

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:00CV02445
)	
MICHAEL JOHANNNS, Secretary of)	Judge: James Robertson
Agriculture,)	
)	
Defendant.)	
_____)	

**DEFENDANT’S SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS’
REQUEST FOR ADMINISTRATIVE PROCEDURE ACT REVIEW**

The August 28, 2007 Notice to Counsel invited the parties to address the issue of what specific regulatory provisions, and in particular, the procedures contemplated by (1) 7 U.S.C. § 2279 Note, (2) 7 C.F.R. Part 15f, and (3) Departmental Regulation (“DR”) 4330-003,¹ are relevant to the question of whether plaintiffs state a valid claim under the Administrative Procedure Act (“APA”), and how, or if, they should be applied given their changing nature over time. The only regulatory provisions relevant to the validity of plaintiffs’ alleged APA claim that defendant failed to investigate their civil rights complaints are those which were in effect at the time each particular claim arose. However, as explained in Defendant’s Opposition to Plaintiffs’ Request for Administrative Procedure Act Review at 10-13, none of those provisions supply any “judicially manageable standards” for processing civil rights complaints such that judicial review is possible. Heckler v. Chaney, 470 U.S. 821 830 (1985); see 5 U.S.C.

¹ Defendant believes that the reference to DR 4033-3 in the Court’s Notice to Counsel was intended to refer to DR 4330-003, because there is no DR 4033-3.

§ 701(a)(2).

None of the regulatory provisions listed by the Court in its Notice to Counsel are relevant to plaintiffs' claims that are at issue. Section 741 extended by two years from its date of enactment (October 21, 1998) the statute of limitations for filing "eligible" discrimination complaints, *i.e.*, those originally filed before July 1, 1997, alleging discrimination between January 1, 1981, and December 31, 1996. Congress enacted Section 741 to remedy what it viewed as USDA's past failure to process claims in a timely fashion. Love v. Veneman, No. 00-2502 (D.D.C. Dec. 13, 2001), Memorandum at 14 (finding that Congress extended the statute of limitations "precisely because of USDA's failure to investigate"); see also H.R. Rep. No. 105-593 at 2. Section 741 in effect gave claimants a two-year window within which to renew those claims by either (a) filing a civil action in court, or (b) seeking an administrative determination from USDA. Section 741(a), (b). By filing the present action in this Court on October 13, 2000, all of the plaintiffs in this case chose option (a).

Persons who chose option (b) and sought an administrative determination are not associated with this lawsuit. For them, Section 741 provides general standards for the processing of their administrative complaints. See 7 U.S.C. § 2279 Note, Section 741(b) (requiring the provision of a hearing, appropriate relief, and an investigation with a written determination and proposed resolution). The regulations implementing Section 741, 7 C.F.R. Part 15f; see also 63 Fed. Reg. 67392, set forth more extensive procedures for processing the administrative complaints, but again, those regulations pertain only to claimants who elected to seek an administrative determination from USDA "as authorized under section 741(b)." 7 C.F.R. § 15f.1; see also 63 Fed. Reg. 67392 (Dec. 4, 1998) (stating that the regulations "implement a

process for eligible complainants to seek an administrative determination on their complaints from USDA under section 741(b)"). None of these procedures are applicable to the instant plaintiffs' claims since plaintiffs elected option (a) of Section 741 and filed suit in federal Court. The procedures in internal DR 4330-003, § 10 (March 3, 1999), do not implement Part 15f at all, but rather, implement the standard conducted complaint process in Part 15d. See DR 4330-003, § 5(b)(2) (listing as its authority "7 CFR Part 15, Nondiscrimination in USDA-conducted programs and activities"); 7 C.F.R. Part 15d ("Nondiscrimination in Programs or Activities Conducted by the United States Department of Agriculture"). In any event, DR 4330-003 only applies prospectively to the processing of administrative complaints. Thus, none of the regulatory provisions cited by the Court are relevant to the question of whether plaintiffs state a valid claim under the APA with respect to their failure-to-investigate allegations.

Even assuming, purely for the sake of argument, that the administrative procedures established by Section 741 and the ensuing regulations do provide applicable standards for processing civil rights complaints such that judicial review is not precluded by 5 U.S.C. § 701(a)(2), plaintiffs' claims still evade judicial review. An adequate remedy specifically created by Congress is available to plaintiffs under ECOA for their failure-to-investigate claims, 15 U.S.C. § 1691 et seq. Therefore, the APA does not waive sovereign immunity with respect to them. 5 U.S.C. § 704.

CONCLUSION

For the foregoing reasons, plaintiffs' request for APA review should be denied.

Respectfully submitted,

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