



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

**APPELLANT'S OPENING BRIEF**

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Dated: May 6, 2016

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## NATURE AND STAGE OF PROCEEDINGS

On November 23, 2010, Appellant Robert Ovens (“Ovens”), through his attorney, filed a complaint under the Delaware Equal Accommodations Law (“DEAL”), 6 *Del. C.* § 4500 *et seq.*, against then Commissioner of the Delaware Department of Correction, Carl C. Danberg; G. R. Johnson, Warden of the Sussex Correctional Institution (“SCI”); and the administrators of the medical service providers for SCI, Correct Care Solutions and MHM Services. A4-7.<sup>1</sup> The complaint alleged that Ovens, who is deaf, non-verbal and communicates through American Sign Language (“ASL”), was being denied the full and equal accommodations, facilities, advantages or privileges of SCI on the basis of his disability. A6. After the Delaware Human Relations Commission (“Commission”) dismissed the complaint on jurisdictional grounds, the Superior Court remanded the case for further proceedings because the Commission failed to articulate its reasoning for the dismissal. *Lum, Brown, Slezak and Ovens v. State Human Relations Commission*, 2011 WL 5330507 (Del. Super. Oct. 26, 2011). The Division of Human Relations agreed to process Ovens’ complaint. A8.

On July 6, 2012, Ovens, through his attorney, re-filed the November 23,

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<sup>1</sup> Citations to Appellant’s Appendix are indicated as “A” followed by the applicable page numbers.

2010 complaint against the same respondents and alleged the same violations of DEAL. A9-11. Respondents filed a Motion to Dismiss the complaint on jurisdictional grounds (A12-26) and Petitioner filed his Opposition. A27-73. The Commission took the Motion to Dismiss under advisement while it conducted a hearing which took place over the course of four evenings, September 25, 2013, October 16 and 17, 2013 and November 19, 2013. A89. Two certified sign language interpreters were used for the hearing. A359-60, A376-77.

Prior to issuing its decision, the Commission requested briefing from the parties regarding the potential effect of a recently issued opinion in the case of *Lakisha Short v. State of Delaware*, 2014 WL 11048190 (Del. Super. Aug. 5, 2014). A79-80. Letter Memoranda were submitted by the parties. A81-85. On December 16, 2014, the Commission issued the Panel Decision and Order denying the Motion to Dismiss and finding by a two to one vote that Respondents Department of Correction (“DOC”), SCI and Warden G. R. Johnson violated the DEAL due to the discriminatory practices against Ovens based upon his disability. A86-151. Accordingly, the Commission awarded Ovens damages, attorney’s fees and costs. A143-46.

On December 22, 2014, Respondents requested reconsideration of the Commission’s decision and Ovens submitted his opposition on December 30,



2014. A152-61. The Commission denied Respondent's Application for Reconsideration by a two to one vote in a decision dated July 10, 2015. A162-70.

Respondents appealed the decision to Superior Court which held that the Commission erred in declining to follow the *Short* decision on the issue of whether a prison constitutes a place of public accommodation. Because the *Short* decision concluded that prisons were not places of public accommodations, the Superior Court held that it was error for the Commission to refuse to follow it. As such, in the absence of any urgent reason or clear manifestation of error justifying the Commission to revisit an issue already decided by Superior Court, the court reversed the Commission's decision and held that under Delaware law, prisons are not places of public accommodation.

Ovens appealed that decision to this Court on March 14, 2016 and a brief schedule was issued the same day. This is appellant's opening brief.

## SUMMARY OF ARGUMENT

1. The Commission's conclusion that SCI is a place of public accommodation for the purpose of the Delaware Equal Accommodations Law is supported by substantial evidence and is not an error of law.

2. The Commission's decision that Appellees violated 6 *Del. C.* § 4504(a) has sufficient evidentiary support; is free of legal error; and is the product of an orderly and logical deductive process.

## STATEMENT OF FACTS

### A. Ovens' deafness

At the time of the hearing, Ovens was 45 years old. A220. When he was two years old, Ovens became ill with spinal meningitis and lost his hearing by the time he was three. A221. He is not able to speak. *Id.* Ovens' native or first language is American Sign Language ("ASL") which is the most common language used by persons who are deaf. A213, A221. ASL is an independent, visual language with its own grammar and syntax. A211. Signed English follows English grammar and is simply a representation of English through a series of signs. *Id.*, A212. Deaf people whose native or first language is ASL are not able to communicate in and understand signed English. A213. They also have difficulty understanding written English. A213-14. While they might be able to recognize two or three words in a sentence, they would not be able to understand all of the information. *Id.* Ovens has difficulty understanding written English. A216. To insure that Ovens can understand written English, the writing needs to be on a third grade level. A214.

Ovens has a high school education. A237. While in high school, Ovens attended a half day of school followed by a half day in a welding program. A238. He was mainstreamed in high school with deaf and hearing students and was able

to participate in the program with the assistance of a sign language interpreter.

A237-38. After high school, he continued his training at a trade school for a year after which he obtained work as a welder. A238.

Ovens communicates with other deaf persons by videophone, a form of internet-based skyping or G-chat that allows deaf persons to see one another while they communicate through ASL. A214-15. Ovens can talk with hearing persons by videophone by calling the video relay service, sign to the operator, a sign language interpreter, who communicates in spoken English to the hearing person. A215. In the absence of a videophone, the best way for a hearing person to communicate with Ovens in order to be sure that the communication is accurate is through an ASL sign language interpreter. A216.

#### **B. Ovens' initial incarceration at SCI**

Ovens was committed to SCI on May 12, 2010 around four or five in the morning. A221, A245. According to the Director of Nursing at SCI, Mary Tolson ("Tolson"), within two hours of an inmate's arrival at SCI, a member of the medical staff performs a medical screening on the individual which includes "asking them about their health status, if they are taking any medications, reviews their mental health status, as well provides education and a handout packet to them. And it also explains in that packet how to access health care while they are

there.” A244. Ovens’ medical screening on May 12, 2010 was conducted by a correctional officer “who could sign some, but it wasn’t really American Sign Language. It wasn’t clear.” A221-22. Following Ovens’ screening, he was taken to the medical unit because of complaints of anxiety. A245. The person who acted as Ovens’ interpreter at that time was an employee of SCI’s mental health department, Jenni Buchanan. A222, A245. She was not a certified interpreter but knew sign language from school. A223. She had a basic understanding of sign language but did not sign fluently and had to ask Ovens to repeat himself frequently. A224. Although the circumstances were somewhat exigent requiring Ms. Buchanan to be used as an interpreter, she was brought back two days later to interpret for a meeting between Ovens and a nurse practitioner with no attempt to obtain the services of a qualified interpreter. A249.

If no interpreter was available, communication between the medical department and Ovens was done through note writing. A247-48. Tolson believed that as long as Ovens was able to read and to write, he could understand the note writing. A251. Following a staff meeting about Ovens’ medical care, at which staff from medical, mental health and a counselor with the DOC were in attendance, it was decided that writing would be satisfactory for uncomplicated communications with Ovens but that for complicated communications or if Ovens

requested one, a certified sign language interpreter would be obtained. A246. That meeting occurred on September 17, 2010, four months after Ovens was committed to SCI. A250.

**C. Ovens' access to a telephone after he was incarcerated**

When Ovens was first committed to SCI on May 12, 2010, he was assigned to housing unit four which is part of the pretrial building. A224-25. According to Ovens' counselor, Sharon Buss ("Buss"), there were five phones on Ovens' housing tier. A268-69. The phones are turned on at 6 or 8 in the morning and turned off at 8 or 10 in the evening. A268. Warden Johnson, in his responses to the Commission's questionnaire, stated that inmates at SCI are permitted to use the phones anytime during their recreation times which are approximately 8:30 am to 10:00 am; 11:30 am to 2:30 pm; and 6:00 pm to 10:00 pm. A74-78. According to Mary Morris, the administrator/technician for the inmate phone vendor at SCI, inmates at SCI had access to the phones starting at 9:00 am until 10:30 pm. A252-53. Inmates are allowed to make 15 minute collect phone calls to a maximum of five phone numbers and have to wait 15 minutes in-between phone calls. A253. When inmates are first committed, they are told to fill out a phone sheet with the five telephone numbers they want to call. A267. Processing that list into the phone system can take three to five days depending on the day of the week

especially if there is an intervening weekend. *Id.*, A287. At the time of his commitment, Ovens was not asked to provide names and phone numbers of people he wanted to communicate with. A239.

Although there were five telephones on Ovens' housing unit when he was first incarcerated, he was not able to use them because he was deaf and he had no access to a TTY. A225. A TTY is an antiquated teletype machine that is used with a telephone handset and allows the user to exchange English messages that appear in text on the machines' screen. A217-18. For Ovens to use a TTY on his housing unit, he would have to place the receiver of a telephone into the cradle of the TTY and, using the telephone, dial 711 which would connect him to a relay center and a TTY operator. A219, A257. Using the keys on the TTY, Ovens could type a message which would be displayed on the other party's TTY via the phone signal. A257. Ovens would signal that he had finished his message by typing GA for "go ahead" so the other party would know to begin typing their message. A258. Because the message is displayed in English, it can be difficult for a deaf person to understand. A218.

SCI had one TTY device at the time of Ovens' commitment. A256. When he first asked a correctional officer about making a phone call, he received no response for several days. A225. He wanted to call his family to let them know

where he was. *Id.* He repeatedly asked the correctional officers for permission to make a phone call and was told to submit a slip to speak with a counselor. A226-27.

Buss, one of two counselors responsible for the pretrial unit, testified that she was not aware that a deaf inmate was in the pretrial unit because she was on vacation and only realized Ovens was there when she returned on Thursday, May 20, 2010. A269. Actually, Buss was not on vacation until the following Monday, May 17, 2010. *Id.* Because Ovens had been committed in the early hours of Wednesday, May 12, 2010, Buss was at work the first three days of Ovens' incarceration. *Id.* When Buss returned to work on Thursday, May 20, 2010, she was told there was a deaf inmate in pretrial and instructed to provide him with TTY access and find out if he needed to contact anybody. A269-70. The next day on Friday, May 21, 2010, Buss' second day back at work following her vacation and the tenth day of Ovens' incarceration, Buss met with Ovens, told him that SCI did have a TTY available and that whenever he wanted to use it, he was required to submit a counselor slip requesting to use it. A279. At the same time, she gave Ovens a memo dated the same day confirming her instructions. A181, A279. Because Ovens wanted to use the TTY that day, she agreed to set it up for him. A279. Buss retrieved the TTY from her supervisor's office, connected it to a



phone line in a small conference room just off the housing unit and Ovens was able to call his mother and father. A629-31. Ovens finally was able to make his first phone call on the tenth day of his incarceration. A280-81.

While Ovens was talking on the TTY with his mother and father, Buss was communicating with Ovens through notes which appear in the record at A171-80, A282. Ovens attempted to explain that he needed a videophone, a newer technology that had all but replaced TTYs, and that the last time he used a TTY had been five years earlier. A172, A228. Buss requested that Ovens provide her with the name, relation and phone number of all individuals he wished to call and Ovens responded "Relay Service 711." A171, A282. Buss eventually learned that the 711 number was for TTY calls to a call center. A283.

