

UNIVERSITY OF TORONTO

THE GOVERNING COUNCIL

REPORT NUMBER 190 OF THE ACADEMIC APPEALS COMMITTEE

May 17, and October 19th, 1994

To the Academic Board,
University of Toronto.

Your Committee reports that it held a hearing that began on Tuesday, May 17th, 1994 at 1:30 p.m. and continued on Wednesday, October 19th, 1994 at 12:30 p.m., in the Flavelle Room, Faculty of Law, 78 Queen's Park Crescent, at which the following were present:

Professor A. Weinrib, Vice-Chairman
Professor J. Brailey
Ms P. Cross
Professor J. T. Mayhall
Mr. M. Teper

Ms S. Girard, Governing Council Secretariat

In attendance:

Dr. Z, the appellant
Mr. G. Kelly, of Macdonald, Affleck, counsel for the appellant
Mr. T. Pinos, of Cassels, Brock & Blackwell, counsel for the Faculty.

This is an appeal by Dr. Z from a decision of the Faculty of Medicine Appeals Committee which dismissed his appeal of a decision that he be discontinued as a Resident in the Department of Surgery in the Faculty.

At the time that the events leading to this appeal took place, Dr. Z was in his fifth residency year as a resident in Surgery. Dr. Z had graduated from the University of Ottawa in Medicine and had successfully completed the first four years of the Residency Programme. In July 1991 Dr. Z commenced his senior residency year at The Wellesley Hospital. His previous training had been done elsewhere.

The evidence and argument in this case centred around Dr. Z's activities during this residency year, and the actions and reactions of the members of the Division of General Surgery at The Wellesley Hospital to Dr. Z. The appellant's complaint was that he had not been treated fairly by the members of the Division and he wishes to be reinstated into the Surgical Residency Programme at the Faculty and to be allowed to proceed with his training. The Faculty's position

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is that he was given ample opportunity to show that he be allowed to successfully complete the programme, but that the evidence was that he was not going to be a sufficiently good surgeon in order to be passed in his senior residency year. This was a novel and difficult case in that it seems to be the first case where a resident in surgery was terminated from the programme during his or her final residency year.

Dr. Z's evidence was that he was on call 24 hours a day, 7 days a week, during July, August and September, 1991. This is known as a one-to-one call. His duty hours during October, November and December were on a two-to-three basis, and from January 1992 until his termination in March, 1992 he was put back on a one-to-one call. Counsel for Dr. Z argued that the appellant's call schedule was inconsistent with the agreement between the Professional Association of Interns and Residents of Ontario and the Ontario Council of Teaching Hospitals. Apparently, the type of call schedule to which Dr. Z was assigned is not unusual despite the agreement, and in any event Dr. Z seems not to have objected to it.

Dr. Z gave evidence of the stress that he suffered both on the job and at home during this period. He obtained professional help which helped him deal with the stress. Mrs. Z, the appellant's wife, also gave evidence of this, and she generally gave supportive evidence of Dr. Z's relationship with the surgeons in the Division.

A major complaint of the appellant was that there was no formal feedback from the surgeons in the division to himself and that nobody was specifically assigned to assist him in the last stage of his learning to become an independent surgeon.

By September, 1991, it is obvious that the surgeons in the Division had misgivings about the appellant's progress in surgery. Late in September, 1991, Dr. Z received a letter from Dr. R.L. Mackenzie, his Supervisor, saying that it was the opinion of the staff of the Division of General Surgery that aspects of Dr. Z's clinical judgment and operative technique were substandard for a person at his level of training. He was placed on probation for a three-month period ending on December 31, 1991. During probation his performance was to be reviewed and if it did not improve, Dr. Mackenzie wrote that "a further response will be made" by the Division.

About a month later, Dr. Z met with Dr. Bryce Taylor, the Programme Director, to discuss the Division's concerns with his performance. On October 28th, 1991, Dr. Taylor wrote to the appellant summarizing the discussions which had just taken place. In this letter Dr. Taylor characterized Dr. Z as a conscientious, hard-working resident who is dedicated to his job. However, he also wrote that "there have been observed problems in organization of thought, decision-making and judgment in relation to clinical problems." He concluded as follows:

The major concerns of myself as Program Director, and Dr. Mackenzie who is your supervisor for this year, are that the major deficiencies in the current situation relate to fundamental judgment and decision-making rather than anything inherent to the practice of medicine in particular; it is therefore very concerning to us that a fundamental ability which is not taught in medical school, but put into practice on the basis of previous education, has not apparently been learned. It is also this deficiency that is absolutely essential for the practice of safe, competent surgery.

