

UNIVERSITY OF TORONTO

THE GOVERNING COUNCIL

REPORT NUMBER 187 OF THE ACADEMIC APPEALS COMMITTEE

October 25th, 1994

To the Academic Board,
University of Toronto.

Your Committee reports that it held a hearing on Tuesday, October 25th, 1994 at 12:30 p.m. in the Board Room, Simcoe Hall, at which the following were present:

Professor J. B. Dunlop, Chairman
Professor J. Brailey
Ms P. Haist
Professor J. Mayhall
Ms M. Smith

Ms L. Snowden, Secretary

In attendance:

Ms D.B., the appellant
Ms A. Huggins, Koskie & Minsky, counsel for the appellant
Dr. R. Swinson, Faculty of Medicine
Ms S. Springer, Cassels, Brock & Blackwell, counsel for the Faculty

At a meeting on October 25th, 1994, the Academic Appeals Committee heard and decided the appeal of Ms. D.B. from a decision of the Appeals Committee of the Faculty of Medicine dated August 19th. That Committee had dismissed her appeal against the decision of the Board of Examiners dated June 17th that she had failed the Second Medical year in 1993-94 for failing to meet the Standards of Professional Behaviour for Medical Undergraduate and Postgraduate students. The decision of this Committee is that the appeal must be allowed.

THE DETAILS OF THE DECISION

The official statement of the appellant's results in the Second Medical year, 1993-94 reads:

HIC-211-Y HEALTH/ILLNESS/COMM.	69 C
ASC-211Y ART/SCI/CLIN/MEDICINE	77 B
PBD-211F PATHOBIOLOGY/DISEASE	74 B
FMP-211S FOUNDATION/MED/PRACT.	64C
SECOND YEAR	70 FAIL

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She had passed each course, the passing mark being 60. She had achieved a passing average, the required minimum being 65. However, an accompanying letter dated June 17, 1994 from the Chairman of the Board of Examiners stated:

your performance during the second medical year was discussed at the Board of Examiners meeting on June 17, 1994.

It was the decision of the Board that you fail the second medical year on the basis that you have failed to meet the "Standards of Professional Behaviour for Medical Undergraduate and Postgraduate Students" as outlined in the "Academic Regulations and Procedures" of the Faculty Calendar.

A decision regarding your suitability to continue in the medical program will require that you undergo an assessment by the Board of Medical Assessors and subsequent re-evaluation by the Board of Examiners based on their recommendations.

Please make an appointment to see Dr. M. Rossi, Associate Dean, Student Affairs and Admissions as soon as possible to discuss this matter.

The record of the discussion is in the minutes of the meeting of the Board on June 17th under the heading, "Discussion by the Board of Students in Academic Difficulty". The entry concerning the appellant reads:

The Board was advised about Ms D.B.'s behavioural problems. It was noted that Ms D.B. withdrew from Medical School without academic penalty during the 1992-93 session. The Board was advised that she upset the dynamics of a group and that many students had complained about her; she lacked responsibility. It was felt that Ms D.B. should not continue until she had been offered an assessment.

L. Russell [the course director] advised that in ASCM II Ms D.B. had failed five stations on the OSCE, receiving a mark of 65.5 with a final mark of 77. She received high marks (85.5) in the in-course assessments. Her teachers advised that although her written assignments were good there were major problems in interactions with peers, but this improved through the year.

D. Wasylenki [also course director] had advised that there were difficulties, primarily attitudinal, in HIC. The agency could not keep track of what she was doing, she did not have a sense of what process she had undertaken, she was not acceptable to the agency. The Hospital Coordinator tried to contact Ms D.B. but she did not return telephone calls. There was concern about the way she approached things, and one had a sense that there was some disrespect for the whole educational experience.

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B. Woodside [course director] had advised that Ms D.B. had passed all the components of Foundations of Medical Practice, however she had the lowest PBL mark (64) in the class. B. Woodside expressed serious concern about this student. She appeared to have difficulties in analysis, in focusing, in judgment and evaluation. Although she was a marginal student, B. Woodside recommended that she pass, she had met the course requirements.

After discussion it was moved by D. Jones, seconded by K. Worry:

THAT Ms [D.B.], fail the Second Medical Year on the basis that she has failed to meet the Standards of Professional Behaviour for Medical Undergraduate Students and Postgraduate Students as outlined in Academic Regulations and Procedures, pages 36-37 of the 1993-94 Faculty Calendar. CARRIED

It was moved by D. Jones, seconded by K. Worry:

THAT a decision regarding Ms [D.B.]'s suitability to continue in the medical program will require assessment by the Board of Medical Assessors and re-evaluation by the Board of Examiners. CARRIED

There is little information about the appellant's behavioural and ethical performance. The first and third paragraphs contain several broad conclusions but few details of the conduct or incidents on which they are based. No reference is made to any particular provision of the Standards. There is no indication that the appellant had been apprised of the concerns and, of course, no evidence of any response. The appellant did not see the minutes until her counsel requested a copy in preparing the appeal. And even then, the excerpt she received omitted the first paragraph and revised the third to read:

D. Wasylenki had advised that there were difficulties, primarily attitudinal, in HIC. It was difficult to keep track of what she was doing. She did not return telephone calls. There was concern about the way she approached things, and one had a sense that there was some disrespect for the whole educational experience.

