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Supreme Court No. 88323-8
Court of Appeals No. 68343-8-I

SUPREME COURT
OF THE STATE OF WASHINGTON

DUANE STORTI, and a class of faculty members,
Plaintiffs/Petitioners,

v.

UNIVERSITY OF WASHINGTON,
Defendant/Respondent.

SUPPLEMENTAL BRIEF OF PLAINTIFF FACULTY CLASS

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ORIGINAL

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INTRODUCTION

University of Washington faculty brought this class action suit after the University breached the faculty's employment contract that expressly promised that the University "shall" pay the faculty a 2% raise if they performed meritorious work in the 2008-09 academic year.¹

Late in the 2008-09 academic year, after the faculty had worked nine months out of the 12-month academic (fiscal) year, the University "suspended" its promise and refused to pay the raises in the 2009-10 academic year (due July 1, 2009). The University breached black letter contract law because an employer's offer of a raise cannot be revoked after employees substantially perform the work necessary to earn the raise.

The University's failure to pay the 2% merit raise is also a breach of contract that is established by *res judicata*. In 2005 King County Superior Court Judge Mary Yu ruled against the University in *Storti I* on the precise claim here in *Storti II* after the University failed to pay its faculty the 2% merit raise in the 2002-03 academic year for meritorious work performed in the 2001-02 academic year.

STATEMENT OF THE CASE

The parties filed cross-motions, and the trial court granted summary judgment for the University. CP 1487-88. The Court of

¹ The "academic year" is also the State's fiscal year, running from July 1 to June 30.

Appeals affirmed by a 2-1 decision, with a vigorous dissent by Judge Applewick. This Court granted review.

I. THE SALARY POLICY'S PROMISE OF A MINIMUM 2% RAISE FOR MERITORIOUS SERVICE IS A CONTRACT THAT COULD NOT BE REVOKED AFTER THE FACULTY SUBSTANTIALLY PERFORMED THE WORK.

A. The Salary Policy in the Faculty Code is Part of the Faculty's Employment Contract.

The University's Faculty Salary Policy ("Salary Policy") is in the Faculty Code, which is part of the University Handbook. It is part of the faculty's employment contract. *Nostrand v. Little*, 58 Wn.2d 111, 123, 132, 361 P.2d 551 (1961), *appeal dismissed*, 368 U.S. 436 (1962); *Mills v. W. Wash. Univ.*, 170 Wn.2d 903, 908-09, 246 P.3d 1254 (2011).²

The University's promise of a merit raise is a unilateral contract because it is a promise (a 2% minimum raise) by one party, the University, to the other party, the faculty, that is accepted by their performance (meritorious work in the academic year). In *Cook v. Johnson*, 37 Wn.2d 19, 23, 221 P.2d 525 (1950), the Court described a unilateral contract:

A unilateral contract is a promise by one party – an offer by him to do a certain thing in the event the other party performs a certain act. The performance by the other party constitutes an acceptance of the offer and the contract then becomes executed.

“[A] unilateral contract [therefore] becomes enforceable and irrevocable

² More generally, a public employer's policies and rules establish enforceable duties to employees. *Roberts v. King County*, 107 Wn.App. 806, 27 P.3d 1267 (2001); *review denied*, 145 Wn.2d 1024 (2002) (county policy on equal pay for equal work).

‘when performance has occurred in response to a promise.’” *Navlet v. Port of Seattle*, 164 Wn.2d 818, 848, 194 P.3d 221 (2008), quoting 25 *Washington Practice: Contract Law and Practice*, § 1.4 at 8 (2007).³

Unilateral contracts are common in employment settings. 2 *Corbin on Contracts* § 6.2, at 213, nn.1-2 (1995). For example, an employer’s offer of a bonus or a raise to an employee is a “unilateral contract” binding upon the employer when the employee accepts the offer by performing the work. *Scott v. J. F. Duthie & Co.*, 125 Wash. 470, 471, 216 Pac. 853 (1923) (employer bound by promised bonus when employee accepts the offer by performing); *Powell v. Republic Creosoting Co.*, 172 Wash. 155, 159-60, 19 P.2d 919 (1933) (employer’s practice of paying a year-end bonus created an implied contract for a bonus that the employee accepted and earned by working); *Simon v. Riblet Tramway Co.*, 8 Wn.App. 289, 292-94, 505 P.2d 1291 (1973), *review denied*, 82 Wn.2d 1004 (1973), *cert. denied*, 414 U.S. 975 (1973).⁴

³ The difference between unilateral and bilateral contracts is in the nature of the acceptance; a unilateral contract is created by the offeree’s performance in response to the offeror’s offer (rather than a promise in return). *Multicare Medical Center v. Dep’t of Soc. & Health Serv.*, 114 Wn.2d 572, 584, 790 P.2d 124 (1990).

⁴ The Court of Appeals majority distinguished these cases by a “critical distinction between bonuses that are compensation for work already completed and raises that . . . relate to future, as yet unearned compensation” Op. at 12. This purported “critical distinction” is foreclosed by this Court’s decision in *Carlstrom v. State*, 103 Wn.2d 391, 394-95, 694 P.2d 1 (1985), in which the Court held that despite a financial emergency declared by the Governor and legislation enacted by the Legislature in fiscal year 1981-82 suspending the raise promised to faculty in fiscal year 1982-1983, the State was (continued)

Here, the University's Salary Policy was unambiguously an offer of a 2% raise accepted by Professor Storti and the class by performance of meritorious work in the 2008-09 academic year. After the 2008-09 academic year commenced on July 1, 2008, Professor Storti and others in the faculty class worked for six months in 2008 and three months in 2009 until the promised 2% raise was "suspended" on March 31, 2009. CP 350. The University had the benefit of those services, which were found meritorious in May, 2009, CP 1105, for the bulk of the 2008-09 academic year. The issue here is whether the University could withhold the promised raise after the faculty substantially performed the work necessary to earn it.

B. Because Substantial Performance Had Already Occurred, The Revocation Late in the Year Did Not Eliminate The Contract to Provide the Raise.

The Court of Appeals majority said that because Executive Order 29 revoking the raise after reevaluation was "effective" before the start of the 2009-10 academic year "[t]he University's contractual obligation did not exist at the relevant time." Opinion at 8; see also UW Ans. To Pet. For Rev. at 3, 6; Resp. Br. at 27-28. The majority said that it was "*unable to ascertain any promise* in the faculty salary policy that as soon as meritorious work is performed for most of the academic year, *the raise is vested* or earned at that

contractually obligated for the raises that were owed starting on July 1, 1982. Moreover, the purported "critical distinction" between bonuses and raises has no support in the law of contracts. They are two types of pay increases. A bonus is a pay increase on top of the base pay and a raise increases the base. See Brief of Appellants at 20.

time.” Op. at 9 (emphasis added).⁵

The majority opinion is directly contrary to *Navlet* because “[w]hen services are rendered, the right to secure the promised compensation is vested as much as the right to receive wages or any other form of compensation, and the lack of a promise to vest does not revoke the employer’s obligation to pay.” 164 Wn.2d at 849 (citation omitted; emphasis added). Employment contracts are governed by the law of contracts. *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 155, 43 P.3d 1223 (2002). The contract here is therefore governed by the law of contracts without specifically incorporating contract law.⁶

The rule stated by the Court in *Navlet* that substantial performance renders a unilateral contract offer irrevocable is well-established in contract

⁵ The faculty agree that the Salary Policy was properly revoked as a matter of procedure, and the issue here is whether the revocation could apply to work already performed in the academic year (it could not) as opposed to work in a future academic years (where plaintiffs agree the revocation applied). In *Nye v. UW*, 163 Wn.App. 875, 260 P.3d 1000 (2011), *rev. denied*, 173 Wn.2d 1018 (2012), Peter Nye argued the suspension process was inadequate and he lost. The University sometimes argues as though, like *Nye*, this were also a process case, Resp. Br., 2-11, 13-17, even though the University agrees this *Storti II* case does not question the process. *Id.* at 12-13.

