

JUN 29 1995

File: 166-2-25623

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

ANDREW J. DAMER

Grievor

and

**TREASURY BOARD
(Transport Canada)**

Employer

Before: Rosemary Vondette Simpson, Board Member

For the Grievor: Peter Barnacle, Counsel for the Canadian Air Traffic
Control Association

For the Employer: Ron Snyder, Counsel

Heard at Toronto, Ontario,
January 23, 1995.

DECISION

Mr. Andrew J. Damer, the grievor, is an air traffic controller with 24 years service. He is classified as an AI-5. He is licensed with endorsements for all the locations he has worked. On May 19, 1993, he submitted the following grievance:

On January 20th, 1993, upon successful completion of my aviation medical, I was informed that my licence validation was revoked by regional office. This was due to the fact that the 20/20 vision in my left eye was the result of surgery that had been performed on that eye alone during the previous month. The removal of my medical endorsement forced me to begin immediately using maintenance of salary provisions and consequently lose other benefits including leave credits and opportunity to work available overtime. The removal of my medical was arbitrary, punitive and unjustified. On May 15th, 1993, my medical was re-instated although there was absolutely no change in my vision status, confirmed by test conducted by my ophthalmic surgeon. At least one other individual has been employed by Transport Canada as a air traffic controller with admitted vision problems substantially greater than mine. The employer has not kept abreast of advances in medicine and treatments and had no documentable policy on corrective surgery for vision dealing with air traffic controllers.

Corrective Action Requested

- 1. Determine that I was at all times medically fit and was forced into salary maintenance directly as a result of no information, standards, or policy being in place to deal with my situation.*
- 2. Article 10 of the collective agreement make provision for leave with pay for other reason. I request that because I should have not been placed on maintenance of salary and removed from duty, that all benefits should be reinstated, especially lost credits.*
- 3. That compensation for lost income be awarded for overtime hours no longer available to me during this period.*
- 4. Swift action to correct the lack of a definitive medical standard for air traffic controllers regarding this very popular and effective medical procedure.*

Until the subject matter of the grievance arose, the grievor had always been considered medically fit. He testified that he has never experienced any health problems. In the last 10 years he suffered a marginal deterioration of the sight in his left eye which was corrected by contact lenses or glasses. The problem did not interfere with his work. He was removed from his operational duties on January 20, 1993 and was not returned to them until after he was declared medically fit as of May 15, 1993. The grievor maintains that he was medically fit to perform his duties during the whole period in question.

The grievor testified that in order to improve his vision, he decided to undergo a radial keratotomy on his left eye. The operation was performed by a Dr. Karas on December 14 or 15, 1992. It was a simple procedure taking less than 10 minutes and performed in Dr. Karas' office. The grievor was able to leave in a few minutes and was given an eye patch to wear for a few hours. The only adverse symptom he suffered was a slight feeling of scratchiness on the first day. This symptom disappeared and he never needed to use the eye patch again after the first day.

On December 23, 1992 and January 7, 1993, Mr. Damer testified that he re-attended the office of Dr. Karas for follow-ups. There were no infections or complications. His vision was tested to be 20/20. The witness testified that his present vision is also 20/20 and that it had never changed in the interim.

He did not tell Dr. Karas either before or immediately after the operation that he was an air traffic controller, nor had he told anyone in management at work about the operation. Since the operation was performed on Mr. Damer's days off, he lost no time from work. After the operation he felt able to return to work without corrective lenses.

