

Date: September 16, 2004

Matter of: [name]

File Number: 03-0032

OPM Contact: Robert D. Hendler

The claimant is employed as [position] in Seoul, Republic of Korea, who is requesting reconsideration of his agency's decision regarding his entitlement to receive a higher living quarters allowance (LQA). We received the claim on August 20, 2003 and the agency administrative report on April 8, 2004. For the reasons discussed herein, the claim is denied.

The claimant purchased privately owned quarters (POQ) in Seoul on August 29, 2002. He indicated that he paid 418 million won for the property. Correspondence contained in the agency administrative report indicated that one purchase price (418 million won) was reported to the United States Government while another purchase price (78 million won) was reported to the Korean tax office. Two Housing Sales Contract Papers were prepared: one reflecting 418 million won; another reflecting 78 million won. The claimant requested LQA based on the 418 million won. This was denied and the Civilian Personnel Advisory Center (CPAC) based the claimant's LQA entitlement on the lower of the two purchase prices. When the claimant disagreed with this, the agency advised the claimant on several occasions to reconcile the documents regarding the purchase price of his property.

The agency administrative report stated that the employees filing LQA claims for POQ must provide the following documents to the CPAC:

- A copy of the bill of sale for verification of the purchase price;
- A receipt showing payment of the full purchase price;
- The Registration Tax Receipt;
- The Korean property registration showing proof of ownership; and
- The Acquisition Tax Receipt.

This provides evidence to ensure that government funds are expended in an appropriate manner and to preclude fraudulent claims.

The agency advised the claimant that he could do one of the following in an effort to obtain a higher LQA:

- Have the Korean tax office change the tax document so it matches the higher purchase price on the Housing Sales Contract Paper;
- Have the Korean tax office certify their awareness of the differences in the purchase prices.

The claimant could then submit the documentation to the CPAC so that his LQA could be adjusted.

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 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, Subchapter 1250.

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 . . . *

DOD 1400.25-M, Subchapter 1250, Overseas Allowances and Differentials, SC 1250.5.1.1.4 provides that: “The annual rent payable for Personally Owned Quarters is based on the purchase price or appraised value of the property, converted to US dollars at the exchange rate in effect at the time of purchase.”

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 claims settlement process does not provide for challenging the agency's records keeping or other processes as addressed by the claimant in his rationale. In view of the permissive rather than mandatory language in the applicable statutes and regulations, 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 given the need to account for the expenditure of appropriated funds. 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 agency has determined that a LQA will be authorized at the lower rate when discrepancies exist between two purchase documents for POQ's. Further, the agency advised the claimant that when he resolves the discrepancy between the two purchase documents, he should contact the CPAC so that the LQA can be adjusted accordingly.

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.