U.S. Department of Justice

Civil Rights Division

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

July 8, 1988

Ken W. Smith, Esq.
Wilkes, Johnson & Smith
P. O. Drawer 900
Hazlehurst, Georgia 31539-0900

Dear Mr. Smith:

This refers to Act No. 650, H.B. No. 1166 (1973), which adopts a majority vote requirement for the mayor and council; establishes the runoff election date for the third Tuesday in December; provides the procedures for filling vacancies; changes the compensation of the mayor and council; and establishes conditions under which elected officials are suspended from office, filing requirements for candidates, candidate qualifications, voting qualifications, the extension of poll hours, and absentee ballot provisions; the ordinance of January 8, 1988, which codifies the majority vote requirement for the mayor and council and numbered posts for councilmembers; and the March 5, 1986, annexation to Lumber City in Telfair County, Georgia, 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 the information to complete your submission on May 9, 1988.

We have considered carefully the factual information and legal arguments you have provided, as well as 1980 Census data and information provided by other interested parties. At the outset, we note the city's assertion that neither the majority vote requirement nor the designated post provision is a change which occurred since November 1, 1964, the operative date of Section 5 coverage for the city. We also note that the city charter in effect on November 1, 1964, established a plurality-win system for the mayor and council and the information you have provided fails to indicate that the city implemented a majority vote requirement in any city election prior to November 1, 1964. Indeed, as noted by the court in Woodard v. Mayor and City Council of Lumber City, No. CV 387-027, slip op. at 6 (S.D. Ga. Nov. 25, 1987), "[n]owhere is it even suggested that the statutory plurality-voting system was being discarded" prior to the adoption of the 1973 charter. Thus, from all that appears to us, the adoption of the majority vote requirement in 1973 is a change in a voting practice subject to Section 5. See Perkins v. Matthews, 400 U.S. 379, 394-395 (1971).

According to our information, black candidates did not become active in city elections until 1985, when a black candidate received a plurality of the votes for a position on the council but lost to a white candidate in a runoff election held under the provisions of Act No. 650 (1973) that is part of the submission now pending before us. Indeed, it appears that no black candidate ever has won a contested election involving white candidates for a council seat and these results seem based, at least in part, on a pattern of racially polarized voting in city elections. Where, as in Lumber City, racial bloc voting exists in the context of an at-large system, the use of certain election features, such as a majority vote requirement, serves but to enhance the opportunity for discrimination against minority voters. See Thornburg v. Gingles, 106 S. Ct. 2752, 2764 (citing S. Rep. No. 417, 97th Cong., 2d Sess. 28-29; see City of Rome v. United States, 446 U.S. 156, 184 & n.19 (1980) (citing U.S. Comm'n on Civil Rights, The Voting Rights Act: Ten Years After 206-207 (1975). The reality of the potential for discrimination becomes readily apparent from the results of the 1985 election where, by virtue of the majority vote requirement, the black candidate failed to become the first black elected to the city council, although she appeared to have been the clear choice of minority voters.

Unlike the majority vote requirement, however, it appears that the city in fact did employ a procedure prior to November 1, 1964, whereby candidates designated the position they sought based on incumbency, although the designated post requirement was never enacted by charter, ordinance, or other provision, as mandated under Georgia law. Thus, even though the January 8, 1988, ordinance does not appear to institute a substantive change in practice, it does appear to effect the first formal state or local law enactment of designated posts, and this codification of the incumbency posts as numbered posts is a change in voting practice subject to review. See Perkins v. Matthews, supra.

According to the information available to us, the 1988 ordinance codifying designated posts as numbered posts occurred at a time when blacks were becoming politically active in city elections and subsequent to the filing of the Woodard, supra, lawsuit in which black plaintiffs are challenging, inter alia, the legality of the designated post system. Furthermore, the 1988 codification of designated posts serves to continue an election feature which, like the majority vote requirement discussed above, enhances the opportunity for discrimination against black voters in the presence of racial bloc voting during at-large elections. The information you have provided to this point fails to establish that the act of formally maintaining a designated post feature, at a time when black participation was increasing, is not tainted, at least in part, by a proscribed

purpose. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-266 (1977); City of Rome, supra, at 172; Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982), aff'd mem. 459 U.S. 1166 (1983).

