State of Alaska
Ombudsman

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August 31, 2015

Stuart Seugasala, #14039-006
USP Tucson
P.O. Box 24550
Tucson, AZ 85734

RE: Ombudsman Complaint A2015-0320
Finding of Record and Closure

Dear Mr. Seugasala,

Investigation of your complaint against the Alaska Department of Corrections (DOC) Anchorage Correctional Complex (ACC) is closed. I have enclosed a copy of the public version of the final investigative report that our office recently issued in response to your complaint against the DOC. This document has been redacted to remove any information that would identify you. It is our office's practice to post redacted versions of investigative reports on the Ombudsman's web site and I intend to do so in this case.

My office investigated the following allegation, restated to conform to statutory guidelines for investigations by the ombudsman (AS 24.55.150):

> ***No grounds for agency action: The Department of Corrections has classified the complainant to administration segregation for nearly two years solely based on a request from the U.S. Marshals Service, without any basis in law.***

After investigation, I proposed to find your allegation ***justified*** and so notified DOC in the preliminary report.

Under AS 24.55.180, I am required to give an agency an opportunity to respond to the findings and may revise a report if an agency provides information to justify modifying the findings or recommendations. In this case, DOC chose not to respond to the report even though it was given multiple opportunities to do so. As such, the finding of record in your complaint remains ***justified***.

I originally made the following recommendation:

> ***DOC should immediately provide the Complainant with an administrative segregation review hearing that comports with DOC policy and provides sufficient due process.***

However, because you were transferred from DOC custody to the Federal Bureau of Prisons in June the recommendation was essentially moot. In lieu, I have recommended that DOC

immediately change its practice of apparently deferring to a U.S. Marshals' request to house a federal inmate in administrative segregation when there is no basis in law to support the practice.

Because DOC failed to respond to the report and it appears that you were not given an independent classification review hearing before your transfer, this complaint has been closed as ***justified*** and ***not rectified***.

If you have any questions about the content of this report, please contact either me or Ms. Higgins at the address listed above or via Corrlinks.

Sincerely,

Linda Lord-Jenkins
State of Alaska Ombudsman

Enc: A20150320 Investigative Report
Public Version

State of Alaska
Ombudsman

OMBUDSMAN COMPLAINT A2015-0320

FINDING OF RECORD AND CLOSURE

August 31, 2015

This investigative report has been edited and redacted to remove information made confidential by Alaska Statute and to protect privacy rights.

SUMMARY OF THE COMPLAINT

A federal prisoner housed at the Alaska Department of Corrections (DOC) Anchorage Correctional Complex (ACC), contacted the ombudsman in February 2015 to complain about the length of time he been held in administrative segregation. He alleged that he had been held in segregation for a year–and-a-half and had been denied fair hearings on his placement there. The Inmate alleged that the Department of Corrections had inappropriately classified him to administrative segregation based on a request from the U.S. Marshals Service.

The ombudsman opened an investigation with the following allegation conforming to the requirements of AS 24.55.150:

> ***No grounds for agency action: The Department of Corrections has classified the complainant to administration segregation for nearly two years, solely based on a request from the U.S. Marshals, without any basis in law.***

Assistant Ombudsman Kate Higgins notified Anchorage Correctional Center (ACC) Assistant Superintendent Chris Lyou of the complaint on March 17, 2015, and requested copies of DOC's records pertaining to the Inmate's classification to administrative segregation.

BACKGROUND

DOC's records show that the Inmate was remanded to Anchorage Correctional Complex in early June 2013, on federal probation violations. He was held in the general population until August 23, 2013, when he was placed in administrative segregation (ad seg). The day before he had been indicted on new federal drug charges and the U.S. Marshals Service submitted a request to ACC that the Inmate be held in administrative segregation. The request came in the form of a Field Report and stated, in relevant part:

> On 8-22-2013 the U.S. Marshals for the District of Alaska were provided information with respect to Federal Inmate, [Name Redacted by Ombudsman], located at the Cook Inlet/ACC-West.
>
> Past information alleges that [INMATE], while not in custody, has forcibly sodomized persons with foreign objects causing great bodily harm.

