Date: November 18, 2004

Matter of: [name]

File Number: 04-0002

OPM Contact: Robert D. Hendler

The claimant is a retired military member hired locally overseas, who is requesting reconsideration of his agency's decision regarding his entitlement to receive a living quarters allowance (LQA). He also requests that the U.S. Office of Personnel Management (OPM) waive Section 30, paragraph 031.12B of the Department of State Standardized Regulations (DSSR) and authorize his entitlement to receive LQA. We received the claim on October 17, 2003, and the agency administrative report on April 8, 2004. For the reasons discussed herein, the claim is denied.

The claimant retired from active military service effective September 30, 2003, in Heidelberg, Germany. He was appointed to a [position] in Heidelberg, Germany in September 2003, under the Veterans Recruitment Appointment authority. He indicated that he is eligible for LQA, because even though the recruiting station is located in Heidelberg, all recruitments/enlistments are with and for the Albany, New York Recruiting Battalion.

The agency administrative report stated that the claimant's local hire appointment in September 2003, did not meet the eligibility requirements to receive LQA because he was not recruited from the United States. The report stated that the deciding factor for receipt of LQA was the actual location of the Army Recruiting Center where [claimant] reenlisted. The Albany New York Recruiting Detachment was located in Heidelberg, Germany. Agency records indicate that the claimant's Certificate of Release or Discharge from Active Duty Form (DD form 214) reflects Heidelberg, Germany as his place of entry on active duty. All his subsequent re-enlistments were effected under the current station stabilization reenlistment option, allowing the claimant to remain in Germany from December 28, 1982 until his retirement on September 30, 2003. Therefore, the claimant does not meet the Department of State Standardized Regulations (DSSR) Section 031.12b, which states that quarters allowances may be granted to employees recruited outside the United States, provided that prior to appointment, the employee was recruited in the United States.

The Overseas Differentials and Allowances Act, Pub. L. 86-707, 74 Stat. 793, 794 (Sept. 6, 1960), as amended and codified at 5 U.S.C. §§ 5922-5924 provides that, under regulations

prescribed by the President, LQAs "may" be paid to federal employees in foreign areas. The President, by executive order, delegated this authority to the Secretary of State, who issued Standardized Regulations concerning eligibility to receive, and payment of, LQAs.

Section 013 of the DSSR further delegates to the heads of Federal agencies the authority to grant LQAs to agency employees. Section 013 of the DSSR specifies that the head of an agency "may" grant quarters allowances and issue further implementing regulations, as he or she may deem necessary for the guidance of the agency in granting such allowances. The Department of Defense (DoD) has issued further implementing regulations through its requirements for DoD civilian employment overseas, DoD 1400.25-M, Subchapter 1250.

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 applied at the time of receipt shall be fairly attributable to his 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 has been in substantially continuous employment by such employer under conditions which provided for his/her return transportation to the United States . . .[*]

The DSSR further provides that the head of the agency upon determination that unusual circumstances in an individual case justify such action "may" waive Section 031.12b.

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).

The DoD regulation specifies further that, except in unusual circumstances, an LQA is to be used as an incentive to persuade employees in the United States to apply for overseas positions. DoD Directive1400.25-M, SC1250.4.1 states that:

> The foreign post differential and the 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 U.S. citizen civilian employees living in the United States to accept federal employment in a foreign area. If a person is already in the foreign area, that inducement normally is unnecessary.

[*] Subchapter 2-2b(1) of DoD 1400.25-M, CPM 592, provides in relevant part that, under section 031.12b of the DSSR, former military and civilian members will be considered to have "substantially continuous employment" for one year from the date of separation.

The claim settlement process also does not provide for waiving requirements of the DSSR as requested by the claimant. In view of the permissive rather than mandatory language in the applicable statutes and regulations, as noted above, 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, March 15, 1982. The claimant was offered and accepted a position as a local hire at the time of his appointment. 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.