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Description of document: Peace Corps policy, memoranda and email relating to the appropriations language prohibiting the use of Peace Corps funds for abortions, 1981, 2011-2013

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Titles of documents: MS 263 Volunteer Pregnancy
Peace Corps Employment Policies .for Pregnant Volunteers

Note: Records released on appeal begin on PDF page 23

Source of document: Peace Corps
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[Esubmit Citizen Portal](#)

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August 29, 2013

RE: FOIA 13-0185

This is a response to your Freedom of Information Act (FOIA) request dated April 26, 2013. Specifically, you request, "A copy of any memos at the Peace Corps discussing the impact or implications or effect of the appropriations rider prohibiting Peace Corps funds used to pay for abortions in cases where a Peace Corps volunteer is raped." We interpret the request to cover memos and other records.

We have found material which is responsive. Attached, please find Peace Corps Manual Section 263, "Volunteer Pregnancy" (4 pages). Also attached, please find a copy of an opinion from the Office of Legal Counsel of the U.S. Department of Justice: "Peace Corps Employment Policies For Pregnant Volunteers," 1981 OLC LEXIS 60; 5 Op. O.L.C. 350, November 20, 1981. These are the most responsive documents available. No pages have been withheld. We are providing both documents to you at no cost. Emails have been withheld pursuant to 5 U.S.C. § 552(b)(5). Exemption 5 protects communications over legal matters with attorney-client privilege.

You may appeal this determination within 20 calendar days of your receipt of this letter. The appeal should be addressed to Earl W. Yates, Associate Director – Management, Peace Corps, 1111 20th Street NW, Washington, DC 20526. Your appeal must include the FOIA request number and a statement of the reason the withheld records should be made available and why the denial of the records was in error. It is possible to submit the appeal by U.S. mail (see below) or fax or email. Note that our fax number is 202-692-1385 and our email is FOIA@peacecorps.gov. Also, however you submit the appeal, "Freedom of Information Act Appeal" should be clearly marked on the appeal letter, and the envelope, or the email subject line, or the fax cover sheet.

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If you have questions, please contact me at (202) 692-1904 or foia@peacecorps.gov.

Sincerely,

Candice Allgaier
FOIA/PA Specialist

Attachments

MS 263 Volunteer Pregnancy

Effective Date: March 12, 2012

Responsible Office: Office of Medical Services (OMS)

Supersedes: 12/7/05; 1/5/83 (v.2); MS 242, 4/13/78

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Issuance Memo

Issuance Memo (3/12/2012)

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1.0 Authority

22 U.S.C. 2504 (e); Pub.L. 108-447, and any superseding law that includes the abortion restriction.

2.0 Purpose

This manual section sets out the Agency's policies and procedures governing pregnancy during service.

3.0 Policies

3.1 A V/T expecting a child may not continue her Peace Corps service unless she is given both medical and programmatic approval to continue to do so.

3.2 In order to ensure that all V/Ts are familiar with the policy and procedures set out in this manual section, Peace Corps Medical Officers (PCMOs) shall include discussion of the pregnancy policy and procedures during the V/Ts' initial health orientation/training, and V/Ts shall be told that pregnancy could lead to a medical separation.

4.0 Procedures to Determine Whether a V/T May Continue Service

4.1 Medical Approval

In order for a pregnant V/T to continue service, the PCMO, in consultation with OMS, must determine that:

- (a) Health facilities in-country are adequate for the delivery, given the V/T's general health and any potential complications;
- (b) Host country facilities are adequate for prenatal, obstetric, postnatal, and infant care according to the OMS Technical Guidelines; and
- (c) The V/T's project location presents no health hazards that would prevent the V/T from remaining there during pregnancy or after the birth of a child, or, if hazards do exist, an in-country transfer to a safer location is feasible.

4.2 Programmatic Approval

To determine whether the pregnant V/T may continue in service, the CD shall determine that the V/T will be able to continue to serve effectively after the birth of the child.

5.0 Continued Service

If the V/T is approved to continue service, the following apply:

5.1 Maternity Leave

A V/T may be granted 45 days of maternity leave with full allowances. She may elect to take the leave at any time before or after the birth or both. She also may elect to use some, or all, of her accrued annual leave for this period. After the 45-day maternity leave is expired, the CD may grant up to 45 days of additional maternity leave at the V/T's request. The decision to grant this additional leave must be based on programmatic considerations balanced against the needs of the mother.

5.2 Child Care

After the birth of a child, the Country Director may authorize allowances for child care, as appropriate, in accordance with Manual Section 221, *Volunteer Allowances*.

5.3 Documentation

The birth of a child should be documented on the appropriate form which is sent to the Volunteer Financial Office.

5.4 Health Care

The Peace Corps will provide, or pay the cost of, prenatal and obstetric care for pregnant V/Ts or the pregnant wife of a V/T regardless of her citizenship or volunteer/non-volunteer status during the V/T's service. See also section 8.0.

6.0 Early Termination as a Result of Pregnancy

6.1 Medical Separation

If the considerations set forth in Section 4.0 are not satisfied and the V/T does not wish to resign, she shall be medically separated in accordance with MS 284, *Early Termination of Service*. If, however, in the judgment of the PCMO, adequate prenatal care is available and if the CD concurs, the V/T may be allowed to continue service until the fourth month of pregnancy.

