

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Gerald John Visser, Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

Aeronautics Act, R.S.C. 1985, c. A 2; paragraph 8.3(1)(a)

**Review Determination
Suzanne Racine**

Decision: February 22, 2011

Citation: *Gerald John Visser v. Canada (Minister of Transport)*, 2011 TATCE 3 (review)

[Official English translation]

Heard at Abbotsford, British Columbia, on December 14, 2010

Held: The decision to refuse the application to remove the notations of suspension from the Applicant's record dated April 29, 2008, is referred back to the Minister of Transport for reconsideration.

I. BACKGROUND

[1] On April 29, 2008, the Applicant, Gerald John Visser, requested that the Minister of Transport remove from his record the notations of suspension of his Airline Transport Pilot Licence ("ATLP") No. AA409846 pursuant to subsection 8.3(1) of the *Aeronautics Act* ("Act"). The last suspension appearing in the Applicant's Aviation Enforcement record expired on February 27, 2006.

[2] Although the Applicant's application was made after the statutory two-year waiting period following the expiry of the last suspension appearing in his record, the Minister refused to

remove the notations of suspension from the Applicant's record, alleging that their removal was contrary to the interest of aviation safety pursuant to subsection 8.3(1) of the *Act*.

[3] The Minister informed the Applicant of his decision by registered mail on February 18, 2009.

[4] The Applicant is appealing the Minister's decision before the Transportation Appeal Tribunal of Canada ("Tribunal").

II. STATUTES, REGULATIONS AND POLICIES

[5] Section 8.3 of the *Act* provides as follows:

8.3 (1) Any notation of a suspension by the Minister of a Canadian aviation document under this Act or of a penalty imposed in accordance with sections 7.6 to 8.2 shall, on application by the person affected by the suspension or penalty, be removed from the record respecting that person kept by the Minister after the expiration of two years from the date the suspension expires or the penalty amount has been paid unless

(a) in the opinion of the Minister, the removal from the record would not be in the interest of aviation safety or security; or

(b) a suspension or penalty under this Act has been recorded by the Minister in respect of that person after that date.

(2) The Minister shall, as soon as practicable after the receipt of an application under subsection (1), by personal service or by registered or certified mail, notify the applicant of the decision of the Minister in relation thereto.

(3) Subsections 7.1(3) to (8) and section 7.2 apply, with any modifications that the circumstances require, in respect of a decision of the Minister referred to in subsection (2).

(4) No application under subsection (1) shall be considered by the Minister within two years from the date of a previous application under that subsection in respect of the same applicant.

III. EVIDENCE

A. Minister of Transport

(1) *Jean-François Mathieu*

[6] Jean-François Mathieu, Chief of Enforcement at Transport Canada, refused, on behalf of the Minister, to remove the notations of suspension from the Applicant's record. It should be noted

that decisions on whether or not to remove notations of suspension can only be made by the Chief of Enforcement.

[7] The witness told the Member that he relied on the following documents to make his decision:

1. The recommendation of the Enforcement Office, Pacific Region, although he is not bound by it (Exhibit M-1);
2. the wording of section 14.1 of the Aviation Enforcement Policy Manual TP 13794 (Exhibit M-2);
3. the wording of section section 14.1.2 of the Aviation Enforcement Procedures Manual (Exhibit M-3);
4. the background of the Applicant's Aviation Enforcement record (Exhibit M-4);
5. EMS Report 42253, a 4-day suspension for contravening section 602.96 of the *Canadian Aviation Regulations* ("CARs") on July 19, 2000 (Exhibit M-6);
6. EMS Report 43365, a 15-day suspension for contravening section 406.03 of the *CARs* on December 11, 2000 (Exhibit M-7);
7. EMS Report 54790, a 90-day suspension for three contraventions of section 406.03 of the *CARs* on January 1 and 2, 2004 (Exhibit M-8);
8. EMS Report 67221, a 30-day suspension for allegedly contravening subsection 602.88(2) of the *CARs* on September 2, 2008 (Exhibit M-5).

[8] The witness confirmed that over two years had passed, as required by subsection 8.3(1) of the *Act*, between the expiry of the last suspension (EMS 54790 – February 27, 2006) and the Applicant's application made in writing to the Minister on April 29, 2008.

