



## INVESTIGATIVE REPORT

Findings of Record and Closure

Ombudsman Complaint A2016-0317

September 9, 2016

### REDACTED PUBLIC REPORT PER AS 24.55.200

*This investigative report has been edited and redacted to remove information made confidential by Alaska Statute and to protect individual privacy rights.*

## SUMMARY OF THE COMPLAINT

An Inmate complained to the Ombudsman that the Department of Corrections (DOC) deemed him ineligible for furlough based on a criminal charge from his juvenile record. The Inmate explained that he had been charged with a sex offense as a juvenile, but that the charge had been dismissed. He is serving seven years in prison for convictions of burglary, robbery, and assault. He contended that DOC's determination involving the alleged sex offense was in error.

The Ombudsman opened an investigation into the following allegation, stated in terms that conform to AS 24.55.150:

***Unreasonable: DOC deemed the complainant ineligible for furlough for reasons not outlined in regulation or policy.***

Assistant Ombudsman Kate Higgins notified DOC Chief Classification Officer Brann Wade of the complaint on March 2, 2016, in accordance with AS 24.55.140.

## BACKGROUND

The Inmate contacted the Ombudsman in February 2016 because he had attempted to apply for furlough and had been told that he was ineligible because of a sex charge in his juvenile record. He said that the juvenile charge had been dismissed and that he had never been adjudicated for the offense. He was upset that DOC deemed him ineligible for furlough because it meant that, unlike a furlough denial, he could not appeal the ineligibility determination. The Inmate believed that he met the furlough eligibility criteria outlined in DOC policy and he said he could not understand why he was not allowed to apply.

## INVESTIGATION

A prerelease furlough gives inmates the opportunity to be placed in the community while serving a portion of their sentence. Inmates granted a prerelease furlough will be placed at a Community Restitution Center (CRC)<sup>1</sup>. DOC may impose conditions on a furlough, such as requiring the inmate to obtain and keep employment or compliance in a treatment program. The decision to grant an inmate furlough is a discretionary function; furlough is a privilege and not a right.

## STANDARDS:

DOC's statutes, regulations, and policies set the guidelines for furloughs and establish the criteria for eligibility.

**AS 33.30.091. Designation of programs.** Except as provided in AS 33.30.111 and 33.30.161, the commissioner may assign a prisoner committed to the commissioner's custody to a program established under AS 33.30.011(3) considering

- (1) safeguards to the public;
- (2) the prospects for the prisoner's rehabilitation;
- (3) the availability of program and facility space;
- (4) the prospect of future judicial proceedings requiring the presence of the prisoner;
- (5) the nature and circumstances of the offense for which the prisoner was sentenced;
- (6) the needs of the prisoner as determined by a classification committee and any recommendations made by the sentencing court;
- (7) the record of convictions of the prisoner with particular emphasis on crimes specified in AS 11.41;
- (8) the use of drugs or alcohol by the prisoner;
- (9) the length of the prisoner's sentence; and
- (10) other criteria considered appropriate by the commissioner, including experimental evaluation of correctional programs that are consistent with protection of the public and reformation of the prisoner.

### **AS 33.30.101. Furloughs.**

- (a) The commissioner shall adopt regulations governing the granting of prerelease furloughs and short-duration furloughs to prisoners
  - (1) to obtain counseling and treatment for alcohol or drug abuse;
  - (2) to secure or attend vocational training;
  - (3) to obtain medical or psychiatric treatment;
  - (4) to secure or engage in employment;
  - (5) to attend educational institutions;

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<sup>1</sup> Community Restitution Centers were so designated in AS 33.30.151 but have been come to be known as Community Residential Centers.

