

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stephen P. Beauford,	:
Petitioner	:
	:
v.	:
	:
Pennsylvania Board of Probation	:
and Parole,	:
Respondent	: No. 526 C.D. 2008
	: Submitted: September 19, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
 HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: December 8, 2008

Steven P. Beauford (Beauford) petitions this Court for review of the March 10, 2008 decision of the Pennsylvania Board of Probation and Parole (Board) dismissing his request for expedited review as untimely.

On August 31, 1993, Beauford was sentenced by the Lawrence County Court of Common Pleas to imprisonment for three to ten years for manufacturing, delivery, possession with intent to deliver, and unlawful delivery of a controlled substance (Case 1). His maximum release date was March 18, 2003. After being paroled in 1996, the Board recommitted Beauford as a technical parole violator to serve backtime. Due to a conviction on drug charges in the Beaver County Court of Common Pleas during his period of parole (Case 2), the Board also imposed

backtime to be served concurrent with that owed for his technical violation on Case 1. This recommitment changed his maximum release date to July 7, 2005.

On August 23, 1999, Beauford was arrested again in Beaver County on drug charges, criminal mischief and resisting arrest (Case 3). While he posted bail on the new charges on September 13, 1999, he was detained in the Beaver County Prison on a warrant issued by the Board for Case 1. As a result of his conviction on Case 3, on August 21, 2000, the Board recommitted Beauford as a convicted parole violator relative to Case 1. The Board set Beauford's new maximum release date as December 15, 2005.

On June 12, 2001, the Board constructively reparaoled Beauford from his ten-year sentence for Case 1 to serve his new six-year sentence in Case 3. On June 3, 2003, he was transferred to a half-way house, from which he was paroled on April 5, 2004.

On December 28, 2004, Beauford was arrested in Washington County on drug charges (Case 4). He posted bail on January 26, 2005, and was detained by the Board from February 5, 2005 through February 27, 2006, when he was sentenced to two to five years for his guilty plea relative to Case 4.

By decision dated June 27, 2006¹ Beauford was recommitted in Case 1 in order to serve backtime, and his new maximum release date was November 2, 2009. On August 11, 2006, Beauford timely appealed the Board's June 27, 2006 decision averring, among other things, that the Board erred in recomputing his maximum term expiration date as November 2, 2009, since he should have been

¹ This decision was rendered by the Board on June 27, 2006; however, it was originally mailed on July 20, 2006, and then re-mailed on July 31, 2006.

credited for time served between January 26, 2005 and June 8, 2006, when he was in custody on the Board's warrant and detainer.²

On August 24, 2006, after a new trial was granted on Case 3, the Beaver County Court of Common Pleas vacated a number of Beauford's guilty pleas, and modified his sentence to twenty-one to forty-two months with credit for time served.

Due to the fact that Case 3 was vacated, by a combined revocation decision and recalculation order dated July 20, 2007, the Board rescinded its August 21, 2000 recommitment action, June 12, 2001 constructive reparing decision, the February 23, 2004 paroling decision effective April 5, 2004, and the April 4, 2007 parole denial action and changed Beauford's maximum release date from November 2, 2009 to "when available."

Following a revocation hearing relative to Case 3, on September 28, 2007, the Board recommitted Beauford in Case 1, and his new maximum release date was set for July 19, 2010. However, on December 7, 2007, the Board rescinded its September 28, 2007 action, noted that no action would be taken as to Beauford's conviction for Case 3, reverted to its June 27, 2006 action recommitting him as a convicted parole violator, and reinstated his maximum release date was again November 2, 2009.

On December 18, 2007, Beauford filed a Request for Expedited Administrative Relief challenging the Board's authority to recommit him pursuant to the June 27, 2006 action, because the facts changed since that time.

On March 10, 2008, the Board concluded that its recalculated maximum term expiration of November 2, 2009 was correct, and ultimately dismissed

² By a decision issued May 24, 2007, the Board affirmed its June 27, 2006 decision.

Beauford's Request for Expedited Administrative Relief for being untimely filed. This appeal followed.³

On appeal, Beauford avers that the Board erred as a matter of law by dismissing his December 18, 2007 appeal as untimely. He further avers that the Board erred as a matter of law by recommitting him as a convicted parole violator under circumstances in which the offense and conviction for which he was recommitted did not take place until after his maximum sentence had expired, and the Board had rescinded its June 12, 2001 paroling action.

