FOR INFORMATION **OPEN SESSION**

TO: Academic Board

SPONSOR: Mr. Christopher Lang, Director, Appeals, Discipline and Faculty Grievances

CONTACT INFO: christopher.lang@utoronto.ca

PRESENTER: See Sponsor

CONTACT INFO:

DATE: May 19, 2022 for May 26, 2022

AGENDA ITEM: 16b

ITEM IDENTIFICATION: Academic Appeals Committee, Individual Reports, Spring 2022

JURISDICTIONAL INFORMATION:

Section 2.1 of the *Terms of Reference of the Academic Appeals Committee* describes the function of the Committee as follows:

> To hear and consider appeals made by students against decisions of faculty, college or school councils (or committees thereof) in the application of academic regulations and requirements and to report its decisions, which shall be final, for information to the Academic Board. The name of the appellant shall be withheld in such reports.

Section 5.3.4 of the *Terms of Reference of the Academic Board* provides for the Board to receive for information Reports of the Academic Appeals Committee without names.

GOVERNANCE PATH:

1. **Academic Board [for information] (May 26, 2022)**

PREVIOUS ACTION TAKEN:

The last semi-annual report came to the Academic Board on November 17, 2021.

HIGHLIGHTS:

The purpose of the information package is to fulfill the requirements of the Academic Appeals Committee and, in so doing, inform the Board of the Committee's work and the matters it considers, and the process it follows. It is not intended to create a discussion regarding individual cases or their specifics, as these were dealt with by an adjudicative body, with a legally qualified chair and was bound by due process and fairness. The Academic Appeals Committee's decisions are based on the materials submitted by the parties and are final.

FINANCIAL IMPLICATIONS:

There are no financial implications.

RECOMMENDATION:

For information.

DOCUMENTATION PROVIDED:

- Academic Appeals Committee, Individual Reports, Spring 2022

UNIVERSITY OF TORONTO
GOVERNING COUNCIL

Report # 417 of the Academic Appeals Committee
December 13, 2021

To the Academic Board
University of Toronto

Your Committee reports that it held a hybrid hearing (mix of both in-person and electronic via Zoom) on Monday, December 13, 2021, at which the following members were present:

Academic Appeals Committee Members:
Professor Stephen Waddams, Chair
Professor Ron Levi, Faculty Governor
Ms. Mozynah Nofal, Student Governor

Hearing Secretary:
Mr. Christopher Lang, Director, Office of Appeals, Discipline and Faculty Grievances

For the Student Appellant:
Mr. O.R. (the "Student")

For the Faculty of Applied Science and Engineering:
Professor Thomas Coyle, Faculty of Applied Science and Engineering

Background

The Appellant was prevented by illness from completing work in three courses in the Faculty of Applied Sciences and Engineering in 2020: HMB 200, MIE 304 and FOR 424. The Appellant had obtained a mark of 48 per cent in FOR 424. He petitioned the Examination Committee of the Faculty for permission to complete the work for the three courses at later dates. The medical evidence was undisputed, and the Examination Committee agreed that accommodation was appropriate. The accommodation allowed was retroactive withdrawal, explanations being given in identical words in respect of each course, without reference to the mark in FOR 424.

The result was that the Appellant did not incur any academic penalty, but neither did he receive any academic credit, nor was he given the opportunity of completing the remaining requirements of FOR 424. The Appellant appealed to the Faculty's Academic Appeals Board, which dismissed the appeal on the ground that 'there is no evidence that the student completed sufficient course work for the courses in question'; no reference was made in the Board's reasons to the mark of 48 per cent in FOR 424. The Appellant now appeals to your committee, stressing the distinction between FOR 424 and the other two courses.

An expedited hearing was scheduled in view of the need for a decision before the Winter term of 2022.

Decision

Your committee's decision is that the appeal should be allowed in respect of FOR 424, and the Appellant afforded an opportunity to complete the remaining requirements of that course during the Winter term of 2022. The accuracy of the mark of 48 per cent was not disputed by the Faculty, and consequently the reason given by the Academic Appeals Board (that 'there is no

evidence that the student completed sufficient course work') does not apply to this course: the 48 per cent mark is, to say the least, some evidence.

In respect of the other two courses (HMB 200 and MIE 304) no evidence was presented of the extent of work completed, and, consequently, the appeal in respect of those two courses is dismissed.

UNIVERSITY OF TORONTO

GOVERNING COUNCIL

Report # 418 of the Academic Appeals Committee
February 8, 2022

To the Academic Board
University of Toronto.

Your Committee held an electronic hearing by Zoom, on December 14, 2021, at which the following members were present.