Ovens' relief in being able to make his first phone call was short lived. Three days later, by memo dated May 24, 2010, Buss informed Ovens that her supervisor had decided that he would not be allowed to use the TTY for personal phone calls except for a family emergency, death or to communicate with his Public Defender. A182-83. If Ovens disagreed, he could write to the warden. A183, 284. All other inmates in the pretrial unit had access to the five phones on the tier anytime during their recreational periods. A286. On May 28, 2010, Ovens filed a grievance requesting the same access to the TTY as hearing inmates had to

the phones and asked that he be allowed to call his family too. A184, A285.

According to the grievance officer's informal resolution on June 1, 2010, SCI was "working on a manner and method to supply this service, however it may take some time to work out." A184.

On July 21, 2010, Ovens' undersigned counsel, emailed Donna Tregoe, the secretary to the Security Superintendent, regarding Ovens not being able to use the TTY. A188, A299. Ms. Tregoe's response, which was copied to Warden Johnson, indicated that Ovens currently had access to the TTY and that his counselor, Angela Musser, was the person who would bring it to him to use. *Id.* Ms. Tregoe also advised that SCI was in the process of installing a TTY in Ovens' housing unit but was unable to say when that would be completed. A188. However, Warden Johnson contradicted Ms. Tregoe's statement about Ovens' access to the TTY. After Warden Johnson reviewed Ovens' May 28, 2010 grievance, which he testified he did sometime after August 3, 2010, he believed that the necessary repairs were being made to the phone lines or the TTY and directed that the TTY be made available to Ovens during recreation and not only for emergency calls. A294-98.

According to Ovens, once SCI allowed him to use the TTY for calls other than emergencies, he had to submit a counselor's slip and wait, sometimes days, to

be taken off the tier to use the TTY in the conference room. A229, A301-02. In addition, although Ovens was able to make personal calls, those calls were limited to calls within Delaware. A229. Unlike other inmates who were able to make out of state phone calls, Ovens was not allowed to call his wife and other family members who lived in Alaska because he was restricted to making in-state calls only. A240, A241-43.

By email dated August 11, 2010, Ovens' attorney confirmed that a TTY had been installed on his housing tier and that Ovens had the ability to make outside calls in the same manner as hearing inmates. A187. However, because the TTY was kept in a locked box on the tier, Ovens had to ask the correctional officers to unlock the box whenever he wanted to make a phone call at times other inmates were allowed access to the phones. A254. Phone records confirmed that as of August 13, 2010, three months after he was committed to SCI, Ovens was able to use the TTY on his housing tier. A186, A273-74.

However, even with the TTY on his tier, Ovens continued to have problems with equal access to phone calls. Ovens wrote to Mary Morris on October 18, 2010 to complain that he had been unable to make any phone calls for three weeks and that nobody had responded to his request for repairs. A194. This likely was related to a changeover in phone vendors for SCI that occurred after the TTY was

on Ovens' tier. A254-55, A257. Although all inmates were affected by the changeover, the effect on Ovens was longer and, according to Mary Morris, was "[d]efinitely a few weeks he was without a TTY device." A255. Ovens filed a grievance on November 27, 2010 because of the problems that he was having with the TTY since October. A195. Buss responded on December 7, 2010 that she believed the problems with Ovens' phone calls had been resolved. A196.

Ovens still was not able to make out of state calls after the TTY was installed on his tier and filed a grievance which was resolved favorably on December 12, 2010. A197, A241.

Ovens described the impact of being denied equal access to a telephone as follows:

I felt isolated and frustrated. How am I supposed to work things out? They close the door to the cell. That's it. I had no contact, no communication. Hearing inmates, they could communicate. And it wasn't fair to me. I was completely isolated and very upset, very frustrated. I know that my family and my wife, they were worried about me, and that upset me. I was worried about them. A230.

**D. Ovens' access to educational services**

Ovens attended an anger management violence prevention group at SCI. A231, A259-60. He realized he had a problem and wanted to learn how to manage his anger, stress and frustrations. A233. The class consisted of six one hour

sessions during August and September 2010. A185. The instructor was aware that Ovens was deaf and believed that he was accommodating Ovens' disability by using another inmate in the group he believed could sign and interpret for Ovens. A260, A264. The instructor initially testified that Ovens did not ask him to provide an interpreter but then stated he could not recall if Ovens requested an interpreter. A264-66. The group consisted of 8-10 inmates and the class involved teaching, demonstrating skills and dialoging about experiences by the inmates. A262-63. The inmate who assisted Ovens sat next to him and knew a little bit of sign. A233. However, the other inmate's signs were basic, he used homemade words and invented gestures. A304. Although Ovens could understand "bits and pieces here and there," he needed an interpreter for the class. A304-05. Ovens asked the instructor several times for an interpreter and was told that he would get in touch with the warden. A305. Ovens' attorney also emailed the Deputy Attorney General representing the DOC at the time and requested that Ovens be provided with an interpreter for the anger management class. A187, A191, A300.

Ovens also could not understand the written materials that he received for the class because they were in English. A231, A233. He would look at the paper and only see words he didn't understand. A232. Ovens attended all the sessions and received a certificate. A192, A231, A261. However, he was upset that he was

not able to participate fully in the class without an interpreter as he had wanted to learn how to control his anger in order to improve himself. A233.

Ovens returned to SCI on September 11, 2012 because of a violation of probation charge resulting from new charges as well as testing positive for drugs. A198, A200, A275. Because of his continued drug use, substance abuse treatment was recommended by Ovens' counselor and a correctional officer as part of Ovens' classification review on October 2, 2012. *Id.*, A199, A276-77. Ovens recognized that he had a problem with addiction and wanted to learn more about it. A236. He participated in the TEMPO substance abuse program. A234-35. Ovens believed the class would be in a group setting but when he attended the first class with a large group of hearing inmates, he was pulled out of the class because he was deaf and was assigned to work on a computer with a second deaf inmate. A235-36. He told a woman at the class that he wanted to participate in the group with the hearing inmates and asked her to obtain an interpreter. A235. Instead, Ovens and the other deaf inmate worked separately on a computer based program that had been adapted from written materials that were part of the TEMPO program. A288. Ovens' program was designed so that he and the other deaf inmate, with the assistance of an inmate facilitator, had to read and answer questions that appeared on the computer screen. A290-91. Kevin, the facilitator,

tried to help Ovens and the other deaf inmate understand the written material by reducing it to more basic English. A308-09. Kevin also would change Ovens' written answers to make them more understandable. A309-10. Examples of Ovens' edited work appear at A201-05.

