

Date: February 3, 2006

Matter of: [name]

File Number: 05-0017

OPM Contact; Robert D. Hendler

The claimant is a former United States military member hired locally overseas by Department of the Navy. He is requesting that the U.S. Office of Personnel Management (OPM) reconsider his agency's decision regarding his entitlement to receive a living quarters allowance (LQA). We received the claim request on May 9, 2005. The claim did not include a copy of the agency denial which is required before OPM will docket and process a compensation or leave claim (see 5 CFR 178.102(a)(3)). The request included an advisory opinion from Navy's Office of Civilian Human Resources (OCHR) to his employing agency component, the Naval Criminal Investigative Service (NCIS), dated April 5, 2005, advising that NCIS was correct in disallowing LQA to the claimant. After contacting OCHR, we were informed in an e-mail dated June 1, 2005, that the advisory to the Deputy Assistant Director for Personnel Operations and Services, NCIS constituted the final agency decision on the matter. Based on that e-mail, we accepted the claim on June 15, 2005, and requested the agency administrative report on the same date. We received the agency administrative report on September 29, 2005, and additional information on January 10, 2006. For the reasons discussed herein, the claim is denied.

The NCIS advisory request of January 10, 2005, provided by the claimant states:

[Claimant] was separated from the military service in Japan on 30 October 1998. He was appointed by COMFLEACTS Yokosuka (Child Development Center) on 07 June 1999. His initial SF-50, enclosure (2), noted that he was not eligible for a transportation agreement or allowances (except for post allowance). It appears that his local hire designation at that time was based on the fact that the NAF position was not one for which non-local recruitment was necessary. Although that particular position did not provide for return travel benefits, [claimant] was still within one year of his military separation, with return travel benefits to the states, when he was hired as an NCIS employee on 13 September 1999. The SF-50 prepared by the servicing HRSC at that time, enclosure (3), was silent on the issue of entitlement to a transportation agreement or overseas allowances. Further, [claimant] maintains that his entitlement to overseas allowances was not discussed with him at that time....Per the JTR, in order for an overseas local hire to be eligible to execute a transportation agreement, the position in question must be one for which out-of-country

recruitment normally is undertaken....A search of [claimant's] Official Personnel Folder did not reveal a copy of the actual vacancy announcement for the position for which he was hired, an Investigations Assistant. However, as a general rule, vacancy announcements for Investigations Assistants throughout the NCIS system are not limited to those within the immediate commuting area.

The report discussed the fact that the claimant's permanent residence was California, Kentucky. It included a memorandum to OCHR requesting "to receive entitlements to a Living Quarters Allowance." In the background information, the claimant stated:

I interviewed for the NCIS job in June and was notified of selection in July or August and accordingly, did not pursue shipment of household goods. I believed that because the hiring HRO was stateside and I had not used my return rights, that I would continue to maintain my return rights and would receive my LQA and associated entitlements.

The claimant stated that he:

Communicated desire for LQA immediately upon notification of selection...to my prospective supervisor, [name]. [He] was helpful...Continued to speak to [him] and various emails were sent between him and HQ. The end result (based on verbal communication from [prospective supervisor]) was HQ said I was eligible except the position for which I was hired was "not a hard [to] fill." At no time did the professional administrative staff step in to assist me...In about June 2004...I decided I should research the requirements myself. My research clearly indicated that my agency (at least locally) had no idea of the requirements and in fact it appeared to me very clearly that I was entitled and should have been awarded LQA entitlements.

The claimant provided his reasoning for his "entitlement." That is, he was appointed to his NCIS position without a break in service from the Child Development Center within one year of his military separation; a quotation from an NCIS e-mail stated:

The position must be one for which out-of-country recruitment normally is undertaken....We...are unable to obtain a copy of the actual vacancy announcement for which you were originally appointed. I cannot make a definitive statement that all Investigative Assistants overseas are hired locally; thus, *my feeling is that, absent something specific to the contrary, you meet this specific requirement with regard to eligibility*[,]

and he had a bona fide residence in the United States. The claimant also stated that other employees who received LQA were employed under circumstances he viewed as similar to his own.

The claimant stated that his "appeal" was based on the following:

1. I was entitled to receive LQA and any detrimental impact such as it being to [sic] late now...should be more than offset by the failure of my agency to have handled it correctly from the beginning.
2. It was never my intention to remain indefinitely in Japan. I have been very active in seeking jobs both in CONUS and OCONUS to include Washington DC. Therefore, LQA *should* have been an “incentive” for me to remain in Japan.
3. I believe that in view of the circumstances...that the failure of the government to assist me in this matter is tantamount to abandonment.

The claimant also quoted from a April 13, 2005, letter from his supervisor, [name]: “I have no doubt that if [claimant] had not been available in July 1999, a much wider search would have been conducted.”