The University continues to tout that Professor Lovell said the “the process worked” in 2009 when the University issued EO 29 revoking the 2% raise. Resp. Br. at 10; Ans. to Pet. for Rev. at 1. But the faculty never agreed with Professor Lovell. The faculty could not vote on the matter because the University unilaterally suspended the Policy before a vote could take place. CP 1275, 1296-98. The faculty instead filed this class action lawsuit to obtain the raise due to the University’s breach of the contract.

⁶ The University agrees the Salary Policy should be interpreted “[u]nder long settled contract law.” CP 1210; Resp. Br. at 18 n. 6 (“contract principles apply”); UW Ans. to Statement of Grounds for Direct Review No. 86310-5 at 1 (“straightforward contract dispute”); CP 1459 (University President Emmert: Salary Policy is “contractual and legally binding”). Elsewhere, the University argues that contract principles do not apply (“illusory promise”). See *infra* p. 9.

law. *Navlet*, 164 Wn.2d at 848, cited the substantial performance rule in
1 *Corbin on Contracts* § 3.16 at 388 (1993), which is:

There are cases in which an employer has promised a “bonus,” some form of benefit in addition to agreed wages or salary, on condition that the employee or employees remain in service for a stated period. . . . [I]t is sufficient that the employee continues in the employment . . . A unilateral contract exists when the period of service is substantially completed. Prior to that time the offer has become irrevocable. This analysis goes beyond the bonus promise to the many kinds of promises made to employees with regard to fringe benefits

2 *Corbin on Contracts* §6.2 at 217 also explains the rule:

[A]lthough the bonus is not fully earned until the service has continued for the full time, *after a substantial part of the service has been rendered the offer of the bonus cannot be withdrawn without a breach of contract. The same is true in the case of promises of “vacation pay” and “severance pay” and other forms of compensation.* (Citations omitted; italics added.)

Accord, Knight v. Seattle First National Bank, 22 Wn.App. 493, 496-98, 589 P.2d 1279 (1979); *Restatement of Contracts* §45 (1932).

Accordingly, “[i]n the employment context, an employee who renders service in exchange for compensation has a vested right to receive such compensation.” *Navlet*, 164 Wn.2d at 828 n. 5. The substantial performance doctrine is sound policy because “[a]n employer cannot expect to accept the benefit of continued service from its employees while reserving the right to not compensate those employees once it has received the full benefit of their service.” *Id.* at 848-49. Indeed, it would be blatantly unfair for employees to perform services in exchange for an

employer's promised raise, bonus, or other compensation and to then have the employer renege on the promise after services are performed.

Numerous courts have applied the substantial performance doctrine discussed in *Navlet* in rejecting the same arguments at issue here. For example, in *Horton v. Prepared Media Laboratory, Inc.*, 165 Or.App. 357, 997 P.2d 864, 866 (Or. App. 2000), the employer argued:

Even if the policy was a contract, it was a contract that expressly allowed [defendant] to terminate the severance pay benefit without notice. . . . It was terminated. There was no severance policy when plaintiff left [defendant]. That is the end of the story. (Brackets in original.)

The Court said “[t]he story is not that simple” and explained (*id.* at 866-87):

An employer generally is free to set the terms and conditions of employment, and the employee is free to accept or reject those terms and conditions. The offering of certain terms and conditions may amount to an offer of a unilateral contract, however. In such cases, an employee's part performance precludes the employer from revoking what it offered in exchange for the employee's work. (Citations omitted.)

The Oregon court therefore held that the employer could revoke the plan, but the revocation could not affect the employee's severance benefits because the plan was a unilateral contract that the employee accepted by performance.⁷

⁷ The Oregon court relied on *Harryman v. Roseburg Fire Dist.*, 244 Or. 631, 634-35, 420 P.2d 51 (1966) (employer was obligated to pay sick leave even though paid sick leave plan was revoked before employee was terminated from employment); *Taylor v. Multnomah County Deputy Sheriff's*, 265 Or. 445, 450-51, 510 P.2d 339 (Or. Sup. Ct. 1983) (employer's retirement plan constituted a unilateral contract that could not be revoked after the employee's part performance); *McHorse v. PGE*, 268 Or. 323, 331, 521 P.2d 315 (1974) (employer's revocation of disability benefits could not affect employee who had obtained a right to those benefits by working).

Similarly, *Holland v. Earl Graves Publishing Co.*, 46 F.Supp.2d 681, 687 and n. 10 (E.D. Mich. 1998) (applying law of Michigan) explained:

Defendant contends that it could modify the contract any time . . . Yet, this is an erroneous statement of the law. Unilateral contracts cannot be modified once performance is begun.

Holland thus held that the employer could not change the formula by which the employee would receive an incentive pay increase above her base salary after she had substantially performed the work for the pay increase.⁸

Accordingly, the University's "suspension" of the raise before the academic year ended did not eliminate the promised raise because the faculty had already substantially performed the work that made the offer irrevocable.

⁸ *Accord, Kulins v. Malco, a Microdot Co., Inc.*, 459 NE.2d 1038, 1044-45, 121 Ill. App.3d 520 (Ill. App. 1984) (relied on by *Navlet*, 164 Wn.2d at 849) (employer modification of severance pay provision could not apply to work already performed because that would make the plan's offer "illusory" and thus modification could be "prospective" only); *Demerath v. The Nestle Co., Inc.*, 121 Wis.2d 194, 358 NW 2d 541, 543 (Wis. App. 1984) (employees entitled to severance pay because "personnel policies offering stated benefits in exchange for the employee's service, are binding contracts upon substantial performance of the requested service."); *Vanegas v. American Energy Services*, 302 S.W.3d 299, 303-04, 53 Tex. Sup. Ct. 204 (2009) (employer breached agreement to pay employees a percentage of the proceeds of sale as part of their pay because employees accepted the offer by working until sale took place and the fact that they were at will and could have been fired before the sale did not make the offer "illusory"); *Cook v. Coldwell Banker*, 967 S.W.2d 654, 657-58 (Mo. App. 1998) (employee entitled to bonus because the bonus offer could not be withdrawn after substantial performance by the employee); *Marchiondo v. Scheck*, 78 N.M. 440, 432 P.2d 405, 408 (N.M. App. 1967) ("We hold that part performance by the offeree of an offer of unilateral contract results in a contract with conditions. The condition is full performance by the offeree."); *In re Global Inc.*, 381 B.R. 603, 619 (D. Del. 2007) ("The 1996 policy constituted an offer of employment benefits by Beloit [the employer] that became a binding unilateral contract upon substantial performance of employment services").

II. THE SALARY POLICY IS MANDATORY AND CONTRACTUAL; IT IS NEITHER AN “ILLUSORY PROMISE” NOR EXPRESSLY CONDITIONED ON LEGISLATIVE FUNDING.

A. The Reevaluation Provision Does Not Make The Policy an Illusory Promise Because It Is Prospective and Does Not Make the Raise Discretionary or Optional.

The University argues that it could withhold the 2% raise *after* the faculty had accepted the offer by substantially performing the work. Resp. Br. at 13-18. The University says the Salary Policy's language stating the promise was subject to "reevaluation" in future years meant it "retained . . . explicit discretion to withhold payments otherwise owed to employees[,]" trying to distinguish *Scott* and *Powell* (cited *supra*, p. 3). Resp. Br. 22. The “reevaluation” provision actually states (Appendix [“App.”] 6, CP 338):

This Faculty Salary Policy is based upon an underlying principle that new funds from legislative appropriations are required to keep the salary system in equilibrium. Career advancement can be rewarded and the current level of faculty positions sustained only if new funds are provided. Without the infusion of new money from the Legislature into the salary base, career advancement can only be rewarded at the expense of the size of the University faculty. Without the influx of new money or in the event of decreased State support, a reevaluation of this Faculty Salary Policy may prove necessary.

