

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Abdel Fattah,	:	
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Petitioner	:	
	:	
v.	:	No. 1513 C.D. 2009
	:	
Pennsylvania Board of Probation and	:	Submitted: June 18, 2010
Parole,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: October 21, 2010**

Abdel Fattah (Fattah) petitions for review of the Order of the Pennsylvania Board of Probation and Parole (Board) that rescinded his executed parole. Fattah argues that the Board failed to show good cause supported by substantial evidence in the record to rescind his parole. The Board argues that Fattah's parole was conditioned on his deportation to the Arab Republic of Egypt (Egypt) and that Fattah sabotaged efforts to deport him and lied to the Board in pre-parole interviews about his citizenship and his desire to be deported to Egypt. This Court previously remanded this case to the Board for a clarification of its rationale for

rescinding Fattah's executed parole. For the following reasons, we affirm the Order of the Board.

This Court previously described the factual circumstances underlying this case as follows:

Between 2001 and 2003 Fattah was sentenced for crimes he committed, including aggravated assault, terroristic threats, and ethnic intimidation, in Philadelphia, Bucks, and Cumberland counties. On August 25, 2001, Fattah began serving an aggregated sentence of three years, three months to eleven years, eleven months, with a minimum date of November 25, 2004 and a maximum date of July 25, 2013. After denying Fattah parole four times between 2003 and 2004, the Board again considered Fattah for parole in late 2007 and 2008. Among the materials the Board considered was an interview with Fattah in which he stated that "he now wants to return to Egypt – says he's reached out to Egyptian Gov't trying to pave the way for return." (Parole Decision Making Guidelines at 2-3, December 20, 2007, R. at 28-29.) The Board, in its brief to this Court, also asserts that Fattah's parole was motivated, in part, by the costs of medical care incurred due to Fattah's hunger strikes. (Board's Br. at 3.) In an order recorded on May 13, 2008, the Board paroled Fattah to an Immigration and Customs Enforcement (ICE) detainer, stating:

Following an interview with you and a review of your file, and having considered all matters required pursuant to the Parole Act, the Board of Probation and Parole, in the exercise of its discretion, has determined at this time that: your best interests justify you being paroled/reparoled; and, the interests of the Commonwealth will not be injured. Therefore, you are granted parole/reparole at this time. The reasons for the Board's decision include the following:

The positive recommendation made by the Department of Corrections.

The existence of detainers filed against you.

Parole to Immigration and Customs Enforcement [ICE] deportation order detainer. Approved home to be available.

You shall abide by the rules and regulations of the institution.

(Notice of Board Decision, May 13, 2008, R. at 37.) Fattah was given the conditions of his parole, which he signed. Among other things, these conditions stated:

Upon you [sic] release from your ICE detainer, you must report IMMEDIATELY with orders to:  
HARRISBURG COMMUNITY CORRECTIONS  
CENTER (203)  
27 NORTH CAMERON STREET  
HARRISBURG, PA 17101

(Conditions Governing Parole/Reparole, June 12, 2008, R. at 40.) Fattah was released to ICE on the deportation detainer; however, ICE ultimately failed to deport Fattah. The parties disagree over the reasons for this failure, and the record contains conflicting evidence as to why Fattah was not deported.

On March 23, 2009, Fattah was returned to the custody of the Commonwealth on a Board detainer. On March 25, 2009, the Board issued a Notice of Good Cause and Hearing stating that it would hold a rescission hearing. Following a hearing before a hearing examiner on April 10, 2009, at which Fattah was represented by counsel, the hearing examiner recommended that the Board not rescind Fattah's parole. Nonetheless, on June 8, 2009, the Board issued an order rescinding Fattah's parole, stating only:

As recorded on June 8, 2009 the Board of Probation and Parole rendered the following decision in your case:

Rescind Board action recorded on 05/13/08 and release orders executed on 06/12/08 for release on 06/17/08, good cause established.

(Notice of Board Decision, June 8, 2009, R. at 186.) On June 29, 2009, Fattah filed a Petition for Administrative Relief with the Board. By letter dated July 28, 2009, the Board replied that it could not

accept Fattah's Petition for Administrative Relief because the "Board regulations regarding administrative relief do not apply to decisions rescinding prior grants of parole." (Letter from Assistant Counsel for the Board to Fattah (July 28, 2009), R. at 190.)

