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

Claimant:	[name]
Organization:	Department of the Army U.S. Army Garrison Humphreys Pyongtaek, South Korea
Claim:	Request for Living Quarters Allowance
Agency decision:	Denied
OPM decision:	Denied
OPM file number:	09-0007

//Judith A. Davis for

Robert D. Hendler Classification and Pay Claims Program Manager Merit System Audit and Compliance

1/21/2010

Date

The claimant is a Federal civilian employee of the Department of the Army at the U.S. Army Garrison Humphreys in Pyongtaek, South Korea. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of living quarters allowance (LQA). We received the claim on November 21, 2008, and the claim administrative report on March 23, 2009. For the reasons discussed herein, the claim is denied.

The claimant is employed as a [position], who was ineligible for LQA as a local hire upon his initial appointment. He was given a management-directed reassignment on August 30, 2005, when his function was transferred from Seoul to Pyongtaek, South Korea, and requested LQA in the new posting. The agency denied the claimant's LQA request on January 13, 2006.

The claimant believes he gained entitlement to LQA when, as a condition of continued employment, he was required by management direction to relocate to another area. The agency states this action confers LQA eligibility rather than entitlement and the actual granting of LQA in these circumstances is discretionary.

Section 031.12 of the Department of State Standardized Regulations (DSSR) provides the following guidance relative to employees recruited outside the United States:

Quarters allowances prescribed in Chapter 100 may [emphasis added] be granted to employees recruited outside the United States, 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 the agency.

Thus, the DSSR clearly establishes that granting of LQA under section 031.12c is discretionary on the part of the agency. This tracks the statutory language authorizing overseas quarters allowance (5 U.S.C. § 5923(a)): "When Government owned or rented quarters are not provided without charge for an employee in a foreign area, one or more of the following quarters allowances *may* [emphasis added] be granted...."

DoD Manual 1400.25-M, which implements the provisions of the DSSR for DoD civilian employees, provides the following supplemental guidance relative to section 031.12 above:

SC1250.5.1.7. The designated official will determine whether or not an employee requires an LQA under Section 031.12c of Reference (b) when the assignment is within or between countries. Section 031.12c of Reference (b) provides that an LQA may be given to an employee recruited outside the United States if, "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 the Agency. "A condition of employment," if not fulfilled, results in failure to gain or retain employment. Section 031.12c of Reference (b) shall be applied when an employee is relocated to another area by a management-generated action. It also shall be applied when management requests that an employee relocate is considered a management-generated action. A move through a voluntary reassignment program is not considered a management-generated action. To make a determination under Section 031.12c of Reference (b), the following tests must be applied:

SC1250.5.1.7.1. Will employment be ended if the employee fails to accept relocation?

SC1250.5.1.7.2. Is the relocation caused by a management-generated action?

SC1250.5.1.7.3. Must management request an employee not now in receipt of LQA to relocate to another area?

SC1250.5.1.8. To grant an allowance under Section 031.12c of Reference (b) and its implementing guidance, the answer must be affirmative to questions SC1250.5.1.7.1., SC1250.5.1.7.2., and SC1250.5.1.7.3 Selecting a person to be relocated is based on regulatory guidance, leaving management little option to recruit a new employee or select an employee receiving an LQA. There are also certain common sense considerations. If an employee's new duty station is within the local area of work of the previously established residence, no LQA will be authorized. If the employee is joining a spouse at a new duty station who is eligible for LQA, the reassigned employee will not be given the allowance. If the management-generated action would not cause employment to end if the employee fails to accept relocation, the DoD Component may approve LQA if a determination in made that there is no choice but to move the employee for official reasons (e.g., mobility is inherent in the functional area).

Subchapter 1250.5.1.7 of DoD Manual 1400.25-M provides the specific conditions under which LQA may be granted to an employee not currently eligible for such, pursuant to DSSR section 031.12c. It does not mandate the granting of LQA but rather states that DSSR section 031.12c be

"applied" when certain eligibility criteria are met. When LQA eligibility under subchapter 1250.5.1.7 of DoD Manual 1400.25-M is met, then LQA *may* be granted in accordance with DSSR section 031.12c. In other words, meeting the specific LQA eligibility requirements prescribed for DoD civilian employees by DoD Manual 1400.25-M allows DSSR section 031.12c to be invoked for the granting of LQA at the discretion of the designated official. Subchapter 1250.5.1.8 of DoD Manual 1400.25-M preserves the discretionary nature of LQA in these circumstances by presenting the caveat that common sense considerations may dictate against granting LQA.

Subchapter 1250.4.3 of DoD Manual 1400.25-M reinforces the discretionary aspect of granting LQA:

Overseas allowances and differentials (except 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.

Based on its review of the relevant regulations and guidance, the agency denied the claimant's LQA request in its January 13, 2006, decision, stating:

LQA is specifically intended to be a recruitment incentive for U.S. citizen civilian employees living in the United States to accept Federal employment in foreign areas. In that [claimant] is already living in Korea and not receiving LQA, his move to Area III is not a compelling reason to grant LQA. Therefore, the request is denied.<sup>1</sup>

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. In this case, the claimant became eligible for LQA upon his management-directed relocation, but the granting of such is discretionary on the part of the agency. Consistent with relevant regulations and guidance, the agency declined to grant the claimant LQA based on the budgetary impact of

<sup>&</sup>lt;sup>1</sup> We note that the agency subsequently conducted a projected cost analysis of granting LQA to all employees upon management directed relocation within the Korean peninsula. The cost was found to be prohibitive due to the numerous ongoing base relocations and consolidations in Korea. As a result, a policy memorandum, Subject: Living Quarters Allowance (LQA) Determinations on Management Directed Reassignment of Locally Hired Employees not Currently Receiving LQA, dated January 30, 2006, was issued. This memorandum established the policy that employees not currently in receipt of LQA who are relocated to other areas on the Korean peninsula will not be granted LQA. It is considered neither cost efficient nor in the best interest of the Army or the command to grant LQA to these employees at a time of severe budget reductions. It would defy the "common sense considerations" allowed under subchapter 1250.5.1.8 of DoD Manual 1400.25-M that the expense of granting LQA, intended primarily as a recruitment incentive and specifically not identified as an entitlement, become a principle determinant in military base restructuring decisions.

Although the policy memorandum was issued after the claimant's relocation, it is consistent with the agency's rationale for denying LQA, as described in the denial letter, regarding agency discretion in LQA determinations granted by the DSSR and the implementing DoD Manual 1400.25-M.

extending this action to all other similarly-situated employees. The agency subsequently formalized this decision as stated policy applicable to all civilian employees on the Korean peninsula. The agency's action is not arbitrary, capricious, or unreasonable. Accordingly, the claim for an 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.