

**UNIVERSITY OF TORONTO
GOVERNING COUNCIL**

Report #403 of the Academic Appeals Committee
May 9, 2019

To the Academic Board
University of Toronto

The following academic appeal was heard on Thursday, March 28, 2019.

Panel:

Ms. Vanessa Laufer, Chair
Professor Mark Lautens, Faculty Governor
Ms. Mala Kashyap, Student Governor

Appearances:

For the Student:

D.B., the “Student”
Mr. Michael D. Wright, Cavaluzzo LLP
Mr. Tyler Boggs, Cavaluzzo LLP

For the Faculty of Medicine:

Ms. Emily Lawrence, Paliare Roland Rosenberg Rothstein LLP
Mr. Robert A. Centa, Paliare Roland Rosenberg Rothstein LLP

The Appeal

The Student appeals a decision of the Faculty of Medicine Appeals Committee (the “FMAC”) of April 30, 2018 (the “FMAC Decision”) that upheld the decision of the Undergraduate Medical Education Board of Examiners (“BOE”) dated October 14, 2015 wherein the BOE concluded that the student had lapses in professional behaviour and referred him for remediation in professionalism (the “BOE Decision”). The Student is seeking that your Committee set aside the FMAC Decision, find that there were no minor lapses in professionalism, and that the Student’s record be amended accordingly. The Student appeals on grounds of procedural fairness and that the decision was unreasonable. Specifically, the Student argues that:

- i) Faculty of Medicine regulations and procedures were not followed;
- ii) Relevant evidence was not taken into consideration when the decision was made; and

- iii) The decision could not be supported by the evidence that was considered when it was made by the FMAC.¹

The Faculty of Medicine submits that the FMAC Decision was reasonable and this appeal should be dismissed.

Overview of the Facts

The Student graduated from the MD Program in May 2016. He is a registered member of the College of Physicians and Surgeons of Ontario and is a practicing physician.

From 2012 – 2016, the Student was enrolled in the 4-year Faculty of Medicine Undergraduate Medical Program at the University of Toronto (“MD Program”). The MD Program included two years of pre-clerkship in a classroom setting followed by two years of clerkship rotation in a hospital setting, in various areas of medical practice.

The clerkship phase was overseen by Dr. Stacey Bernstein, Clerkship Director. Each course during the clerkship had a course director who reported to Dr. Bernstein.

Professional behaviour and ethical practice are requirements of the MD Program.² “Satisfactory professional behaviour is a requirement to achieve credit in every course, and assessment of professionalism is included in every course.”³ Accordingly, the MD Program has formal mechanisms such as Professionalism Evaluation Forms wherein course directors and supervising teachers can note professionalism lapses, and informal mechanisms for assessing and monitoring students’ professionalism including communicating issues directly to students or to the Pre-Clerkship and Clerkship Directors. Furthermore, relevant, context-specific expectations are also set out in the *Standards for grading and promotion of undergraduate medical students*, *Standards of Professional Practice Behaviour for all Health Professional Students*, *Guidelines for the Assessment of Undergraduate Medical Trainees in Academic Difficulty*, and *Regulations for Student Attendance and Guidelines for Approved Absences from Mandatory Activities*.

There is disagreement between the parties about the characterization of the Student’s professional behaviour during the MD Program.

December 2013 – Pre-clerkship

Dr. Pier Bryden cited the Student for “1 or 2 minor lapses in professional behaviour” on the Preclerkship Professionalism Evaluation Form for not notifying “... a course director or faculty lead of a recent absence from an ethics session until he was contacted after the session.”⁴ Dr.

¹ Affidavit of the Student, Notice of Appeal of the Student, Tab C, p 2 – 3

² *Standards for grading and promotion of undergraduate medical students*, Section 5, Tab 4, p. 22 in the Student’s Book of Documents.

³ Ibid.

⁴ Preclerkship Professionalism Evaluation Form, Tab 2, E, p.61, Faculty of Medicine’s Book of Documents.

Bryden spoke to the Student about the issue and noted the following under the Areas for Improvement section of the Form: “We discussed that when [the Student] anticipates a potential absence or difficulty meeting an academic obligation, he needs to contact the appropriate supervisor, course director directly and proactively, and ask for help if required.”⁵ This minor lapse in professionalism is undisputed by the parties to this appeal.

