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38400

LEGAL SERVICES CORPORATION

45 CFR Part 1607

Governing Bodies

AGENCY: Legal Services Corporation.

ACTION: Proposed regulation.

SUMMARY: This proposed rule amends Part 1607 of the Legal Services Corporation regulations prescribing the requirements for recipient governing bodies. The amendments and additions will provide new guidelines for the selection, composition, and procedure of such governing bodies. The section on compensation has been changed to better conform with the language in the Act. In addition, the size of the membership and the length of active membership of any board member are proposed to be limited.

DATE: Comments on proposed regulations must be submitted on or before November 18, 1987.

ADDRESS: Comments should be mailed to the Office of the General Counsel, Legal Services Corporation, 400 Virginia Avenue SW., Washington, DC 20024-2751, (202) 663-1623.

FOR FURTHER INFORMATION CONTACT: Timothy B. Shea, General Counsel, Legal Services Corporation, 400 Virginia Avenue SW., Washington, DC 20024-2751, (202) 663-1823.

SUPPLEMENTARY INFORMATION: Section 1007(c) of the Legal Services Corporation Act ("Act"), 42 U.S.C. 2996(f) *et seq.*, establishes the procedural requirements for the governing body of any recipient that receives funding for the purpose of providing legal assistance to eligible clients. Among other things, it requires that at least sixty (60) percent of the governing body of a recipient consist of attorneys who are members of the bar in the state where legal assistance is to be provided. Part 1607, which implements these statutory provisions, has been revised two times since its original promulgation on July 23, 1976, with the consistent objective of insuring that programs will be accountable to the communities that they serve.

Part 1607 originally allowed for selection of attorney board members by several groups, including bar associations, law schools and anti-poverty organizations. Also, it required that only one member of the Board be an eligible client. 41 FR 25900 (1976). On July 28, 1976, the rule was revised to implement 1977 amendments to sec. 1007(c). See Pub. L. 95-222 (1977). As amended, it required that at least one-third of the members of a recipient

governing body be eligible clients to insure that the recipient would be accountable to the client communities it served. 43 FR 32772 (1978).

The next revision, which became effective on February 16, 1983, contained new mechanisms and requirements for selection of attorney members of recipient governing bodies as required by Pub. L. 97-377, the LSC appropriations bill for that year. 48 FR 1971 (1983). The provision in the LSC appropriations bill commonly referred to as the McCollum Amendment required that the appointment of the attorney members of the governing body of a recipient be conducted so that a majority of the board be selected by the governing bodies of the state, county or municipal bar associations, the membership of which represented the majority of attorneys practicing law in the recipient's service area. All subsequent appropriations bills have retained this provision.

Finally, on August 15, 1983, a final Guideline, No. 83-1, was published after notice and comment as an authoritative interpretation of the regulation as amended. 48 FR 36820 (1983). Briefly, the Guideline establishes that the general membership bar association that is co-extensive with the recipient's service area is to be the appointing bar. The proposed revision would require that the state bar for the state in which the recipient maintains its principal offices, whether or not it is co-extensive with the recipient's area, be the appointing body. To the extent that the changes proposed here are inconsistent with Guideline 83-1, conforming modifications are proposed to be made to the Guideline simultaneously.

The current proposed revisions and amendments to Part 1607 have been constructed to more fully conform to the Act, to better implement Congressional intent, and to insure that recipient governing bodies more closely reflect the structure and procedures which pertain to LSC's own governing body. See 42 U.S.C. 2996(c), 1004.

Section 1607.3 Composition

The proposed change to § 1607.3(c) concerns the appointment of attorneys to governing bodies. It is proposed that attorney board members must be appointed by a nine member legal services selection committee established by the governing body of the state bar association of the state in which the recipient is located. Selection of the nine member committee shall be conducted by an election in which all the voting members of the appointing bar are allowed to participate. The members of the legal services committee, who must

be members of the relevant bar, shall sit for no more than a period of three years. The object of this change is to foster consideration and appointment of board members by the broadest possible representation of bar members.

Experience under the Act and the prior versions of Part 1607 taught that often only narrow segments of local bars were consulted in forming recipient boards. As a result, Representative William McCollum initiated an amendment, first articulated in 1981 in H.R. 3490 and later enacted in the appropriations bills for 1983, see Pub. L. 97-276 and Pub. L. 97-377, that was intended to require that the sole authority to appoint the majority of recipient board members be exercised by the governing body of either the state, county, or municipal bar association. The main purpose of the provision was to prevent self-selecting and self-perpetuating recipient governing bodies. See 127 CONG. REC. H 12550 (daily ed. June 16, 1981).

