LEGAL SERVICES CORPORATION

45 CFR Parts 1606 abd 1625

Procedures Governing Denial of Refunding

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This final rule separates the Corporation's denial of refunding regulations from its termination regulations and revises the denial of refunding regulations. This action is needed because denial of refunding proceedings are excessively costly and time-consuming. This rule simplifies and expedites denial of refunding proceedings and broadens the grounds for denial of refunding to the extent consonant with the statutory requirement for a timely, full and fair hearing for recipients.

EFFECTIVE DATE: This regulation is effective December 30, 1983.

FOR FURTHER INFORMATION CONTACT: John C. Meyer, Deputy General Counsel, (202) 272-4010.

SUPPLEMENTARY INFORMATION:

Introduction

Both the proposed regulations (August 15, 1983, 48 FR 36845) and the final regulations divided the former 45 CFR Part 1606, which governed both termination and denial of refunding, into two regulations: 45 CFR Part 1606, Termination, and 45 CFR Part 1625, Denial of Refunding. The provisions of 45 CFR Part 1606 are unchanged except for technical amendments deleting all references to denial of refunding. Consequently, this regulation will not be further discussed in this preamble. The provisions of 45 CFR Part 1625 have undergone substantive amendment in both the proposed and the final regulation.

The Corporation received considerable comment by the September 14, 1983 deadline for receipt of comments. The opposition to the proposed changes concentrated on §§ 1625.2, 1625.3, 1625.8, and 1625.9, which contained the major changes. The final regulation retains these changes with a few modifications in response to comments. The four sections listed above will be discussed section-by-section below, and other minor changes will be discussed under the heading of "other issues." Before reaching this section-by-section analysis, some general issues raised by comments will be addressed.

General Issues

A number of comments advocated delaying any action on this regulation until there is a confirmed Legal Services Corporation Board of Directors. However, the present Board of recess appointees has the same fiduciary responsibilities as any other corporate board and cannot abdicate them. Furthermore, the Board cannot postpone decisions on the basis of the prospect of a confirmed Board at some uncertain time in the future without paralyzing the Corporation for an indefinite period. The issues surrounding the regulation have been extensively considered, and it is the conclusion of the Corporation that it is in the best interest of the Legal Services Program to make a decision on this regulation.

It was also argued that action should be postponed awaiting action on amendments to section 1011 of the Legal Services Corporation Act in the Corporation's pending reauthorization. Again, the Corporation would be paralyzed if it were to await the passage of proposed amendments to section 1011 of the Act at a future time uncertain.

The separation of denial of refunding and termination procedures was questioned on the basis that section 1011 of the Act provides the same standard of "timely, full and fair hearing" for both. The Corporation agrees that this is the minimum standard for both termination and denial of refunding, but does not agree that differences in procedure are proscribed, provided this minimum standard is met. Furthermore, by the nature of the two proceedings there must be some differences between them. Indeed, even the current combined regulation contains differences in two crucial sections, the definitions of termination and of denial of refunding and the grounds for termination and for denial of refunding.

The final regulation retains all the basic constituents of a full hearing, although it compresses some of the time limits and reduces some of the prehearing and posthearing procedures, as discussed below. Not everthing in the current regulation was required by the simple statutory language of section 1011 of the Act. Consequently, the careful streamlining of procedures in the final regulation can eliminate some procedural steps without denying a full and fair hearing.

Section 1625.2 Definitions.

The proposed § 1625.2 made, and the final regulation retains, two significant changes from the corresponding definitions in current § 1606.2. The first is that it simplifies the definition to cover only a reduction of more than 10 percent in a recipient's annualized funding level; it eliminates reference to a reduction of more than $20,000 and to all of the language of the corresponding § 1606.2(a)(3) concerning the addition of a new term or condition not generally applicable to all recipients of the same class. The second change is the addition of an exception to the definition for a reduction of funding "by the uniform application of a statistical formula among the members of the same class of recipients." The final regulation makes one technical change from the proposed regulation, substituting the words, "the same class" for the words "a class" or "the class" for the sake of clarity.

