STATE OF WISCONSIN
SUPREME COURT
NO. 2015AP231

State of Wisconsin ex rel. John Krueger,

Plaintiff-Appellant-Petitioner,

v.

Appleton Area School District Board of Education and
Communication Arts 1 Materials Review Committee

Defendants-Respondents.

Appeal from the December 23, 2014 Decision by the
Outagamie County Circuit Court, Case No. 2013CV868,
the Honorable Vicki L. Clussman Presiding

PLAINTIFF-APPELLANT-PETITIONER'S REPLY BRIEF

Richard M. Esenberg, WI Bar No. 1005622
Brian McGrath, WI Bar No. 1016840
Thomas C. Kamenick, WI Bar No. 1063682
WISCONSIN INSTITUTE FOR LAW & LIBERTY
1139 E. Knapp Street
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385
Attorneys for Plaintiff-Appellant-Petitioner

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INTRODUCTION

This case boils down to a simple question. When a government body or high-ranking government officials exercising authority delegated to them create a government committee to do work the body has required be done, is that committee subject to the Open Meetings Law? The Legislature has made the answer as clear as can be – yes. The District strains to present something – anything – to complicate what is quite simple. In this case, the Appleton School Board approved a rule and a handbook directing that the selection of educational materials be undertaken by a committee. A committee was formed and selected educational materials. Its meetings were closed. The Open Meetings Law was violated.

ARGUMENT

I) CAMRC OBTAINED ITS AUTHORITY FROM AND OPERATED UNDER RULE 361.1 AND THE ACI HANDBOOK

In Krueger's first brief, he showed through the testimony of the District's own witnesses that CAMRC both obtained its authority from Rule 361.1 (promulgated by the Board) and the ACI Handbook (adopted by the Board) and operated as the "review committee" required by the

Handbook. (P. Br. 26-33.) It did what the Board wanted done by committee – it formed recommendations for the selection of educational materials. While the District claims that there is "no evidence in the record . . . that CAMRC was created pursuant to Rule 361.1 or the ACI Handbook" (Resp. Br. vii, ix, 19), its own witnesses said that it was. The very people who formed CAMRC said that CAMRC obtained its authority from Rule 361.1 and the ACI Handbook, and performed the work of the "review committee" required by the Handbook. (*See* P. Br. 9-11.) Nothing else the witnesses said contradicts that testimony.

They testified that Steinhilber and Bunnow made the decision to create this particular review committee. They testified that Steinhilber and Bunnow had discretion in their job duties. They testified that they "modified" the original process to suit the situation. None of that is inconsistent with their testimony that Rule 361.1 and the Handbook were the source of CAMRC's authority. They testified that the immediate catalyst for the creation of CAMRC was Krueger's request for an alternative course. But that is not inconsistent with their testimony that CAMRC also performed the "review committee" work required every six years by the Handbook.

A) It Is Immaterial that Rule 361.1 and the ACI Handbook Do Not Address a Request for an Alternative Course

The District hinges its argument that Rule 361.1 and the ACI Handbook are not the "rule or order" that created CAMRC on the lack of any language in either addressing a request for an alternative course. In other words, because the witnesses said that CAMRC – the committee doing work that the Board delegated to a committee – was formed following a request to do something else, all bets are off and its meetings can be closed. That is, to put it mildly, a strained reading of legal requirements that the Legislature has directed should be read broadly in favor of openness.

The District's argument might work, if all CAMRC did was decide whether or not to recommend creating an alternative course. But CAMRC did much more than that – it performed the duties of the "review committee" laid out in the ACI Handbook in light of the new Common Core standards[1] and because it had been eight years (not the six required by the Handbook) since the last time a review committee met to update the

[1] The District claims that because the ACI Handbook does not mention "Common Core," CAMRC was not following the Handbook. (Resp. Br. 21.) But how exactly could the District – in 2003 (R. 12:27) – have included a reference to a then-nonexistent set of standards? The Common Core project was not launched until 2009. The Court can take notice of this simple fact taken from Common Core's own webpage. http://www.corestandards.org/about-the-standards/development-process/. *See* §902.01.

Communication Arts 1 reading list. That makes it the committee called for by rule or order – Rule 361.1 and the Board-approved Handbook – doing the work that the rule or order called for.

