

Date: December 8, 2003  
Claimant: [name]  
File Number: 03-0020  
OPM Contact; Deborah Y. McKissick

The claimant is a former military member hired locally overseas who is requesting reconsideration of his agency's decision regarding his entitlement to receive a living quarters allowance (LQA) for the period of November 18, 2002, through June 30, 2003. The Office of Personnel Management (OPM) accepted the claim for the LQA on February 26, 2003, and the agency provided information, dated June 27, 2003, which we received on July 11, 2003. For the reasons discussed herein, the claim is denied.

On November 4, 2002, the claimant accepted a [position] with the Headquarters, United States Army Europe and Seventh Army (USAREUR), Office of the Deputy Chief of Staff, G4, Heidelberg, Germany, effective on November 18, 2002. The claimant was on active military duty in Heidelberg, Germany, when he accepted the Federal civilian position. The Civilian Personnel office (CPO) in Heidelberg, Germany, informed the claimant that he was a local hire. The claimant retired from active duty with the U. S. Army on November 30, 2002, while stationed in Germany.

The agency administrative report states that "it is the Headquarters, USAREUR position that the request for grant of LQA was properly disapproved and that there is no authority to allow it under this claim." Exercising the discretionary authority under the DSSR and following DoD regulatory guidance and requirements, USAREUR implemented LQA regulation AER 690-500.592 in March 1999. Subsequently, this regulation was first revised in November 2001. At the time of the claimant's appointment in November 2002, the second revision of AER 690-500.592, dated 17 October 2002, was applicable. Paragraph 5.b. of this regulation restricts payment of LQA to only those local hires that are selected for pre-identified 'hard-to-fill' positions and meet the eligibility criteria of DSSR, section 031.12b. In accordance with the explanation of terms under paragraph 3.b. of AER 690-500.592, the term 'local hire' includes, but is not restricted to, military members who separate from military service in the overseas area. As mentioned, this discretion is legally vested with the agency."

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 that, under regulations prescribed by the President, 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 Department of State Standardized Regulations (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 Department of Defense (DoD) has issued further implementing regulations through its requirements for DoD civilian employment overseas, DoD 1400.25-M, CPM 592.

The DSSR, Section 031.12, states, “Quarters allowances prescribed in Chapter 100 *may* be granted to employees recruited outside the United States, provided that: (a) 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. . . .” (Emphasis added). As a result of his military assignment, the claimant was on active duty in Germany, when he applied for the Federal civilian position in Germany.

The Civilian Personnel Manual of the Department of Defense, DoD Regulation 1400.25-M, Subchapter 1250, Overseas Allowances and Differentials, SC 1250.3.7., dated December 1996, states that a U.S. Hire is a “person who *resided permanently in the United States . . .* of a possession of United States from the time he or she applied for employment until and including the date he or she accepted a formal offer of employment.” (Emphasis added). The definition of a U.S. Hire does not describe the claimant’s situation since he applied for the civilian position while living and working in Germany.

DoD Regulation 1400.25-M, Subchapter 1250, E,1,a(2), states, “Under the provisions of Section 031.12b of the DSSR (reference(a)), 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, which occurs first.” The claimant has “substantially continuous employment” because he retired from the military on November 30, 2002, and his appointment to the Federal civilian position was effective on November 18, 2002.

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).

The DoD regulation specifies further that, except in unusual circumstances, an LQA is to be used as an incentive to persuade employees in the United States to apply for overseas positions. Subchapter 1-1b of DOD 1400.25-M, CPM 592 provides in relevant part:

The foreign post differential and the foreign area allowances (except the post allowance) are not automatic salary supplements attached to all positions in the foreign area. They are intended to be recruitment and/or retention 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 in the foreign area, that inducement normally is unnecessary. The specific circumstances under which an employee who is hired in a foreign area *may* be granted the allowances provided in section 031.12 of the DSSR, as supplemented by this chapter. (Emphasis added).

In view of the permissive rather than mandatory language in the applicable statutes and regulations, as noted above, the degree of discretion that heads of agencies have in determining whether to authorize these allowances, and the facts of this claim, we cannot say the agency's application of the DoD regulation in this case was arbitrary or capricious.

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. The claimant and the agency agree that the claimant was offered, and accepted, the position as a local hire at the time of his appointment to the civilian position. At the time the claimant was hired, management did not grant an LQA as an incentive for the position. 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.