

NATIONAL FEDERATION OF FEDERAL EMPLOYEES

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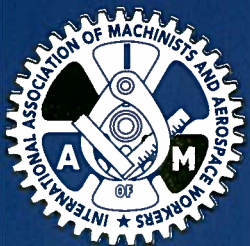
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July 29, 2008

Inventory Challenge Official
Attn: Bureau Coordinator
Department of State
C/O Jason Passaro
SA-15, Suite 840
Washington, DC 20522

Re: FAIR Act Inventory Challenge for Fiscal Year 2007

Dear Mr. Passaro:

This is an appeal filed on behalf of the National Federation of Federal Employees (NFFE) and the 100,000 federal workers we represent, including 1,400 employees at the Department of State's Passport Services division, pursuant to Section 3 of the FAIR Act, regarding the published rules for challenging the Fiscal Year 2007 FAIR Act Inventory. The specific job function that we challenge is the job of accepting and executing passport applications at the Passport Agency's public counters, subject to the "Note" below. We challenge the classification of this function as being subject to commercial competition. We believe it should be designated as an inherently governmental function.

This job involves identifying the passport applicant, preventing/detecting passport fraud, ensuring completeness of the application, determining priority of service, accepting fees, and administering an oath, among other duties. Prior to the so-called "passport surge" of 2007, this job function had always been performed by government employees and had always been considered to be an "inherently governmental function". At the Department of State ("Department" or "DoS"), this function had always been performed at domestic Passport Agencies by Passport Specialists, who are in the bargaining unit represented by NFFE Local 1998. During the surge, and faced with record setting workload levels, for the first time ever, contrary to established DoS policy and policy as articulated in the March 7, 2007 Notice of Proposed Rule Making, the Department began using contractors to perform this function. This job function is an inherently governmental function and should be listed

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as such. The new practice of allowing contractors to perform this function should cease.

Note Regarding the Fiscal Year 2007 Inventory

The Department's FAIR Act Inventory for Fiscal Year 2007 is published on the Department's website using an Excel file that lists hundreds of job functions and locations. The file does not list job titles, such as "Passport Specialist", and does not break down job functions. Based on the number of FTE's listed and their locations, it appears that the Passport Specialist job position is listed as Activity Function Code D410 (Compliance Operations), with Status "I" (inherently governmental), and Reason "Z". However, the job function of accepting and executing passport applications is not shown on the list. It is not listed either as being inherently governmental or as being subject to commercial competition on the inventory. Because the activity has not been clearly listed on the inventory, NFFE assumes that the Department has determined that this activity is commercial. Our appeal is filed to preserve any and all rights we have at law.

If the Department of State has reconsidered the decisions and course of action from 2007 and determined once again that accepting and executing passport applications is an inherently governmental function, then we request confirmation of that determination.

Background

Prior to June 2007, DoS and Passport Services held the position that the function of accepting and executing passport applications was an inherently governmental function, limiting the performance of this work only to governmental employees. With the record-setting workload and delays in 2007, and corresponding pressure on Passport Services to take action, on May 29, 2007 management officials notified NFFE Local 1998 of the decision to use contractors for this function. The function was not advertised in the public for other contractor companies to bid on, and no notice of the proposed change was posted in the Federal Register. Indeed, the only notice related to this subject posted in the Federal Register was a March 7, 2007 proposed update of Title 22 of the Code of Federal Regulations, Chapter 51, that would explicitly put into place the longstanding Department of State policy that prohibited the use of contractors for the acceptance function.¹ Contrary to publically state policy and practice, contractors began performing this function on June 8, 2007.

NFFE Local 1998 filed two Unfair Labor Practice charges with the Federal Labor Relations Authority regarding the union's notification and bargaining issues, which were resolved with two Memorandums of Understanding signed between the Union and Management on January 29, 2008. Bargaining did not – and could not – cover the subject of whether the function of passport application acceptance is inherently governmental.

