

STATE OF WISCONSIN CIRCUIT COURT COUNTY OF DANE
BRANCH 2

J.B. VAN HOLLEN,
In his official capacity as
Attorney General of the State
Of Wisconsin,

Plaintiff,

REPUBLICAN PARTY
OF WISCONSIN,

Intervenor Plaintiff,

Vs.

Case No. 08CV4085

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

Defendants,

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

Intervenor Defendants.

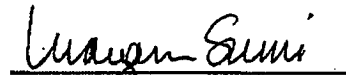
ORDER

For the reasons stated in the attached transcript of oral decision issued October 23, 2008, the defendants' motions to dismiss are granted. The complaints of Plaintiff Attorney General J.B. Van Hollen and Intervenor Plaintiff Republican Party of Wisconsin are hereby DISMISSED.

This is a final order that disposes of the entire matter in litigation between the parties and is intended to be an appealable order within the meaning of § 808.03(1), Wis. Stats.

Dated this 23rd day of October, 2008.

BY THE COURT



Maryann Sumi, Judge
Circuit Court Branch 2

Cc: AAG Steven Means
Atty. Lester Pines
Atty. James Troupis
Atty. Robert Friebert
Atty. Edward Garvey
Atty. Richard Saks
Atty. John Skilton

APPEARANCES (Continued):

MATTHEW O'NEILL, FRIEBERT, FINERTY & ST. JOHN, S.C.,
Two Plaza East, 330 Kilbourn Avenue, Milwaukee,
WI 53202, appearing on behalf of intervening
defendant The Democratic Party of Wisconsin;

**EDWARD GARVEY and CHRISTA WESTERBERG, GARVEY McNEIL
& MCGILLIVRAY, S.C.,** 634 West Main Street, Suite
101, Madison, WI 53703, appearing on behalf of
intervening defendants Madison Teachers, Inc.,
American Federation of Teachers-Wisconsin, and
Firefighters Local 311;

**RICHARD SAKS and JEFFREY SWEETLAND, HAWKS QUINDEL EHLKE
& PERRY, S.C.,** 700 West Michigan, Suite 500, PO
Box 442, Milwaukee, WI 53201-0442, appearing on
behalf of intervening defendants Milwaukee Branch
of the NAACP and Milwaukee Teachers Education
Association.

1 (Transcript of Court's Decision)

2

3 THE COURT: Once again, thank you, counsel,
4 for your arguments which have, as Mr. Troupis said,
5 been civil, and I appreciate that, especially in
6 something like this, that is so politically charged.
7 So with that, I will decide the motions to dismiss that
8 are before me today.

9 As you know, we're here because Wisconsin is
10 late in complying with the federal Help America Vote
11 Act requirement that Wisconsin implement a computerized
12 voter database list. This requirement was effective as
13 of January 1st, 2006, and it has only recently been put
14 into full operation. What caused, I think, the
15 attorney general to file the complaint was the
16 Government Accountability Board's plan, which it
17 adopted in the summer and has put into effect, to
18 conduct and provide what are so-called HAVA checks on
19 all new voter registrations entered after August 6,
20 2008.

21 The board declined, at least prior to the
22 November 4th election, to run HAVA checks or coordinate
23 information with other agency databases, like Social
24 Security, like the Department of Transportation, on
25 those voter registrations received between January 1,

1 2006 and August 6th. And it is that decision that
2 causes the attorney general to come into court.

3 The Wisconsin attorney general has filed
4 really a three-part action, one that asks that the
5 court order a writ of mandamus. Basically that's a
6 writ directed to a public official or a board directing
7 that board or public official to comply with the law.
8 The attorney general has also asked that the court
9 declare, through what's called declaratory judgment,
10 that the board has violated the law; and that the court
11 enjoin or issue an injunction against further
12 violations of the law, essentially the flip side of
13 asking for the writ of mandamus.

14 In its request for mandamus relief, the board
15 asks that I require, that I order the -- I'm sorry.
16 The attorney general asks that I order the board to
17 take all steps necessary to ensure that prior to
18 November 4th that the statewide computerized voter
19 registration list is brought into compliance with HAVA
20 and state law. And at a minimum, says the attorney
21 general, that requires that ineligible voters be
22 identified and removed, and that for individuals who
23 registered on and after January 1, 2006 and prior to
24 August 8, 2008, that their eligibility to vote must be
25 verified by the same steps as applied to individuals

1 registering on or before August 6th, 2008, including
2 HAVA checks where applicable.

