



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Charles R. Fernandez - Living Quarters Allowance - Retired Soldier
Employed Overseas

File: B-256410.2

Date: March 22, 1995

DIGEST

An Army member stationed in Germany was preparing for retirement in Hawaii when he was offered a civilian position with the Army in Germany. Because it was too late to change his place of retirement, and apparently on advice of the officer offering the civilian position, the member traveled to Hawaii at his own expense and completed the retirement. He then returned to Germany and subsequently was employed in civilian positions over the next 12 years. He claimed living quarters allowance for the periods of his employment but the Army found him ineligible because he was neither hired from the United States for the foreign employment, nor did he fall within an exception that would allow eligibility for a member separating from the Army in a foreign area who is hired into a civilian position in the local area since he separated in Hawaii. The denial of the claim is sustained. That part of the claim for the period more than 6 years prior to its receipt by the Army or the General Accounting Office is barred from consideration by 31 U.S.C. § 3702(b). Any entitlement for later periods would be contingent on reversal of determinations of noneligibility the Army made more than 6 years prior to receipt of the claim, and GAO declines to review such determinations.

DECISION

This is in response to an appeal of our Claims Group's denial of Mr. Charles R. Fernandez's claim for living quarters allowance (LQA) for the periods of his employment in two separate civilian positions with the U.S. Army in Germany after his retirement from active duty in the Army.¹ For the reasons explained below, we sustain the denial of his claim.

¹The claims were denied by Claims Group settlement certificate Z-2868658, Dec. 3, 1993.

BACKGROUND

From the record before us, it appears that in the first part of 1979, Mr. Fernandez was a member of the U.S. Army, accompanied by his family, whose permanent duty station was in Germany. He had at that time submitted his papers for retirement from the Army and had requested that the retirement take place in Hawaii where he planned to live. Prior to his travel to Hawaii for retirement, he was offered a civilian position with the Army in Germany after his retirement. He states that the officer who offered him the position told him that it was too late to change the place of his retirement from Hawaii to Germany, and that to preserve his entitlement to LQA in connection with his civilian employment, Mr. Fernandez could travel to Hawaii at his own expense and then return to Germany. Mr. Fernandez states that he and his family did so, but when he returned to Germany after his retirement in June 1979, the position he had been offered had been downgraded and he therefore decided not to accept it. Several months later, in October 1979, he accepted a different position with the Army in Germany. He was terminated from that position in December 1980. In May 1981, he accepted another position with the Army in Germany in which he served until his resignation in October 1991.

Mr. Fernandez states that he applied for LQA in 1979 and in the early 1980's in connection with these two periods of employment, but the Army's civilian personnel offices would not approve his requests, and he did not receive LQA for the periods of employment. It appears that shortly after his resignation in 1991, he filed a claim with the Army for LQA for both periods of employment. His entitlement to LQA was denied by the Army on the basis that he did not meet the eligibility requirements in that he had not been recruited for the civilian positions from the United States, and he did not meet the exception to this requirement applicable to a military member who retires overseas and is hired locally at that point. As to the erroneous advice Mr. Fernandez apparently received prior to his retirement, the Army indicates that the officer to whom Mr. Fernandez referred did not have the authority to determine eligibility for LQA, and those who did have such authority consistently advised him that he was not eligible for LQA.

Mr. Fernandez subsequently filed his claim with our Office seeking to have the Army's determination overturned. As noted above, however, our Claims Group denied the claim, advising Mr. Fernandez that the part of the claim applicable to the period prior to November 15, 1983, was barred from consideration by the 6-year statute of limitations applicable to such claims, and the part of his claim applicable to the period of November 15, 1983, through October 29, 1991, was disallowed on substantive grounds.

Mr. Fernandez seeks reconsideration of the denial of his claim. He argues, in effect, that the Army and our Claims Group misconstrued the applicable regulations governing his initial eligibility for LQA and that, in any event, he should receive the LQA on equitable grounds because he followed the advice of the officer who initially offered him the position in Germany and traveled to and from Hawaii at his own expense to preserve his

subsequent eligibility for LQA. As to the statute of limitations, he argues that he tried several times in 1979 and the early 1980's to have the Army grant him LQA, but the paperwork was lost. As evidence of his efforts, Mr. Fernandez provided a copy of a letter to him dated May 13, 1987, from a congressman advising Mr. Fernandez that the congressman had referred the matter to the Office of Personnel Management (OPM) on Mr. Fernandez's behalf.

ANALYSIS AND CONCLUSION

The authority for LQA is found in 5 U.S.C. §§ 5923 and 5922, and implementing regulations issued by the Department of State. As the Claims Group's settlement advised Mr. Fernandez, the Department of State's regulations applicable at the time of his acceptance of employment in Germany in 1979 and 1981 are contained in the Standardized Regulations (Government Civilians, Foreign Areas), in particular subsection 031.12.² This subsection provides that LQA "may be granted" to employees recruited outside the United States, provided that the employee's actual place of residence in the place to which the LQA applies shall be fairly attributable to his or her employment by the U.S. Government. An additional requirement in such a case is that "prior to appointment, the employee was recruited in the United States, the Commonwealth of Puerto Rico, the Canal Zone, or a possession of the United States, by" (among others) the United States Government, "including its Armed Forces," and

"had been in substantially continuous employment by such employer under conditions which provided for his/her return transportation to the United States . . ." Subsection 031.12b.

