

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
J.A. MAKSYM, B.L. PAYTON-O'BRIEN, T.R. ZIMMERMANN  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JOSEPH J. FROIO  
LOGISTICS SPECIALIST SEAMAN (E-3), U.S. NAVY**

**NMCCA 201200029  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 27 October 2011.

**Military Judge:** CDR Douglas Barber, JAGC, USN.

**Convening Authority:** Commanding Officer, USS GONZALEZ  
(DDG 66).

**Staff Judge Advocate's Recommendation:** LT K.C. Marsh, JAGC,  
USN.

**For Appellant:** CDR Christopher Geis, JAGC, USN.

**For Appellee:** LT Benjamin Voce-Gardner, JAGC, USN.

**30 April 2012**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of indecent language in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for one year, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

On 19 March 2012, appellate defense counsel filed what purported to be a "Submission of Case Without Specific Assignments of Error," but which alleged that the convening authority did not comply with the terms of the pretrial agreement, to wit: disapproval of the bad-conduct discharge and suspension of some period of confinement. On 20 March 2012, this court issued an Order for the Government to show cause why the court should not enforce the terms of the pretrial agreement, which obligated the CA to disapprove the bad-conduct discharge and suspend all confinement in excess of six months for the period of confinement served plus twelve months. The Government filed a timely response agreeing that the court should enforce the terms of the pretrial agreement.

An accused who pleads guilty pursuant to a pretrial agreement is entitled to the fulfillment of any promises made by the Government as part of that agreement. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. Smith*, 56 M.J. 271, 272 (C.A.A.F. 2002). Therefore, we agree with the appellant and the Government, and take corrective action.

Finally, although not raised by counsel, we note that the military judge misadvised the appellant regarding the effect the pretrial agreement had on the adjudged sentence. After sentence is announced, the military judge shall ensure that an accused understands the effect of the maximum sentence provisions of a pretrial agreement. RULES FOR COURTS-MARTIAL 910(f)(3) and 910(h)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The pretrial agreement in this case obligated the CA to suspend all confinement in excess of six months. Appellate Exhibit IV. However, instead of advising the appellant that the balance of the one year of adjudged confinement would be suspended, the military judge stated, "the convening authority promises to reduce the sentence down to 6 months. So the impact is to reduce the term from 1 year down to 6 months." Record at 95 (emphasis added). Both parties concurred with the military judge's incorrect explanation. *Id.* This faulty advice could be construed to mean that the CA agreed to disapprove all confinement in excess of six months, rather than to suspend it. This error does not affect the providency of the plea. See *United States v. Lundy*, 60 M.J. 52, 57 (C.A.A.F. 2004). Nonetheless, we give the benefit of the doubt as to the pretrial agreement's effect on the sentence to the appellant, and take corrective action on the sentence below.

The findings and so much of the sentence as provides for six months confinement and reduction to pay grade E-1 are

affirmed. The balance of the adjudged confinement and the bad-conduct discharge are set aside. Following this correction, no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

For the Court

R.H. TROIDL  
Clerk of Court