

**UNIVERSITY OF TORONTO
GOVERNING COUNCIL**

Report # 349 of the Academic Appeals Committee
November 16, 2010

To the Academic Board
University of Toronto

Your Committee reports that it held a hearing on Wednesday, October 20, 2010, at which the following persons were present:

Professor Hamish Stewart, Chair
Professor Maydianne Andrade
Professor Robert Baker
Professor Michael Marrus
Ms Priatharsini Sivananthajothy

Secretary: Ms Natalie Ramtahal, Coordinator, Appeals, Discipline and Faculty Grievances

In Attendance:

Mr B . B , The Student
Mr Daniel Goldbloom, Law Student, Downtown Legal Services

Professor Berry Smith, Vice-Dean of the School of Graduate Studies
Ms Jane Alderdice, Director, Quality Assessment and Governance, School of Graduate Studies

I. The Appeal

In the Spring of 2009, The Student received a failing grade in CIV1174 (Finite Elemental Methods). He asked the Graduate Departmental Academic Appeals Committee (GDAAC) to allow him to withdraw from CIV1774 without academic penalty. In a decision dated June 15, 2009, the GDAAC refused his request. The Student appealed to the Graduate Academic Appeals Board (GAAB). The GAAB heard the appeal on September 23, 2009, and, on December 4, 2009, dismissed his appeal by a majority. The Student appeals to your Academic Appeal Committee, seeking the remedy of late withdrawal from CIV1774 without academic penalty.

II. Facts and Applicable Policies

The Facts of The Student's Case

The GAAB succinctly stated the facts of the case as follows:

The Student enrolled in CIV1174 ... taught by Professor Bentz in the Spring of 2009. The Course Description indicates that the evaluation consisted of 10 weekly short assignments worth 1% each, a mid-term test on February 27, 2009 worth 20%, and end of term project worth 20% and a final exam held on April 20, 2009 worth 50%.

The deadline for withdrawing from courses without academic penalty was February 27, 2009. At that point in time, The Student had had 5 of the 10 assignments graded, and was doing well in the course. The mid-term test written February 27, 2009 was returned on Wednesday, April 15, 2009. The Student did poorly on the mid-term. The deadline for withdrawal without academic penalty had passed on February 27, 2009. The Student wrote the final examination on April 20, 2009.

The Student received a mark of 62% on the final examination and a grade of FZ in the course.

Applicable Policies

The University of Toronto's University Grading Practices Policy, revised April 9, 1998, is hereinafter referred to as the University Grading Policy. This Policy "applies to all individuals and committees taking part in the evaluation of student performance in degree, diploma, and certificate credit courses (hereafter referred to as courses)." Its provisions include the following requirement (emphasis added):

II.2 Classroom Procedures

To ensure that the method of evaluation in every course reflects appropriate academic standards and fairness to students, divisional regulations governing classroom procedures *must be consistent with the practices below*:

...

(f) At least one piece of term work which is a part of the evaluation of a student performance, whether essay, lab report, review, etc., shall be returned to the student prior to the last date for withdrawal from the course without academic penalty.

...

The University of Toronto's Graduate Grading and Evaluation Practices Policy, May 12, 2004, is hereinafter referred to as the Graduate Grading Policy. This Policy "applies to all individuals and committees taking part in the evaluation of student performance in the School of Graduate Studies." Its Purposes are expressed as follows:

The purpose of the Graduate Grading and Evaluation Practices Policy is to ensure:

- (a) that grading practices in the School of Graduate Studies are consistent with those throughout the University and reflect appropriate academic standards;
- (b) that the evaluation of student performance is made in a fair and objective manner against these academic standards;
- (c) that grade scales in the School of Graduate Studies are compatible with those in other divisions of the University.

Part II.1 of the Graduate Grading Policy generally parallels Part II.2 of the University Grading Policy, but does not explicitly incorporate para. II.2(f) of the University Grading Policy or any requirement comparable to it.

It is not disputed that both the University Grading Policy and the Graduate Grading Policy apply to The Student as a student enrolled in CIV1774. The University Grading Policy applies because CIV1174 is a course offered by the University of Toronto. The Graduate Grading Policy applies because The Student was an SGS student enrolled in CIV1174.

III. Previous Decisions

In June 2009, The Student appealed to the GDAAC, seeking late withdrawal from CIV1174 without academic penalty. "The Student argued that he was not provided with timely feedback and that it was unfair to deny him the opportunity to assess his performance, and withdraw from the course if necessary." (GAAB Decision, p. 2.) The GDAAC found that the instructor had "provided adequate and timely feedback in the form of 5 assignments prior to ... February 27th", the deadline for withdrawal without academic penalty. Accordingly, the GDAAC rejected The Student's request.

The Student appealed to the GAAB. The Student once again argued that he had not been provided with adequate feedback before February 27. A majority of the GAAB found that the letter of the University Grading Policy had been complied with and therefore dismissed the appeal (p. 4). However, the GAAB, in what might be characterized as *obiter dicta*, expressed concern about the evaluation scheme in CIV1174H:

... the practice in CIV1174 was not consistent with the spirit of [the University Grading Policy]. The policy is intended to ensure students have meaningful feedback which might then inform their decision to stay in the course or to withdraw without penalty. ...

