

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

Claimant: [name]

Organization: [agency component]
U.S. Air Forces in Europe (USAFE)
[installation], Germany

Claim: Request for living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 10-0013

//Judith A. Davis for

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

6/6/11

Date

The claimant occupies a [position] at [installation], Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of living quarters allowance (LQA). We received the December 11, 2009, claim on December 24, 2009, the agency administrative report (AAR) on March 1, 2010, and the claimant's response to the AAR on March 16, 2010. For the reasons discussed herein, the claim is denied.

The record shows the claimant was residing in Germany when he applied for and was subsequently offered and accepted [position], with an effective appointment date of April 4, 2005. The position was recruited both internally and externally. The claimant was selected as an external candidate under Veterans Employment Opportunity Act authority. The vacancy announcement stated the position was a centrally managed personnel career field position and "PCS [permanent change in station] costs will be paid IAW AFMAN 36-606." The vacancy announcement did not address overseas allowances, but noted in another section that external (non-Air Force) "candidates selected for Career program position vacancies MAY be eligible for centrally funded PCS dollars associated with a move."

The March 2, 2005, official job offer letter stated that employees hired locally: "will not receive a living quarters allowance (LQA) designed as a reimbursement for rent and utilities when occupying permanent quarters. PCS orders are not authorized." The Overseas Employment Agreement which the claimant signed on March 15, 2005, stated "Locally Appointed-No Return Rights" and "No Transportation Entitlement." The agreement which the claimant signed also states: "I understand and accept the conditions established in the agreement."

The record contains a February 19, 2009, email indicating that the Civilian Personnel Office was asked by a third party to reconsider the claimant's denial of LQA. A February 20, 2009, memorandum from the Civilian Personnel Officer, 435th Air Base Wing (USAFE), stated the claimant was "hired locally and his position was not eligible for LQA at the time of his appointment." The memorandum stated: "I regret I am unable to provide a more favorable reply to your request. If [claimant] wishes to seek further redress concerning this matter, he may appeal this decision by contacting the Office of Personnel Management."¹

In his claim request to OPM dated December 11, 2009, the claimant seeks "\$87,264.31 (as of Dec 09) for retroactive LQA, as well as a favorable LQA determination," and states that he was:

¹ Part 178 of title 5, Code of Federal Regulations (CFR), concerns the adjudication and settlement of claims for compensation and leave performed by OPM under the provisions of section 3702(a)(2) of title 31, United States Code (U.S.C.). Section 178.102(a)(3) of 5 CFR requires an employing agency to have already reviewed and issued an initial decision on a claim before it is submitted to OPM for adjudication. Based on the information submitted, we find no record of the claimant having filed a signed, written claim with his employing agency as required by statute and regulation (31 U.S.C. § 3702(b)(1) and 5 CFR 178.102(a)). Section 178.104 of 5 CFR states a claim must be received by OPM or by the department or agency out of whose activities the claim arose to show that it has been filed within the 6-year statute of limitations contained in 31 U.S.C. § 3702(b). We note the LQA reconsideration request directed to the agency in February 2009 was submitted by a third party rather than by the claimant. Therefore, we will assert jurisdiction based on the agency's February 20, 2009 memorandum. As such, the claim was preserved when it was received by OPM from the claimant on December 24, 2009.

incorrectly denied the allowance based on being categorized as a “local hire”; thus the *position* did not require a recruitment incentive. However, I am aware of many “local hire” employees who were hired under similar circumstances and are receiving the allowance. This leads me to believe that my determination is in fact arbitrary, capricious, and unreasonable.

To support his request for LQA, the claimant² comments on both his personal eligibility for LQA and the position’s eligibility for LQA. The claimant states the position was eligible for LQA because it was recruited for in the continental United States (CONUS) with attendant PCS entitlements. He faults the recruitment and vacancy announcements for failing to state whether LQA would or would not be granted as provided for in HQ USAFE memorandum for Civilian Personnel Flights, Subject: Living Quarters Allowance, 31 March 2003. The claimant disagrees with the statements in the position offer memorandum that (1) all employees who are locally hired will not be entitled to the allowance given the fact that there are employees within USAFE that have been locally hired and are receiving LQA, and (2) the fact that PCS orders were not authorized has no bearing on whether a position qualifies for LQA given the fact other local hire employees who never received PCS orders receive LQA.

