

**THE UNIVERSITY OF TORONTO
THE GOVERNING COUNCIL**

Report #431 of the Academic Appeals Committee
February 5, 2024

To the Academic Board
University of Toronto

Your Committee reports that it held a hearing on November 23, 2023, at which the following members were present:

Senior Chair:

Professor Hamish Stewart

Hearing Secretary:

Nadia Bruno, Special Projects Officer, Office of Appeals, Discipline and Faculty Grievances

For the Student Appellant:

█ (the “Student”)

For the Rotman School of Management:

Lily Harmer, Paliare Roland Rosenberg Rothstein LLP
Joseph Berger, Paliare Roland Rosenberg Rothstein LLP

Background to this ruling

The Student appealed from the grade of B+ that he received in RSM1160 at Rotman School of Management (Rotman) in the Fall 2021 term. His appeals within Rotman and the School of Graduate Studies (SGS) were dismissed. He then appealed to your Committee. The appeal was heard on the afternoon of Thursday, November 23, 2023. The Student, who holds a J.D. degree from the Faculty of Law, was self-represented. Rotman was represented by counsel.

During Rotman’s oral submissions, reference was made to the SGS policy on “Re-reading & Retention of Examinations” (the SGS Re-Reading Policy), available at <https://facultyandstaff.sgs.utoronto.ca/managing-student-records/retention-examinations/>. The text of this policy was not included in either party’s materials. Wondering whether the SGS Re-Reading Policy might have some bearing on the appeal, the Chair asked counsel for Rotman where it could be found. Counsel promptly provided the link noted above. The Chair was not able to determine in the moment whether the SGS Re-Reading Policy was relevant to the issues in the appeal and so asked the parties to provide submissions on that question. On December 19, 2023, the Student provided written submissions consisting of an introduction, two substantive submissions, and a conclusion. The Student included the SGS Re-Reading Policy as an exhibit to his submissions and described it as “Ambush Evidence.”

The Chair read the Student's submissions in early January and found that the Student's first substantive submission (concerning procedural fairness) was without merit. On January 10, 2024, he offered Rotman an opportunity to reply to the Student's second substantive submission (concerning relevancy). On January 11, 2024, the Student wrote to the Chair, objecting to Rotman's having been given the opportunity to make submissions and asking him to take "one of the following courses of action":

1. Deny the Faculty an opportunity to provide further submissions and render a timely decision on the basis of the information already in the appeal record; or
2. Issue an interim report with (i) written reasons for the AAC's decisions to (a) permit the Faculty's introduction of the Ambush Evidence during the hearing and (b) accept further submissions from the Faculty ...; and (ii) a confirmation that the Appellant will have an opportunity to respond to the Faculty's further submissions within 30 calendar days of the date on which the Faculty serves its further submissions on the Appellant.

On January 12, 2024, Rotman provided its response to the Student's submissions of December 19, 2023.

For the reasons outlined below, the Chair responds to the courses of action requested by the Student as follows. As for 1, the Chair rejects the Student's request to deny Rotman an opportunity to respond to the Student's submissions of December 19, 2023. As for 2(i), the Chair provides this decision, though the Chair notes that he did not decide to accept the SGS Re-Reading Policy at the hearing; rather, he invited submissions as to its relevance. As for 2(ii), in light of the ruling below, no further submissions from either party concerning the SGS Re-Reading Policy are needed.

Decision

Procedural Fairness

The Student's first submission is that your Chair should not consider admitting the SGS Re-Reading Policy at all because it would be procedurally unfair to do so. As he puts it, "the window of opportunity for the Faculty to introduce new evidence has long since expired." He notes that there are several points in the process where Rotman could have added the SGS Re-Reading Policy to its material but failed to do so. He describes Rotman's conduct at the hearing, and his response to it, as follows:

At the eleventh hour, out of sheer desperation in the face of an irrefutable appeal, the Faculty is grasping at straws to introduce nothing but the slightest sliver of evidence that, in reality, fails to support the Faculty's arguments and is irrelevant to the appeal. Now, the Appellant is being forced to provide additional submissions to prevent the Academic Appeals Committee ("AAC") from inappropriately accepting the Faculty's introduction of the School of Graduate Studies "Re-reading & Retention of Examinations" policy ("Ambush Evidence").

