**STATE OF MAINE**
**SUPREME JUDICIAL COURT**
**SITTING AS THE LAW COURT**

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LAW COURT DOCKET NO. KNO-17-294

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EDWARD ARBOUR

Appellant

v.

DEPARTMENT OF CORRECTIONS, ET AL.

Appellees

ON APPEAL FROM KNOX COUNTY SUPERIOR COURT

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# BRIEF OF RESPONDENTS/APPELLEES DEPARTMENT OF CORRECTIONS

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## STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

### *Statement of the Facts*

On December 16, 2015, Officer Mayer, a correctional officer at the Maine State Prison, was delivering prisoner mail in Close E Pod. Appendix ("App.") 11. He arrived at a cell occupied by the Appellant, Edward Arbour, and another prisoner and knocked on the window to get the attention of the occupants. *Id.* Arbour, who was on the top bunk, expressed displeasure at having mail delivered at 10:30 in the evening, calling it "f_king bull sh_t." *Id.* Officer Mayer asked Arbour if he wanted his mail, and Arbour came up to the door in an aggressive manner and yelled at Officer Mayer not to threaten him with his mail. *Id.* Officer Mayer delivered the mail and wished Arbour goodnight and the prisoner replied, "Yeah, rub it all over your f_king chest." *Id.* Officer Mayer cited Arbour for "Disorderly Behavior" and "Harassment, General." *Id.*

Pursuant to the Department of Corrections' disciplinary policy, a disciplinary hearing was scheduled. Officer Mayer's report regarding his interaction with Arbour was submitted into evidence. App. 16. Arbour testified and denied making the comments and also stated that he was not the prisoner occupying the top bunk, as stated in the report. *Id.* Prisoner S.G., Arbour's cellmate, was called as a witness at Arbour's request. He testified

that he and Arbour made a "joke" to Officer Mayer about late mail delivery and that Arbour did not say the things attributed to him in the report. *Id.*

The hearing officer did not find the prisoners' testimony credible, stating that it appeared they had both read the report "so they could get [their] stories [straight]." App. 16. He found Arbour guilty of harassment based upon Officer Mayer's statements in his report, and he recommended a sanction of twenty days' disciplinary cell restriction. App. 16, 18. Arbour appealed to the warden, and the warden's designee denied the appeal without further comment.

Arbour filed in the Superior Court a petition for judicial review of final agency action pursuant to 5 M.R.S. §§ 11001-11008. Arbour argued that the formal discipline report was not approved by a supervisor within 72 hours, as required by the disciplinary policy. App. 8-9, Petitioner's brief, p. 4. He asserted that he had asked for Officer Mayer to testify at the hearing but that the hearing officer denied his request. Petitioner's Brief, p. 7.[1] He also argued that the report did not state adequately what evidence the hearing officer relied on in reaching his decision. *Id.*, p. 9. Finally, he questioned the sufficiency of the evidence, noting that the disciplinary report identified his

[1] The disciplinary policy requires a prisoner to list requested witnesses on the initial notification form. DOC Policy 20.1, Procedure B (13). Arbour listed only his cell mate, S.G. App. 15. There is nothing in the hearing record that indicates that Arbour requested Officer Mayer to testify at the hearing.

housing unit as MSP/Close/E Pod/E 103/B, with the letter "B" indicating that he was assigned the bottom bunk of cell 103, while Officer Mayer described a conversation with someone occupying the top bunk. *Id.*

The Superior Court affirmed the decision. The court held that, despite some evidence to the contrary, there was sufficient evidence in the record to support the hearing officer's conclusion that Arbour was occupying the top bunk at the time of the incident. App. 3. The court also ruled that any procedural irregularities did not affect the outcome of the proceedings. *Id.*

Arbour timely appealed to this court.

## ISSUES PRESENTED FOR REVIEW

1. Whether the conduct described in the disciplinary incident report constitutes the disciplinary violation of "harassment."

2. Whether the hearing officer's decision is supported by competent evidence in the record.

3. Whether the report of the hearing contains an adequate explanation of the reasons for the hearing officer's decision.

## SUMMARY OF ARGUMENT

1. The conduct described in the disciplinary report meets the definition of "harassment" as that term is used in the disciplinary policy.

2. Officer Mayer's report, relied on by the hearing officer, provides sufficient support for his finding that Arbour committed the infraction.

3. The hearing summary contains an adequate explanation of the reasons for the hearing officer's decision.

## ARGUMENT

**1. The conduct described in the disciplinary report meets the definition of "harassment" as that term is used in the disciplinary policy.**

On appeal from intermediate appellate review, this Court reviews the agency's decision directly for abuse of discretion, error of law, or findings not supported by the evidence. *Fryeburg Health Care Center v. Dept. of Human Services,* 1999 ME 122, ¶ 17, 731 A.2d 1141. The party challenging the agency's decision has the burden of showing that it was arbitrary or based on an error of law. *Id.*

In reviewing an agency's interpretation of its rules, the Court will determine whether the rule is reasonably susceptible of different interpretations and will then either plainly construe the unambiguous rule or review the agency's interpretation of an ambiguous rule for reasonableness. *Central Maine Power v. Public Utilities Commission*, 2014 ME 56, ¶ 18, 90 A. 3d 451. Although the Court is not bound by the agency's interpretation, that interpretation is entitled to deference and will be upheld unless it is plainly

contrary to the language of the rule. *Conservation Law Foundation v. Public Utilities Commission,* 2017 ME 109, ¶ 18, 163 A.3d 182.

