

Federal Court



Cour fédérale

Date: 20111115

Docket: T-439-11

Citation: 2011 FC 1311

Ottawa, Ontario, November 15, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DAVID WILLIAMS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Integral to the security of passengers in Canada is the certification of screening officers, a responsibility of the Canadian Air Transport Security Authority [CATSA].

[2] In this case, the Applicant, as a result of twice failing the X-ray component of his re-certification test, was decertified for a period of twelve months.

[3] Due to the decision-maker's statutory authority and in recognition of reasonable findings in the purview of the decision-maker, the Court agrees with the position of the Respondent.

II. Background

A. CATSA

[4] CATSA was established as a federal Crown corporation in April 2002 by the enactment of the *Canadian Air Transportation Security Authority Act*, SC 2002, c 9, s 2 [CATSA Act]. The creation of CATSA was the Government's response to the new reality faced by the tragic events of September 11, 2001.

[5] CATSA's mission is to protect the public by securing the air transportation system as assigned by the government.

[6] CATSA is responsible for the provision of key air security services such as pre-board screening of passengers and their belongings, screening of non-passengers and the acquisition, deployment and maintenance of explosives detection equipment at airports.

[7] CATSA currently oversees the work of over 6,800 Screening Officers at 89 airports across Canada. In 2010-2011, CATSA screened over 62 million pieces of baggage, 51 million passengers and conducted 1.2 million screenings of non-passengers (air crew, maintenance staff, caterers, etc). To deliver its screening mandate, CATSA contracts with screening contractors who employ Screening Officers. Aeroguard was the screening contractor at the Vancouver International Airport (and the Applicant's employer).

[8] Pursuant to the *CATSA Act*, CATSA is responsible to train and certify screening officers. Section 8 of the *CATSA Act*, confers upon CATSA the authority to establish criteria respecting the qualifications, training, certification, and performance of Screening Officers. Pursuant to the same section, CATSA also has the authority to vary, suspend, or cancel a Screening Officer's certification, if it determines that the officer no longer meets established criteria.

B. CATSA's National Training and Certification Program

[9] All Screening Officers must be trained and certified by CATSA. Screening Officers require formalized knowledge, training, and specialized technical skills to perform the screening function. To this end, CATSA has established a multi-level National Training and Certification Program [NTCP] to ensure that Screening Officers have the knowledge and skills required to effectively carry out their duties. As Screening Officers progress through the NTCP, they obtain "endorsements" in respect of physical search of persons and the operation of the X-ray equipment.

[10] Before entering CATSA's NTCP, screening contractors pre-select and hire individuals as Screening Officer candidates. Each Screening Officer candidate must meet the following regulatory criteria set out in the *Canadian Aviation Security Regulations*, SOR/2000-11, and the *Designation Standards for Screening Officers*:

- a. Be at least 18 years of age;
- b. Be a Canadian citizen or a permanent resident as defined in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and hold a valid employment authorization document;

- c. Understand, speak and write one or both Canadian official languages, as confirmed by successful testing according to CATSA's testing requirements;
- d. Hold a valid medical report stating that they meet the criteria of the CATSA Screening Officer Medical Examination Report; and
- e. Hold an enhanced Transport Canada security clearance.

C. Applicant's Training

[11] In November 2009, the Applicant entered the NTCP. The Applicant passed the "Foundations I" course and became certified at that level. The Applicant obtained the following endorsements: i) pre-screening; ii) physical search of persons; iii) operation of the walk through metal detector; and, iv) use offhand held metal detector. The Applicant completed his post-certification on-the-job training and was allowed to conduct these four screening activities without supervision.

[12] The Foundations I course did not contain any courses on the X-ray equipment. The Applicant was then supposed to take the Foundations II course which would have contained a component on the X-ray equipment.

[13] As a result of the attempted bombing of Northwest Airlines flight 253 on December 25, 2009, CATSA was required to enhance security screening. As a result, changes to the training program occurred. The Foundations I and Foundations II courses were replaced with Foundations and X-ray courses. All Screening Officers who had completed Foundations I but not Foundations II upgrade" course. The Foundations II upgrade course did not include training on X-ray equipment.

The Applicant was one of the Screening Officers that had completed the Foundations I course but not the Foundations II course.

[14] In February 2010, the Applicant took the “Foundations II upgrade” course and passed. The Applicant obtained the following endorsements: i) explosive detection trace; ii) physical search of checked baggage; iii) physical search of carry-on baggage; and, iv) professional conduct.

