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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

TIM NOLT, et al.,

CASE NO. CV F 05-1429 LJO SMS

Plaintiffs,

**SUMMARY JUDGMENT/ADJUDICATION  
DECISION**  
(Doc. 36.)

vs.

PETER MEHAS, et al,

Defendants.

**INTRODUCTION**

Defendant school administrators seek summary judgment/adjudication on plaintiff teachers’ 42  
U.S.C. § 1983 (“section 1983”) claims of retaliation for exercise of free speech and denial of due  
process. Defendant school administrators contend that plaintiff teachers lack evidence to support their  
claims and that defendant school administrators are protected by qualified immunity. Plaintiff teachers  
contend that triable issues exist whether defendant school administrators individually and jointly  
engaged in actions to chill plaintiff teachers’ First Amendment rights to address matters of public  
concern. This Court considered defendant school administrators’ summary judgment/adjudication  
motion on the record,<sup>1</sup> pursuant to Local Rule 78-230(h). For the reasons discussed below, this Court

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<sup>1</sup> This Court carefully reviewed and considered all arguments, points and authorities, declarations, depositions, exhibits, statements of undisputed facts and responses thereto, objections and other papers filed by the parties. Omission of reference to an argument, document, paper or objection is not to be construed to the effect that this Court did

1 GRANTS summary adjudication in part to the defendant school administrators.

2 **BACKGROUND**

3 **The Parties**

4 Plaintiffs Tim Nolt (“Mr. Nolt”), Tim Allison (“Mr. Allison”) and Chris Hudson (“Mr. Hudson”) are teachers with the Fresno County Office of Education’s (“FCOE’s”) court schools division (“court schools”) which provides instruction to minors in penal custody or institutionalized as court wards. Mr. Nolt, Mr. Allison and Mr. Hudson (collectively “plaintiffs”) are members of and have been active in their union, the Fresno County Office Schools Educators’ Association (“union”). Mr. Nolt, an FCOE teacher of 30 years, was union president for 13 years until May 2000. As union president, Mr. Nolt was called upon by the media, including the Fresno Bee, to comment on FCOE issues. Mr. Allison has been an FCOE teacher since 1989 and was union vice president for three years until May 2000. Mr. Hudson has been an FCOE employee since 1999 and was a union site representative at FCOE’s Violet Heinz Educational Academy (“Heinz Academy”)<sup>2</sup> during 2005-2007.

14 Mr. Nolt has filed 20 union grievances against FCOE since 1976. Mr. Allison has filed six union grievances against FCOE, and Mr. Hudson has filed three union grievances.

16 Defendant Peter G. Mehas (“Superintendent Mehas”) was FCOE superintendent during 1991-2006.<sup>3</sup> Mr. Nolt filed nine union grievances during Superintendent Mehas’ tenure. In 1998, Superintendent Mehas hired defendant Jan Biggs (“Mr. Biggs”) as an FCOE legal department administrative advisor. Mr. Biggs served in that position during 1999-2006.<sup>4</sup> Defendant Ken Campbell (“Mr. Campbell”) was the FCOE court schools director during 1998-2005 and had previously served as the court schools principal.<sup>5</sup> Mr. Campbell supervised plaintiffs.

22  
23 not consider the argument, document, paper or objection. This Court thoroughly reviewed and considered the evidence it deemed admissible, material and appropriate for summary judgment/adjudication.

24  
25 <sup>2</sup> The Heinz Academy is also known as the “boot camp.”

26 <sup>3</sup> Plaintiffs characterize Superintendent Mehas as “the employer of all of the other parties in this case” in that Superintendent Mehas had “sole authority to hire all staff, including staff administrators and teachers.”

27 <sup>4</sup> Mr. Biggs currently serves as senior administrator to the FCOE superintendent.

28 <sup>5</sup> Superintendent Mehas, Mr. Biggs and Mr. Campbell will be referred to collectively as “defendants.”

1 **Plaintiffs' Activities And Grievances**

2 To support their claims, plaintiffs point to a long history of their "First Amendment" activities  
3 and defendants' responses to such activities.

4 ***Mr. Nolt's Early Opposition Of Superintendent Mehas***

5 In 1989, Mr. Nolt, as union president, was involved in the union's decision to oppose  
6 Superintendent Mehas' initial election as FCOE Superintendent. The Fresno Bee quoted Mr. Nolt about  
7 the union's opposition to Superintendent Mehas.

8 According to Mr. Nolt, in 1993, he "became prominently involved in several public disputes  
9 involving FCOE." On January 22, 1993, the Fresno Bee quoted Mr. Nolt's criticism of Superintendent  
10 Mehas' "acceptance of a raise at the expense of teachers." Mr. Nolt was quoted that teachers believed  
11 FCOE board members were "out of touch" and that Superintendent Mehas "should never have accepted  
12 the raise."

13 Mr. Nolt's opposition to Superintendent Nolt's re-election was noted in several 1994 newspaper  
14 articles.

15 ***Mr. Biggs' Hiring***

16 In 1998, Mr. Nolt criticized Superintendent Mehas in Fresno Bee articles for hiring as "Advisor  
17 to the Superintendent," Mr. Biggs, a former partner of a Fresno law firm and a disbarred attorney who  
18 committed felony theft of firm and client funds. Plaintiffs characterize Superintendent Mehas and Mr.  
19 Biggs as friends and that Mr. Biggs "took over the supervision of the [FCOE] legal department" and  
20 became a member of Superintendent Mehas' "cabinet" of FCOE administrators which met every other  
21 week.

22 On September 25, 1998, Eli Setentich ("Mr. Setentich") wrote a Fresno Bee column which  
23 plaintiffs characterized as "lamprooning Mehas by quoting from essays written by Juvenile Hall inmates  
24 about Biggs being a convicted felon." Mr. Nolt had provided Mr. Setenich the student essays with  
25 student names redacted. Mr. Nolt had also provided information to a Los Angeles Times reporter for  
26 a September 8, 1998 Times article on Mr. Biggs' hiring.

27 Superintendent Mehas issued a December 1, 1998 letter of deficiencies-unprofessional  
28 conduct/unsatisfactory performance to Mr. Nolt based on Mr. Nolt's providing Mr. Setenich with

1 protected “pupil records” which were “clearly derogatory and demeaning to the students, the  
2 Superintendent, and Fresno County Office of Education.” The letter insisted that Mr. Nolt correct “these  
3 deficiencies immediately,” and was placed in Mr. Nolt’s personnel file.

4 ***Audit Of FCOE’s Daily Attendance***

5 In 1999, the Fresno Bee published several articles on an audit of FCOE’s compliance with  
6 requirements to collect state funds for education. One reported issue involved FCOE’s receipt of state  
7 money without providing requisite 240 minutes of daily instruction required by state law for students  
8 held in “B” unit. The Fresno Bee quoted Mr. Allison as being skeptical of FCOE’s claim of “losing  
9 money” on the “B” unit and lacking ability to pay teachers’ salaries.

10 ***Steven Natsues’ Hiring***

11 Plaintiffs note that on March 10, 1999, the Fresno Bee “ran a lengthy front page article about the  
12 decision to hire Steven Natsues [(“Mr. Natsues”)]– ‘a teacher with a troubled past.’” The Fresno Bee  
13 noted that Mr. Natsues had been forced to resign after he had been charged with sexual misconduct with  
14 students. Plaintiffs note that Superintendent Mehas and Mr. Natsues were friends and attended the same  
15 Greek Orthodox church. Mr. Nolt claims that he “became involved in the public discussion of the  
16 Natsues hiring decision at a union meeting where he was asked about union liability for Natsuses.”

17 In 1999, FCOE issued a letter of reprimand to Mr. Nolt and asserted that Mr. Nolt had made false  
18 and disparaging remarks concerning Mr. Natsues’ hiring and Superintendent Mehas. Mr. Nolt pursued  
19 a union grievance which culminated in a September 2000 California Public Employment Relations  
20 Board (“PERB”) decision that reprimand for Mr. Nolt’s alleged statement was unfounded and which  
21 noted Superintendent Mehas’ “evident hostility” against and “evident distaste” for Mr. Nolt to justify  
22 “an inference of unlawful motivation.”

23 ***Alienation Of Mr. Nolt And Mr. Allison***

24 Mr. Nolt and Mr. Allison claim that in late 1999, Mr. Biggs, with Superintendent Mehas and Mr.  
25 Campbell’s involvement, “began a campaign to use a report of sexual harassment to alienate Nolt and  
26 Allison’s fellow teachers from Nolt and Allison.” In 1999, Cecil Thomason (“Mr. Thomason”), a court  
27 schools teacher and union grievance representative, told Mr. Campbell that Mr. Thomason had received  
28 complaints from female teachers about offensive behavior, including “feigned oral and canine sex acts”

1 in the staff lounge. Mr. Thomason was concerned that female teachers would be offended and asked Mr.  
2 Campbell to distribute a memo to remind staff to act professionally. Mr. Nolt claims that the day  
3 following Mr. Thomason's discussion with Mr. Campbell, Mr. Campbell reprimanded Mr. Nolt for  
4 allegedly calling a female teachers aide a "pervert" five weeks previously.

5 Plaintiffs claim that Mr. Campbell and Mr. Biggs investigated the "oral and canine sex acts"  
6 matter but that no one was reprimanded or disciplined on the matter and no memo was distributed that  
7 employees act professionally in the staff lounge. Plaintiffs claim that Mr. Biggs "gave a number of talks  
8 before teachers" at FCOE facilities and told teachers that "one of your union representatives asked what  
9 are you going to do about the sexual activity in the staff lounge" and "the very next day other members  
10 of your union asked Ken Campbell specifically, 'what are you going to do Mr. Campbell about the  
11 canine and oral sex taking place in the lounge.'" Mr. Nolt and Mr. Allison assert that the "effect of the  
12 attention given to this matter was to undermine Nolt and Allison's relationship with a number of their  
13 fellow teachers."

#### 14 *FCOE Financial Transactions*

15 Mr. Nolt and Mr. Allison note that in 2000, they "learned that Mehas was giving away money  
16 received from the 'Forest Reserve Fund' to various charities, such as the Fresno Philharmonic,  
17 Metropolitan Museum, Tree Fresno, the local public broadcasting channel and Fresno State University."  
18 Mr. Nolt and Mr. Allison questioned FCOE's expenditure of Forest Reserve Fund monies and asserted  
19 these improper expenditures represented a potential teacher salary increase. Mr. Nolt and Mr. Allison  
20 contacted the Federal Bureau of Investigation ("FBI"), news media and a local taxpayer association to  
21 address these matters. Defendants note that Superintendent Mehas had discretion to disburse Forest  
22 Reserve Fund monies.

#### 23 *Mr. Nolt And Mr. Allison's Transfers*

24 Mr. Nolt and Mr. Allison noted that in May 2000, they resigned their union leadership positions  
25 and claim that in August 2000, they were involuntarily transferred from Fresno County Juvenile Hall  
26 ("Juvenile Hall") to new, separate locations and retaliated against for engaging in protected activities  
27 to result in their December 2000 union grievance. Mr. Nolt was transferred to Abby School, which "was  
28 less desirable because it was located in a high crime area, he lost his half-hour of preparation time and

1 lost the opportunity to teach an extension session, which lowered his income.” Mr. Allison was  
2 transferred to the Heinz Academy to require more than an additional hour of driving to bother ruptured  
3 disks in his back.

