PORTER FOSTER RORICK LLP

July 2024

Washington School Law Update

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

Ninth Circuit Court of Appeals

Religious Accommodation

Bacon v. Woodward
No. 22-35611 (6/18/24)

The Ninth Circuit Court of Appeals held that City of Spokane firefighters adequately alleged that the City's application of a proclamation requiring vaccination against COVID-19 unduly burdened their constitutional right to free exercise of religion. In 2021, Washington Governor Jay Inslee, by Proclamation, required health care providers to be fully vaccinated against COVID-19, but also required employers to provide accommodation for employees' sincerely held religious beliefs. As licensed EMTs or paramedics, Spokane firefighters met the Proclamation's definition of a health care provider, and as a result, were required to meet the vaccination requirement. The City developed a framework for evaluating individual accommodation requests, but it ultimately determined that accommodating unvaccinated firefighters would impose an undue hardship, and it discharged firefighters who failed to comply with the vaccination mandate. Nearby fire departments granted firefighters medical and religious accommodations, and through an agreement with those other departments, the firefighters from neighboring departments entered Spokane on a daily basis to provide emergency services. As a result, neighboring firefighters whose departments had provided religious accommodation operated within Spokane and provided emergency services to City residents alongside Spokane firefighters. A group of Spokane firefighters who were denied religious accommodation filed a lawsuit against the City, arguing that the City's refusal to allow them to work as firefighters without being vaccinated violated the Free Exercise Clause of the First Amendment to the U.S. Constitution. The district court dismissed the firefighters' complaint. The Ninth Circuit reversed, holding that a law burdening religious exercise is subject to the most rigorous scrutiny unless it is both neutral and generally applicable. The Court held that the City's application of the vaccination mandate was not generally applicable because it prohibited religious conduct by terminating its own firefighters who refused to get vaccinated, but then allowed unvaccinated firefighters from neighboring departments to fill in the gaps left by its diminished workforce. Because the policy was not generally applicable, the Court held it was subject to strict scrutiny, which required the City to show that application of the policy served a compelling government interest and was narrowly tailored to advance that interest. The Court held that the City failed to meet this heightened constitutional standard

because the firefighters adequately alleged that there were less restrictive ways to address the City's health and safety concerns, such as testing and masking for COVID-19, taking temperatures, or relying on natural immunity. The Court further held that the City had undermined its interest by requiring its own employees to be vaccinated without religious accommodation, but then continuing to work with unvaccinated firefighters from nearby departments. As a result, the Court reversed dismissal of the firefighters' complaint and remanded for further proceedings. Judge Hawkins dissented and would have applied the more favorable rational basis review standard to the plaintiffs' claims, which he concluded would have been met here because the City treated all employees and medical and religious accommodation requests the same.

COVID-19 Vaccination Mandate

Health Freedom Defense Fund, Inc. v. Carvalho
No. 22-55908 (6/7/24)

