

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

Claimant: [name]

Organization: [agency component]
Naval Criminal Investigative Service
Department of the Navy
Naples, Italy

Claim: Living Quarters Allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 08-0098

//Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Merit System Audit and Compliance

4/16/2010

Date

Introduction

The claimant is currently employed in an [position] in the [agency component], Naval Criminal Investigative Service (NCIS), in Naples, Italy. In the May 29, 2008, letter received by the U.S. Office of Personnel Management (OPM) on June 2, 2008, the claimant's duly appointed representative seeks to set aside the "wrongful denial" of living quarters allowance (LQA) benefits to the claimant by his employing agency. OPM received the agency administrative report (AAR) via email on September 20, 2008, letters dated October 30, 2008, December 3, 2008, February 17, 2009, and February 19, 2010, with attachments from the claimant's representative, additional documentation from the agency at our request from the claimant's official personnel folder and other pertinent files, and copies of published agency regulations and policies germane to the settlement of this claim. For the reasons discussed herein, the claim is denied.

The record shows the claimant was appointed effective January 29, 1975, to a nonappropriated fund instrumentality (NAFI) Security Guard, LUS-1/1, position with the Navy Exchange, Naval Support Activity, in Naples, Italy. The appointment was temporary not to exceed April 29, 1975, with: "Employment contingent upon satisfactory results concerning security investigation." Effective April 29, 1975, the claimant's employment status changed from temporary to probationary, and from probationary to permanent effective July 29, 1975. A Personnel Action (PA) effective January 25, 1976, shows the claimant as occupying a Security Guard, LUS-1/2, position, and a PA effective May 16, 1976, shows a change from Security Guard, PS-085-3/1, to Security Guard, PS-085-3/2. A PA effective July 8, 1976, shows a change to Exchange Detective, PS-083-5/1. A Notification of Personnel Action Standard Form 50 (SF 50) effective July 27, 1981, shows the claimant received an excepted appointment-conditional to a Laboratory Support Technician, GS-303-5, position with a duty station of Capodichino, Naples, Italy, with the Naval Investigative Service, Drug Identification Laboratory, Naples, Italy. Other SF-50s show the claimant was subsequently promoted to other positions and currently occupies the above cited position in the excepted service, and not a GS-1811 "Criminal Investigator" position as asserted by the claimant and the claimant's representative.

Jurisdiction and authority to settle the claim

In his May 29, 2008, letter, the claimant's representative asserts his December 5, 2005, letter to the Director, NCIS, was his firm's "original effort to obtain a final agency decision, although [the claimant] first sought to obtain LQA benefits from NCIS within six years of his employment with NCIS, when his claim first accrued." The claimant's representative describes his efforts to obtain LQA for the claimant from NCIS as a "separate internal appeals process [the claimant] wants to use, in addition to his original request, to consider granting him relief." He asserts the claimant "has never been advised of the results, if any, from that request through separate channels." He points to the enclosure labeled TAB D consisting of emails with the subject "LOCAL HIRE vs. US HIRE," discussing documentation to receive "entitlements."

The claimant's representative challenges the Navy-level conclusion communicated in an April 30, 2008, email that an April 3, 1995, memorandum from the Navy denying the claimant LQA was the final agency decision:

However, nothing about the memorandum itself indicates it is a final agency decision or that it needed to be or even could be further appealed...[the] memo also indicates that internal notes show a telephone conversation in May 1996 between a Susan Ejtemai and an unidentified staff member in his office advising someone (who is not clear) that a final agency decision had been given. However, [the claimant] advises he never heard of Ms. Ejtemai referenced in the e-mail (although he had employed the law firm of Passarelli & Brand)...In addition, it appears the advice given, (again to whom is not clear) to appeal to the GAO was erroneous, which advice (of the fact of a purported final agency decision in any event) was never communicated to [the claimant]. For these reasons, our position is that [the claimant] never received clear communication of a final agency decision on his request for LQA benefits.

