State of Alaska
Ombudsman

Ombudsman Complaint A2014-1621
Finding of Record and Closure
December 30, 2014

This investigated report has been edited and redacted to remove information that is confidential by law or that violates the privacy interest of the parties involved.

On October 8, 2014, an inmate complained to the Ombudsman's office that the Department of Corrections (DOC) Palmer Correctional Center (PCC) had imposed disciplinary sanctions on him without due process of law. The inmate was found guilty of violating 22 AAC 05.400(b)(10), which prohibits inmates from committing Class A or unclassified felonies.

The ombudsman opened an investigation into the following allegations, stated in terms conforming to AS 24.55.150:

> ***ALLEGATION 1: CONTRARY TO LAW: The Department of Corrections denied an inmate due process of law by failing to adequately maintain the chain of custody of evidence in an evidentiary hearing.***

During the investigation the ombudsman added the following allegations to the complaint, under the ombudsman's initiative per AS 24.55.120.

> ***ALLEGATION 2: CONTRARY TO LAW: The Department of Corrections violated regulatory requirements by basing discipline on an incident report that was not written by the person with direct knowledge of the incident.***
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> ***ALLEGATION 3: CONTRARY TO LAW: The Department of Corrections violated the law and denied an inmate due process of law by failing to make findings of fact in a disciplinary hearing.***

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

INVESTIGATION

The complainant alleged violations of his rights in a disciplinary hearing. The investigator reviewed the entire written disciplinary record of the case and listened to the audio recording of the hearing, and reviewed all institutional appeal documents. The investigator also questioned the superintendent by email and interviewed officials in the Alaska Department of Administration, Division of Personnel and Labor Relations.

The evidence at the hearing consisted of a one-page "Incident Report", a one-page "Evidence Record," and a photocopy of what appears to be two small zip-type plastic bags and one larger plastic bag, photographed next to a ruler.

The Incident Report, written by a PCC Sergeant, in its entirety, reads:

> On 9/4/14 at approximately 1630, Property Officer [Name Redacted] handed me an envelope with an unknown substance in it. He found it in inmate [Name Redacted] property. It was the end of my shift and I glanced at it and put it in my cargo pocket.
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> On 9/5/14 at approximately 0945 I performed a Nik[1] test on the substance and it was positive for heroin. Security Sgt. [Name Redacted]was notified and I relinquished custody to him. EOR.

This report was read into the record at the inmate's hearing. The inmate declined to have the writer of the report present. He was advised that the incident that was the basis of the disciplinary case may be referred to law enforcement for criminal prosecution, and that he was therefore entitled to have an attorney present to advise him on his Fifth Amendment right to not incriminate himself. The inmate waived the right to consult with an attorney. When asked, he pleaded not guilty, and made the following statement:

> Well from what I read here in the write up she took it home. We don't know what it was that was in my property. I don't know what it was that was in my property. Where is the chain of evidence at? It just shows, chain of evidence shows from him handing it to her, and then she left with it, is what I'm assuming, because she didn't say she put it into the evidence locker, there were, where's the evidence locker number at? I mean where's the chain of evidence at? It could have been anything. So, that's all I got to say about it.

Based on the above, the committee found the inmate guilty. The committee prepared a "Report of Disciplinary Decision" on a preprinted form. The report form did not contain any findings of fact or an explanation of how the committee reached its decision, other than the words, "Chain of evidence & report."

The Disciplinary Committee issued the following sanctions to the inmate:

- 60 Days Punitive Segregation
- 60 Days Loss of Commissary/Rec Sales
- 90 Days loss of Good Time

The inmate appealed the decision to the superintendent with an appeal form bearing the following statement:

> I've been in the hole since 8-29. On 9-4 the property officer went through my property, found an envelope with some substance in it. He gave the envelope to SGT [Name Redacted]. [The Sergeant] glanced at it, stuck it in [his/her] cargo pocket and since it was the end of [his/her] shift . . . went home. The next day at 9:45 in the morning . . . finally got around to testing whatever it was that they found in my property. It tested positive for heroin. I got a b10 write up. I'm appealing because SGT. [name redacted] didn't do the proper procedures and . . . also took the substance off PCC property. If I'm

[1] NIK stands for Narcotics Identification Kit. The NIK field presumptive test kits are part of a narcotic, drug identification system that is designed to rapidly identify substances of being illegal or controlled substances. http://www.alternateforce.net/nik-drug-test-kit.html

