
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

KAREN ROGERS,
Appellant,

v.

TACOMA COMMUNITY COLLEGE,
Respondent.

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

Court of Appeals
Division II

No. 38041-2-II

BRIEF OF APPELLANT

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INTRODUCTION

This case poses the specific question whether a community college may disregard a seniority system during a reduction in force, and it poses the more general question whether the college may benefit from an accelerated review procedure if the timing of that procedure permits it to conceal other instances of its breach of contract.

ASSIGNMENTS OF ERROR

The Board of Trustees of Tacoma Community College entered four findings of fact (CP 94) with respect to its decision to terminate the tenured appointment of History instructor Karen Rogers:

The current financial status of the college required the reassignment and eventual RIF [reduction in force] proceeding for a number of staff.

The college followed all RIF procedures outlined in the contract. These procedures were followed properly and your position was correctly identified under college procedures as most appropriate for elimination.

Your credentials, as the incumbent of the position identified for elimination, were thoroughly reviewed by the college and there was no appropriate alternate position in which to place you.

The procedures set forth in the faculty negotiated contract were properly followed throughout this process.

1. Rogers assigns error to the finding that her position was eliminated. Evidence from the next academic year conclusively demonstrates there was no elimination of any position within the History Department.

2. Rogers assigns error to the finding that there was no alternate position for her. Evidence from the next academic year conclusively demonstrates that part-time instructors were hired by the College to teach the equivalent of a full-time position within the History Department.

3. Rogers assigns error to the finding that contract procedures were properly followed. A tenured instructor with less seniority than Rogers was retained by the College, in violation of the contract, to teach History classes.

4. Rogers assigns error to the decision by the Board of Trustees to terminate her tenured appointment.

5. Rogers assigns error to the denial by the Superior Court of her motion to supplement the record with the addition of evidence from the 2007–2008 academic year.

6. Rogers assigns error to the final decision of the Superior Court which affirmed the termination of her tenured appointment.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is a reduction in force properly invoked when the department from which a tenured instructor is removed experiences no actual reduction in its work load during the academic year immediately after the discharge?

2. Does the collective bargaining agreement require the college, during a reduction in force, to refrain from hiring part-time instructors within a particular department if the effect would be to displace a tenured instructor?

3. May the college entirely disregard the seniority provisions of the collective bargaining agreement?

4. Was the termination of the tenured appointment arbitrary and capricious due to multiple breaches of the collective bargaining agreement by the College?

5. Should the Administrative Procedure Act be construed to permit supplementation of the record, as a matter of course, when events occur during the pendency of a judicial review which retroactively invalidate the action taken by the agency?

6. If a breach of contract does not, by the very nature of things, become provable until after the final decision of a college to terminate the employment of a

tenured instructor, does it deny due process to deprive the instructor of an opportunity to prove that breach during the pendency of a judicial review?

STATEMENT OF THE CASE

Karen Rogers was a History instructor who achieved tenure in 2001. In April of 2007, she received a letter from the President of Tacoma Community College informing her that her position was being eliminated due to a reduction in force. (CP 89–90)

The Contract

Rogers, like every other academic employee at the College, enjoyed the benefits of a “Negotiated Agreement” (“contract”) collectively bargained between the College and the local American Federation of Teachers. (AR 117–200) Four sections of that contract pertain in this case:

1. *Section 12.11* (AR 184) specifies that a principal purpose of tenure is to “retain academic employees of such character and scholarly ability” that the College can “justifiably undertake to employ them for the rest of their academic careers.”

2. *Section 14.23* (AR 192) gives some measure of protection during a financial crisis. It requires that

“[a]lternatives to reduction in force *shall* be implemented by management *prior to* the initiation of reduction in force procedures.” That same section also provides that “[a] tenured academic employee *will be given* sections normally staffed by part-time academic employees *before* being offered other alternatives to reduction in force.” (emphasis added)

3. *Section 14.25* (AR 193) assigns high priority to seniority whenever it becomes necessary to terminate a tenured instructor: “[T]he employment needs of the department...shall be the primary basis for identifying the order of reduction in force. First consideration will also be given to seniority.”

4. *Section 14.26* (AR 193) provides that for two years after a reduction in force, a former tenured instructor “shall have the right to recall to any academic position, either a newly created position or a vacancy.”

The Previous Year

The College organizes its courses on the basis of a conventional academic year. The timing of the President’s letter ensured that the applicable predeprivation procedure would be completed before the beginning of the 2007–2008 academic year.

The basic unit of instruction at the College is the section, a class taught for one hour each day, five days each

week. Contract section 6.23 (AR 192) specifies that a full-time instructional load amounts to 15 hours per week, which equals three sections per quarter or nine sections per academic year. (AR 56:19–20) The phrase “full-time equivalent” or its abbreviation “FTE” is sometimes used (*e.g.*, AR 26:23, 30:23) as a measurement unit equal to the nine sections taught by a full-time instructor during an academic year. FTEs can be used to calculate appropriations, budgets, and staffing needs.

