

**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  
SHAPE, Belgium

**Claim:** Living quarters allowance

**Agency decision:** Denied

**OPM decision:** Denied

**OPM file number:** 13-0040

/s/ Linda Kazinetz for

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Robert D. Hendler  
Classification and Pay Claims  
Program Manager  
Agency Compliance and Evaluation  
Merit System Accountability and Compliance

5/8/14

\_\_\_\_\_  
Date

The claimant is a Federal civilian employee of the Department of the Army (DA) with the NATO Special Operations Headquarters (NSHQ) at Supreme Headquarters Allied Powers Europe (SHAPE), Belgium. She requests the U.S. Office of Personnel Management (OPM) reconsider her agency's termination of her living quarters allowance (LQA). We received the claim on May 28, 2012, and the agency administrative report (AAR) on August 13, 2013. For the reasons discussed herein, the claim is denied.

The claimant was a mobilized military reservist stationed in Stuttgart, Germany, from June 19, 2009, to May 9, 2011. While stationed in Stuttgart, she was offered her current position in Belgium as a non-competitive candidate on March 23, 2011, and accepted the position on March 24, 2011.<sup>1</sup> She returned to the United States upon her May 9, 2011, demobilization, after which she relocated to Belgium and was appointed to the Federal service effective July 3, 2011. Although she was initially granted LQA by the agency, in May 2013 the claimant was notified that, as a result of a Department of Defense (DoD)-directed LQA audit, it was determined she did not meet the LQA eligibility provisions in the Department of State Standardized Regulations (DSSR) sections 031.12a or 031.12b, the latter of which requires that an employee recruited outside the United States must, prior to appointment, have been recruited in the United States by his or her previous employer and have been substantially continuously employed by such employer under conditions providing for return transportation to the U.S. The agency expanded upon this explanation in the AAR by stating that "[claimant] returned to the United States for demobilization purposes" and "no longer had a valid return transportation agreement to the United States or the other enumerated locations stipulated in DSSR 031.12b(4) upon her civilian employment into federal government service."

The DSSR sets forth the basic eligibility criteria for the granting of LQA. However, under section 013, it allows agencies to issue implementing regulations as follows:

When authorized by law, the head of an agency *may* defray official residence expenses for, and grant post differential, difficult to staff incentive 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 thereof, 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. [Italics added.]

The use of the permissive term "may" in section 013 above as opposed to the mandatory terms "will" or "shall" indicate that LQA is a discretionary allowance on the part of the agency. Thus, agency implementing regulations such as those contained in Department of Defense Instruction (DoDI) 1400.25, Volume 1250, administratively reissued July 31, 2009, cited by the claimant

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<sup>1</sup> The period of the vacancy announcement was October 5-19, 2010, and the area of consideration was worldwide. However, the claimant did not apply for the position under the vacancy announcement. The "RPA tracker" for the position shows "Referral list returned 11 Feb 11. No selection made. Management will contact some possible non-comp eligibles that have recently been referred to them," and on February 25, 2011, "Management selected a non-comp candidate (VRA)."

and in effect at the time of her appointment, may impose additional requirements to further restrict LQA eligibility, but may not exceed the scope of the DSSR; i.e., allow for the granting of LQA in cases not otherwise permitted under the DSSR.

Section 031.11 states LQA may be granted to 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.

DSSR section 031.12 states LQA 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; or

- c. as a condition of employment by a Government agency, the employee was required by that agency to move to another area, in cases specifically authorized by the head of the agency.

