

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Joseph A. Konkin, Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

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

Review Determination
William Thornton Tweed

Decision: January 6, 2004

The matter is referred back to the Minister for reconsideration. Having considered the written submission of the Minister and the Applicant, I hereby stay the suspension pending a review by the Minister.

A review hearing on the above matter was held Monday, October 27, 2003 at 10:00 hours at Robson Square in Vancouver, British Columbia.

BACKGROUND

On April 28, 2003, the approved check pilot (ACP), Mr. Joseph Anthony Konkin, carried out a pilot proficiency check (PPC) on First Officer C P H. The ride was assessed as a pass.

Mr. Konkin is a newly appointed ACP. The report that resulted in his suspension was the report he submitted for his fourth check ride as an ACP.

Inspector Henk van Erkelens, in his role as Superintendent Rotorcraft, Commercial and Business Aviation, reviewed the flight test report as submitted by Mr. Konkin. He observed what he believed may have been a discrepancy between the satisfactory with briefing "S/B" assessment in box 7A of the report and the written comments in the "comments - general assessment" section of the report. The comments suggested to him that, pursuant to section 10.10.22 of the Approved Check Pilot Manual, an unsatisfactory "U" assessment might have been more appropriate in the

circumstances. Inspector van Erkelens expressed his concern in a letter to Mr. Konkin dated May 8, 2003. The letter "invited" Mr. Konkin to provide his comments.

Based on the evidence submitted, there was no direct communication between Mr. Konkin and Inspector van Erkelens. Mr. Konkin discussed the report with Mr. Kim Carswell, his supervisor, and a training pilot for Helijet. Mr. Carswell discussed the report with Mr. van Erkelens.

Without further notice to Mr. Konkin or Helijet, his employer, Inspector van Erkelens issued a Notice of Suspension, pursuant to paragraph 7.1(1)(b) of the *Aeronautics Act*, on June 6, 2003 withdrawing Mr. Konkin's ACP authority.

The document holder presented two expert witnesses, Mr. Kim Carswell and Mr. Dennis Anthony Rigo, both ACPs with considerable experience. The Minister accepted both witnesses as expert. Mr. Jenner, the document holder's agent, described to both experts the circumstances of the PPC that lead to Mr. Konkin's assessment of an S/B and his written comments. Both witnesses agreed that given the circumstances of the ride the S/B assessment and the overall assessment of a pass was appropriate. They both agreed that the report would have been clearer if the S/B had been indicated opposite the particular emergency for which the comments were made and that the comments could have better described the reason for the S/B assessment. However, they both agreed the S/B assessment, as indicated in box 7A, was acceptable. Their evidence was not challenged.

There was no evidence that the candidate pilot should have failed or that flight safety was compromised.

THE ISSUE

Was the withdrawal of Mr. Konkin's ACP delegation of authority carried out as required in section 2.6 of the ACP Manual?

The evidence does not support a finding under paragraph 7.1(1)(b) of the *Aeronautics Act* that Mr. Konkin is incompetent, has ceased to meet the necessary qualifications, or that the public interest warrants the suspension of his ACP authority. The unchallenged evidence of the experts was that assessment of the candidate was appropriate in the circumstances. There was no evidence to suggest that Mr. Konkin assessed a pass when he should have assessed a failure. Mr. Konkin's report made sense when he explained it. His challenge will be to write his reports so they make sense without the need of an explanation.

Section 2.6 of the ACP Manual sets out the criteria for the withdrawal of the ACP authority and the procedure that shall be followed prior to the removal of the ACP authority.

Section 2.6.2 of the ACP Manual:

2.6.2 The issuing authority may withdraw an ACP's authority if evidence shows that the ACP

- (a) ceases to have the qualifications necessary for issuance of the document or to meet or comply with the conditions subject to which the document was issued
- (b) at any time, acted in a manner which is in contravention of any of the requirements contained in this manual;
- (c) placed a personal interest, or the interest of the company, ahead of the interest of the traveling public;
- (d) required instruction to maintain the required standards or to follow proper procedures;
- (e) fraudulently used ACP authority or has acted in any other way that would discredit the Minister;
- (f) breached the *Aeronautics Act* or Canadian Aviation Regulations;
- (g) exercised poor judgment in assessing candidates performance in relation to the standards; or
- (h) demonstrated to a TC Inspector during the course of a flight check, monitor, or inspection that they no longer meet TC standards and that holding an ACP authority is therefore no longer in the public interest.

