

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:

JOSE HERNANDEZ,

Complainant,

HAVA Complaint No. 23-09
Determination

-v-

NEW YORK CITY BOARD OF ELECTIONS,

Respondent.

Procedural Background

On January 31, 2023, the New York State Board of Elections (hereinafter “SBOE”) received a written, sworn, signed, and notarized Complaint (hereinafter “Complaint”) dated January 20, 2023, filed by Jose Hernandez, alleging violation of Title III of the Help America Vote Act of 2002 (52 U.S.C. § 21081) (hereinafter “HAVA”).

According to the Complaint, during the early voting period of the 2022 General Election on either November 3rd or November 4th, Mr. Hernandez attempted to vote at the Bronx County Supreme Courthouse. After utilizing the ballot marking device (hereinafter “BMD”) Mr. Hernandez’s personal care assistant inserted the ballot into the scanner, which appeared to freeze. After about five minutes of waiting, a poll worker opened the BMD and removed the ballot, which had been heavily damaged. The poll worker spoiled the ballot, and assisted Mr. Hernandez in receiving a replacement ballot before continuing to troubleshoot the BMD. A second attempt to vote on a different BMD also resulted in a frozen BMD, but this ballot was retrieved without damage. However, Mr. Hernandez was then instructed to try the first BMD again, which once again damaged the ballot.

While issuing Mr. Hernandez a second replacement ballot, the poll workers informed him that he would not be able to receive another ballot if this one was damaged by the BMD. Running out of time before work, Mr. Hernandez asked his personal care assistant to help him fill out the ballot rather than risk

damage to it by using either of the BMDs. In all, the voting process took 45-50 minutes. Further, both BMDs were positioned so that the screens faced the table where poll workers were seated for lunch, so Mr. Hernandez did not have privacy during the voting process.

In response, the New York City Board of Elections (hereinafter “NYCBOE”) stated that they provide training to all poll workers regarding the requirement that all polling places be fully accessible and provide all voters with privacy, including voters utilizing BMDs. A floor plan was developed by NYCBOE that shows exactly where the BMD was to be positioned. That floor plan did not include a table at which poll workers would take breaks or eat meals. This floor plan was provided to all parties in an email supplemental to the written response. Similarly, certain pages of the poll worker training manual were provided which related to disability awareness, poll site setup, as well as BMD inspection and troubleshooting.

Hearing

A hearing was held on March 29, 2023. In attendance was Mr. Hernandez, as well as Jenessa Seymour, Mr. Hernandez’s advocate from Disability Rights New York. NYCBOE was represented by General Counsel Hemalee Patel, as well as Deputy General Counsel Raphael Savino. SBOE Deputy Counsels Kevin Murphy and Aaron Suggs served as Hearing Officers.

During the hearing, Mr. Hernandez reaffirmed the allegations in the Complaint, adding that he was particularly concerned with the poll workers informing him that he was only eligible to receive two replacement ballots, even when the ballot was damaged by the BMD through no fault of his own. He stated his hope that poll worker training would be updated to address this issue and clarify this is not the case.

The testimony of NYCBOE reaffirmed its Response to the Complaint, pointing out that it is in fact in the poll worker training materials provided to all parties that ballots damaged by a BMD do not count toward the three-ballot limit. Likewise, the floor plan provided for the poll site in question did not provide for a table to be placed where Mr. Hernandez claims one was stationed and should not have been. The general training and procedure for preparing and troubleshooting BMDs was reviewed, and it was

mentioned that the BMDs throughout New York City are older machines and that NYCBOE would be interested in purchasing and implementing newer machines once such technology is approved by SBOE.

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 Jose Hernandez has standing to bring a Complaint.

Issues Raised by the Complainant

The Complainant, Jose Hernandez, alleges the following:

1. Mr. Hernandez attempted to vote at the Bronx County Supreme Courthouse during the early voting period of the 2022 General Election. After utilizing the BMD, the machine malfunctioned and his ballot was damaged and spoiled.

2. After receiving a replacement ballot, Mr. Hernandez utilized the second on-site BMD, which also malfunctioned, but the ballot was retrieved without damage. When an attempt was made to scan the ballot on the first BMD, the ballot was once again damaged and spoiled.

3. Poll workers mistakenly informed Mr. Hernandez that his second replacement ballot would be his last, as he was allegedly entitled to only two replacement ballots regardless of the method by which they became damaged.

4. Mr. Hernandez was then compelled to vote with the assistance of his personal care assistant instead of utilizing the BMD out of concern that his ballot would be damaged a third time.

5. The poll site was set up in a manner where the BMD screens were in the line of sight of a table at which the poll workers were eating lunch, which prevented Mr. Hernandez from voting with privacy as required by statute.

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

Both BMDs malfunctioned at the poll site

Despite Mr. Hernandez being present at the poll site for at least 45 minutes, neither BMD was able to be made fully functional to the point where he could utilize the machine without fear of his ballot being damaged. It does appear that NYCBOE followed the proper internal procedures when the machines

malfunctioned, but the fact remains that two separate BMDs were not operational at the time Mr. Hernandez attempted to vote.

Poll workers incorrectly informed Mr. Hernandez that he was limited to two replacement ballots

Despite the poll worker training materials stating the contrary, the poll workers that spoke to Mr. Hernandez incorrectly informed him that he was limited to two replacement ballots, even when the ballot was spoiled due to damage caused by the BMD. As stated by NYCBOE's own poll worker materials: "If a ballot is spoiled by a Poll Worker, it does not count toward the three ballots."

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 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. Thoroughly inform poll workers of their obligations with regard to BMDs, including explicit instructions regarding a voter's options when a BMD malfunctions or is otherwise non-operational.
3. Review poll worker training materials to ensure clarity that BMD-related spoilage of ballots do not count toward the limit of two replacement ballots.
4. Review procedures related to maintaining the privacy of all voters including voters with disabilities and the procedures for following poll site floor plans.

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 NYCBOE to comply with the Remedy section of these findings.

Dated: May 3, 2023

Kevin G. Murphy

Deputy Counsel, New York State Board of Elections

Aaron Suggs

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