Words in a contract are construed according to their ordinary meaning. *Cambridge Townhomes v. Pac. Star*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009). The word “reevaluation” ordinarily means “the act or result of evaluating again.” Webster's Third New Intern, Dict. at 1907

(1976). And "evaluate" means "to examine and judge concerning the worth, quality, significance, amount, degree or condition of." *Id.* at 786. The word "reevaluation" does not mean "withhold," "subject to retroactive revocation," or "discretionary." *Id.* The Court of Appeals majority understood this, Op. at 8, n. 8, but missed its significance.

The reevaluation provision is read in light of the substantial performance doctrine that is part of all unilateral contracts. *Navlet*, 164 Wn.2d at 848 and authorities cited *supra* at pp. 4-8. The reevaluation provision makes it plain that the University is not making a career-long promise, and it retains the right to prospectively change the policy. But under the substantial performance doctrine, reevaluation cannot affect the promised raise for 2009-10 after the faculty substantially performed the work in 2008-09 to earn the raise. *Id.*

As the dissent said (p. 1): "Properly read, reevaluation has application to future years. It cannot be reasonably read to be an agreement by the faculty that the University of Washington had the unilateral right to modify or cancel the promised raise for meritorious faculty in the middle of and effective for the current academic contract year." (See also Judge Yu's *Storti I* decision, App. 22-23.)

Moreover, a contract is construed as a whole so that no part is ineffective or meaningless. *Cambridge Townhomes*, 166 Wn.2d at 487.

The "reevaluation" language is therefore construed in light of the other Faculty Code provisions. *Id.* And the Code repeatedly says the University "shall" pay the raise to faculty who perform meritorious work in an academic year: §24-70.B.1, a "salary increase . . . shall be granted to provide an initial minimum equal-percentage salary increase to all faculty following a successful merit review;" §24-71.A.1, the University "shall each year make available funds to provide an initial minimum increase to all faculty deemed meritorious under Section 24-55;" and Executive Order 64, "[a]ll faculty shall be evaluated annually for merit. . . . A faculty member who is deemed to be meritorious in performance shall be awarded a regular 2% merit salary increase at the beginning of the following academic year." App. 8-9 (emphasis added).⁹

The word "shall" in the provisions for a merit raise creates a *mandatory* duty, not a discretionary or optional duty. *Scannell v. City of Seattle*, 97 Wn.2d 701,704, 656 P.2d 1083 (1982); *Roberts*, 107 Wn.App. at 815. And this is especially true here because the Faculty Code uses both "shall" and "may," stating that the University "shall" pay the merit raise and it "may" provide other raises such as retention. *See* EO 64, §§24-70.B.1 and -70.B.6, and §§24-71.A.1 and -71.B.3 (App. 5, 8-9). And

⁹ Consistent with the Policy's "shall" language, the UW President and Provost repeatedly told the faculty *contemporaneously* with formulating and adopting the Policy that meritorious faculty are "guaranteed" the 2% raise. CP 270, 272, 279, 300, 303 (quotes collected at CP 574-76, 1075-76, and 1305-06).

"when both 'may' and 'shall' are contained in the same provision, 'may' presumably indicates a permissive duty, while 'shall' indicates a mandatory duty." *Scannell*, 97 Wn.2d at 707.¹⁰

The University and the Court of Appeals majority rely on “illusory promise” cases to argue that the University’s discretion “to change the policies” gave it the right to withhold the promised raises *after* the faculty’s performance and despite the Salary Policy’s mandatory language. Op. at 11, *citing Spooner v. Reserve Lite Ins. Co.*, 47 Wn.2d 454, 287 P.2d 735 (1955), and *Goodpaster v. Pfizer Inc.*, 35 Wn.App. 199, 665 P.2d 414, *review denied*, 100 Wn.2d 1011 (1983); Resp. Br. 14, 16; CP 1211-12, 1217. An “illusory promise” is as if no promise were made at all and there is no contract. *Id.*

Because construing a contract to be illusory renders the "contract" meaningless, such a construction is highly disfavored in contract law. A "court will not give effect to interpretations that would render contract obligations illusory." *Taylor v. Shigaki*, 84 Wn.App. 723, 730, 930 P.2d 340 (1997), *citing Kennewick Irrig. Dist. v. U.S.*, 880 F.2d 1018, 1032 (9th Cir. 1989) (“[p]reference must be given to reasonable interpretations as opposed to those that are unreasonable, or that would make the contract

¹⁰ The Court of Appeals majority recognized the word “shall” creates a “mandatory” duty, Op. at 8, n. 6, but the decision inconsistently finds the promise discretionary. The dissent disagreed (pp. 1-2): “The promise was not that the University of Washington in its discretion ‘might’ grant a raise. The language is ‘shall.’”

illusory"). See also *Vanegas*, 302 S.W.3d at 303-04 and *Kulins*, 459 N.E.2d at 1044-45. The Court of Appeals majority disregarded this principle of contract construction.

In *Spooner*, the Court found an illusory promise when the company expressly told the employees, in the same bulletin announcing a bonus, that it was "voluntary" and could be "withheld . . . by the employer with or without notice." 47 Wn.2d at 457 (emphasis added). The Court explained that the "ordinary meaning of 'withhold' is 'to refrain from paying that which is due'" and the employer told the employees "in plain English that the company could withhold or decrease the bonus with or without notice." *Id.* at 459. In *Goodpaster*, similarly, the employer "expressly stated that the bonus payment was discretionary." 35 Wn.App. at 200 (emphasis added). The promise was unenforceable because it contained provisions "making its performance optional or entirely discretionary by the promisor." *Id.* at 202-03.

This Court more recently addressed what an employer must do to effectively create an illusory promise in *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 862 P.2d 664 (1992). The basic principle is that "an employer is not entitled to make extensive promises . . . and then ignore those promises as illusory." *Id.* at 536. Any disclaimer of the promise must therefore be "conspicuous" and "unequivocal." *Id.* at 526-27. "At a

minimum, the disclaimer must state in a conspicuous manner that nothing contained in the handbook [etc.] is intended to be part of the employment relationship and that such statements are instead simply general statements of [the employer's] policy." *Id.* at 527.

The University's "illusory promise" argument is thus a highly disfavored construction. The Salary Policy's "reevaluation" provision does not render illusory the requirement that the University "shall" pay the raise because "reevaluation" does not mean, in unequivocal terms, that the University had unilateral discretion to withhold the promised 2% raise.

B. The Reevaluation Provision Did Not Condition the Promised Raise on Legislative Funding; the University Intended the Policy to Apply in "Real Crunch Times."

The Court of Appeals majority said the promised raises here are somehow different from bonuses in *Powell*, *Scott*, and *Simon* (discussed *supra* at p. 3), because the President and Regents could amend the Policy before the raise was to begin if funding were insufficient. *Op.* at 8-11; *Resp. Br.* at 2-18. This is directly contrary to *Carlstrom*, 103 Wn.2d at 394-95, where a collective bargaining agreement made *future percentage pay raises* between college faculty and the State subject to "future legislative enactments[,] but did not *expressly* make the contractual salary increase "contingent on the availability of legislative appropriation."

