65143-9

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No. 65143-9-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

PETER NYE, et al.

Appellants,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

BRIEF OF APPELLANTS

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ORIGINAL

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ASSIGNMENT OF ERROR

In an order dated March 5, 2010, the trial court erred in granting the University of Washington's motion for summary judgment and denying Prof. Nye's motion for summary judgment on his breach of contract claim for wages in the form of merit raises.

ISSUES ARISING FROM THE ASSIGNMENT OF ERROR

1. Absent a declared financial emergency may the University's President and/or its Board of Regents override a provision in the Faculty Code that came into being as the result of a vote by the voting members of the University's faculty and approval by the University's President?
2. What steps must the University take to render inoperative a provision in the Faculty Code that came into being as the result of a vote by the voting members of the University's faculty and approval by the University's President?
3. What conclusion does the fact that from the advent of the Faculty Code in 1956 until 2009 the University's President and its Board of Regents never took an action that intentionally overrode a provision in the Faculty Code that came into being as the result of a vote by the voting members of the University's faculty and approval by its President?

INTRODUCTION

This appeal arises out of a breach of contract action for wages in the form of merit salary increases that the University of Washington (University) decided that it would not pay to its meritorious faculty members during the 2009-2011 biennium. The obligation to pay merit raises is etched in the University's Faculty Code (Code). From its advent in April 1956 until the spring of 2009, the University and its faculty adhered to the Code's provisions that govern the employment relationship between those parties. In the spring of 2009, for the first time ever the President and the Board of Regents (Regents) overrode a provision in the Code and "suspended" the payment of merit raises.

STATEMENT OF THE CASE

The Faculty Code came into being in April 1956 as the result of a joint agreement between the University and its faculty. Since April 1956 the University and its faculty have consistently shared in the formulation of and abided by provisions in the Faculty Code.

The University maintains a Handbook that comprises six volumes. Part 1 of the Handbook sets forth "Delegations of Authority." Part 2 comprises the Code. The Code includes a series of provisions that describe terms and conditions of employment for members of the University's faculty, including, for example, qualifications required for appointment and promotion to particular faculty ranks. The current version of the Code has its provenance in an extensively revised "Faculty Handbook" that took effect on April 16, 1956.[1]

Pursuant to RCW 28.20.130(1) ultimate control of the University resides in the Regents. At the same time, RCW 28B.20.200 decrees that the University's "faculty shall have charge of the immediate government of the [University] under 'such rules as [the Regents may prescribe]." Pursuant to RCW 28B.10.528 the Regents may delegate their powers of governance to the University's President. Since 1971, standing orders of the Regents have delegated authority to the President to delegate to the faculty authority for formulating rules and regulations for the immediate government of the University. Handbook §§12-12.A. and B. By an Executive Order (EO) of the President, dated May 31, 1956, the faculty has shared responsibility with the President for formulating rules and regulations for governance of the University. Handbook §13-21. While Handbook §12-12.A gives the Regents authority to modify or rescind any rules or regulations in the Code, pursuant to a delegation of authority by the Regents Ch. 29 of the Code prescribes the sole mechanism for

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[1] The Code is publicly accessible at www.washington.edu/faculty/facsenate/handbook/Volume2.html. In this brief all references to sections, unless otherwise stated, are to sections in the Code. The footnote, marked by an asterisk, to §13-31.C describes the origins of the current Code. In addition, a "history" of the numerous provisions in Vol. 2 of the Handbook appears at the end of each of the numbered sections in that volume.

modifying, rescinding, or amending a provision of the Code that has come into being through the passage of Class A legislation.

The University's faculty, as a whole, share in governing the University through the right to adopt legislation. Pursuant to the Code, neither the Regents nor the President has authority to initiate the legislative process. Instead, the Code, pursuant to the 1956 delegation by the President, as authorized by the Regents, vests in the University's Faculty Senate (Senate) sole authority to initiate the legislative process. Legislation that the Senate might propose falls into one of three classes: A, B, or C. §22-71.

Class A legislation is reserved for one function: amending a provision of the Code other than a statute, a resolution of the Regents, or an EO. The process for adopting Class A legislation, and thereby amending a section of the Code, finds expression in Chapter 29. As that chapter of the Code describes, because the Senate has sole authority to initiate legislation, the process of amending the Code must start with that body. Adoption of an amendment requires several steps, the penultimate of which is a vote by voting members of the University's faculty. §29-36. If a majority of the eligible voting faculty members, or a 2/3 majority of those voting members actually voting, approve, the measure goes to the President. The amendment becomes effective if (a) the President approves, or (b) the President takes no action within 14 days of the voting faculty members having voted to approve. Thus, the President must take affirmative action to disapprove a measure approved by a faculty "referendum." Otherwise the measure will become part of the Code. Once part of the Code, pursuant to Chapter 29 the measure must remain in effect until Class A legislation amends it. §29-37; §29-31.A. and B.

Pursuant to delegations of authority by the Regents and the President the legislative system for determining conditions of employment for the University's faculty, as set forth in the Code, has always been that which Chapter 29 details. From the adoption of Chapter 29 of the Code on April 16, 1956 through April 15, 2009, the Regents and the University's several Presidents honored their delegation to the University's faculty authority to approve changes to sections of the Code. Not once during that 53-year period did the Regents, by Resolution, or the President by EO, ever rescind, amend, or modify any section of the Code that came into being as a result of Class A legislation.

Thus, for example, the Regents have never rescinded any provision in Chapter 25 of the Code. As its title, Tenure of the Faculty, suggests, Chapter 25, among other things, establishes the criteria for granting tenure, the procedures that must attend a tenure review, and the deadline by which the University must consider a tenure-track faculty member for tenure. Those and all other provisions in Chapter 25 came about as the result of the enactment of Class A legislation in the manner that Chapter 29 requires.

Pursuant to the Code, not all faculty members are eligible to attain tenure. Instead, only ladder, or tenure-track faculty qualify. Of the 12 titles that constitute the faculty, only assistant professors, associate professors, and professors are "ladder" faculty. §21-31. Of that group, persons holding appointments as assistant professors are untenured. They are instead probationary faculty. They can attain tenure, and promotion to associate professor, if they undergo a successful review for tenure, typically no later than their sixth year as an assistant professor.

§24-57 mandates that during each year of that six-year period department chairs must meet with each of their department's assistant professors to, among other things, provide feedback on the probationary faculty member's performance and discuss what the faculty member should do to obtain a favorable tenure review. Thus, the annual meeting functions as something of a planning session and an informal performance review. The ultimate performance appraisal for a probationary faculty member comes in the form of the mandatory tenure review. Because the University operates an "up or out" tenure system, a negative tenure review translates into a one-year terminal appointment for the unsuccessful candidate who has reached the end of the probationary period. §25-41. Since the advent of the Code in 1956, neither the Regents, nor the President, have ever rescinded, or modified in any way, any provision in Chapter 25. Further, all reviews for tenure have had to be in accordance with that chapter.