Under Section 5 of the Voting Rights Act, the submitting jurisdiction bears the burden of showing that a submitted change has neither a discriminatory purpose or effect. See Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In view of all of the above, I am unable to conclude, as I must under Section 5, that the city has sustained its burden with regard to either the majority vote requirement or the designated post codification. Accordingly, on behalf of the Attorney General, I must interpose an objection to the provisions of Act No. 650 (1973), insofar as they establish a majority vote requirement for the election of the mayor and council and a runoff election procedure and date, and to the provisions of the January 8, 1988 ordinance, insofar as they codify the majority vote requirement and designated posts.

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 the changes do not have the purpose and will not 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 effect of the objection by the Attorney General is to make the use of a majority vote requirement and the codification of designated posts for the mayor and council of Lumber City legally unenforceable. See also 28 C.F.R. 51.10.

With regard to the 1986 annexation and the other provisions of both Act No. 650 (1973) and the January 8, 1988 ordinance, the Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial enforcement of such changes. See 28 C.F.R. 51.41.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action Lumber City plans to take regarding these matters. If you have any questions concerning this letter, please feel free to call Lora L. Tredway, Attorney-Reviewer in the Section 5 Unit of the Voting Section (202-724-8290).

Because the status of the submitted changes is at issue in Woodard v. Mayor of Lumber City, supra, we are providing a copy of this letter to the court in that case.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: Honorable Dudley H. Bowen, Jr.
United States District Judge

U.S. Department of Justice

Civil Rights Division

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

OCT 7 1988

Ken W. Smith, Esq.
City of Lumber City Attorney
P. O. Drawer 900
Hazlehurst, Georgia 31539

Dear Mr. Smith:

This refers to your request that the Attorney General reconsider his July 8, 1988 objection, under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c to the provisions of Act No. 650, H.B. No. 1166 (1973), insofar as they establish a majority vote requirement for the election of mayor and council and a runoff election procedure and date, and to the provisions of the January 8, 1988 ordinance, insofar as they codify the majority vote requirement and designated posts as numbered posts for the council in the City of Lumber City in Telfair County, Georgia. We received your letter on July 28, 1988.

We have considered carefully the information you have provided and the arguments that you set forth in your request. At the outset, we note your view that racial bloc voting does not characterize elections in Lumber City. Under Thornburg v. Gingles, 478 U.S. 30 (1987), and Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987), on which you rely to support your contention, legally significant racial bloc voting does exist when "a significant number of minority group members usually vote for the same candidates" and bloc voting by whites typically defeats "the combined strength of minority support plus white 'crossover' votes." Gingles, supra, 478 U.S. at 45. You still have not provided us with anything which would demonstrate that the above standard does not characterize Lumber City elections. Indeed, your description of the 1985 municipal elections would seem to affirm that many voters did make their choices with race as a primary consideration with blacks voting for the black candidate, who lost, and whites voting for the white candidate, who won.

In addition, even though we have noted your contention that the codification of designated posts as numbered posts is not a change subject to Section 5, we also note that you have provided us

with nothing new on this issue which would change our earlier conclusion in that regard. According to the information available to us, the city's election code, as set forth in the municipal charter and ordinances, did not include any version of a designated or numbered post requirement on November 1, 1964, or at any time thereafter. Therefore, the addition of a provision for that requirement is a change in the city's election code and voting standards different from those in force or effect on November 1, 1964, the date of the city's coverage under Section 5. Thus, this formal change in the city's election code provisions is an enactment of a voting standard within the purview of Section 5. See NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 176, 181 (1985) (citing Allen v. State Board of Elections, 393 U.S. 544, 566-67 (1969); Dougherty County Board of Education v. White, 439 U.S. 32, 38 (1978)).

In sum, the city has presented no new facts as a basis for a change in our earlier conclusions, nor do the city's arguments present previously unconsidered legal issues that would serve as such a basis. Therefore, on behalf of the Attorney General, I must decline to withdraw the objection.

Of course, Section 5 permits you to seek a declaratory judgment from the United States District Court for the District of Columbia that the changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, irrespective of whether the changes previously have been submitted to the Attorney General. As previously noted, until such a judgment is rendered, the legal effect of the objection by the Attorney General is to render the changes in question legally unenforceable. See also 28 C.F.R. 51.10.

Because the status of the submitted changes is at issue in Woodard v. Mayor of Lumber City, No. CV 387-027 (S.D. Ga. Nov. 25, 1987), we are providing a copy of this letter to the court in that case.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: Honorable Dudley H. Bowen, Jr.
United States District Judge

Will Ed. Smith, Esq.