

DEPARTMENT OF AGRICULTURE**Office of the Secretary****7 CFR Part 15f****Administrative Civil Rights
Adjudications Under Section 741**

AGENCY: Office of the Secretary, USDA.

ACTION: Interim final rule.

SUMMARY: This interim final rule implements the United States Department of Agriculture (USDA) adjudication process for certain civil rights discrimination complaints filed administratively with USDA, as authorized by section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277.

DATES: This interim final rule is effective December 4, 1998. Written comments via letter, facsimile, or Internet are invited from interested individuals and organizations, and must be received by January 4, 1999.

ADDRESSES: Comments should be sent to Alyce Boyd-Stewart, Special Assistant to the Director, Office of Civil Rights, 202-720-5212.

FOR FURTHER INFORMATION CONTACT: Alyce Boyd-Stewart, Special Assistant to the Director, Office of Civil Rights, 202-720-5212.

SUPPLEMENTARY INFORMATION:**Classification**

This final rule has been reviewed under E.O. 12866, and it has been determined that it is not a "significant regulatory action" because it will not have an annual effect on the economy of \$100 million or more or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This final rule will not create any serious inconsistencies or otherwise interfere with actions taken or planned by another agency. It will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof, and does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or principles set forth in E.O. 12866.

Regulatory Flexibility Act

USDA certifies that this rule will not have a significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Pub. L. 96-534, as amended (5 U.S.C. 601 *et seq.*).

Paperwork Reduction Act

USDA has determined that the provisions of the Paperwork Reduction Act of 1995, 44 U.S.C., chapter 35, do not apply to any collections of information contained in this rule because any such collections of information are made during the conduct of administrative action taken by an agency against specific individuals or entities. 5 CFR 1320.4(a)(2).

Background and Purpose*History*

During much of the 1980's and 1990's, the USDA administrative processes for review of program civil rights complaints filed against USDA agencies by program participants did not function effectively. As a result, while administrative complaints were pending, the statutes of limitation for certain discrimination statutes under which complainants potentially could obtain relief continued to run and the time periods available for obtaining relief expired, thus foreclosing the possibility for relief for those who had filed discrimination complaints administratively with the Department. Accordingly, the Secretary of Agriculture sought the enactment of legislation to waive the applicable statutes of limitation for those individuals who had filed nonemployment related discrimination complaints with USDA alleging discrimination during that time period.

Requirements of Section 741 Statute

Congress enacted legislation to so waive the applicable statutes of limitation in section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, for a period of two years after the enactment of that Act. The section 741 provisions are available to any person who filed a nonemployment related discrimination complaint with USDA before July 1, 1997, that alleged discrimination by USDA occurring at any time between January 1, 1981, and December 31, 1996, either (1) in

violation of the Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*) with respect to the administration of a farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account, or with respect to a housing program established under title V of the Housing Act of 1949, or (2) in the administration of a commodity program or a disaster assistance program. Section 741 also allows an eligible complainant to bring suit directly either in the United States Court of Federal Claims or a United States District Court to seek relief on the same bases within two years of enactment of Pub. L. 105-277.

Section 741(b) of the statute also preserves to an eligible complainant the right, in lieu of court proceedings, to first seek an administrative determination by USDA on the merits of his or her complaint. Such an administrative determination then would still be subject to de novo review in either the United States Court of Federal Claims or a United States District Court, if filed within 180 days of the final USDA determination.

Section 741(b) provides some minimal steps that must be a part of this administrative process, but the language of section 741 triggers the application of other law that fills out the balance of the required procedures. Section 741(b)(1) provides the complainant with the right of an opportunity for a hearing on the record before USDA makes a determination on the complaint. A statutory requirement for a determination to be made on the record after opportunity for hearing generally makes an agency administrative process for making a determination subject to section 554(a) of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, and thus specifically triggers the application of the provisions of the APA applicable to formal adjudications, i.e., 5 U.S.C. §§ 554, 556, 557, and 3105. *See, e.g., Lane v. U.S. Dept. of Agriculture*, 120 F.3d 106 (8th Cir. 1997); *City of West Chicago, Ill. v. U.S. Nuclear Regulatory Comm'n.*, 701 F.2d 632 (7th Cir. 1983). Section 741(g) applies chapter 5 of title 5 of the United States Code generally to these proceedings, except for the standard for judicial review. Both the APA and the Equal Access to Justice Act, 5 U.S.C. § 504 (EAJA), which permits eligible prevailing parties to recover attorneys fees when the position of the agency is not substantially justified in an administrative adversary adjudication, are included in chapter 5 of title 5 of the United States Code.

