

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:

JACOB WRIGHT ROBERTS,

Complainant,

HAVA Complaint No. 21-01
Determination

-v-

THE NEW YORK CITY BOARD OF ELECTIONS,

Respondent.

Procedural Background

On February 18, 2021, the New York State Board of Elections (hereinafter SBOE) received a written, sworn, signed, and notarized Complaint (the "Complaint") dated October 27, 2021, filed by Jacob Wright Roberts, 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 SBOE and the New York City Board of Elections (NYC BOE) are failing to comply with HAVA Title III, § 302 (a)(5)(A) and (a)(5)(B); (52 USCA § 21082 (a)(5)(A) and (a)(5)(B)); and Election Law §§ 9-212 and 8-302, in that the SBOE and NYC BOE are failing to provide written information related to a "free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted."

According to the Complaint, the Complainant is a poll worker who attempted to vote early on October 24, 2021; however, the poll worker was "unable to find Complainant in the voter rolls, despite the fact that Complainant received a notice of approval, was hired and trained as a poll worker, and will

be working on Election Day. Officials repeatedly attempted to search for Complainant's record in their system to no avail." As such, the Complainant voted through the affidavit ballot process.

The Complaint further alleges no information was furnished regarding a free access system to check to see if the affidavit ballot would be counted. On Monday, October 26, 2021, the Complainant contacted the SBOE, who referred Complainant to the NYC BOE. Upon calling and speaking with an employee of the NYC BOE, the Complainant was informed that a notice would be sent if the ballot was not counted. At that, Complainant read the relevant sections of HAVA to the board employee, who responded that: "he knew of no way to check the status of the ballot" and "didn't know how to answer the question." The employee agreed to transfer the Complainant to a supervisor; however, according to the Complaint, "rather than transferring Complainant, First Representative hung up on Complainant." Subsequently, the Complainant called the same phone number, but was not given information related to a free access system to check the status of the affidavit ballot.

On March 10, 2021, the NYC BOE responded to the Complaint. The Response denies that it is not complying with HAVA, and affirmatively states that its process is consistent with Election Law §§ 9-212 and 8-302 and HAVA Title III, § 302 (a)(5)(a) and (a)(5)(b); 52 U.S.C. § 21082(a)(5)(a) and (a)(5)(b). According to the Response, "the Board has a website with a toll free 1-800 number by which individuals who voted by affidavit can call the number to inquire about whether the vote of that individual was counted or not and if the vote was not counted, the reason that the vote was not counted per section 9-212. According to section 8-302, at the time that an individual casts an affidavit ballot, the appropriate state or local election official shall give the individual written information that states that any individual who casts an affidavit ballot will be able to ascertain under the system established under subdivision four of section 9-212 of this chapter whether the vote was counted, and if the vote was not counted, the reason that the vote was not counted. The aforementioned HAVA Sections are directly consistent with

the above Election Law provisions.” In its response, NYC BOE indicates that it provides notice to all voters who vote via affidavit ballot via the “Notice to Voters” as prepared by the SBOE.

Further, NYC BOE stated that the reason the poll worker could not locate the Complainant in the poll book was because: “when he submitted his voter registration form on September 1,2020, he filled it out incorrectly by putting his last name in the first name field and vice versa.” Further, the NYC BOE indicated that the Complainant’s vote was canvassed and counted.

Jurisdiction

Section 402 of Help America Vote Act of 2002 (52 U.S.C. § 21112) 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 (failing to provide for a free access system to check the status of a provisional ballot), SBOE determines that Jacob Wright Roberts has standing to bring a Complaint.

Issues Raised by the Complainant

The Complainant, Jacob Wright Roberts, alleges the following:

1. The NYC BOE has failed to provide written information to the Complainant regarding a free access system that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted."

Legal Authority

Title III of HAVA, sections 302 (a)(5)(A) and (a)(5)(B); (52 USCA § 21082 (a)(5)(A) and (a)(5)(B)); provides that "(a)t the time that an individual casts a provisional ballot, the appropriate State or local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under ... whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted...(t)he appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted."

These requirements are effectuated via Election Law § 9-212(4) (quoting: "(the appropriate state or local election official shall establish a free access system (such as a toll-free telephone number or an internet website) that any individual who casts an affidavit ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted."); and Election Law § 8-302 (quoting: "(a)t the time that an individual casts an affidavit ballot, the appropriate state or local election official shall give the individual written information that states that any individual who casts an affidavit ballot will be able to ascertain under the system established under subdivision four of section 9-212 of this chapter whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted.").

Findings of Fact

Complainant's sole claim is that NYC BOE failed to provide the Complainant with written information that states how the Complainant can ascertain whether the Complainant's affidavit ballot counted via a free access system as required by Election Law § 8-302 and Title III of HAVA, § 302 (a)(5)(A) and (a)(5)(B); (52 USCA § 21082 (a)(5)(A) and (a)(5)(B)). As the underlying material facts are not in dispute, a hearing is not required. Here, Complainant voted via an affidavit ballot process, which included receiving a "Notice to Voters." Per Election Law § 8-302 (3-a), the Notice to Voters is in a form as prescribed by the SBOE. The form prescribed by the SBOE includes the NYC BOE address and telephone number. As noted in NYC BOE's response, this affidavit process is compliant with the Election Law.

It should be noted that original guidance from the SBOE instructed counties to add language to the address and phone number section informing a voter that they could check their affidavit ballot status by contacting the phone number and address in the notice. However, the "Notice to Voters", while containing information on how to contact the applicable Board of Elections, does not clearly indicate that the voter may contact the Board via a toll-free number or website (provided) to ascertain whether the affidavit ballot was canvassed and counted. Instead, the notice simply states: "(y)ou will be notified whether your ballot is counted and the reason for such decision" and provides for the address and phone number of the board. As such, this notice does not comply with Election Law § 8-302 (3-c) and Title III of HAVA, sections 302 (a)(5)(A) and (a)(5)(B) in so much as it does not adequately notify the voter that they may either call or access a toll-free telephone number or website provided in order to ascertain "whether the vote was counted, and if the vote was not counted, the reason that the vote was not counted."

As such, given the lack of adequate notice in the “Notice to Voters” as prepared by the SBOE, we must find that a HAVA violation did occur in relation to the drafting of the Notice to Voters. Based upon the foregoing, the form of the Notice to Voter should be amended by the SBOE to reflect the HAVA Notice requirements as outlined above, so as to ensure better compliance with HAVA and the Election Law.

While there is an issue with the Notice to Voters, it is very important to note however that the Complainant, who was a trained Poll Worker in the City of New York, attempted to find out if his Affidavit Ballot was counted on October 26, 2020, which was 9 days prior to the November 3rd Election Day. As Affidavit Ballots are not canvased until sometime after the closing of the Polls on Election Day, it was an impossibility for the Complainant to be provided with an answer one way or the other. It should also be noted again that the reason why the Complainant had to vote via an affidavit ballot was because Complainant filled out his voter registration form incorrectly, where the first and last names were reversed, making it difficult to find the Complainant’s name in the poll book.

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 its staff to amend the Notice to Voters to comply with Election Law § 8-302 and Title III of HAVA, §§ 302 (a)(5)(A) and (a)(5)(B); (52 USCA § 21082 (a)(5)(A) and (a)(5)(B); as soon as practicable.

Determination

For the reasons stated above, SBOE finds the allegations in the Complaint to be credible, finds that there was a violation of Title III of HAVA, and directs its staff to comply with the Remedy section of these findings.

Dated: May 18, 2021

William J. McCann, Jr.
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