

Compensation Claim Decision
Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: [agency component]
Department of the Air Force
Stuttgart, Germany

Claim: Living Quarters Allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 08-0116

//Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability

2/3/2009

Date

The claimant is currently employed in a [position] at the [agency component], Department of the Air Force (AF), in Stuttgart, Germany (GE). He requests the U.S. Office of Personnel Management (OPM) reverse his agency's decision to deny him living quarters allowance (LQA). In a September 17, 2008, letter sent to the claimant and his servicing human resources office (HRO), OPM rejected the initial claim request since it was unclear as to whether an authorized agency official had denied the claim as required in section 178.102(a) of title 5, Code of Federal Regulations (CFR). OPM received the claimant's resubmitted claim request on November 12, 2008. However, OPM received by email on November 4, 2008, the agency administrative report (AAR) from the claimant's servicing HRO for the claimant's as yet "undocketed" claim. For the reasons discussed herein, the claim is denied.

The record shows the claimant was appointed to a [position] effective April 16, 2007. The claimant separated from the military (Army) on January 10, 2007, in Darmstadt, GE. The claimant describes his efforts, prior to his military separation, to seek employment in Belgium or GE. He states:

I was living in government quarters and had to vacate before my ETS [Enlisted Time Served]. I was advised by the local transportation management office that I should use my transportation entitlement because it would be lost. Because I had to move from government quarters no later than 10 January 07, I arranged for TMO to move my household goods on 5 Jan 06 [sic] to my mother-in-law's basement in Germany until I was hired...I was counting on the Living Quarters Allowance that was advertised with the position announcement.

The claimant states he signed his LQA determination letter on March 13, 2007, which advised the claimant that he would not receive LQA. He requests this determination be "overturned" because he received "inaccurate information from the Army Transportation Management Office [ATMO] about using part of [his] Transportation Agreement." The claimant states he was unaware the movement of his household goods had a mileage limit which would affect his transportation entitlement and was not aware he was "entitled to a courtesy move." The claimant says the "difference" in the courtesy move and the move to his in-laws house "was minute." The claimant points to Department of Defense (DoD) Civilian Personnel Manual (CPM) 1400.25-M, SC1250.5.1.1. which states:

SC1250.5.1.1. Quarters Allowance Eligibility Policy. Under the provisions of Section 031.12b of Reference (b) [Department of State Standardized Regulations (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. In unusual cases, an employee may be considered to have substantially continuous employment even though a portion of the entitlement (e.g., early return of a family member or movement of household goods from nontemporary storage) has been used.

The claimant also relies on DSSR 031.12 [identified by the claimant as DSSR 031.12c] which states DSSR 031.12b may be “waived by the head of the agency upon determination that unusual circumstances in an individual case justify such action.” The claimant states: “I feel my situation more than adequately fits this description.” The claimant also points to the waiver provision in DoD CPM 1400.25-M SC1250.5.1.3 which provides for a waiver of DSSR 031.12b if “the employee is an incumbent of a position designated as emergency-essential according to DoD Directive 1404.10.”

The AAR states the claimant was denied LQA on January 31, 2007, because he failed to meet the eligibility criteria in “DSSR, Section 031.12(a) and (b); DoD 1400.25-M, Subchapter 1250, paragraph SC1250.5.1.1 and HQ USAFE/DPC Policy Letter, Para 4.b.” The AAR indicates DoD CPM 1400.25-M SC1250.5.1.1 “was not considered in this determination as it is not mentioned in the HQ USAFE/DPC Policy Letter.” The record shows USAFE Memorandum, Subject: Living Quarters Allowance, 31 Mar 2003, does not adopt the “In unusual cases...” provision of DoD CPM 1400.25-M SC1250.5.1.1. The AAR indicates that because the claimant “used part of his military transportation entitlement prior to his appointment into his civilian AF position,” he no longer met the “substantially continuous employment” condition of the governing regulations. The AAR also states: “Mr [sic] Irving’s argument about inaccurate information received from the Army TMO was not considered in our determination as the AF is not responsible for erroneous information provided by Army officials.”

