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UNIVERSITY OF TORONTO

THE GOVERNING COUNCIL

REPORT NUMBER 27 OF THE SUBCOMMITTEE ON ACADEMIC APPEALS

To the Academic Affairs Committee,
University of Toronto.

Your Subcommittee reports that it held meetings on Wednesday, October 27th, 1976, Wednesday, November 3rd, 1976, and Wednesday, November 8th, 1976, at 4:15 p.m. in the Council Chamber, Faculty of Pharmacy, at which the following were present:

Appeal of DR. F.

Professor J. B. Dunlop (In the Chair)
Professor J. Michael Bliss
Professor A. M. Hunt
Principal A. M. Kruger

Miss Valerie Pugh
Professor Peter H. Salus
Mr. David Vaskevitch
Miss M. Salter, Secretary

In Attendance:

Dr. F.
and Counsel, Miss Joan Gilmour
Campus Legal Assistance

Mr. K. G. Crompton
Cassels, Brock

Miss F. Morris
Faculty of Medicine

Professor J. W. Steiner
Associate Dean
Faculty of Medicine

Professor J. S. Thompson
Chairman, Department of Anatomy
Faculty of Medicine

Appeal of MR. L.

Professor J. B. Dunlop (In the Chair)
Mrs. Frances Barten
Professor A. M. Hunt
Professor J. W. Meakin

Miss Valerie Pugh
Professor Peter Salus
Mr. David Vaskevitch
Miss M. Salter, Secretary

In Attendance:

Mr. L.
and Counsel, Mr. Murray Shopiro
Campus Legal Assistance

Dr. L. F. W. Loach
Period II Co-ordinator
Faculty of Medicine

Mr. K. G. Crompton
Cassels, Brock

Professor J. W. Steiner
Associate Dean
Faculty of Medicine

Dean R. B. Holmes
Faculty of Medicine

THE FOLLOWING ITEMS ARE REPORTED FOR INFORMATION

THE MEETINGS WERE HELD IN CLOSED SESSION

1. DR. F.

At its meeting on October 27th, 1976, the Subcommittee on Academic Appeals heard the appeal of DR. F. from a decision of the Appeals Committee of the Faculty of Medicine upholding the decision of the Board of Examiners that he fail the first medical year and not be permitted to repeat. The decision of the Subcommittee is to allow the appeal and to remit the matter to the Board of Examiners to be reconsidered in a manner that is consistent with the following reasons.

In the academic year 1975-76, Dr. F., who holds a Ph.D. in Organic Chemistry, was repeating the first medical year. At the conclusion of the year he had passed all his subjects - although in some cases only after informal reassessment - with the exception of Behavioural Science. In that subject he had failed the examination at the end of Period IA and the Board of Examiners had then approved giving him an informal reassessment. It was in dispute before the Subcommittee whether he should be treated as having passed Behavioural Science on the basis of the reassessment or not. It was common

1. DR. F. (Cont'd)

ground that Dr. F. had undertaken an oral examination by way of reassessment which he had not completed and upon which he could not be granted a pass. He had become upset during this examination, his evidence being that it was a result of a personality conflict. Dr. F. was subsequently offered the opportunity of writing an essay by way of reassessment but did not avail himself of it. In March Dr. E. Llewellyn-Thomas, Associate Dean, talked to the appellant and advised him to proceed with the reassessment. Finally, in May, Dr. F. approached Dr. M. J. Kelner, Acting Chairman of the Department of Behavioural Science and following a discussion between Dr. Kelner and Dr. I. Kalnins of the Department it was agreed that the appellant have a further opportunity to do a written reassessment. As a result of this reassessment a grade of "Pass" was submitted to the Dean's Office.

When the matter came before the Board of Examiners, however, the Board passed the following motion:

That in view of his overall record over the past two years, that Mr. F. fail and be required to withdraw from the Faculty.

After hearing his appeal the Appeals Committee resolved,

That Dr. F.'s performance in the repeat First Year was marginal and that therefore this Committee rejects his appeal and upholds the decision of the Board of Examiners that he fail the year and not be permitted to repeat.

Although the Chairman of the Board of Examiners ruled that Behavioural Science, for reasons to be considered hereafter, should be shown as a failure, the decision that Dr. F. should fail his year seemed to have been based on a general discretionary authority to fail a student for marginal performance. There was some evidence in the minutes of the Board, the minutes of the Appeals Committee and in testimony before the Subcommittee that overall attitude was considered as well. There was also evidence to the contrary, but the Subcommittee is unable to exclude the possibility that the decision may have been affected by this factor.

The only reference in the regulations concerning grading, promotion and failure that deals with a general discretion on the part of the Board is the following:

(b) Promotion

The Board of Examiners may, after consideration of all the evidence on the student's performance, recommend promotion even though certain deficiencies have been identified.

