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)

APPELLANT'S REPLY BRIEF

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I. DELAWARE STATE AGENCIES, INCLUDING PRISONS, ARE PLACES OF PUBLIC ACCOMMODATION UNDER DELAWARE'S EQUAL ACCOMMODATIONS LAW.

A. Question Presented: Are Delaware prisons subject to the Delaware Equal Accommodations Law ("DEAL") as a place of public accommodation? 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).

B. 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).

C. Merits of Argument

a. The amendment to 6 *Del. C.* § 4502(14) is unambiguous.

Appellees do not dispute that DEAL was amended in 2006 by adding the following language to the definition of a place of public accommodation: "This definition includes state agencies, local government agencies, and state-funded agencies performing public functions." 6 *Del. C.* § 4502(14). According to the General Assembly, the amendment "clarifies the application of the equal

accommodation statute to public agencies." A48. Appellees claim that it is clear that the new stand-alone language, without providing any authority, must be read in conjunction with the preceding sentence which defines a place of public accommodation as "any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public." Ans. Br. at 14.

According to Appellees, the Sussex Correctional Institution ("SCI"), notwithstanding that it is part of a state agency, must still provide goods and services, not just to the inmates at SCI, a subset of the public, but to all members of the general public. Ans. Br. at 19. This was the same argument advanced by the plaintiff in *Department of Corrections v. Human Rights Commission,* 917 A.2d 451 (Vt. 2006) and rejected by the Vermont Supreme Court. As the court observed, "[n]othing in the language or the history of the statute, however, indicates that the Legislature intended the law to cover some governmental entities, but not others, depending on whether, or how directly, they offer services or benefits to the general public." *Id.* at 452. According to the court, the question whether a particular establishment served the general public "makes little sense, however, when applied to public or governmental entities, which are created for the very purpose of serving the general public." *Id.*

Unlike Delaware's stand-alone amendment, Vermont's 1992 amendment to

its public accommodations statute created an "interpretive problem" by clarifying that governmental entities were covered by the law in the definition of a "public accommodation" but retaining the term "general public" in the definition of a "place of public accommodation." *Id.* at 458. Because the court could not determine the meaning of the statute from the words alone, it had to rely on the legislative history to determine the intent behind the 1992 amendment. The court noted that the term "general public" in connection with the provision of "services, facilities, goods, privileges, advantages, benefits or accommodations" was part of the statutory language since the law's inception in 1957 and was used to determine which private entities were subject to the law. *Id.* at 454, 458. As such, the court did not believe that the retention of the term "general public" demonstrated a legislative intent to distinguish between public entities that do and do not serve the general public. *Id.* at 459. The court held that "[i]n short, the general scheme of the public accommodations statute, viewed in light of its underlying purpose and history, demonstrates that the Legislature intended to make all governmental entities subject to the public accommodations law." *Id.* Because the Legislature did not exempt prisons from the law that was intended to apply to all governmental entities, the court concluded that state prisons were included. *Id.*

Delaware's 2006 amendment clarifying that DEAL applies to public agencies

does not require statutory interpretation as the sentence that "this definition [of a place of public accommodation] includes state agencies" is clear and unambiguous. *Freeman v. X-ray Assocs., P.A.,* 3 A.3d 224, 230 (Del. 2010). Appellees, like the plaintiff in *Department of Corrections v. Human Rights Commission*, 917 A.2d at 458, rely heavily on dictionary definitions in support of their position that the plain meaning of 6 *Del. C.* § 4502(14) does not include prisons. Ans. Br. at 17-19. However, there is no need for the Court to consider dictionary definitions in view of the clear and unambiguous language of 6 *Del. C.* § 4502(14).

b. Appellees' authority is not persuasive.

