



OFFICE OF THE UNDER SECRETARY OF DEFENSE

4000 DEFENSE PENTAGON
WASHINGTON, DC 20301-4000

AUG 27 2010

PERSONNEL AND
READINESS

Ms. Gail Fenumiai
Director, Division of Elections
Office of the Lieutenant Governor
State of Alaska
P.O. Box 110017
Juneau, AK 99811-0017

Dear Ms. Fenumiai:

The Department of Defense received from the State of Alaska a timely application dated May 5, 2010, copy attached, for an undue hardship waiver under Section 102(g) of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), as amended by the Military and Overseas Voter Empowerment Act (MOVE Act), for the November 2, 2010 Federal general election.

Under delegated authority from the Secretary of Defense as the Presidential Designee for UOCAVA, I have reviewed the State's application, consulted with the representative of the Attorney General of the United States, and find it does not meet the requirements for a one time undue hardship waiver under Section 102(g)(2) of UOCAVA. Accordingly, I deny the State of Alaska's request to waive the application of Section 102(a)(8)(A) of UOCAVA for the November 2, 2010 Federal general election.

In rendering this decision, I carefully considered the assertions made by the State in support of its waiver request, which are addressed in detail in the Memorandum attached to this letter. Based on those assertions and the attached rationale, I have determined the following: 1) the October 28, 2009 passage of the MOVE Act and Alaska's primary election scheduled for August 24, 2010 created an undue hardship that prohibits the State from complying with Section 102(a)(8)(A) of UOCAVA; 2) the State's proposed comprehensive plan for this election does *not* provide sufficient time for UOCAVA voters to vote and have their ballots counted as a substitute this election for the new Federal requirement that absentee ballots be sent to all UOCAVA voters at least forty-five days prior to Election Day.

Sincerely,

Lynn C. Simpson
Director, Human Capital and Resource
Management
Performing the Duties of the Principal
Deputy Under Secretary of Defense
(Personnel and Readiness)

Enclosures:
As stated



Memorandum

Denial of the State of Alaska's MOVE Act Waiver Request under Section 102(g)(2) of UOCAVA for the November 2, 2010 Federal General Election

The Federal Voting Assistance Program (FVAP) of the Department of Defense received the application of the State of Alaska (the State), dated May 5, 2010 for an undue hardship waiver for the November 2, 2010 Federal general election, as provided by the amendments to Section 102(g) of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)¹ enacted by the Military and Overseas Voter Empowerment Act (MOVE Act).² Denial of the waiver request the assertions made by the State in support of its waiver request, including the official waiver request letter and subsequent supplementary information provided, and the explanation of its written request in the conference call of July 22, 2010 among Gail Fenumiai, Director, Division of Elections, Office of the Lieutenant Governor of Alaska; Sarah Felix, Assistant Attorney General, Alaska Department of Law; and officials from FVAP and the United States Department of Justice's Voting Section (DOJ/Voting).

The Presidential Designee for UOCAVA³ has reviewed Alaska's application, consulted with the representative of the Attorney General of the United States, finds the State's application does not meet the requirements for a one-time undue hardship waiver under Section 102(g)(2) of UOCAVA,⁴ and denies Alaska's waiver request from the application of Section 102(a)(8)(A) of UOCAVA for the November 2, 2010 Federal general election. For purposes of this Memorandum, the term "Presidential Designee" includes those officials exercising authority delegated by the Presidential Designee.

I. Background and Initial Findings

UOCAVA authorizes the Presidential Designee to grant a waiver only to those States whose reason for needing a waiver fits one of three situations:

1. The State's primary election date prohibits the State from complying with Section 102(a)(8)(A);
2. The State has suffered a delay in generating ballots due to a legal contest; or
3. The State Constitution prohibits the State from complying with such Section.⁵

It is within the Presidential Designee's authority to consider Alaska's waiver application because Alaska states that its primary election scheduled for August 24, 2010 prohibits the State from complying with Section 102(a)(8)(A) of UOCAVA.⁶

¹ 42 U.S.C. § 1973ff, *et seq.*

² Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009).

