

J.B. VAN HOLLEN,

Plaintiff,

Case No. 08-CV-4085

vs.

GOVERNMENT ACCOUNTABILITY BOARD,
THOMAS CANE, GERALD NICHOL,
MICHAEL BRENNAN, WILLIAM EICH,
VICTOR MANIAN, GORDON MYSE,
KEVIN J. KENNEDY and NATHANIEL E. ROBINSON,

Defendants.

**GOVERNMENT ACCOUNTABILITY BOARD'S BRIEF IN
SUPPORT OF ITS MOTION TO DISMISS**

I. INTRODUCTION.

The Attorney General has sued the Defendants the Government Accountability Board, its members Thomas Cane, Gerald Nichol, Michael Brennan, William Eich, Victor Manian, and Gordon Myse, and its staff Kevin Kennedy and Nathaniel Robinson (hereinafter collectively "the Government Accountability Board" or "the Board") claiming that the Board has failed to do certain things that the Attorney General asserts it should be doing regarding the maintenance of the state-wide computer voting list that it compiled as required by the Help America Vote Act 42 U.S.C. §15301 et seq. (P.L.107-252) ("Help America Vote Act" or "HAVA"). Simply put, the Attorney General

asserts that his interpretation of HAVA's requirements regarding the maintenance of that list and its coordination with the Wisconsin Department of Transportation database is right, and the Government Accountability Board's interpretation is wrong. However, it is the Board, not the Attorney General, that has responsibility and discretion to interpret and implement HAVA's provisions.

The Government Accountability Board brings its Motion to Dismiss pursuant to Wis. Stat. §802.06(2) on several grounds. First, under §802.06 (2)(a)(1), the Board contends that the Wisconsin Attorney General has no authority granted to him by the Legislature to bring a lawsuit about these matters. Second, under §802.06(2) (a)(6), the complaint fails to state a claim upon which relief can be granted, in two specific respects: (a) the relief he seeks is not available via mandamus, and (b) the relief he seeks is prohibited by law.

A motion to dismiss on the basis that a complaint fails to state a claim upon which relief can be granted tests the legal sufficiency of the complaint. *Scott v. Savers Property and Cas. Ins. Co.*, 2003 WI 60, ¶15, 262 Wis. 2d 127, 663 N.W.2d 715, *reconsideration denied*. The facts pled by the Plaintiff are liberally construed and accepted as true for purposes of the motion, but not for trial. *Id.*

II. THE ATTORNEY GENERAL HAS NO AUTHORITY TO BRING THIS SUIT.

A. The Authority And Claim Asserted By The Attorney General.

J.B. Van Hollen is the elected Attorney General of the State of Wisconsin, who

brings this case “in his official capacity as Attorney General of the State of Wisconsin.” *Complaint*, p. 2, ¶7. He claims that he has the authority to do so pursuant to Wis. Stat. §5.07, the only source of authority to which he cites. *Complaint* ¶¶1, 2.

B. The Attorney General Of The State Of Wisconsin Has Only Those Powers That Are Specifically Granted To That Office By The Legislature.

In Wisconsin, the Attorney General has only those powers explicitly granted to that office by the legislature. The Attorney General has neither implied powers nor residual powers based on the common law. He may do only what the legislature allows him to do. In *State of Wisconsin v. City of Oak Creek*, 2000 WI 9, ¶¶19-22, 24, 232 Wis. 2d 612, 625-628, 605 N.W.2d 526, the Wisconsin Supreme Court succinctly explained the strict limitations on the power of the Attorney General of Wisconsin:

¶ 19 We begin with the plain meaning of Wis. Const. art. VI, § 3. As stated above, art. VI, § 3 defines the scope of the attorney general's powers: “[t]he powers, duties and compensation of the ... attorney general shall be prescribed by law.” This court has consistently stated that the phrase “prescribed by law” in art. VI, § 3 plainly means prescribed by statutory law.

¶ 20 The first case that examined this phrase was *State v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 179, 190, 116 N.W. 900 (1908). This court very clearly stated:

In Wisconsin, otherwise than in many if not most states, the powers of the attorney general are strictly limited. He is a constitutional officer, but by the constitution he is given only such powers as “shall be prescribed by law.” Sec. 3, art. VI, Const. It is therefore essential to the maintenance of an action brought by the attorney general ex officio and sua sponte that we should find some statute authorizing it.