Appellees claim that courts in other jurisdictions have concluded that a prison is not a place of public accommodation in the context of similar equal accommodations laws. Ans. Br. at 21. However, the cases cited in support of this argument do not have similar equal accommodations laws. *See Beeman v. Livingston,* 468 S.W.3d 534, 538-39 (Tex. 2015) (while noting that the Texas Human Resource Code was not a model of clarity, the definition of "public facilities," which consists of seven different categories including "a public building" and "public accommodation . . . to which the general public is . . . invited" and contains no specific reference to state or governmental agencies, did

not include prisons); *CHRO ex rel Alsenet Vargas v. State of Connecticut Department of Corrections,* 2014 WL 564478 (Conn. Super. Jan. 10, 2014) (holding that Connecticut's statute which defines a place of public accommodation, resort or amusement as "any establishment which caters or offers its services or facilities or goods to the general public" does not include a prison facility and distinguishes Vermont statute as "fundamentally different" because it specifically includes governmental entities unlike Connecticut); *Brown v. King County Department of Adult Corrections*, 1998 WL 1120381 (W.D. Wash. Dec. 9, 1998) (a county correctional facility is not a place of public accommodation under Washington's statute which does not contain any reference to state or governmental agencies); *Skaff v. West Virginia Human Rights Commission,* 444 S.E.2d 39 (W.Va. 1994) (state's penal institutions are not places of public accommodation under state's Human Rights Act which contains in its definition the state or any subdivision thereof but specifically requires that the state or subdivision offer services, goods, facilities, or accommodations to the general public); and *Blizzard v. Floyd*, 613 A.2d 619 (Pa. Commw. 1992) (state correctional facility is not a public accommodation under Pennsylvania Human Relations Act in which "Commonwealth facilities" are among the specific list of public accommodation, resort or amusement that are "open to, accepts or solicits

the patronage of the general public").

c. The Department of Correction provides goods and services to the general public through Delaware Correctional Industries.

Appellees argued before the Human Relations Commission ("Commission") in their Motion to Dismiss that the Department of Correction ("DOC") is not a place of public accommodation. While Appellees agreed that the DOC was a state agency, they claimed that DEAL only applied to state agencies which provided goods or services to the general public. A16. Because the only services the DOC provides is to "the very small portion of the population which has been deprived of their freedom via court order," Appellees claimed that such services were insufficient to make DOC a place of public accommodation. *Id.*

However, Appellees now concede that the Delaware Correctional Industries ("DCI"), a unit within the DOC, does provide "market quality goods and services to its customers at a competitive price." Ans. Br. at 18.[1] However, Appellees claim that DCI provides the 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." *Id.* At best, Appellees' argument represents a strained reading of the facts and DEAL.

[1] According to the website provided in Appellees Answering Brief, DCI is "serving state agencies, schools, non-profits, & the general public."

First, while DCI does have a home page that is part of the DOC's official website, it also has office locations, one of which is the same address as the DOC's administrative office and the address used on Ovens' Equal Accommodations Complaints, 245 McKee Road, Dover, Delaware 19904. A6, A10. Second, there is no question that DOC is a state agency that provides goods and services to its customers, "state agencies, schools, non-profits, & **the general public**" through DCI, a unit of DOC. Finally, as a place of public accommodation, it is an unlawful practice for any owner, lessee, proprietor, manager, director, supervisor, superintendent, agent or employee of DOC, and by inclusion SCI, to withhold from or deny Ovens, on account of his disability, any of the accommodation, facilities, advantages or privileges thereof. 6 *Del. C.* § 4504(a).

In sum, the Commission's determination that DOC, and by inclusion SCI, is a state agency and therefore a place of public accommodation subject to DEAL, is supported by substantial evidence and free of legal error. DOC, and by inclusion SCI, is also a place of public accommodation subject to DEAL because it provides goods and services to the general public.

II. THE COMMISSION'S DETERMINATION THAT APPELLEES VIOLATED THE DELAWARE EQUAL ACCOMMODATIONS LAW IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS FREE OF LEGAL ERROR.

A. Question Presented: Is the Commission's determination that Appellees violated DEAL supported by substantial evidence and free of legal error? 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).

B. 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).

C. Merits of Argument

a. Ovens established his *prima facie* case of discrimination.

