WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

May 2023

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

Ninth Circuit Court of Appeals

Religious Accommodation

Bolden-Hardge v. California State Controller
No. 21-15660 (4/3/23)

The Ninth Circuit Court of Appeals reversed dismissal of a state employee's religious accommodation challenge to a public employee loyalty oath mandated by the California state constitution. The California Constitution requires all public employees (with certain narrow exceptions) to swear or affirm that they will support and defend the federal and state constitutions against all enemies and will "bear true faith and allegiance" to those constitutions. Brianna Bolden-Hardge, a devout Jehovah's Witness, began working for the California Franchise Tax Board in 2016 without first signing the loyalty oath. The next year, she was offered a higher-paying position at the California Office of the State Controller, which she accepted. The Controller's Office asked Bolden-Hardge to sign the California loyalty oath, which she believed violated her religious beliefs that mandate her allegiance is "first and foremost to the Kingdom of God." Because the oath required her to swear "true faith and allegiance" to the state and federal constitutions in violation of her faith, Bolden-Hardge requested an accommodation to sign the oath with an attached addendum stating that her allegiance was first and foremost to God. This request was denied, and after Bolden-Hardge refused to sign the oath, the Controller's Office rescinded the job offer. Bolden-Hardge filed a lawsuit in federal court against the Controller's Office and the California State Controller in her official capacity, alleging in part that their refusal to allow her addendum to the oath violated Title VII of the 1964 Civil Rights Act, which prohibits an employer from denying a job to an applicant because of their religion. The district court dismissed Bolden-Hardge's complaint for failing to state a claim, holding that the alleged facts did not support a prima facie claim that the Controller's Office failed to accommodate her religious beliefs. The Ninth Circuit reversed, holding that Bolden-Hardge had adequately pleaded a conflict between her job requirements and religious beliefs, noting that the burden to allege a conflict with religion is "minimal," and that the oath could be reasonably understood as requiring a state employee to swear allegiance to the federal and state constitutions over their allegiance to God. The Court noted that the Controller's Office may be able to rebut Bolden-Hardge's claim by demonstrating that accommodating her religious beliefs posed an undue hardship. However, since the case was dismissed on a motion to dismiss for failure to state

a claim, the Court held that there was insufficient evidence to support an undue hardship defense at this stage of the proceedings, and remanded the case to the district court for further proceedings.

Washington Supreme Court

Recall

In re Recall of Bird
No. 100976-3 (4/27/23)

The Washington Supreme Court held that recall petitions filed against three Richland School District Board members could proceed to public vote, concluding that charges that the Board members had knowingly violated statewide COVID-19 mandates when they voted to make facemasks optional in Richland schools during the 2021-22 school year were factually and legally sufficient to be put before voters. In early 2022, by order of the governor and secretary of health, face coverings were required to be worn in most indoor settings in Washington, including in public schools. Around this time, the Richland Board began discussing options for removing the mask mandate from its schools and Board meetings. The Board sought advice from multiple attorneys, who consistently advised them that the District was required to follow the mandates, and that the Board could not vote to remove masks in contradiction of those mandates. Nonetheless, on February 15, 2022, the Board held a special meeting, during which Board member M. Semi Bird made a motion that the Board vote to "go to mask choice in the Richland School District." Board members Audra Byrd and Kari Williams supported the motion. The other two Board members voted no, explaining that the motion was not provided ahead of time or properly noted on the agenda, which only described the purpose of the meeting as "Resolution No. 940—Local Control." The next day, the superintendent closed the schools and held an emergency meeting to discuss the legality of the Board decision. The Board took no action to reverse its decision, and Richland schools remained closed the following day. The Board held another emergency meeting on February 17, and all Board members except for Bird voted to modify the effective date of their motion to coincide with the governor's newest projected end to the statewide mask mandate. Richland schools resumed regular operation the next day. In April 2022, a group of Richland voters filed petitions to recall the three Board members who voted to remove the mask mandate at the February 15 meeting. 10 counts were brought against Byrd and Williams, and 12 counts were brought against Bird. The superior court determined that multiple counts against each Board member were factually and legally sufficient, altered some language on the ballot synopses, and dismissed the remaining counts. The three Board members appealed the decision on the remaining counts, and the Washington Supreme Court accepted direct review. The Washington Supreme Court affirmed in part and reversed in part, holding that the counts related to the Board members knowingly violating the OPMA and the statewide mask mandate at the February 15 meeting were factually and legally sufficient to be placed on the ballot for a recall vote. The Court held that the public notice for the special meeting did not specify the "business to be transacted" at the meeting, as required by the OPMA, and the Board members were on notice of this violation given that one member had expressed concern at the meeting that it was not properly noted. The Court further held that the charges related to the adoption of an optional mask policy in schools were sufficient because the action was taken in knowing violation of state law. The Court rejected the Board members' argument that the governor and secretary of health did not have the power to issue such mandate, holding that state statutes expressly give them the authority to mandate masking pursuant to their emergency powers, and the Court held that local school boards could not override