4 Ultimately, the PERB concluded that Mr. Nolt and Mr. Allison had “engaged in protected  
5 activities”<sup>6</sup> and that their transfers violated their union’s collective bargaining agreement (“CBA”) and  
6 were unlawfully motivated. PERB concluded that FCOE’s “continuous use of the overstated ‘oral and  
7 canine sex’ term, long after an objective analysis of its own investigation showed the seminal events had  
8 actually occurred, manifests an intent to treat Nolt and Allison in a manner differently than it treated  
9 other employees.”

#### 10 *New Teacher Disciplinary Procedures*

11 Plaintiffs claim that after Mr. Nolt and Mr. Allison resigned their union leadership positions, new  
12 union leadership agreed to a new CBA which gave teachers a pay raise but allowed Superintendent  
13 Mehas to suspend teachers up to 20 days without the benefit of “an independent fact-finder in cases  
14 involving suspensions without pay.” The new CBA provided for review by a disciplinary review panel  
15 comprising two members selected by the union, two members selected by the Superintendent, and one  
16 member selected by random drawing. According to plaintiffs, the disciplinary review panel was required  
17 “to accept the facts established by the Superintendent’s investigation were true, and to limit their  
18 determination to whether the penalty was appropriate in light of those facts.”

#### 19 *Mr. Nolt’s 2001 10-Day Suspension*

20 With his May 21, 2001 memorandum, Superintendent Mehas suspended Mr. Nolt for 10 days  
21 under the CBA on grounds that Mr. Nolt allegedly used force on a student and suggested to another  
22 student’s family that they talk to the Fresno Bee about the incident. In his declaration, Mr. Nolt states  
23 that the “alleged use of force” arose in 2001 when Mr. Nolt “intervened to prevent a 17 year old from  
24 sexually molesting a 12 year old girl.” Mr. Nolt declares that he saw the 17 year old male “draped over”  
25 the girl and reaching for her breast. Mr. Nolt further declares that when the male refused to leave, “he  
26 bumped into me and I took him by the shoulders and faced him toward the exit.”

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27 <sup>6</sup> The PERB identified protected activities as union leadership roles, grievances, unfair practice charges,  
28 Forest Reserve Fund confrontations with Superintendent Mehas, and opposition to FCOE negotiation proposals.

1 In his memorandum, Superintendent Mehas noted that the “male student and female student both  
2 denied your allegation of inappropriate touching.” The memorandum further noted: “In interviewing  
3 all students identified, including a student identified by you, we have been unable to corroborate your  
4 claim and have found no one who observed inappropriate touching.”

5 The disciplinary review panel upheld the 10-day suspension. Defendants note that Mr. Nolt and  
6 the union dismissed writ proceedings to challenge the suspension.

7 ***Mr. Natsues’ Theft***

8 Mr. Hudson claims that in approximately 2002, he discovered that Mr. Natsues turned in false  
9 time sheets. Mr. Hudson further claims that after his supervisor told him “nothing could be done,” Mr.  
10 Hudson continued to monitor Mr. Natsues’ time.

11 In 2003, plaintiffs reported to the Fresno County District Attorney’s Office (“D.A.’s Office”) and  
12 Fresno Bee as to what they characterized as Mr. Natsues’ embezzlement of FCOE monies by submitting  
13 false time sheets for time he did not work. Mr. Nolt claims that to assist the D.A.’s Office, he contacted  
14 a former aid to explain he wanted Mr. Natsues’ time sheet “to give to law enforcement about Natsues’  
15 stealing from the county, and had her fax him a copy of one of Natsues’ time sheets.” This information  
16 was furnished to the D.A.’s Office.

17 The Fresno Bee published a June 5, 2003 article on Mr. Natsues’ arrest for obtaining money  
18 under false pretenses. The Fresno Bee published a June 14, 2003 article to identify Mr. Allison as the  
19 “primary whistle blower” who went to the D.A.’s Office with allegations about Mr. Natsues based on  
20 Superintendent Mehas’ personal relationship with Mr. Natsues. Mr. Natsues resigned from FCOE.

21 Plaintiffs note that Mr. Biggs and Mr. Campbell “interrogated” them about their contacts with  
22 the D.A.’s Office and press. Plaintiffs claim that Mr. Biggs threatened and intimidated them regarding  
23 the Mr. Natsues’ matter and told Mr. Hudson that Mr. Hudson was “on thin ice” and Mr. Hudson’s job  
24 was in “jeopardy” if he did not turn over documents which he had given to the D.A.’s Office. Plaintiffs  
25 further claim that they were instructed not to speak with the media.

26 Mr. Campbell sent Mr. Hudson a June 18, 2003 letter, which Mr. Campbell characterizes as a  
27 reprimand. The letter criticizes Mr. Hudson for “insubordination, dishonesty; and your refusal to  
28 produce requested documentation obstructs the ability of the County Office to complete its investigation

1 and determine the appropriate restitution to seek from Mr. Natsues.” On July 22, 2003, the Fresno Bee  
2 reported that Mr. Natsues pled guilty to a felony and agreed to repay \$2,000 in overtime.

3 Mr. Campbell sent Mr. Nolt a December 18, 2003 memorandum of reprimand to criticize Mr.  
4 Nolt’s obtaining a confidential time sheet “for another employee” without abiding by FCOE policy and  
5 procedures. The employee from whom Mr. Nolt had received the time sheet also received a letter of  
6 reprimand.

7 *Hostile Work Environment*

8 Plaintiffs attribute Superintendent Mehas in August 2003 as telling a staff assembly that Fresno  
9 Bee articles about the Mr. Natsues’ matter resulted from those who were not happy in their jobs and who  
10 should have the “courage to leave their job,” and that if a person is unhappy in a job, that can be “like  
11 a cancer.” Plaintiffs further attribute Superintendent Mehas, at an August 2004 teacher assembly, as  
12 stating that he wanted to get “bitchers” “off the bus.” Mr. Allison and Mr. Hudson claim that the  
13 comments were directed to them.

14 Mr. Allison and Mr. Hudson claim that they “found themselves in a hostile work environment”  
15 after the start of the 2003-2004 school year. They further claim that their supervisor Constante Tacata  
16 (“Mr. Tacata”) ostracized them from routine professional interactions, including lunches and  
17 conferences. According to Mr. Allison and Mr. Hudson, they were not informed of courses to receive  
18 college credits and were given an inordinate number of students until they complained. Mr. Allison and  
19 Mr. Hudson point to Mr. Tacata’s criticism of their dress although it was no different than prior years.  
20 Mr. Allison and Mr. Hudson assert that they were not allowed to become leaders of FCOE’s Western  
21 Association of Schools and Colleges (“WASC”) credential team despite their superior experience.

22 In March 2004, Mr. Allison and Mr. Hudson began a grievance process of differential treatment  
23 and harassment. Mr. Allison and Mr. Hudson submitted a seven-page “point by point” outline of alleged  
24 differential treatment and harassment. Mr. Campbell denied the grievance. In April 2004, FCOE  
25 Deputy Superintendent of Educational Services Don Collins (“Deputy Superintendent Collins”) denied  
26 the grievance at its second level of review. Mr. Allison and Mr. Hudson proceeded to the third grievance  
27 level before Superintendent Mehas as hearing officer and Mr. Biggs as “acting” Superintendent. Mr.  
28 Allison and Mr. Hudson claim that since their grievances increased, Superintendent Mehas, Mr. Allison

1 and Mr. Hudson agreed for Mr. Allison and Mr. Hudson to restart the grievance process within 60 days  
2 with a complete list of grievances.

3 On July 23, 2004, within 60 days of the agreement to restart, Mr. Allison and Mr. Hudson gave  
4 their supervisor Mr. Tacata informal notification of their intent to restart their grievance. Mr. Allison  
5 and Mr. Hudson claim that when they restarted their grievance before Mr. Campbell, they “were told  
6 that they had not meet the 60 day deadline” and that Mr. Campbell would not meet with them. Mr.  
7 Allison and Mr. Hudson continued their grievance to Deputy Superintendent Collins and Superintendent  
8 Mehas, each of whom denied the grievance as untimely.

9 ***Mr. Nolt’s 15-Day Suspension For Improper Comments To Students***

10 The Fresno County Probation Department had received a complaint that Mr. Nolt had made  
11 sexually inappropriate comments to students in February 2004. With her May 4, 2004 letter, FCOE  
12 Human Resources Director Laurie Gabriel (“Ms. Gabriel”) informed Mr. Nolt that he had been placed  
13 on administrative leave with pay due to “inappropriate comments toward student(s) in your classroom.”  
14 Mr. Nolt claims that although Mr. Tacata’s initial investigation determined there was insufficient  
15 documentation to proceed, no further action was taken until May 2004 when Mr. Campbell decided to  
16 investigate. Ms. Gabriel assisted Mr. Campbell.

17 Superintendent Mehas issued a September 29, 2004 letter of reprimand for Mr. Nolt’s “immoral  
18 and unprofessional conduct toward students” and to find Mr. Nolt’s “actions grossly unprofessional.”  
19 The reprimand letter placed Mr. Nolt on a 15-day unpaid suspension to be reported to the California  
20 Commission on Teacher Credentialing (“CTC”) and advised Mr. Nolt that he had 10 days to respond  
21 in writing and could seek review by the disciplinary review panel.

22 In January 2006, CTC issued a letter of probable cause to recommend Mr. Nolt’s public reproof.

23 ***Handicap Placard***

24 Mr. Nolt has a handicap parking placard because he claims to suffer “neuropathy, psoriatic  
25 arthritis and osteoporosis and pustulent psoriasis.” Mr. Nolt claims that in spring 2006, FCOE security  
26 officers attempted to confiscate his placard and threatened him with arrest if he did not surrender the  
27 placard. Mr. Nolt claims that he learned that Glenn Harvey (“ Mr. Harvey”), a long-time friend of Mr.  
28 Biggs’ and FCOE employee, “bragged about how he worked with Biggs and Mehas to have Nolt arrested

1 for using a handicap placard.”

2 **Plaintiffs’ Claims**

3 On August 23, 2005, plaintiffs filed their action to allege section 1983 claims in Fresno County  
4 Superior Court. Six days later, on August 29, 2005, plaintiffs filed their first amended complaint. In  
5 November 2005, defendants removed the action to this Court. Recently, the magistrate judge permitted  
6 plaintiffs to supplement their first amended complaint to add a couple of alleged subsequent retaliatory  
7 acts. With their operative first supplemental complaint, filed July 24, 2007, plaintiffs allege 24  
8 retaliatory acts as follows:<sup>7</sup>

- 9 1. In 2000, Mr. Nolt and Mr. Allison were involuntarily transferred from Juvenile Hall to  
10 “substantially worse job locations”;
- 11 2. Mr. Nolt and Mr. Allison were not returned to Juvenile Hall until August 22, 2005 after  
12 a PERB final decision that the transfers were wrongful;
- 13 3. In spring 2000, Mr. Biggs defamed Mr. Nolt and Mr. Allison before FCOE staff on two  
14 separate occasions and accused them of spreading lies and rumors;
- 15 4. In May or June 2003, Superintendent Mehas provided the Fresno Bee information to  
16 reference plaintiffs as “liars” in connection to the Mr. Natsues’ matter;
- 17 5. In August 2003, Superintendent Mehas, referring to plaintiffs, told FCOE staff that  
18 employees responsible for a critical Fresno Bee article were “a cancer at FCOE” and not  
19 team players;
- 20 6. In December 2003, Mr. Nolt received a letter of reprimand from Mr. Campbell to accuse  
21 Mr. Nolt of poor judgment in connection with the Mr. Natsues’ matter;
- 22 7. In 2004, defendants conspired to conduct a biased investigation of Mr. Nolt to culminate  
23 in a September 2004 letter of reprimand and 15-day suspension. Mr. Nolt was denied  
24 due process in that he was not given an opportunity to present his case to an impartial  
25 fact finder/adjudicator;
- 26 8. In 2004, FCOE changed grievance procedures to increase difficulty for Mr. Allison and

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27 <sup>7</sup> This Court summarizes the alleged retaliatory acts in the order in which they appear in plaintiffs’ first  
28 supplemental complaint.

