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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 people often have difficulty obtaining legal information and we cannot provide specific advice to everyone who requests it. However, 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.

## **RIGHTS REGARDING CDCR SERIOUS RULE VIOLATION CHARGES**

Revised December 2019

We have received your request for assistance in defending against California Department of Corrections and Rehabilitation (CDCR) rule violation charges or in appealing a rule violation finding of guilt. This office cannot represent you in a rule violation proceeding or challenge. This letter summarizes your rights during the hearing process for a serious rule violation charge and how you can challenge a rule violation finding of guilt. We hope that it helps you protect and assert your rights.

The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution provides some rights to people facing serious prison rule violation charges; however, those rights are not as broad as the rights of people facing criminal charges.<sup>1</sup> California Penal Code § 2932 and CDCR regulations (15 CCR §§ 3310-3326) also establish many specific rights for people charged with serious prison rule violations.<sup>2</sup>

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<sup>1</sup> *Wolff v. McDonnell* (1974) 418 U.S. 539, 555-556, 560 [94 S.Ct. 2963; 41 L.Ed.2d 935]; see also *In re Gomez* (2016) 246 Cal.App.4th 1082, 1093-1094 [201 Cal.Rptr.3d 124] (loss of credits was a deprivation of liberty, even though credits could be restored for subsequent good behavior). For example, there is no absolute right to confront or cross-examine witnesses, no right to an attorney, and no right to have the charge heard by a judge, and a hearing officer can consider a charged person's silence at the hearing to be an indication of guilt. *Baxter v. Palmigiano* (1976) 425 U.S. 308, 315-322 [96 S.Ct. 1551; 47 L.Ed.2d 810]; *Wolff v. McDonnell* (1974) 418 U.S. 539, 567-571 [94 S.Ct. 2963; 41 L.Ed.2d 935].

<sup>2</sup> CDCR differentiates between "serious" and "administrative" rule violations. See 15 CCR §§ 3314-3315. Administrative violations involve less serious types of misconduct and cannot be punished by a loss of credits. 15 CCR 3314. Some, but not all, of the same procedural rights apply. See 15 CCR §§ 3314-3321.

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If you are charged with a serious rule violation, you have the following rights:

- 1) **Written notice of the rule violation charge.** You have a due process right to fair advance written notice of the charges no less than 24 hours before the hearing.<sup>3</sup> Under California law, notice usually must be given within 15 days after the prison officials discover the rule violation, although there are some circumstances in which notice can be given later.<sup>4</sup> The notice will be given on a Rules Violation Report (RVR) and must include certain information, including “the specific charge, the date, the time, [and] the place the alleged misbehavior took place.”<sup>5</sup> If CDCR fails to provide notice within the required time period, it cannot take away time credits as punishment for the rule violation.<sup>6</sup>
- 2) **Written notice of any referral for criminal prosecution.**<sup>7</sup> In some cases, CDCR may ask the district attorney to consider filing criminal charges based on the same action that is the basis for a rule violation charge. If your case is referred to the DA, you can request postponement of the rule violation hearing until the district attorney decides whether to bring criminal charges and any criminal proceedings are over. One reason for postponing would be if you are concerned that what you say at the rule hearing might be used against you in a criminal trial. You can revoke the request for postponement at any time up until any formal criminal proceedings begin.<sup>8</sup>
- 3) **Assignment of an Investigative Employee (IE),** when the issues are complex and require further investigation, your housing status makes it unlikely that you can collect the necessary evidence, additional information is necessary for a fair hearing, and/or the rule violation charge may be related to Security Threat Group (STG) activity. You cannot choose a specific staffperson to be the IE, but you can object to the first IE who is assigned (before the IE begins the investigation), in which case a different IE will be substituted.<sup>9</sup> The IE gathers information, and

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<sup>3</sup> *Newell v. Sauser* (9th Cir. 1996) 79 F.3d 115, 117-119, *Wolff v. McDonnell* (1974) 418 U.S. 539, 563-564 [94 S.Ct. 2963; 41 L.Ed.2d 935]; see also *Zimmerlee v. Keeney* (9th Cir. 1987) 831 F.2d 183, 188; *Pratt v. Rowland* (N.D. Cal. 1991) 770 F.Supp. 1399, 1402; *In re Estrada* (1996) 47 Cal.App.4th 1688 [55 Cal.Rptr.2d 506].

