

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:

DEVIN FERNANDEZ,

Complainant,

HAVA Complaint No. 22-01
Determination

-v-

SUFFOLK COUNTY BOARD OF ELECTIONS,

Respondent.

Procedural Background

On January 28, 2022, the New York State Board of Elections (hereinafter SBOE) received a written, sworn, signed, and notarized Complaint (the “Complaint”) dated December 10, 2021, 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) (“HAVA”).

According to the Complaint, on Election Day, November 2, 2021, Mr. Fernandez went to his polling place at Oquenick Elementary School located at 425 Spruce Avenue West Islip, NY. Mr. Fernandez, who is blind, uses a Ballot Marking Device (BMD) to vote independently and privately but was unable to do so because of problems with the BMD.

When Mr. Fernandez went to vote it took poll workers approximately 40 minutes to properly set up the BMD. Mr. Fernandez was then able to use the BMD to mark his choices, but the ballot would not print. The poll worker then called the Suffolk County Board of Elections (Suffolk County BOE) for guidance on the problems with the BMD. Suffolk County BOE advised the poll worker that it was likely that the machine was jammed but were not sure how long it would be until it could be fixed by a

technician. The poll worker told Mr. Fernandez that once they were able to fix the machine, they would take his ballot from the machine and cast it in the scanner.

At approximately 6PM on Election Day the polling place Coordinator called Mr. Fernandez to inform him that the ballot did not print properly. Mr. Fernandez was told that he could not vote and that he should speak to the Suffolk County BOE. Mr. Fernandez then spoke to the Suffolk County BOE and they instructed him to return to his polling place and vote by affidavit ballot which he did with the assistance of his wife.

The Complaint further alleges that Mr. Fernandez experienced another accessibility related issue when a poll worker refused to assist him in leaving the polling place.

In addition, the complaint alleges that on or around October 11, 2021, Mr. Fernandez tried to request an absentee ballot from the Suffolk County BOE but the link on the Suffolk County BOE's website was not screen reader accessible. Mr. Fernandez called Suffolk County BOE and they said they would send him one. Since he never received it, around October 25, 2021, Mr. Fernandez called Suffolk County BOE again to request an accessible ballot and was told that they would not be able to send him one.

On February 18, 2022, Suffolk County BOE responded to the Complaint. The Response stated that the BMD was set up properly before the polls opened. However, when the Coordinator attempted to set up the voting session for Mr. Fernandez the BMD indicated that there was a connection problem. The coordinator contacted the Suffolk County BOE and that issue was resolved.

Mr. Fernandez then used the BMD to vote but it did not work properly. The primary cause of the malfunction was that the Coordinator failed to insert a ballot into the BMD before Mr. Fernandez fully marked his ballot. The time between Mr. Fernandez making his ballot choices and the insertion of the ballot was too long. As a result, the BMD "timed out" and only a portion of the ballot printed. The

ballot remained in the BMD since it would not eject a partially printed ballot. This led to the Coordinator to believe that the BMD was jammed, which was communicated to the Suffolk County BOE who sent a bipartisan team of technical custodians to the poll site to assess the BMD. However, if Suffolk County BOE had known about the “time out” issue the Coordinator would have been instructed to cancel the session, physically remove the ballot, and start a new session with a new ballot.

Since the Coordinator did not know how long it would take for the custodians to arrive, Mr. Fernandez was asked if he would like to vote with assistance. He stated he wanted to vote on the machine and left the poll site. When the custodians arrived, they removed the ballot where it was spoiled by the Coordinator. The Board reviewed the spoiled ballot and confirmed that it was partially printed.

It is unclear who contacted Mr. Fernandez about his ballot but he returned to the poll site and completed an affidavit ballot since he left the poll site after receiving a ballot and commencing the voting process. However, Suffolk County BOE was compelled to reject the affidavit ballot because Mr. Fernandez checked in on the poll pad, which reflected him as having voted on a machine and there was no evidence to the contrary.

The Response by the Suffolk County BOE also explains that the denying of assistance was most likely due to a “very negative and disgruntled inspector” who was disrespectful to other poll workers and voters. That inspector was terminated and the complained conduct was not due to lack of training or knowledge.

The Response to the Suffolk County BOE’s website not being accessible states that the Suffolk County BOE website links to the SBOE website and that any issue was beyond the control of the Suffolk County BOE. In addition, the response states that they have no record of receiving a request for an accessible absentee ballot or an application for it from Mr. Fernandez. However, voters that called the

Suffolk County BOE around October 18, 2021, would have been directed to use the New York State portal.

Lastly, the Suffolk County BOE's response denies that they did not instruct poll workers on the voter's options to vote when the BMD breaks down.

A hearing was held on March 16, 2022.

During the hearing, Mr. Fernandez reaffirmed the allegations in the Complaint except for the allegations regarding requesting an absentee ballot which were withdrawn. Mr. Fernandez testified that it took approximately 40 minutes to set up the BMD. Additionally, the Complainant testified that the initial problems setting up the BMD were due to the Coordinator being unable to find the password. After the password issue was resolved there were further issues with the BMD headphones and two different headphones were tried before an operational pair was located. Mr. Fernandez testified that he was then able to use the BMD but there were problems with the printing of the ballot and after multiple consultations with the Suffolk County BOE, it was determined that the BMD was likely jammed. Mr. Fernandez further testified that he was told by the Coordinator that they did not know when individuals would arrive to fix the BMD and he left the poll site after being there for almost 3 hours. Mr. Fernandez also testified that the poll workers did not offer to assist him with marking his ballot since the BMD was not working.

