

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

Claimant: [name]

Organization: [agency component]
Department of the Army
Kaiserslautern, Germany

Claim: Request for Living Quarters Allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 07-0002

/s/ for

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

8/20/2007

Date

The claimant is a former military member who retired from the U.S. Army in Germany on January 31, 2006, and was hired as a Department of the Army civilian employee overseas. At the time he initiated this claim, he occupied a Customs and Border Clearance Agent, GS-1801-7 position, with promotion potential to the GS-9 grade level, with the [agency component], Department of the Army (DA), Kaiserslautern, Germany (GE), with duty station in Ramstein, GE. The claimant requests reconsideration of his agency's decision concerning his eligibility for living quarters allowance (LQA) stemming from his reassignment to his current position. The U.S. Office of Personnel Management (OPM) received the compensation claim on September 20, 2006, and the complete agency administrative report (AAR) on March 27, 2007. For the reasons discussed herein, the claim is denied.

The record shows that the claimant was first appointed in GE effective January 23, 2006, to the position of Local Training Area/Range Technician, GS-303-7. Subsequently, effective May 28, 2006, he was competitively selected and reassigned to the GS-1801-7 position. The claimant states that although he was in GE when he was selected for the GS-1801-7 position, he reentered the military in January 1989 in Stuttgart, GE at Robinson Barracks Recruiting Center. Consequently, it is his understanding because he reentered the military on a military installation where the American flag was raised it was as if he was in the United States, and this should be considered in determining eligibility for LQA. He indicates that upon military retirement he was granted a transportation entitlement back to the United States which he has not used and has had continual General Schedule (GS) employment in GE since his retirement. In support of his claim, he states: "Approval of this request would greatly affect my morale and enhance my quality of living while serving in this theater."

The initial AAR to OPM, dated December 27, 2006, states:

[Claimant] separated from active military service on 31 January 2006 in Ansbach, Germany. He received a job offer while physically residing in Germany.

[Claimant] was a local hire. He was appointed as a Local Training Area/Range Technician, GS-7 effective 23 January 2006. On 28 May 2006 he was selected as a Customs & Border Clearance Agent, GS-7, full performance level of the position was GS-9.

On the date of hire, USAREUR Regulation 690-500.592, dated 18 November 2005, was in effect. Paragraph 7a. of this regulation restricts payment of LQA to only those local hires that also meet the eligibility criteria of DSSR, section 031.12.

In accordance with the DSSR, Section 031.12b. LQA may be granted, provided that, prior to appointment, the employee was recruited in the United States, the Commonwealth of the Northern Mariana Islands, the former Canal Zone, or a possession of the United States, by the United States Government, including its Armed Forces.

[Claimant] did not meet the above eligibility criteria since he was not originally recruited in the United States by the Armed Forces, but rather entered active service in the overseas area.

Conditions for LQA regarding this claim are set forth in USAREUR Regulation 690-500.592, dated 18 November 2005, which is the governing regulation for LQA eligibility on the date of the claimant's hire. Section 7.a. indicates LQA will be granted for the following appropriated fund (APF) employees:

- (1) Employees recruited in the United States or its possessions for positions at grades GS-09 (or equivalent), WG-11, WL-09, WS-05, and above. This includes employees selected for entry-level positions with target grades at or above these grade levels. Grade restrictions do not apply to applicants selected for hard-to-fill positions or career program positions below the GS-09 (or equivalent) level.
- (2) Employees who are recruited from outside the United States or its possessions for positions in grades GS-09 (or equivalent), WG-11, WL-09, WS-05, and above. This includes employees selected for entry-level positions with target grades at and above these grade levels. Grade restrictions do not apply to applicants selected for hard-to-fill positions or career program positions below the GS-09 (or equivalent) level.

Section 1.b. of the regulation directs it be used with Department of State Standardized Regulations (DSSR) and Department of Defense (DOD) 1400.25-M, subchapter 1250.

It is Department of Defense (DOD) policy, under DOD 1400.25-M, that:

The foreign post differentials and 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 United States 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. The specific circumstances under which an employee who is hired in a foreign area, **may** (*emphasis added*) be granted the allowances [including LQA] are provided in section 031.12 of the DSSR, as supplemented by this chapter [CPM 592]; and

Employees recruited outside the U.S. will have their eligibility for quarters allowance determined at the time of hire and at any time pertinent **changes in their individual status** (*emphasis added*) occur that may confer eligibility.

The claimant did not receive LQA at the time of his initial appointment or when reassigned to the GS-1801-7. As stated above, and in accordance with pertinent guidance, LQA eligibility decisions are made at the time of the employee's appointment (i.e., January 23, 2006, in the instant claim) and if or when changes in a particular employee's circumstances result in a situation that may make them eligible.

LQA eligibility criteria properly used to adjudicate this claim are as follows:

USAREUR Regulation 690-500.592 (18 November 2005), Section 7. a. (1) and (2) as summarized above, addressing LQA entitlement for APF employees who are recruited in or from outside the United States or its possessions for positions in grades GS-09 (or equivalent).

DSSR, section 031.1, Quarters Allowance, subsection 031.12, Employees Recruited Outside the U.S. (a, b and c) states: “Quarters allowance may be granted to employees recruited outside the U.S., provided that:

- 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, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the former Canal Zone, or a possession of the United States, by:
 - (1) the United States Government, including its Armed Forces;
 - (2) a United States firm, organization, or interest;
 - (3) an international organization in which the United States Government participates; or
 - (4) a foreign government and had been in substantially continuous employment by such employer under conditions which provided for his/her return transportation to the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the former Canal Zone, or a possession of the United States; or
- c. as a condition of employment by a Government agency, the employee was required by that agency to move to another area, in cases specifically authorized by the head of agency.”

