WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

December 2017

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

PFR Announcements

21st Century Bargaining Skills Workshop

January 11, 9 am to 4 pm
Doubletree Suites by Hilton at Southcenter

PFR attorneys are partnering with the Washington School Personnel Association to present a one-day workshop on collective bargaining. The basic track provides a foundation for all school administrators who may be sitting on a management bargaining team for the first time. The advanced track focuses on expanding the skill of experienced bargainers. Registration is available at www.wspa.net.

Public Records Disclosure Training

May 7, 9 am to 3 pm
Two Union Square Conference Center, Seattle

Join Tim Reynolds and Jay Schulkin of Porter Foster Rorick for a full day of hands-on training in processing public records requests and avoiding mistakes that lead to legal liability. This workshop will satisfy the legally-mandated training for district officials and public records officers. Information regarding cost and registration will be forthcoming.

Washington Supreme Court

Employment Discrimination

Zhu v. North Central Educ. Serv. Dist. (ESD 171)
No. 94209-9 (11/9/17)

The Washington Supreme Court unanimously held that the Washington Law Against Discrimination (WLAD) prohibits an employer from discriminating against a job applicant due to the applicant's prior opposition to a different employer's discriminatory practices. Jin Zhu, a math teacher, sued the Waterville School District for racial discrimination. Waterville eventually settled the case and Zhu resigned. Zhu then applied for a position in the North Central Education Service District and was rejected. Zhu sued North Central, alleging it refused to hire him in retaliation for his prior lawsuit against Waterville. A jury found in favor of Zhu and North Central appealed. The WLAD provides that an employer may not "discriminate against any person because he or she has opposed any practices forbidden by" the WLAD. RCW 49.60.210(1). Therefore, the Washington Supreme Court held an employer may not deny a position to job applicant due to prior opposition to a different employer's discriminatory practices.

Washington Court of Appeals

Public Records Act

Wash. Pub. Emps. Ass'n v. Wash. State Cent. for Childhood Deafness & Hearing Loss
No. 49224-5-II (10/31/17)

The Court of Appeals held that article I, section 7 of the Washington Constitution protects from public disclosure public employees' full names associated with their corresponding birthdates. The Freedom Foundation sent public records requests to various state agencies requesting disclosure of union-represented employees' full names, birthdates, and work email addresses. The agencies determined that the records were disclosable and that they would disclose the records absent a court order. The unions filed motions for temporary and permanent injunctions to prevent disclosure. Following a hearing, the superior court concluded that no exemptions applied and denied the motions for a permanent injunction. The unions appealed, and a Court of Appeals commissioner granted an emergency stay only as to the employees' full names associated with their corresponding birthdates.

The Court of Appeals reversed and remanded to the superior court. The Court stated that under article I, section 7 of the Washington Constitution, public employees are entitled to an expectation of privacy in their full names associated with their birthdates because a citizen of the state would reasonably expect that personal information that would potentially subject them to identity theft (such as his or her full name associated with his or her birthdate) would remain private. The Court rejected the Freedom Foundation's argument that the Washington Supreme Court in *Nissen* categorically precluded the Constitution from being used as a PRA exemption, and instead concluded that *Nissen* stands for the proposition that there is no categorical constitutional PRA exemption, but that such an exemption may be found to exist following an individualized analysis of a given public records request. Next, having concluded that employees have a constitutionally-protected expectation of privacy in their full names associated with their birthdates, the Court examined whether the PRA qualifies as authority of law (similar to a warrant) that would justify an intrusion into the employees' privacy. The Court examined the PRA's purpose statement and concluded that, rather than promoting oversight of government, public disclosure of the requested information would only reveal discrete personal details of state employees not connected to their role as public servants and would thus not further the purpose of the PRA. As a result, the Court held that the PRA does not justify the intrusion into public employees' privacy that would result from disclosure of the requested information. Finally, the Court held that the unions had satisfied the remaining requirements for a PRA permanent injunction, and reversed and remanded.

Local Government Tort Claims

Rumburg v. Ferry County Pub. Util. Dist. No. 1
No. 34572-6-III (11/16/17)

The Court of Appeals held that the local government tort claim filing statute provides claimants an additional five-day grace period where the statute of limitations is tolled. RCW 4.96.020 requires a plaintiff to wait until sixty days have elapsed since the submission of a tort claim before commencing a lawsuit against a local government, and tolls the statute of limitations for sixty days to account for the required waiting period. An additional provision of the statute states that "an action commenced within five court days after the sixty-calendar day period has elapsed is deemed to have been presented on the first day after the sixty-day calendar period elapsed." Under RCW 4.96.020(5), the statute must be "liberally

construed so that substantial compliance will be deemed satisfactory." On July 16, 2012, Rumburg was injured by the collapse of a tent set up by Ferry County Public Utility District No. 1 (PUD). The parties agreed that the applicable statute of limitations for the alleged tort was three years. Without consulting an attorney, Rumburg submitted a tort claim to the PUD on November 30, 2012. Two and a half years later, Rumburg consulted with an attorney, who, unaware of the earlier tort claim, filed a second tort claim on July 14, 2015. Sixty-three days later, on September 15, 2015, the attorney filed a summons and complaint. The PUD argued that the lawsuit was untimely, and the trial court agreed and dismissed the claim. The issue before the Court of Appeals was whether the statute's five-day "grace period" could only be utilized immediately following Rumburg's first tort claim, or if it was essentially a five-day extension of the sixty-day tolling period. The Court relied on the "substantial compliance" provision of the statute to hold that the five-day grace period extends the sixty-day tolling period, and thus held that Rumburg's lawsuit was timely commenced.

