



UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

NOV 16 2011

PERSONNEL AND
READINESS

Mr. Robert H. Brehm
Mr. Todd D. Valentine
Co-Executive Directors
State Board of Elections
40 Steuben Street
Albany, NY 12207-2108

Dear Messrs. Brehm and Valentine:

The Department of Defense received from the State of New York a timely application dated August 30, 2011, copy attached (including supplement received September 21, 2011), 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 September 11, 2012 primary election for Federal office.

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, 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 New York's request to waive the application of Section 102(a)(8)(A) of UOCAVA for the September 11, 2012 Federal primary election.

This waiver denial is predicated on the assertions made by the State in support of its waiver request as 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 New York State Constitution does not create an undue hardship that prohibits the State from complying with Section 102(a)(8)(A) of UOCAVA for the Federal primary election; and (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 for the MOVE Act requirement that absentee ballots be sent to all UOCAVA voters at least forty-five days prior to Election Day.

Sincerely,

A handwritten signature in black ink, appearing to read "Jo Ann Rooney".

Jo Ann Rooney
Acting

Enclosures:
As stated

MEMORANDUM

Denial of State of New York's MOVE Act Waiver Request under Section 102(g)(2) of UOCAVA for the September 11, 2012 Federal Primary Election

The Federal Voting Assistance Program (FVAP) of the Department of Defense received the application of the State of New York (the State), dated August 30, 2011, for an undue hardship waiver for the September 11, 2012 primary election for Federal office, as provided by the amendments to 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 and this memorandum is predicated on 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 September 15, 2011, between Messrs. Robert Brehm and Todd Valentine, Co-Executive Directors of the New York State Board of Elections (NYSBOE); Mr. Paul Collins, Deputy Counsel of the NYSBOE; Ms. Kim Galvin, Special Counsel to the NYSBOE; Mr. Jeff Dvorin, New York Attorney General's Office; and officials from FVAP and the United States Department of Justice's Voting Section.

Under delegated authority from the Secretary of Defense as the Presidential Designee for UOCAVA,³ the Principal Deputy Under Secretary of Defense for Personnel and Readiness has reviewed New York State's application, consulted with the representative of the Attorney General, and 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 Accordingly, New York State's request for a waiver of the application of Section 102(a)(8)(A) of UOCAVA for the September 11, 2012 Federal primary election is denied. 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 Fed. Reg. § 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).

New York State submitted a single waiver application for two elections, the September 11, 2012 Federal primary election and the November 6, 2012 Federal general election. Because a waiver approved by the Presidential designee is valid only for the Federal election for which the State requested it and cannot be used by a State for any subsequent Federal election,⁶ the Presidential Designee will consider the merits of the waiver application separately for the primary and general elections. It is within the Presidential Designee's authority to consider New York State's waiver application as to its Federal primary election because the State asserts that its Constitution, as it pertains to the State's redistricting requirements, prohibits it from complying with UOCAVA's requirement that states transmit absentee ballots to military and overseas voters at least 45 days prior to a Federal election (45-day prior requirement).⁷ It is not statutorily within the Presidential Designee's authority, however, to consider New York's waiver application for the asserted undue hardship condition that the date of New York's Federal *primary* election prohibits it from meeting the 45-day prior requirement for the very same *primary election*.⁸ Accordingly, the Presidential Designee limited her review of New York's application and supplemental filing, as required by the statute, to a consideration of why New York's redistricting activities, as required by the State Constitution, prohibit it from transmitting absentee ballots to UOCAVA voters by the 45th day prior to the September 11, 2012 primary election (July 28, 2012), thereby creating an undue hardship.⁹

Under UOCAVA, if a State determines it is unable to comply with the requirement to transmit absentee ballots at least 45 days before a Federal election due to one of the three situations¹⁰ referenced above resulting in an undue hardship, the Chief State Election Official must 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, mark, 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.

A finding by the Presidential Designee as to whether an enumerated issue creates an undue hardship depends on all relevant factors, including:

1. the type of election for which the waiver is requested;
2. timing considerations, such as how much time has passed since the situation was first created; and

⁶ See 42 U.S.C. § 1973ff-1(g)(4).

⁷ Waiver Application, Supplemental Information at 2. See 42 U.S.C. § 1973ff-1(g)(2)(B)(iii) and 42 U.S.C. § 1973ff-1(a)(8)(A).

⁸ 42 U.S.C. § 1973ff-1 (g)(2)(B)(i).

⁹ See Waiver Application, Supplemental Information at 2.

3. other emergent circumstances, such as a ballot legality challenge.

The comprehensive plan proposed by New York State addresses the following requirements set forth in the MOVE Act:

1. the steps the State will undertake to ensure UOCAVA voters have time to receive, mark, and submit their ballots in time to have those ballots counted in the election;
2. why the plan provides UOCAVA voters sufficient time to vote as a substitute for the requirements of the MOVE Act; and
3. the underlying factual information explaining how the plan provides sufficient time to vote as a substitute for such requirements.¹¹

As required by UOCAVA,¹² New York State's application recognizes 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 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.

The State's comprehensive plan was evaluated against several criteria; and the analysis as to whether the 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 ballot and have it counted. Finally, the State's comprehensive plan was reviewed for any previous and additional efforts made by the State that were put in place subsequent to the changes in the law, which improved the likelihood a UOCAVA voter would be able to receive, vote and return the ballot and have it counted. Given that the State did not alter its law with respect to its Federal primary election date, however, the features of the State's plan were also evaluated in light of New York's experience implementing the terms of the waiver granted by the Presidential Designee for the 2010 Federal general election.