The grievor continued to work through the month of January 1993 in his regular position. Operational employees must undergo annual medical examinations in order to maintain "fit for duty" status. On January 20, 1993, the grievor reported to Dr. Jovey, the Aviation Medical Officer (A.M.O.), for medical assessment. Dr. Jovey found Mr. Damer's eyesight to be 20/20 and therefore from the point of view of vision, he would be considered "fit" for operational duties. However, when Dr. Jovey reviewed the history of

Mr. Damer's previous eye examinations, he indicated that he was puzzled because Mr. Damer's vision had markedly improved over his last eye examination. It was then that the grievor told Dr. Jovey about the eye operation that he had undergone. Dr. Jovey then telephoned the office of the Regional Aviation Medical Officer (R.A.M.O.) for advice on how to handle the situation. Mr. Damer heard the conversation. After the telephone conversation, Dr. Jovey told Mr. Damer that because of the operation he had undergone he could not certify him as "medically fit". Mr. Damer was stunned by this turn of events. Shortly thereafter, he was informed that he would have to be taken off his operational duties. He would receive full salary while he was off by virtue of the Letter of Understanding (3-91) which provides for "maintenance of salary".

Mr. Fazal Bhimji, Vice-President, Labour Relations, Canadian Air Traffic Control Association, testified. He explained how the Letter of Understanding (3-91), which forms part of the AI collective agreement, works.

To be eligible for this maintenance of salary benefit, one must be an operational controller. It is a protection of salary for one year and is non-renewable. It can be used up in a full year or in shorter periods. During this period all sick leave and annual leave accruing to the controller is "burned off" first. When these credits are gone, the controller remains on full salary. This one-year maintenance of salary is not something a controller would wish to use lightly. Since it is a "once only" benefit, most controllers would want to save this for use only in extreme circumstances when they are ill and unable to obtain a medical endorsement thereby losing their Licence Validation Certificate.

Mr. Damer testified that when he was declared medically unfit and placed on salary maintenance he was told that he might expect to be considered medically unfit for up to two years. The consequences for Mr. Damer of being placed on salary maintenance were that he was not allowed to work and that he lost benefits, such as scheduled overtime. He would have received overtime had he been able to follow his schedule. As well as scheduled overtime, he lost the opportunity for "call-in" overtime.

Ms. A.B. Yakeley, Manager, ACC Operations Toronto, advised Mr. Damer, by letter dated January 20, 1993, that as a result of information relayed from the R.A.M.O., he was to be removed from operational control duties effective January 20, 1993. He would be placed on "maintenance of salary" and his annual leave and sick leave credits would be utilized concurrent with the maintenance of salary (Exhibit G-4).

On February 8, 1993, Dr. Y. Karas, the eye physician and surgeon who performed Mr. Damer's radial keratotomy, wrote to Dr. R.J. Hicks, the Aviation Medical Officer, who examined Mr. Damer's sight on January 20, 1993 (Exhibit G-7). The letter contains the following medical report:

This patient requested to send you the following information.

He underwent Radial Keratotomy on his left eye on December 15, 1992.

His visual acuity without correction prior to the surgery was 20/25 in the right eye and 20/200 in the left. The visual acuity in the left eye improved, after the surgery, to 20/20. His near vision remained normal in both eyes (N.5).

The surgical procedure was, as stated above, Radial Keratotomy. Eight radial incisions were performed.

The post-operative period was uneventful. His vision at this time is stabilizing and the prognosis is excellent.

His visual field is normal.

The pre-operative K-readings were: O.S. 43.00/43.625.

Please let me know if further information is required.

Dr. Hicks then wrote the following letter, dated February 18, 1993, to Mr. Damer (Exhibit G-9):

This will confirm our recent discussions wherein you were advised that you must be considered medically unfit for active controller duties at this time because of the recent surgery you had to your left eye. Accordingly, your medical examination report dated January 19, 1993, has been assessed as unfit for

Category 2 or 3, and Transport Canada is being so advised.

Refractive surgery is generally satisfactory, but well documented adverse results such as diurnal variation in corrected vision, glare-sensitivity and individual variability of results in the near term preclude immediate relicensing post surgery. We would be prepared to consider a restricted licence, dependent on operational requirements, in your case six months following your procedure with the submission of additional medical information. It is requested that you have your attending surgeon provide the following data for our assessment at that time:

- a. preoperative refractive error and keratometer readings;*
- b. a description of the surgical technique;*
- c. the refractive error and keratometer readings at 6 months post surgery; and*
- d. certification that there is no diurnal variation in corrected vision and no increased glare sensitivity.*

Should there be additional questions at all, please do not hesitate to contact our office.

