



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
MANPOWER AND RESERVE AFFAIRS
111 ARMY PENTAGON
WASHINGTON DC 20310-0111

March 6, 2000

CHALLENGE Number 2000-0125, 2000-0126, 2000-0127 and 2000-0128

[REDACTED]

President
American Federation of Government Employees
Local 2004
P.O. Box 384
New Cumberland, Pennsylvania 17101

Dear [REDACTED]

This responds to your challenges to the Army's 1999 FAIR Act inventory. Your challenges concern six activities. I will address each activity, in turn.

Standing. As head of a labor organization within the meaning of 5 U.S.C. 7103(a)(4), you are an "interested party" who is qualified to submit challenges of inclusion or exclusion to the Army list. Other issues raised in your challenge are not relevant to FAIR Act determinations.

Date of Receipt. I received your Challenge on February 8, 2000.

Installation Support Functions

Activity Challenged. You have challenged the inclusion on the list of numerous installation support functions at Carlisle Barracks performed under Function Codes G011, J999, P100, S700, S701, S726, S727, S731, S740, S999, W999, Y200, Y410, Y520, Z999, as defined in the functional definition at the Army web site, <http://www.asamra.army.pentagon.mil/fair>, which is hyperlinked to the DOD FAIRNET website at <http://gravity.lmi.org/DODFAIR>.

Decision. I have determined that the installation support activities included under the above Function Codes pertaining to the support of Carlisle Barracks, are, for the most part, not inherently Governmental. Therefore, they are properly included in the Army's FAIR Act list.

Rationale. The FAIR Act list includes only functions and activities that, in the judgment of the head of the agency, are not inherently Governmental. An inherently Governmental function includes those activities that require either the exercise of substantial discretion in applying Government authority or the making of value judgments in making decisions for the Government.

Your challenge contends that the installation support functions included in your challenge are inherently Governmental because they involve the interpretation and enforcement of laws and regulations. Law enforcement operations involving the direct conduct of criminal investigations are inherently Governmental. The FAIR Act list presumes that persons in positions classified to Occupational Series GS 1811 assigned to the CID Command under Function Code Y410, "Criminal Investigation," are the only activities involved in the direct conduct of criminal investigations within the Army.

The Army FAIR Act list presumes that the inherently Governmental portion of the installation support functions included in this challenge would be the responsibility of senior personnel. Accordingly, the performance of these functions by most personnel who are assigned to positions at grades GS-13 and above within management headquarters are presumed to be inherently Governmental. However, most of the work involved in performing these functions is performed by personnel at lower grades. This presumption is based in part on the degree to which the exercise of discretion within this function is substantially circumscribed by law, rule and regulation. Another consideration is that these functions are performed in the private sector and many are subject to on-going A-76 competitions.

Your challenge contends that the installation support functions bind the United States to take or not take some action by virtue of their executing their authorizations to order necessary materials. The ordering of materials and supplies to complete work at an installation, with or without a Government credit card, does not normally entail the exercise of substantial discretion or value judgements in making decisions for the Government.

Your challenge contends that contractor performance of installation support functions could create conflicts of interest and undermine independent decision-making of Government officials. Conflicts of interest apply equally to Federal employees as well as contractors. Any alleged conflict of interest can be avoided through appropriate safeguards in the administration of the contracted work.

Your challenge contends that access to private, personnel-sensitive or confidential information renders a function inherently Governmental. Access to procurement-sensitive information, personnel-sensitive information, or criminal investigative information may in some circumstances be a consideration in deciding whether some work should continue to be performed by Government sources. However, it is not a basis for determining that a function is inherently Governmental in nature.

Function Code H999, Other Health Services

Activity Challenged. You have challenged the inclusion of "Other Health Services," Function Code H999, on the list. This function is defined to include services such as

HIV testing, administering physical examinations and performing evaluations of medical suitability, providing support to medical centers, hospitals, laboratories, alcohol abuse residential treatment, operation of pharmacies, pathology and blood bank functions, and numerous other health care services listed in the functional definition at the Army web site, <http://www.asamra.army.pentagon.mil/fair>, which is hyperlinked to the DOD FAIRNET website at <http://gravity.lmi.org/DODFAIR>.

Decision. I have determined that the activities included under Function Code H999 are not inherently Governmental. Therefore, they are properly included in the Army's FAIR Act list.

