

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

Claimant: [name]

Organization: [agency component]
U.S Army Corps of Engineers
Department of the Army
Aviano, Italy

Claim: Living Quarters Allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 07-0037

/s/ for

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

4/18/2008

Date

The claimant was locally hired overseas through a Veterans Recruitment Appointment (VRA) on June 1, 2004, when he was appointed to a [GS-11 position] with the Engineering and Construction Division, Europe District, U.S. Army Corps of Engineers (USACE), in Aviano, Italy. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's decision denying him living quarters allowance (LQA) from the date of his initial employment. We received his claim on March 15, 2007, and the agency administrative report (AAR) on September 21, 2007. For reasons discussed herein, the claim is denied.

The claimant believes he is entitled to LQA from the time of his initial employment with USACE based upon his employment status prior to the job offer; email traffic and conversation during the hiring process which led him to believe that he would receive LQA; and his reading of Army in Europe (AE) Regulation 690-500.592, Civilian Personnel Living Quarters Allowance, effective July 1, 2003.

From October 2003 until May 2004, the claimant resided and was employed locally in Italy as a Communications Technician contractor with Wireless Communication Technical Services, Incorporated (WCTS). WCTS is a private United States firm that holds the Federal Government contract for operation and maintenance of the digital microwave radio system at Camp Ederle, Vicenza to Longare, Italy. The claimant provided evidence that he resided in and was recruited from the United States by WCTS. On September 5, 2003, he was offered the contractor position with WCTS, which afforded travel reimbursement upon arrival in Italy and for his return to the United States upon completion of 12 months of employment.

On April 5, 2004, the agency issued a vacancy announcement, number NEGE04786352, for the [GS-11 position] located at USACE, Aviano Air Base, Italy. The announcement did not state LQA was authorized and specifically indicated that Permanent Change of Station (PCS) expenses were not authorized. Although the claimant applied for the position, he did not meet the eligibility criteria for appointment through this announcement. As a result, the agency appointed the claimant through the use of the VRA authority. The claimant was officially offered and accepted the [GS-11 position] on May 14, 2004. Subsequently, the claimant resigned from employment with WCTS on May 17, 2004. On May 20, 2004, the claimant received email clarification from USACE, Civilian Personnel Advisory Center, that neither LQA nor PCS was authorized. He was appointed on June 1, 2004, and the remarks on the claimant's appointment Notification of Personnel Action (SF-50) stated no LQA was authorized.

In his June 21, 2004, and November 14, 2005, letters the claimant requested USACE review his eligibility for LQA. He specifically cited the AE regulation 690-500.592, effective July 1, 2003. He believed he was eligible for LQA based upon his status as a local hire appointed as a GS-9 or higher. The AAR states the claimant's supervisor and agency management staff verbally explained to the claimant on several occasions between June 2004 and November 2005 he would not be paid LQA because he was a local hire. The agency denied his request in a February 6, 2006, letter stating he was not authorized LQA because he was a local hire, and the allowance was not authorized for his

position. The claimant filed a grievance with USACE on February 21, 2006, requesting a review of his denial of LQA. In the grievance letter, the claimant stated "...I knew when I accepted the job it was possible I would not receive LQA but was led to believe the decision would be based upon my eligibility." In a March 9, 2006, response the agency denied his request stating LQA is not grievable under the Administrative Grievance Procedure System. The agency further made the following two pertinent statements: "...it was never the intent to offer LQA for the position to which you were hired" and:

...you made reference to U.S. Army Europe Regulations (USAREUR) governing LQA and sought the advice of the USAREUR Civilian Personnel Office. While the Army Corps of Engineers are Army employees in Europe, we follow a different chain of command, report to a different major command (MACOM), and observe our own LQA policies.

The AAR stated the claimant willingly accepted the position knowing that neither LQA nor PCS expenses would be authorized. The agency provided copies of emails contradicting the claimant's assertion he was led to believe during the hiring process he would receive LQA. Specifically, an email dated May 14, 2004, at 9:55 a.m. from an agency management official to the claimant states: "...as soon as you are officially chosen, then we need to get started on trying to get the LQA." This email exchange occurred before the claimant had received his official offer, which indicates the claimant was aware LQA was not authorized for the position. In addition, because these emails occurred prior to the date upon which the claimant resigned from his previous employer (May 17, 2004), they contradict the claimant's assertion that he was told LQA would not be granted only after accepting the position and resigning from WCTS. The agency states that the claimant's request for LQA was thoroughly considered, but reiterated it was never the intent to offer LQA for the position for which the claimant was hired.

Eligibility for LQA is governed by the Department of State Standardized Regulations (DSSR). Section 013 of the DSSR delegates to the heads of Federal agencies the authority to grant LQA to agency employees. It states the head of an agency "may" grant LQA and issue further implementing regulations as he or she may deem necessary. However, the DSSR does not require agency officials to grant LQA when an employee fulfills basic eligibility requirements in the DSSR. 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 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. The DoD regulation specifies further that, except in unusual circumstances, an LQA is to be used as an incentive to persuade employees in the U.S. to apply for overseas positions. DoD Manual 1400.25-M, SC1250.4.3 states:

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 accept Federal employment in a foreign area. If a person is already living in the foreign area, that inducement is normally unnecessary. Individuals shall not automatically be granted these benefits simply because they meet eligibility requirements.

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. In the instant case, the claimant accepted the civilian position after the agency informed him that he was not entitled to LQA. The claimant has failed to present clear and convincing evidence that AE regulation 690-500.592, effective July 1, 2003, should have been applied by the agency in his case as required by 5 CFR 178.105. Absent such evidence, we must accept the USACE's position that it sets its own policy and is not governed by this AE regulation. In addition, evidence provided by the agency further supports the agency's position it did not intend to authorize LQA for the position. 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.