



United States  
Department of  
Agriculture

Office of the  
Assistant Secretary  
for Administration

Office of  
Civil Rights

1400 Independence  
Avenue SW

Washington, DC  
20250

## DECISION MEMORANDUM FOR THE SECRETARY

**THROUGH:** Paul W. Fiddick  
Assistant Secretary  
for Administration

SEP 29 2000

**FROM:** Rosalind D. Gray  
Director  
Office of Civil Rights

SEP 18 2000

**SUBJECT:** Sexual Orientation Nondiscrimination and Diversity at the  
Department of Agriculture (USDA)

### ISSUE:

Whether USDA should accept the recommendations made in the Second USDA Task Force Report on Sexual Orientation.

### BACKGROUND:

The Director, Office of Civil Rights (CR), convened the Second USDA Task Force on Sexual Orientation in July, 1999. This task force was charged to review, update, and modify the findings published in 1994 by the First USDA Task Force on Sexual Orientation. The May 23, 2000, Second Task Force report made 20 specific recommendations (attached). The recommendations were designed to help the Department prevent harassment and discrimination against sexual minorities, promote the full acceptance and open service of gay, lesbian, bisexual, and transgendered (GLBT) employees, and provide full access to USDA programs by GLBT customers.

On June 13, 2000, you spoke at the Department's annual Gay and Lesbian Pride Month celebration and discussed the task force report. You indicated that while an entire review of the document had not been completed, you were directing that action be taken on three of the 20 recommendations. You directed the Assistant Secretary for Administration (ASA) to: (1) broaden the Department's Workplace Violence Prevention and Response Program to include hate crimes; (2) draw up plans to establish a "Safe Space" program within the Department, and (3) investigate the feasibility of authorizing the payment of relocation expenses for domestic partners of employees moved by the Department.

In your June 29, 2000, civil rights address, you announced the establishment of five new employee advisory committees, which would comprise, along with the Hispanic

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Advisory Council and the Secretary's Advisory Committee on Employees with Disabilities, the Diversity Advisory Council. An advisory committee based on sexual orientation will have Diversity Advisory Council representation.

### DISCUSSION:

The ASA distributed the task force report to all Departmental Mission Areas and Agencies and requested their review and comments. Responses have been received from 13 offices and agencies. All of the responses either fully supported the recommendations of the report or supported most of the recommendations with certain exceptions. The most notable exceptions raised concerns regarding the Department's authority to expand our policies with regard to sexual orientation nondiscrimination in employee benefits and program delivery. Additionally, some comments pointed to the need for more USDA-specific research to either validate or expand upon the conclusions of the report.

CR has reviewed the task force report, its recommendations, and the comments received from within the Department. Based on our assessment, we have divided the 20 task force recommendations into four categories:

- I. Actions already initiated. Six of the 20 recommendations have already been directly or indirectly initiated.
  - A. You began the process of implementing the recommendations by:
    - 1) Speaking at the USDA Gay and Lesbian Pride Month celebration and indicating your desire that actions be taken based on the task force report (Recommendation 1);
    - 2) Charging the ASA with pursuing this initiative (Recommendation 2), and
    - 3) Establishing an ongoing forum for addressing GLBT issues through an employee advisory committee (Recommendations 16 and 20).
  - B. CR provided sexual orientation training:
    - 1) For Civil Rights Directors on July 19, 2000, (Recommendation 13), and
    - 2) For all employees through the ongoing Phase II civil rights training (Recommendation 15).
- II. Actions achievable with minimal effort. Four of the 20 recommendations are readily achievable by modifying current Departmental procedures or activities:

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- A. As you previously requested, the Department's Workplace Violence Prevention and Response handbook and training program be modified to include a discussion of hate crimes (Recommendation 6);
  - B. Departmental Regulation 4300-7 (Processing EEO Complaints of Discrimination) could incorporate an additional segment for processing EEO complaints (internally) on sexual orientation (Recommendation 7);
  - C. The current Departmental exit interview process has been revised to collect more meaningful Department-wide data on USDA's cultural environment and employee reasons for separation (Recommendation 18), and
  - D. Agencies should incorporate in their vacancy announcements and publications appropriate nondiscrimination statements (Recommendation 19).
- III. Actions achievable with developmental work. Five of the 20 recommendations may be implemented but will require a period of further development. These include:
- A. The "Safe Space" program you have already endorsed (Recommendation 5);
  - B. An employee brochure on sexual orientation civil rights and diversity issues (Recommendation 10);
  - C. An employee manual on avenues of redress for discrimination complaints (Recommendation 11);
  - D. A sexual orientation training program for managers (Recommendation 14), and
  - E. An employee brochure on benefits (Recommendation 17).
- IV. Actions which require further study. Five of the 20 recommendations will require further study before any actions can be taken.
- A. The two recommendations that relate to domestic partner benefits (Recommendations 3 and 4). You have already called for an exploration of the feasibility of authorizing the payment of relocation expenses for domestic partners.
  - B. Three of these recommendations concern sexual orientation nondiscrimination in customer service (Recommendations 8, 9, and 12).

OPTIONS:

1. Charge the ASA to work with the newly formed Advisory Committee on Sexual Orientation to implement actions in categories II and III and to make recommendations for actions under category IV.

PROS: This approach assures central coordination and monitoring of the Department Task Force's recommendations, provides for full input from GLBT employees, and ensures that a majority of the recommendations will be implemented and provides for further study of the remaining recommendations.

CONS: The ASA and the Advisory Committee on Sexual Orientation could meet with resistance from some agencies/offices over how various initiatives should be implemented and the staff and financial resources required. You would need to fully endorse this approach to maximize cooperation between the ASA, the GLBT Advisory Committee, and agencies/offices involved.

2. Charge the agencies and offices with primary jurisdiction over individual recommendations (as listed in Chapter 4 of the task force report) with the responsibility of researching and/or implementing the individual recommendations.

PROS: This approach would provide for the most direct assessment and implementation of each of the 20 recommendations. Each initiative could be integrated into the ongoing priorities and budgetary constraints of the individual agencies/offices.

CONS: This approach provides no central coordination of the many initiatives. It would also be difficult to assure adequate input from GLBT employees, customers, and other agencies affected by the various initiatives and to assure that the recommendations were actually implemented.

3. Thank the Task Force members, but decline to implement the recommendations at this time.

PROS: Allows CR, the Office of Human Resources Management, and others to continue to focus limited personnel and financial resources on the current civil rights and diversity efforts without expanding into a new area.

CONS: Would be inconsistent with your civil rights record and the Administration's efforts to eliminate all forms of discrimination. Taking no action would leave you open to criticism from within and outside the Department for only paying lip service to the civil rights concerns of GLBT employees and customers.

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**RECOMMENDATION:**

CR recommends that you approve Option I: Charge the ASA to work with the newly formed Advisory Committee on Sexual Orientation to implement actions in categories II and III, and to make appropriate recommendations for actions under category IV.

**DECISION BY THE SECRETARY:**

Approve: \_\_\_\_\_

*[Handwritten signature]*

Disapprove: \_\_\_\_\_

Discuss with me: \_\_\_\_\_

Date: \_\_\_\_\_

*11/15/2000*

Reviewed by: \_\_\_\_\_

Attachment

## Chapter 4

### Recommendations for Policy Implementation

*This chapter proposes that the responsibility for implementing the Department's sexual orientation nondiscrimination policy is shared by every USDA employee, and discusses how this policy implementation can be accomplished.*

#### Shared responsibility

In Chapter 1 we established the civil rights, diversity, and economic arguments which support an aggressive implementation of the Department's sexual orientation nondiscrimination policy. In Chapters 2 and 3 we discussed in broad terms the major employee and customer issues that must be considered to implement this policy. From those chapters several implementation themes have emerged. First, the nondiscrimination policy must be clearly defined, which the Department has to a large degree accomplished. Second, in order to prevent incidents of discrimination and harassment, the nondiscrimination policy must be effectively communicated, training must be provided, and the USDA culture must evolve toward full acceptance of GLBT people. Finally, when complaints arise, they must be resolved quickly and effectively through the appropriate avenues of redress.

While this task force was authorized by the USDA's Office of Civil Rights (OCR), we do not believe that the full implementation of the Department's sexual orientation nondiscrimination policy is simply a civil rights issue or the sole responsibility of OCR. Because this or any nondiscrimination policy can be reduced to a simple matter of respect and acceptance, the responsibility of implementing this policy lies with every USDA employee and must be addressed at every level of the USDA managerial structure. Therefore we have divided this chapter according to the actions we believe need to be taken at each level of the Department.

#### Secretary of Agriculture

The success of any policy or program within the Department begins with the support of the Secretary of Agriculture. Both Secretaries Espy and Glickman have voiced their support for sexual orientation nondiscrimination since 1993.<sup>8</sup> In order to effect this support, there are several steps that the Secretary can and should take to ensure Departmental commitment to full implementation of this policy.

**Recommendation 1:** The Secretary of Agriculture should open a dialog on GLBT issues within the Department. Because this is an issue that most USDA employees and managers would rather avoid, the Secretary must exercise his leadership to set the tone for the Department on GLBT issues. The Secretary should be visible and vocal in his support of GLBT nondiscrimination, should regularly celebrate sexual orientation diversity, and should project an image of inclusiveness if he is to encourage our employees to do the same. Two examples of how this dialog could be initiated include:

- The Secretary should support, fund, and attend the annual Department-wide Gay and Lesbian Pride Month celebration each June. This event provides the Secretary with the opportunity to both celebrate sexual orientation diversity and to report on civil rights program achievements.
- The Secretary should personally announce and visibly support sexual orientation nondiscrimination initiatives through meetings with managers, through letters to employees and articles in *USDA News*, and through the Secretary's participation in the annual civil rights training.

**Recommendation 2:** The Secretary of Agriculture should designate a member of his Subcabinet as a Champion for GLBT employees and issues. Raising GLBT issues to this level would provide a clear message to employees and the public that USDA management is committed to aggressively implementing its sexual orientation nondiscrimination policy. The designated Champion should provide advocacy for and ensure inclusion of GLBT issues within the broader development, execution, and funding of the Department's various missions. This individual should meet with OCR and USDA GLOBE on a regular basis to maintain managerial focus on the implementation of our sexual orientation nondiscrimination policy.

**Recommendation 3:** The Secretary of Agriculture should direct the Office of Human Resources Management (OHRM) to institute a uniform, Department-wide policy which authorizes the payment of relocation expenses for an employee's domestic partner when the employee is relocated by the Department. Because the payment of relocation costs is the only benefit over which the Department has direct discretion, and because this action would have a positive financial impact on GLBT employees, we believe this is the strongest message the Secretary could send to GLBT employees that the Department recognizes and values their families and that USDA is indeed committed to their equitable treatment.

**Recommendation 4:** Because USDA is one of the largest civilian employers in the Federal Government, the Secretary of Agriculture should work with OPM to advocate for legislative changes to permit an employee to share benefits with a domestic partner. USDA and OPM should encourage Congress to develop an equitable benefits program which is family-based rather than marriage-based, and which allows the employee, rather than the government, to define his or her family.

## **Assistant Secretary for Administration**

As the manager responsible for administrative functions, the Assistant Secretary for Administration is principally responsible for translating the Department's broad diversity and nondiscrimination agenda into action. Therefore, as with the Secretary of Agriculture, it is important for the Assistant Secretary for Administration to be visible and vocal in his or her support for the full implementation of our sexual orientation nondiscrimination and diversity policy. Most of the recommendations made in the remainder of this report are directed at offices that fall under Departmental Administration, and thus will require the leadership, endorsement, and encouragement of

the Assistant Secretary in order to be successful. There are, however, two specific initiatives for which the Assistant Secretary should take the primary leadership role.

**Recommendation 5:** The Assistant Secretary for Administration should develop and implement a "Safe Space Program." By doing so, the Department would communicate that USDA can be a safe place for GLBT employees to serve openly, and would identify supportive coworkers with whom GLBT employees can talk freely, thus encouraging more GLBT employees to come out of the closet. The AT&T and Department of Commerce programs discussed in Chapter 2 should be used as models, both because of their success and to speed Department-wide implementation at USDA.

**Recommendation 6:** The Assistant Secretary for Administration should broaden the Department's discussion of workplace violence to include a consideration of hate crimes. Departmental Administration should revise "The USDA Handbook on Workplace Violence Prevention and Response" and the workplace violence training program to a) define hate crimes; b) discuss their incidence; c) caution supervisors and employees to consider extremely biased language as a possible predictor of a violent situation; and d) discuss appropriate prevention and response strategies to deal with hatred in the workplace. Organizations such as the Human Rights Campaign and the Southern Poverty Law Center could be contacted for assistance and advice in this effort.

## Office of Civil Rights

While the entire Department must share the responsibility of implementing our nondiscrimination and diversity policies, OCR is the group charged with the crucial, technical aspects of turning policy into reality. As such, this office conducts the critical tasks of Departmental rulemaking, policy communication, civil rights and diversity training, complaint resolution, and interactions with advisory groups. In order to give effect to our sexual orientation nondiscrimination policy, OCR should take a number of steps within these five areas.

### Departmental rulemaking

As the office responsible for technically defining how the Department's broad civil rights and diversity policies will be administered, it is critical that OCR develop rules and procedures which are consistent with the Secretary's policy statement, with existing civil rights statutes, and with existing programmatic statutes. In this regard, we believe that the full force of the Secretary's policy statement has not been captured in the subsequent technical rules which have been developed to implement that policy. Based on the discussions in Chapters 2 and 3, we believe that USDA's nondiscrimination rules can be strengthened, within the scope of current statutory authority, for both employment and program delivery.

**Recommendation 7:** As discussed in Chapter 2, DR 4300-7 provides for the inclusion of sexual orientation in the Department's employment discrimination complaint process. To strengthen this document, OCR should revise and reissue DR 4300-7 with the following changes:

- Section 4.a. should include a reference to the 1978 Civil Service Reform Act, 5 U.S.C. 2302(b).
- Section 5 should define sexual orientation as homosexuality, heterosexuality, and bisexuality, whether that orientation is real or perceived.
- Section 6.c.(2) should be revised to prohibit questioning or the identification of the sexual orientation of witnesses.

**Recommendation 8:** As discussed in Chapter 3, OCR should develop a new framework, based on the cooperative use of civil rights and programmatic statutes, for processing and preventing customer discrimination complaints. Under this framework, an Agency's Civil Rights Staff should be well versed in the Agency's programmatic statutes, and the Agency's administration should fully understand the various civil rights statutes. Through training, both civil rights and programmatic eligibility standards should be understood by all Agency employees as the dual basis for nondiscriminatory customer service. To assist in establishing this new framework, OCR should revise and reissue DR 4330-2 and DR 4330-3 with the following changes:

- Section 4 of both documents should be revised to include a uniform nondiscrimination statement which combines the civil rights and programmatic protections that should be applicable to customers of both conducted and assisted programs. An example of such a statement would be: "It is USDA policy to ensure no person is subject to prohibited discrimination in programs and activities conducted or funded by USDA based on race, color, national origin, gender, religion, age, disability, sexual orientation, marital status, familial status, political beliefs, income, receipt of public assistance, or any factor other than the eligibility requirements of individual programs."
- Section 5 of both documents should be expanded to indicate the various authorizing statutes and regulations which define the eligibility requirements of the various USDA assisted and conducted programs. While this list would no doubt be extensive, it would provide a necessary resource for Agency Civil Rights Directors when enforcing the Department's nondiscrimination policy or when managing challenges to that policy.
- Section 7.d. of both documents should be revised to add the following or an equivalent statement: "[An Agency will] (1) Ensure that all Agency services and benefits are distributed to beneficiaries based solely on programmatic eligibility requirements." The subsequent parts under section 7.d. should be renumbered (2) through (6).

**Recommendation 9:** Because the Department's civil rights policy applies equally to the areas of employment and customer service, OCR should assure that all published nondiscrimination policy statements adhere to this principle. DR 4300-3 should be revised and reissued to carry a single, uniform public notification policy statement to be used on all publications, regardless of whether the publication is targeted for employees, applicants, or customers of conducted or assisted programs. An example of an appropriate, inclusive statement would be: "The U.S. Department of Agriculture (USDA) prohibits discrimination in all programs and activities conducted or funded by USDA based on race, color, national origin, gender, religion, age, disability, sexual

orientation, marital status, familial status, political beliefs, income, receipt of public assistance, or any factor other than the eligibility requirements of individual programs.”

### **Policy communication**

After defining nondiscrimination policy rules, a second critical function of OCR is to communicate our nondiscrimination policy to all employees and customers.

Unfortunately, sexual orientation issues and nondiscrimination policies are unique in their ability to draw questions and, occasionally, criticism from both employees and customers. Therefore, we believe that the Department could benefit enormously by developing and distributing several educational publications.

**Recommendation 10:** OCR should develop a brochure which a) defines sexual orientation; b) describes our sexual orientation nondiscrimination policy and the authority on which the policy was adopted; c) discusses the importance of this policy in employment and coworker diversity awareness and customer service; d) identifies June as the officially recognized Gay and Lesbian Pride Month; e) identifies USDA GLOBE as the officially recognized GLBT employee group; f) refers the reader to other manuals which describe avenues of redress for sexual orientation discrimination complaints; and g) lists contact information and other resources for more reading on the subject. The information in the brochure could be presented in a “Questions and Answers” format. The brochure should be distributed to all employees through their biweekly pay envelope and be available to customers.

**Recommendation 11:** OCR should develop a comprehensive employee manual describing all the options available for resolving employment discrimination complaints and workplace conflict. These options should include appeals to MSPB or OSC; the EEO complaint process (DR 4300-7); alternative dispute resolution (CPRC); the negotiated grievance procedure of an employee’s union; and counseling through EAP. A specific discussion of sexual orientation complaints and conflicts should be fully integrated into the information provided in the manual on each of these avenues of redress. Furthermore, the detailed information found in this manual should be summarized in a brochure which introduces employees to all the avenues of redress available within the Department and indicates where the manual can be obtained. This brochure should be distributed to all employees through their biweekly pay envelope.

**Recommendation 12:** Recently, as a follow up to the 1996 USDA Civil Rights Action Team recommendations, OCR initiated the development of a brochure and questionnaire regarding discrimination complaints and the complaint process for use by USDA customers.<sup>6</sup> We believe that OCR should complete the development and distribution of these documents. Sexual orientation discrimination should be an integral part of the discussion of the prohibited discrimination bases listed in the brochure, and should be listed on the questionnaire as a basis on which a complaint can be filed for both conducted and assisted program customers.

## Civil rights and diversity training

A third critical function of OCR is to coordinate the training of managers and employees on civil rights and diversity issues. This crucial activity was underscored in September 1998 by the issuance of DR 4120-1, entitled "Annual Departmental Civil Rights Training."<sup>3</sup> This DR requires that all USDA employees must receive such training.

We believe the information presented in the preceding three chapters regarding the unique concerns and constant evolution of sexual orientation issues in the workplace is sufficient to justify specific training on these issues for managers as well as the inclusion of these issues in the annual civil rights training for employees. As the trend toward more openness by GLBT individuals regarding their sexual orientation continues, such training will be critical to prevent employment discrimination complaints, program delivery complaints, and workplace conflicts.

**Recommendation 13:** At a June, 1999, meeting between USDA GLOBE and Civil Rights Director Rosalind Gray, Ms. Gray assured the group that she would hold a sexual orientation training session for Agency Civil Rights Directors.<sup>50</sup> Subsequently, this Task Force was asked to identify an appropriate contract trainer, which it did in October 1999.\* OCR should authorize and conduct this training session as soon as possible.

**Recommendation 14:** OCR should initiate sexual orientation training for all managers, civil rights personnel, and employee relations specialists within each USDA Agency. This training should be conducted and/or developed by contract firms which specialize in this issue. The training sessions should, at a minimum, include a discussion of the employment, workplace culture, and customer issues discussed in the earlier chapters of this report. The training should also give managers practical tools for dealing with issues such as inappropriate versus inclusive workplace language and behavior; workplace violence; religious objections to GLBT people; and the resolution of sexual orientation discrimination complaints and conflicts.

**Recommendation 15:** OCR should conduct a review of the all-employee annual civil rights training modules which are currently under development. OCR should assure that sexual orientation issues are adequately and appropriately integrated into the discussions of equal employment opportunity, cultural diversity, and program delivery in these modules. USDA GLOBE should be consulted in this review effort, and should be asked to review training materials for accuracy while in draft form. A similar cooperative approach should be used in the development of all future annual civil rights training materials.

## Complaint resolution

As discussed in Chapters 2 and 3, there are essentially no outstanding complaints of sexual orientation discrimination within the Department. However, as the culture within and outside of USDA changes, the Department must be prepared for complaints to be

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\*Bonnie J. Berger & Associates, Tokoma Park, MD.

filed, to deal swiftly and effectively with these complaints, and to hold accountable those individuals responsible for discrimination. We encourage OCR to make this a particular focus in the training discussed above, particularly for civil rights personnel and employee relations specialists.

### **Interactions with advisory groups**

A final OCR function critical to implementing nondiscrimination policies is its responsibility to interact with employee advisory groups. USDA GLOBE was recognized by the Department as an official employee organization in March 1994. The organization's mission is "to create a work environment free of discrimination and harassment based on sexual orientation,"<sup>51</sup> and the organization attempts to play a supportive role within the Department. However, this task force has found evidence that USDA GLOBE has been underutilized as a technical resource by USDA. Since the group was founded, only one attempt has been made by the Department to establish a formal link between OCR and USDA GLOBE. Following a request from the organization in 1996, a liaison to USDA GLOBE was appointed within OCR. Unfortunately, the appointed person was not a member of Civil Rights management, and consequently the level of access necessary to effectively utilize this group was not achieved.<sup>50</sup>

**Recommendation 16:** OCR should appoint one of its senior managers as a liaison to USDA GLOBE. This individual should work with the Board of USDA GLOBE to develop a regular system of communication and consultation to assist the Department in the development of OCR programs, decisions, and training which affect GLBT employees and customers. This cooperative relationship could also serve to fulfill many of the same functions currently provided by the Special Emphasis Programs established for other protected classes (e.g., celebratory months; program outreach).

