

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gary L. Peavley,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1527 C.D. 2007
	:	
Pennsylvania Board of	:	Submitted: February 8, 2008
Probation and Parole,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: April 15, 2008

Gary L. Peavley petitions for review of a decision of the Pennsylvania Board of Probation and Parole (Board) denying his request for administrative relief of Board decisions mailed October 11, 2006, January 17, 2007 and April 30, 2007, denying his request for credit for the time he was housed at Eagleville Hospital, Luzerne II Center and Gaudenzia House. We affirm.

Peavley was initially sentenced to a five to fifteen-year term of imprisonment based on his guilty plea to one count of Burglary. Certified Record (CR) at 1. With an effective date of May 14, 1993, his sentence had a minimum expiration date of May 14, 1998 and a maximum expiration date of May 14, 2008. CR at 2.

On July 6, 1999, Peavley was released on parole pursuant to the provisions of the statute commonly referred to as the Parole Act.¹ As a special condition of his parole, he was required to report directly to Gaudenzia House in West Chester for participation in an in-patient drug and alcohol program. CR at 4. Peavley was housed at Gaudenzia House from July 6, 1999 to December 20, 1999. CR at 131.

On October 15, 2000, Peavley was arrested by the Philadelphia Police and charged with Possession of a Controlled Substance. CR at 9, 10. By decision dated December 11, 2000, the Board recommitted Peavley to serve nine months backtime as a technical parole violator. CR at 10-11.

On February 19, 2002, Peavley was released on reparole. CR at 16. As a special condition of his reparole, Peavley was again required to report directly to Gaudenzia House for participation in an in-patient drug and alcohol program. CR at 17. However, by decision dated February 21, 2002, Peavley was declared delinquent as of the date of his release when he failed to appear at Gaudenzia House. CR at 20, 22. Peavley's whereabouts remained unknown until he was arrested in Kentucky on June 2, 2003. CR at 22. By decision dated January 21, 2004, the Board recommitted Peavley to serve twelve months backtime as a technical parole violator based upon multiple violations of the technical conditions of his parole. CR at 25-26.

On September 7, 2004, Peavley was again released on reparole. CR at 34. As a special condition of his reparole, Peavley was required to report to Luzerne II Center for participation in an in-patient drug and alcohol program. CR

¹ Act of August 6, 1941, P.L. 861, as amended, 61 P.S. §§ 331.1 – 331.34a.

at 35. Peavley was housed at Luzerne II Center from September 7, 2004 to December 21, 2004. CR at 85.

On December 21, 2004, Peavley was discharged from the program at Luzerne II Center after a breathalyzer test disclosed that he had consumed alcohol. CR at 42. As a result, Peavley was transferred to the SAVE program at Eagleville Hospital Treatment Center. Id. Peavley was housed at Eagleville Hospital Treatment Center from December 21, 2004 to March 6, 2005, when he absconded from the center. Id. By decision dated March 8, 2005, the Board declared Peavley delinquent effective March 7, 2005. CR at 38. Peavley's whereabouts remained unknown until he was again arrested in Kentucky on November 3, 2005. CR at 42.

By decision mailed April 13, 2006, the Board recommitted Peavley to serve twelve months backtime as a technical parole violator based upon multiple violations of the technical conditions of his parole. CR at 45. In that decision, the Board also recommitted Peavley to serve a concurrent twelve months backtime as a convicted parole violator based upon his convictions for Operating a Motor Vehicle While Under the Influence of Alcohol, Resisting Arrest, and Operating on a Suspended or Revoked Operator's License. Id. The decision also recalculated Peavley's parole violation maximum date to be February 20, 2012, apparently not giving him credit for any of the time he was housed for participation in the in-patient drug and alcohol programs. CR at 46.

On May 8, 2006, Peavley submitted a request for administrative relief in which he sought credit for the time he was housed for participation in the in-patient drug and alcohol programs. CR at 48-50. More specifically, Peavley sought credit for: (1) the first forty-five (45) days of the period from July 7, 1999 to December 20, 1999 that he was housed at Gaudenzia House; (2) the full one hundred and four (104) days of the period from September 7, 2004 to December

20, 2004 that he was housed at Luzerne II Center; and (3) the full seventy-six (76) days of the period from December 21, 2004 to March 6, 2005 that he was housed at Eagleville Hospital Treatment Center. Id.

On September 6, 2006, an evidentiary hearing was conducted on Peavley's request for credit for the period that he was housed at Eagleville Hospital Treatment Center. Peavley testified in support of the request. See CR at 60-66. In addition, William Charles Folk, the director of the Recovery Program at the Center, was called as a witness by the parole agent. See CR at 67-71.

