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Date: 4/25/96

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This transmission consists of this cover sheet and 10 page(s).

From: Rina Tucker

Comments: Here is letter to Ana Prada and  
the Peace Corps case, we discussed.

If you have any questions, please call  
me at (202) 606-5000 x 257

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AD-207

Getting Things Done.  
AmeriCorps, National Service  
Learn and Serve America  
National Senior Service Corps

BY FACSIMILE ((303) 236-4151)

April 25, 1996

Ana Prada  
U.S. Department of Agriculture  
Dispute Resolution Staff  
755 Parfet Street, Suite 136  
Lakewood, CO 80215



Re: AmeriCorps participants and Title VII.

Dear Ms. Prada:

This letter sets forth information relating to whether AmeriCorps participants are covered by title VII of the Civil Rights Act of 1964, as amended. It is the Corporation's position that AmeriCorps participants are not covered by title VII or any other employment discrimination law for the reasons set forth below. (As we discussed, attached is Correri v. Peace Corps, an EEOC case.)

#### Background

The National and Community Service Act of 1990, as amended, created a unique program in which AmeriCorps participants perform service in four areas: education, environment, public safety or human needs. For example, participants may clean up a polluted stream or help children improve their reading skills. Participants enroll for a specific term (usually between nine and twelve months) during which they receive a fixed allowance to cover living expenses. At term's end, they receive an educational award payable to student loan institutions or post-secondary schools.

1. National service is distinct from employment.

The National and Community Service Act of 1990, as amended, reflects Congress' painstaking efforts to create a wall between national service and employment. Listed first among the Act's purposes is to "meet the unmet human, educational, environmental, and public safety needs of the United States, without displacing existing workers". 42 U.S.C. § 12501 (emphasis added).

The Act includes a litany of rules designed to separate national service from the labor market, explicitly prohibiting national service participants from:

displacing or even reducing the hours, wages, or benefits of employees;

infringing on an employee's promotional opportunities;

duplicating an employee's duties;

supplanting the hiring of employed workers; or

performing any duties that were performed by employees.

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42 U.S.C. § 12637.

Moreover, the definitions section of the Act provides that "[a] participant shall not be considered to be an employee of the program in which the participant is enrolled". 42 U.S.C. § 12511(17)(B) (emphasis added).

2. AmeriCorps participants are provided a fixed living allowance -- not a wage.

As further evidence that Congress established a separate statutory scheme for national service participants that is entirely different from employer/employee relationships, full-time participants receive a living allowance -- not a wage. The living allowance is intended to cover a participant's costs of food, clothing, housing and transportation. The amount of the living allowance is not bargained for; it does not fluctuate based on seniority, merit, or number of hours served in a given period of time. The amount of the living allowance must be within a range set by the National Service Act, which is keyed to the average annual allowance provided to Volunteers in Service to America, or VISTAs. 42 U.S.C. § 12594.

The current living allowance minimum is \$7945 for a full-time Member. Depending on the number of hours required for successful completion of a term of service (the minimum is 1700 hours, many programs require between 1800 and 1900), the actual per hour amount may be less than the federal minimum wage.

In further contrast to a wage, the living allowance cannot affect a Member's eligibility for Food Stamps, Section 8 housing, public housing, federal student financial aid and all other federal need-based programs, excluding programs under the Social Security Act. 42 U.S.C. § 12637(d). And Members may opt not to receive their living allowance.

3. AmeriCorps participants can only be released for cause and cannot be "terminated at will".

AmeriCorps programs cannot terminate a participant's term of service at will and without cause. Programs must demonstrate cause, such as misconduct, prior to releasing a participant against his or her wishes. Programs are required to provide a grievance process to a participant wishing to contest a decision to release for cause.

4. The U.S. Department of Labor has ruled that, as a matter of federal law, national service participants need not be provided unemployment insurance.

In a Program Letter dated April 20, 1995, the Department of Labor ruled that coverage is not required for AmeriCorps participants under the Federal Unemployment Tax Act. The Department concluded that, as a matter of law under the National and Community Service Act of 1990, as amended, no employer-employee relationship exists between participants and their programs. Having reached this conclusion of law, the Department did not even apply common law principles or specific statutory exemptions.

Ana Prada  
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5. AmeriCorps participants are not covered by title VII or the Age Discrimination in Employment Act.

The National and Community Service Act of 1990, as amended, specifically provides which non-discrimination laws apply to AmeriCorps programs. The statute states that -

[a]ny assistance provided under this subchapter shall constitute Federal financial assistance for purposes of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.) . . .

