

INVESTIGATIVE REPORT

Final Finding and Closure

*****PUBLIC REPORT*****

(Edited to remove confidential information)

Alaska Ombudsman Complaint A098-0777

April 30, 1999

SUMMARY OF THE COMPLAINT

A former Correctional Officer (CO) complained to the Ombudsman in December 1998 that the Department of Corrections (DOC) had unfairly refused to rehire him as a correctional officer and did not provide a written reason for the decision, depriving him the information needed to appeal the decision. He also complained that DOC unreasonably required him to take the psychological examination which, he contended, he was exempt from under a 'grandfather' clause in state statute.

Assistant Ombudsman Linda Lord-Jenkins investigated this complaint.

BACKGROUND

The former CO wrote that he had been a correctional officer for Alaska DOC for several years when he was injured and received workers compensation benefits in the early 1990s. He was terminated for this medical disability two years later but in the summer of 1998, the Alaska Department of Administration, Division of Personnel notified him that, under the Injured Worker's Rehire Act, he was entitled to his job back if he was deemed physically able to work. He provided Alaska a copy of a very brief medical statement stating that he was physically able to

work.

The DOC hiring process was implemented under Police Standards Council (PSC) requirements implemented in 1991. Those requirements, as codified in 13 AAC 85.210, state that the Police Standards Council (PSC) must certify all police and troopers, correctional, parole and probation officers. In order to be certified, candidates for hire in law enforcement and corrections must pass specific physical, mental and training standards established by legislation and regulation.

Included in those standards is the requirement that applicants pass a psychological screening and possibly a psychological examination. Most specifically in the former CO's case is the standard that requires that correctional officers pass a psychological screen or more thorough psychological tests.

At the direction of the Department of Administration, DOC began the process to rehire him under AS 39.25.158, the Reemployment of Injured State Employees Act. At DOC's request, a DOC contract psychologist specializing in employment psychology, conducted a psychological examination of him in the fall of 1998. Within a month, DOC notified the former CO that he would not be hired. He complained to the Ombudsman in December that the DOC Human Resources Division did not tell him why DOC refused to rehire him.

The allegation was:

Unfair: Department of Corrections personnel director has refused to allow complainant to return to job and has not provided a written reason for this decision, depriving the complainant the information needed to appeal the decision.

INVESTIGATION

Ombudsman investigator interviewed the complainant, DOC Human Resources Director Diane Corso, Director of Institutions Allen Cooper, Alaska Police Standards Council Director Laddie Shaw, and DOA Division of Personnel Employee Resources Consultant Adrien Snow. She reviewed applicable statutes, regulations and legislative history.

The Investigator requested of DOC and received copies of all correspondence between the former CO and the agency. Included was a December 28, 1998 letter to him from DOC Human Resources Manager

Diane Corso. It stated, in part:

As stated in your letter dated December 21, 1998 (received December 28, 1998) I informed you on November 27 that you could not be returned to a Correctional Officer position at this time based on the results of a psychological screening examination. The examination is required of all individuals prior to employment as a Correctional Officer and is performed pursuant to regulations promulgated by the Alaska Police Standards Council. The regulations may be found at 13 AAC 85.200-900.

This letter told the former CO why DOC did not rehire him: He failed the psychological examination. What the letter did not do is explain why he did not pass the psychological examination. Ms. Corso's letter invited him to call her if he had further questions and she indicated to the investigator that the two have spoken about this matter.

The former CO complained that he was required to take the psychological examination and to sign the waiver stating he would not be told the exact results of the exam in undated correspondence to DOC and to Police Standards Council Director Laddie Shaw. His letter stated, in part:

First, I was to be RETURNED TO MY FORMER POSITION PCN under the authority of AS 39.25.158 NOT "reemployed" under the authority of AS 18.65.248. I did not go on Medical Retirement until 1993 and was grandfathered in (see AS 18.565.248, sec 9, para. (a)), as were my peers when this policy took effect September 4, 1998.

I voiced these concerns on more than one occasion, requested the policies governing the stated requirements, and even asked if an Attorney General's opinion had been requested. However, no one seemed willing to research this issue and give me a reasonable response.

I agreed to the testing requirements under, they said, Police Standards under protest, but felt I had no other option. I was told AFTER I reported for my written psychological evaluation that I would not be given the evaluation if I wanted the results. I was told the same thing at the oral interview – there would be no interview if I wanted the results. On both occasions I was told I

would have to sign a release or the process would STOP.