Appellees dispute that Ovens established his *prima facie* case of discrimination. They agree that Ovens has a disability because he is deaf but claim he was not denied access to public accommodations. Ans. Br. at 25. However, there is no dispute that Ovens was denied access to a TTY for the first nine days of his incarceration and that he was unable to participate effectively in

educational programs or a classification review because he was denied a sign language interpreter. Appellees appear to believe that Ovens' eventual access to a TTY, albeit with restrictions which continued for at least two months, and the fact that he was able to attend classes and the classification review, notwithstanding the absence of an interpreter, defeats the second prong of Ovens' *prima facie* case. Ans. Br. at 25. However, such disparate treatment because of Ovens' disability, notwithstanding SCI's attempts to provide him with minimal services, still constitute unlawful practices under DEAL. Further, because the withholding of the accommodations that Ovens required can take the form of something less than an outright denial of services, Appellees' argument that Ovens did have access to the disputed services has no merit. *Hadfield's Seafood v. Rouser,* 2001 WL 1456795, *3 (Del. Super., Aug. 17, 2001).

Appellees also argue that Ovens did not establish the third prong by demonstrating that he was treated less favorably than other inmates who were not deaf. Ans. Br. at 25. However, the Commission determined that Ovens was required to wait for four to six days longer than non-deaf inmates before he was able to make his first telephone call; that the TTY was not readily available to Ovens as the phones on the housing tier were to non-deaf inmates; that restrictions were imposed on Ovens use of the TTY that were not imposed on non-deaf

inmates' use of telephones; and that in the absence of a sign language interpreter, Ovens was not able to participate in classes or classification review as effectively as non-deaf inmates. A133-38. The third prong is satisfied by demonstrating that Ovens was denied a public accommodation that was provided to other similarly-situated inmates. *Boggerty,* 14 A.3d at 551. As such, the Commission's conclusion that Ovens established a *prima facie* claim of discrimination is supported by substantial evidence.

b. Appellees discriminated against Ovens because of his disability with respect to his initial phone call.

Appellees do not dispute that Ovens was denied his initial phone call for nine days, four to six days longer than hearing inmates. They claim that this treatment of Ovens because of his disability, which they admit was different from other inmates, is not significant and, even if it was not reasonable, "[u]nreasonable does not a denial make." Ans. Br. at 26. According to Ovens, however, following his initial commitment to SCI,

> [The housing unit] had several phones, but no TTY access. I asked the officer how I could use – or how I would be able to make a phone call, and nothing. I got no results, no response for several days. I wanted to let my wife know where I was, let my parents know where I was. I couldn't tell anybody anything. (A225)

While hearing inmates likely have similar feelings of despair upon their initial

incarceration until they are able to call family members, Ovens' despair, because of his disability and SCI's apparent indifference to his hardship, was twice as long as other inmates. This was indeed significant and unreasonable. Such disparate treatment does a denial make. *Boggerty,* 14 A.3d at 551; *Hadfield's Seafood,* 2001 WL 1456795 at *3. Therefore, as to the second prong of his *prima facie* case of discrimination, Ovens did establish that he was denied access to this accommodation. Finally, as to the third prong, there is no question that a delay in having access to an initial phone call that is twice as long as hearing inmates demonstrates that Ovens was treated less favorably than other inmates.

Appellees next argue that the Commission erred by not accepting their nondiscriminatory explanation for Ovens' initial access to a phone. Ans. Br. at 26-27. It is clear that the Commission incorrectly used "establish" instead of "articulate" in referring to Appellees' burden to produce a legitimate, non-discriminatory reason for denying Ovens his initial access. A140.[2] However, such error was harmless because the Commission correctly concluded that Appellees "did not, however, offer any reason as to why Ovens was not able to make his initial call by the third or fifth day of his incarceration" notwithstanding the

[2] Ovens' Opening Brief at page 31, n.4, incorrectly cites to A1007 instead of A140. Additionally, the reference to A1008 in the next sentence of n.4 should be A141.

availability of the TTY. A140-41. By failing to provide any explanation for this disparate treatment, Appellees failed to meet their burden of production.[3]

Appellees now claim that they did provide an explanation as to why Ovens was not able to make his initial call by the third or fifth day of his incarceration. There was no phone line on his housing unit; the TTY was in an office accessible only by staff; and that his counselor had not been told of his presence and then she went on vacation. Ans. Br. at 27. However, these stated reasons are not worthy of belief.

