

CIVIL AVIATION TRIBUNAL

BETWEEN:

Michael James Poole, Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

Aeronautics Act, R.S.C. 1985, c. A-2, s. 7.1(1)(b)

Failure to record defects, Incompetence, AME licence suspension

Review Determination
Keith Edward Green

Decision: September 20, 2000

By virtue of the evidence submitted and the testimonies rendered, the Tribunal has decided to uphold the Minister's decision and confirm the suspension of the Applicant's Aircraft Maintenance Engineer Licence.

A **Review Hearing** on the above matter was held August 23 and 24, 2000 at 10:00 hours, at the Kelowna Law Court, in Kelowna, British Columbia.

BACKGROUND

Mr. R. G. Marshall, Transport Canada Civil Aviation Safety Inspector, issued on June 6, 2000 a Notice of Suspension to Mr. Michael James Poole (Applicant).

The Notice of Suspension reads in part as follows:

Pursuant to subsection 7.1(1)(b) of the *Aeronautics Act* and in consideration of other circumstances The Minister of Transport has decided to suspend your Aircraft Maintenance Engineer Licence for the following reason:

Certifications and maintenance activities you performed or supervised relating to Canadian registered aircraft C-FUHH, C-FSSO, C-FLCV, C-GTXU, C-FATU, C-FYDJ and C-GTOE have demonstrated that you are incompetent to hold an Aircraft Maintenance Engineer Licence.

This suspension comes into effect immediately and remains in effect until you demonstrate that you meet the requirements set out in Chapter 566 of the *Airworthiness Manual* in respect of training, knowledge, experience, and skill and the document referred to above is reinstated by the Minister. Conditions for reinstatement are contained in Appendix II.

APPENDIX I

NOTICE OF SUSPENSION

1. The following airworthiness defects existed in an aircraft registered C-FUHH following certification on an Annual Inspection of the aircraft by M106363 Michael James Poole.

- The installed battery was not an approved aeronautical product.
- The battery installation was not in accordance with the manufacturer's instructions.
- There was a fuel leak from the engine primer line at the firewall.
- There was a fuel leak from the fuel bowl. The retaining nut was not lockwired.
- The propeller corrosion inspection was past due.
- The stall warning was not serviceable.
- The foam Bracket air filter was badly deteriorated.
- The fuel selector position placard was not installed.
- There were no entries for outstanding defects entered in the aircraft technical records.

2. The following airworthiness defects existed in an aircraft registered C-FSSO following certification on an Annual Inspection of the aircraft by M106363 Michael James Poole.

- Five rollers on the flap track were found seized.
- The standby compass was dry.
- The required limitations placard was not installed in the cockpit.
- Both elevator tip fairings were broken and missing pieces.
- The instrument panel was found nearly detached from the aircraft
- The front windshield was cracked.
- The rear window was badly crazed.
- The aircraft had been out of service for 11 years, there was no record of a corrosion inspection being accomplished on the engine.
- The aircraft tires were badly cracked and weather checked.

- The mandatory corrosion inspection on the propeller had not been carried out. It was 33 years past due.
- Outstanding defects were not entered into the technical records.

3. The following airworthiness defects existed in an aircraft registered C-FCLV [sic] following certification on an Annual Inspection of the aircraft by M106363 Michael James Poole.

- The seat track stops were missing from both front seats.
- The mixture control cable was incorrectly attached to the carburetor. The attachment point was unable to rotate causing stress on the cable.
- The propeller backing plate had an unapproved welded repair.
- Outstanding defects were not entered in the technical records.
- The tachometer accuracy check was not accomplished.
- Airworthiness Directive 90-04-06R1 was recorded as accomplished by Michael Poole although the modification had not been incorporated.
- There were no entries for outstanding defects in the aircraft technical records.

4. The following airworthiness defects existed in an aircraft registered C-GTXU following certification on an Annual Inspection of the aircraft by M106363 Michael James Poole.