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Mr. Hudson's grievances;

9. On August 27, 2004, Superintendent Mehas, referring to plaintiffs, told FCOE staff that "we need to get all of the bitchers and moaners off the bus";
10. In June 2004, Mr. Allison's supervisor unfairly criticized Mr. Allison's dress;
11. In April 2004, Mr. Allison's supervisor singled Mr. Allison out for not attending a meeting;
12. During 2003-2005, Mr. Allison and Mr. Hudson were excluded from staff lunches;
13. In 2004, Mr. Allison and Mr. Hudson were not informed of conferences to satisfy continuing education requirements to result in lost expenses of several thousand dollars and time to make up continuing education requirements;
14. In May 2004, Mr. Allison's supervisor began to monitor when time Mr. Allison left his classroom;
15. In June 2004, Mr. Allison and Mr. Hudson were denied leadership positions on the WASC focus group;
16. In June 2004, Mr. Allison and Mr. Hudson were not offered professional development science training in which less senior teachers participated;
17. In June 2004, Mr. Allison and Mr. Hudson were denied a conference and training offered to all other teachers at their work site;
18. During 2004, all teachers, except Mr. Allison and Mr. Hudson, received a daily five-minute break;
19. In 2004, Mr. Allison and Mr. Hudson were not told about supervisory vacancy to deny them career advancement and salary;
20. In May and June 2004, Mr. Allison and Mr. Hudson were not contacted to cover an absent teacher's class to deny them additional salary;
21. During his 2000-2005 transfer away from Juvenile Hall, Mr. Allison lost regularly scheduled overtime;
22. Superintendent Mehas and Mr. Biggs established a policy to refer to Mr. Biggs all personnel matters concerning Mr. Nolt and Mr. Allison;

1 23. CTC publicly reprovved Mr. Nolt based in part on his 15-day suspension in 2004; and

2 24. In spring 2006, FCOE security officers, at Superintendent Mehas or Mr. Biggs' behest,  
3 confronted Mr. Nolt for parking in a handicap space although Mr. Nolt has a handicap  
4 parking card.

5 With their first supplemental complaint, plaintiffs allege a (first) section 1983 cause of action  
6 for retaliation in that defendants conspired to retaliate against plaintiffs for exercising First and  
7 Fourteenth Amendment rights. The (first) retaliation cause of action points to: (1) Mr. Nolt and Mr.  
8 Allison's 1999 Fresno Bee contact to report FCOE and Superintendent Mehas' use of Forest Reserve  
9 Fund monies, (2) Mr. Nolt and Mr. Allison's institution of 1999 and 2000 PERB proceedings to address  
10 their grievances; and (3) plaintiffs' advising the D.A.'s Office and Fresno Bee in 2003 of Mr. Natsues'  
11 embezzlement of FCOE funds. The (first) retaliation cause of action further alleges that the "retaliation  
12 consists of a pattern and practice which in its totality is intended to deter plaintiffs from engaging in  
13 further protected activities and to materially and adversely alter the terms, privileges and conditions of  
14 their employment." Plaintiffs allege damages of lost wages and benefits and emotional distress.

15 The first supplemental complaint alleges a (second) section 1983 cause of action of denial of due  
16 process that Mr. Nolt had a constitutionally protected interest in his FCOE employment benefits and was  
17 denied due process in that Superintendent Mehas as the 2004 hearing decision maker was not impartial  
18 because of his personal animus against Mr. Nolt.<sup>8</sup> The (second) due process cause of action further  
19 alleges that Superintendent Mehas retaliated against Mr. Nolt for Mr. Nolt's whistle blowing activities  
20 and participation in a PERB hearing which resulted in describing Superintendent Mehas as "biased" and  
21 "not credible."

## 22 DISCUSSION

### 23 Summary Judgment/Adjudication Standards

24 F.R.Civ.P. 56(b) permits a party against whom a claim is asserted to seek "summary judgment  
25 in the party's favor upon all or any part thereof." Summary judgment/adjudication is appropriate when  
26 there exists no genuine issue as to any material fact and the moving party is entitled to

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27 <sup>8</sup>  
28 The chief focus of the (second) due process cause of action is Mr. Nolt's claim alone against only Superintendent Mehas.

1 judgment/adjudication as a matter of law. F.R.Civ.P. 56(e); *Matsushita Elec. Indus. v. Zenith Radio*  
2 *Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec.*  
3 *Contractors Ass'n*, 809 F.2d 626, 630 (9<sup>th</sup> Cir. 1987). The purpose of summary judgment/adjudication  
4 is to “pierce the pleadings and assess the proof in order to see whether there is a genuine need for trial.”  
5 *Matsushita Elec.*, 475 U.S. at 586, n. 11, 106 S.Ct. 1348; *International Union of Bricklayers v. Martin*  
6 *Jaska, Inc.*, 752 F.2d 1401, 1405 (9<sup>th</sup> Cir. 1985).

7 On summary judgment/adjudication, a court must decide whether there is a “genuine issue as to  
8 any material fact,” not weigh the evidence or determine the truth of contested matters. F.R.Civ.P. 56(c);  
9 *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9<sup>th</sup> Cir. 1997); see *Adickes v. S.H. Kress*  
10 *& Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598 (1970); *Poller v. Columbia Broadcast System*, 368 U.S. 464,  
11 467, 82 S.Ct. 486 (1962); *Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1313 (9<sup>th</sup>  
12 Cir. 1984). The evidence of the party opposing summary judgment/adjudication is to be believed and  
13 all reasonable inferences that may be drawn from the facts before the court must be drawn in favor of  
14 the opposing party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986);  
15 *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348. The inquiry is “whether the evidence presents a sufficient  
16 disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as  
17 a matter of law.” *Anderson*, 477 U.S. at 251-252, 106 S.Ct. 2505.

18 To carry its burden of production on summary judgment/adjudication, a moving party “must  
19 either produce evidence negating an essential element of the nonmoving party’s claim or defense or  
20 show that the nonmoving party does not have enough evidence of an essential element to carry its  
21 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210  
22 F.3d 1099, 1102 (9<sup>th</sup> Cir. 2000); see *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d  
23 563, 574 (9<sup>th</sup> Cir. 1990). “[T]o carry its ultimate burden of persuasion on the motion, the moving party  
24 must persuade the court that there is no genuine issue of material fact.” *Nissan Fire*, 210 F.3d at 1102;  
25 see *High Tech Gays*, 895 F.2d at 574. “As to materiality, the substantive law will identify which facts  
26 are material. Only disputes over facts that might affect the outcome of the suit under the governing law  
27 will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

28 “If a moving party fails to carry its initial burden of production, the nonmoving party has no

1 obligation to produce anything, even if the nonmoving party would have the ultimate burden of  
2 persuasion at trial.” *Nissan Fire*, 210 F.3d at 1102-1103; *See Adickes*, 398 U.S. at 160, 90 S.Ct. 1598.  
3 “If, however, a moving party carries its burden of production, the nonmoving party must produce  
4 evidence to support its claim or defense.” *Nissan Fire*, 210 F.3d at 1103; *see High Tech Gays*, 895 F.2d  
5 at 574. “If the nonmoving party fails to produce enough evidence to create a genuine issue of material  
6 fact, the moving party wins the motion for summary judgment.” *Nissan Fire*, 210 F.3d at 1103; *see*  
7 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986) (“Rule 56(c) mandates the entry of  
8 summary judgment, after adequate time for discovery and upon motion, against a party who fails to make  
9 the showing sufficient to establish the existence of an element essential to that party’s case, and on  
10 which that party will bear the burden of proof at trial.”) “But if the nonmoving party produces enough  
11 evidence to create a genuine issue of material fact, the nonmoving party defeats the motion.” *Nissan*  
12 *Fire*, 210 F.3d at 1103; *see Celotex*, 477 U.S. at 322, 106 S.Ct. 2548. “The amount of evidence  
13 necessary to raise a genuine issue of material fact is enough ‘to require a jury or judge to resolve the  
14 parties’ differing versions of the truth at trial.” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (quoting  
15 *First Nat’l Bank v. Cities Service Co.*, 391 U.S. 253, 288-289, 88 S.Ct. 1575, 1592 (1968)). “The mere  
16 existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient.” *Anderson*,  
17 477 U.S. at 252, 106 S.Ct. 2505.

18 Under F.R.Civ.P. 56(c), a summary judgment/adjudication motion, interlocutory in character,  
19 may be rendered on the issue of liability alone. “In cases that involve . . . multiple causes of action,  
20 summary judgment may be proper as to some causes of action but not as to others, or as to some issues  
21 but not as to others, or as to some parties, but not as to others.” *Barker v. Norman*, 651 F.2d 1107, 1123  
22 (5<sup>th</sup> Cir. 1981); *see also Robi v. Five Platters, Inc.*, 918 F.2d 1439 (9<sup>th</sup> Cir. 1990); *Cheng v.*  
23 *Commissioner Internal Revenue Service*, 878 F.2d 306, 309 (9<sup>th</sup> Cir. 1989). A court “may grant  
24 summary adjudication as to specific issues if it will narrow the issues for trial.” *First Nat’l Ins. Co. v.*  
25 *F.D.I.C.*, 977 F.Supp. 1051, 1055 (S.D. Cal. 1977).

26 \_\_\_\_\_ As discussed below, plaintiffs have failed to support their (first) retaliation cause of action to  
27 entitle defendants to summary adjudication in their favor on plaintiffs’ retaliation claims, some of which  
28 are time barred. Mr. Nolt has raised sufficient factual issues as to his (second) due process cause of

1 action against Superintendent Mehas but fails to support his due process claims against Mr. Biggs and  
2 Mr. Campbell, who are entitled to summary adjudication on Mr. Nolt's due process claims.

3 **Limitations Period Defense**

4 Defendants contend that plaintiffs pursue discrete retaliatory acts which are time barred.

5 Federal civil rights statutes have no independent limitations period. *Johnson v. State of*  
6 *California*, 207 F.3d 650, 653 (9<sup>th</sup> Cir. 2000); *Abreu . Ramirez*, 284 F.Supp.2d 1250, 1257 (C.D. Cal.  
7 2003). The applicable limitations period is determined by borrowing the forum state's limitations period  
8 for personal injuries. *Johnson*, 207 F.3d at 653; *Abreu*, 284 F.Supp.2d at 1257.

9 Federal law determines when a civil rights claim accrues. *Johnson*, 207 F.3d at 653; *Elliot v.*  
10 *City of Union City*, 25 F.3d 800, 801-802 (9<sup>th</sup> Cir. 1994); *Abreu*, 284 F.Supp.2d at 1257. Under federal  
11 law, a claim accrues when the plaintiff knows, or should have known, of the factual basis underlying  
12 his/her cause of action. *Johnson*, 207 F.3d at 653; *Abreu*, 284 F.Supp.2d at 1257.

