




OFFICE OF LEGAL AFFAIRS

EXTERNAL OPINION
EX-2006-1002

TO: Gayle C. Williams, Associate Director of Administration
Legal Services of Eastern Missouri, Inc.
4232 Forest Park Avenue
St. Louis, MO 63108

FROM: Victor M. Fortunato 
Vice President & General Counsel

DATE: May 8, 2006

SUBJ: Criminal Cases and CSR Reporting

You have asked the Office of Legal Affairs ("OLA") for guidance on whether the Legal Services of Eastern Missouri ("LSEM") can report cases in its Legal Services Corporation ("LSC") annual Case Statistical Report ("CSR") involving work performed pursuant to a grant from the U.S. Department of Housing and Urban Development ("HUD"). Under that HUD grant, LSEM represents homeless persons with tickets and outstanding warrants for violations of various local ordinances, some of which involve the possibility of jail time.

Summary

As per OLA External Opinion 2002-1005 (May 7, 2002), LSEM may handle cases pursuant to its HUD grant involving offenses that are *not* punishable by a jail sentence and LSEM may include those cases in its CSR numbers regardless of whether LSEM serves such persons with LSC or HUD funds. For those cases in which the offenses *may be* punishable by a jail sentence, LSEM may provide representation using these HUD funds, but LSEM cannot do so with LSC funds, private funds, or non-LSC public or tribal funds provided for other purposes. Those cases that would not be LSC eligible cannot be included in LSEM's CSR numbers.

Background

As we understand it, LSEM receives a grant from HUD to represent homeless individuals who have tickets and outstanding warrants for violations of various City or County ordinances in the State of Missouri. You report that the types of tickets and warrants at issue are for offenses such as sleeping in public, public intoxication,

urination in public, disorderly conduct, criminal trespass, and the like. We understand that some of these offenses are punishable by a fine, while some may also be punishable by a jail sentence (although actual incarceration is rarely imposed).

Analysis

Under Part 1613 of LSC's regulations, implementing section 1007(b)(2) of the LSC Act, recipients are prohibited from using LSC funds to provide "legal assistance with respect to criminal proceedings." 45 CFR §1613.1. Part 1613 defines "criminal proceeding" as:

the adversary judicial process prosecuted by a public officer and initiated by a formal complaint, information, or indictment charging a person with an offense denominated "criminal" by applicable law and punishable by death, imprisonment, or a jail sentence.

45 CFR §1613.2.

As you correctly cite in your request letter to OLA, OLA considered a similar question in 2002 involving a HUD grant for representation of "homeless people with tickets and outstanding warrants for misdemeanors" OLA External Opinion 2002-1005 (May 7, 2002). In that situation "the warrants and tickets . . . [were] not punishable by death, imprisonment or a jail sentence" and thus were not prohibited by Part 1613. *Id.* Some of the laws that you are dealing with are covered by EX 2002-1005 because they also do not involve any possibility of punishment by death, imprisonment or a jail sentence.

In a subsequent OLA Opinion, LSC has interpreted Part 1613 as permitting representation in "nominally criminal matters or matters which can fairly be considered to be technically criminal cases, but which are basically civil in nature" so long as the offense carries *no possibility of a jail sentence as punishment*. See, OLA External Opinion 2004-1002 (February 17, 2004) and Opinions cited therein.

In other cases, where you are dealing with ordinances that include the possibility of a jail sentence (albeit an unlikely one), the issue you raise goes beyond the analysis and opinions articulated in EX 2002-1005 and EX 2004-1002. In those cases, part 1613 prohibits an LSC recipient from *using LSC funds* to provide representation to the defendant.

Nonetheless, the LSC Act allows LSC recipients to use *non-LSC public funds* to provide representation in criminal cases in which there is a possibility of a jail sentence if those funds were provided for that purpose. Section 1010(c) of the LSC Act prohibits recipients from using non-LSC funds for any purpose prohibited by the LSC Act "except

that this provision shall not be construed to prevent recipients from receiving other public funds or tribal funds . . . and expending them in accordance with the purposes for which they are provided" 42 U.S.C. §2996i(c). "Public funds" are defined by LSC as "non-LSC funds derived from a Federal, state or local government or instrumentality of a government" 45 CFR §1610.2(f). The HUD funds received by LSEM are clearly "public funds" and, according to your letter, were provided for the purpose of providing representation in these kinds of cases.

The current LSC appropriation also prohibits LSC recipients from engaging in any activities, regardless of the source of funding, that are prohibited by section 504 of the 1996 LSC appropriation ("Section 504"), as modified and incorporated through subsequent appropriations. See Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, 119 Stat. 2290, 2330-31 (2005) incorporating by reference Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, §504, 110 Stat. 1321, 1321-53-57 (1996) through Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998, Pub. L. 105-119, 111 Stat. 2440, 2510-12 (1997) (other unrelated modifications of the 1996 restrictions appear in other statutes). The activities prohibited by Part 1613 are not all "prohibited by or inconsistent with Section 504." See 45 CFR §1610.2(b) (listing the Section 504 restrictions). Thus, LSEM may use these HUD funds to provide the assistance contemplated by the grant, even in cases that might otherwise be prohibited by Part 1613.¹

Part 1610 of the LSC regulations summarizes the application of the LSC Act and Section 504 restrictions to non-LSC public funds. Generally, "a recipient may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with Section 504, unless such use is authorized by §§1610.4, 1610.6 or 1610.7 of this part." 45 CFR §1610.3. Section 1610.4(b) provides that "[a] recipient may receive public or IOLTA funds and use them in accordance with the specific purpose for which they were provided, if the funds are not used for any activity prohibited by or inconsistent with Section 504" of the LSC FY 1996 appropriations act. Other provisions of §1610.4 discuss private funds and tribal funds.

The reporting of these cases handled under the HUD grant for CSR purposes depends on whether the cases would otherwise be "LSC-eligible," that is, whether it is a case for which LSC funds could be used (even if non-LSC funds are used). See "Frequently Asked CSR Questions and Answers" (December 2003) and 2001 CSR Handbook §§4.3 and 5.2, <http://www.rin.lsc.gov/refermat.htm>. Our understanding of

¹ This conclusion assumes, as stated in your letter, that all other applicable LSC eligibility requirements are met.

the situation from your letter and our conversations is that some of the cases handled under the HUD grant are otherwise LSC-eligible. Those are the cases in which the offenses involved do not qualify as "criminal proceedings" under Part 1613 and the clients are otherwise LSC eligible. Those cases can be supported with LSC funds, and LSEM may report them for CSR purposes even though they are HUD funded. However, LSEM should not report cases in which the offense charged carries with it the possibility of a jail sentence (regardless of the likelihood of such a sentence being imposed). Those cases are not otherwise "LSC-eligible" and cannot be reported for CSR purposes.

Conclusion

LSEM may represent clients pursuant to its HUD grant involving charges that are *not* punishable by a jail sentence, and LSEM may include those cases in its CSR numbers regardless of whether LSEM serves such persons with LSC or HUD funds. OLA External Opinions 2002-1005 (May 7, 2002) and 2004-1002 (February 17, 2004). For those cases in which the offenses *may be* punishable by a jail sentence, LSEM may provide representation using these HUD funds, but LSEM cannot do so with LSC funds, private funds, or non-LSC public or tribal funds provided for other purposes. Those cases that would not be LSC eligible cannot be included in LSEM's CSR numbers.