

**State of California
Office of Administrative Law**

In re:
**Department of Corrections and
Rehabilitation**

Regulatory Action:

Title 16, California Code of Regulations

Adopt sections: 3392.1, 3392.2, 3392.3,
3392.4, 3392.5, 3392.6,
3392.7, 3392.8, 3392.9,
3392.10, 3417

Amend sections: 3391, 3392

Repeal sections:

**NOTICE OF APPROVAL OF CERTIFICATE OF
COMPLIANCE**

**Government Code Sections 11349.1 and
11349.6(d)**

OAL Matter Number: 2022-0912-03

**OAL Matter Type: Certificate of Compliance
(C)**

This action makes permanent, with amendments, emergency regulations concerning California Department of Corrections and Rehabilitation employee discipline. The action primarily adopts an employee penalty-levels disciplinary matrix and related definitions and procedures to be used by hiring authorities in determining and imposing disciplinary measures on employees for misconduct directed at inmates, parolees, wards, other employees, or members of the public.

OAL approves this regulatory action pursuant to section 11349.6(d) of the Government Code.

Date: September 29, 2022



**Dale P. Mentink
Assistant Chief Counsel**

For: Kenneth J. Pogue
Director

Original: Kathleen Allison, Secretary
Copy: Rosie Ruiz

CERT

STATE OF CALIFORNIA—OFFICE OF ADMINISTRATIVE LAW
NOTICE PUBLICATION/REGULATIONS SUBMISSION

For use by Secretary of State only

STD. 400 (REV. 10/2019)

| | | | |
|------------------|--------------------|--------------------------|------------------|
| OAL FILE NUMBERS | NOTICE FILE NUMBER | REGULATORY ACTION NUMBER | EMERGENCY NUMBER |
| | Z-2022-0404-02 | 2022-0912-03 | C |

For use by Office of Administrative Law (OAL) only

OFFICE OF ADMIN. LAW
2022 SEP 12 PM4:35

ENDORSED - FILED
In the office of the Secretary of State
of the State of California

SEP 29 2022

1:48 PM

| | |
|--------|-------------|
| NOTICE | REGULATIONS |
|--------|-------------|

AGENCY WITH RULEMAKING AUTHORITY
California Department of Corrections and Rehabilitation

AGENCY FILE NUMBER (if any)
21-50

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

| | | | |
|---|--|------------------------|-------------------------------|
| 1. SUBJECT OF NOTICE | TITLE(S) | FIRST SECTION AFFECTED | 2. REQUESTED PUBLICATION DATE |
| 3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other | 4. AGENCY CONTACT PERSON | TELEPHONE NUMBER | FAX NUMBER (Optional) |
| OAL USE ONLY | ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn | NOTICE REGISTER NUMBER | PUBLICATION DATE |

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

| | |
|---|--|
| 1a. SUBJECT OF REGULATION(S) Employee Discipline | 1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S) 2021-1208-04EON, Z2022-0404-02, 2022-0531-01EO |
|---|--|

| | | |
|---|---|---|
| 2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related) | SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.) | ADOPT 3392.1, 3392.2, 3392.3, 3392.4, 3392.5, 3392.6, 3392.7, 3392.8, 3392.9, 3392.10 and 3417 |
| | | AMEND 3391 and 3392 |
| | TITLE(S) 15 | REPEAL |

| | | |
|---|--|---|
| 3. TYPE OF FILING | | |
| <input type="checkbox"/> Regular Rulemaking (Gov. Code §11346) | <input checked="" type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute. | <input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h)) |
| <input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4) | <input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1) | <input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100) |
| <input type="checkbox"/> Emergency (Gov. Code, §11346.1(b)) | | <input type="checkbox"/> File & Print |
| | | <input type="checkbox"/> Print Only |
| | | <input type="checkbox"/> Other (Specify) |

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)
August 11, 2022 through August 26, 2022

| | | |
|---|---|--|
| 5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100) | | |
| <input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a)) | <input checked="" type="checkbox"/> Effective on filing with Secretary of State | <input type="checkbox"/> \$100 Changes Without Regulatory Effect |
| | | <input type="checkbox"/> Effective other (Specify) |

| | | |
|--|--|---|
| 6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY | | |
| <input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660) | <input type="checkbox"/> Fair Political Practices Commission | <input type="checkbox"/> State Fire Marshal |
| <input type="checkbox"/> Other (Specify) | | |

| | | | |
|---------------------------------|------------------------------------|---|---|
| 7. CONTACT PERSON Rosie Ruiz | TELEPHONE NUMBER (916) 445-2244 | FAX NUMBER (Optional) (916) 324-6075 | E-MAIL ADDRESS (Optional) rosie.ruiz@cdcr.ca.gov |
|---------------------------------|------------------------------------|---|---|

8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

| | |
|--|------------------|
| SIGNATURE OF AGENCY HEAD OR DESIGNEE <i>Jennifer Barretto</i> | DATE 9/9/2022 |
| TYPED NAME AND TITLE OF SIGNATORY Jennifer Barretto, Undersecretary, Administration | |

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

SEP 29 2022

Office of Administrative Law

Text of Adopted Regulations

Title 15. Crime Prevention and Corrections

Division 3. Adult Institutions, Programs and

Parole Subchapter 5. Personnel

Article 2. Employees

3391. Employee and Appointee Conduct.

(a) Employees and appointees of the California Department of Corrections and Rehabilitation (CDCR or department) shall:

- (1) Comply with all laws, including applicable sections of the California Code of Regulations, Title 15 and Title 2, section 172, General Qualifications.
- (2) Comply with departmental policy and applicable local operating procedures.
- (3) Comply with their duty statements or institution post orders, as applicable.
- (4) Adhere to the professional standards applicable to their profession.
- (5) Report for duty at the time directed and remain in their work assignments until the completion of their workday or tour of duty, except with permission of their supervisor.

If for any reason an employee is unable to report for duty, the employee shall notify their supervisor prior to the start of their scheduled workday.

- (6) Be alert, courteous, respectful, and professional in their interactions with inmates, wards, parolees, fellow employees, visitors, their families, and members of the public.
 - (7) Not engage in any behavior or use language, which is sexually explicit, abusive, profane, discriminatory or harassing while on duty. Employees and appointees shall not engage in any conduct that discredits an employee, appointee, or the department.
 - (8) Respect others and treat them equally regardless of race, color, national origin, ancestry, gender, gender identity, gender expression, religion, marital status, age, disability, medical condition, pregnancy, sexual orientation, veteran status, political affiliation, or their membership in a protected class as defined by state or federal law.
 - (9) Report misconduct, unethical or illegal activity, and any complaints or discipline that impacts professional licensure.
 - (10) Cooperate with any inquiry or investigation conducted by, or on behalf, of the department.
 - (11) Peace officers shall comply with the Peace Officer Code of Ethics as defined in CCR, Title 11, Division 2, Article 1, section 1013. Peace officers are held to a higher standard of conduct on and off-duty than other public employees.
- (b) Failure to adhere to the above expectations, on or off-duty may result in disciplinary action.

Note: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Section 19572(m), Government Code; Sections 5054 and 5058.4, Penal Code, *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, Court Case number 94-cv-02307-CW, *Madrid v. Woodford*, Special Masters

Final Report Re: Department Of Corrections Post Powers Investigations And Employee Discipline; Case No. C90-3094-T.E.H., and *Madrid v. Woodford*, Order; Case No. C90-3094-T.E.H. Class Action.

3392. Employee Discipline.

(a) Definitions – The definitions in this section apply to Subchapter 5, Article 2, sections 3391 and 3392 through ~~3392.9~~ 3392.10.

(1) 5/8/40 Work Schedule – A fixed work schedule consisting of five 8-hour days during a workweek.

(2) Administrative Time Off – A form of paid leave initiated by a hiring authority when it is determined that an employee should not come to work as set forth in section ~~3392.8~~ 3392.9.

(3) Adverse Action - A punitive action taken by a hiring authority to discipline an employee as set forth in section 3392.23.

(4) Allegation Inquiry Unit (AIU) – The unit within the Office of Internal Affairs that conducts investigations into complaints alleging misconduct toward incarcerated persons and parolees as set forth in 3486.2, and reviews allegation inquiry reports completed by locally designated investigators.

(45) Appointing Power - The Secretary of the CDCR.

(56) Bargaining Unit Agreement (also known as a Memorandum of Understanding)- An agreement entered into between the State of California and an employee representative organization certified by the Public Employee Relations Board as the exclusive representative for an employee bargaining unit.

(67) Centralized Screening Team - The entity that reviews documentation to determine if the documentation contains a routine issue, alleges misconduct toward an incarcerated person or parolee, or alleges misconduct not involving an incarcerated person or parolee.

(78) Corrective Action - A non-punitive action taken by a supervisor to assist an employee to improve work performance, or correct behavior or conduct as set forth in section 3392.42.

(89) Designated Case – An employee discipline case assigned to a vertical advocate.

(910) Employee Disciplinary Matrix - The department’s Employee Disciplinary Matrix set forth in section 3392.45, utilized by all hiring authorities to identify misconduct allegations and determine the penalty to be imposed when an allegation(s) of misconduct is sustained.

(1011) Employee Relations Officer – The department employee responsible for coordinating the administrative process for designated cases, and representing the department in non-designated cases during the disciplinary process and at any administrative hearings.

(1112) Hiring Authority - The appointing power may act, or delegate the power to act, as the hiring authority. The hiring authority has the power to hire, initiate the investigation process by submitting a confidential request for internal affairs investigation or approval for direct adverse action, discipline, and dismiss staff. The power to act as a

hiring authority may be delegated to the following classifications: Undersecretary; Assistant Secretary; General Counsel; Chief Deputy General Counsel; Executive Officer; Chief Information Officer; Director; Deputy Director; Associate Director; Assistant Deputy Director; Chief, Office of Correctional Safety; Chief, Office of Labor Relations; Warden; Superintendent; Health Care Chief Executive Officer; Regional Health Care Administrator; Regional Parole Administrator; Parole Administrator; Superintendent of Education; Assistant Superintendent of Education; Administrator at the Richard A. McGee Correctional Training Center for Correctional Officer Cadets; or any other person authorized by the appointing power.

~~(4213)~~ Job Steward – A recognized union representative for a state bargaining unit.

~~(4314)~~ Letter of Intent – Written notification to a peace officer employee that an investigation has been completed, adverse action will be taken, and the proposed penalty.

~~(4415)~~ Manager – An employee in a managerial classification having significant responsibilities for formulating or administering agency or departmental policies and programs or administering an agency or department.

(16) Locally Designated Investigator– Departmental staff trained by OIA to collect evidence and conduct Allegation Inquiries.

~~(4517)~~ Monitored Case – An employee discipline case monitored by the Office of the Inspector General.

~~(4618)~~ Non-Designated Case – An employee discipline case assigned to an employee relations officer.

~~(4719)~~ Notice of Adverse Action – A written notice of punitive action to an employee including the penalty, effective date of the action, causes for discipline, factual allegations of misconduct, pre-deprivation (*Skelly*) rights, and the right to appeal the action to the State Personnel Board.

(20) Office of Internal Affairs – The entity with authority to investigate allegations of employee misconduct.

~~(4821)~~ Official Personnel File – A file for a department employee containing records maintained by the department including records relating to the employee's performance or any grievances filed by the employee.

~~(4922)~~ Preponderance of Evidence - The standard of proof necessary to establish that it is more likely than not that the alleged misconduct occurred.

~~(2023)~~ Progressive Discipline – Written preventative, corrective, or disciplinary action, providing an employee with notice of departmental expectations, an opportunity to learn from prior mistakes, and correct and improve future work performance.

~~(2424)~~ Qualifying Pay Period – Eleven or more qualifying workdays of service in a monthly pay period.

~~(2225)~~ Qualifying Work Day – An employee's regularly scheduled workday, excluding regular-days-off, sick leave, holidays, vacation, annual leave, or other periods of approved leave.

~~(2326)~~ *Skelly* Hearing – A hearing, normally held prior to the effective date of an adverse action, which provides the employee with an opportunity to respond to the allegations of

misconduct set forth in the notice of adverse action.

(~~2427~~) *Skelly* Letter – A letter notifying the employee of the hiring authority’s final decision regarding the imposition of a disciplinary penalty.

(~~2528~~) *Skelly* Officer - An employee, normally a manager assigned to conduct a *Skelly* Hearing and make a recommendation to the hiring authority as set forth in section ~~3392.7~~ 3392.8.

(~~2629~~) *Skelly* Package – All documents and materials relied upon by the hiring authority to impose adverse action.

