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B-230743, Jun 29, 1990

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APPROPRIATIONS/FINANCIAL MANAGEMENT - Appropriation Availability - Purpose availability - Specific purpose restrictions - Lobbying DIGEST: 1. By spending Legal Services Corporation (LSC) funds, at the direction of its Board of Directors, to prepare and send a resolution and cover letter to the Senate Judiciary Committee on the confirmation of Robert Bork to the U.S. Supreme Court, Wayne County (Michigan) Neighborhood Legal Services violated restriction in 42 U.S.C. Sec. 2996f(a)(5) on using LSC funds to influence legislation. APPROPRIATIONS/FINANCIAL MANAGEMENT - Appropriation Availability - Purpose availability - Specific purpose restrictions - Lobbying 2. The use of Legal Services Corporation (LSC) funds by Wayne County Neighborhood Legal Services to send a resolution and cover letter of its Board of Directors to the Senate Judiciary Committee on the confirmation of Robert Bork to the U.S. Supreme Court, violated an LSC regulation prohibiting the use of LSC funds fro legislative lobbying. 45 C.F.R. Sec.1612.4 (1987). MISCELLANEOUS TOPICS - Federal Administrative/Legislative Matters - Legislation - Lobbying 3. Wayne County (Michigan) Neighborhood Legal Services did not violate the prohibition is 42 U.S.C. Sec. 2996e(e)(1) against employees of recipients intentionally identifying it with a polictical activity because the mailing to the Senate Judiciary Committee of a resolution and letter opposing a judicial nomination was the action of the recipient's Board of Directors, who are not subject to the restrictions applicable to "employees" and the recipient's executive director and secretaries, who are employees, merely provided administrative support for the Board's action. MISCELLANEOUS TOPICS - Federal Administrative/Legislative Matters - Political activities - Restrictions - Applicability 4. Wayne County (Michigan) Neighborhood Legal Services did not violate the prohibition is 42 U.S.C. Sec. 2996e(e)(1) against employees of recipients intentionally identifying it with a polictical activity because the mailing to the Senate Judiciary Committee of a resolution and letter opposing a judicial nomination was the action of the recipient's Board of Directors, who are not subject to the restrictions applicable to "employees" and the recipient's executive director and secretaries, who are employees, merely provided administrative support for the Board's action. MISCELLANEOUS TOPICS - Federal Administrative/Legislative Matters - Legislation - Lobbying 5. Based on an agency regulation interpreting the term (45 C.F.R. Sec. 1612.1(f) (1987)), we construe "legislation" as used in 42 U.S.C. Sec. 2996f(a)(5) to encompass Senate deliberations on the confirmation of a judicial nominee. MISCELLANEOUS TOPICS - Federal Administrative/Legislative Matters - Political activities - Restrictions - Applicability 6. It is not clear that the Hatch Act's proscription against participating in "an election or a nomination for office" (5 U.S.C. Sec. 1502(a)(1)) was intended to apply to participation in judicial nominations. MISCELLANEOUS TOPICS - Federal Administrative/Legislative Matters - Political activities - Restrictions -

Applicability 7. Because the National Legal Aid and Defender Association did not provide legal assistance to eligible clients under the legal services program, it was not a "recipient" under 42 U.S.C. Sec. 2996e(a)(1)(A) and was therefore not prohibited from engaging in political or lobbying activities during 1987, by statutes applicable to "recipients" in effect at that time.
APPROPRIATIONS/FINANCIAL MANAGEMENT - Appropriation Availability - Purpose availability - Specific purpose restrictions - Lobbying 8. Any Legal Services Corporation (LSC) recipients that paid membership dues exceeding $100 to the National Legal Aid and Defenders Association before August 28, 1987 (available records do not permit us to determine whether any grantees fit in this category) violated a LSC regulation (45 C.F.R. Sec. 1612.3) prohibiting recipients from using LSC funds to pay dues exceeding $100 per annum to an organization, a purpose of which is to engage in political or legislative activities. In any event, the question is academic because Congress has prohibited LSC from using appropriated funds to enforce this provision. See Pub.L. No. 99-591, 100 Stat. 3341-69 (1986); Pub.L. No. 100-202, 101 Stat. 1329-33 (1987); Pub.L. No. 100-459, 102 Stat. 1226-27 (1988); Pub.L. No. 101-162, 103 Stat. 1035-36 (1989).

