



**STATE OF HAWAII
OFFICE OF ELECTIONS**

SCOTT T. NAGO
CHIEF ELECTION OFFICER

July 27, 2010

Director Robert Carey
Federal Voting Assistance Program
Department of Defense

RE: MOVE ACT HARDSHIP WAIVER APPLICATION

Dear Director Carey:

On July 21, 2010, my office had an extended conversation with you, your staff, and the Department of Justice regarding our application.

As noted in our conversation, we clarified that our administrative rules provides that Uniformed and Overseas Citizens Voting Act (UOCAVA) voters are able to request ballots by email or mail, as opposed to the local election official dictating how the material is transmitted.

As we explained, it is physically impossible to mail, fax, or email ballots exactly 45 days prior to the General Election. Specifically, there are exactly 45 days between our Primary Election on September 18, 2010 (Saturday) and the General Election on November 2, 2010 (Tuesday).

Even if it was possible, which it is not, to determine election results and print out ballots after the close of polls at 6:00 p.m. on September 18, 2010 (Saturday), it is not our understanding that the United States Postal Service is open on Saturday nights or the following Sunday. As such, the earliest any ballot could be mailed out would be September 20, 2010 (Monday), which would be 43 days prior to the General Election.

When we asked hypothetically, if we could somehow mail out ballots 44, 43, or 42 days prior to the General Election, the answer appeared to have been that it would not be acceptable as 45 days would still be required. Further, even if we were to email ballots 44, 43, or 42 days prior to the General Election, essentially giving the overseas voter over 40 days to return their ballot, the answer still appears to be that is not acceptable, as 45 days is required.

Director Robert Carey
July 27, 2010
Page 2

In the end, it appears that it is your position that even if we were to mail out or email ballots 44, 43, or 42 days in advance of the General Election, this would only be acceptable if the Office of Elections were to set a deadline after the election for the receipt of ballots, which would result in 45 days from the issuance of the ballots, despite that fact that our law is explicit that all ballots must be received by the close of polls on election day. HRS § 15-9.

We repeated this state law several times, and it appeared that there was a desire on your part for the Office of Elections to find some way to not follow it. As we indicated, as a state government official, the Chief Election Officer must operate from the premise that all state laws he operates under are legal and constitutional barring a decision from a court of competent jurisdiction otherwise. We were even asked if we would agree to a consent decree to receive ballots late. Such a request is premature, as we expect first a determination on our waiver application.

As explained in our previous correspondence, we sought to resolve our application in advance of our most recent legislative session. In respecting our state sovereignty, if you had told us then that you believed we were required to change our state law regarding the deadline for the receipt of ballots, or any other state law, we could have submitted the issue to our legislature to consider and resolve.

Instead, you are now essentially placing responsibility on a mere government official to essentially make decisions which are traditionally within the province of the legislative branch to make.

Finally, we find that this whole experience is inconsistent with how we and other states understood we would be treated under this law. Below is the text of the approval of the waiver request process.

(2) Approval of waiver request - After consulting with the Attorney General, the Presidential designee shall approve a waiver request under paragraph (1) if the Presidential designee determines each of the following requirements are met:

(A) The comprehensive plan under subparagraph (D) of such paragraph provides absent uniformed services voters and overseas 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 election for Federal office.

(B) One or more of the following issues creates an undue hardship for the State:

(i) The State's primary election date prohibits the State from complying with subsection (a)(8)(A).

(ii) The State has suffered a delay in generating ballots due to a legal contest.

(iii) The State Constitution prohibits the State from complying with such subsection.

42 USC § 1973ff-1(g)(2).

As indicated in 42USC § 1973ff-1(g)(2)(B)(i), an automatic undue hardship exists when “[t]he State's primary election date prohibits the State from complying with subsection (a)(8)(A).” There is no dispute, given that our Primary Election and General Election are exactly 45 days apart, we cannot comply with the mailing of ballots 45 days in advance of the General Election.

With this in mind, we considered logically that the focus of our application would be on the “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 election for Federal office” aspect of the waiver approval process. 42 USC § 1973ff-1(g)(2)(A).

The question of what constitutes “sufficient time” we consider to be a question of fact, which as recently as 2009 has been reviewed been litigated and addressed by the federal judicial system. Our applications cites a variety of cases including United States of America v. Jean Cunningham, et al., Civil Action Number 3:08CV709 (October 15, 2009).

In that case, the State of Virginia in its Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, and Reply Memorandum in Support of Defendant's Motion for Summary Judgment, interpreted the federal government's factual statements regarding ballot transit time as follows:

Intervenor's Facts

Not only do the Intervenor's facts not support its argument, the self-contradictory nature of the Intervenor's position is evident from the disparate time estimates required for absentee ballot-mailing as proffered by various federal employees.