On the basis of these provisions of section 741, USDA has determined that

the provisions of the APA applicable to formal adjudications, as well as EAJA, are applicable to the formal consideration of administrative complaints processed by USDA under section 741. The regulations promulgated below implement a process for eligible complainants to seek an administrative determination on their complaints from USDA under section 741(b) that complies with the requirements of both the APA and EAJA.

Initiating USDA Consideration of a Complaint Under Section 741

In order for a complaint to be processed under these regulations, it must already have been filed with USDA and be an "eligible complaint" as defined in section 741(e). Therefore these regulations presume that there is a pre-existing complaint, and that proceedings under these regulations will be at the request of, or with the consent of, the complainant to consider his or her pre-existing complaint under these procedures. Accordingly, a brief description of the process follows.

The USDA Office of Civil Rights (OCR) has reviewed, or already is in the process of reviewing, many of these eligible complaints. For those already reviewed or in process, OCR automatically will docket them for consideration as "Section 741 Complaint Requests" under these rules. OCR will issue a letter notifying the complainants of this action, and their Section 741 Complain Request docket number, by March 1, 1999. Such a letter also will provide further instructions or options for the individual circumstances of each complainant, and may include an offer of settlement for the complaint.

For those complaints not currently under review by OCR, or for those complainants who do not receive letters by March 29, 1999, notifying them that their complaints have been docketed under these rules, complainants must file a Section 741 Complaint Request with OCR seeking review of his or her complaint under these regulations. OCR will assign the Section 741 Complaint Request a docket number, and will so notify the complainant.

OCR Administrative Review and Settlement Opportunities

Until a complainant elects to request a hearing, the Section 741 Complaint Request will be reviewed by OCR. The intent of these regulations is to provide all eligible complainants with every opportunity to seek administrative (informal and formal) and judicial adjudication of their complaints as permitted by Section 741. The Director

will review all eligible complaints and consider possible settlement opportunities. Specifically, if the Director finds that your complaint is an eligible complaint, the Director will: (1) review all documents and evidence submitted by you; (2) review all agency or OCR files, if any exist, regarding the circumstances surrounding the alleged discrimination; (3) review any damage claims; and (4) seek any further clarification, if necessary, from either you or the agency. OCR also may refer your eligible complaint for a formal investigation by the OCR Program Investigation Division or by an outside contractor. Based on his or her review, the Director will either (1) undertake negotiations with you to resolve the complaint; or (2) inform you that OCR will not settle the complaint and explain to you your rights, including your right to pursue formal proceedings before an ALJ under these rules. If the complaint is successfully resolved or settled, the Director will issue a final determination disposing of the matter and concluding consideration of the complaint under these procedures.

Notwithstanding the informal settlement process, once OCR docketed a complainant's Section 741 Complaint Request, a complainant may request a hearing before an administrative law judge (ALJ) at any time during consideration of his or her complaint under these rules. These rules provide procedures for the conduct of such hearings.

Proceedings Before an Administrative Law Judge

As noted above, the complainant may request a hearing on the record before an ALJ at any time after his Section 741 Complaint Request is docketed. OCR will turn over to the ALJ its entire file on the complaint, and file a report with the ALJ stating its position with respect to whether the complaint is an eligible complaint, and, if so, its position on the merits of the complaint. If the complainant chooses to have an ALJ consider the complaint, he or she may either request that the ALJ render a proposed determination on the written record consisting of the complaint, the Section 741 Complaint Request, the OCR report, and other submissions of the parties, or proceed with a full hearing.

The ALJ will make a proposed decision that may either deny the complaint or sustain the complaint and recommend award to the complainant of such relief as would be afforded under the applicable statute or regulation under which the eligible complaint was filed, notwithstanding any statute of

limitations. The proposed decision of the ALJ will become final within 35 days, unless you request review of the determination by the Assistant Secretary for Administration (ASA). The ASA may also choose to review this on his or her own motion.

Timing of Final Determinations and Judicial Review

Whether with or without a hearing or review by the ASA, the USDA will render a final determination to the maximum extent practicable within 180 days after docketing of the Section 741 Complaint Request. If the complaint is denied by USDA, in whole or in part, the complainant will have at least 180 days to file suit in Federal court seeking a review of the denial, regardless of any applicable statute of limitations.

