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October 10, 2014

Matt Boehmer, Director
Federal Voting Assistance Program
Department of Defense
4800 Mark Center Drive, Suite 03J25-02
Alexandria, VA 22350-5000

Re: Request of State of West Virginia for Hardship Exemption of Requirement that Absentee Ballots be Transmitted to UOCAVA Voters 45 Days Before 2014 General Election

Director Boehmer:

The Secretary of State of West Virginia seeks a waiver of the deadline for transmittal of absentee ballots to UOCAVA voters, as provided in 42 U.S.C. §1973ff-1(g)(2)(B). The Secretary of State finds that an undue hardship exists that may cause the alteration of already transmitted absentee ballots. The hardship is the result of a legal challenge to the make-up of the ballot filed in the West Virginia Supreme Court of Appeals on the forty-third day before the election. On October 1, 2014, the Court ruled that an additional candidate must be added to the ballots involving a West Virginia House of Delegates District in one county.

The Secretary of State submits the attached documentations and explanations which:

1. Identify the undue hardship to the state;

2. Identify the jurisdiction affected;

3. Specifically recognize that the purpose of the act's forty-five day prior requirement is to allow UOCAVA voters enough time to vote and have their votes counted in an election for federal office; and

4. Establish by a comprehensive plan procedures which allow UOCAVA voters sufficient time to receive, mark and return absentee ballots in time to have those ballots counted in an election for federal office.

The West Virginia Secretary of State believes that the conditions for granting of a waiver have been met and requests prompt response so that the West Virginia Court of Appeals can fully understand the timelines involved.

Respectfully submitted,

Timothy G. Leach
Assistant General Counsel

Attachments

Undue Hardship to State

The legal challenge filed relates to the absence from the ballot of a candidate who sought to be a substitute for a candidate who had been nominated in the primary but later formally withdrew. Under West Virginia statutes, a substitution in those circumstances can only be authorized by the State Election Commission after finding statutory requirements have been met. The State Election Commission found that the requirements had not been met during a meeting on August 13, 2014, the eighty-third day before the general election. However, the challengers did not file their petition for a writ of mandamus to overrule the State Election Commission until September 22, 2014, the forty-third day before the election.

Beginning on the forty-sixth day, September 19, the clerk of the county impacted by the challenge began to deliver absentee ballots in compliance with UOCAVA. During the pendency of the legal challenge, the clerk has continued transmitting ballots within twenty-four hours of receipt of any additional requests.

On October 1, 2014, the West Virginia Supreme Court issued an order requiring the changing of the ballot and requiring the county clerk to transmit corrected ballots to those voters (31 UOCAVA voters) to whom the original ballot had been transmitted. The county clerk must now conduct a new ballot position draw for one race and then submit a new list of candidates to the official printer. The printer must reprogram the election software and submit an official proof of the new ballot to the county ballot commissioners for approval. The ballot commissioners must formally meet and approve the new ballot proof and return it to the printer. The printer then begins printing approximately 50,000 ballots and also programs a new audio voice ballot. The printer currently estimates four days turnaround after receiving a proof back from the county.

Adding the preparation and printing time to the date of the Court's order means that the new ballots can be transmitted to UOCAVA voters no earlier than October 6, the twenty-ninth day before the election.

Jurisdictions Impacted

The ballot which was changed by the Court involves the 35th Delegate District of the West Virginia House of Delegates. The Delegate District is entirely contained within Kanawha County and contains approximately 50,000 registered voters.

The federal offices impacted include the election of United States Senator and election of United States House of Representatives, 2nd West Virginia District. Both federal offices are on the same ballots as the 35th House of Delegates district. Consequently, any delay or change to the transmittal of absentee ballots for the West Virginia office election will also delay delivery of the two federal election absentee ballots.

Acknowledgment of Purpose of UOCAVA

The West Virginia Secretary of State hereby specifically recognizes that the purpose of UOCAVA's requirement of transmittal forty-five day prior to election is to allow UOCAVA voters enough time to vote and have their votes counted in an election for federal office. The West Virginia Secretary of State fully supports the purpose of the Act and the requirements of the Act.

