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 Supreme Court

Open Public Meetings Act

Columbia Riverkeeper v. Port of Vancouver USA
No. 92455-4 (6/8/17)

The Washington Supreme Court held that a government entity may only hold an executive session under RCW 42.30.110(1)(c) to discuss the minimum price at which real estate will be offered for sale or lease, but not to discuss all factors comprising that price. In 2013, the Port of Vancouver negotiated a lease that would be the Port's largest single revenue generator. The lease's terms were negotiated by Port staff, and the Port commissioners were not involved in the negotiations. The Port Commission's stated primary role was to vote to accept or deny the lease. The Commission held seven executive sessions to discuss the project. To justify the executive sessions, the Port relied on RCW 42.30.110(1)(c) of the Open Public Meetings Act, which allows government entities to hold executive sessions "[t]o consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price." In those executive sessions, the Commission discussed an array of topics related to the lease. Columbia Riverkeeper sued, alleging that the executive sessions included topics that should have been discussed in a public meeting. The Port moved for summary judgment, and the trial court granted summary judgment as to some of the meetings and denied it as to others. The Supreme Court granted direct review. On appeal, the crux of the dispute was whether the OPMA permits the governing body of a public entity to discuss in executive session all factors influencing the price to sell or lease property, or whether the executive session must have a narrower focus. The Port argued for a broad interpretation by which government entities could "consider in executive session the key deal factors that drive the minimum price." Riverkeeper argued for a narrow interpretation which would limit discussion to "the least amount of money to be accepted for a lease." The Court reversed the grant of summary judgment and held that the clear language of the statute limits discussion in executive session to consideration of the lowest acceptable value to sell or lease property, but that to the extent that various factors directly alter the lowest acceptable value, the governing body may discuss how these factors impact the minimum price. The Court further held that RCW 42.30.110(1)(c) does not permit a general discussion of the contextual factors

themselves; instead, any such general discussion must occur at an open public meeting. Once the relevant factors have been discussed in public session, the governing body can move to executive session to consider a minimum price. The Court rejected concerns that its holding would jeopardize the Port's negotiating power and deferred to the legislature to amend the statute if doing so is necessary to protect public entities' bargaining power.

Minimum Wage Act

Brady v. Autozone Stores, Inc.
No. 93564-5 (6/29/17)

The Washington Supreme Court held that an employer is not automatically liable if an employee misses a meal break, and that where an employee provides evidence that he or she did not receive a meal break, the burden shifts to the employer to show that no violation occurred or that a valid meal break waiver exists. Brady sued Autozone under the Minimum Wage Act seeking unpaid wages for meal breaks that Autozone allegedly withheld. Autozone removed the case to federal district court. The district court certified two questions to the Washington Supreme Court: (1) whether an employer is strictly liable under WAC 296-126-092, the regulation governing meal breaks; and (2) if an employer is not strictly liable under WAC 296-126-092, whether the employee has the burden to prove that the employer did not permit the employee an opportunity to take a meaningful meal break. In answering the first question, the Court gave deference to Department of Labor and Industries Administrative Policy ES.C.6, which states that "[e]mployees may choose to waive the meal period requirements," and held that consistent with the regulation's plain language and L&I's Policy, an employer is not automatically liable if a meal break is missed because the employee may waive the meal break. Regarding the second question, the Court held that an employee asserting a meal break violation can meet his or her prima facie case by providing evidence that he or she did not receive a timely meal break. If the employee makes a prima facie case, the burden shifts to the employer to rebut this by showing that in fact no violation occurred or that a valid waiver exists.

Washington Court of Appeals

Discrimination

Cornwell v. Microsoft Corp.
No. 74919-6-I (6/5/17) (unpublished)

The Court of Appeals held that to prove retaliation under the Washington Law Against Discrimination (WLAD), a plaintiff must prove that the individual who took adverse employment action against the plaintiff had knowledge that the plaintiff had engaged in protected activity—the fact that the employer as a corporate body had such knowledge does not suffice. While a Microsoft employee in 2005, Cornwell threatened or filed litigation against the company (the record available to the Court of Appeals did not make clear whether litigation was ever filed). Cornwell entered into a settlement agreement with Microsoft that included a confidentiality provision. In 2012, during the midst of a performance review in which she eventually received a poor score, she was terminated as part of a reduction in force. She only learned of the poor 2012 score when she unsuccessfully applied for another position at Microsoft in 2014. In 2015, Cornwell filed a complaint alleging retaliation under the WLAD, asserting that the poor 2012 performance review was retaliation for her earlier protected activity. The trial court granted summary judgment in Microsoft's favor, stating that there was no evidence that the supervisor who gave her a poor review had any knowledge of an earlier WLAD complaint. The Court of Appeals affirmed.

