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.

Ninth Circuit Court of Appeals

First Amendment

Garnier v. O'Connor-Ratcliff
Nos. 21-55118; 21-55157 (7/27/22)

The Ninth Circuit Court of Appeals held that two members of the Poway Unified School District Board of Trustees (Board) violated the First Amendment when they blocked certain parents from their social media pages. Board members Michelle O'Connor-Ratcliff and T.J. Zane created public Facebook and Twitter pages to promote their election campaigns. After they won and assumed their positions, the Board members used their social media pages to communicate with constituents, inform the public about the work of the school district, and invite the public to attend Board meetings. Two parents of children in the school district were critical of the Board, and routinely responded to the Board members' social media posts with lengthy, critical public comments. On one evening, a parent posted 226 identical replies to O'Connor-Ratcliff's Twitter page, one to each Tweet O'Connor-Ratcliff had ever posted. Frustrated by the lengthy and repetitive nature of the parents' posts, the Board members began to delete or hide their replies, and eventually blocked the parents from their social media pages. The parents filed suit under 42 U.S.C. § 1983, seeking damages and injunctive relief for violation of their First Amendment rights. The case proceeded to a two-day bench trial, after which, the district court entered an order finding that the Board members acted under the color of state law when they banned the parents from their social media pages, and had also violated the First Amendment by indefinitely blocking the parents. The Ninth Circuit Court of Appeals affirmed, holding that the Board members' use of their social media pages was directly connected to the performance of their duties given that they had used those pages to communicate with the public about the work of the Board, selection of a new superintendent, and the school district's activities and programs. Further, the Court concluded that the Board members were acting in the performance of their official duties, given that they identified themselves as government officials on the pages, and did not include a disclaimer to the effect that the pages reflected only their personal opinions in a non-official capacity. As a result, the Court held that the Board members' decision to ban the parents from the social media pages constituted state action, as necessary for the parents to bring a First Amendment claim. The Court further held that the Board members' social media pages constituted a designated public forum, which exists when the government intentionally opens up a non-

traditional forum for public discourse. Because the social media pages constituted a designated public forum, the Board members could only impose reasonable time, place, or manner restrictions on protected speech, provided that those restrictions were also narrowly tailored to serve a "significant government interest" and left open "ample alternative channels for communication." The Court held that the Board members' decision to indefinitely ban the parents from posting in the designated public forum did not meet this test because it burdened substantially more speech than was necessary to effectuate the Board members' stated interest of avoiding "clutter" on the pages. As a result, the Court affirmed the decision of the trial court.

Washington Court of Appeals

Public Records Act

West v. City of Lakewood
No. 55779-7-II (7/12/22) (unpublished)

The Washington Court of Appeals held that the City of Lakewood failed to conduct an adequate search for records responsive to Arthur West's Public Records Act (PRA) request when it exclusively relied on a misspelling in the body of West's request, despite the term being properly spelled in the subject line. West requested records related to the shooting and killing of Michael Reinoehl by Lakewood officers in August 2020. The subject line of West's request properly spelled the name "Reinoehl," but the body of the request had misspelled it as "Reinoel." Upon receipt, the City's public records specialist routed the request to other City staff, including Lakewood police lieutenant Chris Lawler, who was aware of Reinoehl's shooting and knew that Thurston County was actively investigating the incident. An information technology analyst for the City also searched the internet for the date of the shooting and found reports that someone "with a name similar to the search term 'Michael Reinoel'" had been shot in August 2020. Nonetheless, the City searched its email server and text message database exclusively using the search term "Michael Reinoel," as it was misspelled in the body of West's request. This search produced no responsive documents, and the City notified West it was closing his request. The City's closing letter to West informed him that after a diligent search, it did not locate any responsive records. Confusingly, the letter also stated that the City could not release information to him at this time because the records requested were associated with a case that was under active investigation. The City did not provide any exemption log identifying whether it was asserting an exemption to disclosure of responsive records. West filed a complaint in superior court, seeking penalties under the PRA for the City's failure to reasonably disclose responsive records. After West filed his lawsuit, the City added additional search terms using the proper spelling of "Reinoehl," which produced more than 7,700 pages and 11 text messages. It provided West these documents in installments between December 30, 2020, and February 8, 2021. The superior court dismissed West's PRA lawsuit on summary judgment, finding that the City had adequately searched for responsive records when it reasonably relied on West's misspelling. The Court of Appeals reversed and held as a matter of law, the City's search was inadequate because it failed to follow through on obvious leads, including the proper spelling in the subject line of West's request, especially given Lieutenant Lawler's knowledge of the shooting and the technology analyst's internet research showing someone with a name similar to "Michael Reinoel" had been shot on the date in question. The Court further held that the City violated the PRA because it appeared to have asserted the investigative privilege exemption to the PRA in the closing letter, but it did not provide an exemption log explaining the claimed exemption. Finally, the Court rejected the City's

argument that it cured the error by producing the records after West initiated a lawsuit, noting that such action did not cure the violation, but could be relevant to the consideration of remedies imposed.

