



Office of Command Counsel Newsletter

December 1999, Volume 99-6

Revised EEOC Regulations Create New Challenges for AMC Labor Counselors

On 9 November 1999, the Equal Employment Opportunity Commission's (EEOC) regulations revising 29 CFR 1614 will go into effect.

According to the EEOC, all EEO matters, new and pending, will be processed under the new procedures on and after that date. Labor counselors must be prepared to face the new challenges posed by increased power being asserted by the EEOC and EEOC Administrative Judges.

Guidance is now available from a number of sources. Labor counselors have already been advised by e-mail and through the AMC Forum on JAGCNet that the EEOC is offering Technical Assistance Program Seminars (TAPS) designed especially for the Federal Sector throughout the country during November, December and January. Information and registration forms are available at <http://www.eeoc.gov/taps/fed.html>.

Labor counselors who were not able to attend OTJAG's 29 October 1999 VTC and who submit blank videotapes to AMCCC's Employment Law Team will receive a taped copy of the VTC as soon as it becomes available.

One of the most important changes to go into effect on 9 November will be that EEOC Administrative Judges will have the authority to issue decisions (including remedies and relief, if any) that will become final and binding if the Army does not issue a final order and file an appeal within 40 (forty) days.

Although only EEOCCRA will be authorized to file appeals, EEOCCRA will work closely with agency representatives, who will prepare draft versions of appeal briefs for review by MACOM legal offices and OTJAG as well as EEOCCRA.

Due to this need for increased coordination, **Ed Korte** announced in a memorandum dated 1 Novem-

ber (Encl 1), a requirement that any agency representative who is notified of an adverse decision from an EEOC Administrative Judge will notify the Employment Law Team within 24 hours. This can be accomplished by telephone or e-mail.

POC is **Linda B.R. Mills**, DSN 767-8049.

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Fair Use of Copyrighted Materials

The term “fair use” refers to a doctrine in copyright law in which certain limited copying of copyrighted material can occur without infringing the copyright. The fair use doctrine has gained importance in view of the increased ease with which copyrighted material can be, and is, accessed and copied. A particularly important factor in the increase in copying is the growing practice of downloading of material from the internet. Consequently, it is important for individuals to have a basic understanding of the fair use doctrine, and this article supplies a basic outline of that doctrine.

The doctrine of fair use has been codified at 17 USC §107. In fair use determinations, the statute favors certain purposes: criticism, comment, news reporting, teaching, scholarship and research. The statute clarifies that copying of an unpublished work does not automatically fall outside the scope of fair use. Finally the statute lists four factors to be considered when adjudging whether a given case of copying is fair use.

Purpose and Character of Use: whether the copier’s use is “productive”.

Nature of the Copyrighted Work: whether the work has been published.

Amount and Substantiality of the Portion Copied: for example, copying a 300 word paragraph from Tolstoy’s *War and Peace* would be fair use whereas copying a whole 300 word written joke would not.

Effect of Use on Copyright Owner’s Potential Market: to negate a claim of fair use, one only needs to show that if the challenged use were widespread, it would harm the potential market for copyrighted work.

The fair use factors are not exactly defined. Generally, a judicial decision in the fair use area of the law can be relied upon only for a very narrow, specific set of circumstances. Thus, it is impossible to set forth concise, clear, dependable and generally applicable rules pertaining to the doctrine. The local intellectual property counsel can assist in devising a copying strategy that falls within fair use parameters.

Thanks TACOM’s **David Kuhn**, DSN 786-5681 for providing this excellent resource (Encl 2).

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Check out the Newsletter on the Web at http://www.amc.army.mil/amc/command_counsel/

Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

Contract Bundling Guidelines

Sallie Flavin, AMC's Assistant Chief of Staff for RDA provides for your information and widest dissemination the "HQ AMC Contract Bundling Guidelines" dated November 1999.

This document is a useful quick reference tool highlighting contract bundling in context of statutory/regulatory background, definition, required actions that need to be taken when faced with a bundling situation, and the aspects of justifying your bundling needs.

At the end of the document there are 12 common sense suggestions for you to consider and examine as alternatives in mitigating the impact on the small business community as a result of your bundling decision.

