



INVESTIGATIVE REPORT

Ombudsman Complaint J2004-0137

Finding of Record

Public Report

(Edited to remove information that is confidential under Alaska Statute)

December 29, 2005

SUMMARY OF THE COMPLAINT

On September 24, 2004, a Ketchikan Correctional Center (KCC) inmate contacted the Office of the Ombudsman to file a complaint against the Department of Corrections (DOC). The inmate alleged that KCC Superintendent Alan Bailey had repeatedly denied him access to a telephone to call his attorney in August 2004. The inmate also alleged that KCC staff prevented him from participating telephonically in a civil court hearing on August 23, 2004.

The ombudsman opened an investigation into the following allegations, stated in terms that conform to Alaska Statute (AS) 24.55.150, which authorizes the ombudsman to investigate complaints relating to the administrative acts of state government agencies:

ALLEGATION 1: CONTRARY TO LAW: Department of Corrections staff at the Ketchikan Correctional Center acted contrary to law by repeatedly denying the complainant's requests to access a telephone to contact the complainant's attorney.

ALLEGATION 2: Department of Corrections staff at the Ketchikan Correctional Center unreasonably denied the complaint access to a telephone to participate in a court civil hearing.

Assistant Ombudsman Charlsie Huhndorf-Arend investigated this complaint with assistance from Assistant Ombudsman Lisa Weissler. Ms. Huhndorf-Arend provided verbal notice of investigation to KCC Standards Supervisor Diane Gregory on October 15, 2004, in accordance with AS 24.55.140.

INVESTIGATION

The ombudsman investigator reviewed relevant Alaska Statutes (AS), Alaska Administrative Codes (AAC), DOC Policies and Procedures, and the KCC Inmate Handbook. She also reviewed copies of the complainant's DOC cop-outs and grievances, disciplinary documents, and PIN Call Detail Report for the period of July through

September 2004 as well as the court calendars and court logs for the complainant's criminal and civil court cases.

Ms. Huhndorf-Arend also interviewed:

The complainant,
KCC Superintendent Alan Bailey;
KCC Standards Supervisor Diane Gregory;
KCC Sergeant Carl Thompson, and
Assistant Public Defender Amanda Skiles.

On June 14, 2004, the complainant was arrested on two felony forgery charges and a misdemeanor theft charge. He was taken into DOC custody and held at KCC as a pre-trial detainee. Subsequent to his arrest, he was charged with several misdemeanor domestic violence offenses for unlawful contact and violating a domestic violence order involving his wife.¹

The DOC disciplinary documents show that KCC staff issued an incident report on August 1, 2004, alleging the inmate had violated 22 AAC 05.400(d)(3), unauthorized use of mail or telephone. According to the report, the inmate had used another inmate's PIN number to make telephone calls.²

On August 5, 2004, KCC staff issued another incident report alleging the inmate had violated 22 AAC 05.400(c)(19), refusing to obey a direct order of a staff member. The inmate had reportedly sent his mother a letter that contained a message for his wife despite a court order directing the inmate not to communicate directly or indirectly with his wife. KCC staff had previously intercepted two similar letters that contained messages for his wife and had directed him not to attempt to contact her again.

On August 8, 2004, KCC staff issued two incident reports alleging the inmate had violated 22 AAC 05.400(c)(19), refusing to obey a direct order of a staff member. According to the report, the inmate had been caught twice that day using another inmate's PIN number to make telephone calls. On the report, KCC staff noted that after the August 1 incident the inmate had been given a direct order not to use the PINs of other inmates.

According to KCC Standards Supervisor Diane Gregory and Sgt. Carl Thompson, the superintendent made an individualized determination to suspend the complainant's telephone privileges for a 30-day period. In reviewing the above documentation, it appears this period of suspension began mid-day August 9 and ended September 8.

The inmate addressed a cop-out to KCC Superintendent Alan Bailey on August 9, 2004, questioning why he couldn't call his attorney. Superintendent Bailey replied, "You have

¹ A review of the trial court index indicates that the inmate has a lengthy history of domestic violence and other charges since 1993. His wife filed for divorce on August 18, 2004. The dissolution was granted January 6, 2005. Since January 1, 2005, he has been involved in 22 court cases for domestic violence, illegal contact and violating terms of his release.

² DOC's telephone system works by assigning a personal identity number (PIN) to inmates. They are required to use their own PIN number when making all calls. When a call is made, an automatic machine announces to the recipient that the call is from a correctional center. The recipient then can indicate whether the call is accepted or declined. If declined, that phone number is automatically deleted from the phone numbers that an inmate's PIN can call.

been warned 4 times – I would have thought you would have understood after the first time.” The superintendent’s reply was not dated.