Public Records Act

Earl v. City of Tacoma
No. 56160-3-II (7/12/22) (unpublished)

The Washington Court of Appeals affirmed dismissal of a Public Records Act (PRA) lawsuit as untimely because it was filed nearly three years after the City of Tacoma closed the records request. Lisa Earl's daughter was shot and killed by a Tacoma police officer in 2016. In an effort to learn what happened, Earl submitted a comprehensive records request to the City seeking records related to the shooting. The City produced records in two installments. On November 23, 2016, the City provided Earl a closing letter, stating that there were no other records responsive to the request and that it was now considered closed. In 2017, Earl filed a wrongful death claim in federal court, and she eventually received a record in discovery which she had not received in response to her earlier public records request, and which she believed was responsive to her request. On August 29, 2019, she filed a PRA complaint in superior court, alleging that the City violated the PRA when it failed to disclose the record in question. The trial court dismissed Earl's PRA complaint, finding that it was filed outside of the PRA's one-year statute of limitations. The Court of Appeals affirmed, rejecting Earl's argument that the discovery rule—which postpones the running of a statute of limitations until the time when a plaintiff should have discovered a cause of action existed—applies to PRA cases. The Court further held that equitable tolling—which allows an action to proceed "when justice requires it"—did not apply here because equitable tolling requires a showing of bad faith, deception, or false assurance by the defendant. Because there was no evidence that the City had deliberately attempted to mislead Earl, the Court held that equitable tolling did not apply, and it affirmed dismissal of Earl's PRA lawsuit as untimely.

Public Records Act

Kitsap County v. Campese
No. 56900-1-II (7/12/22) (unpublished)

The Washington Court of Appeals affirmed an order of the trial court denying a public records requestor's request for attorney fees, costs, and penalties under the Public Records Act (PRA) following Kitsap County's voluntary dismissal of its request for declaratory judgment—a legal action the County had initiated asking the court to determine whether certain records fell under an exemption of the PRA. Dominic Campese submitted a PRA request to the County, seeking all of its *Brady* material (evidence a prosecutor is required to disclose in the course of a criminal trial). The County provided Campese two installments of responsive records, but also filed a petition in superior court asking the court to determine whether investigative records compiled by the prosecutor's office pursuant to its *Brady* obligation constitute attorney work-product, which is exempt from disclosure under the PRA. Campese filed a counterclaim, arguing that the County violated the PRA by seeking declaratory judgment on this issue. The County later moved to voluntarily dismiss its petition, explaining that it had already waived the work product privilege as to the records in question, such that the exemption could no longer apply. Campese then filed a motion seeking fees, costs, and penalties pursuant to the PRA, arguing that he was the "prevailing party" in an action brought under the PRA because the County had moved to voluntarily dismiss its petition for declaratory judgment. The trial court dismissed Campese's request for fees and costs as "premature" because it had not yet ruled on his counterclaim. The Court of Appeals affirmed, reasoning that trial courts have broad discretion in managing cases, and also noting that there was no

legal authority to support Campese's argument that deferring ruling on attorney fees and costs until the case had fully concluded was unreasonable.

PERC

Refusal to Bargain

Ben Franklin Transit (Teamsters Local 839)
Decision 13409-A (7/25/22)