Academic Appeal Committee Members:
Professor Andrew Green, Chair
Professor Jan Mahrt-Smith, Faculty Governor
Mr. Evan Kanter, Student Governor

Hearing Secretary:
Mr. Christopher Lang, Director, Office of Appeals, Discipline and Faculty Grievances

For the Student Appellant:
M.M. (the "Student")
Ms. Julia Wilkes, Adair Goldblatt Bieber LLP
Ms. Marlie Earle, Adair Goldblatt Bieber LLP

For the School of Graduate Studies:
Mr. Robert Centa, Paliare Roland Rothstein Rosenberg LLP
Ms. Deniz Samadi, Paliare Roland Rothstein Rosenberg LLP

Overview

The Student seeks reconsideration of a decision of a prior panel of the Academic Appeals Committee ("AAC"). In Report 398 dated July 10, 2018 (the "AAC Decision") the Panel dismissed the Student's appeal of a decision by the Graduate Academic Appeals Board (the "GAAB") dated October 12, 2017. This reconsideration request provides your Committee with its first opportunity to consider whether it has the authority to reconsider prior decisions.

In 2016, the Student was enrolled in Scientific Overviews CHL5418 (the "Course") as part of the Masters of Public Health in Epidemiology program at the Dalla Lana School of Public Health. Among other things, the Student disputed a mark that was assigned for an assignment in the Course and its impact on her final mark. She appealed to the Graduate Department Academic Appeal Committee and the GAAB, both of which dismissed her appeal. She then appealed to the AAC which dismissed her appeal in the Decision in 2018.

In 2019, the Student filed a *Freedom of Information and Protection of Privacy Act* ("FIPPA") request for emails held by the University of Toronto relevant to her mark in the Course. Based on the almost 4000 pages produced by this FIPPA request, the Student contacted the University's Office of Appeals, Discipline and Faculty Grievances ("ADFG") concerning reconsideration of the Decision by the AAC in 2020. In 2021, the Student submitted her request for reconsideration to the ADFG. She argued that the material from the FIPPA request provided evidence that the grades she received for the Course were unreliable and that certain members of the School of Public Health had deliberately withheld documents and/or misled both the GAAB and the prior panel of the AAC. She sought a re-calculation of the marks on two assignments, which would alter her final mark, and a removal of the Decision from the ADFG website.

Your Committee dismisses this request for reconsideration. While it finds that the AAC may in certain very limited circumstances reconsider its prior decisions, the facts in this case do not permit such reconsideration.

The Facts

In 2016, the Student was enrolled in the Course. Students were evaluated through four assignments and a participation grade. The Student received a failing grade on her first assignment, an A on assignments 2 and 3 and four out of five for participation. Her grade on the fourth assignment is key to the appeal before the prior panel and to this request for reconsideration (although the Student also in this request raises issues about the first assignment).

At the centre of the dispute around the grade for assignment 4 is the question of the application of a late penalty. The Student submitted assignment 4 several hours after the deadline. The syllabus for the Course indicated that "A late penalty of 10% per day [would] be applied to all late assignment submissions." One of the tutors for her group, Dr. Sarah Frise, emailed her to confirm the paper was late and the Student acknowledged it was late.[1]

Dr. Frise marked the Student's assignment 4. In an email on April 24, 2016, to Professor Liane Macdonald, one of the two course instructors, Dr. Frise stated that "Overall, I gave her a 70% but being late by one day, we end up with 60% (10% deduction)".[2] On April 29, 2016, Professor Natasha Crowcroft, the other course instructor, wrote to Professor Macdonald about the Student's paper stating "I would have given her a failing grade but that is largely because it really wasn't made clear enough how the tobacco literature was relevant, and that affected the way I read everything and hence the marking. Everything is built on the research question, as you know. I think in view of Sarah's comments and yours we may have to err on the side of just passing her. A fail on the basis of being one day late is, I agree, a little harsh."[3]

[1] April 18, 2016 email from the Student to Sarah Frise, School of Graduate Studies Book of Documents (SGS BOD), p. 83.
[2] Written submissions of the Student (Student Submissions), p. 95. This document was produced as part of the FIPPA request.
[3] SGS BOD, p. 152. This document appears to have been produced through the FIPPA request.

Then, on May 9, 2016, Professor Macdonald wrote to Professor Crowcroft indicating that she had done "a final review of our course marks distribution".[4] She stated that given they had not reduced the marks by 10% for other students who had submitted their assignments late, she reduced all late deductions to 7% from 10% and that "for the other student ([the Student]), this bumped her from a B- to B (72 to 73)."

