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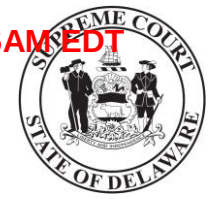

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT OVENS, Appellee Below, Appellant, v. CARL DANBERG, Commissioner, Department of Correction; G.R. JOHNSON, Warden, Sussex Correctional Institution, Appellants Below, Appellees.	: : : : : : : : : : : : : :	No.: 123, 2016 Appeal from the Superior Court (C.A. No. S15A-07-006-THG)

APPELLEES' ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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NATURE AND STAGE OF PROCEEDINGS

Carl C. Danberg, Commissioner of Department of Corrections ("DOC"), G.R. Johnson, Warden of Sussex Correctional Institute ("SCI"), Administrator for Correct Care Solutions, and the Administrator for MHM Services, Inc. are the Appellees in this matter. Robert Ovens is the Appellant.

Ovens, who is deaf, was incarcerated at SCI three separate times between May 12, 2010 and May 13, 2013. B1, A221.[1] On November 23, 2010 Ovens filed a complaint with the Delaware Human Relations Commission alleging that DOC Commissioner Carl C. Danberg, G.R. Johnson, Warden of Sussex Correctional Institute; and the administrators of two of the DOC's medical service providers (collectively known as "Appellees") denied him the full and equal accommodations, facilities, advantages or privileges of SCI because of his deafness in violation of the Delaware Equal Accommodations Law ("DEAL"), specifically, 6 *Del. C.* § 4504(a). A19-22. The purpose of DEAL is to prevent, ***in places of public accommodation***, discrimination against any person because of race, age, marital status, creed, color, sex, handicap, sexual orientation or national origin. 6 *Del. C.* § 4501 (emphasis added). Respondents filed a Motion to Dismiss the complaint on July 20, 2012, arguing in relevant part that SCI is not a place of public accommodation and therefore the Commission lacked jurisdiction to

[1] Citations to the Appellant's Appendix are indicated as "A" followed by the applicable page numbers. Citations to the Appellee's Appendix are indicated as "B" followed by the applicable page numbers.

entertain Ovens' complaint.[2] A13. Ovens provided a written response on August 9, 2012. A27. The Commission took the Motion to Dismiss under advisement and scheduled a hearing on the new complaint. A90. The hearing occurred on September 25, 2013; October 16, 2013; October 17, 2013; and November 19, 2013. A89. After the hearing concluded, but before the Commission ruled, the Superior Court opinion *Lakisha Short v. State of Delaware,* 2014 WL 11048190 (Del. Super. Aug. 5, 2014) issued, holding that prison is not a place of public accommodation. At the Commission's request, Ovens and Respondents filed supplemental briefs regarding the *Short* decision in October 2014. A79-85.

On December 16, 2014, the Commission issued its Decision and Order in this case. A89. The Commission, by a vote of two to one, concluded that, contrary to the Superior Court's ruling, a prison was a place of public accommodation and denied Respondents' Motion to Dismiss on that basis.[3] A131-132. The two "majority" Commission members did, however dismiss Ovens' complaint against Carl C. Danberg, finding no personal or official involvement by Mr. Danberg.

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[2] On March 31, 2011 the Human Relations Commission dismissed Ovens' complaint, finding that it lacked jurisdiction. Ovens appealed to the Superior Court and on October 26, 2011, that Court remanded the matter, instructing the Commission to articulate its bases for finding it lacked jurisdiction. *Lum, Brown, Slebzak and Ovens v. State Human Relations Commission*, 2011 WL 5330507 (Del. Super. Oct. 26, 2011). Rather than issue a new opinion articulating its bases for dismissing the complaint on jurisdictional grounds, the Commission reversed itself and directed Ovens to re-file his complaint. A36a. Ovens re-filed on July 6, 2012. A9-11. The complaint listed the same Appellees and alleged all of the same claims. *Id.*

[3] The dissenting Commission member issued a separate opinion, concluding that the Human Relations Commission did not have subject matter jurisdiction over Ovens' complaint because a prison was not a place of public accommodation. A149.

A90. The Commission also did not address the alleged violations regarding medical services, indicating that the Decision and Order does not apply to the health care contractors. *Id.* Ultimately, the Commission found in favor of Ovens, holding that Sussex Correctional Institution Warden, G.R. Johnson, violated 6 *Del. C.* § 4504(a). *Id.* The Commission awarded Ovens $25,000, imposed a civil penalty of $2,500, awarded attorney fees of $29,088 and costs of $1,315 to be paid by the appellees to Community Legal Aid Society, Inc.. A143-146. Appellees filed a Motion to Reconsider on December 22, 2014. A152-155. The Motion was denied by the majority of the Commission on July 7, 2015, and again one Commissioner issued her own dissenting opinion, re-asserting that the Commission lacked jurisdiction because a prison was not a place of public accommodation. A163-170.

Respondents appealed the decision to Superior Court. The Superior Court reversed the Commission's decision because the Commission erred in declining to follow the *Short* decision on the issue of whether a prison constitutes a place of public accommodation and held that under Delaware law, prisons are not places of public accommodation. *Danberg v. Ovens*, 2016 WL 626476, (Del. Super. Feb. 15, 2016).

Ovens appealed that decision to this Court on March 14, 2016 and a brief schedule was issued the dame day. This is appellees' answering brief.

SUMMARY OF ARGUMENT

1. Denied. The Commission's conclusion that the Sussex Correctional Institution is a place of public accommodation for the purpose of the Delaware Equal Accommodations Law is not supported by substantial evidence and represents legal error.