The 15-20 hearing inmates would meet as a group and discuss the written materials with the assistance of a different inmate facilitator. A292-93. While Ovens was working on the computer, he was able to watch the group interaction and realized he was missing an opportunity. A306-07. The hearing inmates were able to share their experiences and their successes and give each other feedback while Ovens sat at his computer. A311. Had Ovens had an interpreter, he believed he would have been able to participate in learning how the other inmates dealt with their problems, their addiction, their terms in prison and how they tried to succeed. *Id.* Ovens understood he had an addiction, that it was the cause of his repeated violations of probation and he was prepared to stop repeating the same mistakes. *Id.* Unfortunately, he was denied the opportunity. Ovens obtained a Certificate of Completion for the class. A206, A289.

#### **E. Ovens classification review**

Substance abuse treatment was recommended for Ovens as a result of the October 2, 2012 classification review. A200, A276. According to Buss, the

purpose of classification is to determine an inmate's security level, housing, education, programs and work. A276. Classification meetings are important. A277. Notwithstanding the importance of such meetings, Buss did not think it was necessary to obtain a sign language interpreter for Ovens. A278. She testified that Ovens did not request an interpreter nor did she ask him whether he wanted one. *Id.* Ovens testified that he asked for an interpreter during the meeting because he didn't understand the information. A303. He had asked Buss multiple times before that meeting for an interpreter and she always ignored him. *Id.* Notwithstanding the agreement that a sign language interpreter would be obtained for complicated communications or if Ovens requested one, no interpreter was provided for his classification review. A190, A246. Further, Ovens' October 13, 2010 Treatment Plan, which he signed on November 15, 2010, required that an interpreter be utilized for all potentially complicated interactions or at his request. A193, A271-72.



## ARGUMENT

### I. THE COMMISSION'S CONCLUSION THAT SCI IS A PLACE OF PUBLIC ACCOMMODATION FOR THE PURPOSE OF THE DELAWARE EQUAL ACCOMMODATIONS LAW IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NOT AN ERROR OF LAW.

#### Question Presented

Did the Commission commit legal error in concluding that the Delaware Department of Correction including SCI, is a place of public accommodation under the Delaware Equal Accommodations Law, 6 *Del. C.* § 4500 *et seq.*, as a governmental agency? This issue was presented to the Commission (A90, A131-32) and addressed by the Superior Court. *Danberg v. Ovens*, 2016 WL 626476, at \*2-3 (Del. Super. Feb. 15, 2016).

#### Scope of Review

The Court's review of a decision of a Delaware administrative agency, including the Commission, mirrors that of the Superior Court, and is limited to determining whether the Commission's decision is supported by substantial evidence and is free from legal error. *Boggerty v. Stewart*, 14 A.3d 542, 550 (Del. 2011). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Domino's Pizza v. Marian Harris and the Human Relations Comm'n*, 2000 WL 1211151, at \*6 (Del. Super.

2000). The Court does not “weigh the evidence, determine questions of credibility, or make its own factual findings.” *Id.* Rather, the Court determines “if the evidence is legally adequate to support the agency’s factual findings.” *Id.* If those findings are not supported by substantial evidence, “or are not the product of an orderly and logical deductive process, then the decision under review cannot stand.” *Quaker Hill Place*, 498A.2d at 179 (citing *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985)).

### **Merits of Argument**

#### **A. The Commission’s decision on jurisdiction was the product of an orderly and logical deductive process.**

The Delaware Equal Accommodations Law (“DEAL”) defines a “place of public accommodation” as follows:

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) (emphasis added).

In determining that SCI was a place of public accommodation subject to DEAL, the Commission primarily relied on a decision by the Vermont Supreme Court, *Department of Corrections v. Human Rights Commission*, 917 A.2d 451 (Vt. 2006) because the legislative history to DEAL’s amendments very closely

mirrored the history to Vermont's equal accommodations statute. A131. Further, of all the authority that was submitted to the Commission (see A14-16; A28-32), the Vermont Supreme Court case is the most analogous to the instant case. As observed by the Commission, with the 2006 amendment to DEAL, the law was clarified to include public agencies to the definition of a place of public accommodations.<sup>2</sup> A132. In view of this amendment and the fact that the Department of Correction (and by inclusion SCI) is a state agency, the Commission properly determined that by definition, SCI is a place of public accommodation subject to DEAL. *Id.*

In arriving at its decision, the Commission considered but was not persuaded by a recent Superior Court decision that a correction facility was not a place of public accommodation. *See Lakisha Short v. State of Delaware*, 2014 WL 11048190, at \*5 (Del. Super. Aug. 5, 2014). The Commission correctly decided the *Short* decision was not entitled to *stare decisis* because it did not contain a thorough analysis of the issue; did not consider the legislative history to DEAL; did not consider the inclusion of governmental agencies to the definition of a place of public accommodation; and was persuasive authority only. A131-32.

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<sup>2</sup> A copy of the synopsis to the amendment was attached as an exhibit to Petitioner's Opposition to Motion to Dismiss. A48.

