State of Alaska
Ombudsman

INVESTIGATIVE REPORT

Ombudsman Complaint A2014-1425
Finding of Record and Closure

REDACTED PUBLIC VERSION

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

August 31, 2015

A Palmer Correctional Center (PCC) Inmate complained to the ombudsman in September 2014 the Department of Corrections (DOC) had imposed disciplinary sanctions on him without due process of law. The ombudsman opened an investigation into the following allegation, stated in terms conforming to AS 24.55.150:

> ***CONTRARY TO LAW: The Department of Corrections denied an inmate due process of law by reversing the decision of a disciplinary hearing officer without adequate explanation or justification.***

Assistant Ombudsman Dale Whitney notified PCC Superintendent Tomi Anderson of the complaint on October 16, 2014. Mr. Whitney investigated these allegations and drafted the report.

INVESTIGATION

The Inmate was housed at Palmer Correctional Center during the events in this investigation. The Inmate alleged violations of his rights following disciplinary proceedings at PCC. The investigator reviewed the entire written disciplinary record of the case, listened to the audio recording of the hearing, and reviewed all institutional appeal documents.

The Inmate was accused of engaging in prohibited conduct in two incident reports filed by Sergeant Paul Lucio at Palmer Correctional Center. Sergeant Lucio did not observe any misconduct, but he received two complaints within a very short period of time, 15 to 25 minutes apart, from a woman who works in the facility's Residential Substance Abuse Treatment Program (RSAT). The Inmate was not an RSAT program participant. The RSAT worker works under contract, and is not a direct DOC employee.

Sergeant Lucio's first incident report, in disciplinary case number 14-008, reads in its entirety:

> Infraction Citation & Title: 22 AAC 05.400(c)(15) engaging in a group or individual demonstration or activity that involves throwing of objects, loud yelling, loud verbal confrontation, or pushing, shoving, or other physical contact that disrupts or interferes with the orderly administration of the facility.
>
> Narrative: On 1/9/14 at approximately 1355 hours, I Sgt. Lucio was in the shift office when [The RSAT worker] approaches me to inform me that prisoner [INMATE] had touched her hand. [The RSAT worker] said that she told prisoner [INMATE] that there is no reason to ask her any questions because he is not an RSAT client and to stop asking any more questions. After leaving the shift office, prisoner [INMATE] seen her going to her office from the Law Library and followed her upstairs to the office. She once again asked him why are you following me he replied "you know I need to talk to you." [The RSAT worker] comes back to the shift office saying that prisoner [INMATE] was still continuing the same behavior.

The above incident report, number 14-008, was dated January 9, 2014, at 1345 hours. There appears to be a typographical error in the report, as the narrative states that the RSAT worker first reported to the shift office at 1355 hours, which would be 10 minutes after the report was written. It is unclear which time reference is in error. The report states that the RSAT worker returned to the shift office a second time, but it does not provide the time of the RSAT worker's second complaint about the Inmate.

The second incident report, for disciplinary case number 14-009, is dated January 9, 2014, 1410 hours, which is either 15 or 25 minutes after the first report, depending on which time reference in the original report was correct. The second report, in its entirety, reads:

> Infraction Citation & Title: 22 AAC 05.400(c)(19) Refusing to obey a direct order of a staff member.
>
> Narrative: On 1/9/14 at approximately 1410 hours, I Sgt. Lucio was in the shift office when [The RSAT worker] approaches me once again about prisoner [INMATE], continuing to harass her. Prisoner [INMATE] was told more than once not to have any contact with her due to him not being in the RSAT.

As can be seen, the first report documents that the RSAT worker contacted Sergeant Lucio in the shift office, and then returned a second time after the Inmate followed her upstairs. The second report restates the second visit to the shift office that was previously reported in the first report, and provides the time of the second visit. The second incident report charges violation of a different regulation, refusing to obey an order of a staff member.

Inmate Faces Disciplinary Hearing on Two Charles

Hearings for both of these incident reports were held on January 14, 2014, before Correctional Officer III Sergeant Robert Hall, serving as hearing officer. Several documents were introduced, including questions that the Inmate had prepared for the RSAT worker, Sergeant Lucio, and another inmate who had observed the Inmate and the RSAT worker in conversation the day of the alleged incident. The Inmate was not allowed to question any of these witnesses directly in the hearing, and no other witnesses were called.

Although the RSAT worker was the person complaining of misconduct and the only person to have allegedly witnessed any misconduct, the facility did not call her, or anyone else, as a

witness. Prisoners in disciplinary proceedings at PCC are generally not allowed to call witnesses in their defense, even when facing periods of solitary isolation and extended prison sentences in the form of lost statutory "good time," and the Inmate was not allowed to question the RSAT worker.

As an alternative to questioning witnesses, inmates are allowed to write questions to be presented to witnesses, and have the written answers to the questions placed into the hearing record. This prevents the accused from asking follow-up questions to clarify incomplete or cursory answers at the hearing. The Inmate prepared written questions for the RSAT worker, Sergeant Lucio, and one inmate named [Inmate B]. Sergeant Hall asked the questions for the RSAT worker before the hearing and wrote the answers on the Inmate's original list of questions. The handwritten document was admitted as evidence. The questions and answers for the RSAT worker are as follows:

Q: Prior to 1/9/14 have you or has anyone ever witnessed you engage in small talk or chit-chat with [the Inmate] that was not RSAT related?

A: Yes.

Q: Have you ever laughed or exchanged jokes with [the Inmate]?

