

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:
RANDALL BORST,

Complainant,

HAVA Complaint No. 17-01
Determination

-v-

THE ERIE COUNTY BOARD OF ELECTIONS,

Respondent.

Procedural Background

On January 5th, 2017, the New York State Board of Elections (hereinafter SBOE) received a written, sworn, signed, and notarized Complaint (the "Complaint") dated December 23, 2016, filed by Randall Borst, alleging certain conduct that constitutes violations of Title III of the Help America Vote Act of 2002 (52 U.S.C. § 21081). The Complaint alleges the following:

During Election Day, November 8th, 2016, the Complainant used a Ballot Marking Device ("BMD") at his polling site using the audio interface. When the Complainant attempted to print, the BMD responded with an error message and instructed him to speak to a poll worker. The Complainant spoke to three poll workers, but none of the poll workers knew how to address the issue. The poll workers then called the Erie County Board of Elections ("BOE"). After speaking with the BOE, the poll workers instructed the Complainant to leave the ballot in the device and informed him that it would be extracted and counted later. The Complainant did not agree to this. He requested that the ballot in the machine be marked as spoiled and that he be given a new ballot to mark. The poll workers called Erie County BOE again and were instructed to offer the Complainant an affidavit ballot. The Complainant refused at first, as his name was in the poll book, but then consented as he was offered no alternative. According to the Complainant, the voting process took about an hour because of the BMD malfunction.

The Complainant further alleges that he experienced similar malfunctions in 2012 and 2014.¹ In those years, the Complainant alleges that the poll workers marked the ballot in the BMD as spoiled and issued a new ballot to the Complainant.

On March 21, 2017, Erie County BOE responded through commissioners Ralph Mohr and Jeremy Zellner. In summary, the Response states that, in relation to the alleged BMD malfunction, there is no record of the BMD in question malfunctioning during the general election. Further, the Response stated that pre- and post-Election Day testing shows that the BMD was and continues to be in working order. Further, the Response states that any malfunction as stated in the complaint would require advanced technical training not covered in the standard poll worker training classes. Lastly, the Response states that if a poll worker cannot extract a ballot, an affidavit ballot is meant to ensure that the Complainant's vote is counted.

A hearing was held, on April 6, 2017.

During the hearing, the Complainant reaffirmed his allegations in the Complaint. Additionally, Complainant testified that he voted early in the morning, between 6 and 7 am. He stated that he inserted the ballot into the BMD and the audio interface was able to read the ballot. After the Complainant made his choices, the BMD was able to read back the choices. When the Complainant attempted to print, the audio interface indicated that there was a problem marking the ballot. He requested help from poll workers, who said they did not know how to fix the BMD and needed to call Erie County BOE. After contacting the BOE, the poll workers told the Complainant that the ballot would be extracted and counted later. The Complainant refused because the BMD stated that there was a problem marking the ballot. After calling Erie County BOE again, the poll workers offered the

¹ At the hearing, Complainant testified that he used the BMD during the April 19, 2016 Presidential Primary and experienced no malfunction or issues.

Complainant an affidavit ballot. The Complainant noted that this malfunction caused him to have his wife assist him in voting, which compromised his privacy. After leaving the polling site, the Complainant called Mr. Todd Vaarwerk, an advocate from Western New York Independent Living, to let him know about the BMD malfunction.

Commissioner Ralph Mohr testified on behalf of Erie County BOE. Initially, Erie County BOE indicated that, because one of the commissioners recently left Erie County BOE, an adequate investigation was not performed prior to Erie County BOE's written response. After investigating, Erie County BOE concedes that the BMD failed to mark Complainant's ballot, but that the failure was not due to a malfunction; rather, it was because the BMD was not plugged into a live electrical outlet. There was no record of this issue because neither the inspectors nor the Erie County BOE knew that the BMD was not plugged into a live electrical outlet until after BOE's investigation.

Erie County BOE submitted an activity report from the BMD in question that shows the BMD was powered on at 5:39 am. At the same time, the report indicates that the BMD was running on battery power. At 7:23 am, a ballot, presumably Complainant's, was loaded into the BMD. At the same time, the report indicates that the battery was low. At 7:27 am, two printer malfunctions occurred; a paper jam and an unspecified "error." At 7:40 am, the BMD powered down due to lack of power.

Erie County BOE stated that, according to the vendor, when the Complainant inserted the ballot into the BMD, the BMD had enough power to read the ballot, but did not have enough power to mark the ballot. Hence, the BMD's failure to mark the ballot was not due to a malfunctioning, or broken, BMD; rather, it was due to a lack of power supply. Further, Erie County provided pre- and post-election inspection reports showing that the BMD in question was operational.