The language of the McCollum Amendment gives LSC discretion to grant appointing authority to either the state, county or municipal bar as long as the membership of that bar represents a majority of attorneys practicing law in the recipient's service area. Exercising this discretion, LSC requires in Guideline 83-1 that the local general membership bar association that is co-extensive with the recipient's service area be the appointing bar. Problems have been encountered in the administration of this requirement, however. Recipients' service areas often subsume several county or municipal boundaries; in such cases, the interested local bars are counseled to coordinate appointments. Yet uncertainty as to the identity of the majority bar or shared authority among responsible bars often has led to an absence of interest by the bar and, consequently, inattention and indifference towards the appointment process. Recipients have also been known to forum shop among local bars for the most favorable appointment process. In addition, local bars often accept and adopt recommended nominations furnished by the programs themselves. Such self-selection defeats the long-standing objective of active independent attention by the bar itself. The revisions are carefully constructed to avoid such problems. First, selection of appointees by an elected committee will ensure substantial participation by a broad spectrum of the bar membership. Second, selection at the state level will eliminate the uncertainty as to the responsible appointing bar.

National support centers serve recipients nationwide. Because it would be unrepresentative of areas served to have just one State's bar be the appointing organization, and unduly cumbersome to have attorney members appointed by bar associations of several States, it is proposed that the appointment of attorney members of the governing bodies of national support centers be conducted by the governing body of the voluntary bar association having the largest membership in the United States.

The present paragraph (h) is proposed to be deleted as inconsistent with the proposed selection procedure outlined in paragraph (c).

A new paragraph (h) is proposed as an addition to § 1607.3 to limit the number of board members of any one political party that may serve at one time on a recipient's governing body. Pursuant to this section, no more than sixty percent of a recipient's governing body may be members of the same political party. This proposal would reinforce the breadth of representation appropriate for governing bodies. It would also reduce the potential for partisan political interference as was intended by Congress when it included the provision in the Act mandating a bipartisan board for the Corporation. See 42 U.S.C. 1004(a); S. Rep. No. 495, 93d Cong., 1st Sess. 9 (1973). Although legislative initiatives to establish this requirement have been entertained but not adopted, see 129 CONG. REC. S. 14443-14449 (daily ed. Oct. 21, 1983), 129 CONG. REC. H. 9587-9589 (daily ed. Nov. 9, 1983), the explicit purpose of the McCollum Amendment is to insure that recipients remain free from political influence, see 127 CONG. REC. 12550 (1981).

Paragraph (i) is proposed as an addition to § 1607.3 in order to limit the length of consecutive terms that a member of a recipient governing body can serve on that body. This proposed amendment prohibits a board member from serving more than a total of six consecutive years and requires a minimum three year absence from board membership before being eligible for reappointment to the same body. By requiring bar associations to appoint board members, Congress intended to prevent self-selecting, self-perpetuating recipient boards. See 127 CONG. REC. 12550 (1981). The bar was considered to be an objective, independent entity that would help insure that recipients remain free from political influence and deliver quality legal services to the poor. Congressional intent is defeated if board members are permitted to serve for

unlimited terms with the result that the opportunity to appoint other bar members is constrained. Fixed terms also allow more attorneys in the recipient's area to participate over the years, thus increasing the legal community's involvement with and appreciation of the need for legal services.

Paragraph (j) is proposed as an addition to § 1607.3 to limit the number of voting members of a recipient's governing body to nineteen, absent a waiver obtained through a showing made in accordance with the requirements contained in § 1607.5(b). This revision is intended to reduce the possibility of recipient governing bodies expanding over time, thus diluting the effectiveness and involvement of individual board members. LSC recipient governing bodies currently range in size from approximately fourteen to sixty-six. Governing bodies larger than nineteen tend to be too ponderous to be efficient decisionmakers for recipient organizations.

Paragraph (k) is proposed as an addition to § 1607.3 in order to establish regulations and standards for committees appointed by a recipient governing body. Such committees are permissible, and their actions and resolutions may be effective and binding on the full governing body, only if certain requirements are observed. Any action of a properly constituted committee of a recipient governing body must be ratified by the full governing body prior to its implementation. Alternatively, the actions and resolutions of such a committee may be binding upon the full governing body and the recipient if the committee's quorum is identical in number to that of the full governing body. The intent of this provision is to prevent a committee of a governing body, such as an executive committee, which was a quorum requirement less than that of the entire governing body yet has authority to bind the entire governing body and recipient, from exercising its authority so as to circumvent the quorum requirement of the full governing body.

Paragraph (l) is proposed as an addition to § 1607.3 so as to make the previous revisions and additions, specifically those contained in paragraphs (c), (h), (i), (j), and (k) of § 1607.3, effective as soon as feasible following the effective date of the proposed changes.

Section 1607.4 Compensation

Section 1607.4 is revised to make the language of this part conform to section 1007(e) of the Act in order to insure that

no board member will receive compensation from any recipient. This change is proposed to avoid any confusion that may exist due to the inconsistency between the language in the Act and that in the regulation. The Act prohibits an attorney from serving on a board if he receives compensation from "a", meaning "any", recipient. The regulation's language prohibits the receipt of compensation from "the" recipient.

An Opinion dated October 8, 1987, by the Office of Monitoring, Audit and Compliance of LSC, interpreted the Corporation's policy as prohibiting a board member from receiving compensation from any recipient.

This clarification is intended to apply to full-time and part-time recipient staff members as well as to members of the private bar who are concurrently serving as recipient board members. Payment for normal travel expenses and other out-of-pocket expenses is not considered compensation within the meaning of this section.