- (6) to secure a residence or make other preparations for release;
  - (7) to appear before a group whose purpose is a better understanding of crime or corrections;
  - (8) for any other rehabilitative purpose the commissioner determines to be in the interests of the prisoner and public.
- (b) If the commissioner determines with reasonable probability that a prisoner can live under reduced supervision without violating the law or the conditions established for the conduct of the prisoner, the commissioner may grant a furlough after considering
- (1) the factors in AS 33.30.091;
  - (2) violations, if any, by the prisoner of a condition of a prior furlough;
  - (3) the history, if any, of institutional misconduct by the prisoner;
  - (4) the best interests of the prisoner and the public.
- (c) The regulations adopted under (a) of this section may not provide for the granting of a furlough of any type to a prisoner sentenced to a mandatory 99-year term of imprisonment under AS 12.55.125(a) or a definite term of imprisonment under AS 12.55.125(l) unless the prisoner is at all times in the direct custody of a correctional officer while the prisoner is away from the correctional facility.
- (d) The commissioner may release on furlough a prisoner convicted of a crime involving domestic violence only under conditions that would protect the victim of domestic violence or other household member.

**AS 33.30.011. Prerelease Furloughs.**

- (d) Notwithstanding AS 33.30.101(b), and other eligibility criteria established by the commissioner, that relate to risks to the public posed by the proposed furlough of a prisoner,
- (1) a prisoner sentenced to a definite term of imprisonment of more than one year but less than five years is not eligible for a prerelease furlough until the prisoner has served at least one-third of the sentence; and
  - (2) a prisoner sentenced to a definite term of imprisonment of five years or more is not eligible for a prerelease furlough until the prisoner has served at least one-third of the sentence or is within three years of the release date, whichever is later.

**22 AAC 05.321** also addresses prerelease furloughs. The following lists, in part, criteria for furlough consideration:

- (b) The regional director<sup>2</sup> may grant an eligible sentenced prisoner a prerelease furlough in accordance with (c) of this section. If a request for prerelease furlough is denied, the prisoner must be provided a written explanation of the reasons for the denial. The decision of the regional director may be appealed to the deputy commissioner.

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<sup>2</sup> 22 AAC 05.321 was adopted in January of 1987 and has not been amended since. The Department has not had the positions of regional directors for more than a decade. The role of regional directors is now encompassed in the one position of Director of Institutions.

- (c) To be eligible for consideration for a prerelease furlough, the prisoner must
- (1) be classified at the community custody level;
  - (2) if the sentence is more than one year, have served at least one-third of the sentence and be within three years or less of the firm release date;
  - (3) not have a pending disciplinary action, and must not have been found guilty of a major or high-moderate infraction within the past 120 days; and
  - (4) agree in writing to abide by the conditions established for the prisoner's behavior while on furlough.

**DOC Policy and Procedure 818.02** addresses prerelease furloughs and states in relevant part:

Policy

A sentenced prisoner will be granted a prerelease furlough during at least the last six months of incarceration unless the prisoner's potential for reformation is considered so minimal, and the immediate threat to public safety is considered so great that these factors clearly outweigh the benefits to the public and the prisoner of gradual reintegration into society prior to release from custody. ***Prisoners who are close of [read: or] maximum custody grade, or who are sex offenders who have not satisfactorily completed a Department of Corrections institutional sex offender treatment program during incarceration are ineligible for prerelease furlough consideration.*** It has been determined that such offenders may pose an immediate threat to public safety which clearly outweighs any potential for reformation to be gained by furlough placement.

*[Emphasis added]*

A prisoner who has previously been removed from a furlough or other CRP [Community Residential Program] placement for cause during the current incarceration is ineligible for further furlough consideration for a period of at least 90 days following the date of removal. Return to furlough status is subject to the approval of Central Classification, irrespective of who may have approved the initial furlough. A prisoner who is ineligible for a prerelease furlough or, if eligible refuses such placement, is ineligible for any kind of furlough or other community based activities.