2. Denied. The Commission's decision that Appellees violated 6 *Del. C.* § 4504(a) is not supported by substantial evidence nor free from legal error.

STATEMENT OF FACTS

The Delaware Department of Correction ("DOC") was established to provide for the treatment, rehabilitation and restoration of offenders as useful, law-abiding citizens within the community. 11 *Del. C.* § 6502. DOC is subject only to powers vested in the judicial and certain executive departments and officers of the State, and has exclusive jurisdiction over the care, charge, custody, control, management, administration and supervision of all offenders and persons under its custody. 11 *Del. C.* § 6504. SCI is an adult correctional facility in Sussex County, Delaware operating under the auspices of DOC. Its purpose is to provide incarceration and rehabilitation programs for those individuals that are awaiting trial, have been convicted of a crime, or are awaiting sentencing. 11 *Del. C.* § 6502; http://www.doc.delaware.gov/BOP.

Ovens was incarcerated at Sussex Correctional Institution ("SCI") three separate times between May 12, 2010 and May 13, 2013. B1. During all relevant time periods, G.R. Johnson was the Warden of SCI.[4] Ovens has been deaf since the age of two. A221. Ovens attended and graduated from a mainstream high school in Rochester, New York in 1987. A220-221. After high school, Ovens continued his education and became a welder. *Id.* The staff at SCI communicated with Ovens through the exchange of notes, interpreters, and a computer.

[4] During this time period, Ovens was also committed to Sussex Correctional Community Center ("SCCC") on occasion. SCCC includes the Sussex Violation of Probation Center, is independent of SCI, and has a different warden charged with its administration.

Ovens telephone access during his incarceration

When Ovens was first committed to SCI and placed in the pretrial building on May 12, 2010, he informed correctional officers he needed to make a call. A226. Due to his deafness, Ovens required an auxiliary aid to utilize a phone. Text telephone devices (TTY) are one such aid. In May 2010, there was no TTY machine on Ovens' tier and correctional officers instructed Ovens to fill out a counselor slip. A226. On May 21, 2010, senior correctional counselor, Sharon Buss, returned from vacation and learned that Ovens was deaf and needed the use of a TTY to make a call. A269. On this same day, Buss tried to hook up the TTY on the tier, but had difficulty. A270. Buss found a phone line that she could plug the TTY into in the conference room. A281. Ovens immediately wanted to call Alaska, but Buss was concerned because she knew Ovens had "no contact" orders in other states, including Alaska. B63. Buss did not have access to out of state court orders, and believed only the Warden had access to this information, so she did not allow Ovens to call out of state on that date. *Id.* However, Buss did permit Ovens to call his mother, with whom he became very upset, and who indicated she did not want to talk to Ovens. B66.

On May 24, 2010 and again on May 26, 2010 Buss informed Ovens that he could place calls regarding family emergencies or for legal purposes. B4; B5. Ovens filed a grievance on May 28, 2010. B6. The grievance investigator

generated a report on June 1, 2010, indicating he had made contact with Ovens and allowed Ovens to call his family and attorney. *Id.* Acting Warden Johnson and Deputy Warden Kline made contact with the inmate telephone contractor, PCS, requesting a phone line for accessing the TTY in the housing area. *Id.*

While PCS was fixing the problem with the phone line and the maintenance department was constructing a secure box for the TTY, Ovens filled out counselor slips for when he wanted to use the TTY. B87-88. SCI staff would then escort Ovens off the tier and set up the TTY for his use. B58. On June 9, 2010 Buss informed Ovens by memo that plans were being made to provide him phone access with a TTY machine on the tier. B15. Without restriction on who or what kind of calls Ovens could make, Buss asked Ovens to fill out a phone sheet for the people he would like to call, in the same manner as hearing prisoners. *Id.*

In August of 2010, the TTY was secured on the tier in a lockbox. B52. No restrictions regarding who Ovens could call were in place, however, a change in phone contractors temporarily affected Ovens ability to call out of state. B56-57. The changeover caused interruptions in the inmate phone system that affected ***all inmates***. A255. By August 17, 2010 phone records indicate that Ovens was able to use the TTY machine successfully. B16. Also, during a multidisciplinary meeting on September 8, 2010 in which Ovens participated, Buss' notes indicate that Ovens was satisfied with his TTY access. B18. Unfortunately, problems with

the TTY machine still would occur on occasion. B68. There were multiple reasons the TTY would stop working, such as Ovens keying with too much force (B69); allowing hearing inmates to use the TTY, exceeding the capacity for which it was designed (A256); or removing the batteries to light cigarettes. B67.

Ovens was released from SCI on April 4, 2011. B1. He was committed again on October 24, 2011 and then released on December 15, 2011. *Id.* From October – December 2011, Ovens was housed in the pretrial building where Buss was still a counselor. B61-62. The initial pretrial building Ovens was placed did not have a TTY but Ovens was moved a few days later and had access to the TTY on his tier. B53. The TTY machine did break in November 2011, and Ovens filed a grievance. A197. A new TTY machine was purchased, Ovens confirmed that the TTY machine was working fine, and the grievance was resolved prior to his release in December 2011. *Id.*

Ovens was committed to SCI again on September 11, 2012 until May 13, 2013. B1. Ovens testified that he had access to a TTY during this time period. B54-55.