August 2014: Transition to Clerkship (TTC) – absence request for concert

During TTC, the Student sought and received permission in advance for a planned absence from an education session to attend an out of town concert, and he later completed required make-up activities. However, when permission for the absence was granted, the Student was made aware of the *Regulations for Student Attendance and Guidelines for Approved Absences from Mandatory Activities* by Dr. Schreiber, then Co-Director of the TTC Course, and told that requests for such an absence during clerkship would not be permitted.⁶ At the FMAC, the Student submitted this was incorrectly presented to the BOE as a lapse in professionalism. However, the Faculty of Medicine contended this was not presented to the BOE as a lapse but to indicate that the Student had been told during TTC that such requests would not be allowed during clerkship and that he had been directed to the relevant policy.

October 2014: Internal Medicine shift and meeting changes

During the Student’s Internal Medicine Clinical Rotation, he received approval from Dr. Isaac Bogoch to switch a work shift from a Saturday to a Thursday. His site supervisor, Dr. Cheryl Jaigobin denied the Student’s subsequent request for an earlier mid-rotation feedback meeting with her so he could leave by train to Windsor Friday morning for thanksgiving. Dr. Jaigobin indicated the Student had not been given permission through proper protocols to change his Saturday shift. The Student then met with and asked Dr. Bernstein to advocate for the shift change, which was then approved requiring the Student to complete an additional weekend shift. Dr. Jaigobin contacted Dr. Bogoch who indicated that he had approved the change due to a safety issue.⁷ The Student claims that Dr. Bogoch initiated the shift change due to a safety concern about the long drive.

The Student’s conduct was outlined by Dr. Katina Tzanetos on the Student’s Internal Medicine Clerkship Professionalism Evaluation Form under Critical Comments: “The student requested to be given time off call during the thanksgiving weekend without notifying the site directors. The importance of meeting call responsibilities was discussed with him and he agreed to complete an additional weekend shift.”⁸ It was not characterized as a lapse of professional behavior on the form.

⁵ Ibid., p. 63.

⁶ Faculty of Medicine’s Book of Documents, Email from Dr. Schreiber to the Student, Exhibit F, p. 65

⁷ Faculty of Medicine’s Book of Documents, Email from Dr. Bogoch to Dr. Jaigobin, Exhibit B, p. 121.

⁸ Affidavit of Dr. Michael Roberts, Respondent’s Book of Documents, Tab 4, p 135

At the FMAC, the Student submitted Dr. Bernstein misrepresented this situation to the BOE and characterized him unfairly as just wanting an extra-long thanksgiving weekend rather than indicating his request was due to a family thanksgiving dinner with older relatives.

The Faculty indicated that the Student was made aware of the protocols for call shifts at the beginning of the Internal Medicine rotation.

May 2015: Issues in Portfolio Course

The Student's Portfolio Course instructors, Drs. Roberts and Parker, assessed the Student's May 28, 2015 Portfolio Group performance as insufficient under all categories due to his behavior, and that subsequent email correspondence and a meeting with the Student led them "to question his ability to work in a professional manner."⁹ Dr. Roberts indicated he would have noted this as a professionalism lapse if the course had used Professionalism Evaluation Forms at that time.¹⁰ The matter was shared with the Course Director, and then Dr. Bernstein who referred the Student to Dr. Erika Abner (the faculty ethics advisor) for professionalism coaching and moved the Student to another Portfolio Group.

The Student submitted that his behavior in portfolio was not disruptive or disrespectful, the Faculty wrongly indicated that he did not make himself readily available to meet about the May 28th session, that it was incorrect and misleading for the Faculty to imply the alleged behaviour took place in more than *one* session and to suggest that he was referred to Dr. McKnight. He submitted that his meeting with Dr. Abner was not a remediation nor was a professionalism lapse mentioned as part of that meeting.

August 2015: Faculty Medicine Rotation – missing a seminar, and shift change requests

In August 2015, Dr. Lisa Ilk, the Student's Family Medicine Rotation Clinical Supervisor, cited him for two minor professionalism lapses - one for missing a seminar without prior approval, even after a discussion with her about the protocol; the other for attempting to change his shifts to work with specific doctors, even after he had been told by Dr. Ilk that this was inappropriate. Dr. Ilk indicated the Student informed her about his stepfather's health but when asked, had said he did not need time off for it.

The Student's view is that he followed correct protocols regarding the missed seminar and the shift changes.

He sent a critical email to Dr. Ilk about her mentorship, indicating that he was uncomfortable with the minor lapses, and that she had not considered his stepfather's health. Dr. Ilk informed the Course Director, Dr. Azadeh Moaveni of the situation.

