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No. 86310-5

**SUPREME COURT
OF THE STATE OF WASHINGTON**

DUANE STORTI, and a class of faculty members,

Petitioners-Appellants,

vs.

UNIVERSITY OF WASHINGTON

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF FACTS	2
A. The University Handbook Authorizes the President and Board of Regents to Change Policies Regarding Faculty Salaries.....	2
B. The University President Used His Authority in 2000 to Issue an Executive Order Regarding Faculty Salaries.....	4
C. The University Did Not Fund These Faculty Raises in 2002-03.....	5
D. The University Reevaluated and Changed Executive Order No. 64 in 2009.....	6
E. The Court of Appeals Upheld the University’s Authority to Suspend the Raises.....	11
F. Storti Filed This Complaint More Than a Year Later.	12
III. ARGUMENT	13
A. The Express Language of the University Handbook Allows the University to Change Its Policy.	13
1. <i>Washington courts enforce an employer’s right to change its policies.</i>.....	14
2. <i>The University’s interpretation gives meaning to all provisions of the Handbook.</i>.....	16
3. <i>The Nye decision is binding precedent in this case.</i>.....	17

B.	Storti’s Alternative Legal Theories Do Not Prohibit Suspension of the Two Percent Raises.	18
1.	<i>The University was entitled to reevaluate and change Executive Order No. 64 even if it was a unilateral contract.....</i>	<i>18</i>
2.	<i>The cases cited by Storti do not lead to a different result than Nye.....</i>	<i>20</i>
3.	<i>Extrinsic evidence cannot be used to contradict the Handbook’s plain language.....</i>	<i>25</i>
4.	<i>The University was not required to wait a full year before suspending faculty raises.....</i>	<i>27</i>
C.	Res Judicata Does Not Apply.	29
IV.	CONCLUSION	32

TABLE OF AUTHORITIES

	Page
CASES	
<i>Carlstrom v. State</i> , 103 Wn.2d 391, 694 P.2d 1 (1985)	21
<i>Cole v. Red Lion</i> , 92 Wn. App. 743, 969 P.2d 481 (1998).....	15, 23
<i>Duke v. Boyd</i> , 133 Wn.2d 80, 942 P.2d 351 (1997)	25
<i>Gaglidari v. Denny’s Rests., Inc.</i> , 117 Wn.2d 426, 815 P.2d 1362 (1991)	15, 23
<i>Goodpaster v. Pfizer, Inc.</i> , 35 Wn. App. 199, 665 P.2d 414 (1983)	14, 16
<i>Govier v. North Sound Bank</i> , 91 Wn. App. 493, 957 P.2d 811 (1998)	14, 15, 23
<i>Hanson v. City of Snohomish</i> , 121 Wn.2d 552, 852 P.2d 295 (1993)	31
<i>Hearst Commc’ns, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005)	25
<i>Karr v. Bd. of Trustees of Mich. State Univ.</i> , 325 N.W.2d 605 (Mich. App. 1982)	24
<i>Knuth v. Beneficial Wash., Inc.</i> , 107 Wn. App. 727, 31 P.3d 694 (2001)	30
<i>Kuhlman v. Thomas</i> , 78 Wn. App. 115, 897 P.2d 365 (1995).....	30
<i>Navlet v. Port of Seattle</i> , 164 Wn.2d 818, 194 P.3d 221 (2008)	23
<i>Nye v. University of Washington</i> , 163 Wn. App. 875, 260 P.3d 1000 (2011)	passim
<i>Powell v. Republic Creosoting Co.</i> , 172 Wash. 155, 19 P.2d 919 (1933)	22

<i>Rains v. State</i> , 100 Wn.2d 660, 674 P.2d 165 (1983).....	30
<i>Schoeman v. New York Life Ins. Co.</i> , 106 Wn.2d 855, 726 P.2d 1 (1986)	29
<i>Scott v. J. F. Duthie & Co.</i> , 125 Wash. 470, 216 P. 853 (1923)	22
<i>Seattle-First Nat'l Bank v. Westlake Park Assocs.</i> , 42 Wn. App. 269, 711 P.2d 361 (1985)	19
<i>Subryan v. Regents of the University of Colorado</i> , 698 P.2d 1383 (Colo. App. 1984).....	24
<i>Trimble v. Washington State University</i> ,140 Wn.2d 88, 993 P.2d 259 (2000)	15, 23

STATUTES

RCW 28B.20.100(1).....	3
RCW 28B.20.130(1).....	3, 14
RCW 41.06.070	7
RCW 41.06.070(3) (2009).....	7

RULES

ER 402	25
ER 801	26

TREATISES

2 <i>Corbin on Contracts</i> , § 6.2 (1995)	19
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I. INTRODUCTION

The University of Washington made a prudent decision in 2009 to suspend annual two percent faculty salary increases in light of the global recession and a dramatic decrease in state funding. The University's Board of Regents, President, and Faculty Senate all participated in the process to suspend the raises, and it is undisputed that the University followed the proper procedures. In fact, the Chair of the Faculty Senate praised the process as an example of the University's system working the way it should.

