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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CHUNG KAO,

Plaintiff and Appellant,

v.

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION,

Defendant and Respondent.

D060814

(Super. Ct. No. 37-2010-00102014-  
CU-WM-CTL)

APPEAL from an order of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

Plaintiff and appellant Chung Kao, an incarcerated person representing himself in propria persona (Appellant), appeals an order of dismissal of his petition for writ of mandamus against the California Department of Corrections and Rehabilitation (the Department). The petition challenged the manner in which the Department's personnel processed his inmate administrative grievances, in particular, one dated May 23, 2010, complaining of several instances of "staff misconduct" by various Department personnel,

in connection with his inmate appeals. (Cal. Code Regs., tit. 15, § 3084 et seq.)<sup>1</sup> In response to that appeal, the Department's appeals coordinator sent him an explanation that he could submit only one issue per appeal, and must separate his issues and submit them on different Department appeal forms.

In this appeal, Appellant contends his petition was meritorious and the trial court should be ordered to grant it, because the Department (1) unlawfully discarded his appeals, in violation of regulatory protections, and/or (2) violated his equal protection rights under Penal Code<sup>2</sup> section 832.5, providing for law enforcement agencies' investigation and retention of misconduct complaints against its officers (with some exceptions).

We conclude the trial court was correct in determining that the Department did not violate any ministerial duties in these instances, and the procedures used here did not amount to an equal protection violation under the applicable law. The record supports the denial of the petition and we affirm.<sup>3</sup>

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<sup>1</sup> All further regulatory references are to the California Code of Regulations, title 15. Appellant has correctly noted that since the time his May 2010 appeal was filed, the applicable body of regulations for inmate appeals has been amended, effective January 28, 2011. The parties' briefs have utilized the version in effect in 2010, and we do likewise.

<sup>2</sup> All further statutory references are to the Penal Code unless noted. Section 5058 authorizes the Department to enact rules and regulations for the administration of the prisons, pursuant to the Administrative Procedures Act, Government Code section 11340 et seq. (the APA).

<sup>3</sup> Appellant has abandoned as moot another issue that he previously pursued in the trial court, a request to consolidate this petition with a related action.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. The Department's Administrative Appeals Process

On and before November 2009, Appellant was an inmate at the Richard J. Donovan Correctional Facility. Beginning November 9, 2009, he filed three separate appeals (Dept. Form 602) to recover lost property that he had purchased from authorized prison vendors (law books and sports and art supplies). The second and third ones were dated December 13, 2009 and January 20, 2010, along with a resubmission he made January 5, 2010. He also wrote a letter to the warden on April 8, 2010, complaining that the appeals had not been properly processed, and requesting that staff do so or that his enclosed copy be treated as a staff complaint.

In response, from November 2009 through April 2010, the Department's appeals coordinator sent to Appellant its itemized form responses denoted "Screening at the first level," as to each of the three appeals, rejecting them for specified procedural deficiencies (failure to attempt to resolve at an informal level, or failure to attach original appeal with a resubmission). The March 25, 2010 response notified Appellant that the appeals coordinator's office did not track or maintain copies of informal appeals.

On May 23, 2010, Appellant filed the operative appeal form (the May 2010 appeal), stating it was an appeal of staff misconduct by three named Department staff members (Captain Seibel, Sergeant Marriner and Officer Santos), who had allegedly thrown away his appeals, and also misconduct by the appeals coordinator (G. Pederson) who had required repeated submissions and allegedly thrown away the appeals.

Appellant also complained about Warden Neotti's indifference to his complaints. He

attached copies of his previous letter to the warden and his January 2010 appeal, and a staff response.

Appellant also attached to the May 2010 appeal a Department Form No. 1858, a "Rights and Responsibility Statement," pertaining to alleged misconduct by a departmental peace officer. (Former Reg. 3084.1, subd. (e); now see current Reg. 3084.9, subd. (i) [providing, "Staff Complaints. A staff complaint filed by an inmate or parolee shall be processed as an appeal pursuant to this Article, not as a citizen's complaint. However, any appeal alleging misconduct by a departmental peace officer as defined in [Reg. 3291, subd. (b)] shall be accompanied by the subsection [Reg. 3391, subd. (d)] Rights and Responsibility Statement."].)<sup>4</sup>

The Department's appeals coordinator sent Appellant a first level screening response dated May 27, 2010, stating that only one issue per appeal was allowed, and he must separate his issues and submit them on different forms.

