STATE OF MAINE
knox, ss.

SUPERIOR COURT
Civil Action
Docket No. AP-17-008

EDWARD ARBOUR,
Petitioner,
v.

Maine Department of Corrections,
Respondents

APPEAL TO LAW COURT

Now Comes the Petitioner Edward Arbour in the above captioned matter and brings to this Honorable Court his appeal from the lower Court for Judicial Review of Final Agency Action/Inaction. With the docket number of AP-17-008 in the Knox county Court. Justice of the Maine Superior Court, Hon. Bruce C. Mallonee. Petitioner brings this appeal for the denial of his appeal.

Plaintiff's appeal was denied based upon the decision of Hon. Bruce C. Mallonee. Petitioner believes that Hon. Mallonee did not employ the STANDARD OF REVIEW when it comes to evaluating a decision for Judicial Review.

STANDARD OF REVIEW

When the decision of an administrative agency is appealed pursuant to M.R. Civ. P. 80-C, the court reviews the agency's decision for abuse of discretion, errors of law, or findings not supported by the evidence. Centamore v. Dep't of Human Services, 664 A.2d 369, 370 (Me.1995). "An administrative decision will be sustained if, on the basis of the entire record before it, the agency could have fairly and reasonably found the facts as it did." Seider v. Board of Exam'r of Psychologists, 2000 ME 206 ¶9, 762 A.2d 551, 555 (citing CWCO, Inc. v. Superintendent of Ins., 1997 ME 226, ¶6, 703 A.2d 1258, 1261). In reviewing the decision of an agency, the court should "not attempt to second-guess the agency on matters falling within its relm of expertise" and the court's review is limited to "determining whether

the agency's conclusions are unreasonable, unjust or unlawful in light of the record." Imagineering v. Superintendent of Ins., 593 A.2d 1050, 1053 (ME 1991). The focus on appeal is not whether the court would have reached the same conclusion as the agency, but whether the record contains compentent and substantial evidence that supports the result reached by the agency. See CWCO, Inc. v. Superintendent of Ins., 1997 ME 226, ¶6, 703 A.2d 1258, 1261. "Inconsistent evidence will not render an agency decision unsupported." Seider, 2000 ME 206, ¶ 9, 762 A. 2d at 555 £citing Bischoff v. Bd. of Trustees, 661. 2d 167, 170 £Me.1990··. The burden of proof rests with the party seeking to overturn the agency's decision, and that party must prove that no compentent evidence supports the agency's decision. See Id.

The disciplinary report in question is MSP-2016-2106 (AR. pg2 App. pg. 31).

The charge is "Harrassment, General" cited as a Class "B" infraction. The Maine State prisons definition of "Harrassment, General" Harassment by words, gesture, or other behavior of any person, Class "B". (Brief of resp. at pg 1. fn. 1)(App. pg. 10)).

The statements that petitioner allegedly stated are not harassment as defined by the vague policy and its definition. The statements that were made were not directed at the person in order to harass. In order to harrass the statement(s) need be directed at the person in a way that makes fun of him, or his person. The statements in no way reflect the persons looks, demeanor or anything about him. These were statements that were in the form of a question, even the last statement, "Yeah, rub it on your #*cking chest." does not indicate harassment.

Harass is to incite. The Maine State Prison rule book does not properly define what Harassment is.

The definition for "Harassment, Specific." Harassment by words gesture, or other behavior of any person that is motivated by the person's race, color, ethnicity, national origin, religion, creed, gender, sexual orientation, or similar circumstance, physical or mental disability, or crime. Class A. (AR at pg 17 of Policy 201, App. at pg. 86)

The definition for Harassment, General was taken from the "specific" and made into a general, the wording is exactly the same but without any definition.

Rules and regulations are to be clear and explict in their meaning otherwise a prisoner is left to guessing as to what is and isn't expected of him.

Due process forbids rules that are so vague that people of ordinary intelligence must guess at their meaning [1] or fail to provide explicit standards for those who enforce the rules [2]

A rule may be vague "on its face" meaning that under no circumstances can it be applied constitutionally. [3]

It may also be vague "as applied" meaning that it does not give adequate notice that it prohibits the conduct with which a particular prisoner is charged.