Fattah v. Pennsylvania Board of Probation and Parole, No. 1513 C.D. 2009, slip op. at 2-4 (Pa. Cmwlth. Feb. 16, 2010). Fattah then appealed to this Court, which determined that, because Fattah's parole was executed, he was entitled to full due process protections. Id., slip op. at 4 (citing Gruff v. Pennsylvania Board of Probation and Parole, 986 A.2d 953, 958 (Pa. Cmwlth. 2009)). However, this Court ultimately concluded that we were unable to resolve the merits of this case because "the exact theory under which the Board rescinded Fattah's parole is not clear from its order, the record, or the Board's brief. In its brief, the Board articulates different rationales for why it may have rescinded Fattah's parole." Fattah, slip op. at 5. Accordingly, we remanded this case to the Board so that it might provide "its reasons for rescinding Fattah's parole, set[] forth the evidence it relies upon, and resolve[] questions of credibility." Id., slip op. at 6. In response, the Board issued a Status Report, dated March 19, 2010, providing this Court with the information requested by our order in Fattah, and this case is now ready for disposition.<sup>1</sup>

In Gruff, this Court held that an inmate whose parole was executed is entitled to full due process protections in the rescission of his parole, including a

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<sup>1</sup> This Court's review of a decision by the Board rescinding a petitioner's executed parole "is 'limited to whether constitutional rights were violated, an error of law was committed, or necessary findings of fact are supported by substantial evidence.'" Gruff, 986 A.2d at 957 n.3 (quoting Dinkins v. Department of Justice, Pennsylvania Board of Probation and Parole, 523 A.2d 1218, 1220 n.1 (Pa. Cmwlth. 1987)).

decision explaining the facts and rationale underlying the Board's decision to rescind parole. Gruff, 986 A.2d at 959. In the Status Report, the Board explained that it paroled Fattah only so that he could be deported to Egypt and that the Board would not have paroled him had it known that Fattah would not be deported. The Board also states that Fattah lied during his parole interview when he said that he wished to return to Egypt and that Fattah actively frustrated the attempts of ICE to deport him.

As evidence supporting this rationale, the Board, in the Status Report, takes notice of a number of its records, including: a supplement to its initial parole decision stating that Fattah's parole would be granted once the Board received confirmation that Fattah would be deported; handwritten notes of one of the Board members that Fattah told the Board member that he wanted to return to Egypt and was attempting to work with the Egyptian government to facilitate his return; a Board decision continuing the Board's deliberations until Fattah's Egyptian citizenship could be confirmed; and handwritten notes of the Board members on vote sheets indicating that the Board members intended to release Fattah to a deportation detainer *only*. The Board also takes official notice of a letter from United States Senator Arlen Specter to the President of Egypt, contained in the Congressional Record, describing Fattah's conduct in filling out an Egyptian passport request form with expletives and gibberish. The Board further relies on Fattah's own statements at the rescission hearing, indicating that he was not deported because he believed the passport being used in his deportation was fraudulent and that he wished to remain in the United States because he would receive better medical care than he would in Egypt. The Board also relied upon

declarations by Fattah and his attorney that indicated, among other things, that Fattah entered the United States illegally and that, previously, he had fraudulently obtained a German passport under a false name.

Initially, we must point out that rescission of parole “is based on information or facts *arising prior to* the inmate’s release on parole.” Lord v. Pennsylvania Board of Probation and Parole, 580 A.2d 463, 464 n.1 (Pa. Cmwlth. 1990) (emphasis added). Revocation of parole, in contrast, occurs “when an inmate already at liberty on parole violates a term or condition of that parole or is convicted of a crime while on parole.” Id. If the Board had argued that cooperation with deportation was a condition of Fattah’s parole and that Fattah failed to cooperate, in other words, did not comply with a condition of his parole, this would support revocation, but not rescission of Fattah’s parole. However, the Board has based its decision to rescind Fattah’s parole not only on its understanding that Fattah was to be deported immediately following his parole, but also on the grounds that Fattah made misrepresentations about his desire to be deported and that the Board was not aware of other material information, such as the fact that Fattah had previously used at least one false passport, which hampered ICE’s attempts to deport Fattah.

