

1 Edward W. Swanson, SBN 159859
August Gugelmann, SBN 240544
2 SWANSON & McNAMARA LLP
300 Montgomery Street, Suite 1100
3 San Francisco, California 94104
Telephone: (415) 477-3800
4 Facsimile: (415) 477-9010

5 Court Expert
6
7
8
9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 JOHN ARMSTRONG, et al.,

14 Plaintiffs,

15 v.

16 GAVIN NEWSOM, et al.,

17 Defendants.
18

Case No. CV 94-2307 CW

**COURT EXPERT'S QUARTERLY
REPORT ON INVESTIGATIONS AND
DISCIPLINE**

19 Pursuant to the Court's orders for remedial measures at RJD, LAC, COR, SATF, CIW,
20 and KVSP (Dkts. 3060 and 3218), the Court Expert provides the following report on
21 implementation of CDCR's new investigations and discipline system. This report discusses the
22 Centralized Screening Team (CST), which is the first step in the new process, as well as issues
23 that have arisen with regard to regulatory language and Plaintiffs' reports of deficiencies in
24 investigations and discipline at SATF and RJD.

25 **I. Centralized Screening Team (CST)**

26 A central component of the new investigations and discipline process outlined in the
27 remedial plans is the requirement that all staff misconduct complaints be investigated by the
28 Allegation Inquiry Unit (AIU) of the Office of Internal Affairs (OIA). Under CDCR's previous

1 system, complaints were reviewed by the Allegation Inquiry Management Section (AIMS) to
2 determine whether they established a “reasonable belief” that misconduct had occurred, and only
3 complaints that met the “reasonable belief” threshold were investigated by OIA. Under the new
4 system, all complaints are routed to OIA’s Centralized Screening Team (CST). CST employs an
5 Allegation Decision Index (ADI) to determine which complaints raise allegations of staff
6 misconduct that must be investigated by AIU. The ADI was the product of negotiations between
7 the parties. Generally speaking, it requires that AIU investigate allegations of more serious staff
8 misconduct. Complaints alleging less serious misconduct and complaints that do not concern
9 staff misconduct at all are routed to the institutions for inquiry.

10 CST began processing complaints raised via Form 602-1¹ from the six institutions subject
11 to the Court’s remedial orders on May 31, 2022. Over the last four months, it has become
12 apparent that far more complaints qualify for AIU investigation than CDCR anticipated. CDCR
13 predicted that an average of 505 cases would be referred to AIU per month, but currently over
14 1000 cases per month raise allegations that are listed in the ADI. Once the new process is fully
15 implemented, all of these cases will be investigated by AIU; however, due to the phased rollout,
16 AIU is currently receiving only complaints from the six prisons. In June, July, and August, AIU
17 received an average of around 290 referrals/month from those institutions. CDCR has increased
18 staffing at AIU, from 20 investigators in June to 34 currently, and reports that to date, AIU has
19 been able to accommodate the volume.

20 CDCR has proposed an additional filter to CST’s screening to reduce the number of cases
21 routed to AIU. The ADI describes certain categories of misconduct that relate to protected status
22 or activity, such as discrimination/harassment on the basis of race, color, or other characteristics
23 and retaliation for reporting misconduct. As to those categories, CDCR has proposed instituting a
24 “causal connection” requirement, pursuant to which CST would assess whether a complaint
25 sufficiently alleges that the staff member’s actions were in fact connected to a protected status or
26 activity before referring the matter to AIU. CDCR has also suggested implementing guidelines to

27 ¹ Form 602-1 is the newly revised version of CDCR’s Grievance form, which is used by
28 incarcerated individuals to file complaints.