(~~2730~~) Vertical Advocate – An Employment Advocacy and Prosecution Team departmental attorney who provides legal advice to represents the department during investigations, and the employee discipline process for designated cases, and represents the department at administrative hearings, and during any subsequent writ or appellate proceedings.

(~~2831~~) Work Week – Any seven consecutive days, starting with the same calendar day each week beginning at any hour on any day, so long as it is fixed and regularly occurring.

Note: Authority cited: Section 5058 and 5058.3, Penal Code. Reference: Sections 5054, 5058.4, and 6053, Penal Code; Sections 3304(d)(1), 3513, 19570 and 19574, Government Code; Section 115, Evidence Code; *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194; *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995); and *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, Court Case number 94-cv-02307-CW, *Madrid v. Woodford*, Special Masters Final Report Re: Department Of Corrections Post Powers Investigations And Employee Discipline; Case No. C90-3094-T.E.H., and *Madrid v. Woodford*, Order; Case No. C90-3094-T.E.H. Class Action.

3392.1. Allegation Inquiry and Investigation Findings

(a) Upon receipt and review of an allegation inquiry report, investigation report, or approval of direct adverse action, the hiring authority shall render a determination for each allegation for each subject. The findings and their explanations are as follows:

(1) NO FINDING: The complainant failed to disclose promised information to further the investigation; the investigation revealed that another agency was involved and the complainant has been referred to that agency; the complainant wishes to withdraw the complaint; the complainant refuses to cooperate with the investigation; or the complainant is no longer available for clarification of facts/issues.

(2) NOT SUSTAINED: The investigation failed to disclose a preponderance of evidence to prove or disprove the allegation made in the complaint.

(3) UNFOUNDED: The investigation conclusively proved that the act(s) alleged did not occur, or the act(s) may have, or in fact, occurred but the individual employee(s) named in the complaint(s) was not involved.

(4) EXONERATED: The facts, which provided the basis for the complaint or allegation, did in fact occur; however, the investigation revealed that the actions were justified, lawful, and proper.

(5) SUSTAINED: The investigation disclosed a preponderance of evidence to prove the allegation(s) made in the complaint.

(b) If the hiring authority finds an allegation inquiry report insufficient to make investigation findings, the hiring authority shall refer the case to AIU for investigation.

(c) When a hiring authority sustains misconduct as a result of an allegation inquiry, only corrective action can be imposed unless a request for direct adverse action is approved by AIU.

Note: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Sections 5054 and 5058.4, Penal Code, *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, Court Case number 94-cv-02307-CW, *Madrid v. Woodford*, Special Masters Final Report Re: Department Of Corrections Post Powers Investigations And Employee Discipline; Case No. C90-3094-T.E.H., and *Madrid v. Woodford*, Order; Case No. C90-3094-T.E.H. Class Action.

3392.12. Corrective Action.

(a) A hiring authority shall only impose corrective action when the hiring authority determines that an employee's behavior or performance is correctable by counseling or training.

(b) Failure by an employee to comply with corrective action may result in adverse action, based on repeated incidents of misconduct, or the severity of the misconduct.

Note: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Section 5054, Penal Code, *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, Court Case number 94-cv-02307-CW, *Madrid v. Woodford*, Special Masters Final Report Re: Department Of Corrections Post Powers Investigations And Employee Discipline; Case No. C90-3094-T.E.H., and *Madrid v. Woodford*, Order; Case No. C90-3094-T.E.H. Class Action.

3392.23. Adverse Action.

(a) Any employee or person whose name appears on any employment list may receive adverse action based on any of the causes for discipline listed in Government Code section 19572.

(b) When taking adverse action, the penalty shall be imposed consistent with the Employee Disciplinary Matrix.

(c) A hiring authority may only take adverse action after finding that the allegation(s) of misconduct are sustained by a preponderance of evidence.

(d) Adverse action ~~for non-sworn staff~~ for off-duty misconduct requires a Nexus between the employee's behavior and their employment.

Note: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Sections 18524 and 19571, 19572, Government Code; Section 115, Evidence Code; and Sections 5054 and 5058.4, Penal Code; *Yancey v. State Personnel Board* (1985) 167 Cal.App.3d.478; *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, Court Case number 94-cv-02307-CW, *Madrid v. Woodford*, Special Masters Final Report Re: Department Of Corrections Post Powers Investigations And Employee Discipline; Case No. C90-3094-T.E.H., and *Madrid v. Woodford*, Order;

3392.34. Adverse Action Penalties.

- (a) Letter of Reprimand: A Letter of Reprimand is the lowest level of adverse action.
- (b) Salary Reduction: A Salary Reduction is a reduction of a percentage of an Employee's salary within the salary range of the employee's classification for a specified number of qualifying pay periods.
- (c) Suspension without Pay: Suspension Without Pay is a temporary separation from state service during which the employee does not work and pay is docked for a specified period of time. A Suspension without Pay shall be specified in qualifying workdays.
 - (1) While on a Suspension without Pay, an employee who is on an alternate work schedule will revert to a 5/8/40 work schedule.
 - (2) The Suspension without Pay shall not run concurrent with any other leave and shall be tolled for any holiday, vacation, furlough, or other leave.
 - (3) An employee's service credits, health benefits, and other benefits may be affected depending upon the length of Suspension without Pay.
 - (d) Demotion: Demotion may be to any lower class, within the promotional chain, for which the employee is otherwise qualified and eligible, at a lower than maximum salary, and at a salary not exceeding the salary the employee received in their prior position.
 - (1) A demotion may be permanent or temporary.
 - (2) If the demotion is temporary, the employee returns to their prior higher classification following the conclusion of the temporary demotion.
- (e) Dismissal: Dismissal from state service is an appropriate penalty for misconduct that renders the individual unsuitable for continued employment. Dismissal may or may not be preceded by corrective action or prior adverse action.

Note: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Section 19570, Government Code; Sections 5054 and 5058.4, Penal Code; *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, Court Case number 94-cv-02307-CW, *Madrid v. Woodford, Special Masters Final Report Re: Department Of Corrections Post Powers Investigations And Employee Discipline; Case No. C90-3094-T.E.H., and Madrid v. Woodford, Order; Case No. C90-3094-T.E.H. Class Action.*

3392.45. Employee Disciplinary Matrix.

(a) Employee Disciplinary Matrix Penalty Levels:

| | | |
|------------------------|---|--|
| 1. Letter of Reprimand | 4. Salary Reduction 10% for 7-12 Qualifying Pay Periods; or Suspension Without Pay for 14-24 Qualifying Work Days. | 7. Salary Reduction 10% for 31-45 Qualifying Pay Periods; or Suspension Without Pay for 62-90 Qualifying Work Days. |
|------------------------|---|--|

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| <p>2. Salary Reduction 5% for 1-2 Qualifying Pay Periods; or</p> <p>Suspension Without Pay for 1-2 Qualifying Work Days.</p> | <p>5. Salary Reduction 5% for 25-36 Qualifying Pay Periods; or</p> <p>Suspension Without Pay for 25-36 Qualifying Work Days.</p> | <p>8. Temporary Demotion to a lower class for 12-24 Qualifying Pay Periods; or</p> <p>Permanent Demotion.</p> |
| <p>3. Salary Reduction 5% for 3-12 Qualifying Pay Periods; or</p> <p>Suspension Without Pay for 3-12 Qualifying Work Days.</p> | <p>6. Salary Reduction 10% for 19-30 Qualifying Pay Periods; or</p> <p>Suspension Without Pay for 38-60 Qualifying Work Days.</p> | <p>9. Dismissal.</p> |

(b) Employee Disciplinary Matrix Misconduct Categories and Penalty Ranges:

| A. ATTENDANCE | BASE PENALTY | PENALTY RANGE |
|---|---------------------|----------------------|
| 1) Excessive tardiness. | 1 | 1 2 3 |
| 2) Unauthorized absence. | 1 | 1 2 3 |
| 3) Excessive absenteeism. | 1 | 1 2 3 4 5 6 7 |
| B. CODE OF SILENCE or RETALIATION | BASE PENALTY | PENALTY RANGE |
| 1) Intentional failure to report misconduct by another employee. | 3 | 2 3 4 5 |
| 2) Intentional failure to report serious misconduct by another employee. | 7 | 4 5 6 7 8 9 |
| 3) Intimidation, threats, or coercion that could interfere with an employee's duty to report misconduct, or an act of retaliation for reporting misconduct. | 9 | 7 8 9 |
| 4) Any independent act(s) that prevents or interferes with the reporting of misconduct. | 9 | 4 5 6 7 8 9 |
| 5) Any involvement in a concerted or coordinated effort with other employees to prohibit or impede the reporting of misconduct. | 9 | 7 8 9 |
| C. ALCOHOL, TOBACCO, AND DRUGS | BASE PENALTY | PENALTY RANGE |
| 1) Use or possession of controlled substances on or off-duty, unless medically prescribed. | 7 | 4 5 6 7 8 9 |

| | | |
|--|---------------------|----------------------|
| 2) Use or possession of marijuana on or off-duty in violation of State or Federal law. | 7 | 4 5 6 7 8 9 |
| 3) Sale or distribution of prescribed medications or controlled substances. | 9 | 9 |
| 4) Theft of medication. | 9 | 7 8 9 |
| 5) Use of over-the-counter or prescription medications while on duty which impairs an employee's ability to discharge his or her duties. | 4 | 3 4 5 6 7 |
| 6) Use of medication prescribed to another. | 6 | 4 5 6 7 8 9 |
| 7) Possession of alcohol on institutional grounds, while on duty, or in the presence of inmates, wards, or parolees. | 6 | 4 5 6 7 |
| 8) Use of alcohol or drunkenness on duty. | 7 | 4 5 6 7 8 9 |
| 9) Operating a private vehicle for state business, a state vehicle, or a vehicle rented for state business, under the influence of alcohol, controlled substances, or prescribed medication. | 7 | 4 5 6 7 8 9 |
| 10) Use or possession of tobacco products in unauthorized areas of department owned or controlled property. | 1 | 1 2 3 4 |
| D. CONDUCT OR JOB PERFORMANCE | BASE PENALTY | PENALTY RANGE |
| 1) Discourtesy toward inmates, wards, parolees, other employees, or the public. | 1 | 1 2 3 4 5 6 |
| 2) Negligently endangering self, fellow employees, inmates, wards, parolees, or the public by violation of statutes, regulations, ordinances, or departmental policy, procedures, or training. | 2 | 1 2 3 |
| 3) Intentionally endangering self, fellow employees, inmates, wards, parolees, or the public by violation of statutes, regulations, ordinances, or departmental policy, procedures, or training. | 6 | 4 5 6 7 8 9 |
| 4) Leaving assigned post without supervisor approval. | 2 | 1 2 3 |
| 5) Less than alert, inattentive, or distracted while on duty. | 2 | 1 2 3 |
| 6) Asleep while on duty. | 3 | 1 2 3 4 |
| 7) Gambling on duty. | 2 | 1 2 3 |
| 8) Unauthorized use of department position, uniform, or equipment. | 2 | 1 2 3 |

| | | |
|---|---|-----------------|
| 9) Use of identification or department position to solicit a gratuity or privilege. | 4 | 3 4 5 6 7 8 |
| 10) Engaging in a relationship in violation of the department's nepotism or fraternization policy. | 4 | 3 4 5 6 7 8 9 |
| 11) Failure to report a relationship in violation of the department's nepotism or fraternization policy. | 3 | 2 3 4 5 6 |
| 12) Improperly accessing or unauthorized possession or disclosure of confidential information. | 4 | 2 3 4 5 6 7 8 9 |
| 13) Improperly accessing or unauthorized possession or disclosure of confidential information with malicious intent or for personal gain. | 5 | 3 4 5 6 7 8 9 |
| 14) Disruptive, offensive, or vulgar conduct which discredits the department. | 3 | 2 3 4 5 6 |
| 15) Intimidation, threat, or assault without the intent to inflict serious injury toward a department employee, inmate, ward, parolee, or member of the public. | 5 | 3 4 5 6 7 8 |
| 16) Intimidation, threat, or assault with the intent to inflict serious injury toward a department employee, inmate, ward, parolee, or member of the public. | 7 | 5 6 7 8 9 |
| 17) Battery against a departmental employee or member of the public without the intent to inflict serious injury. | 5 | 3 4 5 6 7 8 |
| 18) Battery against a department employee or member of the public with the intent to inflict serious injury. | 7 | 5 6 7 8 9 |
| 19) Sexual misconduct involving staff or a member of the public. | 6 | 5 6 7 8 9 |
| 20) Over-familiarity with inmate(s), ward(s), parolee(s) or inmate, ward, or parolee family member(s). | 5 | 4 5 6 7 8 9 |
| 21) Sexual misconduct with an inmate, ward, or parolee. | 9 | 9 |
| 22) Prostitution or solicitation of prostitution. | 6 | 5 6 7 8 9 |
| 23) Bringing contraband into a secure area for personal use. | 1 | 1 2 3 4 5 6 |
| 24) Bringing for or providing contraband to an inmate, ward, or parolee. | 9 | 5 6 7 8 9 |
| 25) Failure to observe and perform within the professional standards, including community standards of care, applicable to a profession, or engaging in behavior that constitutes | 3 | 3 4 5 6 7 8 9 |

