

**THE UNIVERSITY OF TORONTO
THE GOVERNING COUNCIL**

Report #381 of the Academic Appeals Committee
April 28, 2016

To the Academic Board
University of Toronto

Your Committee reports that it held a hearing on February 10, 2016 at 1:30 pm, at which the following members were present:

Ms. Sara Faherty, Chair
Mr. Raiyyan Khan, Student Governor
Professor Paul Kingston, Faculty Governor

Secretary: Mr. Christopher Lang, Director, Office of Appeals, Discipline and Faculty Grievances
Ms. Tracey Gameiro, Associate Director, Office of Appeals, Discipline, & Faculty Grievances

Appearances:

For the Student Appellant:

Dr. R [REDACTED] E [REDACTED], Student Appellant
Mr. Jordan Goldblatt, Adair Barristers, Lawyers for the Appellant

For the University at Toronto Faculty of Medicine:

Dr. Glen Bandiera, Faculty of Medicine
Dr. Lisa Bahrey, Department of Anesthesia
Dr. Mark Levine, Department of Anesthesia
Ms. Sari Springer, Littler, LLP, Lawyers for the Respondent

I. Appeal

The Student appeals a decision of the University of Toronto, Faculty of Medicine Faculty Appeals Committee dated July 17, 2015, denying his appeal of the PGME Board of Examiners (BOE) March 30, 2015 decision dismissing him from the Anesthesia Program for failing to meet the standards of his Remediation with Probation period.

II. Facts

History

The Student Appellant entered the Anesthesia Residency Program at the University of Toronto in 2009 with the status of PGY2, or a post-graduate in his second year of residency. The PGY2

status was based on his having been an International Medical Graduate. He was a certified anesthetist in the Philippines and completed fellowship training in Japan, as well as having completed a year of fellowship in Australia. The Student Appellant was accepted through a specialist pathway program.

Despite his advanced status, the Student Appellant's path through the program was troubled. He was placed on a 6-month remediation plan in October of 2012, which was originally scheduled to end in April of 2013. That remediation plan was extended by one month, then by four months and then again by another month. It terminated in September of 2013. The Appellant was then placed on a medical leave, returning in May of 2014 to commence the remediation period that is the subject of this appeal.

The Student Appellant's prior history in the Program is not relevant to the questions raised by this appeal, as he correctly points out. None of the facts set forth regarding the period prior to May 2014 form the basis of your Committee's decision. However the previous arrangements do provide context to the issues raised below. They establish the Student Appellant's familiarity with remediation plans, and the Faculty's efforts to support him in completing the program.

The May-October, 2014 Remediation Plan

In May of 2014 the Student Appellant commenced a Remediation and Probation period. The terms of the Remediation plan were set forth in a document titled "Request for Remediation", dated April 16, 2014. The document includes a section titled "Plan," that sets forth numerous elements of remediation, including separate sections on *Goals and Objectives*, *Learning and Teaching Strategies*, and *Evaluation of Achievement*. The measurable steps included in the column titled *Evaluation of Achievement* include:

1. achieve a grade of "3" or higher in the areas of medical expert, communicator, and manager in 90% of the written evaluations in the final three months of the remediation period and achieve a grade of "3" or higher in the area of overall rating in 90% of those evaluations;
2. achieve an overall rating of "satisfactory" on *Reflection on Encounter Forms* evaluating sessions with a communications counselor, Dr. Dawn Martin; and
3. achieve an overall average score of greater than 65% correct across the 7 domains of the AKT 24 examination at the end of the period.

The Remediation program was modified, at the request of the Board of Examiners, in a letter dated April 29, 2014. The modifications included:

4. a remark that "baseline testing (e.g. written exam, simulator, oral exam) needs to be considered near the start of the remedial period," and
5. a request from the Board of Examiners for an interim progress report.

The Faculty of Medicine asserts that the Student Appellant needed to succeed in all three of these requirements independently in order to meet the standards of his Remediation Period. The Faculty determined that the Appellant failed on the first two measures, and explains that it did not administer the third measure because those failures rendered the test unnecessary.

In a decision dated March 30, 2015, the Board of Examiners accepted the Faculty of Medicine's conclusions, and dismissed the Student Appellant from the Faculty.

The Student Appellant appealed to the Faculty Appeals Committee on grounds that there had been material deviations from the Remediation Plan. The Faculty Appeals Committee heard the Student's appeal and dismissed it in a letter dated July 17 2015.

