



UNDER SECRETARY OF THE ARMY
WASHINGTON

24 MAR 2000



CHALLENGE Number 2000-0102

Dear [REDACTED]

This responds to your appeal of the February 24, 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 10, 2000.

Function Code Y530, Civilian Personnel Advisory Services

Activity Challenged. You are appealing the decision that the function of "Civilian Personnel Advisory Services" included within Function Code Y530 and as provided by generalists employed in civilian personnel advisory centers (CPACs) was 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 Y530 pertaining to "Civilian Personnel Advisory Services" 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 identifies numerous situations requiring the CPAC generalists to exercise discretion in advising commanders and civilian managers. Examples of these situations include advice to senior management on organization structure, position management, reductions in force, transfers of function and mission; participating with labor relations specialists in negotiating contracts, impact and implementation bargaining, administering labor contracts, and representing management in third party adversary proceedings; and providing advice to managers on grievances, investigations, disciplinary actions, and other matters involving sensitive information. However inherently Governmental functions within the meaning of the FAIR Act do not normally include providing advice opinions, and recommendations to Government officials, even when this involves access to confidential or sensitive information. The work of labor relations specialists, which your appeal mentions, is presumed to be inherently Governmental only to the extent of binding the Army in direct negotiations with labor organizations. This is because such representational work



entails the exercise of discretion that results in the effective establishment of Army civilian personnel policy with respect to the bargaining units represented. It is the aspect of establishing Army civilian employment policy that is inherently Governmental. This principle applies as well to the work of other personnelists when they are engaged in committing the Army to establish and adhere to particular employment policies through direct negotiations with unions and other third parties. However this principle does not apply to the work of CPAC generalists when they are only serving as subject matter experts in negotiations with unions.

Throughout the Army, as in most other Federal agencies, managers and supervisors make employee selection decisions. Personnel specialists implement these decisions by making formal job offers to the applicants and otherwise providing advice and assistance to help accomplish the tasks necessary to execute the personnel actions. With respect to these personnel actions, tenure, salary, benefits and other terms and conditions of employment are largely set by law, regulation, and the policies of higher headquarters. Hence the range of discretion available to managers, supervisors, and the personnelists advising them is fairly circumscribed. It is for this reason that the role of the CPAC generalists in helping to commit job applicants to Federal jobs is not considered to be inherently Governmental. This reasoning also applies to the selection of training vendors and the obligating of funds for group and individual training of employees.

Your appeal contends that contractor involvement in advising management on A-76 studies would disadvantage a Federal manager's ability to compete successfully by involving contractors on both sides of the A-76 process. To the contrary, the Army already is successfully engaging contractors to conduct A-76 studies for the Government and participate in the development of Most Efficient Organizations and Performance Work Statements. No conflicts of interests are created by these arrangements so long as those same contractors are not participating as bidders in the resulting solicitations.

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 Army's larger, ongoing review of all functions for possible reengineering, 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 black ink, appearing to read "Bernard Rostker". The signature is fluid and cursive, with a large initial "B" and "R".

Bernard Rostker