42 U.S.C. § 12635(b) (1993) (emphasis added). As a result of this provision, AmeriCorps participants may file a discrimination complaint against the programs pursuant to any of these non-discrimination laws. If Congress had intended for the participants to be considered employees for the purposes of title VII or the Age Discrimination in Employment Act, it would have specifically provided so.

6. EEOC's decision, that Peace Corps Volunteers are not covered by title VII or the Age Discrimination in Employment Act, supports the Corporation's position.

The Commission has held that it has no jurisdiction over a title VII complaint filed by a former Peace Corps Volunteer against the Peace Corps. See Correri v. Peace Corps, EEOC 05921050, (May 27, 1993). In its decision, the Commission stated that "[t]he Peace Corps Act [provides] that . . . except as provided in this chapter, volunteers shall not be deemed officers or employees or otherwise in the service or employment of, or holding office under, the United States for any purpose." *Id.* (emphasis added). The Commission further stated that-

"[g]iven that Congress passed a statute that unambiguously provides that Peace Corps volunteers shall not be considered federal employees, except for the purposes of certain laws, and Title VII, the Rehabilitation Act, and the Age Discrimination in Employment Act are not included in the list of exceptions, we have no jurisdiction over this matter."

Id. (citing Wisher v. Coverdell, 782 F. Supp 703, 707 (D. Mass. 1992)).

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Ana Prada  
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Conclusion

Based on the language in the National and Community Service Act of 1990, as amended, (which provides that AmeriCorps participants are not employees of the AmeriCorps programs) and the EEOC's decision in Correri v. Peace Corps, it is the Corporation's position that AmeriCorps participants are not covered by title VII or any other federal employment discrimination statute. Therefore, discrimination complaints filed by participants against the AmeriCorps programs are not subject to title VII or any other federal employment discrimination law.

I hope this letter is helpful to you. Please feel free to call me ((202) 606-5000 ext. 256) if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Tucker". The signature is written in a cursive style with a large, circular initial "R".

Rina Tucker  
Assistant General Counsel

cc: Ron De Munbrum,  
USDA Grants Officer

Enclosure

Correri, Paul T. VS Peace Corps.  
Thu Mar 14, 1996

Equal Employment Opportunity Commission (EEOC)  
Correri, Paul T. VS Peace Corps.  
Document Number: 05921050  
05921050

Date: 27 May 93  
Tracker: 01922383  
Subject: Decision on Procedural Issues  
Employees - Definition  
Equal Employment Opportunity Commission - Jurisdiction  
Peace Corps - Volunteers  
Requests for Reconsideration - Erroneous Interpretation of Law,  
Regulation, or Policy

Hardcopy Page Count: 6

Paul T. Correri,  
Appellant,

v.

Josh Hogan,  
Acting Director,  
Peace Corps,  
Agency.

Appeal No. 01922383  
Agency No. PC 92-04

#### GRANTING OF REQUEST TO REOPEN

#### INTRODUCTION

On September 21, 1992, the Peace Corps (hereinafter referred to as the agency), initiated a request to the Equal Employment Opportunity Commission (EEOC) to reopen and reconsider the decision in Paul T. Correri v. Josh Hogan, Acting Director, Peace Corps, EEOC Appeal No. 01922383 (August 18, 1992). EEOC Regulations provide that the Commissioners may, in their discretion, reopen and reconsider any previous decision. 29 C.F.R. 1613.235(a). The party requesting reopening must submit written argument or evidence which tends to establish one or more of the three criteria prescribed by 29 C.F.R. 1613.235(b). The agency bases its request on 29 C.F.R. 1613.235(b)(2) (the previous decision involved an erroneous interpretation of law or regulation or misapplication of established policy). For the reasons set forth herein, the agency's request is granted. 1

#### ISSUE PRESENTED

Correri, Paul T. VS Peace Corps.  
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The issue presented in this request is whether the Commission has jurisdiction to entertain appeals filed by Peace Corps volunteers.

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## BACKGROUND

Appellant, a former Peace Corps volunteer, filed an EEO complaint on March 12, 1992, alleging discrimination based on his sexual orientation and his age (62) when he was allegedly harassed by the Country Director. The next day, the record reflects that appellant amended his complaint to include the bases of color (white), national origin (American), sex (male), race (Caucasian), and retaliation. By decision dated March 24, 1992, the agency informed appellant that because he did not contact an EEO Counselor on the additional bases of age, color, national origin, sex, race, and retaliation, he had twenty (20) days to provide more specific information on the allegations involving these bases of discrimination. The agency noted that appellant's allegations pertaining to the additional bases were vague and general. Moreover, the agency dismissed appellant's allegation of discrimination based upon his sexual orientation, on the grounds that sexual orientation is not a basis covered under Title VII.