Subsection 031.12(b) may be waived by the head of agency upon determination that unusual circumstances in an individual case justify such action.

DOD 1400.25-M (CPM chapter 592), Subchapter 2, Quarters Allowance, section 2.2(b), Eligibility – Employees recruited outside the U.S., states:

- 1.) Under the provisions of section 031.12(b), DSSR, former military and civilian members will be considered to have “substantially continuous employment” for one year from the date of separation or until the retired/separated member or employee uses any portion of entitlement to government-paid transportation back to the U.S., whichever comes first.
- 2.) The requirements of section 031.12(b) of the DSSR may be waived in individual cases when unusual circumstances exist. If the Major Command recommends a waiver, the case will be forwarded to serviced DOD Component headquarters for head-of-agency consideration. All other requests should be returned by letter to the employee explaining the reasons for non-recommendation.

- 3.) Officials identified in paragraph 1-2(a) of this chapter (that is, appointing officers) will waive DSSR section 031.12(b) requirements for locally hired employees when, but for the condition surrounding the employment, the employee would be residing in the United States, Puerto Rico, any U.S. possession, or the former Canal Zone. One of the following must have occurred for this waiver:
 - a) Death of sponsoring spouse.
 - b) Sponsoring spouse becomes physically or mentally incapable of continued employment with the Government.
 - c) Divorce or legal separation; a legal separation deemed to exist at such time as either the employee or spouse shall have initiated legal action to dissolve the marriage or one separates from bed and board short of applying for divorce.
 - d) Sponsoring spouse left the post or area permanently.
 - e) Either spouse's work location became so separated that a common dwelling could not be maintained.
 - f) The employee is an incumbent of a position designated as emergency-essential in accordance with DOD Directive 1404.10.
- 4.) Except for the circumstances described in (3)(b), waiver of section 031.12(b), DSSR, will not be made for the married employee who accompanied or followed his/her spouse to a foreign area and is still residing with that spouse.
- 5.) Section 031.12(b), DSSR, will be waived for locally hired U.S. citizen employees who have, immediately prior to appointment, been directly employed by the U.S. as foreign nationals under third country citizen contracts or agreements that provide them with living quarters allowance or housing at no cost.

The record shows the claimant retired from active service with the U.S. military in GE on January 31, 2006, in Ansbach, GE. He was residing in GE at that time, and upon his retirement was granted a transportation entitlement to return to the United States which he has not exercised. As previously noted, on January 23, 2006, he was appointed a DA civilian employee to the position of Local Training Area/Range Technician, GS-303-7, with the U.S. Army in Europe. Effective May 28, 2006, he was reassigned to his current position as Customs and Border Clearance Agent, GS-1801-7.

In order to have been eligible for LQA on January 23, 2006, as described above, the claimant's employment history would have to have met Section 7.a. (1) or (2) of USAREUR Regulation 690-500.592 (18 November 2005), and DSSR section 031.12 (a) **and** (b) **or** (c) as supplemented by DOD 1400.25-M, subchapter 2, section 2.2(b).

The claimant did not meet either section 7.a. (1) or (2) of USAREUR Regulation 690-500.592 (18 November 2005). He did not meet Section 7.a. (1) because he was not recruited in the United States or its possessions for a position at GS-09 or equivalent. As a result of his military service and retirement he was already residing in GE when he received his first appointment. The fact that he reentered the military in January 1989 in Stuttgart, GE, at Robinson Barracks Recruiting Center does not equate to being in the United States for purposes of recruitment. In addition, he was recruited for and initially appointed to a GS-7 grade-level position, which was the target grade of the position. It was not a hard-to-fill or career program position. He did not meet section 7.a. (2) because he was appointed to a GS-7 level position with no higher target grade level, and which was not a hard-to-fill or career program position. The claimant's selection and reassignment on May 28, 2006, for the position of Customs and Border Clearance Agent, GS-1801-7/9, is not covered by the regulation as this was not his initial appointment, as he was already employed by DA when selected and reassigned.

The claimant met DSSR section 031.12 (a), as it was defined at the time of his initial appointment. His actual place of residence would have been fairly attributable to his employment by the U.S. Government at the time he would have **received** LQA, had he been granted the allowance. The criteria is for individuals already living overseas and makes no distinction between continued residence, or the establishment of a new residence as a result of accepting an offer of Federal civilian employment.

As a former military member, the claimant was "considered to have substantially continuous employment" under conditions providing for his return transportation to the U.S. for one year from his date of separation. DSSR 031.12 (b) requires employees be recruited in the U.S. prior to appointment as a Federal civilian employee overseas. Prior to his appointment as a USAREUR civilian employee, the claimant was a U.S. military member working in GE. He was not recruited in the U.S. by the U.S. Government, a U.S. firm, organization, interest, foreign government or international organization in which the U.S. participates and substantially continuously employed by them under conditions providing for his return transportation to the U.S. until his civilian appointment with USAREUR. Nor was he recruited from the U.S. by the U.S. military, then substantially continuously employed by them until the date of his appointment as a Federal civilian employee overseas. Consequently, the claimant did not meet DSSR 031.12 (b). Therefore, we find at the time of his appointment, the claimant met DSSR 031.12 (a), but not (b) or (c), and thus he was ineligible for LQA. In addition, the record does not show the claimant met any of the special circumstances of DOD 1400.25-M, (2), (3), (4), or (5), as described above for waiving DSSR 031.12(b), or the conditions specified for crediting DSSR 031.12 (c).

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

DA decision regarding the claimant's entitlement to LQA is not arbitrary, capricious, or unreasonable. Accordingly, this claim for LQA 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.