

STATE OF NEW YORK  
NEW YORK STATE BOARD OF ELECTIONS

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In the Matter of:

GIUSEPPE FLOCCARI,

Complainant,

HAVA Complaint No. 22-02  
Determination

-v-

NEW YORK CITY BOARD OF ELECTIONS,

Respondent.

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**Procedural Background**

On February 18, 2022, the New York State Board of Elections (hereinafter “SBOE”) received a written, sworn, signed, and notarized Complaint (the “Complaint”) dated January 31, 2022, filed by Giuseppe “Joe” Floccari, alleging violation of Title III of the Help America Vote Act of 2002 (52 U.S.C. § 21081) (hereinafter “HAVA”).

According to the Complaint, on Election Day, November 2, 2021, Mr. Floccari went to his polling place at P.S. 227, otherwise known as Shallow Middle School, 6500 16<sup>th</sup> Avenue, Brooklyn, New York. Mr. Floccari utilized a Ballot Marking Device (“BMD”) to vote independently and privately but was unable to do so because of problems with the machine.

When Mr. Floccari attempted to vote with the BMD, the machine would not print his ballot. Poll workers rebooted the machine in an attempt to remedy the issue; however, the ballot still would not print. Poll workers did note that the BMD was repaired a few days prior to Election Day following an error, but the particular error was unspecified.

The Complaint states that it is unclear whether poll workers called a technician to service the BMD while Mr. Floccari was at the polling place, but he was told that it was unclear how long it would

take for a technician to arrive. Poll workers then provided Mr. Floccari with a replacement ballot to fill out by hand. No assistance was provided to Mr. Floccari in completing his ballot.

On April 4, 2022, SBOE received a written response (the “Response”) to the Complaint from the New York City Board of Elections (hereinafter “NYCBOE”). The Response stated that all proper protocols were followed at the polling place. Poll workers are directed to ensure that BMDs are in working order prior to the opening of the polls and throughout the day. If a BMD is inoperable at any point, poll workers are instructed to provide voters with the following options:

1. Wait at the poll site until the BMD is repaired;
2. Return to the poll site after the repair is completed; or
3. Vote with assistance from a bipartisan team of inspectors.

NYCBOE’s Response verified that the BMD malfunctioned as Mr. Floccari described, and similarly verified that Mr. Floccari was provided with a replacement ballot to fill out by hand. However, NYCBOE did not speak to the veracity of the allegation that Mr. Floccari was neither offered nor provided assistance in filling out the replacement ballot. The Response indicates that where NYCBOE is informed that a poll worker may not have followed the required policies and procedures, those workers are contacted and receive additional training as required. NYCBOE confirms that this process will be followed with respect to Mr. Floccari’s Complaint.

A hearing was held on May 4, 2022. In attendance was Mr. Floccari, as was Helen Hellmuth, an advocate from Disability Rights New York. NYCBOE was represented by General Counsel Hemalee Patel and Deputy General Counsel Raphael Savino. Kevin Murphy and Aaron Suggs, Deputy Counsels for SBOE, served as Hearing Officers.

During the hearing, Mr. Floccari reaffirmed the allegations made in the Complaint, except to the extent that portions of the Complaint relating to absentee ballots were withdrawn. Mr. Floccari testified that he attempted to use a BMD, which “ate” his ballot and would not print.

The testimony of the New York City Board of Elections reaffirmed its Response to the Complaint. NYCBOE further testified that since the COVID pandemic began, they have been providing poll worker training through virtual means. In-person training is returning for poll workers for this election cycle.

NYCBOE indicated that all BMDs used for an election are tested before they are sent to their respective poll sites, and that poll workers are instructed to check that the BMDs are operational both prior to the opening of the polls each day as well as during the day. Poll workers do not test the BMDs by running ballots through them, as this testing is done by technicians prior to the device's deployment.

NYCBOE testified that 1,286 BMDs were deployed throughout the five boroughs on Election Day 2021, and that Mr. Floccari's Complaint was the only report they received regarding a malfunctioning BMD that day.

### **Jurisdiction**

Section 402 of HAVA (52 U.S.C. § 21112) requires the State to create a state-based administrative complaint procedure to assure compliance with Title III of HAVA. Subdivision 16 of § 3-102 of the New York State 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 Giuseppe Floccari has standing to bring a Complaint.

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

The Complainant, Giuseppe Floccari, alleges the following:

1. On Election Day in 2021, Mr. Floccari attempted to use a BMD to vote independently and privately, but was unable to do so because the BMD malfunctioned;
2. Poll workers were unable to resolve the technical issues with the BMD while Mr. Floccari was present at the poll site;
3. Poll workers provided Mr. Floccari a replacement ballot when the BMD malfunctioned, and failed to offer any assistance in filling out said ballot.

### **Legal Authority**

Title III of HAVA, Section 301(a), outlines the minimum standards for polling locations used in federal elections. It is explicitly stated 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 (52 U.S.C. § 21081(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)).

Section 8-102 of the Election Law requires election inspectors to inspect ballot devices and BMDs to ensure they are in working order prior to the opening of the polls, and to inspect the polling site to ensure that there is sufficient privacy when using devices, booths, and BMDs. Section 8-300 of the Election Law provides that “(t)he operating of the ballot scanner by the voter while voting or the use of a privacy booth or ballot marking device for marking a ballot shall be secret and obscured from all other persons except as provided by this chapter in cases of voting by assisted voters or in cases of children under the age of sixteen accompanying their voting parents or guardians.”

## **Findings of Fact**

### The BMD Malfunctioned:

The BMD malfunctioned and would not properly print Mr. Floccari's ballot at the time he attempted to vote. Due to the malfunction, Mr. Floccari had to fill out a replacement ballot by hand.

### Poll Workers Did Not Offer to Assist Mr. Floccari with His Ballot:

Poll workers should have offered to assist Mr. Floccari with his ballot when the BMD malfunctioned. Options for assistance should have included waiting for the BMD to be repaired by a technician, assistance by a bipartisan team of election inspectors to fill out a replacement ballot, or to return to the polling place once the BMD had been repaired.

### Absentee Ballot Requests:

This portion of the Complaint was withdrawn at the Hearing held May 4, 2022.

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 NYCBOE to do the following:

1. Instruct poll workers on procedures relating to the checking of BMDs to ensure they are operational both prior to the opening of the polls and throughout the day;
2. Review current troubleshooting and training materials to ensure that all procedures are up to date and thoroughly inform poll workers of their obligations with regard to BMDs;

3. Instruct poll workers to inform voters of each of their options to cast their vote when a BMD malfunctions or is otherwise non-operational; and
4. Instruct poll workers on procedures requiring poll workers to provide bipartisan assistance to voters using replacement ballots following BMD malfunctions.

**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 the NYCBOE to comply with the Remedy section of these findings.

Dated: May 24, 2022

Kevin G. Murphy  
Deputy Counsel, New York State Board of Elections

Aaron Suggs  
Deputy Counsel, New York State Board of Elections