

## Statement of Charge

1. Charging Party Academic Professionals (APC) is an exclusive representative within the meaning of Government Code section 3562(i) representing approximately 2,200 employees in Unit 4 of Respondent California State University (CSU), an employer within the meaning of Government Code section 3562(g).
2. By letter dated June 4, 2014, CSU Associate Vice Chancellor/Labor Relations John A. Swarbrick informed APC President Patrick Choi that the CSU would issue “three systemwide policies on June 4, 2014,” namely “Executive Order 1095 (supersedes Executive Order 1072),” “Executive Order 1096 (supersedes Executive Order 1089),” and “Executive Order 1097 (supersedes Executive Order 1074).” A true and correct copy of the aforementioned letter is attached hereto as Exhibit “A” and incorporated herein by this reference. True and correct copies of Executive Orders (“EO”) 1072, 1089, and 1074 (collectively referred to below as “the Old Policies”) are attached hereto as Exhibits “B,” “C,” and “D,” respectively, and incorporated herein by this reference. True and correct copies of EO 1095, 1096, and 1097 (collectively referred to below as “the New Policies”) are attached hereto as Exhibit “E,” “F,” and “G,” respectively, and incorporated herein by this reference. The actual “Effective Date” of each of the New Policies was June 3, 2014. *See* EO 1095, p. 1; EO 1096, p. 1; EO 1097, p. 1.
3. Prior to the receipt of the aforementioned letter, CSU did not give APC notice and an opportunity to meet and confer about CSU’s decision to issue the New Policies, or the impact of that decision on matters within the scope of representation, and APC also did not otherwise have actual or constructive notice of CSU’s intention to issue the New Policies.
4. The New Policies establish new criteria and procedures for the discipline of Unit 4 members, including, but not limited to, the following negotiable changes:
  - a. The New Policies for the first time add “domestic violence,” “dating violence,” and “stalking” to the list of offenses for which Unit 4 members can be disciplined. *See* EO 1095, pp. 5-6; EO 1096, p. 6; and EO 1097, pp. 5-19. EO 1095 purports that the definitions for these new offenses are taken from, or based on, California Penal Code § 13700(b) and California Family Code § 6211, California Penal Code § 13700(b), and California Penal Code § 646.9, respectively. *See* EO 1095, p. 5 n. 7; *id.*, p. 6, n. 8 & 9. However California Penal Code § 13700(b) does not contain a definition of “dating violence,” and the definition of “stalking” is considerably broader than the definition of that offense in California Penal Code § 646.9. *Compare* EO 1095, p. 6 (defining “stalking” as “a repeated course of

conduct directed at a specific person (when based on gender or sex) that places that person in reasonable fear for his/her or others' safety, or to suffer substantial emotional distress") with CAL. PENAL CODE § 646.9(a) (defining "stalking" as "willfully, maliciously, and repeatedly follow[ing] or willfully and maliciously harass[ing] another person and . . . mak[ing] a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family" [italics supplied]). Had APC been given prior notice and an opportunity to meet and confer about the New Policies, it could have sought to bargain over the potentially overly broad definitions of these new offenses. Moreover, on their faces, the New Policies do not limit disciplinable cases of "domestic violence," "dating violence," or "stalking" to such conduct during working hours or on CSU property, but also cover after-hours, off-campus conduct. In fact, given that EO 1096 allows any "third party," *i.e.*, "a person other than an Employee or Student" (*see* EO 1096, p. 8) to use the complaint procedure outlined therein against a Unit 4 employee (*see id.*, p. 12), EO 1096 authorizes the CSU to discipline a Unit 4 employee for conduct that is entirely unrelated to his or her employment with CSU, including when the alleged victim has no relationship with the CSU other than his or her relationship with the Unit 4 employee. Had APC been given prior notice and an opportunity to meet and confer about the New Policies, it could have sought to bargain over the potentially overly broad application of these new offenses.

- b. The New Policies for the first time define "consent" as "an informed, affirmative, conscious decision by each participant to engage in mutually agreed-upon sexual activity" and specify that "[c]onsent requires positive cooperation in a particular sexual act, or expression of intent to engage in that sexual act through the exercise of free will," and that "[t]here must *always* be mutual and affirmative consent to engage in sexual activity." EO 1095, p. 4; EO 1096, p. 5; EO 1097, pp. 4-5 (bolding and italics in original). There are numerous consensual sexual activities that do not allow for the type of "affirmative consent"—*i.e.*, "positive cooperation in a particular sexual act" or "expression of intent to engage in that sexual act"—required by the New Policies, and there are numerous alternatives to this potentially overly narrow definition of "consent," including definitions that include failure to object when an opportunity to do so was given, and a reasonable person in the alleged victim's shoes would have felt free to do so, as a valid form of "consent."<sup>1</sup> Had APC been given prior notice and an opportunity to meet and

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<sup>1</sup> A bill that would write the New Policies' potentially overly narrow definition of "consent" into law has been passed by the Legislature and is currently headed to the Governor's desk. *See* [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB967](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967) (last accessed September 3, 2014). CSU is on record as supporting the bill. *See*

confer about the New Policies, it could have sought to bargain over this potentially overly narrow definition of “consent.”

- c. The New Policies for the first time require Unit 4 employees “to disclose the name of a possible victim of Sexual Violence to the Title IX Coordinator **even where the victim has requested that his/her name remain confidential.**” EO 1096, p. 9; EO 1097, p. 9 (bolding and underlining in original). While this potentially places any Unit 4 employee in an untenable position by requiring him or her to betray the confidence of, *e.g.*, a co-worker who disclosed sensitive details in a non-work-related, social setting, it especially places any APC steward in the untenable position of having to betray the confidence of a rank-and-file Unit 4 member who disclosed sensitive details in a steward and rank-and-file setting. These concerns are amplified when considered in light of the potentially overly broad definition of, *e.g.*, “stalking” and the potentially overly narrow definition of, *e.g.*, “consent” in the New Policies. Had APC been given prior notice and an opportunity to meet and confer about the New Policies, it could have sought to bargain over the the requirement to disclose the name of a possible victim of sexual violence to the Title IX Coordinator even where the victim has requested that his or her name remain confidential.
5. By letter dated June 25, 2014, Mr. Norris wrote to Mr. Swarbrick: “APC demands that the University rescind these policies until the Parties have concluded the required decision bargaining process . . . .” A true and correct copy of said letter is attached hereto as Exhibit “H” and incorporated herein by this reference.”
6. To date, the CSU has refused and failed to rescind the New Policies, which remain posted on its website. See <http://www.calstate.edu/eo/EO-1095.html>; <http://www.calstate.edu/eo/EO-1096.html>; <http://www.calstate.edu/eo/EO-1097.html> (last accessed August 27, 2014).
7. By the conduct described above, CSU refused and failed to engage in meeting and conferring with APC in violation of Government Code section 3571(c). The same conduct also violated Government Code sections 3571(a) and (b). CSU should be

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<http://www.calstate.edu/bot/agendas/sep14/GovRel.pdf> (last accessed September 3, 2014). An article about the bill on the widely read web-site “Insider Higher Ed” notes that “A similar policy at Antioch College in the 1990s was widely mocked and seen at the time as political correctness run amok.” See <https://www.insidehighered.com/news/2014/06/09/california-lawmakers-would-require-students-get-yes-sex#ixzz34984j8Kc> (last accessed September 3, 2014). While APC does not take a position in that dispute, it supports the negotiability of the New Policies.

ordered to return to the *status quo ante*, to make whole all affected employees, and to cease and desist from violating its obligation to meet and confer with APC, as well as to post the usual notices.