

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Rodney Hontz,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 597 C.D. 2011
	:	
Pennsylvania Board of Probation	:	Submitted: August 12, 2011
and Parole,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: December 30, 2011**

Rodney Hontz, pro se, petitions for review from the March 11, 2011, determination (March Determination) of the Pennsylvania Board of Probation and Parole (Board), which denied Mr. Hontz’s administrative appeal from the Board’s September 10, 2010, decision (September Decision) that revoked Mr. Hontz’s parole and recalculated his new maximum date as March 31, 2015. Mr. Hontz argues, *inter alia*, that the Board erred by not considering the issues Mr. Hontz presented in his January 21, 2011, “Request for Administrative Relief,” but addressing only Mr.

Hontz's "Application to file Administrative Review *Nunc Pro Tunc*" (*Nunc Pro Tunc* Application).

On November 25, 2002, Mr. Hontz pled guilty to, among other things, burglary and criminal trespass and was sentenced to serve four to ten years. (Sentence Status Summary Sheet at 1, R. at 1.) Thereafter, Mr. Hontz was released on parole on January 9, 2006. (Order to Release on Parole/Reparole, R. at 15.) The Board declared Mr. Hontz delinquent effective March 9, 2007, and he was arrested for violation of his parole on August 17, 2007. (Board Administrative Action, March 13, 2007, R. at 20; March Determination at 1.) The Board recommitted Mr. Hontz to serve backtime as a technical parole violator (TPV) by decision mailed on February 22, 2008. (Notice of Board Decision at 1, February 22, 2008, R. 21.)

On February 9, 2009, the Board released Mr. Hontz on parole to the Wernersville Community Corrections Center (WCCC). (Order to Release on Parole/Reparole, R. 24-25.) Mr. Hontz's maximum date when he was released on parole was April 3, 2012. (Notice of Board Decision, February 22, 2008, R. 21.) While on parole, Mr. Hontz was arrested on new charges on March 16, 2010, and did not post bail. (Criminal Arrest and Disposition Report, March 19, 2010, R. at 30; Criminal Docket CP-06-CR-0001481-2010 (Criminal Docket) at 2, R. at 55.) The Board declared him delinquent on March 17, 2010, and issued a warrant to commit and detain Mr. Hontz on March 18, 2010. (Administrative Action, March 17, 2010, R. at 28; Warrant to Commit and Detain, March 18, 2010, R. at 29.)

Mr. Hontz pled guilty to one of the new criminal charges on July 1, 2010, and was sentenced to a new term of imprisonment in a state correctional facility. (Criminal Docket at 3, R. at 56; Sentence Order, July 12, 2010, R. at 36-37.) The Board issued a Notice of Charges and Hearing as a prelude to revoking Mr. Hontz's parole. (Notice of Charges and Hearing, July 13, 2010, R. at 33.) On July 14, 2010, Mr. Hontz waived the revocation hearing, as well as his panel hearing and right to counsel. (Waivers of Revocation and Panel Hearings and Right to Representation, July 14, 2010, R. at 39-41.) The Board revoked Mr. Hontz's parole, recommitted him as a TPV to serve twelve months backtime, and recommitted him as a convicted parole violator (CPV) to serve six months backtime; the six and twelve months of backtime were to run concurrently for a total of twelve months. (Notice of Board Decision, April 8, 2010, R. at 34-35; Notice of Board Decision, September 21, 2010, R. at 65-66.) The Board then recalculated Mr. Hontz's maximum date as March 31, 2015, by taking 1149 days, the time remaining on Mr. Hontz's sentence at the time of his most recent parole, February 9, 2009, and adding 585 days for the "constructive parole time added" for his time on parole from January 9, 2006, through August 17, 2007 (his previous time on parole from which he was recommitted as a TPV), for a total backtime owed of 1734 days. (Order to Recommit, R. 63.) Adding 1734 days to July 1, 2010, the date Mr. Hontz was returned to custody to serve his original sentence, the Board recalculated a new maximum date of March 31, 2015. (Order to Recommit, R. 63.)