Ovens educational services received during his incarceration

From August 8, 2010 until early September 2010, Ovens participated in an anger management violence prevention group at SCI. A185. Ovens participated in this program along with a hearing man in the group who could sign, and who

assisted with interpretation when necessary. A260. Ovens was provided all of the written materials. *Id.* Dr. Drevno, a licensed school psychologist and licensed professional counselor, facilitated the program. A213. Dr. Drevno testified that Ovens actively participated in the class with the assistance of the man who signed for him. A261. After completing the class, Ovens requested a copy of his successful completion certificate be sent to his defense attorney. B17.

In October 2012, the classification committee determined that Ovens would benefit from a substance abuse treatment program. B65. His counselor at this time was James Deel. B71. Deel was a Crisis Counselor at SCI from March 2005 until January 2013. B70. Deel testified that he, like Buss, communicated with Ovens primarily through writing. B72. Deel testified that Ovens never asked for an interpreter and that their ability to communicate through writing never presented any problems. B74. Again, as with Buss, no grievances were ever filed by Ovens indicating he could not communicate with counselor Deel. B2; B6; B32; B34; B37. Deel arranged for Ovens to participate in an expedited TEMPO substance abuse program because Ovens' sentence was not long enough to accommodate the traditional TEMPO course. B74-75.

Ovens classification review during his incarceration

On September 11, 2012, Ovens was again committed to SCI but now as a sentenced inmate. B1. Classification reviews are required if an inmate has been

sentenced to 90 days or more of imprisonment. 11 *Del. C.* § 6530. The reviews are conducted by a classification committee. *Id.* "Each classification committee shall determine and prescribe the custodial and rehabilitation program and the care for each person coming under its jurisdiction. The classification committee shall determine the persons who shall work and labor and shall assign persons to jobs, studies and programs according to their abilities and in the manner best calculated to effectuate their training and rehabilitation." *Id.* The statute does not require the inmates to participate nor require the inmate to sign off on the recommendations of the classification committee.

On October 2, 2012, Ovens met with his classification committee, which included his previous counselor, Buss. A276-277. Buss testified that Ovens did not request an interpreter for this meeting, nor did she think one was necessary. A278. Buss, as Ovens counselor for 13 months, believed Ovens could communicate effectively. *Id.* Ovens never submitted a grievance indicating he had a problem communicating with Buss, nor do any of the counselor slips indicate Ovens ever asked Buss for an interpreter. B2; B6; B32; B34; B37; B10-14.

ARGUMENT

I. THE SUSSEX CORRECTIONAL INSTITUTION IS NOT A PLACE OF PUBLIC ACCOMMODATION AS DEFINED IN 6 *DEL. C.* § 4502(14).

A. Question Presented

Did the Commission commit legal error in concluding the Sussex Correctional Institution is a place of public accommodation as defined in 6 *Del. C.* § 4502(14)? This issue was raised at A14-A15 and addressed by the Superior Court. *Danberg v. Ovens*, 2016 WL 626476, at *2-3 (Del. Super. Feb. 15, 2016).

B. Standard and Scope of Review

Upon review of an administrative decision, the Court must examine the record for errors of law and determine whether substantial evidence exists to support the Board's finding of fact and conclusions of law. *Histed v. E.I. DuPont de Nemours & Co.,* 621 A.2d 340, 342 (Del. 1993). This Court reviews questions of law decided by the Superior Court *de novo*. *Arben-Wilmington, Inc. v. Director of Revenue*, 596 A.2d 1385 (Del. 1991).

C. Merits of Argument

a. The Superior Court correctly held that the Commission was required to follow the *Short* decision.

The Commission lacked jurisdiction to hear Ovens' complaint because the Sussex Correctional Institution is not a place of public accommodation as defined in 6 *Del. C.* § 4502(14). A "place of public accommodation" is defined as:

> any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public. This definition includes state agencies, local government agencies, and state-funded agencies performing public functions.

6 *Del. C.* § 4502(14). In *Short*, the Superior Court concluded prisons do not fit within the statutory definition of a place of public accommodation [pursuant to DEAL]. *Lakisha Short v. State of Delaware,* 2014 WL 11048190 (Del. Super. Aug. 5, 2014). In *Danberg v. Ovens,* the Superior Court determined that the doctrine of *stare decisis* was applicable and that the Commission erred in declining to follow the *Short* decision because "all lower courts and administrative agencies, follows its prior decisions 'except for urgent reasons and upon clear manifestation of error.'" *Danberg,* 2016 WL 626476, at *6 (citing *Wilmington Amusement Co. v. Pacific Fire Ins. Co.*, 21 A.2d 194, 196 (Del. Super. 1941)).

Stare decisis applies whenever there is a judicial opinion on a point of law expressed in a final decision. *State v. Phillips*, 400 A.2d 299, 308 (Del. Ch. 1979). The judicial opinion should be treated as a precedential, in the light of the factual situation that gave rise to the opinion. *Id.* In the *Short* case, a transgendered inmate was prevented from changing her name because 10 *Del. C.* § 5901(c)(2) precluded name changes by inmates unless based on sincerely held religious beliefs.[5] Short argued this statute was preempted by the same statute at issue here, 6 *Del. C.* § 4502(14). Specifically, Short argued that because a prison is a place of

[5] On June 25, 2015, 10 *Del. C.* § 5901(c)(2) was amended to include gender identity.

public accommodation, it may not discriminate based on gender identity. The Superior Court expressly rejected this argument, holding that "[a] correction facility clearly does not fit within the statutory definition of a place of public accommodation. Correction facilities are designed specifically so that those people housed inside remain inside, and so those people outside of them are unable to gain access." *Short,* 2014 WL 11048190, at *5.