> not mistaking (sic), the proper procedure was to test it right then and there and then log it it (sic) into the evidence locker. This [he/she]did not do. I've been at P.C.C. rest on back

Whatever the inmate had printed on the back of the appeal form was not provided to the ombudsman by the Department of Corrections. In response, the superintendent wrote,

> FAILURE OF A STAFF MEMBER TO FOLLOW THE REGULATIONS SET OUT IN THIS CHAPTER DOES NOT INVALIDATE A DECISION ABSENT A SHOWING OF PREJUDICE BY THE PRISONER ACCORDING TO 22 AAC 05.610. AS THE PROPERTY OFFICER WAS INVENTORYING THE PRISONERS'S PROPERTY, HE FOUND CONTRABAND, WHICH TESTED POSITIVE FOR HEROIN. APPEAL: DENIED EOR.

The inmate appealed the superintendent's decision to the director of institutions. His appeal stated:

> On 8/29/14 I was placed in seg pending a C-15 write-up. I was later given an itemized list of my roll up property signed C.O. [Name Redacted], who stated he did not roll up my property, that it was my cellie who rolled it up. On 9/5/14 I was given disciplinary paperwork for a B-10, alleging that my property box had been searched on 9/4/14 and C.O. [name redacted] found a white envelope with an unknown substance inside. At 1630 C.O. [name redacted]gave it to Sergeant [name redacted] who isn't the property SGT. SGT. [name redacted] "glanced at it and put it in a pocket of [his/her] cargo pants as it was the end of [his/her] shift." SGT. [name redacted] then went home for the day taking the envelope off of prison property. The next day at 0945 [he/she] tested a substance that tested positive for Heroin. I am appealing this write up for two reasons:
>
> 1.) This substance that was allegedly found in my property was taken off P.C.C. property overnight, which even Superintendent Anderson acknowledges as violation of procedure.
> 2.) All of my property was issued to me prior to my being sent to seg on 8/29/14 and no unknown substances were found then. I have had zero visits during my stay at P.C.C. Ms. Anderson quotes Alaska Statute 22 AAC 05.610 as "harmless error". Only a fool would consider a violation of regulations as harmless error. This B-10 would affect my classification score possibly closing me out. It will also affect my furlough eligibility, and could possibly result in criminal charges. This is in no way a harmless error.

DOC's response, signed by Deputy Director of Institutions F. Lee Sherman, stated:

> I fully concur with the Supt.'s decision. Also I noticed you never claimed the contraband was not yours, just that protocol was not followed. I believe you are guilty. Appeal denied.

The ombudsman investigator concluded the investigation by contacting Xavier Frost in the Division of Personnel and Labor Relations. Mr. Frost stated that the Sergeant [name redacted] had self-reported that he/she had taken the heroin home with him/her. The division determined that the incident was a one-time mistake, and that there were no apparent issues regarding substance use or other misconduct on the Sergeant's [name redacted] part that required action by the division. In response to an email to the superintendent of the facility, Assistant Superintendent Earl Houser stated that the Sergeant did receive a Letter of Instruction.

ANALYSIS AND PRELIMINARY FINDING

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; 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 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, 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.

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.

> ***ALLEGATION 1: CONTRARY TO LAW: The Department of Corrections denied an inmate due process of law by failing to adequately maintain the chain of custody of evidence in an evidentiary hearing.***

The inmate contends that by taking the heroin home, the Sergeant [name redacted]rendered the heroin unreliable as evidence, invoking the term "chain of custody." The superintendent determined that any violation of regulation, policy, or procedure the sergeant may have committed by taking the evidence home with him/her was harmless error. The inmate contends in turn that the error was not harmless, as he was found guilty and suffered the consequences.

"Chain of custody" is a legal term that refers to "the movement and location of real evidence, and the history of those persons who had it in their custody, from the time it is obtained to the time it is presented in court."[2] In the inmate's case, the evidence contained a form entitled "Evidence Record." In a space for the purpose at the top of the form, a description of the baggie containing the heroin is printed. Below, in a section entitled "Chain of Custody," the form provides lines for each person having possession of the evidence to acknowledge by printed name and signature the time at which they received and relinquished the evidence. This form shows that the Sergeant received the evidence on September 4, 2014, from the Property Officer, and delivered it to another Sergeant on September 5, 2014.