This document contains excerpts from SBA's Interim Rule on contract bundling dated 19 Oct 99, and should be used in conjunction with SBA's Rule and any internal procedural guidance.

For convenience and wider accessibility, we have also included the "HQ AMC

Contract Bundling Guidelines" within the respective websites of the HQ Small Business Office, RDA Acquisition Policy Division, and Command Counsel. The document can be retrieved at any one of the following sites: <http://www.amc.army.mil/amc/smlbus/index.html>

<http://www.amc.army.mil/amc/rda/rda-ap/contbund.html>

http://www.amc.army.mil/amc/command_counsel/newsletter.html (avail in Dec)

This document was produced in collaboration between the HQ Small Business Office and the RDA Acquisition Policy Division. Please keep in mind the information provided is subject to change upon issuance of SBA's final ruling.

Thanks to **Major Cindy Mabry**, DSN 767-2301, for providing the document to the AMC legal community (Encl 3).

List of Enclosures

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Acquisition Law Focus

A-76 Lessons Learned & Various Considerations in Commercial Activities Acquisition Efforts

The following lessons learned and information items were compiled based on discussions with Government representatives involved in recently completed and ongoing Commercial Activities (CA) acquisitions (Encl 4).

This information is being shared throughout the AMC community to assist those activities that are in the earlier phases of CA acquisitions.

We hope this document provokes critical thinking about the CA process, encourages productive discussion and information sharing, facilitates success in achieving CA objectives, and provides useful tips to help smooth some of the bumps in the CA road.

The nature of CA acquisitions makes them nearly universally contentious. However, planning, effective communications and the

commitment of adequate resources throughout the process will serve to reduce the occurrence of problems and better manage those problems and risks that can not be eliminated.

The enclosed document covers many areas. It divides the discipline into 5 separate major areas with several component parts to each:

Leadership & Teamwork

Ensure CA is a Priority
Early Preparation
Make it a Team Effort
from the Start
Team Composition
Key Players

Communications

It's a Two-Way Street
Keep the Lines of Communication Open
and Positive Security

Training

Timing Is Everything
Considerations
"CA 101" Training
Contractor Awareness
Conflicts of Interest

Process Considerations

Planning
Prioritize Work Efforts
Data Collection
Market Research
How many Solicitations?

Solicitation Phrase

90 Days is Probably Not Enough
Solicitation Document
Best Value Considerations Evaluation
Cost Realism Analysis and Most Probable Cost Adjustment
Conditional Award

POC is **Diane Travers**,
DSN 767-7571.

DOD FY 2000 Authorization & Appropriations Acts-- Summary

The enclosed summary was prepared by the HQ AMC Office of the Command Counsel and highlights many of the important provisions contained in the National Defense Authorization and Appropriations Acts for Fiscal Year 2000 (Encl 5).

Although both Acts consist of several hundred pages, we selected only those sections we believed would be of most interest to our clients.

The summary contains a brief explanation of each section; it is not intended as a detailed explanation of every requirement. If more information is desired about a section, HQ AMC personnel should contact the attorney listed at the end of the entry; other personnel should contact their supporting legal office.

POCs are **Bill Medsger, Lisa Simon, MAJ Ed Beauchamp, Diane Travers, Cassandra Johnson,** and **Dave Harrington.** Thanks as

well to **Elaine Timberlake** for her administrative efforts in bringing the paper together.

The paper is divided into 12 areas, with several components in each area:

- Military Benefits
- DOD Workforce Provisions
- Performance of Functions by Private Sector Sources
- Major Weapons Acquisition Programs
- Arsenals, Depots and Ammunition Plants
- Military Readiness Reports
- Acquisition Provisions
- Financial Management Provisions
- Research, Development, Test and Evaluation Provisions
- Chemical Agents and Munitions
- Real Property Provisions
- Miscellaneous

Fraud Update: New EO on Child Labor Use

AMC Procurement Fraud Advisor **Diane Travers**, DSN 767-7571, provides the latest DA PF Advisory (Encl 6). In addition to recent cases, the following EO is highlighted.

Executive Order 13126 restricts the Federal Government's purchase of goods made by forced or indentured child labor. The order resulted from evidence that use of child labor is steadily rising and concerns that child slavery remains a serious problem.