Carlstrom holds that in the absence of language *explicitly* making a promised salary increase contingent on legislative appropriation, the

contract did not allow the State to escape its promise of future raises and the State unconstitutionally impaired the contract when it enacted legislation abrogating the future percentage raises. 103 Wn.2d at 394-95.¹¹ The Court specifically rejected the State's economic argument, saying “[f]inancial necessity, though superficially compelling, has never been sufficient to permit states to abrogate contracts.” *Id.* at 396.¹² The Court also said that “the State was fully aware how to makes its contracts contingent on future acts of the Legislature” as evidenced by a contract with a different union that “made the salary schedule contingent on the availability of legislative appropriation.” *Id.* at 394.

Here, just as in *Carlstrom* and *Caritas*, there is no language in the Salary Policy *explicitly* making the promised 2% raise contingent on

¹¹ The Court applied the *Carlstrom* holding in *Caritas v. DSHS*, 123 Wn.2d 391, 404 & 406, 869 P.2d 28 (1994), when DSHS argued — just as the University argues here — that it could retroactively modify an existing contract because the contract said the parties' rights and obligations were subject to the laws of Washington "as now existing or hereafter adopted or amended[.]" The Court explained, however, that "states or agencies may put potential contractors explicitly on notice that the terms of a public contract are subject to retroactive adjustment as the whims or the budgetary necessities of the state may dictate." *Id.* at 406 n. 9. But "our case law requires such reservation clauses to be made *explicitly* contingent on future acts of the Legislature with retroactive effect." *Id.* at 406 (emphasis by the Court), *citing Carlstrom*, 103 Wn.2d at 393-95, 398-99. And "[b]ecause neither the contract nor the statute explicitly mentions future retroactive modification of pre-existing or already performed contracts, we hold they are insufficient to reserve the power to retroactively modify the contracts between DSHS and [the health care providers]." *Caritas*, 123 Wn.2d at 407.

¹² Courts in other states have rejected similar fiscal arguments because a University's obligations "must be given effect and cannot be disregarded or thought of as advisory merely because funding problems have arisen." *Subryan v. Regents of the Univ. of Colo.*, 698 P.2d 1383, 1385 (Colo.App. 1985); *Karr v. Bd. of Trustees of Mich. St. Univ.*, 325 N.W.2d 605, 609 (Mich.App. 1982) (faculty employment contracts are not "subject to unilateral change any time thereafter that the Legislature decides to cut appropriations.").

legislative funding. And just as in *Carlstrom*, the University knew how to make a promise contingent on legislative funding because elsewhere in the handbook it promised faculty that “Resources permitting” it would pay “salaries commensurate with those of their peers elsewhere” (§24-70.A, App. 8), which would “require a 20 percent increase in full professor salaries[.]” CP 1164. As the dissent said (p. 2): the Policy “did not expressly condition the promised 2 percent raise for the academic year as due only if specific legislative funding was provided. Nor did the policy expressly state that the raises promised were subject to cancellation if overall funding by the legislature was deemed inadequate.”

In addition, the University intended that the “shall” language guaranteeing the 2% merit raises would specifically apply in times of financial stress.¹³ The Provost thus explained to the faculty as part of the approval process that the Salary Policy would have a “profound impact in lean years” when faculty would receive the 2% raise “independent of what

¹³ When interpreting a contract, the “surrounding circumstances and other extrinsic evidence are to be used ‘to determine the meaning of *specific words and terms used*’ and not to ‘show an intention independent of the instrument’ or to ‘vary, contradict, or modify the written word.’” *Hearst Communications Inc., v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (citation omitted; emphasis added by Supreme Court); *accord, Alder v. Fred Lind Manor*, 153 Wn.2d 331, 352, 103 P.3d 773 (2004) (the “text of the agreement” as “well as the parties’ statements and conduct, support Fred Lind Manor’s claim that the agreement also requires it to arbitrate its disputes against employees.”). Moreover, under *Swanson*, 118 Wn.2d at 534-35, employer statements inconsistent with an employer’s disclaimer of enforceable rights are considered in deciding whether an enforceable promise is made. See also App. Reply at 20-22.

Olympia does [and] independent of what the market does”:¹⁴

In February 1999 Provost Huntsman told the Faculty Senate that “the real significance of the new policy is . . . independent of what Olympia does, independent of what the market does, we will make this a first priority from our own available resources. In an era with a budget cut from Olympia, we’re going to be downsizing new-faculty positions in order to fund this first priority. We’re saying that when real crunch times come, we’re no longer going to balance the budget on the backs of the continuing faculty in favor of retaining ‘stars.’ We’re going to fund a minimum level of ‘career progression.’” CP 270.

In March 1999 Provost Huntsman told the Faculty Senate Executive Committee that a “major emphasis in the salary policy will guarantee minimum awards for career progression.” The Policy will therefore have “a *profound* impact in the lean years, when it will mean that, despite the lack of additional funding from the Legislature, we will use the recapture money first to do this - even if we have to reduce the faculty count by cannibalizing vacancies. That’s where the power of the policy is.” CP 272 (emphasis in original).

Accordingly, the University knew how to make a raise contingent on legislative funding because it made the provision concerning pay parity with peer institutions contingent on funding, while the Salary Policy did not expressly condition the 2% merit raise on funding. Instead, the Policy repeatedly states that the University “shall” pay the 2% raise to meritorious faculty. The University expressly contemplated and intended the Salary Policy to apply when “real crunch times come[.]” CP 270. But rather than pay the merit raises, the University did the exact opposite of what the

¹⁴ The Salary Policy expressly recognized that legislative funds were only one of many sources to fund the promised 2% raises, and these other sources included “funds from tuition increases” and funds from “faculty turnover, grant, contract, and clinical funds” and “other internal resources.” App. 4, CP 336 (EO 64).

Provost stated and the Policy intended, *i.e.*, the University failed to pay the promised raise that the Policy said it “shall” pay, while it provided the retention raises the Policy said it “may” pay. App. 16, CP 350 (EO 29).

III. RES JUDICATA APPLIES BECAUSE JUDGE YU RULED AGAINST THE UNIVERSITY IN *STORTI I* ON THE PRECISE CLAIM HERE; ONLY THE YEAR OF THE BREACH IS DIFFERENT.

In 2005 King County Superior Court Judge Mary Yu decided in *Storti I* that the Salary Policy’s “plain language creates a mandatory duty that requires the University to provide meritorious faculty an annual merit increase of at least 2%. The court cannot find any language that makes the merit salary increase contingent on funding.” App. 21, CP 774. Judge Yu ruled that the “reevaluation” language in the Salary Policy did not provide the University “the right to unilaterally disregard the meritorious raise provision[.]” App. 22-23, CP 775-76.

The Court of Appeals said that *res judicata* does not apply here because *Storti II* is supposedly a different “cause of action” from *Storti I* that does not “arise out of the same transactional nucleus of facts” and does not involve “substantially the same evidence.” Op. at 14. The majority said that “Storti I involved the University’s refusal to fund raises in 2002 while leaving EO 64 intact. This case arises from the University’s 2009 decision to reevaluate and suspend raises under EO 64 by promulgating EO 29.” Op. at 14-15.

But the facts and evidence need not be identical to be the *same* cause of action for *res judicata*. *Marshall v. Thurston Co.*, 165 Wn.App. 346, 355-56, 267 P.3d 491 (2011) (same cause of action arose in different time periods). It is the same cause of action when “the subject matter involves claims and issues that were litigated, or might have been litigated in [plaintiffs’] first petition.” *Spokane Co. v. Miotke*, 158 Wn.App. 62, 66-69, 240 P.3d 811 (2010), *rev. denied*, 171 Wn.2d 1013 (2011).

