WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

November 2017

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

Washington Supreme Court

Unfair Labor Practice; Statute of Limitations

Killian v. Int'l Union of Operating Eng'rs, Local 609-A
No. 93655-2 (10/12/17)

The Washington Supreme Court held that two employees' unauthorized practice of law and Consumer Protection Act (CPA) claims against their union were subsumed within their claims that the union breached its duty of fair representation, but that PERC's six-month statute of limitations did not apply to unfair labor practices filed in superior court because the applicable statute only applies to claims filed with PERC. This case stemmed from a union grievance challenging the dismissal of two Seattle Public School (SPS) employees. The employees were represented by an IUOE representative in the grievance process who was not an attorney. The employees also retained outside legal counsel to represent them in unlawful discrimination and retaliation claims against the District. IUOE and SPS settled the grievance in exchange for SPS extending monetary settlement offers to the employees. The employees rejected the settlement offers because they involved a release of SPS from all legal claims against it, including private claims. The employees then filed a lawsuit against both SPS and IUOE, alleging in part that the union representative had been negligent in negotiating the settlement of the grievance. The employees reached a settlement in their claims against SPS. IUOE then moved for summary judgment in the duty of fair representation, unauthorized practice of law, and CPA claims on the basis that all claims were subsumed by the duty of fair representation claim, which the union argued had a six-month statute of limitations that had expired. The trial court granted summary judgment and the Court of Appeals affirmed. Reviewing the lower court's decision, the Washington Supreme Court agreed that the unauthorized practice of law and CPA claims were subsumed within the duty of fair representation claims because they all involved claims against the union itself and how it acted in relation to the grievance. The Court reversed the lower court's summary judgment, however, holding that the six-month statute of limitations for unfair labor practices does not apply to unfair labor practice claims filed in superior court based on the plain language of RCW 41.56.160(1) and RCW 41.80.120(1), which both impose a six-month statute of limitations for unfair labor practice complaints filed "with the commission" (meaning

PERC). In reaching this conclusion, the Court noted that the employees could not have filed their duty of fair representation claims with PERC, as it does not assert jurisdiction in duty of fair representation cases arising from the union's actions in processing a claim under a CBA.

Wrongful Discharge and Gender Discrimination

Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County
No. 93731-1 (10/19/17)

The Washington Supreme Court unanimously held that an employee alleging discriminatory discharge under the Washington Law Against Discrimination (WLAD) need not prove the employee was replaced by someone outside his or her protected class. The court reversed summary judgment and sent the case back to the trial court, holding that the employee showed genuine issues of material fact regarding gender discrimination and whether the employer's corrective action policy modified her at-will employment status. The plaintiff, Kim Mikkelsen, worked for the Public Utility District No. 1 of Kittitas County (the District) for 27 years as the finance and accounting manager. In 2010, the District hired Charles Ward to serve as the General Manager. Subsequently, Ward fired Mikkelsen, stating simply that "it's not working out." To replace Mikkelsen, Ward hired another woman near Mikkelsen's age. Mikkelsen sued the District, alleging, among other things, that her dismissal violated the WLAD because Ward's behavior amounted to gender discrimination, and that her dismissal violated the District's corrective action policy. The policy grants the District broad discretion to implement any disciplinary action in any situation but also provides that corrective action should be fair and administered in light of employee rights and expectations. The District argued that Mikkelsen failed to demonstrate that gender discrimination was a substantial factor in her dismissal. It further argued that Mikkelsen's dismissal did not violate the corrective action policy because the policy did not modify Mikkelsen's at-will employment status and therefore the District retained the discretion to implement any disciplinary action it deemed appropriate in any situation, up to and including discharge. The court disagreed, concluding that the evidence of Ward's gender bias created a genuine issue of material fact as to whether discrimination was a substantial factor in Mikkelsen's discharge and that the fact that her successor was a woman did not defeat her discrimination claim. The court also held the discretionary language in the corrective action policy was at odds with other parts of the policy that seem to promise fair treatment and arguably establish a for-cause requirement for discharge. Therefore, Mikkelsen could also demonstrate a genuine issue of material fact as to whether the policy modified her at-will employment status.

Washington Court of Appeals

Public Records Act

Silva v. King County
No. 75338-0-I (10/2/17) (unpublished)

The Court of Appeals held that separate divisions within an agency need not produce identical copies of a record in response to a public records request. Silva submitted an identical public records request to three separate departments within King County. Two of the three departments provided Silva with the responsive record. Silva sued, alleging that he was entitled to receive the responsive record from each department to which he had submitted his public records request. The trial court rejected his argument. The Court of Appeals affirmed, holding that nothing in the PRA requires that separate divisions within an agency repeatedly disclose identical copies of the agency's public record.