Date: 10/1/2014

Natalie E. Tennant
West Virginia Secretary of State

Procedures to allow UOCAVA voters sufficient time to receive, mark and return absentee ballots

F. Comprehensive Plan:

1. Total number of days UOCAVA voter could have to receive, mark, and return the absentee ballot, and have the ballot be counted.

UOCAVA voters will have 38 days for the new ballot to be transmitted by mail to receive, mark, and return the ballot in time to have it counted. There will be a total of 32 days prior to and including Election Day, and 6 days after Election Day to complete the process.

a. Election officials transmitted the ballot either electronically or by postal mail to UOCAVA voters 32 days (October 3, 2014) prior to Election Day.

b. Ballots returned by mail must be received by the start of canvass on the sixth day (November 10, 2014) following the election.

c. Ballots returned by email or fax must be received by election day. UOCAVA voters employing these means of returning ballots will have 32 days before the election, but no days after the election to receive, vote, return, and have their votes counted.

d. Because the transit time of electronic delivery significantly reduces the overall time required to return a voted ballot, the state believes, given the timelines stated above, that UOCAVA voters will have sufficient time to mark and return a ballot in time to have it counted. In its 2013 Annual Report to Congress, FVAP notes transit times are reduced significantly to 10-12 days in Minnesota and Wisconsin. West Virginia would expect similar results.

e. A total of 10 (3 to overseas addresses and 7 to U.S. addresses) UOCAVA voters had requested ballot delivery by mail. The 3 ballots requested by mail to an address outside the United States (2 in Canada and 1 in the UK) were sent express service with a prepaid express return envelope provided. All other UOCAVA voters (27) were informed by email that the Secretary of State or County Clerk will provide a pre-paid express mail envelope by the delivery service of the voter's choosing. This will reduce the transit time and help ensure that mailed ballots will be able to be voted and returned in time to be counted.

2. Details of alternate transmission methods other than mailing.

a. (see preceding paragraph) UOCAVA voters have already selected their preferred method of delivery and the new ballots will be delivered by the same method. However, all voters, whether ballots were transmitted electronically or by mail, have now been informed by email or telephone call that the county will provide a prepaid return envelope for the delivery service of the voter's choosing.

b. UOCAVA voters also received instructions transmitted with the corrected ballot, that they may return their ballot by means other than how the ballot was transmitted. Their return options will be:

1. By USPS Overnight Express Service (or by other delivery service of the voter's choosing); or
2. By email or facsimile if they complete and submit a privacy waiver that will be included with the ballot and instructions transmitted to the voter.

c. The impacted county does not participate in the State's optional on-line ballot delivery program. However, the on-line program alerts the voter by email of a link to which they can go to obtain and print their ballot. The email transmission of the ballot used by the county is no slower than the on-line ballot deliver program.

3. Additional efforts made that improve the likelihood that a UOCAVA voter would receive, mark and return ballot, and have the ballot counted.

Those voters who were transmitted the original ballot have been identified and were automatically sent a corrected ballot without having to make second request. Additional efforts have included emailing or telephoning all recipients who have not yet returned the voted corrected ballot, tracking responses, and follow-up contact as required. Anyone who requests an absentee ballot after the correction will be transmitted the corrected ballot upon receipt of request.

4. Success of UOCAVA voters, in previous approved waiver request situations, in receiving, marking, returning and having absentee ballots counted.

West Virginia has never asked for nor received a waiver under these provisions, so there is no data to provide concerning successful ballot return under previous waivers.

5. How the Stated will ensure compliance with State's comprehensive plan by local election officials.

Ensuring compliance with the comprehensive plan was made significantly less burdensome because there is only by one local jurisdiction affected. Ultimately, only 30 UOCAVA voters required transmittal of a new ballot. The State immediately began discussions with the county about alternative transmittal means and other details of this comprehensive plan. The State has remained in close contact with the local election official to monitor the delivery of ballots, notifications to the impacted voters, and tracking of returned ballots. By monitoring the full number of impacted voters, the state can work with the county election official to ensure prompt delivery by the deadlines required in the comprehensive plan.