Here, the Court of Appeals majority erred because this case involves the same facts and same evidence as *Storti I*, *i.e.*, the University breached its mandatory duty to pay the 2% raise under the Salary Policy after the faculty performed the work necessary to earn the raise. And Judge Yu ruled in *Storti I* that it did not matter whether the University had suspended the Policy, as it contended, because it had a “mandatory duty” to pay the raise after the faculty performed the work to earn the raise. App. 23, CP 776; Br. of App. at 35-36; App. Reply at 19-20 (discussing “same claim” for breach after substantial performance in *Storti I* as in *Storti II*). Judge Yu said that “the court need not reach the question of what process would have been utilized to repeal, evaluate, or modify the Faculty Salary Policy” because whatever the process, it could not revoke the promised 2% merit raise for work already performed. App. 23, CP 776.

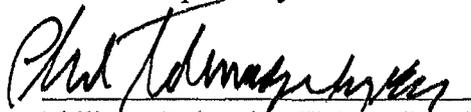
The University also argues that plaintiffs are trying to enforce the

Storti I settlement agreement and the agreement cannot be used to establish liability. Ans. to Pet. for Rev. at 14 n. 4. But plaintiffs are not relying on the settlement to establish liability; plaintiffs are relying on Judge Yu's summary judgment order establishing the University's liability. Plaintiffs only cite the settlement agreement to show the finality of the litigation. Br. of App. at 31-32 (collecting cases showing summary judgment orders in settled cases bar subsequent litigation unless the settlement agreement voids the summary judgment orders).

CONCLUSION

The Court should reverse the grant of summary judgment to the University, direct the trial court to enter summary judgment for plaintiffs, and remand to determine the amount owed to the faculty and to determine attorney fees under the common fund doctrine. *Bowles v. Dep't of Retirement Systems*, 121 Wn.3d 52, 71-72 (1993) (common fund fees awarded in class actions when plaintiffs obtain a common fund for the class).

Respectfully submitted this 8th day of July, 2013.



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CERTIFICATE OF SERVICE

A copy of Supplemental Brief of Plaintiff Faculty Class and this Certificate of Service have been served by USPS regular mail on defense counsel, as follows:

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Original was electronically filed with the Clerk's Office,
Washington Supreme Court.

I declare under penalty of perjury of the laws of the State of
Washington that the foregoing is true and correct.

Dated this 8th day of July, 2013.



Monica I. Dragoiu, *Legal Assistant*

FACULTY CODE EXCERPTS

EXECUTIVE
ORDER
NO. 64



University of Washington Office of the President, Box 351230

AUTHORIZATION TO REVISE THE UNIVERSITY HANDBOOK

TO: Professor Lea Vaughn
Secretary of the Faculty
Box 351271

FROM: Richard L. McCormick
President
Box 351230

SUBJECT: New Executive Order -- University of Washington Faculty Salary Policy

I certify that the attached statement has been properly approved and may now be published as a revision to the *University Handbook*.

Richard L. McCormick
Signature

President
Title

January 7, 2000
Date

bc: Dr. Mary B. Coney
Dr. Lee L. Huntsman
Mr. Weldon E. Ihrig
Ms. Carol S. Niccolls ✓
Dr. Steven G. Olšwang
Dr. Gerry F. Phillipsen

Storti PDA (8/18/04) 002135

Executive Order

University of Washington Faculty Salary Policy

The fundamental purpose of the University of Washington Faculty Salary Policy is to allow the University to recruit and retain the best faculty. To accomplish these two objectives, the faculty must have confidence that their continuing and productive contributions to the goals of their units and to the University's missions of teaching, research, and service will be rewarded throughout their careers. To compete for the best faculty, the University must be competitive with its peers. To retain the best faculty requires a similarly competitive approach. Therefore, the University places as one of its highest priorities rewarding faculty who perform to the highest standards and who continue to do so throughout their appointments at the University. This new policy is designed to provide for a predictable and continuing salary progression for meritorious faculty.

Salary funds must be used to attract, retain, and reward those faculty whose continuing performance is outstanding, while recognizing that disciplinary variations exist in the academic marketplace. Accordingly, the University's Salary Policy must allow for differential allocations among units. This provides the necessary flexibility to address the market gaps that develop between UW units and their recognized peers, acknowledges existing and future differentials in unit performance and contribution, and also recognizes that differing funding sources and reward structures exist among schools and colleges. The policy must ensure that equity considerations and compression are also addressed as needed.

The University's Salary Policy is founded upon the principle that individual salary decisions must be based on merit as assessed by a performance review conducted by faculty and administrative colleagues. Salary adjustments for performance and retention, as well as salary awards stemming from differential unit performance and marketplace gaps, are based upon a consultative process of faculty and administrative evaluation. Merit/performance evaluations are unit-based and reward the faculty for their contributions to local units as well as to the University's goals.

Allocation Procedure

Resources from both external and internal sources are used to fund faculty salaries. The Faculty Salary Policy anticipates new resources being made available from the Legislature, including legislative allocations for faculty salary increases and special legislative allocations for recruitment and retention, or through funds from tuition increases. Funds centrally recaptured from faculty turnover, grant, contract, and clinical funds available to individual units, and other internal resources which the Provost might identify are also used to support the plan.

Prior to the beginning of each biennium, the Provost will meet with the Board of Deans, the Faculty Senate Planning and Budget Committee, and the University Budget Committee to formulate a recommendation for a salary distribution plan. After consultation with the above

storti PDA (8/18/04) 002136

groups, the Provost shall make a recommendation to the President for faculty salary allocations. The President shall decide faculty salary allocations for the biennium, and this decision shall be reported to the Faculty Senate and to the University community more broadly.

Allocation Categories

Consistent with the stated objectives, the first priority shall be to support regular merit and promotion awards to current faculty. Further, each biennium the minimum salaries by rank will be reviewed and, if adjusted, support will be provided to ensure those minimum levels are achieved. Other funds, as available, may be allotted among the following faculty salary adjustments:

1. Additional merit to all faculty;
2. Differential distributions by unit to correct salary gaps created by changing disciplinary markets or assessments of unit quality;
3. Recruitment and retention;
4. Systemwide adjustments to raise the salaries of all meritorious faculty.

The University commits to support salary adjustments based on performance evaluations for those faculty deemed meritorious after a systematic review by faculty colleagues, department or unit head, Dean, and Provost. In order for these performance evaluations and merit salary recommendations to be meaningful, they must be done systematically and over an appropriate length of time to be able to make true quality assessments about performance and progress, considering the cumulative record of faculty.

All faculty shall be evaluated annually for merit and for progress towards reappointment, promotion and/or tenure, as appropriate. A faculty member who is deemed to be meritorious in performance shall be awarded a regular 2% merit salary increase at the beginning of the following academic year. Higher levels of performance shall be recognized by higher levels of salary increases as permitted by available funding.

Any faculty member whose performance is not deemed meritorious shall be informed by the Chair/Dean of the reasons. If deemed meritorious in the next year's review, the faculty member shall receive a regular 2% merit increase at the beginning of the following academic year. A departmental advisory committee, appointed consistent with Section 24-55H of the Faculty Code, will consider the development needs of faculty members not receiving regular merit salary increases for two consecutive years.

Promotion

In addition to regular merit salary allocations, each faculty member who is promoted in rank shall be awarded a 7.5% promotion salary increase beginning on the date the promotion is effective.

Unit Adjustments

Additional salary funds may be allocated by the Provost to colleges and schools at any time during the biennium, after appropriate consultations with the Faculty Senate Planning and Budgeting Committee, to address differentials occurring in the academic labor markets and to reflect assessments of the quality, standing, and contributions of units to College, School, and University goals. Unless specifically allocated by the Provost for a particular unit or purpose, the Deans shall consult with their elected faculty councils before distributing any additional salary increase funds among their constituent units. The procedures of Section 24-55 of the Faculty Code will be followed in distributing funds allocated to adjust faculty salaries based on merit.