\* \* \*

Procedures

A. Review of Prisoners Eligible for Consideration of Prerelease Furlough

1. In accordance with Policy 818.03<sup>3</sup> (Victim Notification), the victim(s) of a prisoner's crime will be notified of that prisoner's eligibility for prerelease furlough consideration. The probation officer shall make such notification:

- a. Upon receipt of a written request for furlough consideration from a prisoner eligible under VI.A.2, or
- b. At least 30 days prior to the time a prisoner meets the eligibility criteria under VA.A.3, and

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<sup>3</sup> DOC Policy 818.03 was eliminated in 2012 and replaced with DOC policy 100.01, Victim Notification. The Policy 818.02 reference to Pre-release Furlough Matrix 20-818.02A is outdated and incorrect.

*c. If the current offense is a sex offense, there is [a] written report by staff of a DOC institutional sex offender treatment program attesting to satisfactory completion of such program during service of the sentence imposed for the current offense. [Emphasis added]*

2. Prisoners sentenced to one year or less: The assigned probation officer shall complete the Prerelease Furlough Matrix (20-818.02A) for a prisoner sentenced by the court to a composite term of one year or less or returned to custody by the Parole Board for a period of incarceration of one year or less.

a. Qualifying criteria:

b. Has not been found guilty of a high moderate or major infraction within the past 120 days of incarceration; and has no pending disciplinarians [should read: disciplinaries] at any level; and

c. Requests in writing to be considered for a prerelease furlough.

d. Approving Authority:

e. The holding facility superintendent is the approving authority for prisoners holding medium and minimum custody grades;

f. The superintendent shall complete section G or H of the furlough Form and, if the furlough is approved, may modify any sections of the furlough conditions; and

g. Reduction to community custody becomes effective upon transfer to the CRP. The superintendent shall complete the information required in section H.

3. Prisoners sentenced to more than one year: The probation officer shall complete the Prerelease Furlough Matrix (20-818.02A) for a prisoner sentenced by the court to a composite term of more than one year, or returned to custody by the Parole Board for a period of incarceration of more than one year.

a. Criteria:

b. Has served at least one third of the sentence (sentence imposed minus good time divided by three) and has at least 60 days remaining to a firm release date;

c. Has not been found guilty of a major or high moderate infraction within the past 120 days of incarceration and has no pending disciplinarians [read: disciplinaries] at either of those levels;

d. If minimum custody grade, is within 38 months of a firm release date;

e. If medium custody grade, is within 14 months of a firm release date;

f. Does not have an active detainer of any kind; and

*g. If current offense is a sex offense, there is a written report by staff of a DOC institutional sex offender treatment program attesting to satisfactory completion of such program during service of the sentence imposed for the current offense. [Emphasis added]*

Policy 818.02 was last updated on August 16, 1994, nearly 23 years ago. It contains several references to policies and citations that do not exist, and to the "Regional Directors" position which DOC has not had for more than a decade, having been replaced by the Director of Institutions.

## SIMILAR OMBUDSMAN COMPLAINTS

An inmate complained that DOC was unlawfully using his juvenile record against him for purposes of classification, including furlough. The inmate had been adjudicated as a minor for sex abuse of a minor. Because of the adjudication, DOC deemed him ineligible for furlough. The inmate believed that DOC was barred from using information in his juvenile record against him.

The ombudsman investigator closed the complaint after receiving advice from the ombudsman's in-house counsel indicating that DOC was likely able to utilize juvenile conduct when assessing inmates for furlough and other classification actions. In *Moore v. State*, 174 P.3d 770 (Alaska Court of Appeals 2008), the Court held that juvenile adjudications may be used in subsequent, adult sentencing decisions, not for the adjudication itself, but for the behavior the adjudication evidenced. The ombudsman attorney surmised that, if juvenile history could be used in a criminal sentencing, then it was likely permissible for the DOC to use it in making a furlough decision.

In June 2014, an inmate complained that DOC deemed him ineligible for furlough because of information in his pre-sentence report. The complainant was serving time for assault but information in his pre-sentence report detailed several police reports referencing possible sexual misconduct as a juvenile. It was unclear from the report whether the inmate had ever been charged or adjudicated for the conduct.

