THE UNIVERSITY OF TORONTO

THE GOVERNING COUNCIL

REPORT # 327 OF THE ACADEMIC APPEALS COMMITTEE

August 14, 2008

Your Committee reports that it held a hearing on Wednesday, June 11, 2008, which was continued on June 18, 2008. Your Committee also met *in camera* on July 10, 2008, to deliberate upon its decision in this appeal. The following members were present:

Professor Emeritus Ralph Scane (Senior Chair)
Professor Clare Beghtol,
Dr. Gerald Halbert,
Professor Glen Jones,
Mr. Alex Kenjeev.

Secretaries:

Ms Nancy Smart, Judicial Affairs Officer.
Ms Mette Mai.

In Attendance:

For The Student Appellant:

Mr. Zak Muscovitch (Counsel).
Mr. H. L. D. (the Student)
Mr. D. Sawh

For the Faculty of Medicine:

Ms Sari L. Springer (Counsel)
Ms Fiona Cherryman,
Ms Gwen Llewellyn

This is an appeal from the decision of the Appeals Committee of the Faculty of Medicine (the Faculty), dated November 17, 2006, which dismissed an appeal from the Board of Examiners (BOE) of the Medical Radiation Sciences Program (the Program) dated September 5, 2006. This latter decision accepted the recommendation of the Radiological Technology Program Review Committee that the Student be dismissed from the Program.

The Program is jointly offered by the Faculty and the Michener Institute. The two institutions confer upon a student who successfully completes the three – year program a B.Sc degree and diploma respectively. One of the disciplines offered by the Program, and the one in which the Student was enrolled, is Radiological Technology.

The Radiological Technology stream is constructed to offer students almost entirely didactic, theoretical courses during the first two years of the Program, although there is a required clinical practicum course during the Summer term which ends the second year. In the third year, there are sixteen – week clinical practicum courses in each of the Fall and Winter terms.

The Student acquired a degree or degrees in medicine abroad. English is not his native language. He entered the Program in 2002. He successfully completed the requirements of the first two years. His instructors noted that he was having some language difficulties, and provided some support through an ESL consultant.

The Student commenced the third year of the Program in the Fall term of 2004. In that term, he was required to take only two “courses”, a clinical project and Clinical Practicum II. The project was completed successfully, but the Student had difficulties in the practicum course. After the course ended, the BOE decided to place the Student on a program – initiated leave of absence with remediation. A remediation plan was devised, which the Student completed successfully during the Winter term of 2005. In accordance with the BOE decision, the Student then, in May, 2005, returned to repeat Clinical Practicum II with the status of “Remediation with Probation”.

The Student’s instructors and supervisors in that Practicum were dissatisfied with the Student’s performance to the extent that the Program Review Committee recommended his dismissal from the Program and the BOE, in a decision dated July 19, 2005, accepted this recommendation. This decision was appealed to the Appeals Committee of the Faculty. That Committee allowed the appeal, in a decision dated August 16, 2005. The Student accordingly was readmitted into the Program and repeated Clinical Practicum II in the Fall term of 2005. The Student successfully completed this repeated practicum, and proceeded, in the Winter term of 2006, to start Clinical Practicum III, still on probation.

During this practicum, at Scarborough General Hospital (SGH), the Student’s supervisors were noting the same type of flaws in his performance that had led to the failure in Practicum II. Generally, these were lapses in technical application, problems in properly positioning patients, difficulty in communication, a tendency to reject or react adversely to critical appraisals, and difficulty in adapting his techniques to the more difficult challenges sometimes met in a major primary care hospital’s radiology department. The Faculty acknowledges that he was generally competent in dealing with basic, more set-piece assignments, but the supervisors were concerned that the Student was performing sufficiently below the level to be expected of one at his stage of the Program to concern them. The Student does not accept that these concerns were justified.

On the issue of communication problems, your Committee observes that these were not only translation type problems, although this aspect, for which the Faculty had supplied the Student with support, was present. Of greater concern was a too-frequent lack of a good sense of how and what to communicate to patients, both verbally and non-verbally, as he prepared them for the required x-rays.

The Student proposed to take a leave of absence of about one month from about mid-May to mid-June, 2006, to visit his homeland. On May 3, 2006, the Chair of Medical Radiation Sciences wrote to the Student. This letter advised the Student that he had not satisfied all the requirements of the practicum and that he was being granted a four – week extension of his placement at SGH in order to complete them. The matters to be completed and, in one case, repeated, were set out. The Student was warned that, if the requirements were not met within the extension period, which was timed to take place after his return from his intended visit home, there would be no further extension of the practicum.

