WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

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

Washington Court of Appeals

Public Records Act

SEIU 775 v. State
No. 48881-7-II (4/25/17)

The Court of Appeals held that even where disclosure of requested records would constitute a ULP, the Public Employees Collective Bargaining Act (PECBA), Chapter 41.56 RCW, does not provide an "other statute" exemption under RCW 42.56.070(1). The Freedom Foundation made a public records request to DSHS for the times and locations of meetings that SEIU-represented providers of services to functionally disabled persons were required to attend. SEIU sought an injunction to prevent DSHS from disclosing the requested records. The trial court denied the request for injunction, and SEIU appealed. SEIU argued that PECBA prohibits employers from committing a ULP, and that DSHS's release of the requested records would constitute a ULP, so PECBA provides an "other statute" exemption from public disclosure. The Court of Appeals disagreed and affirmed, holding that PECBA did not provide an "other statute" exemption under RCW 42.56.070(1) that would exempt the requested records. It relied on the 2016 Washington Supreme Court case *John Doe A v. Wash. State Patrol*, in which the Supreme Court held that a statute qualifies as an "other statute" exemption only where it expressly prohibits or exempts the release of records. The Court of Appeals noted that no PECBA provision expressly prohibits a public employer from releasing records or even addresses the release of records or the privacy or confidentiality of information. For that reason, the Court affirmed the trial court's denial of SEIU's request for an injunction preventing DSHS from disclosing the requested records.

Duty of Good Faith and Fair Dealing

Nova Contracting, Inc. v. City of Olympia
No. 48644-0-II (4/18/17) (unpublished)

The Court of Appeals reversed summary judgment for a city on a breach of contract claim when the city allegedly made it unreasonably difficult for the contractor to complete a construction project. The City of Olympia invited bids to replace a culvert underneath a paved bike trail, and accepted contractor Nova's bid. The contract between the parties required Nova to send several submittals for the City engineer to approve before construction could begin. The contract also required Nova to complete the work within 45 days after the City issued a notice to proceed, and made

Nova liable for liquidated damages for each day Nova failed to complete the project on time. Problems abounded. When the City issued the notice to proceed, Nova was unable to mobilize because of delays in the submission and approval of the submittals. The City continued to reject Nova's submittals and re-submittals. The City eventually sent Nova a letter stating that it considered Nova to be in material default because the City believed that Nova would not complete the project in time. The City then terminated the contract. Nova filed a lawsuit alleging breach of contract, and the City counterclaimed, also alleging breach. The City moved for summary judgment, arguing that it properly terminated the contract and that Nova was liable for liquidated damages. The trial court granted summary judgment. On appeal, the Court reversed. Nova argued that the City had a duty of good faith and fair dealing, and that questions of fact existed concerning whether the City breached the duty when considering Nova's submittals. The Court held that the City was subject to the duty of good faith and fair dealing because the contract gave the City discretionary authority, not unconditional authority, to accept or reject Nova's submittals. Nova's expert had stated that the City's requirements were nonsensical or impossible, that the City engaged in "gotcha" review of the submittals, and that Nova was faced with moving targets. The Court held that viewing that evidence in a light favorable to Nova, the trial court erred in granting summary judgment.

Washington Attorney General

Immigration Enforcement

Guidance Concerning Immigration Enforcement (4/6/17)

The Attorney General issued guidance on immigration enforcement for local governments, including advice directed at school districts. The guidance states that school districts are prohibited from releasing student information and records to other entities (including federal immigration agencies) absent an exception to the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and suggests adopting a policy affirming that employees are not required to share immigration information absent a separate legal requirement. The AG also states that while public schools can discourage ICE from operating on campus, "as a legal and practical matter, an institution may be unable to prevent ICE officials and agents from coming onto public portions of a campus without a warrant." The guidance states that an institution could deny officials access to those areas not open to the general public absent a warrant. School districts should check any warrant presented to check that it is signed by a judge, identifies the agency with authority to search, identifies the search locations, includes the correct date and has not expired, and references a specific person. The guidance also advises that districts encourage families to plan for unexpected detention of a child's parents or caregivers.

