

place. In addition, even if they had been operational, the administrative procedures set forth in § 741 and Part 15f were optional and limited in time and scope so that the Court, applying current law as it is obligated to do, should ignore § 741 and Part 15f. The APA is the only avenue Plaintiffs have to obtain redress for their complaints about discrimination in the granting of farm loans.

Overview

Since at least 1966, USDA regulations have required the investigation of discrimination complaints. Initially USDA's Office of the Inspector General was charged with investigating discrimination complaints, which were required to be handled in accordance with USDA's procedures for investigating non-discrimination complaints. 7 C.F.R. § 15.52 (1966), 31 FR 8175 (June 10, 1966). For more than thirty years, USDA was required to investigate discrimination complaints using the procedures specified for investigating non-discrimination complaints, although the USDA official charged with the responsibility for the investigation changed from time to time.¹

In 1998, Congress' enacted Pub. L. No. 105-277, codified at 7 U.S.C. § 2279 Note. At the same time it extended the statute of limitations for lawsuits alleging discrimination claims against USDA, Congress provided that complainants who had previously lodged discrimination complaints with USDA could, if they chose, elect to resubmit their complaints to USDA for review. 7 U.S.C. §§ 741 (b)-(g). Congress did not mandate that USDA create a new administrative procedure to fulfill 741(b) but instead suggested a few modifications to the investigatory protocol USDA already had in place pursuant to its regulations under 7 C.F. R.

¹ From 1966 through 1984, the Office of the Inspector General was obligated to conduct the investigations. 7 C.F.R. § 15.52, 31 FR 8175 (June 10, 1966). From 1985 to 1989, the Assistant Secretary for Administration was charged with the investigatory function. 7 C.F. R. § 15.52, 50 FR 25687 (June 21, 1985). Beginning in 1990, through 1999, the Office of Advocacy and Enterprise was responsible for conducting investigations of discrimination complaints. 7 C.F.R. §15.52, 54 FR 31164 (July 27, 1999).

§ 15.d. USDA's regulations had already created an obligation for the agency to investigate discrimination complaints and a standard by which they were charged with doing so. *See, e.g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Mass. Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708 (D.C. Cir. 1985); *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984).

On December 4, 1998, USDA promulgated the Part 15f regulations to support and elaborate on the administrative process Congress outlined in § 741. Part 15f vested the investigative function in USDA's Office of Civil Rights ("OCR") and, in theory, provided some changes to the protocol then in place for how the agency conducted investigations of discrimination complaints, but the investigatory process itself was substantially the same as the existing process. Like § 741(b), Part 15f was expressly limited to complaints refiled prior to October 21, 2000. 7 C.F.R. Part 15f.5(c) (2007).

Shortly after the promulgation of Part 15f, on March 3, 1999, USDA introduced departmental regulation (DR) 4330-3 and departmental manual (DM) 4330-001 to provide USDA employees with more detailed guidance for conducting discrimination investigations. Although DR 4330-3 and DM 4330-001 were promulgated close in time after the introduction of Part 15f, they applied to all of the USDA regulations involving the investigation of discrimination complaints under Part 15. The new intra-department regulations included some of the modifications addressed in § 741(b) and Part 15f, such as the precatory goal of processing a complaint within 180 days after receipt, which became applicable to the processing of all discrimination complaints. *See, e.g.,* DR 4330-3 at ¶ 10(e).

The § 741 process, as supplemented by Part 15f, DR 4330-3 and DM 4330-001 (the "§ 741 Optional Process") was available only to those who had already asserted discrimination

complaints against USDA and only for two years, until October 21, 2000. Theoretically, the § 741 Optional Process, while largely the same as the pre-existing USDA process for the investigation of discrimination complaints, held out the promise of some improved features, including faster processing times than had been previously observed by USDA, the routine involvement of administrative law judges and the opportunity for a hearing. 7 U.S.C. §§ 741(b)(1) and (3) (2007). The reality of the § 741 Optional Process, however, was that it made no change in the way USDA handled discrimination complaints. According to the sworn statement of Rosalind D. Gray, the Director of USDA's OCR from July 13, 1998 through January 20, 2001, the period when the § 741 Optional Process was established and theoretically operational, OCR was unable to process, and did not process, discrimination complaints in accordance with the § 741 Optional Process. *See* Declaration of Rosalind D. Gray, attached as an Exhibit to Plaintiff's Brief in Response to Notice to Counsel in *Garcia v. Johanns*, C.A. No. 1:00cv02445 (D.D.C.) and also attached here as Exhibit 1 ("Gray Dec."), at ¶¶ 9-10. Instead, as Ms. Gray affirms, the § 741 Optional Process was merged into the procedure for the processing of existing and new complaints received by OCR and USDA's entire "complaint processing system collapsed...." *Id.* at ¶ 10. The §741 Optional Process failed, as did USDA's other protocols for investigating and redressing administrative complaints of discrimination, leaving Plaintiffs with only an APA claim to redress their complaints.

