65143-9 65143-9

No. 65143-9-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

PETER NYE, et al.

Appellants,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

REPLY BRIEF OF APPELLANTS

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Introduction

For the academic years 2009-2010 and 2010 -2011, the University seeks to have Washington courts excuse it from paying merit raises that its continuing meritorious faculty members have earned. As justification for what it seeks the University advances two types of argument: one is ostensibly grounded in law; the other appeals purely to a sentiment, i.e., to a feeling or emotion as opposed to reason. As to the first, the University contends that wages are not wages; that the Faculty Code (Code) is not a contract; and, inconsistently, that the Code is a contract which the University had the right to abrogate by suspending the payment of merit raises that Prof. Nye and the other members of the putative class have earned.

A sentiment has no relevance for the resolution of a legal issue.

The "sentiment" argument emphasizes two incontrovertible facts: The University is a very prominent institution; it is Washington's third largest employer. Second, the University has not escaped the effects of the worst economic crisis since the Great Depression. This argument reduces to an implicit inference that "the President and the Board of Regents (Regents) know best." Neither before the trial court nor in its brief in this appeal has the University offered any explanation as to how that sentiment is relevant to the issue at the heart of this appeal: By suspending the payment of earned merit raises for the 2009-2011 biennium did the University breach a contractual obligation to its continuing meritorious faculty members?

The issue is not whether public policy might be well served were the Washington Legislature or Washington courts to carve out a "prominence" or "financial crunch" exception to the common law of contracts. One doubts that the University would argue it should be excused from paying for electricity or water that it consumes because it is prominent and/or because it has suffered a loss in state funding.

There is no legal basis for the University's position that RCW 34.05 provides the proper avenue for redress of Prof. Nye's wage claim.

The purported legal basis for the University's request for an exception to the law of contracts comprises several parts. To begin, the University notes that Prof. Nye did not avail himself of the opportunity to file, pursuant to RCW 34.05, Washington's Administrative Procedure Act (APA), a petition for judicial review of the University's action suspending the merit raises. The APA embodies the sole mechanism for a challenge to an "agency action." Washington case law requires that the term "agency action" be broadly construed. According to the University, broad construction is necessary to serve the "policy . . . to increase opportunities for judicial review." Resp. Br. at 31. RCW 34.05.010(3) does not mention "wages." A denial of "benefits" does come within that definition. Thus, the University's argument seems to go, the Court must recognize the suspension as being an agency action to deny a benefit. Accordingly, the trial court lacked jurisdiction over Prof. Nye's lawsuit. This line of reasoning hangs on whether the merit raises are "benefits" as opposed to "wages."

The University cites neither to statute, regulation, case law, nor even a dictionary definition to support its contention that the merit raises are "benefits" and not "wages." It simply argues that broad construction of "benefits" renders the merit raises "benefits" for purposes of the APA. Although uncertain as to the precise classification of the merit raises, the trial court rejected the University's argument that they are "benefits." CP 48-49.

There is no common law definition of "wages" that one can find cited in Washington case law. Several Washington statutes define the word in specific contexts. For example, the state's Minimum Wage Act, Ch. RCW 49.46, defines "wage" as "compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director." RCW 49.46.010(2). The wage claim statute, Ch.

RCW 49.48, adopts that definition of "wage." RCW 49.48.082(10). Our courts regard the above-quoted language as being unambiguous: "'wages' [means] compensation due to an employee by reason of his employment payable in legal tender or equivalent." *State ex rel. Hagan v. Chinook Hotel, Inc.*, 65 Wn.2d 573, 580, 399 P.2d 8 (1965).

