

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Feliberto Saez,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1162 C.D. 2012
	:	
Pennsylvania Board of Probation	:	Submitted: December 7, 2012
and Parole,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: January 17, 2013

Feliberto Saez petitions for review of an Order of the Pennsylvania Board of Probation and Parole (Board) denying his request for administrative relief. On appeal, Saez argues that the Board erred and abused its discretion by denying him credit for time served at the Erie Community Corrections Center (Erie CCC). Discerning no error, we affirm the Board's Order.

Saez was sentenced to 7 to 15 years for aggravated assault and 6 months to 1 year for two counts of reckless endangerment on December 2, 1993. (DC16E –

Sentence Status Summary, C.R. Item 1.) Between November 14, 2001 and January 9, 2008, Saez was released on parole, declared delinquent, and recommitted to serve backtime on at least 3 separate occasions. (Parole Determination, September 13, 2001, C.R. Item 2; Delinquency Determination, April 2, 2002, C.R. Item 3; Board Decision, November 7, 2003, C.R. Item 3; Board Decision, September 23, 2004, C.R. Item 3; Administrative Action, December 7, 2004, C.R. Item 4; Board Decision, October 20, 2005, C.R. Item 4; Board Decision, January 25, 2006, C.R. Item 4; Board Decision, May 31, 2006, C.R. Item 4; Administrative Action, October 6, 2006, C.R. Item 5; Board Decision, January 9, 2008, C.R. Item 5.) The Board paroled Saez to the Erie CCC on March 4, 2010. (Board Decision, March 4, 2010, C.R. Item 5; Conditions Governing Parole/Reparole at 1, C.R. Item 5.) On July 16, 2010, Saez was declared delinquent. (Administrative Action, July 19, 2010, C.R. Item 6.) The Board lodged a detainer against Saez on October 6, 2010. (Warrant, October 6, 2010, C.R. Item 7.) Saez was arrested in New Jersey for various crimes, was convicted on April 15, 2011, and recommitted as a convicted parole violator by Board decision mailed on September 12, 2011. (Judgment of Conviction, April 21, 2011, C.R. Item 8; Criminal Arrest and Disposition Report, October 21, 2010, C.R. Item 9; Board Decision, September 12, 2011, C.R. Item 12.) Saez requested administrative review of the September 12, 2011 decision and asserted that he was entitled to credit on his parole violation maximum sentence from April 29, 2010 through July 16, 2010 for the time he spent at Erie CCC. (Petition For Administrative Appeal, C.R. Item 13.) The Board remanded the matter for a hearing on the credit issue. (Letter from Board to Saez (October 25, 2011), C.R.

Item 13.) A hearing officer held the hearing on December 6, 2011, at which Saez and an employee of Erie CCC (Employee) testified.

Saez testified that, while at Erie CCC, he completed a violence prevention program and he did not have a home plan. He indicated that, on his way to Erie CCC, he rode in a van with caging in it, stopped at another prison and, at one point, was placed in a regular cell. Saez acknowledged that, while at Erie CCC, he was not subject to security checks, he was not locked in his room unless the staff was performing a count, he could go into the yard and dining hall, and he could leave the building at certain times, but had to be back by 7:00 p.m. Saez testified that: he believed that an alarm would go off if someone would attempt to crack open a window; he had to go through security devices when coming back into the facility from the street; and there were cameras throughout the building, including in the visiting area and facing the parking lot. (Hr'g Tr. at 9-27, C.R. Item 14 at 106-24.)

Employee testified that the facility has two main doors: one is locked from the outside, but not the inside; and the second door has a fire alarm on it that will buzz if it is opened. Employee stated that there is a third door that is open until 9:00 p.m., at which time it is locked. According to Employee, parolees can leave Erie CCC for work, a job search, school, appointments, and personal activities, which include going to the movies, shopping, or eating at a restaurant. Employee testified that parolees are not escorted when they leave the facility, no parolee had ever been charged with escape for leaving the facility, but a parolee who leaves and does not return is referred to as an absconder. Employee explained that the facility does not have bars on the windows, the facility's windows are unlocked but

alarmed, and the facility has a six to seven foot tall wooden fence with no gate. Employee testified that the facility does have cameras in the hallways, stairwells, and outside the building to film the parking lot and the recreation area. (Hr'g Tr. at 34-37, 39-41, C.R. Item 14 at 131-34, 136-38.)

