

Date: September 29, 2004

Matter of: [name]

File Number: 04-0009

OPM Contact; Robert D. Hendler

The claimant is a former United States military member hired locally overseas, who is requesting reconsideration of his agency's decision regarding his entitlement to receive a living quarters allowance (LQA). We received the claim on December 9, 2003, and the agency administrative report on March 15, 2004. We received the claimant's response to the report on June 24, 2004. In addition to his response, the claimant provided the following: a copy of his April 21, 2004, e-mail to his agency requesting LQA based on his promotion to GS-9 effective April 4, 2004; his possession of an extended military transportation agreement; and the agency response that his promotion does not confer LQA eligibility. For the reasons discussed herein, the claim is denied.

The claimant separated from active military service effective January 8, 2001, in Kaiserslautern, Germany. He was appointed to a WL-5 job on May 21, 2001, and was converted to a WG-5 job on August 26, 2001. The claimant requests a change in LQA policies and regulations that would permit the agency to grant him LQA and the granting of LQA based on that change.

The agency administrative report stated that because the claimant's local hire appointment was on May 7, 2001, he did not meet the eligibility requirements to receive LQA, as defined in U.S. Army in Europe (USAEUR) Regulation 690-500.592, dated June 2003. The agency subsequently provided a copy of the USAEUR LQA 1998 policy in effect in 2001 when the claimant was appointed.

The agency report also stated that the claimant believes that all separated military members who are hired within one year after separation and meet the requirements of and should be eligible for LQA, regardless of their grade. The report states that in 1998, USAEUR revised its policy on the payment of LQA to comply with the intent of the 1997 Department of Defense (DoD) Directive 1400.25-M, Subchapter 1250.41, which states: "Overseas allowances and differentials (except post allowance) are not automatic salary supplements; nor are they entitlements. They are specifically intended to be recruitment incentives for U.S. citizen civilian employees living in the United States to accept Federal employment in a foreign area." The agency explained that Subchapter 1250.4.2 provides that: "Individuals

authorized to grant overseas allowances and differentials shall consider the recruitment need, along with the expense the activity or employing agency will incur, prior to approval.”

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 LQA eligibility. 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.

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 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. Thus, 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).

DoD Instruction 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

* Subchapter 2-2b(1) of DoD 1400.25-M, CPM 592, provides in relevant part that, under section 031.12b of the DSSR, former military and civilian members will be considered to have “substantially continuous employment” for one year from the date of separation.

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 1998 USAEUR LQA policy for the authorization of LQA for appropriated and nonappropriated fund employees states, in pertinent part at paragraph 6:

- a. Recruited from the United States, U.S. territories, or protectorates. Except for hard to fill positions, an employee will not be considered as recruited from the United States, if the period of residence in the United States is less than one year immediately prior to receipt of the job offer overseas.
- b. Transferred from another overseas activity or agency, originally recruited from the United States, and eligible to receive or receiving LQA the time of selection. These individuals will continue to receive LQA and will not be subject to the one-year U.S. residency requirement.

The policy also provided that:

7. LQA may be authorized for locally hired individuals selected for hard-to-fill positions, if approved by the Commander of the of the funding activity prior to the recruitment and the selectee meets the criteria of section 031.12(a) and (b) or section 013.12c of reference 2a [DSSR]. NAF employment will be considered in determining substantially continuous employment.

The claim settlement process also does not provide for challenging agency implementing regulations or policies as requested by the claimant. 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, a position as a local hire at the time of his appointment. At the time the claimant was appointed, he was placed in a position that also did not meet the defined hard-to-fill provisions required for granting an LQA. Therefore, the claimant did not meet any of the qualifying situations for the granting of LQA at the time of his appointment. 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.