Determination To Issue an Interim Final Rule

Delay, neglect, and inadequate consideration of these discrimination complaints by USDA in the past created the need for Congress to pass this extraordinary relief statute in the first instance. The waiver of the statute of limitations in section 741(a) is available only for a period of 2 years after the date of enactment which occurred on October 21, 1998. That is, all complaints under section 741 must be filed either in court or with USDA by October 21, 2000. (Those complainants, who initially seek USDA administrative review, then will have 180 days after USDA's issuance of a final determination under section 741 to pursue an action for judicial review even if the USDA review or the 180-day period extends beyond October 21, 2000.) Since less than two years remain for those who allegedly have suffered discrimination to file complaints with USDA, time is of the essence in implementing this procedure as soon as possible. Accordingly, publication of these rules of procedure as interim final, without prior notice and comment, is permissible under either the procedural rules or good cause exceptions to the APA requirement for notice and comment rulemaking. 5 U.S.C. § 553(b)(3) (A) and (B). However, USDA is providing a comment period of 30 days to provide for comment and subsequent modification of this rule, if necessary.

List of Subjects in 7 CFR Part 15f

Administrative practice and procedure, Agriculture, Appeal procedures, Civil rights, Equal access to justice, Ex parte communications, Farmers, Federal aid programs, Guaranteed loans, Insured loans, Loan

programs, Nondiscrimination, Price support programs.

For the reasons set out in the preamble, subtitle A of Title 7 of the Code of Federal Regulations is amended as set forth below:

Part 15f is added to read as follows:

PART 15F—ADJUDICATIONS UNDER SECTION 741

Subpart A—What Is The Purpose Of These Regulations And To Whom And To What Programs Do They Apply?

Sec.

- 15f.1 What is the purpose of these regulations?
 15f.2 Who may use these procedures for processing their discrimination complaint with USDA?
 15f.3 If I want to use these procedures to have USDA consider my complaint, how long will it take for USDA to make a decision?
 15f.4 What do certain words and phrases in these regulations mean?

Subpart B—I Filed A Complaint With USDA Prior To July 1, 1997, How Do I Request That USDA Consider My Complaint Using These Procedures?

- 15f.5 How do I request that USDA consider my complaint under these procedures?
 15f.6 What must I say or include in my Section 741 Complaint Request?
 15f.7 May I be represented by an attorney?

Subpart C—What Happens After I Send In My Request? May I Seek to Resolve My Complaint Informally With OCR?

- 15f.8 What does the Docketing Clerk do with my request?
 15f.9 What will the Director do to settle my Section 741 Complaint Request when it is received?
 15f.10 What if I do not want the Director to review my Section 741 Complaint Request and I want to proceed directly to a hearing?

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- 15f.11 Where must I file a hearing request and what happens to it?
 15f.12 Am I entitled to a hearing in all circumstances?
 15f.13 What is the function of the ALJ and who may communicate with him?
 15f.14 What happens after I file a request for a hearing?
 15f.15 What Happens After the Docketing Clerk Notifies All Parties?
 15f.16 Although I request a hearing, may I request the ALJ to issue a decision without a hearing?
 15f.17 What happens before the hearing?
 15f.18 May I depose potential witnesses?
 15f.19 Other than myself, OCR, and the agency, may any other interested party participate in the proceeding?
 15f.20 May I subpoena witnesses to the hearing?
 15f.21 What rules are applicable to the actual conduct of the hearing?
 15f.22 What happens after the hearing?

15f.23 What will constitute the record for the final determination?

15f.24 When and in what form will a final determination be made on my complaint by USDA?

15f.25 Will USDA pay my attorneys fees if I win?

Subpart E—What If I Do Not Agree With The Final Determination By USDA?

15f.26 May I seek judicial review of the final determination?

Subpart F—How Do I Count Days For Purposes Of Deadlines And What Happens If I Miss A Deadline In These Rules?

15f.27 When is something considered "filed" as required by these rules and to whom do I need to give copies of what I file?

15f.28 When I or someone else has to do something within a certain number of days, how will USDA or the ALJ count the days?

15f.29 May I request an extension of a deadline or may I get relief for missing a deadline in these rules?

Authority: 5 U.S.C. 301; section 101(a) of Pub. L. 105-277, 112 Stat. 2681; Reorganization Plan No. 2 of 1953 (5 U.S.C. App.).

Subpart A—What Is The Purpose Of These Regulations And To Whom And To What Programs Do They Apply?

§ 15f.1 What is the purpose of these regulations?

These regulations provide the rights of complainants and the procedures for the processing of certain nonemployment related complaints alleging discrimination by USDA that were filed with USDA prior to July 1, 1997, as authorized under section 741(b) of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277.

§ 15f.2 Who may use these procedures for processing their discrimination complaint with USDA?