The Code that came into being in April 1956 contained no requirement of post-tenure performance appraisals. Tenured faculty members enjoyed permanent job security. Pursuant to §25-71 they still do. That is, the University may discharge a tenured faculty member only for "cause" as §25-51 defines that term. If the University wishes to affect a discharge for cause, the Provost must file a petition for adjudication against the faculty member, in accordance with the requirements of Chapter 28, the Code's adjudication chapter. In the subsequent adjudication the Provost bears the burden of showing by a preponderance of the evidence that "cause" exists for terminating the employment of the faculty member. Neither the Regents, nor the President, have ever rescinded, or modified in any way, any provision in §25-51, §25-71, or Chapter 28.

Extensive negotiations, in 1998 and 1999, between University administrators and members of the University's Faculty Senate

resulted in the approval by the University and its faculty, in 1999 and 2000, of the Faculty Salary Policy as part of the Faculty Code.

The reality of job security, coupled with the lack of a requirement that tenured faculty undergo performance reviews similar to those probationary faculty members underwent annually, came before the Senate and the Senate Executive Committee (SEC) in 1998 and 1999. Senators understood that the Regents and outside groups, including some members of the Legislature, were desirous of having post-tenure reviews that could punish "underperforming" faculty members. CP 492; CP 496.

At the same time, Senators expressed an ongoing concern regarding the system for determining faculty salaries at the University. Once a faculty member commenced employment at the University the system for subsequently increasing a faculty member's salary had resulted in University faculty lagging behind the average salaries paid to their peers at peer institutions. Compounding this problem was the University's practice of offering retention raises to University faculty members who received offers of higher salaries from other universities/colleges. Thus, monies that could have gone to increase the salaries of career, i.e. long-time, loyal, University faculty members often went to faculty "stars." CP 487.

These conditions created an opportunity for the Senate and administration negotiators to "strike a deal", explained below, in which the two sides would provide consideration to each other. That is, the faculty, including those who had attained tenure, would agree to undergo annual performance reviews that focused on whether the faculty member "added value" beyond that for which the University paid a salary. For its part, the University, would agree to pay, on an annual basis, an across-the-board equal percentage merit raise to all continuing faculty members who underwent successful performance reviews.

The Faculty Salary Policy incorporates the elimination of the "star" system that the University had used to distribute moneys for faculty salary increases prior to the adoption of the Faculty Salary Policy.

Speaking for the University at a meeting of the SEC in February 1999, Provost Huntsman explained the University's intent regarding the importance of merit raises to career faculty members under the new policy:

> Over the last number of years, we have been engaged in a salary policy based on "hope." We have seen the market move away from us, and so we have necessarily funded new appointments [to faculty positions] at market level and necessarily given priority to retention; the amount of money left over for the rest of the faculty is steadily falling behind. [This] is a "policy of hope" because we've hoped that sooner or later we would get an influx of new money and catch up. What this new policy

> proposal calls for is an end to this era and a beginning of an era of . . . "new hope." **We are essentially saying in this policy is that the first priority is will** [sic] **be to sustain at least a minimal award system for good and meritorious faculty. We're inverting our priorities: saying we're going to put first dollars toward rewarding career merit, a baseline of rewards for meritorious faculty.** ***Then we'll take the remaining dollars and do the usual juggling – recruiting, retaining, etc. . . . [T]he real value [in the new policy] is this shift in priorities.*** (Emphasis supplied).
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> . . .
>
> [T[he real significance of the new policy is . . . the priority position given to this sort of merit salary increase. We're [i.e. the administration] saying that independent of what Olympia does, independent of what the market does, we'll make [merit salary increases] a first priority from our own available resources. We're saying that when real crunch times come, we're no longer going to balance the budget on the backs of continuing faculty in favor of retaining "stars."

CP 487.

At the SEC meeting on March 1, 1999, Provost Huntsman made clear the lengths the University intended to go to pay merit increases to career faculty members:

> [a] major emphasis in the salary policy will ***guarantee*** minimum awards for career progression. ***This will be our number one priority.*** Providing substantial salary increments with promotion will be second; filling vacancies at competitive market salaries will be third; and funding counteroffers to retain current faculty will be fourth.
>
> . . .
>
> The statement of priority will have almost no impact in normal years, when there is enough to fund everything, but it will 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***. (emphasis supplied).

CP 489. At the Senate meeting on April 29, 1999, Provost Huntsman indicated that two percent was that figure that was likely to attach to the annual merit raises. CP 498.

Thus, according to Provost Huntsman, if the Legislature were not to allocate funds to pay the merit increases in a given year, the University would, if necessary, refrain from hiring new faculty and use monies that would otherwise go to pay those new faculty to fund across-the-board merit increases.

Consistent with the system of shared governance, described above, neither the Regents nor the administration of the University unilaterally imposed the new policy, with its guarantee of annual merit raises and its inversion of salary priorities, on the University's faculty. Instead, pursuant to Chapter 29 the Senate initiated amending the Code to incorporate the new policy. In July 1999, as the result of a favorable vote by the University's voting faculty members, §§24-70 and 24-71 became part of the Code. §24-70, titled Faculty Salary System: Policy and Principles, reflects the inversion of priorities about which Provost Huntsman spoke in 1999. Specifically, that section lists the seven ways in which a faculty member can attain and increase in his or her salary.

In first place on the list is equal percentage, i.e. across-the-board, merit increases for meritorious faculty members. Second is promotional raises. Retention raises are farther down the list, consistent with Provost Huntsman's promise of inverting the priorities. Among other things, under the new policy set forth in §§24-70, faculty "stars" may not be rewarded at the expense of loyal, long-time meritorious faculty.

§24-71, titled Procedures for Allocating Salary Increases, describes the process for allocating monies to fund salary increases for faculty members. Significantly, each biennium the Provost has responsibility for recommending allocations of available funds across six of the seven classes set forth in §24-70. Pursuant to the two sections, during every year in which the University allocates monies to fund salary increases, the monies *must* go first to pay the equal-percentage, i.e. across-the-board, merit increases. Only if monies are left over after paying those increases and promotion increases, and increases to faculty members below the salary "floor" for the applicable rank, may the University pay, for example, retention or extraordinary merit increases.

Since its adoption in July 1999, §24-70 has never been amended. Nor has the priority ordering in §24-71ever been amended. Conspicuously, §24-70 does not specify a percentage for the mandatory equal percentage annual merit raises. By its language Footnote 2, also known as Executive Order 64 (EO 64)[2], to §24-57 is the mechanism for implementing the agreement regarding increases in faculty salaries that the University and its faculty struck when §§24-70 and 24-71 became part of the Code in July 1999. Because they operate together, §§24-70 and 24-71 and EO 64 constitute the University's Faculty Salary Policy (FSP). Accordingly, under EO 64, issued in January 2000, the University established the same two percent figure that Provost Huntsman stated would attach to the merit salary increases he guaranteed in 1999.