Pursuant to Ch. RCW 51.08, the Industrial Insurance Act (IIA), the Department of Labor and Industries (L&I) determines the level of workers' compensation payments to persons injured on the job. That level depends on the "wage" that the injured worker was receiving at the time of the injury. RCW 51.08.178 specifies that "the term 'wages' shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire . . . ." In *Cockle v. Department of Labor and Industries*, 142 Wn.2d 801, 16 P.3d 583 (2001), the Court decided that

> "board, housing, fuel, or other consideration of like nature" in *RCW 51.08.178(1)* [means] readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival. [fn. omitted]. Core nonfringe benefits such as food, shelter, fuel, and health care all share that "like nature." . . . [W]e do not believe injury-caused deprivation of the reasonable value of *fringe* benefits that are *not* critical to protecting workers' basic health and survival qualifies as the kind of "suffering" that Title 51 RCW was legislatively designed to remedy. . . .

Id. at 822-23. The Court then held that health insurance paid for by the employer qualifies as a core nonfringe benefit, i.e. as a "wage."

In *Gallo v. Department of Labor and Industries*,155 Wn.2d 470, 120 P.3d 564 (2005), the Court ruled that because an employer's contributions to a tax-exempt retirement trust are not "cash wages," i.e., cash transfers from the employer to the employee, they are not "wages." That is, they are fringe "benefits." Employees do not pay federal income tax on those contributions. Thus, "wage" must apply to taxable transfers from the employer to the employee. *Id.* at 485-87. Because merit raises become part of the taxable salary of meritorious faculty members, those raises, within the context of the IIA are "wages," not "benefits."

In both *Cockle* and *Gallo* aggrieved workers sought judicial review of L&I's action denying the payment of workers' compensation, a benefit, in an amount to which the workers believed they were entitled. Without the availability of a petition for judicial review, those workers would have had no opportunity for challenging L&I's action in the courts.

McGinnity v. AutoNation, 149 Wn. App. 277, 202 P.3d 1009 (2009), sheds light on the meaning of "wages" in a context that has applicability here. There the plaintiff sought attorneys' fees pursuant to RCW 49.48.030, which authorizes an award of those fees "[i]n any action in which any person is successful in recovering judgment for wages or salary owed to him[,]" which is precisely what Prof. Nye seeks. At issue was whether unpaid vacation benefits qualify as "wages" under the statute. *Id.* at 284. After noting that no Washington case had answered the question, the Court explained, "[h]owever, our courts have treated compensation as wages in a number of contexts requiring that the term [wages] be construed broadly." As examples of broadly construing "wages" the Court listed back pay, front pay, sick leave cash-outs, and commissions. Accordingly, "[t]hese cases support the rule that if the employee gets the money on account of having been employed, then the money is wages in the sense of 'compensation by reason of employment.'" *Id.* Thus, the court ruled, in the limited context before it, a particular "benefit" qualified as a "wage." At no point did the Court even suggest that the terms "wages" and "benefits" are co-extensive.

Cockle, *Gallo*, and *McGinnity* are representative of the cases in which the "wage" versus "benefits" question arises. The issue before the court is always whether a particular benefit comes within the meaning of "wage," not vice versa. For good reason the University has cited to no case to support its assertion that a salary increase is a "benefit" as the APA uses that term: There is no such case.

In adopting a revised RCW 34.05 in 1998 the Washington Legislature intended not only "to bring greater public access to administrative decision making," but also to have Washington courts interpret the APA, to the greatest extent possible, consistently with the way that federal courts interpret the federal APA. RCW 34.05.010.

As to the latter, federal courts are clear that judicial review of agency action is available only when there is no adequate remedy for the aggrieved person's claim(s) elsewhere. *Tucson Airport Authority v. General Dynamics Corporation*, 136 F.3d 641, 645 (9th Cir. 1998). Thus, as the court explained in *Filebark v. United States DOT*, 555 F.3d 1009, 1010, 1012-1013 (D.C. Cir. 2009), employees of federal agencies may not bring claims centering on wage disputes against their employers pursuant to the federal APA. Other avenues for addressing wage claims are available to those employees. More generally, a LEXISNEXIS search of all state and federal cases in the form "administrative procedure! act /50 wage!" produces 349 reported cases. Not one of those cases supports the proposition that a petition for judicial review is the exclusive mechanism for an agency employee's wage claim against the agency.

The "commonsense" reading of RCW 34.05.010(3) that the University urges would reduce the applicable statute of limitations for breach of a written contract for wages from six years to 30 days. To accept the University's "commonsense" reading would hardly provide greater opportunities for a faculty member to seek redress for the University's failure to pay wages.

In *Storti v. University of Washington*, KCSC No. 04-2-16873-9 SEA, the University advanced a similar jurisdictional argument to that which it urges here. CP 506-507. After noting that the University had "argued contract principles should apply" to Prof. Storti's claim for payment of merit raises, Judge Yu ruled that

> [t]he court has original jurisdiction over this contract dispute in which the relief sought is monetary damages.

CP 99.

The University, without citing any authority, mischaracterizes the nature of the merit raises that are at issue in this appeal.

The University contends that Prof. Nye's characterization of the merit raises at issue as being "earned" before they are paid "turns the idea of a raise on its head." The only "authority" for this statement is an expansion on the statement itself. That is, a raise is compensation for work performed in the future. According to this line of reasoning, Prof. Nye, to whom the University last paid a merit raise during the 2008-2009 academic year, earned the raise during that academic year. The argument misstates the way that the system for earning and paying faculty raises works pursuant to the Code.

§24-70 mandates the payment of promotion raises during any academic year in which the University has allocated funds to pay faculty raises. The University pays the promotion raise beginning in the academic year following the one in which the faculty member successfully demonstrated the he or she deserved the promotion. That is, the University pays the promotion raise based on the faculty member's past performance. Similarly, when a law firm pays a bonus to an associate for having billed 3000 hours in a year, the bonus is not a raise based on the number of hours that the associate might bill in the future.

In precisely the same way, in order to receive an annual merit raise, a faculty member must undergo a merit review that is based on his or her cumulative record. If the faculty member is not deemed unmeritorious, he or she has earned the raise, which the University pays during the subsequent academic year. If, during that subsequent year, the faculty member's job performance is substandard and does not enhance his or her cumulative record, the University does not withhold the raise. Instead, the absence of an enhanced cumulative record will likely result in the next annual merit review's being unsuccessful. The reason for requiring annual merit reviews under the FSP is clear: Faculty members must earn each new merit raise by enhancing their cumulative records every year.

Thus, when President Emmert promulgated Executive Order 29 (EO 29) on March 31, 2009, Prof. Nye and the other members had already earned the merit raise that the University had promised to pay during the 2009-2010 academic year. Because EO 29 did not suspend the FSP's requirement that all faculty undergo an annual review for merit, during 2009-2010 academic year Prof. Nye and other members of the putative class who underwent successful merit reviews earned merit raises payable beginning in 2010-2011. The University does not deny that those reviews were required. It simply states that it will not pay the raises. And it has not. It has suspended the payment of "compensation due to an employee by reason of his employment payable in legal tender or equivalent," i.e., wages earned.

Contrary to its admission in *Storti*, the University now argues that the Code, particularly the FSP, is more a set of illusory promises than a contract. At the same time the University cites to contract cases for proposition that it had the contractual right to abrogate the contract.

The Code has attributes of a variety of forms of contract. For reasons that we have already discussed, the Code does not comprise a set of illusory promises. Nor is the Code like the employer promulgated handbooks that the court regarded as forming the basis for unilateral contracts in *Govier v. North Sound* Bank, 91 Wn. App. 493, 957 P.2d 811 (1998), *Gagliardi v. Denny's Rest., Inc.*, 117 Wn.2d 426, 815 P.2d 1362

(1991), and *Cole v. Red Lion*, 92 Wn. App. 743, 969 P.2d 481 (1998). Regardless, the University argues that the teachings of *Govier,* and other cases pertaining to employer-promulgated handbooks, apply here even though it simultaneously contends that the Code is not a contract:

> Just like the employer policies in *Trimble* and *Goodpaster*, all provisions in the University Handbook must be given effect, including the right to reevaluate the raises contained in "Funding Cautions," 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.

