



## **INVESTIGATIVE REPORT**

Ombudsman Complaints A2010-0600, A2010-0601

Finding of Record and Closure

October 13, 2011

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

### **SUMMARY OF THE COMPLAINTS**

A Matanuska Valley resident contacted the ombudsman on April 27, 2010 to complain that the Alaska State Troopers (AST) wrongly “profiled” her as a drunk driver after she crashed her car, when in fact she was “disabled and just coming out of a seizure.” She alleged that the AST inappropriately treated her as a criminal instead of recognizing that she was in need of medical assistance.

The Complainant also alleged that she suffered an epileptic seizure because her medicine was withheld by the staff of the Mat-Su Pre-Trial Center, where she was incarcerated on charges of driving under the influence after the crash.

The ombudsman reviewed the allegations in detail, but ultimately found both allegations unsupported by the evidence. However, in the course of investigation, the ombudsman noted a related issue that merits further attention.

The ombudsman investigator noted that there is no requirement for anyone, including those in law enforcement, to report to the Department of Motor Vehicles if they learn a driver has been diagnosed with epilepsy. This seems at odds with State of Alaska Administrative Code 2 AAC 90.440, which states: “A person who has a driver’s license and who has had an uncontrolled seizure or an episode of loss of conscious control as a result of a medical condition must surrender that person’s driver’s license to the department.” The ombudsman therefore suggests that the Departments of Public Safety, Administration and Corrections jointly consider whether some form of a mandatory reporting scheme should be established to pass on information to the Division of Motor Vehicles about licensed drivers who have been diagnosed with a seizure disorder.

## INVESTIGATION

The ombudsman restated the complainant's allegations in terms that conform with AS 24.55.150:

### ***Ombudsman Complaint A2010-0600***

***Unnecessarily Discriminatory: The Department of Public Safety, Alaska State Troopers, wrongly profiled the Complainant as a drug and/or alcohol user and by doing so failed to recognize that the Complainant was in the midst of a medical emergency and jailed her instead of calling for medical aid.***

### ***Ombudsman Complaint A2010-0601***

***Abuse of Discretion: The Department of Corrections Mat-Su Pre-Trial Facility wrongly withheld the Complainant's epilepsy medication, precipitating a seizure wherein the Complainant fell and gashed her head on a cement floor.***

These complaints arrived in the mail and were initially assessed by Intake Secretary Linda Ritchey. Assistant Ombudsman Pete Spivey was then assigned to conduct investigate the allegations; he forwarded his conclusions to the ombudsman.

The ombudsman investigation included:

- a lengthy telephone interview with the Complainant;
- a separate discussion with the Complainant's mother, who originally attempted to file a complaint on her daughter's behalf;
- review of the Troopers' reports in the arrest described above, plus the reports of an earlier arrest under similar circumstances;
- discussions with several staff members in the Division of Motor Vehicles, including a telephone interview with the Director of the State Driver License Office about regulating drivers with seizure disorder; and lastly,
- a telephone interview with a Washington State Toxicology Laboratory forensic analyst who examined the Complainant's blood samples taken in both her arrests.

The Complainant granted permission to use her name in reviewing her complaint, but the Investigator revealed her identity solely to the then-AST Palmer Post Commander in order to request the arrest records. The ombudsman has not identified the complainant in this letter, as her identity is not necessary to support the analysis or explain the ombudsman's suggestion. The ombudsman is obliged to maintain a complainant's confidentiality unless disclosure is necessary to enable the ombudsman in carrying out the office's duties.

## **Background**

### ***Complainant's automobile accident and arrest***

In late 2009, seven months before filing her complaints with the Office of the Ombudsman, the Complainant was driving on the Parks Highway at 9:30 a.m. when her vehicle left the roadway, just before a curve, shot through a ditch and then crashed into a large boulder on the border of a gas station property. According to the Trooper's report on the accident, "The vehicle was high-centered on a boulder and had damage to the right front wheel. The (vehicle) was not driveable." The Complainant was not injured.

Upon arriving at the crash site and speaking with her, the Trooper observed that the Complainant had slurred speech. She also appeared very tired and had difficulty keeping her eyes open. She performed poorly on several Standardized Field Sobriety Tests, but a breath test indicated no presence of alcohol. The Complainant told the Trooper she had only ingested an antibiotic and "some Benadryl" that morning. In his report, the Trooper wrote that the Complainant "stated she was pretty sure she dozed off while driving. [She] stated she was not ill, diabetic, did not use insulin, but was *epileptic*." [Emphasis added]

The Trooper reported that when he inspected the interior of the Complainant's vehicle, with her permission, he found empty pill bottles that had held recently filled 30-day prescriptions for Ambien (a sleep aid) and Xanax (an anti-anxiety drug). He also listed a variety of other prescription and non-prescription drugs found in the car, several bearing warnings that using the medicine might promote dizziness or sleepiness. His inventory appeared comprehensive, and it did not list the anti-seizure drug Keppra, either in the form of pills or packaging. Keppra was the drug the Complainant told him she had been prescribed to control seizures associated with her epilepsy.

The Trooper arrested the Complainant for DUI/Drugs (she was also cited for an expired license and no proof of insurance), and transported her to the Palmer AST Post, where another officer administered a Drug Recognition Evaluation.

The Complainant agreed to provide a blood sample, taken later at medical facility, which AST sent to the Washington State Toxicology Laboratory for testing. The Complainant told the officer that "she recently had been diagnosed with epilepsy and takes Keppra." She also "stated she takes Xanax, Zimbalta (sic), Percocet, Ibuprofen, Ambien and just got cough medicine with Codeine."

She said she did not take an Ambien to sleep the night before, but had taken the codeine cough syrup "about 3 or 4 o'clock" that morning, and a Percocet (an opioid painkiller that she said was prescribed for a work-related neck injury).

In the early afternoon the arresting officer took her to the Mat-Su Pre-Trial Facility, where she was booked pending a \$5,000 bail.

### ***Complainant injured while in custody at Mat-Su Pre-Trial Facility***

That evening at Mat-Su Pre-Trial, the Complainant collapsed, struck her head on the floor, and suffered a scalp laceration that required a trip to the Mat-Su Regional Medical Center emergency room and three surgical staples to close the wound. According to the record of her visit to the hospital, her chief complaint was listed as "Seizure." The

attending physician also wrote, "She does have a history of seizure disorder . . . and she has been on antiepileptic medication but is not currently on anything." The emergency room physician provided a dose of Keppra at the hospital, as well as a prescription for Keppra for the DOC medical staff to administer. DOC staff began providing the Complainant with Keppra the following day. The complainant was released on bail after eight days, without further incidents.

### **Complainant's previous arrest for impaired driving**

Just 34 days before the incident described above, the Complainant was stopped and ultimately arrested for DUI by another Trooper. According to AST's records, a motorist had called by cell phone to report a young woman driving erratically, drifting back and forth to the roadway's far edges, and possibly had scraped along a guard rail at one point. When the Trooper spotted her, according to his report, he witnessed her vehicle come "within inches of the concrete barrier dividing the Parks Highway."

Upon stopping her, the Trooper's initial assessment was that she was "extremely drowsy", "disoriented", her eyelids appeared "droopy", and that she "slurred" her speech. In short, he wrote "(she) had drunk-like behavior." She told him she had not been drinking but had taken Ambien about 10 hours earlier. She also said, "I do have epilepsy. I take Keppra," and also said that "I think I might have hit the guard rail."

As was the case in the later incident in which she crashed the car, a breath test showed no evidence of alcohol, but the results of both her field sobriety tests and Drug Recognition Evaluation led to her arrest.

### ***Complainant's Blood Analysis***

The ombudsman investigator contacted Brian Capron, the forensic analyst with the Washington State Toxicology Laboratory who analyzed the Complainant's blood samples following each of her arrests. He often testifies as an expert witness, he said, including appearances in perhaps 20 Alaska trials. In the earlier case he found evidence of Benadryl and Ambien; in the second case, which gave rise to this complaint, he found those two same substances plus codeine.

Mr. Capron told the ombudsman investigator the analysis revealed that the amounts were "definitely not miniscule," and the levels had most likely been even higher at the time of the crash; the blood samples were taken several hours later. Despite the diminishment, he said, the amounts his testing found in her blood sample would still have had a strong influence: "A person with those levels would appear intoxicated," he said.

## **ANALYSIS AND FINDING OF RECORD**

AS 24.55.150 authorizes the ombudsman to investigate administrative acts 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; or performed in an inefficient or discourteous manner; or otherwise erroneous.

The ombudsman may investigate to find an appropriate remedy.

