

DOUG KOEBERNICK
Inspector General

ZACH PLUHACEK
Assistant Inspector General



STATE OF NEBRASKA
OFFICE OF INSPECTOR GENERAL OF CORRECTIONS
State Capitol, P.O. Box 94604
Lincoln, Nebraska 68509-4604

SUMMARY OF OIG REPORT ON CCC-L COMPLAINT

April 21, 2022

INTRODUCTION

In 2015, the Nebraska Legislature adopted the Office of Inspector General of the Nebraska Correctional System Act. Nebraska Rev. Stat. §47-902 provides that the intent of the Act is to:

“(a) Establish a full-time program of investigation and performance review to provide increased accountability and oversight of the Nebraska correctional system;

(b) Assist in improving operations of the department and the Nebraska correctional System;

(c) Provide an independent form of inquiry for concerns regarding the actions of individuals and agencies responsible for the supervision and release of persons in the Nebraska correctional system. A lack of responsibility and accountability between individuals and private agencies in the current system make it difficult to monitor and oversee the Nebraska correctional system; and

(d) Provide a process for investigation and review in order to improve policies and procedures of the correctional system.”

The Act provides that the Office of Inspector General (OIG) is to investigate misconduct, misfeasance, malfeasance, or a violation of a statute or of the rules and regulations of the Nebraska Department of Correctional Services (NDCS). After a report of an investigation is completed, pursuant to the Act, it shall be first provided to the Public Counsel and may recommend systemic reform or case-specific action as part of its recommendations. The report is then provided to the Director of NDCS, and the Director has 15 days to determine whether to

accept, reject or request modifications of the recommendations in the report. After any modifications, the report becomes final. The OIG may publicly release a summary of the report after consultation with the Chair of the Judiciary Committee of the Nebraska Legislature.¹

In July 2021, a family member of an incarcerated individual (further referred to as Mr. X) at the Community Corrections Center – Lincoln (CCCL) contacted the OIG and asked to discuss two separate issues. The OIG and the family member met shortly thereafter, and the following two concerns were discussed:

1. An allegation that signatures of inmates were being forged as part of misconduct reports within the Unit Disciplinary Committee (UDC) and Institutional Disciplinary Committee (IDC) process; and
2. An allegation of misconduct by correctional staff in regards to testing of materials that allegedly contain illegal narcotics.

Further review resulted in a full investigation into the allegations after it was determined there were legitimate issues of concern regarding the allegations made in the initial complaint. The investigation resulted in a number of findings and recommendations related to the allegations, as well as related issues that were unearthed during the course of the investigation.

This summary report is largely similar to the OIG's official report. However, specific identifying incarcerated individual information that would be considered confidential under §83-178 or NDCS policy that is considered confidential or sensitive was either taken out or redacted. It also includes a response from NDCS as well as additional information from the OIG. It was determined that it was appropriate for the OIG to finalize this summary under §47-912.

¹ Neb. Rev. Stat. §47-912.

ALLEGATIONS

There were two allegations about two separate incidents. These will be known as Issue #1 and Issue #2.

ISSUE #1

The first allegation concerned the UDC and IDC process at the Community Corrections Center-Lincoln (CCCL) and was focused on the process for waiving of an inmate's presence at a UDC hearing. Mr. X was alleged to have committed a Class 2I charge (Gambling or Promoting Gambling) on June 3, 2021. As a result he received Misconduct Report (MR). Mr. X made an allegation that his presence was waived at the hearing despite him wanting to attend the hearing. On the UDC Action Sheet it stated "Sent copy, failed to respond by 6/7/21. waived" after "Summary of Inmate's testimony." Mr. X shared that he had not waived his appearance. He made an allegation that his signature was forged because the signature looked nothing like his signature. As part of this allegation, other documents related to other inmates were shared that appeared to have the exact same signature. Documents were also shared that showed Mr. X's typical signature.

As a result, inquiries were made and it was made clear that the signature was not forged and it was a digital signature that actually said "Waived." It was learned that this digital signature was utilized on a frequent basis to indicate that the inmate was not a part of the UDC hearing.

This finding then led to a closer examination of the UDC process at CCCL because NDCS policy regarding UDC hearings is that the individual is provided the proposed date and time of the hearing when the inmate is given notice of a UDC hearing and the alleged violation or violations. NDCS policy states that the individual has a right to be at the hearing and is supposed to be given the option to sign a written waiver which allows a hearing to be held within 24 hours of the notice and/or for the hearing to occur without their presence.