Discrimination

Floeting v. Group Health Coop.
No. 75057-7-I (10/9/17) (published)

The Court of Appeals held that the Washington Law Against Discrimination (WLAD) protects against sexual harassment in places of public accommodation. Christopher Floeting is a patient of Group Health. On many of his visits to Group Health, a particular Group Health employee made numerous sexually inappropriate comments to him. He complained to Group Health that he had been sexually harassed by the employee. Group Health investigated and terminated the employee. Floeting sued Group Health, alleging that the WLAD provides for a right against sexual harassment by an employee of a place of public accommodation and that because of the employee's conduct, Group Health had deprived him of this right. Group Health moved for summary judgment, arguing that the WLAD does not recognize such a right, and that even if it does, the court should use the test for employment sexual harassment rather than the test used for discrimination in the public accommodations context. The trial court granted summary judgment for Group Health. The Court of Appeals reversed, holding that because the WLAD prohibits sex discrimination in places of public accommodation, and because sexual harassment is a form of sex discrimination, the WLAD therefore protects against sexual harassment in places of public accommodation. The Court also held that the proper standard in such cases is the test for discrimination in the public accommodations context, rather than an employment-based standard. The applicable standard is that a plaintiff must establish four elements: (1) that the plaintiff is a member of a protected class; (2) that the defendant is a place of public accommodation; (3) that the defendant discriminated against the plaintiff; and (4) that the discrimination occurred because of the plaintiff's protected status.

Public Records Act

John Doe v. Benton County
No. 34519-0-III (10/10/17) (published)

The Court of Appeals held that when an agency is enjoined from producing responsive records in response to a public records request, it has not violated the PRA by denying the requestor the right to inspect the records. The Zinks made a public records request to Benton County for certain records pertaining to Level I sex offenders. The County provided third-party notice to John Doe, a sex offender named in the records. John Doe filed suit against the County to enjoin production of the records. The County took the position that the records should not be exempt. The Zinks asserted a cross claim against the County, claiming the County violated the PRA by withholding the requested records while it notified John Doe. The trial court dismissed the cross claim and entered an injunction enjoining the County from releasing the requested records. The Supreme Court later held in a different case that the records were not exempt. The County then moved to dissolve the injunction, and the trial court granted the County's motion. The County provided the unredacted records to the Zinks. The Zinks appealed the dismissal of their cross claim. The Court of Appeals held that the County did not deny the Zinks the right to inspect any record when it provided third-party notification to John Doe, who subsequently obtained an injunction. Because the County had not yet finished producing all responsive documents, the request was still open, and the County never claimed an exemption, refused to produce the records, or otherwise took final action denying access to the records. As a result, there was no PRA violation and the Zinks were not entitled to penalties or attorney fees.

Worker's Compensation; Industrial Insurance Act

Boyd v. City of Olympia, Dep't of Labor & Indus.
No. 48927-9-II (10/24/17) (Published)

The Court of Appeals held that a communication from an employee amounts to a protest under the Industrial Insurance Act only if the content of the communication, combined with relevant information the Department of Labor and Industries already possesses, reasonably puts the Department on notice that the injured worker is taking issue with a Department decision. After the Department closed Richard Boyd's workers' compensation claim, the City's workers' compensation administrator received a doctor's chart note and a medical bill for services relating to hip problems. The City did not construe the note as a protest of the Department's closure order. After the closure order became final, Boyd filed notice of appeal, arguing the City should have construed the note as a protest of the order. The court held that for a communication to be a protest, it must reasonably put the Department on notice that the worker is taking issue with a Department decision. This analysis includes the content of the communication and relevant information the Department already possesses. Applying this standard, the court held the chart note and bill did not constitute a protest because an earlier chart note suggested Boyd's hip problems were unrelated to the back injury giving rise to his workers' compensation claim and because the note did not reference a claim number, any Department orders, or Boyd's employer.

PERC

Unit Clarification

Puyallup School District
Decision 12730-A (9/19/17)

The Commission affirmed the Executive Director's decision that four positions were not supervisors and therefore should be included in the bargaining unit. The school district appealed the Executive Director's decision arguing that the Director was incorrect in finding that one of the employees at issue did not perform the evaluation of a subordinate. The Commission agreed that the record supported the District's allegation that the position did perform the evaluation, in addition to providing input on evaluations of two other employees, but still held that substantial evidence supported the Executive Director's conclusion that the position was not supervisory.

