

April 30, 1976 (41 FR 18081), is now in effect. A proposed final regulation was published for comment on January 26, 1977 (42 FR 4864), and a revised version was published for comment on January 3, 1978 (43 FR 16), following final amendment of the Legal Services Corporation Act. Full consideration of written comments, and extended discussion with interested persons, preceded the decision made by the Board of Directors of the Corporation on July 6, 1978 to adopt the following regulation.

There is little functional difference between a decision to deny refunding and a decision to terminate a recipient's grant or contract. Both are serious actions to be taken only as necessary to achieve the purpose of the Act. In the vast majority of cases, the Corporation will seek to ensure that service will continue to the community affected without regard to whether financial assistance has been terminated or refunding denied. The single difference between the two types of action is the equitable consideration that, having made a grant or contract to a particular recipient, the Corporation should not be permitted to terminate on the basis of a rule, regulation, guideline, or instruction that did not exist at the time financial assistance was extended. That principle is reflected in section 1606.4 of the regulation.

Section 1606.3, enumerating the grounds for denial of refunding, has been revised to provide more specificity than existed in previous drafts. The final version is designed to provide a satisfactory balance between the need for fairness to recipients and the need to protect the Corporation's ability to meet its statutory responsibilities and to respond to anticipated contingencies.

Section 1606.11, dealing with burden of proof, has been revised. The final version assigns to the corporation the burden of proving any disputed fact relied upon as a basis for denying refunding. In addition, the "substantial basis" language in section 1606.11(b) indicates that, even if the Corporation proves its case, refunding should not be denied for an insubstantial or trivial reason. Consistent with that meaning of section 1606.11(b), section 1616.13 gives the presiding officer authority to recommend continuation of funding if the grounds for denying it—though proven—are unreasonable, insubstantial, or trivial. The same discretion is conferred on the President of the Corporation by section 1606.14.

Accordingly, 45 CFR Part 1606 is revised to read as follows:

[6820-35]

Title 45—Public Welfare

CHAPTER XVI—LEGAL SERVICES CORPORATION

PART 1606—PROCEDURES GOVERNING TERMINATION OF FINANCIAL ASSISTANCE AND DENIAL OF REFUNDING

AGENCY: Legal Services Corporation.

ACTION: Final regulation.

SUMMARY: The Legal Services Corporation issues a final regulation establishing procedures to insure a fair hearing before any application for refunding will be denied or financial assistance terminated. This regulation is required by the Legal Services Corporation Act, as amended.

EFFECTIVE DATE: August 28, 1978.

ADDRESS: Legal Services Corporation, 733 15th Street NW., Suite 700, Washington, D.C. 20005.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: Section 1011 of the Legal Services Corporation Act, 42 U.S.C. 2996j, requires the Corporation to establish procedures to insure that no application for refunding will be denied and financial assistance will not be terminated unless the recipient has been afforded an opportunity for a fair hearing. A temporary regulation, published on

PART 1606—PROCEDURES GOVERNING TERMINATION OF FINANCIAL ASSISTANCE AND DENIAL OF REFUNDING

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AUTHORITY: Sec. 1006(b)(1) and (3), 1007(a)(1), 1007(a)(3), 1007(a)(9), 1007(d), 1008(e), 1011 (42 U.S.C. 2996c(b)(1) and (3), 2996f(a)(1), 2996f(a)(3), 2996f(a)(9), 2996f(d), 2996g(e), 2996j).

§ 1606.1 Purpose.

By affording a recipient the opportunity for a timely, full, and fair hearing that will promote informed deliberation by the Corporation when there is reason to believe a grant or contract should be terminated or refunding denied, this part seeks to avoid unnecessary disruption in the delivery of legal assistance to eligible clients.

§ 1606.2 Definitions.

(a) "Termination" means a decision that financial assistance to a recipient will be permanently terminated in whole or in part prior to expiration of the recipient's current grant or contract.