Dr. Karas examined Mr. Damer again on May 6, 1993 and the following report ensued (Exhibit G-6):

The following is an updated report regarding Mr. Damer's ophthalmological condition.

As you are aware, he underwent Radial Keratotomy on his left eye on Tuesday December 15, 1992.

On examination today at 9:00 a.m., and again at 5:00 p.m., his visual acuity without correction was 20/20 in the right eye and 20/20 in the left.

The K-Reading was: O.S. 39.125/39.75.

Please let me know if any further information is required.

Following Dr. Karas' report, Dr. Hicks wrote to Mr. Damer on May 12, 1993 (Exhibit G-5):

This will confirm our recent telephone conversation wherein you were advised that based on Dr. Karas' report dated May 6, 1993 you are considered medically fit for a category 2R; specifically, that you may be employed in Terminal Radar Controller duties only with further review in December 1993. Transport Canada is being advised of this recommendation.

It is requested that you submit a report from your treating ophthalmologist at the one year anniversary date of your surgery with the information as outlined in our letter of April 7, 1993.

Should there be further questions, please contact our office.

While medical deliberations continued concerning the stability of Mr. Damer's sight and his fitness for operational duty, his Air Traffic Controller Licence was actually revoked. This was done by letter dated March 12, 1993 to Mr. Damer from Mr. Joseph Szwalek, A/Regional Director, Aviation Licensing (Exhibit G-10):

Your medical application dated January 19, 1993 and accompanying documentation concerning your medical fitness for a Private Pilot Licence & Air Traffic Controller Licence were reviewed by the Minister's medical advisor in accordance with the Personnel Licensing Handbook, Volume 3, Medical Requirements, Part 3, Paragraphs 2.1(c), 2.33, 3.1(c) & 3.33.

After considering the recommendation of the Minister's medical advisors, we regret to inform you that you are not considered medically fit to exercise the privileges of any type of Flight Crew Licence and therefore in accordance with section 7.1(1)(a) of the Aeronautics Act, your Licence Validation Certificate is not being renewed. This refusal to renew your Licence Validation Certificate No. 126728 becomes effective this date. If you require any further details of your assessment, please contact the Regional Aviation Medical Officer at this address or telephone (416) 224-3144.

This decision may be reviewed in accordance with the provisions of section 7.1 of the Aeronautics Act by filing a written request on or before April 12, 1993 to the Civil Aviation Tribunal Office at the following address:

*The Civil Aviation Tribunal
Room 405, Canada Building
344 Slater Street
OTTAWA, Ontario
K1A 0N5*

A request for review does not operate as a stay of the refusal to renew your Licence Validation Certificate.

Should you request a review, the Tribunal will appoint a time and place for a hearing at which you will be entitled to present evidence and make representation in relation to the decision. On a review of the Minister's decision to refuse a Canadian aviation document, the burden of establishing that the Minister's decision is unjustified is on the person requesting the review.

Ms. Yakeley, Manager, Air Control Centre, Toronto Air Traffic Service Facility, testified for the employer. Her evidence was that as soon as she received notice of the medical assessment, she was bound by the results. She double-checked with the R.A.M.O. and also with the Licensing Office. Both agreed that the surgery which Mr. Damer had undergone invalidated his medical. He had to be removed as an operational controller because he lacked the requisite licence to perform his duties. Ms. Yakeley asked Mr. Damer if he was interested in performing non-operational duties. There was, for example, a terminal course underway and there might be an opportunity to serve as an instructor in that course. Mr. Damer informed her that he was not interested in performing non-operational duties at that time and, while he appreciated her offer, he wanted to devote his time to pursuing the question of his medical fitness for duty.

