



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



REPLY TO  
ATTENTION OF

February 24, 2000

**CHALLENGE Number 2000-0090**

Dear

This responds to your challenge to the Army's 1999 FAIR Act inventory. Your challenge concerns one activity.

**Standing.** As an employee within the meaning of 5 U.S.C. 2105 performing the safety functions included under Function Code Y999, "Other Functions," 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 24, 2000.

**Function Code Y999, Safety Functions**

**Activity Challenged.** You have challenged the inclusion on the list of Safety Functions, Function Code Y999, 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 safety activities included under Function Code Y999 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. The Army FAIR Act list presumes that the inherently Governmental portion of this function 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 organizations are presumed to be inherently Governmental. However, most of the work involved in performing these functions are 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 safety functions are performed in the private sector and have been included in A-76 studies.

Your challenge contends that these functions should be considered inherently Governmental because of potential conflicts of interest associated with private sector performance of the Safety function. Conflicts of interest concerns 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.

**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 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