



UNDER SECRETARY OF THE ARMY
WASHINGTON



8 0 MAR 2000

CHALLENGE Number 2000-0107



Dear

This responds to your appeal of the February 29, 2000, decision of the Assistant Secretary of the Army (Manpower and Reservé Affairs), denying your challenge to the 1999 FAIR Act inventory. I received your appeal on March 15, 2000.

Curator and Historian Functions

Activity Challenged. You are appealing the decision that the FAIR Act inventory properly includes on the list the curator and historian functions included under Function Code Y200.

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 curator and historian functions 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 raises three major points: that the Y200 function code definition does not adequately reflect the functions, duties and actual work performed by Army museum staff; that the Assistant Secretary's decision does not adequately address the requirements of law and regulation; and that his decision is contrary to the FAIR Act. Each of these points is addressed below.

The title of Function Code Y200 is "Commanders and Support Staff." The definitions under this code include numerous activities typically found in support of an installation commander. I agree with you that historical and museum activities are not specifically described in these definitions, but they should be. This omission will be corrected for future FAIR Act inventories, as will the Function Code definition for S750, Museum Operations.

Pertinent laws mentioned in your appeal include the Antiquities Act of 1906, as amended; the Archaeological Resources Protection Act of 1979; and the National Historical Preservation Act. These authorize the President and the Secretary of the Army among others, to declare historic sites as national monuments, to issue permits for examination of ruins, excavations, and gathering of objects of antiquity; to protect



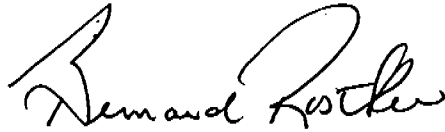
archaeological resources on public lands, and to lend or give unneeded military items to museums and other institutions and organizations. The Army implementing regulations, AR 870-5 and AR 870-20, reflect the Army's existing implementation choices and are subject to revision at the direction of the Secretary of the Army. Nothing in these Acts precludes the Secretary from reevaluating from time to time how best to perform some or all of the functions assigned under these laws. Indeed this point is explicitly recognized in paragraph 3-8 of AR 870-20 (January 1999 version): "Contract support may be used to provide conservation or restoration of the artifacts, physical security, exhibit production, and training, education and outreach programs."

Your appeal suggests that characterizing functions mandated by statute, as not inherently Governmental, such as portions of the curator and historian functions, amounts to a decision to dispense with employees who perform that function and to abrogate the responsibilities to perform these functions. But the determination of whether a function is or is not inherently Governmental is not a decision on whether or not the function is to be performed, or whether the function is to be outsourced. Many important core missions of the Army are not inherently Governmental and have, therefore, been included on the FAIR list as non-inherently Governmental functions exempted from private sector performance. Determining what is or is not inherently Governmental, the focus of the FAIR Act, is a different issue from determining what is appropriate for private sector performance. Many other very important Army missions are performed by contractors, or have been determined to be most appropriately performed by contractors, such as some of the historian functions currently included in on-going A-76 studies. These previous decisions to contract historian and museum functions are not dispositive for purposes of FAIR Act determinations, but they represent past judgements that are entitled to some weight.

I understand your third point to be that the decision of the Assistant Secretary reflects a subjective misapplication of the meaning of "inherently Governmental," in the absence of statutory definitions of the critical terms of "substantial discretion," "value judgements," and "applying Governmental authority or in making decisions for the Government." To the contrary, I know that the Assistant Secretary's decision was carefully made after taking into consideration the available guidance relating to these terms found in the Office of Management and Budget FAIR Act implementing guidance and Circular No. A-76. Paragraph 6.e. of the Circular provides insight into the proper application of the quoted terms.

Finally, I wish to address your point that the historic preservation laws apply equally throughout the Army, and to other agencies such as the Department of Interior, as well. Your point is noted. However the Assistant Secretary's decision is not, as you suggest, an attempt to exempt the Army from its responsibilities under the law. Rather his decision only reflects his judgement that it would not be illegal to consider carrying out these responsibilities, wholly or in part, by other than Federal civil servants.

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.

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Bernard Rostker



UNDER SECRETARY OF THE ARMY
WASHINGTON

30 MAR 2000



CHALLENGE Number 2000-0117



Dear [Redacted]

This responds to your appeal of the February 29, 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 27, 2000.

Museum Functions

Activity Challenged. You are appealing the decision that the FAIR Act inventory properly includes on the list the museum functions included under Function Code Y200.

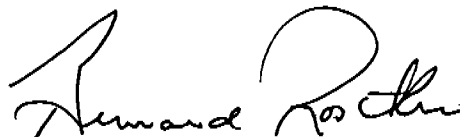
Decision. I have reviewed the Assistant Secretary's decision, which is incorporated herein by reference, in light of your appeal. Based upon this review, I have determined that the museum functions are not inherently Governmental. Therefore, I am affirming the challenge decision that they are properly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

Rationale. Your appeal suggests that the combination of historian and museum services together in Function Code Y200 does not correctly reflect the functions, duties and actual work performed by Army museum staff. For this reason, your appeal asserts that the rationale for finding the museum function to be non-inherently Governmental was incorrect. However, I do not believe that grouping museum functions with historian functions materially affected the Assistant Secretary's appropriate characterization of the museum functions. In this connection, and accepting your point that the primary function of Army museums is to train soldiers, you should be aware that the work included under FAIR Act Function Codes U510, Professional Military Education, and U999, Other Training Functions, is also considered to be non-inherently Governmental. Your appeal contends that museum operations should be excluded from the list as being inherently Governmental because of the absence in the private sector of the skills that Army curators and technicians must have. However, as conceded in your appeal, such a consideration is not the basis for characterizing the function as inherently Governmental. Pursuant to Office of Management & Budget Circular A-76, the absence of qualified private sector vendors to perform a commercial function is a basis for

temporarily exempting that function from private sector performance provided an affirmative effort is made to ascertain that such a capability is truly not available. Also, the scope of discretion exercised by museum personnel in theater, regarding the disposition and transportation of captured enemy equipment, is substantially circumscribed by numerous laws and regulatory guidance (such as, AR 870-20). For this reason, the decisions of such personnel ordinarily do not result in policy making so as to justify consideration of this function as inherently Governmental.

Your appeal suggests that characterizing functions mandated by statute, as not inherently Governmental, such as portions of the curator and museum functions, may adversely affect the performance of the function itself. But the determination of whether a function is or is not inherently Governmental is not a decision on whether or not the function is to be performed, or whether the function is to be outsourced. Determining what is or is not inherently Governmental, the focus of the FAIR Act, is a different issue from determining what is appropriate for private sector performance. Many important core missions of the Army are not inherently Governmental and have, therefore, been included on the FAIR list as non-inherently Governmental functions exempted from private sector performance. Many other very important Army missions are performed by contractors, or have been determined to be most appropriately performed by contractors, such as some of the museum functions currently included in on-going A-76 studies.

Please note that this decision is not intended in any way to diminish recognition of the important and significant contributions to the strength of America's Army that are made by museum curators and staff. Rather, 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.

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Bernard Rostker