As to the dismissal of Beauford's December 18, 2007 appeal as untimely, Section 73.1(b)(1) of the Board's Regulations, 37 Pa. Code § 73.1(b)(1), requires that petitions for administrative review be received by the Board within thirty days of the mailing date of the Board's determination. Section 73.1(b)(3) of the Board's Regulations, 37 Pa. Code § 73.1(b)(3), states that "second or subsequent petitions for administrative review and petitions for administrative review which are out of time . . . will not be received."

The December 7, 2007 decision of the Board from which Beauford appeals was mailed December 7, 2007. (Petitioner's Brief Ex. A). Beauford's request for review of that determination was received by the Board on December 21, 2007. Certified Record (C.R.) at 99. Very simply, Beauford's appeal was timely filed.

The Board does not address the timeliness issue in its response to Beauford's appeal. However, in its decision mailed March 10, 2008, it argues that since Beauford is challenging the Board's computation of the November 2, 2009

³ Our scope of review of the Board's decision denying administrative relief is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed, or whether constitutional rights have been violated. *McNally v. Pennsylvania Bd. of Probation and Parole*, 940 A.2d 1289 (Pa. Cmwlth. 2008).

maximum release date, which was originally recorded in the Board's determination of June 27, 2006, it is untimely, as it was not received by the Board within thirty days. The Board also stated that, since Beauford challenged the November 2, 2009 date in his August 11, 2006 request for administrative appeal, his December 18, 2007 request for review constitutes a second and subsequent appeal of the Board's decision of June 27, 2006, which is not permitted under Section 73.1 of the Board's Regulations. We disagree.

Section 35.241(a) of the of Administrative Practice and Procedure (General Rules), 1 Pa. Code § 35.241(a), permits a party to file a request for reconsideration within fifteen days of the issuance of a final order by an agency because of matters that have arisen since the issuance of the order. This Court has previously held that a request for reconsideration based upon changed circumstances is not the same as a subsequent appeal, and where a petitioner's letter is, in reality, a request for reconsideration under Section 35.241 of the General Rules, Section 73.1 of the Board's Regulations does not apply. *See Shaw v. Pennsylvania Bd. of Probation and Parole*, 812 A.2d 769 (Pa. Cmwlth. 2002) (holding that the Board erred in treating inmate's letter as a subsequent administrative appeal under Section 73.1(a)(4), instead of an application for reconsideration).⁴

It is clear that if this Court were to consider Beauford's Request for Expedited Administrative Relief a request for reconsideration, it was timely filed, since it was received by the Board on December 21, 2007, within fifteen days of

⁴ While this Court's decision in *Shaw* was based upon a parolee's appeal filed under Section 73.1(a)(4) of the Board's Regulations, rather than 73.1(b)(3), as here, we find that the reasoning in *Shaw* nevertheless applies, since the language in both sections is nearly identical, and the difference between actions taken under those sections is based on whether a parolee is challenging recommitment (Section 73.1(a)), as opposed to recalculation of his term (Section 73.1(b)). The difference between the two actions appears to be only in how they are handled by differing divisions of the Board.

the date its December 7, 2007 decision was issued. It is also clear that there were significant changes to Beauford's circumstances after the Board issued its June 27, 2006 decision. The sentence for Case 3 was vacated, which led to the Board issuing the revocation and recalculation decision dated July 20, 2007, and resetting his maximum release date as "when available." Thereafter, on September 28, 2007, the Board recommitted Beauford and set his new maximum release date as July 19, 2010. Finally, on December 7, 2007, the Board rescinded its September 28, 2007 action, and reverted to its June 27, 2006 action recommitting him as a convicted parole violator, again setting his maximum release date as November 2, 2009, which is the decision from which Beauford filed his Request for Expedited Administrative Relief.

Whether Beauford's appeal was a petition for administrative review or a request for reconsideration, it was timely filed with the Board. We find, therefore, that the Board erred in dismissing Beauford's request as untimely.