1 determine whether alleged dishonesty (another category of misconduct) was sufficiently material
2 to warrant investigation by AIU. While Plaintiffs share CDCR’s concern regarding the
3 unexpected volume of staff misconduct allegations, they have objected to these causal
4 connection and materiality screens as requiring skills outside the training and expertise of CST
5 staff (who are not trained as investigators) and as improperly reestablishing the “reasonable
6 belief” threshold that the remedial plan was designed to eliminate. Based on an examination of
7 sample cases reviewed by CST, Plaintiffs also believe the “causal connection” test would
8 improperly screen out allegations that should be sent to AIU. As of this date, CDCR has not
9 implemented the causal connection or any other additional CST screening.

10 The Court Expert shares some of Plaintiffs’ concerns. The Court Expert reviewed a
11 sample of cases that CDCR believes would not qualify for referral to AIU under the proposed
12 screens. From that review, it appears that the screens are difficult to apply in a consistent and
13 objective manner, and it was not clear why some cases were excluded from AIU review. While
14 the Court Expert recognizes the importance of focusing AIU’s resources on the more serious
15 cases, any modification to the screening process must be clear and consistent and must not result
16 in allegations of serious misconduct being sent back to the institutions.

17 The number of cases that CST is handling, and the number eligible for referral to AIU,
18 give cause for concern. The Court Expert notes that the percentage of cases that CST has been
19 unable to screen within 6 days of receipt of the allegation has steadily increased over the past
20 four months, and CDCR has informed the Court Expert of staffing and retention problems at
21 CST. CDCR is working to ameliorate these issues, but the large number of cases and the staffing
22 issues at CST will require further monitoring. Ultimately, however, the bigger issue is the
23 unexpectedly large number of cases being referred to AIU. CDCR made budget and staffing
24 decisions for AIU based on certain workload estimates, but at the current rate of referral AIU
25 may be handling twice as many cases as CDCR anticipated. This has obvious implications for
26 AIU’s ability to conduct the comprehensive, unbiased, and timely investigations required by the
27 remedial plans.

1 **II. Regulatory issues**

2 The parties are also currently discussing Plaintiffs’ concerns with amendments to CDCR
3 regulations. The investigations and discipline process is currently governed by emergency
4 regulations.² On August 15, 2022, CDCR gave notice of intended changes to those regulations.³
5 Plaintiffs have raised concerns with language in the new proposed regulations that departs from
6 previous agreements.

7 Plaintiffs’ primary objection concerns the Allegation Decision Index. The remedial plan
8 requires CST to “utilize an Allegation Decision Index (ADI) to determine whether a complaint
9 should be referred to OIA for investigation or returned to the local hiring authority for inquiry.”
10 Dkt. 3393, 8. CDCR’s emergency regulations incorporated this requirement, attaching the ADI
11 and providing that “if the misconduct described in the allegation is listed in the Allegation
12 Decision Index, CST shall refer the allegation to OIA for investigation.” 15 C.C.R. § 3486.1(h)
13 (emergency). The new regulations delete all reference to the ADI and provide instead that
14 allegations of staff misconduct “requiring specialized investigative skills or resources ... shall be
15 referred to AIU[.]” 15 C.C.R. § 3486(d)(2) (proposed).

16 Plaintiffs object to the removal of language regarding the ADI. Defendants have
17 explained that the ADI will be incorporated in upcoming revisions to the Department Operations
18 Manual (DOM), which governs CDCR’s implementation of the regulations, and they have
19 confirmed to Plaintiffs and the Court Expert that the ADI will continue to control CST’s
20 screening decisions. Defendants have also expressed willingness to modify the regulatory
21 language to address Plaintiffs’ concerns.

22
23
24 ² The emergency regulations currently in effect are cited as (emergency) and can be found at:
25 [https://www.cdcr.ca.gov/regulations/wp-
content/uploads/sites/171/2021/12/Staff_Misconduct_Emergency_Reg_Approval_ADA-
12.31.21.pdf](https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2021/12/Staff_Misconduct_Emergency_Reg_Approval_ADA-12.31.21.pdf)

26 ³ The proposed new regulations are cited as (proposed) and can be found at:
27 [https://www.cdcr.ca.gov/regulations/wp-
content/uploads/sites/171/2022/08/Corrected_Renotice_for_NCR_22-
06_Staff_Misconduct_Allegations.pdf](https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2022/08/Corrected_Renotice_for_NCR_22-06_Staff_Misconduct_Allegations.pdf)

1 Plaintiffs have also objected to other provisions in CDCR's newly proposed regulations,
2 among them removal of reference to the Investigation Assignment Index (IAI) and changes to
3 the proposed implementation timelines for CST review of allegations arising from sources other
4 than Forms 602-1 at the six subject institutions. The parties continue to discuss these issues.

