



OFFICE OF THE UNDER SECRETARY OF DEFENSE

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WASHINGTON, DC 20301-4000

AUG 27, 2010

PERSONNEL AND
READINESS

Mr. John Abramson, Jr.
Supervisor of Elections
Election System of the Virgin Islands
Post Office Box 1499, Kingshill
St. Croix, VI 00851-1499

Dear Mr. Abramson:

The Department of Defense received from the Territory of the Virgin Islands (The Territory) a timely application dated April 6, 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 Territory'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 Territory of the Virgin Island'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 Territory 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 Virgin Island's primary election scheduled for September 11, 2010 does *not* create an undue hardship that prohibits the State from complying with Section 102(a)(8)(A) of UOCAVA; 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 this election for the new Federal requirement that absentee ballots be sent to all UOCAVA voters at least forty-five days prior to the election.

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 Territory of the Virgin Islands' 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 Territory of the Virgin Islands (the Territory) dated April 6, 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 discussed in this Memorandum, the denial of the waiver request followed careful consideration of the assertions made by the Territory in support of its waiver request, including the official waiver request letter and subsequent supplementary information provided, and the explanations of its written request and discussion of available options relating to the Federal contest in the conference calls on July 26 and August 24, 2010 among John Abramson, Jr., Supervisor of Elections, Election System of the Virgin Islands; and officials from FVAP and the United States Department of Justice's Voting Section (DOJ/Voting).

The Presidential Designee for UOCAVA³ has reviewed the Virgin Islands' application, consulted with the representative of the Attorney General of the United States, finds the Territory's application does not meet the requirements for a one-time undue hardship waiver under Section 102(g)(2) of UOCAVA,⁴ and denies the Virgin Islands' 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 the Virgin Islands' waiver application because the Virgin Islands states that its primary election scheduled for September 11, 2010, prohibits the Territory from complying with Section 102(a)(8)(A) of UOCAVA.⁶ We note that there are no federal contests whatsoever in this primary election.

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 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 Virgin Islands addressed the following requirements set forth in the MOVE Act:

- (i) the steps the Territory 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 the Virgin Islands' 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 Territory'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 Territory Has Not Shown Undue Hardship

In its application, and as required by the statute, the Virgin Islands explained why its chief State election official believes its primary election date and associated activities required to generate a 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. In light of the Territory's lack of any contested Federal primary elections this year, however, the Territory does not convincingly present a case that its primary election date prohibits it from complying with UOCAVA's 45-day ballot-mailing deadline for this year's Federal general election. Moreover, the Territory's Supervisor of Elections acknowledged that it was possible to create and transmit a ballot for UOCAVA voters containing only Federal races by September 18, 2010. Accordingly, the Presidential Designee finds the Virgin Islands has not established that the Territory'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 Territory's Comprehensive Plan Does Not Provide Sufficient 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 the Virgin Islands 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

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).

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.

Under its submitted comprehensive plan, the Territory will require absentee ballots to be transmitted no later than 30 days before the Federal general election.¹¹ The Territory will allow absentee ballots to be received and counted by local election jurisdictions until November 12, ten days after Election Day. This provides absent uniformed services voters and overseas voters a total of 40 days prior to their ballot due-date to receive, vote, and return their ballots. UOCAVA voters may receive their ballots by postal mail, fax, and email, and may return their ballots by postal mail or fax. In addition, the Virgin Islands, after transmitting absentee ballots by the method requested by the voter, will contact every UOCAVA voter who has applied for an absentee ballot to ensure that the voter has received the ballot. If not, Board of Elections personnel will send an immediate replacement absentee ballot, which can be transmitted by facsimile or email if the voter chooses. Also, the Virgin Islands will accept UOCAVA absentee ballots and will count them if they are voted on Election Day and received no later than November 12, 2010 regardless of the postmark date or whether or not a postmark date is on the return envelope on the ballot. Finally, the registration system provided by the Territory also includes social media options, like Facebook and Twitter for UOCAVA voters to receive information from the elections board and raise voter awareness of the receipt options available, and increase the likelihood voters will request the ballot transmission method that will maximize their opportunity to receive, vote, and return their ballots in time to be counted.

The Presidential Designee considered the ballot transit time provided in conjunction with the additional methods other than postal mail available to the Virgin Islands' UOCAVA voters to receive and return their ballots, along with the additional administrative procedures and rules. While these electronic options and administrative procedures and rules will increase the opportunity for some UOCAVA voters to receive and cast timely ballots, the Presidential Designee determines that given the totality of circumstances, the Territory's comprehensive plan does not provide UOCAVA voters sufficient time to receive, vote and return ballots in time to be counted.

IV. Conclusion

Given the foregoing and considering the totality of the circumstances presented, the waiver request of the Territory of the Virgin Islands' is denied. The Presidential Designee has determined the Virgin Islands has not established an undue hardship on grounds that the Territory'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 the Virgin Islands does not provide UOCAVA voters sufficient time to receive absentee ballots they have requested and to submit

¹¹ In its waiver application and subsequent correspondence, the Territory indicated that it would transmit ballots to UOCAVA voters 30 days prior to the general Federal election. During a teleconference with FVAP and DOJ officials, the Supervisor of Elections Abramson stated that ballots would be transmitted on October 2.

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.