Rogers knew, prior to her predeprivation hearing in June of 2007, that the History Department had taught 39 sections, or a fraction over four FTEs, during the 2006–2007 academic year. (CP 49–54) Rogers herself had taught one FTE. Two FTEs had been divided between two other tenured instructors, one of whom—Bernard Comeau—was hired by the College as recently as September 1, 2004 and was, therefore, substantially junior to Rogers in seniority. (CP 84) The remaining FTE had been shared by part-time instructors Leann Almquist and David Brumbach. (CP 18 tbl.)

The Adjudication

The predeprivation hearing resembled a trial with an official from the Public Employment Relations Commission acting as judge and a five-member review committee acting as jury. (AR 16–18) Two administrators appeared for the

College. Their testimonies consisted primarily of forward-looking statements. One administrator predicted declining enrollments and a budgetary shortfall during the next academic year. (AR 22–25) It was mentioned that Rogers and two tenured faculty members from other departments had been selected for dismissal. (AR 29) It was candidly admitted that “Karen is a good teacher. This has nothing to do with her abilities. It has nothing to do with competency.” (AR 68:17–19)

The College submitted (AR 19:5–8) a document (AR 72–76) which outlined its decision-making process. The document reveals a frequent use of adjunct instructors within the History Department:

We employ adjuncts to cover the US History OL section, and to flex with the rise and fall of enrollments; and the Washington History course.... With Duchin, Comeau, [tenured instructors] and the occasional adjuncts, we are adequately staffed in US History....

According to the Instructional Research Office’s data for Fall 2005, the current FT/Adjunct ratio is 54.8% FT to 45% Adjunct. *It should be noted that even with the History department sharing two FT faculty with Philosophy and Humanities, the FT to PT ratio is higher than either of the two other programs in this Division.*

(AR 74, 76)

Rogers could not, by the very nature of things, defend against the forward-looking statements of the college administrators. The proof she needed would have to await the passage of time. She did, nevertheless, express concerns that the College would indeed breach the contract in ways that would not become apparent until the next academic year: She quoted the contract regarding employment of tenured instructors for their entire careers (AR 38:12–17); she testified that Comeau was lower than she on the list of seniority (AR 39:3–17); and she reminded the committee that she had priority over adjunct instructors. (AR 49:20–50:13)

By an unknown vote, the review committee upheld the dismissal. The matter was then taken up by the Board of Trustees. After a brief hearing, attended by Rogers, the Board announced its final decision in a July 9, 2007 letter. The letter contained, among other things, the four findings of fact set forth above. (CP 93–94).

The Next Year

Rogers filed a timely petition for review. (CP 1–4) Soon thereafter, the College began its new academic year. The judicial review was scheduled to be considered by the Superior Court on June 24, 2008. This allowed Rogers an opportunity to gather evidence of employment within the History Department during the 2007–2008 academic year.

Rogers discovered from public records that the department taught 38 sections, or a fraction over four FTEs, during the 2007–2008 academic year. (CP 19–40) Precisely three FTEs were taught by tenured instructors, including Comeau, who taught one section fewer than the nine required for an FTE. Part-time instructors Almquist and Brumbach taught, between them, the remaining FTE plus two additional sections. (CP 18 tbl.)

Rogers also discovered from public records that the College saved money for every FTE taught by a part-time instructor. In the year 2007, a part-time instructor teaching one FTE would have earned \$29,025. Tenured instructors during 2007 earned \$49,832. (CP 55–73) (CP 17 fig.) Salaries for administrators were rising quickly. The salary of the President rose 16 percent from 2005 to 2007. The salary of the Vice President for Academic and Student Affairs, who testified at the hearing, rose 26 percent during that same interval. (CP 55–81) (CP 17 fig.)

The Judicial Review

Rogers bundled this new evidence with a motion to supplement the record. (CP 5–7) At the Superior Court hearing her attorney demonstrated what this new evidence proved, why it could not be obtained until after the final administrative decision, and why it would be fundamentally

unfair not to supplement the record. (RP 14–17, 19–20) The Superior Court refused to consider any evidence which did not exist prior to the July 9, 2007 decision. (RP 21–22) The argument proceeded to the administrative decision itself. Rogers, through her attorney, provided an elaborate analysis of the manner in which the College breached the contract—an analysis substantially similar to the argument in this brief. (RP 23–32, 38–42) The Superior Court nevertheless affirmed the Board of Trustees. (RP 42)

STANDARD OF REVIEW

A contract is interpreted as a matter of law according to the ordinary, usual, and popular meaning of the words used rather than the unexpressed subjective intent of the parties unless extrinsic evidence is necessary to determine the meaning of specific words. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503–04, 115 P.3d 262 (2005). Statutory constructions and constitutional challenges are both reviewed *de novo*. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). Statutes are subject to as-applied due-process challenges. *State v. Nelson*, 158 Wn.2d 699, 147 P.3d 553, 555 (2006). If a statute is capable of a constitutional construction, it will

be given that construction. *State v. Oyen*, 78 Wn.2d 909, 913, 480 P.2d 766 (1971), *vacated on other grounds*, 408 U.S. 933, 92 S.Ct. 2846, 33 L.Ed.2d 745 (1972).

ARGUMENT

A. THE LACK OF AN ACTUAL REDUCTION IN FORCE IMPLIES THAT THE COLLEGE BREACHED THE TENURE CONTRACT

Tenure is a right to employment for the duration of one's career absent the occurrence of an unusual event that would justify dismissal for cause. See RCW 28B.50.851(1). See also WAC 132V-22-010 (career employment for tenured instructors at College); WAC 132V-22-050 (dismissal of tenured instructors only for "sufficient cause" at College).