USDA's failure to conduct discrimination investigations mandated by statute and/or regulation has been well documented. Notwithstanding USDA's promulgation in 1999 of new regulations and internal directives affecting its investigations of discrimination complaints and Congress' enactment of § 741, USDA continued its failure to actually process discrimination complaints or to provide redress to the complainants. A number of government publications,

written and disseminated after Congress promulgated § 741 and USDA established new regulations, document USDA's persistent inability to process discrimination complaints in a meaningful way. For example, in 2003 the U.S. Commission on Civil Rights analyzed whether USDA had responded to the Commission's 1966 civil rights recommendations. *See*, U.S. Commission on Civil Rights, Office of Civil Rights Evaluation, *Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Vol. III: An Evaluation of the Department of Agriculture and the Interior, The Environmental Protection Agency, and the Small Business Administration* (Sept. 2003), relevant portions of which are annexed as Exhibit 5 to Plaintiffs' Brief in Support of Claims Based on the Administrative Procedures Act filed on July 10, 2006 ("Plaintiffs' Brief). The U.S. Commission concluded that "[s]ince the Commission's 1996 report, there is little evidence that the department has changed or improved what the Commission found to be a complicated civil rights enforcement program, nor has it addressed the Commission's recommendations significantly." *Id.* at 2. Similarly, in 2000 the Office of the Inspector General ("OIG") at USDA conducted an audit as a follow-up to recommendations made in 1997 and thereafter. *See*, U.S. Department of Agriculture Office of Inspector General Audit Report, *Office of Civil Rights Status of the Implementation of Recommendations Made in Prior Evaluations of Program Complaints* (March 2000), relevant portions of which are annexed hereto as Exhibit 2. Its conclusion was that despite OCR officials' admission that OCR's complaint processing system was neither effective or efficient, and despite recommendations by the OIG to transform the system, "*no significant changes in how complaints are processed have been made.* As a result, we, [OIG] cannot conclude that all complaints are processed with due care." *Id.* at i (emphasis in the original). The Senate Committee on Agriculture, Nutrition and Forestry heard testimony on the issue in 2000 and

concluded that USDA's investigation of discrimination complaints was ineffective and that discrimination against minorities persisted. *See Review of the Operation of the Office of Civil Rights, USDA and the Role of the Office of General Counsel, USDA, in addressing Discrimination Complaints Pertaining to Program Delivery and Employment: Hearing Before Sen. Comm. On Agric., Nutrition and Forestry, 106th Cong. (Sept. 12, 2000)*, relevant portions of which are annexed as Exhibit 6 and 7 to Plaintiffs' Brief.

Changes in the regulatory scheme, by statute, agency regulation or directive, do not negate the viability of Plaintiffs' claim under the APA. At all relevant times USDA had a duty borne of its own regulations to investigate discrimination complaints. *Mass. Fair Share*, 758 F.2d at 708. For purposes of determining whether an APA claim will lie, it is immaterial that the regulatory scheme establishing investigative guidelines and protocols changed over time because USDA failed to conduct investigations using the established processes or did so with such incompetence or in such few numbers that its actions were the functional equivalent of no action at all. *Cf. Sierra Club v. Thomas*, 828 F.2d 783, 793-97 (D.C. Cir. 1987). Moreover, for purposes of the APA, the relief requested is not dependent on which regulations USDA violated. Because the changes to USDA's investigation protocols over time were not substantive and did not affect Plaintiffs' rights, the Court should analyze this case under the current law. *See, e.g., Legal Assistance for Vietnamese Asylum Seeking v. Dep't. of State*, 104 F.3d 1349, 1352 (D.C. Cir. 1997). Under current law, the APA provides Plaintiffs with the only avenue for a court to address their claims. 5 U.S.C. § 704 (2007).

Specific Responses to the Court's Questions

In response to the specific points raised by the Court, Plaintiffs respond as follows:

- (1) The significance, if any, of the procedures contemplated by Pub.L. No. 105-277 § 741 (b)-(g), codified at 7 U.S.C. § 2279 Note.**
- (2) The significance, if any, of the regulations promulgated at 7 C.F.R. Part 15(f). See also 63 Fed. Reg. 67392 (promulgating Interim Final Rule).**

Neither the procedures contemplated by §§ 741(b)-(g), nor the regulation promulgated at Part 15f preclude Plaintiffs from stating a valid APA claim as neither the statute nor the regulation, nor the two together, provides an “adequate remedy in a court.” 5 U.S.C. § 704 (2007).

Since 1966, and currently, regulations 7 C.F.R. § 15.52 and 7 C.F.R. Part 15d have required USDA to investigate and resolve discrimination complaints. These regulations have mandated, among other things: (1) that persons who complain of discrimination be informed of their right to file a complaint; (2) which department at the USDA is responsible for handling discrimination complaints; (3) an investigation of the complaint; (4) a determination on the merits of the complaint after investigation; and (5) the taking of corrective action to resolve the complaint. 7 C.F.R. § 15.52 (1966-1999); 7 C.F.R. § 15d (2000-2007). An opportunity for a hearing before an administrative law judge (“ALJ”) regarding the complaint was provided pursuant to the regulations governing the duties of the Assistant Secretary of Administration (and later the Assistant Secretary of Civil Rights), who in turn delegated this duty to the appropriate body in charge of handling discrimination complaints. 7 C.F.R. § 2.25 (1976-1999) (“Issue orders to give a notice of hearing or the opportunity to request a hearing pursuant to Part 15 of this title; arrange for the designation of an Administrative Law Judge to preside over any such hearing; and determine whether the Administrative Law Judge so designated will make an initial decision or certify the record to the Secretary of Agriculture with his or her recommended findings and proposed action.”), 7 C.F.R. § 2.80(h)(5) (1976-1995) (same), 7 C.F.R. § 2.89(a)(9)

(1996-2003) (same), 7 C.F.R. § 2.25(a)(9) (2003-2007) (same), 7 C.F.R. § 2.30(a)(9) (2003-2007) (same).

