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No. J. R. 10-423-45

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CONFIDENTIAL

Date FEBRUARY 17, 1945.

FILE CHECKED FOR MPV
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REGISTRY

Department of Justice

PERMANENT RETENTION
IN JUSTICE
CONSERVATION PERMANENTE
A LA JUSTICE

REMARKS:

From NATIONAL DEFENCE (ARMY)

SUBJECT:

MAJOR-GENERAL G.R. PEARKES, VC, CB, DSO, MC.

Charged to R.F.

CROSS REFERENCE:

No. J. R. 10-725-72

MPV / DSUM ON FILE / SUM POSSIBLE
YES / OUI / NO / NON ()

ABSTRACTOR / REDACTOR: DD

DATE: 25 July 1968

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CAN. PATENT
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No. J. R. 10-423-45

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FPV/AH

March 1,

45.

Brigadier A. C. Spencer, C.B.E., E.D.,
Acting Adjutant-General,
Department of National Defence,
O t t a w a.

J.R. 10,423-45
Re: Major-General G. R. Pearkes
V.C., C.B., D.S.O., M.C.
Your File H.Q.F. 3271, F.D. 1

My dear Brigadier Spencer,

In accordance with your request of February 16 I have made a careful examination of the several letters and telegrams communicated by the above-mentioned officer to National Defence Headquarters included in the correspondence files submitted by you with the view to advising whether any disciplinary action would lie against this officer.

Examination of the communications satisfies me that no offence of a civil or criminal nature is disclosed, and I am satisfied that no civil or criminal proceedings in the civil courts would be justified.

I have also considered the question of proceedings by way of court martial, which question is, I believe, whether or not any of these communications constitutes an act to the prejudice of good order and military discipline within the meaning of section 40

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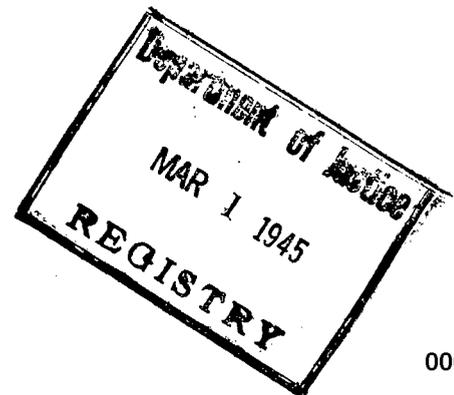
of the Army Act. The question is whether reports made by a commanding officer to National Defence Headquarters on the results of the adoption of a certain military policy, which reports are critical of the aforesaid policy and are framed in offensive terms, indicate insubordination or other breach of good order and discipline on the part of the writer. The language used in the telegram of December 9 to Lieutenant-General Murchie and in the letter of January 23 to the Departmental Secretary was certainly offensive and might very well be held to indicate insubordination or other breach of good order and discipline. The intent of the officer, however, would be relevant in this connection, and a court martial, considering all the circumstances and the evidence of the officer - which might be to the effect that the language employed was intended to emphasize the gravity of the situation as he saw it - might conceivably hold that there was in fact no such intent on the part of the writer as would indicate a breach of order or discipline on his part.

I return your files herewith.

Yours very truly,

F. P. Varcoe

Encl.



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OTTAWA, February 28, 1945.

MEMORANDUM:

J.R. 10,423-45

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The Oxford Dictionary gives to the phrase "to the prejudice of" the meaning "to the resulting injury of". Hence an act to the prejudice of discipline is an act resulting in injury to discipline. "Discipline" means the order maintained and observed among persons under control or command. Hence an act of insubordination or disobedience or which is insulting or in any other way amounts to a breakdown of courtesy, dignified bearing and so on, which implied a state of good order and military discipline, is an offence.

It is suggested that an officer who is simply reporting a state of affairs in his command cannot possibly be guilty of an offence so long as his communication is "factual". A factual statement itself, however, could be couched in such language as to carry the innuendo that the writer was intending to criticize his superior, hold him up to ridicule and so forth. It is suggested to me that the statement in the telegram "At this distance this procrastination appears contemptible evasion of responsibility" is simply a report of the state of public opinion on the Coast. I would not think so. I would think Headquarters knew the situation well enough and that Pearkes knew that they knew it. I think he was deliberately combining a report of facts as he understood them to be with an expression of strong personal criticism. The expression "contemptible evasion of responsibility" would never have been used by an officer whose relationship with his superior was on a well-disciplined basis. Similarly, the statement about "mutinous behaviour", "disturbances" and absenteeism being the "visual and undisputable results of the policy which I am now ordered to repeat" implies undisciplined criticism as does the reference to soldiers of low medical category. The use of the expressions "a mockery" and "a sad joke" indicate what was in General Pearkes' mind.

