

Memorandum of Understanding

(memorializing agreement signed May 11, 2018)

between the

All Faculty Association

and the

Sonoma County Junior College District

regarding

Article 23: Misconduct Investigations and Progressive Discipline

March 4, 2019

AFA and the District agree to the following new provisions of Article 23.

23.01 INTRODUCTION

- A. This Article is grounded in the parties' mutual respect for the professionalism and dedication of the SRJC faculty to the tenets of their profession and role as educators. The parties recognize the primary function of discipline is to provide employees with the opportunity to improve and be effective in their positions.
- B. To that end, District administrators and representatives who have a role in this process will use the principles of progressive discipline as described in this Article and demonstrate fairness, objectivity, and reasonableness in the administration of discipline, with the goal of supporting and preserving the healthy academic culture of the College. All parties to a disciplinary process will adhere to the highest standards of integrity, preserve confidentiality as required, and respect defined processes.

23.02 INVESTIGATIONS

- A. **Mutual Respect for a Fair Investigative Process:** The District has the authority and obligation to investigate complaints, reports or other credible information that a unit member has engaged in misconduct. Faculty members are entitled to be presumed innocent of wrongdoing during the investigation process, are entitled to certain protections during the investigation process, and shall be treated with the same dignity and respect as alleged victims and complainants.
- B. **Misconduct Investigation Defined:** A misconduct investigation is a District-initiated investigation of a faculty member alleged to have engaged in misconduct, based on information received from a formal or informal complaint made by an identifiable author, a credible report of misconduct, manager observations, or other credible sources of information. An anonymous accusation of specific misconduct that—if true—presents a threat to the health or safety of others may also be investigated. However, it is understood that an employee may not be charged based on anonymous claims.
- C. **Employee Notification Packet:** An employee who is under investigation shall be sent an Employee Notification Packet no later than ten (10) business days before the member's

appointment for an investigatory interview, attached to this Agreement at Appendix XX. The Notification shall include the AFA Members Benefits Letter, Acknowledgement of Rights Form, Employee Notification Form, and Summary of Interview Subject Matter, specifically as follows:

1. **AFA Members Benefits Letter and Acknowledgement of Rights Form:** The member shall be provided with notice of his or her right to representation, which shall include:
 - a. A copy of the AFA Members Benefits Letter informing members of the benefits of union representation during the investigation process, attached to this Agreement as Appendix XX.
 - b. A copy of the Acknowledgement of Rights Form, attached to this Agreement at Appendix XX, which: (a) includes a space for the member to sign and date acknowledgment of receipt of the above-referenced AFA letter; and (b) indicates whether the member is authorizing disclosure of the investigation to AFA.
 - 1) If the member authorizes disclosure, all communications to the member regarding the investigation shall be copied to AFA.
 - 2) If the member does not authorize disclosure, AFA shall be provided with a copy of the member's signed Acknowledgement of Rights Form upon demand.
2. **Employee Notification Form:** The member shall be provided a notification form providing the following information:
 - a. The District takes a neutral stance when investigating possible misconduct and no findings of wrongdoing have been made;
 - b. The District maintains the confidentiality of the investigation to the fullest extent possible;
 - c. No findings will be made prior to completion of the investigation, and the investigation will not be closed until after the scheduled date of the employee's interview.
 - d. The District recommends that the faculty member refrain from contacting the complainant(s) or witnesses to avoid even the appearance of interference or retaliation.
 - 1) However, the faculty member may contact and discuss the investigation with the Union, their union representative, or legal counsel, and confer with their colleagues for their mutual aid and protection.
 - 2) Alternatively, if the District determines that it is necessary to restrict the faculty member from discussing the investigation because of witness or complainant protection, danger of evidence being destroyed, danger of testimony being fabricated, or to prevent a cover-up, and determines that any such concerns outweigh the faculty member's rights, the District may instead inform the faculty member that they are required to keep the investigation confidential, except for communications with the faculty member's legal counsel or union representatives. The District's determination and direction to the employee under this subsection are subject to grievance.