1. Teddie Dyson. Mr. Dyson is a U. S. Postal Service employee. See Intervenor's Exhibit I. Mr. Dyson averred that "Standard Transit Times" for locations vary as follows:

7-9 days (Europe)

7-9 days (Central America/South America/Carribbean)

7-13 days (Iraq)

7-13 days (Japan, Korea, Pacific Islands, Far East)

35 days (for "remote, austere" locations, which are not identified).

Mr. Dyson also states that "Transit times will vary." *Id.* The Intervenor makes the claim that these numbers "average" to 30 days round trip. See Intervenor's Memorandum, p. 5 (emphasis supplied). The Intervenor omitted the arithmetical basis for this assertion, which in any event raises the question why a State should have to obtain these transit times to begin with, and then perform an averaging process in order to discern its statutory obligations under UOCAVA.

2. William H. Moser. Mr. Moser works for the State Department. See Intervenor's Exhibit J. His Department operates only the Diplomatic Pouch Service and Diplomatic Post Office service, and "The Department of State is unable to comment on mail transit times for balloting materials sent by other methods or mail transit times for balloting materials sent to uniformed services voters." For voters under "Chief of Mission authority" (of no relevance to the case at bar), he estimates that "sending and receiving an absentee ballot using the diplomatic pouch *may take on average* 30 days." *Id.* (emphasis supplied). However, sometimes pouch service may take "as much as 60 days," except for DPO mail which takes "an estimated 20 days round-trip." *Id.*

3. Robert H. Carey, Jr. Mr. Carey works for the Defense Department in the Federal Voting Assistance Program. He avers that "it is necessary to allow at least 30 days for the round trip from the dispatch center in the United States to the individual located overseas and back to the dispatch center." He adds that the U. S. Postal Service "also indicates that 30 days is a reasonable benchmark for round-trip transit time for international mail." *Id.* However, he goes on to say that "FVAP has recommended that

states allow, as an ideal, 45 days for round trip mailing time when sending absentee ballots to overseas voters.”

Thus, not only does UOCAVA lack a specific deadline for States to mail absentee ballots to UOCAVA voters, the Intervenor’s three witnesses proffer different estimates of the appropriate time period necessary. In addition, and tellingly, even those witnesses are internally inconsistent. Mr. Carey, for example, refers to a 30 day period as (i) “necessary” and (ii) “a reasonable benchmark”, yet refers to a 45 day period as “ideal.” The Intervenor does not explain how States are supposed to infer binding obligations from these remarks.

Memorandum at pages 3-5 (September 1, 2009)

Ultimately, the court after reviewing various other legal decisions and the facts presented to it ruled that

[w]ith very few exceptions, a UOCAVA voter can reasonably expect to receive, execute, and returned an absentee ballot in time for it to be counted as validly-cast if it is originally mailed to him thirty days before an election. This deadline is not arbitrary as Defendants suggest, but is instead a calculated and reasonable deadline based on undisputed evidence before the Court.

Memorandum Order at page 13 (October 15, 2009).

We do not assume any material facts regarding the postal system have changed since that time and that your declarations will be similar. As such, we believe as a question of fact, a court would find that 30 days is in fact sufficient time, even though we plan to mail out ballots at least 35 days prior to the election.

In our application, we noted that we had updated our administrative rules to permit ballots to be emailed to voters, in addition to being faxed. Essentially, by allowing the electronic transmission of ballots to voters, no later than 35 days prior to the General Election, the voter has essentially 35 days to return the ballot. This is more than “sufficient time” for one way ballot transit and as we noted it is “sufficient time” for roundtrip ballot transit.

At our meeting, we expected to have a good discussion regarding the question of fact as to whether UOCAVA voters have a “sufficient time” to receive and return ballots under our proposal. Instead, it appeared that it was unilaterally decided only 45 days was “sufficient time” for ballot transit time.

Two simple questions arise from our meeting with you. First, why even have an involved waiver application process? Second, why are you still developing your guidance in consultation with the DOJ?

Specifically, it appears you could have simply told all states that if you don't mail out ballots at least 45 days prior to the General Election, then you can only get a waiver if you extend the deadline for the receipt of ballots for the General Election to a specific date after the election, so as to guarantee 45 days of ballot transit time.

It is our hope that our initial impression is incorrect and that your office is in fact seriously considering our application and the question of whether our waiver application provides "sufficient time" for UOCAVA voters to vote.

