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Implementing Collective Bargaining "Enabling Legislation": Washington Universities Join the Party

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IMPLEMENTING COLLECTIVE BARGAINING
“ENABLING LEGISLATION”:
Washington’s Universities Join the Party

National Center for the Study of Collective Bargaining in
Higher Education and the Professions

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>II. THE HISTORY</td>
<td>1</td>
</tr>
<tr>
<td>A. Public Sector Collective Bargaining in Washington</td>
<td>1</td>
</tr>
<tr>
<td>B. Bargaining at Higher Education Institutions</td>
<td>1</td>
</tr>
<tr>
<td>III. THE STATUTE</td>
<td>1</td>
</tr>
<tr>
<td>A. Coverage Under the Statute</td>
<td>2</td>
</tr>
<tr>
<td>B. The Bargaining Unit</td>
<td>2</td>
</tr>
<tr>
<td>C. Scope of Bargaining</td>
<td>3</td>
</tr>
<tr>
<td>D. Faculty Governance Systems</td>
<td>3</td>
</tr>
<tr>
<td>IV. BARGAINING TO DATE</td>
<td>4</td>
</tr>
<tr>
<td>A. Conflicts with the Senate</td>
<td>4</td>
</tr>
<tr>
<td>B. Workload</td>
<td>5</td>
</tr>
<tr>
<td>C. Sick Leave</td>
<td>6</td>
</tr>
<tr>
<td>D. Disputes</td>
<td>7</td>
</tr>
<tr>
<td>E. Adjunct Issues</td>
<td>7</td>
</tr>
<tr>
<td>F. Merit Pay</td>
<td>7</td>
</tr>
<tr>
<td>V. NEXT STEPS</td>
<td>7</td>
</tr>
</tbody>
</table>
IMPLEMENTING COLLECTIVE BARGAINING “ENABLING LEGISLATION”:
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I. INTRODUCTION.

In 2002, Washington passed enabling legislation that, for the first time, expressly granted to the faculty at the state’s public four-year colleges and universities the right to bargain regarding their terms and conditions of employment. To date, faculty at four of the state’s six four-year public institutions of higher education have formed unions, and two of those unions have negotiated first contracts. This paper describes the history of that process, the legal framework in which it took place, and the issues of greatest importance at the bargaining table.

II. THE HISTORY.

A. Public Sector Collective Bargaining in Washington. Collective bargaining with classified staff was modified in 2004 to include bargaining over wages. Prior to 2004, both wages and benefits were established by the legislature. Faculty at community colleges were authorized to collectively bargain in 1987.

B. Bargaining at Higher Education Institutions. Prior to the enactment of a statute authorizing collective bargaining for faculty at four year institutions, Eastern Washington University (EWU) entered into voluntary negotiations. In January, 1994, Public Employment Relations Commission (PERC) certified the bargaining unit as follows:

Any full-time employee that is regularly contracted to perform services as a faculty member or department chair, excluding the President of the University, Vice-Presidents, Provost, Vice-provost, Deans, Associate Deans, part-time employees, and persons not regularly contracted as faculty employees.

An election was held and the United Faculty of Eastern (UFE)/American Federation of Teachers (AFT)/National Education Association (NEA) was certified as the representative for the purposes of collective bargaining with their employer with respect to wages, hours and conditions of employment.

The UFE and EWU negotiated an initial contract in 1994 and a subsequent contract in 2000. When the statute authorizing collective bargaining was enacted, EWU and UFE learned from PERC that the UFE would need to be certified under the new legislation.

III. THE STATUTE.

Rather than accomplish this goal by adding the faculty at four-year schools to one of the multiple existing statutory frameworks already in existence in the state, the Legislature crafted an entirely new statute that shares some of the unusual features of other Washington collective bargaining laws, but which also sports unique provisions applicable only to faculty.
A. **Coverage Under the Statute.** The statute generally grants bargaining rights to all who hold faculty status at the four-year schools. Rather than adopt a common definition for “faculty” status, the statute defers to the definitions established at each university by the relevant faculty governance system. Revised Code of Washington (RCW) 41.76.005(5). As a result, the universe of eligible faculty members at the various institutions differs depending on their individual policies. For example, coaches are defined as faculty on some campuses and not on others.

