

Date: March 17, 2006
Matter of: [name]
File Number: 05-0044
OPM Contact: Robert D. Hendler

The claimant is a retired United States military member hired locally overseas who requests the Office of Personnel Management (OPM) reconsider his agency's decision regarding his entitlement to receive a living quarters allowance (LQA) effective September 9, 2002. We received the claim on February 15, 2005, and the claim administrative report on December 22, 2005. For the reasons discussed herein, the claim is denied.

The claimant separated from military service on May 31, 2001, while stationed in Germany. While still residing in Germany, he applied for [position] with the Department of the Army in Heidelberg, Germany, in March 2002. He received and accepted a tentative job offer (pending verification of his eligibility for a Veterans Employment Opportunity Act appointment and security clearance) on May 13, 2002, and was appointed to the position on September 9, 2002. The claimant believes that his employment should be considered to commence as of the date of the tentative job offer. He also believes that since a waiver was granted to allow him eligibility for Federal employment beyond the one-year limit for foreign residency, a waiver should also have been granted to allow him an LQA. The claimant's rationale points to the failure of the agency to process his appointment timely. He stresses the financial hardship of his living two hours away from his Heidelberg, Germany, post of duty.

On August 19, 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 employment" outlined in Department of Defense (DoD) Manual 1400.25-M, subchapter 1250.5.1.1.2.1. The agency wrote that the appellant did not qualify for an LQA because his one-year period of "substantially continuous employment" expired on May 31, 2002; i.e., one year after the date of his separation from military service.

Section 031.12 of the Department of State Standardized Regulations (DSSR) provides that living 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* [emphasis added] , the employee was recruited in the United States....by...(1)the United States Government, including its Armed Forces; (2) a United States firm, organization, or interest....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) above, 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, March 15, 1982. In this case, the claimant, at the time of his appointment, did not meet the criteria for "substantially continuous employment" as that term is defined in DoD Manual 1400.25-M for local hires (i.e., employees recruited outside the United States). His "period of substantially continuous employment" expired on May 31, 2002, and he was not appointed to a civilian position with the United States Government until September 9, 2002. DSSR section 031.12(b) specifies that employment commences on the date of *appointment*. The DSSRs also allow that section 031.12(b) *may* be waived by the *head of agency* in unusual circumstances. DoD Manual 1400.25-M reiterates that the requirements of DSSR section 031.12(b) *may* be waived in individual cases when unusual circumstances exist. Therefore, this authority is discretionary by the employing agency and does not extend to OPM. The circumstances that led to the delay in his appointment and the financial impact of not receiving LQA are conditions not addressed in the DSSR or DoD Manual 1400.25-M and, therefore, may not be considered by us in the claims settlement process. Accordingly, the claim for an 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.