Jurisdiction

Under section 3702(a)(2) of title 31, United States Code (U.S.C.), OPM is responsible for settling Federal civilian employee compensation and leave claims. Section 3702(b)(1) of title 31, U.S.C. states a claim against the Government presented under this section must contain the signature and address of the claimant or an authorized representative. The claim must be received by the official responsible under subsection (a) for settling the claim or by the agency that conducts the activity from which the claim arises within six years after the claim accrues. Implementing regulations promulgated by OPM in part 178 of title 5, Code of Federal Regulations (CFR), require that a claim must be submitted in writing and must be signed by the claimant or the claimant’s representative. See 5 CFR 178.102(a). Under 5 CFR 178.105, the burden is upon the claimant to establish the timeliness of the claim, the liability of the Government, and the claimant’s right to payment. Settlement of claims is based on the written record only.

As part of his resubmitted claim, the claimant provided a copy of a September 29, 2008, claim denial from his servicing HRO advising the claimant to file his claim with OPM under the provisions of 5 CFR Part 178. The claim denial indicates it is in response to the claimant’s “telephone call from 25 Sep 2008.” Neither the claimant nor the servicing HRO, acting on behalf of the agency, have submitted documentation showing the claimant has ever filed a signed and written claim against the Government. The claimant also failed to sign the initial and the resubmitted claim request. Claimant has failed to meet the requirements for filing a valid claim under the provisions described above; therefore, the claim for review is denied. Nevertheless, even assuming *arguendo* that the claimant filed a valid claim, our review of the merits of the

case as described in further detail below leads to the conclusion that the claimant is not entitled to relief.

Analysis

Eligibility for LQA is governed by the provisions of the DSSR, which are the overriding regulations for allowances and benefits available to all Federal Government civilians assigned to foreign areas. The DSSR, in Section 013, delegates to the heads of Federal agencies the authority to grant LQAs to agency employees and specifies the head of an agency “may” grant LQA and issue further implementing regulations as he or she may deem necessary. DoD CPM 1400.25-M, specifies 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 the foreign area, that inducement is normally unnecessary.

The terms of the relevant statutory and regulatory provisions 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 the circumstances justify such action, and the agency’s action will not be questioned unless it is determined the agency’s action was arbitrary, capricious, or unreasonable. *Joseph P. Carrigan*, 60 Comp. Gen. 243, 247 (1981); *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979). This approach also applies to the establishment of LQA policies which are more restrictive than those of the DSSR. USAFE has established more restrictive LQA policies than those found in the DSSR in its March 31, 2003, LQA policy memorandum by not adopting the “in unusual cases” language provided for in DoD CPM 1400.25-M, SC1250.5.1.1. Thus, the claimant’s reliance on this provision is misplaced. The claimant’s reliance on the waiver provisions in DoD CPM 1400.25-M SC1250.5.1.3 is also misplaced in that the March 31, 2003, USAFE LQA policy memorandum does not provide for a waiver of DSSR 031.12b under the circumstances of this claim. The authority to waive the requirements of DSSR 031.12b is reserved to the head of the employing agency, and OPM will not review such determinations.

When the agency’s factual determination is reasonable, we will not substitute our judgment for that of the agency. See, e.g., *Jimmie D. Brewer*, B-205452, March 15, 1982. In this case, under controlling agency policy in effect at the time the claimant was hired (USAFE Memorandum, Subject: Living Quarters Allowance, 31 Mar 2003), we find the employing activity acted in accordance with agency policy in declining to provide the claimant with LQA because he had used a portion of his entitlement for return transportation to the United States. Therefore, the USAFE’s January 31, 2007, decision denying the claimant’s request for LQA is not arbitrary, capricious, or unreasonable since it acted within the confines of well-established LQA policy authorized by the DSSR and DoD CPM 1400.25-M. Accordingly, even if claimant had submitted a valid claim, the claim for an LQA would have been denied.

The claimant seeks relief because of “inaccurate information” from the ATMO on using his transportation entitlement. The AAR statement that “the AF is not responsible for erroneous information provided by Army officials” misconstrues controlling case law on this issue. It is well established that 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. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 110 S. Ct. 2465, *rehearing denied*, 497 U.S. 1046, 111 S. Ct. 5 (1990). See also OPM file number S9700423; OPM file number 9700369, January 15, 1998; OPM file number S98001982, October 2, 1998; and OPM file number S001584, November 16, 1998. Therefore, erroneous advice from an Army or AF official may not be relied on as a basis for granting this claim.

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.