(b) "Denial of refunding" means a decision that, after expiration of its current grant or contract, a recipient:

(1) Will not be provided with financial assistance; or

(2) Will have its annual level of financial support reduced to an extent that is not required either by a change of law or by a reduction in the Corporation's appropriation that is apportioned among all recipients of the same class in proportion to their current level of funding, and is either more than 10 percent or more than \$20,000 below the recipient's annual level of financial assistance under its current grant or contract; or

(3) Will be provided with financial assistance subject to a new condition or restriction that is not generally applicable to all recipients of the same class, and that would significantly reduce the ability of a recipient to maintain the quality and quantity of

its current legal assistance to eligible clients.

(c) "Director of a recipient" means the person who has overall day-to-day responsibility for management of operations by the recipient.

(d) "Presiding Officer" means the person appointed by the President to recommend a decision that a grant or contract should be continued or terminated, or that refunding should be granted or denied.

§ 1606.3 Grounds for denial or refunding.

Refunding may be denied when (a) Denial is required by, or will implement, a provision of law, a Corporation rule, regulation, guideline, or instruction that is generally applicable to all recipients of the same class, or a funding policy, standard, or criterion approved by the Board; or

(b) There has been substantial failure by a recipient to comply with a provision of law, or a rule, regulation, or guideline issued by the Corporation, or a term or condition of a current or prior grant from or contract with the Corporation. In the absence of unusual circumstances, refunding shall not be denied for this cause unless the Corporation has given the recipient notice of such failure and an opportunity to take effective corrective action; or

(c) There had been substantial failure by a recipient to use its resources to provide economical and effective legal assistance of high quality as measured by generally accepted professional standards, the provisions of the act, or a rule, regulation or guideline issued by the Corporation. In the absence of unusual circumstances, refunding shall not be denied for this cause unless the Corporation has given the recipient notice of such failure and an opportunity to take effective corrective action.

§ 1606.4 Grounds for termination.

A grant or contract may be terminated on any of the grounds and under the circumstances stated in § 1606.3, except that termination shall not be based on a Corporation rule, regulation, guideline, or instruction that was not in effect when the current grant was made or when the current contract was entered into.

§ 1606.5 Preliminary determination.

(a) When there is reason to believe that a grant or contract should be terminated or that refunding should be denied, the Corporation shall serve a written preliminary determination upon the recipient, which shall state the grounds for the proposed action, and shall identify, with reasonable specificity, any facts or documents relied upon as justification for that action.

(b) The preliminary determination shall advise the recipient that it may, within 10 days of receipt of the preliminary determination, make written request for

(1) a hearing under this part, or
(2) an informal conference under § 1606.6 of this part, with a subsequent right as there provided to request a hearing.

(c) The preliminary determination shall also advise the recipient of its right to receive interim, and to request termination, funding, under § 1606.18 or § 1606.19 of this part.

(d) If the recipient advises the Corporation that it will not request review, or if it fails to request review within the time prescribed in § 1606.5(b) or § 1606.6, the preliminary determination shall become final.

§ 1606.6 Informal conference.

On timely request by the recipient, the Corporation employee who made the preliminary determination shall promptly conduct an informal conference with the recipient at a time and place designated by the employee. The parties thereto shall exchange views, seek to narrow the issues, and explore the possibilities of settlement or compromise. At the conclusion of the conference, which may be adjourned for deliberation or consultation, the Corporation employee may, in writing, modify, withdraw, or affirm the preliminary determination. The recipient may, within 5 days thereafter, make written request for a hearing under § 1606.9 through § 1606.15 of this part.

§ 1606.7 Initiation of proceedings.

Within 10 days after receipt of a request for a hearing made under § 1606.5(b) or § 1606.6, the Corporation shall notify a recipient in writing of

(a) The name of the presiding officer, and of the attorney who will represent the Corporation;

(b) The date, time and place scheduled for a prehearing conference, if any should be requested or ordered; and

(c) The date, time and place scheduled for the hearing.

§ 1606.8 Presiding officer.

(a) The presiding officer shall be appointed by the President, and shall be a person who is familiar with legal services and supportive of the purposes of the Act, who is independent, and who is not an employee of the Corporation.