The ombudsman investigator contacted DOC's Chief Classification Officer Brann Wade about the complaint:

**From:** Kate Higgins  
**Sent:** Wednesday, July 09, 2014 11:12 AM  
**To:** brann.wade@alaska.gov  
**Subject:** Ombudsman Complaint A2014-1034

Good morning Brann,

I am contacting you about a complaint that [the inmate], filed with our office. He is upset that DOC has deemed him ineligible for furlough, with no avenue for appeal. I reviewed the documents that he sent us, talked with his probation officer, reviewed ACOMS and the regulations and policy pertaining to furloughs. Here is what I have gathered:

On 6/24, [the inmate's] furlough application was completed. His probation officer recommended that he be "approved for furlough with increased supervision." The application was sent to central classification on 6/25. The same day, [Deputy Classification Officer] Pam Martin responded by email:

Based on the information on page 7 of his PSI, there are 3 different boys that claim he forced them to have oral and anal sex with him. Since the sexually assaultive behavior is documented in the PSI, we can consider him **ineligible for CRC placement**. I will add the caution in ACOMS. [Emphasis added]

A caution was entered in ACOMS marking [the inmate] as "CRC ineligible" and noting that "Per the PSI - juvenile history of sexually assaulting 3 different victims."

22 AAC 05.321(c) discusses furlough eligibility, stating:

To be eligible for consideration for a prerelease furlough, the prisoner must

- (1) be classified at the community custody level;
- (2) if the sentence is more than one year, have served at least one-third of the sentence and be within three years or less of the firm release date;
- (3) not have a pending disciplinary action, and must not have been found guilty of a major or high-moderate infraction within the past 120 days; and
- (4) agree in writing to abide by the conditions established for the prisoner's behavior while on furlough.

DOC P&P 818.02 offers additional guidance as follows:

Prisoners who are close or maximum custody grade, or who are sex offenders who have not satisfactorily completed a Department of Corrections institutional sex offender treatment program during incarceration are ineligible for prerelease furlough consideration. It has been determined that such offenders may pose an immediate threat to public safety which clearly outweighs any potential for reformation to be gained by furlough placement.

And, in the procedures section of the same policy, it discusses the criteria for considering furlough for inmates with more than one year to serve and states at A.3.g. "If the current offense is a sex offense, there is a written report by staff of a DOC institutional sex offender treatment program attesting to satisfactory completion of such program during service of the sentence imposed for the current offense." [Emphasis added]

[The inmate] is serving time on two assault charges and is not serving time for a sex offense. From what I can tell, he may have a juvenile adjudication for a sex offense but that is not entirely clear from Ms. Martin's email and caution in ACOMS. And, even if he does, I don't see anything in either regulation or policy that would render [the inmate] ineligible because of a juvenile adjudication. Policy provides that *current* sex offenders can be considered eligible if they obtain treatment while incarcerated so I'm not clear why [the inmate] would be considered ineligible for offenses he may have committed as a juvenile.

Can you tell me what I'm missing here? It seems to me that [the inmate] *is* eligible for furlough consideration, with the idea that his history may be something to consider when deciding whether to approve him for furlough or not. Does that sound right to you?

Thanks,

Kate

Mr. Wade responded as follows:

**From:** Wade, Brann (DOC) [mailto:brann.wade@alaska.gov]

**Sent:** Monday, July 28, 2014 2:09 PM

**To:** Kate Higgins

**Subject:** RE: Ombudsman Complaint A2014-1034

We always use juvenile criminal history to determine furlough eligibility. This is not something new. From what you have given me below he is not eligible for furlough based on his juvenile criminal history.

