

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:

JENNIFER MONTHIE,

Complainant,

HAVA Complaint No. 16-01
Determination

-v-

THE ALBANY COUNTY BOARD OF ELECTIONS,

Respondent.

Procedural Background

On November 28, 2016, the New York State Board of Elections (hereinafter SBOE) received a written, sworn, signed, and notarized Complaint (the "Complaint") dated November 22, 2016, filed by Jennifer Monthie. Specifically, the Complainant alleges that she attempted to use a Ballot Marking Device (BMD) at her polling site, but the BMD ripped her ballot while printing, displaying an error message. Further, Complainant alleges that election inspectors were unable to fix the machine. The complaint alleges that inspectors did not know how to use the BMD and had to call technical support for assistance. Further, the Complainant alleges that it took her an hour to vote. Additionally, the Complainant alleges that there was a second BMD at the polling site, but it was not turned on.

On December 30, 2016, the Albany County Board of Elections ("BOE") responded through commissioner Mathew Clyne. In summary, the response states that the Complainant is deficient because it fails to cite the section of Title III Albany County BOE allegedly violated, and, to the extent the Complaint is valid, any delay was due to high voter turnout, causing technicians to be deployed to other areas, and caused by the BMDs, which were first deployed in 2009, showing signs of obsolescence.

A hearing was held, on March 1, 2017.

At the hearing, the Complainant testified to the following: On Election Day, Complainant arrived at her polling site at around “early to mid-morning.” When she received her ballot, she told the inspector that she wanted to use the “BMD.” The inspector misunderstood her, and said she could register to vote at the “DMV.” At that, the Complainant clarified herself and stated that she wanted to use the “Ballot Marking Device.” According to the Complainant, the inspector looked confused and referred her to another inspector. The Complainant told the second inspector that she would like to use the “Ballot Marking Device.” Again, there was confusion, so the Complainant stated she wished to use “the device that helps you mark the ballot.” At that, the second inspector said she was looking for “the handicap device.” At that, the second inspector directed the Complainant to the BMD. The inspector asked the Complainant if she knew how to use the device. Complainant indicated that she knew how to use the device as she had used it before. Thereafter, the Complainant had a brief conversation with the inspector, telling him that she liked the device. Complainant then asked the second inspector if he knew about the device, upon which the inspector stated that he was not allowed to look at the screen and walked away. The Complainant opined that the second inspector was nice, but had limited knowledge of the equipment.

Subsequently, Complainant submitted the ballot into the BMD and selected her choice of candidates. When the Complainant pushed the print button, the BMD made a loud noise and ripped the ballot. The Complainant asked for assistance from an inspector, who instructed the Complainant to return the ripped ballot so they can issue her a new ballot. When Complainant received her new ballot, she was unable to submit the ballot into the BMD because the “error on the screen still existed.” The Complainant asked for help, but there was a reluctance by the inspectors to look at her screen. Complainant encouraged the inspectors to look at the screen, stating that there was nothing on the screen except an error message. Eventually, an inspector saw the screen and saw the error message. The inspector attempted to push “a couple of buttons on the BMD,” but that did not make the error

message go away. The inspector looked at a manual, and stated that there was nothing in the manual about error messages. Thereafter, the inspector indicated that she did not know how to fix the BMD, but stated that she will call the Albany County BOE for technical support.

The phone call with technical support lasted about ten to fifteen minutes. According to the Complainant, it appeared that the person from tech support was giving direction to the inspector, however, tech support had difficulty understanding the situation. It took approximately ten to fifteen minutes to instruct the inspector how to open the BMD to check for a paper jam. While the inspector was on the phone with tech support, another inspector asked if the Complainant wished to vote without the BMD, at which the Complainant declined. At that, it was suggested that the Complainant use the second BMD; however, the second BMD was turned off. The inspector told the Complainant that it would likely take a long time to boot up the second BMD.

Tech support concluded that the BMD needed to be rebooted. It took approximately ten to fifteen minutes to reboot the BMD. Meanwhile, another voter wishing to use the BMD stood in line behind the Complainant. After the BMD rebooted, the Complainant was able to mark her ballot and vote. When the Complainant was done, and finished voting, the second BMD was still in the process of being booted up. According to the Complainant, the inspectors had difficulty finding the appropriate inspectors with the keys to turn on the BMD.