### **Office of Human Resources Management**

OHRM is primarily responsible for assuring that personnel and benefits issues are addressed in an equitable manner. With regard to implementing the Department's sexual orientation nondiscrimination policy, we believe OHRM should address two key issues.

**Recommendation 17:** As discussed in Chapter 2, there are several benefits which GLBT employees can share with their domestic partners if they make the appropriate beneficiary or insurable interest designations. Because these designations and their availability are not well understood by all employees, OHRM should develop a brochure which discusses the benefits available to all employees, and the particular considerations of which an employee should be aware when designating a domestic partner as a beneficiary or an insurable interest. This brochure should be distributed to all employees through their biweekly pay envelope, and should be coupled with a more detailed educational campaign for personnel managers and benefits specialists.

**Recommendation 18:** As discussed in Chapter 2, OHRM should use exit interviews or an alternative survey tool to evaluate the USDA's cultural environment. Such a standard instrument should be used to monitor cultural trends through data collected from employee experiences, such as observations of intolerant attitudes expressed in the workplace or the use of inappropriate language or jokes. These data could be compiled into an annual report for use by the Department as an additional measure of the effectiveness of our nondiscrimination and diversity programs.

## **Office of Communication**

The USDA Office of Communications (OC) is responsible for distributing the nondiscrimination statements that must appear on all USDA publications and vacancy announcements. Although sexual orientation has been included in the official statements used by the Department since 1998 (DR 4300-3), many USDA publications and vacancy announcements still fail to include sexual orientation as a nondiscrimination basis. Therefore, OC must become more active in assuring that the correct nondiscrimination statements are used on all USDA publications.

**Recommendation 19:** OC should redistribute to all Agencies the appropriate Public Notification Policy Statement(s) found in DR 4300-3 which should be used on all USDA publications and vacancy announcements. This redistribution should include a notice requiring that all Agencies review their publication procedures to assure that all templates carry the correct statements. OC should develop a system to actively monitor Agency vacancy announcements, program statements, research and outreach publications, and all other published documents for inclusion of the appropriate policy statements.

## **Mission Areas and Agencies**

As discussed earlier, all employees bear responsibility for implementing the Department's nondiscrimination and diversity policy. While all of the preceding recommendations call for individual managers or offices to implement specific activities such as training or a new approach to customer service, the employees and managers within the Department's Mission Areas and Agencies must be open and receptive to these activities. We encourage all employees to recognize their role in changing the culture at USDA. This message should be conveyed in the training initiatives discussed above.

## **Advisory Groups**

In discussions with USDA GLOBE, this task force was assured of that group's interest in serving actively as an information resource for the Department. USDA GLOBE should be commended for its vigorous role as an advocate for GLBT employees to date, and we encourage the group to continue to be available to assist the Department with the implementation recommendations made above.

Finally, we commend the Department for taking the unique approach of studying GLBT policy issues through the use of a task force. The members of this task force know that we have learned much through this process, and hope that we have contributed to the advancement of nondiscrimination and diversity at USDA. We believe USDA should continue to use this task force approach as a means of regularly evaluating the Department's progress as it strives to be more inclusive of GLBT employees and customers.

**Recommendation 20:** USDA should review its progress in implementing the Department's sexual orientation nondiscrimination and diversity policy and evaluate the need to appoint and convene a Third USDA Task Force on Sexual Orientation in 2005. That task force could conduct an in depth review of the progress made in the Department since the issuance of this report, and could propose recommendations for future actions. The need for additional task forces on sexual orientation should be assessed every five years.



DEPARTMENT OF AGRICULTURE  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20250

TO: Paul W. Fiddick  
Assistant Secretary  
for Administration

FROM: Dan Glickman  
Secretary

SUBJECT: Report of the Second USDA Task Force on Sexual Orientation

I have accepted the Report of the Second USDA Task Force on Sexual Orientation and am committed to implementing appropriate recommendations. The recommendations delineate actions beyond the Civil Rights Action Team report to ensure that USDA and its employees do not discriminate on the bases of sexual orientation. These actions can contribute significantly to achieving our overall civil rights and diversity goal of treating employees and customers fairly and equitably, with dignity and respect.

To assure that the Task Force's recommendations are fully implemented to the best of our ability, I am asking you to work with the newly formed Advisory Committee on Sexual Orientation to implement actions in categories II and III and an appropriate committee to make recommendations for action under category IV. Please report to me on your progress no later than December 30, 2000.

Thank you.

DRAFT

TO: Paul W. Fiddick  
Assistant Secretary  
for Administration

FROM: Dan Glickman  
Secretary

SUBJECT: Report of the Second USDA Task Force on Sexual Orientation

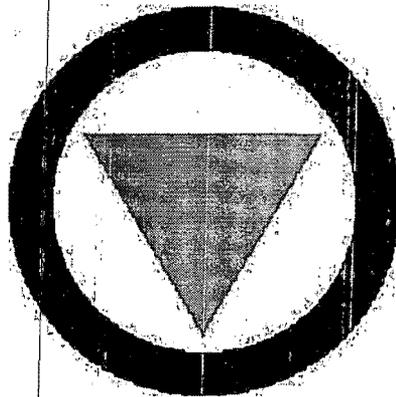
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To assure that the Task Force's recommendations are fully implemented to the best of our ability, I am asking you to work with the newly formed Advisory Committee on Sexual Orientation to implement actions in categories II and III and an appropriate committee to make recommendations for action under category IV. Please report to me on your progress no later than December 30, 2000.

Thank you.

# **FROM THE MARGINS TO THE MAINSTREAM:**

## **A Plan to Recognize and Include Sexual Orientation Diversity in the United States Department of Agriculture**



**Report of the Second USDA Task Force on Sexual Orientation**

**May 23, 2000**

**USDA** UNITED STATES DEPARTMENT OF  
**AGRICULTURE**

## Executive Summary

In the past decade, American society's understanding of its gay, lesbian, bisexual and transgendered (GLBT) citizens has evolved dramatically. GLBT issues are commonly discussed in the media, domestic partner benefits are available in many workplaces, and same-sex marriage may soon become a reality. These societal changes provide an impetus for USDA to reexamine sexual orientation issues within the Department. Therefore, in July 1999, USDA Civil Rights Director Rosalind Gray convened the Second USDA Task Force on Sexual Orientation. This group was asked to review, update, and extend the findings published in 1994 by the First USDA Task Force on Sexual Orientation.

Our review found that the Department has taken several steps in recent years to document a sexual orientation nondiscrimination policy and to define an appropriate system for filing complaints of discrimination based on sexual orientation. We also found that much work remains to be done if the Department wishes to prevent harassment and discrimination against sexual minorities, promote the full acceptance and open service of GLBT employees, and provide full access to USDA programs by GLBT customers.

We have made a number of recommendations designed to reach these goals. Through these recommendations, we propose that the responsibility for implementing the Department's sexual orientation nondiscrimination policy is shared by every USDA employee. In particular:

- The Secretary of Agriculture should open a dialog on sexual orientation issues within the Department; designate a member of his Subcabinet as a Champion for GLBT employees and issues; and authorize the payment of relocation expenses for domestic partners of employees moved by the Department.
- The Assistant Secretary for Administration should implement a "Safe Space" program to encourage the open service of GLBT employees in the Department and should broaden the Department's Workplace Violence Prevention and Response Program to address hate crimes.
- The Office of Civil Rights should broaden the Departmental Regulations on civil rights to strengthen its ability to prevent and process complaints of sexual orientation discrimination in both employment and program delivery; should fully communicate these policies and avenues of redress to employees and customers; should train all employees -- but particularly managers and civil rights personnel -- on sexual orientation discrimination and diversity; and should utilize the USDA Gay, Lesbian, Bisexual and Transgendered Employee Organization (GLOBE) as an information resource to support these activities.
- The Office of Human Resources Management should educate employees on available benefits, particularly as they apply to the domestic partners of GLBT employees, and should conduct exit interviews of employees voluntarily separating from the Department as a method to gauge improvements in diversity tolerance within the Department.
- The Office of Communication should develop a mechanism to actively monitor Departmental vacancy announcements and publications to assure that these documents carry an approved, fully inclusive equal opportunity policy statement.

If the Department fully implements its sexual orientation nondiscrimination and diversity policy, USDA stands to gain greater openness, job satisfaction, and retention among its workforce; increased productivity and customer service; and the prevention of costly complaints. We have estimated the potential savings that could be realized by the Department through this course of action to be approximately \$23 million annually.

## Acknowledgments

The members of this task force are proud to have been selected by the Department to undertake this assignment. It has been a privilege to serve the Department through this effort and to learn from one another and those with whom we consulted.

We would like to thank the following individuals for their contributions and assistance in this project: USDA Civil Rights Director Rosalind Gray for establishing this task force; Mr. Anthony Varona, Mr. Daryl Herrschaft, and Mr. Chad Lord of the Human Rights Campaign for their assistance in understanding non-Federal sexual orientation workplace issues; Mr. Robert Sadler, Past President of Federal GLOBE, for his perspectives on sexual orientation workplace issues in other Federal Departments; Mr. Brendan Doyle of Federal GLOBE for sharing his knowledge on Federal employee benefits; the Executive Board and members of USDA GLOBE for sharing their experiences in addressing sexual orientation issues at USDA; Ms. Bonnie Berger for sharing her knowledge on sexual orientation diversity training; Ms. Helen Norton of the Department of Justice for her perspectives on sexual orientation discrimination in customer service; Mr. Thomas Sullivan for his unwavering research assistance; and Dr. Craig Reed, Administrator of the Animal and Plant Health Inspection Service, for financial assistance in the printing of this report.

Finally, although we cannot name them all here, each task force member would like to thank our supervisors who afforded us the time to work on this project and our coworkers who bore the burden of our distraction.

Patricia Browne, Chair  
John Bottum  
Elizabeth Daly  
Curt Deville  
Dale Gentry  
T. J. Myers  
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About the cover: The pink triangle and green circle is the trademark symbol of the Safe Space Program of the Lesbian, Bisexual and Gay United Employees (LEAGUE) of AT&T and Equal at Lucent, and is used here with their permission. The pink triangle is a symbol that was forcibly worn by homosexuals interred in Nazi concentration camps during World War II, and was later adopted as a symbol of pride and remembrance by the gay and lesbian community. The green circle represents acceptance.

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## Introduction

In July 1999, USDA Civil Rights Director Rosalind Gray announced the formation of the Second USDA Task Force on Sexual Orientation. Eight individuals, representing a variety of professions and Agencies throughout the Department, were selected to form this task force. The names and affiliations of these individuals can be found in Appendix 1.

The First USDA Task Force on Sexual Orientation was established in 1993 after then Secretary of Agriculture Mike Espy first included sexual orientation in the USDA Civil Rights Policy Statement. The original task force presented its findings in a report dated January 31, 1994, which can be found in Appendix 2. The charge handed to the current task force was to review, update, and extend the findings of the original task force report.

The January 1994 report identified six major areas for which recommendations were made. These areas are:

- Filing complaints of discrimination based on sexual orientation
- Benefits for partners and families of gay and lesbian employees
- Program delivery and related areas
- Training and education
- Advisory committee on sexual orientation and employee resource group
- Communication of USDA policies on sexual orientation

Through our review we have found that several steps have been taken since 1993 to establish a sexual orientation nondiscrimination policy for the Department of Agriculture and to define an appropriate system for filing complaints of discrimination based on sexual orientation. For this the Department should be commended. These accomplishments, however, have not yet made a significant impact on the USDA workplace culture. Consequently, if the Department wishes to create an environment that welcomes sexual orientation diversity, USDA now stands at a point in time where it must begin to fully implement this nondiscrimination policy.

The subsequent chapters of this report will review each of the above six areas in depth. Chapters 2 and 3 will discuss the core issues of equal access to employment opportunities and program delivery, respectively. Chapter 4 will discuss the implementation of our sexual orientation nondiscrimination policy through effective communication, training and education, and other steps necessary to establish a workplace culture that is more tolerant and accepting of sexual minorities. However, before considering the achievements and ongoing challenges since the last report, we believe it is instructive to ask why the Department should focus on this issue at this time. In Chapter 1 we attempt to answer this question by examining the changes that have occurred in society and the workplace since the establishment of the first task force in 1993 and by identifying factors which point to the need for greater Departmental attention to this issue.

Two terms require definition before this report can be adequately digested:

First, *sexual orientation* is understood to include homosexuality, heterosexuality, and bisexuality, whether that orientation is real or perceived.\* Therefore, the reader should keep in mind that policies designed to prevent discrimination on the basis of sexual orientation protect all employees, even though common parlance focuses on the effect such policies have on self-identified sexual minorities.

Second, to be fully inclusive of *sexual minorities*, we will use the acronym GLBT for gay, lesbian, bisexual and transgendered<sup>†</sup> individuals. It should be noted, however, that some transgendered individuals may self-identify as heterosexual. Additionally, discrimination against transgendered individuals may be determined in many cases to be sex discrimination when such discrimination is a response to nonconformity with expected gender roles. Despite these two exceptions, however, we are including all transgendered individuals in our consideration of sexual minorities because our definition of sexual orientation encompasses an observer's perception or assumption of whether another individual is homosexual, heterosexual or bisexual.

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\*This definition of sexual orientation has been used in all the complaint process regulations developed by other Federal departments and is the definition that is found in the draft Employment Non-Discrimination Act (ENDA).<sup>18,20,45</sup>

<sup>†</sup>Transgender, or "gender blending," has been variously defined, but is most commonly considered to encompass individuals whose gender identity or display differs in part or in total from their biological sex, based on the surrounding society's expectations of members of that sex.<sup>16,40</sup> Transgenderism in the American workplace can raise questions and conflicts which range from the simple physical appearance issues of a man wearing earrings or a woman wearing a tie, to the complex social and biological issues raised by individuals who undergo sexual reassignment surgery.

# Chapter 1

## Background and Justification

*This chapter discusses the recent advances that have been made in GLBT civil rights in America, the concurrent changes that have taken place in the Federal workplace, and the benefits that could be realized by USDA if further efforts are made to embrace sexual orientation diversity within the Department.*

### Advances in GLBT civil rights during the 1990's

The history of the United States has been one of evolving attitudes and laws on civil rights, from the adoption of our Constitution in 1789 when voting citizenship was reserved for land owning white males, through the abolition of slavery in 1863, the enfranchisement of women in 1920, and the end of legalized segregation in 1964.<sup>26</sup> The debate over civil rights for GLBT citizens during the later half of the twentieth century is simply the latest mile of this national civil rights journey. Within the past decade, many changes have occurred that affect GLBT individuals in our society. While this report cannot present a comprehensive history of GLBT civil rights in the 1990's, we would like to identify several reference points from which we can evaluate USDA's workplace policies, activities, and culture.

Because laws and policies are typically an extension of cultural attitudes, it is useful to first examine the evolving acceptance of GLBT equal rights in American society. A review of public opinion polls conducted on systematically selected and representative samples of the U.S. adult population reveals the following about American adults:<sup>56</sup>

- In 1999, 83% indicated they support equal rights for homosexuals in terms of job opportunities, up from 71% in 1989 and 56% in 1977.
- In 1999, 70% indicated they support homosexuals serving in the armed forces, up from 60% in 1989 and 51% in 1977. Similarly, 75% and 61% favor hiring homosexual doctors and high school teachers, respectively. These numbers are up from 56% and 47%, respectively, in 1989.
- In 1998, 52% supported equal rights in terms of Social Security benefits for gay and lesbian domestic partners. (No data were collected on this question during the 1970's and 1980's.)

These data indicate that a regularly expanding majority of Americans believe workplace rights and benefits should accrue equally to all employees, regardless of sexual orientation. This attitude is reflected in the growing number of state laws and municipal ordinances which are gradually reversing legal workplace discrimination against GLBT employees:<sup>52</sup>

- Approximately 104 million Americans (38% of the population) are currently protected from sexual orientation discrimination in employment under some form of state and/or municipal statute. Eighteen states and the District of Columbia prohibit

discrimination in public employment (i.e., state employees); 11 states, the District of Columbia, 18 counties, and 106 cities prohibit discrimination in private employment. In contrast, only 2 states and the District of Columbia provided such protection in 1990.

- Currently, 7 states, 19 counties, and 64 cities offer some form of domestic partner benefits to their employees. One state (California), 4 counties, and 37 cities provide some form of domestic partner registry for their citizens.

Similarly, corporate America has taken significant steps to end sexual orientation discrimination in the workplace and to provide GLBT employees with equal pay for equal work through domestic partner benefits.<sup>32,54</sup>

- Currently, 1,585 employers in the United States are identified as having nondiscrimination policies that include sexual orientation. This number includes 255 of the Fortune 500 Companies and 282 colleges and universities. With no centralized mechanism for collecting such statistics, these data are likely an underestimate.
- Similarly, 3,402 employers in the United States are identified as providing domestic partner health insurance. This number includes 92 of the Fortune 500 Companies and 104 colleges and universities. For employers offering domestic partner benefits, 69% offer these benefits to both same-sex and opposite-sex couples. An independent survey conducted in 1997 estimated that 13% of all U.S. employers provide domestic partner health care benefits. In contrast, less than two dozen U.S. employers provided domestic partner benefits to their employees in 1990.
- A 1999 survey conducted by the Society for Human Resource Management found domestic partner benefits to be the No. 1 recruiting incentive for executives and the No. 3 recruiting incentive for managers and line workers. Today, nearly two employers a week begin offering domestic partner benefits to their employees.

Apart from legislative, executive, and corporate gains in workplace nondiscrimination, advances have also been made through the judicial system:

- In the 1996 case of *Romer v. Evans*,<sup>44</sup> the U.S. Supreme Court struck down Colorado's "Amendment 2," which sought to bar any municipality within the state from adopting an ordinance permitting "homosexual, lesbian or bisexual orientation [to] entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination." Writing for the Court's 6 to 3 majority, Justice Anthony Kennedy invoked the 14th Amendment's guarantee of "equal protection of the laws" by stating: "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."
- In the 1998 case of *Oncale v. Sundowner Offshore Services*,<sup>38</sup> the U.S. Supreme Court held unanimously that same-sex sexual harassment violates Title VII's prohibition against discrimination on the basis of sex.
- In the 1999 case of *Baker v. State*,<sup>5</sup> the Vermont Supreme Court held unanimously that "the State is constitutionally required to extend to same-sex couples the

common benefits and protections that flow from marriage” under the “common benefit” clause of the Vermont Constitution. This clause is the State Constitution’s analog to the 14th Amendment’s “equal protection” clause. In writing for the State Supreme Court, Chief Justice C. J. Amestoy stated that extending the common benefits clause to same-sex relationships “is simply, when all is said and done, a recognition of our common humanity.”

Despite the above advances in workplace rights, gains in other areas are not as numerous. While a majority of Americans favor equal protection of GLBT employees, the same review of public opinion polls discussed earlier suggests that, for some individuals, this belief reflects tolerance rather than full acceptance of GLBT people:<sup>56</sup>

- In 1998, 48% of adult Americans considered homosexual relationships between consenting adults to be morally wrong, essentially unchanged from 47% in 1977. Similarly, in 1999, 46% did not consider homosexuality to be “an acceptable alternative lifestyle,” down only slightly from 51% in 1982.
- In 1998, only 36% supported equality in terms of adoption rights for gay and lesbian domestic partners, and only 33% supported the legal recognition of homosexual marriages. (No data were collected on these two questions during the 1970’s and 1980’s.)

As with the tolerant attitudes discussed earlier, intolerant attitudes have also led to legislative action or obstruction:<sup>24</sup>

- Between 1996 and 1999, 30 states have adopted legislation or state constitutional amendments barring homosexual marriages. During 1996, the first year that such bills were contemplated, anti-same-sex marriage laws were successfully enacted by 15 of 31 states considering such a bill.
- Conversely, between 1996 and 1999, 96 bills favorable to GLBT citizens (comprehensive civil rights bills, employment nondiscrimination bills, and/or domestic partnership bills) were introduced in various state legislatures, with only 7 of these bills successfully enacted.

The issue of moral or religious judgments and the intolerance for GLBT people such judgments can generate are important because they are reflected in the attitudes that many individuals bring to the workplace. These attitudes shape the culture and environment of an organization, and present significant challenges when implementing a nondiscrimination policy.

### **Has the Federal workplace kept pace with recent advances in GLBT civil rights?**

The information presented in the previous section indicates clear support on the part of many corporations, executives, legislators, jurists, and a majority of the American public for equitable treatment of GLBT people in the workplace. But has this shift in attitude been reflected in the Federal workplace in the 1990’s? The answer to this question is yes with regard to executive initiatives, but no with respect to legislative actions.

