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**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

PETER NYE, and a class of similarly situated persons,

Appellant,

vs.

UNIVERSITY OF WASHINGTON

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

CONTENTS

I. INTRODUCTION1

II. STATEMENT OF THE CASE2

 A. The University Handbook Authorizes the President and the Board of Regents to Make and Change Policies Regarding Faculty Salaries.....2

 B. Executive Order No. 64 Authorized Annual Two Percent Faculty Salary Raises.4

 C. The University Did Not Fund Faculty Raises In 2002-03.....5

 D. The University Reevaluated and Changed Executive Order No. 64 in 2009.....5

 E. Procedural Posture.12

III. AUTHORITY.....13

 A. The University Had Authority to Change the Handbook.13

 1. *Washington courts recognize an employer’s right to change a handbook.....13*

 2. *The University Handbook expressly retained discretion for the President and the Board of Regents.17*

 3. *A financial emergency is not required for the Handbook to be changed.....21*

 4. *A faculty vote is not required to suspend the raises.....23*

5.	<i>Even if they had not been changed by the Board of Regents' Resolution, Sections 24-70 and 24-71 do not provide unconditional raises.</i>	24
B.	A Potential Raise is Not "Wages Earned."	27
C.	The Trial Court Was Required to Dismiss This Action Because It Was Filed After the Deadline Established by the Administrative Procedure Act.	28
1.	<i>Nye's claims are governed by the APA.</i>	29
2.	<i>Nye did not meet the APA's procedural requirements.</i>	32
IV.	CONCLUSION	35

TABLE OF AUTHORITIES

	Page
CASES	
<i>Amy v. Kmart of Washington LLC</i> , 153 Wn. App. 846, 223 P.3d 1247 (2009)	29
<i>Cheek v. Employment Sec. Dep't of Wash.</i> , 107 Wn. App. 79, 25 P.3d 481 (2001)	33, 34, 35
<i>City of Seattle v. Pub. Employment Relations Comm'n</i> , 116 Wn.2d 923, 809 P.2d 1377 (1991)	33, 34, 35
<i>Cole v. Red Lion</i> , 92 Wn. App. 743, 969 P.2d 481 (1998).....	14
<i>Costanich v. Wash. Dep't of Soc. & Health Servs.</i> , 138 Wn. App. 547, 156 P.3d 232 (2007), <i>overruled on other grounds by Costanich v. Wash. Dep't of Soc. & Health Servs.</i> , 164 Wn.2d 925, 194 P.3d 988 (2008).....	30, 31
<i>Gaglidari v. Denny's Rest., Inc.</i> , 117 Wn.2d 426, 815 P.2d 1362 (1991)	14
<i>Goodpaster v. Pfizer, Inc.</i> , 35 Wn. App. 199, 665 P.2d 414 (1983)	14, 15, 17, 28
<i>Govier v. North Sound Bank</i> , 91 Wn. App. 493, 957 P.2d 811 (1998)	13, 14
<i>Hollis v. Garwall, Inc.</i> , 137 Wn.2d 683, 974 P.2d 836 (1999).....	26
<i>Korslund v. Dyncorp Tri-Cities Servs., Inc.</i> , 156 Wn.2d 168, 125 P.3d 119 (2005)	16
<i>McGinnity v. AutoNation, Inc.</i> , 149 Wn. App. 277, 202 P.3d 1009 (2009)	31
<i>Morgan v. Kingen</i> , 166 Wn.2d 526, 210 P.3d 995 (2009)	27
<i>Muckleshoot Indian Tribe v. Wash. Dep't of Ecology</i> , 112 Wn. App. 712, 50 P.3d 668 (2003)	30, 31, 32, 33

<i>Schilling v. Radio Holdings, Inc.</i> , 136 Wn.2d 152, 961 P.2d 371 (1998)	27
<i>Seattle-First Nat'l Bank v. Westlake Park Assocs.</i> , 42 Wn. App. 269, 711 P.2d 361 (1985)	17
<i>Trimble v. Washington State University</i> , 140 Wn.2d 88, 993 P.2d 259 (2000)	14, 15

STATUTES

RCW 28B.20.100(1).....	2
RCW 28B.20.130	30
RCW 28B.20.130(1).....	2, 21
RCW 34.05.010(11)(a).....	29
RCW 34.05.010(16)	29
RCW 34.05.010(2)	29
RCW 34.05.010(3)	29, 30, 31, 32
RCW 34.05.510	29, 31, 32
RCW 34.05.540(4)(b).....	31
RCW 34.05.542(3)	33, 35
RCW 34.05.570(4)	29
RCW 34.05.570(4)(b).....	29, 32
RCW 41.06.070	6
RCW 41.06.070(3)	6, 30

I. INTRODUCTION

The University of Washington is one of the oldest state-funded research institutions on the West Coast, and currently serves more than 45,000 students. The University employs more than 40,000 people, including thousands of faculty members. Like other state agencies, the University has been hard hit by the recession. The University's state funding was cut dramatically. Despite supplemental federal funds and significant tuition increases, the University still had to make significant cuts to its budget. Through layoffs and unfilled vacancies, the University has reduced its staff by 600. The University also implemented faculty hiring restrictions and reduced its faculty by more than 100 full-time equivalent positions.

