IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

David A. Katz,

Plaintiff,

v.

Pima County Community College District, et al.,

Defendants.

No. CV-14-02515-TUC-CKJ

ORDER

Plaintiff David A. Katz filed this action alleging federal and state employment claims related to disciplinary action and the non-renewal of his employment contract as a chemistry instructor at Pima Community College. He filed his First Amended Complaint (FAC) on July 10, 2015. (Doc. 25.) Defendants are the Pima County Community College District (PCCCD); Mary Kay Gilliland and James M. Sinex, wife and husband; Louis Albert and Anne E. Albert, husband and wife; and Lee Lambert and Jane Doe Lambert, husband and wife.[1] Defendants move for summary judgment on all counts. (Doc. 41.) Plaintiff moves for partial summary judgment, seeking summary judgment on his claim for breach of contract in Count 6. (Doc. 45.) The Court heard oral argument on the motions on May 23, 2016.

The Court will grant Defendants' Motion for Summary Judgment in part and deny

[1] According to the FAC, at all relevant times, Defendant Gilliland was employed by PCCCD as its Dean of Science, Technology, Engineering, and Math at the West Campus; Defendant Albert was employed by PCCCD as President of the West Campus; and Defendant Lambert was employed by PCCCD as Chancellor and Chief Executive Officer.

it in part, deny Plaintiff's Motion for Partial Summary Judgment, and grant Plaintiff summary judgment on Count 2. The remaining claims are Counts 2 (damages), 4, 6 and 7.

I. Background

Plaintiff was employed full time by PCCCD through yearly contracts as a chemistry instructor beginning in August 2002; he had a teaching contract for the 2013-2014 academic year, but he did not teach after October 2013, and the parties did not enter into a teaching contract thereafter. The FAC raises the following counts:

> Count 1: suspension from teaching as retaliation for exercise of First Amendment right of free speech, in violation of 42 U.S.C. § 1983;
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> Count 2: suspension without hearing is a failure to provide Fourteenth Amendment Due Process rights, in violation of 42 U.S.C. § 1983;
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> Count 3: seizure and taking of private property, in violation of 42 U.S.C § 1983, the Fourth Amendment and Fifth and Fourteenth Amendments;
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> Count 4: rescission of approval of contract for 2014-1015 school year by Board on March 12, 2014 without notice or opportunity to be heard was a violation of 42 U.S.C § 1983, the Fourteenth Amendment right to procedural due process for property;
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> Count 5: failure to offer renewal of teaching contract as retaliation for exercise of First Amendment right of free speech, in violation of due process and 42 U.S.C. § 1983;
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> Count 6: failure to provide teaching contract for 2014—2015 in breach of contract;
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> Count 7: failure to provide teaching contract for 2015—2016 in breach of contract.

Plaintiff alleges that the retaliatory conduct stems from an email sent to Defendant Gilliland on July 30, 2013. He alleges a right to renew his teaching contract based on custom and practice and the PCCCD "Faculty Personnel Policy Statement." Defendants move for summary judgment on all counts and argue that as to the federal

claims, the individual Defendants are entitled to qualified immunity. The parties cross-move for summary judgment on Count 6.

II. Summary Judgment

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Under summary judgment practice, the moving party bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party who must demonstrate the existence of a factual dispute and that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 250; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The opposing party need not establish a material issue of fact conclusively in its favor; it is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968).

When considering a summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits or declarations, if any. *See* Fed. R. Civ. P. 56(c). At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The evidence of the non-movant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But, if the evidence of the non-moving party is merely colorable or is not significantly probative, summary judgment may be granted. *Id.* at 248-49.

Conclusory allegations, unsupported by factual material, are insufficient to defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). *See Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) ("[c]onclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment").

A scintilla of evidence, or that which is merely colorable and not significantly probative, does not present a genuine issue of material fact. *United Steelworkers of America v. Phelps Dodge*, 865 F.2d 1539, 1542 (9th Cir. 1989).

III. Factual Background

The following facts are not in dispute unless otherwise noted.

Plaintiff was employed full time by PCCCD as a chemistry instructor beginning in August 2002; he taught at the West Campus.

Disciplinary matters in 2011

Plaintiff objects to Defendants' Statement of Facts (DSOF) ¶¶3 through 33, which allege conduct by Plaintiff in 2011 and Defendants' response to the conduct. He moves to strike the allegations as irrelevant to his claim of retaliation for an email sent in 2013.[2] (Doc. 53 at 2-3.) He does not however, dispute that on September 29, 2011, Dr. Gilliland sent Plaintiff a "Notice of Fact Finding Meeting" to "discuss my concerns regarding your unprofessional behavior." (Doc. 42, Ex. F, 9/29/11 Notice (PCC364).) Defendants allege that on October 6 and 13, 2011, Plaintiff and his representative, Scott Collins, met with Dr. Gilliland and Diane Landsinger for two Fact Finding meetings. (*Id*., Ex. F, 10/6/11 Minutes (PCC367–68); Ex. B, Katz depo., 104:6–25; Ex. F, 10/13/11 Minutes (PCC368A–368B); Ex. B, Katz depo., 109:2–18.) Plaintiff disputes that the meetings were for fact finding or that any conclusions were reached.

On October 18, 2011, Dr. Gilliland sent Plaintiff a Notice of Corrective Action Meeting, which required Plaintiff to attend and discuss the behaviors listed, including

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[2] The Court denies the motion as moot as it need not consider the merits of the various disciplinary charges.

unprofessional e-mail communications, inappropriate interactions with Dean Gilliland (e.g., door slamming), and conduct that disrupts the work of colleagues (e.g., entry into another instructor's class). "The purpose of this meeting is to initiate a Step 1 Corrective Plan of Action that contains specific performance requirements that you will need to address." (*Id.*, Ex. F, 10/18/11 Notice (PCC369–70).) The Corrective Action Plan explained areas of concern with specific examples, and provided detailed behavioral expectations going forward. For example, "You will not yell at, raise your voice, slam doors or otherwise behave in an outwardly antagonistic or hostile manner towards your colleagues." All such requirements derived from the Code of Conduct policy statement: "In brief, you are expected to be polite, courteous, cooperative and collegial, and to conduct yourself in such a way as to facilitate the work of the department, division, campus and college." (*Id*. Ex. F, Corrective Action Plan (PCC373–78).)

On October 25, 2011, Plaintiff emailed Diane Landsinger, stating, in relevant part, that "I cannot sign this document containing what I consider to be falsified and misleading information without extensive modifications that will take me time to address." Ms. Landsinger responded, in relevant part, to say that "There are no charges in this document or notice letter … The notice letter is provided to help you understand the issues, your communication style and disrespectful behaviors." (*Id.*, Ex. C, 10/25/11 Emails (PCC386–90).) On October 31, 2011, Plaintiff emailed his Corrective Action Plan response, which denied that his behavior was ever inappropriate. (*Id*., Ex. F, 10/31/11Response (PCC379–85, 388–90).)

Dr. Albert sent Plaintiff Written Directives on November 22, 2011, that explained that "Nothing in this memorandum prevents you from expressing your opinion on issues of importance to the Department. The key is the manner and style of your communications—they must at all times be professional and respectful of others." Dr. Albert further explained that "your failure to correct these behaviors may result in your name not being submitted for a new contract for the 2012–2013 fiscal year." (*Id.*, Ex. F, Written Directives (PCC394–398); Ex. B, Katz depo., 125:17–126:22.) On November 28,

2011, Plaintiff emailed Dr. Albert with his refusal to sign the Written Directives, stating that he was willing "to wipe the slate clean and move forward from this point"—nothing else. (*Id.*, Ex. C, 11/28/11 Email (PCC399).) Defendants assert that after the disciplinary process entered the presidential level, Plaintiff's conduct became more "manageable," which lasted through 2012. Plaintiff asserts there is no evidence of his non-compliance through 2012 and up to September 2013.

Disciplinary matters in 2013

Complaints were made beginning in March 2013 regarding Plaintiff's conduct, including complaints from the Science Lab Supervisor Don Harp regarding use of too many lab carts and refusal to follow lab prep sheet procedure, a complaint from the Chemistry Lab specialist that Plaintiff yelled at him and two student aides, and a complaint that Plaintiff had stored a small bottle marked Thermite in the lab, which was an OSHA safety violation. (*Id.* ¶¶ 40, 44, 48.) In August 28 and 29, 2013, Dr. Gilliland reported Plaintiff's repeated failures to submit a required time sheet; she explained that after requesting the time sheet, Plaintiff ignored her, and then continued to ignore her after she printed out a time sheet and placed it in his inbox. (*Id.* 43.) Plaintiff controverts the allegations and offers his explanations for events and his conduct although he does not dispute that complaints were made. (Doc. 53 ¶¶ 40, 43, 44, 48.)

