



U.S. Department of Justice

Civil Rights Division

Voting Section - NWB
950 Pennsylvania Ave, NW
Washington, DC 20530

January 28, 2014

The Honorable Jim Condos
Secretary of State
128 State Street
Montpelier, Vermont 05633

Dear Secretary Condos:

We write to you as the chief elections official for the State of Vermont concerning Vermont's compliance with the requirements of the Uniformed and Overseas Citizens' Absentee Voting Act (UOCAVA), 42 U.S.C. §§1973ff to 1973ff-7, as amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, 123 Stat. 2190 (2009) ("MOVE Act"). As we have discussed, we remain concerned that the late federal primary election date in Vermont, scheduled for the fourth Tuesday in August, does not provide enough time to ensure transmission of UOCAVA ballots by the 45th day prior to the November federal general election as UOCAVA requires.

As you are aware, UOCAVA guarantees active-duty members of the uniformed services, and their spouses and dependents, and United States citizens residing overseas the right "to vote by absentee ballot in general, special, primary, and runoff elections for federal office." 42 U.S.C. § 1973ff-1(a)(1). To give those voters sufficient time to vote, the MOVE Act amended UOCAVA to require that states transmit absentee ballots to UOCAVA voters at least 45 days before an election for federal office. 42 U.S.C. § 1973ff-1(g)(1)(A) ("Each state shall . . . transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter . . . not later than 45 days before the election."); 42 U.S.C. § 1973ff-1(g)(1)(A) ("the purpose [of the 45-day requirement] is to allow absent uniformed services and overseas voters enough time to vote"); *see* 156 Cong. Rec. at S4518 (discussing development of 45-day advance transmission requirement based upon evidence before Congress.)

Under UOCAVA, Vermont is responsible for ensuring that validly-requested absentee ballots are sent in accordance with its terms. 42 U.S.C. §§ 1973ff-1, 1973ff-6(6). Vermont has a decentralized system in which it has delegated to its 246 municipalities the responsibility to transmit absentee ballots to UOCAVA voters. Thus it is critical that the federal election calendar provide election officials enough time between the primary date and the UOCAVA transmission deadline before the general election to certify the election results, resolve any election challenges, finalize, print, proofread, and deliver ballots to each municipality for transmittal to the voters.

In 2012, Vermont was not able to transmit all of its UOCAVA ballots by the 45-day deadline before the federal general election. Subsequent to the August 28 primary election, the Vermont Superior Court in Washington County ordered a recount because of a dispute

concerning the results of the gubernatorial primary election for the Progressive Party.¹ On September 18, 2012, the Superior Court announced the results of the recount and declared a winner of the gubernatorial primary election. After the recount results were announced, your office had approximately three days to prepare ballots for Vermont voters who were serving in the military or living overseas.

On October 11, 2012, the United States filed a lawsuit to enforce the rights of Vermont's UOCAVA voters to vote in the 2012 federal general election. *See United States v. State of Vermont*, No. 5:12-cv-236 (D. Vt. 2012). As alleged in the Complaint, 45.3 percent of cities and townships with UOCAVA ballots to transmit for the 2012 general election sent them after the September 22 transmittal deadline. On October 12, 2012, the parties filed a Settlement Agreement, which was approved by the federal court on October 22, 2012. The agreement extended the ballot receipt deadline by ten days to ensure that UOCAVA ballots could be counted, and included a notice provision to let UOCAVA voters know of the extension. Paragraph eight of the agreement provides that the United States will not take steps to recommence the action against Vermont "unless Vermont fails to take adequate steps to ensure that future qualified UOCAVA voters receive the opportunity to vote in elections for Federal office that is provided by UOCAVA." In the agreement, you expressed support for legislation that would remedy the late primary date.

We understand that a change in Vermont's late primary date is currently under consideration by the state legislature. The Senate passed an omnibus elections bill (S. 86) that is currently being considered by the House Committee on Government Operations in the Vermont House of Representatives. As introduced in the Senate, the bill contained a change in the State's primary date to the first Tuesday in August in each even-numbered year. Although that change was deleted from the final version passed by the Senate, we understand that it may be added back during the House's consideration of the bill. We also understand that some members of the legislature have opposed moving the primary date because other states have late primary dates.

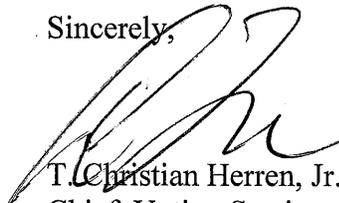
As you know, after the MOVE Act was passed, a number of states voluntarily moved their federal primary election dates to ensure UOCAVA compliance. Where states have had difficulties meeting the UOCAVA deadline due to structural or administrative impediments, we have sought to work cooperatively with state officials to identify the necessary changes to their election calendars and other associated requirements. Where such barriers have impeded UOCAVA compliance without resolution, the Department also has initiated litigation in federal court to obtain the structural changes sufficient to ensure that UOCAVA voters will have the full 45 days prior to federal elections to receive, cast and return their ballots. For example, in *United States v. State of New York*, No. 1:10-cv-1214, (N.D.N.Y. Jan. 27, 2012), after failures to meet the 45-day deadline, the court concluded that New York's late federal primary date violated UOCAVA because it did not allow for timely transmission of UOCAVA ballots by the 45th day before the November general election and ultimately ordered New York to implement a new earlier federal primary date. The Department did not advocate for adoption of any particular primary election date, so long as it allowed sufficient time for the state to comply with the UOCAVA ballot transmission deadline. And while that judgment must be made in the context of each state's procedures, in the New York case the court found that the federal primary election

¹ A similar recount also occurred during the gubernatorial primary election in 2010.

date needed to be no later than 35 days in advance of the 45-day UOCAVA transmittal date before the federal general election, i.e., at least 80 days before the federal general election, in order to complete all necessary election administration procedures under New York law and still meet the 45-day deadline.

We greatly appreciate your cooperation in our continuing efforts to ensure that Vermont's military and overseas voters are afforded the full voting opportunities guaranteed by UOCAVA. For the reasons discussed above, we believe it is important that Vermont consider moving its primary election date, beginning with the August 26, 2014 primary election, to a date that will ensure timely transmittal of its UOCAVA ballots by the 45th day before the November general election. Please feel free to call Deputy Chief Tim Mellett in the Voting Section at (202) 353-0099 if you have any questions about this correspondence.

Sincerely,



T. Christian Herren, Jr.
Chief, Voting Section
Civil Rights Division

cc: Will Senning, Director of Elections and Campaign Finance