

§ 1606.13 Interim and termination funding; reprogramming.

(a) Pending the completion of termination proceedings under this part, the Corporation shall provide the recipient with the level of financial assistance provided for under its current grant or contract with the Corporation.

(b) After a final decision has been made to terminate a recipient's grant or contract, the recipient loses all rights to the terminated funds.

(c) After a final decision has been made to terminate a recipient's grant or contract, the Corporation may authorize termination funding if necessary to enable the recipient to close or transfer current matters in a manner consistent with the recipient's professional responsibilities to its present clients.

(d) Funds recovered by the Corporation pursuant to a termination shall be used in the same service area from which they were recovered or will be reallocated by the Corporation for basic field purposes.

§ 1606.14 Recompensation.

After a final decision has been issued by the Corporation terminating financial assistance to a recipient in whole for any service area, the Corporation shall implement a new competitive bidding process for the affected service area. Until a new recipient has been awarded a grant pursuant to such process, the Corporation shall take all practical steps to ensure the continued provision of legal assistance in the service area pursuant to § 1634.11.

PART 1625—[REMOVED AND RESERVED]

For the reasons set out in the preamble, and under the authority of 42 U.S.C. 2996g(e), 45 CFR part 1625 is removed and reserved.

Dated: November 18, 1998.

Victor M. Fortuno,
General Counsel.

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LEGAL SERVICES CORPORATION**45 CFR Part 1623****Suspension Procedures**

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This final rule substantially revises the Legal Services Corporation's rule on procedures for the suspension of financial assistance to recipients to implement changes in the law governing

certain actions used by the Corporation to deal with post-award grant disputes.

DATES: This rule is effective on December 23, 1998.

FOR FURTHER INFORMATION CONTACT: Suzanne Glasow, Office of the General Counsel, 202-336-8817.

SUPPLEMENTARY INFORMATION: The Operations and Regulations Committee (Committee) of the Legal Services Corporation's (LSC) Board of Directors (Board) met on April 5, 1998, in Phoenix, Arizona, to consider proposed revisions to the Corporation's rule on procedures for suspending funding to LSC recipients. The Committee made several changes to the draft rule and adopted a proposed rule that was published in the **Federal Register** for public comment at 63 FR 30446 (June 4, 1998). On September 11, 1998, during public hearings in Chicago, Illinois, the Committee considered public comments on the proposed rule. After making additional revisions to the rule, the Committee recommended that the Board adopt the rule as final, which the Board did on September 12, 1998.

This final rule is intended to implement major changes in the law governing certain actions used by the Corporation to deal with post-award grant disputes. Prior to 1996, LSC recipients could not be denied refunding, nor could their funding be suspended or their grants terminated, unless the Corporation complied with Sections 1007(a)(9) and 1011 of the LSC Act, 42 U.S.C. 2996 et seq., as amended. For suspensions, the Corporation could not suspend financial assistance unless the recipient had been provided reasonable notice and an opportunity to show cause why the action should not be taken. For terminations and denials of refunding, the Corporation was required to provide the opportunity for a "timely, full and fair hearing" before an independent hearing examiner.

In 1996, the Corporation implemented a system of competition for grants that ended a recipient's right to yearly refunding. Under the competition system, grants are now awarded for specific terms, and, at the end of a grant term, a recipient has no right to refunding and must reapply as a competitive applicant for a new grant.

The FY 1998 appropriations act made additional changes to the law affecting LSC recipients' rights to continued funding. See Pub. L. 105-119, 111 Stat. 2440 (1997). Section 501(b) of the appropriations act provides that a recipient's hearing rights under Sections 1007(a)(9) and 1011 are no longer applicable to the provision, denial, suspension, or termination of financial

assistance to recipients. This rule implements this new law as it applies to suspensions. Another final rule, also in this publication of the **Federal Register**, deals with the new law as it applies to terminations and denials of refunding. See final rule 45 CFR part 1606, which would revise the Corporation's policies and procedures for terminations and adds provisions dealing with debarments and recompetition.