The inmate addressed another cop-out to Superintendent Bailey on August 10, 2004, inquiring when his telephone privileges would be restored and advising him that he needed to call his attorney. Superintendent Bailey replied, “30 days. Write your attorney. Explain to him why you can’t use the phone.” The superintendent’s reply was not dated.

The inmate filed another cop-out on August 11, again inquiring when his telephone privileges would be restored and advising KCC staff that he had not been able to call his attorney to arrange for a third-party release. Superintendent Bailey replied, “Asked previously and answered. If you ask again I will add another 60 days to the loss of your phone.” The superintendent’s reply was not dated.

DOC held a disciplinary hearing on August 17, 2004, for all four of the above rule violations. According to the Reports of Disciplinary Decision, the inmate pleaded guilty to the d-3 infraction and two of the c-19 rule infractions. The disciplinary hearing officer also found the inmate guilty of the other c-19 rule infraction. The inmate did not appeal this finding.

The Summary Findings of Disciplinary Committee show the penalties imposed upon the inmate for these rule violations were 100 days loss of statutory good time with 55 of those days suspended and 55 days of punitive segregation all of which were suspended. The disciplinary committee did not suspend or restrict the complainant’s telephone privileges.

The inmate addressed another cop-out to Superintendent Bailey on August 17, 2004, stating that he had gone before the disciplinary board and inquiring when his telephone privileges would be restored. Superintendent Bailey replied, “60 days from infraction.” The superintendent’s reply was dated August 17.

The inmate addressed yet another cop-out to Superintendent Bailey on August 18, 2004, asking when his telephone privileges would be restored. He also informed the superintendent that he had a hearing scheduled the following Monday [August 23] and that he had not been allowed to call his attorney. Superintendent Bailey replied, “See other cop-out 8/17.” The superintendent’s reply was not dated.

On August 18, 2004, the inmate also addressed a cop-out to KCC Sgt. Thompson asking to arrange for him to participate telephonically in a civil court hearing scheduled for Friday, August 27, 2004. Sgt. Thompson responded August 20. “This is a civil matter. You have access to the telephone to call into the court. If you are going to be locked down, have the court re-schedule the hearing to a date/time when you are not locked down.”

The inmate addressed another cop-out to Superintendent Bailey on August 23, 2004. In that cop-out he inquired why he hadn’t gotten back “any of the cop-outs” he had previously sent in. He also advised the superintendent that he hadn’t been allowed to call his attorney since August 8 and that he had a court hearing that day [August 23]. He inquired about his legal right to have contact with his attorney. He also advised the superintendent that he had a court hearing scheduled for August 27 and that he needed to

arrange for a telephonic hearing. Superintendent Bailey's undated reply stated simply, "Write."

On August 25, 2004, the inmate addressed a cop-out to Superintendent Bailey requesting to participate telephonically in a court hearing on August 27 at 3 p.m. The inmate noted, "I can't use the dorm phone because it is a court hearing and the dorm phone only allows 15 min[utes] then cuts off." Superintendent Bailey replied, "Approved to use phone in dorm. You can recall. The court is advised and approves. 225-3195 [clerk of court telephone number.]" The superintendent's reply was not dated.

The inmate addressed a cop-out to Sgt. Thompson on September 7. The inmate noted in the cop-out that his telephone privileges had been suspended for 30 days and he requested that they be reinstated. Sgt. Thompson replied, "I did not [revoke] your phone privileges. I took your good time." Sgt. Thompson's reply was dated September 8.

The inmate also filed a separate grievance on September 7, 2004, which in part read:

My phone privledges [sic] were completely taken away because of 3 KCC rule violations.... My concerns are that I haven't even been allowed to call my attorney (no phone) or religious members etc. I asked by cop-out several times to allow my prisoner rights to no avail in fact I received a threatning [sic] return that more time would be taken if I asked again.

The inmate indicated on the grievance form that the relief he sought was to have his phone privileges restored and his PAN cleared of wrong numbers.

Superintendent Bailey screened back the complainant's grievance on September 8, 2004, and stated, "You are not grieving a procedural process but the outcome of a disciplinary action. You have access to an attorney."

The complainant's PIN Call Detail report for the month of August shows that he did not make any calls during the period of August 10 through August 24. According to this report, the last call he made on August 9, 2004, was at 2:02 p.m. to his attorney. The next call he made was on August 25, 2004, at 3 p.m. to the court, followed by a call at 3:20 p.m. to his attorney. The report then shows that for the period of August 26 through September 8 he made calls only to his attorney and the court. In reviewing the report, it appears that the complainant's regular telephone privileges were restored as of September 9.

Ms. Huhndorf-Arend discussed the complaint with Superintendent Bailey on November 3. She explained that after reviewing the complainant's DOC cop-outs and grievances the ombudsman was concerned that it appeared KCC staff had knowingly denied the inmate access to a telephone for the purpose of contacting his attorney. She noted that statute, regulation, and departmental policy require DOC to allow inmates telephone access to their attorneys.