Black's Law Dictionary contains a discussion of chain of custody that, while not based on a legal authority, is instructive:

[2] *Black's Law Dictionary* 260 (9th ed. 2009).

> Chain of custody requires testimony of continuous possession by each individual having possession, together with testimony by each that the object remained in substantially the same condition during its presence in his possession. All possibility of alteration, substitution or change of condition need not be eliminated. For example, normally an object may be placed in a safe to which more than one person had access without each such person being produced. However the more authentication is genuinely in issue, the greater the need to negate the possibility of alteration or substitution.[3]

While it is not clear what the Sergeant [name redacted] did with the heroin while he/she was at home, or wherever he/she went between the time he/she left work on September 4 and the time he/she returned on September 5, this does not necessarily mean that the chain of custody was broken to the degree that the evidence was useless. There is no indication that Sergeant [name redacted] necessarily left the evidence anywhere that was not secure, and he/she was available to testify and answer any questions about where the evidence was, how he/she secured it, and who had access to it. On the other hand, this unusual handling of critical evidence cannot be said on its face to be harmless error. It's understandable that the inmate has declined to directly accuse the Sergeant [name redacted] of framing him by substituting material, but it is also true that neither he nor DOC can prove one way or another what happened to the evidence during this time, and the opportunity for substitution was much greater than if the evidence had been directly placed in an evidence locker.

On this issue, the fact that the inmate declined to exercise his right to question the Sergeant is significant. If authentication was genuinely at issue, one would expect the inmate to have questioned the Sergeant [name redacted] about what he/she did with the heroin from the time he/she left the facility until the time he/she returned, and such questioning might have revealed lapses that would call into question the integrity of the evidence. However, the Sergeant's incident report stated that the material he/she tested was the same material he/she received from the CO, and the inmate declined to challenge him/her on the matter. The committee would have been within its rights to find the Sergeant's report credible on its face, if it had made findings of fact. The ombudsman proposes to find this allegation ***unsupported***.

Aside from its effect on the outcome of the inmate's disciplinary case, this complaint initially appeared to present the alarming prospect of a corrections officer taking home a bag of heroin with remarkably casual indifference. The investigation in this case showed that the Sergeant was not as casual about the matter as his/her incident report in this case would suggest. In fact, the Sergeant had been on his/her way to deliver the evidence properly near the end of his/her shift when he/she was distracted by an unrelated disturbance in which his/her assistance was required, and he/she forgot about what was in his/her pocket. Upon his/her return to work the next day, he/she reported the matter, and it was referred to the Division of Personnel and Labor Relations. The division determined that the matter involved a mistake, properly self-reported, and not misconduct. The Sergeant was issued a letter of instruction. While the ombudsman finds disingenuous the assertion that the Sergeant did not know what was in the baggies when he/she took them home, this incident does appear to be an isolated error properly addressed, and the ombudsman therefore declines to consider the matter except as it relates to the inmate's case.

[3] Id., citing Michael H. Graham, *Federal Rules of Evidence in a Nutshell* 402 (3d ed. 1992).

ALLEGATION 2: CONTRARY TO LAW: The Department of Corrections violated regulatory requirements by basing discipline on an incident report that was not written by the person with direct knowledge of the incident.

According to 22 AAC 05.410(b), disciplinary reports "must be written by the staff member with the most direct knowledge of the incident." The Alaska Supreme Court in 2011 stated that "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' of the incident."[4]

In this case, the Sergeant wrote the report, even though he/she had no firsthand knowledge of where the substance came from or the circumstances under which it was found. The source of his/her knowledge that the Property Officer found the substance among the inmate's belongings appears to be based on hearsay from the Officer, although that is not clear from the report. While the Sergeant did have the most direct knowledge that the substance in his/her pocket was heroin, there was no way for the hearing officer to know from firsthand evidence where the heroin originally came from and what facts connected the inmate with the heroin.

A fair argument could be made that the inmate waived his rights under 22 AAC 05.410(b) because he did not demand to question the Sergeant or the CO at the disciplinary hearing. However, at a disciplinary hearing, a prisoner is presumed innocent of an infraction, and the facility has the burden of establishing guilt.[5]

> **22 AAC 05.455. Rules of evidence in disciplinary hearings; lesser included infractions** (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.

