COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP231 **Cir. Ct. No. 2013CV868**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

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 an order of the circuit court for Outagamie County: VICKI L. CLUSSMAN, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 SEIDL, J. John Krueger appeals a summary judgment order dismissing his complaint that alleged open-meetings violations by the Appleton Area School District Board of Education ("School Board") and the

Communications Arts 1 Materials Review Committee ("Review Committee"). Krueger argues the circuit court erroneously determined the Review Committee was not a "governmental body" subject to the open-meetings law. We reject Krueger's argument and affirm. Additionally, we grant a motion to strike portions of Krueger's reply brief.

BACKGROUND

¶2 Krueger was an Appleton Area School District taxpayer and parent of a child who attended a district school.[1] In July 2011, Krueger requested that the district provide an alternative ninth-grade Communication Arts 1 ("CA-1") course due to his concerns with the content of the current course reading materials. In his responses to the School Board's requests for admissions in this lawsuit, Krueger confirmed that his request to the district superintendent was for an alternative course, rather than a review of existing course materials. Specifically, he responded:

> Mr. Krueger did not make a request to Superintendent [Lee] Allinger to review the book list for CA[-]1. To review the existing reading list would have been a waste of time. Those books had already been approved by the Board. Mr. Krueger was asking for an alternate course, in which the books used would be selected using more stringent criteria than those used for the existing list.

¶3 Allinger, in turn, averred he "was not involved in the development of the process for addressing the … concerns at issue which resulted in the creation of [the Review Committee]." Rather, he "asked [Kevin] Steinhilber and [Nanette] Bunnow to respond to [Krueger's] concern as part of their job responsibilities and

[1] Before the circuit court, the parties agreed there were no disputed issues of material fact and the case could be decided on summary judgment.

in the ordinary course of the District's business." Allinger further stated, "I did not direct Steinhilber and Bunnow as to the process to utilize."

¶4 Steinhilber and Bunnow were both members of the school district's Assessment, Curriculum, and Instruction Department ("ACI department"), which was responsible for instructional programming and assessment. The ACI department was comprised of administrative professionals and staff who were responsible for the planning, selection, revision, and implementation of curriculum within the district. The ACI department's responsibilities included working with parents and the community to address curriculum issues.

¶5 Steinhilber was the school district's "Chief Academic Officer" and led the ACI department. That leadership position encompassed two district position titles with distinct job descriptions, an "Assistant Superintendent/School Services," which reported directly to the superintendent, and a "Curriculum, Instruction and Assessment Director," which reported to the assistant superintendent position. Steinhilber oversaw a group of nine curriculum directors and coordinators, including Bunnow, the district's director of humanities.

¶6 Steinhilber and Bunnow ultimately decided to conduct a review of the existing CA-1 books to determine whether different books, as opposed to an entirely new course, would resolve Krueger's concerns. They formed the Review Committee to conduct the book evaluation. Steinhilber and Bunnow subsequently expanded the Review Committee's duties to include a full review of the course materials for CA-1 because the materials had not been reviewed for eight years. Review of the CA-1 reading materials also allowed the school district to address the impact of the common core requirements, including those relating to nonfiction reading materials.

¶7 Steinhilber and Bunnow developed the procedures utilized for the Review Committee's evaluation of the course materials by using a modified version of a process described in Board Rule 361.1 and the ACI Handbook. Although Steinhilber and Bunnow borrowed concepts from Board Rule 361.1 and the ACI Handbook, the Review Committee was not created based on any specific provision of either. Additionally, the School Board never took formal action to approve or direct the Review Committee's creation or the processes the Review Committee adopted.

¶8 The Review Committee had seventeen members, consisting of district administrators, teachers, and staff. It held nine meetings between October 2011 and March 2012. Bunnow, as co-chair, prepared the agendas for the meetings and recorded and distributed the minutes. The Review Committee read approximately ninety-three fiction books, assessed their suitability to meet various curricular needs, and forwarded a recommended list of twenty-three books to the School Board's programs and services committee.[2] In April 2012, that committee adopted the recommended reading list as proposed. The School Board then adopted the proposed list later that month.[3]

¶9 Krueger had asked to attend the Review Committee meetings, but Steinhilber and Bunnow told him they were closed to the public. He emailed superintendent Allinger in November 2011, copying Bunnow and Steinhilber, indicating his belief that the Review Committee was subject to the open-meetings

[2] The proposed list consisted of twelve new books and twelve existing course books, with one book having been withdrawn following solicitation of public comment.