On May 19, 2016, Professor Crowcroft wrote to Dr. Frise stating:

> For [the Student], I parallel marked her assignment and agreed her assignment was not good. My grade was actually lower, so we accepted the 70% or B- grade. In addition, there was a 10% late deduction that would have meant a clear fail. Liane and I discussed because late assignments are problematic with respect to failing the whole course. For the final overall grade we reduced the impact of the late deduction slightly so that she passes the course overall with a B. I suggest you feedback [sic] a B- and don't mention the late deduction as that is up to Liane and I to apply (as an aside, in future years we will reduce the late reduction because in retrospect we found that 10% is a little excessive).[5]

On May 24, 2016, Dr. Frise informed the Student that she had received a B- on Assignment 4, listing some positive comments as well as "Points to Consider for Improvement".[6] The Student emailed Dr. Frise on May 24, 2016 asking "Does this grade include the 10% you indicated that you were going to remove for sending the paper in Monday afternoon?" Dr. Frise replied "Yes it does."[7]

Also on May 24, 2016 the Student emailed Dr. Frise asking for a breakdown of the marks for assignment 4. Dr. Frise asked Professor Crowcroft her thoughts and Professor Crowcroft stated that "we haven't usually given the percentage grades because it is not in the students interest – it gives us less wiggle room when putting the grades together for the final mark. Would it be possible to give her more information on the sections where the most marks were lost without giving the actual grades?"[8] On May 24, 2016, Dr. Frise responded to the Student that "We don't routinely provide the marks by each section since you end up with an overall Grade average (vs. percentage)."[9]

On May 27, 2016, the Student met with Professor Crowcroft to discuss her concerns with her grade. In an email that day to Dr. Frise and others (copying Professor Macdonald), Professor Crowcroft summarized the discussions.[10] She noted that the Student raised the issue of the removal of the late deduction. Professor Crowcroft wrote "I let her know that it had already been reduced from a 10% deduction in the process of generating the final weighted mark, but I would see what could be done. However, I did not tell her that this would not change her overall grade as she

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[4] Student Submissions, p. 42. This document appears to have been produced through the FIPPA request.
[5] Student Submissions, p. 43. This document appears to have been produced through the FIPPA request.
[6] SGS BOD, pp. 190-1.
[7] Student Submissions, p. 20.
[8] SGS BOD, p 180. This document appears to have been produced through the FIPPA request.
[9] Student Submissions, p 51.
[10] SGS BOD, p. 179.

would have a 76% which is still a B. It also may not be possible depending on the implications for other students." She also stated:

> I also warned her that when I remarked her paper I have her an even lower mark but we went with the tutor's mark because they were marking all the scripts and had a better sense of the literature. But if she is challenging the marks this marking might also need to be taken into consideration. These are some of the comments I had (not shared with her). Overall this was not a Masters level piece of work. It was confusing in places, unclear, overly ambitious and more complex than it needed to be. I didn't find an executive summary and the one page summary was double spaced which didn't follow the instructions, and there were problems with the table format. I gave her 61% without even taking off the late mark, which is a clear fail.

Professor Crowcroft emailed the Student on June 3, 2016, confirming the meeting.[11] She stated:

> I have reviewed the feedback from Sarah Frise, your assignment which I had parallel marked previously, and had a discussion with Sarah and Megan. Overall I found Sarah's feedback to be well constructed and balanced.
>
> … We had already double-marked any assignments that were in the lower range. The grade you had been given was significantly higher than the percentage I had assigned on marking in parallel… We had erred on the side of positive in accepting the Tutor's grade whenever it was higher.
>
> On the other issue of the late deduction and the delayed Tutorial, I have accepted that we should remove the late deduction as you requested. This has been done. Because we had already reduced the amount of the deduction your final grade was unchanged, however.

On July 15, 2016, Professor Crowcroft wrote to Professor Nancy Krieger, Head of the Division of Epidemiology, who had been contacted by the Student about her mark. Professor Crowcroft stated "Her first request has already happened, as she should know that. The late deduction was removed but this did not make any difference to her letter grade. On the other request, because Sarah had given her a low mark I duplicate marked as we did for all the marginal students. Unfortunately I gave her a failing grade. This was not on the basis of the issue that she discusses but because it was a bad assignment, poorly written, constructed and argued. I would be happy to change her grade to an average of Sarah and my grades if she wants to include the second opinion, but then she would fail the assignment."[12] Professor Kreiger subsequently emailed the Student indicating she felt the grades "were fair and justified".[13]

The Student appealed the grade to the GDAAC, citing the failure to return the 10% late penalty on Assignment 4 and "marks lost due to lack of agreement between tutorial assistants."[14] The

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[11] SGS BOD, p. 187.
[12] SGS BOD, p. 188. This document may have been produced through the FIPPA request.
[13] July 15, 2016 Email from Nancy Kreiger to the Student, Student Submissions p. 27.
[14] GDAAC Report, Student Submissions, p. 28.