³ The Secretary of Defense was designated the Presidential Designee by Executive Order 12642 (June 8, 1988), 53 CFR § 21975. The Secretary of Defense has delegated this authority to the Under Secretary of Defense (Personnel & Readiness) through DOD Directive 1004.04.

⁴ 42 U.S.C. § 1973ff-1(g)(2).

⁵ 42 U.S.C. § 1973ff-1(g)(2)(B).

Under UOCAVA, if a State determines that it is unable to comply with the requirement to transmit absentee ballots at least 45 days before a federal election (45 day prior requirement) due to one of the three situations referenced above resulting in an undue hardship, the Chief State Election Official shall request a waiver from the Presidential Designee pursuant to the Act. The Presidential Designee shall approve such a request if the Presidential Designee determines that:

1. One or more of the three referenced situations creates an undue hardship for the State; and
2. The State's comprehensive plan presented in support of its request provides absent uniformed services and overseas voters (UOCAVA voters) sufficient time to receive and submit absentee ballots they have requested in time to be counted in the election for Federal office.

The Presidential Designee's findings for each of these requirements are addressed separately below.

The comprehensive plan proposed by Alaska addressed the following requirements set forth in the MOVE Act:

- (i) the steps the State will undertake to ensure that UOCAVA voters have time to receive, mark, and submit their ballots in time to have those ballots counted in the election;
- (ii) why the plan provides UOCAVA voters sufficient time to vote as a substitute for the requirements of the MOVE Act; and
- (iii) the underlying factual information which explains how the plan provides such sufficient time to vote as a substitute for such requirements.⁷

Further, as required by UOCAVA,⁸ Alaska's application includes recognition that the purpose of the Act's 45 day prior requirement is to allow UOCAVA voters enough time to vote and have that vote counted in an election for Federal office.

In determining whether the State's comprehensive plan provides sufficient time to vote as a substitute for the requirement to transmit ballots 45 days before the election, the Presidential Designee considered that the minimum absentee ballot requirements under the new law require ballots to be transmitted 45 days prior to Election Day, using the voter's choice of either postal mail or electronic transmission method. Although facsimile transmission is compliant with the MOVE Act's electronic transmission requirements, it is the least desirable method of electronic transmission, given that it has the least availability among overseas active duty military voters, Reserve component military voters, and overseas DOD civilian employees.⁹

⁶ See 42 U.S.C. § 1973ff-1(g)(2)(B)(i) and 42 U.S.C. § 1973ff-1(a)(8)(A).

⁷ 42 U.S.C. § 1973ff-1(g)(1)(D).

⁸ 42 U.S.C. § 1973ff-1(g)(1)(A).

⁹ Defense Manpower Data Center, "2006 Survey Results on Voting Assistance Among Military Members and DoD Civilian Employees by Location, Age, and Paygrade," Survey Note No. 2007-011, at 3, July 9, 2007, at <http://www.fvap.gov/resources/media/ivas06dod.pdf>.

Each State's comprehensive plan was evaluated against several criteria, the analysis as to whether a State's comprehensive plan provides sufficient time was examined by considering the totality of circumstances presented in the plan. Among the issues considered was the total time a voter has to receive, mark and return his or her ballot and have it counted (including the number of days before and after Election Day). Also among the issues considered was the cumulative number and accessibility of alternative methods of ballot transmission, and, if applicable, ballot return, as additional alternative methods provide more UOCAVA voters with the likelihood they will have sufficient time to receive, vote, and return their ballots and have them counted. Finally, each State's comprehensive plan was reviewed for any additional efforts made by the State, whether put in place in advance of or subsequent to any changes in the law, that improved the likelihood a UOCAVA voter would be able to receive, vote and return his or her ballot and have it count.

II. The State Has Shown Undue Hardship

Alaska's application, as required by the statute, explained why its chief State election official believes its primary election date and associated activities required to generate a general election ballot prohibit it from transmitting to UOCAVA voters an absentee ballot by the 45th day prior to the November 2, 2010 Federal general election, thereby creating an undue hardship. Accordingly, the Presidential Designee finds that given the timing of the passage of the MOVE Act on October 28, 2009 and the issues and challenges cited by the State in its waiver application, Alaska's scheduled primary creates an undue hardship as contemplated by the MOVE Act.