It is irrelevant whether a TTY or phone line were on Ovens' housing unit at the time he was first incarcerated as Mary Morris, the administrator/technician for the inmate phone vendor at SCI (A252), testified that the policy prior to Ovens' incarceration had always been that a counselor would take a deaf inmate off the tier to a separate room to use the TTY. B58. Also, Buss was not on vacation when Ovens was incarcerated on Wednesday, May 12, 2010. She did not start her vacation until the following Monday so she was at SCI for the first three days after Ovens arrived. A269. Based on this "specific and significantly probative"

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[3] The Commission's error in using "burden of proof" instead of "burden of production" (A141) with respect to Ovens' initial access to the TTY is harmless in view of the Commission's conclusion that no reasons for the denial were advanced by Appellees.

evidence, Appellees' explanation for denying Ovens his initial call was pretextual.

c. Appellees discriminated against Ovens because of his disability with respect to the types of calls he could make.

Appellees do not dispute that once Ovens had access to a TTY, he was required to seek permission from a counselor to be taken off his housing unit to use the TTY in a separate office and that such calls were limited to family or medical emergencies, deaths or to communicate with his public defender. A182-83; A301-02. He was not allowed to make personal phone calls. *Id.* Hearing inmates are allowed to make 15 minute collect phone calls from the housing unit to five selected numbers anytime during three different recreation periods during the day, 8:30 am to 10:00 am; 11:30 am to 2:30 pm; and 6:00 pm to 10:00 pm. A74-78, A253.

According to Warden Johnson, he became aware of the restrictions on Ovens' use of the TTY when he reviewed Ovens' May 28, 2010 grievance sometime after August 3, 2010. A294-98. At that point, he directed that the TTY would be made available to Ovens during recreation period and that Ovens would be allowed to make all calls and not just emergency calls. A298. Appellees claim that Warden Johnson lifted the restrictions on Ovens' use of the TTY on June 1, 2010, two months earlier, and rely on the grievance investigator's report as support. Ans. Br.

at 28. However, the evidence does not support this claim and is contradicted by the grievance report and Warden Johnson's testimony.

There is no dispute that Ovens' filed his grievance on May 28, 2010, days after being told in two different memos from Counselor Buss that he only could use the TTY for emergencies, deaths or to communicate with his public defender. B4-6. In his grievance, Ovens described his complaint as follows:

> I'M complaint by supervisor waht-counselor Bass told em She won't be letting me using TTY deaf machine to make personal phone calls. Pat Ditto said call family Death or Emergency and only legal purposes. I disagree that I can makes call any personal legal ect. Same as other inmates hearing them use the phone call thier family. Why not about me. My deaf family. B6.

While the investigator noted that Ovens had been allowed an initial call with his family and his lawyer, he stated it was not possible for Ovens to have the same access as other inmates. B6. His report further stated that he spoke with Acting Warden Johnson and Deputy Warden Kline but that correcting the problem was going to take time. *Id.* Warden Johnson received the report on August 3, 2010 (A297, B9) and agreed to at least lift the restrictions on the types of calls that Ovens could make on the TTY in a separate office off the housing unit. A298. Thus, the evidence establishes that the restrictions on the types of calls Ovens could make continued until a TTY was installed on his tier, almost three months

after they were imposed. A186-97; A273-74. Appellees' claim that the restrictions were removed within a matter of days (Ans. Br. at 29) is simply wrong.

Finally, the restrictions on the types of calls Ovens could make also included not being able to make out of state calls on the TTY. A229, A240. Hearing inmates were able to make out of state phone calls. A240. Because Ovens had family living out of state, he "did not have access to half the people I want to communicate with." A240-41. The Commission concluded that Ovens did not have the ability to make out of state calls from the end of May 2010 until that restriction was corrected in October 2010. A136. There is no question that the Commission correctly determined that Ovens had established his *prima facie* case of discrimination with respect to the restrictions placed on the types of calls Ovens could make. A141.

