



United States Department of Agriculture

Office of the Secretary
Washington, D.C. 20250

MAR 30 2016

The Honorable Elijah Cummings
Ranking Member
Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Cummings:

Thank you for your letter of January 12, 2016, requesting information related to the U.S. Department of Agriculture's (USDA) Equal Employment Opportunity (EEO) program. USDA is committed to protecting the civil rights of our employees, and we welcome the opportunity to discuss reforms we have made in our EEO program and civil rights, generally. As detailed below, these reforms have significantly improved the timeliness and quality of our EEO complaint processing and promoted a more diverse and welcoming workplace at USDA.

Background

USDA has worked diligently to improve our civil rights processes during the Obama Administration. In 2009, for example, the Office of the Assistant Secretary for Civil Rights (OASCR) faced more than 140 outstanding management challenges from USDA's Office of the Inspector General (OIG) that had not been addressed during the previous administration. Under the leadership of Dr. Joe Leonard, who has served as USDA's Assistant Secretary for Civil Rights since April 2009, OASCR promptly implemented OIG's recommendations and closed every one of these challenges.

These and other reforms undertaken by OASCR have significantly improved the performance of USDA's EEO program. In fiscal year (FY) 2009, USDA timely completed just 52 percent of our EEO investigations—this percentage was among the bottom tier of Federal agencies. After centralizing the EEO investigative function within OASCR and upgrading our contractors, however, USDA timely completed 75 percent of investigations in FY 2015.¹ By comparison, the Federal average was 73 percent in FY 2014.²

¹ OASCR, Office of Adjudication data and iComplaints database.

² Without the United States Postal Service, the government-wide average was 64 percent. Government-wide numbers for FY 2015 are unavailable at this time.

USDA also has treated EEO complaints with the seriousness they deserve. From FY 2001 to FY 2008, the annual number of findings of discrimination by USDA in the EEO complaint process was in the single digits.³ In FY 2008, for example, USDA accounted for only four out of 191 findings by agencies across the Federal Government. By contrast, since the start of this Administration, USDA has averaged more than 14 findings of discrimination a year and emerged as a leader among Federal agencies and departments. From FY 2009 to FY 2014, USDA accounted for 9 percent of discrimination findings across the Federal Government, including a high of 27 out of 212 Government-wide findings in FY 2011.

The Equal Employment Opportunity Commission (EEOC) recognizes that the increase in our findings is not because discrimination has increased at USDA. Rather, the EEOC sees the increase in findings as evidence that USDA is willing to acknowledge and address discrimination where it has occurred and that our EEO program is doing its job.

In FY 2013, the EEOC invited Assistant Secretary Leonard to speak to Federal EEO Directors on the “new approach taken at his Department to improving complaint processing” (10/9/12 EEOC email to Federal EEO Directors, enclosed). We understand this was a rare invitation that came because the EEOC recognizes the considerable progress we have achieved during this Administration and sees USDA as a model for other Federal agencies to follow.

In addition to our EEO reforms, USDA has undertaken historic civil rights settlements in the *Pigford II* and *Keepseagle* litigation to compensate African American and Native American farmers and ranchers without going through arduous litigation in Federal court. USDA also set up a voluntary claims process to provide the same relief for Hispanic and women farmers and ranchers (HWFCP). The combined civil rights settlements in *Pigford II*, *Keepseagle*, and the HWFCP have provided more than \$2.5 billion in payments to claimants, more than \$118 million in debt relief, and will provide millions of additional dollars to nonprofit and educational institutions through the *cy pres* funds of *Pigford II* and *Keepseagle*. These historic civil rights settlements will benefit the claimants and their communities for generations. Moreover, these settlements have helped to both reduce negative perceptions about USDA and transform how USDA does business.

USDA’s improvements in civil rights reflect the commitment of Secretary Vilsack, who just after his Senate confirmation in 2009 announced “A New Civil Rights Era for USDA” with one of the strongest Civil Rights Policy Statements in the Federal Government, which was the first statement of its kind for USDA.⁴ As part of this new era, USDA has undertaken a number of initiatives and policies to protect and promote civil rights, including:

³ This refers to Final Agency Decisions (FADs) issued by USDA, not findings issued by EEOC after a hearing on the merits.