Ovens nonetheless asserts that this express holding of the Superior Court does not control the findings of the Commission because, Ovens claims, the facts in the *Short* case are fundamentally different from the facts here and the "points of law" are somehow not the same. Op. Br. at 24. Specifically, Ovens' claims that the second part of the definition of a place of public accommodation, which states "[t]his definition ***includes*** state agencies, local government agencies, and state-funded agencies performing public functions," creates an independent basis for finding Delaware prisons to be a place of public accommodation and the Superior Court's failure to hold that this exemplar swallowed the rest of the definition leaves an opening for an administrative body to ignore the entire holding of *Short* and find correction facilities places of public accommodation. Op. Br. at 24 (citing 6 *Del. C.* § 4502(14) (emphasis added)). Ovens' argument fails on its face. It was not necessary for the court in *Short* to address this erroneous interpretation which ignores the plain meaning of the word "includes." Effect should be given to the

legislature's intent by ascertaining the plain meaning of the language used. *Freeman v. X-Ray Assoc., P.A.*, 3 A.3d 224, 227-228 (Del. 2010). When the legislature added the language "[t]his definition ***includes*** state agencies..." it is clear that it was to be read in conjunction with the first part of the definition, which requires a showing that the place of public accommodation (which may include a state agency) caters to, or offers goods or services or facilities to, or solicits patronage from, the general public.

In *Short*, the court concluded prisons were not a place of public accommodation, thus, settling this point of law and creating a precedent that should be followed by all lower courts and administrative agencies when the same question is at issue unless an "urgent reason" or clear manifestation of error can be articulated. *Oscar George, Inc. v. Potts*, 115 A.2d 479, 481 (Del. 1955). The Commission was presented with the same question of law and failed to articulate any urgent reason or clear manifestation of error to support its decision to disregard the precedent.

b. *Dept. of Corrections v. Human Rights Commission*, 917 A.2d 451 (VT. 2006) is not persuasive authority.

The Commission incorrectly held that because the DOC is a state agency and SCI is a part of DOC, SCI is a "place of public accommodation," subject to the jurisdiction of the Commission. A132. In concluding that a prison is a place of public accommodation, the Commission ignored controlling Delaware case law,

disregarded the opinion of the majority of states that have looked at this issue, and relied exclusively on the sharply divided decision of the Vermont Supreme Court in *Department of Corrections v. Human Rights Commission*, 917 A.2d 451 (Vt. 2006). A131-132. The Commission half-heartedly justified its reliance on the Vermont case, stating it "...reviewed the legislative history surrounding the amendments to the Act [DEAL] and [found] that it very closely mirrors the history of statutory amendments to the equal accommodations statute in the State of Vermont." A131. A cursory review of the Vermont decision, however, illuminates the hamartia of the Commission's holding. Vermont amended its equal accommodations statute in 1992, shortly after the American Disabilities Act of 1990, 42 U.S.C. § 12131 *et. seq.*, ("ADA"), with the clearly expressed intent that its amended statute be consistent with the ADA. DEAL, on the other hand, was not amended to include state agencies until 2006 and was amended without a single reference to the ADA.

Ovens argues that the Commission correctly relied on the Vermont Supreme Court decision as controlling the outcome in this case, because, like DEAL, its relevant laws were amended to apply to all governmental entities. Op. Br. at 24-25. This is an oversimplification and a closer look at the definitions applicable in Vermont's statute compared to the definitions in DEAL illustrates the fallacy of this argument. Vermont's applicable statutes state:

> **"Public Accommodation"** is defined as "an individual, organization, ***governmental*** or other entity that owns, leases, leases to or operates a place of public accommodation." 9 V.S.A. § 4501(8) (emphasis added)
>
> **"Place of Public Accommodation"** is defined as "any school, restaurant, store, establishment or other facility at which services, facilities, goods, privileges, advantages, benefits or accommodations are offered to the general public." 9 V.S.A. § 4501(1).

The Vermont Court determined that there was an "interpretive problem" as the term "public accommodation" did not include the term "general public," while the term "place of public accommodation" retained the term. *Dept. of Corrections,* 917 A.2d at 454. The Court stated that the ". . . definition of 'public accommodation' does not necessarily restrict governmental entities to the criteria set forth in the definition of 'place of public accommodation.'" *Id.* Due to this "interpretive problem" the Court turned to the legislative history for guidance. DEAL does not present the same "interpretive problem" faced by the Vermont court. DEAL does not have a separate definition for the term "public accommodation," as Vermont does. *See* 6 *Del. C.* § 4502(14). There are not conflicting definitions in the Delaware code, and it was not logical for the Commission to follow the rationale of the Vermont Supreme Court and conclude that as a governmental agency, SCI is a place of public accommodation.

Simply stated, there is not substantial evidence to conclude that Delaware's statutory history in any way mirrors that of Vermont's and thus to imply

Delaware's legislature intended to include prisons within its definition of places of public accommodations. Relying on Vermont's holding interpreting a completely different statute was an error of law. The Commission also committed a fatal error of law by failing to conduct its own meaningful analysis of DEAL and 6 *Del. C.* § 4502(14).

c. The plain meaning of the language of 6 *Del. C.* § 4502(14) supports the conclusion that prisons are *not* places of public accommodation.