| | | |
|---|---------------------|---|
| <u>professional misconduct under professional standards.</u> | | |
| 26) Failure to observe and perform within the scope of training, post orders, duty statements, department policy, or operational procedures. | 1 | 1 2 3 4 5 |
| 27) Failure to observe and perform within the scope of practice for medical, nursing, psychiatric, psychological, dental, or other health care employees. | 3 | 3 4 5 6 7 8 9 |
| 28) Employee's failure to report discipline by a licensing agency. | 3 | 3 4 5 6 7 8 9 |
| 29) Failure to intervene in or attempt to stop misconduct by another employee. | 5 | 4 5 6 7 8 9 |
| 30) Failure to intervene in or attempt to stop misconduct by another employee directed at an incarcerated person. | 7 | 5 6 7 8 9 |
| 31) Felony criminal conviction. | 9 | 9 |
| 32) Misdemeanor conviction involving moral turpitude. | 9 | 7 8 9 |
| E. INTEGRITY AND DISHONESTY | BASE PENALTY | PENALTY RANGE |
| 1) Petty theft. | 4 | 3 4 5 6 7 Penalty shall be relative to value and circumstances |
| 2) Grand theft. | 9 | 7 8 9 Penalty shall be relative to value and circumstances |
| 3) Making evasive statements, failing to report, or omitting material facts or information to a supervisor by non-sworn staff. | 3 | 2 3 4 5 6 7 |
| 4) Making evasive statements, failing to report, or omitting material facts or information to a supervisor by sworn staff. | 4 | 2 3 4 5 6 7 |
| 5) Making intentionally false or intentionally misleading statements regarding a material fact or intentionally omitting material facts to a supervisor. | 7 | 4 5 6 7 8 9 |

| | | |
|---|---|-------------|
| 6) Making intentionally false or intentionally misleading statements regarding a material fact, or intentionally omitting material facts, during an inquiry or investigation conducted by the department's Office of Internal Affairs. | 9 | 7 8 9 |
| 7) Making intentionally false or intentionally misleading statements regarding a material fact or intentionally omitting material facts to a public safety officer on or off-duty. | 7 | 5 6 7 8 9 |
| 8) Making intentionally false or intentionally misleading statements regarding a material fact or intentionally omitting material facts during an investigation conducted by any local, state, or federal entity; state or federal licensing agency; or professional peer review board. | 9 | 7 8 9 |
| 9) False testimony under oath. | 9 | 9 |
| 10) Falsification of material facts in reports or official records. | 9 | 7 8 9 |
| 11) Falsification of a time record or financial record for fraudulent purposes. | 9 | 4 5 6 7 8 9 |
| 12) False claim for Leave Entitlement. | 5 | 4 5 6 7 8 9 |
| 13) Falsification by an employee of a medical note or record obtained from a dental, medical, mental health, or health care provider. | 9 | 4 5 6 7 8 9 |
| 14) Entering false or intentionally misleading statements in a dental, medical, mental health, or other health care record. | 9 | 4 5 6 7 8 9 |
| 15) Altering or destroying dental, medical, or mental health care records in violation of department policy or state or federal law. | 9 | 5 6 7 8 9 |
| 16) Falsification, alteration, planting, or destruction of evidence. | 9 | 7 8 9 |
| 17) Falsification, alteration, or destruction of department records, documents, or communications in violation of department policy. | 9 | 7 8 9 |
| 18) Repeated unintentionally failing to start, shutting off, or disabling Audio-Visual Surveillance System or Body-Worn Cameras. | 2 | 1 2 3 |
| 19) Intentionally failing to start, shutting off, or disabling Audio-Visual Surveillance System or Body-Worn Cameras. | 9 | 7 8 9 |

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| 20) Tampering with, altering, or destroying Audio-Visual Surveillance System or Body-Worn Camera equipment or recordings. | 9 | 7 8 9 |
| 21) Cheating on a civil service examination; unauthorized possession, use, or distribution of examination materials; or participating in an examination for another person. | 9 | 4 5 6 7 8 9 |
| 22) Falsification or intentional omission of information on applications or other documents submitted for employment or promotion. | 9 | 4 5 6 7 8 9 |
| 23) Participating in hiring practices that violate the law or department policy. | 7 | 4 5 6 7 8 9 |
| F. FAILURE TO COMPLY | BASE PENALTY | PENALTY RANGE |
| 1) Failure to obtain approval from or provide updated information to a hiring authority regarding secondary employment outside the department. | 1 | 1 2 3 |
| 2) Accepting employment outside the department or engaging in activities inconsistent or incompatible with departmental employment as set forth in section 3413. | 4 | 3 4 5 6 |
| 3) Failure to attend required training. | 1 | 1 2 3 |
| 4) Failure to comply with an admonishment or other lawful instruction by the Office of Internal Affairs during an investigation. | 6 | 5 6 7 8 9 |
| 5) Failure to follow lawful instructions as directed by a supervisor or higher-ranking official. | 3 | 2 3 4 5 6 7 |
| 6) Failure to report a change in qualifications, licensure, or certification required for continued employment in a job classification. | 4 | 3 4 5 6 7 8 9 |
| 7) Refusal to submit to or take any oath or affirmation required by law. | 9 | 9 |
| 8) Refusal to take a medical or psychological examination or submit to drug or alcohol testing, as required by law, civil service rules, department policy, Memoranda of Understanding, or lawful order. | 9 | 9 |
| G. EQUAL EMPLOYMENT OPPORTUNITY | BASE PENALTY | PENALTY RANGE |

| | | |
|--|---|----------------------|
| 1) Unsolicited, unwelcome, or offensive verbal or written comments that are derogatory, sexual in nature, or discriminatory based on protected status. | 3 | 1 2 3 4 5 6 7 8 9 |
| 2) Unsolicited, unwelcome, or offensive physical conduct that is derogatory, sexual in nature, or discriminatory based on protected status. | 4 | 1 2 3 4 5 6 7 8 9 |
| 3) Unsolicited, unwelcome, or offensive visual conduct that is derogatory, sexual in nature, or discriminatory based on protected status. | 3 | 1 2 3 4 5 6 7 8 9 |
| 4) Displaying objects, cartoons, pictures, or posters that are derogatory, sexual in nature, or discriminatory based on protected status. | 3 | 1 2 3 4 5 6 7 8 9 |
| 5) Making employment decisions or changing the terms, conditions, or privileges of employment based on an individual's protected characteristics. | 3 | 1 2 3 4 5 6 7 8 9 |
| 6) Changing the terms, conditions, or privileges of employment in retaliation for engaging in activity protected by state or federal law, filing a discrimination, harassment or retaliation complaint; opposing unlawful discrimination, harassment or retaliation; or participating in the discrimination complaint process. | 6 | 1 2 3 4 5 6 7 8 9 |

| H. WORKPLACE VIOLENCE | BASE PENALTY | PENALTY RANGE |
|---|---------------------|----------------------|
| 1) Conduct that is disruptive because it disturbs, intimidates, interferes with, or prevents normal work functions or workplace activities. | 3 | 1 2 3 4 5 6 7 8 9 |
| 2) Threatened acts of violence with the intent to harass, intimidate, commit an injury to self or others, or damage or destroy property. | 4 | 1 2 3 4 5 6 7 8 9 |
| 3) Stalking which consists of willful, malicious, and repeated following or harassing of another person, by any means direct or indirect, that causes a reasonable person to fear for their safety or the safety of their immediate family. | 6 | 3 4 5 6 7 8 9 |
| I. MISUSE OF STATE RESOURCES | BASE PENALTY | PENALTY RANGE |
| 1) Unauthorized use of state equipment or services for personal use. | 3 | 1 2 3 4 5 6 7 |
| 2) Failure to carry required equipment. | 1 | 1 2 3 4 5 |
| 3) Misuse or non-use of issued equipment. | 1 | 1 2 3 4 5 |

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| 4) Misappropriation of state equipment, property, supplies or funds. | 1-9 | 1-9 Penalty shall be relative to value of property and circumstances. |
| J. OFF-DUTY INCIDENTS | BASE PENALTY | PENALTY RANGE |
| 1) Failure to report off-duty arrest to the hiring authority. | 2 | 1 2 3 |
| 2) Drunk or disorderly conduct in public. | 2 | 1 2 3 |
| 3) Off-duty driving under the influence of alcohol or a drug without collision. | 2 | 1 2 3 4 5 |
| 4) Off-duty driving under the influence of alcohol or a drug with collision. | 5 | 4 5 6 |
| 5) Off-duty driving under the influence of alcohol or a drug resulting in injury. | 7 | 7 8 9 |
| 6) Carrying a concealed firearm off-duty without a carry concealed weapon permit or department authorization. | 5 | 3 4 5 6 7 8 9 |
| 7) Possessing a department authorized off-duty firearm while impaired by alcohol or a drug. | 6 | 4 5 6 7 8 9 |
| 8) Misuse of firearm while off-duty. | 3 | 1 2 3 4 5 |
| 9) Illegal display or brandishing of firearm while off-duty. | 5 | 3 4 5 6 7 |
| 10) Negligent handling of firearm without injury while off-duty. | 2 | 1 2 3 4 5 |
| 11) Negligent handling of firearm with injury while off-duty. | 6 | 3 4 5 6 7 8 9 |
| 12) Gross negligence in handling of firearm without injury while off-duty. | 7 | 4 5 6 7 8 9 |
| 13) Gross negligence in handling of firearm with injury while off- duty. | 9 | 4 5 6 7 8 9 |
| 14) Domestic violence. | 6 | 4 5 6 7 8 9 |
| 15) Child abuse or endangerment. | 6 | 4 5 6 7 8 9 |
| 16) Sexual misconduct involving, or sexual abuse of, a minor. | 9 | 7 8 9 |
| 17) Intimidation, threat, or assault of a private citizen. | 5 | 3 4 5 6 |
| 18) Battery of a private citizen without intent to commit injury. | 4 | 1 2 3 4 5 6 7 8 |
| 19) Battery of a private citizen with intent to commit injury. | 7 | 6 7 8 9 |

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| 20) Other off-duty criminal conduct. | 1-9 | 1-9 Penalty shall be relative to nature of criminal offense |
|--------------------------------------|-----|--|

| K. ON-DUTY TRAFFIC-RELATED INCIDENTS | BASE PENALTY | PENALTY RANGE |
|--|---------------------|----------------------|
| 1) Negligent driving while on duty. | 2 | 1 2 3 |
| 2) Negligent driving while on duty with collision. | 3 | 2 3 4 |
| 3) Dangerous, reckless, or wanton driving while on duty. | 5 | 3 4 5 6 |
| 4) Dangerous, reckless, or wanton driving while on duty with collision. | 7 | 4 5 6 7 8 |
| L. USE OF FORCE | BASE PENALTY | PENALTY RANGE |
| 1) Unnecessary use of force without injury. | 2 | 1 2 3 |
| 2) Unnecessary use of force causing injury. | 5 | 4 5 6 7 8 9 |
| 3) Unnecessary use of force causing great bodily injury. | 9 | 6 7 8 9 |
| 4) Excessive use of force without injury. | 3 | 1 2 3 |
| 5) Excessive use of force causing injury. | 5 | 4 5 6 7 8 9 |
| 6) Excessive use of force causing great bodily injury. | 9 | 6 7 8 9 |
| 7) Intentional unnecessary or excessive use of force. | 9 | 7 8 9 |
| 8) Employee's failure to report their own use of force. | 5 | 2 3 4 5 6 |
| 9) Employee's failure to report their own unnecessary or excessive use of force. | 9 | 4 5 6 7 8 9 |
| 10) Employee's failure to report use of force observed. | 4 | 2 3 4 5 6 |
| 11) Employee's failure to report unnecessary or excessive use of force observed. | 9 | 4 5 6 7 8 9 |
| M. WEAPONS – LETHAL & LESS-LETHAL WHILE ON DUTY | BASE PENALTY | PENALTY RANGE |
| 1) Misuse or non-use of available weapons while on duty. | 2 | 1 2 3 |
| 2) Inappropriate display of weapon(s) while on duty. | 2 | 1 2 3 4 5 |
| 3) Negligent handling of weapon(s) without injury while on duty. | 2 | 1 2 3 4 5 |
| 4) Negligent handling of weapon(s) with injury while on duty. | 6 | 3 4 5 6 7 8 9 |

| | | |
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| 5) Unintentional discharge of weapon(s) while at the range. | 1 | 1 2 3 4 |
| 6) Gross negligence in handling of weapon(s) without injury while on duty. | 7 | 4 5 6 7 8 9 |
| 7) Gross negligence in handling of weapon(s) with injury while on duty. | 9 | 4 5 6 7 8 9 |

(c) Applying the Employee Disciplinary Matrix.

