

LEGAL SERVICES CORPORATION
OPERATIONS & REGULATIONS COMMITTEE MEETING
(Continued from February 4, 2005)

O P E N S E S S I O N

Saturday, February 5, 2005

9:21 a.m.

Melrose Hotel
2430 Pennsylvania Avenue, N.W.
Washington, D.C.

COMMITTEE MEMBERS PRESENT:

Thomas R. Meites, Chairman
Lillian R. BeVier
Frank B. Strickland, *ex officio*

OTHER BOARD MEMBERS PRESENT:

Robert J. Dieter
Herbert S. Garten
David Hall
Maria Luisa Mercado
Florentino A. Subia
Ernestine Watlington (via telephone)

OTHERS PRESENT:

Helaine M. Barnett, President
Richard (Kirt) West, Inspector General
Victor M. Fortuno, Vice President for Legal Affairs,
General Counsel & Corporate Secretary
Laurie Tarantowicz, Assistant Inspector General
Patricia D. Batie, Manager of Board Operations
Mattie Condray, Senior Assistant General Counsel
Alice Dickerson, Director, Office of Human Resources
Linda Perle, Center for Law & Social Policy (CLASP)

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P R O C E E D I N G S

(9:21 a.m.)

MR. MEITES: Good morning, ladies and gentlemen. This is the resumption of the committee meeting of the Committee on Operations and Regulations.

The next item on our agenda is further consideration of the petition of Mr. Andal to amend our Rule 1617 which deals with class actions.

Mattie, I think if you would come up, and we can pick up where we were last time.

As you may recall, our committee has now considered the petition and related matters on two occasions, and we hope to be able to wrap it up this morning.

At our last session, both through Mr. Andal's direct testimony and discussion of the committee, we determined that it was appropriate to ask the staff to survey our grantees to ascertain whether and to what extent any of our grantees were still involved in any litigation which was proceeding on a class action basis.

The staff has conducted such a survey, and has

1 given us a report.

2 Mattie, why don't you explain the methodology
3 that the staff used and what it found?

4 MS. CONDRAV: I would love to do that if I had
5 been involved in the production of this report.

6 MR. MEITES: Okay.

7 MS. CONDRAV: But I wasn't.

8 MR. MEITES: Actually, it's from --

9 MS. CONDRAV: It's from Danilo Cardona, from
10 the Office of Compliance and Enforcement.

11 MR. MEITES: Who is not here.

12 MS. CONDRAV: I can take a whack at it.

13 MR. MEITES: Well, let me summarize it.

14 MS. CONDRAV: Okay.

15 MR. MEITES: I do have the information, and I
16 believe that we have enough.

17 The OCE surveyed all 143 grantees, and as of
18 January 19th, we are informed, 141 of the 143 had
19 responded, and I believe that this was done -- I know
20 it was done by a paper document questionnaire being
21 sent out to the grantees --

22 MS. CONDRAV: That's my understanding.

1 MR. MEITES: -- which asked in some detail,
2 considerable detail, about the participation in
3 continuing class actions.

4 In fact, some seven of the 141 grantees
5 responded that they were still, in one form or another,
6 involved in class litigation, and the report details
7 which of our grantees are so involved and the nature of
8 the involvement.

9 I will tell you that in my understanding, the
10 continued participation falls into three categories.

11 One category is what I expected. There are
12 some class actions, and I do this professionally, so
13 I'm quite familiar with it, where individuals, as a
14 member of the class, have a personal stake in the
15 outcome. They are entitled to a small amount of money
16 or some kind of benefit that's been obtained through
17 the class litigation.

18 In those cases, as I understand it, our
19 grantees are representing individuals, and I don't
20 think that raises the issues Mr. Andal was concerned
21 about, because those individuals will meet our
22 eligibility requirements, and they, in that capacity,

1 are participating as an individual in the process.

2 However, there's two other situations where it
3 appears that our grantees are still involved, and
4 they're really related, and I'm not sure the
5 distinction is very clear.

6 In those cases, some time ago, often in the
7 '80s, a class action was commenced at a time when the
8 present prohibitions were not in effect, with a grantee
9 or a predecessor of one of our grantees as the attorney
10 of record.

11 Those cases, in lay terms, were resolved or
12 ended or ceased to be active before the prohibitions
13 were instituted.

