



UNDER SECRETARY OF THE ARMY
WASHINGTON



16 MAR 2000

CHALLENGE Number 2000-0101



Dear [REDACTED]

This responds to your appeal of the February 18, 2000, decision of the Assistant Secretary of the Army (Manpower and Reserve Affairs), denying your challenge to the 1999 FAIR Act inventory. I received your appeal on March 3, 2000.

U600, Selected Education and Training Services

Activity Challenged. You are appealing the decision that certain guidance counseling and management functions (including the examples of test compromise and tuition assistance recoupment responsibilities mentioned in your challenge) associated with the Army Continuing Education System, as performed at Fort Carson, were properly included on the list.

Decision. I have reviewed the Assistant Secretary's decision, which is incorporated herein by reference, in light of your appeal. Based upon this review, I have determined that the selected activities included under Function Code U600 are not inherently Governmental. Therefore, I am affirming the challenge decision that they are properly included in the Army's FAIR Act list.

Rationale. Your appeal suggests that the Assistant Secretary did not consider the specific arguments pertaining to the individual jobs alleged by different interested parties working in the same function. To the contrary, each challenge was reviewed and decided individually. However the FAIR Act requires consideration of the nature of functions, not of individual jobs or positions. In this regard, the Assistant Secretary determined from an Army-wide perspective that the function of soldier counseling, including off-duty and on-duty education programs, was not inherently Governmental within the meaning of the FAIR Act.

In reaching my decision, I have also considered other points raised in your appeal and underlying challenge. These include the contentions that management functions are Governmental in nature within the meaning of Office of Federal Procurement Policy (OFPP) Letter 92-1 even if the functions being managed are commercial in nature; that the grouping of the counseling function with other functions in one function code makes it difficult to determine if a function is included on the list; and



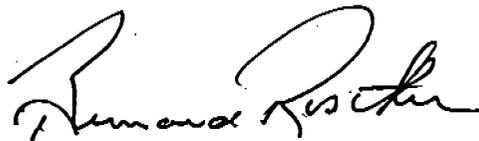
that you disagree with the internal Army process used to develop the FAIR list and the identification of functions that emerged out of the Defense Reform Initiative Directive 20.

If the FAIR Act challenge process were applied to jobs rather than to functions, your interpretation of the OFPP Letter 92-1 would not be unreasonable. But the FAIR Act challenge process pertains to functions, not to individual jobs. Therefore, if a function is otherwise determined not to be Governmental in nature, administration and management (as distinct from policy and oversight) of work required to perform that function is also not inherently Governmental. In making such determinations, grouping of like or related kinds of work and activities performed for similar purposes (broadly defined) assists rather than impedes the evaluation of the functions.

Your initial challenge letter noted that an Army regulation referred to a House of Representatives report that discourages the contracting of guidance counselors and to a local legal office determination that these functions were Governmental in nature. With respect to the first point, the fact that Congress may prefer that certain work be performed by civil service employees does not make the functions inherently Governmental. With respect to the second point, I can only say that the Assistant Secretary has more recently reviewed the functions involved, perhaps from a broader perspective, and reached a different determination.

Lastly I want to comment on your statement that "career progression dictates that managers come from Guidance Counselors" because the two functions are so closely linked. Career progression has been and continues to be a consideration when deciding what functions and activities must remain in-house in order to preserve core capability. However it is not a consideration when determining whether a function is inherently Governmental under the FAIR Act.

Please note that the Army's FAIR Act determinations are only one step in pursuing a larger objective. The larger objective is to ensure that Army functions and activities are performed in a manner that is both cost-effective and in the best interests of the taxpayers. In this connection, the Army FAIR Act inventory will be reviewed in conjunction with its larger, ongoing review of all functions for possible re-engineering, privatization, consolidation or other reinvention efforts. As the Assistant Secretary indicated, these reviews may lead to decisions to keep performance of some activities in-house based on risk assessment, national security considerations, or enlightened human resources management.

A handwritten signature in cursive script, appearing to read "Bernard Rostker".

Bernard Rostker