The Honorable Jack Fields House of Representatives:

You asked, in your January 29, 1988 letter, that we determine whether recipients of grants from the Legal Services Corporation (LSC) misused grant funds following the nomination of Robert Bork to the Supreme Court. While the nomination was pending, efforts were undertaken to influence Senate deliberations. You suggested that some LSC grantees may have participated inappropriately in these efforts in violation of law or regulations.

Your request, as modified through our discussions with your staff, focused on three grantees: Wayne County Neighborhood Legal Services, the National Legal Aid and Defenders Association, and the Mental Health Law Project.

We conclude that a small amount of grant funds was spent by Wayne County Neighborhood Legal Services in violation of section 2996f(a)(5) of title 42, United States Code, and section 1612.4(b) of title 45, Code of Federal Regulations. These provisions prohibit grantees from using legal assistance grant funds to attempt to influence the passage or defeat of legislation before the Congress. In support of the Wayne County Neighborhood Legal Services Board of Directors' adoption and transmittal to the Senate Judiciary Committee of a resolution opposing Judge Bork's confirmation, legal assistance grant funds were used for incidental expenses, including mileage and parking fees for Board members, secretarial time in typing the resolution, messenger service, copying, stationery, and postage. We find that these expenses were paid in violation of the law.

We found no contravention of law by the National Legal Aid and Defenders Association. The Association's grants from LSC were not for the purpose of providing legal services. As a result, the Association was not subject to statutory and regulatory provisions applicable to grantees engaged in providing legal assistance to clients.

The Mental Health Law Project had no LSC funding during the Bork confirmation period, and therefore was not subject to statutory or regulatory prohibitions under the Legal Services Corporation Act.

Also, LSC grantees who, prior to August 28, 1987, used LSC grant funds to pay

annual membership dues of more than $100 to the National Legal Aid and Defenders Association would have contravened a LSC regulation (45 C.F.R. Sec. 1612.3) then in effect. That regulation prohibited recipients of LSC grants from making such payments to an organization which has as one of its purposes to engage in political or legislative activities. Available records do not permit us to determine whether any grantees made these prohibited payments. In any event, the question is academic because Congress has prohibited LSC from using appropriated funds to enforce this regulation.

We discuss these conclusions in more detail in the enclosed staff analysis.

We trust this is responsive to your request. As agreed to by your staff, this opinion will be made available to the public 30 days from today. ENCLOSURE:

GAO STAFF LEGAL ANALYSIS

LEGALITY OF ACTIONS BY LEGAL SERVICES CORPORATION GRANTEES IN OPPOSING A NOMINEE TO THE UNITED STATES SUPREME COURT - B-230743

We were asked by Representative Jack Fields whether grantees of the Legal Services Corporation (LSC) expended any LSC grant funds in violation of law or regulations.

As agreed with members of the Congressman's staff, we limited our review to the period during which Judge Robert H. Bork's nomination as an Associate Justice of the Supreme Court was pending before the Senate, i.e., between July 1, 1987, the date President Reagan nominated Judge Bork, and October 23, 1987, when a Senate vote to advise and consent to the nomination fell short of the necessary majority.

We further agreed that our review would focus on three LSC grantees: Wayne County Neighborhood Legal Services, the National Legal Aid and Defenders Association, and the Mental Health Law Project.

Wayne County Neighborhood Legal Services

In September 1987, the Board of Directors of Wayne County Neighborhood Legal Services adopted a resolution at a Board meeting opposing Senate advice and consent to Judge Bork's nomination. On October 2, the resolution and a cover letter were sent to the Senate Judiciary Committee. The letter was on Wayne County Neighborhood Legal Services letterhead, typed by employees of that organization, but signed by the Chairperson of its Board of Directors. As discussed below, the Chairperson and Board members are not employees of Wayne County Neighborhood Legal Services.