CCCL leadership was contacted and it was learned that the practice at CCCL was contrary to NDCS policy. The practice was that individuals were told during their hearing with the Preliminary Hearing Officer (PHO) - which they may or may not attend - who to contact if they wished to attend the UDC hearing. If they did not contact anyone, CCCL took this as that

IDC AND UDC HEARINGS

There are two types of disciplinary committees at each facility: Unit Disciplinary Committees (UDC) and Institutional Disciplinary Committees (IDC).

After a misconduct report is filed, the warden or their designee reviews the report and, based on the alleged offense, determines whether the hearing shall be conducted by UDC or IDC.

UDC follows the rules and Code of Offenses found in the inmate handbook. They may not order the loss of good time or impose disciplinary segregation. It is less formal than the IDC.

IDC is a more formalized disciplinary process that involves an investigating officer who meets with the inmate and may interview others. They make a recommendation to the IDC whether the charge should be dismissed. There are specific timelines and processes followed under the IDC, including the ability to call witnesses and provide the inmate with assistance.

IDC can result in good time lost and other sanctions and the results can be appealed.

(SOURCE: NDCS Inmate Handbook)

person waiving their right to attend the hearing. As a result, those at CCCL were not being provided the written waiver to sign as is found in NDCS policy.

In Mr. X's case, he stated that he was not given notice, which resulted in him not knowing when the hearing was taking place. As a result, his UDC hearing was held in his absence. He was found guilty and was unable to have the opportunity to present any evidence or present his side of the case. He only received a verbal reprimand, but because it was a Class II MR, this made him ineligible to receive three good time days each month. It also shows up on his record, which can be reviewed by NDCS or the Board of Parole for classification or release decisions.

It was learned that as part of the NDCS policy, "...inmates may request a Central Office review of a UDC decision if that decision disqualifies them for sentence reduction available" under state law. In this case, the decision did impact him in this manner. There were inmate interview requests from Mr. X which requested an appeal but his request was not provided to NDCS Central Office by CCCL. As a result, NDCS policy was again not followed and Mr. X did not have his appeal heard as required.

On November 18, 2021 the OIG sent Director Scott Frakes a letter sharing these findings. The letter preceded the investigative report due to this impacting the release date of Mr. X. This was shared with Director Frakes in the letter. The letter ended with:

"Any future report by my office will likely recommend that CCCL begin to follow the NDCS policy and that NDCS review what is being practiced at other facilities to make sure that they are all following NDCS policy in this area. In addition, my office is aware of other examples of this waiving being done and it would appear that there is a chance that the number of cases in which this has occurred may be significant. It is our intent to determine the extent of this practice but I would guess that you may initiate a review of this to determine how many other individuals were impacted by this practice.

I have brought this to your attention now instead of waiting for the completion of a report due to the fact that the current practice is likely impacting individuals each day. In addition, if you agree with my initial finding this would allow Mr. X to start receiving his good time back now rather than at a later date. It is still my intent to complete a report at a later date and provide that to you."

While no response from Director Frakes was received, it was later learned from CCCL leadership that Mr. X's charges were dismissed and that his good time was to be restored. It was also shared that all inmates at CCCL must now attend their PHO hearing unless they sign a waiver, and that they will be receiving notice of their IDC hearing at the PHO hearing. If they waive that, they will receive a pass. If staff are unable to find them for their UDC hearing, they will be sent a pass for that hearing more than 24 hours in advance of the hearing. In essence, the practice was changed to reflect NDCS policy.

After the letter was sent to Director Frakes, the OIG asked CCCL Warden James Jansen if there was a way to compile a list of people or the number of people whose presence at their UDC

hearing was waived because they had not followed the previous CCCL practice. He responded that this would be a difficult undertaking.

ISSUE #2

The second allegation made by Mr. X relates to another Misconduct Report, in which Mr. X was charged with and found guilty of drug or intoxicant abuse by the Institutional Disciplinary Committee (IDC). The IDC's basis for finding him guilty was that it was "based on body of report inmate was found in possession of item and non-negative tru narc test." As a result, he initially lost 30 days of good time and had a 30 day furlough restriction. Mr. X appealed the decision, and according to the appeal, his reasoning was as follows:

"On appeal to the Appeals Board, inmate X argues that he passed the drug test that he agreed to take and was lied to about the positive results of the lab test because the lab report that he received was blank."

As stated earlier, the IDC found him guilty, and one of the reasons for this finding of guilt was the non-negative TruNarc² test. However, as Mr. X pointed out in his appeal, the lab test he received was blank. This would appear to indicate that there was no test completed. Despite this, the Appeals Board denied his appeal. Part of their reasoning included:

"The Appeals Board finds substantial evidence was presented proving inmate X committed the offense of Drug or Intoxicant Abuse. The record indicates that a stained piece of paper was found in inmate X's hat. Corporal Wilson, due to his correctional experience, recognized this to be synthetic marijuana. This is sufficient evidence of a Rule 5-I-H violation even without a lab test."

