

UNIVERSITY OF TORONTO
THE GOVERNING COUNCIL

REPORT NUMBER 228 OF THE ACADEMIC APPEALS COMMITTEE¹

April 15, 22 and 27, and May 4 and 5, 1998

To the Academic Board,
University of Toronto.

Your Committee reports that it met on April 15, 22 and 27, and May 4, 1998 to hear evidence and argument in the appeal of Dr. H., and on May 5, 1998, in the absence of the parties and counsel, to consider its decision. The following members were present:

Professor Emeritus Ralph Scane, Acting Chair
Mrs. Margo Coleman
Professor Catherine Grisé
Mr. Paul Lomic
Professor Emmet Robbins.

Ms Rosanne Lopers-Sweetman, Secretary, Academic Appeals Committee

In Attendance:

Dr. H., the Appellant
Mr. Richard Levin and Mr. G. Naimer, Counsel for Appellant
Dr. A. Ten Cate and Dr. P. Rossouw, Faculty of Dentistry
Ms S. Springer, Counsel for the Faculty of Dentistry

Your Committee considered an appeal from a decision of the Academic Appeals Committee of the Faculty of Dentistry, formally undated, but apparently made on or about November 25, 1997. That Committee reviewed a decision of the Faculty of Dentistry that Dr. H. had failed the subject Orthodontics III in the graduate diploma programme in Orthodontics, with the consequence that he failed the year and was required to repeat both course work and examinations in all subjects of the year, i.e., the second year of the diploma programme. The decision of the Faculty's Academic Appeals Committee states that the Appeal was denied, but in fact, that Committee afforded substantial relief to the Appellant, in

¹ **Note:** Subsequent to the release of this decision, the Student made an application for judicial review. The Divisional Court quashed the decision of the Academic Appeals Committee, declared the results of the written test should be expunged from the Student's academic record and declared that the student had fulfilled all of the requirements for graduation: [1998] O.J. No. 6045. The Court of Appeal subsequently restored the decision of the Academic Appeals Committee: [1999] O.J. No. 1057

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that it offered an opportunity to the Appellant to take a written examination in the course Orthodontics III, successful completion of the examination to constitute a pass in the course. This Committee assumes that, in saying that the appeal was denied, the Faculty committee meant that the relief sought by the Appellant from that Committee was refused. It assumes that the Appellant was there seeking the same relief which he sought before this Committee, namely that he be passed in Orthodontics III on the basis of the evaluations on the clinical work and oral examinations he had received in that course, exclusive of the written examination in that course, which he had failed.

The decision of your Committee is that, subject to some minor variations which are made by this Committee, the order made by the Faculty's Academic Appeals Committee was correct, and the further appeal to this Committee should otherwise be dismissed.

The Appellant took his first dental degree abroad. In 1993, he was admitted to the diploma programme in Orthodontics here. Originally he was admitted as a special student. Due to some visa difficulties, the Appellant made a late start in that year, causing him to miss a preliminary study course in clinical work. However, he successfully completed a number of non-clinical courses which are normally part of the "First Year" of the diploma programme, and, in June 1994, became a regular student in the diploma course in Orthodontics.

The diploma course in Orthodontics requires a minimum of two years full-time study, and must be completed within five years. The general regulations for the Faculty's postgraduate programmes provide that, in the "major" subject of the various programmes, a student must obtain a B- grade. Failure to obtain that grade will constitute failure of the year, as well as of the course, and will require repetition of both course work and examinations for all courses of the year. Supplemental examinations are not allowed in a major subject. In the Orthodontics diploma programme, Orthodontics II, III and IV are designated in the Calendar as "major" subjects.

Finally, Paragraph 6 of the general regulations provides that Faculty Council may suspend a student for a maximum of two years, or require withdrawal from the Faculty, without right of re-enrolment, if it judges the work of the student to be unsatisfactory.

There is a systemic problem arising in the application of these provisions to the Orthodontics diploma programme, particularly as Orthodontics III is concerned. While only indirectly bearing upon the core issues in this appeal, the problem gave your Committee difficulty during the hearing, and obviously had created difficulty in the minds of the Faculty administration in the application of the regulations in the case of the Appellant.