In 1998, Congress focused on the problem of USDA's failure to investigate and remedy discrimination complaints and enacted Pub. L. No. 105-277, which provided that complainants who had previously filed discrimination complaints with USDA could renew those complaints which USDA would review under a slightly different protocol than the one allegedly in place at USDA. U.S.C. § 2279 NOTE. The administrative procedure, outlined in § 741(b), was designed to be optional and available for only two years following enactment - - until only October 21, 2000. It was limited only to those who had previously filed a discrimination complaint with USDA. § 741(e). The § 741 Optional Process outlined in § 741 was as a general matter the same as that required under the existing USDA's regulations. USDA was to investigate the discrimination complaint, make a determination based on that investigation, propose a resolution to the complaint and provide the complainant with an opportunity to be heard. *Id.* Congress added that USDA's investigation should, to the extent possible, be completed within 180 days, that the complainant be permitted a hearing on the record, and that the statute of limitations was waived. 7 U.S.C. § 741(b).

After Congress' passage of § 741, USDA, in turn, promulgated Part 15f to respond to Congress's enactment of the statute. Part 15f specifically states that the "regulations [are] promulgated ... [to] implement a process for eligible complainants to seek an administrative determination on their complaints from USDA under § 741(b)" 7 C.F.R. Part 15f. Consistent with the USDA regulations in place since 1966, Part 15f required USDA to investigate discrimination complaints, make determinations as to the merits of the complaints, resolve the complaints, and provide an opportunity for complainants to be heard before an ALJ.

7 C.F.R. Part 15f. The Part 15f regulations provided some additional detail for complaint processing designed to dovetail with § 741. *See, e.g.*, Part 15f.9. Like § 741(b), the Part 15f regulations were intended to set forth a temporary regime whereby USDA's then existing procedures would be used for handling old discrimination complaints on a more streamlined and expedited basis.

On March 3, 1999, USDA introduced departmental regulation (DR) 4330-3 in order to “establish and convey policy and provide guidance and direction to [USDA] agencies and employees in order to ensure compliance with and enforcement of the Department's prohibitions against discrimination in its conducted programs and activities.” DR4330-3 specifically addresses “processing administrative complaints of discrimination filed with [USDA] in any program or activity conducted by USDA.” DR 4330-3, at 1. DR4330-3 was intended to apply, and does apply, USDA's investigation of all discrimination complaints under Part 15, DR4330-3, at 2. It includes a directive for OCR to complete investigations of discrimination complaints within 180 days. *Id.* at ¶ 10(e)(4).

Pursuant to the directive of DR4330-3, USDA also promulgated a departmental manual (DM) 4330-001 on complaint processing to implement the provisions of DR4330-3. DR4330-3, at 15; DM4330-001. As such, DM4330-001 supplements DR4330-3 by providing a greater level of detail for how to process discrimination complaints. It too pertains to the processing of all discrimination complaints, not just those refiled pursuant to the § 741 Optional Process.

In reality, the § 741 Optional Process did not work and was quickly abandoned by USDA. According to the sworn statement of Ms. Gray, USDA actually engaged in little effort to establish a special administrative process consistent with § 741 and Part 15f. Gray Dec. at ¶ 9. Notwithstanding the many discrimination complaints that had been lodged with USDA over the

years, USDA sent out only 111 notification letters to complainants who had previously submitted discrimination complaints about the Farm Service Agency (“FSA”) to advise them about the availability of the § 741 Process. Gray Dec. at ¶ 9. FSA refused to review its data bases and records to determine whether additional eligible complaints were retained in local FSA offices and whether additional complainants should have received notification letters. *Id.* USDA undertook no special efforts to advise women farmers of the § 741 Optional Process. *Id.* at ¶ 10. Only a few farmers attempted to utilize the § 741 Optional Process. *Id.* By 2000 the OCR staff was overwhelmed by the flood of new discrimination complaints being filed and the § 741 Optional Process was merged into OCR’s routine complaint processing system. *Id.* Thus, the § 741 Optional Process was never really functional and was soon abandoned by USDA. As Ms. Gray has affirmed, at OCR, “[c]ivil rights procedures were developed and published, but were not and are not followed.” *Id.* Despite Ms. Gray’s best efforts, “the complaint processing system collapsed and complaints, whether submitted pursuant to the optional § 741 procedure or otherwise, were caught up in the dysfunction that characterized OCR.” *Id.* In short, the § 741 Optional Process was both ineffective, and ultimately, non-existent.

USDA’s internal directives support Ms. Gray’s sworn statement that OCR abandoned the § 741 Optional Process and that complaints refiled thereunder were merged into USDA’s routine complaint investigation processes. USDA promulgated DR 4330-3 and DM 4330-001 shortly after § 741 and Part 15f were enacted, yet they were applicable to OCR’s investigation of all discrimination complaints, not just those under the § 741 Optional Process. USDA’s promulgation of DR 4330-3 and DM 4330-001 reflect the reality of USDA’s handling (or non-handling) of discrimination complaints; there was no distinction between those to be investigated under the § 741 Optional Process and those under OCR’s regular protocols.

Accordingly, § 741 and Part 15f have no significance with regard to Plaintiffs' ability to assert a legally cognizable APA claim.

