

DISTRICT COUNTER PROPOSAL #1 TO AFT

May 2, 2025

ARTICLE 23: HANDLING OF INFORMAL COMPLAINTS AND FORMAL MISCONDUCT INVESTIGATIONS OF UNIT MEMBERS

23.1 DEFINITIONS

23.1.1 Complaint

A complaint is any potentially credible verbal or written allegation by an identifiable author that a unit member has violated District policy to the complainant's detriment, for which the complainant seeks a remedy. A non-credible complaint is one which the receiving administrator determines does not require further inquiry because the administrator found the complainant not credible, or that the allegations are frivolous or too trivial or minor to merit District inquiry, such that there is no need to address the allegations with the accused faculty member.

23.1.2 Informal Complaint

An informal complaint under this Article is a complaint where all of the following apply:

- (a) The Complaint does not allege unlawful harassment or discrimination,
- (b) The Complaint is not a grade grievance, and
- (c) The District has not initiated a formal investigation.

Informal harassment or discrimination complaints and informal resolution of harassment or discrimination complaints shall be handled in conformance with the governing federal and state laws and corresponding Board Policies and Administrative Procedures ~~San Mateo County Community College District Discrimination and Harassment Investigations Procedures, Section VII.~~

Student grade grievances shall be handled in conformance with the grade grievance procedures at each college.

23.1.3 Formal Misconduct Investigation

A formal misconduct investigation is a District-led investigation of a unit member into allegations that the unit member has violated District policy and/or law, based on information received from a formal or informal

complaint made by an identifiable author; a report of misconduct; manager observations; or other potentially credible sources of information. A formal misconduct investigation is initiated at the point that the District determines there is sufficient information to proceed with an investigation.

23.2 INFORMAL COMPLAINT NOTICE AND RESOLUTION

23.2.1 Initial Review and Routing of Complaints

Complaints shall be reviewed by Administration to determine:

1. Whether the complaint warrants formal investigation. If the District determines to initiate a formal investigation at any point, the notices, protections, and procedures set forth in Section 23.2 “Formal Misconduct Investigations” shall apply and any informal process shall end. Whether or not to initiate a formal investigation shall be within the sole discretion of the District.
2. Whether the complaint constitutes an informal complaint of harassment or discrimination. In such case, the Administrator shall proceed in conformance with the **applicable Administrative Procedure** ~~District’s Harassment Investigation informal resolution procedure~~ and this Article shall not apply.
3. Whether the complaint constitutes a grade grievance, in which case the complaint will be handled in conformance with the applicable college’s grade grievance procedure—including the rights of faculty as summarized in those procedures, **and this Article shall not apply.**
4. Whether the complaint is an informal student grievance that does not involve grades. In such case, the faculty member shall be entitled to the notice as set forth below in section 23.2.b. However, the Section 23.2.3 informal resolution process of this Article shall not apply. Rather, the informal student grievance process established at each college shall apply.
5. Whether the complaint is an informal complaint by a nonstudent, other than a complaint alleging harassment or discrimination, in which case the informal resolution process set forth in Section 23.2.3 shall apply.

23.2.2 Notice of Informal Complaints

After its initial review of the Complaint, if Administration determines that

the notice provisions of this Article apply, it shall provide notice of the informal complaint to the affected employee as follows:

- a. **Nonstudent informal complainant:** If a person files a complaint about a unit member, the complaint shall be presented to the Faculty member by the Administrator receiving the complaint as soon as possible but no later than ten (10) instructional days after it was received. If the Faculty member is not available within this timeframe, the complaint shall be presented upon the Faculty member's return to work.
- b. **Student informal complainant:** If a student files a complaint about a unit member (other than a grade grievance), it shall be provided to the unit member within ten (10) instructional days of when it is received, unless the information pertains to a class that is currently in session, and in which the student complainant is enrolled. If the complaint relates to a class where the student is currently enrolled, at the student's request, the complaint shall be provided to the affected unit member no later than ten (10) workdays after the grades for the class are filed at the completion of the Academic Term. As noted above in Section 23.2.1(3), grade grievances shall be handled in conformance with each college's grade grievance procedure.