Appellant next sent a July 8, 2010 letter to the warden asking him to require the appeals coordinator to process the May 2010 appeal as a staff complaint, regarding only one issue, and he attached photocopies of it, but without an original signature and date.

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<sup>4</sup> This form 1858, the "Rights and Responsibility Statement," to support an allegation of misconduct by a departmental peace officer, contains a reference to section 148.6 (imposing penalties for false allegations), and was adapted, for clarification purposes, to add correctional departmental language. It implements the procedures of section 832.5, for making a complaint about any improper peace officer conduct under an established procedure for administrative investigation of an inmate's complaint, with the complaints and any reports or findings to be retained for least five years. (See former Reg. 3084.1, subd. (e).)

The Department's July 21, 2010 letter to Appellant, a first level screening reply, returned that submission and gave him the following instructions, "Your appeal is incomplete. You must include supporting documentation. All documents must be legible. (If necessary, you may obtain copy(ies) of requested documents by sending your request with a signed trust withdrawal form to your assigned counselor.) Your appeal is missing: [*nothing specified*]."

In reply, Appellant sent the appeals coordinator a memorandum dated August 6, 2010 entitled "Request for Processing of Dishonestly Rejected Appeal" demanding that the May 2010 appeal be processed forthwith, telling him that the rejection was incorrect or unlawful, and that "bogus" reasons were invented for rejection, and the rejection action was "despicable."

The appeals coordinator replied to Appellant on August 16, 2010 that the most recent mailing was being returned because it constituted an abuse of the appeal process pursuant to Regulation 3084.4, subdivision (b) (containing false information, profanity, or obscene language). On September 8, 2010, Appellant sent back another letter requesting more information, such as where exactly the falsity, profanity, or obscenity was in that appeal.

#### B. Petition for Writ of Mandate; Ruling

On October 8, 2010, Appellant, in propria persona, filed a petition for writ of mandate seeking to compel the Department to process the operative grievance as a staff complaint. (Code Civ. Proc., § 1085.) He amended the petition, and the Department

filed an opposition. The May 2010 appeal is the only one listed in the prayer of that petition.

The trial court granted Appellant's unopposed motion to file a supplemental petition, adding allegations regarding a subsequent appeal dated March 23, 2011, about items being lost in the mail. Opposition was filed, but this supplemental petition admittedly became moot, when that subsequent appeal was accepted for filing. Next, Appellant filed a motion for consolidation of this case with another writ petition he had filed, that also referred to a third party's case. The trial court heard telephonic argument and took the matter under submission.

On August 31, 2011, the trial court issued an order denying the petition, stating: "The Court finds there is no ministerial duty to compel [the Dept.] to process [Appellant's] inmate appeals as suggested by [Appellant]. Penal Code section 832.5, 15 CCR 2084.1, et. seq. [15 CCR 3084, et. seq.] and other authorities cited by [Appellant] provide that [the Dept.] shall put procedures in place for the review and consideration of inmate appeals. Those procedures allow [the Dept.] to reject the inmate appeals under certain circumstances." The court then determined that the Department had duly accepted and processed Appellant's appeals, "albeit, not to the satisfaction of [Appellant]. The law does not require more."<sup>5</sup>

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<sup>5</sup> The court's ruling refers to Regulation 2084 (found in the Information Practices Act, pertaining to access to records of the Board of Prison Terms). That was evidently a typographical error, as the court was instead clearly concerned with correctional appeals, Regulation 3084, et seq.

The order next made a finding that no evidence had been presented that the Department had intentionally discarded the appeal or otherwise improperly disregarded it. Further, "[Appellant] failed to establish how [the Dept.'s] conduct was arbitrary, capricious or lacking in evidentiary support. [¶] Therefore, the petition for writ of mandamus is DENIED."

The order also acknowledged Appellant's concessions that his supplemental writ petition was moot and his motion for consolidation was moot. After the Department gave notice of entry of the order, Appellant filed this appeal.

## DISCUSSION

Appellant claims entitlement to relief in mandamus, alleging his May 2010 appeal was not screened consistently with the applicable regulations, nor according to the protections and recordkeeping requirements of section 832.5. We first outline the Department's obligations under administrative regulations, then consider the interaction of those regulations with section 832.5.