The claimant asserts she meets DSSR section 031.12a because her "actual place of residence at the time [she] applied for the job was Pine Mountain, Georgia" and as proof, she "provided [her] driver's license with [her] permanent Georgia address." She further asserts that her "current residence in Belgium is solely attributable to the job offer [she] received from the Department of the Army." She asserts she meets DSSR section 031.12b because she "was recruited in the United States by the U.S. Navy and was serving at that time on involuntary active duty orders to

Germany" and "had 'substantially continuous employment' by the U.S. Navy, which provided for [her] return transportation to the United States." She further asserts:

The Department of the Army is incorrectly interpreting the definition of a U.S. hire found in DoDI 1400.25. They imply that because I was not physically in the United States when I applied for and accepted the job offer, I am not a U.S. hire... However, as a mobilized reservist, my permanent home of record and physical residence is the location from which I was activated. I did not move permanently to Germany and I maintained my residence in the state of Georgia. I continued to pay state income taxes to Georgia as my primary physical residence. I was not permanently residing in Germany; I was assigned there temporarily by the U.S. Navy. Therefore I physically resided permanently in the United States.

The definition of a locally-hired individual contained in Reference c. [DODI 1400.25, Volume 1250] refers to a person who resided in the country where the foreign post is located. Since I was in Germany when I was offered the position, and the post is in Belgium, I cannot be considered a locally-hired employee.

The claimant's above statements conflate the requirements of DSSR sections 031.11 and 031.12b. She states she maintained permanent residency in the United States during her mobilization in Germany and refers to the definition of "U.S. hire" in DoDI 1400.25, thus suggesting she is asserting eligibility as a U.S. hire under section 031.11, which allows for the granting of LQA to employees recruited in the United States or one of the enumerated territories or possessions. However, the plain language of the phrase "recruited in" clearly connotes physical presence in the United States at the time of recruitment. This language does not allow for a more expansive interpretation such as the maintenance of a residence in the United States. *See* OPM File Numbers 08-0098, 10-0037, and 12-0019. DoDI 1400.25 further defines "U.S. hire" as:

A person who resided permanently in the United States, or the Northern Mariana Islands, from the time he or she applied for employment until and including the date he or she accepted a formal offer of employment.

Since LQA eligibility criteria contained in DoDI 1400.25 may not exceed the scope of the DSSR as stated in DSSR section 013, the above definition of "U.S. hire" and its interpretation must be consistent with the criteria in DSSR section 031.11. Thus, the plain language of the term "resided" as opposed to "maintained a residence" also connotes physical presence in the United States during the recruitment process rather than maintenance of a physical or legal residence at some place other than where the employee was actually located at that time. Since the claimant was offered and accepted her current position while she was stationed and residing in Germany, as opposed to the United States or one of the enumerated territories or possessions, she does not meet LQA eligibility criteria under section 031.11. The DSSR does not exempt particular categories of employees, such as military reservists mobilized overseas, from the provisions of section 031.11. Thus, agencies are precluded from doing so either explicitly or implicitly in their implementing regulations as this would exceed the scope of the DSSR.

Further, although the claimant asserts she "did not move permanently to Germany," the presence of all U.S. citizens abroad would be considered "temporary" unless they have obtained either

citizenship or permanent residency status allowing their "permanent" presence in the foreign country. Therefore, the term "resided permanently in the United States" as it is used in the DoDI 1400.25 definition of "U.S." hire cannot be construed in a manner that would grant LQA eligibility to essentially all U.S. citizens recruited overseas as de facto "U.S. hires," as this would render DSSR section 031.12b superfluous. It is a cardinal principle of statutory construction that a statute should be construed such that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). This principle also applies in interpreting regulations, including the DSSR, and as such, the claimant's interpretation of the term "residency" is improper.

To support her assertion of LQA eligibility as a U.S. hire, the claimant states she cannot be considered a "locally-hired" employee as defined in DoDI 1400.25; i.e., "refers to the country in which the foreign post is located," because she was in Germany when she was offered the position in Belgium. However, the DSSR provides eligibility criteria for only two classes of employees, those recruited in the United States (or its territories or possessions) and those recruited outside the United States (or its territories or possessions.) In the latter case, it does not distinguish between employees recruited overseas in the country in which the post is located and employees recruited overseas outside the country in which the post is located. Since the claimant acknowledges she was in Germany when she was offered and accepted the position; i.e., outside the United States, she cannot be considered a U.S. hire under section 031.11 regardless of where the post of assignment was located.