23.2.3 Review and Resolution of Informal Non-Student Complaints

The appropriate Dean/Immediate Supervisor may call a meeting with the affected Faculty member to review the complaint. At the request of the Faculty member, an AFT representative may accompany the Faculty member to the meeting. The appropriate Administrator may also call a meeting with the complainant to clarify the issue.

If the appropriate Dean/Immediate Supervisor determines that a meeting between the complainant and affected unit member is appropriate, the Dean/Immediate Supervisor will call the meeting and the affected member shall attend.

Further, the affected unit member may meet with the member's Dean/Immediate Supervisor and other affected parties to attempt to settle the allegations informally if the other party agrees to an informal resolution.

23.2.4 Limitation on Use of Information from Informal Complaint Resolutions

No investigatory interview shall take place at any resolution meeting held pursuant to Section 23.2.3 of this Article, with the understanding that such meetings are designed to resolve or mediate matters where the District has already concluded the fact-finding process.

Further, to foster and encourage the resolution of informal complaints, the parties agree that any faculty-respondent statements made during such resolution meetings may not be used by the District in any subsequent investigation, evaluation, discipline, or other employment decision, such as a decision regarding assignment, workload, or leave.

If, during such a meeting, a supervisor believes further inquiry and an investigatory process becomes necessary based on new statements made or information presented, the supervisor will immediately conclude the meeting and the District shall begin the Article 23.3 formal investigation process.

23.2.5 Complaints that Are Withdrawn, Not Sustained, or Not Presented to the Member

Regardless of whether a formal investigation was initiated, any complaint that is withdrawn, was not sustained, or not called to the attention of the employee may not be used as the basis for any evaluation, reprimand, discipline or discharge. Nor shall it be placed in the Faculty member's personnel file. Such documents may only be retained in a separate and secure file within the Office of Human Resources to the extent required by the laws regulating the retention of public records. Further, access to these documents shall be on a "needs to know" basis only, as determined by the Head of Human Resources.

23.3 FORMAL MISCONDUCT INVESTIGATIONS

23.3.1 Mutual Respect for a Fair Investigative Process

The parties understand and agree that the District has the authority and obligation to investigate non-frivolous complaints, reports and/or other potentially credible information that a unit member has engaged in misconduct. The parties further understand and agree that unit members are entitled to be presumed innocent of wrongdoing during the investigation process, and shall be treated with the same dignity and respect as alleged victims and complainants. They are entitled to a fair investigation process, including certain protections during the investigation process.

While individuals have the right to bring forth complaints, faculty have the right to expect that complaints shall be handled fairly. Consistent with these principles, this procedure provides faculty members that are the subject of a District-initiated misconduct investigation, with the opportunity to respond to any allegations. A misconduct investigation will not be arbitrary or capricious. In entering into this Agreement, the Union

does not waive any of its rights to information as allowed by the EERA, the California Public Records Act, or which it is otherwise entitled by law to receive.

23.3.2 Non-Investigatory Interviews

The parties understand and agree that in the day-to-day operation of the District, managers and unit members meet regularly to share information. These are not investigatory interviews.

However, the parties further understand and agree that, if a manager reasonably expects that such a meeting may elicit information that warrants discipline, the manager shall notify the unit member in advance. The unit member so notified shall have the right to bring the AFT Grievance Officer or their designee to the meeting.

23.3.3 Initiation of a Formal Misconduct Investigation

Whether or not to initiate a formal investigation shall be within the sole discretion of the District. The District is not obligated to investigate anonymous accusations, ~~unless the District is required to investigate such anonymous accusations pursuant to law, Board Policy and/or Administrative Procedure.~~ However, it is understood that, where the District does investigate an anonymous complaint, an employee may not be charged based solely on anonymous claims that are not substantiated. ~~No action will be taken against an employee regarding an anonymous complaint that is unsubstantiated.~~

23.3.4 Preponderance of Evidence Standard

In determining whether or not an allegation is sustained, the District shall use the preponderance of evidence standard for misconduct investigations.