In his February 17, 2009, letter to OPM, the claimant's representative reiterates his view the claimant never heard of, met or talked to Ms. Ejtemai, and denies any communication, if one was made to her, "could be considered binding in any way" on the claimant. The claimant representative states the claimant "affirms that he has never been given any document that stated it was a final agency decision concerning his claim for LQA benefits or spoken with a Mr. Higgins of the GAO or been advised by him of any right of appeal." The claimant's representative states:

Furthermore, NCIS has admitted that it failed to properly determine [the claimant's] eligibility for LQA at the time of his appointment to NCIS...Even now [the claimant] has requested reconsideration of his LQA status by submitting his claim internally in Naples pursuant to a process published to employees there, and no determination has been communicated to him.

As OPM advised the claimant's representative in a January 28, 2009, email:

Your December 3, 2008, letter to OPM indicates [claimant] "seeks a hearing on the denial and the opportunity to present evidence in support of his claim and to challenge the basis for the denial." However, 5 CFR 178.105 states: "The settlement of claims is based upon the written record only..." Therefore, I am providing you with a final opportunity to provide me with any and all additional information you wish OPM to consider in settling this claim.

Under section 3702(a)(2) of title 31, United States Code (U.S.C.), OPM is responsible for settling Federal civilian employee compensation and leave claims. Section 3702(b)(1) of title 31, U.S.C. states a claim against the Government presented under this section must contain the signature and address of the claimant or an authorized representative. The claim must be received by the official responsible under subsection (a) for settling the claim or by the agency that conducts the activity from which the claim arises within six years after the claim accrues. Implementing regulations promulgated by OPM in part 178 of title 5, Code of Federal Regulations (CFR), require that a claim must be submitted in writing and must be signed by the claimant or the claimant's representative. See 5 CFR 178.102(a). OPM will not accept and adjudicate a claim until the claimant has received an agency denial. See 5 CFR 178.102(a) and

(b). Under 5 CFR 178.105, the burden is upon the claimant to establish the timeliness of the claim, the liability of the Government, and the claimant's right to payment. Settlement of claims is based on the written record only.

The claimant's representative has presented jurisdictional arguments which would defeat the claimant's attempt to seek redress on this matter from OPM. By arguing the claimant has never received a final agency decision and that he is currently seeking a reconsideration of his LQA status, the claimant's representative would preclude OPM from accepting and adjudicating the instant claim under 5 CFR 178.102(a) and (b). However, we find that we do have jurisdiction over a portion of the claim, as further described below.

The Navy's Office of Civilian Personnel Management (now Office of Civilian Human Resources (OCHR)), the Department's headquarters human resources office (HRO), is the organization within Navy authorized to issue final decisions on compensation claims. The April 3, 1995, memorandum from this office documents the denial of the NCIS' attempt to seek LQA on behalf of the claimant and a denial of a waiver for LQA. This denial was adopted and communicated to the claimant and his representative by email on April 30, 2008, as constituting the final agency decision on the matter. The record shows that although the claimant's representative began corresponding with NCIS in his September 2, 2005, letter, he was not duly appointed until November 5, 2007, by the claimant after receiving notification of this requirement in an October 29, 2007, voice mail by OCHR staff. Citation and adoption of the April 3, 1995, memorandum as constituting Navy's final decision is sufficient for OPM to conclude the April 30, 2008, OCHR communication constitutes a final agency denial making this claim ripe for adjudication. It is unclear why the claimant persists in seeking reconsideration of his LQA request with Navy staff in Naples, Italy, since Navy headquarters, the entity authorized to issue final decisions for the agency, has spoken for the agency by denying the claimant's LQA claim.

In his December 5, 2005, letter to NCIS, the claimant's representative appears to argue that the claimant should have received LQA while employed by the Navy Exchange:

Executive Orders 11137 and 111382 describe Navy Exchange employees as federal employees for purposes of living quarters allowance and travel provisions. [The claimant] was not advised of his right to return travel or an LQA at the time of his hire by Navy Exchange, nor was any such determination made...