(b) Within 5 days of receipt of the notice required under § 1606.7, the recipient shall notify the Corporation if it objects to the presiding officer on the grounds that the person does not satisfy the criteria stated in § 1606.8(a), or is personally biased. The notice shall state the specific facts and documents that the recipient contends

support its objection, and, if a pre-hearing conference has not been scheduled, shall request a pre-hearing conference for the purpose of presenting the objection. At the pre-hearing conference, the recipient and the Corporation may question the presiding officer for a reasonable period of time on matters relevant to the recipient's objection.

(c) The recipient shall, within 5 days following the pre-hearing conference, notify the Corporation of any further facts that it contends support its objections. The President shall, within 10 days following the pre-hearing conference, either sustain the objection and appoint a new hearing officer or overrule the objection.

(d) No objection to the appointment of a presiding officer may be made unless presented in the manner specified by this section.

§ 1606.9 Pre-hearing conference.

(a) A pre-hearing conference may be ordered by the presiding officer, and shall be ordered if requested by either the recipient or the Corporation. The matters to be considered at the conference shall include:

- (1) Proposals to define and narrow the issues;
- (2) Efforts to stipulate the facts, in whole or in part;
- (3) The probable number, identity, and order of presentation of exhibits and witnesses;
- (4) On the agreement of the parties, the possibility of presenting the case in written submission or oral argument;
- (5) The desirability of advance submission of some or all of the direct testimony in writing;
- (6) Any necessary variation in the date, time and place of the hearing;
- (7) Discussion of settlement; and
- (8) Such other matters as may be appropriate.

(b) In advance of the pre-hearing conference, the presiding officer may require a party to submit a written statement discussing any matter described in subparagraph (a). After the pre-hearing conference, the presiding officer may establish the procedures, consistent with this part, to be followed at the hearing.

(c) The presiding officer may, at the pre-hearing conference or at any subsequent appropriate time prior to completion of the hearing, require the Corporation or the recipient, on sufficient notice, to produce a relevant document in its possession, to make a report not unduly burdensome to prepare, or to produce a person in its employ to testify, if any might offer a relevant and substantial addition to the accuracy or completeness of the record. With the consent of the presid-

ing officer, a party may make a written submission before the hearing.

§ 1606.10 Conduct of hearing.

(a) The hearing shall be scheduled to commence at the earliest appropriate date, ordinarily not later than 45 days after the notice required by § 1606.7, and, whenever practical, shall be held at a place convenient to the recipient and the community it serves. A hearing affecting more than one community or recipient shall be held in a single centrally located place unless the presiding officer determines that an additional hearing place is required.

(b) The presiding officer shall preside, conduct a full and fair hearing, avoid delay, maintain order, and insure that a record sufficient for full disclosure of the facts and issues is made. The hearing shall be open to the public unless, for good cause and in the interests of justice, the presiding officer shall determine otherwise.

(c) The presiding officer may allow any interested person or organization to participate in the hearing if such participation will not broaden the issues unduly or cause delay, and will aid in proper determination of the issues.

(1) A person or organization wishing to participate in a hearing shall request permission from the presiding officer, stating the reason for the request, and the nature of the evidence or argument to be offered; and shall notify the Corporation and the recipient of its request.

(2) The presiding officer shall notify the Corporation, the recipient, and the person or organization requesting participation whether the request has been granted, and in case of denial shall include a brief statement of the reasons therefor.

(3) The presiding officer may limit the scope or form of participation authorized under this paragraph.

(d) The Corporation and the recipient each may present its case by oral or documentary evidence, conduct examination and cross-examination of witnesses, examine any document submitted by another party, and submit rebuttal evidence.

(e) If a party fails, without good cause, to produce a person or document required under § 1606.9(c), the presiding officer may make an adverse finding on the fact or issue with respect to which production was required.

(f) Technical rules of evidence shall not apply. The presiding officer shall make any procedural or evidentiary ruling that may help to insure full disclosure of the facts, to maintain order, or to avoid delay. Irrelevant, immaterial, repetitious or unduly prejudicial matter may be excluded.

(g) Official notice may be taken of published policies, rules, regulations, guidelines, and instructions of the Corporation, of any matter of which judicial notice may be taken in a Federal court, or of any other matter whose existence, authenticity, or accuracy is not open to serious question.

(h) A stenographic or electronic sound record, or a summary of the hearing shall be made in a manner determined by the presiding officer, and a copy shall be made available to a party upon payment of its cost.