Brigadier Orde says that Major-General Pearkes could successfully plead the statements were intended entirely for the purpose of indicating the advisability of relieving him of command. I do not think it matters a bit what Major-General Pearkes' intention was. He might have struck a senior officer in the hope that he would be relieved of command as a result. Brigadier Orde goes on to say that he would be strongly inclined to the view that no court would convict against such a defence. He goes on to speak of there being no reasonable expectation of success. All I can say is that, if a court martial exonerated General Pearkes on the ground that they accepted as a good defence that he made these statements in order to be relieved of his command, the court martial would not be doing its duty. A court martial of Canadian officers of course might be very sympathetic with General Pearkes and acquit him accordingly.

F.P.V.

OTTAWA, February 28, 1945.

MEMORANDUM FOR MR. FORSYTH:J.R. 10,423-45

Now, on looking at the telegram of December 9 to General Murchie, I view it a little differently. The objectionable sentence reads as follows:-

"AT THIS DISTANCE THIS PROCRASTINATION APPEARS CONTEMPTIBLE EVASION OF RESPONSIBILITY."

I had not previously observed the underlined words. They suggest to me that the writer meant that to all those concerned or interested in British Columbia the procrastination appeared to be evasive. In other words, it is open to the construction that General Pearkes was simply reporting to Headquarters the state of public opinion as he thought it to be.

As regards paras. 3 and 5 of the letter of January 23, my understanding is that Brigadier Orde considered that they implied a criticism of policy which had been decided on and constituted a prima facie case, being acts "to the prejudice of good order and military discipline". Brigadier Orde indicates in his memorandum that the writer would doubtless say in his defence that these statements were intended to indicate the advisability of relieving him of his command as indicating the strong view which he held against the adopted policy.

In my view it is certainly no offence for a high-ranking officer to offer honest criticism of the plans of his superiors. The use of the expressions "a mockery" and "a sad joke" might be regarded as offensive and therefore likely to prejudice good order and discipline, but I would think it highly improbable that General Murchie or others at Headquarters would say that this letter, assuming that its contents were not disclosed by General Pearkes to any person but the addressee, was prejudicial in fact. What does "prejudicial" mean other than this, that the officers who receive and see this criticism are affected thereby to the extent that a breach of order and discipline is committed? My own personal view would be that there is no prima facie case made out.

I am informed that criticism is forbidden. Brigadier Nolan refers in this connection to K.R. 433. There is a reference there to prejudging questions, but the section has nothing whatever to do with any honest criticism by one officer made to his superior with reference to military matters.

F.P.V.

OTTAWA, February 23rd, 1945.

MEMORANDUM FOR THE DEPUTY MINISTER:J.R. 10,423-45

The telegram in question is from Major-General Pearkes to Lieut. General Murchie and says in part as follows:-

"To date no statement has appeared in any B.C. papers. At this distance this procrastination appears contemptible evasion of responsibility. If the good names of officers now in command of troops ordered to the front as reinforcements are to be cleared before they actually start moving it is necessary that the Minister make his statement before Monday 11th December, 1944. May this be done please."

This would, I submit, be interpreted as meaning a contemptible evasion of responsibility on the part of the Minister.

Section 8(2) of the Army Act provides:-

"Every person subject to military law who commits any of the following offences, that is to say;-

strikes or uses or offers any violence to his superior officer or uses threatening or insubordinate language to his superior officer shalletc."

The footnote to this section on page 433 of the Manual says:-

"Expressions used of a superior officer and not within his hearing, or which cannot be proved to be used to a superior officer, must be charged as an offence under section 40 and not under this section, but the use of threatening or otherwise insubordinate language regarding one superior to (in the sense that it is intended to be heard by) another superior constitutes an offence of 'using insubordinate language' under this section.

The words must be used with an insubordinate intent, that is to say, they must be, either in themselves, or in the manner or circumstances in which they are spoken, insulting or disrespectful, and in all cases it must reasonably appear that they were intended to be heard by a superior."

It would appear from the above that the remarks in question must be considered under section 40. Section 40 reads:-

"Every person subject to military law who commits any of the following offences; that is to say,

is guilty of any act, conduct, disorder, or neglect to the prejudice of good order and military discipline shall.....etc."

