

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony Powell,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1275 C.D. 2009
	:	
Pennsylvania Board of	:	Submitted: January 15, 2010
Probation and Parole,	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: March 8, 2010

Anthony Powell petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) denying his request for administrative relief. The only issue in this appeal is whether Powell's December 18, 2008, parole violation hearing was untimely.

Powell was paroled on November 5, 2007, and arrested on July 14, 2008, on charges that he violated condition 7 of his parole. Specifically, Powell was charged with the consumption and possession of alcohol and the unsuccessful discharge from sex offender treatment. A preliminary hearing was held on July 31, 2008, wherein Powell was represented by counsel. The hearing examiner ruled

that probable cause existed on the parole violation charges and Powell requested a panel hearing.

A parole violation hearing before a panel was scheduled for 77 days later at SCI-Dallas for October 16, 2008. Powell did not receive notice of the October 16th hearing until October 15th and his counsel did not receive any notice of the hearing. As a result, Powell appeared without counsel and the hearing was continued until November 24, 2008, which was 116 days from the date of the preliminary hearing. However, the November 24, 2008, hearing was continued and the parole violation hearing finally took place before a panel on December 18, 2008.

The transcript of the December 18, 2008, panel hearing reveals that counsel for Powell objected to the timeliness of the hearing on the basis that the time period between October 16, 2008, and November 24, 2008, should be attributed to the Board, not Powell, due to the Board's failure to notify Powell's counsel of the October 16th hearing. Counsel argued further that the November 24, 2008, hearing was continued to December 18, 2008, with no explanation to Powell or counsel. Accordingly, counsel requested that the matter be dismissed.

During the hearing, Parole Agent Hendershot was questioned by the panel as to whether the agent knew why the November 24, 2008, hearing was continued. Agent Hendershot responded that the Board did not have any panel days scheduled in November.

By decision dated February 24, 2009, the Board recommitted Powell as a technical parole violator to serve 6 months backtime. Powell filed a request for administrative relief wherein he argued that the Board's February 29, 2009, decision was in error because the parole violation hearing was untimely. By

decision mailed June 10, 2009, the Board denied Powell's request for administrative relief. This appeal followed.¹

Pursuant to the Board's regulations, "[i]f a violation hearing is scheduled, it shall be held no later than 120 days after the preliminary hearing." 37 Pa. Code §71.2 (10). In determining the period for conducting a violation hearing, a delay which is directly or indirectly attributable to, *inter alia*, "[c]ontinuances granted at the request of a parolee or counsel" or "reasonable or necessary continuances granted to, or occurrences related to, the Board or its employees", shall be excluded from the 120 day period. 37 Pa. Code §71.5(c)(2), (3).

Where a parolee asserts that the Board held a hearing beyond the 120 day period, the Board bears the burden of proving, by a preponderance of the evidence, that it conducted the hearing in a timely manner. Mack v. Pennsylvania Board of Probation and Parole, 654 A.2d 129 (Pa. Cmwlth. 1995). If the Board fails to sustain this burden, the appropriate remedy is a dismissal of the parole violation charges with prejudice. Id.

Herein, Powell argues that the December 18, 2008, violation hearing was untimely because it was held more than 120 days from the date of the July 31, 2008, preliminary hearing. Powell contends that the time period between October 16, 2008, and November 24, 2008, should be attributed to the Board since notice of the October 16th hearing was improper. Powell contends further that the November 24, 2008, hearing never took place without any explanation to either Powell or his

¹ This Court's 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 was violated. Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, Gaito v. Pennsylvania Board of Probation and Parole, 563 A.2d 545 (Pa. Cmwlth. 1989), petition for allowance of appeal denied, 525 Pa. 589, 575 A.2d 118 (1990).

counsel. Thus, the Board erred by recommitting Powell as a technical parole violator.

In response, the Board contends that the violation hearing was held within 101 includable days after Powell's preliminary hearing; therefore, the December 18, 2008, hearing was timely. The Board argues that 39 of the 140 days from July 31, 2008, the date of the preliminary hearing, to December 18, 2008, the date of the violation hearing, were excludable due to the continuance granted to Powell on October 16, 2008. The Board argues that the October 16, 2008, hearing was continued at Powell's request and but for the continuance request, the hearing would have been held on October 16, 2008. The Board points out that continuances granted to a parolee are excludable from the calculation of the 120 day period pursuant to 37 Pa. Code. §71.5(c)(2).

We agree with the Board that the December 18, 2008, panel violation hearing was timely but not for the reason advanced by the Board. Regardless of whether the 39 day delay between October 16, 2008, and November 24, 2008, was attributable to Powell or the Board, the panel violation hearing rescheduled by the Board for November 24, 2008, was 116 days from the date of the preliminary hearing. Thus, if the hearing had been held on that date, it would have been timely.

The record shows that the hearing was continued from November 24, 2008, because Powell had requested a panel violation hearing and there were no panel days scheduled for November. As stated previously herein, the Board's regulations provide that any delay in any stage of the proceedings attributable to "[r]easonable or necessary continuances granted to, or occurrences related to, the Board" is excluded from the time period for conducting violation hearings. 37 Pa. Code §71.5(c)(3). Powell never waived his right to a panel hearing. As such, it

was reasonable and necessary for the Board to continue the November 24, 2008, violation hearing to December 18, 2008, so that the Board could comply with Powell's request for a panel violation hearing.

Accordingly, the Board's order is affirmed.²

JAMES R. KELLEY, Senior Judge

² It is well settled that this Court may affirm on other grounds where the grounds for affirmance exist. Karl Smith Development Company v. Borough of Aspinwall, 558 A.2d 181 (Pa. Cmwlth. 1989), petition for allowance of appeal denied, 525 Pa. 614, 577 A.2d 545 (1990).

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Probation and Parole,	:	
	:	
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ORDER

AND NOW, this 8th day of March, 2010, the order of the Pennsylvania Board of Probation and Parole entered in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge