

Date: February 14, 2006

Matter of: [name]

File Number: 04-0019

OPM Contact: Robert D. Hendler

The claimant is a retired United States (U.S.) military member hired locally overseas who is requesting reconsideration of his agency's decision regarding his entitlement to receive living quarters allowance (LQA), separate maintenance allowance (SMA), and retroactive payments for those allowances if they are granted. We received the claim on March 24, 2004, and the agency administrative report on June 24, 2004. For the reasons discussed herein, the claim is denied.

The claimant retired from active military service effective February 28, 1998, while he was stationed overseas. The claimant submitted the first page of an employment agreement dated June 8, 2002, the first page of an employment agreement dated June 14, 2001, and the first nine pages of an employment agreement dated June 9, 1998. The claimant also submitted a document entitled "Current Employee-Local Hire Questionnaire for Living Quarters Allowance," which was signed by the claimant on August 31, 2003. It included employment information showing that the claimant worked for Brown and Root Services, Service Employees International, Inc., from June 8, 1998, until January 4, 2003, and for U.S. Army, Europe (USAREUR) from January 13, 2003, to the present.

On January 13, 2003, the Department of the Army appointed him to the full-time permanent position of [GS-12 position], in Heidelberg, Germany. On December 17, 2003, the Department of the Army denied the claimant's request for an LQA because his situation did not meet the conditions outlined in USAREUR Regulation 690.500.592.5(a)(2), which states that LQA will be granted to local hire appointments in positions at the GS-9 level and above, provided both of the eligibility criteria below are met:

- Before being appointed, the employee was recruited in the United States by the United States 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 above under conditions that provided for the employee's return transportation to the United States.

The agency wrote that the claimant did not qualify for LQA based on his civilian employment contract with Brown and Root Services, Service Employees International, Inc. The claimant's contract identified that he may terminate his employment at any time, subject to loss of compensation and incentives. The anticipated duration of the claimant's assignment was 12 months. Early termination of the contract by the employee was subject to loss of compensation and incentives. The most recent contract was effective June 8, 2002, and the claimant terminated the contract in January 2003 to accept civilian employment with the U.S. Army. This was approximately five months before the end of the employment contract. Further, the claimant submitted a copy of an airline ticket and itinerary for airline transportation purchased through Kellogg, Brown and Root for flights on January 7, 2003, to Montgomery, Alabama. Therefore, the agency stated that claimant no longer had a transportation agreement on January 13, 2003, his entrance on duty date with the U.S. Army.

The agency administrative report indicated that the claimant did not qualify for LQA based on his military entitlement. He lost his initial transportation entitlement on February 28, 1999, which was one year after his military retirement. The agency stated that since the claimant was not eligible for LQA, he was also not eligible for SMA.

Section 031.12 of the Department of State Standardized Regulations (DSSR) provides that LQA "may" be granted to employees recruited outside the U.S. , 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 . . .

In addition to the previously discussed requirements, USAREUR Regulation 690-500-592(5)(a)(2) indicates that former military members and civilian employees will be considered to have "substantially continuous employment" for up to one year after the date of 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. Non-appropriated fund (NAF) employment will be considered in determining substantially continuous employment.

USAREUR Regulation 690-500.592 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 U.S. , the Commonwealth of Puerto Rico, the Northern Mariana Islands, the former Canal Zone, or a possession of the U.S. 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 claimant asserts that SMA eligibility is not linked to LQA eligibility. However, Section 031.2 of the DSSR provides that other cost of living allowances (separate maintenance allowances, etc.) “may” be granted subject to exceptions contained in the foregoing chapters, only to those employees who are eligible for quarters allowance under Section 031.1. SMA is defined as an allowance to assist an employee who is compelled by reason of dangerous, notably unhealthful, or excessively adverse living conditions at the post of assignment in a foreign area, or for the convenience of the Government, to meet the additional expense of maintaining family members elsewhere than at such post.

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, 1998. His “period of substantially continuous service” expired on February 28, 1999, and he was not appointed to a civilian position with the U.S. Army until January 13, 2003. He was appointed as a “local hire” as defined in USAREUR Regulation 690-500-592. Early termination of the June 9, 2002, employment agreement by the claimant resulted in a loss of compensation and incentives, including his transportation entitlement. Therefore, the claimant is not eligible for LQA. Since he is not eligible for LQA, he is also not eligible for SMA. The Department of the Army's decision of December 17, 2003, regarding the claimant's lack of eligibility for LQA and SMA is not arbitrary, capricious, or unreasonable. Accordingly, the claim for an LQA and SMA 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.