(1) The Employee Disciplinary Matrix shall be used for all disciplinary actions to identify the applicable matrix misconduct allegation(s) and determine the appropriate penalty.

(2) Prior to assessing a disciplinary penalty, the hiring authority must find the investigation or direct action materials sufficient to make investigation findings, which must be documented on CDCR Form 402 (Rev. 01/22), Hiring Authority Review of Investigation, which is incorporated by reference. If the hiring authority finds the investigation or direct action materials insufficient to make investigation findings, the Hiring Authority shall document that finding on the CDCR Form 402 and refer the case to OIA for investigation.

(3) The Employee Disciplinary Matrix identifies a base penalty and penalty range for each misconduct allegation. The base penalty contained in the base penalty column shall represent the starting point for determining the penalty level of an adverse action.

(4) The Employee Disciplinary Matrix is based on the assumption that there is a single act of misconduct at issue and this is the employee's first adverse action. When multiple acts of misconduct occur, the hiring authority shall utilize the Employee Disciplinary Matrix to determine which allegation warrants the highest penalty. The hiring authority shall utilize the penalty range for the most severe charge, and other acts of misconduct shall be considered aggravating factors that may increase the penalty up to and including dismissal.

(5) The hiring authority shall impose the base penalty unless aggravating or mitigating factors, as set forth in 3392.45, subsections (c)(9) and (11), are identified. The aggravating and mitigating factors shall be considered in determining the appropriate penalty level within the penalty range.

(6) If the hiring authority sustains allegations against an employee in a supervisory or managerial position, which renders that employee unfit to continue as a supervisor or Manager in their position, the hiring authority may in addition to the identified matrix penalty, impose a permanent or temporary demotion.

(7) No leniency shall be afforded when assessing a penalty under the Employee Disciplinary Matrix because of an employee's high rank or position.

(8) Aggravating and mitigating factors may increase or decrease the penalty within the identified penalty range. Mitigating factors may be used to reduce the penalty level from the base penalty. Aggravating factors may increase a penalty from the base penalty up to and including dismissal.

(9) The following mitigating factors shall be considered when determining a penalty:

- (A) The misconduct was unintentional and not willful.
 - (B) The misconduct was not premeditated.
 - (C) The employee had a secondary or minor role in the misconduct.
 - (D) Based upon: length of service; lack of training; inexperience; lack of written policy directives, post orders, or duty statements; or the inherent nature of the act, the employee did not understand the consequences of his or her actions.
 - (E) Commendations received by the employee.
 - (F) The employee was forthright and truthful during the investigation.
 - (G) The employee was forthright and truthful in documents written or signed by the employee.
 - (H) The employee was initially untruthful, but later came forward with an explanation.
 - (I) The employee accepts responsibility.
 - (J) The employee is remorseful.
 - (K) The employee reported the harm caused or independently initiated steps to mitigate the harm caused in a timely manner.
- (10) For any action where the hiring authority identifies mitigating factors that would allow the penalty under the Employee Disciplinary Matrix to be mitigated to a Letter of Reprimand, the hiring authority may reduce the penalty to corrective action if the hiring authority can specifically articulate why corrective action is appropriate to address the misconduct. The justification for any penalty reduction to corrective action, including identification of mitigating factors, must be specifically articulated on CDCR Form 403 (Rev. 01/22), Justification of Penalty, which is incorporated by reference, when reducing a penalty to corrective action.
- (11) The following aggravating factors shall be considered when determining a penalty:
- (A) The misconduct was intentional and willful.
 - (B) The misconduct was premeditated.
 - (C) The employee had a primary or leadership role in the misconduct when committed in concert or coordinated with others.
 - (D) Based upon:
 1. Length of service.
 2. Training.
 3. Experience.
 4. Existence of written policy directives, post orders, or duty statements.
 5. The inherent nature of the act, the employee knew or should have known that their actions were inappropriate.
 - (E) Managerial and supervisory employees, licensed professionals, and sworn staff shall be held to a higher standard of conduct, and misconduct engaged by these employees shall be considered an aggravating factor for the purposes of assessing

disciplinary penalties.

- (F) Serious consequences occurred or could have resulted from the misconduct.
- (G) Conduct resulted in or, if repeated, is likely to result in harm to the public service.
- (H) The misconduct was committed with malicious intent.
- (I) The misconduct was committed for personal gain.
- (J) The misconduct resulted in injury to a person or property.
- (K) More than one act of misconduct forms the basis for the disciplinary action.
- (L) The employee has committed repeated acts of misconduct resulting in prior sustained adverse action.
- (M) The employee was evasive, dishonest, or intentionally misleading during an inquiry or investigation.
- (N) The employee does not accept responsibility.
- (O) The employee did not report the harm caused or attempted to conceal the harm through action or inaction.

(12) Suspensions without pay are a more severe penalty than a salary reduction due to the loss of pay, potential negative impact to employee benefits and seniority, and impact to department operations, and shall be considered as such for Progressive Discipline purposes.

(13) If the employee engages in repeated acts of the same misconduct that have already resulted in sustained adverse action, the hiring authority may impose a penalty above the Employee Disciplinary Matrix penalty range, if the hiring authority can specifically articulate why the higher penalty is necessary and appropriate to address repeated misconduct. Justification for aggravating any penalty above the matrix penalty range, including identification of aggravating factors, must be specifically articulated on the CDCR Form 403.

Note: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Section 5054, Penal Code; Section 19572, Government Code; *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995.); *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, Court Case number 94-cv-02307-CW, *Madrid v. Woodford, Special Masters Final Report Re: Department Of Corrections Post Powers Investigations And Employee Discipline; Case No. C90-3094-T.E.H., and Madrid v. Woodford, Order; Case No. C90-3094-T.E.H. Class Action.*

3392.56 Statutes of Limitation

- (a) Notices of adverse action and letters of intent shall be served on employees prior to the expiration of the applicable statute of limitations period pursuant to Government Code sections 3304 and 19635.
- (b) The statute of limitations for taking adverse action shall be assessed in accordance with all applicable laws, including Government Code section 3304(d)(1) for sworn staff, and Government Code section 19635 for both sworn and non-sworn staff.

(c) For the purpose of commencing the one-year statute of limitations for peace officers under Government Code section 3304(d)(1), only a hiring authority and the Office of Internal Affairs (OIA) Centralized Screening Team (CST) is authorized by the department to initiate the internal affairs investigation process upon the hiring authorities or CST's discovery of an allegation of misconduct.

Note: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Section 5054, Penal Code; Sections 3304 and 19635, Government Code; *Jackson v. City of LA* (2003) 111 Cal.App.4th 899; *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, Court Case number 94-cv-02307-CW, *Madrid v. Woodford*, Special Masters Final Report Re: Department Of Corrections Post Powers Investigations And Employee Discipline; Case No. C90-3094-T.E.H., and *Madrid v. Woodford*, Order; Case No. C90-3094-T.E.H. Class Action.

3392.67. Setting the Effective Date of the Action.

(a) The hiring authority shall determine the effective date of the adverse action.

(b) The effective date must be set out at least 5 working days from the date of service of the notice of adverse action for non-manager employees pursuant to CCR, Title 2, section 52.6, and twenty calendar days for managers pursuant to Government Code section 19590(b), to provide time for a *Skelly* Hearing if requested.

Note: Authority cited: Section 5058 and 5058.3, Penal Code. Reference: Sections 5054 and 5058.4, Penal Code; *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194; Sections 3513(e) and 19590, Government Code; *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, Court Case number 94-cv-02307-CW; *Madrid v. Woodford*, Special Masters Final Report Re: Department Of Corrections Post Powers Investigations And Employee Discipline; Case No. C90-3094-T.E.H., and *Madrid v. Woodford*, Order; Case No. C90-3094-T.E.H. Class Action, and CCR, Title 2, section 52.6.

3392.78. Skelly Hearing.

(a) All department employees may request a *Skelly* Hearing prior to the effective date of an adverse action.

(b) Non-manager employees must request a *Skelly* hearing within five working days from the date of service of the notice of adverse action. Managerial employees must request a *Skelly* hearing within ten calendar days from the date of service of the notice of adverse action. If any provision of this section is inconsistent with a Bargaining Unit Agreement, the notice provision(s) of the agreement shall apply.

(c) Employees waive their right to a *Skelly* Hearing by not timely requesting a *Skelly* Hearing.

(d) If the employee requests a *Skelly* Hearing, the *Skelly* Hearing shall be conducted, and a *Skelly* Decision issued, prior to the effective date of the adverse action unless waived by the employee in writing.

(e) The *Skelly* Package shall be served on the employee with the notice of adverse action prior to the *Skelly* Hearing.

(f) Unless waived by the employee, the *Skelly* Officer shall be a manager at an organizational level above the employee's supervisor, who did not request a

confidential internal affairs investigation or approval of direct action, sign the employee's notice of adverse action, or participate in the decision to take adverse action.

(g) If the subject employee's supervisor is the appointing power, the appointing power may act as the *Skelly* Officer or designate another person to act as the *Skelly* Officer.

(h) Employees shall be allowed representation during the *Skelly* Hearing. The representative cannot be involved in the incident resulting in adverse action. A rank-and-file Job Steward acting in their representational capacity cannot represent a supervisory employee. A supervisory Job Steward acting in their representational capacity cannot represent a rank-and-file employee. However, a rank-and-file or supervisory Job Steward may represent an employee in a non-union capacity, but not during state time.

(i) The employee and the employee's representative may present facts in mitigation to the *Skelly* Officer in writing, orally, or both. The employee or their representative may submit affidavits or written statements for the *Skelly* Officer's consideration. The *Skelly* Hearing is not an evidentiary proceeding, therefore, the employee does not have the right to call witnesses on their behalf.

(j) The *Skelly* Officer may ask questions related to the allegations contained in the notice of adverse action, the supporting evidence, or any information presented by the employee or the employee's representative. The *Skelly* Officer has the right to restrict any oral presentation that is argumentative or repetitive. The *Skelly* Officer is not subject to examination by either the employee or the employee's representative. With the exception of acknowledging receipt, the *Skelly* Officer shall not provide any response to the information submitted by the employee or the employee's representative, and shall not disclose their *Skelly* recommendation.

(k) After the conclusion of the *Skelly* Hearing, the *Skelly* Officer shall make one of the following independent recommendations to the hiring authority:

- (1) Additional information or investigation is needed.
- (2) The adverse action should proceed without modification.
- (3) The factual allegation(s) supporting the adverse action should be amended or the penalty reduced.
- (4) The adverse action should be withdrawn in its entirety.

Note: Authority cited: Section 5058 and 5058.3, Penal Code; Reference: Sections 5054 and 5058.4, Penal Code; *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194; Section 19590, Government Code; *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, Court Case number 94-cv-02307-CW; *Madrid v. Woodford*, Special Masters Final Report Re: Department Of Corrections Post Powers Investigations And Employee Discipline; Case No. C90-3094-T.E.H., *Madrid v. Woodford*, Order; Case No. C90-3094-T.E.H. Class Action, and CCR, Title 2, Section 52.6.

3392.89. Use of Administrative Time Off.

(a) When an employee is under investigation or subject to discipline, the hiring authority shall place an employee on Administrative Time Off (ATO) for one or more of the following reasons, unless the employee is transferred pursuant to section 3392.910,

or unless, based on the circumstances of the misconduct, the hiring authority determines that ATO or transfer is not necessary to ensure the safety and security of the institution or the integrity of the investigation:

- (1) The employee has been convicted of a felony.
- (2) The employee is suspected of smuggling contraband.
- (3) The employee has jeopardized or their continued presence will jeopardize, the safety and security of the workplace or the health and welfare of other employees, inmates, wards, or parolees.
- (4) The employee's continued presence in the workplace during the investigation or discipline process would undermine the department's ability to conduct a fair and thorough investigation or discipline process.
- (5) The proposed discipline is likely dismissal.

