

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 2

DANE COUNTY

J.B. VAN HOLLEN,

Plaintiff, and

REPUBLICAN PARTY OF WISCONSIN

Intervening Plaintiff,

Case No. 08CV4085

Petition for Writ of Mandamus 30952

vs.

GOVERNMENT ACCOUNTABILITY BOARD et al.,

Defendant, and

DEMOCRATIC PARTY OF WISCONSIN,
MADISON TEACHERS, INC., AMERICAN
FEDERATION OF TEACHERS-WISCONSIN,
MADISON FIREFIGHTERS LOCAL 311, THE
MILWAUKEE CHAPTER OF THE NAACP, and
THE MILWAUKEE TEACHERS' EDUCATION
ASSOCIATION,

Intervening Defendants.

REPLY OF INTERVENING DEFENDANTS MADISON TEACHERS, INC.,
AMERICAN FEDERATION OF TEACHERS-WISCONSIN, AND MADISON
FIREFIGHTERS LOCAL 311 IN SUPPORT OF MOTION TO DISMISS

Madison Teachers, Inc., American Federation of Teachers-Wisconsin, and Firefighters Local 311 (collectively, "MTI"), by their attorneys, Garvey McNeil & McGillivray, S.C., reply to Plaintiff J.B. Van Hollen's response to MTI's motion to dismiss. Plaintiff asserts he is not seeking to enforce the federal Help America Vote Act, and that he only alleges Defendants Governmental Accountability Board et al. ("Defendants") have violated state law. Yet he still cannot identify any state law

Defendants have actually violated, or that compels them to “match” Wisconsin’s Statewide Voter Registration System (“SVRS”) to other state databases. In reality, Plaintiff Van Hollen’s suit is simply a back door attempt to enforce HAVA, a suit he plainly cannot bring and that accordingly fails to state a claim for which relief can be granted. Even if his Complaint did state a claim, Plaintiff would lack standing to initiate civil litigation to bring it. This suit must be dismissed.

ARGUMENT

I. PLAINTIFF FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.

A. *Plaintiff Alleges No Violation of State Law.*

Plaintiff Van Hollen contends in his brief that “the Attorney General is not seeking to enforce federal law” – in this case, the Help America Vote Act (“HAVA”). (Pl. Resp. Br., 10/15/08. at 3.) Rather, he claims he is enforcing state law, or in his terms, “obligations imposed on the GAB by the Wisconsin Legislature to keep Wisconsin in compliance with federal law.” (*Id.*) But this is simply a roundabout way of saying the suit is about HAVA, which cannot be maintained.

First, it is well that Plaintiff Van Hollen now says he is not seeking to enforce federal law. As filings by various defendants last week showed, the United States Supreme Court has very recently spoken on this matter and determined that private rights of action under HAVA are not permitted. *Brunner v. Ohio Republican Party*, 555 U.S. ___, No. 08A332, slip op. (Oct. 15, 2008) (per curiam).¹ In the *Brunner*

¹ The U.S. Supreme Court’s decision is attached to the Westerberg Affidavit as Exhibit G, filed 10/17/08, and is available on the Supreme Court’s website at <http://www.supremecourtus.gov/opinions/08pdf/08A332.pdf>.

decision, the Court vacated a temporary restraining order (“TRO”) upheld by an *en banc* panel of the Sixth Circuit Court of Appeals, which had been sought by the Ohio Republican Party. *Ohio Republican Party v. Brunner*, __ F.3d __, No. 80-4322, slip. op. (6th Cir. Oct. 14, 2008). The TRO would have required Ohio Secretary of State Brunner to modify the state’s computerized voter registration list to identify names that failed to match up with other state databases. *Id.* This is an obligation similar to what the Plaintiffs appear to seek in this case. In granting Ms. Brunner’s request for a stay and vacating the TRO, the Supreme Court said:

Respondents . . . are not sufficiently likely to prevail on the question whether Congress has authorized the District Court to enforce Section 303 in an action brought by a private litigant to justify the issuance of a TRO. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

Brunner, slip op. at 1-2.

Plaintiff Van Hollen additionally does not attempt to address MTI’s argument that HAVA enforcement is preempted by enforcement of the United States Attorney General. (MTI Br. at 10-13.) Indeed the attachments to his brief from the United States Department of Justice to the States of Louisiana and Maryland reinforces MTI’s argument that the U.S. Attorney General only can and does enforce HAVA. (Pl.’s Resp. Br. Exs. A, B.)