13 On January 1, 2003, California Code of Civil Procedure section 335.1 ("section 335.1")<sup>9</sup> took  
14 effect to extend the prior limitations period for personal injury actions (and correspondingly to federal  
15 civil rights claims, see *Wilson v. Garcia*, 471 U.S. 261, 271-272, 105 S.Ct. 1938 (1985); *Johnson v.*  
16 *Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716 (1975); *Krug v. Imbrodino*, 896 F.2d 395,  
17 396-397 (9<sup>th</sup> Cir. 1990)) from one year under former California Code of Civil Procedure section 340(3)  
18 ("section 340(3)") to two years. *Abreu*, 284 F.Supp.2d at 1255; see Cal. Senate Bill 688 (Burton), Stats.  
19 2002, ch. 448, §3.

20 "A new statute that enlarges a statutory limitations period applies to actions that are not already  
21 barred by the original limitations period at the time the new statute goes into effect." *Andonagui v. May*  
22 *Department Stores Company*, 128 Cal.App.4th 435, 440, 27 Cal.Rptr.3d 145, 149 (2005) (citing  
23 *Douglas Aircraft Co. v. Cranston*, 58 Cal.2d 462, 465, 24 Cal.Rptr. 851 (1962)); *Mudd v. McColgan*,  
24 30 Cal.2d 463, 468, 183 P.2d 10 (1947); *Thompson v. City of Shasta Lake*, 314 F.Supp.2d 1017, 1024  
25 (E.D. Cal. 2004).

26 Defendants contend that plaintiffs' claims arising more than two years prior to the August 23,

27 \_\_\_\_\_  
28 <sup>9</sup> Section 335.1 provides: "Within two years: An action for assault, battery, or injury to, or for the death of,  
an individual caused by the wrongful act or neglect of another."

1 2005 filing of plaintiffs' original complaint are time barred. Defendants argue that "any cause of action  
2 that was more than one-year old as of January 1, 2003, would be barred under the previous one-year  
3 statute of limitations." Plaintiffs appear to agree with defendants that "the relevant statute of limitations  
4 for discrete acts of retaliation is two years prior to the filing of the complaint in this case." Plaintiffs  
5 argue that retaliatory acts continued during the period two years prior to the filing of plaintiffs'  
6 complaint.

7 Defendants contend that the following alleged retaliatory acts are time barred:

- 8 1. Mr. Nolt and Mr. Allison's transfer from Juvenile Hall in 2000;
- 9 2. Mr. Biggs' spring 2000 defamation of Mr. Nolt and Mr. Allison and accusal that they  
10 spread lies and rumors;
- 11 3. Superintendent Mehas' providing the Fresno Bee information to reference plaintiffs as  
12 liars in May or June 2003; and
- 13 4. Superintendent Mehas' August 18, 2003 statements referring to plaintiffs and told to  
14 FCOE staff that employees responsible for a critical Fresno Bee article were a "cancer"  
15 and not team players.

16 Defendants are correct. Clearly, the section 340(3) and 335.1 limitations periods apply to  
17 retaliatory acts alleged by plaintiffs. Section 335.1 does not revive claims barred under section 340(3)  
18 as of January 1, 2003. As such, plaintiffs' claims which had accrued no later than January 1, 2002 are  
19 time barred. Plaintiffs' claims which accrued after January 1, 2002 are entitled to section 335.1's two-  
20 year limitations period. Based on the August 23, 2005 filing of plaintiffs' original complaint, plaintiffs'  
21 only timely claims are those which accrued no later than August 23, 2003. Stated another way, only  
22 plaintiffs' claim arising after August 23, 2003 survive.

### 23 *Continuing Violation*

24 Defendants argue that their alleged "continuous pattern and practice of retaliation" does not  
25 revive plaintiffs' time barred claims in that a "practice" of retaliation does not convert related discrete  
26 acts into a single unlawful practice to timely file a complaint. Defendants contend that each adverse  
27 employment action constituted a separate unlawful employment practice or discrete act to start its own  
28 limitations period.



1 Just as state law determines the applicable limitations period, state law also determines the  
2 applicability of tolling doctrines in civil rights actions when applicability is not inconsistent with federal  
3 law. *Hardin v. Straub*, 490 U.S. 536, 109 S.Ct. 1998 (1989); *Johnson*, 207 F.3d at 653; *Abreu*, 284  
4 F.Supp.2d at 1257. The doctrine of equitable tolling requires: (1) timely notice to the defendant of filing  
5 the first claim; (2) lack of prejudice to the defendant to defend against the second claim; and (3) the  
6 plaintiff's good faith and reasonable conduct to file the second claim. *Addison v. State of California*,  
7 21 Cal.3d 313, 319, 146 Cal.Rptr. 224, 227 (1978).

8 Defendants argue that the first equitable tolling prong is not met due to lack of notice to  
9 defendants, who were not parties to the underlying PERB proceedings. Defendants note that the PERB  
10 proceedings addressed union unfair labor practice charges that FCOE violated the CBA by transferring  
11 Mr. Nolt and Mr. Allison in 2000 from Juvenile Hall to Abby School and Heintz Academy to retaliate  
12 for their protected union activities. Defendants contend that the PERB proceedings did not put them on  
13 notice that they might be sued personally in a civil rights action in that the union pursued charges against  
14 FCOE.

15 Turning to equitable tolling's prejudice prong, defendants argue that they did not defend against  
16 civil rights claims in connection with unfair labor practice charges against FCOE. Defendants note that  
17 they lacked personal liability in the PERB proceedings and were not represented by counsel. Defendants  
18 argue that section 1983 and state unfair labor claims are separate and independent to prevent tolling of  
19 limitations period for section 1983 claims.

20 As to equitable tolling's reasonable and good-faith conduct prong, defendants question plaintiffs'  
21 delay to 2005 to complain of adverse action arising years earlier. Defendants claim that plaintiffs "saved  
22 up" their complaints and waited to see if they prevailed in the PERB proceedings.

23 Plaintiffs do not appear to assert tolling to save claims of pre-August 23, 2003 retaliatory acts.  
24 As such, tolling does not revive time-barred retaliation claims.

25 In light of the above, defendants are entitled to summary adjudication that plaintiffs' retaliation  
26 claims accruing prior to August 23, 2003 are time barred and including:

- 27 1. Mr. Nolt and Mr. Allison's transfer from Juvenile Hall in 2000;
- 28 2. Mr. Biggs' spring 2000 defamation of Mr. Nolt and Mr. Allison and accusal that they

1 spread lies and rumors;

2 3. Superintendent Mehas' providing the Fresno Bee information to reference plaintiffs as  
3 liars in May or June 2003; and

4 4. Superintendent Mehas' August 18, 2003 statements referring to plaintiffs and told to  
5 FCOE staff that employees responsible for a critical Fresno Bee article were a "cancer"  
6 and not team players.

7 **Section 1983 Liability – Retaliation For Free Speech**

8 As the parties note, to establish a section 1983 First Amendment retaliation claim, a plaintiff  
9 employee must demonstrate that: (1) he/she engaged in protected speech; (2) the employer took adverse  
10 employment action against the plaintiff employee; and (3) the plaintiff employee's speech was a  
11 "substantial or motivating" factor for the adverse employment action. *Coszalter v. City of Salem*, 320  
12 F.3d 968, 973 (9<sup>th</sup> Cir. 2003). "A government entity has broader discretion to restrict speech when it acts  
13 in its role as employer, but the restrictions it imposes must be directed at speech that has some potential  
14 to affect the entity's operations." *Garcetti v. Ceballos*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 1951, 1958 (2006).

15 Based on United States Supreme Court reasoning,<sup>10</sup> courts apply a multi-step analysis to address  
16 infringement of a public employee's First Amendment free speech. The first is a legal issue whether the  
17 plaintiff's speech is constitutionally protected. *Knapp v. Whitaker*, 757 F.2d 827, 845 (6<sup>th</sup> Cir. 1985);  
18 *see Pickering*, 391 U.S. at 569-572, 88 S.Ct. 1731. A "court first considers whether the employee's  
19 speech is of public concern." *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 923 (9<sup>th</sup> Cir. 2004);  
20 *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 994 (9<sup>th</sup> Cir. 1999). "The First Amendment's guarantee of  
21 freedom of speech protects government employees from termination *because of* their speech on matters  
22 of public concern." *Umbehr*, 516 U.S. at 675, 116 S.Ct. 2342 (italics in original); *see Connick*, 461 U.S.  
23 at 146, 103 S.Ct. 1684 (speech on merely private employment matters is unprotected); *see also Callaway*  
24 *v. Hafeman*, 832 F.2d 414, 417 (7<sup>th</sup> Cir. 1987) ("the Connick test' requires us to look at the point of the  
25 speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of  
26 public concern, because they are of public concern? Or was the point to further some purely private

27 \_\_\_\_\_  
28 <sup>10</sup> *See Pickering v. Board of Ed.*, 391 U.S. 563, 88 S.Ct. 1731 (1968); *Mt. Healthy City Board of Ed. v. Doyle*,  
429 U.S. 274, 97 S.Ct. 568 (1977); *Connick v. Myers*, 461 U.S. 138, 148, n. 7, 103 S.Ct. 1684 (1983)

1 interest?” (quoting *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir.1985)); cf. *Rode v. Dellarciprete*,  
2 845 F.2d 1195, 1202 (3<sup>rd</sup> Cir. 1988) (holding that speaker's “personal stake” in a controversy does not  
3 prevent speech on the issue from involving a matter of public concern).

4 If the plaintiff’s speech is constitutionally protected, inquiry turns to whether government  
5 officials took adverse action against the plaintiff and to a factual issue “whether the constitutionally  
6 protected speech was a substantial or motivating factor in the defendant’s actions.” *Knapp*, 757 F.2d  
7 at 845; see *Umbehr*, 516 U.S. at 675, 116 S.Ct. 2342; *Alpha Energy Savers*, 381 F.3d at 923.

8 If the plaintiff meets his/her burden, “the government officials (and the government itself) can  
9 nonetheless escape liability if they demonstrate either that: (a) under the balancing test established by  
10 *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731, legitimate administrative interests in promoting efficient  
11 service-delivery and avoiding workplace disruption outweigh the [plaintiff’s] free speech interests; or  
12 (b) under the mixed motives analysis established by *Mt. Healthy City School Dist. Bd. of Education v.*  
13 *Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568 (1977), they would have taken the same actions in the absence  
14 of the [plaintiff’s] expressive conduct.” *Alpha Energy Savers*, 381 F.3d at 923. The “government can  
15 escape liability by showing that it would have taken the same action even in the absence of the protected  
16 conduct. . . . And even termination because of protected speech may be justified when legitimate  
17 countervailing government interests are sufficiently strong.” *Umbehr*, 516 U.S. at 675, 116 S.Ct. 2342.  
18 If the protected speech was a substantial or motivating factor, inquiry proceeds to the next factual issue  
19 “whether the defendant defeated the plaintiff’s claim by demonstrating that he would have reached the  
20 same decision in the absence of plaintiff’s constitutionally protected speech.” *Knapp*, 757 F.2d at 845;  
21 see, e.g., *McKinley v. City of Elroy*, 705 F.2d 1110, 1115 (9<sup>th</sup> Cir. 1983).

### 22 ***Protected Speech – Matter Of Public Concern***

23 Inquiry whether expressive conduct addresses a matter of public concern “is a question of law”  
24 and is made in light of “the content, form, and context” of the expressive conduct “as revealed by the  
25 whole record.” *Connick*, 461 U.S. at 147-148, 103 S.Ct. 1684. “Speech that concerns issues about  
26 which information is needed or appropriate to enable the members of society to make informed decisions  
27 about the operation of their government merits the highest degree of first amendment protection.”  
28 *Coszalter*, 320 F.3d at 973 (internal quotations and citations omitted). “[P]ublic concern is something

1 that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern  
2 to the public at the time of publication.” *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 83-84, 125 S.Ct.  
3 521, 525-226 (2004).

