

## APPEAL OF SENTENCE IN PROTECTION ACTION

### FILE 4430-2009

**CONSTITUTIONAL COURT:** Guatemala, January 27, 2010.

On appeal and considering the prior procedural instances of the case, the Court will examine the sentence handed down on November 17, 2009, by the Supreme Court of Justice, acting as a Protection Tribunal, in the protection action brought by Carlos Alexander Molina Garrida against the Ministry of National Defense. The claimant is represented by attorney Thelma Inés Peláez Pinelo.

## PROCEDURAL HISTORY

### I. THE PROTECTION ACTION

**A) Presentation and jurisdiction:** Presented on February 12, 2009, before the Criminal Justice of the Peace on duty. **B) Act that is the subject of the protection action:** The resolution issued by the Ministry of National Defense on December 5, 2008, which denied the appeal brought the claimant in respect of items fifteen (15) and fifty-one (51) of the General Military Order for Officers No. 6 – 2008, dated June 29, 2008. **C) Violation claimed:** rights to health and the inalienable right to work, as well as right to due process. **D) Facts underlying the protection action:** The claimant's argument is summarized as follows: **a)** The Ministry of National Defense, by way of General Military Order for Officers No. 6 – 2008, dated June 29, 2008, stated in items fifteen (15) and fifty-one (51), the following: the one hundred demerits that were imposed against Carlos Alexander Molina Garrido for "consuming alcoholic beverages in a restaurant" are hereby confirmed; and item fifty-one indicates that the claimant was therefore dismissed from the Guatemalan Armed Forces, for reasons of conduct, upon the confirmation of the aforementioned one hundred demerits; **b)** the claimant appealed said resolution, which appeal was denied by way of resolution dated December 5, 2008, in which the authority whose decision was challenged stated: *"...That the final offense committed by Frigate Ensign Carlos Alexander Molina Garrido (B), according to the Office of Intelligence of the Pacific Naval Command, in administrative report number SI-004-2008, dated March 16, 2008, was, that the claimant, while serving as Commander of the Naval Base at Sipacate, Escuintla, on March 9, 2008, was drinking alcoholic beverages, while dressed as a civilian, inside a restaurant, accompanied by two civilians. Such conduct is codified as a serious offense in accordance with Article 5, Paragraph G, of the Regulation on Disciplinary Sanctions of the Armed Forces. The aforementioned offense was sanctioned by the imposition of the maximum number of demerits possible for said offense, the blocking of any promotion, and definitive dismissal upon completion of the required time period in the claimant's current position. This offense, when considered in addition to the claimant's previous offenses, the sanctions in respect of which were each duly registered, means that the claimant is now in violation of Article 85, numeral 5), of the Law Constituting the Armed Forces, which codifies the offense of gross misconduct, as determined by the Chiefs of Staff of National Defense, and which is cause for the dismissal from the Guatemalan Armed Forces in the case of General*

