WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

August 2018

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

Ninth Circuit Court of Appeals

Board Meeting Prayer

Freedom from Religion Foundation, Inc. v. Chino Valley Unified School District
No. 16-55425 (7/25/18)

The Ninth Circuit held that a school board's policy of conducting prayer during board meetings violates the Establishment Clause of the U.S. Constitution. In 2010, the Board adopted a policy regarding board meetings that provided for local members of the clergy to lead a prayer at each meeting. Invited clergy sometimes gave prayers, but Board members also gave prayers at some meetings. Board members would also invoke Christian beliefs while conducting Board business, often explicitly linking the Board's work with Christianity. The Freedom From Religion Foundation sued, alleging these practices violated the Establishment Clause. The Court agreed, holding that the religious exercise during Board meetings impermissibly fostered excessive government entanglement with Christianity and served no secular purpose.

Washington Supreme Court

Eminent Domain, Competing Public Uses

Central Puget Sound Regional Transit Authority v. WR-SRI 120th N. LLC
No. 94255-2 (8/2/18)

The Washington Supreme Court held that a government entity cannot condemn property already being used for a public purpose unless the proposed public use is compatible with the prior public use. Sound Transit sought to condemn several properties for the purpose of constructing a new light rail track. The properties included electrical line easements owned by the City of Seattle. The City argued that Sound Transit could not condemn property that is already being used for a public purpose. The court held that the prior public use doctrine prohibits condemnation of property that is already being used for a public purpose when the proposed use would substantially impair the existing public use. However, such condemnation is permissible when the two public uses are compatible. The court further held that, when two competing public uses are incompatible, the condemnor's proposed use must be curtailed to achieve compatibility with the prior public use. Because these are factual questions, the court remanded the case to the trial

court to determine whether the proposed public use is compatible with the existing public use.

Washington Court of Appeals

Public Records Act, Ongoing Investigation

Gipson v. Snohomish County
No. 76826-3 (7/9/18) (unpublished)

The Washington Court of Appeals held that Snohomish County did not violate the Public Records Act (PRA) when it redacted records from an investigation after it had ended because the investigation was ongoing at the time of the request. The County hired an outside investigator to investigate female employees' allegations that Ron Gipson had committed sexual harassment and sexual discrimination in the workplace. Gipson requested records from this investigation before it had concluded. The County redacted the records under the exemption for records related to an ongoing investigation, but it produced the installment of records after the investigation had concluded. The Court held this did not violate the PRA because an agency must determine whether a record is exempt at the time it receives the request for the record. Therefore, because the investigation was ongoing when the County received the request, it did not violate the PRA by providing redacted records of the investigation even though the investigation had concluded.

Public Records Act, Inadequate Search

Zellmer v. King County
No. 76825-5 (7/16/18) (unpublished)

The Washington Court of Appeals held that even though King County conducted an inadequate search in responding to a public records request, penalties were unwarranted under the Public Records Act (PRA) because the County acted in good faith and the requestor was an inmate. Prison inmate Joey Zellmer submitted public records requests to the County seeking photographs of his home taken on specific dates. In determining whether photographs were taken on the requested dates, the County relied solely on the "date modified" field on the computer screen for each potentially responsive photograph. As a result, the County inadvertently withheld over 200 photographs whose "date modified" information did not reflect the date each photograph was actually taken. The Court looked to an earlier case, *Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702. 261 P.3d (2011), in which records' "date modified" and "date created" fields were inaccurate, and held that those two sources of information are "an inherently unreliable way to ascertain the actual date that a document was created." The Court concluded that the County knew or should have known that those two data fields were inherently unreliable, and that relying on those fields was unreasonable and an inadequate search. However, under RCW 42.56.565(1), a court shall not award PRA penalties to an inmate unless the agency acted in bad faith. Because Zellmer failed to show the County acted in bad faith, the court held that penalties were not warranted.

Public Records Act, Penalties

Hoffman v. Kittitas County
No. 35091-6 (7/24/18)

The Washington Court of Appeals held that the County's negligence in responding to a records request did not warrant increasing the penalty award. The trial court determined the County violated the Public Records Act (PRA) when it improperly withheld records from Randall Hoffman, imposing a penalty of $0.50 per record, per day. On appeal, Hoffman argued the principal factor for determining a PRA penalty award is whether the agency acted in bad faith and that the award should be higher because the County acted in bad faith. The court disagreed, stating that the

presence or absence of bad faith is not the primary consideration. Rather, trial courts should consider a variety of mitigating and aggravating factors to determine a penalty that is reasonable in light of the agency's overall culpability. Finding no error in the trial court's culpability assessment, the court affirmed the penalty and declined to increase it.

OSPI Regulations

OSPI released new permanent student discipline rules on July 30 that will be phased in over the upcoming two school years, with the first set of new rules taking effect on August 30. Later this month Porter Foster Rorick will distribute a guidance document to our clients explaining the changes to the rules and how school districts should revise their student discipline policies, procedures, and practices to comply with the new rules.

PERC

Failure to State a Claim

University of Washington
Decision 12891 (7/13/18)

PERC dismissed an employee's interference and discrimination complaint for failure to state a claim. The employer had allegedly directed an employee to meet with HR after the employee had refused to perform functions she believed were beyond her job duties, and allegedly informed the employee that she did not need a union representative at the meeting because no corrective action was contemplated. The employee alleged interference with her *Weingarten* rights and discrimination. PERC found that the complaint lacked sufficient facts regarding whether the meeting actually occurred; what occurred during the meeting; whether the meeting was investigatory; whether the employee specifically requested representation at the meeting; and whether the employer denied the request for representation. As a result, PERC dismissed the interference claim. PERC next found that the employee failed to allege facts demonstrating that she was engaged in protected activity or that the employer retaliated against her for such protected activity, and so dismissed the employee's discrimination claim.

Skimming; Unilateral Change

Wapato School District
Decision 12894 (7/27/18)

PERC found that Wapato School District did not skim bargaining unit work without bargaining or unilaterally change working conditions related to communications to families regarding student unexcused absences. The District adopted a new policy of aggressively addressing student unexcused absences, including generating quarterly form letters to inform parents of unexcused absences and making phone calls regarding the same. The Wapato Pupil Personnel Association (WPPA) alleged that the District skimmed the work of WPPA attendance clerks without bargaining by assigning the unexcused-absence work to building secretaries represented by the Wapato Association of Educational Office Personnel (WAEOP). Conversely, WAEOP alleged that the District unilaterally altered its members' job duties by assigning unexcused-absence work to building secretaries without bargaining. PERC consolidated the two complaints. The hearing examiner found that the District did not impermissibly skim WPPA work because the work was new and not historically performed by WPPA, and so was not WPPA work. The hearing examiner next found that the District did not unilaterally add new job duties to WAEOP members because the work was so limited that it did not constitute a material impact on wages, hours, or working conditions. As a result, the hearing examiner dismissed both complaints.

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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

Jon Collins
jon@pfrwa.com

Leilani Fisher
leilani@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
Jon Collins
Leilani Fisher
Cliff Foster

Jeff Ganson
Kathleen Haggard
Parker Howell
Lauren McElroy
Rachel Miller
Buzz Porter

Tim Reynolds
Mike Rorick
Jay Schulkin
Valerie Walker
Lorraine Wilson