As discussed in OPM File Number S004184 (March 21, 2000), LQA claims for NAFI employees are not reviewable by OPM and do not fall under the claim provisions of 31 U.S.C. § 3702:

Thus, Executive Order 11137, as amended, declares employees of NAF activities to be employees of the United States for the purposes of the provisions in 5 U.S.C. Chapter 59, subchapter III, including the LQA provisions of 5 U.S.C. 5923.

The Executive Order, however, does not declare employees of NAF activities to be employees within the meaning of 5 U.S.C. 2105, or for the purposes of considering their claims under 31 U.S.C. 3702. Moreover, title 5, U.S.C., does not include any provision that authorizes OPM to consider claims from employees of NAF activities concerning

their entitlement to an LQA. Accordingly, this claim is dismissed because OPM does not have the authority to consider it.

Therefore, while we do have jurisdiction to consider the portion of the claim concerning the claimant's eligibility for LQA while employed with the Naval Criminal Investigative Service, we do not have jurisdiction to consider the claimant's eligibility for LQA while employed by the Navy Exchange.

Period of the claim

The claimant's representative appears to assert the claimant preserved his claim "within six years of his employment with NCIS, when his claim first accrued" as discussed previously. However, none of the documents cited in support of this assertion meet the statutory and regulatory requirements for submission by the claimant or the claimant's duly authorized representative of a written and signed claim, which is required to preserve the claim (both the General Accounting Office's (GAO) regulations at 4 CFR 31.2 in force when the claimant was initially employed by NCIS and OPM's regulations at 5 CFR 178.102(a) contain these requirements)¹. As discussed in GAO's Principles of Federal Appropriation Law, Second Edition, Volume III, November 1994 (Redbook):

However, claims must be in writing and must contain the signature and address of the claimant or an authorized agent or attorney. 31 U.S.C. § 3702(b)(1); 4 C.F.R. § 31.2; 69 Comp. Gen. 455 (1990); 18 Comp. Gen. 84, 89 (1938). The purpose of the signature requirement is to "fix responsibility for the claim and the representations made therein." *Bialowas v. United States*, 443 F.2d 1047, 1050 (3d Cir. 1971). Otherwise, "there would be no assurance that the claimant is still alive, that the record address is still the proper address, that the claimant himself may not have waived or forfeited [the claim], or that the check in payment of the claim would reach the claimant himself." 24 Comp. Gen. 9,

¹ 4 CFR 34.2. Form of claim, states: "Unless otherwise specifically provided, claims will be considered only when presented in writing over the signature and address of the claimant or over the signature of the claimant's authorized agent or attorney." 4 CFR 31.3 states: "A claim filed by an agent or attorney must be supported by a duly executed power of attorney or other documentary evidence of the agent's or attorney's right to act for the claimant." 4 CFR 31.5(a) states: "Statutory limitations relating to claims generally. Statutory limitations relating to claims generally are contained in 31 U.S.C. 3702(b). Claimants should submit their claims to the Claims Group, Accounting and Financial Management Division of the General Accounting Office if the statutory period of limitation will soon expire."

5 CFR 178.102 (a) states: "Content of claims. Except as provided in paragraph (b) of this section, a claim shall be submitted by the claimant in writing and must be signed by the claimant or by the claimant's representative." 5 CFR 178.103 states: "A claim filed by a claimant's representative must be supported by a duly executed power of attorney or other documentary evidence of the representative's right to act for the claimant." 5 CFR 178.104(a) states: "The claimant is responsible for proving the claim was filed within the applicable statute of limitations."

11 (1944). If GAO involvement in the claim becomes necessary, GAO will accept a copy bearing a legible facsimile signature. B-235749.1, June 8, 1989 (internal memorandum).

While a simple letter format will generally do the job, it must be clear that a claim is being asserted. The receiving agency should not be expected to engage in interpretation to divine the letter's intent. A letter making an inquiry or requesting information is not sufficient. B-150008, October 12, 1962.