The Board sent the September Decision to Mr. Hontz at State Correctional Institution-Frackville (SCI Frackville). However, when the mailroom at SCI Frackville received the September Decision, Mr. Hontz was not there, but in Lehigh

County Prison attending a civil trial. Mr. Hontz did not receive the September Decision until November 4, 2010, well after his thirty days to appeal had expired. (March Determination at 1.) On November 9, 2010, Mr. Hontz filed a grievance with the Department of Corrections (Department) based on the mailroom's failure to timely forward his mail, and received an initial response denying the grievance on November 16, 2010, which was upheld by the SCI Frackville's superintendent's office on November 29, 2010. (Official Inmate Grievance #342282, November 9, 2010, R. at 70; Initial Review Response, November 16, 2010, R. at 71; Response to Official Inmate Grievance #342282, November 29, 2010, R. at 73.) On December 3, 2010, Mr. Hontz filed his *Nunc Pro Tunc* Application with the Board, which stated, *inter alia*, that: “[d]ue to the negligence of the SCI Frackville officials, petitioner failed to receive proper notice of the Board[']s [September D]ecision causing him to lose his appeal rights outside of 37 Pa[.] Code § 73”; he had filed a grievance against the prison officials for holding the September Decision, and he attached the grievance documents that he had received thus far; and “[t]here are substantial issues of arguable merit involved in this review, including, but not limited to, the denial of 42 Pa. C.S.[] § 9760, credit for time served.” (*Nunc Pro Tunc* Application, R. at 67.) Accordingly, Mr. Hontz “respectfully requested that the [Board] grant [him] the right to an Administrative Review *Nunc Pro Tunc*.” (*Nunc Pro Tunc* Application, R. at 67.) Mr. Hontz did not receive any response to his *Nunc Pro Tunc* Application.

Ultimately, Mr. Hontz prevailed in his grievance and received notice that SCI Frackville's facility manager had “spoken with representatives from [the Board, who] have agreed to reinstate your appeal rights. You must file your appeal by the close of business on January 28, 2011.” (Facility Manager's Appeal Response, January 13,

2011, R. at 79.) Mr. Hontz then filed a “Request for Administrative Relief” dated January 21, 2011, in which he set forth his arguments for how the Board erred in recalculating his new maximum date. (Request for Administrative Relief, January 21, 2011, R. at 77.) In his request, Mr. Hontz asserted that he was entitled to credit for the time he spent at the WCCC following his parole on February 9, 2009, pursuant to Cox v. Pennsylvania Board of Probation and Parole, 507 Pa. 614, 493 A.2d 680 (1985). (Request for Administrative Relief, January 21, 2011, R. at 77.) He then filed an “Amended Request for Administrative Review” dated February 16, 2011, setting forth additional information and legal argument regarding why the Board erred in the September Decision. (Amended Request for Administrative Review, February 16, 2011, R. at 75.)

The Board issued its March Determination, indicating that it was in response to Mr. Hontz’s *Nunc Pro Tunc* Application, which the Board received on December 7, 2010. (March Determination at 1.) The Board, acknowledging that the Department confirmed that Mr. Hontz had not received the September Decision until November 4, 2010, accepted the *Nunc Pro Tunc* Application as a timely petition for administrative review. (March Determination at 1.) However, the Board did not accept the January 21, 2011, and February 16, 2011, Requests for Administrative Relief/Review received January 26, 2011, and February 23, 2011, respectively, because they were submitted more than thirty days after Mr. Hontz had received the September Decision. (March Determination at 1.) The Board then analyzed its recalculation of Mr. Hontz’s new maximum date, without considering any of the allegations contained in the January 2011 “Request for Administrative Relief,” i.e., that Mr. Hontz was entitled to credit for the time he stayed at the WCCC pursuant to

Cox. The Board concluded, *inter alia*, that because Mr. Hontz was recommitted as a CPV, he forfeited the credit he previously had for the period from January 9, 2006, through August 17, 2007, under Houser v. Pennsylvania Board of Probation and Parole, 682 A.2d 1365 (Pa. Cmwlth. 1996). (March Determination at 1.) Additionally, the Board noted that Mr. Hontz was not entitled to any credit for the period he was incarcerated before July 1, 2010, the date he pled guilty to new criminal charges and was sentenced to a new term of imprisonment, because he was not incarcerated solely on the Board's detainer pursuant to Gaito v. Pennsylvania Board of Probation and Parole, 488 Pa. 397, 412 A.2d 568 (1980). (March Determination at 1-2.)