Responding to the April 5, 2005, OCHR advisory to NCIS, the claimant disagreed with the OCHR statement: “We concur with the 1999 decision made by the Naval Criminal Investigative Service” since he stated that he never received a final NCIS decision on his request for LQA. He asserted that the statements made by the Deputy Assistant Director for Personnel Operations and Services, Naval Criminal Investigative Service, and [supervisor], should be the determining factors.

The agency administrative report cited the State Department Standardized Regulations (DSSR) and implementing Department of Defense (DoD) Regulations 1400.25-M, December 1996, for determining that the claimant was not eligible for LQA. The report indicates that the claimant met the eligibility requirement of “substantially continuous employment” in that he was hired by NCIS within on year of his separating from the military and was still eligible for return rights to the United States. Citing DoD 1400.25-M, SC 1250, the agency indicated that allowances and differentials, other than for post allowance, are not automatic salary supplements and are not entitlements:

They are specifically intended to be recruitment 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 living in the foreign area, that inducement is normally unnecessary. [Claimant’s] residence in Japan established him as a local hire in accordance with DoD 1400.25-M, SC 1250.

DoD 1400.25-M, SC 1250, authorizes payment of LQA for local hired employees who meet the eligibility requirement and it is determined LQA is required as an incentive to fill the vacant position. The actual vacancy announcement, selection certificate and other recruitment documentation are no longer available to ascertain official management intent on the issuance of LQA. However, based on the documentation submitted to this office, [claimant] was told on numerous occasions beginning immediately upon notification of selection of the position by NCIS management staff, the GS-06, Investigations Assistant, was not a “hard to fill” position and therefore the payment of LQA was not required as a recruitment incentive. Although [claimant] met the eligibility requirements for receipt of

LQA, the position did not warrant the payment of LQA in accordance with the DoD regulation.

Contrary to the claimant's assertions, LQA is not an entitlement. 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 LQA eligibility. 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.

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 applies at the time of receipt thereof shall be fairly attributable to his/her 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 had 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).

DoD Instruction 1400.25-M, SC1250.4.1 states that:

Overseas allowances and differentials (except the post allowance) are not automatic salary supplements; nor are they entitlements. They are specifically intended to be recruitment incentives for U.S. citizen civilian employees living in the United States to

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\* 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.

accept Federal employment in a foreign area. If a person is already living in the foreign area, that inducement is normally unnecessary.

The claim settlement process also does not permit us to consider the claimant's financial circumstances or rationale not based on the application of the DSSR and the agency's implementing regulations. These regulations do not permit us to speculate on what the supervisor's intent may have been at the time that the claimant was hired by NCIS or what the claimant believes that NCIS wishes to do at this point in time. The statements: "I cannot make a definitive statement that all Investigative Assistants overseas are hired locally" and "as a general rule, vacancy announcements for Investigative Assistants throughout the NCIS system are not limited to those within the local commuting area" cannot be construed as meaning the same as: "[T]he position in question must be one for which out-of-country recruitment normally is undertaken." While the claimant believes that he is entitled to LQA because he was not adequately assisted in obtaining LQA by agency staff, his receiving LQA should have been used as an incentive for him to remain in Japan, and that he has been abandoned by the Government, they are not valid regulatory bases upon which to grant LQA.

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, a position as a local hire at the time of his appointment. The written record does not show that he was placed in a position that met the defined hard-to-fill provisions required for granting an LQA. Therefore, the claimant did not fully meet eligibility for the granting of LQA at the time of his appointment. The written record; i.e., his appointment SF-50 effective September 13, 1999, is silent on LQA and no other written documentation has been proffered showing that an agency official authorized to approve LQA for the claimant at the time of his appointment ever did so as required by controlling regulations. These regulations do not permit us to consider or construe this lack of decision as a valid basis to grant LQA. Therefore, we must conclude that the claimant was offered, and accepted, a position where LQA was not authorized. Accordingly, the claim is denied.

We note that the claimant also requested that we "launch an investigation into the manner in which the OCHR...handled this case" and raised objections in his e-mails to this office that we had requested that office to provide us with the claim administrative report. As we informed the claimant, requests for claims administrative reports are routinely sent to the agency office that issued the claim denial since that office maintains the records related to the agency claim decision. The claims process provides the claimant with the opportunity to review and comment on that report. OPM functions as an independent third party, reviews the facts of each case, and renders an independent decision. OPM's authority to adjudicate compensation and leave claims flows from 31 U.S.C. §3702. The authority in §3702 is narrow and limited to adjudication of

compensation and leave claims. Section 3702 does not include any authority to investigate the claims settlement practices of other agencies.

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.