II. The State Has Not Shown Undue Hardship

In support of its application, New York State argues that its State Constitution's¹³ redistricting provisions prohibit it from moving the Federal primary date, thereby creating an undue hardship.

¹¹ 42 U.S.C. § 1973ff-1(g)(1)(D).

¹² 42 U.S.C. § 1973ff-1(g)(1)(A).

¹³ See Waiver Application, Supplemental Information at 2; N.Y. const. art. III, § 4 ("Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants

Specifically, the State argues that because its redistricting process requires 2010 census data, and such data was not available until March 24, 2011, a redistricting plan will not be finalized for several months.¹⁴ Because of this, the State asserts, New York will be unable to move its primary date for the 2012 election cycle. The State further claims that it is unable to transmit its primary ballots by July 28, 2012 (45 days prior to Election Day) because *State law* provides: (1) that the State Board of Elections certify its primary ballot not later than 36 days before the primary election (August 6, 2012); (2) that the 62 county boards of elections certify their respective primary ballot not later than 35 days before a primary (August 7, 2012); and (3) that military and special Federal ballots shall be transmitted to eligible voters not less than 32 days before the primary election (August 10, 2012).¹⁵

The State's arguments do not support a finding of undue hardship. The State Constitution merely compels the legislature to use recent census data in redistricting. Nothing in the Constitutional provision cited requires that redistricting occur prior to enacting other legislative changes to comply with UOCAVA. In its application, the State demonstrates that it has made the legislative decision to prioritize its redistricting process over UOCAVA compliance, not that it was constitutionally compelled to do so.

In summary, the State failed to establish that its Constitution prohibits the State from timely transmitting absentee ballots to UOCAVA voters on or before July 28, 2012. In the totality of circumstances presented, compliance with the 45-day prior requirement is simply not contingent upon the completion of redistricting. Accordingly, the Presidential Designee finds New York State has not established that the State is experiencing an undue hardship in meeting that requirement.

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 New York State 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 September 11, 2012 Federal primary election.¹⁶ For clarity, we note that the comprehensive plan in the State's waiver application does not appear to differentiate the procedures for the 2012 primary election from those proposed for the 2012 general election, except for the round-trip ballot transmission time referenced below.

In reaching this determination, the Presidential Designee examined the totality of circumstances 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 the Presidential Designee considered were (1) the time voters have to receive, mark and return their ballots and have them counted (both before and after Election Day); (2) the cumulative

in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor.").

¹⁴ Waiver Application, Supplemental Information at 2.

¹⁵ Waiver Application at 3 and Appendix B.

¹⁶ 42 U.S.C. § 1973ff-1(g)(2)(A).

number and accessibility of alternative methods of ballot transmission and return; and (3) the effectiveness of the previous comprehensive plan as it relates to the proposals for the 2012 election.

With regard to the first factor, New York does not offer any plan that provides UOCAVA voters with a minimum of 45 days for ballot transit time. Under New York State's comprehensive plan, county boards of elections will transmit absentee ballots to UOCAVA voters by August 10, 2012, which is thirty-two (32) days before the primary election. UOCAVA voters will have seven (7) days after Election Day for ballots to be received and counted, so long as the ballot envelope is postmarked the day before Election Day. This gives UOCAVA voters only 39 days for roundtrip ballot transit.

Second, New York's comprehensive plan provides for the alternative ballot transmission options of e-mail and facsimile, upon the voter's request. New York also proposes using an online ballot delivery system. We note that no specifics regarding the means of online ballot access are provided, nor is there an assurance in the State's application that the system will be accessible to voters in 2012. The plan does not provide voters the option of receiving or returning ballots by express mail delivery at the State's expense.

Finally, the features of the State's plan described above were evaluated in light of New York's experience implementing the terms of the waiver granted by the Presidential Designee for the 2010 Federal general election. In 2010, New York's plan failed to afford sufficient time between the primary election and the ballot transmission date for the general election to prepare and transmit ballots to UOCAVA voters as proposed. The result was widespread failure to transmit ballots in accordance with the timetable approved by the waiver determination. New York's proposed comprehensive plan proposes a similarly compressed schedule for the preparation and transmission of primary election ballots in 2012. The plan proposes few safeguards for voters aside from assertions of enhanced communication, education, and oversight of the local boards of election by the State Board. Although enhanced oversight is important, and communication problems between the State and local election officials may have contributed to the State's UOCAVA non-compliance in 2010, the 2012 comprehensive plan provides no concrete solution to the problems that arose in 2010 from the State's overly-compressed schedule for preparing and transmitting ballots. This factor raises significant concern that the State will not in fact be able to comply with the proposed schedule, which itself falls short of providing even a 45-day roundtrip ballot transit time. Thus, the Presidential Designee cannot conclude that New York State's proposed comprehensive plan adequately addresses the significant compliance problems that arose following approval of its 2010 comprehensive plan.

IV. Conclusion

Given the foregoing and considering the totality of the circumstances presented, New York State's waiver request is denied. The Presidential Designee has determined that the State has not established an undue hardship on grounds that the State's Constitution prohibits compliance with UOCAVA's requirement to transmit ballots at least 45 days prior to the September 11, 2012 Federal primary election. The Presidential Designee has further determined that the comprehensive plan presented by New York State is inadequate to 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 September 11, 2012 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.