(3) The relevance of changes that have occurred in the regulatory regime over time, and the applicability *vel non* of the past and current regulations (including intra-departmental regulations such as DR-4033-3) to plaintiffs' claims.²

The changes in USDA's regulatory regime for the investigation of discrimination complaints should have no impact on the Plaintiffs' APA claim. The Court should apply the current law to the issues at bar because notwithstanding changes over time, Plaintiffs' substantive rights to have USDA investigate and redress their discrimination complaints have remained constant and undiminished. The § 741 Optional Process, even if it had been functional at one time, does not currently provide an adequate court remedy because it expired in October 2000. Plaintiffs' only viable claim for redress is the APA.

It is well settled in this Circuit that where changes in applicable law have occurred over the course of litigation, the court is to apply the law in effect at the time it renders its decision when the change in the law applies to procedure rather than substantive rights. *Moore v. Agency for Int'l Dev.*, 994 F.2d 874, 878-79 (D.C. Cir. 1993) (quoting *Gersman v. Group Health Ass'n*, 975 F.2d 886, 898-99 (D.C. Cir. 1992))(law in effect applies if it is "remedial provisions – not substantive obligations or rights under a statute").³ In other words, if changes in the statute or regulation are only collateral to substantive rights, then a court must apply the law that exists at the time it renders its decision. *Brown v. Marsh*, 868 F. Supp. 15, 17 (D.D.C. 1994).

² Presumably the Court intended to refer to DR 4330-3 rather than 4033-3.

³ In so holding, the D.C. Circuit reconciled two conflicting lines of Supreme Court cases. In *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), the Supreme Court held that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." In *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974), however, the Supreme Court held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." In *Gersman*, the D.C. Circuit gave effect to both of these seemingly contradictory principles, which had troubled the lower courts, by ruling that changes in the law would be retroactively applied if they were collateral to substantive rights (applying *Bradley*) but would not be retroactively applied if the changes affected substantive rights (applying *Bowen*).

The D.C. Circuit's decision in *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 104 F.3d 1349, 1352 (1997), is a good illustration of these principles at work. In that case, the plaintiffs alleged that the State Department's consular venue policy discriminated on the basis of nationality and they asserted claims, *inter alia*, under the Immigration and Nationality Act. *Id.* at 1350-51. The district court granted summary judgment to the defendant, and while the case was on appeal, Congress amended the Immigration and Nationality Act to provide the State Department with total discretion to determine its consular venue policy, a change in the statutory scheme that was extremely favorable to the State Department's position in the case. *Id.* at 1351. Not surprisingly, the State Department argued that the amendment applied to the pending case. *Id.* at 1351. The Court of Appeals agreed, principally on the grounds that the amendment to the Immigration and Nationality Act "merely enacts a change in the procedure by which plaintiffs' visa applications are considered. This policy does not upset any substantive right." *Id.* at 1352. The Court of Appeals was also persuaded that the current law should be applicable to the case because the plaintiffs were seeking prospective relief in the form of an injunction against the State Department, which would be operating in the future under the amendment to the statute. *Id.*

Here, modifications in USDA's complaint investigation regime over time were not substantive. From 1966 to 1998, the procedures were essentially the same, while the USDA official charged with the responsibility for handling the complaints changed. The enactment of § 741 and the promulgation of Part 15f, even if they had been operational, would not have affected Plaintiffs' rights to investigations and redress, nor would they have caused material changes in the regulatory system. In reality, the § 741 Optional Process was even more short-lived than the two years it was supposed to be in place, and was quickly abandoned and merged

into OCR's dysfunctional and ineffective complaint process, so that the slight procedural modifications that were supposed to be available under the § 741 Optional Process were not. *See* Gray Dec. at ¶¶ 9-10; *see also* DR 4330-3. Changes in USDA's system over all did not vest complainants with any new substantive rights but merely modified slightly the procedures already theoretically in effect. Moreover, the relief that Plaintiffs seek here is prospective, including the issuance of an order mandating that USDA institute an effective system for investigating and timely responding to complaints of gender discrimination. As a result, the law currently in effect governs the availability of this relief. *See, e.g., Legal Assistance*, 104 F.3d at 1352.

Thus § 741 and Part 15f have no impact on Plaintiffs' APA claim. The APA is available to claimants who have no other court remedy. 5 U.S.C. § 704. Because the changes in USDA's regulatory regime over time did not impact Plaintiffs' substantive rights to have their discrimination complaints investigated and redressed, and were at most collateral to their rights, the Court is required to apply the law currently in effect. The current regulatory system is governed by 15 C.F.R. § 15.d, DR 4330-003 and DM 4330-001; the § 741 Optional Process is not available to Plaintiffs. Because the administrative regulations do not provide a mechanism for the Plaintiffs to obtain review by a court of USDA's failures to investigate and remedy their complaints, they state a cognizable claim under the APA. 5 U.S.C. § 704; *see also Bowen v. Mass.*, 487 U.S. 879, 903-05 (1988).

CONCLUSION

For the reasons emphasized here, as well as in Plaintiffs' prior memoranda and at oral argument, Plaintiffs should be permitted to proceed with their APA claim.

