

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

Claimant: [name]

Organization: Department of the Army
Chievres, Belgium

Claim: Full Personally Owned Quarters
Allowance

Agency decision: Denied

OPM decision: Granted in part

OPM file number: 11-0038

//Ana A. Mazzi

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Deputy Associate Director
Merit System Audit and Compliance

4/10/2012

Date

The claimant is a Federal civilian employee of the Department of the Army (DA) in Chievres, Belgium. The claimant requests the U.S. Office of Personnel Management (OPM) require his employing agency to grant him full personally owned quarters (POQ) allowance, a form of living quarters allowance (LQA), including retroactive payments.¹ Although the claimant has not provided an exact beginning date for his claim, the record indicates he moved into his POQ in July 2005.² OPM received the claim dated August 28, 2011, on September 14, 2011, the agency administrative report (AAR) on January 30, 2012, additional information from the agency on February 3, 2012, and the claimant's response to the AAR on February 21, 2012. For the reasons discussed herein, the claim is granted in part.

On June 29, 2009, OPM received a similar request from the claimant on this same issue seeking to increase his POQ allowance for a home he purchased and owns jointly with his partner from 50 percent to 100 percent and change his "family size number [from 1] to '2'." The claimant sought review of DA's claim denial dated April 4, 2008, "since the Obama administration extended same-sex couples housing benefits and includes family members when calculating family size." OPM responded via letter dated July 2, 2009, and advised the claimant that while President Obama issued a Memorandum dated June 17, 2009, regarding the extension of benefits to same sex domestic partners, that Memorandum itself did not create any new legal rights. Instead, it requested the Secretary of State and the Director of OPM, in consultation with the Department of Justice, to extend benefits they have respectively identified to qualified same-sex domestic partners of Federal employees where doing so could be achieved and was consistent with Federal law. The Memorandum also directed OPM to lead a 90-day Government-wide review to determine the extent to which other agencies could extend such benefits under existing law. OPM advised the claimant that as of the date of the letter, there was no legal basis for his allowance request, stating: "In the event the review results in the necessary changes in the applicable regulations, you may resubmit your request to the Department of the Army at that time." He did not do so, but resubmitted the agency denial dated April 4, 2008, with his claim request dated August 28, 2011. Based on information provided by the agency, we have accepted the denial dated April 4, 2008, as the final agency decision so that we may render a decision on this matter.

In his current claim request, the claimant seeks "reconsideration of the original [Army] decision" based on Army's erroneous assumption that he and his partner each own 50 percent of the home. The claimant states:

¹ It appears the claimant is seeking 100 percent POQ at the "with family" rate for a family size of 2 (he wants his family to include his same sex spouse) starting when the Department of State Standardized Regulations were amended to include domestic partner and 100 percent POQ at the "without family" rate for the time period from when he purchased the home with his same sex domestic partner up until the DSSR was changed to include domestic partner. See page 2 of the claimant's rebuttal letter dated February 21, 2012. Since on or around September 2005, the claimant has only been receiving 50 percent of the without family rate for POQ because he owns the POQ with his same sex domestic spouse.

² Page one of the claim dated August 28, 2011, states the claimant and his partner bought the home in *August* 2005. However, the Department of Army memorandum dated April 4, 2008 states the home was purchased in July 2005.

My partner and I are legally married in Belgium and in our home of record (NH). Belgian law requires the house to be held in joint tenancy with right of survival, neither party having the ability to relinquish a part of the whole without the consent of the other.

I consulted the Belgian Law office at the US Army Legal Office in SHAPE³, Belgium to determine ownership status since the property ownership is governed by Belgian law. The law office response is that each of us is 100% joint owners of the home.

The Department of State Standardized Regulations (DSSR) set forth basic eligibility criteria for the granting of POQ to U.S. Government civilian employees. All individuals appointed to the Federal service overseas in appropriated fund positions are subject to these criteria in determining eligibility for and the amount of POQ allowance that may be granted the employee. Real estate laws of the foreign country are considered only to the extent they may help define allowable expenses, e.g., land rent. *See* DSSR section 131.3. Section 136 of the DSSR covers POQ allowances. The publically accessible version of DSSR section 136 available on the State Department's website⁴ with a posted effective of June 6, 2010, states:

When quarters occupied by an employee are owned by the employee or the spouse, or both, an amount up to 10 percent of original purchase price (converted to U.S. dollars at original exchange rate) of such quarters shall be considered the annual rate of his/her estimated expenses for rent. Only the expenses for heat, light, fuel, (including gas and electricity), water, garbage and trash disposal and in rare cases land rent, may be added to determine the amount of the employee's quarters allowance in accordance with Section 134. The amount of the rental portion of the allowance (up to 10 percent of purchase price) is limited to a period not to exceed ten years at which time the employee will be entitled only to above utility expenses, garbage and trash disposal, plus land rent.

The agency cited this language in the AAR as its reason for denying the claim. The agency noted DSSR section 040m(1) defines "family member" as including "spouse or domestic partner." The agency notes that throughout DSSR section 130 *et seq.*, covering the scope, granting, commencement, adjustment, and termination of LQA and other areas relevant to LQA, the language identifies the "employee and his/her family" as defined in DSSR sections 040i and 040m to be the eligible recipients of the allowance, except in DSSR section 136 which concerns the grant of LQA for POQ.