<sup>4</sup> Penal Code § 2932(c)(1); 15 CCR § 3320(a). The notice period for escape starts when you are returned to CDCR custody, and the notice period for an offense leading to removal of an ACP participant from the community starts when you are returned to a CDCR institution. Notice may be delayed by up to an additional 30 days (a total of 45 days) if the misconduct could be prosecuted as murder, attempted murder, or an assault/battery on staff, an investigation is continuing to identify people involved in the misconduct; the investigating officer requests a delay, and the request is approved by the Chief Disciplinary Officer (CDO). Penal Code § 2932(c)(1); 15 CCR § 3320(a)(2). Notice may also be delayed for up to a total of 45 days if the misconduct is referred to the district attorney for possible prosecution, and the district attorney requests in writing that you not be notified in order to protect the confidentiality of the criminal investigation. Penal Code § 2932(f).

<sup>5</sup> Penal Code § 2932(c)(1); 15 CCR § 3312(a)(3).

<sup>6</sup> 15 CCR § 3320(f)(1).

<sup>7</sup> 15 CCR § 3316(a)(3).

<sup>8</sup> Penal Code § 2932(f); 15 CCR § 3316(c)(1)(A).

<sup>9</sup> Penal Code § 2932(c)(2); 15 CCR § 3315(d)(1).

interviews you and any witnesses, then prepares a written report for the hearing officer; you must be given a copy of the IE's report at least 24 hours before the hearing.<sup>10</sup>

- 4) **Assignment of a Staff Assistant (SA)** (as a "counsel substitute" instead of or addition to an IE), if you are illiterate or non-English speaking, if you have a disability, or if the issues are so complex that assistance is necessary for you to comprehend the charges, collect and present the necessary evidence, or participate in the rule violation hearing process.<sup>11</sup> You cannot choose a specific staffperson to be your SA, but can object to the first SA who is assigned, in which case a different SA will be substituted.<sup>12</sup> You cannot give up your right to assignment of an SA if you are in the Developmentally Disabled Program (DDP), the Enhanced Outpatient Program (EOP) or a Mental Health Crisis Bed (MHCB).<sup>13</sup> The SA should inform you of your rights and of the rule violation hearing procedures, and assist and advise you in preparing for the hearing and presenting any defense. The SA must keep information that you tell them confidential, unless the information concerns commission of a future crime.<sup>14</sup>
- 5) **Mental health evaluation when mental illness, developmental disability, or cognitive deficits may have contributed to the misconduct.** CDCR mental health staff should prepare an assessment if you are charged with a serious rule violation and you are in the EOP or higher level of mental health care or the DDP. An assessment is also required if you are in the Clinical Case Management System (CCCMS) if the charge is a Division A, B, or C offense or could result in a SHU term. An assessment is required if you engage in indecent exposure or sexual disorderly conduct or bizarre or unusual behavior, even if you are not receiving mental health treatment.<sup>15</sup> If mental illness or developmental/cognitive disability contributed to the rule violation, the hearing officer must consider the mental health assessment in determining whether you should be disciplined and the appropriate method of any discipline.<sup>16</sup> Also, if your behavior was so strongly influenced by mental illness or developmental or cognitive disability, mental health staff can recommend that the behavior should be documented in an alternative manner, and the charge might be reduced in level or dismissed and documented on a general chrono.<sup>17</sup> There are some circumstances in which you cannot be punished for acting out due to mental illness, unless you commit a Division A-1 offense or an assault or battery on a correctional officer or other staffperson. For example, if a mental health clinician determines that you were attempting suicide or self-mutilation, you cannot be subjected to a rule violation for that behavior.<sup>18</sup>

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<sup>10</sup> 15 CCR § 3318(a).

<sup>11</sup> *Wolff v. McDonnell* (1974) 418 U.S. 539, 570 [94 S.Ct. 2963; 41 L.Ed.2d 935]; *Clutchette v. Enomoto* (N.D. Cal. 1979) 471 F.Supp. 1113; Penal Code § 2932(c)(2); 15 CCR § 3315(d)(2).

<sup>12</sup> 15 CCR § 3315(d)(2).

<sup>13</sup> 15 CCR § 3315(d)(2); *Clark v. California* (N.D. Cal. Mar. 1, 2002) No. C96-1486, Remedial Plan, § VII.L.2.

<sup>14</sup> 15 CCR § 3318(b).

<sup>15</sup> 15 CCR § 3317(b). CDCR, *Mental Health Services Delivery System Program Guide*, Ch 1, § I and Attachment B.

<sup>16</sup> 15 CCR § 3317(a), (g).

<sup>17</sup> 15 CCR § 3317.1.

<sup>18</sup> 15 CCR § 3317.2(c); see also 15 CCR § 3317(d).

