



## **INVESTIGATIVE REPORT**

### **Final of Record and Closure**

**Ombudsman Complaint A2004-0614  
December 4, 2006**

### **SUMMARY OF THE COMPLAINT**

In April 2004, the Alaska Department of Commerce, Community and Economic Development (DCCED) Division of Community Advocacy (DCA) announced the FY 2005 funding for the Alaska Regional Development Organization (ARDOR) program. An ARDOR is a non-profit organization supported by public and private interests working together to achieve economic development in their region. Generally, ARDORs conduct research and planning, and coordinate and provide services designed to stimulate and encourage economic development in their regions. There are 11 ARDORs in Alaska.

DCA announced that for the first time since the program was established in 1988, funding to the 11 ARDORs was to be distributed among three tiers: Tier I received the lowest amount of funding; Tier II received mid-level funding which roughly matched funding for FY04, and Tier III received the highest amount of funding. The Lower Kuskokwim Economic Development Council (LKEDC) applied for Tier III status but was designated as Tier I, resulting in a funding reduction of \$14,336 compared to FY 04.

Carl Berger, the executive director of LKEDC, asked DCA to explain LKEDC's Tier I ranking and how he could remedy the situation. Mr. Berger also complained that DCA created a conflict of interest by appointing ARDOR executive directors to the Tier Review Committee that determined how much funding each ARDOR would receive.

DCA responded that LKEDC was placed in Tier I because it applied for Tier III funding without having met all of the Tier II requirements. DCA also confirmed that four ARDOR executive directors served as Tier review committee members. DCA didn't answer Mr. Berger's question about how to remedy his low ranking.

After receiving this response, Mr. Berger brought his complaint to the Office of the Ombudsman. On July 2, 2004, the ombudsman opened an investigation into the following allegations stated in terms that conform with AS 24.55.150.

***Allegation 1: DCA unreasonably placed LKEDC in the Tier I funding category without giving it an opportunity to fulfill the Tier II requirements. This greatly reduced the funds granted to LKEDC for FY05.***

***Allegation 2: DCA unfairly created a conflict of interest by appointing persons to the ARDOR Tier Review Committee who were also executive directors of agencies applying for ARDOR funding.***

***Allegation 3: DCA unreasonably required ARDORs to provide costly financial reports and penalized ARDORs that couldn't provide the reports. This requirement is not supported by Alaska Statute.***

## **INVESTIGATION**

Assistant Ombudsmen Charlise Huhndorf-Arend and David Newman investigated the allegations and forwarded their report to the ombudsman. Ms. Huhndorf-Arend gave written notice of investigation to DCA on September 23, 2004 in accordance with AS 24.55.140.

The investigators interviewed the complainant, Mr. Berger, ARDOR Program Manager Midge Clouse, and DCA Director Gene Kane; and reviewed the following:

- LKEDC's FY05 ARDOR Tier Application dated March 15, 2004;
- ARDOR Tier system funding information;
- ARDOR financial reports for FY04, FY05, and FY06;
- ARDOR annual reports posted on-line on the DCA Web site;
- Correspondence, including letters and e-mails, between Mr. Berger and Ms. Clouse, Mr. Kane, and DCED Commissioner Edgar Blatchford during the months of March through June of 2004;
- AS 44.33.020 and AS 44.33.895; 3 AAC 57.010 – 3 AAC 57.900;
- 2 AAC 45.010, Single Audit Requirements.

## **BACKGROUND**

The Alaska Legislature established the ARDOR program in 1988 to help coordinate economic development activities in their ARDOR regions. Specifically, the funding was designed to help the ARDORs:

- enable communities to pool their limited resources, and work together on economic development issues;
- develop partnerships among public, private and other organizations;
- offer a technical, nonpartisan capacity to develop and implement an economic development strategy; and

- provide needed technical assistance via direct links with local citizens.<sup>1</sup>

Each ARDOR is guided by a board of directors who are appointed or elected by organizations in their region. The board of directors has the responsibility to hire an executive director to oversee the day-to-day operations.

Under the program, the DCCED, through DCA, annually awards approximately \$620,000 in state funds to be divided among all state-certified regional development ARDORs. During FY05, 11 ARDORs were operating; the same ARDORs are operating today.

LKEDC is one of the ARDORs that receives state funding. LKEDC was formed in 1991 to promote economic development activities in Bethel and 26 surrounding villages.<sup>2</sup> Carl Berger has been the executive director and only employee of LKEDC since 1992. LKEDC's FY04 appropriation was nearly \$48,000. LKEDC's FY05 grant was reduced to \$33,385.

In FY 2004, all of the ARDORs received the same amount of money from the ARDOR program. Prior to FY 2005, DCA worked with the ARDORs to implement a new award process referred to as the "Tier System." Under this system, each ARDOR would receive funding based on its Tier designation. The Tier system was designed to reward ARDORs that offered more services and accomplished more to develop their region's economy.

Under the Tier funding plan, all ARDORs receive the base funding for Tier I. If an individual ARDOR meets additional requirements, the ARDOR receives its share of funding allocated for Tier I plus a proportional share of Tier II funding divided among those ARDORs that have been approved for Tier II status. Likewise, ARDORs meeting criteria established for Tier III share Tier III funding in addition to the Tier I and Tier II funding for which they originally qualified.

The FY 2005 Tier application form listed funding criteria divided by tiers and directed ARDOR applicants to check off those criteria that the ARDOR had met.

The application first listed three categories of overall requirements for the ARDORs. They follow:

The first page of the FY05 ARDOR Tier Application states:

Check all requirements that apply to your ARDOR. Include supplemental information as needed.

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<sup>1</sup> See ARDOR program Web site at <http://www.commerce.state.ak.us/dca/ardor/ardor.htm>

<sup>2</sup> The villages in the LKEDC are: Akiachak, Akiak, Atmaultluak, Bethel, Chefornak, Chevak, Eek, Goodnews Bay, Hooper Bay, Kasigluk, Kipnuk, Kongiganak, Kwethluk, Kwigillingok, Mekoryuk, Napakiak, Napaskiak, Newtok, Nightmute, Nunapitchuk, Oscarville, Platinum, Quinhagak, Toksook Bay, Tununak, Tuluksak, Tuntutuliak. The region is arguably the poorest region in the state in terms of economic development and personal income.

Staff Requirements:

- Office is open to public with staff available; office site is established and staff is available to the public in the office or in the field. This includes a Web site, access to e-mail, and voice mail on the phone system. The public is informed on how to reach staff.
- At least one staff person demonstrates they can be considered “professional” with appropriate economic development experience and/or education.

**Board Representation Requirements:**

- For Tier I ARDORs only**, board participates in at least one board training session/year. New board members attend training.
- Board tracks number of volunteer hours donated to the ARDOR and economic development activities.
- Board meets at least twice/year, if no executive committee exists.
- Executive board member participates in at least 50% of the board meetings.
- Executive committee members participate in at least 50% of the executive committee meetings.
- Board has/adopts an attendance policy for board members.
- Each ARDOR clearly defines the selection process for board members and informs the public.
- Board members include locally elected officials and representatives from business, service industries, transportation, utilities, labor, the professions, and educational institutions.
- Annual certification that the board composition meets the ARDOR regulatory requirements.