Mr. Fernandez testified that at approximately 6pm the Coordinator called and told him that the ballot removed from the BMD did not print properly and that it was spoiled. In addition, he was told that he would not be able to vote and would have to take it up with the Suffolk County BOE. After speaking with the Suffolk County BOE, Mr. Fernandez returned to the polling site and voted by affidavit ballot with the assistance of his wife. Mr. Fernandez testified that he later learned that his affidavit ballot was not counted.

Mr. Fernandez also testified that the Coordinator was the only person that assisted him at the polling place and that the Coordinator was the person that refused to provide him with assistance exiting the poll site.

Deputy Commissioners Gail Lolis and Erin McTiernan appeared on behalf of the Suffolk County BOE. In their testimony they reaffirmed their response to the complaint. The printing problem was uncommon and caused by an experienced Coordinator. Since the malfunction of the BMD was not common and the BMD would not eject the ballot the Coordinator and Suffolk County BOE felt that the machine was jammed. However, if Suffolk County BOE had known that the issue was with the BMD timing out they could have resolved the issue in a more satisfactory manner.

Suffolk County BOE further testified that they tried to bring the Coordinator in for retraining but he chose to resign and will no longer work for the Suffolk County BOE. They also testified that there are existing instructions on how to operate the BMD but they are supplementing them with illustrations of different troubleshooting scenarios. Suffolk County BOE testified that the issues that Mr. Fernandez faced that day were due to the Coordinator, who was both experienced and properly trained.

Regarding Mr. Fernandez' vote not counting, Suffolk County BOE testified that it was inexcusable and that his vote did not count because the affidavit ballot did not have any information explaining that he was not able to vote on the BMD. Since there was not any explanation Suffolk County BOE testified that they were compelled to not count his ballot since he had signed in on the poll book and there was no evidence that he had not voted on the BMD. What happened to Mr. Fernandez should have been noted by the Coordinator, however, it was not. To prevent this from happening again Suffolk County BOE is supplementing their training to highlight the procedures in this situation. However, they have made the decision not to provide enhanced training on how to operate the BMD to

all the poll workers, reasoning that they want only the most qualified people using the BMD, which are polling place Coordinators and Assistant Coordinators.

Suffolk County BOE further testified that they believe Mr. Fernandez when he said that the poll workers did not inform him of his options to vote when the BMD malfunctioned. However, all the relevant poll workers received the required training on the procedures in this situation.

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 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. On Election Day in 2021, Mr. Fernandez, who is blind and uses a BMD to vote independently and privately, was unable to do so because the BMD malfunctioned;

2. Poll workers did not provide Mr. Fernandez with his options to vote when the BMD malfunctioned;
3. Poll workers did not provide Mr. Fernandez with assistance exiting the polling site; and
4. Mr. Fernandez was unable to obtain an accessible absentee ballot by contacting the Suffolk County BOE or from the Suffolk County BOE's website.

Legal Authority

Title III of HAVA, section 301(a), outlines the minimum standards for polling locations used in federal elections. Title III specifically states 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. Id. § (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:

There were multiple issues with the BMD during the Complainant's voting session. The issues with setting up the machine were resolved while those dealing with the printing of the ballot were not. The printing issue was the result of not inserting the ballot into the BMD in a timely manner. This is an uncommon error and the Coordinator was not aware at the time that this was what caused the BMD to malfunction. Now that this issue is known additional training and troubleshooting information can help avoid this issue in the future.

Options to Vote if the BMD Malfunctions:

Poll workers should have provided Mr. Fernandez with alternative options to vote when the BMD malfunctioned, including waiting for the BMD to be fixed by a technician, being assisted by a bipartisan team of election inspectors in filling out his ballot, or coming back later when the BMD was fixed.

Lack of Assistance Exiting the Polling Place:

During Mr. Fernandez time at the polling place, he only dealt with the Coordinator that was helping him with the BMD. The Coordinator should have provided assistance to the Complainant when requested. The Coordinator has since resigned and will not work for Suffolk County BOE at future elections.

Absentee Ballot Requests:

This issue was withdrawn by the Complainant at the hearing held March 16, 2022.

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 BOE to do the following:

1. Instruct poll workers and update troubleshooting and training information to include a reminder that a ballot should be inserted into the BMD before a voter fully marks their ballot and that failure to do so could cause the BMD to malfunction; in addition, Suffolk County BOE has indicated that it will revise the BMD instructions to better respond to connection issues that may occur;
2. Instruct poll workers to inform voters of their options to vote when a BMD breaks down;
3. Instruct poll workers regarding the requirement to attach a written explanation to affidavit ballots if utilized due to the voter checking in on a poll pad and then not being able to vote by machine; and
4. Instruct poll workers on proper procedures when an individual asks for assistance leaving the poll site.

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 18, 2022

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

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Deputy Counsel, New York State Board of Elections