14 However, because of the nature of the relief,
15 the case in form continues. Typically, an injunction
16 was issued.

17 It often involved a prison, a school, or some
18 state social service agency, requiring that institution
19 to take certain steps to maintain a desegregation plan;
20 to assure the safety of prisoners or the conditions
21 under which prisoners are kept in a state institution;
22 to compel a state agency to provide certain kinds of

1 hearings before canceling certain kinds of benefits.

2 By the nature of that relief, they are open-
3 ended, for better or worse. There was no end point or
4 end time put to the duration of the obligation.

5 As a result, the cases in form, and sometimes
6 in fact, are still real litigation.

7 The role that several of the respondents have,
8 as they describe it, is to monitor the continued
9 performance of the defendant, the entity under the
10 injunction, in terms of its compliance with the decree,
11 and presumably, if the grantee finds that there is a
12 lack of compliance, they or another attorney would take
13 steps to bring that to the court's attention.

14 As I read the report, at this time, none of
15 the grantees feel any need to take that step. However,
16 I will tell you that I believe that -- and I know this,
17 because our office does it -- we have class actions
18 that have gone on forever, and we get reports, and I
19 know when I read that report, I am acting as a lawyer.

20 I'm reading the report, and I'm trying, I'm
21 determining in my mind if the conduct being reported to
22 me is in compliance with the decree, and in that

1 capacity, I am acting as an attorney for the class, and
2 I -- and I haven't discussed this with Lillian -- but I
3 believe that's not appropriate conduct for our
4 grantees, because to the extent that they are picking
5 up that piece of paper quarterly or yearly and
6 receiving it and reading it with a lawyer's
7 intelligence, I believe they are acting as an attorney
8 for the class.

9 And it is my view, though I haven't discussed
10 it with the staff at all, and I certainly haven't
11 discussed it with Lillian and Mike, I believe that
12 those grantees should withdraw from those cases where
13 they have a continuing obligation, because I believe
14 they're acting as attorneys.

15 Now, I know that there's difficulties
16 involved, because you just don't go to a federal judge
17 and say, "I'm throwing in my papers," because the
18 federal judge is not going to leave a case that is
19 still on his or her docket without an attorney.

20 So our grantees are going to have to -- if I
21 understand the situation properly, in my view, our
22 grantees are going to have to find substitute counsel,

1 and that may, in some cases, be difficult. I don't
2 know.

3 I suspect that, for institutional reasons,
4 given the prominence of these cases, that they will be
5 able to find counsel who can take on the very minimal
6 role of reviewing the yearly or quarterly filings, but
7 I at least believe that that step should be required,
8 and what I would like to ask -- and Lillian, I'd like
9 to get your views, because I haven't discussed this
10 with anyone -- that the staff consider what I've said.

11 And I believe it's management's function to
12 make this determination, not ours. All we can do is
13 tell you our views as a committee, should take
14 appropriate steps.

15 Lillian?

16 MS. BeVIER: Well, I don't have the same
17 intimate knowledge of how attorneys work in class
18 actions.

19 What you say seems persuasive to me, and that
20 being the case, and they are continuing to act as
21 lawyers for a class, in however limited a capacity, it
22 seems, they're in violation of the class action

1 restrictions as written and I think that it would be a
2 good idea to get them moving on trying to get
3 substitute counsel.

4 MR. MEITES: I understand how this occurs
5 because these really are old cases, and they are
6 asleep, but as I understand the report, they're not
7 dead.

8 MS. CONDRAY: Can I ask a clarifying question?

9 MR. MEITES: Sure.

10 MS. CONDRAY: Are you suggesting that you
11 believe that the rather passive activity of monitoring
12 is in fact adversarial?

13 MR. MEITES: I do, because it's adversarial in
14 the sense, as I said, that when the lawyer reviews the
15 filing, he or she has to make a determination whether
16 there's compliance, and that very analytical process
17 puts you potentially in the other side of the courtroom
18 from the party on the other side.

19 I'm sympathetic to our grantees, because these
20 are -- these cases long predated the Act, the
21 amendments, and in fact, nothing has happened in these
22 cases for 15 or 20 years.

1 On the other hand, given Mr. Andal has brought
2 this matter to our attention, which I appreciated --
3 you know, it's one of those loose ends that, unless
4 someone from the public brings it to our attention,
5 we're not going to know about it.

6 But we now know about it, and we appreciate
7 the OCE's efforts to do a very thorough survey and we
8 appreciate the promptness of our grantees in
9 responding.

10 I think this is a loose end that should be
11 cleared up.

12 MS. BeVIER: And I take it, too, that although
13 they're not active, there is something being done each
14 reporting period by our grantees in the sense of
15 monitoring for compliance, and there is compliance
16 being undertaken, but there's monitoring of that, and
17 that's where the problem is.