- 6) **Effective communication (if you have a disability)** of the RVR, of all other documents and communications related to the charges, and at the hearing. Depending on what type of disability you have, effective communication may be provided through assignment of a staff assistant, an interpreter, or a reader, or by use of large print materials, sound amplification devices, or a TDD phone.<sup>19</sup>
- 7) **Request witnesses** to attend the hearing. You have a due process right to call witnesses “when permitting [such action] will not be unduly hazardous to institutional safety or correctional goals.”<sup>20</sup> You should make your requests for witnesses in writing well before the hearing, and you can ask for either friendly or adverse witnesses. The employee who reported the rule violation must attend the hearing if requested; other witnesses may be denied only if the hearing officer determines that appearance at the hearing would endanger the witness, the witness has no relevant or additional information, or the witness is unavailable. Reasons for denying a witness must be documented on the RVR form.<sup>21</sup> Witnesses may testify in person or by telephone, and people who are incarcerated at other institutions will not be transferred to testify at the hearing unless the chief disciplinary officer determines the transfer is necessary for a fair hearing.<sup>22</sup>
- 8) **Question all witnesses.** You have a right to question the witnesses who appear at the hearing, although the hearing officer can screen your questions to ensure they are relevant to the charge.<sup>23</sup>
- 9) **Present documentary evidence in defense or mitigation of the charge.**<sup>24</sup> You have a due process right to present documentary evidence “when permitting [such action] will not be unduly hazardous to institutional safety or correctional goals.”<sup>25</sup>
- 10) **Copies of all non-confidential information at least 24 hours before the hearing.** You have a due process right to disclosure of the evidence against you.<sup>26</sup> Under state law, you must be provided with all non-confidential information at least 24 hours before the hearing. Such information includes the RVR, the IE’s report, and all non-confidential reports (such as incident reports) that the hearing officer might rely upon at the hearing.<sup>27</sup>

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<sup>19</sup> *Armstrong v. Davis* (N.D. Cal. Jan. 3, 2001) No. C94-2037, Remedial Plan, § II.D *Clark v. California* (N.D. Cal. Mar. 1, 2002) No. C96-1486, Remedial Plan, § VI.L.2 and 4; see also *Duffy v. Yost* (9th Cir. 1996) 98 F.3d 447 and *Bonner v. Lewis* (9th Cir. 1988) 857 F.2d 559.

<sup>20</sup> *Wolff v. McDonnell* (1974) 418 U.S. 539, 566 [94 S.Ct. 2963; 41 L.Ed.2d 935]; *Edwards v. Balisok* (1997) 520 U.S. 641, 646-647 [117 S.Ct. 1584; 137 L.Ed.2d 906]; *In re Fratus* (2012) 204 Cal.App.4th 1339, 1348 [139 Cal.Rptr.3d 660]; but see *Koenig v. Vannelli* (9th Cir. 1992) 971 F.2d 422, 423; see *Bostic v. Carlson* (9th Cir. 1989) 884 F.2d 1267, 1271-1272 overruled on other grounds by *Nettles v. Grounds* (9th Cir. 2016) 830 F. 3d 922.

<sup>21</sup> 5 CCR § 3315(e); see also *Serrano v. Francis* (9th Cir. 2003) 345 F.3d 1071, 1080.

<sup>22</sup> 5 CCR § 3315(6); 15 CCR § 3320(i).

<sup>23</sup> 15 CCR § 3315(e)(5); *In re Fratus* (2012) 204 Cal.App.4th 1339 [139 Cal.Rptr.3d 660].

<sup>24</sup> 15 CCR § 3320(l).

<sup>25</sup> *Wolff v. McDonnell* (1974) 418 U.S. 539, 566 [94 S.Ct. 2963; 41 L.Ed.2d 935].

<sup>26</sup> *Wolff v. McDonnell* (1974) 418 U.S. 539, 558-560, 564 [94 S.Ct. 2963; 41 L.Ed.2d 935].

<sup>27</sup> 15 CCR § 3320(c).

