

§ 42.213

period after notification under § 42.208, the State government or unit of local government may request an expedited preliminary hearing on the record in accordance with 5 U.S.C. 554 in order to determine whether it is likely that the State government or unit of local government would, at a full hearing under § 42.213, prevail on the merits on the issue of the alleged noncompliance.

(b) The preliminary hearing shall be initiated within 30 days of request. The ALJ shall make his finding within 15 days after the conclusion of the preliminary hearing.

§ 42.213 Full hearing.

(a) At any time after notification of noncompliance under § 42.208, but before the conclusion of the 120-day suspension period referred to in § 42.210, a State government or unit of general local government may request a hearing on the record in accordance with 5 U.S.C. 554 in order to contest the findings of determination of noncompliance made under § 42.208. The Office shall initiate the hearing within 60 days of request.

(b) Within 30 days after the conclusion of the hearing, or, in the absence of a hearing, at the conclusion of the 120-day period referred to in § 42.210, the Director of OJARS shall make a finding of compliance or noncompliance.

(1) If the Director makes a finding of noncompliance, the Director shall:

(i) Notify the Attorney General in order that the Attorney General may institute a civil action under section 815(c)(3) of the JSIA;

(ii) Cause to have terminated the payment of funds under the JSIA and/or the Juvenile Justice Act; and

(iii) If appropriate, seek repayment of funds.

(2) If the Director makes a finding of compliance, payment of the suspended funds and reconsideration of applications shall resume.

§ 42.214 Judicial review.

Any State government or unit of general local government aggrieved by a final determination of the Office under § 42.213 may appeal such determination as provided in section 805 of the JSIA.

28 CFR Ch. I (7-1-04 Edition)

§ 42.215 Other actions authorized under the JSIA.

(a) The Director of OJARS may, at any time, request the Attorney General to file suit to enforce compliance with section 815(c)(1). OJARS will monitor the litigation through the court docket and liaison with the Civil Rights Division of the Department of Justice. Where the litigation does not result in timely resolution of the matter, and funds have not been suspended pursuant to § 42.215(b), OJARS will institute administrative proceedings unless enjoined from doing so by the court.

(b)(1) Whenever the Attorney General files a civil action alleging a pattern or practice of discriminatory conduct on the basis of race, color, religion, national origin, or sex in any program or activity of a State government or unit of local government which State government or unit of local government receives funds made available under the JSIA or the Juvenile Justice Act and the conduct allegedly violates or would violate the provisions of this subpart or section 815(c)(1) of the JSIA and neither party within 45 days after such filing has been granted such preliminary relief with regard to the suspension or payment of funds as may otherwise be available by law, the Director of OJARS shall suspend further payment of any funds under the JSIA and the Juvenile Justice Act to that specific program or activity alleged by the Attorney General to be in violation of the provisions of section 815(c)(1) of the JSIA until such time as the court orders resumption of payment.

(2) The Office expects that preliminary relief authorized by this subsection will not be granted unless the party making application for such relief meets the standards for a preliminary injunction.

(c)(1) Whenever a State government or unit of local government or any officer or employee thereof acting in an official capacity, has engaged or is engaging in any act or practice prohibited by section 815(c)(1) of the JSIA, a civil action may be instituted after exhaustion of administrative remedies by the person aggrieved in an appropriate U.S. District Court or in a State court or general jurisdiction.

(2) Administrative remedies shall be deemed to be exhausted upon the expiration of 60 days after the date the administrative complaint was filed with the Office or any other administrative enforcement agency, unless within such period there has been a determination by the Office or the agency on the merits of the complaint, in which case such remedies shall be deemed exhausted at the time the determination becomes final.

(3) The Attorney General, or a specifically designated assistant for or in the name of the United States may intervene upon timely application in any civil action brought to enforce compliance with section 815(c)(1) of the JSIA if he certifies that the action is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action.

