

LAW REVIEW¹ 12117

December 2012

Good News on Military and Overseas Voting from Isle of Wright County, Virginia

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.

Thank you to the Honorable Lisa E. Betterton (General Registrar of Isle of Wright County, Virginia) for completing our questionnaire on military and overseas voting in the 2012 general election, and thank you especially for her 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.

Isle of Wight County is located in the Norfolk metropolitan area, and the population of the county is 35,270, according to the 2010 Census. Some of the county's residents commute to work at Naval Base Norfolk, one of the largest naval bases in the world.

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.

The General Registrar reports that she received 98 Federal Post Card Applications (FPCAs)³ requesting absentee ballots for the 2012 general election. The Registrar sent out 98 ballots by e-mail or mail—none of the completed FPCAs were rejected.

As amended in 2009, UOCAVA requires local election officials (LEOs) to send out absentee ballots to UOCAVA voters at least 45 days before any primary, general, or special election that includes federal offices (President, United States Senator, or United States Representative). For the general election held on November 6, 2012, LEOs were required to send out ballots by Saturday, September 22.

Isle of Wight County has joined the 21st Century, transmitting unmarked absentee ballots to UOCAVA voters by e-mail, if the voter has requested e-mail transmission and has provided an e-mail address. On September 19 (three days before the deadline), Isle of Wight County transmitted 37 unmarked ballots to UOCAVA voters by e-mail. On September 20 (two days before the deadline), Isle of Wight County sent out 16 absentee ballots to UOCAVA voters by mail.

Of course, the LEO cannot send out an absentee ballot to a voter until the LEO has received the voter's application for an absentee ballot, and not all of the completed FPCAs were received by September 19. After that date, the General Registrar sent out an additional 37 unmarked ballots to UOCAVA voters by e-mail and another eight ballots by mail.

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 citation refers to title 42, United States Code, section 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

³We are using FPCAs as a marker for voters who are eligible to vote under a federal law called the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). We believe that UOCAVA voters almost always use the FPCA because it is readily available on-line and through Voting Assistance Officers in military units and at American embassies and consulates around the world, and because by federal law the UOCAVA voter is permitted to use the FPCA as a simultaneous absentee ballot request and voter registration application, if the individual is not already registered. UOCAVA voters are active duty members of the United States uniformed services and their voting-age family members, whether inside or outside our country, and U.S. citizens outside our country temporarily or permanently.

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 98 unmarked ballots that Isle of Wight County transmitted to UOCAVA voters, 79 of them came back on time, as marked ballots, and were counted. There were no ballots that were received on time but rejected for procedural deficiencies (like the voter’s failure to sign the affidavit on the back of the ballot return envelope). There were three ballots that came back late (after November 6) and were not counted. Two ballots were returned unmarked (by the United States Postal Service) as undeliverable and 14 ballots did not come back. Add up these numbers and you get 98, the number of completed FPCAs received.

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 Isle of Wight County in 2012. The county received eight completed FWABs and counted all eight.

Readers: Please contact your own LEO to obtain this sort of information for your county or municipality. If the questionnaire yields good news, as in Isle of Wight County in Virginia and Kane County in Illinois (Law Review 12113), please congratulate and thank the LEO.

If the questionnaire shows problems (military and overseas voters being disenfranchised), 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-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.

Please join or support ROA

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:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002