

Citation: *R. v. Gunner V. Pejanovic*, 2006 CM 20

Docket: F200620

**STANDING COURT MARTIAL
CANADA
ONTARIO
2ND REGIMENT, ROYAL CANADIAN HORSE ARTILLERY
CANADIAN FORCES BASE PETAWAWA**

Date: 14 December 2006

PRESIDING: LIEUTENANT-COLONEL J-G PERRON, M.J.

HER MAJESTY THE QUEEN

v.

**GUNNER V. PEJANOVIC
(Accused)**

FINDING

(Rendered orally)

DECISION

[1] Gunner Pejanovic, this Standing Court Martial must try two charges of being absent without leave. The particulars of the first charge read as follows: In that he, at 0230 hours 6 July 2005 without authority was absent from 2nd Regiment Royal Canadian Horse Artillery and remained absent until 0845 hours 6 July 2005.

[2] The particulars of the second charge to be tried read as follows: In that he, at 0730 hours 7 July 2005 without authority was absent from 2nd Regiment Royal Canadian Horse Artillery and remained absent until 2130 hours 12 July 2005.

[3] I find you guilty of both charges. I will now provide you with my reasons for this finding of guilt.

REASONS

[4] The CMAC decision of *R. v. Gauthier* provides us at paragraph 14 with the elements of the offence for the infraction of being absent without leave. The Court Martial Appeal Court indicates that:

...this is a strict liability offence made up of the following elements:

- (a) the accused had a duty to be in a given place at a specific time;
- (b) the accused failed to be there;
- (c) the accused did not have authority for failing to be there; and
- (d) with respect to the mental element associated with the material elements, the accused was aware of the duty which was imposed on him or her.

[5] At paragraph 15, the court directs that the onus is on the prosecutor to establish beyond a reasonable doubt that the accused was under a duty to be at the place, was aware of the duty and was absent from the place without having been given any authority or leave to do so.

[6] Finally, once these elements are proved by the prosecutor, it falls to the accused to provide a reasonable excuse or justification for failing to be in the required place at the required time or to establish that he or she exercised reasonable diligence in attempting to fulfill the duty.

[7] At the beginning of the prosecution's case, the prosecution presented an Agreed Statement of Facts. This Agreed Statement of Facts was read to the court by the prosecutor and presented as an exhibit. The accused did not object to this Agreed Statement of Facts being presented as an exhibit and also confirmed that he agreed to it as admissions under Military Rule of Evidence 37(b). Military Rule of Evidence 37 (b) reads as follows:

37. When, at his trial, the accused chooses to make a complete or partial admission of incriminating facts in respect of an offence for which he is being tried, he may make a judicial confession

...

(b) after pleading not guilty, and whether or not he also decides to testify as a witness under oath, by personally or through his counsel or defending officer admitting, for the purpose of dispensing with proof, any fact the prosecutor must prove ...

Charge #3

[8] With respect to charge number 3, the Agreed Statement of Facts provides this court with evidence beyond a reasonable doubt for every element of the offence. Although, the accused gave some contradictory evidence pertaining to who had given him the order pertaining to the exact duty he had to perform and at what time and location he was expected to perform this duty, there is no doubt that he had been given an order to

present himself for duty and that he deliberately decided to leave CFB Petawawa knowing full well that he had no authority to do so.

[9] The accused in his testimony did not attempt to provide the court with a reasonable excuse or justification for failing to be in the required place in the required time or to establish that he exercised reasonable diligence in attempting to fulfill his duty. His defence counsel in his final arguments did not attempt to explain or justify his absence.

Charge #1

[10] With respect to charge number 1 or the first charge of absence without leave, the Statement of Facts provides clear evidence to prove beyond a reasonable doubt that the accused had a duty to be in a given place at a specific time; that is to say he had to be at CFB Petawawa at Building Z-120 at 02:0 hours on 6 July 2005. You, Gunner Pejanovic, did not dispute that you had been so ordered on 2 July 2005. You confirmed that you understood the importance of that timing.

[11] There is also no doubt that you failed to be at Building Z-120 at 02:30 hours on 6 July 2005.

[12] Now, the question is: did the accused have authority for failing to be there?

[13] As I said, it is clear from your testimony that you knew that you had to be in Petawawa for 02:30 hours on 6 July 2005 with the rest of the Army Gun Race Team to take the bus to Ottawa. You stated that you knew the importance of this timing. Nonetheless, you chose on 5 July to wait until, as you said, "the last possible moment", to call someone in authority to advise them of your situation.

[14] Faced with this relatively last minute information, Master Bombardier Dalton requested guidance from his superior and relayed this directive to you. Your new order was to ensure that you would be on time for the flight at the Ottawa Airport. As Master Bombardier Dalton testified, it was now too late for you to arrive in Petawawa in time for the 02:30 hours timing. Now, the crucial mission that had to be accomplished was to "at least get one of you on the plane."