Mr. Hontz filed a Request for Reconsideration with the Board and a Petition for Review with our Court.<sup>1</sup> In his pro se Petition for Review, Mr. Hontz challenges the Board's March Determination because the Board "accepted and made a decision on [his *Nunc Pro Tunc* Application] as a Petition for Administrative Review." (Petition for Review ¶ 9(a), April 1, 2011.) Mr. Hontz asserts that the *Nunc Pro Tunc* Application was solely a request to restore his appeal rights and, as such, "did not raise any specific factual and/or legal points for the Board to consider." (Petition for Review ¶ 9(b).) He points out that the *Nunc Pro Tunc* Application referred to an issue of arguable merit based on a denial of credit, not for the reason presumed by the Board, but because he did not receive "credit from the past when he was on parole

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<sup>1</sup> In reviewing the Board's Order, our review "is limited to determining whether the Board's findings are supported by substantial evidence, an error of law [was] committed, or whether any of the parolee's constitutional rights were violated." Andrews v. Pennsylvania Board of Probation and Parole, 516 A.2d 838, 841 n.10 (Pa. Cmwlth. 1986).

and in ‘custody.’” (Petition for Review ¶ 9(c).) This Court appointed counsel (Counsel), who filed an Amended Petition for Review on Mr. Hontz’s behalf. Counsel raised two issues: (1) Mr. Hontz did not receive credit for time served solely on the Board’s warrant; and (2) Mr. Hontz did not receive a timely revocation hearing. (Amended Petition for Review ¶¶ 5-6, May 31, 2011.) Noting that he was not challenging either of the issues raised in Counsel’s Amended Petition for Review, Mr. Hontz chose to waive counsel and proceed pro se, and Counsel filed a Motion to Withdraw Appearance.<sup>2</sup> We granted Counsel’s Motion to Withdraw Appearance by order dated June 7, 2011. This matter is now ready for our review.

Mr. Hontz argues that the Board erred in considering the *Nunc Pro Tunc* Application as his Petition for Administrative Review, rather than his January 2011 “Request for Administrative Relief,” which included the specific assertion that he was entitled to credit for the time he spent at the WCCC and was filed before January 28, 2011, the last day to file his appeal as stated in the Facility Manager’s Appeal Response. (Facility Manager’s Appeal Response, January 13, 2011, R. at 79.) He asserts that, because the *Nunc Pro Tunc* Application was merely his request for the Board to reinstate his appeal rights, it did not include the specific challenge to the error in calculating his credit, and that this request went unanswered until the March Determination. Mr. Hontz contends that he followed the directions supplied in the Facility Manager’s Appeal Response and specifically raised the issue of his

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<sup>2</sup> In his letter to Counsel, Mr. Hontz noted that he had waived his revocation hearing and that he was not seeking “credit for any time spent under the Board’s warrant.” (Letter from Mr. Hontz to Counsel (June 1, 2011), Ex. A to Counsel’s Motion to Withdraw Appearance, June 6, 2011.)

entitlement to the time he spent at the WCCC in his January 2011 “Request for Administrative Relief,” an issue that has not been addressed and is not waived.

The Board responds, *inter alia*, that Mr. Hontz has waived all of the issues asserted in his brief because they were not raised in the only “legitimate” Petition for Administrative Review filed by Mr. Hontz, the *Nunc Pro Tunc* Application, which did not assert an entitlement to credit for the time spent at the WCCC per Cox. (Board’s Br. at 10.) The Board argues that the January 2011 “Request for Administrative Relief” and February 2011 “Amended Request for Administrative Review” were not accepted because they were untimely, having been filed more than thirty days after November 4, 2010, the date Mr. Hontz received the September Decision. Moreover, the Board asserts that Mr. Hontz’s issues also are waived because they were not included in the Amended Petition for Review filed with this Court, which asserted only that Mr. Hontz’s revocation hearing was untimely and that he was entitled to credit for time served solely on the Board’s warrant. The Board maintains that, even if these issues were not waived, Mr. Hontz is not entitled to a hearing because his allegations in the January 2011 “Request for Administrative Relief” are insufficient to support such a hearing.

As a preliminary matter, we will address the Board’s argument that all of Mr. Hontz’s issues are waived because they were not included in the Amended Petition for Review filed with this Court. Although it is true that the issues Mr. Hontz raises in his brief are not included in the Amended Petition for Review, it is clear from the record that the Amended Petition for Review did not include the issues that Mr. Hontz desired to raise in his appeal to this Court. An examination of Mr. Hontz’s



original, pro se Petition for Review reveals that it does not include the two issues asserted in the Amended Petition for Review. Rather, it sought review of the Board's decision to address the *Nunc Pro Tunc* Application, rather than the January 2011 "Request for Administrative Relief," as Mr. Hontz's Petition for Administrative Review. It would be inequitable to bind Mr. Hontz to a document that plainly does not raise the issues that he sought to be raised, particularly where he did not submit or appear to approve that document for submission to his Court.<sup>3</sup> Moreover, the Board addresses the merits of the issues raised in Mr. Hontz's original, pro se Petition for Review and brief and, therefore, we likewise will consider the merits of those issues raised in the original, pro se Petition for Review.<sup>4</sup>

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<sup>3</sup> Mr. Hontz did not sign or verify the Amended Petition For Review, only Counsel signed that document.

