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**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.

1 it in part, deny Plaintiff’s Motion for Partial Summary Judgment, and grant Plaintiff
2 summary judgment on Count 2. The remaining claims are Counts 2 (damages), 4, 6 and
3 7.

4 **I. Background**

5 Plaintiff was employed full time by PCCCD through yearly contracts as a
6 chemistry instructor beginning in August 2002; he had a teaching contract for the 2013-
7 2014 academic year, but he did not teach after October 2013, and the parties did not enter
8 into a teaching contract thereafter. The FAC raises the following counts:

9
10 Count 1: suspension from teaching as retaliation for exercise of First
11 Amendment right of free speech, in violation of 42 U.S.C. § 1983;

12 Count 2: suspension without hearing is a failure to provide Fourteenth
13 Amendment Due Process rights, in violation of 42 U.S.C. § 1983;

14 Count 3: seizure and taking of private property, in violation of 42 U.S.C §
15 1983, the Fourth Amendment and Fifth and Fourteenth Amendments;

16 Count 4: rescission of approval of contract for 2014-1015 school year by
17 Board on March 12, 2014 without notice or opportunity to be heard was a
18 violation of 42 U.S.C § 1983, the Fourteenth Amendment right to
19 procedural due process for property;

20 Count 5: failure to offer renewal of teaching contract as retaliation for
21 exercise of First Amendment right of free speech, in violation of due
22 process and 42 U.S.C. § 1983;

23 Count 6: failure to provide teaching contract for 2014—2015 in breach of
24 contract;

25 Count 7: failure to provide teaching contract for 2015—2016 in breach of
26 contract.

27 Plaintiff alleges that the retaliatory conduct stems from an email sent to
28 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

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

3 **II. Summary Judgment**

4 A court “shall grant summary judgment if the movant shows that there is no
5 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
6 of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23
7 (1986). Under summary judgment practice, the moving party bears the initial
8 responsibility of presenting the basis for its motion and identifying those portions of the
9 record, together with affidavits, which it believes demonstrate the absence of a genuine
10 issue of material fact. *Id.* at 323.

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

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

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

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

9 **III. Factual Background**

10 The following facts are not in dispute unless otherwise noted.

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

13 **Disciplinary matters in 2011**

14 Plaintiff objects to Defendants’ Statement of Facts (DSOF) ¶¶3 through 33, which
15 allege conduct by Plaintiff in 2011 and Defendants’ response to the conduct. He moves
16 to strike the allegations as irrelevant to his claim of retaliation for an email sent in 2013.²
17 (Doc. 53 at 2-3.) He does not however, dispute that on September 29, 2011, Dr. Gilliland
18 sent Plaintiff a “Notice of Fact Finding Meeting” to “discuss my concerns regarding your
19 unprofessional behavior.” (Doc. 42, Ex. F, 9/29/11 Notice (PCC364).) Defendants
20 allege that on October 6 and 13, 2011, Plaintiff and his representative, Scott Collins, met
21 with Dr. Gilliland and Diane Landsinger for two Fact Finding meetings. (*Id.*, Ex. F,
22 10/6/11 Minutes (PCC367–68); Ex. B, Katz depo., 104:6–25; Ex. F, 10/13/11 Minutes
23 (PCC368A–368B); Ex. B, Katz depo., 109:2–18.) Plaintiff disputes that the meetings
24 were for fact finding or that any conclusions were reached.

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

27
28 ² The Court denies the motion as moot as it need not consider the merits of the
various disciplinary charges.

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

13 On October 25, 2011, Plaintiff emailed Diane Landsinger, stating, in relevant part,
14 that "I cannot sign this document containing what I consider to be falsified and
15 misleading information without extensive modifications that will take me time to
16 address." Ms. Landsinger responded, in relevant part, to say that "There are no charges in
17 this document or notice letter ... The notice letter is provided to help you understand the
18 issues, your communication style and disrespectful behaviors." (*Id.*, Ex. C, 10/25/11
19 Emails (PCC386–90).) On October 31, 2011, Plaintiff emailed his Corrective Action
20 Plan response, which denied that his behavior was ever inappropriate. (*Id.*, Ex. F,
21 10/31/11Response (PCC379–85, 388–90).)

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

1 2011, Plaintiff emailed Dr. Albert with his refusal to sign the Written Directives, stating
2 that he was willing “to wipe the slate clean and move forward from this point”—nothing
3 else. (*Id.*, Ex. C, 11/28/11 Email (PCC399).) Defendants assert that after the disciplinary
4 process entered the presidential level, Plaintiff’s conduct became more “manageable,”
5 which lasted through 2012. Plaintiff asserts there is no evidence of his non-compliance
6 through 2012 and up to September 2013.