**B. The Superior Court incorrectly held that the Commission was required to follow the *Short* decision.**

On appeal, the Superior Court reversed the Commission's decision because the Commission declined to follow the *Short* decision. *Danberg v. Ovens*, 2016 WL 626476, at \*3 (Del. Super. Feb. 15, 2016). The court concluded that the Commission was required to follow prior decisions of the Superior Court "except for urgent reasons and upon clear manifestation of error." *Id.* (quoting *Wilmington Amusement Co. v. Pacific Fire Ins. Co.*, 21 A.2d 194, 196 (Del. Super. 1941)). Because the *Short* decision previously determined that prisons are not places of public accommodation, the court concluded there was no urgent reason or clear manifestation of error to justify the Commission revisiting an issue already decided by the Superior Court. *Danberg*, 2016 WL 626476, at \*3. As such, the court followed the *Short* decision in holding that prisons are not places of public accommodation and that the Commission lacked jurisdiction to entertain Ovens' complaint. *Id.*

However, the court appears to have misinterpreted the doctrine of *stare decisis* in requiring that the Commission adhere to the *Short* holding. This Court has observed that *stare decisis* is well established in Delaware jurisprudence and "operates to fix a specific legal result to facts in a pending case based on a judicial

precedent directed to identical or similar facts in a previous case in the same court or one higher in the judicial hierarchy.” *Account v. Hilton Hotels Corporation*, 780 A.2d 245, 248 (Del. 2001). Once a point of law has been settled by a decision of a court, “it should be followed except for urgent reasons and upon clear manifestation of error.” *Id.* “Where the facts are essentially different, *stare decisis* does not apply, because a sound principle applied to one set of facts may be entirely inappropriate when applied to slightly varied set of facts.” *State v. Phillips*, 400 A.2d 299, 308 (Del. Ch. 1979).

The *Short* case involved a female inmate who was seeking to change her name because she was a transgender person but was prevented from changing her name by 10 *Del. C.* § 5901(c)(2). *Short* at \*1. Short argued that the conflict between 10 *Del. C.* § 5901(c)(2) and DEAL’s recently enacted protection against discrimination in places of public accommodation on the basis of gender identity, required that the 2013 amendment to DEAL was controlling. *Id.* at 2. The court rejected Short’s argument and concluded as follows:

Places of public accommodation are defined as any establishment which caters to or offers goods or services or facilities to, or solicits from, the general public. A correction facility clearly does not fit within the statutory definition of a place of public accommodation. *Id.* at \*5.

Unlike the present case, there were no allegations in *Short* that the prison was

violating the DEAL in its treatment of Short. Because the facts of the two cases are “essentially different,” it was not appropriate for the court to apply *stare decisis*. This is further supported by *Wilmington Amusement Co. v. Pacific Fire Ins. Co.*, a case relied upon by the court as support for the doctrine of *stare decisis*. Because this case involved the interpretation of a provision in a fire insurance policy that was identical to the policy in a previously decided case, the application of *stare decisis* was appropriate. 21 A.2d at 196.

Not only are the facts in the present case fundamentally different from those in the *Short* case, the points of law are not the same. In *Short*, the court concluded that a correction facility did not fit within the first sentence of the statutory definition of 6 *Del. C.* § 4502(14) which applies to “any establishment which caters to or offers goods or services or facilities to, or solicits from, the general public.” *Short* at \*5. In contrast, the Commission concluded that SCI fell within the second sentence of the statutory definition that “includes state agencies, local government agencies, and state-funded agencies performing public functions.” The court did not address this point of law. As such, it was appropriate for the Commission not to apply *stare decisis* to the *Short* decision.

### **C. Applicability of Vermont Supreme Court decision**

As explained by the Commission, the Vermont Supreme Court’s decision,

*Department of Corrections v. Human Rights Commission, supra*, was applicable to the instant matter because the Vermont statute was also amended to apply to all governmental entities. A132. While DEAL was amended to add “state agencies, local government agencies, and state-funded agencies performing public functions” to the definition of a place of public accommodation, Vermont’s Public Accommodations Act (“Act”) was similarly amended to make it explicit that government entities are covered by the law. 917 A.2d at 454. The Supreme Court of Vermont concluded that the Legislature intended to make all governmental entities subject to the Act and did not exempt state prisons or any other public entity from the law. *Id.* at 459-60. As such, the court held that all governmental entities, including state prisons, were subject to the Act. *Id.* at 452.

Although the Commission acknowledged that Vermont’s Act contained an amendment allowing claims actionable under the Americans With Disabilities Act (“ADA”) to be brought under the Act (A132), the DEAL does not prohibit such claims. In fact, this Court has acknowledged the similarities between DEAL and the ADA in approving the Superior Court’s reliance on federal law to interpret DEAL. *Thompson v. Dover Downs*, 887 A.2d 458, 461 (Del. 2005). Further, according to 6 *Del. C.* § 4501, “in defining the scope or extent of any duty imposed by this chapter, higher or more comprehensive obligations established by

otherwise applicable federal, state, or local enactments may be considered.”

The Commission’s conclusion that the DOC, and by inclusion SCI, fell within the statutory definition of a place of public accommodation as a governmental agency, was the product of an orderly and logical deductive process, is supported by substantial evidence and is not an error of law.

**D. According to the United States Supreme Court, state prisons are public entities under the ADA.**

Title II of the ADA, 42 U.S.C. § 12131, *et seq.*, prohibits a “public entity,” including any agency or department of a local or state government from denying benefits or services to any qualified individual. *Id.* §§12131, 12132. The 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 places of public accommodation under 6 *Del C.* § 4502(14). The United States Supreme Court has held that state prisons fall squarely within the statutory definition of “public entity” of Title II of the ADA which includes “any department, agency, special purpose district, or other instrumentality of a State or States or local government.” *Pennsylvania Department of Corrections, et al. v. Yeskey*, 524 U.S. 206, 210 (1998) (quoting 42 U.S.C. § 12131(1)(B)). Given the similarities between the language of the ADA’s definition of a “public entity” and



DEAL's "place of public accommodation," and this Court's approval of the use of the ADA in interpreting DEAL, it was appropriate for the Commission to conclude that SCI is a place of public accommodation. *See also Scott v. Androscoggin County Jail*, 866 A.2d 88, 93 (Me. 2004) (Maine Supreme Court noted that there was no dispute that the reference to "public entity" in the Maine Human Rights Act included a county jail); *Ptaszynski v. Uwaneme*, 853 A.2d 288, 297 (N.J. Super. 2004) (a municipal police department as well as any state governmental agency was a place of public accommodation under New Jersey's Law Against Discrimination); *Chisolm v. McManimom*, 97 F.Supp.2d 615, 621-22 (D.N.J. 2000), *rev'd and remanded on other grounds*, 275 F.3d 315 (3d Cir. 2001) (New Jersey Supreme Court would find that jails and prisons are "places of public accommodation" under New Jersey's Law Against Discrimination).

