

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:

GIUSEPPE FLOCCARI,

Complainant,

HAVA Complaint No. 23-10
Determination

-v-

NEW YORK CITY BOARD OF ELECTIONS,

Respondent.

Procedural Background

On March 3, 2023, the New York State Board of Elections (hereinafter "SBOE") received a written, sworn, signed, and notarized Complaint (hereinafter "Complaint") dated February 15, 2023, filed by Giuseppe Floccari, 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. Floccari went to vote on November 8 around 1pm at the Edward Shallow Middle School in Brooklyn, NY. He was accompanied by his personal care assistant (hereinafter "PCA"). When Mr. Floccari arrived at the poll site the poll worker spoke exclusively to and handed the ballot to his PCA. Mr. Floccari's PCA assisted him with inserting the ballot into the Ballot Marking Device (hereinafter "BMD"). The ballot fed into the BMD incorrectly and then ripped. A poll worker attempted to remove the ballot from the BMD however part of the ballot was left in the machine. The poll worker then instructed the PCA on Mr. Floccari's options for voting. Mr. Floccari then told the poll worker that she should be speaking to him and not his PCA. The poll worker then voided Mr. Floccari's ballot and issued him another. Mr. Floccari then marked the ballot by hand and left for work. The poll worker told Mr. Floccari that she would report the malfunctioning BMD but he did not have time to see if that actually happened.

On March 23, 2023, the New York City Board of Elections (hereinafter “New York City BOE”) responded to the Complaint. The Response denied the allegations contained in the Complaint. New York City BOE contends that the temporary inoperability of a NYS BOE certified BMD or user error is not, in and of itself, a HAVA violation. According to the response, New York City BOE meticulously crafts the layout of each poll site to best serve the voters and to ensure compliance with all relevant laws and regulations. In addition, New York City BOE states that its operations comply with New York State Election Law and Title III of HAVA and that each poll site and early voting site has at least one BMD. Each poll site is inspected by the New York City BOE’s Voting Machine Technicians (“VMTs”) and roving bi-partisan teams, with each borough assigned at least one team devoted specifically to accessibility issues. These teams are trained and instructed to make sure the BMDs and other equipment are operating properly and placed in the proper location at the time of their visit. VMTs and bi-partisan teams are likewise dispatched to particular poll sites immediately if the New York City BOE is notified of an issue. All poll workers, VMTs and the bi-partisan teams are directed to report any issues they discover immediately to the New York City BOE . If there is an issue, VMTs are responsible for making repairs and are able to request additional voting equipment. When needed, technicians from the vendor which provides the BMDs are also available to promptly address issues throughout the day. All poll workers receive BMD and disability etiquette training.

A hearing was held on May 11, 2023. In attendance was Mr. Floccari, as well as Jenessa Seymour, Mr. Floccari’s advocate from Disability Rights New York. New York City BOE was represented by General Counsel Hemalee Patel, as well as Deputy General Counsel Raphael Savino. SBOE Deputy Counsels Aaron Suggs and Kevin Murphy served as Hearing Officers.

During the hearing, Mr. Floccari reaffirmed the allegations made in the complaint. He testified that when he asked the poll worker to speak to him and not his PCA the poll worker did not have any response. He testified that when the BMD malfunctioned the poll workers informed him that his only

option was to wait until the BMD was fixed. Mr. Floccari also testified that he has had issues in the past when he voted. In addition, he testified that he would want to fill out the ballot himself and not have the PCA help him. In his testimony Mr. Floccari also emphasized the importance of disability etiquette training.

New York City BOE generally reaffirmed the information contained in their response, adding that there are 35,000 to 45,000 poll workers in New York City required to do in person training. New York City BOE also testified that disability etiquette is a part of the training and it includes training poll workers to speak to the voter and not a voter's PCA.

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 Mr. Floccari has standing to bring a Complaint.

Issues Raised by the Complainant

The Complainant, Giuseppe Floccari, alleges the following:

1. On November 8, 2023 Mr. Floccari attempted to use the BMD but it malfunctioned;
2. Mr. Floccari was not provided with all his options to vote when the BMD malfunctioned;
3. Poll workers did not speak to Mr. Floccari during his voting experience and instead directed their conversations to Mr. Floccari's PCA until he asked them to stop;

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 and the poll workers did not provide Mr. Floccari with all his options to vote

When Mr. Floccari attempted to vote using the BMD the ballot fed into it incorrectly and then ripped. A poll worker attempted to remove the ballot from the BMD but part of the ballot was left in the machine. Mr. Floccari's ballot was then spoiled by the poll worker. The poll workers did not provide Mr. Floccari with his full options to vote and only told him that he could wait until the BMD was repaired.

The poll workers did not follow proper disability etiquette protocol and directed their speech to Mr. Floccari's PCA instead of Mr. Floccari

Poll workers directed their speech and questions to Mr. Floccari's PCA when he first checked into the poll site and continued to do so until Mr. Floccari asked the poll worker to speak directly to him.

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 New York City BOE to:

1. Review training materials and emphasize disability etiquette during poll worker training including the proper procedures for interacting with individuals assisted by PCAs;
2. Instruct poll workers on the process and options for a voter to vote when a 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 its staff to comply with the Remedy section of these findings.

Dated: June 5, 2023

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

Aaron Suggs
Deputy Counsel, New York State Board of Elections