7 **Disciplinary matters in 2013**

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

19 **Lab emails in 2013**

20 Defendants assert that the PCCCD campus infrastructure is in need of
21 improvement and that Defendant Gilliland knew when she took over as Dean that all of
22 the science departments, including the chemistry department, had equipment that needed
23 to be repaired or replaced. (Doc. 42, Ex. K, Gilliland Aff., ¶ 3.) Defendants assert that Dr.
24 Gilliland helped form a Lab Supervisory Group to identify specific improvements that
25 STEM Department faculty believed were necessary; she encouraged all faculty members,
26 including Plaintiff, to provide information on what they believed were the pressing needs
27 of their respective departments. (*Id.*, Ex. K, Gilliland Aff., ¶4; Ex. D, Gilliland depo.,
28 165:23–166:9.) Plaintiff controverts this allegation to the extent that he asserts that he

1 does not recall the formation of any Lab Supervisory Group and further that he was never
2 asked to join or participate. He asserts that over the years he made suggestions to his
3 colleagues and the administration about needs in the chemistry department. (Doc. 53,
4 PSOF ¶¶51-54.) Defendants assert that Plaintiff elected not to participate in the Lab
5 Supervisory Group; he instead sent emails to Dr. Gilliland dated July 30, 2013 and
6 August 24, 2013, identifying needed repairs to the chemistry lab's balances, a
7 spectrophotometer, and several hot plates. (Doc. 42, Ex. K, Gilliland Aff., ¶ 7.) Plaintiff
8 controverts the allegation to the extent that he asserts that he did not know about the Lab
9 Supervisory Group and that if he had, he would have participated. (Doc. 53 ¶54.)
10 Plaintiff's July 30, 2013 email to Dr. Gilliland also complained about the location of
11 deionized water units, which Plaintiff described as "totally unreasonable." (Doc. 1-2 at
12 24, 7/30/13 Email from Plaintiff to Gilliland.) Plaintiff explained that "students will be
13 using these instruments," i.e., the Spectronic 20 Genesis, and that "the balances are used
14 in just about every laboratory class ... they should be serviced in time for the start of our
15 laboratory experiments." (Doc. 42, Ex. C, 8/24/13 Email (PCC447-48).)

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

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

1 **2013-2014 Contract**

2 The PCCCD renewed Plaintiff's contract for the 2013–2014 academic year; the
3 Governing Board (the Board) authorized the execution of the contract in a meeting on
4 March 20, 2013, and the parties executed the contract on July 10, 2013. (*Id.*, Ex. A,
5 2013–2014 Contract (PCC244).) Plaintiff understood when he signed his contracts that
6 he was agreeing to “comply with the policies and regulations imposed or adopted by the
7 governing board of the college,” including all personnel policies. (*Id.*, Ex. B, Katz depo.,
8 40:11–41:14.)

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

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

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

7 **IV. Retaliation (Counts 1 and 5)**

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

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

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27
28 ³ Count 1 is against all Defendants except Lambert, and Count 5 is against PCCCD only.

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

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

11 552 F.3d 1062, 1070 (9th Cir. 2009). If the plaintiff establishes a prima facie case by
12 establishing elements (1) through (3), then the burden of proof shifts to the government to
13 show (4) or (5). *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1259 (9th Cir.
14 2016). Although the test is referred to as sequential, in *Dahlia v. Rodriguez*, the Ninth
15 Circuit clarified that by “sequential” it meant only that all factors are necessary and that
16 failure to meet any one factor is fatal to a plaintiff’s case. 735 F.3d 1060, 1067 n.4 (9th
17 Cir. 2013). A court need not go through the steps in the same order they are listed in *Eng*.

18 **A. Private citizen or public employee**

19 The speech at issue is Plaintiff’s July 2013 email. It opens “Hi Mary Kay, This is
20 a follow-up to our discussion last week concerning laboratory issues. As I mentioned,
21 these have been long-term ongoing issues.” (Doc. 1-2 at 24.) It then points to specific
22 laboratory equipment issues as follows: (1) the balances are in need of servicing and
23 calibration, (2) one of the Spectronic 20 Genesis spectrophotometers is in need of repair,
24 (3) several hot plates are in need of repair, (4) distilled or deionized water is
25 inconveniently located in the biology department where it can only be accessed by
26 chemistry personnel for short periods each day, (5) there is no repair budge for
27 instruments and equipment and Plaintiff suggests allocating a portion of student lab fees
28 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,

1 but we cannot move forward if we cannot maintain the equipment and instrumentation
2 we have.”⁴

3 “[W]hen public employees make statements pursuant to their official duties, the
4 employees are not speaking as citizens for First Amendment purposes, and the
5 Constitution does not insulate their communications from employer discipline.” *Garcetti*,
6 547 U.S. at 421. The issue is a mixed question of law and fact. *See Posey v. Lake Pend*
7 *Oreille School District No. 84*, 546 F.3d 1121, 1127-29 (9th Cir. 2008).

