

Date: July 3, 2003
Matter of: [name]
File Number: 02-0041
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). We received the claim on September 12, 2002, the agency administrative report on February 19, 2003, and the claimant's response to the report on April 1, 2003. For the reasons discussed herein, the claim is denied.

The claimant retired from active duty with the U.S. Navy on July 15, 1999, while he was stationed at the U.S. Naval Forces Europe London, England (CINCUSNAVEUR). On July 12, 2000, the claimant was offered employment as a local hire for a [position]. He worked as a civilian local hire from July 17, 2000, until his resignation on December 15, 2000. The claimant resided in the United States from December 31, 2000 until he returned to England on May 2, 2001, after accepting an offer of employment as a local hire on May 1, 2001, with the CINCUSNAVEUR. During his first and second civilian appointments in England, the claimant requested LQA and the agency disapproved both requests.

The agency administrative report stated that the agency decided that the claimant's local hire appointment on May 7, 2001, does not meet the eligibility requirements to receive LQA. The decision was based on the Department of State Standardized Regulations (DSSR) Section 013 and the Department of Defense (DoD) Directive 1400.25-M, Subchapter 1250. The report stated that the claimant applied for, and was appointed to, a [position] that is normally filled by candidates residing in the local commuting area. The agency determined that a recruitment incentive was not needed to fill the position.

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.

Section 031.12 of the DSSR provides that quarters allowances “may” be granted to employees recruited outside the United States, when:

- a. 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
- b. prior to appointment, the employee was recruited in the United States . . . by the United States Government, including its armed forces, . . . and has been in substantially continuous employment by such employer under conditions which provided for his/her return transportation to the United States . . . *

The DSSR further provides that the head of the agency upon determination that unusual circumstances in an individual case justify such action “may” waive Section 031.12b. Thus, the DSSR authorizes, but does not require, agency officials to grant an LQA when an employee fulfills the basic eligibility requirements in the DSSR.

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

* Subchapter 2-2b(1) of DoD 1400.25-M, CPM 592, provides in relevant part that, under section 031.12b of the DSSR, former military and civilian members will be considered to have “substantially continuous employment” for one year from the date of separation.

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.