B. **The Bargaining Unit.** Unlike other Washington collective bargaining statutes, RCW 41.76 provides that there can be only one faculty bargaining unit at each of the four-year institutions. RCW 41.76.005(11). As a result, PERC has taken the position that all individuals who hold faculty status must be included in the bargaining unit.

1. **The Tenure Divide.** At Central Washington University (CWU), the administration and the union stipulated to bargaining units consisting solely of tenure-track, tenured faculty and non-tenured faculty who taught 50% or more of a full-time load. PERC rejected the stipulated bargaining units as inappropriate, since it did not include all adjuncts. According to PERC, the statutory limit of one faculty bargaining unit per institution means that excluding adjunct faculty from a unit would prevent those faculty members from exercising their right to join a union and bargain collectively as provided in the statute. PERC required the parties at both universities to reform the proposed unit to include any faculty member (as defined by university policy) who performed faculty duties more than one-sixth of the time normally worked by a full-time faculty member. Given that full-time employment for faculty at the universities covers only nine months, PERC applied its one-sixth standard to a nine-month year to determine eligibility for the bargaining units.

2. **Department Chairs and Program Coordinators.** Unlike the National Labor Relations Act upon which they are based, most of Washington’s various collective bargaining statutes extend collective bargaining to those with supervisory responsibility. While RCW 41.76 ostensibly exempts from bargaining units “administrators” who exercise “managerial or supervisory authority” over other faculty members, PERC has ruled that department chairs and program coordinators are faculty and not exempt “administrators.” Western Washington University, Decision 8871-A (FCBA), 2005. As a result, each of the bargaining units formed to date includes the department chairs and program coordinators at the university or college.

   a. **The Unique Status of the Evergreen State College (ESC) Deans.** At the ESC, faculty rotate through the dean positions, serving three-year terms. Based on the particular wording of RCW 41.76.005(9), faculty members serving as deans must be excluded from the bargaining unit during their tenure as deans. At present,
the expectation of both the union and the college is that faculty will
come and go from the bargaining unit at the beginning and end of
their multi-year assignment to the dean positions.”

C. **Scope of Bargaining.**

1. **Prohibited Subjects.** The statute prohibits the parties from bargaining over
   the “merits, necessity or organization of any service, activity or program
   established by law or by resolution of the employer” except with respect to
   the impact of that program or activity on faculty. It also prohibits
   bargaining over fees that are not a term or condition of employment,
   admission criteria, degree requirements and “the content, methods,
   supervision, and evaluation of courses, curricula, and research programs.”
   RCW 41.76.010(1).

2. **Permissive Subjects.** The statute makes permissive bargaining over the
   “criteria and standards to be used for the appointment, promotion,
   evaluation, and tenure of faculty.” RCW 41.76.010(2). The EWU and
   CWU contracts include such criteria and standards.

D. **Faculty Governance Systems.** Included in the statute is a definition of “faculty
   governance systems.” The term, however, appears elsewhere in the statute only
   in the definition of “faculty,” which includes those “performing faculty duties as
   defined through policies established by the faculty governance system.” RCW
   41.76.005(1) and (5). The fact that faculty governance systems are discussed but
   not limited by the statute has been interpreted to mean that the statute permits
   unions and faculty governance systems to coexist. Recognizing the overlap of
   historic responsibilities embedded in this arrangement, however, PERC has ruled
   that where a faculty senate or other governance system exists in tandem with a
   union, roles must be redefined to remove from the purview of the faculty
   governance system any responsibility for mandatory subjects of bargaining:

   A reallocation of functions will occur if the faculty selects
   an exclusive bargaining representative under the FCBA
   [Faculty Collective Bargaining Act] RCW 41.76. The
   faculty senate has acted in the past on a wide range of
   matters that included faculty salaries along with curriculum
   academic programs, status and scholarly activities, but that
   scope of activity would need to be divided:

   ▪ All debate concerning wages, hours and other terms
     and conditions of employment of bargaining unit
     members would be shifted to the collective
     bargaining forum, where the employer and union
     would have a duty to bargain in good faith.
The faculty governance system and faculty senate can continue to exist, and can continue to deal with matters that are not mandatory subjects of bargaining under the FCBA.