8 In *Coomes*, the Ninth Circuit Court of Appeals recently found that a special
9 education teacher spoke as an employee, not a concerned citizen, when she pointed out
10 failures to abide by Individualized Education Plans (IEPs) and communicated with
11 administrators and parents her views on the placement and progress of students. 816 F3d
12 at 1264. And she failed to raise a genuine issue of material fact regarding the scope of
13 her job duties. In analyzing her claim, the Ninth Circuit noted that the “First Amendment
14 does not protect speech by public employees that is made pursuant to their employment
15 responsibilities—no matter how much a matter of public concern it might be.” *Id.*, citing
16 *Garcetti*. “[W]hen public employees make statements pursuant to their official duties, the
17 employees are not speaking as citizens for First Amendment purposes, and the
18 Constitution does not insulate their communications from employer discipline.” *Garcetti*,
19 547 U.S. at 423–24. The inquiry as to the “scope and content” of a plaintiff’s job

20 _____
21 ⁴ In PSOF ¶11, Plaintiff asserts that Defendant Gilliland responded to the email
22 with hostility. But he does not specify what she said or how she acted. Moreover, he
23 does not deny DSOF ¶56 that in response to the email “Dr. Gilliland thanked Plaintiff for
24 his input and let him know that she would follow up with the staff regarding the
25 spectrophotometer; she also informed Plaintiff that the Lab Supervisory Group had
26 already established “lab instrumentation” as an agenda item; she finally encouraged
27 Plaintiff to work with his department and the Lab Supervisory Group on these issues
28 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.

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

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

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

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

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

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

5
6 I sent [the July 30, 2016] e-mail (Exhibit 4) as a concerned citizen who was
7 trying to get the PCCCD to take remedial action to correct the deficiencies
8 in its Laboratory which were matters of public concern affecting the quality
9 of the education provided by the PCCCD. None of my duties or
10 assignments or contract obligations required that I report or call to the
11 attention of my PCCCD supervisors or to the public at large such
12 Laboratory deficiencies and the impact on the quality of teaching and
13 instruction at the PCCCD.

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

15 In 2013, I observed certain deficiencies regarding the West Campus
16 Laboratory for chemistry instructors and students which affected the quality
17 of the instruction and the poor condition and lack of maintenance for
18 certain laboratory equipment, and I notified my superior, Defendant and
19 Dean, Dr. Mary Kay Gilliland, and copied other PCCCD officials,
20 including Defendant West Campus President, Dr. Louis Albert. Dean
21 Gilliland seemed unconcerned and disinterested in the Laboratory problems
22 that I had raised with them, so I followed up with an e-mail to her on July
23 30, 2013. This email is attached as Exhibit 4 infra.

24 (*Id.* ¶9.)

25 Plaintiff's assertion that he made his statements as a concerned citizen is a legal
26 conclusion and need not be taken as true. *See Coomes*, 816 F.3d at 1261-62. Neither
27 party submits a formal job description for Plaintiff, but the Court does not find that
28 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

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

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

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

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

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

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

25
26
27 ⁵ Similarly, the Ninth Circuit has held that a prison guard’s internal complaints
28 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).

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

4 The Court finds that Plaintiff's speech consists of complaints and concerns raised
5 up the chain of command about his job, that the evidence indicates that the complaints
6 involve matters falling within his job duties as a professor of chemistry, and that he has
7 failed to raise a genuine issue of material fact regarding the scope of his job duties. The
8 speech was made as a public employee and is not protected under *Garcetti*. See *Coomes*,
9 816 F.3d at 1264.

10 Because Plaintiff's speech is not protected, he cannot prevail on his retaliation
11 claims, and the Court will grant summary judgment to Defendants on Counts 1 and 5.⁶

12 **V. Fourteenth Amendment Due Process⁷--Count 2**

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

15 ⁶ The Court also finds that the speech is not a matter of public concern. The Court
16 considers the content, form, and context of the speech. *Connick v. Myers*, 461 U.S. 138,
17 147-48 & n.7 (1983).

18 The Court looks "to what the employees actually said, not what they say they said
19 after the fact." See *Desrochers v. City of San Bernadino*, 572 F.3d 703, 711 (9th Cir.
20 2009). Plaintiff's email contains no reference to matters of public concern, such as
21 accreditation for the college, adequate education, or safety issues regarding the laboratory
22 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.

23 Plaintiff makes no argument that the form of the speech supports a finding of
24 public concern. It is an email that appears to be sent only to fellow employees at PCCCD.
25 The Ninth Circuit has recognized that "[a] limited audience weigh[s] against [a] claim of
26 protected speech." See *Roe v. City and County of San Francisco*, 109 F.3d 578, 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.

27 ⁷ Count 2 relates to the 2013-2014 contract and Count 4 relates to the 2014-2015
28 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.