A: No.

Q: On the day of 1/9/14 did you or anyone witness you engage in chit-chat and small talk with [the Inmate] prior to you going to the shift office and speaking with Sergeant Lucio?

A: No.

Q: On the day of 1/9/14 did [the Inmate] enter [RSAT] office while you and inmates [B] and [A] were there?

A: Yes.

Q: On the day of 1/9/14 did [the Inmate] directly engage you, and Inmate [B] in a conversation about "Negative Contracts", cats & puppies, and a incident involving you and your neighbor?

A: I was on the computer when he came in. I was with RSAT clients and asked him to leave.

Q: Prior to engaging in that conversation with [Inmate B] and [the Inmate Complainant] did you tell or did anyone witness you state to [the Inmate] that he was not to ask you any questions because he was not a RSAT client?

A: Yes several times.

Q: When you spoke to Sgt. Lucio about [the Inmate] did you inform him about having contact with [the Inmate] in [RSAT] office?

A: Yes, he rubbed my hand on the way out the door.

Q: The second time you spoke to Sgt. Lucio at 2:14 p.m. What, where, and how did [the Inmate] continue to harass you?

A: [The Inmate] followed me up to the office & back to library, I asked him why are you following me? He said you know I need to talk to you.

This document was signed by the Inmate with the date, his prisoner number, and the disciplinary case number. Below the Inmate's signature is a notation in a different hand stating, "Answers written per batum by Sgt. R. H. Hall on 1/13/14 @ 1420 hours" (*sic*) followed by a signature.

In a similar document entitled "Questions for Sgt. Lucio" the Inmate prepared eight questions for Sergeant Lucio. Answers are handwritten for each question, but there is no indication below the Inmate's signature as to who wrote the answers. The handwriting is different from Sergeant Hall's, and it appears that Sergeant Lucio wrote the answers himself. These questions and answers are as follows:

Q: On 1/9/14 did you personally hear or witness [the RSAT worker] tell inmate [the Inmate] not to ask her any questions?

A: No.

Q: On 1/9/14 did you or any other staff member that you were aware of witness [the Inmate] touch or have physical contact with [the RSAT worker]'s hand?

A: No.

Q: On 1/9/14 did you personally inform, order or direct [the Inmate] that he was not to have any present or future contact with [the RSAT worker]?

A: No.

Q: Prior to writing the incident reports on 1/9/14 were you personally present for or witness to the incidents alleged by [the RSAT worker]?

A: No.

Q: Other than what [the RSAT worker] told you. Did you personally have any independent reason to write a report in reference to [the Inmate] on 1/9/14? If your answer is yes, please explain?

A: Physical contact & harassment.

Q: Prior to writing your report. Did [the RSAT worker] ever tell you or inform you that on the day of 1/9/14 she had engaged in small talk and chit-chat that was not related to RSAT with [the Inmate]?

A: No.

Q: When you wrote the 2nd incident report for a (c)19 [14-0009]. Did [the RSAT worker] state when, where, and how [the Inmate] continued to harass her? If so, please explain?

A: Following her to her office.

Q: Did you or any other staff member personally witness the alleged continued harassment?

A: No.

Finally, the Inmate prepared eight written questions for Inmate B, an inmate who had been present when the Inmate Complainant had had contact with the RSAT worker on the day in question:

Q: On 1/9/14 (Thursday) were you, Inmate [A], and [the RSAT worker] sitting in [RSAT] office at approximately 1:15 p.m. or so?

A: Yes.

Q: On 1/9/14 did you personally witness [the Inmate] enter the office while you, [the RSAT worker], and Inmate [A] were there?

A: [The Inmate] stayed in the doorway.

Q: Did you personally see [the Inmate] engage or directly address [the RSAT worker] in conversation or small talk? If your answer is yes, briefly explain how you would categorize that conversation, i.e., friendly, unfriendly, etc.

A: Yes, cordial & friendly

Q: At any point while you, [the Inmate Complainant], [inmate A] and [the RSAT worker] were in the office together did you hear [the RSAT worker] say to [the Inmate] that he ([the Inmate]) is not to ask her any questions or speak to her directly because he is not a RSAT client?

A: [The Inmate] was asked to refrain from RSAT subjects but was otherwise conversing freely.

Q: Did [the RSAT worker] ever tell [the Inmate] to leave the office because he is not an RSAT client?

A: She asked him to leave (not due to the reason above) & he did so

Q: While you, [Inmate Complainant], [Inmate A] and [the RSAT worker] were in the office together, did you, [the Inmate Complainant], and [the RSAT worker] engage in small talk & chit-chat about “negative contracts”, cats & puppies, and a incident between [The RSAT worker] and her neighbor?

A: We spoke on differences of communication styles i.e. assertive, non assertive as well as pets.

Q: Prior to 1/9/14 have you ever personally witness [the Inmate] speak to or engage in casual conversation unrelated to RSAT with any of the RSAT counselors?

A: In passing

Q: Approximately how many times would you say you have seen that?

A: At least once a week

At his hearing for write-up 14-008, the Inmate told the hearing officer that he could have also questioned inmate A and other inmates who have seen him routinely conversing with the RSAT worker and other RSAT staff, but he did not because their testimony would have been cumulative.