This is quite different from the kind of discretion claimed. At the Appeals Committee meeting, according to the minutes,

Dr. Steiner pointed out that the opposite is not stated, i.e. a student may fail even though all subjects have been passed, but practice has established that this may occur. He stated that it was his experience that, as a basic principle, the Board of Examiners has the right to fail a student even if all subjects were passed, on the basis of the best evidence available to the Board.

At the Subcommittee's hearing Dr. Steiner reiterated his view that custom permitted failure, but also stated that it was the first occasion in his experience that a Board of Examiners had failed a student on the basis of this kind of discretion. Normally, he said, it works to the student's benefit.

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The kind of discretion claimed, to deprive a student of a pass when he or she has ostensibly met the stated requirement is an extraordinary one, one which the Subcommittee on Academic Appeals would have some difficulty accepting as necessary and which would, in the Subcommittee's view, need to be clearly expressed in regulations published to the student body. It is not obvious to the Subcommittee that even then such a discretion would be in keeping with the principles of natural justice to which, as was held in re. P. and the Governing Council of the University of Toronto the student is entitled in respect of his or her examinations. Thus the basis upon which the appellant was failed is not, in the Subcommittee's view, legally justified. One could not dispute with any conviction Dr. Steiner's description of Dr. F'S record as "dismal". It may well be, therefore, that formal regulations should preclude the possibility of someone with such a record passing. This could be done, however, without creating the kind of discretion here at issue. For example, formal regulations could, as they do in the Faculty of Arts and Science, require a repeating student to achieve a better record than on the first occasion. Another possibility might be a provision that a repeating student be allowed re-assessments or supplemental examinations only in special circumstances such as illness. But while the necessity of a discretion to pass a student who has not precisely met requirements is one that can be seen to be desirable if not altogether necessary, the discretion to fail a student who has met the stated requirement seems to the Subcommittee to be both unnecessary and undesirable.

There is danger, as well, in allowing the question of a student's "attitude" to affect his or her right to pass or fail. The Subcommittee is concerned that unsubstantiated opinion evidence and hearsay not answerable by the student could be a factor in success or failure, especially where regulations do not make "attitude" a judgmental criterion. No doubt there are some contexts in which attitude is important. It would be preferable to have reference made to this fact in the description of assessment procedures.

It remains to be determined whether there were any other grounds upon which the decision to fail Dr. F. was justified. These would have to relate to his performance in Behavioural Science. The provision for informal reassessment in the calendar of the Faculty of Medicine is as follows:

- (b) Informal Reassessment by the Systems, Topics or Departmental Committee concerned may be sought by a student for purposes of providing the Board of Examiners at the conclusion of the academic year with additional information on his ability to perform satisfactorily in the failed subject. No Systems, Topics or Departmental Committee is obliged to offer such informal reassessments. The Associate Dean, Undergraduate Affairs will counsel the student and act as liaison with the Systems, Topics or Department concerned.

The position taken by the Faculty is that this regulation permits one reassessment only and that the Department's action in offering more than one reassessment was ultra vires. Assuming the handling of Dr. F'S reassessment constituted something more than one reassessment, this interpretation is not clear on the face of the regulation and since method is left largely to the discretion of the Systems, Topics and Departmental Committees, the Subcommittee does not agree that the Department's decision was unauthorized. It was given in evidence on behalf of the Faculty that this interpretation, too, was a matter of tradition. Since, however, informal reassessment has only existed for three years, having replaced formal reassessment, and since it was common for some Systems and Topics to offer multiple formal reassessments the Subcommittee is not persuaded that the "tradition" of not giving more than one informal reassessment had become a hard and fast rule. Neither Dr. Llewellyn-Thomas nor Dr. Kelner seems to have been aware of this restriction. In the view of the Subcommittee, therefore, the Board of Examiners was bound to consider the passing grade presented by the Department in accordance with the regulation "as additional information of the appellant's ability to perform satisfactorily in a failed subject". In other words, it had to consider the result of the reassessment on its merits. It could not ignore it on the ground that the reassessment was unauthorized.

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If there be good reasons for not accepting the reassessment it is unclear to the Subcommittee why Dr. F. should not then be entitled to a formal supplemental examination. The regulation in the calendar states that students with more than one failure may be denied this privilege, but this would seem to imply that students with one failure only, as Dr. F. would have if the informal reassessment were rejected, are entitled as of right to a supplemental examination. This issue was not argued at the Subcommittee's meeting.

For these reasons the Subcommittee has concluded that the Board of Examiners must reconsider Dr. F.'s record and determine whether he should pass or fail in Behavioural Science on the basis of his performance in that subject. If necessary, the Board should then determine whether he should be allowed a formal supplemental examination. On the basis of his success or failure in the subject it must ultimately decide whether he is entitled to promotion to the Second Medical Year.

