

Date: March 16, 2006
Matter of: [name]
File Number: 06-0009
OPM Contact: Robert D. Hendler

The claimant requests the Office of Personnel Management (OPM) reconsider her agency's decision regarding her entitlement to receive a living quarters allowance (LQA). Although the claimant did not specify a claim period, we assume it is from March 6, 2005, when the claimant was appointed to her position with the Defense Security Cooperation Agency (DSCA), George C. Marshall Center (also identified in the record as United States European Command, George C. Marshall European Center for Security Studies), to November 18, 2005, when the agency reports that she was granted an LQA based on a change in the governing regulations. We received the claim on December 2, 2005, and the claim administrative report on February 3, 2006. For the reasons discussed herein, the claim is denied.

The claimant was employed by the contracting firm of Kellog, Brown, and Root Services, Inc. (KBR) in Kuwait. While physically residing in Kuwait, she applied for [position] with the DSCA in Garmisch, Germany. The position was identified as hard-to-fill for the purpose of authorizing LQA. On December 16, 2004, she returned to the United States (U.S.) for 30 days of leave using a round-trip airline ticket that she had purchased. While in the U.S., she was offered and accepted the Department of the Army position. She decided not to return to Kuwait and resigned from her position at KBR effective January 13, 2005. KBR subsequently reimbursed her for the airline ticket. She entered on duty with the Department of the Army on March 6, 2005.

The claimant's initial request for LQA was denied, as was a subsequent appeal to the European Region Civilian Personnel Operations Center, Department of the Army. The agency denied the appeal on the basis that the claimant applied for the position in question while living and working in Kuwait and thus could not be considered a U.S. hire. Further, on the date of her appointment, the agency reported that the claimant no longer had a valid return transportation agreement with her previous employer (in her case, KBR) as required for local hires. These conditions were set forth by United States Army Europe (USAREUR) Regulation 690-500.592, dated June 20, 2003, which was the governing regulation on the date of the claimant's hire. This regulation was revised on November 18, 2005. The revised regulation removed the one-year residency requirement for U.S. hires and the claimant was granted an LQA. However, the

agency did not grant retroactive adjustments for employees who were deemed eligible for LQA as of November 18, 2005.

USAREUR Regulation 690-500-592(5)(b) dated June 20, 2003, specifies that LQA will be granted for employees selected for hard-to-fill positions when they are either of the following:

- (1) Local hires in grades GS-08 (or equivalent), WG-10, WL-08, WS-04, or below.
- (2) Hired from the United States for identified hard-to-fill positions at any grade and do not meet the one-year residency requirement. These employees must have established permanent residency in the United States.

A U.S. hire is defined 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 or she applied for employment* (emphasis added) until and including the date he or she accepted a formal job offer.

USAREUR Regulation 690-500-592(5)(b) also indicates that the basic eligibility criteria of Department of State Standardized Regulations (DSSR), section 031.12, must be met. These provide 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 U.S. Government; and
- prior to appointment, the employee was recruited in the U.S....by...(1)the U.S. Government, including its Armed Forces; (2) a U.S. 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 U.S....

DoD Manual 1400.25-M, subchapter 1250.5.1.1.2.1, specifies that, under DSSR, section 031.12(b), above, 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 U.S., *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. In this case, under USAREUR Regulation 690-500-592(5)(b), the claimant was not a U.S. hire because she was residing in Kuwait when she applied for the position in question. Further, at the time of her appointment, she did not meet the criteria for "substantially continuous employment" as that term is defined in DoD Manual 1400.25-M for local hires (i.e., employees recruited outside the U.S.) in that she used her transportation entitlement back to the U.S. when she was reimbursed for her airline ticket by KBR after her resignation from that firm. Therefore, the claimant is not entitled to an LQA from March 6, 2005, to November 18, 2005. The Department of the Army's decision of August 1, 2005, 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 U.S. Court.