The District calls for a "Simon Says" approach to the Open Meeting Law in which minor deviations from the rule or order can result in exemption from the Law. But that the process was "modified" or that the events that caused the district to perform the Board-mandated review included a request for an alternative course does not change this critical fact: CAMRC was a committee conducting a review the Board delegated to such a committee. The overly formalistic rule called for by the District would make it simple for government entities to evade the Law by pointing to slight irregularities in procedures.

B) Krueger Is Not Arguing that Structure or Purpose Alone is Determinative

The District claims that Krueger is arguing that "the 'substance' of a group of employees' work should determine whether the Open Meetings Law applies without regard to the 'form' of rule or order" and even in the absence of a rule or order. (Resp. Br. vii, 24.) Later the District claims that Krueger is arguing that CAMRC's formal structure alone makes it subject

to the Law. (Resp. Br. 31-33.) At no point has Krueger made any of those arguments The District cannot point to where Krueger allegedly did so.

Krueger has argued that a body must be doing governmental work and must have the form of a cohesive body to be subject to the Open Meetings Law. (*E.g.*, P. Br. 22-23.) However, those are necessary, but not sufficient conditions. If a group of employees is amorphous and does not act collectively, it does not fit the types of bodies described in the statute. *See* Compliance Guide at 7. If a body is not doing governmental work, it is not holding a "meeting" under §19.82(2). But even if both of those things are true, the body is not a "governmental body" unless it was created by rule or order. §19.82(1).

C) Krueger Is Not Arguing that "Every Meeting" Is Subject to the Open Meetings Law

Throughout its brief, the District claims that Krueger is trying to subject every meeting of government employees to the Open Meetings Law, constantly repeating phrases like "every meeting" or "any meeting" or "each and every meeting." (*See, e.g.*, Resp. Br. vi, xiv, 18, 20, 22, 34, 39-41.) It orchestrates a long parade of horribles based on that strawman.

But Krueger has made it patently clear that the interpretation he proposes would not subject routine employee meetings to the Open

Meetings Law. (R. 20:1-4; 21:1; P. Ct. App. Br. 21-22; P. Ct. App. Reply Br. 5-6.) A meeting by itself does not establish the existence of a "governmental body." Even if an administrator calls together a group of employees to meet regularly, no "committee" has been created unless, as the Attorney General has noted, the group has the formal structure of a cohesive body, with numerically-defined membership and a method of collective decision-making. Compliance Guide at 7. The District argues that whether a committee has such a formal structure is irrelevant (Resp. Br. at 31-32), but that is wrong. It is relevant because it provides an important part of the basis for where to draw the line for application of the Open Meetings Law.

II) THE OPEN MEETINGS LAW DOES NOT LIMIT WHO CAN ISSUE "RULES OR ORDERS" TO GOVERNING BOARDS

The District argues – contrary to statutory language, case law, and Attorney General interpretations – that a "rule or order" under §19.82(1) can only be issued by a "governing board." (Resp. Br. x, xiv, xv, 24.) But Section 19.82(1) contains no such limitation. Nor can it be found in *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 239 N.W.2d 313 (1976), as the District claims. (Resp. Br. 24, 35-36.) At no point does the *Conta* Court

state that a "rule or order" must come from a governing body. Here is the Court's discussion of the creation of a governmental body, in its entirety:

> The open meeting law thus defers the determination of the existence or composition of a particular governmental body to the enactment which creates the body. Stated another way, the question of whether a particular group of members of the government actually compose a governmental body is answered affirmatively only if there is a 'constitution, statute, ordinance, rule or order' conferring collective power and defining when it exists. The creating enactment or the created body in turn might define 'formally constituted subunits.'

71 Wis. 2d at 681. When quoting language from this excerpt, the District misleadingly adds words (adjacent to, but outside, quotation marks) like "by the governmental body" and "of a governing body" to misrepresent the *Conta* Court as concluding only a governing body can issue a "rule or order." (*See* Resp. Br. 24, 35-36.)

The District backs away from this absolute position later in its brief, stating that at least the "impetus" for a rule or order must come from a "governing body" (Resp. Br. 26), or that a "governmental body" must issue a "lawful charge" before a "lower level executive official[] or employee[]" can issue a rule or order creating a governmental body (*id.*, 36). Citing to Attorney General Opinions where such a charge was present, the District argues that authority to issue a "rule or order" must be expressly delegated

by a governmental body. But while those opinions involved express delegation, nowhere does the Attorney General opine that only an express delegation is sufficient. In fact, he concludes the opposite in 78 Op. Att'y Gen. 67 – that it can be presumed that officials are acting within their delegated authority when they create committees to do governmental work. *Id.* at 69. The District mischaracterizes this opinion when it claims that it requires a "rule or order" to be issued by a governing body. (Resp. Br. 25-26, 36.)

The District's interpretation would also lead to absurd results. For one, if a government entity not headed by a governing body (for example, any state agency headed by a cabinet-level secretary) created a committee, it would never be subject to the Open Meetings Law. That is not consistent with "the fullest and most complete information regarding the affairs of government." §19.81(1). For another, a governing body could shield all of its committees from the Law by the simple expedient of implicitly, rather than explicitly, authorizing their creation – omitting the option of using committees from all its delegations of authority, while not prohibiting them.

A) Krueger Is Not Arguing that the Mere Participation of Administrators Triggers the Open Meetings Law

The District also incorrectly claims that Krueger is arguing that the mere participation of high-ranking administrators in a meeting makes it subject to the Open Meetings Law (Resp. Br. 33-34, 40-41), and repeats the trope that Krueger's argument would subject "any meeting of so-called 'high-ranking administrators'" to the Law, (*id.*, 39). The District correctly identifies Krueger's argument that CAMRC's creation by high-ranking administrators makes it subject to the Law, but then argues against a strawman – that Krueger is claiming "any meetings conducted by school administration, teaching professional, or other employees" are subject to the Law. (*Id.*, 34 (emphasis added).) Krueger has made no such argument and has always acknowledged that not every meeting is subject to the Law.

There is a world of difference between applying the Open Meetings Law to a committee created by an administrator (Krueger's actual position) and to a meeting conducted by an administrator (how the District characterizes Krueger's position). Only the former is subject to the Law. For example, if Administrators Arendt, Balistreri, and Craig meet together one day, there is no "body." The same conclusion applies if Arendt holds a meeting with Subordinates Danielczak, Elgin, and Flanders. But if Arendt

creates a committee comprised of Balistreri, Craig, Danielczak, Elgin, and Flanders, and assigns it a governmental job to do, there is both a "body" and a "rule or order" creating the body.

CAMRC was a committee created by administration; it was not a series of meetings of administrators and employees. The 17 members of CAMRC did not just decide to meet. Steinhilber and Bunnow created a committee with those 17 members and gave it specific jobs to do. Unlike the counter examples in Attorney General guidance where an administrator merely calls her subordinates together to talk with them, CAMRC was created as a cohesive body with its own authority. Bunnow and Steinhilber were not merely "seeking collaborative input" (*see* Resp. Br. 40), to help them guide their own decision-making; they created CAMRC to make recommendations to the Board on a matter for which the Board had statutory responsibility.

B) This Court Does Not Need to Draw the Line for High-Ranking Administrators

The District questions how this Court would draw a line for where "high ranking administrators" will stop, suggesting once again that "all meetings" within a school district would be subject to the Open Meetings Law because such a line cannot be drawn. (Resp. Br. 40-41.) But this

Court has no need to draw a line. The District does not dispute that Steinhilber and Bunnow were high-ranking administrators,[2] arguing instead that high-ranking administrators cannot issue "rule or orders" (at least without express delegation from a governing body). By failing to dispute the matter, the District has conceded it. *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (1979). The Court does not need to draw a line; it can conclude based on the facts of this case (facts provided entirely by the District), that Steinhilber and Bunnow are high-ranking administrators.

C) CAMRC Was Not Performing "Day-to-Day" Tasks

The District repeatedly claims that CAMRC was merely performing "day-to-day" duties in the "ordinary" or "regular" "course" of its members' own employment duties. (*See, e.g.*, Resp. Br. vi, x, 4, 10, 20, 23, 26, 28, 35, 37, 41.) Because CAMRC was just doing "routine" work, the District's argument goes, finding that CAMRC was subject to the Open Meetings Law would make virtually any meeting of government employees subject

[2] The closest the District comes to disputing this argument is claiming that Steinhilber's and Bunnow's actions did not matter because they "were not in aid of the Board." (Resp. Br. 27, 28.) That claim is demonstrably false, as CAMRC (pursuant to the ACI Handbook's procedures) took its recommendations to a Board committee and then to the Board itself for approval.

to the Law. But that factual claim not only lacks an evidentiary basis, it is demonstrably false.

