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

AUG 27 2010

PERSONNEL AND READINESS

Mr. Kevin J. Kennedy
Director and General Counsel
State of Wisconsin Government Accountability Board
212 East Washington Ave., 3rd Floor
Post Office Box 7984
Madison, WI 53707-7984

Dear Mr. Kennedy:

The Department of Defense received from the State of Wisconsin 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 State'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 State of Wisconsin'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 Wisconsin'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; 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 Election Day.

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

State of Wisconsin'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 an application from the State of Wisconsin (the State), dated August 2, 2010 requesting an undue hardship waiver for the November 2, 2010 general election for Federal office, 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] Denial of the waiver request followed careful consideration of 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 during a conference call which took place on August 4, 2010 and included: Kevin J. Kennedy, Director and General Counsel; Mr. Nathaniel Robinson, Elections Division Administrator; David Buerger, Elections Specialist; Michael Haas, Staff Counsel, Wisconsin Government Accountability Board, and officials from FVAP and the United States Department of Justice's Voting Section (DOJ/Voting).

The Presidential Designee for UOCAVA,[3] has reviewed Wisconsin's waiver application and consulted with the representative from the Attorney General of the United States, 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] and denies Wisconsin'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 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 requesting a waiver fits one of the three 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]

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[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] *1973ff-1(g)(2)(B).*

It is within the Presidential Designee's authority to consider Wisconsin's waiver application because Wisconsin states that its primary election scheduled for September 14, 2010 prohibits the State 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 that results 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 Wisconsin 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] Wisconsin'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 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. Although facsimile transmission is compliant with the MOVE Act's electronic transmission requirements, it is the least desirable method of electronic

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[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 has the least availability among overseas active duty military voters, reserve component military voters and overseas voters.[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 counted.

II. The State Has Shown Undue Hardship

Wisconsin'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 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 passage of the MOVE Act on October 28, 2009 and the issues and challenges cited by the State in its waiver application, Wisconsin's scheduled primary creates an undue hardship as contemplated by the MOVE Act.

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

The Presidential Designee concludes that Wisconsin 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 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.

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[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, Table 1, p.2, 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, Wisconsin will transmit absentee ballots to UOCAVA voters by postal mail, fax, and email (at the voter's request) no later than October 4, 2010, which is 29 days before the election. Certain UOCAVA voters [11] will have ten (10) days after Election Day for ballots to be received by local election jurisdictions, so long as they are postmarked by Election Day. For the remainder of UOCAVA voters, their ballots must be delivered to local election officials by Election Day. Those certain federal UOCAVA voters described above will have a total of 39 days to receive, cast and return their ballots, and the remaining UOCAVA voters will have 29 days. The Presidential Designee considered the ballot transit time provided in conjunction with the additional methods other than postal mail available to Wisconsin's UOCAVA voters to receive and return their ballots, such as facsimile and email transmission of the ballot to the voter at the voter's request. While these electronic options will increase the opportunity for some UOCAVA voters to receive and cast timely ballots, the Presidential Designee cannot conclude that Wisconsin's plan provides sufficient transit time for all UOCAVA voters to receive, mark and return their ballots in time to be counted.

IV. Conclusion

Given the foregoing and considering the totality of the circumstances presented, the waiver request of the State of Wisconsin is denied. The Presidential Designee has determined 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, however, that the comprehensive plan presented by Wisconsin does not 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 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.

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[11] 42 U.S.C. § 1973ff-1(g)(2)(A) (limited to members of a uniformed service, members of the merchant marine, civilian employees of the United States and civilians officially attached to a uniformed service who are serving outside the United States, peace corps volunteers, and spouses and dependents of the above.)