Section 1607.7 Compliance

Proposed § 1607.7 outlines the necessary steps which must be taken if a recipient governing body fails to comply with the revisions and additions herein proposed for Part 1607. Paragraph (a)(1) through (5) of § 1607.7 deals with specific information which must be included in the non-compliance report.

List of Subjects in 45 CFR Part 1607

Legal services, Governing bodies of recipients.

PART 1607—GOVERNING BODIES

For reasons set out in the Preamble, it is proposed that 45 CFR Part 1607 be amended as follows:

1. The authority citation for Part 1607 is revised to read as follows:

Authority: Sec. 1007(c), 42 U.S.C. 2996f; Pub. L. 99-591, 100 Stat. 3341; Pub. L. 99-180, 99 Stat. 1165.

2. Section 1607.3 (c) and (h) are revised and paragraphs (i) through (l) are added to read as follows:

§ 1607.3 Composition.

(c) Appointment of the attorney members of the governing body shall be conducted by a nine member legal services selection committee established by the governing body of the integrated state bar association of the State in which the recipient is located. In a State which has no integrated bar, appointment shall be made by a nine member legal services selection

committee established by the governing body of the voluntary bar association having the largest membership in that State. Appointment of the attorney members of the governing body of national support centers shall be conducted by a nine member legal services selection committee established by the governing body of the voluntary bar association having the largest membership in the United States. Selection of the nine member committee shall be conducted by an election held by the appointing bar's governing body in which all voting members of the appointing bar are allowed to participate. The elected committee members, who shall be members of the relevant bar association shall sit for a term of no more than three years.

(h) No more than sixty percent of a recipient governing body may be members of the same political party. In the case of unaffiliated status or independent party status on the part of certain board members, the sixty percent maximum of this subpart shall apply only to those board members who claim party affiliation. Party affiliation shall be determined by voter registration in States where voters register by party. In other States, party affiliation shall be determined by participation in the most recent party primary, as reflected by the official voter participation roll.

(i) No board member of a recipient governing body shall serve more than six consecutive years. Board members who have served more than six consecutive years on a particular recipient's governing body shall be absent from that recipient's governing body for a minimum of three years before being eligible for reselection.

(j) No recipient's governing body shall have more than nineteen voting board members, except as otherwise authorized according to the provisions contained in § 1607.5(b).

(k) The governing body of a recipient may establish such committees of board members as are necessary for the handling of specific matters as required by the Act or as are determined, by the

governing body as a whole, to be required for the most efficient oversight and administration of the recipient. The actions and resolutions of such committees shall not be binding upon the governing body as a whole, or upon the officers and staff members of the recipient, unless ratified prior to implementation by the full governing body, or unless—

(1) Such committee's quorum is identical in number to that of the full governing body, and

(2) The membership of such committees maintains and reflects the proportions regarding attorneys, eligible clients, and political affiliation specified by the Act and other sections of Part 1607.

(l) The provisions contained in paragraphs (c), (i), (j) and (k) of § 1607.3 shall be implemented by recipient governing bodies as soon as is practicable after the effective date of the revisions of Part 1607 contained herein. In no event shall compliance with the provisions of the aforementioned sections be achieved later than September 30, 1988, unless so authorized in advance by a waiver obtained in accordance with the terms of § 1607.5. No such waiver shall delay compliance with the provisions of the aforementioned subparts beyond December 31, 1988.

3. Section 1607.6 is revised to read as follows:

§ 1607.6 Compensation.

While serving on the governing body of a recipient, no board member shall receive compensation from any recipient of the Corporation, whether such compensation is termed salary, per diem, or otherwise. A board member may receive payment for normal travel and other out-of-pocket expenses required for fulfillment of the obligations of board membership.

4. Section 1607.7 is revised to read as follows:

§ 1607.7 Compliance.

A recipient whose governing body does not satisfy the requirements of this

part, as of the effective date of this rule, shall submit a report to the Corporation's Compliance Division no later than thirty days after such effective date. Such report shall include:

(a) The current composition of the recipient's governing body, identifying each board member by name, appointing body, political affiliation, and length of service on such governing body

(b) A listing of the recipient's current governing body committees, which listing shall specify the identity of such committee's membership as well as the recipient's quorum requirements;

(c) A listing of the date upon which the terms of each current board member of the recipient's governing body will expire;

(d) A listing of board members who have received compensation from other Corporation recipients during their service as board members on the recipient's governing body, together with:

(1) The identity of other Corporation recipients which have provided compensation to the board member in question; and

(2) The amount of any such compensation;

(3) A description as to the nature of the compensation (whether salary, per diem, etc.) and the justification for payment;

(a) A statement specifying the date by which the provisions contained in 45 CFR 1607.3 will be met. In the case of anticipated non-compliance, such statement shall specify that an application for waiver, in accordance with the provisions contained in § 1607.5, will be submitted by the recipient. The statement must state the reasons why such a waiver is warranted and why compliance with the provisions of Part 1607 without such a waiver would be unduly burdensome or impossible for the recipient to achieve.

Dated: October 15, 1987.

Timothy B. Shea,

General Counsel.

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