

UNIVERSITY OF TORONTO
THE GOVERNING COUNCIL

REPORT NUMBER 168 OF THE ACADEMIC APPEALS COMMITTEE

September 28th, 1993

To the Academic Board,
University of Toronto.

Your Committee reports that it held a hearing on Tuesday, September 28th, 1993 at 1:30 p.m. in the Flavelle Room, Faculty of Law, 78 Queen's Park Crescent at which the following were present:

Professor J. B. Dunlop (Chairman)
Professor B. F. Brown
Ms P. Cross
Professor M. Moskovits
Professor J. Nautiyal

In Attendance:

Mr. R.M., the appellant
Ms J. Curry, counsel for the appellant
Professor M. Donnelly, Associate Dean, Faculty of Arts and Science

At a meeting on September 28th, 1993 the Academic Appeals Committee heard the appeal of Mr. R.M. from a decision of the Academic Appeals Committee of the Faculty of Arts and Science dismissing the appeal of his grades in courses taken by him from the 1983 winter session to the 1990 winter session. He requests that he

- (1) be allowed late withdrawal from two courses, PSY 220F (Grade E), PSY 306F (Grade F);
- (2) have his grades in 14 courses raised by 15%:

FRE 101Y, (Grade B+)	PSY 323F, (Grade C)
PHI 247S, (Grade C+)	PSY 280Y, (Grade D-)
PSY 100Y, (Grade B-)	ECO 220Y, (Grade D)
ECO 100Y, (Grade D)	FRE 301S, (Grade C)
PSY 230S, (Grade D)	FRE 261Y, (Grade D)
PSY 240S, (Grade C-)	PSY 320F, (Grade D+)
PSY 220S, (Grade B-)	PSY 333S, (Grade B+);
- (3) be excused incomplete work in three courses and have the grades raised:

JLP 343S (Grade E)
FRE 361Y (WD)
PSY 343S (Grade F).

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GROUND OF APPEAL

The appeal was based on the ground that a learning disability, identified by tests only in recent months, and after the appeal to the Faculty's Board, would, if known at the time, have entitled him to an accommodation resulting in higher grades. He requested an across-the-board increase of 15% of the courses in groups (2) and (3) above.

DECISION OF THE COMMITTEE

The decision of the Committee is to allow the appeal in part. We are unable to grant the remedy of higher grades as requested. We see three relevant remedies that we can make available:

- (1) permission to withdraw from any course already taken by the appellant the result of which was affected by the disability;
- (2) entitlement to accommodation in respect of any course to be taken hereafter; and,
- (3) notation on or accompanying his transcript stating that during the period covered by the transcript the appellant had an unidentified learning disability that would have entitled him to accommodation, primarily in time allotted for tests, essays, examinations and other assignments.

The first is the remedy sought by the appellant in respect of PSY 220F and PSY 306F. Presumably he would choose to have it apply to JLP 343S, FRE 361Y, and PSY 343S as well since his preferred remedy is unavailable to him. We cannot presume to know what his attitude towards applying the remedy to the other 14 courses might be.

THE PROBLEM WITH THE GRADE REMEDY

In requesting an increase in his grades the appellant's counsel, Ms Janet Curry, noted that we had granted grade remedies in earlier cases and that we have broad powers to correct errors. Both these propositions are accurate. However, we have never awarded a "correct", which usually means a *higher*, grade unless it were a precise and certain conclusion on the evidence. For example, there was a case in which a committee on standing reduced the grades of all students who had got 80% (A-) in a particular course to 79% (B+) because it thought there were too many high grades. The instructor had presented written reasons for the number of high marks being unusual compared to other years and other courses. No further explanation having been given by the committee on standing, this Committee found its action arbitrary and unjustified. It restored the A- grade of the student who had appealed¹. (A motion brought in a subsequent meeting of the Academic Affairs Committee resulted in the same treatment being accorded the other students reduced to 79%.) A second case involved an error in calculation which was correctable with available information. A third related to the problem of variations in sectional averages in multi-section labs in science courses. A section in which the grades were "corrected" improperly

¹ **Editor's Note:** See Report Number 24 of the Subcommittee on Academic Appeals (as the Academic Appeals Committee then was).

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by the demonstrator applying a formula to make them "equivalent" to the other sections had its grades restored.

THE APPELLANT'S VIEW

The appellant's disability was diagnosed by the sleep disorders clinic at the Western Division of the Toronto Hospital where the appellant was being tested for a sleep disorder. The two conditions were identified and described by physicians and psychologists only after the appellant had lost his appeal to the Faculty's Board. It was said that the appellant's conditions placed him under a 40% handicap.

