



OFFICE OF THE UNDER SECRETARY OF DEFENSE

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WASHINGTON, DC 20301-4000

AUG 27, 2010

PERSONNEL AND  
READINESS

Mr. Rokey W. Suleman, II  
Executive Director  
District of Columbia Board of Elections and Ethics  
441 4<sup>th</sup> St., NW, Suite 250  
Washington, DC 20001-2745

Dear Mr. Suleman:

The Department of Defense received from the District of Columbia a timely application dated July 30, 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 District'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 District of Columbia'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 District 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 the District's primary election scheduled for September 14, 2010 created an undue hardship that prohibits the District from complying with Section 102(a)(8)(A) of UOCAVA; 2) the District'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 District of Columbia'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 an application from the District of Columbia (the District), dated July 30, 2010, for an undue hardship waiver for the November 2, 2010 general election for Federal office, as provided by the amendments to Section 102(g) of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA),<sup>1</sup> enacted by the Military and Overseas Voter Empowerment Act (MOVE Act).<sup>2</sup> Denial of the waiver request and this Memorandum are predicated on the assertions made by the District in support of its waiver request, including the official waiver request letter and subsequent supplementary information provided, and the explanation of its written request during a conference call which took place on August 4, 2010 and included: Rokey W. Suleman II, Executive Director, DC Board of Elections & Ethics; Terri Stroud, Senior Staff Attorney, DC Board of Elections & Ethics; Paul Stenbjorn, Chief Technology Officer, DC Board of Elections & Ethics; and officials from FVAP and the United States Department of Justice's Voting Section (DOJ/Voting).

The Presidential Designee for UOCAVA<sup>3</sup> has reviewed the District's application, consulted with the representative of the Attorney General, and finds the District's application does not meet the requirements for a one-time undue hardship waiver under Section 102(g)(2) of UOCAVA,<sup>4</sup> and denies the District'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 requesting a waiver fits one of the three 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.<sup>5</sup>

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<sup>1</sup> 42 U.S.C. § 1973ff, *et seq.*

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

<sup>3</sup> 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.

<sup>4</sup> 42 U.S.C. § 1973ff-1(g)(2).

<sup>5</sup> 42 U.S.C. § 1973ff-1(g)(2)(B).

It is within the Presidential Designee's authority to consider the District's waiver application because the District states that its primary election scheduled for September 14, 2010 prohibits the District from complying with Section 102(a)(8)(A) of UOCAVA.<sup>6</sup>

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 that results 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 voters 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 the District addressed the following requirements set forth in the MOVE Act:

- (i) the steps the District 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.<sup>7</sup>

Further, as required by UOCAVA,<sup>8</sup> the District'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 District'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. Although facsimile transmission is compliant with the MOVE Act's electronic transmission requirements, it is the least desirable method of electronic

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

<sup>7</sup> 42 U.S.C. § 1973ff-1(g)(1)(D).

<sup>8</sup> 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.<sup>9</sup>

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 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 that a UOCAVA voter would be able to receive, vote and return the ballot and have it counted.

## **II. The District Has Shown Undue Hardship**

The District of Columbia's application, as required by the statute, explained why its chief State election official determined that its primary election date and associated activities required the District to generate a general election ballot which would prohibit it from transmitting to UOCAVA voters an absentee ballot by the 45<sup>th</sup> day prior to the November 2, 2010 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 District in its waiver application, the District's scheduled primary creates an undue hardship as contemplated by the MOVE Act.

## **III. The District of Columbia's Comprehensive Plan Provides Insufficient Time for UOCAVA Voters To Vote and Have That Vote Counted**

The Presidential Designee concludes that the District of Columbia 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.<sup>10</sup> 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.

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<sup>9</sup> 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>.

<sup>10</sup> 42 U.S.C. § 1973ff-1(g)(2)(A).

Under its submitted comprehensive plan, the District of Columbia will require absentee ballots to be transmitted electronically to UOCAVA voters by October 4, 2010, which is 29 days before the election. The District will require absentee ballots to be transmitted by postal mail no later than October 13, 2010, which is 20 days before the Federal general election. The District will allow absentee ballots returned by postal mail to be received and counted until November 12, 2010, 10 days after Election Day, but ballots returned electronically must be received by Election Day. The comprehensive plan proposed by the District provides three alternative transmission methods for all UOCAVA voters in addition to postal mail and will make ballots available by any of the alternative methods the voter requests: email, facsimile or electronic delivery using the District's new online ballot delivery system. Voters may also return their ballot by each of these methods. The District has partnered with the Open Source Digital Voting Foundation to implement a "Digital Vote by Mail" system (DVBM). The District states the DVBM system will allow voters to return private voted ballots electronically. This last option is a significant technological advance in ballot availability. While these electronic options will increase the opportunity for some UOCAVA voters to receive and cast timely ballots, the Presidential Designee cannot conclude the District of Columbia's plan provides sufficient opportunity for UOCAVA voters to receive, mark and return their ballot by Election Day.

#### **IV. Conclusion**

Given the foregoing and considering the totality of the circumstances presented, the waiver request of the District of Columbia is denied. The Presidential Designee has determined the District'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 the District of Columbia 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](mailto:Paddy.McGuire@fvap.gov).