



United States
**Office of
Personnel Management**

Washington, DC 20415

Date: JUN 15 2005

Matter of: [name]

File Number: 04-0042

OPM Contact: Robert D. Hendler

The claimant is a retired United States military member hired locally overseas who requested reconsideration of his agency's decision regarding his entitlement to receive a living quarters allowance (LQA) effective July 1, 2003. We received the claim on June 3, 2004, the agency administrative report on November 9, 2004, and the claimant's comments on that report on December 2, 2004. For the reasons discussed herein, the claim is denied.

The claimant was appointed to a 20 hour per week non-appropriated funds (NAF) civilian position in Heidelberg, Germany with the Department of the Army effective May 19, 2000. He retired from active military service effective June 30, 2000, while he was overseas. After his retirement, the claimant reported that he was converted to full-time employment status. On February 11, 2002, the Department of the Army appointed him to the full-time permanent appropriated funds [GS-6 position] in Manheim, Germany. The claimant wrote that he was not eligible for LQA at the time he was appointed. However, he indicated that he became eligible when the Department of the Army revised United States Army Europe (USAREUR) Regulation 690-500.592 on June 20, 2003. Therefore, he submitted his request for LQA. He also took issue with what he described as the poor and confusing wording of the regulations governing LQAs.

On April 19, 2004, the Department of the Army denied the claimant's request for an LQA because his situation did not meet the definition of "substantially continuous service" outlined in Department of Defense (DoD) Manual, 1400.25-M, subchapter 1250.5.1.1.2.1 and the revised USAREUR Regulation 690-500.592.5(a)(2). The agency wrote that the claimant did not qualify for LQA because his NAF employment did not contain a return transportation agreement. Additionally, the agency wrote that the claimant did not qualify for LQA because he was appointed to the full-time permanent [position] on February 11, 2002, which was after June 30, 2001, the date that his initial transportation entitlement was extended. The agency also wrote that the claimant did not meet the grade level requirements outlined in revised USAREUR Regulation 690-500.592.

The agency administrative report further supports the agency's denial to the claimant. The report indicates that at the time of the claimant's appointment to the appropriated funds position on February 11, 2002, he was not eligible to receive LQA because his interim full-time non-appropriated fund employment from April 11, 2001, until February 10, 2002, did not confer return transportation entitlements to the United States and therefore, could not be considered towards the "substantially continuous employment" period. The report states that former military members will be considered to have "substantially continuous employment" for up to one year from the date of separation or when an employee uses any portion of the entitlement for Government transportation back to the United States, whichever occurs first. The claimant's "period of substantially continuous service" expired on June 30, 2001, his NAP appointment did not confer return transportation entitlements to the United States, and he was not appointed to a civilian appropriate funds position with the United States Government until February 11, 2002.

Section 031.12 of the Department of State Standardized Regulations (DSSR) provides that living quarters allowances "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 applied at the time of receipt shall be fairly attributable to his 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.... and has been in substantially continuous employment by such employer under conditions which provided for his/her return transportation to the United States ...

DoD Manual, 1400.25-M, subchapter 1250.5.1.1.2.1, specifies that, under DSSR section 031.12(b), service members and civilian employees shall be considered to have substantially continuous employment for up to one year from the date of separation or when transportation entitlement is lost, or until the retired or separated member uses any portion of the entitlement for government transportation back to the United States, *whichever occurs first*.

USAREUR Regulation 690-500-592(5)(a)(2) dated June 20, 2003 specifies that local hire appointments to positions in grades GS-9 and above must meet the following criteria:

- Before being appointed, the employee was recruited in the United States by the U.S. Government, including its armed forces; a U.S. firm, organization, or interest; or an international organization in which the U.S. Government takes part.
- The employee has been in substantially continuous employment by one of the employers listed above under conditions that provide for the employee's return transportation to the United States.

USAREUR Regulation 690-500-592(5)(a)(2) also indicates that former military members and civilian employees will be considered to have "substantially continuous employment" for up to one year after the date of separation; or when the initial transportation entitlement

is lost or extended; or until the retired, separated member, or employee uses a substantial portion (50 percent or more) of the entitlement for Government transportation back to the United States. Non-appropriated fund (NAF) employment will be considered in determining substantially continuous employment.

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).

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. The claimant's retirement from military service occurred on June 30, 2000. His NAF employment did not provide for the claimant's return transportation to the United States. His "period of substantially continuous service" expired on June 30, 2001 and he was not appointed to a civilian appropriated funds position with the United States Government until February 11, 2002. Therefore, the claimant is not entitled to LQA. The Department of the Army's decision of April 19, 2004 regarding the claimant's entitlement to an LQA is not arbitrary, capricious, or unreasonable. Accordingly, the claim for an LQA is denied.

OPM's authority to adjudicate compensation and leave claims flows from 5 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 respond to concerns regarding the clarity of compensation regulations.

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.