Respectfully submitted,

/s/ Barbara S. Wahl

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Dated: September 18, 2007

EXHIBIT 1

**SECOND SUPPLEMENTAL DECLARATION OF
ROSALIND D. GRAY**

1. I am over 18 years of age and a United States Citizen.
2. My business address is 607 Oneida Place, N.W., Washington, D.C.
3. I am a 1973 graduate of Howard University School of Law, a member of the Mississippi Bar and have practiced in many federal district courts. I am also a member of the Bar of the United States Supreme Court. From 1976 to 1986, as trial counsel for and director of the Lawyers' Committee Municipal Services Equalization Project, I represented minorities in small, rural communities seeking to equalize municipal services. I have served as a consultant to the Legal Services Corporation, the Office of Revenue Sharing and the Department of Justice and Housing and Urban Department. I have also served as Acting General Counsel to the U.S. Commission on Civil Rights and as Deputy General Counsel at the Equal Employment Opportunity Commission ("EEOC"). As EEOC Deputy General Counsel, I managed EEOC's national litigation programs and participated in the settlement of a number of major class actions. In addition, I have served as Associate General Counsel for the University of the District of Columbia ("UDC") where I represented UDC in federal litigation and administrative proceedings on employment discrimination and other labor claims. From July 13, 1998 to January 20, 2001, I served as Director of the Office of Civil Rights ("OCR") for the United States Department of Agriculture ("USDA").
4. The OCR has broad responsibility for implementing and coordinating all USDA nondiscrimination, civil rights, and equal opportunity efforts in connection with all USDA programs and activities, including programs and activities which are operated or sponsored by USDA and carried out by non-federal organizations. During my tenure as the OCR Director, I was the principal advisor to the Secretary and the Assistant Secretary

for Administration on all matters related to equal opportunity and civil rights. In 2003 the duties of the Assistant Secretary for Administration with respect to civil rights matters were transferred to the Assistant Secretary for Civil Rights. One of the principal duties of OCR was to investigate and process discrimination complaints of farmers and other producers with respect to the administration of USDA farm credit and non-credit benefit programs.

5. In my April 6, 2002 declaration, I described the problems that plagued OCR and stymied my best efforts to improve OCR's processing of discrimination complaints. These problems continue to plague OCR and are reportedly worse.

6. In my October 18, 2006 declaration, I affirmed, based upon my personal experience, that there can be no justification for OCR's inability to comply with the requirements of Departmental Regulation 4330-3 and that the fact that farmers have not had their discrimination complaints acknowledged or investigated years after filing them indicates that the system is still dysfunctional.

7. During my tenure as OCR Director, I attempted to work with the USDA Office of General Counsel ("OGC") to formulate and implement the procedures promulgated at 7 C.F.R. Part 15f in response to the enactment of Pub. L. No. 105-277 § 741, codified at 7 U.S.C. § 2279 note. These efforts took place against the backdrop of the on-going *Pigford* litigation, the certification of a class in that litigation, and a struggle between OGC and OCR regarding how to carry out the remedial intent of the legislation. In terms of addressing fully the problems that gave rise to the special legislation extending the statute of limitations, the regulations were fatally flawed.

8. Previously I affirmed in my April 6, 2002 declaration that until 1997 the Farm Service Agency ("FSA") and its predecessor, Farmers Home Administration ("FmHA"), processed their civil rights complaints and that many complaints were destroyed, not accepted or not recorded at all even though FSA provided for a verbal complaint to be filed in person or through the telephone. Indeed, the Civil Rights Action Team

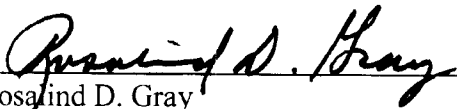
("CRAT"), appointed by Secretary Glickman in 1996 to investigate civil rights enforcement within USDA, noted that it "was unable to gather historical data on program discrimination complaints at USDA because record keeping on those matters has been virtually nonexistent." CRAT Report at 24. Despite this fact, OGC insisted that the regulations require a complainant to have a written discrimination complaint on file with USDA in order to invoke the optional procedure described in 7 C.F.R. Part 15f, a limitation more narrow than the special remedial statute, more narrow than the definition of the class certified in the *Pigford* litigation and inconsistent with representations made by Secretary Glickman that oral complaints made during the recorded listening sessions conducted by the CRAT in January 1997 would be fully investigated.

9. In determining who would be eligible to receive notification letters prescribed by 7 C.F.R. § 15f.5, all members of the *Pigford* class as defined were eliminated. As a result of these efforts to limit eligibility, only 194 notification letters were sent pursuant to 7 C.F.R. § 15f.5 and of that number only 111 involved FSA programs. Characteristic of the apparent indifference of USDA to civil rights enforcement was the complete lack of response from FSA to OCR's request that FSA review its databases and records to determine whether additional eligible complaints were still lodged with the local FSA offices. In addition, the regulation placed the burden upon those complainants who had not received a notification letter to contact OCR in order to find out how to participate in the statute of limitation process. However, information about the program was not disseminated in a way reasonably calculated to provide notice to all minority farmers covered by the special legislation. To the best of my recollection, the outreach effort consisted of contacting the 1890 historically black agricultural schools, black farmer organizations and state FSA offices, which was particularly ironic inasmuch as black farmers who fit within the *Pigford* class definition were deemed to be ineligible to receive the § 741 notification letter. I do not recall and am not aware of any efforts to

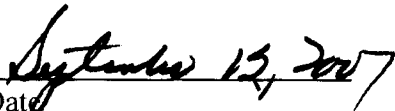
inform Hispanic or women farmers or any organizations representing such farmers of the optional § 741 procedure.

