

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael A. Hubler, :
Petitioner :
 :
v. : No. 229 C.D. 2010
 : Submitted: July 9, 2010
 :
Pennsylvania Board of :
Probation and Parole, :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: October 6, 2010

Michael Hubler (Hubler) petitions for review of an adjudication of the Pennsylvania Board of Probation and Parole (Board) that recommitted Hubler as a technical parole violator. Hubler argues that the record lacks substantial and competent evidence to support the Board's finding that he violated two conditions of his parole. Finding no merit in Hubler's arguments, we affirm the Board.

On October 22, 2007, the Board paroled Hubler from two concurrent 24-year State prison sentences for burglary and theft. By a revocation decision mailed February 1, 2008, the Board recommitted Hubler as a technical parole violator; this Court reversed that decision in *Hubler v. Pennsylvania Board of Probation and Parole*, 971 A.2d 535 (Pa. Cmwlth. 2009), and Hubler's parole was reinstated. On May 5, 2009, the Board imposed special conditions on Hubler's parole: (1) that he avoid discharge from the Harrisburg Community Corrections Center (Center), his

approved residence, until he had successfully completed the Center's sex offender treatment program, and (2) that he not sleep or stay overnight at any location other than the Center without prior written permission of parole supervision staff. Certified Record at 47-48 (C.R. __).

On Saturday, May 16, 2009, at approximately 10:15 p.m., Hubler went outside the Center to smoke a cigarette. When Hubler had not returned by 10:30 p.m., Center staff notified the Board that he had absconded. Hubler returned to the Center the next day, May 17, 2009, at which time he was discharged from the Center for leaving without permission and without having completed the sex offender treatment program. Three days later, Hubler's parole agent charged him with violating the special conditions of his parole.

A hearing was held before a hearing examiner on September 18, 2009. The Board presented the testimony of Lieutenant Santiago DeLeon, a security officer at the Center and the acting director on weekends. Lieutenant DeLeon read into the record a portion of a report that he and the director of the Center prepared after the incident. Reading from the report, Lieutenant DeLeon testified:

At approximately [10:15 p.m.], Hubler went out during a smoke break. At [10:30 p.m.], it was discovered that Hubler did not return inside the facility. At [10:30 p.m.], [the Board's] 24/7 operator was called and Hubler was reported as an absconder. On 5/17/09, Hubler returned to the center at approximately [5:00 p.m.] Parole authorities were contacted, arrived at the center at [6:30 p.m.] and returned Hubler to institutional custody.

C.R. 72-73. Lieutenant DeLeon confirmed that Hubler was discharged from the program. Lieutenant DeLeon further testified that the report was made in the regular course of the Center's business, the day after the incident. Upon questioning by

Hubler's counsel, Lieutenant DeLeon conceded that the witnesses who provided the information in the report were not present at the hearing. The report was admitted into evidence over counsel's objection.

Michelle Zimmerman, a parole agent, testified about a conversation she had with Hubler while transporting him to prison on May 17, 2009. According to Agent Zimmerman, Hubler told her that "he had left the center the night before" and stayed "at a friend's house up on the hill somewhere." C.R. 83-84. Hubler's counsel did not object to this testimony.

Hubler presented the testimony of Emiko Moyes, a monitor at the Center. Moyes testified that when she arrived at work on May 17, 2009, Hubler was absent. Moyes recalled receiving a phone call from Hubler during her shift. Moyes testified that Hubler told her "he didn't know what to do and that he had been afraid and he had run away." C.R. 93.

Hubler testified on his own behalf. The following testimony was elicited on direct examination:

Q. What time was it --- well, let me ask you this. Did you leave the center?

A. Yes, I did.

Q. Did you get the approval of anyone to leave the center?

A. No, I didn't.

Q. What time, approximately, was that?

A. I think it was around 10:15, 10:20.

Q. And that was on May the 16th?

A. Yes.

Q. Where did you go?

A. I went to my friend's house on --- the first place I went to, my friend's house on Muench Street and stayed on the porch there until he woke up at seven o'clock in the morning.

