SUPREME COURT OF WISCONSIN
APPEAL 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.

On Appeal from Outagamie County Circuit Court
The Honorable Vicki L. Clussman, Presiding
Outagamie County Case No. 13-CV-868

NON-PARTY BRIEF OF WISCONSIN COUNTIES ASSOCIATION, LEAGUE OF WISCONSIN MUNICIPALITIES, WISCONSIN ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, WISCONSIN ASSOCIATION OF SCHOOL PERSONNEL ADMINISTRATORS, WISCONSIN ASSOCIATION OF SCHOOL BOARDS, WISCONSIN COUNCIL FOR ADMINISTRATIVE SERVICES, ASSOCIATION OF WISCONSIN SCHOOL ADMINISTRATORS, WISCONSIN ASSOCIATION OF SCHOOL DISTRICT ADMINISTRATORS

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INTRODUCTION AND ISSUES PRESENTED.

This case presents this Court with the opportunity to confirm and clarify that the policy undergirding the Open Meetings Law ("OML") is not maximum access at all costs. Instead, it is a policy of balance between functional government and public access. *See* Wis. Stat. § 19.81(1). The Court should affirm this policy by affirming the Court of Appeals decision, rejecting Mr. Krueger's arguments and clarifying the Attorney General's informal guidance that undergird much of Mr. Krueger's argument. That guidance fails at times to provide clear answers to when meetings are covered by the OML. Indeed, on the definition of the term "rule or order," that guidance is vague and provides no workable standard, leaving governmental actors and the public guessing as to whether a gathering of particular persons is subject to the OML.

Government functions best when there are clearly defined and uniformly applicable standards. Accordingly, this Court should replace that portion of Attorney General's guidance with a clear, plain meaning definition of the term "rule or order." In doing so, this Court will achieve the balance that undergirds the OML.

This brief addresses two issues:

1. When is a governmental body created by "rule or order?"

The OML law recognizes that a governmental body may be created by "rule or order." The phrase "rule or order" is not defined in the statute. Likewise, this Court has not defined it. The phrase must be interpreted in light of the balance that undergirds the OML. As such, the bounds of when a new governmental body is created by "rule or order" must be clearly articulated. With all due respect, the informal guidance provided by the Attorney General over the years has left this issue muddled and provides no clear, usable standard. This Court should provide that clarity and hold that "rule or order" under the OML means lawful directive from an extant governmental body adopted or issued in the normal manner by which the governmental body acts.

2. When can anyone other than the extant governmental body create a new governmental body?

There is no doubt that individual governmental actors are not covered by the OML. Thus, the question becomes: under what circumstances can an individual governmental actor create a new governmental body that is subject to the OML. Mr. Krueger posits that any "high ranking official" may create a new governmental body whenever the

official creates a committee to address a matter within the scope of the extant governmental body's authority. This cannot be the law. Such a standard begs the question as to how high ranking an official must be? Moreover, this is too broad a standard. Indeed, all matters that an official would be concerned with are necessarily within the scope of the governmental body's authority. Here, the Court should affirm the prior Attorney General guidance and confirm that it is not the relative position of an official in the chain of command that matters but rather that an official is acting on authority expressly delegated to the official from the extant governmental body.

ARGUMENT

I. THE POLICY UNDERGIRDING THE OPEN MEETINGS LAW IS BALANCE.

No one disputes that access to the workings of government is a necessary feature of an American-style representative republic. And, no one disputes that the OML is designed to help fulfill this need. However, just as the Founders and authors of our republican form of government had to find the right balance between democracy and the protection of inaliable rights and minority view points, the drafters of the OML struck a balance between access and function:

> In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government *as is compatible with the conduct of governmental business.*

Wis. Stat. § 19.81(1)(emphasis added). Keeping this balance in mind is necessary to the proper determination of the issues in this case. Indeed, it appears that the problems that have crept into the Attorney General's informal guidance have resulted from a focus on rhetoric instead of a focus of the defining policy of balance between access and function.

Indeed, the Attorney General's brief, citing a prior formal opinion of the Attorney General misstates the policy as "to ensure the public is entitled to the fullest and most complete information regarding the affairs of government." (Attorney General's Brief at p. 3). Access to the fullest and most complete information possible is not the policy of the OML. Instead, the policy is balance; of allowing access to the "fullest and most complete information regarding the affairs of government" only to the extent that it *"is compatible with the conduct of government business."* Wis. Stat. § 19.81(1)(emphasis added).

