

**Date: 20080425**

**Docket: CMAC-503**

**Citation: 2008 CMAC 4**

**CORAM:   BLANCHARD C.J.  
          HUGESSEN J.A.  
          HANSEN J.A.**

**BETWEEN:**

**MASTER CORPORAL PAUL  
PATRICK BILLARD**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Ottawa, Ontario, on April 25, 2008.

Judgment delivered from the Bench at Ottawa, Ontario, on April 25, 2008.

**REASONS FOR JUDGMENT BY THE COURT BY:**

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**MASTER CORPORAL PAUL  
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**Appellant**

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**REASONS FOR JUDGMENT**

(Delivered from the Bench at Ottawa, Ontario, on April 25, 2008)

**BY THE COURT**

[1] The Appellant applies for leave and if leave is granted appeals the severity of his sentence of 21 days of detention imposed by a Military Judge on July 6, 2007, after the Appellant pleaded guilty on the charge of neglect to the prejudice of good order and discipline pursuant to section 129 of the *National Defence Act*, R.S.C. 1985, c, N-5 (NDA).

[2] In the charge sheet, the following particulars are given:

NEGLECT TO THE PREJUDICE OF GOOD ORDER AND  
DISCIPLINE

*Particulars:* In that he, on or about 22 May 2006, at or near Kandahar Province, Afghanistan, whilst the forward operating base in which he was present was under direct attack, failed to don his helmet and flak vest contrary to Task Force Standing Orders.

[3] The following statement of circumstances was read into the record at the Court Marshall and was accepted by the accused:

1. MCpl Billard was at all pertinent times, and remains, a member of the Regular Force. At all pertinent times, MCpl Billard was serving as an image analyst at a Forward Operating Base (FOB) located in Kandahar Province, Afghanistan. He was quartered in room 3A.
2. The term “stand-to” refers to a defensive state of preparedness of troops in anticipation of enemy action. The order “stand-to” is given to soldiers to indicate that they are to ready themselves to defend their position from attack.
3. The term “fighting order” refers to an order of dress worn by soldiers. At the pertinent time and place, “fighting order” included the following; helmet, flak vest, load bearing vest, rifle, pistol, and personal radio.
4. MCpl Billard arrived at the FOB on 12 December 2005. Within a day of his arrival, MCpl Billard attended an in-clearance briefing given by the Camp Sergeant Major (CSM). Included in that briefing were orders pertaining to the security of the FOB and the Task Force (TF) to which MCpl Billard belonged. Amongst the orders was an instruction that, in response to a stand-to (which could be initiated by a siren or by the verbal command “stand-to”), personnel were to don their fighting order and react to the person in charge. Once the CSM had given the in-clearance briefing to a member, the CSM would sign the member’s in-clearance card on a line entitled “CSM (Security Brief)”. On 13 December 2005, the

CSM signed the security brief line of MCpl Billard's in-clearance card.

5. Also included on the in-clearance card was a line entitled "mbr read and ack TF standing orders" (meaning: member has read and acknowledges the task force standing orders). On 13 December 2005, MCpl Billard signed the line indicating that he had read the standing orders. According to the TF standing orders, in response to an attack, either direct or indirect, members were to don their helmets and flak vests. At the pertinent time, MCpl Billard had read the standing order and was aware of the requirement to don his helmet and flak vest in response to an attack.

6. On 21 May 2006, MCpl Billard attended a briefing during which TF members were informed that there was an increased threat to the FOB at that time. Members were also told that a rehearsal of stand-to drills would be held that night. That rehearsal, however, would not involve use of the stand-to siren or the live fire of weapons. Members were warned that the FOB was particularly vulnerable at that time, as a large number of soldiers were then absent from the camp.

7. The personnel living in room 3A were not the primary defenders of the FOB but, if necessary, were to act as stretcher-bearers and the reserve force.

8. At approximately 0200 hours, 22 May 2006, two armed insurgents launched a direct attack on the FOB. From a distance of approximately 50 metres, one of the insurgents aimed a Rocket Propelled Grenade (RPG) at one of the FOB's guard towers. A member of the FOB's defence and security detail, "Soldier A", was present in that guard tower. Soldier A observed the insurgent aim the RPG at the tower and saw a flash emanate from the launcher, indicating that the insurgent had attempted to fire the RPG. However, the RPG malfunctioned and failed to leave the launcher. Soldier A then yelled out loud, the order "stand-to" and repeated the order into his radio. Soldier A then engaged the insurgents with small arms fire. Soldier A heard fire from other weapons but could not determine if they were firing at the FOB.

