

**CIVIL AVIATION TRIBUNAL**

BETWEEN:

**Karl Peter Friesen, Appellant**

- and -

**Minister of Transport, Respondent**

**LEGISLATION:**

*Air Regulations, C.R.C. 1978, c. 2, s 548(1)(c), 555(3) and 520(1)*

**Negligent or Reckless Operation of an Aircraft, Instrument Approach Procedures, Descent below minimum descent altitude without required Visual Reference**

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**Appeal decision**

**G. Richard, John J. Eberhard, Q.C., Suzanne Jobin**

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**Decision: January 7, 1993**

***MR. FRIESEN'S LICENCE WILL BE SUSPENDED FOR A TOTAL OF 122 DAYS. THE SUSPENSION WILL START ON THE FIFTEENTH DAY FOLLOWING THE DATE OF SERVICE OF THE PRESENT APPEAL DETERMINATION ON THE APPELLANT'S AGENT, MR. DONALD SHANKS.***

**The Appeal Hearing** on the above matter was held before designated Tribunal Members at the Royal Canadian Mounted Police External Review Committee, 365 Laurier Avenue West, 9th Floor, Room 900, in the City of Ottawa, Ontario on September 28, 1992 at 10:00 hours.

**BACKGROUND**

By NOTICE OF SUSPENSION dated July 31, 1991, Mr. Friesen's pilot licence was suspended for a total of 366 days for having contravened paragraph 548(1)(c), and subsections 555(3) and 520(1) of the Air Regulations.

Pursuant to Mr. Friesen's request, a hearing was held to review the Minister's decision. At the conclusion, the Tribunal member determined that Mr. Friesen had committed the infractions as alleged by the Minister. Having further entertained written submissions as to sanction, he

imposed a penalty of 122 days for the breach of paragraph 548(1)(c) of the Air Regulations, 122 days for the breach of subsection 555(3) of the Air Regulations and 60 days for the breach of subsection 520(1) of the Air Regulations, to run consecutively for a total of 304 days.

Mr. Friesen requested an appeal of the Review determination on the following grounds:

- "1. The learned Hearings Officer erred in failing to grant any of the motions brought by the applicant.
2. The learned Hearings Officer erred in giving weight to the testimony of witness Janice MacLellan as if she were a witness for Captain Friesen when she in fact was called by the respondent Ministry of Transportation.
3. The learned Hearings Officer erred in failing to even list as witnesses and failing to accept uncontradicted testimony of expert witnesses on behalf of Captain Karl Peter Friesen that the manoeuvres as executed by the applicant were safe, acceptable, normal practice and routine.
4. The learned Hearings Officer erred in finding on the facts that Captain Friesen permitted the aircraft to descent [sic] to less than 2,100 feet above sea level before passing the COMOE final approach fix.
5. The learned Hearings Officer erred in fact and law in concluding the pilot on the instruments, when there are two pilots in the cockpit, is charged with making an assessment of the aircraft position and the rate of change of position relative to the nominal flight path, thereby failing to properly address the question of whether the required visual reference was obtained.
6. The learned Hearings Officer erred in finding a contravention of count number three, Reg. 520(1) as alleged by the Minister in that:
  - (i) there was no finding of negligence on the grounds listed by the minister so as to endanger the life or property of any person;
  - (ii) that the facts as alleged by the Minister were not proven; and
  - (iii) on the facts as proved, the height of the aircraft and the manoeuvres as performed did not endanger life nor property.
7. The learned Hearings Officer erred in using the facts of the first two counts section 548(1)(c) and section 555(3) of the Air Regulations as a basis for finding negligence under rule 520(1), thereby putting the applicant in double jeopardy and convicting him on the basis of charges not laid, and on the basis of charges already found as the basis for conviction on other sections of the Air Regulations, all contrary to law.

8. The learned Hearings Officer erred in fact and law in concluding a pilot flying on IFR must cancel an IFR flight and proceed on VFR contact approach, and by so doing erred in finding Captain Friesen negligent.

9. In the alternative, the Hearings Officer erred in assessing penalties and suspensions for each of the counts and taking into account matters inappropriate.

10. The learned Hearings Officer erred in reaching conclusions of fact and law unsupported by testimony and evidence and not part of the charges against the applicant, and making findings contrary to the evidence as presented.

11. In the further alternative, the suspensions are excessive having regard to the fact the defendant earns his livelihood through the use of his license, the thereby incurred and the other matters as stated.

12. Such further grounds as counsel may advise."

Based on a review of the record, the submissions of the Parties at the appeal hearing and the jurisprudence quoted, we have determined as follows:

1. We concur with the Review determination that Mr. Friesen did contravene paragraph 548(1)(c) of the Air Regulations.

The Tribunal member accepted the evidence of co-pilot Janice MacLellan that the aircraft had descended below 2,100 feet at the COMOE approach fix and resolved the issue of credibility in her favour. We see no reason to disturb this finding.

2. We concur with the Review determination that Mr. Friesen did contravene subsection 555(3) of the Air Regulations.

The Tribunal member accepted the evidence of co-pilot Janice MacLellan and relied on the testimony of four other witnesses that the aircraft came out of the clouds.

We see no reason to disturb the finding that Mr. Friesen failed to remain at the minimum descent altitude prior to obtaining the required visual reference.

3. We concur with the Review determination that Mr. Friesen was negligent in failing to recognize a deteriorating sequence of events both inside the cockpit and on the final approach to the Kenora airport.

Counsel for Mr. Friesen argued that the Minister ought to have elected to charge him with either recklessness or negligence and that his failure to do so should cause the charge to be stayed. He relied on the Appeal case of Sanchez and MoT (CAT File No. 0-0105-33) where the presiding Tribunal member stated:

"It is unclear as to which of the two elements of the charge the Minister was alleging by virtue of the notice of suspension. While this is not the subject matter of the within appeal, no doubt the Minister will be met with the argument on some future occasion.

It is inappropriate to charge both negligence and recklessness at the same time and clearly the Minister should make a choice at the time of imposing [sic] the suspension as to which of the two delicts it relies."

It must be noted that the Tribunal member's comments were obiter and that the Tribunal is not bound by its own prior decisions. In the present instance, the Appellant, while he raised the issue identified in Sanchez, failed to offer compelling reasons in favour of his position.

The Tribunal member found as a fact that the airmanship exhibited by Mr. Friesen fell below the standard required of a competent pilot. We see no reason to disturb this finding.

We are also of the opinion that all of the offenses are separate and relate to different phases of the flight. We, therefore, reject the double or triple jeopardy argument as inapplicable to the present set of circumstances.

The remaining issue is that of penalty. The basic aim of any sanction in the framework of the Aeronautics Act is the fostering of aviation safety. The factors to consider in assessing the appropriateness of a penalty consist of denunciation, specific deterrence of the offender, general deterrence of others in the community and rehabilitation of the offender. In the instance before us, we find the sanctions imposed by the presiding Tribunal member to be entirely appropriate.

However, considering the crushing impact that the totality of the aggregate sanctions would have on Mr. Friesen's career and livelihood, we have determined that the sanctions will run concurrently and not consecutively.

**MR. FRIESEN'S LICENCE WILL THEREFORE BE SUSPENDED FOR A TOTAL OF 122 DAYS. THE SUSPENSION WILL START ON THE FIFTEENTH DAY FOLLOWING THE DATE OF SERVICE OF THE PRESENT APPEAL DETERMINATION ON THE APPELLANT'S AGENT, MR. DONALD SHANKS.**