III. The State's Comprehensive Plan Provides Insufficient Time for UOCAVA Voters To Vote and Have That Vote Counted

The Presidential Designee concludes that Alaska did not establish that its proposed comprehensive plan provides UOCAVA voters "sufficient time to receive absentee ballots they have requested and submit marked absentee ballots to the appropriate State election official in time to have that ballot counted" in the November 2, 2010 Federal general election.¹⁰ In reaching this determination, the Presidential Designee examined the totality of circumstances presented in the plan to determine whether it provided sufficient time to vote as a substitute for UOCAVA's requirement that ballots be transmitted at least 45 days prior to Election Day. Among the issues considered were the time voters have to receive, mark and return their ballots and have them counted (both before and after Election Day); the cumulative number of alternative methods of ballot transmission and return; and the accessibility of the alternative ballot transmission methods presented in the comprehensive plan.

Under its submitted comprehensive plan, Alaska will commit to transmit absentee ballots by postal mail no later than October 12, 2010 (21 days before the election). While Alaska Statute requires that ballots be available for distribution 25 days prior to the election (October 8, 2010), and that the ballots be transmitted as soon as they are available for distribution, Alaska's practice is to begin mailing ballots approximately 21 days before the election. Alaska also provides UOCAVA voters the opportunity to receive ballots by fax, however, the statute is silent as to the

¹⁰ 42 U.S.C. § 1973ff-1(g)(2)(A).

State's transmittal of the absentee ballot by fax. The State failed to commit to a specific date by which all requests received prior to the 45th day for facsimile transmission would be transmitted in response to a direct question. The Department assumes, therefore, this will also be October 12, 2010. The State will allow UOCAVA absentee ballots mailed from overseas addresses to be received by local election jurisdictions until November 17, 2010, 15 days after the general Federal election. The State will allow UOCAVA absentee ballots mailed from domestic addresses to be received by local election jurisdictions until November 12, 2010, ten days after the general Federal election. Thus, overseas UOCAVA voters who receive and return their ballots by postal mail will have a total of 36 days to receive, mark and return their ballots.

The Presidential Designee considered the ballot transit time provided in conjunction with the additional methods other than postal mail available to Alaska's UOCAVA voters to receive and return ballots. Alaska's comprehensive plan includes the provision of a Special Advance Ballot (which is a State write-in absentee ballot), 60 days before the general election, accompanied by a list of *primary* election candidates who may or may not be candidates in the general election. This is followed by transmission of the official ballot 21 days prior to the election by postal mail. The Presidential Designee determined, however, that in the totality of circumstances of Alaska's comprehensive plan, this Special Advance Ballot, which will not be accompanied by a list or other information supplied simultaneously identifying the Federal general election candidates, does not provide UOCAVA voters the voting opportunity sufficiently comparable to that which would be available under the 45-day prior transmission requirement of UOCAVA.

As noted, Alaska also provides the option of facsimile transmission of absentee ballots to UOCAVA voters, as well as allowing voters to return their voted ballots by facsimile. While these electronic options will increase the opportunity for some UOCAVA voters to receive and cast timely ballots, the Presidential Designee cannot conclude that Alaska's plan provides sufficient transit time for all UOCAVA voters to receive, mark and return their ballots in time to be counted.

IV. Conclusion

Given the foregoing and considering the totality of the circumstances presented, the waiver request of the State of Alaska is denied. The Presidential Designee has determined the State's primary election date prohibits the State from complying with Section 102(a)(8)(A) of UOCAVA. The Presidential Designee has further determined, however, that the comprehensive plan presented by Alaska does not provide UOCAVA voters sufficient time to receive absentee ballots they have requested and to submit marked ballots to the appropriate election official in time to be counted in the November 2, 2010 Federal general election, and thus is an inadequate substitute for UOCAVA's 45 day prior requirement.

Any questions or concerns, please contact Paddy McGuire, FVAP Deputy Director for Election Official Assistance, at 703-588-1584, or Paddy.McGuire@fvap.gov.