**Organizational Membership Requirements:**

- Local participation requirements are reflected in support for the organization and local cash contributions.

The directions on the application are quoted below:

Check all qualifying criteria that pertain to the Tier you are applying for and all qualifying criteria in the lower tier(s) that apply. If the ARDOR does not currently meet a qualifying criterion, that criterion must be met by October 1, 2004, to remain in that tier. If the criterion is not met by October 1, 2004, the ARDOR’s grant agreement will be amended to reflect funding at the lower Tier level.

**Tier I Qualifying Criteria**

- ARDOR certification standards are met and maintained;
- Established office, phone, fax;
- Record of board meetings, committee meetings kept on file;
- Financial records maintained, budget developed, leverage of other funds calculated;
- Measure of volunteer hours kept, by project area if possible;
- Budget levels as an element of threshold for a tier are met – match requirements met;

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- Measure assignment of tasks in support of specific state agency goals. Included in reports;
- Measure collaborative efforts with other economic development organizations, both public & private. Included in grant reports;
- Establishment of regional development plans;
- Measure of meetings, attendance, action items, leadership and volunteers, etc., kept on file;
- At least one full- or part-time staff position maintained;
- Board fully populated and representative of the region with a proscribed [sic] elections/appointment process;

**Tier II Qualifying criteria**

- Measure of outreach, meetings, attendance, action items, etc. kept on file;
- Organization type evaluated, for inclusiveness of various stakeholder types in region;
- Web site developed, maintained;
- Budget levels as an element of threshold for a tier are met – match requirements met;
- Local and private sector participation established and measured through financial contributions;
- Maintenance of regional development plans, or development of CEDS;<sup>3</sup>
- Complete peer review every four years;
- Measure of projects undertaken, completed, and economic impact assessed;
- Annual independent financial compilation completed;

**Tier III Qualifying Criteria**

- Budget levels as an element of threshold for a tier are met – match requirements met;
- Other designations from and/or partnerships with: EED, RC&D<sup>4</sup>, regional investment councils, etc.
- Capital needs assessments and prioritization process in place and maintained, using CEDS/Regional strategy/borough lists;
- Economic meetings/summit held every 3 year(s) (funding summits).
- Supplemental programs in place (workforce development, small business development, other);
- Complete constituent satisfaction/evaluation every four years;
- Annual independent financial audit or review completed.

After the application documents and funding criteria were established for FY 05, Ms. Clouse acknowledged in an e-mail to the ARDORs that “many of the Tier criteria need to be better defined: client satisfaction survey, peer review, supplemental programs, the regional strategy economic forums, to name just a few.”

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<sup>3</sup> Comprehensive Economic Development Strategy

<sup>4</sup> Resource Conservation and Development

***FY05 Tier Funding Level Formula***

The total amount of money available to each Tier is set in a formula. Ms. Clouse provided the following explanation on the Tier funding formula amounts. The information she provided follows verbatim.

In FY05 all ARDORs receive a portion of the **Tier I** “bucket” which constitutes 70 percent of the total \$620,000 ARDOR grant funding. [Tier I: \$620,000 X 70 percent = \$434,000 divided by 13 (11 ARDORs + 2 possible new ARDORs) = \$33,385]<sup>5</sup>

**Tier II** recipients receive their Tier I funds plus a share of the total ARDOR grant set aside for Tier II recipients which is 20 percent of the total grant. [Tier II: \$620,000 X 20 percent = \$124,000 divided by 10 (all ARDORs except LKEDC) = \$12,400 + Tier I funding (\$33,385) = \$45,785] <sup>6</sup>

**Tier III** recipients receive their Tier I and II funding plus they share 10 percent of the ARDOR funding set aside for Tier III. [Tier III: \$620,000 X 10 percent = \$62,000 divided by 4 (Tier III ARDORs) = \$15,500 + Tier II funding (\$45,785, which already includes Tier I funding) = \$61,285]

The final Tier grant amounts are calculated after the Tier designations are made to account for the number of ARDORs at each Tier level sharing that percentage of the funding.

TIER SYSTEM	FY 2005 FUNDING TO ARDORS
Tier I (Lowest Funding)	\$33,385
Tier II (Middle Funding)	\$45,785
Tier III (Highest Funding)	\$61,285

Ms. Clouse stated that exact funding amounts were not finalized until it was determined how many ARDORs were included in each tier. After the Tier designations were made, the amount of money was shared equally among the ARDORs in each tier. Ms. Clouse noted that “[a] slight change in the number of ARDORs at a Tier level doesn't have a significant impact on the grant amount for each Tier level.”

The investigator reviewed the Tier formula information provided by Ms. Clouse to determine if each ARDOR applicant received the amount of funds listed above. According to the ARDORs’ FY05 annual reports, the information provided by Ms. Clouse coincided with the actual funds granted the ARDORs.

<sup>5</sup> The tier funding formula information was provided by ARDOR Program Director Midge Clouse. Although her initial breakdown listed the possibility that two new ARDORs would be funded, records for FY05 and FY06 do not list any additional ARDORs. Despite that, the Tier I ARDOR allocation received an amount calculated as if 13 ARDORs shared the total Tier I allocation.

<sup>6</sup> The Tier II and Tier III calculations don’t calculate funding based on 13 ARDORs as stated on the Tier I calculation; instead they calculate the actual number of ARDORs funded: 11.

The grant payments are provided in three installments; the first 50 percent is issued in September; the second installment, 40 percent, is issued in January; and the final 10 percent is issued once the grant funds have been closed out in July, after the end of the fiscal year.

***Agency Responses to Mr. Berger***

In mid-April 2004, the DCA ARDOR Program Manager sent an e-mail to all the ARDORs informing them of their FY 2005 Tier placement. LKEDC was the only ARDOR placed in Tier I. LKEDC was to receive \$33,385, a 27 percent reduction in funding from the prior year.

A breakdown of the LKEDC funding for the past three fiscal years is as follows:

<b>Category</b>	<b>FY 04</b>	<b>FY05</b>	<b>FY06</b>
St. ARDOR Grant	\$47,720	\$33,384	\$47,438
Other St. Funds	\$54,684	\$35,500	\$30,000
Federal Funds	\$13,500	\$18,500	\$14,000
Private Sector	\$ 2,000	\$ 7,000	\$11,211
Other/In-kind	\$ 4,000	\$ 0	\$ 0
<b>Total</b>	<b>\$121,904</b>	<b>\$ 94,384</b>	<b>\$102,649</b>

After learning of DCA's decision on April 22, 2004, Mr. Berger and LKEDC Chairman Fred Phillip wrote to Ms. Clouse to ask her why LKEDC was placed in Tier I and how they could remedy the situation. On April 28, 2004, Ms. Clouse responded to Mr. Berger and Mr. Phillip, but did not specifically answer their questions. She wrote:

The current Tier designations will be in effect during FY05. During the fiscal year, LKEDC will have the opportunity to implement those Tier II and/or Tier III requirements in order to secure funding at those levels. The other ARDOR directors are an excellent source of information and would be willing to assist you in identifying opportunities to meet the Tier II and Tier III criteria.