Cornwell argued that the Court of Appeals should adopt a "general corporate knowledge" principle for retaliation cases under which a plaintiff would not need to show that the individual who took adverse employment action against the plaintiff knew of the plaintiff's protected activity, but instead, would need to show only that the employer as a whole had "general corporate knowledge" of the protected activity. The Court rejected this approach, instead following the established standard that a plaintiff must prove that the individual who took adverse employment action had personal knowledge that the plaintiff had engaged in protected activity.

Negligence

Hendrickson v. Moses Lake School District
No. 34197-6-III (6/8/17) (published)

Where the trial court failed to give a jury instruction about a school district's heightened duty of care in a negligence lawsuit against the district, the Court of Appeals held that that failure could have impacted the jury's verdict for the district and reversed. A student suffered a thumb injury during her shop class and brought a negligence action against the school district, alleging three distinct types of duties and breach. The trial court declined to give a proposed jury instruction explaining that a school district has a special relationship with its students, and thus a heightened duty of care. The jury found that the district was negligent, but that the district's negligence was not a proximate cause of the student's injury. The jury made no findings as to whether negligence pertained to one theory, two theories, or all three. The student appealed, and the Court of Appeals reversed and remanded for a new trial. The Court stated that there was no serious dispute over whether the trial court should have issued an instruction explaining the district's heightened duty of care. The issue was whether the absence of such an instruction prejudiced the jury's verdict. The Court held that, given the jury's failure to make a finding regarding which of the student's three theories constituted negligence by the district, the trial court's failure to advise the jury as to the district's enhanced duty of care could have made a difference in the jury's causation analysis. The Court also held that the district's enhanced duty of care did not prohibit the district from asserting contributory negligence. The dissent argued that because the jury heard all three of the student's theories of liability and determined that none were the cause of the injury, the jury's verdict should be affirmed.

Public Records Act

Rufin v. City of Seattle
No. 74825-4-I (6/26/17) (published)

The Court of Appeals held that the City of Seattle's PRA response was timely even where it came too late for the records to be used in a separate civil trial, and that CR 68 applies in PRA actions. Rufin, a former City of Seattle employee, made numerous public records requests to the City in connection with a retaliation lawsuit she was bringing against the City. Three of the requests were at issue in the appeal. In the first request, Rufin asked for all emails containing her name sent to or from four particular City employees. In the second request, made shortly before her retaliation trial, she requested various payroll records and wrote that "TIME IS OF THE ESSENCE" given the upcoming trial. In the third request, she asked for various hiring files, again stating that time was of the essence given her upcoming trial. The City provided a five-day notice in response to the first two requests, but not the third. The City did not provide the requested records in time for the retaliation trial. Rufin brought a PRA suit. The City made a CR 68 offer of judgment, but Rufin rejected the offer. Following a bench trial on four of the PRA requests, the trial court awarded a small judgment for one PRA violation and found that CR

68 does not apply in PRA cases. Rufin appealed dismissal of three of her PRA claims, and the City cross-appealed the trial court's finding that CR 68 does not apply to the PRA. The Court of Appeals affirmed in part and reversed in part. The Court held that the City's search in the first request was reasonable where it failed to find a particular responsive email in the accounts of the four specific employees but where the email existed in another employee's account. The Court next held that the City produced responsive documents within a reasonable amount of time even though they were provided after Rufin's retaliation trial. Next, the Court held that the trial court erred by finding no PRA violation where the City failed to provide a response to the third request within five days. Finally, the Court held that CR 68 applies in PRA actions.

PERC

Union's Duty of Fair Representation

Grays Harbor County
Decision 12695 (5/17/17)

At a preliminary stage in the ULP process PERC dismissed a union member's complaint alleging the union breached its duty of fair representation because the allegations fell outside of the six-month statute of limitations and failed to include anything more than dissatisfaction with a union representative's actions. PERC uses three standards to measure whether a union has breached its duty of fair representation: (1) the union must treat all factions and segments of its membership without hostility or discrimination; (2) the union's broad discretion to assert the rights of individual members must be exercised in complete good faith and honesty; and (3) the union must avoid arbitrary conduct. PERC held that the alleged facts, which included the union refusing to investigate complaints and file grievances, discussing issues related to the employee's employment with the employer against the wishes of the employee, negotiating changes to the CBA in response to a grievance, and assisting the employer by sharing information about union members, did not violate any of the three standards applicable to the union's duty of fair representation. A union is not required to accomplish the goals of or provide complete satisfaction for each bargaining unit member. In this case, the employee failed to explain how the union's actions were arbitrary, discriminatory, or in bad faith.