Ms. Yakeley stated that she herself was very interested in having Mr. Damer's medical status reinstated because it was very costly to the Department to be without one of its operational controllers. She was interested in having him back as soon as possible.

Once a controller's Licence Validation Certificate (LVC) has been removed, the course that she as manager had to follow was quite clear. This is set out in the Letter of Understanding (3-91). The Letter of Understanding reads as follows:

Provided a controller has performed active control duties for the Employer for a period of five (5) years and is no longer able to perform active control duties due to medical reasons, it was agreed that the individual involved would suffer no loss of his or her normal pay for a minimum of one (1) year. Subject to paragraph 4 this one (1) year period will commence on the date on which the medical endorsement of his or her air traffic controller licence is revoked or sixty (60) days following the first day that the employee ceased to exercise active control duties as a result of being on sick leave, whichever is earlier. This maintenance of salary would be conditional upon the employee first performing other duties related to his or her technical background and/or experience as assigned by the Employer for which the employee is medically qualified. If the employee is unable to perform such duties because of medical reasons or if no alternate duties are available then he or she must utilize all earned leave credits during the maintenance of salary period referred to above.

The total maintenance of salary provided under this letter shall not exceed one (1) year during an employee's total period of employment in the Public Service unless, through consultation on individual cases, the parties agree to an extension of salary maintenance.

An employee will not be placed on maintenance of salary if the employee has sufficient sick leave credits to cover the period of his absence and the employee's LVC is not affected.

She did not push Mr. Damer to perform non-operational duties because she supported Mr. Damer's request to have time available to pursue the question of his medical fitness. Mr. Damer himself did not push for these duties. In fact he had only five days of sick leave left in his bank so that he was not disadvantaged by having to "burn off" a large accumulation of sick leave before receiving full pay for days he could not perform his duties. During the whole period that Mr. Damer was off work, his situation seemed to be in some state of review.

Mr. Doug Craven, Superintendent, Training and Human Resources, Air Traffic Services, testified concerning the efforts that he and others in the Department made to have Mr. Damer's medical situation reviewed as soon as possible. A number of letters were sent to Mr. Damer (Exhibits E-4, G-3, G-12) and a Mr. Washington wrote to Mr. Craven (Exhibit E-5) in a memorandum dated April 6, 1993 indicating that he had

discussions with the R.A.M.O. That memorandum provides:

RETURN TO WORK - ANDREW DAHMER

I met with the RAMO on this date to discuss the LVC situation of Andy Dahmer. As you recall, he underwent successful eye surgery, on one eye, in December 1992.

In February 1993, Mr. Dahmer took an eye exam and it was revealed that his vision was becoming stable. The RAMO is going to write Mr. Dahmer and request that he take another eye examination, and providing that his vision is now stable, will restore the LVC with some restrictions. The restriction will be that Mr. Dahmer undertake other eye examinations at programmed intervals (perhaps every six months) and that he be restricted to working only terminal control positions (including data). It is expected that all restrictions will be lifted by December 1993.

Given normal administrative processes, it is expected that Mr. Dahmer would be back to work by May 1, 1993. Should Mr. Dahmer fail to provide the RAMO with the requested eye examination data within a reasonable period, he will be taken off MOS.

Dr. Brenton E. Haskell, Regional Aviation Medical Officer, Ontario Region, testified. He was called as an expert witness for the employer. Counsel for the grievor objected to the fact that he had not been given notice of Dr. Haskell being called as an expert witness. Counsel did not, however, raise objections as to Dr. Haskell's qualifications as an expert.

Dr. Haskell testified that the Minister of Transport had delegated responsibility for setting medical standards for air traffic controllers and pilots to Civil Aviation Medicine, i.e. Dr. Haskell's office.

Dr. Haskell explained the surgical technique of radial keratotomy that Mr. Damer had undergone. He testified as to the amount of consideration he and his colleagues had given to the study of this kind of surgery, its results and its after effects. He referred to attending a Canadian Aviation Visual Standards Conference (Exhibit E-12) at which this subject had been discussed.

