

TESTIMONY OF SUSAN LERNER, EXECUTIVE DIRECTOR, COMMON CAUSE/NY TO SENATE COMMITTEE ON ELECTIONS

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Thank you for the opportunity to testify on these significant, challenging and very enormous topics. In all honesty, it would take a voluminous report - or perhaps several - to fully explore all of the issues that are raised by the conduct of the 2020 and 2021 elections, as well as improving the voting process, election administration throughout the state and improving New York State's Election Law. In my testimony, I will concentrate on measures which can be implemented through statute or change in procedure and only briefly touch on matters that would require a constitutional amendment.

Needed Election Reforms Accomplished

I would first like to acknowledge the significant reforms and improvements to New York's Election Law that have been accomplished in a short three year period by this committee under Senator Myrie and the Senate Democratic Majority's leadership, as well as changes necessitated by the COVID-19 pandemic. Some of the changes necessitated by the pandemic were accomplished by the Boards of Elections with less than 2 months notice. Usually, changes in election law happen over extended periods of time. The wide scope of changes instituted placed enormous pressure on the Boards of Elections, particularly in June and November of 2020 and, in large part, they adequately handled the challenges. Changes to absentee procedures passed in special session and quickly implemented for the November 2020 election significantly helped the conduct of the November 2020 election. Nevertheless, significant weaknesses in election administration were revealed – particularly in the smooth operation of early voting and our newly expanded absentee voting.

Administrative Weaknesses Revealed

Because of the decentralized, bottom-up nature of election administration in our state, it is hit or miss whether any particular county's Board of Elections has the necessary expertise and resources necessary to implement the election reforms which New York's voters demand. Repeatedly, litigation, such as the lawsuit around the final count in Congressional District 22 for the November 2020 election or the lawsuit filed by Common Cause/NY against the NYC Board of Elections for its infamous purge of voters in 2016, has shown that some Boards do not have basic management procedures in place. To the extent that the State Board of Elections attempts to create some uniformity of administration through regulation, those regulations are not enforced. Even statutory requirements, such as the requirement that Boards must identify their early voting locations by a date certain, are simply ignored and there are no consequences for failing to comply. We attribute these problems to various factors. Lack of accountability is a major factor, which we will discuss in the next

section. The controlling role which politics plays in choosing Election Commissioners is another major contributing factor, as not even basic management skills are necessary criteria for selection or retention as a commissioner, much less familiarity with election administration. The fact that there are an even number of commissioners, split between Democrats and republicans is a further complicating factor, as the lawsuit filed in 2020 by 3 Democratic Election Commissioners against their own Boards to effect a desperately needed extension of early voting hours illustrates. Changing the bipartisan nature of the Boards would require a constitutional amendment. Nevertheless, there are statutory changes which could be affected to improve administration.

First, the statutorily required duplication of non-officer staff positions according to party affiliation should be eliminated. Art. II § 8 of the New York Constitution only requires that commissioners and officers of the board be bipartisan. All other positions should be professionalized, governed by civil service criteria, without bipartisan duplication of non-officer positions.

The appointment process of commissioners is governed by statute, not by constitutional requirement. It can be changed to set skill-based criteria, not simply party affiliation. The current appointment process has turned into a rubber stamp for political party nominees, which is unacceptable. Public hearings on qualifications should be required. Executive officers, such as County Executives and Mayors, should have veto power over commissioner appointments. Commissioners should have designated areas of responsibility, authorizing broad authority for professional staff over day-to-day and administrative operations. All management staff should serve for a set term, with the possibility of renewal after a public approval process. Finally, county chairs of political parties should be prohibited from serving on, or being employed by, Boards. It is the most obvious conflict of interest which offends the voting public.

The New York City Board presents unique challenges. Unlike every other Board, the NYC Commissioners do not run the day-to-day affairs of the Board. They are part-timers who come in weekly to make decisions. In my experience, few exhibit any curiosity about how elections are conducted in other jurisdictions or commonly adopted best practices. They do not attend professional association meetings, where they could become knowledgeable about changes in election law and administration best practices – not even the NYSECA conferences widely attended by commissioners from other Boards. They do not even deign to appear before either the City Council or this committee to explain their decisions and be held accountable for the results of those decisions., choosing instead to send management staff, who then point to the need for commissioners to make decisions in answers to questions. S6226(Krueger)/A5691A(Rozic) takes an interesting approach to adjusting some of the NYC BOE issues. The bill should be amended to require national searches for management positions. The final candidate can move to New York City, register to vote and accept the position.