The Faculty's Calendar sets out the courses required to be completed to obtain the diploma. The courses are divided into "Year I" and "Year II" courses, and these are further subdivided in each case into "First Term" and "Second Term" courses. Orthodontics III, a "major" course, is listed as running throughout both terms of both "Year I" and "Year II". Orthodontics III involves learning by treating, under supervision, a minimum number of clinic patients assigned to a student by the Faculty. In the normal course, it is contemplated that the student will stay with the same patients until their treatment is completed, or the student has qualified to graduate from the programme.

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It is difficult to reconcile a major clinical course of the nature of Orthodontics III, running throughout at least the two minimum years of the diploma programme, and the requirement that a student who fails a major course must repeat the entire year. If the student fails the major subject, Orthodontics II, scheduled for only the First Year, the effect of a repeated year on Orthodontics III is unclear. Presumably, the patients on which the student is working would not be removed and a new set assigned to be started from scratch by the student. On the other hand, as the Faculty discovered in this case, it is not possible to fail Orthodontics III at the end of the First Year of the programme, as it is a two-year course and there is no provision in the Calendar for an intermediate examination as a condition of proceeding into the Second Year. If a student does repeat the First Year, as Dr. H. did in special circumstances, the student appears to end up in a hybrid position, at least as far as Orthodontics III is concerned. Your Committee recommends that the Faculty reconsider the interaction between its general requirement for all diploma programmes that a failed major subject requires a repeat of the year, and the particular requirements of the Orthodontics programme. The Calendar should spell out clearly how these regulations will work out in practice.

By the end of Dr. H.'s First Year, Dr. Rossouw, the Head of the Department of Orthodontics, had concluded that Dr. H.'s clinical competence in the Orthodontics III clinic was below the required level. After Dr. Rossouw advised Dr. Ten Cate, the Chair of the Graduate Department of Dentistry, of the Department's negative assessment, Dr. Ten Cate informed the Appellant, by letter of May 31, 1995, that he had failed the Year. The problem, mentioned above, that Orthodontics III was a two-year course, still incomplete, then surfaced, and on June 5, 1995, Dr. Ten Cate withdrew his letter of May 31. However, the Orthodontics Department then indicated to Dr. Ten Cate that it wished to ask Faculty Council to compel the Appellant to withdraw from the programme. This request did not proceed to Faculty Council because Dr. Ten Cate arranged for the Appellant to repeat First Year voluntarily, a result apparently acceptable to the Department of Orthodontics. Again, this part of the history is only marginally relevant to this appeal. However, it was strongly suggested by counsel for the Appellant that this was an improper action on Dr. Ten Cate's part for two reasons. First, the regulations of the Faculty did not permit this action when the Appellant had not actually failed a course at this time. Second, the acceptance by the Appellant of this course of action was not "voluntary". In fairness to Dr. Ten Cate, your Committee felt that it should make clear that it considers Dr. Ten Cate's action to have been completely proper. Faculty Council might have implemented the Department's recommendation that the Appellant be required to withdraw, or suspended him for up to two years. There is no requirement that a student formally fail anything before this power may be utilized. Your Committee holds that appropriate officers of the University may enter into special arrangements of this nature with students if the student consents. Here, the student consented. The fact that the choices facing the Appellant were unpalatable does not make the choice actually made non-voluntary. Presumably, in the Appellant's mind, the choice made protected him from the risk that an even more unwelcome result would materialize.

As the 1996-1997 academic year neared its end, students in the clinical programme were evaluated. The evaluation was intended by the Orthodontics Department to consist of three equal components: an evaluation of the student's treatment of the patients assigned to him in the clinic; an oral examination by panels of examiners, and a written examination. It is the

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propriety of the administration of the written examination at all, and particularly to the Appellant, that is at the core of this appeal.

The Appellant received a "B" from the members of Faculty who appraised the results of his work in the clinic, and a "C" as the overall grade on the oral examination. Unfortunately, he received a mark of 28.5% on the written examination. This resulted in a failure of the course Orthodontics III and consequently of the Year, and led to the appeal to the Faculty's Academic Appeals Committee, and from there to this Committee.