Ms. Clouse did not answer why LKEDC was placed in Tier I and, other than refer LKEDC to the other ARDOR directors, she did not specify how the situation could be rectified.

On May 5, 2004, Mr. Berger wrote to DCA Director Gene Kane again asking why LKEDC was placed in Tier I and how they could remedy the situation. On May 18, 2004, Mr. Kane responded:

By applying for Tier III funding, LKEDC certified that all Tier II and Tier I requirements were currently being met. ... Because [the financial compilation and Web site] Tier II requirements were not met, the only alternative for the Tier review committee was to grant LKEDC funding at the Tier I level.

Mr. Berger was not satisfied with that response and, on June 8, 2004, he wrote a letter to then-DCCED Commissioner Edgar Blatchford, and requested the same information he

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had sought from Ms. Clouse and Mr. Kane. On June 23, 2004, Mr. Blatchford responded that he would discuss the situation with Mr. Kane and Ms. Clouse, but suggested that Mr. Berger explore an "ARDOR peer review." Mr. Berger received no other correspondence from the commissioner to indicate that he had actually considered the request.

***FY 2005 ARDOR Program Application***

Ms. Clouse told the ombudsman investigator that all of the ARDORs were informed of the new Tier requirements for FY 2005 during meetings and teleconferences. She said no minutes were taken at these meetings and teleconferences, but noted that "the products developed as a result of these meetings and teleconferences served to document the results." Specifically, Ms. Clouse noted that "Documents outlining the Tier criteria were prepared and transmitted to all ARDORs for their continual use."

One of the products developed from these meetings was the FY05 Application. The opening portion of the instructions on the FY05 Application advised applicants to:

Check all qualifying criteria that pertain to the tier you are applying for and all qualifying criteria in the lower tier(s) that apply. If the ARDOR does not currently meet a qualifying criterion, that criterion must be met by October 1, 2004, to remain in that tier. If the criterion is not met by October 1, 2004, the ARDOR's grant agreement will be amended to reflect funding at the lower tier level.

\* \* \* \* \*

After the Tier criteria check-off boxes was the following

Certification:

I certify that the (ARDOR name) meets or will meet by October 1, 2004, all of the staff requirements, the Board Representation Requirements, and the Organizational requirements, as listed above. [LKEDC's application underlined the words "or will meet" as represented in the above quote].

The (ARDOR name) is applying for funding at (Tier I, Tier II, Tier III) and meets or will meet by October 1, 2004, all the qualifying criteria of that Tier, as listed above. [LKEDC's application form had the hand-written note "except as noted in attached correspondence – audit" after this portion of the certification.]

Ms. Clouse told investigators in August 2004 that the ARDORs were given until March 31, 2005, to complete the annual independent financial review/audit requirement Tier III. This information was not included on the application.

***Tier I Designation Issues***

Mr. Kane's May 18, 2004 letter to Mr. Berger said that LKEDC was designated at the Tier I level because it applied for Tier III funding without meeting all of the Tier II requirements. Specifically, Mr. Kane noted that LKEDC failed to fulfill the Tier II requirements of having an operating Web site and financial compilation. LKEDC already had met all Tier I requirements.

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Ms. Clouse told the ombudsman investigator in August 2004 that the ARDORs were not required to have a Web site for FY04.

In an e-mail to the ombudsman investigator, Ms. Clouse stated:

LKEDC did not have a web site until well after the tier designations had been made, the funding levels had been established, and the grant application had been released. The grant application was released in April 2005, many months after the October 1, 2004 tier deadline. LKEDC's financial compilation was not completed until March 2005, barely in time for their tier application request for FY06.

Ms. Clouse told the investigator that she searched the Internet to determine that LKEDC didn't have a Web site. She stated she did not ask Mr. Berger about the Web site, and that she "checked all the ARDOR Web sites without discussing them with the individual ARDOR".

Mr. Berger told the ombudsman investigators that LKEDC's Web site was completed in April 2004, but that the financial compilation was not completed until March 2005.

Mr. Berger said LKEDC established its Web site during April 2004. He said he informed DCA about the Web site on May 5, 2004 in response to DCA's April e-mail saying LKEDC did not have a Web site. In an August 2004 e-mail to Assistant Ombudsman Charlsie Huhndorf-Arend, Mr. Berger wrote:

To our knowledge, THERE WAS NO STATED REQUIREMENT, EITHER VERBAL OR IN WRITING, THAT LKEDC WAS REQUIRED TO HAVE A WEB SITE OPERATING DURING FISCAL YEAR 2004. There was nothing in the FY 2004 Contract for Services with DCED that required LKEDC to have a Web site in place by a certain time. This topic was not addressed at all in our contract.

Ms. Clouse told the investigator that in April 2003 DCA started informing the ARDORs verbally and by e-mail that the Web site would be a Tier requirement. She supplied the ombudsman a draft document entitled **FY04 Program Revisions** that lists, among other things, staff requirements.

Office must be open to the public with staff available; office site is established and staff is available to the public in the office or in the field. **This includes a web site**, access to e-mail, and voice mail on the phone system. The public will be informed on how to reach staff. [Emphasis added]

In a draft document entitled **Proposal for FY05**, the category for staff requirements is again listed and states:

Office must be open to the public with staff available; office site is established and staff is available to the public in the office or in the field. **This includes a**

web site, access to e-mail, and voice mail on the phone system. The public will be informed on how to reach staff. [Emphasis added]

Neither document addressed the timing of the requirements.

Ms. Clouse also said that “technically,” LKEDC never “informed” DCA that its Web site had been completed; Mr. Berger contacted a DCA Web technician and asked that the DCA Web site insert a link to LKEDC’s Web site.

In a February 8, 2006 phone conversation with the ombudsman investigator, Dawn Rogers, Webmaster for Spoon Frog Graphics, confirmed that she completed LKEDC’s Web site during the last week of May 2004. Ms. Rogers said that Mr. Berger contacted her around May 20, 2004, and said he needed the Web site created right away so she did the work immediately.

### ***Financial Compilation/Audit Requirement***

DCA said that LKEDC also lacked a financial compilation as required in Tier II, or a financial review or audit as required in Tier III. Tier III applicants can submit either a full audit or the lesser financial review.

A **financial audit** is conducted by a certified public accountant who certifies that the fiscal information in the audit is true and correct. A lesser requirement is a **financial review** which is also provided by a CPA but the accuracy of the information is not certified. The CPA only attests that nothing came to their attention.

A **financial compilation** is the least rigorous of the requirements and requires only that the financial information be submitted in a form that can be understood by oversight agencies. The compilation does not attest that the information provided has been verified or that the person assembling the information found anything that was right or wrong.

Ms. Clouse also told investigators that the ARDORs are not required to submit the financial compilation, review or audit to the DCA for review even though they are required for Tier funding placement. Information in the ARDORs’ annual reports posted on the DCA Web site includes very general financial information but not the specific information that would be included in an audit.

Mr. Berger said that the fiscal submission requirement presented a financial and logistical problem for LKEDC because the ARDOR lacked funds to pay for the compilation. He said Ms. Clouse suggested he find someone in Bethel to do the work pro bono.