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

4 Count Two is against all Defendants.

5 **A. Count 2—suspension from employment**

6 **1. Parties' Contentions**

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

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

1 respond. Under *Brewster*, “that is all that is required at the predeprivation stage.” 149
2 F.3d at 986.

3 Defendants also argue that Plaintiff received adequate post-deprivation due
4 process, which will “cure what would otherwise be an unconstitutional deprivation of
5 life, liberty or property.” *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir.
6 2001). On July 1, 2014, after his contract expired, Plaintiff had another meeting with the
7 Chancellor, who later offered him a written “return to work” agreement, which he
8 rejected. According to Defendants, the return-to-work offer was more than sufficient to
9 cure any alleged defect in the pre-deprivation hearing process.

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

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

21 **2. Analysis**

22 **a. Due process violation**

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

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

1 or written notice of the charges against him, an explanation of the employer's evidence,
2 and an opportunity to present his side of the story. *Id.* The notice must be sufficient to
3 enable the plaintiff to prepare for the hearing in a meaningful way. *See Memphis Light,*
4 *Gas and Water Division v. Craft*, 436 U.S. 1, 14 (1978). Due process also requires
5 provision of a hearing “at a meaningful time.” *E.g., Armstrong v. Manzo*, 380 U.S. 545,
6 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). At some point, a delay in the post-
7 termination hearing would become a constitutional violation. *See Barry v. Barchi*, 443
8 U.S. 55, 66 (1979).

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

20 Other documents show that the charges to which Plaintiff was expected to respond
21 were not limited to the behavior toward staff or the time sheets set forth in the September
22 15 Notice. In addition to the behavior issues, the October 1, 2013 Summary of Findings
23 alleges observation by several unidentified witnesses of unspecified safety violations of
24 Pima College protocols and OSHA standards and encouraging students to flout safety
25 rules. It also refers to evidence that Plaintiff had admitted to unidentified staff that he
26 was conducting an experiment for personal gain—specifically, using Pima College

27
28 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.

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

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

7 In addition, the evidence does not show that the September 23 meeting was before
8 an impartial decision maker—it took place with Dr. Gilliland and Dr. Sanchez. Dr.
9 Gilliland was Plaintiff’s chief accuser and Dr. Sanchez had prepared his Fact-Finding
10 Report before the September 23 meeting. Due process requires an impartial decision
11 maker. *Clements v. Airport Auth. of Washoe Cnty.*, 69 F.3d 321, 333 (9th Cir. 1995).
12 The Ninth Circuit has found that while due process requires that a hearing take place
13 before termination, “the failure to provide an impartial decisionmaker at the
14 pretermination stage, of itself, does not create liability, so long as the decisionmaker at
15 the post-termination hearing is impartial.” *Walker v. City of Berkeley*, 951 F.2d 182, 183
16 (9th Cir. 1991). Here, there was no post-termination proceeding.

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

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

6 **b. Qualified immunity**

7 A defendant in a § 1983 action is entitled to qualified immunity from damages for
8 civil liability if his conduct does not violate clearly established federal statutory or
9 constitutional rights of which a reasonable person would have known. *Harlow v.*
10 *Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity analysis formerly required
11 the court to make two distinct inquiries, the “constitutional inquiry” and the “qualified
12 immunity inquiry.” *See Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1049 (9th Cir.
13 2002). The “constitutional inquiry” asks whether, when taken in the light most favorable
14 to the non-moving party, the facts alleged show that the official’s conduct violated a
15 constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The “qualified immunity
16 inquiry” asks if the right was clearly established at the relevant time. *Id.* at 201-02.

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

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

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

6 Defendants argue that they are entitled to qualified immunity. “[B]ecause
7 procedural due process analysis essentially boils down to an ad hoc balancing inquiry, the
8 law regarding procedural due process claims can rarely be considered ‘clearly
9 established’ at least in the absence of closely corresponding factual and legal precedent.”
10 *Brewster*, 149 F.3d at 983. They claim that under existing precedent, a reasonable
11 official could find that Defendants’ conduct was lawful. According to Defendants, a
12 reasonable official could find that the conduct was lawful, given the Code of
13 Conduct/Discipline, the results of Dr. Sanchez’s investigation, and Plaintiff’s refusal to
14 cooperate during the 2011 corrective action discussions. A reasonable official could
15 believe Chancellor Lambert’s conduct was lawful, because, according to Defendants, he
16 was careful to get Plaintiff’s “take,” both in writing and in person, and to have someone
17 interview Plaintiff’s additional witnesses before reaching a final decision. And a
18 reasonable official could believe that Plaintiff’s contract expired in May 2014 under the
19 express terms of the contract and PCCCD policy, which did not provide for automatic
20 renewal. Even if that belief was mistaken, qualified immunity applies because the
21 mistake was reasonable. “Qualified immunity gives government officials breathing room
22 to make reasonable but mistaken judgments about open legal questions.” *Lane v. Franks*,
23 134 S. Ct. 2369, 2381 (2014).