APPENDIX A TO SUBPART D OF PART 42—
COMMENTARY

Section 42.201(c). The compliance enforcement mechanism of section 815(c)(2) applies by its terms to State and local government. The prohibitions in section 815(c)(1), however, apply to all recipients of OJARS assistance. Accordingly, where a private entity which has received LEAA, NIJ, or BJS assistance through a State or local unit of government is determined by OJARS to be in non-compliance, OJARS will invoke the section 815(c)(2) mechanism against the appropriate unit of government for its failure to enforce the assurances of compliance given it by the private recipient, unless the unit has initiated its own compliance action against the private recipient. The fund termination procedures of section 803(a) will be invoked against non-complying private recipients which receive assistance directly from LEAA, NIJ, or BJS, or through another private entity.

Section 42.202(g). Section 815(c)(1) of the JSIA limits suspension and termination of assistance in the event of noncompliance to the “programs or activity” in which the non-compliance is found. The phrase “program or activity” was first used in section 815(c)(1) of the Crime Control Act of 1976, the substantially identical predecessor to section 815(c)(1).

House Report No. 94-1155 (94th Congress, 2d Session), at p. 26, explained the provision as follows:

“Suspension may be limited to the specific program or activity found to have discriminated, rather than all of the recipients’ LEAA funds.

“For example, if discriminatory employment practices in a city’s police department were cited in the notification, LEAA may only suspend that part of the city’s payments which fund the police department. LEAA may not suspend the city’s LEAA funds which are used in the city courts, prisons, or juvenile justice agencies.”

This passage makes it clear that OJARS need not demonstrate a nexus between the particular project funded and the discriminatory activity. See *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

Sections 42.203(b) and 42.203(e-i). These provisions are derived from 28 CFR 42.104(b) of subpart C of the Department of Justice Non-discrimination Regulations. Where appropriate “sex” and “religion” have been added as prohibited grounds of discrimination, and “denial of employment” as another activity within the scope of section 815(c)(1).

Individual projects benefiting a particular sex, race, or ethnic group are not violative of section 815(c)(1) unless the granting agency or the recipient has engaged in a pattern of granting preferential treatment to one such group, and cannot justify the preference on the basis of a compelling governmental interest, in the case of racial or ethnic discrimination, or a substantial relationship to an important governmental function, in the case of sex discrimination.

Section 42.203(b)(10). On August 25, 1978, the Department of Justice, the Equal Employment Opportunity Commission, the Department of Labor and the then-Civil Service Commission published the Uniform Employee Selection Guidelines codified at 28 CFR 50.14. Since OJARS is a component of the Department, these guidelines are applicable to the selection procedures of LEAA, NIJ, and BJS recipients. See 44 FR 11996 (March 2, 1979) for a detailed commentary on the guidelines.

Section 42.203(c). In the Conference Report on section 518(c) of the Crime Control Act (the substantially identical predecessor of section 815(c)), the managers stated that “In the area of employment cases brought under this section, it is intended by the conferees that the standards of title VII of the Civil Rights Act of 1964 apply.” H. Rept. No. 94-1723 (94th Cong., 2d Sess.) at p. 32.

This section makes the OJARS standards of employment discrimination consistent with those used by the Civil Rights Division of the Department of Justice. It further clarifies that the burden shifts to the employer to validate its selection procedures once OJARS has demonstrated that those procedures disproportionately exclude an affected class. Discriminatory purpose on the part of the employer, which must be shown before the burden shifts in a Fourteenth Amendment case such as *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040 (1976), need

not be shown in an employment discrimination case brought under section 815(c)(1).

Section 42.203(j). Section 815(b) of the JSIA reads:

“Notwithstanding any other provision of law, nothing contained in this title shall be construed to authorize the National Institute of Justice, the Bureau of Justice Statistics, or the Law Enforcement Assistance Administration (1) to require, or condition the availability or amount of a grant upon the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or other program to achieve racial balance in any criminal justice agency; or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program.”