6.2 FECA Benefits

In accordance with the Pregnancy Discrimination Act, the Federal Employees' Compensation Act (FECA) coverage is extended to V/Ts for pregnancies that occur during Peace Corps service overseas and continue past the date of termination. Therefore, a pregnant V/T should contact the Office of Medical Services upon arrival in the United States to file a FECA claim. The costs of all pregnancy-related conditions, including prenatal, obstetric, and postnatal care of the mother, will be paid by the Department of Labor (DOL). However, the DOL will not pay costs related to the care of the baby, including nursery costs.

6.3 V/T Husband of a Pregnant V/T

If the pregnant V/T resigns or is medically separated, her Volunteer husband will be offered the option of resigning. If he does not resign, he shall be administratively separated, except as provided in the following paragraph.

When a pregnant V/T resigns or is separated and she wishes to remain in country or return to her home-of-record while her Volunteer husband continues his service, the CD should consider whether to permit the V/T husband to continue service under the policies in MS 205, *Volunteer or Trainee Marriage*. When considering the request, the CD and the PCMO must ensure that the provisions of MS 205 and MS 284, *Early Termination of Service*, regarding loss of benefits to the terminating V/T, including return transportation, allowances, and health care not related to pregnancy, are fully explained to the Volunteer couple.

7.0 Non-Volunteer Mother

7.1 Healthcare for a Non-Volunteer Mother

Where a V/T is married to a non-Volunteer mother or has taken action to acknowledge paternity which, under local law, will make him financially and legally responsible for the care and support of the child, Peace Corps will provide prenatal and birth-related care of the non-Volunteer mother in order to protect the health and safety of the unborn child. Peace Corps will pay for such care for the non-Volunteer mother only while the Volunteer is in service. No other medical care or other benefits are provided by Peace Corps for a non-Volunteer mother.

7.2 Documentation

The birth of the child should be documented on the appropriate form which is sent to the Volunteer Financial Office.

8.0 Benefits for a Child Born During Service

The child of a V/T born during the V/T's service will receive the same health care and benefits as a V/T, for as long as the child resides with the V/T parent during service overseas. See MS 262, *Peace Corps Medical Services Program*.

The child will be entitled to benefits as provided in MS 221, *Volunteer Allowances*, and to return airfare to the U.S. upon the V/T's completion of service.

The child is also entitled to post-service medical care for service-related conditions pursuant to Section 5(m) of the Peace Corps Act. Congenital disabilities are not covered by FECA. See MS 266, *Post-Service Medical Benefits for Trainees, Volunteers and Dependents*.

9.0 Medical Evacuation

A V/T who delivers a baby or has medical complications is treated as any other V/T on medevac status and may be maintained on this status while under medical care for up to 45 days. If a longer period of care for recuperation is necessary, the V/T will be medically separated. (See MS 264, *Medical Evacuation*)

In rare circumstances, if unanticipated problems arise, e.g., medical complications, natural disasters, or political conditions, evacuation to the U.S. may be authorized during the last trimester of pregnancy to protect the health of the mother or child or both. A pregnant V/T will not be medically evacuated to a third country to await delivery.

The Peace Corps will pay for a pregnant V/T's spouse to accompany her only if the spouse is a V/T and the PCMO determines that his presence is medically advisable or the evacuation is likely to result in a medical separation.

10.0 Counseling

A V/T who is pregnant shall be offered counseling concerning her options. In a case where the V/T has become pregnant as a result of rape, the V/T should be referred to the Office of Victim Advocacy

11.0 Abortion

11.1 Medical Evacuation

A V/T who decides to have an abortion will be medically evacuated at Peace Corps expense to a location where medically adequate facilities for obtaining counseling and an abortion are available and where abortions are legally permissible. OMS is responsible for providing guidance to the PCMO regarding the location of facilities that meet these criteria. The V/T may not be medically evacuated to a different site for an abortion without prior approval by OMS.

11.2 Medical Expenses of an Abortion

When a V/T elects to have an abortion, the medical expenses directly related to the abortion procedure will be the responsibility of the V/T. As a matter of law, the Peace Corps may not pay these costs. However, the Peace Corps will pay for medical expenses incurred due to complications. The V/T should be advised that she may make a withdrawal from her accrued readjustment allowance to pay for the procedure. To preserve her medical confidentiality, such a withdrawal request should be made to the Volunteer Financial Office after arrival in the U.S.

11.3 Reproductive Health Services

After the abortion procedure, if the V/T is medically cleared and wishes to return to country, she will be offered reproductive health services.

12.0 Effective Date

This manual section will be effective on the date of issuance.

Authored By Anne Passmore
Mar 12, 2012



U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

26 NOV 1981

MEMORANDUM FOR ALEXANDER B. COOK
General Counsel
Peace Corps

Re: Peace Corps Employment Policies for Pregnant
Volunteers

This responds to your request for this Office's views on several questions about the Peace Corps' policies on hiring and reinstatement of volunteers who become pregnant while overseas and of pregnant volunteers who elect to have an abortion, and on reimbursement of travel and per diem expenses to volunteers evacuated to the United States for the purpose of obtaining an abortion. We conclude that the Pregnancy Discrimination Act would prohibit the Peace Corps from implementing any across-the-board policy of terminating volunteers who become pregnant while overseas or pregnant volunteers who elect to have abortions, but that in some limited circumstances termination or reassignment may be appropriate, on an hoc basis, because of the unique demands and constraints of Peace Corps service. We do not believe, however, that the Peace Corps may consider the fact that a volunteer who had been terminated because of pregnancy subsequently elected to have an abortion in reviewing that individual's application for reinstatement. With respect to the funding of abortion-related expenses, we conclude that the Peace Corps is not barred from using appropriated funds to pay travel costs and a per diem to volunteers who are evacuated for the purpose of obtaining an abortion, and, in fact, that the Pregnancy Discrimination Act requires the Peace Corps to continue paying those costs, so long as travel and per diem expenses are paid to volunteers evacuated for other comparable medical disabilities.

I. Background

Current Peace Corps policy provides for an ad hoc determination of whether volunteers who become pregnant or pregnant volunteers who elect to have an abortion will be allowed to remain in their assigned countries. In determining whether a pregnant volunteer (including her spouse) should be allowed to remain in service, the Country Director looks at a variety of factors, including health hazards to the mother and child, the ability of the parents to support the child, and the prospects for continued effectiveness by the parents. A pregnant volunteer who elects to have an abortion may be separated, or returned to duty if the Country Director determines she will be able to serve effectively under the circumstances. Pregnant volunteers, volunteers with dependent children, and volunteers who have had abortions while in service do serve in the Peace Corps, although individuals who are pregnant or who have dependent children are not encouraged to become volunteers. Volunteers who choose to have an abortion are generally evacuated to the United States for the procedure. The Peace Corps pays travel expenses and a per diem to those volunteers who have an abortion, as it does for volunteers evacuated for other medical or surgical treatment. ^{1/} Because of a prohibition in the Peace Corps' current appropriations

^{1/} Payment of medical and related expenses for Peace Corps volunteers is authorized by 22 U.S.C. § 2504(e), which provides that "[v]olunteers shall receive such health care during their service . . . as the President may deem necessary or appropriate"

authority against the use of appropriated funds to pay for abortions except where the life of the woman would be endangered or in cases of reported rape or incest, the Peace Corps does not now pay the costs of the abortion procedure itself. Volunteers may, however, draw upon accumulated readjustment allowance funds to pay for abortion procedures. 2/

You have asked us to address the following questions:

1. Can the Peace Corps terminate any volunteer who becomes pregnant while a volunteer because of pregnancy? If so, could such a policy be limited to single volunteers?
2. Can the fact that a volunteer has a husband in-country be cause to allow a pregnant volunteer to remain in that status longer than she would if she were single?
3. Does payment for travel for a volunteer to return to Washington and per diem while here, leaving the payment for the abortion procedure up to the volunteer, comply with the legislative restriction on Peace Corps appropriations?
- 4(a) If a volunteer is terminated, asked to resign due to pregnancy, and subsequently obtains an abortion, can that fact be considered if she applies for readmission to the Peace Corps as a volunteer?
- (b) Since a normal term for volunteers is two years, if the answer to (a) is "no," could the fact that a volunteer resigned more than once to have an abortion be considered upon her request for readmission?

2/ Under § 2504(c) of the Peace Corps Act, 22 U.S.C. § 2501 et seq., volunteers are entitled to receive a readjustment allowance of \$125 per month, payable on return of the volunteer to the United States. Amounts accrued as readjustment allowance may be paid to the volunteer, members of his family, or others during the period of the volunteer's service, "under such circumstances as the President may determine." The readjustment allowance is transferred, on a monthly basis, to a noninterest bearing account until payment to the volunteer. For income tax purposes, the allowance is deemed paid to the volunteer when transferred to the fund from which the readjustment allowance is payable. 22 U.S.C. § 2504(c).

II. Requirements of the Pregnancy Discrimination Act

The Peace Corps' termination, reinstatement and benefits policies for pregnant volunteers or volunteers who have an abortion must comply with the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (PDA). The PDA amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to clarify Congress' intent that the sex discrimination prohibited by Title VII includes discrimination on the basis of "pregnancy, childbirth or related medical conditions." ^{3/} The PDA provides that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work" The prohibition against discrimination does not require an employer to pay "health insurance benefits" for abortions, except where the life of the mother would be endangered if the fetus were carried to term, or where medical complications arise from an abortion.

Except for the express language allowing an employer to refuse to pay health benefits for abortion, the prohibition against discrimination contained in the PDA is to be read broadly to extend to "the whole range of matters concerning the child-bearing process," including pregnancy, miscarriage, abortions, and childbirth, and to the whole range of employment policies that can adversely affect pregnant workers, including "hiring, reinstatement, termination, disability benefits, sick leave, medical benefits, seniority and all other conditions covered by Title VII." See H.R. Rep. No. 95-948, 95th Cong., 2d Sess., reprinted in [1978] U.S. Code Cong. & Ad. News 4749, 4752, 4753 (House Rep.). Any employment practice or policy that treats pregnant employees differently from other disabled workers, with the exception of payment of health insurance benefits for an abortion, is a prima facie violation of the Civil Rights Act. See Harris v. Pan American World Airways, Inc., 649 F. 2d 670, 673 (9th Cir. 1980); see generally Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

^{3/} The Pregnancy Discrimination Act applies to "volunteers serving under . . . the Peace Corps Act" by virtue of § 12 of the Domestic Volunteer Services Act, as amended, 42 U.S.C. § 5057(c)(1), with the exception of provisions affording aggrieved individuals a right of appeal to the Merit Systems Protection Board.

