

STATE OF NEW YORK  
NEW YORK STATE BOARD OF ELECTIONS

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In the Matter of:  
DARREN JACKSON,

Complainant,

HAVA Complaint No. 18-02  
Determination

-v-

THE ERIE COUNTY BOARD OF ELECTIONS,

Respondent.

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### **Procedural Background**

On February 20, 2018, the New York State Board of Elections (hereinafter SBOE) received a written, sworn, signed, and notarized Complaint (the “Complaint”) dated February 14, 2018, filed by Darren Jackson, 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:

On Election Day, November 7<sup>th</sup>, 2017, the Complainant went to vote at his polling site, Saint Aloysius in Springville, New York. He attempted to use the Ballot Marking Device (“BMD”) to mark his ballot, however, he was unable to printout his ballot. A poll worker called a technician to fix the BMD. The Complainant was then informed that the technician was an hour away. As a result, the Complainant left the polling site. The Complainant was then called by the Erie County Board of Elections (“Erie County BOE”) to go back to the polling site to cast his vote. The Complainant returned to the poll site and was informed that the technician arrived but could not fix the BMD fast enough for him to use it. As such, one of the poll workers assisted him to mark the ballot. The Complainant believes that his right to a private and independent vote was violated.

On March 28, 2017, Erie County BOE responded through commissioners Ralph Mohr and Jeremy Zellner. In summary, the Response states that on Election Day, an election inspector at the poll site in question called the Erie County BOE to alert staff that a BMD malfunction occurred.

Additionally, the Response states that Deputy Commissioner Robin Sion received a telephone call from Todd Vaarwerk, an advocate from Independent Living Center. Mr. Vaarwerk told the Deputy Commissioner that a voter, who turned out to be the Complainant, attempted to cast his ballot using the BMD device, opted to have the ballot returned to him by the BMD, but the ballot was not returned to the voter. The Deputy Commissioner attempted to call the Complainant with a phone number the BOE had on file, but the number did not work. However, the Deputy Commissioner was able to get Mr. Jackson's phone number by calling Mr. Vaarwerk a second time. Deputy Commissioner Sion telephoned the voter and instructed him to return to his polling location to ensure that he was able to cast his vote. According to Deputy Commissioner Sion, there was approximately 15 minutes left before the polls closed. This time constraint prevented Erie County BOE from replacing the malfunctioning machine as the poll site in question is approximately 45 minutes from the Erie County BOE warehouse.

In regards to the BMD, the response states that a technician did arrive at the polling site at 7:14 pm. The malfunctioning device was determined to be BMD Unit 215. The technician found an error instruction on the BMD to call an election official. The technician found the unmarked ballot in the device, retrieved the same, and gave it to the Election Inspectors.

Further, the Response states that Erie County BOE employees performed tests on BMD machines prior to the 2017 General Election. When Test Deck ballots were run on the BMD machines, the machines were found to be in working order. After Election Day, BMD Unit 215 was placed out of service for inspection by Election Systems & Software, LLC ("ES&S"). According to the Response, ES&S

tested BMD Unit 215 on multiple occasions starting on or about March 13, 2018 to on or about March 20, 2018.

Per the Response, the ES&S inspection found BMD Unit 215's printer cartridge ink did not flow to mark the ballot. As a result, Erie BOE has ordered new ink cartridges for all of its BMDs.

A hearing was held on April 25, 2018.

During the hearing, the Complainant reaffirmed his allegations in the Complaint. Additionally, Complainant testified that he attempted to vote on the BMD and tried to print out his ballot for review, but the BMD would not print the ballot. At that, the Complainant asked an Election Inspector for help. The Election Inspector told the Complainant that she would call someone for assistance. After the phone call, the inspector informed the Complainant that a technician will fix the machine, but the technician is over an hour away. The Complainant testified that the inspector offered the Complainant an alternative way of voting, but, at this juncture, he was upset, disappointed and wanted to go home. As such, the voter left the polling site. On his walk home, the Complainant called a friend to talk about his voting experience. His friend then called Todd Vaarwerk, who then, in turn, called Deputy Commissioner Sion. The Deputy Commissioner eventually called the Complainant and convinced him to go back to the polling site to vote. The Complainant returned to the poll site at or around 8:45 pm. As it was too late to fix or replace the BMD, one election inspector assisted the Complainant in filling out his ballot. After reviewing the ballot, the Complainant cast his vote.

Commissioner Ralph Mohr testified on behalf of Erie County BOE. Erie County BOE conceded that the BMD malfunctioned, but stated that Erie County has over 800 BMDs that were in operation during Election Day. Additionally, Erie County disagreed with the Complaint's testimony regarding whether it would have taken an hour for a technician to arrive at the poll site to repair the BMD. According to Erie County BOE, a technician was twenty minutes away from the poll site. Erie County

BOE suggested that there must have been a misunderstanding by either the Election Inspector or the Complainant. Notably, Erie County BOE did not interview the Election Inspector when it investigated this matter to determine what the Complainant was told.

According to Erie County BOE, the technician did arrive at the poll site on or about 7:14 pm. Erie County BOE noted that the Complainant was not at the poll site when the technician arrived and, as such, could not ascertain “the exact nature of the problem.” The technician did retrieve the ballot from the machine, and it was not marked. Erie County BOE testified that it was not possible for the technician to determine the true nature of the malfunction because that would require marking a ballot. According to Erie County BOE, only “live” ballots can be marked on Election Day, not test ballots, in order to preserve the integrity of the election.

