

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

Claimant: [name]

Organization: Department of the Air Force
Ramstein, Germany

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0058

/s/ Chris Hammond for

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

3/10/14

Date

The claimant is a Federal civilian employee of the Department of the Air Force (AF) in Ramstein, Germany. 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 on August 19, 2013, and the agency administrative report on September 12, 2013. For the reasons discussed herein, the claim is denied.

The claimant separated overseas from active duty military service on January 1, 2009. He began contractor employment with the private firm L-3 at Ramstein Air Base on November 18, 2008, and was appointed to his position with AF on December 6, 2010. He was initially found eligible for and was granted LQA in connection with this appointment. In April 2013 the claimant was notified that, as a result of a Department of Defense (DoD)-directed LQA audit, it was determined his initial LQA eligibility determination was erroneous. The agency identifies his "more than one overseas employer prior to being appointed to this position" as the basis for their LQA ineligibility determination.

The claimant asserts in his claim request that "[a]ccording to a decision issued by OPM, OPM Ref# 1996-01103, the term 'employment' is restricted to civilian employment and applies only when an individual is moving from one civilian (or private sector) position to a civilian position in the federal sector. Members of the armed forces are not considered 'employees,' nor are their tenure in the armed services considered 'employment.'" The claimant thus concludes that when he "retired from active duty service, [he] maintained 'substantially continuous employment' by only one employer before becoming a government civil servant."

The Department of State Standardized Regulations (DSSR) are the governing regulations for allowances, differentials, and defraying of official residence expenses in foreign areas. However, under section 013, they allow 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.]

Thus, agency implementing regulations such as those contained in Department of Defense Instruction (DoDI) 1400.25, Volume 1250, 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. Therefore, an employee 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 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 appointment¹, 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.

The claimant, prior to his appointment by AF on December 6, 2010, was employed by the United States firm L-3 (as permitted under DSSR section 031.12b(2)). However, L-3 had recruited him in Germany rather than in the United States or one of the enumerated territories or possessions as required under section 031.12b.² Thus, the claimant does not meet LQA eligibility criteria under DSSR section 031.12b.

The agency's language that the claimant had "more than one overseas employer" as the basis for his LQA ineligibility is not used in the DSSR. Rather, it is an abbreviated way of characterizing section 031.12b, which allows LQA eligibility in those instances where the employee, prior to appointment, had "substantially continuous employment" with one of the entities listed under b(1) through b(4), and which entity (i.e., the singular usage of "such employer") recruited the employee in and provided return transportation to the United States or its territories or possessions. Therefore, by extension, an employee who has had more than one "employer" overseas prior to Federal appointment would be disqualified because the initial overseas employer rather than the employer immediately preceding appointment would have recruited the employee in the United States. As such, the claimant's assertion that military service is not considered "employment" has no bearing on his LQA eligibility determination, which is based on the plain language of DSSR section 031.12b and specifically, his not having been recruited in the United States by L-3, his employer prior to appointment.

¹ The term "prior to appointment" is construed as meaning prior to appointment to the position for which the LQA determination is being made.

² There is no documentation in the claim record to establish whether L-3 provided the claimant with return transportation to the United States or its territories or possessions.

The OPM decision cited by the claimant, #1996-01103, was for a home leave claim and dealt with the interpretation of the term "employment" in section 6304(b)(2) of title 5, United States Code (U.S.C.). The decision states that "[t]hrough the definitions in section 5 U.S.C. 6301(2), the term 'employee,' as used in section 6304, incorporates the definition of employee in 5 U.S.C. 2105, which expressly applies to persons appointed into the civil service. Therefore, if a civilian employee hired overseas claims entitlement to home leave based on prior military service, the applicable subsection is (b)(3)." In other words, 5 U.S.C. § 6304 specifically adopts the definition of "employee" in 5 U.S.C. § 2105, which does not include military members. As a result, 5 U.S.C. § 6304(b)(2), with its numerous references to "employment," applies only to civilian employees, whereas 5 U.S.C. § 6304(b)(3) specifically applies to individuals "who are discharged from service in the armed forces." However, the DSSR, implementing the overseas differentials and allowances provisions of subchapter III of chapter 59 of title 5, U.S.C. does not adopt the definition of "employee" in 5 U.S.C. § 2105 for purposes of granting such allowances and differentials (see 5 U.S.C. § 5921(3)), and this definition may therefore not be used for the purposes of applying the DSSR. In fact, DSSR section 031.12b(1) refers to "the United States Government, including its Armed Forces" as a qualifying "employer." Therefore, if the claimant had not had intervening contractor employment prior to appointment, his military service could have been considered as qualifying for the purpose of establishing LQA eligibility, if the military (i.e., "such employer") had recruited him in the United States or one of its territories or possessions.

The claimant states his initial LQA eligibility was based on DoDI 1400.25, Volume 1250³, Enclosure 2, paragraph 1.e. (as annotated by the agency on their "Position Eligibility Determination for Living Quarters Allowance" finding him eligible for LQA in November 2010), which states:

Section 031.12b of Reference (b) [DSSR] will be waived for locally-hired U.S. citizen employees who have, immediately prior to appointment, been directly employed by the United States as foreign nationals under third-country citizen contracts or agreements that provided them with LQA or housing at no cost.

It is unclear why the claimant attempts to apply this provision in his claim, as there is no indication he was either a foreign national or employed under a third-country citizen contract prior to appointment. Therefore, it will not be addressed further.

The claimant refers to his LQA grant as a "paid entitlement with the agreed upon terms of my employment." However, as stated in DoDI 1400.25, Volume 1250, paragraph 4.c.:

Overseas allowances and differentials are not automatic salary supplements, nor are they entitlements. They are specifically intended to be recruitment incentives for U.S. citizen 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.

³ The version in effect at the time of the claimant's appointment is dated December 1996 incorporating change 1, June 26, 2006, administratively reissued July 31, 2009.

In addition, 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 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 to continue receiving such erroneous payments, regardless of the terms that may have been "agreed upon" at the time of appointment.

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). 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.