

LAW REVIEW¹ 12113
November 2019 (Updated April 2022)

Good News on Military and Overseas Voting from Kane County, Illinois

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

7.1—Election officials must get the absentee ballots out in time for the service member to vote.

I have asked ROA members and others to contact their local election officials (LEOs) to obtain statistics about military and overseas absentee voting in the 2012 general election.³ We have good news from Kane County, Illinois, a major suburban county southwest of Chicago. Kane County has a population of 515,269, according to the 2010 Census.

The Honorable John A. Cunningham, County Clerk of Kane County, has most graciously provided information to respond to our questionnaire. Kane County received 593 absentee ballot applications, for the 2012 general election, from UOCAVA (Uniformed and Overseas Citizens Absentee Voting Act) voters—these are active duty members of the uniformed services (Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public

¹I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

³There are more than 7,500 LEOs nationwide. Only Alaska, Maine, and the District of Columbia administer absentee voting centrally at the state level. In the other 48 states, absentee voting is administered by officials at the county level, or parishes in Louisiana, except for the New England states, Michigan, and Wisconsin, where absentee voting is administered by officials at the city, town, or township level. There are 1,851 LEOs in Wisconsin alone, and another 1,500 in Michigan. The title of the LEO varies (County Clerk, County Recorder, County Registrar, Supervisor of Elections, Town Clerk, etc.), but you can figure it out.

Health Service and the commissioned corps of the National Oceanic and Atmospheric Administration) or Merchant Marine and their voting-age family members, whether within or outside the United States, as well as voting-age U.S. citizens who are outside our country temporarily or permanently.

In 2009, Congress enacted the Military and Overseas Voter Empowerment Act (MOVE Act), which amended UOCAVA in several important ways. The most important was to add an explicit requirement that each state mail out ballots to UOCAVA voters (military and civilian) by the 45th day preceding any primary or election for federal offices. This is title 42, United States Code, section 1973ff-1(a)(8)(A), or 42 U.S.C. 1973ff-1(a)(8)(A). In 2012, LEOs should have sent out absentee ballots on or before September 22, which was 45 days before the November 6 general election.

I am most pleased to note that Kane County beat this deadline by two days, sending out 266 UOCAVA ballots on September 20. Of course, the LEO cannot send a ballot to a voter until the LEO has received the individual's application for a ballot. An additional 327 UOCAVA voters submitted their applications after September 20, and those ballots were sent out as soon as possible after the applications were received.

There is an important lesson to be learned here. UOCAVA voters should be encouraged to apply *early* for their absentee ballots, in order to take advantage of the statutory requirement that LEOs send out unmarked absentee ballots not later than the 45th day before Election Day. UOCAVA explicitly overrides state "not earlier than" rules for a UOCAVA voter to submit his or her absentee ballot request: "A State may not refuse to accept or process, with respect to any election for Federal office, any otherwise valid voter registration application or absentee ballot application (including the postcard form prescribed under section 1973ff of this title) submitted by an absent uniformed services voter during a year on the grounds that the voter submitted the application before the first date on which the State otherwise accepts or processes such applications for that year submitted by absentee voters who are not members of the uniformed services." 42 U.S.C. 1973ff-3.

This means that if you are an active duty member of the uniformed services or the voting-age family member of such a member (within or outside the United States), you are permitted by federal law to submit your absentee ballot request *at any time during the calendar year of the election* (even in January for the November general election) without regard to state "not earlier than" rules. Under Article VI, Clause 2 of the United States Constitution (commonly called the "Supremacy Clause"), federal law trumps conflicting state laws and state constitutions.

Many service members are reluctant to submit their absentee ballot requests early in the year because they do not know where they will be, and what mailing address they will be using, in the weeks leading up to the November general election. I recognize that the service member does not control and often cannot predict his or her movements even a few days into the future. My advice is that you submit your absentee ballot request early in the year and then establish contact with the LEO by e-mail or telephone. If you are transferred or deployed, you should notify the LEO as soon as possible of your new ballot mailing address.

Of the 593 absentee ballots sent out to UOCAVA voters, 483 of them came back on time and were counted. No ballots came back late, at least as of November 19, and no ballots that came back on time were rejected for other reasons.

Kane County reports that four ballots were returned by the United States Postal Service as undeliverable. In each instance, the County Clerk was able to contact the applicant, obtain a better mailing address, and resend the ballot.

Section 1973ff-2 of UOCAVA (42 U.S.C. 1973ff-2) provides for the Federal Write-in Absentee Ballot (FWAB). The UOCAVA voter who has applied for the regular absentee ballot but has not received it is permitted to submit a completed FWAB. The FWAB is limited to federal offices in the general election. For each federal office, the voter marks the FWAB by writing in the name of the favored candidate or by expressing a party preference, like “Democratic nominee” or “Republican nominee.” This is an unsatisfactory ballot, but it beats being wholly disenfranchised.

In past elections, there have been reports of LEOs rejecting many completed FWABs based on various technicalities. Happily, that was not the case in Kane County in 2012. The county received 20 completed FWABs and counted all 20.

I am most pleased with these statistics, and I congratulate County Clerk John A. Cunningham for his efforts to facilitate the enfranchisement of the brave young men and women from that county who are away from home and prepared to lay down their lives in defense of our country.

Readers—please contact your LEO to obtain this information for your county or municipality. If the questionnaire yields good news, like in Kane County, please congratulate and thank the LEO. If the questionnaire yields bad news, please tell the LEO that we want to work with him or her to improve the performance in 2014 and beyond.

Update – April 2022

The location of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) within the United States Code changed. UOCAVA was previously cited at 42 U.S.C. §§ 1973ff–1973ff-7. After an editorial reclassification, the UOCAVA is now codified at 52 U.S.C. §§ 20301–20311. The changes in codification have not changed the substance or application of the sections.

The relevant sections cited throughout the article can be found at:

42 U.S.C. § 1973ff-1 discussing state responsibilities can be found at 52 U.S.C. § 20302.

42 U.S.C. § 1973ff-2 discussing the federal write-in absentee ballot in general elections for Federal office for absent uniformed services voters and overseas voters can be found at 52 U.S.C. § 20303.

42 U.S.C. § 1973ff-3 discussing the prohibition of refusal of applications on grounds of early submission can be found at 52 U.S.C. § 20306.

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This article is one of 1800-plus “Law Review” articles available at www.roa.org/page/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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