U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 4 1991

Honorable John Hannah, Jr.
Secretary of State
P. O. Box 12060
Austin, Texas 78711-2060

Clarence A. West, Esq.
City Attorney
P. O. Box 1562
Houston, Texas 77251-1562

Dear Messrs. Hannah and West:

This refers to Chapter 666 (1991), which amends the procedures for filling vacancies; and the 1991 redistricting plan for the City of Houston in Harris, Montgomery, and Fort Bend Counties, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial response to our request for additional information on August 29, 1991, and received further responses on several dates thereafter.

We have carefully considered the extensive information provided by the city and the arguments ably presented by its representatives, as well as the comments and information provided by other individuals, including members of the city's black and Hispanic communities. At the outset, we note that in making the necessary Section 5 determinations, we apply the legal rules and precedents established by the federal courts and our published administrative guidelines. See, e.g., Procedures for the Administration of Section 5 (28 C.F.R. 51.52 (a), 51.55, 51.56). For example, we cannot preclear those portions of a plan where the jurisdiction has deferred to the interests of incumbents while refusing to accommodate the community of interest shared by insular minorities. See, e.g., Garza v. Los Angeles County, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991); Ketchum v. Byrne, 740 F.2d 1398, 1408-09 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). Such concerns are frequently related to the unnecessary fragmentation of minority communities or the needless packing of minority constituents into a minimal number of districts in which they can expect to elect candidates of their choice. See 28 C.F.R. 51.59. We endeavor to evaluate these issues in the context of the demographic changes which compelled the particular jurisdiction's need to redistrict (id.). Finally, our entire review is guided by the principle that the Act insures fair election opportunities and does not require that any jurisdiction attempt to guarantee racial or ethnic proportional results.

Turning to the instant submission, we note that perhaps the most striking demographic change experienced by the City of Houston in the past decade has been the dramatic increase in the Hispanic population. From 1980 to 1990, the Hispanic population grew by 60 percent, rising from 17.6 percent to 27.6 percent of the total city population. The black population percentage remained essentially unchanged while the white population percentage dropped from 52.3 to 40.6 percent.

This demographic shift, however, does not appear to have been reflected in any significant increase in the past decade in the opportunity of Hispanic voters to elect candidates of their choice to the city council. Following the city's adoption in 1979 of the current system of nine councilmembers elected from single-member districts, five elected at-large, and the mayor elected at large (the "9-5-1" system), each districting plan has included one district with an Hispanic majority and the sole Hispanic elected to the council has represented that district. As described by the city, there are a number of factors relevant to understanding this disparity between potential Hispanic voting strength and what has been realized, but, in large part, it appears to be the product of an ongoing pattern of polarized voting operating in the context of an electoral system in which only one district has an Hispanic majority.

Recently, in response to concerns voiced by the Hispanic community for greater representation on the city council, the city undertook an intensive review of its electoral system. Numerous hearings and meetings were conducted, from February through April of this year, and minority leaders testified about the underrepresentation issue. After much debate, it was agreed to propose an enlarged city council elected pursuant to a 16-6-1 system. However, the change was conditioned on approval in a referendum, and the proposal was subsequently defeated in the August 1991 citywide vote.

It was in this context that, in May and June of this year, the city council considered and adopted the proposed redistricting plan for the existing 9-5-1 structure. The city informs us that here, as well, it sought to recognize the growing Hispanic population. However, the plan continues to provide only one district in which Hispanic voters will have the opportunity to elect a candidate of their choice and fragments the remainder of the community into a number of adjoining districts.

In this regard, we note that several alternative plans were developed which would more fairly represent Hispanic voting strength in the city. In particular, it was shown that by avoiding fragmentation a plan would contain two districts in which Hispanics constitute a majority of the voting age population. While we understand that these illustrative districts were developed in the context of an alternative plan that had an unrelated deficiency, we have received no explanation for the city's decision not to present these districts for public review in a plan that properly could be implemented.

We have carefully considered the city's contentions concerning the redistricting process, the redistricting issues with which it was confronted, and the reasons stated for the choices it ultimately made. This review indicates that, by the end of the process, it was generally recognized that a nine-district plan with two districts with Hispanic voting age population majorities would provide Hispanic voters with a substantially greater electoral opportunity than contained in the proposed plan.

We also take note that in the plan adopted to implement the 16-6-1 proposal, the city appears to have been willing to recognize the Hispanic population growth. However, in the nine district proposal this latter goal appears to have been subordinated to a concern for protecting white incumbent councilmembers. As noted above, while incumbency is not in and of itself an inappropriate consideration, it may not be accomplished at the expense of minority voting potential. See, e.g., Garza, 918 F.2d at 771.

Finally, we note that another factor which seemingly limited the city's ability to fairly reflect Hispanic voting strength was the decision not to split existing county precincts. We are aware that the plan ultimately must be implemented without such precinct splits, but it is our understanding that if such splits are necessary in order to adopt a proper plan, the county may then adjust its precincts to follow the new city district lines.

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, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the 1991 redistricting plan.

With regard to the change in the procedures for filling vacancies, the Attorney General does not interpose any objection. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. In addition, as authorized by Section 5, we reserve the right to reexamine this change if additional information that would otherwise require an objection comes to our attention during the remainder of the 60-day period. See 28 C.F.R. 51.41 and 51.43.

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 change has neither 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. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the redistricting plan continues to be legally unenforceable. Clark v. Roemer, 59 U.S.L.W. 4583 (U.S. June 3, 1991); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, and in light of the impending municipal election, please inform us of the action the city plans to take concerning this matter. In this regard, we stand ready to immediately review any remedial redistricting plan adopted by the city. If you have any questions, you should call Mark A. Posner (202) 307-1388, an attorney in the Voting Section.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division