



## COURT MARTIAL

**Citation:** *R. v. Misiaczyk*, 2016 CM 3018

**Date:** 20161107

**Docket:** 201613

Standing Court Martial

4th Canadian Division Support Base Petawawa  
Petawawa, Ontario, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Warrant Officer R.P. Misiaczyk, Offender**

**Before:** Lieutenant-Colonel L.-V. d'Auteuil, M.J.

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### **REASONS FOR SENTENCE**

(Orally)

[1] Warrant Officer Misiaczyk, having accepted and recorded a plea of guilty in respect of the second charge, the Court finds you now guilty of this charge, and considering my decision on the first and the third charge, I find you not guilty of those charges.

[2] In the particular context of an armed force, the military justice system constitutes the ultimate means of enforcing discipline, which is a fundamental element of military activity in the Canadian Armed Forces (CAF). The purpose of this system is to prevent misconduct, or in a more positive way, to promote good conduct. It is through discipline that an armed force ensures that its members would accomplish, in a trusting and reliable manner, successful missions. The military justice system also ensures that public order is maintained and that those subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[3] Here, in this case, the prosecutor and the offender's defence counsel made a joint submission on a sentence to be imposed by the Court. They recommended that this Court sentence you to detention for a period of 15 days.

[4] Although this Court is not bound by this joint recommendation, it is generally accepted that the sentencing judge should depart from the joint submission only when it would be contrary to the public interest, as stated very recently by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43 at paragraph 32:

[32] Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[5] It is a more stringent test, which no longer involves the fitness test, i.e. is the proposed sentence reasonable and appropriate in the circumstances. The reason for such approach was well explained by the Supreme Court of Canada in *Anthony-Cook*.

[6] First, it is proper and necessary to the system, to the penal system. In the decision of *Anthony-Cook*, it was a criminal justice system that was under scrutiny, but it is applicable before this Court martial, because I think it is also necessary for the following reasons:

- (a) It provides certainty for the accused, because the accused gives up his right to trial knowing that there is a good possibility that the joint submission would be accepted by the Court. If there is no certainty, why speaking with the prosecution? It would be done for nothing;
- (b) There is a certainty for the prosecution, too, as expressed by the Supreme Court of Canada, because it minimizes the risk and secures convictions, perhaps not on all charges but on some of them; and
- (c) It also minimizes the stress and the legal costs and, as mentioned by Major Boutin, it minimizes the impact on other participants such as victims and witnesses.

[7] In order for the Court to depart from the suggestion made by counsel, it would be done in those specific circumstances only where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system and I refer here to the decision of *Anthony-Cook*, paragraph 42.

[8] I would highlight the fact that this approach relies heavily on the work of the prosecution as representing the community's interests, and the defence counsel as acting in the accused's best interest.

[9] Here, I'm dealing with Warrant Officer Misiaczyk, who has more than 20 years' experience as an infantryman in the CAF. He has extensive experience in leadership roles, has been deployed many times and has served his country well. My

understanding is that his experience and his outstanding performance have often been recognized by his chain of command.

[10] The Statement of Circumstances and the Agreed Statement of Facts filed in court are reproduced to provide a full account of the circumstances of both the offence and the offender:

“STATEMENT OF CIRCUMSTANCES

1. At all material times:
  - a. WO Misiaczyk and Cpl Fernandes were both members of the Regular Force, Canadian Armed Forces, 1 Royal Canadian Regiment (1 RCR).
  - b. By virtue of rank, WO Misiaczyk was a superior of Cpl Fernandes. WO Misiaczyk knew that Cpl Fernandes was subordinate to him.
  - c. Both were employed within the Reconnaissance Platoon;
2. On 7 August 2015, WO Misiaczyk and Cpl Fernandes, along with other members from Reconnaissance Platoon, were on exercise in Corner Brook, Newfoundland. While on exercise, the members from Reconnaissance Platoon were sleeping at Gallipoli Armoury. WO Misiaczyk was the Reconnaissance Platoon Warrant Officer and acting platoon commander. He was the senior member on the exercise.
3. Toward the beginning of the exercise, WO Misiaczyk had given instructions to the troops under his command to keep the Armoury in good order and for members to clean after themselves at all times.
4. On the evening of Friday 7 August 2015, members of the Reconnaissance Platoon on the exercise were provided with “time off” and authorized to go out into town. Cpl Fernandes, along with other members from Reconnaissance Platoon, went out to town for drinks at local bars. WO Misiaczyk went out to town by himself. Both WO Misiaczyk and Cpl Fernandes consumed alcohol during the evening.
5. Upon returning to the Armoury in the early hours of Saturday 8 August 2015, WO Misiaczyk went to the kitchen, where he found Cpl Fernandes and Cpl Koehler who were cooking some food and having a discussion. A heated exchange involving primarily WO Misiaczyk and Cpl Fernandes ensued. WO Misiaczyk eventually directed both members to go to bed.

6. Once Cpl Fernandes and Cpl Koehler were at their respective bed space, WO Misiaczyk angrily expressed his dissatisfaction regarding the state of the kitchen, which was not in good order.

7. WO Misiaczyk then directed both members to go clean the kitchen. Through this, WO Misiaczyk used swear words and slur, which included "I am not your nigger". While Cpl Koehler complied and proceeded to the kitchen to clean, Cpl Fernandes resumed arguing with WO Misiaczyk.