As to Beauford's recommitment as convicted parole violator as a result of Case 4, Section 331.21a(a) of the Act commonly known as the Parole Act,⁵ provides that any parolee under the jurisdiction of the Board may, at the Board's discretion, be recommitted to prison as a parole violator if, during parole, he commits any crime punishable by imprisonment for which he is convicted or found guilty, or pleads guilty or nolo contendere to any time thereafter in a court of record. This Court has consistently held that "the Board retains jurisdiction to recommit a parolee convicted of a crime committed while on parole even after expiration of a maximum sentence date." *Reavis v. Pennsylvania Bd. of Probation and Parole*, 909 A.2d 28, 34 (Pa. Cmwlth. 2006).

⁵ Act of August 6, 1941, P.L. 861, *as amended*, 61 P.S. § 331.21a(a).

Beauford claims that due to the Board's rescission of the August 21, 2000, June 19, 2001, April 5, 2004 and April 4, 2007 orders, his maximum release date had been incorrectly calculated as November 2, 2009. He claims that his correct maximum release date for Case 1 was July 7, 2005, as declared in the Board's November 18, 1998 order. C.R. at 6. He reasons, therefore, that since his maximum release date for Case 1 passed before he was sentenced for the crime that resulted in Case 4 and he was no longer on parole, the Board improperly recommitted him on Case 1. Petitioner's Brief at 18; C.R. at 96-97. The Board's response is merely that Beauford waived any claim he may argue on appeal since his brief cites no authority to support any claim, and that his maximum release date is not November 2, 2009, but rather September 12, 2010. Respondent's Brief at 5-6, 9. We cannot agree with either party.

The parties' arguments consist of detailed calculations of the time each claims Beauford served on Case 1, both of which are based upon assumptions about how the Board's rescission of the August 21, 2000, June 19, 2001, April 5, 2004 and April 4, 2007 orders affected Beauford's maximum release date. Each reaches a vastly different result.⁶ This Court is unable, based upon the information contained in the certified record, to determine which party is correct. Since, however, an accurate calculation of Beauford's maximum release date is not necessary for this Court to rule on Beauford's appeal, it will not be undertaken here.

⁶ Throughout the record before this Court, the Board repeatedly states that, since June 27, 2006, Beauford's maximum release date was November 2, 2009. C.R. at 56, 81-83, 86, 88, 99. Reference to the new September 12, 2010 release date is only now made by the Board. Respondent's Brief at 5-6, 9. Since this date is nowhere referenced in the certified record, and the manner it was reached by the Board makes assumptions not clear on the record, this Court will not consider it as to this appeal.

When Beauford was recommitted due to Case 3 in August of 2000, his maximum release date was changed by the Board from July 7, 2005 to December 15, 2005. December 15, 2005 remained his maximum release date until the time he was arrested for Case 4 on December 28, 2004. Beauford feels that since the actions that led to the December 15, 2005 maximum release date calculation were rescinded, his maximum release date should revert to July 7, 2005. We find, however, that whether one uses the July 7, 2005 date proposed by Beauford, or the December 15, 2005 date used by the Board,⁷ the crime for which Beauford objects to recommitment occurred on December 28, 2004, which is well before either maximum release date expired. The fact that he was not sentenced relative to Case 4 until February 27, 2006 is irrelevant. We find, therefore, that the Board did not err in recommitting Beauford as a convicted parole violator on June 27, 2006.

JOHNNY J. BUTLER, Judge

⁷ While it is difficult to determine in light of the action of the Beaver County Court of Common Pleas vacating and resetting Beauford's sentence for Case 3, and the Board's rescission of its August 21, 2000 and June 19, 2001 orders, it may be that the December 15, 2005 maximum release date (on which the Board bases its calculation to reach its November 2, 2009 date) should have been modified to some degree. We do not find, however, that if the December 2005 date were modified, it would change the outcome of this appeal.

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ORDER

AND NOW, this 8th day of December, 2008, the March 10, 2008 order of the Pennsylvania Board of Probation and Parole is affirmed in part and reversed in part. The order is REVERSED in so far as it dismissed Petitioner's appeal as untimely. The order is AFFIRMED, however, with respect to Petitioner's recommitment on June 27, 2006.

JOHNNY J. BUTLER, Judge