Mr. Berger argued that Bethel has no certified public accountant to do the work. He eventually found an accountant in Anchorage who charged LKEDC \$1,200 to complete the compilation and he submitted a compilation in March of 2005, within the timeframes outlined by Ms. Clouse for submission of the fiscal reports.

The investigator reviewed the Bethel phone book, Internet yellow pages and state licensing records to determine what accounting resources were available to LKEDC. The phone book shows only one accountant entry, that from a Fairbanks company. The

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Occupational Licensing Division database shows one Certified Public Accountant living in Bethel but the CPA's license has been inactive since 1991 and the licensee cannot practice as a CPA unless it is activated. An Internet Google search shows that two Bethel area entities list themselves as bookkeepers: the Akiak Native Community and the Yukon Kuskokwim Corporation. The ombudsman contacted both entities and learned that the bookkeepers do not provide services to anyone outside the agencies.

Mr. Berger argued that Alaska Statute does not require funding recipients to produce audits if they receive less than \$300,000 in state funds annually, therefore, LKEDC should not have been penalized because it didn't complete the compilation timely. He said the requirement drained necessary funding from his ARDOR.

Ms. Clouse said the Tier requirement system was developed in response to legislative concern about ARDOR accountability. Because of intense Legislative scrutiny of the program, the ARDOR directors worked with the Division to create the Tier system for grant funding so that grant funding would be based on performance.

The Ombudsman consulted with Legislative Auditor Pat Davidson about the issue of financial requirements placed on recipients of public funding.

Ms. Davidson stated that grant recipients have argued in the past that they should not be penalized for not submitting a review or compilation because the State Single Audit requirements did not require them to do so. Others have argued that they shouldn't be required to supply a full audit if the state does not specifically provide funds to pay for one. She said neither argument has prevailed but that she believes that it is reasonable to require funding recipients to provide some proof of their expenditures and activities to the funding agency.

**2 AAC 45.010 Audit Requirements** states at (b):

An entity that expends financial assistance with a cumulative total of \$300,000 or more during the entity's fiscal year shall submit an audit report for the audit period to the state coordinating agency . . .

The regulation goes on to specify timeframes for providing the audit, guidelines for auditor's qualifications, information required in an audit, and other information. This regulation does not address requirements of financial "compilations" or reviews.

***Extension of deadline to complete Tier requirements***

Mr. Berger contended that DCA allowed the ARDORs – but not LKEDC -- some leeway in the deadline to complete Tier requirements.

The tier application stated that 'if the ARDOR does not currently meet a qualifying criterion, that criterion must be met by October 1, 2004, to remain in that tier.' We read this to mean that we had six months, from the time the tier application was submitted, to complete any unmet requirements. Our Web site was functioning prior to July 1, 2004, the beginning of FY 2005.

The FY05 ARDOR application states the following:

If the ARDOR does not currently meet a qualifying criterion, that criterion must be met by October 1, 2004, to remain in that tier. If the criterion is not met by October 1, 2004, the ARDOR's grant agreement will be amended to reflect funding at the lower tier level.

Ombudsman investigators and Ms. Clouse discussed this issue at length on several occasions. On August 26, 2004, she e-mailed Ms. Huhndorf-Arend that she didn't keep copies of her e-mails to and from the ARDORs nor take minutes for the teleconferences held to establish Tier requirements. She wrote:

To apply for a Tier level, all the criteria in the lower Tier had to be met. **Only those criteria in the Tier being applied for had any flexibility to comply with by October 1** (with the noted exception). LKEDC applied for Tier III funding, but did not meet all of the Tier II criteria. As a result, LKEDC was designated at Tier I. LKEDC did not have a Web site until well after the Tier designations had been made, the funding levels had been established, and the grant application had been released. Carl [Mr. Berger] had eight months to create a Web site. Instead, he chose to wait until after the Tier designations were made, funding levels were determined, and the applications were distributed before creating a Web site.

### *Peer Review Committee*

DCA created a four-member Tier Review Committee and gave it the responsibility to recommend ARDOR Tier placements. DCA filled the four seats with ARDOR executive directors, whose agencies were competing for ARDOR funding.

Mr. Berger told the ombudsman investigator in 2004 that he found out that the committee was "hand picked by the division" to help with the review process. He said in 2004 that he was told that the opportunity existed for anyone to participate but he told DCA he never received any notice about committee membership from the division. In 2006 he told the investigator that he does not remember if he volunteered to serve on the review committee, but that he "probably did." He also noted that he criticized the Tier system from the beginning, arguing that it would favor larger organizations.

Ms. Clouse said the purpose of the Tier system for grant funding was to reward performance.

Prior to FY05, all ARDORs received basically the same amount of funding, regardless of performance. Because of intense Legislative scrutiny of the program, the ARDOR directors worked with the Division to create the tier system for grant funding so that grant funding would be based on performance. This concept was acceptable to the Legislature. Since all ARDOR directors participated in all discussions of the tier system, I can only assume all directors understood the underlying concept of the change.

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The initial agreement among the ARDORs was that the ARDOR program manager would be solely responsible for determining the tier designation of each ARDOR. A Tier application review committee consisting of non-ARDOR directors would have relied heavily on the program manager's input in their decision-making process, which would have amounted to a tacit deferral to the program manager's viewpoint. This was no better than the initial agreement and would have presented other problems.

Ms. Clouse said the review committees were filled by notifying the ARDORs that the committee was being established. There were two two-member committees.

The ARDORs were informed via e-mail and the issue was discussed on a teleconference March 17, 2004, that review committees would be set up. I don't recall if I specifically requested volunteers but this is a group that doesn't hesitate to volunteer. Carl [Mr. Berger] didn't ask any questions concerning the Tier Review Committee s nor did he express any interest in serving.

Ms. Clouse said the Tier Review Committee's Tier designations were recommendations to DCA. The committee's designations were discussed with and approved by the Division Director before they were made final and announced.

Ms. Clouse said the methodology used by the review committee was discussion based on the Tier criteria and the committee's knowledge of an ARDOR's programs and performance. On occasion, the review committees had questions or wanted additional information, which was provided by the ARDOR in question. Committee members took written notes but they were not transcribed.

Ms. Clouse noted that DCA appointed ARDOR executive directors to the Tier Review Committee out of necessity. In an e-mail to the Ombudsman investigator, she stated:

I'm not aware of any grant program guidelines or policies outlining conflicts of interest for review committees. While the use of non-ARDOR personnel for the tier application review process would have been ideal, in practicality it would have created other, more problematic issues. The pool of individuals knowledgeable about the ARDOR program is small and the pool of individuals knowledgeable about the new tier system is practically non-existent outside of the ARDOR directors.

Ms. Clouse told the ombudsman investigator that she did not call Mr. Berger or any of the ARDORs concerning omissions in the Tier applications. She stated that contacting Mr. Berger would "have shown preferential treatment to Carl."

Ms. Clouse confirmed that executive directors from four ARDORs comprised the Tier Review Committee s which recommended Tier levels for all 11 ARDORs. The four committee members came from the Southwest Alaska Municipal Conference (SWAMC), Kenai Peninsula Borough Economic Development Council (Kenai EED), the Fairbanks

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North Start Borough Economic Development Commission (FNSBEDC), and the Mat-Su Resource Conservation & Development Council (Mat-Su RCDC).

