

Date: November 18, 2004

Matter of: [name]

File Number: 04-0010

OPM Contact: Robert D. Hendler

The claimant requests a final decision on her eligibility for Living Quarters Allowance (LQA) from March 21, 2000 through September 7, 2003, when she was placed on voluntary leave without pay. We received the claim on December 12, 2003 and the agency administrative report on April 8, 2004. For the reasons discussed herein, the claim is denied.

The claimant was employed as a [GS-11 position] with the Department of the Army at the Redstone Arsenal, Alabama when she accepted a transfer to a [GS-9] position with the Department of the Air Force at the RAF Chicksands, United Kingdom, effective February 6, 1994. She believed that she was eligible for LQA with that transfer. However, the Standard Form 50, Notification of Personnel Action, which documented her transfer to the United Kingdom, does not contain any remarks that recognize any overseas entitlements due her. Therefore, she was not eligible for LQA. In September 1994, the claimant then transferred to the Department of the Army at the RAF Molesworth, United Kingdom. The record shows that during the years of her employment in the [United Kingdom as a civilian employee of the Army and the Air Force, the claimant had ample opportunities to review her status and receipt of LQA and seek correction of her records.

The claimant's husband, a Defense Logistics Agency civilian employee in the United Kingdom, was receiving the "with family" rate for LQA until his disability retirement in April 1998. The record shows that the claimant was covered and that she and her husband received LQA based on his authorization. Due to her husband's disability retirement, the claimant requested and obtained LQA for a two year period based on a waiver of the Department of State Standardized Regulations (DSSR), Section 031.12b.

The agency administrative report indicated that the Department of the Air Force made the initial determination that in accordance with the Air Force LQA policy in effect at the time, the claimant was not eligible for LQA when she transferred from the Department of the Army, Redstone Arsenal, Alabama to Department of the Air Force, United Kingdom.

The report stated that the claimant did not meet eligibility to receive LQA based on her own entitlement because she did not meet the criteria outlined in the DSSR or the Department of Defense Civilian Personnel Manual 1400.25M due to insufficient evidence.

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 regulations regarding 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. DoD issued further implementing regulations through its requirements for DoD civilian employment overseas, DoD 1400.25-M, SC1250.

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).

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 *Jimmie D. Brewer*, B-205452, March 15, 1982. Section 178.105 of Title 5, Code of Federal Regulations, specifies that claims are settled on the basis of the written record. The written record indicates that the claimant was offered, and accepted, a position where LQA was not authorized. 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.