

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:

DEVIN FERNANDEZ,

Complainant,

HAVA Complaint No. 23-03
Determination

-v-

SUFFOLK COUNTY BOARD OF ELECTIONS,

Respondent.

Procedural Background

On January 17, 2023, the New York State Board of Elections (hereinafter "SBOE") received a written, sworn, signed, and notarized Complaint (hereinafter "Complaint") dated January 5, 2023, filed by Devin Fernandez, alleging certain conduct that constitutes violations of Title III of the Help America Vote Act of 2002 (52 U.S.C. § 21081)(hereinafter "HAVA").

According to the Complaint, Mr. Fernandez went to vote on Saturday, November 5, 2022 at approximately 1pm at the West Islip Senior Center. Mr. Fernandez who is blind approached a poll worker and the poll worker stated, "he's going to need assistance." Mr. Fernandez indicated that he did not need assistance because he votes using a Ballot Marking Device (hereinafter "BMD"). The poll worker replied there was not a BMD on site. Mr. Fernandez' wife, who accompanied him to vote, said she did not notice a BMD at the poll site. Mr. Fernandez then voted with assistance from his wife.

On February 3, 2023, the Suffolk County Board Of Elections (hereinafter "CBOE") responded to the Complaint. According to the response, Mr. Fernandez checked in at the West Islip Senior Center on Saturday, November 5th at 11:17 a.m. and voted with assistance from Linda Fernandez. The CBOE interviewed all staff working at the poll site on the day Mr. Fernandez voted. The poll site was equipped

with four ImageCast Evolution voting machines which is an all in one optical scanner, tabulator, and BMD. One of the four machines was designated as the primary accessible BMD and had the Audio Tactile Interface device and headphones connected prior to the opening of the polls. While none of the poll workers had a specific recollection of Mr. and Mrs. Fernandez they all stated they would never have told a voter that they had to vote with assistance of another person. This poll site had very experienced poll workers at the time Mr. Fernandez voted. The Co-coordinators and one of the inspectors that checked in Mr. Fernandez knew that there was a BMD available and none of them were aware of anyone asking to use it. The BMDs used during the early voting period were different than the BMDs used in prior years' election day voting and the Board's records reveal that this was the first time that Mr. Fernandez and his wife used early voting. As such, neither would have been familiar with the new voting machines. If Mr. or Mrs. Fernandez had spoken with a Coordinator or any other poll worker about using a BMD, any misunderstanding could have been corrected. In addition, the CBOE was informed that representatives of Disability Rights of New York were visiting all of the CBOE's early voting sites in order to survey the BMDs. The CBOE then informed all poll workers at early voting sites. No issues were reported to the CBOE by Disability Rights of New York and the receipt of the complaint is the first time the CBOE had any knowledge of any issues involving Mr. Fernandez' voting experience.

A hearing was held on March 2, 2023.

During the hearing, Mr. Fernandez reaffirmed most of the allegations made in the Complaint. However, Mr. Fernandez testified that the poll workers did not specifically say that there was not a BMD at the poll site only that he would need assistance. Mr. Fernandez did not speak to the Coordinator or Assistant Coordinator at the poll site or report any issues that day to the CBOE.

Deputy Commissioners Gail Lolis and Erin McTiernan appeared on behalf of the CBOE. In their testimony they reaffirmed their response to the complaint. CBOE reiterated their belief that Mr.

Fernandez voting issues were due to a misunderstanding. Due to the issues Mr. Fernandez experienced, the CBOE is reevaluating the training manual information for similar situations. The CBOE also clarified which voting machines were used on early voting and the general assistance needed from poll workers in order for a voter to use a BMD to vote.

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 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 Devin Fernandez has standing to bring a Complaint.

Issues Raised by the Complainant

The Complainant, Devin Fernandez, alleges the following:

1. Mr. Fernandez, who is blind and uses a BMD to vote independently and privately, was unable to do so because he was told that the poll site did not have a BMD when he voted on Saturday, November 5, 2022;

2. Mr. Fernandez was forced to vote with the assistance of his wife since he was told a BMD was not available at the poll site.

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 Poll Site Had An Available BMD But Poll Workers Incorrectly Told Mr. Fernandez That He Would Have To Vote With Assistance:

There was an operational BMD at the poll site and poll workers should have allowed Mr. Fernandez to use it to vote. Instead, due to miscommunication and poll worker error, the poll workers required Mr. Fernandez to vote with the assistance of his wife instead of allowing him to use the BMD.

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 Board of Elections to:

1. Emphasize during poll worker training the obligations of poll workers with regard to BMDs, including but not limited to, the specific procedures to be followed if a voter requests the use of a BMD.

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: April 14, 2023

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

Aaron Suggs
Deputy Counsel, New York State Board of Elections