From the standpoint of policies and legal protections, Federal GLBT employees have, on paper, enjoyed equal rights in hiring and promotion since 1978. The Civil Service Reform Act of 1978 identifies discrimination as a prohibited personnel practice (PPP), and stipulates that no employee with authority to take or direct a personnel action shall "discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others."<sup>9</sup> A 1980 memorandum from Office of Personnel Management (OPM) Director Alan Campbell outlined the Government's policy on PPPs, and stated that "applicants and employees are to be protected against inquiries into, or actions based upon, non-job-related conduct, such as religious, community, or social affiliations, or sexual orientation."<sup>7</sup>

This law and OPM policy as it regarded sexual orientation discrimination in Federal employment was not widely recognized, communicated or enforced during the 1980's. Subsequently, President Clinton and his Administration have taken the following steps:

- In 1993, President Clinton directed his Cabinet to institute sexual orientation nondiscrimination policies in their Departments and Agencies. Throughout his term in office, he has also appointed over 150 openly gay or lesbian officials to his administration, including James Hormel, U.S. Ambassador to Luxembourg; John Berry, Assistant Secretary of the Department of Interior; Roberta Achtenburg, former Assistant Secretary of Housing and Urban Development; and Bruce Lehman, former Director of the U.S. Patent and Trademark Office.<sup>47</sup>
- In 1995, President Clinton issued Executive Order 12968 which mandated that Federal security clearances could no longer be denied solely on the basis of an employee's sexual orientation.<sup>1</sup>
- In 1998, President Clinton issued Executive Order 13087 which provided for "a uniform policy for the Federal Government to prohibit discrimination based on sexual orientation,...to the extent permitted by law."<sup>21</sup> This Executive Order was followed in 1999 with an OPM guidance document which defines how this Executive Order should be implemented within Federal Agencies.<sup>2</sup>

Despite these administrative gains, there have been several significant legislative setbacks in the 1990's for Federal GLBT employees:

- In 1993, following Congressional resistance to President Clinton's plan to lift the ban on gays in the military, a compromise policy termed "Don't ask, don't tell, don't pursue" was accepted and subsequently codified. Despite the title of this law, the number of gay and lesbian service members discharged annually has steadily increased since the policy was implemented, with 1,149 individuals discharged in 1998, up from 597 in 1994.<sup>10</sup> Currently, the United States and Turkey are the only members of the NATO alliance that still bar gay and lesbian individuals from military service.<sup>42</sup>

- In 1996, the Defense of Marriage Act (DOMA)<sup>13</sup> was passed by Congress and signed by President Clinton, following a Hawaii Supreme Court ruling which could have led to the recognition of same-sex marriages in that state. DOMA permits states to refuse to recognize same-sex marriages should such unions become legal in another state.\* Additionally, for the purposes of the Federal Government, DOMA defines marriage as “a legal union between one man and one woman as husband and wife,” and defines a spouse to be “a person of the opposite sex who is a husband or a wife.” These definitions would restrict Federal spousal benefits, including those of Federal employees, regardless of any wider definition of marriage that may be adopted by a state. Marriage laws have always been regarded as a state function, and DOMA represents the first time in U.S. history that Federal definitions have been applied to the terms ‘marriage’ and ‘spouse.’<sup>53</sup>
- The Employment Non-Discrimination Act (ENDA) has been introduced in every session of Congress since 1994 (currently, HR 2355 and S 1276).<sup>18,29</sup> This Act would prohibit employment discrimination on the basis of sexual orientation nationwide. The bill would not apply to small businesses (less than 15 employees), religious organizations, or the uniformed services, and would not provide for preferential treatment, affirmative action, claims of statistically disparate impact, or the collection of statistics on sexual orientation. Despite the limited scope of this bill as a civil rights statute, and despite the impressive number of House and Senate co-sponsors (171 and 37, respectively), the bill has yet to pass either House of Congress.

## Where does USDA stand?

Despite Congressional resistance to equal employment opportunity for GLBT individuals, The President and his Cabinet Secretaries have been clear in their mandate to prohibit discrimination on the basis of sexual orientation in the Federal workplace. Where does USDA stand in comparison to other agencies in providing these protections?

The brief answer to this question is that the Department compares favorably to other Federal agencies in establishing sexual orientation nondiscrimination policies. For example:

- The 1994 report from the First USDA Task Force on Sexual Orientation is unique in the Federal government. No other Department has developed a task force approach to studying the development and implementation of sexual orientation nondiscrimination policies.<sup>45</sup>
- In 1994, the USDA became one of the first Departments to officially recognize a GLBT employee group, the USDA Gay, Lesbian, Bisexual, and Transgendered Employee Organization (GLOBE).<sup>45,50</sup>

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\*The constitutionality of this provision of DOMA is doubtful, based on the “full faith and credit” clause of the U.S. Constitution, which requires states to recognize the “acts, records, and proceedings” of other states.<sup>53</sup>

- By 1996, working with USDA GLOBE, the Department had included sexual orientation in the nondiscrimination policy statements of every Agency within the Department. This was accomplished two years before President Clinton's 1998 Executive Order 13087 mandated such a uniform policy.<sup>50</sup>
- In 1999, the USDA included sexual orientation in the Departmental Regulations which define discrimination complaint procedures for employees<sup>41</sup> and conducted program customers.<sup>34,35</sup> While most other Federal departments have defined such procedures for employees, to date, no other department has defined these procedures for customers.<sup>20,45</sup>

While the Department can be proud of the above accomplishments, our review of the recommendations from the First USDA Task Force on Sexual Orientation reveals that significant challenges remain in order to implement the Department's sexual orientation nondiscrimination policy (see Appendix 3). The USDA is not unique in this regard; implementation of sexual orientation nondiscrimination policies is an ongoing challenge in every Department and Agency of the Federal Government. The subsequent chapters of this report will attempt to define the issues which should be considered and the strategies which should be adopted to fully implement the USDA's sexual orientation nondiscrimination policy. For comparison sake, however, we would like to list here two positive examples where other Departments have effectively engaged employees and customers on GLBT issues:

- The Department of Commerce (DOC), working closely with Commerce GLOBE, has developed a brochure on sexual orientation nondiscrimination policies and complaint procedures, and distributed this brochure to all DOC employees. DOC also developed "The Common Ground Program," in which employees can voluntarily display a symbol in their work area indicating that theirs is an accepting environment for GLBT coworkers.<sup>45</sup> (The brochure and program description can be found in Appendix 4.) In contrast, the USDA has yet to develop a Department-wide mechanism for communicating our sexual orientation nondiscrimination policy.
- Many Departments have been fortunate to have openly gay or lesbian political appointees within their Subcabinet and/or Senior Executive Service (SES). Such appointments often provide an advocate for GLBT issues within a Department's administration, leading to supportive activities by the Department. For example, on June 11, 1999, President Clinton proclaimed June to be Gay and Lesbian Pride Month.<sup>22</sup> At this time, the Department of Interior (DOI) listed the Stonewall Inn\* on the National Register of Historic Places. DOI also held a Department-wide Pride celebration during June 1999. These activities within DOI were a direct result of the leadership of Mr. John Berry, an openly gay Assistant Secretary at DOI, working cooperatively with DOI GLOBE.<sup>50</sup> While the Clinton Administration has appointed over 150 openly gay or lesbian officials in the Federal Government, this task force could only identify one such political appointee at USDA.<sup>†</sup> Furthermore, the Department does not have a designated advocate for GLBT issues within the Secretary's Subcabinet.

\*The Stonewall Inn is the site of the 1969 New York City uprising that marked a key turning point in the modern GLBT civil rights movement.

†Ms. Glenda Humiston, Deputy Undersecretary for Natural Resources and Environment; name used by permission.

## Financial benefit of USDA action

The USDA has met the letter of the Civil Service Reform Act and Executive Order 13087 by enacting policies against sexual orientation discrimination and by outlining avenues of redress for processing discrimination complaints. Why should the Department take the next step of communicating and implementing the spirit of these policies? Acknowledging that it is the correct and logical next step from a civil rights standpoint does not provide a complete answer to this question. This task force recognizes that, given the earlier description of the disparate views held by the Administration and Congress on GLBT issues, any implementation activities the Department undertakes will need to withstand Congressional scrutiny. To do so, the Department must be able to show that the benefits far outweigh the costs of aggressively implementing our policy at a time of limited financial resources.

We have identified several tangible business incentives which underpin the argument for USDA to become more assertive in supporting our GLBT employees and customers:

- It is safe to assume that a workplace which tolerates the expression of anti-GLBT attitudes causes a significant amount of personal stress and loss of productivity among its GLBT employees. The Human Rights Campaign (HRC) has developed a formula for estimating the cost of this reduced productivity.<sup>25</sup> The HRC formula multiplies a) the number of GLBT employees in an organization; b) an estimated 10% reduction in productivity; and c) the average annual employee salary. Estimates of the number of GLBT individuals in the general population have ranged from 1% to 10%.<sup>30</sup> Using a conservative figure of 5%, and assuming that our approximately 103,000 USDA employees<sup>12</sup> are representative of the general population, we can estimate that there are at least 5,150 GLBT employees at USDA. Using this figure and the average USDA salary of \$43,000<sup>12</sup> in the HRC formula, we estimate that by cultivating a workplace that welcomes GLBT employees and allows them to fully focus on their work, the Department could recover as much as \$22.1 million in lost productivity annually. Furthermore, this figure could be doubled or tripled if one factors in the equally negative effects experienced by employees who are relatives and friends of GLBT individuals.
- In the current economy which boasts an unemployment rate of only 4.1%,<sup>17</sup> hiring the best employees is a constant challenge. The Department competes directly with many corporations, colleges and universities for employees in the agriculture, food processing, information technology, and agricultural research and education sectors of today's economy. A small sample of our many competitors who have implemented sexual orientation nondiscrimination policies and offer domestic partner benefits includes: General Mills, Pillsbury, Tropicana/Dole Beverages, Monsanto Company, Genentech, Glaxo-Wellcome, SmithKline Beecham, The National Grocers Association, The Nature Conservancy, Microsoft Corporation, IBM, Apple Computer, Cornell University and the State University of New York System, the University of Michigan and Michigan State University, the University of California System, the University of Iowa, and the University of Minnesota.<sup>54</sup> We must be able to offer a welcoming work environment with full compensation in the form of domestic partner benefits if we are to successfully compete for employees with these firms and academic institutions. Furthermore, recent GLBT college

graduates are more open about their sexual orientation than their older counterparts. Additionally, recent heterosexual college graduates often delay marriage and child rearing to a later age while they establish their careers. Both of these groups demand a nondiscriminatory work environment, as reflected in the recruiting power of domestic partner benefits discussed earlier.

- To become an employer of choice requires that an organization not only attract and hire talented individuals, but also retain them. During fiscal year (FY) 1999, 1,964 employees voluntarily resigned from the Department, excluding retiring and seasonal employees.<sup>12</sup> The Department does not collect data to define the variety of reasons that motivate such separations, the amount spent on training these individuals while employed at the Department, or the cost of hiring and training replacement employees. However, it is safe to assume that failure to establish a workplace that welcomes GLBT employees and offers equal pay for equal work through domestic partner benefits has contributed to the loss of skilled and experienced employees in whom the Department has considerable investment. If we estimate that 5% of the 1,964 employees who separated from the Department in FY 1999 (i.e., 98 individuals) are GLBT, and that the Department's workplace culture contributed at least in part to their departure, we can predict that developing a work environment which encourages the retention of GLBT employees could save USDA thousands of dollars annually in recruiting, advertising, interviewing, relocating, and training expenses.
- Recent (1996-1999) initiatives by the Department to resolve outstanding complaints and law suits in other civil rights areas have highlighted the immense costs that the Department incurs when employees do not respect civil rights mandates.<sup>36,37</sup> To more effectively deal with complaints, the Department is attempting to shift from a reactive mode to a preventive mode through at least two critical initiatives of Secretary Glickman's Administration: Department-wide civil rights training for all employees,<sup>3</sup> and the development of alternative dispute resolution (ADR) to resolve complaints informally before they reach the costly formal stage.<sup>49</sup> The statistics discussed earlier indicate that a vast majority of Americans now view sexual orientation discrimination in the workplace to be unacceptable. As this perspective becomes the norm, and as the recent inclusion of sexual orientation in the Department's complaint procedures becomes common knowledge, we can expect both employment and program complaints to be filed. With an average cost of \$175,000 per adjudicated formal complaint,<sup>37</sup> even if only three employment and three program complaints per year resulted in a finding of sexual orientation discrimination, \$1.05 million could be saved annually if these complaints were prevented through proper implementation of our sexual orientation nondiscrimination policy.

Using the above estimates on productivity gains, employee retention, and complaint prevention, we believe that the Department stands to save in excess of \$23 million annually by fully implementing its sexual orientation nondiscrimination policy. This figure doubtlessly exceeds the annual costs that the Department would incur implementing this policy.

Financial arguments against political challenges to sexual orientation nondiscrimination policies have been successful in the past. For example, in 1993, Apple Computer

proposed building a service center in Williamson County, near Austin, Texas. The expansion would have preserved 700 area jobs and created 750 additional jobs. However, the Williamson County Commissioners voted against a \$750,000 tax abatement necessary for Apple to begin construction, despite the projected \$300 million economic benefit to the region. The Commissioners took this action because Apple Computer provides domestic partner benefits to its gay, lesbian, and unmarried heterosexual employees. When Apple Computer began considering alternative construction sites outside of the region, the local business community and Texas Governor Ann Richards confronted the Commissioners. Faced with choosing between their moral judgments and losing jobs and corporate taxes, the County Commissioners withdrew their objection to the Apple Computer policy and granted the tax abatement.<sup>31</sup>

Thus we can see the trends exhibited in public opinion polls, state legislation, judicial rulings, administrative actions, and corporate practices indicate that full nationwide civil rights protections for GLBT individuals is, in matters of the workplace, a short term inevitability, and in all other matters, a long term eventuality. The Department can choose to act on this reality or it can rest on its current accomplishments and allow productivity to lag, discrimination complaints to accumulate, and current and prospective employees to be lost to our competitors. We believe that the wiser, more fiscally responsible course of action is to engage the future today, to the fullest extent possible.

## Chapter 2

# Equal Access to Employment Opportunities

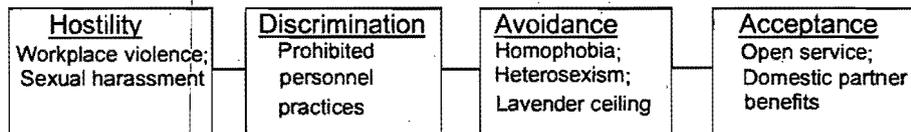
*This chapter develops the concept of the workplace cultural continuum and proposes that USDA can best prevent occurrences and complaints of sexual orientation discrimination and harassment in employment by striving to develop a workplace culture which fully accepts and respects GLBT employees.*

### The workplace cultural continuum

The workplace culture that any employee or applicant might encounter can be looked upon as a continuum of behaviors and attitudes, ranging from complete rejection to complete acceptance. These cultural conditions, either negative or positive, are the result of the actions of both the employing institution and individual employees. Whether one examines this continuum from the vantage point of civil rights, worker productivity, or diversity of the employee talent pool, an employing institution cannot remain viable unless it eradicates negative and divisive policies and behaviors, and cultivates a work environment in which all of its employees are valued.

For the purposes of this report, we have divided the workplace cultural continuum into four stages (see Figure 1). Under each stage we have identified how workplace behaviors and attitudes in each of these stages are manifested with regard to GLBT employees and applicants.

Figure 1. The workplace cultural continuum, as applied to GLBT employees and applicants.



In the following sections we discuss each of these stages in depth, and examine where USDA's workplace culture resides along this continuum. Using this continuum as a philosophical framework, we propose that USDA should work to reduce, to the greatest extent possible, institutional and personal behaviors that fall within the categories of hostility, discrimination and avoidance, and should strive to promote tolerance and ultimately full acceptance of its GLBT employees.

### Hostility: Workplace violence and sexual harassment

Physical and verbal attacks on GLBT individuals, often referred to as "homohatred," have been commonplace throughout much of recorded history. Recently, such violence has been acknowledged as a serious problem in the United States, as highlighted by the

murder of Matthew Shepard in Wyoming in 1998. This and other tragedies have led to hate crimes legislation to increase the collection of statistics and the severity of penalties for these crimes. As of 1999, 23 States and the District of Columbia have some mechanism in place to respond to or record information about hate crimes related to sexual orientation.<sup>52</sup> The Federal Bureau of Investigation (FBI) also collects nationwide data on hate crimes and publishes these statistics in their annual Uniform Crime Reports.<sup>23</sup> During 1998, the most recent year for which data are available, 9,235 bias-motivated criminal offenses were reported in the United States. An evaluation of these data reveals the following:

- Of the 9,235 hate crime offenses reported, 1,439 (16%) were committed based on the sexual orientation of the victim.
- The most frequently reported offenses perpetrated against GLBT individuals include simple or aggravated assault (40%), intimidation (34%), and property damage or vandalism (20%).
- Of the 13 bias-motivated murders committed in 1998, 4 (31%) were committed against GLBT individuals.
- Of the 7,755 reported incidents of bias motivated crime (which may include one or more criminal offenses), 101 incidents (1.3%) occurred in a government or public building. Eleven of these incidents (11%) were directed at GLBT victims.

Some weaknesses in these data should be discussed. First, not all jurisdictions participate in the Hate Crime Data Collection Program. However, the FBI estimates that 80% of the U.S. population is represented by the jurisdictions that do participate. Second, because of privacy concerns, many GLBT individuals either do not report that their sexual orientation was the target of the crime, or do not report the crime at all. Based on their evaluation of this underreporting, the Southern Poverty Law Center, a non-profit organization that studies hate crimes, estimates that homosexuals are more likely to be physically assaulted than any other group -- twice as often as Blacks and six times as often as Jews or Hispanics.<sup>4</sup>

These statistics directly concern USDA because they indicate that GLBT individuals are targets of hate crimes in excess of their representation in the general population, and that the Federal workplace is not immune from serving as a setting for this type of violence. Indeed, USDA GLOBE is aware of at least one recent workplace incident of bias motivated intimidation against a gay USDA employee.<sup>50</sup>

Unfortunately, violence in the workplace is an issue which USDA has had to face in recent years. Consequently, the Department has developed an aggressive campaign to prevent workplace violence through the development and distribution of educational materials and through mandatory training for its employees.<sup>48,55</sup> Workplace violence may have a variety of motivations which are beyond the scope of this report to review. However, hatred for a particular class of individuals is clearly one of these motivations. Therefore, because the hate crimes statistics discussed above indicate that GLBT individuals are the most frequently targeted group, the USDA Workplace Violence Prevention and Response program could be strengthened by directly addressing such hate crimes when conducting training for employees.

Along with violence, sexual harassment is another direct expression of hostility that an employee may experience in the workplace. As discussed in Chapter 1, the Supreme Court recently expanded the interpretation of the Title VII definition of sex discrimination to include same-sex sexual harassment. It is likely that many of the GLBT-targeted acts of intimidation identified in the hate crimes statistics discussed above would include cases of same- and opposite-sex sexual harassment.

The Department has developed a mandatory training initiative for all employees on the subject of sexual harassment. This training initiative was part of the Phase II civil rights training recently conducted by the Department. The Department developed a "Preventing Sexual Harassment Guidebook"<sup>39</sup> which was distributed to the Agencies for use in their self-training programs. This training manual provides an excellent review of the issue of sexual harassment. USDA should be commended for developing a handbook and training program which fully integrates same-sex sexual harassment into the discussion of prohibited activities.

### **Discrimination: Prohibited personnel practices**

As discussed in Chapter 1, sexual orientation discrimination in employment is a prohibited personnel practice under the 1978 Civil Service Reform Act. This Act was reiterated in 1998 by Executive Order 13087, which added sexual orientation to the list of Federal employment nondiscrimination bases. To clarify this Executive Order, in June 1999, OPM published a guideline entitled "Addressing Sexual Orientation Discrimination in Federal Civilian Employment -- A Guide to Employee's Rights."<sup>2</sup> This guideline defined four avenues by which a Federal employee may file a complaint of discrimination based on sexual orientation. These include the Merit Systems Protection Board (MSPB), the Office of Special Counsel (OSC), the Negotiated Grievance Procedure of an employee's union, and the Agency Grievance Procedure.

In March, 1999, USDA published DR 4300-7 "Processing EEO Complaints of Discrimination,"<sup>41</sup> which for the first time included sexual orientation in the Department's procedures for processing and resolving complaints of employment discrimination. With this publication, the Department has met its obligations under the above legislative and administrative actions to establish a policy and to define a mechanism for resolving complaints of sexual orientation discrimination. This achievement brings the Department in line with other cabinet level departments, most of which have established such avenues of redress.<sup>20,45</sup> A review of DR 4300-7 reveals several items of note:

- o DR 4300-7 takes a somewhat unique approach in that it allows an individual filing a sexual orientation discrimination complaint to use the regular structure of the EEO complaint process (while making it clear that the complaint cannot be appealed to the EEOC, but must be resolved within the Department). In this way the Department can resolve sexual orientation discrimination complaints within the current Office of Civil Rights (OCR) structure, without the need to devise a separate agency grievance procedure. The Department should be commended for designing an integrated rather than separate mechanism for resolving sexual orientation discrimination complaints.

- Although we believe DR 4300-7 to be a basically sound document, there are three areas where this procedure could be strengthened. First, the list of statutes on which this DR is based should be expanded to include the Civil Service Reform Act of 1978. This act is the cornerstone of protection against sexual orientation discrimination in Federal employment, as discussed earlier. Second, the DR should include the definition of the term "sexual orientation" used in the introduction to this report. Because this term is often misunderstood, inclusion of this definition will benefit anyone who reads or implements the DR. Third, during investigations of sexual orientation discrimination complaints, an investigator should not be required to ask and record the sexual orientation of a witness. While this question is often obvious or minimally intrusive for the other discrimination bases, inquiring as to the sexual orientation of a witness could be viewed as an invasion of privacy which may discourage the cooperation of the witness and thereby weaken the complainant's case.

In addition to a complaint processing procedure, in 1998 the Department established the Conflict Prevention and Resolution Center (CPRC). This initiative is designed to assist employees in resolving workplace conflicts in a confidential manner at the most informal level possible, through the use of alternative dispute resolution (ADR) techniques.<sup>49</sup> This is an avenue which could be of great benefit to GLBT employees at USDA because the confidential nature of this program would allow conflict resolution without disclosing one's sexual orientation through the administrative grievance or EEO complaint processes. Also, incidents of harassment that a GLBT employee could experience on the job might not fit into the distinct categories of employment discrimination, sexual harassment, or workplace violence. The Department should be commended for developing a mechanism whereby these conflicts can be effectively resolved.

