OFFICE OF THE UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, DC 20301-4000

AUG 27 2010

PERSONNEL AND READINESS

Ms. Elaine Manlove
Commissioner of Elections
State of Delaware
905 S. Governor's Ave., Suite 170
Dover, DE 19904

Dear Ms. Manlove:

The Department of Defense received from the State of Delaware a timely application dated May 3, 2010, originally sent to the U.S. Department of Justice, Civil Rights Division, Voting Section, 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 State'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 State of Delaware'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 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 Delaware's primary election scheduled for September 14, 2010 created 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 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 State of Delaware will transmit absentee ballots for the November 2, 2010 Federal general election to UOCAVA voters no later than September 20, 2010 and that absentee ballots will be accepted up to close of the polls on November 2, 2010 and counted.

Sincerely,

Lynn C. Simpson

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 State of Delaware's 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 State of Delaware (the State), dated May 3, 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] Approval of the waiver request and this Memorandum are 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 July 16, 2010 including Ms. Elaine Manlove, Commissioner of Elections; and officials from FVAP and the United States Department of Justice's Voting Section (DOJ/Voting).

The Presidential Designee for UOCAVA[3] has reviewed Delaware's application, consulted with the representative of the Attorney General, and finds the State's application meets the requirements for a one-time undue hardship waiver under Section 102(g)(2) of UOCAVA,[4] and approves Delaware's 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]

It is within the Presidential Designee's authority to consider Delaware's waiver application because Delaware states that its primary election scheduled for September 14, 2010 prohibits the State from complying with Section 102(a)(8)(A) of UOCAVA.[6]

---

[1] 42 U.S.C. § 1973ff, *et seq.*

[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).

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 Delaware addressed the following requirements set forth in the MOVE Act:

> (i) the steps the State 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] Delaware's 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 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 transmission, given that it is the least available among overseas active duty military voters, Reserve component military voters, and overseas DOD civilian employees.[9]

---

[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).
[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.

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 ballot and have it 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 State Has Shown Undue Hardship

Delaware's 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 general election ballot prohibit it from transmitting 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 passage of the MOVE Act on October 28, 2009 and the issues and challenges cited by the State in its waiver application, Delaware's scheduled primary creates an undue hardship as contemplated by the MOVE Act.

III. The State's Comprehensive Plan Provides Sufficient Time for UOCAVA Voters To Vote and Have That Vote Counted

The Presidential Designee concludes that Delaware 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. 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.

Under its submitted comprehensive plan, Delaware will transmit absentee ballots to UOCAVA voters no later than September 20, 2010 (43 days before the election). The State will allow absentee ballots to be received by local election jurisdictions until the close of polls on Election Day. Delaware subsequently amended its application, stating that all absentee ballots would be transmitted no later than September 18, 2010 (45 days before the election). However, Delaware also indicated that given the short time between the certification of its primary results and the availability of its general election ballots, and potentially limited postal service availability on

Saturday, September 18, 2010, it was concerned that the ballots would not effectively be transmitted by postal service until Monday, September 20, 2010. Therefore, it requested that the waiver application stand with the request to transmit ballots no later than September 20, 2010, to protect against that narrow contingency.

The Presidential Designee considered the ballot transit time provided in conjunction with the additional methods other than postal mail available to Delaware's UOCAVA voters to receive and return their ballots. The comprehensive plan proposed by Delaware provides two alternative transmission methods for all UOCAVA voters and will make ballots available by either of the alternative methods, in addition to postal mail, that the voter requests: facsimile or online delivery. All voters in Delaware may choose to use FVAP's-funded Electronic Voting Support Wizard, an online ballot delivery and ballot marking system. This is a significant technological advance in ballot availability, as it allows for online marking of the ballot in addition to online delivery, making an electronic ballot available to a UOCAVA voter the same day the official printed ballots would be placed in the mail. This also allows the voter to mark the ballot online, print the marked ballot and receive complete local instructions for returning the ballot that same day. The various electronic options allow voters to receive ballots the day they become available.

Additionally, Delaware's comprehensive plan notes that in response to the MOVE Act, Delaware gave the State Election Commissioner, in collaboration with the local election jurisdictions, broad authority to implement UOCAVA. The State Election Commissioner, in collaboration with the county departments of elections, established procedures for electronically delivering absentee ballots to the voters with instructions and for the voters to electronically return the ballots. The county department of elections will transmit to the applicant within three days of application, an absentee ballot, instructions, and other necessary information needed to vote and return that applicant's own ballot. An applicant who is sent a ballot electronically may return such ballot via postal mail, courier, facsimile, or email, in accordance with the instructions sent with the ballot. When a person returns a ballot electronically, he/she returns a signed oath and identification information with the ballot. The oath may be signed digitally as provided in the instructions sent to the voter.

Therefore, given the totality of circumstances presented in the comprehensive plan and the other election administration rules already in place, the Presidential Designee finds Delaware's 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 State of Delaware is granted. The Presidential Designee determines the State's primary election date prohibits the State from complying with Section 102(a)(8)(A) of UOCAVA. The Presidential Designee has further determined that the comprehensive plan presented by Delaware 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 State of Delaware will comply with all understandings described herein, including that they will transmit absentee ballots for the November 2, 2010 Federal general election to UOCAVA voters no later than September 20, 2010, and that absentee ballots will be accepted up to close of polls on November 2, 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, downloaded from the online ballot delivery and ballot marking system, and sent by postal mail;
- Any feedback, whether positive or negative, received from voters about any elements of the State'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, Delaware 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 State'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.