

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class WENDELL M. PORTER JR.
United States Air Force**

ACM 35341

27 August 2004

Sentence adjudged 6 August 2002 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Timothy D. Wilson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 7 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Diane M. Paskey.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Jennifer R. Rider, and Major Shannon J. Kennedy.

Before

STONE, GENT, and SMITH
Appellate Military Judges

PER CURIAM:

We examined the record of trial, the assignment of error, and the government's answer. The appellant asserts that the convening authority failed to adhere to the provision of the pretrial agreement wherein the convening authority agreed to approve no confinement in excess of 6 months. The government explained that the convening authority intended to adhere to this provision and give clemency by remitting confinement after 25 November 2002, but the action does not correctly reflect the convening authority's intention. The government suggests that we direct the convening authority to issue a corrected action as follows:

Only so much of the sentence extending to reduction to E-1, forfeiture of all pay and allowances, confinement for 6 months, and a bad-conduct

discharge is approved. The sentence, except for the bad-conduct discharge, will be executed. That portion of confinement remaining to be served after 25 November 2002 is remitted.

Well-established precedent from our superior court provides that where a convening authority fails to take action required under the terms of a pretrial agreement, this Court has the authority to enforce the agreement. *United States v. Cox*, 46 C.M.R 69, 71-72 (C.M.A. 1972). We hold that the convening authority failed to adhere to the pretrial agreement. The convening authority will issue an action as suggested by the government.

The findings are affirmed. The action of the convening authority is set aside. The record is returned to The Judge Advocate General for remand to the convening authority for a new action consistent with this opinion. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, will apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court