- e. Every effort will be made to complete the investigation within ninety (90) days of when the District first received the complaint or information triggering the investigation. Where this is not possible two things will occur:
 - 1) the faculty member will receive a status update on where the District is in its investigation and when it expects to be completed; and
 - 2) when AFA represents the faculty member, the District and AFA will have a check-in meeting in person or by telephone.
- f. The employee will receive notice of the findings of the investigation, and whether the allegations investigated were or were not sustained;
- g. In the event the investigation leads to disciplinary action, the employee will be afforded all the prediscipline due process rights to which the member is entitled. This includes providing the employee, and AFA with the employee's consent, with a copy of the information relied upon to issue the charges; and
- h. District policy and law prohibit retaliation of any kind against anyone involved in the investigation, or against anyone the employee believes to have provided information or otherwise cooperated in the investigation. ~~and that~~ Such conduct constitutes an independent basis for serious discipline up to and including termination.

3. Summary of Interview Subject Matter:

- a. If appropriate, and at the discretion of the Vice President, Human Resources or designee, the name of the complainant(s), or individual(s) whose concerns caused the District to initiate an investigation. To the extent the Collective Bargaining Agreement provides for greater notice, the CBA prevails.
- b. What allegedly occurred. The employee shall be entitled to a description of the subject matter and alleged conduct or actions at issue in the investigation.
- c. When the incident(s) allegedly occurred. The notice shall be as specific as possible, based on the information available at the time the notice is given.
- d. Where the incident(s) allegedly occurred. The notice shall be as specific as possible, based on the information available at the time the notice is given.
- e. This information shall be current and accurate at the time of interview. If, after interviewing the member, the District learns of other allegations during the investigation and seeks to re-interview the member, the member shall be provided with a new summary of the subject matter of the interview a reasonable amount of time prior to the interview.
- f. If prior to interviewing the member, the District learns of other allegations it wishes to cover during the interview, the member shall receive an updated summary a reasonable amount of time prior to the interview. Reasonableness shall necessarily depend on the complexity of the matter and the parties are expected to cooperate in expediting the process to the fullest extent possible.

- D. **Additional Information to AFA:** When AFA represents the faculty member under investigation, the District shall provide AFA with the following information within a reasonable amount of time prior to the investigatory interview, unless nondisclosure is authorized under this section:

1. A copy of the written complaint if there is one; or
 2. In those cases where there is no written complaint, a written summary of the allegations with as much specificity as possible, based on the information available at the time the notice is given.
 3. Additional information requested by AFA in its representation of the faculty member under investigation.
- E. **Nondisclosure:** The District shall provide the above information (23.02.D.1-3) unless it concludes that disclosure is not allowable or otherwise determines that it has a compelling reason permitted by law not to disclose, based on the specific facts of the matter. If the District does not disclose any or all of the information listed above, it shall promptly notify AFA in writing of the basis for the denial and offer to meet and confer with AFA to identify information it is able to provide that meets AFA's needs and otherwise seek to accommodate the request through redaction or other means.
- F. **Additional Notice Requirements Where Member is Placed on Paid Leave**
1. **Basis for Paid Leave During an Investigation:** It is understood that it is within the District's discretion to place a member on a non-disciplinary, paid administrative leave during the pendency of a misconduct investigation. However, in exercising this discretion, the District acknowledges that even a nondisciplinary, paid leave can be disruptive and upsetting to an employee who is under investigation. As such, leave shall be imposed only where the District concludes that the alleged conduct includes: (a) acts of retaliation or intimidation; (b) acts of serious dishonesty or the destruction of property; (c) allegations which, if true, present a reasonable concern for the health or safety of others; (d) allegations which, if true, present a reasonable concern that the member's students are suffering educational harm; or (e) allegations the nature of which require the immediate preservation of physical evidence which may be compromised if the member is not placed on leave.
 2. **Notice of Leave**
 - a. **Nonemergency Situation.** At least two business days prior to placing a member on an involuntary, paid administrative leave, the District shall provide the member with written notification of the general nature of the allegations of misconduct upon which the decision to place the employee on leave is based. The Notice shall also include an explanation that while administrative leave constitutes a directive to stay away from the workplace, it does not apply to the AFA office or areas and events that are open to the public. The Notice may also instruct the member to remain available to the District for questioning during the employee's regular hours of work.
 - b. **Emergency Situation.** Where the District concludes that the specific allegations, if true, present a serious risk of physical danger or other necessity, the District may place the member on an immediate, nondisciplinary paid leave without prior notice. In such instance, the notice described in 23.02.F.2.a shall be provided within five business days of the employee being placed on the leave.
 3. **Status Reporting:** The District will provide the member with a monthly status report on the progress of the investigation and estimated date of completion. This is a report on timing only and shall not provide details regarding the investigator's activities, witnesses, findings, etc.