- The oil screen was incorrectly lock wired.
- The seat track locking pin was disengaged from the correct position. The lower retaining pin was not installed.
- The lower [forward] engine mount was badly age checked.
- The left hand exhaust collector was cracked at the outlet.
- The left hand muffler was missing the internal flame cone baffles.
- The fuel bowl was partially obscured with accumulated dirt. There was visible contamination of the fuel screen.
- The ELT was past due the recertification.
- The outer landing gear support bulkheads were found to be cracked in the area of the lower attach bolts. (both sides).
- There were no inspection sheets for the annual inspection.
- Outstanding defects were not entered into the aircraft technical records.

5. The following airworthiness defects existed in an aircraft registered C-FATU following certification on an Annual Inspection of the aircraft by M106363 Michael James Poole.

- There was fuel leak from the carburetor, fuel was pooling in the engine compartment
- There was excessive play in the flap and aileron bearings.
- There were several holes in the air induction boot.

6. The following airworthiness defects existed in an aircraft registered C-FYDJ following certification on an Annual Inspection of the aircraft by M106363 Michael James Poole.

- The flap and aileron bearing [hangers] were attached with (commercial) non-aircraft hardware.
- The stabilizer trim handle was loose and incorrectly attached.
- Non aircraft hardware was used to attach the landing gear.
- There were no [entries] for outstanding defects in the aircraft technical log.

7. The following airworthiness defects existed in an aircraft registered C-GTOE following certification on an Annual Inspection of the aircraft by M106363 Michael James Poole.

- The tail trim jack had excessive play
- The exhaust muffler was cracked
- The left hand brake line was damaged.
- There was a fuel leak from the left hand wing tank.
- The propeller corrosion inspection was 5 years overdue.
- There were no entries for outstanding defects in the aircraft technical record.

Mr. Poole decided to bring the matter before the Civil Aviation Tribunal in accordance with section 7.1 of the *Aeronautics Act*.

PREAMBLE

Having concluded his initial opening statement, the Member addressed prior to the Hearing a "Notice of Application" filed by the Minister regarding "reasonable apprehension of bias." The Member made a ruling on the Minister's Notice of Application, wherein the Notice of Application was rejected. The Ruling was read into the record. There were no further preliminary motions tendered.

THE LAW

Paragraph 7.1(1)(b) of the *Aeronautics Act* provides as follows:

7.1 (1) Where the Minister decides

[...]

(b) to suspend or cancel a Canadian aviation document on the grounds that the holder of the document is incompetent or the holder [...] ceases to have the

qualifications necessary for the issuance of the document or to meet or comply with the conditions subject to which the document was issued, or

[...]

the Minister shall [...] notify the holder, owner or operator of the Minister's decision.

AGREEMENT BETWEEN PARTIES

The Member asked the parties if there had been any pre-hearing agreements or settlements reached. The Minister responded in the negative.

THE MINISTER'S CASE (Respondent)

The Minister proceeded first as the Respondent, being represented by Mr. Glenn Hector (CPO) and assisted by Mr. Simon Mears. The Minister called Mr. Bruce Boechler as their first witness. Mr. Boechler was one of the initial investigating officers whose primary function was to provide a physical examination of the aircraft in question, noting in the process all discrepancies. Supporting the Notice of Suspension and explaining the various deficiencies as listed under each aircraft, the Minister presented the evidence in an order other than that categorized in Appendix I.

Considerable diligence, care and time were dispensed by the Minister in the performance of rendering the evidence and testimony to the Tribunal. However, a key factor in understanding the evidence as submitted in relation to the allegation is to revisit the first criteria, being "to establish whether the Minister successfully proved 'on a balance of probabilities' that the document holder, Mr. Poole, was incompetent as per definition in the performance of his duties."

The Minister provided evidence to the Tribunal in conjunction with testimony to substantiate the airworthiness defects noted within Appendix I of the Notice of Suspension. Evidence was systematically produced against each individual aircraft's defects as allegedly discovered by the Minister's inspectors. For the purpose of writing my determination I have refrained from citing all of the evidentiary material due to the enormous volume involved, the Minister's evidence alone consisting of 67 exhibits. Instead, I have opted to reference two short examples, which I feel demonstrate the quality of the evidence entered.