Also in July 1999, an amended version of §24-55 went into effect as the result of the passage of Class A legislation. That section, titled Procedure for Salary Increases Based Upon Merit, mandates that all faculty undergo an annual review for merit by colleagues senior to them in rank. Thus, for example, professors and associate professors review assistant professors. It is the result of that review which determines whether the University will pay, commencing with the start of the academic year following the review, the faculty member the two percent merit raise set forth in EO 64.

[2] Effective June 21, 2010, a revised version of EO 64 went into effect. All references to EO 64 in this brief are to the version that was promulgated in January 2000 and was in effect when Prof. Nye filed his lawsuit. That version of EO 64 appears at CP 180-182.

Pursuant to the Faculty Salary Policy, based on annual reviews of their cumulative records faculty members must earn annual merit raises in order to receive them.

The language of §24-55 makes clear that the raises are not automatic. Instead, the review is based upon an evaluation of the faculty member's *cumulative* record on scholarship/research, teaching, and service. Thus, a faculty member whose cumulative record does not improve from one review to the next would not demonstrate performance that justified a merit increase. Accordingly, although tenured faculty members enjoy job security, a negative merit review for such persons carries a negative consequence in the form of a salary freeze. In short, in order to receive a merit raise a faculty member must earn that raise during the academic year immediately preceding the payment of the increase.

In 2002-2003 the University failed to pay merit raises. In 2005 a King Court Superior Court ruled that in doing so the University breached a contractual obligation under the Faculty Salary Policy.

Along with provisions that implement the priorities of §§24-70 and 24-71, EO 64 contains a Funding Cautions provision that became the focus of class action litigation as the result of the University's decision not to pay two percent merit raises during the 2002-2003 academic year. In 2004, Duane Storti, a faculty member in the University's College of

Engineering, initiated a class action lawsuit to recover unpaid merit raises for all continuing faculty who were not deemed unmeritorious during the 2001-2002 academic year. *Storti v. University of Washington*, KCSC No. 04-2-16973-9 SEA. In defending the lawsuit the University argued that pursuant to the Funding Cautions provision in EO 64, because the Legislature did not allocate monies to pay those raises, the University was under no obligation to pay.

In its entirety the Funding Cautions provision is as follows:

> *Funding Cautions.* The [FSP] 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 [FSP] may prove necessary.

CP 182.

On October 25, 2005, after the parties had filed competing motions for summary judgment, the court, the Hon. Mary Yu presiding, issued an order denying the University's motion but granting Prof. Storti's motion. CP 207. In so doing Judge Yu noted that Prof. Storti claimed the Code constitutes the University's employment contract with its faculty, and that

> [t]he University does not dispute this claim for summary judgment purposes and indeed argued that principles of contract interpretation should apply . . ..

CP 203.

According to the University, the Funding Cautions provision in EO 64 gave the University, i.e. its President and/or Regents, discretion not to pay two percent merit increases. Further, the University contended that the Funding Cautions provision made payment of the two percent merit increases contingent on funding from the Legislature. After noting that §§24-70 and 24-71 taken together with EO 64 constitute the FSP, Judge Yu dispensed with the argument by ruling that

> the plain language [of §§24-70 and 24-71, along with EO 64] creates a mandatory duty that requires the University to provide meritorious faculty with an annual merit increase of at least 2%. The court cannot find any language that makes the merit salary increase contingent on funding.

CP 205. Thus, nothing in the Code, in particular §§24-70 and 24-71and EO 64, gives the University, i.e. its President and/or Regents, discretion to withhold, unilaterally, payment of two percent merit raises that faculty earn pursuant to those provisions and §24-55.

Nothing in the Code suggests, however, that once enacted a Code section is in place into perpetuity. As noted above, the Code itself contemplates amendments to its sections. Language in the Funding Cautions provision is consistent with that reality:

> Without the influx of new money or in the event of decreased State support, a reevaluation of [§§24-70 and 24-71 and EO 64] may prove necessary.

CP 204. Thus, Judge Yu explained, by that language the University reserved the right to change the policy and procedures for allocating and paying monies for salary increases. CP 205. Although Judge Yu declined to issue a ruling as to precisely what process would have to attend any such change, as explained above, amending either or both of §§24-70 and 24-71 would necessitate a vote by the voting members of the University's faculty.

Despite the King County Superior Court's ruling in 2005 that the University could take appropriate steps to change the Faculty Salary Policy, even in the face of mounting reports starting in 2007 of a global financial crisis, the University's administration took no steps to initiate a change until February of 2009.

Subsequent to the issuance of Judge Yu's order granting Prof. Storti's motion for summary judgment, he and the University settled the case. CP 211-235. §§24-70, 24-71, and 24-55 have never been amended since then. Even throughout 2007 when media reports detailed billions of dollars in losses sustained by such prominent financial institutions as

HSBC bank, Merrill Lynch, Citigroup and Lehman Brothers the University took no action to amend the FSP. [3]

As of November 2008, evidence mounted that the troubles of the world's financial system were likely to make themselves felt in the state of Washington. That month the state's Office of Financial Management published an estimate that the state would face an approximate $1.9 billion revenue shortfall during the forthcoming biennium. CP 237. In December 2008, the governor released a budget document that estimated a shortfall of approximately $5.7 billion for the 2009-2011 biennium. CP 241. The projected loss of state revenue would translate into, among other things, decreased state funding for the University. According to the University the decrease for the 2009-2011 biennium will total approximately $214 million. CP 65.

Despite almost two years of financial crisis, the earliest public suggestion of a potential change to the faculty salary system from the University's chief executive did not come until a meeting of the Senate on December 4, 2008. In response to a question, President Emmert opined there would have to be discussions about the "2% rule" if it were not possible to pay that amount in the next biennium. His reported remarks

[3] On May 19, 2008, BBC News published a time-line regarding the events listed above. The article is available on the BBC website: www.bbc.co.uk/news/.

contain no mention, however, of a need to "reevaluate" §§24-70 and 24-71 together with EO 64. CP 283.

In violation of the Code the University unilaterally overrode the Faculty Salary Policy in 2009, suspended the payment of merit raises, and reinstituted salary priorities that the Faculty Salary Policy replaced.