### I

#### *STANDARDS FOR PROCEEDINGS IN MANDAMUS*

Department regulations allow a prison inmate to appeal departmental decisions, actions, conditions, or policies that allegedly adversely affected the inmate's welfare. (*Wright v. State* (2004) 122 Cal.App.4th 659, 666-667 (*Wright*), citing § 5058 and former Reg. 3084.1, subd. (a).) This administrative appeal process anticipates that first, an informal review takes place, followed by several formal reviews. (*Wright, supra*, at pp. 666-667.) Where, for example, the inmate seeks a remedy for an unreasonable delay in

processing the appeal, a writ of mandate lies to order the Department to perform its duty by completing the review. (*Id.* at pp. 667-668, citing *Wasko v. Department of Corrections* (1989) 211 Cal.App.3d 996 (*Wasko*).

Thus, the courts acknowledge that relief in mandamus is available for an institutional failure to perform a ministerial duty, such as making available to an inmate those procedures required by applicable regulations. (*Wright, supra*, 122 Cal.App.4th 659, 666-668; *Wasko, supra*, 211 Cal.App.3d 996, 1000.) Under Code of Civil Procedure section 1085, the standards of ordinary mandamus required the trial court to consider whether the Department's actions "were arbitrary, capricious, totally lacking in evidentiary support, or conducted without the proper notice and procedure." (*Consaul v. City of San Diego* (1992) 6 Cal.App.4th 1781, 1793 (*Consaul*).

On appellate review of the trial court's determinations of fact, "all factual matters are viewed most favorably to the prevailing party, with all conflicts resolved in favor of the judgment appealed from; we determine only whether any substantial evidence supports the conclusion reached by the trier of fact. [Citation.] Regarding the trial court's use of a particular legal standard, in the absence of a contrary indication in the record, we assume a correct standard was used in ruling on the petition. [Citation.] ' "A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." ' [Citation.]" (*Consaul, supra*, 6 Cal.App.4th 1781, 1792, italics omitted.)

## II

### *ADMINISTRATIVE REGULATIONS*

As explained in *Sapp v. Kimbrell* (9th Cir. 2010) 623 F.3d 813, 824, the administrative grievance system is intended to put the correctional institution on adequate notice of the problem for which the prisoner seeks redress: "To provide adequate notice, the prisoner need only provide the level of detail required by the prison's regulations. [Citation.] The California regulations require only that an inmate 'describe the problem and the action requested' " such that " 'it alerts the prison to the nature of the wrong for which redress is sought.' "

Upon receipt of an inmate appeal, the Department is authorized to utilize screening procedures to evaluate its formal sufficiency. (Reg. 3084.1, et seq. [former and current].) In this case, Appellant's underlying appeals were rejected for lack of informal efforts to resolve the matter or failure to attach supporting documents. His May 2010 appeal, the subject of this proceeding and referring to the underlying appeals, was rejected because it listed multiple issues in a single appeal. His subsequent letters and memoranda were treated as appeals and he was notified that they lacked adequate documentation or used abusive language, contrary to regulations.

To the extent Appellant is specifically arguing that the Department had no administrative authority to reject his May 2010 appeal, the trial court made a factual finding to the contrary, which we evaluate for substantial evidence support. (*Consaul, supra*, 6 Cal.App.4th 1781, 1792.) The record supports the trial court's finding that the manner in which the Department processed the May 2010 appeal did not violate its

regulations, and the applicable administrative procedures allowed the Department to reject the appeal under circumstances in which it was found to be procedurally defective.

In particular, the face of the May 2010 appeal lists at least three issues, possibly five, and the court was justified in concluding, "The evidence demonstrates [the Dept.] has in fact, accepted and processed [Appellant's] appeals, albeit, not to the satisfaction of [Appellant]. The law does not require more. [¶] At the hearing on the writ, [Appellant] argued that [the Dept.] refused to process his appeal pursuant to the law by discarding his appeal without proper consideration. However, there is no evidence that [the Dept.] intentionally discarded the appeal or that [the Dept.] otherwise improperly disregarded it. [¶] Further, [Appellant] failed to establish how [the Dept.'s] conduct was arbitrary, capricious or lacking in evidentiary support."

Under the current definition in Regulation 3084, subdivision (g): "Staff misconduct means staff behavior that violates or is contrary to law, regulation, policy, procedure, or an ethical or professional standard." (Previously Reg. 3084.1, subd. (e) merely required the filing of a "Rights and Responsibility Statement," in support of an appeal about such alleged "misconduct.") To the extent Appellant is arguing that he successfully converted his May 2010 appeal from an administrative appeal into a staff misconduct complaint that was entitled to additional protections, we next examine his reliance on section 832.5.