24 Plaintiff argues that the individual Defendants have no qualified immunity because
25 a public employee’s rights to procedural due process were well established in 2013 and
26 2104.

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

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

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

10 **c. PCCCD liability**

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

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

1 of a direct order from a policymaking official, as in *Pembaur* where sheriff's deputies
2 referred the issue of entering the plaintiff's clinic to the County prosecutor, who
3 commanded the officers to forcibly enter the clinic, which caused the violation of the
4 Fourth Amendment. *Gillette*, 979 F.2d at 1346, citing *Pembaur v. City of Cincinnati*,
5 475 U.S. 469, 483 (1986). As the Court observed in *Pembaur*, a government frequently
6 chooses a course of action designed for a particular situation and not intended to dictate
7 decisions in later situations. 475 U.S. at 481. If such a decision is properly made by the
8 authorized decisionmaker, "it surely represents an act of official government 'policy' as
9 that term is commonly understood." *Id.*

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

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

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

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

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

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

10 This Count is against PCCCD, Gilliland and Albert.

11 **A. Parties’ Contentions**

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

- 21
- 22 (A) a bottle of uranyl acetate dihydrate;
 - 23 (B) a bottle of uranyl nitrate hexahydrate;
 - 24 (C) a radium spot source (a spot of radium paint on a small rubber
bumper); and
 - 25 (D) a bottle of blue no. 1 food color (also known as “Brilliant Blue
FCF”).

26 (FAC ¶21.)

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

1 Plaintiff that certain chemicals could not be released due to regulatory restrictions.
2 (DSOF 86, Ex. Q, 10/19/13 Police Report (PCC508–509); Ex. B, Katz depo., 261:9–
3 262:16; Ex. N, Albert Aff., ¶ 9.) On February 18, 2014, Plaintiff emailed a so-called
4 “theft report” to the College’s Acting Chief of Police, Chief Amado, regarding several
5 personal items that Plaintiff claimed to have stored in the chemistry lab at West Campus:
6 (a) one bottle of uranium acetate; (b) one bottle of uranium nitrate; (c) one radium point
7 source; and (d) seven jars of FD&C food colors. (DSOF 87, Ex. C, Personal Property
8 Emails (PCC552–558, 575– 579); Ex. B, Katz depo., 258:17–259:12.)

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

19 Defendants argue that Plaintiff presents no evidence that Dr. Gilliland or Dr.
20 Albert directly participated in seizing or taking any of plaintiff’s property and that there is
21 no *respondeat superior* liability under § 1983. *Palmer v. Sanderson*, 9 F.3d 1433, 1438
22 (9th Cir. 1993). Because neither of the individually-named defendants directly
23 participated in seizing or taking any of Plaintiff’s property, they are entitled to summary
24 judgment. Defendants also assert qualifiedly immune as to the seizure/taking claim.
25 Even if Dr. Gilliland and Dr. Albert had removed the property, a reasonable official could
26 believe there was a reasonable basis to do so, given the EHS Director’s opinion that the
27 radioactive materials were potentially dangerous and should be disposed of. (DSOF ¶90.)
28

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

9 B. Analysis

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

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

19 All Defendants are entitled to summary judgment on this Count.

20 VII. Breach of contract--failure to provide teaching contract for 2014—2015 21 (Count 6)

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

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

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

3 **A. Background**

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

8
9 A Faculty member shall be offered a new contract for the ensuing
10 academic or fiscal year unless he/she receives notice otherwise on or
before March 1.

11 (PSOF ¶ 5.)

12 Defendants argue that there is no evidence of a custom or practice of automatic
13 renewal. They also assert that Plaintiff's reliance on the quoted provision is misplaced
14 because the provision is "taken out of context" and that, in fact, when read as a whole the
15 policy "unambiguously rejected any possible expectation of automatic renewal, stating,
16 '[nothing in the policy statement, or in any group employee policy statement, creates an
17 express or implied contract or expectation of employment beyond any current contract
18 period.'" (Doc. 47 at 5.) They cite to *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287,
19 291, 246 P.3d 938, 942 (App. 2010) for the proposition that "each part of a contract must
20 be read together, to bring harmony, if possible, between all parts of the writing." (Doc.
21 47 at 5.) They contend that PCCCD had never previously renewed Plaintiff's contract
22 automatically; rather, he executed a separate written contract every year. Defendants
23 further assert that Plaintiff was ineligible for automatic renewal because he had notice
24 during the contract period that he was under investigation for serious misconduct.

25 **B. Discussion**

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

1 *Villas, LLC*, 232 Ariz. 92, 96, ¶ 16, 302 P.3d 617, 621 (2013). “For an enforceable
2 contract to exist, there must be an offer, an acceptance, consideration, and ... the parties
3 manifested assent or intent to be bound.” *Rogus v. Lords*, 166 Ariz. 600, 602, 804 P.2d
4 133, 135 (App. 1991). Plaintiff must establish the terms of the contract.

