

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

Claimant: [name]

Organization: U.S. Department of the Army
Seoul, Korea

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0061

/s/ Linda Kazinetz for

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

3/25/14

Date

The claimant is a Federal civilian employee of the U.S. Department of the Army (DA) in Seoul, Korea. 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 August 26, 2013, and the agency administrative report on November 7, 2013. For the reasons discussed herein, the claim is denied.

The claimant was officially separated from military service at Yongsan Garrison, Korea, on July 31, 1997. While residing in Korea, he was recruited for and accepted employment with Troy State University (TSU), Yongsan Education Center, in Korea, effective October 6, 1997. He applied for, was selected, and subsequently appointed to his current Federal service position, effective February 2, 1998.

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 disclosed he had been erroneously determined 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 explained in its May 2013 letter the claimant did not meet DSSR section 031.12b requirements since he "had more than one employer in the overseas area prior to [claimant's] appointment into appropriated fund Federal civilian service," thus concluding his overseas employment with TSU rendered him ineligible for LQA. The claimant challenges the agency's findings, stating the agency did not correctly apply the "specific OPM case-law regarding the one-year return rights for military retirees¹." Citing Department of Defense Instruction (DoDI) 1400.25-V1250, he asserts his appointment to the Federal service predates the expiration of his "one-year retiree rights." He explains in his claim request:

I had one year to return to the U.S. under the terms of my employment, i.e. under my vested retiree rights. I owned a house at 104 Pawnee Street, Enterprise, Alabama, and my intent was to return to my place of legal residence if I did not receive a job in Korea with an LQA authorization.

He further states:

I did not exercise my return rights or any of my travel/transportation privileges within 1 year. I had one temporary job ([TSU]) after military retirement which started and ended in 7 months (Program Coordinator, full time). Such employment did not cause me to lose my transportation entitlements. I applied for a GS position listed on Announcement K-97-119, Legal Technician. I accepted the job, with LQA authorization, on 2 February 1998, before my one year return rights ended on 31 July 1998. The first LQA approval (SF 1190) was 23 March 1998, for 2 years... As such, I was still within the one year

¹ OPM has authority to adjudicate compensation and leave claims for many Federal employees; however, the OPM's adjudication authority is an administrative remedy, not a judicial remedy, and does not constitute "case law."

timeframe with vested transportation entitlements as required for “substantially continuous employment” [in accordance with] Section 031.12 of the DSSR.

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 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. [italics added]

The agency’s language that the claimant had “more than one employer in the overseas area” 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.

Immediately prior to appointment, the claimant was employed by TSU in Korea. Although not specifically stated in the record, the claimant has provided no documentation to contradict that TSU had recruited him in Korea, where he had separated from military service. As such, prior to appointment, he 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. Army, as evidenced by his DD Form 214, Certificate of Release or Discharge From Active Duty, showing his place of entry into active duty as Kansas City, Missouri. His subsequent employment by TSU broke the continuity of employment by a single employer (i.e., “such employer that recruited him in the United States”). The record shows no intervening United States residency occurring between the claimant’s separation from military service and TSU employment, during which time he may have been recruited from the United States. Furthermore, the claimant has submitted no documentation indicating that TSU provided for his return transportation to the United States or one of the enumerated locations as an employment benefit. So regardless of his statements characterizing employment with TSU as “temporary” and his compensation as “not substantial enough to eliminate the inducement nature of LQA, or substantive enough to induce [him] to stay in Korea after [his] return rights had lapsed,” the claimant was not recruited in the United States prior to appointment by his previous employer (TSU), under conditions that provided for his return transportation to the United States. See DSSR Section 031.12b(2) above. Therefore, he does not meet basic LQA eligibility requirements under the DSSR for locally hired employees.

Supplementing DSSR section 031.12b, DoDI 1400.25-V1250, dated December 1996, and in force at the time of the claimant’s LQA eligibility determination, provides the following provision regarding “substantially continuous employment” as that term is used in DSSR section 031.12b:

Under the provisions of Section 031.12b of the DSSR... former military and civilian members will 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. The above-cited provision of DoDI 1400.25-V1250 supplements but does not supplant or 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 TSU 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.

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.