With this in mind, we provide the following information from the 2008 General Election, which reflects that only a small percentage of returned ballots from UOCAVA voters were returned late and that was with 35 days of ballot transit time, as opposed to our current application which incorporates electronic transmission of ballots to voters.

COUNTY	NO. OF OVERSEAS REQUESTS	NO. RETURNED COUNTED	OVERALL NO. RETURNED AFTER DEADLINE AND NOT COUNTED
County of Hawaii	78	61	7
City and County of Honolulu	3446	2325	87
County of Kauai	57	Not Tracked	Not Tracked
County of Maui	219	129	17
Grand Total	3800	2515	111

As reflected in the table, the County of Kauai does not track the amount of ballots returned. In addition, these numbers do not differentiate between UOCAVA voters who submitted timely requests 35 days in advance of the election as opposed to those who could have submitted Federal Postcard Applications (FPCAs) all the way up to 7 days prior to the election, which is the latest that the counties by state law must mail out ballots in response to absentee ballot applications by registered voters. HRS § 15-4. As such, to the extent UOCAVA voters sent in FPCAs less than 35 days prior to the election, those voters essentially self-designated a shorter ballot transit time.

With this in mind, we were able on short notice to get the relevant information from the City and County of Honolulu as to when late ballots were originally requested. Specifically, the City and County of Honolulu was able to review the late ballots and

check the postmark date for mailing from the State of Hawaii. All ballots that were mailed out, were mailed out within a day of an FPCA being received by the City and County of Honolulu.

Date of Mailing	Days before November 4, 2008 General Election	Amount of Ballots Received after General Election
9/30/08	35	32
10/1 – 10/4	31-34	12
10/5 – 10/11	24-30	8
10/12 – 10/18	17-23	15
10/19 - 10/25	10-16	10
10/26 - 10/31	4-9	7
Unknown (postmark could not be read)	N/A	3

These numbers reflect that only 32 of the ballots mailed out 35 days before the General Election were received late. As to those 32 ballots, we do not know how long the voter had the ballot in his or her possession before deciding to return the ballot. The remaining 45 were received late, due in part to voters submitting their FPCA requests 34 days or less before the election. Focusing on our current practice of mailing ballots out 35 days in advance, the following can be said: (1) 2325 ballots were returned on time, (2) 32 ballots mailed out 35 days in advance were returned late, (3) adding 2325 plus 32 ballots equals 2357, and (4) the 32 ballots out of 2357 returned ballots equals a late return rate of 1.36%.

As previously noted, “[w]ith very few exceptions, a UOCAVA voter can reasonably expect to receive, execute, and returned an absentee ballot in time for it to be counted as validly-cast if it is originally mailed to him thirty days before an election. This deadline is not arbitrary as Defendants suggest, but is instead a calculated and reasonable deadline based on undisputed evidence before the Court.” Memorandum Order at page 13 (October 15, 2009). We believe our utilization of a 35 ballot transit time is reasonable, especially as supplemented through the present use of email and fax.

Further, it should be noted you asked what the present amount of FPCA requests are, given the removal in the law of the requirement that FPCA requests be considered valid for two election cycles. Presently, the amount of FPCA requests for the upcoming election cycle are relatively small. The County of Maui has three requests. Of those requests two request ballots by mail and the third request checked off the box for email and mail. For the County of Hawaii, it has seven FPCAs. Two indicate email, three indicate mail, and two do not indicate a preference. The County of Kauai has two FPCA requests. It did not indicate if the manner in which voters requested their ballots to be

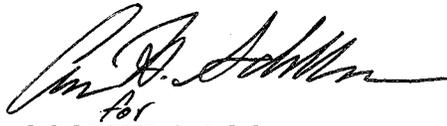
Director Robert Carey
July 27, 2010
Page 8

delivered. As for the City and County of Honolulu, it has not yet entered its FPCA requests into its computer system and as such does not have that information presently available. However, it is quite clear that the overall amount of voters who will fill out FPCAs for our upcoming elections will be relatively small given the change in the law regarding treating FPCA requests as being good for two election cycles.

Finally, given the above noted numbers reflect a relatively low percentage of late ballots, and as we noted the late return of ballots is due, in part, to voters requesting ballots as late as seven days before an election, we would like specifics as to what was meant by your following statement and what facts support it: "The fact of the matter is, Hawaii has had one of the worst records in terms of military and overseas voter success." Military voting law could affect Hawaii primary, Navy Times, March 15, 2010. Only by having this critical information can we both be on the same page as to how to move forward.

Please feel free to contact me at [REDACTED] if you have any questions.

Sincerely,



SCOTT T. NAGO
Chief Election Officer