¹ That the final rule published on November 19, 2007 completely reversed that policy will be the subject of other communications from NFFE to the Department of State.

NFFE Local 1998 also submitted a complaint to the Department's Office of Inspector General (OIG) on June 26, 2007. The OIG referred the issue to the Office of Legal Advisor, which responded on October 4, 2007 with an opinion that the function was not inherently governmental.

What is "passport acceptance and execution"?

Passport applications are accepted and executed by acceptance agents at over 9,400 facilities around the country, and at 15 Passport Agencies (and 2 Passport Centers, though less frequently). The acceptance facilities include post offices, clerks of court, and other government entities (e.g., police stations, libraries, neighborhood service centers). The acceptance agents at those facilities are all government workers who administer the oath, identify the applicant, accept the application and documents and fees, and transmit the application to the Department of State for adjudication by Passport Specialists. Applicants with urgent travel plans who apply at the 15 Passport Agencies that have public windows have always, prior to June 2007, had their applications accepted and executed by Passport Specialists. Approximately 5% of the passport applications are executed by at the Passport Agencies and 95% are executed at acceptance facilities.

There are many tasks involved in passport acceptance/execution. The acceptance agent administers an oath to the applicant, asking him/her if the statements on the application are true/complete and if the photo attached is a true likeness of him/herself. The applicant's signature is witnessed and the identification is scrutinized for authenticity and then recorded on the application. The acceptance agent must ensure that 1) the person applying is the same as 2) the person in the passport photo that has been submitted with the application as well as the same as 3) the person pictured in the identification document (the driver's license). The acceptance agent signs the application and affixes the official seal to indicate that the applicant received the oath and signed in the presence of the agent. The acceptance agent also makes sure that the applicant submitted the necessary documents and fees and thoroughly completed the application.

When this function is performed at a DoS Passport Agency, the acceptance agent is an "adjudicator" (a Passport Specialist), and he/she also determines if the applicant is a U.S. citizen/national and enters the application into the Passport Agency's (TDIS) computer system. In this particular situation, the Passport Specialist is *solely* responsible for verifying the identity of the applicant. When the acceptance function is performed at an acceptance facility of than a DoS office (e.g., post office), the application *must be* sent to a Passport Agency office, where the application is "adjudicated" by a Passport Specialist. Where passport applications are accepted in a non-DoS facility, the "acceptance" agent shares responsibility with the Passport Specialist for determining or verifying the identity of the applicant. This point is significant since the acceptance agents have long been called "the eyes and ears" of the Passport Agency, and their observations and notations are a vital part of the effort to fight passport fraud.

Why the Job Function is Inherently Governmental

OMB Circular A-76 states that it is government policy:

Retain Governmental Functions In-House. Certain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees. These functions are not in competition with the commercial sector. Therefore, these functions shall be performed by Government employees.

The Circular defines an “inherently governmental function” as:

. . . a function which is so intimately related to the public interest as to mandate performance by Government employees. Consistent with the definitions provided in the Federal Activities Inventory Reform Act of 1998 and OFPP Policy Letter 92-1, these functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. Services or products in support of inherently Governmental functions, such as those listed in Attachment A, are commercial activities and are normally subject to this Circular. Inherently Governmental functions normally fall into two categories:

(1) The *act of governing*; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce, including food and drugs.

Based on OMB Circular A-76 and the FAIR Act, the job of accepting/executing passport applications meets the test of being considered “an inherently governmental function” based on the following considerations:

1. It “is an activity that is so intimately related to the public interest as to mandate performance by government personnel” because preventing and detecting passport fraud, preventing and detecting other criminal activity, securing our borders, and preventing terrorism is in the public interest.
2. Determining that a passport applicant is who he/she claims to be and has submitted sufficient documentation to that effect “require[s] the exercise of

substantial discretion in applying government authority and/or in making decisions for the government”.