Under 21 AAC 20.210, the ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency's action 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, a complaint is *not supported* if the evidence shows that the administrative act was appropriate. If the ombudsman finds both that a complaint is *justified* and that the complainant's action or inaction materially affected the agency's action, the complaint may be found *partially justified*. A complaint is *indeterminate* if the evidence is insufficient "to determine conclusively" whether criticism of the administrative act is valid.

***A2010-0600 Allegation 1: Unnecessarily Discriminatory: The Department of Public Safety, Alaska State Troopers, wrongly profiled the Complainant as a drug and/or alcohol user and by doing so failed to recognize that the Complainant was in the midst of a medical emergency and jailed her instead of calling for medical aid.***

### ***Ombudsman's Standard:***

As defined in the Policies and Procedures of the Office of the Ombudsman, "Unnecessarily discriminatory" means:

There is evidence of discrimination or discriminatory treatment in an agency's administrative action or decision and the evidence shows the agency's action or decision:

- (A) was based on considerations that the legislature or a similar body could not have intended to make relevant; or
- (B) was not reasonably required to achieve the purpose that the action of decision was intended to serve.

### ***Analysis and Finding on Allegation 1***

The ombudsman found this complaint ***not supported***.

The Complainant's obvious signs of impairment stood large in the circumstances leading to her arrests in both cases, but to term that as "profiling" seems disingenuous. The Troopers were not out looking for her. In her first arrest they responded to a citizen's worried call about a driver barely able to keep her car on the road, and in the second to a call informing them of the crash. Troopers are trained to look for signs of impairment when they come into contact with drivers, especially in an accident or hazardous driving situation. In both incidents the complainant's signs of impairment were not difficult to detect. She did not claim, according to their reports, that she had experienced a seizure; just that she was epileptic.

The Complainant insisted the Troopers had unfairly "profiled" her as a drunk/drugged driver. In her interview with our investigator she explained that that she felt "treated like a criminal" both in her experience with the Troopers and as a prisoner at the jail. In her written complaint to the ombudsman she wrote that she was "medically disabled and just

coming out of a seizure and unable to pass the sobriety test” at the time of the wreck, rather than drunk or abusing drugs.

It is well beyond the ombudsman’s capabilities to determine whether the Complainant crashed her vehicle because she had a seizure; or because she fell asleep at the wheel after continually taking a substantial amount of medication with sleep-inducing side effects; or because she was simply just too exhausted from lack of sleep to be driving safely. When the trooper contacted her after the accident, she reported having epilepsy, but made no mention of having had a seizure, so the officer was left with the normal procedures to follow when dealing with an apparently impaired driver. The trooper followed those procedures, and the Complainant failed both the series of field sobriety tests and a drug recognition screen. In short, while the Complainant may have felt unjustly accused of being a drunk driver, the AST could not help but suspect that she was impaired, albeit in both cases it proved not to be by alcohol.

In fact, the Washington State forensic analyst found that the Complainant was impaired and would appear intoxicated. This allegation is therefore found to be **unsupported**.

***A2010-0601 Allegation 1: Abuse of Discretion: The Department of Corrections wrongly withheld the Complainant’s epilepsy medication, precipitating a seizure wherein the Complainant fell and gashed her head on a cement floor.***

### ***Ombudsman’s Standard***

Reviewing a complaint alleging abuse of discretion requires first a determination that the agency could exercise discretion in the matter that was before it, and second, a determination that, in the exercise of its judgment, the agency:

- (A) did not proceed according to law;
- (B) based its decision on an erroneous choice of standards or principles;
- (C) based its decision on considerations not supported by evidence;
- (D) based its decision on considerations that were not relevant; or
- (E) made a decision that was clearly contrary to the reasonable inferences or deductions to be made from the evidence.

### ***Analysis and Finding on Allegation 2***

The Ombudsman found this complaint **not supported**.

Although she was arrested in the morning, it was early afternoon before the arresting Trooper in the crash incident took the Complainant to the Mat-Su Pre-Trial Facility for booking. Early that evening, she fell at the jail and sustained a scalp laceration that required a trip to the hospital and closure with surgical staples. She later said that she had suffered a seizure, and complained that it happened because the jail staff did not allow her to keep her anti-seizure medication.

The available evidence casts doubt on whether the Complainant in fact had her prescribed anti-seizure medication with her when arrested and remanded. The Trooper who searched her vehicle inventoried a variety of medications and empty prescription bottles but did

not list Keppra. It seems unlikely that he would note an over-the-counter drug like Excedrin, as he did on his inventory, and make no mention of Keppra.