4 However, “speech that deals with individual personnel disputes and grievances and that would  
5 be of no relevance to the public’s evaluation of the performance of government agencies, is generally  
6 not of public concern.” *Coszalter*, 320 F.3d at 973. The United States Supreme Court has held that  
7 “when a public employee speaks not as a citizen upon matters of public concern, but instead as an  
8 employee upon matters only of personal interest, absent the most unusual circumstances, a federal court  
9 is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public  
10 agency allegedly in reaction to the employee’s behavior.” *Connick*, 461 U.S. at 147, 103 S.Ct. 1684.

11 The Ninth Circuit Court of Appeals has held “that when government employees speak about  
12 corruption, wrongdoing, misconduct, wastefulness, or inefficiency by other government employees, .  
13 . . their speech is inherently a matter of public concern.” *Ceballos v. Garcetti*, 361 F.3d 1168, 1174 (9<sup>th</sup>  
14 Cir. 2004), *cert. denied*, 2005 WL 443869 (2005). The Ninth Circuit further explained:

15 That rule applies to invidious discrimination as well – whether it consists of a single act  
16 or a pattern of conduct. Disputes over racial, religious, or other such discrimination by  
17 public officials are not simply individual personnel matters. They involve the type of  
18 governmental conduct that affects the societal interest as a whole – conduct in which the  
19 public has a deep and abiding interest. Litigation seeking to expose such wrongful  
20 governmental activity is, by its very nature, a matter of public concern.

21 *Alpha Energy*, 381 F.3d at 926-927.

22 Defendants question whether plaintiffs’ activities at issue here are entitled to constitutional  
23 protection. Defendants argue that plaintiffs’ union grievances addressed personal matters, not issues of  
24 public concern subject to constitutional protection. Defendants contend that plaintiffs’ “union activities”  
25 were not in their capacities as union officials or representatives. Defendants note that Mr. Nolt and Mr.  
26 Allison have not held union offices since 2000 and that Mr. Hudson served merely as a union site  
27 representative. Defendants point out that Mr. Nolt has filed nine union grievances during Superintendent  
28 Mehas’ tenure and that Mr. Allison and Mr. Hudson have filed six and three grievances respectively.  
Defendants characterize all of plaintiffs’ grievances during Superintendent Mehas’ tenure to address  
“employment issues directly affecting [plaintiffs’] personal interests.” Defendants continue that “the

1 media does not cloak” Mr. Nolt’s conduct with First Amendment protection.

2 Mr. Nolt claims that he “was involved in sustained continuous First Amendment protected  
3 activities over a fifteen year period.” Mr. Nolt points to his opposition to Superintendent Mehas’  
4 elections and pay raise, contacts with the media about Mr. Biggs’ hiring, comments to union members  
5 about Mr. Natsues’ hiring, contacts with the FBI about Forest Reserve Fund expenditures, contacts with  
6 the D.A.’s Office about Mr. Natsues’ theft, and comments about “sexual harassment” in the staff lounge.  
7 Mr. Nolt contends that his “activities were intended to protect the interests of employees and taxpayers”  
8 and achieved favorable results, including dismissal of Mr. Natsues.

9 Undoubtedly, Mr. Nolt points to his activities addressing public concerns which generated news  
10 interest at his behest. Most of the activities upon which he relies arose prior to 2001, during his active  
11 union leadership days. In viewing the evidence most favorably to Mr. Nolt, this Court concludes that  
12 Mr. Nolt engaged in First Amendment protected activities.

13 Like Mr. Nolt, Mr. Allison and Mr. Hudson claim that they engaged in protected First  
14 Amendment activities. Mr. Allison points to his 1999 Fresno Bee quotes that he was skeptical that  
15 FCOE lost money on the “B” unit and lacked ability to pay teachers’ salaries, 2000 contacts with the FBI  
16 and news media about Forest Reserve Fund expenditures, and identification as the “whistle blower” of  
17 Mr. Natsues’ theft. Mr. Hudson points to his D.A.’s Office and Fresno Bee contacts regarding Mr.  
18 Natsues’ theft and his seven-page “point by point” outline of alleged differential treatment and  
19 harassment of him and Mr. Allison.

20 Mr. Allison and Mr. Hudson identify limited protected speech about FCOE matters and Mr.  
21 Natsues’ theft. However, their seven-page outline of differential treatment and harassment addresses  
22 their specific job treatment and not personnel matters of others to remove it from protected status.  
23 “[T]he type of personnel matters that we have deemed unprotected under the public concern test are  
24 employment grievances in which the employee is complaining about her *own* job treatment, not  
25 personnel matters pertaining to others.” *Thomas v. City of Beaverton*, 379 F.3d 802, 808 (9<sup>th</sup> Cir. 2004)  
26 (italics in original).

27 ***Adverse Employment Action***

28 The Ninth Circuit has explained that “[w]hen a government employee exercises his protected

1 right of free expression, the government cannot use the employment relationship as a means to retaliate  
2 for that expression”:

3           The precise nature of the retaliation is not critical to the inquiry in First  
4 Amendment retaliation cases. The goal is to prevent, or redress, actions by a government  
5 employer that “chill the exercise of protected” First Amendment rights. *See Rutan v.*  
6 *Republican Party*, 497 U.S. 62, 73, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) (protection  
7 of political belief and association under the First Amendment). Various kinds of  
8 employment actions may have an impermissible chilling effect. Depending on the  
9 circumstances, even minor acts of retaliation can infringe on an employee's First  
10 Amendment rights. *See id.* at 75-76, 110 S.Ct. 2729.

11           To constitute an adverse employment action, a government act of retaliation need  
12 not be severe and it need not be of a certain kind. Nor does it matter whether an act of  
13 retaliation is in the form of the removal of a benefit or the imposition of a burden.

14 *Coszalter*, 320 F.3d at 974-975 (adverse employment actions include reassignment to a different  
15 employment position, banishment from meetings and training, subjection to investigation and adverse  
16 employment report).

17           The relevant inquiry is whether the state had taken “action designed to retaliate against and chill  
18 political expression” or, stated another way, whether “the exercise of the first amendment rights was  
19 deterred” by the government employer’s action. *Coszalter*, 320 F.3d at 975 (citations omitted.) “[A]n  
20 action is cognizable as an adverse employment action if it is reasonably likely to deter employees from  
21 engaging in protected activity.” *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir.2000). Proper inquiry  
22 is “whether an official’s acts would chill or silence a person of ordinary firmness from future First  
23 Amendment activities.” *Mendocino Envir. Center v. Mendocino County*, 192 F.3d 1283, 1300 (9<sup>th</sup> Cir.  
24 1999).

25           “[D]amage to reputation is not actionable under § 1983 unless it is accompanied by ‘some more  
26 tangible interests,’ ” and such limitation “cannot be avoided by alleging that defamation by a public  
27 official occurred in retaliation for the exercise of a First Amendment right.” *Patton v. County of Kings*,  
28 857 F.2d 1379, 1381 (9th Cir.1988).

29           Defendants argue that their action has not chilled plaintiffs’ free speech in that plaintiffs have  
30 continued to pursue numerous union grievances and expressed their views. Defendants content that  
31 “Plaintiffs cannot recover for uncharged and remote acts of retaliation, and they cannot rely on evidence  
32 of those acts to raise triable issues of fact to defeat summary judgment.” Mr. Nolt responds that he has

1 been subjected to chilling and silencing acts, including is 2004 15-day suspension, May to September  
2 2004 investigation into inappropriate sexual comments to students, referral to CTC resulting in public  
3 reproof, letter of reprimand addressing his obtaining Mr. Natsues' time sheet, Superintendent Mehas'  
4 "bitchers . . . off the bus" comment, and security officer harassment regarding the parking placard.

5 Given the extent of actions against him, Mr. Nolt has raised factual questions whether the actions  
6 of which he complains were designed to chill exercise of his First Amendment rights. Inferences from  
7 the evidence most favorable to Mr. Nolt presents a question of potential retaliation.

8 Mr. Allison and Mr. Hudson contend that they were subject to "a campaign of harassment"  
9 running from the beginning of the 2003-2004 school year. Mr. Allison and Mr. Hudson point to Mr.  
10 Tacata's ostracizing them from lunches and conferences, criticisms of their dress, inordinate student  
11 loads (until they complained), and denial of WASC leadership roles and their grievances.

12 Defendants respond that "the trivialities complained of by Hudson and Allison do not constitute  
13 adverse action, since they attempt to recharacterize their cause of action as one for hostile environment  
14 in violation of Section 1983. Such a cause of action does not exist under free speech principles, and  
15 there is no authority for demonstrating adverse employment action in violation of constitutional rights  
16 by accumulating evidence of petty slights and hurt feelings." As defendants note, there is an absence  
17 of evidence that they instructed Mr. Tacata to single out Mr. Allison and Mr. Hudson and that they  
18 lacked involvement to exclude them from lunches. Defendants contend that Mr. Allison and Mr.  
19 Hudson's grievance difficulties resulted from "re-filing a one-page grievance on a new form" in a  
20 process that was negotiated by the union and FCOE.

21 The problem for Mr. Allison and Mr. Hudson is that they fail to demonstrate or raise a question  
22 that defendants' alleged retaliation was adverse to chill the exercise of their free speech. For instance,  
23 Mr. Tacata is the focus of many of their claims. The gist of Mr. Allison and Mr. Hudson's claims is  
24 differential treatment or harassment suggesting a discrimination claim, not a First Amendment retaliation  
25 claim. Mr. Allison and Mr. Hudson make no showing that they were deterred to engage in protected  
26 activity. The evidence demonstrates that they were quite good at voicing their concerns. There is no  
27 evidence to causally connect that defendants were responsible for the matters of which Mr. Allison  
28 Hudson complain. In the absence of adverse employment action at the hands of defendants, Mr. Allison

1 and Mr. Hudson's (first) retaliation causes of action fail.

2 ***Substantial Or Motivating Factor***

3 To establish that speech was a substantial motivating factor for an adverse employment action,  
4 a plaintiff must demonstrate a casual nexus between the protected speech and the alleged adverse  
5 employment action. *Huskey v. City of San Jose*, 204 F.3d 893, 899 (9th Cir.2000); *Berg v. California*  
6 *Horse Racing Board*, 419 F.Supp.2d 1219, 1232 (E.D. Cal. 2006). The "primary focus" is not on any  
7 possible animus directed at the plaintiff; rather, it is more specific, such as an intent to deter public  
8 comment on a specific issue of public importance. *Crawford-El v. Britton*, 523 U.S. 574, 118 S.Ct.  
9 1584, 1594 (1998). A plaintiff "must provide more than 'mere evidence' that the defendants were aware  
10 of [plaintiff's] expressive conduct in order to establish a genuine material dispute as to whether  
11 retaliation was a substantial or motivating factor for their conduct." *Alpha Energy Savers*, 381 F.3d at  
12 929. A plaintiff must establish: (1) proximity in time between plaintiff's expressive conduct and the  
13 allegedly retaliatory actions; (2) produce evidence that the defendant's expressed opposition to his/her  
14 speech, either to him or to others; or (3) demonstrate that the defendant's proffered explanations for  
15 adverse action were false and pretextual. *Alpha Energy Savers*, 381 F.3d at 929; *Coszalter*, 320 F.3d  
16 at 977. A plaintiff cannot demonstrate a casual nexus if the same adverse employment actions occurred  
17 before and after he/she engaged in protected speech. *Berg*, 419 F.Supp.2d at 1232.