The Barring Act, 31 U.S.C. 3702(b)(1), requires a claim against the United States to be received within six years after the claim arises. GAO regulations in effect before June 15, 1989, required a claim to be received at GAO within six years after the claim arose to stop the limitation period from running. *John M. Nelson*, B-238379 (March 16, 1990); *Jerry L. Courson*, B-200699 (March 2, 1981). Filing a claim with any other Government agency at that time failed to satisfy the filing requirements of the Barring Act, and did not toll or stop the statutory six-year limitation period from running. *My Anh Company*, B-252872 (April 19, 1994); *Frederick C. Welch*, 62 Comp. Gen. 80 (1982). This was true even though failure to file with the GAO within the six-year period was the fault of the agency and not of the employee. *Sara Dyson*, B-260207.2 (November 6, 1995); *John M. Nelson*, *supra*; *Richard C. Bockus*, B-198085 (November 5, 1980); *James C. Payne*, B-191801 (October 20, 1978).

GAO revised its regulations on June 15, 1989, to provide that the filing requirements of the Barring Act would be satisfied by timely filing the claim with the agency involved or with GAO. 54 Fed. Reg. 25437 (1989); see also *John M. Nelson*, *supra*. The revised regulations only applied to claims that were not barred under the Barring Act as of June 15, 1989. Thus, a claim which arose on or after June 15, 1983 (six years prior to June 15, 1989), and had been filed with an agency, did not have to be filed with GAO for purposes of tolling the Act. Nothing in the record shows the claimant filed a valid claim within the meaning of the Barring Act with GAO between June 15, 1983, and June 15, 1989. Thus, any potential claim for LQA which arose prior to June 15, 1983, is time barred.

The AAR includes a June 5, 1987, memorandum from the Regional Director for Operations (RDO), Naval Investigative Service Regional Office, Europe (NISROE), to the claimant which cites an enclosed April 15, 1987, letter (not provided in the AAR) addressing the claimant's "eligibility for LQA and associated eligibility for dependent attendance in the DOD Dependent School System" and advising the claimant of the evidence required to establish eligibility for these benefits. It does not indicate the claimant filed a written signed claim on these issues as required by regulation to submit a claim, nor does it establish what actions gave rise to either letter.

The AAR also includes an August 19, 1991, letter from the Assistant Director for Career Services, Naval Investigative Service Command, to a Mr. Mancini from Dobson, Sinisi & Toms, in Rome, Italy, responding to a July 18, 1991, letter on the issue of the claimant's eligibility for LQA. The first enclosure to this letter is an October 14, 1981, memorandum from the Director, Consolidated Civilian Personnel Office, U.S. Naval Support Activity, Naples, to the claimant responding "to questions concerning benefits" and explaining why the claimant was not eligible

for LQA or a Transportation Agreement. The second is the previously cited April 15, 1987, letter and the third (not provided) is a May 24, 1991, letter from the Head, Human Resources Division. The letter to Mr. Mancini reaffirms the claimant's ineligibility for LQA, and advises any exception to the eligibility criteria "requires head of agency approval." The record does not contain a written designation of representation signed by the claimant authorizing Dobson, Sinisi & Toms to represent him, as required by regulation (4 CFR 31.3). The record does not establish that the claimant filed a written and signed claim as required by regulations in force at the time (4 CFR 31.2) to preserve the claim.

Additional information submitted by NCIS on November 2, 2009, and received by OPM on November 9, 2009, includes an NCIS communication dated November 9, 1981, acknowledging receipt of the claimant's October 28, 1981, letter (not provided) "concerning the recent CCPO Naples Action on his non-entitlement to a quarters allowance. We are working the matter here and will advise...of our progress." Also included is a copy of a February 5, 1987, Naval Investigative Service (NCIS) message from "0028" to "Dist" discussing the claimant's "ELIGIBILITY FOR OVERSEAS BENEFITS" which states:

TO QUALIFY FOR OVERSEAS BENEFITS, [claimant] MUST ESTABLISH THAT HE WAS ENTITLED TO RETURN TRAVEL TO THE UNITED STATES BY VIRTUE OF EMPLOYMENT WITH A NON-APPROPRIATED FUND ACTIVITY, THE RED CROSS, ANOTHER FEDERAL AGENCY, OR AN INTERNATIONAL ORGANIZATION IN WHICH THE UNITED STATES PARTICIPATES PRIOR TO HIS EMPLOYMENT; OTHERWISE HE MUST BE CONSIDERED A LOCAL HIRE...TO DO THIS HE MUST SHOW THAT PRIOR TO HIS EMPLOYMENT BY NIS, HE WAS RECRUITED FROM THE UNITED STATES BY ONE OF THE AFOREMENTIONED ORGANIZATIONS UNDER CONDITIONS OF EMPLOYMENT WHICH PROVIDED FOR RETURN TRANSPORTATION, THAT HE COMMITTED TO A SPECIFIC VACANT POSITION WITH NIS BEFORE LEAVING HIS PRIOR EMPLOYMENT, AND THAT HE WAS APPOINTED BY NIS NOT LATER THAN ONE MONTH AFTER LEAVING HIS PRIOR EMPLOYMENT. OUR UNDERSTANDING OF HIS SITUATION LEADS TO THE BELIEF THAT THERE ARE NO RETURN RIGHTS.

The message states "OCPM" will consider the claimant's case taking into account such factors as his ownership of a home in the United States, the length of his absence from the claimed place of residence and the reasons for the absence, and whether the claimant has, in fact, established residence overseas; e.g., has the claimant voted in the United States, has he participated in local overseas elections, has he obtained a waiver of U.S. tax liability based on foreign residence.²

Included in the November 9, 2009, submission is a copy of the aforementioned April 15, 1987, memorandum from the Assistant Director, Administration, Naval Security and Investigative

² The NIS discussion refers to Joint Travel Regulations (JTR) Section C4004.2.B which does not control and is not germane to determining the claimant's eligibility for LQA. The claimant's representative appears to rely on "2 JTR 4004(B)(1)" for the same misplaced reasons (see page 6 of December 5, 2005, claim letter).

Command, to the RDO, NISROE, regarding the claimant's eligibility for LQA. The memorandum states the claimant was locally appointed to a position with the Navy Exchange in Naples, Italy, "for the period 25 Jan 1975-24 July 1981" and maintained a residence in Naples, Italy, at the time he was "appointed with the NIS in 1981." The memorandum states the claimant must "produce tangible evidence of his residence in CONUS at the time of his appointment either with the Exchange System in 1975 or with the NIS in 1981. If he cannot produce such proof, he has no entitlement."

The November 9, 2009, submission also includes a copy of an April 27, 1987, memorandum from the RDO NISROE, to the Special Agent in Charge, NIS Resident Agency Naples, enclosing the April 15, 1987, memorandum (referred to as a letter), stating absent the proof of residence as discussed in the April 15, 1987, memorandum, the claimant must be advised in writing that he is not eligible for LQA. A copy of a June 5, 1987, memorandum from the RDO, NISROE, to the claimant enclosed a copy of the April 15, 1987, memorandum and advised the claimant of the proof the claimant needed to submit to be eligible for LQA.

Neither GAO's previous nor OPM's current claims settlement regulations require an agency to advise a potential claimant of his or her right to file an administrative claim against the agency or with OPM. As noted in the Redbook:

...GAO review of a claim is an optional procedure. No one is ever required to seek GAO review as a prerequisite to bringing a lawsuit. *Iran National Airlines Corp. v. United States*, 360 F.2d640, 642 (Ct. Cl. 1966); B-163046, December 19, 1967.

Since a claimant is not required to pursue an administrative resolution, a claimant who initiates an administrative claim may abort it at any time, whether it is before GAO or the agency involved, and go directly to court. See B-219738, April 16, 1986 (agency should not pay settlement agreement where claimant abrogated it and filed lawsuit).

Therefore, whether or not the Navy apprised the claimant of his right to file an administrative claim has no effect on the claim settlement process or the merits of the claim before us. Based on the written record, we find the claimant preserved his claim as required by statute and regulation on November 5, 2007, the date on which the claimant's representative was duly appointed and the representative's written claim took legal effect. Thus, the claim is time barred prior to November 5, 2001.