⁴ See <http://www.usda.gov/documents/NewCivilRightsEra.pdf>

- The Cultural Transformation (CT) Initiative to create “a workplace where all employees and customers are treated with dignity and respect and provided the opportunity for success”⁵;
- The StrikeForce Initiative for Rural Growth and Opportunity, which has supported nearly 190,000 projects and which has invested \$23.5 billion in high-poverty and often high-minority areas across 970 rural counties, parishes, boroughs, and census areas⁶;
- LGBT protections and outreach, including the extension of non-discrimination protections on the basis of gender identity, the Rural Pride campaign to engage and highlight rural LBGT communities, and broad protections for same-sex married couples; and
- A Departmental Regulation in 2014, prohibiting discrimination in all USDA programs and activities on the basis of national origin and Limited English Proficiency (LEP). Along with this regulation, OASCR provided guidance to ensure that every agency within USDA provides equal access to LEP persons.

USDA is proud of our civil rights record over the last 7 years and of the recognition of the EEOC and others. This broader record of accomplishment and trajectory of improvement is important context for considering the specific subjects of your request—the MD-715 reports and the letter by the Office of Special Counsel (OSC). Consistent with our approach throughout this Administration, USDA addressed issues in both cases as soon as they were identified. As explained below, our practices for MD-715 reports have changed according to the counsel of our EEOC Liaison, and the OSC letter acknowledged that USDA’s corrective actions “adequately address the management and conduct of OASCR going forward.”

MD-715 Reporting

USDA submitted an aggregate MD-715 report in FY 2010. However, after this submission, our then-EEOC Liaison advised us that USDA no longer had to submit an aggregate report because EEOC would be receiving reports from individual USDA agencies electronically. All USDA agencies and offices required to submit MD-715 reports to the EEOC (i.e., those with 1,000 or more employees) did so in fiscal years 2011, 2012, and 2013. In addition, some small USDA agencies or offices not required to submit their own MD-715 reports nonetheless did so in some or all of those years (including the Foreign Agricultural Service, the Risk Management Agency, and the Grain Inspection, Packers and Stockyards Administration).

USDA collects EEO data annually through the National Finance Center (NFC) Reporting Centers’ Workforce Data Tables. At EEOC’s request, OASCR provided aggregate Workforce Data Tables for FYs 2011, 2012, and 2013 to assist with trend analysis. Importantly, however, the EEOC has never asked USDA to produce aggregate MD-715 reports for the years in question.

⁵ See <http://culturaltransformation.usda.gov/>.

⁶ See <http://www.usda.gov/strikeforce>.

In FY 2014, USDA again prepared and submitted an aggregate MD-715 report after a new EEOC USDA Liaison advised us that it was required. In addition, all USDA agencies and offices with 1,000 or more employees submitted Parts A through F, and H through J of the MD-715 annual form⁷ and completed and retained in their files a Part G Self-Assessment Checklist. As requested, the enclosed documents identify these agencies/offices, provide dates of MD-715 filings, and include Part G checklists for 2013 and 2014, as well as 2014 Part H Action Items, which address deficiencies identified in the Part G checklists.

In accordance with MD-715 standards, USDA also tracks/analyzes recruitment/hiring on a monthly basis by Race, National Origin, Gender, Reported Disability, Targeted Disabilities, and Veterans as part of Secretary Vilsack's CT Initiative (noted above), which focuses on creating a workforce that reflects the diversity of the American people. Among the accomplishments of this initiative:

- USDA in FY 2015 ranked number three in the Federal Government for Support of Diversity, according to the Federal Employee Viewpoint Survey;
- Our senior executive ranks are among the most diverse in the Federal Government, exceeding the Government-wide average;
- The diversity of students in our Pathways Programs has increased significantly from less than 17 percent minority students in FY 2010 to more than 39 percent in FY 2015; and
- Employment of veterans has increased from below 5 percent in FY 2009 to more than 12 percent in FY 2015.

OASCR's Compliance Division has oversight responsibility for USDA's efforts to achieve compliance with civil rights and EEO laws and regulations. This oversight includes monitoring the compliance efforts undertaken by USDA agencies' civil rights/EEO offices and conducting some direct compliance activities as well. Currently, the Compliance Division is comprised of seven employees: the chief, a team lead, and five specialists.

USDA's Office of Human Resources Management is responsible for processing requests for disability-based accommodations for the USDA staff offices. Each USDA subcomponent also has at least one reasonable accommodations designee either at the agency level or through its mission area.