LSC grant funds were spent in supporting this action of the Wayne County Neighborhood Legal Services Board of Directors. Although LSC does not specify an amount, it has said that the expenditures were "modest" and consisted of mileage and parking for members of the Board attending the meeting at which the resolution opposing the Bork confirmation was adopted, one-half hour of secretarial time for preparing the resolution and cover letter, messenger delivery of the two documents to the Board of Directors, copying, stationery, and postage.

We find that Wayne County Neighborhood Legal Services-- which, while the Bork

nomination was pending, provided legal assistance to clients from funds it received from LSC-- expended LSC funds in violation of the following provision of the LSC Act:

"With respect to grants or contracts in connection with the provision of legal assistance to eligible clients under the LSC Act, ... no funds made available to recipients by the Legal Services Corporation shall be used at any time, directly or indirectly ... to undertake to influence the passage or defeat of any legislation by the Congress of the United States." U.S.C. Sec. 2996f(a)(5).

We accept LSC's view that "legislation" in this context includes nominations. The LSC Act and its history are silent on this question. However, LSC regulations define "legislation" broadly to include "actions on ...approval of appointments." 45 C.F.R. Sec. 1612.1(f) (1987). LSC's view, given its role in administering the Act, is entitled to considerable deference.

Expenditures by Wayne County Neighborhood Legal Services for the Board's resolution and letter also violated LSC regulations prohibiting the use of funds by grantees for "legislative lobbying." 45 C.F.R. Sec. 1612.4(b). Legislative lobbying is defined to include a communication intended to influence a Member of Congress in connection with "any Act, bill, resolution or similar legislation." 45 C.F.R. Sec. 1612.1(h)(1) (1987). Again, we rely on the definition in LSC's regulation of "legislation" as including approval of appointments.

LSC identified two other LSC Act provisions that, in its view, were contravened by Wayne County Neighborhood Legal Services or its staff. we discuss below, we conclude that neither of these provisions was violated.

LSC argued, based on the same actions discussed above, that the Executive Director of Wayne County Neighborhood Legal Services, as a "staff attorney" under LSC regulations, had contravened Hatch Act restrictions (made applicable to LSC staff attorneys by the LSC Act) that prohibit the use of "official authority or influence for the purpose of ... affecting the result of an election or a nomination for office." 42 U.S.C. Sec. 2996e(e)(2), incorporating by reference 5 U.S.C. Sec. 1502(a)(1); 45 C.F.R. Sec. 1608.5(a) (1987). The Executive Director was in charge of the day-to-day operations of Wayne County Neighborhood Legal Services, including supervision of the staff who prepared the resolution and letter for the Board.

LSC also concluded that the secretaries at Wayne County Neighborhood Legal Services who typed the resolution and cover letter, as well as the Executive Director, violated a LSC Act provision prohibiting employees of recipients of LSC funding from intentionally identifying the recipient "with any partisan or nonpartisan political activity associated with a political party or association, or the campaign of any candidate for public or party office." 42 U.S.C. Sec. 2996e(e)(1); 45 C.F.R. Sec. 1608.4 (1987). We do not agree that either the Hatch Act or the LSC Act provision was violated.

The Board of Directors of Wayne County Neighborhood Legal Services instigated the mailing, which was identified as the action of the Board. We agree with LSC that the Board members were not "employees" of the grantee.

The Executive Director and the secretaries, who were employees of the grantee, merely provided administrative support for the Board's action. By typing the Board's resolution and cover letter, the secretaries may not be held to have

used official authority to affect a nomination or to have engaged in intentional identification with any "political activity associated with a political party or association," in violation of either statutory prohibition. Further, the record does not suggest that the Executive Director attended the Board meeting other than to discharge normal administrative duties, or that she took any position on, or participated in, the Board's decisions to approve and forward the resolution to the Senate Judiciary Committee. We cannot conclude that the Executive Director engaged in the prohibited activities, based solely on her position as supervisor of the secretaries who typed the Board's resolution and cover letter.

