



OFFICE OF THE UNDER SECRETARY OF DEFENSE

4000 DEFENSE PENTAGON
WASHINGTON, DC 20301-4000

AUG 27 2010

PERSONNEL AND
READINESS

The Honorable William Galvin
Secretary of the Commonwealth of Massachusetts
State House, Room 337
Boston, MA 02133

Dear Mr. Galvin:

The Department of Defense received from the Commonwealth of Massachusetts a timely application dated August 2, 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 Commonwealth's application, consulted with the representative of the Attorney General of the United States, and find it meets the requirements for a one-time undue hardship waiver under Section 102(g)(2) of UOCAVA. Accordingly, I approve the Commonwealth of Massachusetts' 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 Massachusetts' primary election scheduled for September 14, 2010 created an undue hardship that prohibits the Commonwealth from complying with Section 102(a)(8)(A) of UOCAVA; and 2) the Commonwealth's proposed comprehensive plan for this Federal general election provides sufficient time for UOCAVA voters to vote and have their ballots counted. As explained in the attached rationale, this waiver is based on the understanding that the Commonwealth of Massachusetts will transmit absentee ballots for the November 2, 2010 Federal general elections to UOCAVA voters no later than September 28, 2010, and that absentee ballots received back electronically will be accepted up to the close of the polls and that absentee ballots received back by mail will be accepted up through November 12, 2010, and counted.

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

Approval of the Commonwealth of Massachusetts' 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 Commonwealth of Massachusetts (the Commonwealth) dated August 2, 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, approval of the waiver request followed careful consideration of the assertions made by the Commonwealth 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 10, 2010 which included Michelle K. Tassinari, Director and Legal Counsel for Elections, Kristen R. Green, Attorney for Elections, and Paul Lazour, Special Counsel for Elections for the Commonwealth of Massachusetts; and officials from FVAP and the United States Department of Justice's Voting Section (DOJ/Voting).

The Presidential Designee for UOCAVA,³ has reviewed Massachusetts' application, consulted with the representative of the Attorney General of the United States, and finds the Commonwealth's application meets the requirements for a one time undue hardship waiver under Section 102(g)(2) of UOCAVA,⁴ and approves Massachusetts' 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 Explanation and Rationale, 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

¹ 42 U.S.C. § 1973ff, *et seq.*

² 42 U.S.C. § 1973ff-1(g).

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 Massachusetts' waiver application because Massachusetts states that its primary election scheduled for September 14, 2010 prohibits the Commonwealth 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 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 voters and overseas voters (UOCAVA voters) sufficient time to receive and submit absentee ballots they have requested in time to be counted in the Federal general election.

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

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

- (i) the steps the Commonwealth 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 Massachusetts' 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

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 Commonwealth Has Shown Undue Hardship

Massachusetts' application, as required by the statute, 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, and how that created an undue hardship. Accordingly, the Presidential Designee finds that given the timing of the enactment of the MOVE Act on October 28, 2009 and the issues and challenges cited by the Commonwealth in its waiver application, Massachusetts' scheduled primary creates an undue hardship as contemplated by the MOVE Act.

III. The Commonwealth's Comprehensive Plan Provides Sufficient Time for UOCAVA Voters to Vote and Have that Vote Counted

The Presidential Designee concludes that Massachusetts did 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.

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).

Under its submitted comprehensive plan, Massachusetts will transmit absentee ballots to UOCAVA voters no later than September 28, 2010 (35 days before the Federal general election). The Commonwealth will allow absentee ballots returned by postal mail to be received and counted by local election jurisdictions until ten days after Election Day. This provides absent uniformed services and overseas voters using postal mail a total of forty-five (45) days to receive, vote, and return their ballots. The Commonwealth will allow electronically returned absentee ballots to be received and counted by local election jurisdictions until Election Day. This provides absent uniformed services voters and overseas voters returning ballots electronically a total of thirty-five (35) days to receive, vote, 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 Massachusetts' UOCAVA voters to receive and return their ballots. The comprehensive plan proposed by Massachusetts provides two alternative transmission methods, in addition to postal mail, for all UOCAVA voters and will make ballots available by either of the alternative methods the voter requests: facsimile or email delivery.

Additionally, Massachusetts' comprehensive plan notes that the Commonwealth will allow UOCAVA voters to return their voted ballots by facsimile or email, thereby providing UOCAVA voters the opportunity to mark and return their ballots the same day they are received. Significantly, Massachusetts will mail absentee ballots through express postal mail services to all UOCAVA voters who have not requested electronic transmission. For voted ballot return, Massachusetts will provide UOCAVA voters access to free expedited postal mail services. Finally, the Commonwealth accepts the Federal Write-in Absentee Ballot (FWAB) for all federal, Commonwealth and local races and for all elections, and allows the voted FWAB to be returned electronically. The Commonwealth will also accept a voted FWAB, regardless of whether the voter has ever submitted an application for an absentee ballot.

Therefore, given the totality of circumstances presented in the comprehensive plan and the other election administration rules already in place, the Presidential Designee finds Massachusetts' comprehensive plan provides UOCAVA voters with sufficient time to receive, mark, and return their ballot in time to be counted.

IV. Conclusion and Final Requirements

Given the foregoing and considering the totality of the circumstances presented, the waiver request of the Commonwealth of Massachusetts is granted. The Presidential Designee determines the Commonwealth's primary election date prohibits the Commonwealth from complying with Section 102(a)(8)(A) of UOCAVA. The Presidential Designee has further determined that the comprehensive plan presented by Massachusetts provides 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, is therefore a sufficient substitute for Section 102(a)(8)(A)'s requirement to transmit ballots 45 days in advance of Election Day, and thus the State's plan serves as a basis for granting a hardship waiver under section 102(g)(2).

Consequently, as noted above, this waiver is based on the understanding that the Commonwealth of Massachusetts will comply with all commitments described herein, including that they will transmit absentee ballots for the November 2, 2010 Federal general election to UOCAVA voters no later than September 28, 2010, and that absentee ballots received back electronically will be accepted up to the close of the polls and that absentee ballots received back by mail will be accepted up through November 12, 2010, and counted.

A. Post-Election Evaluation

Because a waiver plan must provide UOCAVA voters sufficient time to vote, an important component of the approved comprehensive plan is a post-election evaluation of the comprehensive plan, provided to FVAP, which must include the following:

- Written certification that ballots were transmitted to UOCAVA voters on the date and in the manner described in the waiver application;
- The numbers of ballots sent to absent uniformed services voters with APO and FPO addresses, the number of ballots sent to uniformed services voters at a street address within the United States, and the number of ballots sent to overseas civilian voters;
- The number of ballots from each of these groups returned in time to be counted;
- The number of ballots from each of these groups returned too late to be counted;
- If possible, a breakdown of further details about each of the above categories between ballots faxed, emailed, and sent by postal mail or expedited mail;
- Any feedback, whether positive or negative, received from voters about any elements of the Commonwealth's comprehensive plan; and
- Any additional information relevant to the effectiveness of the comprehensive plan, including information showing quantitatively the results of the comprehensive plan, and how the plan provided UOCAVA voters sufficient opportunity to receive, vote, and return their ballots.

B. Reporting

As part of its comprehensive plan, Massachusetts officials agreed to keep FVAP and DOJ/Voting apprised of any subsequent problems in implementing the comprehensive plan as proposed, including but not limited to any failures of local election officials to transmit absentee ballots in accordance with the timeframe specified by the Commonwealth's comprehensive plan.

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