The claimant states the unfavorable LQA determination was made, in part, on his “‘local hire’ status; thus the position did not require a recruitment incentive.” He states this means a determination was made on whether or not LQA would be authorized once the individual was selected, which he states “appears contradictory since the position eligibility had to be made at the time the recruitment/vacancy announcement (e.g., position eligibility), according to the published guidance.” The claimant states the “personnel specialist made an arbitrarily [sic], capriciously [sic] and unreasonable LQA determination” based on the claimant’s “local availability and that he was never afforded personal eligibility consideration.” He states he “understood the position was eligible for LQA and if he was selected, he would have to meet the personal eligibility requirements established in the governing instructions/regulations.”

The claimant acknowledges he was living in the local area of Germany when he was hired. However, he questions how “the personnel specialist could reasonably conclude that he was a ‘local hire’ given his military affiliation at the time, the fact that he did not change his legal residency, and that he was appointed to [the] civil service while still on terminal military leave from his military service.” He cites “Zervas v. United States, 26 Cl. Ct. 1425 (1992) (Zervas I); Zervas v. United States, 28 Fed. Cl. 66 (1993) (Zervas II); Zervas v. United States, 30 Fed. Cl. 443 (1994) (Zervas III)” regarding LQA determination, and purports to quote *Zervas v. United States*, 43 Fed. Cl. 757 (1991) (quoting *Zervas II*, 28 Fed. Cl. at 69) with the statement, “The Government **must conclusively prove** that plaintiff’s residence in Germany was not fairly attributable to his employment by the United States Government³.”

² The rationale submitted by the claimant was developed by another USAFE employee on behalf of this claimant and another claimant, but we refer to it as the claimant’s rationale in this decision.

³ The correct quotation is: “Defendant [The United States] bases its argument exclusively on two isolated facts . . . Although these facts are relevant to the required Section 031.12(a) analysis, in and of themselves they do not conclusively prove that plaintiff’s residence in Germany was not fairly attributed to his . . . employment by the United States Government.”

The agency states the claimant entered the overseas area as an active duty military member and was locally hired at [installation], Germany. The agency also states the position for which the claimant was hired:

did not meet the criteria for position eligibility as specified in HQ USAFE Policy Letter, dated 31 Mar 03. At the time of recruitment it was determined that PCS/LQA was not used as a recruitment incentive for local candidates. This was outlined in the offer letter to [claimant] on 2 Mar 05. At the time of appointment, [claimant] was residing in the local commuting area....

In response to the claimant's rationale which cites the receipt of LQA by another employee under similar recruitment circumstances, the agency states the reference and justification to provide LQA to the claimant:

is of no pertinent value to this determination for several reasons.

The cases are not comparable because there are several years time difference between the two. The decision regarding position eligibility always has to be seen in the context of the time period in which recruiting is on going. This context can be different every time the job is filled thus leading to different decisions regarding position eligibility.

HQ USAFE/A1K in their memo dated 23 Apr 09, suggests that [employee cited by claimant] may have been granted LQA erroneously at the time of hire. The assumption of an error however cannot be used as authorization to make the same mistake on [claimant's] LQA determination.

In his March 16, 2010, response to the AAR, the claimant restates that he was not a local hire:

I contend that the sole reason I was in the local area was due to military orders, and I had every intention of returning to California at my expiration of term of service. Based on the job announcement I was hired under, I was eligible for PCS orders from the U.S. and LQA since I was neither a military spouse nor a family member with preference.

I disagree with the local CPO's claim that citing the case of [employee's name] is of no pertinent value due to the difference in time of recruitment. Time would only be relevant if the circumstances of recruitment were different. For example, changes in the regulation or a shortage of skilled people to fill the vacancy are examples warranting the differences in recruitment. In the case of [employee's name], the 86 MSS/DPC provided no evidence to support applying a different set of rules for LQA at the time of our recruitment. I contend the 86 MSS/DPC correctly granted [employee's name] LQA based on the USAFE/DPC Living Quarters Allowance memo, 31 Mar 03; DSSR Sections 031.12(a) and 031.12(b), and DoD 1400.25-M, Subchapter 1250; and, the same rules and circumstances should apply to my LQA determination.