The following observations may be made:-

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- ✓ 1. The act must be to the prejudice of both good order and of military discipline (see footnote page 458 Manual).
2. The words must be used with guilty intent (see page 459 Manual).
3. There are no other sections creating the offence. All sections dealing with offences are similarly worded.
4. I consider the words "to the prejudice of" connotes that the act in fact prejudices.
5. I submit that it might be held that Pearkes in using the said words was in fact benefitting military discipline instead of prejudicing it.
6. I consider you are not in a position to determine whether or not the sending of the said telegram is an act to the prejudice of good order and military discipline. It must be established that good order and military discipline have suffered in consequence thereof. This is a question of fact and the Department of National Defence should determine whether they have in fact suffered as a result.
7. I agree that offences of a purely military nature do not fall within your province. This, of course, cannot probably relieve you of responsibility if the matter is referred to you. It might, however, be wise to suggest that in future such matters should be determined by the Judge Advocate General. The case of Heddon v. Evans, 1919, 35 Times Law Reports, 642 may be some guide to the scope of your responsibilities herein. In this case Heddon was a private in the Army, Evans was the Commanding Officer. Heddon wrote a letter to Evans charging another officer in the same unit with the following offences:-
 1. With giving untrue evidence on the 30th of June;
 2. With adopting a course of malice and persecution towards the plaintiff;
 3. With habitually using language to his inferiors which was unbecoming an officer and a gentleman.

Evans thereupon laid a charge against Heddon under section 40 with conduct to the prejudice and good order of military discipline. He convicted Heddon and sentenced him to fourteen days C.B. An action subsequently arose for damages for false arrest and the question was discussed as to what powers the court held in the exercise of military discipline. His Lordship held as follows:-

- "1. A military tribunal or officer will be liable to an action for damages if, when acting in excess of or without jurisdiction, it or he does or directs to be done to a military man, whether officer or private, an

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act which amounts to assault, false imprisonment or other common law wrong even though the injury purports to be done in the course of actual military discipline.

2. If the act causing the injury to person or liberty be within jurisdiction and in the course of military discipline, no action will lie upon the ground only that such act has been done maliciously and without reasonable and probable cause.

I would, therefore, give as your opinion that the alleged offence is of strictly military nature and not within your province and that in order to establish that the act in question was to the prejudice of both good order and military discipline, you will require evidence that both good order and military discipline have suffered as a result thereof.

R.F.

Commander Dixon

Duty to Tell

Commander Coipm

OTTAWA, February 21, 1945.

MEMORANDUM FOR MR. FORSYTH:J.R. 10,423-45

I wish you would reconsider this question with particular reference to the telegram of December 29. This contains abusive statements which, I should think, might easily prejudice good order and military discipline. A regimental officer charging his senior with contemptible evasion of responsibility would surely be guilty of an act prejudicial to order and discipline. Similarly, I suppose if a local commander charged his senior at headquarters in the same terms, that might be regarded as prejudicial. But you say as to this that where senior officers are sharing responsibility - as in the case of a G.O.C. a military district and N.D.H.Q. - the utmost frankness of expression must be permitted in communications between them relative to military operations for which they are jointly responsible. However, I would still think that opprobrious expressions are more likely to prejudice good order than to maintain or advance it. Is there any difference when the charge is directed against the Minister? At any rate, I should like to have this statement given some further consideration.

Note that s. 40 does not create offences but merely provides punishment. I wonder if there are provisions elsewhere which refer to acts prejudicial to good order and military discipline.

Note that the offence is an act "to the prejudice". Does this mean "likely to prejudice" or "capable of prejudicing" or, as you suggest, "actually prejudicing". If this latter is the correct view, then the question is one of fact. If it is not a question of fact but of opinion, we must rely on evidence to be given by the officers at N.D.H.Q. as to the effect or probable effect of such a statement.

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Finally, I should like to have consideration given to the question whether this department should offer any advice with reference to the question whether any military offence has been committed. The alleged offence here is peculiarly a military one. Many offences punishable by court martial are similar to or identical with Criminal Code offences. What I have in mind is that a civilian would not be expected to know what is prejudicial within the meaning of s. 40. You might discuss this point with the J.A.G. if you feel like doing so.

Note the conjunctive "and" in s. 40.

It may be that we should ask Brigadier Orde to discuss this matter with us informally.

F.P.V.

OTTAWA, February 19th, 1945.

MEMORANDUM FOR THE DEPUTY MINISTER:

J.R.10,423-45

Re: Major-General Pearkes, G.R.

This is a reference from the Department of National Defence enclosing correspondence with Major-General Pearkes, in which Pearkes asks that he be relieved of his command and retired on pension.

Pearkes is particularly displeased at the inquiry conducted by Lieut. General Sansom. He takes objection to the fact that the officers under his command ^{who} are the subject of this inquiry ^{and} when they are proceeding overseas ~~and they~~ have not yet been exonerated. In a telegram dated the 29th of December, 1944, to Lieut. General Murchie, he uses this expression:-

"This procrastination appears contemptible evasion of responsibility."

This apparently is one of the statements objected to.

