

The McMaster University Act, 1976
Executive and Governance Committee of the
McMaster University Board of Governors

IN THE MATTER of a removal proceeding under the McMaster University Revised Policy and Resolutions with Respect to Academic Appointment, Tenure and Promotion [2012] (the “*Tenure and Promotion Policy*”)

BETWEEN:

DR. DAVID FARRAR

President and Vice-Chancellor

On behalf of McMaster University

- and -

DR. SCOTT WATTER

Executive and Governance Committee:

Jane Allen

Chair, Executive & Governance Committee

Chair, Board of Governors

Kevin Nye

Sandra Cruickshanks

Michael Ferencich

David Feather

Stephen Elop

Jennifer Rowe

Appearances

For Dr. Watter:

Warren A. Mouck
SimpsonWigle
Barristers & Solicitors

For the University:

George Avraam
Baker & McKenzie
Barristers & Solicitors

Counsel to the Committee:

William Kaplan
Barrister & Solicitor

The matter proceeded by Zoom on May 14, 2024.

Introduction

The Executive and Governance Committee, as the designated committee of McMaster University's Board of Governors met on May 14, 2024, to hear representations from Dr. Scott Watter relating to his objections to the process and procedures of the Hearing Committee that found that adequate cause had been established for his removal from the teaching staff of the University, and to consider his request that the decision and findings of that Hearing Committee be set aside and remitted to a differently constituted Hearing Committee for redetermination.

Prior to this meeting, Dr. Watter and the University filed comprehensive written submissions. At the meeting, Dr. Watter was represented by counsel, who made oral submissions. The University was invited to attend and was also represented by counsel, who did not make oral submissions.

We now have had an opportunity to carefully consider the decision of the Hearing Committee, including the procedural orders that it made, documents introduced into evidence at the hearing, and relevant authorities, along with Dr. Watter's written and oral submissions, and the written response of the University.

We approach this matter mindful of our important responsibilities and the impact of our decision on Dr. Watter, a tenured member of faculty who was, and is, owed a high degree of procedural fairness. Having borne these considerations in mind and for the reasons that follow, we are of the view that there was no process or procedural error, and certainly no material process or procedural error, that could lead us to conclude that Dr. Watter's assertions are founded and that his request for relief should be granted.

The Complaint in Summary

Dr. Watter states:

The approach taken by the Hearing Committee was not procedurally fair, and resulted in a flawed conclusion based on a hearing that lacked the foundation of adequate particulars. This was compounded by unfair procedural rulings that culminated in a final decision that is unreasonable.

And:

From the first day of hearing and throughout the proceedings, the Hearing Committee consistently ruled in favour of the University and against Dr. Watter on matters that were fundamental to the fair disposition of the case against Dr. Watter. The Hearing Committee conducted itself in a way that demonstrated it was not equipped, willing or able to provide Dr. Watter with a fair hearing.

Discussion

The June 29, 2021, Charging Document met the requirements of the *Tenure and Promotion Policy*. That policy requires a “precise description of the charges against the member in sufficient detail to enable the faculty member to prepare a defence.” This standard was met in the Charging Document (a letter from the President of the University) setting out the charges against Dr. Watter and advising him that removal proceedings would commence. Accordingly, well in advance of the hearing that led to the finding of adequate cause and the removal recommendation, Dr. Watter knew exactly why a Hearing Committee had been established.

Dr. Watter was provided with both general and specific interrelated particulars including:

1. that as a faculty member Dr. Watter abused his position of trust, power, and authority;
2. that Dr. Watter breached identified University policies;
3. that Dr. Watter engaged in major misconduct by his sexual relationship with a graduate student from his department who presented with mental health struggles, a student who he knew was engaging in self-harm (Dr. Watter went to her residence to counsel her and treat her wounds), and who he also knew suffered from suicidal ideation; and,

4. that Dr. Watter engaged in a sexual relationship with another graduate student who he hired as a research assistant using grant funds without disclosing the sexual relationship, among other issues.

From the Charging Document, and from various supporting documents (and this includes the Provost's June 23, 2021, letter), Dr. Watter knew what misconduct was being alleged, and Dr. Watter also knew that alleged breaches of the *Code of Conduct for Faculty and Procedures for Taking Disciplinary Action*, the *Sexual Violence Policy*, the *Discrimination and Harassment Policy*, and the recommendation for removal under the *Tenure and Promotion Policy* would be before the Hearing Committee.