The University's authority to suspend the raises is clearly spelled out in three provisions of the University's employment handbook. The handbook includes "Funding Cautions," which warn faculty members the raises may be reevaluated. The handbook also allows the University President to change the University's policy with up to 60 days' notice to faculty. Finally, the University's handbook expressly notifies faculty the Regents retain ultimate authority to change the handbook or other rules or policies.

Plaintiff Duane Storti brought this lawsuit to challenge the University's right to suspend the raises for the 2009-10 academic year. His case was dismissed on summary judgment, from which he now appeals.

Storti is not the first faculty member to challenge this suspension. Professor Peter Nye filed an earlier case also alleging breach of contract based on the suspension. The trial court dismissed Nye's case on summary judgment. The dismissal was recently affirmed by the Court of Appeals. *Nye v. University of Washington*, 163 Wn. App. 875, 260 P.3d 1000 (2011). The Court of Appeals found that "[t]he handbook's express terms warn faculty that the provision of merit raises may be reevaluated, allow the president to issue executive orders, and state that the board [of Regents] may modify rules formulated by the president or faculty." *Id.* at 886. Based on this clear authority, the Court of Appeals concluded: "[T]he evidence in the record clearly demonstrates that the university acted pursuant to its statutory and contractual authority when it suspended the faculty merit raises." *Id.* at 888.

The Handbook and Washington law both authorize the University to suspend the raises in the manner it did. The Court should therefore affirm the dismissal of Storti's claims.

II. STATEMENT OF FACTS

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

The University of Washington was founded in 1861 and is one of the oldest state-supported institutions of higher education on the West

Coast. The University is a large research institution, with more than 45,000 enrolled students and more than 40,000 employees, including thousands of faculty members. CP 1225. The University offers more than 250 different degrees across three campuses. *Id.* The annual operating budget of the University exceeds \$3 billion. *Id.*

The University is a state agency governed by a Board of Regents appointed by the governor. RCW 28B.20.100(1). The Board of Regents has full control over the University and its property. RCW 28B.20.130(1). Although the Board of Regents has delegated some of its authority to the President of the University, the Board retains the “right to intervene and modify any rule, regulation, or executive order formulated by the President or the faculty, the right to amend or rescind any existing rule, regulation, or executive order, and the right to enact such rules, regulations, and orders as it deems proper for the government of the University.” CP 1229 (University of Washington Handbook (“Handbook”) § 12-12(A)).

The President is the chief executive officer of the University. He has the authority to issue rules, regulations and executive orders for the governance of the University, including executive orders concerning utilization of available resources. *Id.* (Handbook § 12-12(B)). Before issuing an executive order, the President must send it to the Faculty Senate

for review. CP 1234 (Handbook § 12-21(B)(1)). The review by the Faculty Senate must take place “within a reasonable time, but in any event **no longer than sixty days** after receipt of such request for review.” *Id.* (emphasis added). If the Faculty Senate suggests revisions to the proposed order, the President must consult with the Chair of the Faculty Senate to seek to resolve those differences. *Id.* “Following such consultations, the decision of the President is final.” *Id.*

B. The University President Used His Authority in 2000 to Issue an Executive Order Regarding Faculty Salaries.

Using this authority, in January 2000, then-President Richard McCormick issued Executive Order No. 64, which contained a faculty salary policy. CP 1241-43. The provision of Executive Order No. 64 at issue in this case is an annual two percent salary increase. *Id.* Executive Order No. 64 states:

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

CP 1243.

Executive Order No. 64 was expressly premised on the expectation that new funds would be available from the Legislature. It also recognized that if economic conditions deteriorate—particularly if funding from the

Legislature were to shrink—it could be necessary to reevaluate the salary policy. The executive order included an express “Funding Cautions” section, which stated:

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

CP 1243 (emphasis added). The University funded salary increases of at least two percent from 2000-01 through 2008-09, except for one year.

CP 1226.

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

Faced with budget cut in 2002, the University passed a budget that did not include funding for merit raises for 2002-03. The University did not officially change or suspend Executive Order No. 64 at that time.

Storti filed a class action lawsuit and obtained a summary judgment ruling in favor of University faculty. The Superior Court reasoned that, although the University retained the right to change Executive Order No. 64, it could not leave the policy on the books and simply fail to fund salary increases. CP 1255-60. The Superior Court

found that “the word ‘reevaluation’ reserves the right of the University to change the policy at some future date,” CP 1259, but expressly did “not reach the question of what process would have been utilized to repeal, evaluate, or modify the Faculty Salary Policy,” CP 1260. Because the University had not changed the policy, the Superior Court also never reached the question of *when* a policy change would be effective. That case settled, and no final judgment on this issue was entered by the trial court. CP 709-11 ¶¶ 2, 8.