Keeping this foundational public policy in mind and close to hand is necessary for the proper resolution of the issues presented by this case.

II. A RULE OR ORDER MUST BE ADOPTED OR ISSUED IN THE NORMAL MANNER BY WHICH THE EXISTING GOVERNMENTAL BODY LAWFULLY ACTS.

The OML applies to only to meetings of governmental bodies. The OML defines a governmental body as: "a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order ...". Wis. Stats. § 19.82(1). The statute does not define the term "rule or order." Neither has the Court of Appeals or this Court.

Stepping into this breach and attempting to fulfill his statutory duty to provide guidance regarding the OML, the Attorney General has given advice in the form of letters responding to specific questions. Those letters address what the Attorney General believes constitutes a rule or order. Unfortunately, this informal guidance is built upon the misstated public policy outlined above and thus has generated a vague, overbroad and unworkable definition that simply does not account for the impact on the ability of governments to function.

Consistent with this misunderstanding of the defining public policy, the Attorney General has defined "rule or order" too broadly. The Attorney General defines rule or order "to include any directive, formal or informal,

that creates a body and assigns it duties." (Attorney General's Brief at p. 3). At first blush this definition might not seem problematic; however, its failings become apparent when one attempts to apply it

Only an existing governmental body can issue a rule or order that creates another governmental body.[1] But a defining characteristic of American-style republicanism is that governmental bodies, be they the US Congress or the local town board, do not take action informally – they act by majority vote of the body. Those votes are held in public and are recorded in the official minutes of the body. The entire notion of an informal rule or order is oxymoronic.

Put simply, any new governmental body supposedly created by an informal rule or order of a county board (for example) is not and cannot be a governmental body because its creation would be *void ab initio* and any actions it attempted to take would be *ultra vires.* Or in the alternative, any such informally created entity simply would not be a governmental body.

For example, if a member or even a couple members of a county board wanted to gain additional knowledge about a topic relevant to the county and convened a group of individuals to study it, that group could not

[1] As will be discussed below, this power can be delegated.

be a governmental body because it was not created by a vote of the county board and it would be without the legal power to take any actions. In such a situation, there is no need for a meeting of this group to be open to the public. Yet with the unbounded definition of "rule or order" adopted by the Attorney General this group could very well be deemed a governmental body. As such, any meeting would require 24 hours' notice, the public would have to be allowed to attend, public comments may be taken and the simple desire of a responsible county board member to education him or herself would become frustrated. It is not inconceivable that lesson learned would be that it is simply not worth it.

This Court, however, need not entertain hypotheticals as real examples provide an even stronger demonstration that the Attorney General's current definition is problematic.

Indeed, the Georgeson Correspondence provides such an example of the problem with a definition of "rule or order" that includes informal directives.[2] In that instance, a group calling itself the "Racine Independent Education Commission" gathered to study the operations and finances of the Racine Unified School District and to provide advice to the District.

[2] This correspondence is included in the Attorney General's appendix at DOJ App. 014-018.

What is clear from the correspondence is that Commission was an independent entity, comprised entirely of community volunteers none of whom were governmental officials, it had no power to make any official decisions, and all expenses associated with its work were paid for by private sources. Moreover, it is clear that the "impetus for the Commission emerged from discussions among interested members of the community, rather than from any governmental official or entity." (Georgeson Correspondence at DOJ App. 017).

Yet, the Attorney General could not definitively find that this was not a governmental body because it was possible that this group of concerned community members may have had too much interaction with the Superintendent. Indeed, the Attorney General stated that this group of concerned community members may have been transformed into a governmental body because the Superintendent may have had some level of "input into the scope or direction of Commission ...". (Id. at DOJ App. 018). The Attorney General concluded his letter by recommending that if a group of citizens such as the Commission wanted to avoid being subject to the open meetings law it should "minimize, or avoid entirely, any involvement in the groups formation by any governmental officials to

whom it plans to provide ... advice ..." (Id. at DOJ App. 018). This would surely make the Commission less effective as its entire purpose was to provide useful information to the actual governmental body. If, however, the term "rule or order" were interpreted to require a formal directive adopted by the School Board through its normal process, the status of the Commission would be clear and the members of the Commission would be free from the threat of civil forfeiture.

