WISCONSIN SUPREME COURT INTERPRETS "GOVERNMENTAL BODY" BROADLY IN LATEST RULING

–Christine V. Hamiel and Andrew T. Phillips, von Briesen & Roper, s.c.

In a ruling that initially sent shock waves through local governments across the state, the Wisconsin Supreme Court unanimously ruled on June 29, 2017, that a review committee created by administrators and employees of the Appleton Area School District constituted a "governmental body" within the parameters of the Open Meetings Law. This means that the meetings of the group of teachers, a principal, a curriculum director, and a library media specialist, was a "governmental body" within the meaning of Wis. Stat. § 19.82(1) and, therefore, falls within the strictures of the Open Meetings Law. *State of Wisconsin ex rel. Krueger v. Appleton Area Sch. Dist. Bd. of Educ.*, 2017 WI 70.

THE FACTS.

The review committee at issue was created by two school district administrators in response to a parent complaint concerning the book list for a 9th grade communication arts course. Upon receiving the complaint, the administrators loosely relied upon a curriculum department handbook that had been previously adopted by the Board of Education, to create a review committee to review the book list, make a determination as to whether the reading material was appropriate for the course, and ultimately take their recommendations to the board. This working group of 17 district employees did not open its meetings to the public.

When the review committee completed its work, it presented a list of books to the board for approval, and the full board voted to approve the list. The review committee members were not appointed by the board; nor did any board members serve on the review committee.

IT IS CRITICAL THAT COUNTY BOARDS REVIEW POLICIES AND RULES AND REDRAFT, REVISE, AND AMEND SUCH POLICIES TO ENSURE COMPLIANCE WITH THE SUPREME COURT'S DECISION.

The complaining parent filed suit claiming that the review committee – comprised entirely of school district administrators and professional educators – was created by "rule or order" of the Board of Education and, therefore, was required to conduct meetings consistent with Wisconsin's Open Meetings Law. The Circuit Court and the Court of Appeals ruled against the parent. On appeal, the issue before the Supreme Court was whether the review committee was a "governmental body" subject to the Open Meetings Law.

THE DECISION.

A unanimous Supreme Court found that the review committee was a "governmental body" within the meaning of Wis. Stat. § 19.82 and, therefore, was subject to the Open Meetings Law. The Court reasoned that a governmental body is created when the form of the group and the source of its authority satisfy the definition of "governmental body" in Wis. Stat. § 19.82(1), which provides that a governmental body is created when two criteria are met – (1) when the body takes the form of a state or local agency, board, commission, committee, council, department, or public body whether corporate or politic; and (2) when the governmental body was created or authorized by a constitution, statute, ordinance, rule, or order.

The Supreme Court was persuaded that the review committee met the form requirement as it was a "committee" with a defined membership of 17 individuals. It was created by district employees on the basis of a board rule and a board-adopted handbook – a board authorized formation. In the Supreme Court's estimation, the review committee was conferred the authority to review the book list and to take collective action based upon the board rule and the board-adopted handbook. Under the board-adopted handbook, the review committee members had authority as a group to select the materials recommended to the board – authority which none of the members had individually. Further, the review committee met to carry out its authority. The fact that the review committee called itself a "committee," kept minutes, recorded attendance, and took votes further supported the conclusion that the review committee satisfied the form requirement.

Moreover, the Supreme Court found the source of the review committee's creation to be a "rule" as that term is used in the Open Meetings Law. Notably, the Supreme Court adopted the definition of "rule" from the *American Heritage Dictionary*, 1577 (3rd ed. 1992), which provides that a rule includes: "any authoritative, prescribed direction for conduct, such as the regulations governing procedure in a governmental body." The Court held that the review committee at issue was created by "rule" through the board rule regarding curriculum and through the board-ad-

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opted handbook. Taken together, the board rule and the handbook constituted the "rule" (that is, the source of the review committee's creation) because, in the Court's estimation, they explicitly set forth the process district employees were expected to follow when reviewing educational materials and the handbook authorized the creation of committees for such purpose. Thus, the review committee satisfied the criteria of a committee created by rule.

ISSUES REMAINING.

The decision of the Supreme Court in *Krueger* left unresolved the question of what is a "rule" in the context of the Open Meetings Law. While the Supreme Court found in this instance that the group of school district employees was a governmental body created by "rule" of the school board, the Supreme Court declined to provide clear and concise guidance as to what action is needed by a governmental body to create a committee. What does it mean for an action to constitute a "rule?" Must it be explicit policy? Is tacit approval enough?

Further, the Supreme Court passed on addressing the parent's argument that a "high ranking official" could create a committee by rule or order. The Attorney General has voiced support for this proposition – that certain government officials such as a county executive, a mayor, or a head of a state or local agency, department, or division, have independent authority to create a "governmental body" subject to the Open Meetings Law. It remains unclear as to whether a high ranking official in a county can create a governmental body. The *Krueger* decision leaves these questions unanswered.

GUIDANCE MOVING FORWARD.

What does this mean for counties across the state? First and foremost, once a county board and administration have had an opportunity to digest the decision and its implications, it is critical that county boards review policies and rules and redraft, revise, and amend such policies to ensure compliance with the Supreme Court's decision. To avoid the fate that has befallen the school district in this case, it is important that board rules which endorse the creation of committees that otherwise involve purely administrative functions of local government be revised or eliminated as these committees are not properly within the scope of the Open Meetings Law. Moreover, explicit policy provisions should renounce the creation of a government body by board policy unless expressly set forth and adopted by the board.

Specifically, local governments should consider the following analysis to determine whether committees utilized in the ordinary course fall within the ambit of "governmental bodies" subject to the Open Meetings Law. First, a county must determine what body created the committee. Second, a county should determine to whom the committee reports. Next, the county should consider whether there is a rule or policy of the county board that relates to the topic of the committee's work. Finally, the county should ascertain whether the committee is addressing a topic that is explicitly the county board's responsibility. Such analysis will provide the needed framework for the county board in fulfilling their obligations under the Open Meetings Law.