*Officers, Senior Officers and Junior Officers of the Armed Forces, and upon which the claimant's one hundred (100) demerits and his subsequent dismissal from the Guatemalan Armed Forces are based..."; c)* the claimant argued in his memorandum requesting the protection action that the resolution under appeal seriously violated his right to due process in a number of ways. First, the resolution gave credence to a report made by intelligence officer "Alex Rivera," administrative report S one dash zero zero four dash two thousand and eight, which indicated that on March 9, 2009, Carlos Alexander Molina Garrido was found in the restaurant "La Boca Barra" in a state of inebriation; however at no time was it proven that the claimant himself was drinking alcoholic beverages, and in fact far from it, the official from the Department of Military Intelligence who prepared the report had simply assumed that based on the fact that the claimant was standing near a table on which there were two bottles, that the claimant was inebriated. Second, based on this report, the Commander of the Pacific Naval Commander informed the General Fleet Commander that the claimant had been discovered drinking alcoholic beverages. Third, in the resolution under appeal, the claimant's evidence was not taken into account, such as the declaration from the Naval Police Officer who had been with the claimant, and who declared that it was not true that the claimant had been consuming alcoholic beverages, as well as the declarations presented into evidence by the Mayor or the Trustee of the Municipality of Sipacate to the same effect. Despite these facts, the respective record of the proceeding shows no record of this evidence; the only evidence considered was the report made by the Military Intelligence officer. The claimant also argues that his right to work was violated, given that on the same day that he was to have received a promotion in rank, he was notified that he had been dismissed as a naval officer, based only on the fact that a Military Intelligence officer "assumed" that because there had been two open bottles on a table where the claimant was standing with four other people, the claimant himself was inebriated. The claimant was dismissed, with no respect for his rights as an employee, without considering his record in the service, and much less with the appropriate respect for due process, and without payment of his benefits owed, thereby violating his employment rights in their totality. The claimant also notes that as part of the benefits due to him as an officer of the Guatemalan Armed Forces, he had a right to health care at the Military Medical Center, and as of his dismissal he was no longer able to access these services. The claimant pleaded that his petition for the protection action be granted, and, as a result, that his legal situation be rectified, and that within three days of the issuance of the decision in respect of the protection action, that the military be ordered to issue the corresponding resolution declaring the claimant's reinstatement to his position in the armed forces and the payment to the claimant of lost salaries as a result of his dismissal. **E) Use of resources:** none. **F) Applicable law:** The claimant cites to Paragraphs a), b), f), and h) of Article 10 of the Law of the Protection Action, Personal Liberties and Constitutionality. **G) Laws violated:** The claimant cites to Articles 12, 93 and 106 of the Political Constitution of the Republic of Guatemala, Article 4 of the Law of the Protection Action, Personal Liberties and Constitutionality, and Article 16 of the Law of the Judicial Branch.

## **II. PROCEDURE OF THE PROTECTION ACTION**

**A) Interim protective measures:** Not authorized. **B) Interested third parties:** The State of Guatemala. **C) Respondent's evidence:** The respondent stated that: **i.** In his appeal memorandum, Carlos Alexander Molina Garrido accepts that he was found in a place where alcoholic beverages are consumed, accompanied by civilians who were under the influence of alcohol, and therefore the presumption of innocence that he claims is of no benefit to him; **ii.** Prior to imposing upon the claimant the sanction that is the subject of the present claim, the matter was under the charge of the Department of Military Justice, which, after hearing from all involved parties, issued Acts Nos. DJM-SAI-JLR-zero ninety-nine-two thousand and eight (DJM-SAI-JLR-099-2008) and DJM-SAI-JLR-one hundred-two thousand and eight (DJM-SAI-JLR-100-2008), on May 15 and 26, respectively, and sentence DJM-zero seventy-eight-JLR-two thousand and eight (DJM-078-JLR-2008), on June 2, 2008, which confirmed that the claimant was found under the effects of alcohol on the date and time and at the place indicated by the evidence; **iii.** There was no violation of the claimant's right to work, given that as an officer of the Guatemalan Armed Forces, he was subject not only to the Political Constitution of the Republic of Guatemala, but also to the laws and regulations of the Armed Forces, which set forth that officers must at all times observe decorous conduct standards, a requirement that is not only promulgated by the Ministry of National Defense, but also but all State entities and private organizations. As a result, there was no violation of the claimant's rights, as alleged; **iv.** The claimant also alleges that his mother's right to health has been violated, as she was previously receiving attention in the Military Medical Center due to a health condition. However, the claimant does not have standing to raise this circumstance as a violation of his own rights; **v.** The appeal brought by the claimant against items fifteen and fifty-one of the Ministry of National Defense's resolution General Military Order for Officials No. 6 – 2008, dated June 29, 2008, was heard through the proper channels, and upon the completion of the corresponding hearings, on December 5, 2008, the appeal was denied, with notification to the claimant on January 16, 2009. The respondent requests that the protection action be dismissed, due to the fact that the challenged authority proceeded in accordance with the law. **D) Remittance of the record:** record of the administrative appeal brought by the claimant against the Ministry of National Defense (unnumbered). **E) Evidence:** **a)** Respondent's evidence; **b)** the remitted record of the proceedings, comprising the following documents: **i)** original act DJM-SAI-JLR-100-2008, signed by Carlos Gustavo Pérez Flores, José Manuel Monroy Molina and Joel Lehabín Reyes Morales, which contains the affidavit of Naval Police Officer Monroy Molina, affirming that he was present at the date and time of the events in question, and as an eyewitness to such events, states that the facts alleged against the claimant are false; **ii)** original of Official Letter PER-197-2008, in which Rafael Alonso Reneau Franco affirms that the claimant was drinking alcohol, based on the report from the military intelligence officer; and **c)** the legal and factual assumptions arising from the facts on the record. **F) Decision in the first instance:** the lower court considered that: "From our analysis of the claimant's arguments, the resolution under appeal and the facts on the record, this Court finds that Carlos Alexander Molina Garrido, in his appeal brief has raised the following petition: '*...that the Court issue its decision as the law requires, and therefore declare that: a) the*