SWAMC and Kenai EED received Tier III ranking. FNSBEDC and Mat-Su RCDC received Tier II ranking. Ms. Clouse said that each executive director abstained from Tier recommendations for his or her own ARDOR.

***DCA Policy and Procedures***

DCA has policy and procedures for competitive grant programs. However, these policies and procedures are not used for the ARDOR program. Ms. Clouse stated that:

DCA does have grant administration policies and procedures, grant award policies and procedures, and a grievance/appeal process. However, these grant procedures are used for the Division's competitive grant programs. Since the ARDOR program was not competitive prior to FY05 and is still not a completely competitive program, the Division's grant procedures are of limited use.

She defined competitive as:

Having no set outcome as to grantees or grant amounts; not all applicants are awarded grant funds. The ARDOR grants aren't competitive because all ARDORs receive grants; all applicants are awarded grant funds; funding levels are known prior to the grant application being submitted.

***Tier Designation Appeal***

Ms. Clouse said ARDORs could appeal their Tier designation by writing a letter to the DCED commissioner. Mr. Berger stated he was never told about the right to appeal the decision and this was supported by letters from Ms. Clouse and Mr. Kane. When he did contact Commissioner Blatchford, he was referred back to the peer review panel which, in his view, made the original erroneous decision.

DCA has no written policies for appealing a decision on ARDOR funding, according to Ms. Clouse.

***Ms. Clouse's observations on LKEDC's problems and application***

Ms. Clouse said that the LKEDC application had numerous problems.

LKEDC's Tier application was incomplete when first submitted. When the completed application was received, it omitted information concerning the web site and the financial compilation. There was no indication that these items would be addressed by the respective deadlines.

During the numerous discussions concerning the tier funding system, Carl [Mr. Berger] repeatedly stated his reticence to comply with the tier criteria. Several ARDOR directors offered him suggestions. One suggestion involved ideas he could pursue to meet the financial compilation/audit requirement. It does not appear that he has used any of the suggestions.

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On several occasions, Carl [Mr. Berger] has expressed his frustration with the lack of support from his board of directors and from the private sector in his region. Providing the required local cash match is always a problem for LKEDC. Given these circumstances, any ARDOR program would struggle for success.

When reviewing LKEDC by itself, [its] performance appears problematic. When reviewing LKEDC in context with other ARDOR programs, the disparities are even more evident.

Ms. Clouse also gave her views on LKEDC's low Tier ranking:

LKEDC performs at a level to meet the bare minimum of requirements to maintain ARDOR certification. The other ARDORs have programs that far surpass LKEDC in quantity and quality of projects and programs. To say LKEDC is on the same level as the other Tier II ARDORs is unfair to the other ARDORs. LKEDC consistently has problems meeting the local cash match requirement; has had the same three projects for the last three years; failed to submit a complete Tier application by the deadline; fails to submit the grant application electronically, as required; responds to requests for information after the deadline or not at all; and works to circumvent the need to perform. In addition, when attending the meetings and teleconferences, Carl [Mr. Berger] rarely contributes to the discussion.

In contrast, the other ARDORs meet the local cash match; complete numerous projects each year; submitted completed Tier applications by the deadline; always submit the grant application electronically; respond to requests for information in a timely manner with substantive information; have shown true leadership and willingness to change the ARDOR program to a more performance-based program; and contribute positive comments and offer solutions during discussions in meetings and on teleconferences.

Perhaps the question of fairness to LKEDC would be easier to answer if it was rephrased, given the difference in performance. A better question to ask might be: would it be fair to the other Tier II ARDORs to designate LKEDC as a Tier II ARDOR, implying that LKEDC performs at the same level as the other ARDORs.

## **ANALYSIS AND PROPOSED PRELIMINARY FINDING**

The standard used to evaluate all ombudsman complaints is the **preponderance of the evidence**. Blacks Law Dictionary defines "preponderance of the evidence thusly:

Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

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: DCA unreasonably placed LKEDC in the ARDOR program Tier I funding category without giving it an opportunity to fulfill the Tier II requirements. This greatly reduced the funds granted to LKEDC for FY05.***

The Office of the Ombudsman's Policies and Procedures Manual defines "unreasonable" at 4040(2). The portion of the definition that applies to this allegation reads as follows:

(B) a procedure that defeats the complainant's valid application for a right or program benefit.

\* \* \* \* \*

Before FY05, there was no ARDOR Tier system and all ARDORs received equal funding at a level equal to Tier II. In response to legitimate legislative concerns, DCA and the ARDORs developed criteria to reward ARDORs that performed at a higher level.

The process to develop the criteria was not documented other than the application forms that DCA issued.

In FY05, four ARDORs were designated at Tier III and six ARDORs at Tier II. LKEDC, which sought Tier III designation, was the only ARDOR placed in Tier I. The difference in funds for LKEDC was more than \$14,000 -- 27 percent of its prior annual ARDOR grant.

LKEDC applied for Tier III status and certified on its application that it had fulfilled all Tier I and II requirements with the exception of the financial review/audit in order to be eligible for Tier III. Mr. Berger indicated that he had not submitted the financial reporting requirement but on the line after the Tier III criteria of "Annual independent financial audit or review completed," the word "completed" is underlined and "3/31/05" is printed. This coincides with the information provided by Ms. Clouse that DCA had extended the financial reporting requirement to March 31, 2005.

Mr. Berger contends that DCA's decision to deny LKEDC Tier III status was unreasonable because it denied LKEDC an opportunity to fulfill the Tier II requirements by October 1, 2004, the date other ARDOR applicants were given to complete unfinished Tier requirements.

When analyzing this allegation, the ombudsman considered the following issues:

1. Did the DCA clearly inform applicants about how the Tier requirements worked and the penalty for not timely meeting all lower Tier level requirements?
2. Was DCA's stated rationale for denying LKEDC's request consistent with written guidelines on the application?
3. Did LKEDC actually meet the Tier II requirements in a timely fashion?
4. Did the DCA treat ARDORs which sought Tier III funding differently than those which sought Tier II funding? If so, was the disparity reasonable?

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As per Ms. Clouse, there is little historical documentation on the development of the Tier review process criterion other than the application forms that resulted, therefore much of this analysis will depend on the language in those forms.

The application stated:

Check **all qualifying criteria** that pertain to the tier you are applying for and all qualifying criteria in the lower tier(s) that apply. **If the ARDOR does not currently meet a qualifying criterion, that criterion must be met by October 1, 2004, to remain in that tier. If the criterion is not met by October 1, 2004, the ARDOR's grant agreement will be amended to reflect funding at the lower tier level.** [Emphasis added]

The instructions contained the Tier criteria check-off boxes and then ended with the following certification blanks.

I certify that the (ARDOR name) meets or will meet by October 1, 2004, all of the staff requirements, the Board Representation Requirements, and the Organizational requirements, as listed above.

The (ARDOR name) is applying for funding at (Tier I, Tier II, Tier III) and meets or will meet by October 1, 2004, all the qualifying criteria of that Tier, as listed above.