5 It is undisputed that Plaintiff signed a one-page employment contract for the 2013-
6 2014 academic year. It requires him to perform in accordance with “policies and
7 regulations imposed upon or adopted by the Board for the governing of the College
8 District ...” and later states it requires him to comply with “College faculty standards and
9 College personnel policy statements.” (Doc. 1-2 at 3.) The contract does not mention any
10 specific provisions of the Personnel Policy Statements and does not place an obligation
11 on PCCCD to abide by the Personnel Policy Statements on which Plaintiff relies.
12 Plaintiff’s first argument is somewhat unclear; he appears to assume that the Personnel
13 Policy Statements are a separate contract or are part of the one-page contract. Plaintiff
14 makes no showing that the Personnel Policy Statements were the subject of a separate
15 offer and acceptance or other elements of a contract or that they are incorporated by
16 reference into his employment contract. The Court declines to find that the Personnel
17 Policy Statements are incorporated by reference into the employment contract; the
18 contract references to standards and personnel policy statements are too vague to clearly
19 identify them as the Personnel Policy Statements on which Plaintiff relies.

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

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

28

1 Arizona at-will employment cases also offer guidance on the subject of the
2 significance of policy statements because at-will employment relationships are
3 contractual and such contracts may be modified by an employer’s conduct or words; that
4 is, an employee can show a contract term that is either expressed or inferred from the
5 words or conduct of the parties. *Demasse v. ITT Corp.*, 194 Ariz. 500, 505, 984 P.2d
6 1138, 1143 (1999); *Leikvold v. Valley View Comm. Hosp.*, 141 Ariz. 544, 548, 688 P.2d
7 170, 174. An implied-in-fact term is part of the contract and is enforceable. *Wagenseller*
8 *v. Scottsdale Mem. Hosp.*, 147 Ariz. 370, 381, 710 P.2d 1025, 1036 (citing 1 Arthur L.
9 Corbin, Corbin on Contracts § 17, at 38 (1960)). A term that offers the employee job
10 security, such as specifying the duration of employment or limiting the reasons for
11 dismissal—is an example of an implied-in-fact-term. *See id.*; *Leikvold*, 141 Ariz. at 548,
12 688 P.2d at 174.

13 Implied-in-fact terms may be found in an employer’s policy statements regarding
14 job security or employee disciplinary procedures, such as those contained in personnel
15 manuals or memoranda. *Roberson v. Wal-Mart Stores, Inc.* 202 Ariz. 286, 290, 44 P.3d
16 164, 169 (App. 2002), *see, e.g., Leikvold*, 141 Ariz. 544, 546, 688 P.2d 170, 172 (1984);
17 *Wagenseller*, 147 Ariz. at 382-83, 710 P.2d at 1037-38.

18 But not all employer policy statements create contractual promises. “A statement
19 is contractual only if it discloses ‘a promissory intent or [is] one that the employee could
20 reasonably conclude constituted a commitment by the employer.’ ” *Demasse*, 194 Ariz. at
21 505, ¶ 15, 984 P.2d at 1143. For example, “[a]n implied-in-fact contract term is formed
22 when ‘a reasonable person could conclude that both parties intended that the employer’s
23 (or the employee’s) right to terminate the employment relationship at-will had been
24 limited.’ ” *Id.* On the other hand, a disclaimer that clearly and conspicuously tells
25 employees that a personnel manual is not part of the employment contract and that their
26 jobs are terminable at will “instill[s] no reasonable expectations of job security and do[es]
27 not give employees any reason to rely on representations in the manual.” *Leikvold*, 141
28 Ariz. at 548, 688 P.2d at 174.

1 Whether an employer has implied-in-fact a promise of job security or certain
2 disciplinary procedures through its personnel manual or otherwise is a question of fact.
3 *Leikvold*, 141 Ariz. at 548, 688 P.2d at 174 (“Evidence relevant to this factual decision
4 includes the language used in the personnel manual as well as the employer's course of
5 conduct and oral representations regarding it.”); *see also Wagenseller*, 147 Ariz. at 383,
6 710 P.2d at 1038.