[15] On May 18, 2010, the Applicant took the X-ray course and passed. As such, the Applicant was certified to operate the X-ray machine. The Applicant was required to complete post-certification on-the-job training [OJT] before he could operate the X-ray machine unsupervised. The Applicant completed his OJT on May 21, 2010. The Applicant was then allowed to operate the X-ray machine on his own.

[16] After a Screening Officer is certified to work on the X-ray machine, CATSA has no control on how the screening contractor decides to staff the different positions at the screening check point. It is up to the screening contractor to ensure that its employees get the necessary exposure on various screening duties and equipment.

[17] According to his XRT Transcript, the Applicant logged into “X-ray Tutor” (a training program where Screening Officers view X-ray images of bags to practice identifying prohibited items) a total of forty four (44) times and completed twenty eight (28) sessions from May 21, 2010 to November 17, 2010. From November 18, 2010 to January 5, 2011, the Applicant logged in a total of eighty four (84) times and completed seventy four (74) sessions. From the first time that the

Applicant logged on in December 2009, until he failed his final re-certification test, he logged over 190 times and he completed 102 sessions on the X-ray tutor according to the transcript.

[18] As the Applicant was initially certified in November 2009, he was required to be recertified by November 2010 (one year later). To be recertified, on October 26, 2010, the Applicant enrolled to take the Recurrent Learning and Recertification Program [RLRP] exams. The RLRP is a continuous learning program to assist Screening Officers in maintaining and enhancing their skills and competencies, primarily through self-directed e-modules, XRT and in-service exercises. Screening Officers that successfully complete the RLRP are recertified and to no need to undergo further testing.

[19] If a Screening Officer fails the RLRP exams, the Screening Officer is required to undergo re-certification exams in person before a CATSA Learning and Performance Advisor.

[20] On October 26, 2010, the Applicant tailed the X-ray image analysis component of the RLRP. As such, the Applicant was required to undergo his re-certification testing in person with a CATSA Learning and Performance Advisor.

D. Applicant's X-ray re-certification testing on November 17, 2010

[21] On November 17, 2010, the Applicant underwent re-certification testing for X-ray. The examination was conducted by CATSA's Learning and Performance Advisor [LPA] Mark Flemming. The examination consisted of reviewing ten (10) X-ray images of bags. The Screening

Officer is required to take appropriate action for each image. The Applicant failed to identify prohibited items in two (2) X-ray images.

[22] Despite the Applicant's assertions, the pass mark was not 80%. The pass mark is simply a pass. The Applicant did not meet the requirements to pass the X-ray component of the recertification exam.

[23] The pass mark of the recertification exam did not change.

[24] Failing to properly identify two images on the X-ray component was not an 80%, it is a failure. The Applicant did not meet the requirements to pass the practical X-ray examinations.

E. Performance Improvement Plan and On-the-Job Training

[25] As a result of his failed X-ray re-certification testing, the Applicant was provided with a Performance Improvement Plan [PIP]. This PIP was to help the Applicant prepare for his second attempt at the X-ray re-certification exam.

[26] The PIP required the Applicant to complete ten (10) hours of OJT. The OJT consisted of working on the X-ray machine under the supervision and coaching of a supervisor.

[27] The Applicant completed the PIP requirements on December 18, 2010; however, Mr. Saul Hermann, the Point Leader that concluded the skills review, indicated the following:

His knowledge of the X-ray ATIX 6040 was very poor so we started from scratch. He stops all bags but his image analysis is slow and in my consideration is at minimum acceptable standards.

(Affidavit of Jean Sévigny [Sévigny Affidavit] at para 25; Exhibit A at p 9).

[28] Moreover, in the X-ray Training Activities document, the Point Leader commented that the Applicant's "overall performance" is at "barely minimum standards" (Sévigny Affidavit at para 26; Exhibit A at p 10).

[29] On December 20, 2009, Kiran Saran, Aeroguard Training Coordinator sent the PIP and the Performance Event Report to Sangita Gore, Acting, Regional Learning Manager, for approval. In her email to Kiran Saran, dated December 20, 2010, Sangita Gore notes that there are concerns with the Applicant's skills review and comments on the Performance Event Report. Sangita Gore requests that the Applicant be provided with additional training followed by another skills review (Sévigny Affidavit at para 27; Exhibit A at p 12).

