

Part 1606 showing January 31, 2012, NPRM changes.

§ 1606: TERMINATION, LIMITED REDUCTION IN FUNDING, AND DEBARMENT PROCEDURES; RECOMPETITION

§ 1606.1 Purpose.

The purpose of this rule is to:

- (a) Ensure that the Corporation is able to take timely action to deal with incidents of substantial noncompliance by recipients with a provision of the LSC Act, the Corporation's appropriations act or other law applicable to LSC funds, a Corporation rule, regulation, guideline or instruction, or the terms and conditions of the recipient's grant or contract with the Corporation;
- (b) Provide timely and fair due process procedures when the Corporation has made a preliminary decision to terminate a recipient's LSC grant or contract, or to debar a recipient from receiving future LSC awards of financial assistance; and
- (c) Ensure that scarce funds are provided to recipients who can provide the most effective and economical legal assistance to eligible clients.

§ 1606.2 Definitions.

agreement, for the period of time stated in the final debarment decision.

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

(c) *Limited reduction in funding* means a reduction in funding of less than 5 percent of a

(2) A termination does not include:

(i) A reduction of funding required by law, including a reduction in or rescission of the Corporation's appropriation that is apportioned among all recipients of the same class in proportion to their current level of funding;

(ii) A reduction or deduction of LSC support for a recipient under the Corporation's fund balance regulation at 45 C.F.R. Part 1628;

(iii) A recovery of disallowed costs under the Corporation's regulation on costs standards and procedures at 45 C.F.R. Part 1630;

(iv) A withholding of funds pursuant to the Corporation's Private Attorney Involvement rule at 45 C.F.R. Part 1614; or

(v) A limited reduction of funding as defined in this paragraph.

~~(v) A reduction of funding of less than 5 percent of a recipient's current annual level of financial assistance imposed by the Corporation in accordance with regulations promulgated by the Corporation. No such reduction shall be imposed except in accordance with regulations promulgated by the Corporation.~~

§ 1606.3 Grounds for a termination.

(a) A grant or contract may be terminated when:

(1) There has been a substantial violation by the recipient of a provision of the LSC Act, the Corporation's appropriations act or other law applicable to LSC funds, or Corporation rule, regulation, guideline or instruction, or a term or condition of the recipient's grant or contract, and the violation occurred less than 5 years prior to the date the recipient receives notice of the violation pursuant to §1606.6(a); or

(2) There has been a substantial failure by the recipient to provide high quality, economical, and effective legal assistance, as measured by generally accepted professional standards, the provisions of the LSC Act, or a rule, regulation, including 45 CFR 1634.9(a)(2), or guidance issued by the Corporation.

(b) A determination of whether there has been a substantial violation for the purposes of paragraph (a)(1) of this section, and the magnitude of any termination in whole or in part, 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.

§ 1606.4 Grounds for debarment.

(a) The Corporation may debar a recipient, on a showing of good cause, from receiving an additional award of financial assistance from the Corporation.

(b) As used in paragraph (a) of this section, “good cause” means:

- (1) A termination of financial assistance to the recipient pursuant to part 1640 of this chapter;
- (2) A termination of financial assistance in whole of the most recent grant of financial assistance;
- (3) The substantial violation by the recipient of the restrictions delineated in §1610.2 (a) and (b) of this chapter, provided that the violation occurred within 5 years prior to the receipt of the debarment notice by the recipient;
- (4) Knowing entry by the recipient into:
 - (i) A subgrant, subcontract, or other similar agreement with an entity debarred by the Corporation during the period of debarment if so precluded by the terms of the debarment; or
 - (ii) An agreement for professional services with an IPA debarred by the Corporation during the period of debarment if so precluded by the terms of the debarment; or
- (5) The filing of a lawsuit by a recipient, provided that the lawsuit:
 - (i) Was filed on behalf of the recipient as plaintiff, rather than on behalf of a client of the recipient;
 - (ii) Named the Corporation, or any agency or employee of a Federal, State, or local government as a defendant;

(iii) Seeks judicial review of an action by the Corporation or such government agency that affects the recipient's status as a recipient of Federal funding, except for a lawsuit that seeks review of whether the Corporation or agency acted outside of its statutory authority or violated the recipient's constitutional rights; and

(iv) Was initiated after the effective date of this rule.

§ 1606.5 Termination and debarment procedures.

Before a recipient's grant or contract may be terminated or a recipient may be debarred, the recipient will be provided notice and an opportunity to be heard as set out in this part.

§ 1606.6 Preliminary determination.

(a) When the Corporation has made a preliminary determination that a recipient's grant or contract should be terminated and/or that a recipient should be debarred, the Corporation employee who has been designated by the President as the person to bring such actions (hereinafter referred to as the "designated employee") shall issue a written notice to the recipient and the Chairperson of the recipient's governing body. The notice shall:

- (1) State the grounds for the proposed action;
- (2) Identify, with reasonable specificity, any facts or documents relied upon as justification for the proposed action;
- (3) Inform the recipient of the proposed sanctions;
- (4) Advise the recipient of its right to request:
 - (i) An informal conference under §1606.7; and
 - (ii) a hearing under §1606.8; and
- (5) Inform the recipient of its right to receive interim funding pursuant to §1606.13.

(b) If the recipient does not request an informal conference or a hearing within the time prescribed in §1606.7(a) or §1606.8(a), the preliminary determination shall become final.

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(c) The designated employee shall conduct the informal conference.