The Inmate explained to the hearing officer that he works in the prison barber shop, which is located along a hallway on the second floor of the facility. The next two doors beyond the barber shop are the offices of the RSAT program. The Inmate stated that he routinely comes into contact with the RSAT worker and other RSAT employees on a daily basis. He stated that at times the RSAT personnel are very busy and have no time for more than a brief greeting in passing. Other times, however, the Inmate stated, the employees have unoccupied time, and they will come out into the hallways and engage in conversation and chit-chat. The Inmate stated that the RSAT worker had regularly engaged in conversations with him on a number of occasions before the alleged incident. The Inmate stated that he had chatted with the RSAT worker on the day in question, while several other inmates were present, and that he was not aware of anything he had said or done that could be construed as inappropriate. He also stated that the RSAT worker had not told him of anything he had done that she felt was unwanted or inappropriate.

At the hearing, the Inmate pointed out to the hearing officer the vagueness of the reports and indicated that it was not clear to him what he had done to prompt the RSAT worker's complaint. He also pointed out that the writer of the reports, Sergeant Lucio, admitted that he had not personally witnessed any of the alleged misconduct. Though he did not use the term, the Inmate explained that Sergeant Lucio's reports were hearsay, and he offered some reasons why in this case the hearsay might not be reliable.

The Inmate did not accuse Sergeant Lucio of fabricating allegations, and he specifically stated on the record that he was not accusing the RSAT worker of lying. But he pointed out a general lack of clarity, indicators of confusion about what actually happened, the possibility of miscommunication, and a lack of information about specific conduct that would constitute the offenses charged.

Hearing Officer Questions Double Charges for Same Event

The hearing officer questioned the Inmate, and stated his concern that there were two alleged incidents in a row. In response, the Inmate directed the hearing officer's attention to the fact that the two reports were written within minutes of each other.

In the first report, the conduct alleged was "followed her upstairs to the office." In the second report, the conduct alleged was "continuing to harass her." The Inmate explained that the alleged continuing harassment was actually the act of following the RSAT worker up the stairs that had been reported in the first incident report. In a written question to Sergeant Lucio, the Inmate had asked, "When you wrote the 2nd incident report for a (c)(19), did [the RSAT worker] state when, where, and how [the Inmate] continued to harass her? If so, please explain." Sergeant Lucio's response, in its entirety, was "following her to her office," which, the Inmate correctly pointed out, was the conduct that was the basis for the first report. The Inmate then directed the hearing officer's attention to a written question he had put to the RSAT worker, and her answer:

> Q: The second time you spoke to Sgt. Lucio at 2:14 p.m. What, where, and how did [the Inmate] continue to harass you?
>
> A: [The Inmate] followed me up to the office & back to library, I asked him why are you following me? He said you know I need to talk to you.

The Inmate correctly pointed out that this alleged continuing conduct was charged in the first incident report for case 14-008:

> After leaving the shift office, prisoner [INMATE] seen her going to her office from the Law Library and followed her upstairs to the office. She once again asked him why are you following me he replied "you know I need to talk to you." [The RSAT worker] comes back to the shift office saying that prisoner [INMATE] was still continuing the same behavior.

While the RSAT worker complained to Sergeant Lucio twice in a very short time, the record does not appear to show more than one incident of something done or said while the RSAT worker was on her way to her office that afternoon. The Inmate is correct that the two reports are duplicative. They charge different offenses, but describe the same alleged incident.

The Inmate speculated that Sergeant Lucio may have mistakenly interpreted two reports of a single incident as reports of two separate incidents. With so little detail in the record about what it was that he had allegedly done that constituted misconduct, The Inmate and the hearing officer could do little more than guess why two separate incident reports had been filed. It is clear from the record, however, that whatever conduct was the basis for the second report, was also included in the first report.

All prohibited conduct for inmates in Alaska prisons is listed in 22 AAC 05.400. The regulation contains four lists in subsections (b) through (e), organized according to degree of seriousness. "Major infractions" are listed in subsection (b), with misconduct such as homicide and rioting. Subsection (c) contains "high-moderate" infractions such as fighting or destroying property, (d) contains "low-moderate" infractions such as being in an unauthorized area, and (e) contains "minor infractions." Prison staff and inmates routinely refer to misconduct by its number in this regulation. Thus, if someone was found guilty of unauthorized use of a telephone in violation of 22 AAC 05.400(d)(3), it would be said that he "had committed a (d)(3)."

The first incident report in case 14-008 had accused the Inmate of committing a (c)(15), which is "engaging in a group or individual demonstration or activity that involves throwing of objects, loud yelling, loud verbal confrontation, or pushing, shoving, or other physical contact that disrupts or interferes with the orderly administration of the facility." The second incident report accused him of a (c)(19), which is "refusing to obey a direct order of a staff member."

After the Inmate had concluded his statement, Sergeant Hall stated, "Okay, well what I am going to do is find you guilty of the (d), what did we say it was, (d)(13)." A (d)(13) is "using abusive or obscene language or gesture that is likely to provoke a fight or that clearly disrupts or interferes with the security or orderly administration of the facility."

A (d)(13) is a lesser infraction than the (c) infractions that the Inmate had been accused of, but Sergeant Hall did not make a finding or provide an explanation on the record of what abusive or obscene language or gestures the Inmate had expressed. Sergeant Hall went on to impose a sentence of 10 days of punitive segregation and a 60-day loss of statutory good time, and then concluded the hearing by explaining The Inmate's appeal rights.

