

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:
MARILYN TUCCI,

Complainant,

HAVA Complaint No. 20-03
Determination

-v-

THE SUFFOLK COUNTY BOARD OF ELECTIONS,

Respondent.

Procedural Background

On December 29, 2020, the New York State Board of Elections (hereinafter SBOE) received a written, sworn, signed, and notarized Complaint (the "Complaint") dated December 4, 2020, filed by Marilyn Tucci, 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 attempted to vote at the Brookhaven Town Hall during the first weekend of early voting, on October 25, 2020, but the line was too long. The Complainant asked a poll worker if there was a separate line for people with disabilities, or if chairs were being provided for people with disabilities; but was informed there was no separate line nor chairs being provided.

The Complaint also alleges that the Complainant was unable to independently cast her ballot due to Ballot Marking Device ("BMD") errors at the early voting poll site located at Mastic Recreation Center on October 26, 2020. When the Complainant approached the BMD located at the early voting site in order to mark and cast her ballot, it was positioned in a manner where the screen was viewable to the public. Upon request, the BMD was repositioned to ensure the Complainant's privacy.

The Complaint further alleges that when the Complainant attempted to use the BMD, she was unable to use it because the headphones were missing. When she requested the headphones, the poll worker did not know where they were located. After a five-minute search, the headphones, along with protective headphone shields, were located and provided to the Complainant.

Further, the Complaint alleges that when the Complainant attempted to use the BMD with the headphones, the audio did not work. After troubleshooting with poll workers, the audio did work, but it was very low, where the Complainant had difficulty hearing.

Additionally, the Complaint alleges that as the Complainant was marking the ballot with the BMD, the machine froze and was inoperable. After 10 minutes, the poll worker resolved the issue. However, the ballot, which was not complete, wound up being deposited into the scanner. Subsequently, the poll worker offered the Complainant a replacement ballot. (Subsequent testimony revealed that the ballot was not scanned; rather, it was marked spoiled by poll inspectors).

Further, the Complaint alleges that when the Complainant received her new ballot, the BMD was not scrolling through the races properly. The section for certain candidates kept bouncing and was not making a selection. The issue could not be resolved, so the Complainant opted to not vote for the races the BMD skipped. She attempted to print the ballot, but only the proposition section on the back of the ballot was filled out. At that, the Complainant marked her ballot with the assistance of a friend. It took the Complainant over an hour to vote.

On January 29, 2021, the Suffolk County Board of Elections ("Suffolk County") responded to the Complaint. The Response conceded that there were no separate lines at the Brookhaven early voting site, nor were chairs provided for voters waiting on line; however, Suffolk County did assert that it provided reasonable accommodations. According to the response, voters needing an accommodation were escorted to the front of the line where there was seating available and were permitted to check in

and vote as soon as was practicable. The supervisor at this location confirmed that there was one person designated to monitor the line which included asking voters if anyone needed assistance or an accommodation. The supervisor recalled that they had experienced unprecedented lines that first weekend but does not recall any complaint about refusing to provide assistance or an accommodation to a voter. The supervisor did recall that there were numerous voters that were provided with reasonable accommodations throughout the early voting period. These voters were escorted to the front of the line and permitted to check in and vote as soon as reasonably practicable.

In relation to the allegations related to the BMD, Suffolk County conceded that the BMD was situated in a manner where the screen was viewable to the public. Suffolk County stated that the device was positioned in a way that enabled it to be utilized as an additional tabulator for scanning ballots. To ensure privacy for the Complainant, it was necessary to turn the machine approximately 45 degrees. Suffolk County stated that in the future, poll workers will be instructed to ensure the machine is positioned in the proper position to provide privacy prior to use by voters needing assistance. Concerning the headphones for the BMD, the supervisors on site confirmed that they had not been placed in their proper location and that the protective ear covers were incorrectly placed with the COVID Personal Protective Equipment supplies. Suffolk County stated that poll workers will be reminded that they must ensure that all supplies for BMDs be located and accessible prior to opening the poll site.

Suffolk County confirmed that the Complainant experienced problems voting. The Board asserted that when problems arose, the supervisors contacted individuals at the Board with technical knowledge of the machine and were able to successfully troubleshoot problems throughout the process. However, Suffolk County did confirm that issues continued to arise throughout the various phases of voting.

According to Suffolk County, after this incident, the audio-tactile interface ("ATI") was replaced. Prior to being deployed to early voting sites, the BMDs were tested and determined to be working properly. Following early voting, the Board attempted to recreate the issues experienced by the Complainant. The audio was determined to be functioning normally and the ballot was fully functional in its interaction with the ATI. All races were accessible on the ballot. Suffolk County was unable to recreate the complaint concerning the machine not properly navigating the Justice races. Suffolk County found that the duplexer failed to print properly when the "Write- in" access panel within the machine was open and it is presumed that this access panel was open during Ms. Tucci's incident. Suffolk County intends to increase training in the use of these machines and will reinforce the need to inspect the write in access panel which is located within the machine to ensure that it is closed when the machine is first opened.