<sup>4</sup> We note that, in the third argument section of Mr. Hontz's brief, he asserts that the Board improperly forfeited his credit for the time he was previously on parole and that the Board improperly extended his sentence when it recalculated his maximum date. However, because those issues were not included in any of the documents filed with the Board or in either of the Petitions for Review filed with this Court, those issues are waived. Reavis v. Pennsylvania Board of Probation and Parole, 909 A.2d 28, 36 (Pa. Cmwlth. 2006); Siers v. Pennsylvania Board of Probation and Parole, 725 A.2d 220, 221 (Pa. Cmwlth. 1999). Even if they are not waived, the Board properly forfeited Mr. Hontz's credit for the time he was on parole from January 9, 2006, through August 17, 2007, pursuant to Richards v. Pennsylvania Board of Probation and Parole, 20 A.3d 596, 600 (Pa. Cmwlth. 2011) (stating that time spent in good standing prior to recommitment for TPV is not shielded from forfeiture when a parolee is subsequently recommitted as a CPV). Moreover, the Board did not improperly extend his sentence, but simply declined to give him credit for the period of time he was at liberty on parole as permitted by Section 6138(a)(2) of the Prison and Parole Code, which states that if recommitted pursuant to this provision, a parolee "shall be reentered to serve the remainder of the term which the parolee would have been compelled to serve had the parole not been granted and shall be given no credit for the time at liberty on parole." Id. at 598 (emphasis added). Thus, in ordering Mr. Hontz to serve backtime and extending his maximum date, the Board simply was taking into account the amount of time Mr. Hontz had remaining on the sentence imposed and required him to serve that sentence.

Next, we consider the Board's contention that the only "legitimate" Petition for Administrative Review was Mr. Hontz's *Nunc Pro Tunc* Application, which did not seek a Cox commutation. "As a threshold matter . . . a petitioner in an appeal *nunc pro tunc* must proceed with reasonable diligence once he knows of the necessity to take action." Kaminski v. Montgomery County Board of Assessment Appeals, 657 A.2d 1028, 1032 (Pa. Cmwlth. 2005). "A party seeking permission to file a *nunc pro tunc* appeal . . . needs to establish that: (1) [he] filed the appeal shortly after learning of and having an opportunity to address the untimeliness; (2) the elapsed time is one of very short duration; and (3) the respondent will not suffer prejudice due to the delay." J.A. v. Department of Public Welfare, 873 A.2d 782, 785 n.4 (Pa. Cmwlth. 2005).

We agree with Mr. Hontz that the *Nunc Pro Tunc* Application merely was a request for the Board to reinstate his appeal rights and that the Board erred in not considering the January 2011 "Request for Administrative Relief." Under these circumstances, we conclude that Mr. Hontz acted with reasonable diligence once he learned of the untimeliness of his appeal by filing his *Nunc Pro Tunc* Application within thirty days of his receipt of the September Decision. Mr. Hontz's *Nunc Pro Tunc* Application set forth the date Mr. Hontz received the September Decision, the reason for the delay of his receipt, his belief that this delay was the result of negligence on the part of the officials at SCI Frackville, that he had filed a grievance regarding the delay, and his belief that he had meritorious issues regarding the calculation of his credit. In other words, the *Nunc Pro Tunc* Application focused on identifying the reasons why the Board should reinstate Mr. Hontz's appeal rights. We note that the Board did not respond to the *Nunc Pro Tunc* Application, even

though it was received on December 7, 2010, and that Mr. Hontz was advised on January 13, 2011, by SCI Frackville's Facility Manager, who had discussed the matter with the Board, that the Board was reinstating his appeal rights and he could file for administrative review of the September Decision before the close of business on January 28, 2011. (Facility Manager's Appeal Response, January 13, 2011, R. at 79.) Having had his appeal rights reinstated *nunc pro tunc*, Mr. Hontz proceeded to assert those rights by timely filing his January 2011 "Request for Administrative Relief," which set forth the specific reasons for challenging the recalculation of his maximum date. The Board offers no explanation as to how or why it will be prejudiced by considering the issues asserted in the January 2011 "Request for Administrative Relief." For the foregoing reasons, we conclude that the Board should have accepted the January 2011 "Request for Administrative Relief" as Mr. Hontz's Petition for Administrative Review and considered the issues contained therein.<sup>5</sup>