Because enforcing federal law is now off the table, Plaintiff Van Hollen must hang his hopes on state law. When pressed by the motions to dismiss to identify state law he is seeking to enforce, however, Plaintiff Van Hollen cites only Wis. Stat. §§ 5.05(1) and 6.36(1)(a). (*Id.* at 17.) As MTI pointed out in its initial brief, the

former is simply the general GAB enabling statute, and the latter says only that the GAB must “compile and maintain electronically an official registration list.” (MTI Br., 10/6/08, at 11-13.) While the statute goes on to state the specific contents of the list, Wis. Stat. § 6.36(1)(a) does not require the GAB to “cross-check and verify voter registration information” (Pl.’s Resp. Br. at 2).

Plaintiff Van Hollen does not cite any state provision that mandates the so-called “HAVA check.” While he claims “the obligation to verify and cross-reference voter registration information – that is, conduct a ‘HAVA check’ – cannot be disputed,” he cites only the two state statutes noted above (which do not speak to this requirement) and then a string of citations from HAVA. (*Id.* at 19 (citing Wis. Stat. § 5.05(1), 6.36; 42 U.S.C. §§ 15483(a)(1)(A), 15483(a)(2)(A), 15483(a)(5)(A)(iii), 15483(a)(5)(B)(ii)). Similarly, he acknowledges that the Wisconsin Statutes do not “detail[] each and every step GAB was required to take to achieve HAVA compliance,” and that the Legislature’s “general delegation” of authority to the GAB must be read with “the preexisting provisions of HAVA.” (*Id.* at 17.) Thus, while it may be undisputed that the GAB must somehow coordinate the SVRS with other databases, it is also undisputed that this obligation arises under federal law only.

The glaring realities of state law force Plaintiff Van Hollen to essentially argue that because state law broadly authorizes the GAB to implement HAVA in Wisconsin, he may enforce the “HAVA check” requirement even though it is not actually contained in state law. (Pl.’s Resp. Br. at 6.) He cites one additional statute to this end: Wis. Stat. § 5.05(10), which directs GAB to create a plan for HAVA

compliance that will make the state eligible for federal funding. (*Id.*) But again, this provision does not speak to "HAVA checks" or action the GAB should take upon making a HAVA check. Plaintiff does not even allege GAB has failed to carry out the requirements Wis. Stat. § 5.05(10) *does* speak to: authoring the HAVA plan, or even following it. The Wisconsin statutes on the books that spring from HAVA thus do not go so far as requiring GAB to conduct "HAVA checks" and take specific action on the HAVA checks it has conducted.

Plaintiff next attempts an analogy:

The fact that state legislation is motivated by federal law does not turn an effort to enforce state law into a federal matter. For example, Wisconsin may choose to adopt a minimum legal drinking age in order to qualify for federal funding. However, if someone violates the law, they receive a Wisconsin citation for underage drinking from a Wisconsin police officer.

(Pl.s' Resp. Br. at 7.) This analogy fails, because while the motivation for Wisconsin's legal drinking age may have come from federal law, **the minimum drinking age requirement is actually contained in state law.** Wis. Stat. § 125.02(8m) ("Legal drinking age' means 21 years of age.") Wis. Stat. ch. 125 accordingly contains a host of restrictions and requirements that relate to Wisconsin's state-established legal drinking age, which are explicitly enforceable by state officers, including the Attorney General. *Id.* § 125.145. But as noted above, Wisconsin law is comparatively silent on HAVA check requirements.

The point here is that federal law is not enforceable as state law when a state does not incorporate that federal law, or does not incorporate all the provisions of that federal law. See *Am. Motors Corp. v. Dept. of Indus., Labor and Human Relations*,

101 Wis.2d 337, 353, 305 N.W.2d 62 (1981) (“the fact that the Civil Rights Act of 1964 . . . requires some accommodation does not import these provisions into state law enacted in 1945, absent some appropriate action by the State of Wisconsin to incorporate that provision of the federal law”), *rejected on other grounds, Lindas v. Cady*, 150 Wis. 2d 421, 441 N.W.2d 705 (1989); *see also People v. Tilehkooh*, 7 Cal. Rptr. 3d 226, 235-236 (Cal. Dist. Ct. App. 2003) (“Since the state does not punish a violation of the federal law ‘as such,’ it can only reach conduct subject to the federal criminal law by incorporating the conduct into the state law.”); *Prairie Rivers Network v. Ill. Pollution Control Bd.*, 781 N.E.2d 372, 380-81 (Ill. App. Ct. 2002) (holding that delegation of permitting program under federal Clean Water Act makes federal laws and regulations unenforceable in state court, and that claims must be brought under state law in state court), *accord, Friends of Milwaukee’s Rivers v. DNR*, Dane County Circuit Court Case No. 07-CV-497 (Order, 11/2/07). In other words, federal law is not necessarily enforceable as state law because of some glancing blow between federal and state law.

Thus, in this case, only the HAVA provisions that have been explicitly adopted as state law are enforceable as state (rather than federal) law. Since, as shown above, the “HAVA check” requirement is not contained in Wisconsin law, any alleged failure to follow the HAVA check requirements is not a violation of state law. That is particularly true for HAVA, where, as noted above and in MTI’s initial brief, enforcement of HAVA by a private litigant is prohibited and preempted by federal enforcement. (MTI Br. at 5-13.) This suit should be dismissed.

