

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Senior Airman GARETH A. SMITH
United States Air Force**

ACM 37672

09 March 2011

Sentence adjudged 10 March 2010 by GCM convened at Osan Air Base, Republic of Korea. Military Judge: Mark A. Allred (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Don M. Christensen and Gerald R. Bruce, Esquire.

Before

**BRAND, ORR, and WEISS
Appellate Military Judges**

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas of guilty to charges of false official statement and larceny, in violation of Articles 107 and 121, UCMJ, 10 U.S.C. §§ 907, 921, a military judge sitting as a general court-martial convicted the appellant and sentenced him to a bad-conduct discharge, sixteen months of confinement, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved a bad-conduct discharge, confinement for fifteen months, forfeiture of all pay and allowances, and reduction to E-1.¹ Although appellant's defense counsel submitted this case on its merits, we find prejudicial error in that the convening authority's action does not comply

¹ The pretrial agreement provided that confinement would not exceed 15 months.

with the terms of the pretrial agreement; therefore, we return the case to the convening authority for a new action.

Background

The appellant entered into a pretrial agreement with the convening authority that included a provision which addressed adjudged and “automatic” forfeitures.² The Appendix A to the Offer for Pretrial Agreement included the following language, in which the convening authority agreed to undertake that:

Adjudged and automatic forfeitures under Articles 57 & 58 [sic] of the Uniform Code of Military Justice will be deferred until action. If there are adjudged forfeitures, they shall be suspended for six months or for the duration of the period of confinement, whichever is less. If automatic forfeitures are required, they shall be waived for six months or for the duration of the period of confinement, whichever is less. The waiver of forfeitures will be for the benefit of the Accused’s dependents.

Prior to the convening authority’s action, the staff judge advocate, in his Staff Judge Advocate Recommendation (SJAR), advised the convening authority regarding the appellant’s sentence and the convening authority’s obligations under the terms of the pretrial agreement as consideration for the appellant’s plea of guilty to all charges and specifications. The SJAR contained the above-referenced verbatim provision of the pretrial agreement regarding forfeitures. The convening authority’s action, however, stated in pertinent part:

In the case of SENIOR AIRMAN GARETH A. SMITH . . . only so much of the sentence as provides for a bad conduct discharge, forfeiture of all pay and allowances, confinement for 15 months and reduction to E-1 is approved and, except for the bad conduct discharge, will be executed. Pursuant to Articles 57, Section (a)(2), and 58b, Section (a)(1), Uniform Code of Military Justice, all of the mandatory forfeitures were deferred 14 days from the date sentence was adjudged until the date of this action. Pursuant to Article 58b, Section (b), Uniform Code of Military Justice, all of the mandatory forfeitures are waived for a period of 6 months or release from confinement, whichever is sooner, with the waiver commencing on the date of this action. The total pay and allowances are directed to be paid to . . . ex-spouse of the accused, for the benefit of the accused’s dependent child

² Forfeitures pursuant to Article 58b, UCMJ, 10 U.S.C. § 858b, are often referred to interchangeably as “mandatory,” “automatic” or “required” forfeitures. As does our superior court, this opinion will refer to them as “mandatory” forfeitures.

The convening authority's action thus failed to defer and suspend the adjudged forfeitures as required by the terms of the pretrial agreement.

Discussion

The meaning and effect of a pretrial agreement is a question of law that we review de novo, and the issue of noncompliance is a mixed issue of fact and law. *United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009) (citing *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006)). "A pretrial agreement in the military justice system establishes a constitutional contract between the accused and the convening authority." *Id.* The convening authority is "bound to keep its constitutional promises." *Lundy*, 63 M.J. at 301.

"[M]andatory forfeitures apply only when pay and allowances are 'due that member.'" *United States v. Emminizer*, 56 M.J. 441, 443 (C.A.A.F. 2002). "[W]hen total forfeitures become effective under Article 57(a) . . . there are no mandatory forfeitures that can be waived." *Id.* at 445.

In appellant's case, given the contents of the SJAR and the absence of evidence in the record of appellant's noncompliance with the terms of the pretrial agreement, we find the convening authority was obligated to effect compliance with the forfeiture provision, a material term of the pretrial agreement, through his action. His failure to do so by omitting the deferment and suspension of adjudged forfeitures is prejudicial error.

On its face, the practical effect of this omission in the convening authority's action is that the adjudged forfeitures of all pay and allowances took effect 14 days after sentence was announced, in accordance with Article 57, UCMJ, 10 U.S.C. § 857. The wording of the action reflected only deferment of mandatory forfeitures under Article 58b, UCMJ, 10 U.S.C. § 858b, and not the adjudged forfeitures as well. Therefore, the deferment of forfeitures is, in effect, a nullity because there were no mandatory forfeitures available to defer since the adjudged forfeitures became operative. *Emminizer*, 56 M.J. at 444-45. Likewise, because the language of the action failed to suspend the adjudged total forfeitures, no pay and allowances were available to trigger the mandatory forfeitures under Article 58b, UCMJ; therefore, mandatory forfeitures were not available for the convening authority to waive for the benefit of appellant's dependents as transitional compensation. *Id.*

That appellant did not raise this issue in his post-trial clemency matters or on appeal may suggest that military finance officials did not actually take his pay and allowances as they were legally authorized to do in accordance with the language of the convening authority's action; however, there is no evidence in the record to confirm that this happened. Even if this were the case, our superior court has held that appellant nevertheless is harmed by the possibility that funds received by him or his dependents under these circumstances could be subject to recoupment. *United States v. Johnson*,

62 M.J. 31, 38 (C.A.A.F. 2005); *United States v. Lajaunie*, 60 M.J. 280, 281 (C.A.A.F. 2004) (mem.).

Although the omission of the conforming language from the convening authority's action may have been an oversight or administrative error, the fact remains that the wording of the action does not comply with the convening authority's obligations to the appellant under the pretrial agreement and the appellant is entitled to relief.

Conclusion

The action of the convening authority is set aside. We return the record of trial to The Judge Advocate General for remand to the convening authority for a new action consistent with this opinion. Thereafter, Article 66(c), UCMJ, 10 U.S.C. § 866(c), shall apply.

OFFICIAL



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over a faint, light blue circular stamp or watermark.

STEVEN LUCAS
Clerk of the Court