Western Washington University, Decision 8871-A (FCBA, 2005).

**IV. BARGAINING TO DATE.**

As of the date of this paper, two universities, CWU and EWU, have completed negotiations for initial contracts under the new statutory regime. The two other organized campuses, WWU and the ESC, are very early in the bargaining process. The following is a summary of some of the issues that arose at the table and away from it during negotiations to date, and the solutions that the parties have found to those issues:

A. **Conflicts with the Senate.** Each of the organized institutions in Washington has historically operated under a model of shared governance between the administration and a faculty senate (or, in the case of the ESC, faculty Agenda Committee). Reallocating responsibilities previously wielded by the faculty senates to the unions has proved to be one of the more politically sensitive tasks in all of the implementation activities to date, and it has met with varying degrees of success at the different campuses.

1. **EWU.** With a long history of unionization before the advent of the FCBA, and with an equally long history of a union co-existing with a faculty senate, EWU’s structures have been slowest to change. During bargaining, the senate demonstrated its keen interest in the mandatory subjects at issue by endorsing proclamations aimed at the negotiating teams, and at one point, censuring the Board of Trustees for what the senate perceived as the Board’s inflexible bargaining style. During this initial year the administration has tried to delineate the respective roles of the Senate and the Union. Further, the Presidents of the University, UFE, and Faculty Senate meet monthly, and the Union is an ex-officio member of the Faculty Senate.

2. **CWU.** At CWU, the Board of Trustees and the administration determined early on that to have a successful relationship with the faculty union, the mandate of the faculty senate would have to change. With this in mind, the administration began negotiations with the senate at the same time it bargained a first contract, with a goal of reaching agreement on a revised senate charter aimed at academic affairs outside of the circle of mandatory subjects. Unfortunately, the sides were unable to reach such an agreement prior to completion of the collective bargaining process. As a result, at the time it ratified the collective bargaining agreement, the Board took the unusual step of repealing those portions of the pre-existing faculty code (a creation of the senate) that conflicted with the new collective bargaining agreement, as well as those sections of the code that gave the senate
oversight of mandatory subjects. The Board also tasked the senate and the
administration with working cooperatively to draft a revised senate charter
limited to non-mandatory subjects. After lengthy negotiations over such a
document, the Board ratified a new senate charter in February 2007,
approximately seven months after ratification of the collective bargaining
agreement. Further, the Union and Faculty Senate leaders meet regularly
to discuss implementation of the collective bargaining agreement and
other necessary issues. The Union and Faculty Senate also sponsor a
tenure recognition dinner.

3. **Western Washington University (WWU) and the ESC.** The intersection of
collective bargaining with shared governance was an issue keenly debated
prior to the representation elections conducted at both WWU and the ESC.
Neither institution has yet confronted in a substantive way the difficulties
of having a senate and union co-exist.

B. **Workload.** Perhaps the most challenging issue at the bargaining table at the two
schools that have completed one round of bargaining has been how to address
faculty workload. The diversity and scope of the bargaining units has made this
issue particularly complex at both tables.

1. **The Problems.**

   a. **Equity.** Paramount on the agendas of the union bargaining teams
   has been reaching an agreement that apportions workload equitably
   among faculty, both in terms of the total volume of work required,
   and the distribution of work across the spectrum of teaching,
   scholarship, and service. Finding a structure that meets this need
   has proven a challenge, as it requires comparison of faculty with
   very diverse teaching styles and demands.

   b. **Flexibility.** From the perspective of the universities, a workload
   system based on rigid formulas is unworkable because it cannot
   account for the diverse and ever-changing demands that must be
   accommodated, both to properly serve students and to permit
   faculty time needed for professional growth.

   c. **Administration.** The structure of the bargaining units – spanning
   from very part-time adjuncts to department chairs – adds several
   levels of complexity to administering any contract terms governing
   workload. As a starting point, the difference in responsibilities
   between adjuncts and tenure-track or tenured faculty makes
   adopting even a standard workload parlance problematic. In
   addition, the fact that the department chairs, who as a matter of
   sheer numbers must administer any workload system, are a part of
   the bargaining unit makes the task of administering and enforcing
   that system politically and practically challenging.
2. **The Solutions.** In both contracts completed to date, the parties have taken a similar approach to defining and managing the workload of faculty. In each case, the contracts articulate a generalized total workload, beyond which a faculty member must be paid additional compensation. The components of the workload, however, are flexible, and may be distributed among teaching, scholarship, and service. The balance of these elements is determined by the faculty member working with his or her department chair, and memorialized in a plan that is reviewed and approved by the dean. Once approved, the plan becomes the expectation against which faculty performance, including progress towards tenure and promotion, is measured.