Comments reflected strong opposition to this section, focusing on the first change. Both the right of the Corporation to define denial of refunding as a more than ten percent reduction in annualized funding and the desirability of the change were questioned. As for the legality of the change, the Corporation considers it to be clear. The words of section 1011, "" * * an application for denial of refunding shall not be denied * * *", have no additional definition in the Act. Virtually the same language, "" * * nor shall an application for refunding under section 221, 222, or 312 be denied * * *", appeared in section 604(2) of the Economic Opportunity Act of 1964, as amended, and was taken from that statute in 1974 to form part of section 1011 of the Act when Legal Services Corporation was split off from the Office of Economic Opportunity and established as an independent corporation. At that time, and for seven years previous thereto, the Office of Economic Opportunity interpreted denial of refunding as a reduction of at least 20 percent in a recipient's funding. Thus, as is also evident from the commonsense meaning of the words denial of refunding, it is clear that a reduction of 10 percent or less in a recipient's funding was not considered by Congress to be denial of refunding within the meaning of section 1011 as passed in 1974.

As for the desirability of this change, its purpose is to set one simple standard applying equally to all recipients for determining what constitutes a denial of refunding. The numerical figure of $20,000 had no evident logical basis and was completely outdated by inflation and the growth of the Corporation's funding since 1975. As a result, this figure applied to most recipients and the basic 10 percent standard applied only to the smaller recipients. Furthermore, the numercial standard made an unfair

and unreasonable distinction between large and small recipients.

The deletion of the provision concerning attachment of a special condition to a recipient's grant will have little effect, since the Corporation has found no record of this provision being invoked in any denial of refunding proceeding under 45 CFR 1606. Furthermore, the attachment of a special condition to a recipient's grant is a standard management tool and can often avoid the necessity to proceed to deny refunding to a recipient at a later date. If the Corporation could be required to initiate such a lengthy and expensive procedure as a denial of refunding hearing to place a special condition on one recipient's grant, this management tool would not be usable.

The second change attracted far less comment, although a few comments questioned the desirability of allowing a reduction of more than 10 percent in funding in any circumstances without a hearing. The logic of exempting the uniform application of a statistical formula from the hearing requirement is that, like a uniform reduction in funding caused by a reduction in appropriations, it is not either aimed at or responsive to the circumstances of any particular recipient. Thus, the purpose of requiring a hearing, which is to establish whether the recipient's conduct justifies a denial of refunding, cannot be served in the case of the uniform application of a statistical formula, and a hearing would be an empty and expensive formality.

Section 1625.3 Grounds for Denial of Refunding—New Paragraph (d).

The major difference between current section 1606.3 and the proposed § 1625.3 is the addition of a new section, § 1625.3(d), allowing denial of refunding when "the Corporation finds that another organization, whether a current recipient or not, could better serve eligible clients in the recipient's service area." Many comments criticized this change on policy and procedural grounds. In particular, it was claimed that the new standard denies due process, owing to the vagueness combined with the reversal of the burden of proof in § 1625.9. The commentators maintain it would force a recipient to establish that the Corporation did not have a substantial basis for concluding that another organization could better serve eligible clients, while the recipient would be unable to compel this other organization to produce relevant witnesses and/or documents.

Although the Corporation did not agree with the general contentions of the commentators, it did reexamine the relationship between §§ 1625.3(d) and 1625.9 and concluded that the recipient should be assured of the ability to examine witnesses and documents from the proposed new recipient organization. In response to this problem, the final regulation was amended by adding a new sentence to another section, § 1625.7(c), requiring the proposed new recipient of funding to produce any such witnesses and documents, subject to the sanctions in §1625.8(f) (which is identical to current § 1606.8(f)). This section allows the presiding officer to make a finding adverse to any party refusing to produce witnesses or documents.

Issues concerning the change in the burden of proof will be considered in the discussion of §1625.9 below. As for the issue of the vagueness of the standard of "better serve eligible clients in the recipient's service area", the Corporation submits that it is as concrete as the standard of current § 1606.3(c) concerning failure to provide "economical and effective legal assistance." A decision to deny refunding, unlike a decision to terminate an existing grant, need not be based on a specific violation, but may reasonably be a broad, programmatic decision. Even if a recipient is not clearly failing to provide "economical and effective legal assistance," the Corporation should have the right to fund another organization so that the Corporation may carry out its statutory duty under section 1007(a)(3) of the Act to "insure that grants and contracts are made so as to provide the *most* economical and effective delivery of legal assistance to persons in both urban and rural areas;" (emphasis supplied).

