News for School Law Clients | FYI | November 2016

Supreme Court To Hear Open Meetings Case & WERC Announces Revised CPI-U

The Wisconsin Supreme Court has agreed to hear a case involving the question of "Whether a formal committee, created by school district officials, pursuant to school district policies, in order to carry out school district functions, is a 'governmental body' subject to the Open Meetings Act." This case will be of great interest to school districts as it will be one of the first court cases specifically addressing this issue. There are a handful of Attorney General Opinions and letters addressing aspects of when a "committee" meets the definition of a "governmental body" within the Open Meetings Law. Those Attorney General Opinions, while useful, still leave a number of situations unresolved and are only considered persuasive authority and not binding on courts. The Court's decision in this matter, which is a review of an unpublished Court of Appeals case, will likely provide additional guidance to school districts.

In this case, a parent complained about the content of reading materials for a course his freshman daughter was taking in the Appleton School District. He specifically requested that the district provide an alternative course, rather than a review of the existing course materials. In response to his request, the district superintendent directed two administrators, who were responsible for the planning, selection, revision, and implementation of curriculum within the district, to respond to the parent's request.

The two administrators ultimately decided to conduct a review of the existing books in the class the student was in to determine whether different books, as opposed to an entirely new course, would resolve the parent's concern. They formed a "Communication Arts 1 Materials Review Committee" ("Review Committee") to conduct the evaluation. During the course of the review, they expanded the Review Committee's duties to include a full review of the course materials because the materials had not been reviewed for eight years.

The administrators developed the procedures utilized for the Review Committee's evaluation of the course materials by using a modified version of a process described in a Board Rule and the Assessment, Curriculum, and Instruction Department Handbook. The Review Committee was not created based on any specific provision of the Board Rule or Handbook, and the Board never took formal action to approve or direct the Review Committee's creation or the processes of the Review Committee.

The Review Committee had seventeen members and held nine meetings between October 2011 and March 2012. The parent asked to attend the Review Committee meetings, but he was told they were closed to the public. The administrators acknowledged that one reason they wanted the meetings closed was to prevent parents from attending and publicizing statements made by Review Committee members about particular books. The administration explained that this parent had previously publicized teachers' statements made in a standard Review Committee meeting, and the teachers did not want that to occur again.

The Review Committee read approximately 93 fiction books and recommended a list of 23 books to the Board's Programs and Service Committee. In April 2012, the Programs and Service Committee adopted the recommended reading list as proposed, and the Board adopted that proposed list later that month.

The Review Committee meetings remained closed, and no public meeting notices were posted. The parent filed a complaint with the District Attorney who refused to prosecute. A private action was brought in circuit court alleging the Review Committee was a governmental body, which violated the Open Meetings Law by failing to give notice of the meetings and excluding the public. The circuit court held that the Review Committee was not a "governmental body" subject to the Open Meetings Law. The Court of Appeals affirmed that decision. The Court of Appeals determined that the precise issue in this case was whether the Review Committee was "created by" a "rule or order" within the meaning of the Open Meetings Law. The Court of Appeals focused on one particular Attorney General letter which attempted to provide guidance on this issue. The Court of Appeals noted that particular Attorney General letter described two scenarios with different results: 1.) If a school board had in fact given a 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. 2.) If the management team had developed recommendations on its own initiative to submit to the board, then the Open Meetings Law would not apply.

In this case, the Court of Appeals held that because there was no established district procedure for requesting an alternative course or responding to the specific request the parent made in this instance, the Board Rule and Handbook did not determine how the Review Committee should proceed. Rather, the superintendent directed the administrators to respond to the parent's request and was not further involved in the development of any process. The Court of Appeals found the administrators decided on their own initiative to create the Review Committee and then subsequently expanded the scope of the Review Committee's work to include a review of the existing course materials and make a recommendation to the Board. As a result, the Court held the Review Committee was not a "governmental body" subject to the Open Meetings Law.

In their briefs to the Court of Appeals, the parties noted the difficulty was trying to draw the line between when meetings of administrators, professionals and staff were just part of the ordinary day-to-day business of a school as opposed to when such meetings might be construed as being a meeting of a "governmental body." The district, in its argument to the Court, noted that, if the Open Meetings Law was interpreted as broadly as the parent was suggesting in this case, the number of meetings that would be required to be subject to the Open Meetings Law in not only this district but in all school districts across the state would be endless. Districts would be forced to notice and open to the public any employee or departmental meetings not only related to curriculum but in other areas such as building repairs, insurance, sanitary facilities, school hours, continuity of educational programing, and providing court mandated services. The district suggested such a broad interpretation would result in inefficiencies and handcuff superintendents and others from effectively running the school.

The parent had also raised an issue before the Court of Appeals as to whether, because the Review Committee was created by a "high ranking administrator," that it constituted a "governmental body." The Court of Appeals ruled the parent had forfeited that argument because it had not raised it at the circuit court level. The parent has renewed that argument in his brief to the Supreme Court. Whether the Supreme Court will address that argument and, if so, what affect it might have on the case also remains to be seen. The Attorney General has held in some circumstances that a directive from a high-ranking official creating a body and assigning it duties is a "rule or order" sufficient to bring the committee within the meaning of "governmental body" under the Open Meetings Law. In this case, an assistant superintendent was the person who formed the committee in response to the superintendent's directive to respond to the parent's complaint.

It will be interesting to see where the Supreme Court draws the line in these situations. Oral argument has not yet been scheduled, but a decision should be issued before next summer.

CPI-U REVISED for Bargaining Agreements Beginning January 1, 2017

On November 4, 2016, the Wisconsin Employment Relations Commission (WERC) published a revision to the Department of Revenue's calculation of the applicable CPI-U. This is a result of the Bureau of Labor Statistics (BLS) releasing four months of revisions due to an error it reported in October and described as a problem in the "indexes for prescription drugs… published for May 2016 through August 2016, which affected the U.S. All items index."

After reviewing all of the previously published rates, the only one affected by the revised BLS index is the one calculated for collective bargaining agreements with a beginning date of January 1, 2017. When originally reported, the cap was .68%. It has now been reduced to .67%.

If you are still bargaining to reach an agreement effective January 1, 2017, use the new CPI-U data. If the parties to such an agreement have previously settled for a stated base wage increase above .67%, they may wish to consult an attorney or the WERC to determine the potential impact. This does not impact most school district bargaining since the July 1, 2016, CPI-U remains unchanged, and the July 1, 2017, CPI-U will not be calculated until approximately January 19, 2017, when the December CPI-U data is expected to be released.

The relevant portion of the WERC's table is reproduced below:

> Consumer Price Index Calculation Chart (updated last on 11-07-16)
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> The Wisconsin Department of Revenue (DOR) has advised the Wisconsin Employment Relations Commission (WERC) that the CPI-U increase applicable to one year collective bargaining agreements with a term beginning on the following dates is as noted in the corresponding column in the chart below.
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> *Revised 11/4/2016.

Beginning date of one year collective bargaining agreement	Applicable CPI-U as determined by WI Department of Revenue
April 1, 2017	0.93%
March 1, 2017	0.80%
February 1, 2017	0.73%
January 1, 2017	0.67%*
January 1, 2017	0.68%

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