

OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION
NO. 2013007

DATE: October 1 2013

SUBJ: MLSC's Eligibility for Governing Body Waivers

Questions Presented

Is Micronesian Legal Services Corporation (MLSC) entitled to a mandatory or discretionary waiver of the legal services corporation (LSC) governing body requirements (1) that at least 60% of its board of directors be comprised of attorney members (2) that a majority of its board be comprised of attorneys who are appointed by a bar association representing a majority of the attorneys in the service area, and (3) that its client eligible board members be appointed by a variety of appropriate granted designated groups

Short Answer and Recommendations

Under 45 C.F.R. § 1607.6(a), MLSC is entitled to a mandatory waiver of the LSC Act's requirement that 60% of its board be comprised of attorney members (the "60% attorney requirement") because MLSC was receiving funding from the Office of Economic Opportunity (OEO) and had a non-attorney majority board when LSC was established on July 25, 1974. Although MLSC will always meet these prerequisites, (its historical circumstances as of July 25, 1974 will not change), it may not always need or want a waiver, especially if future circumstances permit full compliance. Thus, to complement the Act's directive that the waiver only be available "upon application," we recommend that the President of LSC grant MLSC a mandatory waiver, but require MLSC to reapply every ten years.

MLSC is also entitled to a mandatory waiver of the first two requirements that a majority

appointment requirement unnecessary to reconcile the statutes. Mandatory waivers are unavailable for the McCollum Amendment's manner of appointment requirements

Discretionary waivers are also unavailable for the McCollum Amendment's manner of appointment requirement that requirement is mandated by applicable law and, therefore, cannot be waived under LSC's regulations at 45 C.F.R. § 1607.6(b). Thus, MLSC must comply with LSC's manner of appointment requirements at 45 C.F.R. § 1607.3(b)(1). MLSC's current practice of allowing the MLSC Board itself to collectively appoint ()-10(n()Tj 0as(he)40 s/ [(45 C)-3(.)10(F)6(.Rt216(

languages are spoken throughout the culturally diverse region¹¹. Tribal traditions and customs (including caste systems) continue to permeate many aspects of public life, including the developing governmental systems in each country.¹² Throughout Micronesia, a very strong emphasis is placed on “traditional” or “customary” law in contrast to United States common¹³ law.

Very few lawyers practice in Micronesia. There are no 3s aa.

leaders.²⁴ The seventh member, a licensed attorney, is selected by the CNM Bar.²⁵ These seven members, in turn, select two large members, one of whom must be a licensed attorney.²⁶ Due to the unique structure and geographic circumstances of the MLSC service area, LSC expressly agreed to this governing board composition and selection policy.²⁷

Currently, five of MLSC's nine board members (56%) are eligible.²⁸ Pursuant to its

members, such as accounting, fundraising, or business management experts. The 60% attorney requirement must be waived for former recipients of OEO funding that had attorney majority boards when LSC was established, and may be waived, in LSC's discretion, when the nature of the service area makes grantee compliance with the 60% attorney requirement impossible. Id.

B. The McCollum Amendment

Section 502 of LSC's FY 1983 appropriations act, commonly referred to as "the McCollum Amendment" after its sponsor Rep. William McCollum (R), imposed additional governing body requirements on LSC grantees. Pub. L. 97-377, 96 Stat. 1874 (1982). Congress has included some version of the McCollum Amendment in all of LSC's subsequent appropriations including Section 502 of LSC's 1996 appropriations, which has been incorporated by reference every year thereafter.³² Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, Title V, § 502(2)(B), 110 Stat. 1321 (April 26, 1996) ("1996 Appropriation Act"), incorporated by reference in subsequent appropriations, *see*, Commerce, Justice, Science, and Related

³² The original text of the McCollum Amendment appeared in LSC's 1981 reauthorization bill, H.R. 3480, to amend Section 1006(a)(1) of the LSC Act (relating to corporate grantmaking ~~and~~ governing bodies). It read:

Section 1006(a)(1) of the Legal Services Corporation Act is amended to read as follows: "(1) to provide financial assistance to and to make grants to and contracts with (A) qualified nonprofit organizations chartered under the laws of one of the States for the sole purpose of furnishing legal assistance to eligible clients, the majority of the board of directors or other governing body of which organization is comprised of attorneys who are admitted to practice in one of the States and who are appointed to terms of office on such board or body by the governing bodies of State, county, or municipal bar associations the membership of which represents a majority of the attorneys practicing law in the locality in which the organization is to provide legal assistance, and (B) private attorneys for the sole purpose of furnishing legal assistance to eligible clients pursuant to the provisions of section 1007(a)(12).

188 Cong. Rec. H12569 (daily ed. June 16, 1981). When it became clear that the reauthorization bill was not going to pass, the McCollum Amendment was added as a rider to LSC's FY 1983 appropriation statute (a Continuing Resolution):

Provided further, that none of the funds appropriated in this Act for the Legal Services Corporation shall be used by the Corporation in making grants or entering into contracts for legal assistance unless the Corporation insures that the recipient is either (1) a private attorney or attorneys (for the sole purpose of furnishing legal assistance to eligible clients) or (2) a qualified nonprofit organization chartered under the laws of one of the States furnishing legal assistance to eligible clients, the majority of the board of directors or other governing body of which organization is comprised of attorneys who are admitted to practice in one of the States who are appointed to terms of office on such board or body by the governing bodies of State, county, or municipal bar associations the membership of which represents a majority of the attorneys practicing law in the locality in which the organization is to provide legal assistance