By decision mailed October 11, 2006, the Board denied Peavley's request for credit for the period that he was housed at Eagleville Hospital Treatment Center. See CR at 81. More specifically, the decision stated the following, in pertinent part:

The Board finds that the Parolee: (1) has not rebutted the presumption that he was at liberty on parole during his attendance at Eagleville Hospital; (2) did not meet his burden of producing evidence to prove that specific characteristics of the Eagleville Hospital constituted restrictions on his liberty sufficient to warrant credit on the sentence from which he was on parole during his attendance; and (3) has not persuaded the Board that the specific characteristics of the Eagleville Hospital constituted restrictions on his liberty sufficient to warrant credit on the sentence from which he was on parole during his attendance.

Id.

On October 30, 2006, an evidentiary hearing was conducted on Peavley's request for credit for the period that he was housed at Luzerne II Center. Peavley testified in support of his request. See CR at 85-100. In addition, James Walker, director of Luzerne II Center, was called as a witness by the parole agent. See CR at 100-110.

By decision mailed January 17, 2007, the Board denied Peavley's request for credit for the period that he was housed at Luzerne II Center. See CR at 122. More specifically, the decision stated the following, in pertinent part:

The Board finds that the Parolee: (1) has not rebutted the presumption that he was at liberty on parole during his attendance at Luzerne Center; (2) did not meet his burden of producing evidence to prove that specific characteristics of the Luzerne Center constituted restrictions on his liberty sufficient to warrant credit on the sentence from which he was on parole during his attendance; and (3) has not persuaded the Board that the specific characteristics of the Luzerne Center constituted restrictions on his liberty sufficient to warrant credit on the sentence from which he was on parole during his attendance.

Id.

On March 28, 2007, an evidentiary hearing was conducted on Peavley's request for credit for the period that he was housed at Gaudenzia House. Peavley testified in support of his request. See CR at 131-140. In addition, Kathleen Scully, the liaison between Gaudenzia House and the Department of Corrections, was called as a witness by the parole agent. See CR at 140-147.

By decision mailed April 30, 2007, the Board denied Peavley's request for credit for the period that he was housed at Gaudenzia House. See CR at 156. More specifically, the decision stated the following, in pertinent part:

The Board finds that the Parolee: (1) has not rebutted the presumption that he was at liberty on parole during his attendance at Gaudenzia Inpatient Program; (2) did not meet his burden of producing evidence to prove that specific characteristics of the Gaudenzia Inpatient Program constituted restrictions on his liberty sufficient to warrant credit on the sentence from which he was on parole during his attendance; and (3) has not persuaded the Board that the specific characteristics of the Gaudenzia Inpatient Program constituted restrictions on

his liberty sufficient to warrant credit on the sentence from which he was on parole during his attendance.

Id.

Peavley submitted administrative appeals of each of these decisions to the Board. CR at 123, 157. By decision mailed July 11, 2007, the Board affirmed the decisions denying Peavley's requests for credit. CR at 164. Peavley then filed the instant petition for review.²

The sole claim raised by Peavley in this appeal³ is that the Board erred in failing to grant him the credit that he requested for the time that he served at Gaudenzia House, Luzerne II Center, and at Eagleville Hospital Treatment Center. More specifically, Peavley asserts that he rebutted the presumption that he was at liberty on parole while housed at these facilities, and that he satisfied his burden of proving that the specific characteristics of each of these facilities constituted restrictions on his liberty sufficient to warrant credit for the time that he was housed there.

² This Court's scope of review of a Board decision granting or denying a request for credit 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. Detar v. Pennsylvania Board of Probation and Parole, 890 A.2d 27 (Pa. Cmwlth. 2006).

³ In his Brief for Petitioner, Peavley also claims that his administrative appeals were not heard by a properly constituted three member panel as required by Section 4 of the Parole Act, 61 P.S. § 331.4. However, Peavley did not raise this issue in the petition for review that he filed in this Court, and he did not seek leave to amend his petition for review to include this issue. As a result, this claim will not be addressed by this Court in this appeal. Pa.R.A.P. 1513; Werner v. Zazyczny, 545 Pa. 570, 681 A.2d 1331 (1996); Siers v. Pennsylvania Board of Probation and Parole, 725 A.2d 220 (Pa. Cmwlth.), petition for allowance of appeal denied, 562 Pa. 678, 753 A.2d 822 (1999); Pierce v. Pennsylvania Board of Probation and Parole, 406 A.2d 1186 (Pa. Cmwlth. 1979).

Section 21.1a(a) of the Parole Act provides that the Board has the authority to recommit a parolee who “during the period of parole ... commits any crime punishable by imprisonment, from which he is convicted or found guilty by a judge or jury or to which he pleads guilty or nolo contendere at any time thereafter....” 61 P.S. § 331.21a. If a parolee is recommitted under this section of the Parole Act, he must serve the remainder of his term of imprisonment he would have had to serve had he not been paroled and does not receive credit for time spent “at liberty on parole.” Id.