He testified that the subject of pilots and controllers having to undergo a waiting period after surgery to allow the sight to stabilize before renewing their licences was discussed by Dr. Haskell and his colleagues over the past few years. In Dr. Haskell's opinion there would be a period of some months at least after the surgery that the patient must be considered unfit for all categories of licences. In the case of Mr. Damer's surgery, there would have been significant physical effects. The structure of the eye and its function were altered. There are some well-known problems associated with this process. People who have had this surgery often have marked variabilities in their sight. There can be a problem with diurnal variation and glare sensitivity which would affect the viewing of visual displays. This could affect Mr. Damer's ability to see aircraft accurately from the tower where he works as well as his ability to work with instrument controls and radar.

Dr. Haskell testified that his office (R.A.M.O.) had been contacted by Dr. Y. Karas by letter dated April 30, 1990 regarding this very surgical procedure. Dr. Karas' position was that operational employees, which would include both pilots and air traffic controllers, should not have to wait prolonged periods before being allowed to return to work. He recommended that the waiting period be reduced to six months. The letter reads as follows (Exhibit E-17):

It is my understanding that the Civil Aviation authorities deny patients who underwent Radial Keratotomy surgery the renewal of their licences for prolonged periods of time.

The operation's side effects are usually transient, and disappear completely within a few months after surgery.

It is my advice that these patients be allowed to regain their licences six months after surgery, on the condition that they undergo two follow-up examinations six months after surgery. One examination must be in the morning, and the other must be in the late evening. By comparing the results of the two examinations, significant fluctuations in vision and glare may be ruled out.

Since most eye surgeons do not give late evening appointments, I would like to offer my patients this service, and would volunteer to send you the appropriate reports.

I would like to take this opportunity to point out that wearing contact lenses can cause glare, fluctuation of vision, and that the lenses may shift in position on the surface of the eye, during a flight. Unlike the side effects of Radial Keratotomy, these conditions are not transient. Yet, contact lens wearers are not denied flying licences.

It is regrettable that these patients, who have wonderful and stable vision, are denied the privilege of flying on the basis of advice your department may have received, based on out-dated information. I would suggest that your department should obtain consultation from surgeons who perform refractive surgery, and therefore are familiar with the recent literature, research, and side effects.

In Mr. Damer's case, Dr. Haskell exercised his discretion to bring him back to operational duties earlier than originally considered after he underwent further tests that satisfied him that he was medically fit.

Mr. Schobesberger, Regional Director of Aviation Licensing of Transport Canada, Ontario Region, testified as to the process of licensing of pilots and air traffic controllers. The licence must be renewed annually or bi-annually. At the time of the annual medical examination, the Medical Examination Report Form is completed. This is forwarded to Dr. Haskell's office who would make the final assessment of fitness. The Medical Examination Report accompanied by the previous file is sent to the Aviation Personnel Licensing Office, i.e. Mr. Schobesberger's office. When a medical endorsement has been withdrawn, Mr. Schobesberger's office must suspend, cancel or refuse to renew the licence. Pursuant to the Air Regulations and under the authority of the *Aeronautics Act*, no other option can be exercised.

The medical requirements for licensing are dealt with by Dr. Haskell's office. The R.A.M.O. makes the recommendations based on findings of medical fitness or unfitness. As pointed out in the letter to Mr. Damer indicating the non-renewal of his licence (Exhibit G-10), the controller affected can request a "review hearing".

It was not necessary to await this letter before removing Mr. Damer from operational duties. In fact, it would be an offence under the *Aeronautics Act* to allow someone to act operationally while knowing of a medical condition of unfitness.

ARGUMENT FOR THE GRIEVOR

Counsel for the grievor basically argued that Mr. Damer should not have been placed on maintenance of salary because he was never medically unfit to perform operational duties. At his medical examination in January 1993, Mr. Damer actually passed the eye examination. In fact, his vision had improved from previous years because of the radial keratotomy that he had taken. His eyesight remained unchanged during the period that he was off work. There is no evidence to show that Mr. Damer was ever medically unfit to perform his duties. The employer should have made greater efforts to find alternatives to placing Mr. Damer on maintenance of salary. One option would have been to assign him non-operational duties. In the beginning, Mr. Damer was told that the date of his return to operational duties was uncertain. He might have to wait two years before being reinstated. Later, this was modified to having to wait "perhaps one year" before being considered again for operational duties. Actually, he was returned to work within five months of the operation. Counsel for the grievor argued that this "moving of the goal posts" indicated a certain arbitrariness of the medical standards.

Counsel for the grievor also argued that Mr. Damer's medical endorsement should not have been withdrawn. Instead he should have been placed in a deferred status until the final tests had been made after the waiting period was over.

ARGUMENT FOR THE EMPLOYER

Counsel for the employer argued that the employer had no control over the medical status of the grievor. Once he had been pronounced medically unfit by the R.A.M.O., the employer had no choice but to remove him from operational duties.

Counsel also argued that I had no jurisdiction to review the finding of medical unfitness of the grievor by the R.A.M.O., citing the *Aeronautics Act*, the Regulations thereto and the Personnel Licensing Handbook.

QUESTION OF TIMELINESS

Counsel for the employer argued that Mr. Damer's grievance was not submitted at the first level of the grievance procedure within the 25-day time limitation period set out in clause 5.03 of the collective agreement between Treasury Board and the Canadian Air Traffic Control Association (Code: 402/91). The matter complained of in the grievance took place on January 20, 1993. The grievance is dated May 19, 1993, approximately four months later.

The grievor's counsel argued that the grievance was not untimely in that the circumstances of Mr. Damer's grievance arose at the point of his return to duty in May 1993. In the alternative, he urged that I exercise my jurisdiction under section 63 of the *P.S.S.R.B. Regulations and Rules of Procedure, 1993* to extend the time limit. Section 63 provides:

63. Notwithstanding anything in this Part, the times prescribed by this Part or provided for in a grievance procedure contained in a collective agreement or in an arbitral award for the doing of any act, the presentation of a grievance at any level or the providing or filing of any notice, reply or document may be extended, either before or after the expiration of those times

- (a) by agreement between the parties; or*
- (b) by the Board, on the application of an employer, an employee or a bargaining agent, on such terms and conditions as the Board considers advisable.*

Having considered the relevant factors in this case, such as the reason for delay, the nature of the grievance and the lack of prejudice to the employer caused by the delay, I have decided that the time limit in the instant case should be extended in order to give Mr. Damer an opportunity to have his grievance heard.

REASONS FOR DECISION

Dr. Jovey, who examined Mr. Damer on January 20, 1993 as part of a routine annual check-up, found him to be ineligible for a renewed medical endorsement. Although the grievor's vision actually showed an improvement over the previous year's test results, Dr. Jovey was concerned about the fact that Mr. Damer had undergone an operation on his left eye in the previous month. He consulted the office of the R.A.M.O. immediately by telephone and it was confirmed that Mr. Damer's medical endorsement would not be renewed at that time. When Mr. Damer's employer received that information the same day it had no other option than to remove him immediately from operational duties. Pursuant to the *Aeronautics Act*, the medical endorsement is an absolute prerequisite of performing operational duties as a controller. Once this step was taken, in order to continue paying the grievor the Department had to place Mr. Damer on salary maintenance or give him other non-operational duties. The Letter of Understanding (3-91) which forms part of the relevant collective agreement is quite clear. It provides that when an employee is removed from active control duties due to medical reasons, he shall suffer no loss of pay for one year provided that certain conditions are met. This "maintenance of salary" provision is basically a protection to the employees despite the fact that use of it involves "burning off" their sick leave credits before the pure salary maintenance provision clicks in. In Mr. Damer's case, he had only five days of sick leave in his bank of credits that had to be used during the approximately four-month period he was on full pay.

