



Appellate Section - RFK Building
950 Pennsylvania Ave, NW
Washington, DC 20530

DJ 166-54-95

January 30, 2012

Mr. Mark J. Langer, Clerk
United States Court of Appeals for
the District of Columbia Circuit
333 Constitution Avenue, NW
Washington D.C. 20001

Re: *LaRoque v. Holder*, No. 11-5349

Dear Mr. Langer:

Enclosed is a copy of a January 30, 2012, letter to James P. Cauley, III, counsel for the City of Kinston, North Carolina. On August 17, 2009, the Attorney General interposed an objection, pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to a proposed change to nonpartisan elections for Kinston municipal elections. *LaRoque v. Holder*, No. 11-5349 Joint Appendix (J.A.) 45-47. That objection led to the instant litigation, which concerns the constitutionality of Section 5. J.A. 5, 222-223. The enclosed letter notifies the City that the Attorney General has determined that it is appropriate to reconsider the August 17, 2009, Kinston objection, due to the receipt of new information relating to a proposed voting change submitted by the Board of Education for Lenoir County, North Carolina, where Kinston is located. It is the Attorney General's intention to make his decision with respect to the reconsideration of the Kinston objection by February 10, 2012. We will notify this Court promptly when that decision is made.

Oral argument in *LaRoque* is scheduled for February 27, 2012. Please distribute copies of this letter and the attached letter to Mr. Cauley to the members of the panel assigned to this case.

Sincerely,

Diana K. Flynn
Section Chief

s/ Linda F. Thome
Linda F. Thome
Attorney
Appellate Section
Civil Rights Division
(202) 514-4706

cc: All counsel of record



Civil Rights Division

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

JAN 30 2012

Mr. James P. Cauley III, Esquire
Rose Rand Wallace
P.O. Drawer 2367
Wilson, North Carolina 27894-2367

Dear Mr. Cauley:

This refers to the change to nonpartisan elections, with a plurality-vote requirement, for the City of Kinston in Lenoir County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. On August 17, 2009, we informed you that the Attorney General was unable to “conclude that the city has sustained its burden of showing that the proposed changes do not have a retrogressive effect.” We have enclosed a copy of that letter for your reference (File 2009-0216).

On September 7, 2011, the Lenoir County Board of Education submitted Section 2(a) and (b) of Session Law 2011-407, which would change the method of electing school board members from partisan elections to nonpartisan elections with a plurality-vote requirement, for administrative review under Section 5 (File 2011-3476). Our initial review indicated that the information provided was not sufficient to reach the requisite determination. Accordingly, on November 7, 2011, the Department requested additional information, pursuant to *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. § 51.37. We have also enclosed a copy of that letter for your reference. On December 12, 2011, the County Board of Education responded to our written request for additional information. The Attorney General expects to make a determination on the County Board of Education submission by February 10, 2012.


During our review of the information that the Board of Education has provided as well as other available information in connection with our analysis of the proposed change in the Board of Education’s method of election, we have had occasion to review recent patterns of electoral behavior in local elections, including the November 8, 2011, election for members of the Kinston City Council. Based upon our review thus far, it appears that there may “have been a substantial change in operative fact” such that it is appropriate to reconsider the August 17, 2009, objection concerning the City of Kinston. 28 C.F.R. § 51.46(a).

Specifically, the available information indicates the following: the black share of the voting-age population in Kinston has risen over the last decade from 58.8 to 65.0 percent; the black share of registered voters in Kinston has risen to 65.4 percent; unlike in most prior municipal general elections in Kinston, in the November 2011 election black voters constituted a majority of the voters turning out to vote; and, in that same November 2011 election, black voters in Kinston elected their candidates of choice to a majority of the seats on the Kinston City Council for the first time in modern times.

Notice of this decision to reconsider the objection will be provided to any parties who commented on the Kinston submission or requested notice of the Attorney General's decision on that matter, and will appear in the next *Notice of Submission Activity under Section 5 of the Voting Rights Act*, which will be published today. 28 C.F.R. § 51.46(b). Because the decision to reconsider the August 17, 2009, objection may be a relevant fact in the litigation currently pending before the United States Court of Appeals for the District of Columbia Circuit in *LaRoque v. Holder*, No. 11-5349, we are providing a copy of this letter to the Court and to counsel of record in that case.

