WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

September 2017

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

Ninth Circuit Court of Appeals

First Amendment

Kennedy v. Bremerton School District
No. 16-35801 (8/23/17)

The Ninth Circuit of Appeals affirmed the denial of injunctive relief in an action brought by a high school football coach who alleged that his school district retaliated against him for exercising his First Amendment rights when it suspended him for kneeling and praying on the football field in view of students and parents immediately after games. The coach sought an injunction ordering the district to stop discriminating against him in violation of the First Amendment, reinstate him to his coaching position, and allow him to kneel and pray on the fifty-yard line immediately after games. The Ninth Circuit Court of Appeals affirmed the district court and held that (1) the coach spoke as a public employee when he knelt and prayed on the field immediately after games in school attire in view of students and parents; (2) the coach had a professional responsibility to communicate demonstratively to students and spectators and he took advantage of his position to press his views upon the impressionable and captive minds before him; (3) the coach's speech fell within the scope of his job responsibilities, he spoke as a public employee, and the district was permitted to order him not to speak in the manner that he did. As a result, the coach was not entitled to a preliminary injunction. In a special concurrence, one judge wrote to share his view that the school district's actions were justified to avoid violating the First Amendment's Establishment Clause.

IDEA

Rachel H. v. Dep't of Educ., State of Haw.
No. 14-16382 (8/29/17)

The Ninth Circuit Court of Appeals held that the Individuals with Disabilities Education Act (IDEA) does not require identification of a particular school where special education services will be delivered in every instance. The IEP team for a high school student with Down syndrome determined that her IEP would be "implemented on a public school campus." All parties understood that that referred to a particular school, Kalani High School, but the IEP did not identify a particular school as the location for services. When the family moved 30 miles away from Kalani, the parents insisted on enrolling the student in private school at public expense. The local education agency refused, informing the family that the student should enroll in her local school. The

family filed for due process, arguing that the local education agency had denied the student FAPE by not identifying the school where the IEP would be implemented. The hearing officer and district court ruled in favor of the local education agency. The Ninth Circuit Court of Appeals affirmed. Noting the IDEA's requirement that an IEP must contain the "location" of services to be provided, 20 U.S.C. § 1414(d)(1)(A)(i)(VII), the Court held that that requirement does not necessarily require an IEP to identify a specific school where the IEP will be implemented. The Court noted that this holding does not mean that "school districts have carte blanche to assign a child to a school that cannot satisfy the IEP's requirements," or that not identifying a specific school can never result in a denial of FAPE; instead, the Court held that the IDEA does not procedurally require every IEP to identify a specific school where services will be delivered.

Attorney General Opinions

Open Public Meetings Act

2017 Op. Att'y Gen. No. 5 (8/3/2017)

The Attorney General's Office (AGO) was asked whether information learned in an executive session is confidential. The AGO broke down that larger question into four sub-issues. First, the AGO considered whether members of a governing body of a public agency are prohibited by the Open Public Meetings Act (OPMA) from disclosing information shared during properly convened executive sessions. The AGO concluded that members of a governing body have a duty to hold in confidence information that they obtain in the course of a properly convened executive session, but only to the extent that such information is within the scope of the statutorily-authorized purpose for which the executive session was called. Second, the AGO considered whether members of a governing body of a public agency are prohibited by the Code of Ethics for Municipal Officers, Chapter 42.23 RCW, from disclosing information shared during properly convened executive sessions. The AGO concluded that RCW 42.23.070(4) prohibits a municipal officer (such as a school board member or city council member) from disclosing confidential information learned in an executive session or from otherwise using such information for personal gain. Third, the AGO considered whether disclosing information exchanged in an executive session constitutes a misdemeanor under RCW 42.20.100 and/or a gross misdemeanor under RCW 9A.80.010. The AGO concluded that facts could arise under which the disclosure of information learned in an executive session might constitute a misdemeanor or gross misdemeanor, but that such cases would be difficult to prove and should rarely arise. Finally, the AGO considered whether a public agency's governing body may exclude a member from an executive session based on concerns about the member disclosing confidential information. The AGO concluded that the OPMA provides a process for asking a court to enforce confidentiality through an injunction or writ of mandamus, but that a governing body likely lacks authority to exclude one of its members from attending an executive session without such an injunction. However, the AGO held open the possibility that a statute governing a particular governing body might allow for a local rule excluding members from executive sessions under some circumstances.

PERC

Unfair Labor Practice

City of Seattle
No. 12760 (7/20/2017)

PERC held that the employer did not commit an unfair labor practice based when it sent a draft body

camera policy to the union, the union requested to bargain the policy, and the employer sought and received court approval for the policy. To prove an unfair labor practice based on a unilateral change, the union must prove that the dispute involves a mandatory subject of bargaining and that the employer made a decision regarding the mandatory subject without first providing the union with notice and the opportunity to bargain. In this situation PERC held that none of the facts in the union's amended complaint alleged that the body camera policy had actually been implemented by the employer, and therefore dismissed the allegation of unilateral change.

Unit Clarification

South Sound 911
No. 12760 (8/4/2017)

PERC held that emergency dispatch employees transferred to the employer from a previous employer should be added to the union's bargaining unit without an election because they share a community of interest with the existing unit and logically belong in the bargaining unit. The determination of an appropriate bargaining unit depends on whether the group of employees at issue share a community of interest. When determining whether there is a shared community of interest, PERC considers the duties, skills, and working conditions of the employees; the history of collective bargaining by the employees and their bargaining representatives; the extent of organization among the employees; and the desire of the employees. Employees are ordinarily permitted a voice in the selection of a bargaining representative, however, employees are not given the choice in the case of an accretion. PERC may order an accretion when a group of unrepresented employees logically belongs in only one existing bargaining unit and the positions can neither stand alone in a separate bargaining unit nor can they logically be placed in another unit configuration. PERC found that the employees in this case logically belong in the same bargaining unit and therefore ordered an accretion because the employees perform the same emergency communications dispatch work as the bargaining unit members, and therefore work jurisdiction issues would be created if they were not added to the unit.