Among the primary vehicles used to audit agencies' EEO performance, including in the field, are compliance reviews and climate assessments. Thirteen USDA agencies and offices, including OASCR, conducted compliance reviews in FY 2014, while 15 did so in FY 2015. These reviews occurred in states such as California, Florida, Georgia, Illinois, Iowa, Mississippi, New Jersey, New York, and Pennsylvania. Moreover, in FY 2015–2016, an independent contractor conducted an assessment of the work environment in the Forest Service's Pacific Southwest

⁷ All but one of these agencies submitted their reports through the Federal Sector EEO Portal (FedSEP), as reflected in the enclosed spreadsheet titled, "FY 2014 MD-715 FedSEP Certification by Agency." The other, the Office of the Chief Financial Officer, made its submission via email, due to system problems.

Region (California), with a focus on female employees. USDA's OIG also may conduct reviews of EEO compliance, such as the one that formed the basis of the OSC letter discussed below.

Office of Special Counsel Letter

In 2014, at OSC's request, USDA's OIG conducted an investigation into complaints by two whistleblowers alleging intentional wrongdoing and destruction of records within one of the 13 divisions of OASCR, the Corporate Services Division (CSD), which was responsible for processing less than 10 percent of USDA's EEO complaints. The OIG found no intentional wrongdoing by any member of the OASCR staff, and no evidence of destruction of records. OSC evaluated OIG's work and accepted these findings in its letter of May 18, 2015.

The OSC letter also addressed concerns about delays in processing EEO complaints at CSD. Completing investigations within the required 180 days is a broad problem across the Federal Government, but delays at CSD were worse than the Federal average in FYs 2010, 2011, and 2012. OASCR recognized this problem even before the OIG investigation and made changes to staffing and policies to fix it. These reforms proved highly successful, causing the rate of cases exceeding the 180-day time limit to fall from more than 80 percent in FY 2009 to 0 percent in FY 2014.

The OSC letter accepted that OASCR's actions "adequately address the management and conduct of OASCR going forward," but went beyond OIG's findings in two respects. One, as quoted in your letter, is OSC's characterization of complaints against OASCR leadership. The other is OSC's suggestion that, "The agency should consider reviewing cases to determine whether harm resulted from delays and how affected individuals could be made whole." Both of these statements, however, appear to be based on misinterpretation.

First, OIG and OASCR identified only 14 complaints filed against OASCR senior management between FYs 2009 and 2014, less than three per year out of a workforce of more than 120. OSC, which did not dispute the numbers reported by OIG, provided no basis for its conclusion that there were an "unusually high number of complaints" against senior management, raising a question about whether OSC confused the total number of complaints handled by CSD in that 5-year period (231) with the much smaller number of complaints against OASCR senior leadership.⁸ Moreover, all 14 of the complaints against OASCR senior leadership have been handled appropriately according to the EEO process. Three of these complaints were dismissed by final decision (two by EEOC and one by Final Agency Decision); one was withdrawn; three are pending a hearing before EEOC; three are pending a Final Agency Decision; and four were settled. Investigations exceeded 180 days in only five of these cases.

Second, it is important to understand there is already a process in place for complainants injured by delay to seek remedy. Although the Title VII enforcement structure established by Congress and the EEOC does not provide a separate right of action for delay, the EEOC is responsible for

⁸ CSD also handled all EEO cases for the USDA Staff Offices that do not have their own Civil Rights Staff and certain EEO complaints against agency heads and civil rights officials throughout USDA.

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assessing claims of delay in complaint processing and determining whether any injury is *de minimis* or severe enough to warrant sanctions. Also, the EEOC can issue a judgment in favor of a complainant solely on grounds of delay. Anytime an investigation has not been completed within the 180-day threshold, a complainant can take the claim directly to the EEOC.

While the Privacy Act prevents us from disclosing the details of the complaints in question, OASCR has resolved some of the cases referenced in the OSC letter by providing the complainant a settlement. However, many of the cases received a decision and were closed by the time the OSC letter was issued. OASCR does not have the legal authority to provide additional compensation where the complaint already has been settled or where the matter is closed. In the past, USDA has settled complaints based on delay, and will continue to weigh procedural issues like delay as a factor in assessing open cases for settlement.

We appreciate your interest in these matters and your leadership on civil rights. If you have further questions, please have a member of your staff contact me at (202) 720-7095.

Sincerely,

A handwritten signature in black ink, appearing to read "Todd Batta", with a stylized, cursive script.

Todd Batta
Assistant Secretary for Congressional Relations

Enclosures