Note: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Section 5054, Penal Code; *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, Court Case number 94-cv-02307-CW, *Madrid v. Woodford, Special Masters Final Report Re: Department Of Corrections Post Powers Investigations And Employee Discipline; Case No. C90-3094-T.E.H.*, and *Madrid v. Woodford, Order; Case No. C90-3094-T.E.H. Class Action.*

3392.910. Temporary Involuntary Transfer.

- (a) A hiring authority may temporarily involuntarily transfer an employee while the employee is under investigation or to prevent misconduct that could lead to adverse action while an investigation is pending.
- (b) Transfer under this section means to transfer the employee either to another position in the same class at the same location or from one location to another consistent with Government Code section 19994.1.
- (c) In evaluating the need for transfer, hiring authorities shall consider the nature of the allegation(s), and whether the staff member has previously been the subject of a staff misconduct allegation or found to have committed misconduct similar to the current allegation(s).
- (d) The hiring authorities shall consider whether transfer is necessary on an ongoing basis throughout the investigation.
- (e) Temporary Involuntary Transfer shall be considered by each hiring authority as an alternative to the use of Administrative Time Off.

Note: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Section 5054, Penal Code; Section 19994.1, Government Code; *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, Court Case number 94-cv-02307-CW, *Madrid v. Woodford, Special Masters Final Report "Re: Department Of Corrections Post Powers Investigations And Employee Discipline; Case No. C90-3094-T.E.H.*, and *Madrid v. Woodford, Order; Case No. C90-3094-T.E.H. Class Action.*

3417. Citizen's Complaints.

(a) An allegation by a non-inmate of misconduct by a departmental peace officer as defined in section 3291(b) is a citizen's complaint pursuant to Penal Code section 832.5. Citizen's complaints alleging misconduct of a departmental peace officer shall be filed within twelve months of the alleged misconduct.

(b) Persons other than an inmate, parolee or staff who allege misconduct of a departmental peace officer shall submit a written complaint to the institution head or parole administrator of the area in which the peace officer is employed.

(c) Citizens filing complaints alleging misconduct by a departmental peace officer are required to read and sign the following statement:

YOU HAVE THE RIGHT TO MAKE A COMPLAINT AGAINST A POLICE OFFICER [this includes a departmental peace officer] FOR ANY IMPROPER POLICE [or peace] OFFICER CONDUCT. CALIFORNIA LAW REQUIRES THIS AGENCY TO HAVE A PROCEDURE TO INVESTIGATE CITIZENS' [or inmates'/parolees'] COMPLAINTS. YOU HAVE A RIGHT TO A WRITTEN DESCRIPTION OF THIS PROCEDURE. THIS AGENCY MAY FIND AFTER INVESTIGATION THAT THERE IS NOT ENOUGH EVIDENCE TO WARRANT ACTION ON YOUR COMPLAINT; EVEN IF THAT IS THE CASE, YOU HAVE THE RIGHT TO MAKE THE COMPLAINT AND HAVE IT INVESTIGATED IF YOU BELIEVE AN OFFICER BEHAVED IMPROPERLY. CITIZEN [or inmate/parolee] COMPLAINTS AND ANY REPORTS OR FINDINGS RELATING TO COMPLAINTS MUST BE RETAINED BY THIS AGENCY FOR AT LEAST FIVE YEARS. IT IS AGAINST THE LAW TO MAKE A COMPLAINT THAT YOU KNOW TO BE FALSE. IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE, YOU CAN BE PROSECUTED ON A MISDEMEANOR CHARGE.

Note: Authority cited: Section 5058 and 5058.3, Penal Code. Reference: Sections 148.6 and 832.5, Penal Code.

HIRING AUTHORITY REVIEW OF INVESTIGATION

CDCR 402 (Rev. 01/22)

HIRING AUTHORITY REVIEW OF INVESTIGATION

| | |
|--------------------|---|
| EMPLOYEE | CLASSIFICATION |
| CASE NUMBER | STATUTE OF LIMITATIONS EXPIRATION DATE |

The Hiring Authority shall review the final investigative report and complete the following including specific details regarding an insufficient investigation if further investigation is requested. The completed and signed original form shall be forwarded to the ERO/Disciplinary Officer. The ERO/Disciplinary Officer shall coordinate with the Office of Internal Affairs, Central Intake Unit, for any requests for further investigation. The ERO/Disciplinary Officer shall forward a copy of the completed and signed form to the Vertical Advocate for designated cases and the SAIG for cases monitored by the Office of the Inspector General.

| | |
|---|---|
| <input type="checkbox"/> Investigation is insufficient (Please provide comments below) | <input type="checkbox"/> Further investigation requested (Please provide comments below) |
|---|---|

| | |
|--|--|
| <input type="checkbox"/> Investigation is sufficient | <input type="checkbox"/> Corrective action ordered <input type="checkbox"/> Disciplinary action ordered <input type="checkbox"/> No action taken |
|--|--|

Indicate findings for each allegation,

Allegation 1:

Allegation 2:

Allegation 3:

Allegation 4:

Comments:

HIRING AUTHORITY SIGNATURE/TITLE

DATE

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JUSTIFICATION OF PENALTY

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Page 1 of 2

JUSTIFICATION OF PENALTY

| | |
|-------------|--|
| EMPLOYEE | CLASSIFICATION |
| CASE NUMBER | STATUTE OF LIMITATIONS EXPIRATION DATE |

The Hiring Authority shall refer to all investigation documentation and the Employee Disciplinary Matrix when determining the level of discipline to impose. The Hiring Authority shall immediately forward the completed and signed original version of this form to the ERO/Disciplinary Officer. The ERO/Disciplinary Officer shall forward a copy of the signed and completed form to the Vertical Advocate for designated cases and the SAIG for cases monitored by the Office of the Inspector General.

Adverse action to be imposed:
 Yes (Select penalty level and detail the reasoning below)

 No (Provide reasons below)
LEGEND FOR PENALTY

| | | |
|---|---|--|
| 1 Official Reprimand | 4 Salary Reduction 10% for 7-12 Qualifying Pay Periods; or Suspension Without Pay for 14-24 Qualifying Work Days. | 7 Salary Reduction 10% for 31-45 Qualifying Pay Periods; or Suspension Without Pay for 62-90 Qualifying Work Days. |
| 2 Salary Reduction 5% for 1-2 Qualifying Pay Periods; or Suspension Without Pay for 1-2 Qualifying Work Days. | 5 Salary Reduction 5% for 25-36 Qualifying Pay Periods; or Suspension Without Pay for 25-36 Qualifying Work Days. | 8 Temporary Demotion to a lower class for 12-24 Qualifying Pay Period; or Permanent Demotion |
| 3 Salary Reduction 5% for 3-12 Qualifying Pay Periods; or Suspension Without Pay for 3-12 Qualifying Work Days. | 6 Salary Reduction 10% for 19-30 Qualifying Pay Period; or Suspension Without Pay for 38-60 Qualifying Work Days. | 9 Dismissal |

| | |
|--|---------------------------------------|
| PENALTY LEVEL (check one) | SPECIFIC PENALTY TO BE IMPOSED |
| <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> 4 <input type="checkbox"/> 5 <input type="checkbox"/> 6 <input type="checkbox"/> 7 <input type="checkbox"/> 8 <input type="checkbox"/> 9 | |

 HIRING AUTHORITY SIGNATURE/TITLE

 DATE

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JUSTIFICATION OF PENALTY

CDCR 403 (Rev. 01/22)

JUSTIFICATION OF PENALTY

Indicate each Matrix category and describe all aggravating and mitigating factors considered in determining the penalty. If no aggravating or mitigating factors are considered, please explain.

Disciplinary Matrix Section:

Mitigating Factors:

Aggravating Factors:

HIRING AUTHORITY SIGNATURE/TITLE

DATE

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INITIAL STATEMENT OF REASONS

The California Department of Corrections and Rehabilitation (CDCR or department) proposes to amend sections 3391 and 3392, and adopt sections 3392.1, 3392.2, 3392.3, 3392.4, 3392.5, 3392.6, 3392.7, 3392.8, 3392.9, 3392.10 and 3417 of the California Code of Regulations (CCR), Title 15, Crime Prevention and Corrections, Division 3, Chapter 1, regarding Employee Discipline. The purpose of this rulemaking action is to establish a Code of Conduct and Employee Disciplinary Matrix, and to relocate the Citizen's Complaint Process.

Penal Code section 5058.4(a) requires the Secretary of the department to implement a disciplinary matrix identifying misconduct categories and penalty ranges applicable to all employees, taking into account aggravating and mitigating factors for establishing a just and proper penalty, as required by the California Supreme Court in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. Penal Code section 5058.4(b) requires the Secretary of the department to adopt a Code of Conduct for all employees of the department.

This rulemaking action implements, in part, a remedial plan adopted by CDCR as directed by court order issued in *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, Court Case number 94-cv-02307 CW on September 8, 2020 (Order). This Order requires CDCR to implement remedial measures to achieve compliance with the *Armstrong Remedial Plan* (ARP) and the Americans with Disabilities Act (ADA) at the Richard J. Donovan Correctional Facility (RJD), including:

CDCR develops measures to ensure that CDCR imposes appropriate and consistent discipline against employees who engage in violations of the ARP or ADA with respect to class members at RJD; and that employees who engage in criminal misconduct against class members at RJD in violation of the ARP or ADA are appropriately investigated and, if warranted, referred for prosecution.

This regulation also provides for temporary involuntary transfers so that officers accused of serial violations of the RJD Remedial Plan or ADA with respect to class members at RJD in conformance with the Investigation and Discipline Section of the RJD Remedial Plan.

The Order mandates the use of body-worn cameras (BWC) and audio-video surveillance systems (AVSS) to record staff interactions with incarcerated persons, and requirements for investigating allegations of staff misconduct toward incarcerated persons and parolees. The Employee Disciplinary Matrix adds new and additional misconduct categories and associated penalties for staff disabling BWC, and tampering with or destroying BWC or AVSS recordings not contained in current CDCR regulations or policies.

As part of its remedial plan to comply with the Order, CDCR agreed to promulgate regulations implementing organizational changes regarding the processing of complaints containing allegations of staff misconduct toward incarcerated persons and parolees, including processes for analyzing staff misconduct allegation complaints by a Centralized Screening Team (CST), and referring cases to the department's Office of Internal Affairs (OIA) when an administrative or criminal investigation is required.

The rulemaking action for Staff Misconduct Allegations is dependent upon the implementation of the Employee Discipline Matrix contained in this rulemaking action because the CST must utilize the Allegation Decision Index which is based on the misconduct categories and related penalty ranges in the Employee Discipline Matrix to screen complaints to determine whether a case will be referred to OIA for investigation. OIA must utilize the Investigation Assignment Index which is also based on the misconduct categories and related penalty ranges in the Employee Disciplinary Matrix to make an investigation assignment decision.

This rulemaking action is necessary to ensure compliance with the *RJD Remedial Plan*. The implementation of changes in processing complaints containing staff misconduct allegations, which include expanded categories for allegations of staff misconduct, is dependent on the establishment of the regulatory Employee Disciplinary Matrix.

The creation of CST also impacts the department's policy for calculating the one-year statute of limitations period for imposing adverse action pursuant to Government Code section 3304(d)(1), which commences on the date of discovery of an allegation of misconduct by a person authorized by the department to initiate an investigation. This rulemaking action expands who is authorized under department policy to initiate an investigation, to include CST, to ensure the imposition of timely discipline and compliance with the *RJD Remedial Plan*.

Finally, this regulatory action relocates the department's Citizen's Complaint Process for citizens making misconduct complaints against department peace officer employees, from within the prior Code of Conduct regulation to its own regulatory section in the CCR, to ensure that the public can more easily locate the process for making a citizen complaint.

CONSIDERATION OF ALTERNATIVES:

The department must determine that no reasonable alternative considered, or that has otherwise been identified and brought to the attention of the department, would be more effective in carrying out the purpose for which this action is proposed, would be as effective and less burdensome to affected private persons than the action proposed, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Currently, no reasonable alternatives have been brought to the attention of the department that would alter the department's initial determination.

ECONOMIC IMPACT ASSESSMENT:

In accordance with Government Code Section 11346.3(b), CDCR has made the following assessments regarding the proposed regulations:

The department has determined that there will be no significant economic impact as a result of this proposed regulation because the department already provides the rights contained herein under our current department policy.

Significant Adverse Economic Impact on Business

The department has made an initial determination that this action will not have a significant statewide adverse economic impact on business, including the ability of California business

to compete with businesses in other states because the proposed regulations only affect the internal management of the California state correctional system, places no obligations or requirements on any business, and only affects current and future department employees.