Resp. Br. at 15.

A search for the internal consistency in the verbiage above is fruitless. First, the University acknowledges that the President's power to modify an EO derives from a contractual provision in the Code. Then, the University asserts, in effect, that because the Regents have "ultimate authority to alter the Handbook [of which the Code is a part,]" the Code is not a contract. Instead, it is a set of illusory promises.[1] This second assertion reveals the significance of the University's reference to *Goodpaster*, where the court cited to the rule that

> [a] supposed promise may be illusory because it is so indefinite that it cannot be enforced, or by reason of provisions contained in the promise which make its performance optional or entirely discretionary by the promisor. *Spooner [v. Reserve Life Ins. Co.*, 47 Wn.2d 454] at 458.

[1] To no avail, in its motion for summary judgment in *Storti* the University advanced the same argument. CP 518-520.

Goodpaster v. Pfizer, Inc., 35 Wn. App. 199, 203, 665 P.2d 414 (1983).

Next, the University notes, with the exception of the 2002-2003 academic year, until 2009-2010 it always paid annual merit raises. It argues, however, that it did not have to do so. After noting that its alleged obligation to pay annual merit raises finds expression in EO 64 the University cites to a series of Washington cases for the proposition that an employer has the right to change, unilaterally, any provision in an employee handbook. The cases to which the University cites for the proposition involved an employer/employee relationship far different from that between the University and its continuing faculty members. In each case the subject relationship was at-will. In each case the employer promulgated the subject handbook unilaterally. In none of the cases did a shared governance model affect the operation of the enterprise.

In *Duncan v. Alaska USA Federal Credit Union, Inc.*, 148 Wn. App. 52, 199 P.3d 991 (2008), the court explained that in an at-will employer/employee relationship the employer is free to terminate the employment of the employee at any time. Consequently, the "greater right" to terminate in such a relationship includes the lesser right to modify terms contained in a handbook that the employer unilaterally promulgated. *Id.* at 77. The employer's modification may operate, however, only prospectively. *Id.* at 77-78, n. 100.

The employer/employee relationship between the University and its faculty members is not at-will: The University may discharge a faculty member only for cause during the term of his or her appointment. §§25-51, 25-62. Further, the promise to pay annual merit raises, set forth in §24-70 of the Code, came into existence as the result of the operation of the University's model of shared governance: The University did not unilaterally promulgate that numbered section in the Code. Finally, even if the employment relationship between the University and its faculty were at-will and shared governance did not exist, suspension of the promise to pay annual merit raises could operate only prospectively, as *Duncan, supra*, teaches. Thus, the University did not have the "right" to suspend the Code's promise of payment of the merit raises for 2009-2010 after Prof. Nye and the other members of the putative class had earned them in 2008-2009.

According to the University, *Trimble v. Washington State University,* 140 Wn.2d 88, 993 P.2d 259 (2000), supports the rule that an employer has the right to unilaterally modify a handbook. To the contrary, the issue before the court derived from a provision in a Faculty Manual that required at least annual performance reviews of probationary, i.e., non-tenured, faculty members by tenured faculty members. Trimble claimed that the provision required written documentation of the reviews conducted by the tenured faculty. The Court disagreed, reasoning that "[a]t best, written documentation is to be provided if the tenured faculty members believe it is appropriate." *Id.* at 95. The case had nothing to do with an employer's right to unilaterally modify a provision in a handbook.

Although offered ostensibly as support for the argument that an employer has the right to modify a handbook, *Trimble*, along with *Goodpaster v. Pfizer, Inc.*, 35 Wn. App. 199, 665 P.2d 414 (1983), a non-handbook case in which the employer/employee relationship was at-will, apparently have relevance for a different contention: A handbook that the employer promulgates may contain provisions which give the employer discretionary decision making authority. Stated another way, a handbook promulgated by an employer may contain provisions that do not constitute specific promises of specific treatment in specific circumstances. *Trimble* and *Goodpaster* focused on examples of such provisions.

