

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Lee A. Smith, :  
 :  
 : Petitioner :  
 :  
 : v. : No. 2092 C.D. 2010  
 : SUBMITTED: June 10, 2011  
 :  
 Pennsylvania Board of Probation :  
 and Parole, :  
 : Respondent :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED: August 1, 2011**

Lee A. Smith petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) denying his administrative appeal from an order recommitting him for a technical parole violation. After review, we affirm.

Lee was paroled under specified conditions of parole, including that he attend and successfully complete a community corrections center program; a discharge or termination from the program for any reason other than successful completion would constitute a violation of his parole. In accordance with this condition, Smith was paroled to and resided at the Harrisburg Community Corrections Center. On October 22, 2009, Smith was discharged from the Center as a result of assaultive behavior towards a staff member.

During the violation hearing that followed, two witnesses testified for the Commonwealth, Lt. DeLeone, the Security Supervisor at the Center, and Rob Tompkin, the Center monitor who was involved in the incident with Smith that led to Smith's premature discharge from the Center. Lt. DeLeone testified that on October 22, 2009, Smith came to his office to discuss an incident that had just occurred between Smith and Tompkin. Then, after Smith left, Lt. DeLeone called Tompkin into his office but before Tompkin could enter, Smith and Tompkin began to yell at each other. When Tompkin entered the Lieutenant's office, Smith followed him in uninvited, approached Tompkin chest-to-chest, and then continued to exchange more words. Lt. DeLeone characterized Smith as the aggressor. He also noted that it was an "intense situation." Violation Hearing of February 19, 2010, Notes of Testimony at 14. Lt. DeLeone separated the two men and told Smith to leave his office, whereupon he then shut the door. Lt. DeLeone then requested that Smith be dismissed for assaultive behavior. The Lieutenant acknowledged that Smith acted properly in contacting him initially about the incident and that Smith left the office when asked.

According to Tompkin, when he went down to talk to the Lieutenant, Smith followed him into the office "and started saying something about you're not going to treat me like your bitch. . . . and I said I'm not treating you like your bitch. You're treating me like --- I mean you're treating me like your bitch." *Id.* at 19. When questioned whether physical contact occurred, Tompkin replied, "Well, yeah, the chest."<sup>1</sup> *Id.* While he testified on direct examination that he stepped up to Smith when Smith entered the office, on cross-examination, Tompkin testified that

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<sup>1</sup> Both the Supervision History (Certified Record at 29) and an occurrence report (*id.* at 37) indicate that the physical contact was made when Smith placed his chest against Tompkin's.

Smith stepped up to him and then he stepped to Smith and Smith stepped back at him. He further testified that he stepped towards Smith, “[t]o let him know that he wasn’t going to step on me like I’m his bitch.” *Id.* at 22. He also testified that the incident started when Smith asked him for his check and when the question was repeated a second time, Tompkin told him that “we’re not here to serve you.” *Id.* at 20. During this incident, Smith raised his voice and Tompkin raised his voice in return.

Smith testified in turn that when he asked Tompkin for his check, Tompkin did not acknowledge him, and when he repeated the question, Tompkin replied that, “I’m not here to serve you. . . . I’m not your f---ing slave . . .” *Id.* at 26. According to Smith, Tompkin then started to scream at him; he described Tompkin as “irate” and “trippin’.” *Id.* He further stated that when Tompkin came towards him to enter the Lieutenant’s office, he was screaming that Smith was not tough, to which Smith replied: “[Y]o, you trippin’ on me. You treating me like I’m your bitch. I’m not your bitch, why you trippin’?” *Id.* at 29. Smith further testified that when he entered the Lieutenant’s office, he and Tompkin were both shouting and that he went into the office to clarify what had happened. As to who approached whom, Smith said that Tompkin came at him screaming but that they both walked towards each other; he denied that any contact occurred, noting that the Lieutenant got between the two of them.

Based upon the evidence, the Board found that Smith violated the condition of parole that required a successful discharge from the Center and recommitted him to serve back time as a technical parole violator. When his administrative appeal was denied, this appeal followed.

While Smith’s argument is not clearly articulated on appeal, he seems to take issue with both the Board’s credibility findings as well as its conclusion that the facts demonstrate assaultive behavior.<sup>2</sup> As to the first contention, Smith suggests that the Board erred in crediting the testimony of both Lt. DeLeone and Tompkin, whom he alleges were biased. He also seems to imply that it was error to credit Tompkin because the evidence demonstrates that Tompkin acted in an unprofessional manner and his conduct was “more reprehensible than [sic] any actions taken by Mr. Smith.” Petitioner’s brief at 16. There is no merit to this first contention. It is well settled that as the ultimate fact finder, the Board is charged with evaluating witness credibility, resolving conflicts in evidence and assigning evidentiary weight. *Flowers v. Pa. Bd. of Prob. & Parole*, 987 A.2d 1269 (Pa. Cmwlth. 2010). Accordingly, this court is bound by the Board’s credibility findings and they are not subject to our review on appeal. *McCauley v. Commonwealth, Pa. Bd. of Prob. & Parole*, 510 A.2d 877 (Pa. Cmwlth. 1986).

We also find no merit to Smith’s second contention, that is, that the Board failed to demonstrate that he engaged in assaultive behavior and, therefore, presumably was improperly discharged from the Center. With regard to “assaultive behavior,” this court recently observed:

Although the Board’s regulations require that parolees refrain from assaultive behavior, the regulations do not provide a definition of “assault.” 37 Pa. Code §

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<sup>2</sup> In response, the Board argues, *inter alia*, that Smith’s appeal is frivolous because he was not recommitted due to a finding that he engaged in assaultive behavior but because he was discharged from the Center prior to successfully completing the program. We believe that Smith is essentially arguing that the record does not demonstrate that he engaged in assaultive behavior and, therefore, he was improperly discharged from the Center. We note that pursuant to 37 Pa. Code § 63.4(5)(iii), the general conditions of parole include that the parolee refrain from assaultive behavior.