protection action be decided in favor of CARLOS ALEXANDER MOLINA GARRIDO; B) the Claimant's legal situation be rectified and his employment rights be reinstated as the moment in which the violation that is the subject of this action occurred; C) For such purposes, that the Court order the respondent authority, within three days of the issuance of its decision, to issue a resolution as required by law, declaring that: c.1 the claimant be reinstated to his job; c.2 the claimant be paid amounts owed to him in respect of lost salaries..., that the respondent authority upon failure to do so be fined in the amount of three thousand quetzals, without prejudice to any other applicable civil or criminal penalties.' Therefore it is clear that the claimant's petition requests that the Constitutional Court order his reinstatement as a military officer and the repayment of lost salaries as a result of his dismissal from such position, as well as determine whether the circumstances that resulted in his dismissal were just or unjust. Notwithstanding the foregoing, this Court is of the opinion that the Ministry of National Defense, as an appointed authority, acted within its powers in accordance with the law in deciding upon the claimant's employment situation; in addition, from the Court's review of the challenged resolution, it concludes that the resolution dated December 5, 2008, issued by the authority in question, which decided the appeal brought by Carlos Alexander Molina Garrido, was issued in accordance with Article 15 of the Law of Administrative Litigation, which states that: '*...Within fifteen days of the finalization of the proceedings, a final resolution shall be issued, which shall not be limited to such causes of action or violations as plead by the claimant, but may examine the legality of the decision in question in its totality, and may revoke, confirm or amend it...*' in this respect we find that the respondent authority did not violate the claimant's rights. In light of the foregoing considerations, it is clear that the protection action cannot proceed, given that there was no violation of the claimant's rights. It has also been established that there was no restriction or limitation whatsoever of any of the rights raised by the claimant, as guaranteed to him by the Political Constitution of the Republic of Guatemala and other applicable laws. Therefore the protection action must be denied, with the corresponding declarations as required by law in respect of the imposition of a fine to be paid by the claimant's attorney. However the claimant is not to be ordered to pay costs, as there is no subject with standing to recover." **The Court therefore resolved:** "I) TO DENY, as grossly inadmissible, the protection action brought by Carlos Alexander Molina Garrido against the Ministry of National Defense. II. The claimant is not ordered to pay costs. III. The claimant's attorney, Thelma Inés Peláez Pinelo, is ordered to pay a fine of one thousand quetzals, which should be paid to the Treasury of the Constitutional Court within five days of the signing of this decision, and in case of her failure to pay, the fine shall be remitted to the corresponding judicial proceedings for its execution. So notified."

### **III. APPEAL**

The claimant appealed.

### **IV. ARGUMENTS BEFORE THE COURT.**

**A) The claimant** alleged that his right to a defense and to due process were violated, given that during the proceedings of his administrative claim, which underlies the present action, the respondent authority did not take into account or properly weight