C. **Sick Leave.**

1. **The Problem.** Both CWU and EWU have historically relied on the “honor system” with respect to paid leave for illness or injury. At each school, a tenure-track or tenured faculty member who became ill was entitled to many months of paid leave for each occurrence, an amount that reset each time the faculty member returned to work following an absence. Particularly in light of recent changes to Washington law that permit employees to use paid sick leave to care for relatives, regardless of the limitations in the employer’s policy, the open-ended sick leave provisions applicable at the universities before commencing negotiations seemed ill-suited to a new collective bargaining agreement. As a result, both CWU and EWU raised at the table the need to meaningfully reign in the amount of time a faculty member could miss work while receiving full pay, while at the same time establishing a coherent system for dealing with absences by adjunct faculty.

2. **The Solution.** Each school ultimately bifurcated sick leave into two components. The first, analogous to sick leave in any other employment setting, permits faculty (other than part-time adjuncts) to miss up to two weeks of work for an illness or injury, with the absence covered within the department. Absences of longer than two weeks are considered short-term disability, and the total permitted duration of such absences in an academic year varies based on status at CWU or status combined with years of service at EWU. In addition, to address the longer term illnesses or injuries previously covered by the expansive sick leave systems, the universities agreed as part of the total economics of the deals to purchase disability insurance for certain faculty.

D. **Disputes.** Both parties readily agreed at CWU and EWU that certain issues addressed in the contracts, promotion and tenure chief among them, were not well-suited to grievance arbitration. To ensure that there is a method for resolving disputes in areas requiring academic judgments, while at the same time, insulating such matters from review by arbitrators who may not have the academic background to resolve them, both agreements contain mechanisms through which
faculty may challenge academic judgments, including those involving workload, before a panel of peers. That panel then recommends to the provost or president (as applicable) a resolution of the dispute, which the administration may or may not accept. Either way, the administration’s word is final, and may not be grieved.

E. **Adjunct Issues.** The desires of adjunct faculty to gain longer term, more stable employment, and greater recognition for ongoing efforts has been a topic of lengthy discussion, particularly at CWU which has employed a number of adjuncts in consistent roles for years (or even decades). At times this agenda conflicted to a greater or lesser degree with that of the tenured and tenure-track faculty. There is also a tension with the Administration’s policies regarding approaches to tenure/tenure-track faculty and non-tenured faculty. The extent to which these tensions persist, and the solutions to remedy them, have not yet been fully explored and will likely be issues for renewed bargaining for many years to come.

F. **Merit Pay.** Each of the universities believed strongly in the concept of merit or incentive pay structures. Proposals along these lines met with a cool (or even frosty) reception from the unions, but ultimately both CWU and EWU insisted on and negotiated provisions to reward merit. At CWU, this will take the form of base salary adjustments, awarded bi-annually to approximately fifteen percent of the faculty following nominations from the departments and colleges. EWU plans to pass out one-time incentive payments to approximately ten percent of its faculty each year to reward outstanding efforts in teaching, scholarship, and service. As at CWU, nominations bubble up from the department lever to the provost, who has final decision-making responsibility.

V. **NEXT STEPS.**

Both CWU and EWU are headed back to the bargaining table this summer to negotiate economics for the coming biennium, as well as a maximum of two issues that each party may nominate, as part of re-openers in their current agreements. WWU has begun negotiations for an initial agreement that will not likely be completed for many months. The ESC is currently preparing for bargaining, with the expectation of reaching the table in Fall 2007.

Further, the United Faculty of Washington State, Washington Education Association and AFT Washington are working with the Council of Presidents to advance public support for public higher education in the current legislative session.