Superintendent Bailey replied that the inmate had been caught several times using the PINs of other inmates. He commented that his staff had been unsuccessful in controlling

The complainant's abuse of the telephone. Therefore, he decided to suspend the complainant's telephone privileges in an effort to gain his compliance.

When asked, Superintendent Bailey advised Ms. Huhndorf-Arend that as best he could recall he had given a verbal directive to his staff not to allow the inmate to use the telephone. The inmate was in open population and was not segregated at the time he gave this directive. As such, the house officers and the control room staff would have been responsible for monitoring the complainant's telephone calls and enforcing this directive.

Superintendent Bailey said that he had not intended to keep the inmate from his attorney. He said his intent was simply to remove the complainant's ability to abuse the telephone.

He further stated,

"I tried to use a lesser measure. I have no apologies or regrets and would do it again. . . I'm not trying to sit here and violate people's rights. . . The real truth of it is that I would likely do it again in the future and have probably done it in the past. When they start complying, I immediately withdraw the sanction. Now, he's found his way into segregated status."

Public Defender Amanda Skiles

The ombudsman investigator also interviewed the complainant's attorney, Public Defender Amanda Skiles. In reviewing her telephone log, she confirmed that she did not receive any calls from the inmate during the period of August 10 through August 24. She said they had spoken briefly on August 9. The next telephone contact listed on Ms. Skiles' records was on August 25 when he left her a message advising her that his telephone privileges at KCC had been suspended and he was concerned he may not be able to participate telephonically in an upcoming civil hearing.

Ms. Skiles said that after receiving the complainant's telephone message on August 25 she went to KCC to speak with him regarding his criminal case. While she was at KCC she also requested to speak with Superintendent Bailey. She said she discussed the issue of the complainant's telephone access with the superintendent and she told the superintendent that if KCC would not allow the inmate access to a telephone to participate in the court hearing scheduled the following day then DOC would need to arrange to transport him to the courthouse to attend the hearing. She said Superintendent Bailey told her that KCC staff would not allow the inmate to use a private phone and room to contact the court. However, he told her that if the inmate arranged to have the hearing during his time out of his cell when he had access to the dorm phone, KCC staff would allow him to participate in the hearing telephonically.

Ms. Skiles said she received a letter dated August 23 from the inmate on August 26. In the letter, he told her his telephone privileges had been suspended and that KCC staff had not allowed him to use the phone since August 8. Ms. Skiles noted that she had spoken with him on August 9 and believed he must have had his dates confused. In the letter, he also told her he had missed a civil hearing on August 23. He then expressed concern that KCC staff may not allow him to participate telephonically in a civil hearing scheduled for August 27.

The ombudsman investigator asked Ms. Skiles if she was aware of any court hearings the inmate may have missed due to his restrictions. She said that she was aware that he missed a civil hearing on August 2 for unrelated reasons. Regarding the hearing the inmate said he missed, Ms. Skiles said she thought that perhaps a bail hearing had been scheduled for August 23 but that at some prior point it was either rescheduled or cancelled. However, she said she was not sure of this. She suggested that perhaps the inmate had his dates confused.

Ms. Skiles said that the inmate was physically present for his August 26 criminal hearing, at which time he entered a plea. The ombudsman investigator asked Ms. Skiles if she believed the complainant's inability to contact her by telephone due to the restrictions imposed upon him by DOC had hindered his criminal case. She responded that she could not say with certainty the impact this may have had. She did say that discussing a case with an inmate at the courthouse during the brief window of time before a court hearing is difficult because the inmate is shackled to other inmates and there is no opportunity for confidential consultation.

On August 27, Ms. Skiles said she advised the judge in the complainant's civil court case of the difficulty he was having in arranging to participate telephonically in hearings from KCC. She said she stayed at the civil hearing just long enough to ensure that the court was able to connect to the inmate by telephone at KCC for the hearing.

The court calendars and logs show that the inmate had a criminal court hearing scheduled for August 24. The inmate was present and in DOC custody for this hearing. Ms. Skiles asked for a continuance and the next hearing was scheduled for August 26. He was present for this hearing and in DOC custody. The inmate also had a civil court hearing scheduled for August 27. He participated telephonically in this hearing.

Former Alaska Public Defender Barbara Brink

The ombudsman contacted, then-Alaska Public Defender Barbara Brink, to discuss any concerns she might have about the complainant's situation. She said:

Clearly DOC was incorrect in denying the inmate access to his attorney. Most of the institutions are very well aware that we're the only call [inmates] can make.³ When someone is in administrative segregation we are the only call they can make. Most institutions do it appropriately. I have never heard of another superintendent denying communication with an attorney.