Having launched an appeal, the appellant received no other notice of the facts intended to be relied upon by the Board of Examiners when the appeal was heard on August 17th. With the assistance of counsel, Ms Arleen Huggins and Dr. Rossi, she acquired copies of the reports to the Board by Doctors Wasylenki, Woodside and Rossi. Both before and after the appeal to the Faculty Committee she assembled various documents in support of her case some of which will be referred to hereafter. The Appeals Committee's rejection of the appeal was dated August 19th. The letter observed that the Committee could allow an appeal only where

- i) Faculty regulations and procedures were not followed, or
- ii) All relevant information had not been taken into account.

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Both requirements had been met, in the Committee's view.

THE PROBLEM WITH THE DECISION

The concept of professional behaviour is common to all professions although the details vary as do methods of ensuring that members of the profession respect their obligations. For the more serious departures, discipline proceedings leading to suspension or even termination of professional rights and privileges are not uncommon. Less serious breaches, especially if they are "first offenses" might result in a reprimand. It is not always easy to know what constitutes appropriate or inappropriate behaviour in every circumstance and it is never too soon to begin learning. No doubt sanctions have a role in the teaching-learning process. Failure of a year is one of the more serious sanctions for the student, unlikely to be imposed, one would suppose, except for serious shortcomings.

At the same time, allegations of unprofessional conduct tend to reflect on the character of the individual and damage his or her reputation. Furthermore, while an examination in an academic subject can be presumed to produce an accurate reflection of a candidate's knowledge of the subject, to be overcome only by cogent evidence, the individual may not infrequently be able to dispute, qualify or explain allegations relating to behaviour. If in a position to do so, the individual would almost certainly wish to have that opportunity. Both the law and the regulations of all professions take the common sense approach of requiring that the person be informed of any allegations of the sort and invited to respond. The provision in the *Statutory Powers Procedure Act*¹, for instance, requires adequate notice and an opportunity to reply to any allegations relating to behaviour. The Faculty of Medicine provided for the valuation of professional and ethical performance which "should be timely in relation to the end of a rotation and communicated to a student. If appropriate and necessary, opportunities for remediation should be offered."² A numerical rating system is suggested but written opinions by the instructors and tutors are mandatory.

This Committee heard oral evidence from the appellant, Dr. Rossi and Dr. Swinson. Pressed by the appellant's counsel for details of the substandard behaviour justifying her failure, Dr. Swinson said the decision to fail would have been based on the appellant's record in the Faculty. But he could give no further particulars relating to professional or ethical conduct, and his evidence indicated that the Board had considered the appellant's weaker grades in second year and "marginal" performance in first as part of the record.

On the question of notice he said he knew Dr. Rossi was seeing the appellant, that Dr. Rossi was supposed to discuss problems with students, and he assumed she would have discussed the appellant's problems with her.

¹ R.S.O. 1990, c. S-22, s. 8

² Faculty Calendar, 1993-94, at p. 37

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ANALYSIS

The Faculty Appeals Committee's conclusion that all regulations had been observed and all relevant evidence taken into account was patently incorrect. Neither process seems to have been followed. The statement of results and the explanatory letter left the appellant dumbfounded she said. No one had spoken to her about her performance. A crucial procedural requirement had been omitted by the Board and by the Appeals Committee as well. As it turned out, much valuable, uncontradicted evidence favourable to the appellant was not taken into account.

Not only did the Board and the Committee ignore relevant evidence, but also in considering the appellant's weaker grades they were using evidence relevant to academic performance to reach the conclusion that the appellant had not behaved professionally. Behaviour is not less professional or ethical because a student has some weaker grades. "Breaches of the ethical and behavioural standards...represent failure to meet academic standards" according to the regulations in the Calendar. That may be. It does not mean low passing grades are behavioural breaches.

THE EVIDENCE

One could scarcely imagine a better case to illustrate the importance of the ignored procedural requirements. A number of incidents that were treated as departures from appropriate standards of professional behaviour were explained in a manner that, if it did not nullify the unfavourable interpretation at least reduced its significance. Some cogent evidence favourable to the appellant evidently had not been seen or heard by the Board, although it should have been. When it was put before the Appeals Committee it was ignored, notwithstanding that it fell within the category of "relevant information". There was, finally, some significant evidence that went unexamined both the Board and the Committee.

The first paragraph of the Board's minutes refers to the appellant's "behavioural problem", her withdrawal from second year in 1992-93, and more vaguely, her upsetting of "group dynamics" and lack of responsibility.

The appellant told this Committee that no one had contacted her about her performance but that she had sought assistance from Dr. Rossi for, among other things, her tendency in some stressful circumstances to let her anxiety impair her capacity. She was concerned about the dynamics of the class because of a perception of "cliquishness". With advice and counseling she was now much improved and, as recommended by the Board of Medical Assessors who saw her in September and who expressed the opinion that she was capable of proceeding, she continued with the counseling.