Lab emails in 2013

Defendants assert that the PCCCD campus infrastructure is in need of improvement and that Defendant Gilliland knew when she took over as Dean that all of the science departments, including the chemistry department, had equipment that needed to be repaired or replaced. (Doc. 42, Ex. K, Gilliland Aff., ¶ 3.) Defendants assert that Dr. Gilliland helped form a Lab Supervisory Group to identify specific improvements that STEM Department faculty believed were necessary; she encouraged all faculty members, including Plaintiff, to provide information on what they believed were the pressing needs of their respective departments. (*Id.*, Ex. K, Gilliland Aff., ¶4; Ex. D, Gilliland depo., 165:23–166:9.) Plaintiff controverts this allegation to the extent that he asserts that he

does not recall the formation of any Lab Supervisory Group and further that he was never asked to join or participate. He asserts that over the years he made suggestions to his colleagues and the administration about needs in the chemistry department. (Doc. 53, PSOF ¶¶51-54.) Defendants assert that Plaintiff elected not to participate in the Lab Supervisory Group; he instead sent emails to Dr. Gilliland dated July 30, 2013 and August 24, 2013, identifying needed repairs to the chemistry lab's balances, a spectrophotometer, and several hot plates. (Doc. 42, Ex. K, Gilliland Aff., ¶ 7.) Plaintiff controverts the allegation to the extent that he asserts that he did not know about the Lab Supervisory Group and that if he had, he would have participated. (Doc. 53 ¶54.) Plaintiff's July 30, 2013 email to Dr. Gilliland also complained about the location of deionized water units, which Plaintiff described as "totally unreasonable." (Doc. 1-2 at 24, 7/30/13 Email from Plaintiff to Gilliland.) Plaintiff explained that "students will be using these instruments," i.e., the Spectronic 20 Genesis, and that "the balances are used in just about every laboratory class … they should be serviced in time for the start of our laboratory experiments." (Doc. 42, Ex. C, 8/24/13 Email (PCC447–48).)

Defendants assert and Plaintiff does not dispute that Dr. Gilliland thanked Plaintiff for his input and let him know that she would follow up with the staff regarding the spectrophotometer; she also informed Plaintiff that the Lab Supervisory Group had already established "lab instrumentation" as an agenda item; she finally encouraged Plaintiff to work with his department and the Lab Supervisory Group on these issues moving forward. (*Id*., Ex. K, Gilliland Aff., ¶ 7.) Plaintiff responded to Dean Gilliland, in part, to say that "the arrangement you describe is unacceptable." (*Id.*, Ex. C, 8/26/13 Email (PCC447–48).)

Defendants assert and Plaintiff does not dispute that Dr. Nair and Dr. Kolchens, who are still chemistry instructors at the West Campus, expressed concerns to Dr. Gilliland regarding the chemistry department infrastructure; Dr. Gilliland worked to address these concerns, and took no adverse action against Dr. Nair or Dr. Kolchens for providing their views as to what improvements were needed. (*Id.* 58.)

2013-2014 Contract

The PCCCD renewed Plaintiff's contract for the 2013–2014 academic year; the Governing Board (the Board) authorized the execution of the contract in a meeting on March 20, 2013, and the parties executed the contract on July 10, 2013. (*Id*., Ex. A, 2013–2014 Contract (PCC244).) Plaintiff understood when he signed his contracts that he was agreeing to "comply with the policies and regulations imposed or adopted by the governing board of the college," including all personnel policies. (*Id*., Ex. B, Katz depo., 40:11–41:14.)

The PCCCD's Personnel Policy Statement for College Employees provided that: (1) "Faculty are contracted personnel," (2) contracts "will not exceed one fiscal year," and (3) "[n]othing in this policy statement, or in any employee group policy statement, creates an express or implied contract or expectation of employment beyond any current contract period." (Doc. 1-2 at 9.) It also states that "A Faculty member shall be offered a new contract for the ensuing academic or fiscal year unless she/he receives notice otherwise on or before March 1." (*Id*. at 6.) The Code of Conduct/Discipline in PCCCD's Personnel Policy Statement for College Employees required all employees to "show mutual respect for others, basic courtesy, reciprocity (treating other as we wish to be treated), and behaviors that create a positive environment in which to learn and to work." (DSOF ¶37.)

The Code of Conduct/Discipline also included a detailed process for investigating and imposing discipline for an employee's failure to comply with the Code of Conduct, up to and including suspension without pay and/or termination. (*Id*., Ex. G, Code of Conduct/Discipline (PCC745–758); Ex. B, Katz depo., 44:3–45:10.) The process starts with an investigation, which could entail an investigatory leave of absence with pay, and then, if necessary, proceeds to corrective action. Under the corrective action phase, "management may in its sole discretion begin corrective or disciplinary procedures at any step," which includes Step One: Initial Corrective Action Discussion, Step Two: Second Corrective Action Discussion, and then a Disciplinary Procedure, which could be a

written reprimand, suspension without pay, or termination. (*Id.*, Ex. G, Code of Conduct/Discipline (PCC745–758).) Plaintiff does not dispute this but adds that the Code of Conduct also states at Section 1(e): "Upon satisfactory completion of the corrective action plan, the employee shall be provided written confirmation of the satisfactory performance. One year after satisfactory completion of the plan, the written record will be removed from the supervisor's files and returned to the employee."

IV. Retaliation (Counts 1 and 5)

Plaintiff claims that his suspension from employment (Count 1) and the non-renewal of his contract (Count 5) were in retaliation for his July 2013 email seeking lab improvements and repairs.[3] To prevail on a retaliation claim, the "employee must prove that (1) the conduct at issue was constitutionally protected, and (2) that it was a substantial or motivating factor" in the adverse employment action. *Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 675 (1996) (citation omitted, enumeration added). "If the employee discharges that burden, the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct." *Id*.

In addition, because it is undisputed that Plaintiff was a public employee, the court must determine whether he spoke as a citizen on a matter of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Only if the answer is yes to both issues does the possibility of a First Amendment claim arise. *Id.* In other words, to qualify as "protected speech" under the first element of a First Amendment retaliation claim, the employee must have spoken on a matter of public concern and as a citizen, not an employee; "when public employees make statements pursuant to their official duties, those statements do not receive First Amendment protection." *Marable v. Nitchman*, 511 F.3d 924, 929 (9th Cir. 2007), citing *Garcetti*, 547 U.S. at 1955-56.

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[3] Count 1 is against all Defendants except Lambert, and Count 5 is against PCCCD only.

In *Eng v. Cooley*, the Ninth Circuit refined the applicable test into a five-step inquiry where a court asks:

> (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

552 F.3d 1062, 1070 (9th Cir. 2009). If the plaintiff establishes a prima facie case by establishing elements (1) through (3), then the burden of proof shifts to the government to show (4) or (5). *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1259 (9th Cir. 2016). Although the test is referred to as sequential, in *Dahlia v. Rodriguez*, the Ninth Circuit clarified that by "sequential" it meant only that all factors are necessary and that failure to meet any one factor is fatal to a plaintiff's case. 735 F.3d 1060, 1067 n.4 (9th Cir. 2013). A court need not go through the steps in the same order they are listed in *Eng*.

A. Private citizen or public employee

The speech at issue is Plaintiff's July 2013 email. It opens "Hi Mary Kay, This is a follow-up to our discussion last week concerning laboratory issues. As I mentioned, these have been long-term ongoing issues." (Doc. 1-2 at 24.) It then points to specific laboratory equipment issues as follows: (1) the balances are in need of servicing and calibration, (2) one of the Spectronic 20 Genesis spectrophotometers is in need of repair, (3) several hot plates are in need of repair, (4) distilled or deionized water is inconveniently located in the biology department where it can only be accessed by chemistry personnel for short periods each day, (5) there is no repair budge for instruments and equipment and Plaintiff suggests allocating a portion of student lab fees for this purpose. The email ends by saying "we have been faced with a crumbling infrastructure for several years. There has been an effort to clean up the chemistry area,

but we cannot move forward if we cannot maintain the equipment and instrumentation we have."[4]

"[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. The issue is a mixed question of law and fact. *See Posey v. Lake Pend Oreille School District No. 84*, 546 F.3d 1121, 1127-29 (9th Cir. 2008).

In *Coomes*, the Ninth Circuit Court of Appeals recently found that a special education teacher spoke as an employee, not a concerned citizen, when she pointed out failures to abide by Individualized Education Plans (IEPs) and communicated with administrators and parents her views on the placement and progress of students. 816 F3d at 1264. And she failed to raise a genuine issue of material fact regarding the scope of her job duties. In analyzing her claim, the Ninth Circuit noted that the "First Amendment does not protect speech by public employees that is made pursuant to their employment responsibilities—no matter how much a matter of public concern it might be." *Id.*, *citing Garcetti*. "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 423–24. The inquiry as to the "scope and content" of a plaintiff's job

[4] In PSOF ¶11, Plaintiff asserts that Defendant Gilliland responded to the email with hostility. But he does not specify what she said or how she acted. Moreover, he does not deny DSOF ¶56 that in response to the email "Dr. Gilliland thanked Plaintiff for his input and let him know that she would follow up with the staff regarding the spectrophotometer; she also informed Plaintiff that the Lab Supervisory Group had already established "lab instrumentation" as an agenda item; she finally encouraged Plaintiff to work with his department and the Lab Supervisory Group on these issues moving forward. (Doc. 42, Ex. K, Gilliland Aff., ¶ 7.) Plaintiff declined to respond and thus admitted the substance of ¶56. *See Rowberry v. Wells Fargo Bank NA*, 2015 WL 7273136, at *3 (D. Ariz. Nov. 18, 2015) ("Court deems admitted any statement of fact not clearly denied"). Moreover, there is nothing in the record to suggest a pre-existing dispute over laboratory equipment repair.

responsibilities is not limited to a formalistic review of a plaintiff's job description but is "practical." *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011) quoting *Garcetti*, 547 U.S. at 424); *see Marable*, 511 F.3d at 932–33. In resolving this factual question, a court considers "a set of non-exhaustive 'guiding principles' drawn from our case law applying *Garcetti*." *Coomes* , 816 F.3d at 1261; s*ee Dahlia*, 735 F.3d at 1074–76.