YOUR SUBCOMMITTEE AGREED

THAT the appeal of Dr. F. against a decision of the Appeals Committee of the Faculty of Medicine be allowed, and that the matter be remitted to the Board of Examiners to be reconsidered.

2. Mr. L.

At its meeting on November 3rd, 1976, the Subcommittee on Academic Appeals considered the appeal of Mr. L. from a decision of the Appeals Committee of the Faculty of Medicine denying his appeal against his failure in the Period II comprehensive examination and confirming the requirement that he repeat the third medical year. The decision of the Subcommittee is that Mr. L.'s appeal be allowed and that he be admitted to Period III with a credit for the clerkship rotations already satisfactorily accomplished.

The evaluation formula applicable to the Period II comprehensive according to the 1975-76 Calendar of the Faculty of Medicine was as follows:

"The examination at the conclusion of Period II in May 1976 shall be a compulsory, comprehensive integrated examination. It will consist of a multiple-choice written examination and an oral bedside examination. The term 'compulsory' is interpreted to mean 'graded and recorded'. In compiling the final rating (which will be recorded as "P" or "F" only), the following formula will be used: multiple-choice written examination - 40%; oral bedside examination - 40%; average of the aggregated marks for all Period II Systems and Topics - 20%."

This evaluation formula had been adopted by the Faculty commencing with the academic year 1974-75. When Mr. L. took the comprehensive examination in May 1976, he was assessed at 57% on his oral, which was a marginal failure, the pass mark being 60%, but was assessed at 70% on the written portion and achieved a passing average on the aggregated mark for his Period II Systems and Topics as well. Thus he had an overall passing average and met the requirements established by the Faculty for the comprehensive examination. The Board of Examiners, however, failed Mr. L. on his comprehensive relying on a decision of the Period II Committee to change the regulation as set out in the calendar to require candidates to pass each segment of the examination independently. Mr. L. was required to take a supplemental oral and in the meantime was admitted conditionally to Period III where he successfully completed three clinical rotations. He was unsuccessful on his supplemental, however, and in August the Board of Examiners ruled that he should fail and be required to repeat the year.

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The change in regulations upon which the Board of Examiners relied in June had been decided upon by the Period II Committee in September 1975, but by May 1976, it had still not been approved by Faculty Council let alone by the Academic Affairs Committee of the Governing Council. Under the University of Toronto Act, and the by-laws and resolutions of the Governing Council such approval is necessary. Thus the regulation had not been effectively changed. The rule in force was the rule appearing in the 1975-76 calendar. The Board of Examiners was not legally entitled to rule that Mr. L. should fail on his comprehensive examination when he had met the requirements previously adopted by the Faculty and still in force for that examination. It should also be noted that formal notice of any change, or proposed change, had not been given to the students although the Subcommittee was told that student members of the Period II committee were expected to communicate such matters to their classmates. In the Subcommittee's view not only approval of change but notice of change is required.

The Subcommittee was informed that approval of the amendment has now been given and the regulation as it appears in the 1976-77 calendar states that a student must pass both the written and oral parts of the comprehensive examination. It was not established, however, that the approval was retrospective. It seems unlikely that the Faculty Council and the Academic Affairs Committee would have been prepared to approve a retrospective amendment removing Mr. L.'s existing right to be assessed in accordance with the prescribed evaluation system. It may even be doubted whether such a step could legally be taken within the University. In any event it would require very clear wording to achieve it. The fact that Mr. L. did not appeal until after he had written and failed the supplemental examination does not affect his situation. It was not shown to the Subcommittee that he was aware of the invalidity of the rule and accepted it.

It was the ruling of the Appeals Committee of the Faculty that Mr. L. should retain credit for the clinical rotations satisfactorily accomplished. The Subcommittee endorses this position.

The Subcommittee does not question the importance of the change in criteria for determining success in the comprehensive examination. Nor does it doubt that it may be a salutary rule. The former rule, on the other hand, must at one time have been regarded as satisfactory and students were assessed and promoted in accordance with it. That one more student should be adjudged in accordance with it cannot be regarded as a catastrophic event even though the new rule may be preferable. It has been held by the Divisional Court of the High Court of Justice for Ontario in re. P. and the Governing Council of the University of Toronto that students are entitled to be treated in accordance with the principles of natural justice in connection with their examinations, and the importance of the University and its faculties and schools acting in accordance with these principles must not be doubted.

YOUR SUBCOMMITTEE AGREED

THAT the appeal of MR. L. against a decision of the Appeals Committee of the Faculty of Medicine be allowed and that he be admitted to Period III with a credit for the clerkship rotations already satisfactorily accomplished.

Secretary
December 6th, 1976.

Chairman