4. **Time of Leave:** The District should complete the investigation within 90 days of placing the member on leave. Where this is not possible, the District shall provide the member with a written explanation as to the reason why, and a reasonable estimate of when the investigation will be completed.
5. **Definition of Nondisciplinary Paid Leave:** Nondisciplinary paid leave includes all compensation and benefits to which the member would have been entitled but for placement on paid leave.

G. Investigations of Allegations Posted to Social Media

1. **Introduction:** The parties recognize that unique challenges, rights and obligations may arise where members are made the subject of accusations on social media, in particular sexual misconduct allegations. The parties have a mutual interest in fostering an environment where members of the college community feel empowered and unafraid to report sexual misconduct and the abuse of power. However, the parties also share a mutual interest in fostering an environment that values due process and the presumption of innocence. In recognition of these dual interests, investigations of social media accusations made against members shall be regulated by this section.
2. **Application:** This provision only applies to allegations of sexual misconduct, abuses of power and/or unlawful harassment or discrimination made against faculty who, at the time the social media accusation is made, are employed as contract or adjunct faculty or are in the District's adjunct pool.
3. **Social Media Defined:** "Social media" refers to forms of electronic communication through which users create online communities to share information, ideas, personal messages, and other content (such as videos.) Current examples of social media include Facebook, Twitter, YouTube, Instagram, and similar sites.
4. **Member Privacy:** The posting of an accusation to social media does not erode the private nature of any District response, investigation or action taken in connection with the allegations, except that AFA shall receive the notice, described below, without first securing the member's consent for disclosure to AFA in 23.02.C.1.
5. **Notice to AFA:** The District shall provide AFA with notice within three business days of it becoming aware of social media allegations against a member involving sexual misconduct, abuse of power and/or unlawful harassment or discrimination. No prior consent of the member who is the subject of the allegation is required. The notice to AFA will also be provided to the member who is the subject of the allegations. The Notice shall include:
 - a. The social media platform(s) where the accusation was made;
 - b. When the District learned of the accusation; and
 - c. Whether the District has received a formal complaint in connection with the allegations. If so, the complaint will also be provided to AFA, to the extent that it covers the same subject matter as the allegations posted to social media.
 - d. Timeline for completion of the initial inquiry.
6. **The Initial Inquiry:** Prior to opening an investigation based on allegations posted to social media, the District will conduct an initial inquiry, the conclusions of which control whether

an investigation may be initiated. An investigation may be initiated where the initial inquiry determines that:

- a. The allegations pertain to conduct occurring within the last 4 years that—if true—have a sufficient nexus to the workplace to warrant investigation. Sufficient nexus is determined by presuming the allegations to be true for the purposes of the nexus test and applying the *Morrison* factors to the allegations. *Morrison v. State Board of Education* (1969) 1 Cal. 3d 214.
- b. The alleged conduct is more than 4 years old, but:
 - 1) The complainant(s) are current students or employees who would be entitled to a remedy if the allegations are true, even if discipline is not available to the District;
 - 2) The alleged conduct describes conduct that is similar in nature to a complaint(s) that was investigated and sustained by the District within the last 4 years;
 - 3) The alleged conduct, if true, indicates that the faculty member was not truthful in the application process or otherwise actively concealed material facts that, if known, would have caused the District not to hire the faculty member.
 - 4) The allegations include a claim that the faculty member was convicted of an offense for which termination is mandatory.
7. **Initiation of Investigation:** If the District determines that an investigation is warranted, it shall provide notice to the affected employee and AFA that it is opening an investigation, the basis for opening the investigation under subsection 23.02.G.6 (above); and timeline for completion. The procedures and respective rights of the Union, member and District during the investigation are otherwise controlled by the general provisions in Article 23.02.
8. **Closure of Investigation:** The general notices and rights regarding closure of investigations set forth in Article 23A apply equally to investigations triggered by social media accusations. In addition, if the allegations are investigated and determined to be unfounded, AFA, with the affected member's written consent, may request a public letter informing the public that the allegations were determined to be unfounded and the investigation closed.
9. **Public Statements by the District:** Statements made by District officials, including in response to inquiries from the press and the public, shall not state the name or other identifying information of the complainant or accused without their written consent. Public comment shall include a statement of the District's neutrality while the matter is under review, and that members are presumed innocent until and unless the evidence shows otherwise. However, nothing in this section affects the District's duties under The CLERY Act to issue a Timely Warning, if legally required.