Pub. L. 97-377, 96 Stat. 1874 (1982). The text of the McCollum Amendment was revised in 1984 to broaden the scope of organizations that would be eligible for LSC funding:

Provided further, that none of the funds appropriated in this Act for the Legal Services Corporation shall be used by the Corporation in making grants or entering into contracts for legal assistance unless the Corporation insures that the recipient is either (1) a private attorney or attorneys (for the sole purpose of furnishing legal assistance to eligible clients) or (2) a qualified nonprofit organization chartered under the laws of one of the States for a purpose of which furnishing legal assistance to eligible clients, the majority of the board of directors or other governing body of which organization is comprised of attorneys who are admitted to practice in one of the States and who are appointed to terms of office on such board or body by the governing bodies of State, county, or municipal bar associations the membership of which represents a majority of the attorneys practicing law in the locality in which the organization is to provide legal assistance. Pub. L. 98-96, 97 Stat. 1092 (1983) (emphasis added); Compare with Pub. L. 97-377, 96 Stat. 1874 (1982) ("for the sole purpose of").

Agencies Appropriations Act, 2012, Pub. L. 112-5, Div. B, Title IV, 125 Stat. 629 (2011) The McCollum Amendment, in its current form and relevant part, provides

None of the funds appropriated in this Act to the Legal Services Corporation shall be used by the Corporation to make a grant, or enter into a contract, for the provision of legal assistance unless the Corporation ensures that the person or entity receiving funding to provide such legal assistance is

...

- (2) a qualified nonprofit organization, chartered under the laws of a State or the District of Columbia, that
 - (A) furnishes legal assistance to eligible clients; and
 - (B) is governed by a board of directors or other governing body, the majority of which is comprised of attorneys who
 - (i) are admitted to practice in a State or the District of Columbia; and
 - (ii) are appointed to terms of office on such board or body by the governing body of a State, county, or municipal bar association, the membership of which represents a majority of the attorneys practicing law in the locality in which the organization is to provide legal assistance;

... |

C. LSC Governing Body Regulations

LSC regulations at 45 C.F.R. §1607.3 implement the governing body requirements of both the LSC Act and the McCollum Amendment:

- (b) At least sixty percent (60%) of a governing body shall be attorney members.
 - (1) A majority of the members of the governing body shall be attorney members appointed by the governing body(ies) of one or more State, county or municipal bar associations, the membership of which represents a majority of attorneys practicing law in the localities in which the recipient provides legal assistance.
 - (i) Appointments may be made either by the bar association which represents a majority of attorneys in the recipient's service area or by bar associations which collectively represent a majority of the attorneys practicing law in the recipient's service area.
 - (ii) Recipients that provide legal assistance in more than one State may provide that appointments of attorney members be made by the appropriate bar association(s)

The lack of any express intent to repeal the LSC Act waiver provisions is significant. When Congress wants to amend or repeal the LSC Act via appropriations act, it knows precisely how to do so. The rider directly following the McCollum Amendment (relating to the implementation of a competitive grant system) explicitly repealed two provisions of the Act that otherwise would have

Even the Corporation focused on the manner of appointment requirement when it first implemented the McCollum Amendment⁴²:

The changes [to Part 1607 of the LSC regulations] are made in response to new provisions contained in the continuing resolution appropriations for the Corporation during the 1983 fiscal year [the McCollum Amendment]. The amendments provide new mechanisms and requirements for

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III. MLSC's Eligibility for Governing Body Waivers

A. MLSC Is Eligible for and Should Be Granted a Mandatory Waiver of the Majority -Attorney Board Composition Requirements

Under LSC regulations, former recipients of OEO funding that had attorney majority boards on July 25, 1972, are eligible for a mandatory waiver of board composition requirements that they may "continue their non-attorney majority." 45 C.F.R. § 1607.6(a) accord 42 U.S.C. § 2996(f)(c), LSC Act § 1007(c). For the foregoing reasons, MLSC is eligible for a mandatory waiver under 6 Tw 3.39 0 Td [(ma)6(S)-4(C)-3(r)3(e)-6(g)10(ul)-2(a)4(t)-2(i)-2(ons)-1(, f)3(o[(m)-2

C. MLSC's Request for a Waiver of the Client Eligible Board Appointment Requirements Should be Denied as Unnecessary

LSC regulations, in accordance with the Act, require that at least one-third of granted board members be eligible clients when appointed. 45 C.F.R. § 1607.3(c) accord 42 U.S.C. § 2996f(c), LSC Act § 1007(c) The regulations also provide for their manner of appointment:

The members who are eligible clients shall be appointed by a variety of appropriate groups designated by the recipient that may include, but are not limited to, client and neighborhood associations and community-based organizations [that] advocate for or deliver services or resources to the client community served by the recipient. Recipients shall designate groups in a manner that reflects, to the extent possible, the variety of interests within the client community

45 C.F.R. 1607.3(c) (emphasis added).

The LSC president has discretion to waive the manner by which eligible clients are appointed—a requirement that is not mandated by applicable law—a recipient demonstrates that it cannot comply with them because of the nature of the population, legal community area served' 45 C.F.R. § 1607.6(b)(1) accord 42 U.S.C. § 2996f(c), LSC Act § 1007(c) recipient seeking a discretionary request for a waiver of the requirement that at least one-third of granted board members be eligible clients when appointed. 45 C.F.R. § 1607.3(c) accord 42 U.S.C. § 2996f(c), LSC Act § 1007(c) The regulations also provide for their manner of appointment:

Advisory