WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

May 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

ADA Qualified Individual

Anthony v. TRAX Int'l Corp.
No. 18-15662 (4/17/20)

The Ninth Circuit Court of Appeals held that the Americans with Disabilities Act (ADA) does not preclude the use of evidence that an employee was not a "qualified individual" that the employer acquired after the time of an adverse employment decision. An employee took leave under the Family and Medical Leave Act (FMLA) to address her post-traumatic stress disorder and related anxiety and depression. The employer denied the employee's request to work from home at the end of her initial period of FMLA leave, extended her FMLA leave by 30 days, and notified the employee that she would be fired at the end of that period unless she provided a doctor's release for her to return to work with no restrictions by the time her extended leave expired. The employee never submitted a doctor's release and was terminated at the end of her FMLA leave. The employee sued the employer for disability discrimination under the ADA, alleging that the employer terminated her because of her disability without engaging in an

interactive process to find her a reasonable accommodation. During litigation, the employer learned that the employee lacked the bachelor's degree required for her position, contrary to the employee's representation on her job application. The trial court granted summary judgment in favor of the employer on the basis that the employee was not a "qualified individual" under the ADA since she lacked the required bachelor's degree at the time of her termination, but the trial court did not address whether the employer failed to engage in the interactive process to identify reasonable accommodations. The Court of Appeals affirmed the trial court. The Court held that after-acquired evidence may be used to show that an individual is not qualified under the ADA since an employee must first establish that the employee is a "qualified individual" as part of the prima facie disability discrimination case before the burden will shift to the employer to establish that there was a legitimate, nondiscriminatory reason for the employer's adverse action. The Court held that because it was undisputed that the employee did not possess the requisite job qualifications, she could not establish that she was a qualified individual. The Court also held that the employer was not obligated to engage in the process to find a reasonable accommodation because the employee was not a qualified individual.

Attorney General Opinions

Competitive Bidding

2020 Op. Att'y Gen. No. 1 (4/21/20)

The Attorney General's Office (AGO) was asked to provide a formal legal opinion on the question of whether a school district can enter into an interlocal agreement with an educational service district (ESD) for construction management services, value engineering reviews, constructability reviews, building commissioning, and "other public works" without seeking competitive bids. The AGO concluded that school districts may only enter into such interlocal agreements without competitive bidding if a project's estimated cost is less than the $100,000 threshold found in RCW 28A.335.190(4), unless the contract is awarded using the small works roster process or any other procedure authorized for school districts. Various provisions of Title 392 WAC require school districts that participate in a state construction assistance program to use construction management services, value engineering reviews, constructability reviews, and building commissioning. The AGO concluded that those four categories of services qualify as "other work," as used in RCW 28A.335.190(1), that is subject to RCW 28A.335.190(4)'s competitive bidding requirements for a "public works project." The AGO further concluded that "other public works" beyond the four specific services discussed above are likewise subject to competitive bidding requirements under RCW 28A.335.190(4) unless their estimated cost falls below $100,000 or if the work is completed through a small works roster, and that those competitive bidding requirements cannot be avoided by a school district entering into an interlocal agreement with an ESD.

PERC

Unilateral Change

Ben Franklin Transit
No. 13910 (4/21/20)

A PERC examiner held that Ben Franklin Transit did not commit a unilateral change unfair labor practice (ULP) by restricting coach operators' shop stewards' access to the transit dispatch office. The public transit agency's dispatchers performed routing and operator assignment duties from an office where they also maintained physical copies of operator records such as daily sign-in and sign-out sheets, leave documentation, and operator route bids. The operators and their shop stewards

could access the dispatch office at any time to request these records from dispatchers for the purpose of verifying that operator assignments and time off were administered according to the terms of their collective bargaining agreement, but operators also distracted dispatchers from their dispatch duties by entering and congregating in the dispatch office. To address ongoing dispatch errors and allow dispatchers to better concentrate, the employer unilaterally required that the dispatch office be locked at all times and required that any business between dispatchers and operators (including shop stewards) occur at a service window into the office. The shop stewards argued that their ability to detect and address potential grievances would be inhibited by requiring them to request and examine these records from outside of the dispatch office. The examiner held that the employer did not commit a unilateral change ULP, concluding that the employer's decision was a permissive subject of bargaining since the employer's management interest in reducing dispatch errors and increasing efficiency by restricting access to the dispatch office, along with the public's interest in an efficient transit system, outweighed the union's interest in accessing the physical space of the dispatch office.

Duty to Provide Information

Island County
No. 13182 (4/7/20)

A PERC examiner held that Island County committed a refusal to bargain unfair labor practice (ULP) by refusing to provide information that its Deputy Sheriffs union requested and by charging excessive copying or scanning fees. The union requested 29 items of information or documentation from the County under Chapter 41.56 RCW and the Public Records Act as the parties prepared to enter interest arbitration. The County provided records to the union on a thumb drive, but the union soon realized that the records were not complete and advised the County of which responses were deficient via email. The union then filed a ULP complaint regarding the County's alleged refusal to provide information, and the interest arbitration was subsequently suspended. The examiner evaluated all of the County's responses to the union's requests and found that the County's incomplete responses amounted to a refusal to provide information for a number of reasons. First, the County failed to adequately respond to the union's request for the factors used to determine jurisdictions for salary comparisons, the terms and conditions for employees at those jurisdictions, or the status of the labor contracts in those jurisdictions by failing to provide the supporting data or failing to explain that certain data was unavailable. Second, the examiner held that the County violated its duty to provide information by initially attempting to charge the union 25 cents per page for photocopies and scans of wage surveys, which the examiner noted was in excess of the fees authorized by the Public Records Act. Third, the County only provided civil service records from 2013 to the present in response to the union's request for civil service records from 2005 through the present, and failed to disclose to the union that it had been unable to locate any documents for the years 2005-2012. Fourth, the County failed to disclose some of the requested records until the day after the ULP was filed, and had not fully responded to some of the requests at the time of the instant decision.

Porter Foster Rorick

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.

Update Editors

Elliott Okantey
elliott@pfrwa.com

Jay Schulkin
jay@pfrwa.com

PORTER FOSTER RORICK LLP
601 Union Street | Suite 800
Seattle, Washington 98101
Tel (206) 622-0203 | Fax (206) 223-2003
www.pfrwa.com

Lance Andree
Lynette Baisch
Cliff Foster
Tevon Edwards
Jeff Ganson
Kathleen Haggard
Parker Howell
Lauren McElroy
Rachel Miller
Elliott Okantey
Buzz Porter
Liz Robertson
Mike Rorick
Jay Schulkin
Valerie Walker
Christina Weidner
Lorraine Wilson