WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

March 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. Registration is only $150 per person and includes lunch. Reserve a space by sending an e-mail with the names of attendees to info@pfrwa.com.

Washington Supreme Court

Public Records Act

John Doe, et al. v. Dept. of Corrections
No. 94203-0 (2/22/18)

The Washington Supreme Court held that special sex offender sentencing alternative evaluations (SSOSA) are not exempt from disclosure as "health care information" under the Public Records Act (PRA). The PRA exempts from disclosure health care information under chapter 70.02 RCW. That chapter defines "health care information" as information "that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care." A SSOSA is an evaluation to determine if a first-time sex offender is amenable to treatment. Because a SSOSA is a forensic evaluation to determine if an offender should be granted an alternative sentence, rather than a medical evaluation, the court held SSOSAs are not "directly related" to health care and thus not exempt as health care information.

Washington Court of Appeals

Arbitration Provisions in CBAs

Cox v. Kroger Co.
No. 76143-9 (2/5/18) (Published)

The Washington Court of Appeals held that an employee's wage theft claim was statutory, rather than contractual, and therefore it was not precluded by the arbitration provisions in the collective bargaining agreement (CBA). Cox sued Kroger for wage theft under RCW 49.52.050(2), claiming that Kroger's method of rounding hourly employees' time to the nearest quarter-hour deprived him of wages for actual time worked. Kroger filed a motion to compel arbitration,

claiming the CBA arbitration provision required arbitration for wage disputes. But the court held that Cox's claim arose from a statute, not the contract. Because the CBA did not contain a clear waiver of statutory claims, the arbitration provision did not encompass Cox's wage theft claim.

Qualified Immunity

Friends of Moon Creek v. Diamond Lake Improvement Assn.
No. 34938-1 (2/6/18) (Published)

The Washington Court of Appeals held that a government employee had qualified immunity from civil liability because damage to private property from herbicide did not violate the federal constitution under clearly established law. Sharon Sorby is the coordinator for the Pend Oreille County Noxious Weed Control Board. Sorby used herbicide to eradicate noxious weeds near Diamond Lake, and the herbicide damaged vegetation on nearby private properties. The property owners sued under 42 U.S.C. § 1983, claiming Sorby violated their constitutional rights by depriving them of property without just compensation and without due process. The court held Sorby had qualified immunity from civil liability because it was not clearly established that the damage constituted either an unconstitutional taking or that it implicated a property interest.

Public Records Act

West v. City of Puyallup
No. 49857-0 (2/21/18) (Published)

The Washington Court of Appeals held that a city councilmember's Facebook posts were not public records because she did not prepare them within the scope of her official capacity as a city council member. Arthur West submitted a public records request to the City of Puyallup, asking for all records sent or received at Julie Door's Facebook site, "Friends of Julie Door." The City claimed that the site did not contain public records even though the posts on the site primarily contained information regarding City activities. The court explained that although Facebook posts by city officials can be public records under some circumstances, the posts on Door's page were not public records because Door did not prepare them within the scope of her employment or in her official capacity as a council member, she was not conducting City business through the site, and she was not furthering the City's interests.

Attorney General Opinions

Parent Conferences

2018 Op. Att'y Gen. No. 3 (2/16/18)

Responding to a request from the State Board of Education, the Washington Attorney General issued an opinion concluding that days devoted entirely to parent conferences likely count toward the statutory minimum of 180 school days required by RCW 28A.150.220(5)(a). That provision requires each school district to offer a minimum of 180 "school days" each year. The State Board of Education has operated under the view that a day devoted to parent conferences is not a "school day" because conferences are included in the statutory definition of "instructional hours," but are not included in the statutory definition of a "school day." For this reason, the State Board requires a school district to request a waiver from the 180-day rule if the district wants to dismiss students for the entire day in order to hold parent conferences. Prior to 2011, state law defined a "school day" as one in which students were engaged in "educational activity." The definition of "instructional hours" also uses the phrase "educational activity" and expressly includes parent conferences. A 2011 amendment to the definition of "school day" changed the phrase "educational activity" to "academic and career and technical instruction," but because this

amendment does not clearly contradict the historical meaning of the statute, the Attorney General concluded a day devoted to parent conferences would likely count toward the 180-day statutory minimum school year. Because alternative readings of the statutes are possible, the Attorney General also invited the State Board of Education to issue administrative regulations or request legislation clarifying these definitions.