[30] On December 25, 2010, the Applicant was provided with an additional four (4) hours of OJT and a new skills review. In the Performance Event Report, dated December 25, 2010, Saul Hermann, Point Leader indicated that the Applicant showed improvement and that he "could be considered as meeting minimum standards" (Sévigny Affidavit at para 28; Exhibit A at p 13).

[31] On December 31, 2010, the Applicant's second PIP requirements were completed (Sévigny Affidavit at para 29; Exhibit A at p 15).

F. Applicant's second X-ray re-certification testing on January 5, 2011

[32] On January 5, 2011, before undergoing his second attempt at re-certification testing, the Applicant signed his Recertification Readiness Form indicating that he was prepared to take the test. This included the fact the Applicant checked off that he has “completed all pretest requirements - including, but not limited to: On-the-Job Training (OJT), X-ray Tutor, and Performance Improvement Plans” (Sévigny Affidavit at para 30; Exhibit A at p 6).

[33] On January 5, 2011, the Applicant underwent his second re-certification testing for X-ray. The examination was conducted by CATSA's Learning and Performance Advisor (LPA) Diane Klein. The examination consisted of reviewing ten (10) X-ray images of bags and the Screening Officer is required to take appropriate action for each image. As set out in the LPA Briefing Note, dated January 5, 2010, the Applicant failed this test because he made two (2) incorrect decisions (Sévigny Affidavit at para 31; Exhibit a at pp 3 and 4).

[34] The January 5, 2011 test was witnessed by Rattandeep Paul, Training Point Leader (Sévigny Affidavit at para 32; Exhibit A at p 5).

G. CATSA's Decertification Process

[35] CATSA promotes and maintains a certification process. To this end, CATSA has established the Local Decision Board [LDB] and the National Decision Board [NDB].

[36] CATSA provides Screening Officers with an opportunity to make representations and provide evidence and additional information where necessary. Screening Officers can seek the

assistance of any representative to help them throughout the investigation and review process.

CATSA's investigation and review process to deal with Performance Events is set out in chapter 11 of the SOP (Sévigny Affidavit at para 34; Exhibit A at pp 85 to 94).

[37] In the present case, the Performance Event was the Applicant's failed recertification tests.

H. Local Decision Board Recommendation

[38] When a Performance Event occurs, the LDB reviews the event to determine its severity and make further recommendations. In the event of a second failed X-ray recertification test, the NTCP provides that the LDB refers the matter to the NDB. As indicated in the LPA Briefing Note, dated January 5, 2011, the LDB was of the view that the Applicant's testing had been done fairly and there were no reasons to offer a third attempt (Sévigny Affidavit at para 35; Exhibit A at pp 3 and 4).

I. National Decision Board

[39] The NDB reviews matters that may lead to a Screening Officer de-certification. In the Applicant's case, the NDB was comprised of the Senior Director of Screening Operations, the Director of Screening Personnel, Learning and Development, the General Manager of Training Delivery and the Manager, National Operations Coordination.

[40] The members of the NDB have a background and are trained in various areas of aviation security screening including the training requirements necessary to ensure the integrity of aviation

security. Members of the NDB are aware of the importance of set procedures in the review and investigation of Screening Officer certification-related matters.

[41] On January 31 2011, the NDB sent a letter to the Applicant explaining that his X-ray endorsement had been suspended following the result of his second failed recertification attempt. The NDB also explained how it would conduct its review and enclosed several documents (Sévigny Affidavit at para 38; Exhibit A at pp 31-60).

[42] On February 8, 2011, the Applicant submitted his written submissions and additional documents. In those submissions, he did not raise the issue of being under duress when signing his readiness from prior to his second recertification test, or that he had not completed the required OJT in preparation for his second attempt (Sévigny Affidavit at para 39; Exhibit A at pp 61-67).

[43] After completing a thorough review, the NDB, headed by Mr. Jean Sévigny, Director, Learning and Development, decided to decertify the Applicant for a period of twelve (12) months. This means that the Applicant could reapply to become a Screening officer as of February 23, 2012.

[44] The NDB decision and reasons were communicated to the Applicant on February 23, 2011.

III. Issues

[45] (1) What is the appropriate standard of review?

(2) Did the decision-maker base the decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before him?