23.3.5 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 employee's appointment for an investigatory interview. The Notification shall include the *AFT Members Benefits of Representation Letter*, *Acknowledgement of Rights Form*, *Employee Notification Form*, and *Summary of Interview Subject Matter*. The forms are Appendix H to the Contract, and consistent with this section as follows:

a. Employee Notification Form:

The faculty member shall be provided a Notification Form with the following information:

1. The District takes a neutral stance when investigating possible misconduct and no findings of wrong-doing have been made;
2. The District maintains the confidentiality of the investigation to the fullest extent possible;
3. 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;
4. The information received could lead to discipline and the employee is entitled to have union representation at the meeting;
5. The investigation is confidential and the employee should refrain from discussing it with other members of the campus community while the investigation is pending (except for the purpose of receiving representation during the investigation or exercising other rights as recognized under the Educational Employment Relations Act (EERA));
6. 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 (or sooner if required pursuant to Title IX or other applicable law that regulates the conduct of investigations.) Where this is not possible two things will occur: (1) the employee will receive a status update on where the District is in its investigation and when it expects to be completed; and (2) when AFT is representing the employee, the District and AFT will have a check-in via email regarding a status update and a follow up telephone call for questions or points of clarification if necessary;
7. The employee will receive notice of the findings of the investigation, and whether the allegations investigated were or were not sustained;
8. In the event the investigation leads to disciplinary action, the employee will be afforded all of the pre-discipline due process rights to which the employee is entitled. This includes providing the employee, and AFT with the employee's consent, with a copy of the information relied upon to issue the charges; and

9. District policy and law prohibit retaliation of any kind 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.

b. Summary of Interview Subject Matter

A summary of the subject matter of the interview including:

1. If appropriate, and at the discretion of the Head of Human Resources or designee, the name of the complainant(s), or individual(s) whose concerns caused the District to initiate an investigation.
2. What allegedly occurred. The employee shall be entitled to a description of the subject matter or allegations of the investigation and alleged conduct, actions or omissions at issue in the investigation;
3. When the incident(s) allegedly occurred. The notice will be as specific as possible, based on the information available at the time the Notice is given, including dates and times; and
4. Where the incident(s) allegedly occurred. The notice will be as specific as possible, based on the information available at the time the Notice is given.

Further, 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 statement of the subject matter of the interview a reasonable amount of time prior to the interview.

Similarly, 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.

c. AFT Members Benefits of Representation Letter and Acknowledgement of

Rights Form:

The faculty member shall be provided with notice of the right to representation, which shall include:

1. A copy of the *AFT Members Benefits of Representation Letter* informing faculty of the benefits of union representation during the investigation process.
2. A copy of the *Acknowledgement of Rights Form* which:
 - (a) includes a space for the faculty member to sign and date acknowledgment of receipt of the above-referenced AFT letter; and (b) indicates whether the faculty member is authorizing disclosure of the investigation to AFT.
 - i. If the faculty member authorizes disclosure, all communications to the faculty member regarding the investigation shall be copied to AFT.
 - ii. If the faculty member does not authorize disclosure, AFT shall be provided with a copy of the faculty member's signed *Acknowledgement of Rights Form* upon demand.

23.3.6 Placement on Paid Administrative Leave of Absence While an Investigation is Pending

Placement of a member on Paid Administrative Leave of Absence while an investigation into alleged misconduct is pending shall conform to the following standards and procedures:

- a. Placement on Paid Administrative Leave of Absence while an investigation is pending constitutes a non-disciplinary action;
- b. Placement on Paid Administrative Leave of Absence shall not be automatic and it is not an action that the District takes lightly. 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 **administrative** leave can be disruptive and upsetting to an employee who is under investigation. As such, **paid administrative** 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; (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; ~~(f) acts of harassment or discrimination; (g) allegations the nature of which the District's investigation may be compromised if the member is not placed on leave;~~ or other matters deemed necessary by the District.