In commenting on the Crime Control Act of 1976, Senator Roman Hruska of Nebraska explained the difference between quotas and goals and timetables as follows:

“Section 518(b) [now 815(b)] of the act prohibits the setting of quotas. This provision was unchanged, and this provision will still bind the Administration.

“LEAA does have an affirmative obligation under this law to seek to eliminate discriminatory practices, voluntarily, if possible, prior to resorting to fund termination. LEAA can request that a recipient eliminate the effect of past discrimination by requiring the recipient to commit itself to goals and timetables. The formulation of goals is not a quota prohibited by section 518(b) of the act. A goal is a numerical objective fixed realistically in terms of the number of vacancies expected and the number of qualified applicants available. Factors such as a lower attrition rate than expected, bona fide fiscal restraints, or a lack of qualified applicants would be acceptable reasons for not meeting a goal that has been established and no sanctions would accrue under the program.” Cong. Rec. S 17320 (September 30, 1976, daily ed.).

The Senate Judiciary Committee Report on the JSIA also emphasized that section 815(b) does not “undercut subsection (c) in any way; subsection (b) has been interpreted so as not to limit LEAA’s anti-discrimination enforcement capabilities. Indeed, recent court decisions have made this abundantly clear. See, e.g., *United States v. City of Los Angeles*, No. 77-3460 (C.D. Cal. 2/1/79).” S. Rept. 96-142, p. 57.

See also the Equal Employment Opportunity Commission Affirmative Action Guidelines, 44 FR 4422 (January 19, 1979).

Section 42.204. All grantees and subgrantees must make the assurances found in paragraph (a). Only State and local units of government and agencies thereof must make the assurance found in paragraph (c), since, as explained in the commentary on §42.201(c), the enforcement provisions of section

815(c)(2) apply only to governmental recipients.

Section 42.205(a). Where information available to the Office clearly and convincingly demonstrates that the complaint is frivolous or otherwise without merit, the complaint will not be investigated, and the complainant will be so advised.

Section 42.205(b). A one-year timeliness requirement is imposed to ensure that OJARS will be devoting its resources to the resolution of active issues, and to maximize the possibility that necessary witnesses and evidence are still available.

Examples of good cause which would clearly warrant an extension of the filing period are a statement from the complainant stating that he or she was unaware of the discrimination until after a year had passed, or that he or she was not aware that a remedy was available through OJARS.

Section 42.205(c)(1). Jurisdiction exists if the complaint alleges discrimination on a ground prohibited by section 815(c)(1), if the recipient was receiving funds at the time of the discrimination, and the respondent named in the complaint is a current recipient of LEAA, NIJ, or BJS assistance.

Prior to a determination of noncompliance, OJARS will attempt to negotiate voluntary compliance only during the 30-day period following receipt of the Office’s preliminary findings, and only at the request of the recipient, as provided in §42.205(c)(3). If a determination of noncompliance is made, OJARS will participate in voluntary compliance efforts during the 90-day period following the letter sent to the chief executive(s) under section 42.208.

Sections 42.205(c)(3) and (4) and 42.206(e). OJARS will notify the appropriate chief executive(s) of its recommendations during the voluntary resolution phase of both the complaint investigation and compliance review process. OJARS expects that the early involvement of the chief executive will often expedite the resolution of issues.

Section 42.205(c)(5). OJARS will initiate an investigation if the litigation discussed in this subparagraph becomes protracted or apparently will not resolve the matter within a reasonable time.

Section 42.205(c)(6). In order to effectively utilize the resources of other agencies, and to avoid duplication of effort, OJARS may request another agency to act on a particular complaint. OJARS expects this practice to be limited, and will attempt to ensure that any cooperative agreement reached with another agency is consistent with the timetables set forth in §42.205(c).