A person may use these procedures if he or she filed a nonemployment related discrimination complaint with USDA prior to July 1, 1997, that alleged discrimination by USDA at any time during the period beginning January 1, 1981 and ending December 31, 1996 :

(a) In violation of the Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*) in administering—

(1) A farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account; or

(2) A housing program established under title V of the Housing Act of 1949; or

(b) In the administration of a commodity program or a disaster assistance program.

§ 15f.3 If I want to use these procedures to have USDA consider my complaint, how long will it take for USDA to make a decision?

To the maximum extent practicable, a final determination under these procedures will be issued within 180 days after you have filed your request.

§ 15f.4 What do certain words and phrases in these regulations mean?

Agency means the USDA agency, office, or committee that the complainant alleges has discriminated against the complainant in the administration of a covered program.

ALJ means an Administrative Law Judge appointed pursuant to the Administrative Procedure Act (5 U.S.C. 557(b)(3), 3105) who presides over a hearing if requested by a complainant.

ASA means the Assistant Secretary for Administration.

Complainant means a person who requests that USDA consider his or her complaint under the procedures of this part.

Complaint means a written document filed with USDA by a person alleging discrimination by USDA under a covered program.

Covered program means:

(1) A farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account;

(2) A housing program established under title V of the Housing Act of 1949; or

(3) A commodity program or disaster assistance program.

Director means the Director of USDA, OCR, or his or her subordinate designee.

Docketing clerk means an employee of the USDA Office of Civil Rights, designated to serve in this capacity.

Eligible complaint means a complaint that was filed with the Department of Agriculture before July 1, 1997, and that alleges discrimination occurring at any time during the period beginning on January 1, 1981 and ending December 31, 1996—

(1) In violation of the Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*) in administering—

(i) A farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account; or

(ii) A housing program established under title V of the Housing Act of 1949; or

(2) In the administration of a commodity program or a disaster assistance program.

Ex parte communication means a prohibited communication between a party to a proceeding and the ALJ outside of the presence of, or without notice to, the other parties to the proceeding, as explained more fully in § 15f.13.

Final determination means the final USDA decision made on your complaint under these rules.

Hearing means a proceeding in which you may present your case before the ALJ.

Interested party means a person, other than the complainant, OCR, and the agency, who has an interest in a proceeding under these rules and is admitted to the proceeding under § 15f.20.

OCR means the USDA Office of Civil Rights.

Party or parties means the complainant, OCR, the agency, or a person admitted to the proceeding as an interested party.

Secretary means the Secretary of Agriculture.

Section 741 means section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277.

Section 741 Complaint Request (or Request) means a request by a complainant to consider his complaint under these rules.

USDA means the United States Department of Agriculture.

Subpart B—I Filed A Complaint With USDA Prior To July 1, 1997, How Do I Request That USDA Consider My Complaint Using These Procedures?

§ 15f.5 How do I request that USDA consider my complaint under these procedures?

In order for USDA to consider your complaint under these procedures, a Section 741 Complaint Request must be docketed with the Docketing Clerk in the USDA OCR.

(a) *Do I have to file a "Section 741 Complaint Request" if USDA is already working on my complaint? Do I have to file again?* If USDA OCR already reviewed or is working on your complaint, you will receive a notice by March 1, 1999, indicating that your complaint automatically has been docketed as a Section 741 Complaint Request for consideration under these

procedures. The notice will provide you with the docket number assigned your Request and will give you further instructions with respect to what options you have or what actions you must take.

(b) *What if USDA is not working on my complaint? If I think USDA has reviewed or is working on my complaint, but do not receive a letter by March 1, 1999, what should I do?* If USDA is not already working on your complaint, or you do not receive a letter from USDA by March 1, 1999, or within 30 days thereafter, you should file a Section 741 Complaint Request with the Docketing Clerk at USDA OCR.

(c) *How long do I have to file my Section 741 Complaint Request?* You have until October 21, 2000 to file your Section 741 Complaint Request.

§ 15f.6 What must I say or include in my Section 741 Complaint Request?

If you must file a Section 741 Complaint Request, it should include a copy of your original complaint, a request in writing that USDA consider the complaint in accordance with these procedures, a statement as to when your complaint was filed with USDA, and any other evidence you consider necessary to prove that your complaint is an eligible complaint suitable for consideration under these procedures.

§ 15f.7 May I be represented by an attorney?

(a) If your Section 741 Complaint Request is automatically docketed as set forth in § 15f.5(a), and you already are represented by counsel of whom you have notified USDA, then this section does not apply.