Lack of management skills and familiarity with election law and administration is compounded by a lack of uniform training for commissioners and management staff. We strongly support S5800

(Comrie)/A4323(Walker), which has passed the Senate. That bill would set up a mandatory training curriculum for commissioners and management personnel and a uniform training schedule. If enacted, this bill has the potential to help set uniform standards for election administration throughout the state.

Accountability and Oversight Needed

N.Y. EL §1-102 should be amended to make clear that an important purpose of the state's election law is to serve the public and to run efficient elections that satisfy the public's requirements for safe, inclusive and secure elections. In other words, to clarify that New York's Election Law places the interest of the voters above any other concerns.

To an extraordinary degree, the Boards of Elections are not accountable to any government entity. Court cases interpreting N.Y. EL §§3-226 and 3-300 have given the board non-reviewable authority over hiring and firing of personnel and selection of voting equipment. In New York City, the BOE refuses to provide detailed information regarding its spending and ignores some city laws governing its conduct of city elections. It has refused to provide information required by the Mayor's Management Report, on the grounds that it is not a city agency. It engages in feuds over statutory interpretation with the NYS Board. In Westchester, case law was interpreted to require the County Legislature to float a \$6 million bond issue in the middle of the pandemic with huge reductions in county revenue. Expansive interpretation of those cases have made the various Boards, practically, unaccountable in any meaningful way. This situation is untenable and must be changed.

State Election Law should be changed to set up clear reporting and oversight authority governing various of the BOEs' functions. BOEs should be required, without exception, to provide detailed information, both budgetary details and performance metrics, to the jurisdiction that funds its operations. The misinterpretation of §3-226 must be corrected, giving the appropriate legislative body the ability to override, reject, or re-negotiate the BOE's equipment choices and major purchases through an open hearing process. Similarly, §3-300 must be amended to ensure that it is not used to justify complete unreviewable conduct by the BOEs.

The process of certifying election equipment in our state is outmoded and must be updated. The NYS BOE must be given greater discretion to reject equipment that, while it may pass technical tests, does not actually satisfy non-technical requirements, such as cost efficiency, security and reliability. We support S331 (Myrie)/A8849 (Paulin), as a good start, but the entire procedure should be overhauled, including requiring vendors to comply with the most recent federal standards. Additionally, we support correcting a problem created by our outmoded certification process and ban the future certification of hybrid voting machines by passing A1115 through the Assembly (it has passed the Senate as S309) and having it signed into law.

Election Law should be amended to provide penalties for failure to comply with reporting and other requirements. Failing to meet statutorily set deadlines and reporting requirements should result in fines to be paid by the commissioners personally.¹ The ability of the NYS Board to interpret and enforce its regulations must be delineated and should pre-empt any contrary interpretations or policies of any local Boards. Standardization and uniformity of policies statewide and enforcement of the same. Is essential for better election administration.

Improving the Voting Experience

Knowledgeable and competent poll workers are an essential component of a successful election day. Just as the Election Law now requires that every Board appoint a registration activities coordinator, the law should be amended to require Boards in New York City and larger jurisdictions to appoint a volunteer coordinator and, as appropriate, supporting staff. That person's responsibilities will be to coordinate with local and state government and the NYS Board, as well as local, state and national civic organizations, to creatively recruit a sufficient number of poll workers for its jurisdiction and to establish a system for assigning poll workers to polling places no later than 7 days before the assignment is to start, including a system for filling vacancies and providing additional poll workers to busy polling places as needed. Experience in 2020, where, for the first time many BOEs, including the NYC BOE, had sufficient poll workers, shows that creative efforts to recruit poll workers pay off. Volunteer recruitment and management is a distinct skill and the BOE should be required to develop appropriate volunteer management programs. Too many poll workers do not return because the volunteer program is badly managed in the larger jurisdictions.

S5800, the Comrie bill previously discussed, provides for the development of a poll worker curriculum, A uniform poll worker curriculum, with required hands-on exercises with the relevant voting equipment is essential for improving the voter experience and retaining skilled poll workers.

We strongly recommend that national election administration experts be consulted by the larger jurisdictions to improve the processing of absentee ballots. The recent changes will assist somewhat, but procedures need to be streamlined in light of the recent changes.

Finally, voters need more information about elections, when they are held, where their polling place is, whether it has moved and who and what is on the ballot. An annual mailing is simply not sufficient. New York can and should do better.

Conclusion

There is much work to be done to bring New York's elections up to a 21st century standard. We look forward to continuing this discussion with this committee, other members of the Legislature and Board of Elections Commissioners.

¹ Fines could be set at a level to provide deterrence, say \$500 or \$1000, but not so high as to be unnecessarily punitive.