The Appeals Board appears to have confirmed that there was no laboratory test, yet upheld the finding of guilt despite this inaccuracy in the misconduct report.

On July 15, 2021, the OIG contacted Warden Jansen about this case. This communication included:

² In the numerous exchanges mentioned in this report regarding the TruNarc device TruNarc is spelled a variety of ways but they all refer to the same testing device.

TRUNARC

The TruNarc device is a handheld spectrometer that is used for the presumptive screening of suspected controlled substances, drug precursors, essential chemicals and cutting agents.

Samples such as powder, crystal, tablet, capsules and liquids are able to be screened directly on the TruNarc analyser.

Once screened, drugs or analytes such as narcotics, stimulants, depressants, cutting agents and drug precursors can be specifically identified if they are part of the TruNarc substance library.

To use the TruNarc, a sample in a packet is placed against the nose cone of the analyser. A laser beam exits the device and strikes the sample. If a positive match is found, the identity of the drug is listed on the screen. If not, another message is provided on the screen.

(Source: Guidelines on Raman Handheld Field Identification Devices for Seized Materials)

“In the IDC Action Sheet, it indicated that the committee found him guilty based on the body of the report and the non-negative tru narc test. However, when he appealed it it seemed to admit that there was actually not a non-negative tru narc test. He lost the appeal because they said that Corporal Wilson's correctional experience was enough to know that it was synthetic marijuana. However, the original guilty finding was at least partially based on what appears to be an inaccurate report and I would think that this irregularity would be a cause for concern and that there would be a hesitancy to continue to find him guilty.

While I understand that drugs at CCCL are a very serious problem, those found with them or alleged to have them should still receive a fair and accurate hearing. It is also my understanding that he originally asked to see the results of the true narc test but was told that he had to file an appeal to get the results of the test. Is that the practice at CCCL? Also, was the paper disposed of and if so, when did that take place? It would be very easy to prove whether or not it had synthetic marijuana if it was actually tested. If it was disposed of before the appeal was heard that would also seem to be a bit problematic as far as fairness and accuracy. If that took place, is that also the current practice at CCCL.”

On July 22, 2021 Warden Jansen shared the following:

“I have reviewed MR# (number deleted by OIG) in its entirety. I had staff retest the piece of paper in evidence to verify the Tru-Narc results (attached). The results again came back as inconclusive (Non negative). If it was just paper it would have recorded the results as negative. Mr. X appealed the MR and it was upheld. At that time we were not recording or documenting non-negative test results. We have since switched this practice and will have documentation like that provided (similar to the one attached).”

Warden Jansen also provided a picture of the Tru-Narc result. The screen indicated a reading of “Inconclusive.”

Later, Warden Jansen was contacted with additional questions regarding the TruNarc process and he responded by sharing that TruNarc indicates “Clear” when an item is negative.

Other individuals reported having cases where they were alleged to have been in possession of an intoxicant and that results of their TruNarc test were “inconclusive.” Upon researching this issue, the OIG reviewed a United Nations document called "Guidelines on Raman Handheld Field Identification Devices for Seized Materials" which reported that while “inconclusive” results were infrequent, they do in fact occur. In the report, "inconclusive" is defined as "No controlled substance, drug precursor or essential chemical as well as cutting agent or diluent present in TruNarc Substance Library is detected and identified." The report further states "However, the possibility of the above substances not present in the library, cannot be ruled out:" and ends with "Other techniques of analysis should be used to identify the unknown sample."³

³ https://www.unodc.org/documents/scientific/Guidelines_Raman_Handheld_Field_identification_Devices.pdf (DK)

The OIG shared this with NDCS Deputy Director Robert Madsen in September 2021 via a series of email exchanges. As part of that exchange, Madsen was asked if there is a policy that includes how to utilize the TruNarc device, how the “inconclusive” results are to be handled, and whether or not such results result in follow up tests.

