

THE UNIVERSITY OF TORONTO

THE GOVERNING COUNCIL

Report Number 308 of the Academic Appeals Committee

February 3, 2006

To the Academic Board,
University of Toronto.

Your Committee reports that it held a hearing on Tuesday, January 24, 2006, at which the following members were present:

Professor Emeritus Ralph Scane, Senior Chair
Professor Glen Jones
Professor Michael Marrus
Professor Ian McDonald
Mr. Mahadeo Sukhai

Secretary: Mr. Anthony Gray, Judicial Affairs Officer

In Attendance:

For the Student Appellant:

Mr. Robert Wakulet (Counsel)

For the Faculty of Medicine

Ms Sari Springer (Counsel)

This is a motion brought by the Faculty of Medicine (The Faculty) to quash, on the grounds of undue delay and want of prosecution, an appeal brought by the Student from a decision of the Appeals Committee of the Faculty, dated January 5, 2001. The latter decision dismissed an appeal from the decision of the Board of Examiners, Postgraduate Programs, dated December 17, 1999, to terminate the Student from the residency programme in plastic surgery.

The Student entered the residency programme in July, 1996. His ultimate dismissal from the programme in December, 1999 arose from alleged behavioral problems which, for the purposes of this motion, it is not necessary to chronicle here.

The Student filed an appeal to the Academic Appeals Committee from the decision of the Appeals Committee of the Faculty on April 4, 2001. This filing was made within the time permitted by your Committee's Terms of Reference. Under the title, "Supporting Documents", the notice of appeal to your Committee listed "The Pleadings of the proceedings herein, [the Student]'s medical and psychiatric reports, Affidavit character evidence, ITERS [In-Training Evaluation Reports], Admissions File." In fact, none of these documents accompanied the notice of appeal. On April 6, 2001, the Acting Secretary of your Committee wrote to [the Student], acknowledging receipt of the Notice of Appeal and advising that a copy of it had been forwarded to the Faculty. The letter continued, "[w]hen you are ready, please let me have any further documentation you wish to submit in support of your appeal.Once I have received your complete submission I can proceed to set a date for the hearing.". On April 18, 2001, the present solicitors for the Faculty replied to the Acting Secretary, advising that they would be representing the Faculty on the appeal, and requesting that further correspondence, including further submissions from [the student], be sent directly to them.

On June 25, 2002, the then Judicial Affairs Officer in the Governing Council Office e-mailed the solicitor handling the file for the Faculty, noting that there had been no activity in the file since her letter of April 18, 2001, referred to above, and asking if she had any idea what was happening with the file. Apart from this, the Governing Council file contains nothing until April 2, 2004. At that time, a "Statement of Appeal" was filed on behalf of the Student by Downtown Legal Services (DLS), the vehicle through which law students at the University offer legal aid. This was a lengthy document containing a brief of the facts relied upon by the Student, the proposed argument and copies of a number of documents, including medical reports. A copy of this document was forwarded to the Faculty's solicitors. On April 6, 2004, the then Judicial Affairs Officer e-mailed DLS, acknowledging receipt of the document, advising as to who was acting as solicitors to the Faculty, and advising that the solicitor in charge of the file was away until April 15, 2004. On April 27, the Faculty's solicitors replied to the Judicial Affairs Officer, advising that the Faculty had decided to bring a preliminary motion to dismiss the appeal for excessive delay, rather than file a response to the substantive appeal, and requesting information as to procedure.

Thereafter, the Governing Council file reveals no activity until early May, 2005. At that time, staff in the Governing Council Office who were conducting a review of apparently dormant files communicated with DLS with respect to this appeal. Your Committee understands that, following that communication, DLS was able to get in touch with the Student, who indicated a desire to proceed with the appeal. DLS advised the Governing Council Office that the Student would be in British Columbia until mid-July, 2005.

To complete the chronology, after filing the Appeal with your Committee in April, 2001, the Student attempted to pursue postgraduate study in medicine at Queen's University. Your Committee quotes from the Statement of Appeal filed by the Student in April, 2004:

"9. On April 4, 2001, the Appellant filed a Notice of Appeal to Governing Council.

.....

10. The Appellant then decided to begin anew and applied to the Postgraduate Training Program at Queen’s University. He was accepted into this program in April 2002.

11. In December 2002, the Appellant received official notice from the College of Physicians and Surgeons of Ontario that he would not be granted a license to begin his medical school training.

12. The Appellant decided to appeal his decision. His Appeal was heard by the College of Physicians and Surgeons of Ontario on September 9, 2003, and he has not yet received the final decision.”

Your Committee was advised by counsel for the Student that the appeal referred to was ultimately unsuccessful.

The Student’s appeal, as formulated in the “Statement of Appeal” filed in April, 2004, is founded on medical grounds. Medical reports included with that statement, or filed in conjunction with the Student’s response to the motion presently before your Committee indicate that the Student was suffering from either some form of depression, or a personality disorder. The most recent of these, a lengthy report apparently prepared for the College of Physicians and Surgeons of Ontario (the College), was dated August 29, 2002. This report considered that a personality disorder, rather than depression, was the principal cause of his behavioural problems.

