



PUBLIC REPORT

Ombudsman Complaint A2007-1411 (Finding of Record and Closure)

(Edited to remove confidential information as per AS 24.55.160)

April 22, 2008

On November 13, 2007, a Wildwood Pre-Trial Facility (Wildwood) inmate complained to the Office of the Ombudsman about the Department of Corrections (DOC). Specifically, the inmate complained that DOC violated its policies and procedures by testing for tetrahydrocannabinol (THC) at a threshold less than 50 nanograms per milliliter. Tetrahydrocannabinol is the main psychoactive substance found in the cannabis plant.

Assistant Ombudsman David Newman opened a complaint file with the following allegation, stated in terms that conform to AS 24.55.150, which authorizes the ombudsman to investigate complaints about administrative acts of state agencies:

DOC unreasonably violated its policies and procedures by testing for THC at a threshold less than 50 nanograms per milliliter.

Mr. Newman investigated this complaint and forwarded his report to the ombudsman. For reasons stated below, the ombudsman found this allegation ***partially justified***.

BACKGROUND

On September 16, 2007, the inmate tested positive for THC at Wildwood. DOC used the American Bio Medica Corporation's Rapid Drug Screen procedure to test the inmate's urine sample. American Bio Medica Corporation is a biotechnology company that develops, manufactures and markets immunoassay diagnostic test kits. The Rapid Drug Screen is a multi-drug test that includes a collection cup with a temperature strip and test card that detects drugs of abuse in urine. Using this procedure, the inmate's sample tested positive for THC above the 50 nanogram threshold.

After receiving the results of the positive test, the inmate requested a second independent test. On September 26, 2007, DOC Correctional officer Valerie Hudson sent the inmate's urine sample to Worksafe Inc. (Worksafe) to be independently tested. Worksafe is a private company that provides drug and alcohol testing to companies throughout Alaska. In contrast

to DOC, Worksafe uses the gas chromatography/mass spectroscopy (GC/MS) method of drug testing. GC/MS combines a gas chromatograph with a mass spectrometer to identify different substances within a test sample.

On October 10, 2007, Worksafe released its report to DOC confirming that the inmate tested positive for THC. The inmate appealed the finding and alleged that Worksafe's screening sample did not conform to minimum threshold prescribed in DOC's policies and procedures. Specifically, the inmate claimed that Worksafe screened his sample at only 20 nanograms per milliliter, instead of the 50 nanograms that is required under Policy and Procedure 808.14(D).

On October 22, 2007, DOC denied the appeal stating "Guilty based on the report as written which indicates that [the inmate's] U.A. sample taken here was positive which was confirmed by [Worksafe]." The inmate then received and served 14 days in punitive segregation.

INVESTIGATION

DOC Policy and Procedure 808.14(D) states "Cannabinoid shall be tested at a threshold of 50 nanograms. All other substances shall be tested at the lowest threshold offered by the manufacturer."

During the course of the investigation, the ombudsman investigator interviewed:

- DOC Hearing Officer Sherry Lewis;
- DOC Correctional Officer Valerie Hudson; and
- Worksafe Program Manager Elaine Perez.

The investigator also reviewed the inmate's drug test results and his DOC grievances and appeals.

On November 27, the ombudsman investigator spoke to DOC Hearing Officer Sherry Lewis. Officer Lewis informed the investigator that DOC used the American Bio Medica Corporation's Rapid Drug Screen procedure to test the inmate's urine sample. She confirmed that his sample was tested above the 50 nanogram threshold and came back positive for THC. Officer Lewis added that the inmate's sample was then sent to Worksafe to be independently tested.

On November 28, the ombudsman investigator spoke to Worksafe Program Manager Elaine Perez. Ms. Perez reviewed the inmate's results and confirmed that the inmate tested positive for THC using the GC/MS method. She also confirmed that Worksafe had screened the inmate's urine sample at 20 nanograms per milliliter. However, Ms. Perez stated that the inmate's sample tested positive for THC at a quantity of 53 nanograms. She explained that because the quantity level was over 50 nanograms, it did not matter in the inmate's case that the screening sample was only 20 nanograms. She stated that the high quantity level would have appeared on either the 20 or 50 nanogram sample. Ms. Perez acknowledged that the difference between 20 and 50 nanograms could be significant for other inmates in the future if their quantity levels do not test as high as the inmate's did. She further noted that Worksafe would continue to test at 20 nanograms per milliliter until DOC notifies them in writing to make a change.

