

RULES AND REGULATIONS

independent impartial outsider, or an official of the Corporation who had not been involved in any way at all with the preliminary determination. In our view the objection misconceives the nature and purpose of the review contemplated by Congress and Regulation 1606. Section 1011 of the Act does not describe an appellate review process. Rather it assures that the Corporation will not act arbitrarily in the first instance. The purpose of § 1011 of the Act is to assure that a recipient has a full opportunity to present the reasons for continued funding before the Corporation makes a final decision not to continue support. The hearing required by Section 1011 and provided in this Regulation is not an adversarial one; but even if it were, its provision for a presiding officer would satisfy the Constitutional test of impartiality. See, e.g., *Withrow v. Larkin*, 95 S.Ct. Rptr. 1456, 1464 (1975), in which the Court held that due process does not even prohibit combining investigative and adjudicative functions in the same person or body—a combination that does not occur in Part 1606. The Court said that a contention that there is an unconstitutional risk of bias in administrative adjudication must "overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness . . . there is such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented." After considering the purpose of the hearing required by Section 1011, and the organizational structure of the Corporation, we believe that the provisions of 1606.2 (d) do not present a prohibited risk of prejudice. And, as a matter of policy, we believe that it would be irresponsible of the Corporation to delegate to an outsider a decision granting or denying refunding, which should be made in the context of the Corporation's overall efforts to implement the Act.

Some comments recommended that an addition be made to 1606, enumerating all possible grounds on which refunding might possibly be denied. We believe that a temporary regulation dealing with procedure is not the appropriate place in which to make such important and far reaching decisions. But Section 1606.4 does require that a recipient be given a written notice that includes "a detailed statement of supporting reasons and facts" for a preliminary determination to deny refunding; and Section 1606.15 applies similar requests to final determinations. Thus the Part does insure that a recipient will be informed of the grounds and bases for the Corporation's decisions, and of the issues that may be covered in a review hearing. If a recipient regards the statement of reasons in the notice as inadequate, the Prehearing Conference described in Section 1606.10 provides an opportunity for further identification and clarification of the issues.

Some comments criticized 1606.2, which states that an applicant shall be given an opportunity to "demonstrate

that its application for refunding should not be denied, or that the preliminary determination was based on "erroneous information, or was arbitrary or capricious." Comments said that this section imposed an unfair or unduly heavy burden on a recipient, and that the burden of proving that refunding should be denied should rest upon the Corporation. As we see it, the Section does not impose a formal burden of proof on either side, and the slight presumption in favor of a carefully considered preliminary determination that it creates is appropriate; but the standard for review set forth in 1606.5 provides ample opportunity for challenge by a recipient.

After giving full consideration to these and all other issues of law and policy raised by the comments received, the Corporation determined that the proposed temporary regulation meets the requirements of Section 1011 of the Act, and should be adopted, without change, as a temporary regulation. The Corporation further determined that all comments received on the proposed temporary regulation should be considered again before a permanent regulation is adopted.

At a meeting held on April 24, 1978, the Board of Directors of the Corporation approved the following resolution, that adopts, without change, the proposed temporary regulation that was published on March 12, 1978:

Resolved, that Regulation 1606, which has been published for public comment and embodies procedures prescribed by the Corporation and now in effect in matters arising under Section 1011 of the Act, shall be, and hereby is, adopted without change, as a temporary regulation;

Resolved further, that Regulation 1606 shall be published in the FEDERAL REGISTER.

THOMAS EHELEK,
President,
Legal Services Corporation.

PART 1606—APPLICATIONS FOR REFUNDING

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Authority: Sec. 1006(a)(7)(A), 95 Stat. 281 (42 U.S.C. 2006(a)(1)(A)); Sec. 1007(a)(9), 95 Stat. 284 (42 U.S.C. 2007(a)(9)); Sec. 1011, 95 Stat. 285 (42 U.S.C. 2011).

CHAPTER XVI—LEGAL SERVICES CORPORATION

PART 1606—APPLICATIONS FOR REFUNDING

Adoption of Temporary Regulations

The Legal Services Corporation ("the Corporation") was established pursuant to the Legal Services Corporation Act of 1974, Pub. L. 93-355, 88 Stat. 378, 42 U.S.C. 2996-2996I ("the Act"), for the purpose of providing financial support for legal assistance in non-criminal proceedings or matters to persons financially unable to afford legal assistance. Section 1011 of the Act, 42 U.S.C. 2996j, requires that the Corporation prescribe procedures to insure that, among other things, applications for refunding are not denied unless the grantee, contractor, or person or entity receiving financial assistance has been afforded reasonable notice and an opportunity for a timely, full and fair hearing.

On page 10630-10632 of the FEDERAL REGISTER of March 12, 1978, the Corporation published a proposed temporary regulation designed to satisfy the requirements of Section 1011 of the Act. (The procedures described in the proposed temporary regulation have been prescribed by the Corporation in matters now pending before it.) Interested persons were given until April 11, 1978 to submit comments on the proposed temporary regulation, and all comments received were given full consideration.