A hearing was held on February 26, 2021.

During the hearing, the Complainant reaffirmed her allegations in the Complaint. Additionally, the Complainant testified that when she arrived at the Brookhaven early voting site, hundreds of people were waiting on line. She testified that there were voters who brought their own chairs to sit; however, she was informed that the poll site was not providing chairs. She also testified that she was informed that there were no separate lines for people with disabilities or the elderly. She also testified that she heard that, at some point, when she was not there, some people fell, and an ambulance was called at the early voting site due to the long lines.

Complainant testified that she opted to have a friend drive her to the Mastic early voting site on October 26th. They arrived at the polling site at approximately 5:50 am, and there was already a line of approximately thirteen people. By 6:30, the parking lot was full, and the line was around the block; however, the poll site was not scheduled to open until 7:00 am.

Upon signing in, when the Complainant was directed to the BMD, the Complainant noticed that the BMD was situated in a manner where the screen was viewable to the public. The poll workers agreed to turn the BMD around to make it more private. When the Complainant asked where the headphones were located, she testified that the poll worker responded by saying, "Didn't you bring your own?" The poll worker then searched for the headphones, which were eventually found. Further, Complainant said that, because she cannot hear in one ear, it was difficult to hear the machine because the poll site was very noisy. Poll workers did say that they would hold the voting line so no one else can enter the poll site, so the poll site would be less crowded, to assist the Complainant; however, the Complainant declined. The Complainant also testified that the BMD had problems as outlined in the Complaint, including the BMD screen freezing and the BMD skipping certain races. After about an hour, the Complainant opted to have her friend, who drove her to the poll site, help her fill out the ballot because her friend had to go back to her children. The Complainant did not recall if the poll workers offered to have a technician go to the poll site to fix the machine or if she was given the option to wait or come back later; she testified that she just wanted to get out of there so that her friend could go back home.

Deputy Commissioners Gail Lolis and Gail McTiernan appeared on behalf of the Suffolk County Board of Elections. In regards to the line at the Brookhaven Early Voting site, Deputy Commissioner Lolis indicated that when the Complainant went to the site on October 25th, Suffolk County had a poll worker monitoring the line; however, during the first weekend of early voting, lines were unexpectedly long and there was a lot of confusion. As such, Suffolk County did not dispute that the line worker failed to ask the Complainant if she needed an accommodation. After the first weekend, Suffolk County reinforced, through the early voting sites supervisors, the importance of walking the lines, and not just asking about absentee ballots, but also informing everyone of accommodations. Under Suffolk County's process, a poll worker walks up and down the line, asking if anyone needs accommodations. Further, Suffolk

County is amending its training manual and classes to incorporate line management and providing accommodations. Deputy Commissioner Lolis indicated that the process is consistent with State Board guidance on the issue.

Regarding the BMD issues at the Mastic early voting site, Deputy Commissioner Lolis testified that when the poll workers were aware of the issues with the BMD, they contacted the county board, and were in constant contact with the IT director and the board and were being directed what to do. Suffolk County conceded that the headphones should have been connected to the machine and should have not been in a separate box. Suffolk County plans to address this with the trainers and supplement the manual to that regard. Further, Suffolk County conceded that the BMD should have been positioned in a manner to ensure the privacy of the voter before bringing the voter to the machine. Further, Deputy Commissioner Lolis testified that a technician did go to the poll site and replaced the ATI.

Regarding the noise volume at the poll site, Suffolk County conceded that it was noisy at the poll site. Deputy Commissioner Lolis testified that poll workers were able to adjust the volume of the BMD to assist the voter. After this incident, Suffolk County attempted to recreate the incident regarding the screen freezing and the BMD skipping over certain races, however, it was unable to do so. Deputy Commissioner Lolis testified that technicians believe that the issue may have stemmed from a loose connection with the ATI, or, alternatively, a malfunctioning ATI; however, as the ATI was replaced on the day of the incident, Suffolk County is unsure of the cause.

Suffolk County was able to recreate the issue related to the ballot failing to fully print. Suffolk County determined that this issue was related to an open "write in access panel." If the panel is open, then the BMD fails to print on both sides. At the time of the incident, poll workers did not check this issue and the IT director did not direct the poll workers to check this issue. In response to this incident,

Suffolk County will create a trouble shooting card for BMDs and incorporate such trouble shooting in trainings.

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 Marilyn Tucci has standing to bring a Complaint.

Issues Raised by the Complainant

The Complainant, Marilyn Tucci, alleges the following:

1. The Complainant was denied reasonable accommodations to vote at the Brookhaven site because the board of elections did not have a separate line for persons with disabilities; nor did they provide chairs or other similar accommodations;
2. The Complainant's right to a private vote was compromised because the BMD was positioned in a manner that was viewable to the public;

3. The Complainant's right to a private vote was compromised because there were no headphones attached to the BMD;
4. The Complainant was denied her right to a private vote because the BMD was inoperable, and it took too long to resolve the different issues with the BMD.

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).