The problem becomes even clearer when reviewing the Tylka Correspondence.[3] In that situation, the Stevens Point Area Public School District Board directed the Superintendent to formulate and submit recommendations for addressing a budget deficit. The Superintendent then meet twice with a group known as the Management Team to discuss the budget deficit. The Management Team was a pre-existing group comprised of district administrative staff, including the Superintendent, that meet semi-regularly. Mr. Tylka asked the Attorney General whether the meetings held for the purpose of addressing the budget issues were subject to the OML. Ultimately, the Attorney General could not reach a conclusion because it was unclear whether the School Board or Superintendent issued

[3] This correspondence is included in the Attorney General's appendix at DOJ App. 009-013.

a directive to convene the Management Team to take up the issue or whether members of the Management Team initiated the budget related meetings on their own accord. And, as the Attorney General saw it, this was the dispositive issue:

> If it is true that, in your situation, there was a directive issued by the Board to the Superintendent and then delegated to the Management Team, then a court would probably find that the specific Management Team meetings in question were held pursuant to a "rule or order" and thus were subject to the open meetings law.
>
> The Superintendent has informed me, however, that there was no such directive to him from the Board and also no directive from him to the Management Team. The Superintendent maintains, rather, that the initiative to develop the budget recommendations and submit them to the Board originated with the members of the Management Team themselves. If that is true, then, a court would probably conclude that the meetings in question were not held pursuant to a "rule or order" and thus were not subject to the open meetings law. Because this office cannot resolve factual disputes, it is impossible to provide a more definitive opinion on this question.

(Tylka Correspondence at DOJ App. 012).

To the Attorney General's application of the OML turned on whether the meeting was called in a top down or bottom up fashion. And, because the Attorney General has created a standard that allows for informal rules or orders, that fact was both disputable and in dispute. Whether the OML applied was left unanswered.

The kinds of meetings discussed in the Tylka Correspondence

happen routinely in Wisconsin's schools, counties, villages and cities. Staff, including high level administrators, meet to discuss process improvement, budgeting, etc. Such meetings are necessary for the proper functioning of government. Applying the OML to these meetings adds no real value to the citizen. Indeed, as the Tylka Correspondence reveals all the Management Team did was forward recommendations to the School Board who could adopt or reject them only at a properly held open meeting of the School Board. No official policy decisions were made in these meetings because such groups do not have such power. Overlaying the requirements of the OML to such meetings would do nothing other than add a layer of administrative burden that would negatively impact the functioning of government.

These kinds of problems or issues, however, can be avoided by the adoption of a clear and understandable definition of the term "rule or order." This Court should reject the Attorney Generals definition of "rule or order" that includes informal directives. In its place, the Court should hold that a "rule or order" is a directive adopted or issued by an existing governmental body in the normal manner by which it does its work. In all most, if not all, situations this will be adoption by a majority vote. And,

such formal directives will be recorded in the minutes of the governmental body. Such a definition will give clear guidance to all concerned and factual disputes about the existence of the rule or order, such as existed in the Tylka Correspondence, will be eliminated.

III. AN INDIVIDUAL GOVERNMENTAL ACTOR CAN CREATE A NEW GOVERNMENTAL BODY ONLY IF THE ACTOR IS A CONDUIT BETWEEN THE EXTANT GOVERNMENTAL BODY AND THE NEW BODY TO BE CREATED.

Mr. Krueger has argued that the specific committee at issue in this case, the CAMRC, is a governmental body subject the OML because it was constituted by two individuals he labels "high-ranking officials." Mr. Krueger's argument must be rejected. In Reply, Mr. Krueger attempts to address the very real concern raised by the District – high ranking officials call and participate in meetings on a nearly daily basis in Wisconsin's schools (the same is true of county, city and village governments). Mr. Krueger's attempt to allay this concern is ineffectual. Mr. Krueger responds that he is not arguing that all meetings in which a high ranking official participates should be open. Mr. Krueger draws a line between meetings of committees created by a high ranking official and meetings conducted by a high ranking official. (Reply at. 9). This supposed distinction misses the point.