3. Determining that an applicant is who he/she claims to be is inextricably intertwined with the decision that that person is a U.S. citizen/national, which is an “exercise of sovereign government authority”. The passport itself is an official document from the U.S. government to foreign governments around the world that attests to the identity and nationality of the bearer. Only the government can say that the applicant is who he/she claims to be and is a citizen/national and therefore entitled to a U.S. passport. The oath taken by the applicant is an oath to the U.S., represented by the acceptance agent or passport specialist, that the statements on the application are true.
4. Accepting the application and identifying the applicant as the person who applied for the passport “bind(s) the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise”.
5. Issuing passports to citizens wishing to travel abroad, and denying passports to those who are not entitled to them, plays a part in “(d)etermining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise”.
6. Mistakes and issuing a passport to a fraudulent applicant who is seeking to use the passport to facilitate or flee from another crime (e.g., theft, murder, rape, child molestation, fraud, kidnapping, gun running – these are not hypotheticals, but actual crimes committed by some of our fraudulent applicants) “(s)ignificantly affect[s] the life, liberty, or property of private persons”. Failing to properly identify a true person and failing to properly execute a true individual’s passport application jeopardizes legitimate travel needs, which can also affect their property and business pursuits.
7. The job of determining a person’s identity involves significant “official discretion”. The employee performing the acceptance agent function administers an oath to the applicant whereby the applicant represents to the U.S. government, in the person of the agent, that the statements on the application are true. The Department prosecutes persons for making false statements on passport applications. The acceptance agent “exercises “discretion” and renders “value judgment[s]” in the performance of his/her duties. The acceptance agent ensures that the person standing before him/her is the same as the person in the photo submitted and the same as the person pictured in the identifying document. Not all applicants are who they claim to be, and not all applicants submit photos of themselves. The acceptance agent exercises his/her discretion in requiring additional identification documentation to be submitted, as well as exercising his/her discretion in requiring evidence of parental relationship and parental permission for minors.
8. Unequivocally, this “activity in question” was not “already being performed by the private sector”. At the thousands of acceptance facilities across the country,

the activity is *only* performed by public sector employees. Similar job functions, such as administering an oath in court, or determining identity at the border or for government benefits, are performed by government workers.

Preventing passport fraud

According to a July 2007 report by the Government Accountability Office (GAO), “Security of New Passports and Visas Enhanced, but More Needs to Be Done to Prevent Their Fraudulent Use”, passport fraud is described as follows:

Applicants commit passport application fraud through various means, including submitting false claims of lost, stolen, or mutilated passports; child substitution; and counterfeit citizenship documents. According to State’s Bureau of Diplomatic Security investigators, imposters’ use of assumed identities, supported by genuine but fraudulently obtained identification documents, is a common and successful way to fraudulently obtain a passport. This method accounted for about 65 percent of 3,703 total confirmed passport fraud cases investigated by the bureau in fiscal year 2006, according to Diplomatic Security documentation.

That same GAO report noted how vitally important the face-to-face contact that the acceptance agent has with the applicant is in detecting passport fraud:

Although resources and other tools are available to passport examiners at domestic passport offices to verify citizenship evidence and potentially detect false claims of identity, there are a number of indicators in the inspection of applicants that enhance the ability to detect efforts to use a false identity to obtain a genuine passport. Moreover, passport examiners and other officials at passport offices told us it is easier to detect application fraud when interviewing applicants directly at the passport counter. However, the majority of passport applications that passport examiners adjudicate are accepted by individuals at passport acceptance facilities.

The Department published the Passport Agent’s Reference Guide (PARG) for use by acceptance facilities. The February 2008 edition of the Passport emphasized in bold font that:

“The Acceptance Agent is the most important person in determining the legitimate identity of the vast majority of customers.”