**E. DOC and SCI offer goods or services to the general public.**

Although not part of its decision because it was able to conclude that SCI was a place of public accommodation as a state agency, the Commission was provided with undisputed evidence that both the DOC and SCI offer goods or services to the general public. As part of Ovens' opposition to Respondents' motion to dismiss, these goods or services consist of the following: (1) DOC operates Delaware Correctional Industries which, according to the description of

the program, utilizes offender labor to “provide products and services” to state agencies, schools, non-profits and the general public (A32-33, A50-51); (2) DOC provides offender work crews that are dispatched on almost daily assignments to various organizations and provided more than 219,000 hours of community service for non-profits and state agencies in 2011 (A33, A53-55); (3) DOC operates Community Relations which provides services to civic, community and religious organizations, research bodies, government agencies, municipalities and Delaware citizens (A33, A57); and (4) the Sussex Work Release Center and Sussex Violation of Probation, which are located on the grounds of SCI, provide offender labor for private employers as well as community service projects that benefit towns, churches, non-profit organizations, American Legions, senior and recreation centers, schools and cemeteries (A33, A59-60).

Although not part of the Commission’s jurisdictional analysis because it was able to correctly determine that SCI was a place of public accommodation as a state agency, the evidence of DOC and SCI’s offering of goods or services to the general public, which has never been disputed by Appellees, has always been part of the record in this case. As such, the Commission’s conclusion that SCI is a place of public accommodation under either part of the definition contained in 6 *Del. C.* § 4502(14), is supported by substantial evidence and is not an error of law.

**II. THE COMMISSION'S DECISION THAT APPELLEES VIOLATED 6 DEL. C. § 4504(A) HAS SUFFICIENT EVIDENTIARY SUPPORT; IS FREE OF LEGAL ERROR; AND IS THE PRODUCT OF AN ORDERLY AND LOGICAL DEDUCTIVE PROCESS.**

**Question Presented**

In determining that the Department of Correction and SCI violated 6 *Del. C.* § 4504(a), does the Commission's decision have sufficient evidentiary support; is the decision free of legal error and is the decision the product of an orderly and logical deductive process? This issue was presented to the Commission (A139-43) and addressed by the Superior Court. *Danberg v. Ovens*, 2016 WL 626476, at \*2-3 (Del. Super. Feb. 15, 2016).

**Scope of Review**

The Court's review of a decision of a Delaware administrative agency, including the Commission, mirrors that of the Superior Court, and is limited to determining whether the Commission's decision is supported by substantial evidence and is free from legal error. *Boggerty v. Stewart*, 14 A.3d 542, 550 (Del. 2011).<sup>3</sup>

**Merits of Argument**

**A. Requirements for a *prima facie* case of discrimination**

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<sup>3</sup> Because the Scope of Review is the same as for Argument I, the remainder of the Scope of Review that appears on page 19 *infra* is hereby incorporated by reference for this argument.

To prevail on a claim of unlawful discrimination based on a violation of 6 *Del. C.* § 4504(a), a plaintiff must establish a *prima facie* case which requires the plaintiff to establish the following: (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. *Boggerty v. Stewart*, 14 A.3d 542, 550 (Del. 2011). In evaluating such a claim, this Court is guided by the analytical framework articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and adopted by the Delaware Supreme Court in *Thompson v. Dover Downs*, 887 A.2d at 461. Under this framework, the following is required:

Once the plaintiff establishes a *prima facie* case of discrimination, the burden then shifts to the defendant to produce evidence of a legitimate, non-discriminatory reason for denying the plaintiff access. 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. *Boggerty*, 14 A.3d at 550-51.

Based upon its Findings of Fact, the Commission concluded that Owens established a *prima facie* case of discrimination by showing that: 1) he was a member of a protected class due to his disability; 2) he was denied access to the public accommodations of telephonic communications, educational services and classification reviews; and 3) inmates who were not members of the protected

class were treated more favorably. A140. While it was not disputed during the proceedings before the Commission that Ovens has a disability due to his deafness, Appellees did dispute the second and third elements of a *prima facie* case of discrimination. However, the Commission's conclusion that Ovens established a *prima facie* claim of discrimination is supported by substantial evidence.

