

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Abdel Fattah,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1513 C.D. 2009
	:	
Pennsylvania Board of Probation and Parole,	:	Submitted: December 4, 2009
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: February 16, 2010**

Abdel Fattah (Fattah) petitions for review of the order of the Pennsylvania Board of Probation and Parole (Board) that rescinded Fattah’s executed parole. Fattah argues that the Board failed to show good cause to rescind his parole or that Fattah violated a condition of his parole. The Board responds 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. For the following reasons, we remand the matter to the Board for it to make findings of fact based on the record and explain the reasons for its decision.

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 now petitions this Court for review.

As a preliminary matter, this Court must determine what standard of review is applicable to the Board’s order rescinding Fattah’s parole. As this Court stated in Gruff v. Pennsylvania Board of Probation and Parole, \_\_\_ A.2d \_\_\_, \_\_\_, No. 816 C.D. 2009, 2009 Pa. Commw. LEXIS 1697 at \*9 (Pa. Cmwlth. Dec. 23, 2009):

We have recognized the Board’s power to rescind a grant of parole without judicial review where the parole is unexecuted—that is, before the inmate signs the acknowledgment of conditions and before the Board issues the release order. . . . However, where the grant of parole has been executed, even if the inmate has not been released from confinement, this Court has required due process guarantees of notice and a hearing, which can be reviewed upon appeal.

Id. at \_\_\_, 2009 Pa. Commw. LEXIS 1697 at \*9 (footnote omitted). In this case, although he was never at liberty, but was instead released to an ICE deportation detainer, Fattah’s parole was, nonetheless, executed because he signed the conditions of his parole and the Board issued his release order. Therefore, due process protections apply to the Board’s decision to rescind Fattah’s parole and our “review is ‘limited to whether constitutional rights were violated, an error of law was committed, or necessary findings of fact are supported by substantial evidence.’” Id. at \_\_\_ n.3, 2009 Pa. Commw. LEXIS 1697 at \*5 n.3 (quoting Dinkins v. Department of Justice, Pennsylvania Board of Probation and Parole, 523 A.2d 1218, 1220 n.1 (Pa. Cmwlth. 1987)).

With regard to the due process safeguards required of an order rescinding executed parole, this Court has stated that such an order must include “written conclusions which include the evidence relied upon and the reasons for the rescission.” Id. at \_\_\_, 2009 Pa. Commw. LEXIS 1697 at \*11 (citing Morrissey v. Brewer, 408 U.S. 471, 489 (1972)). As quoted above, the Board’s decision rescinding Fattah’s parole does not disclose the reasons for that rescission or the evidence or findings of fact supporting those reasons. In Gruff, this Court was able to reach the merits of the Board’s decision because the parties did not dispute the facts of the case, and the Board’s reason for rescinding the petitioner’s parole was clear. Id. at \_\_\_, 2009 Pa. Commw. LEXIS 1697 at \*14.

In this case, however, 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, stating: (1) Fattah’s parole was “subject to a condition subsequent that the United States government deport him,” (Board’s Br. at 5); and (2) “Fattah lied to the Board during his parole interview when he said that he wanted to return to Egypt,” and subsequently sabotaged ICE’s attempts to deport him, (Board’s Br. at 8-9). Additionally, there is unresolved conflicting evidence in the record regarding whether Fattah’s deportation was, in fact, a “condition subsequent” of his parole and whether ICE’s failure to deport Fattah was due to Fattah’s lack of cooperation or even active resistance, or due to other factors.

Because we lack the information necessary to determine the reasoning for the Board’s decision and what evidence the Board relied upon to support that

decision, we are unable to review the Board's order to determine whether its findings of fact are supported by substantial evidence, whether the Board erred in applying the law, or whether the Board violated Fattah's constitutional rights. We must, therefore, remand this matter to the Board so that it may issue a decision wherein it provides its reasons for rescinding Fattah's parole, sets forth the evidence it relies upon, and resolves questions of credibility.

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**RENÉE COHN JUBELIRER, Judge**

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Abdel Fattah,	:	
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Pennsylvania Board of Probation and	:	
Parole,	:	
	:	
Respondent	:	

**ORDER**

**NOW**, February 16, 2010, the above-captioned matter is **REMANDED** to the Pennsylvania Board of Probation and Parole to issue, within 60 days of the date of this order, a decision setting forth the reasons for the Board's order in the above-captioned matter and the evidence relied upon.

Jurisdiction retained.

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**RENÉE COHN JUBELIRER, Judge**