In *Coomes*, the Ninth Circuit stated that if the plaintiff's "speech 'owes its existence' to [her position as a teacher, then [she] spoke as a public employee, not as a citizen, and our inquiry is at an end." 816 F.3d at 1260 (internal citations omitted). To meet its summary judgment burden on this issue, the school district in *Coomes* submitted the plaintiff's formal job description, the emails allegedly motivating the retaliation, and legal argument. *Id*. at 1261.

Here, Defendants assert that Plaintiff sent the email in response to a request by the employer. (Doc. 41 at 6.) Gilliland asserted that she requested input about department needs and formed the Lab Supervisory Group. (DSOF 51, Ex. K ¶ 4.) Plaintiff asserts that he does not recall the formation of the Lab Supervisory Group and denies that he was ever asked to join or participate in it. (Doc. 53, PSOF ¶51.) He goes on to say, however, that he "did over the years make suggestions to his colleagues and the administration about needs in the chemistry department." (*Id*.) The email itself states that it is a follow up to a previous discussion.

Defendants also point to the content of the email; specifically that Plaintiff explained that he wanted the improvements done "in time for the start of our laboratory experiments" because his "students will be using these instruments." (Doc. 1-2 at 24 (having "balances out of service … reduces the available instruments for each laboratory class"), (spectrophotometers "are used in several laboratory experiments and … should be repaired or replaced in time for the Fall semester"), ("Hot plates are used in almost all the laboratory classes"), ("It would be in the best interests of our classes if [additional deionized water] units could be in place for the Fall semester"). Finally, Defendants

argue that Plaintiff submitted his email up the chain of command rather than to an outside entity. (Doc. 41 at 7.)

Plaintiff asserts that he had no duty to report the laboratory equipment deficiencies and made his statement as a concerned citizen. Specifically he alleges:

> I sent [the July 30, 2016] e-mail (Exhibit 4) as a concerned citizen who was trying to get the PCCCD to take remedial action to correct the deficiencies in its Laboratory which were matters of public concern affecting the quality of the education provided by the PCCCD. None of my duties or assignments or contract obligations required that I report or call to the attention of my PCCCD supervisors or to the public at large such Laboratory deficiencies and the impact on the quality of teaching and instruction at the PCCCD.

(Doc. 53, PSOF ¶10 (Pl. Decl. ¶10).) But he also asserts:

> In 2013, I observed certain deficiencies regarding the West Campus Laboratory for chemistry instructors and students which affected the quality of the instruction and the poor condition and lack of maintenance for certain laboratory equipment, and I notified my superior, Defendant and Dean, Dr. Mary Kay Gilliland, and copied other PCCCD officials, including Defendant West Campus President, Dr. Louis Albert. Dean Gilliland seemed unconcerned and disinterested in the Laboratory problems that I had raised with them, so I followed up with an e-mail to her on July 30, 2013. This email is attached as Exhibit 4 infra.

(*Id*. ¶9.)

Plaintiff's assertion that he made his statements as a concerned citizen is a legal conclusion and need not be taken as true. *See Coomes*, 816 F.3d at 1261-62. Neither party submits a formal job description for Plaintiff, but the Court does not find that dispositive. Although Plaintiff asserts that none of his job duties or assignments or contract obligations requires him to report lab deficiencies, a specific job duty is not required because the inquiry is a practical one. *See Johnson*, 658 F.3d at 966. The case law overwhelmingly supports the conclusion that even if particular speech is not a specific or formal requirement of a teacher's job, if the speech is for the benefit of students and thus aids in the fulfillment of the teacher's teaching responsibilities it is

pursuant to the teacher's job duties and not made as a concerned citizen. "[S]peech that government employers have not expressly required may still be 'pursuant to official duties,' so long as the speech is in furtherance of such duties." *Weintraub v. Bd. of Educ. of City Sch. Dist. of City of New York*, 593 F.3d 196, 202–03 (2d Cir. 2010) (citing cases from the Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits). This is true "even though [the speech] is not required by, or included in, the employee's job description, or in response to a request by the employer." *Id.* at 203. Weintraub was a public elementary school teacher who suffered serious adverse work consequences after he filed grievances with his union representative when a student was simply returned to class after twice throwing books at Weintraub. *Id.* at 198-99. The Second Circuit Court of Appeals concluded that Weintraub's grievance was "pursuant to" his official duties because it was "part-and-parcel of his concerns" about his ability to "properly execute his duties," as a public school teacher—"namely, to maintain classroom discipline, which is an indispensable prerequisite to effective teaching and classroom learning." *Id.* at 203.

The *Weintraub* court cited to cases from other circuits finding that in particular circumstances teachers' speech was pursuant to their official duties. *Id.*, citing *Brammer–Hoelter v. Twin Peaks Charter Acad*, 492 F.3d 1192, 1204 (10th Cir. 2007) (the Tenth Circuit noted that "as teachers, Plaintiffs were expected to regulate the behavior of their students."); *Renken v. Gregory*, 541 F.3d 769, 773 (7th Cir. 2008) (the Seventh Circuit held that when a professor complained to university officials about the difficulties he encountered in administering an educational grant he had been awarded, he was speaking as a faculty employee because the grant, though not necessarily a formal requirement of his job, was "for the benefit of students" and therefore "aided in the fulfillment of his teaching responsibilities."); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 693-94 (5th Cir. 2007) (the Fifth Circuit concluded that the plaintiff, as Athletic Director, spoke pursuant to his official duties when he wrote memoranda to his school principal and office manager requesting information about the use of funds collected at athletic events in order to perform his duties of buying sports equipment, taking students

to tournaments, and paying their entry fees.) The Court in *Weintraub* reasoned that Weintraub's speech challenging the school's decision to not discipline a student in his class was a "means to fulfill," *Renken*, 541 F.3d at 774, and "undertaken in the course of performing," *Williams*, 480 F.3d at 693, his primary employment responsibility of teaching.[5]

Plaintiff cites no case law holding to the contrary, and he does not otherwise explain how reporting laboratory deficiencies would not be a means to fulfill or done in the course of performing his teaching responsibilities.

The Court finds that the email was part and parcel of Plaintiff's job duties as a teacher to advocate for the needs of his students; the speech owed its existence to Plaintiff's position as a chemistry teacher. Further, the Court finds that Plaintiff fails to create a genuine issue of material fact about his job duties. The Ninth Circuit has held that "[w]here ... the case turns on a mixed question of fact and law and the only disputes relate to the legal significance of undisputed facts, the controversy is a question of law suitable for disposition on summary judgment." *Coomes*, 816 F.3d at 1262, quoting *Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). Therefore, summary judgment is appropriate "if legally supportable." *Id.*

Turning to the question of the audience for Plaintiff's email, the Ninth Circuit has held that "whether or not the employee confined [her] communications to [her] chain of command is a relevant, if not necessarily dispositive, factor in determining whether [s]he spoke pursuant to [her] official duties." *Dahlia*, 735 F.3d at 1074. Thus, "generally, 'when a public employee raises complaints or concerns up the chain of command at [her] workplace about [her] job duties, that speech is undertaken in the course of performing [her] job.'" *Id*.

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[5] Similarly, the Ninth Circuit has held that a prison guard's internal complaints documenting her superior's failure to respond to inmates' sexually explicit behavior towards her is not protected; these reports were part of her official duties. *Freitag v. Ayers*, 468 F.3d 528, 546 (9th Cir. 2006).

Here, Defendants specifically argued that the submission of the email to supervisors and colleagues and not the public, weighs against speech as a concerned citizen. (Doc. 41 at 7-8.) Plaintiff did not respond to this argument. (Doc. 52 at 14.)

The Court finds that Plaintiff's speech consists of complaints and concerns raised up the chain of command about his job, that the evidence indicates that the complaints involve matters falling within his job duties as a professor of chemistry, and that he has failed to raise a genuine issue of material fact regarding the scope of his job duties. The speech was made as a public employee and is not protected under *Garcetti*. *See Coomes*, 816 F.3d at 1264.

Because Plaintiff's speech is not protected, he cannot prevail on his retaliation claims, and the Court will grant summary judgment to Defendants on Counts 1 and 5.[6]

V. Fourteenth Amendment Due Process[7]--Count 2

Plaintiff claims that his suspension from employment in September 2013 (Count 2) was without due process. A procedural due process claim requires (1) a deprivation of

[6] The Court also finds that the speech is not a matter of public concern. The Court considers the content, form, and context of the speech. *Connick v. Myers*, 461 U.S. 138, 147-48 & n.7 (1983).

