WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

June 2020

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

Washington Court of Appeals

Public Works Contracting

Conway Construction Co. v. City of Puyallup
No. 80649-1 (5/4/20)

The Washington State Court of Appeals held that the City of Puyallup improperly terminated a public works contract when the contractor had not refused to correct rejected work and had resolved safety issues before termination, but reversed an award of attorney fees since the contractor failed to make a pre-trial settlement offer. The City contracted with Conway Construction for a road improvement project. During construction, the City raised concerns about the quality of materials being used, construction defects, and unsafe work conditions that the City reported to the Department of Labor & Industries (L&I). The City sent Conway a notice of suspension and breach of the contract which gave Conway 15 days to address nine items of rejected work and safety rule violations, and suspended operations until L&I deemed the worksite safe. Conway denied any wrongdoing or safety violations but began working with L&I on resolving the City's safety concerns during the 15-day period. The City issued a notice of termination for default and withheld payments at the close of that period, and L&I issued a citation to Conway for a serious safety violation endangering workers shortly thereafter. Conway sued the City for improper termination and breach of contract and was awarded damages, attorney fees, and costs. The Court of Appeals held that the City breached the contract and improperly terminated because Conway had not neglected or refused to correct rejected work as required by the contract's termination provisions and because Conway resolved the safety issues by engaging with L&I during the 15-day pre-termination cure period notwithstanding the post-termination L&I citation, which was for the unsafe work condition that Conway timely cured. However, the Court reversed Conway's attorney fees award because Conway failed to make a pre-trial settlement offer to the City as required under RCW 39.04.240 and RCW 4.84.280.

U.S. District Court

Negligence

Swearingen v. North Thurston School District
No. 3:18-cv-05727 (5/7/20)

The U.S. District Court for the Western District of Washington denied the summary judgment motion of parents of a student who attempted suicide at school, holding that disputed facts regarding

foreseeability and legal causation were matters for the jury to decide. A North Thurston Public Schools student with an individualized educational program (IEP) who had been diagnosed with autism, ADHD, and bipolar disorder began experiencing conflict and harassment with other students. During a session with the school counselor, the student revealed that a classmate had previously talked him out of his intention to "jump off the railing." When the counselor asked the student to rate the seriousness of his suicidal ideation on a one-to-ten scale, the student characterized his previous intention to jump from the railing at 8, but rated any suicidal ideation he had on the day of the counseling session at 1 or 2. The counselor then determined that the student was "low-risk," completed no further risk assessment, and concluded that it was not necessary to fill out a safety plan. Instead, the counselor wrote down a plan that called for keeping tabs on the student, communicating frequently, and ensuring that he felt supported by adults at the school. The counselor informed the school psychologist, the student's case manager, and the assistant principal, but did not comply with the processes prescribed in former RCW 28A.300.285 for reporting, investigating, and resolving incidents of harassment, intimidation, and bullying (HIB) or for convening the student's IEP team to discuss whether incidents of HIB affected his access to a free and appropriate public education. The student made no further reports of serious suicidal ideation before attempting suicide at school by jumping from a second-floor railing six months later after continued conflict and harassment from other students. The student's parents sued the District and moved for partial summary judgment on their negligence claim. Although the Court determined that a school is under a duty to protect students from harm, including a suicide attempt, the Court denied summary judgment because genuine issues of material fact existed with regard to the foreseeability of the student's harm. Specifically, the Court determined that the following issues must be determined by the jury: whether the six months that passed after the student reported serious suicidal ideation to the counselor cut off foreseeability, whether the student was the aggressor in some of the incidents with other students, and whether the parents' decision to take the student off of ADHD medication prescribed to help treat his impulsive behavior could have been a superseding or intervening cause of his suicide attempt. As a result, the Court denied the parents' motion for summary judgment.

Legislation

Public Records Act

RCW 42.56.250

In the 2020 session, the Washington State Legislature made significant changes to RCW 42.56.250, a provision of the Public Records Act ("PRA") that concerns employment records. These changes expand the categories of exempt information found in employment-related files, including but not limited to personnel files. The changes also require public agencies to give third party notice to employees and unions when employee records are requested. These changes are summarized below:

RCW 42.56.250(4). The legislature exempted from disclosure "**payroll deductions** including the amount and identification of the deduction" from personnel records, public employment related records, and volunteer rosters.

RCW 42.56.250(8). The legislature exempted from disclosure **month and year of birth** from personnel files of employees and volunteers.

RCW 42.56.250(12). If a public agency receives a request for information that is located exclusively within an employee's personnel, payroll,

supervisor, or training file, the agency **must provide third party notice** to the employee and the employee's union, if any. The notice must allow a minimum of ten days' notice prior to release of the records. The purpose of the notice is to allow the affected employee and/or union time to seek a court injunction against release if desired. If an injunction is sought, the employee and/or union will have the burden of proving that the material is exempt. The employee and/or union must also prove that the PRA's injunction standard is satisfied, meaning that disclosure "would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions." RCW 42.56.540.

These changes to RCW 42.56.250 take effect on June 11, 2020.

PERC

Duty to Bargain

Whatcom County
Decision 13082-A (5/12/20)

On appeal from the decision of a hearing examiner, the Public Employment Relations Commission held that Whatcom County committed a unilateral change unfair labor practice (ULP) by deducting the maximum allowable employee portion of Paid Family and Medical Leave (PFML) premiums from Sheriff's Deputy Guild employees' wages without bargaining to impasse or engaging in mediation and interest arbitration. Under the PFML statute, leave benefits are funded by monthly premiums apportioned between employers and employees starting January 1, 2019. The statute authorizes employers to deduct up to 100% of the family leave premium and up to 45% of the medical leave premium from employee payroll, but employers can elect to pay all or any portion of the employee share. The collective bargaining agreement in effect on January 1, 2019, was silent on the premium issue. The County and the Guild engaged in negotiations after the County informed the Guild in November of 2018 that the employee share of premiums would be deducted from employee wages starting January 1, 2019. The County wanted Guild members to pay the statutorily authorized maximum employee share of the premiums and the Guild wanted the County to pay the premiums in full. They could not reach an agreement by the time the County began deducting the employee portion of premiums in January of 2019. A PERC examiner granted summary judgment in favor of the County, finding that the County had not unilaterally implemented the statutorily prescribed payroll deductions without bargaining in violation of Chapter 41.56 RCW. The examiner reasoned that the PFML statute constituted a new status quo as of January 1, 2019, and that the County adhered to the new status quo, so there was no unlawful unilateral change to a mandatory subject of bargaining. The Commission reversed the examiner, holding that the payroll deductions were a change to the status quo because Guild members had not been paying the premium before January 1, 2019. The Commission also held that the County committed a ULP by implementing the premium payroll deductions without first bargaining to an agreement or impasse, and without resolving impasse with uniformed personnel through mediation and interest arbitration as required by statute. The Commission ordered the County to cease and desist from deducting the employee premiums from payroll, reimburse Guild members for the premiums already deducted, and negotiate with the Guild through mediation and interest arbitration if necessary.

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