DCA wrote to Mr. Berger in April 2004 that "Because Tier II requirements [the Web site and financial compilation] were not met, the only alternative for the Tier review committee was to grant LKEDC funding at the Tier I level." Mr. Berger countered that the application stated the ARDORs had until October 1, 2004 to satisfy the criterion.

Ms. Clouse much later wrote to the ombudsman investigator:

To apply for a Tier level, all the criteria in the lower Tier[s] had to be met. *Only those criteria in the Tier being applied for had any flexibility to comply with by October 1 (with the noted exception).*

"The noted exception," which was not mentioned on the application, was the unwritten March 31, 2005, extended deadline to submit a financial review or audit.

Ms. Clouse's explanation about the eligibility for the October deadline extension was not supported by the plain language of DCA's application instructions. Those instructions set a date certain to meet all qualifying criteria except the financial reporting requirements. The first sentence of the instructions lumps all three tiers into consideration for qualifying criterion. The next sentence refers to "a" qualifying criterion, "that" criterion, and "that" tier. The final sentence speaks to the penalty for not meeting criterion by saying the grant agreement will be amended to reflect funding at "the" lower level.

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But, neither the application instructions nor the draft FY04 and 05 guidelines ever stated that ARDORs would revert to the lowest Tier if they could meet the Tier II requirements but not reach the Tier III requirements.

Ms. Clouse's explanation suggests that LKEDC would have been eligible for an extension if only it had applied for Tier II funding but not Tier III. We find this explanation puzzling. If the true goal of the Tier system was performance accountability, why force an ARDOR that met Tier II requirements into the lower funded Tier I level. DCA, it seems, penalized LKEDC for overreaching its grasp on the application.

Additionally, in conversations with the ombudsman, Ms. Clouse criticized LKEDC for not detailing its plans to complete the Tier II requirements. She said:

When the completed application was received, it omitted information concerning the web site and the financial compilation. **There was no indication that these items would be addressed by the respective deadlines.** [Emphasis added]

Ms. Clouse is right and wrong on this point. Mr. Berger *did not* spell out LKEDC's plans for addressing its omissions. However, LKEDC *did* comply with the application form and address the omissions. The application contains the following certification:

I certify that the (ARDOR name) meets or will meet by October 1, 2004, all of the staff requirements, the Board Representation Requirements, and the Organizational requirements, as listed above. [Ombudsman's Note: The requirement for a Web site was a staff requirement according to the draft documents.]

The (ARDOR name) is applying for funding at (Tier I, Tier II, Tier III) and meets or will meet by October 1, 2004, all the qualifying criteria of that Tier, as listed above.

LKEDC signed the certification on the instruction form but it didn't submit specific information on how it would complete the unfinished tasks.

But, based on the application and the draft documents previously mentioned, LKEDC didn't have to submit specifics. The instruction sheet and the closing certification did not require or even ask the grant applicants to provide additional information about how they would accomplish their uncompleted tasks. They merely had to certify that they would get the work done, which LKEDC did. If DCA's application didn't ask the question, it is unreasonable to penalize those who don't answer.

And it must be pointed out that while Ms. Clouse informed the ombudsman about the application deficiencies, no one provided this information to Mr. Berger.

***Did LKEDC meet all of the Tier requirements timely?***

The answer to this question, as it applies to the Web site, depends on which deadline date is used: April 2004 or October 1, 2004.

Ms. Clouse told the ombudsman that LKEDC simply failed to meet the April 2004 deadline for having a functional Web site. DCA said the earlier deadline applied because LKEDC applied for the highest Tier but hadn't met middle Tier requirements, therefore it was ineligible to obtain extra time to qualify. By extension, if LKEDC had applied for Tier II, it would have been eligible for the five month deferment.

DCA's rules on this were either so poorly written as to be unrecognizable or they were simply unwritten and not transmitted to LKEDC. The verbal explanation is incomprehensible and, as applied, defeats LKEDC's valid application for a program benefit. The ombudsman does not believe that DCA reasonably denied LKEDC the deadline extension granted to other applicants. Therefore, the ombudsman believes that the correct deadline to be applied to the Web site is October.

Ms. Clouse determined LKEDC's Web site was not operational because she was unable to find the site when she did a Web search. She said she didn't want to exhibit favoritism by asking Mr. Berger how to find the Web site therefore she did not contact LKEDC to determine why she was unable to find its site. However, she also stated that the Peer Review Committee occasionally contacted the ARDOR applicants with questions so her concern about not exhibiting favoritism to LKEDC is puzzling.

Mr. Berger's application indicated that he had an operating Web site in April 2004. He originally told the ombudsman the Web site was operational in April but later said it became operational in early May. LKEDC's Web designer told the ombudsman that she created the site in late May 2004. The ombudsman is inclined to accept the Web designer's timeframe but, in either case, the Web site did not meet the April deadline which DCA contends should be used. The ombudsman believes the October deadline was the reasonable standard, therefore the Web site criteria was fulfilled within timeframes.

DCA said it also denied LKEDC Tier III status because it failed to submit a financial "compilation" by the deadline. This presents two major concerns. LKEDC applied for Tier III which required it to produce a financial review or audit. DCA says that because LKEDC didn't submit a "compilation" necessary to qualify for Tier II, LKEDC was ineligible to apply for Tier III.

This is perplexing. The Tier requirements were new. DCA had not required the ARDORs to submit financial reports before. Under DCA's reasoning, LKEDC would be required to submit two types of fiscal reports in order to qualify for Tier III: a Tier II compilation *and* a Tier III audit/review. It seems redundant and unreasonable to the ombudsman for DCA to require LKEDC to submit *both* a compilation and an audit/review.

In any event, the record shows LKEDC submitted its compilation in March of 2005, the deferred deadline that DCA established for financial reporting. The compilation came in late, but it was within the deadline granted to all other ARDORs.

**Did DCA treat applicants for Tier III unreasonably by not allowing them an extension to meet lower Tier requirements?**

If LKEDC applied for Tier II status, it would have been granted an extension to fulfill the Tier requirements. Nowhere was it stated nor is there documentation to substantiate that DCA informed applicants that they would be penalized by loss of opportunity to meet lower Tier requirements if they applied for Tier III.

If this unwritten rule did not exist, LKEDC would have been able to fulfill its Tier II requirements and, presumably, been granted Tier III status. We say presumably because DCA never indicated to LKEDC or the ombudsman that LKEDC did not fulfill the Tier III requirements. Ms. Clouse spoke candidly to the ombudsman about the problems she saw with LKEDC's performance and application but DCA never informed LKEDC of its shortcomings. Mr. Berger asked three DCA/DCCED officials for an explanation in 2004 and 2005 but has yet to receive an explanation.

The ombudsman understands the necessity of holding the recipients of public funds to reasonable performance standards. The ombudsman does not understand judging recipients by unwritten rules and disproportionately penalizing them for not attaining a stated goal inside a deadline that no one else is held to.

At a minimum, LKEDC should have been given the opportunity to fulfill the Tier II requirements by October 1, 2004. It is unreasonable and unfair to offer a deadline extension to all but one member of a group and then deny the benefits of that extension to one party. The Ombudsman therefore proposes to find this allegation ***justified***.