* * *

¶ 21 Similarly, this court held in *State ex rel. Haven v. Sayle*, 168 Wis. 159, 163, 169 N.W. 310 (1918), that the attorney general “must find authority in the statute when he sues in

the circuit court in the name of the state or in his official capacity." In *State v. Snyder*, 172 Wis. 415, 417, 179 N.W. 579 (1920), we reiterated that "[i]n this state the attorney general has no common-law powers or duties." See also *State ex rel. Jackson v. Coffey*, 18 Wis.2d 529, 538, 118 N.W.2d 939 (1963); *State ex rel. Reynolds v. Smith*, 19 Wis.2d 577, 584, 120 N.W.2d 664 (1963); *State ex rel. Beck v. Duffy*, 38 Wis.2d 159, 163, 156 N.W.2d 368 (1968)(abrogated on other grounds by *State v. Antes*, 74 Wis.2d 317, 246 N.W.2d 671 (1976)).

¶ 22 This court has further stated that "[t]he attorney general is devoid of the inherent power to initiate and prosecute litigation intended to protect or promote the interests of the state or its citizens and cannot act for the state as *parens patriae*." In *re Estate of Sharp*, 63 Wis.2d 254, 261, 217 N.W.2d 258 (1974)(citing Arlen C. Christenson, *The State Attorney General*, 1970 Wis. L.Rev. 298). This is because the Wisconsin Constitution removed all of the attorney general's "powers and duties which were found in that office under common law." *Id.* Therefore, "[u]nless the power to [bring] a specific action is granted by law, the office of the attorney general is powerless to act." *Id.* . . .

* * *

¶ 24 In sum, it is well established by case law that according to the plain meaning of Wis. Const. art. VI, § 3, the attorney general's powers are prescribed only by statutory law.

Thus, for the Attorney General to have the authority to sue the Government Accountability Board about its implementation of HAVA, there must be a statute that gives him the authority to do so. There is no such statute.

C. Wis. Stat. §5.07 Does Not Provide The Attorney General The Authority To Bring This Lawsuit.

1. This case is about "voting qualifications."

This lawsuit is about "voting qualifications," i.e., the determination of who is and is not qualified and eligible to vote. The Attorney General's Complaint makes that abundantly clear:

Because of the Defendants' inaction, **properly qualified voters** are at risk of having their votes diminished and diluted by the votes of **unqualified**,

ineligible voters who are not entitled to cast ballots. . . .

Complaint ¶ 2. (emphasis added)

Despite state and federal laws that require Wisconsin to maintain an accurate and updated list of qualified voters, it is virtually certain that **Wisconsin's official list of registered voters** currently includes the names of individuals who are **not eligible to vote** in the upcoming presidential election.

Complaint ¶ 5. (emphasis added)

. . . He has, therefore, brought this action to compel Wisconsin's Government Accountability Board, its members, its director, and the administrator of its Election Division, to take all steps necessary **to ensure that ineligible voters are removed** from the State's official list of registered voters before the November elections.

Complaint ¶ 6. (emphasis added)

Pursuant to the duties imposed under state law, GAB and GAB members also have an express obligation **to ensure that ineligible voters** are removed from Wisconsin's statewide, computerized voter registration list. . . .

Complaint ¶ 22. (emphasis added)

For the reasons alleged herein, a writ of mandamus should immediately be issued directing GAB and GAB Members to take all steps necessary to insure [sic] that, prior to November 4, 2008, **the statewide, computerized voter registration list** is brought into compliance with HAVA and state law. At a minimum, this requires that **ineligible voters be identified and removed**. . . .

Complaint ¶ 46. (emphasis added)

For the reasons stated herein, Plaintiff Attorney General J.B. Van Hollen is entitled to a declaration that Wisconsin's statewide, computerized **voter registration** is not currently in compliance with applicable law, . . .

Complaint ¶ 50. (emphasis added)

For the reasons stated herein, Plaintiff Attorney General J.B. Van Hollen is entitled to preliminary and permanent injunctions directing the Defendants to bring the statewide, computerized **voting registration list** into compliance with HAVA and state law, prior to the November 4, 2008, presidential election. Plaintiff Attorney General J.B. Van Hollen is also entitled to preliminary and

permanent injunctions directing the Defendants to **remove ineligible voters**. . . .

Complaint ¶ 55. (emphasis added)

2. **The Attorney General has no power to bring a lawsuit about “voting qualifications.”**

The Attorney General does not have the power to bring a lawsuit regarding “voting qualifications.” A review of Wis. Stat. §§5.06 and 5.07 makes that apparent. It is appropriate to read both of those sections *in pari materia*, as they are contained in the same chapter and assist in implementing the chapter’s goals and policy. See *Beard v. Lee Enterprises*, 225 Wis. 2d 1, 15, 591 N.W.2d 156 (1999); *In Interest of R.W.S.*, 162 Wis. 2d 862, 871, 471 N.W.2d 16 (1991); *Pulfus Farms v. Town of Leeds*, 149 Wis. 2d 797, 804, 440 N.W.2d 329 (1989).