She added she had never had a client complain about this problem.

³ The statutes granting inmates telephone access to their attorneys includes telephone access to the Alaska Office of the Ombudsman.

Chronology of events

Date	Activity
August 1, 2004	KCC staff issues disciplinary report alleging unauthorized use of telephone
August 2, 2004	Complainant missed court for reasons unrelated to telephone privileges
August 5, 2004	KCC staff issues disciplinary report alleging the inmate violated a direct order by attempting to get message to his wife
August 8, 2004	KCC staff issues disciplinary report alleging two counts of refusing to obey a direct order by using another inmate's PIN.
August 9, 2004	KCC Supt. Bailey issues unwritten individualized determination suspending the complainant's telephone privileges.
August 10, 2004	The inmate files cop-out to Supt. Bailey asking when phone privileges will be restored so he can call his attorney.
August Undated	Supt. Bailey responds to the cop-out and tells the complainant to write to his attorney.
August 11, 2004	The inmate files cop-out to Supt. Bailey asking about phone privileges and advising staff he needs to call his attorney.
August / Undated	Supt. Bailey responds to cop-out and threatens to add 60 days to the loss of the phone privileges if the inmate asks again.
August 17, 2004	KCC disciplinary board hears all four charges and penalizes the inmate 100 days of good time, 55 suspended, and 55 days of punitive segregation, all suspended.
August 17, 2004	The inmate files cop-out to Supt. Bailey saying he has gone before the D-Board and asking when his phone privileges would be restored.
August 17, 2004	Supt. Bailey replies "60 days from infraction."
August 18, 2004	The inmate sends cop-out to Sgt. Thompson asking him to arrange a telephone civil court hearing on August 27.
August 18, 2004	The inmate files another cop-out telling Supt. Bailey that he has an August 23 hearing and he hadn't been able to talk with his attorney about it. He asked when his phone would be restored
August / Undated	Supt. Bailey refers the inmate to his August 17 response.
August 20, 2004	Sgt. Thompson responds to the complainant's August 18 cop-out. He tells the inmate to call the court and ask that the hearing be rescheduled to a time when he is not locked down.
August 23, 2004	The inmate sends cop-out to Supt. Bailey saying he hadn't been able to talk with his attorney, he had a hearing that day as well as August 27 and he needed access to the telephone.
August / Undated	Supt. Bailey responds "write."
August 25, 2004	The inmate sends cop-out to Supt. Bailey asking to participate telephonically in a court hearing on August 27.
August 25, 2004	Public Defender Skiles receives message from the inmate and speaks to Supt. Bailey about the phone privileges for a hearing.
August 25, 2004.	Supt. Bailey approves the inmate to use the public phone in the mod only for the hearing.
September 7, 2004	The inmate files grievance alleging that DOC didn't allow him telephone access to talk with his attorney.
September 8, 2004	Supt. Bailey screens the complainant's grievance saying it was improper because it was grieving the outcome of a disciplinary action, not a procedural matter.

ALASKA STATUTE, REGULATIONS AND DOC POLICY AND PROCEDURES

According to **AS 33.30.231**, "Telephone Access and Monitoring Inside Correctional Institutions":

(a) A prisoner shall have reasonable access to a telephone except when access is suspended as punishment for conviction of a rule infraction or pending a hearing for a rule infraction involving telephone abuse. A suspension under this subsection must be reasonable in length and **may not prohibit telephone communication between the prisoner and an attorney** or between the prisoner and the office of the ombudsman.
[Emphasis added]

Under 22 AAC 05.530, "Prisoner Phone Calls":

(c) The superintendent may limit a prisoner's access to a telephone, **except to call an attorney**, if reasonable grounds exist to believe that the prisoner's use of a telephone threatens the security of the facility or the protection of the public. A prisoner who is classified maximum custody, or who is placed in punitive segregation or administrative segregation because the prisoner poses a threat to others or to the security of a correctional facility, may not have access to a telephone **except (1) to communicate with an attorney**, (2) to otherwise communicate as provided in 22 AAC 05.015, or (3) in an emergency as determined appropriate by the superintendent."

DOC Policy 808.01, "Legal Rights of Prisoners" Policy states:

(A) **The Department will ensure that prisoners have access to privacy and a telephone to communicate with their attorney or legal representatives.** Prisoners also must have access to the court for transmitting correspondence and documents. Department staff may not penalize prisoners for seeking judicial relief.