(b) If you are filing your Section 741 Complaint Request with USDA, and if you are represented by an attorney, your Section 741 Complaint Request should also include an authorization signed by you indicating that the attorney is entitled to represent you on your behalf. If USDA receives such an authorization, all documents in connection with consideration of your complaint under these procedures will be sent to your attorney and not to you.

(c) Once your Section 741 Complaint Request is docketed with USDA, and you afterwards retain an attorney, you should forward an authorization to USDA signed by you indicating that the attorney is entitled to represent you on your behalf. If USDA receives such an authorization, all documents in connection with consideration of your complaint under these procedures will be sent to your attorney and not to you.

Subpart C—What Happens After I Send In My Section 741 Complaint Request? May I Seek to Resolve My Complaint Informally With OCR?

§ 15f.8 What does the Docketing Clerk do with my Section 741 Complaint Request?

All Section 741 Complaint Requests docketed by the OCR Docketing Clerk will be referred to the Director for an informal review. The Director will determine if the complaint is one that can be resolved informally, and, if so, the Director will seek to resolve the complaint informally with the complainant.

§ 15f.9 What will the Director do to settle my Section 741 Complaint Request when it is received?

The Director will review each Section 741 Complaint Request. If the Director finds that your complaint is an eligible complaint, the Director will: review all documents and evidence submitted by you; review all agency or OCR files, if any exist, regarding the circumstances surrounding the alleged discrimination; review any damage claims; and seek any further clarification, if necessary, from either you or the agency. OCR also may refer your eligible complaint for a formal investigation by the OCR, Program Investigation Division or by an outside contractor. Based on his or her review, the Director will either undertake negotiations with you to resolve the complaint; or inform you that OCR will not settle the complaint and explain to you your options, including your right to pursue formal proceedings before an ALJ under subpart D. If the complaint is successfully resolved or settled, the Director will issue a final determination disposing of the matter.

§ 15f.10 What if I do not want the Director to review my Section 741 Complaint Request and I want to proceed directly to a hearing?

If you do not want the Director to review your Section 741 Complaint Request, you may request a hearing following the procedures below in subpart D. You may request a hearing at any time during informal review or negotiations with the Director, or at any time during USDA consideration of your Section 741 Complaint Request.

Subpart D—If I Request A Hearing, What Will Happen? How Will The Hearing Be Conducted?

§ 15f.11 Where must I file a hearing request and what happens to it?

If you desire a hearing, you must file a request for a hearing with the Docketing Clerk, citing the docket

number assigned to your Section 741 Complaint Request. When the Docketing Clerk receives your request for a hearing, your Section 741 Complaint Request will be assigned to an ALJ. The Docketing Clerk will send a notice of your hearing request to OCR and the agency, notifying them of the docket number and the assigned ALJ. The Docketing Clerk also will send you a notice of receipt of the hearing request that will inform you of the name of the assigned ALJ.

§ 15f.12 Am I entitled to a hearing in all circumstances?

Under section 741, you have a right to a hearing as part of the process for USDA to render a final determination on your eligible complaint. However, if at any time the ALJ determines that your complaint is not an eligible complaint, he or she may dismiss your complaint with a final determination and USDA review of your complaint will then have been completed. You also are not entitled to a hearing if there are no material issues of fact in dispute between you and USDA. In other words, if the only dispute remaining is a question of law, you will not receive a hearing and the ALJ will make a final determination under § 15f.16.

§ 15f.13 What is the function of the ALJ and who may communicate with him?

(a) *What are the powers of the ALJ?* The ALJ is responsible for conducting a hearing at your request on your Section 741 Complaint Request. He or she will have all powers prescribed in these rules and will make a proposed determination on your complaint. The proposed determination then will become the final determination after 35 days, unless the ASA reviews the proposed determination.

(b) *What is an ex parte communication?* An *ex parte* communication is a communication by one party to a proceeding with the ALJ outside of the presence of, or without notice to, the other parties to a proceeding. *Ex parte* communications in the proceedings on your complaint are prohibited and will be handled as follows:

(1) The ALJ will not engage in *ex parte* communications regarding the merits of a complaint with any party or with any person having any interest in the proceedings on the complaint, including OCR and any person in an advocacy or investigative capacity, at any time between the assignment of a hearing to him or her and the issuance of a proposed determination. This prohibition does not apply to:

(i) Discussions of procedural matters related to the complaint; or

(ii) Discussions of the merits of the complaint where all parties to the proceeding on the complaint have been given notice and an opportunity to participate.

(2) In the case of a communication described in paragraph (b)(1)(ii) of this section, a memorandum of any such discussion shall be included in the hearing record.

(3) No party to the proceeding or other interested person shall make or knowingly cause to be made to the ALJ an *ex parte* communication relevant to the merits of the complaint.

