THE DISCIPLINE APPEALS BOARD
UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on October 30, 2012;

AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters,* 1995;

AND IN THE MATTER OF the *University of Toronto Act*, 1971, S.O. 1971, c.56 as amended S.O. 1978, c. 88

BETWEEN:

S[redacted] F[redacted] ([redacted])

Appellant

and

THE UNIVERSITY OF TORONTO

Respondent

REASONS FOR DECISION

Panel Members:

Ronald G. Slaght	Chair
Elizabeth Peter	Faculty Panel Member
Jenna Jacobson	Student Panel Member
Graeme Norval	Faculty Panel Member

Appearances:

Robert A. Centa	Counsel for the University of Toronto
Julia Wilkes	Counsel for the Appellant

In Attendance

S[redacted] F[redacted]	Appellant
John Britton	Dean's Designate

Introduction

[1] This matter comes before the Discipline Appeals Board on appeal from a penalty imposed by a Panel of the University Tribunal, at a hearing held August 6, 2013.

[2] The appellant, S[redacted] F[redacted] ("Mr. F[redacted]"), was not in attendance at the hearing. Before the hearing, Mr. F[redacted], who was then unrepresented, negotiated an Agreed Statement of Facts with the Provost, in which Mr. F[redacted] admitted to a number of serious offences in breach of the *Code of Behaviour on Academic Matters* ("*Code*") including false statements, forgery and falsification of documents, all of which he had constructed in support of his requests for academic accommodation.[1]

[3] The Provost and Mr. F[redacted] also reached agreement on a Joint Submission on Penalty ("JSP"), which included a term that Mr. F[redacted] would receive a suspension from the University for a period of five years, as well as a permanent notation on his transcript and grades of zero on 17 courses.[2]

[4] The Panel reserved its decision at the hearing and in Reasons delivered September 5, 2013[3], the Panel added an additional term to the penalty, a recommendation to the President that Governing Council be requested to expel the Student from the University. The Panel rejected the JSP on the basis that a five year suspension, meaning the Student could return to the University, would bring the administration of justice into disrepute and would condone the Student's misconduct.

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[1] Agreed Statement of Facts, Appeal Book, Tab E

[2] Joint Submission on Penalty, Appeal Book, Tab F

[5] The Appellant argues before us that the Tribunal erred in its decision not to impose the sanction agreed to in the JSP. The Respondent Provost joins the Appellant in that submission. This appeal raises for this Appeals Board's consideration the questions of when and under what circumstances a hearing panel may impose a penalty other than one agreed to in a JSP, and whether this Panel was justified in rejecting the proposed sanction agreed to by the parties in this case.

Jurisdiction

[6] The Discipline Appeals Board has broad powers on appeal, including with respect to penalty, both arising from the provisions of the *Code* and the relevant authorities. Section E.7 of the *Code* reads in part as follows:

> ...
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> c. The Discipline Appeal Board shall have power...In any other case, to affirm, reverse, quash, vary or modify the verdict, penalty or sanction appealed from and substitute any verdict, penalty or sanction that could have been given or imposed at trial.

[7] Rooted in the broad language of this statutory power, Appeals Board decisions have established that little deference need be shown to decisions of the Tribunal below on the facts or the law, although a hearing panel's assessments of credibility, or the exercise of truly discretionary authority will be afforded considerable weight. There exists also the recognition that, despite its jurisdiction to do so, the Appeals Board will not feel compelled to interfere and will grant deference where the decision under appeal is found to be reasonable in all the circumstances even if other reasonable dispositions could also be supported in the case.

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[3] Reasons, Appeal Book Tab B

[8] In carrying out its function of ensuring consistency in the application of principle and policy within the University setting as articulated over time in Tribunal decisions, the Appeals Board generally, however, will act to intervene where some unsupportable deviation from principle has occurred below.

The Facts

[9] The facts of this matter can be simply stated. Mr. F[redacted] had been enrolled at the University since 2003. As the Agreed Statement of Facts records, Mr. F[redacted], in 2008, submitted a petition to the appropriate Committee seeking late withdrawal without academic penalty from ten courses, supported by documents evidencing various family and personal illnesses and difficulties. The petition was accepted by the University.

[10] In the following year, in May 2009, the Student submitted another petition seeking late withdrawal without academic penalty from seven other courses, supported by reasons and documents evidencing personal difficulties, together with a Medical Certificate, and other supporting material. This petition was denied. Later, in September 2009, the Student submitted a further petition for the same relief, documenting that his grandmother had passed away, submitting a Certificate of her Death, and, subsequently, a newspaper notice of his grandmother's death.

[11] Various additional submissions were made and queries and follow-ups emanated from the Petitions Office over these submissions continuing into 2012.