Finally, of note, Plaintiff did not respond to MTI's argument that the Court cannot award Plaintiff the relief he seeks because specific Wisconsin Statutes govern the procedure for modifying voter registration information, procedures that primarily vest local officials with these duties. (MTI Br. at 13.) Since Plaintiff does not ask that these procedures be followed, and since he has not named the local officials as parties, his suit must be dismissed for this reason as well.

For these reasons, Plaintiff has not articulated any state law that the GAB has violated, much less that imposes on the GAB a "positive and plain duty" to do anything, as is required for a writ of mandamus. *Mt. Horeb Comm. Alert v. Village Bd. of Mt. Horeb*, 2003 WI 100, ¶ 9, 263 Wis. 2d 544, 665 N.W.2d 229. All three of Plaintiff's causes of action must be dismissed for failure to state a claim for which relief can be granted.

II. PLAINTIFF LACKS STANDING.

Even if Plaintiff had alleged a violation of state law, he lacks standing to bring this suit, despite his protestations to the contrary.

A. *The Attorney General's Statutory Authority is Narrowly Construed.*

First, Plaintiff Van Hollen contends the Attorney General's statutory powers in Wisconsin are not narrowly construed, and criticizes a law review article MTI cited for this proposition. (Pl.'s Br. at 20.) Plaintiff cites nothing in support of his position, though the law review article is substantiated by case law. Scott Van Alstyne & Larry J. Roberts, *The Powers of the Attorney General in Wisconsin*, 1974 Wis. L. Rev. 721, 744, 746. As the article states:

The problem of narrow statutory construction is well-illustrated by the recent case of *Estate of Sharp*. The court found that the attorney general's statutory power to enforce charitable trusts did not include the power to intervene in estate proceedings to challenge an allegedly excessive trustee's fee. In so holding, the court prevented the attorney general from acting to protect the public interest where he was the only party likely to so act. Although consistent with the court's prior holdings, that result is surely not consistent with public policy.

Id. at 746 (footnotes omitted) (citing 63 Wis. 2d 254, 217 N.W.2d 258 (1974)). Thus, for better or for worse, the statutory powers of Wisconsin's attorney general are narrowly construed. Other cases concur with this conclusion. *E.g.*, *State v.*

Milwaukee Elec. Ry. & Light Co., 136 Wis. 179, 190, 116 N.W. 900 (1908) (holding statute authorizing Attorney General to enjoin companies from conducting actions unauthorized by their charters did not permit him to revoke the charters if companies had acted illegally); *State ex rel. Haven v. Sayle*, 168 Wis. 159, 163, 169 N.W.2d 310 (1918) (holding the Attorney General may not enjoin municipal corporation officials from recounting votes under statute allowing him to restrain individuals from exercising unauthorized corporate rights).

Notably, Plaintiff does not address MTI's argument that the Attorney General's authority is subject to especially narrow construction when he is suing another state entity. (MTI Br. at 19-20 (citing *State v. Snyder*, 172 Wis. 2d 415, 179 N.W.2d 579, 580-81 (1920).) Just as notably, Plaintiff does not cite any case where the Attorney General has even used Wis. Stat. § 5.07 to initiate civil litigation, much less litigation against another state agency.

Thus, from the outset, the Court should narrowly construe Wis. Stat. § 5.07.

B. *Plaintiff Cannot Obtain Standing to Bring this Case Through Wis. Stat. § 5.07.*

1. Plaintiff Cannot Bring Suit Under Wis. Stat. § 5.07 Against GAB.

As MTI explained in detail in its initial brief, the context of Wis. Stat. § 5.07 in Chapter 5 confirms that it may not be used against the GAB. (MTI Br. at 16-20.)

Without any support, Plaintiff claims that Wis. Stat. § 5.07 permits him to sue GAB because “it is nonsensical to think that the Legislature would put a broad enforcement provision in subchapter 1 of chapter 5 unless the duties in that subchapter were within the provision’s scope.” (Pl’s Resp. Br. at 15.)

Plaintiff cannot read into Wis. Stat. § 5.07 the authority to sue the GAB by implication. Not only would Plaintiff’s reading subvert the tradition of narrowly interpreting the Attorney General’s authority to sue another state agency, it would also upset the Legislature’s careful, stepped scheme for GAB investigation and enforcement of Wis. Stat. chs. 5-12. (MTI Br. at 16-20.) Further, if the Attorney General could jump outside of this statutory scheme and sue the GAB, the usual judicial review process for agency decisions in Wis. Stat. ch. 227 would be meaningless. This process, established in decades of Wisconsin case law, respects the Legislature’s delegation of authority to agencies, as well as their expertise. It does so by granting agencies deference to interpretations of statutes they are charged with implementing. *E.g., Cardinal v. Leader Nat. Ins. Co.*, 166 Wis. 2d 375, 390-91, 480 N.W.2d 1 (1992) (“We are cognizant that where the legislature charges an administrative agency to enforce a particular statute that the agency’s interpretation of that statute is entitled to great weight.”). The Legislature has vested GAB with

wide authority and responsibility for administering Wisconsin's elections laws in Wis. Stat. chs. 5-12, a statutory scheme other agencies should respect. Had the Legislature intended to break with well-established prior policy and case law and permit the Attorney General to sue the GAB under Wis. Stat. § 5.07, it would have said so.

Further, Wis. Stat. § 5.07 only empowers the Attorney General to sue for violations of "the laws regulating the conduct of elections or election campaigns." As explained in MTI's initial brief (MTI Br. at 17, 22), this phrase refers to Wis. Stat. ch. 5-12. It does not apply to violations of HAVA, and since there is no requirement in Wis. Stat. chs. 5-12 to conduct a "HAVA check," it cannot apply to this process, either. Tellingly, Plaintiff did not acknowledge this portion of MTI's argument.

Wis. Stat. § 5.07 does not give the Attorney General authority to bring this suit.

2. Wis. Stat. § 5.061 Applies to the Plaintiff.

While recognizing that the administrative process in Wis. Stat. § 5.061 applies only to HAVA – and not the state laws he claims he is enforcing – Plaintiff at length argues specific reasons why Wis. Stat. § 5.061 is inapplicable to the Attorney General. (Pl.'s Resp. Br. at 29.) Plaintiff is in error as explained below and in MTI's initial brief. (MTI Br. at 21-22.)

Plaintiff's claims that Wis. Stat. § 5.061 does not apply to suits brought by the Attorney General are based on a convoluted interpretation of federal and state law. (Pl.'s Resp. Br. at 25-30.) He primarily argues that the Attorney General is not a "person" under the statute and that he is therefore exempt from following its

procedural requirements. In this case, however, there is a simple answer that shows the Legislature included the Attorney General in the definition of “person” under Wis. Stat. § 5.061. Wis. Stat. § 5.06, which directly precedes Wis. Stat. § 5.061, specifically includes the Attorney General within the ambit of “person,” as follows: “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 . . .” (emphasis added). Thus, viewing Wis. Stat. § 5.061 in its context in Wis. Stat. ch. 5, it is clear that a “person” includes the Attorney General. *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶ 15, __ Wis. 2d __, 754 N.W.2d 439 (“[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes”) (quoting *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis.2d 633, 681 N.W.2d 110).

Plaintiff also contends that Wis. Stat. § 5.061 is not a mandatory procedure. But in Wisconsin, the “rule of exclusivity” requires that “where 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, 254 N.W.2d 310 (1977); see also *Jefferson County v. Timmel*, 261 Wis. 39, 63, 51 N.W.2d 518 (1952).

Finally, Plaintiff contends that “given the importance of fair and legal elections, it doesn’t make sense that the Legislature would allow GAB to be the arbiter of its own compliance.” (Pl.’s Resp. Br. at 30.) But of course GAB is not:

HAVA empowers the U.S. Attorney General to enforce HAVA Title III, and GAB's compliance with state law is reviewable through Wis. Stat. ch. 227.

Thus, considering Plaintiff's Complaint really concerns violations of HAVA, it should be dismissed for first failing to comply with the procedures in Wis. Stat. § 5.061.

III. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO JOIN INDISPENSABLE PARTIES.

MTI argued in its initial brief that Plaintiff's Complaint should be dismissed for failing to join the local election officials who would, if Plaintiff obtained the relief he sought, be required to conduct the HAVA checks. (MTI Br. at 23-24.) Even Intervening Plaintiff Republican Party of Wisconsin, in a separate filing, has noted this fact. (RPW SJ Br., 10/6/08, at 16 ("The Attorney General has sought relief that, although nominally through the GAB, is essentially directed at local election officials.")) MTI notes here that Plaintiff's response brief has completely failed to address this argument, and maintains that Plaintiff's Complaint should be dismissed for failure to join the proper parties. Wis. Stat. § 802.06(2)(a)7.

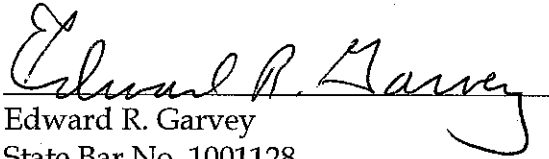
CONCLUSION

For the reasons stated above, MTI respectfully requests that the Court dismiss Plaintiff Van Hollen's lawsuit.

Dated this 20th day of October, 2008.

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