Analysis of the claim

The claimant's representative states the claimant applied for his initial overseas position with the Navy Exchange in 1974 while on vacation in Naples, Italy. He states that after a few weeks on a tourist visa in Italy, the claimant returned to New Jersey on August 19, 1974, and continued to work as a plumber for the City of Paterson. The claimant's representative asserts the claimant had no residence in Naples at the time and no right to work. He states the claimant was subsequently contacted by the Navy Exchange and offered employment as a security guard

which the claimant accepted, traveled to Italy for the job, and received his foreign worker's permit on January 29, 1975.

The claimant's representative asserts the claimant is eligible for LQA whether he "is considered to have been recruited in the United States (his first appointment to NCIS in Suitland) or recruited locally (his second appointment in Naples)." With regard to the first assertion, the claimant's representative argues the claimant meets the eligibility for LQA in Department of State Standardized Regulations (DSSR) 031.11 as an employee who was "recruited by the employing agency in the United States" due to his initial appointment to NCIS which took place in Suitland, Maryland.

Alternatively, the claimant's representative asserts the claimant meets DSSR 031.12 as someone recruited outside the United States (in Naples for NCIS) who, prior to appointment, was recruited in the United States by the United States Government since the claimant "was living in New Jersey at the time he was recruited for employment with the Navy Exchange, which is a non-appropriated funds activity of the United States government." (See DSSR 031.12(b)). Claimant's representative asserts the claimant has been in substantially continuous employment by such employer under conditions which provided for his return transportation to the United States since the claimant was "continuously employed by the Navy Exchange immediately prior to accepting a position with NCIS" and the claimant's "employment within NCIS provides for his return transportation to the United States."

The agency's April 3, 1995, memorandum denying the claimant LQA states:

The regulations requires [sic] the employee's actual place of residence in the overseas area to be attributable to the employment by the United States (US) Government and, but for the condition surrounding the employment, the employee would be residing in the US or its possessions. There is no showing [the claimant] would be residing in the US were it not for his employment with the Naval Criminal Investigative Service (NCIS) in Naples, Italy. He maintains no residence nor does he have reemployment return rights back to the US. [The claimant] left his employment in the US with the State of New Jersey to return to Italy due to a family situation. It appears all of [the claimant's] thirteen (13) years of employment with NCIS is as a local hire and directly related to his home of record in Naples, Italy.

A December 28, 1994, memorandum from the Director, NCIS, to the Director, OCPM, seeking an LQA waiver determination on behalf of the claimant states the claimant:

left the United States in 1976 and returned to Naples, Italy, as his widowed mother-in-law was terminally ill. Within two weeks of his arrival in Naples, [the claimant] was hired as a security guard for the Navy Exchange at the Naval Support Activity in Naples. He remained in this position until he was hired by NCIS in 1981. Were it not for his position with NCIS, [the claimant] has stated he would return to a residence in the United States.

The December 28, 1994, memorandum was in response to an October 11, 1994, OCPM memorandum on the same subject denying NCIS's request to grant LQA to the claimant, which

states: "There is no indication he [the claimant] ever resided in the US, was previously employed with the US Government in the US, or is in the overseas area due to a sponsoring spouse's employment. [The claimant's] local hire employment appears to be directly related to the overseas area and the duties required in the position."

The October 11, 1994, memorandum was in response to an August 18, 1994, memorandum from the Assistant Director for Administration, NCIS, to the Director, OCPM, seeking an LQA waiver on behalf of the claimant, which provides additional background and states: "[The claimant] was employed by the NCIS on 27 July 1981. Due to his local hire status and the fact that he did not initially occupy a key and essential billet, the payment of LQA was not considered appropriate."

