

Compensation Claim Decision
Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: USAG Stuttgart
[directorate]
ADCO Stuttgart
Stuttgart, Germany

Claim: Living Quarters Allowance

Agency decision: Denied

OPM decision: Denied

OPM contact: Robert D. Hendler

OPM file number: 06-0031

/s/ for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability

1/17/2007

Date

The claimant is a retired military member hired locally overseas, who is requesting reconsideration of his agency's decision regarding his eligibility to receive a living quarters allowance (LQA). We received his claim on March 14, 2006, and the agency administrative report (AAR) on June 8, 2006. For the reasons discussed herein, the claim is denied.

The claimant separated from his military position with the Department of the Navy on September 30, 2002, with the intention of remaining in Germany and obtaining Federal civilian employment as a GS-11 [position]. In order to meet the qualification requirements for this position, the claimant had to pursue additional education and meet licensure requirements. While on terminal military leave prior to his retirement, he was appointed to a part-time, non-appropriated fund position that did not provide him with LQA. The claimant and his family remained in Germany while he continued to work and go to school. He completed these requirements and was hired on December 12, 2005, as a [GS-11], with the understanding that he was not entitled to LQA. The claimant accepted the position, and shortly thereafter requested his eligibility be reviewed. The agency denied his request for LQA in a letter dated February 16, 2006.

The claimant does not dispute the facts as presented by the agency, but requests special consideration because of what he believes to be unique circumstances. He stated that the qualification requirements for a GS-11 [position] changed several times and it became necessary for him to obtain a masters degree and become licensed as a [profession] in order to qualify. By the time he completed these requirements, at what he described as considerable hardship to himself and his family, three years had elapsed since his retirement. The claimant stated that he has not used his return transportation entitlements as a military retiree.

The AAR stated that at the time the claimant was hired on December 12, 2005, he was informed the job offer did not include the payment of LQA. He was considered to be a "local hire" since he was living and working in Germany at the time of appointment and did not meet the Department of the Army's criteria allowing payment of LQA to certain local hires. Specifically, the agency stated he did not meet the definition of "substantially continuous employment" required by the Department of State Standardized Regulations (DSSR) section 031.12. To determine the claimant's eligibility for LQA, the agency used US Army Europe Regulations (USAEUR) 690-500-592, dated November 18, 2005, which states "former military members and civilian employees will be considered to meet DSSR, Section 031.12 eligibility requirements of 'substantial continuous employment' if they are appointed within one year after their separation or when the transportation entitlement is lost, whichever occurs first."

The Overseas Differentials and Allowances Act, Pub. L. 86-707, 74 Stat. 793, 794 (September 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, in DoD Manual 1400.25-M, Subchapter 1250. These regulations are supplemented by USAEUR Regulation 690-500.592, Civilian Personnel Living Quarters Allowance.

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 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. DoD Manual 1400.25-M, SC1250.4.1 states:

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 USAEUR Regulation 690-500-592, dated November 18, 2005, specifically states “former military members and civilian employees will be considered to meet DSSR, Section 031.12, eligibility requirements of ‘substantial continuous employment’ if they are appointed within one year after their separation or when the transportation entitlement is lost, whichever occurs first.”

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).

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. 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 was offered and accepted a position as a local hire at the time of his appointment. He had exceeded the one year requirement to be considered to have been "substantially continuously employed." The fact he had not used his return transportation entitlements as a military retiree was no longer a determining factor in extending his "substantially continuously employed" status. The claimant was not employed within one year of his retirement. Since this provision "occurred first," the fact that he had not used his transportation entitlement may not serve as a basis for granting LQA. 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.