The statute requiring the Department of Corrections' Commissioner to promulgate a discipline policy does not address how specific the rules must be. 34-A M.R.S.A. § 3032 (1) (requiring Commissioner to "adopt rules describing disciplinary offenses and punishments. . ."); *Clark v. Maine Dept. of Corrections*, 463 A.2d 762, 766 (Me. 1983). The Court has not interpreted the statute to require prison rules to specifically detail offenses, but it does require reasonable specificity to give prisoners fair notice to conform. *Id.*

The Department's discipline policy defines "Harassment, General" as "Harassment by words, gesture, or other behavior of any person." DOC Policy 20.1, Prisoner Discipline, Procedure E. Although the policy's definition is somewhat tautological, "harassment" is a common term generally understood to include verbal or physical conduct that creates a hostile situation. The Merriam Webster Dictionary defines "harass" as: "To create an unpleasant or hostile situation for especially by uninvited and unwelcome verbal or physical conduct." https://www.merriam-webster.com/dictionary/ *harass* (last visited 11/14/17). Arbour's conduct described in Officer Mayer's report – approaching the cell door in an aggressive manner, yelling at the officer and using foul and abusive language – clearly falls within the common

understanding of the word "harassment," such that a reasonable prisoner would be on notice that such conduct is proscribed. Even if the definition of that term in the policy can be said to be ambiguous, the hearing officer's interpretation of the term "harassment" as including the conduct described in the disciplinary charge was not unreasonable.

**2. Officer Mayer's report, relied on by the hearing officer, provides sufficient support for his finding that Arbour committed the infraction.**

The burden of proof rests on the party seeking to overturn an agency's decision to show that there is no competent evidence in the record to support the decision. *Seider v. Board of Examiners of Psychologists*, 2000 ME 206, ¶ 9, 762 A.2d 551. An administrative decision will be sustained if, on the basis of the entire record, the agency could have found the facts as it did. *Id.* When ruling on the adequacy of an agency's factual findings, the issue before the Court is not whether the Court would have reached the same conclusion as the hearing officer but whether there is competent and substantial evidence that supports the result reached. *CWCO, Inc. v. Superintendent of Insurance*, 1997 ME 226, ¶ 6, 703 A.2d 1258.

Arbour challenges the hearing officer's findings of fact on two specific points: whether he was in fact the prisoner occupying the top bunk at the time of the incident and whether he made the statements attributed to him in

the officer's report. Arbour points out that, according to the housing assignment indicated on Officer Mayer's report, he was assigned to the bottom bunk and that Officer Mayer identified the subject of the disciplinary report as occupying the top bunk. Officer Mayer's report, however, clearly identifies the person on the top bunk as Arbour. App. 11.

Arbour points to the testimony of his cell mate, S.G., that Arbour did not make the statements attributed to him in the report, and that S.G. and Arbour made a joking comment to the officer about late delivery of the mail. This is in contrast to Officer Mayer's report, which clearly attributes the offensive statements and aggressive demeanor to Arbour. App. 11.

The hearing officer thus was faced with divergent accounts of the incident. It was his obligation to weigh the credibility of the prisoner witnesses against the detailed account in Officer Mayer's report. That he chose to credit the latter was a decision committed to his discretion. His finding is supported by ample evidence in the record and should not be overturned.

**3. The hearing summary contains an adequate explanation of the reasons for the hearing officer's decision.**

The statute governing prisoner discipline requires the Department to maintain a record of "all disciplinary complaints, hearings, proceedings and

dispositions." 34-A M.R.S. § 3032(6)(G). Under the prisoner discipline policy, the hearing officer must prepare a written summary of the evidence presented, the decision and a statement of the reasons and evidence relied on for the decision. DOC Policy 20.1, Procedure C (15). App. ___. While findings must be sufficient to allow a reviewing court to determine whether a decision is supported by substantial evidence, in cases where the subsidiary facts are obvious or easily inferred from the record, a remand for further findings is unnecessary. *Christian Fellowship and Renewal Center v. Town of Limington*, 2001 ME 16, ¶ 19, 769 A. 2d 834.

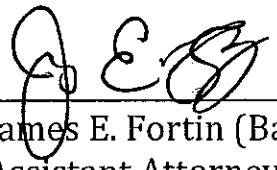
Here, the hearing officer cited as the basis of his decision Officer Mayer's report, stating: "In the report, the officer is very clear about what was said." App. 16. He also specified his reasons for rejecting the testimony of Arbour and his cellmate, stating that he believed the prisoners had reviewed the report together "so they could get [their] stories [straight] because they referenced the report." *Id.* The facts underlying the hearing officer's decision are set forth in Officer Mayer's report and are evident from the record. The hearing officer's remarks constitute a sufficient explanation of the information he relied on in reaching his decision as well as for accepting Officer Mayer's report and rejecting the testimony of Arbour and S.G.

## CONCLUSION

For the reasons stated above, the Department of Corrections requests that the Court affirm the Department's final decision finding Edward Arbour guilty of the disciplinary infraction of Harassment.

Dated at Augusta, Maine, this 21st day of November 2017.

JANET T. MILLS
Attorney General



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CERTIFICATE OF SERVICE

I, James E. Fortin, Assistant Attorney General for the State of Maine, do hereby certify that I have served two copies of this brief by depositing them in the U.S. mail, postage prepaid, addressed as follows:

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Dated: November 21, 2017

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