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### Your Responsibility When Using the Information Provided Below:

When we wrote this Informational Material we did our best to give you useful and accurate information because we know that prisoners often have difficulty obtaining legal information and we cannot provide specific advice to all the prisoners who request it. The laws change frequently and are subject to differing interpretations. We do not always have the resources to make changes to this material every time the law changes. If you use this pamphlet it is your responsibility to make sure that the law has not changed and is applicable to your situation. Most of the materials you need should be available in your institution law library.

### **INFORMATION RE: IMPROPER OR UNLAWFUL USE OF FORCE BY CDCR STAFF** (revised December 2011)

We received your letter regarding use of force by officers or other staff employed by the California Department of Corrections and Rehabilitation (CDCR). Improper and unlawful use of force has been and continues as a serious concern in California's prisons, as shown by continuing complaints by prisoners and reports by the independent California Inspector General. Unfortunately, this office has limited resources and cannot provide individual advice or assistance to all of the prisoners who request help. However, the information in this letter should help you understand the laws and rules regarding the improper use of force, and what you might be able to do about it. (Please note that if you are suffering from sexual abuse by staff, the Prison Law Office has a separate letter on that topic that can be provided free on request.)

### **FEDERAL AND STATE LAWS REGARDING USE OF FORCE**

Under the Eighth Amendment to the U.S. Constitution, it is unlawful to impose "cruel and unusual punishment" against prisoners. Use of force against a prisoner may be "cruel and unusual punishment" if excessive force was applied "maliciously and sadistically to cause harm." *Hudson v. McMillan* (1992) 503 U.S. 1, 6-7; *Whitley v. Albers* (1986) 475 U.S. 312, 319-321. A constitutional claim involves examination of both the degree of force used and the mental state of the officer or other staff person who applied the force. For the first factor, the force must be more than "de minimis" or minor. A simple push or shove, or use of vulgar language alone, are not enough to violate the constitution. *Hudson, supra*, 503 U.S. at p. 9.; *Oltarzewski v. Ruggiero* (9th Cir. 1987) 830 F.2d 136, 139. However, a prisoner does not actually have to suffer a serious injury to show that the force was excessive. *Wilkins v. Gaddy* (2010) \_\_\_ U.S. \_\_\_, 130 S.Ct. 1175. For the second factor, the prisoner must show that the staffperson acted "maliciously and sadistically for the very purpose of causing harm," and not in a

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good-faith effort to maintain or restore discipline. *Hudson, supra*, 503 U.S. at pp. 6-7; *Whitley, supra*, 475 U.S. at pp. 319-321. Force that is applied recklessly or negligently during an emergency does not violate the Constitution. See, e.g., *Jeffers v. Gomez* (9th Cir. 2001) 267 F.3d 895, 912.

Higher-ranking prison officials like wardens may be sued for excessive force used by lower-level prison employees. In such cases, prisoners need to show that, through deliberate indifference, the supervising officials permitted and condoned a pattern of excessive force against prisoners or failed to establish adequate procedures for controlling use of force by prison staff, despite knowing that this failure created grave risks to prisoners' safety. *Madrid v. Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146, 1247-1255.

California state laws also prohibit use of excessive force against prisoners. California Penal Code §§ 2650-2652 prohibit cruel, corporal or unusual punishments or punishments not "authorized by the Director of Corrections." A person who injures a prisoner is subject to the same laws as a person who injures a non-prisoner. For a prisoner to get an injunction or win a money damages award under state law, the prisoner must allege and prove that the prison employee acted negligently or committed assault or battery under state "tort" law. Also, prison officers and staff may be subject to criminal charges for abusing prisoners.