that state-level action. Finally, the Court held that a charge related to the Board members violating their own policy requiring Board members to take "such actions as are necessary to assure compliance with law" was sufficient because the policy provision at issue contained mandatory, rather than optional, language. As a result, the Court held that those factual allegations were sufficient to be placed on a ballot for the voters to decide on recall.

Washington Court of Appeals

Hostile Work Environment

Thomas v. Bethel School District No. 403
No. 57013-1-II (4/25/28) (unpublished)

The Washington Court of Appeals held that a school district administrative assistant failed to sufficiently establish a claim of hostile work environment based upon her interactions with her building principal. Kelli Thomas worked as an administrative assistant to Chris Brauer, an elementary school principal for the Bethel School District. According to Thomas, Brauer had once complimented her on how she looked and, at the end of the day, rubbed her back and told her in a low, "intimate" voice that "it was time to go home." Thomas also claimed that Brauer greeted her with a "bear hug" at a student football training session, and he made comments suggesting that she should make him sandwiches. In February 2018, Thomas reported her concerns to the District's human resources director, who investigated the complaint, including interviewing Thomas and Brauer. Following the investigation, the human resources director concluded that there was enough evidence to "have a conversation" with Brauer regarding his behavior. The human resources director provided Thomas a copy of the District's sexual harassment policy, asked her to review it, and to decide whether she wanted her complaint to be treated as formal or informal. The human resources director also met with Brauer, who agreed that he would immediately modify his interactions with Thomas, including limiting physical contact, limiting personal conversations, and being cognizant of Thomas's personal space. Thomas continued in her position without loss in pay or benefits, and she emailed human resources that she saw an immediate change in Brauer's behaviors. Thomas told human resources that she felt "awkward and uncomfortable" around Brauer after her report, but that she did not feel threatened by him, and Thomas clarified that she intended for her complaint to be processed informally. In March 2018, Thomas accepted a position as registrar at one of the District's middle schools and resigned from her administrative assistant position. In 2021, Thomas filed a complaint against the District in superior court, alleging several claims, including hostile work environment based on sexual harassment. The superior court dismissed Thomas's lawsuit on summary judgment. The Court of Appeals affirmed, holding that Thomas did not show that the complained of conduct was "sufficiently pervasive that it altered the terms and conditions" of her employment, a necessary element of a hostile work environment claim. The court acknowledged that Brauer's behaviors were not appropriate, but noted that the District had met with Brauer and he agreed to immediately modify his behaviors, including limiting physical interactions and personal conversations. Thomas admitted that Brauer's conduct had stopped, and that she continued to work without loss in pay or benefits. Thus, viewing "the totality of the circumstances," the Court held that the conduct was not sufficiently pervasive to alter the terms and conditions of Thomas's employment, and it affirmed dismissal of her hostile work environment claim.