Despite the Department's accomplishments in defining avenues of redress for complaints of discrimination or harassment based on sexual orientation, this task force could find no documentation of an outstanding or closed employment complaint of sexual orientation discrimination alleged against the Department. Because it is impossible to imagine that this form of discrimination does not occur at USDA, we have assumed that two factors contribute to this observation:

- *Procedures for processing sexual orientation discrimination complaints have only recently been established.* To address this factor, the Department will need to clearly communicate to all employees the avenues of redress that are now available. This must be done in an integrated manner, so that employees are aware of all the options for resolving conflict, including The Merit Systems Protection Board (MSPB), the Office of Special Counsel (OSC), the EEO complaint process (DR 4300-7), the Conflict Prevention and Resolution Center (ADR), employee unions, and the Employee Assistance Program.\*

\*Because of the fear of disclosing one's sexual orientation, the first place an employee might turn when faced with discrimination or harassment is to the confidentiality and support provided by the Employee Assistance Program (EAP). The EAP needs to be linked to the other avenues of resolving complaints and conflicts so that personal sexual orientation issues do not cloud the need to address external, inappropriate pressures an employee may be experiencing in the workplace.

- *Employees fear disclosing their sexual orientation in order to file a complaint.* To address this factor, the Department must advance the USDA workplace culture beyond its current position on the continuum in order to create an atmosphere which both deters sexual orientation discrimination or harassment and encourages complaints to be filed by those who believe they are victims of sexual orientation bias.

## **Avoidance: Homophobia, heterosexism, and the lavender ceiling**

While overt discrimination can be dealt with through the avenues of redress discussed above, there are covert forms of discrimination which negatively impact GLBT employees. Two terms need to be defined here: homophobia and heterosexism.<sup>30</sup> *Homophobia* is a fear or misunderstanding of GLBT people. *Heterosexism* is the assumption that everyone is or ought to be heterosexual.

In a nationwide poll conducted in 1998, 55% of Americans indicated they have a friend or acquaintance who is homosexual, up from 24% in 1983.<sup>56</sup> While this appears to be an encouraging statistic, it reveals that approximately half (45%) of all Americans claim to know no one who is gay or lesbian. In an extremely mobile and active society, one in which GLBT issues appear regularly on the nightly news and in television sitcoms, it is astounding that nearly half of the population maintains this assertion. This statistic supports the observation that homophobia and heterosexism are still pervasive in American society.

In the workplace, these attitudes of intolerance, fear, and denial allow heterosexual employees to disparage or avoid GLBT people and issues. This creates an environment where many GLBT employees keep their sexual orientation a secret; i.e., they remain "closeted." Furthermore, when GLBT issues are avoided organizationally as well as individually, the result is an institutionalized "lavender ceiling."<sup>28</sup> In other words, when homophobia and heterosexism are an established part of the workplace culture, the open service, career development, and promotional advancement of GLBT employees is impeded or prevented. The inability of a GLBT employee to serve openly at work harms the emotional and financial well being of the employee and, through reduced worker productivity, impairs the competitiveness of the employing institution.

Both the cause and effect of a lavender ceiling in an organization can be evidenced in a variety of ways, such as the absence of a GLBT nondiscrimination policy, the absence of organization-wide training and communication on GLBT issues, or the absence of any openly GLBT managers or executives. Within USDA there are individual offices and work sites where GLBT employees work openly, without fear of negative personal or professional consequences. However, when viewed as a whole, we have found evidence that a lavender ceiling exists within our Department. For example:

- Since the initial inclusion of sexual orientation in the Department's Civil Rights Policy Statement in 1993, USDA has not developed a Department-wide communication or training program on GLBT issues.

- While the Department granted official recognition of the establishment of USDA GLOBE in 1994, the Department has not sought to establish a partnership with USDA GLOBE for advice or assistance in implementing the USDA's sexual orientation nondiscrimination policy.
- The Department has not made provisions to include GLBT employees or issues in the Department's Special Emphasis Programs. We recognize that GLBT issues fall outside of the affirmative action initiatives on which these programs are based. However, Special Emphasis Programs have a wider function than affirmative action activities (e.g.: organizing the designated celebratory months; conducting outreach to minority groups) and could be made to include GLBT issues.
- The Department has only one openly GLBT Cabinet, Subcabinet, or Senior Executive Service manager of which this task force is aware. This may be more an effect than a cause of the Department's Lavender Ceiling. However, it leaves the Department without the sensitivity to, and advocacy for, GLBT issues that are necessary at the upper echelons of management.

As discussed above, the Department should be applauded for developing its current policies against sexual orientation discrimination. For these written policies to be taken seriously, however, the Department must take concrete steps to breathe life into these documents. If the Department wishes to progress toward the positive end of the workplace cultural continuum, USDA management will need to dismantle our lavender ceiling. To remove this barrier to full diversity, the Department must conduct training and communicate with employees on sexual orientation issues. Furthermore, the Department must engage, publicly support, and celebrate its GLBT employees.

For most employees without managerial responsibilities, GLBT issues are not usually discussed in the USDA workplace. Breaking down barriers between employees is a major organizational challenge, one that requires effort by both managers and employees. The communication and training initiatives discussed above will be critical to this effort. However, in addition to training and communication, some companies and at least one Federal department have developed what are called "Safe Space Programs"<sup>27,30,45</sup> as a means of breaking down barriers between employees. (See the DOC Common Ground Program in Appendix 4.) In these programs, an employee places in his or her office a small sign or magnet with a symbol, such as a pink triangle surrounded by a green circle. This sign indicates the employee's acceptance and support of GLBT coworkers and willingness to discuss GLBT issues. We propose that USDA should develop and implement such a program.

If the Department attempts to revise cultural attitudes in the workplace, it will be necessary to develop some measurement to evaluate the effectiveness of these efforts. The current methods of evaluating civil rights programmatic accomplishments (e.g.: tracking the resolution of outstanding complaints; evaluating the civil rights performance of Departmental Administrators and managers) would not be sufficient to gauge cultural changes within the Department. We believe that the Department should develop a mechanism whereby the less quantifiable issues of tolerance versus intolerance (for any protected class) are surveyed on a regular basis. This task force does not have the expertise to develop a specific survey design for this evaluation. However, we believe an option that should be considered is conducting exit interviews with employees who

voluntarily separate from USDA. Surveying this pool of employees would be less cumbersome than conducting a Department-wide, random survey on a periodic basis, and would provide an ongoing measurement that could be compiled on a regular schedule. Also, these employees would most likely be inclined to answer frankly regarding the cultural environment within the Department. The collection of such data would serve to not only gauge how well the Department is doing in reducing intolerant cultural attitudes, but also would identify areas that need redoubled intervention efforts.

### **Acceptance: Open service and domestic partner benefits**

By working to prevent and resolve hostility, harassment, and discrimination, and by striving to break down communication barriers between employees, an employer can positively influence the workplace culture and the level of respect and acceptance exhibited among employees. For GLBT employees, the ultimate expression of gaining the respect and acceptance of coworkers is the opportunity to serve openly within the workplace. The reduced stress which accompanies the ability to be one's self and to work in an inclusive environment, one that is free of anti-GLBT jokes, slurs, and attitudes, should not be underestimated. If this level of acceptance is achieved at USDA, the Department will witness the increased job satisfaction and savings in reduced discrimination complaints, increased productivity, and worker retention discussed in Chapter I.

An employing institution cannot require its employees to treat one another equitably, however, if it does not require itself to do so. The most potent mechanism by which an employer can demonstrate the equitable treatment of employees is to provide equal pay for equal work. For GLBT employees, this statement of equitable treatment can be reduced to a simple question of family and economics: Does the Department recognize my family, and will I receive compensation in the form of benefits equal to my heterosexual coworkers?

The family is the basic unit of American society. Employers have long recognized that providing benefits which support the family structure, especially health care and retirement benefits, is critical to attracting and maintaining a productive workforce. Currently, the average American worker receives approximately 40% of his or her compensation in the form of benefits.<sup>52</sup> Such benefits were developed and were particularly crucial at a time when most households consisted of a wage earning husband, a non-wage earning wife, and dependent children. However, family structure in America has changed dramatically in recent years. The typical family just described is now atypical; married couples with at least one child now comprise only 25% of American households.<sup>11</sup> Currently, there are 4.5 million households composed of unmarried couples living in the United States; one third of these households are composed of same sex couples.<sup>52</sup> Other alternative family structures exist, such as single parent households and households composed of extended family members.

Therefore, the typical employee benefit structure used by most employers is based upon a societal demographic that no longer exists. Consequently, what were once considered to be employment benefits provided to all can now be viewed as benefits provided to the

privileged few. By structuring health and retirement benefits around traditional families, an employer invalidates the majority of families that currently exist and creates an unnecessary and unfair class distinction between employees.

For the purposes of this report, three questions must be examined to fully evaluate the domestic partner benefits issue. 1) What are the current benefits available to USDA employees? 2) How are GLBT employees and their partners included or excluded from these benefits? 3) What can USDA realistically do to affect the current benefit structure, given that employee benefits are largely determined by Congress and OPM?

To answer these questions, we are fortunate that a committee within Federal GLOBE recently completed a review of Federal benefits.<sup>15</sup> A table of their findings is attached as Appendix 5. The benefits listed in this table can be divided into three categories. In the following paragraphs we will review the benefits in each of these categories, and discuss the steps that the Department could take to improve the benefit structure at USDA for its GLBT employees.

1. *Benefits for which GLBT employees and their domestic partners are denied equal access.* For each of the benefits listed in this section, statutory changes will be required to extend these benefits to GLBT employees and their partners:

- Health benefits. By statute, a Federal employee can only share health insurance benefits with the employee's spouse or dependent children. The common definition of spouse has always been sufficient to exclude the unmarried partners of GLBT employees from these benefits. However, in 1996, Congress and President Clinton specifically limited the Federal definition of spouse to a married member of the opposite sex through the adoption of the "Defense of Marriage Act" (DOMA).<sup>13</sup> The inability to share health benefits with one's domestic partner can cause significant financial hardship to Federal GLBT employees if an employee's partner loses his or her job, is self employed, works for an employer who does not offer health insurance benefits, or chooses to remain at home to raise children.
- Leave without pay. The Family and Medical Leave Act of 1993 permits employees to take 12 weeks of leave without pay to attend to personal or family illnesses or for the birth or adoption of a child. However, this law narrowly defines family to only include a spouse, son, daughter, or parent. Again, the DOMA definition of spouse leaves no doubt that unmarried GLBT partners are actively excluded from a Federally recognized family. This is a particularly harsh distinction in light of the incidence of HIV/AIDS and breast cancer among working age gay men and lesbians, respectively.
- Benefits for surviving spouse. Again based on the limitations of the term "spouse," unmarried GLBT employees are barred from designating their domestic partner as their surviving spouse for worker's compensation payment should the employee die, or for survivor annuity payments upon the death of the retiree.

2. *Benefits for which GLBT employees and their domestic partners have equal access.*

Fortunately, there are a number of benefits which GLBT employees can share with their domestic partners. However, many employees and personnel managers may not be aware of how these benefits apply to GLBT individuals:

- Accumulated sick leave. Under the Federal Employee's Family Friendly Leave Act of 1994, an employee's accumulated sick leave can be used not only for personal illness, but to care for an ill family member, to take a family member to medical appointments, to adopt a child, and to make funeral arrangements. This Act is inclusive of GLBT partners because it uses a broad definition of family, i.e.: "any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship." An additional executive memorandum provides that an employee may take up to 24 hours leave without pay for similar medical concerns, as well as school and early childhood activities. Because this executive memorandum does not define family, there is no exclusion of GLBT partners.
- Leave bank/leave transfer. After exhausting all available leave, employees in medical need can apply for participation in a leave bank or leave transfer program. The regulations which govern these programs use the broad "affinity" definition of a family member discussed above. Therefore these programs are available to employees who require leave to care for an ill domestic partner.
- Annuity benefits for a surviving insurable interest. As discussed earlier, unmarried GLBT employees are barred from listing their domestic partner as a spouse for retirement survivor benefits. However, in the absence of a spouse any employee can designate an insurable interest or beneficiary to receive survivor annuity payments. Therefore, this avenue is available for a GLBT employee to provide retirement survivor benefits to his or her partner. Before an insurable interest or beneficiary can receive survivor benefits, however, all other legal claims to the benefits must be exhausted. These include a former spouse with a court order, a current spouse with entitlement rights, and minor children.
- Designated surviving beneficiary. An employee may designate anyone of his or her choosing as a surviving beneficiary for the Thrift Savings Plan, the Federal Government Life Insurance Program, unpaid compensation, and retirement disability compensation. Thus there are no impediments for a GLBT employee to designate his or her partner as a beneficiary for any of these payments. However, the employee must actively make these designations, whereas a spouse is the automatic beneficiary of these payments for a heterosexually married employee, unless otherwise designated.

3. *Benefits for which GLBT employees and their domestic partners could have equal access, depending on Departmental discretion.* The only benefit which meets this description is the payment of relocation expenses when an employee changes job locations. Federal departments and agencies are given broad discretion to define an employee's household when paying these expenses. Consequently, agencies within USDA have varied widely in their decisions on whether or not to pay to move the partner of a GLBT employee who is being relocated.

As discussed earlier, employee benefits are established by Congress and OPM. However, we believe there are several steps that USDA could take to communicate its support for the equal pay of GLBT employees. First, because each department has discretion in the payment of relocation expenses, USDA should publish and implement a standard policy requiring Departmental agencies to include the cost of moving a GLBT employee's partner when relocating an employee. Second, the Department should effectively communicate information on those domestic partner benefits currently available to GLBT employees. Finally, for those domestic partner benefits which are denied to GLBT employees, USDA should develop a partnership with OPM to encourage Congress to revise the current Federal employee benefit structure to provide domestic partner health and retirement benefits for both homosexual and unmarried heterosexual employees. Alternatively, OPM and USDA could conduct a cost/benefit analysis of family-based versus marriage-based benefits. Such an evaluation could examine a variety of benefit restructuring programs; for example, health benefits could be offered at various rates such as Self, Self+1, Self+2, etc., to allow the employee to define his or her family.

## Chapter 3

### Equal Access to Program Delivery

*This chapter examines the policies prohibiting sexual orientation discrimination against USDA customers, and proposes a model for preventing such discrimination by assuring customer access to benefits and services.*

#### Customer nondiscrimination policies and complaints

To adequately consider customer nondiscrimination policies, we must make a distinction between USDA conducted and assisted programs. A *conducted program* is any effort by a USDA agency that results in the delivery of a benefit or service directly to a member of the public (a customer or “beneficiary”). Examples of these programs include the Direct Farm Loan Program, the Natural Resource Conservation Programs, and the Food Safety Inspection Service programs. An *assisted program* is any effort funded by USDA but administered by an intermediary state, public, or private agency or organization (a “recipient”) that delivers a benefit or service to a beneficiary. Examples of these programs include the Food Stamp Program, the National School Lunch Program, and the Cooperative State Research, Education, and Extension Service programs.

#### Conducted programs:

- In 1999, the Department published a Final Rule at 7 CFR 15d entitled “Nondiscrimination in Programs or Activities Conducted by the United States Department of Agriculture.”<sup>34</sup> This rule defines the Department’s nondiscrimination policy for conducted programs, and, for the first time, includes sexual orientation among the list of nondiscrimination bases. This represents the first rule published by a Federal agency or department to protect beneficiaries from sexual orientation discrimination.<sup>45</sup> The Department should be applauded for taking this bold step.
- Concurrent with the publication of the above Federal regulation, the Department published DR 4330-3 “Nondiscrimination in USDA-Conducted Programs and Activities.”<sup>35</sup> This Departmental Regulation defines the enforcement authorities, compliance activities, and complaint procedures necessary to implement the above nondiscrimination policy.

#### Assisted programs:

- In 1999, the Department published DR 4330-2 “Nondiscrimination in Programs and Activities Receiving Federal Financial Assistance From USDA.”<sup>33</sup> Similar to DR 4330-3 discussed above, this document defines the policy, compliance activities, and complaint procedures necessary to implement the Department’s prohibition against discrimination in USDA assisted programs. Unlike the conducted programs policy, however, this document fails to include sexual orientation as a nondiscrimination basis, and provides no other avenue of protection from this form of discrimination to assisted program beneficiaries.

Similar to the discussion in Chapter 2 on employment discrimination complaints, this task force could document only one outstanding and no closed complaints against the Department alleging sexual orientation discrimination in program delivery. As with employment complaints, we assume the same factors of fear and the prior absence of a complaint process have resulted in this lack of complaints.

### **A model for assuring accessibility to benefits and services**

The Department can be proud that it has broken new ground in protecting customers of directly conducted USDA programs from discrimination on the basis of sexual orientation. The development and publication of nondiscrimination policies and procedures must be followed, however, by appropriate implementation. Therefore, we have reviewed DR 4330-2 and DR 4330-3 to evaluate the likely effects their implementation will have on GLBT customers.

We found both DR 4330-2 and DR 4330-3 to be thorough, well written documents, within the confines of the subjects they attempt to cover. Despite this praise, however, we believe that these documents still take a narrow view of civil rights in the delivery of service to our customers. Both documents are adversarial, relying solely on civil rights statutes and regulations to compel nondiscrimination.

We believe that the Department should adopt a broader philosophical approach to assure nondiscrimination in program delivery -- one which yokes traditional prohibitory civil rights requirements with affirmative program eligibility requirements. This tact would be identical to the approach we take in employment nondiscrimination. That is to say, Title VII and several other civil rights statutes prohibit employment discrimination on a variety of specific bases (race, gender, disability, etc., but not sexual orientation, social affiliation, etc.). These prohibitions are coupled with the 1978 Civil Service Reform Act, which takes an affirmative approach by requiring that an applicant for employment or promotion can be judged only on the merits of his or her application or performance.

Using this two pronged benchmark to assess program delivery, we see that DR 4330-2 and DR 4330-3 protect USDA customers from discrimination on the various bases found in Title VI and other related civil rights statutes, but do not couple these prohibitions with any complimentary affirmative statutes. Logically, then, the Department could strengthen its efforts to prevent discrimination against USDA customers by relying upon our various program statutes which require that USDA benefits and services must be distributed only on the basis of customer eligibility.

This approach has some precedent in the Department. For example, several complaints have been filed against the Department in recent years with regard to the 4-H Program.<sup>14</sup> This is an assisted program which provides youth development and agricultural technology education to teenage students, and is administered by state Land Grant colleges and universities using USDA funds distributed by the Cooperative State Research, Education, and Extension Service (CSREES). The complaints have stemmed either from a community that wanted to remove a gay or lesbian 4-H leader, or from a 4-H leader who did not want to admit a gay or lesbian student into the 4-H club. Based

on the current wording of DR 4330-2, which does not include sexual orientation as a nondiscrimination basis, there is no statutory civil rights authority to resolve these complaints. Over the years, however, CSREES has not allowed a single 4-H leader or student to be dismissed because of his or her sexual orientation. This is because the Smith-Lever Act<sup>46</sup> which authorizes the 4-H Program mandates that participation must be open to all citizens.

We recognize that DR 4330-2 and DR 4330-3 do not preclude the use of program standards to assure equal access to program benefits, and that equitable program administration is the responsibility of the various USDA Agencies. However, USDA Civil Rights Directors have the responsibility of assisting Agencies in preventing discrimination through every means at their disposal. Unfortunately, the dual model discussed above is not widely known or appreciated by Civil Rights Directors or Agency Administrators. For example, in 1999, the simple inclusion of the words "sexual orientation" on a nondiscrimination poster required to be displayed by parochial school recipients in the USDA National School Lunch Program sparked a complaint against the USDA's Food and Nutrition Service (FNS).<sup>6</sup> This complaint resulted in a revision of the Department's Public Notification Policy Statement (DR 4300-3)<sup>19</sup> so that sexual orientation no longer appears in the nondiscrimination statement found on posters and publications distributed by USDA to assisted program recipients. This action was taken because sexual orientation is not included in Title VI or other related civil rights statutes. And yet the National School Lunch Act<sup>43</sup> which authorizes the National School Lunch Program requires that service to beneficiaries be based solely on financial need, and provides no mechanism whereby a recipient could legally deny a meal to a student based on the student's or the student's parent's sexual orientation. Unfortunately, parochial schools no doubt believe that such a denial would go unchallenged by USDA.

We believe that USDA should expand its approach to addressing current and preventing future sexual orientation discrimination in program delivery by adopting the two pronged model discussed above. Agency Civil Rights Directors and Agency Administrators should be encouraged to work cooperatively for the prevention of discrimination through the proper delivery of program benefits and services, backed with the full force of both programmatic and civil rights statutes. Furthermore, DR 4330-2 and DR 4330-3 should be revised, not on civil rights grounds, but on programmatic grounds, to articulate the two pronged model discussed above. Finally, DR 4300-3 should be revised to allow the Department to return to a single nondiscrimination statement, inclusive of sexual orientation, that can be used on all publications seen by employees, applicants, and the customers of conducted and assisted programs.

## Chapter 4

### Recommendations for Policy Implementation

*This chapter proposes that the responsibility for implementing the Department's sexual orientation nondiscrimination policy is shared by every USDA employee, and discusses how this policy implementation can be accomplished.*

#### Shared responsibility

In Chapter 1 we established the civil rights, diversity, and economic arguments which support an aggressive implementation of the Department's sexual orientation nondiscrimination policy. In Chapters 2 and 3 we discussed in broad terms the major employee and customer issues that must be considered to implement this policy. From those chapters several implementation themes have emerged. First, the nondiscrimination policy must be clearly defined, which the Department has to a large degree accomplished. Second, in order to prevent incidents of discrimination and harassment, the nondiscrimination policy must be effectively communicated, training must be provided, and the USDA culture must evolve toward full acceptance of GLBT people. Finally, when complaints arise, they must be resolved quickly and effectively through the appropriate avenues of redress.

