



REPLY TO
ATTENTION OF

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

February 18, 2000

CHALLENGE Number 2000-0033

[REDACTED]
Local President
American Federation of Government Employees
Local 2484
Post Office Box 1425
Frederick, Maryland 21702-0425

Dear [REDACTED]

This responds to your challenge to the Army's 1999 FAIR Act inventory. Your challenge concerns two 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 January 28, 2000.

Function Code S724, Guard Services

Activity Challenged. You have challenged the inclusion on the list of work performed under the Function Code S724, "Guard Services." This work includes force protection, installation security program management support, physical security 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 Codes S724 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 substantial discretion in applying Government authority or the making of value judgments in making decisions for the Government. This includes law enforcement

operations involving the direct conduct of criminal investigations. 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. On the other hand, inherently Governmental functions do not normally include services that are primarily ministerial in nature, such as building security, prisoner detention, and non-military national security details.

In this connection, current statutory prohibitions on contracting guard services illustrate recognition by Congress that guard services are not inherently Governmental functions.

Function Code W999, Other ADP Functions

Activity Challenged. You have challenged the inclusion on the list of work performed under the Function Code W999, "Other ADP Functions." This work includes printing and publications, communications support, information management 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 W999 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 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 provide information technology services; none suggest an application of Governmental authority or making value judgments for the Government.

Another consideration is that these information technology services are commonly available in the private sector and routinely contracted for by the Department. Your challenge contends that these functions should be considered inherently Governmental because of this work requires extensive knowledge of current systems and processes for which there are no qualified contractors. Operational concerns or the absence of commercial sources 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.

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 not 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 T. 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