After going off record for case 14-008, Sergeant Hall went back on record for case 14-009. The hearing officer referenced the previous case, and he and the Inmate agreed that there was no need to repeat the entire discussion. The Inmate briefly restated his belief that although the first incident report charged a violation of 22 AAC 05.400(c)(15) and the second a violation of 22 AAC 05.400(c)(19), both reports were for the same alleged behavior. In response the hearing officer stated, "okay, what I'm going to do is find you not guilty, dismiss this one." Again, the

hearing officer did not make any findings of fact, either on the record or in his report, or explain why he had found the Inmate not guilty and then dismissed the case.

The hearing officer asked if the Inmate wished to appeal the decision to dismiss the second case; with some chuckling on both sides, the Inmate stated that he did not wish to appeal that decision. The Inmate did appeal the decision on the first case, 14-008, arguing that the incident report should have been written by the staff member with the most direct knowledge of the alleged incident, which in this case would have been the RSAT worker.

After the hearing, Sergeant Hall filled out a preprinted Report of Disciplinary Decision form for each case. On the report for case 14-008, in the line for "Summary of Prisoner's Statement" Sergeant Hall wrote,

> Wk in barber shop, always in contact w/ staff. Approx. 20 mins before he was in the RSAT office; personal conversation – 30 minutes later she reported to Sgt. Lucio. Staff member w/ most knowledge of incident should write report.

The report contains little else, with most lines blank. In the space for "Summary of adjudication decision: including reasons, evidence considered and specific facts upon which finding is based" the hearing officer wrote only, "Report & History." In the space for "Summary of disposition decision: Including reasons, factors considered and specific elements upon which disposition is based" the hearing officer wrote, "Report & Write-Up history."

In the report for case 14-009, in the space for "Summary of Prisoner's Statement:" the hearing officer wrote only, "Prisoner Statement." For "Summary of adjudication decision: Including reasons, evidence considered and specific facts upon which finding is based:" the hearing officer wrote, "Not Guilty – Dismissed." In the space for "Summary of disposition decision: Including reasons, factors considered and specific elements upon which disposition is based:" the hearing officer wrote, "statement of prisoner."

Superintendent Overrules Disciplinary Board's Ruling

Although the Inmate elected not to appeal Sergeant Hall's decision to dismiss case 14-009, a week later the Inmate received the following memo from PCC Superintendent Tomi Anderson, dated January 21, 2014:

> According to 22 AAC 05.480(m) Appeal from disciplinary decision, in part states, "By request of the prisoner or on the official's own motion, the superintendent, director of institutions, or the deputy commissioner may reconsider a final decision or order on appeal issued by the respective official at any time to correct an error.
>
> On 1/9/14 at approximately 1410 hours, staff member [RSAT worker] contacted the Shift Supervisor Lucio due to prisoner [Inmate] not following a directive. The staff member told the prisoner not to have contact with her since he was not enrolled into the RSAT program. The prisoner did not comply.
>
> On 1/14/14 at approximately 1104 hours, the Disciplinary Chair found the prisoner not guilty of PCC Disciplinary Case 14-009, which is an error.
>
> According to 22 AAC 05.455 (f1), Appeal from disciplinary decision in part states, "the disciplinary tribunal's decision may be affirmed, reversed, or modified, in whole or in part, in conformance with 22 AAC 05.455(b), or remanded, in whole or in part, for

> rehearing, findings, or clarification of findings; the superintendent may take any combination of actions described in this section."
>
> The infraction is affirmed; however, the penalties have been modified due to the error:
> Infraction: C-19
> Sanctions are as follows: 20 days Punitive Segregation
> 60 days loss of Commissary

The Inmate does not know why, seemingly out of the blue, the Superintendent took it upon herself to reverse Sergeant Hall's decision. Superintendent Anderson did not make any findings of fact to supplement the above memo, nor is there any indication in the file that she listened to recordings of the hearings in which the Inmate had explained the duplicative nature of the two incident reports. Nowhere else in the record is there any documentation of any legal error on Sergeant Hall's part that would provide an explanatory context for the superintendent's apparent assertion that it is a *prima facie* error to find an inmate not guilty.

The Inmate appealed this decision to then-Deputy Director of Institutions F. Lee Sherman[1]. On January 31, 2014, the Deputy Director wrote:

> There was an error in the original hearing verdict. The Supt. reversed the decision which she is allowed to do. You violated a direct order & will be held accountable. Appeal denied."

A week after reversing the hearing officer's decision in case 14-009, Superintendent Anderson ruled on the Inmate's appeal in case 14-008, in which he objected to the fact that the incident report had not been written by the person with direct knowledge of the incident:

> RSAT Personnel is a non-DOC employee and is not a "staff member" for purposes of discipline. Rule infraction: C-15; penalty – P.S. 10 days; 60 days loss of good time. Appeal denied.

Thus, based on a single incident, in one case Superintendent Anderson found that the RSAT worker was not a staff member, and in the other case she punished the Inmate for disobeying a staff member when he allegedly did not follow her directions.

Adding the penalties for both cases, the Inmate was ultimately sentenced to a total of 30 days of punitive segregation, 60 days of lost statutory good time, and 60 days loss of commissary privileges.

ANALYSIS AND PROPOSED PRELIMINARY 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.

[1] Mr. Sherman retired at the end of August 2015. While working at DOC, his official title was Director of Operations, a title associated with the name Floyd Sherman. However, on the DOC website he was also listed as F. Lee Sherman and his title was listed as deputy director of institutions.

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 standard used to evaluate all Ombudsman complaints is **the preponderance of the evidence**. If the preponderance of the evidence indicates that the administrative act took place and the complainant's criticism of it is valid, the allegation should be found justified.