A finding of guilt must be based only on evidence presented at the hearing.[6] While it is true that, absent a demand for the presence of the writer of the report, the report itself alone may serve as evidence supporting a guilty finding, in this case it is not likely that the Sergeant's presence would have been sufficient to inform the hearing officer of facts supporting a guilty finding. The report should have been written by a person with direct knowledge that the heroin belonged to the inmate, if indeed that is what the facility was trying to prove.

Regardless of whether a court would find the error to be a basis to reverse the committee's decision under the circumstances of this case, it cannot be disputed that the facility did violate the important requirement of 22 AAC 05.410(b) to have the report written by somebody who had the most direct knowledge of the facts. This violation of the law is not excused by the fact that

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[4] *James v. State, Department of Corrections*, 260 P.3d 1046, 1054 (2011).
[5] 22 AAC 05.455(a).
[6] *Id.*

the inmate lacked the legal skills to correct the department's error by calling the witnesses that the facility should have called to make its case. The ombudsman proposes to find this allegation ***justified***.

Agency Response:

On November 17, 2014, Superintendent Tomi Anderson wrote to the Ombudsman:

> This letter is to notify you that the Alaska Department of Corrections at Palmer Correctional Center will accept the Ombudsman's recommendation to rehear disciplinary case 14-324 for prisoner [name redacted] while following the requirements of the law contained in 15 AAC 05.400-480 and the cases cited in the Ombudsman's Preliminary Finding Complaint A2014.1621 dated November 3, 2014. Thank you.

In response, the Ombudsman wrote to Superintendent Anderson on December 3, 2014, and invited further comment on the proposed findings, as well as a detailed explanation of the steps that would be taken to address the issues raised in the preliminary hearing. At this time the Ombudsman also requested copies of audio recordings of further proceedings and copies of related documents as proof of corrective action.

On December 23, 2014, Acting Commissioner Ronald Taylor wrote in part,

> I am responding to your letter of December 3, 2014 to Palmer Superintendent Tomi Anderson regarding the investigation of Inmate [name redacted] disciplinary proceedings. The Department's primary response to the preliminary report was to rehear the disciplinary proceedings regarding Inmate [name redacted], in order to cure the procedural defects that were found . . . The second allegation, which was added to the complaint by your staff, states that the writer of the report was not the person with direct knowledge of the incident. This procedural technicality was addressed upon rehearing the matter, as the Property Officer [name redacted] submitted a report and testified at the hearing . . .

Ombudsman Comment:

While the agency has accepted the finding that the allegation was justified and pledged to rectify the situation, the agency has failed to provide the requested copies of audio recordings of the second hearing and copies of any documents from the second hearing that would prove compliance with the law. The Ombudsman cannot find the allegation has been rectified; this allegation will be closed as ***justified***.

The acting commissioner's characterization of a violation of the Fourteenth Amendment as a "procedural technicality" that was "added to the complaint by your staff" shows a disturbing nonchalance on the part of the agency. The allegation was not surreptitiously added by a staff member; it is the Ombudsman's own concern over constitutional violations of a kind that the United States Supreme Court has carefully considered and found to be intolerable in this country.

ALLEGATION 3: CONTRARY TO LAW: The Department of Corrections violated the law and denied an inmate due process of law by failing to make findings of fact in a disciplinary hearing.

In order to protect the constitutional rights of inmates in disciplinary hearings, 22 AAC 05.475(a) requires that, if a prisoner is found guilty of an infraction, the committee must prepare in writing a statement of the disciplinary tribunal's adjudicative and dispositive decisions and the reasons

for those decisions, including a statement of the evidence relied upon and the specific facts found to support the disciplinary tribunal's decision.

The Alaska Supreme Court has had several occasions to review the rights of inmates in prison disciplinary hearings. The court has found that "like their federal counterparts, state constitutional rights do not entitle prisoners to the full panoply of rights accorded in criminal proceedings. Nonetheless the rights are substantial."[7]

In one of the first Alaska cases involving due process rights in disciplinary proceedings, *McGinnis v. Stevens*, the court adopted the then-recent findings of the United States Supreme Court in *Wolff v. McDonnell* that forfeiture of statutory good time and placement in "solitary" confinement each constitutes deprivation of "liberty" under the Fourteenth Amendment.[8] The Alaska court found that the Alaska Constitution provided the same protections as the U.S. Constitution in this context, and some additional protections.