DOC provided the investigator a copy of the psychological exam waiver form that the former CO signed four times. He acknowledged participating in the evaluation as part of the selection process for correctional officer. He acknowledged that the assessment was geared to provide DOC information about his psychological status and suitability for working in the position for which he was applying. Because he signed the form, he gave up the right to know the specifics of the results and the Ombudsman will not challenge this.

The investigator reviewed the statutes the CO cited to support his argument that he should not have been required to take the psychological examination. The Investigator also reviewed the intent language accompanying the Injured Worker Rehire Act. The Alaska Legislature included this legislative letter of intent when this portion of the statute was written:

In enacting HB 367, it is the intent of the (Legislature) that any correctional, probation, or *parole officer employed under the "current employment" exception* made by sec. 9(a) of the bill should not be discriminated against in any matter relating to the officer's employment status, wages and benefits payable, promotion and reassignment opportunities, or training necessary to attain certification because the officer does not have a certificate issued by the Alaska Police Standards Council. [Emphasis supplied]

Section 9, ch., 11, SLA 1988 provides:

Notwithstanding AS 18.65.248, added by sec. 6 of this Act, a person employed by the state as a correctional, probation or parole officer on February 9, 1991, may continue to be employed as an officer without a certificate issued by the Alaska Police Standards Council. The Department of Corrections may not discriminate against a person employed as a correctional, probation, or parole officer under this subsection in any matter relating to the officers employment status, wages and benefits payable, promotion and reassignment opportunities, or training necessary to attain certification because the officer does not have a certificate issued by the Alaska Police Standards Council.

(b) A person continuing in employment under the

exemption provided in (a) of this section, ***who terminates that employment after February 9, 1991 may be reemployed by the state as a correctional, probation or parole officer only if the person holds a valid certificate issued by the Alaska Police Standards Council.***

[Emphasis supplied]

As we read this letter of intent, coupled with the wording of the statute amendment, the Legislature intended to protect existing employees from being adversely affected by the new requirements of certification. Had the former CO remained an employee of DOC he would not be required to pass a psychological exam to continue being a correctional officer. However, section (b) clearly states that anyone who terminated as an employee after February 9, 1991 and who now wishes – for whatever reason – to rehire, must meet the statutory and regulatory requirements imposed by DOC on new hires.

AS 39.25.158(c), (d) and (e) speak to what the agency is to do if the employee is not eligible for reemployment at his or her former job. Neither this statute nor letter of intent at any point suggests that it invalidates statutory professional requirements of the Police Standards Act. This statute and intent language does not exempt him from the numerous PSC requirements. Because he terminated from DOC employment in 1993, he was no longer “a person employed by the state” under SLA 1988 Section 9, ch 112 (a) or “a person continuing in employment” under SLA 1988 Section 9, ch 112 (b). Therefore, upon rehire, he fell under the current standards which required testing. DOC could not hire him if he did not meet the physical requirements imposed in this regulation. Nor can it differentiate between the physical and psychological requirements.

He did not challenge the validity of the testing; just the tests as they were applied to him and the reason that he was not provided the results. DOC’s position in this case is that the agency is the client of the psychologist who administered the test of hiring applicants on the agency’s behalf. The requirement for testing has never been challenged nor has the required waiver from knowing the exact results of the examination.

DOC Director of Institutions Allen Cooper told the investigator that only 12 percent of applicants to DOC, the Alaska State Troopers and Anchorage Police Department pass all PSC requirements. He said that he and superintendents initially were alarmed at the relatively small number of candidates were approved through this process but have since decided that the quality of candidate approved is far superior to uncertified candidates. Mr. Cooper indicated that he has had to remove

for cause only four PSC-certified employees since 1991.

FINDING OF RECORD

Because the Ombudsman determined that DOC did inform the former CO of why he was not hired and followed Alaska Statute when determining how to handle this rehire process, this complaint is found to be *unsupported*. Because this allegation was found to be unsupported the Ombudsman made no recommendations.

One last aspect of this complaint is that AS 39.25.158 provides for rehire eligible workers to apply for different positions in the original employer agency or other state governmental agencies if they are ineligible for rehire in their original job. DOA Division of Personnel Employee Resources Consultant Adrien Snow explained this option to the former CO in a December, 1998 letter but he did not apply for any alternative work as of the January 29, 1999 deadline and this option is no longer available to him.