Appellant disagreed with the agency's decision and appealed to this Commission. By decision dated August 18, 1992, the Commission affirmed the agency's decision rejecting appellant's allegation of discrimination based upon his sexual orientation, inasmuch as it is not a basis covered by Title VII. Nonetheless, we found that the agency's decision rejecting the remaining issues was improper. We stated that the agency should have referred appellant to an EEO Counselor when he amended his complaint. Accordingly, we ordered the agency to notify appellant that he is to discuss his additional bases of discrimination with an EEO Counselor, and amend his complaint. Thereafter, the agency was instructed to process the allegations in accordance with 29 C.F.R. 1613.216 et seq.

In its request to reopen, the agency claims that Section 12(b) of the Domestic Volunteer Service Amendments of 1979, which amended the Domestic Volunteer Service Act of 1973, precludes EEOC jurisdiction in cases of discrimination filed by volunteers. The agency quoted the following pertinent section (section 5057(c)(1)) of the amendments:

The Director shall apply the nondiscrimination policies and authorities set forth in section 717 of the Civil Rights Act of 1964, in Title V of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 to applicants for enrollment for service as volunteers, and to volunteers serving, under this Act and the Peace Corps Act. Any remedies available to individuals under such laws, other than the right to appeal to the Civil Service Commission authorized by section 717 of the Civil Service Act of 1964, and transferred to the Equal Employment Opportunity Commission by Reorganization Plan Number 1 of

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1978, shall be available to such applicants or volunteers.

The agency stated that, according to the legislative history, this exclusion was not designed to eliminate the right to appeal entirely, only the right to appeal to another federal agency. In this regard, the agency noted that it had established its own discrimination complaint procedure pursuant to Congressional mandate. According to the agency, Peace Corps Regulation 22 C.F.R. 306 states that ACTION regulations 45 C.F.R. Part 1225 et seq. are applicable to Peace Corps volunteers. These regulations establish a discrimination complaint procedure which includes the right to appeal within the agency and file a complaint in District Court.

Appellant responded to the agency's request to reopen by letter dated January 26, 1993. In this letter, he claims that the agency was required to comply with the Commission's previous decision, inasmuch as the request to reopen was filed thirty five (35) days after the August 18, 1992 Commission decision.

#### ANALYSIS AND FINDINGS

As a preliminary matter, the Commission notes that 29 C.F.R. 1613.235(b) states that parties may request reopening, provided that the request is made within thirty (30) days of receipt of the previous Commission decision. The record reflects that the agency received the August 18, 1992 decision on August 20, 1992, and filed the request to reopen on September 21, 1992. The Commission notes that the thirty (30) day period for filing a request to reopen therefore expired on September 19, 1992. However, we also note that September 19, 1992 was a Saturday. EEOC Regulation 29 C.F.R. 1613.240 states that if the last day of the time period falls on a Saturday, Sunday, or federal holiday, the period shall be extended to include the next business day. In this case, the next business day is September 21, 1992, the date the agency filed its request. Accordingly, the Commission finds that the agency's request is timely, and compliance with our August 18, 1992 decision was properly suspended.

The Commission must now address the jurisdictional issue presented in the agency's request to reopen. The agency contends that 1979 amendments to the Domestic Volunteer Service Act specifically preclude Peace Corps volunteers from filing an appeal with the Commission. According to the agency, these amendments were designed to contain the discrimination process within the agency. In fact, the agency cites agency regulations which establish a separate complaint procedure to be utilized by volunteers filing complaints, and claims that this procedure does not provide for a right to appeal to the EEOC.

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The Commission acknowledges that the Domestic Volunteer Service Act of 1973 was created, in part, to establish ACTION as a federal agency and to administer domestic volunteer programs. At one time, the Peace Corps was a part of ACTION; however, the International Security and

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Development Cooperation Act of 1981, approved on December 29, 1981 (P.L. 97-113), established the Peace Corps as an independent agency. Accordingly, 42 U.S.C. 5057 of the Domestic Volunteer Service Act was further amended in 1984 to strike "and the Peace Corps Act" from the end of the first sentence. The first sentence of 5057 currently ends "volunteers serving under this chapter." Therefore, the Commission finds that the agency's reliance on the Domestic Volunteer Service Amendments of 1979 to eliminate Commission jurisdiction in this case was in error.