The regulations also provide that the head of the agency may waive these conditions upon a determination that unusual circumstances in an individual case justify such action. In addition, the regulations provide that within the scope of these regulations, the head of an agency may issue such further implementing regulations as he or she may deem necessary for the guidance of his or her agency with regard to the granting of and accounting for these payments.³

The Army's implementing regulations in effect in 1979, when Mr. Fernandez was appointed to the initial civilian position in question, provide that in applying the provisions of subsection 031.12b of the Standardized Regulations discussed above, "a military member who chooses to separate locally in order to remain in the foreign area may be considered to have 'substantially continuous employment' until his rights to transportation back to a United States area expire unless available evidence indicates that the employee

²Change no. TL:SR-304, Oct. 8, 1978.

³Section 013.

'intends to establish permanent roots abroad and not return to live in the United States.'⁴ (Emphasis added.) These regulations also provide that determinations of eligibility for LQA will be made at the time of hire and redetermined anytime pertinent changes in circumstances occur. The Army report on Mr. Fernandez's claim states that "separate locally" in this context means separate in the foreign command where the member was last stationed as a military member. Because Mr. Fernandez was retired in Hawaii, the Army determined that he was not "separated locally" and, therefore was not eligible for LQA at the time he was hired in Germany in 1979.

As to the second period of employment, beginning in May 1981, Mr. Fernandez was not hired from the United States for that employment and, since he had no LQA eligibility in the previous employment, he had none to carry over into the subsequent employment, so he did not qualify on either of those grounds.

First, concerning the application of the statute of limitations, 31 U.S.C. § 3702, as the Claims Group advised Mr. Fernandez, this statute bars consideration of a claim not received within 6 years of the accrual of the claim. In Mr. Fernandez's case, any claim he had for LQA would have accrued as the LQA was earned. The Claims Group found that the earliest documentation in the record of the receipt of information from Mr. Fernandez that would toll the running of the statute of limitations indicates receipt on November 15, 1989, and thus any amounts of LQA he claims for periods more than 6 years prior to that date (before November 15, 1983) are barred from consideration. As to the May 13, 1987, letter from the congressman to which Mr. Fernandez refers as evidence that he had filed a claim earlier, that letter states that the congressman had referred Mr. Fernandez's inquiry to OPM. However, receipt of a claim in OPM would not toll the running of the statute of limitations in Mr. Fernandez's case because under the terms of the statute, and the implementing regulations, the claim must have been received by the General Accounting Office or by the department or agency out of whose activities the claim arose. Receipt of a claim from Mr. Fernandez by his congressman or by OPM would not toll the running of the statute. See 4 C.F.R. § 31.5(a) (1994).⁵

In addition, as explained below, we may not allow payment on the part of Mr. Fernandez's claim covering the period on and after November 15, 1983.

As noted above, Mr. Fernandez argues that the requirements of the regulations should be waived in his case because he relied on erroneous advice by the officer who initially

⁴Department of the Army CPR 592, Subch. 2, para. 2-2, Jan. 29, 1975.

⁵Prior to a modification in these regulations applicable to claims not yet barred as of June 15, 1989, the statute was interpreted even more strictly to provide that only receipt in the General Accounting Office tolled the running of the act. See John M. Nelson, B-238379, Mar. 16, 1990.

offered him employment, suggesting that Mr. Fernandez travel to Hawaii at his own expense for retirement and then return to Germany for employment. The Army advises, however, that the officer who Mr. Fernandez states gave him that advice did not have the authority to determine eligibility for LQA, and the advice the Army provided in response to Mr. Fernandez's subsequent inquiries, that he was not eligible for LQA, was correct. Also, while as noted above, the Army did have the authority to waive certain requirements of the regulations, it did not do so. For Mr. Fernandez to now prevail on any part of his claim would require us to reverse the Army's determinations of noneligibility it made in 1979 and 1981 when Mr. Fernandez was appointed to the positions in question. These determinations were made by the Army under the discretion granted by the regulations, and we decline to review those determinations made long prior to the earliest part of his claim not barred by 31 U.S.C. § 3702(b). See 71 Comp. Gen. 398 (1992); and Hart v. United States, 910 F.2d 815 (Fed. Cir. 1990), cited therein.

Accordingly, the denial of Mr. Fernandez's claim for LQA is sustained.

Robert P. Murphy
General Counsel

B-256410.2

**The Honorable Daniel K. Inouye
United States Senate**

Dear Senator Inouye:

This further responds to your letter of July 21, 1994, regarding the claim of Mr. Charles R. Fernandez for a Living Quarters Allowance (LQA) during his employment in civilian positions with the U.S. Army in Germany after his retirement from active duty in the Army in Hawaii on June 30, 1979.

Enclosed is a copy of our decision B-256410.2 of today explaining in detail why we may not allow his claim.

We trust this serves the purpose of your inquiry.

Sincerely yours,

**for \s\ Seymour Efros
Robert P. Murphy
General Counsel**

Enclosure