GDAAC found that the 10% penalty had already been removed and that there were no marks to be returned to the Student as Assignment 4 was double marked and would have been a failure but the Student was given the passing grade.

The Student then appealed to the GAAB. At the GAAB, the Student was represented by counsel. Shortly before the GAAB hearing in September 2017, the SGS provided an excel spreadsheet "showing that the various components of the mark for the assignment, on their academic merit, added up to 70."[15] The Student's counsel consented to its inclusion and "did not contest its authenticity or reliability".[16] On the merits, however, it noted that "assignment #4 received a mark of B- on its academic merits and that neither Dr. Frise nor Professor Crowcroft ever applied a late penalty." The GAAB found that the communications with the Student were confusing but "the GAAB accepts the School's position that its confusing communications with the Student did not transform the quality of the Student's work from B- to A. Accordingly, the mark of B- stands."[17] The GAAB also dismissed claims by the Student of conflicts of interest or bias.

The Student then appealed to the AAC, resulting in the prior 2018 decision of the AAC that is the subject of this reconsideration request. As with the GAAB, the AAC noted that there was a failure in communication. It noted there was an ambiguity in the May 24, 2016 email response by Dr. Frise saying "yes it does" in response to an ambiguous question about whether the B- includes the late penalty. The AAC found, however, that there is no compelling evidence that Assignment 4 ever received a grade of more than 70%. It then proceeded through a careful discussion of the various iterations of the application of the late penalty, including its initial application then reduction and finally removal. It noted that the final mark provided to the Student was "a simple function of arithmetic" and went through the various calculations to show why the grade remained a B after the late penalty was removed. In terms of relevant polices and practices, it stated that it "neither heard nor saw evidence to indicate that they had been applied inconsistently, unfairly or with partiality".[18] The panel found "that, though the language used by the School to communicate with the Student concerning the application or the non-application of the lateness penalty could have been clearer, the preponderance of evidence considered by your Committee is that the Student's Assignment #4 had never deserved a mark higher than 70/100."[19] It also dismissed allegations by the Student of bias by Professor Crowcroft against the Student, the marking of the Policy Options portion of the assignment and the effect of a delayed tutorial. This decision was released and provided to Governing Council.

In early 2019 the Student, dissatisfied with the result at the AAC, submitted a FIPPA request for information relevant to her grade in the Course. She received approximately 4000 pages, mostly by March 2019.[20] Some of the FIPPA materials are referenced above and the materials will be discussed in more detail below. Based on this material, the Student seeks reconsideration of this Decision by your Committee.

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[15] GAAB Report dated October 12, 2017, p. 3.
[16] GAAB Report dated October 12, 2017, p. 3.
[17] GAAB Report dated October 12, 2017, p. 5.
[18] AAC Report 398 dated July 10, 2018, p. 16.
[19] AAC Report 398 dated July 10, 2018, p. 17.
[20] SGS Submissions, para. 38.

Issues

Three issues were raised in this request for reconsideration:

- Does the AAC have the jurisdiction to reconsider its prior decisions and, if so, should it do so in this case?
- If the panel decides that it should reconsider the Decision, should it decline to do so because of delay?
- If the panel decides it should reconsider this decision and that there is no unreasonable delay, should it allow the Student's appeal on its merits?

Jurisdiction to Reconsider Decisions

The first issue has two parts. First, does the AAC ever have the power to reconsider its prior decisions and if so, in what circumstances? This issue of jurisdiction is a question of law that is decided by the Chair of the AAC panel.[21] Second, if the AAC does have jurisdiction to reconsider its prior decisions in certain circumstances, should the panel do so in this case? As this aspect involves consideration of the facts of this case, it is decided in part by the panel as a whole. We will deal with these two parts in turn.

Can the AAC ever reconsider its decisions and, if so, in what circumstances?

Whether the AAC can reconsider its prior decisions rests on the application of the legal principle of *functus officio*. With certain exceptions, an administrative tribunal, such as the AAC, which makes a final decision is *functus officio* – that is, its work is done and it cannot change or reconsider its decision. The principle rests on the need for finality in decision making. Such finality provides certainty for the parties, allows reliance on the decision, limits the burden on the administrative system as a whole by placing an end point to a matter and allows a stable basis for judicial review or appeal.[22] In the administrative law context, there still may be recourse to the courts through judicial review or, if applicable, statutory rights of appeal but an administrative tribunal (with certain exceptions) cannot change its decision.