18 MR. MEITES: Now, I'd like to open this up for
19 public comment, if a member of the public would like to
20 respond. Whenever you've like, we'd love to hear from
21 someone who knows more about the grantees than
22 certainly we do.

1 MS. PERLE: Well, first of all, I haven't seen
2 this report.

3 MR. MEITES: Okay.

4 MS. PERLE: So, you know, I'm not aware of,
5 you know, the numbers or specifically what the grantees
6 have indicated that they've been doing.

7 I was obviously aware of the fact that the
8 report was -- that the survey was being done, and I
9 have talked to a few programs, in terms of what they,
10 you know, what kinds of cases they needed to report and
11 what they didn't need to report.

12 I guess I am troubled by the notion that just
13 reading a report is an adversarial activity, which is
14 what the rule talks about.

15 MR. MEITES: I understand, and it's -- I would
16 rather err on the right side on this, and not have
17 someone splitting hairs, because the fact is that if
18 you get one of these reports and the state director
19 says, "We're very sorry, but we actually let that 100
20 prison guards go and we're now triple-celling," in
21 reading that and analyzing what that commissioner has
22 just told you, you are thinking like a lawyer against

1 the commission.

2 MS. PERLE: Well, I agree that you're thinking
3 like a lawyer. I just don't know that by reading it
4 you're doing anything that's adversarial.

5 If you then go to the court and say they're
6 not obeying the terms of the order, I absolutely agree
7 a program should not do that.

8 MR. MEITES: But you have to do something. As
9 attorney for the class -- this is what I do Monday
10 through Friday --

11 MS. PERLE: Right.

12 MR. MEITES: -- once you read that and see
13 that the commissioner is triple-celling rather than
14 double-celling, you as an attorney for the class have,
15 there's no way around it, you've got to get on the
16 phone, and because you have that obligation, it's not
17 fair, it seems to me, either to your clients or to the
18 court that you don't take the next step.

19 And if you're obliged to take the next step,
20 then you put yourself in a position where somebody else
21 should be analyzing that report and someone else should
22 be making that decision whether to make the phone call

1 or not.

2 It's a close call, but I don't really see --
3 there's only a few grantees involved -- why we or the
4 grantees or Congress or anybody should lose a moment's
5 sleep over this. These are old cases. My sense is,
6 let's put them to bed.

7 MS. BeVIER: And especially if they're going
8 to have to get a substitute anyway, if it turns out
9 that they do identify a problem with compliance, and so
10 sooner rather than later, without the pressure of
11 losing time when it might really matter to the client,
12 you want to have the client in a position to take
13 enforcement action when the time comes, and, you know,
14 if it's going to be --

15 MS. PERLE: I don't --

16 MS. BeVIER: Okay, go ahead.

17 MS. PERLE: Excuse me. I'm sorry.

18 I don't disagree with what you're saying. I
19 mean, I think from a practical perspective, and I have
20 advised programs over and over, that they should just
21 get out.

22 But what I've heard over and over is that it's

1 very difficult; when nothing is happening, it's very
2 difficult to find somebody else who is willing to take
3 over that responsibility of reviewing these reports,
4 somebody who doesn't necessarily know anything about
5 the case, so --

6 MR. MEITES: I guess our sense is that the
7 staff should go back to these seven grantees, should
8 talk to them. OCE can do it. I'm not going to go into
9 details, but there's very few here, there may be one or
10 two cases where if the judge doesn't let you out, then
11 we have a problem. I don't know.

12 But given how promptly and completely they
13 responded, I am absolutely confident we'll have
14 cooperation from the grantees and OCE can work through
15 these few cases.

16 MS. PERLE: Excuse me. I don't have a problem
17 with, and I would prefer that it be Office of Legal
18 Affairs rather than OCE, but --

19 MR. MEITES: That's --

20 MS. PERLE: -- that's up to the staff --

21 MR. MEITES: -- whoever does it --

22 MS. PERLE: -- to suggest that it would

1 probably be prudent for programs to get out of these.

2 What I'm concerned is that it not be treated
3 as a situation where there's noncompliance currently,
4 and that's what I heard you saying.

5 MR. MEITES: No, no. I'm not saying that. I
6 gave you my opinion, and after hearing OCE yesterday, I
7 understand that compliance is a fine art, and I gave
8 you my lay views on how I behave in this situation.

