STATE OF WISCONSIN
COURT OF APPEALS
District III
Appeal No. 2015AP000231

STATE OF WISCONSIN ex rel.
JOHN KRUEGER,

Plaintiff-Appellant,

v.

APPLETON AREA SCHOOL DISTRICT
BOARD OF EDUCATION AND COMMUNICATION
ARTS 1 MATERIALS REVIEW COMMITTEE,

Defendants-Respondents.

Appeal from the Circuit Court of Outagamie County
Honorable Vicki L. Clussman Presiding
Case No. 13-CV-868

PLAINTIFF-APPELLANT'S REPLY BRIEF

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INTRODUCTION

This Court is faced with a question of first impression about what is necessary for a government committee to be considered "created by rule or order" and therefore subject to the Open Meetings Act. The Court has, essentially, two options. It can adopt the restrictive reading advanced by the Defendant-Respondents and hold that governing boards and high-level administrators can delegate their duties downward in order to evade the Open Meetings Act. Or it can follow the legislature's directive to interpret the Open Meetings Act liberally and hold, consistent with Attorney General opinions, that any directive, formal or informal, that creates or authorizes the creation of a committee and assigns it governmental duties is a "rule or order."

The Creative Arts Materials Review Committee ("CAMRC") was not created organically by its members in the course of carrying out their day-to-day responsibilities. Rather, it was created by high-ranking Appleton Area School District ("District") administrators pursuant to directives of the District's Board of Education ("Board") in order to assist the Board in exercising its own authority. It was thus a "governmental body" and subject to the Open Meetings Act.

ARGUMENT

I) The Open Meetings Act Is to Be Liberally Construed

The Defendant-Respondents accuse the Plaintiff-Appellant of trying to turn the legislature's directive to construe the Open Meetings Act liberally into an automatic win. The Plaintiff-Appellant is doing no such thing, and acknowledges that the statutory elements that define when a group is subject to the Open Meetings Act must be met.

But a liberal construction means that a committee should be subjected to the Open Meetings Act only when it is undeniably not a "governmental body." Any reasonable debate over whether a body is subject to the law should be resolved in favor of transparency and public access. *See* Attorney General, 2012 Open Meetings Compliance Guide, at 3. ("Any doubts as to the applicability of the open meetings law should be resolved in favor of complying with the law's requirements."). In effect, ties go to the public, not the government.

II) The Open Meetings Act Applies to Government Groups Created "Top-Down" Instead of "Bottom-Up"

The text of the Open Meetings Act and Attorney General opinions on the subject support the conclusion that "governmental bodies" are

created top-down by an entity with authority over the group rather than bottom-up, or organically, by the group's members.

The text of the Open Meetings Act states that a "governmental body" must be "created by constitution, statute, ordinance, rule or order." Wis. Stat. §19.82(1). Each of those terms connotes an entity with superior authority creating the body. The Constitution is the will of the sovereign people of Wisconsin. Bodies created by statute are subject to the superior authority of the Legislature. Bodies created by ordinance are subject to the superior authority of a municipality. Likewise, the use of "rule or order" presumes some entity capable of exerting authority over the created body. Therefore, if some entity possessed the authority to create the body at issue, define it, assign it duties, disband it, and/or create rules for its governance, it was created by rule or order.

This reading is supported by plentiful Attorney General opinions, which have uniformly used this authority-based top-down test to determine whether a group was created "by rule or order." *See, e.g.*, 78 Op. Att'y Gen. 67, 69-70 (1989) (finding that such authority rested in "department district directors, bureau directors and property managers" as well as governing boards and secretaries of state departments); Tylka

Correspondence (finding such authority in a superintendent); Staples Correspondence (same); Sherrod Correspondence (finding such authority in a committee that created a subservient planning team); Informal Correspondence to Joseph F. Paulus, June 8, 2001 (finding such authority in "governmental bodies, presiding officers of governmental bodies or certain governmental officials, such as county executives mayors or heads of a state or local agency, department or division" and noting that such authority could be delegated downward and still be subject to the Open Meetings Act).

To the contrary, groups that are created by their own members are not subject to the Open Meetings Act because they were created organically, from the bottom-up. The Attorney General has recognized this distinction. In Tylka, the Attorney General opined that if the superintendent had directed his management team to meet and provide him with recommendations, it would be subject to the law, but if the members of the management team had decided to meet on their own, without direction from the superintendent, it would not be subject to the law. Tylka

Correspondence at 4.[1] Similarly in Pepelnjak, the Attorney General opined that a group of county administrators and private vendors who met regularly to carry out a contract were not a "governmental body"; there was no superior authority directing them to meet and act collectively. Pepelnjak Correspondence at 1-2.