From the very beginning, and throughout, Dr. Watter knew the University was alleging that he had conducted himself in a manner that was completely incompatible with continued employment as a tenured member of faculty, he knew the reasons why the University had formed this view, and he knew what case it intended to present before the Hearing Committee.

An alleged breach of one of the policies – the *Sexual Violence Policy* – was not ultimately pursued by the University and this does not, in our view, deprive the Hearing Committee of jurisdiction, as Dr. Watter alleges. Simply put, the Hearing Committee's jurisdiction flowed from the *Tenure and Promotion Policy* and there was nothing that limited that jurisdiction to alleged breaches of only one of the policies. The task of the Hearing Committee, as it stated, was to determine in a hearing *de novo* whether the University had established adequate cause for Dr. Watter's removal based on the allegations in the Charging Document, and this is exactly what it did. The Hearing Committee decision makes clear that the Hearing Committee did not bind itself

to findings from Dr. Watter’s criminal trial; nor did it adopt the findings of the independent investigation. The Hearing Committee based its decision on direct evidence that was introduced by both the University and Dr. Watter, the evidence that it determined was relevant and reliable, all in a hearing *de novo*.

Any suggestion that Dr. Watter was not fully informed about the particulars of the specific misconduct being alleged, and the policies said to have been violated, is not correct and was rejected by the Hearing Committee in one of its first procedural ruling for reasons that were provided. As the Hearing Committee observed in its March 25, 2023, procedural order: “...fulsome and reasonable particulars [were] provided....” Having reviewed the record, we agree with this assessment. It is correct. Dr. Watter knew the case against him.

Indeed, in addition to the Charging Document, and further detailing the case against him, Dr. Watter was provided with a copy of the Investigation Report and appendices. As well, the University disclosed transcripts and relevant videos. In a related matter, we conclude that the Hearing Committee, in another procedural order, properly and correctly rejected Dr. Watter’s requests for additional disclosure in support of a collusion theory as irrelevant to the allegations in the Charging Document, which is what the hearing was about. The Hearing Committee gave reasons for this decision that are justifiable, intelligible, and transparent. This was also the case for the Hearing Committee’s reasons in other procedural orders that were made over the course of the proceeding (in some cases reasons were not necessary). The same conclusion – justifiable, intelligible and transparent – is also reached about the final decision.

We note that the University, which had the evidentiary onus, went first; beginning with an opening statement, and then presented its case which, as is clear from the Hearing Committee decision, was responsive to and directly related to the allegations particularized in the Charging Document. Dr. Watter was provided with a full opportunity to examine and cross-examine witnesses and to call evidence and make written submissions (and he was given broad latitude to do so in some respects, over the objection of the University). The Hearing Committee provided Dr. Watter and the University identical participatory rights. As allowed by the *Tenure and Promotion Policy*, an Observer from the McMaster University Faculty Association was present throughout. We do not accept the assertion that Dr. Watter was not heard – he was fully heard as the record establishes.

On careful examination, many of Dr. Watter's submissions take issue with the Hearing Committee's substantive findings. For example, the Hearing Committee concluded that Dr. Watter exploited two graduate students for his own personal benefit. Dr. Watter objects to this on the basis that the Charging Document did not include any exploitation allegations and that a finding about this, therefore, was a procedural and process flaw.

We do not agree. That finding fell squarely within the four corners of the Charging Document (it was also a logical conclusion/corollary based on the evidence). Disagreement about substantive findings does not establish process or procedural error (and there are other examples of this in Dr. Watter's written submissions that likewise do not reveal any process or procedural flaws). Contrary to what Dr. Watter asserts, we cannot conclude that there was any flawed process or procedure that produced substantive findings. The findings in the Hearing Committee decision

emerge from a proper procedure; they are based on evidence and reasoned findings. Dr. Watter's statement – above – that the Hearing Committee was ill equipped, unwilling, or unable to provide him with a fair hearing is without merit. There is nothing in the process or procedures, rulings, and final decision that lends credence to this assertion. Stated somewhat differently, there is nothing in the record that indicates anything other than an impartial hearing conducted by colleagues aware of the importance of the matter in dispute who were acting with a heightened degree of procedural fairness. The evidentiary standard they adopted and then implemented, as is apparent in their decision, is an illustration of this: reliance on admissible evidence that was clear, cogent, and convincing on crucial points within the scope of the matter before them.

