Date: January 30, 2006

Matter of: [name]

File Number: 05-0004

OPM Contact: Robert D. Hendler

The claimant, who is employed in a [position] with Headquarters, United States Army Europe (HQ USAREUR), is requesting reconsideration of his agency's decision regarding his entitlement to receive living quarters allowance (LQA) since his appointment on November 3, 2003. We received the claim on December 22, 2004, and the agency administrative report (AAR) on March 15, 2005. For the reasons discussed herein, the claim is denied.

The claimant was employed by the Titan Corporation in Germany from April 17, 2000, until he voluntarily resigned on December 31, 2002. In his claim request, he stated that at the time he left Titan Corporation, he was offered a "contingency position with another contractor" in Germany, but "the intended contract was not granted to the contractor. In the meantime, I applied to work for the U.S. Government in Germany." The claimant stated that he began "working in that capacity November 3, 2003. During the initial negotiations, my LQA status was not determined. I was informed that upon my LQA approval, I would receive compensation to November 3." He said that he has received conflicting information since then, and that he was submitting "pertinent documents that I feel justify me being able to receive LQA."

> Documentation submitted by the claimant includes a March 5, 2004, e-mail from USAREUR to the claimant stating, in part, that:
>
> You were appointed to a [position] effective 3 November 2003.
>
> In addition both of the following eligibility criteria must be met:
>
> a) Before being appointed, the employee was recruited in the US and
> b) The employee has been in substantially continuous employment under conditions that provided for your return transportation to the United States.
>
> You were originally recruited by TITAN effective 17 April 2000. Your employment with TITAN ended effective 31 December 2002. TITAN issued you a return ticket, that you did not use. (as per your email dtd 30 September 2003).

> This means that you no longer had a return transportation agreement through TITAN.
>
> At the time of your employment as a GS-2210-12 you no longer had a return transportation entitlement, which is one of the requirements for LQA eligibility.

A June 8, 2004, letter from Titan Corporation, submitted to the agency by the claimant, states: "Additionally, Titan had a transportation agreement with [claimant]." An August 3, 2004, USAREUR letter to the claimant states:

> We received conflicting information regarding your transportation entitlement to the United States….However, in an e-mail…dated 30 September 2003, you verified that upon termination, Titan Corporation had issued you a return ticket, which you did not use. However although you did not travel with that airline ticket issued you at the end of your employment, your travel entitlement is considered used because you accepted the ticket. Accordingly, you are not eligible for LQA grant. Your transportation entitlement would have remained intact and you would have been eligible for LQA, had you, prior to its expiration, returned the unused airline ticket to the company.

An August 18, 2004, letter from Titan, submitted to the agency by the claimant, states:

> At the time of his voluntary resignation, [claimant] remained in Germany and did not return to the United States on an airline ticket purchased by Titan. No ticket was issued. However, [claimant] was eligible for transportation back to the United States at Titan's expense.

A September 13, 2004, USAREUR letter to the claimant responding to these documents states:

> The reason for the denial of your request has not changed. Although Ms. Rega, HR Director, Titan Corporation, confirmed that you were entitled to return transportation to the United States…further clarification received from Ms. Rega revealed that your return entitlement to the United States was valid for 90 days following your resignation. Accordingly, your return entitlement with Titan Corporation expired on 31 March 2003. Therefore, you had no valid return transportation entitlement when you were appointed to your current position on 3 November 2003.

The record shows that the claimant did not respond to rationale of this letter which was reiterated in the AAR.

Section 031.12 of the Department of State Standardized Regulations (DSSR) provides that living quarters allowances "may" be granted to employees recruited outside the United States, when:

- 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

- 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 . . .

Department of Defense Manual 1400.25-M, Subchapter 1250.5.1.1.2.1 states:

> Under the provisions of Section 031.12b of the DSSR…former military and civilian members shall be considered to have "substantially continuous employment" for up to 1 year, from the date of separation or when transportation entitlement is lost, or until the retired and/or separated member or employee uses any portion of the entitlement for Government transportation back to the United States whichever occurs first.

USAREUR Regulation 690-500-592(5)(a)(2) dated June 20, 2003, specifies that local hire appointments to positions in grades GS-9 and above must meet the following criteria:

- Before being appointed, the employee was recruited in the United States by the U.S. Government, including its armed forces; a U.S. firm, organization, or interest; or an international organization in which the U.S. Government takes part.
- The employee has been in substantially continuous employment by one of the employers listed above under conditions that provide for the employee's return transportation to the United States.

USAREUR Regulation 690-550-592(5)(a)(2) also indicates that former military members and civilian employees will be considered to have "substantially continuous employment" for up to one year after the date or separation; or when the initial transportation entitlement is lost or extended; or until the retired, separated member, or employee uses a substantial portion (50 percent or more) of the entitlement for Government transportation back to the United States.

USAREUR Regulation 690-550.592 defines a local hire as a person hired to fill a position who is physically residing in the country in which the position is located or in any other country outside the United States, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the former Canal Zone, or a possession of the United States. Local hires include but are not limited to locally separated military personnel; employees of a U.S. firm, organization, or interest; and employees of international organizations in which the U.S. Government participates. The regulations define a U.S. hire as a person who permanently resided in the United States, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the former Canal Zone, or a possession of the United States from the time he/she applied for employment until and including the date he or she accepted a formal job offer. The residence must have been for at least one year immediately before accepting a formal job offer.

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 resigned from Titan Corporation on December 31, 2002, and his transportation agreement entitling his return to the United States expired 90 days later on March 31, 2003. His "period of substantially continuous service" expired on March 31, 2003, and he was not appointed to a civilian position with the United States Government until November 3, 2003. Therefore, the claimant is not entitled to an LQA. The Department of the Army's decision of August 3, 2004, 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.