The Corporation also considers it fair and wise to insure that it has the programmatic authority to fund the best recipients. The Corporation does not accept the notion that Congress intended in section 1011 of the Act to establish a presumption that all existing recipients be perpetually refunded. What Congress did mandate, and what this final regulation does provide, is an opportunity for a timely, full and fair hearing before an independent hearing examiner. After such a hearing, this independent hearing examiner will determine whether the Corporation has a substantial basis for changing recipients.

Section 1625.3 Grounds for Denial of Refunding—Other Changes.

In both the proposed and final regulation, § 1625.3(b) is amended so that a recipient is no longer entitled to notice of and opportunity to correct a specific violation prior to commencement of a denial of refunding proceeding. For proceedings under the more general criteria of § 1625.3(c) a recipient is still entitled to such notice. This change also received considerable negative comment on the basis that a recipient should be entitled to a second chance, and that some recipients may be defunded on minor, technical, or unclear violations.

The Corporation does not consider defunding on such violations to be possible, as discussed below under discussion of the meaning of a "significant" violation. The Corporation maintains that a recipient that has committed such a significant violation should not be entitled to a second chance as a matter of right. When denial of refunding is seriously considered, there is either a long history of violations or a truly major violation. Recipients are organizations staffed by attorneys who should be able to avoid such serious or repeated violations. Furthermore, the Corporation faces a lengthy, expensive and uncertain procedure, averaging six to nine months and $100,000 in total cost, exclusive of staff time. The Corporation will not attempt to convince an independent hearing examiner of the property of denial of refunding for specific violations and undergo such expense unless it has a strong case.

This discussion of the types of violation that will lead the Corportion to initiate a denial of refunding proceeding leads to the other change made in both §§ 1625.3(b) and 1625.3(c). Both the proposed and final regulation substitute the word "significant" for "substantial" as the standard for a violation sufficiently serious to warrant denial of refunding. This term is intended to continue to exclude minor, technical, or unclear violations, while counteracting the assumption which has come to surround the term "substantial" that a recipient has to be a complete failure before denial of refunding is justified. It is not intended, as one comment feared, to allow denial of refunding when a recipient in good faith misinterprets a complex, new regulation, such as 45 CFR Part 1626 concerning Restrictions of Assistance to Aliens. In such an instance, the Corporation would not have a case for establishing a significant violation, unless the recipient has been informed that its interpretation and resulting practice were in violation of the regulation and allowed an opportunity to correct the violation. However, in a clear case, such as a recipient assisting a partisan political campaign, there is no justification for an automatic second chance.

There is one other change in § 1625.3(b) which was added in the final regulation. It is the addition of "instruction" to the list of Corporation issuances, the violation of which may result in denial of refunding. This addition makes violation of any official Corporation issuance published in the Federal Register pursuant to section 1006(e) of the Act a possible ground for denial of refunding. As some current Corporation instructions are quite significant, the Corporation considers this to be a logical and desirable addition to § 1625.3(b).

Section 1625.8 Conduct of the Hearing.

The major issue raised by comments on this section of the proposed regulation was the elimination of intervenors, as provided for in the corresponding § 1606.10(c). This change does not reduce the procedural rights of the recipient in any way and is consistent with the Corporation's objective of simplifying and expediting the hearing process. The strongest objection to the elimination of intervenors was that client groups could no longer participate. However, it is likely that either the recipient or the Corporation will find it in its interest to include such client input in its case. The inclusion of a third party in such an administrative proceeding is a major cause of increased delay and expense, and the Corporation believes that most of the testimony and/or arguments offered will be duplicative of testimony and/or arguments in the case put on by either the Corporation or the recipient. Thus any benefit gained by inclusion of intervenors is more than counterbalanced by the additional delay and expense resulting therefrom. Consequently, provisions for intervenors is eliminated from the final regulation.