The leading decision on the application of *functus officio* to administrative decision-makers, such as the AAC, is the Supreme Court of Canada's decision in *Chandler v. Alberta Association of Architects* (*Chandler*).[23] Justice Sopinka, writing for the majority, found that *functus officio* does apply to administrative tribunals:

> [T]here is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can

[21] Terms of Reference Academic Appeals Committee (February 17, 2011), section 3.1.4.
[22] Anna SP Wong, "Doctrine of Functus Officio: The Changing Face of Finality's Old Guard" (2020) 98 *The Canadian Bar Review* 543.
[23] *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

> only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. V. J. O. Ross Engineering Corp*., supra.[24]

To take account of the fact that the principle was being applied in the administrative law context as opposed to in court proceedings, Sopinka J. held that the doctrine must be applied flexibly:

> To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.[25]

The principle of *functus officio* then applies to administrative tribunals such as the AAC based on the need for finality of proceedings but must be applied flexibly. Unfortunately, courts have struggled in attempting to clarify the nature of such flexibility. There are two clear exceptions to the *functus officio* principle outlined in the *Paper Machinery Ltd.* decision cited by the Supreme Court:

- that the tribunal has made a "slip" in its decision such as a minor error in wording; and
- that the tribunal made an error in expressing its "manifest intention".[26]

Beyond these two exceptions, *functus officio* generally applies unless there is an explicit or implicit statutory power of reconsideration.[27] A first question, then, in relation to the AAC is whether it has either an explicit or implicit power to reconsider its prior decisions. Both parties properly agree that there is no such power. Ontario's *Statutory Powers Procedure Act* provides that a tribunal may review its decisions where it considers it advisable and its rules permit such review.[28] The AAC gets its authority under bylaws of the University of Toronto's Governing Council as well as its Terms of Reference ("TOR").[29] Neither the relevant bylaw nor the TOR provide the AAC with an explicit power of reconsideration. Moreover, the TOR do not contain any procedures relating to reconsideration and emphasize that the AAC is the final decision-maker on appeals that have already gone through appeals processes of different divisions.[30] Further, the TOR explicitly reference the application of the *Statutory Powers Procedure Act* yet do not contain any rules relating to reconsideration.[31]

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[24] *Chandler*, para. 76.
[25] *Chandler*, para. 77.
[26] *Chandler*, para. 75.
[27] *Jacobs Catalytic Ltd. v. I.B.E.W., Local 353*, 2009 ONCA 749 [*Jacobs*] at para. 33.
[28] *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 21.2(1).
[29] University of Toronto Governing Council By-Law Number 2, s. 29(b) and Terms of Reference Academic Appeals Committee (February 17, 2011) (AAC Terms of Reference).
[30] ACC Terms of Reference, s. 2.1.
[31] AAC Terms of Reference, s. 3.1.9.

The Student argues that in applying *functus officio* flexibly in the administrative law context, courts have extended the exceptions in certain circumstances. First, the Student points out that in the context of court proceedings, courts have made an exception for fraud on the tribunal.[32] The Student argues that such an exception to *functus officio* is appropriate also in the administrative law context. The decisions cited do not find such a fraud exception in the context of an administrative tribunal.[33] Moreover, as the Federal Court of Appeal has stated, there should be a reluctance to find new exceptions to the *functus officio* rules.[34] While there may be instances in which a tribunal (and a court) may wish to extend the exceptions to include fraud, it is unnecessary to decide this issue in this case. Even if such a fraud exception exists, as we will discuss in the next section there is no evidence of fraud in this case.

Second, the Student points to a broader exception to the application of *functus officio* relating to a denial of "natural justice" or perhaps unfairness more generally. The Supreme Court in *Chandler* stated that a tribunal must "start afresh" where "the error which renders the decision a nullity is one that taints the whole proceeding" and cited cases which "involve a denial of natural justice which vitiated the whole proceeding."[35] The Student raised an Ontario Human Rights Tribunal decision and a Nova Scotia Supreme Court decision as references for tribunals obtaining the power of reconsideration where there was a breach of procedural fairness.[36]

However, the case law seems somewhat unclear on this point. In particular, in two recent decisions of the Ontario Court of Appeal, the Court found that there was no power of reconsideration even though the contexts encompassed potential breaches of procedural fairness. In *Jacobs*, the Court, faced with an issue relating to the provision of reasons, found that there was no power of reconsideration, noting that "[b]eyond clerical or mathematical errors, or an error in expressing the tribunal's intention, functus officio generally applies except where varied by statute. There is no suggestion in this case of a slip or error. Therefore the Board's jurisdiction to revisit its reasons must be through the authorization of the LRA."[37] Fairness encompasses the provision of reasons.