The change in the law regarding suspensions does not mean that grant recipients have no hearing rights before their funds are suspended. Constitutional due process generally requires that a discretionary grant recipient is entitled to "some type of notice" and "some type of hearing" before its grant funding can be suspended or terminated during the grant period. Stein, *Administrative Law* at § 53.05[4]. However, the new law emphasizes a congressional intent to strengthen the ability of the Corporation to ensure that recipients are in full compliance with the LSC Act and regulations. See H. Rep. No. 207, 105th Cong., 1st Sess. 140 (1997). Accordingly, under this rule, the hearing procedures for suspensions have been streamlined. The changes emphasize the seriousness with which the Corporation takes its obligation to ensure that recipients comply with the terms of their grants and provide quality legal assistance but, at the same time, to provide recipients with notice and a fair opportunity to be heard before any suspension action is taken.

The Corporation received three comments on the proposed rule. The commenters generally agreed that the proposed rule represented an appropriate implementation of statutory requirements, but made recommendations for clarifications or revisions for policy changes. An analysis of comments and recommendations for changes to the proposed rule is provided below.

Section-by-Section Analysis**Section 1623.1 Purpose**

This section is revised from the prior rule to clarify the purpose of a suspension, as opposed to other sanctions the Corporation might choose to apply to a recipient. A suspension is one of several actions that may be taken by the Corporation to ensure the compliance of LSC recipients with the terms of their LSC grants. A suspension is generally used by Federal agencies as a temporary withdrawal of a grantee's authority to obligate or receive grant funds, pending corrective action by the

grantee or a decision by the agency to terminate the grant. Stein J., Administrative Law at § 53.02[3]. Suspensions are intended to be used in emergency situations which require prompt action and thus are normally not subject to full administrative appeals. Id. For example, the Corporation might choose to suspend when quick action is necessary to safeguard against a loss of LSC funds or the Corporation believes that prompt action will bring about corrective action and prevent the likely recurrence of violations. No changes have been made from the proposed version of this section.

Section 1623.2 Definition

The definition of suspension is revised from the prior rule to clarify the nature of a suspension and the differences between a suspension and a termination. The proposed definition stated that a suspension withholds funding to a recipient until the end of the suspension period. This was intended to clarify that when the Corporation suspends funding after a hearing under this part, it may only withhold the funds until the end of the suspension period as provided in § 1623.4(e) and (f). After the suspension period, the Corporation must return the funds to the recipient, and either begin termination proceedings or determine that the recipient is taking adequate steps to cure the problem.

One comment suggested that the temporary nature of a withholding under a suspension should be expressly stated in the rule. The Board agreed and added a provision in § 1623.6 stating that funds withheld under a suspension must be returned to the recipient at the end of the suspension period.

A definition of knowing and willful has been added to clarify one of the criteria included to determine whether there has been a substantial violation for the purposes of § 1623.3(b)(5). Knowing and willful means that the recipient had actual knowledge of the fact that its action or failure to take a required action constituted a violation and despite such knowledge, undertook or failed to undertake the action. For an in-depth discussion of the meaning of knowing and willful, see the discussion of the term in the final rule, 45 CFR part 1606, also published in this volume of the **Federal Register**.

Section 1623.3 Grounds for Suspension

Paragraph (a) of this section sets out the grounds for most suspensions. The underlying reason for a suspension is a substantial violation by the recipient of the terms of its LSC grant. A decision to

suspend, rather than terminate, funding will usually be made when the Corporation has reason to believe that prompt action is necessary to safeguard LSC funds or effect an immediate cure of the violation at issue.

A provision setting out the criteria for determining whether there has been a substantial violation is included in this section in paragraph (b). The prior rules on suspension, termination and denial of refunding included two different undefined standards. Terminations or suspensions were undertaken for substantial violations and denial of refunding for significant violations. Because there has been some confusion over the years about the scope of the meaning of the two standards, this rule includes criteria intended to provide guidance to recipients on what constitutes a substantial violation. § 1623.3(b).

Comments on the criteria in the proposed rule mirrored those for the same standard in proposed rule, Part 1606, and the Board made the same revisions to the criteria for this rule as those made for Part 1606. Part 1606 is also published as a final rule in this volume of the **Federal Register** and recipients should refer to the preamble to Part 1606 for interpretive guidance on the criteria.

