

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 2

DANE COUNTY

J.B. VAN HOLLEN,

Plaintiff,

THE REPUBLICAN PARTY OF WISCONSIN,

Plaintiff-Intervenor,

vs.

CASE NO. 08-CV-4085

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

Defendants,

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

Defendant-Intervenors.

**GOVERNMENT ACCOUNTABILITY BOARD'S BRIEF IN
SUPPORT OF ITS MOTION TO DISMISS COMPLAINT OF THE
REPUBLICAN PARTY OF WISCONSIN**

I. INTRODUCTION AND INCORPORATION.

On October 6, 2008, the Republican Party of Wisconsin filed a Notice of Party Status and Complaint. That document announced the Republican Party of Wisconsin's

intention to participate in this lawsuit as a Plaintiff-Intervenor, and adopted the Complaint of the Attorney General as its own in this matter, only replacing three of the Attorney General's paragraphs with the following paragraph:

The plaintiff, Republican Party of Wisconsin is a recognized political party in the state of Wisconsin, and was granted the right to intervene in this action on September 24, 2008. The RPW has standing to maintain an action to demand that state officials comply with state and federal laws in the course of their administration of elections in Wisconsin.

Also on October 6, 2008, the Government Accountability Board, its members and staff ("Government Accountability Board" or "the Board") filed a Motion to Dismiss the Attorney General's Complaint with supporting Brief. The Government Accountability Board adopts and incorporates by reference as though fully set forth here, Sections I, III and IV of that Brief, replacing references to the Attorney General's Complaint with references to the Republican Party of Wisconsin's Complaint. As an additional ground for dismissal of the Republican Party of Wisconsin's Complaint, the Board asserts that the Republican Party of Wisconsin does not have standing to bring this suit.

II. THE REPUBLICAN PARTY OF WISCONSIN'S COMPLAINT SHOULD BE DISMISSED FOR ITS FAILURE TO HAVE EXHAUSTED THE EXCLUSIVE ADMINISTRATIVE REMEDY AVAILABLE TO IT UNDER WIS. STAT. §5.061.

A. The Republican Party of Wisconsin Is Claiming That, By Its August 27, 2008 Decision, The Board Violated Title III Of P.L 107-252 (The Help America Vote Act).

The Republican Party of Wisconsin by joining in the Attorney General's Complaint, has asserted that it believes that a violation of Title III of P.L.107-252 ("the Help America Vote Act" or "HAVA") "has occurred, is occurring, or is proposed to

occur with respect to an election for national office in this state” because the Complaint alleges at numerous paragraphs that the Board has not complied with HAVA in the manner in which the Board has coordinated or failed to coordinate data in the statewide voter registration with drivers’ license data from the Wisconsin Department of Transportation (i.e., “HAVA checks.”) (*Complaint* ¶¶ 21, 24)

On August 14, the chairman of the Republican Party of Wisconsin, Reince R. Priebus, wrote on its behalf to the Board. The letter, a certified copy of which is attached to the Affidavit of Counsel that is filed herewith, asserted that the Board was obligated under HAVA to complete “HAVA checks” on all registrants from January 1, 2006 to the present rather than from August 6, 2008 as the Board had discussed.

On August 27, 2008 the Board discussed the issue of “HAVA checks” and heard comments by numerous parties, including the Republican Party of Wisconsin. The Board then decided by a vote of 5 to 1 to “continue with the HAVA Check procedure in effect as of August 6, 2008 through the fall election, and to correct the SVRS [Statewide Voter Registration System] later” and that “[a] mismatch with Wisconsin DOT data, in and of itself, shall not result in the disqualification of a voter.” (*Affidavit of Counsel, Certified copy of Minutes of August 27, 2008 GAB Meeting*).

B. The Republican Party of Wisconsin Failed To Exhaust Its Administrative Remedies And Is Therefore Barred From Proceeding In Court.

Following the Board’s August 27, 2008 vote, if it believed that the Board was violating HAVA, the Republican Party of Wisconsin could have made a formal

complaint with the Board and demanded a contested case hearing on its allegations as allowed by Wis Stat. §5.061 which states, in relevant part:

(1) Whenever any person believes that a violation of Title III of P.L. 107-252 has occurred, is occurring, or is proposed to occur with respect to an election for national office in this state, that person may file a written, verified complaint with the board.

* * *

(3) A complainant under sub. (1) . . . may request a hearing and the matter shall then be treated as a contested case under ch. 227, except that the board shall make a final determination with respect to the merits of the complaint and issue a decision within 89 days of the time that the complaint or the earliest of any complaints was filed, unless the complainant, . . . consents to a specified longer period.

(4) If the board finds the complaint to be without merit, it shall issue a decision dismissing the complaint. If the board finds that the violation alleged in the complaint has occurred, is occurring, or is proposed to occur, the board shall order appropriate relief . . .

The administrative procedure is exclusive: (1) it was enacted to comply with Congress' directive in HAVA requiring states to enact such a complaint procedure, 42 U.S.C. §155123(a); (2) it is consistent with the administrative complaint procedures applicable to state law election issues found in §5.06; and, (3) as §5.06(2) makes clear, no individual who may make a complaint about violations of state based election issues may seek judicial relief without first exhausting the administrative remedies set out in §5.06(1) .

Despite the fact that there is an exclusive administrative procedure for complaints about the very section of HAVA to which this lawsuit is addressed, the Republican Party of Wisconsin ignored it, a choice that is fatal to its claim of standing in this case, because in Wisconsin the doctrine of exhaustion of administrative remedies is one of judicial restraint and provides that "judicial relief will be denied until the parties

have exhausted their administrative remedies.” *Nodell Inv. Corp. v. City of Glendale*, 78 Wis.2d 416, 424, 254 N.W.2d 310, 315 (1977). As our Supreme Court explained in *Kramer v. Horton* 128 Wis.2d 404, 414, 418 383 N.W.2d 54 (1986):

In *Nodell Investment Corp. v. Glendale*, supra, we stated the general rule that courts should deny judicial relief “until the parties have exhausted their administrative remedies; the parties must complete the administrative proceedings before they come to court.” 78 Wis.2d at 424, 254 N.W.2d 310. We noted that the exhaustion rule is premised on the assumption that an administrative remedy which will protect the party’s claim of right is readily available to the party on his initiative. *Id.*

* * *

In a sense, our adherence to the exhaustion doctrine serves as a measure of our respect for the integrity of the procedural process which Wisconsin’s administrative agencies afford to its citizens. With its progressive tradition, the Wisconsin legislature has afforded its citizens strong administrative protections throughout its history. . . Indeed, the doctrine of exhaustion of administrative remedies complements our progressive tradition. It provides state agencies with the opportunity to correct their own errors and prevents premature judicial incursions into agency activities. In addition, the doctrine of exhaustion promotes judicial efficiency. Conflicts often are resolved without resort to litigation. Further, if a case is not resolved in the agency, the process of agency review provides the court with a greater clarification of the issues and a more complete factual record.

The Republican Party of Wisconsin could have engaged in a contested case before the Board and then, if dissatisfied with the outcome, sought a prompt §227 review. Because the Republican Party of Wisconsin failed “to complete [its] administrative proceeding before [it] came to court” it is not entitled to judicial relief.

III. THE REPUBLICAN PARTY OF WISCONSIN LACKS STANDING TO BRING THIS LAWSUIT BECAUSE THERE IS NO PRIVATE RIGHT TO ENFORCE HAVA.

Without citation to any authority, the Republican Party of Wisconsin alleges that it has “standing” to bring this lawsuit for mandamus, declaratory judgment and

injunctive relief to enforce the provisions of Title III of HAVA, 42 U.S.C. §15483. The Republican Party of Wisconsin is silent about the source of law that supplies it standing. It is silent for a good reason: HAVA did not create a private right of action that would allow individuals (or organizations representing individuals) to bring lawsuits to enforce its provisions. *Brunner v. Ohio Republican Party, et al.*, 555 U.S. ____ (2008) (Case No. 08A332, October 17, 2008 attached); *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir.2004); *Taylor v Onorato*, 428 F. Supp. 384, 386 (W.D. Pa 2006); *Florida Democratic Party v. Hood*, 342 F.Supp.2d 1073, 1077 (N.D.Fla.2004).

Brunner v. Ohio Republican Party came before the United States Supreme Court on a motion to stay and vacate a temporary restraining order that had been entered by a district court, reversed by a panel of the 6th Circuit and then reinstated by the 6th Circuit *en banc* in *Ohio Republican Party, et al. v. Brunner*, (6th Circuit Court of Appeals Case No. 08-4322, October 15, 2008) (opinion submitted separately for the court's convenience). The dissenting opinion by Judge Karen Nelson Moore (pp. 14-24) provides a primer on the law of private rights of action under HAVA, explaining that while there have been judicial decisions that allowed individuals to bring actions pursuant to 42 U.S.C. §1983 to enforce their right to cast a provisional ballot under HAVA, there has never been any decision that found a private right of action to enforce 42 U.S.C. §15483, (Section 303 of HAVA). This lawsuit, of course, is an attempt to enforce that very provision.

Had Congress wanted to allow individuals or organizations comprised of individuals, like the Republican Party of Wisconsin, to be able to bring lawsuits to enforce these HAVA provisions it could have done so. As Judge Moore's dissent explained: "Senator Christopher Dodd, a sponsor of HAVA and principal Senate author of the conference report, stated that '[w]hile [he] would have preferred that we extend [a] private right of action . . . , the House simply would not entertain such an enforcement provision[]. Nor would they accept federal judicial review of any adverse decision by a State administrative body.'" 148 Congo Rec. S10505 (daily ed. Oct. 16, 2002) (statement of Sen. Dodd)." (*id.* page 18)

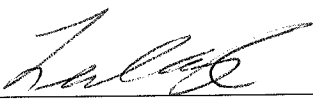
Absent a private right of action to enforce the provisions of HAVA at which the Republican Party of Wisconsin's complaint is directed, it is utterly without standing to proceed. Its Complaint must be dismissed.

IV. CONCLUSION.

The Motion of the Government Accountability Board to Dismiss the Complaint of the Republican Party of Wisconsin should be granted.

Dated this 17th day of October, 2008.

CULLEN WESTON PINES & BACH LLP

By: 
Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111
Nicholas E. Fairweather, SBN 1036681
Attorneys for the Defendants