Tenure rights are granted to individuals for well-known and historically-important purposes. The specific purpose of a tenure right is to create a sense of job security within the mind of the individual faculty member. This sense of job security, collectively held, promotes the more general purposes of tenure, which include, in the context of this particular case, "[a] sufficient degree of economic security to make the profession attractive to men and women of ability [which is] indispensable to the success of an institution in fulfilling its obligations to its students and

to society.” *Barnes v. Wash. State Community College Dist. No. 20*, 85 Wn.2d 90, 94, 529 P.2d 1102 (1975) (quoting American Association of University Professors, *Statement of Principles on Academic Freedom and Tenure* (1940)).

The balance of this discussion must, of course, focus upon the particular dispute. Rogers nevertheless urges that these general principles always be kept in mind. To permit a breach of tenure rights by the College in this instance may contribute to the erosion of the collective sense of security held by the remaining members of the faculty. This would be detrimental in the long run by diminishing the perceived value of a faculty appointment. The pool of qualified new applicants may diminish with the more attractive candidates seeking appointments elsewhere. Existing faculty members may become tempted by lateral career opportunities. This would have obvious negative consequences for the students, their future employers, and the larger community.

As for Rogers, the passage of an entire academic year post-discharge allows her to conclusively establish three particular ways in which the College breached the contract: (1) It experienced no actual reduction in the instructional load within the History Department and therefore lacked adequate cause to order the dismissal; (2) it rehired two

part-time instructors to teach a single FTE in History which should have been reserved for her; and (3) it retained a tenured instructor within her layoff unit with less seniority to teach History classes.

**1. THERE WAS NO LACK OF FUNDING
NOR CURTAILMENT OF WORK WITHIN
THE HISTORY DEPARTMENT**

Contract section 14.21 imposes certain conditions upon the right to invoke a “reduction in force”:

A reduction in force is a dismissal of tenured academic employee without prejudice and for adequate cause, which shall include lack of funds and necessary curtailment of work....

The meaning of this section is plain. There are two conditions to the right: there must be a “lack of funds,” and there must also be a “curtailment of work.” If both of these conditions occur, the College has a right to discharge the instructor. But the contrapositive must also be true: if there is no lack of funds and no curtailment of work, then the College has no right. *See AAUP v. Bloomfield College*, 136 N.J. Super. 442, 346 A.2d 615, 616–17 (1975) (college has burden of proving whether “financial exigency was the *bona fide* cause for the decision to terminate the services” of tenured faculty).

The Board of Trustees made only one rather elliptical finding on this issue: “The current financial status of the college required the reassignment and eventual RIF proceeding for a number of staff.” (CP 94)

Rogers assigns error to this finding based upon evidence she produced from the 2007–2008 academic year which proves there was no actual reduction in force within the History Department, hence no “requirement” caused by any “financial status of the college” that she be discharged. *Cf. Refai v. CWU*, 49 Wn. App. 1, 8, 742 P.2d 137 (1987) (appropriate unit of analysis when challenging reduction in force not entire institution but department).

Rogers lost her position between the 2006–2007 and 2007–2008 academic years. The instructional load within her department remained almost precisely the same during both of those years—a fraction over four FTEs. There was, therefore, no actual “curtailment of work.” The faculty configuration also remained the same. Tenured instructors taught three FTEs. Part-time or adjunct instructors taught the remaining FTE. With no change in faculty configuration, there was no reduction in total salaries, therefore, no demonstrable “lack of funds” during the second year compared to the first.

Cunningham v. Community College Dist., 79 Wn.2d 793, 489 P.2d 891 (1971), involved contract language identical to section 14.21. The college, in that case, expanded its food service to include a newly constructed dormitory. It claimed it could reduce costs by replacing its tenured food-service workers with an independent contractor. Administrators “indicate[d] that their action was based upon belief, feeling and impression that there would be an economic advantage to a contracted service.” 79 Wn.2d at 800. The Supreme Court held that this testimony did not support a finding of “lack of funds.” *Id.* at 801. The absence of proof regarding “lack of funds” is even more compelling in this case. Class schedules conclusively prove there was no decrease in total salaries within the History Department. As for “curtailment of work,” *Cunningham* held that “[t]he evidence...effectively negates a showing of curtailment of work...since it is conceded that the college’s food service was being expanded rather than eliminated or reduced.” *Id.* The evidence in this case likewise “negates a showing of curtailment of work.” The History Department taught the same number of FTEs after the discharge.

Rogers used class schedules—evidence published by the College itself—to prove that the two conditions specified by section 14.21 did not occur. There is no need

to weigh or interpret this evidence. Its implications are clear as a matter of law. As she requested in her Petition for Review (CP 4), Rogers should be reinstated and compensated for her economic loss, RCW 34.05.574; and she should also be paid her reasonable attorney's fees. RCW 4.84.350.

2. THE COLLEGE HIRED TWO PART-TIME INSTRUCTORS TO TEACH A FULL-TIME HISTORY POSITION

Even if Rogers erred by claiming there was no "lack of funds" and no "curtailment of work" to justify her discharge, the College nevertheless breached the contract by disregarding the priority she enjoys as a tenured member of her department.