DCCED Deputy Commissioner Albert Clough replied on behalf of the agency. The response generally disputed the proposed findings on all allegations

**Agency Response to Allegation 1:**

The Department does not agree with the Ombudsman's assertion that this is justified.

LKEDC had ample time and ample opportunity to meet the needs of the specific Tier. Further, LKEDC was offered support by other ARDORs in order to meet these needs.

- *Funding for FY05 was offered to LKEDC at Tier II level, but requirements to meet the criteria were not met in a timely manner. [Emphasis added]*
- Funding requirements were relaxed by the ARDOR committee in an attempt to support LKEDC as much as possible, to meet Tier requirements in FY 04 and FY 05.
- On April 15<sup>th</sup>, 2005 a certified letter sent to LKEDC came back unclaimed. This lack of action would demonstrate LKEDC was at the time

not maintaining a fully functional office which is contrary to ARDOR program requirements (a follow-up letter was sent and later claimed).

**Ombudsman Response:**

The ombudsman disagrees with DCCED's assertion that "Funding for FY05 was offered to LKEDC at Tier II level." The facts documented in this investigative report support the conclusion that LKEDC was never offered Tier II funding. DCCED has offered nothing to alter that conclusion.

In mid-April 2004, Ms. Clouse informed Mr. Berger that LKEDC was placed in Tier I. Later, Director Kane informed Mr. Berger that "Because Tier II requirements were not met, the only alternative for the Tier review committee was to grant LKEDC funding at the Tier I level." However, no one at the time questioned LKEDC's viability as an operating office because of problem with delivery of a certified letter to LKEDC.

The FY 05 application stated that "If the ARDOR does not currently meet a qualifying criterion, that criterion must be met by October 1, 2004, *to remain in that tier.*" [Emphasis added] However, LKEDC was never given the opportunity to complete the requirements by October 1, 2004, *and then remain in Tier II.* Instead, it was placed in Tier I and later told to explore an "ARDOR peer review."

Therefore, the ombudsman does not find DCCED's arguments compelling and finds Allegation 1 to be **justified.**

***Allegation 2: DCA unfairly created a conflict of interest by appointing persons to the ARDOR Tier Review Committee who were also executive directors of agencies applying for ARDOR funding.***

Mr. Berger alleged that DCA unfairly created a conflict of interest by appointing executive directors of agencies competing for ARDOR funding to the very group that judged all funding applications.

The Office of the Ombudsman's Policies and Procedures Manual defines "unfair" at 4040(3). The portion of the definition of "unfair" that applies to this allegation reads as follows:

(C) the decision maker is not without bias or other disqualification.

\* \* \* \* \*

DCA's appointment of ARDOR executive directors to the two review committees appeared to create a conflict of interest because the executive directors had a personal interest in the funding outcome. In this instance, the executive directors competed for the same grant funds and had a direct interest in the outcome of the grant award process.

Ms. Clouse said that the directors based their decisions on their knowledge of an ARDOR's programs and performance. The committees were discussed and approved by the Division Director before they were made final.

It is understandable that Mr. Berger came to the conclusion that the review committee members' status as ARDOR executive directors could have impaired their ability to be objective when making a Tier recommendation on their own ARDOR. However, Ms. Clouse attested that the executive directors did not make a Tier recommendation on their own ARDOR. Instead, executive directors would recuse themselves when their ARDOR was ranked.

The fact that the committee based its recommendations on its own "knowledge of the programs and performance" and its actions were not documented is troubling. Without a written record, applicants have no information on which to appeal the committee/DCA's decision.

Ms. Clouse also argued that the Tier changes "didn't greatly affect" the amount of money granted each ARDOR. Nonetheless, the Tier II and III pots were higher without LKEDC sharing in them. Additionally, the Tier ranking greatly affected the amount of money going to LKEDC which lost nearly \$15,000 – 27 percent of its funding – because of its low Tier designation.

DCA took the appropriate steps to avoid an executive director from having a conflict of interest in the ranking of his or her ARDOR. However, the appearance of a conflict of interest still existed. Any person not directly involved in the creation of the review committee, including Mr. Berger, could have reasonably come to the conclusion that a conflict of interest existed. Government programs must not only be free of personal conflicts in decision making, they must avoid the appearance of conflicts, in order to ensure the integrity of the process and to maintain public trust and confidence.

Additionally, because two committees judged different applications, the likelihood is great that applications were held to different standards. Ms. Clouse said the committees judged the applications based on their knowledge of the ARDOR's performance. It is practically impossible for two separate committees to have identical knowledge of all applicants or identical standards by which to judge.

However, DCA resolved any appearance of a conflict of interest for FY 2006 by removing the four executive directors from the review committee and replacing them with people unaffiliated with the ARDORs. The single review committee for FY06 consisted of a DCA employee who had limited direct involvement with the ARDOR program, a staff representative from the U.S. Economic Development Administration, and an employee from a private sector business who was also involved with the State Chamber of Commerce.

The ombudsman proposes to find this allegation ***justified and rectified.***

**Agency Response to Allegation 2:**

Mr. Clough stated in part that "The Department does not agree that this action necessarily created a conflict of interest. However, the Department does agree that this could be construed as an "apparent" conflict of interest.

**Ombudsman Response:**

DCCED acknowledged that the ARDOR executive directors' place on the Tier review committee "could be construed as an 'apparent' conflict of interest." Previously, DCCED resolved this problem by removing the executive directors from the committee.

Therefore, the ombudsman finds Allegation 2 to be *justified* and *rectified*.

***Allegation 3: DCA unreasonably required ARDORs to provide costly financial reports and penalized ARDORs that couldn't provide the reports. This requirement is not supported by Alaska Statute.***

Mr. Berger contends that DCA's requirement that ARDOR applicants submit costly financial compilations, reviews or audits is not found in state statute and places an unreasonable burden on the ARDORs, especially those from rural areas without CPAs.

He is correct in his belief that statute does not require the audits for entities receiving less than \$300,000 annually. However, the Legislative Auditor considers it reasonable that the recipients of public funds provide some accountability to the funding agency.

The ombudsman agrees. It is therefore troublesome that, according to Ms. Clouse, the ARDORs are not required to provide the compilation, review or audit to DCA for its own audit purposes. If the ARDORs are required to pay for this task, the requirement should have some meaning. If DCA does not review the fiscal reports, it has no meaning and is an unreasonable requirement.

The ombudsman therefore proposes to find this allegation to be *justified*.

**Agency Response to Allegation 3:**

Mr. Clough stated that "The Department does not agree with the Ombudsman that this assertion is justified."