However, the phrase “at liberty on parole” is not defined in the Parole Act. In Cox v. Pennsylvania Board of Probation and Parole, 507 Pa. 614, 493 A.2d 680 (1985), the Pennsylvania Supreme Court stated that “at liberty on parole” means “not at liberty from all confinement but at liberty from confinement on the particular sentence for which the convict is being reentered as a parole violator.” Cox, 507 Pa. at 618, 493 A.2d at 683 (quoting Haun v. Cavell, 154 A.2d 257, 261 (Pa. Super. 1959), cert. denied, 363 U.S. 855 (1960)). The Supreme Court held that it is presumed a parolee is “at liberty on parole” in a treatment facility and, therefore, it is the parolee’s burden to demonstrate to the Board that time spent in a treatment facility was the equivalent of incarceration thereby entitling the parolee to credit for the time spent there. Id. at 619-620, 493 A.2d at 683. Further, the Supreme Court noted that “[t]he majority of jurisdictions which allow credit on backtime for time spent in rehabilitation programs examine the specifics of the program to make this determination.” Id. at 619, 493 A.2d at 683 (citation omitted). Thus, as this Court has stated, “[a] review of the relevant case law reveals that the entitlement to credit based on the restrictions placed upon a parolee

[in a treatment facility] is very fact specific.” Figueroa v. Pennsylvania Board of Probation and Parole, 900 A.2d 949, 952 (Pa. Cmwlth. 2006).⁴

As noted above, Peavley claims that the Board erred in failing to grant him the credit that he requested for the time that he served at Gaudenzia House, Luzerne II Center, and at Eagleville Hospital Treatment Center because: (1) he rebutted the presumption that he was at liberty on parole while housed at these facilities; and (2) he satisfied his burden of proving that the specific characteristics of each of these facilities constituted restrictions on his liberty sufficient to warrant credit for the time that he was housed there. Peavley cites to specific portions of the testimony that was presented during the evidentiary hearings in support of this claim.

However, it is well settled that questions of resolving conflicts in the evidence, witness credibility and evidentiary weight are within the exclusive province of the Board as the finder of fact. Detar; Pastuszek v. Pennsylvania Board of Probation and Parole, 544 A.2d 1051 (Pa. Cmwlth. 1988); Falasco v. Pennsylvania Board of Probation and Parole, 521 A.2d 991 (Pa. Cmwlth. 1987); Harper v. Pennsylvania Board of Probation and Parole, 520 A.2d 518 (Pa. Cmwlth.), petition for allowance of appeal denied, 515 Pa. 625, 531 A.2d 432 (1987); McCauley v. Pennsylvania Board of Probation and Parole, 510 A.2d 877 (Pa. Cmwlth. 1986); Fallings v. Pennsylvania Board of Probation and Parole, 502 A.2d 787 (Pa. Cmwlth. 1986); Chapman v. Pennsylvania Board of Probation and Parole, 484 A.2d 413 (Pa. Cmwlth. 1984). Thus, the Board is free to reject even

⁴ In Cox, the Supreme Court also stated that a reviewing court should “not interfere with the Board’s determination of that issue unless it acts arbitrarily or plainly abuses its discretion. See 2 Pa.C.S. § 704; Bradshaw v. [Pennsylvania Board of Probation and Parole], 461 A.2d 342 (Pa. Cmwlth. 1983).” Cox, 507 Pa. at 620, 493 A.2d at 683.

uncontradicted testimony, and the Board's determinations in this regard will not be reviewed on appeal to this Court. Pastuszek; McCauley. In addition, the mere fact that there is conflicting evidence in the certified record does not serve as a basis upon which the Board's findings will be disturbed on appeal. Harper; McCauley; Fallings; Chapman.

As noted above, in denying Peavley's requests for credit, the Board specifically determined that he had failed to provide sufficient persuasive evidence to support his burden of proving that the specific characteristics of each of the facilities in question constituted restrictions on his liberty sufficient to warrant credit on his sentence. See CR 81, 122, 156. The mere fact that there is evidence in the certified record supporting contrary conclusions is of no moment; it was within the Board's sole discretion to consider and weigh the testimony that was presented in this case. In short, we will not accede to Peavley's request to reconsider and to reweigh the evidence presented to the Board that supports a finding that he should receive credit on his sentence as it is patently beyond our appellate review.

Accordingly, the decision of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

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	:	
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ORDER

AND NOW, this 15th day of April, 2008, the decision of the Pennsylvania Board of Probation and Parole, July 11, 2007 at Parole No. 0524-W, is AFFIRMED.

JAMES R. KELLEY, Senior Judge