The claimant states that he is eligible for LQA as a CONUS hire since he maintained a residence in the United States and was only in the local area due to military orders. In doing so, he appears to assert that he is eligible for LQA as a United States hire.

The Department of State Standardized Regulations (DSSR) 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.

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

DoD Manual 1400.25-M in effect at the time of the claimant's appointment to his GS-343-11 position provides the following definitions relevant to this determination:

SC1250.3.4. Locally Hired. For the purpose of this Subchapter, locally hired refers to the country in which the foreign post is located.

SC1250.3.7. U.S. Hire. A person who resided permanently in the United States, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the former Canal Zone, or a possession of the 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.

“Recruited by the employing government agency in the United States,” as stated in DSSR 031.11, 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 claimant admits and the record shows he was living in Germany at the time he applied for and was selected for appointment. Therefore, his argument that he was a CONUS hire eligible for LQA under DSSR 031.11 fails.

The claimant’s rationale regarding his eligibility for LQA under DSSR 031.12(a) and (b) is internally contradictory in that he states that he was not a “local hire”; however, DSSR 031.12(a) and (b) are the regulatory bases for providing LQA to employees recruited outside CONUS, e.g., local hires.

The claimant’s reliance on *Zervas* in supporting his claim is misplaced. *Zervas* does not reach a decision on the merits of the case; it denies summary judgment since there were material issues of fact. Furthermore, *Zervas* does not address the controlling regulation in this claim, which is DSSR 013. DSSR 013 grants an agency the discretion to limit the payment of LQA to employees who are eligible under DSSR 031.11 or 031.12 (a) and (b). DSSR 013 states:

013 Authority of Head of Agency (effective 4/26/98)

When authorized by law, the head of an agency may defray official residence expenses for, and grant post 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.

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.* [Emphases added]

HQ USAFE memorandum for Civilian Personnel Flights, Subject: Living Quarters Allowance, 31 Mar 2003, issued under this authority contains specific limitations on the granting of LQA to locally hired employees:

4. Authorization of LQA for Locally Hired Employees: Each Civilian Personnel Flight (CPF), acting for the appointing authority, will determine whether LQA is a necessary recruitment incentive for the position and whether the applicant is eligible to receive LQA. When the incentive is not necessary, no further determination is required.

With regard to position eligibility, the memorandum states:

2. Qualified LQA Positions: LQA determinations will not be made on a mechanical grade level basis but will be based on whether LQA is necessary in the recruitment process. A qualified position requires CONUS recruitment with attendant Permanent Change of Station (PCS) entitlements. The final decision on which positions meet the criteria for LQA remains with the appointing authority. Approval for any exceptions due to extenuating circumstances for eligible employees will continue to reside at base level, but must be based on factors consistent with the general DoD policy.

The claimant points out that the vacancy announcement for which he applied did not meet another section of HQ USAFE memorandum for Civilian Personnel Flights, Subject: Living Quarters Allowance, 31 Mar 2003:

3. Position Notification: All recruitment and vacancy announcements should state whether LQA will or will not be granted. If a position is determined to be appropriate for LQA, the vacancy announcement should state that the payment of LQA will be subject to the employee meeting eligibility criteria.

The claimant also states:

Clearly, the *position* met the criteria established in the government guidance and policy memo; however, the unfavorable LQA determination was made based, in part, on the fact that the classification specialist made his/her LQA determination based upon [claimant's] "local hire" status; thus the *position* did not require a recruitment incentive. This asserts that a determination was made on whether or not the recruitment incentive (e.g., [sic] LQA) would be authorized once the individual was selected (e.g., [sic] personal eligibility), which appears contradictory since the position eligibility had to be made at the time of the recruitment/vacancy announcement (e.g., [sic] position eligibility), according to published guidance. This brings into question that if a person was recruited from CONUS, it would appear they receive LQA; whereas, a qualified candidate deemed to be living in a foreign country while on substantially continuous employment is not entitled to the same allowance.