10. For the few farmers that opted for the § 741 administrative procedure, their complaints and the staff initially designated to process them were soon merged into the processing of existing and new complaints that poured into OCR. As I affirmed in my April 6, 2002 declaration, after substantially reducing the backlogged cases that I encountered when I assumed the position of OCR Director, OCR received 1261 new cases filed in 1999 and another 671 cases in fiscal year 2000 and many of the filings were more than a year old before the initial processing began. Ultimately, OCR staff was simply not prepared to do the work of the office. In the final analysis, as I also affirmed in my April 6, 2002 declaration, “[c]ivil rights procedures were developed and published, but were not and are not followed,” and despite my best efforts to make the system work properly, the complaint processing system collapsed and complaints, whether submitted pursuant to the optional § 741 procedure or otherwise, were caught up in the dysfunction that characterized OCR.

I have reviewed the foregoing Declaration and declare under penalty of perjury that it is true and correct to the best of my personal knowledge.



Rosalind D. Gray



Date

EXHIBIT 2



**U. S. Department of Agriculture
Office of Inspector General
Audit Report**

**OFFICE OF CIVIL RIGHTS
STATUS OF THE IMPLEMENTATION
OF RECOMMENDATIONS MADE
IN PRIOR EVALUATIONS
OF PROGRAM COMPLAINTS**



**Audit Report No.
60801- 4 - Hq
March 2000**

Executive Summary

Results in Brief

This report presents the results of our review of the effectiveness of the U.S. Department of Agriculture's Office of Civil Rights (CR) in responding to recommendations made by OIG to improve the efficiency of CR's process for resolving complaints of discrimination in USDA programs. Questions concerning CR's efficiency arose in 1996, when minority farmers and other socially disadvantaged participants in USDA programs protested that little was being done to resolve their concerns about discrimination in the award of program benefits. In 1997, it was determined that CR had a growing backlog of complaints, and OIG began a series of reviews of CR's operations and its management of the backlog. Beginning with our February 1997 review, we put forward 67 recommendations to improve the efficiency of CR and the Farm Service Agency (FSA), the agency against which most of the complaints were brought. Fifty-four of our recommendations were addressed to CR. The Secretary of Agriculture requested this review to assess the status of the corrective actions CR has taken since February 1997 in response to those recommendations.

The Secretary also asked us to review CR's employment complaints process, which has come under recent criticism of its own. We performed reviews of both processes concurrently and are issuing the results of both audits under separate covers. (For issues concerning the employment complaints process, see Audit Report No. 60801-3-Hq.)

CR has implemented 13 of the 54 recommendations we made concerning program complaints. Among the actions taken, CR has been able, after 2 years of activity, to substantially clear the original backlog of complaints.¹ In November 1997, the backlog stood at 1,088 cases; 10 months later, it remained at 616 cases; as of this report, it has been reduced to 35. We are recommending that CR resolve these 35 cases with all deliberate speed.

Many other critical issues remain unresolved. Most notably, CR did not reengineer its complaints resolution process. Although CR officials had previously agreed that the system they used to process complaints was neither effective nor efficient and although we recommended a major transformation of this system,² *no significant changes in how complaints are processed have been made.* As a result, we cannot conclude that all complaints are processed with due care.

¹ CR defined its backlog as all complaints filed before November 1, 1997.

² See our *Evaluation of the Office of Civil Rights' Efforts to Reduce the Backlog of Program Complaints (Phase V)*, dated September 30, 1998. The CR officials emphasized that the system was not designed by civil rights professionals who would know the intricacies of complaints processing.

We also note that CR's method of clearing its backlog has raised a concern about the nature of its settlement agreements. Of the backlogged cases, 34 had been settled through agreements that awarded the complainants compensatory damages and relief from USDA debt. Damages awarded under settlement agreements are paid from USDA appropriations, and the awards in these 34 cases do not appear to satisfy all the requirements of appropriations law. Although the USDA task force that cleared the backlog recommended limited damages and debt relief in many cases, CR increased the amounts significantly but did not document its analysis of USDA's liability. A Department of Justice opinion states that because damage awards are paid from appropriations, such awards should only be made if it is determined that a court would have made a similar award. Such a determination presupposes an assessment of the degree to which USDA was liable in the case. We found that the awards to the 34 claimants who accepted settlement offers were not fully supported by documentation that reasoned USDA's degree of liability. These claimants received \$2.31 million in compensatory damages and \$3.66 million in debt relief. In 8 of these cases, the USDA task force had found either no finding of an inference of discrimination or a low to very low potential of discrimination. None of these 34 settlements were reviewed by the Office of the General Counsel (OGC) for legal sufficiency.

As noted above, CR has been slow to address our prior recommendations. The following table summarizes the correlation between our recommendations and the six reviews (phases) of our ongoing evaluation.

	Recommendations	Management Decision¹	Implemented	Not Implemented	Partially Implemented
Phase I	14	10	5	5	4
Phase II	16	16	12 ²	-	4 ³
Phase III	-	-	-	-	-
Phase IV	-	-	-	-	-
Phase V	29	7	4	15	10
Phase VI	8	2	1	2	5
TOTALS	67	35	22	22	23
¹ "Management Decision" is reached when OIG and CR agree which actions will likely correct the deficiency and satisfy the recommendation. ² Nine of these recommendations were directed at the Farm Service Agency (FSA). ³ All four of these recommendations were directed at FSA.					

Table 1. Summary of Recommendations Made in OIG Civil Rights Reports.