Deviation from the Remediation Plan

At his hearing in front of the Academic Appeals Committee, the Student Appellant identified six points in which the Division's implementation of the Remediation plan differed from the written plan, as amended by the Board of Examiners:

1. The baseline testing recommended in the Board of Examiner's April 29, 2014 letter was never administered.
2. There was a lack of clarity regarding what constituted the crucial "last 3 months" of the remediation plan.
3. The "interim progress report" requested in the Board of Examiner's April 29, 2014 letter was dated September 10, 2014.
4. The Student Appellant was never placed on-call, as contemplated in the Remediation Plan.
5. Dr. Martin Ma, who was identified as a "non-evaluative mentor" in the Remediation plan did, in fact, complete some evaluations of the Student Appellant.
6. The Division did not collect evaluations for the Student Appellant every day that he worked in the Program. While the Division collected many daily evaluations, some supervising doctors acknowledged that they had not completed a written form on a given day.

III. Decision

The role of the Academic Appeals Committee is to evaluate the decisions of the bodies it reviews and "consider[] whether the relevant academic regulations and requirements have been applied correctly, consistently, and fairly." (Motion Decision 359-1 of the AAC dated August 25, 2011) In this case, the relevant decision is the Faculty of Medicine's, Faculty Appeals Committee's July 17, 2015 decision, and determine whether that Committee followed its own policies consistently and fairly.

The Faculty Appeals Committee rejected the argument by the Student Appellant that the implementation of his remediation plan was so inadequate as to warrant an additional probation period. Your Committee does not find this conclusion unreasonable. Difficult as it is to terminate a student's progress, your Committee finds that the Faculty of Medicine has provided the Student Appellant with ample opportunities to improve and succeed, and it is now justified in dismissing him from the Anesthesia Program. While the Student Appellant argues that some elements of the remediation plan were not carried out as specified in the Remediation Plan, the individual Remediation Plan is not the equivalent of an academic regulation or policy. It seems inevitable that in a detailed plan that takes place over the course of several months, there will be some deviation from the details set forth in the original document. The Student Appellant has not established that any of those deviations were so significant as to render the remediation plan invalid. This was the primary finding of the Faculty Appeals Committee, and your Committee finds that conclusion to be reasonable and supported by the evidence.

The Student Appellant, citing *Kane v. Board of Governors of UBC*, [1980] 1 SCR 1105, took the position that he did not need to show that the alleged deviations did make a difference in the ultimate outcome, but only that they *could* have made a difference. We disagree. First, the rule set forth in *Kane* is not applicable to a medical faculty's implementation of an anesthesiologist's remediation plan. *Kane* addressed the outcome of a judicial tribunal under circumstances where the hearing process included a breach of natural justice. That is not the case here. The busy floor of a hospital is not a judicial tribunal. Here, there were, predictably, variations in the detailed day-to-day processes set forth in an abstract months- long remediation plan.

Remedy

The Student Appellant asks, as a remedy, that this Tribunal determine that

1. his Remediation Program was not complied with,
2. that he is entitled to a proper Remediation Program, and that
3. this Committee determine that he is entitled to a further period of Remediation.

We note that the third request falls outside the purview of this body. The Academic Appeals Committee obtains its powers through its Terms of Reference from Governing Council. Under section 2.1 of its Terms of Reference, the Academic Appeals Committee is "to hear and consider appeals made by students against decisions of faculty, college or school councils (or committees thereof) in the application of academic regulations and requirements".

The powers of your Committee to grant a remedy may include a judgement as to whether the Faculty of Medicine's Appeals Committee's ruling that the Student Appellant's Remediation Program was complied with was supported by evidence, and whether he is therefore entitled to reinstatement in the program. Neither your Committee nor the Faculty of Medicine can determine whether the SA should receive a further period of Remediation. That decision can come only from the Board of Examiners.

There is little disagreement between the parties about the events that lead to this appeal. The disagreement lies in whether numerous aspects of the actual Remediation process were unjust and constituted substantial changes to the Remediation plan, or whether they constituted "changes" at all. The Student Appellant asserts the alleged deviations were "material, numerous,

and significant” and the Division insists that no mistakes were made, and what the Student Appellant perceives as deviations from the plan were, in fact, contemplated all along.

The Student Appellant identified six points in which the implementation of the Remediation plan differed from the Plan:

1. The baseline testing recommended in the Board of Examiner’s April 29, 2014 letter was never administered.
2. There was a lack of clarity regarding what constituted the crucial “last 3 months” of the remediation plan.
3. The “interim progress report” requested in the Board of Examiner’s April 29, 2014 letter was dated September 10, 2014.
4. The Student Appellant was never placed on-call, as contemplated in the Remediation Plan.
5. Dr. Martin Ma, who was identified as a “non-evaluative mentor” in the Remediation plan did, in fact complete some evaluations of the Student Appellant.
6. The Division did not have 100% of the daily evaluations for the Student Appellant. Some supervising doctors acknowledged that they had not completed a form on a given day.