Proposed § 1625.3(c) was criticized for the omission of the word "full" in characterizing the hearing. In response to these comments, the statutory language "full and fair" has been restored in the final regulation; similarly, it has been restored where it had been dropped from § 1625.1.

Section 1625.8(h)(2) was added to the proposed regulation, and has been retained in the final regulation; it bars challenge to the validity of "rules, regulations, guidelines, and instructions duly published under section 1006(e) of the Act." Considerable comment was received opposing this change; however, the Corporation considers the case for this change to be very clear. The presiding officer is appointed by the Corporation President, who is appointed by the Board of Directors of the Corporation. The Board has the statutory authority to adopt regulations, pursuant to section 1006(e) of the Act. Consequently, there can be no justification for the presiding officer (or even the President who makes the final decision) to rule on the validity of such regulations. Only a court has the authority to inquire into the validity thereof.

Section 1625.9 Burden of Proof.

This section leaves the burden of proof on specific factual issues with the Corporation, as in the corresponding 45 CFR 1606.11; however, it transfers the overall burden of proof from the Corporation to the recipient. This section is retained in the final regulation. Comments strongly opposed this transfer of the burden of proof. Many comments were based on the concept that recipients have a presumptive right to refunding; as discussed above, the statute does not so provide. As also noted above, the Corporation has amended § 1625.7(c) to insure that a recipient facing a hearing under § 1625.3(d) has the procedural ability to discover the evidence needed to carry this burden against a proposed new recipient.

Many commentators claim that this reversal of the burden of proof denies recipients their due process rights under section 1011 of the Act, especially in proceedings under § 1625.3(d). Their contention is that the procedural protections are inadequate because of the difficulty of establishing that the Corporation lacks a substantial basis for concluding that another recipient "could better serve clients in the recipient's service area." As discussed above, this determination is based on the standard of "economical and effective delivery of legal assistance" in section 1007(a)(3) of the Act. Such programmatic issues must be decided by any grant-making agency. Significantly, the appropriations bill for the Corporation recently passed by the Congress places the burden on the recipient "to show cause" why it should be refunded.

The hearing will develop as a comparison between the recipient's record and the record or potential of the proposed alternative recipient. The Corporation maintains that Congress intended to require procedural safeguards, including the independent presiding officer, but did not intend to preclude a change of recipients, based on broad, programmatic grounds. The recipient is not entitled to a presumption of refunding, absent specific misconduct or complete failure to deliver economical and efficient legal services; there is nothing in section 1011 stating or implying that the Corporation cannot switch funding to a better recipient.

Other Issues

The proposed regulation shortened most of the time limits in the regulation, consistent with its purpose of expediting the hearing procedures. Two of these time limits evoked significant comment. In § 1625.11, the reduction of the time limit for appeal of an adverse decision to the President from 10 to 5 days was criticized as too short and, upon reconsideration, the Corporation agrees and this time limit is restored to 10 days in the final regulation. In § 1625.6(b), the five day limit for challenging the impartiality of the hearing officer was also questioned; this limit is unchanged from that in corresponding § 1606.8(b), and it is retained.

Section 1606.6 requires an informal conference with the Corporation upon request by the recipient prior to the appointment of a presiding officer. This section was not included in the proposed regulation. Some comments advocated its restoration; however, the Corporation has decided that it should not be restored. It is to be noted that this is not the prehearing conference which is provided for in § 1625.7. In 45 CFR Part 1606, there are two conferences, an informal conference before appointment of a presiding officer and a prehearing conference afterwards. Elimination of this multiplicity of steps is one of the main purposes of this revision of denial of refunding procedures. Should both parties decide they would find such an informal conference useful, there is nothing in this regulation forbidding it, but it is eliminated as a required procedural step.

The proposed regulation made no change in § 1625.13, but, in response to comments, the final regulation removes the cap on allowable compensation to recipient's counsel. The cap was transferred to § 1625.14, so a recipient that prevails may be reimbursed for attorney's fees up to the hourly equivalent of the rate of Level V of the executive schedule as set in 5 U.S.C. 5316.