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Because of the above, we have serious concerns about your ability to complete your training as a competent general surgeon in the current year, and equally serious reservations about your ability to ever achieve this goal.

Over the next three months, i.e. until January 31, 1992, we expect that you will work hard to correct these deficiencies, and we will monitor them closely. If at the end of that period there are still major problems in your ability to make important surgical decisions, we will be forced to terminate your training.

If there are any questions about these issues, please don't hesitate to get in touch with either myself or Dr. Mackenzie.

The reason Dr. Taylor put the appellant on three months probation ending January 31, 1992, was that only he, and not Dr. Mackenzie had the power to put a resident on probation.

In his evidence Dr. Z said that there was no formal structure of feedback and learning available to him during his residency. On cross examination, the appellant said that he did get feed-back during his surgical performances and that in this situation one learns through doing patient care and operations and by watching surgery being done. Dr. Z did say that he found it very difficult to speak to Dr. Mackenzie in order to find out how he could improve his performance. He pointed out that during the period in question he received above average scores in seven out of ten categories in the Principles of Surgery multiple-choice examination.

On December 10, 1991, Dr. Mackenzie wrote to the other members of the Division of General Surgery that he had spoken to Dr. Taylor about Dr. Z. Part of that memorandum read as follows:

To be sure that all appearances of justice and fairness have been given to Dr. [Z], it would seem reasonable that a decision be delayed until after the probation period has been completed.

It was argued that although seven weeks remained in the probation period set by Dr. Taylor, this memorandum suggests that his fate had already been decided. This Committee is unable to read the document in that manner. It seems to us that the memorandum is simply a statement of concern about a resident on probation.

On January 31, 1992, the day the probation period ended, nothing was said to Dr. Z. Indeed no notification relating to the probation period was given to him until March 6, 1992 when Dr. Mackenzie told him that he had been terminated as a resident. On March 10, 1992 Dr. Taylor wrote to Dr. Z that he should not continue in surgery.

Dr. Z appealed to the Appeals Committee of the Faculty of Medicine. In November, 1993 the Committee rejected his appeal. It concluded that Faculty regulations and procedures were followed and that all relevant evidence was taken into consideration when the decision that the Appellant should not continue as a resident in surgery was made. The Committee does not seem to have considered the merits of the appeal. We have said before and we say again, that first level appeals within faculties must provide for a review on the merits of the appeal. It is not enough that the original decision was a procedurally regular one. Appeal committees within faculties are probably better suited to hear appeals involving evidence which is within the knowledge and experience of a committee than is a more remote appeal committee. The reasons

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given by the Faculty Appeals Committee in this case and similar cases seem to us to be merely formal reasons which do not let the student know specifically why it is that his or her appeal has been rejected.

The two main witnesses before this Committee for the Faculty were Dr. Bryce Taylor, the Program Director in General Surgery, and the Chair of the Department, and Dr. John Bohnen, a surgeon at The Wellesley Hospital. Dr. Taylor gave evidence that the one-on-one call was not imposed on residents but that most residents were happy to have as much experience as possible doing surgery. He testified that it was the first time in his experience that a resident in Dr. Z's position had been terminated, but that a meeting of the surgery staff at Wellesley had unanimously agreed that he ought not to continue in the programme. The feeling was that a period of remediation would not be helpful. They seem not to have regarded Dr. Z as a borderline case where another chance to do more work would ensure that he became a competent surgeon.