The record includes affidavits from various former NCIS employees providing their perspectives on the claimant's employment history and LQA status. For example, the Head, Administration Department, of the Naval Investigative Service (NIS) in 1981 stated in his November 26, 2005, affidavit that the claimant traveled to NIS Headquarters in Suitland, Maryland, in July 1981 "where he was appointed and sworn in for a position as a laboratory technician, located in Naples, Italy." Added as a handwritten note at the end of the affidavit: "It was my intent and expectation that [the claimant], a U.S. citizen with a [sic] active residence in the U.S. and sworn in/employed in the U.S., would receive all benefits normally given to such U.S. employees upon arrival in Italy." In his March 25, 2005, affidavit, the Special Agent in Charge (SAIC) of the NIS Resident Agency (NISRA) in Naples, Italy, stated:

I was surprised to learn that [the claimant] has not been provided with a Living Quarters Allowance ("LQA") during his career at NIS, later NCIS, in Naples. I do know that [the claimant] had a Return Travel Agreement with NCIS. It was my expectation and intent that [the claimant] would receive an LQA.

In his August 10, 2005, affidavit the Assistant Head of Personnel for NIS at the time of the claimant's July 1981 appointment to NIS stated: "My understanding was that [the claimant] was a stateside hire for this new position...I believe the intention at this time was that [the claimant], a U.S. citizen, would be entitled to the same benefits as other U.S. citizens hired in the U.S. for overseas government posts." This individual stated he became SAIC for NISRA, Naples, in or about June 1982, and "was surprised to learn that [the claimant] was not receiving his Living Quarters Allowance" and indicated the claimant subsequently signed a mobility agreement. He stated the claimant received Department of Defense educational benefits for his children and said: "In my experience, civilian employees of the U.S. Navy similarly situated to [the claimant] in Naples were receiving full overseas benefits, including LQA." This individual also stated: "It was always my expectation and intent that [the claimant] as a U.S. government employee assigned overseas would receive LQA."

In his February 13, 2009, affidavit, the claimant points to his maintaining a U.S. residence in Hawthorne, New Jersey, during the period of his overseas employment at the time he was appointed to NIS, and states: "As set forth above, I traveled back to Italy from my residence in New Jersey in late 1974 only because I was offered employment by the Navy Exchange there, and later offered employment by the NCIS, and I would not, and could not legally, be living and working in Italy otherwise."

The information forwarded to OPM by NCIS on November 9, 2009, includes the July 8, 1981, NCIS background investigation conducted on the claimant and states contact with the Paterson Board of Education (Board) shows the claimant was employed by the Board from February 16, 1967, through September 1, 1969, at which time the claimant resigned for “personal reasons.” The investigation states the claimant was rehired on October 16, 1970, and subsequently resigned on August 31, 1974, for “personal reasons.” The claimant’s February 24, 1981, Personal Qualifications Statement (SF-171) states his reason for leaving the Board’s employ was “death in family.”

The February 19, 2010, response from the claimant’s representative to the AAR reiterates the previously described rationale: (1) the claimant’s residence in Italy was “fairly attributable to his employment by the United States Government;” (2) the claimant applied for his initial NAFI position while on a tourist visit to Italy; (3) the claimant was continuously employed by the Navy Exchange before accepting a position with NCIS in July 1981; and (4) the claimant’s “employment with Navy Exchange was under conditions that provided for his return transportation to the United States, a crucial point that still has never been properly considered by NCIS....[claimant] was not advised of his right to return travel or an LQA at the time of his hire by Navy Exchange....” The claimant’s representative again discusses the circumstances surrounding the claimant’s traveling to Suitland, Maryland, to take his oath of office for the NCIS drug laboratory technician position and the intention of NCIS staff to provide overseas benefits to the claimant. The claimant’s representative reiterates the claimant has a mobility agreement in place and, but for his position with NCIS, would return to his residence in the United States.

Although we lack jurisdiction to settle the NAFI period of his claim, we must reconstruct this action in order to render a decision on the claimant’s eligibility for LQA during the period of the claim which is not time barred and is under OPM’s claims settlement jurisdiction.

The DSSR regulations concerning eligibility for LQA state:

031.11 Employees Recruited in the United States

Quarters allowances prescribed in Chapter 100 may be granted to employees who were recruited by the employing government agency in the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the possessions of the United States. In the case of married couples see Section 134.13.