Unit Clarification

Eastern Washington University
No. 12763 (8/11/2017)

PERC held that newly-created senior advisor positions are not supervisors and therefore should be added to the union pursuant to the union's unit clarification petition. Supervisors are generally excluded from the bargaining unit of subordinate employees to avoid the potential for conflicts of interest when they exercise authority on behalf of the employer over those subordinate employees. A supervisory employee is any employee whose preponderance of actual duties includes the independent authority to hire, assign, promote, transfer, layoff, recall, suspend, discipline, or discharge other employees, or to adjust their grievances or effectively recommend such action. The preponderance standard can be met either by an employee performing a preponderance of those duties or the employee spending a preponderance of his or her time performing those duties. Although PERC found that the senior advisors have some level of independent authority, they do not exercise the type of independent authority that would cause them to be excluded from the bargaining unit. For instance, although senior advisors sit on hiring panels, they do not have the authority to make independent hiring decisions. Additionally, senior advisors only have the authority to resolve academic advisor grievances at the first step in the process and may not impose discipline more severe than oral and written reprimands. The employer argued that the

positions are supervisory in nature because the senior advisors spend 35% of their time providing team leadership, vision, and management and 30% of their time assisting in the planning, delivery, and assessment of the advising program. PERC did not find this argument persuasive, instead finding that the preponderance of senior advisors' time is spent supporting the overall function of the academic advising program and directly supporting students. Therefore, because senior advisors share a community of interest with the bargaining unit and do not perform a preponderance of supervisory duties, PERC added those positions to the unit.

Unfair Labor Practice

Bellevue School District
No. 12767 (8/25/17)

PERC held that a school district interfered with unionized football coaches' rights by prohibiting certain coaches from meeting or speaking with other coaches while they were on administrative leave; held that the district refused to bargain when it began enforcing a conflicts of interest policy without providing the union with notice and an opportunity to bargain the impacts of the decision; and held that the district committed an unfair labor practice by unilaterally implementing a policy that precluded a coach's renewal for two years for violation of the conflicts of interest policy because the default disciplinary consequence was a mandatory subject of bargaining.

The union first alleged that the district discriminated against two coaches by placing them on administrative leave in reprisal for filing an unfair labor practice complaint. The disciplinary sanctions were the result of investigations by the WIAA into excessive payments for coaching and by the district for violations of its conflicts of interest policy. PERC held that the district did not discriminate against the coaches because it made the initial decision to take action before an unfair labor practice complaint was filed, and because the district established nondiscriminatory reasons for its actions.

PERC found, however, that the employer interfered with protected union rights when it placed the two coaches on non-disciplinary administrative leave and prohibited the employees from meeting, conferring, organizing, or speaking with any other coaches, parents, students, or other district employees while on administrative leave because these actions could have been interpreted by a reasonable employee as a direct response to the union's insistence that the district follow the CBA and reappoint these coaches for the following year, as it had already committed to do. Further, because one of these coaches was the president of the coaches' union, the restrictions placed on that coach interfered with his ability to serve as the union's president, and thus could reasonably be perceived as interfering with the union's right to self-governance.

The union also alleged that the district failed to fulfill its duty to bargain in five instances by implementing unilateral changes to mandatory subjects of bargaining. PERC held that only two of those allegations constituted unfair labor practices. To determine if an issue is a mandatory subject of bargaining, PERC balances the employees' interests in wages, hours, and working conditions against the right of the employer to control the management and direction of government. PERC held that the district committed an unfair labor practice when it decided to begin strictly enforcing its conflicts of interest policy for coaching during the summer activities period, the current version of which had been in place since 2012, without first providing the union with notice and an opportunity to bargain the impacts of the decision. PERC found that the district had a legitimate interest in following the WIAA's practices related to conflicts of interest to ensure its membership in WIAA

remained in good standing and, thus, the decision to enforce the policy was not a mandatory subject of bargaining. The union had the right, however, to be notified of the decision and afforded the opportunity to bargain the impacts of enforcing the policy. The decision to begin enforcement of the policy was essentially a new term and condition of employment.

PERC also held that the district committed an unfair labor practice by unilaterally implementing a new default disciplinary policy that precluded the renewal of a coach's position for two years if the coach was found to have violated the conflicts of interest policy. Although the district had a legitimate interest in ensuring its coaches followed the conflicts policy, that interest did not outweigh the impact that discipline had on working conditions. Because this default disciplinary consequence was a mandatory subject of bargaining, the district was required to bargain the decision to implement the new practice.

As a remedy, PERC held that it was not appropriate to order the district to rescind its decision to enforce the conflicts of interest policy because the decision to implement the policy was permissive, and instead ordered the district to provide notice of its intent to enforce the policy and bargain its impacts upon request. Further, PERC ordered the district to rescind its two-year ban on coaching for violations of the conflicts of interest policy and to give notice and opportunity to request bargaining to the union if the district desires to implement the policy in the future. PERC also denied the union's request for reinstatement of the coaches who had been placed on administrative leave. While the district's initial decision to terminate their employment was based upon violations of the conflicts of interest policy, the employer rescinded its decision to terminate their employment and instead paid the two employees for the 2016-17 school year. The district then exercised its right under the CBA to inform both employees that their coaching appointments would not be renewed for the 2017-18 school year.

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