The Defendant-Respondents repeatedly attack a strawman by claiming that the Plaintiff-Appellant seeks to impose Open Meetings Act requirements on "all committees of government employees" or that he argues the form of a body alone is sufficient to make it subject to the Open Meetings Act. (*See, e.g.*, D. Resp. Br. 1, 3, 24, 29, 30, 31.) The Plaintiff-Appellant is not making those arguments, and in fact expressly denied doing so in his opening brief. (*See* P. Br. 22 ("There is no doubt that the employees of the district are authorized to discuss between themselves a host of issues relating to their duties and responsibilities, including curriculum issues and text books. The Plaintiff-Appellant does not suggest that each and every one of those meetings is subject to the Open Meetings

[1] This distinction explains why the Defendant-Respondents' comparison to Tylka (*See* D. Resp. Br. 39-40), is erroneous. In Tylka, the Attorney General considered a situation where the members of a group themselves formed the committee organically, concluding such a group would not be a "governmental body." Here, in contrast, the 17 members of CAMRC did not decide among themselves to form a committee to make a booklist recommendation, the group was formed and given that task by District administrators.

Act.").) Concluding that a governmental body must be created top-down is a reasonable restriction that stops any slide down a slippery slope that could lead to a "meeting" of two employees deciding to discuss their job duties being subject to the Open Meetings Act.

III) CAMRC Was Created Top-Down

The Record demonstrates that CAMRC was formed from the top-down by entities with authority to do so. The Defendant-Respondents repeatedly assert that the Record is devoid of any evidence that CAMRC was created pursuant to Board policy, but that is factually incorrect. The Defendant-Respondents' own witnesses testified without contradiction that the authority for CAMRC flowed from Rule 361.1 and the ACI Handbook.

The Defendant-Respondents' statement that "it is undisputed [CAMRC] was not created based on any provision in Board Rule 361.1 or the ACI Handbook" (D. Resp. Br. 17), is patently false. It is in fact undisputed that CAMRC was created under both of those sources. Their own witnesses testified to that fact, and they point to no record evidence outlining any other source for CAMRC's authority.

At best, the Defendant-Respondents can say that CAMRC may have taken some actions outside the authority delegated to it and/or deviated

from the procedures it was supposed to follow, but they cannot deny that the committee's core function – providing a recommended reading list to the Board – was done under the authority of the Rule and the Handbook. Furthermore, even if the Rule and the Handbook were completely out of the picture, CAMRC would still be a "governmental body" because it was created top-down by high-ranking administrators and given a governmental task to do.

A) Rule 361.1 Authorized the Creation of CAMRC

The Board has adopted a Rule acknowledging that it has the legal responsibility for all educational material used in the District. Rule 361.1 (App. 106.) That Rule then delegates the responsibility for selecting educational materials to District personnel, while retaining final approval. *Id.* That is precisely what happened in this case – CAMRC used that delegated authority to review books and made a recommendation to the Board, which adopted those recommendations.

The Defendant-Respondents' litigation position, that the Board is not responsible for curriculum, is directly contrary to the District's previously stated position as well as the governing statutes cited in the Plaintiff-Appellant's original brief. The Defendant-Respondents' arguments on

statutory language are merely semantic. Whether we call it the "creation" or "provision" or "maintenance," the Board has the ultimate legal responsibility for the curriculum used in the District.

The District's own witnesses testified that CAMRC's authority to recommend books came from Rule 361.1. (*See* P. Br. 6-8.) These are not opinions on the law, but rather factual statements based on the witnesses' own personal knowledge. Who else would have known whether some other source of authority had been relied on (that the Plaintiff-Respondent may not have been aware of) by CAMRC? But they testified that the authority had no other source. (*Id.*) The Defendant-Respondents cannot now argue that CAMRC was acting under some other authority.

B) The Handbook Authorized the Creation of CAMRC

Rule 361.1 further states that the "procedures for selection of educational materials and textbooks" are "defined in the AASD Assessment, Curriculum, and Instruction Handbook." Rule 361.1 (App. 109). Although written by District employees, the Board adopted that Handbook as official policy. (R. 12:27, 54-55.) The process in the Handbook starts with the appointment of a review committee made up of

AASD staff and teachers and ends with Board approval based on the committee's recommendations. Again, that is exactly what happened here.