[9] However, Mr. Mathieu explained to the Member that, even though two years had passed since the expiry of the suspension, the application for the removal of notation of suspension is not automatic. In fact, subsection 8.3(1) of the *Act* provides that the removal of a notation of suspension or penalty cannot be granted if another suspension or penalty has been recorded since the date of the last suspension or penalty, in this case, February 27, 2006. The same applies if the Minister is of the opinion that the removal of a notation of suspension would be contrary to the interest of aviation safety. Section 14.1 of the Aviation Enforcement Policy Manual (Exhibit M-2) and section 14.1.2 of the Aviation Enforcement Procedures Manual (Exhibit M-3), both Transport Canada manuals, reflect the requirements of subsection 8.3(1) of the *Act*.

[10] When asked to comment on the Applicant's record (Exhibit M-4), the witness drew the Member's attention to the fact that it contained only notations of suspension, which are more severe sanctions than monetary penalties. Of the first three notations of suspension in the Applicant's record, two notations (EMS 43365/December 2000 and EMS 54790/January 2004)

were both recorded for contravening section 406.03 of the *CARs*. The Minister imposed a 15-day suspension the first time (EMS 43365) and increased the length of the suspension to 30 days for each of the three subsequent repeat offences (EMS 54790). The Applicant's record also includes a notation of a 4-day suspension (EMS 42253) for contravening section 602.96 of the *CARs* in July 2000.

[11] The witness stated that he had also considered the findings of a report (Exhibit M-5) recommending a 30-day suspension of the Applicant's Canadian ATLP for commencing a flight on September 2, 2008, although the aircraft the Applicant was flying was not carrying sufficient fuel to allow the aircraft to fly to the destination aerodrome and then to fly for a period of 30 minutes at normal cruising speed, thus contravening section 602.88 of the *CARs* (EMS 67221). On January 13, 2009, the Minister issued a 30-day Notice of Suspension of Mr. Visser's ATLP. Mr. Visser appealed the Minister's decision before the Tribunal.

[12] The seriousness of the alleged offence on September 2, 2008 (EMS 67221), combined with the contraventions already appearing in the Applicant's record, satisfied Mr. Mathieu that it was not in the interest of aviation safety, in accordance with subsection 8.3(1) of the *Act*, that the Minister remove the notations of suspension from the Applicant's record.

[13] On cross-examination, the witness indicated that, under the *Act*, the Applicant could have requested that the Minister remove the notations of suspension from his record as of March 2008, ensuring, however, that his application respect the requirements of subsection 8.3(1) of the *Act*.

[14] Mr. Mathieu stated that he only reviewed the Applicant's record on February 10, 2009, and that he informed the Applicant of his decision eight days later after having analyzed the documents that were introduced as evidence.

[15] The witness emphasized that EMS 54790 reported at least seven contraventions of section 406.03 of the *CARs* for each of which Transport Canada initially recommended a 30-day suspension. However, the Minister merely imposed a 90-day suspension for only three of the seven contraventions.

B. Applicant

(1) Gerald John Visser

[16] The Applicant, Mr. Visser, stated that he had submitted a first application to have the notations of suspension removed from his record to Ms. Marie Zubryckyj of Transport Canada on May 2, 2007 (Exhibit A-1). He submitted a copy of the application, this time annotated by Transport Canada and including the following note (Exhibit A-1b):

- Reapply in writing Mar 2008.

[17] In a telephone conversation on August 23, 2007, Transport Canada told Mr. Visser to reapply. Ms. Zubryckyj told him that she could not process his application before March 2008 as two years had not elapsed since the expiry of the last suspension entered in his record. She also

told him that she would keep his application. In March 2008, the Applicant believed that Ms. Zubryckyj would start working on his application again. He tried to reach her to no avail: she was no longer working there. He telephoned Mr. Adrian Walker, Regional Manager, Enforcement, Transport Canada on a number of occasions to check on the status of his application. Mr. Walker told him that there was no written application from the Applicant. Since the Applicant was unable to find a copy of his application to Ms. Zubryckyj in his records, he eventually decided to submit a new application to Mr. Walker.

[18] Mr. Visser submitted the second application to Transport Canada online on April 29, 2008. On June 4, 2008, Mr. Walker acknowledged receipt of his application and informed him that the notations of suspension could not be removed for the time being since he would shortly be the subject of a regulatory investigation for an alleged offence that, according to a Civil Aviation Daily Occurrence Reporting System (CADORS) report, had occurred on or about April 21, 2008 (EMS 65383) (Exhibit A-2). Mr. Walker told him that the notations of suspension in his record could be removed if no subsequent suspensions or penalties had been recorded in his file. On the same day, June 4, 2008, Inspector Claudio Rosa of Transport Canada informed the Applicant that he was being investigated for the alleged offence (Exhibit A-5).