The claimant was recruited outside the United States and meets DSSR section 031.12a in that her presence in Belgium is directly attributable to her employment by DA. However, her assertion of eligibility under section 031.12b rests on her characterization of her employment prior to appointment as being with the U.S. Navy as a reservist in Stuttgart. This is inaccurate because she indicates on her "Questionnaire for LQA Determinations," signed by her on March 9, 2011, that she separated from military service on May 9, 2011, and that after her demobilization on May 9, 2011, but prior to her relocation to Belgium, she was residing in the United States. As such, section 031.12b is not applicable to her situation because although she had been recruited outside the United States, prior to appointment she was no longer employed by one of the qualifying entities listed under section 031.12b(1)-(4) under conditions providing for her return transportation to the United States.

The claimant asserts she meets DSSR section 031.12c, which refers to situations where the employee was required by the employing Government agency to move to another area as a condition of employment. To support this assertion, she states: "I was required by the U.S. Navy to relocate to Germany. The orders I received from the U.S. Navy were involuntary and a refusal to accept them would have resulted in my discharge from the service." However, the claimant misconstrues the intent of these criteria. "Employee" is defined in DSSR section 040 as "an individual employed in the civilian service of a government agency." Thus, section 031.12c relates exclusively to existing employees of Government agencies who are stationed overseas but have not otherwise qualified for LQA under section 031.12b, but who are subsequently required by their agencies to relocate from one overseas area to another in cases specifically authorized by the head of the agency (e.g., a transfer of function or base closure.) Accordingly, the claimant's mobilization from the United States to Germany by the U.S. Navy as a military reservist prior to her appointment to the Federal Service is not applicable to the criteria under section 031.12c.

In support of her claim, the claimant additionally asserts:

Based on anecdotal evidence, I believe the Department of the Army is the only organization that is interpreting the referenced regulations in this manner... From conversations with individuals in other services and agencies under the Department of Defense, reservists who were mobilized when they were offered positions are considered U.S. hires.

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Whether intentional or otherwise, the Department of the Army's decision is discriminatory against myself and all other U.S. Reserve Force members serving overseas at the time of hire into the civil service. I believe the Department of the Army's implementation of this guidance is not only contrary to the spirit and intent of higher-level DoD regulations, it also violates the original contractual terms of my employment and is possibly in violation of U.S. labor laws.

OPM adjudicates compensation claims for certain Federal employees under the authority of section 3702(a)(2) of title 31, United States Code (U.S.C.). The authority in 31 U.S.C. § 3702(a)(2) is limited to deciding if the governing statutes and regulations have been properly interpreted and applied in determining the pay and/or benefits which an employee may be entitled to or granted. Therefore, the claimant's assertions of inequity in the interpretation of the governing regulations (i.e., the DSSR) by the other DoD components, or an unspecified "discrimination" against military reservists,<sup>2</sup> have no bearing on our claim determination.

Further, Federal employers serve under appointment, not contract, and their pay and benefits are determined by the applicable statutes and regulations rather than by the terms of a purported employment contract. The claimant states that her "original job offer included the statement that [she] was eligible for LQA and [she] wouldn't have accepted the position otherwise." However, 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 law, and erroneous advice, information, or actions of 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). Therefore, that the agency erred when it initially found her eligible for LQA, and that she accepted the position based on this erroneous determination, does not confer eligibility not otherwise permitted by statute or its implementing regulations.

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

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<sup>2</sup> We note that the application of the DSSR to military reservists recruited while stationed overseas is no different than its application to civilian employees recruited while stationed overseas.

the claimant's right to payment. *Joseph P. Carrigan*, 60 Comp. Gen. 243, 247 (1981); *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979). As discussed previously, the claimant has failed to do so. Since an agency decision made in accordance with established regulations as is evident in the present case cannot be considered arbitrary, capricious, or unreasonable, there is no basis upon which to reverse the decision.

This settlement is final. No further administrative review is available within the OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States court.