WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

June 2017

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

Washington Supreme Court

Union Security Provision

Thorpe v. Inslee
No. 92912-2 (5/4/17)

The Supreme Court held that the union security provision contained in a collective bargaining agreement ("CBA") between the State of Washington and SEIU that allows employees to opt out of the union and their obligation to pay union dues is authorized by Chapter 41.56 RCW. The plaintiff who brought suit against the Department of Social and Health Services and SEIU is an individual provider of home care services ("IP"), a category of employees paid by the state who are considered public employees solely for the purpose of collective bargaining. The plaintiff did not initially choose to opt out of the union and missed her window for doing so, and as a result union dues were deducted from her paycheck. She then filed suit, asserting that withholding union dues without express authorization violates RCW 41.56.113, the statute which addresses IP collective bargaining and allows union dues deductions if the CBA includes a union security provision authorized in RCW 41.56.112. The plaintiff argued that the union security provision in the CBA is not valid because it is not an "agency shop" provision which imposes a mandatory financial obligation on every bargaining unit member. Citing PERC, NLRB, and federal labor law precedent, the Court held that a "maintenance of membership" clause—a clause that typically requires union members to maintain union membership as a condition of employment—which allows members to opt out is still a union security provision authorized by RCW 41.56.112. It noted that union security provisions can be crafted within a broad range of options, including combinations of maintenance of membership and agency shop provisions. The Court stated that the goals of union security provisions are to encourage union membership and predictability, and the provision at issue promotes those purposes through the default scheme that requires members to pay dues.

Washington Court of Appeals

Recreational Immunity

Lockner v. Pierce County
No. 48659-8-II (5/9/17) (published)

The Court of Appeals held that the recreational immunity statute, RCW 4.24.120, only applies to

land opened to the public "solely" for recreational purposes, and that it applies to negligence claims as well as to premises liability claims. Lockner was riding her bicycle on the Foothills Trail in Pierce County. The County's website describes the Foothills Trail as "a popular commuter route and recreational destination." The County's Regional Trails Plan envisions the Trail as providing recreation and transportation options. While riding on the trail, Lockner passed a Pierce County Parks and Recreation employee mowing grass on the side of the trail. When Lockner passed the lawnmower, she raised a hand from her handlebars to shield her eyes from debris from the lawnmower. Lockner fell and was hurt. Lockner brought a negligence claim against the County. The County moved for summary judgment, arguing that the recreational immunity statute, RCW 4.24.210, immunized the County from Lockner's claims. The recreational immunity statute generally immunizes landowners who open their land to the public for recreational purposes where no fee is charged. The trial court granted summary judgment in the County's favor. The Court of Appeals reversed. Relying on the dissent's characterization of the majority's opinion in the Washington Supreme Court case *Camicia v. Howard S. Wright Constr. Co.*, the Court of Appeals held that recreational immunity is limited to land opened to the public "solely" for recreational purposes and does not apply to land opened to the public for multiple purposes. Because the County at times characterized the Foothills Trail as a transportation corridor, the Court held that genuine issues of material fact existed regarding whether the trail was opened to the public solely for recreational purposes, and so summary judgment was improper. Additionally, the Court held that the recreational immunity statute applies to negligence claims, not only to premises liability claims.

PERC

Unit Clarification

Vancouver School District
Decision 12685 (4/28/17)

PERC's Executive Director dismissed the union's unit clarification petition because it was not filed within a reasonable period of time after a change in circumstances altering the community of interest for the two positions at issue. The union filed the unit clarification petition to include a historically-excluded position and a newly-created position in the bargaining unit. PERC rules require unit clarification petitions to be filed within a reasonable period of time after a change in circumstances altering the community of interest of the employees or positions at issue. This change in circumstances must be a meaningful change in an employee's duties, responsibilities, or working conditions. The work performed by the positions at issue had essentially remained unchanged since 2005, aside from the addition of other duties to the newly-created position, and the union was not attempting to include those duties as bargaining unit work through its petition. PERC dismissed the unit clarification petition as untimely because the parties have historically excluded the position and work at issue from the bargaining unit and neither the addition of other, non-bargaining unit duties to the new position nor the recent decision to change the software used to perform the work was a significant change in circumstances sufficient to warrant review of the bargaining unit status of either position.

Refusal to Bargain

King County
Decision 12632-A (5/8/17)

PERC held that the new standard it announced in *Central Washington University*, Decision 12305-A,

for refusal to bargain when contracting out bargaining work also applies to situations involving refusal to bargain that arise out of skimming allegations. Applying this test, PERC held that the employer skimmed bargaining unit work in one of the four situations where the union alleged skimming occurred. Under the *Central Washington University* standard, the threshold question in skimming cases is whether the work assigned to non-bargaining unit employees is bargaining unit work. If the work is bargaining unit work, the *City of Richland* balancing test is then applied to determine whether the decision to assign bargaining unit work to non-bargaining unit employees is a mandatory subject of bargaining. The *City of Richland* balancing test weighs the competing interests of the employees in wages, hours, and working conditions against the right of a public sector employer, as a representative of the people, to control the management and direction of government. If the decision is a mandatory subject of bargaining, the next question is whether the employer provided the union with notice and an opportunity to bargain. If it did not, the union will have met its burden to prove the employer refused to bargain by skimming bargaining unit work. In this case, PERC found that the employer skimmed bargaining unit work when it assigned project management of security system work to another unit because transit security projects fall within the union's bargaining unit work, the employer did not provide the union with notice and an opportunity to bargain, and the *City of Richland* balancing test favored the interest of the of the union's employees in wages, hours, and working conditions. PERC was unpersuaded by the employer's argument that the union had to prove the work was "exclusive" bargaining unit work; whether other employees have performed the work is something PERC will consider when determining whether the work is bargaining unit work, but is not determinative.

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