Fattah argues that the Board cannot rely upon a number of the documents of which the Board takes official notice in the Status Report because it did not take official notice of these records at the rescission hearing. In Johnson v. Pennsylvania Board of Probation and Parole, 890 A.2d 45 (Pa. Cmwlth. 2006), this Court held that although the Board may generally “take official notice of

documents contained in its own files . . . this court has held that the Board may not take official notice of documents in its file when such documents were not offered into evidence and pertained to a necessary factual determination.” *Id.* at 49-50. Thus, Fattah argues that the Board may not consider evidence including, *inter alia*: the Board members’ handwritten notes indicating that they wished to parole Fattah to a deportation detainer only; notes of an interview in which Fattah expressed a desire to be deported to Egypt; or the Board’s decision dated January 8, 2008 continuing deliberations until Fattah’s Egyptian citizenship could be established. We note that this information all appears in the record certified to this Court by the Board and that Fattah has neither made a motion to amend the record to have these documents removed, nor did Fattah argue that this evidence should not be considered in his brief prior to remand. However, even assuming this argument is valid and not waived, there is still sufficient evidence in the testimony of the Board’s agent, Lisa Peters, before the hearing examiner, along with the Board’s Order paroling Fattah and Fattah’s admissions to support the Board’s decision to rescind Fattah’s parole.

The Board’s Order paroling Fattah cites as a reason for the parole “the existence of detainers filed against [Fattah]” and states “parole to Immigration and Customs Enforcement deportation order detainer.” (Notice of Board Decision, May 13, 2008, R. at 37.) It is clear from this Order alone that the Board’s intent in paroling Fattah was that he be available for deportation. In addition, Ms. Peters testified “[t]hat was the only condition of his parole was to be deported. . . . So if we had actually been aware of the fact that he was not a resident of Egypt beforehand then we would have never signed him out on parole.” (Hr’g Tr. at 15,

R. at 73.) Fattah, through his counsel, admitted that some of the difficulties in deporting him stemmed from his travel documents listing an incorrect name, which he had previously used in obtaining a German passport. (Statement in Opposition to Rescission of Parole, Hr'g Ex. D-1 (Opposition Statement), at 2, 6, R. at 106, 110.) Fattah, in his own statement attached to the Opposition Statement, stated:

4. On 6-17-08 ICE staff attempted [sic] to deport me with false name, false birth date and false address etc;

5. ICE was able to get/obtain a travel document from the embassy office in NY City based on fake passport copy that I used in Germany about (20) years ago.

6. In Egypt if any Egyptian used false information to benefit from it in any way, under the Egyptian law this is a serious crime and people who do this go to the jail for a long time.

7. Even though that ICE is the one who obtain the travel document does not change the fact that I am the one who responsible for the document under the Egyptian law because I didn't refuse to accept to take any part of the process.

(Statement of Fattah, attachment to Opposition Statement, ¶¶ 4-7, R. at 113.) That Fattah had previously used false information on a passport was a fact of which the Board asserts it was unaware when it granted Fattah parole. There is no evidence in the record to suggest that the Board was aware that Fattah had previously used a fraudulent passport or that he would be unable to be deported due, in part, to this fraud. Thus, the record supports the conclusion that the Board was unaware of a material fact which would have affected its decision to parole Fattah and, therefore, rescission of Fattah's parole is warranted.

Fattah devotes much of his Supplemental Brief to the argument that either his deportation was not a condition of his parole or that he was unaware that deportation was a condition of his parole, and that ICE's failure to deport him was due to no fault of his own. These arguments are unavailing. As noted above, it is clear that the Board paroled Fattah only on the understanding that he was to be deported. As to whether or to what degree Fattah intentionally frustrated the attempts to deport him, the record is unclear, although it is clear that Fattah's prior use of fraudulent travel documents hampered, if not prevented, his deportation. Fattah's culpability is not a necessary element, however, to the consideration of whether the Board may rescind Fattah's parole. For example, in Lord, this Court upheld the rescission of the executed parole of the petitioner, Lord, where the parole had resulted from a clerical error, which was no fault of Lord's. Moreover, even if culpability were at issue in this case, the material fact of which the Board was unaware, that Fattah had previously obtained a passport using false personal information, is hardly one with regard to which Fattah is blameless.

For these reasons, we affirm the Order of the Board.

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**RENÉE COHN JUBELIRER, Judge**

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No. 1513 C.D. 2009

**ORDER**

**NOW**, October 21, 2010, the Order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is hereby **AFFIRMED**.

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**RENÉE COHN JUBELIRER, Judge**