The appellant is convinced that 15% reflects the least improvement that would have been realized if an appropriate uniform or across-the-board accommodation of his problem had been allowed at the time he was pursuing the programme represented by the courses on his transcript. In some courses in which accommodation had been allowed for different reasons he had done very well, although in others he had not. Perhaps understandably, the appellant tended to think that his best marks were evidence of adequate accommodation and that lower marks indicated accommodation that was inadequate. This reasoning along with the feeling that an estimated 40% handicap justified much more, led to the conviction that raising his grades by 15% across-the-board was appropriate.

THE COMMITTEE'S REASONING

However, while expressing a handicap in percentage terms is convenient and helpful, it cannot be taken to mean that uniform accommodation will produce uniform improvement any more than the absence of accommodation resulted in uniform grades. The grades ranged across a spectrum. The result of the accommodation might have done likewise. The appellant's proposal is arbitrary and artificial.

Chances are the appellant would have done significantly better but that is as precise an estimate as we believe it possible to make. He may prove the point in future courses. The various teachers who graded his work were unaware, as was the appellant except in a vague way, of the appellant's condition and his grades reflected his performance under the circumstances. Assuming knowledge of the condition, adding "appropriate" accommodation and producing a precise grade is unrealistic. One could ensure that the transcript contained or was accompanied by a note of the later events but going further and attaching a grade value could well be considered misleading by others asked to rely on the transcript to support a decision. Hence the Committee's inability to grant actual grade increases.

THE FACULTY'S CONCERN

Obviously this Committee heard not only different evidence from that heard by various committees and officials in the Faculty of Arts and Science, but an entirely different case. This is not an uncommon event due to the type of appeal we offer². In the circumstances there would be no criticism expressed or implied of the position taken by the Faculty. Given that appeals from the Faculty are relatively rare and that a dramatic difference of the sort that occurred here is

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even rarer, it is not a matter that warrants concern. The cure, possibly requiring a transcript or an elaborate documentary record in hundreds of cases would be worse than the ailment.

DISPOSITION

The appeal is allowed to the extent that the appellant:

- (a) may withdraw from any courses already taken and recorded on his transcript;
- (b) shall be entitled to accommodation in respect of any course he may take hereafter; and,
- (c) have noted on or with his transcript that during the period covered by the transcript the appellant had an unidentified learning disability that would have entitled him to accommodation, primarily in time allotted for tests, essays, examinations and other assignments.

Secretary
October 20th, 1993

Chairman

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² The types of appeals possible and the reason for the choice for this Committee will appear in the Academic Appeals Handbook currently under revision. A draft reads:

Appeals have several possible forms. In the appellate courts of most common law jurisdictions the appeal is based on a transcript of the evidence given at the trial and the record of documents filed. It is possible in such circumstances to examine the decision in light of the evidence to see whether the conclusion reached was justified and to determine whether the law was correctly applied.

This sort of appeal is not possible in the University because no transcript of evidence is available and even the documentation may be sketchy. To insist that evidence be recorded in the many hundreds of petitions and applications made by students in the course of a year so that it is available for transcription in a score of cases coming to the Academic Appeals Board would, if not otherwise impossible, be impossibly expensive.

Another type of proceeding that is often thought of as an appeal is what is called in administrative law "judicial review". It is, in fact, the only way in which the decisions of the Academic Appeals Committee can be challenged. Judicial review is a more limited examination than the appeal referred to above. It is generally applicable where the decision in question is not that of a lower court but of a specialized tribunal that has been created to deal with some specific sort of dispute: arbitration boards, labour relations boards, municipal boards and many others including the Academic Appeals Committee. The questions asked on a judicial review are: (1) whether the tribunal was within its jurisdiction in deciding as it did (the Academic Appeals Board has, for example, no authority over offences under the codes of behaviour applicable in the University); (2) whether the parties had a fair hearing which would include adequate notice of the hearing and the issues, an adequate opportunity to meet the other party's case including the right to test, usually by cross-examination, the other side's evidence, an opportunity to present evidence, and the opportunity to make an argument.

It is clear that the Academic Appeals Committee cannot use that procedure to review divisional decisions because, in order to satisfy the requirements of the Statutory Powers Procedure Act, the Committee must see that the parties have had a fair hearing and without a transcript of the earlier proceedings or at least a much more complete and carefully compiled record than is the norm in the University, it does not know more than the decision reached.

Thus the Committee proceeds almost by way of trying the case again and as a result it sometimes hears or receives evidence that has not been presented previously and which, indeed might have resulted in a different decision by the Divisional appeal body if it had heard the same evidence. Some say this makes the divisional appeal a waste of time but this patently is not so. The vast majority of appeal cases are finally decided in the divisions, where they should be. In the relatively few that reach the Academic Appeals Committee the reason the new evidence is new is that the student did not have the assistance in the presentation of his or her case and having lost, and having realized that the procedure is more difficult than at first perceived has decided to seek assistance after all. Although many think it should be otherwise, most people are not better at being their own lawyers than at being their own doctors.

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In those few cases it would be unduly legalistic of the Committee to insist that they confine the evidence to that which was presented to the tribunal appealed from.