9 I'm not saying -- I wouldn't have a clue as to
10 whether people are in compliance or not in compliance,
11 because I don't understand what that means in terms of
12 the staff detail.

13 However, it seems to me that there's every
14 reason, for the practical reasons that Lillian said,
15 that you all go back to the grantees and work your way
16 through these few cases, and let's just close this
17 window.

18 MS. WATLINGTON: Ernestine here --

19 MR. MEITES: Pardon me?

20 MS. WATLINGTON: I just let you know I was
21 listening to that. I'm on the line.

22 MR. MEITES: Okay. Thank you very much.

1 MS. BeVIER: Is Mike McKay here?

2 MR. MEITES: Pat, Mike is not on yet?

3 MS. BATIE: No.

4 MR. MEITES: Okay.

5 MS. CONDRAV: So if I can, just to clarify,
6 then, what you're suggesting from the procedural
7 standpoint is that, if I understand, your
8 recommendation, then, to the full Board would be that
9 we do not need to engage in rulemaking.

10 MR. MEITES: No, I'm not --

11 MS. CONDRAV: Okay.

12 MR. MEITES: That's in response to this part.

13 MS. CONDRAV: Okay. Thanks.

14 MR. MEITES: We still have the petition, which
15 when we're done with this, let's move on to that.

16 Maria Luisa?

17 MS. MERCADO: I still think that the key word
18 in this particular part of the review of these actions
19 that are pending to go along with the regulation action
20 that we're fixing to take is the issue of whether or
21 not they're adversarial, because both as a mediator and
22 as a litigator myself, and in fact, you know, all the

1 courts are going to adversarial versus non-adversarial
2 proceedings, the fact that litigation is alive and
3 pending doesn't necessarily make it adversarial.

4 And so consequently, that's why the language
5 of non-adversarial activity that a grantee is doing in
6 the monitoring of these class actions specifically
7 means they cannot get into the litigation.

8 I know that we're trying to prevent something
9 from happening in the future, but what you end up
10 doing, de facto, is making them be in noncompliance if
11 you're going to put that as a condition of them getting
12 out of all this litigation, and for those who are not
13 able to get out, they're going to be in noncompliance
14 and then in a probability of either losing funding or
15 whatever else is appropriate, because then we're going
16 to have to follow through with our enforcement action
17 against them.

18 MR. MEITES: Let me respond to that.

19 You're absolutely right that the key phrase is
20 non-adversarial, but I'm giving my view, at least, that
21 it necessarily, given the lawyer's responsibility to
22 the class, has an adversarial component, even though

1 it's only in your head.

2 Maria Luisa's point about if you're not able
3 to withdraw, the judge can say, "I'm not going to let
4 you out." If we face that problem, then we'll deal
5 with it.

6 You're absolutely right. I don't think you
7 would say that you're in noncompliance because a
8 federal judge essentially orders you to violate our
9 regulations.

10 If that were to happen, I'm sure that
11 management would try to figure out what to do.

12 But let's take the first step and see if we
13 can untangle what's here, and if there's a problem,
14 there's a problem.

15 MS. PERLE: Just to clarify that, what you're
16 suggesting is that in order to avoid situations where
17 programs are not in compliance, that we would recommend
18 -- that you'd recommend that they try to withdraw from
19 these cases.

20 MR. MEITES: Yeah. Let's take it one step at
21 a time.

22 MS. BeVIER: Right. And I think, isn't that

1 what happened in the Andal situation?

2 MS. PERLE: Yes, it is, and I'm not suggesting
3 that it couldn't happen in certain situations, and
4 that's the reason why, you know, as I said, I've
5 advised programs over and over to get out of these
6 cases if it's at all possible.

7 MR. MEITES: Yeah. Your point is well taken.
8 That I believe it's adversarial -- I, speaking as an
9 attorney in this area -- is not to reflect that I think
10 in terms of the agency that it is noncompliance.
11 That's not my role this morning, just to give you my
12 personal experience and to urge the management to see
13 if we can put this behind us.

14 If that's what we have on this, let's talk
15 about 617.

16 MS. BeVIER: Wait a second. You said there
17 were three.

18 MR. MEITES: Oh, there's a third category.

19 One of our grantees is still trying to get a
20 pre-1996 fee, and as far as I'm concerned, more power
21 to him. That is appropriate, it is adversarial, but it
22 involves fees earned before the Act, as I understand

1 it, they're entitled to those fees and they can keep
2 trying. That's my sense of it.