Community colleges in this state typically organize their faculties on a two-tier basis. Full-time instructors are usually hired on a probationary basis with an opportunity to achieve tenure after a fixed number of years. Part-time or adjunct instructors are hired on a contract basis for a fixed period with no opportunity for tenure. See contract § 0.20(b)(1) and (2) (AR 127-28) (definitions), contract § 6.23 (AR 162-63) (full-time instructional load), and contract § 6.24 (AR 163-64) (part-time instructional load).

If during a reduction in force, a tenured instructor competes with part-time instructors for the last available

FTE within a department, contract section 14.23 (AR 192) unambiguously commands the College to award the position to the tenured instructor:

Alternatives to reduction-in-force shall be implemented by management prior to the initiation of reduction-in-force procedures. The application of these alternatives will be handled through the appropriate division or department. A tenured academic employee will be given sections normally staffed by part-time academic employees before being offered other alternatives to reduction-in-force....

See Agnew v. Lacey Co-Ply, 33 Wn. App. 283, 289, 654 P.2d 712 (1982) (use of *shall* in contracts usually understood to be mandatory, not permissive).

The predeprivation hearing took place in June of 2007. The Board of Trustees made its decision in July. Rogers had no choice under applicable procedures but to marshal her evidence as best she could during that summer. Presumably, at the time of the June hearing, the College had not yet signed contracts with Almquist and Brumbach for the next academic year.

Although the College refrained from announcing at the hearing any actual intent to assign one History FTE to part-time instructors, its administrators certainly suggested that they had a right to do so if they wished.

In an outline of their deliberations, they noted with certain pride that the ratio of full-time to part-time instructors in the History Department was 55 percent, a number higher than the ratio for two other programs in the division. (AR 76) Their apparent satisfaction with this number proved to be a rationalization in advance for the hiring of Almquist and Brumbach, who—between them—taught 11 sections (a fraction over one FTE) within the History Department during the 2007–2008 academic year.

The College saved over \$20,000 by choosing Almquist and Brumbach over Rogers. Public records from the Department of Financial Management reveal that during January of 2007, the most recent month and year for which records are available, Rogers and Almquist would have shared \$29,025 for teaching one FTE. Rogers earned \$49,832 for the same quantum of instruction. (CP 56) The value of fringe benefits makes this difference even larger.

The College might be tempted to justify its action based upon these savings. But this it may not do. *State Employees v. Spokane Community College*, 90 Wn.2d 698, 585 P.2d 474 (1978), presented an analogous situation. The college was expanding. It wished to hire new custodians from outside the bargaining unit, without changing the status of existing employees, for the sole purpose of saving

approximately \$10,000 per year for each new employee. The Washington Supreme Court declared that plan unlawful. Despite the projected savings, the Court held that a system of merit selection avoided corrupt influences and promoted efficiency. “[A]n anticipated or real savings in cost cannot be a basis for avoiding the policy and mandate of civil service laws.” 90 Wn.2d at 703.

Osterlof v. Univ. of Washington, 17 Wn. App. 621, 564 P.2d 814 (1977), presents an even closer parallel. The university’s printing department had been ordered to eliminate one position. The choice came down to two persons, one of whom had been a “consultant” for nine years, and the other of whom had been a classified civil servant for three years. The supervisor preferred the consultant as the more valuable employee. He therefore discharged the civil servant. The Court of Appeals ordered the civil servant reinstated, holding that “[t]he classified service established by the Higher Education Personnel Law may not be circumvented by the retention of permanent consultants.” 17 Wn. App. at 624. In the case *sub judice* it might similarly be said that the retention of permanent part-time instructors may not be used to circumvent tenure rights negotiated by the College and the faculty union and

guaranteed by statute. See RCW 28B.50.861 (dismissal of tenured faculty member only for sufficient cause).

Cunningham, 79 Wn.2d 793, also fits within this line of cases. In upholding the rights of food-service workers threatened with replacement by an independent contractor, the Supreme Court held that

curtailment of work cannot be established by merely showing that the employer has determined, for whatever reason, to have the work accomplished by others. Such interpretation...would render any limitation upon an employer's right to remove an employee (whether by discharge, layoff, or by any other means) meaningless, completely thwarting the purposes for a civil service system.

Id. at 801-02.

The replacement of Rogers by part-time instructors cannot be otherwise but a breach of her contract rights, as a consequence of which, her remedy remains the same. She should be reinstated and compensated for her economic loss, RCW 34.05.574; and she should also be paid her reasonable attorney's fees. RCW 4.84.350.

3. THE COLLEGE ENTIRELY DISREGARDED THE SENIORITY SYSTEM ESTABLISHED BY CONTRACT

Rogers was hired by the College in 1998 and achieved tenure in 2001. Comeau was hired by the College in 2004 and achieved tenure in 2007. Rogers and Comeau were assigned to the same layoff group, and both taught sections within the History Department.

The seniority system at the College, as it pertains to this case, is governed by contract sections 9.20(a), 14.22(b), and 14.25, which should be interpreted *in pari materia*.

Section 9.20(a) (AR 176) defines how seniority is determined:

Seniority shall be based on the Board (or delegated administrative) approved date of hire as a full-time academic employee with the College or its predecessor school district, excluding temporary academic and specially funded academic appointments.

