

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Fehnel,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2723 C.D. 2010
	:	SUBMITTED: June 24, 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 23, 2011

Robert Fehnel petitions for review of the order of the Pennsylvania Board of Probation and Parole (Board) that denied his administrative appeal from an order recommitting him to serve three months of backtime as a technical parole violator. We reverse.

Fehnel was released on parole on July, 13, 2009. He was ordered to report to a Community Corrections Center (“CCC”), and was informed that discharge from the CCC for any reason other than a successful completion of his time there would constitute a violation of his parole. In April, 2010, he was charged with a violation for being unsuccessfully discharged from the CCC “due to infractions of the CCC rules, including presence in an unauthorized area, and

possession of [an] automobile without permission from center staff.” Reproduced Record (R.R.) at 34. After a hearing, Fehnel was recommitted for three months. Fehnel’s administrative appeal to the Board was denied, and an appeal to this court followed.

On appeal, Fehnel argues that the Board’s determination is not supported by sufficient evidence, and that the preponderance of the evidence standard relied upon by the Board was in violation of the Due Process Clause of the United States Constitution. As we reverse on first contention, we do not reach the constitutional argument.

The Board determined that Fehnel violated his parole because he was unsuccessfully discharged from the CCC. Under this court’s precedent, discharge can only be cause for revocation of parole when the parolee is at least somewhat at fault for the discharge. *Hudak v. Bd. of Prob. and Parole*, 757 A.2d 439 (Pa. Cmwlth. 2000). A parolee who voluntarily violates CCC rules is considered at fault for his discharge. *McPherson v. Bd. of Prob. and Parole*, 785 A.2d 1079 (Pa. Cmwlth. 2001). On appeal, Fehnel argues that the evidence was insufficient to support either of the alleged rule violations, and that the charge he was unauthorized to possess the automobile was waived. The Board argues that Fehnel was properly dismissed from the CCC for unauthorized possession of an automobile, and for presence in an unauthorized area. We examine each alleged violation in turn.

Fehnel argues that the rule violation for unauthorized possession of an automobile was waived by the Board on administrative appeal. After the hearing, the Board issued a decision revoking Fehnel’s parole because he did not successfully complete the CCC program. The Board’s decision did not specify

whether it found that Fehnel had violated both rules, or if the Board had concluded that Fehnel had committed only one of the violations charged. After Fehnel's administrative appeal, the Board issued an opinion affirming its prior decision. *See* Brief for Petitioner, Exhibit B. In this opinion, the Board noted only the alleged presence in an unauthorized area, and did not mention the alleged unauthorized possession of an automobile. After Fehnel appealed to this court, the Board asserted in its brief that his dismissal from the CCC was justified by both rule violations.

While the Board's order and subsequent opinion do not make its findings with regard to the automobile charge clear, because the Board asserts that violation of the rule justified Fehnel's dismissal from the CCC, we have examined the record on this point. It is clear that the alleged violation is not supported by substantial evidence. Fehnel's parole officer testified that she had given Fehnel permission to possess an automobile. While the director of the CCC testified that Fehnel also needed to obtain his permission to have the automobile, he also admitted to seeing Fehnel with the car several times over a period of weeks without taking any action, stating that he needed to investigate whether Fehnel had permission from his parole agent. Quite simply, the record establishes that Fehnel had permission from his parole officer to possess the automobile, and was openly doing so without drawing any rebuke. On these facts, the evidence does not support a finding that Fehnel was at fault for his dismissal from the CCC on the basis of this alleged rule violation.

With respect to the second alleged violation, presence in an unauthorized area, the evidence is also lacking. The CCC director initially testified that Fehnel had signed out of the facility to an address to which he was forbidden

to go, the residence of his adult son. Upon further questioning, the director acknowledged that Fehnel had signed out to this address numerous times in the past, and that he was in fact allowed to visit there, but stated that he was not allowed to go to the address at this particular time, because there were minors present.¹ On cross-examination, the director acknowledged that he had no evidence that minors were present in the home at the time Fehnel visited, and that when he had confronted Fehnel about it, Fehnel had denied there were children in the home.² Considering the director's contradictory and confusing testimony, it is not clear to this court what the content of the rule Fehnel was accused of violating was, and there certainly is not substantial evidence that he violated it.

For all the forgoing reasons, we reverse.

BONNIE BRIGANCE LEADBETTER,
President Judge

¹ We note that the conditions of Fehnel's parole limit his contact with minor children. However, Fehnel was not charged with violating this condition of his parole, but with failure to successfully complete the CCC program.

² Although the director testified that Fehnel "admitted to signing out to that address to only receive extra time out of the center," we fail to see how that established that Fehnel was ever in an "unauthorized area." R.R. at 88. Moreover, the hearing examiner explicitly asked if the issue was whether Fehnel was allowed to be at the stated address and the director stated, "Yes. He wasn't allowed to sign out to 2832 Cedar where there was any minors." R.R. at 97.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Fehnel,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2723 C.D. 2010
	:	
Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 23rd day of August, 2011, the order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is hereby REVERSED.

BONNIE BRIGANCE LEADBETTER,
President Judge