- 11) **Notification of use of confidential information and disclosure of as much of the information as possible without identifying the source.**<sup>28</sup> Due process does not forbid prison officials from using confidential information in rule violation proceedings.<sup>29</sup> However, you do have some specific due process rights regarding confidential information. Prison officials must decide that there are safety considerations that prevent disclosure of the informant's name and that evidence supports a reasonable finding that the informant is reliable, and they must tell you that confidential information is being considered.<sup>30</sup> CDCR rules define confidential information as any information which, if known by you, would endanger the safety of any person, jeopardize the security of the prison, or be medically or psychologically detrimental to you; it also includes any information classified as confidential by another agency.<sup>31</sup> Confidential information will be put in your central file, but you cannot view it.<sup>32</sup> When prison staff receive confidential information, they must evaluate the informant's reliability and decide why the information should not be disclosed to you.<sup>33</sup> According to CDC rules, any of the following circumstances may show that an informant is reliable: the informant previously provided information that turned out to be true, another confidential informant has provided the same information, the information is self-incriminating, part of the information is corroborated by non-confidential witnesses or other evidence, the informant is the victim, or the informant passed a polygraph test.<sup>34</sup> If prison staff want to consider confidential information in a rule violation proceeding, they must notify you about the information, disclose as much of the information as possible without identifying the informant, and state why they are not disclosing the informant's identity and why the information is considered reliable.<sup>35</sup> This is usually done on a Confidential Information Disclosure Form.
- 12) **A hearing within 30 days of receiving written notice of the charge,** unless you have been transferred out of CDCR custody or there are exceptional circumstances.<sup>36</sup> Failure to hold a hearing within 30 days of the notice (or within 30 days of notification of the outcome of a criminal prosecution referral or within 30 days after you revoke your request for postponement of the hearing) bars CDCR from taking away time credits as punishment for the offense, unless there

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<sup>28</sup> 15 CCR § 3321(b)(3).

<sup>29</sup> *Wolff v. McDonnell* (1974) 418 U.S. 539, 568-569 [94 S.Ct. 2963; 41 L.Ed.2d 935]; *In re Jackson* (1987) 43 Cal.3d 501, 505 [233 Cal.Rptr. 911].

<sup>30</sup> *Zimmerlee v. Keeney* (9th Cir. 1987) 831 F.2d 183, 186. *In re Jackson* (1987) 43 Cal.3d 501, 511-512 [233 Cal.Rptr. 911]; *In re Estrada* (1996) 47 Cal.App.4th 1688 [55 Cal.Rptr.2d 506]; see also *Cato v. Rusben* (9th Cir. 1987) 824 F.2d 703 (uncorroborated hearsay statements of informant who had no firsthand knowledge and whose polygraph test was inconclusive were not shown to be reliable).

<sup>31</sup> 15 CCR § 3321(a).

<sup>32</sup> 15 CCR § 3321(d).

<sup>33</sup> 15 CCR § 3321(b).

<sup>34</sup> 15 CCR § 3321(c).

<sup>35</sup> 15 CCR § 3321(b).

<sup>36</sup> Penal Code § 2932(c); 15 CCR § 3320(b).

are exceptional circumstances, you are given a written explanation of those circumstances, and the hearing officer finds that the delay did not cause you prejudice.<sup>37</sup>

- 13) **Request postponement of the hearing pending the outcome of a referral for possible criminal prosecution or for up to 30 days based on a reasonable need.** Your request for postponement must be in writing. You may revoke a request for postponement pending criminal prosecution up until the time that formal criminal charges are filed.<sup>38</sup>
- 14) **Be present at the hearing.** You have a due process right to an opportunity to be heard in person.<sup>39</sup> Unless you waive this right, you must be allowed to attend the rule violation hearing. There are exceptions: the hearing may be held without you if you have been convicted of escape and have not been returned to CDCR, or if you have a serious mental disorder that prevents you from participating in the hearing and there is a compelling reason to hold the hearing without you.<sup>40</sup>
- 15) **An impartial decision-maker.** You have a due process right to a hearing in front of a decision-maker who was not actively involved in bringing the rule violation charge.<sup>41</sup> Under state law, the hearing officer may not be someone who reported, observed, classified, or investigated the violation, who assisted you in preparing for the hearing, or who has already believes that you are guilty or innocent.<sup>42</sup> The hearing officer will usually be a correctional lieutenant. The hearing officer will review the evidence, will decide whether to find you guilty or not guilty, and (if you are found guilty), will decide on your punishment.
- 16) **Proof of guilt by a preponderance of the evidence.**<sup>43</sup> This means that you should not be found guilty of a charge unless the evidence as a whole shows that it is more probable than not that you are guilty.<sup>44</sup>
- 17) **Review of the hearing results by the Chief Disciplinary Officer (CDO).** The CDO has the authority to order a different result or to order a new hearing. If your case is re-heard, any punishment imposed after the rehearing may not exceed the original punishment, except when there is new information or evidence that was not reasonably available at the time of the first rule violation hearing.<sup>45</sup>
- 18) **A written statement of the decision and the evidence relied upon.** You have a due process right to a written statement by the hearing officer as to the evidence relied on and reasons for the

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<sup>37</sup> 15 CCR § 3320(f)(3), (4), (5); see also 15 CCR § 3000 (defining exceptional circumstances).