In a letter dated the 23rd of January, 1945, Pearkes to the Secretary of the Department of National Defence states as follows:-

"On the other hand the effects of this policy have been disastrous in that discipline has been ruined and the authority of officers undermined by the refusal of large numbers of men to accede to their officers' requests. In consequence men failed to distinguish between a request and an order and gradually the impression permeated amongst certain sections of the men that only those orders which appeared necessary or attractive to the men need be obeyed. The mutinous behaviour of the troops at Terrace last November, the disturbances in many other camps throughout the Country, and the large number of NRMA soldiers now away without leave or declared deserters, are the visual and undisputable results of the policy which I am now ordered to repeat and which is to be extended to Commanders overseas.

The troops at my disposal, available for the

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operational duties assigned to this Command have been reduced to a minimum. I have already reported that nearly all units are considerably under strength and are largely made up of soldiers recently transferred from other units. Their esprit de corps at present is negligible and their standard of discipline low. It is essential that discipline be restored and determined steps taken to improve the efficiency of the units remaining in this Command, otherwise they cannot be relied upon. This is a requisite of first importance. If these men are now to be appealed to again and again to go active after they have turned a deaf ear to all previous entreaties, any hope of restoring discipline or rebuilding efficiency will be destroyed and the men will only accept those orders that appeal to them, thus reducing the units to groups of disgruntled individuals.

To ask NRMA soldiers of low medical category to volunteer for general service when they know that in all probability they will never be permitted to go overseas is making a mockery of the volunteer system and is regarded as a sad joke by officers and men.

I am fundamentally opposed to the continuation of a policy of asking my Regimental Officers to appeal repeatedly to their soldiers. As this policy is to be followed, I can no longer assume the responsibility for maintaining discipline amongst the units of my Command, nor for the fulfilment of their various operational roles. I therefore request that I now be relieved of my Command and that I be compulsorily retired in accordance with my recommendation in PCO 7069 dated 22 Jan 45."

In connection with the above, the J.A.G. has given his opinion as follows:-

"Prior to any reply being sent to the telegram PCO 7069 or to the receipt of any reply thereto, the GOC-in-C wrote at length to NDHQ under date of 23 Jan 45. In this communication he narrates at some length certain factual situations as appeared to him to exist in the troops under his command and he reiterates the request previously made in the matter of his retirement. If his communication of the 23 Jan 45 had been confined solely to these factors it would, in my opinion, be unobjectionable in the same degree as I have indicated above, but in the concluding portion of

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paragraph 3 and in paragraph 5 that Officer has seen fit to express his views generally on a matter of Government policy and in so doing he has technically, in my opinion, overstepped the bounds within which criticism by a subordinate Commander of the policy of superior authority should be confined. The statement mentioned would serve prima facie as a basis for a charge of conduct to the prejudice and good order and military discipline and the Officer has thus exposed himself to proceedings under the Army Act. As to whether or not a charge should be laid and as to whether or not a Court Martial would convict is an entirely different matter."

Pearkes has seen fit to express the above opinion in personal communications to the Department of National Defence. I cannot see how such opinions could be regarded as prejudicial to good order and military discipline. If he had expressed these views to his subordinate officers, the result might be otherwise.

You will further note that Pearkes does not refuse to carry out orders, he merely states that he is in entire disagreement and he is no longer ~~fit~~ to hold the position and asks to be relieved of same. I would, therefore, advise that no offence has been committed for which Pearkes might be disciplined.

R.F.

433 K.R. 1939.

QUOTE NO. HQC 3271, FD 1

Forsyth

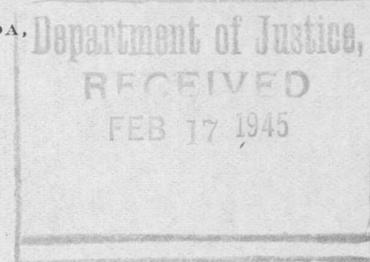


DEPARTMENT OF NATIONAL DEFENCE
ARMY

C O N F I D E N T I A L

OTTAWA, CANADA.

16 Feb 45



Mr. F.T. Varcoe,
Deputy Minister of Justice,
Ottawa, Ontario.

Dear Mr. Varcoe:-

Major-General G.R. Pearkes, VC, CB, DSO, MC

In accordance with the instructions of the Minister of National Defence (at folio 25 on HQC 3271, FD 1) the enclosed documents are transmitted herewith for your perusal or by officers of your Department and advice as to any disciplinary action which may lie against this officer:-

- (a) False Docket 1 on confidential file, HQC 3271, which contains relevant personal documents.
- (b) Adjutant-General's working file showing copies of certain correspondence relating to apprehension of absentees and deserters in Pacific Command, and which throw light on some of the background in this case.
- (c) Report of Lieut-General E.W. Sansom, CB, DSO, on his investigation into circumstances of certain statements by senior officers stationed in Pacific Command, to the Press in Vancouver, B.C., on 20 Nov 44.

I shall appreciate it if you will be so good as to return these documents at your earliest convenience.

Yours sincerely,

A.C. Spencer

(A.C. Spencer)
Brigadier

Acting Adjutant-General