The rules set forth in the California Code of Regulations define reasonable force and unnecessary force, describe the types of force authorized in various situations, and establish responsibilities and procedures for reporting and reviewing incidents involving use of force. 15 CCR §§ 3268-3268.3; see also Dept. Ops. Manual (DOM) §§ 51020.1 et seq.. Among other things, these rules require that if a prisoner alleges excessive use of force, prison staff must conduct a video-taped interview with the prisoner within 48 hours of the injury or allegation. 15 CCR § 3268.1(d)(2); DOM §§ 51020.17.3. The CDCR rules also require that staff write a report every time force is used, and that supervisors, including a warden's committee, review every use of force to make sure that it did not violate the CDCR rules. 15 CCR § 3268.1.

California law requires the independent Office of the Inspector General to monitor, evaluate and report on the CDCR's warden's committee reviews and internal affairs investigations regarding use of force. Penal Code § 6133.

## **WHAT A PRISONER CAN DO ABOUT UNNECESSARY OR EXCESSIVE FORCE**

There are several steps that a prisoner can take if prison staff have used excessive force. The main options are to file an administrative appeal, request an investigation and, in some cases, consider filing a formal legal action such as a lawsuit for money damages.

As a general matter, use of excessive force by prison officers or other prison employees is one of the most frustrating problems to address. Prisoners and their advocates are likely to face bureaucratic obstacles in interviewing prisoner witnesses and in getting relevant documents and reports. A lack of credible witnesses often makes it difficult to prove that the use of force was not justified. Even if other prisoners or staff were present during the incident, they may not be able or willing to identify the staffpeople who were involved or make statements about what happened. Moreover, prison staff will often write an incident report and/or rule violation report describing the incident as reasonable force that

was necessary to control some alleged misbehavior by the prisoner. Medical staff reports might not exist or might minimize any injury suffered by the prisoner. The net effect of these hurdles is that a prisoner may be in the difficult position of having nothing but his or her word against the word of the officer or officers involved in the incident.

A prisoner should develop skills for making his or her claim of excessive force as strong as possible. This includes writing down what happened during each incident in as much detail as possible. The prisoner should write down the time, date, what exactly happened and what injuries the prisoner suffered. The prisoner should make a list of the participants and witnesses, and should try to find out their full names and ID numbers. It is also important for the prisoner to make sure that medical staff know of any injuries and describe all the prisoner's injuries in a medical report.

The following sub-sections provide an overview of the ways in which a prisoner can challenge use of force by prison staff.

### **Administrative Appeals**

If a prisoner wishes to complain about excessive force, it is very important that he or she file an administrative appeal (CDCR Form 602). A prisoner usually must file a 602 appeal though the highest level of review before bringing any type of court action alleging excessive force; this is called "exhausting administrative remedies." The prisoner should file the administrative appeal immediately because late appeals can be rejected and returned to the prisoner unanswered. If the appeal concerns misconduct by a correctional peace officer, the prisoner must also fill out and attach a CDCR Form 1858 Rights and Responsibilities Statement to the appeal. 15 CCR §§ 3084.9(i) and 3391(d). In the appeal, the prisoner should state that he or she is complaining about excessive force by staff, describe what happened and provide details like names, location, time and date.

As a remedy, a prisoner can request the following actions:

- **an internal affairs investigation** by the CDCR. The prisoner will be told whether a CDCR internal affairs investigation or a confidential inquiry by prison officials is undertaken. The prisoner will also be informed of the general outcome of any investigation or inquiry. However, the actual report from the investigation or inquiry will be confidential and the prisoner will not have access to it. 15 CCR 3084.9(i). If the investigators conclude that the staffperson acted improperly, the staffperson may be disciplined, suspended or fired, or referred to the District Attorney for criminal prosecution.
- **other protective relief** such as reassignment of the staffperson away from areas where the prisoner lives or works or removal of harmful or untrue documents from the prisoner's file.
- **money damages**, if there is any possibility that the prisoner may want to seek money damages for serious physical injuries caused by excessive use of force. Although the CDCR will not grant money damages through an administrative appeal, a prisoner still must ask for money damages in the appeal in order to exhaust administrative remedies for a court action requesting money damages. *Booth v. Churner* (2001) 532 U.S. 731, 734.