AS 24.55.150 also provides that "the ombudsman may investigate to find an appropriate remedy."

The Inmate filed the following complaint against PCC:

> ***CONTRARY TO LAW: The Department of Corrections denied an inmate due process of law by reversing the decision of a disciplinary hearing officer without adequate explanation or justification.***

The superintendent exceeded her authority by reversing the hearing officer and imposing discipline on the complainant.

Prison disciplinary hearings are governed by 22 AAC 05.455(a):

> A prisoner is presumed innocent of an infraction, and the facility has the burden of establishing guilt. A prisoner cannot be found guilty of an alleged infraction unless the hearing officer or a majority of the disciplinary committee, as applicable, is convinced from the evidence presented at the hearing that the prisoner's guilt is established by a preponderance of the evidence. The decision in the adjudicative phase of the hearing must be based only on evidence presented at the hearing. If a prisoner does not request the presence of the facility staff member who wrote the disciplinary report, the report may be considered as evidence by the disciplinary tribunal and alone may serve as the basis for a decision. Other hearsay evidence may be considered if it appears to be reliable. The decision in the dispositive phase of the hearing may be based on evidence presented at the hearing or contained in the prisoner's case record.

When disciplinary hearings result in solitary confinement, as in this case, prisoners are entitled to certain due process rights. Although these rights do not extend to the full panoply of rights that a defendant in a criminal case would be entitled to, the rights are nevertheless substantial.[2]

In this case, there are no findings of fact that explain how he reached his decision, but it is clear that after reviewing the evidence presented at the hearing, Sergeant Hall was not convinced that that the facility had met its burden of proving that the Inmate was guilty of more than one

[2] *Brandon v. Dept. of Corrections*, 865 P 2d 87, (Alaska 1993); *McGinnis v. Stevens*, 543 P.2d 1221, (Alaska 1975).

offense, or that the Inmate should suffer any greater penalties than those imposed in the first case.

When she decided on her own initiative to reverse the hearing officer, Superintendent Anderson relied on 22 AAC 05.480(m), which states:

> By request of the prisoner or on the official's own motion, the superintendent, director of institutions, or the deputy commissioner may reconsider a final decision or order on appeal issued by the respective official at any time to correct an error.

Both the superintendent and the deputy director have misinterpreted the regulation. The regulation allows certain higher officials to reconsider final decisions, but only when the decision was "issued by the respective official." If the Inmate had appealed a decision and the superintendent had made a decision on appeal, she could later on her own motion decide that her decision was a mistake that should be corrected. The regulation does not grant a superintendent any authority to reverse a decision made by a hearing officer who has actually heard the evidence in a hearing, particularly when the decision has not been appealed.

There is no indication in the record that Superintendent Anderson herself was present at the hearing or even reviewed a recording of the hearing. 22 AAC 05.470(a) is clear that "only a disciplinary tribunal may impose punishment for an infraction." While the superintendent may "reconsider" her own decisions, she does not have the authority to impose punishment unless she is also the tribunal, which in this case she was not. The superintendent also wrote in her memo,

> According to 22 AAC 05.455 (f1), Appeal from disciplinary decision in part states, "the disciplinary tribunal's decision may be affirmed, reversed, or modified, in whole or in part, in conformance with 22 AAC 05.455(b), or remanded, in whole or in part, for rehearing, findings, or clarification of findings; the superintendent may take any combination of actions described in this section."

The language the superintendent quoted was actually from 22 AAC 05.480(f)(1). That subsection, read as a whole, states,

> (f) When acting on an appeal, the superintendent shall consider the disciplinary tribunal's decision under 22 AAC 05.475 and the reasons submitted by the prisoner in support of appeal. The superintendent shall consider whether the disciplinary tribunal's findings justify the adjudication or the penalty imposed. In acting on an appeal, the superintendent may take any of the following actions:
>
> > (1) the disciplinary tribunal's decision may be affirmed, reversed, or modified, in whole or in part, in conformance with 22 AAC 05.455(b), or remanded, in whole or in part, for rehearing, findings, or clarification of findings; the superintendent may take any combination of actions described in this section;
> >
> > (2) a penalty imposed by the disciplinary tribunal may be reduced or suspended, in whole or in part.

It should first be noted that this subsection only applies when the superintendent is acting on an appeal. Because the Inmate did not appeal the decision in case number 14-009, the superintendent was not acting on appeal, and the entire subsection should not even apply to this case.

Second, the regulation allows the director to affirm, reverse, or modify the decision, but only in conformance with 22 AAC 05.455(b). That subsection allows the finding of a *lesser* included offense, but it does not permit finding of an offense greater than any found by the hearing officer. Finally, subparagraph (1) must be read together with subparagraph (2), which only permits reduction or suspension of a penalty, not increasing or adding an entirely new penalty. The overall intent of the regulation is clear: on appeal, the superintendent may reduce the charge or the penalty, but not increase the charges or penalty beyond anything found by the hearing officer. The regulation recognizes that it would be a violation of due process for the superintendent to add charges and penalties without having heard the case firsthand.

The superintendent's identification of a hearing officer "error" was disingenuous. In her memo to the Inmate, Superintendent Anderson wrote, "the Disciplinary Chair found the prisoner not guilty . . . which is an error." A natural assumption would be that the statement is out of context, and the superintendent meant that the hearing officer's decision was based on some legal or factual mistake that is explained elsewhere. However, there is no context that provides the superintendent's statement with an alternate meaning. The superintendent did not identify any kind of error on the part of the hearing officer. While the record is thin, it appears that the hearing officer simply did not believe that the Inmate had committed two separate offenses, or at least that the facility had not proved by a preponderance of the evidence that the inmate had committed two separate offenses, and he acted according to the truth as he saw it. It appears that the superintendent was merely unhappy with the result.