Sometime before February 18, 2009, President Emmert summoned the Chair and Vice Chair of the Senate to meet with him and the President of the Regents to discuss modification of EO 64's mandate requiring the payment of two percent merit raises. As the result of that meeting the President and the Chair of the Senate established an ad hoc committee of a few University administrators and faculty members to effect the modification of which President Emmert spoke. CP 66. It was not until a meeting of the SEC on February 23, 2009 that President Emmert addressed his desire to "modify" EO 64's mandate before a group of faculty other than the Chair and Vice Chair of the Senate. In addressing the assembled Senators on that day President Emmert made clear his intentions as to what to do about the payment of two percent merit raises during the 2009-2011 biennium:

> [t]he issue is complicated by [EO 64] being embedded within the *Faculty Code* (Section 24-70). If portions of the *Faculty Code* are not simultaneously "suspended" or

> amended (requiring Class A legislation), and if [EO 64] were suspended, the *Code* would preclude any new hires or salary adjustments required to retain a faculty member who has been offered a greater salary increase elsewhere. [President Emmert] hopes that working together, the University can find a solution that would allow the suspension of the 2% policy—but still provide departments with constrained flexibility to make hires and retention increases.

CP 329.

Thus, President Emmert hoped to "suspend" the merit raises without having to (a) comply with the dictates of §§24-70 and 24-71 and (b) amend those sections of the Code. Never before since its inception, had there been a suspension of any provision in a Code section effected by Class A legislation. Regardless, President Emmert wished, with help from a few Senators, to find a way to suspend the payment of merit raises but continue to pay retention raises, something that §§24-70 and 24-71 do not allow. To that end, members of the SEC had before them for discussion at the February 23, 2009 meeting a proposed EO that would "suspend" for the 2009-2011 biennium payment of the regular merit raises, but leave intact, among other things, payment of promotion raises and the requirement that all faculty undergo annual merit reviews. In addition, under the proposed EO the University could pay retention raises and allocate funds for hiring new faculty members.

There would be no "cannibalizing" of faculty positions if the proposed EO were to go into effect. CP 341.

On March 10, 2009, the Chair of the Senate provided the Senators with a copy of President Emmert's proposed EO for the agenda of the Senate meeting of March 12, 2009. CP 321. The Chair anticipated that, at the meeting, Senators would have an opportunity to vote on a Class C resolution in support of the proposed EO. At the meeting President Emmert fielded several questions regarding the proposed EO including an inquiry as to whether the merit raises could be postponed and not suspended. President Emmert responded that the option had been rejected as being prohibitively expensive. Further, when asked why faculty were, in mid-March, being asked to comment on a budget that would be finalized in a few weeks, President Emmert responded that it was necessary to move quickly so as to enable the University to defend against lawsuits that would arise out of the suspension of the raises. CP 305.

Despite the Chair's prediction of a vote to approve the proposed EO, the Senators did not enact Class C legislation in support at the March 12 meeting or at any other time. CP 352-353. Following the meeting the Chair and the Secretary of the Faculty wrote to President

Emmert with some of the concerns about the proposed EO that Senators had voiced during the meeting. CP 355-356.

Pursuant to the Code, prior to promulgating an EO the president must "consult" with members of the Senate. §12-21.B. As to what "consult" means, the Code is largely silent. Regardless, after receiving the letter from the Chair and the Secretary of the Faculty, and incorporating some of the suggestions advanced in that letter, on March 31, 2010, President Emmert promulgated EO 29. EO 29 suspended immediately several provisions in EO 64:

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 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.*

CP 66; CP 83-84.

From beginning to end the process of "modifying" the promise to pay two percent merit raises consumed but a few weeks. The "consultative" process involved just two discussions between members of the Senate and the President. The Senate never voted to approve what President Emmert proposed to promulgate. Nor did the University's voting faculty ever vote on proposed Class A legislation aimed at "modifying" the mandate of §§24-70 and 24-71, as implemented by EO 64.

That mandate, in the words of Judge Yu, came about as the "result of extensive negotiations between the University Administration and the faculty represented by the Faculty Senate." CP 204, l. 6-7. In short, with the "stroke of a pen" President Emmert unilaterally decreed the FSP, which took more than a year of negotiations to bring into being, was not in effect for the 2009-2010 and 2010-2011 academic years. Instead, salary priorities that he preferred would hold sway. On April 16, 2009, the Regents for the only time since April 16, 1956 passed a resolution rendering inoperative provisions in the Code that came into being through Class A legislation. §24-57, Fn. 4. Or, as the University stated in its answer to Prof. Nye's complaint

> the **University admits** . . . that on April 16, 2009,**the Board of Regents adopted a Resolution endorsing [EO 29] and declaring the [EO] would prevail over the . . . Code** . . . . (emphasis supplied).

CP 13.

Pursuant to Class A legislation passed in 1975, and subsequently amended three times with the requisite approval by the University's voting faculty, §26-31 gives the Regents authority to declare a financial emergency. If the Regents do so, the University has limited authority to suspend provisions in the Handbook. Apart from §26-31nothing in the Code gives the President or the Regents authority to "suspend" a provision that has come into being as the result of the adoption of Class A legislation.

Consistent with the provisions of EO 29, at the beginning of the 2009-2010 academic year, the University began not to pay merit raises to its faculty members who underwent successful reviews for merit raises during the 2008-2009 academic year. It has never paid those raises. Further, the University has made clear that all its faculty members had to undergo reviews for merit raises during the recently concluded 2009-2010 academic year and that it will not pay, in the 2010-2011 academic year, merit raises to those faculty deemed meritorious during the 2009-2010 academic year. At the same time the University has continued to hire new faulty. CP 13, 17, 44, 45.

Procedural History of the Current Appeal

On October 16, 2009, Peter Nye, an Associate Professor in the Business Program at the University's Bothell campus, filed a class action lawsuit against the University in King County Superior Court. Prof. Nye alleged that with the promulgation of EO 29 the University breached its contractual obligation to pay merit raises to its meritorious faculty in the

2009-2010 and 2010-2011 academic years. Thus, his lawsuit, which is the subject of this appeal centers on a claim of breach of contract for wages. CP 1-7.

Prior to any discovery having been conducted in the case, the parties filed competing motions for summary judgment. On March 5, 2010, the Court heard oral argument on those motions. Counsel for Prof. Nye and the University presented oral argument and responded to questions from the Court. Although Prof. Nye's complaint centered on an alleged breach of contract for wages, at no time during the oral argument did the Court ask questions of respective counsel regarding the alleged breach of contract or engage in contractual analysis. In fact the Court mentioned the word "contract" only once in ruling on the motions. RP 1-47. Regardless, for reasons that are difficult to discern in the Report of the Proceedings, the Court denied Prof. Nye's motion but entered summary judgment dismissal. RP 48-52. On March 26, 2010, Prof. Nye filed a Notice of Appeal of the March 5, 2010 decision. CP 666.