The *Wolff* court specifically found that the Fourteenth Amendment required "a written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action."[9]

In *Brandon v. Department of Corrections*, Brandon claimed that the hearing committee report was inadequate because there were no findings of fact by the disciplinary committee. The committee simply stated that Brandon was found guilty. Brandon argued that without any findings of fact he could not know whose testimony was believed and what evidence was relied on. The court found that "while the [incident] report is admissible evidence and may alone provide the basis of the committee's decision, the committee is not relieved of the requirement to make specific findings of fact." The court further explained,

> Without findings of fact it is difficult for an inmate to know exactly what formed the basis for the conviction, and to obtain meaningful review. In this case it is clear that not everything in the reports was true, otherwise Brandon would have been found guilty of the stolen radio charge. Furthermore the reports list "contraband" seized from Brandon including two large paper bags of candy, two ballpoint pens, one roll of tape, twelve AA batteries and three AAA Batteries. There are no findings that these items in fact are all "contraband." While the disciplinary committee may rely on the reports, it is still the task of the committee to be the finder of fact and determine which facts found in the reports support violations of regulations.[10]

To ensure protection of this constitutional right, 22 AAC 05.475 requires a disciplinary tribunal to prepare a written decision document that contains "a statement of the disciplinary tribunal's adjudicative and dispositive decisions and the reasons for those decisions, including a statement of the evidence relied upon and the specific facts found to support the disciplinary tribunal's decision."

The inmate was found guilty of violating 22 AAC 05.400(b)(10), which prohibits inmates from committing Class A or unclassified felonies. In order to sustain a guilty finding, it was necessary for the disciplinary board to conclude that the inmate did some act that, if proved beyond a reasonable doubt in a criminal case, would result in conviction of a Class A or greater felony.

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[7] *Brandon v. Dept. of Corrections*, 865 P 2d 87, (1993); *McGinnis v. Stevens*, 543 P.2d 1221 (Alaska 1975).
[8] *McGinnis* at 1225, citing *Wolff v. McDonnell*, 418 U.S. 539 (1974).
[9] *Wolff* at 564.
[10] *Brandon* at 91.

The committee was then required by law to state its decision in writing, to state the specific facts that would constitute the criminal offense, and to state specifically which evidence it relied on to reach its decision.

The Incident Report that is the accusatory document does not specify which Class A or unclassified felony it is alleged that the inmate committed. It merely alleges that someone else found some heroin with the inmate's property. The committee may have inferred that the inmate was aware of the heroin's presence in his property and that it was his, but it did not say so. The committee did not say what it believed had happened, or why it believed that. The committee's report says the evidence relied on was "chain of custody & report," which is to say, the only documents that were submitted as evidence. The report does not indicate what facts in the incident report the committee relied on to find the inmate guilty.

The most that can be inferred from the incident report is that the heroin that was found belonged to the inmate. Heroin is a Schedule IA controlled substance.[11] Possession of a Schedule IA controlled substance, in any amount, is a Class C felony.[12] To raise possession of heroin to a Class A felony, the department would have had to prove at the hearing that the inmate manufactured the substance, delivered it, or possessed it with the intent to deliver.[13] In this context, "deliver" means "the actual, constructive, or attempted transfer from one person to another of a controlled substance whether or not there is an agency relationship."[14]

There are no findings of fact in the committee's report that the inmate did anything that would constitute a Class A or unclassified felony, nor is there even a hint in the record that would suggest conduct rising to that level of criminal offense. Because the committee merely found the inmate guilty with no explanation, it has been impossible for the inmate to defend himself. In this way, the committee has violated DOC regulations and the inmate's constitutional rights. The ombudsman therefore proposes to find this allegation ***justified***.

Agency Response:

In his letter of December 23, 2014, Acting Commissioner Ronald Taylor wrote in part,

> The third issue added by your staff, alleged that the Department failed to make findings of fact at the initial disciplinary hearing. Again, this deficiency was cured during the rehearing process.