[15] This order did not modify the original order that had been given to you on 2 July. This order was given to you to minimize the potential harm to the Army Gun Race Team created by Gunner Thompson's and your actions.

[16] During re-examination, you again stated that you had "waited about the last possible moment" to call someone in Petawawa because you thought you "could get Thompson in trouble."

[17] You also stated that you called Master Bombardier Dalton because "we have a situation what should I do?" You then stated that you were thinking "I can still make it back to Petawawa if you want me to make it if you're going to say you're AWOL if you don't make it by 02:30 hours."

[18] Gunner Pejanovic, it appears to me from your testimony that you don't clearly understand the concept of obeying orders. On 2 July 2005, you had received a clear order to report to Building Z-120 for 02:30 hours on 6 July 2005. Now, you are telling this court that you were expecting Master Bombardier Dalton to repeat this order.

[19] How many times do you expect your superiors to say an order before you're expected to obey it? You could have left Toronto sometime in the evening of 5 July in order to arrive in Petawawa on time or you could have called earlier during the evening. Instead, on 5 July, you chose to do as you wish and at the last possible moment you called your superiors to inform them of a problem.

[20] You are the architect of your misfortunes. You have not provided me with a reasonable excuse or justification for failing to be in the required place, namely Building Z-120 at CFB Petawawa, at 02:30 hours on 5 July 2005. Nor have you established that you exercised reasonable diligence in attempting to fulfill this duty. By calling your superiors at approximately 23:00 hours on 5 July from Toronto, you were basically informing them that you could not be reasonably expected to be in Petawawa for 02:30 hours on 6 July. Waiting to the last possible moment to call is not exercising reasonable diligence in attempting to fulfill your duty.

[21] I will say a few words concerning your first call to Master Bombardier Dalton. During your examination-in-chief, you stated that you called between 22:35 hours and 22:40 hours and then called him back approximately one half hour later. You also stated that your second call with Master Bombardier Dalton finished at about 23:30 hours.

[22] Master Bombardier Dalton testified that the first call was at approximately 23:00 hours and the second call at approximately 23:30 hours. Although there was no clear description of the length of these calls it would make sense that they would last only a few minutes. Therefore, I conclude that your first call to Master Bombardier Dalton was closer to 23:00 hours than to 22:35 hours.

[24] I gather from your testimony that you seem to not understand clearly two fundamental related concepts that are at the very heart of any military force. I am talking about discipline and obeying orders.

[25] It is accepted in Canada that we have special disciplinary standards in the military. The Supreme Court of Canada in its *R. v. Genereux* 1992 decision confirmed this and stated at paragraph 60:

Without a code of service discipline the armed forces could not discharge the function for which they were created. In all likelihood those who join the armed forces do so in time of war from motives of patriotism and in time of peace against the eventuality of war. To function efficiently as a force there must be prompt obedience to all lawful orders of superiors, concern, support for and concerted action with their comrades and a reverence for and a pride in the traditions of the service. All members embark upon rigorous training to fit themselves physically and mentally for the fulfilment of the role they have chosen and paramount in that there must be rigid adherence to discipline.

[26] You, through your counsel, assert that your respect for the buddy system is the justification for your absence. You might as well start learning today what discipline is and what the true meaning fo the buddy system is and how it fits within discipline in the Canadian Forces. The buddy system is important, it is there to ensure that we take care of our own. The buddy system forms part of the cohesion and esprit de corps that we must have in the military. These are the characteristics of an army that will help each of us survive and achieve our missions.

[27] I will now tell you what the buddy system is not. The buddy system is not a reason or an excuse for one to decide when he or she wants to obey orders or not. You were a member of the Army Gun Race Team, you occupied an important position within this team, this gun team was an important public relations exercise for the Canadian Army. You knew the importance of that trip to Calgary.

[28] You simply made the wrong decision, the wrong choice on 5 July 2005. You could have called your superiors earlier and ask them for guidance, you chose not to. You placed yourself in a difficult situation and you also placed them in a difficult situation by calling them at the last minute. Gunner Thompson put himself in a difficult situation. Your superiors were attempting to mitigate the situation that you and Gunner Thompson had created; they wanted to ensure that you would be on that flight to Calgary since the whereabouts of Gunner Thompson were unknown at the time of that last minute call.

[29] Discipline and obeying orders are the key to the success of an operation, be it combat operations in Afghanistan or the successful completion of a planned public relations event involving the Army Gun Team in Canada.

[30] I expect that you have been taught from your very first days in the Canadian Forces that obeying orders is fundamental in the military. Article 19.015 of the Queen's Orders and Regulations for the Canadian Forces states that and I quote:

Every officer and non-commissioned member shall obey lawful commands and orders of a superior officer.

[31] I can't say that I am impressed with your attitude towards obeying orders and towards discipline. I strongly recommend that you reflect on this if you wish to have a successful career in the Canadian Forces.

LIEUTENANT-COLONEL J-G PERRON, M.J.

COUNSEL:

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