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

Unfortunately, the University—along with the rest of the country—is still struggling to recover from the most severe economic crisis since the Great Depression. With tax revenues shrinking in 2008, the state needed to cut billions of dollars from its budget. In August 2008, Governor Christine Gregoire urged state agencies to adjust their spending. CP 1262-64. She announced a statewide freeze on hiring, purchasing of new equipment, and out-of-state travel. CP 1262. She urged the presidents of the state’s institutions of higher education to take similar action. *Id.* Also in response to the economic crisis, on February 19, 2009, the Washington Legislature passed ESSB 5460, which mandated: “For the twelve months following February 18, 2009, a salary or wage increase

shall not be granted to any position exempt from classification under this chapter.” RCW 41.06.070(3) (2009).¹

The statewide budget cuts had a dramatic impact on the University. The University’s state funding was slashed by more than \$214 million for the 2009-11 biennium, the largest percentage cut of any institution of higher education in the state. CP 1226 ¶ 6. Even after the injection of \$24.7 million in one-time federal stimulus funds and significant tuition increases, the University had to cut its overall budget by more than 12 percent. *Id.* The University also implemented faculty hiring restrictions in 2008, which remain in place. *Id.* Through layoffs and unfilled vacancies, the University reduced its staff by more than 600 people and reduced its faculty by more than 100 full-time equivalent positions. *Id.*

Against the backdrop of difficult budget cuts, President Emmert found it necessary to reevaluate Executive Order No. 64. *Id.* ¶ 8. President Emmert and Faculty Senate Chair David Lovell appointed a Committee to Re-Evaluate Executive Order No. 64, which included faculty and administration members. *Id.* The outcome of the reevaluation

¹ Faculty members are exempt from classification pursuant to RCW 41.06.070; thus, state funds could not be used to fund any salary increases. Rather than treat faculty members differently based on the source of their funding, the University chose to revise its policy for all faculty.

was a proposed new executive order, which President Emmert submitted to the Faculty Senate for review in accordance with the procedures outlined in the University Handbook. CP 1234 (Handbook § 12-21(B)(1)); CP 1249-50 ¶ 2; CP 1226-27 ¶ 8. The Faculty Senate reviewed the proposed executive order at its March 12, 2009 meeting and reported back to the President and the Regents. CP 1249-50. The Faculty Senate Chair consulted with the President regarding revisions proposed by the faculty, and President Emmert incorporated many of the faculty's suggestions into his Executive Order. CP 1249-50 ¶¶ 2-3; CP 1226-27 ¶ 8.

On March 31, 2009, the President issued Executive Order No. 29. CP 1226-27 ¶ 8. The new Executive Order modified Executive Order No. 64 by partially suspending certain provisions. Executive Order No. 29 states, in part:

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

Need for Temporary Reevaluation of Faculty Salary Policy. **Executive Order No. 64 recognized that in the event of decreased State support, a reevaluation of the Faculty Salary Policy could prove necessary.** Unfortunately, we face that contingency to a degree that could not have been predicted even a year ago. The nation and the state of

Washington are experiencing the effects of a global financial crisis of historic proportions. One consequence of this financial crisis is a drastic reduction in the State budget, which is virtually certain to result in significant reductions in State support for the University. The expected reductions in State support, combined with other economic forces, will result in cuts to programs, increased tuition, and reduced access for students, lay-offs and non-renewal of personnel, as well as limitations on the University's ability to increase salaries for broad classes of its employees. The cost of maintaining regular merit increases for the 2009–11 biennium would be even more damaging in the midst of broad and dramatic budget cuts across the institution.

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

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

All other portions of Executive Order No. 64 remain in effect. This suspension shall expire at the conclusion of the 2009–11 biennium.²

CP 1244-45 (emphasis added).

In April 2009, the Board of Regents reviewed the President's new Executive Order. Before passing a resolution endorsing the order, the Regents invited Faculty Senate Chair David Lovell to speak.³ He said:

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

² Faced with continuing funding reductions, the University later revised Executive Order No. 64. Those revisions are not relevant to this case because Storti is seeking relief only for the 2009-10 academic year.

³ The chair of the Faculty Senate is the Senate's sole spokesperson "[o]n all matters concerning the publication or public explanation of Senate actions." CP 1240 (University Handbook § 22-54).

CP 1250-51 (emphasis added).

In its resolution, the Regents recognized that Executive Order No. 29 was a result of “extensive review and consultation with the Faculty Senate in accordance with the Faculty Code,” and that the President was compelled by financial necessity to issue the new order. CP 1246-47 (Board of Regents Resolution Regarding Faculty Salaries, April 16, 2009). In addition to endorsing the President’s action, the Regents directed that a copy of the new Executive Order be added to the University Handbook. *Id.* The Regents resolved that the new Order “will prevail over any University policies, rules, or codes or regulation to the extent they may be inconsistent.” *Id.*

Faculty members, including Storti, were notified of the change in an April 10, 2009 e-mail from Faculty Senate Chair Lovell. CP 1251 ¶ 5. Storti did not initiate any official action—either within the University or in court—until he filed this action in December 2010. CP 1.