The superintendent's statement and her action in this case could lead to the conclusion that, regardless of what happens at a hearing, at PCC it is error for a hearing officer to find an inmate not guilty of an offense once the inmate has been accused. If the superintendent is correct in this view, disciplinary hearings are nothing more than meaningless technical exercises, and inmates cannot expect that they will be listened to and provided with a fair hearing when they are accused of misdeeds in prison. The superintendent's actions send a message to disciplinary hearing officers that they must always find a prisoner guilty, regardless of the facts, or their decisions will be reversed. The result strips hearing officers of their legal authority to use good judgment to ensure that prisoner's rights are respected and they are treated fairly. Ultimately, this action has the potential to undermine order in the facility, as prisoners lose respect for the system and those who represent it.

A number of subsequent complaints to the Ombudsman from other PCC inmates suggest that the superintendent's actions may have had a chilling effect on hearing officers' willingness to conduct genuine fair hearings. The Inmate's disciplinary hearing was held in January 2014. In Ombudsman case numbers A2014-0895, A2014-1059, and A2014-1275, several inmates were accused of conspiring or attempting to escape from PCC in May of 2014. Their hearings were held in May 2014. The inmates who spoke to the ombudsman said they felt that their guilt had been predetermined before the hearing. After cursory hearings, all seven of the accused inmates were found guilty and given severe penalties, such as loss of an entire year of statutory good time. The Ombudsman found that there had been no relevant evidence to support the accusations, and DOC had suppressed potentially exculpatory evidence. After one of the inmates appealed to the Superior Court, DOC held a new hearing in his case and ended up reversing the guilty findings for all of the inmates involved. Sergeant Hall was one of the hearing officers on the three-person panel in those cases.

The incident report writer was not the staff member with direct knowledge of the incident

According to 22 AAC 05.410(b), an incident report "must be written by the staff member with the most direct knowledge of the incident." The Alaska Supreme Court has explained how this regulation protects an inmate's constitutional right to due process:

> Another regulation, 22 AAC 05.410(b), provides that a disciplinary report "must be written by the staff member with the most direct knowledge of the incident." This requirement ensures that an inmate and the disciplinary hearing officer will be able to identify the inmate's accuser, and that the accuser has "direct knowledge" and can testify regarding facts and observations rather than report hearsay evidence . . . While failure to follow a state regulation is not a per se constitutional violation, here the regulation at issue, designed to protect an inmate's opportunity to confront accusers, implicated James's due process rights.[3]

Superintendent Anderson's assertion that because the RSAT worker is a contract employee she is not a "staff member" for purposes of discipline is belied by the superintendent's own decision in the second case that, when he allegedly disobeyed her, the Inmate had committed a (c)(19) for "refusing to obey a direct order of a staff member."

This case clearly illustrates the reason that incident reports are required to be written by the staff member with direct knowledge of an incident. The Inmate had a right to require that Sergeant Lucio, as the writer of the report, be present at the hearing to answer questions. However, Sergeant Lucio admitted in writing that he had no direct knowledge of what happened, and that he did not witness any of the alleged misconduct in this case. The fact that the report was written by someone with only hearsay knowledge of the incident foils the intent of the law that the "inmate and the disciplinary hearing officer will be able to identify the inmate's accuser, and that the accuser has 'direct knowledge' and can testify regarding facts and observations rather than report hearsay evidence."

It is far from clear what the Inmate did that constituted an infraction in either of these cases. The words that the RSAT worker alleges were spoken that constituted harassment were "you know I need to talk to you." It is quite possible that, if the facility had called the RSAT worker to come in and explain what it was that the Inmate had done and the context, the evidence might be clear that the Inmate had committed some serious offense and was deserving of punishment. In that case, it would not matter from a legal standpoint whether the RSAT worker was appearing as the writer of the report or as a facility witness: she could explain to the hearing officer what happened, the Inmate could ask her questions that would clarify the facts, and regardless of whether the regulations were precisely followed there would be no due process violation.

As it stands in this case, however one frames the regulatory issues, the person who has claimed that the Inmate committed some act of misconduct did not provide any explanation either in writing or in person as to precisely what the Inmate did that was a violation of the rules, and the Inmate was not allowed to directly question his accuser. The Inmate's right to due process was violated, and it is questionable whether the facility even presented enough evidence to find him guilty of anything. Because the hearing officer did not make any specific findings of fact, one is invited to assume that when the hearing officer found the Inmate guilty of "using abusive or obscene language or gesture that is likely to provoke a fight or that clearly disrupts or interferes

[3] *James v. State, Department of Corrections*, 260 P.3d 1046, 1054, (Alaska 2011).

with the security or orderly administration of the facility," he was merely guessing that the Inmate might have done something that could be categorized in that regulation. It is difficult to see how the Inmate could defend himself when it is unclear what he did wrong.

The Inmate was denied due process in case 14-009 because, contrary to regulations, the superintendent imposed punishment without giving him notice and an opportunity to be heard, as the hearing officer had done before dismissing the case. The Inmate was denied due process in case 14-008, because he not allowed to confront his accuser, who should have been the person to write the report. The ombudsman proposes to find this allegation ***justified***.