The University states that "[it] has implemented a handbook with a multitude of provisions that govern University operations." Resp. Br. at 15. If by this statement the University contends that it promulgated the Code, just as did the employers in *Govier, Cole,* and *Gagliardi*, the statement is untrue. The advent of the Code, and the subsequent changes to its numbered sections, came about as the result of the operation of the

University's model of shared governance. It is, however, accurate to state that, for example, EO 64 stands as an example of a provision in the Code that implements numbered sections in the Code, i.e., 24-70 and 24-71. In its motion for summary judgment in *Storti* the University acknowledged as much. CP 506-507.

What emerges at base in the University's brief is an attack on shared governance at the University and the accompanying notion that the Code is a contract, as two headings in the argument section of that brief indicate:

> The University Handbook expressly retained discretion for the President and the Board of Regents.
> A faculty vote is not required to suspend the raises.

Resp. Br. at 17, 21.

As to the first, the University wants this court to ignore two incontrovertible facts: In its answer to the complaint in this case the University admitted that in decreeing a suspension of the merit raises for the 2009-2011 biennium the President and the Regents overrode the Code. CP 9. Second, prior to March and April of 2009, neither the President nor the Regents had ever since the advent of the Code in 1956 overridden a numbered section of the Code. As Prof. Nye explained in his opening brief, *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 534, 826 P.2d 664 (1992), teaches that an employer's conduct can negate a disclaimer in a handbook. The University ignores that case and the first of those incontrovertible facts. As to the second fact, the University contends there is no evidence in the record as to the history of changes to provisions in the Code.

As Prof. Nye explained in the opening brief, the Code itself sets forth the applicable history. The Code comprises Part II of Volume Two of the University Handbook. The contents of Volume Two begin with an Introduction. Among other things, the Introduction provides an overview of the history of the development of the Code and describes the abbreviations that appear throughout it. At the end of each section in the Code one finds information, utilizing those abbreviations, that tells, for example, whether and when Class A legislation amended the section.

Similarly, the "Titles Preface," which appears at the beginning of the Revised Code of Washington (RCW), explains the entries that appear at the end of each section of the RCW. Those entries, according to "Titles Preface," provide the reader with a history of the section as to its origins and changes brought about by legislative action. That is, the "Titles Preface" at the beginning of the RCW and the Introduction at the beginning of Volume Two of the University Handbook perform the same function. Simply put, the Code itself is the "evidence" that prior to March and April 2009, the President and the Regents never unilaterally "changed" any numbered section in the Code. Accordingly, despite the reservation of discretion to change any such provision, until March and April 2009, the President and the Regents always treated the Code's provisions as being binding.

Changing the FSP requires a faculty vote.

The validity of the assertion that "[a] faculty vote is not required to suspend the raises" requires a determination that shared governance at the University is no more than an illusion. At least since the advent of the Code in 1956, the model of shared governance set forth in the Code has governed the conduct of a range of activities at the University. The very fact that the University takes pains to point out that President Emmert promulgated EO 29 following the procedures set forth in the Code for doing so evidences the University's belief that shared governance is neither optional nor discretionary.

A vital element of shared governance at the University arises in the mechanism for amending, i.e., "changing," a numbered section in the Code. As Prof. Nye explained in his opening brief, the Code itself is clear that there is but one way of effecting an amendment: the enactment of Class A legislation. The enactment of Class A legislation requires a vote by the voting members of the University's faculty. Accordingly, a change to the provisions in §24-70 requires a vote of those same faculty. That section, however, has never been amended. Yet, that section mandates the payment of annual merit raises. Thus, contrary to the University's assertion, a faculty vote is required to "suspend" the payment of annual merit raises.

The University ignores, however, the significance and meaning of §24-70's mandate regarding the payment of annual merit increases. Instead, it asserts that

> [e]ven if they had not been changed by the Board of Regents' Resolution, Sections 24-70 and 24-71 do not provide unconditional raises.