E. The Court of Appeals Upheld the University’s Authority to Suspend the Raises.

More than a year before Storti filed his case, Professor Peter Nye filed a class action complaint in October 2009, claiming the University could not suspend the raises. *Nye*, 163 Wn. App. at 881. Professor Nye argued both that the University lacked the authority to suspend the raises,

and that even if it had the authority, the University acted too late because faculty members had already worked meritoriously for part of the year, and had therefore already earned the raises. *E.g., id.* at 884-85, 887; CP 104-05 (Nye’s Court of Appeals Brief). The Superior Court found the University was legally entitled to suspend the raises, and granted summary judgment in favor of the University. *Nye*, 163 Wn. App. at 882. Nye appealed the decision, and the Court of Appeals affirmed the trial court’s dismissal. *Id.* at 888. The *Nye* Court applied rules of contract interpretation, and agreed with the University that “the express terms of the handbook allowed for modification of the contract.” *Id.* at 883. The *Nye* Court also considered Nye’s argument that the raises were “wages earned” because the faculty had already earned the raises by working the prior year. *Id.* at 887. The Court made clear that raises are not wages already earned: “[A] raise compensates for the performance of future work. Here, before Nye performed that future work during the 2009-10 academic year, the merit raise had been properly suspended by the university.” *Id.*

F. Storti Filed This Complaint More Than a Year Later.

While Nye’s case was pending in the Court of Appeals, Storti filed this case.⁴ Storti did not pursue Nye’s argument that the University lacked

⁴ Nye was granted permission to intervene in Storti’s case. CP 1470.

authority to change the policy, and instead admitted the University had followed the proper procedures to do so. CP 5 ¶ 26. However, Storti reasserted Nye’s argument that the raises could not be suspended because faculty members had already earned them by working the previous year. *Id.* ¶ 28. As with *Nye*, Storti’s claim was dismissed on summary judgment. CP 1487-89.

III. ARGUMENT

A. **The Express Language of the University Handbook Allows the University to Change Its Policy.**

The University Handbook authorizes the University to change its policy regarding faculty raises. First, Executive Order No. 64 specifically says the policy may be reevaluated if state funding is decreased, which is precisely what happened here. CP 1243 (Executive Order No. 64). Second, the University Handbook also expressly authorizes the President to issue new executive orders, and spells out the procedures for doing so. CP 1234 (Handbook § 12-21(B)). Those procedures were undisputedly followed in this case. CP 5 (Compl. ¶ 26). Those procedures include allowing for input by elected faculty leaders, which the faculty must provide within 60 days. CP 1234 (Handbook § 12-21(B)). Finally, the University Handbook reserves for the Board of Regents the “right to intervene and modify any rule, regulation, or executive order formulated by the President or the faculty, the right to amend or rescind any existing

rule, regulation, or executive order, and the right to enact such rules, regulations, and orders as it deems proper for the government of the University.” CP 1229 (Handbook § 12-12(A)); *see also* RCW 28B.20.130(1). These express terms unequivocally allow the University to suspend the raises. This explicit authority was upheld by the Court of Appeals in *Nye*. 163 Wn. App. at 886-88.

1. Washington courts enforce an employer’s right to change its policies.

Washington courts enforce employers’ policies, including provisions that reserve discretion to employers to change the policies. A court must “give meaning to all the terms of the policy statement and cannot ignore the qualifications.” *Goodpaster v. Pfizer, Inc.*, 35 Wn. App. 199, 203, 665 P.2d 414 (1983) (granting summary judgment to employer where promise to pay a bonus was discretionary).

Employers may also change their policies even when the written policies do not expressly reserve the employer’s right to do so. For example, in *Govier v. North Sound Bank*, 91 Wn. App. 493, 957 P.2d 811 (1998), the Washington Court of Appeals affirmed summary judgment in favor of an employer that repeatedly modified its employment policies without obtaining consent from its employees. “Although the Bank’s policies regarding benefits and job security were legally enforceable, its

obligations existed only while its policies were in effect. When the Bank changed [its policies], the former contract terms were no longer enforceable.” *Id.* at 501-02. The *Govier* Court recognized that operating policies must be “adaptable and responsive to change” and that employers have the ability to modify policies even if the employer has not specifically reserved that discretion in the employment policy. *Id.* at 498, 501. Other Washington court decisions reach similar conclusions. *Gaglidari v. Denny’s Rests., Inc.*, 117 Wn.2d 426, 435-36, 815 P.2d 1362 (1991) (concluding employer could modify its employment policies without employee consent); *Cole v. Red Lion*, 92 Wn. App. 743, 751-52, 969 P.2d 481 (1998) (affirming summary judgment for employer based on modified employment policies). Therefore, employers may amend or revoke policies even where that discretion has not been specifically reserved in the policy.

Here, of course, the University Handbook does explicitly reserve discretion for the University to change its policy. Washington courts uphold an employer’s exercise of that discretion. For example, in *Trimble v. Washington State University*, the court found that a university did not breach its employment policies because the policies gave the university department discretion in how to conduct a performance review. 140 Wn.2d 88, 95, 993 P.2d 259 (2000) (affirming denial of tenure based

on University's policies); *see also Goodpaster*, 35 Wn. App. at 203 (all terms of the policy must be given effect). In this case, the University properly exercised its discretion to change its salary policy in accordance with the specific terms of that policy.

2. The University's interpretation gives meaning to all provisions of the Handbook.

For Storti's argument to prevail, the Court must ignore specific provisions of the Handbook. Tellingly, Storti's brief does not address the substance of either Section 12-12 (Regents' authority to manage the University) or Section 12-21 (President's authority to issue executive orders). Section 12-21 is particularly important because it contains a specific timeline for promulgating new executive orders. As previously described, the President is required to consult with the Faculty Senate by providing a copy of the proposed executive order to the Chair of the Faculty Senate. CP 1234 (Handbook § 12-21(B)(1)). The Faculty Senate must then respond to the President **within 60 days or less**. *Id.* Once the President has received this feedback and consulted with the Chair of the Faculty Senate, the President's decision is final. *Id.* The President's Executive Order then "become[s] effective on the day signed by the President." *Id.* These Handbook provisions relating to the 60-day deadline and the immediate effectiveness of the Executive Orders are

rendered meaningless under Storti's Handbook interpretation, which must be rejected for that reason.