Creation or Elimination of Jobs within the State of California

The department has determined that these proposed regulations will have no impact on the creation or elimination of existing jobs or businesses within California because those jobs or businesses are not affected by the department's internal employee disciplinary process utilized for state civil service employees and appointees.

Creation of New or the Elimination of Existing Businesses within the State of California

The department has determined that the proposed regulations will not have an impact on the creation, expansion or elimination of new or existing businesses within California. The proposed regulations place no requirements or restrictions on businesses inside or outside California as the proposed regulations only affect the internal management of the California state correctional system.

Expansion of Business Currently Doing Businesses within the State of California

These proposed regulations have no effect on the expansion of businesses currently doing business within the State of California as the proposed regulations only affect the internal management of prisons.

BENEFITS OF THE REGULATIONS:

These regulations will benefit the public, incarcerated persons, parolees, and department employees by ensuring that failure by employees or appointees to comply with the law, CDCR policies, or employee expectations are consistently and fairly addressed through the employee discipline process.

These regulations put department employees and appointees on notice of conduct expectations, the process for assessing allegations and penalties for the imposition of discipline, and provide for consistent application of the department's employee disciplinary process and employee due process.

These regulations also enable hiring authorities to make consistent statewide discipline decisions through the use of the Employee Disciplinary Matrix, which includes allegations and penalties for serious on-duty and off-duty misconduct including disabling, tampering with, or destroying video cameras and recordings, Equal Employment Opportunity (EEO) violations, use of force, off-duty firearm issues, stalking, and workplace violence.

Penal Code section 5058.4 requires the Secretary to adopt a Code of Conduct for all CDCR employees. The proposed amended regulations in section 3391 implement provisions that establish a Code of Conduct for all CDCR employees and appointees, and establish that failure to comply with these conduct expectations may result in disciplinary action.

Penal Code section 5058.4 also requires the implementation of a disciplinary matrix with offenses and associated punishments applicable to all CDCR employees. This statute

requires that the disciplinary matrix take into account aggravating and mitigating factors for establishing a just and proper penalty for the charged misconduct, as required by the California Supreme Court in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.

This rulemaking action will:

- Implement a new regulatory Code of Conduct for all department employees and appointees, and a regulatory Employee Disciplinary Matrix to ensure consistent statewide discipline for employees engaging in misconduct, consistent with the requirements set forth in California Penal Code section 5058.4(a)-(b).
- Ensure the department's compliance with the federal court order issued in *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, Court Case number 94-cv-02307-CW on September 8, 2020, including Implementation of penalty ranges in the Employee Disciplinary Matrix for employees disabling, tampering with, or destroying video cameras and recordings, and misconduct related to off-duty firearms, EEO violations, stalking, and workplace violence.
- Implement an Employee Disciplinary Matrix to be utilized as the basis for the Staff Misconduct Allegations regulation to make investigation screening and assignment decisions for administrative and criminal investigations into allegations of staff misconduct.
- Implement a separate and independent regulation for citizen complaints by adopting sections 3417(a)-(c) to make it easier for members of the public to locate regulations pertaining to filing of citizen's complaints.

MATERIALS RELIED UPON:

The department, in proposing amendments to these regulations, has in part relied upon:

The Federal court order issued in *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, Court Case number 94-cv-02307 CW on September 8, 2020. This document is available for review as part of the rulemaking file at: [Armstrong v. Newsom, Case No. 94-cv-02307 CW](#).

SPECIFIC PURPOSE AND RATIONALE FOR EACH SECTION, PER GOVERNMENT CODE SECTION 11346.2(b)(1):

Subsection 3391 is retitled. The title now reads: Employee and Appointee Conduct. The section is being amended to include conduct expectations.

Existing subsection 3391(a) is amended to implement a regulatory Code of Conduct for all department employees and appointees in compliance with the requirements set forth in California Penal Code section 5058.4(a)-(b). The Code of Conduct establishes a comprehensive list of expectations for employee performance and conduct found in new subsections 3391(a)(1)-(11), and extends employee conduct and performance standards to CDCR appointees. These amendments are necessary to notify employees and appointees of conduct expectation and performance standards set forth in other established law, CDCR policies and procedures, and professional licensure requirements, so the department can hold employees and appointees accountable for failing to comply with performance standards and expectations, and impose employee discipline.

Existing subsections 3391(b)-(d) are deleted because they will be adopted as part of section 3417, which pertain specifically to requirements for filing citizen's complaints.

New subsection 3391(b) is adopted to implement Penal Code section 5058.4, by providing notice to employees and appointees that failure to comply with the performance and conduct expectations set forth in subsection (a) may result in discipline.

Existing section 3392 is retitled. The title now reads: Employee Discipline. This change is necessary as this section will now provide employee discipline regulations and the Employee Discipline Matrix. Punctuality regulations were previously included in this section and the information is adopted in subsection 3391(a)(5).

New subsections 3392(a)(1)-(31) are adopted to explain the meaning of words and define terms used in Title 15, Subchapter 5, Article 2, which have specific meaning within the context of the employee discipline process.

New subsection 3392.1 is adopted to implement the requirement of Penal Code section 5058.4 that the department establish and implement a disciplinary matrix applicable to all department employees, in order to ensure notice and consistency statewide by requiring hiring authorities to impose disciplinary penalties consistent with the regulatory Employee Disciplinary Matrix. This requires that hiring authorities, after reviewing an Office of Internal Affairs confidential investigative report, or receiving approval to impose direct adverse action, make investigation findings for each allegation made against each employee, and ensure notice and consistency statewide by identifying and defining the findings that may be made.

New subsection 3392.2(a) is adopted to implement the Penal Code section 5058.4 requirement that the department's disciplinary matrix takes into account aggravating and mitigating factors for establishing a just and proper penalty for charged misconduct as required by the California Supreme Court in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. This provides notice to hiring authorities of when corrective action is appropriate to be imposed, as opposed to adverse action, and for determining under section 3392.4(c)(10) if mitigating factors allow for imposition of a penalty outside of the lowest disciplinary matrix category of a penalty of Letter of Reprimand.

New subsection 3392.2(b) is adopted to provide notice to employees that failure to comply with corrective action may result in adverse action.

New subsection 3392.3(a) is adopted to implement and make specific Government Code section 19572, by identifying individuals in the department who may be subject to adverse action.

New subsection 3392.3(b) is adopted to implement the requirement of Penal Code section 5058.4 that the department establish and implement a disciplinary matrix applicable to all department employees, in order to ensure notice and consistency statewide by requiring hiring authorities to impose disciplinary penalties consistent with the regulatory Employee Disciplinary Matrix.

New subsection 3392.3(c) is adopted to ensure that hiring authorities only take adverse action when the imposition of discipline is justified and the department believes it can meet its evidentiary burden at hearing. The hiring authority must find the investigation or direct action materials sufficient to make investigation findings, which must be documented on CDCR Form 402 (Rev. 01/22), Hiring Authority Review of Investigation, which is incorporated by reference. The justification for any penalty reduction to corrective action, including identification of mitigating factors, must be specifically articulated on CDCR Form 403 (Rev. 01/22), Justification of Penalty, which is incorporated by reference.

New subsection 3392.3(d) is adopted to implement the requirement in *Yancey v. State Personnel Board* (1985) 167 Cal.App.3d.478, that a determination is made that a nexus exist between acts of misconduct by permanent civil service employees and the employee's job duties prior to imposing discipline.

New subsections 3392.4(a)-(e) are adopted to implement and make specific Government Code section 19570, by identifying and defining the types of adverse action penalties that may be imposed by a hiring authority.

New subsection 3392.5(a) is adopted to establish penalty ranges as required by Penal Code section 5058.4 to ensure notice and consistency statewide.

New subsections 3392.5(b)(A)(1)-(M)(6) are adopted to implement the Employee Disciplinary Matrix by identifying misconduct categories with specified acts of misconduct, and applicable penalties as required by Penal Code section 5058.4(a). The Employee Disciplinary Matrix makes regulatory the current Employee Disciplinary Matrix contained in department policy since 2006, implemented as part of the Madrid federal remedial orders in *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995) and updates the matrix disciplinary categories to take into account changes in the law. The base penalty levels were established consistent with the requirements for a just and proper penalty pursuant to *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, and State Personnel Board penalty decisions for similar allegations of misconduct. The penalty ranges reflect the range of potential penalties following consideration of aggravating and mitigating factors identified in section 3392.4, subsections (c)(9) and (11) which consider the harm to the public service resulting from the employee's misconduct, the circumstances surrounding the misconduct, and the likelihood of its recurrence.

The Employee Discipline Matrix is also necessary to implement the Remedial Plan required by the *Armstrong* Court Order, which orders CDCR to develop measures to reform the discipline process to ensure that appropriate and consistent discipline is imposed statewide against employees who engage in misconduct. This subsection puts department employees on notice of misconduct categories and penalty ranges for specified acts of misconduct to ensure notice and consistency statewide.

New subsection 3392.5(b)(A) is adopted to establish regulatory misconduct charging allegations and penalty levels related to attendance for employees who engage in excessive absenteeism or are absent without approved leave. This is necessary to ensure that CDCR imposes appropriate and consistent discipline against employees who engage in misconduct based on the identified violations set forth in this matrix category.

New subsection 3392.5(b)(B) is adopted to establish regulatory misconduct charging allegations and penalty levels related to code of silence and retaliation when employees attempt to conceal misconduct through non-reporting, conspiring with other employees to engage in a code of silence to prevent discovery of misconduct, or by threatening or

retaliating against other employees to prevent the discovery of misconduct. This is necessary to ensure that CDCR imposes appropriate and consistent discipline against employees who engage in misconduct based on the identified violations set forth in this matrix category.

New subsection 3392.5(b)(C) is adopted to establish regulatory misconduct charging allegations and penalty levels related to the illegal use or misuse of alcohol, tobacco, and drugs under prescribed circumstances. This is necessary to ensure that CDCR imposes appropriate and consistent discipline against employees who engage in misconduct based on the identified violations set forth in this matrix category.

New subsection 3392.5(b)(D) is adopted to establish regulatory misconduct charging allegations and penalty levels related to workplace conduct, job performance expectations, and hiring. The allegations encompass employee misconduct that is discourteous to or endangers staff, the public, incarcerated persons, and parolees; violates the department's nepotism and fraternization policies and hiring practices; abandons posts or sleeps while on duty; inappropriately accesses and disseminates confidential information; engages in workplace violence, sexual misconduct, or overfamiliarity with incarcerated persons and parolees; violates training, expectations, licensure requirements, and professional standards for professional employees (i.e., medical, dental, mental health, and legal professionals); fails to intervene and stop other employees from engaging in misconduct; and convictions of felonies or misdemeanors involving moral turpitude. This is necessary to ensure that CDCR imposes appropriate and consistent discipline against employees who engage in misconduct based on the identified violations set forth in this matrix category.

New subsection 3392.5(b)(E) is adopted to establish regulatory misconduct charging allegations and penalty levels related to lack of integrity and dishonesty for employees that are dishonest and misleading in official records, documents, and incident reports; engage in criminal acts of theft or fraud; or provide intentionally false, dishonest, evasive, and misleading written statements or testimony during internal affairs investigations. This is necessary to ensure that employees who engage in criminal misconduct; falsify, destroy, or plant false evidence; disable or tamper with body-worn-cameras or audio-visual surveillance systems; or destroy or alter audio or video recordings of incidents inconsistent with the law or department policy, are appropriately and consistently disciplined for engaging in misconduct based on the identified violations set forth in this matrix category.

New subsection 3392.5(b)(F) is adopted to establish regulatory misconduct charging allegations and penalty levels related to a failure to comply with department requirements, such as failing to attend required training; engaging in secondary employment without prior approval; failing to comply with lawful instructions by supervisors, managers, or investigators; failing to report changes in license or weapons status; engaging in incompatible activities in violation of section 3413; or refusing to submit to physical, psychological, or drug testing as required by law, civil service rules, department policy, Memoranda of Understanding, or lawful order. This is also necessary to ensure that CDCR imposes appropriate and consistent discipline against employees who engage in misconduct based on the identified violations set forth in this matrix category.

New subsection 3392.5(b)(G) is adopted to establish regulatory misconduct charging allegations and penalty levels for employees that engage in harassment, discrimination based on protected status, or retaliation for engaging in protected activity or for opposing discrimination or harassment. This is necessary to ensure that CDCR imposes appropriate and consistent discipline against employees who engage in misconduct based on the identified violations set forth in this matrix category.