Upon the Deputy Commissioner receiving a call from Todd Vaarwerk, Erie County BOE testified that the Deputy Commissioner reached out to the Complainant, stated that his ballot was not marked and urged him to go back and vote. At that point, it was too late to deploy a replacement BMD, so an Election Inspector assisted the Complainant in marking his ballot. Erie County BOE suggested that if the Complainant waited for the technician, then the technician would have ascertained the problem and replaced the BMD with a backup in a timely manner.

### **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 SBOE 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 Darren Jackson has standing to bring a Complaint.

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

The Complainant, Darren Jackson, alleges that the BMD malfunctioned and was told he could vote on a regular ballot with assistance or that he could wait one hour for a technician to arrive to repair the BMD. Additionally, at the hearing, the Complainant indicated that one inspector assisted him in filling out the ballot; not a bipartisan team of inspectors.

### **Legal Authority**

Title III of HAVA, section 301(a), outlines the minimum standards for polling locations. 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).

Election Law § 8-306(3) requires that when a “voter who requires assistance to vote by reason of blindness, disability or inability to read or write may be given assistance by a person of the voter's choice... A voter entitled to assistance in voting who does not select a particular person may be

assisted by two election inspectors not of the same political faith.” Additionally, per page 35 of the Erie County Board of Elections 2017 Election Day Instruction Manual, when a BMD breaks down and a voter requests assistance in filling out a ballot, “(a) Bipartisan team of inspectors or any individual of the voters choosing shall assist the voter in marking a ballot.” See also Borst v. Erie County Board of Elections, HAVA Complaint No. 17-01 (2017).

### **Findings of Fact**

Initially, SBOE finds and determines that the BMD in question failed because of a dysfunctional ink cartridge. Erie County BOE indicated that, as a result of this incident, it is going to replace the ink cartridges on all of its BMDs and is in the process of doing so, which is consistent with ES&S’s “Pre-Election Procedures for the Election Official” guidance.

Second, the SBOE finds that the Complainant’s factual assertions in his testimony to be credible. As such, SBOE finds that a HAVA violation did occur because, pursuant to Complainant’s testimony: 1) the Complainant attempted to mark his ballot with the BMD; 2) the BMD failed to mark the ballot; 3) when the Complainant asked for help, he was told that a technician would not arrive for an hour; and 4) when the Complainant did vote, he required assistance in filling out his ballot, and was assisted by one election inspector, not a bipartisan team as required under Election Law § 8-306(3).

In response to point number 3, Erie County BOE suggests that because technicians are usually only twenty minutes away from any site, the one hour cited by Complainant must have been a miscommunication. Additionally, records submitted to SBOE suggests that a technician did arrive within thirty minutes of the call. However, Erie County BOE did not interview or discuss this matter with the Election Inspector during its investigation. Further, the Complainant appeared to be truthful and candid during his testimony. As such, the Board gives full credit to his testimony that he was told that an inspector would arrive in an hour. A one-hour wait is unreasonable as 9 NYCRR § 6210.19(c)(1) provides

that “County boards shall deploy sufficient voting equipment, election workers and other resources so that voter waiting time at a poll site does not exceed 30 minutes.”

Additionally, as the BMD was not operational, the Complainant required assistance in filling out his ballot. However, he was assisted by one election inspector, not a bipartisan team as required under the Election Law. Section 8-306(3) of the Election Law permits a voter who needs assistance to vote to choose any person such voter wishes to assist him or her provided the person is not the voter's employee or an agent of the voter's union. If no one is selected and the voter needs help, two inspectors, not of the same political faith, shall assist the voter. The purpose of having a bi-partisan team to assist the voter is to ensure the integrity of the election. Having only one inspector assist the Complainant not only violated Election Law § 8-306(3), it compromised the integrity of that vote.

While certain mishaps did occur, as outlined above, Deputy Commissioner Sion should be commended for her handling of Todd Vaarwerk’s phone call on behalf of the Complainant. After receiving Mr. Vaarwerk’s phone call, Deputy Commissioner Sion made several attempts to contact the Complainant and made efforts to ensure that the Complainant’s vote would be cast. The State Board finds that her efforts were exemplary.

### **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 investigate the reason why the Complainant was told it would take an hour for a technician to arrive at the poll site. Additionally, Erie County shall submit a report to the SBOE within sixty (60) days of this determination, detailing:

1. The results of its investigation;
2. Any action it plans on taking as a result of its investigation;
3. Improvements to inspector training for future elections;
4. The “improvements” to inspector training must include lessons learned from the issues raised by the instant Complaint;
5. The “improvements” shall also include an increase emphasis that when Election Inspectors assist voters with disabilities, it shall be consistent with § 8-306 of the Election Law; and
6. Further, Erie County shall submit a plan in its report related to ES&S’s “Pre-Election Procedures for the Election Official.” Such plan shall indicate how Erie County BOE intends to comply with such procedures, including procedures related to replacing ink cartridges for the Auto Mark BMD and the training of technicians and appropriate staff for such purposes.

### **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: May 17, 2018

William J. McCann, Jr.  
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