The order directs the Labor Department to publish within 120 days a list of products, identified by country of origin, for which there is a "reasonable basis to believe have been mined, produced, or manufactured by forced or indentured child labor."

Whenever a contracting officer determines that forced or indentured child labor has been used to produce one of the products the contracting officer must refer the matter for investigation.

The head of the agency may terminate a contract or suspend or debar a contractor that has furnished products that have been mined, produced, or manufactured using forced or indentured child labor.

Acquisition Law Focus

GAO Protest Statistics

Cases Filed FY 99: 1,268

Cases Filed FY 98: 1,566

Sustain Rate FY 99: 22%

Sustain Rate FY 98: 16%

ADR Cases Fy 99: 81

ADR Cases FY 98: 53

ADR Success FY 99: 93%

ADR Success FY 98: 83%

Hearings FY 99: 9%

Hearings FY 98: 13%

A-76 Lessons Learned Web Sites

<http://www.acqnet.sarda.army.mil/acqinfo/lsnlrn/index.htm>

<http://www.hqda.army.mil/acsimweb/ca/lessons/default.htm>

<http://www.hqda.army.mil/acsimweb/ca/lesson1.htm>

<http://www.afmc-mil.wpafb.af.mil/HQ-AFMC/XP/XP M/xpms/a76/lessons.htm>

GAO Protest Decision Highlights--12 Issue Areas

The AMC Protest Litigation Branch, headed by **Vera Meza**, DSN 767-8177, provides an excellent compendium of significant GAO Protest decisions (Encl 7).

Issues covered include:

Documentation of evaluation and source selection record:

Adequate documentation of evaluation and source selection decisions continues to be critical. GAO may give little weight to post-protest evidence unless it represents the memorialization of pre-protest analyses or judgments.

Evaluations and Tradeoffs

Agencies must evaluate proposals in accordance with the terms of the solicitation.

Past Performance evaluations

Downgrading an offeror's past performance rating simply because the offeror has filed claims or protests is impermissible.

Cost Realism Evaluations

Competitive Range

Even under the FAR 15 rewrite, a competitive range of one is permissible.

Discussions

Particularly in the context of enhanced oral and written communication **between** agencies and offerors, the legal requirements regarding discussions have become increasingly important.

Task and Delivery Orders

Must be within the scope of the contract.

Commercial item acquisitions

Simplified Acquisitions/Schedules

Other Ordering Issues

Bundling

A-76 Competitions

Three significant GAO decisions are reported, one addressing the right of private sector offerors to a debriefing if they are not selected for comparison with the in-house offer.

Prejudice

A protestor must demonstrate a reasonable possibility that it was prejudiced by the agency's actions.

Labor-Management Partnership Reaffirmed by the President

On October 28, 1999, President Clinton issued a Memorandum entitled, "Reaffirmation of Executive Order 12871 (Encl 8). It can also be viewed on the Web at

<http://www.whitehouse.gov/library/PressReleases.cgi?date=1&briefing=8>

The memo advises that the President is proud of the many labor-management partnership successes but is also convinced that we can do even more. He directs agencies to develop a plan with their unions at appropriate levels of recognition for implementing the memo and the Executive Order. The plans should help the agency and its employees deliver the highest quality service to the American people. The President again encourages parties to resolve disputes through consensus using interest-based problem solving techniques.

Additionally, agencies are directed to report to the President, through OMB, on the progress made toward achieving the goals of the memo and the Order. These reports must be submitted annually with the first due April 14, 2000.

The reports have to describe the nature and extent of efforts to comply with the Order, and identify specific improvements in customer service, quality, productivity, efficiency, and quality of worklife achieved through partnership.

OPM will analyze the reports and, in coordination with OMB, advise the President on further steps that might be needed to ensure successful implementation of the Order and this memo.

Undoubtedly, OPM, OSD and HQ DA will be issuing additional guidance once it is determined the type(s) of report(s) that will be generated from OSD.

FLRA Issues Negotiability Appeal Guide

The Federal Labor Relations Authority has issued the subject guide. For those interested in reading the steps of a negotiability appeal and the requirement of the various filings, this is the document for you. It is available at

http://www.flra.gov/reports/ng_guide.html

Keep in mind that activity representatives wishing to declare a proposal nonnegotiable should first coordinate with their MACOM.