The panel recommends that the Department develop and disseminate best practices within the existing SGS policy setting out the proportion of graded work which should be returned prior to the date for late withdrawals. At a minimum, a meaningful portion of graded work should be returned to the student with

feedback before the deadline, unless there are pedagogic reasons in a particular course where this is not possible.

A minority of the GAAB would have allowed The Student's appeal.

IV. Decision

Submissions

Both the GDAAC's decision and the GAAB's decisions were premised on the assumption that para. II.2(f) of the University Grading Policy applied to CIV1174H. The written submissions received in advance of the hearing were similarly premised on this assumption.

The central thrust of The Student's written submissions was that while the grading scheme for CIV1174H may have complied with the letter, it did not comply with the spirit of para. II.2(f). He stated that if "he had received meaningful feedback in a timely fashion, he would not have continued with the course" (The Student's written submission at para. 23; see also The Student's affidavit of March 2, 2010, at para. 4). The Student's written submission conceded that the letter of the University Grading Policy had been complied with, but relied on the GAAB's observation that the intent of para. II.2(f) was to require "meaningful feedback". The Student submitted that work amounting to 5% of the final grade was not "meaningful feedback", and noted by way of comparison that in H courses offered in the Faculty of Arts and Science, instructors are required to return marked assignments worth at least 10% of the total mark before the deadline for withdrawal without academic penalty. The Student submitted that he was entitled to the remedy of late withdrawal without academic penalty because the spirit of the policy had not been followed. This remedy, analogous to the equitable remedies available in a superior court, would put The Student in the same position he would have been in if the spirit as well as the letter of para. II.2(f) had been followed.

In its written submissions, the SGS argued in effect that because some graded work had been returned to The Student before February 27, the University Grading Policy had been complied with. The SGS submitted that The Student's statement that he would have withdrawn from the course if he had received timely feedback was "purely speculative", and noted that there were no "extenuating circumstances" militating in favour of late withdrawal. Finally, the SGS took issue with the GAAB's *obiter dicta*, noting that the University Grading Policy did not require "meaningful" feedback and asserting that the word "meaningful" was "open to extensive subjective interpretation."

In his written reply, The Student submitted that the 5% portion of work returned before February 27 was "not substantial enough to allow [him] to take stock of his academic performance" (at para. 7), noted that he was not relying on any extenuating circumstances of a personal nature (at para. 17), and provided additional evidence in support of his sworn statement that he would have dropped the course if he had had more meaningful feedback (paras. 11-13 and affidavit of June 10, 2010). Finally, The Student submitted

that the word “meaningful”, though not capable of precise definition, was a useful way of expressing the intent behind para. II.2(f) of the University Grading Policy. The Student submitted that it would be “patently unreasonable for the university to require that a ‘meaningless’ amount of term work be returned to the student by the drop deadline.”

At the hearing on October 20, Professor Smith, on behalf of the SGS, did not rely on the arguments made in the SGS’s written submissions, but instead introduced an entirely new argument. He submitted that because para. II.2(f) of the University Grading Policy was not explicitly incorporated into the Graduate Grading Policy, it did not apply to any SGS courses, including CIV1174H; thus, any debate over non-compliance with either the letter or the spirit of para. II.2(f) was irrelevant. In support of this interpretation of the grading policies, Professor Smith proffered a print-out of an e-mail dated August 28, 2009, from Anil Purandaré, SGS Governance Officer, forwarding an e-mail from Professor Brian Corman, Dean and Vice-Provost, Graduate Education, to “Graduate Department, Centre & Institute Directors, Chairs, Coordinators and Administrative Assistants”. A copy of this e-mail is appended to your Committee’s report. In the e-mail, Professor Corman quotes the Provost, Professor Cheryl Misak, as follows:

It seems very clear to me that some of the practices embedded in the Grading Practices Policy are not apt for many graduate courses. At issue, of course, is the practice that a substantial piece of work be marked before the drop date. The reasons for this practice’s lack of fit in graduate education are varied. For instance, in some graduate programs (particularly in professional programs), courses are compulsory and there is no possibility of dropping a particular course; some courses are practicum based; and some courses, such as those in my own discipline, warrant the bulk of the evaluation being based on a substantial research paper which can only be written towards the end of the course. University policy allows for local variation and I hereby interpret the current SGS grading policy as such local option.

It is obvious from the record that in its original decision, the GDAAC assumed that para. II.2(f) of the University Grading Policy applied to CIV1174. The argument that para. II.2(f) did not apply was not considered by the GAAB. It was not considered in The Student’s original written submissions. It was not raised in the SGS’s written submissions. Therefore, it was not considered in The Student’s written reply or in Mr Goldbloom’s initial oral submissions. It was made for the first time during Professor Smith’s presentation of the SGS’s case at the hearing.