Other aspects of Dr. Watter's process and procedural failure claims are, likewise, completely unfounded. In another example, he alleges error because of the University's failure to call certain witnesses: one of the two graduate students referred to in the Charging Document, and senior administrators to explain the University's rationale to commence removal proceedings. Dr. Watter called one of the graduate students to testify but not the other. The University chose not to summon the other graduate student. That is not a process or procedural flaw. The University still had the evidentiary onus, and in the particular circumstances present here, no adverse inference can be drawn from the failure to call this particular graduate student.

Dr. Watter asserts that the University's failure to call senior administrators is a material process and procedural flaw. We do not agree. To be sure, the University could have called the President or some other senior University official to explain the rationale to commence removal

proceedings. But there was no ambiguity about the rationale – it was made crystal clear in the Charging Document – and this is not, in our view, a process or procedural flaw. There is no construction of this decision not to adduce that evidence that could lead one to conclude there was a material process or procedural flaw.

It is apparent from the Hearing Committee decision that the University chose to base a part of its case on witness testimony and part of its case on the written record, i.e., certain text exchanges. These materials were determined by the Hearing Committee to be relevant; they were properly identified, and they were marked as exhibits. Significantly, some of these materials – materials that Dr. Watter now objects to – were referred to by the University in its opening statement but were introduced into evidence by Dr. Watter’s counsel while Dr. Watter was testifying to establish the existence of a consensual relationship with one of the graduate students (not the one he called to testify). Put another way, Dr. Watter sought to rely on these texts because he considered them exculpatory; they were part of his defence to the Charging Document. These records did reveal a consensual relationship, but their content also established grounds for reaching the adequate cause conclusion, as outlined in detail in the Hearing Committee’s decision. Dr. Watter’s suggestion that these text message exchanges have “no relevance” – text messages that his counsel relied on throughout Dr. Watter’s evidence and in his closing submissions – is not persuasive or sustainable given this context.

Whether these text exchanges should have been referred to in the University’s opening submissions before they were formally introduced into evidence is not determinative of any issue before us and this does not, in any event, constitute a material process or procedural flaw. Dr.

Watter wished to, and did, rely on the materials for one purpose – to establish consent – but objects to them being relied on for other purposes, i.e., when they establish his misconduct. Those materials were properly introduced into evidence and the Hearing Committee was fully entitled to consider and weigh them, apply the law, and make findings. The procedure followed by the Hearing Committee in reaching its substantive findings was not flawed much less fundamentally flawed. The substantive findings can be relied upon as they flow from a completely normative process, one that was fully in accordance with the procedural rules that were agreed-upon by the parties at the outset, and due process more generally. There is not even a hint of evidence that the removal proceedings were, in any event, arbitrary, discriminatory, or made in bad faith as was alleged in Dr. Watter’s written submissions and by his counsel on May 14, 2024. It would be impossible for a reasonable person to read the Hearing Committee decision and reach this conclusion.

Dr. Watter further asserts that the case devolved into a “treasure hunt for moral and/or character flaws, as opposed to a prosecution over wrongdoing.” That would raise serious process and procedural concerns if true. But this is another claim made without foundation. The evidence is to the opposite effect. If anything, the Hearing Committee sought to avoid that very result by segregating and excluding certain colourable, arguably inflammatory, or potentially prejudicial matters that were then specifically not relied upon by it for the findings that it made.

The Hearing Committee’s decision fully canvasses the evidence that was led in support of the allegations that were set out in the Charging Document (and took pains to distinguish between hearsay documents such as the investigation report and direct evidence). The Hearing Committee


determined that the University proved allegations in the Charging Document. Extensive reasons are provided for all the findings that are made that fully justify the result reached. Having thoroughly reviewed Dr. Watter's written submissions and having carefully considered his counsel's oral representations, we conclude that there were no process or procedural errors and there was certainly no error that was sufficiently material to require the decision to be set aside and a new Hearing Committee established.

No human process achieves perfection, but perfection is not the standard. In this case, a committee of colleagues, following a lengthy hearing, determined there was adequate cause for his removal. This came following a hearing in which Dr. Watter knew the case against him. He fully participated in the hearing. Dr. Watter obviously does not agree with the Hearing Committee's decision which he characterizes as unreasonable. But he has not established any material process or procedural errors.

Disposition

For the foregoing reasons, the Executive and Governance Committee, as the designated committee of McMaster University's Board of Governors, has decided to remove Dr. Watter from the teaching staff of the University, thus terminating his appointment as a tenured faculty member.

DATED at Hamilton this 27th day of May 2024.



Jane Allen (Chair)
on behalf of the
Executive & Governance Committee