U. S. Department of Justice

Civil Rights Division

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

MAR 12 2010

Robert T. Bass, Esq.
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402 West 12th Street
Austin, Texas 78701

Dear Mr. Bass:

This refers to the Spanish language election procedures, including the use of Texas Secretary of State forms and notices, the procedures for translating county-produced election materials, and the oral assistance procedures, for Gonzales County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your response to our November 2, 2009, request for additional information on January 11, 2010.

According to the 2000 Census, the county had a total population of 18,628 persons, of whom 7,381 (39.6%) were Hispanic, and had a total voting age of population of 13,421, of whom 4,705 (35.1%) were Hispanic. The census also indicated that 14.3 percent of Hispanic residents over the age of five speak English less than very well, 30.3 percent of Hispanic voting age citizens were limited English proficient, over three-quarters of the county's Hispanic population speak Spanish at home, and over 76 percent of Hispanics of voting age in the county are United States citizens. Significantly, 1,411 Hispanics live in households in which no one over the age of 14 speaks English "without difficulty." The Texas Secretary of State's January 27, 2010, report indicates that the county has 12,259 registered voters, of whom 3,694 (30.1%) are Spanish surnamed.

On December 7, 1978, the Attorney General informed county officials that no objection would be interposed to the county's proposed bilingual procedures. In describing those procedures, the county represented that "all notices concerning elections are both posted in the courthouse and published in all the county newspapers. All these notices are in Spanish and English." Our review of those notices found the translations to be accurate. With regard to the assignment of bilingual poll workers, the county characterized it as based on where they were most needed. It noted that precincts not staffed with "interpreters," as the county then called bilingual assistors, had "either no Spanish speaking people * * * or only 1 to 2." This process resulted in the assignment of at least one bilingual individual to 10 (55.6%) of the 18 voting precincts for the November 1976 general election to provide the required oral assistance.

Since that time, the county has neither made a submission to the Attorney General of any changes to those procedures to which no objection has been interposed, nor has it obtained a declaratory judgment from the United States District Court for the District of Columbia that any such changes did not have a discriminatory purpose and would not have a discriminatory effect. As the county has noted previously, the 1978 procedures remain in effect and, accordingly, constitute the benchmark bilingual procedures against which the submitted bilingual procedures are measured.

Changes to bilingual election procedures constitute a voting change under Section 5. *Apache County High School District No. 90* v. *United States,* Case No. 77-1518, p. 15 (D.D.C. 1980); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.13. As such, the submitting authority has the burden of establishing that a proposed change is not motivated by a discriminatory purpose and will not have a retrogressive effect on the ability of minority voters to participate in the political process and elect candidates of choice. *Georgia v. United States,* 411 U.S. 526 (1973); 28 C.F.R § 51.52. Changes related to voting may not be implemented unless and until the submitting authority establishes that, when compared to that jurisdiction's benchmark standard, practice or procedure, the proposed change does not diminish the ability of minority voters to participate in the political process. *Beer v. United States*, 425 U.S. 130 (1976).

The applicable legal standard for determining whether discriminatory purpose exists is *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). This approach requires an inquiry into 1) the impact of the decision; 2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; 3) the sequence of events leading up to the decision; 4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and 5) contemporaneous statements and viewpoints held by the decision-makers. *Id.* at 266-68.

With regards to the county's use of Texas Secretary of State forms and notices, the Attorney General does not interpose any objection to the specified change. 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. 28 C.F.R. 51.41.

With regards to the remaining elements of the county's proposed bilingual procedures, we have carefully considered the information you have provided, as well as information from other interested parties. Under Section 5, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed change "neither has 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. As discussed further below, I cannot conclude that the county has sustained its burden of showing that the proposed changes do not have a retrogressive effect or a discriminatory purpose. Therefore, based on the information available to us, I object on behalf of the Attorney General to the procedures for translating county-produced election materials and the oral assistance procedures.

The county proposes to use an internet machine translator, such as Google Translator, for the initial translation of county-produced election materials. The county indicates that the resulting translations will then be sent to the Office of the Texas Secretary of State and to the local LULAC chapter to confirm its accuracy. However, the county has not established that it has an arrangement with the Secretary of State to review these county-generated translations. That state office has also informed us that it has had no communication with the county on this matter. In fact, our information is that the Secretary of State does not offer this service to counties with respect to county-generated notices and the state must itself hire a third-party vendor to translate documents into Spanish.

Because there is no evidence that the county has an agreement with the state to review the translation, the sole quality control rests with the local LULAC chapter's review of the initial translation. The county has not provided sufficient information to establish this measure will, by itself, ensure adequate review of county-produced election materials. For instance, the procedures do not establish a deadline for the county to provide the initial translations to LULAC for its review, which would ensure adequate time to conduct the review, or for that organization to return its edits and/corrections to the county, which would ensure adequate time before an election to incorporate those changes. Although the involvement of county residents and organizations, such as a local LULAC chapter, would be a positive element in any program, such entities are under no obligation to assist the county, whereas a third-party translator, such as a high-school Spanish teacher retained by the county, would be contractually bound to perform.

