

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

Claimant: [name]

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

Claim: Request for Living Quarters Allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 10-0004

//Judith A. Davis for

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

4/16/10

Date

The claimant is a Federal civilian employee of the Department of the Army at the Weisbaden [agency component], Germany. 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 October 20, 2009, the claim administrative report on January 5, 2010, and the claimant's response to the administrative report on February 2, 2010. For the reasons discussed herein, the claim is denied.

The claimant arrived in the overseas area in 1997 as a family member accompanying his then-sponsoring spouse to her duty station in Vicenza, Italy, followed by their reassignment to Weisbaden, Germany, in June 2005. On March 6, 2006, the claimant was appointed to his [current position] at the Weisbaden [agency component] without LQA. When his sponsoring spouse accepted a position in and relocated to Landstuhl, Germany, on August 19, 2007, the claimant remained in his position in Weisbaden and requested he be granted LQA by waiver of the basic eligibility requirements set forth in the Department of State Standardized Regulations (DSSR) section 031.12a and b. The agency granted an initial one-year waiver on October 30, 2007, and an additional one-year extension on October 14, 2008, which expired on October 30, 2009.

The claimant requests "continuation of permanent LQA" due to "unusual circumstances," which he describes as having received LQA for 12 years (which statement is inaccurate, as his spouse was the actual LQA recipient), having been granted two extensions of LQA, and having been approved for his own transportation agreement.

The agency notes the claimant is ineligible for LQA in his own right under DSSR section 031.12 a and b, and waivers of section 031.12b granted under Department of Defense (DoD) 1400.25-M "shall last no longer than one year from the date eligibility is established, unless extended by the appropriate DoD Component delegate."

The DSSR sets forth basic eligibility criteria for the granting of LQA. Section 031.12 states LQA may 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

The claimant does not meet section 031.12a because, at the time of appointment, his presence in Germany was not due to his employment by the U.S. Government. Rather, he was a retired military member who was accompanying his spouse. He does not meet section 031.12b because prior to appointment, he was not recruited in the United States or one of the other enumerated locations. Thus, he does not meet basic DSSR eligibility criteria for receipt of LQA in his own right.

In support of his claim request, the claimant cites the following provision of DSSR section 013:

When authorized by law, the head of an agency may defray official residence expenses for, and grant post differential, difficult to staff incentive differential, danger pay allowance, quarters, cost-of-living, representation allowance, compensatory time off at certain posts and advances of pay to an employee of his/her agency and require an accounting there for, subject to the provisions of these regulations and the availability of funds. Within the scope of these regulations, the head of an agency may issue such further implementing regulations as he/she may deem necessary for the guidance of his/her agency with regard to the granting of and accounting for these payments. *Furthermore, when the Secretary of State determines that unusual circumstances exist, the head of an agency may grant special quarters, cost-of-living, and representation allowances in addition to or in lieu of those authorized in these regulations (emphasis added by claimant).*

This is not applicable to the claimant's case as we are unaware of the Secretary of State having determined that "unusual circumstances" exist that would allow the agency to grant special quarters allowances in addition to or in lieu of those otherwise authorized. It should be noted that the term "unusual circumstances" as used within the context of section 013 does not relate to individual cases but to situational considerations that compel additional delegations of authority from the Secretary of State to the agency heads.

Although the claimant states in his claim request "[t]his is not a request for waiver," he cites the following provision of DSSR section 031.12 as supporting justification:

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

Within the context of the DSSR, "head of agency" refers to the heads of the agencies directly "subject to the provisions of these regulations" and authorized to "issue such further implementing regulations as he/she may deem necessary" as stipulated in section 013. This does not encompass OPM's claim adjudication authority under 31 U.S.C. § 3702, which is narrow and limited in the case of LQA claims to determining whether a claimant is eligible for LQA and, if so, whether the claimant has received LQA in accordance with agency policies and procedures. An agency's decision to waive LQA eligibility requirements and grant LQA under DSSR section 031.12 is, by its very nature, at the discretion of the agency and is not subject to review under 31 U.S.C. § 3702. Therefore, although the claimant professes his claim does not represent a request for waiver, the DSSR provision cited above clearly relates exclusively to the waiver authority delegated to his agency and we will consequently not address the "unusual circumstances" asserted by him as the basis for his claim.

In support of his claim request, the claimant also cites Army in Europe Regulation (AER) 690-500.592, paragraph 7, which states that LQA may be granted to “[e]mployees 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.” However, paragraph 4 of this regulation stipulates that:

To be considered eligible for allowances covered by this regulation, employees must meet the basic eligibility requirements of DSSR, section 031.11 and section 031a and b.

Since the claimant does not meet basic LQA eligibility criteria in the DSSR as discussed previously, the additional implementing regulations set forth in AER 690-500.592, paragraph 7, are not applicable.

DoD Manual 1400.25-M specifies overseas allowances are not automatic salary supplements, nor are they entitlements. They are specifically intended as 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. 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 the circumstances justify such action, and the agency’s action will not be questioned unless it is determined the agency’s action was arbitrary, capricious, or unreasonable. *Joseph P. Carrigan*, 60 Comp. Gen. 243, 247 (1981); *Wesley L. Goecker*, 58 Comp. Gen. 378 (1979); *OPM Decision S9700047* (1997). In this case, the claimant was a local hire who had not been recruited from the U.S. prior to appointment. The agency’s action is not arbitrary, capricious, or unreasonable. Accordingly, the 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.