**B. Ovens was denied equal access to his initial phone call.**

In evaluating the denial of Ovens' use of the TTY, the Commission considered the amount of time Ovens was required to wait before being allowed to make his first call and the restrictions that were imposed on Ovens on the types of calls thereafter. There is no dispute that Ovens was denied access to a TTY for the first nine days of his incarceration. *See* Statement of Facts *infra* at 10-11. With respect to Ovens' initial phone call on the tenth day of his incarceration, the Commission determined that Appellees failed to offer any reasons why Ovens was not able to make his initial call by the third or fifth day of his incarceration as non-deaf inmates were able to do. *Id.* at 8-9. This failure to articulate a legitimate, non-discriminatory reason resulted in the Commission correctly concluding that

Appellees had not met their burden with respect to Ovens' initial call.<sup>4</sup>

**C. Ovens was restricted on the types of calls he could make.**

After Ovens finally was given access to a TTY, it was short lived because of the restrictions imposed. Three days after his initial TTY call, his counselor informed him that he could not use the TTY for personal phone calls except for a family emergency, a death or to communicate with his attorney. A182-83. The Commission determined that Respondents articulated legitimate non-discriminatory reasons for the restrictions but ultimately determined that the proffered reasons were pretextual. A141-42. No witness could explain why Ovens could not call his family unless there was an emergency or death, restrictions that non-deaf inmates did not have. He was not able to fill out a telephone list because he did not understand this requirement as no interpreter was provided to explain. The possibility that he might have illegal contact with his wife or other family member did not justify the restriction on out of state phone

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<sup>4</sup> Although the Commission incorrectly used "establish" instead of "articulate" in referring to Appellees' reasons for denying Ovens access (A1007), this appears to be a one time drafting mistake as Appellees' burden of production is correctly referenced thereafter. Additionally, the Commission stated "the respondents have not met their burden of proof" (A1008) with respect to Ovens' initial call instead of burden of production as required by *Texas Dept. Of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981). However, it appears the terms were used interchangeably. Two paragraphs later, the Commission stated that the Appellees had satisfied its burden of proof (not production) in articulating legitimate, non-discriminatory reasons for the restrictions on Ovens' calls. A141. Notwithstanding this oversight, it is not a substantive error and did not alter the Commission's analysis.

calls. Finally, Ovens' reaction to being snubbed by his mother in his initial phone call was not sufficient to justify a blanket restriction on his calls, a restriction also not explained or imposed on other inmates. A134-36. As such, the Commission applied the guidance provided by *Fuentes v. Perskie*, 32 F.3d 759, 762 (3d Cir. 1994) and correctly found that these stated reasons were pretextual. A141-42.

**D. Ovens was denied equal access to educational services.**

There is no question that Ovens was denied equal educational services in his two treatment programs at SCI. *See* Statement of Facts *infra* at 14-17. Without the assistance of a qualified sign language interpreter, the Commission found that Ovens was unable to participate in the programs to the same extent as non-deaf inmates. A136-38. Ovens testified, and the Commission accepted, that he could not understand the inmate used for the anger management class (A304-05) and his instructor testified that the inmate helping Ovens with the substance abuse class could not sign. A291. The Commission also found that Respondents' reasons for not providing Ovens with an interpreter for the classes - Ovens did not ask for one, Ovens was provided with a booklet and a computer, Ovens understood and participated, written communications were sufficient, another inmate interpreted for him and all Ovens wanted was good time credit - were insufficient to satisfy their burden to articulate a legitimate, non-discriminatory reason for denying

Ovens the accommodation. A142. By offering specific and significantly probative evidence for rejecting Appellees' stated reasons (A142), the Commission provided sufficient evidentiary support to conclude that Appellees' explanation was a pretext.

**E. Ovens was denied equal access to his classification review.**

As he did with other meetings with his counselor, Ovens asked for an interpreter for his classification review. A303. No interpreter was provided. A278. Buss claimed that no interpreter was necessary because she believed that Ovens could communicate effectively in writing. *Id.* The Commission properly rejected this reason for not obtaining an interpreter given the importance of the purpose of classification and Ovens' low proficiency in reading and writing English. A138, A143. According to the Commission, "[r]equiring 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." A138. The Commission found that Appellees did not offer a legitimate, nondiscriminatory reason for denying Ovens this accommodation. A143. Adequate evidentiary support exists for this finding.



## CONCLUSION

For the reasons advanced, Appellant Robert Ovens respectfully requests that this Court reverse the Superior Court's decision that SCI is not a place of public accommodation under DEAL and affirm the Commission's decision that Appellees denied Ovens access to the accommodations of telephonic communications, educational services and classification reviews. The Commission's decision is supported by substantial evidence, is free of legal error and was the product of an orderly and logical deductive process.

Respectfully submitted

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UNPUBLISHED OPINION. CHECK COURT RULES  
BEFORE CITING.

Superior Court of Delaware.

Re: Danberg  
v.  
Ovens;

C.A. No. S15A-07-006 THG

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**Opinion**

T. HENLEY GRAVES, RESIDENT JUDGE

**\*1 Dear Counsel:**

Pending before the court is an appeal filed by the respondents-below from a decision rendered by the Delaware State Human Relations Commission (the "Commission"). That decision concluded prisons were places of public accommodation and found that the respondents-below had violated the Delaware Equal Accommodations Act. For the reasons stated herein, the Commission's decision is reversed.

**FACTUAL AND PROCEDURAL BACKGROUND**

On November 23, 2010, Robert Ovens ("Ovens") filed a complaint with the Commission, alleging violations of Delaware's Equal Accommodations Act ("DEAL")<sup>1</sup> by then-Commissioner of the Delaware Department of

Corrections, Carl C. Danberg; Warden of the Sussex Correctional Institution ("SCI"), G.R. Johnson; and the administrators of the medical service providers from SCI, Correct Care Solutions and MHM Services (collectively, the "Respondents"). Ovens was incarcerated at SCI three times between May 12, 2010, and May 13, 2013. The complaint alleged the Respondents denied Ovens, who is deaf, non-verbal and communicates through the use of American Sign Language ("ASL"), full and equal accommodations, facilities, advantages or privileges of SCI on the basis of his disability. Specifically, Ovens complained he was denied: (1) qualified interpreters for anger management classes, medical appointments, grievance hearings or other essential meetings; (2) telephone service equal to that available to hearing inmates; and (3) video conferencing with his criminal attorney, a service available to hearing inmates.