As the table shows, over three-fourths of the recommendations we directed at CR have not been fully addressed. Some of these issues were raised as long ago as our Phase I review in February 1997. The table on the following page summarizes the key areas for which our recommendations were made and in which uncorrected deficiencies persist.

Issue	OIG Evaluation Phases							
	Alert (02/25/97)	I (02/27/97)	II (09/29/97)	Memo (12/18/97)	IV (03/04/98)	V (09/30/98)	VI (03/24/99)	VII
Review State foreclosure actions	x	x	x	x	x	x	x	
Send letters of acknowledgement (Completed November 1997)		x	x					x
Develop and maintain a data base		x	x	x	x	x	x	x
Evaluate each agency's civil rights staff		x	x	x	x	x	x	x
Clean casefiles		x	x	x	x	x	x	x
Clear original backlog		x	x	x	x	x	x	x
Publish regulations		x	x	x	x	x	x	x
Reconcile casesfiles with USDA agencies		x	x	x	x	x	x	x
Write plans for compliance reviews		x	x	x	x	x	x	x
Followup on isolated instances of potential discrimination				x	x	x	x	x
Find lost casefiles		x	x	x	x	x	x	x
Use aging reports		x	x	x	x	x	x	x
Train investigators			x	x	x	x	x	x
Monitor Settlement Agreements							x	x

x Condition originally noted and recommendation made. x Condition continues.
 x Corrective action partially completed. x Corrective action take but not adequately implemented.

Table 2. Recurring Office of Civil Rights Issues

Among the 22 recommendations that were not implemented are 5 that CR stated it had completed but that our review found incomplete. Several of these recommendations were in critical areas: we had asked CR to obtain legal sufficiency reviews from the Office of the General Counsel on 7 cases, to locate 40 files that were missing during our previous review, and to keep open cases that CR refers to the Food Nutrition Service (FNS) until it can be certain the cases are resolved. Of the 7 cases needing a legal sufficiency opinion, none has received one; of the 40 missing files, 14 remain missing; and of the 16 cases referred to FNS in fiscal year 1999, all were closed by CR on or shortly after the day of referral. We concluded that the complaints in these cases were not processed by CR with due care.

In addition to the issues listed in Table 2 was a problem encountered after we issued our December 18, 1997, memorandum. The memorandum contained nine recommendations³ relating to instances of unprofessional remarks or behavior by FSA personnel that may have adversely affected minorities. We had recommended that CR review each of the nine confidential cases. However, without informing OIG, CR referred all nine cases to FSA for review. CR later recalled the cases at our direction and has taken action on four of our recommendations. The other five recommendations are still unresolved.

In other areas of CR's current operating environment, we found no substantial improvement. CR's data base and file room remain poorly managed. The data base still contains missing dates, incorrect closure codes, and incorrect file locations: 21 casefiles are still checked out to an employee who left CR over 18 months ago; 1,215 casefiles are not recognized as being in any location; and 16 casefiles are shown as missing. CR has installed a new data base that promises to overcome many of the current inefficiencies. The new data base will allow only authorized employees to make changes to the data, and it will identify employees that are accountable for cases. However, CR has not implemented new procedures for data entry, and it has not provided sufficient training to ensure data integrity. Unless CR employees are trained to use the new system, it will prove no more efficient than the old one.

Given the condition of the program complaint files, we concluded that no document-by-document sweep of the files has occurred. Casefiles were still missing.

To determine if CR's client servicing had improved, we reviewed 188 cases that were in the earliest stage of processing or that had been closed during that stage. We found that many of the old inefficiencies were still in evidence. Over two-thirds of the closed cases had been closed even though the complainants had not been given an opportunity to provide the information needed to formalize the complaints, and nearly two-thirds of the complainants with open cases did not receive acknowledgement letters. Although CR

³ Because these 9 recommendations were contained in a confidential correspondence to the Assistant Secretary for Administration, they were not included in the 67 recommendations we issued through official channels.

has given itself 30 days to decide whether enough information exists to investigate a complaint, we found that it was taking an average of 126 days. At least 454 cases currently have exceeded this 30-day limit and may be considered backlog.

CR has presented data to the Secretary that suggests it has made progress in its operations; however, we found that the numbers are misleading and do not accurately reflect the average time it has taken CR to completely process a program complaint. CR's data base of open, perfected complaints does not show the time it took CR to determine that it had jurisdiction in the case, a time that in turn is not captured by CR in its average processing times. CR's actual average processing time for 1999, for example, would include the 126 days it expended on intake as well as the 174 days we calculated that CR took on average to investigate and adjudicate each case, clearly longer than the 124 days CR claimed was its average processing time for that year.

Of equal importance, CR has not maintained a consistent effort to acknowledge its receipt of complaints. Although it had sent Acknowledgment Letters to all complainants in the original backlogged cases, it has not been mailing these letters to new complainants in a timely manner and may not have sent some letters at all. Because the casefiles of 83 complainants were missing, we could not determine whether they received any acknowledgment of their complaints. Our Phase I review emphasized that complainants are not well served if the Department does not inform them of the status of their complaints.

The 13 recommendations directed at CR that were adequately implemented include 4 concerning the needed reduction of the backlog. In addition, CR issued departmental regulations governing the receipt, processing, and resolution of discrimination complaints. Another two recommendations were made during the formative stages of CR. We had recommended that the Department establish a uniform system that would hold designated USDA officials accountable for the receipt, processing, and resolution of program complaints within established timeframes. We had also recommended that the Department revoke the delegation of authority that granted FSA responsibility to conduct preliminary inquiries and give this authority to CR on a permanent basis. The Secretary implemented these recommendations by establishing the Office of Civil Rights and giving its director full responsibility to investigate and adjudicate discrimination complaints arising from conducted or assisted programs.