The essence of the Appellant's allegation that the written examination should not be considered in establishing his status is that Orthodontics III was, at the time he entered the course, stated to be evaluated only by clinical assessments and oral evaluations. The imposition of a written examination, without the consent of at least a majority of students enrolled in the course, violates Paragraph II.2 of the University's *Grading Practices Policy*.

The Faculty's position is:

- (a) A written examination was specified as a component of the evaluation of the course, and hence, there was no violation of the *Policy*;
- (b) Even if the examination is not counted, the Appellant did not receive the requisite overall grade of B- in the remaining evaluation components; and
- (c) In a "settlement agreement" made at a meeting between the parties and their counsel on March 5, 1997, the Appellant and the Faculty agreed, among other matters, that, in order to satisfactorily complete the programme, the Appellant would take oral and written examinations in April 1997.

It is convenient to deal with the "settlement agreement" first, as, if the Appellant did agree to take the disputed written examination as part of some bargain, the core of his grounds of appeal disappears.

The Appellant denies that he ever agreed at that meeting or at any time to take such an examination. Your Committee finds that it was certainly the intention of the Faculty, there represented by Dr. Ten Cate and Dr. Rossouw, that the Appellant take such an examination, and that this position was made clear. Your Committee also finds that there was a bargain, or contract, made with respect to some of the matters at issue, for example, the agreement that Dr. Rossouw not be one of those evaluating the Appellant on the examinations. However, the Committee is not satisfied that, with respect to the nature of the evaluations that the Appellant must undergo to satisfy his clinical requirements, the Appellant agreed to accept the Faculty's position. He may have remained silent on the point at the meeting, but the evidence is not clear enough to enable the Committee to conclude that he acquiesced so as to bind himself to take the written examination regardless of any rights he may have had to avoid it.

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Turning to the question of whether the students in Orthodontics III were advised "as early as possible ... (and no later than the division's last date for course enrolment)" of the methods of evaluation and their relative weights, as required by the *Policy*, your Committee concludes that they were not. Certainly, there was nothing in writing given to the students to satisfy this requirement of the *Policy*. A document, intended to inform First Year postgraduate orthodontics students of the departmental requirements for graduation, was handed to incoming students in the programme in June of 1994, when Dr. H. was entering as a regular student. This document, which was required to be signed by the students, stated, among other matters, that "the department does not usually give written examinations in orthodontic subjects" but that there would be oral and clinical evaluations. The paragraph in question went on to say that, as the professional accrediting body was contemplating implementing examinations to obtain registration as an orthodontist, "[w]ritten examinations may thus become essential to prepare candidates for this event and can be implemented at any time." Such wording is too indefinite to comply with the requirements of Section II.2 of the *Policy*, and the Committee was not referred to any other writing that could so comply.

In fact, the *Policy* does not require that the information as to evaluation which must be made known to the students in a course be given to those students in writing. The Faculty's regulations for the D.D.S. degree do so require, but your Committee holds that these regulations do not apply to the postgraduate programmes of the Faculty except to the extent they may be specifically imported. The Committee can find nothing that imports into the postgraduate regulations the requirement that D.D.S students be informed in writing of evaluation methods and relative weights. During cross-examination, both Dr. Rossouw and Dr. Ten Cate said that they assumed that D.D.S. regulations in this matter would apply to the postgraduate programmes, but this does not assist the Appellant. There is no evidence that he had any knowledge of the doctors' beliefs in this regard, (if they had considered the question before this hearing), let alone that he relied upon those beliefs to his detriment.

Therefore, it was open to the Department to supply the required information orally. Dr. Rossouw believes he told the incoming students of the written examination requirement, and indeed, all the evaluation requirements, at the first meeting, at which the information document referred to above was handed out. In any event, he believes it was certainly discussed at one of the numerous meetings that he had with the four students in the course, individually or collectively over the term of the course, and, as he stressed repeatedly, students in such a small course could easily come and ask, if they were in any doubt. The Appellant denies that any information as to the fact that there would definitely be a written examination was given anywhere near the commencement of the course. Letters from two graduates of the course who started their clinical programme with the Appellant, and who are now practicing out of Ontario, each stated that they did not recall such information being given to them at or near the beginning of their clinical training. They recall learning, in their first year, about a written examination by observing the students one year ahead of them preparing for one. This evidence was not wholly satisfactory, as it was not practicable to test it by cross-examination, but as far as it went, it offered some corroboration of the Appellant's position.