"Position Notification" must be read in conjunction with the 435th Air Base Wing (USAFE) Memorandum, Subject: Quarters Allowance Agreement, 17 Aug 2005:

5. It is 435 MSS/DPC policy that a firm determination regarding an employee's eligibility for Quarters Allowance is made prior to an employee's appointment. When it is determined that the position eligibility is not met, no further determination on the personal eligibility is required and the applicant is not granted the quarters allowance.

The vacancy announcement for which the claimant applied did not expressly address position LQA eligibility. However, the announcement states the position is a “centrally managed Personnel Career Field position,” that “PCS costs will be paid IAW AFMAN 36-606,” and that “External (Non-Air Force) candidates selected for Career Program covered position vacancies MAY be eligible for centrally funded PCS dollars associated with a move. Determination of eligibility and extent of coverage for PCS funding will be made if/when an external candidate is selected.”

Therefore, we find the vacancy announcement is properly read to potentially provide for the granting of LQA for external candidates eligible for centrally funded PCS. Thus, we agree with the claimant’s observation to the extent that a person recruited from CONUS under this announcement would be potentially eligible, but not entitled as the claimant states, for LQA, but a local hire like the claimant would not. We also agree the vacancy announcement was not as specific as the previously discussed 31 Mar 2003 memorandum might imply. However, the announcement’s silence regarding the potential granting of LQA to any other applicants can be fairly read as not authorizing LQA for them, including those personally eligible for LQA.⁴

The claimant’s statement that he understood the position was eligible for LQA and if he was selected, he would have to meet personal eligibility requirements, implies he was officially informed of same. However, it is well settled that a claim may not be granted based on misinformation that may have been provided by agency officials. See *OPM v. Richmond*, 496 U.S. 414, 425-426 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed. Cir. 1997); and 60 Comp. Gen. 417 (1981). We note that the job offer letter, which the claimant received 33 days before he entered on duty, made clear that he would not receive LQA as a local hire.

The claimant states “management (i.e. supervisory chain) and the Manpower Career Program consider LQA appropriate for the 0343 occupational series, unless it is specifically expressed otherwise, regardless of the recruitment source.” He states these centrally-managed positions are considered “hard to qualify for” and thus “hard to fill” and “by name” requests are often used as a recruitment tool to reach qualified candidates. The claimant also states that “[t]o simply suggest that a ‘by name’ request, who [sic] happens to be in the local area, negates the need to offer the incentive is misleading and inappropriate because it has nothing to do with the *position* in which [sic] the local applicant applied for.”⁵

As discussed previously, LQA authorization for locally hired employees is vested in each CPF. Thus, the views or opinions of the claimant’s “supervisory chain” and “the Manpower Career Program” are not determinative or controlling in the LQA authorization process.

The claims jurisdiction of OPM is limited to consideration of legal and regulatory liability. We adjudicate compensation claims by determining whether controlling regulations, policy, and other written guidance were correctly applied to the facts of the case. OPM has no authority to authorize payment based solely on consideration of equity. The fact that others might have obtained benefits improperly does not give the claimant an enforceable right. Further, his

⁴ The agency would be well-served to clearly address the granting of LQA to local applicants in its vacancy announcements.

⁵ Although this portion of the rationale primarily pertains to another claimant, we respond to it to address the LQA authorization authority.

assertion that he should be granted LQA because other individuals in a similar situation were granted LQA would have the effect of obligating the agency to continue granting LQA to other applicants in perpetuity regardless of the merits of any particular situation. We note LQA is designed exclusively as a recruitment incentive and is not an entitlement. 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 DSSR 013). Therefore, the claimant's assertion he has not been treated equitably has neither merit nor applicability to our claim settlement determination.

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).

In this case, the agency adhered to its stated policy that LQA would not normally be offered to "local hires," in keeping with DoD written policy that LQA not normally be offered to job candidates already living in the foreign area. An agency decision which is consistent with stated policy or regulatory guidance cannot be considered arbitrary, capricious, or unreasonable. Accordingly, the claim for 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.