CR itself fully implemented another three recommendations that have aided the integrity of the complaints resolution process. In our Phase I evaluation, and again in our Phase II evaluation,⁴ we had recommended that CR send a letter signed by the Secretary to all complainants whose cases had not been resolved, assuring them that action would be taken. As of this review, these letters have been sent to all complainants in the original

⁴ Repeated recommendations, such as this one, count as two separate recommendations.

backlog of cases. We had also recommended in our Phase I evaluation that CR assume control of FSA's program complaint system. CR did this temporarily between May and November 1997. The function was given back to FSA after FSA agreed to assign more personnel to its civil rights staff.

In more recent action in response to our Phase V report, CR has taken steps to realign some of its program staff, and has agreed to give due consideration to hiring managers with strong knowledge, skills, and experience in civil rights, and ensure that they receive training in departmental programs. In addition, in our Phase VI report, we recommended that a determination be made as to whether a settlement term in a settlement agreement would be implemented. CR and FSA took actions to implement the term in the settlement agreement.

Statistical Data on Complaints

According to CR's data base as of December 1, 1999, the Department's inventory of non-class action complaints totals 897 (open and intends). In addition, the class action lawsuit brought against the Department comprises an additional 185 cases. These cases are identified separately because the court prohibited CR from processing the cases as long as they were under litigation.

The tables below and on the following page identify the status of all cases in the inventory of Department complaints.

	Not in Class Action		Class Action ⁵		Total	
	Intend ⁶	Open	Intend	Open	Intend	Open
Original Backlog		35		93		128
New		216		19		235
Incomplete	563		14		577	
Statue of Limitations	83		59		142	
Totals	646	251	73	112	719	363

Table 3: Status of All Civil Rights Program Complaints as of December 1, 1999.

⁵ All of these class action cases should be either closed or reclassified as non-class action; however, CR has not properly updated its database for these cases.

⁶ 'Intend-to-file' cases are cases where no determination has been made as to whether to accept the complaint or not and some may be eligible under the waiver of the Statue of Limitation.

	Not in Class Action	Class Action	Total
Pre-Investigation	187	17	204
Under Investigation	8	2	10
Adjudication	16	0	16
At OGC	2	0	2
Pending Closure	3	0	3
Total	216	19	235

Table 4: Status of Open ‘New’ Civil Rights Program Complaints⁷ as of December 1, 1999.

Reason Closed	Non-Class	Percent*	Class	Percent*	Total
Withdrawn	217	25%	5	6%	222
Dismissed	162	18%	1	1%	163
Referred to FNS	13	1%	0	0%	13
Consent Decree	10	1%	63	82%	73
Settlement	98	11%	5	6%	103
Statute of Limitations	66	7%	1	1%	67
Final Agency Decision – No Discrimination	255	29%	0	0%	255
Final Agency Decision – Discrimination	12	1%	2	3%	14
Other	50	6%	0	0%	50
Subtotal	883		77		960
Cases Still Open	35		93		128
Total Backlogged Cases	918		170		1,088
Data compiled from 12/01/1999 data base and has not been audited.					
* Percent is based on the subtotal of closed backlog non-class and class cases.					

Table 5: Backlogged Cases Closed By Category as of December 1, 1999.

Key Recommendations

We are recommending that for future settlement awards, CR include in its operating procedures a requirement that it document the computations behind its awards of compensatory damages, debt relief, and attorney’s fees, in accordance with the legal opinion set forth by the Department of Justice’s Office of Legal Counsel, and submit this documentation to OGC as part of its legal sufficiency review, in accordance with the Secretary’s August 30, 1999, memorandum. We are also recommending the CR resolve the remaining 35 cases in the original backlog with all deliberate speed.

For the corrective actions that have not yet been completed on our previous recommendations, we recommend that these actions be implemented within 60 days of issuance of this report.

⁷ ‘New’ cases are those civil rights complaints received and perfected after November 1, 1997.

Although not included in the narrative of this report, we are recommending that CR implement a management plan that addresses the inefficiencies we have noted in past reviews of the program complaints process. These same inefficiencies were evident during our current review of CR's employment complaints process, and in the results of that review (Audit Report No. 60801-3-Hq), we discuss the need for such a management plan. The plan should address issues of effective leadership, changing organizational culture, customer focus, and process reengineering, the management areas we believe are essential to the successful operation of CR.

Finally, we are recommending that CR improve the operations of its intake unit to ensure that all complaints are processed with due care. CR should review all open intend-to-file cases and determine (1) if Acknowledgment Letters have been sent in all cases, (2) if any cases should be moved forward in the resolution process, and (3) if any cases have been open beyond the established timeframe. Further, Acknowledgment Letters should state clearly what CR's requirements are for a complaint of discrimination against USDA so that complainants are given a fair chance to fulfill those requirements.

Agency Response

On March 3, 2000, CR provided a written response to our draft report. Based on that response, we have made some revisions to the report. We have also incorporated excerpts from CR's response to our recommendations into the body of the report, along with our positions and the action necessary to reach management decision on those recommendations. In addition, CR's response to our draft report is included in its entirety as Exhibit D in this report.