

Date: December 9, 2003
Claimant: [name]
File Number: 03-0024
OPM Contact; Deborah Y. McKissick

The claimant is a [GS-5], employed with the Department of the Army in Seoul, Korea. She is requesting reconsideration of her agency's decision regarding her entitlement to receive a living quarters allowance (LQA). OPM accepted the claim for the LQA on April 16, 2003, and the agency provided information, dated June 5, 2003, which we received on June 13, 2003. For the reasons discussed herein, the claim is denied.

The claimant resided in the United States when she applied for, was offered, and accepted a Federal civilian position with the Eighth U.S. Army SOFA Claims Office. The claimant accepted the position, with the knowledge that LQA would not be paid.

The agency administrative report states that the claimant resided in the United States when she applied for and accepted a [GS-5] position in Seoul, Korea, which was announced Korea-wide only. The announcement stated that the LQA would not be paid to the selectee. The claimant accepted the position on August 12, 2002, and was appointed to the position on September 1, 2002. On November 19, 2002, the claimant requested approval of a LQA and the agency disapproved the request on February 13, 2003. The agency denied the request "because the position for which she applied and was selected was announced Korea-wide, and thereby an LQA was not authorized."

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, and payment of, LQAs. Section 013 of the Department of State Standardized Regulations (DSSR) further delegates to the heads of federal agencies the authority to grant LQAs to agency employees. Section 013 of the DSSR 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. The Department of Defense (DoD) has issued further implementing regulations through its requirements for DoD civilian employment overseas, DoD 1400.25-M, CPM 592.

The Civilian Personnel Manual of the Department of Defense, DoD Regulation 1400.25-M, Subchapter 1250, Overseas Allowances and Differentials, SC 1250.3.7., dated December 1996, states that a U.S. Hire is a "person who resided permanently in the

United States ...of a possession of United States from the time he or she applied for employment until and including the date he or she accepted a formal offer of employment.” Hence, the claimant would have met the eligibility requirements based on the Department of State Standardized Regulations (DSSR) Sections 031.12a and b, and the Department of Defense (DoD) Regulation 1400.25-M, Dec. 96, Subchapter 1250E1a(2)(a), if management had authorized the payment of LQA as an incentive to fill the position. However, the agency did not authorize LQA for the position.

The DoD Regulation 1400.25-M, Dec 96, Subchapter 1250 D1 states, "allowances are not automatic salary supplements nor are they entitlements. If a person is already living in a foreign area, that inducement is normally unnecessary." The agency response also references DoD Regulation 140025-M, Dec 96, Subchapter 1250 D3 which states, "individuals shall not automatically be granted these benefits simply because they meet eligibility requirements."

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).

The DoD regulation specifies further 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. Subchapter 1-1b of DOD 1400.25-M, CPM 592 provides in relevant part:

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. The specific circumstances under which an employee who is hired in a foreign area *may* be granted the allowances provided in section 031.12 of the DSSR, as supplemented by this chapter. (Emphasis added).

In view of the permissive rather than mandatory language in the applicable statutes and regulations, as noted above, 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 and the agency agree that the claimant was offered, and accepted, the position with the knowledge, at the time of her appointment to the civilian position, that she would not receive LQA. At the time the claimant was hired, management did not grant an LQA as an incentive for the position. Accordingly, the claim 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.