U. S. Department of Justice

Civil Rights Division

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

June 28, 2010

Ms. Elesa Ocker
County Clerk
P.O. Box 189
Ballinger, Texas 76821

Dear Ms. Ocker:

This refers to the Spanish language election procedures for the November 4, 2008, general and the November 3, 2009, statewide constitutional amendment elections, including use of Texas Secretary of State forms and notices and the oral assistance procedures, for Runnels 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 April 12, 2010, follow-up request for additional information on April 30, 2010; supplemental information was received on May 12, 2010.

According to the 2000 Census, the county had 11,495 persons, of whom 3,372 (29.3%) were Hispanic, and a total voting age of population of 8,398, of whom 2,047 (24.4%) were Hispanic. Between 1980 and 2000, the county's Hispanic population percentage grew from 19.4 to 29.3 percent of the total population. The Texas Secretary of State's January 27, 2010, report indicates that the county has 6,791 registered voters, of whom 1,534 (22.6%) are Spanish surnamed. The census also indicated that 38.2 percent of Hispanic voting age citizens speak English less than very well, more than 90 percent of the county's Hispanic voting age population speaks Spanish at home, more than 86 percent of Hispanics in the county are United States citizens, and 1,037 Hispanic residents over the age of five speak Spanish but are limited English proficient. Significantly, 619 Hispanics live in households in which no one over the age of 14 speaks English "without difficulty."

The Attorney General interposed no objection to the county's procedures for providing bilingual election materials on December 29, 1978. The county described the procedures as including the use of the "Spanish language in all of the electoral process," and indicated that "all ballots, polling places notices, and any other notices concerning elections" were provided in both English and Spanish. With regards to Spanish language oral assistance, on October 29, 1984, the Attorney General informed county officials that no objection would be interposed to the county's proposed bilingual oral assistance election procedures, which were set forth in the

Runnels County Commissioners' Court order of March 13, 1984, which requires "each voting precinct election judge to hire as an election clerk for each election a bilingual person, able to speak and read both Spanish and English."

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 judgement 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. The 1978 procedures for providing bilingual election materials and the 1984 procedures for providing Spanish language oral assistance 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 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. *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 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 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 to the oral assistance procedures used for the November 4, 2008, general and November 3, 2009, constitutional amendment elections on behalf of the Attorney General.

Under the benchmark procedures enumerated in the 1984 order, the county was required to assign one bilingual poll worker to each of its five consolidated polling places. Despite an almost fifty percent increase in the county's Hispanic population percentage since 1984, our examination of the November 2008 general and November 2009 constitutional amendment elections show that at least half of county voting precincts did not have a bilingual poll worker for the November 4, 2008, general election, and no voting precincts had a bilingual poll worker for the November 3, 2009, constitutional amendment election. Both census data and anecdotal evidence from members of the minority community indicate, however, that there continues to be a significant need for such assistance. The proposed level of assignment, moreover, is below the Texas Secretary of States's recommended guidelines that bilingual poll workers be stationed in election precincts where five percent or more of the inhabitants are persons of Spanish origin.

Instead of applying the benchmark standard for the elections in question, the county implemented a practice in the 2008 and 2009 elections of having only having an on-call bilingual assistor available by phone in the event that Spanish language oral assistance was required on election day. We note that procedure has not been reviewed under Section 5. The evidence available to us, however, demonstrates that this procedure does not provide effective Spanish language oral assistance. In fact, it appears that the on-call bilingual assistor has not received a single call for assistance in the approximately seven years that she has served in that capacity. We also note that the county does not test the Spanish language proficiency of its bilingual poll workers, or provide training for bilingual assistance. Our information suggests that one of the individuals asserted by the county to be a bilingual poll worker is not proficient in Spanish.

The county contends that departure from the benchmark procedure stems from difficulties in finding bilingual poll workers willing to work in several voting precincts. Our information, however, is that after a recent election a county official told a bilingual poll worker that her services were no longer required. Additionally, employing the on-call bilingual assistor as a poll worker would provide for more effective oral assistance than employing her on-call, since she has never received a call for assistance. Further, despite written and telephonic requests to do so, the county has produced no information documenting its good-faith efforts to recruit, find, or hire bilingual poll workers. 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*, *supra*, looks first to the clear retrogressive impact of the county's failure to provide oral assistance in Spanish to those who require it to cast an informed ballot. The county decided to reduce the level of bilingual assistance for the 2008 election and to eliminate it totally for the 2009 election. The county

committed itself to a procedure that it knew would not maintain the level of Spanish language oral assistance envisioned under the benchmark. This county has not only failed to provide any data indicating this reduction did not have a retrogressive effect, but has offered no explanation as to why its failure to either recruit new bilingual individuals or to retain other individuals who previously served as bilingual poll workers for the 2008 and 2009 elections is not the result of an intent not to provide less bilingual assistance than under the benchmark. In sum, the evidence precludes the county from establishing that the procedures for assigning bilingual poll officials for the November 4, 2008, general and November 3, 2009, constitutional amendment elections 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 deviations from the county's benchmark bilingual election procedures described above will continue to be legally unenforceable. *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 Runnels County plans to take concerning this matter. If you have any questions, you should call Maureen Riordan (202-353-2087), an attorney in the Division's Voting Section.

Sincerely,

Thomas E. Perez

Thomas E. Perez
Assistant Attorney General