United States



Office of Personnel Management

Washington, DC 20415

Date: December 9, 2004

Matter of: [name]

File Number: 04-0014

OPM Contact: Robert D. Hendler

The claimant is a retired United States military member hired locally overseas, who is requesting reconsideration of his agency's decision denying his request to receive a living quarters allowance (LQA) that was issued August 13, 2003. We received the claim on November 19, 2003, and the complete agency administrative report on August 24, 2004. For the reasons discussed herein, the claim is denied.

The claimant retired from active military service effective April 30, 1987, while he was stationed in Germany. He was appointed as a local hire on July 31, 1989, to [position]. In the interim, he was employed by a contractor, COBRO Corporation, in Germany. The claimant submitted a copy of a March 20, 1987, offer of employment from the contractor, which included an overseas differential of \$6,177. The claimant maintains that the proper interpretation of Department of Defense (DoD) Directive 1400.25-M, subchapter 1250.4.1, December 1996 with changes 1-16, is that allowances and differentials fall into the same category which qualifies an overseas differential as a form of housing allowance. He says that the differential which he received from the contractor should not be considered a break in entitlements from the time that he retired from the military to the time that he was hired as a Federal civilian employee on July 31, 1989. In a memorandum dated October 20, 2003, the Commanding General of the claimant's employing command endorsed the claimant's rationale and stated that the claimant currently occupies a "hard to fill" position. The General also cites United States Army, Europe, and Seventh Army (USAEUR) Regulation 690-500-592 as authorizing LQA "for 'hard to fill' positions or for employees hired by U.S. firms."

On August 19, 2003, the Headquarters, USAREUR denied the claimant's request for an LQA because his situation did not meet the definition of "substantially continuous service" outlined in the Department of State's Standardized Regulations (DSSR) section 031.12 and DoD Directive 1400.25-M, subchapter 1250, Paragraph E la(2)(a). The agency states that service members and civilian employees are considered to have substantially continuous employment for up to one year from the date of separation or until transportation entitlement is lost, or until the retired or separated member uses any portion of the entitlement for government transportation back to the United States, whichever comes first. The agency concludes that under the DoD regulation, his period of "substantially continuous service"

expired on April 30, 1988, and he is not entitled to LQA, citing OPM Claim Decision S003443, November 30, 1999.

Section 031.12 of the DSSR provides that LQA "may" be granted to employees recruited outside the United States, when:

- the employee's actual place of residence is 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
- prior to appointment, the employee was recruited in the United States.... by the United States Government, including its armed forces, a United States firm, organization, or interest.... and has been in substantially continuous employment by such employer under conditions which provided for his/her return transportation to the United States...

DoD Manual, 1400.25-M, subchapter 1250.5.1.1.2.1, specifies that, under DSSR section 031.12(b), service members and civilian employees shall be considered to have substantially continuous employment for up to one year from the date of separation or when transportation entitlement is lost, or until the retired or separated member uses any portion of the entitlement for government transportation back to the United States, *whichever occurs first*.

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).

When 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, March 15, 1982. The claimant's retirement from military service occurred on April 30, 1987. His period of "substantially continuous service" expired on April 30, 1988, and he was not appointed to a civilian position with the United States Government until July 31, 1989. The claimant's intervening local hiring by and employment with a United States contractor cannot be construed as meeting the requirements of "substantially continuous employment" for determination of LQA eligibility under these regulations. The overseas differential provided by the contractor also has no bearing on his eligibility for LQA in applying the DSSR and DoD implementing regulations. His appointment to a "hard to fill" position, subsequent to his initial Federal civilian appointment, also has no affect on this determination. Therefore, the claimant is not entitled to an LQA. The Department of the Army's decision of August 19, 2003 regarding the claimant's entitlement to an LQA is not arbitrary, capricious, or unreasonable. Accordingly, the claim for an LQA 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.