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

Bamburg, Germany

Claim: Living quarters allowance and temporary

quarters subsistence allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 14-0024

/s/Linda Kazinetz for

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

6/11/14

Date

The claimant is a Federal civilian employee of the Department of the Army in Bamburg, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's decision to terminate his living quarters allowance (LQA). OPM received the claim request on January 23, 2014. For the reasons discussed herein, the claim is denied.

The claimant states that as a result of a Department of Defense (DoD) directed, DOD-wide LQA audit, he was notified on May 1, 2013, that he had been erroneously found eligible for LQA when he was appointed by the Department of the Army. Although he does not specifically identify the basis for this determination, other documentation accompanying his claim indicates the agency found he did not meet eligibility requirements under section 031.12b of the Department of State Standardized Regulations (DSSR) because prior to appointment he had been recruited overseas and had been employed by more than one employer in the overseas area. The record also includes documentation indicating he had been granted a one-year waiver of DSSR section 031.12b and was authorized continuation of his LQA grant until May 2014. However, the claimant was notified on October 31, 2103, by the Civilian Human Resources Agency-Europe (CHRA) that his LQA was being terminated immediately because the LQA "that had been granted to maintain and pay for quarters had not been utilized for its intended purposes"; i.e., the claimant was 5,100 Euro in arrears for rent. The CHRA also stated they would "conduct a reconciliation which requires that [he] submit proof of rental payments rendered as well as utility payments paid to the utility provider." The claimant requests that OPM "reinstate [his] eligibility and forgive that [he] started out behind with [his] current lease," and that he be provided with this "entitlement as promised by [his] original job offer."

The 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.]

The use of the permissive term "may" as opposed to the mandatory terms ""shall" or "will" indicate that the granting of LQA is discretionary on the part of the agency. See <u>Roberts v. United States</u>, No. 2012-5113, -5114, 2014 U.S. App. LEXIS 2438 (Fed. Cir. Feb. 10, 2014) Therefore, the agency's decision to terminate the claimant's LQA for cause was within its discretionary authority under DSSR section 013.

OPM adjudicates compensation and leave 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 narrow and limited to determining if monies are owed the claimant under the controlling statutes or regulations. In the present case, this would be limited to determining if

the claimant was eligible for LQA under the DSSR and calculation of payment if LQA was granted by the agency. This would not extend to reviewing the agency's decision to terminate an LQA grant for cause. Thus, the claimant's request that we "forgive" his non-payment of rent and by extension, reverse the termination of his LQA for cause, is not reviewable by OPM and this portion of his claim is denied for lack of jurisdiction.

Although the claimant also requests that OPM "reinstate" his LQA eligibility, he provides no support or justification for why he believes the agency's LQA determination of his ineligibility was erroneous beyond his request being "based on written documentations and authorizations that were done by agency staff and I worked continuously overseas as a Social Work Care Manager." However, he confirms he worked for two separate contract firms while overseas "when the Army awarded the Social Work Care Management contract from Choctaw Management Services Enterprises to Aliron International," but chose not to resign because this would have left "several patients without adequate services and violated [his] professional social work ethics."

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.

DSSR section 031.12b 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 is disqualified because the initial overseas employer rather than the employer immediately preceding appointment would have recruited the employee in the

United States. The claimant has provided no information or documentation to establish whether his employer prior to appointment, Aliron International, had provided him with return transportation to the U.S., but does not dispute that Aliron International recruited him in Germany rather than in the U.S. Therefore, we find he does not meet LQA eligibility under DSSR section 031.12b and this portion of his claim is accordingly denied because he has not provided any documentation or advanced any argument challenging this conclusion.

The claimant submitted, as a separate letter but in the same claim package, a request for temporary quarters subsistence allowance (TQSA). DSSR Section 111 defines "quarters allowance" as an allowance granted under sections 120 (TQSA) or 130 (LQA) of these regulations. Eligibility requirements for quarters allowances set forth in Section 031 do not distinguish between LQA and TQSA, the latter of which covers only transient quarters occupied before the permanent quarters covered by LQA are secured. Thus, eligibility for TQSA is dependent on eligibility for LQA and may not be considered separately. However, we may not render a decision on this matter in that TQSA is a lodging expense. As such, TQSA claims fall under the jurisdiction of the General Services Administration's Civilian Board of Contract Appeals.

It is unclear if the claimant is requesting that OPM waive DSSR provisions in order to "reinstate" his LQA eligibility. However, 31 U.S.C. § 3702(a)(2) does not include the authority to waive provisions of the DSSR, which determine LQA eligibility. The applicable regulation in this case, DSSR section 031.12c, authorizes the head of the employee's agency to waive section 031.12b upon determination that unusual circumstances in an individual case justify such action. Therefore, OPM may not consider a request for waiver of DSSR provisions within the context of the claims adjudication function it performs under section 31 U.S.C. § 3702(a)(2).

It is similarly unclear if the claimant is requesting that OPM waive repayment of any portion of his LQA grant as a result of the reconciliation. However, as a result of legislative and executive action, the authority to waive overpayment of pay and allowances now resides with the heads of agencies, regardless of the amount. See 5 U.S.C. § 5584. Neither the General Accounting Office Act of 1996, Pub. L. No. 104-316, 110 Stat. 3826, approved October 19, 1996, nor the Office of Management and Budget's Determination Order dated December 17, 1996, authorizes OPM to make or to review waiver determinations involving erroneous payments of pay or allowances under the provisions of 31 U.S.C. § 3702(a)(2). Therefore, OPM does not have jurisdiction to consider, or issue a decision on, a 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. Payments of money from the Federal Treasury are limited to those authorized by law, and erroneous advice or information provided by 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 claimant had erroneously been found eligible for LQA, had been extended LQA in his original job offer, and had initially received LQA based on that erroneous determination does not confer eligibility not otherwise permitted by statute or its implementing regulations to continue to receive such erroneous payments.

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.