the evidence presented in his favor, and only considered the report based on assumptions made by a Military Intelligence officer. In addition, his family's right to health has been violated, given that the Constitutional Court has confirmed that administrative resolutions under appeal are to be suspended and not enforced, however, the respondent authority has prevented the claimant's mother from receiving medical attention at the Military Medical Center, despite the fact that she suffers from a severe case of diabetes. The respondent authority violated the Code of Ethics by considering past events that have no relation to the resolution under appeal, specifically those sanctions imposed upon the claimant during the course of his military career, in order to give the appearance that the claimant did not conduct himself as befits an officer. However, at no point during the lower court's consideration of the protection action was the evidence presented by the claimant taken into account. The claimant alleges that the Supreme Court of Justice rejected the protection action without reviewing the facts, but the claimant may request the execution of a declaration of protection, and this tribunal has the power to concede or to deny the protection action, in accordance with its review of the facts and the constitutional violations. The lower court, without considering the due process violations and the claimant's right to have his evidence reviewed, analyzed and evaluated, and for the process to take place in a legal framework that results in a resolution that respects the procedural rights guaranteed to him, considered *a quo* that matters of the claimant's reinstatement should be considered by a labor court, and therefore ruled denied the protection action, for failure to plead a violation of the claimant's rights, based only on the fact that the respondent authority issued its resolution within thirty days as required by law. The claimant requests that the sentence under appeal be overturned and the protection action granted. **B) The respondent authority, the Ministry of National Defense**, stated that the claimant's administrative appeal was denied based on Governing Act number 210-2005, dated June 16, 2005, Article 14 of which sets forth that an officer's conduct shall be judged based on those records on file with the Chiefs of Staff of National Defense, and taking into consideration: a) That in accordance with the Regulation on Disciplinary Sanctions of the Armed Forces of Guatemala, such officer who commits a serious offense or exceeds the number of demerits for his rank shall not be selected for promotion to the next highest rank, and after having completed the period ordered for service at his rank, shall be definitively dismissed from the Guatemalan Armed Forces, in addition to which Article 84, numeral 5), codifies the offense of gross misconduct as determined by the Chiefs of Staff of National Defense, and which is cause for the dismissal from the Guatemalan Armed Forces in the case of General Officers, Senior Officers and Junior Officers. These laws form the legal and judicial basis for the resolutions under appeal, and in virtue of which the claimant's administrative appeal was denied. The respondent authority requests that the appeal be dismissed and the appealed sentence confirmed. **C) The Public Ministry** stated that in the present case the protection action is appropriate, given that the claimant was in no way provided with an opportunity that would have permitted him to rebut the facts that resulted in his dismissal from the Armed Forces of Guatemala, and the only evidence to which credence was given was that provided by the Department of Military Justice, as a result

of the procedures set forth by the provisions that govern the Armed Forces of Guatemala. It is very likely that in a given case the precepts established by the law applicable to the case will be strictly followed, but if such precepts do not provide for an audience, in the case of a fundamental right, such an audience should be granted. The Ministry requests that the lower court's decision be overturned and the protection action granted.

#### WHEREAS

- I -

The violation of a right is the essential element required in order for the protection action to proceed. Without such violation, the protection requested by the aforementioned action cannot be granted, above all when the respondent authority, at the time of issuing the act that is challenged as in violation of a right, has acted within the scope of its powers and authorities as recognized by the law, and has interpreted and applied the law in an appropriate manner. In such case there can be no violation of those fundamental rights guaranteed by the Political Constitution of the Republic, international instruments and the law.

- II -

In the case at hand, Carlos Alexander Molina Garrido requests that his protection action brought against the Ministry of National Defense be granted, indicating the act that violated his rights as the resolution issued on December 5, 2008, which dismissed his appeal brought against items fifteen and fifty-one of the General Military Order for Officials No. 6 – 2008, dated June 29, 2008, and confirmed the resolutions being appealed. The claimant argues that the respondent authority's actions violated his constitutional rights, given that in his opinion the proceedings were carried out in an illegal and arbitrary manner, based on a flawed assumption, which was no more than a calumny that however served to end his military career and to deprive his mother of her access to healthcare.

- III -

Item fifteen (15) of the General Military Order for Officials No. 6 – 2008, dated June 29, 2008, states: *"Confirmation of demerits. In accordance with the information received from and the recommendation of the Chiefs of Staff of the National Defense, this office confirms that the one hundred (100) demerits that Commander of the Pacific Naval Command, in Puerto Quetzal, Escuintla, imposed upon Frigate Ensign Carlos Alexander Molina Garrido, as a result of the fact that while acting as Commander of the Naval Base at Sipacate, Escuintla, on March 09, 2008, dressed as a civilian, Frigate Ensign Carlos Alexander Molina Garrido was found to be consuming alcoholic beverages inside a restaurant accompanied by two (2) civilians from the area, and having been ordered to return to his post, it was determined from observation of his behavior that he was under the effects of alcohol, and had abandoned his duties as commander of said naval base. Frigate Ensign Carlos Alexander Molina Garrido was therefore found to be in violation of Article 333 and 368 of the Regulations for Military Personnel during Times of Peace, and his conduct was codified as falling within the offenses established by Article 5, paragraph G., and Article 6, paragraph A., 1, 2 and 3 of Governing Agreement No. 24-2005, dated January 24, 2005, of the Regulation on Disciplinary Sanctions of the Armed*