[3] The meetings of the School Board and its committee were both open to the public.

law. The email was forwarded to the School Board, but all meetings remained closed and no public meeting notices were posted. Steinhilber testified at his deposition that one reason they wanted the meetings closed was to prevent Krueger from attending and publicizing statements made by committee members about particular books. Steinhilber explained Krueger had previously publicized teacher statements made in a standard review committee meeting, and the teachers did not want that to occur again.

¶10 Krueger commenced the present action, alleging the School Board and Review Committee violated the open-meetings law by failing to give notice of the meetings and excluding the public. *See* WIS. STAT. § 19.83(1).[4] The parties filed cross-motions for summary judgment, and the circuit court granted summary judgment to the defendants, dismissing Krueger's action in a written decision. The court held that, because the Review Committee was not created by a directive of the School Board, the committee was not a "governmental body" subject to the open-meetings law. Krueger now appeals.

DISCUSSION

¶11 WISCONSIN STAT. § 19.83(1) provides: "Every meeting of a governmental body shall be preceded by public notice …, and shall be held in open session." Krueger argues the circuit court erroneously determined the Review Committee was not a "governmental body" subject to the open-meetings

[4] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

law. The parties agree this presents a question of law subject to de novo review.[5] *See* ***State ex rel. Hodge v. Town of Turtle Lake***, 180 Wis. 2d 62, 70, 508 N.W.2d 603 (1993).

¶12 "Governmental body" is a defined term under the open-meetings law. It means:

> a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order;
>
> a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation;
>
> a local exposition district under subch. II of ch. 229;
>
> a long-term care district under s. 46.2895; or
>
> a formally constituted subunit of any of the foregoing ….

WIS. STAT. § 19.82(1) (spacing modified). The precise issue here is whether the Review Committee was "created by" a "rule or order" within the meaning of § 19.82(1).

¶13 When interpreting and applying the open-meetings law, we are guided by the following declaration of policy:

> **(1)** 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

[5] While neither party sets forth the summary judgment standard of review, Krueger observes in a footnote that the parties agreed in the circuit court there were no material disputed facts and the case could be decided on summary judgment. Summary judgment is appropriate when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Generally, when both parties move by cross-motions for summary judgment, it is the equivalent of a stipulation permitting the circuit court to decide the case on the legal issues. ***Millen v. Thomas***, 201 Wis. 2d 675, 682-83, 550 N.W.2d 134 (Ct. App. 1996).

> 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.
>
> **(2)** To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.
>
> ….
>
> **(4)** This subchapter [V] shall be liberally construed to achieve the purposes set forth in this section ….[6]

WIS. STAT. § 19.81(1), (2), (4).[7]

¶14 The parties agree we should consider both official and informal opinions of the Wisconsin Attorney General in making our determination. Attorney general opinions are not binding on the courts but may be given persuasive effect. ***Milwaukee Journal Sentinel v. City of Milwaukee***, 2012 WI 65, ¶41, 341 Wis. 2d 607, 815 N.W.2d 367 (citing both official and informal attorney general opinions). "The opinions and writings of the Attorney General have special significance in interpreting the Public Records Law, inasmuch as the legislature has specifically authorized the Attorney General to advise any person about the applicability of the Law." ***Id.*** (citing WIS. STAT. § 19.39). The open-meetings law has a similar attorney general authorization. *See* WIS. STAT. § 19.98.

[6] Subchapter V refers to WIS. STAT. §§ 19.81-19.98 and is titled, "OPEN MEETINGS OF GOVERNMENTAL BODIES."

[7] The first argument in Krueger's primary brief is that the circuit court erred by failing to apply a liberal construction of the open-meetings law. Because our review is de novo, we do not review the circuit court's rationale. Moreover, Krueger's liberal-construction/policy-based argument is undeveloped because it is untethered from any interpretation or application of the statutory language. Accordingly, we view Krueger's first argument as merely an introduction.

Thus, attorney general opinions are likewise "of particular importance" in the open-meetings context. ***State v. Beaver Dam Area Dev. Corp.***, 2008 WI 90, ¶37, 312 Wis. 2d 84, 752 N.W.2d 295.

¶15 Both parties rely on the same four attorney general opinions, as follows: 78 Wis. Op. Att'y Gen. 67 (1989); Letter from Wis. Ass't Att'y Gen. Thomas C. Bellavia to Joe Tylka (June 8, 2005); Letter from Wis. Att'y Gen. James E. Doyle to Clarence L. Sherrod (Oct. 17, 1991); and Letter from Wis. Ass't Att'y Gen. William H. Wilker to Virgil M. Staples (Feb. 10, 1981).[8] The most recent of these opinions aptly summarizes the office's position regarding the creation of a "governmental body" by "rule or order."[9] The Tylka letter, at 2-3, first observes:

> The term "rule or order" has been broadly construed by this office to include any directive, formal or informal, that creates a body and assigns it duties. *See* 78 [Wis.] Op. Att'y Gen. 67, 68-69 (1989). This includes directives

[8] The School Board additionally relies on one other short, informal opinion, which is of little assistance due to the requestor there having provided very limited information to the attorney general. *See* Letter from Wis. Ass't Att'y Gen. Mary W. Schlaefer to Jim Pepelnjak (June 8, 1998).