The ACP will be informed verbally, upon completion of the flight check or monitor, or the TC Inspector may stop the flight at the time the problems occur.

There is no evidence to support a finding pursuant to paragraphs 2.6.2(a) through (h).

The ACP Manual sets out at paragraph 2.6.3(a) the procedures that **shall** be followed prior to the withdrawal of an ACP authority:

2.6.3 When it has been alleged that any ACP has acted in a manner specified in 2.6.2, the issuing authority **shall**, prior to making a final decision in the matter, ensure:

- (a) a comprehensive report from an Inspector who has investigated the matter has been submitted for consideration; and

[...] [emphasis added]

In this case the inspector and the issuing authority were the same person. A comprehensive report was not done. Although the regulation does not state it explicitly, it is implicit that the investigating inspector and the issuing authority be different people. The procedural safeguards required under the *Aeronautics Act*, as specifically stated at section 2.6.4 of the ACP Manual, are compromised when the same person is the investigator and the decision maker.

Paragraph 2.6.3(b) of the ACP Manual:

2.6.3 When it has been alleged that any ACP has acted in a manner specified in 2.6.2, the issuing authority *shall*, prior to making a final decision in the matter, ensure:

[...]

(b) the ACP and where applicable, the company in question have been given a formal opportunity to respond to the allegations, either verbally or in writing. [emphasis added]

Section 2.6.4 of the ACP Manual:

2.6.4 If the decision of the issuing authority is to suspend or cancel the ACP's authority, a notice of suspension or cancellation shall be issued to the ACP as per section 7.1(1)(b) or (c) of the *Aeronautics Act*. ACPs are entitled to procedural safeguards, under the *Aeronautics Act*, including recourse to the Civil Aviation Tribunal (CAT).

Neither Mr. Konkin nor his company knew the authority was considering withdrawing his ACP authority or given the opportunity to respond to the allegations. There is no evidence the company was ever advised of the pending withdrawal in advance of the "Notice of Suspension". Inspector van Erkelens' letter of May 8, 2003 to Mr. Konkin cannot reasonably be interpreted as notice he was considering withdrawing Mr. Konkin's ACP authority. To meet a minimum threshold of a "formal opportunity to respond" the authority must at least state the fact that the withdrawal of the ACP authority is being considered and the reasons for the proposed withdrawal. To require otherwise is to make "a formal opportunity to respond to the allegations" meaningless.

DETERMINATION

The evidence before the Tribunal does not support a finding that the withdrawal of Mr. Konkin's ACP delegation of authority was appropriate in the circumstances. Further, the suspension was not done in a manner consistent with the requirements of the ACP Manual. I therefore refer the matter back to the Minister for reconsideration.

STAY DETERMINATION

Having considered the written submission of the Minister and the Applicant, I hereby stay the suspension pending a review by the Minister.

As previously stated in my reasons, there is no evidence before the Tribunal to show that aviation safety was compromised. The Minister did not challenge the evidence of the Applicant's two expert witnesses, both of whom stated that in the circumstance of the pilot candidate's performance during the ride, a SB was an appropriate assessment for the two procedures noted

and that the overall assessment of a pass was appropriate. The Minister presented no evidence to show that Mr Konkin breached his duty to ensure the pilot candidate met the necessary standard before assessing a pass on the pilot candidate's PPC. The Minister's evidence that Mr Konkin's report writing, as shown on one report, needs some work cannot reasonably be found to be a threat to aviation safety.

Therefore, pursuant to subsection 7.1(8) of the *Aeronautics Act*, and for the reasons stated I have determined that granting a stay does not constitute a threat to aviation safety. A stay of the suspension of the Applicant's approved check pilot delegation of authority is granted until the reconsideration from the Minister is concluded.

William T. Tweed
Member
Transportation Appeal Tribunal of Canada