Timeliness of Petition

University of Washington
Decision 12696 (5/26/17)

PERC held that the union's petition to include part-time employees in the same bargaining unit as full-time employees was untimely because the union did not notify the employer of this desire during contract negotiations. Unless there is a substantial change in circumstances that warrants the inclusion or exclusion of employees from the bargaining unit, WAC 391-35-020(2)(a) requires a party seeking to include or exclude supervisory or part-time employees from a bargaining unit to place the other party on notice during negotiations that it would contest the inclusion or exclusion of the employees. The petitioning party must also file its unit clarification petition prior to signing the CBA. The union failed to put the employer on notice of its challenge of the exclusion of part-time employees during negotiations and did not file the unit clarification petition prior to signing the CBA, and therefore the petition was untimely and dismissed.

Union's Duty of Fair Representation

City of Seattle
Decision 12697 (5/30/17)

At a preliminary stage in the ULP process PERC dismissed portions of 17 complaints filed by union members alleging that the union violated its duty of fair representation by tentatively agreeing to provisions for a new CBA that were less attractive to those employees than to other members of the bargaining unit. PERC held that the tentative agreement for a one-time ratification incentive for the other bargaining unit members was not arbitrary, discriminatory, or in bad faith. Further, it stated that "[t]here is no statutory requirement that a union must accomplish the goals of each bargaining unit member or job classification, and complete satisfaction of all represented employees is not expected."

Employer Domination

Snohomish County
Decision 12723 (6/8/17)

PERC held that one of the union's allegations involving employer domination failed to state a cause of action because it did not describe facts that suggest the employer unlawfully rendered assistance to the union. An employer violates RCW 41.56.140(2) when it controls, dominates, or interferes with a bargaining representative by involving itself in the internal affairs or finances of the union, or attempts to create, fund, or control a "company union." A domination violation requires proof of employer intent. In order to state a cause of action for employer domination the complaint must describe facts that suggest the employer violated the statute through acts such as rendering assistance to union officers, supporting a company union, or showing favoritism to one union over another during an organizing campaign. The complaint alleged no such acts of assistance, so PERC dismissed the allegation.

Skimming

Everett School District
Decision 12724 (6/9/17)

At a preliminary stage in the ULP process, PERC held that the union's complaint failed to state a cause of action for skimming. The complaint alleged that the employer skimmed bargaining unit work by creating a new position within the bargaining unit and assigning duties to that position that had previously been assigned to other members of the unit. PERC explained that moving work duties from one bargaining unit position to another bargaining unit position does not constitute skimming because the work stays within the bargaining unit.

Appropriateness of Bargaining Unit

Thurston County
Decision 12727 (6/14/17)

PERC held that lieutenants at the Thurston County Corrections facility were appropriately included in a non-supervisory bargaining unit and denied the Thurston County Sherriff's Office Captain's Association's (Association) petition to represent them. In order to sever the employees from the existing bargaining unit, the Association needed to demonstrate either that (1) the petitioned-for employees no longer share a community of interest with the existing bargaining unit, or (2) the incumbent bargaining representative has inadequately represented the petitioned-for employees. PERC then evaluates the appropriateness of the petitioned-for unit and whether the residual unit would maintain its appropriateness. PERC will not grant severance if either unit would be inappropriate. The Association argued that the lieutenants no longer shared a community of interest with the existing unit because they are supervisors. PERC held that they are not supervisors because, among other things, they do not have independent authority to

make hiring decisions and have limited disciplinary authority. The supervisory duties the Association relied upon were nearly the same duties performed by sergeants, union members neither of the parties argued are supervisory. PERC also held that the Association did not demonstrate that the lieutenants' existing bargaining representative provided inadequate representation. The Association presented evidence that some lieutenants were dissatisfied and believed that their issues were not adequately addressed in negotiations, but the fact that some members of a union have unique issues not shared by others is not a basis for severance.

Supervisory Employees

Puyallup School District
Decision 12730 (6/16/17)

PERC clarified the District's bargaining unit to include positions that were previously excluded as supervisory because none of the positions perform a preponderance of supervisory duties nor do they spend a preponderance of their time performing supervisory duties. PERC found that the Payroll Generalist, Accountant II, Benefits Analyst, and Special Services Analyst positions direct employees, evaluate employees, have the authority to approve employee leave, and have the authority to issue written reprimands. However, none of the positions has the independent authority to fire, suspend, transfer, layoff, recall, promote bargaining unit employees, or adjust employee wages through the evaluation or disciplinary process. Although all of the employees at issue have limited authority to exercise duties that could potentially create a conflict of interest with subordinate employees, the conflict taken as a whole were insufficient to warrant the employees' exclusion from the bargaining unit. PERC also held that much of the time the employees at issue spent "supervising" subordinate employees, as the District claimed, was not supervisory work. Duties such as working side-by-side with subordinate employees or checking their work are not presumptively supervisory duties.

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