Thank you,  
K. Brann Wade, P.O. V  
Chief Probation Officer  
Division of Institutions  
(907) 269-7425  
(907) 269-7439 fax

When asked for additional clarification, Mr. Wade elaborated on DOC's practice regarding sex offenders and furlough:

**From:** Wade, Brann (DOC) [mailto:brann.wade@alaska.gov]  
**Sent:** Tuesday, July 29, 2014 3:16 PM  
**To:** Kate Higgins  
**Subject:** RE: Ombudsman Complaint A2014-1034

DOC policy only allows for those who completed the Hiland Mountain sex offender program to apply for furlough. That is the institutional sex offender treatment program that the policy is referring to. We do not let those that complete the PCC or LCCC sex offender programs apply for furlough (policy has been rewritten though not yet signed by Commissioner). We don't make a distinction between juvenile and adult history. Criminal history is criminal history.

Just to be clear, current sex offenders are NOT considered in any way eligible for furlough. We haven't furloughed a sex offender since the Hiland sex offender program shut down many years ago.

I hope this helps.

Brann

Although DOC's practice, as described by Mr. Wade, did not match policy 818.02, Ms. Higgins closed the inmate's complaint based on the fact that Mr. Wade had also indicated that DOC was in the process of revising the policy. Because it appeared that the agency was going to fix the discrepancy, the complaint was closed.

Several months after receiving the complaint detailed above (A2014-1034), the ombudsman received another complaint regarding DOC's furlough practice. This complaint came from an inmate who had been charged, as an adult, with a sex crime. The charge was later dismissed by the prosecution; the inmate was never convicted of a sex offense.

This complaint was closed without review in part because the DOC was purportedly in the process of revising its policy regarding furlough. However, revisions were never completed and the 1994 version of the policy remains in effect.

The ombudsman has, over the past two years, provided DOC a list of regulations and policies and procedures governing Department policies that ombudsman staff found to be outdated or in conflict with Alaska Statute or Administrative Code. This list included reference to the

Department's furlough policy. This list was provided to former Commissioners Schmidt, Taylor, Interim Commissioner Monegan and most recently Commissioner Williams. As of August 30, 2016, DOC has drafted a new furlough policy but internal review of the policy is continuing and the final policy has not been approved.

## **ANALYSIS AND FINDINGS**

The complainant alleged the following:

***Unreasonable: The Alaska Department of Corrections deemed the complainant ineligible for furlough for reasons not outlined in regulation or policy.***

The ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency's actions is valid, and then makes a finding that the complaint is *justified*, *partially justified*, *not supported*, or *indeterminate*. A complaint is *justified* if, on the basis of the evidence obtained during investigation, the ombudsman determines that the complainant's criticism of the administrative act is valid. Conversely, a complaint is *not supported* if the evidence shows that the administrative act was appropriate. If the ombudsman finds both that a complaint is *justified* and that the complainant's action or inaction materially affected the agency's action, the complaint may be found *partially justified*. A complaint is *indeterminate* if the evidence is insufficient "to determine conclusively" whether criticism of the administrative act is valid.

The standard used to evaluate all ombudsman complaints is the *preponderance of the evidence*. If the preponderance of the evidence indicates that it is more likely than not that the administrative act took place and the complainant's criticism of it is valid, the allegation is found justified.

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:

- (A) the agency adopted and followed a procedure in managing a program that was inconsistent with, or failed to achieve, the purposes of the program,
- (B) the agency adopted and followed a procedure that defeated the complainant's valid application for a right or program benefit, or
- (C) the agency's act was inconsistent with agency policy and thereby placed the complainant at a disadvantage relative to all others.

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The Inmate alleged that DOC inappropriately deemed him ineligible for furlough because of a criminal charge from his juvenile record. He felt that he met the eligibility criteria established in statute, regulation, and policy to be considered for prerelease furlough. DOC's determination that he was ineligible to apply meant that he could not appeal the department's decision.