Contact with the Department of State, however, revealed the version of DSSR section 136 dated June 6, 2010, and posted on the Department of State's website inadvertently replaced a previously posted version, the provisions of which are still in effect. With an interim effective date of July 5, 2009, and a final effective date of August 30, 2009, the correct language of DSSR section 136 is:

³ SHAPE stands for Strategic Headquarters Allied Powers Europe.

⁴ Available at http://aoprals.state.gov/content.asp?content_id=241&menu_id=81 (last visited Mar. 1, 2012).

136 Personally Owned Quarters (Interim eff. 7/5/2009 TL:SR 711; final eff. 8/30/2009 TL:SR 715)⁵

- *a. When quarters occupied by an employee are owned by the employee or the spouse, or both, or by the employee or the domestic partner, or both, an amount up to 10 percent of original purchase price (converted to U.S. dollars at original exchange rate) of such quarters shall be considered the annual rate of his/her estimated expenses for rent. Only the expenses for heat, light, fuel, (including gas and electricity), water, garbage and trash disposal and in rare cases land rent, may be added to determine the amount of the employee's quarters allowance in accordance with Section 134. The amount of the rental portion of the allowance (up to 10 percent of purchase price) is limited to a period not to exceed ten years at which time the employee will be entitled only to above utility expenses, garbage and trash disposal, plus land rent.
- b. The following transactions shall not be considered to meet the intent of these regulations so as to warrant payment of the rental portion of living quarters allowance beyond the initial ten year period specified in Part a:
 - *(1) sale or gift of quarters owned by the employee or the spouse, or both, or by the employee or the domestic partner, or both, with employee remaining in the same quarters, or
 - (2) the purchase or exchange and move to other quarters in daily commuting distance of the same post.

Payment for utilities and (if necessary) land rent may be continued beyond the 10 year period. The head of agency may allow the payment of the rental portion of the allowance beyond the 10 year period in unusual circumstances and in the best interest of the government.

Therefore, effective July 5, 2009, DSSR section 136 was modified to treat ownership of a POQ by employee and domestic partner the same as employee and spouse. Effective that same date, DSSR section 40m(1) was changed to define "family" or "family member" as: "(1) spouse or domestic partner (the latter as defined by agency regulations, when the head of agency determines this is in the interest of the Government), but not both." Thus, effective July 5, 2009, the claimant's partner was eligible to be treated as a family member for purposes of family size and POQ, if the claimant's agency issued an agency regulation defining domestic partner for purposes of implementing the DSSR. The Department of Defense revised Volume 1250 of DoD Instruction (DoDI) 1400.25 effective February 23, 2012, to issue agency regulations defining

⁵ According to information provided by the Department of State, "TL:SR" stands for Transmittal Letter: Standardized Regulations. The number that follows "TL:SR" is a sequence number that uniquely identifies a biweekly cable (every Federal pay period) of allowance rate changes (and, when applicable, regulation changes) through the years.

"domestic partner" for purposes of implementing the DSSR. Therefore, the claimant may only be granted full POQ at the with family rate retroactively to February 23, 2012.

The claimant cites NATO Status of Forces Agreement (SOFA) requirements regarding adherence to local housing law, which defines the claimant and his domestic partner as "each 100% joint owners," and asserts this entitles him to "100% of my Single Person POQ entitlement up to, but not exceeding, the cap, prior to 3/1/2009⁶, the date when 'domestic partnership' became officially recognized in the DSSR." However, the claimant's SOFA status has no bearing on this determination. The SOFA is a diplomatic instrument that establishes the legal treatment of U.S. Armed Forces and support personnel stationed in NATO countries. Its primary purpose is to shield U.S. service members and Department of Defense civilians from certain aspects of the legal and taxation systems while they are resident in NATO countries. The claimant's attempt to import SOFA terminology to the POQ determination process is misguided. The terms of the SOFA are not applicable for interpreting the provisions of the DSSR. SOFA status confers neither entitlement nor eligibility for POQ and SOFA provisions may not be substituted for the plain language of the DSSR in determining POQ eligibility. Since the claimant owns the POQ in question with another individual, he may not be treated as being the sole; i.e., 100 percent, owner for purposes of applying the DSSR.

The claimant's reliance on Belgian and New Hampshire law regarding the definition of "spouse" for purposes of applying DSSR section 136 is misplaced. The DSSR must be applied consistent with controlling Federal law. The Defense of Marriage Act, Public Law 104-199, codified at 1 U.S.C. § 7, defines "marriage" and "spouse" and states:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

The statutory and regulatory languages are permissive and give agency heads considerable discretion in determining whether to grant POQ to agency employees. *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979). Thus, an agency may withhold POQ 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). We find the agency acted reasonably in granting the full amount of the utilities portion of the POQ rather than reduce it as provided for in DSSR Section 134.2a(1) since it was unclear as to who was bearing the costs for the utilities, the claimant or his partner. Based on the foregoing analysis, the claim is granted in part.

⁶ It is unclear why the claimant cites March 1, 2009, as the effective date of the DSSR provisions regarding "domestic partners". As referenced above, the Department of State provided evidence that the correct effective date is July 5, 2009.

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.