ARGUMENT

Standard of Review

> On review of a summary judgment order, [the appellate court] engages in the same inquiry as the trial court. *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d

> 119 (2005). All facts and reasonable inferences are considered in a light most favorable to the nonmoving party, while all questions of law are reviewed de novo. *Berger v. Sonneland*, 144 Wn.2d 91, 102-03, 26 P.3d 257 (2001). Summary judgment is appropriate only when there are no disputed issues of material fact and the prevailing party is entitled to judgment as a matter of law. CR 56(c).

Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, 165 Wn.2d 679, 686, 202 P.3d 924 (2009).

In Washington a Faculty Handbook is an employment contract between a public university and its faculty.

A faculty "handbook" has the status of an employment contract between a public university and its faculty. *Nostrand v. Little,* 58 Wn.2d 111, 123, 132, 361 P.2d 551 (1961); *Meyer v. University of Wash.*, 105 Wn.2d 847, 854, 719 P.2d 98 (1986); *Trimble v. Washington State University*, 140 Wn.2d 88, 93-95, 993 P.2d 259 (2000); and *Mills v. W. Wash. Univ.*, 150 Wn. App. 260. 269, 208 P.3d 13 (2009), review granted by, review denied by *Mills v. W. Wash. Univ.*, 167 Wn.2d 1020, 225 P.3d 1011 (2010). *Nostrand* and *Meyer* involved the Code that came into being in 1956 at the University. Further, as discussed above, in *Storti*, the University asserted that interpretation of the FSP required application of contract principles.

Apart from the four cases cited above, Washington's case law derives largely from an analysis of employee handbooks where the nature of the employment relationship is at least nominally at-will. Regardless, the nature of the employment relationship as reflected in an employee handbook requires an examination of not only the words in the handbook but also the totality of the actions and practices of the parties. *Swanson v. Liquid Air Corp.*, 118 Wn.2d 5124, 534, 826 P.2d 664 (1992). Thus, for example, a disclaimer in a handbook that nothing in that document constitutes a contract, may be of no consequence where the employer's representations and practices are inconsistent with the disclaimer. *Id.* Further, an employee handbook may modify an otherwise at-will relationship by creating an express contract. Alternatively, an implied contract between the employee and the employer may arise as a result of the conduct of the employer and the employee. Finally, irrespective of the absence of an express or implied contract, a handbook may contain promises of specific treatment in specific circumstances on which the employee justifiably relies. *Kuest v. Regent Assisted Living, Inc.*, 111 Wn. App. 36, 48, 43 P.3d 23 (2002). Further complicating the matter of the nature of provisions in an employee handbook is the fact that contracts can be either bilateral or unilateral. Regardless, the nature of the employment relationship evidenced in part by the faculty handbooks in the four cases above is not uniform, as we explain below.

The university promulgates provisions in the Faculty Handbooks at Washington State University and Western Washington University.

As the titles indicate, *Trimble* and *Mills* involved, respectively, the Faculty Handbooks at Washington State University (WSU) and Western Washington University (WWU). Although both of those handbooks qualify as employment contracts, and both handbooks embody shared governance between the administration and the faculty of the respective state institutions, the provisions in those handbooks came about in a manner quite different from what accounts for the existence of sections of the Code.

At WSU the faculty senate has authority to recommend to the University's president additions or modifications to provisions in the faculty handbook, known as the Faculty Manual (Manual). The president is obligated to consult with the faculty senate regarding those recommendations. Regardless, the president has sole discretion to add, or to modify an existing, provision. There is no requirement of a vote by voting members of the faculty prior to the president's decision to add or modify. Thus, after consulting with members of the faculty senate, the president, pursuant to authority delegated by the WSU Board of Regents, promulgates, on behalf of the university, additions or modifications to the Manual. [4]

At WWU, the Board of Trustees (Trustees) has sole discretion to modify or add to provisions in the Faculty Handbook (Handbook). The president, after having consulted with the Faculty Senate, may recommend modifications or additions. Further, by obtaining 25 signatures on a petition to recommend changes, faculty members may also recommend modifications or additions. As in the case at WSU, there is no requirement for a vote of the voting members of the WWU faculty. Instead, the Trustees, at their discretion, promulgate modifications or additions.[5]

Because at WSU and WWU the university promulgates the faculty handbook that qualifies as an employment contract for faculty members at the two institutions, the terms of those contracts do not arise as the result of bargaining between the parties to the contract. Similarly, in companies that have employee handbooks, the employer exercises discretion to promulgate, unilaterally, those handbooks. Washington courts are clear

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[4] The process for modifying or adding provisions in the manual appears in the Manual at p. 122 under the heading Section VI: Revision of Preceding Sections. The Manual is publicly accessible at the website of the WSU faculty senate at facsen.wsu.edu/faculty_manual/Section_VI.pdf.

[5] The process for modifying or adding to provisions in the Handbook appears in Section I.C. of the Handbook, titled Handbook Amendment Procedure. The Handbook is publicly accessible at the website of the Faculty Senate at WWU: www.acadweb.wwu.edu/senate/.

that a handbook an employer unilaterally promulgates, if accepted by the employee in the form of his or her working in compliance with the terms in the handbook, has the status of a unilateral contract.

Beginning with *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 228-29, 685 P.2d 1081 (1984), Washington courts have adhered to the rule that promises in an employee handbook, or manual, an employer unilaterally promulgates can be binding on the employer and the employee even if the employer/employee relationship is at-will. In *Govier v. North Sound Bank*, 91 Wn. App. 493, 499, 957 P.2d 811 (1998), the court rejected at-will-employee Ms. Govier's contention that the handbook at issue constituted a bilateral contract between her and her employer. In rejecting the assertion the court noted that at the time she commenced employment, Ms. Govier was unaware of the handbook's contents; that Ms. Govier did not negotiate the terms of her employment contract with the employer; and that on eight occasions during her employment the employer had modified the handbook without either consulting with Ms. Govier or seeking her assent to the modifications. Thus,

> because of the circumstances here, the provisions in the employee handbook had the force of a unilateral contract, one in which the promisor does not receive a promise in return as consideration . . . .

Govier v. North Sound Bank, 91 Wn. App. at 499.

The unilateral contract between Ms. Govier and her employer came into being when she chose to work under the terms set forth in the handbook. Ms. Govier's employer or any other employer who unilaterally promulgates an employee handbook may, however, unilaterally modify any provision in the handbook by giving sufficient notice. Similarly, the faculty handbooks in effect at WSU and WWU, described above, appear to qualify as unilateral contracts between those universities and the members of their faculties.