The courts have held that the prima facie test applies both to facially neutral policies or practices which have a disparate impact on pregnant employees, and policies or practices that single out pregnant employees for disparate treatment. See, e.g. Harris v. Pan American World Airways, Inc., supra, 649 F.2d at 673. An employer may show that facially neutral policies or practices are justified by and based upon a nondiscriminatory business purpose, although the employee may rebut that showing if other devices that do not have a similar discriminatory effect would serve that business purpose. See Griggs v. Duke Power Company, 401 U.S. 424, 431 (1971); Dothard v. Rawlinson, supra, 433 U.S. at 329. Where a policy or practice overtly discriminates against pregnant employees, it may be justified only if the employer can show that the discrimination is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). The federal courts have consistently stated that this exception is "extremely narrow" and requires the employer to demonstrate, for example, that the discrimination is "reasonably necessary to the essence of his business," 4/ that he has a "factual basis for believing that all or substantially all [pregnant] women would be unable to perform safely and efficiently the duties of the job involved . . .," 5/ or that it would be "impossible or highly impractical to deal with [pregnant women] on an individualized basis." 6/ See Harris v. Pan American World Airways, Inc., supra, 649 F.2d at 676; see generally Dothard v. Rawlinson, supra, 433 U.S. at 334.

It is important to note that the PDA does not require an employer to treat pregnant employees in any particular manner or to provide particular benefits for pregnant employees. Rather, it prohibits only discriminatory treatment that is not fully justified by the particular requirements of the job. Women disabled due to pregnancy, childbirth or related medical conditions must be provided the same benefits and same employment consideration as those provided to other similarly disabled workers, but need not be provided any greater benefits or consideration. House Rep. at 4, [1978] U.S. Code Cong. & Ad. News at 4752. Thus, the initial question is whether the Peace Corps' current policies

4/ See Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971).

5/ See Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 235 (5th Cir. 1969); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971).

6/ See Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 235 n.5 (5th Cir. 1969).

or the possible changes raised by your questions would be consistent with the treatment of other volunteers who are similarly affected in their ability to perform the major functions of their assignments. If any of those policies treats volunteers differently or has the effect of treating volunteers differently because of pregnancy (including volunteers who have abortions), it would be a prima facie violation of the PDA. The second level of inquiry would then be whether the discrimination is justified as a bona fide occupational qualification (if the policy discriminates on its face) or by business necessity (if the policy is facially neutral but discriminatory in impact).

III. Termination and Reinstatement

Under current policy, a Peace Corps volunteer may be separated from service before the end of his or her term for a variety of reasons, most of which involve a discretionary determination by the Country Director that the volunteer's continued effectiveness has been impaired. A volunteer may be terminated, for example, for use of illegal drugs or for excessive use of alcohol. Marriage is a ground for early termination in some instances, for example if the volunteer marries another volunteer whose term has ended, or if a volunteer marries a dependent non-volunteer and it is determined that the volunteer will be unable to support his or her spouse while in service. Marital separation or divorce is generally cause for reassignment of one volunteer, or, if no other suitable assignment is available, for termination of one volunteer. A volunteer may also be terminated for failure to adjust to the conditions of the assignment, unacceptable personal conduct, inadequate job performance, or lack of a suitable assignment. As noted above, a pregnant volunteer may be separated from service if the Country Director determines that continued service could present a health hazard for the mother or child, if the volunteer will be unable to support the family, or generally if having a child will impair the volunteer's continued effective service. A volunteer who obtains an abortion may be terminated if the Country Director determines she will not be able to serve effectively.

A. Pregnancy

We believe that, so long as a decision to terminate a pregnant volunteer is based on an assessment of the volunteer's ability to function effectively in her assignment after delivery of the child, the Peace Corps' current policy allowing discretionary termination of pregnant volunteers does not violate the PDA. We base this conclusion on our understanding that the same considerations are applied to any volunteer who has a dependent, including volunteers who have

dependent children or spouses prior to entering the Corps, and volunteers who marry dependent spouses during service. The application of this policy, on an ad hoc basis, would thus not have a disparate impact on volunteers who become pregnant during their term overseas, and would not be discriminatory under the PDA. To the extent that the Peace Corps considers the marital status of any volunteer who has dependents as relevant to the volunteer's continued effectiveness in the assignment, we believe the Peace Corps may take into consideration a pregnant volunteer's marital status, and whether her spouse accompanies her in her assignment, in deciding whether termination is appropriate. Similarly, if the Peace Corps as a matter of policy or practice reassigns or terminates volunteers if continued service in a particular assignment would pose a health threat to the volunteer or his or her children, the Peace Corps may reassign or terminate a pregnant volunteer if a bona fide threat to her health or to the health of the child exists.

Under limited circumstances, we believe the Peace Corps could terminate or reassign a volunteer solely because she is pregnant, independent of the considerations outlined above. We can foresee the possibility that in individual cases a volunteer would not be able to function adequately during her pregnancy because of cultural biases in her assigned country. Because of the unique situation of Peace Corps volunteers, who must live and work in the culture of their assigned countries, in such a situation we believe the Peace Corps could exercise its discretion based on the facts of a particular case and remove the volunteer from her assignment. See, e.g., Dothard v. Rawlinson, supra, 433 U.S. at 334 (1977). 7/

While the Peace Corps could terminate pregnant volunteers on a case-by-case basis for the reasons outlined above, we do not believe that the Peace Corps could, as a matter of overall policy, terminate pregnant volunteers solely because they become pregnant. Some recent decisions of lower federal courts have upheld policies requiring women to take mandatory leave beginning in the early stages of pregnancy, but those decisions turn on the narrow ground that continued employment of the woman during her pregnancy could pose a safety

7/ We would caution that the Peace Corps should remain even-handed in application of its policies. Thus, to the extent that the Peace Corps can accommodate volunteers with dependents, for example by choice of assignments or personal leave, or reassigns volunteers if necessary to avoid cross-cultural concerns, it must extend the same consideration to volunteers who become pregnant and have children while in service.

risk to co-workers and the public. ^{8/} We have not been informed of a comparable factual basis that would justify an across-the-board policy of terminating pregnant volunteers. In fact, the Peace Corps' historic experience with pregnant volunteers who remain in service might undermine, if not preclude, an argument that such a policy is justified, even by the unique demands of the Peace Corps.

