

**Citation:** *R. v. ex-Petty Officer 1st Class R.L. Gero*, 2008 CM 4006

**Docket:** 200774

**DISCIPLINARY COURT MARTIAL  
CANADA  
NOVA SCOTIA  
CANADIAN FORCES BASE HALIFAX**

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**Date:** 21 May 2008

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

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**HER MAJESTY THE QUEEN**

**v.**

**EX-PETTY OFFICER 1ST CLASS R.L. GERO  
(Offender)**

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**SENTENCE**

**(Rendered orally)**

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[1] Ex-Petty Officer 1st Class Gero, please stand up. Ex-Petty Officer 1st Class Gero, having accepted and recorded your plea of guilty to charge number two, the court now finds you guilty of this charge. You have pled guilty to a charge laid under section 116 of the *National Defence Act*. You may be seated.

[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 this offence.

[3] You were employed as the Regulating Petty Officer at the Fleet Maintenance Facility Cape Scott at the time of the offence. As a secondary duty, you were entrusted with the custody and control of the unit equity fund. You began this secondary duty in mid-June 2005, until you were deployed overseas in November 2006. You were briefed on how to perform this secondary duty when the fund was transferred to you. This equity fund is a non-public fund provided for the benefit of unit members. This fund is used for events such as retirement functions, promotion parties, and the annual Christmas dance. The primary purpose of the fund is the promotion of morale and the welfare of unit members.

[4] On or about 10 November 2006, you gave the unit equity fund to Chief Petty Officer 1st Class Fisher. Although Chief Petty Officer 1st Class Fisher had insisted that you both conduct an audit before he would accept the responsibility for the fund, this audit did not occur because you brought the remaining money of the fund and the receipts for the spent money to Chief Petty Officer 1st Class Fisher on your last morning at Cape Scott, and did not return to Chief Petty Officer 1st Class Fisher's office after your farewell luncheon to complete this audit.

[5] Chief Petty Officer 1st Class Fisher completed an audit in the presence of Petty Officer 2nd Class Miller and discovered that \$1, 484.19 was missing from the fund for the fiscal year 2006/2007. This amount represented approximately 50 per cent of the fund. Chief Petty Officer 1st Class Fisher informed the military police of this situation. When you were asked by your supervisor, and when you were questioned under caution by the military police as to the whereabouts of this missing amount, you answered that it was in a safe deposit box at the Toronto-Dominion Bank. These answers were false. You did not have a safety deposit box at that bank.

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

[7] The court has also considered the guidance set out in sections 718 to 718.2 of the *Criminal Code of Canada*. Section 718 sets out the fundamental purpose of sentencing as a means of contributing to ensure respect for the law and the maintenance of a just and peaceful society by the imposition of just sanctions that have one or more of the following objectives: the denunciation of unlawful conduct; deterring the offender and other persons from committing offences; separating the offender from society, where necessary; assisting in rehabilitating offenders; providing reparations for harm done to victims or to the community; and the promotion of a sense of responsibility in offenders in acknowledgment of the harm done to victims and to the community.

[8] 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. Usually, the court must also give consider-

ation to the fact that sentences of offenders who commit similar offences in similar circumstances should not be disproportionately different. I have not been able to accomplish this exercise in comparison since I was not provided, by either counsel, with any case law that is similar to the circumstances of this case.

[9] Although I have considered the principles and purposes set out in sections 718 to 718.2 of the *Criminal Code of Canada*, and have taken them into consideration when I considered the joint submission on sentencing, I am mindful that the ultimate aim of sentencing in the court martial process is the restoration of discipline in the offender and in military society. The court must impose a sentence that should be the minimum necessary sentence to maintain discipline.

[10] The prosecution and your defence counsel have jointly proposed a sentence of a reprimand and a fine in the amount of \$1, 500. They have also recommended that this fine be paid at a rate of \$200 per month. The Court Martial Appeal Court has stated clearly 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.

[11] I will firstly address the aggravating factors of this case. The amount that was lost because of your neglect is significant. It is significant because it is a considerable portion of the complete amount allotted to the unit. I understand that the total sum of the unit equity fund would be approximately \$3,300. You were 49 years old and had the benefit of approximately 29 years of service at the time of the offence. You were a Petty Officer 1st Class. You had been in the Canadian Forces long enough, and you had all the necessary experience to know the importance of that unit fund. You also had enough experience to understand the importance of performing that secondary duty to the best of your abilities. Although the Statement of Circumstances at Exhibit 6 infers that the cause of the loss is a pattern of negligence and not a momentary lapse, it does not provide any further evidence or description pertaining to the pattern of negligence.

[12] The maximum punishment for this offence is imprisonment for less than two years. When one examines the service offences found at sections 73 to 129 of the *National Defence Act*, one discovers that 25 of these 58 service offences have as a maximum punishment imprisonment for less than two years. This is the least severe of the maximum punishments found at sections 73 to 129. I therefore conclude that these 25 offences, which include section 116, are objectively less serious than the other 33 service offences found at sections 73 to 129.

