WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

October 2019

A brief summary of legal developments relevant to Washington public school districts from the previous calendar month.

Ninth Circuit Court of Appeals

Sovereign Immunity

City of San Juan Capistrano v. CPUC
No. 17-56693 (9/11/19)

The Ninth Circuit Court of Appeals held that political subdivisions of state government lack standing to challenge administrative rulings of state agencies on constitutional grounds in federal court, and that such suits are also barred by sovereign immunity since state agencies are within state government. The City of San Juan Capistrano, California opposed an electric utility's plans for a transmission line and substation project on property the utility owned within the City. The utility commission ultimately approved the project, and the City sued the commission in federal district court for depriving the City's liberty and property interests over its environmental integrity, cultural integrity, and development, along with its procedural right to a fair hearing. The trial court dismissed the suit. The Court of Appeals upheld the trial court's dismissal of the suit, holding that political subdivisions of state government such as cities and school districts lack standing to sue state agencies such as the utility commission in federal court, and that the Eleventh Amendment bars claims against a state—including its agencies—in federal court.

Washington Supreme Court

Public Records Act

SEIU v. University of Washington
No. 96262-6 (9/5/19)

The Washington Supreme Court held that when determining whether a record is subject to the Public Records Act (PRA), whether it was prepared within a public employee's "scope of employment" is the applicable legal test only for records retained on the employee's personal device or account. The Court also held that the "scope of employment" test only addresses the issue of whether the record is "prepared, owned, used, or retained" by the agency, and not whether the record contains "information relating to the conduct of government." In 2015, the Freedom Foundation requested records related to certain faculty and employees of the University of Washington (UW). Pursuant to this request, a professor represented by the Service Employees International Union (SEIU) submitted emails from his UW and non-UW email accounts relating to faculty unionization and UW's treatment of

students and faculty. UW reviewed the emails and informed the professor of its intent to release them. SEIU then filed a lawsuit to enjoin the release. The trial court enjoined the release of all of the records and granted summary judgment in favor of SEIU. The Court of Appeals affirmed by applying the "scope of employment" test from *Nissen v. Pierce County*. The Supreme Court held that the Court of Appeals erred by applying the "scope of employment test" to records maintained by an agency, rather than on an employee's personal account. Therefore, the Supreme Court determined that the issue in this case was whether these records contained information relating to the conduct of government. The Supreme Court reversed and remanded, explaining that on the limited record before the Court, the disputed emails appeared to relate to the conduct of government, and thus qualify as public records, because they most likely address faculty working conditions or the UW's educational mission. The Court expressly noted that it did not reach SEIU's other arguments against disclosure, including various statutory and constitutional exemptions.

Public Records Act

Hoffman v. Kittitas County
No. 96286-3 (9/26/19)

The Washington Supreme Court held that appellate courts must apply the abuse of discretion standard when reviewing a trial court's overall penalty assessment for a PRA violation. An inmate requested certain records from the Kittitas County Sheriff's Office. After receiving records from the County, the requestor sued. The trial court determined that the County had acted negligently, not in bad faith, and imposed penalties based on its determination that the records had been improperly redacted and withheld. The Court of Appeals reviewed the trial court's penalty under an abuse of discretion standard and affirmed. On review to the Supreme Court, the requestor argued that the penalty award was too low and that the trial court's determination of a lack of bad faith should be reviewed de novo. The Supreme Court affirmed, holding that PRA violation penalty awards are reviewed for abuse of discretion rather than de novo because trial courts exercise discretion in determining penalty awards. The Court upheld the penalty award, finding no abuse of discretion on the part of the trial court.

Washington Court of Appeals

Anti-SLAPP Statute

Leishman v. Ogden Murphy Wallace PLLC
No. 77754-8-I (9/3/19)

The Washington Court of Appeals held that civil immunity under the state's anti-strategic lawsuits against public participation (anti-SLAPP) statute does not apply to government contractors who communicate information to a government agency. The Attorney General's Office (AGO) retained law firm Ogden Murphy Wallace (OMW) to investigate an AGO employee's allegations that his supervisor had committed sexual orientation discrimination and the supervisor's allegations that the employee had acted with inappropriate aggression toward her. OMW's investigative report concluded that there was no support for the employee's sexual orientation discrimination claims, but that the employee had acted inappropriately toward his supervisor. After the AGO terminated the employee, he sued the AGO for employment-related claims and later reached a settlement agreement releasing all claims against the AGO and its agents. Subsequently, the employee brought a series of legal claims against OMW arguing that the firm had not acted as the AGO's agent and that the claims were therefore not barred by his settlement with the AGO. The trial court granted judgment on the pleadings in favor of OMW on the basis that it was immune under RCW 4.24.510 for communicating its investigative findings to the AGO. RCW 4.24.510

provides immunity from civil liability for a "person" that communicates a complaint to a public agency regarding a matter of reasonable concern to the agency." The Court of Appeals reversed, finding that a government contractor performing the work of a government agency is not a "person" protected from civil liability through the anti-SLAPP statute's protections for a citizen's right to petition and participate in government.