The county has conducted no research or study into the effectiveness of the proposed process, and has provided no evidence, in the form of a sample or otherwise, supporting the conclusion that the process will produce adequate translations. In comparison to the benchmark procedure, in which a third-party translator produced understandable translations of county-generated notices, the proposed procedure lacks an effective quality control mechanism to ensure the accuracy of the translations.

Hence, the county has not established that its proposed procedure for translating using an internet translator with the review process described in its submission will not have a retrogressive effect when compared to the benchmark of engaging a third-party translator.

We now examine the assignment of bilingual poll workers. Both census data and anecdotal evidence indicate that there continues to be a significant need for Spanish language oral assistance in the county. Under the benchmark procedures, which were devised at a time when the county's Hispanic population percentage was significantly smaller than it is today, the county assigned bilingual poll workers to over half of its voting precincts in 1976. Under the proposed procedure, the county provides that it will make "best efforts" to provide bilingual poll workers to seven of the county's 15 voting precincts. The county's "best efforts" are not equivalent to an unqualified commitment to provide any number of bilingual poll workers, be it the number provided previously under the benchmark procedures, the number recommended by

the Secretary of State's office, or any number in between those two standards. In contrast, the benchmark procedures result in measurable commitments, assuring that only precincts with a handful of Spanish-surnamed voters will be without bilingual poll workers.

The county contends that its failure to meet the requirements of federal law stems from difficulties in finding bilingual poll workers willing to work in several voting precincts. Our information, however, is that prior to the November 2008 and 2009 elections, minority individuals and organizations contacted county officials volunteering to help the county meet federal language minority requirements. The county failed to employ those bilingual citizens who volunteered as poll workers for those elections.

The county's refusal to adopt a standard for staffing polling places with bilingual poll workers increases the concern that these elements of the program will diminish the ability of Hispanic voters to participate in the electoral process. As with its proposed translation procedures, the county has failed to show that its proposed procedures to assign bilingual poll workers will not have a retrogressive effect.

Our analysis under the standard identified in *Arlington Heights* also precludes a determination that the county has met its burden of showing that the proposed plan was not adopted, at least in part, with the a discriminatory purpose. We look first to the clear retrogressive impact of the county's failure to translate all election-related information into Spanish adequately as well as the lack of a commitment to provide adequate oral assistance in Spanish to those who require it to cast an informed ballot. More importantly, the county has determined that it does not plan to generate its own election notices in the future, including one similar to one posted at the Gonzales City Hall for the November 2008 general election; the notice had information not contained in the notice of election translated by the state, including the date of the close of registration prior to the election, a request by the county clerk for 911 addresses from voters maintaining post office boxes, and notice of the voter identification requirement, as well as appropriate county contacts. As our March 24, 2009, letter noted, that translation had numerous errors and omissions. Now, it appears that rather than translate this important information correctly, the county has chosen simply not to post it.

Equally significant is the historical context in which these activities have occurred. As noted earlier, on March 24, 2009, we interposed an objection to an earlier attempt by the county to change its benchmark bilingual election procedures. That objection letter detailed shortcomings of the proposed change. The county's actions following the receipt of the March 2009 objection raises additional hurdles to the county establishing the absence of a discriminatory purpose. If anything, the current proposal is retrogressive even when measured against the 2008 bilingual program to which an objection was interposed. Moreover, even after the objection, the county continues to post English-only election notices on its website, raising concerns about its stated commitment to provide translations of all election materials.

County officials have openly expressed hostility toward complying with the language minority provisions of the Voting Rights Act. In local news articles, the county official who has direct control over the election process has expressed frustration with this Department's efforts to increase the availability of bilingual poll workers, suggesting that language minority voters are not citizens if they do not speak English. The county has proposed the use of either state officials or local residents, two options that would not incur any additional cost (assuming these options even exist), as a quality control mechanism for the machine translation because the county asserts that it is likely unable to pay for a third party, even a local Spanish-language high-school teacher, to translate materials. On the whole, it seems reasonable that the county could afford to pay a qualified translator on the rare occasion that it generates its own election materials, as it did under the benchmark practice.

In sum, the available information precludes the county from establishing that its implementation of the procedures for the translation of election materials into Spanish and assignment of bilingual poll officials was not motivated, at least, in part, by discriminatory purpose. *Arlington Heights*, 429 U.S. at 266-68.

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 United States District Court for the District of Columbia is obtained, the specified elements of the proposed bilingual procedures will continue to be legally unenforceable. *Clark* v. *Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

We further note that the county remains obligated to comply with the language minority requirements of Sections 4(f)(4) and 203 of the Voting Rights Act, 42 U.S.C. 1973b(f)(4) and 1973aa-1a.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action Gonzales County plans to take concerning this matter. If you have any questions, you should call Robert S. Berman (202-514-8690), a Deputy Chief in the Voting Section.

Sincerely,

Thomas E. Perez
Assistant Attorney General