3 Now, the attorney general has modified that
4 request for immediate relief somewhat, but I think the
5 complaint can still be read as asking that the court
6 order HAVA checks for everyone. It is correct that the
7 attorney general is not telling, asking the court to
8 tell the board what to do in the event of a mismatch.
9 It seems that at this point the attorney general agrees
10 that that is something that is within the board's
11 discretion.

12 Now, the Republican Party of Wisconsin is
13 asking for something a little bit different. It
14 intervened, adopted the attorney general's complaint,
15 but made a separate request for mandamus relief. One
16 is that the Republican Party is saying don't force this
17 obligation on local officials; make it the obligation
18 of the Government Accountability Board.

19 The second thing that the Republican Party is
20 asking is that for any nonmatch registrations for which
21 no corrective action can be taken, that such
22 registrations remain on the voter list but be flagged
23 as "needs identification" on election day, and that
24 they proceed that way at the polls.

25 As an alternative, if this court would decide

1 that that's not practically doable, the Republican
2 Party asks that I simply single out registrations
3 conducted through deputy registrars. In its brief, the
4 Republican Party clarifies that this means HAVA checks
5 in parts of Wisconsin "where there is knowledge that
6 criminal activity has taken place."

7 Of course, there is no evidence before this
8 court, nor is this the time for there to be evidence
9 before the court as to criminal activity. So I think
10 that's something for which there is no competent
11 evidence before the court at this time.

12 Now, all defendants have moved to dismiss the
13 complaint on multiple grounds, the first of which is
14 failure to state a claim upon which relief can be
15 granted. On a motion to dismiss the court accepts as
16 true the factual allegations of the complaint, not the
17 legal statements in the complaint, but the facts, and
18 then decides whether, given those facts, the complaint
19 can be supported under the law.

20 The attorney general's complaint is premised
21 on §5.07 of the Wisconsin Statutes which authorizes the
22 attorney general to sue for violations of law relating
23 to the conduct of elections, whether those violations
24 are occurring, have occurred, or are about to occur.
25 So to decide whether the Wisconsin AG has stated a

1 claim, it is necessary for me to address Wisconsin law
2 on voter qualifications, federal law, and particularly
3 HAVA, and then determine where federal law and state
4 law intersect.

5 First, Wisconsin law. The Wisconsin
6 Constitution guarantees, and Wisconsin Statutes
7 protect, the right to vote in Wisconsin. The right to
8 vote is so fundamental because it is the gateway for
9 citizens to preserve other basic civil and political
10 rights. Wisconsin's progressive tradition of
11 protecting the franchise goes back to statehood. In
12 one of the earliest State Supreme Court cases, called
13 *Wood v. Baker*, the court set the tone for the next
14 century and a half. And the court said, "The
15 constitution," the Wisconsin Constitution, "vests and
16 warrants the right to vote at the time of election, and
17 everyone having the constitutional qualifications then
18 may go to the polls vested with this franchise, of
19 which no statutory condition precedent can deprive
20 him."

21 The court went on to note in that case and in
22 later cases that even errors of election officials in
23 compiling voter lists can't defeat the right to vote in
24 this state. I won't take you on a forced march through
25 the decades of Wisconsin voter law because I think the

1 Supreme Court four years ago pretty cogently summarized
2 what the law is. The court did walk through all of
3 those cases and concluded in *Roth v. LaFarge School*
4 *District Board of Canvassers* in 2004, this is Justice
5 Crooks speaking for a unanimous court: It is evident,
6 the court said, noting Wisconsin's proud history of
7 protecting the right to vote, "It is evident that this
8 court has consistently placed a premium on giving
9 effect to the will of the voter." And not just the
10 will of the voter with respect to whether there's a
11 checkmark in the right place, whether, if we were in
12 Florida, hanging chads, or any other formal problem,
13 but the will of the voter in terms of the ability to go
14 to the polls, vested with the franchise.

15 This respect for the right to vote, the
16 franchise, appears in the very first provision of our
17 elections statutes. §5.01(1) says, "Chapters 5 through
18 12," which are the voter and election and campaign
19 laws, "shall be construed to give effect to the will of
20 the electorate if that can be ascertained,
21 notwithstanding informality or failure to fully comply
22 with some of these provisions."

23 We see Wisconsin's presumption in favor of
24 the free exercise of the vote again in the Wisconsin
25 registration procedure, and that's contained in

1 Chapter 6. Wisconsin is unusual among the states in
2 that it permits same day registration at the polls. In
3 the Republican Party's August 14, 2008 request to the
4 Government Accountability Board that laid the basis for
5 this action, the Republican Party was critical of
6 Wisconsin's statutes permitting same day registration,
7 and labeled it "Wisconsin's exceptionally lax
8 registration rules." But this in fact is how the
9 Wisconsin legislature has chosen to protect Wisconsin's
10 fundamental right to vote.

11 Now, who is eligible to vote in Wisconsin?
12 Mr. Saks touched on a few of the qualifications. There
13 are a few others. Article III, Section 1 of the
14 Wisconsin Constitution says every Wisconsin citizen age
15 18 or older who is a resident of an election district
16 is a qualified elector. Section 2 then of that
17 constitutional provision states, the legislature may
18 enact laws excluding convicted felons and people who
19 have been found by a court to be incompetent, and
20 defining what residence means. And the Wisconsin
21 legislature has done this in §6.02 and §6.03. So
22 truly, convicted felons who have not been restored
23 their civil rights cannot vote in this state, nor can
24 incompetent people.

25 I was surprised to learn that the legislature

1 also said that no one can vote if he or she has made a
2 bet about the outcome of the election. I hope that
3 none of you in this room have done that.

4 Notably, though, there is no requirement in
5 Wisconsin law that there be a driver's license or a
6 Social Security number for registration. There is no
7 state law requirement that data in a voter list must
8 match data kept by any other agency as a precondition
9 to voting.

10 So we look then to federal law. As I've
11 said, this lawsuit is about HAVA, Help America Vote
12 Act, and this is, as you all know, a federal law passed
13 following the tumultuous 2000 national election. Its
14 purpose is to improve election administration among the
15 50 states, and the primary vehicle to do this is the
16 funding program that HAVA established. And Wisconsin
17 has been the beneficiary of millions of those federal
18 dollars to set up its own system.

19 HAVA itself does not mandate voter
20 qualifications, except in one limited instance for
21 voters who register by mail. It leaves voter
22 qualifications to the states pursuant to HAVA §15485.
23 And by the way, there have been some confusing
24 references to different provisions of HAVA. I'm
25 relying on the United States Code, 42 U.S. Code, and

1 they're all five-digit numbers, kind of mind-numbing
2 after you look at them for awhile, but they're
3 contained in 42 U.S. Code, beginning at, the pertinent
4 provisions, §15485, or 83.

5 HAVA does in §15483 require each state
6 through its chief election official, here the
7 nonpartisan Government Accountability Board, to
8 implement and maintain a "single, uniform, official,
9 centralized, interactive, computerized statewide voter
10 registration list."

11 With respect to maintenance of this list,
12 HAVA is explicit that removal of names occurs only in
13 accordance with state law for states, like Wisconsin,
14 which permit voter registration at the polls on the day
15 of election. HAVA is also quite clear on each state's
16 discretion. For purposes of HAVA's election technology
17 and administration requirements, which include the
18 voter list requirement, the law provides, HAVA
19 provides, "The specific choices on the methods of
20 complying with the requirements of this subchapter
21 shall be left to the discretion of the state."

22 Now, to make sure that each state is
23 accountable to its electorate, to any who might be
24 watching, HAVA requires states to establish an
25 administrative complaint procedure. And the state, as

1 I'll go into a little bit later, has done that.

2 It's important that we not read HAVA in
3 isolation though. HAVA has to be read in its context
4 and its history, beginning with the Voting Rights Act
5 of 1965. Most of us, through all of our lives -- most
6 of us don't know life before the Voting Rights Act of
7 1965. It was an ugly situation, and I think those of
8 you who do remember it understand why it was passed.
9 It is part of our history, and it's part of the
10 backdrop for HAVA.

11 One of the key provisions of the Voting
12 Rights Act of 1965 is this: "No person, acting under
13 color of state law, shall deny the right of any
14 individual to vote in any election because of an error
15 or omission on any record or paper relating to any
16 application, registration, or other act requisite to
17 voting, if such error or omission is not material in
18 determining whether such individual is qualified under
19 state law to vote in such election." And of course the
20 purpose of that provision was to make sure that people
21 didn't walk into the polling place and have them say
22 oh, you know, there's a slight problem with your
23 registration. I'm sorry, you won't be able to vote.
24 And it will turn out, and did turn out over and over,
25 that the mistake, the omission, was insignificant, but

1 noneththeless, these people were denied the right to
2 vote.

3 HAVA recognizes the Voting Rights Act of
4 1965, and in its very last section, §15545, explicitly
5 states that, "Nothing in HAVA authorizes conduct that
6 would otherwise be prohibited under the Voting Rights
7 Act of 1965."