Paragraph (c) implements Section 509 of the Corporation's 1996 appropriations act, which has been incorporated by the Corporation's FY 1998 appropriations act. Section 509 requires recipients to complete audits which are consistent with the guidance promulgated by the Office of Inspector General. In addition, it authorizes the Corporation, after receiving a recommendation from the OIG, to suspend funding to a recipient who fails to have an acceptable audit, and allows the Corporation to continue the suspension until the recipient has completed an audit acceptable to the OIG. This generally means that the audit is prepared according to OIG audit guidances, which consist of the LSC Audit Guide for Recipients and Auditors and any relevant bulletins issued by the OIG.

One comment noted that the Corporation has discretion whether to suspend funding when it receives a recommendation from the OIG and urged the Corporation to clarify in the final rule that the Corporation would suspend funding only under extraordinary circumstances. The Board did not agree. Whether or not a recipient's audit meets the requirements of the OIG audit guidance is a determination made by the OIG. Whether to suspend based on the OIG recommendation is a determination

made by LSC management. Although management has discretion in taking action, it should exercise this discretion on a case-by-case basis and generally give deference to the OIG decision. Requiring the Corporation to use an "extraordinary circumstances" standard in all cases would be inconsistent with the scheme set out in Section 509 of the Corporation's appropriations act which provides the OIG with specific authority to determine whether an audit is acceptable and which envisions management following up on a finding made by the OIG. The Corporation always has enforcement discretion to determine whether it is financially or administratively advisable to take action against a recipient. The Corporation should not limit its ability to take action when it is advisable to suspend funding.

The comment also encouraged revising the rule to indicate the criteria that would be used by the OIG to determine whether an audit meets OIG guidances. Based on comments from the OIG, the Board did not revise the rule. According to the OIG, the criteria by which an audit is judged are contained in the audit guidance issued by the OIG, which are the Audit Guide for Recipients and Auditors (which includes the requirements of government auditing standards and OMB Circular A-133) and audit bulletins. Both recipients and their auditors should be well aware of these documents, which set out the requirements for an audit and the responsibilities of recipients and auditors with respect to the audit.

One comment suggested that the preamble to the rule should indicate that the Corporation would consider only a suspension in part when a suspension in whole would leave the recipient with insufficient funds to remain in operation, thereby interrupting client services and interfering with the professional obligations of attorneys employed by the recipient. The Board decided not to obligate the Corporation to such an exact policy. It is clearly a responsibility long recognized by the Corporation to ensure continued legal assistance in each service area. Both the competition rule and the termination rule include provisions providing the Corporation funding discretion to address this need and the Corporation's decisions regarding suspension will be guided by this concern.

Section 1623.4 Suspension Procedures

The suspension procedures in this section are substantially the same as in the prior rule, but are set out in a new structure for clarity, and with two

substantive changes. First, references to the employee who orders a suspension are replaced by a reference to the Corporation. Second, the section deletes the provision in § 1623.3(c) of the prior rule that required the Corporation, except for unusual circumstances, to give the recipient an opportunity to take effective corrective action before suspending funding. Instead, paragraph (a)(3) provides the Corporation the flexibility needed in extraordinary circumstances addressed by suspensions to suspend funding before corrective action has taken place. However, the Corporation must identify any corrective action the recipient can undertake to avoid or end the suspension in the proposed determination.

Paragraph (a) of this section authorizes the Corporation to issue a written preliminary determination to suspend funding to the recipient. The recipient then has the burden to show cause why the suspension should not take place.

The preliminary determination is required to state the grounds for the action, identify the relevant facts and documents underlying the determination, specify any corrective action the recipient may take, and advise the recipient of its right to submit written materials in response to the preliminary determination and to request an informal hearing with the Corporation. Paragraph (c) requires the Corporation to consider all materials and oral evidence presented under this section and, if the Corporation thereafter determines that grounds for a suspension exist, the Corporation may issue a final written determination to suspend and shall provide that determination to the recipient.

Paragraph (e) permits the Corporation to rescind or modify the terms of the final determination to suspend and, after providing written notice to the recipient, reinstate the suspension without any additional proceedings under this part. Paragraph (e) also states that, except for suspensions for the failure of a recipient to complete an audit consistent with the guidance promulgated by the Office of Inspector General, a suspension shall not exceed 30 days, unless there is agreement between the recipient and the Corporation to extend the suspension for up to 60 days. This reflects the presumption that a suspension of too long a duration would likely endanger a recipient's ability to continue service to its clients. A suspension is intended to be used for extraordinary circumstances when prompt intervention is likely to bring about immediate corrective action. The

Corporation, therefore, should act quickly to determine that the problem is solved and is unlikely to reoccur, the appropriate corrective action has been taken, or initiate a termination process under part 1606.