While this task force was authorized by the USDA's Office of Civil Rights (OCR), we do not believe that the full implementation of the Department's sexual orientation nondiscrimination policy is simply a civil rights issue or the sole responsibility of OCR. Because this or any nondiscrimination policy can be reduced to a simple matter of respect and acceptance, the responsibility of implementing this policy lies with every USDA employee and must be addressed at every level of the USDA managerial structure. Therefore we have divided this chapter according to the actions we believe need to be taken at each level of the Department.

#### Secretary of Agriculture

The success of any policy or program within the Department begins with the support of the Secretary of Agriculture. Both Secretaries Espy and Glickman have voiced their support for sexual orientation nondiscrimination since 1993.<sup>8</sup> In order to effect this support, there are several steps that the Secretary can and should take to ensure Departmental commitment to full implementation of this policy.

**Recommendation 1:** The Secretary of Agriculture should open a dialog on GLBT issues within the Department. Because this is an issue that most USDA employees and managers would rather avoid, the Secretary must exercise his leadership to set the tone for the Department on GLBT issues. The Secretary should be visible and vocal in his support of GLBT nondiscrimination, should regularly celebrate sexual orientation diversity, and should project an image of inclusiveness if he is to encourage our employees to do the same. Two examples of how this dialog could be initiated include:

- The Secretary should support, fund, and attend the annual Department-wide Gay and Lesbian Pride Month celebration each June. This event provides the Secretary with the opportunity to both celebrate sexual orientation diversity and to report on civil rights program achievements.
- The Secretary should personally announce and visibly support sexual orientation nondiscrimination initiatives through meetings with managers, through letters to employees and articles in *USDA News*, and through the Secretary's participation in the annual civil rights training.

**Recommendation 2:** The Secretary of Agriculture should designate a member of his Subcabinet as a Champion for GLBT employees and issues. Raising GLBT issues to this level would provide a clear message to employees and the public that USDA management is committed to aggressively implementing its sexual orientation nondiscrimination policy. The designated Champion should provide advocacy for and ensure inclusion of GLBT issues within the broader development, execution, and funding of the Department's various missions. This individual should meet with OCR and USDA GLOBE on a regular basis to maintain managerial focus on the implementation of our sexual orientation nondiscrimination policy.

**Recommendation 3:** The Secretary of Agriculture should direct the Office of Human Resources Management (OHRM) to institute a uniform, Department-wide policy which authorizes the payment of relocation expenses for an employee's domestic partner when the employee is relocated by the Department. Because the payment of relocation costs is the only benefit over which the Department has direct discretion, and because this action would have a positive financial impact on GLBT employees, we believe this is the strongest message the Secretary could send to GLBT employees that the Department recognizes and values their families and that USDA is indeed committed to their equitable treatment.

**Recommendation 4:** Because USDA is one of the largest civilian employers in the Federal Government, the Secretary of Agriculture should work with OPM to advocate for legislative changes to permit an employee to share benefits with a domestic partner. USDA and OPM should encourage Congress to develop an equitable benefits program which is family-based rather than marriage-based, and which allows the employee, rather than the government, to define his or her family.

### **Assistant Secretary for Administration**

As the manager responsible for administrative functions, the Assistant Secretary for Administration is principally responsible for translating the Department's broad diversity and nondiscrimination agenda into action. Therefore, as with the Secretary of Agriculture, it is important for the Assistant Secretary for Administration to be visible and vocal in his or her support for the full implementation of our sexual orientation nondiscrimination and diversity policy. Most of the recommendations made in the remainder of this report are directed at offices that fall under Departmental Administration, and thus will require the leadership, endorsement, and encouragement of

the Assistant Secretary in order to be successful. There are, however, two specific initiatives for which the Assistant Secretary should take the primary leadership role.

**Recommendation 5:** The Assistant Secretary for Administration should develop and implement a "Safe Space Program." By doing so, the Department would communicate that USDA can be a safe place for GLBT employees to serve openly, and would identify supportive coworkers with whom GLBT employees can talk freely, thus encouraging more GLBT employees to come out of the closet. The AT&T and Department of Commerce programs discussed in Chapter 2 should be used as models, both because of their success and to speed Department-wide implementation at USDA.

**Recommendation 6:** The Assistant Secretary for Administration should broaden the Department's discussion of workplace violence to include a consideration of hate crimes. Departmental Administration should revise "The USDA Handbook on Workplace Violence Prevention and Response" and the workplace violence training program to a) define hate crimes; b) discuss their incidence; c) caution supervisors and employees to consider extremely biased language as a possible predictor of a violent situation; and d) discuss appropriate prevention and response strategies to deal with hatred in the workplace. Organizations such as the Human Rights Campaign and the Southern Poverty Law Center could be contacted for assistance and advice in this effort.

## Office of Civil Rights

While the entire Department must share the responsibility of implementing our nondiscrimination and diversity policies, OCR is the group charged with the crucial, technical aspects of turning policy into reality. As such, this office conducts the critical tasks of Departmental rulemaking, policy communication, civil rights and diversity training, complaint resolution, and interactions with advisory groups. In order to give effect to our sexual orientation nondiscrimination policy, OCR should take a number of steps within these five areas.

### Departmental rulemaking

As the office responsible for technically defining how the Department's broad civil rights and diversity policies will be administered, it is critical that OCR develop rules and procedures which are consistent with the Secretary's policy statement, with existing civil rights statutes, and with existing programmatic statutes. In this regard, we believe that the full force of the Secretary's policy statement has not been captured in the subsequent technical rules which have been developed to implement that policy. Based on the discussions in Chapters 2 and 3, we believe that USDA's nondiscrimination rules can be strengthened, within the scope of current statutory authority, for both employment and program delivery.

**Recommendation 7:** As discussed in Chapter 2, DR 4300-7 provides for the inclusion of sexual orientation in the Department's employment discrimination complaint process. To strengthen this document, OCR should revise and reissue DR 4300-7 with the following changes:

- Section 4.a. should include a reference to the 1978 Civil Service Reform Act, 5 U.S.C. 2302(b).
- Section 5 should define sexual orientation as homosexuality, heterosexuality, and bisexuality, whether that orientation is real or perceived.
- Section 6.c.(2) should be revised to prohibit questioning or the identification of the sexual orientation of witnesses.

**Recommendation 8:** As discussed in Chapter 3, OCR should develop a new framework, based on the cooperative use of civil rights and programmatic statutes, for processing and preventing customer discrimination complaints. Under this framework, an Agency's Civil Rights Staff should be well versed in the Agency's programmatic statutes, and the Agency's administration should fully understand the various civil rights statutes. Through training, both civil rights and programmatic eligibility standards should be understood by all Agency employees as the dual basis for nondiscriminatory customer service. To assist in establishing this new framework, OCR should revise and reissue DR 4330-2 and DR 4330-3 with the following changes:

- Section 4 of both documents should be revised to include a uniform nondiscrimination statement which combines the civil rights and programmatic protections that should be applicable to customers of both conducted and assisted programs. An example of such a statement would be: "It is USDA policy to ensure no person is subject to prohibited discrimination in programs and activities conducted or funded by USDA based on race, color, national origin, gender, religion, age, disability, sexual orientation, marital status, familial status, political beliefs, income, receipt of public assistance, or any factor other than the eligibility requirements of individual programs."
- Section 5 of both documents should be expanded to indicate the various authorizing statutes and regulations which define the eligibility requirements of the various USDA assisted and conducted programs. While this list would no doubt be extensive, it would provide a necessary resource for Agency Civil Rights Directors when enforcing the Department's nondiscrimination policy or when managing challenges to that policy.
- Section 7.d. of both documents should be revised to add the following or an equivalent statement: "[An Agency will] (1) Ensure that all Agency services and benefits are distributed to beneficiaries based solely on programmatic eligibility requirements." The subsequent parts under section 7.d. should be renumbered (2) through (6).

**Recommendation 9:** Because the Department's civil rights policy applies equally to the areas of employment and customer service, OCR should assure that all published nondiscrimination policy statements adhere to this principle. DR 4300-3 should be revised and reissued to carry a single, uniform public notification policy statement to be used on all publications, regardless of whether the publication is targeted for employees, applicants, or customers of conducted or assisted programs. An example of an appropriate, inclusive statement would be: "The U.S. Department of Agriculture (USDA) prohibits discrimination in all programs and activities conducted or funded by USDA based on race, color, national origin, gender, religion, age, disability, sexual

orientation, marital status, familial status, political beliefs, income, receipt of public assistance, or any factor other than the eligibility requirements of individual programs.”

### **Policy communication**

After defining nondiscrimination policy rules, a second critical function of OCR is to communicate our nondiscrimination policy to all employees and customers. Unfortunately, sexual orientation issues and nondiscrimination policies are unique in their ability to draw questions and, occasionally, criticism from both employees and customers. Therefore, we believe that the Department could benefit enormously by developing and distributing several educational publications.

**Recommendation 10:** OCR should develop a brochure which a) defines sexual orientation; b) describes our sexual orientation nondiscrimination policy and the authority on which the policy was adopted; c) discusses the importance of this policy in employment and coworker diversity awareness and customer service; d) identifies June as the officially recognized Gay and Lesbian Pride Month; e) identifies USDA GLOBE as the officially recognized GLBT employee group; f) refers the reader to other manuals which describe avenues of redress for sexual orientation discrimination complaints; and g) lists contact information and other resources for more reading on the subject. The information in the brochure could be presented in a “Questions and Answers” format. The brochure should be distributed to all employees through their biweekly pay envelope and be available to customers.

**Recommendation 11:** OCR should develop a comprehensive employee manual describing all the options available for resolving employment discrimination complaints and workplace conflict. These options should include appeals to MSPB or OSC; the EEO complaint process (DR 4300-7); alternative dispute resolution (CPRC); the negotiated grievance procedure of an employee’s union; and counseling through EAP. A specific discussion of sexual orientation complaints and conflicts should be fully integrated into the information provided in the manual on each of these avenues of redress. Furthermore, the detailed information found in this manual should be summarized in a brochure which introduces employees to all the avenues of redress available within the Department and indicates where the manual can be obtained. This brochure should be distributed to all employees through their biweekly pay envelope.

**Recommendation 12:** Recently, as a follow up to the 1996 USDA Civil Rights Action Team recommendations, OCR initiated the development of a brochure and questionnaire regarding discrimination complaints and the complaint process for use by USDA customers.<sup>6</sup> We believe that OCR should complete the development and distribution of these documents. Sexual orientation discrimination should be an integral part of the discussion of the prohibited discrimination bases listed in the brochure, and should be listed on the questionnaire as a basis on which a complaint can be filed for both conducted and assisted program customers.

## Civil rights and diversity training

A third critical function of OCR is to coordinate the training of managers and employees on civil rights and diversity issues. This crucial activity was underscored in September 1998 by the issuance of DR 4120-1, entitled "Annual Departmental Civil Rights Training."<sup>3</sup> This DR requires that all USDA employees must receive such training.

We believe the information presented in the preceding three chapters regarding the unique concerns and constant evolution of sexual orientation issues in the workplace is sufficient to justify specific training on these issues for managers as well as the inclusion of these issues in the annual civil rights training for employees. As the trend toward more openness by GLBT individuals regarding their sexual orientation continues, such training will be critical to prevent employment discrimination complaints, program delivery complaints, and workplace conflicts.

**Recommendation 13:** At a June, 1999, meeting between USDA GLOBE and Civil Rights Director Rosalind Gray, Ms. Gray assured the group that she would hold a sexual orientation training session for Agency Civil Rights Directors.<sup>50</sup> Subsequently, this Task Force was asked to identify an appropriate contract trainer, which it did in October 1999.\* OCR should authorize and conduct this training session as soon as possible.

**Recommendation 14:** OCR should initiate sexual orientation training for all managers, civil rights personnel, and employee relations specialists within each USDA Agency. This training should be conducted and/or developed by contract firms which specialize in this issue. The training sessions should, at a minimum, include a discussion of the employment, workplace culture, and customer issues discussed in the earlier chapters of this report. The training should also give managers practical tools for dealing with issues such as inappropriate versus inclusive workplace language and behavior; workplace violence; religious objections to GLBT people; and the resolution of sexual orientation discrimination complaints and conflicts.

**Recommendation 15:** OCR should conduct a review of the all-employee annual civil rights training modules which are currently under development. OCR should assure that sexual orientation issues are adequately and appropriately integrated into the discussions of equal employment opportunity, cultural diversity, and program delivery in these modules. USDA GLOBE should be consulted in this review effort, and should be asked to review training materials for accuracy while in draft form. A similar cooperative approach should be used in the development of all future annual civil rights training materials.

## Complaint resolution

As discussed in Chapters 2 and 3, there are essentially no outstanding complaints of sexual orientation discrimination within the Department. However, as the culture within and outside of USDA changes, the Department must be prepared for complaints to be

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\*Bonnie J. Berger & Associates, Tokoma Park, MD.

filed, to deal swiftly and effectively with these complaints, and to hold accountable those individuals responsible for discrimination. We encourage OCR to make this a particular focus in the training discussed above, particularly for civil rights personnel and employee relations specialists.

### **Interactions with advisory groups**

A final OCR function critical to implementing nondiscrimination policies is its responsibility to interact with employee advisory groups. USDA GLOBE was recognized by the Department as an official employee organization in March 1994. The organization's mission is "to create a work environment free of discrimination and harassment based on sexual orientation,"<sup>51</sup> and the organization attempts to play a supportive role within the Department. However, this task force has found evidence that USDA GLOBE has been underutilized as a technical resource by USDA. Since the group was founded, only one attempt has been made by the Department to establish a formal link between OCR and USDA GLOBE. Following a request from the organization in 1996, a liaison to USDA GLOBE was appointed within OCR. Unfortunately, the appointed person was not a member of Civil Rights management, and consequently the level of access necessary to effectively utilize this group was not achieved.<sup>50</sup>

**Recommendation 16:** OCR should appoint one of its senior managers as a liaison to USDA GLOBE. This individual should work with the Board of USDA GLOBE to develop a regular system of communication and consultation to assist the Department in the development of OCR programs, decisions, and training which affect GLBT employees and customers. This cooperative relationship could also serve to fulfill many of the same functions currently provided by the Special Emphasis Programs established for other protected classes (e.g., celebratory months; program outreach).

### **Office of Human Resources Management**

OHRM is primarily responsible for assuring that personnel and benefits issues are addressed in an equitable manner. With regard to implementing the Department's sexual orientation nondiscrimination policy, we believe OHRM should address two key issues.

**Recommendation 17:** As discussed in Chapter 2, there are several benefits which GLBT employees can share with their domestic partners if they make the appropriate beneficiary or insurable interest designations. Because these designations and their availability are not well understood by all employees, OHRM should develop a brochure which discusses the benefits available to all employees, and the particular considerations of which an employee should be aware when designating a domestic partner as a beneficiary or an insurable interest. This brochure should be distributed to all employees through their biweekly pay envelope, and should be coupled with a more detailed educational campaign for personnel managers and benefits specialists.

**Recommendation 18:** As discussed in Chapter 2, OHRM should use exit interviews or an alternative survey tool to evaluate the USDA's cultural environment. Such a standard instrument should be used to monitor cultural trends through data collected from employee experiences, such as observations of intolerant attitudes expressed in the workplace or the use of inappropriate language or jokes. These data could be compiled into an annual report for use by the Department as an additional measure of the effectiveness of our nondiscrimination and diversity programs.

## **Office of Communication**

The USDA Office of Communications (OC) is responsible for distributing the nondiscrimination statements that must appear on all USDA publications and vacancy announcements. Although sexual orientation has been included in the official statements used by the Department since 1998 (DR 4300-3), many USDA publications and vacancy announcements still fail to include sexual orientation as a nondiscrimination basis. Therefore, OC must become more active in assuring that the correct nondiscrimination statements are used on all USDA publications.

**Recommendation 19:** OC should redistribute to all Agencies the appropriate Public Notification Policy Statement(s) found in DR 4300-3 which should be used on all USDA publications and vacancy announcements. This redistribution should include a notice requiring that all Agencies review their publication procedures to assure that all templates carry the correct statements. OC should develop a system to actively monitor Agency vacancy announcements, program statements, research and outreach publications, and all other published documents for inclusion of the appropriate policy statements.

## **Mission Areas and Agencies**

As discussed earlier, all employees bear responsibility for implementing the Department's nondiscrimination and diversity policy. While all of the preceding recommendations call for individual managers or offices to implement specific activities such as training or a new approach to customer service, the employees and managers within the Department's Mission Areas and Agencies must be open and receptive to these activities. We encourage all employees to recognize their role in changing the culture at USDA. This message should be conveyed in the training initiatives discussed above.

## **Advisory Groups**

In discussions with USDA GLOBE, this task force was assured of that group's interest in serving actively as an information resource for the Department. USDA GLOBE should be commended for its vigorous role as an advocate for GLBT employees to date, and we encourage the group to continue to be available to assist the Department with the implementation recommendations made above.

Finally, we commend the Department for taking the unique approach of studying GLBT policy issues through the use of a task force. The members of this task force know that we have learned much through this process, and hope that we have contributed to the advancement of nondiscrimination and diversity at USDA. We believe USDA should continue to use this task force approach as a means of regularly evaluating the Department's progress as it strives to be more inclusive of GLBT employees and customers.

**Recommendation 20:** USDA should review its progress in implementing the Department's sexual orientation nondiscrimination and diversity policy and evaluate the need to appoint and convene a Third USDA Task Force on Sexual Orientation in 2005. That task force could conduct an in depth review of the progress made in the Department since the issuance of this report, and could propose recommendations for future actions. The need for additional task forces on sexual orientation should be assessed every five years.

## Conclusion

America's view and understanding of GLBT issues is very different in the year 2000 from what it was in 1993 when the First USDA Task Force on Sexual Orientation convened. During those seven years, domestic partner benefits have moved from the vanguard to the commonplace, and same-sex marriage has moved from the unthinkable to the inevitable. During this same period of time, USDA has focused more attention on civil rights than at any time in its history. As a byproduct of those efforts, the Department's GLBT employees and customers now have, at least on paper, greater protections against discrimination than they did in 1993.

A disparity exists, however, between the scope of the cultural shift that has occurred in American society and the steps that USDA has taken to accommodate that shift. Over the past seven years, little has been done through training, communication, or revised employee benefits to enhance the workplace environment for GLBT employees or service to GLBT customers. The silence of the Department on GLBT issues can only leave our GLBT employees and customers to conclude that they have been quietly but actively excluded from any real benefit of the Department's increased focus on civil rights.

In light of this disparity, the question the Department now faces is this: What will America look like in another seven years, and will USDA take the steps necessary to adapt to those changes? While we cannot predict the future, we can conclude that the Department must either adapt or suffer the financial consequences of its failure to respond to a changing society. Fortunately, based on the societal changes that have occurred to date, USDA now has an incredible opportunity to fully implement its sexual orientation nondiscrimination policy with far less concern over Congressional or public criticism than at any time in the past.

To seize this opportunity, this task force urges the Department to adopt and implement the recommendations made in this report in order to fully integrate sexual orientation nondiscrimination and diversity into all of the Department's activities. By doing so, the Department stands to gain a greater openness and job satisfaction among its employees, increased employee productivity and customer service, and the prevention of costly complaints. As a result, the Department will finally communicate to its GLBT employees and customers that it does indeed treat *all* people fairly and equitably, and with dignity and respect.

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**Appendix 2**

**REPORT OF THE  
USDA TASK FORCE ON  
SEXUAL ORIENTATION**

**January 31, 1994**

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## Preface

On April 15, 1993, Secretary Espy issued the Department's Equal Employment Opportunity (EEO) and Civil Rights Policy Statement which specifically prohibits discrimination and harassment based on sexual orientation. The statement reads in part, "... our actions will be directed towards positive accomplishments in the Department's efforts to attain a diverse workforce, ensure equal opportunity, respect civil rights, and create a work environment free of discrimination based on gender or sexual orientation." In June 1993, this Departmental Task Force was formed to develop recommendations designed to implement the Secretary's policy regarding this issue.

The USDA is not a pioneer in addressing the issue of sexual orientation in the work place. Several other cabinet level Departments and other Federal agencies, including the Department of Transportation and the General Accounting Office, are formulating similar policies. Eight states and several local governments have laws or ordinances which prohibit discrimination based upon sexual orientation. A wide range of companies in the private sector have also begun to implement such non-discrimination policies, recognizing not only the equity imperative, but also the issue of ensuring the productivity of all employees in an organization.

Still, given the reality that fundamental denial of civil rights to gays, lesbians, and bisexuals is not prohibited by federal law and is accepted as the norm in this culture, the Department faces no small challenge. Implementing a policy of non-discrimination based on sexual orientation will necessarily involve confronting and indeed challenging the current legal and cultural realities. Therefore, at the outset of this endeavor to put forward initial recommendations for the implementation of this policy, we wish to address several critical issues.

First of all, denial of protection against discrimination based on sexual orientation has been defended based on the fact that sexual orientation is not included as a protected class under Title VII of the Civil Rights Act of 1964 as amended along with race, color, national origin, religion, or gender; nor is it included under a separate statute as in the case of age and disability. This is absolutely true. While eight states and over one hundred cities have outlawed discrimination based on sexual orientation, the Federal government, most states, and most municipalities do not extend such protection. Rights and protections are denied in the areas of housing, employment, education, health care, and the right to legally sanctioned relationships, custody of children, and police protection. However, in Federal employment decisions, Title V of the Civil Service Reform Act of 1978 mandates that employment

decisions based on non-merit factors are prohibited personnel practices. A person's sexual orientation is clearly a non-merit factor, and therefore an employment decision based on it constitutes a prohibited personnel practice. Furthermore, the Secretary may extend employment protections for USDA employees beyond those mandated by Title VII. In doing so, the Secretary has taken a strong stand against one of the last acceptable forms of discrimination.