The School Board and the Review Committee filed a single brief. For ease of reading, we refer to their collective arguments as those of the School Board.

Neither party supplied this court with copies of the informal attorney general opinions on which they relied. The preferred practice would be to supply those authorities in the appendix, similar to the rule concerning unpublished court opinions. *See* WIS. STAT. RULES 809.19(2)(a), 809.23(3)(c).

[9] The Tylka letter explains that, when considering whether a group is a "governmental body," two determinations must be made. Letter from Wis. Ass't Att'y Gen. Thomas C. Bellavia to Joe Tylka, at 1 (June 8, 2005). "First, the group in question must constitute a collective body, rather than a mere assemblage of individuals." ***Id.*** at 2. There is no dispute that this first element is satisfied with respect to the Review Committee. The second determination is whether there "is a directive creating the group in question," that is, whether the group was "'created by constitution, statute, ordinance, rule or order.'" ***Id.*** (quoting WIS. STAT. § 19.82(1)).

> issued by governmental bodies, presiding officers of such bodies, or certain government officials such as a county executive, a mayor, or a head of a state or local agency, department or division. *See* ***id.*** at 69-70. It may also include directives from lower level executive officials or employees to whom the governmental function in question has been delegated or re-delegated. *See* ***id.*** The open meetings law does not apply, however, to meetings of groups of government officials and employees that are not established pursuant to some such formal or informal directive, but that simply meet together on an *ad hoc* basis in the interest of governmental efficiency or good staff work.

¶16 Proceeding to the issue before it, the Tylka letter, at 4, further explains:

> 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 of that official. *See* 78 [Wis.] Op. Att'y Gen. at 70 (state agency managers); [four additional informal opinions respectively concerning a school superintendent, mayor, town chairperson, and county executive]. Even more specifically on point, 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. *See* June 8, 2001, correspondence #010131009 to Joseph F. Paulus.

¶17 The Tylka letter observed there were two competing versions of facts presented, which the attorney general's office could not resolve. However, it gave its opinion as to each scenario. If the school board had in fact given the superintendent a directive to make a recommendation to it, which directive the superintendent then delegated to the management team, then the open-meetings law would apply. ***Id.*** However, if the management team had developed

recommendations on its own initiative to submit to the board, then the open-meetings law would not apply. ***Id.***

¶18 Here, Krueger argues the Review Committee was created by rule or order because it was "specifically created under" Board Rule 361.1 and the ACI Handbook. This argument fails because it is based on a false premise. Krueger is unable to direct us to any provision of either authority under which the Review Committee was created.[10]

¶19 Board Rule 361.1 is titled "Educational Materials Selection," and is ten single-spaced pages long. The rule provides two "Procedures for Handling Objections to Educational Materials." The first allows parents to "object to specific educational materials being used with his/her child." The second procedure allows any adult resident of the school district to object to the use of "a specific educational material." Where the second procedure is implicated, the complaint may be escalated to a standing sixteen-member "educational materials

[10] Krueger does refer to language in the introductory portion of Board Rule 361.1, which indicates that while the School Board is legally responsible for all educational materials in the district, "[t]he selection of educational materials is delegated to the professionally trained and certified personnel employed by the school system." The introductory section next states the ACI department is responsible for "coordinating and maintaining qualitative standards in the selection process," but "[t]extbooks, however, must be formally adopted by the [School Board] since they often constitute the major content of the curriculum." We fail to see how any of this general language could reasonably constitute a "rule or order" creating the ad hoc Review Committee or assigning it duties.

We note the rule defines both "educational materials" and "textbooks." "Educational materials" is "the general term used to refer to all print and non-print materials or resources [that] are used as a part of the educational program of the District. Throughout [Rule 361.1], the term 'materials' shall be used to mean educational materials." "Textbooks" refers to "the book or set of materials [that] serves as the foundation of the content of any Board-approved course. In Wisconsin, textbooks must be formally adopted by the [School Board]."

review committee," which consists of school staff and administration, parents, students, and community members.