Although CAMRC may have deviated from the procedures laid out in the Handbook, that cannot possibly be an excuse to not follow the Open Meetings Act. If a committee could evade the Open Meetings Act by "breaking the rules," the Open Meetings Act becomes meaningless. Any governmental body could opt out of compliance simply by claiming that their misbehavior proves they were not acting within their delegated authority. The mandatory liberal construction of the Open Meetings Act precludes such chicanery.

C) CAMRC Was Created at the Direction of High-Ranking Administrators

Even if Rule 361.1 and the Handbook were irrelevant, CAMRC would still be a "governmental body" because it was created by high-ranking administrators. "When an individual government official, acting within the scope of properly delegated authority, creates an advisory body, that body is treated as if it had been created directly by the governmental body with authority over that official." Tylka Correspondence at 4.

CAMRC was created by high-ranking District administrators. The Defendant-Respondents admit freely that Steinhilber and Bunnow created

CAMRC. (*See, e.g.*, D. Resp. Br. 39.) Under Attorney General guidance, both Steinhilber and Bunnow are sufficiently "high-ranking" to trigger the Open Meetings Act. *See* Pepelnjak Correspondence at 1 (noting the Attorney General had "interpreted the phrase 'rule or order' to mean a formal or informal directive from a high-ranking government official, creating a body and assigning it duties"); 78 Op. Att'y Gen. 67 (listing "district directors, bureau directors and property managers" as such officials); Paulus Correspondence at 3 (listing "heads of a state or local agency, department or division" as such officials).

Steinhilber's title at the District is Curriculum, Instruction and Assessment Director and/or Chief Academic Officer,[2] and he reports to the Assistant Superintendent-School Services, putting him only two steps below the superintendent. (R.19:2, Allinger Aff. ¶7, Exs. A, B.) He has a "key position[] in the District's ACI Department as it relates to curriculum." (Allinger Aff. ¶7.) He "heads up a group of nine (9) curriculum directors and coordinators and is responsible for the curriculum development process." (*Id.*) His responsibilities revolve heavily around the development of curriculum. (*See* D. Resp. Br. 10.) Steinhilber was

[2] Compare Superintendent Allinger's affidavit ("Chief Academic Officer") to the job description attached to that affidavit ("Curriculum, Instruction and Assessment Director.") (R.19:2, Allinger Aff. ¶7, Ex. A.) The precise title is not determinative.

thus in a position of high authority, ultimately responsible for curriculum design, which is what CAMRC was engaged in. He was a "director" of a department and fit within the parameters of governmental officials the Attorney General has recognized as having sufficient authority to create a committee subject to the Open Meetings Act.

Bunnow served directly below Steinhilber, and herself had substantial authority (the Allinger affidavit says she has a "key position" in the ACI Department as well (R.19:2, Allinger Aff. ¶7)). "Bunnow provides leadership in developing curriculum . . . and assisting with the curriculum development process through serving on or leading committees and planning groups." (R.19:2, Allinger Aff. ¶8.) Bunnow, along with Steinhilber, had "responsibility[y] for supervision, coordination, and direction of curriculum, instruction, and staff development, and [was] required to hold the Director of Instruction license pursuant to Wis. Admin. Code §§ PI 34.32(1) and (4). She, too, was a "director." (D. Resp. Br. 10; R.19:2, Allinger Aff. ¶8, Ex. C.)

Therefore, even if CAMRC was exercising authority that did not stem solely from Rule 361.1 or the Handbook, it was still a "governmental

body" because it was created by high-ranking District administrators and given a governmental task.

IV) CAMRC Was Completing a Special Task in Aid of the Board's Powers, Not Undertaking Day-to-Day Staff Responsibilities

The Defendant-Respondents repeatedly attempt to cast CAMRC as merely exercising the pedestrian and routine "day-to-day" tasks of its members. But CAMRC was not acting to further the daily job performance of its members, but in a special assignment to aid the Board in its policy-making functions.

First, the timing was not "day-to-day." CAMRC was undertaking a task that was supposed to be done once every six years – and in fact had not been done for eight years. How is a task that is done once or twice a decade "day-to-day" or in any way routine?