7 Plaintiff points to the Faculty Personnel Policy Statement providing that “[a]
8 Faculty member shall be offered a new contract for the ensuing academic or fiscal
9 year unless he/she receives notice otherwise on or before March 1.” He also cites
10 to his declaration where he asserts a custom and practice. (Doc. 46, Ex. 1, ¶19.)
11 Plaintiff’s declaration is devoid of fact; he does not even include facts about his
12 own personal experiences with offers of renewed contracts. But there is other
13 evidence in the record suggesting that such a custom or practice may exist. For
14 example, it is undisputed that on February 5, 2014, the Board met to consider the
15 “approval of regular faculty appointments for the 2015 fiscal year,” as listed in the
16 Meeting Agenda and Action Item 16.5; the list of recommended appointments included
17 340 faculty members. (Doc. 42-1, Ex. P, 2/5/14 Meeting Agenda (PCC528–537); Ex. P,
18 2/5/14 Action Item 16.5 (PCC538–42).) The “Action Item” from the PCCCD Board of
19 Governors states that the Chancellor recommends that the Board of Governors approve
20 the faculty regular appointments for Fiscal 2015. (*Id.* Ex. P (Doc. 42-1 at 592). The
21 Action Item, which is signed by Chancellor Lambert, further provides as “background”:

22
23 As stated in the 2023/2014 Faculty Personnel Policy Statement ‘a faculty
24 member shall be offered a new contract for the ensuing academic or
25 fiscal year unless he/she receives notice otherwise on or before March
1.’

26 Moreover, Lambert testified at his deposition that the above-quoted statement was, in
27 fact, the policy at the time. (Doc. 42-1, Ex. O, Lambert depo., 74:20–75:9.)
28

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

3
4 ‘Teacher Tenure: Odessa College has no tenure system. The Administration
5 of the College wishes the faculty member to feel that he has permanent
6 tenure as long as his teaching services are satisfactory and as long as he
7 displays a cooperative attitude toward his co-workers and his superiors, and
8 as long as he is happy in his work.’

9 408 U.S. at 600. They contrast this with the PCCCD Personnel Policy Statement
10 language that “[nothing in the policy statement, or in any group employee policy
11 statement, creates an express or implied contract or expectation of employment beyond
12 any current contract period.” Defendants argue that PCCCD’s policy “expressly
13 disavowed any expectation of continued employment.”¹⁰ And they argue that Plaintiff
14 did not satisfy *Perry*’s policy, even assuming it applied here, because he did not “display
15 a cooperative attitude.”

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

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

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

27 ¹⁰ Notably, Defendants offer nothing to explain why the recommended
28 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.

1 *Meritplan Ins. Co.*, 132 Ariz. 72, 75, 643 P.2d 1042, 1045 (App.1982); *see also LeBaron*
2 *v. Crismon*, 100 Ariz. 206, 209, 412 P.2d 705, 707 (1966). Thus, the meaning of a
3 contract must be determined by reading the instrument as a whole, and not by construing
4 different sections of the contract separately. *Technology Constr., Inc. v. City of Kingman*,
5 229 Ariz. 564, 568, 278 P.3d 906, 910 (Ct. App. 2012), citing *Daily Mines Co. v. Control*
6 *Mines, Inc.*, 59 Ariz. 138, 147, 124 P.2d 324, 328 (1942). A contract is to be interpreted
7 “in such a way as to reconcile and give meaning to all its terms, if reconciliation can be
8 accomplished by any reasonable interpretation.” *Technology Constr., Inc.*, 229 Ariz. at
9 568, 278 P.3d at 910, quoting *Gfeller v. Scottsdale Vista North Townhomes Assoc.*, 193
10 Ariz. 52, 54, ¶ 13, 969 P.2d 658, 660 (App.1998) (citing *Hamberlin v. Townsend*, 76
11 Ariz. 191, 196, 261 P.2d 1003, 1006 (1953)). In other words, an interpretation should not
12 render part of the contract meaningless. *Hamberlin*, 76 Ariz. at 196, 261 P.2d at 1006
13 (citing 17 C.J.S., Contracts, § 309 for the proposition that apparently conflicting
14 provisions must be reconciled, rather than nullify any, if reconciliation can be effected by
15 any reasonable interpretation). Furthermore, specific provisions of a contract qualify the
16 meaning of a general provision.” *Technical Equities Corp. v. Coachman Real Estate Inv.*
17 *Corp.*, 145 Ariz. 305, 306, 701 P.2d 13, 14 (App.1985); *see also Norman v. Recreation*
18 *Ctrs. of Sun City, Inc.*, 156 Ariz. 425, 428, 752 P.2d 514, 517 (App.1988).

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

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28

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

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

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

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

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26 ¹¹ This distinguishes *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 578
27 (1972), on which Defendant relies. In that case the court noted that the terms of the
28 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.

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

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

17 Finally, if there was a contract right to an offer of employment for the following
18 academic year, it must be determined if the contract right was breached. The question of
19 whether a contract has been breached is ordinarily a question for the jury. *Turner v. Alta*
20 *Mira Village Home owners Ass'n, Inc.*, 2014 WL 7344049 (Ct of Apps. Dec. 24, 2014),
21 citing *Matson v. Bradbury*, 40 Ariz. 140, 144, 10 P.2d 376, 378 (1932). Defendants
22 acknowledge that they did not offer Plaintiff an employment contract—only a return-to-
23 work agreement with conditions. But they contend that if Plaintiff had accepted the
24 conditions of his return to work, they would have offered him an employment contract
25 and this was Plaintiff's understanding as well. (See Doc. 42, Ex. B, Pl. dep., Sept. 17,
26 2015, 242:15-22.) There is no language in the policy requiring Defendants to offer the
27 same contract every year. The issue of breach must be decided by the jury.