Some comments stated objections to 1606.2(d), which authorizes any person who has not been "directly involved" in the preliminary determination to deny refunding to be designated by the President of the Corporation as the "responsible Corporation official", or presiding officer, at a hearing. It was urged that he presiding officer charged with the duty of reviewing a preliminary determination to deny refunding should be an

Subpart A—General

§ 1606.1 Purpose.

These temporary regulations establish procedures for processing applications for refunding by the Legal Services Corporation of financial assistance provided by the Office of Legal Services of the Community Services Administration or any other applications for refunding of financial assistance under section 1006 (a) (1) (A) of the Legal Services Corporation Act of 1974.

§ 1606.2 Definitions.

As used in this part,

(a) "Act" means the Legal Services Corporation Act of 1974, Pub. L. 93-355, 88 Stat. 578 (42 U.S.C. 2996-2996f);

(b) "Corporation" means the Legal Services Corporation established by section 1003 of the Act (42 U.S.C. 2996b);

(c) "Applicant" means any grantee or contractor receiving funds for the provision of legal assistance;

(1) From the Office of Legal Services of the Community Services Administration, or

(2) From the Corporation under section 1006(a) (1) (A) of the Act,

and any subgrantee, subcontractor or delegate agency thereof through which legal assistance is provided;

(d) "Responsible Corporation official" means the President of the Corporation or the President's designee, provided that such designee shall not be any person directly involved in the preliminary determination described in § 1606.4;

(e) "Application for refunding" means a request by any applicant seeking financial assistance beyond the term of its existing grant or contract;

(f) "Denial" of an application for refunding means:

(1) A determination by the Corporation not to provide financial assistance beyond the term of a current grant or contract to an applicant which has filed an application for refunding, or

(2) A determination to provide financial assistance beyond the term of a current grant or contract to an applicant which has filed an application for refunding when the determination:

(i) Reduce the applicant's annual rate of financial support under its existing grant or contract, *Provided*, That a "denial" shall not mean any reduction in funding which is necessitated by a reduction in the Corporation's appropriation which is uniformly applied to all applicants of the same class, or

(ii) Imposes new conditions or restrictions which would prevent the applicant from maintaining its current level of legal services to eligible clients.

Subpart B—Application Process; Preliminary Determination; Interim Funding

§ 1606.3 Applications for refunding.

An application for refunding must be filed with the Corporation at least 120 days before the expiration of the applicant's current grant or contract, unless the Corporation agrees to a later filing.

Applications shall be filed in accordance with instructions which may from time to time be issued by the Corporation.

§ 1606.4 Preliminary determinations.

The Corporation shall act upon applications for refunding as soon as practicable. If the Corporation makes a preliminary determination that an application for refunding should be denied, the Corporation shall give written notice to the applicant. The notice shall include a detailed statement of supporting reasons and facts and shall be accompanied by copies of all relevant documents. The notice shall also advise the applicant of its right to request review of the preliminary determination pursuant to subpart C, and shall state that the applicant must request review in writing within 15 days of receiving such notice.

§ 1606.5 Interim funding.

When the Corporation issues a preliminary determination to deny an application for refunding pursuant to § 1606.4, or fails to act upon an application by the end of the term of the applicant's current grant or contract, the Corporation shall provide the applicant with interim funding necessary to maintain its current level of legal assistance activities under section 1006(a) (1) (A) of the Act until (a) the application for refunding has been approved and funds pursuant thereto received or (b) a final determination has been made under Subpart C of the Part.

§ 1606.6 Temporary funding.

Where an application for refunding has been finally denied in accordance with subpart C of this Part, the Corporation may authorize temporary funding in order to ensure that current matters for existing clients are closed or transferred in accordance with attorneys' professional responsibilities.

Subpart C—Review Procedures; Final Determinations

§ 1606.7 Request for review.

An applicant receiving notice that a preliminary determination has been made to deny its application for refunding shall advise the Corporation in writing within 15 days of receipt of such notice whether it requests a review pursuant to this subpart. If an applicant advises the Corporation that it will not request a review or if it fails to request a review within the prescribed period the Corporation's preliminary determination shall become final.

§ 1606.8 Review in general.

A review under this subpart shall afford a full and fair opportunity for the applicant to demonstrate that its application for refunding should not be denied or that the preliminary determination was based on erroneous information or was arbitrary or capricious. The review shall also provide an opportunity for determining whether temporary funding shall be provided in accordance with § 1606.5.

§ 1606.9 Review notice.

Within 10 days of receiving a request from an applicant for review the Corporation shall notify the applicant in writing of:

(a) The name of the responsible Corporation official;

(b) The date and place of the pre-hearing conference described in § 1606.10; and

(c) The time within which written submissions described in § 1606.11 shall be filed.

§ 1606.10 Pre-hearing conference.

The responsible Corporation official shall preside over a pre-hearing conference which shall take place within 10 days of the issuance of the notice required by § 1606.9 and shall be held, whenever possible, at a place convenient to the applicant and the community affected. The purpose of the pre-hearing conference shall be to identify the issues and to attempt to resolve such issues by informal means. At the pre-hearing conference a determination shall be made whether a hearing under § 1606.12 is necessary, and, if so, the responsible Corporation official shall set the date, time and place of such hearing.