The dispositive point is not how high the official is in the chain of command, nor whether the official created a committee or simply led a meeting. Instead, what matters is the source of the authority relied upon by the official to constitute the committee or call the meeting. Here, the Court should adopt the informal guidance of the Attorney General. That guidance has consistently held that a governmental actor can only create a new governmental body subject to the OML when the official is acting upon "properly delegated authority." (Tylka Correspondence at DOJ App. 012). Indeed, in Tylka the Attorney General made clear that the authority needed to originate with the school board:

> If it is true that, in your situation, there was a directive issued by the Board to the Superintendent and then delegated to the Management Team, then a court would probably find that the specific Management Team meetings in question were held pursuant to a "rule or order" and thus were subject to the open meetings law.

(Tylka Correspondence at DOJ App. 012). In announcing this guidance, the Attorney General recounted and relied on past guidance:

> This office has previously concluded that, where a school superintendent delegates to members of the school district's administrative staff advisory functions with which the superintendent has been lawfully charged by the school board, those staff members, for purposes of the open meetings law, are to be treated as if they had been directly charged by the school board to carry out those functions.

(*Id.* at DOJ App. 012) (citing correspondence to Joseph Paulus).[4]

What is inescapable in this guidance is that the authority must be vested in the extant governmental body and then delegated to the official. It is not the rank of the official that matters. What matters is that a committee established by the official is established on the authority of the governmental body. This makes perfect sense as it is the governmental body that is vested with policy making authority.

Mr. Krueger has argued, if the official who creates a committee or gathers co-workers has job duties in areas that overlap with the authority of the governmental body, such meetings fall into the OML. (Appellant Brief at p. 46). This cannot be the standard. Ultimately, every job duty carried out by every employee of a school district, county, village or city is within the scope of the governmental body's authority because the governmental body is the governing, policy-setting body. Adopting Mr. Krueger's argument on this point would literally expand the OML to cover any meeting of employees that make any collective decisions.

An absurd example may best drive home this point. There is no doubt that a school board is ultimately responsible for maintaining the

[4] The Paulus Correspondence is included in the Appendix submitted by Mr. Krueger at pages 132-136).

district's buildings. Under Mr. Krueger's theory, a meeting of all janitorial staff called by the head of the Department of Facilities and Maintenance, in anticipation of the upcoming budget cycle, to discuss and decide on what methods, and associated cleaning products, best maintain the integrity of the district's various gymnasium floors would be subject to the OML. Such a meeting would have to be noticed 24 hours in advance, the meeting would have to be held in a place that would allow for the public to attend, and public comments may be taken. If meetings such as these are to be subject to the OML, governance will become ineffectual. Basic information gathering will be absurdly bureaucratic. Decision making will be slower and likely less deliberative as not having the meeting may become the preferred course.

This Court should reject Mr. Krueger's argument, affirm the prior guidance from the Attorney General, and hold that an official can create a governmental body subject to the OML only when the official is acting in the stead of the extant governmental body. There must be an actual, affirmative delegation of authority.

CONCLUSION

This case presents the opportunity for this Court to find and announce the proper balance between access and function. To do so, this Court must give the term "rule or order" its plain meaning: a rule or order is a formal directive adopted by a governmental body through the normal process by which the governmental body does its work. Likewise, this Court must find that a governmental official may create a governmental body subject to the OML only when that official is exercising authority belonging to the extant governmental body, which has been delegated to the official. Adopting these standards will provide clear and understandable guidance to school boards, counties, villages, cities and all other units of government.

And, with these standards clarified, it is clear that this Court should affirm the Court of Appeals.

Dated this 28th day of December, 2016.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this non-party brief conforms to the Rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 3,385 words, as counted by our word processor.

Dated this 28th day of December, 2016.

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I hereby certify that:

I have submitted an electronic copy of this non-party brief, excluding the appendix, if any, which complies with the requirements of s. 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.

Dated this 28th day of December, 2016.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he has caused three true and correct copies of the foregoing non-party brief to be served upon counsel of record by via U.S. mail, as follows:

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Subscribed and sworn to before me
this 28th day of December, 2016.
Karen J. Brandt
Notary Public, State of Wisconsin
My Commission expires: 11/4/2017