IV. Analysis

(1) Standard of Review

[46] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraphs 62 and 64, the Supreme Court of Canada set out the applicable test for the standard of review. The Court must first ascertain whether past jurisprudence has satisfactorily determined the standard of review with regard to the particular category of question.

[47] The case of *Bhatthal v Canada (Attorney General)*, 2009 FC 1182, 354 FTR 302, as in this case, involved a judicial review of a decision of a CATSA National Decision Board. In *Bhatthal*, this Court considered the standard of review to be applied in such cases to be reasonableness (*Bhatthal* at para 17-22).

[48] In *Bhatthal*, the Federal Court stated:

[22] In *Dunsmuir*, the Court held that reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process, as well as whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para. 47).

[49] Similarly in *Bhatthal*, the Court specified:

[28] In this case, based on this standard of review, it is not for the Court to interfere with the decision of the CDR, if reasonable in light of the evidence, because it was up to the CATSA, as master of its domain of airport security, to weigh the evidence before it.

(2) There was no erroneous finding of fact

(a) *Was the Decision Reasonable?*

[50] The Court agrees with the position of the Respondent that the decision is reasonable.

(i) The reference in the Decision regarding logging into the XRT over 190 times

[51] The Applicant indicates that it was an error of fact in the Decision that the decision-maker referred to the Applicant logging into the XRT program 190 times to improve his image recognition skills. This is not an error in fact.

[52] The Applicant logged in at least 190 times from the time he first logged on to the XRT program in December 2009 and the time that he failed his second recertification test on January 5, 2011. The Applicant is erroneously focussing on time periods referenced in the Affidavit of Jean Sévigny which are different than those that were referenced in the Decision (Sévigny Affidavit at para 16; Exhibit A at pp 24-30).

[53] Also, with respect to the Applicant's repeated assertions that the training equipment (X-ray Tutor) is not the same type of equipment used at a screening point, it is important to note that X-ray Tutor is a training software that projects X-ray images on a personal computer. X-ray Tutor is a training tool and is not meant to be a reproduction of the actual X-ray machine.

(b) The reference in the Decision to 14 hours of OJT

[54] The Applicant has suggested that between his first-recertification failure and his second recertification test he had not received the 14 OJT hours noted in the Decision; however, on January 5, 2011, before undergoing his second recertification testing, the Applicant signed his Recertification Readiness Form indicating that he had "completed all pretest requirements – including, but not limited to: On-the Job Training (OJT), X-ray Tutor, and Performance Improvement Plans" and that he was prepared to take the second recertification test.

[55] In addition, on December 18, 2010, the Applicant initialized each OJT component on the Performance Event Report indicating that he had received all the required OJT on December 18, 2010 and this is also indicated in the Training Activities Report, dated that day.

[56] While the Applicant now claims that he was under duress to complete the Recertification Readiness Form prior to his second recertification testing, there is no evidence that was the case. Moreover, this allegation was not brought to the attention of CATSA prior to the testing. Also, the allegation of duress was not raised in the Applicant's submissions to the NDB.

[57] Additionally, the Applicant did not raise before the NDB his allegation of not having received the required OJT hours after his first recertification failure and prior to his second recertification test.

[58] Accordingly, he is estopped from raising those issues now on judicial review (*Canada v Chevron Canada Resources Ltd*, [1999] 1 FC 349 (CA)).

[59] In any event, a review of the Applicant's evidence reveals that the Applicant received the 14 hours of OJT noted in the Decision. The exhibits attached to his affidavit indicate that he received 7 hours of "basic" training and 3 hours of "intermediate" training for a total of 10 hours of OJT on December 18, 2010 (Affidavit of David Williams [Applicant's Affidavit] at para 23-35; Exhibits 6 and 7).

[60] The Applicant's position with respect to the additional four (4) hours of OJT on December 25, 2010 is contradictory. In paragraph 35 of his affidavit, the Applicant acknowledges that the four hours of OJT were completed on December 25, 2010. Then he appears to suggest that he only received one hour of OJT. Again, the Applicant did not raise any issue regarding the insufficiency of the OJT in his submissions to the NDB (Applicant's Affidavit at para 35-41; Exhibits 9-11).

[61] The documents establish that OJT was completed on December 25, 2010. During the Applicant's 10 hour shift, there is no reason by which to understand that the four (4) hours of OJT were not obtained. The Performance Event Report signed by the Applicant on that day indicates that his skills review was completed that day as this box was checked off (Applicant's Affidavit at para 34-40; Exhibits A at pp 12-14).

