

CIVIL AVIATION TRIBUNAL

BETWEEN:

Daniel L. Lafayette, Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

Aeronautics Act, R.S.C. 1985, c. A-2, s. 6.1

Review Determination
Robert J. Rushford, Q.C.

Decision: July 3, 1990

Heard: Saskatoon, Saskatchewan, June 25, 1990

I confirm the suspension.

Review Hearing on the above matter held before a designated Tribunal member, at the office of Meyer Verbatim Reporting Agency Inc., 404 402, 21st Street East, in the city of Saskatoon, Saskatchewan, on June 25, 1990, at 11:00 hours.

The Applicant's private pilot licence was suspended by Transport pursuant to the provisions of section 6.1(1)(b) of the *Aeronautics Act* on the ground of incompetence.

The relevant portions of section 6.1 of the *Aeronautics Act* are as follows:

6.1(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 of any aircraft, airport or other facility, in respect of which the document was issued, 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, the Minister shall, by personal service or by registered mail sent to the holder or to the owner or

operator of the aircraft, airport or facility, as the case may be, at his latest known address, notify the holder, owner or operator of his decision.

(2) A notice under subsection (1) shall be in such form as the Governor-in-Council may, by regulation, prescribe and shall, in addition to any other information that may be so prescribed,

(a) indicate, as the case requires,

(ii) the nature of the incompetence of the holder of the Canadian aviation document that the Minister believes exists, the qualifications necessary for the issuance of the document that the Minister believes the holder of the document or the aircraft, airport or facility, in respect of which the document was issued, ceases to have, or the conditions subject to which the document was issued that the Minister believes are no longer being met or complied with;

FACTS

The Applicant flight-planned a trip from Edmonton, Alberta, to Dauphin, Manitoba. Because of unfavourable winds, the Applicant refuelled in Saskatoon, Saskatchewan. The Applicant's route from Saskatoon to Dauphin was via the Yorkton and Dauphin VORs. Part way along this route, the Applicant was VFR on tops, although the Applicant says that there were sufficient "holes" that he could have descended VFR. The radial from Yorkton to Dauphin is 083 degrees. Instead of setting his VOR at 083 degrees at Yorkton, the Applicant used 033 degree and ended up approximately 80 miles northeast of Yorkton on the 033-degree radial. Had he continued on this radial, he would have ended up in the area of Red Lake. When the Applicant discovered his error, he attempted to get his Loran equipment operating, but found it was inoperative. Fortunately, the Applicant had the presence of mind to look up the frequency of Winnipeg Centre in his flight supplement and requested help. As a result, the Applicant was vectored to Winnipeg and landed safely with what the Applicant says was approximately a 30-minute fuel reserve. It is the facts relating to this flight on which Transport bases their suspension.

The letter of suspension is dated May 23, 1990, and reads as follows:

May 23, 1990

DOUBLE REGISTERED

Mr. Daniel L. Lafayette
10218 - 153 St.
Edmonton, Alberta
T5P 2V6

Dear Mr. Lafayette:

An investigation into the circumstances preceding the incident of aircraft CF-UAX on March 11, 1990, has shown that you demonstrated a degree of incompetency by your actions. Specifically, the flight planning, weather interpretation, tracking, radio navigation procedures and judgment exhibited numerous errors, and the safety of the flight was compromised. By reason of this incompetence and in the interest of aviation safety, your Private Pilot Licence XDP-10792 is hereby suspended.

This suspension comes into effect immediately and remains in effect until such time as you have successfully completed:

1. The written exam for the private pilot licence, navigation and meteorology sections.
2. A flight test with a Transport Canada civil aviation inspector which shall include flight planning, weather interpretation and a navigation exercise involving radio navigation to be completed in a suitable aircraft.

When you are prepared to complete the listed requirements, please contact the Edmonton Regional Office at the following address:

Transport Canada
Canada Place
1100 - 9700 Jasper Avenue
Edmonton, Alberta
T5J 4E6

Attn: Aviation Licensing

Telephone:(403) 495-5254

Air Regulation 408(b) forbids the exercise of licence privileges during any period for which they have been suspended. A suspended licence must be returned to the Minister and, accordingly, your licence should be returned to the Edmonton office, address listed on previous page.

This suspension may be reviewed in accordance with the provisions of section 7.1 of the *Aeronautics Act* by filing a written request on or before June 23, 1990, to the Civil Aviation Tribunal at the following address:

Civil Aviation Tribunal
Registrar
4711 Yonge Street, Suite 702
North York, Ontario
M2N 6K8

The filing of a request for review does not operate as a stay of the suspension.