Rationale. The FAIR Act list includes only functions and activities that, in the judgment of the head of the agency, are not inherently Governmental. An inherently Governmental function includes those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government. The purpose of the health services functions and activities listed above is to provide care to patients; none suggest an application of Governmental authority or making value judgments for the Government.

Another consideration is that these health services are commonly available in the private sector. Your "challenge" contends that these functions should be considered inherently Governmental because this work entails access to private, personnel-sensitive, or confidential information. Access to sensitive information, including information classified in the interests of national security, may in some circumstances be a consideration in deciding whether some work should continue to be performed by Government sources. However, it is not a basis for determining that a function is inherently Governmental in nature.

Function Code U100 and U500, Education and Training Services

Activity Challenged. You have challenged the inclusion on the list of "Education and Training," Function Code U100, and "Professional Development Training," Function Code U500. This function is defined to include operation of the U.S. Army War College, and numerous other educational and training services listed in the functional definition at the Army web site, <http://www.asamra.army.pentagon.mil/fair>, which is hyperlinked to the DOD FAIRNET website at <http://gravity.lmi.org/DODFAIR>.

Decision. I have determined that the activities included under Function Codes U100 and U500 are not inherently Governmental. Therefore, they are properly included in the Army's FAIR Act list.

Rationale. The FAIR Act list includes only functions and activities that, in the judgment of the head of the agency, are not inherently Governmental. An inherently Governmental function includes those activities that require either the exercise of

discretion in applying Government authority or the making of value judgments in making decisions for the Government. The purpose of the educational and training functions and activities listed above is to instruct and train military and civilian employees of the Department of the Army. Although operating the Army War College is a core capability of the Department, this function does not entail substantial discretion or value judgments in making decisions for the Government within the meaning of the FAIR Act. Moreover Office of Management and Budget Circular A-76 characterizes education and training functions, in general, as commercial functions. Another consideration is that these educational and training services are commonly available in the private sector.

Function Code Y510, Budget & Financial Program Management

Activity Challenged. You have challenged the inclusion of "Budget & Financial Program Management," Function Code Y510, on the list. This function is defined to include services such as program and budget administration, management analysis functions, managerial accounting services, and numerous other services listed in the functional definition at the Army web site, <http://www.asamra.army.pentagon.mil/fair>, which is hyperlinked to the DOD FAIRNET website at <http://gravity.lmi.org/DODFAIR>.

Decision. I have determined that the activities included under Function Code Y510 are, for the most part, not inherently Governmental. Therefore, they are properly included in the Army's FAIR Act list.

Rationale. The FAIR Act list includes only functions and activities that, in the judgment of the head of the agency, are not inherently Governmental. An inherently Governmental function includes those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government. This includes, e.g., the determination of budget policy, guidance, and strategy. On the other hand, services that relate to budget preparation, fact finding, efficiency studies, or to providing budget or accounting-related advice, opinions, and recommendations generally do not entail substantial discretion or value judgments in making decisions for the Government.

Another consideration is that both budget and accounting services are commonly available in the private sector. Your challenge contends that these functions should be considered inherently Governmental because this work entails maintenance of Government control over property, compliance with law, and ensures decision-making in accordance with the public interest. The Army FAIR Act list presumes such considerations would be the responsibility of senior personnel. Accordingly, the performance of these functions by personnel who are assigned to positions at grades GS-13 and above within a management headquarters are presumed to be inherently Governmental. However, most of the work involved in performing these functions is

performed by personnel at lower grades. This presumption is based in part on the degree to which the exercise of discretion within this function is substantially circumscribed by law, rule and regulation.

Personnel, Community Activities and Manpower Functions

Activity Challenged. You have challenged the inclusion on the list of Function Code Y530, "Personnel, Community Activities and Manpower Program Management," as defined in the functional definition at the Army web site, <http://www.asamra.army.pentagon.mil/fair>, which is hyperlinked to the DOD FAIRNET website at <http://gravity.lmi.org/DODFAIR>.

Decision. I have determined that the activities included under Function Codes Y530 are, for the most part, not inherently Governmental. However, some activities listed under Function Code Y530 are improperly included in the Army's FAIR Act list and will be deleted from the list.