18 Defendants argue that they escape liability for plaintiffs' (first) section 1983 retaliation cause of  
19 action in that their actions were not motivated by the content of plaintiffs' speech. Defendants contend  
20 that plaintiffs are unable to produce evidence that the employment decisions were wrongfully motivated.  
21 To attempt to demonstrate substantial or motivating factor for adverse employment action, Mr. Nolt  
22 points out that each defendant was involved in the investigation and decision to suspend Mr. Nolt for  
23 15 days.

24 At this point, Mr. Nolt's retaliation claims begin to unravel. In sum, Mr. Nolt complains of his  
25 December 2003 letter of reprimand regarding Mr. Natsues' time sheet, 15-day suspension and CTC  
26 reproof regarding his inappropriate comments and spring 2006 altercation with FCOE security officers.  
27 Mr. Nolt raises no factual issue that disciplinary action against him was designed to deter comment on  
28 specific issues of public importance. The evidence, construed in Mr. Nolt's favor, reveals that

1 defendants would have reprimanded and suspended Mr. Nolt in the absence of his protected activities.  
2 Mr. Nolt does not dispute that he obtained Mr. Natsues' time sheet without abiding by FCOE policy and  
3 procedures. In fact, the employee who provided him the time sheet received a similar reprimand letter.

4 The fact that each defendant was involved in the investigation of Mr. Nolt's inappropriate  
5 comments or the decision to suspend him does not demonstrate his free speech activities were a  
6 substantial motivating factor for his suspension. Serious allegations were lodged against Mr. Nolt  
7 regarding his classroom conduct which resulted in CTC public reproof. Defendants note that Mr. Nolt  
8 did not rebut investigation findings prior to the decision to suspend Mr. Nolt and that Mr. Nolt  
9 contributed to investigation delay by his failure to interview during off duty summer months.  
10 Defendants contend that CTC notification of Mr. Nolt's suspension was required by California  
11 Education Code section 44242.5(a), which provides: "Each allegation of an act or omission by . . . holder  
12 of[] a credential for which he or she may be subject to an adverse action shall be presented to the  
13 Committee of Credentials." Defendants further point to California Education Code section 44242.5(c)  
14 which requires CTC investigation and review, including an adjudicatory hearing if CTC "determines that  
15 probable cause for an adverse action on the credential exists." Defendants point out that for its  
16 investigation, CTC used the same information relied upon by Superintendent Mehas and that Mr. Nolt  
17 presented additional evidence to CTC. Mr. Nolt fails to demonstrate how his protected speech  
18 outweighs FCOE's legitimate interest to maintain classroom decorum and teacher professionalism. Mr.  
19 Nolt points to no evidence that defendants would have made different decisions in the absence of Mr.  
20 Nolt's protected activities.

21 Mr. Nolt further complains that in spring 2006, FCOE security officers, at Superintendent Mehas  
22 or Mr. Biggs' behest, confronted Mr. Nolt for parking in a handicap space although Mr. Nolt has a  
23 handicap parking card. Defendants note the absence of dispute that FCOE did not own the parking lot  
24 and that defendants lacked authority to control it. Defendants point to an absence of evidence that  
25 Superintendent Mehas or Mr. Biggs directed or caused security officers to confront Mr. Nolt or their  
26 retaliatory motive to do so. Mr. Nolt relies on at best hearsay on hearsay that Mr. Harvey "bragged about  
27 how he worked with Biggs and Mehas to have Nolt arrested for using a handicap placard." Mr. Nolt  
28 produces no reliable evidence that the parking placard issue was a substantial or motivating factor for

1 an adverse employment action. In short, there is no evidence to connect Mr. Nolt's protected activities  
2 to the parking card matter.

3 Defendants are entitled to summary adjudication on plaintiffs' (first) retaliation cause of action  
4 in the absence of evidence to support elements of the cause of action.

5 **Section 1983 Liability – Personal Participation**

6 Defendants contend that potential section 1983 liability of each defendant “must be evaluated  
7 independently” based on each defendant's personal participation in wrongs to deprive plaintiffs of  
8 federal rights.

9 Section 1983 imposes liability upon “[e]very person who, under color of any statute, ordinance,  
10 regulation, custom or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United  
11 States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or  
12 immunities secured by the Constitution and laws . . .” A section 1983 plaintiff must establish that: (1)  
13 the complained of conduct was committed by a person acting under color of state law; and (2) the  
14 conduct deprived the plaintiff of a cognizable constitutional right. *Rinker v. Napa County*, 831 F.2d 829,  
15 831 (9<sup>th</sup> Cir. 1987); *Leer v. Murphy*, 844 F.2d 628, 632-633 (9<sup>th</sup> Cir. 1988). Section 1983 requires that  
16 there be an actual connection or link between the actions of defendant and deprivation allegedly suffered.  
17 *See Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976).

18 The Ninth Circuit Court of Appeals has held that “[a] person ‘subjects’ another to deprivation  
19 of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates  
20 in another's affirmative acts or omits to perform an act which he is legally required to do that causes the  
21 deprivation of which complaint is made.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9<sup>th</sup> Cir. 1978). The  
22 requisite causal connection can be established by direct personal participation in the deprivation and “by  
23 setting in motion a series of acts by others which the actor knows or reasonably should know would  
24 cause others to inflict the constitutional injury.” *Johnson*, 588 F.2d at 743-744. If state law imposes  
25 liability upon a public official for the acts of his subordinates, vicarious liability can also be imposed  
26 upon him under section 1983. *Johnson*, 588 F.2d at 744; *Hesseltger v. Reilly*, 440 F.2d 901 (9<sup>th</sup> Cir.  
27 1971).

28 Defendants characterize plaintiffs's claims as attempting to hold Superintendent Mehas

1 “vicariously liable for every decision made by FCOE personnel, because he was Superintendent.”  
2 Defendants argue that plaintiffs fail to allege that Superintendent Mehas set in motion a series of others’  
3 acts to inflict constitutional injury. Defendants contend that plaintiffs’ alleged constitutional  
4 deprivations arise from discrete acts, not broad policy decisions or failure to perform a legally required  
5 act. Defendants challenge plaintiffs to present evidence that each defendant participated personally in  
6 retaliatory conduct or acted to cause another to violate plaintiffs’ constitutional rights.

7 Mr. Nolt responds that “Mehas’ subordinates would ‘gin up’ a case against Nolt that Mehas  
8 would then use to justify his pre-ordained conclusion.” Mr. Nolt continues that “it was foreseeable to  
9 Biggs and Campbell that their biased investigations would be used by Mehas to retaliate against Nolt,  
10 and it was foreseeable to Mehas that Mehas and Biggs would perform biased, inadequate investigations  
11 to support his retaliation.”

12 Plaintiffs offer no tangible evidence to raise a factual issue that defendants, individually or  
13 collectively, set in motion a series of acts by others which each defendant knew or reasonably should  
14 have known would cause others to inflict the constitutional injury. Plaintiffs “ginning up” arguments  
15 are at best speculative in light of the lack of supporting facts for them. Plaintiffs fail in their claims,  
16 expressed or implied, that Superintendent Mehas “ginned up” a case against Mr. Nolt to justify a pre-  
17 ordained conclusion.

18 **Section 1983 Liability – Conspiracy**

19 Defendants argue that their alleged conspiracy to deprive plaintiffs’ constitutional rights does  
20 not satisfy the *Johnson* standard of setting in motion others’ acts to inflict constitutional injury.  
21 Defendants contend that plaintiffs fail to allege specific facts for a 42 U.S.C. § 1985 (“section 1985”)<sup>11</sup>

22  
23 <sup>11</sup> Section 1985(3) provides:

24 If two or more persons in any State or Territory conspire or go in disguise on the highway or on the  
25 premises of another, for the purpose of depriving, either directly or indirectly, any person or class of  
26 persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the  
27 purpose of preventing or hindering the constituted authorities of any State or Territory from giving or  
28 securing to all persons within such State or Territory the equal protection of the laws; or if two or more  
persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote,  
from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully  
qualified person as an elector for President or Vice President, or as a Member of Congress of the United  
States; or to injure any citizen in person or property on account of such support or advocacy; in any case

1 conspiracy claim.

2 Section 1985 proscribes conspiracies to interfere with certain civil rights. A section 1985 claim  
 3 “must allege facts to support the allegation that defendants conspired together. A mere allegation of  
 4 conspiracy without factual specificity is insufficient.” *Karim-Panahi v. Los Angeles Police Dept.*, 839  
 5 F.2d 621, 626 (9<sup>th</sup> Cir. 1988). A conspiracy occurs only when the parties have reached “a unity of  
 6 purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.”  
 7 *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10, 66 S.Ct. 1125, 1138, 90 L.Ed. 1575  
 8 (1946). Congress did not intend to create a general federal tort law by the passage of section 1985(3).  
 9 *Western Telecasters, Inc. v. California Federation of Labor, AFL-CIO*, 415 F.Supp. 30, 33 (S.D. Cal.  
 10 1976.) “[T]o effectuate the intent of Congress, the conspirators must be motivated by a class-based,  
 11 invidiously discriminatory animus.” *Western Telecasters*, 415 F.Supp. at 33 (section 1985(3) should not  
 12 be interpreted to encompass all discrimination between classes of persons, and a claim of discrimination  
 13 against employees of a non-union entity does not allege an invidiously, discriminatory animus and is not  
 14 actionable under 42 U.S.C. s 1985(3)).

15 Citing to *Gilbrook v. City of Westminster*, 177 F.3d 839, 856-858 (9<sup>th</sup> Cir. 1999), plaintiffs argue  
 16 that they pursue conspiracy claims under section 1983, which does not require the same showing as does  
 17 section 1985. Plaintiffs point to the Ninth Circuit’s discussion in *Mendocino Envir.*, 192 F.3d at 1301:

18 To establish the defendants' liability for a conspiracy, a plaintiff must demonstrate  
 19 the existence of “ ‘an agreement or ‘meeting of the minds' to violate constitutional  
 20 rights.’ ” *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539,  
 21 1540-41 (9<sup>th</sup> Cir.1989) (en banc) (quoting *Fonda v. Gray*, 707 F.2d 435, 438 (9<sup>th</sup>  
 22 Cir.1983)). The defendants must have, “by some concerted action, intend[ed] to  
 23 accomplish some unlawful objective for the purpose of harming another which results  
 24 in damage.” *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9<sup>th</sup> Cir.1999) (quoting  
*Vieux v. East Bay Reg'l Park Dist.*, 906 F.2d 1330, 1343 (9<sup>th</sup> Cir.1990)). Such an  
 agreement need not be overt, and may be inferred on the basis of circumstantial evidence  
 such as the actions of the defendants. *See id.* at 856. For example, a showing that the  
 alleged conspirators have committed acts that “are unlikely to have been undertaken  
 without an agreement” may allow a jury to infer the existence of a conspiracy. *Kunik v.*  
*Racine County*, 946 F.2d 1574, 1580 (7<sup>th</sup> Cir.1991).

25 \_\_\_\_\_  
 26 of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any  
 27 act in furtherance of the object of such conspiracy, whereby another is injured in his person or property,  
 28 or deprived of having and exercising any right or privilege of a citizen of the United States, the party so  
 injured or deprived may have an action for the recovery of damages occasioned by such injury or  
 deprivation, against any one or more of the conspirators.