In *Ebling v. Gove's Cove*, 34 Wn. App. 495, 496-97, 663 P.2d 132 (1983), a salesperson agreed to manage the employer's operation at a particular location in exchange for the employer's promise to pay the salesperson a higher commission rate on sales. The court ruled that the exchange of promises created a bilateral contract between the employer and the employee. Accordingly, the employer did not have discretion to reduce, unilaterally, the promised commission rate. Instead, modification of the contract required assent by the employer and the employee. *Id.* at 498. Although *Gove's Cove* was not a "handbook" case, nothing in any reported employee handbook case in Washington suggests that an employment contract in the form of an employee handbook cannot be a bilateral contract. Language in *Govier, supra*, suggests that had (a) the employer and the employee negotiated terms in the handbook and (b) the employer obtained the employee's assent to modifications in the handbook, the negotiated terms and the modifications likely would have satisfied the requirements for a bilateral contract.

The Code's sections at issue are contractual provisions that came into being as the result of joint action by the faculty and the University. The conduct of the parties subsequent to the advent of those sections has reinforced their status as contractually binding.

As explained above, §§24-70 and 24-71 came into existence as the result of extensive negotiations between the University's administration and members of the Senate. Those negotiations led to proposed Class A legislation that the University's voting faculty members approved through the Code's prescribed voting process. That is, before those sections went into effect the employer, the University, obtained the assent of its employees, i.e. its voting faculty members, to the modifications to the Code. *Govier*'s teaching strongly suggests, therefore, that the FSP as embodied in §§24-70 and 24-71 is a bilateral contract between the University and its faculty. Fundamental principles of contract law, as illustrated by *Gove's Cove, supra*, prohibit one party to a bilateral contract from unilaterally modifying any term in the contract. In violation of this rule, by two actions in the spring of 2009, the University unilaterally modified the FSP. First, President Emmert promulgated EO 29, which "suspended" both the payment of across the board annual merit raises and the fixed priorities for distributing monies that the University allocates for increases in faculty salaries, as set forth in §§24-70 and 24-71. Second, the Regents promulgated unilaterally, for the first time since the advent of the Code, a resolution that suspended provisions in the Code. Notwithstanding the Regents resolution of April 16, 2009, the University's voting faculty members never assented to a modification of any provision in those two Code sections. Nor did they ever have the opportunity to vote on modifications to the two sections prior to the Regents' issuing the April 16, 2009 resolution.

Further, for several reasons, the authority that the Regents retained, pursuant to §12-12.A., to modify, unilaterally, any provision in the Code is of no consequence for the contractual obligations in the FSP. First, the authority, i.e. disclaimer, fails to state that nothing in the Code constitutes a contract between the University and its faculty. Second, as noted above, at no time from April 16, 1956 through April 15, 2009 did the Regents ever modify, unilaterally, any provision in the Code. Third, at no time during the same period did the President of the University ever modify, suspend, or render inoperative any provision in any section of the Code through an EO. In short, by their conduct since April 16, 1956, the

Regents and the President delegated away the reserved authority to the faculty.

Swanson, supra, teaches that the parties' conduct can establish an implied contract between the employer and the employee and thereby negate the disclaimer. As the Washington Supreme Court explained in *Henson v. Employment Sec. Dep't*, 113 Wn.2d 374, 379, 779 P.2d 715 (1995),

> [t]his court has repeatedly defined an implied contract as "an agreement of the parties arrived at from their acts and conduct viewed in light of the surrounding circumstances." [citations omitted].

Alternatively,

> [a]n implied contract comes about when through a course of dealing and common understanding, the parties show a mutual intent to contract with each other. [citation omitted].

Irvin Water Dist. v. Jackson P'Ship, 109 Wn. App. 113, 122, 34 P.3d 840 (2001).

This articulation finds application here in two forms. First, is the import of §12-12.A.'s disclaimer for all other sections in the Code itself. The history of the University, in the persons of its Regents, and its faculty employees under the Code makes clear that both parties have regarded the provisions in the Code as binding on each other. Faculty members are expected to abide by those provisions. Pursuant to §21-71 the Secretary of the Faculty makes every new faculty member aware of the provisions in the Code. The University has the right, for example, pursuant to the Code to terminate the employment of a faculty member during the term of his or her employment for cause as the Code defines that term, and in accordance with procedures established in the Code for effecting a termination for cause. There is no evidence that the University has ever rendered inoperative, even temporarily, those sections of the Code that address termination for cause, or, apart from §§24-70 and 24-71, any other section of the Code. Thus, consistent, with the rulings in *Nostrand*, *Meyer*, and *Storti*, by the conduct of the University and its faculty, the Code throughout its 50+ years of existence has functioned as an implied contract between those parties.

But the Code's provisions consist of two types: sections and EO's. As explained above, the latter is an exercise of delegated authority by the President, albeit in consultation with members of the Senate. Irrespective of the consultation requirement, the President enjoys authority under the Code to promulgate an EO that is at odds with what members of the Senate might prefer. Again, however, until March 31, 2009, the President never promulgated an EO that rendered inoperative any provision in any section of the Code. With that qualification, EOs are, ostensibly, the Code's unilateral contractual provisions. In contrast, the Code's sections have, throughout their existence, functioned as the Code's bilateral contractual provisions: They came about as the result of assent by both the University and the faculty to the terms in those provisions and for as long the provisions have been in existence, both parties have adhered to the terms. §§24-70 and 24-71 are no exception. Those sections came about as the result of extensive negotiations between the University administration, i.e., persons who function as delegees of the Regents, and members of the Senate. The administration and the faculty assented to the terms in those sections. 2002-2003, the one academic year in which the University decided that it had discretion not to pay across-the- board two percent merit raises to meritorious faculty, as called for in the FSP, resulted in a King County Superior Court's ruling that the University had breached a contractual obligation to pay the raises.

The court's order in *Storti* as to the University's contractual obligation to pay two percent merit raises did not turn on the nature of the contractual obligation. For the reasons set forth below, whether the FSP is a bilateral or a unilateral contract leads to the same conclusion. In promulgating EO 29, and the supporting Regent's resolution, the University breached a contractual obligation to pay those raises during the 2009-2011 biennium.

Where employee handbooks constitute unilateral contracts, Washington courts apply the teaching of *Thompson, supra*, to alleged contract breaches. Further, there the Washington Supreme Court held that an employer may be held to promises in a handbook even if the handbook contains a statement that it is not a contract. This holding finds expression in a three-part test that an employee must satisfy to hold an employer liable for alleged breach of contract:

> (1). . . a statement (or statements) in an employee manual or handbook or similar document amounts to a promise of specific treatment in specific situations, . . . (2) the employee justifiably relied on the promise and . . . (3) the promise was breached.

Korslund v. DynCorp. v. Tri-Cities Serv's, 156 Wn.2d 168, 184-185, 125 P.3d 119 (2005).

Whether qualifying as a bilateral or a unilateral contract, the meaning of terms in the FSP is governed by rules of contract interpretation. *Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 298, 890 P.2d 840 (1995). Further, in ascertaining the intent of the parties to the FSP the court should give the words in that policy their ordinary meaning. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Finally, Washington courts subscribe to the "context" rule for ascertaining intent of the parties to the contract.

