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

Claimant:	[name]
Organization:	[agency component] Department of the Army Stuttgart, Germany
Claim:	Request for Living Quarters Allowance
Agency decision:	Denied
<b>OPM decision:</b>	Denied
OPM file number:	08-0016

//Judith A. Davis

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

11/7/2008

Date

The claimant is a Federal civilian employee of the Department of the Army at the [agnecy component] in Stuttgart, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's decision determining him ineligible for living quarters allowance (LQA). We received the claim on June 14, 2007, the agency administrative report (AAR) on May 19, 2008, and comments on the AAR from the claimant on June 26 and July 23, 2008. For the reasons discussed herein, the claim is denied.

The claimant separated from military service on July 31, 2005, and subsequently accepted a GS-9 position with the Department of the Army on a term appointment not to exceed July 12, 2006. He received LQA while employed in this position. Immediately upon expiration of the appointment with no break in service, he accepted a position with the Army and Air Force Exchange Service (AAFES) in Germany, a non-appropriated fund (NAF) component of the Department of Defense. He did not receive LQA while employed in this position. On September 18, 2006, he was appointed to a GS-5 position with the [agency component]. This position was not designated as hard-to-fill and had no promotion potential. He was not granted LQA in this new position.

On December 21, 2006, the Department of the Army denied the claimant's request for LQA, stating that under Army in Europe Regulation (AER) 690-500.592, the claimant had to be either receiving or eligible to receive LQA at the time of selection in order to be granted LQA in the new position. Specifically, the AAR states that when he was appointed effective September 18, 2006, he was appointed as a local hire to a GS-5 position as described previously; he was not eligible under AER 690-500.592 grandfather provisions since he was not covered by this regulation while employed by AAFES; his military transportation agreement was no longer valid for LQA purposes; and his employment with AAFES did not provide him with any transportation agreement.

The claimant asserts he is entitled to LQA because he did not have a break in service of more than three calendar days between the GS-9 appointment and the AAFES position, his transportation agreement as a retired military member was intact, AAFES is a U.S. Firm, and he was covered under AER 690-500.592 while employed by AAFES.

The claimant misconstrues the rationale of the AAR and the application of AER 690-500.592 as it relates to the facts of his claim. On the date of hire, AER 690-500.592, dated November 18, 2005, was in effect. Stated clearly on the cover page, the regulation covers appropriated fund employees. Thus, when employed as a NAF employee by AAFES, the claimant did not fall under the provisions of this regulation. He could no longer be construed as meeting the Department of State Standardized Regulations (DSSR), section 031.12 eligibility requirement of "substantially continuous employment" which ends if a former military member or civilian employee is not appointed within one year after the date of separation eligibility within the meaning of the regulation. This eligibility ended when the NAF position to which he was appointed did not provide for a transportation agreement.

Section 7.a.(3) of AER 690-500.592, which pertains directly to the claimant, stipulates that LQA will be granted to *Federal civilian or NAF employees selected for or converted from NAF to positions in grades GS-09 (or equivalent), WG-11, WL-09, WS-05, and above; or a position that has an equivalent target grade; a hard-to-fill position; or a career program position at any grade;* who meet all of the following:

- (a) Are transferring to the European theater from another overseas Government activity or agency without a break in service.
- (b) Meet basic eligibility criteria in DSSR, section 031.11 or 031.12a and b.
- (c) Were already receiving or eligible to receive LQA at the time of selection.

Thus, the basic criterion that must be met for LQA eligibility relates to the grade level of the position for which the employee has been selected. The claimant did not meet this basic criterion. The subsequent three conditions listed above are not even relevant unless the grade level requirement has first been met.

Additionally, in its discussion of continuing eligibility, section 9 states that:

Unless otherwise prescribed, all employees who met the eligibility criteria in prevailing regulations at the time of appointment but who do not meet the criteria of this regulation will continue to receive LQA . . . LQA in such cases will continue as long as the employee remains employed in a position covered by this regulation without a break of service of more than 3 calendar days.

In other words, an employee who is receiving LQA in one position under earlier eligibility regulations and then moves to another position but no longer meets the eligibility requirements of the new regulations can continue to receive LQA as long as there was no break in service of more than three days.

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 converted from NAF to a GS-5 excepted appointment position not to exceed August 31, 2007. This position was not designated as hard-to-fill, had no identified target grade, and was not a career program position. Thus, the claimant did not meet basic eligibility for LQA (namely, that the position for which selected be at GS-9 or above, have an equivalent target grade, or be designated as hard-to-fill). Further, he did not have *continuing* eligibility for LQA because he was not receiving LQA in the position he occupied at the time of appointment; i.e., his position with AAFES. His LQA was terminated upon expiration of his previous GS-9 appointment with Department of the Army. The fact that there was no break in service between the GS-9 and AAFES positions is irrelevant. 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.