[12] On July 26, 2012, matters appeared to come to a head and at a meeting between Mr. F[redacted] and the Dean's Designate, John Britton, Mr. F[redacted] admitted to some falsifications

in his submissions. In October 2012, he was formally charged with 22 counts of academic misconduct.

[13] In the Agreed Statement of Facts, Mr. F[redacted] admitted that much of his submission made in support of the 2008 petition was false. He admitted to various other forgeries and falsifications of letters, the Medical Certificate, the Certificate of Death and that his grandmother's purported death notice in Sri Lanka was actually that of another person, among other admissions.

[14] A further Agreed Statement of Facts revealed that Mr. F[redacted] had committed an act of plagiarism in the Summer of 2009, resulting in his receiving a zero on the particular assignment, and he admitted to a further act of plagiarism occurring in the Summer of 2012, with a penalty levied of zero on that assignment and a reduction in the final grade. This second offence will be the subject of further comment later in these Reasons.

The Issue

[15] Well settled principles exist surrounding the questions of when a trier of fact charged with setting a penalty or sanction may depart from a joint submission from both sides to the dispute and when a panel should accept and implement an agreement the parties have reached, reflected in their joint submission on penalty.

[16] The first of these principles, is to emphasize that a panel is not obliged or required to accept a joint submission. The panel retains the obligation and responsibility to impose a fit sentence in the circumstances of every case, including those where a JSP has been proposed.

[17] Indeed, Mr. F[redacted] signed a Consent in this matter acknowledging that the University Tribunal was not bound by the terms of the Joint Submission on Penalty and may impose a greater penalty including that the Tribunal may recommend his expulsion from the University, as indeed the Tribunal decided to do.[4]

[18] With that said, however, the companion obligation in law to which a trier of fact is equally bound, which the Panel in this case did recognize, is that a joint submission may be rejected only in circumstances where to give effect to it would be contrary to the public interest or bring the administration of justice into disrepute.[5]

[19] Forming part of this element of the test, if it is to reject a joint submission, it is the panel's obligation to clearly articulate with specificity its reasons for doing so and particularly why the joint submission, if given effect, passes the high bar necessary to hurdle before rejection can be justified.[6]

[20] These principles, developed in the criminal law context, are equally applicable in the realm of administrative law and to decision making by boards and tribunals of like nature to the University Tribunal.[7] Of course, such boards and tribunals, with their more focussed jurisdiction, are not concerned with questions of the broader obligation owed by courts to the administration of justice at large. Tribunals such as the University Tribunal rather must assess a joint submission against the backdrop of their particular constituencies and the set of values and

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[4] Consent, Appeal Book, Tab D

[5] *R. v. Tsicos*, (2006) 216 O.A.C. 104. See also *R. v. McNeil* 2006 Canlii 212414

[6] *R. v. E. (R.W.)* 2007 ONCA 461 at paras. 22-23

[7] See, eg. *University of Toronto v. S.M.* (2013), Appellant's Authorities, Tab 7, para. 24

behaviours they are charged with upholding. For the University Tribunal, these may be found reflected, for example, in the Preamble to the *Code* and in the shared expectations which members of the University community abide by in all phases of University affairs.

[21] Only after careful consideration and specific assessment of all the relevant circumstances measured against these broad values and shared goals, is a panel of the Tribunal justified in rejecting a JSP, which of course is itself partially the result of arm's length negotiations by representatives of the University who may be expected to be fully familiar with these governing tenets which they too are charged with upholding.

[22] In an effort to make more specific and understandable the high burden upon a tribunal which chooses to reject a joint submission, various expressions of the test have been attempted in a variety of decisions released by bodies and tribunals bound to apply these principles. One particularly illuminating expression of the concept is found in a decision of the Law Society Appeal Panel in a case that came before it on appeal, raising the same issues as this Appeals Board now has before it. In that matter, that Appeal Panel stated that only truly unreasonable or "unconscionable" joint submissions should be rejected. We think this a good, understandable expression of the test.[8]

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[8] *Law Society of Upper Canada v. Stephen Alexander Cooper*, 2009 ONLSAP 007 at para. 19, Respondent's Authorities, Tab 5

Disposition

[23] Following completion of the arguments before us and after deliberation, we advised the parties we had concluded that this appeal must be allowed and that we would, after further consideration, provide the basis for our decision, which these Reasons now set out.

[24] There are a number of reasons supporting our conclusion which I will briefly address but, overall, the view of this Appeals Board is that, taking all into account, the imposition of a five-year suspension, as opposed to a recommendation for expulsion, is not so fundamentally unreasonable or unconscionable that rejection of the JSP was justified in this case.