As one form of evidence, the Minister entered into record various photographic depictions of numerous defects. For example, aircraft C-FUHH where the Minister had discovered a fuel leak emanating from the fuel bowl and a retaining nut on the bowl not lockwired. The photograph (Exhibit M-38) clearly depicted a fuel stain and the absence of safety wire. Another example of photographic evidence rendered against the same aircraft was for the utilisation of an unapproved aeronautical product (main battery) and the incorrect installation. This image (Exhibit M-36) depicted the unapproved product and also showed further that the installation

was not accomplished in accordance with manufacturers' instructions. Exhibit M-36 clearly demonstrated the hazardous nature of the defects in question.

Aside from the numerous photographs submitted in support of the Minister's case, there was a substantial abundance of "hard" evidence in the form of "Certified True Copy" material and other official documents. One supportive example is for aircraft C-FLCV. The Minister alleges that Airworthiness Directive 90-04-06R1 was recorded as having been accomplished by Mr. Poole, although the modification had not been incorporated on the aircraft. The Minister presented Exhibit M-62 (the Textron Lycoming AD 90-04-06 R1) as evidence that the modification was indeed a requirement against aircraft LCV. The Minister then presented a certified true copy of the aircraft's Engine Log^[1] (Exhibit M-65) demonstrating that Mr. Poole had signed for the work as accomplished. In this instance, the first two exhibits presented proved the Minister's allegation. As corroborating evidence however, the Minister also presented Exhibit M-64BB depicting (digitally) the oil line referenced in the AD, which was useful as a clarifying tool.

It should be realised that, upon first analysis, an individual defect might seem trivial in comparison to other more substantive deficiencies. However, it is not for the presiding Member to determine what defines a reasonable deficiency, or for that matter, what does not. What is important is that a deficiency, as rendered by the Minister, be corroborated by supportive evidence. It must also be remembered that in determining "incompetence" an evidentiary trail of deficiencies must be followed, rendered and proved. On this occasion the Minister's evidence, irrespective of some minor inaccuracies, produced such a trail.

THE DOCUMENT HOLDER'S CASE (Applicant)

Subsequent to the Member's opening statement, Mr. Poole was asked if he had received a disclosure package and whether it contained sufficient information. Mr. Poole responded in the affirmative, to both questions.

Mr. Denis Brown represented Mr. Poole as counsel. The second day of the hearing, August 24, 2000, commenced with Mr. Brown's cross-examination of the Minister's first witness, Mr. Bruce Boechler, which was followed later in the day by the cross-examination of the Minister's second witness, Mr. Gordon Marshall. During the cross-examination process of the Minister's witnesses, Mr. Boechler and Mr. Marshall were asked a series of questions pertaining to their personal experience in aviation and the maintenance defects as presented by the Minister and outlined in Appendix I of the Notice of Suspension. Although this process revealed several minor facts and one or two minor inaccuracies concerning the evidence submitted by the Minister, it did not demonstrate sufficient quantity of errors or inaccuracies, with respect to the findings furnished during the examination in chief of both witnesses, to sway the balance of probabilities away from the Minister's case to that of Mr. Poole.

Mr. Poole, having been sworn in, entered the witness stand, whereupon he answered a series of questions rendered by Mr. Brown. The testimony thus entered into the record provided the Member with little indication that Mr. Poole performed the annual inspections in a competent fashion, as one would expect from a man of Mr. Poole's experience. Mr. Poole, having spent

many years servicing like aircraft, is also privileged with other substantial aviation qualifications, i.e., a structures licence and pilot licence for both fixed and rotary wing aircraft. In respect to this, examination of the *Re Mason and Registered Nurses Association* decisional five principles, item number three – second sentence is applicable, and reads as follows: "... a person not lacking in physical or mental attributes may nonetheless be incompetent by reason of a deficiency of disposition to use his or her abilities and experience properly." The key words in this instance being "disposition, abilities, experience" and "properly."