PERC

Discrimination

Washington State Department of Children, Youth, and Families
Decision 13329-B (4/5/23)

A PERC Examiner held that the Washington State Department of Children, Youth, and Families (DCYF) did not commit a discrimination unfair labor practice (ULP) when it terminated an employee for gaining unauthorized access to confidential information in an employer database. Silvia Zarate worked as a social service specialist for the DCYF Field Operations division, a position represented by the Washington Federation of State Employees (Union). Zarate is also a licensed foster parent, and the foster parent licensing program is overseen by the DCYF Licensing Department, a separate department from the one in which Zarate worked. Zarate's position afforded her access to the DCYF's database containing confidential case management and intake data for various aspects of DCYF's operation, including divisions in which she did not work. In January 2020, Child Protective Services (CPS) opened an investigation into allegations that Zarate had engaged in child abuse and neglect in her role as a foster parent. Consistent with DCYF practice, Zarate was placed on an alternate assignment while the investigation was conducted. The CPS investigation resulted in a "founded finding," which meant it was more likely than not that the alleged abuse or neglect had occurred. As a result, DCYF kept Zarate in the alternate assignment and conducted a separate workplace investigation. During that investigation, DCYF discovered that Zarate had used her database credentials to gain unauthorized access to confidential CPS foster parent information unrelated to her work, including viewing her own and a co-worker's case file more than 100 times. Zarate admitted to the unauthorized database access, and following a predisciplinary meeting with DCYF, she sent an email notifying her supervisor that she was "joining in" on a separate pending grievance filed by her Union. DCYF terminated Zarate's employment in December 2020 based on the substantiated conduct of her unauthorized databased access, as well as the "founded finding" related to the child abuse allegations. Zarate filed an unfair labor practice complaint with the Public Employment Relations Commission (PERC), claiming that DCYF terminated her in retaliation for her November letter stating she would be joining a pending Union grievance. A PERC Examiner determined that the letter was protected union activity and that there was a causal connection between that letter and Zarate's termination due to the proximity in time. As a result, Zarate established a prima facie claim of discrimination. However, the examiner determined that DCYF had met its burden to rebut Zarate's discrimination claim by showing a legitimate, nondiscriminatory reason for terminating Zarate's employment (evidence she had accessed the database without authorization). As a result, the examiner dismissed Zarate's complaint, concluding that she had failed to prove DCYF had discriminated against her for engaging in protected union activity.

Unit Clarification

City of Kirkland
Decision 13642 (3/9/23)

The PERC Executive Director held that a newly created technology position for the City of Kirkland was a "confidential employee" that should be excluded from an existing bargaining unit. In response to changing technology needs during the COVID-19 pandemic, the City created a new Resilience and Technology Officer (RTO) position in July 2021. The person hired for this position helped the City bargain policy initiatives for teleworking and reopening the City offices to the public, including a revised telework policy that had not been updated since 2000. The RTO also

helped create the City's reopening plan and helped develop a business continuity plan to prepare for future pandemics and emergencies. Through that process, the RTO worked with the City management team to review and answer union questions, formulate bargaining proposals and counterproposals, and participate in negotiations with the labor unions regarding impact to working conditions. The City also intended for the RTO to assist with upcoming initiatives which will necessitate bargaining over changes to certain employees' working conditions. In September 2021, the Washington State Council of County and City Employees—an existing labor union that represents the City's office clerical, financial, and professional employees—filed a unit clarification petition seeking to include the RTO position in its bargaining unit. The Union argued that the RTO position should be included because, although the person occupying that position participated in management meetings, that person did not make "impactful contributions." Following an evidentiary hearing, the PERC Executive Director dismissed the Union's petition, holding that the RTO position required expertise in policies that guided management in making decisions impacting employees' working conditions, and that the RTO actively participated on behalf of management in back and forth conversations with the Union regarding bargaining proposals, formulating counterproposals, and bargaining over the impact to the employees' working conditions. As a result, the Examiner held that the RTO exercised independent judgment and directly participated in the formulation of labor relations policy, collective bargaining, and administration of the collective bargaining agreements, which created a confidential status exempting the RTO from the bargaining unit. The Examiner further rejected the Union's argument that the City was inappropriately "spreading" confidential duties to multiple employees in an effort to exclude them from the bargaining unit, reasoning that in this case, the City was only seeking to exclude one position and noting that employers are allowed some reasonable number of personnel who are exempt from collective bargaining rights.

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