<sup>38</sup> Penal Code 2932(f) (criminal prosecution); 15 CCR § 3316(c) (criminal prosecution); 15 CCR § 3320(d) (reasonable need).

<sup>39</sup> See *Wolff v. McDonnell* (1974) 418 U.S. 539, 558-560 [94 S.Ct. 2963; 41 L.Ed.2d 935].

<sup>40</sup> 15 CCR § 3320(g).

<sup>41</sup> *People v. Superior Court (Hamilton)* (1991) 230 Cal.App.3d 1592, 1597-1598 [281 Cal.Rptr. 900].

<sup>42</sup> Penal Code § 2932(c)(1); 15 CCR § 3320(h).

<sup>43</sup> Penal Code § 2932(c)(5); 15 CCR § 3320(l).

<sup>44</sup> *Black's Law Dictionary* (6th ed. 1990).

<sup>45</sup> 15 CCR § 3312(b).

decision.<sup>46</sup> Under CDCR rules, this statement should be provided to you within 5 working days after the hearing officer's decision is reviewed by the CDO.<sup>47</sup>

- 19) **Have rule violation records removed from your Central File if charges are dismissed or you are found not guilty.**<sup>48</sup> If you are found guilty of a rule violation, copies of the RVR and other documents used in the proceedings will be placed your central file.<sup>49</sup> But if the charge is dismissed, you are found not guilty, or a guilty finding is reversed, the RVR cannot be kept in your file.<sup>50</sup> Any documents about the charge must be updated with a cross-reference to a chrono showing the final disposition.<sup>51</sup> However, information developed during the rule violation process that is documented on the chrono can still be considered by classification committees.<sup>52</sup>
- 20) **Appeal a finding of guilt through the CDCR's administrative appeal process.**<sup>53</sup> You should submit your CDCR administrative appeal within 30 business days after receiving the RVR with the hearing officer's decision.<sup>54</sup> You should attach a copy of the RVR to your appeal.<sup>55</sup> It is important to file a timely administrative appeal if you might want to file a court action challenging the rule violation procedures or finding. If you want more information about how to file an administrative appeal and take it through all levels of review, write to the Prison Law Office to request our information letter on Administrative Appeals.
- 21) **Challenge a finding of guilt in court.** If you file your CDCR administrative appeal to the highest level of review, but do not get a satisfactory response, you can ask a court to review the issues. You can challenge a rule violation finding or punishment by filing a petition for writ of habeas corpus in state court. In your petition, you can ask the court to order prison officials to overturn the finding of guilt; you can also ask the court to order prison officials to hold a new hearing with fair procedures. If you do not have money to hire a lawyer, and the court orders further formal briefing, then the court must appoint a lawyer to represent you at no cost to you. However, be aware that if you argue that there was not enough evidence to find you guilty, a court will uphold the prison officials' findings so long as there is "some evidence" in the record from which the hearing officer could find you guilty.<sup>56</sup> If you want more information about how to file a state habeas corpus petition, write to the Prison Law Office to request our State Habeas Corpus Manual.

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<sup>46</sup> *Wolff v. McDonnell* (1974) 418 U.S. 539, 563-564 [94 S.Ct. 2963; 41 L.Ed.2d 935].

<sup>47</sup> Penal Code § 2932(d); 15 CCR § 3320(l).

<sup>48</sup> 15 CCR § 3326(a)(2).

<sup>49</sup> 15 CCR § 3326(a)(1)

<sup>50</sup> 15 CCR § 3326(a)(3), (c).

<sup>51</sup> 15 CCR § 3326(d).

<sup>52</sup> 15 CCR § 3326(a)(3), (b).

<sup>53</sup> Penal Code § 2932(d).

<sup>54</sup> 15 CCR § 3084.8(b).

<sup>55</sup> 15 CCR § 3084(h); 15 CCR § 3084.3(b).

<sup>56</sup> *Superintendent v. Hill* (1985) 472 U.S. 445 [105 S.Ct. 2768; 86 L.Ed.2d 356]; *In re Rothwell* (2008) 164 Cal.App.4th 160, 166 [78 Cal.Rptr.3d 723].

This letter has only an outline of your rights regarding rule violation proceedings. A more complete explanation of your rights, plus tips on defending against rule violation charges and challenging findings of guilt, can be found in Chapter 5 of *The California Prison and Parole Law Handbook* (2019). Please write to Prison Law Office for information about how to order a copy of the *Handbook*. The *Handbook* and other information packets are also available in the prison law libraries or for free downloading on the Resources page at [www.prisonlaw.com](http://www.prisonlaw.com).