“Recruited by the employing government agency in the United States” means an active attempt, on the part of the employing agency, to induce applicants currently residing in the United States or the other enumerated locations to relocate overseas. Having a residence in the United States does not control this determination. The record does not support the conclusion the claimant responded to a vacancy announcement which sought to induce the relocation of United States civilian applicants from the United States to Italy. Based on the claimant’s own description of events, he applied for his initial Navy Exchange position while on travel in Italy. The record does not contain a copy of the vacancy announcement establishing the area of recruitment.

Therefore, the claimant has failed to establish he was recruited in the United States for the Navy Exchange position in question.³ Whether the claimant was eligible to work and/or live in Italy at the time he was appointed to his initial Navy Exchange position or that he had moved to Italy in anticipation of such appointment have no bearing on this requirement and do not affect this eligibility determination. The issue of whether the claimant continued to maintain a residence in the United States also has no bearing on determining his eligibility for LQA.

Since the claimant was living in Italy at the time he was selected for his first NIS position, his status was that of a local hire when he was appointed to that position. His travel to the United States to make his appointment to NIS effective July 27, 1981, or the intentions of NCIS management officials, also have no bearing on this determination.⁴

Local hires may be eligible for LQA under certain conditions. DSSR 031.12 states:

031.12 Employees Recruited Outside the United States

Quarters allowances prescribed in Chapter 100 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

- c. as a condition of employment by a Government agency, the employee was required by that agency to move to another area, in cases specifically authorized by the head of agency.

³ The claimant has also failed to provide a copy of his initial offer of employment with the Navy Exchange.

⁴ Whether the claimant was or should have been eligible for return travel is subject to review by the General Services Administration Civilian Board of Contract Appeals.

Subsection 031.12b may be waived by the head of agency upon determination that unusual circumstances in an individual case justify such action.⁵

The January 29, 1975, personnel action showing the claimant's appointment to the previously described Navy Exchange Security Guard position in Naples, Italy, shows an Italian address (Via M. Diana, 138, San Cipriano D'Aversa (CE))." NCIS states while the claimant has provided excerpts from his United States passport, "he has provided no entry stamps or visa information to establish the purpose of his initial entry into Italy on November 12, 1974," which was more than two months before the NAFI appointment

However, review of the copies of Foreigner's Permit of Stay provided by NCIS and the claimant show the claimant entered Italy on November 16, 1974. In addition, the Foreigner's Permit of Stay dated January 29, 1975, shows the "purpose of stay" as "employed by the Navy Exchange." Thus, we must conclude the claimant has failed to establish he was recruited (or hired) in the United States (DSSR 031.11) or that he was recruited outside the United States (local hire) under the conditions stipulated in DSSR 031.12(a) and(b) as discussed previously in this decision. That is, the claimant was not recruited in the United States was also not recruited the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the former Canal Zone, or a possession of the United States prior to his initial NCIS overseas appointment. In addition, he was not recruited prior to his NCIS appointment from the United States or these other enumerated locations 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.

The relevant statutory and regulatory provisions 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 the circumstances justify such action, and the agency's action will not be questioned unless it is determined 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 authority to waive the requirements of DSSR 031.12b is reserved to the head of the employing agency, and OPM will not review such determinations.

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

⁵ We note that prior to July 11, 1972, DSSR 031.12 included subsection d: "the employee was temporarily in a foreign area for travel or formal study and immediately prior to such travel or study had resided in the United States, the Commonwealth of Puerto Rico, the Canal Zone, or a possession of the United States." See B-1826012, August 12, 1975. Thus, the earlier DSSR provision which would have made the claimant potentially eligible for LQA as a local hire was no longer in effect when the claimant applied for and was appointed to his initial Navy Exchange position.

Navy's decision denying the claimant's request for LQA is not arbitrary, capricious, or unreasonable since it acted within the confines of the DSSR. We find the claimant has failed to meet his burden under 5 CFR 178.105 to establish the liability of the Government. Accordingly, this claim for LQA is denied.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States court.