3 I don't know why it's taking them, I believe,
4 seven years to get their fee, but --

5 MS. PERLE: I think it's because the case is
6 still going on. Somebody else is doing it, but --

7 MR. MEITES: Whatever, more power to them.

8 MS. BeVIER: You mean good luck?

9 MR. MEITES: Yes. I won't go into how
10 important attorneys' fees are.

11 Okay. 617. We have discussed this
12 extensively. We have received comments from the
13 inspector general. The comments actually are two-part.

14 One part of the comment actually was going to
15 be a real problem for us, because the great State of
16 California has a very odd law, 17-200, which I don't
17 presume you know anything about, except that it is a
18 quasi-class action statute which allows any member of
19 the public to bring essentially a representative action
20 on behalf of the public without either any individual
21 injury or having suffered the injury complained of, or
22 having to go through the class action certification

1 processes.

2 And Mr. Andal, in his petition, had mentioned
3 this section, and the inspector general also had
4 mentioned these comments, but for better or worse,
5 California has amended that statute, and so it now
6 conforms to traditional class action contours, and I
7 don't believe the inspector general -- I know the
8 inspector general no longer believes that that is a
9 cause for special treatment.

10 The inspector general also was concerned about
11 FLSA cases, which are, I'm not going to bore people
12 with this, are not class cases, they're representative
13 cases, but each person who wants to participate makes
14 an individual decision to participate, and the
15 inspector general points out that doesn't implicate our
16 eligibility requirements because our grantees would
17 only represent individuals who qualify under their
18 usual rules.

19 The inspector general's one continuing comment
20 is about just what we were talking about, the tag end
21 of these cases.

22 And let me let Laurie make her own pitch on

1 this, rather than paraphrasing her.

2 MS. TARANTOWICZ: I think you've done an
3 excellent job of paraphrasing us, and I really don't
4 have anything to add.

5 MR. MEITES: Okay. Basically what it is is
6 that, really what we were just talking about.

7 MS. TARANTOWICZ: Exactly. I think that you
8 fixed it.

9 MR. MEITES: Whether our language, existing
10 language is too loose and so would allow kind of
11 entanglement of our grantees in the end game of class
12 actions.

13 MS. TARANTOWICZ: Right.

14 MR. MEITES: My sense is that, particularly
15 with this clarification we've had this morning, that
16 cleaning up this one loose end, I think that we've met
17 most of Mr. Andal's expressed concerns, at least, and I
18 think that with this loose end taken care of, my sense
19 is our existing language is adequate.

20 Lillian?

21 MS. BeVIER: Yeah. It seems -- it doesn't
22 seem a good idea to me to make a change in the regs

1 when there's not a problem, and there's not likely to
2 be a problem continuing into the future.

3 So if we can avoid it, I guess I'd sort of
4 like to wait and see what happens when we ask or
5 recommend or however we put that language, the grantees
6 to get disentangled.

7 MS. TARANTOWICZ: Yes, I'm sorry, I would
8 agree.

9 Our memo was to provide information for your
10 consideration, and I think that, you know before we
11 turn to this, the petition in particular, the action
12 that you took or the guidance that you gave to
13 management would take care of the problem.

14 MR. MEITES: All right. If that makes sense,
15 why don't we just continue it 'til our next meeting,
16 and hopefully, we can --

17 MS. BeVIER: Oh, good. We certainly wouldn't
18 want to take final action on anything, would we?

19 MR. MEITES: That concludes the open part of
20 our meeting. If there is any more public comment,
21 we'll receive it now. Otherwise, Lillian, do you want
22 to move we go into closed session?

1 M O T I O N

2 MS. BeVIER: I move we go into closed session.

3 MR. MEITES: And I second it, and we will now
4 go into closed session. Thank you very much.

5 (Whereupon, at 9:25 a.m., the meeting was
6 adjourned to closed session.)

7 (11:43 a.m.)

8 MR. MEITES: We're back in open session. The
9 next thing on our agenda is any new business.

10 Does anyone have any new business? Any new
11 business?

12 (No response.)

13 MS. BeVIER: No new business.

14 MR. MEITES: I'll open the floor to the public
15 if the public has anything to contribute.

16 (No response.)

17 MR. MEITES: Thank you, public.

18 And I'll consider a motion to adjourn.

19 M O T I O N

20 MS. BeVIER: I move we adjourn.

21 MR. MEITES: Second.

22 (Whereupon, at 11:44 a.m., the meeting was

1 adjourned.)

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