The Commission finds, however, that it has no jurisdiction over this matter, albeit for reasons other than those cited by the agency. We make this finding based upon the Peace Corps Act, itself. The Peace Corps Act states:

...except as provided in this chapter, volunteers shall not be deemed officers or employees or otherwise in the service or employment of, or holding office under, the United States for any purpose. In carrying out this subsection, there shall be no discrimination against any person on account of race, sex, creed, or color. 22 U.S.C. 2504(a).

The statute does provide for exceptions for, "...the purposes of the Federal Tort Claims Act and any other Federal Tort liability statute, the Federal Voting Assistance Act of 1955 ... section 3342(a), (b), and c(1) of Title 31, section 5584 of Title 5 ... and section 214 of this title." 22 U.S.C. 2504(h). 2 The statute does not make an exception for discrimination laws. The Commission concludes that, inasmuch as Congress clearly knew how to make an exception when it so intended, failure to include discrimination laws was not an oversight. Given that Congress passed a statute that unambiguously provides that Peace Corps volunteers shall not be considered federal employees, except for the purposes of certain laws, and Title VII, the Rehabilitation Act, and the Age Discrimination in Employment Act are not included in the list of exceptions, we find that we have no jurisdiction over this matter. See *Wisher v. Coverdell*, 782 F. Supp 703, 707 (D. Mass. 1992).

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Support for this conclusion is found in the regulations passed to implement the Peace Corps Act, which mirror the procedures and remedies available generally to federal employees who wish to file complaints of discrimination. Peace Corps Regulation 22 C.F.R. 306 provides for a volunteer discrimination complaint procedure. This provision specifically states that ACTION regulations concerning the volunteer discrimination complaint procedure, appearing in 45 C.F.R. Part 1225, are applicable to Peace Corps volunteers. The Commission notes that the stated purpose of 45 C.F.R. Part 1225 is to "...establish a procedure for the filing, investigation, and administrative determination of allegations of discrimination based on race, color, national origin, age, sex, handicap or political affiliation, which arise in connection with the recruitment, selection, placement or termination of Peace Corps ... Volunteers...."

An examination of the complaint procedure reveals that it tracks the

Correri, Paul T. VS Peace Corps.

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complaint procedure established by this Commission, with the following exceptions: no right of a hearing before an EEO Administrative Judge is provided, and the right to appeal a final agency decision to this Commission is excluded. The Peace Corps regulations provide, instead, that after a final agency decision is issued, an aggrieved party may file a civil action in an appropriate U.S. District Court. 45 C.F.R. 1225.9(b) and 45 C.F.R. 1225.21.

It is clear that appellant was a volunteer in the Peace Corps, and thus, his complaint of discrimination must be processed in accordance with the volunteer discrimination complaint procedure established by the Peace Corps Act. The fact that appellant's complaint was processed through the EEO process until the request to reopen was filed, is not dispositive. The explicit mandate of Congress which holds that a Peace Corps volunteer is not an "employee" of the federal government is controlling. Accordingly, we find that our previous decision was based upon an erroneous interpretation of the law and regulations applicable to Peace Corps volunteers, and we thus grant the agency's request to reopen.

#### CONCLUSION

After a review of the agency's request to reopen, the previous decision, and the entire record, the Commission finds that the agency's request meets the criteria of 29 C.F.R. 1613.235(b). Accordingly, it is the decision of the Commission to grant the agency's request to reopen. The decision of the Commission in EEOC Appeal No. 01922383 (August 18, 1992) is hereby reversed. There is no further right of administrative appeal from the decision of the Commission on this request to reopen. This decision does not constitute a decision on the merits of appellant's complaint.

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#### RIGHT TO FILE A CIVIL ACTION (P1092)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS of the date that you receive this decision. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

#### RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other

Correri, Paul T. VS Peace Corps.

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security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

Frances M. Hart  
Executive Officer  
Executive Secretariat

5/27/93  
Date

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#### FOOTNOTES

Footnote 129 C.F.R. Part 1614 (57 Fed. Reg. 12,634) became effective October, 1992. This rule revises the way federal agencies and the Equal Employment Opportunity Commission will process administrative complaints and appeals of employment discrimination filed by federal employees and applicants for federal employment. However, since this request to reopen was filed prior to the effective date of Part 1614, it has been processed in accordance with Part 1613 regulations.

Footnote 2The exceptions enumerated in 22 U.S.C. 2504(h) are identified as follows: 31 U.S.C. 3342 (check cashing and exchange transactions); 5 U.S.C. 5584 (claims for overpayment of pay and allowances); and 22 U.S.C. 214 (fees for executions and issuance of passports; persons excluded from payment).

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