

STATE OF NEW YORK  
NEW YORK STATE BOARD OF ELECTIONS

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In the Matter of:

PHILLIP BENNETT,

Complainant,

HAVA Complaint No. 22-03  
Determination

-v-

NEW YORK CITY BOARD OF ELECTIONS,

Respondent.

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**Procedural Background**

On February 18, 2022, the New York State Board of Elections (hereinafter SBOE) received a written, sworn, signed, and notarized Complaint (the “Complaint”) dated February 15, 2022, filed by Phillip Bennett, 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, the Complainant, Phillip Bennett, tried to vote on October 26, 2021 at approximately 6pm at Marine Park Active Adults and Senior Center located at 3000 Filmore Ave, Brooklyn, NY 11229. Mr. Bennett attempted to use a Ballot Marking Device (BMD) to complete his ballot, but there was a printing error. Mr. Bennett reported the error to a poll worker who instructed Mr. Bennet to exit the voting session, leaving him with a ballot that printed only on one side. The poll worker then directed Mr. Bennett to use the other BMD at the polling place and to put his ballot into it. However, the second BMD would not accept the partially marked ballot and Mr. Bennett had to mark the rest of his ballot by hand. Poll workers did not offer a machine technician to look at the BMD or to assist Mr. Bennett with marking his ballot.

In addition, the complaint further alleges that the New York City Board of Elections (NYCBOE) did not have an accessible means to request an absentee ballot.

On March 30, 2022, NYCBOE responded to the Complaint stating that they acted in a lawful manner. The response explains that when the first BMD did not work, Mr. Bennett was directed to use a second BMD. When the second BMD did not work he was given a replacement ballot to fill out by hand. In addition, the response outlined the procedures for when there are issues with the BMD and provided information on how BMDs operate. The response also states that each BMD has a bipartisan poll worker team assigned to it and there are accessibility clerks at every poll site to assist persons with disabilities. Furthermore, a voter may ask an individual of their choosing to assist them provided they complete an oath and are not associated with the voter's employer or union. NYCBOE's response also states that procedures are in place to ensure that BMDs are in working order prior to the opening of the polls. In addition, NYCBOE has Voting Machine Technicians that inspect poll sites throughout the day and are sent to any poll site immediately if they are notified of an issue. The response further explains that according to the procedure of NYCBOE, if a BMD malfunctions, poll workers are instructed to provide the voter with the following options: wait until the BMD is repaired; return to the poll site after it is repaired; or vote with assistance from a bipartisan team of inspectors. If NYCBOE is informed that a poll worker did not follow the policies, they receive additional training.

A hearing was held on May 4, 2022.

During the hearing Mr. Bennett reaffirmed the allegations made in the complaint except for those that pertained to the accessible absentee ballot which were withdrawn. Mr. Bennett testified that he tried to use a BMD, but it malfunctioned and only printed on one side. He testified that the ballot was inserted into the machine in a crooked manner. He was then instructed to use a second BMD at the poll site. However, the second BMD would not accept the partially printed ballot so he was

unable to use it. Mr. Bennett then filled out the rest of the ballot by hand but was not asked by the poll site staff if he wanted assistance. After marking the ballot by hand Mr. Bennett testified that he placed the ballot into the scanner and took five attempts before the scanner would read his ballot. Mr. Bennett testified that he did not ask for a technician to fix the BMD because when he had previously voted he had issues with the BMD and it took the technician many hours to get to the poll site to fix it.

General Counsel Hemalee Patel and Deputy General Counsel Raphael Savino appeared on behalf of the NYCBOE. Their testimony reaffirmed their response to the complaint. NYCBOE testified that since the COVID pandemic began they were providing their training through virtual means. NYCBOE explained that they are again providing their poll worker training in person.

NYCBOE also indicated that the BMDs used for the election are tested before they are sent to the poll site and they are checked every morning before early voting. NYCBOE further testified that poll workers are required to verify if the BMD is operational multiple times a day. Of the approximately 212 BMDs that were used during early voting this was the only HAVA complaint that NYCBOE received that day.

NYCBOE also testified that normal procedures for when BMDs malfunction are to provide a second BMD if available, give the voter the option to wait until the BMD is repaired, or offer the voter assistance with filling out their ballot.

### **Jurisdiction**

Section 402 of Help America Vote Act of 2002 (52 U.S.C. § 21112) 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 Phillip Bennett has standing to bring a Complaint.

### **Issues Raised by the Complainant**

The Complainant, Phillip Bennett, alleges the following:

1. While voting early on October 26 2021, Mr. Bennett, was unable to vote privately and independently because both BMDs at the poll site malfunctioned;
2. Poll Workers did not provide Mr. Bennett with alternative options to vote when the BMDs were unable to be used; and
3. NYCBOE did not have an accessible means to request an absentee ballot.

### **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.”

### **Findings of Fact**

#### The BMD Malfunctioned:

Both BMDs malfunctioned and would not print Mr. Bennett’s ballot properly at the time he went to vote. Due to the malfunction Mr. Bennett had to mark his ballot by hand.

#### Poll Workers Did Not Offer to Assist Mr. Bennett With His Ballot:

Poll workers should have offered to assist Mr. Bennett with his ballot when the BMDs malfunctioned. Options for assistance should have included waiting for the BMD to be fixed by a technician, assistance from a bipartisan team of election inspectors to fill out his ballot or to come back later when the BMD was fixed.

### Absentee Ballot Requests:

This issue was withdrawn at the hearing held May 4, 2022.

### **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 NYCBOE to do the following:

1. Instruct poll workers on procedures relating to the checking of BMDs to ensure they are operational both prior to the opening of the polls and throughout the day;
2. Review current troubleshooting and training materials to ensure that all procedures are up to date and thoroughly inform poll workers of their obligations with regard to BMDs;
3. Instruct poll workers to inform voters of each of their options to cast their vote when a BMD malfunctions or is otherwise non-operational; and
4. Instruct poll workers on procedures related to poll workers providing bipartisan assistance to voters using replacement ballots following BMD malfunctions.

### **Determination**

For the reasons stated above, SBOE finds the allegations in the Complaint to be credible, finds that there was a violation of Title III of HAVA, and directs its staff to comply with the Remedy section of these findings.

Dated: May 24, 2022

Kevin G. Murphy  
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