



OFFICE OF THE UNDER SECRETARY OF DEFENSE

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AUG 27 2010

PERSONNEL AND
READINESS

The Honorable Bernie Buescher
Secretary of State of Colorado
Department of State
1700 Broadway, Suite 200
Denver, CO 80290

Dear Mr. Buescher:

The Department of Defense received from the State of Colorado a timely application dated August 3, 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 Colorado'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 explained 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 Colorado's primary election of August 10, 2010 does *not* create 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 State of Colorado'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 Colorado (the State), dated August 3, 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 As described in this Memorandum, the denial of the waiver request followed careful consideration of 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 August 5, 2010, between Mr. Judd Choate, Director of Elections, Mr. Wayne Munster, Deputy Director of Elections, Mr. Rich Coolidge, Public Information Officer, Mrs. Hilary Rudy, Sr. Legislative and Policy Analyst; and officials from FVAP and the United States Department of Justice's Voting Section (DOJ/Voting).

The Presidential Designee for UOCAVA,³ has reviewed Colorado'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 Colorado'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 a waiver corresponds with one of the following 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

¹ 42 U.S.C. § 1973ff, *et seq.* UOCAVA's waiver provision is found at 42 U.S.C. § 1973ff-1(g).

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).

It is within the Presidential Designee's authority to consider Colorado's waiver application because Colorado states that its primary election scheduled for August 10, 2010 prohibits the State from complying with Section 102(a)(8)(A) of UOCAVA.⁶

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 general 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 Colorado 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 Colorado'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 their votes 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

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).

transmission, given that it is the least available among overseas active duty military voters, Reserve component military voters, and overseas DOD civilian employees.⁹

Each State's comprehensive plan was evaluated against several criteria; and 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 the 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 the ballot and have it count.

II. The State Has Not Shown Undue Hardship

In its application, and as required by the statute, Colorado explained why its chief State election official determined that its primary election date and associated activities required to generate a Federal general election ballot prohibit it from transmitting to UOCAVA voters an absentee ballot by the 45th day prior to the November 2, 2010 election, thereby creating an undue hardship. However, Colorado did not convincingly present a case that local election officials statewide could not make absentee ballots available to voters within the thirty-nine (39) day period between the primary date (August 10, 2010) and the forty-five day ballot-transmission deadline established by UOCAVA. Accordingly, the Presidential Designee finds Colorado has not established that the State's primary election date prohibits compliance with UOCAVA's requirement to transmit ballots at least 45 days prior to the November 2, 2010 Federal general election.

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

In addition to its failure to establish an undue hardship, the Presidential Designee concludes that Colorado 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

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>.

¹⁰ 42 U.S.C. § 1973ff-1(g)(2)(A).

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, Colorado will transmit absentee ballots to UOCAVA voters by October 1, 2010, which is 32 days before the election. Military personnel residing outside the United States, and their spouses and dependents absent from the United States, will have eight (8) days after Election Day for ballots to be received and counted, so long as the ballot envelope is postmarked by Election Day. Other UOCAVA voters must have their ballots delivered to their local elections office by Election Day. The Presidential Designee considered the ballot transit time provided in conjunction with the additional methods other than postal mail available to Colorado's UOCAVA voters to receive and return their ballots, such as facsimile and email transmission of the ballot to the voter at the voter's request. Military personnel residing outside the United States and their spouses and dependents absent from the United States may receive and return their ballots by postal mail, fax or email; all other UOCAVA voters are limited to receiving and returning ballots by postal mail or fax. Colorado also allows voters in six (6) counties to use the FVAP-funded Electronic Voting Support Wizard, an online ballot delivery and ballot marking system. While these electronic options will increase the opportunity for some UOCAVA voters to receive and cast timely ballots, we cannot conclude that Colorado'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 Colorado is denied. The Presidential Designee has determined Colorado has not established an undue hardship on grounds that the State's primary election date prohibits compliance with UOCAVA's requirement to transmit ballots at least 45 days prior to the November 2, 2010. The Presidential Designee has further determined that the comprehensive plan presented by Colorado 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 election, and thus is an inadequate substitute for UOCAVA's 45 day prior requirement.

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