1. *The baseline testing recommended in the Board of Examiner’s April 29, 2014 letter was never administered.*

The Student Appellant asserts that the baseline testing recommended in the Board of Examiners letter amending the Remediation Plan was never administered. The Faculty gave different explanations for this. To the Faculty Appeals Committee the Faculty acknowledged it had not performed baseline testing. At the hearing in front of your Committee the Faculty argued that it did not find baseline testing to be necessary because the Student Appellant’s technical skills and knowledge were not at issue, but rather his decision making under pressure was perceived as the problem. The Faculty also asserted that the daily questions asked on the floor by supervising doctors constituted that testing.

Your Committee believes the Faculty of Medicine should have communicated more clearly about whether or not it was going to administer the baseline testing. However we note that the Board of Examiners suggested only that the Faculty “consider” the test...it was not a requirement. The Student Appellant did not request more specific testing during the period, nor has he established that the failure to test him at the beginning of the remediation period affected his performance on the measures set forth in the Remediation Plan.

2. *There was a lack of clarity regarding what constituted the crucial “last 3 months” of the remediation plan.*

There has never been consistent clarity regarding the time frame of the Appellant’s remediation and probation plan. The original documents are contradictory: the Division repeatedly uses the phrase “six months” to describe the term of the remediation plan, but the start and end dates listed (May 5 to October 3, 2014) identified a period of only 5 months. The same errors were reproduced in the September 10th interim report. This discrepancy was not addressed by the Division in its written submissions. On his part, the Appellant also failed to point out the discrepancy, and reported at the hearing that he had failed to notice the discrepancy until February of 2016. At the hearing the Division explained the discrepancy as a “typographical error,” insisting that the Remediation Plan was intended to occur, and in fact did occur, between May 3 and November 3rd.

The end and start times of the remediation period are important, because the Appellant was required to achieve a rating of “3” or better in 90 percent of the relevant categories (medical expert, communicator, manager, and overall rating) for the last three months of the period. Knowing whether the last three months were July 3- October 3 or August 3 – November 3 is necessary in order to make this critical calculation. To confuse matters even further, the Division submitted a *Department of Anesthesia University of Toronto In-Training Evaluation Report* that tracks neither of those time periods, but rather runs from July 1, 2014 to November 16, 2014. Other documents, aggregating survey results, were submitted for the periods from July 21 – August 12, 2014; August 13 – September 9, 2014; and September 9 – October 2, 2014. These documents also fail to track what we now understand to be the relevant time period: August 3 – November 3, 2014.

This sloppiness about dates and calculations would be a serious deficiency for the Division’s argument, but for three import points: first, the Appellant cannot point to *any* three month time period in which he reached the performance bench marks set forth in the remediation plan. Second, the remediation had a separate and independent requirement for the Appellant’s continued enrollment: he needed to achieve an overall rating of “satisfactory” in 80% of the *Reflection on Encounter Forms* completed by Dr. Martin. There is no doubt that the Appellant failed to reach that benchmark. Finally, as the Faculty of Medicine’s Appeals Committee noted, the student “had the responsibility to raise concerns or seek clarification when the testing was not administered as [he] believed it should have been.” While it is unfortunate that the administration did not correct the error in the listed dates sooner, the significant factor is that the Student actually did have six months of Remediation. If the reverse were true, and the Division had listed a correct set of dates, but actually only provided a five month plan, then that error would have been material.

3. *The “interim progress report” requested in the Board of Examiner’s April 29, 2014 letter was dated September 10, 2014.*

The Student Appellant feels that the fact that the interim progress report requested by the Board of Examiners was not produced until September 10, 2014, disadvantaged him because, coupled

with the lack of clarity of the time frame of the Remedial Plan it was difficult for him to determine whether a significant amount of time was left in the remedial period for him to make corrections. The Faculty of Medicine points out that the interim plan was directed to the Board, not the Student. In fact, because the remediation period did extend into October there was time for the Student Appellant to address issues raised in the interim report. Your Committee notes that the word “interim” does not mean “mid-point,” but rather refers to any intervening time. In any event, there is no evidence that timing of the interim report prejudiced the Student Appellant. We also note that the Student Appellant received daily oral feedback from the doctors supervising him on the floor of the hospital. The medical experts on the Faculty of Medicine Appeals Committee found this form of measurement and feedback to be “reasonable” and we agree.

