



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE

4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

MAR - 4 2022

The Honorable Frank LaRose
Secretary of State
State of Ohio
22 North Fourth Street, 16th Floor
Columbus, Ohio 43215

Dear Secretary LaRose:

On February 26, 2022, the Department of Defense received from the State of Ohio an application dated February 26, 2022 for an undue hardship waiver under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) for the May 3, 2022 primary 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, and find it does not meet the requirements for a one-time undue hardship waiver under 52 U.S.C. § 20302(g)(2). Accordingly, I deny the State of Ohio's request to waive the application of 52 U.S.C. § 20302(a)(8)(A) for the May 3, 2022 primary 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 enclosure to this letter. Based on the rationale summarized in the enclosure, I have determined the following: (1) Ohio has established an undue hardship on the grounds that the State has suffered a delay in generating ballots due to a legal contest, prohibiting compliance with UOCAVA's requirement to transmit ballots at least 45 days prior to the May 3, 2022 primary election; and (2) Ohio's comprehensive plan does not provide absent UOCAVA voters sufficient time to receive and submit absentee ballots in time to be counted in the May 3, 2022 primary election.

If you have any questions or concerns, please contact Scott Wiedmann, Deputy Director, Federal Voting Assistance Program, at 571-255-9755 or scott.wiedmann@fvap.gov.

Sincerely,

Gilbert R. Cisneros, Jr.

Enclosure:
As stated

cc:
Director Amanda Grandjean

**Denial of the State of Ohio's Waiver Request
under 52 U.S.C. § 20302(g)(2)
for the May 3, 2022, Ohio Primary Election**

The Federal Voting Assistance Program (FVAP) of the Department of Defense received the application of the State of Ohio (the State), dated February 26, 2022, for an undue hardship waiver for the May 3, 2022 Ohio primary election, as provided by the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).¹ The denial of the waiver request relies on matters submitted by the State in support of its February 26, 2022 official, waiver request and supplementary information provided during a telephonic conference call on March 1, 2022, in which the State, FVAP, and the United States Department of Justice participated.

Pursuant to authority delegated by the Secretary of Defense, to serve as the Presidential Designee² for UOCAVA,³ the Under Secretary of Defense for Personnel and Readiness has reviewed the State's application and consulted with the representative of the Attorney General. The Under Secretary has determined that the State's application does not meet the requirements for a one-time undue hardship waiver under 52 U.S.C. § 20302(g)(2),⁴ and has therefore denied the State's waiver request under 52 U.S.C. § 20302(a)(8)(A)⁵ for the May 3, 2022 Ohio primary election.

I. Background and Initial Findings

UOCAVA authorizes the Presidential Designee to grant a waiver to a State when at least one of following conditions is met:

1. The State's primary election date prohibits the State from complying with the requirement to transmit an absentee ballot to an absent Uniformed Service member or overseas civilian as prescribed in UOCAVA 52 U.S.C § 20302(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 52 U.S.C. § 20302(a)(8)(A)

Under UOCAVA, if a State determines that it is unable to comply with the requirement to transmit timely-requested absentee ballots at least 45 days before an election for Federal office (45-day advance transmission 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

¹ 52 U.S.C § 20302 (formerly 42 U.S.C. § 1973ff, et seq.). UOCAVA's waiver provision is found at 52 U.S.C. § 20302(g)(2).

² For purposes of this Memorandum, the term "Presidential Designee" includes those officials exercising authority delegated by the Presidential Designee.

³ The Secretary of Defense was designated as the Presidential Designee by Executive Order 12642 (June 8, 1988), 53 FR § 21975. The Secretary of Defense delegated this authority to the Under Secretary of Defense for Personnel and Readiness in DoD Directive 5124.02.

⁴ Formerly 42 U.S.C. § 1973ff-1(g)(2)(B)(ii).

⁵ Formerly 42 U.S.C. § 1973ff-1(a)(8)(A).

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 in regard to each of these requirements are addressed separately below.