Written declarations of nonnegotiability should only be provided in response to written requests by the union. These declarations must be issued within 10 days of receipt of the union's request.

AMCCC continues to work closely with the field and with HQ DA. With CPO regionalization reducing the CPAC staffs, AMC labor counselors are now more involved in all labor-management relations issues.

Employment Law Focus

MSPB Wants *You* to Know: the Consequences of Filing a Grievance or A Board Appeal on the Other

In a November 1, 1999 Federal Register notice, the Merit Systems Protection Board (MSPB) proposed to change its rules, and require agencies to notify employees of the consequences of choosing between grievance procedures and the MSPB appeal procedure.

Oftentimes, employees have the right to file a grievance or an MSPB appeal, but may not pursue both.

An example of this is when an employee challenges a conduct-based adverse action under 5 U.S.C. 7512, or an action based on unacceptable performance under 5 U.S.C. 4303.

The employee's choice of procedure is determined by which he files first. If she or he chooses to file a grievance, he may not later initiate an MSPB appeal, and vice versa.

The Board wants to make sure employees know all of their options, and the significance of choosing one over the other, by requiring agencies to state this explicitly in the notice letters they must provide to employees against whom they take an appealable action.

The Board's proposed rule is contained in the Federal Register, Vol. 64, No. 210, pp. 58798-99. Comments to the proposed rule are due by January 3, 2000.

FLRA GC on Developing a Labor-Management Strategic Plan

The Office of the General Counsel, the Federal Labor Relations Authority has made available to all an excellent document, "Guidance on Developing a Labor Relations Strategic Plan (Encl 9). This Guidance is divided into four parts:

- (1) What is a labor relations strategic plan and why is it necessary?
- (2) Assessing your current labor relations strategy: what is it and is it successful?
- (3) How do labor and management develop a strategy to meet their goals?
- (4) Approaches to implementing a successful labor relations strategic plan.

The Guidance also includes two appendices, which set forth agendas for an internal strategy development program and a joint strategy development program.

FSIP on Dispute Resolution

The Federal Service Impasses Panel has issued an excellent guide to their dispute resolution procedures, covering five different commonly used processes, but

also including a section on jurisdictional questions, and a narrative highlighting the responsibilities of the parties to participate in good faith (Encl 10).

Environmental Law Focus

Treatise: Mining, Mineral Leasing & Energy Production...On Army (and Surplus Army) Lands

IOC counsel **Geraldine Lowery**, DSN 793-5932, provides us an excellent case study on the issue of mining, mineral leasing and energy production on Army lands and surplus Army lands (Encl 11).

Enclosed is the Table of Contents and the Background and Conclusions sections of the opinion. Please contact Ms. Lowery if you wish for a copy of the detailed analysis.

The document contains an excellent summary of the two types of authority over Federal lands, and describes

the two types of Federal property. The various relevant statutes, Code of Federal Regulations, and DOD and DA implementing regulations are also addressed.

There are two principle questions addressed. The first question is under what circumstances may military controlled lands [non-civil works] be purchased for mineral exploration and extraction. The second question is under what circumstances may one use, without purchasing, military controlled land for mineral exploration and extraction.

AMC Forum: Where To Get Environmental Legal Documents

The Environmental Law Team has restructured the Environmental Document Repository, in the AMC JAGCNET Forum to establish fifteen subject matter subcategories.

A number of standard reference documents have already been posted, and more will follow. When you need environmental reference material, take a look in the AMC Document Repository. Also, if you have good reference documents to add, contact either **Bob Lingo** or **Stan Citron**.

ELD Bulletins: Sept & Oct 1999

Environmental Law Division Bulletins for September (Encl 12) and October 1999 (Encl 13) are provided for those who have not received an electronic version from ELD or who have a general interest in Environmental Law.

Environmental Law Focus

DOD FY 2000

Authorization Act: Seeking Congressional Approval to Pay Penalties \$\$\$\$\$\$\$\$

The Defense Authorization Act for FY 2000 includes a provision that requires the Department of Defense to request and receive Congressional authorization before using FY 2000 funds to pay fines and penalties, including Supplement Environmental Projects (SEPs).