1. Chatin v. Coombe, 186 F.3d 82, 89 (2d Cir. 1999): Rios v. Lane 812 F.2d 1032, 1038 (7th Cir.1987); Soto v. City of Sacramento, 567 F.Supp. 662, 684-85 (E.D.Calf. 1983) and cases cited.
2. Chatin at 87 Supra; Aiello v. Litscher, 104 F.Supp.2d 1086, 1083 (W.D. Wis 2000).
3. Cassels v. Stadler, 342 F.supp.2d 555, 564-67 (M.D.La. 2004) (striking down rule forbidding "spreading rumors" as vague and overbroad on its face); Noren v. Straw, 578 F.Supp. 1, 6 (D.Mont 1982)(rule requiring inmates to act in an "orderly, decent manner with respect for the rights of the other inmates" was vague: new rules required); Jenkins v. Werger, 564 F.Supp. 806, 807-08 (D.Wyo.1983)(Statute barring "unruly or disorderly" conduct was void for vagueness).

With that said petitioner also argues that it is clear that the statements were made by the individual who was on the top bunk as indicated by the report and that the "Inmate on the top bunk" looked at the officer (AR at pg.2, APP. at pg. 31). Petitioner was on his own bunk the bottom bunk.

When Ofc. Mayer made the statement "I guess you don't want your mail." is when the prisoner on the top bunk went to the door and said "Don't threaten me with my mail." (As everyone knows that mail for a prisoner is their lifeline to the outside world and that's one thing you don't mess with.)(Staff rarly use mail as a tool to manipulate a prisoner because they know how sensitive that issue is.))

Ofc. Mayer then handed the inmate my mail and made the remark "Have a good-night" also knowing that staff do not use the word GOOD before Morning or night, as that is considered disrespectfull as staff know there is no such thing as a GOOD-DAY in prison.

Ofc. Mayer stated he was going to write up prisoner Arbour anyway at a certain point (AR pg.2 APP at pg 31).

Regardless of what Capt. Abbott (Disciplinary Hearing Capt.) wanted to interpret or believe what He wanted outside of what was written by the reporting officer, the report is clear, Ofc. Mayer states the inmate on the Top bunk turned over. had Ofc. Mayer intended to indicate the prisoner on the bottom bunk he would have indicated prisoner Arbour as he did in every other instance, (AR pg.2 App. pg. 31).

There is no compentent evidence to support that petitioner Arbour was on the top bunk, petitioner's medical restrictions only enhances his claim as to being on the bottom bunk, as his restrictions are valid in that petitioner can't climb the bedside ladder because he shakes to much to hold onto the rungs. Capt. Abbott does not rely upon any evidence that is in the record to support his contention that prisoner Arbour was on the top bunk.

The lower Court, Knox, Superior Court, made statements that were not part of the record in its Order Denying Appeal ¶2 ("including an assessment of whether petitioner, notwithstanding his assignment to a bottom bunk, was actually occupying a top bunk at the time of the incident.") (Order denying appeal, App. pg. 3).

Capt. Abbott did not assess any evidence relating to the top bunk issue he disregarded anything that Prisoner S.G. said and never made an independent assessment as to his truthfulness. Capt. Abbott never questioned either prisoner & just made an assupmtion. Capt. Abbott states that he believed the prisoners reviewed the report in order to get their stories straight, but he does not rely upon any evidence to support his contention or belief, and this cannot stand. Capt. Abbott does not care about prisoners due process rights and does not allow procedures that are supposed to be allowed, i.e., questions of witnesses, witnesses themselves, and when Capt. Abbott is confronted with policies and procedures and statutes he becomes verbally abusive and ends the hearing making the statement this hearing is over "I find you guilty!" (App. pg. 35 A.R. pg.6), he does not explain his reasoning for finding guilt does not state what evidence he relied upon or explain why he gave the discipline that he gave, these due process protections are grounded in the case of **Wolff v. McDonnell, 418 U.S. 539.**(4)

The lower court, Knox Superior, states that there was compentent evidence in the record. This petitioner is shocked that the court could come to that conclusion when the disciplinary hearing summary is so vague that no reviewing authority could even guess as to what actually took place in the hearing.

If this court took just the disciplinary report and the disciplinary hearing summary of Capt. Abbott this court would come to the conclusion that there is not enough information in the summary to make a proper and informed decision.

4. "written statement by the factfinder as to the evidence relied on and the reasons' for the disciplinary action."