It should be noted that this suspension of your flying privileges is not for punitive or punishment purposes, but for simple harm prevention, and does not deal with guilt.

Yours truly,

M. Loewen
Acting Regional Manager
Aviation Licensing
Central Region

Section 6.1(2)(ii) of the *Aeronautics Act* require Transport to state "the nature of the incompetence".

The suspension letter refers to five areas in which it is alleged that incompetence was demonstrated, namely:

1. Flight Planning
2. Weather Interpretation
3. Tracking
4. Radio Navigation Procedures
5. Judgment

The letter goes on to say that the Applicant exhibited "numerous errors". No details of the numerous errors are given and the notice falls far short of complying with the provisions of the legislation requiring "the nature of the incompetence" to be stated.

Prior to proceeding with the hearing, I adjourned to enable Transport to provide the Applicant with particulars of the numerous errors alleged. The particulars provided are as follows:

1. Interpretation of Met reports, forecasts and the terminals
2. Flight planning procedures
3. Navigation
4. Pilot training or the pilot navigation
5. Preparing for the flight
6. The weather, the route, the check points
7. Preparing the charts

8. The flight planning, the navigation parts
9. What you should do if you're uncertain of your position
10. Using radio navigation to VOR

The Applicant says he understands what is meant by these details and was prepared to proceed with the hearing. If the Applicant did not understand the particulars, I would not have proceeded with the hearing.

The ten particulars given are still far too general in nature to give the hearing officer any clear idea of what specific errors the Applicant made.

Transport must detail what a document holder has done to enable the document holder to prepare a full and complete defence. Having provided those details or particulars, that is the case the document holder must meet, and no other.

Section 6.1(2)(a)(ii) also requires Transport to state in the Notice of Suspension "the qualifications a document holder ceases to have" or "the conditions that are no longer being complied with". The suspension letter is also defective in this respect.

This case is further complicated by the fact that Transport, in the suspension notice, prescribed two conditions which, if met, would remove the suspension:

1. The written exam for the private pilot licence, navigation and meteorology sections.
2. A flight test with a Transport Canada civil aviation inspector, which shall include flight planning, weather interpretation and a navigation exercise involving radio navigation to be completed in a suitable aircraft.

The Applicant chose, prior to this hearing, to write the written exam, and he did not pass the navigation and meteorology sections. That fact is now in evidence and the issue of competence in relation to the flight in question becomes academic. Had this hearing been held prior to the exams having been written, I may very well have concluded that the Applicant's actions on the flight in question, while negligent, did not amount to incompetence. It is not necessary for me to decide that issue in view of the fact that the Applicant has written and failed the meteorology and navigation sections of the exam.

While the question of incompetence is academic in this case, a review of the Tribunal cases would indicate that the Tribunal has not dealt with this matter definitively in previous cases.

Prior to concluding that the Applicant's failure of the meteorology and navigation sections of the exam made a decision relating to incompetence on the facts surrounding the Applicant's flight, academic, I have considered the broader issue of incompetence as the term is used in the *Aeronautics Act*. A review of the Tribunal decisions reveals that this issue has not been dealt

with definitively in previous cases, and the result of my research may, therefore, be of assistance to others.

While section 6.1 of the Act permits Transport to suspend for incompetence, the Act and the Regulations are of no assistance in defining the term. Reference to dictionary definitions and the judicial decisions in which the meaning has been considered is, therefore, necessary.

Dictionary definitions are of some assistance:

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".

An extensive review of the meaning of incompetence is found in:

Re: Mason and Registered Nurses Association of B.C. 102 DLR (3rd) page 225.

In that decision, Anderson, J. deals with the term as it is used in the *Registered Nurses Act of B.C.* and, in addition, extensively reviews the American decisions. After reviewing the decisions, Anderson, J. concluded that the following principles may be discerned from the authorities:

1. The particular definition placed upon the word "incompetency" should be molded 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.

In dealing with matters of incompetence within the meaning of the *Aeronautics Act*, the principles enunciated by Anderson, J. should, in my view, be followed in determining whether an allegation of incompetence is justified.

Because the Applicant wrote the navigation and meteorology section of the private pilots exam and failed prior to this hearing, I confirm the suspension. Had the Applicant not written the exam prior to the hearing, I may have concluded otherwise.