According to Erie County BOE, the BMD was eventually powered back on. Commissioner Mohr testified that he was out in the field during Election Day and, at around 11 am, received a message from

Mr. Todd Vaarwerk stating that there was an issue with the BMD at the polling site in question. The Commissioner was asked to meet with someone at the poll site to resolve the issue. The Commissioner testified that he visited the site, but no one was there regarding the BMD. Upon visiting the site, the Commissioner testified that voters had rearranged furniture near the BMD outlet, so they could sit down while waiting in line. He suspected that the extension cord may have been kicked out of the socket, so he pulled the extension cord out of the electrical socket, and inserted it into another wall. He stated that the new outlet was obviously a live outlet, because the report indicates that the BMD was powered on at 11:17 am. The Commissioner stated that he did not know, at the time, that the BMD was powered down. When he walked in the poll site, he was responding to what the voters were doing (moving furniture near an outlet), not in response to the BMD complaint he received. While the Commissioner was informed that there was an issue with the BMD, he testified that he was unaware of the nature of the issue. The Commissioner testified that he approached the inspectors and asked if there was an issue with the BMD, but was told that there was an issue earlier, but the issue was now resolved. The Commissioner testified that he then inspected the BMD and it was powering up. The Commissioner stated that he was not surprised it was powering up as he recently unplugged the BMD in order to plug it into a new outlet.

Erie County BOE testified that inspectors are provided with a three-prong extension adaptor for each voting system that glows orange when it is plugged into a live outlet. These adaptors are supposed to be used with all of the voting systems to ensure the machines have a power supply. Additionally, the BMD itself indicates that it is running on battery power through an amber light on the screen.

In relation to Complainant's interaction with the inspectors, Erie County BOE testified that it interviewed the poll site inspectors, who stated that the BMD was working in the morning when they turned on the BMD. Further, two inspectors stated that they offered to assist the Complainant, but he refused. Specifically, one of the inspectors stated "I walked over and he didn't want any help. As time

went on, he said it wasn't operating, but he didn't want any help. He didn't ask for assistance, so we gave him the affidavit." The Complainant disputes this testimony. He said that the inspectors offered assistance when he first arrived, but he said he did not need assistance because he knew how to operate the BMD. After the BMD did not mark the ballot, he went to the inspector for help, and eventually received an affidavit ballot.

Erie County BOE stated that when a voter requests a new ballot, but does not submit the original ballot that was provided, the proper procedure is to give the voter an affidavit ballot. According to Erie County BOE, this ensures that a voter does not vote more than once. Further, Erie County BOE stated that if a BMD marks a ballot, but does not release the ballot because of a paper jam, it is proper procedure to inform the voter that the ballot will be extracted and counted later, when a technician fixes the machine.

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 Randall Borst has standing to bring a Complaint.

Issues Raised by the Complainant

The Complainant, Randall Borst, alleges the following:

1. The BMD in question malfunctioned and should be replaced;
2. The Complainant was denied his right to voting privately because Erie County BOE and the inspectors failed to adequately assist Complainant and address the BMD malfunction; and
3. The Complainant should not have been required to vote via an affidavit ballot, but should have been given a new ballot to scan.

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).

When the voter's name and address do not appear on the registration poll record, instead of presenting a court order, the voter may swear to and subscribe an affidavit stating that he has duly

registered to vote, the address in such election district from which he registered, that he remains a duly qualified voter in such election district, that his registration poll record appears to be lost or misplaced or that his name and/or his signature was omitted from the computer generated registration list or that he has moved within the county or city since he last registered, the address from which he was previously registered and the address at which he currently resides, and at a primary election, the party in which he is enrolled. Election Law § 8-302(3) provides that inspectors must offer an affidavit ballot to voters whose name and address do not appear on the registration poll record.

Findings of Fact

Initially, SBOE finds and determines that the BMD in question functions properly. SBOE finds Erie County BOE credible in that there is nothing mechanically wrong with the BMD. Erie County BOE provided adequate evidence, in the pre- and post-inspection results, that the BMD in question functions properly. Erie County BOE submits that the BMD did not mark the ballot because of a lack of power supply. SBOE accepts this explanation. As such, SBOE does not believe replacing the BMD in question is an appropriate remedy.

Second, the SBOE finds that the Complainant's factual assertions in his testimony to be credible. Specifically, SBOE finds that: 1) the Complainant attempted to mark his ballot with the BMD; 2) the BMD failed to mark the ballot; 3) the Complainant requested assistance from the inspectors; 4) that inspectors called the Erie County BOE who instructed the Complainant to either leave the ballot in the BMD or vote via an affidavit ballot; and 5) the Complainant needed assistance from his wife to fill out the affidavit ballot. 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.

It is understandable that mishaps may happen, and voting machines may break down, particularly during a busy presidential election. However, the assistance provided to the Complainant

was severely lacking in this matter. When the Complainant approached the inspectors to inform them that the BMD was not marking his ballot, the inspectors stated that they were unsure of what to do and called Erie County BOE. Contacting Erie County BOE in this situation was the appropriate action; however, the advice rendered by Erie County BOE did not serve Complainant well, and denied him his right to vote independently and privately.