Under that rule, "surrounding circumstances and other extrinsic evidence" may be used to "determine the meaning of *specific words and terms used* [in the contract]." *Id.* at 503, quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 693, 974 P.2d 836 (1999). The surrounding circumstances and other extrinsic evidence may include

> (1)the subject matter and objective of the contract, (2)all the circumstances surrounding the making of the contract, (3)the subsequent acts and conduct of the parties, and (4)the reasonableness of respective interpretations urged by the parties.

Id. at 502.

As to (1), the subject matter of the FSP is clear: §§24-70 and 24-71 established a system of priorities and processes for allocating moneys that the University would pay in the form of salary increases to members of its faculty in any given academic year. The objective of the two sections finds clear expression in the first subsection of §24-70:

> 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. (emphasis supplied).

As explained above, §§24-70 and 24-71 and EO 64, which implemented the priorities in those two sections, reflected the intent of the parties to address several concerns: First, the University desired to have post-tenure reviews instituted; second, Senators sought to have the University pay regular, i.e. annual, raises for themselves and their colleagues; third, Senators sought to have the University abandon the "star system" under which the University had traditionally provided raises to its faculty "stars" at the expense of long-term, loyal, "non-star" faculty members; and finally, Senators sought to have the members of the University's faculty move toward achieving salary parity with their peers at peer institutions. Significantly, during negotiations with Senators in 1999, the University, through its Provost, Lee Huntsman, represented the extent to which it was willing to commit to satisfying the goals expressed by Senators:

> The statement of priority will have almost no impact in normal years, when there is enough to fund everything, but it will 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.*** (emphasis supplied).

CP 489.

Thus, while during the "lean years" the University might have difficulty providing its "meritorious faculty members with salaries commensurate with those of their peers elsewhere," the University, if necessary, was prepared to "cannibalize" faculty positions to fund the first priority of regular merit raises. That is, instead of, for example, filling open positions created by retirements, resignations, or tenure denials, the University would direct the funds that would be otherwise available to fill open faculty positions to pay regular annual merit increases. In that way the "faculty count" would decline, if necessary.

Although the term "lean years" does not appear anywhere in the FSP, the *Funding Cautions* provision in EO 64, as explained above, refers to periods in which the Legislature does not appropriate funds for increases in faculty salaries. In *Storti* the University took the position that the *Funding Cautions* provision gave the University discretion to refrain from paying regular across-the-board merit raises when the Legislature had not appropriated money to fund those raises. The Court ruled, however, that the plain language of the *Funding Cautions* provision only gave the University authority to change the FSP at some future date. Because there had been no change to the FSP prior to the beginning of the 2002-2003 academic year, the University was contractually obligated to pay regular merit raises during that year in exchange for contributions that meritorious faculty members had made to their departments, schools/colleges, and to the University. CP 206.

As a result of settling with Prof. Storti, the University paid $17.45 million for its failure to pay merit raises in the 2002-2003 academic year. In each of the academic years from 2003-2004 through 2008-2009 the University paid regular across-the-board merit raises to its meritorious faculty members. CP 65. Further, throughout that period the University did not change the FSP: No Class A legislation amended §§24-70 or 24-71. Instead, as described above, in March 2009, President Emmert promulgated EO 29, which suspended for the 2009-2011 biennium the payment of regular across-the-board merit raises and on April 16, 2009, the Regents adopted a resolution that supported EO 29 and effectively rendered inoperative the FSP's priorities set forth in §§24-70 and 24-71.

The University's arguments before the trial court rested on faulty propositions.

Before the trial court in this lawsuit, the University argued that the Code permits the President and the Regents to do what they did in March and April of 2009. The argument rests on three propositions: First, §12-12.A. gives the Regents, and by implication, the President, authority to modify or rescind any provision in the Code at any time. Thus, §12-12.A. as a disclaimer renders the Code as something other than a contract; the provisions in the Code are not promises on the part of the University. As discussed above, however, in the 53 years that the Code had existed prior to the spring of 2009 neither the Regents nor the

President had ever acted as though they had authority to rescind or render inoperative any section in the Code. Instead, the Regents and the President always treated the Code's provisions as binding. A pertinent example of that conduct appears in the second proposition on which the University relied before the trial court.

Second, even if the Code is a contract between the University and its faculty, the *Funding Cautions* provision in EO 64 gave the University discretion to "change" the FSP by EO. Thus, according to the proposition, President Emmert did exactly that when he promulgated EO 29. The University explains, however, that the Code requires the President to consult with members of the Senate before he promulgates an EO. The evidence is that President Emmert did consult with members of the Senate before he promulgated EO 29. That is, he treated the Code's requirements for promulgating an EO as binding on him. Otherwise, he would have bypassed the "consultation" requirement altogether.

The third proposition is the centerpiece of the University's argument. At the outset of its motion, in President Emmert's declaration in support of that motion, and in the opening words on oral argument in support of the motion, the University adverted to the world-wide financial crisis that has made its effects felt in the state of

Washington, particularly for the University, the state's third largest employer. CP 1, 4, 65. Because of the financial crisis the University will lose approximately $214 million in state funds during the 2009-2011 biennium. This fact forms the basis for what seems to be a pragmatic/prudential argument. Specifically, when faced with the impending loss of revenues, from the state, of that magnitude, the Regents and President Emmert had authority to make whatever spending decisions they deemed to be prudent. Thus, so the argument seems to go, the Regents and President Emmert had authority to render inoperative any provision in the Code including the FSP with its clearly articulated priorities for expending funds on salary increases for faculty.

The infirmities with the pragmatic/prudential argument are several: First, in 1999 Provost Huntsman represented that the University's promise to pay annual across-the-board merit increases was to apply every year under the FSP, including during "lean times." Nothing in §§24-70 or 24-71 suggests otherwise. Second, pursuant to §12-21.B. the president has authority to promulgate an EO after consulting with the Senate. Nothing in 12-21.B. gives the President authority, however, to amend any of the Code's sections. Instead, as explained above, the Code's sole prescribed method for amending the priorities in §§24-70 and 24-71 requires the passage of Class A legislation. Chapter 29 contains no exception to the method when the University faces the effects of a world-wide financial crisis.

Fourth, as an implied corollary to the pragmatic/prudential argument the University claimed that the very fact it would suffer a $214 million decline in state revenues during the 2009-2011 meant it could not afford to pay regular across-the-board merit raises. Thus, so the argument goes, it is axiomatic that the University did not have to pay those raises. The problem with this argument is at least twofold. First, the raises are earned compensation. As explained above, in order to receive a merit raise in a given academic year, during the immediately preceding academic year a faculty member must enhance his or her cumulative record as to scholarship, teaching, and service. Or as §24-70.A makes clear, a regular merit raise is compensation for contributions that the faculty member makes to his or her department, school or college, and to the University. That is, the faculty member must earn the raise. Pursuant to the FSP, if he or she does so, the University will pay the raise.