*Forces of Guatemala, applicable at the time the events took place.” Item 51, in turn, states that: “Frigate Ensign Carlos Alexander Molina Garrido, classified as No. 546523, Frigate Ensign in the Roster of Officers in Active Service of the Armed Forces of Guatemala, will relinquish his appointment as commander of the Rescue and Underwater Works Brigade of the Pacific Naval Command, Position No. 7064789, due to the fact that, having completed the period of service at his rank and being considered as a candidate for promotion to the immediately superior rank, the Promotion Approvals Board, having heard his case and based on the negative record of his conduct at his current rank, ordered his definitive dismissal for gross misconduct. Such sanction to be published in this General Military Order for Officials, in accordance with the confirmation of the order of 100 demerits. As a result, Frigate Ensign Carlos Alexander Molina Garrido’s case is governed by Article 14, paragraph A), and Article 7, paragraph A), numeral 4, of Governing Agreement No. 210-2005, dated June 16, 2005, of the Regulation on Promotions of the Armed Forces of Guatemala; Article 6, paragraph A, numeral 3, of Governing Agreement No. 24-2005, of the Regulation on Disciplinary Sanctions of the Armed Forces of Guatemala, based on Article 84, numeral 5, of Decree No. 72-90 promulgated by the Congress of the Republic, in the Law Constituting the Armed Forces of Guatemala.”*

This Court, having examined the record of the administrative case containing the appeal that gave rise to this protection action, in order to determine the reasons for which the decision was made to dismiss the claimant from the ranks of the Guatemalan Armed Forces, notes that on page fifty-seven and fifty-eight of the record, there appears a record of the claimant’s history with the armed forces, issued by the Board of the Military Justice Department, which describes in detail the offenses that the military administration considers the claimant to have committed, and to which the respondent authority referred in making its decision to dismiss the claimant from military service. From this record, this Court rejects the argument that the claimant was only punished for those offenses raised in his appeal—that is, for those offenses that gave rise to the resolution he appeals. Instead, in taking its decision to dismiss the claimant from military service, the respondent authority took into consideration a series of events in violation of military disciplinary standards.

In ordering the claimant’s dismissal from military service with the Armed Forces of Guatemala, based on the misconduct attributed to the military officer who was dismissed, this Court finds that this decision was in no way unlawful, given that the claimant had ample opportunity to exercise his right to a defense, and the decision appealed in this protection action was issued within the scope of the legal powers authorized to the respondent authority, and the respondent authority did not exceed such powers in issuing the resolution in question. Therefore, the Court finds no violation of the claimant’s rights as he claims, and for this reason, the protection action is denied. The lower court having resolved *a quo* to the same effect, the sentence appealed is hereby confirmed.

#### **APPLICABLE LAW**

The cited Articles 265, 268, and 272, paragraph c), of the Political Constitution of the Republic of Guatemala, Articles 1, 8, 42, 43, 44, 45, 46, 56, 57, 60, 61, 67, 149, 163,

paragraph c), and 185, of the Law of the Protection Action, Personal Liberties and Constitutionality; and Articles 8 and 17 of Agreement 4-89 of the Constitutional Court.

**THEREFORE**

The Constitutional Court, in base of the foregoing and the cited legal provisions, orders that: **I)**The appealed sentence is hereby **confirmed**. **II)** So notified, case files to be returned by certified mail.

**JUAN FRANCISCO FLORES JUÁREZ**  
**CHIEF JUSTICE**

**ROBERTO MOLINA BARRETO**  
**JUSTICE**

**ALEJANDRO MALDONADO AGUIRRE**  
**JUSTICE**

**MARIO PÉREZ GUERRA**  
**JUSTICE**

**GLADYS CHACÓN CORADO**  
**JUSTICE**

**CARLOS ENRIQUE LUNA VILLACORTA**  
**JUSTICE**

**HILARIO RODERICO PINEDA SÁNCHEZ**  
**JUSTICE**

**AYLIN ORDOÑEZ REYNA**  
**CLERK OF THE COURT**