PERC determined that Teamsters Local 839 (union) did not commit a refusal to bargain unfair labor practice (ULP) when its lead negotiator used profanity and argued aggressively with the employer during negotiations. PERC further determined that the employer did not commit a refusal to bargain ULP when its human resources (HR) director sought an order of protection against the union's lead negotiator in superior court. The union represents three bargaining units of employees for Ben Franklin Transit (employer). In June 2019, the employer and union met to negotiate the successor collective bargaining agreements covering two of its bargaining units. Before the negotiations began, the union's lead negotiator, who was not an employee of Ben Franklin Transit, launched into a profanity-laced tirade, expressing frustration regarding the employer's conduct in a grievance meeting and anger that the room was not properly set up for negotiations. The employer team caucused, and upon return, stated that they would not negotiate that day, but would contact the union with future bargaining dates. The union's lead negotiator responded with further profanity and accused the employer of refusing to bargain. In subsequent negotiations, tension developed between the union's lead negotiator and the employer's HR director, and at some point, the union's lead negotiator directed someone to "put a leash" on the human resources director. According to the employer's HR director, the union's lead negotiator also threatened, shook his fists, and pointed his finger at her. The HR director filed an ex parte petition for an order of protection in superior court, alleging that the union's lead negotiator had harassed her during negotiations. Although she initially sought the order of protection on her own, later, the employer paid for the HR director's attorney fees. Both the employer and union filed multiple ULP complaints against one another. Following an evidentiary hearing, a PERC Examiner concluded that the union breached its good faith bargaining obligation because its lead negotiator's behavior was hostile, abusive, and not reasonable. The Examiner further concluded that the employer did not breach its good faith bargaining obligation when it supported its HR director in obtaining an order of protection. Both parties appealed, and the PERC Commission reversed in part and affirmed in part. PERC acknowledged that the union representative's vulgar language during negotiations was uncivil, but it concluded that such remarks were nonetheless free speech protected by the First Amendment. In viewing the totality of the circumstances, PERC concluded that the union representative's behavior did not evidence an absence of sincere desire to reach an agreement, and therefore did not constitute a refusal to bargain ULP, reversing the Examiner's decision on this basis. However, PERC affirmed the Examiner's conclusion that the employer did not breach its good faith bargaining obligations when its HR director sought an order of protection in superior court. Again, PERC acknowledged that the HR director had a First Amendment right to seek an order of protection, and it also found that her petition was not objectively baseless given her reasonable belief that she was being harassed. Commissioner Busto dissented in part, and would have concluded that the HR director's application for an order of protection was baseless and pursued for the retaliatory purposes of removing the union's lead negotiator.

Skimming

University of Washington
Decision 13483-A (7/29/22)

PERC concluded that the University of Washington committed a refusal to bargain unfair labor practice (ULP) when it reassigned patrol of its campus residence halls to non-bargaining unit employees without providing notice and an opportunity to bargain. The University of Washington maintains a police department, which is staffed by uniformed (and armed) police officers (Campus Police Officers), as well as unarmed Campus Security Guards (CSGs), Campus Security Officers (CSOs), and Campus Security Responders (CSRs). The Campus Police Officers are represented by Teamsters Local 117 (Teamsters), and the other security positions are represented by Service Employees International Union (SEIU). The Teamsters police officer bargaining unit has historically been exclusively responsible for patrolling the student residence halls, and a section of their collective bargaining agreement expressly provides for bidding of the residence hall patrol shift assignments. In 2020, the University of Washington Black Student Union submitted a list of demands, seeking that the University "disarm and divest" from its police department. In response, the University president committed to a "holistic approach to campus safety that minimizes armed police presence" on campus. As part of this commitment, the University planned to reduce the size of its police force and limit the use of armed police officers to those situations where there is a threat of, or realistic possibility of, imminent harm. Consistent with that commitment, in September 2020, the University notified the Teamsters police officer bargaining unit that it would be reassigning dorm patrol assignments to unarmed CSRs, who were represented by the SEIU. Teamsters filed a ULP complaint, alleging that the University committed a skimming ULP when it unilaterally decided to reassign the campus patrol shifts to SEIU members. Following an evidentiary hearing, a PERC Examiner concluded that the Teamsters police bargaining unit had historically been exclusively responsible for patrolling student residence halls, but nonetheless concluded that the decision to reassign the work to CSRs was not a mandatory subject of bargaining because the University's entrepreneurial interest in changing its public safety model outweighed the union's interest in maintaining the residence hall assignments. The PERC Commission reversed, concluding that the residence hall patrol assignments were historically Teamsters' bargaining unit work. PERC further concluded that the decision did not lie at the core of entrepreneurial control because the University was changing its public safety model, not its educational policy or basic mission. Therefore, PERC rejected the University's argument that its interest in providing broader and more inclusive security services to students living in its residence halls outweighed the union's interest in maintaining historically bargaining unit work. As a result, PERC reversed the Examiner's ruling and ordered the University to restore the work of patrolling the residence halls to the police bargaining unit represented by Teamsters.

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