

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:
CHRISTINA ASBEE,

Complainant,

HAVA Complaint No. 16-02
Determination

-v-

THE COLUMBIA COUNTY BOARD OF ELECTIONS,

Respondent.

Procedural Background

On December 5th, 2016, the New York State Board of Elections (hereinafter SBOE) received a written, sworn, signed, and notarized Complaint (the "Complaint") dated December 2, 2016, filed by Christina Asbee, alleging certain conduct that constitute violations of Title III of the Help America Vote Act of 2002 (52 U.S.C. § 21081). Specifically, the Complainant alleges that she attempted to use a Ballot Marking Device (BMD) at her polling site, but the BMD was turned off and had likely not been turned on all day as there was still tape on the machine when she tried to use the BMD. Further, the Complainant alleges that poll workers attempted to turn the device on, but were unable to do so, even after attempting to call Columbia BOE and an entity in Albany. After about an hour, the Complainant was not able to use the BMD and voted via a pre-printed ballot.

On December 21, 2016, Columbia County Board of Elections (BOE) responded through its commissioners, Virginia Martin and Jason Nastke. In summary, the response states that Columbia County BOE investigated the mater and found that the incident happened at a particularly busy time during the day. Further, the response states that an election inspector did have difficulty in starting an "accessible session," which caused the inspector to call Columbia BOE who instructed the inspector to call the "Voting Machine Specialist." However, the specialist was out in the field with a cell phone. The response further states that the inspector was unable to reach the specialist, perhaps because the

specialist was at a poll site at Hillside, which has poor cell service. The response states that subsequently, a second inspector offered to help, stating that it has been a number of years since anyone has used the BMD, and at that point the Complainant voted via a preprinted ballot.

A hearing was held, on February 17, 2017.

At the hearing, the Complainant testified to the following: On December 2, 2016, she filed a HAVA complaint based on her voting experience on November 8, 2016. When she entered the polling site, she requested to use the BMD. Upon her request, she was given a blank ballot to vote on the BMD. Complainant was then instructed to go to a “very narrow area” where the BMD was located. Complainant did not have a tape measure and was unsure of whether the space around the BMD was ADA compliant, however, she did note that there was a trash can that she had to walk around in order to access the BMD. When the Complainant walked to the BMD, a poll worker went towards the Complainant, where upon the Complainant asked for assistance with the BMD. Further, the Complainant noted that there was tape covering a slot on the BMD. Complainant understood that the BMD was not turned on as she was told by an inspector that the BMD had to be turned on. The poll worker attempted to turn the BMD on, but the BMD was not responsive. After about fifteen minutes, where the poll worker was working on the device, the “head poll worker” asked if there was an issue. The head poll worker then told the assisting poll worker to “call the numbers.” The poll worker made several phone calls, including phone calls to the Columbia BOE and a number in Albany. The Complainant waited twenty-five minutes for the poll worker to make the calls, and an additional fifteen minutes to get a call back; however, nobody ever called back. At this point, the Complainant had been at the poll site for over an hour, so she requested to vote via a preprinted ballot.

In response, Columbia County BOE apologized for the event and stated it is investigating its procedures. Columbia County BOE explained how the BMD process works. BMDs are always turned on,

however, to operate the device, an inspector needs to initiate an “accessible session.” Ballots are blank because the BMD will print out a ballot; however, a poll worker needs to set up the BMD so that it will print the appropriate ballot for the corresponding election district. Election Day manuals in relation to the operation of the voting machines are available at all polling sites. Election inspectors are trained and instructed to refer to an Election Day instruction manual if issues arise. Columbia County BOE indicated that all inspectors receive an annual training on all of the Election Day processes, including a fifteen-minute training related to the BMD, and then an additional fifteen to twenty minutes having the inspector successfully initiate an accessible session on a BMD. Lastly, Columbia County BOE stated that the tape is placed on the slot portion of the BMD in order to prevent voters from inserting a ballot in the slot. According to Columbia County BOE, a voter once mistook the BMD for a scanner and attempted to insert the voted ballot in the slot. This caused a jam in the BMD, making the BMD unusable for a period of time.

In regards to the events in question, Columbia County BOE testified that there were eight inspectors assigned to the poll site, with two inspectors involved in this matter, a woman inspector who was working the information table directing voters to the appropriate election district table (the Complainant mistakenly thought she was the head inspector), and a poll worker assigned to assist voters on the machines. Columbia County BOE speculated that, in trying to initiate an accessible session, the inspector assigned to assist with the machines missed a necessary step. Columbia County BOE suggested that the inspector likely failed to refer to the Election Day instruction manual when issues arose with the BMD. Ideally, he would have referred to the manual and followed all of the steps required to initiate an accessible session. The election inspector did call the machine technician to troubleshoot and left a message; however, Columbia County BOE was unaware if the machine technician ever received the message from the inspector requesting help or if the inspectors ever followed up with the technician after leaving a message. Columbia County BOE testified that the

inspector at the information desk, after “feeling badly” about the incident, did attempt to initiate an accessible session later in the afternoon, and was able to successfully initiate a session.

In issuing this Determination, the written submissions of the parties have been received and considered, the credibility has been weighed, the Complaint and the responses thereto have been considered. Further, SBOE considered all of the testimony at the hearing. Additionally, SBOE applies a preponderance of the evidence standard in these findings. N.Y. Elec. Law § 3-105.

Jurisdiction

Section 402 of Help America Vote Act of 2002 requires the State to create a state-based administrative complaint procedure to assure compliance with Title III of the Help America Vote Act of 2002 (hereinafter HAVA). Subdivision 16 of § 3-102 of the New York State Election Law (hereinafter Election Law) directs SBOE to establish a HAVA administrative complaint procedure. Section 3-105 of the Election Law outlines the Complaint procedure, such as that a formal complaint shall be in writing, signed and notarized; that the evidentiary standard shall be a preponderance of the evidence; and that the final determination shall be published and appropriate action shall be taken by the state Board of Elections as necessary. Additionally, 9 NYCRR § 6216.2 further outlines the administrative complaint process.

As the Complaint was written, signed and notarized, and as the Complaint alleges conduct that constitutes a violation of Title III of HAVA, SBOE determines that Christina Asbee has standing to bring a Complaint.

Issues Raised by the Complainant

The complainant, Christina Asbee, alleges the following:

1. The BMD was not turned on when she attempted to use the device.

2. The poll workers were unfamiliar with the BMD machine and were unable to successfully operate troubleshoot issues with the BMD.

3. A trash can obstructed access to the BMD, making the BMD non-compliant with HAVA accessibility standards.

Legal Authority

Title III of HAVA, section 301(a), outlines the minimum standards for polling locations used in federal elections. Title III specifically states that all voting systems must be accessible to persons with disabilities. 52 U.S.C. § 21081 (a)(3)(A). Furthermore, Title III outlines particular requirements that states must satisfy-namely, providing non-visual accessibility to the blind and visually impaired and maintaining at least one voting system at each polling location equipped for persons with disabilities. Id. § (a)(3)(A-B). Title III also requires that the voting opportunities provided by elections officials to persons with disabilities “be accessible in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters(.)” 52 U.S.C. § 21081 (a)(3)(A). This accessibility requirement also requires poll sites to have a clear path of travel at entrances, exits, and voting areas. Id. See also 52 U.S.C.A. § 21021(a)(1).

Findings of Fact

In regards to whether the BMD was turned off at the time Complainant attempted to vote, SBOE finds that the BMD was turned on and operational at the time of the incident. Complainant testified that the machine did not appear to be turned on because there was tape on the BMD, that the inspector indicated that he needed to turn on the BMD, and because the BMD appeared to be inoperable while the inspector worked on it. SBOE finds and determines the Columbia County BOE’s testimony that the BMD was on, but the inspector was unable to initiate an accessible session, and that tape was on the BMD to prevent voters from mistaking the BMD as a scanner, to be credible. Further, when the

inspector was attempting to initiate an accessible session, it is likely that the Complainant mistook this to mean he was turning the BMD “on.” As such, SBOE determines that there is no Title III HAVA violation in relation to the BMD being turned off when Complainant attempted to vote.

SBOE finds and determines that the assisting inspector in question failed to follow the troubleshooting process he was trained and instructed to do by Columbia County Board of Elections. According to Columbia County BOE, the inspector should have reviewed the Election Day manual and followed the instructions related to BMDs. Instead, the inspector attempted to operate the BMD by memory, which caused him to skip a necessary step in initiating an accessible session. Additionally, from the testimony, the inspector called Columbia County BOE for help, and instead of referring the inspector to the Election Day manual, and assisting the inspector through that process, the BOE instructed the inspector to call a technician, effectively deflecting responsibility the Board had to the voter onto the inspector (who, it shall be noted, is likely not a full time employee, but only works for the board a handful of times during the year; during elections or trainings). Further exacerbating the situation, it does not appear that the Columbia County BOE or the inspector followed up with the “Voting Machine Specialist” after the voter left, even though everyone was under the impression that the BMD was inoperable. This effectively left the polling site without a BMD for an indeterminate amount of time, until the information table inspector decided, on her own initiative, to initiate an accessible session. The consequences of this failure are significant. The Complainant was unable to use the BMD, and the inspector was unable to indicate when the BMD would be repaired to voters. Without the BMD, voting systems were inaccessible for voters with a disability as defined by HAVA. As such, SBOE determine and finds that the Columbia County BOE’s and inspector’s failure to follow Columbia County’s BOE’s procedures, or ensure that the BMD was in the process of being repaired, constitute a violation of Title III of HAVA.

While the Complainant testified that a trash can obstructed her access to the BMD, making the BMD inaccessible, this allegation was not alleged in the Complaint. As such, Respondents did not have a reasonable opportunity to investigate or speak on the allegation. As such, the SBOE declines to make a determination related to the alleged obstruction. However, SBOE does urge Columbia County BOE to ensure that the path of travel, entrances, exits, and voting areas of all of its polling facilities be accessible to individuals with disabilities and compliant with the ADA.

Remedy

Section 3-105 of the Election Law requires that “(w)hen a violation has been found, the final determination shall include an appropriate remedy for any violation of Title III of the Help America Vote Act of 2002 (HAVA) found by the state board of elections.” Further, 9 NYCRR 6216.2(f)(1) states that “(r)emedies may consist of a directive to the local or State official(s) or entities to undertake or to refrain from certain actions or to alter certain procedures pertaining to Federal elections.”

Pursuant to this authority, SBOE directs Columbia County BOE to do the following:

Columbia County BOE shall submit a report to the SBOE within sixty (60) days of this determination, detailing:

1. Improvements to poll worker and BOE staff training for future elections;
2. The “improvements” to inspector training must include lessons learned from the issues raised by the instant Complaint;
3. The “improvements” should also include training for the inspector at the poll site in question and the BOE staff who referred the inspector to the technician; and
4. At a minimum, trainings must emphasize that an inspector should refer to the Election Day manual when troubleshooting with a BMD machine.

Determination

For the reasons stated above, SBOE finds the allegations in the Complaint to be credible, finds that there were violations of Title III of HAVA, and directs NYC BOE to comply with the Remedy section of these findings.

Dated: March 17, 2017

William J. McCann, Jr.
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