Following consultations with the Faculty Senate, the University also suspended annual two percent salary increases for its remaining faculty. The University's President implemented this salary freeze by issuing an Executive Order according to procedures spelled out in the University Handbook. The faculty knew this change was a possibility because the original Executive Order issued by the President warned that annual raises may be reevaluated "in the event of decreased state support" The Board of Regents, which has ultimate authority to manage the University under state statute and pursuant to the University

Handbook, passed a Resolution endorsing the President's Executive Order. The Chair of the Faculty Senate praised the process used to reach this decision and specifically noted that the faculty's advice was "listened to and in fact our advice was taken."

Six months later, Peter Nye filed this action seeking a two percent raise. The lawsuit failed to satisfy the procedural requirements of the Administrative Procedure Act because Nye waited too long to file and failed to serve the University properly. More importantly, Nye's claim for a two percent raise was based on (1) an Executive Order that had already been changed by the President, and (2) other provisions of the University Handbook that were modified by the Board of Regents' Resolution. Both the President's action and the Board of Regents' action were expressly authorized by the University Handbook.

The King County Superior Court dismissed Nye's claims on summary judgment, and this Court should affirm that decision.

II. STATEMENT OF THE CASE

A. The University Handbook Authorizes the President and the Board of Regents to Make and Change Policies Regarding Faculty Salaries.

The University is a state agency governed by a Board of Regents appointed by the Governor. RCW 28B.20.100(1). The Board of Regents has full control over the University and its property. RCW 28B.20.130(1).

Although the Board of Regents has delegated some of its authority to the University's President, the Board retains the

right to intervene and modify any rule, regulation, or executive order formulated by the *President or the faculty*, the right to amend or rescind any existing rule, regulation, or executive order, and the right to enact such rules, regulations, and orders as it deems proper for the government of the University.

CP 68 (University of Washington Handbook ("Handbook") § 12-12(A)) (emphasis added).

The President is the University's chief executive officer. CP 72 (Handbook § 12-21(A)). He has the authority to issue rules, regulations, and Executive Orders for the governance of the University, including Executive Orders concerning utilization of available resources. CP 68 (Handbook § 12-12(B)). Before issuing an Executive Order, the President must send it to the Faculty Senate for review. CP 73 (Handbook § 12-21(B)(1)). If the Faculty Senate suggests revisions to the proposed order, the President must consult with the Chair of the Faculty Senate and attempt to resolve those differences. *Id.* "Following such consultations, the decision of the President is final." *Id.* The Faculty Senate cannot amend an Executive Order. CP 197 (Handbook § 29-31(A)).

B. Executive Order No. 64 Authorized Annual Two Percent Faculty Salary Raises.

In January 2000, then-President Richard McCormick issued Executive Order No. 64, which contained a faculty salary policy. CP 80-82. Executive Order No. 64 expressed the University's goal of recruiting and retaining the best faculty. *Id.* at 80. This appeal relates to the Order's provision regarding annual two percent faculty salary raises. CP 81.

Executive Order No. 64 states:

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.

Id.

Executive Order No. 64 was expressly premised on the availability of new funds from the Legislature. It recognized that if economic conditions deteriorate—particularly if funding from the Legislature is reduced—it could be necessary to reevaluate the salary policy. Those concerns were expressed in a section of the Order entitled “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.

CP 82. The University funded salary increases of at least two percent in 2000-01, 2001-02, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09. CP 65.

C. The University Did Not Fund Faculty Raises In 2002-03.

In 2002, the University faced budget cutbacks and passed a budget that did not include merit salary increases for 2002-2003. A faculty member, Duane Storti, filed a class action lawsuit and obtained a summary judgment ruling in favor of University faculty. CP 94-99 (*Storti v. University of Washington*, King County Superior Court Cause No. 04-2-16973-9 SEA, Order Granting Plaintiff's Mot. for Summ. J., Oct. 25, 2005 (J. Yu)). The Superior Court reasoned that, although the University retained the right to change Executive Order No. 64, it could not leave the policy on the books and simply fail to fund salary increases. *Id.* The case settled, and no final judgment on this issue was entered by the trial court.

D. The University Reevaluated and Changed Executive Order No. 64 in 2009.

Unfortunately, the University—along with the rest of the country—has been facing the most severe economic crisis since the Great

Depression. Real estate values have plummeted and unemployment has risen sharply. Public agencies have not been immune to the recession. With tax revenues shrinking, the state needed to cut billions of dollars from its budget. In August 2008, Governor Christine Gregoire urged state agencies to adjust their spending. CP 100-02. She announced a statewide freeze on hiring, purchasing of new equipment, and out-of-state travel. *Id.* She urged the presidents of the state's universities to take similar action. *Id.* Also in response to the economic crisis, on February 19, 2009, the Washington Legislature passed ESSB 5460, which mandated: "For the twelve months following February 18, 2009, a salary or wage increase shall not be granted to any position exempt from classification under this chapter." The Legislature has since extended that salary freeze through June 30, 2011. RCW 41.06.070(3).¹

The statewide budget cuts have had a dramatic impact on the University. The University's state funding was slashed by more than \$214 million for the 2009-2011 biennium, the largest percentage cut of any institution of higher education in the state. CP 65. Even after the injection of \$24.7 million in one-time federal stimulus funds and significant tuition increases, the University had to cut its overall budget by more than 12 percent. *Id.* The University also implemented faculty hiring

¹ Faculty members are exempt from classification pursuant to RCW 41.06.070.