Neither statute nor regulation specifically mention furlough eligibility for sex offenders. DOC policy provides that if an offender is *currently* serving time for a sex offense, he is only eligible for furlough if he has successfully completed sex offender treatment while incarcerated. The policy doesn't address eligibility for inmates previously convicted of a sex offense but currently serving time for a different offense but, presumably, if an inmate currently serving time for a sex

offense could become eligible for furlough one would think that an offender who was previously convicted of sex offense could be eligible as well. Furlough eligibility for inmates charged with but not convicted of a sex offense, whether due to dismissal or acquittal, is not addressed either. However, DOC policy clearly contemplates that offenders currently serving time for a sex offense may be eligible for furlough as long they meet the condition of completing treatment.

DOC's long-standing practice, however, is to prohibit inmates with any sort of indicia of sexual misconduct from release on furlough. This practice apparently applies even if an inmate was merely charged with a crime and regardless of whether the alleged crime occurred when the inmate was a minor. One complaint that the ombudsman received involved an inmate whose charge was dismissed by the district attorney. Another complaint involved an inmate who was deemed ineligible for furlough because of information in his presentence report that indicated that as a minor he had been involved in sexual misconduct with other minors. It was unclear whether that inmate had even been charged with a crime for those incidents.

We do note that a presentence report may be more reliable than, say, a charging document since a presentence report is subject to litigation. If a defendant disagrees with information in the report, he may challenge it in court and have erroneous information redacted by the court. One can, therefore, assume that information contained in a presentence report is accurate.

The current complaint involves an inmate whose juvenile charge was dismissed prior to adjudication. He is not a convicted sex offender and is not currently serving time for a sex offense. As such, the Department's prohibition on furlough eligibility outlined in Policy 818.02 does not apply to him. Nevertheless, the DOC has told him that he is ineligible for prerelease furlough based on the dismissed charge from his juvenile record. In doing so, the agency's decision is inconsistent with its written policy.

Therefore, the ombudsman proposes to find this complaint *justified*.

## **RECOMMENDATIONS**

***Recommendation 1: DOC should review and revise Policy 818.02 to explicitly address furlough eligibility for those inmates with histories of sex offenses.***

It is clear that DOC's practice does not match its policy and hasn't for some time. Several years ago the Department began the process of revising its policy but never completed the task. The ombudsman recommends that DOC take this opportunity to revise Policy 818.02 and specifically address the eligibility criteria for sex offenders. The Department should also examine whether it makes sense to prohibit inmates from furlough who have merely been charged, but not convicted, of a sex offense.

The ombudsman recognizes that the Department's decision to grant an inmate a prerelease furlough is a discretionary function and, if the Department determines that the risk of releasing inmates with past histories of sex offenses, whether verified or not, outweighs the benefit to the inmate of obtaining a furlough, then that decision falls firmly within the Department's discretion. However, that discretion should be explicitly addressed in policy so that inmates can clearly understand whether or not they meet the eligibility criteria.

Finally, this is an opportunity to bring 818.02 and 22 AAC 05.321 current by updating inaccurate citations and position titles.

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## **DEPARTMENT'S RESPONSE**

DOC Commissioner Dean Williams replied, in relevant part:

The Department agrees with this recommendation and is in the process of revising the existing policy and making recommended changes to address furlough eligibility for prisoners with a history of sex offenses.

In researching this complaint and recommendation it was revealed the Department had been operating with the guidance from a 1994 memorandum produced by a former Chief Classification Officer that supplemented the older policy. In this case the basis for Prisoner [INMATE's] denial was not found in policy, rather in compliance of the procedural memorandum.

Thank you for your consideration and I look forward to the issuance of the final report in this matter.

Additionally, DOC Deputy Commissioner Clare Sullivan forwarded a draft updated version of Policy 818.02 that the Department is working on. The Ombudsman will monitor development of this policy through to completion.

## **FINDING OF RECORD AND CLOSURE**

As the Department did not dispute the finding in this case, the complaint will be closed with a final finding of *justified* and *rectified*. We thank the Department for its swift action to begin implementation of the Ombudsman's recommendation.

PUBLIC VERSION NUMBER AS 2015-200