Retention Adjustments

With approval from the Provost, college-administered or University funds may be used to adjust faculty salaries as a means to retain faculty members at the University of Washington either at the time of merit reviews or at other times as necessary throughout the academic year. Assessments of a faculty member's quality and unit contribution are essential elements in decisions to make retention adjustments. Consultative processes to recommend retention adjustments shall be established at the unit level following the procedures set forth in Section 24-71 of the Faculty Code.

Funding Cautions

This Faculty Salary Policy is based upon an underlying principle that new funds from legislative appropriations are required to keep the salary system in equilibrium. Career advancement can be rewarded and the current level of faculty positions sustained only if new funds are provided. Without the infusion of new money from the Legislature into the salary base, career advancement can only be rewarded at the expense of the size of the University faculty. Without the influx of new money or in the event of decreased State support, a reevaluation of this Faculty Salary Policy may prove necessary.

SECTIONS
24-70 & 24-71

Section 24-70 Faculty Salary System: Policy and Principles

- A. Faculty at the University of Washington shall be salaried on a merit-based system that reflects the University's standing among its peer institutions. Under this system, all faculty deemed meritorious shall be regularly rewarded for their contributions to their department, school/college, and university. Resources permitting, the University shall provide its meritorious faculty with salaries commensurate with those of their peers elsewhere.
- B. Advancement in salary can be effected in several distinct, but not mutually exclusive, ways. A salary increase:
1. Shall be granted to provide an initial minimum equal-percentage salary increase to all faculty following a successful merit review (conducted in accord with procedures of Section 24-55);
 2. Shall attend, in addition to awards under Subsection B.1 above, promotion in rank (approved in accord with Section 24-54);
 3. Shall be awarded to raise individuals' salaries to the minimum salary for each faculty rank (in accord with Section 24-71, Subsection A.3 below);
 4. May be awarded as an additional merit salary increase beyond that available under Subsection B.1 (following review procedures of Section 24-55);
 5. May be awarded as a result of unit-level adjustment (in accord with Section 24-71, Subsection B.2 below);
 6. May be offered in response to a potential or actual external offer of appointment (upon review in accord with Section 24-71, Subsection B.3 below); and
 7. May be allocated as a University-wide increase in the faculty salary base that shall be distributed in equal dollar amounts or equal percentage salary increases to all meritorious faculty.

S-A 99, July 9, 1999 with Presidential approval.

Section 24-71 Procedures for Allocating Salary Increases

- A. The Provost shall consult with the Senate Committee on Planning and Budgeting and, each biennium, shall subsequently recommend to the President the allocation of available funds for salary increases, for distribution among all categories listed in Section 24-70, Subsection B. The President shall make the final decision on these allocations and shall report the decision to the Faculty Senate.
1. This allocation shall each year make available funds to provide an initial minimum

equal-percentage salary increase to all faculty deemed meritorious under Section 24-55.

2. This allocation shall each year make available funds to provide salary increases to all faculty awarded promotions approved in accord with Section 24-54.
3. Every two years, the Provost shall, after consultation with the Senate Committee on Planning and Budgeting, determine the minimum salary for each faculty rank. This determination shall take account of the recent salaries of beginning assistant professors at the University of Washington, and shall endeavor to reflect in the floors for other ranks the general expectation of salary advancement for faculty.

B. The Provost may distribute, in the course of a biennium, funds allocated by the President:

1. To provide additional merit salary increases (beyond those awarded under Subsection A.1). This allocation shall be distributed as equal-percentage increases to all units to fund merit increases for faculty (in accord with Section 24-55).
2. To address the market "gap" of an individual unit. Allocation of such funds to units shall follow close consideration of individual units and consultation with the Senate Committee on Planning and Budgeting. The Provost shall periodically gather updates on salary information from appropriate sources, including unit heads, and shall make those findings available to the faculty. The department chair (or dean in an undepartmentalized school/college) shall consult with the unit's voting faculty who are senior (or, in the case of full professors, equal) in rank—or the unit's designated faculty committee(s)—about the appropriate distribution of these funds; and
3. To retain a current faculty member, based on the recommendation of the dean. Prior to preparing a response, the dean shall first consult with the unit's chair. The faculty of each academic unit shall be provided the opportunity to cast an advisory vote on the appropriate response; alternatively, the faculty may establish, consistent with the procedures of Chapter 23, Section 23-45, a different policy regarding the level of consultation they deem necessary before a competitive salary offer may be made. This policy shall be recorded with the dean's office of the appropriate unit and a copy forwarded to the Secretary of the Faculty. The faculty shall vote whether to affirm or amend this policy biennially.

C. The deans of the schools and colleges shall, after consultation with their elected faculty councils (Chapter 23, Section 23-45, Subsection B), allocate to the faculty of the constituent units of their school/college, all funds made available to provide salary increases under Section 24-70, Subsection B. Distribution of these awards to individual faculty shall be carried out following the requisite procedures of Chapter 24.

S-A 99, July 9, 1999; S-A 105, May 6, 2002: both with Presidential approval.

SECTION

24-55

Section 24-55. Procedure for Salary Increases Based Upon Merit

Faculty at the University of Washington shall be reviewed annually by their colleagues, according to the procedures detailed in this Section, to evaluate their merit and to arrive at a recommendation for an appropriate merit salary increase. Such reviews shall consider the faculty member's cumulative record, including contributions to research/scholarship, teaching, and service, and their impact on the department, school/college, university, and appropriate regional, national, and international communities.

The evaluation of a faculty member's merit and salary shall be arrived at after review of the individual's performance in relation to that of their colleagues and by comparison of individuals' present salaries to those of their peers. In evaluating a faculty member's eligibility for merit-based salary increases (Section 24-70.B.1 and 4; Section 24-71.A.1 and B.1) and for "market gap" salary increases (Section 24-71.B.2), the following procedure shall be followed.

- A. In arriving at their recommendations for salary decisions the appropriate faculty, department (unit) chairs, and deans shall each consider the following:
 1. the cumulative record of the candidate, taking into account the qualifications prescribed in Sections 24-32, 24-33, 24-34, and 24-35 for the various academic ranks;
 2. the candidate's current salary;
 3. documentation of the review conference required by Section 24-57.D ; and
 4. any documents produced under Section 24-55.H Salary recommendations shall seek to minimize salary inequities. Salary compression and other inequities, including those resulting from variations in the level of merit funds available over time, may be considered in making merit salary recommendations.
- B. The merit and salary of each faculty member below the rank of professor shall be considered by the voting members of the department, or undepartmentalized college or school, who are his or her superiors in academic rank, and they shall recommend any salary increase which they deem merited.
- C. The chair of a department, or the dean of an undepartmentalized school/college, shall consider the merit and salary of each full professor in his or her unit. Before forwarding his/her recommendations the chair (or dean in an undepartmentalized school/college) shall seek the advice of the full professors according to a procedure approved by the voting members of the unit.
- D. If the recommendation is a departmental one, the chair shall transmit it to the dean with any supporting data the dean may request. If the chair does not concur in the recommendations he or she may also submit a separate recommendation.
- E. The dean shall review the department's recommendation and forward his or her recommendation regarding faculty merit and salary to the President.
- F. The dean of each college/school shall review the record and salary of the chair of each department and shall recommend an appropriate salary increase to the President.

- G. The President shall authorize the salary increases of the faculty, and of each dean.
- H. At the option of the faculty member affected, and mandatorily in the event of two consecutive annual ratings of no merit (as a result of reviews under 24-55), the chair of the faculty member's department (or dean of an undepartmentalized school or college) shall, after consultation with the faculty member, appoint an ad hoc committee of department (or school/college) faculty superior (or, in the case of full professors, equal) in rank to the faculty member. This committee shall meet at its earliest convenience with the faculty member and review more fully the record and merit of that faculty member.