Mr. Brown's attempt to discredit the evidence and testimonies rendered by the Minister, incorporated rationale that the time between Mr. Poole conducted the annual inspections and the actual time of the Minister's inspection could have been sufficient for other persons, i.e., owners, pilots etc., to have performed tasks relating to the defects submitted by the Minister into evidence. This notion however, I have rejected for one major reason: The sampling of aircraft furnished by the Minister belonged to different owners and, as one can deduce from the pilots' signatures in the journey logs, were flown by different pilots in the case of all aircraft. Consequently, it would have been a simple matter for Mr. Brown or Mr. Poole to produce an owner(s) or pilot(s) as witnesses, to testify that they had personally tampered with their respective aircraft and that it was not Mr. Poole's oversight or incompetence that resulted in the defects discovered by the Minister. In other words, I find insufficient evidence, other than that presented as speculation, to entertain the concept of other people being responsible for any or all of the defects discovered by the Minister during the inspection of the said aircraft, after Mr. Poole's annual inspections.

Although counsel for Mr. Poole managed to demonstrate certain items of the Minister's evidence contained one or two minor inaccuracies, Mr. Brown once again failed to demonstrate that the greater percentage of evidence was anything other than accurate with respect to the findings furnished during the examination in chief of both Mr. Boechler and Mr. Marshall and that as listed in the Notice of Suspension. More importantly, Mr. Brown did not convince the Member that the defects as presented by the Minister were not apparent or present at the time Mr. Poole inspected the said aircraft. The evidence indicates that the greater majority of defects, on a balance of probabilities, were present at the time of Mr. Poole's annual inspections as rendered against each aircraft. This deduction thus raises the conclusion that Mr. Poole: a) deliberately chose not to rectify the defects, thus resulting in multiple non-compliance with section 605.94 of the CARs and Appendix B of the same, or b) was not acute enough to notice the referenced discrepancies during his inspection; both inferences resulting ultimately in one conclusion, that of incompetence.

As already stated, it should be remembered that contravention of paragraph 7.1(1)(b) of the Act is not treated in the same manner as an offence is treated but rather as evidence of a safety problem^[2] and therefore, admissible evidence should be viewed more as a collective whole, rather than on an individual basis. To paraphrase, admissible evidence should be appraised and scrutinized for a pattern representative of negligence and/or incompetence. This principle thus renders small discrepancies in the evidence less important, with respect to the collective whole.

THE ARGUMENTS

The Respondent

The Minister proceeded with his argument, outlining the contravention and basic facts as presented during Mr. Poole's hearing. This accomplished, the CPO reiterated the law and reviewed examples of the evidence submitted during the case. Mr. Hector stated that Mr. Boechler's testimony was reliable, accurate and was not challenged by Mr. Poole's counsel on cross-examination. Mr. Hector continued with a supposition in which he stated two consequences for failing to note the defects in the journey log: "One: Mr. Poole is incompetent because he missed the defects, and our submission is that a competent AME would not have missed that number of defects." The second conclusion is: "That even if he found the defects, he's incompetent because he didn't put it in the journey log, telling the owner is not enough." The Minister concluded his argument by presenting the Member with two case histories pertaining to incompetence and contravention of paragraph 7.1(1)(b) of the Act.

The Applicant

Mr. Poole's counsel presented the argument on behalf of the Applicant. Mr. Brown emphasized the time loss between Mr. Poole's annual inspection and that of the Minister's inspection, the shortest duration being two months and the longest being ten months. Mr. Brown stressed his concern over the methodology demonstrated by Transport Canada in the amount of time lost between the respective inspections, and ultimately casting doubt over the accuracy of the evidence and findings of the Minister's inspection. Counsel continued by stating: "the passage of time brings with it accidental damage, misuse by the operator, all sorts of factors, corrosion, external storage of the aircraft (most being stored outside), lends to a continued deterioration, not even considering the accumulation of hours flown or not flown." Mr. Brown also pointed out that Transport Canada admitted in at least one instance that an owner was active in working on an aircraft, quoting a Transport Canada officer as saying an owner had, "proudly showed us," referencing some type of work accomplished. Mr. Brown then continued by stating "We have an unknown factor. How much or how little has been done by the owners since the date of certification?"