The Court looks "to what the employees actually said, not what they say they said after the fact." *See Desrochers v. City of San Bernadino*, 572 F.3d 703, 711 (9th Cir. 2009). Plaintiff's email contains no reference to matters of public concern, such as accreditation for the college, adequate education, or safety issues regarding the laboratory equipment. *Cf Gilbrook v. City of Westminster*, 177 F.3d 839, 866 (9th Cir. 1999)(involving statements which addressed "the fire department's ability to respond effectively to life-threatening emergencies"). The content of the speech, which is the most important factor, weighs against Plaintiff.

Plaintiff makes no argument that the form of the speech supports a finding of public concern. It is an email that appears to be sent only to fellow employees at PCCCD. The Ninth Circuit has recognized that '[a] limited audience weigh[s] against [a] claim of protected speech.'" *See Roe v. City and County of San Franscico*, 109 F.3d578, 585 (9th Cir. 1997). Here, the form of the speech weighs against Plaintiff. Plaintiff also makes no argument regarding the context of the speech as it relates to public concern.

[7] Count 2 relates to the 2013-2014 contract and Count 4 relates to the 2014-2015 contract. The analysis of the due process claims is made more difficult because Defendants never terminated Plaintiff; instead they let his 2013-2014 contract expire without taking action. Further, they never gave him notice that they would not offer him a new contract for 2014-2015.

a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections. *Brewster v. Bd. of Ed. of Lynnwood Unified School Dist.*, 149 F.3d 971, 982 (9th Cir. 1998).

Count Two is against all Defendants.

A. Count 2—suspension from employment

1. Parties' Contentions

Defendants argue that Plaintiff received "an opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 982. They assert that a "[A] constitutionally adequate pre-deprivation hearing consist[s] of only three elements: (1) oral or written notice to the employee of the 'charges' against him; (2) an explanation of the employer's evidence; and (3) an opportunity to respond, either in person or in writing." *Id.* at 986. According to Defendants, Plaintiff received written notice of the "charges" and the "evidence" against him on September 16, 2013, when Dr. Gilliland initiated investigatory leave with pay. Defendants argue that Plaintiff also received an opportunity to respond to Dr. Gilliland's September 16 notice before being suspended without pay on October 4, 2013. Specifically, on September 23, 2013, Plaintiff received a personal audience with his "accusers," Dr. Gilliland and Dr. Sanchez, accompanied by an employee representative, Scott Collins. Plaintiff received additional opportunities to be heard before his contract expired without renewal in May 2014, including (1) an October 4 notice from Campus President Albert of findings and that he was being placed on suspension without pay as the College moves forward with termination and (2) a meeting on October 9 to further discuss the findings.

In addition, Plaintiff's counsel sent an 8-page letter to Chancellor Lambert on November 7, in response to Dr. Albert's termination recommendation. Then, Plaintiff had a meeting with the Chancellor on December 17, after he received Dr. Sanchez's report. Defendants assert that the Chancellor was careful to get Plaintiff's "take," and even had Mr. Silvyn interview Plaintiff's witnesses before making a decision. Thus, Plaintiff had notice of the allegations and evidence against him, as well as multiple opportunities to

respond. Under *Brewster*, "that is all that is required at the predeprivation stage." 149 F.3d at 986.

Defendants also argue that Plaintiff received adequate post-deprivation due process, which will "cure what would otherwise be an unconstitutional deprivation of life, liberty or property." *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001). On July 1, 2014, after his contract expired, Plaintiff had another meeting with the Chancellor, who later offered him a written "return to work" agreement, which he rejected. According to Defendants, the return-to-work offer was more than sufficient to cure any alleged defect in the pre-deprivation hearing process.

Plaintiff argues that Defendants cite no evidence of any act of due process *before* his suspension on September 16, 2013, which was imposed effective immediately without prior notice or opportunity to protest the suspension and that he had a due process right to some opportunity to be heard before his suspension. (Doc. 52 at 16, citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (establishing due process right of public employee with property right to job to be heard before adverse action by employer taken).

He further argues that although Defendants claim he was provided with due process notice and a due process hearing on the merits of his suspension and later his non-renewal, there is minimal evidence of notice and no evidence of an evidentiary hearing where evidence could be presented and a fair decision made thereafter.

2. Analysis

a. Due process violation

As to the contract for the 2013-2014 academic year, Defendants do not dispute that Plaintiff had a property right and that he was entitled to due process.

"Due process demands that one be given an opportunity to be heard at a meaningful time and in a meaningful manner." *Jones*, 702 F.2d at 206. Due process requires notice and some kind of opportunity to be heard. *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 546 (1985). Pre-termination, an employee must receive "oral

or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. *Id.* The notice must be sufficient to enable the plaintiff to prepare for the hearing in a meaningful way. *See Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 14 (1978). Due process also requires provision of a hearing "at a meaningful time." *E.g., Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). At some point, a delay in the post-termination hearing would become a constitutional violation. *See Barry v. Barchi*, 443 U.S. 55, 66 (1979).

Even a cursory examination of the September 16 Notice and other documents shows that Defendants did not provide Plaintiff an adequate explanation of the charges against him. The September 16 Notice (Doc. 1-2 at 26) and other documents contain generalities about Plaintiff's behavior toward college staff and supervisors without identifying the people with whom he interacted, the dates of the interactions, or the precise conduct charged. Moreover, according to the terms of the September 16 Notice, the decision to place him on a leave of absence had already been made before he was offered an opportunity to respond at a meeting on September 23 with Dr. Gilliland and Dr. Sanchez. Likewise, Dr. Sanchez's Investigative Fact-Finding Final Report is dated September 20—three days before Plaintiff met with Dr. Gilliland and Dr. Sanchez on September 23 to respond to the charges.[8] (PSOF, Ex. L, Doc. 42-1, Ex. L at 515-518.)

Other documents show that the charges to which Plaintiff was expected to respond were not limited to the behavior toward staff or the time sheets set forth in the September 15 Notice. In addition to the behavior issues, the October 1, 2013 Summary of Findings alleges observation by several unidentified witnesses of unspecified safety violations of Pima College protocols and OSHA standards and encouraging students to flout safety rules. It also refers to evidence that Plaintiff had admitted to unidentified staff that he was conducting an experiment for personal gain—specifically, using Pima College

[8] There were additions to the Fact-Finding Report—a finding of safety violations and admission by Plaintiff that he had conducted an experiment for personal gain—that apparently referred to matters discussed in the September 23 meeting.

material and facilities to create a product for sale to a chemistry vendor. These matters were not mentioned in the September 16 Notice.

Like the September 16 Notice, the October 4 Notice advises that a decision had been made to suspend Plaintiff without pay. The meeting to respond to this determination was set for October 9—a mere five days later. The recommendation to terminate was made the next day—October 10.

In addition, the evidence does not show that the September 23 meeting was before an impartial decision maker—it took place with Dr. Gilliland and Dr. Sanchez. Dr. Gilliland was Plaintiff's chief accuser and Dr. Sanchez had prepared his Fact-Finding Report before the September 23 meeting. Due process requires an impartial decision maker. *Clements v. Airport Auth. of Washoe Cnty*., 69 F.3d 321, 333 (9th Cir. 1995). The Ninth Circuit has found that while due process requires that a hearing take place before termination, "the failure to provide an impartial decisionmaker at the pretermination stage, of itself, does not create liability, so long as the decisionmaker at the post-termination hearing is impartial." *Walker v. City of Berkeley*, 951 F.2d 182, 183 (9th Cir. 1991). Here, there was no post-termination proceeding.

In addition to the memoranda/notices discussed above, the record shows that Plaintiff met with Chancellor Lambert on December 17, 2013, and on December 19, 2013 Lambert issued a decision to return Plaintiff to paid investigatory leave because further review and information was necessary before he made a final decision. But there is no information in the record regarding any further investigation or opportunity for Plaintiff to provide additional information; the PCCCD appears to have merely let the time run until Plaintiff's contract expired. Plaintiff lost pay during the period he was on unpaid leave status and the pay was not restored. It is undisputed that Chancellor Lambert never made a decision to terminate Plaintiff; rather, Plaintiff's contract expired and was not renewed when he refused the return-to-work terms. The Court need not determine the exact scope of process due to find that Plaintiff never had an adequate post-deprivation proceeding.

Although Plaintiff did not move for summary judgment on this issue, he has established a due process violation. The parties have had an opportunity to fully brief the issue of due process regarding the suspension, and there is no genuine issue of fact. The Court will, therefore, grant summary judgment to Plaintiff on this Count. *See* Fed. R. Civ. P 56(f), *Albino v. Baca*, 747 F.3d 1162, 1176-77 (9th Cir. 2014).

b. Qualified immunity

A defendant in a § 1983 action is entitled to qualified immunity from damages for civil liability if his conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity analysis formerly required the court to make two distinct inquires, the "constitutional inquiry" and the "qualified immunity inquiry." *See Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1049 (9th Cir. 2002). The "constitutional inquiry" asks whether, when taken in the light most favorable to the non-moving party, the facts alleged show that the official's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The "qualified immunity inquiry" asks if the right was clearly established at the relevant time. *Id.* at 201-02.