New subsection 3392.5(b)(H) is adopted to establish regulatory misconduct charging allegations and penalty levels related to workplace violence for employees that disrupt the workplace by engaging in acts of violence, threatened acts of violence, intimidation, or stalking. This is necessary to ensure that CDCR imposes appropriate and consistent discipline against employees who engage in misconduct based on the identified violations set forth in this matrix category.

New subsection 3392.5(b)(I) is adopted to establish regulatory misconduct charging allegations and penalty levels for misuse of state resources when employees inappropriately use the department's equipment or resources for personal use; fail to properly use or misuse equipment necessary to perform their job duties; or misappropriate state equipment, property, supplies or funds. This is necessary to ensure that CDCR imposes appropriate and consistent discipline against employees who engage in misconduct based on the identified violations set forth in this matrix category.

New subsection 3392.5(b)(J) is adopted to establish regulatory misconduct charging allegations and penalty levels related to off-duty incidents as identified, which have a nexus with an employee's performance or impact the employee's ability to perform their job duties. This is necessary to ensure that CDCR imposes appropriate and consistent discipline against employees who engage in misconduct based on the identified violations set forth in this category.

New subsection 3392.5(b)(K) is adopted to establish regulatory misconduct charging allegations and penalty levels related to on-duty traffic-related incidents for employees that drive state vehicles on-duty in a negligent or dangerous manner. This is necessary to ensure that CDCR imposes appropriate and consistent discipline against employees who engage in misconduct based on the identified violations set forth in this matrix category.

New subsection 3392.5(b)(L) is adopted to establish regulatory misconduct charging allegations and penalty levels related to use of force while on duty for employees that engage in the use of unnecessary and excessive use of force in violation of department policy and the law; fail to properly report force used by another employee, or force an employee observes used by other employees. This is necessary to ensure that CDCR imposes appropriate and consistent discipline against employees who engage in misconduct based on the identified violations set forth in this matrix category.

New subsection 3392.5(b)(M) is adopted to establish regulatory misconduct charging allegations and penalty levels related to the use of lethal and less-lethal weapons while on duty for employees that misuse or fail to use weapons when required in the course of the employee's duties, inappropriately display weapons, negligently handle weapons while on duty, unintentionally discharge a weapon at a range, and handle firearms in a grossly negligent manner while on duty. This is necessary to ensure that CDCR imposes appropriate and consistent discipline against employees who engage in misconduct based on the identified violations set forth in this matrix category.

New subsection 3392.5(c) is adopted to provide instruction to hiring authorities to ensure the consistent statewide application of the Employee Disciplinary Matrix. This includes a determination regarding the sufficiency of the investigation or direct action materials, identification of the misconduct allegation, the base level penalty for the misconduct, and application of aggravating and mitigating factors to determine the appropriate penalty to be imposed in compliance with Penal Code section 5058.4.

New subsections 3392.5(c)(9) and (11) are adopted to identify the inclusive list of aggravating and mitigating factors a hiring authority may consider when determining whether to increase or decrease the base penalty level within an applicable penalty range. These subsections notify department employees of the factors that can aggravate or mitigate a base penalty level within a penalty range, and that if an employee engages in repeated acts of misconduct, the penalty level may exceed the penalty range identified in the Employee Disciplinary Matrix. This subsection also notifies department employees that if the base penalty is a Letter of Reprimand, or if hiring authority can mitigate a penalty to a Letter of Reprimand, the hiring authority can impose corrective action when appropriate under section 3392.1. In this situation, the hiring authority must document the mitigating factors supporting the penalty decision.

New subsection 3392.5(c)(12) is adopted to ensure that hiring authorities take into account that suspensions are considered a more severe penalty than salary reductions for purposes of progressive discipline when determining a fair and just disciplinary penalty.

New subsection 3392.5(c)(13) is adopted to allow a hiring authority to deviate from the penalty ranges established by the Employee Disciplinary Matrix, and impose a higher level of penalty when an employee engages in repeated acts of the same misconduct. In this situation, the hiring authority must document the aggravating factors supporting the penalty decision.

New subsection 3392.6 is adopted to ensure that hiring authorities serve Letters of Intent and disciplinary actions in compliance with the timeframes set forth in the applicable statutes of limitation pursuant to Government Code sections 3304(d)(1) and 19635. This subsection is also necessary to establish that only a hiring authority or the Office of Internal Affairs Centralized Screening Team is authorized to initiate the investigative process for purposes of commencing the one-year statute of limitations period under Government Code section 3304(d)(1).

New subsection 3392.7 is adopted to ensure compliance with the pre-deprivation due process rights set forth in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, CCR, Title 2, section 52.6, and Government Code section 19590(b).

New subsection 3392.8 is adopted to ensure employees are afforded a *Skelly* Hearing upon timely request in compliance with *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, CCR, title 2, section 52.6, and Government Code section 19590(b).

New subsections 3392.8(a)-(g) are adopted to ensure the department's compliance with *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, by requiring the department to notify employees of their right to respond to charges prior to the imposition of a disciplinary penalty, their right to a *Skelly* Hearing if timely requested, their right to a *Skelly* Package, their right to know the person identified to serve as a *Skelly* Officer, and the employee's right to waive the requirement that a non-involved manager act as a *Skelly* Officer.

New subsection 3392.8(h) is adopted to establish that employees have a right to representation during the *Skelly* Hearing process, and who may act as an employee representative which is necessary to comply with *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, applicable State Bargaining Unit Memoranda of Understanding, and the law.

New subsection 3392.8(i) is adopted to ensure the department's compliance with *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, by specifying the rights that must be afforded an employee or their representative during the *Skelly* Hearing.

New subsection 3392.8(j) is adopted to ensure the department's compliance with *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, by specifying certain rights and duties of a *Skelly* Officer conducting a *Skelly* Hearing.

New subsection 3392.8(k) is adopted to ensure the department's compliance with *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, by specifying the duties of a *Skelly* Officer when making an independent *Skelly* recommendation to the hiring authority after the conclusion of the *Skelly* Hearing.

New subsection 3392.9 is adopted to ensure that employees are removed from the workplace when an employee is under investigation under specified circumstances to maintain the safety and security of the workplace, the integrity of the investigation, and the health and welfare of incarcerated persons, parolees, or wards, unless the employee can be temporarily transferred from their work location under subsection 3392.9, or when based on the circumstances of the misconduct, the hiring authority determines that Administrative Time Off (ATO) or transfer is not necessary to ensure the safety and security of the institution or the integrity of the investigation. Consistent with the Investigation and Discipline Section of the *RJD Remedial Plan*, this section allows employees who are accused of serial violations of the *RJD Remedial Plan* or ADA with respect to class members, to be placed on ATO during an investigation.

New subsection 3392.10 is adopted to ensure that employees are temporarily transferred from their work location when an employee is under investigation to maintain the safety and security of the workplace, and the health and welfare of incarcerated persons, parolees, or wards. Consistent with the Investigation and Discipline Section of the *RJD Remedial Plan*, this section allows employees who are accused of serial violations of the *RJD Remedial Plan* or ADA with respect to class members, to be temporarily transferred to another work location during an investigation.

New subsection 3417 is adopted to relocate the department's Citizen's Complaint Process for citizens making misconduct complaints against department peace officer employees from within the prior Code of Conduct regulation to its own regulatory section in the CCR to ensure that the public can more easily locate the process for making a citizen complaint.

New subsection 3417(c) is adopted to ensure that citizen's filing complaints against peace officers alleging misconduct are aware of their rights to file a complaint, that complaints are retained by the employing law enforcement agency for a period of five years, and their obligation set forth in Penal Code section 148.6 to read and sign an acknowledgement that if a citizen makes a complaint that they know to be false, the citizen may be prosecuted for a misdemeanor violation.

FINAL STATEMENT OF REASONS

The following documents are incorporated by reference:

The Initial Statement of Reasons (ISOR).

Notice of Change to Text as Originally Proposed (August 11, 2022-August 26, 2022)

Readoption of the emergency regulations (OAL File no. 2022-0531-01)

UPDATES TO THE INITIAL STATEMENT OF REASONS:

On December 9, 2021, the California Department of Corrections and Rehabilitation (CDCR or the department) submitted to the Office of Administrative Law (OAL) proposed emergency regulations concerning Employee Discipline. The emergency regulations were approved effective January 1, 2022. An emergency readoption of the regulations was submitted to OAL on May 31, 2022, and approved effective June 13, 2022. This readoption extended the period of emergency authority to September 13, 2022.

Notice of Proposed Regulations #22-02 was published in the California Notice Register on April 15, 2022, which began the public comment period through May 31, 2022. On the same day, Notice of Change to Regulations (NCR) 22-02, including the text of the regulations and the ISOR, was mailed to persons who requested to be placed on the department's mailing list to receive notifications of rulemaking actions. On the same day, NCR 22-02 was posted on the department website. Six written public comments were received during the public comment period. The comments are summarized and responded to below under the heading *Summaries and Responses to Written Public Comments Received During the Initial Comment Period*. A public hearing was requested and held on June 2, 2022. There were no speakers at the public hearing.

After publication of the Notice of Proposed Regulations, it was determined that additional changes were necessary. The Notice of Change to Text as Originally Proposed (Renotice) was distributed on August 11, 2022, to those who provided comments during the public comment period, and was posted on the department website on August 11, 2022. The department accepted public comments from this date through August 26, 2022. No public comments were received.

During the Renotice, the following changes were made to the Text as Originally Proposed:

Section 3391 was amended to strikeout subdivision letters (b), (c), and (d) to correct an inadvertent omission as the text for these subsections is being deleted.

Section 3392 was amended to amend the definition of "vertical advocate" to specify that a vertical advocate is an attorney from the department's Employment Advocacy and Prosecution Team who represents the department for designated cases. This amendment was needed for additional clarity concerning the vertical advocate and their responsibilities.

Section 3392.3(d) was amended to remove the text "for non-sworn staff" in regards to the Nexus between the employee's behavior and their employment. This amendment was needed for clarity that Nexus is required to be established for all staff.

Section 3392.9(a) was amended to accurately reference the section for Temporary Involuntary Transfers, 3392.10.

Non-substantive formatting changes and typographical corrections are made throughout for additional clarity.

DETERMINATIONS, ASSESSMENTS, MANDATES, AND FISCAL IMPACT:

The department has determined that no alternative considered would be more effective in carrying out the purpose for which the regulation is proposed, or would be as effective and less burdensome to affected private persons, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the action proposed. No such alternatives were proposed or brought to the department's attention during the adoption of this rulemaking action. This determination was reached by a consensus of the department's Office of Legal Affairs.

Except as set forth and discussed in the summary and response to the comments received, no other alternatives have been proposed or otherwise brought to the department's attention that would alter the department's decision.

The department has made an initial determination that the action will not have a significant adverse economic impact on business. Additionally, there has been no testimony or other evidence provided that would alter CDCR's initial determination.

The department has determined that this action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement of costs or savings pursuant to Government Code sections 17500 - 17630.

The department has determined that no reasonable alternatives to the regulation have been identified or brought to the attention of the department that would lessen any adverse impact on affected private persons or small businesses than the action planned.

NOTE REGARDING CDCR FORMS INCORPORATED BY REFERENCE (CCR, TITLE 1, SECTION 20)

The department referenced CDCR Form 402 (Rev. 01/22), Hiring Authority Review of Investigation, and CDCR Form 403, (Rev. 01/22), Justification of Penalty, throughout the proposed regulation text: CDCR Forms 402 and 403 were made available to the public throughout the rulemaking process, and will continue to be made available upon request.

The department uses over 1,500 regulatory forms, including the above-referenced forms. Because of this high volume, it would be unduly cumbersome, expensive, and impractical to print all the forms in Title 15 due to the space needed for these forms and the high cost of printing all of these forms. Therefore, department forms are incorporated by reference into Title 15 within their relevant section, when appropriate.

SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS RECEIVED DURING THE INITIAL COMMENT PERIOD:

COMMENTS #1

Commenter states that proposed section 3392.5 conflicts with the penalty for intentional violations of the Information Practices Act of 1977 (IPA). IPA section 1798.55 includes possible termination of employment for such a violation. The Employee Disciplinary Matrix section D-26 has a maximum penalty level of 5, which is a salary reduction of a 5 percent for 25-36 pay periods or a suspension without pay for 25-36 days. To be compatible with the IPA section 1798.55, the penalty should be a maximum level 9, dismissal.