Section 14.22(b) (AR 192) organizes tenured instructors into “lay-off units” (emphasis added):

For the duration of this agreement, the lay-off units and assignments thereto, as agreed to in the union-management meeting of February 3, 1974, or the most recent updating of those lay-off units and assignments thereto, *shall be used* as the basis for reduction in force. An employee may be assigned to only one lay-off unit even though he or she is teaching in more than one unit.

Section 14.25 (AR 193) specifies how a reduction in force should actually take place:

If a reduction is determined to be necessary within a lay-off unit, the employment needs of the department or program shall be the primary basis for identifying the order of reduction in force. First consideration will also be given to seniority as defined in Article 9, provided that such consideration results in the retention of qualified academic employees to replace and perform the necessary duties of the personnel reduced. In determining what duties an academic employee is qualified to perform, the president will consider, but not be limited to, (a) general professional experience, (b) actual work experience in the area under consideration, and (c) educational background.

These contract sections can readily be interpreted on the basis of the ordinary meaning of the words they contain. The first step in the process is identified within the first sentence of section 14.25: "the employment needs of the department or program shall be the primary basis for identifying the order of reduction in force." The College appears to have performed that step when it selected the History Department as one of three that would experience a reduction in force. The second step is identified within the second sentence of section 14.25: "First consideration will also be given to seniority as defined in Article 9, provided that such consideration results in the retention of qualified

academic employees....” The College stipulated that Rogers was qualified. (AR 68:17–19) If the History Department contained no *unqualified* instructors, then the second sentence of section 14.25 would require the College to select for discharge the *qualified* instructor within the department who had the least seniority. Comeau had less seniority than Rogers. Section 14.22(b) therefore required that Comeau be selected for discharge before Rogers. *See Agnew*, 33 Wn. App. at 289 (use of *shall* in contracts).

The seniority issue was ripe for adjudication at the administrative level inasmuch as Comeau himself enjoyed tenure and would therefore have continued his employment during the next academic year if he were not the one selected for discharge. The review committee was apprised of this specific tenure issue. (AR 38:24–40:9) The Board of Trustees completed the breach of contract when it approved the selection of Rogers for discharge. Rogers should be reinstated and compensated for her economic loss, RCW 34.05.574; and she should also be paid her reasonable attorney’s fees. RCW 4.84.350.

B. THE SUPERIOR COURT ACQUIESCED TO THE ARBITRARY AND CAPRICIOUS ELIMINATION OF A TENURED POSITION

Comeau's retention was the only breach of contract amenable to proof at the predeprivation hearing. To explain how the College otherwise breached the contract, it was necessary to discover how many sections were taught by whom within the History Department during the 2007–2008 academic year, the year immediately after the discharge.

The principal conundrum presented by this case is that none of the evidence from the 2007–2008 academic year was considered by the College or by the Superior Court. The College did not consider this evidence for the simple reason that the events occurred after the July 9, 2007 decision of the Board of Trustees. The Superior Court did not consider this evidence because of its ruling that the Administrative Procedure Act prohibited it from adding “new” evidence to the record.

The Superior Court erred in two respects: it refused to enforce seniority rights on the basis of the existing record, and it refused to consider new evidence of other ways in which the College breached the contract—evidence which did not and could not come into existence until after the Board of Trustees decision.

The effect of these two Superior Court decisions was to permit an arbitrary and capricious action—a “willful and unreasoning action, without consideration and in disregard of facts and circumstances”—to stand. *State v. Rowe*, 93 Wn.2d 277, 284, 609 P.2d 1348 (1980) (definition).

**1. THE FAILURE OF A MATERIAL CONDITION
SUBSEQUENT DID NOT MANIFEST ITSELF
UNTIL THE NEXT ACADEMIC YEAR**

The rejection of new evidence deprived Rogers of an opportunity to completely prove how the College breached the contract. This is because the breach of contract took place not during a point in time but over an interval. By closing the record before the conclusion of that interval, the ruling amounted to a prior restraint on the right to a comprehensive review.

The interval began when the College formed an intention to eliminate positions, delivered its formal notices, and supported its intention with forward-looking statements. It ended at the conclusion of the next academic year, when it became possible to assess whether the forward-looking statements had been accurate, that is, whether there had been an actual reduction in force.

Under contract section 14.21, the right to declare a “reduction in force” comes into being upon an “adequate

cause, which shall include lack of funds and necessary curtailment of work.” (AR 192) But the question remains what actually triggers the right—the announcement of future cutbacks or the actual implementation of cutbacks. The context surrounding a tenure appointment makes the answer to this question self-evident. Neither party would have intended to establish, at the time tenure was granted, a right so insubstantial that it could be terminated through a mere utterance. The parties must instead have intended an aleatory contract, where rights and duties are conditioned upon a fortuitous event—in this case, an actual financial crisis. See *Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 669, 999 P.2d 29 (2000) (quoting Mills Holmes & Mark S. Rhodes, *Holmes’s Appleman on Insurance* 2n, § 1.3, at 13 (1996)) (definition of aleatory contract).

