

Citation: *R. v. Lieutenant J. Hernandez*, 2009 CM 4003

Docket: 200879

**STANDING COURT MARTIAL
CANADA
ALBERTA
CANADIAN FORCES BASE WAINWRIGHT**

Date: 17 February 2009

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

HER MAJESTY THE QUEEN

v.

**LIEUTENANT J. HERNANDEZ
(Offender)**

SENTENCE

(Rendered Orally)

[1] Lieutenant Hernandez, stand up. Lieutenant Hernandez having accepted and recorded your plea of guilty to charges number 1 and number 2, the court now finds you guilty of these charges. You may sit down.

[2] The statement of circumstances, to which you formally admitted the facts as conclusive evidence of your guilt provides this court with the circumstances surrounding the commission of these offences.

[3] On 13 September 2007, while you were at the officers' mess at CFB Borden, you were drunk. You were drunk because you had consumed approximately two or three pitchers of beer while participating in a drinking game. You were stumbling, your speech was slurred and you were bumping into people. Your behaviour was erratic in that you were at times aggressive and at other times laughing or crying. Twice in the process of falling forward, you had to brace yourself by putting your hand on another officer. During the first occasion, you put your hand on the chest of a female captain and the second time you braced yourself by putting your hand on another captain's back.

[4] Major Cohen, who was part of that group of officers, ordered you to leave the group alone. Major Cohen was dressed in his uniform. You verbally threat-

ened Major Cohen and you became physically aggressive. It appeared that you were about to strike Major Cohen. You moved towards him and you pushed your chest against his chest.

[5] Major Cohen left to call the police since he felt the situation was getting out of control. A captain walked you to your room. These are the facts of this case.

[6] The principles of sentencing which are common to both courts martial and civilian criminal trials in Canada have been expressed in various ways. Generally, they are founded on the need to protect the public and the public includes the Canadian Forces. The primary principles are the principles of deterrence that includes specific deterrence in the sense of deterrent effect on you personally as well as general deterrence; that is deterrence for others who might be tempted to commit similar offences. The principles also include the principle of denunciation of the conduct and last but not least the principle of reformation and rehabilitation of the offender.

[7] The court must determine if protection of the public would best be served by deterrence, rehabilitation, denunciation, or a combination of those factors.

[8] The court has considered the guidance set out in section 718 to 718.2 of the *Criminal Code of Canada*. This guidance includes the denunciation of unlawful conduct to deter the offender and other persons from committing offences, to separate the offender from society where necessary, to assist in rehabilitating offenders, to provide reparations for harm done to victims or to the community and to promote a sense of responsibility in offenders and acknowledgment of the harm done to victims and to the community.

[9] The court is also required, in imposing a sentence, to follow the directions set out in article 112.48 of Queen's Regulations and Orders which obliges it in determining a sentence to take into account any indirect consequences of the finding or of the sentence and impose a sentence commensurate with the gravity of the offence and the previous character of the offender.

[10] The court must impose a sentence that should be the minimum necessary sentence to maintain discipline. The ultimate aim of sentencing is the restoration of discipline in the offender and in military society.

[11] Discipline is at the heart of the matter in this case. Discipline is that quality that every CF member must have which allows him or her to put the interests of Canada and the interests of the Canadian Forces before his or her personal interests. This is necessary because Canadian Forces members must willingly and promptly obey lawful orders that may have very devastating personal consequences such as injury or death. Discipline can be described as a quality but ultimately it is something which is

developed and encouraged by the Canadian Forces through instruction training and practice. It is an internal quality. It is one of the fundamental prerequisites to operational efficiency in any armed force.

[12] The prosecution and your defence counsel have jointly proposed a sentence composed of a reprimand and a fine in the amount of 1000 dollars to be paid in monthly instalments of 250 dollars.

[13] The Court Martial Appeal Court decision in *R. v. Paquette* [1998] C.M.A.J. No. 8, clearly stated that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or unless the sentence is otherwise not in the public interest.

[14] I will now set out the aggravating circumstances and the mitigating circumstances that I have considered in determining the appropriate sentence in this case. I consider the following to be aggravating. You became intoxicated to a point where you were a general nuisance to other members of the officers' mess and you became aggressive when a superior officer intervened and ordered you to leave a group of officers alone. Although you were not charged with the much more serious offence of striking or offering violence against a superior officer, that being section 84 of the *National Defence Act*, which provides for a maximum punishment of imprisonment for life and you were not charged with insubordinate behaviour, that being section 85 of the *National Defence Act*, which provides for a maximum punishment of dismissal with disgrace from Her Majesty's service, you did commit an assault against a superior officer while in the presence of a number of officers. You were 36 years old and you had served in the Canadian Forces for approximately 13 years when you committed these offences; you had enough experience to know better.

[15] As to the mitigating circumstances, I note the following. You do not have a conduct sheet. You have fully cooperated with the CFNIS investigation and you have pled guilty to both charges. Therefore, the court accepts that you do regret your actions and that you do take full responsibility for your actions. You took steps to assess if you had any specific problems related to the consumption of alcohol; it would appear from the evidence presented by your counsel that you do not have such problems. It would also appear from your Personnel Evaluation Reports and from the reference letter provided by Major Brulé that this incident could be described as one that is out of character.

DECISION

[16] Lieutenant Hernandez, stand up. You drank beer to a level of intoxication that prevented you from using your common sense to properly judge the situation and act accordingly. Becoming inebriated while attending TGIT at the officers' mess is

not in itself a service offence. One runs afoul with the Code of Service Discipline when one drinks to a point where one is not in control of himself or herself and behaves in a disorderly manner or in a manner likely to bring discredit upon Her Majesty's Forces. While your actions are not the worst that a military tribunal has seen or will see, they are nonetheless unacceptable and cannot be condoned. The Canadian Forces cannot tolerate such conduct. Your conduct showed a total lack of self-discipline.

[17] Having said that, I do note that you have taken full responsibility for your actions and that, based on the evidence before me, they do appear to be out of character.

[18] Therefore, I will agree with the joint submission of counsel on sentencing.

[19] I sentence you to a reprimand and a fine in the amount of 1000 dollars to be paid in monthly payments of 250 dollars.

LIEUTENANT COLONEL J-G PERRON, M.J.

Counsel:

Major B. McMahon, Regional Military Prosecutor, Western Area.
Counsel for Her Majesty The Queen
Captain B. Tremblay, Directorate of Defence Counsel Services
Counsel for Lieutenant J. Hernandez