New York State Board of Elections regulations provide 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.” 9 NYCRR § 6210.19(c)(1).

Findings of Fact

Lines at Brookhaven Early Voting Site

Due to the nature of the 2020 general election, voter turnout for early voting was robust, which led to long lines throughout the state. Approximately 2.6 million people voted during the early voting period. Due to the long lines statewide during the first weekend, the State Board of Elections issued

guidance to county boards on October 29, 2021. The guidance reminded county boards that they should perform line management at early voting sites; have staff assist in keeping the line moving by facilitating and assisting absentee voters in dropping off their absentee ballots at the early voting site; have staff communicate the availability of accommodations for voters in need; and have staff announce to voters that accommodations are available to voters who have such need. The Guidance specifically states: "(i)t is not sufficient for staff to make this known to voters with visually obvious disabilities (e.g., voters with walkers or canes) because some disabilities are not visually observable. As such, staff should regularly announce the availability of accommodations."

While not completely unpredictable, long lines at early voting sites for the 2020 general elections was a statewide issue, not a county specific issue. Early voter turnout was difficult to predict, especially considering the unprecedented increase in absentee balloting prior to the election. As such, some counties were not fully prepared to deal with the long lines that occurred at the beginning of Early Voting. After becoming aware of the issue, Suffolk County took measures consistent with the aforementioned State Board directions to address the issue of providing accommodations to voters who may require such accommodations. Further, testimony revealed that several voters used these accommodations. Given everything in the aggregate, the State Board does not find a HAVA violation in relation to the long early voting line at the Brookhaven early voting site; but does suggest that Suffolk County continue to use its line management protocol in future elections consistent with State Board of Elections guidance and 9 NYCRR § 6210.19(c)(1) cited above.

Public Facing BMD Screen and Headphones Not Attached to the BMD

Title III of HAVA requires that the voting opportunities for 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" and that all voting systems be accessible. Here, Suffolk

County concedes that the BMD was positioned in a manner where the screen was public facing and that the headphones were not connected with the BMD. If the Complainant did not advocate for herself, her privacy would have been compromised, or she would have been unable to operate the BMD due to the lack of headphones. As such, the placement of the BMD and the misplacement of the headphones do constitute a violation of Title III of HAVA. It should be noted that using the BMD as both a BMD and scanner at the poll site to help alleviate lines of voters seeking to cast their marked ballots is not at issue and such use is perfectly permissible. At issue is not having the BMD correctly positioned to insure privacy prior to initiation of the BMD session.

The BMD was Inoperable and Took Too Long to Resolve

Several issues occurred with the BMD during the Complainant's voting session. Some of the issues were resolved (volume of the BMD and the screen freezing), while the remainder were not resolved within the hour voting period (ballot not printing and BMD skipping certain races). With regards to the ballot not printing on both sides, this was an apparent result of the write-in access panel not being fully shut. Poll worker staff did not ensure that the panel was shut, nor did they check for it when the problem occurred. Now that this is a known issue, Suffolk County can avoid this problem in the future through additional training and by providing a trouble shooting card for poll workers.

With regards to the BMD skipping certain races, it appears that a technician was required to repair the BMD, in particular the ATI card. The Complainant did say that poll workers were very nice and apologetic, but she could not recall if poll workers said a technician was coming, or whether she could wait until a technician arrived and fixes the machine. When it was obvious that the Complainant could not use the BMD and that the BMD needed repair, poll workers should have informed the Complainant of all of her options, including 1) waiting for the BMD to be fixed by a technician, 2) being assisted by a bi-partisan team of election inspectors in filling out her ballot; 3) coming back later when the BMD is

fixed, or 4) voting on a different early voting day or Election Day itself. (See HAVA Determination 16-02, *Liss v. New York City Board of Elections*). It may not be obvious to voters what the process is when an election machine breaks down. As such, voters need direction from election workers. Here, the Complainant felt the need to vote by hand because she did not want to keep her friend who drove her to the early voting site waiting as her friend needed to leave due to childcare responsibilities.

Given the above, 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.

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 the Suffolk County BOE to do the following:

Suffolk County BOE shall:

1. Instruct election workers and inspectors to inform voters of their options of ways to vote when a BMD breaks down, including: 1. waiting at the poll site until the BMD is fixed; 2. getting assistance from a bi-partisan team in filling out the ballot; 3. coming back at a later time after the BMD is fixed; or 4. voting on a different early voting day or Election Day itself ; and
2. Draft and create a "trouble shooting" card for poll workers, and update training, on ways to troubleshoot common issues with a BMD, including a reminder to ensure that the write-in panel is shut; and

3. Instruct election workers and inspectors to position BMDs in a manner to ensure privacy when setting up a poll site, ensure the screen is not viewable to the public when a voter is using the BMD, and, where the BMD is also being used as a scanner, to make sure the BMD is properly positioned to ensure privacy before initiation of a BMD session; and
4. Instruct election workers and inspectors, and update training materials to reflect, that headphones must be attached to the BMD when setting up the machine.

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

Dated: March 22, 2021

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