Although the right of the College to terminate employment must be conditioned upon more than a mere utterance, it would serve no useful purpose to delay a discharge, after the announcement of a reduction in force, simply to guard against the prospect that no reduction in force will actually occur. That would place an unreasonable burden upon the employer who, it is reasonable to presume, would accurately predict a financial setback in the majority of situations.

But as this case illustrates, inconsistencies do arise. Employees should be protected in these situations, whether error or intent is the cause of the inconsistency. There are two ways the contract might be construed to provide this protection with no added burden to the College.

The right to declare a reduction in force could be construed as a right which arises at the time of the announcement but a right which nevertheless remains subject to a condition subsequent. *See e.g., Crabtree v. Retirement Systems*, 101 Wn.2d 552, 556, 681 P.2d 245 (1984) (pension vested subject to continued employment); *Mithen v. Board of Trustees*, 23 Wn. App. 925, 933, 599 P.2d 8 (1979) (employment subject to board approval); *Horner v. Board of Trustees*, 61 Cal.2d 79, 87, 389 P.2d 713, 37 Cal. Rptr. 185 (1964) (discharge subject to hearing and possible reversal). The condition would be the actual occurrence of faculty cutbacks during the year after the announcement. If the condition fails to occur, the College will have breached the contract as a result of the discharge.

The right to declare a reduction in force could also be construed as a right which arises at the time of the announcement but a right that nevertheless remains subject to an implied covenant of good faith and fair dealing. *See Miller v. Othello Packers, Inc.*, 67 Wn.2d 842, 844, 410

P.2d 33 (1966) (adopting implied covenant). If later events demonstrate no actual reduction in force, that would be evidence of a breach of the covenant.

If, however, there were no condition upon the right to terminate employment other than the making of an announcement, the right to tenure would be illusory. *See Wharf Restaurant v. Port of Seattle*, 24 Wn. App. 601, 609, 605 P.2d 334 (1979) (contract illusory if performance optional or discretionary). At-will employment would be the practical result.

Of these two constructions, the implied condition subsequent would be more appropriate in this case. Good faith should not be an issue. The right to tenure exists independently of the state of mind of College administrators. The contract lends textual support to this construction. Section 14.26 provides a two-year right of recall for any tenured instructor who loses a position. This retained right is similar to the contingent right an instructor would retain pending the actual occurrence of the reduction in force.

No matter which of the foregoing constructions is more appropriate, this case cannot be fairly adjudicated unless Rogers is permitted the benefit of evidence from any point in time within the relevant interval.

2. PROCEDURAL STATUTES SHOULD HAVE BEEN CONSTRUED TO PERMIT EVIDENCE FROM THE NEXT ACADEMIC YEAR

Prior to entering its final decision, the Superior Court considered whether to admit the new evidence. (RP 14–21) Counsel for Rogers presented substantially the same argument as appears in this brief. (RP 14–17, 19–20) Counsel for the College argued, among other things, that Rogers was attempting to turn this case into a “civil claim” and that the correct procedure would be to “take a snapshot, what were the facts in existence that the Board could have known at the time the decision was made.” As for the new evidence in particular, counsel expressed the opinion that nothing which occurred even “three months later...[was] relevant to what the board did at the time they did the decision.” (RP 17–19) The court, without explanation, disallowed all new evidence which did not predate the hearing. (RP 21)

The focus of the debate was RCW 34.05.562, which enumerates situations where “[t]he court may receive evidence in addition to that contained in the agency record.” The use of the word *may* in this statute certainly implies some measure of discretion. But there are necessary limits to that discretion. All statutory procedures must provide due process. It is therefore conceivable that the suppression

of evidence may, in a particular case, render this statute constitutionally invalid “as applied.”

Rogers believes that she was wrongfully denied her remedy under RCW 34.05.562(2)(b), which permits a case to be remanded to the administrative agency—despite the “snapshot” theory—whenever there exists new evidence which “could not have reasonably been discovered *until after the agency action.*” (emphasis added)

Rogers argues (*see infra* Part C) that evidence from the 2007–2008 academic year is such a vital part of her case that its suppression from the record did indeed violate her right to due process. But it is possible to avoid the constitutional issue simply by construing RCW 34.05.562 consistently with due process. *See e.g., State v. Thorne*, 129 Wn.2d 736, 769, 921 P.2d 514 (1996). The proper construction of RCW 34.05.562 would be to supplement the record as a matter of course whenever evidence of a breach of contract first comes into existence during the pendency of a judicial review.

C. THE SUPPRESSION OF EVIDENCE OFFENDED DUE PROCESS BY DEPRIVING ROGERS OF AN OPPORTUNITY TO PROVE A BREACH OF CONTRACT

Rogers respectfully submits that the suppression of evidence regarding faculty hires within the History Department during the year after her discharge offended her right to due process by depriving her of an opportunity to prove a breach of contract. U.S. Const. amend XIV, § 1 (“No State...shall...deprive any person of life, liberty, or property, without due process of law.”)

The first step in any due process analysis is to determine whether a protected interest exists. This case involves two protected interests. The first interest concerns the bundle of rights implicit in tenure itself. Tenure is a species of property protected by the Due Process Clause. *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). The second interest concerns the right of access to a reasonable court procedure prior to the deprivation of a substantive property right. This abstract right is a species of property protected by the Due Process Clause because it is “an individual entitlement grounded in state law, which cannot be removed except for cause.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

The second step in a due process analysis is to determine whether there has in fact been a deprivation. This can be demonstrated simply by observing that Rogers not only lost her job but also her opportunity for a reasonable adjudication, due to the suppression of evidence by the Superior Court.

The third step in a due process analysis is to determine what process is due and whether access to that process has been denied.

All state procedures are subject to due process scrutiny as a matter of federal constitutional law:

Each of our [Supreme Court] due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."...Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach: "While the legislature may elect not to confer a property interest, ...it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. ...[The] adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms."

Logan, 455 U.S. at 432 (quoting *Vitek v. Jones*, 445 U.S. 480, 490-91, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980)).

The general standard for due process is whether an opportunity to be heard is "granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

It is possible for a statute to appear valid on its face yet violate due process in a particular application. That is the basis of the due process claim presently made by Rogers:

[A] statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question....[T]he right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals.

Boddie v. Connecticut, 401 U.S. 371, 379-80, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). *Accord, City of Redmond v. Moore*, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004).

Logan, 455 U.S. 422, illustrates well how the rigid enforcement of a statutory procedure can lead to the denial of due process. *Logan* was a plaintiff in a discrimination case who was denied access to the courts because a state agency failed to conduct a fact-finding conference until five

days after a statutory deadline. The Supreme Court observed that the state courts correctly enforced the statute as a matter of state law but that the statute itself offended due process, in that particular application, by tying the plaintiff's fate to the negligence of persons beyond his control. *Id.* at 436.

Rogers faces a similar dilemma. Although her access to the courts has not been altogether denied, the rigid application of the statute regarding new evidence denies her *reasonable* access to the courts. Her fate has been tied not to the negligence of others, but to the misrepresentations of others—misrepresentations regarding future cutbacks in the History Department. These misrepresentations did not and could not become apparent until sufficient time had passed. When the evidence finally emerged, jurisdiction had already passed to the Superior Court—which refused to supplement the record. The trap faced by Rogers resembles the bar faced by Logan. Both were denied their process due.

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Supreme Court approved criteria for determining what process is due. The Court reaffirmed that due process “is not a technical conception with a fixed content unrelated to time, place and circumstances,” 424

U.S. at 334 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961)), but instead “is flexible and calls for such procedural protections as the particular situation demands,” 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). The Court then specified the appropriate method of analysis in due process cases:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

These three criteria are applicable to this case:

1. *The private interest.* Tenure is an extraordinarily valuable property right. It follows that Rogers should not be deprived of tenure without being afforded a substantial opportunity to prove the absence of a *bona fide* reduction in force within her department.

2. *Risk of erroneous deprivation.* An employee in the private sector would have had up to six years to begin

a civil action for breach of an employment contract. This would allow sufficient time in nearly every case for the discovery of relevant evidence. There are, moreover, protections such as the discovery rule which are designed to prevent unfair outcomes such as the one in this case. *See Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969) (adopting discovery rule). If Rogers had been employed in the private sector rather than the public sector, she would have retained her right of access to the courts upon learning of the breach of contract. As it turned out, Rogers had only 64 days after receiving her notice of discharge to prepare for her predeprivation hearing. Without access to evidence from the next year, her chance of prevailing was certainly much less. The risk of an erroneous deprivation will therefore be high in any situation where dispositive evidence first becomes available after the final agency decision.

3. *The government's interest.* There is no issue in this appeal regarding any of the predeprivation procedures at the College. The relief presently sought by Rogers would leave those procedures in place. Rogers does not, moreover, ask for injunctive relief or any type of provisional remedy that would disrupt the College or tax its resources prior to the entry of a final decision. All that she requests is a fair opportunity during the *de novo* review to prove that her

discharge was indeed a breach of contract. If she were granted this request, the college would experience only two detriments: a *de minimis* increase in legal expenses and an increased risk that Rogers would prevail on her claim. The latter detriment is not a legitimate concern to the extent that the College did indeed breach the contract.

The high value of the tenure right and the high risk of erroneous deprivation are not offset by any appreciable detriment to governmental interests. This implies that a right to due process has indeed been violated by the suppression of new evidence in this case.

**D. ATTORNEY'S FEES SHOULD BE AWARDED
UNDER AUTHORITY OF THE STATE EQUAL
ACCESS TO JUSTICE ACT**

RAP 18.1(b) requires a party to "devote a section of the brief" to a request for attorney's fees. Rogers wishes to assert her right to fees with respect to this appeal and does now hereby do so. The basis for the award is a statute commonly known as the state Equal Access to Justice Act, RCW 4.84.350. Rogers qualifies under that statute and will verify her qualifications at the appropriate time.

CONCLUSION

With public records generated by the College itself, Rogers has proven, as a matter of law, that the College committed a breach of the negotiated agreement when its Board of Trustees dismissed her from a tenured appointment. There is no need for additional fact finding. This case should be remanded to the Superior Court for reinstatement and for entry of judgment for economic-loss damages and attorney's fees.

RESPECTFULLY SUBMITTED this 8th day of
December 2008.



