

**U.S. Office of Personnel Management
Compensation Claim Decision
Under section 3702 of title 31, United States Code**

Claimant: [name]

Organization: Department of the Navy
Yokosuka, Japan

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 11-0033

//Judith A. Davis for

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

8/22/2012

Date

The claimant is a Federal civilian employee of the Department of the Navy in Yokosuka, Japan. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of living quarters allowance (LQA). We received the claim on August 17, 2011, and the agency administrative report (AAR) on December 6, 2011. For the reasons discussed herein, the claim is denied.

The claimant separated from active duty military service in Japan on September 30, 2008, and was appointed to his current position on October 14, 2008. He did not use any of his military return transportation entitlement back to the United States. The claimant requests LQA on the basis that he meets all eligibility requirements prescribed by the Department of State Standardized Regulations (DSSR) and implementing Department of Defense guidance. The agency asserts they have exercised their discretionary authority in disallowing LQA to local hires such as the claimant and they informed the claimant when he applied for and accepted the position that LQA may not be granted.

The DSSR sets forth basic eligibility criteria for the granting of LQA. Agency implementing guidance such as that contained in Department of Defense Instruction (DoDI) 1400.25-M, Volume 1250 (V1250), may impose additional requirements, but may not be applied unless the employee has first met the basic DSSR eligibility criteria.

DSSR section 031.12 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 meets section 031.12a because his presence in Japan is attributable to his employment by the Department of the Navy. He meets section 031.12b because prior to

appointment, he was presumably recruited in the United States by the U.S. military¹ under conditions which provided for his return transportation to the United States.

DoDI 1400.25-V1250, Enclosure 2, paragraph 1, provides DoD's definition of "substantially continuous employment" as that term is used in DSSR section 031.12b:

Under the provisions of section 031.12b of Reference (b) [DSSR], former military and civilian members shall be considered to have "substantially continuous employment" for up to 1 year from the date of separation or when transportation entitlement is lost, or until the retired and/or separated member or employee uses any portion of the entitlement for Government transportation back to the United States, whichever occurs first.

The claimant was appointed to his current position within one year of his military retirement and his military return transportation entitlement was still fully intact. As such, he is considered to have had "substantially continuous employment" as prescribed by DoDI 1400.25-V1250 within the context of DSSR 031.12(b). Thus, the claimant was *eligible* for LQA as a locally separated military member under the provisions of the DSSR and DoDI 1400.25-V1250. However, the agency did not grant him LQA in accordance with their local hiring practice disallowing LQA under locally-restricted vacancy announcements.

The Overseas Differentials and Allowances Act of 1960, Pub.L. 86-707, 74 Stat. 792 (codified at 5 U.S.C. §§ 5921-24) establishes the statutory authority for Federal agencies to pay employees LQA. Section 5923 of title 5, United States Code (U.S.C.) states in part:

(a) When Government owned or rented quarters are not provided without charge for an employee in a foreign area, one or more of the following allowances **may be granted** when applicable (emphasis added):

* * *

(2) A living quarters allowance for rent, heat, light, fuel, gas, electricity, and water, without regard to section 3324(a) and (b) of title 31.

Thus, the plain text of the statute, by indicating the Government "may grant" LQA, does not compel payment of such. The statute authorizes the promulgation of regulations governing the payment of allowances and differentials, and the Department of State was subsequently delegated authority to develop the implementing regulations to administer LQA.

The DSSR reiterates the discretionary nature of the statute. In particular, section 031.12, which applies to employees recruited outside the United States, provides that "[q]uarters allowances . . . **may be granted** to employees recruited outside the United States . . ." (emphasis added). The DSSR does not state that an agency *shall* or *must* grant LQA once an employee meets the prescribed eligibility requirements. The DSSR establishes only basic LQA eligibility parameters and bestows considerable discretion to agency heads to decide under what circumstances they

¹ This would be subject to verification by review of the claimant's DD Form 214, Certificate of Release or Discharge from Active Duty, which would identify his "place of entry into active duty." This form was not included with the claim record.

will actually grant LQA to eligible individuals.² See *Mark Roberts v. United States*, No.10-754C, 2012 WL 1825278 (Fed.Cl. Apr. 30, 2012, reissued May 21, 2012). DSSR Section 013 authorizes agency heads to issue further implementing regulations for their own agencies:

When authorized by law, the head of an agency may defray official residence expenses for, and grant post differential, difficult to staff incentive differential, danger pay allowance, quarters, cost-of-living, representation allowances, compensatory time off at certain posts and advances of pay to an employee of his/her agency and require an accounting therefor, *subject to the provisions of these regulations and the availability of funds*. Within the scope of these regulations, the head of an agency may issue such further implementing regulations as he/she may deem necessary for the guidance of his/her agency with regard to the granting of and accounting for these payments. Furthermore, when the Secretary of State determines that unusual circumstances exist, the head of an agency may grant special quarters, cost-of-living, and representation allowances in addition to or in lieu of those authorized in these regulations. [Italics added.]

Accordingly, DoD Manual 1400.25-M, which articulates DoD policy on the granting of LQA, provides the following guidance:

Overseas allowances and differentials (except the post allowance) are not automatic salary supplements, nor are they entitlements. They are specifically intended to be 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. *Individuals shall not automatically be granted these benefits simply because they meet eligibility requirements*. [Italics added.]

Thus, LQA is not a statutory entitlement but rather a discretionary recruitment incentive. The agency has the authority to offer LQA in those instances where they feel it necessary to attract qualified candidates and the fiduciary responsibility to limit it to those instances. (See reference to “availability of funds” in DSSR section 013 above.)

² The discretionary nature of these allowances is reiterated on the Department of State’s official Web site at http://aoprals.state.gov/content.asp?content_id=134&menu_id=75 which states in pertinent part:

SUMMARY OF ALLOWANCES AND BENEFITS

FOR U.S.G. CIVILIANS UNDER THE DEPARTMENT OF STATE STANDARDIZED REGULATIONS (DSSR)

The Department of State Standardized Regulations (DSSR) govern allowances and benefits available to U.S. Government civilians assigned to foreign areas. Note that because individual agencies may draft their own implementing regulations, which can be more restrictive than the DSSR, you may not be eligible for all of the allowances listed below. Employees should check both the DSSR and their agency’s implementing regulations for guidance on a specific allowance.

Within this context, the vacancy announcement for the claimant's position stated:

Living Quarters Allowance (LQA), Transportation Agreement or any other benefits normally paid to a "Stateside" hire may not be granted to an applicant who does not currently receive these allowances and benefits.

In this case, the agency restricted recruitment for the position to local candidates (i.e., eligible applicants residing in Japan) and stated in the vacancy announcement that LQA "may not be granted" to an applicant not already receiving this benefit, in keeping with DoD policy that LQA be treated as a recruitment incentive which is not normally necessary for local hires and should not be granted solely because the applicant meets eligibility requirements. The agency states they subsequently exercised their discretionary authority to deny the claimant LQA as a local hire who was not currently receiving LQA.

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. Under 5 CFR 178.105, the burden is upon the claimant to establish the liability of the United States and the claimant's right to payment. *Joseph P. Carrigan*, 60 Comp. Gen. 243, 247 (1981); *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979). Since an agency decision made in accordance with established policy or regulatory guidance as is evident in the present case cannot be considered arbitrary, capricious, or unreasonable, there is no basis upon which to reverse the decision, and the claim is accordingly 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.