Secondly, the issue of non-discrimination based on sexual orientation often generates objections to opening the door to demands for "special consideration" or Affirmative Action. Non-discrimination based on sexual orientation is simply not an Affirmative Action issue. Gay men, lesbians, and bisexuals are present in the USDA workforce; there is no issue of representation. However, these employees have remained largely invisible in order to ensure their safety and to protect their careers. Although a policy of non-discrimination based on sexual orientation is not an Affirmative Action issue, it is definitely an issue of creating a non-hostile, respectful work environment for all employees. The issue is not one of asking for "special consideration" or "special privileges," but one of providing the same rights and privileges granted heterosexual co-workers.

A third objection to the inclusion of non-discrimination based on sexual orientation focuses on the perception that such a policy advocates immoral choices, immoral sexual acts, and an immoral lifestyle. Judgements about morality and immorality are simply not at issue. No one is being asked to change his or her beliefs. The issue is equal protection, fair and equitable treatment, and the assurance of a non-hostile work environment for all employees.

Preceding paragraphs have addressed policies and issues which directly impact employment of USDA personnel. The Task Force feels that these issues and our proposed recommendations go to the core of the Secretary's policy statement to create ". . . a work environment free of discrimination and harassment based on . . . sexual orientation." However, the Task Force also looked at the issue of prohibited discrimination on the basis of sexual orientation in program delivery and related areas such as the awarding of contracts, licenses and permits. Accordingly, this report will also focus on not discriminating against our "customers," the public we serve, on the basis of sexual orientation.

In light of these issues, this report identifies the following areas as critical to the implementation of the Secretary's policy of non-discrimination based on sexual orientation:

- (1) training and education for all segments of the USDA workforce;
- (2) the establishment of a Secretary's Advisory Committee on Sexual Orientation and an employee resource group;
- (3) avenues of redress for employees who believe they are experiencing discrimination or harassment based on sexual orientation;

- (4) benefits for the partners and families of gay, lesbian, and bisexual employees;
- (5) a policy of non-discrimination for USDA federally conducted programs; and
- (6) communication of the USDA policies on sexual orientation.

The following sections of this report provide background information in each of these areas and propose specific recommendations designed to facilitate the implementation of the Secretary's policy.

It is now USDA policy that discrimination and/or harassment based on sexual orientation will not be tolerated in the Department. And as Secretary Espy states in his April 15, 1993 EEO and Civil Rights Policy Statement, "This policy is more than a sincere statement of intent. It is a personal commitment to take the actions necessary to ensure implementation. Each employee, at every level, will be held personally accountable for her or his performance in ensuring equal opportunity and promoting civil rights." In affirming this commitment, the Secretary has chosen to exercise significant leadership in the shaping of the culture of USDA by assuring a working environment in which all employees have the opportunity to work to their fullest potential in service of the mission of the Department of Agriculture.

## Training and Education

**Discussion:** Training and education for every segment of the USDA workforce will be critical to the effective implementation of the policy of non-discrimination and non-harassment based on sexual orientation.

Inclusion of sexual orientation in the Secretary's EEO and Civil Rights Policy Statement is a powerful, hopeful beginning. However, policies alone do not drive change. Only human energy, awareness, and commitment lead to fundamental change. A tremendous amount of work needs to be done in order to bring USDA to the point of recognizing that discrimination against gay men, lesbians, and bisexuals is fundamentally the same as discrimination based on any of the seven factors of race, color, national origin, gender, religion, age, or disability. Likewise, there is much work to be done in order to bring this society to the point of recognizing that sexual orientation is not about choice, lifestyle, or sexual acts, but rather about as immutable an aspect of an individual's identity as gender or race. It is time for USDA to participate fully in this work of cultural change.

**Recommendation 1:** Conduct training for staff who will be directly involved in the implementation of the Secretary's policy of non-discrimination. Training participants would include Civil Rights Directors, Directors of Personnel, and Public Affairs Officers. These officials will be responsible for working in partnership with senior management to develop specific strategies for implementation within their agencies and within the Department. Training should also be provided to Civil Rights Staff Members, EEO Counselors, Dispute Resolution Board Members, Personnel Specialists, and Public Affairs Specialists. Both technical and awareness training will be critical for those who will be directly responsible for carrying out the policy on an administrative level.

**Recommendation 2:** Conduct training for all members of the USDA Senior Executive Service. This training is essential, as implementation of a policy of non-discrimination based on sexual orientation will require the commitment, understanding, and leadership of top management officials. The Task Force recommends that, as a minimum, a 1/2 day training session be designed to provide Senior Executives with the information necessary to effectively manage the implementation of the USDA policy within their sphere of influence. Topics to be covered should include:

- (1) an introduction to the Task Force report;
- (2) review of the USDA policy, including legal implications;
- (3) sensitivity and awareness training covering areas such as homophobia, sexual orientation vs. sexual preference, and non-traditional family structures; and
- (4) strategies for implementation of the policy under the umbrella of USDA diversity initiatives.

Training addressed in both Recommendations 1 and 2 should occur shortly after the Secretary's acceptance of this report.

**Recommendation 3:** Direct the Human Resource Development Division of the USDA Office of Personnel to use its creative development process to produce a training module on the issue of sexual orientation. The development of this module should include participation and input from gay, lesbian, and bisexual employees in the Department who are willing to serve in this capacity. This module will serve as a resource for Civil Rights training for all segments of the USDA workforce -- for managers and supervisors, for employees, and as a component of new employee orientation programs.

**Recommendation 4:** Include sexual orientation issues and awareness in the USDA Diversity Conference planned for April 1994.

(5)

## Advisory Committee on Sexual Orientation and Employee Resource Group

Discussion: If USDA is to fully realize the Secretary's commitment to "ensuring equal opportunity for all in employment," the perspectives and values of all employees must be used to shape USDA programs and policies. This is especially true for employees who do not currently have access to avenues of influence and power. The work environment in USDA is not sufficiently safe for employees to self-identify as gay, lesbian, or bisexual, and as a result, their experiences and perspectives are absent from the decision-making process. The Department has addressed this lack of power-sharing for many groups through the establishment of advisory committees and various employee resource groups. For example, USDA has established the Secretary's Committee on Employees with Disabilities, the Forum for Blacks in Agriculture, the Women's Action Task Force (WAT), and the Hispanic Association for Cultural Exchange (HACE). There is no group to provide a collective voice for gay, lesbian, and bisexual employees. Nor is there a group that can provide ongoing advice to the Secretary on issues affecting the gay, lesbian, and bisexual community.

### Establishment of Employee Resource Group:

Establishing and supporting an employee resource group will provide:

- (1) support for gay, lesbian, and bisexual employees through the sharing of information and referral to resources;
- (2) employees to assist with training and awareness sessions in USDA; and
- (3) a source for information on sexual orientation work place issues available to all USDA employees.

**Recommendation 1:** Establish and support a USDA chapter of GLOBE (Gay, Lesbian, and Bisexual Employees) as an officially sanctioned employee resource group. Grant USDA GLOBE the same rights and privileges granted to other employee resource groups such as the Hispanic Association for Cultural Exchange (HACE) or the Association of Persons with Disabilities in Agriculture (APDA). Include a representative from USDA GLOBE on the Civil Rights Management Council and include USDA GLOBE members in Departmental planning groups such as the USDA Work Force Diversity Conference Task Force.

Establishment of Advisory Committee to the Secretary:

Establishing an advisory committee to the Secretary will provide:

- (1) advice to the USDA leadership on issues affecting gay, lesbian, and bisexual employees;
- (2) assistance in the implementation of Departmental policies;
- (3) research on issues affecting the gay, lesbian, and bisexual community; and
- (4) resources to the development of a training module.

**Recommendation 2:** Establish a Secretary's Advisory Committee on Sexual Orientation.

## Benefits for Partners and Families of Gay and Lesbian Employees

**Discussion:** Legally, the denial of the right to lawfully sanctioned relationships is the foundation of denial of benefits to same sex couples. Benefits are granted without question to the spouses and families of heterosexual employees who choose to marry.

Culturally, the definition of "family" is at the foundation of the whole issue of benefits. The traditional definition of family includes only a married couple, husband and wife, with children in the household. However, the 1990 Census indicates that only 26% of American households fit this definition. Since gay men and lesbians make up about only 10% of the population, they are clearly not the only segment of the population adversely affected by the narrowness of the traditional definition of family. It is time to change.

In fact, the change has already begun. In recognizing the reality and legitimacy of committed relationships among their gay and lesbian employees -- and among their heterosexual employees whose relationships do not fit the traditional model -- by granting the same benefits as routinely granted to married employees, the Federal Government would definitely not be breaking new ground. A significant number of major corporations, small businesses, state and local governments, and the Province of Ontario have addressed the issue of disparate treatment based on marital or family status by providing equal benefits for gay men and lesbians in committed relationships, as well as for unmarried heterosexual employees in committed relationships. Many others are quickly moving to do the same. As more and more employers recognize and respect the validity of non-traditional families, the Federal Government will become less and less an "employer of choice" if it does not address this issue in a constructive and creative way.

In exploring the issues involved in extending benefits to gay and lesbian employees, perceived budgetary barriers often seem even more imposing than political barriers. However, many companies have found that the myth that extending benefits to domestic partners and non-traditional family members would send the cost of benefits programs sky-rocketing is just that -- a myth. Companies and governmental jurisdictions that have extended benefits have not incurred a dramatically increased cost for benefits packages.

Clearly, the issue of benefits is not "on the horizon." The issue of benefits is here. Invisibility is no longer acceptable to the gay, lesbian, and bisexual community, and tolerance is not enough. Gay men, lesbians, and bisexuals simply want the rights and benefits that are available to their heterosexual co-workers. It is not a matter of "special privileges." It is a matter of equity.

Commitment to valuing the diversity of the USDA work force will remain an illusion if gay, lesbian, and bisexual employees continue to be excluded from full membership in Team USDA.

**Recommendation 1:** Since FEGLI, FEHBA, and retirement benefits are defined by Federal legislation and OPM regulations, USDA should act as an advocate toward changing OPM regulations and Federal legislation to include domestic partners and non-traditional family members in Federal benefits packages. The Task Force recommends that USDA initiate this advocacy role through a letter from Secretary Espy to the Director of the Office of Personnel Management urging OPM to create a government-wide task force to study the issue.

**Recommendation 2:** Direct an ongoing USDA Advisory Committee on Sexual Orientation to thoroughly research the initiatives of private enterprise and public jurisdictions regarding benefits for gay, lesbian, and bisexual employees, their partners, and families and develop a comprehensive working paper on this issue.

**Recommendation 3:** Direct the USDA Office of Personnel to review all regulations governing benefits to determine what benefits can currently be extended to gay and lesbian employees and their families without any changes in federal legislation or OPM regulations.

**Recommendation 4:** Issue a letter to all employees clarifying Designation of Beneficiaries. In the following three areas, employees can name as beneficiary anyone of their choice, including a family member, partner, friend, or even an organization:

- (1) FEGLI Life Insurance (SF-2823);
- (2) Designation of Beneficiary for Unpaid Compensation (SF-1152); and
- (3) Retirement System Designation of Beneficiary (SF-2808 for the Civil Service Retirement System or SF-3102 for the Federal Employees Retirement System).

All other employee benefits provide for disparate treatment based on marital and/or family status.

**Recommendation 5:** Direct an ongoing Secretary's Advisory Committee on Sexual Orientation to conduct a Department-wide survey to evaluate the impact of denial of benefits on USDA employees who are gay, lesbian, or bisexual. Solicit feedback on benefit areas gay and lesbian employees perceive as most crucial to their well-being.

## Filing Complaints of Discrimination Based on Sexual Orientation

Discussion: From the outset, it is important to state that managers and employees have an obligation not to engage in discrimination or harassment on the basis of sexual orientation, and that such prohibited conduct should not have to be addressed solely through an established complaint process. Management has the responsibility to take appropriate steps to address prohibited conduct, including the taking of disciplinary and adverse action if warranted, irrespective of whether a formal complaint or grievance has been filed.

Avenues do currently exist for filing complaints of discrimination based on sexual orientation. Under Title V of the Civil Service Reform Act of 1978, major adverse actions such as a demotion, firing, suspension for more than 14 days, furlough for more than 30 days, or withholding of a within-grade increase may be appealed to the Merit Systems Protection Board (MSPB). Other prohibited personnel practices that are not appealable to MSPB may be addressed through the administrative grievance procedure.

However, the current grievance options are not adequate. For many gay, lesbian, or bisexual employees, filing a grievance would probably mean self-identifying as gay, lesbian, or bisexual. Because of the current environment at USDA, taking such a step may have serious repercussions for an employee's personal and professional well-being. Because a grievance is first filed with their supervisor, this exposes employees to a potentially hostile environment, thus discouraging them from using the grievance procedure.

Most negotiated agreements have some wording to the effect that management will not make personnel decisions based on off-duty conduct, but this wording does not constitute specific protection for gay, lesbian, and bisexual employees.

Since the EEO complaint process in USDA already handles discrimination complaints outside of Title VII, i.e. marital status, it would be a logical and sensitive avenue for handling complaints of discrimination based on sexual orientation as well. In fact, concerns about discrimination based on sexual orientation can and have been dealt with through the EEO counseling process which also has the advantage of affording confidentiality if requested by the employee.

Due to lack of protection under Title VII, however, further clarification is necessary in order to effectively utilize the formal stages of the EEO complaint process for complaints of discrimination based upon sexual orientation. Although USDA clearly has no jurisdiction over the courts or EEOC decisions, the Secretary does have the authority to modify the USDA EEO complaint process to include complaints of discrimination based on factors not currently protected under Title VII. Therefore, if mandated by the Secretary, a complaint of discrimination based on sexual orientation may be accepted by the Department as a formal complaint, may be heard before the Dispute Resolution Board, may be assigned for formal investigation, and may be granted a final decision by the Department.

However, employees must be made aware that should they request a hearing before an EEOC Administrative Judge or request consideration of an appeal of a Departmental decision, the request may well be rejected because sexual discrimination is not currently under the purview of Title VII. Employees would also need to be made aware that a civil suit based on sexual orientation would be precluded on the same basis. Nevertheless, utilizing the Department's internal EEO complaint process for complaints of discrimination based on sexual orientation would afford greatly enhanced protection for gay, lesbian, and bisexual USDA employees and would provide an effective method for enforcing the Secretary's policy of non-discrimination based on sexual orientation.

**Recommendation 1:** Direct the Disputes Resolution Staff to amend the USDA EEO complaint process to include complaints of discrimination based on sexual orientation. The Task Force envisions that procedures would allow for EEO Counseling, acceptance as a formal complaint, a Dispute Resolution Board hearing, formal investigation, and decision by the Department.

**Recommendation 2:** Direct the Disputes Resolution Staff to develop materials explaining the grievance and complaint avenues available to all employees. All materials should clearly reference procedures available to employees and applicants who believe they have been discriminated against because of their sexual orientation. The materials should also clearly articulate the limitations of utilizing the aspects of the EEO complaint process controlled by the EEOC or of filing a civil suit based on sexual orientation.

**Recommendation 3:** Direct agency Labor Relations Officers to negotiate adding sexual orientation to the non-discrimination clause in all new master agreements.

## Program Delivery and Related Areas

USDA programs generally fall into one of two categories. These are:

- (1) Indirect or Federally Assisted programs falling under the purview of Title VI of the Civil Rights Act of 1964 and related statutes; and
- (2) Federally Conducted Programs.

There is currently no statutory prohibition against discrimination on the basis of sexual orientation for either program category. However, there is flexibility for USDA to extend this coverage to its Federally conducted programs; there is much less flexibility for USDA to unilaterally extend such coverage to its Federally assisted programs.

Federally Assisted Programs are those programs in which USDA assistance is provided through a recipient to the beneficiary (program participant). An example would be the Food Stamp Program which is administered by the States (recipients) to food stamp participants (beneficiaries).

Title VI of the Civil Rights Act of 1964 mandates that no persons shall, on the basis of race, color or national origin, be excluded from participation in, or be denied the benefits of, any program or activity of a recipient of Federal financial assistance. In addition, Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in Federally assisted programs. Dependent upon the type of program, other Civil Rights statutes may also apply, e.g. Title IX of the Education Amendment of 1972 prohibits discrimination in education programs and activities on the basis of sex.

Congress would have to amend Title VI to include sexual orientation in order for USDA to extend such a non-discrimination provision to program recipients. In effect, USDA cannot impose on recipients or outside entities requirements beyond what is mandated by Federal law.

Federally Conducted Programs are those programs in which assistance is provided by USDA directly to the beneficiary. An example would be the farm loan programs administered by the Farmers Home Administration. Current regulations found at 7 CFR 15 Subpart B prohibit USDA from discriminating against program beneficiaries on the basis of race, color, religion, sex, age, disability, or national origin.

Unlike Federally assisted programs, the only controlling Civil Rights statute for Federally conducted programs is Section 504 of the Rehabilitation Act of 1973 which prohibits discrimination on the basis of disability. The non-discrimination provisions for Federally conducted programs and activities at 7 CFR 15 Subpart B apply only to USDA employees administering USDA programs. Therefore, USDA can add sexual orientation as a prohibited basis for discrimination in its Federally conducted programs.

USDA should make this addition by:

- (1) issuing a policy statement by the Secretary; and
- (2) amending 7 CFR 15 Subpart B to prohibit discrimination on the basis of sexual orientation in USDA conducted programs.

**Recommendation:** As an immediate act, the Secretary should issue a policy statement prohibiting discrimination on the basis of sexual orientation in USDA Federally conducted programs and activities. This would include prohibiting discrimination on the basis of sexual orientation by USDA in determining recipients of contracts, licenses, permits, assistance grants, and cooperative agreements. As a future initiative, USDA should amend its regulations at 7 CFR 15 Subpart B to include sexual orientation as a prohibited basis of discrimination.

#### Additional Areas of Consideration

(1) **Public Notification Policy:** Departmental Regulation 4300-3, Equal Opportunity Public Notification Policy, states, in part, that ". . . no person shall be discriminated against on the grounds of race, color, religion, sex, national origin, age or handicap in employment or in any program or activity provided by the Department . . . and that this policy will be communicated to the public through all appropriate USDA public information channels."

**Recommendation:** Amend the Public Notification Policy to include sexual orientation as a prohibited basis for discrimination in USDA conducted programs and activities and in employment of USDA personnel. Ensure that the non-discrimination statement on USDA job vacancy announcements includes a reference to sexual orientation.

(2) **Licenses and Permits:** Licenses and permits do not fall into the category of assistance programs. Therefore, the Secretary may have authority to prohibit discrimination on the basis of sexual orientation by holders of licenses or permits; however, this will depend on specific licensing authority for each particular program. In the case of the Forest Service, the primary issuer of licenses and permits, there is a basis for the Secretary to prohibit sexual orientation discrimination by holders of licenses and permits in their provision of services to the public. However, this prohibition could not extend to the employment and other internal practices of licensees and permittees. There would also be an exemption of this policy for youth and religious groups.

**Recommendation:** Amend the Forest Service Manual to include a prohibition against discrimination on the basis of sexual orientation by holders of licenses and permits in their provision of services to the public.

(3) **Procurement contracts:** Procurements are controlled by the Federal Acquisition Regulations which are issued by the Office of Federal Procurement Policy within the Office of Management and Budget. Thus, USDA would probably lack authority to amend its procurement regulations to include a prohibition of discrimination based on sexual orientation by recipient contractors. However, as reflected in the first recommendation, the Secretary should include in his policy statement a prohibition against discrimination on the basis of sexual orientation in USDA's choosing of contract recipients.

(4) **Assistance Grants and Cooperative Agreements:** Some of these programs fall under the umbrella of Title VI, thus USDA cannot place additional non-discrimination sanctions on participants. However, as reflected in the first recommendation, the Secretary should include in his policy statement a prohibition against discrimination on the basis of sexual orientation in USDA's choosing of grantees and recipients of cooperative agreements.

## Communication of USDA Policies on Sexual Orientation

Discussion: The key to successfully implementing the recommended policies is in preparing top leaders for their role in carrying out the policies. If they do not understand the policies in detail and do not have awareness of and sensitivity to gay, lesbian, and bisexual issues, they cannot effectively implement the policies. In addition, those components of the organization who will have administrative responsibility for the policies (personnel, civil rights, public affairs) must also be prepared to do their job. Only after we have completed this step of careful preparation can we move forward in announcing the policies to USDA employees and then implementing them.

In addition, this communication and implementation strategy acknowledges the potentially strong resistance and negative reaction to putting into place non-discrimination and non-harassment policies. The Task Force recommends implementing the policies in stages, over time, and integrating the policies into the appropriate programs.

