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Supreme Court Case No. 88323-8
Court of Appeals No. 68343-8-I

**SUPREME COURT
OF THE STATE OF WASHINGTON**

DUANE STORTI, and a class of faculty members,

Appellant,

v.

UNIVERSITY OF WASHINGTON

Respondent.

ANSWER TO AMICUS CURIAE BRIEF

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 ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. ARGUMENT.....	2
A. The Interest of the AAUP is Identical to the Class. ..	2
B. There Is No Dispute Among the Parties that the University Has the Right to Change Its Salary Policy.	2
C. The University Has Followed the Terms of Its Handbook.....	4
D. The University’s Actions Were Consistent with Existing Case Law.....	6
III. CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

Caritas Services, Inc. v. DSHS, 123 Wn.2d 391, 869 P.2d 28
(1994)..... 6, 7

Carlstrom v. State, 103 Wn.2d 391, 694 P.2d 1 (1985)..... 8

Nye v. University of Washington, 163 Wn. App. 875;
260 P.3d 1000 (2011) 7, 8

Swanson v. Liquid Air Corp., 118 Wn.2d 512, 826 P.2d 664
(1992)..... 7

RULES

RAP 10.6 (a)-(b) 2

I. INTRODUCTION

The amicus brief submitted by AAUP/UW, WSU adds nothing new to this case. The amicus brief recycles the same arguments that have already been rejected twice by the King County Superior Court and twice by the Washington Court of Appeals. The repetitive nature of the amicus brief is not surprising because the Petitioner, Duane Storti, is on the executive board of the AAUP/UW.

The University of Washington values the input of its faculty, and believes in shared governance. That is why it followed the procedures spelled out in the University Handbook and sought faculty participation when economic realities made it necessary to change the salary policy. The Chair of the Faculty Senate, the highest elected faculty leader at the University, praised the steps the University took as an example of the process working the way it should. CP 1250-51. Because the University carefully followed the necessary process to change the salary policy, the Court of Appeals correctly decided “the University did not breach the terms of the Handbook as a matter of law.” Op. at 1. The Court should deny discretionary review.

II. ARGUMENT

A. The Interest of the AAUP is Identical to the Class.

An amicus brief is supposed to be reserved for instances where an additional perspective would be helpful to the court.

RAP 10.6 (a)-(b). In this case, the AAUP does not offer a new perspective. This brief was submitted on behalf of the AAUP UW and WSU chapters, whose membership is made up of faculty members at these institutions. Amicus Br. at 1. The UW Handbook provisions do not apply to WSU, and UW faculty members are already part of the class.¹ Mr. Storti himself is both the Petitioner in this case and a member of the AAUP UW chapter executive board.² Given this complete identity of interest, it is not surprising the amicus merely repeats arguments previously made by the Petitioner.

B. There Is No Dispute Among the Parties that the University Has the Right to Change Its Salary Policy.

The AAUP claims that upholding the previous courts' decisions in this case would "lead to the destruction of shared governance, since an administration could always disregard promises

¹ Even for University of Washington faculty, the decision in this case affects interpretation of the salary policy for only one year. Petitioner has conceded that the University's changes to the salary policy were effective for the following year.

² AAUP UW chapter executive board (April 15, 2013 4:54 p.m.), http://depts.washington.edu/uwaaup/officers_N.html.

made through the shared rulemaking process.” Amicus Br. at 2. This hyperbolic rhetoric has no foundation.

There is no dispute among the parties in this case about whether the University has the authority to change the salary policy. The Petitioner admitted that in his complaint. CP 5. The Petitioner has also agreed the University followed the proper process to reevaluate and suspend the policy. *Id.* The only question in the lawsuit is *when* that change became effective, so this case presents no threat to either shared governance or the notion that the University must follow its own procedures. As the Court of Appeals concluded in this case, “The Handbook plainly and expressly cautioned faculty that the salary policy, including the raise provision, was subject to change and that any changes, if imposed by executive order, would be effective when the order was signed.” Op. at 2.