Resp. Br. at 24. Prof. Nye has never contended that the raises are unconditional. Instead, he is well aware that raises of any kind for faculty are available only when the administration allocates monies for that purpose. §24-71.A. makes that condition clear. §24-70 does not exist in a vacuum. Instead, its priorities for allocating raises come into play only when, pursuant to §24-71, monies have been allocated for faculty raises. Further, both sections mandate that payment of the merit raises at issue in this appeal have first priority in any academic year in which the University allocates monies for the payment of raises for faculty. Indeed, item 1 under the provision labeled *Reaffirmation of Principles and Commitment* in EO 29 recognizes that reality:

> Regular merit raises will resume first priority for allocation of salary funds after this suspension expires;

The University would have this Court ignore that reality and accept the claim that EO 64 stands on its own, apart from §§24-70 and 24-71. As the University acknowledged in *Storti,* Judge Yu recognized in that case, at CP 95, and Prof. Nye explained in his opening brief, the University's salary system for faculty comprises three parts of the Code: §24-70, §24-71, and EO 64. EO 64 came into being in January 2000, approximately six months after the adoption of the Class A legislation that created §§24-70 and 24-71. The priority ordering in EO 64 is precisely the same as that set forth in those two numbered sections of the Code.

The University appears to contend that the absence of a specific percentage for annual merit raises in §§24-70 and 24-71 has some significance for the question that is at the heart of this litigation. The University fails to note, however, that specific percentages appear nowhere in those two sections. That is, not even promotional raises, which occupy second place in the priority ordering in the two Code sections, come with a specified percentage. This fact illustrates the role that EO 64 has, from its promulgation in January 2000, played in the University's faculty salary system: EO 64 implements the two Code sections by, among other things, specifying the percentages for annual merit raises and promotional raises. Thus, the two Code sections define the system for paying raises when funds are made available for faculty raises in the aggregate. Those two sections together make clear that if such funds are made available they must go first to pay annual merit raises. Pursuant to the priority ordering funds may not go to pay promotional raises or retention raises unless funds have gone first to pay merit raises. Pursuant to the Code any change in the priority ordering in those two sections can come about only as the result of Class A legislation. EO 29, which came into being as the result of President Emmert's unilateral action, usurped the function of Class A legislation and re-ordered the priorities in §§24-70 and 24-71.

Item 1 in the Regents Resolution of April 16, 2009 demonstrates that the University knew EO 64 operated in concert with §§24-70 and 24-71 and that any change to the priorities effected by EO 29 would require a corresponding change in the two Code sections:

> [The Board of Regents e]ndorses the President's new Executive Order as a financial necessity and approves the suspension of merit pay increases through the 2009-11 biennium, ***which will prevail over any University policies, rules, or codes or regulations to the extent they may be inconsistent.***

Rather than allow shared governance to effect the change in the priorities in the two sections, the President, by EO 29, and the Regents by their

Resolution, not only suspended the merit raises but also overrode the requirement for Class A legislation to amend the Code. Again, in paragraph 9 of its answer the University admitted as much:

> In response to paragraph 9, the University admits that on March 31, 2009, after consultation with the Faculty Senate, President Mark Emmert issued Executive Order No. 29; and that on April 16, 2009, the ***Board of Regents adopted a Resolution endorsing the Executive Order and declaring the Executive Order would prevail over the Faculty Code***; (emphasis supplied) . . .

CP 9. If the Regents believed that the Code was not binding, there would have been no need for EO 29 or the Resolution in support of it.

The University's faculty did not approve of EO 29 or the process that preceded its promulgation.

The University attaches considerable significance to two portions of remarks made by David Lovell (Prof. Lovell), the then-Chair of the Faculty Senate (Senate), at the meeting of the Regents in which they adopted the Resolution:

> we've been talking about [a proposed executive order that would suspend the annual 2 percent merit raises] very actively for several months.
> 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.

CP 88-89.

