

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

Claimant: [name]

Organization: Defense Commissary Agency, Europe
Kaiserslautern, Germany

Claim: Request for living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 10-0027

//Judith A. Davis for

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

2/17/2011

Date

The claimant is a Federal civilian employee of the Defense Commissary Agency (DeCA) in Kaiserslautern, Germany. 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 April 7, 2010, the agency administrative report (AAR) on June 18, 2010, and the claimant's response to the agency administrative report on August 16, 2010. For the reasons discussed herein, the claim is denied.

The claimant was employed by the Defense Logistics Agency in Guam from April 2007 to March 2008. He applied for his current [YA-02] (GS-11 equivalent) position with DeCA in Kaiserslautern in December 2007, accepted the job offer on February 25, 2008, and was appointed effective March 30, 2008. The claimant and the agency agree that the claimant did not meet the requirements of Army in Europe Regulation (AER) 690-500.592, dated November 18, 2005, which stipulates that employees recruited in the United States or its possessions for positions at grades GS-09 (or equivalent), WG-11, WL-09, WS-05, and above, must have resided permanently in the United States *for at least one year immediately before accepting the formal job offer* if they had previously vacated an outside the United States (OCONUS) civilian or contractor position. Because the claimant had previously held a series of appropriated fund positions in Korea prior to his transfer to Guam, and had not resided in Guam for one full year before accepting the position in Kaiserslautern, he is ineligible for LQA.

The claimant presents the following basis for his claim in his initial request:

I am challenging this decision on the grounds that CHRA Europe originally determined that I was eligible for LQA as part of the overseas allowances offered for this position. And I made the decision to accept the position justifiably relying upon the information furnished to me by the hiring agency... At no time prior to or after accepting the job offer did the agency inform me or my employer, DeCA, about AER 690-500 and the 1-year residency minimum for the LQA eligibility. In fact, the DeCA Europe Human Resources Chief confirmed to CHRA Europe that I was eligible for LQA, based upon the information available to her at that time.

It is well settled by the courts that a claim may not be granted based on misinformation provided by agency officials. Payments of money from the Federal Treasury are limited to those authorized by statute, and erroneous advice or information provided by a Government employee cannot bar the Government from denying benefits which are not otherwise permitted by law. See *Office of Personnel Management v. Richmond*, 496 U.S. 414, *rehearing denied*, 497 U.S. 1046, 111 S. Ct. 5 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed.Cir. 1997); and 60 Comp. Gen. 417 (1981). Therefore, that the claimant was initially granted LQA based on incorrect information provided by a DeCA human resources official does not support continuation of those payments in the absence of the required regulatory authority.

In his response to the AAR, the claimant states he believes "a waiver is warranted" and couches his claim as a request that OPM overturn the agency's refusal to waive the one-year United States residency requirement.

AER 690-500.592.8(d) notes that Department of Defense (DoD) Manual 1400.25-M, subchapter 1250, paragraph 5.1.1.2.2, delegates waiver-approval authority to the major commands in certain specified situations. However, DoD Manual 1400.25-M, subchapter 1250, paragraph 5.1.1.2.2 does not address the Army-imposed one-year United States residency requirement and Army has

not provided for waiver of this requirement in AER 692-500.592. OPM's claim adjudication authority under 31 U.S.C. § 3702 is narrow and limited in the case of LQA claims to determining whether a claimant is eligible for LQA and, if so, whether the claimant has received LQA in accordance with the DSSR and agency policies and procedures. OPM is not granted waiver authority over any provisions of either the Department of State Standardized Regulations (DSSR) or implementing agency regulations. An agency's decision to waive LQA eligibility requirements is, by its very nature, at the discretion of the agency and is not subject to OPM review under 31 U.S.C. § 3702.

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 did not meet the one-year United States residency requirement for employees recruited in the United States or its possessions who had previously vacated an OCONUS position. The agency's action is not arbitrary, capricious, or unreasonable as it is consistent with its own published regulatory guidance. Therefore, the request 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.