Dr. Rossi's evidence on the point added the opinion that some of the difficulty arose from the fact that having withdrawn from second year the appellant was a stranger in the next year and, as the appellant had complained, there was a tendency of the members of the class to form cliques. She took the complaints of the other students about the appellant "with a large grain of salt" and had heard of no difficulty in the second half of the year.

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The Board of Examiners had apparently attached some significance to the fact that the appellant's withdrawal had been "backdated" but this was standard procedure according to Dr. Rossi. The date of withdrawal was the one on which the illness that put the appellant's year in jeopardy had commenced.

It should be noted that Dr. Russell's report of "major problems interacting with peers" is consistent with Dr. Rossi's testimony in stating "this improved during the year." Dr. Rossi had appeared before the Board and the Faculty Committee. Three fellow students and two of the appellant's instructors appeared at the Appeals Committee meeting to support her. They had written letters after hearing of the Board's decision. Whether they saw her early difficulty or not, all assessed very positively her attitude and interaction later in the year. In light of this it is difficult to understand how it could have been concluded that the Board had considered all relevant information.

By the time the appeal came before this Committee there were more letters from several sources including instructors or tutors in support of the appellant as a caring, committed, cooperative student. But there were no more details in support of the adverse conclusions.

In the fuller version of the Board's minutes the paragraph summarizing Dr. Wasylenki's report on the HIC course contained statements that could have supported the conclusion that the appellant "lacked responsibility": "The agency could not keep track of what she was doing,...she was not acceptable to the agency." "The Hospital Coordinator tried to contact Ms D.B. but she did not return telephone calls." A later memorandum from Dr. Wasylenki mentioned only one telephone call.

Deborah Culbert of the agency wrote on August 10th saying she had learned that the evaluation she had provided earlier had gone astray. She enclosed a replacement. Her two-page letter can only be described as glowing in its praise of the appellant.

The hospital coordinator's complaints about the appellant's failure to hand in an evaluation form and return a telephone call related to that lost evaluation. The form had been late in any event and when the appellant tried to hand it in, the person she was to give it to - Ms MacRobb - was away. She therefore left it in a tray, indicated to her by someone in the office. Assuming the telephone call related to the document, she decided it was unnecessary to answer it. Neither the appellant nor the coordinator knew that the document had disappeared until much later. One thought it had never been submitted, the other that it had been received.

Perhaps the appellant was not as careful as she might have been, but she did not simply ignore her obligations. Whatever conclusion one comes to as to the professionalism involved in the conduct, the decision should be based on *all* the evidence, not on an inference as to the worst possible case.

This Committee can only conclude that the Board of Examiners and the Faculty Appeals Committee did not appreciate the procedural implications either of the Faculty's own regulations or the *Statutory Powers Procedure Act*. This committee can also sympathize with the Board and the Appeals Committee since most academic judgments and decisions are uncomplicated by such elaborate procedural requirements, particularly of

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the *Act*. Once one proceeds into the field of professional and ethical conduct, however, the requirements of what really amounts to fair play are urgent and clear as well as unavoidable. One need only imagine oneself in the place of a person against whom a broad allegation of behavioural shortcoming has, wrongly in that person's opinion, been made and the need for more information and a chance to answer is borne in on one.

The appellate tribunal must measure the decision appealed by these requirements. No matter how one might feel in other circumstances one cannot take the judgment on faith. Thus it must be able to see from the record or hear from witnesses the kind of detail needed to settle the issues.

Undertaking to judge professional conduct requires that those who make assessments realize the importance of communicating them to and getting the response of the student. Committees at one remove from this process, hearing summaries from course coordinators, as the Board of Examiners does, must be sure the requirements were observed. Its minutes should record the relevant details e.g. 1) the provision of the Standards of Behaviour that were applicable, 2) incidents demonstrating departure, 3) the communication to the student, and 4) the response if any. At the appellate level this will permit the reviewing committee to see that the procedures were followed and that there *is* evidence supporting the conclusions reached. The reviewers then can determine that the procedures were fair, the evidence was relevant to the issues and the persons passing judgment were acting within their jurisdiction. Details may, of course, be supplied by oral evidence provided details are known.

An official who is expected to discuss problems with students and report to one or more committees should be given either specific instructions on each occasion concerning issues to be discussed and amount of detail expected in response, or standing instructions of the same sort where problems are of a standard type. It is unlikely that the necessary coincidence of committee's needs and official action will be met.

THE REMEDY

A common remedy where a tribunal has fallen short of the procedural ideal is returning the matter to the tribunal appealed from to conduct a proper hearing. As here, such tribunals frequently have special qualifications for the sort of judgment being made. That remedy, however, would deprive Ms D.B. of relief because time is of the essence. Furthermore, looking at the totality of the evidence it is difficult to see even the flimsiest support for the conclusions that failed her. At the same time the evidence on her attitude, interaction with students, patients, clients, and teachers was highly favourable. We have no difficulty concluding that the appellant should be allowed to proceed to Third Year.

The appeal is allowed.

J.B. Dunlop
Chairman

December 7, 1994