H. Investigations Subject to Statutory Deadlines

1. The parties recognize that various laws and regulations create deadlines by which certain investigations must be completed. These include, but are not limited to, the requirement under Title 5 of the California Code of Regulations that investigations into formal discrimination complaints be completed within 90 days; the requirement under Education Code section 87623 that investigations of members placed on paid administrative leave

should be completed within 90 days; and the requirement under Title IX that complaints of sexual misconduct be completed within 60 days.

2. The parties acknowledge that such deadlines place additional responsibilities on the parties. The District is responsible for conducting the investigation as promptly as possible, and the District agrees that otherwise unnecessary delays are not excused by the District's meeting of statutory or regulatory deadlines. The member and AFA have a heightened responsibility to cooperate in making the member and a representative available for the member's interview.

I. Closure of Investigation

1. **Investigations Where Allegations are Not Sustained:** The member shall be provided with written notice that the allegations have not been sustained and confirmation that nothing related to the allegations or investigation will be placed in the employee's personnel file. The notice will not include a copy of the investigation report. Records related to unsustained allegations, including the investigation report shall be maintained in a separate investigation file in a secure location by the Office of Human Resources and apart from the employee's personnel file for the period required by law.
2. **Investigations Where Some or All of the Allegations are Sustained:** The member shall be provided with written notice summarizing the findings as to each allegation and whether or not it was sustained. The member shall also be provided with a copy of the investigation report under the following circumstances:
 - a. If the employee is issued a Notice of Charges in connection with a dismissal or suspension or demotion of an adjunct faculty member with Offer Rights, the investigation report shall be attached to the Notice. In extenuating circumstances, the District may redact portions of the Report so long as it provides notice of redaction to AFA and meets and confers on request.
 - b. If the District does not seek dismissal or suspension, but nevertheless intends to place the report in the member's personnel file or rely on it for a written reprimand or disciplinary transfer, it shall provide the member with a copy of the report and notice of placement of derogatory information in the personnel file. In such case, the member may attach a response.

- J. **Statutory Rights to Information and Documents:** Nothing in this Article shall waive or supersede the District's, AFA's or a faculty member's right to request and receive information and documents as allowed by the EERA, Education Code or other law.

23.03 DISCIPLINE

A. Employment Actions Not Covered Under Article 23.03

1. **Authority to Give Feedback, Guidance and Direction:** Nothing in this Article shall impede the existing authority of the District to provide direction, feedback or guidance to the member in the performance of the member's duties.
2. **Dismissal and Suspension of Probationary or Regular Faculty:** The dismissal or suspension of probationary or regular faculty shall be administered in conformance with the applicable provisions of the California Education and Government Codes, and the

procedures and protections provided for in those sections. Such discipline shall not be subject to the procedures set forth in Article 23.03 or the Article 11 grievance procedure.

3. **Dismissal of Adjunct Faculty Without Article 16 Offer Rights:** Pursuant to Education Code section 87665, the governing board may terminate the employment of an adjunct member who has not acquired Article 16 offer rights at its discretion, at the end of a day or week, whichever is appropriate. The decision to terminate the employment is not subject to judicial review except as to the time of termination. It is understood that this right to terminate a member without cause does not permit termination based on an unlawful reason, including but not limited to unlawful discrimination or retaliation.
 4. **Nonrenewal of Probationary Faculty:** This Article does not apply to a District decision to deny tenure or nonrenew a probationary faculty member's contract. The procedures and rights governing these decisions are set forth in the Education Code and Article 30.
 5. **90-Day Notice and Opportunity to Improve:** It is understood that issuance of a 90-Day Notice pursuant to Education Code section 87734 does not constitute discipline. As such, a 90-Day Notice is not subject to the procedures set forth in this Article and is not subject to grievance under Article 11 of this Agreement. Rather, a 90-Day Notice constitutes a right to receive notice and opportunity to improve to which a member is entitled before the member may be charged with unprofessional conduct or unsatisfactory performance.
 - a. Notwithstanding the above, the parties recognize that:
 - 1) A 90-Day Notice must be designed to provide the member with a meaningful opportunity to improve, and thus must specify the nature of the unprofessional conduct and/or unsatisfactory performance with specific instances of the behavior and with particularity to furnish the employee an opportunity to correct the conduct giving rise to the 90-Day Notice.
 - 2) The District may not file any charges of unprofessional conduct or unsatisfactory performance against a member any sooner than 91 days after the issuance of a 90-Day Notice, or any later than the term or half college year following the term or half college year during which the member received the 90-Day Notice.
 - 3) The member's statutory rights, referenced above in Article 23.03.A, include the right to an evidentiary hearing on the charges, including matters alleged in the 90-Day Notice. The District bears the burden of proof in any such hearing.
- B. **Employment Actions Covered Under Article 23.03:** Article 23.03 regulates the administration of all discipline other than dismissal and suspension of probationary or regular faculty under the Education Code. For the purposes of this Article "discipline" means, and is limited to, the following:
1. **Oral Counseling:** An oral counseling is an informal, verbal communication alerting a member to a conduct or performance concern.
 2. **Written Counseling:** A written counseling is an informal, written communication alerting a member to a conduct or performance concern. Written counselings are not placed in a member's personnel file.
 3. **Written Reprimand:** A written reprimand is a formal written communication informing a member of a conduct or performance concern. A written reprimand shall include clear

