

**ALASKA STATE LEGISLATURE
HOUSE STATE AFFAIRS STANDING COMMITTEE**

March 26, 2013

8:08 a.m.

MEMBERS PRESENT

Representative Bob Lynn, Chair
Representative Wes Keller, Vice Chair
Representative Lynn Gattis
Representative Shelley Hughes
Representative Doug Isaacson
Representative Jonathan Kreiss-Tomkins

MEMBERS ABSENT

Representative Charisse Millett

COMMITTEE CALENDAR

HOUSE BILL NO. 127

"An Act clarifying that the Alaska Bar Association is an agency for purposes of investigations by the ombudsman; relating to compensation of the ombudsman and to employment of staff by the ombudsman under personal service contracts; providing that certain records of communications between the ombudsman and an agency are not public records; relating to disclosure by an agency to the ombudsman of communications subject to attorney-client and attorney work-product privileges; relating to informal and formal reports of opinions and recommendations issued by the ombudsman; relating to the privilege of the ombudsman not to testify and creating a privilege under which the ombudsman is not required to disclose certain documents; relating to procedures for procurement by the ombudsman; relating to the definition of 'agency' for purposes of the Ombudsman Act and providing jurisdiction of the ombudsman over persons providing certain services to the state by contract; and amending Rules 501 and 503, Alaska Rules of Evidence."

- HEARD & HELD; ASSIGNED TO SUBCOMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: HB 127

SHORT TITLE: OMBUDSMAN

SPONSOR(s): RULES BY REQUEST

02/18/13 (H) READ THE FIRST TIME - REFERRALS
02/18/13 (H) STA, JUD
03/12/13 (H) STA AT 8:00 AM CAPITOL 106
03/12/13 (H) Heard & Held
03/12/13 (H) MINUTE(STA)
03/21/13 (H) STA AT 8:00 AM CAPITOL 106
03/21/13 (H) <Bill Hearing Rescheduled to 3/26/13>
03/26/13 (H) STA AT 8:00 AM CAPITOL 106

WITNESS REGISTER

BETH LEIBOWITZ, Assistant Ombudsman
Office of the Ombudsman
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Testified during the hearing on HB 127.

LINDA LORD-JENKINS, Ombudsman
Office of the Ombudsman
Alaska State Legislature

POSITION STATEMENT: Answered questions during the hearing on HB 127.

ACTION NARRATIVE

8:08:55 AM

CHAIR BOB LYNN called the House State Affairs Standing Committee meeting to order at 8:08 a.m. Representatives Gattis, Hughes, Isaacson, Keller, Kreiss-Tomkins, and Lynn were present at the call to order.

HB 127-OMBUDSMAN

8:09:10 AM

CHAIR LYNN announced that the only order of business was HOUSE BILL NO. 127, "An Act clarifying that the Alaska Bar Association is an agency for purposes of investigations by the ombudsman; relating to compensation of the ombudsman and to employment of staff by the ombudsman under personal service contracts; providing that certain records of communications between the ombudsman and an agency are not public records; relating to disclosure by an agency to the ombudsman of communications subject to attorney-client and attorney work-product privileges; relating to informal and formal reports of opinions and recommendations issued by the ombudsman; relating to the

privilege of the ombudsman not to testify and creating a privilege under which the ombudsman is not required to disclose certain documents; relating to procedures for procurement by the ombudsman; relating to the definition of 'agency' for purposes of the Ombudsman Act and providing jurisdiction of the ombudsman over persons providing certain services to the state by contract; and amending Rules 501 and 503, Alaska Rules of Evidence."

[8:10:00 AM](#)

BETH LEIBOWITZ, Assistant Ombudsman, Office of the Ombudsman, Alaska State Legislature, reviewed the intent of HB 127 [as she had previously presented it to the committee during the 3/12/13 hearing]. She said the proposed bill would add three sections to address confidentiality: to modernize testimonial privilege; to remove some communication with executive branch agencies from the public record, so that the trail of confidential investigative reports is not "hanging out there"; and to add an anti-waiver provision to protect agencies that want to share attorney/client privilege material with the ombudsman. Regarding the latter, she said the Office of the Ombudsman cannot compel that information, but there are some executive branch agencies that want to explain their actions to the ombudsman. Ms. Leibowitz said the proposed bill also asks for a change in the ombudsman's procurement statute to bring it into accord with the Legislative Council's procurement policies. Further, it asks for a mechanism to provide an informal investigative report in order to have a clear, statutory process to "deal with things that do not require a full, 20-year, 50-page investigative report, but do require some level of investigative attention." Under HB 127, the ombudsman's salary would be unfrozen from step A, range 26. Further, jurisdiction would be extended over certain types of contractors and to certain types of grantees, because it is clear that including contractors but ignoring grantees "will not actually accomplish the goals very effectively." She offered her understanding that the committee may have some alternate language to that effect.

[8:12:57 AM](#)

CHAIR LYNN asked Ms. Leibowitz to address Sections 12 and 13, which he had asked her not to cover when she offered the sectional analysis at the last hearing, [because he had said he thought Sections 12 and 13 would need more time allotted for discussion].

MS. LEIBOWITZ stated that Section 12 would amend the definition of "agency" to include those that are not state government agencies, but are acting on behalf of state agencies, such as contractors providing custodial services for the Department of Corrections (DOC). She said one such contractor is Hudson Correctional Center in Colorado, which is being phased out, but still holds almost 800 inmates [from Alaska] as of last week. She also mentioned "quite a few" halfway houses across Alaska run by either for-profit or nonprofit private entities. She said people in halfway houses are still inmates, but are being housed "off-campus," and the Office of the Ombudsman would still like to have jurisdiction over those facilities.

[8:14:18 AM](#)

CHAIR LYNN offered his understanding that when the Office of the Ombudsman receives a complaint from an inmate, it must do the investigation through the Department of Corrections, rather than going to the campus outside the state.

MS. LEIBOWITZ answered that is correct. She said that means the Office of the Ombudsman would refer the complainant to DOC and then inquire of DOC what it did with the issue; however, the Office of the Ombudsman cannot "get directly to the problem."

CHAIR LYNN asked, "Would you intend to notify the Department of Corrections before you go to the off-site campus?"

MS. LEIBOWITZ answered, "Not necessarily." She explained that the Office of the Ombudsman expects quite a few of the complaints will not be of great note and may be resolved with a "three-minute phone call." She said the office intends to create regulations to address the change in procedures that would be brought about if allowed to have jurisdiction over contractors. She said she expects the Office of the Ombudsman will be providing DOC with an update every couple of months or at least every year, outlining the type and amount of complaints it received and which contractors were involved. For anything of a more serious nature, the Office of the Ombudsman would give DOC a confidential copy of [its findings] before they are published.

CHAIR LYNN suggested that telling DOC about circumstances after the fact might take the department "out of the loop."

MS. LEIBOWITZ deferred to DOC for its response. Notwithstanding that, she said the Office of the Ombudsman's primary mechanism

for dealing with complaints for DOC is to refer inmates into DOC's grievance process, and the office does not expect that to be much different for those in halfway houses. She said the Office of the Ombudsman expects the vast majority of complaints to be "premature," which is when the complainant has not tried to work the issue out with the system, and she said, "We expect to still be referring them to that system."

8:16:58 AM

REPRESENTATIVE KELLER asked how often problems have resulted as a result of the Office of the Ombudsman not having this provision in place.

MS. LEIBOWITZ answered that the office has encountered some problems, but added, "There are cases that we probably didn't run smack into the problem because we declined the issue as non-jurisdictional at the time." She said the Office of the Ombudsman has a handful of cases from the Hudson facility relating to allegations of a lack of medical care. She said the allegations ultimately proved to be unsupported, but it took the Office of the Ombudsman a long time to find that out, because rather than going directly to Hudson to ask the facility for its medical records, the office was going through DOC. She said the "shuffle" took a lot longer than it probably should have.

8:18:25 AM

REPRESENTATIVE KREISS-TOMKINS asked for a comparison of the total number of complaints the Office of the Ombudsman has had to decline because of not having jurisdiction in the following: residential treatment programs with the Department of Health & Social Services (DHSS), residential services in halfway houses, and residential services in prisons under contract with DOC.

MS. LEIBOWITZ answered that over the last decade, the Office of the Ombudsman has had 88 complaints involving either the Red Rock facility in Arizona or the aforementioned Hudson facility; and 147 complaints involving halfway houses. She said, "This is a small percentage ... relative to the total number of complaints we get from Department of Corrections." She said the Office of the Ombudsman expects these complaints will continue to be received. She said some of them were opened and investigated to the best of the ability of the Office of the Ombudsman, within present constraints. Many of the complaints were declined as non-jurisdictional, she said, especially the halfway house complaints. She said she does not have a

breakdown of "how many were at each," but said most of them would have been declined with a referral to contact DOC.

[8:20:04 AM](#)

REPRESENTATIVE GATTIS asked what kind of complaints the Office of the Ombudsman typically turns away.

MS. LEIBOWITZ clarified that the Office of the Ombudsman did its best to address medical complaints that sounded urgent. The complaints from inmates at the Hudson facility are similar to the ones received from the instate facilities, and they range from inmates complaining that their grievances are not being addressed to inmates complaining that "this is not a nice place to be." To the latter complaint, Ms. Leibowitz stated, "We can't really fix that part, you know; we probably shouldn't." She said the halfway house complaints tend to be similar. She said she has a couple examples. In response to Representative Gattis, she offered more examples of complaints received, which relate to: food; the lack of diet appropriate to medical condition; and the disciplinary process, which already has a set appeal route. She deferred to the ombudsman for further comment.

[8:22:11 AM](#)

LINDA LORD-JENKINS, Ombudsman, Office of the Ombudsman, in response to Representative Gattis' question, offered further examples of types of complaints: DOC's ban on certain visitation; unfair disciplinary actions; classification issues; and any number of issues that inmates want to complain about. She echoed Ms. Leibowitz' remarks about getting more involved in serious medical issues, where referring someone to a grievance or appeal process would not be appropriate. She offered examples. She said there is a liability to the state if the inmate is not treated properly by the contract facility.

[8:25:03 AM](#)

REPRESENTATIVE KELLER opined that because contractors with the state are acting on behalf of the state, with state dollars authorized by the legislature, the legislature has a responsibility there. He asked Ms. Lord-Jenkins if she has found agencies have a clear description of what the violations are.

[8:26:34 AM](#)

MS. LORD-JENKINS responded that the Office of the Ombudsman has reviewed the facilities' contracts; however, because it has no statutory jurisdiction to look at allegation, it has no way of knowing how the contracts are being implemented. She said there have been medical complaints, which raised concern, and about which the Office of the Ombudsman alerted DOC, but the office has not done a contract audit in those instances.

REPRESENTATIVE KELLER, using an example of inmates who need to have certain medication to survive, expressed confidence that DOC has strict guidelines in place regarding drugs and prescriptions. He asked Ms. Lord-Jenkins if she is saying she wants the Office of the Ombudsman to have the authority to "go in and look at Hudson and Red Rock to see exactly what's happening," in order to evaluate whether or not DOC's standards are being fulfilled.

MS. LORD-JENKINS responded yes.

CHAIR LYNN asked, "Would the Department of Corrections know about this before you went in?"

MS. LORD-JENKINS answered that traditionally when the Office of the Ombudsman makes contact with any agency, based on a complaint, part of its investigative methodology is to contact "the agency employee who is closest to the subject of the complaint and take it up the line from there." She said the Office of the Ombudsman has found that if it goes to central office right away, it often will hear "a sanitized version of what should happen, but not always what did happen." She said the reason for the conflict often is a mistaken understanding of policy or a communications breakdown between "the citizen" and "the employee." She echoed Ms. Leibowitz' remark that many of the complaints do not merit disturbing a director or commissioner until a problem is found, at which point the Office of the Ombudsman would bring it to his/her attention.

REPRESENTATIVE KELLER said he is considering how he would feel if he was a private contractor with the state and someone came in to investigate, and he surmised that some contractors would respond negatively. Conversely, he surmised that some contractors might appreciate having a third party looking at a contract; they might consider it a real asset. He asked Ms. Lord-Jenkins what she thinks the reaction would be.

MS. LORD-JENKINS said in her years of experiencing the reactions of agencies the office contacts, she has seen agencies become defensive or wary, but that comes with the territory. She emphasized that the staff in the Office of the Ombudsman are trained to be professional, and the goal of the office is to ensure government employees are acting appropriately. She said the office is a neutral party, and when it delves into complaints and finds out what happened, often the complainant takes the word of the office on the matter; the impartiality of the office fosters faith in its work. She said a contractor housing prisoners is acting as a surrogate for the State of Alaska, and thus has contractual obligations to act as a state employee would act. The Office of the Ombudsman is part of that process. She added that the staff is not paid more or less as a result of any of its findings.

[8:34:48 AM](#)

REPRESENTATIVE HUGHES asked if HB 127 would be retroactive.

MS. LEIBOWITZ answered no. She said HB 127 would apply to contracts made with the state after January 2015.

REPRESENTATIVE HUGHES stated her assumption that Hudson, for example, uses an internal grievance process, which does not "reflect anything in the State of Alaska's process."

[8:37:35 AM](#)

MS. LEIBOWITZ offered her understanding that the Hudson grievance processes are supposed to be the same as those used in DOC. She said she thinks there is some degree of monitoring, for Hudson and the halfway houses, but said the Office of the Ombudsman does not have enough data at this point to determine how active [the monitoring] is. In response to Representative Hughes, she speculated that the office has received far fewer complaints related to juvenile justice facilities, probably because there is more active monitoring by way of more frequent court hearings. She said she thinks that because the [juvenile] residential facilities are more "therapeutic," they are more tightly regulated; therefore, the Office of the Ombudsman has less information indicating problems there. She suggested that the Division of Behavioral Health could speak to the grievance procedures the juvenile residential facilities have in place.

REPRESENTATIVE HUGHES asked if the Office of the Ombudsman is ever concerned that the internal grievance process itself may be flawed and, if so, whether it would recommend improvements.

MS. LEIBOWITZ responded that [inspecting grievance processes] is one of the primary functions of the Office of the Ombudsman. She said the office cannot handle every complaint in every agency; therefore, it encourages agencies to have complaint resolution systems that function sufficiently and impartially. If someone keeps returning to the Office of the Ombudsman because the internal conflict resolving process in his/her agency is not working, then that will most likely lead to "a large, systemic investigation."

[8:40:39 AM](#)

REPRESENTATIVE ISAACSON stated that he sees great value in the Office of the Ombudsman. He expressed concerned over the former exchange between Representative Keller and Ms. Lord-Jenkins, regarding contractors reacting negatively to queries from the Office of the Ombudsman. He noted that Section 12 refers to contractors out of state. He asked how the office deals with retaliatory behavior, if it exists.

MS. LEIBOWITZ deferred to Ms. Lord-Jenkins.

[8:42:04 AM](#)

MS. LORD-JENKINS said there have been cases where complainants alleged that they were being retaliated against or expressed concern that there may be retaliation, which she said DOC knows is not acceptable. She related that since her start in the Office of the Ombudsman, she cannot think of cases where there have been "any indication that that has happened." She said when the office communicates its findings to an agency, it advises the agency that the complainants, witnesses, and anyone assisting the ombudsman in an investigation are protected under "the whistle blower" statute, and citizens have the absolute right to complain about their government. She added, "We usually have a lot of buy-in with that." She stated her intent that if HB 127 passes, the Office of the Ombudsman would prepare material and do on-sight training for the contractors, so that they understand the history and role of the office in working with agencies and contract facilities.

[8:43:46 AM](#)

REPRESENTATIVE HUGHES said she heard that Alaska has a high number of nonprofit organizations per capita, and she asked, "What ... are the total number of these facilities that [under HB 127] you would now be covering, and how would that impact your work load?"

MS. LEIBOWITZ answered that the number of nonprofits and grants for which the state provides various services is the reason Section 12 has been written and is proposed to be rewritten. She said the Office of the Ombudsman is aware that it is not in the position to be able to "pick up that entire area." She relayed that the office would focus on about 8 halfway houses and try to reach only those nonprofit organizations that are "making a threshold determination of 'yes or no, you get to enter this program.'"

REPRESENTATIVE HUGHES asked Ms. Leibowitz to offer an example of what kind of eligibility the Office of the Ombudsman would determine.

MS. LEIBOWITZ responded one example would be Alaska Housing Finance Corporation's low-income weatherization program. The determination of whether a person qualifies for the program is done by a regional grantee organization.

REPRESENTATIVE HUGHES asked, "Would it also include all those that determine whether someone is eligible for any sort of public assistance or Medicaid? It seems like that might be quite a few entities."

MS. LEIBOWITZ answered that upon meeting with the director of the Division of Public Assistance, it appears that the division has retained quite a bit of control over the determination of who will qualify to enter a program. The division has a lot of grantees performing many services, but holds the reins more tightly than Ms. Leibowitz said she might have expected. For example, she said the Child Care Program Office does grants to administer the program, and someone who is trying to get childcare assistance would go to the grantee rather than to the Division of Public Assistance. In terms of temporary assistance, the main cash assistance program, Ms. Leibowitz said there are a lot of grantees working in the area, but she offered her understanding that the Division of Public Assistance has retained control of the determination process.

[8:49:10 AM](#)

CHAIR LYNN related having served on the team of the inspector general in the U.S. Air Force, which he said functioned similarly to a state ombudsman. He stressed the importance of the Alaska Office of the Ombudsman, and indicated that the considerations under HB 127 are "more than meets the eye." He referred to the balance of power between the three branches of government, and he opined that [HB 127] is too important to rush through the standing committee process.

[8:50:31 AM](#)

CHAIR LYNN assigned the following members to form a subcommittee to address the issues in HB 127 and report back to the committee with recommendations: Representative Keller as chair, and Representatives Gattis and Kreiss-Tomkins as members.

[8:51:34 AM](#)

REPRESENTATIVE KELLER said he accepts his designation as chair of the subcommittee, and he emphasized the importance of the issue.

[8:53:10 AM](#)

ADJOURNMENT

There being no further business before the committee, the House State Affairs Standing Committee meeting was adjourned at 8:53 a.m.