In *Pearson v. Callahan*, the Supreme Court held that judges should be permitted to exercise their discretion in deciding which of the two prongs should be addressed first in light of the particular case. 555 U.S. 223, 242 (2009). That is, a court need not first determine if there was a constitutional violation before determining if a defendant is entitled to qualified immunity.

The qualified immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. The plaintiff has the burden to show that the right was clearly established at the time of the alleged violation. *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002); *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). For qualified immunity purposes, "the contours of the right must be sufficiently clear that at the time the allegedly unlawful act is [under]taken, a reasonable official would understand that what he is doing violates that

right;" and "in the light of pre-existing law the unlawfulness must be apparent." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994) (quotations omitted). Therefore, regardless of whether the constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not "clearly established" or the officer could have reasonably believed that his particular conduct was lawful. *Romero*, 931 F.2d at 627.

Defendants argue that they are entitled to qualified immunity. "[B]ecause procedural due process analysis essentially boils down to an ad hoc balancing inquiry, the law regarding procedural due process claims can rarely be considered 'clearly established' at least in the absence of closely corresponding factual and legal precedent." *Brewster*, 149 F.3d at 983. They claim that under existing precedent, a reasonable official could find that Defendants' conduct was lawful. According to Defendants, a reasonable official could find that the conduct was lawful, given the Code of Conduct/Discipline, the results of Dr. Sanchez's investigation, and Plaintiff's refusal to cooperate during the 2011 corrective action discussions. A reasonable official could believe Chancellor Lambert's conduct was lawful, because, according to Defendants, he was careful to get Plaintiff's "take," both in writing and in person, and to have someone interview Plaintiff's additional witnesses before reaching a final decision. And a reasonable official could believe that Plaintiff's contract expired in May 2014 under the express terms of the contract and PCCCD policy, which did not provide for automatic renewal. Even if that belief was mistaken, qualified immunity applies because the mistake was reasonable. "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Lane v. Franks*, 134 S. Ct. 2369, 2381 (2014).

Plaintiff argues that the individual Defendants have no qualified immunity because a public employee's rights to procedural due process were well established in 2013 and 2104.

The Court declines to grant the individual Defendants qualified immunity from damages on this due process claim. Although Dr. Gilliland and Dr. Albert argue that they

could have reasonably believed that they were following PCCCD policies, the issue is whether they could have reasonably believed they were complying with the requirements of due process. The right to adequate notice was well-established and the notices here are lacking in specificity. Moreover, it appears that charges were added without advance warning as the process continued. As to Chancellor Lambert, the record shows that he knew about the unpaid leave status but never restored the lost pay and failed to either terminate Plaintiff after completing the investigation and review or provide additional process—such as a notice of his findings and reason for his determination.

The Court also declines to dismiss the claim for punitive damages at this time.

c. PCCCD liability

As to PCCCD, it is well established that although municipalities and local governmental units can be sued under § 1983, they cannot be held liable solely because they employed a tortfeasor; that is, they cannot be liable on a theory of *respondeat superior*. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). A plaintiff must establish that if a constitutional violation occurred, the violation was caused by an official policy or custom of the governmental unit. A plaintiff can establish an official policy or custom in one of three ways; (1) by showing "a longstanding practice or custom which constitutes the 'standard operating procedure' of the local government entity;" (2) "by showing that the decision-making official was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision;" or (3) "by showing that an official with final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate." *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005); *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992).

A "policy" is "'a deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.'" *Long v. Cnty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006). As noted, the constitutional violation may be the result

of a direct order from a policymaking official, as in *Pembaur* where sheriff's deputies referred the issue of entering the plaintiff's clinic to the County prosecutor, who commanded the officers to forcibly enter the clinic, which caused the violation of the Fourth Amendment. *Gillette*, 979 F.2d at 1346, citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). As the Court observed in *Pembaur*, a government frequently chooses a course of action designed for a particular situation and not intended to dictate decisions in later situations. 475 U.S. at 481. If such a decision is properly made by the authorized decisionmaker, "it surely represents an act of official government 'policy' as that term is commonly understood." *Id.*

Official county policy may, however, be set only by an official with "final policymaking authority." *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989) (citing *Pembaur* 475 U.S. at 481-83.). To identify those officials with "final policymaking authority," a court looks to state law. *Thompson*, 885 F.2d at 1443, citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988) (plurality opinion) (quotations omitted)).

Here, Plaintiff fails to identify, much less establish a policy or custom of PCCCD that was the moving force behind the due process violations.[9] Even if the Court assumes that the policy is to suspend faculty without pay and without due process, Plaintiff does not establish that a final policy-making authority set such a policy. He asserts in his Amended Complaint that Chancellor Lambert is the chief executive officer acting pursuant to Ariz. Rev. Stat. Title 15, Chapter 12. (Doc. 25 ¶5.) But Defendants deny he is the chief executive officer (Doc. 26 ¶7) as defined by Arizona law. The Court is unable to locate any reference to the Chancellor's duties or authority in the cited statute, although § 15-1444 sets forth the general powers and duties of the district governing boards and § 15-1445 sets forth the administrative powers of the district governing

[9] In addition, Plaintiff provides no briefing on the issue of who is a policy maker and the Complaint cites only to A.R.S. Title 15, Chapter 12.

boards. Assuming that the board of PCCCD is the policy-making authority, there is no evidence that the board of PCCCD took any action regarding the suspension or was aware of the events surrounding the suspension or that it took any action to ratify the conduct of others. Ratification requires, among other things, knowledge of the alleged constitutional violation." *Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999).

The Court will grant summary judgment to Defendants on the issue of PCCCD liability in Count 2.

VI. Fourth Amendment and Fifth and Fourteenth Amendments—seizure and taking of private property (Count 3)

This Count is against PCCCD, Gilliland and Albert.

A. Parties' Contentions

Plaintiff alleges that when he was suspended, Defendants PCCCD, Gilliland and Albert ordered him not to return to the West Campus without express permission. He obtained permission to return and remove certain personal property that he used in his teaching and laboratory work. He was allowed a return visit on October 19, 2013, when he retrieved most of his personal property from the chemistry laboratory area and limited property from his office. However, certain personal property was denied him by PCCCD. (FAC ¶20.) He also alleges that through further communication with PCCCD, he obtained additional personal property, but he has been denied the following items by PCCCD:

> (A) a bottle of uranyl acetate dihydrate;
> (B) a bottle of uranyl nitrate hexahydrate;
> (C) a radium spot source (a spot of radium paint on a small rubber bumper); and
> (D) a bottle of blue no. 1 food color (also known as "Brilliant Blue FCF").

(FAC ¶21.)

Defendants assert that on October 19, 2013, Dr. Albert escorted Plaintiff to the chemistry lab to retrieve Plaintiff's personal property and that Don Harp informed

Plaintiff that certain chemicals could not be released due to regulatory restrictions. (DSOF 86, Ex. Q, 10/19/13 Police Report (PCC508–509); Ex. B, Katz depo., 261:9–262:16; Ex. N, Albert Aff., ¶ 9.) On February 18, 2014, Plaintiff emailed a so-called "theft report" to the College's Acting Chief of Police, Chief Amado, regarding several personal items that Plaintiff claimed to have stored in the chemistry lab at West Campus: (a) one bottle of uranium acetate; (b) one bottle of uranium nitrate; (c) one radium point source; and (d) seven jars of FD&C food colors. (DSOF 87, Ex. C, Personal Property Emails (PCC552–558, 575– 579); Ex. B, Katz depo., 258:17–259:12.)

Chief Amado investigated and located: (a) two bottles of uranium nitrate; (b) one radium point source; and (c) six jars of FD&C food colors. (DSOF 88, Ex.C, Personal Property Emails PCC552–558, 575–579); Ex. J, Quinones Aff., ¶ 5.) On March 5, 2014, Amado invited Plaintiff to retrieve the six jars of FD&C food colors and explained that the remaining items could not be released because they contained radioactive materials, which were subject to federal regulation. (DSOF ¶89, Ex. C, Personal Property Emails (PCC552–558, 575–579).) For safety reasons, the College's Director of Environmental Health & Safety recommended removal and disposal of the items containing radioactive materials, which are federally regulated, and potentially dangerous; removal occurred in compliance with HAZMAT protocol. (DSOF ¶90, Ex. J, Quinones Aff., ¶¶ 6–8.)

Defendants argue that Plaintiff presents no evidence that Dr. Gilliland or Dr. Albert directly participated in seizing or taking any of plaintiff's property and that there is no *respondeat superior* liability under § 1983. *Palmer v. Sanderson*, 9 F.3d 1433, 1438 (9th Cir. 1993). Because neither of the individually-named defendants directly participated in seizing or taking any of Plaintiff's property, they are entitled to summary judgment. Defendants also assert qualifiedly immune as to the seizure/taking claim. Even if Dr. Gilliland and Dr. Albert had removed the property, a reasonable official could believe there was a reasonable basis to do so, given the EHS Director's opinion that the radioactive materials were potentially dangerous and should be disposed of. (DSOF ¶90.)