This provision does not change the Army's requirement to comply with environmental statutes and regulations. However, Congress must specifically authorize payment of any agreed penalties or SEPs. DoD has recently issued guidance on seeking such authorization (Encl 14). Further Army implementing guidance will follow.

Improving Your Environmental Compliance

USEPA and the Chemical Manufacturers Association (CMA) have published the "EPA/CMA Root Cause Analysis Pilot Project Report." This examines the underlying causes of environmental violations in federal civil enforcement cases. The leading causes for non-compliance included individual responsibility and lack of awareness of regulatory requirements. Perhaps some of their findings and recommendations could help our compliance program. Can be downloaded at <http://www.epa.gov/oeca/ccsmd/>

The US Army Environmental Center Environmental Compliance Assessment Team (ECAS) publishes a series of 13 User's guides, which contain environmental compliance requirements assembled by function area. Guides can assist installation operators to perform self-checks on related to their activity. These are available on DENIX: <http://www.denix.osd.mil/denix/DOD/Library/Guides/series.html>

AMC Environmental Restoration Program Management Review Workshop

The AMC Environmental Office held an excellent Conference and Workshop on the environmental Restoration Program for active sites. Material from the Workshop will

be posted on the AMC Forum Environmental Documents Repository. Enclosed is a presentation by Mark Connor, of the Army's Office of General Counsel on Land Use Control (Encl 15).

Employee Holiday Celebrations

We are approaching that time of the year when AMC employees plan and prepare their office celebration during the holiday season.

Such celebrations raise ethics and related type of issues — there are some absolute rules... but, in many cases, the issues involve the application of “**Judgment!**”

”The AMC Ethics Team of **Mike Wentink**, **Alex Bailey** and **Stan Citron** contribute an excellent paper that addresses several important issues in planning and administering a holiday celebration (Encl 16).

Among the many issues covered are:

O Official Time: Brief times to plan a luncheon or to coordinate with a restaurant would be allowable.

O Fundraising: The general rule is no fundraising but there are exceptions. It is wrong to solicit outside sources or to raise money through a raffle. The paper addresses a course of action to meet one exception: the DOD JER permits an organization of employees to raise money among their own members when approved by the head of that organization

after consultation with an ethics counselor.

O Participation of Contractor Personnel: They can attend, Whether the contractors’ employees can take the time off to attend, and the nature of the time off (e.g., leave, personal day, administrative absence) are between the contractor and its employees.

When a contractor’s employee is absent, the contractor cannot bill for services not delivered, and may have concerns about such issues as contract schedules, delivery dates, and other matters.

Accordingly, it is the contractor that must decide if and under what conditions one or more of its employees may be absent.

O Exchanging Gifts: There can be a gift exchange, but there are several limitations.

We may have a gift exchange among employees. If it is an anonymous-type exchange, a reasonable value should be established for the individual gifts. If it is not anonymous, i.e., each employee knows for whom they are buying a gift, a value of not to exceed \$10 is the limit.

You Can Accept Official Travel Expenses From a Non-Federal Source, But...

Under certain conditions outlined in the GSA Travel Authority, 31 U.S.C. § 1353, and Government Employees Training Act, 5 U.S.C. § 4111, a DoD employee may accept payment from a non-Federal source for official travel and attendance at a meeting or training event.

The CECOM Legal Office provides an excellent preventive law memorandum outlining the specifics (Encl 17).

The paper discusses the general conditions whereby acceptance of payment is appropriate. Importantly, there is an important reporting requirement with which an employee must comply. If the traveling employee received more than \$250 worth of in-kind benefits or payments to the U.S. Army, the employee must complete and sign a report outlining the travel and payments through their travel approving authority to an ethics counselor in the Legal Office.

The paper includes a copy of the reporting form they use at CECOM.

Conflicts of Interest for SSEB Members:

In the spirit, and to show the benefits, of cross-discipline communication, Protest Litigation Branch chief **Vera Meza** sent the following case to Ethics Team chief **Mike Wentink**.

The protest is against the cancelation of an A-76 solicitation to perform civil operations and maintenance services at Wright AFB. The cancelation was after the SSEB reviewed initial technical proposals and revised technical proposals. The 16 evaluators concluded that the proposals were technically unacceptable, and accordingly the agency decided to implement the MEO.