⁹ Affidavit of Dr. Michael Roberts, Faculty of Medicine's Book of Documents, Tab 4, p 132.

¹⁰ Ibid., p 135.

The Student submitted that Dr. Bernstein omitted information about the Student's stepfather's health from the BOE presentation and exhibited bias, and that he did not know the seminar was mandatory. He disagreed that there had been multiple requests to change the schedule to work with preferred doctors.

September 2015 – Referral to Board of Examiners

The Faculty submitted that Dr. Moaveni upheld the professionalism lapses and noted the tone of the Student's email to Dr. Ilk was unprofessional¹¹. She shared this with Dr. Bernstein. The Student emailed Dr. Bernstein and Dr. Moaveni outlining his disagreement and that he had made an appointment with Dr. Abner, (the faculty ethics advisor). In an email dated September 15, 2015, Dr. Bernstein indicated that she would be bringing the Student to the BOE in October about his professionalism. Despite attempts to meet to discuss, the Student and Dr. Bernstein did not meet before the BOE hearing. There were additional email exchanges including during the weekend prior to the BOE hearing at which time a 45-minute phone call between the Student and Dr. Bernstein also took place.

Process at the BOE

The Student submitted that i) the Faculty did not follow its own regulations and procedures when it referred him to the BOE, ii) relevant evidence was not taken into consideration by the BOE when the decision was made, and iii) that the decision could not be supported by the evidence that was considered when it was made by the FMAC. The Student also indicated that Dr. Bernstein's prepared written submission to the BOE¹² attacked his character without evidence, and without the Student having the opportunity to defend himself. He suggested Dr. Bernstein was biased against him and implied potential impropriety of the attendance of Dr. Nickell, Associate Dean, Health Professions. The Student submitted that since his emails were not presented to the BOE, its members could not evaluate them and the Student could not dispute their characterization in Dr. Bernstein's prepared submission as he did not know what would be presented. He further alleged that he was not given proper notice of the BOE hearing; was not provided adequate time to prepare a defence or know the full case against him; was not permitted to attend or have an advocate attend to present his case in front of the BOE; was not given the right to call witnesses; had a reasonable concern of bias and was not afforded due process regarding professionalism lapses.

The Faculty submitted that it followed its regulations and procedures and acted fairly in all dealings with the Student; followed its Standard in identifying the Student's professionalism issues and provided notice of referral to the BOE and the five incidents to be addressed there; that the FMAC was a fair process with a reasonable and correct finding that upheld the decision of the BOE, that

¹¹ Faculty of Medicine's Book of Documents, Tab 6, Exhibit C, Email from Dr. Moaveni to the Student, p. 248.

¹² Dr. Bernstein's Summary of Difficulty for the Student, Student's Book of Documents, p. 89

the Student presented no evidence of bias and that neither Dr. Bernstein nor Nickell participated in decision-making.

The Standard of Review on this Appeal

The question for your Committee on this appeal is whether the FMAC decision was reasonable.

Decision

Faculty of Medicine regulations and procedures were followed

Your Committee concluded that it was reasonable for the FMAC to determine that Faculty regulations and procedures were followed, that the *Guidelines for the Assessment of Undergraduate Medical Trainees in Academic Difficulty* (“Assessment Guidelines”) could be considered an outline of normal practice regarding minor professionalism lapses, and that the Clerkship Director may deviate from normal practice when referring a case to the BOE provided a rationale is given.

It was reasonable for the FMAC to conclude that Dr. Bernstein had reasonable grounds to take the Student’s case to the BOE considering the professionalism concerns of the Faculty. The evidence showed that in her capacity as Clerkship Director, Dr. Bernstein was the frontline decision maker who received direct observations and assessments of the Student’s professional behaviour from Faculty of Medicine colleagues, such as Drs. Bryden, Jaigobin, Tzanetos, Parker, Roberts, Berger, Moaveni and Ilk. These came in the form of formal assessments (such as Preclerkship Professionalism Form, Critical Comments in the Clerkship Professionalism Form, Evaluation of Group Meetings Form) and/or informal communications including conversations and emails. We accept the Faculty of Medicine’s submission that these doctors were experts who were well suited to make informed, context-specific professionalism evaluations that accordingly should not be interfered with by this Committee.