In his grievance the grievor maintains that he was entitled to discretionary leave with pay pursuant to Article 10 of the collective agreement. Where there is a specific provision in the collective agreement dealing with pay consequences of the loss by an operational air traffic controller of his medical endorsement, such as the Letter of Understanding (3-91), that provision must prevail over general provisions dealing with discretionary leave with pay.

As for offering Mr. Damer non-operational duties, the employer did explore this option with him. Mr. Damer indicated that he preferred not to accept other duties in order to use the time thus made available to him to pursue the renewal of his medical

endorsement. The Department honoured his choice and did not press non-operational duties upon him, nor did Mr. Damer change his mind and ask the Department for them. He received salary maintenance, i.e. full salary from the time that he was taken off operational duties until the date of his return to work immediately after his medical endorsement was renewed on May 15, 1993.

The grievor has asked in his grievance that I determine that he was at all times "medically fit". I have no jurisdiction to review the Regional Aviation Medical Officer's evaluation of Mr. Damer as being medically unfit as of January 20, 1993 which ultimately resulted in the revocation of his licence. Pursuant to the *Aeronautics Act*, this responsibility falls within the jurisdiction of the Minister. I would, however, like to make the following comments.

The foreword to the Personnel Licensing Handbook, Volume 3, dealing with Medical Requirements, Second Edition, April 1990, reads as follows:

Since the early days of aviation the relationship of medical fitness to flight safety has been recognized. Consequently, many countries have, over the years, accumulated valuable funds of experience and information concerning this relationship from both operational and medical points of view. The International Civil Aviation Organization has co-ordinated much of this experience and information on an international scale, and has thus been able to produce specifications of medical fitness which it considers to be appropriate to various Civil Aviation personnel licences. Canada, in signing the Convention, undertook to implement the ICAO Standards to the fullest extent possible.

The Medical Standards for Canadian Civil Aviation Personnel Licensing are prescribed pursuant to subsection (d) of section 403 of the Air Regulations. This edition of the standards was developed in close conformity to the International Civil Aviation Organization Standards for personnel licensing and is considered to be commensurate with the safe performance of the privileges of respective licences and permits issued or revalidated in accordance with Part IV of the Regulations.

Part IV of the Air Regulations enacted pursuant to the *Aeronautics Act* deals with Personnel Licensing. Paragraph 403.(1)(d) and subsection 403.(2) read:

403.(1) Subject to subsection (2), the Minister may make orders or directions that prescribe

...

(d) the qualifications as to age, medical fitness, knowledge, training, experience, skill and competency of persons to whom a licence or permit may be issued under this Part;

(2) Every person applying for the issue of a licence to act as

- (a) a flight crew member;*
- (b) an aircraft maintenance engineer; or*
- (c) an air traffic controller*

shall comply with the requirements applicable to that licence that are set out in Volumes 1, 2 and 3 of the Personnel Licensing Handbook published, as amended from time to time, by the Minister of Supply and Services.

The Personnel Licensing Handbook provides that the issue or revalidation of a license shall be withheld if the medical requirements prescribed for that license are not met. Sections 17 and 18 of the Handbook state:

17. An applicant assessed unfit at the regional level may submit additional reports of Aviation Medical Examiners, specialist examinations and laboratory reports for reconsideration of the assessment. The applicant may, in addition, request the Regional Aviation Medical Officer, or the Aviation Medical Officer to forward all reports and findings to the Headquarters Aviation Medical Review Board for further consideration and consultation with the Licensing Authority.

18. In the event that a licence, permit or certificate holder cannot be considered fit to exercise the privileges of his licence, permit or certificate under the Medical Standards for Civil Aviation Personnel Licensing, appeal may be made to the Civil Aviation Tribunal.