DOC Policies and Procedures 810.01, "Prisoner Access to Telephone," states in part:

(A) Access and Use of Telephone

(1) Access and Limiting Access

Prisoners in open population and administrative segregation shall have reasonable telephone access. An open population or administrative segregation prisoner's telephone access may be limited or suspended by:

- (a) A disciplinary tribunal as punishment for a disciplinary infraction;
- (b) The superintendent, based upon an individualized determination that reasonable grounds exist to believe that the prisoner's telephone use threatens facility security, the safety of a person, the protection of the public, or otherwise constitutes telephone abuse;
- (c) *Prisoners whose telephone access has been limited or suspended **must still be allowed telephone calls to an attorney, the courts for scheduled hearings, and the ombudsman's office**; and*
- (d) A prisoner whose telephone privileges are limited or suspended in connection with placement in administrative segregation or disciplinary action may challenge those restrictions only in the administrative segregation or administrative appeal process, as applicable. A prisoner whose telephone privileges are limited or suspended based upon an individualized determination may challenge the restrictions only by filing a grievance pursuant to 808.03 Prisoner Grievances.

The **KCC Inmate Handbook** on page 7 "Telephone" states in part:

1) Telephones are available for use by the general population, including maximum custody, several hours a day....

5) ***Phone calls to attorneys are not restricted***, but they should be made during normal work hours to increase your chances of contacting him or her. [Emphasis added]

KCC Inmate Handbook on page 16 "Telephones" states in part, "Restrictions could result in only using the phone for calls to attorneys and the Ombudsman."

ANALYSIS AND PROPOSED PRELIMINARY FINDING

In accordance with AS 24.55.150, the ombudsman may investigate administrative acts that the ombudsman has reason to believe might be contrary to law, unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, unnecessarily discriminatory, based on mistake of fact, based on improper grounds, unsupported by an adequate statement of reasons, performed in an inefficient or discourteous manner, or otherwise erroneous.

The ombudsman is impartial and each complaint is considered on its merits. In the investigation of a complaint, the ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency's action is valid. The ombudsman then makes a finding that the complaint is *justified, partially justified, not supported, or indeterminate*

Under 21 AAC 20.210, a complaint is *justified* “if, on the basis of evidence obtained during the investigation, the ombudsman determines or believes the complainant’s criticism of the administrative act is valid.”

The standard used to evaluate all 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: Department of Corrections staff at the Ketchikan Correctional Center acted contrary to law by repeatedly denying the complainant access to a telephone to contact the complainant’s attorney.

The Office of the Ombudsman Policies and Procedures Manual at 4040(1), states, in part, that an administrative act is “Contrary to law” if it fails to comply with statutory or regulatory requirements.

Alaska Statute 33.30.231 is clear on granting prisoners telephone access to their attorneys. A prisoner **shall** have reasonable access to a telephone . . . except when access is suspended as punishment for a rule infraction and then, **the suspension may not prohibit telephone communication between the prisoner and an attorney.**⁴

Alaska Administrative Code is equally clear. It grants a superintendent authority to limit a prisoner’s access to a telephone in justifiable circumstances **except to call an attorney.**

DOC policy at 808.01(A) states that the department **will ensure** that prisoners have access to privacy and a telephone to communicate with their attorney or legal representatives. However, “Prisoners whose telephone access has been limited or suspended **must still be allowed telephone calls to an attorney**”

The evidence is clear that Superintendent Bailey, the man in charge of ensuring that KCC staff adheres to statutes, regulations and DOC policies, repeatedly violated those laws by denying the complainant his right to call his counsel.

Further, Supt. Bailey admitted to restricting the calls but claimed his action was not intended to restrict the complainant’s phone access to his attorney but simply to get his attention. We have a problem with that rationale. If Mr. Bailey didn’t intend to restrict the complainant’s access to his attorney, he would have allowed the inmate to call his attorney on the day that the inmate filed his first cop-out asking for permission to call her. Instead, the inmate and Supt. Bailey entered a 15-day war of wills where the complainant five times sought permission to use the phone to call his attorney and Mr. Bailey five times denied that permission. The repeated denials constitute a violation of state statute, regulation and policy. It is contrary to law.

The ombudsman understands that in order to ensure the security and orderly administration of its institutions and to protect the public it may be appropriate under certain circumstances to restrict inmates’ telephone privileges. A review of the complainant’s legal history gives us a glimpse into the difficulties DOC experienced in dealing with him. However, statute, regulation and departmental policies simply do not

⁴ The statutes granting inmates telephone access to their attorneys includes telephone access to the Alaska Office of the Ombudsman.

authorize DOC to restrict telephone contact between inmates and their attorneys, no matter how vexing the inmate becomes.

Further, the superintendent threatened the inmate with additional sanctions if he continued to seek permission to use the telephone to call his attorney and he improperly screened the complainant's grievance on the matter.