Unfair Labor Practice; Employer Interference and Domination

Warden Education Association
Decision 12778 (9/26/17)

PERC held that an employer did not interfere with employee rights when a school board member exchanged a series of contentious emails and statements with union representatives during two separate grievance proceedings. PERC also held that the employer did not engage in prohibited domination when a school board member made critical statements regarding the union's representative. An employer interferes with employee rights when an employee could reasonably perceive the employer's actions as a threat of reprisal or force associated with the union activity of an employee. PERC found in this case that an employee who served as union president could not reasonably have felt threatened or undermined when a school board member insulted

the union president's leadership abilities and directed a profane insult toward the union's representative who had also directed profane insults and inflammatory statements at school administrators. An employee cannot reasonably perceive that an employer's heated responses to a union representative's contentious statements constitute a threat when both parties are frankly and candidly expressing frustration. Additionally, employees who serve as high-level union officials are expected to have "thicker skin" than rank-and-file unit members and to tolerate a greater degree of conflict during grievance proceedings. PERC also held that statements made to a union representative cannot constitute interference because the union's representative is not an employee and therefore has no protected employee rights. An allegation of employer domination carries with it a high standard of proof, as it requires proof of intent to dominate. PERC found that statements made by a school board member expressing frustrations with the union representative's approach to handling a grievance was not sufficient to establish that the employer intended to influence the union to replace that representative.

Unfair Labor Practice; Refusal to Bargain

City of Everett
Decision 12671-A (10/3/17)

In this reversal of an examiner decision, PERC held that the union did not commit an unfair labor practice by insisting to impasse on a permissive subject of bargaining when it submitted firefighter staffing levels to interest arbitration. Employers and unions that are eligible for interest arbitration may only bargain to impasse and seek interest arbitration over mandatory subjects of bargaining. Although PERC acknowledged that shift staffing is generally a permissive subject of bargaining, in this case it found that the union proved that shift staffing had a direct relationship with workload and safety. When a union presents evidence that shift staffing levels relate to workload and safety, PERC balances the employees' interest in wages, hours, and working conditions against the employer's interest in entrepreneurial control and managerial prerogatives. If a union is able to show that the shift staffing level has a "demonstratedly direct relationship" with employee workload and safety, an employer may be required to bargain staffing. In this case, the employees' interest in workload and safety outweighed the employer's rights because the union presented compelling evidence that the firefighters were fatigued, unable to complete training, and unable to complete inspections as a result of the employer's decision to maintain the current levels of staffing.

Unfair Labor Practice; Failure to Provide Information and Employer Interference

Pacific Northwest Child Care Association
Decision 12781 (10/5/17)

PERC dismissed allegations that an employer refused to bargain and interfered with employee rights by declining to provide employee information to a union other than the employees' exclusive bargaining representative. The only party who may pursue refusal to bargain claims against an employer is the union that is certified as the employees' exclusive bargaining representative. A union that is not certified as the employees' exclusive bargaining representative is not entitled to obtain employee names, addresses, telephone numbers, email addresses, or personally identifiable information from the employer. PERC held that no unfair labor practice for refusal to bargain can be committed against a union that is not the exclusive bargaining representative for the employees at issue, but instead was merely attempting to gather a showing of interest for a change of representation petition.

Unit Clarification; Order of Accretion

State–Social and Health Services
Decision 12783 (10/11/17)

PERC held that employees who were historically unrepresented should be added to existing bargaining units through an accretion, even though there had been no change in circumstances. In this case, the parties stipulated that the five employees at issue performed the same work and shared a community of interest with the bargaining units represented by the union. The only issue was whether an accretion may be ordered when the employees involved have been historically excluded from the bargaining units and there had been no change in circumstances. PERC held that the general requirement of a change of circumstances does not apply in situations when the bargaining unit is the only appropriate unit for the employees or positions at issue. PERC may modify an existing bargaining unit by ordering an accretion whenever a group of unrepresented employees logically belongs in only one existing unit and the positions cannot stand alone as a separate unit.

Bargaining Skills Workshop

As we head into a critical year for collective bargaining in 2018, PFR attorneys are again partnering with the Washington School Personnel Association to present a one-day workshop entitled "21st Century Bargaining Skills." The basic track will provide a foundation for all school administrators who may be sitting on a management bargaining team for the first time. The advanced track will focus on expanding the skill of experienced bargainers. We encourage you to send your entire bargaining team. The workshop will be held on Thursday, January 11, at the Southcenter Doubletree in Tukwila. Registration is available at www.wspa.net.

Porter Foster Rorick LLP

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.

Update Editors

Tim Reynolds
tim@pfrwa.com

Jay Schulkin
jay@pfrwa.com

PORTER FOSTER RORICK LLP
601 Union Street | Suite 800
Seattle, Washington 98101
Tel (206) 622-0203 | Fax (206) 223-2003
www.pfrwa.com

Lance Andree
Lynette Baisch
Jon Collins
Leilani Fisher
Cliff Foster

Jeff Ganson
Kathleen Haggard
Parker Howell
Lauren McElroy
Rachel Miller
Buzz Porter

Tim Reynolds
Mike Rorick
Jay Schulkin
Valerie Walker
Lorraine Wilson