Upon his return from his leave, the Student resumed his extended practicum at SGH, on June 26, 2006. On June 27, an "incident" (to be described later) involving the Student and a patient was observed and reported by a medical radiation technologist. Ms Llewellyn, the Clinical Coordinator in Radiology at SGH, was away that day, but returned to SGH on June 28, 2006. On hearing about the occasion from the technologist, and consulting the Program's Clinical Liaison Officer, she prepared and filed an "incident report". The Clinical Liaison Officer reported the allegations to the Chair of the Medical Radiation Sciences Program. Program officers decided to place the Student on a "Program Initiated Temporary Leave" (PITL), due to a perceived risk to patients. Subsequently, the Radiological Technology Program Review Committee recommended that the Student be dismissed from the Program, and the BOE acted upon this recommendation in its decision of September 5, 2006. The Student, who was never allowed to return to the practicum after being placed on PITL, was thus terminated, in practical terms, from the Program about four weeks before his practicum, as extended, would have normally ended.

The Faculty's position is that the "incident", serious as it was, was not the sole justification for the decision to terminate the Student. It was the substandard performance which, capped by this episode involving danger to a patient's health, led to the conclusion that the Student could not be allowed to continue in the Program. Nevertheless, the "incident" was the event which triggered the termination process, and your Committee believes that, if it had not occurred, then (barring a subsequent similar event), the Student would have been allowed to finish his extended term. He would then have been evaluated on the entire practicum in the usual way, and might or might not have been passed.

Essentially, the Faculty decision which is challenged here is a decision based upon an evaluation by the University's examiners. If the evaluation was correct, the ultimate termination decision was justified. Leaving aside momentarily the fact that the occurrence of the "incident" is challenged by the Student, and also the possibility of bias tainting the evaluations, the appeal would necessarily fail at this point. In a recent decision of another panel of Your Committee, #323, dated March 13, 2008, it was said:

> *Your Committee has on many occasions indicated that it cannot and will not remark examinations or papers that have been evaluated by the examiners appointed by the University, and the same is true for clinical assessments where these are part of the evaluation process. ...... [T]he overall evaluation of the numerous individual appraisals is what matters, and your Committee cannot interfere with the judgment of the Faculty on the grounds that the judgment was wrong, if it was fairly arrived at.*

Your Committee would add that this passage is as applicable to an assessment that a certain action or collection of actions merits immediate suspension from a practicum on the grounds of patient safety as it does to any other evaluation.

The majority of your Committee finds that the decision was fairly arrived at. It finds no evidence of any bias against the Student which could have tainted the decision. It was suggested that the radiation technologist who witnessed and reported the incident may have been influenced against the Student because a low assessment he gave to the Student on some previous work had been raised substantially when the Student appealed to a more senior member of the Program, but your Committee did not find that the evidence on this point raised a reasonable perception of bias on the part of members of the Program and the Faculty who made the decision, first to suspend, and then to terminate the Student. The allegation may be weighed in assessing the credibility of the evidence of the technologist who reported the "incident", but it did not otherwise impinge upon the decisions to place the Student upon PITL, or subsequently, to terminate him from the Program.

This brings your Committee to the "incident". The happening of the "incident" is denied before your Committee, and the Student has adduced evidence from the very patient whose safety was supposed to be at risk, corroborating the denial. Your Committee holds that, in the circumstances of this case, if the "incident" did not happen as alleged, it could affect the vital issue as to whether the evaluations which led to the crucial decisions were "fairly arrived at". The decision to suspend immediately, although made in good faith, could then be fundamentally flawed, and, if so, justice would then require at least that that the Student be allowed to finish out the practicum before being evaluated.

On June 27, 2006, Mr. D. Sawh, then a 42 year old man, came to the Emergency Department of SGH with an injured right shoulder. He had fallen from a bicycle several days before. He had consulted his own doctor earlier on June 27, 2006, because the pain in his shoulder was continuing. His doctor referred him to SGH Emergency for treatment. Initially, staff in the emergency department placed his arm in a sling, which he described as binding his arm tightly against his body, immobilizing it. He was then wheeled on a gurney to the "Fast Track" section of the Emergency department for X-rays and treatment. His shoulder was in fact fractured and dislocated. The Student took Mr. Sawh, and the x-ray instructions, into the X-ray area, Mr. Sawh got off the gurney, and the Student commenced to take the prescribed X-rays.

Mr. Paul, a medical radiation technologist at SGH, was on duty at the time, but not in the room where the Student was x-raying Mr. Sawh when the x-ray procedure started. In a sworn written statement filed with your Committee, he stated that he was in an adjacent room when he noticed that the Student was x-raying Mr. Sawh. He stated that this concerned him, first because

the Student should have consulted with him before taking images, but also because Mr. Sawh's arm was out of the sling. Mr. Paul deposes that he then entered the imaging room, placed the arm back in the sling, and took a third prescribed x-ray himself. The Student had taken two images previously. The removal of an arm from a sling is a breach of SGH protocols for x-raying this type of possible injury, and it is essentially this alleged act which was at the core of the "incident", and which the Program's officials considered serious enough in all the circumstances to require immediate suspension of the Student.