The Ninth Circuit Court of Appeals reversed dismissal of a lawsuit challenging the Los Angeles Unified School District's (LAUSD) policy requiring employees to get vaccinated against COVID-19 as a condition of continued employment. LAUSD has implemented and reversed a COVID-19 vaccination policy for its employees several times since March 2021. LAUSD issued its first policy on March 4, 2021, which was challenged two weeks later in a federal lawsuit filed by California Educators for Medical Freedom (CEMF). The day after that lawsuit was filed, the district reversed course and gave employees an option to test for COVID-19 instead of being vaccinated. Based on that change, LAUSD moved to dismiss the pending lawsuit, which was granted based on the then-existing testing option. Two weeks after obtaining dismissal of the lawsuit, LAUSD adopted a new policy in August 2021, which eliminated the testing option. The new policy provided for religious and medical exemptions, but LAUSD employees allege that they were denied such accommodation upon request. CEMF sued again, this time joined by Health Freedom Fund, Inc. and new individual employees who were denied accommodation under the policy (collectively, the "Plaintiffs"). The complaint alleged that the vaccination policy interfered with the Plaintiffs' fundamental right to refuse medical treatment, arguing that the COVID-19 vaccine is not a "traditional vaccine" because it does not prevent transmission or provide immunity, but instead mitigates symptoms. The Plaintiffs alleged that this distinction rendered the COVID-19 vaccine a medical treatment, not a vaccine. In support, Plaintiffs submitted data and statements from the Centers for Disease Control (CDC), showing that the CDC had changed the definition of "vaccine" in September 2021 by striking the word "immunity," and statements from the CDC that the vaccine does not prevent transmission. LAUSD moved for judgment on the pleadings, and in support, it provided information from the CDC describing the vaccination as "safe and effective" along with statistics on the COVID-19 death count. The district court granted LAUSD's motion and dismissed the case. The district court opinion largely relied on *Jacobson v. Massachusetts*, a 1905 U.S. Supreme Court opinion in which the Court upheld a smallpox vaccination mandate because the vaccination mandate was rationally related to the government interest of preventing the spread of smallpox. Plaintiffs appealed, and twelve days following oral argument at the Ninth Circuit, the LAUSD school board voted to rescind the mandate. Following the Ninth Circuit oral argument, Plaintiffs' counsel also submitted a declaration stating that at oral argument, the LAUSD attorney had turned to him and stated, "What are you going to do when we rescind the mandate?" After the school board voted to rescind the mandate, LAUSD filed a motion to dismiss the appeal pending before the Ninth Circuit, claiming it was now moot. The Ninth Circuit rejected LAUSD's claim that the case was now moot, noting the district's pattern of withdrawing and reinstating the mandate during litigation, which it believed supported an inference that LAUSD was attempting to manipulate the courts and prevent its policy from being reviewed. The Ninth Circuit further held the Plaintiffs had sufficiently alleged that the COVID-19 vaccination was different from the smallpox vaccine at issue in *Jacobson* based on its theory that a "traditional vaccine" must provide immunity and prevent the spread of COVID-19. The Court cautioned that it must at this stage of litigation

accept the Plaintiffs' allegations that the vaccine does not prevent the spread of COVID-19 as true, and as a result, it reversed dismissal of the case and remanded to the lower court for further proceedings. Judge Nelson wrote separately to note that intervening cases called into question whether LAUSD is an arm of the state subject to sovereign immunity, a legal doctrine that would immunize LAUSD from certain lawsuits. Judge Collins also wrote separately, agreeing with the opinion, but emphasizing that a more recent line of Supreme Court authority supports the principle that there is a constitutionally protected liberty interest in refusing unwanted medical treatment. Judge Hawkins dissented and would have dismissed the case as moot given that the district had rescinded the challenged policy.

Washington Court of Appeals

Arbitrability

SEIU v. Snohomish County Public Hospital District No. 1
No. 85477-1-1 (6/10/24)

The Washington Court of Appeals held that an employer's agreement in a collective bargaining agreement (CBA) to follow the terms of a separate benefit plan did not bring disputes arising under the benefit plan within the scope of the CBA's arbitrability clause. Service Employees International Union Healthcare 1199NW (SEIU) represents support services and registered and licensed practical nurses working for the Snohomish County Public Hospital District No. 1 ("Evergreen"), and it has negotiated two separate CBAs with Evergreen. The CBAs define a grievance as an alleged breach of the terms and conditions of the CBA, and they require an employee pursuing a grievance to follow a four-step procedure culminating in the option of arbitration. In the CBAs, Evergreen agreed to provide the employees a retirement plan and to make matching contributions up to specified limits at least twice per year. As required by the CBAs, Evergreen adopted a retirement plan document (the "Plan") under which it agreed to contribute on behalf of each active participant within a "reasonable time" following the end of each calendar month. In January 2023, SEIU sued Evergreen in superior court, alleging that Evergreen had breached the terms of the Plan by failing to contribute within a reasonable time despite its promise to do so in the Plan document. Evergreen moved for summary judgment, asking the court to dismiss the claims because SEIU failed to exhaust the grievance procedure of the CBAs. The trial court granted Evergreen's motion and dismissed the case, reasoning that if SEIU had established a breach of the Plan, then it would establish breach of the CBAs, which the court reasoned subjected the claims to arbitration. The Court of Appeals reversed, holding that Evergreen's obligation to make matching retirement contributions in accordance with the Plan arose from the Plan itself, not from the CBAs. The Court rejected Evergreen's argument that the claims fell within the CBA arbitration clause because it agreed in the CBA to follow the Plan. The Court rejected this theory that a claim the City breached the Plan was equivalent to a claim it breached the CBA, reasoning that it was inconsistent with state and federal law regarding the scope of arbitration clauses within a CBA. The Court held that a CBA's mention of a separate retirement plan does not bring disputes arising under the plan into the CBA's arbitration clause, and it reversed dismissal of SEIU's lawsuit.