It was reasonable for the FMAC to reject the Student’s claim that he had not been provided reasonable notice of the BOE meeting or sufficient time to prepare a defence. Email correspondence of September 15, 2015 submitted by the Faculty showed Dr. Bernstein informed the Student more than a month in advance that she would be taking his case to the BOE plus a rationale for so doing. Her email and rationale were also part of an email string from the same day that included correspondence from Dr. Moaveni to the Student outlining in considerable detail his two Family Medicine lapses and the fact they had met to discuss them. Given this timing, it was reasonable for the FMAC to conclude that the Student had more than a month to make further inquiries about the issues and prepare his written submissions.

Your Committee was not persuaded by the Student’s interpretation of the *Standards for grading and promotion of undergraduate medical students* that the word “normally” does not pertain to professionalism. A broader reading of these Standards must include professionalism since

“Satisfactory professional behaviour is a requirement to achieve credit in every course, and assessment of professionalism is included in every course”¹³.

Relevant evidence was taken into consideration when the decision was made

Your Committee finds the FMAC received and considered extensive evidence – affidavit, documentary, and oral submissions by the parties - and its decision was rationally connected to and based on that evidence. The Student attended the FMAC hearing in person with legal representation and oral submissions were made.

August 2014: Transition to Clerkship (TTC) – absence request for concert

Based on the evidence, including Dr. Schreiber’s August 13, 2014 email to the Student, your Committee finds it was reasonable for the FMAC to determine that the TTC absence was presented to the BOE not as a lapse in professionalism but to make them aware that the Student was informed at that time that missing sessions for personal reasons during Clerkship would not be allowed and that he was directed to the relevant regulations at that time.

October 2014: Internal Medicine shift and meeting changes

Based on the evidence, your Committee finds it was reasonable for the FMAC to determine that the Student reasonably ought to have known that Dr. Bogoch was not the right person to approve a call shift and that the safety rationale for requesting a shift change was questionable. This is supported by the August 13, 2014 email sent to all year 3 Medicine Clerks indicating the complexity of the call schedule, that switching call or requests for planned absences is not simple and providing the relevant policy. Moreover, the Student’s October 6, 2014 email to Dr. Jaigobin requested the meeting change so he could to go to Windsor for the thanksgiving weekend by train. It was reasonable for the FMAC to find that aside from the Student’s testimony, there was no indication that Dr. Bogoch initiated the change request as there was no evidence, aside from the Student’s, to support this.

May 2015: Issues in Portfolio Course

Based on the evidence, it was reasonable for the FMAC to accept the Portfolio scholars’ observations of the Student. As noted above, your Committee accepts these doctors are experts who are well suited to make informed, context-specific professionalism evaluations that accordingly should not be interfered with by this Committee. This includes Dr. Bernstein’s evidence about being unaware of any other conflict arising between student and portfolio facilitators.

August 2015: Faculty Medicine Rotation – missing a seminar, and shift change requests

As the Student had noted in his Statement of Appeal to the FMAC that Dr. Ilk told him there was an expectation for him to attend the seminar, your Committee finds it was reasonable for the

¹³ Affidavit of the Student, Notice of Appeal of the Student, Section 5, *Standards for grading and promotion of undergraduate medical students*, Tab 4 para 5 p. 23.

FMAC to conclude that Dr. Ilk had made it clear to the Student that the seminar was mandatory. We further find that it was reasonable for the FMAC to rule that the combination of the *Clerkship in Family and Community Medicine Student Handbook* and the *Regulations for Student Attendance and Guidelines for Absences from Mandatory Activities* together with Dr. Ilk's expectation of attendance made it reasonably clear that the session was mandatory.

With regards to the second professionalism lapse during the Family Medicine Rotation, based on the evidence of Drs. Ilk and Moaveni, the Committee finds that it was reasonable for the FMAC not to accept the Student's submission that he asked for only one shift change.

The decision could be supported by the evidence that was considered when it was made by the FMAC

Your Committee accepts as reasonable the FMAC findings that Dr. Bernstein's document presented to the BOE was a high-level summary that was not intentionally misleading, and that no evidence of bias was found on the part of the BOE members. We further accept as reasonable the FMAC's determination that the BOE's decision was supportable and connected to the evidence.

