that the Respondent committed professional misconduct by failing to maintain accurate records for two patients. The Committee voted to place the Respondent's License to practice medicine in New York (License) on probation for one year and to require the Respondent to take a continuing education course on record keeping. In this proceeding pursuant to N.Y. Pub. Health Law (PHL) § 230-c (4)(a)(McKinney 2005), the Petitioner asks the ARB to sustain additional misconduct charges, to extend the probation period and to place a monitor on the Respondent's practice. After considering the hearing record and the review submissions from the parties, the ARB affirms the Committee's Determination in full.

Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated N. Y. Educ. Law (EL) §§ 6530(3-6) & 6530(32) (McKinney Supp. 2005) by committing professional misconduct under the following specifications:

Material redacted

Material redacted

The charges involved the care that the Respondent, an anesthesiologist, provided to

Material redacted . The record refers to the Patients by letters to protect patient privacy.

The Committee determined that the Respondent failed to maintain accurate records for Patients A and C. The Committee found that the Respondent failed to document the presence or absence of any pertinent family history of anesthesia problems for Patient A. The Committee found further that in providing anesthesia during a procedure on Patient C, the Respondent failed to enter vital signs for the final twenty minutes of the procedure and failed to note the presence or absence of any pertinent medical history on a pre-anesthesia evaluation form.

Material redacted

Material redacted

The Committee voted to place the Respondent's License on probation for one year and to require the Respondent to complete successfully a five-hour continuing medical education program on medical record keeping, which the Office for Professional Medical Conduct (OPMC) must approve. Under the probation terms, the OPMC Director may review the Respondent's records. The Committee found the penalty appropriate, because the sustained charges involved record keeping only.

Review History and Issues

The Committee rendered their Determination on April 4, 2005. This proceeding commenced on April 19, 2005, when the ARB received the Respondent'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 June 2, 2005.

Material redacted

The Petitioner requests further that the ARB extend the period for probation from one year to three years and that the ARB impose a practice monitor as a probation term. In reply, the Respondent asks that the ARB affirm the Committee's Determination.

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 failed to maintain accurate records

Material redacted

and we reject the Petitioner's request that we extend the probation period or require the Respondent to practice with a monitor during probation. We affirm the Committee's Determination to place the Respondent's License on probation for one year and to require the Respondent to complete successfully a five-hour continuing education course on medical record keeping.

Material redacted

The ARB also concludes that the Committee acted appropriately in ordering the Respondent to complete successfully a course on record keeping and in placing his License on probation for one year. The Committee sustained misconduct charges dealing with record keeping only. We agree that a record-keeping course will aid the Respondent in correcting that problem and we agree that the one-year probation will allow the OPMC the opportunity to review the Respondent's records, to ensure that he has improved his record keeping.

ORDER

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

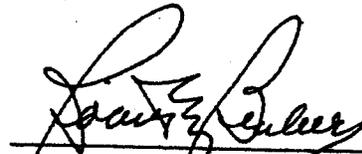
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB affirms the Committee's Determination to place the Respondent's License on probation for one year and to require that the Respondent complete successfully a five-hour course on medical record keeping.

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 Richard Jay Apple, M.D.

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

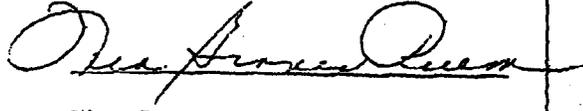
Dated: August 11, 2005


Robert M. Briber

In the Matter of Richard Jay Apple, M.D.

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

Dated: Aug 8, 2005



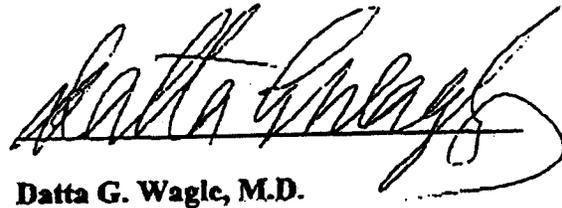
Thea Graves Pellman

In the Matter of Richard Jay Apple, M.D.

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

Matter of Dr. Apple.

Dated: 8/10, 2005



A handwritten signature in cursive script, appearing to read "Datta G. Wagle", written over a horizontal line.

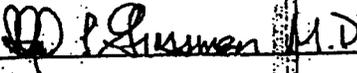
Datta G. Wagle, M.D.

In the Matter of Richard Jay Apple, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Apple.

Dated: August 10, 2005



Stanley L. Grossman, M.D.

In the Matter of Richard Jay Apple, M.D.

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

Dated: August 9, 2008.

Therese G. Lynch M.D.

Therese G. Lynch, M.D.