notice that it will be placed in the member's personnel file in ten (10) business days, and that the member may submit a written response which will be attached to the reprimand once the response is received by the District. A member may revise the response at any time.

4. **Disciplinary Transfer:** A disciplinary transfer is an involuntary transfer that is imposed on the basis that the member has engaged in conduct subject to discipline.
5. **Disciplinary Training:** Disciplinary training is training that a member is mandated to attend on the basis that the member has engaged in conduct subject to discipline. Disciplinary training may be imposed as the sole disciplinary action, or in conjunction with other disciplinary action.
6. **Suspension or Dismissal of Adjunct Faculty with Article 16 Offer Rights**

C. **Progressive Discipline**

1. The District shall utilize progressive discipline to provide members with the opportunity to correct behaviors that may otherwise lead to more serious consequences.
2. "Progressive Discipline" means that the District will impose the lowest level of discipline reasonably calculated to bring about the desired result. Implementation of progressive discipline does not require a specific order, or lock-step adherence to the disciplinary steps identified in Article 23.03.B.1-6. It is understood that the appropriate level of discipline depends upon numerous factors such as the seriousness of the conduct at issue, the history of prior discipline, and possible extenuating or mitigating factors, all of which the District may consider in determining the appropriate level of discipline.

D. **Cause for Discipline**

1. Just cause is required for discipline. Cause for the discipline means any of the causes for discipline set forth in California Education Code Section 87732.
2. Notwithstanding the above (23.03.D.1), unsatisfactory performance shall only constitute cause for discipline under Article 23.03.B.1-6 where the employee has been informed of the performance issues through the Article 14A, 14B, or Article 30 evaluative processes and failed to improve in any required Follow-Up Evaluation. Members shall not receive first notice of a performance concern through discipline.

E. **Rights Regarding Discipline:** Nothing in this Article shall prohibit AFA or members grieving violations of the negotiated investigation procedure set forth in Article 23.02. Additionally, members or their AFA representative on their behalf shall have the following rights regarding discipline. Adjunct faculty who receive discipline are entitled to the same right to respond to and challenge the discipline as contract and regular members.

1. **Written Reprimand:** In addition to the right to attach a response to a written reprimand, a member also has the right to grieve the written reprimand through Step 1 of the grievance process set forth in Article 11. If the member files his or her grievance within 10 business days of receiving the written reprimand, the District shall not place the reprimand in the personnel file until the conclusion of the Step 1 grievance process.
2. **Disciplinary Transfer:** A member who receives a disciplinary transfer shall receive a written, pre-disciplinary notice informing the member of the basis for the transfer with sufficient specificity that the member is able to respond to the charges; the right to a

pre-disciplinary opportunity to be heard orally or in writing; and a post-disciplinary right to grieve the transfer through Step 3 of the grievance process.

3. **Disciplinary Training:** Disciplinary training of three hours or less that is located at the District and scheduled during the member's regular work hours is not subject to challenge. All other disciplinary training may be grieved through Step 1 of the grievance process.
4. **Suspension or Dismissal of Adjunct Faculty with Offer Rights:** Adjunct members who have acquired Article 16 Offer Rights may only be suspended or dismissed for cause and pursuant to the following process:
 - a. The member is entitled to a pre-discipline *Skelly* Notice and opportunity to respond orally or in writing to the charges.
 - b. If the District proceeds with the suspension or dismissal, the member may utilize the grievance process, starting at Step 3 to challenge the decision.
 - c. If the discipline is sustained at Step 3, AFA may move the grievance to Step 4—advisory arbitration.



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