The Commission's reliance on one state's analysis, in complete disregard to all contrary compelling legal authority aside, the plain meaning of Delaware's statute exemplifies the legal error committed by the Commission. The 2006 addition of the language "[t]his definition includes state agencies, local government agencies, and state-funded agencies performing public functions," to the definition of a place of public accommodation did not negate the first part of the definition, which requires that the "place" be one "which caters to or offers goods or services or facilities to, or solicits patronage from, the general public." 6 *Del. C.* § 4502(14). SCI is not a ***place*** that caters or offer goods or services or facilities or solicits patronage from ***the general public***. Effect should be given to the legislature's intent by ascertaining the plain meaning of the language used. *Freeman v. X-Ray Assoc., P.A.*, 3 A.3d 224, 227-228 (Del. 2010). Neither "place" nor "the general public" are defined in Title 6; however, dictionaries are routine

reference sources that reasonable persons use to determine the ordinary meaning of words, and are often relied on by the Court for assistance in determining the plain meaning of undefined terms. *Id.*

Place is defined as: "physical environment," "physical surroundings," or "a building or locality that is used for a particular purpose." *Gordy v. Bice*, 2003 WL 22064103, at *4 (Del. Super. Aug. 21, 2003) (citing Merriam-Websters Collegiate Dictionary (10th ed. 1993)). SCI is a "place" whose purpose is to provide incarceration and rehabilitation programs for those individuals that are awaiting trial, have been convicted of a crime or are awaiting sentencing. To that end, SCI allows eligible inmates to participate in programs run by Delaware Correctional Industries ("DCI"). DCI is focused on assisting offenders with developing marketable job skills, teaching work ethic, applying these principles to post-prison employment, as well as providing market quality goods and services to its customers at a competitive price.[6] Through DCI, SCI inmates provide goods and services to the general public via its on-line presence, but the "place" where the actual goods and services are provided does not include the areas and buildings of SCI where inmates are segregated. The availability of these goods and services to the general public by DCI does not make SCI any more open and accessible to the

[6] *See* http://www.dci.delaware.gov (last accessed November 18, 2015).

general public. The prisons are still secure facilities designed to severely limit and at times totally prevent interaction between inmates and the general public.

Admittedly, SCI provides goods and services to inmates imprisoned within its walls, but inmates are not members of ***the general public*** as the term is used within Title 6. While "general public" is not defined within DEAL, "general" is defined as "involving or including many or most people;" or "used to indicate that a description relates to an entire person or thing rather than a particular part." Merriam-Webster Dictionary (Electronic Ed. 2015). "Public" is defined as "the people as a whole." *Id.* The plain and ordinary meaning of the phrase "the general public" is, therefore, the whole community at large. This is the exact opposite of the people to whom SCI provides goods and services—the inmate population--who represent a subset of the public that is involuntarily segregated from the general public and has seriously constricted freedom. *See Skaff v. West Virginia Human Rights Commission*, 191 W.Va. 161, 163 (W. Va. 1994) ("...it is apparent that [inmates] are not members of the general public. Their criminal convictions and incarcerations seriously curtail the civil liberties which ordinarily are afforded the public at large.")

d. The Legal authority does n*ot* support the Commission's determination that a prison is a place of public accommodation

Ovens' asserts that "[t]he ADA's definition of 'public entity' is analogous to DEAL's inclusion of 'state agencies, local government agencies, and state-

funded agencies performing public functions' as part of the definition of a place of public accommodation." Op. Br. 26. And as such, the Supreme Court of the United States holding in *Pennsylvania Department of Corrections, et al. v. Yeskey*, 524 U.S. 206, 210 (1998), that a state prison falls squarely within the statutory definition of "public entity" should be persuasive authority for this Court to follow. Op. Br. at 26-27. However, the Court in *Yeskey* did not hold that a prison was a place of public accommodation, but rather that a prison was "a public entity." *Yeskey*, 524 U.S. at 210. The statutory definition of "public entity" in Title II of the ADA is significantly different than DEAL's definition of "place of public accommodation." The term "public entity" in the ADA is defined as: "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority (as defined in Section 24102(4) of Title 49)." 42 U.S.C. § 12131(1)(A)&(B). This definition differs significantly from DEAL's "place of public accommodation" definition in that it does not include the language, nor the requirement, that the public entity must be one that caters to offers goods or services or facilities to, or solicits patronage from, the general public. As such, the SCOTUS's opinion in *Yeskey* is not dispositive in the case at bar.

Courts in other jurisdictions have concluded that a prison is not a place of public accommodation in the context of similar equal accommodations laws, including Texas, Connecticut, Washington, Pennsylvania, and West Virginia. *Beeman v. Livingston*, 58 Tex. Sup. J. 1414 (Jun. 26, 2015) (holding a prison is not open and accessible to the public, even though the buildings or some part of them can be accessed in a limited, controlled manner by a small segment of the public and finding "nothing in the language of the statute . . . indicates the Legislature intended for one small subset of the public that is involuntarily segregated from the public and has seriously constricted freedoms (*i.e.*, TDCJ inmates) qualify as the "public"- the community as a whole."); *Chiro ex rel Aslenet Vargas v. State of Connecticut Department of Corrections*, 2014 WL 564478 (Conn. Super. Jan. 10, 2014) (holding prison is not a place of public accommodation as a prison is designed to severely limit and sometimes totally prevent interaction between inmates and the general public); *Brown v. King County Department of Adult Corrections*, 1998 WL 1120381 (W.D. Wash. Dec. 9, 1998) (holding that a place of public accommodation does not encompass a prison environment); *Blizzard v. Floyd,* 613 A.2d 619 (Pa. Cmwlth. 1992) (holding prison is not a place of public accommodation since it did not accept or solicit patronage of general public, or provide benefit to which members of the general public could avail themselves if they so desired and inmates did not enjoy privilege of leaving facility at will); *Skaff*

v. West Virginia Human Rights Commission, 444 S.E.2d 39 (W.Va. 1994) (holding that penal institutions are not places of public accommodations under state law because incarcerated individuals are not members of the general public.).