The following principles should be accepted as USDA moves forward in implementing this change:

- (1) Acknowledge and plan for negative reactions from employees, the public, and members of Congress.
- (2) The policy must be tiered from top management down. Agency heads and other top USDA Officials must support and implement policies before general announcement to the work force.
- (3) The Secretary has the authority to implement the policy.
- (4) The Secretary's EEO and Civil Rights Statement is consistent with USDA goals for a diverse work force.
- (5) Communication and implementation of these policies should occur gradually to minimize the negative reaction.
- (6) Treat all inquiries regarding the sexual orientation policies seriously.
- (7) Use a variety of materials to communicate policy (letters, USDA News, teleconference).
- (8) Communicate these policies as a regular part of doing business; that is, **DO NOT COMMUNICATE THEM ONLY AS SEPARATE POLICIES -- INTEGRATE THESE POLICIES INTO APPROPRIATE PROGRAMS.**

## Policy of Non-Discrimination Based on Sexual Orientation Questions and Answers

For the first time in the history of the Department of Agriculture, the Secretary's EEO and Civil Rights Policy Statement specifically prohibits discrimination and harassment based on sexual orientation. Secretary Espy's April 15 statement reads in part, "... our actions will be directed towards positive accomplishments in the Department's efforts to attain a diverse workforce, ensure equal opportunity, respect civil rights, and create a work environment free of discrimination based on gender or sexual orientation." The following questions are meant to address several basic issues raised by the new policy.

1. Does the Secretary have the power to establish a policy of non-discrimination in employment based on sexual orientation even though sexual orientation is not included as one of the seven factors protected under Title VII of the Civil Rights Act of 1964, the Age Discrimination Act of 1967, or the Rehabilitation Act of 1973?

Yes. Title V of the Civil Service Act of 1978 states that discrimination on the basis of non-merit factors is a prohibited personnel practice. Furthermore, it is fully within the scope of the authority of the Secretary to extend employment protections for USDA employees beyond those mandated by legislation.

2. Under this policy, will an employee who feels he or she has been discriminated against on the basis of sexual orientation be able to utilize the EEO complaint process?

Yes, with certain limitations. A USDA employee who believes he or she has been discriminated against on the basis of sexual orientation may contact an EEO Counselor who will facilitate efforts to resolve the case informally. If the complaint is not resolved at the informal level, the employee may file a formal complaint. The complaint may be heard before the USDA Disputes Resolution Board. If the case is still not resolved, the case will be assigned for investigation after which the employee may request a final Decision by the Department. Ordinarily, an employee would also have the option to request an EEOC hearing. In all probability, EEOC would reject such a request since sexual orientation is not one of the seven factors currently protected by federal legislation. In a similar manner, if an employee wishes to pursue a civil action following the administrative process, the district court would not accept such a case for the same reason.

3. Under this policy, will sexual orientation be a basis for Affirmative Action? In other words, will hiring goals be set for gay, lesbian, and bisexual employees as they have been set for women, minorities, and individuals with disabilities?

No. Non-discrimination based on sexual orientation is not an Affirmative Action issue.

4. Doesn't a policy of non-discrimination based on sexual orientation condone immorality?

No. Judgements about morality and immorality are simply not at issue. The policy does not require anyone to change his or her beliefs. The issue is equal protection, fair and equitable treatment, and the assurance of a non-hostile environment for all employees.

5. Doesn't this policy give "special" rights to gay, lesbian, and bisexual employees?

No. The USDA policy of non-discrimination and non-harassment based on sexual orientation does not extend special rights. It does provide for the same rights and privileges taken for granted by other employees.

6. What kinds of behavior may be considered harassment based on sexual orientation?

Harassment based on sexual orientation may include any or all of the following: unwelcome teasing, insults, innuendoes, jokes, remarks, comments, questions, or stories related to sexual orientation; referring to an employee in derogatory terms, such as faggot, queer, or dyke; ostracizing or denigrating an employee because of sexual orientation. The EEOC has recently published proposed guidelines for determining what constitutes unlawful harassment under Title VII. These guidelines could also be applied to sexual orientation harassment.

## Conclusion

Although the Task Force firmly believes that over the long term, the USDA policy on sexual orientation must be thoroughly integrated into the Department's Civil Rights policies, practices, and programs, we acknowledge this is a significant change that requires emphasis. We strongly advocate that the Secretary supplement his April 15 policy statement with a clear and unambiguous statement which clearly articulates USDA's position regarding discrimination or harassment based on sexual orientation. The Task Force offers the following statement for consideration:

**USDA will not tolerate discrimination against any employee or applicant based on sexual orientation in any aspect of employment. Employees or applicants who believe they have been discriminated against because of their sexual orientation will have the right to file a complaint of discrimination. Furthermore, USDA managers and supervisors will ensure that the work environment is free of harassment based on sexual orientation.**

**It is the policy of USDA to ensure its employees deliver USDA programs to the public without regard for sexual orientation.**

**USDA will inform the public of its policy of non-discrimination in employment and program delivery through the Secretary's EEO and Civil Rights Policy Statement, non-discrimination statements in vacancy announcements and Departmental publications, and all other appropriate media for public information.**

**USDA will act as an advocate toward changing OPM regulations and Federal legislation to include domestic partners and non-traditional families in Federal benefits packages.**

## Appendix 3

### Implementation Status of the Recommendations of the First USDA Task Force on Sexual Orientation

This table lists the recommendations of the First USDA Task Force on Sexual Orientation, published in 1994, and indicates whether or not each recommendation has been initiated, partially completed, or completed. To fit within this table, all recommendations have been paraphrased or abbreviated.

| First Task Force Recommendation   | Not<br>Initiated | Partially<br>Completed | Completed | Footnotes |
|---|------------------|------------------------|-----------|-----------|
| <b>Training and Education</b>   |                  |                        |           |           |
| Train staff who will implement the policy.                                  | X                |                        |           |           |
| Train the USDA Senior Executive Service.                                    | X                |                        |           |           |
| Produce a training module on sexual orientation.                            | X                |                        |           |           |
| <b>Advisory Committee on Sexual Orientation and Employee Resource Group</b> |                  |                        |           |           |
| Establish and support USDA GLOBE  |                  | X                      |           | 1         |
| Establish Advisory Committee on sexual orientation.                         | X                |                        |           |           |
| <b>Benefits for Partners and Families of Gay and Lesbian Employees</b>      |                  |                        |           |           |
| Advocate for legislative approval of partner benefits.                      | X                |                        |           |           |
| Conduct research on domestic partner benefits.                              |                  | X                      |           | 2         |
| Identify currently available domestic partner benefits.                     |                  |                        | X         | 2         |
| Notify employees of beneficiary designation options.                        | X                |                        |           |           |
| Evaluate impact of benefit denial on GLBT employees.                        | X                |                        |           |           |
| <b>Filing Complaints of Discrimination Based on Sexual Orientation</b>      |                  |                        |           |           |
| Amend complaints process to include sexual orientation.                     |                  |                        | X         | 3         |
| Develop materials explaining avenues of redress.                            | X                |                        |           |           |
| Add sexual orientation to union master agreements.                          |                  | X                      |           | 4         |
| <b>Program Delivery and Related Areas</b>                                   |                  |                        |           |           |
| Prohibit discrimination in conducted programs.                              |                  |                        | X         | 5         |
| Include sexual orientation in public statements/job ads.                    |                  | X                      |           | 6         |
| <b>Communication of USDA Policy on Sexual Orientation</b>                   |                  |                        |           |           |
| Communicate/implement policy throughout USDA.                               | X                |                        |           |           |

1. While the Department did grant official recognition to USDA GLOBE as an official employee group, the Department has not supported GLOBE as defined by the text of this 1994 recommendation; i.e., to use GLOBE as a resource during Departmental sexual orientation policy planning, training, and awareness.
2. As a result of establishing the Second USDA Task Force on Sexual Orientation and commissioning this report, the Office of Civil Rights has completed or partially completed these recommendations (see Chapter 2).
3. DR 4300-7, published in March 1999.
4. At the initiation of union members, some union collective bargaining agreements have been revised to include sexual orientation as part of their nondiscrimination clauses.
5. 7 CFR 15d and DR 4330-3, published in November 1999 and March 1999, respectively.
6. DR 4300-3, published in February 1998 and revised in November 1999.

# SEXUAL ORIENTATION DISCRIMINATION

## Questions and Answers

*"The challenge of diversity is to ensure equal opportunity for all employees to achieve their full potential and feel valued in the Commerce community. This includes each employee's right to work without fear of stereotyping and unfair treatment by supervisors and colleagues due to one's sexual orientation. In creating such an environment, we demonstrate our commitment to workforce diversity."*

William M. Daley  
Secretary of Commerce  
June 1997

Appendix 4

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U.S. DEPARTMENT OF COMMERCE  
Office of Civil Rights  
January 1998

U.S. DEPARTMENT OF COMMERCE  
Office of Civil Rights

In August 1996, the Department issued a non-discrimination policy that prohibits discrimination based on sexual orientation. The purpose of this policy is to provide a supportive and respectful work environment. It is only in such a workplace that all employees can contribute fully and reach their maximum potential.

Sexual orientation discrimination is also a prohibited personnel practice under the Civil Service Reform Act of 1978. This act established the basic merit system principles governing federal personnel management.

There are several avenues of redress for sexual orientation discrimination. Information about these procedures and their application to sexual orientation discrimination has not been readily available. Recognizing this void, the Office of Civil Rights compiled information about these avenues of redress in this booklet. This booklet provides this information in a more accessible format to Commerce employees and applicants for employment.

In addition, this booklet provides general information about the Department's policy on sexual orientation discrimination and the state of the law on this issue. It also provides information about other matters related to sexual orientation that may be of interest to Commerce employees in general and to Commerce employees who are lesbian, gay, or bisexual in particular.

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## SEXUAL ORIENTATION DISCRIMINATION

### IN GENERAL

#### What is employment discrimination based on sexual orientation?

Employment discrimination based on sexual orientation is treating employees or applicants for employment differently from similarly situated coworkers or applicants because of:

- their sexual orientation or perceived sexual orientation;
- their relationship with an individual(s) of a particular sexual orientation; or
- their affiliation with a group that is associated with sexual orientation issues or whose membership is composed mainly of people of a particular sexual orientation(s), including an employee organization.

### DEPARTMENT OF COMMERCE POLICY

#### What is the Department's policy on sexual orientation discrimination?

Employment discrimination based on sexual orientation violates Department of Commerce policy and it will not be tolerated. Retaliation for raising concerns of sexual orientation discrimination is also prohibited.

Sexual orientation is also one of the focuses of the Department's diversity initiatives. Diversity in the work place acknowledges the individual worth and dignity of every person. Work force diversity recognizes that all employees — without regard to sexual orientation, age, race, color, differing abilities, religion, gender, or other non-merit factors — must work together with mutual respect to advance the

Department's mission. The goal of diversity is to provide an opportunity for all employees to contribute fully to our nation's economic strength.

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**Does the Department's non-discrimination policy grant special rights to employees and applicants who are gay, lesbian, or bisexual?**

No. The policy prohibits discrimination based on sexual orientation against *all employees* and applicants. It also forbids discrimination based on race, color, religion, sex, national origin, age, and disability. Equal employment opportunity for every employee and applicant is the goal of this policy.

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**In practice, what does the Department's non-discrimination policy mean?**

The non-discrimination policy simply means that:

- sexual orientation cannot be used as a basis for employment decisions;
- all employees must be treated equally without regard to sexual orientation;
- supervisors must ensure that their employees have a work environment that is free of harassment based on their sexual orientation. This includes jokes, comments, cartoons, or any derogatory behavior based on sexual orientation; and
- employees cannot be retaliated against because they raise concerns about sexual orientation discrimination.

**What types of employment issues does the policy cover?**

The non-discrimination policy applies to all aspects of employment including hiring, promotion, termination and all other terms and conditions of employment. It also prohibits hostile environment harassment based on sexual orientation or in retaliation for raising concerns about sexual orientation discrimination. Hostile environment harassment occurs when actions taken because of an employee's sexual orientation (a) are intended to or do reasonably interfere with the employee's work performance or (b) create an intimidating, hostile, or offensive work environment.

**THE LAW**

**What is the law regarding sexual orientation discrimination in federal employment?**

At present, there is no federal civil rights law that prohibits discrimination based on sexual orientation in federal or private employment.

While some state and local laws prohibit employment discrimination based on sexual orientation, these do not apply to federal employment even if your workplace is located in a state or locality with such a law.

However, sexual orientation discrimination in federal employment is a prohibited personnel practice under the Civil Service Reform Act of 1978.

## AVENUES OF INFORMAL RESOLUTION

### EEO COUNSELING AND MEDIATION

#### Can sexual orientation discrimination be raised in the informal Equal Employment Opportunity (EEO) counseling process?

Yes. Employees and applicants for employment may raise claims of sexual orientation discrimination and related retaliation in the informal EEO Counseling process. However, at this time, sexual orientation discrimination complaints may not be addressed in the formal EEO complaint process.

You may pursue EEO counseling and raise your claim in one of the avenues of redress described in the next section. However, you will still need to meet time limits for raising your claim in other procedures.

#### How does the Informal EEO Counseling process work?

The informal EEO Counseling process is a forum in which an EEO Counselor attempts to facilitate an agreement to resolve the claim. The EEO Counselor is neutral and does not represent or support the position of either party.

The EEO Counselor can also provide basic information about other forums for raising an allegation of sexual orientation discrimination.

You may remain anonymous during EEO Counseling. However, remaining anonymous may make it difficult for the Counselor to facilitate a resolution of your concerns.

Mediation, an Alternative Dispute Resolution (ADR) process, is available as an optional part of the EEO counseling process. ADR includes a variety of techniques used to resolve disputes in place of formal legal procedures. Mediation is an informal process in which the employee or applicant and management officials meet with a neutral third party,

called a mediator. In a meeting or series of meetings, the mediator brings the parties together to reach a mutually acceptable resolution of the dispute.

The mediator makes no decisions, but helps the parties agree on a resolution by finding points of general agreement and suggesting various ways that the goals of each party can be met. Mediators are trained to help people carefully consider their goals, interests, and options. When mediation is successful, the mediator draws up a resolution agreement for the parties to sign.

Mediation can reduce the time and cost involved in resolving disputes. All mediation discussions are confidential and no record is kept of the discussions.

#### How can I obtain EEO counseling?

Contact the EEO Officer serving your bureau and ask to be assigned to an EEO Counselor.

For more information about EEO counseling and mediation:

- Contact an EEO Counselor or your Agency EEO Office.
- Call the Department's Office of Civil Rights (OCR) at (202) 482-5691 (Voice/TTY/TDD).
- See the OCR page on the Department's web site at <http://www.doc.gov/ocr>.

## AVENUES OF REDRESS

### IN GENERAL

Employees and applicants for employment who believe they have been discriminated against based on sexual orientation may seek redress under several procedures:

- Merit Systems Protection Board appeal process
- Office of Special Counsel complaint
- Negotiated Grievance Procedures
- DOC Administrative Grievance Procedure

Most of these procedures require you to raise the allegations within a specific time frame from the date that you experienced discrimination or became aware of a discriminatory act. In addition, some procedures may not be used together.

The following sections provide basic information about these procedures and the circumstances under which each can be used. Be aware that more than one procedure may apply to your situation. You are encouraged to obtain additional information about each course of action you are considering before making a choice.

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## THE MERIT SYSTEMS PROTECTION BOARD

### IN GENERAL

#### What is the Merit Systems Protection Board?

The U.S. Merit Systems Protection Board (MSPB) is an independent agency in the Executive branch of the Federal government. Its mission includes ensuring that executive branch agencies make employment decisions in accordance with the principles established by the Civil Service Reform Act (CSRA).

Under the CSRA, it is a prohibited personnel practice to take discriminatory action against an employee because of sexual orientation or other matters that are not job-related. A personnel action (such as appointment, promotion, reassignment, suspension, etc.) may need to be involved before there can be a prohibited personnel practice.

#### How can a claim of sexual orientation discrimination be raised before the MSPB?

A claim of sexual orientation discrimination can be brought before the MSPB in two ways: an MSPB appeal or an Office of Special Counsel complaint.

### MSPB APPEALS

#### What is the MSPB Appeal Process?

The MSPB appeal process is a procedure that allows specified personnel actions to be appealed directly to the Board. In adjudicating appeals, the MSPB operates like a court.

## Who can appeal an agency action to the MSPB?

Employees and others (e.g., applicants for employment, annuitants in retirement cases) who are entitled to appeal specific actions vary depending on the laws and regulations covering the specific action.

Generally, employees who may appeal agency actions to the MSPB are:

- employees in the competitive service who have completed a probationary period; and
- employees in the excepted service with at least two years of continuous service.

## What actions may be appealed directly to the MSPB?

Most Federal employees may appeal certain personnel actions, including:

- adverse actions:
  - removals,
  - suspensions of more than 14 days,
  - reductions in grade or pay, and
  - furloughs of 30 days or less;
- performance-based removals or reductions in grade;
- denials of within-grade increases;
- certain reduction-in-force (RIF) actions;
- denials of restoration to duty or reemployment rights;
- removals from the Senior Executive Service (SES) or failure to be recertified; and
- Office of Personnel Management determinations in employment suitability and retirement matters.

## Can an allegation of constructive discharge be raised with the MSPB?

Yes. Constructive discharge, a type of removal, occurs when an employee is forced to resign or retire due to working conditions that would be intolerable to a reasonable person. Harassment that is very severe may result in constructive discharge.

## How does the MSPB appeal process work?

First, the MSPB determines whether your appeal is timely and falls within MSPB jurisdiction. If your appeal meets procedural requirements, you have the right to choose between a hearing on the merits of your case or a decision based on the written record.

An administrative judge in the MSPB regional or field office issues a decision. Any party may file a petition for review by the full Merit Systems Protection Board. The MSPB's final decision may be appealed to the United States Court of Appeals for the Federal Circuit.

## Who has the burden of proof in appeal proceedings?

The employee who is seeking redress must prove that the appeal falls within the Board's jurisdiction and was timely filed.

If the Board finds that it has jurisdiction, the agency must prove that it was justified in taking the contested personnel action.

If the agency meets its burden of proof, the Board *must* decide in favor of the agency, unless you prove one of the following:

- the agency decision was based on a prohibited personnel practice such as sexual orientation discrimination;
- there was "harmful error" in the agency's procedures; or
- the agency's decision was not in accordance with the law.

**How can I file an MSPB appeal?**

You must file your appeal with the Board's regional or field office which has responsibility for the geographic area where your duty station was located at the time the action was taken. Appeal forms can be obtained from an MSPB office or your servicing human resources office representative. If you do not use the form, you must be sure that the information in your appeal complies with the Board's regulations.

**What is the time limit for filing an MSPB appeal?**

The time limits differ depending on the individual circumstances.

When an effective date has been set in a notice of the personnel action, you must file your appeal within **30** calendar days of the effective date of the personnel action.

When an effective date has not been set in a notice of the personnel action, the appeal must be filed within **35** calendar days of the issuance of the decision.

The MSPB may waive the deadline if there is good reason. You must also present supporting evidence.

**Can I raise an allegation of discrimination based on sexual orientation in an MSPB appeal and a grievance under a negotiated grievance procedure?**

No. An employee must choose between using the negotiated grievance procedure *or* filing an appeal with the Board.

**How can I get more information about MSPB appeals?**

Contact your servicing human resources office or the MSPB's Washington, D.C. headquarters at (202) 653-7200 or 1-800-209-8960

(Voice). TTY/TDD users may use the Federal Information Relay Service (1-800-877-8339) to place calls to these numbers. You may also see the MSPB's web site for more information: <http://www.access.gpo.gov/mspb>.

Title 5, Code of Federal Regulations (5 CFR) contains the Board's regulations in Chapter II, Parts 1200 through 1210. Copies of the regulations are available at any MSPB office, DOC libraries, human resource offices, and most public libraries.

**U.S. OFFICE OF SPECIAL COUNSEL**

**What is the U.S. Office of Special Counsel?**

The U.S. Office of Special Counsel (OSC) is an independent agency that investigates and prosecutes cases before the MSPB.

OSC's mission is to protect employees, former employees, and applicants for employment from prohibited personnel practices and other activities prohibited by civil service law, rule, or regulation.

Individuals may file complaints of prohibited personnel practices with the OSC.

**How does the OSC complaint process work?**

OSC has authority to decide which charges it will investigate and prosecute before the MSPB.

If OSC decides to pursue a complaint, it conducts an investigation. All federal employees are required to cooperate fully with OSC investigators.

An employee may ask the Special Counsel to seek to postpone or "stay" a proposed adverse personnel action pending investigation. OSC may

grant this request if it has reasonable grounds to believe that the proposed action is the result of a prohibited personnel practice.

Following investigation, OSC may recommend that an agency take corrective action if there is reason to believe that a prohibited personnel practice has occurred, exists or is to be taken. If the agency does not take the recommended action after a reasonable period, OSC may ask the MSPB to order corrective action.

If OSC decides to prosecute a case before the MSPB, the case is heard by the MSPB's Chief Administrative Law Judge, who issues a recommended decision. The parties are given an opportunity to file exceptions to the recommended decision, and the MSPB then issues a final decision in the matter. The MSPB's decision may be appealed to the U.S. Court of Appeals for the Federal Circuit.

### How can I file a complaint with OSC?

Complaints submitted to OSC must be in writing. OSC will provide complaint forms upon request. If you do not use the form, you should make sure that your complaint meets OSC's requirements.

Send your complaint to:

U.S. Office of Special Counsel  
Complaints Examining Unit  
1730 M Street, N.W. Suite 300  
Washington, D.C. 20036-4505

### What is the time limit for filing a complaint with OSC?

There is no time limit for filing a complaint. However, your complaint can be addressed more effectively when concerned parties are still in the workforce.

### How can I get more information about OSC?

For more information, call:

Complaints Examining Unit: (202) 653-7188  
Public Information: (202) 653-7984  
(800) 872-9855

TTY/TDD users may use the Federal Information Relay Service (1-800-877-8339) to place calls to these numbers.

You may also see the OSC web site at <http://www.gpo.access.gov/osc>.

## NEGOTIATED GRIEVANCE PROCEDURES

### Can claims of sexual orientation discrimination be raised in the Department's Negotiated Grievance Procedures?

Yes, under certain circumstances. A negotiated grievance procedure (NGP) is a procedure established in a contract between a union and employer that allows bargaining unit employees to raise specified types of issues. The types of claims that may be raised in an NGP vary in different union contracts.

