

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:
CHRISTINE WATERS,

Complainant,

HAVA Complaint No. 18-01
Determination

-v-

THE RENSSELAER COUNTY BOARD OF ELECTIONS,

Respondent.

Procedural Background

On January 23, 2018, the New York State Board of Elections (hereinafter SBOE) received a written, sworn, signed, and notarized Complaint (the “Complaint”) dated January 19, 2018, filed by Christine Waters, alleging certain conduct that constitutes a violation of Title III of the Help America Vote Act of 2002 (52 U.S.C. § 21081). The Complaint alleges the following: on Election Day, November 7th, 2017, the Complainant attempted to use a Ballot Marking Device (“BMD”) at her polling site, however, the poll workers were not familiar with the equipment. The BMD was plugged in, but the screen was not positioned properly. According to the Complaint, it took a considerable amount of fiddling to position the screen correctly. The Complaint notes that the poll workers were very accommodating and respectful, but were not familiar with the equipment and ultimately could not get the BMD to work. Additionally, the Complaint states that the BMD lacked privacy, as the machine and the screen could be seen by others at the polling place.

The SBOE accepted the Complaint and sent a Notice of Acceptance on January 24, 2018 to the Complainant and Respondent. On February 8, 2018, the SBOE received a Response from Edward G. McDonough, Democratic Commissioner of the Rensselaer County Board of Elections (“Rensselaer County BOE”), dated February 7, 2018. In summary, the Response states that the Rensselaer County

BOE conducts mandatory inspector training before the September primary and the November general elections. According to the Response, these classes cover all aspects of what the inspector can expect on Election Day, with a large portion of this training pertaining to the usage of the BMD. Further, the Response states that the inspectors are given a manual at the training classes that they take home, and, on Election Day, a more in-depth manual at the polling site is provided. This manual contains instructions along with pictures of the process. The Response notes that the Board's phone number is in the manual in numerous places. The Response states that at the end of the training class, inspectors are encouraged to practice setting up the machine and look at the BMD more closely. Trainees are also provided an opportunity to ask questions. If an inspector cannot attend any of the classes, inspectors are required to go to the Board of Elections at a time that is convenient for them and do a training session with the Commissioners.

The Response states that the Rensselaer County BOE did not receive a call from either the inspector or the Complainant on Election Day in regards to any issue that may have arisen, and, if it had, the Board could have addressed this issue at that time. Lastly, the Board states that, moving forward, it will continue to emphasize the importance of the use of the BMD on Election Day in its future training classes.

A hearing was held, on March 22, 2018.

During the hearing, the Complainant reaffirmed her allegations in the Complaint. Additionally, the Complainant testified that she voted early in the morning, sometime before 9 am. She noted that there were not many people in the poll site, where it appeared that there were more poll workers than voters present. The Complainant stated that upon entering the poll site, she requested to use the BMD, which purportedly surprised the poll workers. Subsequently, the Complainant and a poll worker went to the portion of the room where the BMD was located; however, according the Complainant, the BMD

was not setup. The Complainant stated that the poll worker, who was very accommodating, pulled out a booklet that had pictures, and, together, both the Complainant and the poll worker attempted to figure out how to start the BMD. The Complainant testified that they worked on the BMD “easily for thirty minutes.” The Complainant stated that the BMD was not functioning and “the lights were not lighting the way the booklet said that it should.” Further, the Complainant testified that the screen was not positioned in a manner that was usable. After thirty minutes, the Complainant was running late for work, and, as she was able to vote independently without the use of the BMD, opted to forego using the BMD.

Commissioner Edward McDonough testified on behalf of Rensselaer County BOE. He stated that he spoke to all four polling inspectors present at the election district in question. He also stated that the chair of the polling location has been an inspector for fifteen years. According to the chair, on Election Day, the Complainant presented herself to the poll inspectors as an attorney with Disability Rights, NY. She gave the inspectors her card, and asked the poll workers if they were prepared to “operate the ADA portion of the machine.” Subsequently, the chair of the district began to assist the Complainant.

The Commissioner concedes that the BMD screen was not setup towards “the back of the room,” which would provide the required privacy; however, poll workers are instructed to set the screen towards the back, for privacy, once a voting session begins.

According to the Commissioner, the first step in initiating a voting session is inserting paper, on which the ballot is printed, in the back portion of the BMD; however, in this instance, the paper would not go in the BMD. According to the poll worker, she told the Complainant that she needed to call the Rensselaer County BOE for assistance, but the Complainant said she was late for work and indicated that she will vote on the front portion of the machine. According to the Commissioner, three of the four

inspectors believe that the Complainant was there for fifteen minutes, not thirty (the fourth inspector did not recall).

Commissioner McDonough believes that if the inspector called the Board, the BMD issues could have been rectified within three minutes. Further, he stated that, in his experience, it can be difficult to feed the paper ballot into the BMD. As stated by the Commissioner, the paper must line up perfectly. Commissioner McDonough indicated that the machine was inspected after the board received this Complaint and determined that the BMD is operational.

In regards to the allegation that poll workers are inadequately trained, Commissioner McDonough stated that during trainings, inspectors are given the opportunity to volunteer to setup and operate the voting equipment. The Commissioner indicated that he is currently in discussions with his counterpart to modify the training, to require the chair of each district would be required to setup and operate the voting equipment during training.

In regards to privacy, the Complainant concedes that she is not sure if there would have been adequate privacy if the BMD was operational and fully setup. She did indicate that if the screen would have faced the back wall, as the commissioner indicated, then it may have been possible for certain people to view the screen peripherally. The Commissioner's position is placing the screen towards the back wall would have provided adequate privacy; however, the board intends to provide privacy screens for BMD use, which will provide enhanced privacy for the voters.

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. A formal complaint shall be in writing, signed and notarized; the evidentiary standard shall be a preponderance of the evidence; 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 Christine Waters has standing to bring a Complaint.

Issues Raised by the Complainant

The Complainant, Christine Waters, alleges the following:

1. She was unable to vote on a BMD because the poll workers were inadequately trained to set up and operate the BMD; and
2. The BMD screen was positioned in a manner that compromised the Complainant's privacy.

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 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.”

9 NYCRR § 6210.9(c)(1) requires that county boards of election deploy sufficient equipment, election workers, and other resources so that the voter’s waiting time does not exceed 30 minutes.

Findings of Fact

Initially, the SBOE notes that if the inspector had called the Board, the BMD issue may have been rectified. The inspector correctly told the Complainant that she needed to call the Board for assistance. 9 NYCRR § 6210.9(c)(1) provides that county boards deploy sufficient equipment, election workers, and other resources so that the voter waiting time does not exceed 30 minutes. As such, the 15 to 30 minute delay, as occurred here, in and of itself is not a violation of Title III of HAVA. However, as noted in the Response, the inspector did not call the Board regarding this matter. At the hearing, the Commissioner conceded that the inspector should have called the Board, even after the Complainant had left, regarding the BMD, and that failure to place such a call breached the Board’s policy of calling immediately when voting equipment is malfunctioning. Failing to ensure the BMD was operational could have disenfranchised voters who need to use the BMD to vote independently and privately, which is a violation of Title III of HAVA.

Further, this incident does appear to derive from a lack of adequate training. As such, the SBOE finds and determines that the Complainant was not able to vote via the BMD because the poll inspectors

were not adequately trained in regards to the BMD process. During the hearing, Commissioner McDonough conceded that the inspector had little experience in working with the BMD, stating that she likely did not know how to line the paper in the BMD properly because, in the past ten years, nobody ever requested to use the BMD at the poll site in question. This indicates that the poll worker had little practice in operating the BMD. Additionally, the Commissioner indicated that actual hands on practice in setting up and operating voting equipment during inspector trainings is wholly voluntary. Given the above, it is possible for an inspector to have never operated a BMD prior to assisting voters. This is particularly concerning given the Commissioner's testimony that feeding the paper into the BMD is even difficult for someone who is experienced.

In regards to the privacy allegation, the SBOE finds that there is inadequate evidence to determine that the Complainant's privacy could have been compromised due to the placement of the screen. At the hearing, the Complainant conceded that she was not sure if her privacy would have been compromised once the voting session started and the screen was properly positioned. Further, Rensselaer County BOE indicated that it will begin to use an apparatus similar to privacy screens with the BMDs in future elections, which mitigates any potential privacy issue.

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 Rensselaer County BOE to do the following:

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

1. Improvements to inspector 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” shall also include requiring at least two inspectors per poll site, with each inspector being a designee of a different political party, practice setting up and operating voting equipment during trainings;
4. The “improvements” shall also include reinforcing that inspectors call the Board of Elections immediately if voting equipment malfunctions.

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 Rensselaer County BOE to comply with the Remedy section of these findings.

Dated: April 11, 2018

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

Nicholas R. Cartagena
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