Your Committee listened carefully to the submissions of both parties and further reviewed the following legal cases that were provided regarding procedural fairness: *Baker v. Canada (Minister of Citizenship & Immigration)*¹⁴, *Khan v. The University of Ottawa*¹⁵, and *AlGhaithy v. University of Ottawa*.¹⁶

Among other things, the *Baker* case established that an oral hearing is not always necessary "to ensure a fair hearing and consideration of the issues involved"¹⁷ and that the duty of fairness has a flexible nature that "recognizes that meaningful participation can occur in different ways in different situations."¹⁸ Five factors for considering procedural fairness were outlined:

1. the nature of the decision being made and process followed in making it;
2. the nature of the statutory scheme and the term of the statute pursuant to which the body operates;
3. the importance of the decision to the individuals affected;
4. the legitimate expectations of the person affected by the decision; and
5. the agency or administrator's choice of procedure.

Accordingly, the Committee considered the specific context of the case before it. The BOE process is *in camera* and submissions are primarily written. Its process is not close to a trial model and so need not be court like. The consequences at the BOE for the Student were remedial, educational and restorative, not punitive. It was not a situation where the Student's right to continue in the program or his career were at stake. The Committee was informed that the Student is currently a

¹⁴ *Baker v. Canada*, [1999] SCC 699 (S.C.C) Book of Authorities of the Student, Tab 1.

¹⁵ *Khan v. The University of Ottawa*, [1977] O.J. No. 2650 (O.C.A) Book of Authorities of the Student, Tab 2.

¹⁶ *AlGhaithy v. University of Ottawa*, 2012 ONSC 142 Book of Authorities of the Faculty of Medicine, Tab 12

¹⁷ *Baker v. Canada*, [1999] SCC 699 (S.C.C), Book of Authorities of the Student, Tab 2 para 33.

¹⁸ *Ibid.*, para 34.

registered member of the College of Physicians and Surgeons of Ontario and is a practicing physician, but as there was no evidence presented on whether the Student suffered grave and permanent consequences on his professional career, it was not a factor that your Committee could weigh in favour of a higher standard of procedural fairness. We concluded that a more relaxed standard of procedural fairness is appropriate in this situation.

Your Committee considered the *AlGhaithy* case and the submissions made about it. The case states that “Courts are reluctant to interfere with the academic decisions of universities unless there has been “manifest unfairness” in the procedure adopted or the decision is unreasonable.”¹⁹ Your Committee does not consider the proceedings of the BOE or the FMAC were manifestly unfair or that the decisions were unreasonable.

Your Committee notes that the Faculty of Medicine had chosen the procedures of its own BOE.²⁰ The Faculty is well-suited to determine what is best for its own community, its faculty members are expert assessors of professionalism within its academic programs, and this Committee should not interfere with their academic assessments. The option to appeal the BOE decision was also available, and the Student availed himself of this option at the FMAC and at this Academic Appeal.

As noted above, your Committee accepts that reasonable notice and sufficient time to prepare a defence were afforded to the Student regarding the BOE hearing. Moreover, detailed communications / assessments of the Student’s professional issues had already been provided to him on previous occasions; these were already well-known to him. He had appeared before the BOE previously and was familiar with its process. Moreover, the evidence shows that all UME students were directed to the BOE Terms of Reference online. No evidence was provided of bias on the parts of Drs. Bernstein or Nickell.

However, if your Committee is incorrect and there was any denial of procedural fairness at the BOE, this Committee accepts the submission of counsel for the Faculty that any such defects were cured by the FMAC proceeding, which amounted to a hearing *de novo* and met the requirements of procedural fairness. Indeed, the FMAC considered the appropriateness of the BOE decision based on extensive evidence and so stood in the BOE’s shoes. The Student had every opportunity to fully present his case there, and he did so with legal representation.

Your Committee notes that the Student’s case is clearly differentiated from the *Khan* case. Unlike the *Khan* case where Khan was facing a failed year and a possible delay if not end to her career, the Student here was not facing a failed year or loss of the right to continue in his profession. Furthermore, the Student’s credibility was not a central issue in this case whereas it was in *Khan* as the only direct evidence in that case was Khan’s word. As such, in the Student’s case, procedural fairness did not require an oral hearing.

¹⁹ *AlGhaithy v. University of Ottawa*, 2012, ONSC 142, Faculty of Medicine’s Book of Documents, Tab 12, p. 305.

²⁰ Board of Examiners Terms of Reference, Faculty of Medicine’s Book of Documents, Tab 9, p. 259.

For the reasons outlined above, your Committee finds the decision of the Faculty of Medicine Appeals Committee of April 30, 2018 to be reasonable.

The appeal is dismissed.