[19] The Applicant told the Tribunal that Inspector Rosa's investigation in August 2008, in particular the monitoring of recorded conversations with the control tower, demonstrated that the Applicant had not committed the offence on April 21, 2008 (EMS 65383), contrary to what is indicated in Exhibit A-3 (case synopsis) from Transport Canada. The Applicant was adamant that he was neither found guilty of the alleged contravention, nor did he admit any responsibility in that respect. He is a prudent pilot, is not a threat to aviation and has never been found guilty of an offence following a CADORS report. He bitterly regrets having lost his temper when he discussed with Transport Canada the justification for various contraventions in his record (EMS 54790) that had occurred seven years ago. He firmly believes that his behaviour lies at the root of his troubles with Transport Canada.

[20] The Applicant argues that he has been entitled to have the notations of suspension removed from his record since March 2008 since he then met all requirements of subsection 8.3(1) of the *Act*. In his view, Mr. Walker should not have delayed processing his application until June 4, 2008, especially as Transport Canada's investigation later demonstrated that he had not contravened subsection 601.09(1) of the *CARs* on April 21, 2008, as alleged. The Applicant submits that Mr. Walker conducted a regulatory investigation of the alleged offence of April 21, 2008, in order to delay the review of his application, probably because he was fed up of having to answer his many calls concerning the status of his application. The investigation, which turned out in his favour, but the outcome of which was not known before the end of August 2008, delayed the processing of his application.

[21] The Applicant then states that his application for removal was also delayed because of another alleged contravention of section 602.88 of the *CARs* which he allegedly committed on September 2, 2008. The Applicant finds it unacceptable that Mr. Walker did not deal with his application more promptly and that he refused to rule on it in August 2008 even though the Applicant was exonerated from the alleged offence of April 21, 2008. He also finds it unacceptable that Transport Canada waited until February 18, 2009, that is almost a year after he

was entitled to have the notations of suspension removed from his record, to inform him that it was not in the interest of aviation safety to have the notations of suspension removed from his record.

[22] Unfortunately, these delays prevent Mr. Visser from occupying the positions of Director of Operations, Aircraft Maintenance Manager and Chief Pilot at his own company and thus seriously jeopardize his financial situation. He submits that he has been adequately punished by Transport Canada, that he has served his sentence and that he has learned his lesson.

[23] The Applicant requests that the Tribunal refer the matter back to the Minister for reconsideration (Exhibits A-4 and A-4a).

[24] On cross-examination, the Applicant stated that he was unable to say whether the handwritten notes in Document A-1b had been made by Ms. Zubryckyj or Mr. Walker. Although he admitted that he had agreed to undergo counselling from Inspector Rosa following the investigation of the alleged offence of April 21, 2008, he categorically denies having committed the offence. According to the Applicant, Inspector Rosa recognized that he had not committed the offence of which Transport Canada had accused him and that there was an error in document A-3. The Applicant pointed out that Inspector Rosa was supposed to have had the error corrected subsequently.

[25] Mr. Visser stated that he had not known that he was the subject of a regulatory investigation for an alleged contravention of subsection 601.09(1) of the *CARs*, which had occurred on April 21, 2008, when he sent his application to have the notations of suspension removed from his record with Transport Canada on April 29, 2008. He only found out on June 8, 2008, when he read the letters from Messrs. Walker and Rosa dated June 4, 2008 (Exhibits A-2 and A-5). The Applicant stated that he had received a call from NAV CANADA about the incident of April 21, 2008, during which he had provided the requested clarifications; according to him, there had never been any question of his being investigated.

