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United States Department of Agriculture

Office of the General Counsel

Washington, D.C. 20250-1400

MEMORANDUM FOR JOEL BERG
DIRECTOR OF NATIONAL SERVICE
OFFICE OF COMMUNICATIONS

FROM: Kenneth E. Cohen Kenneth Cohen
Assistant General Counsel
Research and Operations Division

SUBJECT: Status of USDA Directly-Managed AmeriCorps Participants Under Federal Tort Claims Act and Federal Employees' Compensation Act

This responds to your request for an opinion concerning the relationship of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671, et seq., and the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101, et seq., to United States Department of Agriculture (USDA) AmeriCorps participants whom USDA manages directly.

The National and Community Service Act of 1990, as amended by the National and Community Service Trust Act of 1993, Pub. L. No. 103-82 (the "Act"), 42 U.S.C. §§ 12501, et seq., authorizes the Corporation for National and Community Service (Corporation) to provide grants to private organizations, States, and Federal agencies to conduct AmeriCorps national service programs. The Act authorizes Federal departments and agencies to manage AmeriCorps programs individually or in partnership with others. 42 U.S.C. § 12571(b). Because USDA has been awarded a grant from the Corporation under the Act, USDA is authorized and required to pay the AmeriCorps participants whom USDA manages directly stipends, health care, and child care. 42 U.S.C. § 12594. Thus, receiving assistance under the Act confers considerable authority on USDA that we otherwise would not enjoy. In addition, receiving assistance from the Corporation and managing the programs directly creates a sui generis relationship between USDA and its AmeriCorps participants.

The Act also established a Civilian Community Corps Demonstration Project, the participants of which are housed in Federally-run camps. 42 U.S.C. §§ 12611-12626. Section 160 of the Act specifies that Civilian Community Corps members are not to be considered Federal employees, except for purposes of FTCA and FECA. 42 U.S.C. § 12620. The legislative history of the Act indicates that similar language relating to AmeriCorps

participants was eliminated from the bill that became the National and Community Service Trust Act of 1993.[1]

The legislative history of the Act could be read to indicate congressional intent to exclude all AmeriCorps members from FTCA and FECA coverage. However, the omission of this language must be put into the context of the Act, i.e., the distinction between the AmeriCorps and the Civilian Community Corps. While most AmeriCorps participants will be serving in programs run by State and private organizations under grants from the Corporation, only a very small minority of AmeriCorps participants will be managed directly by the Federal Government. Thus, most AmeriCorps participants will not be managed directly by Federal employees. In contrast, all of the Civilian Community Corps members will be managed directly by the Government. Because AmeriCorps participants who are managed directly by Federal agencies are only a very small subset of the universe of AmeriCorps participants, the legislative history indicating congressional intent to exclude generally AmeriCorps participants from FTCA and FECA coverage should not be determinative. The legislative history is best understood as Congress assuring that participants who are not managed directly by the Federal Government are not covered by FTCA and FECA. Because Congress has not foreclosed coverage, the question remains whether USDA AmeriCorps participants whom USDA manages directly are covered by FTCA and FECA.

The USDA AmeriCorps projects, which began in September 1994, engage AmeriCorps participants in a variety of community service projects designed to address community needs relating to anti-hunger and nutrition, the environment, and rural development. Because each USDA agency carrying out AmeriCorps projects is using existing agency appropriations supplemented by assistance from the Corporation, the projects are consistent with the purposes of those appropriations and the respective authorizing legislation.

For the majority of the USDA AmeriCorps projects, USDA agencies manage the participants directly; no intermediaries are involved. With respect to these USDA AmeriCorps participants, USDA agencies conduct directly the recruitment, selection, and pay administration of the participants; the participants enter into participation agreements directly with USDA; USDA employees supervise directly the participants' daily activities; USDA

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employees establish participants' schedules and tasks; and USDA employees monitor and evaluate the participants' work performance.

Under the factors described above, and absent any unanticipated lack of such control, it is my opinion that the AmeriCorps participants whom USDA manages directly may be considered "employee[s] of the government" under the FTCA,[2] where they are acting in the scope of their "employment" on behalf of USDA in an official capacity.

Under principles of *respondeat superior*, where USDA is supervising an AmeriCorps participant and the participant is acting within the scope of his duties as a USDA AmeriCorps participant, the United States may be liable for the negligent act or omission of the participant. See United States v. Orleans, 425 U.S. 807, 815 (1976) (standard under FTCA is whether agency exercised substantial operational, day-to-day control over actor). However, the determination of whether a participant meets the definition of "employee of the government" under the FTCA must be made on a case-by-case basis under the particular facts of each case.