Here, before the raises were suspended, the faculty actually received more process than is required by Section 12-21. The President appointed a joint faculty and administration "Committee to Re-Evaluate Executive Order No. 64." During the Faculty Senate review that followed, the Faculty Senate provided feedback to the President, most of which was incorporated into the final order. In the words of the Chair of the Faculty Senate, "We were listened to and in fact our advice was taken. So we believe the process—it's a cliché—but we believe the process worked in this case. And appreciate the Regent's [sic] respect for that process." CP 1251 (Statement of Faculty Senate Chair David Lovell to Board of Regents).

3. The Nye decision is binding precedent in this case.

Lawyers often strain to find on-point cases, but there is no such difficulty here. *Nye* involved the same employer, the same policies, and the same facts.⁵ Before Storti even filed his case, *Nye* had already been dismissed and was pending on appeal. CP 14-15. It is understandable that

⁵ Storti claims the *Nye* Court did not have the "benefit" of his 2004 case, which involved different facts. Br. of Appellants at 41. In fact, Nye made arguments similar to Storti's regarding the 2004 case. *E.g.*, CP 16-17 (Nye's complaint referring to the 2004 Storti case). The lack of reference to the earlier case in its decision suggests the Court of Appeals agreed with the trial court that it was irrelevant to the issue at hand.

Storti attempts to distinguish his case from *Nye*, but his arguments are unavailing. Br. of Appellants at 37-42.

Although Storti tries to put a different gloss on his argument, under any legal theory the plain language of the University Handbook remains the same. The Court of Appeals has already found the “express terms of the handbook allowed for modification of the contract” and that the raises were not compensation already earned. *Nye*, 163 Wn. App. at 883, 887. In short, “the university acted pursuant to its statutory and contractual authority when it suspended the faculty merit raises.” *Id.* at 888. Based on the same facts and policy language, the result in this case should be the same, and the dismissal of Storti’s case should be affirmed.

B. Storti’s Alternative Legal Theories Do Not Prohibit Suspension of the Two Percent Raises.

1. The University was entitled to reevaluate and change Executive Order No. 64 even if it was a unilateral contract.

Storti insists that Executive Order No. 64 constituted a unilateral contract offer that, once accepted by the faculty’s substantial performance, could not “unilaterally” be withdrawn by the University under any circumstances.⁶ Br. of Appellants at 14-21. Regardless of the legal

⁶ Storti claims that “[t]he parties agreed below that the Faculty Salary Policy is a unilateral contract.” Br. of Appellants at 14 (citing CP 1210, 1389-90, 1478; RP 18-19). Not so. None of Storti’s citations shows any such agreement by the University, and the University has argued throughout this action that the salary *policy* is just that: a

framework used for analysis, Storti’s claim fails. Storti acknowledges—as he must—that any unilateral contract must be “construed in accordance with traditional contract analysis principles.” Br. of Appellants at 14 n.9. Traditional contract analysis principles require a court to give meaning to all terms in an agreement. *Seattle-First Nat’l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985) (upholding summary judgment in lease dispute and concluding a court must favor an interpretation that gives meaning to all the language of an agreement). For that reason, when an employer has an obligation to its employees, “the extent and character of that obligation are dependent on the terms of the promise that induced the service.” 2 *Corbin on Contracts*, § 6.2 at 213 (1995). Here, the “terms of the promise” at issue plainly included the Funding Cautions and other Handbook terms explicitly warning faculty that Executive Order No. 64 was subject to reevaluation or amendment by the President and the Board of Regents. In this appeal, Storti is essentially asking the Court to read those “terms of the promise” out of the Handbook.

University policy changeable pursuant to the Handbook and subject to the Board of Regents’ ultimate statutory authority to govern the University. *E.g.*, CP 1211-13 (University’s Mot. for Summ. J.). The University has, however, accepted, for purposes of argument, that contract principles apply to this analysis because the outcome is the same.

In affirming dismissal of Nye’s suit, the Court of Appeals agreed that any contract analysis (whether unilateral or bilateral) confirms the University’s authority to suspend the two percent raises. As the court explained,

[A]ny distinction between bilateral and unilateral contracts makes no difference when the provisions of that contract allow for the modification that occurred. The handbook’s express terms warn faculty that the provision of merit raises may be reevaluated, allow the president to issue executive orders, and state that the board may modify rules formulated by the president or faculty.

Nye, 163 Wn. App. at 886. In other words, because faculty members were warned that the University could suspend the raises, it makes no difference whether Executive Order No. 64 is characterized as a “unilateral contract,” a “bilateral contract,” or a “policy.” Its terms govern, and allow suspension of the raises.

2. The cases cited by Storti do not lead to a different result than *Nye*.

a. The University Handbook explicitly warned faculty that policies could be changed.