4. *The Student Appellant was never placed on-call, as contemplated in the Remediation Plan.*

The Student Appellant points out that he was never permitted to work independently by being placed on call, as called for in the Remediation Plan. The Faculty of Medicine responded that it failed to do so out of concerns for patient safety, given the Student Appellant’s lack of progress. The Faculty’s argument highlights the reality that the Remediation Plan, while set forth in detail, had to be altered as events unfolded. Your Committee cannot find that the Faculty was required to place patient safety in jeopardy in order to comply with the Remediation Plan. This is an example of the necessary tailoring of the plan. It would have been a better practice for the Faculty to directly inform the Student of its decision, but actually putting him on call and placing patients at risk could never have been required. In the end, the Student Appellant has not suggested that this alteration to the Plan affected his performance, or significantly altered the outcome.

5. *Dr. Martin Ma, who was identified as a “non-evaluative mentor” in the Remediation plan did, in fact complete some evaluations of the Student Appellant.*

The Student Appellant perceives the fact that Dr. Martin Ma completed a daily evaluation of his work as another deviation from the Remedial Plan. The Faculty responded that the “non-evaluative mentor” does not participate in the final decision regarding a student, but that it does not, in fact, mean that he or she will not participate in the daily evaluations of students. If this is the case, it is unfortunate that the term “non-evaluative mentor” was not clearly explained to the Student Appellant. The Faculty also pointed out that Dr. Ma evaluated the Student Appellant because on the day in question his performance had been so weak that he felt it was a matter of protecting patient safety to point out the Student Appellant’s errors. Again, this Committee is not willing to require the Faculty of Medicine to compromise patient safety in order to comply with a remediation plan. If this was a deviation from the plan, the Student Appellant has not established that it prejudiced him, and in any event it was a justified deviation.

6. *The Division did not have 100% of the daily evaluations for the Student Appellant. Some supervising doctors acknowledged that they had not completed a form on a given day.*

The volume of daily evaluations completed by doctors, providing detailed feedback on the Student Appellant's performance is high, but is not 100% complete. The Student Appellant points out that on some days the supervising doctors did not complete the paperwork evaluating his performance. The Faculty of Medicine sought their explanations. Some doctors replied that they had given the Student Appellant feedback in person, but had not filled out the forms; others said that they felt they had not had enough direct contact with the Student Appellant on a given day to fairly fill out the form. What is apparent from the evidence submitted by the Faculty of Medicine is that the Student Appellant received a high volume of written evaluations and an even more impressive amount of daily oral feedback on his performance. The doctors' explanations support the fact that the reality of working on a busy hospital floor means that the time constraints and pressures sometimes make the daily written feedback impossible. The Student Appellant received an intense amount of feedback, both orally in writing, throughout the remediation period.

Your Committee also notes that this issue could not be dispositive. Even if the Student Appellant had achieved this goal, he still had the separate and independent requirement of achieving an overall rating of "satisfactory" on *Reflection on Encounter Forms* completed by Dr. Dawn Martin.

IV. Conclusion

The Faculty of Medicine continues to insist that it did not make mistakes regarding the Student Appellant's Remediation plan. It might be more accurate to claim that the Faculty did not make mistakes in the *implementation* of the Remediation plan, while it may have made some immaterial mistakes in communicating about the Remediation Plan. To the extent there were flaws in the communication around the Remediation Plan, it is evident that the substantive goals of the Remediation Plan were met. Modifications based on patient safety were well advised, and cannot form a basis for invalidating the Plan.

We note, however, that every single instance of these communication issues could easily have been resolved by the Student Appellant himself if he had made any effort to do so. The Faculty *could* have communicated more effectively, the Student Appellant *should* have communicated more effectively—especially, as he points out, since the stakes were so high for him.

In the end, your Committee must agree with the more expert conclusion reached by the Faculty of Medicine's Appeals Committee. The Student Appellant did not reach the standards set forth in his Remediation with Probation period. He failed to achieve the necessary medical expert grades set forth in the Plan, and he failed to achieve the necessary level in his communication skills. Having failed to reach these benchmarks it was unnecessary for him to rewrite the AKT 24 examination. Despite some ultimately insignificant administrative errors, the substantive training and feedback the Student Appellant received during his Remediation period was clearly sufficient to meet the objectives of the remediation plan, and the Faculty of Medicine's Faculty Appeals Committee reasonably concluded, based on the evidence, that the Student's appeal was not substantiated.