[25] It may be that a penalty of expulsion from the University was one reasonable sanction in the circumstances of this case, as evidently this Panel believed to be so, but that is not the test. The fact that the penalty actually imposed by the Tribunal may itself be reasonable, does not permit the Panel as a matter of law to substitute its conclusion for that called for in the JSP, on that ground alone.

[26] In the larger context, joint submissions promote early resolution of disputes, the saving of time and expense and they provide a level of certainty for the parties which, in turn may lead them to make accommodations that would otherwise not be made. They foster trust and cooperation, valued goals in the University setting. There is also a reliance expectation that arises, present here, as Mr. F[redacted] did not attend the hearing below, and could not address any concerns that were troubling the Panel.

[27] In more specific terms, we cannot agree that the penalty reflected in the JSP, which included grades of zero in seventeen courses, a permanent notation on Mr. F[redacted]'s transcript

and a five-year suspension, (the most severe penalty a Tribunal can self-impose), could in any way be said to "condone" the Student's conduct.

[28] Moreover, what is missing from the Panel's reasons is any recognition that in reaching a negotiated resolution on penalty, there is a balance, a reflection of compromise by both sides, and that the Provost benefitted, not just Mr. F[redacted], from the agreed resolution in this case.

[29] More specifically in this case, absent from the Panel's reasons is the recognition of the duty to consider and weigh the clearly evident fact that the University would have had very real difficulties in making out its case on many of the counts, if it had been put to its burden to prove these allegations at a hearing. Securing evidence of a false death notice in Sri Lanka, trying to learn whether there was truth or not in the litany of family illnesses and difficulties that Mr. F[redacted] had set out, proving forgeries and falsifications of documents, would have been formidable challenges for the prosecution, and all were rendered unnecessary by the admissions Mr. F[redacted] made as a component of settling an Agreed Statement of Facts and a Joint Submission on Penalty.

[30] These submissions were made to the Panel and in our view they ought to have been taken into account.

[31] This is perhaps another way of saying that the Panel did not approach the issue of the Joint Submission as an exercise in weighing all the factors to determine if, in all the circumstances, the JSP was reasonable. Rather, it concluded that expulsion was the proper penalty, and it did not assess the matter of the comparative difference between the two, nor did it turns its attention to any specific analysis as to what was unreasonable about the overall penalty agreed to in the JSP.

[32] We reiterate that in an appropriate case, a hearing panel has the jurisdiction to reject a JSP and substitute a different penalty, but in arriving at such a disposition, the Tribunal must articulate the reasons for its decision and demonstrate how and why the stringent test for rejection has been met in the particular case.

[33] On a different point, we have had the benefit of a more complete review of previous Tribunal decisions and penalties imposed in like cases than did the Panel below. Two Tribunal authorities were referred to the Panel, which it distinguished in its reasons on the basis that in those cases five year suspensions had been imposed but there were no prior offences, but in Mr. F[redacted]'s case, there were two prior offences, the plagiarism offences in 2009 and 2012, justifying the more severe penalty.

[34] In fact, the 2012 plagiarism in this case was committed after the acts which formed the subject of the charges and therefore strictly speaking is not a prior offence. Leaving that aside, however, a review of all relevant Tribunal decisions concerned with forgery and falsification show a consistent pattern, in cases with and without prior offences. They lead to a five-year suspension from the University and not expulsion from the University.[9]

[35] Thus, reflecting the Appeals Board's concern with ensuing consistency in Tribunal cases, it is evident that taking the history of the jurisprudence in like cases into account, it cannot be said that a five-year suspension together with the other sanction terms for Mr. F[redacted] would bring the University's discipline process or values into disrepute or is in any way unconscionable.

[36] We identified other more minor concerns in the course of our review, but in light of our analysis, nothing would be gained by a discussion of these more minor issues. For the reasons we have expressed, we reach the conclusion that the Panel's decision on penalty must be set aside and the sanction agreed to in the Joint Submission on Penalty should be restored.

[37] This result will align the disposition in Mr. F[redacted]'s case with those in like cases decided by panels over a broad range of decisions. This is the most reliable indication that the Joint Submission on Penalty arrived at in this case is not a deviation from a reasonable standard in such cases and rejection of it could not be justified. Rather, the interests of the University community are well served when the predictability and fairness associated with prior dispositions in like matters, in the absence of truly distinguishing features, are reflected in subsequent cases arising.

Order

[38] This Appeal Board orders that the Panel's Order on penalty is set aside and the penalty provided set out in the Joint Submission on Penalty is hereby imposed.

Dated at Toronto: October 20, 2014

Ronald G. Slaght, Q.C.
Chair, for the Appeals Board Panel

[9] E.g. *University of Toronto v. S.P.* (2013), *University of Toronto v. N.G.* (2012), *University of Toronto v. S.M.* (2013), *University of Toronto v. P.P.* (2011), *University of Toronto v. Q.W.* (2012)