PERC

Refusal to Bargain and Direct Dealing

Benton County
Decision 12790 (11/3/17)

PERC held that the employer unlawfully refused to bargain when it denied the union's request to bargain how employees would repay wage overpayments and circumvented the union by providing employees with wage repayment options. PERC also held that the employer made an impermissible unilateral change to a mandatory subject of bargaining when it used wage deductions and leave cash outs to collect employee repayments without first providing the union with the opportunity to bargain. An error in the employer's accounting software had caused the employer to overpay 85 union members over a span of four months in 2016. The employer decided to recover the overpayments by making deductions from future payments, as the county was authorized to do by Chapter 49.48 RCW. Each affected employee was provided with written notification of this decision and given options for repayment. The union subsequently sent a letter demanding to bargain stating it agreed that the wages needed to be repaid, but that it must be allowed to bargain how the repayments are made. The employer responded that it was not able to negotiate its "statutory responsibilities for recouping overpayments" and began deducting wages from employee paychecks during the next pay period. PERC held that how employees would repay wage overpayments is a mandatory subject of bargaining, as it is directly related to wages and not a substantial management prerogative because any number of repayment options could satisfy the employer's interest in collecting repayment. PERC also held that the employer committed the ULP of direct dealing when it presented the affected employees with repayment options, solicited each employee's preference, and asked the employees to waive rights in exchange for their preferred repayment option. Acting in accordance with Chapter 49.48 RCW, which permits wage deductions to recoup overpayments for certain public employers, did not relieve the county of its duty to bargain the multiple wage repayment options that existed, as RCW 41.56.905 requires employers to comply with their bargaining obligation when exercising statutory authority.

Appropriateness of Bargaining Unit

City of Blaine
Decision 12792 (11/7/17)

PERC's Executive Director held that a bargaining unit consisting of one employee was not appropriate and ordered its dissolution. Public employers may voluntarily recognize a union as the

exclusive bargaining representative of its employees. When it does so, the employer has an obligation to bargain with the employees' exclusive bargaining representative, but that obligation does not continue if the bargaining unit is deemed inappropriate. A one-person unit is inappropriate pursuant to WAC 391-35-330. Because the unit in question had included only one employee for an extended period, and was voluntarily recognized by the employer, PERC held that the bargaining unit was inappropriate and should be dissolved.

Employer Interference

State—Ecology
Decision 12732-A (11/14/17)

PERC upheld an examiner's decision that found the employer did not interfere with protected employee rights when it investigated a union member for a variety of matters including misuse of time and an inappropriate response to a supervisor, placed an unfavorable performance review in the employee's file, and gave the employee a letter of reprimand for misconduct. The union alleged that these activities were in reprisal for numerous grievances filed on behalf of the employee that preceded these actions. An employer interferes with employee rights when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or a promise of benefit, associated with the union activity of that employee or of other employees. The timing of an adverse action in relation to protected union activity can support a finding of an interference violation. However, timing is not dispositive of an interference violation in every case. PERC found that timing alone was not enough to prove interference in this situation because, given the frequency of the employee's union activities in the form of grievances, the employer could not have managed the employee without its actions occurring in close proximity to that union activity. Further, the employee was aware of the concerns about his performance before the performance review, the employer's investigations, and the discipline that resulted.

Refusal to Bargain and Unilateral Change

Franklin County
Decision 12794 (11/21/17)

PERC held that the employer breached its good faith bargaining obligations when it presented the union with a draft of a successor CBA for review and signature that included changes which were not agreed to in bargaining. After extensive negotiations over a successor agreement to the parties' 2013-15 CBA, the parties reached what they thought was a tentative agreement over the last sticking points: wages and healthcare benefits. The 2013-15 CBA included reopeners for both wages and healthcare benefits in the second and third years of the agreement. When presenting its proposals the employer had indicated that its proposals included deletion of "obsolete language" and "date cleanup." The proposal that was tentatively agreed upon by the parties addressed wages in each year, eliminating the reopeners on that topic, but was silent on the issue of healthcare benefits, so the union assumed that current contract language would apply and there would be reopeners for benefits in years two and three of the agreement. However, the employer assumed that the proposal to eliminate obsolete language and cleanup dates included elimination of the benefits reopeners, which were specific to 2014 and 2015. The employer also intended that its offer be conditional on elimination of all reopeners, and assumed the union was aware of that intent. The employer prepared the final CBA for signature with the reopener language entirely eliminated and sent it to the union in June 2016. The union did not notice that this language had been eliminated, and signed the CBA in August 2016 after its members approved a voting document that did not address any changes to healthcare benefits. The union

subsequently noticed the removal of this language and challenged the employer, but the employer took the position that the CBA was in full force and effect and should stand as signed.

Parties have a statutory duty to bargain over mandatory subjects of bargaining, and to bargain in good faith prior to making any changes to past practices concerning mandatory subjects. A party may violate its duty to bargain in good faith through a series of questionable acts that, when examined as a whole, demonstrate a lack of good faith even if none of them by themselves would be a per se violation. After concluding that health insurance benefits and the practice of addressing insurance benefits though an insurance committee are mandatory subjects of bargaining, PERC held that the employer did not bargain in good faith based on the totality of the circumstances. Facts that contributed to PERC's finding were the employer's failure to express its intention regarding a conditional offer made during bargaining, the employer's failure to capture a final unconditional understanding between the parties when it drafted the CBA for signatures, and the employer's failure to clear up a misunderstanding that should have been apparent because of questions posed by the union in July 2016 about the elimination of the section at issue from the CBA.

Superintendent of Public Instruction

Special Education

WSR 17-23-054; Chapter 392-172A WAC

OSPI adopted permanent rules updating the special education regulations, Chapter 392-172A WAC. The new rules address changes to federal law, federal requirements, and Washington state law; clarify and reorganize existing requirements under Chapter 392-172A WAC; and correct typos and other outdated information.

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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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