restrictions. *Id.* Through layoffs and unfilled vacancies, the University reduced its staff by more than 600 people and reduced its faculty by more than 100 full-time equivalent positions. *Id.* In her proposed budget for 2010, Governor Gregoire called for more than \$20 million in additional cuts for the University, again the largest cut proposed for any institution of higher education in the state. *Id.*

Against the backdrop of difficult budget cuts, President Mark Emmert found it necessary to reevaluate Executive Order No. 64. CP 65-66. President Emmert and Faculty Senate Chair David Lovell appointed a Committee to Re-Evaluate Executive Order No. 64, which included faculty and administration members. *Id.* The outcome of the reevaluation was a proposed new Executive Order, which President Emmert submitted to the Faculty Senate for review in accordance with the procedures outlined in the University Handbook. CP 73 (Handbook § 12-21(B)(1)); CP 87-88 (Lovell Declaration); CP 65-66 (Emmert Declaration). The Faculty Senate reviewed the proposed Executive Order at its March 12, 2009 meeting and reported back to the President and the Board of Regents. CP 65-66, 87-88. In a March 19, 2009 report to the Board of Regents, Faculty Senate Chair Lovell² stated:

² The chair of the Faculty Senate is the Senate's sole spokesperson "[o]n all matters concerning the publication or public explanation of Senate actions." CP 9 (Handbook § 22-54).

Proposed New Executive Order: Following the guidance of the Storti ruling, the President and Chair of the Faculty Senate formed a joint committee to reevaluate Executive Order No. 64, which required an annual 2% salary increase for all meritorious faculty. The President Proposed a new Executive Order suspending this requirement, and the Faculty Senate and other members of the University community have reviewed it as well.

Faculty Senate Action: At its March 12th meeting, the Faculty Senate took the action that the Faculty Code empowers and obliges it to take: together with the President it reviewed the Executive Order. While most senators understand that saving jobs and programs outweighs the importance of a salary increase, many senators believed they had not had enough time to discuss issues with their colleagues, saw no harm in waiting until the legislature provides more definition to our budget or preferred a one-year over the biennial suspension of the requirement. The Senate Chair and the Secretary of the Faculty have notified the President of the outcome of the review. Although the Senate took no formal action on the proposed Order, the President has subsequently consulted with the Senate Chair on its content.

CP 88. President Emmert consulted with Faculty Senate Chair Lovell regarding revisions proposed by the faculty, and President Emmert incorporated many of the faculty's suggestions into his Executive Order. CP 65-66, 87-88.

On March 31, 2009, President Emmert issued Executive Order No. 29. CP 66. The new Executive Order modified Executive Order No. 64 by partially suspending certain provisions. Executive Order No. 29 states:

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.

CP 83-84.

In April 2009, the Board of Regents reviewed the President's new Executive Order. Before passing a resolution endorsing the order, the Board invited Faculty Senate Chair Lovell to speak. He said:

Well sure, I will make, I will comment about it. Mostly just to confirm what your chair has said that **we've been talking about this very actively for several months**. And the Executive Order which the Resolution is endorsing and declaring as the policy of the University is an executive order that was the work of a joint committee appointed by me and the President. And that executive order was reviewed in a Faculty Senate meeting. As I reported to you at your previous meeting and what has happened since then is that the Secretary of the Faculty and I in accordance with the Faculty Code prepared a set of comments for the President's consideration, reflecting what we took to be the concerns of the faculty as expressed in that meeting and other venues. And made some suggestions about the wording of the Executive Order—what should be and what should not be in it. Mostly additional things that should be in it. And those suggestions were incorporated into the Executive Order. **We were very pleased to see that our advisory role—not only did we advise but we were listened to and in fact our advice was taken. So we believe the process—it's a cliché—but we believe that the process worked in this case.** And appreciate the Regents' respect for that process.

CP 88-89 (emphasis added).

In its resolution, the Board recognized that Executive Order No. 29 was a result of “extensive review and consultation with the Faculty in accordance with the Faculty Code,” and that the President was compelled by financial necessity to issue the new order. CP 85-86. In addition to endorsing the President’s action, the Board directed that a copy of the new Executive Order be added to the University Handbook, that the President and the faculty leadership monitor the effect of the new Executive Order on faculty retention, and that the President propose the earliest possible date to restore the raises. CP 86. The Board also resolved that the new Order “will prevail over any University policies, rules, or codes or regulations to the extent they may be inconsistent.” *Id.*

Faculty members, including plaintiff Peter Nye, were notified of the change in an April 10, 2009 e-mail from Faculty Senate Chair Lovell. CP 89. Nye did not initiate any official action—either within the University or in court—until he filed this action on October 13, 2009. CP 1.

E. Procedural Posture.

Nye filed his Complaint on October 13, 2009. CP 1. Each party filed a motion for summary judgment on February 5, 2010. CP 18, 46. The University then filed two motions to strike evidence submitted by Nye because it was not authenticated and contained inadmissible hearsay.

CP 617-73, 674-79. On March 5, 2010, the trial court heard argument on both motions for summary judgment. The trial court granted the University's motion, denied Nye's motion, and dismissed Nye's Complaint with prejudice. CP 667-68. Although the trial court agreed that much of the evidence submitted by Nye was inadmissible, the court found it unnecessary to rule on the University's motions to strike, having determined that the inadmissible evidence was also irrelevant. RP 52-53. Nye brought his case as a purported class action, but did not pursue class certification before filing his motion to dismiss. Nye filed this appeal on March 26, 2010. CP 666.

III. AUTHORITY

A. The University Had Authority to Change the Handbook.

1. Washington courts recognize an employer's right to change a handbook.

Washington courts have regularly upheld an employer's right to change its policies, even without consent of its employees. In *Govier v. North Sound Bank*, 91 Wn. App. 493, 957 P.2d 811 (1998), the Washington Court of Appeals affirmed summary judgment in favor of an employer that repeatedly modified its employment policies without obtaining consent from its employees. "Although the Bank's policies regarding benefits and job security were legally enforceable, its

obligations existed only while its policies were in effect. When the Bank changed [its policies], the former contract terms were no longer enforceable.” *Id.* at 501–02. The *Govier* Court recognized that operating policies must be “adaptable and responsive to change” and that employers have the ability to modify policies even if the employer has not specifically reserved that discretion in the employment policy. *Id.* at 498, 501. Other Washington court decisions reach similar conclusions. *Gaglidari v. Denny’s Rest., Inc.*, 117 Wn.2d 426, 435–36, 815 P.2d 1362 (1991) (concluding employer could modify its employment policies without employee consent); *Cole v. Red Lion*, 92 Wn. App. 743, 751, 969 P.2d 481 (1998) (affirming summary judgment for employer based on modified employment policies).

When a policy specifically reserves discretion for an employer, as the University Handbook does, it is axiomatic that Washington courts uphold the employer’s exercise of that discretion. For example, in *Trimble v. Washington State University*, 140 Wn.2d 88, 95, 993 P.2d 259 (2000), the court found that a university did not breach its employment policies because the policy gave the University department discretion in how to conduct the performance review. *See also Goodpaster v. Pfizer, Inc.*, 35 Wn. App. 199, 203, 665 P.2d 414 (1983) (enforcing language in

employment policy that reserved discretion for employer to make incentive compensation decisions).

The University has implemented a Handbook with a multitude of provisions that govern University operations. Contrary to Nye's contention, the University is not breaching the terms of the Handbook, but following them. Just like the employer policies in *Trimble* and *Goodpaster*, all provisions of the University Handbook must be given effect, including the right to reevaluate the raises contained in the "Funding Caution," the President's discretion to modify the Executive order following a prescribed process of consulting with the faculty, and the Board of Regents' ultimate authority to alter the Handbook.

Nye attempts to distinguish *Trimble*³ and other employer cases, using a convoluted argument that the University Handbook contains both unilateral and bilateral provisions. Curiously, Nye later concedes the outcome should be the same under either characterization. Opening Brief at 36. The University agrees that the distinction between a bilateral and unilateral contract is not useful here. Regardless of how the alleged contract was formed, its express terms warn faculty the raises may be

³ Nye also attempts to rely on the faculty handbooks of WSU and WWU by citing to Internet copies of the documents (Nye's Opening Brief at 29 n.4 & 5), which were not part of the record below and should not be considered by this Court. Even if these materials were properly before the Court, they would be irrelevant to the University of Washington's Handbook because they relate to alleged contracts promulgated by different institutions.

reevaluated, allow the President to issue Executive Orders, and allow the Board of Regents to modify rules formulated by the President or the faculty.

Nye also argues he relied on receiving a raise, so the policy cannot now be changed. Washington courts consider *justifiable* reliance as one factor to determine whether an employer's policies are enforceable *outside of a contract*. *Korlund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 184, 125 P.3d 119 (2005) (noting three-part test, including justifiable reliance, is not based on contract theory). This theory does not apply in this case because Nye claims the Handbook was a contract. Even if reliance did apply, Nye's alleged reliance must be justifiable. Here, any reliance by Nye was not justifiable because: (1) The two percent raise he claims he relied on was found only in an Executive Order, which contained a "Funding Caution" warning faculty the raises may be reevaluated; (2) the same Handbook notified him that the President could issue and modify Executive Orders; and (3) the same Handbook also notified him that the Board of Regents could change provisions of the Handbook. Under these circumstances, Nye's alleged reliance was not justified.

2. The University Handbook expressly retained discretion for the President and the Board of Regents.

a. Nye Does Not Dispute the President's Authority to Issue Executive Orders.

There is no dispute the President has authority to issue Executive Orders. Even Nye admits “the President enjoys authority under the Code to promulgate an EO that is at odds with what members of the Senate might prefer.” Nye’s Opening Brief at 35. There is also no dispute the Executive Order contains a Funding Caution, warning faculty the raises may need to be reevaluated if the Legislature does not provide additional funding. Nevertheless, Nye is in essence asking the Court to disregard those key Handbook provisions. It is long-settled contract law that a court cannot selectively disregard contract language, and instead must favor an interpretation that gives effect to all the language of an agreement. *Seattle-First Nat’l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985) (upholding summary judgment in lease dispute). This same general principle applies in the employment context. A court must “give meaning to all the terms of the policy statement and cannot ignore the qualifications.” *Goodpaster*, 35 Wn. App. at 203 (granting summary judgment to employer where promise to pay a bonus was discretionary).

