

**THE UNIVERSITY OF TORONTO
THE GOVERNING COUNCIL**

Report #401 of the Academic Appeals Committee
February 27, 2019

To the Academic Board
University of Toronto

This appeal was conducted on the basis of written submissions. The parties did not attend.

Panel

Professor H. Stewart, Senior Chair
Professor J. Mahrt-Smith, Faculty Governor
Mr. T Sutherland, Student Governor

For the Student Appellant:

Mr. N.M.: Mr. Hatim Kheir, Downtown Legal Services

For the Faculty of Medicine:

Ms. Sari Springer, Littler LLP

The Appeal

The Student appeals from a decision of the Chair of the Faculty of Medicine's Academic Appeal Committee (FMAAC), dismissing as abandoned his appeal from a decision of the Faculty's Board of Examiners (BoE), dismissing him from the M.D. program.

Background

The Student was admitted to the M.D. program and commenced his studies in the fall of 2012. He encountered a number of difficulties relating to substance abuse and other issues, and in September 2014 went on a leave of absence. In October 2016, the Student was readmitted to the program, subject to a number of conditions. One of those conditions was that he enroll in the Physician Health Program (PHP) of the College of Physicians and Surgeons of Ontario. The PHP required him to sign a monitoring agreement which contained a number of conditions. On this basis, in September 2017, the Student was readmitted to the M.D. program. On October 28, 2017, he revoked his consent to one of the conditions of the monitoring agreement, effectively terminating that agreement and therefore his participation in the PHP. On November 22, 2017, the Faculty's

Board of Examiners dismissed the Student from the M.D. program because his readmission was conditional on his enrollment in the PHP.

The Student sought to appeal the BoE's decision to the FMAAC. His Notice of Appeal was timely. The initial deadline for the submission of his Statement of Appeal was February 2, 2018. Meanwhile, the Student had made a request under the *Freedom of Information and Privacy Protection Act*, R.S.O. 1990, c. F.31 (FIPPA). The documents disclosed as a result of this request amounted to almost 9000 pages and were available to be picked up on a USB drive at the University's FIPPA office on March 20. At various times, the Faculty agreed to extend the deadline for submission of the Student's Statement of Appeal, first to March 5, then to March 20, and eventually to April 3, 2018.

The Student missed the April 3 deadline, explaining to the Faculty Affairs Officer that he had mistakenly believed the deadline to be April 6 and stating that he would deliver his Statement of Appeal by April 9. He did not do so. On April 10, the Student picked up the FIPPA documents. That same day, the Faculty Affairs Officer granted him a further extension to April 16 and advised him that if the Statement of Appeal was not received by that date, the appeal would be considered abandoned. The Student did not submit his Statement of Appeal by April 16. On April 17, the Chair of the FMAAC dismissed the Student's appeal as abandoned.

Scope of the Appeal

The Student's appeal to your Committee was originally framed as both an appeal from the FMAAC's decision to dismiss his appeal as abandoned and an appeal from the merits of the BoE's decision to dismiss him from the M.D. program. The Student's appeal materials provide submissions on both issues, and include what appears to be a draft Statement of Appeal to be submitted to the FMAAC (though the FMAAC has never received it). Subsequently, the Faculty proposed that your Committee should consider only the FMAAC's decision and, if that decision was set aside, should return the matter to the FMAAC to consider the appeal on its merits. The Student agreed with this approach. The Chair of your Committee also agreed that this was the appropriate way to proceed. Accordingly, in its response to the Student's appeal materials, the Faculty did not make any submissions on the merits of the BoE's decision, and at its meeting on January 19, your Committee did not consider the merits of that decision.

Standard of Review

The Faculty submits that the FMAAC's decision to dismiss the appeal as abandoned should be set aside only if it was "capricious or arbitrary" (Faculty's submissions, para. 68). That is not correct. The applicable standard of review is whether the decision appealed from is a reasonable application of the academic policy in question, in this case, the Faculty's appeal policy.

The Student submits that this appeal is, in effect, a request for an extension to file his appeal at the FMAAC and that your Committee's decision should be guided by the criteria laid out in *Canada*

(Minister of Human Resources Development) v. Gattellaro, 2005 FC 883, adapted to this context: (i) did he have an intention to pursue the appeal; (ii) does he have an arguable case; (iii) is there a reasonable explanation for the delay; and (iv) is there prejudice to the Faculty? (Student's submissions, para. 45.) The issue before your Committee is better framed as whether FMAAC's decision was reasonable; nevertheless, considering these factors has assisted the Committee in deciding that issue.