Mr. Brown continued with his argument by suggesting that Transport Canada also had an opportunity to provide witnesses such as the owners or pilots, to support their inference about any work accomplished and for whatever reason, they chose not to do so. Mr. Brown took exception to the Minister's reference that Mr. Boechler's testimony was not challenged. This Mr. Brown augmented by providing examples for the Minister, showing that he had questioned the evidence and found several flaws in it, one of which was the propeller corrosion interval, being six years and not five. Mr. Brown presented the Tribunal with a copy of No. B046 Airworthiness Notice (AN) (dated 13 July 1998), titled "*Variable Pitch Propeller Calendar Inspection Requirements*." This document explains in conjunction with participating members of the CARAC Maintenance and Manufacturing Technical Committee that Transport Canada was in the process of a Cost/Safety study and that AN B046 was issued as an interim measure until the incorporation of the study results into CARs Standard 625 Appendix C. Ironically, the Acting Director General Civil Aviation, Mr. Ken Mansfield, released an exemption to the above AN B046, on August 3, 2000, in which the basic overhaul period was increased to ten years providing other stipulations are not met with first, i.e., hourly or manufacturers'

recommendations. In concluding his argument Mr. Brown broached the subject of sanction explaining the Applicant's view and aspiration in this regard.

The Minister's Rebuttal

In the Minister's response to Mr. Poole's argument, the Minister tried to explain the reason for the time intervals between the initial annual inspection performed by Mr. Poole and that of the Minister's inspections. Stating, "it would be impossible for Transport Canada to examine every aircraft within a week of their annual report even if they wanted to, due to resources." He continued by informing the Tribunal that more importantly, "the Minister must rely on the AME's expertise to enter defects in the technical log and the AMEs deal with them (defects) appropriately." Mr. Hector admitted that there was a long passage of time, but then the hours flown between inspections must also be examined, and quoted: "When based upon a balance of probabilities, it must be determined that the defects were present at the time of Mr. Poole's annual inspection." The Minister continued by informing the Member that the passage of time and the unknown factors as mentioned by Mr. Brown were taken into account, to some extent, before the Notice of Suspension was issued.

ANALYSIS

The definition of "incompetence" with respect to the performance of duty by a professional has been well accredited by the Tribunal and is clearly defined. Though the Tribunal is not bound by its own or other previous jurisprudence, the delineation rendered on previous occasions is, in this present case, warranted, valid and worthy of replication.

Various dictionaries define "incompetence" in slightly different terminology; however, the three definitions rendered in *Daniel L. Lafayette v. Minister of Transport*^[3] are the most relevant and worthy of quoting:

1. *Black's Law Dictionary* – 'lack of ability, legal qualifications, or fitness to discharge the required duty.'
2. *Funk and Wagnall's New Standard Unabridged Dictionary of the English Language* – 'INCOMPETENCE, incompetency. 1. General lack of capacity or fitness, or lack of the special qualities required for a particular purpose; insufficiency; inability.' 'INCOMPETENT. 1. Not competent; not having the ability necessary or desirable for any purpose; unable to do properly what is required.'
3. *Webster's Third New International Dictionary, Unabridged, 1976 Ed.* – 'INCOMPETENCE: The state or fact of being incompetent; as (a): lack of physical, intellectual, or moral ability: INSUFFICIENCY, INADEQUACY.'

