



COURT MARTIAL

Citation: *R. v. Penner*, 2016 CM 1018

Date: 20161005

Docket: 201605

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Ordinary Seaman E.B. Penner, Offender

Before: Colonel M. Dutil, C.M.J.

REASONS FOR SENTENCE

(Orally)

[1] The Court recorded and accepted a plea of guilty entered by Ordinary Seaman Penner to one charge under section 117(b) of the *National Defence Act* for having improperly demanded compensation in respect of the performance of a military duty. The charge reads as follows:

FIRST CHARGE
s. 117(b) *NDA*

IMPROPERLY DEMANDED
COMPENSATION IN RESPECT OF THE
PERFORMANCE OF A MILITARY DUTY

Particulars: In that he, on 14 September 2015, at approximately 1145 hours, at Nelles Block, CFB Esquimalt, demanded that T77 159 386 OS Gross compensate him with one carton of cigarettes in return for not reporting alcohol found in OS Gross's room following an inspection undertaken

under OS Penner's authority as a Nelles Block Barrack Warden.

[2] Counsel made a joint recommendation in asking the Court to impose a sentence composed of a reprimand and a fine in the amount of \$800, payable in four instalments. Unless the Court finds that the proposed sentence is contrary to public interest or that it would bring the administration of justice into disrepute, the Court must accept it. After review, the Court accepts the joint proposal as it is a fair and just sentence that contributes to maintain discipline in promoting the objectives of denunciation of the conduct, rehabilitation of the offender, as well as general deterrence.

[3] The facts surrounding the commission of the offence reveal that:

Ordinary Seaman Penner enrolled in the Canadian Armed Forces on 10 January 2013. His trade is steward. He completed his trade qualification level 3 in November of 2013 and was posted to CFB Esquimalt that month.

On 14 September 2015, Ordinary Seaman Penner was working as a Barrack Warden in Nelles Block, at Canadian Forces Base Esquimalt. At approximately 1140 hours, he knocked on the door of a Single Quarters (SQ) barrack room assigned to two ordinary seamen. One occupant was inside, and answered the door. The offender announced that he was conducting a random room inspection. He was not accompanied by any other member. The occupant allowed the offender to enter the room. Ordinary Seaman Penner proceeded to inspect the room. He then opened the fridge and found a bottle of beer.

The Base Single Quarters Standing Orders stated that rooms may be inspected at any time, and that rounds are conducted "to ensure that [they] are maintained at a level conducive to good hygiene, sanitation, and of a high military standard." The standing orders did not permit inspection of any areas during regular rounds where members have a reasonable expectation of privacy for the purpose of looking for contraband or conducting an investigation. There is no evidence that there was a smell or leak emanating from the fridge that would have provided grounds for a hygiene inspection.

The offender asked the first occupant about the bottle of beer. He answered that he could not say how the beer got there. Ordinary Seaman Penner sent him to get his roommate. Both occupants returned to the room. The second occupant admitted the beer was his. The offender told them that they were in a lot of trouble. He told the owner of the bottle that he could be charged, and that it would be a mark on his record, that he may be willing to overlook the bottle of beer, but that the second occupant would owe him a favour. Ordinary Seaman Penner then told them that

they could receive a clean inspection report if they provided him with a carton of Pall Mall Menthol cigarettes the next time he was on duty, which was to be 16 September 2015. He also warned them that if anyone found out what he was doing, they would all be in trouble.

Ordinary Seaman Penner communicated with the first occupant by text over the next two days, telling him to remind his roommate that he would be back on duty on 16 September.

[4] The evidence filed at the sentencing hearing consists of character and reference letters, an agreed statement of facts, and a form DND 2315 (Terms of Service) indicating that the offender has decided to release from the Canadian Armed Forces after his initial engagement. Ordinary Seaman Penner will be released on 9 January 2017. The offender is a qualified private pilot and he intends to finish commercial pilot line training. He has applied at a commercial airline company in British Columbia and he is awaiting a reply.

[5] As the fundamental purpose of sentencing at court martial is to contribute to the respect of the law and the maintenance of military discipline, it must be achieved by imposing punishments that meet one or more of the following objectives: to denounce the unlawful conduct; to deter the offender, but also others who might be tempted to commit such offences; to separate offenders from society, where necessary; to provide reparations for harm done to the victims or to the community; to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community; and, the reformation and rehabilitation of the offender.

[6] The sentence must also take into consideration the following principles. The sentence must be commensurate with the gravity of the offence, the previous character of the offender and his or her degree of responsibility. It should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Finally, the sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. However, it remains that the Court must act with restraint in determining sentence in imposing such punishment that should be the minimum necessary intervention to maintain discipline.

[7] In addition to the objective seriousness of this offence, where a person found guilty is liable to imprisonment for less than two years, the Court considers that the aggravating factors in this case relate to the misuse and abuse of the offender's position and authority as a barrack warden and an attempt to bribe two very junior sailors in vulnerable positions. However, the Court considers the following elements to be mitigating factors in the circumstances:

- a. The plea of guilty of Ordinary Seaman Penner. The offender has admitted his guilt to the offence before the court. The Court considers that it is an

expression of remorse for his actions and the acceptance of his responsibility;

- b. The absence of a criminal or disciplinary record. The offender has no prior criminal conviction and it is his first encounter with the military justice system; and
- c. Finally, the age and the financial situation of the offender: Ordinary Seaman Penner is only 26 years of age and he will be effectively released in January 2017.

FOR THESE REASONS, THE COURT:

[8] **FINDS** you guilty of one charge under section 117(b) of the *National Defence Act* for having improperly demanded compensation in respect of the performance of a military duty.

[9] **SENTENCES** you to the following punishments: a reprimand and a fine in the amount of \$800, payable in four monthly instalments, beginning 15 October 2016. The last installment shall cover the remaining amount due and be payable at the date of release.

Counsel:

Major E.J. Cottrill for the Director of Military Prosecutions

Major B.L.J. Tremblay, Defence Counsel Services, Counsel for Ordinary Seaman E.B. Penner