8 Now, how has Wisconsin chosen to implement
9 HAVA? There are four primary ways. First, §6.36 of
10 the Wisconsin Statutes states that the Government
11 Accountability Board shall compile and maintain
12 electronically the official registration list.
13 Subsection (2)(c) of that same statute provides that
14 proof of residency at the polls is only required if the
15 voter has registered by mail and has never previously
16 voted in any election in this state. So that's
17 statutory.

18 The second way that Wisconsin has chosen to
19 implement HAVA. Our legislature in §5.05(10) has
20 directed the Government Accountability Board to adopt a
21 state election administration plan that meets HAVA so
22 as to enable participation by this state in federal
23 financial assistance programs. And because that deals
24 with money, that plan, that state plan has to be also
25 approved by the legislature's Joint Finance Committee.

1 Third. §5.061 of the Wisconsin Statutes
2 again. Following HAVA's command that the state create
3 an administrative process, the legislature adopted a
4 statute, and it's titled "Compliance with Federal
5 HAVA," which authorizes any person who believes a HAVA
6 violation has occurred to file a written verified
7 complaint with the board." The statute then provides
8 that the board must conduct a trial type hearing before
9 the board, followed then by judicial review under
10 Chapter 227 of the Wisconsin Statutes.

11 Judicial review procedures and the
12 availability of Chapter 227 of the statutes is
13 important here. It is the route. It is the check. It
14 is the check and balance, the separation of powers,
15 that prevents the Government Accountability Board from
16 utilizing unchecked power and to taking matters into
17 its own hands and deciding what it's going to do under
18 HAVA or anything else without accountability to any
19 citizen.

20 The fourth primary way that Wisconsin has
21 chosen to implement HAVA is this, and it's most
22 pertinent here. In accordance with HAVA's explicit
23 provision that specific choices on the methods of
24 complying with its requirements fall within the
25 discretion of the state, the state, through the

1 Government Accountability Board, has exercised that
2 discretion and determined that, at least at this time,
3 it will match databases only from August 6, 2008
4 forward. That is exactly the kind of discretionary
5 decision-making the Government Accountability Board was
6 created to do. It is exactly the kind of discretion
7 HAVA left with the states in HAVA §1.5485.

8 On November 4th each qualified voter in
9 Wisconsin will go to the polls, as our Supreme Court
10 said in 1875, vested with the franchise. It doesn't
11 matter if the DOT has misspelled his name or if her
12 middle initial is missing on the voter list. Neither
13 HAVA nor state law require a database match as a
14 precondition to voting. Nor do they require that the
15 voter show any proof of eligibility, essentially to
16 reregister, in the event of a mismatch.

17 Hundreds of pages of paper have been filed,
18 and they boil down to this one reality. Nothing in
19 state or federal law requires that there be a data
20 match as a condition on the right to vote. HAVA does
21 not supplant Wisconsin's constitutionally protected
22 right to establish its own voter eligibility standards.

23 The attorney general's lawsuit against the
24 Government Accountability Board is completely based on
25 §5.07, which authorizes the attorney general to sue for

1 an injunction or writ of mandamus whenever a violation
2 of the laws regulating the conduct of elections or
3 election campaigns occurs or is proposed to occur.
4 What I have just told you in my opinion shows that no
5 violation of state or federal law regulating the
6 conduct of elections is about to occur or has occurred.
7 And the attorney general has presented no other basis
8 upon which this court could act.

9 For a court to issue a writ of mandamus, a
10 plaintiff needs to show a clear legal right to relief
11 and a positive, plain duty on the part of the official
12 to whom the writ would be directed. This is sometimes
13 characterized as a ministerial duty, and by that it
14 means a duty for which there's no discretion. The
15 board, the official, has to do it. It's a no-brainer.
16 No discretion involved. And that is the kind of duty
17 that's required before a writ of mandamus can issue.
18 And so the attorney general's complaint, even if I take
19 the factual allegations to be true, has not stated a
20 clear legal right to relief or a positive and plain
21 duty.

22 The complaint must therefore be dismissed for
23 failure to state a claim upon which relief, whether by
24 mandamus, injunction, or declaration of rights, may be
25 granted.

1 Although I am dismissing the complaint for
2 failure to state a claim and need not consider other
3 grounds for dismissal, I do address, as an alternative
4 basis for this decision today, the defendants' motions
5 to dismiss for lack of standing, both as to the
6 Wisconsin attorney general and the Republican Party of
7 Wisconsin. I think it goes without saying, before I
8 reach the standing issue, that what I have said about
9 failure to state a claim with respect to the attorney
10 general is also true for the Republican Party of
11 Wisconsin's claim. It essentially repeats the
12 allegations of the attorney general's complaint and
13 simply asks for a different form of relief. That
14 complaint has failed to state a claim as well.

15 Nevertheless, I do discuss standing.
16 Standing is basically the right of an individual or
17 entity to file a lawsuit, to come to court. In
18 Wisconsin and in most other states there's a separate
19 but related principle that provides that where a
20 statute provides a method for getting a court to act in
21 a matter, that's the method you're stuck with. No one,
22 not you, not me, or the attorney general, can disregard
23 or ignore the method that's been established by the
24 legislature. And here, both HAVA and state law
25 instruct on what to do if a person believes that HAVA

1 has been violated.

2 First, in HAVA §15511, HAVA has authorized
3 the United States attorney general to bring a civil
4 action against any state in federal court as may be
5 necessary to carry out the election administration
6 provisions of HAVA. The very next section of HAVA
7 requires that states create an administrative process,
8 which Wisconsin has done, in §5.061. The attorney
9 general did not use the process established in §5.061,
10 and went directly to what he believed his powers were
11 under §5.07. As I've already decided though, that
12 section does not give the attorney general power to
13 enforce HAVA or the Wisconsin laws related to HAVA.

14 By way of contrast, the legislature has
15 treated violations of the Voting Rights Act of 1965
16 differently. Mr. Saks mentioned this in his argument
17 this morning. And it did so by directly authorizing
18 the attorney general to commence an action on behalf of
19 any voter in this state whose rights have been
20 violated.

21 The conclusion to be drawn here is that the
22 legislature knows how to give the attorney general
23 authority to sue. And the legislature did so for the
24 Voting Rights Act but not for HAVA. The attorney
25 general is without standing in this action.

1 The Republican Party makes a different
2 argument to support its standing to enforce HAVA.
3 Until September -- until about a week ago it was at
4 least arguable that political parties could sue on
5 behalf of their members to enforce HAVA. And that's
6 what the Sixth Circuit Court of Appeals seemed to be
7 deciding when it granted a temporary restraining order
8 in *Ohio Republican Party vs. Brunner*.

9 Three days after the Sixth Circuit issued its
10 decision, the United States Supreme Court in that same
11 case confirmed that HAVA did not create a private right
12 of action that would allow individuals or groups who
13 would represent them to file lawsuits enforcing HAVA.
14 And the court vacated the restraining order that had
15 been entered there.

16 Now, timing is everything. Parties were in
17 the midst of their briefing schedules and were aware,
18 as I was too, that the *Brunner* case had come out. And
19 acknowledging *Brunner*, the Republican Party of
20 Wisconsin, I think rather deftly, changed its focus and
21 invoked the citizens' right to use mandamus to compel a
22 public official's compliance with law. But that simply
23 takes us back to the beginning. There's no right to
24 mandamus relief without a positive, plain duty under
25 the law. And I have already determined that the

1 Government Accountability Board has no positive, plain
2 duty upon which the Republican Party's or the attorney
3 general's request for relief could be granted. And
4 certainly, there is no basis upon which the Republican
5 Party of Wisconsin could bypass the procedure for HAVA
6 complaints in §5.061.

7 The argument has been made in the briefs that
8 compliance with that administrative complaint process
9 up to and including judicial review under 227 is
10 futile. And when time is running out, how can we make
11 people go to a complaint process that could take months
12 to complete. But Chapter 227 accounts for that and
13 allows stays under §227.54. Courts can intervene when
14 necessary, even under Chapter 227, which appears to set
15 up a laborious process. Believe me, we've all seen
16 cases where Chapter 227 was fully utilized to provide
17 immediate and effective relief by a court, and thereby
18 making sure that government action, government agency
19 action was not left unchecked.

20 And so in the absence of any federal or state
21 law requirement conditioning the right to vote on a
22 HAVA check or having people flagged to reregister at
23 the polls, the court is without authority to create
24 such a requirement. To do so would be substituting a
25 judge's opinion as to who can vote and how and when for

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the eligibility criteria actually established by the constitution and by state law.

For all of these reasons, the motions to dismiss are granted and the complaints are dismissed.

(WHICH CONCLUDES REQUESTED PORTION OF TRANSCRIPT)

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C E R T I F I C A T E

I, GERI HOLMES, Official Court Reporter, certify that the foregoing is a true and accurate partial transcript of proceedings held on the 23rd day of October 2008, before the Honorable **MARYANN SUMI**, Dane County Circuit Court Judge, Branch 2, in my presence and reduced to writing in accordance with my stenographic notes made at said time and place.

Dated at Madison, Wisconsin, this 23rd day of October 2008.

Meri Holmes

Geri Holmes
Court Reporter