PERC

Timeliness of Complaint

Federal Way School District
No. 12827 (1/30/18)

PERC dismissed employee allegations of union interference because the complaint was untimely. A ULP complaint must be filed within six months after the ULP occurred. When multiple ULPs occur as part of a larger event, each ULP occurrence may independently trigger its own six-month statute of limitations. The complaint in this case identified twelve instances of union interference that allegedly occurred over the course of eight years. Because the most recent event occurred more than six months before the complaint was filed, PERC dismissed the complaint. PERC rejected the employee's generalized allegation that one continuing ULP occurred because complainants must allege specific and detailed triggering events

Unit Clarification

Vancouver School District
No. 12832 (2/14/2018)

PERC dismissed the association's unit clarification petition seeking to accrete the position of administrative assistant to two executive directors. The position had been excluded from the bargaining unit since formation of the unit in the 1980s, but the district had recently hired a new incumbent after retirement of a longtime employee. The district argued that the position was excluded by historical agreement and there had been no change in circumstances warranting accretion under WAC 391-35-020(4). The district further argued that the position should be excluded as "confidential." PERC agreed that there was no change in circumstances—i.e., a meaningful change in the employee's duties, responsibilities, or working conditions. Specifically, PERC reiterated that filling a position with a successor employee is not a change in circumstances when there is no material change in duties. PERC also stated that the existing bargaining unit was not the only appropriate potential unit for this position. PERC reminded the union that a representation petition would be the proper method to address historically unrepresented positions.

Remedy, Interference and Discrimination

King County
No. 12582-B (2/15/18)

PERC reversed a hearing examiner order and amended the remedy for an unfair labor practice when an employer unilaterally modified a vacation approval policy, ordered employees not to discuss the pending ULP proceedings and removed an employee from a lead position after that employee had vigorously contested the modified policy. First, although the hearing examiner found the unilateral modification to the vacation approval policy to be a ULP, PERC held that the examiner's remedy for the ULP was inadequate. The standard remedy for a unilateral change violation is for the employer to restore the status quo and compensate employees for lost wages and benefits with interest. Because the examiner had failed to order money damages, PERC ordered the employer to pay back all wages and benefits necessary to make employees whole. Second, PERC held that the employer interfered with employee rights by asking bargaining unit employees not to discuss the

upcoming ULP hearing. Even though the employer had no malintent and merely desired to create a "comfortable work environment," PERC held that discussing ULP proceedings among themselves is a protected employee activity. Finally, PERC held the employer liable for unlawful discrimination. The employer had taken several adverse actions against a particular employee, including the removal of the employee from a lead position, in response to the employee's confrontational demeanor during grievance and management team meetings. In rare instances, an employee's behavior may be so unreasonable that his or her union activity becomes unprotected from employer reprisal, however, challenging management in an abrasive and confrontational manner does not alone constitute the "extreme" behavior necessary to lose protection.

Interference and Domination

Warden School District
No. 12778-A (2/23/18)

A school board member interfered with employee rights by sending a belittling email to the union president. There was no interference violation, however, when the board member sent an equally belittling email and directed demeaning comments exclusively to the union's professional representative. Interference with employee rights occurs when an employer's actions, statements, or written communications could reasonably be perceived by an employee as a threat of reprisal or force associated with union activity. The question is whether an *employee* could reasonably perceive the employer's comments as threatening—not how a typical union official would perceive them. The email directed at the union president constituted interference because the president was an employee and could reasonably have interpreted the email as threatening. The email and comments aimed at the union representative, by contrast, were not witnessed by any rank and file unit members and therefor did not impact any employee rights.

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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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