Date: December 8, 2003

Claimant: [name]

File Number: 03-0018

OPM Contact; Deborah Y. McKissick

The claimant is a former military member hired locally overseas who is requesting reconsideration of his agency's decision regarding his entitlement to receive a living quarters allowance (LQA) and transportation agreement (TA). The U.S. General Services Administration Board of Contract Appeals (GSBCA), not the Office of Personnel Management (OPM), has jurisdiction to adjudicate claims for a TA. OPM accepted the claim for the LQA on February 24, 2003. The agency provided information, dated June 2, 2003, which we received on June 13, 2003. For the reasons discussed herein, the claim is denied.

The claimant retired from active duty with the U. S. Army on January 6, 2003, while stationed in Seoul, Korea. In October 2002, while on active military duty in Korea, the claimant applied for a [position] with the Eighth U.S. Army SOFA Claims Office. Some time between January 6, 2003 and February 18, 2003, the claimant was offered employment as a local hire for a [position] and the appointment was effective February 18, 2003. The claimant resided in the United States from December 2002, until he returned to Korea in early 2003, after accepting an offer of employment as a local hire.

The agency administrative report states that the claimant was on active military duty in Seoul, Korea, when he applied for a Federal civilian position in Korea and the claimant was on transition leave in the United States when he accepted the Federal civilian position in Korea. The agency does not deny the claimant's United States citizenship. However, the agency's determination of the claimant's eligibility for overseas allowances and differentials was based on his actual location during the period when he applied for the position.

The Overseas Differentials and Allowances Act, Pub. L. 86-707, 74 Stat. 793, 794 (Sept. 6, 1960), as amended and codified at 5 U.S.C. §§ 5922-5924 provides that, under regulations prescribed by the President, LQAs may be paid to federal employees in foreign areas. The President, by executive order, delegated this authority to the Secretary of State, who issued Standardized Regulations concerning eligibility to receive, and payment of, LQAs. Section 013 of the Department of State Standardized Regulations (DSSR) further delegates to the heads of federal agencies the authority to grant LQAs to agency employees. Section 013 of the DSSR specifies that the head of an agency may grant quarters allowances and issue further implementing regulations, as he or she may deem necessary for the guidance of the

agency in granting such allowances. The Department of Defense (DoD) has issued further implementing regulations through its requirements for DoD civilian employment overseas, DoD 1400.25-M, CPM 592.

The DSSR, Section 031.12, states, "Quarters allowances prescribed in Chapter 100 *may* be granted to employees recruited outside the United States, provided that: (a) the employee's actual place of residence in the place to which the quarters allowance applies at the time of receipt thereof shall be fairly attributable to his/her employment by the United States Government. . . ." (Emphasis added). As a result of his military assignment, the claimant was on active duty in Korea, when he applied for the Federal civilian position in Korea.

The Civilian Personnel Manual of the Department of Defense, DoD Regulation 1400.25-M, Subchapter 1250, Overseas Allowances and Differentials, SC 1250.3.7., dated December 1996, states that a U.S. Hire is a "person who *resided permanently in the United States* ….of a possession of United States from the time he or she applied for employment until and including the date he or she accepted a formal offer of employment." (Emphasis added). The definition of a U.S. Hire does not describe the claimant's situation since he applied for the civilian position while living and working in Korea and he accepted the position while temporary residing in Maine.

DoD Regulation 1400.25-M, Subchapter 1250, E,1,a(2), states, "Under the provisions of Section 031.12b of the DSSR (reference(a)), former military and civilian members shall be considered to have 'substantially continuous employment' for up to 1 year from the date of separation or when transportation entitlement is lost, or until the retired and/or separated member or employee uses any portion of the entitlement for Government transportation back to the United States, which occurs first. In unusual cases, an employee may be considered to have substantially continuous employment even though a portion of the entitlement (e.g., early return of a family member or movement of household goods from nontemporary storage) has been used. Satisfaction of DSSR paragraph 031.12b alone will not make the former military or civilian employee eligible. The employee must also satisfy the requirements of DSSR paragraph 031.12a, to establish eligibility." The claimant did not have "substantially continuous employment" because he retired from the military on January 6, 2003 and his appointment to the Federal civilian position was effective on February 18, 2003.

The DSSR further provides that the head of the agency upon determination that unusual circumstances in an individual case justify such action "may" waive Section 031.12b. Under the Civilian Personnel Manual of the Department of Defense, DoD 1400.25M, Subchapter 1250, a waiver is only applicable in circumstances 6, "for the period during which a crisis situation is declared to exist under reference (e)." The claimant's position is designated as emergency-essential. However, the DSSR authorizes, but does not require, agency officials to grant an LQA when an employee fulfills the basic eligibility requirements in the DSSR.

The statutory and regulatory languages are permissive and give agency heads considerable discretion in determining whether to grant LQAs to agency employees. *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979). Thus, an agency may withhold LQA payments from an employee when it finds that the circumstances justify such action, and the agency's action will not be questioned unless it is determined that the agency's action was arbitrary, capricious, or unreasonable. *Joseph P. Carrigan*, 60 Comp. Gen. 243, 247 (1981); *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979).

The DoD regulation specifies further that, except in unusual circumstances, an LQA is to be used as an incentive to persuade employees in the United States to apply for overseas positions. Subchapter 1-1b of D0D 1400.25-M, CPM 592 provides in relevant part:

> The foreign post differential and the foreign area allowances (except the post allowance) are not automatic salary supplements attached to all positions in the foreign area. They are intended to be recruitment and/or retention incentives for U.S. citizen civilian employees living in the United States to accept federal employment in a foreign area. If a person is already in the foreign area, that inducement normally is unnecessary. The specific circumstances under which an employee who is hired in a foreign area *may* be granted the allowances provided in section 031.12 of the DSSR, as supplemented by this chapter. (Emphasis added).

In view of the permissive rather than mandatory language in the applicable statutes and regulations, as noted above, the degree of discretion that heads of agencies have in determining whether to authorize these allowances, and the facts of this claim, we cannot say the agency's application of the DoD regulation in this case was arbitrary or capricious.

Where the agency's factual determination is reasonable; we will not substitute our judgment for that of the agency. See e.g., *Jimmie D. Brewer*, B-205452, Mar. 15, 1982. The claimant and the agency agree that the claimant was offered, and accepted, the position as a local hire at the time of his appointment to the civilian position. At the time the claimant was hired, management did not grant an LQA as an incentive for the position. Accordingly, the claim is denied.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the employee's right to bring an action in an appropriate United States Court.