### III

#### *PROVISIONS OF SECTION 832.5*

The form utilized by Appellant in filing his May 2010 appeal, "Rights and Responsibility Statement," refers to section 148.6, imposing penalties for making false allegations of peace officer misconduct. Section 148.6 was enacted in 1995 to control perceived abuses of the *Pitchess*<sup>6</sup> motion provisions created in 1974 (including related Evid. Code, §§ 1043-1047), regarding complaints of such misconduct. (*San Diego Police Officers Assn. v. San Diego Police Department* (1999) 76 Cal.App.4th 19, 22-23; see *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1085.)

The purpose of this legislative scheme is to protect a party's right to a fair trial and an officer's interest in privacy, by balancing the competing interests. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226-1227 [describing criminal defense discovery procedures].) Any exonerated, unsustainable or frivolous complaints may not be kept in the officer's general personnel file, but must be maintained in separate files. (§ 832.5, subd. (c).) Such unsustainable or frivolous complaints qualify as "personnel records," for purposes of a discovery motion, even though they are kept separate from actual personnel files. (*Ibid.*)

The public policy considerations that led to the enactment of section 832.5 indicate that citizens' complaints of police misconduct made to the officer's employing entity are to be encouraged, and law enforcement agencies must accordingly maintain appropriate grievance procedures. (*Pena v. Municipal Court* (1979) 96 Cal.App.3d 77,

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<sup>6</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

82; see 2 Witkin, Cal. Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 27, pp. 1455-1456.) Extensive procedural conditions apply for obtaining discovery of such records. (§§ 832.5, 832.7, 832.8; 5 Witkin, Cal. Criminal Law, *supra*, Criminal Trial, § 63, pp. 133-134, § 65, pp. 134-136; *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 610, 618 [investigations of police misconduct must maintain nonpublic nature of files absent compliance with Evid. Code, § 1043 et seq.] )

Appellant seems to contend that when he characterized his May 2010 appeal as a staff misconduct appeal (due to staff rejection of his underlying appeals), the Department became disqualified from using its above-described regulatory screening methods. He apparently argues that the provisions of section 832.5, requiring law enforcement agencies to investigate complaints against its officers and to retain records of the investigations for at least five years, supersede the Department's administrative regulations and their procedural methods for identifying defective inmate appeals. In his view, there were equal protection violations regarding retention or nonretention of records of his various appeals.

Regulation 3084.1, subdivision (e), in effect at the time the May 2010 appeal was filed, stated that an appeal alleging misconduct by a departmental peace officer had to be accompanied by a Rights and Responsibility Statement, or it could be rejected under former Regulation 3084.3, subdivision (c)(5). Appellant complied with this requirement, and the Rights and Responsibility Statement he used states that the complaint and reports or findings on it "must be retained by this agency for at least five years." That language comes from Regulation 3391, subdivision (d), referring to a citizen's complaint (not an

inmate). This statement on the form does not explain that an inmate's misconduct complaint must nevertheless be filed and processed according to all the applicable Department administrative regulations.

We note that in the current version of the regulations, Regulation 3084.9 more clearly identifies numerous "Exceptions to the Regular Appeal Process," including subdivision (i), dealing with staff complaints: "*A staff complaint filed by an inmate or parolee shall be processed as an appeal pursuant to this Article, not as a citizen's complaint [and shall include a Rights and Responsibility Statement].*" (Italics added.) Thus, the current regulations more clearly authorize treatment of an inmate's staff complaints as administrative matters. However, the format of the Rights and Responsibility Statement utilized by Appellant did not independently create a ministerial duty for the Department to retain inmate appeals that were otherwise determined, in the normal course, to be procedurally defective.

Appellant has not provided any support for his claim that section 832.5 must be interpreted as he requests, to create a ministerial duty not otherwise present in the administrative regulations. This record does not show any evidence or indication that the manner in which the Department processed his May 2010 inmate appeal somehow denied him equal protection, on the basis that perfected complaints by members of the public (not by inmates) are to be retained, even if unsubstantiated. (§ 832.5, subd. (c).) Rather, the Department could justifiably return the May 2010 appeal to him, regardless of its label, for his noncompliance with the administrative requirement that each issue shall be separately presented. No evidence was presented that the Department intentionally

discarded this appeal, the sole subject of the petition, or otherwise improperly disregarded it. Other related filings were also duly processed by the Department.

We conclude the trial court had a sound basis in the record and did not misinterpret the applicable statutory and regulatory provisions, when it determined that "[Appellant] failed to establish how [the Dept.'s] conduct was arbitrary, capricious or lacking in evidentiary support." (*Consaul, supra*, 6 Cal.App.4th 1781, 1791.) We affirm the order denying the petition.

#### DISPOSITION

The order is affirmed. Each party shall bear its own costs.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.