IV. SUBMISSIONS

A. Minister

[26] The Minister submits that the Tribunal must determine whether the decision made by Mr. Mathieu was fair and reasonable given the background of the Applicant's record. When Mr. Mathieu, refused to remove the notations of suspension from the Applicant's record on February 18, 2009, he correctly relied on well-founded observations, namely that:

- the Applicant's record contained only notations of suspension, which are more serious than notations of penalty;
- over a five-year period, the Applicant had accumulated a total of three suspensions, the first for 4 days, the second for 15 days, and the third for 90 days. Over the same period, the Applicant's ATLP was suspended on two occasions, both times for contravening section 406.03 of the *CARs*. The Applicant was therefore a repeat offender;

- at the time of Mr. Mathieu's review of Mr. Visser's application in February 2009, the Applicant's licence had been suspended for 30 days following an alleged contravention of section 602.88 of the CARs for commencing a flight on September 2, 2008, while the aircraft Mr. Visser was flying was not carrying sufficient fuel to allow it to fly to the destination aerodrome and then to fly for a period of 30 minutes at normal cruising speed;
- a contravention of section 602.88 of the CAR is characterized as serious by the Minister, something that Mr. Mathieu could not ignore in making his decision.

[27] Given the information Mr. Mathieu had at his disposal in February 2009, he was right to find that, in accordance with subsection 8.3(1) of the *Act*, the removal of the notations of suspension from the Applicant's record was contrary to the interest of aviation safety. The Minister's decision has to be upheld.

B. Applicant

[28] The Applicant is requesting that the Tribunal refer his application back to the Minister for reconsideration.

[29] As of March 2008, the Applicant was fully entitled to have the notations of suspension removed from his record. Mr. Walker first delayed the review of the Applicant's application by only acknowledging its receipt on June 4, 2008. Mr. Walker then suspended review of the application until August 26, 2008, because of an alleged offence on April 21, 2008, in which the Applicant was entirely blameless. Mr. Visser argues that Mr. Walker's inaction caused him an unnecessary six-month wait. Once it was clear that the Applicant would not be prosecuted for the alleged April 21, 2008, offence, Mr. Walker, instead of dealing with the Applicant's application and removing the notations of suspension from his record, suspended the review of his application a second time because of another alleged offence, which, this time, occurred on September 2, 2008. It was not until February 18, 2009, that the Applicant was finally informed by the Minister that his application of 2008 was contrary to the interest of aviation safety.

[30] The Minister unduly subjected the Applicant to delays. In the Applicant's view, this was a disguised strategy to prevent him from operating his company and to punish him for events that occurred in 2004. He is in danger of going bankrupt if the Minister does not remove the notations of suspension from his record since they are preventing him from occupying key positions in his company.

V. ANALYSIS

[31] Subsection 8.3(1) of the *Act* provides that any notation of a suspension of an aviation document or a penalty imposed in accordance with sections 7.6 to 8.2 shall, "on application by the person affected by the suspension or penalty", be removed from his record after the expiration of two years from the date the suspension expires or the penalty amount has been paid unless

- in the opinion of the Minister, the removal from the record would not be in the interest of aviation safety or security;

or

- a suspension or penalty under this Act has been recorded by the Minister in respect of that person after that date.

[32] Subsection 8.3(1) of the *Act* is clear; the person affected by a suspension or penalty must apply to the Minister to have the notation of said suspension or penalty removed from his or her record.

[33] Mr. Visser first applied to the Minister on May 2, 2007 (Exhibit A-1). In a telephone conversation on August 23, 2007, Transport Canada suggested that he reapply in writing in March 2008 (Exhibit A-1b) since the Applicant had sent his first application to Ms. Zubryckyj only 15 months after the expiry of the last suspension in his record, that is 9 months earlier than stipulated in subsection 8.3(1) of the *Act*. The handwritten notes that appear on the face of Exhibit A-1b are sufficiently explicit. In fact, as the 90-day suspension (EMS 54790) expired on February 27, 2006, the Applicant could legally apply only as of February 28, 2008.

[34] Section 14.1 of the Aviation Enforcement Policy Manual states that any application made within a reasonable time before the two-year waiting period has expired will be retained and acted on when the two-year limit has been reached. An application made nine months before the expiry of the two-year waiting period would not be considered to have been made within a reasonable time before its expiry. The Applicant's application dated May 2, 2007, was therefore premature since it was filed less than two years after the expiry of the suspension.

[35] It was nonetheless possible for the Applicant to submit a second application, online or otherwise, within a reasonable time before the expiry of the waiting period or immediately at the beginning of March 2008 so that it could be examined as quickly as possible by Transport Canada. However, the Applicant did not submit his application to the Minister online until April 29, 2008.