Subsequently, Mr. Sawh was replaced on the Gurney and taken out of the X-ray unit for treatment. He was given a drug which rendered him unconscious, the fracture and dislocation were treated, and he awoke with a new sling. Later, he left the hospital.

The Student denies that he removed the patient's sling, or that the sling had been removed while he was x-raying Mr. Sawh, or that he manipulated in any way the injured arm and shoulder. In this he is supported by Mr. Sawh who both supplied a sworn written statement and attended in person as a witness at the hearing. He swore that the Student had assisted him off the gurney, placed him standing before a "wall" and had taken an exposure when a second man entered the area, watched the Student take a second image, and then took a third image himself. He was emphatic, both in his written statement and in his oral testimony, that at no time did the Student ever manipulate his injured arm or shoulder, and that the sling remained on at all times.

Mr. Paul's sworn statement says, "I have ....reviewed the two images taken by [the Student]. One was with an internal rotation and one was with an external rotation. The external rotation could not possibly have been achieved if the patient's arm had remained in the sling". However, Dr. Cameron, an orthopaedic surgeon, reviewed the x-rays at the Student's request in March, 2008. His report letter, dated March 14, 2008, includes the statement, "[n]o x-rays were done which would require removal of a sling. A sling cannot be seen on an x-ray........I cannot tell therefore if the patient was or was not wearing a sling based on the x-rays."

Although Mr. Paul's evidence was submitted in a sworn written statement, he did not attend the hearing and was not available to be cross-examined on behalf of the Student or questioned by your Committee. No explanation was offered as to why he was not at the hearing, other than that the Faculty had decided against calling him. Under these circumstances, your Committee was charged by the Chair that they might, but need not draw an inference adverse to the Faculty from his failure to appear for questioning.

The Faculty did not attempt to question Mr. Sawh's honesty, but did question the accuracy of his recollection, both because of the lapse of time and because, after the x-ray examination, he had received a drug to render him unconscious for treatment. This drug, according to the evidence of a professor of pharmacology filed with your Committee, sometimes causes amnesia with respect to events which occur "almost concurrently to and after the drug administration". His note also stated that "patients are also unaware that their memory has been impaired". Unfortunately, your Committee was not given any evidence as to the possible scope in time of the phrase "almost concurrently".

Your Committee also had before it reports of two meetings held between the Student and the Clinical Liaison Officer, Ms Sands, and other representatives of the Program. In the report of the first meeting, held on June 29, 2006, in the presence of Ms Llewellyn, it is stated, "[the Student] insisted that he did not remove the patient's sling but that the patient had removed it." In the report of a further meeting between the Student, Ms Sands and two other Program members, held on July 4, 2006, it is stated, "[the Student] insisted that he did not remove it [the sling] but that the patient did because it was easier for the patient to move his arm without the sling".

Your Committee is divided upon the proper finding to be made upon the happening of "the incident". Your Committee was instructed by the Chair that, in matters such as this which have grave consequences on a professional career, Ontario courts insist that courts and tribunals such as this one act on "clear, convincing and cogent evidence", although, given that evidence, issues are still to be decided on the civil standard of proof, i.e., the balance of probabilities, and not the criminal standard of "beyond reasonable doubt".

The majority of your Committee finds that the incident happened substantially as described by Mr. Paul. They believe that Mr Sawh was honest, in that he believes what he told us was true, but that time, or in the alternative, the drug administered to him have made his memory unreliable. The Student has given different and incompatible explanations regarding the sling. Therefore, the majority finds that the Program was not acting under a false assumption as to a key and fundamental fact when the Student was suspended and then terminated, and there is therefore no basis to challenge the evaluations which led to the Student's dismissal. The majority would dismiss the appeal.

The minority finds that the evidence before your Committee, of which the evidence of Mr. Sawh in particular was not available when the Program recommended termination, was not sufficiently "clear, convincing and cogent" to justify suspending the Student from the normal completion of his practicum and thereby destroying his right to be adjudged on his performance over its full term, as previously extended by the Program. The Faculty could not simply change its mind about granting the four week extension after the Student had entered upon it, and no evidence was introduced of any factor, other than that of "the incident", which could justify the interruption, given the Faculty's previous decision to grant the extension. Had the Program officials been aware of the conflicting independent evidence heard before your Committee, they, being equally subject to the requirement of acting only upon "clear, convincing ad cogent" evidence, could not properly have invoked the summary dismissal procedure of the PITL process nor recommended termination, and the BOE, subject to the same requirement, could not properly have ordered the termination. The minority would allow the appeal and permit the Student to complete the balance of his practicum, before being evaluated upon the entire practicum.

The appeal is dismissed.