PERC

Duty to Bargain

University of Washington
Decision 13865 (PECB, 2024) (6/5/24)

A PERC examiner held that the University of Washington (UW) did not refuse to bargain over a mandatory subject of bargaining when it unilaterally notified certain employees that their job positions would become overtime eligible based on the annual adjustments to the Labor and Industries (L&I) overtime salary eligibility thresholds. In 2019, L&I issued new rules governing overtime exemptions under Washington's Minimum Wage Act, which require employees be paid overtime for all hours worked over 40 hours in a workweek unless, among other requirements, their salary meets the minimum salary threshold. L&I adjusts the minimum salary threshold

annually, and the thresholds are set to increase through January 1, 2028. When the new regulations went into effect, UW converted employees whose salaries fell below the new threshold amount from overtime exempt to overtime eligible. L&I's changes have required UW to convert a significant portion of their Research Scientists and Engineers (RSEs) to overtime eligible, and each time the salary adjustment required conversion, UW would notify the impacted RSE and direct them to begin tracking their hours worked. The first adjustment was made July 1, 2020, the second on January 1, 2021, and the third on January 1, 2022. In the meantime, in December 2021, the United Auto Workers Local 4121 ("union") filed a petition to represent a bargaining unit of approximately 1,458 unrepresented RSEs at UW, and it received interim certification in June 2022. The parties began bargaining over an initial collective bargaining agreement in November 2022, during which the UW confirmed that it planned to convert RSEs whose salary rates fellow below the new 2023 overtime threshold from overtime exempt to overtime eligible. The union objected and demanded to bargain over the decision and impact of any change in structure to the pay of the RSEs. UW responded that the decision to convert the impacted RSEs to overtime eligible consistent with L&I regulations was not a mandatory subject of bargaining, but that it was willing to bargain the impact. During bargaining, the union's proposals all focused on raising the salaries of bargaining unit RSEs so that they remained above the overtime eligibility salary threshold. The parties did not reach agreement until June 2023, and in the meantime, UW implemented the overtime eligibility conversion for 157 RSEs whose salaries had remained unchanged but who, based on the new L&I threshold numbers, were no longer overtime exempt. The union filed a ULP complaint with PERC, arguing that UW violated its obligation to maintain the status quo during the bargaining of the initial CBA, and it argued that converting the RSEs to overtime eligible was a mandatory subject of bargaining. Following an evidentiary hearing, a PERC Examiner dismissed the union's complaint, holding that UW's actions were not a change to the relevant status quo. The Examiner held that prior to the representation petition being filed, UW had a practice of implementing the salary threshold changes and converting impacted employees accordingly. By continuing to implement L&I's annual salary adjustments in January 2023, the Examiner held that UW had maintained the status quo that existed when the representation petition was filed. The Examiner further held that UW did not refuse to bargain over a mandatory subject of bargaining, reasoning that employers are required to comply with L&I wage and hour laws and rules, and the overtime salary threshold adjustments at issue in this case were mandatory under those rules.

Duty to Bargain

King County
Decision 13874 (PECB, 2024) (6/12/24)

A PERC Examiner held that King County committed a refusal to bargain unfair labor practice (ULP) when it unilaterally narrowed the scope of a union's information request, failed to communicate updates or timelines in processing the request, and delivered a final installment of documents the evening before a grievance meeting. However, the Examiner dismissed the union's claims related to the employer's unilateral changes to its *Loudermill* pre-termination hearing procedures, holding that such hearings are outside of PERC's jurisdiction. The King County Regional Automated Fingerprint Identification System Guild ("union") is the exclusive bargaining representative for non-commissioned Latent-Print Examiners and Identification Technicians working for the King County Sheriff's Office. The parties began negotiations for a successor collective bargaining agreement (CBA) in late 2020, and as part of those negotiations, they addressed the mandatory COVID-19 vaccine requirement imposed by the County's emergency health and safety order. In September 2021, the union sent the County an information request, seeking a spreadsheet illustrating all County employee COVID-related religious exemption requests, organized by date received, date reviewed, participants on the review meeting, date of the decision regarding the exemption, and the basis for the exemption. The union also requested all accommodations made by the County for granted religious exemptions, a