Capt. Abbott states in his summary that "I believe that the prisoners reviewed the report so they could get [their] stories [straight] because they referenced the report." (App. pg. 35 A.R. pg. 6)

Capt. Abbott based his guilty finding on his belief, what evidence did he rely upon to come to that conclusion, had he found prisoner Arbour or prisoner S.G. to have lied in the past? Did he assess both prisoners for their truthfullness. No, on either account. Capt. Abbott relies on his subjective belief, and that is not evidence. Capt. Abbott can't positively state that the prisoners conspired to concoct a story in order to get them straight. Prisoner S.G. was in the room and was the prisoner who made the statements and it would be appropriate for S.G. to see and read the report as he would be testifying and Arbour would be marshalling the facts and it would only make sense that S.G. would read and know about the report.

The Hon. Mallonee has taken what Capt. Abbott said in his disciplinary summary (App. pg. 34 & 35), and put his own spin onit.

A) Capt. Abbott states the prisoner is guilty based on the officers' report.

B) In the report the officer is very clear about <u>what was said.</u>

C) <u>I believe</u> that the prisoners reviewed the report so they could get [their] stories [straight] because they referenced the report.

1-A. Capt Abbott does not state what evidence he relied upon to find prisoner Arbour guilty "Based on the officers' report."

2-B) Capt. Abbott states the officer is very clear about <u>what was said</u>, but doesn't elaborate as to <u>who said it.</u>

3-C He, Capt. Abbott believes the prisoners reviewed the report so they could get their stories straight.... That's his subjective belief, he has no evidence to support that belief. He has not caught

either prisoner lying either at the hearing or in the past and he did not make an independent assessment of either prisoner to determine whether either was lying or not.

Hon. Mallonee states that he cannot second guess the factual findings. Yet he states the argument was presented that the "Misconduct came from an inmate in an upper bunk, this argument was presented and rejected by the hearing officer.
That is clearly wrong as the record does not reflect any such determination Capt. Abbott never even commented as to who was on the top bunk, let alone rejected it. The report is clear that the comments came from the prisoner on the top bunk, and the prisoner who resides on the top bunk is S.G., the officer wrote the report and stated the comments came from the prisoner on the top bunk, how can that be rejected, those are the facts.

Capt. Abbott does not state why he chose to disbelieve Arbour or S.G. - he only says "I believe...reviewed the report...could get [their] stories [straight] because they referenced the report."

Capt. Abbott's belief is not evidence it is his subjective belief, and what he may or may not believe is not evidence and that cannot stand.

There is no compentent evidence in the record to support Capt. Abbotts' findings, the rule violation is unclear and cannot stand alone without some definition and clairification as to what is expeceted of the prisoner, the rule as it stands is not clear, and even if this court can declare that it is clear enough it does not discribe "Harrasment, General".

The facts are: Three statements came from the prisoner on the top bunk, prisoner S.G. resides on the top bunk, and prisoner S.G. admitted to making the comments.

Prisoner Arbour resides on the bottom bunk with medical restrictions.

Capt. Abbott is only clear about one thing; the comments that were made, he has no proof that prisoner Arbour made the comments, prisoner S.G. lives on the top bunk and prisoner S.G. admits he made the comments.

INADEQUATE INFORMATION

Courts have held that a disciplinary hearing is not "meaningful" if an inmate is given inadequate information about the basis of the charges. WOLFF V. MC DONNELL 418 U.S. 539

RIGHT TO BE HEARD

Prison officials must allow the inmate to personally present a defense at the hearing. WOLFF V. MC DONNELL, 418 U.S. 539 @ 564. FREEMAN V. RIDEOUT, 808 F.2d 949, 953 (2d Cir) (paraphrasing WOLFF to include along among inmates' due process rights "the opportunity to appear at the hearing.

WITNESSES

Hearing officer must explain his decision why he refused to call witnesses.

PONTE V. REAL, 471 U.S. at 499 -- see also Grandison v. Cuyler, 744 F.2d 598, 604 (#d cir. 1985) (Ponte "clarifies that the burden of persuasion as to the existence and sufficiency of such institutional concerns [justifying the denial of an inmates' request to call witnesses] is borne by the prison officials, not the prisoners.") Smith v. Massachusettes Dept. of Corrections, 936 F.2d 1390, 1399-0 (1st Cir. 1991) (court will not speculate on appeal as to reasons why witness not called when prison officials have not submitted affidavit or other evidence to support their decision) Bostic v. Carlson, 884, F.2d 1267, 1273 (9th Cir. 1989) ("The burden of proving adequate justification for denial of a request to present witnesses rests with the prison officials.").