[62] Accordingly, there is no reviewable error in the Decision with respect to the finding that the Applicant had received the additional 14 hours of OJT in the relevant time frame.

(c) Assumption of Jean Sévigny

[63] The Applicant also claims that it is an error of fact that in his letter to the Applicant, dated January 31, 2011, Jean Sévigny indicates that the Applicant is temporarily suspended from his X-ray endorsement after he failed his second recertification test on January 5, 2011, because it indicates an incorrect assumption regarding his continuing screening of passengers after his de-endorsement on November 17, 2010.

[64] Despite the Applicant's assertions as to what Mr. Sévigny must have assumed, the fact is the Applicant was entitled to continue to screen passengers after his de-endorsement but he had to be supervised on the X-ray component. Whether the Applicant's employer permitted him to do so is another matter. It is important to note that this letter, dated January 31, 2011, is not the decision under review and no reviewable error has been demonstrated in any event.

(d) Screening Officer must be Unable to Meet More than One Requirement in Order to Suspend Screening Privileges

[65] The Applicant also asserts that a Screening Officer must be unable to meet more than one requirement in order to have his screening privileges varies, suspended or cancelled according to section 8.3 of the *CATSA Act*; however, a review of that section would indicate that interpretation by the Applicant is not sustainable. Section 8 of the *CATSA Act* reads as follows:

Criteria for screening contractors and officers

8. (1) The Authority must establish criteria respecting the qualifications, training and performance of screening contractors and screening officers, that are as stringent as or more stringent than the standards established in the aviation security regulations made under the Aeronautics Act.

Certification

(2) The Authority must certify all screening contractors and officers against the criteria established under subsection (1).

Critères

8. (1) L'Administration établit des critères de qualification, de formation et de rendement, applicables aux fournisseurs de services de contrôle et aux agents de contrôle, qui sont au moins aussi sévères que les normes qui sont établies dans les règlements sur la sûreté aérienne pris sous le régime de la Loi sur l'aéronautique.

Certificat

(2) L'Administration accorde un certificat de conformité aux fournisseurs et aux agents qui se conforment aux critères.

**Varying, suspending or
cancelling certification**

(3) If the Authority determines that a screening contractor or officer no longer meets the criteria in respect of which they were certified, the Authority may vary, suspend or cancel their certification.

...

**Modification, suspension et
annulation**

(3) L'Administration peut modifier, suspendre ou annuler un certificat si elle conclut que son titulaire ne se conforme plus aux critères.

[...]

[66] There is no indication that the term “criteria” in section 8.3 is referring to endorsements or that the Applicant must fail more than one endorsement to vary, suspend or cancel the Applicant’s screening endorsement.

(e) The Recertification Testing Changed Since the Decision

[67] Finally, the Applicant’s ultimate assertions (para 65) of his argument regarding the testing requirements post Decision do not have a bearing on the matter.

V. Conclusion

[68] Due to all of the above, the Applicant’s application for judicial review is dismissed with costs.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be dismissed with costs.

Obiter

In his written and oral pleadings, Mr. Williams specified that he was "under duress" during his testing period. If Mr. Williams was "under duress", for family reasons as he stated, then he should have requested a leave of absence, or a longer leave of absence, than he originally took, thus, a continued leave of absence; however, he stated he did not do so, for economic reasons, as he did not want to be exposed to the economic repercussions of a leave of absence which went beyond the time-period allocated to him, one, which he had originally requested, but, only for a certain period of time.

It would appear that Mr. Williams' written and oral pleadings in regard to his "stress" or "under duress" argument is not valid. Mr. Williams, it would seem, should have asked for an additional leave of absence from his position; if, Mr. Williams reached the conclusion that he was unable to take the test at the specific time in question, how could he, nevertheless, in the same time-period, have been able to continue to work, at his screening position, responsible for the security of the public, as per his duties?

"Michel M.J. Shore"

Judge

Federal Court



Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-439-11

STYLE OF CAUSE: David Williams v
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: November 10, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: November 15, 2011

APPEARANCES:

David Williams FOR THE APPLICANT

Malcolm Palmer FOR THE RESPONDENT

SOLICITORS OF RECORD:

David Williams FOR THE APPLICANT
Vancouver, British Columbia

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Vancouver, British Columbia