Finally, we consider the Board's assertion that, notwithstanding Mr. Hontz's contention that his new maximum date should reflect credit for his time spent at WCCC, it should neither be required to hold a hearing, nor consider that issue because the factual assertions in Mr. Hontz's January 2011 "Request for Administrative Relief" do not support such credit. Other than citing Meleski v. Pennsylvania Board of Probation and Parole, 931 A.2d 68 (Pa. Cmwlth. 2007) and Torres v. Pennsylvania Board of Probation and Parole, 861 A.2d 394 (Pa. Cmwlth.

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<sup>5</sup> We agree with the Board that the February 2011 "Amended Request for Administrative Review" was not timely, as it was filed after the January 28, 2011, date set forth in the Facility Manager's Appeal Response. 37 Pa. Code §§ 73.1(a)(3), (b)(3) (providing that second or subsequent administrative appeals or petitions for administrative relief are not permitted).

2004) for general statements regarding what is needed in order to establish an entitlement to credit for his time in WCCC, the Board cites no support for its contention that it should not have to provide statutorily-required review, see Section 6113(d)(1) of the Probation and Parole Act, 61 Pa. C.S. § 6113(d)(1) (stating that “[a]n interested party may appeal a revocation decision within 30 days of the [B]oard’s order. The decision *shall* be reviewed by three [B]oard members,” (emphasis added)), because the appellate document does not include all the necessary facts to support the reversal.

Sections 73.1(a)(3) and (b)(2) of the Board’s regulations provide that it can deny an administrative appeal or a petition for administrative review if the document fails “to present with accuracy, brevity, clearness and specificity whatever is essential to a ready and adequate understanding of the factual and legal points requiring consideration.” 37 Pa. Code §§ 73.1(a)(3), (b)(2). However, we conclude that these provisions speak more to providing the Board with specificity as to the allegation of error so as to avoid waiver. See McCaffrey v. Pennsylvania Board of Probation and Parole, 537 A.2d 78, 79 (Pa. Cmwlth. 1988) (providing that a dismissal pursuant to Section 73.1(b)(2) was proper because “[i]t is clear that the quoted portion of the regulation requires a prisoner seeking administrative relief to make his claims with at least some small degree of specificity. Here, all Petitioner’s application for administrative relief does is parrot the phrasing of Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704, without indicating what Board action or inaction constituted error.”). In Cox, our Supreme Court remanded a matter involving a parolee’s allegations that his time at a community corrections center rose to the level of restriction necessary to obtain credit stating, “[a]ny effort to review this factual

question now is defeated by the inadequate record before us. . . . [T]he Board must help in providing a record which makes effective appellate review possible. . . . We cannot make an informed determination of this issue on the record before us.” Cox, 507 Pa. at 620-21, 493 A.2d at 683-84. The Board seeks to have *us* make a determination, in the first instance, as to the application of Cox to this matter without having a factual record. We decline to do so on the ground that it is the Board which first makes this determination and such a determination must be based on a record that will, ultimately, provide this Court with the record necessary to perform effective appellate review, if necessary, in the future. Therefore, we reject the Board’s assertion that it has no obligation to consider the issues raised in the January 2011 “Request for Administrative Relief” or hold a hearing in determining whether Mr. Hontz is entitled to credit for the time he spent at the WCCC.

Accordingly, the Board’s March Determination is vacated and this matter is remanded to the Board to hold a hearing to address the issues Mr. Hontz raised in his January 2011 “Request for Administrative Relief.”

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**RENÉE COHN JUBELIRER, Judge**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Rodney Hontz,	:	
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Petitioner	:	
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v.	:	No. 597 C.D. 2011
	:	
Pennsylvania Board of Probation and Parole,	:	
	:	
Respondent	:	

**ORDER**

**NOW**, December 30, 2011, the March 11, 2011, Order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is hereby **VACATED** and this matter is **REMANDED** for further proceedings in accordance with the foregoing opinion.

Jurisdiction relinquished.

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**RENÉE COHN JUBELIRER, Judge**