Here, the policies contained in the University Handbook came with important qualifications. The two percent raise Nye seeks was once contained in Executive Order No. 64, which contained a specific “Funding Caution” noting that it could be reevaluated in the future. President Emmert did reevaluate that Executive Order by following the process detailed in the University Handbook, which provides:

Before an Executive Order is promulgated or revised by the President, it shall be reviewed by the Faculty Senate. Additionally, the President may request reviews of the Executive Order from other individuals or campus bodies as desired. 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 a 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.**

CP 73 (Handbook §12-21(B)(1) (emphasis added)).⁴

Unlike in the *Storti* case,⁵ there is no dispute the President followed proper procedures to issue Executive Order No. 29, and that the

⁴ Nye claims the Code is “largely silent” regarding the process for consulting with the Senate (Nye’s Opening Brief at 22), when in fact Section 12-21(B) contains a number of specific steps, all of which were followed in this case. CP 73; CP 87-88.

⁵ Although Nye originally argued the *Storti* summary judgment should have collateral estoppel effect in this case (CP 39-40), he has not pursued that argument on

Faculty Senate was consulted. In fact, the Faculty Senate Chair and President Emmert established a joint faculty and administration committee to reevaluate Executive Order No. 64, which goes beyond what is required by the University Handbook.⁶ When addressing the Board of Regents, the Faculty Senate Chair noted that the faculty suggestions were considered and incorporated into the Executive Order. As Faculty Senate Chair Lovell noted, this is an example of the process working the way it should. CP 88-89.

b. The Board of Regents Has Ultimate Governing Authority Pursuant to State Statute and the University Handbook.

After hearing from the Chair of the Faculty Senate about the joint faculty-administration committee and the President's consultation with the faculty, the Board of Regents endorsed the new Executive Order and passed a Resolution giving that order priority over any conflicting provisions of the Handbook. The University Handbook is explicit about

appeal. In the event he raises the issue in his reply, it should be rejected for the reasons the University identified in previous briefing, particularly the significant factual differences between this case and the *Storti* case. CP 651-52.

⁶ Nye implies the process of consulting with the faculty was too short, but in fact the University Handbook envisions a prompt response from the faculty. The Faculty Senate Chair is required to report back to the President on the "outcome of the review within a reasonable time, but in any event no longer than sixty days...." Here, there is no dispute the process was completed within the required 60 days, and there is no suggestion in the record that the Faculty Senate Chair requested additional time. See Nye Opening Brief at 20-21.

the Board of Regents' authority to take this action. Under the terms of the University Handbook, the Board has the

right to intervene and modify any rule, regulation, or executive order formulated by the President or the faculty, the right to amend or rescind any existing rule, regulation, or executive order, and the right to enact such rules, regulations, and orders as it deems proper for the government of the University.

CP 68 (Handbook § 12-12(A)).

While Nye admits the President has the authority to issue Executive Orders, he argues that the Board of Regents cannot exercise the express authority it retained in Section 12-12. His argument does not refer to the text of Section 12-12, which plainly gives the Board this authority. Instead, in an argument not supported before the Superior Court, he makes the unfounded claim that the Board has never exercised this power before, and, therefore, cannot now. This argument fails for two reasons. First, it is completely devoid of factual support. Nye points to no citation from the Superior Court record to support this alleged "fact." *See, e.g.,* Nye Opening Brief at 5-7. The record below contains the current Handbook, but no exhibits or witness statements related to all past Handbook provisions and what effect resolutions by the Board may or may not have had. This argument, which forms the centerpiece of Nye's appeal brief, is completely lacking in factual support.

Second, even if the Board of Regents had not previously exercised this power, Nye has not provided any authority suggesting that the Board is unable to do so now. The Board of Regents' authority derives from RCW 28B.20.130(1), which gives the Board the authority to manage the institution. That statute has not been amended, nor can it simply be waived by previous conduct (of which there is no evidence in this case). This authority is reinforced in the University Handbook, and that authority has not been modified despite regular changes and updates to the Handbook over time.

The terms of the Handbook unambiguously authorize the President to issue Executive Orders and the Board of Regents to modify rules created by the faculty. The Superior Court recognized these key provisions, and properly dismissed Nye's Complaint.

3. A financial emergency is not required for the Handbook to be changed.

Nye concedes that the University Handbook can be changed if the University declares a financial emergency. Nye's Opening Brief at 23-24. This concession represents an acknowledgment that the "contract right" to a specific raise was never unconditional. However, he ignores key portions of the Handbook when he claims that a financial emergency pursuant to Section 26-31 is the only way to "suspend" a provision that

has come into being as the result of the adoption of Class A legislation.”

Id.

This argument ignores other provisions of the University Handbook, which specifically permit the Board of Regents to change provisions of the Handbook. Section 12-12 gives the Board the “right to intervene and **modify any rule**, regulation, or executive order formulated by the President **or the faculty**....” CP 68 (Handbook § 12-12(A)) (emphasis added). This provision does not carve out Class A legislation by the faculty as an exception.

Nye’s argument also reflects a fundamental misunderstanding of the University’s response to a financial crisis. A declaration of financial emergency is not the first step in cutting the University’s budget, but the last. A financial emergency should only be declared when “all other University cost-reduction procedures are not adequate to meet mandated budgetary reductions within the time required.” CP 187 (Handbook § 26-31(A)(1)). A declaration of financial emergency is a significant act that can have a profound effect on the entire University, from the elimination of academic programs to furloughing or terminating tenured faculty members. As mandated by the University Handbook, the University took other steps to survive the severe budget cuts without declaring a financial emergency, including suspending faculty raises

(consistent with the salary freeze enacted by the Legislature for state employees).