More recently, in *Stanley v. Office of the Independent Police Review Director*, the Ontario Court of Appeal held the Independent Police Review Director had no common law power of reconsideration, even though the Divisional Court had found that there was a breach of procedural

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[32] *Berge v. College of Audiologists and Speech Language Pathologists of Ontario*, 2019 ONSC 3351 (*Berge*) and *Kennedy v. College of Veterinarians of Ontario*, 2021 ONSC 578 (Div Ct) (*Kennedy*).

[33] *Berge* centred on fraud in relation to court proceedings, although the Court, in obiter, did state that fraud on a tribunal should result in a motion to the tribunal (para. 22) . In *Kennedy*, the Court explicitly noted that it was not deciding whether such an exception applied to tribunals (para. 18).

[34] *Canadian Association of Film Distributors and Exporters v. Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc*., 2014 FCA 235 at para. 74.

[35] *Chandler*, para. 81.

[36] *Stephens v. Lynx Industries Inc*., 2006 HRTO 31 and *St. George's Lawn Tennis Club v. Halifax (Regional Municipality)*, 2007 NSSC 26. The Student also points to two BC decisions in which the courts found a power of reconsideration even absent a breach of procedural fairness (*Zutter v. British Columbia (Council of Human Rights)*, [1995] B.C.J. No. 626 and *Stenner v. British Columbia (Superintendent of Motor Vehicles)*, 2015 BCSC 2318). More recently, however, in a second judicial review the BC Supreme Court held that in the context of *Stenner*, there was no power of reconsideration (*Stenner v. British Columbia (Superintendent of Motor Vehicles)*, 2016 BCSC 1690.

[37] *Jacobs*, at 33.

fairness.[38] Part of the reason for the Court's position may be that the courts have broadened the ability of parties to seek judicial review on the basis of procedural fairness from the time of *Chandler*.[39] It is interesting to note that even the language of *Chandler* (regarding "natural justice" as opposed to fairness) is outdated in relation to judicial review on procedural grounds. The balance between finality and fairness may then lean more in terms of finality at the tribunal level as there is greater opportunity for review by the courts. In particular, in the case of the AAC, which sits at the end of an appeal process that spans multiple levels, it allows for a final resolution of appeals that gives parties certainty and provides a limit on the resources for any single appeal. Parties can seek judicial review of these decisions on both procedural and substantive grounds. In any event, as with the potential exception to *functus officio* for fraud, even assuming such an avenue for finding the power of reconsideration exists, we find (as we discuss further below) that there was no breach of procedural fairness in this case warranting reconsideration.

In summary, the AAC has no express statutory power to reconsider its prior decisions. It has a very limited common law power to reconsider decisions where there is a minor error that amounts to a "slip" or where the tribunal has made an error in expressing its intent. The Student has raised broader exceptions to *functus officio* relating to fraud and breaches of natural justice. While the caselaw is unclear on these exceptions, it is unnecessary to decide whether they exist as even assuming that they do, they do not apply on the facts of this case.

Should the AAC reconsider the Decision?

The Student is not alleging either that the AAC made a "slip" in this case or that it failed to express its manifest intent. Further, as noted above, the AAC does not have statutory authority to reconsider its decisions. As a result, we need only consider whether it is possible that the AAC has the power to reconsider its decision in this case because there was a fraud on the AAC or a breach of natural justice.

In terms of fraud, assuming such an exception exists, we find that there is no evidence of fraud in this case. Based on the materials from the FIPPA request, the Student argues that prior to the appeals, Dr. Frise, Professor Baxter and Professor Crowcroft "deliberately planned how to misrepresent key information using the excel grading sheet for assignment #4", that Professor Baxter (before the GAAB) and Professors Baxter and Crowcroft (before the AAC) "deliberately misled the decision makers by withholding the facts regarding the 10% deduction on assignment #4" and that the use of assignment 1 to justify the mark on assignment 4 was "misleading".[40]

On the basis of the record including the material from the FIPPA request submitted with this request for reconsideration, your Committee finds no evidence supporting the allegations of fraud. There is no evidence of any intent to mislead either the GAAB or the prior panel of the AAC. One issue raised in the Student's materials is that Professor Baxter misled the GAAB by withholding facts about the 10% deduction. Professor Baxter notes in an email that she was mistaken at the

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[38] *Stanley v. Office of the Independent Police Review Director*, 2020 ONCA 252 (*Stanley*).
[39] See *Knight v. Indian Head School Board Division No. 19*, [1990] 1 SCR 653 and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. In *Chandler*, part of the concern seemed to rest on the lack of potential options for review absent reconsideration.
[40] Student Submissions para. 13.

GAAB hearing about whether a late penalty had been applied.[41] This mistake made its way into the GAAB report as the panel stated that no late penalty had ever been applied. However, Professor Baxter in the contemporaneous email noted that she had been mistaken, as opposed to deliberately misleading. Further, even if there was a factual issue before the GAAB, it was clarified by the time of the AAC panel decision, as the AAC panel clearly goes through all the additions and removals of the late penalty related to assignment 4. At best it was a mistake before GAAB and the evidence suggests it did not exist at the time of the AAC hearing.