Plaintiff argues that it is undisputed that individual Defendants Gilliland and Albert ordered Plaintiff not to return to the campus and effectively prevented him from retrieving his property. *Id.* He asserts that individual Defendants have no qualified immunity because a public employee's rights to be free from unreasonable seizures or takings without compensation were well established in 2013 and 2104. He also states that he does not seek relief from the individual Defendants on the claims arising under 42 U.S.C. § 1983, except for Defendant Lambert who as PCCCD Chancellor was a "policymaker" for the PCCCD. *Penbaur v. City of Cincinnati*, 475 U.S. 469 (1986).

B. Analysis

The evidence fails to establish a genuine dispute of fact regarding Dr. Gilliland or Dr. Albert's involvement in the seizure of Plaintiff's property. Some of the property was returned, and there is no evidence to support their involvement with the apparent destruction of the remaining property. Chancellor Lambert is not a Defendant in this claim. (Doc. 25 at 16.)

As to the liability of PCCCD, for the reasons discussed in Count 2, Plaintiff fails to establish a PCCCD policy that was the moving force behind any constitutional violation. He fails to show that the Director of Environmental Health Services is a policy maker or that any decision he made was ratified by a policy maker.

All Defendants are entitled to summary judgment on this Count.

VII. Breach of contract--failure to provide teaching contract for 2014—2015 (Count 6)

The parties cross-move for summary judgment on this issue. The only Defendant on this Count is the PCCCD. (Doc. 45 at 2.)

Plaintiff argues that this claim arises pursuant to both (1) the PCCCD Faculty Personnel Policy Statement, section E, which he describes as a "contract between the PCCCD and its faculty" and (2) the established custom and practice of PCCCD to offer contract renewals each year to all instructional faculty unless PCCCD would not have a need for such faculty because of a reduction in enrollment or class demand, which

custom and practice created a reasonable expectancy of continued employment from year to year for instructional faculty such as Plaintiff.

A. Background

Plaintiff, who had a contract for the academic year 2012-2013, argues that he should have been automatically offered a new contract for the academic year 2013-2014 because he did not receive notice to the contrary by March 1, 2013. He relies on a provision in the PCCCD Faculty Personnel Policy Statement that:

> A Faculty member shall be offered a new contract for the ensuing academic or fiscal year unless he/she receives notice otherwise on or before March 1.

(PSOF ¶ 5.)

Defendants argue that there is no evidence of a custom or practice of automatic renewal. They also assert that Plaintiff's reliance on the quoted provision is misplaced because the provision is "taken out of context" and that, in fact, when read as a whole the policy "unambiguously rejected any possible expectation of automatic renewal, stating, '[nothing in the policy statement, or in any group employee policy statement, creates an express or implied contract or expectation of employment beyond any current contract period.'" (Doc. 47 at 5.) They cite to *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 291, 246 P.3d 938, 942 (App. 2010) for the proposition that "each part of a contract must be read together, to bring harmony, if possible, between all parts of the writing." (Doc. 47 at 5.) They contend that PCCCD had never previously renewed Plaintiff's contract automatically; rather, he executed a separate written contract every year. Defendants further assert that Plaintiff was ineligible for automatic renewal because he had notice during the contract period that he was under investigation for serious misconduct.

B. Discussion

To have a contract claim, Plaintiff must prove the existence of a contract. "To bring an action for the breach of the contract, the plaintiff has the burden of proving the existence of the contract, its breach and the resulting damages." *Thomas v. Montelucia*

Villas, LLC, 232 Ariz. 92, 96, ¶ 16, 302 P.3d 617, 621 (2013). "For an enforceable contract to exist, there must be an offer, an acceptance, consideration, and … the parties manifested assent or intent to be bound." *Rogus v. Lords*, 166 Ariz. 600, 602, 804 P.2d 133, 135 (App. 1991). Plaintiff must establish the terms of the contract.

It is undisputed that Plaintiff signed a one-page employment contract for the 2013-2014 academic year. It requires him to perform in accordance with "policies and regulations imposed upon or adopted by the Board for the governing of the College District …" and later states it requires him to comply with "College faculty standards and College personnel policy statements." (Doc. 1-2 at 3.) The contract does not mention any specific provisions of the Personnel Policy Statements and does not place an obligation on PCCCD to abide by the Personnel Policy Statements on which Plaintiff relies. Plaintiff's first argument is somewhat unclear; he appears to assume that the Personnel Policy Statements are a separate contract or are part of the one-page contract. Plaintiff makes no showing that the Personnel Policy Statements were the subject of a separate offer and acceptance or other elements of a contract or that they are incorporated by reference into his employment contract. The Court declines to find that the Personnel Policy Statements are incorporated by reference into the employment contract; the contract references to standards and personnel policy statements are too vague to clearly identify them as the Personnel Policy Statements on which Plaintiff relies.

But Plaintiff also makes a contract argument that PCCCD has a custom and practice of renewing faculty contracts. Defendants deny such a custom and practice.

Plaintiff relies on *Perry v. Sinderman*, where the United States Supreme Court held that "rules and understandings" promulgated by state officials could justify a claim of continued employment under a de facto tenure program for a junior college professor whose contract was not renewed. 408 U.S. 593, 600-02 (1972). The Supreme Court held that such rules and regulations could create a property interest that is protectable by due process. *Id*. at 603.

Arizona at-will employment cases also offer guidance on the subject of the significance of policy statements because at-will employment relationships are contractual and such contracts may be modified by an employer's conduct or words; that is, an employee can show a contract term that is either expressed or inferred from the words or conduct of the parties. *Demasse v. ITT Corp*., 194 Ariz. 500, 505, 984 P.2d 1138, 1143 (1999); *Leikvold v. Valley View Comm. Hosp*., 141 Ariz. 544, 548, 688 P.2d 170, 174. An implied-in-fact term is part of the contract and is enforceable. *Wagenseller v. Scottsdale Mem. Hosp*., 147 Ariz. 370, 381, 710 P.2d 1025, 1036 (citing 1 Arthur L. Corbin, Corbin on Contracts § 17, at 38 (1960)). A term that offers the employee job security, such as specifying the duration of employment or limiting the reasons for dismissal—is an example of an implied–in-fact-term. *See id*.; *Leikvold*, 141 Ariz. at 548, 688 P.2d at 174.

Implied-in-fact terms may be found in an employer's policy statements regarding job security or employee disciplinary procedures, such as those contained in personnel manuals or memoranda. *Roberson v. Wal-Mart Stores, Inc.* 202 Ariz. 286, 290, 44 P.3d 164, 169 (App. 2002), *see, e.g., Leikvold*, 141 Ariz. 544, 546, 688 P.2d 170, 172 (1984); *Wagenseller*, 147 Ariz. at 382-83, 710 P.2d at 1037-38.

But not all employer policy statements create contractual promises. "A statement is contractual only if it discloses 'a promissory intent or [is] one that the employee could reasonably conclude constituted a commitment by the employer.' " *Demasse*, 194 Ariz. at 505, ¶ 15, 984 P.2d at 1143. For example, "[a]n implied-in-fact contract term is formed when 'a reasonable person could conclude that both parties intended that the employer's (or the employee's) right to terminate the employment relationship at-will had been limited.'" *Id*. On the other hand, a disclaimer that clearly and conspicuously tells employees that a personnel manual is not part of the employment contract and that their jobs are terminable at will "instill[s] no reasonable expectations of job security and do[es] not give employees any reason to rely on representations in the manual." *Leikvold*, 141 Ariz. at 548, 688 P.2d at 174.

Whether an employer has implied-in-fact a promise of job security or certain disciplinary procedures through its personnel manual or otherwise is a question of fact. *Leikvold*, 141 Ariz. at 548, 688 P.2d at 174 ("Evidence relevant to this factual decision includes the language used in the personnel manual as well as the employer's course of conduct and oral representations regarding it."); *see also Wagenseller*, 147 Ariz. at 383, 710 P.2d at 1038.

Plaintiff points to the Faculty Personnel Policy Statement providing that "[a] Faculty member shall be offered a new contract for the ensuing academic or fiscal year unless he/she receives notice otherwise on or before March 1." He also cites to his declaration where he asserts a custom and practice. (Doc. 46, Ex. 1, ¶19.) Plaintiff's declaration is devoid of fact; he does not even include facts about his own personal experiences with offers of renewed contracts. But there is other evidence in the record suggesting that such a custom or practice may exist. For example, it is undisputed that on February 5, 2014, the Board met to consider the "approval of regular faculty appointments for the 2015 fiscal year," as listed in the Meeting Agenda and Action Item 16.5; the list of recommended appointments included 340 faculty members. (Doc. 42-1, Ex. P, 2/5/14 Meeting Agenda (PCC528–537); Ex. P, 2/5/14 Action Item 16.5 (PCC538–42).) The "Action Item" from the PCCCD Board of Governors states that the Chancellor recommends that the Board of Governors approve the faculty regular appointments for Fiscal 2015. (*Id.* Ex. P (Doc. 42-1 at 592). The Action Item, which is signed by Chancellor Lambert, further provides as "background":

> As stated in the 2023/2014 Faculty Personnel Policy Statement 'a faculty member shall be offered a new contract for the ensuing academic or fiscal year unless he/she receives notice otherwise on or before March 1.'