The decision to reconsider the August 17, 2009, objection does not constitute a final decision regarding whether to continue or withdraw that objection. We intend to accept comments from the City and interested parties regarding reconsideration before making a decision. It is the Attorney General's intention to make his decision with respect to the reconsideration of the August 17, 2009, objection regarding the City of Kinston's proposed change to nonpartisan elections at the same time a determination is made on the Lenoir County Board of Education submission of the proposed change to nonpartisan elections, *i.e.*, by February 10, 2012. Accordingly, interested parties who wish to provide information or comments should do so promptly. If you have any questions, please call Robert Berman (202-514-8690), a deputy chief in the Voting Section.

Sincerely,



Thomas E. Perez
Assistant Attorney General

Enclosures



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

AUG 17 2009

James P. Cauley III, Esq.
Rose Rand Wallace
P.O. Drawer 2367
Wilson, North Carolina 27894-2367

Dear Mr. Cauley:

This refers to the change to nonpartisan elections, with a plurality-vote requirement, for the City of Kinston in Lenoir County, North Carolina, 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 June 10, 2009, request for additional information on June 16, 2009; additional information was received on August 4, 2009.

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 city has sustained its burden of showing that the proposed changes do not have a retrogressive effect. Therefore, based on the information available to us, I object to the voting changes on behalf of the Attorney General.

According to the 2000 Census, the City of Kinston has a total population of 23,688 people, of whom 14,837 (62.6%) are African-American. The total voting age population is 17,906, of whom 10,525 (58.8%) are African-American. The American Community Survey for 2005-2007 estimates the total population to be 22,649, of whom 14,967 (66.6%) are African-American. As of October 31, 2008, the city has 14,799 registered voters, of whom 9,556 (64.6%) are African-American.

Although black persons comprise a majority of the city's registered voters, in three of the past four general municipal elections, African Americans comprised a minority of the electorate on election day; in the fourth, they may have been a slight majority. For that reason, they are viewed as a minority for analytical purposes. Minority turnout is relevant to determining whether a change under Section 5 is retrogressive. *Hale County v. United States*, 496 F.Supp 1206 (D.D.C.).

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Black voters have had limited success in electing candidates of choice during recent municipal elections. The success that they have achieved has resulted from cohesive support for candidates during the Democratic primary (where black voters represent a larger percentage of the electorate), combined with crossover voting by whites in the general election. It is the partisan makeup of the general electorate that results in enough white cross-over to allow the black community to elect a candidate of choice.

This small, but critical, amount of white crossover votes results from the party affiliation of black-preferred candidates, most if not all of whom have been black. Numerous elected municipal and county officials confirm the results of our statistical analyses that a majority of white Democrats support white Republicans over black Democrats in Kinston city elections. At the same time, they also acknowledged that a small group of white Democrats maintain strong party allegiance and will continue to vote along party lines, regardless of the race of the candidate. Many of these white crossover voters are simply using straight-ticket voting. As a result, while the racial identity of the candidate greatly diminishes the supportive effect of the partisan cue, it does not totally eliminate it.

It follows, therefore, that the elimination of party affiliation on the ballot will likely reduce the ability of blacks to elect candidates of choice. Black candidates will likely lose a significant amount of crossover votes due to the high degree of racial polarization present in city elections. Without party loyalty available to counter-balance the consistent trend of racial bloc voting, blacks will face greater difficulty winning general elections. Our analysis of election returns indicates that cross-over voting is greater in partisan general elections than in the closed primaries. Thus, statistical analysis supports the conclusion that given a change to a non-partisan elections, black preferred candidates will receive fewer white cross-over votes.

The change to nonpartisan elections would also likely eliminate the party's campaign support and other assistance that is provided to black candidates because it eliminates the party's role in the election. The party provides forums for black candidates to meet with voters who may otherwise be unreachable without the party's assistance. In addition, the party provides campaign funds to candidates, without which minority candidates may lag behind their white counterparts in campaign spending.

Removing the partisan cue in municipal elections will, in all likelihood, eliminate the single factor that allows black candidates to be elected to office. In Kinston elections, voters base their choice more on the race of a candidate rather than his or her political affiliation, and without either the appeal to party loyalty or the ability to vote a straight ticket, the limited remaining support from white voters for a black Democratic candidate will diminish even more. And given that the city's electorate is overwhelmingly Democratic, while the motivating factor for this change may be partisan, the effect will be strictly racial.