In addition, apparently even after the promulgation of EO 29 the University could still "afford" to pay promotional raises, retention raises, and salaries for new faculty members: EO 29 and the Regents resolution did not "suspend" the allocation of funds for those purposes.

Contrary, however, to what Provost Huntsman represented could be necessary under difficult financial circumstances, i.e. "cannibalizing of the faculty," during the 2009-2010 academic year the University conducted searches to fill open faculty positions. Even today, the University continues to advertise open faculty positions. The advertised faculty positions are publicly accessible at www.washington.edu/admin/acadpers/employment.html. Further, §§24-70 and 24-71 make explicit that payment of, for example, retention raises can occur only after funds have been expended to pay regular, across-the-board merit raises. The adoption of the FSP did away with the "star system" for allocating moneys for salary increases.

Based on the discussion above, application of *Korslund*'s three-part test is straightforward and leads to an outcome different from that in *Trimble, supra.* That case arose in the aftermath of WSU's decision to deny tenure to one of its probationary faculty members, Mr. Trimble. Mr. Trimble alleged that in doing so WSU breached contractual obligations in those portions of the Faculty Manual that address the tenure review process. For example, he claimed that the Faculty Manual required that tenured faculty in his department generate annual written reviews of his performance. Because there were no such written reviews, according to Mr. Trimble, WSU breached a contractual obligation to him. The applicable language in the Faculty Manual gave discretion, however, to the senior faculty as to the form in which they might report annual performance reviews. For that reason, the Court ruled that the language did not amount to a promise of specific treatment. Thus, there was no need for the Court to address the second and third steps in the *Korslund* three-part test. *Trimble, supra,* at 94-98.

The plaintiff and the issue in *Trimble* differ significantly from Prof. Nye and the issue here. Language in the opinion in that case strongly suggests that in the Court's eyes Mr. Trimble was the equivalent of an at-will employee. In addressing Mr. Trimble's allegation regarding the promise of written performance evaluations the Court began by citing to *Drobny v. Boeing Co.*, 80 Wn. App. 97, 907 P.2d 299 (1995), for the rule that

> [a]n employee manual in an employment at will situation provides specific obligations only if the language of the manual is specific.

Trimble v. Wash. State Univ., 140 Wn.2d at 94.

Prof. Nye is not an at-will employee of the University: He has tenure. In fact, no faculty member of the University is an at-will employee. The Code is clear that every faculty member has job security during the period of his or her appointment: The University may discharge a faculty employee only for cause during that period.

Further, §24-70 does not give the University discretion as to whether to pay regular across the board merit raises. Instead, §24-70.A. states that the University *shall* pay the raises to faculty members deemed meritorious.

As to whether faculty members reasonably relied on the promise of regular merit raises, Prof. Nye's declaration is clear that since the advent of the FSP he has known that in order to earn a merit raise he has had to undergo a successful merit review. With the exception of the 2002-2003 academic year, until 2009-2010, every year following his having undergone a successful merit review, he has received a merit raise. Further, the University concedes that it paid merit raises to its meritorious faculty every academic year except 2002-2003. For these reasons it is clear that Prof. Nye and other meritorious members of the University's faculty reasonably relied on the promise of merit raises.

As to the third element of the test, the University has admitted that it would not pay merit raises in the 2009-2010 and 2010-2011 academic years. Nor does the University deny that Prof. Nye and other faculty members had to undergo merit reviews during the 2008-2009 and 2009-2010 academic years. EO 29 did not "suspend" that contractual obligation on the part of the faculty. As to the first of those academic years, when President Emmert promulgated EO 29, faculty members had already spent 2/3 of the academic year working to enhance their performance records on scholarship, teaching and service. Further, those faculty members whom the University deemed to be meritorious as a result of annual merit reviews had earned merit raises to be paid in the 2009-2010 academic year. Thus, EO 29 suspended the payment of wages that faculty members had already earned.

The University is not exempt from the requirement under Washington law that an employer must pay its employees the full measure of wages earned.

Washington law evinces a "strong policy" that every employer must pay the full amount of wages that its employees have earned even when an employer claims that he cannot afford to pay those wages. Whether financial difficulties excuse an employer from having to pay wages earned was the central issue in *Schilling v. Radio Holdings*, 136 Wn.2d 152, 157-158, 961 P.2d 371 (1998). There the Court explained that

> [t]he Legislature has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure payment of wages, including [RCW 49.52.070] which provide both criminal and civil penalties for the willful failure of an employer to pay wages. . . . In RCW 49.48, the Legislature mandated that employers pay all wages due upon the conclusion of the employment relationship and banned all withholding or diversion of wages by employers unless specifically approved by statute. RCW 49.48.010. The

> Legislature allowed recovery of attorney fees in actions to recover wages due. RCW 49.48.030. The Department of Labor and Industries was given concurrent administrative enforcement powers for claims of failure to pay wages. RCW 49.48.040-070.

Id. at 157-158. Accordingly, the Court held the financially constrained employer liable for his failure to pay. *Id.* at 164.

Recently, in *Morgan v. Kingen*, 166 Wn.2d 526, 210 P.3d 995 (2009), the Court identified the issue before it as "whether financial status, specifically bankruptcy under chapter 7 liquidation, is a valid defense to negate the finding of a willful failure to pay wages owed to employees." *Id.* at 531. The Court issued a negative answer to the question. *Id.* at 536. *Schilling* and *Morgan* make clear that no employer in this state may excuse itself from an obligation to pay wages earned in times of financial difficulties, even if the financial difficulties stem from a "worldwide financial crisis." Nothing in Washington statutes or case law suggests that the University enjoys a "financial hardship" exemption from the requirement to pay the full measure of wages earned. Nor beyond the loss in state revenues for 2009-2011 is there any evidence that the University does not have the financial resources to pay the merit raises.

CONCLUSION

During the 2008-2009 and 2009-2010 academic years, members of the University's faculty underwent merit reviews as the FSP requires and which neither EO 29 nor the Regents resolution "suspended." Those faculty members who were deemed meritorious earned merit raises. At the same time, as of April 16, 2009, the University, through two unilateral actions, declared non-binding the Code's requirement of the payment of merit raises to faculty members who continued to be obligated to do what was necessary to earn merit raises: The University unilaterally undid what the University administrators and Senators jointly crafted in 1999. Prof. Nye submits that under any form of contract analysis the University's actions constitute the breach of a contractual obligation to its meritorious faculty members. He requests that this Court reverse the trial court's order on summary judgment, grant his motion, and award statutory fees and costs in connection with pursuing this appeal.

Respectfully submitted this 9th day of August, 2010.

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