Moreover, Lambert testified at his deposition that the above-quoted statement was, in fact, the policy at the time. (Doc. 42-1, Ex. O, Lambert depo., 74:20–75:9.)

Defendants argue that *Perry v. Sinderman* is distinguishable because the policy in question there stated:

> 'Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.'

408 U.S. at 600. They contrast this with the PCCCD Personnel Policy Statement language that "[nothing in the policy statement, or in any group employee policy statement, creates an express or implied contract or expectation of employment beyond any current contract period." Defendants argue that PCCCD's policy "expressly disavowed any expectation of continued employment."[10] And they argue that Plaintiff did not satisfy *Perry*'s policy, even assuming it applied here, because he did not "display a cooperative attitude."

First, the argument that Plaintiff had to satisfy *Perry*'s policy is not persuasive; the issue is not the policy in that case but the PCCCD policy. And even if the PCCCD policy contains a requirement similar to a cooperative attitude requirement, in Plaintiff's case, there was never a final determination to terminate him based on the disciplinary charges.

Next, the interpretation of a contract generally is a question of law for the court. *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, 244, 256 P. 3d 635, 641 (Ariz. App. 2011), citing *Sparks v. Republic National Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127, 1132 (Ariz. 1982).

When interpreting contract language, it is important to "harmonize all parts of the contract . . . by a reasonable interpretation in view of the entire instrument." *Aztar Corp. v. U.S. Fire Ins. Co*., 223 Ariz 463, 224 P.3d 960 (AZ Ct. App. 2010), quoting *Brisco v.*

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[10] Notably, Defendants offer nothing to explain why the recommended appointment of 340 faculty members is not pursuant to automatic renewal. As a practical matter, it would seem unlikely that each academic year the PCCCD starts anew the hiring process for 340 faculty members.

Meritplan Ins. Co., 132 Ariz. 72, 75, 643 P.2d 1042, 1045 (App.1982); *see also LeBaron v. Crismon,* 100 Ariz. 206, 209, 412 P.2d 705, 707 (1966). Thus, the meaning of a contract must be determined by reading the instrument as a whole, and not by construing different sections of the contract separately. *Technology Constr., Inc. v. City of Kingman*, 229 Ariz. 564, 568, 278 P.3d 906, 910 (Ct. App. 2012), citing *Daily Mines Co. v. Control Mines, Inc.,* 59 Ariz. 138, 147, 124 P.2d 324, 328 (1942). A contract is to be interpreted "in such a way as to reconcile and give meaning to all its terms, if reconciliation can be accomplished by any reasonable interpretation." *Technology Constr., Inc,* 229 Ariz. at 568, 278 P.3d at 910, quoting *Gfeller v. Scottsdale Vista North Townhomes Assoc.*, 193 Ariz. 52, 54, ¶ 13, 969 P.2d 658, 660 (App.1998) (citing *Hamberlin v. Townsend*, 76 Ariz. 191, 196, 261 P.2d 1003, 1006 (1953)). In other words, an interpretation should not render part of the contract meaningless. *Hamberlin*, 76 Ariz. at 196, 261 P.2d at 1006 (citing 17 C.J.S., Contracts, § 309 for the proposition that apparently conflicting provisions must be reconciled, rather than nullify any, if reconciliation can be effected by any reasonable interpretation). Furthermore, specific provisions of a contract qualify the meaning of a general provision." *Technical Equities Corp. v. Coachman Real Estate Inv. Corp*., 145 Ariz. 305, 306, 701 P.2d 13, 14 (App.1985); *see also Norman v. Recreation Ctrs. of Sun City, Inc*., 156 Ariz. 425, 428, 752 P.2d 514, 517 (App.1988).

Thus, if both policy provisions in question are part of the contract, the Court must not only interpret them but attempt to reconcile them. Defendants make no effort to harmonize the two provisions in question; they argue that the disclaimer simply disavows the provision requiring notice by March 1. But the Court believes the provisions can be harmonized. The disclaimer is the general rule which is modified by the notice requirement; there is no expectation of employment beyond the faculty member's current contract if he or she is notified by March 1 that PCCCD will not offer a contract for the following academic year. That is, before March 1, PCCCD can exercise its right of non-

renewal by providing notice. But if the faculty member has not received notice of non-renewal by March 1, he or she shall be offered a contract.[11]

At oral argument, Defendants asserted that the language relied on by Plaintiff creates, at most, a right to an offer of a contract and that an offer can always be rescinded. The Court is not persuaded that a *right* to an offer of a contract can be so easily circumvented, and Defendants cite no authority in support of this argument.

In addition, the Court cannot say as a matter of law that because Plaintiff was on a suspension or leave of absence for investigation of charges and possible termination, he had no reasonable expectation of renewal. It is beyond dispute that Chancellor Lambert informed Plaintiff in December that further investigation would be necessary and that Plaintiff did not receive a notice of non-renewal by March 1. Nor did Plaintiff receive a notice of termination or a notice regarding the outcome to the investigation before March 1.[12] Defendant relies on *Hurst v. Bisbee Unified Sch. Dist. No. Two*, where the Arizona Court of Appeals declined to apply the former Teacher Tenure Act's automatic renewal provision because the teacher had notice that termination proceedings were pending against him during the renewal period. 125 Ariz. 72, 76, 607 P.2d 391, 395 (App. 1979). First, the court noted that it did not have jurisdiction because the teacher had not filed a timely appeal of the decision of the governing board. It then stated in the alternative that it would not apply the automatic renewal because the conduct comprising the ground for dismissal occurred close to the date by which dismissal had to take place or automatic renewal would result. Because of the appeal time frame, the teacher could not have been dismissed until well after the automatic renewal date.

No such problem is presented here. The alleged misconduct occurred in 2012 to September 2013. Plaintiff was notified on September 16, 2013 that he was being placed

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[11] This distinguishes *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972), on which Defendant relies. In that case the court noted that the terms of the plaintiff's employment "secured absolutely no possible interest in re-employment for the next year." *Id.* at 578.

[12] In fact, he never received any kind of notice regarding the outcome of the investigation and was never terminated.

on a leave of absence for misconduct, and then notified in October that he was suspended without pay. He had no meetings or other communications with Defendants from that time until December 2013 when Chancellor Lambert advised him that he was being taken off unpaid suspension and put back on leave of absence while an investigation continued. Defendants do not even claim that it had insufficient time during this period to conduct an investigation, and there was never a decision to terminate Plaintiff. Defendants initiated a disciplinary process, provided no deadlines for their own investigation, and let the March 1 deadline pass without a decision and without notification to Plaintiff that his contract would not be renewed. As for Plaintiff being on notice, it can equally be said that Defendants were on notice of the March 1 deadline. At the very least, there is an issue of fact regarding Plaintiff's reasonable expectation of an offer of a new contract.

In sum, there is an issue of fact and evidence from which a jury could infer that there was an implied-in-fact contract provision providing that a faculty member should receive an offer of a new contract if not notified otherwise by March 1 and a question of fact whether Plaintiff had a reasonable expectation of such an offer under the circumstances of this case.

Finally, if there was a contract right to an offer of employment for the following academic year, it must be determined if the contract right was breached. The question of whether a contract has been breached is ordinarily a question for the jury. *Turner v. Alta Mira Village Home owners Ass'n, Inc*., 2014 WL 7344049 (Ct of Apps. Dec. 24, 2014), citing *Matson v. Bradbury*, 40 Ariz. 140, 144, 10 P.2d 376, 378 (1932). Defendants acknowledge that they did not offer Plaintiff an employment contract—only a return-to-work agreement with conditions. But they contend that if Plaintiff had accepted the conditions of his return to work, they would have offered him an employment contract and this was Plaintiff's understanding as well. (*See* Doc. 42, Ex. B, Pl. dep., Sept. 17, 2015, 242:15-22.) There is no language in the policy requiring Defendants to offer the same contract every year. The issue of breach must be decided by the jury.

The Court declines to dismiss the claim for punitive damages at this time.

Therefore, the Court will deny summary judgment to both parties.

VIII. Fourteenth Amendment Due Process--Count 4

Plaintiff claims that the March 12, 2014 rescission of approval to offer a contract for the 2014-2015 school year (Count 4) was without due process. As previously noted, procedural due process claim requires (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections. *Brewster*, 149 F.3d 982.

Count Four is against the PCCCD and Chancellor Lambert.

The record shows that while Plaintiff was on investigatory leave, the Board met on February 5, 2014 to consider the "approval of regular faculty appointments for the 2015 fiscal year," as listed in the Meeting Agenda. (DSOF ¶77.) The motion carried, and the Board approved the list which included 340 faculty members, as a whole. (*Id.* ¶78.) Defendants assert that the list of recommended appointments inadvertently included Plaintiff's name among the 340 faculty members who were recommended for approval. (*Id*. ¶79.) At the next Board meeting on March 12, 2014, the Board corrected its mistake by unanimously voting to withdraw its February 5, 2014 authorization to renew Plaintiff's contract. (*Id*. ¶80.) Plaintiff's 2013–2014 contract expired on May 22, 2014. (*Id*. ¶81.) No one offered Plaintiff a renewal contract. (*Id*. ¶82.)