By memorandum of February 7, 2012, to Chief State Election Officials, the Director of FVAP provided guidance on UOCAVA ballot delivery waivers. Appendix A, Section IV of the guidance, Evaluation of Comprehensive Plans, provides:

In summary, a State's comprehensive plan must provide sufficient time for UOCAVA voters to receive, mark, and return the ballot in time to be counted. The burden is upon the State to demonstrate that a waiver qualifying condition exists, that compliance with the requirements of UOCAVA in light of the condition presents an undue hardship to the State, and that the comprehensive plan provides the UOCAVA voters sufficient time to receive, mark, and return their ballots in time to be counted. To serve as a substitute for the 45-day prior requirement, the comprehensive plan must provide UOCAVA voters sufficient time to successfully vote as compared to the time available by strictly complying with UOCAVA's minimum ballot transmission requirements.⁶

Specifically, the comprehensive plan proposed by Ohio must be assessed based on its ability to meet the following requirements set forth in UOCAVA:

1. The steps the State will take to ensure that 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 UOCAVA; and
3. The underlying factual information that explains how the plan provides such sufficient time to vote as a substitute for such requirements.⁷

Further, as required by 52 U.S.C. § 20302(g)(1)(A), the State's application includes recognition that the purpose of the Act's 45-day transmission requirement is to allow UOCAVA voters enough time to vote and to 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

⁶ Guidance on Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA) Ballot Delivery Waivers, Memorandum dated February 7, 2012, available at <http://www.fvap.gov/eo/waivers>.

⁷ 52 U.S.C. § 20302(g)(1)(D) (formerly 42 U.S.C. § 1973ff-1(g)(1)(D)).

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 timely-requested ballots to be transmitted 45 days prior to Election Day, by the voter's choice of either postal mail or electronic transmission method.

The State's comprehensive plan was evaluated against several criteria; whether the plan provides sufficient time was examined by considering the totality of circumstances presented. Among the criteria considered was the total time afforded a voter to receive, mark, and return the ballot, and have it counted (including the number of days before and after Election Day). Also considered were the cumulative number and accessibility of alternative methods of ballot transmission, and, if applicable, ballot return, as a number of alternative methods increases the likelihood that more UOCAVA voters will have sufficient time to receive, vote, return their ballot, and have it counted. Finally, the comprehensive plan was reviewed for any additional efforts made by the State to improve the likelihood that a UOCAVA voter would be able to receive, vote, and return the ballot, and have it count in the election.

II. The State Has Shown Undue Hardship.

The State asserts an undue hardship based on 52 U.S.C. § 20302(g)(2)(B)(ii): that the State has suffered a delay in generating ballots due to a legal contest. On May 3, 2022, Ohio will conduct a primary election for various offices, including the Federal offices of U.S. Senate and U.S. House of Representatives seats. As a result of litigation, the Ohio Supreme Court required the post-decennial census districts for the Ohio General Assembly and Representative to Congress to be redrawn, and thus the final districts for these offices are not yet settled. With respect to the General Assembly districts, once the court has approved the districting plans, there must be a 30-day period under state law for individuals to change residence to run for election, the candidate qualifying period must be held, any subsequent candidate protests must be resolved, and then ballots must be prepared, proofed, and printed. With respect to the Congressional districts, the waiver request States that "[i]t is unclear when final districts will be established for Representative to Congress." Once the congressional districts are established and approved by the court, county boards of elections are subject to time constraints for candidate qualifying, resolving potential candidate protests, and ballot preparation, ballot proofing, and printing of ballots for Representative to Congress candidates. As a result, the State advises that Ohio's boards of elections cannot timely prepare ballots for any of the offices at issue in the litigation by March 19, the 45th day before the May 3 primary election.

According to the waiver request, the Ohio Secretary of State has repeatedly raised concerns with the Ohio General Assembly regarding the redistricting delay and resulting challenges in conducting the primary election on May 3, 2022. Ohio law prohibits the Secretary of State from moving the date of the election. As of the March 1, 2022 telephonic conference call with the State of Ohio, state legislative leaders have not taken action to adopt a later primary election date.

For these reasons, the State has established an undue hardship.

III. The State's Comprehensive Plan Does Not Provide Sufficient Time for UOCAVA Voters to Vote and Have Those Votes Counted

Even though the State has demonstrated an undue hardship, the State also must show that its comprehensive plan provides "sufficient time for UOCAVA voters to receive, mark, and return the ballot in time to be counted."⁸ In reaching a determination, the Presidential Designee must examine the totality of circumstances presented in the plan to determine whether it provides 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 is 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.

Ohio's comprehensive plan to provide sufficient time to vote as a substitute for UOCAVA's 45-day advance transmission requirement, comprises the following:

1. Send UOCAVA ballots as quickly as possible after the state of Ohio has prepared final ballots for the primary election. At the time of its application, the State admitted it was not in the position to identify a date by which the ballots would be finalized, but identified a "goal" of sending the ballots by April 5, 2022;
2. Conduct outreach to communicate with UOCAVA voters that ballots may be delayed, and encourage them to provide an email address in order to receive their ballots by email.