A prisoner who has been the target of unnecessary force may also wish to address other problems arising from the same incident, such as an unfair disciplinary action, placement in segregation or on-going medical needs. The CDCR regulations indicate that a prisoner should file separate appeals regarding these other types of issues and asking for relief such as reversal of the disciplinary finding of guilt, return to general population housing, or appropriate medical care. See 15 CCR 3084.9(i)(2).

A free information packet on how to file an administrative appeal can be obtained by writing to the Prison Law Office or visiting the Resources page at [www.prisonlaw.com](http://www.prisonlaw.com).

### **Other Types of Investigations**

In addition, to the 602 administrative appeal process, there are other ways for a prisoner or a prisoner's family member or advocate to seek investigation of staff misconduct. However, none of these alternatives will serve to "exhaust administrative remedies" for purposes of bringing a court action and these investigative offices generally will not look into a matter unless the prisoner first completes the administrative appeal process. Also, none of these offices are required to follow up on every request or complaint they receive, and a prisoner or family member may not even get any answer at all. In brief, the options include:

- **The CDCR Office of the Ombudsman.** The Ombudspersons are CDCR employee who has been appointed to investigate complaints. There is one lead Ombudsman and several Ombudspersons who are assigned to help prisoners at certain prisons. The Ombudspersons can be contacted through a Request for Interview for in a U Save 'Em envelope or by writing to the following address (prisoners can send correspondence to the office as Confidential Legal Mail): CDCR Office of the Ombudsman, 1515 S Street, Room 124 South, Sacramento, CA 95811. The office can also be contacted by phone at (916) 445-1773. There is additional information including email addresses for the Ombudsman's staff at the CDCR website: [www.cdcr.ca.gov/Ombuds/index.html](http://www.cdcr.ca.gov/Ombuds/index.html).
- **The CDCR Office of Internal Affairs (OIA).** A family member or friend may call the Internal Affairs office at (916) 255-0860, but the office prefers to be contacted by mail. The address is CDCR Office of Internal Affairs, P.O. Box 3009, Sacramento, CA 95812.
- **The Office of the Inspector General (OIG).** This is an independent agency that was set up to investigate problems in the CDCR. By law, all complaints must be submitted in writing. The address for OIG's main office is: Office of the Inspector General, P. O. Box 348780, Sacramento, CA 95834. The phone number is (800) 700-5952 and the fax number is (916) 928-5974. More information and a contact form are available at the OIG's website: [www.oig.ca.gov](http://www.oig.ca.gov).
- Members of the public (but not prisoners or parolees) may file "**citizen's complaints**" regarding correctional officer abuse inflicted against either themselves or a prisoner. Penal Code § 832.5. The person must submit a written complaint to the Warden (or, for complaints against parole agents, to the Regional Parole Administrator) and must sign a Rights and Responsibilities Statement. 15 CCR § 3391.

- **State legislators or journalists** are sometimes willing to investigate and expose serious use of force problems.

### **Court Actions**

If a prisoner has exhausted administrative remedies, he or she may want to file a court action. The nature of the problem, and the type of remedy sought by the prisoner, will determine what type of action is appropriate. There are three main possibilities:

- a **state petition for writ of habeas corpus** may be used to seek an order (called “injunctive relief”) for prison officials to take action to stop on-going or re-occurring improper uses of force. State habeas corpus is a relatively fast and user-friendly procedure.
- a **federal civil rights lawsuit** (which can be filed in either federal or state court) may be used to seek injunctive relief and/or money damages.
- a **state tort lawsuit** may be used to seek money damages; it is often possible to join state tort law claims with related federal law claims in a federal civil rights lawsuit.

Court actions are complex and have strict timelines and procedural rules. On request, the Prison Law Office can provide additional free information on state habeas corpus cases, federal civil rights actions, and the requirements for bringing lawsuits for money damages against prison staff and officials. These items are also available on the Resources page at [www.prisonlaw.com](http://www.prisonlaw.com).