

Date: December 10, 2002

Matter of: [name]

File Number: 02-0034

OPM Contact: Deborah Y. McKissick

The claimant is a [position], employed with the Department of the Army, Department of Defense (DoD) in Mannheim, Germany. He is requesting living quarters allowance (LQA) for his privately owned quarters (POQ) located in Grainau, Germany. The Office of Personnel Management (OPM) received the claim on July 12, 2002, and the agency administrative report on October 9, 2002. For the reasons discussed herein, the claim is denied.

The claimant stated that his spouse rented property in Grainau, Germany with the option to buy contingent on his getting orders to Germany. After the claimant was assigned to Germany, he communicated with a representative from the servicing Civilian Personnel Operations Center (CPOC) regarding his desire to purchase the rental property. In an e-mail dated August 7, 2001, a CPOC representative states that the claimant would be authorized to receive his maximum amount for LQA and would receive only 50% of the actual expenses. The claimant bought the property in late September 2001.

The claimant filed his initial request for POQ on October 28, 2001. In mid-January 2001, an agency representative determined that the request was incomplete and instructed the claimant to refile his claim. The second request for POQ was filed in late January 2002. After the Civilian Personnel Directorate (CPD) contacted the Civilian Personnel Advisory Center (CPAC), the claimant was instructed on March 19, 2002, to refile for the geographical area of Heidelberg. The CPD's denial of the third request for POQ, filed on April 17, 2002, was based on DSSR, Section 132.11 (ref. b.). The claimant stated that (on the weekends) he commutes to Grainau, which is near Garmisch.

The agency administrative report states that the claimant "meets all the basic regulatory requirements for grant of LQA"; however, his "post of assignment is approximately 272 miles away from the location of his POQ." The agency referenced DSSR, Section 031.12 and Section 132.44, to substantiate their understanding that "the concept of post is a significant factor in LQA eligibility determinations."

The agency administrative report provided the definition of post as defined in the DSSR. DSSR, Section 040h, defines post as a "place designated as the official station of the

employee, regardless of whether he/she is detailed elsewhere or resides at another place with the authorization of approval of the head of his/her agency.” The claimant’s assignment post, Mannheim, and his residence near Garmisch are listed as separate posts with separate rates of LQA under DSSR, Section 920.

In the agency administrative report, the agency confirms that the claimant was erroneously informed about the LQA for his POQ eligibility. The agency referenced title 28, United States Code, Section 2860, which absolves the government of any responsibility for misstatements or unauthorized acts of its agents.

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, under regulations prescribed by the President, that 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, and payment of, 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 DoD has issued further implementing regulations through its requirements for DoD civilian employment overseas, DoD 1400.25-M, CPM 592.

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. 378 (1979), *OPM Decision S9700047* (1997).

OPM does not conduct adversary hearings, but settles claims on the basis of the evidence submitted by the claimant and the written record submitted by the government agency involved in the claim. 5 CFR 178.105; *Matter of John B. Tucker*, B-215346, March 29, 1985. Moreover, the burden of proof is on the claimant to prove the liability of the government and his or her right to payment. 5 CFR 178.105; *Matter of Jones and Short*, B-205282, June 15, 1982. Thus, 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. In view of the language in the applicable statutes and regulations, as previously noted, we do not find that the agency’s actions were arbitrary or capricious. Therefore, the claimant is not entitled to receive POQ. 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.