U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

June 26, 1995

J. Gerald Hebert, Esq.
800 Parkway Terrace
Alexandria, Virginia 22302

Dear Mr. Hebert:

This refers to the change in method of election from at-large by majority vote with numbered posts, staggered terms, and a 2-2-1 method of staggering to cumulative voting by plurality vote with numbered posts, staggered terms, and a 3-2 method of staggering, a change in procedures for filling vacancies on the city council, a change in terms of office for the mayor and councilmembers from three-year terms to two-year terms, and the implementation schedule for the City of Andrews in Andrews County, 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 partial response to our request for additional information on April 27, 1995.

Over the past decade, the city's Hispanic population percentage has increased by about ten percentage points. According to the 1990 Census, Hispanic persons represent 34 percent of the city's total and 28 percent of the city's voting age populations. Under the proposed system, every two years either two or three posts for the city council will be up for election. Candidates must designate the specific post for which they seek election. Voters will be able to cast as many ballots as there are positions, and they may apportion their votes across the posts. Thus, when three posts are up for election, a voter has three votes to apportion. The voter may cast all three votes in a particular post, two votes in one post and one vote in another, or one vote in each post. Because the city eliminated the majority vote requirement, whichever candidate obtains the most votes in a particular post wins. The city does not provide for any kind of voter education or outreach program to help the minority community understand how to use the proposed system effectively.

We have considered carefully the information you have provided. Your initial submission contained virtually none of the information required and explicitly described in our published administrative guidelines for submissions of districting plans and changes in electoral systems. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.52 through 51.60). As a result, we made a timely written request for additional information with regard to this submission on August 5, 1994. 28 C.F.R. 51.37. After our initial request for additional information, we met with the city's attorneys on two separate occasions to discuss the reasons for our request and our concerns about the proposed system.

We explained that the use of staggered terms and numbered posts and the absence of a voter education program appear to unnecessarily dilute the ability of minority voters to elect a candidate of choice. Staggered terms limit the number of positions that are up for election at any one time, and therefore, minority voters must register and turn out to vote in higher proportions to elect their candidate of choice than they would when more positions are up for election. Likewise, without numbered posts, the top two or three candidates overall would be elected. With numbered posts, if the minority community's candidate of choice were to place second or third overall but lose in the particular post, that candidate would not be elected.

On February 9, 1995, we reiterated our original request for additional information. Finally, on April 27, 1995, in a meeting with the mayor and the city's attorneys, we received the city's response to the request made the previous August and were informed by the city's attorney that no other information would be provided. In neither the meeting nor in its written response, did the city provide any more than a cursory explanation of the reasons the proposed system was adopted. The city also has failed to provide any explanation for its rejection of a single-member districting plan containing a majority Hispanic district which was available to the city during its deliberative process.

Nor has the city provided any detailed explanation of the reasons why staggered terms and numbered posts were included as part of the proposed system. In fact, the city's brief justifications for staggered terms and numbered posts appear pretextual. The city claims that staggered terms are necessary to maintain continuity on the council, but the likelihood of all of the council's incumbents being defeated if concurrent terms were used appears to be very small considering that on average each incumbent is re-elected at least once. Nor is the city's claim that numbered posts are required by law credible. State law does not require cities to use numbered posts, and as a home rule city, Andrews apparently has the authority to alter its election system by its own action. Thus, just as it eliminated

the majority vote requirement for councilmembers, the council could have eliminated numbered posts and staggered terms.

The city's rationale for omitting this information from its response is that it is subject to the attorney-client privilege because the deliberations concerning the method of election were part of executive sessions called to discuss the settlement of the voting rights lawsuit that had been brought against the city, League of United Latin American Citizens, District 5 v. City of Andrews, et al., No. MO 93 CA 075 (W.D. Tex. 1993). Because there are no public records or members of the community who were involved in the process, the city and its attorney are the only persons who have access to such information. However, 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 the Procedures for the Administration of Section 5 (28 C.F.R. 51.27, 51.40, and 51.52).

In the absence of any other explanation by the city, a reasonable inference that can be drawn from the information presented to us is that the proposed system was adopted to protect incumbents or otherwise to minimize minority voting strength. For example, the single-member district plan presented to the council during the process paired several incumbents in the same district. Conversely, the proposed system does not require any of the incumbents to run against another; each incumbent may run for an individual post without any competition from a fellow incumbent.

Thus, based on the information available to us, the proposed system not only unnecessarily dilutes the ability of minority voters to elect a candidate of choice, but it also appears to be designed to protect incumbents. 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 v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 111 S.Ct. 681 (1991); Ketchem v. Byrne, 740 F.2d 1398, 1408-9 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). Where, as here, the protection afforded incumbents is provided at the expense of minority voters, the city bears a

heavy burden of demonstrating that its choices are based on legitimate, non-racial considerations that are not tainted, even in part, by an invidious racial purpose. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977); City of Rome v. United States, 446 U.S. 156, 172 (1980); Busbee v. Smith, 549 F. Supp. 494, 516-17 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983); Washington v. Davis, 426 U.S. 229, 242 (1976).

Moreover, we note that the proposed method of election also clearly violates Section 2 of the Voting Rights Act. The city's minority population suffers from a history of discrimination which appears to have resulted in depressed income, education, and registration levels. The electoral history of the city and within the county suggests that voting is polarized along racial and ethnic lines to such a degree that no person of Hispanic heritage has ever served as a councilmember. Moreover, the only Hispanic member of the school board ever to win election was recently defeated in an election in which cumulative voting with staggered terms was employed.

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 proposed change in the method of election from at-large by majority vote with numbered posts, staggered terms, and a 2-2-1 method of staggering to cumulative voting by plurality vote with numbered posts, staggered terms, and a 3-2 method of staggering.

We note 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 system has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. 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 change in the method of election continues to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10 and 51.45.

The Attorney General will make no determination at this time with regard to the change in the terms of office as they are directly related to the proposed change in the method of election for the city council. See 28 C.F.R. 51.22 (b).

The Attorney General does not interpose any objection to the change in the method of filling vacancies. 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 this change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Your April 27, 1995, letter withdraws the implementation schedule from Section 5 review. Accordingly, no determination by the Attorney General is required concerning this matter. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.25 (a)).

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the action the City of Andrews plans to take concerning this matter. If you have any questions, you should call Ms. Colleen Kane (202-514-6336), an attorney in the Voting Section. Refer to File No. 94-2271 in any response to this letter so that your correspondence will be channeled properly.

Since the Section 5 status of the method of election has been placed at issue in League of United Latin American Citizens, District 5 v. City of Andrews, et al., No. MO 93 CA 075 (W.D. Tex. 1993), we are providing a copy of this letter to the court and counsel of record in that case.

Sincerely,

Loretta King

Loretta King
Acting Assistant Attorney General
Civil Rights Division

cc: The Honorable Lucius D. Bunton III
United States District Court

Rolando L. Rios, Esq.
Kevin B. Jackson, Esq.