



United States
**Office of
Personnel Management**

Washington, DC 20415

Date: December 22, 2004

Matter of: [name]

File Number: 03-0006

OPM Contact: Robert D. Hendler

The claimant is employed by the Department of the Army as [position] in Wiesbaden, Germany. He requests reconsideration of his agency's denial regarding his entitlement to receive a one month advance living quarters allowance (LQA). We received the claim on November 1, 2002. By letter dated January 16, 2003, we requested the agency administrative report and received it on June 16, 2004. For the reasons discussed herein, the claim is denied.

The claimant signed a contract in early March 2002, for a rental property in Germany. The effective date of the contract was April 1, 2002. The claimant indicated that his landlord required the first month rent and utility payment on or before March 15, 2002. He stated he paid the April 2002, payment for rent and utilities on March 9, 2002. The claimant writes: "My original LQA advance was for a one-month advance in order to pay my April rent and utilities payment on or before the date established by the landlord. The landlord's requirement for payment of rent almost 30 days in advance of the normal due date should be considered a valid reason...."

The claimant describes the treatment of his claim by staff members of the Department of the Army's Civilian Personnel Operations Center in Europe to be "prohibited personnel practices" as defined "in Section 2302, Title 5, United States Code U.S.C." because they refused to take action on the Standard Form 1199A "request for LQA" that he originally submitted in March 2002. He also states that the action taken on his LQA and salary advance requests constitute unjustified or unwarranted personnel actions as defined in "5 CFR Chapter 1, Paragraph 550.804."

The agency administrative report stated that advance LQA are paid to employees when the rental contract specifies that rental payments for three or more months must be paid in advance. German law prohibits landowners from charging advance rent. The custom in Germany is to pay the rent on or about the first of the month for that month of occupancy.

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 (DSSR) 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. The Department of the Army has issued further implementing regulations for its employees in Europe in its Civilian Personnel Living Quarters Allowance, USAREUR Regulation 690-500-592.

Section 113.3(a) of the DSSR provides that advance payment of LQA may be made in localities where local custom necessitates such advance payments for periods of at least three months and where the individual lessor requires the customary advance payment of rent. Section 113.3(b) of the DSSR indicates that at posts which require initial excessive rental expenses, employees may receive an advance of the LQA not to exceed three months of the annual rate of payment.

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 decide when advance LQAs are necessary. 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).

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 DSSR 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. Given the foregoing, we also find that the agency's actions are not unwarranted or unjustified as defined in 5 CFR 550.804. Therefore, the claim is denied.

OPM's authority to adjudicate compensation and leave claims flows from 31 U.S.C. §3702. The authority in section 3702 is narrow and limited to adjudication of compensation and leave claims. Section 3702 does not include any authority to investigate the allegation of prohibited personnel practices (5 U.S.C. § 2302) raised by the claimant. Such matters fall under the jurisdiction of the Office of Special Counsel (5 U.S.C. § 1212).

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.