On the Complainant's Criminal Remand Screening form, the Mat-Su Pre-Trial staff noted that she reported having taken Keppra the day before. There was also this notation: "Meds to be brought in tonight." Nothing in the DOC records indicated that the staff took custody of any medications arriving with the Complainant.

The Complainant's account frankly was confusing: She expressed irritation that the Trooper "took away all my medications..." and also said of the Mat-Su Pre-Trial staff, "They withheld my meds." In her later conversation with the ombudsman investigator, the Complainant said she was "fuzzy" that first day, which she attributed to her . . . post-seizure state of mind, and that "things smoothed out after that. . . . I got all the meds I needed."

It also must be noted that despite blaming the jail staff for her seizure, when the Complainant was having her laceration treated in the emergency room at Mat-Su Regional that evening she told the attending physician, according to his notes, that "*...she has been on antiepileptic medication but is not currently on anything.*" Before releasing her, the attending physician gave the Complainant a 500 milligram dose of Keppra, a dose of another anti-seizure drug, and the painkiller Toradol. He also wrote her a prescription for Keppra with instructions to take it twice daily, and directed a large daily dose of Ibuprofen. The jail nursing staff began providing the medicines to her the next day.

DOC Policy and Procedure 807.05 (revised January 18, 2001), sets the procedure for remanded prisoners with prescriptions. In section (D)(10), the document states the procedure for a remand with a current prescription, including the following paragraphs:

- b. If the prisoner did not bring medication to the facility at remand, then the health care staff shall attempt to verify the prescription when the prisoner reports he/she is on prescription medication. If verified, the [Institutional Health Care Officer] IHCO or on call health care practitioner must be notified prior to the next scheduled dose.
- c. If no medical staff is on duty and a prisoner indicates that he has medication that must be taken before health care staff is scheduled to be on site, whether the prisoner brought his or her medication or not, the correctional officer shall inform the telenurse who shall attempt to verify the prescription and may conduct a telehealth screening. The prisoner's personal medications may not be used until on-site medical staff has identified the medication. If the prescription is verified, the IHCO or on call health care practitioner must be notified for directions or orders prior to the next scheduled dose. If medication must be taken before medical staff is on duty, then the health care practitioner shall arrange for health care staff to come into the facility, arrange for medication to be brought into the facility, or refer the prisoner to the emergency room.

In summary, the ombudsman found no preponderance of evidence that the Complainant had anti-epileptic medication with her when remanded, and it appears she did not have it when arrested. It is not clear when she had last taken Keppra – the emergency room

record left some doubt as to whether she had a current prescription. She did apparently tell the staff at Mat-Su Pre-Trial that she needed anti-epileptic medication, and while it is not a drug commonly kept in stock at the jail, the DOC records indicate that the staff expected to receive those medications that evening (the Complainant was booked in the early afternoon). If the Complainant actually needed a dose sooner, there is no evidence that she told the DOC staff about that urgent need.

While it is possible that the Complainant's incarceration caused her to miss a scheduled dose of Keppra, and thus contributed to her having a seizure while in custody, the available evidence does not establish this possibility as more likely than not. Further, the evidence does not establish that DOC staff failed to carry out their duties to screen incoming inmates for medical conditions and address those conditions to the best of their abilities.

Therefore, the ombudsman finds this allegation to be unsupported by the facts.

### **Ombudsman's Suggestion**

In a formal investigation, the Ombudsman issues a preliminary report that includes recommendations to remedy problems identified during the investigation. The ombudsman did not find fault with how the Alaska State Troopers or Department of Corrections treated the Complainant; therefore no recommendations are forthcoming. After many discussions, the ombudsman has decided to make a single suggestion: that the Departments of Public Safety, Administration and Corrections jointly consider whether some form of a mandatory reporting scheme should be established to pass on information to the Division of Motor Vehicles about licensed drivers who have been diagnosed with a seizure disorder or other serious impairment.