§5.06(1) states, in relevant part:

Whenever any elector of a jurisdiction or district served by an election official believes that a decision or action of the official or the failure of the official to act with respect to any matter concerning nominations, qualifications of candidates, **voting qualifications**, including residence, ward division and numbering, recall, ballot preparation, election administration or **conduct of elections** is contrary to law, or the official has abused the discretion vested in him or her by law with respect to any such matter, the elector may file a written sworn complaint with the board requesting that the official be required to conform his or her conduct to the law, be restrained from taking any action inconsistent with the law or be required to correct any action or decision inconsistent with the law or any abuse of the discretion vested in him or her by law. . . . (Emphasis added.)

§5.06(3) states:

A complaint under this section shall be filed promptly so as not to prejudice the rights of any other party. In no case may a complaint relating to **nominations, qualifications of candidates or ballot preparation** be filed later than 10 days after the complainant knew or should have known that a violation of law or abuse of discretion occurred or was proposed to occur. (Emphasis added)

It is obvious from those statutes that the legislature considered each of the matters listed in §5.061: (a) nominations; (b) qualifications of candidates; (c) voting qualifications; (d) recall; (e) ballot preparation; (f) election administration; and (g) conduct of elections, to be separate matters. When the legislature uses similar but different terms in a statute, particularly within the same section, courts presume it intended each of the terms to have different meanings. *Wisconsin Central Limited v. Wisconsin Department of Revenue*, 2000 WI App 14, ¶12, 232 Wis. 2d 323, 606 N.W.2d 226. Most certainly, nothing allows one to conclude that all of those specific matters listed in § 5.06(1) are subsumed under the last matter listed, “conduct of elections.”

The first statute in Chapter 5 specifically addressing the Attorney General’s powers to sue is found in §5.06(2), which states, in relevant part:

No person who is authorized to file a complaint under sub.(1), other than the attorney general or a district attorney, may commence an action or proceeding to test the validity of any decision, action or failure to act on the part of any election official with respect to any matter specified in sub. (1) without first filing a complaint under sub.(1), nor prior to the disposition of the complaint by the board.

Section 5.06(2) allows the Attorney General to file a lawsuit without first making a complaint to the Board under §5.06(1).

Specifically which “matter specified in sub (1)” about which the Attorney General is empowered to bring a lawsuit is not addressed in §5.06. That is the key question here. The answer is found in §5.07, the statute claimed here by the Attorney General as his sole source of authority, which states:

Whenever a violation of the laws regulating the **conduct of elections** or election campaigns occurs or is proposed to occur, the attorney general . . . may sue for injunctive relief, a writ of mandamus or prohibition, or other such legal or equitable relief as may be appropriate to compel compliance with the law. . .

Section 5.07 does not grant the Attorney General expansive authority. It restricts him to bringing lawsuits only about the “conduct of elections or election campaigns.” It does not authorize him to sue over “voting qualifications” which is one of the other “matter[s] specified in [5.06(1)].”

As his own Complaint states, this case is about “voting qualifications,” not the “conduct of elections or election campaigns.” Had the legislature wanted to give the Attorney General broader authority, it could easily have written §5.07 to parallel the full list of matters contained in §5.06(1) by saying:

Whenever a violation of the laws regulating nominations, qualifications of candidates, voting qualifications, including residence, ward division and numbering, recall, ballot preparation, election administration or conduct of elections occurs or is proposed to occur, the attorney general . . . may sue for injunctive relief, a writ of mandamus or prohibition, or other such legal or equitable relief as may be appropriate to compel compliance with the law,

but the legislature did not do so. It gave the Attorney General the power to sue over one aspect of the many matters listed in §5.06(1) only: the “conduct of elections,” nothing more.

It is well-settled that “where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed.” *In Interest of R.W.S.*, 162 Wis. 2d at 879, quoting *State v. Wilkos*, 14 Wis. 2d 186, 192, 109 N.W.2d 889 (1961).

Likewise, when the legislature uses the same phrase in two different statutes on the same topic, courts are to presume that the legislature intended the phrase to have the same meaning in both statutes. *F.R. v. T.B.*, 225 Wis. 2d 628, 639, 593 N.W.2d 840 (Ct. App. 1999). In granting authority to sue over the “conduct of elections” but not “voting qualifications,” the legislature intentionally limited the Attorney General’s authority. Absent a broader grant of authority in Wis. Stat. §5.07, the Attorney General may not bring a lawsuit, like this one, about “voter qualifications.”

3. The Legislature had the opportunity to give the Attorney General specific authority to enforce the Help America Vote Act and it did not do so.

