

Compensation Claim Decision
Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: Department of the Army
[agency component]
Kaiserlautern, Germany

Claim: Request for Living Quarters Allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 09-0005

//Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability

5/12/2009

Date

The claimant is a Federal civilian employee of the Department of the Army at the [agency component] in Kaiserslautern, Germany. She requests the U.S. Office of Personnel Management (OPM) reconsider her agency's denial of living quarters allowance (LQA). We received the claim on January 15, 2009, and the claim administrative report on February 2, 2009. For the reasons discussed herein, the claim is denied.

The claimant was living in Germany with her sponsoring spouse, who was receiving LQA, when she entered Government service on February 9, 2004, as [position], at the [previous agency component & location]. She transferred to the [agency component] in Kaiserslautern on April 1, 2007, as [position], and on April 13, 2007, was reassigned to her current position as [position]. This position was subsequently converted to [conversion] under the National Security Personnel System (NSPS). The position has been designated as a hard-to-fill position since June 3, 2002. The claimant requested an exception to policy for LQA when her husband's LQA was terminated upon his retirement in September 2007. The agency denied this request on February 4, 2008.

The agency states the claimant was ineligible for LQA at the time of her initial and subsequent appointments under the regulations in effect at that time. Section 031.12 of the Department of State Standardized Regulations (DSSR) states LQA may be granted to employees recruited outside the United States provided that:

- a. the employee's actual place of residence in the place to which the quarters allowance applies at the time of receipt thereof shall be fairly attributable to his/her employment by the United States Government; and
- b. prior to appointment, the employee was recruited in the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the former Canal Zone, or a possession of the United States, by:
 - (1) the United States Government, including its Armed Forces;
 - (2) a United States firm, organization, or interest;
 - (3) an international organization in which the United States Government participates; or
 - (4) a foreign government

and had been in substantially continuous employment by such employer under conditions which provided for his/her return transportation to the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the former Canal Zone, or a possession of the United States; or

The claimant did not meet these criteria in that she was locally hired while residing in Germany with her spouse and did not have a transportation agreement in her own right which would provide for her return transportation to the United States.

The claimant argues she should be granted LQA because (1) her position is designated as a hard-to-fill position; (2) a waiver may be granted when a sponsoring spouse leaves the post or area

permanently; and (3) a precedence was established when a Baumholder physician submitted a waiver and was awarded LQA in 2003.

U.S. Army in Europe Regulation 690-500.592(7)(a)(1), dated November 18, 2005, states LQA will be granted to employees recruited in the United States. Those employees who had previously vacated an outside the United States civilian or contractor position must have resided permanently in the United States for at least one year immediately before accepting the formal job offer. This one-year residency requirement does not apply to applicants hired into hard-to-fill positions.

Pursuant to this provision, the claimant argues if she had returned to the United States for only a limited period and applied for the position in Kaiserslautern from the United States, she would have been deemed eligible for LQA as an employee hired from the United States in a hard-to-fill position without having to meet the one-year residency requirement in the United States. However, that the claimant may have been granted LQA under a set of hypothetical circumstances does not confer eligibility for LQA under controlling policy and regulations based on her actual circumstances.

The DSSR provides that subsection 031.12b may be waived by the head of the employing agency upon determination that unusual circumstances in an individual case justify such action. DoD Manual 1400.25-M further states that for a waiver of section 031.12b to be approved, one of the following situations must have occurred:

- The sponsoring spouse dies.
- Sponsoring spouse becomes physically or mentally incapable of continued employment with the Government.
- The couple is divorced or legally separated.
- Sponsoring spouse left the post or area permanently.
- Spouses could not maintain a common dwelling due to the relocation of either spouse's work place.

The authority to waive the requirements of 031.12b is reserved to the head of the employing agency, and OPM will not review such determinations. However, we note the claimant's situation does not meet any of the established situations in Department of Defense Civilian Personnel Manual 1400.25-M, Subchapter 1250, Overseas Allowances and Differentials, paragraph SC1250.5.1.3. The above circumstances represent situations where the employee has lost LQA sponsorship due to termination of the spouse's employment through death or mental or physical incapacitation, or because the employee no longer resides with the sponsoring spouse due to divorce or legal separation or the departure of the spouse from the area, or where the spouses cannot maintain a common dwelling because of the relocation of either spouse's workplace. The claimant argues that as a civilian retiree, her husband is not authorized access to any post or entitlements other than retirement pay and thus has "left the post or area permanently." However, the intent of this provision is that the spouse has departed the post or area geographically such that the spouses no longer reside together with the resultant loss of LQA sponsorship. There is no waiver provision for a situation where the sponsoring spouse has voluntarily terminated his or her employment, other than because of physical or mental incapacity, but the spouses continue to reside together in the area.

DoD Manual 1400.25-M specifies overseas allowances are not automatic salary supplements, nor are they entitlements. They are specifically intended as 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. LQA is specifically not designed or intended as a retention incentive.

The claimant cited a former employee who had reportedly appealed his initial LQA denial and was subsequently granted LQA retroactively. However, precedence is not a basis for the granting of LQA. Review of LQA eligibility must be based on controlling regulations and policies and case facts since there is not assurance other cases which may be cited by a claimant have been decided properly.

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 was residing in Germany when she applied and was hired for the position. No recruitment incentive was necessary as the position was recruited locally. The agency's action is not arbitrary, capricious, or unreasonable. 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.