Deputy Director Madsen responded as follows:

“Policy language at this time does not include specifics relative to use of TruNarc. Policy permits the Director/designee to establish protocols for other testing technologies other than those mentioned in Policy 211.02. Only those staff specifically trained on use of TruNarc are permitted to utilize it. Each individual trained went through training with TruNarc representatives and are provided with the Training Manual as their guidelines.⁴ An “inconclusive” result from TruNarc on contraband should not be the basis of a guilty finding for drug/intoxicant abuse. There is no identified chemical on a inconclusive result. Based on the information contained in the manual (similar to your information below), “inconclusive” means TruNarc did not identify any substances of interest or cutting agents. This screen does not rule out the presence of substances of interest in small amounts. In essence, the contraband could remain confiscated based on the results but a finding of drug/intoxicant abuse is not supported with an inconclusive result. The committee could certainly consider other violations such as unauthorized articles. The manual indicates that staff should reposition the same and scan again. We do not send the sample out for testing at a criminal lab unless there is a significant amount or it would constitute a felony offense... We will develop some specific language to include in policy. If you have specific names of others you believe were impacted by this same issue, please send to me so we can review each case.”

The OIG shared information on Mr. X’s case with Madsen, including that CCCL did not record or document non-negative test results earlier but this practice was switched. Madsen was also informed that Mr. X had asked at his hearing to see the results of the TruNarc test and was told that he couldn’t see it unless he filed an appeal. The following was included in that exchange:

“As part of this process I learned that key people did believe that an inconclusive test result could result in a finding of guilt. My recommendation would be that you share with wardens and other key individuals (such as any staff that conduct MR hearings) and let them know what you shared with me. This should result in more uniformity and fairness and it also might lead to the identification of other cases which resulted in a guilty finding (especially if shared with those that conduct the MR hearings). An additional recommendation would be that you have someone make sure that the change made at CCCL regarding documentation of test results is put in place at all facilities.”

As the result of the OIG reviewing other cases involving identified “inconclusive” test result cases, Madsen was asked two questions:

⁴ A list of trained NDCS staff was later provided to the OIG by NDCS.

1) It appears that some people have had their findings of guilt dismissed after we communicated about this. Can you let me know how many individuals have had their results dismissed as a result of your inquiries?

(Madsen response) I am aware of only two misconduct reports that were dismissed by me after being brought to my attention. I have no way of searching to determine if others were dismissed and no one has communicated to me relative to other cases.

2) Has the language that you said would be developed been added to the policy yet? If so, can you please send that to me?

(Madsen response) Policy language has not be finalized. However, all wardens were made aware that an individual cannot be found guilty based on an inconclusive test result.

Mr. X was one of those who had his finding of guilt dismissed. On February 15, 2022 Deputy Director Madsen was asked for an update on the policy change and he indicated that the policy had yet to be changed. The exchange above took place in December 2021.

RECOMMENDATIONS⁵

Finding 1

In Mr. X's case in Issue #1, CCCL failed to follow the NDCS policy regarding the waiver process and the appeal process. During this investigation and as a result of communication with NDCS, the Department reviewed his case and dismissed the guilty finding since the policy was not followed. They also reinstated his good time that was lost.

Recommendations

1. NDCS should review how the policy regarding the waiver process and the appeal process is currently being followed at CCCL and CCCO and implement any necessary changes so that the actual policy is followed at each facility no later than June 1, 2022. The OIG is only recommending this for the two community facilities because of the unique nature of each of them when compared to the other correctional facilities.
2. NDCS should survey those incarcerated at CCCL to determine if any other incarcerated individuals had a case similar to Mr. X which needs to be fairly addressed no later than June 1, 2022.
3. NDCS should review their process for dismissing guilty findings which are found to have been in error outside of the formal appeals process, and determine whether NDCS rules and regulations should be modified to provide for these situations no later than June 1, 2022. NDCS should also track such dismissals.

Finding 2

In Mr. X's case in Issue #2, CCCL viewed "inconclusive" TruNarc test results as "non-negative" results and therefore found that this was evidence of being guilty of possessing an illegal substance. As a result, Mr. X was found guilty of a misconduct report. "Guidelines on Raman Handheld Field Identification Devices for Seized Materials" states that "inconclusive" means that "No controlled substance, drug precursor or essential chemical as well as cutting agent or diluent present in TruNarc Substance Library is detected and identified" but also states that "However, the possibility of the above substances not present in the library, cannot be ruled out:" and ends with "Other techniques of analysis should be used to identify the unknown sample." NDCS shared that an "inconclusive" result from TruNarc on contraband should not be the basis of a guilty finding for drug/intoxicant abuse. During the conducting of this investigation and as a result of communication with NDCS, the Department reviewed his case and dismissed the guilty finding since the guidelines regarding the TruNarc "inconclusive" test results were not followed. They also reinstated his good time that was lost.

⁵ As shared previously in the report, NDCS was contacted about some of the initial findings and preliminary recommendations made by the OIG prior to the completion of this report. As a result, NDCS has already taken action on some of these.