Wis. Stat. §§5.06 and 5.07 were enacted by the Wisconsin Legislature over twenty-five years ago. The Help America Vote Act was enacted by the United States Congress in 2002. In accordance with its obligations under §15512(a) of HAVA, the Wisconsin Legislature then enacted Wis. Stat. §5.061, which provides for enforcement of Title III (including 42 U.S.C. §15483) of HAVA at the state level via an administrative procedure. That procedure allows for complaints from any person who “believes that a violation of Title III of P.L. 107-252 [42 U.S.C. §15483] has occurred, is occurring or is proposed to occur with respect to an election for national office in this state . . .” *Wis. Stat. §5.061(1)*.

Unlike what it did when it adopted §5.06, the Legislature adopted §5.061 without making any reference to the Attorney General and without excepting the Attorney General from its requirements. Section 5.061 certainly does not provide that the

Attorney General may bring any lawsuit, much less a lawsuit like this which attempts to enforce provisions of 42. U.S.C. §15483, all of which relate to voter registration lists.

Because §5.07 only authorizes the Attorney General to bring lawsuits regarding the “conduct of elections or election campaigns” and because §5.061 does not provide the Attorney General with an exemption from using the exclusive administrative complaint procedures set forth in §5.061, the Attorney General has no authority to bring a lawsuit like this one, involving a provision in Title III of P.L. 101-252 (42 U.S.C. §15483).

D. HAVA Does Not Provide The Wisconsin Attorney General With Authority To Bring Suit, Though He May Use The Administrative Procedure.

1. The “Attorney General” with authority to enforce HAVA in court is the United States Attorney General.

Just as the Wisconsin Legislature has given no specific authority to the Wisconsin Attorney General to enforce the voter registration list requirements of HAVA, the United States Congress gave no authority to the attorneys general of the States to enforce those provisions either. Instead, it gave the United States Attorney General sole authority to bring such suits in federal court for declaratory and injunctive relief:

The Attorney General may bring a civil action against any State or jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief (including a temporary restraining order, a permanent or temporary injunction, or other order) as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under sections 15481, 15482, and 15483 of this title.

42 U.S.C. §15511.

“The Attorney General” referred to in this section is the United States Attorney General, not one or more of the attorneys general of the states. Lest there be disagreement on exactly which Attorney General this statute is referring to, reference to the United States Attorney General in the United States Code is typically made using capital letters: “Attorney General,” while reference to one or more Attorneys General of the states, like the Plaintiff here, is typically made using lower case letters: “attorney general.” For example, another Federal law regulating voting provides:

Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding. . .

42 U.S.C. §1971. And, the United States Court of Appeals for the Sixth Circuit specifically noted that the “Attorney General” referred to in HAVA at 42 U.S.C. §15511 is the U.S. Attorney General. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004). Thus, HAVA provides only the United States Attorney General, not the Attorney General of the State of Wisconsin, with authority to bring this kind of suit.

2. The Wisconsin Attorney General has access to the courts via the administrative process, but failed to use it.

Those persons who are not the United States Attorney General are not without recourse to enforce HAVA’s voter registration list provisions, however. “Any person” who believes a violation of Title III of HAVA has occurred may utilize a State-based administrative complaint process. 42 U.S.C. §15512(a). As noted previously, in

Wisconsin that process is found in Wis. Stat. §5.061.

Under Wis. Stat. §5.061, any person who believes that a violation of HAVA “has occurred, is occurring, or is proposed to occur . . . may file a written, verified complaint with the Board.” *Wis. Stat. §5.061(1)*. The complainant may then ask for a hearing, which proceeds as a contested case hearing under Chapter 227 of the Wisconsin Statutes. A decision must be issued within 89 days of the date the complaint was filed, *Wis. Stat. §5.061(3)*, although nothing prevents the Board from making decisions sooner. Adverse decisions may be reviewed by petition to circuit court. *Wis. Stat. §227.53*. The scope of review is typically a review of the record and affords, depending on the question and expertise of the agency, various levels of weight to the agency decision. *Wis. Stat. §227.57*. Appeal of the circuit court’s decision to the Court of Appeals is available to any party. *Wis. Stat. §227.58*.

As a general matter, “when a statute sets forth a procedure for review of administrative action and court review of the administrative decision, such remedy is **exclusive** and must be employed before other remedies are used.” *Nodell Inv. Corp. v. Glendale*, 78 Wis. 2d 416, 422 (1976), *emphasis added*. The Attorney General acknowledges in his Complaint that he did not utilize the procedure provided in Wis. Stat. §5.061. *Complaint* ¶1.

While this Court is not without subject matter jurisdiction over this dispute, the statutes, Wis. Stats. §§5.061 and Chapter 227, provide a clear condition precedent before

