



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-221458

June 13, 1986

James M. Peirce, President
National Federation of
Federal Employees
Suite 200
2020 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Peirce:

We refer to your letter dated December 17, 1985 (your reference 1363-RE-40), in which you requested our decision concerning the entitlement of _____, a civilian employee of the Department of the Army, to payment of a retroactive separate maintenance allowance ("allowance"). Your request was submitted under Part 22, Title 4 of the Code of Federal Regulations. The Army has not submitted any comments on this case.

Specifically, you have requested that we find that the conditions that allowed the Army to grant _____ the allowance effective February 1984 were present for a period of at least 6 years prior to the receipt of his claim in our Office thereby qualifying _____ for the allowance retroactive to the beginning of this 6-year period. This reflects your recognition of the provisions of the barring act, as amended, 31 U.S.C. § 3702(b)(1) (1982) which requires that every claim which is submitted to this Office must be received here within 6 years after the date such claim first accrued. Therefore, the 6-year barring act would be measured from December 17, 1985, the date we received your letter, and no payment could be made for any period prior to December 17, 1979.

The statutory authority for the allowance is found in 5 U.S.C. § 5924 (1982) which, in pertinent part, provides:

"The following cost-of-living allowances may be granted, when applicable, to an employee in a foreign area:

* * * * *

"(3) A separate maintenance allowance to assist an employee who is compelled or authorized, because of dangerous, notably unhealthful, or excessively adverse living conditions at the employee's post of assignment in a foreign area, or for the convenience of the Government, or who requests such an allowance because of special needs or hardship involving the employee or the employee's spouse or dependents, to meet the additional expenses of maintaining, elsewhere than at the post, the employee's spouse or dependents, or both." (Emphasis added.)

Authority to prescribe regulations under this section was delegated to the Secretary of State by Exec. Order No. 10903, January 11, 1961, as amended, 5 U.S.C. § 5921 note (1982). These regulations are presently found in Department of State Standardized Regulations (Government Civilians, Foreign Areas), Sections 260-268. Section 262.1 sets forth conditions warranting an allowance and, like the above statute, is couched in permissive language ("a separate maintenance allowance may be granted * * *"). Therefore, both the law and regulations appear to give to the Army wide discretion in the granting of the allowance. Thus, because of the discretionary nature of the allowance, the question of its proper application is a matter for administrative determination and we will not question a determination made in the absence of evidence showing it to be arbitrary, capricious, or clearly erroneous. However, the question of entitlement to the allowance for the period of December 1979 to February 1984, apparently has not as yet been directly addressed by the Army.

Since granting of the allowance is discretionary with the agency and since we have no evidence that Army considered retroactive entitlement to the allowance, we find it inappropriate to issue a decision on the merits. 4 C.F.R. § 22.8 (1986). However, we would have no objection to a retroactive grant of the allowance if the Army determines that it would be appropriate under the circumstances of case. This would have to be the Army's decision in the first instance. Therefore, we

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would suggest that you direct your request for a decision on the availability of a retroactive separate maintenance allowance to Army.

Sincerely yours,

Douglas A. Faulkner
for Robert L. Higgins
Assistant General Counsel

cc: Civilian Personnel Director
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