

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:

KATHRYN MAYER,

Complainant,

HAVA Complaint No. 16-05
Determination

-v-

MONROE 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 November 28, 2016, filed by Kathryn Mayer, alleging certain conduct that constitute violations of Title III of the Help America Vote Act of 2002 (52 U.S.C. § 21081). The Complaint alleges the following:

During the General Election held on November 8, 2016, the Complainant requested to use the Ballot Marking Device (BMD) at a polling site located at the United Way of Greater Rochester, 75 College Avenue, Rochester, New York. When she made this request, a poll worker, assuming the Complainant did not have a disability, asked the Complainant why she wanted to use the BMD if she did not have a disability. The Complainant did not disclose whether she had a disability, but reaffirmed her request to use the BMD. The poll worker then referred to the Complainant as the person who wanted to "test out" the BMD to the other poll workers. Another poll worker attempted to dissuade the Complainant from using the BMD by informing her that it would take longer to vote via the BMD. The Complainant stated that she still wished to use the BMD. At that, another poll worker intervened and stated that he did not have a problem setting up the BMD and assisting the voter. The BMD was not powered on, nor did it appear to be assembled. The Complainant had to wait while the poll worker read a manual on how to setup the BMD. While assembling the BMD, poll workers stated that it was "good practice because they

never had to set up the machine or see it operate before.” According to the Complainant, there was “a lot of commotion” in setting up the BMD, and several poll workers had to get involved. Upon assembly, the poll workers could not adjust the screen so that the Complainant could see the entire ballot. Additionally, there was little space around the BMD, with wires on the floor that Complainant alleges caused her to trip. Further, the BMD was placed in a heavy traffic area, where the Complainant had difficulty hearing the ballot via the audio interface. When realizing that setting up the BMD caused so much “commotion and delay,” the Complainant requested to vote by marking her ballot with a pen; however, the poll workers declined that request, leaving her no option but to vote via the BMD. When the BMD printed the ballot, there were three poll workers waiting to retrieve the ballot, instead of allowing the Complainant to retrieve the ballot. Lastly, the Complainant alleges that she had to take the ballot out of the privacy sleeve in order to insert it in the scanner, as the scanner would not work otherwise.

SBOE accepted the Complaint and issued a notice of acceptance on December 14, 2016. Subsequently, pursuant to 9 NYCRR 6216(c)(4), Complainant served the Respondent, the Monroe County Board of Elections (hereinafter Monroe County BOE) and filed proof of such service on February 15, 2017.

On March 13, 2017, Commissioners Thomas F. Ferrarese and Douglas E. French filed a written response on behalf of the Monroe County BOE. The Response states the Monroe County BOE conducted over 100 election inspector training classes in preparation for the 2016 presidential election. Each election inspector is required to attend a three-hour training class and pass an examination before working a general election. The inspectors are given a 70-page manual. Both the trainings and the manual covers assisting voters with disabilities. The trainings and manual cover basic etiquette; how to communicate with a person that needs assistance; and points out that not all disabilities are visible. According to the Response, “most trainings classes include hands on step by step process on how to run

the BMD from starting the session to casting the ballot.” The Response indicates that the Commissioners are disheartened to hear about the Complainant’s experience, and states that the chair inspectors at the poll site have been contacted. The Commissioners promise that the level of professionalism and the knowledge of the BMD process will be vastly improved for future elections.

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 Kathryn Mayer has standing to bring a Complaint.

Issues Raised by the Complainant

The Complainant, Kathryn Mayer, alleges the following:

1. An inspector improperly asked why the Complainant wanted to use the BMD, assuming that she did not have a disability;
2. The BMD was not powered on, or assembled, when the Complainant arrived at the polling site;
3. The poll workers were unfamiliar with the BMD, causing significant delay in Complainant's vote;
4. The BMD was situated in a manner that was not accessible to persons with a disability; and
5. Inspectors retrieved the Ballot from the BMD rather than the Complainant, compromising her 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 4-132 of the Election Law requires that booths or devices used for voting be construed in a

manner as to ensure secrecy. 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).

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 an inspector asking a voter why she would use the BMD if she does not have a disability constitutes a barrier in violation of Title III of HAVA. 52 U.S.C. § 21081 (a)(3)(A).

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 at greater risk of being compromised as the BMD markings are unique. However, if more voters use the BMD, the unique markings of the BMD become more common place, better ensuring voter privacy.

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. Inspectors 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 BMD at the poll site was not powered on at the time the Complainant voted. Title III requires that there be at least one voting system located at each polling site accessible to persons with disabilities. 52 U.S.C. § 21081 (a)(3)(A). The BMD is the voting system that is used to make voting accessible to voters with a disability. The inspectors and Monroe County BOE failed to ensure that the BMD on site was available to the voters. This had a disparate impact to voters that wished to use the BMD, including voters with a disability who may rely on using the BMD. As such, SBOE determines that the inspectors and Monroe County BOE failed to ensure that the provided machines were ready and accessible for the voters, in violation of the accessibility provision of Title III of HAVA.

SBOE also finds that the inspectors who assisted the Complainant with the BMD were unfamiliar of how the BMD worked. According to the Complaint, the inspectors admitted unfamiliarity with the machine. Specifically, the inspectors stated that setting up the BMD was "good practice because they never had to set up the machine or see it operate before." This poses an additional barrier to access for persons with Disabilities as it caused unwarranted delays. Exacerbating this issue, inspectors denied the Complainant's request to mark her ballot with a pen once she realized the delay setting up the BMD caused.

SBOE also finds and determines that once the BMD was set up, it was situated in a manner that was not accessible to voters with a disability. The Complainant states that the area around the BMD was narrow, and that she tripped on wires on the floor. 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). Failure to have a clear path makes the BMD inaccessible, in violation of Title III.

Further, SBOE finds and determines that the inspectors failed to ensure the privacy of the voter because the inspectors, without the Complainant's consent, retrieved the Ballot from the BMD. The Complainant states that she was unable to retrieve her ballot from the printer because three inspectors prevented her from retrieving the ballot. The Complainant did not request assistance in retrieving the ballot. It appears that the inspectors, on their own initiative, retrieved the ballot from the printer, compromising the privacy of the Complainant. This constitutes a violation of Title III of HAVA. 52 U.S.C. § 21081 (a)(3)(A).

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 poll sites be prepared and 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 Monroe County BOE to do the following:

Monroe County 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;
4. The report shall include instructions that inspectors power up all required voting machines prior to polls opening, including the BMD;
5. The report shall include improved trainings where inspectors receive hands on training with the BMD, which shall, at a minimum, include powering up and turning off the BMD;
6. The report shall include improve training related to voter privacy; and
7. The “improvements” should also include training for the poll workers at the poll site in question; and

Further, Monroe County BOE shall re-emphasize that a worker cannot ask a voter about their disability as a prerequisite to use the BMD machine in its “Training Manual for Inspectors” and at subsequent poll worker trainings;

Further, Monroe County BOE shall revise the floor plan of the polling site in question to ensure the BMD is situated in a manner that is compliant with Title III of HAVA; and such floor plan shall provide for any needed temporary mats, or other accessories, to ensure that the path of travel to the voting area is accessible.

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

Dated: April 14, 2017

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

Nicholas R. Cartagena
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