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

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

2 **VIII. Fourteenth Amendment Due Process--Count 4**

3 Plaintiff claims that the March 12, 2014 rescission of approval to offer a contract
4 for the 2014-2015 school year (Count 4) was without due process. As previously noted,
5 procedural due process claim requires (1) a deprivation of a constitutionally protected
6 liberty or property interest, and (2) a denial of adequate procedural protections. *Brewster*,
7 149 F.3d 982.

8 Count Four is against the PCCCD and Chancellor Lambert.

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

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

25 ¹³ Therefore, as an initial matter, the success of this claim depends on whether
26 Plaintiff, in fact, had a right to be offered a contract for the 2014-2015 academic year—
27 that is, whether the PCCCD Policy and other facts created an implied contract term.
28 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

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

8 In addition, Defendants argue that the notices and meetings held between
9 September and December 2013 afforded the requisite due process regarding the
10 rescission of approval. This might be true if Defendants had, in fact, terminated Plaintiff
11 before March 1—a separate notice that he would not receive an offer of a contract for the
12 next year would not seem necessary. But on these facts, the Court is not persuaded.
13 First, the Court has found the notices inadequate as to the suspension issue. Second, as
14 previously noted, after the December meeting, Chancellor Lambert restored Plaintiff to
15 paid-leave status and continued the investigation. And Plaintiff was not terminated prior
16 to the March 1 deadline—he was not terminated at all. It is undisputed that Plaintiff did
17 not receive notice prior to March 1 that he would not be offered a new contract. The
18 record shows and the parties acknowledged at oral argument that there was no further
19 communication between the parties after the December 2013 memorandum from
20 Chancellor Lambert until July or August 2014. This action is inadequate to put Plaintiff
21 on notice that the approval would be rescinded and he would not be offered a new
22

23 process. *See e.g. Grand Canyon Pipelines, Inc. v. City of Tempe*, 168 Ariz. 590, 816
24 P.2d 247 (Ct. App. 1991) (a contractor was found to have no due process right to
25 adequate hearing when the City awarded a public contract to another because Arizona
26 statutes created no cognizable property interest to the award of a public works contract;
27 the statute is for the protection of the public). The Court has already held that there are
28 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.

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

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

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

11 Next, the Court must determine if a reasonable official in Chancellor Lambert’s
12 position “would understand that what he is doing violates that right.” *See Saucier*, 533
13 U.S. at 202. Qualified immunity protects government officials who make reasonable
14 mistakes in judgment; thus, officials are not liable for “mistakes in judgment, whether the
15 mistake is one of fact or one of law.” *Butz v. Economou*, 438 U.S. 478, 507 (1978); *see*
16 *also Dias v. Elique*, 436 F.3d 1125, 1131 (9th Cir. 2006), citing *Saucier*, 533 U.S. at 201.
17 In *Willis v. Mullins*, the California district court found that it could not determine whether
18 officers were entitled to qualified immunity regarding the search of the plaintiff’s motel
19 room where the plaintiff’s name was on a Parole Roster in error. 517 F.Supp.2d 1206,
20 1221 (E.D.Cal. Sept. 25, 2007). The officers had entered the room in the erroneous belief
21 that the plaintiff was subject to a condition of parole. (*Id.*) The court found insufficient
22 facts to determine whether reliance on the list was reasonable under the circumstances of
23 the case. (*Id.* at 1227.)

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

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28 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.

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

8
 9 As stated in the 2023/2014 Faculty Personnel Policy Statement ‘a faculty
 10 member shall be offered a new contract for the ensuing academic or
 11 fiscal year unless he/she receives notice otherwise on or before March
 12 1.’

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

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

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

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

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

7 Ariz. Rev. Stat. § 15-1444 A, B.

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

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28 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.

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

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

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

8 **IT IS ORDERED:**

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

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

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

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

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

17 (4) Defendant PCCCD is dismissed from Count 2.

18 (5) The remaining claims are as follows: Count 2 (damages), Counts 4, 6, and
19 7.

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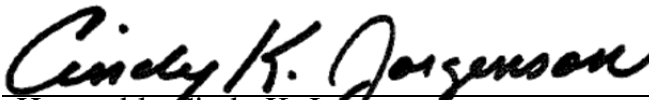
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(6) Pursuant to this Court’s Scheduling Order issued May 6, 2015 (Doc. 25), the parties are directed to file a Joint Proposed Pretrial Order (Pretrial Statement) within thirty (30) days.

Dated this 25th day of July, 2016.


Honorable Cindy K. Jorgenson
United States District Judge