The committee shall, upon completion of its review, report in writing the results to the faculty member and to his or her department chair (or dean in an undepartmentalized school/college) and the committee shall advise them what actions, if any, should be undertaken to enhance the contributions and improve the merit ranking of this colleague, or to rectify existing misjudgments of his/her merit and make adjustments to correct any salary inequity. The faculty member may respond in writing to this report and advice within twenty- one calendar days to the department chair (or dean) and committee (unless upon the faculty member's request and for good cause the response period is extended by the chair or dean). The committee's report and advice, the faculty member's written response (if any), the response by the chair, and any agreement reached by the faculty member and the chair shall be incorporated into a written report.

Section 13-31, April 16, 1956; S-A 58, May 16, 1978; S-A 75, April 6, 1987; S-A 82, November 21, 1990; S-A 99, July 9, 1999: all with Presidential approval.

SECTION

12-21

Section 12-21, The President

A. Functions and Responsibilities

As the chief executive officer of the University, the President has responsibility for the general welfare of the institution, including its programs in instruction, research, and public service. The President is responsible directly to the Board of Regents for the management of the University. The President is the University community's official representative to the Board of Regents. For example, the President is authorized to bring matters to the Board of Regents, or to any of its committees for action. With the advice and consent of the Board of Regents, and after consultation with the Provost, other appropriate members of the University administration, and such groups as the Faculty Senate, the President develops and directs the administration of policies, regulations, and procedures that affect the entire University. The establishment and maintenance of effective relationships with officers of federal and local governments, including the Governor, the State Legislature, members of Congress, and Federal agencies are among the important continuing responsibilities of the President. The President represents the University before the Higher Education Coordinating Board (HEC Board) and to the presidents of other state higher education institutions. The President also serves as the University's principal liaison officer with such other external bodies as national higher education associations, accrediting agencies, the chief executive officers of the member institutions of the Pacific Athletic Conference (Pac-10), and a variety of other organizations. In addition to communication and interaction with the faculty, staff, and the student body, the President is concerned with a number of important external support groups and constituencies identified with the institution's diverse interests, such as alumni, advisory, and visiting committees; private donors; and civic, professional, and community organizations.

Executive Order No. 2 of the President, June 1, 1972; revised February 21, 1978; October 1, 1982

B. Executive Order Procedure

Before an Executive Order is promulgated or revised by the President, it shall be reviewed by the Faculty Senate. The President shall forward the proposed Executive Order (or revision) to the Faculty Senate Chair and to the Secretary of the Faculty, noting reviews that have taken place and requesting appropriate Faculty Senate review. The Faculty Senate Chair shall arrange a review and notify the President of the outcome of the review within a reasonable time, but in any event no longer than sixty days after receipt of such request for review. If revisions to the proposed Order suggested by the Faculty Senate are not approved by the President, there shall be consultations with the Chair of the Faculty Senate to seek to resolve the differences. Following such consultations, the decision of the President is final. When signed by the President, the original of the Executive Order shall be retained in the Executive Order file in the President's Office. The Secretary of the Faculty shall assign a number to the Executive Order, publish it in the Handbook, and arrange for its general campus distribution. Executive Orders become effective on the day signed by the President, unless otherwise noted within the text of the Order. All new or revised Executive Orders shall be listed in the Master Index, accompanied by appropriate background material.

Executive Order No. 3 of the President, June 12, 1996, revised January 6, 2003.

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EXECUTIVE
ORDER
NO. 29

Footnote #3: Partial Suspension of Executive Order No. 64

Purpose. The purpose of this Executive Order is to address the immediate financial circumstances facing the University by temporarily controlling faculty salary levels while reaffirming the University's commitment to ensuring the quality of the University through a competitively compensated faculty dedicated to academic excellence.

Need for Temporary Reevaluation of Faculty-Salary Policy. Executive Order No. 64 recognized that in the event of decreased State support, a reevaluation of the Faculty Salary Policy could prove necessary. Unfortunately, we face that contingency to a degree that could not have been predicted even a year ago. The nation and the state of Washington are experiencing the effects of a global financial crisis of historic proportions. One consequence of this financial crisis is a drastic reduction in the State budget, which is virtually certain to result in significant reductions in State support for the University. The expected reductions in State support, combined with other economic forces, will result in cuts to programs, increased tuition, and reduced access for students, lay-offs and non-renewal of personnel, as well as limitations on the University's ability to increase salaries for broad classes of its employees. The cost of maintaining regular merit increases for the 2009–11 biennium would be even more damaging in the midst of broad and dramatic budget cuts across the Institution.

Partial Suspension of Executive Order No. 64. In light of the economic circumstances facing the University, the following portions of Executive Order No. 64 must be and are immediately suspended:

1. The phrase "regular merit" in the first sentence of the subsection entitled *Allocation Categories*.
2. The sentence that reads, "A faculty member who is deemed to be meritorious in performance shall be awarded a regular 2% merit salary increase at the beginning of the following academic year."
3. The sentence that reads, "If deemed meritorious in the next year's review, the faculty member shall receive a regular 2% merit increase at the beginning of the following academic year."
4. The phrase, "In addition to regular merit salary allocations," in the sentence in the subsection entitled *Promotion*.

All other portions of Executive Order No. 64 remain in effect. This suspension shall expire at the conclusion of the 2009–11 biennium.

Reaffirmation of Principles and Commitment. Although the suspension of merit salary increases is a temporary imperative, it remains equally evident that regular merit increases, promotions, hiring, retention, and competitive compensation of faculty are critical to the long-term success of the University. University leadership remains steadfastly committed to the fundamental elements of Executive Order No. 64, and its principles and priorities are reaffirmed. As evidence of this commitment, the following steps, subject to State law or formal changes to University policy, will be taken to respect the principles of the salary policy in Sections 24-70 and 24-71 of the *Faculty Code* and the portions of Executive Order No. 64 that have not been suspended:

1. Regular merit increases will resume first priority for allocation of salary funds after this suspension expires;
2. Promotion increases will continue during the 2009–11 biennium;
3. If a dean or chancellor, following procedures consistent with Section 24-71 B.3 of the *Faculty Code*, determines that offering a retention salary increase is required, the dean or chancellor will be allowed to allocate to this purpose some of the funds remaining to it after undertaking budget cuts negotiated with the Provost;
4. No pool of funds will be set aside centrally by the Provost or President for the purpose of retention in academic units;
5. Faculty positions will only be filled to the extent necessary to fulfill the University's mission and vision;
6. During the 2009–11 biennium, the Provost will provide the Senate Committee on Planning and Budgeting quarterly reports to review the status of faculty recruitment and retention across the Institution.

Executive Order No. 29 of the President, March 31, 2009.

STORTI I

ORDER ON LIABILITY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DUANE STORTI, and a class of similarly
situated individuals,

Plaintiffs,

v.

UNIVERSITY OF WASHINGTON,

Defendant.

