WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

August 2017

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

Washington Supreme Court

Public Works Attorney Fees

King County v. Vinci Constr.
No. 92744-8 (7/6/17)

The Washington Supreme Court held that the attorney fee provision for public works contracts under RCW 39.04.240 is not the exclusive fee remedy available. King County contracted with three construction firms (VPFK) to expand its wastewater treatment system. The firms secured a performance bond from five surety companies. VPFK encountered many difficulties throughout the project, and the County declared VPFK in default. The County requested that the sureties either cure VPFK's default themselves or agree to fund a new contractor, and the sureties refused. The County filed suit against VPFK and the sureties, claiming breach of contract. The jury found in favor of the County and awarded $130 million in damages as well as $15 million in attorney fees and costs under the *Olympic Steamship* case, where fees are available when an insurer forces the insured to litigate coverage and then loses. The trial court held that the attorney fees could not be segregated because the County's claim against the sureties was intertwined and indistinguishable from its claim against VPFK. On appeal, the sureties argued that *Olympic Steamship* fees did not apply because the fee provisions of RCW 39.04.240 are the exclusive fee remedy in public works contracts. The Court of Appeals rejected that argument and affirmed, holding both that RCW 39.04.240 was not the exclusive fee remedy and that the fees could not be segregated. The Washington Supreme Court affirmed. The Court held that RCW 39.04.240 is not the exclusive fee remedy available in public works contract disputes where the primary issue is coverage, for two reasons. First, the legislature did not explicitly intend such exclusivity. And second, RCW 39.04.240 is not so inconsistent with *Olympic Steamship* that they both cannot simultaneously apply. The Court also held that the trial court did not abuse its discretion in ruling that segregating fees between King County's claims against VPFK and the sureties was impossible because the claims were so related that no reasonable segregation could be made.

Youth Concussions

Swank v. Valley Christian Sch.
No. 93282-4 (7/6/17)

The Washington Supreme Court held that the Zackary Lystedt law, which governs responses to

concussions in youth athletes, created an implied cause of action. In 2009, Washington passed the Lystedt law, RCW 28A.600.190, in order to reduce the risk of injury or death to youth athletes who sustain concussions. Valley Christian School (VCS), a nonprofit religious school, had a football team coached by a volunteer parent. During a game, a student, Swank, sustained a concussion and was immediately removed from the game. A doctor subsequently cleared Swank to play in the next game. During the next game, Swank displayed a number of concussion symptoms, including sluggishness and confusion. The coach grabbed and jerked Swank's face mask and screamed to him about his poor performance on the field. After Swank was hit by an opposing player later in the game, he collapsed on the sideline and died two days later. His parents sued VCS and the coach, alleging negligence and violation of the Lystedt law. The superior court granted summary judgment in favor of the defendants. The Court of Appeals affirmed in part, holding that the Lystedt law did not create an implied statutory cause of action and that the coach was entitled to volunteer immunity. The Swanks appealed, and the Washington Supreme Court reversed. The Court held that the Lystedt law created an implied cause of action under Washington's three-part test for implied causes of action. The Court interpreted the Lystedt law to contain three duties that can support a claim: first, a school district must create and annually distribute a head injury information sheet for parent and student signature; second, a youth athlete must be removed from play immediately when a head injury is suspected; and third, a youth athlete must not be returned to play until he or she is cleared by a health care provider. The Court reversed the Court of Appeals' holding that there was no implied cause of action and reinstated the Swanks' claims against VCS and the coach. Next, the Court held that the trial court erred when it granted summary judgment in favor of the coach on the basis of volunteer immunity. The Court noted that the Lystedt law's implied cause of action applies to coaches. A statute provides immunity to volunteers for simple negligence, but not for gross negligence or recklessness. The Court held that summary judgment in favor of the coach was improper because a reasonable jury could conclude that the coach's actions in allowing Swank to play despite exhibiting concussion symptoms constituted gross negligence or recklessness.

PERC

Employer Interference

State—Ecology
No. 12732 (6/19/17)

PERC dismissed five allegations of employer interference with employee rights. To establish interference the union must prove by a preponderance of the evidence that the employer's conduct interfered with protected employee rights. An employer interferes with employee rights when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or a promise of benefit, associated with the union activity of an employee. PERC dismissed one allegation that arose based on an investigation the employer conducted of a shop steward after a grievance had been filed because the timing of the investigation in relation to the grievance at issue did not support the conclusion that the investigation was an interference. PERC did not find the temporal proximity of these events persuasive in part because there were many grievances filed involving the shop steward and in part because the shop steward, as an experienced representative, should have known that employers often do not begin investigations into alleged misconduct immediately after the alleged misconduct occurs, so he should not have perceived the delay in time until after the grievance had been filed to interfere with his rights.

Coincidental timing is not enough for a shop steward to reasonably perceive an employer's actions as interference. PERC also dismissed an allegation related to a reprimand issued to the shop steward for nearly identical reasons: there were many grievances filed during the time period at issue and it is not unusual for there to be some delay between an employer's investigation and the issuance of a reprimand.