Concluding prisons fall within the definition of a place of public accommodation would be a significant departure from Delaware case law to date. Delaware cases addressing violations of 6 *Del. C.* § 4504 have involved restaurants, stores, hotels, and entertainment venues—places that are open and accessible to the general public and to people who may come and go at will. A prison, like SCI, clearly does not possess such elements.

The Commission's conclusion that the Sussex Correctional Institute is a place of public accommodation as defined in 6 *Del. C.* § 4502(14) was not supported by substantial evidence, constitutes legal error, and it is respectfully requested that the decision must be reversed.

II. THE COMMISSION'S DECISION AND ORDER IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE NOR FREE FROM LEGAL ERROR.

A. Question Presented

Is the Commission's determination that the Sussex Correctional Institute discriminated against Ovens in violation of 6 *Del. C.* § 4504(a) supported by substantial evidence and free from legal error? This issue was presented to the Commission (A139-143) and addressed by the Superior Court. *Danberg v. Ovens*, 2016 WL 626476 at *2-3 (Del. Super. Feb. 15, 2016).

B. Standard and Scope of Review

Upon review of an administrative decision, the Court must examine the record for errors of law and determine whether substantial evidence exists to support the Board's finding of fact and conclusions of law. *Histed v. E.I. DuPont de Nemours & Co.,* 621 A.2d 340, 342 (Del. 1993). Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Olney v. Cooch,* 425 A.2d 610, 614 (Del. 1981).

C. Merits of Argument

The Commission concluded that Appellees, specifically, SCI Warden, G.R. Johnson, violated 6 *Del. C.* § 4504(a), which provides that:

> no person being the owner, lessee, proprietor, manager, director, supervisor, superintendent, agent or employee of any place of public accommodation, shall directly or indirectly refuse, withhold from or deny to any person, on account of race, age, marital status,

> creed, color, sex, disability, sexual orientation or national origin, any of the accommodations, facilities, advantages or privileges thereof.

This Court has found that to establish a violation of this statute, a plaintiff must first establish a *prima facie* case of discrimination. That requires the plaintiff establish three elements: (a) that the plaintiff is a member of a protected class, (b) that the plaintiff was denied access to a public accommodation, and (c) that persons who were not members of the protected class were treated more favorably. *Uncle Willie's Deli v. Whittington*, 1998 WL 960709, at *4 (Del. Super. Dec. 31, 1998). If the plaintiff establishes his *prima facie* case of discrimination, the burden shifts to the defendant to produce evidence of a legitimate, non-discriminatory reason for denying the plaintiff access. *Thompson v. Dover Downs, Inc.*, 887 A.2d 458, 461 (Del. 2005). If the defendant produces such evidence, then the burden shifts back to the plaintiff to show by a preponderance of the evidence that the defendant's proffered reason was merely pretextual. *Id.*

Here, Ovens failed to establish a *prima facie* case of discrimination. There is no dispute as to the first prong, Ovens is deaf, and thus a member of a protected class. As to the second prong, the Commission found that the Warden denied him access to public accommodations, specifically telephonic communications, educational services, and classification reviews, but the evidence does not support these findings. At best, the evidence before the Commission made clear that

Ovens ***did*** have access to telephonic communications through the use of a TTY machine, he ***did*** participate in educational programs, and he ***was*** involved in his classification review. As to the third prong, Ovens did not demonstrate that there was disparate treatment *vis a vis* him and the other similarly situated inmates. Proof of disparate treatment borne of discriminatory motive is critical, and its absence in this case is fatal. *See Boggerty v. Stewart*, 14 A.3d 542, 551 (Del. 2011).

Assuming, *arguendo*, Ovens had established a *prima facie* case of discrimination, the Appellees provided substantial credible evidence of the legitimate nondiscriminatory reasons for "denying" Ovens access, as explained below. Once Appellees produced this evidence, it was Ovens' burden to show that the Appellee's explanations were pretextual. To do this, Ovens was required to present evidence sufficient "that a jury could find that the [defendant] lacks all credibility." *Id.* at 553 (citing *Jaramillo v. Colo. Jud. Dept.*, 427 F.3d 1303, 1310 (10th Cir. 2005)).

a.) Ovens access to a telephone through the use of a TTY machine was not denied.

In its Analysis and Conclusions of Law, the Commission found the Appellees denied Ovens telephonic communications because there was a nine day delay in Ovens' access to a TTY machine and there were initially restrictions

placed on the types of calls Ovens could make. A139. In reaching this conclusion, the Commission determined that Ovens established a *prime facie* case of discrimination. *Id.* The Commission determined Appellees did not provide a legitimate, nondiscriminatory reason for the nine day delay and as to the restrictions the Commission identified three reasons provided by the Appellees to explain the restrictions but found that Ovens met his burden in establishing that Appellees' reasons were pretextual. *Id.*

The Commission erred when it determined that a nine day delay in phone access compared to a three to five day delay "suffered" by hearing inmates equated to disparate treatment. To utilize the phones at SCI, an inmate must fill out and submit a phone sheet listing up to five numbers of people they wish to call. A267. It can take from three to six days to process this request. A287. Ovens was committed to SCI on May 12, 2010, and was able to access a TTY machine on May 21, 2010. A269-270. The nine day delay, as opposed to a 3-6 day delay, is not significant and cannot be considered disparate. Regardless, the Commission concluded that this nine day delay was "not reasonable" and represented a denial of a public accommodation. A141. Unreasonable does not a denial make.