Thomas Cline
Attorney for Appellant

WSBA 11772

APPENDIX

[EXCERPTS FROM]
TACOMA COMMUNITY COLLEGE
AND TCCFT NEGOTIATED AGREEMENT
JULY 1, 2006 THROUGH JUNE 30, 2009

6.00 ACADEMIC YEAR AND LOAD

6.10 Academic Year

The academic year for all full-time academic employees shall be 176 days, consisting of three (3) instructional quarters (fall, winter, and spring)...

6.23 Instructional Load for Full-Time Academic Employees

An instructional load for full-time academic employees shall be an annual average of 14-19 instructional contract hours per week for each instructional quarter....

(a) Lecture and/or Discussion-Individual assignments involving only lecture and/or discussion instruction shall be no more than 15 instructional contact hours per week for each instructional quarter....

6.24 Instructional Load for Part-Time Academic Employees

Pursuant to the definition of part-time academic employees, the instructional load limitations shall be as follows:

(a) Lecture and/or Discussion - Individual assignments involving only lecture and/or discussion instruction shall not exceed ten (10) instructional contact hours per week for each instructional contact quarter....

9.00 TENURED ACADEMIC EMPLOYEE SENIORITY

9.10 Seniority

Seniority is recognized as an important factor to be considered in matters relating to tenured academic employee relations practice.

9.20 Determination of Seniority

(a) Seniority shall be based on the Board (or delegated administrative) approved date of hire as a full-time academic employee with the College or its predecessor school district, excluding temporary academic and specially funded academic appointments....

12.00 TENURE...

12.11 Purpose of Tenure

The purpose of tenure is two-fold:

(1) To protect tenured academic employee appointment rights and tenured academic employee involvement in the establishment and protection of those rights at the College...; and

(2) To assure that tenure is granted to probationary academic employees of such character and scholarly ability that the district, so far as its resources permit, can justifiably undertake to employ them for the rest of their academic careers....

14.00 DISMISSAL FOR CAUSE AND REDUCTION
IN FORCE...

14.20 Procedure Relating to Reduction In Force for
Tenured Academic Employees

14.21 Definition

A reduction in force is a dismissal of tenured academic employee without prejudice and for adequate cause, which shall include lack of funds and necessary curtailment of work. It shall necessarily include dismissals for cause due to declarations of financial emergency by the State Board for Community College Education.

14.22 Lay-Off Units and Procedure for Assignment

(a) A tenured academic employee's assignment to a lay-off unit will be that unit within which his or her job responsibility is classified.

(b) For the duration of this agreement, the lay-off units and assignments thereto, as agreed to in the union-management meeting of February 3, 1974, or the most recent updating of those lay-off units and assignments thereto, shall be used as the basis for reduction in force. An employee may be assigned to only one lay-off unit even though he or she is teaching in more than one unit.

(c) The institutional seniority list, which is to be published annually by November 1st of each year under Article 9 of the Negotiated Agreement, will also include the lay off unit to which a tenured academic employee is currently assigned.

14.23 Alternatives to Reduction In Force

Alternatives to reduction in force shall be implemented by management prior to the initiation of reduction in force procedures. The application of these alternatives will be handled through the appropriate division and department. A tenured academic employee will be given sections normally staffed by part-time academic employees before being offered other alternatives to reduction in force....

14.24 Basis for Reduction

If the number of full-time academic employees is to be reduced, the College president, with advice from the appropriate supervising administrators and department Chairperson shall determine in the case of each affected department or program what courses and services are most necessary to maintain quality education and services at Tacoma Community College. In making the determination on reductions, the College president shall consider the following factors:

- (a) Budget limitations, lack of funds, change in instructional or service programs, or lack of students participating in particular programs or services.
- (b) The enrollment, the trends in enrollment, and their effect upon the department or program.
- (c) The present and anticipated service needs of the College and its students and prospective students.

TACOMA COMMUNITY COLLEGE
History Department

Sections Taught
By Academic Quarter and Academic Year
And by Category of Instructor

Summer 2006 -- Spring 2008

	Karen Rogers	Bernard Comeau	Other Tenured	Part Timers	Total
Summer Quarter 2006	1	0	0	1	2
Fall Quarter 2006	4	2	4	4	14
Winter Quarter 2007	3	2	4	2	11
Spring Quarter 2007	3	1	5	3	12
2006 - 2007	11	5	13	10	39
Summer Quarter 2007	0	0	1	1	2
Fall Quarter 2007	0	3	6	3	12
Winter Quarter 2008	0	3	5	3	11
Spring Quarter 2008	0	2	7	4	13
2007 - 2008	0	8	19	11	38

Note: Full-Time Position Equals Nine Sections Per Year

Sources: TCC Class Open Hourly Reports and Online Class Schedules

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DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

KAREN N. ROGERS,)
)
 Appellant,)
)
 v.)
)
 TACOMA COMMUNITY)
 COLLEGE,)
)
 Respondent.)
 _____)

No. 38041-2-II

**DECLARATION OF MAILING
OF BRIEF OF APPELLANT**

Thomas Cline, attorney for appellant, declares that he mailed a copy of the Brief of Appellant and this declaration to Anne O. Shaw, Assistant Attorney General, at P.O. Box 40100, Olympia, WA 98504-0100, postage prepaid, on December 8, 2008.

DATED this 8th day of December 2008.



Thomas Cline
Attorney for Appellant

WSBA 11772

DECLARATION OF MAILING

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