



INVESTIGATIVE REPORT

Ombudsman Complaint J2016-0149

Finding of Record and Closure

April 11, 2017

SUMMARY

The Ombudsman's office received four complaints against the State Medical Examiner Office (SMEO) in 2016. Review of these complaints did not reveal any evidence of improper conduct by the Medical Examiner's Office, and the complaints were either declined for investigation or closed after formal investigation resulted in a finding that the complaints were unsupported. In the course of reviewing these complaints, however, the investigator observed that the enabling statute for the Medical Examiner's office could be interpreted to require that regulations be formally adopted under the Administrative Procedure Act, as opposed to the office's traditional reliance on written policy and procedure statements.

The Ombudsman is concerned that future actions that are entirely appropriate for the SMEO might be unnecessarily subject to court challenge. In order to alert the SMEO to this possibility and recommend a solution that would firmly establish the legal authority of the SMEO, on September 27, 2016, the Ombudsman opened an investigation on her own initiative into the following allegation, stated in terms complying with AS 24.55.150:

CONTRARY TO LAW: The Alaska Department of Health and Social Services, Division of Public Health, State Medical Examiner Office, has conducted medical death investigations without adopting regulations as required by statute.

The Ombudsman served notice of investigation State Medical Examiner and the Commissioner of Health and Social Services on March 20, 2017. (AS 24.55.140) Assistant Ombudsman Dale Whitney drafted this report.

ANALYSIS

AS 12.65.020 requires the Medical Examiner to perform "a medical death investigation" whenever a death is reported under AS 12.65.005, and it also allows the Medical Examiner to conduct a medical death examination whenever a person dies in other circumstances that, in the opinion of the Medical Examiner, warrant an investigation. The statute goes on to grant authority to the Medical Examiner to take various actions, and it concludes, in subsection (g), by stating that "The Department of Health and Social Services *shall* adopt regulations to implement this section." Despite this statutory mandate to adopt regulations to implement the section, the only current regulations governing the Medical Examiner are 7 AAC 35.090-290, which mostly

govern embalming and costs and fees for services. There are no regulations that detail the circumstances in which the SMEO will take or decline jurisdiction of a case, or that prescribe what precise actions constitute a properly conducted “medical death investigation.”

Lacking governing regulations, the SMEO relies on written policy statements to implement AS 12.65.020. The Medical Examiner adopted a policy entitled “Deaths Reportable to the Medical Examiner’s Office/Assuming Jurisdiction and When to Transport” on December 2, 2015, and a policy entitled “Investigations, General” on December 3, 2015.

These policy statements provide the detailed procedures the SMEO uses to investigate, or decline to investigate, reported deaths in the state. The Ombudsman makes no criticism of the content of these policies and procedures, which are matters within the field of the Medical Examiner’s professional expertise. The issue is whether the policy statements are adequate to meet the statutory duty of the Department to adopt regulations implementing the statute, and whether actions taken under the policies would withstand legal scrutiny when not adopted under formal rulemaking procedures.

When reviewing actions of administrative agencies, the Alaska Supreme Court does not rely on agencies to determine what is mere policy and what is a regulation. Something labeled as a policy might actually be considered a regulation even if it has not been formally adopted as such. In that case, the issue becomes whether the policy/regulation is valid, having not gone through public scrutiny in the formal rulemaking procedure of the Administrative Procedure Act (APA).

In *Jerrel v. State, Dept. Natural Resources*,¹ the court reviewed actions of the Department of Natural Resources regarding branding and marking of livestock on leased public land. The Department had adopted a policy requiring animals grazing on leased land to have a mark visible from 20 feet, and it terminated the plaintiffs’ lease based on failure to comply with the policy. The court explained,

Administrative agencies must comply with the APA guidelines when issuing regulations pursuant to delegated statutory authority. The label an agency places on a policy or practice does not determine whether that rule falls under the APA; the legislature intended for the term “regulation” to encompass a variety of statements made by agencies. Rather, we look to the character and use of the policy or rule. In determining which policies fall under the APA, one of the statutory “indicia of a regulation is that it implements, interprets or makes specific the law enforced or administered by the state agency.” A regulation also “affects the public or is used by the agency in dealing with the public.” Under these standards, we believe that the twenty-foot visibility requirement is a regulation.