At this point, the burden shifted to the Appellees to provide a legitimate, nondiscriminatory reason for the "denial." To meet their burden, Appellee must only explain clearly the nondiscriminatory reasons for its actions. "That burden is

satisfied if [the defendant] simply 'explains what he has done'..." *Boggerty*, 14 A.3d at 552 (citing *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981)). The burden is one of production, not persuasion. *Id.* When Ovens was first committed to SCI there was no TTY machine on the tier where he was placed. A270. At the time Ovens was first incarcerated, there was not a phone line that could support a TTY machine on the tier. B6. The TTY machine was in the classification office, which at that time was accessible only by staff. B64. When Ovens was committed the regular counselor, Buss, was not initially made aware there was a deaf inmate on her tier and was subsequently on vacation. A269. When Buss returned from vacation on May 21, 2010, she rectified the situation and took Ovens to use the TTY machine to make a phone call.[7] *Id.* At this time, Buss had contacted the telephone provider representative, Morris, to find a way to secure the TTY machine on the tier. B64.

The Commission not only failed to acknowledge Appellants' explanation, it specifically mis-stated the applicable rule of law, holding that the Appellants must "establish" a legitimate, non-discriminatory reason for the denial. A140. When read in context with the Commission's failure to acknowledge the Appellants'

[7] On August 15, 2013 SCI adopted a hearing impaired policy. A332-338; A777-780. This policy now requires that during the intake process if the inmate is hearing impaired the information is listed in the Delaware Automated Correction System at which time a specified compliance officer will receive a notification flag alerting the officer that a hearing impaired inmate has been committed at SCI. The compliance officer is tasked with tracking this inmate and making sure that the inmate's needs, such as access to a TTY, are met. *Id.*

legitimate, nondiscriminatory explanation, it is illustratively clear that the Commission committed legal error and applied an incorrect burden. Even if the Commission had recognized the Appellees' non-discriminatory reason, Ovens did not present any specific and significantly probative evidence that Appellee's reason was pretextual. "The plaintiff must offer ***specific*** and ***significantly probative*** evidence that the [defendant's] alleged purpose is a pretext for discrimination." *Boggerty*, 14 A.3d at 554 (citing *Schuler v. Chronicle Broadcasting Co. Inc.*, 793 F.2d 1010, 1011 (9th Cir. 1986)).

In addition, the Commission found that the temporary restriction on the types of calls Ovens could make was a denial of a public accommodation. A141. Buss informed Ovens by memos on May 24, 2010 and May 26, 2010 that he could make calls if it was a family emergency or for legal purposes. B4-5. On May 28, 2010, Ovens filed a grievance to address the phone restrictions. B6. The grievance investigator generated a report on June 1, 2010, indicating he contacted Acting Warden Johnson and Deputy Warden Klein, who informed him that they had made contact with the inmate telephone contractor to resolve the issue with the phone line on the tier that did not currently support a TTY machine. B6. Contrary to the Ovens' opening brief's statement of facts, it was at that time, Acting Warden Johnson, indicated the TTY machine would not be for just emergency calls. Op. Br. at 12; A298.

Within days of filing a grievance about the phone restrictions, the restrictions were removed. The Commission legally erred when it concluded that Ovens had established a *prima facie* case of discrimination. A matter of days does not represent a denial of a public accommodation. Undaunted, the Commission concluded that the phone restrictions equated to a denial and then identified three legitimate, nondiscriminatory reasons provided by the Appellees. The reasons identified by the Commission included (1) failure to provide a phone list, (2) concern over no contact orders, and (3) Ovens becoming upset when his mother indicated she did not want to have contact with him during his call to her on May 21, 2010. A135. The Commission concluded ***all*** of these reasons were pretextual. "To raise an inference of pretext in the face of the [defendant's] legitimate, nondiscriminatory explanation, the plaintiff must undermine the [defendant's] credibility to the point that a reasonable jury could not find in its favor." *Boggerty*, 14 A.3d at 553 (citing *Jaramillo v. Colo. Jud. Dept.*, 427 F.3d 1303, 1310 (10th Cur. 2005)). In a prison setting, these are legitimate and valid concerns.

b.) Ovens was not denied educational services.

Ovens failed to establish he was denied educational services and thus failed to establish a *prima facie* case of discrimination. Ovens requested and participated in two treatment programs offered at SCI. From August 8, 2010 until early September 2010, Ovens participated in an anger management violence

prevention group at SCI. A185. Ovens participated in this program along with a hearing man in the group who could sign, and who assisted with interpretation when necessary. B59. Ovens was provided all of the written materials. B59. The group consisted of 8-10 inmates, including Ovens and the inmate signing for him. A262. Dr. Drevno facilitated the program and testified that Ovens actively participated in the class with the assistance of the man who signed for him. A261. Ovens never filed a grievance about the class and after completing the class, requested a copy of his successful completion certificate be sent to his defense attorney. A192.