Ombudsman Comment:

As in the second allegation, the agency has accepted the finding of justification, but failed to document rectification. Because the agency has not provided copies of written findings of fact, the Ombudsman cannot evaluate them for legal adequacy. This allegation will be closed as ***justified.*** Again, the Ombudsman notes that a finding in a preliminary report signed by the ombudsman is a finding of the Ombudsman herself, not a mere "issue added by your staff."

[11] AS 11.71.140(d)(11).
[12] AS 11.71.040(a)(3)(A)(i).
[13] AS 11.71.020(a)(1).
[14] AS 11.71.900(6).

PROPOSED RECOMMENDATIONS:

> ***RECOMMENDATION 1: The finding of guilt in this case should be vacated and any resulting changes to the Complainant's classification and custody level should be reversed.***

The violations of the inmate's constitutional rights in this case were not mere technicalities. There was simply no evidence presented at the hearing that would even suggest conduct egregious enough to justify a guilty finding of the violation the inmate was accused of. Because the disciplinary committee failed to even attempt to explain how it arrived at its finding of guilt, it is impossible for the inmate to file a meaningful appeal, and it is impossible for a court or any other entity to review and evaluate the disciplinary committee's decision. There is no other meaningful remedy available for these errors other than to vacate the decision, and start all over from the beginning if the Department believes it can make a case.

Agency Response:

In his letter of December 23, 2014, Acting Commissioner Taylor wrote,

> In the report, you also listed two recommendations for the Department's consideration. I must respectfully disagree with the finding in your first recommendation that "there was no evidence presented at the hearing that would even suggest conduct egregious enough to justify a finding of guilt." Heroin was found hidden in Inmate's [name redacted] property and, besides the technical errors your staff pointed out, there is no reason to believe it was not his heroin. The department considers the possession of drugs to be a very serious issues and will continue to vigorously pursue such disciplinary proceedings.

Ombudsman Comment:

The agency has misread and misquoted the ombudsman's recommendation. The recommendation did not say, "there was no evidence presented at the hearing that would even suggest conduct egregious enough to justify a finding of guilt." The recommendation noted a lack of evidence that would "suggest conduct egregious enough to justify a guilty finding *of the violation the inmate was accused of*" (emphasis added).

The inmate was charged with commission of a Class A or unclassified felony under 22 AAC 05.400(a)(10). The accusation did not specify *which* Class A or unclassified felony the inmate was accused of, nor did the department prepare findings of fact that stated which Class A or unclassified felony the inmate had been found guilty of, or what evidence the department relied on to reach a finding of guilt.

The following statutes govern possession of heroin:

> **AS 11.71.140. Schedule IA.**
>
> * * * * *
>
> (d) Schedule IA includes, unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:
>
> * * * * *
>
> (11) heroin;

AS 11.71.040. Misconduct involving a controlled substance in the fourth degree.

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person

* * * * *

(3) possesses

(A) any amount of a

(i) schedule IA controlled substance….

* * * * *

(d) Misconduct involving a controlled substance in the fourth degree is a class C felony.

The ombudsman acknowledges that the facility has presented some evidence of commission of a Class C felony. Had the inmate been accused of the lesser offense of violating 22 AAC 05.400(c)(7), which prohibits "possession, use, or introduction of contraband . . . such as unauthorized drugs," this would be a very different case. But the department has to date failed to provide evidence of commission of a Class A or unclassified felony, or to even state which Class A or unclassified felony it believes the inmate has committed.

RECOMMENDATION TWO: If the Department wishes to conduct a new disciplinary hearing, it should follow the requirements of the law contained in 22 AAC 05.400-480 and the cases cited in this report.

If the Department feels that it does have valid evidence that the inmate has violated department rules, it should begin the case anew and properly present a case in a genuine fair hearing. In short, the accused should be informed specifically what it is that he has been accused of, and the department should present genuine evidence that supports the accusation. The disciplinary committee should bear in mind that the department has the burden of proving its case, and that the accused is presumed innocent. The committee should critically examine the evidence with an open mind to see if the department has met its burden, instead of merely "rubber stamping" the accusations, and it should keep in mind that it is the department's duty to produce witnesses who can make the case against the accused.

One would expect the committee to ask detailed questions of witnesses, even if the accused does not. If the committee finds the accused guilty, it should explain in writing exactly what it believes the accused has done that violates a specific rule, why it reached that conclusion, and specify which evidence it found credible. In specifying evidence relied on, it is not enough for the committee to simply write "report." It must say specifically which factual allegations it found credible, and why. The person drafting the findings of fact should consider the Report of Disciplinary Decision form as a guide, but not expect to be able to fit detailed findings in the small blank spaces contained on the two-page form. The form contains room for a list of attachments, and any narrative meeting the requirements of the law will almost certainly require extra pages.