Rationale. The FAIR Act list includes only functions and activities that, in the judgment of the head of the agency, are not inherently Governmental. An inherently Governmental function includes those activities that require either the exercise of substantial discretion in applying Government authority or the making of value judgments in making decisions for the Government. Most of the military personnel, civilian personnel, community activities and manpower functions included within Function Code Y530 do not require the exercise of substantial discretion in applying Government authority or the making of value judgments in making decisions for the Government. The Army FAIR Act list presumes that substantial discretion in the civilian personnel, military personnel and manpower function is exercised by personnel who are assigned to grades GS-13 and above within a management headquarters (excluding field operating agencies). However, most of the work involved in performing these functions is performed by personnel at lower grades. This presumption is based in part on the degree to which the exercise of discretion within this function is substantially circumscribed by law, rule and regulation. Another consideration is that all of these functions are performed in the private sector. As an exception to the above general presumptions, the corrected FAIR Act list will also presume that substantial discretion is exercised by personnel performing the labor relations function and assigned to grades GS-11 and higher within occupational series 233 to the extent such personnel bind the Army in labor negotiations or represent the Army in third party adversary proceedings.

Function Code Y600, Contracting

Activity Challenged. You have challenged the inclusion on the list of work performed under the Function Code Y600, "Contracting." This work includes work performed by occupational series GS 1102, Contracting, and other activities listed in the functional

definition at the Army web site, <http://www.asamra.army.pentagon.mil/fair>, which is hyperlinked to the DOD FAIRNET website at <http://gravity.lmi.org/DODFAIR>.

Decision. I have determined that the activities included under Function Code Y600 are, for the most part inherently Governmental. Therefore, some activities listed under Function Code Y600 are improperly included in the Army's FAIR Act list and will be deleted from the list.

Rationale. The FAIR Act list includes only functions and activities that, in the judgment of the head of the agency, are not inherently Governmental. An inherently Governmental function includes those activities that require either the exercise of substantial discretion in applying Government authority or the making of value judgments in making decisions for the Government. The purpose of the functions and activities listed above is to contract for supplies and services for the installation and assigned customers. The corrected FAIR Act list presumes that all personnel assigned within occupational series GS 1102 within Army contracting offices directly involved in the awarding, administering, and terminating of contracts are performing inherently Governmental functions. All other work performed within Army contracting offices is presumed to be not inherently Governmental.

Significance. The significance of a non-inherently Governmental designation for an activity is discussed at the Army web site hyperlinked to the DOD FAIRNET at <http://www.asamra.army.pentagon.mil/fair>. In some cases there may be legal impediments to contracting activities designated as non-inherently Governmental, as reflected in statutes, international agreements, and restrictions on contracting for personal services. In other cases, the Army may consider it imprudent to contract activities designated as non-inherently Governmental based on risk assessment and national security considerations, or enlightened human resources management. Such a determination has been made at the present time in the case of some of the activities included within this challenge.

Scope. The Army's functions are defined by its unique roles and missions. Therefore, the Army's FAIR Act decisions may not be extended to other agencies with different missions based solely on function code titles. The Army FAIR Act Inventory included civilian positions performing functions within the Army infrastructure and within Civil Works. The FAIR Act Inventory excluded all contractor positions and all military positions, as well as all personnel performing functions in the following mission areas within the Army: Major Theater of War, Smaller Scale Contingency, Base Engagement Force, Strategic Reserve, Domestic Support, or Homeland Defense.

Appeal Rights. You have the right to appeal my decision since it is adverse to your Challenge. The specific procedures for submitting an appeal are set forth at the enclosure to this decision.



Patrick J. Henry
Assistant Secretary of the Army
(Manpower and Reserve Affairs)

Enclosure

Appeal Rights

Appeals must be in writing and transmitted by United States mail, express mail delivery or other similar service, or facsimile transmission, or may be delivered in person only if the person making the delivery is authorized access to the Pentagon. (To assist in processing, appellants may mark "FAIR Appeal" on the envelope.) Appeals must be submitted to the office listed below within 10 working days of the date on which the challenger received the decision denying or rejecting the challenge:

Department of the Army
Office of the Assistant Secretary
Manpower and Reserve Affairs
ATTN: SAMR-FMMR-FAIR
111 Army Pentagon
Washington, D.C. 20310-0111
Fax: 703-614-6833