As the Court of Appeals held in *Nye*, “[t]he handbook’s *express* terms warn faculty that the provision of merit raises may be reevaluated, allow the president to issue executive orders, and state that the board may modify rules formulated by the president or faculty.” *Id.* (emphasis added). Nevertheless, Storti persists in arguing the Handbook contained

no “express” terms warning faculty that the raises might be suspended.

Br. of Appellants at 21-27. Storti’s argument has no merit.

Storti relies primarily on *Carlstrom v. State*, 103 Wn.2d 391, 694 P.2d 1 (1985), to argue that the University Handbook was not specific enough. But the facts in *Carlstrom* were significantly different. In *Carlstrom*, a contract between a community college and its faculty generally stated that it was “subject to all present and future acts of the legislature.” *Carlstrom*, 103 Wn.2d at 393. When the State later tried to rely on that general statement to rescind faculty raises during a severe economic downturn, the Court held that the more specific contractual provisions relating to the raises, which contained no funding conditions (unlike similar contracts at other colleges) and which were negotiated after the economic emergency was already apparent, indicated that “the parties did not intend to make the salary increases contingent on the availability of legislative appropriations.” *Id.* at 395.

Here, on the other hand, the University’s intent was plainly stated in the text of Executive Order No. 64. Executive Order No. 64 *explicitly* warned faculty that the merit raises might be reevaluated if the legislature reduced its funding to the University. CP 1243. The Handbook also explicitly warned faculty that the President retained the power to issue executive orders, and explicitly reserved the Board of Regents’ authority

to amend or modify any existing rule or executive order. CP 1229, 1233-34. Given those explicit warnings, Storti cannot reasonably complain that he was blindsided by the University's reevaluation of Executive Order No. 64.⁷

b. *The compensation cases cited by Storti do not contain the same express reservation of right as the University Handbook.*

This case is not like the compensation cases cited by Storti, including *Scott v. J. F. Duthie & Co.*, 125 Wash. 470, 216 P. 853 (1923), and *Powell v. Republic Creosoting Co.*, 172 Wash. 155, 19 P.2d 919 (1933), in which employers retained no explicit discretion to withhold payments otherwise owed to employees.⁸ Nor is this situation similar to *Navlet v. Port of Seattle*, where the Court found a vested right in retirement benefits because they “constitute[d] deferred compensation

⁷ Storti argues that the trial court erred by giving effect to allegedly “implicit” reservations and conditions in the Handbook. *E.g.*, Br. of Appellants at 26. To the extent the trial court suggested that the Handbook only implicitly authorized reevaluation of the raises, that characterization of the Handbook's provisions is inconsistent with the provisions themselves, and no party briefed or argued an implied contract theory. *E.g.*, RP 21, 24. The trial court specifically agreed with the University's position (RP 24), which from the outset of this case has been that the University Handbook expressly allowed the policy change.

⁸ These two cases also involve bonuses that were owed to employees for work already completed. As the Court of Appeals explained in *Nye*, there is a significant difference between wages earned for past performance and a potential future increase in salary to be paid for work to be performed in the future. 163 Wn. App. at 887. To the extent Storti seeks to rely on Washington's wage statutes to argue that he and other faculty had already “earned” their potential future raises, the Court of Appeals has already, and properly, rejected that argument in *Nye*: “Here, before Nye performed that future work during the 2009-2010 academic year, the merit raise had been properly suspended by the university.” *Id.*

where the parties negotiate for such benefits as part of the total compensatory package.” 164 Wn.2d 818, 841, 194 P.3d 221 (2008).

Storti’s case does not involve highly regulated vested retirement benefits, deferred compensation, or retirees who found themselves without health care benefits long after they were in a position to find “alternative ways to prepare for retirement.” *Id.* at 849. Instead, Storti is seeking a raise that he was told—far in advance—would depend on state funding.

This case is more similar to employee handbook and policy cases, where Washington courts routinely enforce an employer’s reservation of discretion. *See, e.g., Gaglidari*, 117 Wn.2d at 435-36; *Govier*, 91 Wn. App. at 501-02; *Cole*, 92 Wn. App. at 751-52. Those cases deal with equally significant employment issues, such as job security, benefits, and discipline. Even when employees’ jobs are at stake—a scenario at least as serious as a two percent raise—Washington courts uphold an employer’s exercise of discretion, particularly where the written policies make clear from the outset that discretion has been reserved. *Trimble*, 140 Wn.2d at 95. Here, the University properly reserved discretion to change its policies and the trial court properly granted the University’s motion for summary judgment.

c. *The cases cited by Storti involving out-of-state universities do not apply express language allowing for policy modifications.*

Storti claims “Courts in other states have also rejected fiscal arguments similar to that advanced here by the University....” Br. of Appellants at 27 (citing cases). However, neither case cited by Storti involves application of explicit provisions allowing specific policy changes like those contained herein the University Handbook. *Karr v. Bd. of Trustees of Mich. State Univ.*, 325 N.W.2d 605 (Mich. App. 1982) (contract contained no provision authorizing university to withhold professor’s pay for two and one half days as a cost-cutting measure); *Subryan v. Regents of the University of Colorado*, 698 P.2d 1383 (Colo. App. 1984) (university could not ignore faculty appointment policy while it remained in effect).

Moreover, the University is not arguing it can ignore its policies because of the state funding crisis or the global recession. Rather, in light of the severe economic downturn, including cuts in state funding, the University prudently exercised its existing authority to change its policies. Faculty members were on notice the policies could be changed by the Regents and President, and specifically knew the raises could be reevaluated if funding from the legislature decreased. Neither *Karr* nor *Subryan* involves facts like these.

3. Extrinsic evidence cannot be used to contradict the Handbook's plain language.

Storti dedicates a significant portion of his brief to quoting statements made by University administrators and faculty before Executive Order No. 64 was promulgated. *E.g.*, Br. at 4-9. Storti claims that this “legislative history” or extrinsic evidence demonstrates the University’s “intent to make the [Faculty Salary] Policy mandatory,” despite the Funding Cautions language in Executive Order No. 64. *Id.* at 18.

However, whether Executive Order No. 64 is characterized as a contract or a policy akin to legislation, extrinsic evidence is irrelevant and inadmissible when interpreting Executive Order No. 64’s unambiguous language. *E.g.*, *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501-04, 509, 115 P.3d 262 (2005) (extrinsic evidence irrelevant when interpreting unambiguous contract language); *Duke v. Boyd*, 133 Wn.2d 80, 86-87, 942 P.2d 351 (1997) (courts look to legislative intent only when a statute is ambiguous); *see also* ER 402 (irrelevant evidence is inadmissible). Extrinsic evidence also cannot be used to vary express contract terms. *Hearst*, 154 Wn.2d at 503.

Here, the parties agree the unambiguous language of Executive Order No. 64 authorized the University to reevaluate and suspend faculty

raises. *E.g.*, CP 5 (Compl. ¶ 26). The only dispute is whether, as a matter of law, the University could implement that suspension for the 2009-2010 academic year. That legal analysis is not aided by extrinsic evidence relating to the original issuance of Executive Order No. 64, and none of the extrinsic evidence offered by Storti addresses that question.

Moreover, as the University argued in its Motion to Strike below, CP 1334-42, much of the extrinsic evidence cited by Storti is inadmissible hearsay of the most unreliable kind. For example, much of Storti's cited extrinsic evidence is taken from meeting minutes submitted to faculty committees *by faculty members*. Those minutes are simply a declarant's attempts to summarize what various people allegedly said at a meeting. *E.g.*, CP 268-84 (minutes from Faculty Senate and Faculty Senate Executive Committee meetings), 1113-19 (minutes from Faculty Council on Faculty Affairs meetings). This is quintessential hearsay. ER 801. Even worse, in some cases the minutes purport to recount what Professor X claimed Professor Y once said. *E.g.*, CP 1113 (faculty member reporting what the Chair of the Faculty, the President, and the Provost allegedly had to say about a particular issue). Such so-called

“evidence,” containing multiple layers of hearsay, should be disregarded by the Court, as it was by Judge Hilyer below.⁹

4. The University was not required to wait a full year before suspending faculty raises.

In an attempt to avoid the Funding Cautions language, Storti argues that it referred only to reevaluations that would be implemented more than a year into the future. Br. of Appellants at 25-26. According to Storti, the University’s suspension of merit raises in March 2009 could only take effect more than a year later, in July 2010. *Id.* He claims the Funding Cautions language notified faculty the raise “could be changed in the future, but such a change could apply only prospectively.” *Id.* at 2. The Handbook contains no such limitation.

As described above, at least three provisions in the Handbook notify the faculty of the University’s right to change its salary policy: (1) the Funding Cautions section in Executive Order No. 64; (2) Section 12-21’s description of the process to issue an executive order, including the limit of 60 days or less for faculty review; and (3) the Board of Regents’ ultimate authority under Section 12-12 to modify rules, regulations, and executive orders of the faculty and the President. None of these sections contains the one-year waiting period Storti is seeking to

⁹ Although Judge Hilyer did not grant the University’s motion to strike, Judge Hilyer chose “to ignore” Storti’s proffered extrinsic evidence because it contained “a lot of hearsay” and was not “very probative” in any event. RP 2.

impose. To the contrary, Section 12-21 requires faculty to respond in 60 days or less to a proposed executive order and expressly states the new executive order will become effective on the date signed.

Moreover, a one-year waiting period would render the Funding Cautions meaningless. The University's reserved right to reevaluate the merit raises was valuable only if the University could do so immediately, before a legislative funding cut would take effect. A one-year waiting period would effectively tie the University's hands in responding to rapidly changing economic conditions, and would be inconsistent with the statutory and Handbook language authorizing the President and the Board of Regents to move more quickly. It goes without saying that the University could change any of its policies prospectively, but the Funding Cautions specifically warned the faculty that they could not count on the provision of merit raises in the face of legislative funding cuts. Nothing about those Funding Cautions, the context in which they would be relevant, or the other provisions of the Handbook suggest the existence of a one-year waiting period before any reevaluation could take effect.

In short, the University Handbook includes a time line for issuance of executive orders, which was followed in this case. The Court should reject Plaintiff's attempt to impose longer timelines that are not contained

in the Handbook, and which would undermine express provisions authorizing the President and the Board of Regents to act quickly.

