

Compensation Claim Decision
Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: United States Marine Corps
Camp Smedley D. Butler
Okinawa, Japan

Claim: Request for Living Quarters Allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 07-0042

/s/ for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability

3/11/2008

Date

The claimant is retired from the United States military and currently employed in a [position] with the U.S. Marine Corps at Camp Butler in Okinawa, Japan. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's decision disallowing him a living quarters allowance (LQA). We received the claim request on March 9, 2007, and the claim administrative report after October 12, 2007. For the reasons discussed herein, the claim is denied.

The claimant separated from military service on October 31, 2004, while stationed in Okinawa. He immediately began working for a civilian contractor in Okinawa and subsequently applied for [position], at Camp Butler. He was selected for the position and entered on duty May 2, 2005. The claimant believes he is eligible to receive LQA because he accepted the Federal position within one year of retiring from active duty and thus should be considered to have been continuously employed since his retirement. He acknowledges that he was physically residing in Okinawa when he accepted the position, but argues that he should not be considered a local hire because he was recruited by the military in the United States. He claims the position he accepted had always included LQA and most of the previous employees had retired from active duty, remained on Okinawa and accepted a position with LQA benefits.

On January 31, 2007, the U.S. Marine Corps denied the claimant's request for LQA because he was a local hire, was not receiving LQA prior to his appointment to the position, and was past the one-year eligibility limitation for "substantially continuous employment" as defined in the Department of State Standardized Regulations (DSSR), thus rendering him ineligible for LQA.

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 in the place to which the quarters allowance applies at the time of receipt thereof shall be fairly attributable to his/her 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; an international organization in which the United States Government participates; or a foreign government and had been in substantially continuous employment by such employer under conditions which provided for his/her return transportation to the United States. . .

This provides the basic conditions for LQA *eligibility* for employees recruited outside the United States. However, it does not mandate LQA *entitlement* upon meeting these conditions.

Department of Defense (DoD) Manual 1400.25-M, subchapters 1250.4.1, 4.2, and 4.3, set forth the DOD LQA delegations and policy. Of note in this case are subchapters 1250.4.3 and 4.4:

SC1250.4.3. Overseas allowances and differentials (except the post allowance) are not automatic salary supplements, nor are they entitlements. They are specifically intended to be recruitment incentives for U.S. citizen civilian employees living in the United States to accept Federal employment in a foreign area. If a person is already living in the foreign area, that inducement is normally unnecessary. Individuals shall not automatically be granted these benefits simply because they meet eligibility requirements.

SC1250.4.4. Individuals authorized to grant overseas allowances and differentials shall consider the recruitment need, along with the expense the activity or employing agency will incur, prior to approval.

This regulatory guidance is amplified by United States Marine Corps Policy Letter 3-02 establishing local procedures for the granting of LQA. It reiterates that LQA is not an automatic entitlement but instead is to be used as recruitment incentive for personnel residing in the United States to accept Federal employment in a foreign area, and it is normally deemed to be an unnecessary inducement for persons already living in the overseas area in question. It also sets forth the policy that LQA not be granted for any position if locally qualified applicants are available based on the premise that LQA will not be granted for such applicants, except employees above certain grade levels who are already receiving LQA and are offered additional overseas tours may continue to receive LQA without any further showing of recruitment necessity.

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 the circumstances justify such action, and the agency's action will not be questioned unless it is determined 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, the claimant was clearly a local hire when he applied for and was selected for the position. Whether he was eligible for LQA is immaterial as the agency acted entirely within its authority, discretion, and stated policy by denying him LQA as a local hire. This authority is discretionary on the part of the employing agency and does not extend to OPM. Accordingly, the claim for an LQA is denied.

The claimant's assertion that other previous employees with similar circumstances had received LQAs is not germane to his claim, as LQA determinations are made case-by-case based on recruitment needs. LQA benefits do not automatically convey with particular positions based on prior determinations. We note, however, the agency submitted documentation that the claimant's immediate predecessor in the position received LQA because he was a United States hire. The claimant asks whether he would be "more eligible" for LQA if he had commenced Federal service immediately after his military retirement. As eligibility for LQA does not confer entitlement to same, and LQA is deemed unnecessary for local hires, this would have been immaterial to the LQA determination.

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.