[36] Upon receipt of the Applicant's application, Mr. Walker had to ensure that no further suspensions or penalties had been recorded in respect of the Applicant and that his application was not contrary to the interest of aviation safety or security (section 14.1.5 of the Aviation Enforcement Procedures Manual, Exhibit M-3), as required by the *Act*.

[37] Upon review of the Applicant's record, M. Walker acknowledged receipt of the application submitted on April 29, 2008 (Exhibit A-2), on June 4, 2008, that is, about a month after having received it. The Applicant argues that Mr. Walker unduly delayed the processing of his application by acknowledging its receipt only a month later. The Tribunal does not believe this delay to be unreasonable.

[38] Mr. Walker told the Applicant that he had to suspend review of his application since the Minister had been informed that a contravention of subsection 601.09(1) of the *CARs* may have

been committed by the Applicant on or about April 21, 2008 (EMS 65383) and that the Applicant was currently the subject of a regulatory investigation. Mr. Walker advised the Applicant that he would reconsider his application once light had been shed on the alleged offence. He based his decision on the fact that one of the requirements for allowing the removal of notations of suspension is that no subsequent suspension or monetary penalty has been recorded in respect of the person concerned (Exhibit A-2).

[39] Mr. Mathieu, Chief of Enforcement, relied on the various notations of suspension in the Applicant's record to justify his decision to refuse to remove the notations from the Applicant's record. Although the Minister has asked the Tribunal to determine only whether Mr. Mathieu's decision dated February 18, 2009, was reasonable, the Tribunal must nonetheless consider the context in which the Applicant's application was processed on and after April 29, 2008.

[40] Was Mr. Walker right to suspend the Applicant's application on June 4, 2008, because he had been informed that the Applicant was under investigation for an alleged offence that occurred on April 21, 2008? Was he right to base his decision on the ground that, to be able to grant an application for removal of notation of suspension, no subsequent suspension or penalty can have been recorded in respect of the Applicant, in accordance with subsection 8.3(1) of the *Act*?

[41] For a suspension or penalty to be recorded in an Applicant's file, the Applicant must first have been found guilty of an offence. The investigation of the alleged offence on April 21, 2008, was the result of information obtained through CADORS, information on aviation occurrences. The investigation ended around August 26, 2008, and no suspension or penalty was imposed on the Applicant by the Minister. The Applicant did however receive counselling. In response to the Member's question on why no penalty was imposed on the Applicant, Mr. Mathieu replied that it had probably been a minor offence that had not put aviation safety at risk.

[42] On June 4, 2008, the Applicant's Aviation Enforcement record contained three notations of suspension when Mr. Walker informed the Applicant of his decision. The last suspension recorded had expired on February 27, 2006, and the two preceding suspensions in January and May 2001, respectively. The Applicant was entitled to apply for the removal of the notations of suspension from his record on April 29, 2008, if no subsequent suspension or penalty had been recorded in his file or if it was not contrary to the interest of aviation safety or security.

[43] The Tribunal is of the opinion that the discretion conferred by subsection 8.3(1) of the *Act* does not authorize the Minister to suspend review of an Applicant's file if a suspension or penalty could potentially be recorded in respect of the Applicant at a later date as he did on June 4, 2008. On that date, no suspension or penalty had been recorded in respect of the Applicant since February 27, 2006. On June 4, 2008, when Mr. Walker suspended review of the Applicant's record, the Applicant was the subject of a regulatory investigation for an alleged offence. The investigation had just begun, and the Minister had not yet determined whether the Applicant had actually committed the offence he was accused of; a suspension or penalty could therefore not have been recorded in respect of the Applicant on the date of his application since the expiry of his last suspension.

[44] In the absence of a suspension or penalty in the Applicant's record, Mr. Walker had no other choice but to inform the Applicant that his application had been accepted, unless, of course, it was contrary to the interest of aviation safety or security. It should be noted that Mr. Walker did not suspend the Applicant's application because it was contrary to the interest of aviation safety or security, as Mr. Mathieu did.

[45] Consequently, the Tribunal does not have to rule on the merits of the Minister's decision dated February 18, 2009, since it was not examined in the proper context. In fact, the notations of suspension in respect of the Applicant should already have been removed from his record.

VI. DETERMINATION

[46] The decision to refuse the application to remove the notations of suspension from the Applicant's record dated April 29, 2008, is referred back to the Minister of Transport for reconsideration.

February 22, 2011

Suzanne Racine

Member