RESPONSE FROM THE DEPARTMENT OF CORRECTIONS

On August 3, 2015, Commissioner Ronald Taylor wrote,

> I am responding to your preliminary findings for [Inmate]. In this complaint, the inmate alleged that the department had imposed disciplinary sanctions without the due process of law. The Department believes that any prisoner has the right to have their disciplinary reviewed by the superior court to determine, if any violation of law has occurred. This is a remedy that was available to inmate [Inmate], and should be considered an adequate remedy under AS 24.55110(1).

OMBUDSMAN COMMENT

The Commissioner's disappointing response emphasizes the problem presented by this case. The Department takes a dismissive attitude toward the suggestion that it should at least try to understand and comply with the law, because when it does break the law the courts will sort the matter out. This attitude overlooks the fact that the law provides for an administrative system of review within the Department that is designed to resolve problems internally before they end up in court. When the courts must resolve the Department's errors, it means that besides making the initial mistake the Department has also failed to properly implement the quasi-judicial system provided to correct mistakes. Worse, in this case, the mistake originated not with a hearing officer, but with the superintendent, a designated appellate officer charged with deciding on appeal whether the hearing officers have correctly followed the law.

The Commissioner's response suggests that the Department of Corrections does not believe that it should be held to the same level of professional conduct and accountability to which every other state agency, and even individual citizens, are subject. If the Department of Revenue wrongfully denies applicants their PFDs, the victims can go to court to get their dividends. If the Department of Transportation negligently builds faulty bridges, victims of a bridge collapse can go to court and sue for damages. If a person steals money from another person, the victim can go to court to recover his money. If a person is speeding and driving drunk, the police can take the person to court to hold them accountable, and accident victims can sue for their damages. The availability of these judicial remedies to aggrieved parties does not excuse individuals from doing their best to avoid ending up in court in the first place, nor does it relieve state agencies from the duty to at least try to correctly do their jobs.

Like every other state agency, the Department of Corrections is charged with doing a specific job in accordance with established minimum standards. While the trampling of legal and constitutional rights is obviously an important concern, this case is also about a state agency simply performing, or not performing, its assigned job. The fact that a judicial remedy may be available to those injured by a state agency's failure to follow minimum standards is irrelevant to

the question of whether the state agency is properly performing the tasks it has been charged with, and whether the people of the state should tolerate substandard performance from their government. The Ombudsman submits that the people of Alaska should not have to wait until their government is taken to court by its victims for the government to begin following its own laws and performing in accordance with established minimum standards that are accepted elsewhere across the nation.

Reliance on the courts to correct the Department's errors is an inadequate solution for several reasons. First, access to the courts costs more money than most inmates have. Inmates in disciplinary proceedings do not have a right to appointed counsel. Finding and paying an attorney from inside a prison who is willing to accept a disciplinary appeal for an indigent inmate is such a high bar that few inmates are likely to ever accomplish it.

While there have been cases in which inmates have been able to represent themselves all the way to the Supreme Court, the vast majority of inmates lack the legal skills to obtain a hearing in the superior court and successfully articulate their appeals, even when they have winning cases. A large percentage of inmates lack basic literacy skills. The Ombudsman has observed numerous cases over the years in which inmates with valid complaints have attempted to appeal to the courts, but despite their best efforts have been unable to even get their cases past the court clerk, much less before a judge.

Next, reliance on the judicial remedy places an unreasonable financial burden on other agencies and on the public. The time of judges, court clerks, support staff, and assistant attorneys general all cost substantial amounts of money. Congested court dockets are already a burden on the people of Alaska, who have other problems, both civil and criminal, that they need the courts to resolve. Particularly in these times of declining revenue and strained budgets, it is unacceptable for the Department of Corrections to dump its problems on other agencies and on the public without at least making a credible effort to resolve the problems before they end up in court.

PROPOSED RECOMMENDATIONS:

> ***PROPOSED RECOMMENDATION ONE: The superintendent's decision to reverse the hearing officer's decision and impose punishment in case 14-009 should be vacated.***

Sergeant Hall, sitting as the hearing officer in this case, reviewed the evidence and heard the testimony in the matter. The hearing officer was in the best position to determine whether the facility had met its burden of proving that the Inmate was guilty. Superintendent Anderson did not review the evidence, and was not in a position to evaluate the adequacy of the facility's evidence. Outside the normal appeal process, the superintendent had no authority to reverse the decision of the appointed hearing officer, and her imposition of punishment was illegal. The superintendent's action should be vacated in favor of the hearing officer's decision.

Department Response:

The Department agrees with this recommendation, and has taken the necessary steps to review this case. It has been determined that overturning the disciplinary hearing process and imposing a penalty did not allow the inmate to have a rehearing of the infraction with the required due process required under the Department's disciplinary process, as outlined in 22 AAC 05.400.

Ombudsman comment:

The Department appears to have misunderstood the entire discussion regarding case 14-009. The problem in this case is not that the Inmate was denied due process and the opportunity for a second hearing. The problem is that the hearing officer's final decision was not on appeal, and the superintendent therefore had no legal authority whatsoever to meddle in the case. The case is over. The Department has no authority to attempt a rehearing of this matter, and any further proceedings would be illegal.

The Ombudsman notes that the cited regulation, 22 AAC 05.400, contains a list of prohibited activities, but does not contain any mention of the process for hearing disciplinary cases.

PROPOSED RECOMMENDATION TWO: The finding of guilt in case 14-008 should be reversed.