After considering the evidence presented, the hearing officer concluded that the conditions at Erie CCC were not sufficiently restrictive of Saez's liberty to support a grant of credit for the time Saez spent there. (Evidentiary Hearing Report at 8, S.C.R. Item 3 at 14.) Based on the hearing officer's report, the Board issued a decision denying Saez credit for his time at Erie CCC. (Board Decision, February 27, 2012, S.C.R. Item 4.) Saez filed a Petition for Administrative Appeal, and the Board affirmed its February 27, 2012 determination. (Petition for Administrative Appeal, April 12, 2012, S.C.R. Item 5; Letter from Board to Saez (May 29, 2012), S.C.R. Item 5.) Saez now petitions this Court for review.¹

On appeal, Saez asserts that the rules and regulations at Erie CCC to which he was subjected constituted custodial conditions because he was restricted in how long he could leave the building and the staff at Erie CCC monitored his comings and goings from the facility. Thus, according to Saez, because the restrictions at

¹ Our scope of review of a decision by the Board is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed, or whether the constitutional rights of the parolee were violated. Gaito v. Pennsylvania Board of Probation and Parole, 563 A.2d 545, 547 (Pa. Cmwlth. 1989).

Erie CCC were custodial in nature, he is entitled to credit for the time he spent confined in the Erie CCC.²

Section 6138(a)(2) of the Prisons and Parole Code (Code) provides that a parolee who is recommitted as a convicted parole violator, as Saez was here, “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, except as provided under paragraph (2.1) [(which is not applicable here)], *shall be given no credit for the time at liberty on parole.*” 61 Pa. C.S. § 6138(a)(2) (emphasis added). Although the Code does not define “at liberty on parole,” our Supreme Court in Cox v. Pennsylvania Board of Probation and Parole, 507 Pa. 614, 619, 493 A.2d 680, 683 (1985), held that “at liberty” does not mean freedom from each and every type of confinement. Our Supreme Court explained that the burden is on the parolee to establish that the specific characteristics of a program constitute restrictions on the parolee’s liberty sufficient to warrant credit. Id. at 620, 493 A.2d at 683. In reviewing these matters, there are two factors that are consistently considered in determining whether a community corrections center or group home is sufficiently restrictive so as to be the equivalent of incarceration: (1) whether the facility is locked or secured; and (2) whether a parolee is able to leave the facility without being restrained or escorted. Meleski v. Pennsylvania Board of Probation and Parole, 931 A.2d 68, 73 n.4 (Pa. Cmwlth. 2007); Figueroa v. Pennsylvania Board

² Saez also asserts in his Statement of the Question Presented for Review that the Board erred in calculating his maximum sentence date. However, the brief contains no argument on this issue and, therefore, the issue is waived. Purple Orchid, Inc. v. Pennsylvania State Police, 572 Pa. 171, 176–77, 813 A.2d 801, 804 (2002) (holding issue waived by failure to address and develop in appellate brief).

of Probation and Parole, 900 A.2d 949, 952-53 (Pa. Cmwlth. 2006) (citing Detar v. Pennsylvania Board of Probation and Parole, 890 A.2d 27, 31 n.10 (Pa. Cmwlth. 2006)).

In Meleski, we looked at whether the parolee's time in an inpatient facility was sufficiently restrictive on his liberty to grant credit. This Court concluded that the restrictions present in Meleski, which forbade the parolee from leaving the facility for a specified period of time, placed the parolee under 24-hour supervision during that time, and prevented the parolee from making required trips away from the facility without an escort, could not “reasonably be described as being ‘at liberty on parole.’” Meleski, 931 A.2d at 72 (quoting Torres v. Pennsylvania Board of Probation and Parole, 861 A.2d 394, 401 (Pa. Cmwlth. 2004)). The parolee in Figueroa sought credit for the time he spent in a blackout period during which he could leave the facility only with an escort. Although the parolee testified that the facility's doors were locked and he would be stopped if he attempted to leave unescorted, the manager of the facility contradicted that testimony, indicating that parolees were permitted to leave unescorted and that, even though the doors were locked, the facility's staff would not physically restrain parolees who desired to leave. In contrast to our conclusion in Meleski, we held in Figueroa that the parolee was not constructively incarcerated during the blackout period because the staff would not prevent the parolees from leaving, parolees were not charged with escape if they left the facility, and parolees were permitted to leave unescorted to attend to personal business. Figueroa, 900 A.2d at 952-53.

This matter is more like Figueroa than Meleski. Saez acknowledged that, although he had to be at the facility by 7:00 p.m., he could leave Erie CCC without an escort, he could go anywhere he wanted, and that there was never a time that the staff stopped him from leaving. (Hr'g Tr. at 20-22, C.R. Item 14 at 117-19.) Moreover, Employee testified that parolees, such as Saez, were permitted to leave the facility without an escort to work, attend appointments, and to go to the movies or a restaurant. (Hr'g Tr. at 35-36, C.R. Item 14 at 132-33.) Employee further indicated that parolees, such as Saez, like the parolees in Figueroa, would not be charged with escape if they left the facility. (Hr'g Tr. at 38, C.R. Item 14 at 135.) Therefore, we conclude that the Board did not err in finding that Saez failed to establish that he was not at liberty during his time at Erie CCC.

Accordingly, the Board's Order is affirmed.

RENÉE COHN JUBELIRER, Judge

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	:	
Respondent	:	

ORDER

NOW, January 17, 2013, the Order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge