WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

February 2018

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

PFR Announcements

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 in March.

Ninth Circuit Court of Appeals

First Amendment

Eagle Point Educ. Ass'n v. Jackson Cnty. Sch. Dist.
No. 15-35704 (1/26/18)

The Ninth Circuit held that a school district's policies prohibiting picketing on district property violated the First Amendment. In anticipation of a teacher strike, an Oregon school district adopted policies that prohibited picketing on district property, prohibited strikers from coming on school grounds even for reasons unrelated to the strike (such as picking up their children from school or attending a community flower sale held at a school), and prohibited signs at any district facilities without advance approval. A student drove into the school parking lot with a sign on her car supporting the teachers, and a security guard prohibited her from parking because the sign was forbidden. The union and a student filed suit under 42 U.S.C. § 1983, arguing that the district infringed on their First Amendment rights. The district court granted summary judgment to the plaintiffs. The Ninth Circuit affirmed. The Court first rejected the district's argument that the policies were government speech not subject to the Free Speech Clause of the First Amendment, holding that no reasonable observer would have misperceived the picketers' speech as a position taken by the district, and that the government speech doctrine does not authorize the government's suppression of contrary views. Next, the Court held that even assuming the district's property was a non-public forum, the district's policies violated the First Amendment because they were neither reasonable nor viewpoint neutral. Finally, the Court held that the security guard who prohibited the student plaintiff from parking in the district's lot was implementing the district's policies, so the district was properly held liable for the security guard's actions.

Washington Supreme Court

First Amendment

Sprague v. Spokane Valley Fire Dep't
No. 93800-8 (1/25/18)

The Washington Supreme Court held that Spokane Valley Fire Department (SVFD) violated the free speech clause of the First Amendment when it discharged Sprague for sending religious communications using SVFD resources. Sprague was a captain for SVFD. Along with colleagues, he formed the Spokane County Christian Firefighter Fellowship (Fellowship) and used SVFD's email system to send Fellowship-related emails to colleagues who he believed were interested in the Fellowship's activities. SVFD had a policy that prohibited the use of its email system for personal business. SVFD's health insurer sent EAP newsletters covering topics such as mental health to SVFD employees using the SVFD email system, and employees could respond to those emails. SVFD also maintained an electronic bulletin board that could be used to contact all SVFD employees that was used at times for personal business. Sprague posted information about the Fellowship on the electronic bulletin board, including posts containing scripture, and sent emails through SVFD's system about the Fellowship that included religious content and discussed mental health, suicide, leadership, social activities, and the Fellowship's logo. Sprague's supervisors took progressive discipline in an attempt to stop his communications about the Fellowship on SVFD's bulletin board and email system. He continued to post Fellowship material, and eventually was discharged. He appealed his termination to the local Civil Service Commission, arguing that SVFD violated his right to exercise his religion and his right to free speech. The Commission upheld his termination, and Sprague did not appeal. Instead, he sued under 42 USC § 1983, claiming that SVFD violated his First Amendment right of free speech, among other claims. The trial court granted summary judgment to SVFD on the basis of collateral estoppel (a legal bar on relitigating issues that have already been tried and decided by another tribunal). Sprague appealed, and the Court of Appeals upheld summary judgment on the basis of collateral estoppel. The Supreme Court granted review on the issues of collateral estoppel and whether SVFD's policy was constitutional under the free speech clause of the First Amendment. The Court reversed. First, the Court concluded that SVFD engaged in viewpoint discrimination. The Court held that Sprague was speaking as a citizen on a matter of public concern by discussing leadership and the mental health and well-being of firefighters. The Court then held that Sprague's interest in speaking outweighed SVFD's interest in prohibiting his speech because, on the facts of the case, no reasonable person could perceive Sprague's religious speech as a government endorsement of religion. Sprague's speech was not coercive to his subordinates, so SVFD lacked a strong interest in avoiding an establishment clause violation. Next, the Court held that collateral estoppel did not bar Sprague's lawsuit because (1) the issue here is free speech, whereas the issue before the Civil Service Commission was whether Sprague was discharged for religious reasons; (2) there is a disparity of relief between that offered by the Commission compared to that available in the courts; and (3) public policy supports the lawsuit proceeding.

PERC

Unfair Labor Practice, Duty to Bargain

City of Seattle
Decision 12809 (12/26/17)

PERC held that an employer refused to bargain when it unilaterally established working conditions for a new bargaining unit position without

providing the union notice and an opportunity to bargain. The duty to bargain prohibits employers from unilaterally changing terms and conditions of employment without giving the union notice and opportunity to bargain. This duty does not apply to permissive subjects of bargaining, but a complainant may nevertheless prevail by proving that a change to a permissive subject resulted in a meaningful change to a mandatory subject of bargaining. In this case, the employer created a new bargaining unit position and unilaterally set wages and job responsibilities without utilizing current CBA procedures for doing so. By ignoring the CBA and relevant past practices, the employer effectively changed seniority bidding procedures and adversely impacted promotional opportunities for current unit members. Thus, although the decision to create a new position is a permissive subject of bargaining, the employer was obligated to provide an opportunity to bargain the new position's wages and job responsibilities because they changed the status quo for current unit members.

Unit Clarification, Accretion

University of Washington
Decision 12810 (12/29/17)

PERC granted the union's petition to add 140 historically-unrepresented per diem nurses to an existing bargaining unit. PERC may accrete unrepresented employees into an existing bargaining unit whenever the employees logically belong in only one existing unit and the positions can neither stand alone in a separate unit nor logically be placed in another unit. In this case, PERC ordered an accretion because the nurses logically belonged only in the existing bargaining unit for nurses. PERC held that inclusion was appropriate because it would not raise questions concerning representation and because work jurisdiction issues would arise if the nurses continued to be unrepresented.

Unfair Labor Practice, Union Interference

King County (ATU Local 587)
Decision 12759-A (1/4/18)

PERC dismissed an employee's claim that the union interfered with his rights by breaching the duty of fair representation when it decided not to advance his grievance to the next step of the grievance procedure. A union breaches its duty of fair representation when its conduct is arbitrary, discriminatory, or in bad faith. Additionally, a union has the responsibility to objectively investigate nonfrivolous grievances in more than a perfunctory manner and must have a reason for not processing a grievance. The employee in this case failed to provide evidence that the union's conduct was arbitrary, discriminatory, or in bad faith. The union met its duty by evaluating the merits of the grievance, and it was acting within its right to choose not to advance the grievance.

Unfair Labor Practice, Union Discrimination

King County (ATU Local 587)
Decision 12815 (1/8/18)

PERC dismissed an employee's claim that the union discriminated against him by withdrawing his grievance against the employer. To prove discrimination by a union, an employee must prove that there was a causal connection between the employee's exercise of a legal right and the union's action. The employee in this case claimed that the union decided to withdraw his grievance because he had exercised his legal right to file a ULP complaint against the union. PERC dismissed the complaint because the employee failed to provide any evidence that his ULP complaint caused, or was a substantial motivating factor in, the union's decision. The employee has the ultimate burden of persuasion in discrimination matters.

Unfair Labor Practice, Refusal to Bargain

Snohomish County
Decision 12828 (1/26/18)

PERC dismissed 10 allegations of refusal to bargain but upheld two others because the employer refused to discuss changes to mandatory subjects of bargaining. To determine if a subject is mandatory, PERC balances the relationship the subject bears to wages, hours and working conditions with the extent to which the subject lies at the core of entrepreneurial control or is a management prerogative. PERC recognizes that public sector employers are not "entrepreneurs" in the same sense as private sector employers and considers the right of a public sector employer, as an elected representative of the people, to control the management and direction of government. PERC in this case dismissed nearly all allegations that a county corrections department refused to bargain because the subjects at issue (such as administration of blood draws to inmates) were within the employer's prerogative to train law enforcement officers and to maintain a safe jail environment. But changing the employer's established practice of providing hot meals to graveyard shift workers was a mandatory subject because it was directly tied to employee wages under the CBA. The employer's decision to use non-union employees for transporting inmates was also a mandatory subject because it impacted union working conditions. In addition, PERC explained that an employer who "skims" union work may become liable for refusal to bargain even if the work at issue is not "exclusive" union work.

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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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