B. Abortion

We doubt that the Peace Corps would be able to make a showing under the PDA that would permit it to terminate a volunteer because she elects to have an abortion, so long as other volunteers who undergo surgery of a comparable nature are permitted to return to their assigned countries. The legislative history of the PDA and implementing guidelines promulgated by the EEOC state in categorical terms that a woman's decision to have an abortion cannot be the basis for termination of employment. See House Rep. at 7, [1978] U.S. Code Cong. & Ad. News at 4755 ("[N]o employer may, for example, fire . . . a woman simply because she has exercised her rights to have an abortion."); 29 C.F.R. Part 1604 (Appendix). Moreover, the experience of the Peace Corps with volunteers who have had abortions and have returned to service would substantially undermine any argument that a volunteer who has had an abortion would be unable to perform effectively. This would not necessarily preclude the Peace Corps from reassigning a volunteer who has had an abortion if women who have abortions are ostracized or otherwise condemned by the culture of her assigned country. That circumstance could justify removal of the volunteer from her assignment, if her continued effective service would be substantially impaired by that cultural bias (assuming the fact of her abortion were public knowledge). However, such circumstances may be rare, and might be grounds only for reassignment of the volunteer, not for termination.

^{8/} These cases have involved policies of major airlines requiring stewardesses to take mandatory leave upon learning of their pregnancy, or after the first few months of pregnancy. See, e.g., Harris v. Pan American World Airways, 649 F.2d 670, 677 (9th Cir. 1980); Burwell v. Eastern Air Lines, 633 F.2d 361, 370 (4th Cir. 1980); cert. den. 101 S. Ct. 1480 (1981); see generally Dothard v. Rawlinson, 433 U.S. 321, 336-37 (1977) ("male-only" requirement for prison guards in "contact" positions allowed because of unique security and control problems in Alabama prisons).

We do not believe that under the PDA the Peace Corps could justify a refusal to rehire a volunteer who had been terminated because of pregnancy and subsequently chose to have an abortion. Even if the ostensible reason for the refusal to rehire that volunteer were to avoid disruption caused by repeated breaks in service, or because of questions raised about the volunteer's commitment to serve her full term, ^{9/} it would be difficult to overcome the inference that the volunteer was accorded different consideration in the employment decision because she became pregnant and chose to have an abortion, and might become pregnant and choose to have an abortion again in the future. One of the primary purposes of the PDA revealed in its legislative history is to prevent employers from acting on the basis of such stereotypes, i.e. that all women of child-bearing age are "potentially pregnant." See House Rep. at 6-7, [1978] U.S. Code Cong. & Ad. News at 4754-55; Weeks v. Southern Bell Telephone & Telegraph Co., supra, 408 F.2d at 235-36. Thus, we conclude that under the PDA the fact that a volunteer chose to have an abortion cannot be considered in a decision on her reapplication for service.

III. Reimbursement of expenses

You have also asked whether the Peace Corps must, or indeed can, consistent with the PDA and current restrictions on the use of appropriated funds, continue to pay travel costs and a per diem for volunteers who obtain an abortion while in service. The Peace Corps now pays those costs under a general policy providing for evacuation to the United States of volunteers

^{9/} Among the standards of selection for Peace Corps volunteers is "[m]otivation indicating commitment to serve a full term (usually 2 years) as a Volunteer despite periods of stress." 22 C.F.R. § 305.3(a).

who require "elective (necessary but not emergency) surgery of any consequence." ^{10/} Until the beginning of FY 1979, the Peace Corps also paid for the costs of the abortion procedure itself. In 1978, Congress included language in the Peace Corps' appropriations legislation limiting the use of appropriated funds for abortions. We understand that the currently effective language is contained in Pub. L. 96-536, and prohibits the use of funds "to perform abortions . . . except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for victims of [reported] rape or incest . . . or for medical procedures necessary for the termination of an ectopic pregnancy."

^{10/} The current policy set forth in the Peace Corps manual identifies a number of other factors that require evacuation to the United States, including: difficult diagnostic problems; cases requiring difficult treatment; psychiatric problems that are the primary reason for evacuation or that threaten to complicate the medical management of the case; cases involving a long recuperative period; and cases that can be handled more effectively and at lower cost in the United States than at an intermediate point. Evacuation to intermediate locations is suggested for a number of other problems, including: emergency surgery; elective surgery requiring short-term hospitalization or treatment on an outpatient basis; specialist consultations; simple orthopedic procedures; and treatment if a long recuperative period is not anticipated.

