



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

DJ 166-54-95

February 10, 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 letter from Thomas E. Perez to James P. Cauley III, with attachments, dated February 10, 2012.

Oral argument in *LaRoque* is scheduled for February 27, 2012. Please distribute copies of the attached letter, with attachments, 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

FEB 10 2012

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. 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 January 30, 2012, we informed you that, as the result of information concerning electoral behavior in Kinston, which we reviewed during an analysis of an administrative submission under Section 5 of a proposed voting change for the Lenoir County School District, it appears that there may “have been a substantial change in operative fact” such that it is appropriate for the Department to reconsider the August 17, 2009, objection concerning the City of Kinston. *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. § 51.46(a). A copy of that letter is also enclosed.

The Department provided notice of the January 30, 2012, decision to reconsider the objection to parties who commented on the Kinston submission or requested notice of the Attorney General’s decision on that matter. Notice of the decision to reconsider appeared in the *Notice of Submission Activity under Section 5 of the Voting Rights Act*, which was published January 30. 28 C.F.R. § 51.46(b). The Department also provided notice on January 30 of the decision to reconsider the objection to the Court and to counsel of record in *LaRoque v. Holder*, No. 11-5349 (D.C. Cir.). The Department has reviewed those comments concerning the decision to reconsider that were received after January 30.

Today, we are informing Lenoir County officials that the Attorney General will not interpose an objection under Section 5 to Sections 2(a) and (b) of Session Law 2011-407, which change the method of election for the Lenoir County School District to non-partisan elections

with a plurality-vote requirement (File 2011-3476). As we informed you earlier, we had reviewed electoral behavior within Lenoir County as one factor in our analysis of the proposed change to non-partisan elections for the Lenoir County School District. That review also encompassed electoral behavior in municipal elections within the City of Kinston, including the November 2011 general election.

As the Department's August 17, 2009, letter to Kinston described, our analysis at that time indicated that black voters in Kinston turned out to vote in municipal elections at a lower level than did white voters, such that black voters were typically a minority of the voters on election day. Likewise, our analysis at the time indicated that black voters have had limited success in electing candidates of choice to the city council in Kinston.

Our present review indicates a shift in the electoral pattern in Kinston elections that existed at the time of the August 17, 2009, objection. Specifically, the information that is now available indicates the following: the 2010 Census confirms that the black share of the voting-age population in Kinston has risen over the last decade from 58.8 to 65.0 percent; as of January 2012, the black share of registered voters in Kinston is now 65.4 percent; unlike in most prior municipal general elections in Kinston that we have been able to analyze, in the November 2011 municipal general election, voter turnout data show that black voters constituted a majority of the electorate; and, in that same November 2011 municipal general 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.

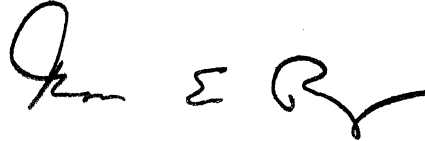
These data lead us to conclude, in light of the consistently high levels of black political cohesion in elections in the City of Kinston, the growing percentage of the voting-age population in Kinston that is black, and the demonstrated increase in the share of the actual electorate in Kinston that is black, that the black electorate is now large enough to successfully elect its preferred candidates in either partisan or nonpartisan municipal elections in Kinston. We therefore conclude that, today, a change from the former to the latter in Kinston is not impermissibly retrogressive under Section 5.

I note that although our reconsideration of the Kinston objection arose in the course of our review of the Lenoir County change, our analysis and determination regarding the Kinston voting change are based on the demographics of and electoral patterns in the City of Kinston in municipal (not county) elections.

Based on the facts described above, the Department has concluded that there has been "a substantial change in operative fact" relative to the August 17, 2009, objection to the proposed change in the method of election for the City of Kinston, and that the City of Kinston has met its burden under Section 5 of showing that the change to nonpartisan elections with a plurality-vote requirement has neither a discriminatory purpose nor will have a discriminatory effect. Accordingly, the August 17, 2009, objection is withdrawn. 28 C.F.R. § 51.48(b). 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.

Because this decision 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*, 11-5349, we are providing a copy of this letter to the Court and to counsel of record.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tom E. Perez', with a stylized flourish at the end.

Thomas E. Perez
Assistant Attorney General

Enclosures



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.

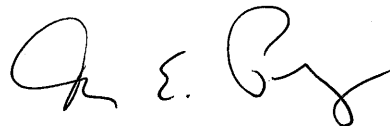
During our review of the information that the Board of Education has provided as well as other available information in connection with our analysis of the proposed change in the Board of Education’s method of election, we have had occasion to review recent patterns of electoral behavior in local elections, 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,

A handwritten signature in black ink, appearing to read 'T. E. Perez', written in a cursive style.

Thomas E. Perez
Assistant Attorney General

Enclosures



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.).

-2-

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.

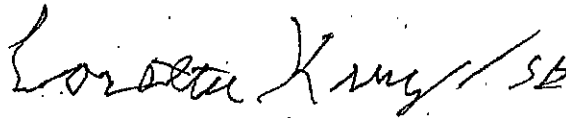
-3-

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



Civil Rights Division

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

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

FEB 10 2012

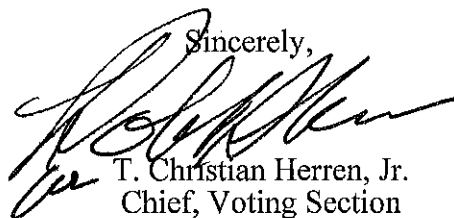
Deborah R. Stagner, Esq.
Tharrington Smith
P.O. Box 1151
Raleigh, North Carolina 27602-1151

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 partial response to our November 7, 2011, request for additional information on December 12, 2011; your full response was received on December 20, 2011; additional information was received through January 30, 2012.

The Attorney General does not interpose any objection to the specified changes. 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 changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. 28 C.F.R. 51.41 and 51.43.

Sincerely,



T. Christian Herren, Jr.
Chief, Voting Section

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2012, 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

Michael A. Carvin
Hashim M. Mooppan
Jones Day
51 Louisiana Ave., NW
Washington, DC 20001

s/ Linda F. Thome
LINDA F. THOME
Attorney