c. Notice of Paid Administrative Leave

1. **Nonemergency Situation:** At least two business days prior to placing a member on a non-disciplinary, 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 paid administrative leave constitutes a directive to stay away from the workplace, it does not apply to the AFT 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.
 2. **Emergency Situation:** Where the District concludes that the specific allegations, if true, present a serious or imminent risk of physical danger or other necessity, the District may place the member on an immediate, non-disciplinary paid administrative leave without prior notice. In such instance, the notice described in subsection "c.1" shall be provided within five business days of the employee being placed on the leave.
- d. **Status Reporting and Time of Paid Administrative Leave.** 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.
- e. 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.

- f. **Definition of Non-disciplinary Paid Administrative Leave.** Non-disciplinary paid administrative leave includes all compensation and benefits to which the member would have been entitled or would have received but for placement on paid administrative leave.

23.3.7 Investigations Subject to Statutory Deadlines

The parties recognize that various laws and regulations create deadlines by which certain investigations must be completed. The parties acknowledge that such deadlines place additional responsibilities on the parties. The District is responsible for conducting the investigation as promptly as reasonably possible, and not unnecessarily delay completion on the basis that the statutory or regulatory deadlines are being met. The member and AFT have a heightened responsibility to cooperate in making the member and a representative available for the member's interview.

23.3.8 Closure of Investigation

a. 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, except where expressly required under the District's Harassment Investigation Procedure.

Records related to unsubstantiated 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.

b. Investigations Where Some or All of the Allegations are Sustained

The member shall be provided with written notice stating the findings as to each allegation and whether or not it was sustained. The member shall also be provided with a copy of the complaint or other documents initiating the investigation, and the investigation report, under the following circumstances:

1. If the employee is issued a Notice of Charges in connection with a dismissal or suspension, 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 AFT and meets and confers on request.

2. 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 other discipline, it shall provide the member with a copy of the report and/or notice of placement of derogatory information in the personnel file. In such case, the member may attach a response.
3. If provision of the investigative report is otherwise expressly required pursuant to the District Harassment Investigation Procedure.

23.4 Investigations of Allegations Posted to Social Media

- 23.4.1 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.
- 23.4.2 Application.** This provision only applies to allegations of sexual misconduct, abuses of power and/or unlawful harassment or discrimination made directly by alleged victims (i.e. not by a third party), 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.
- 23.4.3 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. Social media does not include third-party dissemination of allegations by others, including news outlets.
- 23.4.4 Member Privacy.** The posting of an accusation to social media does not erode the confidential nature of any District response, investigation or action taken in connection with the allegations, except that AFT shall

receive the notice, described below, whether or not the faculty member has requested AFT representation.

23.4.5 Notice to AFT. The District shall provide AFT 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 AFT will also be provided to the member who is the subject of the allegations. The Notice shall include:

1. The social media platform(s) where the accusation was made;
2. When the District learned of the accusation; and
3. Whether the District has received a formal complaint in connection with the allegations. If so, the complaint will also be provided to AFT, to the extent that it covers the same subject matter as the allegations posted to social media.
4. Timeline for completion of the initial inquiry.

23.4.6 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:

1. 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.
2. The alleged conduct is more than 4 years old, but:
 - a. 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;

- b. 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;
- c. 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.
- d. The allegations include a claim that the faculty member was convicted of an offense for which termination is mandatory.

23.4.7 Initiation of Investigation. If the District determines that an investigation is warranted, it shall provide notice to the affected employee and AFT that it is opening an investigation, the basis for opening the investigation under subsection 23.4.6 (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.

23.4.8 Closure of Investigation. The general notices and rights regarding closure of investigations set forth in Article 23 apply equally to investigations triggered by social media accusations. In addition, given the highly unique circumstances surrounding an accusation made through social media, if the allegations are investigated and determined to be not sustained, AFT, with the affected member's written consent, may request a public letter informing the public that the allegations were not sustained and the investigation closed.

23.4.9 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.