

Date: February 8, 2006

Matter of: [name]

File Number: 04-0025

OPM Contact: Robert D. Hendler

The claimant is a retired military member hired locally overseas, who is requesting reconsideration of his agency's decision regarding his eligibility to receive a living quarters allowance (LQA). We received the claim on May 27, 2004, and the agency administrative report on December 13, 2004. For the reasons discussed herein, the claim is denied.

The claimant accompanied his spouse when she transferred from a Defense Commissary Agency facility in Sacramento, California, to Kapaun, Germany. In August 2000, he was appointed as a local spousal hire with veterans' preference to [GS-9 position]. In July 2003, his spouse accepted a position at March Air Force Base, California, while the claimant remained in Germany. While he was overseas, he applied and was selected for a career-conditional appointment to the [GS-9 position]. His appointment was effective August 2003. On October 9, 2003, the agency denied his request for LQA.

The claimant stated that he is eligible for LQA because the vacancy was advertised world-wide from July 18-24, 2003, and he was the best qualified candidate from among five qualified candidates. He stated that he could have elected to return to the United States with his spouse to apply for the position. However, he rejected that option because of workload considerations in his organization. Additionally, he stated that if he accompanied his spouse to the United States and subsequently was selected, Government funds would be expended unnecessarily for transportation of his property and his personal expenses to return to Germany. He further stated that he should be granted a waiver based on Department of Defense (DoD) Manual, 1400.25-M, Subchapter 1250.5.1.1.2.2.4 because his sponsoring spouse left the post or area permanently.

The agency administrative report states that the claimant's local hire appointment in August 2003, did not meet the LQA eligibility requirements because he was not recruited from the United States. The report states that he entered the overseas area as a family member accompanying his wife to her new duty station in Germany. On August 28, 2000, he was locally hired into the [GS-9 position], through a Schedule A Dependent Hire appointment. The claimant's wife returned to the United States in July 2003. At that time, the claimant opted to stay in the overseas area and apply through an external vacancy announcement for the [GS-9 position]. The claimant was living at Ramstein Air Force Base, Germany, at the time he

received his career-conditional appointment on August 24, 2003. The agency states that the claimant does not meet Department of State Standardized Regulations (DSSR), Section 031.12b, which states that quarters allowances may be granted to employees recruited outside the United States, provided that prior to appointment, the employee was recruited in the United States.

The Overseas Differentials and Allowances Act, Pub. L. 86-707, 74 Stat. 793, 794 (September 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 LQAs. Section 013 of the 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 in DoD Manual 1400.25-M, Subchapter 1250.

Section 031.12 of the DSSR provides that quarters allowances “may” be granted to employees recruited outside the United States, when:

- a. the employee’s actual place of residence in the place to which the quarters allowance applied at the time of receipt shall be fairly attributable to his/her employment by the United States Government; and
- b. prior to appointment, the employee was recruited in the United States . . . by the United States Government, including its armed forces, . . .and has been in substantially continuous employment by such employer under conditions which provided for his/her return transportation to the United States . . .

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.

The DoD regulation further specifies 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. DoD Manual 1400.25-M, SC1250.4.1 states that:

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 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).

In view of the permissive rather than mandatory language in the applicable statutes and regulations, 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 was offered and accepted a position as a local hire at the time of his appointment. His motivation to stay in Germany after his spouse's departure does not affect the agency's proper application of controlling regulations to the facts of this case. We also note that waivers are discretionary. The agency policy, included in the claim administrative report, provides that an LQA waiver for employees on family member appointments (Schedule A 213.3106(b)(6)) is subject to termination 60 days after they lose family member status or the sponsor leaves the area. This policy does not support the claimant's rationale as to why he should receive an LQA waiver. 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.