In summary, Complainant believes that the inspectors were unfamiliar with the machine, and need more training because: 1) the inspectors were unfamiliar with the terms "BMD" or "Ballot Marking Device"; 2) After indicating that she knew how to use the BMD, Complainant asked an inspector "do you know how to use the machine," where the inspector stated that he is "not allowed to look at the screen, I can't help you;" 3) when the BMD broke down, and there was an error message, there was a reluctance of one inspector to look at the machine, where she even covered her eyes while approaching

the BDM; and 4) when the inspector saw the error message, she indicated that she did not know how to fix the issue, but will call Albany County BOE for assistance.

In response, Albany County BOE noted that there was exceptionally high voter turn-out this year as it was a presidential election, noting that the machines were feeling the effect of high volume use and the machines are showing signs of aging/wear and tear. Albany County BOE did note that it tests its machines quarterly, and submitted the required paperwork with the State Board of Elections; however, given the age of the machines, issues, such as paper jams, do occur.

Albany County BOE testified that it sounded like the inspectors followed protocol, noting that a poll worker is not a full-time day to day job; rather it is a job most inspectors engage in two to three times a year. Albany County BOE indicated that inspectors receive an annual training on all the Election Day processes consisting of two segments: 1) an administrative training consisting of issues such as how to issue a ballot, when to issue an affidavit ballot, etc.; and 2) "hands on" training with the machines, including how to assemble the BMD, how to power up and turn off the BMD, how to fix a paper jam, etc. Additionally, Albany County BOE also provides training regarding etiquette, terminology and interacting with people with disabilities, including "follow up" trainings to persons who fail to follow protocol. Albany County BOE testified that the BMDs are tested prior to the election, but the BMDs are not tested on election day at the poll site prior to the opening of the polls because testing the BMD on Election Day would record the test as a vote, which could call into question the integrity of the election.

Albany County BOE stated that a low number of people, about "a handful," request to use the BMDs during an election. Albany County BOE opined that given the low demand of BMD requests, and given that inspectors work two to three times a year, expectations that an inspector be as familiar with the BMD as a technician is not feasible. Albany County BOE suggested that, while the inspectors may have not understood the term "BMD," they did understand what the Complainant requested and

directed her to the BMD. Additionally, Albany County BOE stated that an inspector's reluctance to look at the screen is a product of respecting the voter's privacy, which they are trained to respect. Albany County BOE did note that the inspectors did offer an alternative method of voting (via a regular ballot) and that the Complainant did ultimately vote on the BMD within a reasonable amount of time. Given the circumstance, Albany County BOE believes that a reasonable effort was made to identify the problem and find a solution. Albany County BOE argues that the inspectors are not technicians, but used common sense to contact a technician to repair the BMD.

In relation to the second BMD being turned off, Albany County BOE conceded that the BMD should have been turned on, noting that the poll site in question is a heavy volume poll site. Albany County BOE speculated that the inspectors may have made a judgment call that they only needed one BMD or they perceived the BMD to be a "backup" machine; however, Albany County BOE's policy required the inspectors to power up all of the machines, including the BMDs.

In issuing this Determination, the written submissions of the parties have been received and considered, the credibility has been weighed, the Complaint and the responses thereto have been considered. Further, SBOE considered all of the testimony at the hearing. 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 Jennifer Monthie has standing to bring a Complaint.

Issues Raised by the Complainant

The Complainant, Jennifer Monthie, alleges the following:

1. The inspectors were unfamiliar with the machine, causing a significant delay for the Complainant to use the machine;
2. The inspectors used the term “handicap device” in reference to the BMD;
3. Inspectors failed to power up the second BMD that was on site; and
4. BMDs should have been tested at the poll site on Election Day.

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). 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).