5 The Court Expert notes that CDCR published proposed changes to the emergency
6 regulations without giving Plaintiffs prior opportunity to review them, despite the fact that the
7 changes related to matters that had been the subject of extensive negotiation. Should CDCR
8 anticipate future changes to regulations related to investigations and discipline, particularly
9 changes to substantive matters that the parties previously agreed upon, the Court Expert expects
10 that Defendants will give prior notice to both Plaintiffs and the Court Expert.

11 **III. Plaintiffs' concerns regarding investigations and discipline at RJD and SATF**

12 The Court ordered CDCR to produce, on a quarterly basis, documents related to staff
13 misconduct investigations at the six subject institutions. Dkt. 3218, ¶5(f). On June 3 and 6, 2022,
14 Plaintiffs produced reports describing what they viewed as shortcomings in the investigations
15 and discipline process revealed by productions from RJD and SATF. The documents relate to
16 investigations in the fourth quarter of 2021 (as to RJD) and the first quarter of 2022 (as to SATF)
17 and thus predate implementation of the new process. However, because the investigations at
18 issue were conducted by OIA, which will be performing investigations under the new system, the
19 Court Expert believes Plaintiffs' concerns are relevant to the quarterly reporting on the new
20 system. CDCR has not yet responded to these letters, so information presented here is based
21 solely on Plaintiffs' (and the Court Expert's) review.

22 **BWC compliance.** Plaintiffs identified multiple instances at where officers deactivated
23 BWCs at times when CDCR policy would not allow it; in some instances, there was evidence
24 that these deactivations were deliberate efforts to thwart the recording. The parties are currently
25 discussing how CDCR will audit BWC footage for noncompliance; Plaintiffs note that none of
26 the instances of non-compliance would have been flagged under CDCR's current audit
27 methodology. Given the importance of the BWC and AVSS systems to the investigations
28 process, the Court Expert believes these incidents merit CDCR's attention.

1 **Failure to review or analyze footage.** Similarly concerning, given the importance of
2 video evidence, are instances in which investigators failed to request or review relevant footage.
3 For example, Plaintiffs have identified investigations in which investigators reviewed only
4 portions of relevant BWC footage or did not request footage from other officers at the scene; in
5 other cases, investigators do not appear to have taken video evidence supporting a complainant’s
6 version of events into account.

7 **Failure to interview witnesses.** Similarly, Plaintiffs identified instances where
8 investigators failed to interview necessary witnesses, including other incarcerated people who
9 observed the incident or, in some cases, the subject of the complaint.

10 **Inconsistent or inadequate discipline.** Plaintiffs identified instances where the
11 discipline imposed following an investigation appeared inadequate based on the disciplinary
12 matrix or was not consistent between officers found to have participated in similar misconduct.
13 Of even greater concern are instances in which no discipline was imposed despite evidence of
14 misconduct.

15 **Low rate of discipline imposed.** Plaintiffs contend that the overall low rate at which
16 investigations result in sustained findings of misconduct (6% of complaints reviewed at RJD)
17 demonstrates that the system remains characterized by biased and incomplete investigations.
18 While a low sustained rate on its own is not necessarily indicative of incomplete investigations—
19 it might be that only a fraction of complaints have merit—the number of sustained findings
20 coupled with Plaintiffs’ evidence of incomplete or biased investigations raises the concern that
21 meritorious complaints are not being adequately investigated.

22 ///