#### ***Current re-examination system***

Presently, DMV provides for voluntary reporting of possible driver impairment. The relevant regulation, 2 AAC 90.450, provides in part:

(c) The department may cancel a driver's license based on a request from a criminal justice agency, physician, or member of the general public. The department may require reexamination of a licensee. The request must state that the driver cannot safely operate a motor vehicle due to a physical or mental condition and explain the need for a reevaluation by providing specific information pertaining to the person's operation of a motor vehicle or physical condition. A request must be in writing, and may not be anonymous. A request will be treated with confidentiality if requested by the person submitting the request. A police officer, or other individual, who makes such a request, does so through DMV Form 411, "Recommendation for Re-examination." Anonymous reports are not acted upon, nor are those that are based solely on a driver's age or general health. The reporter must cite "specific observations, events, and incidents" relevant to the driver's capability. The form also advises that while the agency will agree to keep the reporter's name confidential, confidentiality cannot be guaranteed if the driver requests a hearing or sues the state. Civil immunity for a good faith report is not included.

This young woman apparently told everyone with whom she came into contact that she recently had been diagnosed with epilepsy. Two Troopers, Mat-Su Pre-Trial medical staff, the doctor at the emergency room for Mat-Su Regional Hospital, and her own physician all received this information from her, but no one sent this information to DMV, so that DMV could review this driver's competence. AST doesn't have a reporting requirement so they don't report impairment except in extreme cases according to AST Captain Dennis Casanovas. AST also has no way of verifying if drivers actually have epilepsy or are using the claim as an excuse to get out of a DUI charge.

Cheryl Vargo, the head nurse at ACC, said staff at correctional centers face similar problems. Medical staff only believes an inmate's claim to have a medical condition if they themselves diagnose it, which is often impossible in a short amount of time, or if someone brings in the prisoner's medical records or a credible statement from his doctor.

The ombudsman is not convinced that the voluntary reporting system is broken, but this case provides cause for concern. While drivers with uncontrolled epilepsy are, fortunately, relatively rare, Alaska also has looming on its horizon an increase in the number of citizens over 65 years of age,<sup>1</sup> a demographic in which chronic medical impairment becomes more common. It would seem in the best interests of the Department of Public Safety and DMV to ensure that the system for reporting and screening problem drivers is reasonably accurate and effective.

### ***Possible changes in reporting driver impairment***

House Bill 149, was offered by Representatives Anna Fairclough and Kurt Olson in the 2011 session and is before the State Affairs Committee. HB149 would allow anyone, including physicians, to report drivers with a medical or other condition that could, in their opinion, impair the ability of a driver to safely operate a vehicle. Such reports would be confidential and exempt from disclosure, and those who submit reports in good faith would not be liable for civil damages for doing so. We should state here that the ombudsman is not proposing the agencies addressed in this report endorse or lobby for passage of this bill. It merely provides a platform to encourage discussion. Some states, such as Oregon, have gone further than HB 149 would, by *requiring* physicians and other health care providers to disclose to the licensing agency information about patients they believe have become impaired drivers.<sup>2</sup> In Oregon, the state grants legal immunity from civil lawsuits to the reporting health care provider in such cases.

The American Association of Motor Vehicle Administrators has developed model legislation that attempts to address driver impairment, titled "Reporting of Driver Impairment Model Law." The report and others concerning impairment are available at a link on the organization's Web site:<sup>3</sup>

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<sup>1</sup> Ed Hunsinger, the State of Alaska Demographer employed by the Department of Labor and Workforce Development, told the ombudsman investigator that he believes the segment of Alaska's population aged 65 and over will easily more than double in the next 25 years, from the current estimate of 52,263 to 124,857 projected.

<sup>2</sup> Oregon Administrative Rules, Chapter 735, Division 74  
Also see: [oregon.gov/odot/dmv/atrisk/index.shtml](http://oregon.gov/odot/dmv/atrisk/index.shtml)

<sup>3</sup> <http://www.aamva.org/KnowledgeCenter/Driver/At-Risk/DriverFitnessandMedicalReview.htm>

Most of the energy devoted to driver impairment by this association, and that of many other state and federal organizations, has to do with America's aging population, and an increasing number of drivers with medical conditions associated with advanced age, such as degraded visual acuity, coordination, and dementia.

Some states have formed Medical Advisory Boards to evaluate and request tests for possibly impaired drivers who have come to the attention of the licensing agency, or who have reached a certain age. One study done for the New Jersey Department of Transportation concluded that such boards, staffed by physicians, ". . . are essential to the medical review process and determining fitness to drive."<sup>4</sup>

At this time, the ombudsman does not recommend a particular change in DMV's system, but does encourage all three agencies to take a hard look at the current reporting and reexamination mechanisms.

This complaint will be closed as *unsupported*.

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<sup>4</sup> "Medical Review Case Reporting at MVC"; Final Report, September 2006, New Jersey Department of Transportation