There was some criticism of the language of § 1625.14 which provides for reimbursement only when the hearing officer finds the Corporation's position to have been "substantially without merit." This language is designed to require the Corporation to pay the recipient's costs if the Corporation should not have commenced the denial of refunding proceeding, but to leave each party to pay its own costs if it was a close issue. It is quite common language to govern award of costs and

fees. The Corporation does not consider the strict liability reimbursement standard previously in effect either to be required by law or to be good policy. Consequently this language is retained in the final regulation.

List of Subjects in 45 CFR Parts 1606 and 1625

Administrative practice and procedure, Legal services.

For the reasons set out above, 45 CFR Part 1606 is amended as follows:

PART 1606—[AMENDED]

1. Part 1606—"Procedures Governing Termination of Financial Assistance and Denial of Refunding" is renamed "Procedures Governing Termination of Financial Assistance."

2. The authority citation for Part 1606 reads as follows:

Authority: Sec. 1006(b) (1) and (3), 1007(a)(1), 1007(a)(3), 1007(a)(9), 1007(d), 1006(e), 1011 Legal Services Corporation Act of 1974, as amended (42 U.S.C. 2996e(b) (1) and (3), 2996f(a) (1), (3), and (9), 2996f(d), 2996g(e), 2996j).

§ 1606.1 [Amended]

3. Section 1606.1 is amended by removing the phrase "or refunding denied."

§ 1606.2 [Amended]

4. Section 1606.2 is amended by removing paragraph (b) and redesignating paragraphs (c) and (d) as paragraphs (b) and (c).

5. Newly redesignated §1606.2(c) is further amended by removing the phrase "or that refunding should be granted or denied."

§ 1606.3 [Removed]

§§ 1606.4–1606.20 [Redesignated as §§ 1606.3–1606.19]

6. Section 1606.3 is removed in its entirety and §§ 1606.4 through 1606.20 are redesignated §§ 1606.3 through 1606.19.

7. The references to the following sections are redesignated as indicated wherever they appear in Part 1606.

Old section	New section
1606.5	1606.4.
1606.5(b)	1606.4(b).
1606.6	1606.5.
1606.7	1606.6.
1606.8	1606.7.
1606.9	1606.8.
1606.9(c)	1606.8(c).
1606.10	1606.9.
1606.13(b)	1606.12(b).
1606.15	1606.14.
1606.16	1606.17
1606.18	1606.18

8. Newly redesignated § 1606.3 is revised to read as follows:

§ 1606.3 Grounds for termination.

A grant or contract may be terminated when:

(a) Termination 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, 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; 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 contract with the Corporation. In the absence of unusual circumstances, a grant or contract shall not be terminated 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 has been substantial failure by a recipient to use its resources to provide economical and effective legal assistance of high quality as measured by generally acepted professional standards, the provisions of the Act, or a rule, regulation or guideline issued by the Corporation. In the absence of unusual circumstances, a grant or contract shall not be terminated for this cause unless the Corporation has given the recipient notice of such failure and an opportunity to take effective corrective action.

§ 1606.4 [Amended]

9. Newly redesignated § 1606.4(a) is amended by removing the phrase "or that refunding should be denied."

§ 1606.10 [Amended]

10. Newly redesignated § 1606.10(a) is amended by removing the words "or denial of refunding."

11. Newly redesignated § 1606.10(b) is amended by removing the words "or denying refunding."

§ 1606.12 [Amended]

12. Newly redesignated § 1606.12(a)(1) is amended by removing the words "or granting refunding."

13. Newly redesignated § 1606.12(a)(2) is amended by removing the words "or denying refunding."

§ 1606.16 [Amended]

14. Newly redesignated § 1606.16 is amended by removing the words "or refunding is granted."

§ 1606.17 [Amended]

15. Newly redesignated § 1606.17 is amended by removing the phrase "or to refunding" in the first sentence.

§ 1606.18 [Amended]

16. Newly redesignated § 1606.18 is amended by removing the phrase "or to deny refunding."

For the reasons set out above, a new 45 CFR Part 1625 is added as follows: