

Minerva Feliciano, Petitioner's Program counselor (Counselor), testified that in accordance with the Program, Petitioner was required to attend three consecutive orientation sessions. He attended two sessions but missed the third. C.R. at 27. It is Program policy that if a client misses one orientation session, then the client is considered to have missed all three sessions. Clients do have an opportunity to restart the orientation and Petitioner was "given ample time" to start over again with a new orientation group. On November 7, 2000, when Petitioner failed to attend the restart of orientation, he was unsuccessfully discharged because of three unexcused absences. The Board concluded that Petitioner was a technical parole violator due to this unsuccessful discharge.

According to Counselor, the Program will not accept a client with health insurance unless the insurance is not willing to pay for the treatment. C.R. at 30. Petitioner testified that he had private health insurance, was dissatisfied with his current treatment and desired to seek treatment from another provider. C.R. at 42. Petitioner was informed that he was to continue to receive treatment at the Program until he could produce written confirmation of his insurer's coverage. C.R. at 28. Petitioner's insurer did cover drug and alcohol treatment so Petitioner set up an appointment with another provider for November 2, 2000.² Based on his own insurance coverage and the scheduled appointment, Petitioner unilaterally decided to stop attending the orientation sessions with the Program.³

Petitioner asserts before this Court that he could not have completed the Program because he did have insurance coverage, i.e., the Program was only

² This appointment was cancelled. C.R. at 51.

³ Petitioner introduced a letter dated November 13, 2000 from his insurer that authorized treatment. The Hearing Examiner took notice that the date of Petitioner's discharge from the Program preceded the date of the insurer's letter.

available to those clients who lacked insurance coverage.⁴ Moreover, he attempted to obtain drug and alcohol counseling from another provider. Pursuant to Hudak v. Pennsylvania Board of Probation and Parole, 757 A.2d 439 (Pa. Cmwlth. 2000), Petitioner contends that his discharge was inevitable and beyond his control. The Board, therefore, abused its discretion by recommitting him without first proving that he was somewhat at fault. We disagree.

In Hudak, we concluded that the Board has the burden of demonstrating that a parolee was somewhat at fault for a violation of a special condition of parole when the ability to comply with the special condition is completely outside of the parolee's control. Id. at 441-42. For example, this burden arose when a parolee was unsuccessfully discharged from a community center for purely medical reasons. Id. In contrast, no such burden is placed on the Board when a parolee acts under his free will and violates his parole. See id. at 442 (citing such acts as leaving an approved district, having contact with unauthorized person, possessing a weapon).

The reason that Petitioner was unsuccessfully discharged was that he failed to attend the orientation sessions; he was not discharged because of the effect of his insurance coverage. The record before us indicates that, although Petitioner would have to use the services covered by his insurer, Petitioner was required to continue with the Program until he produced written evidence of his insurance coverage. It was the failure to provide documentation and Petitioner's

⁴ Our review of the merits of this case is limited under Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704, to determining whether necessary findings are supported by substantial evidence, an error of law was committed, or a constitutional right of the parolee was violated. Hudak v. Pennsylvania Board of Probation and Parole, 757 A.2d 439, 440 n. 1 (Pa. Cmwlth. 2000).

unfounded belief that he could just cease attending orientation sessions which resulted in his unsuccessful discharge. Accordingly, the Board did not have the burden of proving that Petitioner was somewhat at fault for this technical violation. We conclude that the Board's finding is supported by substantial evidence.

The order of the Board is affirmed.

JIM FLAHERTY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alexander McPherson,	:	
Petitioner	:	
	:	
v.	:	No. 833 C.D. 2001
	:	
Pennsylvania Board of Probation and	:	
Parole,	:	
Respondent	:	

ORDER

AND NOW, this 30th day of October, 2001, the order of the Pennsylvania Board of Probation and Parole, dated January 24, 2001, recommitting Alexander McPherson as a technical parole violator to serve his unexpired term is hereby affirmed.

JIM FLAHERTY, Senior Judge