(d) At the informal conference, the designated employee and the recipient shall both have an opportunity to state their case, seek to narrow the issues, and explore the possibilities of settlement or compromise.

(e) The designated employee may modify, withdraw, or affirm the preliminary determination in writing, a copy of which shall be provided to the recipient within 10 days of the conclusion of the informal conference.

§ 1606.8 Hearing.

(a) The recipient may make written request for a hearing within 30 days of its receipt of the preliminary determination or within 15 days of receipt of the written determination issued by the designated employee after the conclusion of the informal conference.

(b) Within 10 days after receipt of a request for a hearing, the Corporation shall notify the recipient in writing of the date, time and place of the hearing and the names of the hearing officer and of the attorney who will represent the Corporation. The time, date and location of the hearing may be changed upon agreement of the Corporation and the recipient.

(c) A hearing officer shall be appointed by the President or designee and may be an employee of the Corporation. The hearing officer shall not have been involved in the current termination or debarment action and the President or designee shall determine that the person is qualified to preside over the hearing as an impartial decision maker. An impartial decision maker is a person who has not formed a prejudgment on the case and does not have a pecuniary interest or personal bias in the outcome of the proceeding.

(d) The hearing shall be scheduled to commence at the earliest appropriate date, ordinarily not later than 30 days after the notice required by paragraph (b) of this section.

(e) The hearing officer shall preside over and conduct a full and fair hearing, avoid delay, maintain order, and insure that a record sufficient for full disclosure of the facts and issues is maintained.

(f) The hearing shall be open to the public unless, for good cause and the interests of justice, the hearing officer determines otherwise.

(g) The Corporation and the recipient shall be entitled to be represented by counsel or by another person.

(h) At the hearing, the Corporation and the recipient each may present its case by oral or documentary evidence, conduct examination and cross-examination of witnesses, examine any documents submitted, and submit rebuttal evidence.

(i) The hearing officer shall not be bound by the technical rules of evidence and may make any procedural or evidentiary ruling that may help to insure full disclosure of the facts, to maintain

writing, that the President may request. A recipient shall be given a copy of and an opportunity to respond to any additional submissions made to the President. All submissions and responses made to the President shall become part of the administrative record.

(d) As soon as practicable after receipt of the request for review of a recommended decision, but not later than 30 days after the request for review, the President may adopt, modify, or reverse the recommended decision, or direct further consideration of the matter. In the event of modification or reversal, the President's decision shall conform to the requirements of §1606.9(b).

(e) The President's decision shall become final upon receipt by the recipient.

§ 1606.11 Qualifications on hearing procedures.

(a) Except as modified by paragraph (c) of this section, the hearing rights set out in §§1606.6 through 1606.10 shall apply to any action to debar a recipient or to terminate a recipient's funding.

(b) The Corporation may simultaneously take action to debar and terminate a recipient within the same hearing procedure that is set out in §§1606.6 through 1606.10 of this part. In such a case, the same hearing officer shall oversee both the termination and debarment actions.

(c) If the Corporation does not simultaneously take action to debar and terminate a recipient under paragraph (b) of this section and initiates a debarment action based on a prior termination under §1606.4(b)(1) or (2), the hearing procedures set out in §1606.6 through 1606.10 shall not apply. Instead:

(1) The President shall appoint a hearing officer, as described in §1606.8(c), to review the matter and make a written recommended decision on debarment.

(2) The hearing officer's recommendation shall be based solely on the information in the administrative record of the termination proceedings providing grounds for the debarment and any additional submissions, either oral or in writing, that the hearing officer may request. The recipient shall be given a copy of and an opportunity to respond to any additional submissions made to the hearing officer. All submissions and responses made to the hearing officer shall become part of the administrative record.

(3) If neither party appeals the hearing officer's recommendation within 10 days of receipt of the recommended decision, the decision shall become final.

(4) Either party may appeal the recommended decision to the President who shall review the matter and issue a final written decision pursuant to §1606.9(b).

(d) All final debarment decisions shall state the effective date of the debarment and the period of debarment, which shall be commensurate with the seriousness of the cause for debarment but shall not be for longer than 6 years.

(e) The Corporation may reverse a debarment decision upon request for the following reasons:

- (1) Newly discovered material evidence;
- (2) Reversal of the conviction or civil judgment upon which the debarment was based;
- (3) Bona fide change in ownership or management of a recipient;
- (4) Elimination of other causes for which the debarment was imposed; or
- (5) Other reasons the Corporation deems appropriate.

§ 1606.12 Time and waiver.

(a) Except for the 6-year time limit for debarments in §1606.11(c), any period of time provided in these rules may, upon good cause shown and determined, be extended:

- (1) By the designated employee who issued the preliminary decision until a hearing officer has been appointed;
- (2) By the hearing officer, until the recommended decision has been issued;
- (3) By the President at any time.

(e) 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 five business days after the recipient's request is received.

(f) If the recipient neither requests an informal meeting nor submits any written materials in opposition to the determination, the determination will be deemed effective at the end of the 10-day period following recipient's receipt of the determination.

(g) If an informal meeting is conducted and/or written materials are submitted by the recipient, the Corporation shall consider any written materials submitted by the recipient in opposition to the limited reduction in funding and any oral presentation or written materials submitted by the recipient at an informal meeting. After considering such materials, the Corporation shall decide within 30 days whether the limited reduction in funding should become effective and shall notify the recipient and the recipient's Board Chair in writing of its decision.