§ 1606.11 Written submissions.

Written submissions by the applicant shall be filed with the responsible Corporation official within 20 days of the issuance of the notice required by § 1606.9. Written submissions shall include a detailed response to the Corporation's preliminary determination and may, in addition, include documentary evidence, briefs, memoranda or any other materials. Upon their own initiative or at the request of the responsible Corporation official, employees or agents of the Corporation may submit additional written materials.

§ 1606.12 Hearing.

A hearing, if any, shall be held within 30 days of the issuance of the notice required by § 1606.9 and shall be held, whenever possible, at a place convenient to the applicant and the community affected. The hearing shall be conducted as follows:

(a) The presiding officer at the hearing shall be the responsible Corporation official. The presiding officer shall conduct a full and fair hearing, avoid delay, maintain order, and make a record sufficient for a full disclosure of the facts and issues. The hearing shall be open to the public unless the presiding officer for good cause shown shall otherwise determine.

(b) The applicant shall have the right to present oral testimony and written evidence pertaining to contested issues of fact and briefs and oral arguments on questions of law and policy. The applicant shall also have the right to examine Corporation employees or agents involved in the Corporation's preliminary determination provided that good cause is shown and that prior arrangement have been made. Upon their own initia-

tive or at the request of the responsible Corporation official, employees or agents of the Corporation may present oral testimony and submit written materials as are appropriate and relevant.

(c) Technical rules of evidence shall not apply. The presiding officer shall make all procedural and evidentiary rulings necessary to ensure admission of relevant evidence and to subject testimony to such cross-examination as may be required for a full disclosure of the facts. Opportunity shall be given to refute all facts and arguments advanced by all parties. The presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence.

(d) The hearing shall be recorded in a manner determined by the presiding officer and such record shall be made available upon payment of any prescribed costs. All documents and other evidence submitted shall be open to examination.

(e) The applicant may waive a hearing, in which case the recommended and final determinations described in §§ 1606.14 and 1606.15 shall be based on all available evidence.

§ 1606.13 Additional authorized participants.

The responsible Corporation official may authorize the participation in review proceedings under this subpart by such persons or organizations as may be necessary for a proper determination of the issues involved.

(a) Any person or organization wishing to participate in review proceedings pursuant to this subpart may request permission to do so from the responsible Corporation official. This request shall state the participant's interest in the proceedings, the evidence or arguments the participant intends to contribute, and the necessity for the introduction of such evidence or arguments.

(b) The responsible Corporation official shall permit or deny such participation and shall give notice of his decision to the participant, the applicant, and the Corporation and, in the case of denial, shall include a brief statement of the reasons therefor.

(c) Authorized participants under this section may be limited to participation in those issues or activities that the responsible Corporation official believes will meet the needs of the review proceedings, and may be limited to the filing of written materials.

§ 1606.14 Recommended final determination.

If the responsible Corporation official is not the President of the Corporation the official shall issue a recommended final determination within 10 days of the conclusion of review proceedings described in §§ 1606.8 through 1606.12. The recommended final determination shall conform with the requirements for a final determination described in § 1606.15(b). Within 10 days of receiving a copy of the recommended final determination, the applicant and others authorized to participate pursuant to § 1606.13 may submit written comments to the President.

Within 30 days of issuance of the recommended final determination, the President shall issue a final determination as described in § 1606.15(b).

§ 1606.15 Final determination.

(a) If the responsible Corporation official is the President of the Corporation the President shall issue a final written determination within 30 days of the conclusion of review proceedings described in §§ 1606.8 through 1606.12.

(b) The final determination shall either:

(1) Grant the application for refunding, subject to such modifications, terms or conditions as the President shall determine to be necessary, or

(2) Deny the application for refunding indicating:

(i) Reasons for such denial, including responses to the specific arguments made in the course of review proceedings described in this subpart, and

(ii) Whether, in what amount, and under what conditions temporary funding shall be made available pursuant to § 1606.6.

§ 1606.16 Right to counsel.

In review proceedings under this subpart the applicant and the Corporation shall have the right to be represented by counsel or other authorized representatives. The applicant is authorized to designate a staff attorney to represent it in such review proceedings or to retain outside counsel who may be compensated by the applicant at the reasonable and customary rate for an attorney practicing in the locality of the counsel so retained. The applicant is authorized to pay for normal and customary travel and per diem expenses for counsel and necessary witnesses.

§ 1606.17 Modifications.

The responsible Corporation official may alter, eliminate or modify any of the provisions of this subpart with the consent of the applicant. All time limitations may be modified, except that in no event shall the proceedings described in §§ 1606.9 through 1606.12 be completed later than 45 days from the issuance of the notice required by § 1606.9.

§ 1606.18 Notices.

All notices required to be sent by the Corporation or the responsible Corporation official shall be sent to the chairperson of the governing body and the project director of the applicant affected.

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