¶20 The second procedure appears substantially similar to the circumstances described in the Staples letter, at 1. There, the attorney general's office determined the review committee was a governmental body "created by rule," as the committee was created "pursuant to school district policies adopted by the school board." However, here, neither Board Rule 361.1 procedure was applicable, because Krueger requested creation of an alternate course altogether since, in his opinion, "to review the existing reading list would have been a waste of time." There was no established district procedure for requesting an alternative course or responding to such a request.

¶21 Rather, the undisputed facts are that superintendent Allinger simply directed Steinhilber and Bunnow to respond to Krueger's request and was not further involved in the development of any process. On their own initiative, Steinhilber and Bunnow decided to create the Review Committee to consider whether alternative books might satisfy Krueger's concerns. Also on their own initiative, Steinhilber and Bunnow broadened the scope of the Review Committee's work to include a review of the existing CA-1 course materials and to make a recommendation to the School Board. That set of events is similar to the second set of facts addressed in the Tylka letter, at 4, wherein the attorney general's office opined the open-meetings law would not apply. We agree that such facts do not constitute creation of a committee by "rule or order" under WIS. STAT. § 19.82(1), even under a liberal interpretation of those terms. Accordingly, we hold that the Review Committee was not a "governmental body" subject to the open-meetings law. *See* WIS. STAT. §§ 19.82(1), 19.83(1).

¶22 Krueger also appears to suggest the Review Committee was subject to the open-meetings law because the committee ultimately made recommendations to the School Board. If that is his argument, it fails because it ignores the statutory definition of "governmental body." *See* WIS. STAT. § 19.82(1). Under this statute, a group is generally either subject to the open-meetings law upon creation, or it is not.[11]

¶23 For the first time in his reply brief, Krueger argues, "Even if Rule 361.1 and the [ACI] Handbook were irrelevant, [the Review Committee] would still be a 'governmental body' because it was created by high-ranking administrators." He asserts, "Under Attorney General guidance, both Steinhilber and Bunnow are sufficiently 'high-ranking' to trigger the Open Meetings Act."

¶24 Following submission of Krueger's reply brief, the School Board moved to strike those portions of the brief that argue the Review Committee was a "governmental body" subject to the open-meetings law because it was created by high-ranking administrators, rather than pursuant to Rule 361.1 or the ACI Handbook. The School Board's twenty-page memorandum demonstrates Krueger never raised a "high-ranking administrators" argument in the circuit court or in his initial appellate brief.

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[11] Our decision is consistent with the observations set forth in Peter J. Block, *An Intro to Understanding Wisconsin's Open Meetings Law*, Wis. Lawyer, Dec. 2015, Vol. 88, no. 11, which states:

> As a general rule of thumb, when attempting to determine whether an entity is a governmental body, how the entity is created matters more than what kind of authority, if any, it possesses. For example, a purely advisory board, with no final decision-making power, may be subject to the Open Meetings Law depending on how the board was created.

¶25 Krueger responds that he is not making a new argument in his reply brief, but merely replying to the School Board's arguments. We disagree. He is presenting an entirely new rationale for concluding the Review Committee was created by a rule or order. Indeed, this is apparent when contrasting his new argument to his initial brief. Whereas his reply brief argues it was sufficient that administrators created the Review Committee, he previously argued that under the School Board/circuit court's view, "governing boards across the state could avoid the Open Meetings Act simply by authorizing administrators to create committees to do their work." Further, while Krueger's new argument relies on some of the authorities cited in his initial brief, such as 78 Wis. Op. Att'y Gen. 67 and the Tylka letter, that fact alone is inadequate because he did not previously rely on those authorities to make the distinct, substantive argument he now raises. Additionally, he now cites an additional authority for the first time (which was cited in the Tylka letter): Correspondence #010131009 to Joseph F. Paulus (June 8, 2001).[12]

¶26 We grant the School Board's motion and strike all references or argument from Krueger's reply brief concerning creation of the Review Committee by high-ranking administrators. Issues not raised at the circuit court are generally deemed forfeited on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727. Although we may exercise discretion to reach forfeited issues in certain circumstances, *see* ***Estate of Hegarty v. Beauchaine***, 2001 WI App 300, ¶¶11-13, 249 Wis. 2d 142, 638 N.W.2d 355, it would be inappropriate to do so here. Krueger not only failed to raise the "high-

[12] We did not review the Paulus correspondence.

ranking administrators" argument in the circuit court, he also failed to do so in his initial appellate brief. "It is a well-established rule that we do not consider arguments raised for the first time in a reply brief." ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. Accordingly, we do not consider the merits of whether the Review Committee should be deemed a "governmental body" created by "rule or order" because it was created by Steinhilber and/or Bunnow as high-ranking administrators.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.