9. Upon hearing Soldier A's "stand-to" order, a soldier on duty in the command post activated the stand-to siren. The stand-to siren and small arms fire could be heard throughout the camp, including in room 3A, where MCpl Billard was present.

10. A Sergeant who lived in room 3A, "Soldier B", had been appointed as the senior Non-Commissioned Officer in charge of room 3A for local defence issues. Before leaving the room to report to his superior, Soldier B reminded everyone in the room that they should get up and get dressed.

11. Most residents of room 3A, but not all, got out of bed and began donning their fighting order. MCpl Billard was amongst those who remained in bed.

12. Another Sergeant living in room 3A, "Soldier C", awoke to hear the stand-to siren sounding and shots being fired. He turned on his radio and heard the following: the order "stand-to"; a contact report; and confirmation that this was not a drill.

13. A Corporal living in room 3A was in the process of donning his fighting order when MCpl Billard said to him, "Where are you going and what for? You are a fucking flincher". Several soldiers then began to urge MCpl Billard to get out of bed. He replied saying, "You are just flinchers. You don't have to get dressed. You're just fucking flinching".

14. Soldier C then suggest to another soldier, "Soldier D", that they could roust MCpl Billard by making a loud noise. Soldier D then struck the side of a locker with a plastic tube. MCpl Billard replied, "I'm immune to that. I'm going to sleep".

15. At no time during the stand-to did MCpl Billard don his fighting order. In particular, MCpl Billard did not don his helmet and flak vest in response to the direct attack upon the FOB.

16. At one point during the stand-to, MCpl Billard had to use the washroom. He got out of bed, pulled on a pair of shorts, grabbed his pistol, and left the room. He returned and climbed back into bed. The stand-to ended a short time later.

17. Throughout the stand-to, MCpl Billard monitored his radio and kept himself apprised of the tactical situation. He came to the conclusion that the situation did not require his getting out of bed. His magazines were loaded with ammunition and his weapons were readied. Although he did not don his fighting order, it was readily accessible.

[4] On sentence, the prosecutor recommended a sentence of 10 to 21 days of detention while defence counsel recommended a severe reprimand and a fine in the amount of \$2,000 to \$3,000 payable by monthly instalments of \$250. Alternatively, defence counsel argued that any period of detention the Military judge saw fit to impose, be suspended.

[5] On July 6, 2007, the Military Judge found the Appellant guilty of neglect to the prejudice of good order and discipline and sentenced the Appellant to detention for a period of 21 days.

[6] Upon review of the record and hearing counsel for the Appellant, we are of the view that the sentence imposed is not illegal or demonstrably unfit. In our view, the Military Judge committed no error in principle, did not fail to consider relevant factors and did not over-emphasize the appropriate factors.

[7] This case raises an important principle, namely, “the Soldier first principle”. A member of the Canadian Forces, whatever his or her rank, trade or occupation, is at all times a fighting soldier. The Appellant’s offence did not relate to the performance of his routine duties as an intelligence operator; the evidence is that he performs those duties very well as witnessed, amongst other things, by the continuing support and presence of his commanding officer and superiors at the hearing of this appeal. Rather, his offence bore directly on his failure to perform as a member of a fighting unit which was then under attack. It put at risk the lives and safety of himself and his comrades.

[8] It is imperative in such circumstances that lawful orders be unquestioningly obeyed.

[9] The principles of denunciation and deterrence assume particular importance in these circumstances. Recognizing that the offence to which the Appellant pleaded guilty carries with it a maximum sentence of dismissal with disgrace, we are of the view that a sentence of 21 days of detention was fit and proper in the circumstances.

[10] Leave to appeal will be allowed and the appeal will be dismissed.

“Edmond P. Blanchard”

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Chief Justice

**COURT MARTIAL APPEAL COURT OF CANADA**

**SOLICITORS OF RECORD**

**DOCKET:** CMAC-503

**STYLE OF CAUSE:** MASTER CORPORAL PAUL PATRICK BILLARD v.  
HER MAJESTY THE QUEEN

**PLACE OF HEARING:** Ottawa, Ontario

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HANSEN J.A.

**DELIVERED FROM THE BENCH BY;**

BLANCHARD C.J.

**DATED:** April 25, 2008

**APPEARANCES:**

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Me Zorica Guzina

FOR THE APPELLANT

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FOR THE RESPONDENT

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