

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 15, 2014

TO: Cornele A. Overstreet, Regional Director
Region 28

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Arts for All, Inc. 177-2400
Case 28-CA-109844 260-0150

The Region submitted this case for advice on whether a person who works for an employer through AmeriCorps is a statutory employee. Because the National and Community Service Trust Act of 1993 states that AmeriCorps participants shall not be considered employees of their host organizations, and the Charging Party is not an employee of any other statutory employer, we conclude that she is not an employee under the National Labor Relations Act. Accordingly, the Region should dismiss the charge, absent withdrawal.

Facts

Arts for All, Inc. ("Employer") is a nonprofit corporation in Tucson, Arizona, that provides arts education, preschool, and after-school care for children and special-needs adults. The Employer receives assistance from AmeriCorps, a federal program that encourages community service by placing its participants with nonprofits.

The Charging Party is an AmeriCorps participant who contracted to work for the Employer for about six months, working fifty hours a week. In exchange she received a living stipend and the promise of an education award if she successfully completed her hours. AmeriCorps reimbursed the Employer for the living stipend paid to the AmeriCorps participants and funded any education awards. The Charging Party's responsibilities were to assist with the physical, emotional, and intellectual needs of adults with disabilities and children who attend the Employer's programs. She worked under the supervision of the Employer's supervisors. The Region found that the Charging Party was discharged in June 2013 for her protected concerted activity of protesting alleged inadequate safety procedures and equipment at the workplace.

Action

We conclude that, because the law establishing the AmeriCorps program states that AmeriCorps participants shall not be considered employees of their host organizations, and the Charging Party is not an employee of any other statutory

employer, we conclude that she is not an employee under the National Labor Relations Act. Thus, the Region should dismiss the charge, absent withdrawal.

Section 2(3) of the Act states that “[t]he term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise.” Section 2(3) then lists classes of individuals who are excepted from the broad definition (including agricultural workers, supervisors, and independent contractors), none of which are applicable to participants in programs such as AmeriCorps. Thus, it would appear that AmeriCorps participants would be considered “employees” under the Act.

However, the National and Community Service Trust Act of 1993, which created the AmeriCorps program, specifically states that an AmeriCorps participant “shall not be considered to be an employee of the organization receiving assistance under the national service laws through which the participant is engaging in service.”¹ The only exception is for the purposes of the Family Medical Leave Act of 1993.² The law also makes clear that participants are not federal employees either, except in a few limited situations.³

In the event of irreconcilable conflict between an earlier law and a later one, principles of statutory construction dictate that the later law will prevail.⁴ Yet, “repeals by implication are not favored” by federal courts.⁵ Accordingly, before a court will find a later law in irreconcilable conflict with an earlier one, it seeks to ascertain the actual intent of Congress by examining the legislative history.⁶

In this case, though, there is little pertinent legislative history. The language at issue dates to before the creation of AmeriCorps, when Congress amended an earlier community service law to clarify that people who participated in community service

¹ 42 U.S.C.A. § 12511(30)(B) (West, Westlaw through P.L. 113-52).

² *Id.* at § 12631.

³ *Id.* at § 12655n(b) (stating that participants are not federal employees except for the purposes of work-related injury claims, tort claims, and allowance for quarters).

⁴ *Chi. & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n.18 (1970) (citing *Va. Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515 (1937)) (resolving conflict between the Railway Labor Act and the Norris-LaGuardia Act).

⁵ *Watt v. Alaska*, 451 U.S. 259, 267 (2010) (quoting *Morton v. Mancari*, 417 U.S. 535, 549 (1974)).

⁶ *Id.* at 266–67.

programs through the federal service laws were not the employees of those programs.⁷ That language was incorporated with some modifications when Congress created AmeriCorps in 1993,⁸ and achieved its final form in 2009 with the Serve America Act.⁹ Congress did not raise the employee issue in any of its debates or reports on these bills. Therefore, there is no evidence of legislative intent that would counter the “later laws will prevail” rule.

A second principle of statutory construction also supports the conclusion that AmeriCorps participants are not employees under the NLRA. Congress expressly provided that AmeriCorps participants should be considered employees for the purposes of the Family Medical Leave Act.¹⁰ According to the Supreme Court, the “[p]roper inference from an exception to the rule is that Congress considered the issue of exceptions and in the end, limited the statute to the ones set forth.”¹¹ Thus, because Congress made an exception for the FMLA alone, we should infer that Congress also considered making an exception for the NLRA and other statutes but decided against it.

Applying these principles of statutory construction, federal courts have held that AmeriCorps participants are not employees for the purposes of other federal employment statutes.¹² For example, in *Murray v. American Red Cross Capital Area*

⁷ National and Community Service Technical Amendments Act of 1991, Pub. L. 102-10, § 3, 105 Stat. 29 (1991) (“Participants shall not be considered employees of the program.”). “Program” was defined as any activity carried out with assistance through the community service laws.

⁸ Pub. L. No. 103-82, §111, 107 Stat. 785 (1993) (“A participant shall not be considered to be an employee of the program in which the participant is enrolled.”).

⁹ Pub. L. 111-13, § 1102, 123 Stat. 1460 (2009) (“A participant shall not be considered to be an employee of the organization receiving assistance under the national service laws through which the participant is engaging in service.”).

¹⁰ This exception also prompted no comment in debate, and the House Report merely reiterated the text of the exception. H.R. Rep. No. 103-155 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1710, 1993 WL 226249 at *116.

¹¹ *United States v. Johnson*, 529 U.S. 53, 58 (2000).

¹² See *Self v. I Have A Dream Found.-Colo.*, No. 11-CV-00492-PAB-CBS, 2013 WL 752952, at *5 (D. Colo. Feb. 4 2013) (finding AmeriCorps participants not employees for the purpose of the ADA); *Rodriguez v. Corp. for Nat’l & Cmty. Serv.*, No. EP-09-CA-041-FM, 2009 U.S. Dist. LEXIS 67534, at *12–13 (W.D. Tex. June 23, 2009) (holding AmeriCorps participants not employees under ADA and Rehabilitation Act of 1973).

Chapter, a federal district court held that an AmeriCorps participant was not an employee for the purposes of Title VII.¹³ The district court acknowledged that the law that governed AmeriCorps contradicted the broad definition of “employee” contained in Title VII, and further noted the absence of legislative history on the matter.¹⁴ In addition, the court found that the FMLA exception “is some indication that when Congress intended to make federal employment law remedies available to Americorps [sic] participants, Congress said so explicitly.”¹⁵ The court therefore ruled that “there is no sufficient ground to depart from the plain meaning of the Americorps statute, under which Ms. Murray was an ‘employee’ of neither the federal government nor the Chapter. She was in short not an ‘employee’ at all.”¹⁶

For the same reasons, we conclude that AmeriCorps participants are not employees of their AmeriCorps-participating employers for the purposes of the NLRA. Since the Charging Party is not an employee of any other statutory employer, she is not an employee under the Act. Accordingly, the charge should be dismissed, absent withdrawal.

/s/
B.J.K.

¹³ No. 4:07CV161-RH/WCS, 2008 U.S. Dist. LEXIS 112052 (N.D. Fla. Jan. 1, 2008).

¹⁴ *Id.* at *4.

¹⁵ *Id.* at *5.

¹⁶ *Id.* at *6–7.