> Current information received by the Marshals indicates that [INMATE] is openly expressing his desire to sexually accost Native inmates at the Cook Inlet/ACC-West.
>
> In order to maintain the safety and well-being of other inmates, the U.S. Marshals are respectfully requesting that the Department of Corrections place [INMATE] in segregation for administrative purposes until further notice.

The initial admission form cites 22 AAC 05.485(a)(8), "presents a substantial and immediate threat to the security of the facility or public safety," as the basis for his admission. Assistant Superintendent Jesse Self approved the placement.

The Inmate's first administrative segregation hearing occurred on August 29, 2013. The ombudsman investigator was unable to review this hearing because it was not saved properly by ACC. The hearing officer's written recommendation cites 22 AAC 05.485(a)(9), "requires protective custody," as the basis for the placement.

The hearing officer's written findings are as follows:

> Recommend [INMATE] remain in segregation, he requires protective custody. The Marshall's [*sic*] requested that we keep him segregated from other inmates.

The Inmate's statement was memorialized as follows:

> This is unfair. There is no reason I should be in segregation. I'm not even in segregation, I'm in a holding cell. Why won't you tell me why I'm in here?"

The ombudsman investigator reviewed the Inmate's disciplinary history on the Alaska Correctional Offenders Management System (ACOMS) and found that he had no disciplinary write-ups or lesser "informationals" either in the two months he was housed in general population or the 22 months after he was placed in segregation.

Each month from August 2013 to his release in June 2015, DOC held ad seg review hearings for the Inmate as required by regulation and DOC policy. However, only three of the review hearings have been recorded – October 30, 2013, June 19, 2014, and October 8, 2014.

At each review hearing, DOC continued to cite to 22 AAC 05.485(a)(9) as the basis for his continued placement in ad seg. Further, DOC denied the complainant the ability to review the U.S. Marshals' Field Report quoted above.

During the June 14, 2014, hearing, Probation Officer (PO) Stewart asserted that it is DOC policy to cite 22 AAC 05.485(a)(9) as the basis for placement in ad seg when the placement is at the behest of the U.S. Marshals. After the ombudsman investigator unsuccessfully tried to find any reference to this supposed policy in DOC's published policy manual, she asked P.O. Stewart to direct her to the policy he referred to during the hearing. P.O. Stewart responded:

> There is not a specific DOC policy for federal inmates, however since DOC is housing the Federal Inmates at the request of federal authorities we do follow certain protocols which fall within the scope of our policy, which is the ADSEG 9 status. As in the case of [the Inmate], which is not unique, the US Marshals wanted this prisoner segregated from the general population because of his aggressive sexual nature and the threats to the native population. ADSEG 9 was the most [appropriate] housing option to meet the Federal direction to house him alone.[1]

[1] Stewart email, dated April 8, 2015 at 2:18 p.m.

On three occasions, [the Inmate] appealed the Superintendent's decision to keep him in ad seg to the Director of Institutions. Each time his appeal was denied.

On November 12, 2013, [the Inmate] appealed his continued placement in ad seg, writing:

> I have not been given an reasonable opportunity to challenge the factual basis advanced in support of my continued housing in administrative segregation. Also the Asst. Superintendent's comments that I will be house in segregation as per the U.S. Marshals request even without an explanation or proof of cause, was made before my classification hearing 30 day review, shows that the outcome of my classification review hearing was decided before the hearing was actually held. Also, I was not allowed an opportunity to review any evidence being used as justification for my continued housing in segregation. I asked my staff advisor to bring my "evidence" to the hearing so I could contest it, and she told me that she was refused access to anything related to my segregation placement. I am being denied due process, and held in a very restrictive manner. It's causing strain on my family and it's straining me mentally. I respectfully request to be returned to general population *(sic)*

On December 5, 2013, Deputy Director of Institutions F. Lee Sherman responded "After review, appeal denied."