Because the ultimate determination by the Government as to scope of employment under the FTCA is within the discretion of the United States Department of Justice (DOJ), I have consulted with Jeffrey Axelrad, Director, Torts Branch, DOJ. Mr. Axelrad agrees that, under factors similar to those described above, and absent any unanticipated lack of control, AmeriCorps participants whom USDA manages directly may be considered "employee[s] of the government" under 28 U.S.C. § 2671, where they are acting on behalf of USDA in an official capacity.

In the event of an accident involving the alleged negligent act or omission by a directly-managed USDA AmeriCorps participant, the incident should be handled under normal FTCA procedures, i.e., the injured third party should be informed of his or her right to file a Standard Form 95, Claim for Damage, Injury, or Death, and the agency involved should investigate the incident and preserve all relevant documents and information pursuant to Departmental Regulation 2510-1.

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capacity. For purposes of FECA, section 8101(1)(B) defines an "employee" to include:

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FECA provides the Secretary of Labor and his designees with the authority to make final and conclusive determinations with respect to FECA coverage. 5 U.S.C. § 8128(b)(1). Thus, I have requested the opinion of Thomas M. Markey, Director for Federal Employees Compensation, Office of Worker Compensation Programs (OWCP), DOL, concerning whether the AmeriCorps participants whom USDA manages directly fall within the definition of a "employee" contained in 5 U.S.C. § 8101(1)(B). Because the USDA AmeriCorps

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[3] Section 177(b)(3) of the Act prohibits specifically any participant in any program receiving assistance from the Corporation from displacing current employees or supplanting the hiring of employees. 42 U.S.C. § 12637(b)(3). At the same, Federal agencies must apply appropriated funds only to those purposes for which Congress has made the appropriation. 31 U.S.C. § 1301(a). Because Federal agency AmeriCorps participants must be engaged in projects for which the agency is authorized to conduct with its appropriations, USDA AmeriCorps participants will be engaged in services similar to those performed by USDA employees.

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If you have any questions or need any further information, please contact Thomas R. Fox of my office at (202) 720-2320.

cc: Jeffrey Axelrad, Director
Torts Branch, Civil Division
U.S. Department of Justice

Terry Russell
General Counsel
Corporation for National and Community Service

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September 30, 1994

TO: Ed Barrons

FROM: Joel Berg

SUBJECT: Liability and Workmans Compensation Issues for AmeriCorps Participants in Programs Run Directly by Federal Agencies

Ed a serious issues exists with respect to USDA AmeriCorps participants and liability and workmans compensation protection. Basically, those participants in the national service programs we are administering directly do NOT have any protection. That means that approximately 900 of our participants including 25 in Vermont are without any protection. The Corporation for National and Community Service is unable to go forward with a request for a technical amendment at this time but they are willing to let us pursue an Agriculture only fix.

Attached is some background material and proposed language. The language was designed to amend the Corporation's legislation but if that is not possible it still presents the body of what we need to accomplish.

Please contact me this weekend. My home number is (202) 387-8221 or you can reach me on my beeper 1 (800) 759-7243, PIN # 570-8679.

ISSUE: The only AmeriCorps participants who will not have liability or workmans compensation coverage are those participants in programs run directly by Federal agencies.

BACKGROUND: The Corporation recognizes the need for participants to have liability or Workmans Compensation protection during the performance of their period of service. One of the requirements for receiving AmeriCorps grants is that the recipient shall provide such coverage through the procurement of an insurance policy and by making the necessary workman's compensation payments. These requirements are not limited to AmeriCorps grants. Almost all Federal Departments and specifically, the Department of Agriculture's regulations for Federal Assistance require a recipient of federal assistance to provide liability and workers compensation protection to program participants. The necessity for such protection is clear, **HOWEVER**, the legal limitations imposed on Federal agencies with respect to purchasing insurance and the current description of the AmeriCorps participants status in the 1993 Trust Act prevent from Federal agencies from acquiring liability insurance or making workmans compensation payments for participants in AmeriCorps programs run directly by a Federal agency and not in conjunction or partnership with a non-government third party.

IMPACT: If such a participant is driving a government vehicle as part of their service and has an accident or if they are digging a ditch and accidentally hit a phone line, the participant is **solely** liable for all damages. If the participant were to be injured on the job, they would have no protection and it is unclear if their health care policy would cover the medical bills. The net result of the current situation is that AmeriCorps participants in programs run directly by Federal agencies do not have the minimum protection, the same Federal agencies will insist be provided to participants in programs run in conjunction with a non-government third party.