Paragraph (f) implements Section 509 of Public Law 104-134, which requires that suspensions for failure to have an acceptable audit should last until the recipient has completed an acceptable audit.

Section 1623.5 Time Extension and Waiver

This section provides that extensions of time may be provided for good cause, except for the time limits in § 1623.4(e). It also permits any other provision of this part to be waived or modified by agreement of the recipient and the Corporation for good cause.

Paragraph (b) from § 1606.6 in the proposed rule has been moved to this section and is designated as paragraph (c). This paragraph provides that a failure of the Corporation to meet a time requirement does not preclude the Corporation from suspending a recipient's grant or contract with the Corporation. See *Brock v. Pierce County*, 476 U.S. 253 (1986).

Section 1623.6 Interim Funding

Generally, this section is the same as in the prior rule. It requires the Corporation to continue funding the recipient at the current level during suspension proceedings. This is necessary to prevent an injustice if the proceedings reveal that a suspension is not in order and to ensure the continued availability of legal services to the poor in the recipient's service area.

List of Subjects in 45 CFR Part 1623

Administrative practice and procedures, Legal services.

For reasons set forth in the preamble, LSC revises 45 CFR part 1623 to read as follows:

PART 1623—SUSPENSION PROCEDURES

Sec.

- 1623.1 Purpose.
- 1623.2 Definitions.
- 1623.3 Grounds for suspension.
- 1623.4 Suspension procedures.
- 1623.5 Time extensions and waiver.
- 1623.6 Interim funding.

Authority: 42 U.S.C. 2996e(b)(1); Pub. L. 104-134, 110 Stat. 1321, Sec. 509; Pub. L. 105-119, 111 Stat. 2440, Sec. 501(b).

§ 1623.1 Purpose.

The purpose of this rule is to:

- (a) Ensure that the Corporation is able to take prompt action when necessary to safeguard LSC funds or to ensure the

compliance of a recipient with applicable provisions of law, or a rule, regulation, guideline or instruction issued by the Corporation, or the terms and conditions of a recipient's grant or contract with the Corporation; and

- (b) Provide procedures for prompt review that will ensure informed deliberation by the Corporation when it has made a proposed determination that financial assistance to a recipient should be suspended.

§ 1623.2 Definitions.

For the purposes of this part:

- (a) *Knowing and willful* means that the recipient had actual knowledge of the fact that its action or lack thereof constituted a violation and despite such knowledge, undertook or failed to undertake the action.

- (b) *Recipient* means any grantee or contractor receiving legal assistance from the Corporation under section 1006(a)(1)(A) of the LSC Act.

- (c) *Suspension* means an action taken during the term of the recipient's current grant or contract with the Corporation that withholds financial assistance to a recipient, in whole or in part, until the end of the suspension period pending corrective action by the recipient or a decision by the Corporation to initiate termination proceedings.

§ 1623.3 Grounds for suspension.

- (a) Financial assistance provided to a recipient may be suspended when the Corporation determines that there has been a substantial violation by the recipient of an applicable provision of law, or a rule, regulation, guideline or instruction issued by the Corporation, or a term or condition of the recipient's current grant or contract with the Corporation; and the Corporation has reason to believe that prompt action is necessary to:

- (1) Safeguard LSC funds; or
- (2) Ensure immediate corrective action necessary to bring a recipient into compliance with an applicable provision of law, or a rule, regulation, guideline or instruction issued by the Corporation, or the terms and conditions of the recipient's grant or contract with the Corporation.

- (b) A determination of whether there has been a substantial violation for the purposes of paragraph (a) of this section will be based on consideration of the following criteria:

- (1) The number of restrictions or requirements violated;
- (2) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory

restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement;

(3) The extent to which the violation is part of a pattern of noncompliance with LSC requirements or restrictions;

(4) The extent to which the recipient failed to take action to cure the violation when it became aware of the violation; and

(5) Whether the violation was knowing and willful.