spreadsheet with all COVID-related medical exemption requests, and all accommodations made by the County for any granted medical exemptions. The County responded, asking if the requests were limited to employees represented by the union, to which the union clarified that they were seeking information County-wide because the "relevant comparable" is all employee requests. In November 2021, the County sent a follow-up email explaining that the information requested does not exist in those formats and that it does not have a duty to prepare the requested spreadsheets. The parties did not have any discussion or agreement to narrow the scope of the request, and the County did not communicate an update or a timeline to the union for approximately three months. In January 2022, the union notified the County that its members seeking exemption and accommodation were no longer an issue, so it was willing to allow the information request to "go stale." However, the union later learned a member who refused to be vaccinated had been denied religious accommodation, and as a result, was facing termination. The union then submitted an amended information request that again encompassed information related to accommodation requests for employees County-wide, not just those represented by the union. The County responded to the request that same day by stating that the request was overbroad, ambiguous and subject to interpretation. The County again asserted that it was not required to prepare such spreadsheets, but that it would provide additional documents once it became aware of them. The County also provided a document listing the union's bargaining unit employees that had participated in the religious accommodation process and offered that the union could contact the County if it was seeking records related to specific employees included in the attachment. In February 2022, the union reasserted its January request for information, and included five additional requests for information related to religious accommodations provided to County-wide employees. The union explained that this information was needed to represent its member who had refused to get vaccinated and sought a religious accommodation request, and who was scheduled for a *Loudermill* pre-termination hearing on February 10. The union received a copy of the *Loudermill* notice shortly before the meeting, and it asked the County to reschedule. The County denied the request to reschedule. The union's attorney attempted to join the *Loudermill* meeting on February 10, but the County refused to allow the attorney to join, asserting that it was not permitting attorneys to appear at the *Loudermill* hearings related to the vaccine mandate. The County terminated the employee, and the union filed a grievance in early March 2022 under the grievance procedures of the CBA. The union asked that the requested records be provided a few days before the step 3 grievance meeting to allow the union time to prepare. The County sent a final installment of the requested records at 6:22 p.m. the evening before the step 3 meeting. The union filed a ULP complaint in April 2022, arguing in part that the County's refusal to provide the requested information and its delay in providing information was a breach of its good faith bargaining obligations. The union further alleged that the County had committed a refusal to bargain ULP when it unilaterally changed the past practice of allowing attorneys to be present at *Loudermill* hearings. Following an evidentiary hearing, a PERC Examiner held that the County committed a ULP by unilaterally narrowing the union's information request to only information related to bargaining unit employees, rather than all County employees, as the union had requested. The Examiner reasoned that the employer's duty to fulfill an information request arises from its collective bargaining obligations to bargain in good faith, and that unilaterally narrowing the scope of the request without discussion, and objecting to the request as overbroad, was a breach of the County's bargaining obligations. The Examiner further held that the County had refused to bargain in good faith by failing to communicate a timeline with the union regarding the request for nearly three months and then delivering the final installment of records on the eve of the step 3 grievance meeting. However, the Examiner rejected the union's claims related to the *Loudermill* hearing, holding that an employer's obligation to provide a pre-termination meeting to public employees arises under state and federal constitutional due process rights, which is outside the scope of PERC's jurisdiction. As a result, the Examiner dismissed the union's claims based on the *Loudermill* hearing, but it

ordered the County to comply with the union's information request and to make good faith efforts to locate requested relevant information in a timely manner.

Discrimination

Washington State Department of Children, Youth, and Families
Decision 13876 (PSRA, 2024) (6/13/24)