(4) If the ALJ receives an *ex parte* communication in violation of this section, the ALJ will place in the written record:

(i) All such written communications;

(ii) Memoranda stating the substance of all such oral communications; and

(iii) All written responses to such communications, and memoranda stating the substance of any oral responses to such communications.

(c) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section the ALJ may, to the extent consistent with the interests of justice and the policy underlying these proceedings, require the party or other interested person making the communication to show cause why such party's claim or interest in the complaint should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

§ 15f.14 What happens after I file a request for a hearing?

Within 20 days after you have filed your request for a hearing, ALJ shall file with the Docketing Clerk a notice stating the time, place, and manner of the hearing. The ALJ will have due regard for the public interest and the convenience and necessity of the parties in determining the time, place, and manner of the hearing. The notice will state whether the hearing will be conducted by telephone, audiovisual telecommunication, or personal attendance of any individual expected to participate in the hearing. The Docketing Clerk will send copies of the notice to the complainant and to all other parties to the proceeding.

§ 15f.15 What happens after the Docketing Clerk notifies all parties?

The first step in this process involves a response to your hearing request by OCR. OCR will turn over its entire file on your complaint to the ALJ. OCR also

will file a report with the ALJ stating its position with respect to whether or not your complaint is an eligible complaint, with reasons for its position, as well as stating its position with respect to the merits of your complaint. OCR must turn over its file and make its report on its position on your complaint within 35 days. OCR must provide a copy to you of anything it provides to the ALJ.

§ 15f.16 Although I request a hearing, may I request the ALJ to issue a decision without a hearing?

(a) At any time after the parties have been notified of your hearing request, you may file a request with the ALJ to make a determination based on the written record. With your request, you should file any other arguments or evidence that you wish the ALJ to consider. The agency and OCR will have 35 days after you file your request to file any additional information, arguments, or evidence for the consideration of the ALJ. The ALJ may recommend dismissal of your complaint on the basis of a finding that it is not an eligible complaint; recommend denial of your eligible complaint on the merits; or make a proposed finding of discrimination on your eligible complaint and recommend to award you such relief as would be afforded under the applicable statute or regulation under which the eligible complaint was filed. The ALJ will make a proposed determination on your complaint based on the original complaint, the Section 741 Complaint Request, the OCR report, and any other evidence or written documents filed by the parties. The proposed determination will become the final determination 35 days after it is filed unless you request review of the proposed determination by the ASA. The ASA also may review the proposed determination on his or her own initiative. If the ASA reviews the decision, he or she will allow the parties a reasonable opportunity to file briefs in support of or opposition to the proposed determination, and afterwards will issue a final determination within 35 days after you request review of the proposed determination.

(b) To the maximum extent practicable, a final determination will be made within 180 days of your filing of the Section 741 Complaint Request.

§ 15f.17 What happens before the hearing?

(a) *Do I need to file another answer or pre-hearing brief?* You may file a pre-hearing brief in support of your complaint.

(b) *Will there be a pre-hearing conference?* The ALJ may hold a pre-hearing conference. If such a conference

is to be held, the notice of the pre-hearing conference also will contain a notice to the parties of a time and date for the pre-hearing conference. Pre-hearing conferences normally will be held by telephone. Issues that may be addressed at the pre-hearing conference may include: simplification of the issues; the possibility of obtaining stipulations of fact and of the authenticity of documents; limitation of the number of witnesses; exchange of copies of hearing exhibits; negotiation, compromise or settlement of issues; identification of documents of which official notice will be requested; a schedule for completion of the actions decided upon at the conference; and any other matters that may aid and expedite the conclusion of the proceeding. No transcript of the pre-hearing conference will be made but the ALJ will issue a written memorandum summarizing the results of the pre-hearing conference.

(c) *What else may the ALJ ask for before the hearing?* Prior to the hearing, the ALJ may require each of the parties to furnish any or all of the following: an outline of a party's position with respect to the complaint, the facts upon which the party intends to rely, the legal theories upon which the party intends to rely, copies of or a list of the documents and exhibits which the party anticipates on introducing at the hearing, and a list of anticipated witnesses.

§ 15f.18 May I depose potential witnesses?

(a) A party may request an order from the ALJ to take the testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence. The application for the order must specify the reason and need for taking testimony by deposition.

(b) The time, place, and manner of taking depositions will be as mutually agreed by the parties, or failing agreement, by order of the ALJ.