1 Plaintiffs rely on PERB decisions that defendants “conspired to retaliate against Nolt for his speech.”

2 The legal grounds by which plaintiffs attempt to pursue a civil rights violation conspiracy are  
3 unclear in that their first supplemental complaint references section 1985 and related sections of Title  
4 42. Section 1985 proscribes conspiracies to interfere with certain civil rights not at issue here.  
5 Nonetheless, plaintiffs produce no meaningful evidence of defendants’ conspiracy to deprive them of  
6 protected rights at issue here. Plaintiffs fail to demonstrate that 2000 and 2002 PERB findings support  
7 a conspiracy for the more remote in time issues at hand. Plaintiffs’ argument that defendants’ behavior  
8 “is inexplicable without there being a meeting of minds to suppress Nolt’s speech” is insufficient to  
9 demonstrate or raise questions of an agreement or meeting of the minds to violate constitutional rights.  
10 Plaintiffs offer no meaningful evidence to raise an inference of defendants’ concerted action to support  
11 their claims here, and the inferences from the evidence in their favor likewise fail to raise sufficient  
12 factual issues of conspiracy. Plaintiffs fail to raise sufficient factual issues of defendants’ conspiracy  
13 to deprive constitutional rights subject to this action.

14 **Mr. Nolt’s (Second) Denial Of Due Process Cause Of Action**

15 Mr. Nolt alleges a (second) cause of action that Superintendent Mehas was biased against Mr.  
16 Nolt to deprive Mr. Nolt of an impartial decision maker for his 15-day suspension in 2004.<sup>12</sup> Mr. Nolt  
17 alleges he “was never given an opportunity before an impartial fact-finder/adjudicator to present his side  
18 of the case” and that Superintendent Mehas as a decision maker retaliated against Mr. Nolt’s whistle  
19 blowing.<sup>13</sup>

20 As a reminder, Mr. Nolt’s 15-day suspension arose from a Probation Department complaint that  
21 Mr. Nolt made sexually inappropriate comments to students. Defendants point out that Mr. Campbell,  
22 Mr. Tacata and Ms. Gabriel investigated Mr. Nolt’s comments. Ms. Gabriel characterized Mr. Nolt’s  
23 comments as “demeaning and unprofessional.”

24 Defendants note that Deputy Superintendent Collins signed off on a report about Mr. Nolt’s

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25 <sup>12</sup> This Court construes the (second) due process cause of action as Mr. Nolt’s alone and that Mr. Allison and  
26 Mr. Hudson do not pursue due process claims in that the cause of action addresses only Mr. Nolt’s 2004 15-day suspension.

27 <sup>13</sup> The (second) due process cause of action focuses on Superintendent Mehas, not Mr. Biggs and Mr.  
28 Campbell. Plaintiffs’ opposition brief does not touch on Mr. Biggs and Mr. Campbell’s alleged due process violation, except to argue that they are not entitled to qualified immunity.

1 comments prior to submission to Superintendent Mehas and that Mr. Nolt does not claim that Deputy  
2 Superintendent Collins is hostile toward Mr. Nolt. Defendants point out that Mr. Nolt was provided an  
3 opportunity to respond to allegations before a final report was submitted and that Mr. Nolt met with Mr.  
4 Campbell, Ms. Gabriel, FCOE counsel Deborah Garabedian and union representative Ricardo Ornelas  
5 on September 20, 2004. Defendants attribute Mr. Nolt as not refuting student allegations of sexually  
6 improper comments.

7 Superintendent Mehas issued a September 29, 2004 letter of reprimand for Mr. Nolt's "immoral  
8 and unprofessional conduct toward students" and to find Mr. Nolt's "actions grossly unprofessional."  
9 The reprimand letter placed Mr. Nolt on a 15-day unpaid suspension to be reported to CTC and advised  
10 Mr. Nolt that he had 10 days to respond in writing and could seek review by the disciplinary review  
11 panel. Defendants point out that although Deputy Superintendent Collins recommended Mr. Nolt's  
12 termination, Superintendent Mehas elected a 15-day suspension recommended by Ms. Gabriel and with  
13 which Mr. Biggs concurred.

14 After the reprimand letter issued, Mr. Nolt, through his attorney, requested review, pursuant to  
15 the CBA, by the disciplinary review panel, which comprised of two members appointed by  
16 Superintendent Mehas, two members appointed by the union, and a fifth member selected by random  
17 drawing. The disciplinary review panel unanimously upheld Mr. Nolt's 15-day suspension.

18 Pursuant to the CBA, Mr. Nolt pursued a union grievance of his suspension which was denied  
19 initially by Deputy Superintendent Collins and subsequently by Superintendent Mehas. Mr. Nolt did  
20 not seek further grievance review by advisory arbitration as allowed by the CBA. According to  
21 defendants, Mr. Nolt offered no evidence during the grievance process.

22 Defendants contend that FCOE complied with the CBA to provide Mr. Nolt adequate opportunity  
23 and process to grieve his suspension and that they "cannot be held personally accountable for any  
24 'unfairness' in union contract procedures." Defendants argue that Superintendent Mehas "did not  
25 deviate from grievance and review procedures pursued by Nolt."

26 Mr. Nolt notes that he "had a property interest in not being suspended without pay." Mr. Nolt  
27 points to following from *Bostean v. Los Angeles Unified School Dist.*, 63 Cal.App.4th 95, 108-109, 73  
28 Cal.Rptr.2d 523 (1998):

1           “The Fourteenth Amendment to the United States Constitution 'places procedural  
2 constraints on the actions of government that work a deprivation of interests enjoying the  
3 stature of "property" within the meaning of the Due Process Clause.' ” (*Coleman v.*  
4 *Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1112 [278 Cal.Rptr.  
5 346, 805 P.2d 300].) “Property interests that are subject to due process protections are  
6 not created by the federal Constitution. 'Rather, they are created, and their dimensions  
7 are defined by existing rules or understandings that stem from an independent source  
8 such as state law.' ” (*Ibid.*) Thus, it has been held, with respect to a state civil service  
9 employee of the state Department of General Services, that “California's statutory scheme  
10 regulating employment in civil service 'confers upon an individual who achieves the  
11 status of "permanent employee" a property interest in the continuation of his [or her]  
12 employment which is protected by due process.' ” (*Ibid.*, citing *Skelly v. State Personnel*  
13 *Bd.* (1975) 15 Cal.3d 194, 206 [124 Cal.Rptr. 14, 539 P.2d 774].) Thus, “. . . a property  
14 right in public employment is a creation of state law. [Citation.] The statutory terms that  
15 define a particular right to employment determine its dimensions and scope.” (*Coleman*  
16 *v. Department of Personnel Administration, supra*, 52 Cal.3d at p. 1114.)

17 Defendants do not appear to contest that Mr. Nolt's 15-day suspension was a taking for due process  
18 purposes. *See Civil Serv. Assn. v. City and County of San Francisco*, 22 Cal.3d 552, 560, 150 Cal.Rptr.  
19 129 (1978).

20           Once it is determined that the Due Process Clause applies, “the question remains what process  
21 is due.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972). An essential principle of  
22 due process is that a deprivation of life, liberty, or property “be preceded by notice and opportunity for  
23 hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.  
24 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950). “The fundamental requirement of due process is the  
25 opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424  
26 U.S. 319, 333, 96 S.Ct. 893 (1976).

27           To fulfill due process, defendants point to Mr. Nolt's pre-deprivation grievance proceedings and  
28 disciplinary review panel decision to uphold his suspension. Defendants argue that 2000 PERB findings  
of Mr. Mehas' animus against Mr. Nolt are defused by the undisputed investigation to demonstrate Mr.  
Nolt's improper comments and similar conclusions reached by the disciplinary review panel and CTC.

          Mr. Nolt responds that PERB decisions noted Superintendent Mehas' bias against Mr. Nolt and  
that Superintendent Mehas' “subsequent conduct does not disclose that Mehas' prejudice against Nolt  
had abated in the two years since the last PERB hearing which was in 2002 and 2004. Consequently,  
Nolt was denied the due process right of an impartial decision-maker.”

          “A biased proceeding is not a procedurally adequate one. At a minimum, Due Process requires

1 a hearing before an impartial tribunal.” *Clements v. Airport Authority of Washoe County*, 69 F.3d 321,  
2 333 (9<sup>th</sup> Cir. 1993) (citing *Ward v. Village of Monroeville*, 409 U.S. 57, 59-60, 93 S.Ct. 80, 83 (1972)).  
3 “A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an  
4 absence of actual bias in the trial of cases.” *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625  
5 (1955). “Of course, an impartial decision maker is essential.” *Goldberg v. Kelly*, 397 U.S. 254, 271,  
6 90 S.Ct. 1011, 1022 (1970) (addressing pretermination evidentiary hearing for discontinuance of public  
7 assistance payments). “Bias cannot be inferred from a mere pattern of rulings by a judicial officer, but  
8 requires evidence that the officer had it ‘in’ for the party for reasons unrelated to the officer’s view of  
9 the law, erroneous as that view might be.” *McLaughlin v. Union Oil Co. of California*, 869 F.2d 1039,  
10 1047 (1989).

11 The requirement that proceedings adjudicating life, liberty or property be free from bias and  
12 partiality has been so “jealously guarded” to include administrative adjudications “to protect the  
13 ‘independent constitutional interest in fair adjudicative procedure.’” *Clements*, 69 F.3d at 333 (quoting  
14 *Marshall v. Jerrico*, 446 U.S. 238, 241-242, 100 S.Ct. 1610, 1613 (1980)). Bias in an administrative  
15 process may not be cured by subsequent judicial review in that “an adjudication that is tainted by bias  
16 can not be constitutionally redeemed by review in an unbiased tribunal.” *Clements*, 69 F.3d at 333.

17 Mr. Nolt criticizes defendants’ resort to the disciplinary review panel in that it did not give Mr.  
18 Nolt a hearing, was not a fact finder and accepted facts found by Superintendent Mehas. Mr. Nolt argues  
19 that the advisory arbitration option could not cure due process denial in that it was advisory, lacking  
20 enforcement power. Mr. Nolt argues that once adverse action was taken against him without due  
21 process, his constitutional deprivation was complete and could not be cured by post-deprivation  
22 procedures.

23 Where a meaningful pre-deprivation hearing is practicable, post-deprivation remedies do not  
24 provide due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436, 102 S.Ct. 1148, 1158 (1982).  
25 Once an employee is subjected to adverse action without the process he is due, the constitutional  
26 deprivation is complete. *Schultz v. Baumgart*, 738 F.2d 231, 237- 238 (7th Cir.1984).

27 Although its findings preceded Mr. Nolt’s suspension by several years, the PERB noted  
28 Superintendent Mehas’ “evident hostility” against and “evident distaste” for Mr. Nolt. There is no

1 evidence of improved relations between Superintendent Mehas and Mr. Nolt over ensuing years. The  
2 reasonable inferences are that Mr. Nolt continued as a thorn in the side of FCOE, and in turn,  
3 Superintendent Mehas. At a minimum, Mr. Nolt has raised a factual issue as to Superintendent Mehas'  
4 bias against him.

5 The evidence reveals that Superintendent Mehas was the decision maker on Mr. Nolt's 2004 15-  
6 day suspension. Although Superintendent Mehas had input from others, his decision counted and was  
7 effectuated. FCOE's compliance with CBA grievance procedures does not mitigate the question of  
8 Superintendent Mehas' bias. Subsequent proceedings or review could not unwind potential effects of  
9 Superintendent Mehas' bias. The fact that later proceedings confirmed Mr. Nolt's 15-day suspension  
10 does not dissipate potential bias in earlier proceedings. Mr. Nolt has raised sufficient factual issues that  
11 his grievance process was tainted by Superintendent Mehas' role in it to avoid summary adjudication  
12 on his (second) due process cause of action against Superintendent Mehas.<sup>14</sup> However, since plaintiffs  
13 do not meaningfully resist summary adjudication in favor of Mr. Biggs and Mr. Campbell as to the  
14 (second) due process cause of action, Mr. Biggs and Mr. Campbell are entitled to summary adjudication  
15 on the cause of action. Mr. Nolt fails to establish or raise factual issues as to due process violations by  
16 Mr. Biggs and Mr. Campbell.

