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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-613**

Dan McGrath, et al., complainants,
Relators,

vs.

Minnesota Secretary of State,
Respondent.

**Filed November 21, 2011
Affirmed
Crippen, Judge***

Office of Administrative Hearings
File No. 15-3500-21801-HV

Erick G. Kaardal, Mohrman & Kaardal, P.A., Minneapolis, Minnesota (for relators)

Lori Swanson, Attorney General, Nathan J. Hartshorn, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Crippen, Judge.

UNPUBLISHED OPINION

CRIPPEN, Judge

Relators challenge an Office of Administrative Hearing (OAH) decision to summarily dismiss a complaint asserted under the federal Help America Vote Act and

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Minnesota statutory provisions implementing the act. Because relators have not identified error, we affirm.

FACTS

In January 2011, relator Dan McGrath, on behalf of himself and Minnesota Majority, filed a Help America Vote Act (HAVA) Elections Complaint Form with the Office of the Minnesota Secretary of State (respondent). The complaint alleged that respondent and 19 counties violated HAVA and Minnesota law in relation to the 2008 and 2010 elections by failing to enter voter-registration information on an expedited basis, and that respondent also violated HAVA by failing to provide adequate support to county officials.

Upon receiving the complaint, respondent forwarded it to OAH and then submitted a reply denying the violations of HAVA and asserting that relators had failed to state a colorable claim. At the prehearing conference, respondent submitted a motion to dismiss or in the alternative for summary disposition. Relators replied to the motion but submitted no additional evidence. On March 7, 2011, the administrative law judge (ALJ) granted summary disposition in favor of respondent on the claims against him and dismissed the claims against the counties for lack of jurisdiction. This certiorari appeal follows.

DECISION

Standard of Review

Minn. R. 1400.5500K authorizes an ALJ to recommend summary disposition “of the case or any part thereof where there is no genuine issue as to any material fact or

recommend dismissal where the case or any part thereof has become moot or for other reasons.” An appeal from an administrative summary disposition is reviewed under the same standard as an appeal from summary judgment. *In re Leisure Hills Health Care Ctr.*, 518 N.W.2d 71, 75-76 (Minn. App. 1994), *review denied* (Minn. Sept. 16, 1994).

When faced with a summary judgment determination, this court reviews de novo “(1) whether there are any genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A court reviewing a summary judgment on appeal must view the record in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But the party opposing the motion may not rely upon mere general statements of fact, but “must demonstrate at the time the motion is made that specific facts are in existence which create a genuine issue for trial.” *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986); *see also* Minn. R. Civ. P. 56.05. General averments are not enough to meet the nonmoving party’s burden. *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976).

Statutory Background

HAVA requires each state election official to implement a single, centralized, computerized statewide voter-registration list, which is to contain the name and registration information “of every legally registered voter in the State.” 42 U.S.C. § 15483(a)(1)(A) (2010). Minnesota, in implementing HAVA, created the Statewide Voter Registration System (SVRS). *See* Minn. Stat. §§ 201.021, .022 (2010).

SVRS contains “the name and registration information of every legally registered voter in the state.” Minn. Stat. § 201.021. Respondent provides the centralized computer system that hosts the SVRS, the network and the software, but each county is responsible for voter registration and for updating SVRS. The county auditors are the chief registrars of voters and custodians of the official records in each county. *Id.* When a person properly registers to vote, the county auditor is required to “enter the information contained on [the registration] into the statewide registration system.” Minn. Stat. § 201.121, subd. 1(a) (2010). HAVA mandates that “[a]ll voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.” 42 U.S.C. 15483(a)(1)(A)(vi) (2010). Minn. Stat. § 201.121 requires registrations completed before election day to be entered within 10 days and those completed on election day to be entered within 42 days after the election, unless the county auditor requests an extension. *Id.*, subd. 1(a).

In addition, Minnesota law requires that, after every election, the county auditors post the “voting history” within six weeks for every person who voted in the election. Minn. Stat. § 201.171 (2010). A “voting history” is the record of whether a specific voter has voted in specific elections. After an election, county auditors go through the voting rosters and enter all pre-registered voters who voted in that election into the SVRS system. Auditors then additionally enter into SVRS new registrations (people who registered on the day of the election at the polls). Respondent’s role in the data entry process (besides providing the computer system, network and software) is to provide

“such support as may be required so that local election officials are able to enter information” 42 U.S.C. § 15483 (2010).

HAVA also requires states to implement procedures for filing complaints regarding its administration. 42 U.S.C. § 155121 (2010). Minn. Stat. § 200.04 (2010) provides two procedures: complaints lodged against “a town, city, school, or county employee or official,” are reviewed and determined by respondent; complaints against respondent are forwarded to the OAH. *Id.*, subds. 2, 3.

I. Claims of Violations by Secretary of State

A. Failure to Provide Support

The second of three claims stated in the complaint asserts that respondent violated HAVA by failing to provide adequate support to the counties in their data entry process. HAVA requires that “[t]he chief state election official shall provide such support as may be required so that local election officials are able to enter information as described in clause (vi).” 42 U.S.C. § 15483(a)(1)(A)(vii). Clause (vi) requires that “[a]ll voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.” 42 U.S.C. § 15483(a)(1)(A)(vi). The principle problem relators identify in alleging a violation of HAVA is a 42-day delay by 19 counties in inputting voter registration data into the statewide voter registration system. Relator claims that the failure of those counties to enter the required data within the 42-day period is evidence that respondent failed to provide adequate support.

Failure to enter data within 42 days is not a per se violation of HAVA. Under HAVA the states are required to create and maintain a centralized list of voter registration information that is updated on an “expedited basis.” But HAVA does not mandate a particular time period within which local election officials must perform their duties. Respondent’s duty under HAVA is to provide support to the counties in their reporting and data entry processes. The counties did not violate HAVA when they failed to complete their data entry within the 42-day time period because HAVA does not mandate them to do so. No evidence was furnished to suggest that county efforts were not expedited. Finally, relator provided no supporting evidence to show that any delay in the reporting process was a result of anything respondent did or failed to do.

Minn. Stat. § 201.121 was enacted to implement the data-entry provisions of HAVA. Section 201.121 provides that “[v]oter registration applications completed on election day must be entered into the statewide registration system within 42 days after the election, unless the county auditor notifies the secretary of state before the 42-day deadline has expired that the deadline will not be met.” *Id.*, subd. 1(a). The statute provides for an extension to the 42-day deadline. The 19 named counties applied for and were granted extensions under Minn. Stat. § 201.121. As a result, relator has failed to show a violation of Minn. Stat. § 201.121. Moreover, relator has not shown that the Minnesota statutory extension process violates HAVA.

Minn. Stat. § 201.171 (2010) requires county auditors to post the post-election “voting history” within six weeks following an election for every person who voted. It does not provide for an extension. But HAVA does not require the states to post any

information regarding voter history. Minn. Stat. § 200.04, the Minnesota law implementing HAVA complaint procedures, specifically states that the complaint process is for “the review of complaints regarding the administration of Title III” *Id.*, subd. 1. HAVA Title III codifies the general requirements for computerized statewide-voter-registration lists and does not include a requirement that the states post voting histories after elections.

Because there is no evidence of specific county failures or of a specific failure that is pertinent to the failure-to-support claim against respondent, the ALJ did not err in dismissing the failure-to-support claim.

B. 2008 Election

The third claim in relators’ complaint alleged violations of Minn. Stat. §§ 201.121, .171 in relation to the 2008 general election. Relators argue that the evidence of a violation is a discrepancy, as of September 2010, between the number of voter histories posted for the 2008 election and the number of votes certified for that same election. Relators claim that this is evidence that voter information in SVRS from the 2008 election is still incomplete.

The public record indisputably involves a number of inconsistencies in voter reports from 2008. Relators highlight that there has been ample time (a period of over two years) within which to cure the discrepancy. But relators have failed to present evidence showing that the inconsistencies show occurrence of a violation.

Respondent asserts, without refutation, that the disparities could be due to many factors other than inaccurate recording: for example, voters who move out of the state

become “inactive” and are no longer included on the list; deceased voters are necessarily removed from the public list; individual voters can request that their names be withheld, deactivate their voter registration or have their information remain confidential for personal safety reasons; and registrations for absentee ballots never appear in the SVRS database. Relators have provided no suggestions for how one might establish that a violation occurred, and they have pointed to nothing under the law that mandates respondent’s retrospective reconciliation of voter records and voter history records. The ALJ correctly concluded that there was no basis to find that respondent failed to provide the required support.

II. Claim of County Violations

The first of the three claims in the complaint alleges that voter-registration information from the 2010 election was not entered on an “expedited basis” as required by HAVA because county officials did not post the names of Minnesota voters who participated in the 2010 election within the required 42-day timeframe in violation of Minn. Stat. § 201.121, and failing to post the names of those who voted on election day within the six-week statutory timeframe in violation of Minn. Stat. § 201.171. Relators again argue that neither HAVA nor the Minnesota statutes provide for an extension of time for inputting voter information.

A. Lack of Jurisdiction

The ALJ dismissed the portion of the complaint directed specifically against the counties for a lack of jurisdiction. According to Minn. Stat. § 200.04, OAH’s jurisdiction is limited to hearing complaints made against respondent. Minn. Stat. § 200.04, subd. 2,

mandates that respondent will hear and make a determination where a complaint “pertains to a town, city, school, or county employee or official.” The merit of the ALJ dismissal is evident on the face of the statutes.

Alternatively, relators argue that respondent should have implicitly understood the counties to be named parties and then served them with the portion of the complaint related to potential county violations (i.e. Minn. Stat. §§ 201.121, .171 violations in data entry), but the claim inadequately identifies which counties are in question and does not identify any county as a party to the proceeding. Moreover, no specific county officials are named and there is no identification of a violation by a specific county official.

B. HAVA

The claim against the counties is premised on erroneous views of the law, as indicated in our prior discussion of relators’ second claim against respondent, section I(A). Relators have offered no legal basis for the assertion that Minn. Stat. §§ 201.121, .171 do not comply with HAVA. And relators allege no facts that would support a claim that any one of the counties did not act expeditiously other than the failure to complete all of the data entry within 42 days.

C. Number of Voters

Relators allege that the fact that “the voter history records are incomplete” creates a material issue of fact regarding whether respondent and the counties have complied with HAVA. This implicates our discussion of relators’ claim on 2008 voters, section I(B). According to relators, if the number of voters in a particular election does not match the number of registered voters in SVRS, there has been a per se violation.

Respondent explained that the discrepancy between the posted number of voters and registered voters in SVRS does not suggest a failure to complete data entry but rather, can be a result of several factors, including: voters who become “inactive” in SVRS because they move or die and are no longer listed; voters who request that their information be withheld from the public information list; and absentee ballots that are recorded separately from SVRS. Accordingly, the two lists will never be the same. The ALJ did not err in finding that there are no material facts supporting a violation of HAVA or the statutes implementing HAVA.

Relators allege no facts that would show that respondent failed to meet its duties.

III. Summary Process

A. Hearing

Relators suggest that the statutory right to a hearing does not permit a summary disposition. But it is mistaken to interpret “hearing” to prevent the ALJ’s termination of proceedings and disposition of the case when there is no showing of cause to further proceed; such an interpretation would produce absurd consequences. The definition of hearing does not proscribe any particular length or process once a party fails to offer proof that would be valuable in exploring a claim. As the ALJ stated, summary disposition is an established method observed in all ALJ cases. We conclude that a hearing under federal law occurs as long as the ALJ takes testimony that is offered and is probative.

B. Discovery

Relators argue that they were not provided an opportunity for meaningful discovery and as such summary disposition was inappropriate. According to Minn. R. 1400.6700, subd. 2, “[a]ny means of discovery available pursuant to the Rules of Civil Procedure for the District Court of Minnesota is allowed.” Generally, a party “may obtain discovery regarding any matter . . . that is relevant to a claim or defense.” Minn. R. Civ. P. 26.02(a). The discovery sought is relevant, however, only if it is “reasonably calculated to lead to . . . admissible evidence.” *Abbott v. Comm’r of Pub. Safety*, 760 N.W.2d 920, 924 (Minn. App. 2009) (quoting Minn. R. Civ. P. 26.02(b)(3)). An ALJ’s ruling on a discovery motion will not be reversed absent an abuse of discretion. *Surf and Sand Nursing Home v. Dep’t of Human Servs.*, 422 N.W.2d 513, 520 (Minn. App. 1988).

The only discovery request relators made was for a complete “master list” of voter histories, which respondent was unable to provide. County auditors are required to make “public information lists” available for inspection. Minn. Stat. § 201.091, subd. 4. But the public information list is not a complete list of all names in SVRS. In addition there is a “master list” that is the “current list of registered voters in each precinct in the county.” *Id.*, subd. 1. The master list is only made available to “public officials for purposes related to election administration, jury selection, and in response to a law enforcement inquiry concerning a violation of or a failure to comply with any criminal statute” *Id.* It was relators’ wish to have access to the private master list. But by statute the only list available for inspection by members of the public is the public information list.

Furthermore, respondent convincingly argued that production of the master list would not have aided relators in proving an HAVA violation because there will always be a discrepancy between the SVRS list and the list of voters from the most recent election. There was no additional identification of other prospective discovery that would enhance relators' claims. The ALJ did not abuse its discretion in denying relators' motion to compel discovery.

IV. Right of Appellate Review

A. Writ of Certiorari

Respondent argues that certiorari jurisdiction is not available in this case. But when no method of review is prescribed for quasi-judicial decisions of administrative bodies, Minn. Stat. § 606.01 (writ of certiorari) is the remedy. *United Migrant Opportunity Servs., Inc. v. Dodge Cnty. Planning Comm'n*, 636 N.W.2d 813, 814 (Minn. App. 2001); *Dietz v. Dodge Cnty.*, 487 N.W.2d 237, 239 (Minn. 1992). Respondent equates the right of review with the right of appeal, but he cites no authority and the suggestion contradicts the right of certiorari.

B. Naming of OAH as Party

OAH, in following the procedure prescribed in Minn. Stat. § 200.04, subd. 3, which governs HAVA complaints filed against respondent, issued a final determination. Subdivision 6 of the same statute provides that any determination made under subdivision 3 is subject to appellate review. Upon review, the appellate court can provide the appropriate remedy; an OAH is not a proper respondent on appeal.

Affirmed.