The Student also points to an email from Dr. Frise prior to the GAAB hearing where Dr. Frise asks Professor Crowcroft: "Nancy – can you use the marking sheet to argue that in fact when I stated that the B- 'includes the 10% late reduction' was that I had personally already 'waived' it and had determined that I would make the B- inclusive whereas if I hadn't waived it, it would have been a fail from the start."[42] There is no evidence that Professor Baxter or Professor Crowcroft attempted to mislead either tribunal on this issue. Professor Baxter replies "The marking sheet is [sic] provides compelling documentation justifying the mark she received. As stated in my response to the GAAB appeal, her mark was a B- on assignment #4 because the quality of her work was poor."[43] Further, the grading spreadsheet was provided and accepted at both the GAAB and AAC hearings and there is no evidence it was manipulated beyond an allegation by the Student before this panel that the Student does not trust it. There is no evidence either Professor Baxter or Professor Crowcroft tried to find some different explanation or sought to commit fraud on the tribunal. In fact, the overwhelming evidence, including that from the FIPPA request, supports the main findings of both the GAAB and the AAC that the paper was never assessed at higher than a 70 and supports a finding that the School was placing evidence to this effect before the tribunals.

The Student further argues that Professor Baxter and possibly Professor Crowcroft misled the GAAB and the AAC about the email exchange between the Student and Dr. Frise on May 24, 2016, concerning whether the grade includes the late penalty. The Student claims the GAAB and the prior panel of the AAC were misled into believing that the email was ambiguous when in fact the evidence shows that the Student took it exactly as Dr. Frise intended it to be taken. On May 15, 2017, Dr. Frise emailed Professors Crowcroft and Baxter prior to the GAAB hearing stating "You will see that her original mark was 70% and in fact although I informed her that the B- included the late deduction I was being quite kind to her because she should have received a failed grade. All in all she was given a mark way above what she ever deserved for this paper. So in trying to give her a break, she thinks she deserved a higher grade than she received."[44]

The GAAB notes that the communication was "confusing" and the School agreed. The AAC agreed that the communications could have been clearer. It is not clear what was argued before the GAAB or the prior panel of the AAC, although it is clear the SGS pointed out the ambiguity in Dr. Frise's response. The statement was ambiguous, regardless of what Dr. Frise intended to convey. However, it is clear that by the time of the AAC, the communication was a live issue. The SGS had provided evidence concerning the grades. It noted the stages of application and removal of the late penalty as well as the results of the double marking. While the AAC panel noted that the

[41] October 16, 2017 Email from Baxter to Crowcroft, Student Submissions p 40.
[42] May 15, 2017 Email from Frise to Crowcroft and Baxter, Student Submissions p 52.
[43] May 15, 2017 Email from Baxter to Crowcroft and Frise, Student Submissions p 52.
[44] Student Submissions, p. 53.

communications could have been clearer, it rested its decision on the fact that there was no evidence that a higher grade had ever been given. It quoted a statement from the SGS submissions that "regardless of what Dr. Frise intended to convey (in reply to the Student's question), the fact remains that [the Student's] paper was awarded a mark of B- before any deductions took place, as demonstrated on the master grade spreadsheet." The panel agreed with this statement. It found that there was no evidence that a higher mark was ever actually awarded. None of the evidence from the FIPPA request points to an intent to deceive the tribunal.

In terms of the exception for breaches of natural justice, assuming there continues to be such an exception following *Jacobs* and *Stanley*, we also find that the proposed exception does not apply in this case. The FIPPA request turned up a range of documents that were not disclosed as part of the hearing process. However, the test for fairness is not whether anything more could be disclosed. The purpose of fairness is to ensure "administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker."[45]

In this case, by the time the Student is before the AAC, she has all the documents necessary to make her case. She was provided with the Excel spreadsheet prior to the GAAB hearing and had been informed about Dr. Frise's initial grade and the subsequent double grading. Moreover, by the time of the initial AAC hearing, the SGS had clarified its prior mistake in communicating unclearly about the late penalty. None of the material provided under the FIPPA request changes any of the basic facts and in fact only more strongly supports the conclusions of the prior panel of the AAC – that the paper was never provided a mark higher than 70 and that the 10% late penalty had been applied and then reduced to 7% and then waived entirely. The undisclosed documents inure to the benefit of the SGS, not the Student and in any event your Committee did not find any insufficiencies in disclosure by the time of the AAC hearing to warrant reconsideration.