After speaking with Ms. Perez, the ombudsman investigator contacted Officer Lewis again. The investigator informed her that the inmate's sample tested positive at a quantity of 53 nanograms. He explained that the quantity level was high enough in this case that the 20 nanogram screening sample did not affect the inmate's results. Nevertheless, the investigator

pointed out that Worksafe was going to continue screening the samples at 20 nanograms until DOC notified them in writing to change to 50 nanograms. The investigator recommended that DOC should write to Worksafe requesting this change as soon as possible. Officer Lewis said she would call Worksafe to confirm the problem and call the investigator back.

The next day, the investigator received a call from Officer Lewis. She confirmed that Worksafe was screening THC samples at 20 nanograms and needed something in writing from DOC to change that to 50 nanograms. Officer Lewis then informed the investigator that all future correspondence sent to Worksafe would direct them to screen inmate's urinary samples for THC at 50 nanograms per milliliter.

ANALYSIS AND FINDING

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 is found justified.

The inmate alleged that DOC unreasonably violated its policies and procedures by testing for THC at a threshold less than 50 nanograms.

The Office of the Ombudsman's Policies and Procedures Manual at 4040(2) defines *unreasonable*. The portion of the definition relevant to this investigation is:

(C) An act that is inconsistent with agency policy and thereby places the complainant at a disadvantage to all others.

The inmate complained that Worksafe only screened his urine sample at 20 nanograms. During the conversation with the ombudsman investigator, Ms. Perez reviewed the inmate's results and confirmed that Worksafe had only used a 20 nanogram screening sample. However, Ms. Perez reported that the inmate's sample tested positive for THC at a quantity of 53 nanograms. She explained that because the quantity level was over 50 nanograms, it did not matter that the screening sample was only 20 nanograms. She stated that the high quantity level would have appeared on either the 20 or 50 nanogram sample. Therefore, based on the high quantity of THC in both of the inmate's tests, the ombudsman believes that DOC acted appropriately by finding him guilty.

Nevertheless, the ombudsman is still concerned that problems could occur in the future if Worksafe continues to use 20 nanogram screening samples. Ms. Perez pointed out that even though it was not significant in this inmate's case, the difference between 20 and 50 nanograms could be significant for other inmates if their quantity levels do not test as high as this inmate's did.

Because it found that DOC acted appropriately in the inmate's case, the ombudsman found his specific allegation of harm to be unsupported. However, because Worksafe's 20 nanogram screening samples could affect other inmates in the future, the ombudsman finds this systemic problem to be *justified*.

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*. Therefore, the ombudsman proposes an overall finding in this case of *partially justified*.

RECOMMENDATIONS

During his conversation with Officer Lewis on November 29, the ombudsman investigator recommended the following:

RECOMMENDATION 1: Wildwood Correctional Center should inform Worksafe in writing that an inmate's urinary sample should be tested for THC at a threshold of 50 nanograms per milliliter.

Officer Lewis accepted the recommendation and told the investigator that all future correspondence that Wildwood sends to Worksafe will request that urinary samples be tested for THC at threshold of 50 nanograms.

With this problem rectified at Wildwood, the ombudsman wants to make sure that all other DOC institutions make the same change if they are relying on tests for THC with a threshold less than 50 nanograms.

RECOMMENDATION 2: DOC Division of Institutions should issue a written reminder to all institutions directing that all institutions follow Policy & Procedure 808.14(D) and test THC at a threshold of 50 nanograms per milliliter.

AGENCY RESPONSE

On March 19, 2008, Standards and Compliance Administrator Tim Lyden responded on behalf of DOC to the ombudsman's preliminary report. Mr. Lyden wrote "... The Department concurs with your findings."

FINDING OF RECORD AND CLOSURE

Because DOC concurred with the findings, the ombudsman closed this complaint as *partially justified* and *rectified*.

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