The District spends substantial time describing its ACI Department and the internal process of curriculum development. (Resp. Br. 4-6, 8.) It describes that work as "ongoing" and part of employees' "day-to-day obligations" and "daily job duties." (*Id.*, 5, 8.) Those facts are a distraction, however, because at no point does the District connect the dots between that process and CAMRC. The District describes "curriculum teams" (*id.*, 8), but never shows that CAMRC was a curriculum team. The District describes staff meetings that occur on an ongoing basis (*id.*), but never shows that CAMRC's meetings were such staff meetings. What the evidence does show, is that CAMRC was a special-purpose "review committee" as described in the ACI Handbook. (*See* P. Br. 35-38.)

The District also cannot show that the members of CAMRC were performing their ordinary job duties. The District describes the duties of "Curriculum Support Specialists" (Resp. Br. 5), but no Curriculum Support Specialists were on CAMRC. CAMRC included one principal and several teachers (R.15:40-41; Resp.Appx.156-157), but the District's brief does not allege that the kind of material selection work CAMRC did was part of the

ordinary job duties of principals or teachers. CAMRC had librarians (*id.*), but the District does not describe the ordinary job duties of librarians.

The claim that CAMRC was just a collection of routine, day-to-day meetings is unsupported. There is no evidence in the record showing that parent requests for alternative courses occur regularly, and it is reasonable to infer that they were extremely rare and possibly unique, as the District had no protocol for addressing them. The evidence shows that CAMRC performed a task that was meant to be done on a six-year cycle – hardly day-to-day or routine work. CAMRC was part of a process to set policy for the entire District for years to come, not something to help individual employees make day-to-day decisions.

III) THIS COURT SHOULD REMAND WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF KRUEGER

Finally, it is unclear what the District is asking for in its final Section. (*See* Resp. Br. 45-46.) According to the heading of the Section, if this Court finds CAMRC violated the Open Meetings Law (reversing the Court of Appeals), it should remand for further proceedings. But if this Court concludes that CAMRC violated the Law (concluding that it was a governmental body and did not follow the Law's requirements), there is no

need for further proceedings other than determining costs and attorney fees.[3]

According to the first paragraph of that section, however, the District argues that if this Court affirms the Court of Appeals, the District asks this Court to remand for further proceedings. But if this Court affirms, the case is over – Krueger has lost. Presumably, that is a typographical error and the District meant that if this Court reverses the Court of Appeals, this Court should remand for further factual proceedings, as it explains in the second paragraph. But whether this Court affirms or reverses, there is no need for further factual development. There are no disputed facts. This Court's decision will determine whether or not the Open Meetings Law applied. If it did apply, it is undisputed the District did not comply with the Open Meetings Law. (P. Br. 52-54.)

[3] Krueger did not request voiding of CAMRC's actions as a remedy under §19.97(3).

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals and remand with directions to enter judgment in favor of Krueger, declaring that CAMRC violated the Open Meetings Law.

Dated this December 13, 2016.

Respectfully submitted,
WISCONSIN INSTITUTE FOR
LAW & LIBERTY
Attorneys for Plaintiff-Appellant-Petitioner

Richard M. Esenberg, WBN 1005622
(414) 727-6367
rick@will-law.org
Thomas C. Kamenick, WBN 1063682
(414) 727-6368
tom@will-law.org
1139 E. Knapp St.
Milwaukee, WI 53202

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief and appendix conform to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of the portions of this brief referred to in section 809.19(8)(c)1. is 2,990 words, calculated using the Word Count function of Microsoft Word 2010.

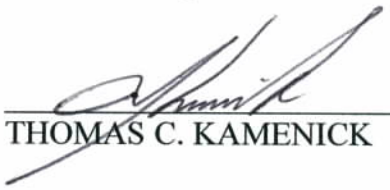
Dated: December 13, 2016

THOMAS C. KAMENICK

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of sections 809.19(12) and 809.19(13). 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.

Dated: December 13, 2016



THOMAS C. KAMENICK