The Chair found the Student's submission concerning procedural fairness to be without merit.

This submission has two branches. First, the Student says that the Chair should not even consider receiving the SGS Re-Reading Policy because it is too late for Rotman to introduce new evidence. As he put it in his letter of January 11, 2024, "Under the AAC's procedures, the Faculty has exactly one opportunity to provide written submissions." The Student is correct to suggest that the parties should include in their materials everything they intend to rely on at the hearing. But it is not uncommon for the parties before your Committee to seek to introduce material that was not included in their original written submissions; whether to permit the panel to consider such material during their deliberations is a discretionary decision for the Chair of the panel to make, based on factors including the importance of the evidence, the reasons why it was not originally included, and the positions of the parties (see, for example, Report #332; Report #335, Report #400). There is no absolute bar to the introduction of new material following the filing of written submissions.

Second, the Student argues that your Committee should not consider the SGS Re-Reading Policy because it is "Ambush Evidence." This argument is entirely without merit. As counsel for Rotman rightly submits, the question whether the panel should consider the SGS Re-Reading Policy was raised by the Chair, not by Rotman; thus, there was no "ambush." Moreover, the SGS Re-Reading Policy is not a fact offered to prove the truth or falsity of another fact; thus, it is not "evidence." The SGS Re-Reading Policy is not a fact but a norm – a University policy. The Chair's tentative view, though it need not be determined for the purposes of this appeal, is that your Committee has the power to notice a University policy whether or not it was included by the parties in their materials. In the Chair's view, the appropriate way to deal with a policy that appears to be relevant but that the parties have not explicitly referenced is to ask the parties whether they wish to make submissions on its relevance. That is the procedure that your Chair followed in this case. If, on the other hand, the SGS Re-Reading Policy is properly characterized as "evidence," the same procedure would have been followed (as outlined above).

The Student also objects to the way in which the Chair followed that procedure in this case. In his letter of January 11, 2024, written in response to the Chair's granting Rotman an opportunity to reply to his submissions, he submits:

It is procedurally unfair, and indeed unprecedented, for the AAC to ... allow the Faculty to respond to the Appellant's submissions without receiving proper submissions on the issue from the Faculty in the first instance.

The Chair interprets this submission as an argument that Rotman should have first been required to make submissions as to the admissibility of the SGS Re-Reading Policy and that the Student should then have been given an opportunity to respond. It would perhaps have been preferable to proceed in that sequence; however, as the Chair now has the benefit of both parties' submissions on the issue, the point is moot.

There is, however, another possible interpretation of this submission. The timing of this particular claim of procedural unfairness suggests that the Student may be referring to the

Chair's decision not to ask Rotman for a response to the Student's submissions concerning procedural fairness. If that is the claim, the Chair rejects it. The Student made an argument for the proposition that it would be procedurally unfair for your Committee to receive the so-called "ambush evidence"; having carefully considered that argument, the Chair found that it had no merit; it was therefore unnecessary to receive Rotman's submissions in response.

Relevance

In his submissions of December 19, 2023, the Student argues that the SGS Re-Reading Policy is not relevant to the issues raised in his appeal and, in the alternative, that the policy strengthens his argument concerning the manner in which Rotman dealt with the re-reading of his paper for RSM1160, in that it provides for some consultation with a student as to a second reader. Rotman notes that the policy does not apply to the Student's appeal because there was no examination in RSM1160, but "submits that it is an example of another re-read policy (for use in different circumstances) which provides for double anonymity which is why it was provided to respond to the question asked of it by the Panel" (Rotman submissions of January 12, 2024, para. 3).

The SGS Re-Reading Policy is relevant, for the reasons given by the parties; however, its relevance is marginal, and the panel would not be significantly assisted by considering it and the parties' submissions concerning its relevance. The Chair therefore will not add it to the material before your Committee.