(c) No testimony taken by depositions will be considered as part of the evidence in the hearing until such testimony is offered and received in evidence at the hearing, and ordinarily it will not be received into evidence if the deponent is present and can testify at the hearing. However, when the deponent is present and can testify, the deposition may be used to contradict or impeach the testimony of the deponent given at the hearing. Where you have requested a final determination by the ALJ based on the written record without a hearing, the ALJ, in his or her

discretion, may receive depositions to supplement the record.

(d) Each party will bear its own expenses associated with the taking of any deposition.

§ 15f.19 Other than myself, OCR, and the agency, may any other interested party participate in the proceeding?

In most cases, there will be no parties to a proceeding under these rules, other than the complainant, OCR, and, and if it so desires, the agency. However, if there are circumstances in which additional parties have an interest in the proceeding, such as a bank which participated in a case involving a guaranteed loan, such other interested parties may be permitted to participate in the proceeding at the discretion of the ALJ.

§ 15f.20 May I subpoena witnesses to the hearings?

No. USDA has no statutory authority to subpoena witnesses to testify at the hearing.

§ 15f.21 What rules are applicable to the actual conduct of the hearing?

(a) *Who may appear at the hearing?* You may appear at the hearing in person or through your attorney. OCR and the agency will appear through a designated representative, which may include a USDA attorney. Any person who appears as counsel must conform to the standards of ethical conduct required of practitioners before the courts of the United States.

(b) *What happens if I fail to show up?* If, after having received notice of the hearing under § 15f.14, you fail to appear at the hearing without good cause, you will have waived your right to a hearing in the proceeding and the ALJ may proceed to issue a final determination based on the written record as provided for under § 15f.16.

(c) *Which party presents its case first at the hearing?* You, as the complainant, will proceed first at the proceeding, unless otherwise determined by the ALJ.

(d) *What kind of evidence will be admitted and how will it be handled?* (1) *In general.* The hearing will be conducted by the ALJ in the manner he or she determines most likely to obtain the facts relevant to the matter or matters at issue. The ALJ may confine the presentation of facts and evidence to pertinent matters and exclude irrelevant, immaterial, or unduly repetitious evidence, information, or questions. Each party will have the opportunity to present oral and documentary evidence, oral testimony of witnesses, and arguments in support of the party's position; controvert evidence relied on by any other party;

and question all witnesses. The testimony of witnesses at a hearing will be on oath or affirmation and will be subject to cross-examination. Any evidence may be received by the ALJ without regard to whether that evidence could be admitted in judicial proceedings. Upon a finding of good cause, the ALJ may order that any witness be examined separately and apart from all other witnesses except those who may be parties to the proceeding.

(2) *Objections.* (i) If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross-examination or to any other ruling of the ALJ, the party must state briefly the grounds of such objection.

(ii) Only objections made before the ALJ may subsequently be relied upon in the proceeding.

(3) *Depositions.* The deposition of any witness will be admitted in the manner provided in and subject to the provisions of § 15f.18(c) of these rules.

(4) *Exhibits.* Unless the ALJ finds that the furnishing of copies is impracticable, two copies of each exhibit must be filed with the ALJ. A party submitting an exhibit must provide every other party (except interested parties) a copy of the exhibit one week before the hearing. A true copy of an exhibit may be substituted for the original.

(5) *Official records or documents.* An official government record or document or entry therein, if admissible for any purpose, will be admissible in evidence without the production of the person who made or prepared the same, and will be *prima facie* evidence of the relevant facts stated therein. Such record or document must be evidenced by an official publication thereof or a copy certified by a person having legal authority to make such certification.

(6) *Official notice.* Official notice will be taken of such matters as are judicially noted by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character if the parties are given adequate notice of matters so noticed, and the parties will be given adequate opportunity to show that such facts are erroneously noticed.

(7) *Offer of proof.* Whenever evidence is excluded by the ALJ, the party offering such evidence may make an offer of proof, which must be included in the transcript. The offer of proof should consist of a brief statement describing the evidence excluded. If the evidence consists of a brief oral statement, it must be included in the transcript in its entirety. If the evidence

consists of an exhibit, it must be marked for identification and inserted in the hearing record.

(8) *Interlocutory review.* Interlocutory review of rulings by the ALJ will not be permitted.

(9) *Transcript or recording.* (i) Hearings to be conducted by telephone will be recorded verbatim by electronic recording device. Hearings conducted by audio-visual telecommunication or by the personal attendance of parties and witnesses must be transcribed, unless the ALJ finds that recording the hearing verbatim would expedite the proceeding and the ALJ orders the hearing to be recorded verbatim. The ALJ must certify that to the best of his or her knowledge and belief any recording made pursuant to this paragraph with exhibits that were accepted into evidence is the record of the hearing.