Offerors Complaint

The offerors complained that the evaluation was not fair because 14 of the 16 agency evaluators held positions that were part of the A-76 study. The Comptroller General agreed that the evaluation process was fundamentally flawed and that there was a conflict of interest that could not be mitigated and sustained the protests!

Mr. Wentink does not note see a single reference to 18 U.S.C. Sec. 208 or 5 C.F.R.

Sec. 2635.402 that prohibits employees from participating in official matters in which they have a financial interest. Of course, the obvious financial conflict of interest here is waived by 5 C.F.R. Sec. 2640.203(d) which exempts financial interests arising from Federal Government employment as long as the employee does not make determinations that individually or specially affects his or her own salary and benefits... at least, Mike assumes this would have been the rationale for letting these employees participate in the evaluation.

GAO Focus

The Comp. Gen.'s focus and rationale is the FAR, specifically FAR Part 9 (Contractor Qualifications), Subpart 9.5 (Organizational and Consultant Conflict of Interest).

The Comp. Gen. starts out with the general FAR standards of conduct at 3.101-1 that transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct, and we must avoid any actual or appearance of a conflict of interest. But, since there are

nothing further that would address this type of situation (again, the Comp. Gen. does not address the law or OGE regulations), it turns to FAR subpart 9.5 that "addresses analogous situations involving contractor organizations... does not apply to government agencies or employees, we believe that in determining whether an agency has reasonably met its obligation to avoid conflicts under FAR 3.101-1, FAR subpart 9.5 is instructive...".

An additional problem

Accordingly, it would seem that we have an additional problem here when looking for members of the SSEB or other evaluators. We have been concerned about the employees and their future job prospects, such as whether their participation in the A-76 process might interfere with their right of first refusal, and similar issues. Well, it seems that there is an even more basic issue, an issue that is going to be resolved under the Organizational Conflict of Interest standards as set out in the FAR.

Happy Holidays and a
Great New Year
to the
AMC Legal Community
from the
Office of Command Counsel

*...And remember: Only 1-year until
the new millenium!!*

Faces In The Firm

Hello &...

AMCOM

Kathryn R. Shelton joined Branch C, Acquisition Law Division on 12 October 1999. Kathy came to us from the City of Huntsville District Attorney's Office.

Wesley G. Smith joined Adversary Proceedings Division on 25 October 1999. Wes was previously employed with the UAW Legal Services Plan.

TACOM-Warren

Andrew Starr joined the staff of the Business Law Division at TACOM-Warren on 26 Oct 99. A member of the State Bar of Michigan, Andrew is a recent Cum Laude graduate of the Detroit College of Law at Michigan State University. In addition to a distinguished legal education, which included honors in Research, Writing and Advocacy, he is also a Magna Cum Laude graduate of Wayne State University.

CECOM

Michele L. Parchman will join Business Law Division C, Fort Belvoir Branch, in December 1999. She comes to us from the SJA Office, US Army Garrison, Fort Belvoir, Virginia, where she worked as a Labor Counselor since January 1997.

...Goodbye

AMCOM

CPT Erica Cain left the Office of Staff Judge Advocate on 19 November 1999 for her new assignment in San Antonio, TX.

CECOM

Margaret Gillen retired after more than 18 years of federal service at Fort Monmouth. The last eight years of Ms. Gillen's service were devoted to providing direct legal assistance services to soldiers, sailors, airmen, Marines, Coast Guardsmen and their family members. We wish Ms. Gillen the best in her future endeavors.

Don Hankins Retires after 30 years at Huntsville

Don Hankins, General Law Division, retired on 29 October 1999 after 30 years of government service. Don spent his entire government career in the AMC Huntsville legal office. Congratulations to Don and best wishes on his retirement.

You can not state in a few words what the loss of **Don Hankins** means to the AMC legal community. 30 years of dedicated service in the areas of employment law, ethics and the other general law and administrative law areas, covers an incredible era of change in AMC and in the law. Don met each challenge with intelligence, creativity and hard work. Best wishes Don.

Birth

AMCOM

Genevia Fontenot, Branch E, Acquisition Law Division, and her husband welcomed baby daughter, Maya Amaka, on 7 October 1999. Maya weighed in at 9 pounds and 11 ounces and was 21 inches long.