

VERMONT SUPERIOR COURT
Orange Unit
5 Court Street
Chelsea VT 05038
802-685-4610
www.vermontjudiciary.org



CIVIL DIVISION
Case No. 20-CV-00307

H. Brooke Paige v. State of Vermont et al

ENTRY REGARDING MOTION

Title: Motion to Dismiss (Motion: 1)
Filer:
Filed Date: August 27, 2020

ENTRY ORDER

Re: Motion to Dismiss and Motion for Hearing

On July 31, 2020, H. Brooke Paige (“Paige”) filed this action which he has styled as an “Interlocutory Appeal of an Administrative Election Complaint filed under 17 V.S.A. 2458, Petition for Declaratory Judgment and Injunctive Relief.” He has named the State of Vermont and the Secretary of State as the Defendants. Paige asserts that the Secretary of State has plans to mail ballots to all registered voters and permit third parties to assist voters with their ballots, that these plans violate the Vermont Election Laws, and he also disagrees with the Secretary’s policy determinations to do so. By way of relief he seeks that the Court:

1. Declare that the Legislature through Act 92 of 2020 and Act 135 of 2020 has only empowered the Defendant, Secretary of State James Condos to conduct the 2020 Election by enacting rules and procedures consistent with the existing Title 17 Election Law Statutes.
2. Issue orders that temporarily and permanently restrain and enjoin defendant, Vermont Secretary of State Condos from implementing a “Vote by Mail” mass-mailing program and to refrain from permitting the mailing of “live” ballots unless requested by registered voters following the procedures in: 17 V.S.A. § 2531. Application for early voter absentee ballot and 17 V.S.A. § 2532. Applications; form.
3. Issue orders that temporarily and permanently restrain and enjoin defendant, Vermont Secretary of State Condos from permitting third parties to engage in “Vote Harvesting” whereby political advocates and organizations canvass in search of voters who have been mailed Early and Absentee Ballots either by request by the voter or by a Vote by Mail mass-mailing. Assistance to Absentee Voters shall be limited to those procedures found in: 17 V.S.A. § 2532. Applications; form, 17

V.S.A. § 2537. Early or Absentee Voting in the Town Clerk’s Office, 17 V.S.A. § 2538. Delivery of Ballots by Justices of the Peace, 17 V.S.A. § 2539. Mailing of Early Voter Absentee Ballots; Permanently Disabled Voters and 17 V.S.A. 2543. Return of Ballots.

Complaint, ¶ 70. Paige is a voter and candidate in the upcoming election.

In the Complaint, Paige sets forth that on July 1, 2020, he filed an election complaint with the Secretary of State pursuant to 17 V.S.A. § 2458. Complaint, ¶ 4. He further acknowledges that the Secretary of State had 90 days to issue a written determination on his complaint. Complaint, ¶ 5. At the time of the filing of this action no written determination had been issued by the Secretary of State and the time in which such a determination must be issued had approximately 60 days remaining.

On August 27, 2020, the Defendants filed a Motion to Dismiss the action and opposition to the request for a preliminary injunction. Defendants contend that Paige prematurely filed this proceeding before he had exhausted his administrative remedies before the Secretary of State, and therefore the court lacks subject matter jurisdiction. Defs.’ Mot. to Dismiss and Opp. to Pl.’s Mot. for Preliminary Injunction at 6–11. Defendants also maintain, *inter alia*, that Paige lacks standing to sue, that the Secretary of State’s actions were authorized by the legislature and are consistent with Title 17, and that Paige is not entitled to a preliminary injunction. Paige opposes the motion and has requested a hearing on his motion for an injunction.

(1) Exhaustion of Administrative Remedies

Exhaustion of administrative remedies is required when specifically mandated by the legislature. *Mullinnex v. Menard*, 2020 VT 33, ¶ 13. When a statute does not mandate exhaustion, the court has the discretion to determine whether a party was required to exhaust administrative remedies prior to filing suit. *Id.* That discretion must be exercised in recognition, however, of the “long-settled rule of judicial administration that when administrative remedies are established by statute or regulation, a complainant must pursue, or ‘exhaust,’ all such remedies before turning to the courts for relief.” *Id.* ¶ 14 (citing *Jordan v. State*, 166 Vt. 509, 511–12 (1997)); *Pratt v. Pallito*, 2017 VT 22, ¶ 15 (“[W]hen administrative remedies are established by statute or regulation, a party must pursue, or ‘exhaust,’ all such remedies before turning to the courts for relief.”). “[E]xhaustion of administrative remedies is a presumed requirement, and the burden is on the party seeking to bypass the administrative process to show that it fits within an exception to this general rule.” *Mullinnex*, 2020 VT 33, ¶ 14.

The Vermont Election Laws, codified at Title 17, require the Secretary of State to create an administrative complaint procedure. 17 V.S.A. § 2458(a) (“The Secretary of State shall adopt rules to establish a uniform and nondiscriminatory complaint procedure to be used by any person who believes that a violation of this title . . . has occurred, is occurring, or is about to occur in the course of any election in which a candidate for federal office appears on the ballot.”). The Secretary’s rules establish such a procedure and provide that a written determination be issued within 90 days from the receipt of a complaint. Rules of the Elections and Campaign Finance

Division, Rule 4(VI), Code of Vt. Rules, 20-2-4:VI (WL). Both the statute and rules provide that decisions of the Secretary may be appealed to the Superior Court. 17 V.S.A. § 2458(d); Code of Vt. Rules, 20-2-4:VI (WL).

Since § 2458 does not expressly mandate the filing of an administrative complaint before a complainant seeks judicial review of agency action, this court will assume, without deciding, that exhaustion is not mandated by the statute itself. Accordingly, the question of whether Paige was required to exhaust his administrative remedies before filing this proceeding is a matter of judicial discretion.¹

When determining whether to exercise discretion to hear a case prior to the exhaustion of administrative remedies, courts look to the purposes of the exhaustion requirement. “The rule serves the dual purposes of protecting the authority of the administrative agency and promoting judicial efficiency. To allow complainants to bypass their administrative remedies deprives the parties and the courts of the benefit of the administrative agency’s experience and expertise, and denies the agency the opportunity to cure its own errors.” *Mullinex*, 2020 VT 33, ¶ 14 (quotations and citations omitted).

Pursuant to § 2458 and the Secretary’s rules, Paige filed an administrative complaint containing comments and other material challenging the Secretary’s determination to mail ballots to all registered voters and allow third parties to assist voters to return ballots. Paige then filed this appeal of his administrative complaint before the Secretary’s time to respond had expired. Because the gravamen of Paige’s complaint is a challenge to the Secretary’s decision-making with respect to the voting process in the coming election, its subject matter falls squarely within the agency’s experience and expertise. The agency should have the opportunity to assess these comments and respond to Paige’s complaint before the Superior Court considers the matter.

In prematurely filing this proceeding, Paige deprived this court of any record to review. When a complainant files an administrative complaint and then appeals it before the agency’s time to respond has expired, a complainant has bypassed the administrative process, and the petition should be dismissed. *Mullinex*, 2020 VT 33, ¶¶ 15, 18.² This is especially true where,

¹ Like § 2458, the statute at issue in *Mullinex* contained a legislative direction to establish an administrative complaint procedure. The Supreme Court did not determine whether this legislative direction constitutes a “specific mandate” of exhaustion; it rested its decision on common law principles. *Mullinex*, 2020 VT 33, ¶ 13.

² Some courts have held that the doctrine of exhaustion is not a jurisdictional issue in the absence of a statutory mandate. See, e.g., *Vermont Dep’t of Pub. Serv. v. United States*, 684 F.3d 149, 156 (D.C. Cir. 2012) (“We presume exhaustion is non-jurisdictional unless Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision.”) Vermont appears to take the position that exhaustion is a jurisdictional issue, even in the absence of a statutory mandate. See *Mullinex*, 2020 VT 33, ¶¶ 13, 18 (ruling that trial court lacked subject matter jurisdiction based on common law exhaustion doctrine and not deciding whether statute mandated exhaustion).

as the appeal is governed by V.R.C.P. 74 which provides for an on the record review. See V.R.C.P. 74(a)(1); *In re Soon Kwon*, 2011 VT 26, ¶ 6, 189 Vt. 598 (mem.) (Rule 74 appeals from governmental agencies pursuant to statute are on the record and not de novo and “the court’s task is solely to determine whether there was any reasonable basis for the [agency’s] finding[s].”). Accordingly, this court declines to exercise its discretion to review this matter prior to the completion of the administrative proceeding Paige initiated.

(2) Standing

Beyond the issue of exhaustion of administrative remedies, Defendant’s contend that Paige does not have standing to pursue this action and to obtain declaratory and injunctive relief. Paige does not agree.

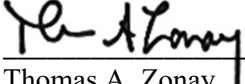
While § 2617 of Title 17 gives the Superior Court general jurisdiction to decide matters relating to elections, and § 2458 allows a complainant to appeal an administrative decision by the Secretary, standing must also be established when asserting a claim. See *Brod v. Agency of Nat. Res.*, 2007 VT 87, ¶¶ 7–8, 182 Vt. 234 (a statute granting jurisdiction to hear challenges “does not eliminate the prerequisite of a justiciable controversy,” including standing); *Paige v. State*, No. 780-12-15 Wncv, slip op. at 3 (Vt. Super Ct. May 12, 2016) (Tomasi, J.) (§ 2458 authorizes suit; standing is a separate determination), *aff’d*, 2017 VT 54, 205 Vt. 287; ; see *Wool v. Office of Prof’l Regulation*, 2020 VT 44, ¶ 10 (“Like the mootness doctrine, standing is rooted in constitutional principles requiring actual controversies between adverse litigants and is a jurisdictional prerequisite.”). To establish standing, a party “must have suffered a particular injury that is attributable to the defendant and that can be redressed by a court of law.” *Bischoff v. Bletz*, 2008 VT 16, ¶ 15, 183 Vt. 235 (quotation omitted); see also *Wool*, 2020 VT 44, ¶ 10 (“To satisfy constitutional standing, a plaintiff must allege facts on the face of the complaint that show “(1) injury in fact, (2) causation, and (3) redressability.”). The injury must be an “invasion of a legally protected interest, not a generalized harm to the public.” *Paige*, 2018 VT 136, ¶ 9 Moreover, the injury alleged “must be reasonably expected and not based on fear or anticipation.” *Brod*, 2007 VT 87, ¶ 9.

Paige alleges a number of concerns about the Secretary mailing ballots to registered voters, in the absence of a specific request from a voter that a ballot be mailed, including an alleged potential for fraud and that the use of certain types of “gummed” envelopes could result in COVID-19 transmission. Paige also has concerns that the Secretary’s authorization of organizations to assist voters with returning ballots could result in fraud, COVID-19 transmission, or improper influence of voters.

These allegations made by Paige in this matter consist of theoretical harms to the election process rather than threats of actual injury being caused to a protected legal interest. *Brod*, 2007 VT 87, ¶ 9. As such, Paige does not have standing and may not sue for a declaratory judgment or enjoin Defendants from mailing ballots to voters or permitting organizations to assist voters with ballot return.

In light of the foregoing, the Defendants' Motion to Dismiss is GRANTED and Paige's request for a hearing is DENIED.

Electronically signed: 9/8/20 at 4:15 PM pursuant to V.R.E.F. 9(d)



Thomas A. Zonay
Superior Court Judge