(c) Financial assistance provided to a recipient may also be suspended by the Corporation pursuant to a recommendation by the Office of Inspector General when the recipient has failed to have an acceptable audit in accordance with the guidance promulgated by the Corporation's Office of Inspector General.

§ 1623.4 Suspension procedures.

(a) When the Corporation has made a proposed determination, based on the grounds set out in § 1623.3, that financial assistance to a recipient should be suspended, the Corporation shall serve a written proposed determination on the recipient. The proposed determination shall:

(1) State the grounds and effective date for the proposed suspension;

(2) Identify, with reasonable specificity, any facts or documents relied upon as justification for the suspension;

(3) Specify what, if any, corrective action the recipient can take to avoid or end the suspension;

(4) Advise the recipient that it may request, within 5 days of receipt of the proposed determination, an informal meeting with the Corporation at which it may attempt to show that the proposed suspension should not be imposed; and

(5) Advise the recipient that, within 10 days of its receipt of the proposed determination and without regard to whether it requests an informal meeting, it may submit written materials in opposition to the proposed suspension.

(b) If the recipient requests an informal meeting with the Corporation, the Corporation shall designate the time and place for the meeting. The meeting shall occur within 5 days after the recipient's request is received.

(c) The Corporation shall consider any written materials submitted by the recipient in opposition to the proposed suspension and any oral presentation or written materials submitted by the recipient at an informal meeting. If, after considering such materials, the Corporation determines that the recipient has failed to show that the

suspension should not become effective, the Corporation may issue a written final determination to suspend financial assistance to the recipient in whole or in part and under such terms and conditions the Corporation deems appropriate and necessary.

(d) The final determination shall be promptly transmitted to the recipient in a manner that verifies receipt of the determination by the recipient, and the suspension shall become effective when the final determination is received by the recipient or on such later date as is specified therein.

(e) The Corporation may at any time rescind or modify the terms of the final determination to suspend and, on written notice to the recipient, may reinstate the suspension without further proceedings under this part. Except as provided in paragraph (f) of this section, the total time of a suspension shall not exceed 30 days, unless the Corporation and the recipient agree to a continuation of the suspension for up to a total of 60 days without further proceedings under this part.

(f) When the suspension is based on the grounds in § 1623.3(c), a recipient's funds may be suspended until an acceptable audit is completed.

§ 1623.5 Time extensions and waiver.

(a) Except for the time limits in § 1623.4(e), any period of time provided in this part may be extended by the Corporation for good cause. 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 30 days of the service of the proposed determination.

(b) Any other provision of this part may be waived or modified by agreement of the recipient and the Corporation for good cause.

(c) Failure by the Corporation to meet a time requirement of this part shall not preclude the Corporation from suspending a recipient's grant or contract with the Corporation.

§ 1623.6 Interim funding.

(a) Pending the completion of suspension proceedings under this part, the Corporation shall provide the recipient with the level of financial assistance provided for under its current grant or contract with the Corporation.

(b) Funds withheld pursuant to a suspension shall be returned to the recipient at the end of the suspension period.

Dated November 18, 1998.

Victor M. Fortunio,

General Counsel.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 36

[CC Docket No. 96-45; FCC 98-160]

Federal-State Joint Board on Universal Service

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission refers to the Joint Board the issues on which referral was sought, and requests that the Joint Board issue a Recommended Decision on the issues by November 23, 1998. The Commission will then issue an order on the issues addressed in the Joint Board recommended decision in time to implement the revised mechanism for non-rural carriers by July 1, 1999.

EFFECTIVE DATE: December 23, 1998.

FOR FURTHER INFORMATION CONTACT: Charles Keller, Attorney, Common Carrier Bureau, Accounting Policy Division, (202) 418-7400.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document released on July 17, 1998. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, NW, Washington, DC, 20554. This document is also available from the Commission's copy contractor, International Transcription Service, 1231 20th Street, NW, Washington, DC 20036.

I. Introduction

1. Section 254 of the Communications Act codified the Commission's long-standing commitment to ensuring the preservation and advancement of universal service in rural, high cost, and insular areas. As section 254 required, the Commission convened a Federal-State Joint Board on Universal Service and, in light of the Joint Board's recommendations, the Commission on May 8, 1997, released the *Universal Service Order*, 62 FR 32862 (June 17, 1997), which, among other things, identified the services included within the definition of universal service and