Recommendation

4. NDCS should identify and review other cases of TruNarc “inconclusive” test results assisting in the finding of guilt and determine whether any adjustments need to be made to the results of their misconduct reports. If identifying these cases is not possible through NICaMS, surveying the inmate population could result in discovering how many other individuals were potentially impacted by this issue. This effort should be completed no later than June 1, 2022 as this could impact release dates of individuals.

Finding 3

NDCS policy does not include specific information or guidance relative to the use of the TruNarc device.

Recommendation

5. NDCS should amend its current policy related to the proper use of drug detection devices and the use of the results of tests involving such devices that accurately reflect their proper use no later than June 1, 2022.

Finding 4

CCCL previously did not record or document non-negative drug detection test results but changed their practice to document those results.

Recommendation

6. NDCS should review the practices at all correctional facilities to determine if the facility does or does not document non-negative drug detection test results, whether from a TruNarc device or another drug detection device no later than June 1, 2022. If they do not, each facility should be directed to do so.

NDCS RESPONSE

On April 11, 2022, Director Frakes responded to the OIG report. The letter is included at the end of this summary report.

Below are the recommendations and the response to each from Director Frakes:

RECOMMENDATION: NDCS should review how the policy regarding the waiver process and the appeal process is currently being followed at CCCL and CCCO and implement any necessary changes so that the actual policy is followed at each facility no later than June 1, 2022. The OIG is only recommending this for the two community facilities because of the unique nature of each of them when compared to the other correctional facilities.

RESPONSE: Accept.

RECOMMENDATION: NDCS should survey those incarcerated at CCCL to determine if any other incarcerated individuals had a case similar to Mr. X which needs to be fairly addressed no later than June 1, 2022.

RESPONSE: Reject: Adequate avenues exist for individuals to seek review of disciplinary findings.

RECOMMENDATION: NDCS should review their process for dismissing guilty findings which are found to have been in error outside of the formal appeals process, and determine whether NDCS rules and regulations should be modified to provide for these situations no later than June 1, 2022. NDCS should also track such dismissals.

RESPONSE: Reject: Current practices are adequate.

RECOMMENDATION: NDCS should identify and review other cases of TruNarc “inconclusive” test results assisting in the finding of guilt and determine whether any adjustments need to be made to the results of their misconduct reports. If identifying these cases is not possible through NICaMS, surveying the inmate population could result in discovering how many other individuals were potentially impacted by this issue. This effort should be completed no later than June 1, 2022 as this could impact release dates of individuals.

RESPONSE: Reject: Adequate avenues exist for individuals to seek review of disciplinary findings.

RECOMMENDATION: NDCS should amend its current policy related to the proper use of drug detection devices and the use of the results of tests involving such devices that accurately reflect their proper use no later than June 1, 2022.

RESPONSE: Modify: Review of the policy is already underway. Publication of the updated policy will occur when the review is completed.

OIG RESPONSE: The OIG has determined that no modification is necessary since the policy review is being undertaken by NDCS. June 1, 2022 would still appear to be a reasonable goal for this being completed.

RECOMMENDATION: NDCS should review the practices at all correctional facilities to determine if the facility does or does not document non-negative drug detection test results, whether from a TruNarc device or another drug detection device no later than June 1, 2022. If they do not, each facility should be directed to do so.

RESPONSE: Accept



April 11, 2022

Doug Koebernick, Inspector General
P.O. Box 90604
Lincoln, NE 68509-4604

Dear Mr. Koebernick,

I received your report concerning _____ on March 29, 2022. I appreciate the opportunity to respond to your recommendations, in accordance with Nebraska Statute §47-915.

- Finding #1: Accept
- Finding #2: Reject: Adequate avenues exist for individuals to seek review of disciplinary findings.
- Finding #3: Reject: Current practices are adequate.
- Finding #4: Reject: Adequate avenues exist for individuals to seek review of disciplinary findings.
- Finding #5: Modify: Review of the policy is already underway. Publication of the updated policy will occur when the review is completed.
- Finding #6: Accept

Thank you for identifying issues with our disciplinary process that needed to be addressed. It is important for the process to be procedurally sound and administered correctly.

Scott R. Frakes, Director
Dept of Correctional Services

P.O. Box 94661 Lincoln, NE 68509-4661
Phone: 402-471-2654 Fax: 402-479-5623

corrections.nebraska.gov

Respectfully,

A handwritten signature in black ink, appearing to read "S. Frakes". The signature is fluid and cursive, with a prominent initial "S" and a long, sweeping underline.

Scott Frakes, Director NDCS

cc: file