In October 2012, the classification committee determined that Ovens would benefit from a substance abuse treatment program. B65. Deel, Ovens counselor, testified that Ovens motivation for wanting to participate in such a program, was to earn good time. B78. Deel sought to find a program that achieved both goals: treatment for Ovens as well as allowing him to acquire good time. B78. Deel arranged for Ovens and another deaf inmate to participate in an expedited TEMPO substance abuse treatment program. B74-75. The traditional TEMPO program involves group participation by inmates, but was not available to Ovens because the traditional TEMPO program has specific start dates, and Ovens sentence was not long enough to allow him to start the traditional TEMPO program and complete it during his sentence. B80. In light of the time restriction, Deel worked

with the education department to modify the TEMPO program to accommodate Ovens. B76. Deel also met with Ovens and inquired if the expedited program, utilizing a computer and written materials was acceptable. B77. Ovens agreed to the expedited structure before the program began. Instead of three to four months, Ovens and another deaf inmate met twice a week and completed the course in only two months. A206; B79. As Deel explained, it was not possible to allow the entire TEMPO group, 25 inmates, to meet twice a week because "[e]verything works off of security, so there is only a certain amount of time, hours, space availability and then facilitators also." B79. Because Ovens had agreed to the program's structure, Ovens never filed a grievance regarding the TEMPO program. B2; B6; B32; B34; B37.

However, the Commission concluded that despite Ovens participation in the programs, it was not to the same extent as hearing inmates. A136. It concluded that the inmate who assisted Ovens in the anger management class was insufficient, and that the inability to participate in group interaction in the Tempo program resulted in a denial of these accommodations. A137-138. The evidence is not legally adequate to support the Commission's conclusion. Ovens testified that he did not understand the majority of the anger management class. A233. Yet, Dr. Drevno, whose Ph.D is in education with an emphasis in applied behavior analysis (A259), testified that Ovens actively participated in the class with the

assistance of the man who signed for him. A261. Dr. Drevno noted that Ovens "...react[ed] in a way that suggested to me that he understood what they were communicating with one another." A264. Ovens demonstrated to Dr. Drevno, through his participation and understanding of the course, that the signing man was communicating clearly. Ovens' self-serving statements, after using the certificate of completion to his advantage, cannot now be substantial evidence that the interpreter was not qualified and access was denied.

As to the TEMPO program, the Commission completely failed to grasp that SCI could not put Ovens in a class with 25 other inmates because his sentence was not long enough, it had nothing to do with his hearing impairment. One Commissioner asked specifically, "In your opinion, would it have been possible for Mr. Ovens to be in the same class as a hearing person?" Deel responded: "it would [have] required [he] have someone to sign for him. That would have been a requirement. But, again, he would have not been able to complete the program ***based on his sentence***." B81-82.

c.) Ovens was not denied a classification review.

On October 2, 2012, Ovens met with his classification committee, which included his previous counselor, Buss. 276-277. Buss testified that Ovens did not request an interpreter, nor did she think one was necessary. A278. Buss, as Ovens' counselor for 13 months, never had a problem communicating with Ovens.

Ovens never submitted a grievance indicating he had a problem communicating with Buss, nor do any of the counselor slips in evidence indicate Ovens ever asked Buss for an interpreter.

The Commission concluded that an interpreter should have been provided for the classification review, otherwise it is a denial of a public accommodation. A138. "Requiring a deaf inmate to communicate via writing when that inmate does not fully comprehend the English language beyond a third grade level amounts to a denial of the accommodation." *Id.* The Commission places enormous weight on its own conclusion that Ovens does not understand the written English language beyond the third grade level. *Id.* This conclusion itself is not supported by substantial evidence, yet it is the sole reason the Commission felt Ovens was denied public accommodations.

Ovens testified that he graduated from a mainstream high school in 1987 and continued his education, eventually becoming a welder. The record also contains numerous letters, counselor slips, and grievances written by Ovens that reflect his understanding of written English. Moreover, Ovens testified he has an email account and uses Facebook.

The Commission, without explanation or analysis, rejected all of this evidence and nonetheless relied on an opinion by Ovens' witness, Christy Hennessey. Hennessey has a bachelor's degree in American Sign Language, and a

graduate degree in rehabilitative counseling for the deaf. B48-49. The Commission accepted her as an expert ***in American Sign Language***. B50-51. Despite this limitation, Hennessey, opined as to Ovens' reading ability, specifically stating, "For Robert, I would say probably looking at a third-grade level." A214. The record fails to establish that Hennessey was qualified as an expert to determine anyone's reading level.[8] Establishing one's reading level falls under scientific, technical or specialized knowledge and requires an expert who has actually undertaken such things as reading assessment testing, to opine on that conclusion.[9] Moreover, an expert's method must not be derived from "subjective belief or speculation." *Price v. Blood Bank of Delaware, Inc.*, 790 A.2d 1203, 1210 (Del. 2002). As such, substantial evidence does not exist on this record to establish that Ovens, an inmate at SCI, was denied access to a public accommodation and it is respectfully requested that the decision of the Commission be reversed.

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[8] The Delaware Supreme Court has established a five-step test to determine admissibility of scientific or technical expert testimony: (1) the witness is qualified as an expert by knowledge, skill, experience, training, or education; (2) the evidence is relevant; (3) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (4) the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and (5) the expert testimony will not create unfair prejudice or confuse or mislead the jury. *Brown v. E.I. DuPont Nemours & Co.*, 906 A.2d 787, 795 (Del. 2006).

[9] See DeBruin Parecki, A. (2004). Evaluating early literacy skills and providing instruction in a meaningful context. High/Scope Resource: A Magazine for Educators, 23(3), 510; Rhodes, L.K., & Shankin, N.L. (1993). Windows into literacy: Assessing learners K8. Heinemann: Portsmouth, NH.

CONCLUSION

For the reasons stated herein, Appellees respectfully request the December 16, 2014 Decision and Order of the Human Relations Commission be reversed, as it was not supported by substantial evidence and constitutes legal error.

Respectfully submitted,

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