WRITTEN DISPOSITION

If there is a guilty finding on a misconduct, the inmate is to be provided a "written statement by the factfinders as to the evidence relied on and the reasons for the disciplinary action." Wolff, supra.

Several courts have said that the written statement must be reasonably specific and may not simply adopt the officers report by stating, for example, "inmate is guilty of misconduct as written."

Courts generally require hearing officers to provide reasons for the disciplinary action, especially when the inmate faces serious charges, or complex factual circumstances or proofs are involved. **Chavis v. Rowe,** 643 F.2d 1281, 1287 (7th Cir.), Cert. denied sub nom. **Chavis v. Rowe** ,, 454 U.S. 907 (1981) ("Without a detailed statement of the [disciplinary] Committee's findings and conclusions, a reviewing court (or agency) cannot determine whether the finding of guilt was based on substantial evidence or whether it was sufficently arbitrary so as to be a denial of the inmates due process rights."). see also **Dyson v. Kocik** , 689 F.2d 466, 467 (3d Cir. 1982) (subsequent history ommitted) (disciplinary conviction not supported by meaningful written statement of evidence relied on and reasons for actions taken where decision failed to make findings as to specific acts of misconduct); **Hayes v. Walker**, 555, F.2d 625, 633 (7th Cir.) (disciplinary sanctions not accompanied by adequate statement of evidence relied on and reasons for actions taken where disciplinary committee merely incorporated the violation report and special investigator's report), cert denied, 434 U.S. 959 (1977). **Chavis,** supra., 643 F.2d at 1286-87 (the written statement must disclose why the disciplinary board relied on certain evidence and rejected other evidence); **King v. Wells,** 760 F.2d 89, at 93-4 (6th Cir. 1985) (each item of evidence must be included in the written statement unless safety concerns dictate otherwise); **Culbert v. Young,** 834 F.2d 624, 631 (7th Cir. 1987), cert. denied, 493 U.S. 1088 (1990).

The Supreme Court has acknowledged that credibility judgments in prison disciplinary hearings are often between inmates and the committees' co-workers and that they "thus are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee.... It is the old situation problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance." **Cleavinger v. Saxner**, 474 U.S. 193, 204, 106 S.Ct. 496 (1985).

SOME EVIDENCE STANDARD

In **Culbert v. Young**, 834 F.2d at 630, the court cited this low standard of review as a factor supporting a low standard for statements of reasons. The leniency of the "some evidence" standard actually supports a requirement of greater specificity in dispositions.

DISCIPLINARY HEARING TO BE RECORDED

The purpose to have disciplinary hearing recorded is to keep the disciplinary hearing officer from leaving out important information, the disciplinary hearing officer (Capt. Harold Abbott) does not provide a complete summary of disciplinary hearings, and leaves the agency or a reviewing court "guessing" as to what actually took place.

In **Al-Shabazz v. State**, 338 S.C. 354, 372, 527 S.E. 2d 742 (1999) (disciplinary hearing are taped-recorded; inmate given limited access to the recordings, which are kept for 180 days before being recycled).

The Maine State Prison used to record disciplinary hearings but discontinued the practice for what ever reason, undisclosed to prisoners. The practice of tape-recording is one that should always be used, for the purpose of a reviewing agency or court so there is no question as to what took place in the hearing.

IMPARTIALITY

The very fact that the disciplinary hearing are not recorded allows Capt. Abbott to say and do as he pleases, in fact he has a picture of Judge Roy Bean (The so-called-hanging-judge) posted in his office in order to intimidate prisoners.

Hearing officers cannot be impartial as required by **Wollff, supra.** see **Perry v. McGinnis,** 209 F.3d 597, 606 (6th Cir. 2000) (hearing officers cannot be impartial as required by **Wolff v. McDonnell** if they focus on finding 90% of the inmates before them guilty).

WHEREFORE: Petitioner prays that this Honorable Court take this appeal and consider it liberally as petitioner is an uneducated prisoner.

Respectfully Submitted this 23 day of Sept, 2017

s/ Edward Arbour

Edward Arbour
MSP/ 807 Cushing Rd.
Warren, Maine 04864