On June 30, 2014, [the Inmate] again appealed his placement in ad seg:

> The "segregation hearing" I had was obviously a "meaningless gesture" and denies me due process and/or a fair hearing to determine why I am being held in solitary confinement, how long I am to be held in solitary confinement and a chance to contest the reasons I am being held in solitary confinement. [The complainant's statement indicates that his appeal narrative continues on the backside of the form but a copy of the backside of the page was not provided to the ombudsman]

On July 15, 2014, then-Director of Institutions Bryan Brandenburg responded:

> You are a federal prisoner and the Marshalls [sic] are requesting you be segregated. Appeal is denied. Mr. Stewart [ACC's classification hearing officer] please provide [the Inmate] with the Marshalls reasons for segregation. *(sic)*

It does not appear that DOC staff provided the Inmate with a copy of the U.S. Marshals' request after the Director ordered that it be released to him.

On October 25, 2014, the Inmate submitted a third appeal of his continued placement in ad seg:

> CIPT [Cook Inlet Pre-Trial][2] bases its decision to hold me in segregation on no more than a "request" from the U.S. Marshals instead of an order from a judge, without a fair due process hearing and actual evidence. P.O. Stewart has never shown me any of the evidence he is basing his decision on, nor have I been given the chance to contest it. it has been over a year of very restrictive housing based on only a request and I have never had any due process hearing. CIPT houses other federal inmates in general population. I request general pop. [Emphasis in original]

[2] Cook Inlet Pre-Trial is the former name of what is now known as Anchorage Correctional Complex West.

On November 14, 2014, then-Director Brandenburg again denied the appeal, stating:

> You are a federal inmate, they request you be segregated. End of story. Your appeal is denied.

The Inmate has been held in administrative segregation since August 2013 – over a year and a half. For those that are unfamiliar with prison conditions, it may be helpful to understand what it means to be placed in ad seg.

Inmates in ad seg are locked in their cells and isolated from other inmates for the vast majority of the day – up to 23 hours a day. They are allowed out of their cells for one hour each day for recreation, also alone. Showers are offered three times a week at ACC, limited to 20 minutes. Segregated inmates must eat alone in their cells.

At ACC, segregated inmates may not visit the law library. Instead, a computer and typewriter are kept on the unit for inmate use. Inmates must request to use the on-unit "library" a day in advance.

Contact with the outside world is also restricted beyond that of a prisoner in general population. Inmates must submit a request to use the telephone a day in advance and are limited to 15 minutes, once a day. Visits are also restricted. Eligible inmates may have up to one hour of visitation per day. These visits are secure visits – meaning that there is a barrier between the inmate and their loved ones that prevents any physical contact. In the case of ACC, all inmate visits are conducted via a video hook-up on a computer monitor, similar to Skype or FaceTime.

Segregated inmates are also restricted in the type and amount of personal property that they may retain, more so than those in general population. Participation in programs and religious activities may also be restricted.

In the Inmate's case, he is not allowed to engage in programs outside of his cell and is limited to one-on-one religious activities. This means that he is unable to attend religious services or engage in various programs offered at the facility.

In his classification appeals, the Inmate indicated that the isolation was straining both him and his family. It is not hard to understand how that would be the case considering that, for over a year and a half, he has gone without having substantive contact with his family or even other human beings.

INVESTIGATION

Alaska State (AS) 33.30.011 specifies that the "commissioner shall…classify prisoners."

AS 33.30.021 requires the commissioner to "adopt regulations to implement this chapter."

22 Alaska Administrative Code (AAC) 05.485 addresses administrative segregation and provides:

> (a) A prisoner may be assigned to administrative segregation if the prisoner
>
> (1) has not been classified since initial admission to a facility, or has not yet had a physical examination under 22 AAC 05.120(b);
>
> (2) is incapacitated;
>
> (3) is suffering or suspected of suffering from a communicable disease;

(4) has had segregation prescribed by a physician, physician's assistance, or mental health professional, based upon mental or physical condition;

(5) requests in writing to be segregated from the general population;

(6) is detained as a non-criminal hold under AS 47.30.705 or AS 47.37.170;

(7) is being held as a material witness under a court order;

(8) **represents a substantial and immediate threat to the security of the facility or to public safety**;

(9) **requires protective custody**; or

(10) requires the most restrictive housing based on the prisoner's behavior which represents a severe threat to the safety and security of the facility or to public safety.

(b) A prisoner assigned to administrative segregation, except one described in (a)(1) of this section, must be immediately informed of the reason for confinement in administrative segregation.