Under DOC Policies and Procedures 810.01(A)(1)(b), superintendents have the discretionary authority to impose telephone restrictions on inmates "based on an individualized determination that reasonable grounds exist to believe that the prisoner's telephone use threatens facility security, the safety of a person, the protection of the public, or otherwise constitutes telephone abuse." Telephone restrictions imposed under the authority of the superintendent are separate and apart from telephone restrictions imposed by a disciplinary committee/hearing officer following formal inmate disciplinary proceedings. In this case, Superintendent Bailey made an unwritten individualized determination to restrict the complainant's telephone privileges.

According to DOC Policies and Procedures 810.01 (A)(1)(d), "A prisoner whose telephone privileges are limited or suspended based upon an individualized determination may challenge the restrictions only by filing a grievance pursuant to 808.03 Prisoner Grievances." The inmate attempted to challenge these restrictions through proper channels by filing a grievance on September 7. Yet, Superintendent Bailey improperly screened back his grievance on September 8 and replied, "You are not grieving a procedural process but the outcome of a disciplinary action. You have access to an attorney."

That response is incorrect. The disciplinary committee did not restrict the complainant's telephone access. Superintendent Bailey did.

Additionally, the complainant's PIN Call Detail Report shows that by the time the inmate filed his grievance he was being allowed access to a telephone to contact only his attorney and the court. KCC staff was still imposing restrictions on his general telephone privileges. He therefore should not have been denied the opportunity to challenge these restrictions through the grievance process.

Finally, Superintendent Bailey admitted that he had restricted the complainant's telephone access, had done it before and would likely do it again. Superintendent Bailey had the absolute right and justification to restrict the complainant's phone privileges to make calls to anyone other than his attorney and the ombudsman. But the superintendent was repeatedly notified of the complainant's desire to communicate with his attorney and he repeatedly denied that access.

Based on the evidence reviewed, KCC staff knowingly and repeatedly denied the complainant's requests to telephone his attorney. In this case, the telephone restrictions imposed by Superintendent Bailey effectively denied the inmate telephonic access to his attorney for a period of 15 days and were contrary to Alaska Statutes, Alaska Administrative Code, departmental policies and procedures and the court Settlement known as the Cleary Final Settlement Agreement. Further, KCC improperly screened his grievance on the general phone restriction in violation of DOC policy. Consequently, the ombudsman proposes to find this allegation *justified*.

ALLEGATION 2: Department of Corrections staff at the Ketchikan Correctional Center unreasonably denied the complainant access to a telephone to participate in a court civil hearing.

The Ombudsman Policies and Procedures Manual at 4040(2), states, in part, that an administrative act is unreasonable if the act “is inconsistent with agency policy and thereby places the complainant at a disadvantage to all other.”

Under 21 AAC 20.210, a complaint is *not supported* “if, on the basis of evidence obtained during the investigation, the ombudsman determines or believes the complainant’s criticism of the administrative act is not valid.”

The evidence reviewed during the course of our investigation did not prove that DOC prevented the complainant from participating telephonically in an August 23, 2004, civil court hearing. In fact, the court calendars and logs do not show that a hearing had been scheduled for August 23. Ms. Skiles, the complainant’s attorney, said she thought that perhaps a bail hearing at one time had been scheduled for August 23 but that at some prior point it was either rescheduled or cancelled. However, she said she could not be sure of this. She suggested that perhaps the complainant had his dates confused. Neither did the complainant provide any documentation to support his claim that he had missed a court hearing that had been scheduled for August 23 or any other date.

Given the above facts, the ombudsman proposes to find this allegation ***not supported***.

The Ombudsman Policy Manual at 4060.3 states that when one allegation of a complaint is found supported and another allegation is found to be not supported or indeterminate, the overall complaint is found to be ***partially justified***.

AGENCY RESPONSE TO PROPOSED FINDINGS

Commissioner Marc Antrim responded to the preliminary findings on behalf of DOC. The commissioner agreed with the finding of justified to Allegation One and unsupported to Allegation Two. He also acknowledged that while the facts did not lead to a supported finding in the second allegation, Superintendent Bailey’s actions could well have led to a denial of the complainant’s participation in a court hearing if one had been held.

Ombudsman Policy and Procedure Manual at 4060.3 states that when one allegation of a complaint is found to be justified and other partially justified, this complaint should be closed as ***partially justified***. This complaint will be closed as partially justified.

OMBUDSMAN’S RECOMMENDATIONS

A primary function of the Ombudsman is to make recommendations that prevent the recurrence of the problem illustrated by the current complaint.

* * * * *

Recommendation 1: Department of Corrections administrators should reinforce with KCC staff the statutes, regulations, and departmental policies and procedures regarding inmate access to telephones for the purposes of contacting their attorneys.

Access to an attorney is a fundamental right of all United States citizens and access is often the only practical option for inmates to communicate with their attorneys. The Alaska Legislature recognized this right when it passed AS 33.30.231 in 1986. DOC must act decisively to ensure that its employees do not deny this right again. Therefore, the ombudsman proposes the following recommendation:

Recommendation 2: Department of Corrections staff should establish procedures for telephone restrictions imposed by superintendents.

