

Date: February 16, 2006

Matter of: [name]

File Number: 04-0035

OPM Contact: Robert D. Hendler

The claimant is a civilian appropriated funds (AF) employee of the Department of the Army who occupies [GS-11 position] with a duty station of Grafenwohr, Germany. He formerly occupied a non-appropriated fund (NAF) position. The claimant requests reconsideration of his agency's decision finding him ineligible to receive a living quarters allowance (LQA). He also requests a suspension of collection of overpayment of LQA as well as a waiver of overpayment of LQA. We received the claim on September 7, 2004, additional correspondence from the appellant on November 10, 2004, the agency administrative report on November 30, 2004, and the claimant's response to the administrative report on February 25, 2005. For the reasons discussed herein, the claim is denied.

In May 2000, the agency advised the claimant he was no longer eligible to receive LQA because of changes in the law, and that his LQA would be terminated on September 9, 2000. By memorandum dated July 10, 2000, he advised the agency that he was eligible because incumbents of positions designated emergency essential were entitled to LQA; and he submitted a signed copy of DD Form 2365, Civilian Employee Overseas Emergency Essential Position Agreement, completed in December 1995. The claimant stated that "I had every reason to believe that I was entitled to continue to receive LQA and no reason to think that I was not fully eligible and authorized to receive LQA." He continued to receive LQA from September 2000 until July 2004.

By memorandum dated August 17, 2004, the agency advised the claimant that his LQA was terminated because he did not meet the requirements outlined in the Department of State Standardized Regulations (DSSR) and because LQA is based on an employee encumbering an emergency essential position when a national crisis has been declared. By memorandum dated October 12, 2004, the agency notified the claimant that a debt was established for his pay account to collect the overpayment of LQA from September 23, 2000, to July 24, 2004. The claimant disagreed and stated that crisis situations which impact his request include the Bosnia crisis from 1995, the September 11 crisis from 2001, and the Iraq crisis since 2003. He asked that we consider his waiver request in light of the "grandfather" provision in Army Regulation

690-500.592 dated June 20, 2003, which provides guidance to avoid affecting employees who met eligibility for LQA under prevailing regulations at the time of selection.

As a result of legislative and executive action, the authority to waive overpayments of pay and allowances now resides with the heads of agencies. See the General Accounting Office Act of 1996, Public Law No. 104-316, 110 Stat. 3826, approved October 19, 1996, and the Office of Management and Budget (OMB) Determination Order dated December 17, 1996. Neither Public Law No 104-316 nor OMB's Determination Order of December 17, 1996, authorizes the United States Office of Personnel Management (OPM) to make or to review waiver determinations involving erroneous payments of pay or allowances. Accordingly, we do not have jurisdiction to consider, or issue a decision on, the request for a waiver of the claimant's indebtedness to the United States or the request for suspension of collection of the overpayment of LQA.

The agency administrative report stated while the claimant was an NAF employee, he received LQA based solely on the local commander's authority. The Defense Authorization Act of 1996 included a new requirement that eligibility for LQA be the same for AF and NAF in the same foreign area. Consequently, the Department of Defense (DoD) regulations were changed so that Commanders could no longer grant LQA as a performance or retention bonus and that employees had to meet the eligibility requirements outlined in the DSSR. The claimant's LQA as a NAF employee was based on the local commander's authority to approve LQA based on performance. Further, the claimant did not meet the grandfather provision of U.S. Army in Europe Regulation (USAEUR) 690-500.592 dated June 20, 2003. The regulation provided a mechanism to avoid adversely affecting employees who met the LQA eligibility criteria under prevailing regulations at the time of selection, but do not meet the criteria of this regulation. The grandfather provision did not apply to certain former NAF employees who received LQA based solely on a local commander's waiver authority. Therefore, the claimant was no longer eligible for LQA.

The agency referenced the DSSR, Section 031.12; the Civilian Personnel Manual, DoD 1400.25M, Subchapter 1250; and USAEUR 690-500.592. The agency stated that the claim should be denied because the claimant does not meet any of the criteria listed in DoD 1400.25M, Subchapter 1250, which would warrant a waiver. Additionally, the agency stated that the grandfather provision contained in USAEUR 690-500.592 does not apply to the claimant.

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 payment of LQAs. Section 013 of the DSSR further delegates to the heads of Federal agencies the authority to grant LQAs to agency employees. It also 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. DoD has issued further implementing regulations through its requirements for DoD civilian employment overseas, DoD 1400.25-M, Subchapter 1250, dated December 1996. The Department of the Army has issued additional regulations through its requirements in USAEUR 690-500.592.

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 unusual circumstances discussed in DoD 1400.25-M, Subchapter 1250, state that officials with delegated authority may waive DSSR section 031.12b requirements for locally hired U.S. citizen employees when, but for the conditions surrounding the employment, the employee would be residing in the United States. One of the following situations must have occurred for this waiver:

1. The sponsoring spouse dies.
2. Sponsoring spouse becomes physically or mentally incapable of continued employment with the Government.
3. The couple is divorced or legally separated.
4. Sponsoring spouse left the post or area permanently.
5. Spouses could not maintain a common dwelling due to the relocation of either spouse's work place.
6. The employee is an incumbent of a position designated as emergency-essential in accordance with DoD Directive 1404.10.

To be eligible for LQA, the claimant must have entered the country as the spouse of a sponsor who was eligible for LQA in circumstances 1 through 5 listed above. A waiver is only applicable in circumstance 6 "for the period during which a crisis situation is declared to exist under reference (e)." DoD Directive 1404.10 defines crisis situation as “Civil insurrection, civil war, terrorism, wartime, or other hostile conditions that threaten physical harm or imminent danger to the health or well-being of the E-E [emergency essential] civilian employee.”

The DoD regulation specifies 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 1400.25-M, Subchapter 1250 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.

With regard to the grandfather provision, USAEUR 690-500.592 dated June 20, 2003, states:

The grandfather provision applies to all U.S. hires and locally hired employees who met the LQA eligibility criteria under prevailing regulations at the time of selection, but do not meet the criteria of this regulation. To avoid adversely affecting these employees, their LQA will continue as long as they remain employed in a position covered by this regulation without a break in service of more than three days. This provision—

1. does not apply to certain former NAF employees who received LQA based solely on a local commander's waiver authority. These employees retained the allowance on employment in an AF position, but did not meet the eligibility requirement of DSSR or DoD regulations and subsequently had LQA terminated as mandated by the Defense Authorization Act of 1996.
2. Will not extend or reinstate payment of LQA when termination of payment has been directed by law, regulation, or policy.

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. The claimant does not meet the eligibility requirements outlined in DSSR 031.12 and does not meet the unusual circumstances for a waiver of DSSR 031.12b outlined in DoD 1400.25-M, Subchapter 1250 in that he is not working under a crisis situation. The grandfather and waiver provisions outlined in USAEUR 690-500.592 do not apply to the claimant. Accordingly, the claim for reconsideration of his agency's LQA determination 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.