C. Res Judicata Does Not Apply.

Storti's final argument is that this Court should not even consider the current facts, but instead refuse to allow the University to argue the pending case based on the settlement of a different case, years ago. Despite twice arguing—and losing—this issue before the trial court, Storti still misunderstands the application of res judicata (also known as claim preclusion). His misunderstanding leads him erroneously to argue yet again that claim preclusion prevents the University from defending itself in this case. Storti is wrong.

Storti argues that the trial court erred when it declined to apply claim preclusion to enter summary judgment in his favor. Br. of Appellants at 29-37. However, “[claim preclusion] does not bar claims which arise out of a transaction separate and apart from the issue previously litigated.” *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 860, 726 P.2d 1 (1986). Consequently, application of claim preclusion requires that two cases have **identical** causes of action, among other requirements.¹⁰ *Knuth v. Beneficial Wash., Inc.*, 107 Wn. App. 727,

¹⁰ Res judicata also requires a final judgment. By deciding to settle, the University did not admit liability. The Class Action Settlement Agreement (which was given the effect of a court order) in the 2004 case states: “This Agreement shall not

731, 31 P.3d 694 (2001). To determine whether two causes of action are identical, a court should examine the following four criteria:

- (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
- (2) whether substantially the same evidence is presented in the two actions;
- (3) whether the two suits involve infringement of the same right; and
- (4) **whether the two suits arise out of the same transactional nucleus of facts.**

Kuhlman v. Thomas, 78 Wn. App. 115, 122, 897 P.2d 365 (1995) (quoting *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983)) (emphasis added).

Storti's claim preclusion argument fails because the 2004 lawsuit and the present lawsuit arise out of different facts. The present case arises from the University's decision to reevaluate and suspend two percent raises in 2009. The evidence related to those facts includes joint appointment of a faculty-administration committee to review the policy, review of a draft policy by the Faculty Senate, issuance of a new executive order by the University President, and a Board of Regents' resolution endorsing the executive order and declaring it will prevail over all other

constitute, be construed as, or be admissible in evidence in this Action or any other action as an admission of the viability of any claim or any fact alleged by Plaintiff....” CP 709. Storti claims he is not trying to use the Settlement Agreement as evidence, but claims he relies instead on the preceding summary judgment order. Br. of Appellants at 32. However, a summary judgment decision is an interlocutory order that would have no lasting effect in the absence of the settlement. Thus, Storti needs to rely on the Settlement Agreement, which he is prohibited by its terms from doing. None of the cases cited by Storti involves a similar situation.

University policies. None of those steps was taken in 2004, when the University did not change its policy, but left the policy intact and simply failed to fund it. In its 2004 decision, the Superior Court specifically noted it “need not reach the question of what process would have been utilized to repeal, evaluate, or modify the [policy].” CP 1260. The Superior Court in 2004 also did not address substantial performance, or when a policy change could take effect after a reevaluation.

The issue in 2004—whether the University could leave its policy intact but fail to fund raises—is legally and factually different from the issue before the Court today: determination of the date on which an admittedly proper change to the University’s policies could take effect. Because the two cases do not arise from the same transactional nucleus of facts and the evidence presented in the cases is materially different, the causes of action are not identical, and claim preclusion cannot apply.¹¹

¹¹ Storti has apparently abandoned his issue preclusion (also known as collateral estoppel) argument. Issue preclusion also does not apply in this case, for the same reason that claim preclusion does not apply. Issue preclusion requires identity of issues. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 562, 852 P.2d 295 (1993). The issue in the 2004 lawsuit was whether the University’s decisions not to fund faculty salary increases without changing its policy first constituted a breach of contract. In contrast, the issue in the present lawsuit is whether, after adhering to administrative procedures set forth in the University Handbook and exercising its undisputed authority to change its policy, the University’s decision to suspend two percent raises could take effect the following academic year. The court in the 2004 lawsuit could not (and did not) consider or decide factual and legal issues that arose seven years later, and are the subject of the present lawsuit.

IV. CONCLUSION

During challenging times, the University made the difficult decision to suspend faculty salary increases. The University's Board of Regents is appointed by the Governor, and is vested with the statutory power to control the University and its resources. The Board of Regents has appointed a President, who is also vested with certain powers, including the power to change executive orders his office previously promulgated, and to effectuate such changes immediately. The faculty has also elected leaders who serve in a Faculty Senate to share in governance of the University. The Board of Regents, President, and Faculty Senate were all involved in the decision to suspend the raises. Faculty members were on notice the policy might change, and participated in the proper process to make the change. Considering the same policy and the same suspension, the Court of Appeals in *Nye* has already concluded the

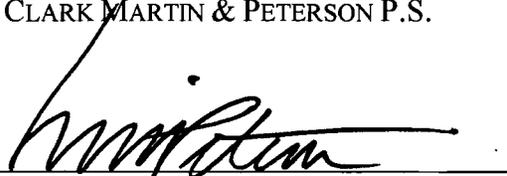
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University acted within its authority when it suspended raises for the 2009-10 academic year. This Court should similarly affirm the dismissal of Storti's case. Because Storti should not be the prevailing party, his request for attorneys' fees should also be denied.

RESPECTFULLY SUBMITTED this 14th day of December, 2011.

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