(ii) If a hearing is recorded verbatim, a party requests the transcript of a hearing or part of a hearing, and the ALJ determines that the disposition of the proceeding would be expedited by a transcript of the hearing or part of a hearing, the ALJ shall order the verbatim transcription of the recording as requested by the party.

(iii) The costs of transcription or verbatim recordings will be paid for by USDA and charged to the agency whose action gave rise to the complaint at issue. Copies of recordings or transcripts of hearings will be made available to any party at the actual cost of duplication.

§ 15f.22 What happens after the hearing?

The ALJ will fix a reasonable time for filing posthearing briefs, proposed findings of fact and conclusions of law, and if permitted, reply briefs. Briefs should include a summary of evidence relied upon together with references to exhibit numbers and citations to the transcript and authorities relied upon. Briefs must be filed with the Docketing Clerk with copies to all parties.

§ 15f.23 What will constitute the record for the final determination?

The original complaint, the Section 741 Complaint Request, the OCR report, the agency answer, the transcript of testimony, exhibits, affidavits, depositions, briefs, memoranda of law, and all pleadings, motions, papers, and requests filed in the proceeding, including rulings, and the proposed determination by an ALJ (if applicable) shall constitute the exclusive record for the final determination.

§ 15f.24 When and in what form will a final determination be made on my complaint by USDA?

(a) The ALJ will make a proposed determination orally at the close of a hearing, or in writing within 35 days. The ALJ may recommend dismissal of your complaint on the basis of a finding that it is not an eligible complaint; recommend denial of your eligible complaint on the merits; or make a proposed finding of discrimination on your eligible complaint and recommend to award you such relief as would be afforded under the applicable statute or regulation under which the eligible complaint was filed. The proposed determination will become the final determination 35 days after it is made, unless you request review of the proposed determination by the ASA. The ASA also may review the proposed determination on his or her own initiative. If the ASA reviews the proposed determination, he or she will allow the parties a reasonable opportunity to file briefs in support or opposition to the proposed determination, and afterwards file a final determination within 35 days after you request review of the proposed determination.

(b) To the maximum extent practicable, a final determination will be filed within 180 days after you filed your Section 741 Complaint Request.

§ 15f.25 Will USDA pay my attorneys fees if I win?

If you prevail on your eligible complaint, either in whole or in part, after a proceeding before an ALJ under the procedures in this subpart, you may be eligible for an award of attorneys fees as a prevailing party under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504. To get an EAJA award, you must file an application for such fees with the ALJ within 30 days after the final determination is made. Instructions for filing an EAJA application and obtaining an EAJA award are contained in 7 CFR part 1, subpart J. The ALJ must follow those rules, and not these Section 741 Complaint Request rules, in making any EAJA award.

Subpart E—What If I Do Not Agree With The Final Determination by USDA?

§ 15f.26 May I seek judicial review of the final determination?

Section 741 provides that you have at least 180 days after a final determination denying your eligible

complaint under these rules to seek judicial review in the United States Court of Federal Claims or a United States District Court of competent jurisdiction.

Subpart F—How Do I Count Days For Purposes Of Deadlines and What Happens If I Miss A Deadline In These Rules?

§ 15f.27 When is something considered “filed” as required by these rules and to whom do I need to give copies of what I file?

A document, or other item, that must be “filed” under these rules is considered filed when postmarked or when it is received and date-stamped by the Docketing Clerk.

§ 15f.28 When I or someone else has to do something within a certain number of days, how will USDA or the ALJ count the days?

Unless otherwise specifically noted, a “day” refers to a calendar day and a document that must be filed by a certain date must either be postmarked on that date or received by the Docketing Clerk on that date. For documents that must be or are “filed” under these regulations, you count the number of days after filing starting with the day after the filing date as day one. For other time periods, you calculate the time period by counting the day after receipt by the party as day one. If the last day of a time period expires on a Saturday, a Sunday, or a Federal holiday, the last day of the time period will expire on the next business day.

§ 15f.29 May I request an extension of a deadline or may I get relief for missing a deadline in these rules?

You may request that the ALJ extend a deadline in these rules, or afford you relief for missing a deadline, which he or she may do, consistent with the principles of sovereign immunity, the terms of any applicable statute, these rules, and the necessity of expeditious completion of the public business. It is the intent of USDA that the time deadlines expressed in these regulations be construed equitably to ensure resolution of eligible complaints, to the extent permitted by law.

Done at Washington, D.C., this 30th day of November, 1998.

Dan Glickman,

Secretary of Agriculture.

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