### 17 **Qualified Immunity**

#### 18 ***Mr. Nolt's Suspension***

19 Defendants contend they are entitled to qualified immunity as to Mr. Nolt's suspension.  
20 Qualified immunity is a defense to claims against governmental officials "arising out of the performance  
21 of their duties. Its purpose is to permit such officials conscientiously to undertake their responsibilities  
22 without fear that they will be held liable in damages for actions that appear reasonable at the time, but  
23 are later held to violate statutory or constitutional rights." *Kraus v. Pierce County*, 793 F.2d 1105, 1108  
24 (9<sup>th</sup> Cir. 1986), *cert. denied*, 480 U.S. 932, 107 S.Ct. 1571 (1987). Qualified immunity protects section  
25

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26 <sup>14</sup> The parties may perceive inconsistency between this ruling on the (second) due process cause of action and  
27 the ruling that Mr. Nolt fails to establish that his protected activities were a motivating factor in his 15-day suspension in that  
28 the evidence reveals that his suspension was well supported. The key is not the ultimate outcome of the suspension  
proceedings. The key as to (second) due process cause of action is that there is a factual issue of a biased decision maker,  
not the ultimate result of suspension proceedings.

1 1983 defendants “from liability for civil damages insofar as their conduct does not violate clearly  
2 established statutory or constitutional rights of which a reasonable person would have known.” *Squaw*  
3 *Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 943 (9<sup>th</sup> Cir. 2004). The “heart of qualified immunity is that  
4 it spares the defendant from having to go forward with an inquiry into the merits of the case. Instead,  
5 the threshold inquiry is whether, assuming that what the plaintiff asserts the facts to be is true, any  
6 allegedly violated right was clearly established.” *Kelley v. Borg*, 60 F.3d 664, 666 (9<sup>th</sup> Cir. 1995).

7 Qualified immunity is “an entitlement not to stand trial or face the other burdens of litigation.”  
8 *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806 (1985). The privilege is “an immunity from suit  
9 rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is  
10 erroneously permitted to go to trial.” *Mitchell*, 472 U.S. at 526, 105 S.Ct. 2806. Courts stress “the  
11 importance of resolving immunity questions at the earliest possible stage in litigation.” *Hunter v.*  
12 *Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534 (1991). “Immunity ordinarily should be decided by the court  
13 long before trial.” *Hunter*, 502 U.S. at 228, 112 S.Ct. at 537.

14 The issue of qualified immunity is “a pure question of law.” *Elder v. Holloway*, 510 U.S. 510,  
15 514, 114 S.Ct. 1019 (1994); *Romero v. Kitsap County*, 931 F.2d 624, 627-628 (9<sup>th</sup> Cir. 1991). The Ninth  
16 Circuit Court of Appeals has explained:

17 Under *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001),  
18 the first step in the qualified immunity analysis is “to consider the materials submitted  
19 in support of, and in opposition to, summary judgment in order to decide **whether a**  
20 **constitutional right would be violated** if all facts are viewed in favor of the party  
21 opposing summary judgment.” *Jeffers v. Gomez*, 267 F.3d 895, 909 (9<sup>th</sup> Cir. 2001). “If  
22 no constitutional violation is shown, the inquiry ends.” *Cunningham v. City of*  
23 *Wenatchee*, 345 F.3d 802, 810 (9<sup>th</sup> Cir. 2003). On the other hand, if “the parties’  
24 submissions” create a triable issue of whether a constitutional violation occurred, the  
25 second question is “**whether the right was clearly established.**” *Saucier*, 533 U.S. at  
26 201, 121 S.Ct. 2151. A constitutional right is clearly established when “it would be clear  
27 to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Id.*  
28 at 202, 121 S.Ct. 2151.

24 *Squaw Valley*, 375 F.3d at 943 (Bold added).

25 The “contours” of the allegedly violated right “must be sufficiently clear that a reasonable official  
26 would understand that what he is doing violates that right. . . . [I]n the light of preexisting law the  
27 unlawfulness must be apparent.” *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039 (1987).  
28 “If the officer’s mistake as to what the law requires is reasonable, however, the officer is entitled to the

1 immunity defense.” *Saucier*, 533 U.S. at 205, 121 S.Ct. 2151.

2 Qualified immunity “turn[s] primarily on objective factors”: “Reliance on the objective  
3 reasonableness of an official’s conduct, as measured by reference to clearly established law, should avoid  
4 excessive disruption of government and permit the resolution of many insubstantial claims on summary  
5 judgment.” *Harlow v. Fitzgerald*, 457 U.S. 808, 818, 102 S.Ct. 2727 (1982). The qualified immunity  
6 standard “gives ample room for mistaken judgments” by protecting “all but the plainly incompetent or  
7 those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 343, 341, 106 S.Ct. 1092 (1986). “If  
8 the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment  
9 based on qualified immunity is appropriate.” *Saucier*, 533 U.S. at 202, 121 S.Ct. at 2156-2157.

10 Defendants argue that Superintendent Mehas could not reasonably believe that serving as  
11 decision maker violated Mr. Nolt’s constitutional rights. Defendants contend that “a reasonable official  
12 could not believe that disciplinary proceedings in compliance with the union Agreement violated Nolt’s  
13 due process.” Defendants continue that “it is too broad an interpretation of due process rules to argue  
14 that because they guarantee a fair hearing, if a decisionmaker was allegedly biased in making a prior  
15 decision, it is apparent that any subsequent decision by the same decisionmaker is a violation of due  
16 process.”

17 Mr. Nolt responds that Superintendent Mehas “clearly is not entitled to qualified immunity” in  
18 that no reasonable person would believe that a person with a bias could serve as an adjudicator. Mr.  
19 Nolt continues that “no reasonable person would have failed to recognized [sic] such bias after two  
20 PERB decisions had pointed out the bias and had described in detail how that bias had tainted the  
21 previously [sic] process by which Nolt had been investigated and subjected to retaliation.”

22 As an initial matter, Mr. Nolt has raised factual issues that Superintendent Mehas’ role violated  
23 Mr. Nolt’s right to fair decision maker. As such, the question turns to whether such right was clearly  
24 established. As the above authorities highlight, due process requires an impartial decision maker. Such  
25 due process right is so fundamental that a reasonable officer would know that if he is biased against a  
26 party, he is unable to adjudicate a proceeding involving that party’s property rights. Mr. Nolt is correct  
27 that Superintendent Mehas is not entitled to qualified immunity based on factual issues as to  
28 Superintendent Mehas’ bias.

1 Although Mr. Nolt does not meaningfully argue that Mr. Biggs and Mr. Campbell are not entitled  
2 to summary adjudication on the (second) due process cause of action, Mr. Nolt argues they are not  
3 entitled to qualified immunity. Mr. Nolt argues that their “votes” and participation in the investigation  
4 of Mr. Nolt’s improper comments “were clearly designed to give Mehas the grounds he needed to play  
5 out his vendetta against Nolt.”

6 Mr. Biggs notes that since his participation was limited to recommending suspension, not  
7 termination, he could not have reasonably believed such recommendation violated Mr. Nolt’s  
8 constitutional rights. Mr. Campbell points out that he participated in the investigation into Mr. Nolt’s  
9 remarks to students and agreed with a recommendation to terminate or suspend Mr. Nolt. Mr. Campbell  
10 argues that he could not have reasonably believed that his investigation participation would violate Mr.  
11 Nolt’s constitutional rights.

12 The gist of the (second) due process cause of action is Superintendent Mehas’ impartiality as  
13 decision maker. Mr. Nolt fails to establish or raise factual issues that Mr. Biggs or Mr. Campbell had  
14 decision making authority in Superintendent Mehas’ ultimate decision. The evidence does not suggest  
15 that Mr. Biggs and Mr. Campbell’s roles in Mr. Nolt’s suspension resulted in or equated to a biased  
16 decision maker to violate Mr. Nolt’s constitutional rights. In the absence of their violation of Mr. Nolt’s  
17 due process rights, Mr. Campbell and Mr. Biggs are not subject to section 1983 liability and are further  
18 entitled to qualified immunity.

19 ***Alleged First Amendment Rights Violations***

20 Putting aside time barred retaliatory acts, defendants focus further qualified immunity analysis  
21 on Mr. Nolt’s December 2003 reprimand letter regarding the Mr. Natsues’ matter and Mr. Nolt’s 15-day  
22 suspension. Defendants argue that they are entitled to immunity for such matters unless a reasonable  
23 official would know that such conduct violated plaintiffs’ clearly established constitutional rights.

24 Defendants contend they are entitled to qualified immunity as to the December 2003 reprimand  
25 letter in that, without more, it “should not be actionable as a deprivation of a constitutional right.”  
26 Defendants argue that a reasonable official could rely on the undisputed investigation into Mr. Nolt’s  
27 sexually improper comments to conclude Mr. Nolt acted inappropriately to warrant his suspension  
28 unanimously approved by the disciplinary review panel. Plaintiffs respond that “any reasonable

1 employer would have known that causing, permitting or not ending the conduct against plaintiffs that  
2 would chill or deter First Amendment activities was a violation of plaintiffs' clearly established First  
3 Amendment rights."

4 As discussed above, plaintiffs have not established or raised factual issues as to section 1983  
5 liability for their (first) retaliation cause of action. In other words, plaintiffs' retaliation claims do not  
6 survive. In the absence of demonstrated, or factual issues on, First Amendment deprivations and  
7 actionable retaliatory acts, defendants are further entitled to qualified immunity on plaintiffs (first)  
8 retaliation cause of action.

9 **CONCLUSION AND ORDER**

10 \_\_\_\_\_ For the reasons discussed above, this Court:

- 11 1. GRANTS defendants summary adjudication that plaintiffs' retaliation claims accruing  
12 prior to August 23, 2003 are time barred;
- 13 2. GRANTS defendants summary adjudication on plaintiffs' (first) retaliation cause of  
14 action and that defendants are entitled to qualified immunity as to plaintiffs' (first)  
15 retaliation cause of action;
- 16 3. GRANTS Mr. Biggs and Mr. Campbell summary adjudication on Mr. Nolt's (second)  
17 due process cause of action and that Mr. Biggs and Mr. Campbell are entitled to qualified  
18 immunity as to Mr. Nolt's (second) due process cause of action;
- 19 4. DENIES Superintendent Mehas summary adjudication on Mr. Nolt's (second) due  
20 process cause of action and that Superintendent Mehas is entitled to qualified immunity  
21 as to Mr. Nolt's (second) due process cause of action;
- 22 5. DIRECTS this Court's clerk to enter judgment in favor of defendants Jan Biggs and Ken  
23 Campbell and against plaintiffs Tim Nolt, Tim Allison and Chris Hudson; and
- 24 6. DIRECTS this Court's clerk to enter judgment in favor of defendant Peter Mehas and  
25 against plaintiffs Tim Allison and Chris Hudson.

26 As a result of this decision, only Mr. Nolt's (second) due process cause of action against Superintendent

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1 Mehas alone survives.

2 IT IS SO ORDERED.

3 **Dated:** August 28, 2007

/s/ Lawrence J. O'Neill  
UNITED STATES DISTRICT JUDGE

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