DNR concedes that it did not promulgate the twenty-foot visibility requirement in accordance with the APA. It claims that it did not need to comply with the APA because the twenty-foot visibility requirement is an informal “policy rule” rather than a regulation. But the requirement includes both core characteristics of a regulation. First, DNR developed the visibility requirement precisely in order to interpret, make specific, and implement the statutory requirement that a mark or brand “show distinctly.” Second, the agency used this requirement not as an internal guideline but rather as a tool in dealing with the public. It actually based its decision to terminate the Jerrels’ leases upon

¹ *Jerrel v. State, Dept. Natural Resources*, 999 P.2d 138, 143-44 (Alaska 2000).

the fact that the Jerrels did not comply with its "policy." Since the twenty-foot visibility regulation did not satisfy the procedural standards of the APA, it is invalid.²

The court did not find that there was anything inherently wrong with a rule requiring that a brand or mark be visible from 20 feet. The problem with the rule was that it implemented a statute and affected the public, and therefore should have been adopted as a regulation under the public APA rulemaking process. Although there was not necessarily anything wrong with the agency's actions, the actions were invalidated because they had been based on a written policy statement instead of a formally adopted regulation.

Like DNR's "policy" on branding animals, the SMEO's policy statements meet both of the core characteristics of regulations as stated by the Alaska Supreme Court: "it implements, interprets or makes specific the law enforced or administered by the state agency" and "affects the public or is used by the agency in dealing with the public." Regardless of the fact that they have been labeled as policies, they are in fact regulations that should have been formally adopted under the APA.

The SMEO has a clear statutory duty to perform a medical death investigation whenever a death is reported under AS 12.65.050. The policy statements implement the SMEO's statutory duty. The statements specify in greater detail the circumstances under which the statutory duty does or does not apply. For example, one of the policies states that stillborn infants shall be transported for autopsy (with placenta and umbilical cord) if the delivery was associated with maternal drug use or injury, but fetal deaths that occur by natural means such as delivery complications do not fall under SMEO jurisdiction. This rule directly implements the law in one case, and states that the law does not apply in another.

The policy statements also directly affect the public and are not mere internal guidelines. For example, the statements specify when bodies will be transported for autopsy, how property associated with bodies (such as jewelry and keys) will be dealt with, and when and under what circumstances bodies may be released to family members or funeral homes. These rules directly affect the deceased's next of kin. In almost every case, rules contained in the policy statements will somehow affect one or more members of the public, often with serious emotional and personal consequences and sometimes with financial effects as well.

As a whole, the policy statements meet the test for being regulations that should have been adopted under the APA's public rulemaking process. Some portions of the policy statements, however, are merely internal guidelines that do not affect the public, and therefore are not regulations subject to the APA. For example, one of the statements requires investigators to prepare reports using "the VertiQ database, including face sheet, narratives and medication sections." These guidelines do not affect the public and should not be included in a regulation. In some cases the policy might affect the public, but not in matters that directly implement the law. For example, the policies direct investigators at death scenes to explain to family members who they are and what their role is, to be supportive, and to provide business cards. These are useful guidelines in dealing with the public, but are not necessarily essential rules to implement the statutory mandate. The Medical Examiner should not be limited in the ability to make efficient management decisions, and regulations should not be cluttered with rules that do not affect the public. The drafters of a new regulation should be careful to sort out internal guidelines

² *Jerrel* at 143-4 (footnotes omitted).

that are not critical to implementing the statute and dealing with the public, and preserve them in policy statements that the Medical Examiner may adjust as needed without going through an unnecessarily burdensome public process.

PROPOSED FINDING:

The State Medical Examiner Office has a statutory duty to conduct medical death examinations for deaths reported under AS 12.65.005 and in certain other cases. The current policy statements implementing the SMEO's statutory duties, while labeled as "policy statements," are in fact regulations that should have been adopted under the public rulemaking procedures of the Administrative Procedure Act. The Ombudsman proposes to find the allegation *justified*.

PROPOSED RECOMMENDATION:

Recommendation 1: The Ombudsman recommends that the SMEO initiate a project to adopt suitable regulations to implement the office's statutory duty. The new regulations should include all parts of the current policy statements that (1) implement, interpret or make specific the law administered by the SMEO, and (2) affect the public or are used by the SMEO in dealing with the public. Portions of the policy statements that function as internal guidelines in the management of the office should remain as policy and not be included in the new regulations.

Agency Response:

The Medical Examiner contacted the Ombudsman and staff and discussed the issue raised in the preliminary report at length. The Medical Examiner advised the Ombudsman that his office had accepted the above finding and recommendation, and that it had initiated a project to adopt appropriate regulations, therefore the ombudsman will close this complaint as *justified* and *rectified*.

Finding of **RECORD AND CLOSURE**

It should again be emphasized that the issue in this report concerns the technical basis of the Medical Examiner's authority, and is in no way intended as criticism of the conduct or performance of the Medical Examiner's office. The Ombudsman thanks the Medical Examiner for a highly professional review of and response to this report, and expects that the new regulation will clarify the role and authority of the office.