The facts do show that Dr. Frise's email on May 24, 2016, was misleading. That unfortunate fact has led to considerable time and expense for both the Student and the University. However, all of the contemporaneous documents that were produced as a result of the FIPPA request, both before and after the May 24, 2016, email exchange, point to the fact that Dr. Frise and the course instructors viewed the paper as poorly done and that 70% was the highest mark it could receive. If there were any disclosure problems at the time of GAAB (such as the mistake relating to communicating the late penalty), they were resolved by the time of the AAC hearing (as shown by the detailed discussion of the marks and the late submission adjustment). There is no indication of any documents that the SGS could have produced that would have aided the Student in her appeal. No document pointed to her paper ever being assessed more than a 70 or changed the discussion of the late penalty in the AAC Report. The best that could be said was that the material made it crystal clear that at the time of the May 24, 2016 email, Dr. Frise knew that the paper was receiving a 70 before the 10% was removed (and then added back).

The Student in her submissions also points to issues about wiggle room that the instructors maintain as well as the fact that the instructors double marked the assignments. However, the Student knew during the appeal process that students only receive letter grades for assignments

[45] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para. 22.

and that her assignments were double marked. These issues either could have been or were raised prior to the FIPPA request.

There was clearly confusing communication on May 24, 2016, and a lack of provision of the spreadsheet prior to the GAAB hearing. However, the FIPPA materials only support the conclusion that the Student received the necessary materials to make her case. While there may be cases where a breach of fairness is so egregious that it gives rise to a power of reconsideration (which, as noted above, is not at all clear given recent caselaw), this is not such a case. Moreover, as noted above, fairness can clearly be raised on a judicial review application.

Finally, the Student points to an email from the ADFG as a ground for allowing reconsideration. In response to a request for a meeting, Christopher Lang, the Director of ADFG, emailed to the Student on February 5, 2020 that "if you have received new information that you believe might have affected the outcome of your appeal, you can request a rehearing. If you decide to go that route, you need to provide my office with the material that forms the basis for your request and an explanation of why it might justify a rehearing. The Senior Chair would then consider the request, and if necessary, ask the division for a response, and then would decide whether a rehearing should be ordered."[46] He reiterated this statement in an email dated July 9, 2020, including that he had been in contact with the Senior Chair, adding that "When your lawyer makes submissions, and if you are successful regarding being granted a rehearing, your lawyer [can request removal of the prior decision from the website]… Given your concerns, I would strongly recommend your lawyer make their submissions soon."[47]

The Student states that "as a matter of fairness, [the Student] ought to be given the opportunity to seek reconsideration of the decision" as she was "advised" by Mr. Lang "that she could seek reconsideration. She expended significant effort, time, and resources to do so".[48] At best the emails from Mr. Lang would be relevant to consideration of delay in seeking reconsideration. It does not give rise to a promise, or legitimate expectation, of reconsideration. Mr. Lang stated that her request for reconsideration would be heard and your Committee has heard the request. Given that we do not need to address delay in this case because of our findings concerning the first issue, we do not need to consider the impact of these emails.

Conclusion

Your Committee therefore finds that there is no power for the AAC to reconsider its prior decision in this case. Given that your Committee finds that this case does not fit within the very limited circumstances permitting reconsideration, it is unnecessary to deal with the other two issues (delay and the merits of this appeal). However, your Committee has two further points it wishes to raise.

First, this entire set of appeals and the request for reconsideration could have been avoided with better communication with the Student. Most clearly, it was not helpful that the Student was left with an erroneous impression about her actual mark on assignment 4 after communicating with her tutor. Moreover, it did not help the resolution of the concerns that the School did not provide the Student with a breakdown of her grades until right before the GAAB hearing – well after the

[46] SGS BOD p. 266.
[47] SGS BOD p. 263.
[48] Student's Submissions, p. 5.

Student initiated informal and formal requests for resolution at the divisional level. The Student has been unnecessarily stressed and both the Student and the University expended considerable time and expense in addressing the issue. The School should ensure steps are taken to provide students with timely and accurate information about their grades when they are appealed. Moreover, consideration should be given to provide clarity to University-wide policies on disclosure by divisions in academic appeals.

Second, this request was the first time that the AAC has addressed the issue of its power of reconsideration. Rather than address requests on an ad hoc basis, it would be helpful for the AAC and the Governing Council to explicitly consider its position on reconsiderations. It may well decide that the AAC's jurisdiction to reconsider decisions should be minimal due to the multi-levels of appeal in the process and the resources involved in relaxing finality. However, in fairness to students it should do so consciously. To determine whether the TOR should be clarified in this regard, your Committee therefore recommends that the governance process be engaged, which could include holding a policy meeting of the AAC.