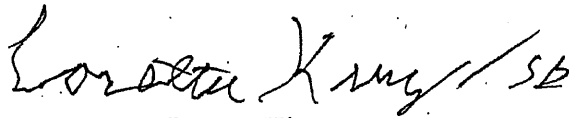
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Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States*, 411 U.S. 526 (1973); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 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 change to nonpartisan elections, with a plurality vote requirement.

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 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. 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, unless and until the objection is withdrawn or a judgment from the District of Columbia court is obtained, the change to nonpartisan elections, with a plurality vote requirement, continues 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 the city plans to take concerning this matter. If you have any questions, please call Mr. J. Eric Rich (202-305-0107), an attorney in the Voting Section.

Sincerely,

A handwritten signature in cursive script that reads "Loretta King" followed by a slanted line and the initials "SB".

Loretta King
Acting Assistant Attorney General



U.S. Department of Justice

Civil Rights Division

TCH:RSB:JER:ZB:tst
DJ 166-012-3
2011-3476

*Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530*

November 7, 2011

Deborah R. Stagner, Esq.
Tharrington Smith
209 Fayetteville Street
Raleigh, North Carolina 27601

Dear Ms. Stagner:

This refers to sections 2.(a) and 2.(b) of Session Law 2011-407 (H.B. 719) (2011), which provide for the change to nonpartisan elections with a plurality vote requirement, and a change to the candidate qualification dates, for the Lenoir County School District in Lenoir County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submission on September 7, 2011; additional information was received through October 21, 2011.

Our analysis indicates that the information sent is insufficient to enable us to determine 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, color, or membership in a language minority group, as required under Section 5. The following information is necessary so that we may complete our review of your submission:

1. Election returns for all school district and county commissioner elections, including primary and runoff elections, held since 2000. For each election, please provide:
 - a. the name, party and race of each candidate (indicating the incumbent(s), if any, and whether incumbency was by election or appointment);
 - b. the total number of registered voters, by voting precinct, party, and race;
 - c. the total number of voters who cast a ballot, by voting precinct, party, and race;
 - d. the number of votes, by voting precinct, each candidate received, and the winners of each contest; and
 - e. the total and voting age population, by race, of the applicable voting precincts.

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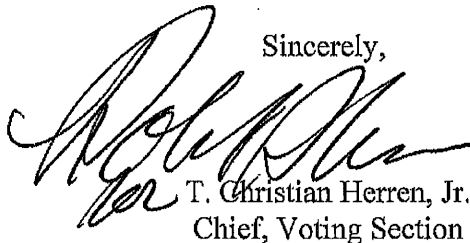
If any or all of the above information is available in an electronic format, it would be helpful if you provide it in that format. If exact numbers by race and party are not available for your responses to items b-e, above, provide your best estimate and the basis for that estimate.

2. All written comments or information presented to or considered by the General Assembly related to Sections 2.(a) and 2.(b) of Session Law 2011-407.
3. Transcripts of all hearings in the General Assembly or in committee in which Sections 2.(a) and 2.(b) of Session Law 2011-407 were considered.
4. Copies of all written publicity concerning the change.

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive the information specified above. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.37. However, if no response is received within sixty days of this request, the Attorney General may object to the proposed changes consistent with the burden of proof placed upon the submitting authority. 28 C.F.R. 51.40 and 51.52(a) and (c). Changes that affect voting are legally unenforceable unless and until the appropriate Section 5 determination has been obtained. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10. Therefore, please inform us of the action the district plans to take to comply with this request.

If you have any questions concerning this letter or if we can assist you in obtaining the requested information, please call Zach Bromer (202-489-1156) of our staff. Refer to File No. 2011-3476 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,



T. Christian Herren, Jr.
Chief, Voting Section

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2011, the foregoing letter was filed electronically with the Clerk of the Court for the United States Court of Appeals for the District of Columbia using the CM/ECF System, and four paper copies were delivered by hand to the Clerk of the Court.

In, addition, I certify that the following participants will receive a copy through the CM/ECF system:

J. Gerald Herbert
191 Somerville St., Suite 405
Alexandria, VA 22304

Michael E. Rosman
Center for Individual Rights
1233 20th St. NW, Suite 300
Washington, DC 20036

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s/ Linda F. Thome
LINDA F. THOME
Attorney