OPTIONS:

1. Have each Federal agency procure a separate policy to cover its particular members. This would be difficult because it is unclear if a Federal Agency can expend their appropriated funds to procure liability and disability insurance. Resolving that issue could take months.

2. Have the Corporation procure such insurance for the affected Federal departments. The drawback here is that such a procurement, if legal, would be subject to formal competition rules and could take four months or longer to implement.

3. Amend the Corporation's legislation so that these participants who were obviously overlooked will enjoy the same protection as all other AmeriCorps participants or insert language in an Agriculture bill that would accomplish the same result.

RECOMMENDATION: Since it is clear that Congress did not intend for participants to be without protection, recommend that a technical amendment be submitted to the Corporation's legislation or language inserted in an Agriculture bill to state that:

11(d) **Status of national service program participants under Federal law**

(1) In general

Except as otherwise provided in this subsection, participants in national service programs under this subchapter shall not, by reason of their status as such participants, be considered Federal employees or be subject to the provisions of law relating to Federal employment.

(2) **Work-related injuries**

For purposes of subchapter I of chapter 81 of Title 5, relating to the compensation of Federal employees for work-related injuries, participants in national service programs under this subchapter administered directly by a Federal agency shall be considered as employees of the United States within the meaning of the term "employee," as defined in section 8101(l)(B) of Title 5.

(3) **Tort claims procedure**

A participant in a national service program under this subchapter administered directly by a Federal agency shall be considered an employee of the Government for purposes of chapter 171 of chapter of Title 28, relating to tort claims liability and procedure.

If this recommendation is not implemented, it is becoming clear that USDA may have to stop all programs it is running directly until the issue is resolved in some other manner. This would impact 700 to 900 of the Department's 1,200 participants.

Attached is specific language that we feel would correct the problem.

United States Department of Agriculture
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OCT 1 2 1994

Kenneth E. Cohen

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5 U.S.C. § 8101(1)(B) (emphasis added).

The AmeriCorps participants whom USDA manages directly will be rendering personal service to USDA agencies in carrying out the agencies missions. The service performed by these AmeriCorps participants will be similar to the service of USDA employees.[3] The participants will receive nominal pay in the form of a stipend,[4] health care, and child care. Finally, the acceptance of the service by USDA is authorized by the Act. Thus, these participants, while in the performance of their duties, appear to meet the definition of "employee" for FECA purposes. This conclusion is consistent with previous United States Department of Labor (DOL) interpretations of FECA. See Matter of George Abraham, 36 E.C.A.B. 194 (1984) (finding volunteer assistant to Smithsonian Institution an "employee" within the meaning of 5 U.S.C. § 8101(1)(B)).

FECA provides the Secretary of Labor and his designees with the authority to make final and conclusive determinations with respect to FECA coverage. 5 U.S.C. § 8128(b)(1). Thus, I have requested the opinion of Thomas M. Markey, Director for Federal Employees Compensation, Office of Worker Compensation Programs (OWCP), DOL, concerning whether the AmeriCorps participants whom USDA manages directly fall within the definition of a "employee" contained in 5 U.S.C. § 8101(1)(B). Because the USDA AmeriCorps

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[3] Section 177(b)(3) of the Act prohibits specifically any participant in any program receiving assistance from the Corporation from displacing current employees or supplanting the hiring of employees. 42 U.S.C. § 12637(b)(3). At the same, Federal agencies must apply appropriated funds only to those purposes for which Congress has made the appropriation. 31 U.S.C. § 1301(a). Because Federal agency AmeriCorps participants must be engaged in projects for which the agency is authorized to conduct with its appropriations, USDA AmeriCorps participants will be engaged in services similar to those performed by USDA employees.

[4] The minimal living allowances to be provided to AmeriCorps participants is not determined upon the actual hours of service performed. 42 U.S.C. § 12594(a).

program has already begun and this issue has already presented itself,[5] I have asked that DOL expedite its determination of this issue. In the interim, in the event of any work-related injuries involving directly-managed USDA AmeriCorps participants, the managing agency should process the appropriate DOL forms as it would for any other USDA "employee." However, DOL has asked that USDA inform OWCP of any such claims so that DOL may coordinate its response to these claims. Thus, any such claims should be reported to the Director of National Service, USDA, so that USDA may inform OWCP of the pending claims.

If you have any questions or need any further information, please contact Thomas R. Fox of my office at (202) 720-2320.

cc: Jeffrey Axelrad, Director
Torts Branch, Civil Division
U.S. Department of Justice

Terry Russell
General Counsel
Corporation for National and Community Service

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[5] I have been informed that at least two USDA AmeriCorps participants whom USDA manages directly have suffered work-related injuries in the performance of their duties.