Decision

The Faculty submits that the Student had "failed to comply with 5 different deadlines: February 2, March 5, April 3, April 9, and ... April 16" (Faculty's submissions, para. 46). This submission is overstated. The Student was granted extensions from the deadlines of February 2 and March 5. If an extension is granted, the former deadline replaced by a new deadline. Thus, February 2 and March 5 are not deadlines that the Student missed. April 9 was not a deadline either; rather, it was the date by which the Student, after missing the deadline of April 3, told the Faculty Affairs Officer that he would submit his Statement of Appeal.

Thus, the Student missed two deadlines: April 3 and April 16. The Student explains these missed deadlines in part with reference to his FIPPA request. Your Committee finds that there is some merit to this explanation.

The Faculty makes three submissions in regard to the delay occasioned by the FIPPA request. First, the Faculty submits that while the Student was entitled to make the FIPPA request, "he ought not to be able to ... rely on the magnitude of the disclosure that he himself sought, to then seek multiple and repeated extensions ..." (Faculty's submissions, para. 50). Relatedly, the Faculty notes that the Student did not use any of the FIPPA documents in his appeal to your Committee. Your Committee rejects these related submissions. It was appropriate for the Student to seek extensions to enable him to determine whether there was anything in the FIPPA materials that could assist his appeal. The right to freedom of information would be of little value in the context of an academic appeal if the time lines for appeals could not be adjusted to give students time to consider the material obtained. Moreover, during this period, the Student was not represented by counsel and therefore did not have the benefit of counsel's advice as to whether and how the materials might assist him. Third, the Faculty notes that although the FIPPA materials were available on March 20, the Student did not pick them up until April 10. The Student explains that he was in Alberta until April 5. The Faculty argues that the Student "assumed he could simply disregard the April 3 deadline, pick up the documents on April 10 without any repercussions" (Faculty's submissions, para. 53). Your Committee is not entirely satisfied with the Student's explanation for the delay in picking up the FIPPA documents. We do not know when he went to Alberta or what arrangements he might have made to have the USB drive sent to Alberta. The Student explains that he did not return to Toronto before the April 3 deadline because of the importance of being with his family (Student's submissions, Tab 19); yet, pursuing his appeal was also very important. But your Committee does not draw the inference urged by the Faculty, and in any event considers the delay

caused by the FIPPA request to provide at least some explanation for the Student's missing the two deadlines.

In arguing that the appeal should be dismissed, the Faculty relies on a number of events that occurred after April 17, 2018. Your Committee is of the view that these events do not bear directly on the reasonableness of the FMAAC's decision as they could not have been known to that Committee. Moreover, it is not clear what inference should be drawn from them. On the one hand, they might be taken to show that the Student generally has difficulty complying with deadlines; on the other hand, they might also be taken to show that it took him some time to complete his review of the FIPPA materials and that he never intended to abandon his appeal.

On April 17, 2018, the Chair of the FMAAC knew that the Student had missed a deadline on April 3, that he had missed another deadline on April 16, and that the Student had been explicitly warned that his appeal would be dismissed as abandoned if he missed the April 16 deadline. However, the Student was at that time not represented by counsel and had recently received a large volume of material through the FIPPA process, which he had not yet fully reviewed. It would have been better if the Student had formally requested an additional extension in advance of the April 16 deadline, rather than allowing that deadline to pass; nevertheless, your Committee finds that in these circumstances it was unreasonable for the FMAAC to treat the Student's appeal as abandoned. Although there had been considerable delay in the process, much of the delay was caused by the Student's not unreasonable decision to make a FIPPA request, which cannot be held against him. The two deadlines that the Student missed were recent and close together. There could be no doubt that the Student intended to pursue the appeal. It is difficult to see what prejudice an additional brief extension would have caused to the Faculty, and indeed (apart from a general reference to the importance of following the rules) the Faculty makes no submissions on that point.

Your Committee understands that the lengthy delays in bringing this matter on for appeal are frustrating for the Faculty. Your Committee does not dictate any timetable to the parties before the FMAAC but urges them to deal with the matter expeditiously. In this connection, your Committee notes that the Student is now represented by counsel and has prepared a draft Statement of Appeal which, presumably, can be filed with the FMAAC in a timely manner.

Conclusion

The appeal is allowed and the matter is returned to the FMAAC.