No. 04-2-16973-9 SEA

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

THIS MATTER came before the undersigned judge on cross motions for summary judgment. Plaintiff filed a Motion for Summary Judgment re: University's Duty to Provide a 2% Merit Salary Increase in the 2002-03 Academic Year and Defendant filed a Motion for Partial Summary Judgment dismissing claims asserted as part of Plaintiff's contract claim. The court reviewed the following:

- Plaintiffs' Second Amended Complaint;
- Plaintiffs' Motion for Partial Summary Judgment re: University's Duty to Provide 2% Merit Salary Increase in the 2002-03 academic year;
- Stephen Festor's December 20, 2004 declaration and its attached exhibits;
- Stephen Festor's January 21, 2005 declaration and its attached exhibits;

Judge Mary I. Yu
King County Superior Court
516 Third Avenue
Seattle, WA 98104
(206) 296-9275

- 1 • Stephen Festor's March 16, 2005 declaration and its attached exhibits;
2 • Stephen Festor's September 23, 2005 declaration and its attached exhibits;
3 • Excerpts from University Handbook;
4 • Brief of Plaintiff Class in Opposition to UW's Motion for Summary Judgment;
5 • Stephen Strong's October 10, 2005 declaration and its attached exhibits;
6 • Excerpts from University Handbook (Volume II);
7 • Plaintiffs' Reply Brief on Summary Judgment;
8 • Stephen Festor's October 17, 2005 declaration and its attached exhibits;
9 • Defendant's Motion for Partial Summary Judgment;
10 • Declaration of David B. Robbins and its attached exhibits;
11 • Declaration of Gerry Philipsen;
12 • Declaration of Bradley Holt;
13 • Declaration of Sandra Silberstein and its attached exhibits;
14 • Declaration of Steven Olswang;
15 • Declaration of Michael Madden and its attached exhibits;
16 • Memorandum in Opposition to Plaintiff's Motion for Summary Judgment;
17 • Declaration of Richard L. McCormick;
18 • Second Declaration of David B. Robbins and its attached exhibits;
19 • Defendants' Reply Memorandum in Support of Motion for Summary Judgment;

20 and heard oral argument on October 21, 2005.

21 **Decision and Order**

22 After considering the pleadings and argument presented by the parties, the court finds
23 that there are no material issues of fact and that the court can decide the issues presented as a
24 matter of law. Summary judgment in a contract dispute is appropriate where the terms of a
25 written contract are unambiguous or where reasonable minds could reach only one conclusion
26 from all of the evidence presented. Therefore, for the following reasons,

27 **IT IS HEREBY ORDERED that Plaintiff's Motion IS GRANTED and Defendant's**
28 **Motion IS DENIED.**

29 The University of Washington's ("the University's") Faculty Salary Policy is contained
in the Faculty Handbook §§24-70 and 24-71, and Executive Order 64. Plaintiff claims that the
Faculty Handbook constitutes the employment contract between the University and its faculty.

1 The University does not dispute this claim for summary judgment purposes and indeed argued
2 that principles of contract interpretation should apply (*see* Memorandum in Opposition to
3 Plaintiff's Motion for Summary Judgment at p.6).
4

5 The Faculty Salary Policy outlines the University's policy on faculty salary pay raises.
6 The Faculty Salary Policy was the result of extensive negotiations between the University
7 Administration and the faculty represented by the Faculty Senate. The issue presented on
8 summary judgment is whether the Faculty Salary Policy regarding merit salary increases
9 constitutes a contractual obligation for the University in the year 2002-03.¹
10

11 A preliminary question is whether the court should consider extrinsic evidence in order to
12 interpret the contract. Both parties offered such evidence to support their respective
13 interpretations.² While the contemporaneous material submitted by Plaintiff supports the court
14 finding that the parties intended to bind themselves to funding a 2% meritorious salary increase,
15 the court concludes that it is not necessary to consider this extrinsic evidence since the intent of
16 the parties is ascertainable by reading the plain language of the agreement. *Hearst*
17 *Communications v. Seattle Time Co.*, 154 Wn.2d 493 (2005).
18
19

20 The Faculty Handbook outlines principles and procedures for implementing promotion,
21 merit based salary, and tenure considerations. It also discusses the purpose of the Faculty Salary
22 Policy which is to "recruit and retain the best faculty" by rewarding faculty based on
23 performance. "This new policy is designed to provide for a predictable and continuing salary
24

25
26 ¹ The University provided at least 2% salary increases to meritorious faculty in 2000-01, 2001-02, and 2003-04. The
only year in question is 2002-03.

27 ² The Plaintiff offered extensive contemporaneous material such as minutes, e-mails, and hard copy
28 correspondence. The Defendant offered *post hoc* testimony of individuals who were directly involved in the
development of the salary policy.
29

1 progression for meritorious faculty.” §24-57, at p.10. The policy goes on to describe allocation
2 categories and prioritizes the salary distribution plan. The first priority is to support regular
3 merit and promotion awards to current faculty, *Id.*, at p. 11. It further states that all meritorious
4 faculty shall receive a 2% merit salary increase:
5

6 All faculty shall be evaluated annually for merit and for progress towards reappointment,
7 promotion and/or tenure, as appropriate. A faculty member who is deemed to be
8 meritorious in performance shall be awarded a regular 2% merit salary increase at the
9 beginning of the following academic year. Higher levels of performance shall be
10 recognized by higher levels of salary increases as permitted by available funding.

11 *Id.*, at p.11-12.

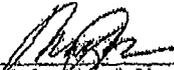
12 The Faculty Salary Policy states that a “salary increase . . . shall be granted to provide an
13 initial minimum equal-percentage salary increase to all faculty following a successful merit
14 review.” §24-70.B.1, at p. 13. Section 24-71.A.1 states that the University President “shall each
15 year make available funds to provide an initial minimum equal percentage salary increase to all
16 faculty deemed meritorious . . .” Executive Order 64, incorporated by reference into the Faculty
17 Salary Policy, states an express commitment by the University to support a salary adjustment
18 based on performance evaluations for those faculty deemed meritorious; that “[a] faculty
19 member who is deemed to be meritorious in performance shall be awarded a regular 2% merit
20 salary increase at the beginning of the following academic year.”
21

22 After reviewing all of the relevant portions of the Faculty Salary Policy, the court
23 concludes that the plain language creates a mandatory duty that requires the University to
24 provide meritorious faculty an annual merit increase of at least 2%. The court cannot find any
25 language that makes the merit salary increase contingent on funding.
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1 must mean that if funding became an issue, the parties would subject the Faculty Salary Policy to
2 further evaluation or review. It does not say that the Faculty Salary Policy will be rescinded,
3 cancelled, or repealed and this court cannot transpose such a meaning to the word
4 "reevaluation." One might assume that reevaluation would require a re-opening of discussions
5 with the Faculty Senate and resubmitting the Salary Policy for review and consideration by all of
6 the stakeholders. However, the court need not reach the question of what process would have
7 been utilized to repeal, evaluate, or modify the Faculty Salary Policy. The Faculty Salary
8 Policy's plain language creates a mandatory duty that requires the University to provide
9 meritorious faculty an annual 2% merit salary increase in the year 2002-03.
10

11
12 In regard to Defendant's Motion for Partial Summary Judgment, the court denies the
13 Motion in its entirety. For the above stated reasons, the court denies Defendant's Motion to
14 dismiss plaintiff's contract claims. The court also rejects Defendant's assertions that the court
15 does not have jurisdiction to consider Plaintiff's claims. The court has original jurisdiction over
16 this contract dispute in which the relief sought is monetary damages. Moreover, the University
17 rejected Plaintiff's attempts to adjudicate the dispute on the basis that the adjudication process of
18 the University was "not the proper forum" to review the faculty salary issue.
19
20

21 IT IS SO ORDERED this 25th day of October, 2005.

22
23 
24 _____
25 Judge Mary I. Yu
26 KING COUNTY SUPERIOR COURT
27
28
29

OFFICE RECEPTIONIST, CLERK

To: Monica Dragoiu
Cc: phil@tal-fitzlaw.com; Paula Chapler; Mary Forsgaard; ldp@hcmp.com; Mary Crego; Jake Ewart; smp@hcmp.com
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Rec'd 7-8-13

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Subject: Case No: 88323-8 - Duane Storti v. University of Washington

Attached for filing please find Plaintiff Faculty Class' Supplemental Brief.

The following information is provided in accordance with the rules for e-filing:

Case name: Duane Storti v. University of Washington

Washington Supreme Court Case number: 88323-8

Name, phone number, bar number and email address of the attorney signing this document:

Stephen K. Strong; 206 622 3536, WSBA# 6266; skstrong@bs-s.com

This brief is being served on all counsel of record by email and US mail.

Thank you.

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