

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:

DENNIS FARRO,

Complainant,

HAVA Complaint No. 23-06
Determination

-v-

NASSAU COUNTY BOARD OF ELECTIONS,

Respondent.

Procedural Background

On January 23, 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 Dennis Farro, 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 of the 2022 General Election, Mr. Farro, who is blind, attempted to vote at the Clear Stream Avenue School in Valley Stream, New York. Upon entering the polling place, he was greeted by Mr. Tom Avalone, a Republican poll worker who has assisted Mr. Farro in the past. Mr. Avalone offered the option to utilize the ballot marking device (hereinafter “BMD”), but Mr. Farro declined, and requested that Mr. Avalone assist him in filling out the ballot by hand. Mr. Avalone then led Mr. Farro to a table and brought over a Democratic poll worker so a bipartisan team was present during the voting session.

Shortly after Mr. Farro began the voting process, a third female poll worker, later identified as Melva Downey, approached the table asking if the assistance was necessary and alerting Mr. Avalone that he was needed elsewhere. She then instructed Mr. Farro to use the BMD, which he declined. Ms. Downey then left, but she shortly returned to attempt once again to get Mr. Farro to utilize the BMD. A verbal

dispute ensued, in which insults were made by Ms. Downey to Mr. Farro. Eventually, Mr. Farro completed his voting session with assistance.

In response, the Nassau County Board of Elections (hereinafter “Nassau County BOE”) confirmed that the poll worker in question as Melva Downey. The Nassau County BOE stated that Ms. Downey alleged she approached the assisted voting session in question to clarify that both a Democratic and Republican poll worker had to be present during the session. Ms. Downey claims that Mr. Farro, without provocation, stood up and began to curse at her and attempted to strike her with his cane. After initially retreating from the table, Ms. Downey returned to express her continued concern that Mr. Farro was not voting with bipartisan assistance.

On March 1, 2023, Jenessa Seymour of Disability Rights New York, on behalf of Mr. Farro, submitted an audio recording of the incident in question, stating Mr. Farro’s intention to submit the recording into evidence at the upcoming hearing. The recording appears to confirm that Mr. Avalone did in fact explain the requirement for a bipartisan team to assist Mr. Farro in his voting session and called over a Democratic counterpart to serve as a witness. Likewise, the recording appears to confirm a female poll worker (confirmed to be Ms. Downey) approaching the table and repeatedly instructing Mr. Farro to utilize the BMD despite being told that Mr. Farro did not desire to use the device. Mr. Avalone attempted to intervene but was unsuccessful and a verbal dispute arose between Mr. Farro and Ms. Downey. Among other insults hurled between the parties, Ms. Downey can be heard uttering the phrase “that’s why God made him so.” Following the dispute, Mr. Farro finished voting with Mr. Avalone’s assistance.

Hearing

A hearing was held on April 21, 2023. In attendance was Mr. Farro, as well as Jenessa Seymour, an advocate from Disability Rights New York. Nassau County BOE was represented by Steven Marx, Counsel to the Board, as well as Ricki Casta, Election Clerk. Melva Downey attended the hearing as a witness for Nassau County BOE. SBOE Deputy Counsels Kevin Murphy and Aaron Suggs served as Hearing Officers.

During the hearing, Mr. Farro reaffirmed the allegations in the Complaint, adding that he records exchanges on his phone from time to time in order to later recall certain information. In this case, as the ballot was being read to him, he wished to record his voting session so he could later recall the candidates for whom he voted. He further explained that he has been assisted by Mr. Avalone in the past, who has always been very accommodating to his requests. Mr. Farro took issue with Ms. Downey's allegation that he attempted to strike her with his cane, which he said was "absolute nonsense," and that his cane was folded up on the ground during his voting session. Similarly, he reiterated that Mr. Avalone did, in fact, ensure that a bipartisan team was present while he was being assisted, and played back certain parts of the audio recording to illustrate this series of events.

The testimony of Nassau County BOE reaffirmed its Response to the Complaint. Mr. Marx stated that he had not himself listened to the audio recording, but would let the recording "speak for itself."

Ms. Downey testified that the only reason she approached the table where Mr. Farro was voting was due to the fact that there was no bipartisan team of poll workers assisting him, and that she would not have approached the table or interrupted the voting session unless that were the case. However, the audio recording of the incident cuts directly against Ms. Downey's testimony. At no point in the recording does Ms. Downey appear to address her alleged concerns, instead making repeated comments directing Mr. Farro to utilize the BMD even after he made it clear that he had no desire to do so. During her testimony, Ms. Downey further attempted to clarify some of her offensive comments, stating that "that's why God made him so" was a reference to his general demeanor, not his lack of sight.

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 certain conduct that constitutes a violation of Title III of HAVA, SBOE determines that Dennis Farro has standing to bring a Complaint.