63.4(5)(iii) (relating to general conditions of parole). However, this Court recognizes “[a]ssaultive behavior encompasses a broader category of actions than would the crime of assault, and thus actions that would not constitute a crime may nonetheless be sufficient grounds for revocation of parole.” *Jackson v. Pa. Bd. of Prob. & Parole*, 885 A.2d 598, 601 (Pa. Cmwlth. 2005).

Moreover, in the context of parole violations, assaultive behavior is defined under the ordinary dictionary definition of assault. *Moore v. Pa. Bd. of Prob. & Parole*, [505 A.2d 1366 (Pa. Cmwlth. 1986)]. Webster’s Collegiate Dictionary, 73 (11<sup>th</sup> ed. 2003) defines assault as: “**1 a:** [A] violent physical or verbal attack . . . [and] **2 a:** [A] threat or attempt to inflict offensive physical contact or bodily harm on a person (as by lifting a fist in a threatening manner) that puts the person in immediate danger of or in apprehension of such harm or contact.”

*Flowers*, 987 A.2d at 1271-72. *See also Jackson v. Pa. Bd. of Prob. & Parole*, 885 A.2d 598, 601 (Pa. Cmwlth. 2005) (stating that, if behavior does not involve physical harm, in order to constitute assaultive behavior, the conduct must “clearly [evoke] a reasonable apprehension of bodily harm.”).

Here, the combined testimony of the Lieutenant and Tompkin, both of whom were credited by the Board, supports the conclusion that Smith engaged in assaultive behavior, justifying his discharge from the program. The testimony of these two witnesses demonstrates that Smith was yelling and acting aggressively in a situation described as “intense.” Moreover, while yelling, Smith followed Tompkin closely into the office, stepped up to him and chest-bumped him. These are actions that could clearly “evoke a reasonable apprehension of bodily harm,” or constitute a violent verbal attack. Thus, the evidence supports the conclusion that Smith was properly discharged from the Center for engaging in assaultive conduct,

which, in turn, supports the Board's order recommitting Smith for an unsuccessful discharge from the Center.

The Board's order is affirmed.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

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Lee A. Smith,	:	
	:	
Petitioner	:	
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v.	:	No. 2092 C.D. 2010
	:	
Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 1st day of August, 2011, the order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is hereby AFFIRMED.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

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HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION  
BY SENIOR JUDGE FRIEDMAN

FILED: August 1, 2011

I respectfully dissent. The majority holds that Lee A. Smith’s words and actions toward Rob Tompkin, a Community Corrections Center (CCC) monitor, constituted assaultive behavior, and, thus, Smith was properly discharged from the CCC for assaultive behavior. Because there is no evidence that Smith threatened violence or that Smith’s words and actions evoked apprehension of bodily harm in Tompkin, I cannot agree.

On October 22, 2009, Smith asked Tompkin for his paycheck. When Tompkin responded, “we’re not here to serve you,” Smith went to the office of Lt. DeLeone to complain. Smith left the office, and Lt. DeLeone summoned Tompkin. When Tompkin arrived, Smith followed him into the office and said, “You’re not going to treat me like your bitch.” Tompkin replied, “You’re treating me like your bitch.” Smith stepped toward Tompkin, and Tompkin stepped toward Smith to “let



him know that he wasn't going to step on me like I'm his bitch." Smith's chest made contact with Tompkin's chest during the exchange. Lt. DeLeone asked Smith to leave, and Smith did so. (Majority Op. at 2-3.)

Assaultive behavior is defined, in relevant part, as "a violent physical or verbal attack." *Jackson v. Pennsylvania Board of Probation and Parole*, 885 A.2d 598, 601-02 (Pa. Cmwlth. 2005). If behavior does not involve actual physical harm, the behavior "must be such that it 'clearly evoke[s] a reasonable apprehension of bodily harm' in the person assaulted." *Id.* at 601 (quoting *Moore v. Pennsylvania Board of Probation and Parole*, 505 A.2d 1366, 1367 (Pa. Cmwlth. 1986)).

Here, Smith said, "You're not going to treat me like your bitch." These words cannot reasonably be construed as a **violent** verbal attack. First, the words do not threaten violence against Tompkin. Second, the words must be construed in context: (1) instead of attempting to inflict bodily harm on Tompkin for ignoring Smith's request for his paycheck, Smith followed proper procedure by going to the office of Lt. DeLeone to complain; (2) Smith obviously addressed Tompkin in the presence of Lt. DeLeone so that the dispute would **not** erupt in violence; and (3) when Lt. DeLeone asked Smith to leave, Smith immediately did so.

Moreover, there is no evidence that the words and touching of chests evoked in Tompkin any apprehension of bodily harm. Indeed, there is no evidence that Tompkin feared Smith. Rather, the evidence shows that, when Smith made the "bitch" remark, Tompkin made his own "bitch" remark. When Smith stepped toward Tompkin, Tompkin stepped toward Smith. Indeed, Tompkin's stance throughout was

that he was not Smith's servant, i.e., his "bitch," and that he did not fear Smith. Although the majority states that Smith's actions "could" evoke a reasonable apprehension of bodily harm in a person, (Majority Op. at 5), there is no evidence that they did evoke any apprehension in Tompkin.

Accordingly, I would reverse.

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ROCHELLE S. FRIEDMAN, Senior Judge