Public Records Act

Health Pros Northwest, Inc. v. State of Washington
No. 52135-1-II (9/17/19)

The Washington Court of Appeals held that when an agency responding to a public records request plans to produce records in installments, the agency satisfies its obligation to promptly respond under the PRA by estimating the amount of time it will take to produce the first installment of responsive records, and that the agency need not also estimate the amount of time necessary to complete its production of records. The court also held that an agency response to a PRA request that states only when the agency will later provide an estimate of when the first installment will be produced does not comply with the PRA. In 2017, Health Pros Northwest, Inc. (HPNW) requested certain records from the Washington State Department of Corrections (DOC). The DOC's five-day response stated only that it would update HPNW on the status of the request within 45 days and failed to estimate a date for actually producing responsive records. Within that 45-day period, the DOC emailed HPNW the cost for the first installment, produced the first installment upon receiving payment from HPNW, and informed HPNW that it would continue to review records and follow up within 40 days. HPNW then filed an action in superior court seeking a ruling on whether the DOC's initial response violated the PRA. The court awarded costs and attorney fees to HPNW because the DOC's initial response failed to estimate the date on which the agency would produce records. HPNW argued on appeal that the PRA required the DOC to provide an estimate of the time needed to completely fulfill a records request. On cross appeal, the DOC argued that the trial court erred in its conclusion that the DOC's initial response violated the PRA. The Court of Appeals held that the DOC's initial response to HPNW violated the PRA because it failed to estimate the date on which the DOC would produce records.

PERC

Skimming

Pierce County
Decision 13057 (PECB, 2019)

A PERC Examiner concluded that the Pierce County Sheriff's Department committed a skimming unfair labor practice by taking community outreach duties that had been performed exclusively by the Department's only community service officer and centralizing the duties within a team of deputies in a different bargaining unit. For 10 of the prior 16 years, the community service officer had organized crime prevention outreach events, created and distributed crime prevention literature, and served as the liaison between the Department and various community groups. In 2017, the Department announced plans to centralize its community service efforts in a newly created community liaison deputy team to be led by a newly created community liaison coordinator position. The community service officer's union issued a demand to bargain, but the Department had staffed the new deputy team and coordinator positions with non-bargaining unit members by the time a formal meeting occurred. The Examiner held that the Department committed a skimming unfair labor practice by filling the positions before the formal meeting, thereby leaving the union no ability to influence the Department's decision.

PFR Announcements

Welcome

The attorneys and staff of Porter Foster Rorick are pleased to welcome three new attorneys to our team:

Lauren Johnston

Lauren graduated in 2016 from Miami University in Oxford, Ohio, and received her law degree from the University of Cincinnati College of Law in 2019. During law school, Lauren served as the Managing Editor of the Intellectual Property and Computer Law Journal and a Leader on the Moot Court Honor Board Competition Team. Lauren also clerked or externed with two in-house corporate legal departments, a federal bankruptcy judge, a federal appellate clinic, and another Seattle education law firm.

Elizabeth Robertson

Liz graduated with honors from the University of Arizona in 2012, and magna cum laude from the University of Arizona James E. Rogers College of Law in 2017. During law school, Liz served as an Articles Editor for the Arizona Law Review and interned with the Consumer Protection Division of the Washington State Attorney General's Office and the Federal Trade Commission. Prior to joining Porter Foster Rorick in 2019, Liz clerked for the Honorable Linda CJ Lee at the Washington Court of Appeals, Division II.

Michelle Saperstein

Michelle graduated cum laude from Whitman College in Walla Walla, Washington in 2010 and earned her Master's in Teaching from Boston University in 2012. Before attending law school at the University of Washington, Michelle taught U.S. History in Cambridge, Massachusetts and later managed policy research at the Center on Reinventing Education. During law school, Michelle externed for the Office of Civil Rights at the U.S. Department of Education, the Washington State Office of the Attorney General, Seattle Public Schools, and Justice Mary Yu at the Washington Supreme Court. Currently, Michelle volunteers as a fundraiser at Whitman College and an application reader at the Hispanic Scholarship Fund.

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Washington School Law Update is published electronically on or about the 5th of each month. To be added to or removed from our e-mail distribution list, simply send a request with your name, organization and e-mail address to info@pfrwa.com.

This information is intended for educational purposes only and not as legal advice regarding any specific set of facts. Feel free to contact any of the attorneys at Porter Foster Rorick with questions about these or other legal developments relevant to Washington public schools.

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