On its face, this restriction covers only payments made "to perform abortions;" it does not prohibit the use of funds to pay expenses, such as a per diem or travel expenses, that are incidental to the abortion. We believe that the plain language of the appropriations restriction is dispositive, and does not require the Peace Corps to cease payment of incidental expenses other than the costs of the abortion itself. 11/

This does not, however, dispose of the question whether the Peace Corps, in its discretion, may cease payment of travel and per diem expenses for volunteers who elect to have abortions. The statutory authority for payment of those expenses vests broad discretion in the President or his delegated representative to authorize "such health care . . . as [is] necessary or appropriate." 22 U.S.C. § 2540(e). We believe this authority is broad enough to allow termination of such payments. It must, however, be read in light of the non-discrimination requirements of the PDA.

We conclude that under the PDA the Peace Corps must continue to pay travel and per diem expenses for volunteers evacuated to have an abortion, so long as it provides such compensation for other volunteers evacuated for comparable medical conditions. As noted above, the PDA expressly exempts from its coverage payment of "health insurance benefits for abortion," except where the life of the mother would be endangered or "medical complications" arise. Because the Peace Corps in effect acts as a self-insurer for the volunteers, this exclusion is consistent with the restriction on use of appropriated funds discussed

11/ Moreover, as we note below, any broader interpretation of the appropriations restriction would conflict directly with the requirements of the PDA. This inconsistency would raise a substantial question of Congressional intent, because the latter-passed bill (the appropriations legislation) does not address the continuing applicability of the PDA. In general, repeals by implication are not favored, especially when the subsequent legislation is an appropriations measure. See, e.g. TVA v. Hill, 437 U.S. 153, 189-90 (1978). To the extent possible, therefore, we must interpret the restriction on the Peace Corps' appropriated funds consistently with the PDA -- i.e. to prohibit only the use of funds to pay for the abortion procedure itself.

above. ^{12/} However, the legislative history of the PDA makes it clear that Congress intended the exclusion of abortion benefits to be limited to benefits for the abortion itself, and not to include incidental benefits available to employees with comparable temporary disabilities. The amendment excluding abortion benefits from the scope of the PDA was adopted during consideration of the bill by the full House Education and Labor Committee. The version adopted by the House Committee, and subsequently by the House, provided as follows:

As used in this subsection, neither 'pregnancy' nor 'related medical conditions,' as they relate to eligibility for benefits under any health or temporary disability insurance or sick leave plan available in connection with employment, may be construed to include abortions, except where the life of the mother would be endangered if the fetus were carried to term

124 Cong. Rec. H 6862-63 (daily ed. July 18, 1978) (emphasis added). As drafted, the bill would have permitted an employer to deny not only payment for the abortion itself, but also incidental benefits such as sick leave and disability. *Id.* at H 6863 (remarks of Rep. Hawkins). The Senate version of the bill contained no exclusion for abortion benefits.

In conference, a compromise was reached on the language that appears in the enacted bill. Senator Williams' remarks on the floor in support of the Conference Report clearly indicate that the intended scope of the exclusion was narrow:

[T]he conferees have adopted a compromise which requires the provision of sick leave and disability benefits in connection with an abortion on the same basis as for any other illness or disabling condition.

^{12/} Although the language of the PDA refers only to "health insurance benefits," the legislative history indicates that the underlying concern was that employers would be required to pay for abortions (whether directly or through insurance plans), even if that employer harbored religious or moral objections to abortions. See House Rep. at 7, [1978] U.S. Code Cong. & Ad. News at 4755.

On the other hand, employers are not in any case required to provide health insurance benefits for the performance of the abortion procedure itself . . .

* * *

Finally, since the abortion proviso specifically addresses only health insurance, the proviso in no way affects an employee's right to sick pay or disability benefits or, indeed, the freedom from discrimination based on abortion in hiring, firing, seniority, or any condition of employment other than medical insurance itself.

124 Cong. Rec. S 18,978-79 (daily ed. Oct. 18, 1978)(remarks of Senator Williams).

Thus, it is clear that, while an employer may refuse to pay the costs of the abortion, under the PDA that employer cannot refuse to provide to women who elect to have an abortion other benefits that are available to temporarily disabled workers. Here, the Peace Corps' evacuation policy, including the payment of travel expenses and a per diem allowance, is such an incidental benefit, and must be extended to volunteers who elect to have an abortion. We believe that the Peace Corps must also continue to allow volunteers to draw on their accumulated readjustment allowance in order to pay for the abortions if they so desire, so long as other volunteers are allowed similar access to cover medical expenses not otherwise covered by the Peace Corps. 13/

13/ We do not believe that allowing volunteers to use those funds would contravene the restriction on the Peace Corps' use of appropriated funds "to perform abortions." Although the readjustment allowance is not required to be paid to the volunteer until the end of his or her term of service, those funds are effectively held for the account of the volunteer and are taxable to the volunteer as accrued. See n.2 supra. Thus, withdrawal from those funds to pay the costs of an abortion would not be payment from funds appropriated generally for the Peace Corps, but rather payment to the volunteer of amounts owing to him or her.

This would not preclude the Peace Corps from altering its current reimbursement policy to provide, for example, for evacuation to an intermediate location, or to eliminate or reduce per diem payments, provided the amended policy applies across the board to all temporarily disabled workers, and not just to volunteers who become pregnant or have an abortion.



Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel



November 15, 2013

RE: Appeal of FOIA Request No. 13-0185
(assigned appeal tracking number 13-0277)

This is the final response to your Freedom of Information Act (FOIA) appeal dated September 1, 2013 and received by this office on September 9, 2013. Specifically, you state that you are appealing the "This is an administrative appeal taken of the response to FOIA 13-0185. While some responsive records were released, all emails were withheld under exemption b(5)." In the initial appeal response dated October 25, 2013, Earl Yates determined that there are segregable portions of the five emails (9 pages) originally withheld. He further instructed the FOIA Office to process for release to you any reasonably segregable portion of the records.

In your original FOIA request letter you asked for "Memos re legal constraint precluding funds for abortion in case of rape. A copy of any memos at the Peace Corps discussing the impact or implications or effect of the appropriations rider prohibiting Peace Corps funds used to pay for abortions in cases where a Peace Corps volunteer is raped." Five emails consisting of 9 pages were withheld in their entirety.

After further review of the 9 pages of emails, certain pages were redacted pursuant to 5 U.S.C. § 552(b)(5). Exemption 5 applies to matters that are inter- and intra-agency communications protected by the attorney-client privilege. These 9 pages are attached.

If you have any questions, please feel free to contact me at 202-692-1236 or email at FOIA@peacecorps.gov.

Sincerely,
Denora Miller
FOIA Officer

Attachment

From: Miller, Nancy
Sent: Tuesday, January 08, 2013 4:48 PM
To: Weinberger, Paul
Subject: RE: rider

Paul: give me a call when you get back to your office.

Nancy G. Miller
Expert, Office of the General Counsel
Peace Corps
1111 20th Street, NW
Washington, DC 20526
202-692-2162

From: Weinberger, Paul
Sent: Tuesday, January 08, 2013 1:13 PM
To: Miller, Nancy
Cc: Sosebee, Carl; Rubin, Bill
Subject: RE: rider

I remember seeing letters and/or memos from the early Clinton administration, involving an outside party lobbying the agency to try to change the language. (b) (5)

Feel free to call if it's easier to discuss. Thx a lot.
x2529

From: Miller, Nancy
Sent: Monday, January 07, 2013 4:06 PM
To: Weinberger, Paul
Cc: Sosebee, Carl; Rubin, Bill
Subject: RE: rider

In our files, the last discussion about the rider is from the late 70s or early 80s, when there was an effort in the Senate to modify it. if there have been any further discussions, they are not reflected in our files.

Nancy G. Miller
Expert, Office of the General Counsel
Peace Corps
1111 20th Street, NW
Washington, DC 20526
202-692-2162

From: Weinberger, Paul
Sent: Monday, January 07, 2013 3:19 PM
To: Miller, Nancy
Cc: Sosebee, Carl; Rubin, Bill
Subject: rider

(b) (5)

Am happy to look through old files if

you don't have the time.
Thanks a lot, Paul

Paul Weinberger
Director of Congressional Relations
Peace Corps
1111 20th Street, NW
Washington, DC 20526
202.692.2529

From: Rubin, Bill
Sent: Thursday, May 31, 2012 9:27 AM
To: Weinberger, Paul; Carroll, Suzie
Cc: Sosebee, Carl; Miller, Jan; Miller, Nancy
Subject: RE: Peace Corps Abortion Language in FY 13 Senate Bill

(b) (5)

From: Weinberger, Paul
Sent: Wednesday, May 30, 2012 18:52
To: Rubin, Bill; Carroll, Suzie
Cc: Sosebee, Carl; Miller, Jan; Miller, Nancy
Subject: Re: Peace Corps Abortion Language in FY 13 Senate Bill

(b) (5)

From: Rubin, Bill
Sent: Wednesday, May 30, 2012 05:49 PM
To: Weinberger, Paul; Carroll, Suzie
Cc: Sosebee, Carl; Miller, Jan; Miller, Nancy
Subject: RE: Peace Corps Abortion Language in FY 13 Senate Bill

(b) (5)

I don't understand your second point.

From: Weinberger, Paul
Sent: Wednesday, May 30, 2012 12:55
To: Rubin, Bill; Carroll, Suzie
Cc: Sosebee, Carl; Miller, Jan; Miller, Nancy
Subject: RE: Peace Corps Abortion Language in FY 13 Senate Bill

(b) (5)

(b) (5)

Provided further, That none of the funds appropriated under this heading shall be used to pay for abortions: Provided further, That notwithstanding the previous proviso, section 614 of division C of Public Law 112--74 shall apply to Peace Corps volunteers to the same effect as it applies to Peace Corps employees.

SEC. 613. No funds appropriated by this Act shall be available to pay for an abortion, or the administrative expenses in connection with any health plan under the Federal employees health benefits program which provides any benefits or coverage for abortions.

SEC. 614. The provision of section 613 shall not apply where the life of the mother would be endangered if the fetus were carried to term, or the pregnancy is the result of an act of rape or incest.

From: Rubin, Bill
Sent: Thursday, May 24, 2012 6:03 PM
To: Carroll, Suzie
Cc: Weinberger, Paul; Sosebee, Carl; Miller, Jan; Miller, Nancy
Subject: RE: Peace Corps Abortion Language in FY 13 Senate Bill

(b) (5)

(b) (5)

From: Carroll, Suzie
Sent: Thursday, May 24, 2012 17:29
To: Rubin, Bill; Miller, Nancy
Cc: Weinberger, Paul; Sosebee, Carl
Subject: Peace Corps Abortion Language in FY 13 Senate Bill

Hi Bill and Nancy,

The Senate Appropriations Committee has released the language for their FY 2013 State, Foreign Ops Bill. I've attached the main section that deals with Peace Corps.