State regulations, 9 NYCRR § 6210.2(a), require that “(t)esting of all voting systems shall be conducted by the county board before the use of the system in any election[,]” and that “(t)he voting system shall be tested to determine that the system is functioning correctly and that all system equipment, including but not limited to hardware, memory, and report printers, are properly integrated with the system and are capable of properly performing in an election.” Such tests “shall be tested at least once every calendar year.” 9 NYCRR § 6210.2(b). Further, state regulations require that “(f)or the period between ballot certification and seven days before the general election, the test ballot format for each piece of equipment shall consist of each general election ballot configuration as certified by the county board. The voting system **shall be cleared of all votes** and a printed report shall be produced by the system, to verify the correct ballot configuration and election configuration, and to confirm that **all voting positions are at zero**. 9 NYCRR § 6210.2(e)(emphasis added).

9 NYCRR § 6216.2(b)(iii) requires that a HAVA formal complaint contain “a description of the violation of title III that is alleged to have occurred, is occurring, or is about to occur, sufficient to apprise the SBOE and the respondent(s) of the nature and specifics of the complaint”.

Procedural Defense

Initially, this determination addresses the Respondent’s defense that the Complainant is deficient because it fails to cite the section of Title III Albany BOE violated. It is determined that the complaint is not deficient.

To the extent the Respondent is arguing that Complainant failed to state that a Title III violation occurred; in determining whether the Complaint fails to state that a violation occurred (or for lack of

better term, “cause of action”), the allegations must be read in the light most favorable to the Complainant, consistent with the rule that in opposing motions to dismiss for failure to state a cause of action, or in motions for summary judgment, a claimant’s submissions must be accepted as true. (see, e.g., Myers v Fir Cab Corp., 64 N.Y.2d 806 (1985); Rovello v Orofino Realty Co., 40 N.Y.2d 633 (1976); Sillman v Twentieth-Century Fox Film Corp., 3 N.Y.2d 395, 404 (1957). In this matter, Complainant alleges that inspectors did not know how to use the BMD; as a result, they had to call tech support to figure out how to fix the machine. Further, the complaint alleges that there was a second BMD on site, but it was not turned on. The complaint also alleges it took the Complainant over an hour for her to vote. Title III requires that election officials provide voting opportunities 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(.)” If the allegations are true (that inspectors were unfamiliar with the BMD and that a BMD was not turned on causing the Complainant to wait one hour to vote), then these circumstances would constitute a violation of Title III of HAVA. In reading the Complaint in the light most favorable to the Complainant, it is determined that the Complainant sufficiently alleges that a Title III violation occurred.

To the extent that the Respondent is arguing that failure to cite a specific provision of Title III of HAVA constitutes inadequate notice, 9 NYCRR § 6216.2(b)(iii) requires that a complaint contain “a description of the violation of title III that is alleged to have occurred, is occurring, or is about to occur, sufficient to apprise the SBOE and the respondent(s) of the nature and specifics of the complaint”. This requirement refers to conduct that the Complainant has observed; it does not require the Complainant to research and specifically cite the provision of Title III that were violated. As discussed in the paragraph above, Complainant clearly articulates conduct that would violate Title III of HAVA. As such, it is determined that the Complaint sufficiently provides notice to the Respondent.

Findings of Fact

First, Complainant alleges that inspectors were unfamiliar with the BMD, causing a significant delay for the Complainant to use the BMD. To determine that this allegation is a Title III violation, the SBOE would have to determine, through the evidence provided, that the inspectors' unfamiliarity and lack of knowledge of the BMD made voting not accessible to persons with a disability. After weighing the evidence, the SBOE determines that the inspectors acted reasonably in relation to making the BMD accessible, and determines that there is no Title III violation in relation to the first issue.

The Complainant cites four reasons why she believes the inspectors were unfamiliar with the BMD: 1) the inspectors were unfamiliar with the terms "BMD" or "Ballot Marking Device"; 2) When the second inspector asked if the Complainant knew how to use the BMD, she indicated to him she did and then asked "do you know how to use the machine" where the inspector stated that he is "not allowed to look at the screen, I can't help you;" 3) when the BMD broke down, and there was an error message, there was a reluctance of one inspector to look at the machine, where she even covered her eyes while approaching the BMD; and 4) when the inspector saw the error message, she indicated that she did not know how to fix the issue but indicated that she will call Albany County Board of Elections for assistance. None of these reasons can reasonably constitute a violation of HAVA.