Absent a waiver, States are required by UOCAVA to transmit timely-requested absentee ballots 45 days prior to Election Day. A waiver request is necessary when a State is not able to meet this requirement. In this case, March 19, 2022 is 45 days before the May 3, 2022 election day. Ohio states that its goal is to have UOCAVA ballots ready by April 5, 2022, although it is not a certainty given the status of the litigation affecting the establishment of the districts. Assuming Ohio is able to transmit UOCAVA ballots by April 5, 2022, only 28 days will remain before the primary election on May 3, 2022. In Ohio, UOCAVA ballots must be voted and submitted for mailing not later than 12:01 a.m. (at the place where the voter completes the ballot) on the date of the election, and received no later than 10 days after Election Day (May 13, 2022), in order to be counted. This would afford UOCAVA voters only 38 days to receive, mark, and return their ballots, 7 days fewer than UOCAVA voters are guaranteed under 52 U.S.C. § 20302(a)(8)(A).

To help ensure sufficient time for voters to receive, mark, and return their ballot in time to be counted, Ohio proposes to communicate with affected voters regarding the delay in transmission of their ballots and encourage voters to request their blank ballot be sent to them electronically. We note that UOCAVA protections afford voters 45 days in advance of the election to return the voted ballot even when the ballot is transmitted to them electronically. In addition, although some UOCAVA voters may benefit from available electronic transmission options, States must ensure that all UOCAVA voters who elect to receive and/or return paper ballots by postal mail have sufficient time to receive, mark, and return them in time to be

⁸ 52 U.S.C. § 20302(g)(2)(A) (formerly 42 U.S.C. § 1973ff-1(g)(2)(A)).

counted. This is necessary both to accommodate voters with limited access to the internet or to electronic equipment, and to permit voters the option guaranteed by UOCAVA to receive and return their ballots through regular mail to avoid any concerns they may have related to electronic transmission, such as the security or secrecy of their ballot.

On the March 1, 2022 telephonic conference call between the State, FVAP, and the Department of Justice, the State mentioned an intent to reach out to the United States Postal Service to try to expedite delivery of mailed blank ballots. With regard to the possibility of providing voters with cost-free options to return their voted ballots by expedited means such as express mail or courier, the State advised that no funding is currently available for such measures, although the State is exploring options for obtaining additional funds for the election. Assuming that the State is able to transmit ballots by its goal of April 5, it is unlikely, however, that even expedited mail service would compensate for the time lost to voters by the 17-day late transmission by the state of their ballots, and the resulting loss of 7 days out of the total 45 days overall for ballot return (taking into account the state's existing 10-day extension for receipt of ballots after the election). We are thus unable to conclude that Ohio's plan ensures sufficient time for all UOCAVA voters to receive, mark, and return their ballots in time to be counted. Although voters who have requested electronic transmission of their ballots will receive their ballots on the day of transmittal, they will still have 7 fewer days than UOCAVA provides to return the ballot. Also of note is the likelihood that at least some UOCAVA voters will not have access to means for receiving the voted ballot by email, and Ohio law does not permit electronic return of voted ballots.

In some cases, in which a State is unable to transmit ballots by the 45-day deadline, the State is able to extend the ballot return or receipt deadline to make up for that lost time. Ohio acknowledged that the Secretary of State does not have the authority under state law to extend the date for ballot receipt beyond the current receipt deadline of May 13, 2022.

Based on the totality of the circumstances in this case, the Presidential Designee finds that the State's comprehensive plan does not provide UOCAVA voters with sufficient time 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, Ohio's waiver request is denied. The Presidential Designee has determined that the State has established an undue hardship on the grounds that the State has suffered a delay in generating ballots due to a legal contest, prohibiting compliance with UOCAVA's requirement to transmit ballots at least 45 days prior to the May 3, 2022 primary election. The Presidential Designee has further determined that Ohio's comprehensive plan does not provide absent UOCAVA voters sufficient time to receive and submit absentee ballots in time to be counted in the May 3, 2022 primary election. The determination that the plan is not a sufficient substitute for 52 U.S.C. § 20302(a)(8)(A)'s⁹ requirement to transmit timely-requested ballots 45 days in advance of Election Day in Federal elections, serves as the basis for denying a hardship waiver under 52 U.S.C. § 20302(g)(2).¹⁰

⁹ Formerly 42 U.S.C. § 1973ff-1(a)(8)(A).

¹⁰ Formerly 42 U.S.C. § 1973ff-1(g)(2).