Representation Petition

Clark County
Decision 12740 (6/30/17)

PERC held that Vegetation Management employees in the Parks Division of the County may be appropriately included in either of two competing unions, and therefore dismissed one of the unions' unit clarification petition to accrete the employees into the union and directed that a cross-check be performed as a result of the other union's representation petition to determine if the employees wish to be represented by that other union. Accretions are the exception to the statutory rule of employee free choice in representation, and an accretion may only be ordered when a group of employees logically only belong in one existing bargaining unit and can neither stand alone in a separate unit nor be logically placed in another unit. Because PERC found that the employees shared a community of interest with both units, it held that accretion was inappropriate.

Unilateral Change, Employer Discrimination & Employer Interference

King County
Decision 12582-A (7/6/17)

In this lengthy decision, PERC held that: the employer committed an unfair labor practice because it unilaterally changed vacation leave approval polices; the union failed to establish a prima facie case for discrimination because it did not show that the employee at issue was engaged in protected union activity; the union met its burden of proof to show that the employer's communications with bargaining unit members could reasonably be perceived as threats of reprisal or force, or a promise of benefit, associated with protected union activities in one of the two allegations of employer interference; and that a cause of action the union claimed should have been addressed in PERC's preliminary ruling could not be considered in the hearing because the complainant did not seek clarification from the Unfair Labor Practice Manager who issued the ruling, which is a statutory requirement. An employer has an obligation to refrain from unilaterally changing terms and conditions of employment unless it gives notice to the union, provides an opportunity to bargain before making a final decision, bargains in good faith upon request, and bargains to agreement or good faith impasse concerning any mandatory subject of bargaining. PERC focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. PERC considers at least five factors when determining whether the parties have reached a good faith impasse: (1) the bargaining history, (2) the parties' good faith in negotiations, (3) the length of negotiations, (4) the importance of the issues on which the parties disagree, and (5) the contemporaneous understanding of the parties about the state of negotiations. The scheduling of vacation and other leave has long been held a mandatory subject of bargaining. PERC found that the employer had provided the union with notice of the proposed change, but the parties did not reach agreement on the proposed changes before they were implemented. PERC held that a lawful impasse did not exist when the changes were made to the vacation leave policy, so the employer committed a ULP when it unilaterally changed the policy. PERC stated that the bargaining history did not support the finding of a lawful impasse because the parties were engaged in discussions regarding

the policy when it was implemented and had a date scheduled to discuss it after the date of implementation. The employer lacked good faith in negotiations because it began with a predetermined outcome and only participated in one meeting. Further, the issue was important to both parties and the parties had different understandings of the state of negotiations, factors that also weigh against a lawful impasse. In order to establish that an employer has committed discrimination against an employee's exercise of union rights, the union must show that: the employee participated in protected union activity or communicated the intent to do so; the employer deprived the employee of some ascertainable right, status, or benefit; and a causal connection existed between the protected activity and the employer's action. PERC held that although the union leader at issue was acting on behalf of the union when she behaved in a manner that resulted in the employer disciplining her, her behavior was excessively confrontational and was therefore not a protected activity.

Unit Clarification

City of Tacoma
Decision 12744 (7/12/17)

PERC dismissed the employer's unit clarification petition that sought to exclude seven positions as supervisory from a non-supervisory bargaining unit because the positions do not have independent authority to act in the interests of the employer and make meaningful changes in the employment relationship of other unit members. According to PERC precedent, a supervisor is an employee whose preponderance of duties includes the independent authority to hire, assign, promote, transfer, layoff, recall, suspend, discipline, or discharge other employees, or to adjust their grievances, or to effectively recommend such action. Preponderance may be met either by the employee spending the preponderance of time performing supervisory activities or if the employees performs a preponderance of the supervisory duties. When conducting this analysis, PERC places emphasis on whether the position has the independent authority to act on behalf of the employer and make meaningful changes in the employment relationship. PERC held that the employees were not supervisors according to its standards because they do not spend a preponderance of their time performing supervisory duties, nor do they perform a preponderance of the supervisory duties. Although they participate on hiring panels, their work on those panels does not rise to the level of possessing independent discretion to recommend that a candidate be hired. Further, although the employees have the ability to issue low-level discipline, any higher-level discipline is handled by their manager or the human resources department with the employees' input. PERC noted that "most of the contested cases before this agency, particularly in the last five years, have resulted in a determination that the contested positions are not supervisory."

Unfair Labor Practice

State—Corrections
Decision 12749 (7/17/17)

PERC dismissed five allegations of unfair labor practices in an employee's complaint against the employer because the allegations failed to state a cause of action. PERC only has the authority to enforce Washington State's collective bargaining laws. The employee's complaint alleged violations of the employee's *Loudermill* due process rights, Washington State Constitution rights, statutes and regulations unrelated to collective bargaining, and the applicable collective bargaining agreement. All of the allegations were outside of the scope of PERC's authority, so PERC dismissed the entire complaint.

Porter Foster Rorick LLP

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

Tim Reynolds
tim@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
Leilani Fisher
Cliff Foster

Jeff Ganson
Kathleen Haggard
Parker Howell
Rachel Miller
Buzz Porter

Tim Reynolds
Mike Rorick
Jay Schulkin
Lorraine Wilson