IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ST. AUGUSTINE SCHOOL, et al.,

Plaintiffs,

v. Case No. 16-CV-575-LA

TONY EVERS, in his official capacity,
as Superintendent of Public Instruction, et. al.

Defendants.

DEFENDANT ANTONY EVERS MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S COMPLAINT AGAINST HIM

INTRODUCTION

The Defendant Anthony Evers concedes he waived sovereign immunity by not opposing removal of this case to federal court. He therefore withdraws that defense to this suit. However, this case must still be dismissed under Rule 12(b)(6) as the State is not a "person" and therefore cannot be sued under 42 USC § 1983. Further, Plaintiffs are incorrect in their interpretation of what constitutes exhausting administrative remedies. They have failed to exhaust their administrative remedies and, therefore, the state law claims must be dismissed as well.

ARGUMENT

I. PLAINTIFFS CANNOT BRING A 42 USC § 1983 CLAIM AGAINST EVERS AS HE IS NOT A PERSON UNDER THE STATUTE WHEN ACTING IN HIS OFFICAL CAPACITY.

As addressed in Defendant Evers motion, the law is quite clear that a State, or a state official acting in his official capacity, is not a person for purposes of 42 U.S.C. § 1983. The Supreme Court held in *Will v. Michigan Dept. of State Police*, 491 U. S. 58, 71 (1989), that

"neither a State nor its officials acting in their official capacities are "persons" under § 1983." Here, Evers is clearly sued in his official capacity, which Plaintiffs' Response Brief makes abundantly clear. *Will* also addressed whether being a person under § 1983 had to do with Eleventh Amendment immunity. In *Will*, the suit was brought in state court where Eleventh Amendment immunity did not apply. The Court held that a § 1983 suit may not be brought against a State in either state or federal court:

> Given that a principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims, and that Congress did not provide such a federal forum for civil rights claims against the States, we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983.

Id. at 66. There was no § 1983 suit that could be brought against Evers in his official capacity in state court or federal court. The Plaintiffs did not address this matter at all, thus Defendant Evers' unchallenged position must prevail. Therefore the § 1983 claim must be dismissed against Evers because there is no cause of action related to the claims of Constitutional violations.

II. PLAINTIFFS HAVE NOT EXHAUSTED THEIR STATE LAW CLAIMS AND ARE INCORRECT AS TO THE LAW.

What is left after disposing of the federal law claims are the state law claims. Those must be dismissed pursuant to the exhaustion doctrine. The Plaintiffs are simply wrong in their characterization of the exhaustion doctrine. Although a Wis. Stat. § 227.52 judicial review case necessarily invokes the judicial branch, it is an extension of the administrative remedies available to citizens aggrieved by agency decisions. Under judicial review, the underlying case is not re-litigated, the facts are taken as true, the standards for agency deference are well-established, and the scope of review is defined in Wis. Stat. § 227.57. Although the Wisconsin Supreme Court in *Casteel v. Vaade*, 167 Wis.2d 1 (1992), held that one does not need to exhaust administrative

remedies before filing a 42 U.S.C. § 1983 case, Defendant Evers is arguing the state law claims must be dismissed for failure to exhaust administrative remedies.

The state statute stands for itself: "Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except as otherwise provided by law. . . ." Wis. Stat. § 227.52. The Plaintiffs' state law claims in the case at hand are challenging a review of an administrative decision. This decision does not fall under one of the enumerated exceptions in § 227.52. There is not an exception otherwise provided by law. Therefore, Wis. Stat. § 227.52 applies.

In order to avoid the plain language of Wis. Stat. § 227.52, the Plaintiffs first argue that Wis. Stat. § 121.51 does not explicitly invoke the procedures of Wis. Stat. § 227.52 and, therefore, Wis. Stat. § 227.52 in inapplicable. This is not true. All administrative decisions which adversely affect the substantial interests of a person are appealable under Wis. Stat. § 227.52. The Department of Public Instruction, which Defendant Evers heads, makes many decisions, all of which are appealable under Wis. Stat. § 227.52 unless otherwise specified.[1]

Judicial review under Wis. Stat. § 227.52 is the express statutory method of review. The Plaintiffs cite *Ottoman v. Primrose*, 332 Wis. 2d 3 (2011), to support their position. As they correctly state, "Common law certiorari is available whenever there is no express statutory

[1] For example, appeals of expulsion decisions, teacher licensing cases, and parental choice program decisions are regularly appealed under Wis. Stat. §227.52 without any of the applicable statutes referencing Chapter 227. *See e.g.,* Thompson v. Wisconsin Dep't of Pub. Instruction, 197 Wis. 2d 688, 697, 541 N.W.2d 182, 185 (Ct. App. 1995)

method of review." *Id.* at 22. However, *Ottoman* involved an appeal of a town's decision to deny an application for a permit. The town was not subject to Chapter 227 provisions. Therefore, there was no other statutory method of certiorari in that case and common law certiorari applied. That is not the case here.

In *State ex rel. First Nat. Bank of Wisconsin Rapids v. M & I Peoples Bank of Coloma*, 82 Wis.2d 529, 263 N.W.2d 196 (1978), the plaintiffs argued that a petition for judicial review was not an adequate method of review for constitutional issues. The court held Chapter 227 judicial review was the exclusive remedy. The court conceded "that there may be 'exceptional cases' in which the method of review prescribed by statute would not be held to be exclusive" but that First National had not alleged that case was an exceptional case that should be treated outside the general rule. *Id.* at 546. Similarly, Plaintiffs St. Augustine and the Forros have alleged no special circumstances which would make this an exceptional case to be treated outside the general rule.

The court does acknowledge that there is an exception to the general rule where an appeal to the administrative agency would not have afforded adequate relief such as where the aggrieved party seeks to declare a statute unconstitutional. *Id.* at 545. Plaintiffs in this case have very deliberately not presented a facial attack on the constitutionality of Wis. Stat. § 121.51 because, if declared unconstitutional, Plaintiffs would be entitled to no transportation and, therefore, not obtain a satisfactory outcome. In addition, just like its predecessor in *First National Bank*, Wis. Stat. § 227.57(8) provides an adequate remedy:

> The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not

> substitute its judgment for that of the agency on an issue of discretion.

Plaintiffs' argument is that the Defendants' decisions, not the statute itself, violate constitutional provisions. Therefore, like in *First National Bank*, Chapter 227 review is the exclusive remedy available.

The Plaintiffs further try to use the fact that the two prior legal decisions regarding Wis. Stat. § 121.51 were not litigated as Chapter 227 appeals as dispositive of this issue. Although one case was not a Chapter 227 appeals, the Plaintiffs are wrong that this means they do not have to exhaust their administrative remedies in this case. In fact, the *Vanko* court states that that case was allowed to proceed because it was a facial challenge to the constitutionality of the statute. If, however, the case was about the criteria used by the school board to determine attendance areas, the court would have "dismiss[ed] the petition on the grounds that the petitioners had not exhausted their administrative remedies under the statute, and were premature in seeking judicial review. . ." *State ex rel. Vanko v. Kahl*, 52 Wis.2d 206, 216 (1971). *Vanko* does not, as Plaintiffs' allege, stand for the proposition that cases regarding Wis. Stat. § 121.51 disputes are necessarily allowed to proceed under certiorari. The other case, *Holy Trinity Community School, Inc. v. Kahl*, 82 Wis.2d 139 (1978), does appear to arise from a petition for review. "On September 20, 1972, the Community School commenced an action for review in the circuit court for Dane County." *Id.* at 142. The Court talks about a delay in receiving the record. *Id* at 142 and 149. Circuit court does not need a record to proceed on a writ of certiorari, but a record is required to be filed under Chapter 227[2]. The circuit court affirmed the order of the State Superintendent.

[2] See 1975-76 Wis. Stat. § 227.18.

The other cases the Plaintiffs rely upon are also easily distinguishable. The Plaintiffs are correct that *State ex rel. City of La Crosse v. Rothwell*, 25 Wis.2d 228 (1964) was commenced as a review by certiorari; however, the court held that the case before the State Superintendent was not a contested case. *Id.* at 239. As such, Chapter 227 did not apply. Further, Defendant Evers has no idea of whether his predecessor asserted a defense of failure to exhaust administrative remedies or the need to comply with Chapter 227 requirements. The decision does not address that issue, and, absent an argument by the defendant, the court would make no finding as to that issue.

As to the Plaintiffs' contention that Defendant Evers did not treat this case as one covered by Chapter 227, this is not true. Nothing in Wis. Stat. § 227.52 states that the administrative decision subject to judicial review had to be previously conducted as a hearing by the Division of Hearings and Appeals ("DHA"). Further, Wis. Stat. § 227.43, which specifies the powers of DHA, does not state an agency must use it, and the Department of Public Instruction is not included as one that must use it for certain cases. In fact, Wis. Stat. § 227.46 covers who an agency may designate as a hearing examiner which includes an official of the agency or an employee on its staff. Here, the State Superintendent designated the former Chief Legal Counsel as the examiner.

A failure to exhaust administrative remedies cannot be remedied by converting a certiorari case to a Chapter 227 case. The time for filing a petition for judicial review is long past. The court cannot make a determination such that it would invalidate the requirement to exhaust administrative remedies. Such a ruling would invalidate the time limits for filing a petition for review. *See* Wis. Stat. § 227.53 (party seeking judicial review must file and serve petition for review within 30 days of an agency's decision).

III. THIS COURT SHOULD NOT REMAND THE STATE CLAIMS TO STATE COURT.

As this case was filed against two Defendants based on allegations of intrinsically entwined violations, it is nonsensical to remand the state claims against Defendant Evers to state court when jurisdiction is proper over Defendant Friess Lake School District ("Friess Lake"). The Court must decide the state law claims to decide the constitutional claims against Friess Lake as discussed in depth in Defendants' Joint Motion for Summary Judgment. It is not an efficient application of law to have a state court decide the claims against one defendant when Friess Lake has properly removed those same claims to this Court.

CONCLUSION

For the reasons stated, the Court should grant State Superintendent Anthony Evers' motion to dismiss and dismiss him from this lawsuit.

Respectfully submitted this 5th day of January, 2017.

/s/ Laura M. Varriale
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