Dr. Bohnen testified that he had daily contact with the appellant. Dr. Bohnen characterized the contacts as involving consultations, discussions, and teaching. He said that Dr. Z was given frequent feedback about his learning and his progress. Dr. Bohnen testified that the frequent feedback the appellant got involved remediation efforts on his part to improve the appellant's performance. He said that the surgeons all felt that Dr. Z was "well below any resident they had ever seen". Dr. Bohnen felt that the appellant's knowledge base was poor, although other surgeons disagreed with Dr. Bohnen; he did not follow his patients closely enough; and that his judgment was deficient. He thought that Dr. Z made more frequent errors than any other senior resident. Dr. Bohnen also said it was very important that Dr. Z seemed not to always recognize which tissue level he should be dealing with. By the middle of December, Dr. Bohnen had written to Dr. Mackenzie indicating that the appellant's performance had not improved and that he would never be a competent surgeon. Dr. Bohnen said he still provided frequent and persistent specific feedback to Dr. Z and that Dr. Z was always welcome to operate under supervision. He testified that he did not think that Dr. Z was remediable if he went to another hospital. Dr. Bohnen specifically said that he did not think that Dr. Z was trainable to be a competent surgeon. He also said that he would be concerned with the safety of patients since he thought it could be dangerous if the appellant were left to operate alone. Upon cross-examination, Dr. Bohnen indicated that he had not made any use of any previous evaluations done in earlier residencies. He said he wanted to make up his own mind about Dr. Z. He reiterated that Dr. Z was apprised frequently of his performance and kept up to date on his deficiencies. The criticisms contained in the internal memoranda were conveyed orally to the appellant.

In his argument, counsel for Dr. Z said that this was a case calling for an innovative approach to remediation. He said that nobody had explored with the appellant what other problems he might have in light of his earlier performance in his residencies. If Dr. Z had gotten written reasons as opposed to the oral feedback, he might have started over again in the following year. He said that the Division seemed to have made up its collective mind against him early on in the residency and there was no way for Dr. Z to turn the opinion against him around. Counsel argued that there were a number of instances of unfairness during his probation. We find that Dr. Z did have the benefit of meaningful professional guidance and that given the circumstances of a division of surgery in a hospital, he cannot complain about the efforts made to help him

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progress as a surgeon. The appellant's complaint of a lack of formal communication of his progress cannot be sustained in light of the evidence provided by Dr. Taylor and Dr. Bohnen.

Counsel for Dr. Z also argued that there is a lack of fairness by the Inter-hospital Coordinating Committee in General Surgery. It was to this Committee that Dr. Taylor took a recommendation of the surgeons that Dr. Z's training be terminated. It was this decision that led to the letter of March 10th, 1992. Counsel argued that the I.H.C.C. did not offer the appellant an opportunity to respond to the allegations made by the surgeons at The Wellesley Hospital, and did not undertake an independent investigation of the recommendation. He also argued that Dr. Taylor was both the "prosecutor" and "judge" at the hearing. In any event counsel said that the I.H.C.C. lacks authority to approve the termination of residents. We do not agree with any of these arguments. The teaching faculty may organize itself in any way it sees fit consistent with providing fair assessment of students. The question is whether that happened in this case.

We have concluded that Dr. Z was put on clear notice as to his shortcomings; that relevant assistance was provided to him by the Division and that he was given opportunities to improve his skills. Although some of the surgeons were dissatisfied with his performance early on in his residency, he was given opportunities to improve and, in the end, the interim judgments which the teaching faculty had reached part way through his residency, were confirmed by the end of January, 1992. It did not strike this Committee that the teaching faculty had reached a conclusion as to Dr. Z's ability too early in the period. The testimony of Dr. Taylor and Dr. Bohnen was both clear and cogent; we believe that the concerns noted in the correspondence which was before the Committee was communicated to Dr. Z. We were obviously impressed by the evidence that there was concern about the appellant's ability to operate in an independent and safe manner. Indeed, Dr. Bohnen's assessment before the Committee that the appellant could not practice surgery safely was clear and unshaken.

This is not a situation where a pre-appeal hearing was required either by University practice or by law. A student is entitled to an appeal if he or she is not satisfied with an academic determination. We have already indicated our dissatisfaction with the internal appeal process at the Faculty. However, before this Committee, the appellant has received a full hearing on the merits of his appeal.

We conclude that on the merits of this situation, the appellant was treated fairly and that the assessment reached by the Faculty was correct.

Appeal dismissed.

Ms S. Girard
Secretary

Professor A. Weinrib
Chairman

April 17th, 1995