Your Committee rejects a suggestion of the Appellant that Dr. Rossouw decided that the written examination would be given only shortly before it was administered. It finds that

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Dr. Rossouw had intended one from the beginning. Whether he made timely communication of his intention is another matter. Your Committee finds, on the balance of probabilities, that Dr. Rossouw's memory on this matter is faulty, and that the fact of the written examination and its relative weight in the total grade was not communicated to the students in a timely manner as required by the *Policy*. It is noteworthy that the Faculty Academic Appeals Committee said,

[b]ased on the evidence of Dr. Rossouw, the Committee believes that *the students were aware of the possibility of a written examination since it was a requirement for the previous second year Orthodontic residents and the possibility of an examination was stated in the Information for First Year Orthodontic Postgraduate Residents sheet.* [Emphasis added].

Neither of these means of "communication" meets the requirements of Paragraph II.2(a) of the *Policy*. Later, the Faculty Committee said that "it accepts Dr. Rossouw's testimony that he informed that [*sic*] students both verbally and in writing of the requirement of a written examination and there were no formal objections". Unfortunately, the Faculty Committee does not say when it found that this information was given to the students. Indeed, the statement carries some implication that this was done at some time later than at or near the commencement of the course. Otherwise, the issue of consent or of student objections would not arise.

On these findings, the students were informed at the beginning of the clinical programme that evaluation would be by assessment of clinical work and oral examination. Thus, the administration of a written examination must be regarded as a change in the methods of evaluation that were communicated to the students at the beginning of the course, and would require consent of a majority of students.

Your Committee finds that there was no consent asked of or given by a majority of the students to such a change. This Committee disagrees with the Faculty's Academic Appeals Committee on this point. That Committee held that "consent to this method of evaluation [i.e., a written examination] was implied by the fact that no evidence was led to demonstrate that the students submitted a formal objection to the introduction of the written examination". Your Committee holds that such an interpretation of what may constitute "consent" is not in keeping with either the spirit or the letter of the *Policy*. There may be reasons why students do not challenge a change in methods of evaluation. This Committee holds that the *Policy* requires a positive seeking and expression of the required consent.

The next question is, what follows? The *Policy* does not set out consequences of non-compliance with the requirement in question. A breach of this provision of the *Policy*, even inadvertently, as the Committee thinks was the case here, is serious, and cannot be disregarded. In the opinion of the Committee, non-compliance with this portion of the *Policy* does not necessarily mean that a student is exempted from fulfilling an evaluation requirement of which due notice, or consent in lieu thereof, has not been given according to the *Policy*. The Committee holds that, to determine the appropriate consequence of a breach in a particular situation, the purpose behind the *Policy's* provision should be considered. The Committee considers that there are two specific purposes underlying the obvious more general purpose of fairness to students. The first is to give students who, for various reasons,

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prefer one means of evaluation to another, an opportunity to select courses accordingly while they still have freedom to move from one course to another without penalty. The second is to give students ample warning of what they must prepare for.

In this case, the first element has no application, and can be given no weight. A candidate who wishes to receive the diploma must take the clinical components, particularly Orthodontics III, however they may be evaluated. There is no alternative course to take if a student does not like the evaluation methods established by the Faculty. It was never suggested that the Appellant, (or any other student) would have refused a rare place in the diploma programme if the student had been aware at the beginning that a written examination was a component of the total evaluation of Orthodontics III.

This leaves the question of prejudice due to lack of timely notice. The Committee cannot rule out some prejudice in this case, and indeed, to make the *Policy effective in practice*, prejudice must really be assumed here. However, the Committee believes that the relief ordered by the Faculty Academic Appeals Committee adequately protected this purpose of the *Policy* in the circumstances of this case.

This Committee amends the order of the Faculty Academic Appeals Committee by deleting the requirement that one of the external examiners be a director of a postgraduate orthodontic programme. The Committee does so because it may not be possible to obtain such an examiner in a timely fashion, and it does not wish this requirement to impose a delay in offering the re-examination ordered. If in fact such an examiner is available without incurring delay, there is no objection to such person being employed in that capacity. To foreclose an opportunity for future argument, the choice of examiners is that of the Faculty.