Q. And that is in the City of Harrisburg?

A. Yes.

Q. Do you know the actual street address on Muench Street?

A. Yes. 206.

Q. And who is this person that lives there?

A. His name is Todd Williams. He is my cosponsor from the AA program.

C.R. 101-102.

In a decision dated November 2, 2009, the Board found that Hubler had committed two technical violations of his parole by failing to reside at his approved residence and failing to avoid discharge from the residency program at the Center. The Board revoked Hubler's parole and recommitted him to serve 9 months of back time. Hubler appealed, but the Board affirmed its decision "based on the credible testimony of Lt. Deleon, State Parole Agent Zimmerman and the documentary evidence introduced at the hearing." C.R. 132. Hubler now petitions for this Court's review.

On appeal,¹ Hubler argues that the Board erred in finding that the two technical parole violations were proven by a preponderance of the evidence. Hubler

¹ Our scope of review is limited to determining whether the Board's essential findings of fact are supported by substantial evidence, whether the Board committed an error of law, or whether any constitutional rights were violated. *Price v. Pennsylvania Board of Probation and Parole*, 781 A.2d 212 (Pa. Cmwlth. 2001).

contends that the Board impermissibly relied upon the incident report and Lieutenant DeLeon's testimony, which was based on that report, to find that he failed to successfully complete the residency program. Hubler asserts that this evidence was hearsay and violated his constitutional right to confront witnesses who were not present at the revocation hearing. Hubler also argues that Agent Zimmerman's testimony was vague and uncorroborated and, thus, could not support the Board's finding that he failed to reside at the Center on the night of May 16, 2009. Lastly, Hubler argues that because the first technical violation (failure to complete the program) is predicated upon the second technical violation (failure to reside at the Center), a successful challenge to the second will necessitate a reversal of the first.

We need not address Hubler's challenges to the Board's evidence in light of his own admissions. This Court has held that "[a] party's statements in its brief ... are treated as a judicial admission." *Bartholomew v. State Ethics Commission*, 795 A.2d 1073, 1078 (Pa. Cmwlth. 2002) (quoting L. PACKEL AND A. POULIN, PENNSYLVANIA EVIDENCE 2D ED. §127, at 30-31 (1999)). Judicial admissions are formal concessions "which have the effect of withdrawing a fact from issue and dispensing it without the need for proof of the fact." *Id.*

In his brief to this Court, Hubler recounts the events of May 16, 2009, culminating with the following statement:

Mr. Hubler panicked, and left the Center. The next day, Mr. Hubler voluntarily chose to return.

Petitioner's Brief at 12. In light of this judicial admission, it is conclusively established that Hubler left the Center without permission and stayed overnight at

another location.² This conduct constituted a technical violation of Hubler's parole, which was conditioned upon him maintaining continuous residency at the Center. It necessarily follows that the other technical violation was also established (failure to complete the residency program), since, as Hubler points out in his brief, that violation was predicated upon the other violation.

In summary, Hubler admitted that he violated the conditions of his parole requiring him to maintain residency at the Center and avoid discharge from the program. Accordingly, we affirm the order of the Board.³

MARY HANNAH LEAVITT, Judge

² We note that Hubler also admitted on direct examination at the hearing that he left the Center and spent the night at a friend's house in Harrisburg. C.R. 101-102. By doing so he corroborated the alleged hearsay evidence in the incident report and the testimony offered by Lieutenant DeLeon and Agent Zimmerman.

³ Hubler also argues that the Board abused its discretion by revoking his parole without considering "extenuating circumstances." Hubler claims that he was wrongfully accused of assault and possession of contraband and fled the Center because he feared he would be sent back to prison. The Board is given broad discretion in matters concerning parole; as such, it is not required to accept mitigating evidence to excuse the commission of a parole violation. *See Pitch v. Pennsylvania Board of Probation and Parole*, 514 A.2d 638, 641-642 (Pa. Cmwlth. 1986). Moreover, instead of absconding Hubler could have pursued less drastic relief if he believed he had been wrongfully disciplined, *e.g.*, alerting his parole officer or filing a grievance.

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ORDER

AND NOW, this 6th day of October, 2010, the order of the Pennsylvania Board of Probation and Parole, dated January 20, 2010, in the above-captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge