

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:

GINA BARBARA,

Complainant,

HAVA Complaint No. 20-02
Determination

-v-

THE NASSAU COUNTY BOARD OF ELECTIONS,

Respondent.

Procedural Background

On September 21st, 2020, the New York State Board of Elections (hereinafter SBOE) received a written, sworn, signed, and notarized Complaint (the "Complaint") dated September 14, 2020, filed by Gina Barbara, alleging certain conduct that constitutes violations of Title III of the Help America Vote Act of 2002 (52 U.S.C. § 21081)("HAVA").

According to the Complaint, for the June 2020 primary, the Complainant went to an early voting site to cast her ballot in person. The early voting site, a local church, was arranged on two levels of the building, with two Ballot Marking Devices (BMDs) on the ground floor and the check-in table, scanner and privacy booths in the basement. However, the elevator was out of order; hence the election equipment in the basement (e.g. scanners) were inaccessible to the Complainant.

The Complaint further alleges that the Complainant attempted to use the BMD, but the BMD would not accept her ballot, and instead, indicated an error message. According to the Complaint, poll workers were unable to resolve the issue. The Complainant attempted to use the second BMD, but the same error occurred. The Complaint alleges that poll workers said they were going to call the Nassau County Board of Elections, but did not inform the Complainant that she could wait until the issue was resolved. As a result, the Complainant filled out the ballot by hand.

Further, the Complaint alleges that the Complainant could not access the scanner to scan her ballot because the elevator was out of order. As such, she gave her ballot to a poll worker who then went to the basement area to scan the ballot, out of view from the Complainant.

On October 8, 2020, Nassau County BOE responded to the Complaint. The Response did not dispute the factual assertions in the Complaint, but asserted several mitigating factors, including: the elevator at the early voting site was operable when the site was chosen. Once Nassau BOE discovered the elevator was out of order, it contacted the church, who assured Nassau BOE that the elevator would be fixed. According to the Response, despite following up daily, the elevator never got fixed. Further, the Response asserts that staff acted appropriately and in a bipartisan manner: staff brought a poll pad to the ground floor for Ms. Barbara's check-in; together they retrieved her ballot from the lower level and brought it to her; and, after she marked her ballot, they, as a bipartisan team, scanned it into the scanner. Nassau asserts that in doing this, they afforded Complainant all of the independence and privacy possible under the circumstances. Nassau County BOE does not know why the BMD did not function. Subsequent to the Complainant's attempts, staff attempted to use the devices, and they were operational, and remained operational for the Early Voting period. In going forward, Nassau County states that they will no longer use the church in question as a poll site; they will implement a protocol to ensure that elevators at its remaining poll sites (Nassau uses eleven poll sites that require elevator use) are operational, and that staff will be instructed to call management immediately if an elevator malfunctions.

A hearing was held, on December 10, 2020.

During the hearing, the Complainant reaffirmed her allegations in the Complaint. Additionally, the Complainant testified that when she arrived at the early voting site, she was informed that the elevator was not working. The BMD was on the ground floor and accessible, but the ballot scanners

were not. Election workers brought a poll pad to the Complainant to sign and brought her a ballot; however, the election workers did not provide a privacy sleeve for the ballot. Nassau County BOE confirmed this, stating that it did not provide privacy sleeves due to the COVID-19 pandemic.

Further, the Complainant testified that she attempted to insert the blank ballot into the BMD six times, and kept getting a ballot error message. She requested assistance from an election worker and was directed to the second BMD on site. The Complainant testified that when she attempted to use the second BMD, she got the same ballot error message. Election workers attempted to decipher the error code and stated that they were going to call the board of elections. The Complainant testified that she was nervous that she would be denied the right to vote. As such, she said that she decided to mark the ballot by hand, which was very difficult and required assistance in deciphering the presidential delegates. When asking for assistance related to the presidential delegates, the Complainant testified that the election worker asked, "why do you need help with that?" When she was done marking the ballot, she handed the ballot to an election worker who took the ballot, without a privacy sleeve, downstairs to scan. The Complainant did not recall a second election worker, and was unsure if a bi-partisan team scanned the ballot.

Bonnie Garone, counsel to the Democratic commissioner, along with John Ryan, counsel to the Republican Commissioner, appeared on behalf of the Nassau County Board of Elections. At the hearing, Nassau County indicated that when the church in question was selected as a poll site, it was accessible, and the elevator was functioning. On the first day of early voting, it was discovered that the elevator was no longer operational. Nassau County BOE contacted the church, who informed Nassau that the elevator would be fixed expeditiously. The original plan was to have all the voting equipment and check-in be located in the basement, which was accessible through stairs and an elevator. Since the elevator was malfunctioning, the board decided to move the BMD to the ground floor, where access to

the elevator was not necessary. Because of space constraints, ballot scanners could not be placed on the ground floor.

Unfortunately, the elevator was never repaired despite Nassau making almost daily phone calls to the church regarding this matter. Nassau County BOE said that given that voting was underway, and given the publicity provided to the public regarding Early Voting locations, it was not practical to move the early voting site.

Further, Nassau County BOE does not know why the BMDs did not accept Complainant's ballot. Subsequent to Complainant's visit, poll workers checked the BMDs, inserted a ballot, and found it to be in working order. Nassau County BOE also stated that the BMDs worked for the remainder of the early voting period. Nassau County BOE further stated that the Complainant was assisted in a bipartisan and consistent manner. Nassau County BOE did concede that when election workers informed Complainant that they would call the Nassau County BOE for assistance, they did not inform Complainant of her options, including waiting for the BMD to be fixed for her to vote; providing bi-partisan assistance in filling out her ballot; or coming back later to vote once the BMD is fixed.

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 Gina Barbara has standing to bring a Complaint.

Issues Raised by the Complainant

The Complainant, Gina Barbara, alleges the following:

1. The Complainant was denied her right to voting privately because the BMD was not operable and she was not able to scan her ballot due to the inaccessible layout of the early voting site; and
2. The Complainant was denied her right to voting privately because she was not given a privacy sleeve; and
3. To the extent that the Early Voting site was inaccessible due to an unforeseen event (e.g. a broken elevator), the Board has a duty to provide notice to the public of the inaccessible condition of the poll site

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).

Findings of Fact

While it is unclear why the ballot error message occurred during Complainant’s voting session on the BMDs, SBOE finds Nassau County BOE credible in its assertion that there is nothing mechanically wrong with the BMDs as election workers were able to operate the BMD and was operational subsequent to the Complainant’s visit. The BMDs would have likely worked if the election workers called the Nassau County BOE while the Complainant was present.

However, Nassau County BOE did err when election workers informed the Complainant that they needed to call the board of elections without informing her of her options to vote. Here, there are several options that could have been presented to the Complainant, including; 1) waiting for the BMD to be fixed, 2) being assisted by a bi-partisan team of election inspectors in filling out her ballot; or 3) coming back later when the BMD is fixed. (*See HAVA Determination 16-02, Liss v. New York City Board of Elections*). It may not be obvious to voters what the process is when an election machine is temporarily unavailable. As such, voters need direction from election workers. Here, the Complainant felt the need to vote by hand because she thought she had no alternatives and was afraid she would be disenfranchised. She only recalls one election worker collecting her ballot, which made her nervous regarding the security of her ballot. It is inevitable that election workers will need assistance or call the board of elections from time to time. However, much of Complainant’s concerns would have been addressed if she was given her options when election workers attempted to call the board of elections regarding the BMDs.

Regarding the layout of the early voting site, HAVA requires poll sites to have a clear path of travel at entrances, exits, and voting areas. 52 U.S.C.A. § 21021(a)(1). Having voting equipment that

requires the use of stairs, as here, is a violation of Title III of HAVA. While there may be instances where an event happens making certain equipment inaccessible (e.g. an elevator malfunctioning), reasonable efforts must take place to ensure that a voter with disabilities is able to independently and privately vote consistent with HAVA. Here, Nassau County BOE indicated that it provided the sign in poll pad and ballot to the voter, as well as assisting the voter to scan the ballot in a bi-partisan manner, which, in this isolated instance, is appropriate. Additionally, election staff could have provided notice, or informed the voter, of the inoperable elevator and of potential options the voter may have. As this was an early voting site; and, in Nassau County, voters could vote at any early voting site in the county, election workers could have informed the voter of her ability to vote at alternative early voting sites. The Complainant would have then had an opportunity to decide to vote elsewhere, which would have preserved her right to vote independently and privately. Furthermore, the Complainant could have been advised of her ability to vote on Election Day itself, at her designated polling site.

Regarding the lack of a privacy sleeve, Nassau County BOE conceded that it did not give anyone a privacy sleeve due to the pandemic. However, here, there were extenuating circumstances that other voters did not have to contend with. Here, the Complainant was unable to scan her own ballot; rather, a third party (election workers) scanned the ballot. This extra step compromises the privacy of the voter. While mishaps may happen from time to time, this does not mitigate the responsibility of the county to ensure that persons with disabilities are able to vote in privacy and with dignity. As such, some mechanism, such as, for example, the use of a folder that could have been thrown out after a single use, should have been used for this voter, where election workers were handling and scanning a filled-out ballot.

Given the above, SBOE determines that this factual background constitutes a violation of Title III of HAVA, as the Complainant was denied access to vote independently and privately.

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 Nassau County BOE to do the following:

Nassau County BOE shall:

1. Instruct election workers and inspectors to inform voters of their options of ways to vote when a BMD is temporarily unavailable, including: 1. waiting at the poll site until the BMD is fixed; 2. getting assistance from a bi-partisan team in filling out the ballot; or 3. coming back at a later time after the BMD is fixed, as well train election workers and inspectors as how to respond to BMD error codes that may occur during a voting session; and
2. Instruct election workers and staff to provide notice and information to voters when unexpected events, such as a broken elevator, makes a site inaccessible, as well as providing information of the voter’s options to vote; and
3. If a filled-out ballot must be handled by staff, instruct election workers and staff to handle such ballot in a manner, and with mechanisms, in order to preserve the privacy of the ballot.

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

Dated: December 21, 2020

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