

**U.S. Office of Personnel Management
Compensation Claim Decision
Under section 3702 of title 31, United States Code**

Claimant: [name]

Organization: Department of the Air Force, Germany

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 12-0007

/s/ Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Agency Compliance and Evaluation
Merit System Accountability and Compliance

9/26/13

Date

The claimant requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of living quarters allowance (LQA). We received the claim on December 11, 2011, and the agency administrative report (AAR) on September 11, 2012. For the reasons discussed herein, the claim is denied.

The claimant applied and was selected for a three-year term position with the Air Force Audit Agency (AFAA) at Ramstein Air Base, Germany, while residing in the United States. The claimant states that shortly after his appointment to the position on October 7, 2002, he was informed by the agency that he was not eligible for LQA. In April 2005, the claimant transferred to a position with the [Air Force component], and was again denied LQA based on the initial agency determination made in 2002. He asserts he should have been granted LQA upon his initial appointment and states "DoDI [Department of Defense Instruction] 1400.25M indicates LQA is intended to be a recruitment incentive for US Citizen civilian employees living in the United States to accept Federal employment in a foreign area." He further cites Army in Europe Regulation (AER) 690-500.592 as stating "LQA will be granted... for U.S. hires in grades GS-09 and above." He requests LQA payments retroactive to October 7, 2002.

The agency counters that the claimant was denied LQA because he was a term employee and they have never paid LQA for their term employees.

The Department of State Standardized Regulations (DSSR) set forth basic eligibility criteria for the granting of LQA. Agency implementing guidance such as that contained in DoDI 1400.25, Volume 1250 (previously issued as DoDI 1400.25-M, Subchapter 1250), may impose additional requirements, but may not be applied unless the employee has first met the basic DSSR eligibility criteria.

DSSR section 031.11 states LQA may be granted to employees recruited in the United States. There is no dispute the claimant met section 031.11 at the time of his term appointment in 2002 because he was residing in the United States when he was recruited by AFAA. Thus, the claimant was *eligible* for LQA as a U.S. hire, but the agency did not grant him LQA in accordance with their policy to deny LQA for term employees.

The Overseas Differentials and Allowances Act of 1960, Pub.L. 86-707, 74 Stat. 792 (codified at 5 U.S.C. §§ 5921-24) establishes the statutory authority for Federal agencies to pay employees LQA. Section 5923 of title 5, United States Code (U.S.C.) states in part:

(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 allowances **may be granted** when applicable (emphasis added):

* * * *

(2) A living quarters allowance for rent, heat, light, fuel, gas, electricity, and water, without regard to section 3324(a) and (b) of title 31.

Thus, the plain text of the statute, by indicating the Government "may grant" LQA, does not compel payment of such. The statute authorizes the promulgation of regulations governing the

payment of allowances and differentials, and the Department of State was subsequently delegated authority to develop the implementing regulations to administer LQA.

The DSSR reiterates the discretionary nature of the statute. In particular, section 031.11, which applies to employees recruited in the United States, provides that “[q]uarters allowances . . . **may be granted** to employees who were recruited by the employing government agency in the United States . . .” (emphasis added). The DSSR does not state that an agency *shall* or *must* grant LQA once an employee meets the prescribed eligibility requirements. The DSSR establishes only basic LQA eligibility parameters and bestows considerable discretion to agency heads to decide under what circumstances they will actually grant LQA to eligible individuals.¹ See *Mark Roberts v. United States*, No.10-754C, 2012 WL 1825278 (Fed.Cl. Apr. 30, 2012, reissued May 21, 2012). DSSR Section 013 authorizes agency heads to issue further implementing regulations for their own agencies:

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 allowances, compensatory time off at certain posts and advances of pay to an employee of his/her agency and require an accounting therefor, *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. [Italics added.]

Accordingly, DoDI 1400.25, Volume 1250 (and its predecessor DoD 1400.25-M), which articulates DoD policy on the granting of LQA, provides the following guidance:

¹ The discretionary nature of these allowances is reiterated on the Department of State’s official Web site at http://aoprals.state.gov/content.asp?content_id=134&menu_id=75 which states in pertinent part:

SUMMARY OF ALLOWANCES AND BENEFITS

FOR U.S.G. CIVILIANS UNDER THE DEPARTMENT OF STATE STANDARDIZED REGULATIONS (DSSR)

The Department of State Standardized Regulations (DSSR) govern allowances and benefits available to U.S. Government civilians assigned to foreign areas. Note that because individual agencies may draft their own implementing regulations, which can be more restrictive than the DSSR, you may not be eligible for all of the allowances listed below. Employees should check both the DSSR and their agency’s implementing regulations for guidance on a specific allowance.

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.* [Italics added.]

Thus, LQA is not a statutory entitlement but rather a discretionary recruitment incentive. The agency has the authority to offer LQA in those instances where they feel it necessary to attract qualified candidates and the fiduciary responsibility to limit it to those instances. (See reference to "availability of funds" in DSSR section 013 above.) Under statutes that vest a degree of discretion in administrative agencies, our review is generally confined to deciding whether an agency's action must be viewed as arbitrary, capricious, or so at variance with the established facts as to render its conclusion unreasonable.

Within this context, the vacancy announcement for the claimant's position did not reference that LQA was being offered for the position, nor did the pre-appointment letter signed by the claimant on September 2, 2002, list LQA as one of the conditions of employment. The claimant included with his claim a copy of what he describes only as the "AFAA 'Application Process'" which states "while overseas, you receive a nontaxable housing allowance, a cost of living allowance, and have full access to the base commissary (grocery store) and medical facilities." The agency identifies this document as deriving from "the AFAA website that contains information regarding overseas benefits for our permanent GS-12 Journeyman-level auditors who are competitively selected for overseas assignments" and states the claimant "was not hired in that category." We note the document provided by the claimant appears to have been associated with a specific vacancy announcement clearly relating to a career (i.e., permanent) position, and lists the cited benefits as applying only to employees who "[a]fter reaching the GS-12 level" are "eligible for overseas tours in Europe and the Pacific." Since the claimant was hired at the GS-11 level under a term (i.e., time-limited) appointment, the stated benefits are not applicable to his position.

The claimant's reliance on AER 690-500.592 as the basis for his claim is misplaced as this is a Department of the Army (DA) regulation applicable only to DA employees. Therefore, it may not be applied to the claimant's case and will not be further addressed.

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. Under 5 CFR 178.105, the burden is upon the claimant to establish the liability of the United States and the claimant's right to payment. *Joseph P. Carrigan*, 60 Comp. Gen. 243, 247 (1981); *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979). In this case, the agency stated they do not grant LQA to term employees. When an agency decision is within their discretionary authority and consistent with their previous practice in similar situations as in the present case, it cannot be considered arbitrary, capricious, or unreasonable. Therefore, there is no basis on which to reverse the decision, and the claim is accordingly denied.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States court.