Although the Commission determined that Appellees articulated legitimate non-discriminatory reasons for the restrictions, it correctly concluded 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. He was unable to fill out a telephone list because he did not understand this requirement as no interpreter was provided to explain and he believed listing "711," the TTY operator, was sufficient. The possibility that he might have illegal contact with his

wife or other family member, something the Commission believed his wife or family member would report, did not justify the restriction on all out of state phone calls. Finally, Ovens' reaction to being snubbed by his mother in his initial phone call with his mother and father was not sufficient to justify a blanket restriction on his calls, a restriction also not explained or imposed on hearing inmates if they were to become upset during a phone call. A134-36. The Commission determined that Appellees' stated reasons were pretextural as Ovens provided sufficient proof that a factfinder could reasonably conclude that each reason was a fabrication. A141.

d. Appellees discriminated against Ovens because of his disability with respect to the educational services.

Appellees claim that Ovens was able to participate effectively in his educational programs without a qualified interpreter. Ans. Br. at 30-32. According to Appellees, Ovens, who is not able to speak (A221), "actively participated in the [anger management] class." *Id.* at 30. The instructor of the class testified that another inmate in the group "who could sign . . . assisted with interpretation when necessary." *Id.* Ovens understood very little of the other inmates' signs. A304-05. Not only did Ovens repeatedly request a qualified interpreter for this class (A305), his lawyer also requested that DOC provide an

interpreter for the class. A187, A191, A300.

With respect to the substance abuse treatment program, Appellees claim that an interpreter was not necessary for the following reasons: Ovens' motivation for the class was to earn good time notwithstanding that the class was recommended by Ovens' classification committee; that it was an abbreviated class so that Ovens could complete it before he was released; and that Ovens had agreed to the structure of the program and, presumably, to the absence of an interpreter. Ans Br. at 30-31.

The Commission acknowledged that Appellees explained what they believed were legitimate nondiscriminatory reasons why Ovens was treated differently than hearing inmates, but the Commission determined that Ovens had adduced sufficient evidence that Appellees' evidence was merely pretextural. A142. The Commission believed Ovens' testimony that he had requested interpreters for both classes over the conflicting testimony of Appellees' witnesses. *Id.* "Motivation, intention, and credibility are intensely factual determinations influenced by various factors including reasonableness, consistency, contradictions and demeanor which are appropriately assessed by the finder of fact." *Domino's Pizza v. Marian Harris and the Human Relations Comm'n,* 2000 WL 1211151, at *7 (Del. Super. July 31, 2000). The Commission also believed Ovens' testimony that

he did not understand the written materials or the inmates who attempted to interpret for him and found that Ovens' motivation in taking the substance abuse class did not excuse Appellees in providing Ovens with the means to effectively participate in the class. A142. By offering specific and significantly probative evidence for accepting Ovens' evidence, the Commission's conclusion that Appellees' explanation was pretextual is supported by substantial evidence.

e. Appellees discriminated against Ovens because of his disability with respect to the classification review.

Appellees argue that the Commission erred in concluding that Ovens should have been provided with an interpreter at his classification review because Ovens understood written English and the Commission should not have accepted Christy Hennessey's testimony that writings should be at a third grade level to ensure Ovens' comprehension. Ans. Br. at 33-34.

Appellees are correct that Ovens graduated from a public high school in Rochester, New York, in which deaf and hearing students were taught together. A237. In order to learn in that environment, Ovens was provided with a full time interpreter. A238. While it is true that the Commission believed it was inappropriate to require Ovens to communicate in writing at his classification review when he did not comprehend English beyond a third grade level, the

Commission also accepted Ovens' testimony that he did not fully understand what was going on at the meeting. A143. Once again, Ovens requested an interpreter when he realized he didn't understand and none was provided. A303.

The Commission rejected Appellees explanation that Ovens did not need an interpreter because his counselor did not believe one was necessary was simply "a subjective opinion unsupported by objective evidence." A143. As such, the Commission concluded that Appellees failed to offer a legitimate, non-discriminatory reason for refusing to provide Ovens with an interpreter at his classification meeting. *Id.*

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.

Respectfully submitted

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