This statement mirrors language from the PARG’s predecessor, the Passport Agent’s Manual. The March 1988, January 1984, November 1978, and September 1976 versions of the Manual state that “[t]he most important function of the Passport Agent is to establish the identity of the passport applicant” (the April 1974 said this was the “primary” function). Chapter 7 of the 1974, 1976, 1978, 1984, and 1988 versions Manual stated, either in bold font or in all capital letters at the introduction to Chapter 7:

THE PASSPORT AGENT IS THE ONLY PERSON WHO CAN DETERMINE THAT THE APPLICANT IS THE PERSON THE APPLICANT CLAIMS TO BE....

The Western Hemisphere Travel Initiative is an attempt to enhance document integrity and reliability at our borders. The workers who accept and execute passport applications are the front line in the effort – they are literally the eyes and ears in the Department of State’s efforts to prevent passport fraud and ensure that only those entitled to a U.S. passport receive one.

Criminals virtually never commit passport fraud for its own sake; passport fraud is perpetrated in order to facilitate or flee from apprehension for another crime. Some of the fraudulent applicants detected by Passport Services include persons who committed murder, rape, theft, assault, child molestation, terrorism, check-kiting, identity theft, and being in the country illegally. Making sure DoS issues passports to the true individuals, and not to fraudulent persons, is definitely and “intimately related to the public interest”.

Complexity, discretion, and value judgments

Ultimately, the question of determining whether the applicant is who he/she claims to be is a value judgment, and the question of determining if enough identifying evidence has been submitted is a matter involving governmental discretion. The job does not simply involve recording the identification, giving an oath, and taking the applicant’s money. There are a number of value judgments and numerous areas of discretion: Is the identification valid? Is it bona fide? Is the applicant nervous? Is the applicant overly talkative? Why does he/she need a passport so quickly? What is the purpose of the trip? Does he/she have a witness? Is another person coaching the applicant? Did the applicant arrive with others who are applying separately? Is the travel agent who issued the ticket connected to other improper activity? Was the ticket issued recently? Were the photos recently taken? Are they photos of the applicant? Are the photos acceptable? Is the applicant wearing military dress in the photo? Does the applicant have an unexplained accent? When was the identification issued? When was the birth certificate issued? If the identification is expired, how long ago was it issued? Does it still identify the applicant? What other identification documents does the applicant have (student ID, work ID, social security card, club membership cards, credit cards, library card, military records, tax records, school records, yearbook, etc.)? Are these documents bona fide or not? Is it necessary to have the applicant submit supplemental identification? Should the application complete a supplementary information statement, or a biographical questionnaire? Has the applicant been living in another country for some time? Has he/she worked there for that government? Has he/she committed an expatriating act? Is it necessary for the applicant to submit an affidavit regarding his/her intentions when committing a potentially expatriating act?

Such is the extent and latitude of the acceptance agent's discretion that, according to the PARG and the Passport Agent's Manual, the agent can determine the applicant's identity through discussion and interview. According to Chapter 7 of the PARG (continuing the policy spelled out for decades previously in the Manuals), an agent may, in rare cases, "establish identification through personal discussion." The agent is authorized to use his/her "best judgment based on all the information and evidence available", including the agent's "personal knowledge of the area".

Only government workers

That passport application acceptance and execution is an inherently governmental function is not only the opinion and belief of NFFE. For decades, the Department and Passport Services shared this opinion and belief. When Passport Services management notified NFFE Local 1998 of the decision to use contractors in the summer of 2007, management officials explained to NFFE that this was nothing different than using the acceptance agents to perform this function. The Office of Legal Advisor also made the same comparison. Therefore, policies and procedures relating to acceptance agents are useful in understanding this issue.

Chapter 16 of the January 2007 version of the PARG contains this explanation:

1. Can any type of office or facility be part of the Passport Acceptance Program?

No, only the following types of offices may request to participate in the program:

- Federal, state, county, township or municipal offices
- U.S. Post Offices, and
- Other public entities, such as libraries and state/city universities, operating under governmental auspices.

....

5. Are there qualifications Acceptance Agents must meet?

Yes, an Acceptance Agent must:

....

- Be a permanent employee of the designated facility (not temporary, *ad hoc*, or contractual);

....