Plaintiff argues that because he was not notified by March 1 that he would not be offered a new contract, he had a property interest in a contract for 2014-2015 pursuant to the same provisions in the PCCCD Faculty Personnel Policy Statement discussed above in Count 6. That property interest, in turn, created a right to due process before the approval of an offer could be rescinded.[13] He asserts that, among other protections, he was entitled to an evidentiary hearing.

[13] Therefore, as an initial matter, the success of this claim depends on whether Plaintiff, in fact, had a right to be offered a contract for the 2014-2015 academic year—that is, whether the PCCCD Policy and other facts created an implied contract term. Without a property interest, there can be no due process claim. The Court recognizes that it is possible that there could be a property interest created by a right to renew a contract and a § 1983 procedural due process claim for rescission of that contract without due

Defendants make the same arguments on this claim as they do on Count 6 regarding the existence of a right to an offer of a new contract. (Doc. 41 at 12-13.) They also asserted at oral argument that the provision on which Plaintiff relies—"[a] faculty member shall be offered a new contract for the ensuing academic or fiscal year unless he/she receives notice otherwise on or before March 1"—provides only for an offer of a contract and that an offer could be rescinded. The Court has already rejected this argument.

In addition, Defendants argue that the notices and meetings held between September and December 2013 afforded the requisite due process regarding the rescission of approval. This might be true if Defendants had, in fact, terminated Plaintiff before March 1—a separate notice that he would not receive an offer of a contract for the next year would not seem necessary. But on these facts, the Court is not persuaded. First, the Court has found the notices inadequate as to the suspension issue. Second, as previously noted, after the December meeting, Chancellor Lambert restored Plaintiff to paid-leave status and continued the investigation. And Plaintiff was not terminated prior to the March 1 deadline—he was not terminated at all. It is undisputed that Plaintiff did not receive notice prior to March 1 that he would not be offered a new contract. The record shows and the parties acknowledged at oral argument that there was no further communication between the parties after the December 2013 memorandum from Chancellor Lambert until July or August 2014. This action is inadequate to put Plaintiff on notice that the approval would be rescinded and he would not be offered a new

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process. *See e.g. Grand Canyon Pipelines, Inc. v. City of Tempe*, 168 Ariz. 590, 816 P.2d 247 (Ct. App. 1991) (a contractor was found to have no due process right to adequate hearing when the City awarded a public contract to another because Arizona statutes created no cognizable property interest to the award of a public works contract; the statute is for the protection of the public). The Court has already held that there are disputed issues of fact regarding the right to be offered a contract. Obviously, if there was no implied contract right or Plaintiff had no reasonable expectation of being offered a new contract, Count 4 fails.

contract for the upcoming school year. In other words, if there was a contract right to be offered a new contract—a property interest—there was a violation of due process.

In addition to the existence of an implied right to receive an offer for a new contract, the success of this due process claim depends on whether Plaintiff can establish the liability of Defendants Chancellor Lambert and the PCCCD.

Chancellor Lambert argues that he is entitled to qualified immunity on this claim. First, Plaintiff has the burden to show that the constitutional right was clearly established at the time of the alleged violation. *Sorrels*, 290 F.3d at 969; *Romero*, 931 F.2d at 627. The right to due process before deprivation of a property interest was clearly established.[14]

Next, the Court must determine if a reasonable official in Chancellor Lambert's position "would understand that what he is doing violates that right." *See Saucier*, 533 U.S. at 202. Qualified immunity protects government officials who make reasonable mistakes in judgment; thus, officials are not liable for "mistakes in judgment, whether the mistake is one of fact or one of law." *Butz v. Economou*, 438 U.S. 478, 507 (1978); *see also Dias v. Elique*, 436 F.3d 1125, 1131 (9th Cir. 2006), citing *Saucier*, 533 U.S. at 201. In *Willis v. Mullins*, the California district court found that it could not determine whether officers were entitled to qualified immunity regarding the search of the plaintiff's motel room where the plaintiff's name was on a Parole Roster in error. 517 F.Supp.2d 1206, 1221 (E.D.Cal. Sept. 25, 2007). The officers had entered the room in the erroneous belief that the plaintiff was subject to a condition of parole. (*Id*.) The court found insufficient facts to determine whether reliance on the list was reasonable under the circumstances of the case. (*Id*. at 1227.)

Because a reasonable but mistaken determination is protected, if Chancellor Lambert acted in a manner that he reasonably believed to be lawful, he is not personally liable. The issue is whether it was reasonable for him to determine or assume there was

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[14] The Court notes that it is not the contract right that must be clearly established; rather it is the constitutional right that must be clearly established.

no PCCCD policy creating a right to an offer of a contract for the next academic year—that is, was it reasonable to believe that Plaintiff had no enforceable right to a new contract. As previously noted, the evidence here shows that Chancellor Lambert recommended that the PCCCD Board of Governors approve the faculty appointments for Fiscal 2015—a list of 340 names, including Plaintiff's name. (*Id.* Ex. P (Doc. 42-1 at 592). The Board Action Item signed by Chancellor Lambert provides as "background" to the recommendation:

> As stated in the 2023/2014 Faculty Personnel Policy Statement 'a faculty member shall be offered a new contract for the ensuing academic or fiscal year unless he/she receives notice otherwise on or before March 1.'

And Chancellor Lambert testified at his deposition that the above-quoted statement was, in fact, the policy at the time.[15] (Doc. 42-1, Ex. O, Lambert depo., 74:20–75:9.) On these facts, the Court cannot find as a matter of law that Chancellor Lambert acted reasonably when he provided no due process, including notice, to Plaintiff regarding the rescission of approval for a new contract offer.

As to PCCCD liability, the issue is whether action was taken pursuant to an official policy, that is, whether there is action by a policy maker. The record shows that the Board of Governors initially approved Plaintiff for an offer of a new contract and then rescinded that approval on March 12. Arizona law provides that:

> A. Except as otherwise provided, the district board shall;
> 6. Appoint and employ a chancellor or chancellors, vice-chancellors, a president or presidents, vice-presidents, deans, professors, instructors, lecturers, fellows and such other officers and employees it deems necessary. . . .
> 8. Remove any officer or employee if in its judgment the interests of education in this state require the removal.
> B. The district board may:

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[15] The Court notes that at oral argument on May 23, 2016, Defendants' attorney stated that Chancellor Lambert is a lawyer.

> 4. Contract. The district board may adopt such policies as are deemed necessary and may delegate in writing to the chancellor or president of the district, or their designees, all or any part of its authority to contract under this paragraph. Any delegation of authority under this paragraph may be rescinded by the district board at any time in whole or in part.

Ariz. Rev. Stat. § 15-1444 A, B.

It appears to the Court, and Defendants do not deny, that the Board of Governors is the policy-making authority for appointment of teachers and that rescission of approval to offer a new contract was an action of the policy-making authority.[16] It is beyond dispute that Plaintiff received no notice (or other due process) before or after the rescission advising Plaintiff that the approval would be rescinded. Assuming that Plaintiff had the right to receive an offer of a new contract, he had a property interest in the contract and an entitlement to due process when the approval for a new contract was rescinded. The record does not show what, if anything, the Board did to see whether or if Plaintiff would receive notice and due process. But having rescinded the approval, the Court does not think that the PCCCD can avoid liability by the Board taking no action regarding notice or due process. Put another way, on this record, whether the Board failed to act itself or failed to delegate authority to act, it appears that the *de facto* policy was to provide no notice and due process. *Cf e.g. Hyland v. Wonder*, 117 F.3d 405 (9th Cir. 1997), amended 127 F.3d 1135 (9th Cir. 1997) (where San Francisco superior court judges left the internal management of the Juvenile Probation Department to the chief juvenile probation officer and did not formulate any policy regarding internal management, the court found a delegation of final policy making authority to the Department.)

[16] Defendants do not identify any other person or body as the policy-making authority for the purpose of teacher contracts, and the Board approved offers to 340 instructors.

The Court will deny Chancellor Lambert's request for qualified immunity at this time and deny summary judgment to the PCCCD on this claim. The Court also declines to dismiss punitive damages claims as this time.

VII. Breach of contract--failure to provide teaching contract for 2015—2016 (Count 7)

The basis of the claim is not clear to the Court but neither party moved for summary judgment on it. Therefore, the claim remains.

IT IS ORDERED:

(1) Defendants' Motion for Summary Judgment (Doc. 41) is **granted in part and denied in part** as follows:

(a) Granted as to Counts 1, 3 and 5; Counts 1, 3, and 5 are dismissed with prejudice.

(b) Denied as to Counts 2, 4, 6, and 7.

(2) Plaintiff's Motion for Partial Summary Judgment (Doc. 45) on Count 6 is denied.

(3) The Court grants summary judgment to Plaintiff on Count 2.

(4) Defendant PCCCD is dismissed from Count 2.

(5) The remaining claims are as follows: Count 2 (damages), Counts 4, 6, and 7.

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(6) Pursuant to this Court's Scheduling Order issued May 6, 2015 (Doc. 25), the parties are directed to file a Joint Proposed Pretrial Order (Pretrial Statement) within thirty (30) days.

Dated this 25th day of July, 2016.

Honorable Cindy K. Jorgenson
United States District Judge