On March 31, 2011, the Commission dismissed Ovens' complaint, finding it did not have jurisdiction over the matter. Ovens appealed to the Superior Court and the Superior Court remanded the case for further proceedings, specifically directing the Commission to articulate its reason for concluding it lacked jurisdiction over Ovens' complaint.<sup>2</sup> Subsequently, by way of letter dated January 13, 2012, the Director of the Division of Human Relations advised the Superior Court she had decided not to request dismissal of Ovens' complaint and Ovens' complaint would be processed pursuant to DEAL procedures.

On July 6, 2012, Ovens re-filed his complaint as he was requested to do by the Division of Human Relations. The complaint named the same Respondents and alleged the same violations of DEAL as the original complaint. The Respondents filed a motion to dismiss for lack of subject matter jurisdiction. The Commission took the motion under advisement while it conducted an evidentiary hearing over the course of several days in September, October, and November of 2013.

After the hearing was concluded, but before the Commission rendered its decision on the matter, a Superior Court decision issued in the case *Short v. Delaware*.<sup>3</sup> In that case, Judge Brady considered whether a prison constituted a place of public accommodation and concluded:

**\*2** A correction facility clearly does not fit within the statutory definition of a place of public accommodation [pursuant to DEAL]. 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.<sup>4</sup>

The Commission subsequently solicited, and the parties submitted, the parties' positions on the relevance of the *Short* decision to Ovens' complaint.

By way of written decision dated December 16, 2014, the Commission issued its decision denying the respondents' motion to dismiss, finding the Commission had subject matter jurisdiction over the matter because a prison is a place of public accommodation. Further, the Commission concluded DEAL had, in fact, been violated and it awarded Ovens damages, attorneys' fees, and costs. The Respondents filed a motion for reconsideration, which the Commission denied. The Respondents appealed these decisions to this court on July 22, 2015, and briefing has been completed. The matter is now ripe for decision.

### QUESTIONS PRESENTED

1. Is the Commission's determination that SCI is a place of public accommodation supported by substantial evidence and free from legal error?

Is the Commission's determination that the Respondents discriminated against Ovens in violation of DEAL supported by substantial evidence and free from legal error?

### DISCUSSION

#### A. Standard of Review

The Court's scope of review of decisions of the Commission is limited to a determination of whether the Commission's decision is supported by substantial evidence and free from legal error.<sup>5</sup> "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>6</sup> This court does not weigh the evidence, determine questions of credibility, or make its own factual findings.<sup>7</sup> It merely determines if the evidence is legally adequate to support the agency's factual findings.<sup>8</sup> However, the court reviews of questions of law *de novo*.<sup>9</sup>

#### B. Public Accommodation

Section 4504 of DEAL provides, in pertinent part,

No person being the ... 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 the account of ... disability ... any of the accommodation, facilities, advantages or privileges thereof.<sup>10</sup>

A place of public accommodation is defined as: [A]ny 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. This definition shall apply to hotels and motels catering to the transient public, but it shall not apply to the sale or rental of houses, housing units, apartments, rooming houses or other dwellings, nor to tourist homes with less than 10 rental units catering to the transient public.<sup>11</sup>

\*3 The Commission determined that, as a matter of law, prisons are places of public accommodation as defined by DEAL. As noted above, the Commission was aware of the recent Superior Court case that reached the opposite conclusion. To reiterate, the Superior Court concluded prisons do not cater to the general public and, therefore, are not places of public accommodation; to wit:

A correction facility clearly does not fit within the statutory definition of a place of public accommodation [pursuant to DEAL]. 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.<sup>12</sup>

The Commission dismissed that rationale, citing the following reasons: (a) the court's "legal conclusion is not based upon a full and in-depth analysis of the issue;" and (b) because the *Short* decision was pending appeal at the time, it was not conclusive authority on the matter.

The Commission erred in declining to follow the leading authority on the issue of whether a prison constitutes a place of public accommodation. The Superior Court, and,

accordingly, all lower courts and administrative agencies, follows its prior decisions “except for urgent reasons and upon clear manifestation of error.”<sup>13</sup> In this case, the Commission elected to reject not only the opinion of the Delaware courts but also, as it acknowledged, that of the majority of other state courts. There was no urgent reason or clear manifestation of error to justify the Commission revisiting an issue already decided by the Delaware Superior Court. The Commission’s decision to do so constituted an error of law that requires reversal. Under Delaware law, prisons are not places of public accommodation and the Commission lacked jurisdiction to entertain Ovens’ complaint.

#### **B. SCI’s Policies**

Given the court’s determination that SCI is not a place of public accommodation under DEAL and the Commission lacked jurisdiction to hear Ovens’ complaint, the court need not address the question of whether the Commission’s determination that the Respondents denied Ovens access to accommodations during his periods of incarceration is supported by substantial evidence and

free from legal error.

#### **CONCLUSION**

In light of the foregoing, the decision of the Commission is reversed.

IT IS SO ORDERED.

Very truly yours,

*/s/ T. Henley Graves*

T. Henley Graves

#### **All Citations**

Not Reported in A.3d, 2016 WL 626476

#### Footnotes

- 1 6 Del. C. § 4500, *et seq.*
- 2 *Lum v. State Human Relations Comm.*, 2011 WL 5330507 (Del.Super.).
- 3 2014 WL 11048190 (Del.Super.).
- 4 *Id.* at \*5.
- 5 See *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66–67 (Del.1965).
- 6 *Gorrell v. Division of Vocational Rehab.*, 1996 WL 453356, at \*2 (Del.Super.).
- 7 *Johnson*, 312 A.2d at 66.
- 8 29 Del. C. § 10142(d).
- 9 See *Duvall v. Charles Connell Roofing*, 564 A.2d 1132 (Del.1989).
- 10 6 Del. C. § 4504(a).
- 11 6 Del. C. § 4502(14).
- 12 *Lum*, 2011 WL 5330507, at \*5.

13 *Wilmington Amusement Co. v. Pacific Fire Ins. Co.*, 21 A.2d 194, 196 (Del.Super. 1941).

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