The decisions of your Committee are in the nature of reviews of decisions made by other tribunals and decision-makers within the University. Basic norms of procedural fairness dictate that in an appeal hearing of this kind, the parties should not be surprised by new arguments that have not been raised earlier in the proceedings. The parties are entitled, in advance of the hearing, to have notice of the issues to be raised and of the submissions to be made. The evidence put before your Committee is typically documentary and should be filed in advance. The Chair of your Committee notes that the e-mail from Professor Corman was sent on August 28, 2009, more than three weeks before the GAAB heard

The Student's appeal, and long before the SGS was called on to reply to The Student's written submissions in this appeal. To the extent that the SGS relied on this document in support of its position, it had ample opportunity to raise the argument that para. II.2(f) did not apply, well in advance of this hearing. Professor Smith could provide no satisfactory explanation for the failure of the SGS to raise this argument at an earlier stage in the proceedings.

In the opinion of the Chair of your Committee, simply to have proceeded with the hearing at this stage would have been a denial of procedural fairness to The Student. The Chair explained his concern to the parties and called a recess so that the parties could consider their positions. When the hearing resumed, the Chair offered The Student the opportunity to adjourn the hearing to another date, to give him time to develop a response to the SGS's new argument. Mr Goldbloom, on behalf of The Student, stated that he was prepared to proceed and would not object to the evidence proffered by the SGS. Your Committee is very grateful to The Student and Mr Goldbloom for their willingness to proceed on October 20.

In response to the SGS's new argument, Mr Goldbloom made several points. First, he submitted that Professor Smith's reliance on the new argument indicated that the SGS no longer took issue with The Student's original arguments. Second, he sought to establish that CIV1174 was not a course of the kind where, according to the Provost's quoted words, the application of para. II.2(f) would be unsuitable: it was not compulsory, it was not practicum-based, and it was not evaluated on the basis of a substantial research paper. Finally, he noted that there appeared to be no way that an SGS student could determine whether or not para. II.2(f) would apply to any given course.

Reasons

The SGS argues that para. II.2(f) of the University Grading Policy does not apply to SGS courses because it is not explicitly repeated in the relevant part of the Graduate Grading Policy. Part II.1 of the Graduate Grading Policy parallels Part II.2 of the University Grading Policy; therefore, the omission of para. II.2(f) must have been deliberate. This argument has important implications for graduate grading practices, not only with respect to para. II.2(f) but potentially with respect to any provision of the University Grading Policy that is not explicitly repeated in the Graduate Grading Policy. But the Graduate Grading Policy might also be interpreted as preserving any provision of the University Grading Policy that is not inconsistent with it. Both policies are equally authoritative, and both policies apply to SGS courses. The Graduate Grading Policy was enacted after the most recent amendments to the University Grading Policy; moreover, the stated purposes of the Graduate Grading Policy indicate Governing Council's intention that grading practices in SGS be consistent with grading practices in other divisions of the University. Since para. II.2(f) is not inconsistent with anything in the Graduate Grading Policy, on this interpretation, it would apply to SGS courses.

Thus, a complete consideration of the arguments raised at the hearing would require your Committee to resolve the following issues:

1. Does para. II.2(f) of the University Grading Policy apply to SGS courses?
2. Does the spirit of para. II.2(f) require students to be provided with “meaningful feedback” before the last date for withdrawal without academic penalty?

If the answer to either question 1 or question 2 is “no”, then The Student’s appeal would fail. But if the answer to questions 1 and 2 is “yes”, then a third question would arise:

3. Does a failure to provide “meaningful feedback” before the last date for withdrawal without academic penalty result in unfairness to students, entitling them to a remedy?

If the answer to question 3 is “yes”, then the following questions relating to The Student’s experience in CIV1174 would have to be answered:

4. Did the grading scheme for CIV1174, though in compliance with the letter of para. II.2(f), fail to comply with its spirit by failing to provide The Student with meaningful feedback on his performance before February 27, 2009?

If the answer to question 4 is “no”, then The Student’s appeal would fail. But if the answer to question 4 is “yes”, then your Committee would have to consider the final question:

5. Is The Student entitled to the remedy of late withdrawal without academic penalty?

Your Committee found that it was unnecessary to resolve all of these questions about the proper interpretation of the grading policies. The Student concedes that, strictly speaking, the grading scheme for CIV1174H complied with para. II.2(f), but argues that this technical compliance did not comply with the spirit of the paragraph. For that purpose, he argues, “meaningful feedback” is required, and in the absence of “meaningful feedback”, he has been treated unfairly and is entitled to the remedy of late withdrawal without academic penalty. A majority of your Committee was of the view that the evaluation received by The Student was sufficient to constitute “meaningful feedback” and therefore complied with the letter and, if required, with the spirit of the university’s grading policies. The five weekly assignments provided The Student with regular graded feedback on different topics related to the course material and amounted to 5% of the final grade, which, though not as great a proportion as in the Faculty of Arts and Science, is nonetheless a meaningful, not a meaningless, amount. In other words, the majority of your Committee found that the answer to question 4 was “no”, and therefore found it unnecessary to answer the remaining questions.

A minority of your Committee would have found that the evaluation received by The Student did not comply with the spirit of the university’s grading policies and therefore would have granted the remedy sought.

The appeal is dismissed.