

**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  
Zama, Japan

**Claim:** Living quarters allowance

**Agency decision:** Denied

**OPM decision:** Denied

**OPM file number:** 13-0046

/s/ Chris Hammond for

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

3/10/14

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Date

The claimant is a Federal civilian employee of the Department of the Army (DA) in Zama, Japan. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's termination of his living quarters allowance (LQA). We received the claim request on July 2, 2013, and the agency administrative report on December 17, 2013. For the reasons discussed herein, the claim is denied.

The claimant was officially separated from military service at Yokota Air Base, Japan, on January 31, 2008. While residing in Japan, he was recruited for and accepted employment with the Embassy Welfare Association (EWA) at the Embassy of the U.S. in Tokyo, Japan, effective February 1, 2008. On May 25, 2008, he left employment with EWA when he was appointed to the Federal service with the U.S. Army Installation Management Agency in Seoul, Korea. He was later recruited for and accepted his current position with the DA, effective April 2009.

At the time of the claimant's appointment to the Federal service, the agency initially concluded he was eligible for and thus granted him LQA. On May 1, 2013, the agency notified the claimant that a review of his records had determined he had been erroneously found eligible for LQA upon his appointment to the Federal service, and that the allowance was therefore being terminated. The basis for this determination was that he did not meet the LQA eligibility provisions in the Department of State Standardized Regulations (DSSR), section 031.12b, 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.

The agency explains in its May 2013 letter that the claimant did not meet DSSR section 031.12b requirements as he was recruited outside the United States and had more than one employer in the overseas area prior to his Federal civilian service appointment. The claimant challenges the agency's findings, stating in his claim request:

...I was recruited by the U.S. Air Force and assigned to Japan. Subsequently retired from the U.S. Air Force in Japan, and went to work as a contractor, then became a Department of Army Civilian. Also, [Department of Defense Instruction (DoDI)] 1400.25-V1250, February 23, 2012, Page 6 states, "Under the provisions of section 031.12b, former military and civilian members shall be considered to have, 'substantially continuous employment' for up to one year from the date of separation or when transportation entitlement is lost, or until the retired or separated member or employee uses any portion of the entitlement for Government transportation back to the United States, whichever occurs first."

The DSSR contains the governing regulations for allowances, differentials, and defraying of official residence expenses in foreign areas. Within the scope of these regulations, the head of an agency may issue further implementing instructions for the guidance of the agency with regard to the granting of and accounting for these payments. Thus, DoDI 1400.25-V1250 implements the provisions of the DSSR, but may not exceed their scope; i.e., extend benefits that are not otherwise provided for in the DSSR. Therefore, an LQA applicant must fully meet the relevant provisions of the DSSR before the supplemental requirements of the DoDI or other agency implementing guidance may be applied. DSSR section 031.12 states, in relevant part, that LQA may be granted to employees recruited outside the United States under the following circumstances:

- 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. [Italics added.]

In its description of circumstances surrounding an employee's recruitment and employment occurring immediately "prior to appointment" as the basis for LQA eligibility, the DSSR makes clear that eligibility is established at the time of appointment. In this case, based on the circumstances existing prior to the claimant's initial appointment to the Federal service with the U.S. Army Installation Management Agency. The "substantially continuous employment" concept is introduced under DSSR section 031.12b covering employees recruited outside the United States. "Substantially continuous employment" must be with the *employer* (singular) which recruited the employee in the United States immediately prior to appointment and induced the employee to accept overseas employment. Although not specifically stated in the record, the claimant has provided no documentation to contradict that EWA had recruited him in Japan, where he had separated from active duty military service. As such, prior to his initial civil service appointment, the claimant had not been recruited in the United States or one of its enumerated territories or possessions.

Rather, the claimant was recruited in the United States by the U.S. Air Force, as evidenced by his DD Form 214, Certificate of Release or Discharge From Active Duty, showing his place of entry into active duty as Brooklyn, New York. His subsequent employment by EWA broke the continuity of employment by a single employer (i.e., "such" employer that recruited him in the United States). The record also shows no intervening United States residency occurring between the claimant's separation from military service and EWA employment, during which time he may have been recruited from the United States. Furthermore, the claimant has submitted no documentation indicating that EWA provided for his return transportation to the United States or one of the enumerated locations as an employment benefit. Since the claimant was not recruited in the United States prior to appointment by his previous employer (EWA), under conditions that

provided for his return transportation to the United States, he does not meet basic LQA eligibility requirements under the DSSR for locally hired employees.

Supplementing DSSR section 031.12b, DoDI 1400.25-V1250, Enclosure 2, paragraph 1a, dated June 26, 2006, and in force at the time of the claimant's LQA eligibility determination, states:

Under the provisions of section 031.12b of Reference (b) [DSSR], former military and civilian members shall be considered to have "substantially continuous employment" for up to 1 year from the date of separation or when transportation entitlement is lost, or until the retired and/or separated member or employee uses any portion of the entitlement for Government transportation back to the United States, whichever occurs first.

Since agency implementing guidance is not applied until basic DSSR eligibility is established, application of this DoDI provision to the claimant's circumstances is moot. Thus, the above-cited provision of DoDI 1400.25-V1250 supplements but does not replace the provisions of DSSR section 031.12b. A former military or civilian employee may retain "substantially continuous employment" for up to one year after separation from employment by the U.S. Government if that employment was qualifying under DSSR section 031.12b; i.e., if the employer from which the transportation benefits derive recruited the employee in the United States prior to appointment to the position for which LQA is requested. In the claimant's case, his intervening employment by EWA renders any retention of transportation benefits from his military service irrelevant for purposes of establishing eligibility under DSSR section 031.12b.

DoDI 1400.25-V1250 specifies that overseas allowances are not automatic salary supplements, nor are they entitlements. They are specifically intended as 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 a foreign area, that inducement is normally unnecessary. Furthermore, 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). 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.

In his claim request, the claimant specifically requests "reconsideration concerning the requirement to repay the [LQA] I have received." As a result of legislative and executive action, the authority to waive overpayments of erroneous payments and allowances now resides with the heads of agencies, regardless of the amount. See the General Accounting Office Act of 1996, Pub. L. No. 104-316, 110 Stat. 3826, approved October 19, 1996, and the Office of Management and Budget (OMB) Determination Order of December 17, 1996. Neither Pub. L. No. 104-316 nor OMB's Determination Order of December 17, 1996, authorizes OPM to make or to review waiver determinations involving erroneous payments of pay or allowances. Under 5 U.S.C. § 5584(a), an authorized agency official may waive the requirement for an employee to repay LQA when collection of the excess payments from the employee would be against equity and good

conscience and not in the best interests of the United States. Therefore, OPM does not have jurisdiction to consider, or issue a decision on, the request for a waiver of a claimant's indebtedness to the United States.

It is well settled by the courts that a claim may not be granted based on misinformation provided by agency officials, such as that resulting in DA's erroneous granting of LQA to the claimant. Payments of money from the Federal Treasury are limited to those authorized by statute, and erroneous advice given by a Government employee cannot bar the Government from denying benefits not otherwise permitted by law. 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). Therefore, that the claimant was erroneously determined to be eligible for LQA upon his appointment to the Federal service and had received LQA based on that determination does not confer eligibility not otherwise permitted by statute or its implementing regulations.

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.