



as a convicted parole violator on March 6, 2007, and on December 11, 2007 the Board mailed a recalculation decision that changed Romig's maximum date to October 2, 2008.

On January 14, 2008, the Board received a petition for administrative review by mail from Romig's attorney objecting to the recalculation decision; the envelope was postmarked January 10, 2008. The Board issued a response on April 10, 2008, dismissing the petition for administrative review as untimely because it was not received within thirty days of the mailing date of the Board's determination, as required by 37 Pa. Code §73.1(b). The Court's review here is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether an error of law was committed or whether the parolee's constitutional rights were violated. *Jackson v. Pennsylvania Board of Probation and Parole*, 951 A.2d 1238 (Pa. Cmwlth. 2008).

The regulation at 37 Pa. Code §73.1(b) provides in pertinent part:

(1) A parolee, by counsel unless unrepresented, may petition for administrative review under this subsection of determinations relating to revocation decisions which are not otherwise appealable under subsection (a). Petitions for administrative review shall be received at the Board's Central Office within 30 days of the mailing date of the Board's determination....

....  
(3) Second or subsequent petitions for administrative review and petitions for administrative review which are out of time under this part will not be received.

Romig contends that the Board's dismissal should be reversed because its policy in regard to determining the timeliness of receipt of petitions for administrative review is unconstitutional in that it violates Romig's due process rights under the Fourteenth Amendment to the United States Constitution. He states that there is

one major exception to the policy requiring that petitions for administrative review be received within thirty days, namely a "prisoner mailbox rule," under which a *pro se* prisoner's petition is considered to be filed when the prisoner gives it to prison officials to mail rather than when the Board receives it. He notes that the United States Supreme Court in *Houston v. Lack*, 487 U.S. 266 (1988), justified the creation of a prisoner mailbox rule by describing the inability of a prisoner to directly file or to monitor the filing process of an appeal. In *Smith v. Pennsylvania Board of Probation and Parole*, 546 Pa. 115, 683 A.2d 278 (1996), the Pennsylvania Supreme Court extended this rule to appeals in Pennsylvania.

Romig refers to a statement in *Smith* rejecting one rationale relied upon in the case that *Smith* overruled, namely *Turner v. Pennsylvania Board of Probation and Parole*, 587 A.2d 48 (Pa. Cmwlth. 1991), to the effect that a prisoner should be bound by the same filing rules as anyone else because a prisoner has a right to counsel in an appeal of a Board order in Pennsylvania. The Supreme Court in *Smith* stated: "While a prisoner may have a right to counsel, he of course is not compelled to use court appointed counsel and may choose to proceed *pro se*. Appellant should not be prejudiced for making such a choice." *Id.*, 546 Pa. at 122, 683 A.2d at 281. Romig asserts that just as a *pro se* prisoner should not be prejudiced for acting without counsel, a prisoner who acts with counsel should not be prejudiced by being held to a shorter deadline than a *pro se* counterpart.

Further, he argues that there is no prejudice to the Board for allowing the postmark to determine the filing date. Conceivably, he notes, a prisoner could discharge counsel and file a petition *pro se*, thereby gaining an extension of a few days. Granting the *pro se* prisoner extra time and excluding a counseled prisoner

creates an unacceptable level of unfairness. Fairness, however, is at the core of the due process rights guaranteed by the Fourteenth Amendment, and fundamental fairness is "the touchstone of due process[.]" *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). Romig refers to the view expressed by Justice Scalia in dissent in *Houston* that certainty is the most important characteristic of a filing requirement.

In response the Board quotes Section 73.1(b)(1) and also refers to 1 Pa. Code §31.11, which states in part in regard to pleadings, submittals or other documents to be filed: "The date of receipt at the office of the agency and not the date of deposit in the mails is determinative." There is no dispute that Romig's petition for administrative review was not received until thirty-four days after the mailing date of the Board's recalculation decision. Romig's sole rationale for claiming that his petition should be deemed to be timely filed is his claim that the *pro se* prisoner mailbox rule should apply to his case.

The Board quotes the rationale for the rule from *Smith*, 546 Pa. at 121 - 122, 683 A.2d at 281 (quoting *Houston*, 487 U.S. at 270 - 271):

The situation of prisoners seeking to appeal without the aid of counsel is unique. Such prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30-day deadline. Unlike other litigants, *pro se* prisoners cannot personally travel to the courthouse to see that the notice is stamped "filed" or to establish the date on which the court received the notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the *pro se* prisoner is forced to do so by his situation. And if other litigants do choose to use the mail, they can at least place the notice directly into the hands of the United States Postal Service (or a private carrier); and they can follow its progress by calling the court to determine whether the notice has been received and

stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it.

Following *Smith*, which concerned the timeliness of a *pro se* prisoner's petition for review to this Court from a Board order recalculating his maximum expiration date, the Court in *Pettibone v. Pennsylvania Board of Probation and Parole*, 782 A.2d 605 (Pa. Cmwlth. 2001), applied the *pro se* prisoner mailbox rule to administrative appeals filed with the Board.

The Board emphasizes, however, that the petition for administrative review involved here was *not* filed by a *pro se* prisoner; rather, it was filed by Romig's counsel. Under the rationale for creation of the prisoner mailbox rule, Romig had an advantage over a *pro se* petitioner in that his counsel could have delivered the petition to the Board personally, deposited it with the Postal Service in advance and monitored receipt or sent a copy to the Board's Central Office by facsimile. Further, the Board points out that in *Christjohn v. Pennsylvania Board of Probation and Parole*, 755 A.2d 92 (Pa. Cmwlth. 2000), this Court specifically rejected applying the rule where a request for administrative relief mailed by counsel was received outside the thirty-day period specified in 37 Pa. Code §73.1(a)(1) on the ground that under the *Smith* rationale, the rule simply did not apply.

The weight of all applicable authority is against Romig's position. The rationale for creating the rule as stated in *Houston* and quoted in *Smith* is based upon the "unique" situation of prisoners seeking to appeal without the aid of counsel. As stated in *Pettibone*, 782 A.2d at 608: "At the heart of the 'prisoner mailbox rule' are the constitutional notions of due process and fundamental

fairness." Thus a prisoner who has exercised his choice to proceed with counsel, such as Romig, does not suffer prejudice because the interests of fairness have required establishing a different rule for prisoners without counsel. A claim that fairness requires otherwise turns the Supreme Court's analysis in *Smith* on its head. Also, the courts readily could detect efforts to alter filing deadlines by the device of temporarily firing counsel and purporting to proceed *pro se*. The Court affirms the order of the Board dismissing Romig's petition for administrative review as untimely.

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DORIS A. SMITH-RIBNER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael C. Romig,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 725 C.D. 2008
	:	
Pennsylvania Board of Probation and	:	
Parole,	:	
	:	
Respondent	:	

***ORDER***

AND NOW, this 19th day of November, 2008, the order of the Pennsylvania Board of Probation and Parole is affirmed.

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DORIS A. SMITH-RIBNER, Judge