

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:

MARILYN TUCCI,

Complainant,

HAVA Complaint No. 24-01
Determination

-v-

SUFFOLK COUNTY BOARD OF ELECTIONS,

Respondent.

Procedural Background

On March 4, 2024, the New York State Board of Elections (hereinafter “SBOE”) received a written, sworn, signed, and notarized Complaint (hereinafter “Complaint”) dated February 26, 2024, filed by Marilyn Tucci, 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, on Saturday, November 4, 2023, Complainant went to an early voting poll site at approximately 11 :30 AM and attempted to use the ballot marking device (BMD). The BMD was not placed for privacy and the Complainant had to ask a poll worker twice to turn the machine around. The poll worker initially insisted the machine was intentionally placed that way because it was used as a scanner. The poll worker then turned the machine around so that Complainant could vote privately. Complainant is blind and needed headphones to hear the device. She was provided with headphones that did not have any type of protective/sanitary sleeve over the earpieces. She inquired about this and was told coverings are not provided. Complainant then followed the prompts on the BMD and completed the full process of selecting her votes. There was then an error message, and a poll worker confirmed that the machine did not print her votes, instead producing a blank ballot. The poll worker did not attempt to troubleshoot the machine. A poll worker then offered the complainant

assistance in filling out her ballot from a bipartisan team. Complainant was not comfortable with this option, as she felt it was a breach of her privacy and independence. Complainant had been at her polling place for an estimated 30 minutes and did not wish to wait longer so she voted with the assistance of her friend. Poll workers did not offer any alternatives to voting on the BMD.

On March 15, 2024, the Suffolk County Board of Elections (hereinafter "Suffolk CBOE") responded to the Complaint. In response the Suffolk CBOE denied that the early voting polling place did not have an operable BMD on site for voters with disabilities to mark their ballots privately and independently and denied the election workers acted improperly. Complainant had the option of voting independently and privately but opted to vote with the assistance of her friend after she experienced difficulty marking her ballot on one of three available BMDs.

When it appeared there was an issue with the BMD because it did not mark complainant's ballot, she was offered the option of voting on a different BMD which was declined. There was no reason to suggest to the voter that she should wait for a BMD to be repaired or leave and return when there were two other BMDs available for voting.

Ms. Tucci said she did not want to vote on another machine and preferred to vote with the assistance of her friend who had already voted and was waiting for her. She then cast her ballot with her friend's assistance.

The following day, two of the inspectors, who had not yet voted, cast their ballots on the subject BMD using an accessible session and experienced no problems with the machine marking their ballots.

Suffolk CBOE concluded, absent voter error, the only reasonable explanation was that there was an issue with the printer cartridge. The voting machine itself worked as it was intended and issued the appropriate error message when the BMD did not mark the ballot. Because the machine printed test ballots properly and had not been used from that time until the subject accessible session, there was a

concern that the ink cartridge may have dried from non-use. After consultation with the manufacturer, the BMDs were programmed to perform Printer Head Servicing hourly to mitigate such risk.

A hearing was held on April 15, 2024.

Marilyn Tucci and Kristin Sherman appeared on behalf of Ms. Tucci. During the hearing, the complainant reiterated the information contained in their complaint. Even though it was not included in the complaint, Ms. Tucci also testified that she asked to use a different BMD after the machine she was using malfunctioned. She testified that she was told she could not use one of the other BMDs since they were being used as scanners.

Gail Lolis and Erin McTiernan appeared on behalf of the Suffolk CBOE. During the hearing, Suffolk CBOE incorporated their response into their testimony. Suffolk CBOE also testified they received information about the complaint from the poll site on the same day that Ms. Tucci voted. The Suffolk CBOE was told that after the BMD malfunction Ms. Tucci decided that she did not want to wait any longer and voted with the assistance of her friend.

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 Marilyn Tucci has standing to bring a Complaint.

Issues Raised by the Complainant

The Complainant, Marilyn Tucci, alleges the following:

1. The BMD was not set up for an individual to vote on the machine in a private manner;
2. The BMD malfunctioned and Ms. Tucci was not provided an opportunity to vote on a different BMD;

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 was set up in a manner that would allow a voter to vote privately:

The BMDs at this poll site were also being used as scanners. While used as a scanner the BMD was placed in a manner that would not allow a voter to vote privately. However, before Ms. Tucci used the BMD in an accessible voting session it was repositioned to allow her to vote privately.

The BMD malfunctioned and Ms. Tucci was not afforded the opportunity to use another BMD onsite to vote:

The BMD malfunction and printed a blank ballot. Poll workers wrongly told Ms. Tucci that she could not use the other BMDs because they were being used as scanners. However, Ms. Tucci could have voted privately using the other BMDs that was being used as a scanner after they were set up for an accessible voting session.

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 Suffolk CBOE to:

1. Instruct poll workers on the proper procedures if a BMD malfunctions and there is another BMD available for use.
2. Instruct poll workers on proper procedures relating to use of BMDs as both a Ballot Marking Device and as a scanner.

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 3, 2024

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