Agency Response:

In his December 23, 2014, letter, Acting Commission Taylor wrote:

> Your second recommendation makes a number of conclusions regarding what due process is required in prison disciplinary proceedings. Prison disciplinary proceedings are

> generally informal, streamlined administrative proceedings and are not considered administrative appeals that are referred to the superior court. They are governed by a much lower standard of evidence. Thus I cannot accept your staff's extensive recommendations that are followed in administrative appeals to alter our current disciplinary procedures.

Ombudsman Comment: DOC's comments above are addressed in the order stated:

> Your second recommendation makes a number of conclusions regarding what due process is required in prison disciplinary proceedings.

Conclusions regarding what process is due in prison disciplinary proceedings are properly reached not by the ombudsman or the department, but by the United States Supreme Court and the Alaska Supreme court. The United States Supreme Court reached the conclusion in *Wolff v. McDonnell* that forfeiture of statutory good time and placement in solitary confinement each constitute deprivations of liberty under the Fourteenth Amendment. While the Alaska Supreme Court noted in *Brandon v. Department of Corrections* that prisoners in disciplinary board hearings are not entitled to "the full panoply of rights accorded in criminal proceedings," the court found that "Nonetheless the rights are substantial." Those rights, and the manner in which they were violated, are discussed in the report and need not be restated.

The acting commissioner wrote:

> Prison disciplinary proceedings are generally informal, streamlined administrative proceedings and are not considered administrative appeals that are referred to the superior court.

Ombudsman Comment: The Department's own regulations in 22 AAC 05.480 prescribe procedures for inmates to appeal decisions in disciplinary proceedings. 22 AAC 05.480(o) specifically provides that "A decision on appeal that has no further level of appeal under this section is a final decision and order of the department that may be appealed to the superior court in accordance with AS 33.30.295 and the Alaska Rules of Appellate Procedure." The agency's response to the recommendation reflects a disturbing lack of familiarity with important elements of the department's own laws.

The acting commissioner wrote:

> They [prison disciplinary proceedings] are governed by a much lower standard of evidence. Thus I cannot accept your staff's extensive recommendations that are followed in administrative appeals to alter our current disciplinary procedures.

Ombudsman Comment: The standard of evidence in a disciplinary proceeding is governed by the following Department of Corrections regulation:

> **22 AAC 05.455. Rules of evidence in disciplinary hearings; lesser included infractions**
>
> (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 preponderance of the evidence standard is precisely the standard of proof used in almost all state administrative hearings, including hearings before the Alaska Office of Administrative Hearings: "Unless otherwise provided by applicable statute or regulation, the burden of proof and of going forward with evidence is on the party who requested the hearing or made the motion under consideration, and the standard of proof is preponderance of the evidence."[15]

The law clearly provides no basis for the Department of Corrections to adhere to lower standards in disciplinary hearings than other agencies adhere to in other kinds of administrative hearings. When the Department of Corrections proposes to extend a human being's period of incarceration by revoking statutory good time, or to place a person in punitive solitary confinement, and the person contests the decision by pleading not guilty to the accusation, there is nothing incongruent about a law that requires the Department of Corrections to observe the same burden of proof that, for example, the Department of Revenue would employ when a person protests denial of a permanent fund dividend, or the setting of a child support amount.

Disciplinary hearings may be, as the Department asserts, "generally informal, streamlined administrative proceedings." But the consequences are substantial for the people who are subject to them. In the inmate's case, the Department extended the inmate's incarceration period by 90 days, and subjected him to 60 days of punitive segregation, or time "in the hole," as it is referred to by inmates. Anyone who has served three months in jail, or spent two full months in solitary confinement in a six-by-nine foot cell, would probably agree that a hearing on the matter merits as much process as a hearing on whether to deny a PFD.

The Ombudsman finds disturbing the Department's disregard and even lack of familiarity with its own laws governing prison discipline, and with the nonchalance with which the Department continues to regard decisions of both the state and federal supreme courts.

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[15] 2 AAC 64.290(e).