The Inmate is correct that he was denied due process of law. The incident report should have been written by the RSAT worker, the staff member with knowledge about what the Inmate allegedly did in violation of prison rules. The superintendent's conclusion that the RSAT worker is not a "staff member," even though she works in the prison, has an office in the prison, and has the authority to issue orders to inmates, is not supported. Even if the RSAT worker is not deemed a staff member, her testimony is necessary in order for the facility to make a case against The Inmate. She is the only person who, allegedly, witnessed any misconduct, and it is impossible for the hearing officer to know what happened, or for the Inmate to defend himself, without her testimony. Because it has not been established what, if anything, the Inmate did that constituted a violation of prison rules, the finding of guilt should be reversed and any loss of good time be restored and change in classification and custody status be reversed.

Department Response:

The Department concurs with this recommendation. All findings have been rescinded, as well as any related classification or disciplinary action.

Ombudsman Comment:

The Ombudsman is pleased that the Department has accepted this recommendation. The Department has not stated whether it intends to resurrect the accusation in this case with a properly prepared incident report and a new hearing. The Ombudsman will be monitoring the inmate's disciplinary files to ensure that any further proceedings are conducted in accordance with the law.

PROPOSED RECOMMENDATION THREE: The superintendent and the deputy director of institutions should attend the Department of Corrections training class for disciplinary hearing officers.

As the officials charged with reviewing decisions of hearing officers on appeal, both the superintendent and the director of institutions are required to determine whether the hearing officer, and in the case of the director the superintendent also, correctly applied the law. In this case the superintendent misinterpreted several important provisions of the regulations governing disciplinary hearings, and the deputy director affirmed the superintendent's erroneous actions.

Alarmingly, these decisions appear to reflect a lack of familiarity with the applicable regulations, applicable court rulings, and the role of the hearing officer.

Both officials should attend the department's training class for disciplinary hearing officers, which covers the disciplinary hearing regulations.

Department Response:

> The Department respectfully rejects this recommendation. We have redesigned the disciplinary process, provided training to all of our hearing officers and reemphasized the importance of the disciplinary procedures and process throughout the chain of command, from the Division Director to the facility Hearing Officers.

Ombudsman Comment:

Upon receiving the above response, the Ombudsman inquired of the Commissioner how the disciplinary process had been redesigned, and how the importance of disciplinary procedures had been "reemphasized." The Commissioner did not respond to the Ombudsman's letter. The Ombudsman then asked the Deputy Commissioner Remond Henderson whether the Department intended to respond to the Ombudsman's questions; the Deputy Commissioner responded by email that the Department would eventually respond, but currently it was busy responding to the Alaska Corrections Commission investigators and to an investigation initiated by the Governor's Office.

While the Ombudsman remains interested in learning what "redesign" of the disciplinary process may have occurred, the fact remains that the law has not been redesigned, and no procedural changes can alter the need to comply with it. However the system has been "redesigned," under 22 AAC 05.480 a prisoner wishing to appeal a hearing officer's decision *must* submit his appeal to the superintendent, and the superintendent *must* act on the appeal within 10 days. If the prisoner has been found guilty of a major infraction, the prisoner may appeal the superintendent's decision to the director of institutions before it is ripe for appeal to the courts.

It should be noted that in this case the principal legal error was not committed by a hearing officer, but by a superintendent who, on her own motion, illegally resurrected a case that had been dismissed by a hearing officer, with a rationale that revealed a serious lack of understanding of the applicable laws. This superintendent is responsible for reviewing the legality of decisions made by hearing officers when inmates appeal. The Commissioner's assertion that superintendents and the director of institutions should not have the same training as hearing officers is analogous to an argument that trial court judges should have to go to law school, but bad decisions by appeals courts can be remedied by redesigning the trial courts. A better solution would be to make sure that appellate judges have the same, or better, training as the trial judges.

The training that is offered to hearing officers is a one-day class that the Department offers at its own facility in Palmer, with many participants appearing electronically from around the state. The Ombudsman recognizes that the superintendents and the director of institutions are very busy people with a great deal of responsibility. At the same time, the prevention of just one hopeless lawsuit and a remand from a court should be more than enough to offset the time these officials would lose to training. A number of other complaints the Ombudsman has recently investigated show that knowledge and respect for the law governing prison discipline on the part of the superintendent and director of institutions would most likely save the Department, and the public, a substantial amount of time and money.

In his most recent email, Deputy Commissioner Henderson wrote,

> On a side note, I'm sure you realize that some circumstances change that make some recommendations no longer applicable. For example, the recommendation that training be provided to Deputy Director Sherman, who is now retired.

First, the ombudsman notes that as of this writing Deputy Director Sherman is still on staff of DOC.

The Director of Institutions is responsible for reviewing legal decisions of all superintendents and hearing officers on appeal in the most serious disciplinary cases. Regardless of who fills the office, this person, or any designated deputies, should have the most thorough understanding of the applicable law of anybody involved with disciplinary hearings. The Ombudsman submits that the recommendation remains applicable to anyone serving in this capacity, particularly someone with less experience than the previous deputy director had before he retired.

CONCLUSION

After the Ombudsman's intervention, the serious errors in this case were fortunately reversed before it became necessary for the state to pay for the costs of litigating the matter in court. Unfortunately, the Department has not demonstrated any specific substantive measures to ensure that similar errors do not continue in the future. The Ombudsman finds the allegation in this case to be ***justified and not rectified.***