PERC

Duty to Bargain in Good Faith

City of Everett
Decision 12671 (3/23/17)

A PERC Examiner held that the union committed an unfair labor practice when it insisted to impasse on a bargaining proposal involving shift staffing levels because it was a nonmandatory subject of bargaining. Although the parties had previously participated in an interest arbitration that found shift staffing to be a mandatory subject of bargaining, such proceedings are not a controlling authority for PERC because the legislature has charged PERC with determining whether specific issues are mandatory subjects of bargaining, not

interest arbitrators. PERC found that the shift staffing proposal was a nonmandatory subject of bargaining because the employees' interest in wages, hours, and working conditions, as reflected by their safety concerns regarding shift staffing levels, are outweighed by the employer's interest in maintaining entrepreneurial control and exercising management prerogative over shift staffing levels.

Employer Interference

Seattle School Dist.
Decision 12672 (3/23/17)

In this lengthy decision that addressed allegations of 12 unfair labor practices, a PERC Examiner held that the employer committed an unfair labor practice by interfering with employee rights on two occasions when a principal sent emails to union representatives and members that discouraged union activity and could reasonably be perceived as containing threats of reprisal for engaging in protected union activities. PERC dismissed all other allegations of interference and all allegations of employer domination and discrimination. In order to establish interference, a union must demonstrate that 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 an employee. A union is not required to prove an employee engaged in protected union activity. PERC held that a principal committed interference by sending an email after union representatives held a meeting with her to express their concerns about her performance. Although the meeting regarding the principal's performance was not protected union activity, her email stating that union representatives should "refrain from negative secret conversations that divide and separate us" could be interpreted as discouraging conversations with the union, which is protected union activity. PERC dismissed one of the allegations of interference because it concerned an email sent to a non-employee union representative, not a union employee, and because the other recipient of the email was an employee who also served as a union representative. The fact that the employee was a union representative was significant because PERC precedent states that employer and union representatives need to be able to share their frustrations with each other, which permits harsher words and criticisms to be exchanged between employers and union representatives than between employers and rank-and-file bargaining unit employees.

Decertification

Chimacum School Dist.
Decision 12623-A (3/24/17)

In a decision addressing an issue of first impression before the Commission, PERC held that a decertification petition filed the same day the union's membership ratified a successor to an expired CBA but before the employer ratified the agreement was timely and not subject to a contract bar. The contract bar doctrine stabilizes the bargaining relationship between the parties, and provides limitations regarding when questions concerning representation may be addressed. If a collective bargaining agreement is expired, a decertification petition may be filed at any time. A public employer and an exclusive bargaining representative do not have an agreement that creates a contract bar until the parties reach an agreement that is set forth in writing, signed by the parties, and ratified by the employer. In this case, although the parties had reached a tentative agreement on the CBA, but it had not been ratified by every party, so therefore a contract bar did not exist.

Interference; Discrimination

State—Agriculture
Decision 12676 (4/7/17)

A PERC Examiner held that the union failed to meet its burden of proof related to multiple allegations of interference and discrimination ULPs by the employer. To prove an interference violation the union must prove by a preponderance of evidence that an employee could reasonably perceive the employer's action as a threat of reprisal or force associated with the union activity of the employee or other employees. To prove discrimination, the union must show that the employee was deprived of some ascertainable right, benefit, or status. The first allegation of interference was dismissed because the union failed to prove that the manager made the statement at issue ("getting the union involved would hurt your career") and because the other statements concerned the employee's work performance, not his union activity. PERC dismissed the second allegation of interference because encouraging an employee to speak with a supervisor before filing a complaint does not in itself constitute interference. PERC held that the employer did not discriminate against the employee when it denied his leave requests because there were legitimate concerns about adequate coverage during the time periods for which the leave was requested. PERC also held that the employer did not discriminate against the employee by refusing to sign off on daily time submittals because no ascertainable benefit was denied when the employee was paid for all time worked for the time period at issue.

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