§ 1606.11 Burden of proof.

At a hearing under § 1606.10:

(a) The Corporation shall have the obligation of proving, by a preponderance of the evidence, the existence of any disputed fact relied upon as justification for termination or denial of refunding; and

(b) On all other issues, the Corporation shall have the obligation of establishing a substantial basis for terminating the grant or contract or denying refunding.

§ 1606.12 Briefs and argument.

(a) Within 10 days after the close of the hearing, each party may, and, upon request of the presiding officer, shall, submit to the presiding officer, with service upon all other parties, proposed findings of fact and argument on matters of law or policy.

(b) The presiding officer may direct or permit oral argument at the close of the hearing or after submission of briefs.

§ 1606.13 Recommended decision.

(a) As soon as practicable after the hearing, and normally within 20 days after its conclusion, the presiding officer shall issue a written recommended decision.

(1) Continuing the recipient's current grant or contract, or granting refunding subject to any modification or condition that may be deemed necessary on the basis of information adduced at the hearing; or

(2) Terminating financial assistance to the recipient as of a particular date, or denying refunding.

(b) The recommended decision shall contain findings of the significant and relevant facts and shall state the reasons for the decision. Findings of fact shall be based solely on the evidence adduced at the hearing or on matters of which official notice was taken.

§ 1606.14 Final decision.

(a) If neither the Corporation nor the recipient requests review by the President, a recommended decision shall become final 10 days after receipt by a recipient.

(b) The recipient or the Corporation may seek review by the President of a

recommended decision. A request shall be made in writing within 10 days after receipt by the party of the recommended decision, and shall state in detail the reasons for seeking review.

(c) As soon as practicable after receipt of a request for review of a recommended decision, and normally within 30 days, the President shall adopt, modify, or reverse the recommended decision, or direct further consideration of the matter. In the event of modification or reversal, the President's decision shall conform to the requirements of section 1606.13(b).

(d) A decision by the President shall become final upon receipt by a recipient.

§ 1606.15 Time and extension and waiver.

(a) Any period of time provided in these rules may, upon good cause shown and determined, be extended:

(1) By the person making the preliminary determination, prior to the time the presiding officer is designated;

(2) By the presiding officer, prior to the issuance of a recommended decision; or

(3) By the President at any time.

(b) Requests for extensions of time shall be considered in light of the overall objective that the procedures prescribed by this part ordinarily shall be concluded within 90 days of the preliminary determination.

(c) Any other provision of these rules may be waived or modified:

(1) By the presiding officer with the assent of the recipient and of counsel for the Corporation; or

(2) By the President upon good cause shown and determined.

§ 1606.16 Right to counsel.

At a hearing under section 1606.10, the Corporation and the recipient each shall be entitled to be represented by counsel, or by another person. The attorney designated may be an employee, or may be outside counsel retained for the purpose. Unless prior written approval is received from the Corporation, the fee paid to outside counsel shall not exceed the hourly equivalent of the rate of level V of the executive schedule specified in section 5316 of title 5, United States Code.

§ 1606.17 Reimbursement.

If the recipient's grant or contract is continued or refunding is granted after a preliminary determination has been issued under section 1606.5, a recipient shall receive reimbursement by the Corporation, to the extent it has prevailed, for reasonable and actual expenses that were required in connection with proceedings under this part.

§ 1606.18 Interim funding.

Failure by the Corporation to meet a time requirement of this part shall not entitle a recipient to continuation of its grant or contract or to refunding. Pending a final determination under this part, the Corporation shall provide the recipient with interim funding necessary to maintain its current level of legal assistance activities under the act.

§ 1606.19 Termination funding.

After a final determination to terminate a recipient's grant or contract or to deny refunding, and without regard to whether a hearing has occurred, the Corporation may authorize temporary funding if necessary to enable a recipient to close or transfer current matters in a manner consistent with the recipient's professional responsibility to its present clients.

§ 1606.20 Notice.

A notice required to be sent to a recipient under this part shall be sent to the director of the recipient, and may be sent to the chairperson of its governing body.

**ALICE DANIEL,
General Counsel,**

Legal Services Corporation.

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