(Emphasis added.)

The Department and Passport Services have repeatedly determined that the job function was inherently governmental for decades, while processing literally over a hundred million passport applications. This position only changed when management officials experienced enormous pressure in mid-2007 with millions of applications backlogged and the public, the media, and the Congress strongly critical of the delays.

Indeed, to this day DoS and Passport Services instruct the over 9,400 acceptance facilities that they must *not* use contractors at their locations to accept and execute passport applications. They must *only* use, and are *only authorized to use*, government workers for this function. 22 CFR 51.22(c)(3), updated on November 19, 2007, spells out Departmental policy that acceptance agents at these 9,400 facilities can *not* be contractors.

The contractors do not receive the same training, do not have the same experience, do not have the same clearance level (which was raised in recent years for government workers in order to combat malfeasance), and do not take the oath of office. The contractors work for the contracting company. Contractors take instructions and orders come from a private business, motivated by profit. The government workers take their orders and instructions from the government managers, and are motivated by public service.

Definition of a passport

According to 22 CFR 51.1, a passport is “a travel document regardless of format issued under the authority of the Secretary of State attesting to the identity and nationality of the bearer.” A passport is essentially a letter of introduction from the government of one country to another, asking the foreign country to allow the bearer to enter and to receive any necessary aid. A century ago, before the booklet format, and long before the card format, a passport literally took the form of a letter. But a passport is not issued by Boeing to its employees, to be presented to Airbus. Rather, a passport is issued by the United States government to its citizens, to be presented to the French government, government to government.

The Office of Legal Counsel, in response to NFFE Local 1998’s complaint to the OIG, overlooks the question of “who is the bearer”? Who is the person pictured in the photo in the passport? Is that person in the photo the same as the person named in the passport? Is that person who he/she claims to be? Is that person a citizen or national of the United States? In the introductory statement in the passport, the Secretary of State introduces the bearer and identifies him/her as a U.S. citizen/national – but is that identification accurate?

The Office of Legal Advisor (L/CA) issued an advisory legal opinion (Doc. 82856) on July 21, 2000 stating that passport adjudication is an inherently governmental function. The Office of Legal Advisor noted that “A passport serves as the attestation of the United States Government to the identity and nationality of the bearer.” The majority of passport frauds detected by Passport Services involve applicants with bona fide citizenship evidence and bona fide identification evidence, but who are not who they claim to be. The role of determining if the applicant is who she claims to be is *integral* in determining whether the applicant is a U.S. citizen. For example, if the applicant submits another person’s birth certificate and identification, but the acceptance agent or adjudicator fails to detect that the applicant is not who he/she claims to be, then an illegal alien, thief, or murderer may have fraudulently obtained a U.S. passport. Therefore,

determining a passport applicant's identity is a *core function* of DoS, and an inherently governmental function. Simply put, determining that an applicant is a citizen necessarily involves determining his/her identity. For the Department to pronounce that an applicant is who he/she claims to be and is a U.S. citizen/national, and to issue him/her a U.S. passport, is a matter that has been and should be accomplished by government employees of the Department.

The Office of Legal Advisor states in Doc. 82856 that "It is clear ... that the decision to issue a passport is inherently a decision that the passport (applicant) is a citizen or national of the United States – a decision that only a government can make." This document adds that "(t)his does not mean that every step involved in processing passport applications involves the performance of an inherently Governmental function. To the extent that steps leading up to passport issuance involve simply input of data or the evaluation of the application against well-defined objective criteria that may be performed with little or no exercise of discretion or judgement [sic], it appears that such steps may properly be performed by contractor personnel..." However, it is clear from the explanation above that the acceptance agent function involves a great deal of discretion and judgment.

Thank you for reviewing our appeal. We look forward to your prompt response to this letter.

Sincerely,



Richard N. Brown
National President

cc: Colin Walle, President, NFFE Local 1998
Susan Tsui Grundmann, General Counsel, NFFE