They've added in some new language after the prohibition on funding for abortions that references section 614 of division C of PL 112-74.

(b) (5)



Thanks,

Suzie

PL 112-74: <http://www.gpo.gov/fdsys/pkg/PLAW-112publ74/pdf/PLAW-112publ74.pdf>

Suzie Carroll

Deputy Director of Congressional Relations

Peace Corps

1111 20th Street NW

Washington, DC 20526

202.692.2128

From: Weinberger, Paul
Sent: Friday, March 04, 2011 9:10 AM
To: Miller, Nancy
Subject: FY 2010 Appropriations Language for Peace Corps

From P.L. 111-117:

INDEPENDENT AGENCIES
PEACE CORPS
(INCLUDING TRANSFER OF FUNDS)

For necessary expenses to carry out the provisions of the Peace Corps Act (22 U.S.C. 2501–2523), including the purchase of not to exceed five passenger motor vehicles for administrative purposes for use outside of the United States, \$400,000,000, to remain available until September 30, 2011: *Provided*, That none of the funds appropriated under this heading shall be used to pay for abortions: *Provided further*, That the Director of the Peace Corps may transfer to the Foreign Currency Fluctuations Account, as authorized by 22 U.S.C. 2515, an amount not to exceed \$5,000,000: *Provided further*, That funds transferred pursuant to the previous proviso may not be derived from amounts made available for Peace Corps overseas operations: *Provided further*, That of the funds appropriated under this heading, not to exceed \$4,000 may be made available for entertainment expenses: *Provided further*, That any decision to open, close, significantly reduce, or suspend a domestic or overseas office or country program shall be subject to prior consultation with, and the regular notification procedures of, the Committees on Appropriations, except that prior consultation and regular notification procedures may be waived when there is a substantial security risk to volunteers or other Peace Corps personnel, pursuant to section 7015(e) of this Act: *Provided further*, That not later than 45 days after enactment of this Act, the Director shall submit a spending plan to the Committees on Appropriations on the proposed uses of funds under this heading: *Provided further*, That not later than 180 days after enactment of this Act, the Director shall, after consultation with the Committees on Appropriations, submit a report to the Committees that includes the findings of a comprehensive assessment of the current program model of the Peace Corps and a strategy for reforming and improving operations.

Alyson Hatchett
Peace Corps
Congressional Relations Assistant
(202) 692-2129

From: Rubin, Bill
Sent: Monday, March 21, 2011 5:18 PM
To: Sosebee, Carl; asw18; Hessler-Radelet, Carrie; Weinberger, Paul
Cc: Montoya, Elisa; Miller, Nancy; Carroll, Suzie
Subject: Abortion Restriction

I just wanted to update everyone on the issue of whether we should request Congress to consider a change in the abortion restriction contained in our appropriation.

(b) (5)

Under 10 USC 1093, Department of Defense medical facilities can be used to perform an abortion where the life of the mother would be endangered if the fetus were carried to term or in a case in which the pregnancy is the result of rape or incest. However, DOD funds may only be used to pay for an abortion where the life of the mother would be endangered if the fetus were carried to term. Therefore, in a case in which the pregnancy is the result of rape or incest, an abortion can be performed in a military hospital, but the woman would have to pay the cost of the abortion herself unless her life would be endangered if the fetus were carried to term. This means that, in the case of rape, the military and the Peace Corps are essentially treated the same way: a woman who becomes pregnant as a result of rape while in service has to pay for her own abortion. There have been attempts in the past to change this provision, but they have not gone anywhere.

As for the State Department, staff would be covered by insurance coverage under the Federal Employee Health Benefits Program. I have taken a look at the benefits for the Foreign Service Benefit Plan, which is the plan designed primarily for members of the foreign service. That plan covers abortions in the case of rape or incest or if the life of the mother would be endangered if the fetus was carried to term.

From: Miller, Nancy
Sent: Monday, February 28, 2011 4:06 PM
To: Simon, Barry; Carmack, Susan
Cc: Sosebee, Carl
Subject: what can PC pay for

The appropriation for the Peace Corps has for more than 30 years contained a restriction on the use of appropriated funds to pay for abortions. However, the Department of Justice's Office of Legal Counsel, has said that The Peace Corps may "pay travel costs and a per diem to Volunteers who are evacuated for the purpose of obtaining an abortion." Office of Legal Counsel, Department of Justice, "Peace Corps Employment Policies for Pregnant Volunteers, November 20, 1981, at p. 1. n. 11. The restriction on use of appropriated funds "prohibit[s] only the use of funds to pay for the abortion procedure itself." Id. at n. 11.

Based on this legal opinion from the Department of Justice, Peace Corps' policy, as set out in MS 264.10.3 is as follows:

"When a V/T elects to have an abortion, the medical expenses directly related to the abortion procedure will be the responsibility of the V/T. As a matter of law, the Peace Corps may not pay these costs. However, the Peace Corps will pay for medical expenses incurred due to complications. The V/T should be advised that she may make a withdrawal from her accrued readjustment allowance to pay for the procedure. To preserve her medical confidentiality, such a withdrawal request should be made to the Volunteer Financial Office after arrival in the U.S. "

Please let me know if you have further questions.

Nancy

Nancy G. Miller
Associate General Counsel
Peace Corps
1111 20th Street, NW
Washington, DC 20526
202-692-2162