4. A faculty vote is not required to suspend the raises.

Nye claims the two percent raises were created by the faculty using Class A legislation, and can only be eliminated the same way. This argument is without merit. The two percent raise was not enacted as Class A legislation. It was contained in an Executive Order issued by the President, and was modified in the same way. Nye has tried to combine Executive Order No. 64 with Sections 24-70 and 24-71 of the University Handbook, and calls the three collectively the “Faculty Salary Policy.” The Handbook itself refers to Executive Order No. 64 alone as the Faculty Salary Policy. In contrast, Section 24-70 is titled “Faculty Salary System: Policy and Principles” and and Section 24-71 is titled “Procedures for Allocating Salary Increases.” Sections 24-70 and 24-71 were added to the Handbook in July of 1999, but Executive Order No. 64 was not issued until the following year. While they all relate to salary issues, they were not issued together, the Handbook does not require that they be changed simultaneously.

Second, the faculty does not have the authority to legislate its own raise. Pursuant to the Handbook, faculty legislation is limited to: (1) the

statutory powers and duties of the faculty, (2) the powers delegated to the faculty by the President, (3) resolutions forwarded to the Faculty Senate by the University faculty, and (4) adopting resolutions on its own behalf. CP 143 (Handbook § 22-32(A)). There is no express authority for the faculty to legislate its own raise through Class A legislation. In fact, Section 29-31 does not allow the faculty to use legislation to amend “statutes of the state, resolutions of the Board of Regents, or executive orders of the President.” CP 197 (Handbook § 29-31(A)).

5. Even if they had not been changed by the Board of Regents’ Resolution, Sections 24-70 and 24-71 do not provide unconditional raises.

Even if they had not been modified by the Board of Regents’ Resolution, Sections 24-70 and 24-71 do not contain the unconditional promise of a raise Nye contends. Section 24-70 contains a condition similar to the Funding Caution found in the Executive Order. Section 24-70 states: “**Resources permitting**, the University shall provide its meritorious faculty with salaries commensurate with those of their peers elsewhere.” CP 184 (Handbook § 24-70(A)) (emphasis added). All other provisions that Nye relies on in Sections 24-70 and 24-71 follow the “resources permitting” condition.

Sections 24-70 and 24-71 also offer other avenues for the exercise of discretion. Following the “resources permitting” language,

Section 24-70 states: “Advancement in salary **can** be effected in several distinct, but not mutually exclusive, ways.” *Id.* at § 24-70(B) (emphasis added). Only after those two conditional statements does the University Handbook then go on to discuss different types of increases. Nye focuses on the use of the word “shall” in referring to the merit salary increase he seeks, but he ignores the “resources permitting” condition and the non-mandatory “can” language that precedes the “shall” in Section 24-70.

Section 24-71 does not deal with whether raises will be provided, but rather how to allocate any funds that are available for salary increases. Section 24-71 follows Section 24-70, which already makes salary increases contingent on the availability of resources. Section 24-71 states: “The President shall make the final decision on these allocations and shall report the decision to the Faculty Senate.” CP 185 (Handbook § 24-71(A)). This section then refers to three categories of raises, including the merit increase Nye seeks, with the term “shall.” However, this must be read in harmony with Section 24-70, which already conditions any raise on whether resources permit it. Far from an unequivocal promise, Sections 24-70 and 24-71 provide a framework for providing raises if resources permit, and give the President discretion to determine how to allocate funds for raises. This biennium, resources do not permit an equal percent salary increase.

Nye attempts to muddy the waters by including hearsay and opinions from various speakers in the form of minutes from meetings. The University objected to the admissibility of these statements because many of them contain multiple levels of hearsay—for example, one faculty member paraphrasing what someone else allegedly said in a meeting. CP 675-78. The Superior Court agreed the statements were hearsay, but because the case was being dismissed did not parse the record to eliminate the inadmissible statements. RP 52. Even if the statements were admissible they would not be relevant to the case at hand. The statements Nye relies on most heavily were made nearly a year before Executive Order No. 64 was issued. Moreover, the statements are contained in meeting minutes drafted by a faculty member, and at best represent a second-hand report of what someone else’s subjective understanding may have been.⁷ The subjective understanding of one side cannot be used to determine intent. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 694-95, 974 P.2d 836 (1999). These statements are inadmissible, irrelevant, and cannot alter the plain text of the University Handbook, which unambiguously allows the President to issue and modify Executive

⁷ The statements also do not uniformly support Nye’s argument that faculty only agreed to performance evaluations in exchange for raises. In fact, then Provost Lee Huntsman, whose statements Nye attempts to rely, noted that the University has a “well-imbued culture of merit evaluations and rewards.” CP 678 n.3.

Orders, and the Board of Regents to modify rules of the President or faculty.