(c) Pending a hearing under this section, the superintendent shall review all assignments to administrative segregation except those under (a)(1) of this section within one working day and either approve, in writing, continued segregation or return the prisoner to general population living space. Upon completion of this review, a prisoner assigned to administrative segregation except one described in (a)(1) of this section, must be given written notice that includes the superintendent's written approval and reasons for the confinement.

(d) Except for a prisoner described in (a)(1) of this section, a prisoner must be granted a classification hearing as soon as possible, but no later than three working days after placement in administrative segregation unless the prisoner requests a continuance of the hearing. In exceptional circumstances and for good cause, the hearing may be postponed for up to 24 hours. In addition, a prisoner assigned to administrative segregation must be granted a review hearing before a classification committee at intervals of no longer than 30 days.

(e) At a classification hearing, the subject of which is continued placement of a prisoner in administrative segregation, **the classification committee or hearing officer has the burden of establishing that the prisoner meets at least one of the criteria set out in (a) of this section**. The committee or hearing officer shall prepare a written recommendation for the superintendent's review and action as required in 22 AAC 05.212(c). **The recommendation must include the factual findings and evidence relied upon in sufficient detail so as to provide an adequate basis for review.** A copy of the superintendent's decision must be furnished the prisoner, and, if the decision is for continued administrative segregation, must include a description of the appeal process available to the prisoner. Forms to facilitate an appeal must be provided upon request.

(f) The prisoner is entitled to at least 48 hours' advance written notice of a classification hearing. [Emphasis added]

DOC Policy & Procedure 804.01 also addresses administrative segregation. Section V.C. defines "protective custody" as "a form of separation from the general population for inmates requesting or requiring protection from other inmates for reasons of health or safety." Because the Inmate has been held in ad seg for so long, two versions of this policy apply to his classification to ad seg. However the relevant portions of both documents are identical so, for ease of reference, we only quote from the current version, effective April 14, 2014

Section VII. lays out the ad seg procedures and provides, in part:

> C. Administrative Segregation Hearing
>
> * * *
>
> 2. **The inmates shall be given the opportunity to challenge the factual basis for the placement, to appear, present evidence, and examine witnesses**, unless the hearing officer makes a written factual finding that to do so would subject another person to a substantial risk of harm. In that case, the Department shall provide the inmate with the substance of the witness' testimony in a written or oral summary. The inmate must also be provided the opportunity to make a statement on his or her own behalf.
>
> 3. The institution shall demonstrate the inmate meets the criteria set forth in Sections A & B above in order to place the inmate in administrative segregation. Except as provided for in section F below, within five (5) working days after the hearing, the Institutional Probation Officer shall prepare an Administrative Segregation Hearing form (804.01B) for the Superintendent's review and action. **The form must include written factual findings and the evidence that the hearing officer relied upon in sufficient detail to permit appellate review.**
>
> * * *
>
> 5. Except as provided in section F below, the Superintendent has three (3) working days to make a final decision regarding the hearing officer's recommendation. The Superintendent may approve, disapprove, or modify the hearing officer's decision. If disapproved or modified, the Superintendent shall state the reasons on the Administration Segregation Hearing form. The inmate shall receive a copy of the decision.
>
> * * *
>
> D. The Institutional Probation Officer hold review hearings within 30 days after the first hearing and every 30 days thereafter for as long as the inmate remains in segregation, except for those inmates housed as Administrative Segregation Maximum, who shall be reviewed every 4 months after the first hearing. At this hearing, the institution shall demonstrate the inmate continues to meet the criteria for segregation. The Superintendent may authorize a hearing at any time to review an inmate's status in administrative segregation.
>
> E. **An inmate may appeal the Superintendent's decision to the Director of Institutions** using form 804.01D within five days of receiving the Superintendent's decision. The Director of Institutions has 15 days to approve, disapprove or modify the decision. The inmate will receive a copy of the final decision. [Emphasis added]

ANALYSIS AND FINDING

Alaska Statute 24.55.150 authorizes the ombudsman to investigate administrative acts of the state agencies that "the ombudsman has reason to believe might be contrary to law; unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law; based on a mistake of fact; based on improper or irrelevant grounds; unsupported by an adequate statement of reasons; performed in an inefficient or discourteous manner; or otherwise erroneous." The ombudsman reformulates citizen complaints against state agencies as allegations using these statutory terms. AS 24.55.150 also provides that "the ombudsman may investigate to find an appropriate remedy."

The ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency's actions is valid, and then makes a finding that the complaint is *justified*, *partially justified*, *not supported*, or *indeterminate*. A complaint is *justified* "if, on the basis of the evidence obtained during investigation, the ombudsman determines that the complainant's criticism of the administrative act is valid." Conversely, an allegation is *not supported* if the evidence shows that the administrative act was appropriate. If the ombudsman finds both that an allegation is *justified* and that the complainant's action or inaction materially affected the agency's action, the allegation may be found *partially justified.* An allegation is *indeterminate* if the evidence is insufficient "to determine conclusively" whether criticism of the administrative act is valid.

The ombudsman may investigate to find an appropriate remedy. AS 24.55.150 (b)

The standard used to evaluate all Ombudsman complaints is **the preponderance of the evidence.** If the preponderance of the evidence indicates that it is more likely than not that the administrative act took place and the complainant's criticism of it is valid, the allegation is found justified.

The Office of the Ombudsman's Policies and Procedures Manual at 4040(12) defines *no grounds for agency action* as "the agency made a decision without reference to any law and entirely lacking a legal basis."

In this case, DOC held the Inmate based solely on the request of the U.S. Marshals Service. There is no indication that DOC independently believed that the Inmate posed the danger asserted in the U.S. Marshals' field report. Rather, DOC acted as though it believed that it must comply with the U.S. Marshals' request without any good basis in law or regulation for that belief. Then-Director Brandenburg summed up the department's position succinctly in his last decision denying the Inmate's appeal: "You are a federal inmate, they request you be segregated. End of story."

It is conceivable that there was a legitimate reason for the Inmate to be held in ad seg. It is clear, however, that DOC has never considered whether or not any such reasons exist. It is obvious, as the Inmate put it in one of his appeals, that DOC had no intention of providing him with a fair and impartial hearing on his continued placement in ad seg. The decision to place him in administrative segregation was made on August 23, 2013 after DOC received the U.S. Marshals'

request and it was never given a second look. Although the DOC has held all of the required review hearings, those hearings were nothing more than a charade; the outcomes had been determined long before the hearings occurred.

DOC has not cited, nor has the Ombudsman been able to find, any law or policy that requires DOC to defer to a request of the U.S. Marshals Service in making a classification decision regarding a prisoner. Just because the inmate is in DOC custody awaiting trial on federal charges does not mean that DOC policies and state law do not apply to that inmate.

Numerous recent studies and news reports have documented the deleterious effects of solitary confinement on an inmate's mental health and physical well-being. The United States Supreme Court long ago determined that placement in solitary confinement is a constitutionally protected taking of liberty that requires due process under the 14th Amendment.[3] The Alaska Supreme Court has held that placing a prisoner in solitary confinement is also a taking of liberty that requires due process under the state constitution.[4] In light of the widespread view that solitary confinement is harmful, many states are working to cut back on its use.[5] As such, it is both surprising and disturbing that DOC has held the Inmate in ad seg for over a year and a half based solely on a request from the U.S. Marshals Service that appears to have no basis in law or policy.

Therefore, the ombudsman proposes to find this complaint ***justified***.

RECOMMENDATION

Recommendation 1: DOC should immediately provide the Inmate with an administrative segregation review hearing that comports with DOC policy and provides sufficient due process.

The Inmate deserves to have DOC make an independent decision, as required by law and policy, on whether he should be placed in administrative segregation. DOC P&P 804.01 provides that the "Superintendent may authorize a hearing at any time to review an inmate's status in administrative segregation." We strongly suggest that the Superintendent exercise his authority and hold an administrative review hearing. At that hearing, DOC should make its own determination of whether the Inmate meets any of the criteria to justify his continued placement in administrative segregation. Rather than an opportunity to "rubber stamp" the Marshals Service request, this hearing should be a genuine consideration of all the facts and evidence, with a reasoned decision. The hearing officer should make written findings of fact that explain what evidence was considered and what facts were found to exist, with a clear explanation of how the decision was reached.