These medical reports are not only tendered as evidence on the substantive appeal, should it be allowed to be heard, but as the basis for defending against the allegation of unreasonable and prejudicial delay in proceeding with this appeal, which is the foundation for the motion presently before your Committee.

Your Committee understands that, to succeed on this motion, the Faculty must persuade it that the delay in proceeding with the appeal after it was filed was unreasonable in all the circumstances, that the responsibility for the delay rests primarily upon the Student, and that the delay is likely to cause significant prejudice to the Faculty in justifying its decision to terminate the Student from the residency programme and otherwise responding to the appeal.

Your Committee concludes that the Faculty has succeeded in establishing these necessary components of its case.

A delay of about three years from the time that a notice of appeal is filed until the supporting materials are filed is on its face unreasonable. The question is whether the surrounding circumstances sufficiently remove the *prima facie* unreasonableness.

The minor argument advanced here on behalf of the Student is that the wording of the form of notice of appeal as supplied to prospective appellants by the University in 2001, stated that “Additional material, not available at the time of filing the Notice of Appeal, must be received

by the Secretary no later than 3 weeks before the date set for a hearing.” Counsel for the Student argued that this would have lulled the Student into a belief that there was no urgency in filing the material referred to in the Notice of Appeal, but which did not accompany it at the time of filing, but that he could wait until a hearing date was fixed. However, the Acting Secretary’s response to the Student on April 6, 2001 clearly indicated that she would await the complete submission of the Student, including any further documentation he might wish to submit, before fixing a hearing date. Given the fact that the stated grounds of appeal included medical grounds, and that the notice indicated that “medical and psychiatric reports” were among the supporting documents listed, but not filed, this was a reasonable decision by the Acting Secretary. She would not expect the Faculty to respond until they had seen these documents, and given the difficulties, then as now, of assembling a panel of your Committee to hear an appeal, she would not want to embark upon arranging a hearing until she knew that written submissions from both sides were apparently complete. Your Committee therefore rejects this argument.

The principal argument made on behalf of the Student with respect to the reasonableness of the delay is that the medical condition of the Student, as revealed in the medical reports filed, offers an explanation and justification for the delay between the filing of the appeal in 2001 and the completion of the Student’s filing by the deposit of the “Statement of Appeal” in April, 2004. Unfortunately, the reports were prepared for other purposes, and do not comment directly upon the Student’s ability to turn his mind to what was necessary to carry this appeal forward. Your Committee noted that a major complaint of the Faculty with respect to his time there was inability to meet deadlines. Depression can lead to “self-defeating” behaviour, and the type of personality disorder diagnosed by the doctor who examined him on behalf of the College could lead to “passive resistance to required tasks”, among a much wider range of symptoms. However, your Committee notes that there is a substantial difference between the challenges posed by a postgraduate programme in surgery and those of gathering a few documents, submitting them, and thereafter keeping in touch with the Governing Council Office if matters did not seem to be progressing as expected. Whether or not the medical evidence would justify some relief from the original decision to terminate the Student from the programme in surgery, a question your Committee is not required to address here, your Committee finds that the symptoms described in the medical reports do not explain or justify the delay in proceeding that took place here. Your Committee also notes that the Student, during the period following the filing of the appeal in April, 2001, was able to focus on preparing a successful application to Queen’s University. Your Committee believes that the Statement in Paragraph 10 of the Student’s Statement of Appeal that, having filed his appeal to the Governing Council, the Student decided “to begin anew” and apply for postgraduate medical training in a different specialty at a different university, is completely accurate. It was only when this new venture was foreclosed by the refusal of the College to licence that study that the student attempted to resurrect his appeal at this University. Your Committee agrees with the Faculty’s argument that, when the Student turned his attention in the new direction, he abandoned his intention to proceed with his studies in plastic surgery, and hence with this appeal here.

Your Committee therefore finds that the surrounding circumstances do not remove the *prima facie* unreasonableness for the delay between the original filing of the notice of appeal, and

the filing in 2004 of documents referred to in that notice which were required to proceed with a hearing.

Your Committee also finds that the Student must bear the responsibility for that delay. The Faculty was under no duty to the Student to press the matter, nor was the Governing Council Office. More recently, that Office is taking a more proactive stance in enquiring into appeals which are showing signs of becoming stale, but that is to try to avoid the additional difficulties for the University which can and have arisen if stale matters suddenly revive themselves, not because of any duty to appellants, who must take responsibility for attending to their own interests.

The Faculty is also prejudiced in making any response to the substantive appeal by the excessive delay. The Faculty's complaints against the Student which lead to his termination from the programme largely stemmed from behavioural issues in a clinical setting. While there was some documentation of such issues in the ITERS and possibly elsewhere, evidence of one person as to the appropriateness of the behaviour of another often involves subjective interpretation, and is particularly vulnerable to challenge on that score. The longer the delay after the event, the more credible a challenge to the accuracy of memory becomes. Even with the mental health of the Student at the relevant time as the focus of the appeal, what actually happened must surely be extremely relevant in assessing the correctness of the decision of the Faculty to terminate him from the programme.

Accordingly, the motion by the Faculty is granted. This appeal is quashed for excessive delay in prosecution. The decision of the Appeals Committee of the Faculty, dated January 5, 2001, stands as the final academic appeal decision of the University.

Professor Emeritus Ralph Scane
Senior Chair