Moreover, it is not clear that the Hatch Act was intended to apply to participation in judicial nominations. Neither the Act nor regulations of the Office of Personnel Management specify what kind of nominations are covered, and we have not found any court decisions which address the issue. However, the focus of the Act was not to preclude political activity as such, or participation by a citizen in government. Rather, it was to curtail active participation of, or candidacy by, government employees in partisan elections. (Indeed, the Act specifically authorizes employee candidacies in nonpartisan elections. See 5 U.S.C. Sec. 1503.) The Act juxtaposes the term "nomination" with the term "election," making it plausible that the kind of nomination referred to was nomination by a party to run for office. We are not persuaded that the Act applies to a nomination, like that of Judge Bork, to an appointive post.

National Legal Aid and Defenders Association

The National Legal Aid and Defenders Association provides assistance to local organizations which offer legal services to poor people. The Association's Executive Director, in a September 1987 letter to Association supporters, expressed the Association's opposition to confirmation of Judge Bork. The letter asked addressees, among whom were LSC grantees, to write to their Senators and urge them to vote against confirmation.

The letter included a list of Senators, as well as a sample letter.

We considered the activities of the Association in light of the same restrictions in the law and regulations discussed above in connection with Wayne County Neighborhood Legal Services. LSC found no violations by the Association. We agree.

The Association is not subject to the laws prohibiting the use of LSC funds by recipients to influence the passage or defeat of legislation, or prohibiting employees from intentionally identifying a recipient with a political activity. 42 U.S.C. Secs. 2996e(e)(1), 2996f(a)(5). Only LSC grantees engaged in providing legal services to clients are "recipients." 42 U.S.C. Sec. 2996e(a)(1)(A). The Association's grants from LSC were not for the purpose of providing legal assistance, and the Association was not in fact providing such assistance at the time of the Bork nomination.

Moreover, the Association's Executive Director, identified by the Association as an LSC "staff attorney," did not violate the Hatch Act. U.S.C. Sec. 2996e(e)(2). For the reasons given above, we do not believe that Act was intended to apply to participation in judicial nominations.

Mental Health Law Project

The Mental Health Law Project did not violate restrictions on recipients of LSC funds or on use of LSC grants at the time of the Bork nomination, because the Project then had no LSC funding. The Project engaged in activities opposing Judge Bork's confirmation. However, according to LSC, the Project had exhausted all funds received under LSC grants by September 1986, well before the Bork nomination.

LSC grantees with membership in the National Legal Aid and Defenders Association

A related issue involves LSC grantees that pay membership dues to the National Legal Aid and Defenders Association. Before August 28, 1987, LSC regulations prohibited recipients from using LSC funds to pay annual dues exceeding $100 to an organization which has as one of its purposes to engage in political or legislative activities. 45 C.F.R. Sec. 1612.3. Since that date, dues payments to such organizations have been permitted when they are not used for the proscribed activity, and are segregated from funds that are so used. 52 Fed.Reg. 28434 (July 29, 1987). One purpose of the Association is to "engage in legislative activities," specifically advocacy of legislative support for legal representation of the poor. It employed a registered lobbyist throughout 1987, when the Bork confirmation was being considered and spent Association funds (but not any funds received as dues) on lobbying activities.

Any LSC grantees that used LSC funds to pay more than $100 for membership in the Association before August 28, 1987, would have been in violation of the LSC regulation. After that date, payments of any amount would have been permissible if they were not used by the Association for political or legislative activities. We have not been able to determine whether any violations occurred. LSC told us that at least 189 LSC recipients each paid more than $100 in LSC funds as Association dues in 1987, but LSC did not know whether the dues were paid before or after August 28, 1987.

In any event, the question whether violations took place, either before or after the change in the regulation, has for the present been rendered academic by law. Congress has, since October 1986, expressly prohibited LSC from using appropriated funds to enforce the prohibition. E.g., Pub.L. No. 99-591, 100 Stat. 3341-69; Pub.L. No. 101-162, 103 Stat. 1035- 36.