Nevertheless, the AAUP seems to be relying on old faculty meeting minutes to argue the raises were “guaranteed” and could not be suspended.³ Amicus Br. at 9. As a preliminary matter, these

³ The AAUP suggests a faculty vote was required to change the policy (Amicus Br. at 2), but the Petitioner does not assert that position in this case. That argument was made in *Nye v. University of Washington*, and the Court of Appeals rejected it. 163 Wn. App. 875, 884-887; 260 P.3d 1000 (2011).

statements are inadmissible hearsay.⁴ Even if such statements were admissible, they cannot be used to alter the express language of the policy. Br. of Resp't at 25. Moreover, none of the statements referred to by Petitioner and the AAUP address the issue in this case, which is when a new executive order could become effective. That question is answered by the express language of the Handbook, which was developed with faculty participation and places faculty members on notice that executive orders become effective immediately.

C. The University Has Followed the Terms of Its Handbook.

The AAUP spends the bulk of its brief arguing that the University Handbook was not an illusory promise. This argument is a red herring. The University has never claimed the Handbook was an illusory promise, or that it did not have to follow the provisions of the Handbook. Rather, the University has said from the outset that the Handbook's terms are binding, and it followed those terms.⁵ The Court of Appeals did not find the Handbook was an illusory promise, but rather interpreted it based on its terms, and correctly concluded the

⁴ The University moved to strike statements from meeting minutes in the trial court. Br. of Resp't at 26-27. Although the trial court agreed the statements were rife with hearsay, the court did not expressly rule on the motion to strike because the entire case was dismissed. RP 2.

⁵ For purposes of this case, it does not matter whether the Handbook is a unilateral contract, bilateral contract, or policy. Op. at 10. Regardless of how the Handbook is characterized, its terms govern and all terms must be given effect. *Id.*

Handbook allowed the University to suspend the salary policy following the process spelled out in the Handbook. Op. at 10-11.

It is the Petitioner—and now the AAUP—who are asking the Court to ignore the specific terms of the Handbook and override the shared governance process. As described in the University’s briefing, the Handbook expressly warned faculty the salary policy may need to be reevaluated. CP 1243. The Handbook also expressly described for faculty the process that would be used to issue executive orders, such as those adopting, and then suspending, the faculty salary policy. CP 1234. That process included opportunities for input by the faculty, but did not require a faculty vote. *Id.* The Handbook also specifically informed faculty that any change made by executive order would be effective immediately. *Id.* The Court of Appeals correctly gave effect to all terms of the Handbook, including the process for implementing executive orders immediately upon the conclusion of the process.

Despite the Handbook’s simple, clear language, the Petitioner and the AAUP argue the suspension of the raises could not take effect for more than a year. As the Court of Appeals has already found, this argument is contrary to the explicit language of the Handbook. “[W]e find no language in the salary policy or elsewhere in the Handbook

that suggests that changes to the policy would not be effective until the following academic year.” Op. at 9.

D. The University’s Actions Were Consistent with Existing Case Law.

This Court, as well as the Court of Appeals, has repeatedly upheld an employer’s right to change its policies, particularly when there is an express notification to employees in a contract, handbook or policy. *See, e.g.*, Br. of Resp’t at 14-16 (citing cases). The AAUP cites several cases to suggest that the Handbook did not contain a clear enough warning that the salary policy might be changed.

Here, however, the University Handbook language was more explicit than in the cases cited by AAUP. For example, the AAUP claims that in *Caritas Services, Inc. v. DSHS*, 123 Wn.2d 391, 869 P.2d 28 (1994), the Court rejected the “precise” argument being made in this case. Amicus Br. at 6. In fact, *Caritas* was very different from the present case. *Caritas* dealt with the “‘tangled skein’ of state and federal statutes and regulations that is the Medicaid reimbursement scheme as it applies to nursing homes.” 123 Wn.2d at 395. The defendant argued a general reservation clause, stating that all obligations were subject to Washington law “as now existing or hereafter adopted or amended,” was sufficient to allow a retroactive

change to the method of calculating reimbursement payments. *Id.* at 406-7.