Further, as contemplated by the Faculty Academic Appeals Committee, the Appellant must receive a mark on the retaken written examination which will give him at least an overall B-grade in Orthodontics III. This poses a problem, as the official grades reported by the Faculty for the other components of the course evaluation are given in letter form only, and there was no evidence given to us that actual numerical marks exist to refine the letter grades. The Committee holds that, in these circumstances, the Appellant must be assumed to have received the highest numerical mark which might be indicated by the letter grade. Unfortunately, the Calendar does not give numerical ranges for the grades B-, B, and B+, all of which are stated to be used in the postgraduate programmes of the Faculty. The Committee believes that the numerical equivalent of the B grade should be taken as 76%, which is the highest equivalent known to the members as being used in the University at that time. The C grade assigned on the oral examination is still more of a problem, as the Faculty lists only C, and does not list C- or C+ as grades used in the postgraduate programme. However, the examiners in that oral examination did make use of the C- grade, as well as the C grade and variations of the B grade. The Committee assumes that the examiners who used a C- or B- designation were using the common numerical equivalent of a range of two marks at the bottom of the numerical range for the entire C and B categories, i.e., 60-62 and 70-72 respectively. Using 62 and 72 as the numerical equivalents of C- and B- grades assigned by the individual examiners on the oral examination, the Committee translates the C grade assigned to the Appellant on this examination as 67%. The Committee directs that these numerical marks should be used when averaging the oral examination and clinical

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assessment with the written examination to determine whether the Appellant has achieved a minimum of B-, i.e., 70%, overall, with all three components being weighted equally.

The Faculty should administer the examination as soon as possible after the expiration of the time, not exceeding six months from the release of this decision, that the Appellant requires to prepare for the examination.

Your Committee also notes that, on the transcript issued by Faculty dated November 13, 1997, Orthodontics IV, a major subject, is listed as NGA. This course involves the postgraduate students teaching undergraduate dental students. There was also difficulty between the Appellant and the Faculty with respect to this course. However, in its written submission to this Committee and in its oral submissions, the Faculty advised this Committee that it had waived any further requirements of the Appellant to complete this course. Accordingly, the matter was only referred to incidentally at this hearing. Dr. Ten Cate, the senior Faculty officer most familiar with this matter, is due to retire shortly. Therefore, Your Committee records this position lest the situation with respect to this course should cause difficulty if the Appellant successfully completes Orthodontics III.

Costs

The Appellant requests that his legal costs be awarded to him by this Committee. Another panel of this Committee has previously ruled that the terms of reference of this Committee, set by the Governing Council, do not confer any jurisdiction upon this Committee to award costs. The Appellant argues that the general law has held that the university Visitor, a concept imported from the law of the United Kingdom, has the inherent power to award costs, and that Ontario jurisprudence with respect to this University has held that the historical powers of a Visitor are now vested in the Governing Council. Assuming for the purpose of the argument that this is so, it does not follow that the Governing Council has necessarily delegated this portion of its powers to this Committee. Your Committee will follow the decision of the previous panel, and hold that it has no jurisdiction to make an award of costs to either party.

Fees

The Faculty of Dentistry asserts that the Appellant is in debt to the University for arrears of certain fees, and asks that this Committee order payment of them by the Appellant. It also requests that, should the Appellant further enroll in the Diploma programme, this Committee should stipulate for immediate payment of the fees for the year. Again, this Committee has not been given such jurisdiction by Governing Council. It should not interfere with the jurisdiction of the University officers who have the responsibility of administering the University's policies and regulations regarding student fees.

Summary

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Subject to the variations, as set out above, of the order of the Faculty of Dentistry Academic Appeals Committee in this matter, made on or about November 25, 1997, the decision of that Committee is otherwise sustained, and this appeal is otherwise dismissed. The request of the Faculty for orders of this Committee directing payment by the Appellant of past or future fees is dismissed.

Rosanne Lopers-Sweetman
Secretary

Ralph Scane
Acting Chairman

May 5, 1998