In addition to the dictionary meaning of the word incompetence, it is important that we examine judicial review of the meaning. One excellent and well-quoted case was *Re Mason and the Registered Nurses' Association of British Columbia*^[4]. Contained within the above decision are five principles, which should be considered to help define incompetence. They are as follows:

1. The particular definition placed upon the word 'incompetency' should be moulded by the object of the enactment in which the word appears ...
2. All the definitions of 'incompetency' focus on the lack of ability, capacity or fitness for a particular purpose.
3. The want of capacity, ability or fitness may arise from a lack of physical or mental attributes. However, a person not lacking in physical or mental attributes may nonetheless be incompetent by reason of a deficiency of disposition to use his or her abilities and experience properly.
4. Negligence and incompetence are not interchangeable terms. A competent [person] may sometimes be negligent without being incompetent. However, habitual negligence may amount to incompetence.
5. A single act of negligence unaccompanied by circumstances tending to show incompetency will not of itself amount to incompetence.

The words "negligence" and "incompetence" are often employed synonymously and are words often thought of as being interchangeable. The reality is that both words are quite different, though they might seem related, even to the point of having an effect upon the other's application. Item number four from the above list clearly states that "Negligence and incompetence are not interchangeable terms. A competent [person] may sometimes be negligent without being incompetent." It continues by stating: "However, habitual negligence may amount to incompetence." The word "habitual" is defined as "formed or acquired by habit; usual, customary." In addition to this statement, we should also consider item number five from the above list, which assists us in understanding the Minister's reason for the allegation of incompetence and the consequent document suspension. In reading item five we will see that a "single act of negligence unaccompanied by circumstances tending to show incompetency will not of itself amount to incompetence."

The Minister in presenting his case provided the Tribunal with a vast array of evidence representing a fairly recent and broad selection of work performed by the Applicant. Although the Minister presented some defects as evidence which were later withdrawn due to error on the Minister's behalf and still other defects that if viewed on their own merit might be construed as exclusively "negligent," the remaining defects entered in evidence clearly demonstrated a coherent case of "habitual negligence" tantamount to incompetence and ultimately proving on a balance of probabilities that Mr. Poole was incompetent in the performance of his duties as a professional AME.

CONCLUSION

In the context of this case, I have analysed the definition of the word "Incompetence" and tested the meaning against the evidence supported by both parties. I determined that rather than one or two specific situations or instances against an Applicant, there must be (to sustain a balance of probabilities) substantial evidence in support of a sequence of events that clearly demonstrates the Applicant (in this case, Mr. Poole) is incompetent and not merely "negligent" in the performance of his/her duties as an AME. I have also examined the context of when "negligence," through serial or habitual practice, develops into incompetence. I have scrutinized the admissible evidence and testimonies, lending each the appropriate weight they deserved. I

heard the Minister's case and that of the Applicant, fairly and without bias. Yet equally as important, I listened to what both parties had to tell me.

In the final analysis, I have drawn my conclusion based upon the facts before me. They clearly demonstrate the Minister has successfully proved — "on a balance of probabilities"— that the document holder, Mr. Poole, was incompetent as per definition in the performance of his duties as a licensed AME, and that Mr. Poole did not exercise "due diligence" in the execution of his duties as an AME, nor did he conduct himself (as self acknowledged, i.e., retiring early whilst work [unsupervised] was still in progress by another person, namely a pilot/owner) as a professional AME would be expected to perform those duties. To answer the question "Did Mr. Poole do everything that a reasonable man (AME) would have done during the course of the annual inspections or a similar situation?" The Tribunal believes that he did not.

DETERMINATION

By virtue of the evidence submitted and the testimonies rendered, the Tribunal has decided to uphold the Minister's decision and confirm the suspension of the Applicant's Aircraft Maintenance Engineer Licence.

Keith Edward Green
Member
Civil Aviation Tribunal

^[1] Record of Engine Airworthiness Directives, Service Bulletins, Special Inspections and Modifications.

^[2] *Elias Ruben Marin v. Minister of Transport*, CAT File No. W-0240-04.

^[3] CAT File No. C-0163-02.

^[4] 102 D.L.R. (3d) 225.