Section 42.206(a). OJARS recognizes the practical impossibility of reviewing the compliance of each of its more than 39,000 recipients. The regulations seek to expedite the review process by reducing its length and narrowing its focus. Compliance reviews may, in

some instances, be limited to specific employment practices, or other functions of a recipient, that appear to have the greatest adverse impact on an affected class.

Section 42.206(b). The factors listed will be considered cumulatively by OJARS in selecting recipients for reviews. OJARS will consider data from all sources, including information provided by both internal and external auditors.

Section 42.208(b). Upon receipt of the publications listed, OJARS will review the case reports for findings that may be violations of section 815(c)(1). In the case of the West Publishing Company reporters, OJARS will consult the topic "Civil Rights" in the Key Number Digests contained in the advance sheets.

Section 42.208(e). This subsection sets forth the minimum procedural safeguards that OJARS would require of an administrative hearing to assure the process was consistent with the Administrative Procedure Act. The sufficiency of other procedures that may vary in form but insure due process and the same opportunity for a fair hearing of both parties' evidence will be determined by OJARS on a case-by-case basis.

The Office will compile a list of State agencies whose procedures have been found consistent with the Administrative Procedure Act, and a list of State agencies whose procedures have been found inconsistent. When a finding of an agency not on either list is received, the Office will attempt to reliably determine the procedures used to render the findings.

Section 42.209(a). Although the signature of the appropriate chief executives are ultimately required on the compliance agreement, these regulations do not preclude them from delegating the responsibility for securing compliance during the 90-day period following notification, to State or local administrative or human rights agencies under their respective authority. A compliance agreement may be an agreement to comply over a period of time, particularly in complex cases or where compliance would require an extended period of time for implementation.

Section 42.209(b). The regulations require that a copy of the proposed compliance agreement be sent to the complainant, if any, before the effective date of the agreement. Although the Act would permit a copy to be sent as late as the effective date, OJARS believes the compliance agreement would be more likely to resolve all concerns and discourage litigation if the complainant's views were considered before it took effect.

Section 42.211(b). An example of a case where compliance would require an extended period of time for implementation would be a court order setting a goal of five years for an employer to raise the percentage of minorities in its workforce to parity with the

percentage of minorities in the relevant geographical labor force.

Section 42.213. The full hearing will be conducted in accordance with JSIA Hearing and Appeal Procedures, 28 CFR 18.1, *et seq.*

Section 42.215(a). In a December 20, 1976 letter to the Administrator of LEAA, Congressman Peter Rodino, Chairman of the House Judiciary Committee, commented on the regulations proposed to implement the substantially identical nondiscrimination provisions of the Crime Control Act. He advised the Administrator that "the committee intentionally omitted the word 'refer' from the law to ensure that LEAA would always retain administrative jurisdiction over a complaint filed with them. It is not appropriate for LEAA to refer cases to the Civil Rights Division or other Federal or State agencies without monitoring the case for prompt resolution."

Section 42.215(c)(2). The exhaustion of administrative remedies at the end of 60 days (unless the Office has made a determination) does not limit OJARS' authority to investigate a complaint after the expiration of that period. OJARS will continue to investigate the complaint after the end of the 60-day period, if necessary, in accordance with the provisions of § 42.205.

Subpart E—Equal Employment Opportunity Program Guidelines

AUTHORITY: Sec. 501 of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197, as amended.

SOURCE: 43 FR 28802, June 30, 1978, unless otherwise noted.

§ 42.301 Purpose.

The experience of the Law Enforcement Assistance Administration in implementing its responsibilities under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Pub. L. 90-351, 82 Stat. 197; Pub. L. 91-644, 84 Stat. 1881) has demonstrated that the full and equal participation of women and minority individuals in employment opportunities in the criminal justice system is a necessary component to the Safe Streets Act's program to reduce crime and delinquency in the United States.

§ 42.302 Application.

(a) *Recipient* means any State or local unit of government or agency thereof, and any private entity, institution, or organization, to which Federal financial assistance is extended directly, or