

Date: September 16, 2004

Matter of: [name]

File Number: 04-0017

OPM Contact: Robert D. Hendler

The claimant is a former United States military member hired locally overseas, who is requesting reconsideration of his agency's decision regarding his entitlement to receive a living quarters allowance (LQA). For the reasons discussed herein, the claim is denied.

The claimant separated from active military service effective August 31, 1998, while he was stationed in Germany. On September 27, 1999, the Department of the Army appointed him to the full-time temporary position of [GS-9 position] in Germany under an appointment not to exceed November 26, 1999. On November 21, 1999, he was converted to a career conditional appointment to the full-time permanent position of [GS-9 position] in Germany.

On August 25, 2003, the Department of the Army denied the claimant's request for an LQA because his situation did not meet the definition of "substantially continuous service" outlined in Department of Defense (DoD) Manual, 1400.25-M, subchapter 1250.5.1.1.2.1.

Section 031.12 of the Department of State Standardized Regulations (DSSR) provides that quarters allowances "may" be granted to employees recruited outside the United States, when:

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

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 . . .

DoD Manual, 1400.25-M, subchapter 1250.5.1.1.2.1, specifies that, under DSSR section 031.12(b), service members and civilian employees shall be considered to have substantially continuous employment for up to one year from the date of separation or when

transportation entitlement is lost, or until the retired or separated member uses any portion of the entitlement for government transportation back to the United States, *whichever occurs first*.

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).

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, Mar. 15, 1982. The claimant's separation from military service occurred on August 31, 1998, and he was not appointed to a civilian position with the United States Government until September 27, 1999. Under DoD regulation, his period of "substantially continuous service" expired on August 31, 1999. In view of this, the claimant is not entitled to an LQA. Therefore, the Department of the Army's decision of August 25, 2003, regarding the claimant's entitlement to an LQA is not arbitrary, capricious, or unreasonable. Accordingly, the claim for an LQA is denied. See OPM S003443, November 30, 1999.

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.