

STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:

CATERINA BEHNSTEDT ,

Complainant,

HAVA Complaint No. 23-05
Determination

-v-

SUFFOLK 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 13, 2023, filed by Caterina Behnstedt, 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, Ms. Behnstedt went to vote on November 8, 2022 around 6:15am at Cayuga Elementary School and she asked to use the Ballot Marking Device (hereinafter “BMD”). She was approached by a poll worker who had helped her in the past and the poll worker told Ms. Behnstedt that she was unsure what to do because she was unavailable when the training on the BMD was given. The poll worker tried to convince Ms. Behnstedt to vote with the assistance of her husband which she declined. The poll worker then started a voting session on the BMD but forgot to give Ms. Behnstedt the controller. She informed the poll worker and received the controller and tried to print her ballot but the selections did not mark. The poll worker explained that they forgot an initialization step which they then tried but it was unsuccessful. The poll worker called the Suffolk County Board of Elections (hereinafter “Suffolk CBOE”) and a woman came to the poll site and confirmed that they used the wrong size paper. The woman from the Suffolk CBOE told Ms. Behnstedt that she could leave and she would

text her when the BMD was available. She received the text, returned to the poll site, and voted on the BMD. It took about 3 hours for Ms. Behnstedt to vote.

On February 8, 2023, the Suffolk CBOE responded to the Complaint. According to the response there were 2 coordinators that spoke to Ms. Behnstedt, Margaret and Christine. Both are experienced poll workers. Margaret had completed the BMD training and Christine had not. Margaret was responsible for opening the BMD but was unable to do so because it ran out of tape. When the BMD would not work she contacted the Suffolk CBOE and advised them of the issue. She followed proper protocol and advised Ms. Behnstedt that she could vote with assistance, return when the BMD was fixed, or wait at the poll site until it was fixed. Ms. Behnstedt left and said she would come back. There were instructional materials on the BMD at the poll site. After the BMD was fixed Margaret called Ms. Behnstedt to let her know and Ms. Behnstedt returned and voted on the BMD. The other coordinator, Christine, denies encouraging Ms. Behnstedt to vote with assistance. Ms. Behnstedt's recollection on the initialization step cannot be accurate because the BMD would not have acted in that manner due to it running out of tape. The Custodian was interviewed and confirmed that the BMD ran out of tape. The BMD was in excellent operating condition and had been tested. When the Suffolk CBOE became aware of the issue they immediately took corrective action. In addition, training and instructional materials have been updated to prevent BMDs from running out of tape and the Coordinators will receive hands on training this year.

A hearing was held on March 2, 2023.

During the hearing, Ms. Behnstedt generally reaffirmed the allegations in the complaint. Ms. Behnstedt also testified that it was difficult to secure transportation to the poll site since she had to schedule accessible transit in advance. Ms. Behnstedt also testified that the BMDs are separate from the other voting machines. In addition, Ms. Behnstedt testified that when the BMD malfunctioned she

was provided with the options of voting with assistance, staying at the poll site until the BMD was fixed, or returning to the poll site when the BMD was fixed.

Gail Lolis and Erin McTiernan appeared on behalf of the Suffolk CBOE and they generally reaffirmed their response. In addition, Suffolk CBOE testified that they received notice that there were issues with the BMD shortly after the polls opened and the Suffolk CBOE dispatched a custodian. While waiting for the custodian the poll worker continued to troubleshoot the BMD. Suffolk CBOE also testified that the BMDs use a different kind of tape than other voting systems and that this was the first election that this type of BMD was used at this poll site. In response to this issue Suffolk CBOE modified their checklists to make sure the poll sites have the proper tape for the new type of BMDs.

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 Caterina Behnstedt has standing to bring a Complaint.

Issues Raised by the Complainant

The Complainant, Caterina Behnstedt, alleges the following:

1. A poll worker tried to convince Ms. Behnstedt to vote with assistance of her husband when she asked to use the BMD;
2. A poll worker told Ms. Behnstedt that she was not trained to assist her to use the BMD; and
3. The BMD malfunctioned and the proper supplies to fix the machine were not at the poll site.

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

When the BMD malfunctioned, the supplies to fix it were not available at the poll site:

The BMD at the poll site malfunctioned and a new roll of tape needed to be inserted into the BMD in order to fix it. However, the poll site did not have the proper tape for the BMD. This was the first election that this type of BMD was utilized and it used a different kind of tape than the other voting machines at the poll site. In past elections the BMDs and other voting machines used the same type of tape. However, when Ms. Behnstedt went to vote the poll site only had tape for the other machines and not for the new type of BMD.

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. Review and update procedures and training materials related to the use of the new type of BMDs; and
2. Instruct poll workers on information related to the use of the new type of BMDs.

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 21, 2023

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

Aaron Suggs
Deputy Counsel, New York State Board of Elections