Dr. Haskell, the Regional Aviation Medical Officer, gave evidence as an expert in aeronautical medicine and his evidence is the only cogent medical evidence I have before me. In his opinion, there was no doubt that Mr. Damer was medically unfit for operational duties as a result of the radial keratotomy he underwent in December 1992. He listed a number of problems that people who undergo this operation normally experience. It is only after a period of time is allowed to pass and it is established by testing that the vision remains constant that the patient can be pronounced medically fit for operational duties.

Dr. Haskell cited a number of reasons why pilots and operational controllers have to undergo a waiting period before they can be found to be medically fit. Dr. Haskell testified that his office (R.A.M.O.) had received a letter dated April 30, 1990 from Dr. Y. Karas regarding radial keratotomy and licensing (Exhibit E-17). In his letter, Dr. Karas did not recommend an immediate return to operational duties for air traffic controllers who underwent this procedure. Although his letter protested the non-renewal of licenses for prolonged periods of time, his advice was that these patients be allowed to regain their licenses six months after surgery if certain conditions are met.

In addition, Dr. Karas wrote a letter to Dr. Hicks on February 8, 1993 in which he refers to Mr. Damer personally. His letter states that Mr. Damer's eyesight is "at this time stabilizing" (Exhibit G-7). This is a recognition of the fact that Mr. Damer required a period of time after his operation to allow his eyesight to stabilize.

Initially it was thought that a waiting period of up to two years was appropriate to determine whether or not he was free from any "sequelae" from his operation. Interventions with the Regional Aviation Medical Officer were made by Mr. Damer's employer on April 6, 1993 (Exhibit E-5). The Regional Aviation Medical Officer continued to review Mr. Damer's case. As a result, his medical was re-assessed, more testing was done and his medical endorsement was reinstated on May 15, 1993. He was thus able to return to operational duties in less than five months from the date of his operation and in less than the six months waiting period referred to by Dr. Karas in his letter of April 30, 1990.

When Mr. Damer was informed that his Licence Validation Certificate (LVC) was not being renewed for medical reasons, he was also informed in the same letter about his right to appeal (Exhibit G-10). In accordance with the provisions of the *Aeronautics Act* and Regulations, he could invoke a review procedure whereby he would be granted a hearing and the opportunity to present evidence and make representations.

Subsections 6.5(1) and (2) of the *Aeronautics Act* state:

6.5(1) Where a physician or an optometrist believes on reasonable grounds that a patient is a flight crew member, an air traffic controller or other holder of a Canadian aviation document that imposes standards of medical or optometric fitness, the physician or optometrist shall, if in his opinion the patient has a medical or optometric condition that is likely to constitute a hazard to aviation safety, inform a medical adviser designated by the Minister forthwith of that opinion and the reasons therefor.

(2) The holder of a Canadian aviation document that imposes standards of medical or optometric fitness shall, prior to any medical or optometric examination of his person by a physician or optometrist, advise the physician or optometrist that he is the holder of such a document.

Had Mr. Damer informed his own doctor, Dr. Y. Karas, that he was an air traffic controller he would undoubtedly have avoided being taken by surprise by the removal of his medical endorsement. It would appear that Dr. Karas was indeed very familiar with the medical requirements regarding this operation and its impact on the medical assessment of an air traffic controller for operational duties. Dr. Karas could have warned Mr. Damer of the implications it would have for him. The operation for Mr. Damer was a purely elective procedure. He was not in any danger of losing his medical endorsement if he did not have it.

Without saying anything to anyone Mr. Damer had the operation and returned to his job and worked as an operational controller for approximately one month before his medical examination on January 20, 1993. From the medical evidence adduced, it would appear that this premature return to work was not without risks. It is also quite clear

from the evidence, however, that Mr. Damer did not appreciate that he might not be able to satisfactorily perform his duties.

For all these reasons, the employer's decision to place him on salary maintenance following his removal from operational duties for medical reasons was in accordance with the provisions of Mr. Damer's collective agreement. Accordingly, the grievance is denied.

**Rosemary Vondette Simpson,
Board Member**

OTTAWA, June 27, 1995.