[13] Notwithstanding my comment pertaining to the objective gravity of this offence, I find that the subjective gravity of this offence could be significant, depending on the evidence presented at trial. Your superiors, and more importantly your fellow

unit members, trusted you to manage that fund efficiently to permit the unit to take full advantage of the fund.

[14] Although the Statement of Circumstances indicates that the loss of this money due to your neglect has had a negative impact on the morale of the members of the Fleet Maintenance Facility Cape Scott, and that it also had a negative effect on the trust of civilians and of junior non-commissioned members in the chain of command, I have not been provided with any specific evidence to illustrate these negative consequences of this loss and may give it only a certain weight. One can safely infer that there will be negative consequences for a unit following such loss of money, but I may not put as much weight on this aggravating factor as I would have had I been provided with more detailed evidence.

[15] You did lie to your supervisor and to the police when they interviewed you and were asking you about the missing amount. It is possible, as argued by the prosecutor, that you might have lied in an attempt to hide the fact that you had lost this money. Since I have not been provided with any explanation as to why you did say this lie, and I do not have a crystal ball and will not attempt to guess what was your motive to lie, I am left with the impression that you initially tried to hide this loss.

[16] I will now deal with the evidence in mitigation of sentence. You do not have a conduct sheet; therefore, you are a first time offender. You have made full restitution of the lost amount of \$1,484.19. I have also reviewed Exhibit 7, the Calculation of Annuity, and Exhibit 8, the Agreed Statement of Facts, when determining a just sentence in this case. It would appear that you indicated at an early stage that you wished to plead guilty at your trial. Canadian jurisprudence generally considers an early plea of guilty as a tangible sign that the offender feels remorse for his or her actions, in that he or she takes responsibility for his or her illegal actions and the harm done as a consequence of these actions. Therefore, an early plea of guilty will usually be considered as a mitigating factor.

[17] This approach is generally not seen as a contradiction of the right to silence and of the right to have the Crown prove, beyond a reasonable doubt, the charge laid against the accused, but is seen as a means for the courts to impose a more lenient sentence because the plea of guilty usually means that the accused wants to take responsibility for the unlawful actions. Also, witnesses do not have to testify, and a guilty plea greatly reduces the costs associated with a judicial proceeding.

[18] You have served Canada and the Canadian Forces for 30 years. You have been awarded the Former Yugoslavia Medal with Bar, the Joint Task Force Southwest Asia Medal. You have also been awarded the Queen's Golden Jubilee Medal, as well as the Canadian Forces Decoration and the Canadian Peacekeeping Service Medal. It would appear that you had an unblemished record until today.

[19] I have carefully reviewed the Personnel Evaluation Report at Exhibit 9, and the Personnel Development Review at Exhibit 10, the letters of appreciation at Exhibits 11 and 12. They describe the qualities and traits of character that we wish to see in a non-commissioned officer. They describe a solid sailor who puts the interests of the organization ahead of his own interests. They also describe a sailor who takes care of his subordinates. The PER and the PDR are exceptional. They describe an exceptional and meticulous administrator and a highly resourceful planner. The descriptions of your managerial qualities, as well as your personal qualities, are quite at odds with the nature of the offence you have committed.

[20] Neglect is defined in the Concise Oxford English Dictionary as, "Fail to give proper care or attention to," and "Fail to do something." The loss of the unit equity fund money because of your neglect seems quite out of character if one compares it with Exhibits 9, 10, 11, and 12. Your counsel said that this case is about a mistake during your career. It might be so, but I have not been provided with any explanation to fully understand why it happened.

[21] Ex-Petty Officer 1st Class Gero, please stand up. After reviewing the totality of the evidence and the representations made by the prosecutor and your defence counsel, I have come to the conclusion that the proposed joint submission on sentencing would not bring the administration of justice into disrepute, and that the proposed sentence is in the public interest. Therefore, I agree with the joint submission of the prosecutor and of your defence counsel. The principle of general deterrence is clearly the prime principle that must be applied in this case. This sentence must give a clear message that the loss of non-public funds due to the negligence of the person entrusted with these funds will be punished. But this sentence must also take into account the gravity of the offence and the previous character of the offender. I have come to the conclusion, based on the circumstances of this case, that the proposed joint submission is the minimum necessary sentence to maintain discipline.

[22] Ex-Petty Officer 1st Class Gero, I sentence you to a reprimand and a fine in the amount of \$1, 500. The fine shall be paid in monthly installments of \$200 commencing on the 1st day of June, 2008. You may sit down.

[23] The proceedings of this Disciplinary Court Martial in respect of ex-Petty Officer 1st Class Gero are terminated.

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

COUNSEL:

Major J.J. Samson, Regional Military Prosecutions Atlantic

Counsel for Her Majesty the Queen

Lieutenant(N) P.D. Desbiens, Directorate of Defence Counsel Services

Counsel for ex-Petty Officer 1st Class R.L. Gero