Second, the scope of CAMRC's activities was not "day-to-day." The 17 members of CAMRC were not meeting to exercise their ordinary staff duties as teachers, librarians, and support assistants. They were not meeting to discuss what <u>they</u> would do as part of their job duties. Instead, CAMRC was tasked with making policy recommendations to the Board. They had no authority on their own to adopt new textbooks or create an alternative course; they could act only in assistance to the Board's own

authority. The effects of CAMRC's actions would be broad, covering all of the District's high schools and setting policy for years to come. The final responsibility for book adoption is the Board's, and the Attorney General has written that that is conclusive:

> Whereas in your case the board utilizes staff who may or may not have a direct professional interest in the book called into question, and whereas you may view it as an internal administrative matter, the final responsibility of inclusion or exclusion, subject to constitutional constraints, is with the board and the committee is acting in aid of such board.

Staples Correspondence 1-2.

The Defendant-Respondents throw a red herring in front of the Court by describing how it uses "curriculum teams" who do meet at a very low level to develop instructional-area curricula without a higher authority directing them to do so. (D. Resp. Br. 14-15.) That information is irrelevant though, as the Defendant-Respondents fail to even argue (much less point to any record evidence) that CAMRC was such a "curriculum team." The undisputed evidence shows that CAMRC was a "curriculum review committee" under the Handbook. (Steinhilber Dep., 17, 27, R. 12:4, 5; Bunnow Dep., 20-21, R. 12:16; Barkmeier Dep., 11, R. 12:24.)

It serves the purposes of the Open Meetings Act to permit the public to have access to view such policy-making activities. This would not be an

intrusion on the daily operations of the District, but rather important insight into high-level decision-making, particularly here where the Board adopted CAMRC's recommendations verbatim.

V) A Committee Cannot Evade the Open Meetings Act by Having an Additional, Non-covered Purpose

Defendant-Respondents argue that because CAMRC was initially created, not to provide recommendations for a book list, but to consider a parent request for an alternative course, it was not subject to the Open Meetings Act. But even if Rule 361.1 and the Handbook are irrelevant, CAMRC was still created by high-ranking administrators and given a governmental task. *See* Section III.C., *supra*.

Even assuming further that CAMRC was not created by a higher authority, it would still be subject to the Open Meetings Act once it began the task of providing a reading list recommendation to the Board. Government entities cannot evade the Open Meetings Act by shoehorning a covered activity into the operations of an otherwise non-covered body. For example, imagine the ninth grade English teachers in the District met once a month over lunch to discuss baseball. If the superintendent borrowed that group, gave it a name and committee structure, and tasked it with a governmental duty, it would become subject to the Open Meetings Act (at

least when holding a "meeting," as that term is defined in §19.82(2), to exercise its governmental power). To hold otherwise would permit easy evasion of the Open Meetings Act, contrary to the Act's purpose. Therefore, CAMRC was covered by the Open Meetings Act once it was tasked with providing a recommendation to the Board, even if for some reason it was not covered initially.

CONCLUSION

Because CAMRC was a "governmental body," it was subject to the Open Meetings Act. Defendant-Respondents do not contest that if it was a governmental body, it failed to meet the requirements for notice and being open to the public imposed by law. Therefore, this Court should reverse the circuit court's decision and remand with instructions to enter summary judgment in favor of the Plaintiff-Respondent.

Dated this 17th day of July, 2015.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. This brief is 2,948 words, calculated using the Word Count function of Microsoft Word 2010.

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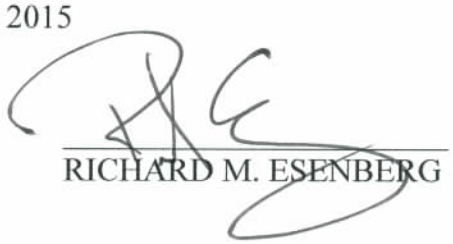

RICHARD M. ESENBERG

CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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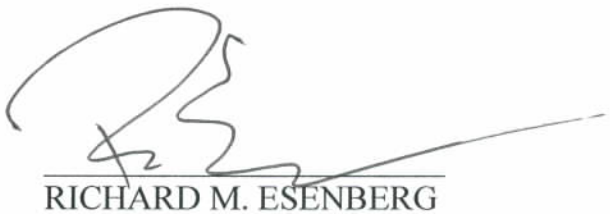

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