Issues Raised by the Complainant

The Complainant, Dennis Farro, alleges the following:

1. On Election Day of the 2022 General Election, Mr. Farro, who is blind, attempted to vote at the Clear Stream Avenue School with assistance from a poll worker after declining to utilize a BMD.
2. Shortly after Mr. Farro began the voting process, a different poll worker interrupted his assisted voting session, repeatedly directed him to utilize the BMD, and attempted to draw the poll worker assisting him away from the table to attend to other duties.
3. A verbal dispute ensued, in which insults were made by the poll worker to Mr. Farro. Eventually, Mr. Farro was left to complete his assisted voting session.

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

Mr. Farro was improperly advised to use the BMD after declining:

Ms. Downey initially seemed unaware of the prior exchange Mr. Farro had with Mr. Avalone regarding the use of the BMD. However, once Mr. Farro stated his opposition to utilizing the BMD, she should have accepted this statement and permitted him to complete his assisted voting session without further interruption. As the recording makes clear, she made repeated attempts to get Mr. Farro to abandon his assisted voting session and utilize the BMD after he declined to do so. Election Law 8-306 is clear that a voter is entitled to a bipartisan assisted voting session such as the one that Mr. Avalone was providing.

Ms. Downey used inappropriate language with Mr. Farro:

As the recording of the incident makes clear, Mr. Farro and Ms. Downey engaged in a verbal altercation that included strong and insulting language. While both parties used coarse and shocking language, it is undeniable that Ms. Downey, as an employee and representative of Nassau County BOE, should be held to a higher standard than a member of the public. Of particular concern is the phrasing “that’s why God made him so,” a statement for which there is no reasonable explanation. Ms. Downey’s role in elevating this confrontation is clear, and her language inexcusable.

Nassau County BOE has established a pattern of HAVA violations:

During her closing statement, Ms. Seymour expressed serious concern that the Nassau County BOE does not appear motivated to even acknowledge its failures with regard to alleged HAVA violations, let

alone address the issues head on or make necessary changes to prevent such issues in the future. The SBOE cannot help but agree.

The HAVA Complaint before us is the third such complaint that was filed against Nassau County BOE resulting from issues during the 2022 election cycle. In the previous two matters, 23-04 (Tronsor) and 23-08 (Barbara), the representatives from Nassau County BOE were dismissive at best, and combative at worst, to the complaints lodged against them. This is of particular frustration in the matter of Ms. Barbara, who was filing her second HAVA Complaint against the County since 2019.

In the current matter, Mr. Marx attended the April 21, 2023 hearing without having listened to the audio recording of the incident, despite having had the recording in his possession for nearly two months and Ms. Seymour's reasonable request that all parties be familiar with the recording prior to the hearing. Inexplicably, Mr. Marx then proceeded to take issue with many characterizations made of the recording.

In summary, the SBOE finds, for the third time in as many months, that the Nassau County BOE has committed a violation of HAVA, and that appropriate remedies must be determined to both address the issues raised in the instant matter and, to the extent possible, prevent similar violations from occurring in the future.

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 Nassau County BOE to do the following:

1. Provide SBOE with copies of all training materials, both written and electronic, that are used during all poll worker trainings by June 1, 2023.

2. Provide SBOE with a detailed list of all currently scheduled poll worker trainings by June 1, 2023, and promptly update SBOE when new trainings are scheduled.

3. Accommodate the attendance of SBOE employees at future poll worker trainings and at poll sites within the county during voting hours.

4. Conduct a thorough review of all training materials to ensure that they sufficiently reflect proper procedures relating to voting by individuals with disabilities, including but not limited to: (A) the operation and use of BMDs, (B) The procedures to be followed when a voter requests an assisted voting session under Election Law § 8-306; (C) Explicit instructions regarding a voter's options when a BMD malfunctions or is otherwise non-operational; and (D) Disability etiquette required to be followed by all poll workers.

5. Emphasize during poll worker training the proper procedures relating to voting by individuals with disabilities, including but not limited to: (A) the operation and use of BMDs (B) The procedures to be followed when a voter requests an assisted voting session under Election Law § 8-306; (C) Explicit instructions regarding a voter's options when a BMD malfunctions or is otherwise non-operational; and (D) Disability etiquette required to be followed by all poll workers.

6. Provide SBOE with a written report thoroughly detailing the steps that Nassau County BOE has undertaken to comply with the above-referenced remedies by July 31, 2023, including copies of any training/guidance materials revised based upon the review conducted pursuant to #4 above.

7. Provide SBOE with an annual written report summarizing Nassau County BOE's actions and procedures relating to voting by individuals with disabilities, including copies of any training/guidance materials revised during the previous annual period, to be delivered to SBOE no later than June 30 of each of the next three years: 2024, 2025, and 2026.

Finally, while the provisions of HAVA do not permit SBOE remedies to include determinations related to employment or staffing, SBOE does highly recommend that Nassau County BOE review the status of Ms. Downey's employment as a poll worker and consider appropriate disciplinary action relating to her improper comments made to the Complainant.

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

Dated: May 4, 2023

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