Mr. Clough cited extensive legislative history on funding for the ARDORs. That history demonstrated the concern legislators had about the effectiveness of the ARDORs in stimulating economic growth in the various regions. Legislators directed DCCED to require the ARDORs to provide proof of their activities and expenses. He then went on the state:

The Department of Commerce, Community, and Economic Development submits that such requirements are fundamental to many grant and community aide programs and therefore to be expected and most necessary as part of the accountability of a program such as ARDOR. Further, DCCED would be remiss in providing funds to an organization that did not meet these fundamental grant requirements. *Whether the then ARDOR coordinator (Midge Clouse) reviewed the required information or not is not the point.* The department needs to require this information per statute and proper grant management protocols. The Alaska legislature has also weighed in directly on this issue. Costly is relative. If an entity

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is using public funds and other public resources there should be some measure of fiscal accountability. Given legislative concerns about the overall performance of ARDORs this is a reasonable course of action, not one that unfairly singles out a particular ARDOR. [Emphasis added]

**Ombudsman Response:**

The ombudsman does not dispute the need for fiscal accountability under the ARDOR program. However, the ombudsman disagrees with DCCED's statement that "Whether the then ARDOR coordinator (Midge Clouse) reviewed the required information is not the point." This statement is extremely troubling. DCCED's response to the preliminary finding demonstrates the Legislature's clear intention that the ARDORs be held accountable for their work product and expenditures. In order to be held accountable by the funding agency, the funding agency must review the reports. If the ARDOR coordinator did not review the required information, who did?

The ombudsman stated that "If the ARDORs are required to pay for this task, the requirement should have some meaning. If DCA does not review the fiscal reports, it has no meaning and is an unreasonable requirement." The ombudsman still believes this to be true. However, Mr. Clough has convinced the ombudsman that DCA's requirements of the ARDORs were in response to legislative directions. Because of that, this finding will be amended to partially justified. If DCCED had proven that DCA reviewed the required fiscal documentation in a meaningful manner, the finding on this allegation would be changed to unsupported.

The ombudsman finds Allegation 3 to be ***partially justified***.

**RECOMMENDATIONS**

A primary function of the ombudsman's office is to provide recommendations to agencies on ways to minimize or prevent future problems similar to the one investigated.

\* \* \* \* \*

Despite the fact that the ARDOR program has existed since 1988, DCA still uses informal procedures for overseeing the program application process. DCA now receives recommendations from the Tier Review Committee before making its Tier assignments. The recommendation and decision are primarily based on past performance and whether the ARDOR currently meets the requirements of a specific tier. However, DCA has no written policies or procedures that establish this as the correct procedure.

Written policies and procedures establish a standard to prevent confusion of responsibility and accountability. Mr. Berger's problems with the application process may not have occurred if such procedures were in place. The ombudsman therefore recommends the following:

***Recommendation 1: DCA should develop clear and well-written policies and procedures for administering the ARDOR grant program application process.***

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The policies and procedures should cover the entire application process, including the requirements of applying for specific tiers. This would seem reasonable considering DCA has policy and procedures for all of their other competitive grants programs.

**Agency Response to Recommendation 1:**

Mr. Clough stated that

The Department feels that the ARDOR grant application process is clear and concise. The ARDOR program was established by the legislature in 1988 and has been in operations continuously since then with minimal complaints from the various ARDORs. Nevertheless, ARDOR staff has been directed to review the ARDOR Grant Application for completeness and clarity and will make modifications as necessary.

**Ombudsman Response:**

The ombudsman believes that the ARDOR Grant Application is not a sufficient substitute for a policies and procedures manual. As stated above “Written policies and procedures establish a standard to prevent confusion of responsibility and accountability. Mr. Berger’s problems with the application process might not have occurred if such procedures were in place.”

The ombudsman finds that the agency response has not rectified the situation that led to this complaint.

\* \* \* \* \*

After the tiers were announced, Mr. Berger repeatedly wrote to DCA and requested an explanation for why LKEDC was placed in Tier I. DCA does not have a written policy or procedure for informing ARDORs why they received an adverse Tier assignment. Ms. Clouse originally suggested that he contact the executive directors of competing ARDORs for guidance. It was not the responsibility of the other ARDOR directors to offer guidance to LKEDC. DCA made the final decision and DCA was responsible to deal with the consequences.

Later Ms. Clouse cataloged a litany of LKEDC’s shortcomings to the ombudsman but she didn’t provide that information to LKEDC or Mr. Berger despite his repeated inquiries. The ombudsman fails to understand how an organization can improve its performance if it is unaware of its deficiencies.

***Recommendation 2: DCA should clearly state in writing the reasons for a denial or a decrease in funding when notifying an ARDOR or any grant recipient of their funding level.***

This should be incorporated into the policy and procedures and would help an ARDOR decide if an appeal would be appropriate. It would also help an ARDOR resolve the problem before future funding cycles.

**Agency Response to Recommendation 2:**

Mr. Clough stated:

This is currently done as a matter of policy in all DCCED administered grants *and was done in the case in question*. Staff has been asked to review the denial correspondence to LKEDC and assure such was properly documented. The Department will continue this practice. [Emphasis added]

**Ombudsman Response:**

The ombudsman agrees that this should be done in all cases, but the evidence is clear that it was not done in this case. DCA offered nothing to support its claim that LKEDC was informed why its Tier designation was lowered. Mr. Berger was not told why LKEDC was placed in Tier I until Director Kane responded to his letter and even then the information was inadequate.

This oversight is the reason why the ombudsman proposed that “DCA should clearly state in writing the reasons for a denial or a decrease in funding when notifying the ARDORs or any grant recipient of their funding level.”

The ombudsman finds that the agency response has not rectified the situation that led to this portion of the complaint.

\* \* \* \* \*

Mr. Berger inadvertently stumbled upon the correct appeal process by writing a letter to Commissioner Blatchford. However, DCA did not inform the ARDORs that this is the way to appeal a funding decision nor did the commissioner provide enlightenment. He sent Mr. Berger back to the peer review process that Mr. Berger blamed for LKEDC’s problems.

***Recommendation 3: DCA should develop a written appeal process for ARDORs to contest their Tier assignments.***

**Agency Response to Recommendation 3:**

Mr. Clough stated that “ARDOR staff has been directed to review the ARDOR grant packet and make sure the appeal process is adequately detailed to include appeals of Tier assignment.”

**Ombudsman Response:**

Currently, Article 23 of the ARDOR grant packet states

Except as otherwise provided in this agreement, any dispute concerning a question of fact arising under this agreement that is not disposed of by mutual agreement shall be decided by the Department, which shall reduce its decision to writing and mail, or otherwise furnish a copy thereof, to the Grantee. The decision of the Department shall be final and conclusive. This “Disputes” clause does not preclude the consideration of questions of law in connection with the decision provided for in the preceding paragraph provided that nothing in this grant

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agreement shall be construed as making final the decisions of any administrative official, representative, or board on a question of law.

The ombudsman believes that Article 23 is strongly and unfairly biased in favor of DCCED. It also does not even mention appeals of Tier assignment.

At the very least, DCCED should develop a written appeal process that explains the basic steps to appeal an ARDOR Tier assignment. In addition, an ARDOR that appeals should be given an impartial forum where it can present evidence on its behalf.

**FINDING OF RECORD AND CLOSURE**

If the ombudsman finds that some components of a complaint are justified and others partially justified, the complaint may be found *partially justified*. Because Allegation 2 was found to be partially justified, this complaint will be closed as **partially justified**.

DCCED has not implemented any of the reasonable and minor recommended changes to rectify the situation that led to this complaint, therefore this complaint will be closed **not rectified**.