WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

April 2020

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

PFR Announcements

Public Records Disclosure Training

Two Union Square Conference Center, Seattle

The training previously scheduled for May 5 has been postponed to later in the year. More information will be forthcoming when a specific date can be finalized. In the interim, please feel free to send any questions about this training to info@pfrwa.com.

COVID-19 Guidance

pfrwa.com/resources.php

PFR attorneys have been closely tracking and analyzing the laws, regulations and governmental guidance published in response to the novel coronavirus pandemic. Memoranda summarizing the leave provisions of the federal Families First Coronavirus Response Act (FFCRA), the classification of school employees as essential critical infrastructure workers under Governor Inslee's Proclamation 20-25, and changes to the Open Public Meetings Act and Public Records Act under Governor Inslee's Proclamation 20-28 are available on the PFR website under the "Resources" tab. Any subsequent memoranda related to the novel coronavirus pandemic will be posted there as well.

Ninth Circuit Court of Appeals

Equal Pay Act

Rizo v. Yovino

No. 16-15372 (2/27/20)

The Ninth Circuit Court of Appeals held that an employee's salary with a previous employer does not provide an affirmative defense to a sex-based pay discrimination claim under the federal Equal Pay Act (EPA). The Fresno County Office of Education hired Aileen Rizo as a math consultant and positioned her on the salary schedule based on a 5% pay increase over her salary with her previous employer. Rizo was the only female math consultant for the County when she learned that all of her male colleagues' salaries—including the salary of a newly hired male math consultant—were higher than hers even though she had more education and experience. The County explained to Rizo that her salary was consistent with its policy of starting employees at salaries 5% above their salaries with their previous employers. Rizo sued the County for sex discrimination under the EPA and several other federal and state statutes. The County moved for summary judgment, arguing that the affirmative defense available to EPA

defendants who can establish that differential pay is based on "any other factor other than sex" applied to the County's prior pay policy. The district court denied the County's motion for summary judgment, distinguishing a prior Ninth Circuit case, *Koubo v. Allstate Insurance Co.*, which held that the EPA did not prohibit employers from "reasonably" considering prior pay to advance "an acceptable business reason." The Court of Appeals affirmed the trial court. The Court held that the "factor other than sex" affirmative defense is only available when differential pay is attributable only to job-related factors. Next, the Court overturned *Koubo* and held that an employer may not rely on prior pay to demonstrate that sex played no part in a decision resulting in differential pay because an employee's prior rate of pay could itself be the result of sex-based discrimination.

Washington Court of Appeals

Public Employee Retirement Benefits

Sloma v. Washington State Department of Retirement Systems
No. 53054-6-II (3/03/20)

The Washington State Court of Appeals held that the retirement benefits of a Public Employees Retirement System (PERS) eligible retiree who returns to PERS-eligible employment and then re-retires will not be recalculated if that PERS member elected to receive a refund of any contributions the member made to the Department of Retirement Systems (DRS) after achieving thirty years of PERS-eligible service time. Upon reaching thirty years of PERS-eligible service time in 2004, Donald Sloma elected under RCW 41.40.191 to receive a refund of the contributions he made to DRS after he reached thirty years of eligible service time. RCW 41.40.191 states that this post-thirty-year election is "irrevocable" and requires that the retirement benefits of an employee who makes this election be calculated based on the employee's average final compensation (AFC) as of the date of the election. Sloma received the refund and began collecting monthly retiree benefits when he retired a few months later, but he returned to work in a higher-salary PERS-eligible position from 2012-2015 under the assumption that, upon his re-retirement, his monthly benefit would be recalculated using a higher AFC that included his 2012-2015 salary. After Sloma's 2015 re-retirement, DRS paid him monthly retirement benefits based only on compensation he had earned prior to his 2004 post-thirty-year election. Sloma appealed after DRS's decision was affirmed in superior court, arguing that DRS had misinterpreted RCW 41.40.191 by applying the statute beyond a member's first retirement. The Court of Appeals held that DRS's decision was consistent with the requirements of RCW 41.40.191 that the retirement benefits of a member who irrevocably elected to enroll in the post-thirty-year program be calculated using the member's AFC as of the time of that election, regardless of whether the member is retiring for the first time or is re-retiring.

PERC

Refusal to Bargain

Pasco School District
No. 13173 (3/17/20)

A PERC Examiner held that the Pasco School District did not commit either a refusal to bargain or a unilateral change unfair labor practice (ULP) while bargaining elementary teacher planning periods and student discipline frameworks. When the District and the union engaged in bargaining to resolve issues arising from a 13-minute planning period that had been added onto elementary teachers' lunch periods, the union claimed that the District engaged in regressive bargaining and that the District's bargainers lacked sufficient authority to represent the District during negotiations. The

union also accused the District of committing a unilateral implementation ULP by enacting a new student discipline policy and procedure pursuant to changes in state law requiring school districts to adopt student discipline policies based on a multi-tiered system of support (MTSS). In response to the union's concerns, the District and the Union entered into memoranda of understanding establishing a joint committee on student discipline and recognizing one such MTSS framework, Positive Behavior Intervention and Support (PBIS), as a voluntary framework that no teacher would be required to implement. The District proposed during bargaining for the 2018-2020 CBA that the District and the union jointly develop a PBIS framework, as recommended by the joint committee, but no agreement could be reached by the time the District adopted a student discipline policy and procedure which identified PBIS as one of four student discipline strategies that aligned with an MTSS framework. The District's last proposal during bargaining on student discipline would allow teachers who did not want to adopt PBIS to use a different framework if it met the state's MTSS standards. The Examiner held that the District had not refused to bargain over elementary planning time because the District met with the union at regular intervals and regularly modified proposals based on feedback from the union. The Examiner also found no evidence that the District's bargaining team lacked sufficient authority to engage in meaningful bargaining and reach tentative agreements despite not having final authority to legally bind the District. The Examiner also held that the District had not unilaterally implemented the student discipline policy because the changes in state statute and regulations created a legal necessity, and because the District had provided the union notice of the state-mandated changes and continued to bargain on the topic.

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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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