The University is not relying on a general reservation clause, or trying to bootstrap a statutory change into its salary policy. Instead, the University specifically and prospectively warned faculty, in a section titled “Funding Cautions,” that the salary policy may need to be reevaluated. CP 1243. The Handbook also spelled out the process for issuing new executive orders, and it specifically informed faculty that changes would become effective immediately. CP 1234.

Furthermore, the issue in *Caritas* was the retroactive application of the statutory change. That is not the issue in this case. Here, the salary policy was changed *before* any work was performed for the 2009-10 academic year, and *before* any wages were owed for that work. Op. at 12; *Nye* 163 Wn. App. at 887.

The AAUP also seeks to rely on *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 826 P.2d 664 (1992), a case in which an employer provided a 200-page benefits manual that included a disclaimer of any promises made in the manual. *Id.* at 515. The *Swanson* Court concluded the plaintiff raised a factual issue regarding the enforceability of a disclaimer. *Swanson* has no bearing on the issues in this case. *Nye*, 163 Wn. App. at 886. The University is not

attempting to disclaim the Handbook, but instead abided by its terms, which included the ability to reevaluate and change the salary policy.

Finally, the AAUP cites *Carlstrom v. State*, 103 Wn.2d 391, 694 P.2d 1 (1985), which has been distinguished at length in the University's previous briefing. Answer to Pet. for Review at 12-13; Br. of Resp't at 21.

The cases cited by the AAUP are not helpful because each case considered provisions very different from those in the University Handbook, which expressly warns faculty members that the raises may be reconsidered and that any new executive orders will be effective immediately upon signing. The Court of Appeals has twice correctly found that this language unequivocally allows the University to change the policy, and that the change became effective before the 2009-2010 academic year. Op. at 8-10; *Nye*, 163 Wn. App. at 888.

III. CONCLUSION

This case does not represent the end of shared governance, as the AAUP claims, but rather is an example of shared governance in action. When the University faced the dire consequences of the global recession along with the rest of the country, it called upon its faculty to join in the effort to avert a financial crisis. The University administration and faculty formed a joint committee to reevaluate the

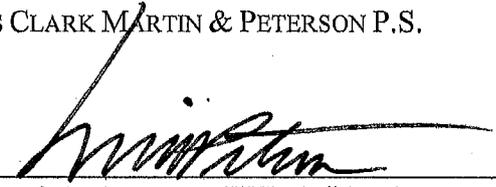
salary policy, and the end result was a new executive order from the President, which became effective when he signed it in 2009. The Chair of the Faculty Senate praised the University for listening to the input from the faculty, and stated that this was an example of the process working the way it should.

The University did not disregard the terms of the University Handbook; it followed them to the letter. The University's decision to suspend the salary increases has been reviewed by four different courts, and each one has found the University's actions were authorized by the express language of the Handbook. That language controls the outcome here, and the Court should decline to grant discretionary review.

RESPECTFULLY SUBMITTED this 17th day of April, 2013.

HILLIS CLARK MARTIN & PETERSON P.S.

By


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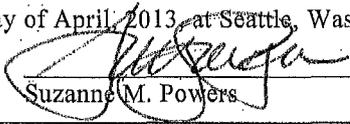
Attorneys for Respondent

CERTIFICATE OF SERVICE

On the date indicated below, I, Suzanne M. Powers, legal assistant, hereby certify that I caused to be served upon all counsel of record, via email and U.S. Mail, postage pre-paid, a true and correct copy of the foregoing document.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17th day of April, 2013, at Seattle, Washington.



Suzanne M. Powers

4/17/13

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Cc: phil@tal-fitzlaw.com; skstrong@bs-s.com; davidfstobaugh@bs-s.com; mforsgaard@ydnlaw.com; skfestor@bs-s.com; Mary Crego Peterson; Jake Ewart
Subject: Case No. 88323-8 - Duane Storti v. University of Washington

Re: Duane Storti v. University of Washington, Supreme Court Case No. 88323-8

Attached is a copy of the Answer to Amicus Curiae Brief. The person submitting this motion is Louis D. Peterson, Telephone: (206) 623-1745, WSBA No. 5776, e-mail address: ldp@hcmp.com.

This brief is being served on all counsel of record by email and U.S. mail.

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