8. At one point during the heated discussion, WO Misiaczyk said "you guys want to fight, I will fucking fight". Cpl Fernandes said "let's go outside", to which WO Misiaczyk replied "why go outside", but then agreed to follow Cpl Fernandes. Cpl Fernandes had taken his T-shirt off and moved towards the side exit doors followed by WO Misiaczyk. Cpl Fernandes did proceed to exit the building. WO Misiaczyk did not follow through but rather locked the doors behind Cpl Fernandes, which he, after the fact, claimed was done with the hope of diffusing the situation. A few seconds later, Cpl Fernandes re-entered the building through the front doors and moved towards WO Misiaczyk. A further heated discussion ensued and, at one point, Cpl Fernandes took a posture which WO Misiaczyk perceived to be aggressive and menacing. WO Misiaczyk then pushed Cpl Fernandes onto another member's empty cot and violently punched him in the face several times. Cpl Fernandes did not consent to being punched in the face by WO Misiaczyk. Cpl Fernandes did not strike back.

9. This was witnessed by several other subordinates who had been awoken by the series of events. One of the members present recorded a video with his iPhone showing WO Misiaczyk punching Cpl Fernandes.

10. The video shows 10 distinctive punches delivered by WO Misiaczyk. The distinctive noise of the punches making contact with Cpl Fernandes' face can clearly be heard, as well as WO Misiaczyk's heavy breathing while he punches him. While delivering the final 3 punches, WO Misiaczyk is heard saying the following to Cpl Fernandes:

"[Inaudible] You fucked up. [Inaudible] bad mistake. You better fucking listen to me. You better fucking [Inaudible]. You fucking mother fucker. [Inaudible]"

11. Once done punching Cpl Fernandes, WO Misiaczyk made angry utterances directed at Cpl Fernandes, which included the following:

a. "Fucking listen to me. Do not fuck with me. I am a fucking 46 years old man. I've got fucking 6 fucking tours, I've got 3 combat tours.

I've managed to fucking get all my troops back alive. I will not put up with any of your fucking shit”;

- b. “Do you fucking understand?”, which he repeats numerous time;
- c. “Don’t ever try to fuck with me”;
- d. “Get into your fucking bed after you clean yourself off”;
- e. “I’m not fucking dealing with you. It’s not fucking funny. You’re fucking being fucking insubordinate”.

12. As a result of the punches delivered by WO Misiaczyk, Cpl Fernandes suffered a bruised and swollen left eye, a cut and swollen lip as well as two slightly chipped teeth. The injuries sustained by Cpl Fernandes to his eye and lip were photographed by Sgt Graham on 8 August 2015, outside the Gallipoli Armoury in Corner Brook, Newfoundland. This picture is being introduced as an exhibit in these proceedings.

13. Cpl Fernandes’ eye remained painful and almost shut for a few days. It took approximately three weeks for the injuries to his eyes and lip to fully heal.”

#### “AGREED STATEMENT OF FACTS

1. Following the incident, while the exercise was still ongoing, Cpl Fernandes was repatriated as the unit Chain of Command assessed it was best to separate him from WO Misiaczyk, pending investigation.

2. Following the return to the unit after the conclusion of the exercise, the unit Chain of Command determined that WO Misiaczyk could no longer be employed as Platoon Warrant Officer, in charge of many subordinates. He was transferred to an operations’ position within the administrative company to be more closely supervised.

3. Cpl Fernandes indicated being uncomfortable with the prospect of working with WO Misiaczyk in the future, although he will, if directed to.

4. In the immediate aftermath, the moral of the members on the exercise was negatively affected by this incident. Despite that, the overall impact of this incident on the unit operational capability was minimal. The Unit did complete the exercise successfully with WO Misiaczyk continuing as OC without further incident or disruption.

5. Since the incident, WO Misiaczyk has continuously maintained a high degree of professionalism and leadership. While no longer in a supervisor role, WO Misiaczyk's recent work performance has been qualified as outstanding by his superiors. WO Misiaczyk has recognized that his actions constitute a serious failure of leadership and expressed genuine regrets to his supervisors."

[11] So, these circumstances of the incident with the agreed statement of facts and your personal circumstances, Warrant Officer Misiaczyk, led me to make a decision regarding the joint submission made to me, and I decided to accept this joint submission made by counsel to sentence you to detention for a period of 15 days considering that it is not contrary to the public interest and will not bring the administration of justice into disrepute.

[12] I am convinced that the professionalism of the prosecution and your counsel resulted in good discussions and you received good advice. I took the time to really explain the offence and you told me that you understood the offence, its nature, and the maximum punishment that may be imposed by the Court. I accepted your guilty plea, and the additional questions I had for counsel were well answered. I think it was loud and clear, it's clearly the result of discussions that were well conducted between counsel and I do not see anything with the suggestion that would be contrary to the public interest or would bring the administration of justice into disrepute.

**FOR THESE REASONS, THE COURT:**

[13] **FINDS** you guilty of the second charge; and

[14] **SENTENCES** you to detention for a period of 15 days.

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**Counsel:**

Major D.J.G. Martin and Captain C. Gaudreault for the Director of Military Prosecutions

Major J.L.P.L. Boutin, Defence Counsel Services, Counsel for Warrant Officer R.P. Misiaczyk