Regards to reason 1, while the inspectors may have misheard BMD to mean DMV, or may have not been familiar with the term BMD, the inspectors were able to navigate the Complainant to the BMD quickly after she indicated that she wanted the machine that marks her ballot, making the BMD accessible. The SBOE declines to find a violation where an inspector may not know the exact name of a voting machine, but knows the basic functionality of the voting machine. However, familiarity by inspectors of related terminology is important.

In regards to reason 2, the inspector asked if the voter knew how to use the BMD, where the Complainant indicated that she did. Subsequently, the Complainant stated that she has used the BMD

before and likes the device. The Complainant then proceeded to ask the inspector if he was familiar with the device, where the inspector said he was not permitted to look at the screen and walked away. The Complainant's question was not a request for help; rather, it appeared to be either idle conversation, or a question related to a fact-finding endeavor. Either way, failure to answer the Complainant's inquiry is inadequate evidence to show that the inspector was unfamiliar with the BMD or that the BMD was not accessible. The inspector clearly affirmed that the Complainant knew how to use the BMD and did not require assistance. Further, given that the inspector stated that he was not permitted to look at the screen indicates familiarity with the BMD. It is more likely that he wanted to establish and maintain the privacy of the voter.

Similarly, in regards to reason 3, the reluctance of the inspectors to view the BMD screen cannot reasonably be construed as being unfamiliar with the BMD; rather, it is likely a product of wanting to maintain the privacy of the voter.

Lastly, in regards to reason 4, not knowing how to address the error message on the BMD screen and calling tech support is not evidence that the inspector was unreasonably unfamiliar with the BMD to the point that the BMD is not accessible. As Complainant testified, the inspector looked through the manual, which did not have directions on how to deal with an error message. Given the circumstances, calling tech support was the reasonable action to take.

Next, the SBOE does find that an inspector referring to the BMD as the "handicap device" to a voter is a barrier to voting that could lead to making the BMD inaccessible to persons with disabilities, making this action a violation of Title III of HAVA. Use of such terminology creates a hostile environment for the voter. Such treatment discourages voters who have a disability from voting, which, in effect, disenfranchises the voter. Albany County BOE testified that it provides training related to proper

terminology, and follow up training when protocol is breached. Given the circumstances of this matter, such follow up training is warranted.

In regards to whether the second BMD was turned off at the time Complainant attempted to vote, the Complainant testified, in detail, how the second BMD was not powered up, and testified about the process the inspectors were trying to undergo in powering up the device. Further, Albany County BOE conceded that the BMD was likely not powered up at the time Complainant voted; as such SBOE finds that the BMD was not turned on at the time of the incident. According to Albany County BOE, it is the BOE's policy that all available machines should be powered up. Further, Albany County BOE noted that the poll site in question is a heavy traffic poll site. Albany County BOE determined that the poll site required two BMDs, however, only one BMD was powered up. The inspectors failed to make all the BMDs on site 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 Albany 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.

Lastly, Complainant alleges that the BMD should have been tested at the election site prior to the opening of the polls. 9 NYCRR § 6210 outlines the testing requirements county boards of elections must conduct on voting systems, which included BMDs. Notably, 9 NYCRR § 6210.2(e) provides that, between the certification of the ballot, and seven days before the election: “(t)he voting system **shall be cleared of all votes** and a printed report shall be produced by the system, to verify the correct ballot configuration and election configuration, and to confirm that all **voting positions are at zero.**” (emphasis added). No other tests are provided for after all the votes are cleared on the voting systems. The purpose of ensuring that votes are cleared from voting machines prior to election day is to ensure the integrity of the election. Further testing of voting systems that would cause a ballot count, or cause the

position of the machine to be anywhere but zero is not provided for by regulations. As such, the SBOE determines that there was no Title III of HAVA violation in relation to the testing of the BMD.

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 Albany County BOE to do the following:

Albany County BOE shall submit a report to the SBOE within sixty (60) days of this determination, detailing:

Improvements to inspector and BOE staff training for future elections, which, at a minimum, shall include instructions that inspectors power up all required voting machines prior to polls opening, and such training shall include terminology related to the equipment (e.g Ballot Marking Device and BMD); and

The Albany County BOE shall conduct a follow up training related to etiquette and terminology with the inspector in question who referred to the BMD as the “handicap device.”

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

Dated: March 17, 2017

William J. McCann, Jr.
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