Superintendent Bailey made the decision and gave a verbal directive authorizing KCC staff to suspend the complainant's telephone privileges. The superintendent then repeatedly denied the complainant's requests to call counsel. DOC policy does not specify whether the discretionary decision of a superintendent to restrict an inmate's telephone privileges through an individualized determination should be documented.

The ombudsman recommends that DOC establish procedures requiring that a decision by a superintendent to restrict an inmate's telephone privileges should be in writing. DOC should provide the inmate written notice of the decision to restrict telephone privileges, the reasons for the restriction, the proposed reinstatement date of the inmate's telephone privileges, and instructions on how to challenge the decision. Further, the ombudsman recommends that telephone restrictions imposed by superintendents be reviewed every 30 days to determine if the restriction should continue or be modified.

AGENCY RESPONSE TO PROPOSED RECOMMENDATIONS

The commissioner first reminded the Ombudsman that DOC's mission is to protect the public by incarcerating and supervising offenders. He also argued that DOC has followed the lead of the Alaska Legislature in its concern about the safety and well being of crime victims. He then reiterated many of the facts listed in the ombudsman's preliminary finding including:

The complainant's lengthy history of domestic violence; his unlawful contact with and violating a domestic violence order involving his wife; his repeated use of another prisoner's PIN to call his wife; and his attempts to smuggle letters out of the institution to his wife, all in violation of the no contact order.

Commissioner Antrim stated:

The Cleary et. Al., Final Settlement Agreement . . . addresses the issuing of an 'individualized determination' limiting a right or privilege based on a substantial and immediate threat. This threat is intended to mean a risk of harm or injury that is significant. [The Prisoner's] history and on-going attempts to terrorize his wife would meet this test. The current statutes, regulations, and policies do not reflect the language in the settlement that was agreed to by the parties. The individual determination must be given to the offender in writing. This probably would have given [the prisoner] a clearer understanding of the situation.

The commissioner quoted the Final Settlement Agreement at II. Principles of Judicial Interpretation and Definitions.

C.) A number of provisions in this agreement discuss rights or privileges that are to be afforded certain classes of inmates absent an “Individualized determination” that such an inmate is an escape, smuggling or security risk. This phrase is not intended to create a liberty interest requiring a due process hearing before denial of the relevant rights or privileges. The phrase is intended, however, to require the superintendent or designee to, in writing, articulate specific facts applicable to the inmate which justify the determination that the inmate is an escape, smuggling or security risk and, therefore, not entitled to a certain right or opportunity. Notice of this determination shall be provided to the inmate as soon as practicable before or upon denial of the right or opportunity. An inmate may challenge such a determination by filing a grievance; or if the action is related to classification (e.g. administrative segregation) or discipline, by filing an appeal.

D.) Provisions in this agreement make certain action contingent upon a “substantial and immediate threat.” A substantial and immediate threat is intended to mean a risk of harm or injury the nature of which is significant, which is based on objective, articulable facts and one for which the danger is imminent or present.⁵

The Commissioner also argued the following:

- The department lacks sufficient staff to monitor every prisoner’s telephone usage or guarantee that a prisoner given a phone to call an attorney won’t place another call when the officer steps away.
- There is no indication whether the complainant followed Superintendent Bailey’s advice to write to his attorney.
- The complainant apparently filed only one grievance that Superintendent Bailey responded to on September 8, at which time the individual determination put in place by Superintendent Bailey had ‘softened’ and the complainant was allowed to place calls to the court and his attorney.
- The complainant’s attorney is located in Ketchikan and can visit with any of her clients at the facility at any time.
- There is no indication that the investigators asked the complainant why he refused to stop abusing the phone system and refused to stop attempting to contact his wife in violation of the court orders. DOC noted “this interesting shift in assigning responsibility.”

⁵ Michael Cleary et al V. Robert Smith, DHS&S, et al, 3AN-81-5274, II Principles of Judicial Interpretation and Definitions.

- Finally, DOC stated that the internal processes worked in this case. The prisoner complained and the original restriction was loosened almost two weeks early.

