U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

December 3, 1990

Dorman Walker, Esq.
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P.O. Box 78
Montgomery, Alabama 36101

Dear Mr. Walker:

This refers to the 1981 elimination of District 10, the resulting decrease in number of members from 15 to 14 and in the number of single-member election districts from 8 to 7, and a redistricting plan; the 1986 change in District 7 from a two-member to a single-member district and change in District 1 from a three-member to a four-member district; the 1988 redistricting plan; and the September 13, 1989, Bylaws, which provide for an increase in the number of members from 14 to 30; a change from an elective to an elective-appointive system with the principle of fair representation and the rule for equal division by gender by district and the procedures therefor to select certain members, including racial quotas by district, a loser eligibility requirement, and the change from certifying as elected the highest votegetter for each CDEC position to permitting losing candidates to be certified as elected; procedures for implementing the fair representation and equal gender division rules when there are an insufficient number of losing candidates; method of election changes to 5 six-member districts, from majority to plurality vote, and elimination of numbered posts in multimember districts; a redistricting plan; procedures for redistricting and implementation thereof; candidate qualifications; procedures for filling vacancies; and the change in authority for conducting party primary elections from committeewide to a special five-member Election Committee, for the County Democratic Executive Committee (CDEC) of the Democratic Party in Perry County, Alabama, 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 supplemental information on October 4, 1990.

At the outset, we note that the CDEC adopted and implemented the instant voting changes, but failed to comply with the preclearance requirements of Section 5 regarding these changes until sued by minority citizens in Hawthorne v. Baker, No. CA 89-T-381-S (M.D. Ala.). We also note that the CDEC has been unable

to provide certain items of information regarding the proposed changes, in part because of the hiatus between adoption and implementation of the changes and the Section 5 submission of those changes.

With regard to the voting changes effected by the 1989 Bylaws, we have carefully considered the information you have provided, as well as information from the Census, previous Section 5 submissions involving the county, and other interested parties. Our investigation has revealed that elections where black candidates and white candidates oppose each other in the county and in Democratic Party primary elections are characterized by a pattern of racially polarized voting, a fact that is relevant in the Section 5 analysis, particularly given that black persons constitute a significant majority of registered voters in Perry County and, based on the information provided, a majority of Democratic voters.

We begin our analysis with the changes in the method of election for the CDEC. Based on the information available to us, it appears that the increase in the number of members and the adoption of the county commission districting plan as a redistricting plan for multimember districts and the concomitant 1989 changes in the CDEC election method (e.g., the change to a plurality vote requirement and the elimination of numbered places) afford black voters in the Democratic electorate of Perry County an opportunity equal to that of white voters to elect candidates of their choice to the CDEC. Indeed, the 1990 implementation of the 1989 election method changes seems to bear out such a conclusion, given that twenty of the thirty candidates who won the election outright are black persons who appear to be the choice of black voters. Thus, the Attorney General interposes no objection to these changes and all the changes effected by the 1989 Bylaws other than those provisions concerning the fair representation principle and the rule for equal division by gender. However, we note that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

We are unable to reach a similar conclusion, however, with regard to the change from a purely elective system to an elective-appointive system, including the provisions for selecting certain members as adopted under the "principle of fair representation" and the rule for equal division by gender, both applied to each individual multimember district. These provisions are apparently intended to insure that the Perry County Democratic Executive Committee will consist of a broad cross section of the community. Yet, the districting scheme adopted in 1989 for the multimember districts seems to have accomplished such a result without resort to the race conscious and gender conscious requirements prescribed by the Bylaws.

Thus, for example, in the June 5, 1990, primary election for the CDEC, voters from across the county participated in a primary election, and twenty black and ten white candidates were elected. However, to conform the CDEC to the Bylaws requirements for racial representation, these election results were then adjusted. Consequently, subsequent to the June 5th CDEC election, three black persons who won the election outright were not certified as CDEC members, and, instead, the committee substituted and certified white persons with fewer votes as the winners over black candidates.

As a result of this "ceiling" being imposed on the number of blacks who can serve on the CDEC from each of the districts, the black representation on that body has been limited. In addition, the current proposal for implementing the equal division by gender rule could require in future elections that a black candidate who actually wins the election be replaced by a white candidate of the opposite gender. Thus, an adjustment in the composition of the CDEC in accordance with the gender preferences required by the By-laws has the same potential for discrimination that the racial preferences have already had in Perry County.

In some circumstances, race and gender conscious affirmative action plans may be necessary to remedy the effects of identified past discrimination. Racial and gender classifications such as those prescribed by the By-laws should be reserved for remedial settings since, outside such settings, "they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." City of Richmond v. Croson, 109 S.Ct. 706 (1989). The record before us, however, does not disclose the requisite specificity of the injury that the "principle of fair representation" is supposed to correct. Indeed, the CDEC proposes a plan that seems to be designed and has been implemented to suppress the will of the Democratic voters in a predominantly black electorate and to minimize black participation on the CDEC.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has no discriminatory purpose or effect. See Georgia v. United States, 411 U.S. 526 (1973); see also 28 C.F.R. 51.52. In satisfying its burden, the submitting authority must demonstrate that the proposed change is not tainted, even in part, by an invidious racial purpose; it is insufficient simply to establish that there are some legitimate, nondiscriminatory reasons for the voting change. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977); see also City of Rome v. United States, 422 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). In light of these principles, and under the circumstances discussed above, I cannot conclude, as I must

under the Voting Rights Act, that the Perry County Democratic Party has sustained its burden in this instance. Therefore, on behalf of the Attorney General, I must object to the provisions of the 1989 Bylaws concerning the fair representation principle and the rule for equal division by gender (Article II, Section 2, fourth through seventh sentences).

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that these changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, Section 51.45 of the guidelines permits you to 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 1989 Bylaws continue to be legally unenforceable only insofar as they incorporate the principle of fair representation and the rule for equal division by gender. Accordingly, the 1990 implementation of those provisions under which three white CDEC members were certified as elected as substitutes for properly elected black members also continues to be legally unenforceable. See also 28 C.F.R. 51.10.

With regard to the 1981 and 1986 changes and the 1988 redistricting plan, the information you have provided indicates that these changes have been superseded in their entirety by the election method and redistricting plan in the 1989 Bylaws. Accordingly, no further determination by the Attorney General is required or appropriate under Section 5 concerning the 1981 and 1986 changes and the 1988 redistricting plan. See 28 C.F.R. 51.35.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the Perry County Democratic Party plans to take with respect to these matters. In particular, please advise us of the steps the party plans to take with regard to the unenforceable implementation of the objected-to provisions in the 1989 Bylaws. If you have any questions, feel free to call Lora L. Tredway (202-307-2290), an attorney in the Voting Section.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division