B. A Potential Raise is Not “Wages Earned.”

Nye also claims that Executive Order No. 29, which temporarily suspends future faculty *raises*, deprives him of “wages” he has already earned, and that the University must pay him those future “wages” regardless of budgetary constraints. Nye’s Opening Brief at 48-49. Nye’s argument turns the traditional notion of a *raise* on its head. A raise is not compensation for work already performed, but an increase in salary for work to be performed *in the future*. For example, had Nye left the faculty at the end of 2006-2007, he would not, upon his departure, have been entitled to a lump sum payment of whatever salary increase he might have received the following year. The wage cases cited by Nye are thus irrelevant to the issues here, and involve employers who, unlike the University, simply stopped sending paychecks altogether. *Morgan v. Kingen*, 166 Wn.2d 526, 532, 210 P.3d 995 (2009) (employer skipped two pay periods); *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 155, 961 P.2d 371 (1998) (employer “stopped issuing regular paychecks”).

Like all faculty members, Nye was on notice that the two percent raise described in Executive Order No. 64 was not guaranteed. Executive Order No. 64’s “Funding Caution” explicitly warned faculty that two

percent raises were premised on increased funding from the Legislature, and might be reevaluated in the event of funding cuts. CP 82. The University Handbook also placed faculty on notice that any provision, including a provision related to raises, was subject to change by the Board of Regents at any time. CP 68 (Handbook § 12-12). Similarly, the two percent raises were created by an Executive Order issued by the President, who at all times retained the right, after consulting the Faculty Senate, to change the salary policy he himself promulgated. CP 73 (Handbook § 12-21). *See also Goodpaster*, 35 Wn. App. at 203 (employer entitled to deny employee bonus because employer reserved discretion to change its bonus policy).

The University has not withheld one penny of the salary Nye earned as a faculty member. This action involves a temporary freeze on future two percent *raises*, and Nye's arguments relating to "wages earned" are meritless.

C. The Trial Court Was Required to Dismiss This Action Because It Was Filed After the Deadline Established by the Administrative Procedure Act.

In seeking reversal of Executive Order No. 29, Nye asked the trial court to review an "agency action" that was reviewable only in accordance with Washington's Administrative Procedure Act ("APA"). Because Nye

did not meet the APA's procedural requirements, the trial court was required to dismiss Nye's Complaint.⁸

1. Nye's claims are governed by the APA.

With exceptions not applicable here, Washington's APA establishes the exclusive means of judicial review of agency action. RCW 34.05.510. An institution of higher education is an "agency." RCW 34.05.010(2). The APA defines reviewable "agency action" to include "licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits." RCW 34.05.010(3). The APA also prescribes review where an agency allegedly fails "to perform a duty that is required by law to be performed." RCW 34.05.570(4)(b).⁹

The APA lists only four types of agency decisions that do not constitute reviewable "agency action." RCW 34.05.010(3). "Consistent with the Legislature's intent that the public have greater access to

⁸ The University advanced this argument in the trial court and, even though the trial court dismissed Nye's Complaint on other grounds, the Court "may affirm on any basis supported by the record." *Amy v. Kmart of Washington LLC*, 153 Wn. App. 846, 868, 223 P.3d 1247 (2009).

⁹ This provision relates to judicial review of "other agency action," that is, agency action not involving a "rule" or "order" as defined by the APA. See RCW 34.05.010(11)(a) & (16). Here, the agency action at issue is neither a "rule" nor an "order" under the APA's definitions, and would therefore be subject to review under the standards established for "other agency action." RCW 34.05.570(4).

administrative decision making,” Washington courts interpret “agency action” broadly, and construe its four exclusions narrowly. *Muckleshoot Indian Tribe v. Wash. Dep’t of Ecology*, 112 Wn. App. 712, 722, 50 P.3d 668 (2003). Indeed, unless a particular act is expressly excluded from the statutory definition of “agency action,” it will constitute “agency action” under the APA. *Costanich v. Wash. Dep’t of Soc. & Health Servs.*, 138 Wn. App. 547, 564, 156 P.3d 232 (2007), *overruled on other grounds by Costanich v. Wash. Dep’t of Soc. & Health Servs.*, 164 Wn.2d 925, 194 P.3d 988 (2008). “The principal effect of the very broad definition of ‘agency action’ is that everything an agency does or does not do is subject to judicial review.” *Muckleshoot*, 112 Wn. App. at 722 (quoting comments to model state APA).

Here, Nye seeks reversal of Executive Order No. 29, which suspends annual two percent faculty salary increases, and which was issued by the University’s President and approved by its Board of Regents. Executive Order No. 29 is subject to APA review because it involves (a) the University’s alleged failure “to perform a duty that is required by law to be performed;” (b) the implementation of a statute, *e.g.*, RCW 28B.20.130 (Board of Regents exercises full control of the University), RCW 41.06.070(3) (mandating salary freeze for certain state employees); and (c) the “withholding of benefits.” RCW 34.05.010(3);

34.05.510; 34.05.740(4)(b). In addition, Executive Order No. 29 does not fall within one of the four limited exceptions to “agency action,” and thus constitutes “agency action” subject to APA review. *Costanich*, 138 Wn. App. at 563-64.

In briefing below, Nye argued that Executive Order No. 29 involves the withholding of “wages,” not the withholding of “benefits,” and, therefore, does not constitute “agency action” under the definition set forth in RCW 34.05.010(3). This argument is not supported by a commonsense reading of the statute or the policy behind broadly defining agency action to increase opportunities for judicial review. In support of his semantic argument, Nye cites only *McGinnity v. AutoNation, Inc.*, 149 Wn. App. 277, 285, 202 P.3d 1009 (2009), which did not involve the APA, but which held that the statute at issue made *no distinction* between benefits and wages. Nye cites no case suggesting that “benefits” and “wages” are treated differently under the APA, and the APA itself makes no such distinction (in fact, the relevant provision does not mention “wages” at all). RCW 34.05.010(3).