A PERC Examiner dismissed a discrimination unfair labor practice (ULP) complaint filed by a Washington State Department of Children, Youth, and Families (DCYF) employee, holding that the employee's long history of repeated unprofessional conduct was a legitimate, nondiscriminatory reason for DCYF to impose more severe progressive discipline. Anjelita Longoria Fornara worked as a social worker for DCYF. During her time with DCYF, Fornara accumulated an extensive disciplinary history for unprofessional conduct beginning in April 2021. Fornara received numerous reprimands during her employment with DCYF for a range of behaviors, including referring to her supervisors as "inept" and "diabolical" in emails, refusing to complete a second interview of a child to assess further concerns of safety and abuse, and being disrespectful and unprofessional with a DCYF client. In April 2022, DCYF produced an investigation report detailing substantiated allegations that Fornara was disrespectful toward her supervisor, refused to follow her supervisor's directives to correct unprofessional documentation in case note entries, and documented case activity in an unprofessional and inappropriate manner. In June 2022, Fornara received a written reprimand for using placeholders in case notes and refusing her supervisor's directions. On September 5, 2022, DCYF discovered through a separate investigation that Fornara had asked a client to write a complaint letter about a fellow social worker. On September 29, 2022, Fornara sent out a statewide email discussing her grievances against DCYF, which included ULP complaints she had filed with PERC. Fornara testified in a ULP hearing against DCYF in December 2022, and in February 2023, she received a notice of pre-disciplinary meeting based on her failure to meet performance expectations and refusal to comply with requests from IT regarding a public records request. Based on those incidents, DCYF gave Fornara a temporary reduction in pay beginning March 22, 2023. On June 2, 2023, Fornara received another reduction in pay based on communication that was disrespectful, inappropriate, and unnecessary, which was later reduced to a written reprimand. In the meantime, on March 22, 2023, Fornara filed a ULP complaint with PERC, alleging that DCYF had reduced her pay in retaliation for her testifying in the ULP hearing held in December 2022. Following an evidentiary hearing, the Examiner dismissed Fornara's complaint, holding that DCYF had met its burden to show that its reason for reducing Fornara's pay was based on a legitimate, nondiscriminatory reason, and was not motivated by union animus. The Examiner held that Fornara's lengthy disciplinary history, which included between 10 and 15 written reprimands, was a legitimate, nondiscriminatory reason for later reducing Fornara's pay as further progressive discipline for the same conduct. The Examiner further held that Fornara failed to meet her burden of showing that this proffered reason was pretextual given that Fornara presented no evidence or argument that DCYF's disciplinary actions were motivated by union animus, and DCYF presented significant evidence of its lengthy disciplinary action history, which increased in severity over time, as required by progressive discipline. As a result, the Examiner dismissed Fornara's complaint in its entirety.

Interference

Western Washington University
Decision 13877 (PSRA, 2024) (6/14/24)

A PERC Examiner held that statements made to a union's legal counsel during an arbitration proceeding did not constitute an interference unfair labor practice (ULP). Public School Employees of Washington (PSE) represents approximately 367 classified staff employed by Western Washington University, including employees in the Human Resources Department and Facilities Management Department. The Washington Federation of State Employees (WFSE) represents 357 classified staff at the university, including employees working in Facilities Management. In May 2022, PSE

learned that the university had entered into an agreement with WFSE to pay its Facility Management employees a retention bonus of $2,000. Relying on a "me too" contract clause in its collective bargaining agreement, PSE asked the university whether it would be providing that same retention bonus to PSE-represented employees. The university agreed to offer the bonus to PSE-represented employees in Facilities Management and Human Resources, as those positions were difficult to retain. PSE took the position that the retention bonus should be offered to all PSE-represented employees based on the provision in its CBA, and it pursued a grievance on the issue through arbitration. The university prevailed at hearing, as the arbitrator determined that the university had not violated the CBA by offering a one-time retention bonus only to Facilities Management and Human Resources employees. After receiving the decision, PSE's legal counsel emailed the arbitrator, seeking clarification about the award and noting that the university had refused to pay any PSE employees the retention bonus. In response, the university stated that it only had an obligation under the contract to offer the retention bonus to the PSE members in Facilities Management and Human Resources, and that offer was rejected by PSE when it demanded that the bonus be given to all PSE-represented employees. The university informed the PSE counsel and the arbitrator that because the offer was rejected, the university's offer was terminated, and it did not intend to provide the bonus to any PSE employees. The arbitrator eventually issued a supplementary award finding that the university was obligated to pay the bonus to the Facilities Management and Human Resources employees consistent with its prior offer. In the meantime, PSE filed a complaint with PERC, arguing that the position the university took in the correspondence with the arbitrator constituted an interference ULP because it was a threat of reprisal or force in response to PSE's union activity of pursuing the grievance. Following an evidentiary hearing, PERC dismissed the complaint, finding that the legal arguments the university made to the arbitrator regarding the award did not constitute a threat of reprisal. The Examiner held that under the specific facts of the case, and the narrow, sophisticated audience of the union's legal counsel and arbitrator, the university's statements that it had terminated the offer could not reasonably be perceived as attempts to discourage protected union activity. However, the Examiner noted that had the statements been made to rank and file union members, it very well could have been viewed as a threat of reprisal in connection with union activity, and then it could have constituted interference.

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