Initially, the Complainant was told to leave the ballot in the BMD and it will be counted later after a technician fixes and extracts the ballot. Given that that the BMD stated that there was an error in marking the ballot, this advice would have caused the Complainant to cast a blank ballot, effectively disenfranchising him. Even if the ballot was marked, and the ballot was not released because of a paper jam, the Complainant has the right to inspect the ballot and cast it through a machine.² Title III of HAVA requires that a voting system “provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error).” 52 U.S.C. § 21081 (a)(1)(A)(ii). 9 NYCRR § 6209.2(a)(3) requires for the provision of a voting device “that produces and retains a voter-verifiable permanent paper record, pursuant to statute, which the voter can review and/or correct prior to the casting of their vote(,)” in order to, among other things, ensure the ballot was fully marked. Furthermore, 9 NYCRR § 6209.2(f)(4) provides that “voting system shall allow the voter to approve or reject the paper record, in the case of DRE systems, marking the ballot as such in the presence of the voter.” The instructions to the Complainant, that he leave the ballot in the BMD and it will be counted later, without alternatives, such as waiting for the technician to inspect the BMD or offering a new

² It should be noted that the BMDs in Erie County give a voter a choice of either providing the ballot to the voter to scan, or submitting the ballot into a locked box to be scanned later. In this matter, the Complainant opted to receive the ballot so he could scan the ballot.

ballot, would have denied Complainant of his right to an opportunity to change his or her ballot before the ballot is cast, in violation of Title III of HAVA and State regulations.

Additionally, when the Complainant refused to leave the ballot, the Complainant was then told that he could vote via an affidavit ballot. The Complainant at first refused, because his name was in the poll book, but then relented as he was given no other alternative.

Erie County BOE testified that an affidavit ballot is provided to a voter when a voter requests a second ballot, but does not relinquish the initial ballot provided, even in circumstances where the ballot is stuck in a BMD. According to Erie County BOE, when a ballot is stuck in a machine, and the voter does not want to vote via an affidavit ballot, the voter has to wait for a technician to fix and extract the ballot. The purpose of this policy to ensure a voter does not cast more than one ballot.

In the instant matter, the Complainant was never given the option of waiting for a technician to extract the original ballot. In fact, a technician was never contacted by the inspectors or Erie County BOE. The BMD issue was not addressed until almost three hours later, when advocate Mr. Todd Vaarwerk contacted Erie County BOE. This effectively left voters at the polling site in question without a BMD for three hours. HAVA Title III requires that voting “be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters” and that to satisfy this requirement, “at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities” is to be available at each poll site. 52 U.S.C. § 21081 (a)(3)(A).

Purportedly, neither the inspectors nor the Erie County BOE knew that the BMD was not powered on. This, however, is unreasonable. First, the mere fact that the Complainant approached the inspectors and stated that the BMD would not release or print his ballot should have prompted Erie

County BOE or the inspectors to inspect the BMD. A mere cursory inspection of the BMD would have revealed that the BMD was powered down. Instead, the Complainant was offered an affidavit ballot, and the BMD problem was ignored. The BMD problem was not addressed until the Complainant called an advocate, who, in turn, contacted Erie County BOE. As such, SBOE determines that Erie County BOE and the inspectors violated Title III of HAVA by taking no action in correcting the BMD issue for three hours.

Further, Erie County BOE's use of an affidavit was inappropriate in this instance. Election Law § 8-302(3)(e)(ii) provides that inspectors must offer an affidavit ballot to voters whose name and address do not appear on the registration poll record. In the instant matter, the Complainant was in the poll book. His request for a second ballot does not fit within the criteria outlined in § 8-302. The inspectors should not have required the Complainant to vote via an affidavit ballot. The inspectors should have given the Complainant an estimate of when a technician would address the BMD and given the Complainant an option of waiting for the BMD to get repaired, or vote with the assistance of a bipartisan team with a new ballot.

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 Erie County BOE to do the following:

Erie 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 training the inspectors to offer alternative options that protect the privacy and independence of a voter, when BMD issues arise, such as waiting for a technician to fix the BMD or offer to assist the voter in marking a ballot;
4. The “improvements” shall also include reinforcing that inspectors check the three prong extension and the voting devices to ensure that they are plugged into live electrical outlets;
3. The report shall include improvements to troubleshooting BMD issues as they arise; and
4. The report should also include training Erie County BOE staff to contact technicians, as warranted, when inspectors cannot address BMD technical issues;
5. The Erie County BOE shall review and revise its policy (advising voters to leave a ballot that is stuck in a machine so that it will be extracted and counted later) to ensure that it complies with HAVA and this determination. At a minimum, such revision shall state: a) that a ballot stuck in a BMD before it can be verified by the voter shall be considered an unvoted ballot; b) if the BMD cannot be repaired within 30 minutes, then the voter should be given the option of voting on a new ballot (not an affidavit or emergency ballot) with assistance pursuant to § 8-306 of the Election Law, or wait for the repair of the BMD; and c) when the BMD is repaired, the stuck ballot should be marked “spoiled” by a bipartisan team;
6. The Erie County BOE shall review and revise its policy regarding issuance of affidavit ballots and emergency ballots to ensure that they are issued appropriately; and
7. Incorporate the revisions in item 5 and 6 into inspector trainings.

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

Dated: April 27, 2017

William J. McCann, Jr.
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