Indeed, Nye’s proposed definition of “benefits” is both improper and illogical. His proposed definition is improper because courts must interpret “agency action” broadly, not narrowly as Nye urges. *Muckleshoot*, 112 Wn. App. at 722 (“agency action” must be interpreted

broadly). His proposed definition is also illogical because it would lead to unreasonable boundaries. For example, under Nye's interpretation, a University decision relating to faculty parking spaces would be subject to APA review because it involves a "benefit," but the APA would not apply to a University decision relating to faculty salaries. No Washington court has limited the scope of APA review in that way. Unlike the employment context, the APA is not attempting to draw a distinction between wages and benefits, but rather to broadly encompass all potential agency action unless specifically excluded.

Nye's claims plainly involve the "withholding of benefits," and the implementation of statutes, and an alleged "failure to perform a duty that is required by law to be performed." RCW 34.05.010(3), 34.05.570(4)(b). His claims thus involve "agency action" and must be filed and served in accordance with the APA. RCW 34.05.510.

2. Nye did not meet the APA's procedural requirements.

The APA authorizes "the superior court to act in a limited appellate capacity to review certain agency actions," but, "[i]n order for the court's appellate jurisdiction to be properly invoked, parties must abide by all the procedural requirements of the act." *Muckleshoot*, 112 Wn. App. at 724. Under the APA, "[a] petition for judicial review of

agency action . . . is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record *within thirty days* after the agency action” or after the petitioner could “reasonably have discovered that the agency had taken the action” RCW 34.05.542(3) (emphasis added). If those requirements are not met, the superior court does not have jurisdiction over the matter, and must dismiss it. *City of Seattle v. Pub. Employment Relations Comm’n*, 116 Wn.2d 923, 929, 809 P.2d 1377 (1991) (petition dismissed where petitioner served parties 33 days after agency action); *Muckleshoot*, 112 Wn. App. at 728 (petition dismissed on summary judgment where petition not served on all parties); *Cheek v. Employment Sec. Dep’t of Wash.*, 107 Wn. App. 79, 84–85, 25 P.3d 481 (2001) (petition dismissed where petition not served on agency until 34 days after agency action).

For example, in *City of Seattle v. Public Employment Relations Commission*, the City of Seattle sought judicial review of an agency action taken by the Public Employment Relations Commission. Although the City filed its petition and served some of the parties within 30 days of the agency action, it served several of the parties three days late. *City of Seattle*, 116 Wn.2d at 925–26. The Supreme Court held that the City had failed to invoke the Superior Court’s appellate jurisdiction by failing to

serve “its petition on *all* of the parties within 30 days,” *id.* at 927 (emphasis in original), and dismissed the City’s appeal, *id.* at 929.

Similarly, in *Cheek v. Employment Security Department of Washington*, the petitioner, Cheek, sought judicial review of an agency action taken by the Employment Security Department of Washington. Although Cheek filed her petition for review and served the Attorney General within 30 days of the agency action, she did not serve the Department until the 34th day. *Cheek*, 107 Wn. App. at 82. Finding that the APA required Cheek “to serve her petition for review on the Department *and* the attorney general *and* all parties of record,” *id.* at 83 (emphasis in original), and that she failed to do each of those things within 30 days, the court held that the Superior Court lacked jurisdiction over the appeal and properly dismissed it, *id.* at 85.

In this case, Executive Order No. 29 was issued on March 31, 2009. A copy of the Order was sent to the faculty, including Nye, on April 10, 2009. Nye did not file or serve his Complaint within 30 days of either of those dates. In fact, Nye did not file his Complaint until October 13, 2009—196 days after Executive Order No. 29 was issued and 186 days after Nye received a copy of it. Nye did not serve his Complaint on the Attorney General until October 15, 2009, and did not serve his Complaint on the University at all. CP 670. Because Nye did not file or

serve his Complaint within 30 days of the “agency action,” as required by RCW 34.05.542(3), the Court lacks jurisdiction and must affirm the trial court’s dismissal. *City of Seattle*, 116 Wn.2d at 929; *Cheek*, 107 Wn. App. 84–85.

IV. CONCLUSION

In the face of drastic reductions in state funding, a call from the Governor to limit spending, and new legislation that froze salaries of state employees, the University President and Board of Regents took the reasonable step of suspending two percent faculty raises. The faculty knew a reevaluation of the raises may be necessary if the Legislature failed to approve new funds for faculty salaries. Instead of providing new funds, the Legislature slashed existing funding and passed a state law prohibiting salary increases for certain state employees for two years. The University’s decision to suspend faculty raises did not breach any term of the University Handbook, but rather was made pursuant to express terms that allowed the President and Board of Regents to make this change. The Chair of the Faculty Senate touted the steps taken by the President as an example of the process working the way it was intended. Nye himself did not challenge this action within 30 days, as required by the Administrative Procedure Act, but waited months before filing this lawsuit.

The Superior Court agreed that the University Handbook allowed these changes, and dismissed Nye's lawsuit on summary judgment. This Court should affirm that decision because it is supported by the plain language of the University Handbook and because Nye failed to follow the procedural requirements of the APA.

RESPECTFULLY SUBMITTED this 15th day of September, 2010.

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