

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:

MICHAEL BIORNSTAD,

Complainant,

HAVA Complaint No. 16-03
Determination

-v-

THE NEW YORK CITY 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 November 30, 2016, filed by Michael Biornstad, alleging certain conduct that constitute violations of Title III of the Help America Vote Act of 2002 (52 U.S.C. § 21081). Specifically, Complainant alleges that, during the Election held on November 8, 2016, he requested to use the Ballot Marking Device (BMD) at a polling site located at Friends of Crown Heights, 671 Prospect Place, Brooklyn, New York. When he made this request, a poll worker asked about his disability. The Complainant responded by stating that the poll worker should not inquiry about his disability. Subsequently, other poll workers intervened and agreed that Complainant could use the BMD. The Complainant alleges that the poll worker was eager to help, but admitted to being unfamiliar with the machine. The Complainant further alleges that, while the BMD was accessible, it faced outward, making the screen viewable to others in the polling area, which, according to Complainant, deprived him of his right to vote in private.

SBOE accepted the Complaint and issued a notice of acceptance on December 7, 2016. Subsequently, pursuant to 9 NYCRR 6216(c)(4), Complainant served the Respondent, New York City Board of Elections (hereinafter NYC BOE) and filed proof of such service on December 15th, 2016.

On December 20, 2016, Michael J. Ryan, NYC BOE Executive Director, filed a written response on behalf of NYC BOE. The Response states NYC BOE trains poll workers each year and provides instruction on the use and set up for the BMDs, including a segment on the proper etiquette for addressing voters' abilities. The Response also states that each poll worker must take and pass a proficiency exam prior to being assigned to work on Election day. NYC BOE further notes that it operates 1,200 poll sites, and employs approximately 37,000 elections. NYC BOE further explains that given the volume of voters, poll sites, poll workers and complexity of election administration, moments can occur where circumstances will be less than ideal."

Neither party requested a hearing in this matter.

In issuing this Determination, the written submissions of the parties have been received and considered, the credibility has been weighed, and the Complaint and the responses thereto have been considered. 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 Michael Biornstad has standing to bring a Complaint.

Issues Raised by the Complainant

The complainant, Michael Biornstad, alleges the following:

1. A poll worker inappropriately inquired about his disability when Complainant said he wanted to use the BMD.
2. The poll workers were unfamiliar with the BMD machine.
3. The BMD faced outward, making the screen viewable to others in the polling area, which deprived the voter of his right to vote in private.

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). Section 4-132 of the Election Law requires that booths or devices used for voting be construed in a manner as to ensure secrecy. Section 8-102 of the Election Law requires election inspectors to inspect

ballot devices and BMDs to ensure they are in working order prior to the opening of the polls, and to inspect the polling site to ensure that there is sufficient privacy when using devices, booths, and BMDs. Section 8-300 of the Election Law provides that “(t)he operating of the ballot scanner by the voter while voting or the use of a privacy booth or ballot marking device for marking a ballot shall be secret and obscured from all other persons except as provided by this chapter in cases of voting by assisted voters or in cases of children under the age of sixteen accompanying their voting parents or guardians.”

Findings of Fact

Upon reviewing the Complaint and Response, SBOE finds and determines that the factual assertions made in to Complaint are credible.

SBOE also finds and determines that a poll worker inquiring whether a voter has a disability as a prerequisite to use the BMD constitutes a barrier in violation of Title III of HAVA. 52 U.S.C. § 21081 (a)(3)(A).

Voting is one of the most fundamental and cherished liberties in our democratic system of government. Burson v. Freeman, 504 U.S. 191, 214 (1992)(Justice Kennedy, concurring). In Reynolds v. Sims, the Supreme Court said “(u)ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” 377 U.S. 533, 561 -562 (1966).

Having a disability is not a prerequisite of using a BMD. In fact, it is encouraged to have broad use of the BMD, as broad use helps to protect the secrecy of voter ballots. If only a few voters use the BMD in an Election District, then the secrecy of the ballot is compromised as the BMD markings are unique. However, if more voters use the BMD, the unique markings of the BMD become more common place, making it more difficult to determine how specific voters voted.

Another reason having a disability is not a prerequisite of using a BMD is that many disabilities are not plainly observable. Questioning a voter about his or her disability creates a hostile environment for the voter. Such treatment discourages voters who have a disability from voting, which, in effect, disenfranchises the voter. Poll workers inquiring whether a voter has a disability as a prerequisite to use a voting device that is available to everyone is disparate treatment on its face. While an inspector may assist a voter with a specific disability in using a BMD (e.g. assisting a voter in using headphones or using a paddleboard), an inspector may not inquire as to the nature of a voter's disability if the purpose of the question is to determine whether the voter is eligible to use the BMD. As such, SBOE concludes that this inquiry is a violation of Title III of HAVA.

SBOE also finds that the poll worker who assisted the Complainant with the BMD was unfamiliar of how the BMD worked. According to the Complaint, the poll worker admitted unfamiliarity with the machine. This poses an additional barrier to access for persons with Disabilities.

SBOE also finds and determines that, because the screen was viewable to others at the poll site, the election workers failed to preserve the privacy of the voter in violation of Title III of HAVA. 52 U.S.C. § 21081 (a)(3)(A). HAVA, State Law, and NYC BOE guidance all require that voting devices be situated in a manner that ensures the privacy of the voter or be provided with screens to ensure privacy. The poll workers at his site failed to ensure such privacy.

It is understandable that, under Election Day pressure, and the volume of voters, mishaps may happen from time to time. This does not mitigate the responsibility of the county to ensure poll workers are adequately trained to interact with persons with disabilities, nor that the poll site be arranged in a manner to ensure voter privacy.

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 NYC BOE to do the following:

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

1. Improvements to poll worker training for future elections;
2. The “improvements” to poll worker training must include lessons learned from the issues raised by the instant Complaint;
3. The report shall include improvements to etiquette and sensitivity training in dealing with persons with disabilities; and
4. The “improvements” should also include training for the poll workers at the poll site in question; and

Further, NYC BOE shall clarify that a worker cannot ask a voter about their disability as a prerequisite to use the BMD machine in its “Basic Poll Worker Manual” and at subsequent poll worker trainings;

Further, NYC BOE shall revise the Disability Awareness section of its “Basic Poll Worker Manual” to include a section on Polling Place Sensitivity and Etiquette, which shall include steps poll workers can take to make persons with disabilities feel welcome and to avoid embarrassment on behalf of poll workers and Election Officials. NYC BOE may consult with disability advocacy groups in drafting this section; and

Further, NYC BOE shall revise the floor plan of the polling site in question to ensure the privacy of voters who use the BMD machine(s).

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 3, 2017

William J. McCann, Jr.
Deputy Counsel, New York State Board of Elections

Nicholas R. Cartagena
Deputy Counsel, New York State Board of Elections