The commissioner asked that the ombudsman replace the ombudsman's recommendations with the following:

DOC Substitute Recommendation One: *The Department of Corrections administrators should issue clear directives and guidelines to Superintendents on the use of individualized determinations to ensure that the Superintendents articulate in writing to the prisoner the reason for the determination.*

DOC Substitute Recommendation Two: *The Department of Corrections should contact the Office of Victim Rights and engage in discussion and seek guidance as to necessary statutory, regulatory and department policy and procedure changes needed to strengthen the protection of victims from incarcerated persons.*

DOC Substitute Recommendation Three: *The Department of Corrections should work with the Legislature to pass applicable legislation strengthening the protection of victims. Once those changes are made, the department should promulgate regulations and make applicable changes in its policies and procedures.*

OMBUDSMAN RESPONSE TO DOC REPLY

The commissioner quoted the Cleary Final Settlement Agreement which states that rights or privileges discussed in the FSA do not create a liberty interest requiring a due process hearing before denial of a relevant right or privilege. The ombudsman accepts that argument but points out that the FSA also requires DOC to use *written* individualized determinations which Mr. Bailey did not do.

Additionally, in Section C Telephone Communication, Cleary states in part:

1. The Department shall ensure that telephones are accessible to the general inmate population several hours per day for phone calls. Inmates in administrative segregation are entitled to access to telephones upon written request, *except for an inmate whose access to a phone must be limited due to demonstrated telephone abuse established by the Department or at the hearing required to be held under Paragraphs VII.B.3 and B.4 of this agreement. **Notwithstanding such a limitation, those inmates shall be entitled to access to a telephone call to an attorney or the Ombudsman office upon written request. Inmates in punitive segregation are limited to telephone calls to attorneys and the Ombudsman's office.*** [Emphasis added]

Thus, the FSA recognizes the security needs of the institution as well as the fact that inmates cannot be denied telephone access to their attorney or the Ombudsman.

The Ombudsman understands that DOC is understaffed and unable to baby-sit each prisoner who makes a phone call. However, that does not negate state law. Prisoners must be allowed to call their attorneys.

DOC also argues that the complainant filed only one grievance about this matter at the same time that his phone restrictions were eased, therefore the internal processes “worked” in this case. The ombudsman disagrees.

Granted a grievance is the correct challenge to an individualized determination. But there was no such determination in this case because the superintendent did not issue a written determination. The process also did not work because Superintendent Bailey improperly screened the grievance about the complainant’s unwritten individualized determination.

DOC also suggests that the ombudsman has shifted responsibility for the complainant’s illegal actions to Superintendent Bailey by not asking the complainant why he didn’t stop his calls. The ombudsman is not blind to the facts of the complainant’s crimes. He had a long history of harassing his wife and was continuing to do so from KCC while thumbing his nose at DOC in the process. His trial court record alone shows 91 court cases, several arising after he filed this complaint. There is no doubt that the complainant bears responsibility and must pay the penalty for his actions outside and inside prison walls. However, his actions simply do not justify the superintendent’s failure to follow the law, regulations, department policy, and the Cleary Settlement Agreement.

DOC has suggested substituting three of its own recommendations for the ombudsman’s proposed recommendations.

DOC Substitute Recommendation One would strengthen the policy on imposition of individualized determinations.

DOC substitute Recommendations One has value but the ombudsman believes it misses the point of proposed Ombudsman Recommendation One. This complaint and investigation focused on a high-ranking DOC official repeatedly and determinedly denying a prisoner’s statutorily protected telephone access to his attorney. His *method* of denying that access was by imposing an unwritten individualized determination. That issue is hardly insignificant and should be addressed but the proposed substitute recommendation focuses only on the *method* used in that violation, and thereby blurs the issues. The fact remains that DOC staff should not violate Alaska Statute, especially this one.

The ombudsman prefers not to issue recommendations reminding agencies to “follow the law.” In this case it is necessary. Recommendation One will stand. The ombudsman will continue to recommend that DOC reinforce with DOC staff and administrators the statutes, regulations and departmental policies and procedures regarding inmate access to telephones for the purpose of contacting their attorneys.⁶

The Ombudsman agrees that DOC should issue clear directives and guidelines on the use of individualized determinations and therefore will accept DOC’s substitute DOC Recommendation One in place of proposed Ombudsman Recommendation Two. The intent of the Ombudsman recommendation is fulfilled by DOC’s suggestion. Therefore, the agency response to this recommendation partially satisfies the ombudsman’s recommendation.

⁶ And the Ombudsman

DOC also suggested that the ombudsman add two recommendations calling for additional study of means and methods to protect victims of domestic violence. The Ombudsman recognizes the importance of protecting victims of domestic violence from their abusers and supports DOC efforts to assist that protection.

* * * * *

The recommendations of record will be as follows:

***Recommendation 1:** Department of Corrections administrators should reinforce with KCC staff the statutes, regulations, and departmental policies and procedures regarding inmate access to telephones for the purposes of contacting their attorneys.*

***Recommendation Two:** The Department of Corrections administrators should issue clear directives and guidelines to Superintendents on the use of individualized determinations to ensure that the Superintendents articulate in writing to the prisoner the reason for the determination.*

FINDING OF RECORD AND CLOSURE

This complaint will be closed as *partially justified* and *partially rectified*.