Response to Comment 1: Proposed section 3392.5(b) is consistent with IPA section 1798.55, and provides penalties for acts of misconduct that constitute a violation of the IPA that includes level 9, dismissal. Employee Disciplinary Matrix, section D12 (Improperly accessing or unauthorized possession or disclosure of confidential information) has a penalty range of level 2 to level 9, dismissal, and section D13 (Improperly accessing or unauthorized possession

or disclosure of confidential information with malicious intent or for personal gain) has a penalty range of level 3 to level 9, dismissal, for acts that would constitute a violation of the IPA.

COMMENTS #2

Comment 2A: Commenter states the proposed regulations are performance measures versus prescriptive standards which are department policy, not regulations. The proposed regulations lack the required necessity, clarity, and consistency for regulations. Commenter states the Disciplinary Matrix does not belong in the California Code of Regulations and the proposed regulatory action should be withdrawn in its entirety.

Response to Comment 2A: Penal Code section 5058.4(a) requires the Secretary of CDCR to promulgate a regulatory disciplinary matrix identifying misconduct categories and penalty ranges applicable to all employees, taking into account aggravating and mitigating factors for establishing a just and proper penalty, as required by the California Supreme Court in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. Penal Code section 5058.4(b) requires the Secretary of the department to adopt a regulatory Code of Conduct for all employees of the department. In addition, the federal court order issued in *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, 94-cv-02307 CW on September 8, 2020 (Order), requires CDCR to implement remedial measures to achieve compliance with the *Armstrong Remedial Plan* (ARP) and the Americans with Disabilities Act (ADA) at the Richard J. Donovan Correctional Facility (RJD). These regulations implement measures necessary to ensure that CDCR imposes appropriate and consistent discipline against employees who engage in violations of the ARP or ADA with respect to class members at RJD.

Comment 2B: Commenter is concerned the Disciplinary Matrix is an attempt to bypass or constrain the State Personnel Board's (SPB) constitutional authority by making the Matrix penalties mandatory for both CDCR and SPB. Commenter states that pursuant to California Constitution, Article VII, Section 3, Subdivision (a), SPB is empowered to "review disciplinary actions" within the state civil service system. As SPB possesses exclusive authority to review disciplinary decisions, Commenter states SPB will give little weight, if any, to the Disciplinary Matrix.

Response to Comment 2B: The Employee Disciplinary Matrix establishes a regulatory procedure for Hiring Authorities for assessing disciplinary penalties when taking adverse action. The Matrix sets forth penalty ranges for specified acts of misconduct to ensure discipline is imposed on all CDCR employees statewide in a fair and consistent manner. Nothing in this regulation prohibits or prevents CDCR employees from exercising their due process rights to appeal disciplinary actions to the State Personnel Board (SPB), nor interferes with the SPB's constitutional authority to review disciplinary actions to determine whether a penalty is "just and proper" as set forth in California Constitution, Article VII, Section 3, Subdivision (a).

Comment 2C: Commenter states the Disciplinary Matrix increases penalties without any justification for increasing the harshness of penalties. Commenter states the categories that do not relate to minimum qualifications should have a range of penalties allowed, even if the recommended penalty is a dismissal at Level 9, to give hiring authorities the authority to account for specific facts of each individual case.

Response to Comment 2C: While some Matrix penalty ranges increased based on CDCR's reassessment of the severity of the misconduct, a majority of the penalty ranges were reduced, or the range now provides a lower level penalty that a Hiring Authority can mitigate to if justified by the facts. Hiring Authorities make penalty determinations based on the specific acts of sustained misconduct, then consider all the aggravating and mitigating factors set forth in section 3394.5(c) to make a penalty decision within the matrix penalty ranges. Most Matrix categories have broad ranges of penalties, and are not only a level 9 dismissal. For categories that have a base level penalty of 9 dismissal, if Hiring Authority believes the penalty should be lowered based on the facts and aggravating and mitigating factors, the Hiring Authority has the discretion to assess a lower penalty when the Hiring Authority can justify their penalty determination.

Comment 2D: Commenter states penalties concerning use of force do not account for injuries resulting from reasonable use of force as injury may not be the result of an excessive use of force, but may result from reasonable use of force applied. Commenter states that it is unknown how these factual distinctions will be applied based upon how the penalty range is defined.

Response to Comment 2D: Disciplinary action results in use of force cases when there is a violation of CDCR's Use of Force policies and procedures, and not for the application of reasonable force. When there is a sustained violation of CDCR's Use of Force policies and procedures, and the inmate or parolee sustains injuries, the level of injury is considered in the Matrix category penalty ranges, based on the harm and severity of the misconduct.

Comment 2E: Commenter states that subsection 3392.3(d) provides that adverse action for non-sworn staff off duty misconduct requires a nexus between the behavior and employment. However, Commenter is concerned that subsection 3392.3(d) can be read to exclude sworn peace officers from the nexus requirement.

Commenter states that establishing this nexus is required by California law, and that removing the nexus requirement for CDCR peace officers creates a different standard inconsistent with the standard applied to other state employed peace officers.

Commenter also states that removing the nexus requirement for peace officers allows for the possibility of discipline not because the employee's behavior is unlawful or violates department policy, but because the department merely disapproves of the conduct.

Accommodation: The text "for non-sworn staff" is removed from subsection 3992.2(d). This amendment was noticed in the Notice of Changes to Text as Originally Proposed issued on August 11, 2022.

Response to Comment 2E: When imposing discipline on all state employees a nexus between the behavior and employment is required for both peace officers and non-sworn employees. Section 3392.3(d), applies this requirement to all CDCR employees, and does not distinguish between sworn and non-sworn employees, stating, "Adverse action for off-duty misconduct requires a Nexus between the employee's behavior and their employment."

Comment 2F: Commenter states subsection 3992.8(c) lacks necessity, consistency, and clarity and should be deleted. Commenter states a waiver without exceptions is arbitrary and does not align with the right to a *Skelly* hearing. Commenter states that the effective date of the adverse action should determine the time limit to request the *Skelly* hearing, yet CDCR

does not do this and fails to show the necessity for this strict waiver of an employee's pre-deprivation rights.

Subsection 3392.8(c) provides that an employee waives the right to a hearing *Skelly* hearing if not timely requested; however, Commenter states there is no reason to limit the time to request a *Skelly* hearing as there is plenty of time for the department and the employee to set up and participate in a *Skelly* hearing even after the time limit detailed in 3392.8(c) has passed as the department typically serves notice of adverse action weeks before the effective date of the adverse action. Commenter contends that both the department and the employee benefit from a *Skelly* hearing as they provide an opportunity to resolve disputes before an appeal is filed.

Response to Comment 2F: Section 3392.8(c) is necessary to establish a time frame for employees to request a *Skelly* hearing so CDCR can assign a *Skelly* Officer, schedule and hold a *Skelly* hearing, and provide a *Skelly* decision prior to the effective date of the adverse action to ensure employees are provided their due process rights. Further, this section complies with *Skelly v. State Board* (1975) 15 Cal.3d 194, and State Personnel Board, Rule 52.6.

Comment 2G: Commenter notes that subsection 3992.8(e) provides that the *Skelly* package (the documents supporting an adverse action) shall be served to the employee prior to the *Skelly* hearing. Commenter is concerned this subsection is inconsistent with the *Bodiford* Settlement Agreement as under the *Bodiford* Agreement, an officer receiving a preliminary notice of adverse action is entitled to "all materials relevant to the adverse action." Commenter is concerned subsection 3992.8(e) fails to take into account CDCR's *Bodiford* obligations for those institutions issuing preliminary notices of adverse actions.

Response to Comment 2G: Section 3992.8(e) pertains to CDCR's *Skelly* rights and procedures setting forth the requirement established in *Skelly v. State Board* (1975) 15 Cal.3d 194, that a state employer must provide an employee with all of the documentation relied upon in imposing discipline, i.e., *Skelly* package, when taking adverse action. The *Bodiford* Settlement Agreement referenced above does not contain any *Skelly* requirements and is not relevant to CDCR's *Skelly* processes.

Comment 2H: Commenter states that subsection 3392.8(h) is arbitrary and may violate due process and an officer's rights under the Public Safety Officers Procedural Bill of Rights. Commenter notes that subsection 3392.8(h) provides that a supervisory Job Steward may represent an employee, but in a non-union capacity and off state time. Commenter states these requirements interfere with their employee right to have their supervisory Job Stewards provide union representation to employees. Government Code section 3303(i) provides that an officer is entitled to a representative of "his or her choice."

Response to Comment 2H: Section 3392.8(h) complies with the Ralph C. Dills Act, set forth in sections 3512 through 3524 of the Government Code, and provides rank-and-file union members with a right to be represented by their respective unions and Job Stewards during work hours. The Dills Act does not require CDCR to allow Supervisory Job Stewards to represent rank-and-file members on state time and at state expense. This section does not limit who the employee may have as their representative of choice, and provides that employees may have private representation or Supervisory Job Stewards can represent rank-and-file employees in a non-union capacity on their own time and not at state expense.

Comment 2I: Commenter subsection 3392.8(j) provides the *Skelly* officer to restrict any oral presentation that is argumentative or repetitive. Commenter states that a *Skelly* hearing is an employee's opportunity to present evidence and make his or her case that the charges brought against him or her are not accurate or not justified. Commenter states this often requires argument and is concerned this is a restriction on an employee's right to be meaningfully heard.

Response to Comment 2I: CDCR's *Skelly* process allows an employee or their representative to present any evidence, information, or legal arguments the employee deems relevant during their *Skelly* hearing, while ensuring that the employee or their representative is not abusive or hostile towards the *Skelly* Officer, and that the hearing is conducted in an expeditious manner.

Comment 2J: Commenter states it should be clarified that the prohibition for the *Skelly* officer to disclose their recommendation applies in the *Skelly* hearing only as the *Skelly* Recommendation may be required to be disclosed by another legal authority.

Response to Comment 2J: Section 3392.8 makes clear that the *Skelly* Officer shall not disclose their *Skelly* Recommendation at the *Skelly* hearing.

Comment 2K: Commenter notes that subsection 3417 is missing required language for citizen's complaints as provided in Penal Code section 148.6:

It is against the law to make a complaint that you know to be false. If you make a complaint against an officer knowing that it is false, you can be prosecuted on a misdemeanor charge.

Response to Comment 2K: This admonishment set forth in Penal Code section 148.6, referenced by commenter, is included in section 3417.

COMMENTER #3

Commenter states the proposed regulations will not be enforced as he has experienced many instances of staff misconduct over the years, and the department's Appeals and Grievance Procedure is a "sham" process. Commenter states the Audio-Video Surveillance System and the Body Worn Cameras can support all his claims of staff misconduct.

Commenter asks the department to explain how the employee discipline regulations will be enforced and not just proposed for another motive, such as "political gain."

Response to Comment 3: The Employee Discipline Regulations are in effect and being complied with for the purposes of imposing employee discipline statewide. If department employees or managers do not comply with the regulations, they may be subject to corrective or adverse action as set forth in sections 3392.2 and 3392.3. The department is also subject to oversight by the Office of the Inspector General who monitors cases to ensure CDCR complies with its policies and procedures, including this regulation.

COMMENTERS #4, 5, and 6:

In regards to the "upcoming" body cameras the housing custody staff will be required to wear, Commenters request that all Central California Women's Facility (CCWF) custody staff wear body cameras including the warden, associate warden, and captains. Commenters note that the last three CCWF wardens have been removed from the position due to their misconduct. Commenters further request that staff video is reviewed by a federal or other independent agency on a random and continuous basis.

Commenters state that this staff wearing body-worn cameras would discover staff misconduct sooner; grievances and complaints will be addressed by these higher positions/decision

makers; and, would help ensure that the inmates housed in CCWF are not silenced and neglected “by the very people” in charge of their safety, security, and rehabilitation.

Response to Comments 4, 5, and 6: As a result of the federal court orders issued in *Armstrong et al. v. Newsom et al.*, United States District Court for the Northern District of California, 94-cv-02307 CW, 8, 2020 (Order), CDCR is installing Audio-Video Surveillance Systems (AVSS) in areas in which CDCR staff interacts with inmates subject to the *Armstrong Remedial Plan* (ARP) and the Americans with Disabilities Act (ADA). Custody staff working in these areas will be required by department policy to wear body-worn cameras. Since Wardens, Associate Wardens, and Captains are not assigned to areas that regularly interact with ARP and ADA inmates, they will not be required to wear body-worn cameras. However, if Wardens, Associate Wardens, and Captains are in areas of the institution in which the AVSS is installed, they will be subject to video recordings consistent with department policy. CDCR is subject to oversight by the Office of the Inspector General, an independent agency, that monitors CDCR internal affairs investigations and reviews body-worn camera footage as part of its oversight duties for monitored cases.