The Chair of the Senate has sole authority to speak for the Senate for but one purpose: to explain an "action" that the Senate has taken. §22-54.E. As the "Legislative agency of the University Faculty," the Senate has authority to take the specific "actions" that Chapter 22 of the Code delineates. Absent from the list of "actions" are any that pertain to the promulgation of an EO. Thus, for example, the Senate lacks authority to veto or even to vote on a proposed EO as a prerequisite to its promulgation. Individual Senators may offer suggestions for modifying the proposed EO. There is no requirement, however, that the Senate vote on what suggestions to make to the President. The Chair is free to communicate whatever suggestions he wishes to the President.

On March 12, 2009, the Senate convened for the only meeting in which the Senators had an opportunity to voice their concerns about the proposed EO 29 and offer suggestions for modifications. In fact, they had received the agenda for the meeting only two days beforehand. The Senate did not pass Class C legislation that expressed the Senate's support for the proposed EO. Neither at that Senate meeting nor at any subsequent Senate meeting did the Senate pass a Class C resolution stating that it

> [was] very pleased to see that [its] advisory role – not only did [the Senate] advise but [it was] listened to and in fact [its] advice was taken. So [the Senate] believes the process – it's a cliché—but [the Senate] believes that the process worked in this case.

CP 305-306.

Thus, in his remarks before the Regents in April 2009, Prof. Lovell did not explain an "action" that the Senate took. Further, one meeting of the Senate does not make for a "very active several month discussion" of the proposed EO 29 by the Senate as a body. Prof. Lovell, together with a handful of faculty members, was actively involved, commencing in February 2009, in crafting what would become EO 29. It is, therefore, misleading to assert that Prof. Lovell's remarks before the Regents accurately reflect the advisory process or the Senate's sentiments regarding that process. Prof. Lovell's remarks are nothing more than his opinion. There is no evidence in the record to the contrary.

Even more disturbing is the impression that the University seeks to conjure by adverting to Prof. Lovell's remarks. The desired inference is that the University's faculty as a whole supported the process leading up to the promulgation of EO 29 and the EO itself. That is, the faculty waived the Code's requirement for Class A legislation to amend §§24-70 and 24-71. Nothing in the Code anoints the Chair of the Senate as the official spokesperson for the faculty. Nor is there any evidence in the record that the University's faculty supported the suspension of merit raises that they earned.

For more than half a century the University's faculty have relied on the rights and duties that the Code prescribes for them.

For more than 54 years the Code has functioned as the employment contract between the University and its faculty. The parties to the contract have honored its provisions. The University's system for granting tenure has, for example, been an integral part of the contract. No less integral is the FSP. The FSP came into being following approximately two years of discussions between members of the faculty and the administration. The FSP abolished the "star" system which rewarded a few faculty stars at the expense of their many loyal, productive colleagues. Under the FSP a modest annual merit raise for those loyal faculty members became the first priority in the system for allocating raises for faculty. In the spring of 2009, after Prof. Nye and other members of the putative class had earned annual merit raises for payment in the 2009-2010 academic year, the University unilaterally declared that it would still pay raises to members of its faculty, but that it would not pay annual merit raises that have first priority under the Code. Faculty would still have to earn merit raises; the University would just not pay them. Under any form of contractual analysis, including the three-part test in *Korslund v. DynCorp,* 156 Wn.2d 168, 184, 125 P.3d 119 (2005), by unilaterally suspending the merit raises the University breached a promise to its continuing, loyal faculty members, a promise on which those faculty members had always relied.

Conclusion

As justification for abrogating its obligation to pay annual merit raises the University believes that its prominence and the current economic crisis entitle it to special treatment: It should have the right to choose which raises to pay despite the Code's requirement that annual merit raises have first priority. Were the President and the Regents to abrogate the University's contract with, for example, a public utility and justify doing so because we are in the midst of the worst economic crisis since the Great Depression, the actions would still constitute a breach of contract. The law requires payment for value received. Accordingly, the University must pay the merit raises that Prof. Nye and other members of the putative class have earned.

Respectfully submitted this 15th day of October, 2010.

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