U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20035*

June 25, 2004

C. Havird Jones, Jr., Esq.
Senior Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211-1549

Dear Mr. Jones:

This refers to Act No. 326 (2002), which adopts numbered posts and a majority vote requirement for Richland-Lexington School District No. 5 in Richland and Lexington Counties. This Act was submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your responses to our August 9, 2002, request for additional information on October 8, 2002, and April 27, 2004.

We have carefully considered the information you have provided, as well as census data, comments from interested parties, and other information. Under Section 5 of the Voting Rights Act, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race. *See Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Procedures for the Administration of Section 5 of the Voting Rights Act*, 28 C.F.R. 51.52 (c). As discussed below, I cannot conclude that the state's burden under Section 5 has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the adoption of numbered posts and a majority vote requirement for the election of board members of Richland-Lexington School District No. 5.

According to the 2000 Census, the district has a voting age population of 54,473 persons, of whom 7,615 (14%) are black. The most recent registered voter data indicate that there are 48,735 registered voters in the district, of whom 7,141 (14.6%) are black. In the Richland County portion of the school district, the black voting age population is 3,751 (17.5%) and the black registration rate is 19.3%. In the Lexington County portion of the district, the black voting age population is 3,856 (11.7%) and black registration rate is 11.2%. The minority population in the district is growing rapidly, particularly among school age children and particularly in Richland County. According to the South Carolina Department of Education, the district had the greatest percentage change in minority enrollment in the state during the 1990s, with minority student enrollment more than doubling from 1,724 to 4,046.

The benchmark election system consists of seven board members elected at large to staggered, four-year terms. Until 2002, five members were elected from Lexington County and two from Richland County. Acting upon a request from the school board, the state legislature in 2002 moved one seat from Lexington to Richland in response to faster population growth in the latter county. On August 9, 2002, the Attorney General informed the state that he had no objection to the reallocation of seats. This electoral system is the benchmark against which the Attorney General determines whether the state has met its burden of establishing that the proposed changes do not have a discriminatory effect and do not have a discriminatory purpose. *See City of Rome v. United States*, 446 U.S. 156, 183-85 (1980); 28 C.F.R. 51.54(b).

Our electoral analysis indicates that elections for membership on the school board are marked by a pattern of racially polarized voting. Within the context of the racially polarized voting patterns that exist in the district, the electoral changes submitted to the Attorney General operate to prevent black voters from using single-shot voting to elect candidates of their choice.

Almost twenty five years ago, the Supreme Court addressed the application of numbered posts and a majority vote requirement in *City of Rome v. United States*. Rome had a black voter registration level of approximately 15%, slightly less than that of the Richland County electorate here and almost the same as the school district as a whole. The Court held that "the electoral changes from plurality-win to majority-win elections, numbered posts, and staggered terms, when combined with the presence of racial bloc voting and Rome's majority white population and at-large electoral system" results in a prohibited retrogression. 446 U.S. at 183.

The district's electoral history provides telling examples of this effect. The single successful black-preferred minority candidate who won election to the school board in 1992 would not have won had the proposed majority vote requirement been in place.

Sherman Anderson won election to the school board in 1992 by garnering 2,042 of 6,676 votes, or 30.2%. Anderson ran against three candidates, who split the white vote sufficiently to allow him to defeat candidate George Summers by 29 votes. Anderson was the clear first choice of black voters, while the white vote was split, with no candidate receiving more than 39.7% of the white votes.

In addition, under the benchmark method of election, the addition of a third seat to the Richland County portion of the school district would create an additional opportunity for a black-preferred candidate to be elected in those years in which two seats are being contested. If the same results from 1996 were repeated in a year in which the two top vote getters were elected, the minority-preferred incumbent would have been returned to the school board.

With elections every other year, the shift of a seat to Richland County results in two seats being contested in every other election. Under the proposed system, these two seats would be contested as separate elections, rather than the two top vote getters being elected as under the benchmark system.

Similarly, a majority vote requirement would prevent the sort of vote-splitting that led to the election of a minority-preferred board member in 1992. If the 1992 election were repeated, Summers and Anderson would have met in a runoff, where Summers, given the level of racially polarized voting, presumably would have picked up support from the other defeated white candidates.

A voting change has a discriminatory effect if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change with respect to their effective exercise of the electoral franchise). *See e.g., Reno v. Bossier Parish School Board*, 528 U.S. 320, 328 (2000); *Beer v. United States*, 425 U.S. 130, 140-42 (1976).

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *See Georgia v. United States*, 411 U.S. 526 (1973); see also 28 C.F.R. 51.52. In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the adoption of numbered posts and a majority vote requirement by Act No. 326 (2002).

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the submitted changes continue to be legally unenforceable. *See Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of South Carolina intends to take concerning this matter. If you have any questions, you should call Ms. Judith Reed (202-305-0164), an attorney in the Voting Section.

Sincerely,

R. Alexander Acosta
Assistant Attorney General