A contract may contain a provision expressly allowing claims of sexual orientation discrimination. If there is no such provision, sexual orientation discrimination may violate another provision of the union contract such as:

- a contract provision that requires the agency to "treat employees with respect and dignity;" or
- a broad scope clause prohibiting the agency from violating any rule or regulation, including "prohibited personnel practices."

Check with your union representative to see if you have the option of raising your claim in an NGP. You should also ask your union representative what time limits apply to you.

### How do NGPs work?

This varies. In most cases, NGPs allow the union or agency to elect to use arbitration to resolve disputes. In arbitration, both parties make a formal presentation of their position. The arbitrator, who is a neutral third party, renders a decision which may or may not be binding on both parties, depending on the terms of the union contract.

### Can I file a claim in both an NGP *and* an MSPB appeal?

No. You must choose between the MSPB appeal process *or* the NGP. You cannot use both. You will want to review these procedures carefully before choosing.

## ADMINISTRATIVE GRIEVANCE PROCEDURE

Allegations of sexual orientation discrimination and related retaliation may be raised in the Department's Administrative Grievance Procedure. The Administrative Grievance Procedure is a process that allows for the review of management decisions by a higher level of management.

With some exceptions, the grievance procedure applies to any matter regarding an individual's employment that is subject to the control of a management official of the Department. An agency action that is appealable to the MSPB may not be raised in the Administrative Grievance Procedure. Other exceptions are listed in Department Administrative Order (DAO) 202-771. Contact your servicing human resources office for a copy of this DAO.

The process has two parts: the Informal Grievance Procedure and the Formal Grievance Procedure. Employees *must* use the informal procedure before filing a formal grievance, except when the grievance concerns: (a) a disciplinary action for which the employee had advance notice and the right to reply, or (b) a summary performance rating with which the employee has expressed disagreement to the approving official in writing in advance.

### How does the informal grievance procedure work?

An informal grievance must be presented orally or in writing to the management official at the lowest organizational level with responsibility for the matter which is the subject of the grievance. This official must conduct an inquiry into the situation and issue a notice of the disposition of the grievance.

The grievance must: (a) be expressly identified as an informal grievance under the Department's administrative grievance system, (b) clearly identify the basis for the grievance, and (c) specify the relief requested. A management official receiving an oral grievance must give the employee a written summary of the grievance.

### What is the time limit for filing an informal grievance?

Grievances must be presented within 15 days of the date of the agency action you are challenging or the date you first became aware or should have become aware of the action. The time limit may be extended only if you show good cause. Grievances concerning *continuing* practices or conditions may be presented at any time.

### How does the formal grievance procedure work?

Formal grievance are submitted to the bureau human resources manager who services the level of the organization above the official who received the informal grievance. If the grievance is procedurally acceptable, it is forwarded to an appropriate deciding official who must conduct fact-finding, consider the evidence, and issue a written decision.

### How can I file a formal grievance?

Your servicing human resources office can help you identify the appropriate officer to receive your grievance.

The grievance must (a) be in writing; (b) contain sufficient detail to identify clearly the basis for the grievance; (c) specify the relief requested; and (d) if applicable, contain a copy of the written notification to the employee of the disposition of the informal grievance.

### What is the time limit for filing a formal grievance?

A formal grievance must be presented within ten calendar days of the completion of the informal procedure. For matters raised directly in the formal procedure, the time limits are:

- for disciplinary actions for which the employee had advance notice and an opportunity to reply: 15 days from the effective date of the disciplinary action; and

- for a summary performance rating with which the employee has expressed disagreement to the approving official in writing: within 15 days of the employee's receipt of the final rating.

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**How can I get more information about the DOC Administrative Grievance Procedure?**

Contact your servicing human resources office for additional information. The procedure is also explained in detail in Department Administrative Order 202-771: *Employee Grievances*.

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**OTHER ISSUES**

**FEDERAL EMPLOYEES FAMILY FRIENDLY LEAVE ACT**

**Why is the Federal Employees Family Friendly Leave Act (FFLA) of particular interest to employees who are lesbian, gay, or bisexual?**

The FFLA permits eligible employees to use *sick leave* to:

- provide care for a family member who is incapacitated due to physical or mental illness, injury, pregnancy, or childbirth; or who requires assistance to go to medical, optical, or dental examinations or treatments or
- make arrangements for and attend the funeral of a family member.

The FFLA is of particular interest to lesbian, gay, and bisexual employees because the definition of a family member under this law includes any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship. Therefore, the FFLA may be used to allow for care of or bereavement for a same-sex partner.

A full-time employee may use up to 40 hours of sick leave in any leave year under this act and may be authorized an additional 64 hours, providing he or she maintains an 80-hour sick leave balance.

For information on how the FFLA applies to employees with part-time or uncommon tours of duty, contact your servicing human resources office.

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**How can I apply for leave under the FFLA?**

Requests for FFLA leave must be submitted to your immediate supervisor via Form SF-71. Your request must state the purpose of the leave, i.e., family care or bereavement.

### How can I get more information about the FFLA?

Contact your servicing human resources office for additional information about FFLA.

### EMPLOYEE ASSISTANCE PROGRAM

#### What services are provided by the Employee Assistance Program?

Employees may obtain assistance to help them manage the effects of discrimination, workplace stress or other mental health concerns from the Employee Assistance Program (EAP). Available services include confidential counseling and referrals to mental health service providers and support groups.

EAP services are also available to immediate family members including same-sex partners and children.

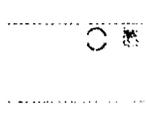
The EAP serving the Hoover Building, can be reached at (202) 482-1569 (Voice). If you work at another location, contact your servicing human resources office for the number of the EAP serving your facility. TTY/TDD users may use the Federal Information Relay Service to place a call to an EAP counselor. (1-800-877-8339)

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### To ORDER OCR PUBLICATIONS



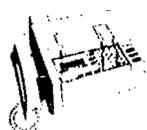
**by phone:**  
(202) 482-4993 (V/TTY/TDD)



**by mail:**  
U.S. Department of Commerce  
Office of Civil Rights  
HCHB Room 6010  
Washington D.C. 20230



**by E-Mail:**  
Civil Rights@DIR@OCR  
(Banyan/Vines E-mail) or  
crights@doc.gov (Internet)



**by fax:**  
(202) 482-5375 or (202) 501-2937

The text of all OCR publications is also available on the OCR page of the Department's web site at <http://www.doc.gov.ocr>.

**Alternate Formats:** OCR publications can be made available in other formats upon request by any of the above methods.

views will aid in the process of overcoming stereotypes, prejudice, homophobia (fear of gay people) and misconceptions.

### THE COMMON GROUND SYMBOL

The Common Ground symbol consists of a pink triangle, surrounded by a green circle. The pink triangle central to the Common Ground symbol has been adopted by the gay community as a symbol of struggle and pride. In Nazi Germany, homosexuals were among the classes of citizens targeted for extermination. Pink triangles were affixed to the clothing of homosexual prisoners in concentration camps. The green circle is a symbol of acceptance.

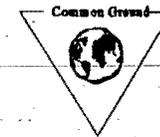
### FOR MORE INFORMATION ON THE COMMON GROUND PROGRAM CONTACT:

Rob Sadler (202) 482-8045  
Barbara Brenkworth (301) 713-0262

Commerce GLOBE  
P.O. Box 7294  
Washington, D.C. 20044-7294  
(202) 543-9583

The Common Ground Program is sponsored by Commerce GLOBE (Gay, Lesbian, or Bisexual Employees of the Department of Commerce) and is modeled on a program developed by Lesbian, Bisexual and Gay United Employees of AT&T (LEAGUE). The symbol is a trademark of LEAGUE and is used with permission.

# THE COMMON GROUND PROGRAM



*"Diversity ... must encompass a fundamental appreciation of one another and a respect for both our similarities and our differences. It must include a heartfelt respect in attitude and behavior towards those of different race, gender, age, sexual orientation, ethnicity, and those with disabilities -- all the facets that make each individual the unique and precious resource that each of us is."*

**Ronald H. Brown**  
U.S. Secretary of Commerce  
Diversity Policy Statement  
July 21, 1994

## WHAT IS THE COMMON GROUND PROGRAM?

The Common Ground Program is designed to foster a supportive, inclusive, discrimination-free work environment for gay, lesbian and bisexual employees and their heterosexual allies. The Common Ground Program helps employees find coworkers and supervisors with whom they can safely discuss matters concerning sexual orientation or identify themselves as gay, lesbian or bisexual.

We can achieve our best only when we feel we are in a safe place. By participating in the Common Ground Program, you will provide the support fellow employees may need to feel like a part of the Commerce team, regardless of their sexual orientation. When the work environment is charged with fear and hatred, or when the contributions of employees are overshadowed by concern over non-job related matters, neither we nor our customers, the taxpayers, receive full value.

"Coming out" (identifying yourself as gay) can be a stressful process. But there are many reasons a gay person may wish to come out at work. Most people enjoy responding to polite, friendly questions about themselves and talking about the people important in their lives. Most people appreciate a courteous expression

of concern when problems arise. While most "straight" (heterosexual) employees feel free to talk about their spouses or partners, display pictures of them, and invite them to office social functions, many gay men, lesbians and bisexuals feel uncomfortable discussing their private lives in the workplace. This discomfort can create feelings of isolation. The Common Ground Program provides opportunities to openly discuss family and relationships and other issues in a supportive environment.

Many gay, lesbian or bisexual employees will still choose to remain "in the closet" at work because they fear the personal and professional consequences if they come out. Others may simply be uncomfortable discussing their personal lives at work. Even for people who do not choose to tell coworkers that they are gay, it is helpful to know that coworkers are supportive.

## WHAT IF YOU ARE UNSURE OF A COWORKER'S SEXUAL ORIENTATION?

Many people say they do not know anyone who is gay. Chances are they — and you — do. Do not make assumptions about sexual orientation based on a coworker's appearance, gestures, manner of speaking, or opinions on social and political issues. There is no single gay point of view or agenda. The gay community is, in itself, diverse, cutting across lines of race, gender, religion, national origin, age, disability, political affiliation,

geographic region, economic status and family structure.

In order to foster a more inclusive work environment, use gender-neutral language in the workplace.

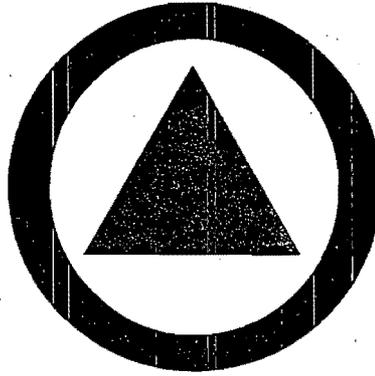
For example, you can ask a male coworker if he is in a relationship rather than ask if he has a girlfriend. When inviting coworkers to office social functions, you can say that "friends" or "guests" are welcome, instead of using language that presumes a particular gender.

## WHAT CAN YOU DO TO CREATE A COMMON GROUND FOR COWORKERS?

- Display the Common Ground symbol in your work space. Voluntarily displaying the symbol lets others know that you support the principle central to the Policy Statement on Diversity: that you further the Department's mission by appreciating and maximizing the talents and expertise of all employees, rather than focusing on personal differences.

- Let others know that you will not tolerate jokes, comments, cartoons or any derogatory behavior directed at people because of their sexual orientation.

- Respect your coworker's privacy. Disclosing your sexual orientation, does not mean you have given up all rights to privacy. Respect for the privacy and dignity of others and courteous consideration of others'



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For further information on the Common Ground program, Commerce GLOBE, or general questions regarding sexual orientation in the workplace, contact:

Commerce GLOBE Hotline  
(301) 309-0639

To report an incident of discrimination based on sexual orientation, contact your local EEO Office.

Thank you for participating in the Common Ground Program.

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| Benefit      | Authority   | Description   | Applicability to Domestic Partners /Actions needed to extend applicability  |
|--------------|---|---|---|
| Annual Leave | 5 USC 6303 and 6304   | Approved Absence with pay from official duties. Can be used for personal or emergency purposes.   | Tied to employee - no applicability to domestic partners<br>No action needed.   |
| Sick Leave   | Federal Employees' Family Friendly Leave Act (FEFFLA), 1994<br><br>5 USC 6307<br><br>5CFR 630.201 & 630.401 | <p>Period of approved absence with pay from official duty. Approved absences can be for:</p> <ol style="list-style-type: none"> <li>1. Personal illness</li> <li>2. Personal medical dental or optical examinations or treatments</li> <li>3. To care for family members who are ill or require medical, dental or optical examinations.</li> <li>4. Funeral arrangements</li> <li>5. Activities related to adoption</li> <li>6. Up to 7 days to serve as a bone-marrow or organ donor</li> </ol> <p><b>Family is very broadly defined:</b></p> <ul style="list-style-type: none"> <li>* spouse &amp; his or her parents</li> <li>* children, including adopted children and their spouses,</li> <li>* parents,</li> <li>* brother &amp; sisters and their spouses</li> <li>* <i>any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.</i></li> </ul> | <p>Family is broadly defined such that domestic partners can be presumed to be "family" members.</p> <p>No action needed.</p> |

| Benefit  | Authority   | Description  | Applicability to Domestic Partners /Actions needed to extend applicability   |
|--|---|--|--|
| <p>Leave Without Pay - (LWOP can be extended to employees for a variety of reasons. Two items presented reflect recent changes that involve LWOP associated with family matters. Other approved LWOP requests are negotiated between employee and supervisor.)</p> | <p>Family and Medical Leave Act of 1993<br/>Section 630, Part 12.10 (Sick and annual leave regulations)</p>   | <p>An approved temporary absence from duty in a non-pay status requested by an employee. Provides employees with entitlement to 12 weeks of unpaid leave for:</p> <ol style="list-style-type: none"> <li>1. Birth and care of new baby</li> <li>2. Activities associated with adoption or foster care</li> <li>3. <i>Care of spouse, son, daughter or parent with serious illness</i></li> <li>4. Personal serious illness</li> </ol>  | <p>Family is very narrowly defined; domestic partner would not qualify as an eligible family member.</p> <p>Change needed: legislation to broaden the meaning of family.</p>   |
| <p>Leave Bank</p>  | <p>Executive Memo - 4/11/97<br/><br/>Agency Leave Manual, Updated April 1997</p> <p><i>Agency policy implemented as an option under the Federal Employees Leave Sharing Act of 1988, P.L. 103-103. 5 CFR 630.1001</i></p> | <p>Permits employees up to 24 hours (3 days) per year for:</p> <ol style="list-style-type: none"> <li>1. School and Early Childhood Educational Activities</li> <li>2. Routine Family Medical Purposes</li> <li>3. Elderly Relatives' Health or Care Needs</li> </ol> <p>Family is not defined.</p> <p><i>After exhausting all available leave, leave bank members in medical need can receive up to 200 hours each leave year due to their own illness or to care for an ill family member. Additional hours may be solicited from and donated by co-workers.</i></p> <p><i>Family member is defined as spouse, parent, in-law, brother, sister, child or any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship (EPA uses the term "significant other").</i></p> | <p>Because "family" is not explicitly defined, domestic partners are granted defacto inclusion.</p> <p>No action needed.</p> <p><i>Family is broadly defined to include domestic partners.</i></p> <p><i>No action needed.</i></p> |

| Benefit                           | Authority                                  | Description   | Applicability to Domestic Partners /Actions needed to extend applicability   |
|-----------------------------------|--|---|--|
| Leave Transfer                    | Required under P.L. 103-103. 5 CFR 630.901 | <p>After exhausting all available leave, employees in medical need due to their own illness or to care for an ill family member may request that leave be solicited from and donated by co-workers.</p> <p>Family member is defined as spouse, parent, in-law, brother, sister, child or any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.</p>  | <p>Family is broadly defined to include domestic partners.</p> <p>No action needed.</p>  |
| Retirement Survivor Beneficiaries | 5 CFR 8331, 8333 & 8342                    | <p>Survivor Benefits are generally payments in the form of monthly pensions. They go first to a former spouse with court order, second to a current spouse with entitlement rights, third to minor children, or finally, to someone with an insurable interest in employee. Insurable interest is very broadly defined.</p> <p>Employees are free to name a beneficiary(s) of their choice as long as there is no one "entitled" to a monthly survivor benefit.</p> <p>FERS has a death benefit payable to the "spouse." Spouse now governed by definition in DOMA.</p> | <p>Employees may name domestic partners as "someone with an insurable interest" or as a beneficiary. Caveat: transfer to domestic partner not automatic. Employees must name survivor/beneficiary and ensure all legal claims are cleared in cases where a current or former spouse may have claim to the benefits.</p> <p>No legal action needed to extend benefits to domestic partners.</p> <p>Educational effort might be necessary.</p> |

| Benefit                      | Authority         | Description   | Applicability to Domestic Partners /Actions needed to extend applicability  |
|------------------------------|-------------------|---|---|
| Thrift Plan                  | 5 CFR 8434 & 8441 | <p>Under FERS - the rules applicable to Survivor Benefits apply.</p> <p>Under CSRS - There is a lump sum payment designated by the employee. If no designation on file, payment is made in accordance with federal law: first to spouse (DOMA), then to children, then parents, then estate, and finally, next of kin.</p>  | <p>Employee must name survivor (someone with insurable interest) or designee.</p> <p>No action needed to extend benefits.</p> <p>Educational effort might be necessary.</p>   |
| Health and Dental Insurance  | 5 USC 8901 - 8913 | <p>OPM contracts with qualified carriers offering health benefit plans. Coverage is offered to federal employees (as defined in 5 USC 8901) and members of the employee's family - defined as "spouse of an employee or annuitant and an unmarried dependent child under 22 years of age, including -</p> <p>(A) an adopted ... or recognized natural child; and</p> <p>(B) a step ... or foster child ...</p> <p>The definitions for marriage and spouse contained in DOMA apply. "Foster child" is broadly defined allowing employees in non-traditional families the flexibility to cover children under 22.</p> | <p>Benefits can not be extended to domestic partners because they do not meet the DOMA definitions.</p> <p>Change needed - legislation to broaden meaning of family, redefine "spouse" or add domestic partners as eligible for coverage.</p> |
| Life Insurance Beneficiaries | 5 CFR 8705        | Employees purchase term life insurance and designate a beneficiary(s) without any restrictions. Beneficiaries can be an individual, organization, trust, estate, etc.   | No action needed.   |

| Benefit  | Authority                           | Description   | Applicability to Domestic Partners /Actions needed to extend applicability  |
|--|-------------------------------------|---|---|
| Disability Compensation associated with retirement | 5 CFR 8337. & 8451                  | Under FERS and CSRS, employees cannot elect someone with an insurable interest.<br><br>Lump sum payment to the designee on file as long as there is no one eligible for a monthly survivor benefit.   | No action needed except educational efforts to ensure employee has made designations.   |
| Worker's Compensation                              | Federal Employee's Compensation Act | Determines how survivor benefits should be paid out in the event an employee dies when in an approved work condition. The benefits go to the surviving 'widow' - means a wife - or 'widower' - means a husband. The law allows others to receive survivor benefits but the eligible recipients are very strictly defined, i.e., children under 18, step children under 18, adopted children under 18, parents, grandchildren, etc. The compensation rate paid is also determined by the number of dependents which are also defined within the act. | There is little ambiguity in this law; doesn't appear domestic partners can be interpreted as eligible survivors.<br><br>Change needed - legislation to add domestic partner as another category of eligible recipient. |
| Unpaid Compensation                                | Title 4, GAO Manual                 | Payment due a deceased employee. Payment can be outstanding salary owed employee, outstanding travel voucher payment, etc. Payment will be made to employee's designee. If no designee, payment is made in accordance with federal law: first to spouse (DOMA), then to children, then parents, then estate, and finally, next of kin.  | No action needed except to ensure employee knows to identify designees.   |
| Relocation Expenses                                |                                     | contact payroll   |   |

## Appendix 6

### Acronyms and Abbreviations

|           |  |
|-----------|--|
| ADR       | Alternative Dispute Resolution                                 |
| AIDS      | Acquired Immune Deficiency Syndrome                            |
| CFR       | Code of Federal Regulations                                    |
| CPRC      | Conflict Prevention and Resolution Center                      |
| CSREES    | Cooperative State Research, Education and Extension Service    |
| DOC       | Department of Commerce   |
| DOI       | Department of the Interior                                     |
| DOMA      | Defense of Marriage Act  |
| DR        | Departmental Regulation  |
| EAP       | Employee Assistance Program                                    |
| EEO       | Equal Employment Opportunity                                   |
| EEOC      | Equal Employment Opportunity Commission                        |
| ENDA      | Employment Non-Discrimination Act (proposed)                   |
| FBI       | Federal Bureau of Investigation                                |
| FNS       | Food and Nutrition Service                                     |
| FY        | Fiscal Year  |
| GLBT      | Gay, lesbian, bisexual, and transgendered                      |
| GLOBE     | Gay, Lesbian, Bisexual and Transgendered Employee Organization |
| HIV       | Human Immunodeficiency Virus                                   |
| HRC       | Human Rights Campaign  |
| MSPB      | Merit Systems Protection Board                                 |
| NATO      | North Atlantic Treaty Organization                             |
| OC        | Office of Communication  |
| OCR       | Office of Civil Rights   |
| OHRM      | Office of Human Resources Management                           |
| OPM       | Office of Personnel Management                                 |
| OSC       | Office of Special Counsel                                      |
| PPP       | Prohibited personnel practices                                 |
| SES       | Senior Executive Service                                       |
| Title VI  | Title VI of the 1964 Civil Rights Act                          |
| Title VII | Title VII of the 1964 Civil Rights Act                         |
| USDA      | United States Department of Agriculture                        |