* * * * *

AGENCY RESPONSE

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[3] *Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed. 935, (1974).

[4] *McGinnis v. Stevens*, 543 P.2d 1221, 1226, (Alaska 1975).

[5] http://www.pbs.org/wgbh/pages/frontline/criminal-justice/trapped-in-the-hole-america-solitary-problem/, citing Colorado, Kansas, Maine, Mississippi, and Ohio as cutting back on the use of solitary confinement in the face of budget cuts and litigation. http://www.nytimes.com/2014/02/20/nyregion/new-york-state-agrees-to-big-changes-in-how-prisons-discipline-inmates.html?_r=0, detailing an agreement by the New York Department of Corrections to limit the use of solitary confinement. Last accessed August 28, 2015.

The Ombudsman statute and regulations require that the agency have an opportunity to review and comment on critical findings in our investigative report before they are released to the complainant or the public. (AS 24.55.180 and 21 AAC 20.210.) If an agency believes that the proposed findings are incorrect, it may provide additional information that it believes the ombudsman should consider and request that the findings be modified.

In this case, the ombudsman issued her preliminary report on April 15, 2015, and gave DOC until May 27, 2015, to respond to the preliminary findings. On May 7, ACC Assistant Superintendent Chris Lyou requested an extension of time on behalf of the Department to respond to the preliminary report, which was granted. The new deadline to respond to the report was June 15, 2015.

That deadline came and went without a response from DOC. On July 13, 2015, Ombudsman Linda Lord-Jenkins emailed DOC Public Information Officer Sherrie Daigle to determine the status of the Department's response to the preliminary report. Deputy Commissioner Remond Henderson responded to Ms. Lord-Jenkins' questions regarding status of DOC's response on several outstanding investigative reports including the long overdue response to Ombudsman proposed findings in Complaint A2015-0320. Ms. Lord-Jenkins provided Mr. Henderson a spreadsheet of cases where the ombudsman had pending investigations of DOC plus a list of all other open DOC complaints. Mr. Henderson committed to determine status of the Department's responses to the investigative reports during a telephone discussion on July 22, 2015.

Later that month, on July 28, Mr. Henderson contacted Assistant Ombudsman Dale Whitney and requested another copy of the preliminary report. Mr. Whitney forwarded another copy of the report via email that day. After receiving no response from DOC, on August 10, Ms. Lord-Jenkins sent Mr. Henderson an email again asking whether the department planned to respond to the preliminary report.

On August 19, Mr. Henderson requested another 30-day extension to respond to the preliminary report. He cited the Department's focus on responding to the Alaska Criminal Justice Commission and the PEW Charitable Trust review of offender recidivism in Alaska, the Alaska Joint Senate House Judiciary Committee's hearings on bills addressing sentencing, and the governor's appointment of a special investigator to review DOC safety procedures.

Because two months had already elapsed from the already extended response deadline the ombudsman declined to grant DOC further delay to respond and closed this complaint.

Due to the department's failure to respond in a timely fashion to the preliminary findings, both the finding and recommendation will stand.

Since the issuance of the preliminary report, the Inmate was sentenced and transferred from DOC custody to the Federal Bureau of Prisons, thus mooting the ombudsman's original recommendation as to the Inmate specifically.

However, it is apparent that DOC needs to reassess its policy of apparently giving blanket deference to a request from the U.S. Marshals to place an inmate in solitary confinement.

We could find no evidence that DOC is required by law, regulation, or policy to defer to a U.S. Marshals' request or that would allow DOC to abdicate its independent responsibility to determine whether an inmate in its care, custody, and control should be placed in solitary confinement for nearly two years.

Therefore the ombudsman substitutes this recommendation:

> ***Recommendation 1: DOC should immediately stop its practice of deferring to U.S. Marshals' requests to house federal inmates in solitary confinement. If there are currently federal inmates being held in solitary confinement pursuant to a U.S. Marshal's request, DOC should immediately hold an administrative segregation classification hearing for those inmates that comports with the basic tenets of due process.***

Because of DOC's failure to respond to the findings or indicate whether it intended to adopt our recommendation, this complaint will be closed as ***justified*** and ***not rectified***.