

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

Claimant: [name]

Organization: [agency component]
United States Marine Corps
Okinawa, Japan

Claim: Request for living quarters allowance,
transportation agreement, and increase in
salary offer

Agency decision: Denied

OPM decision: Denied

OPM file number: 09-0039

/s/ Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Merit System Audit and Compliance

3/19/2010

Date

The claimant is a Federal civilian employee of the United States Marine Corps at [agency component] in Okinawa, Japan. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of living quarters allowance (LQA) and transportation agreement and what he refers to as the "reduction" in his annual salary from \$70,000 to \$57,146. We received the claim on July 16, 2009, the agency administrative report (AAR) on October 13, 2009, the claimant's response to the administrative report on November 3, 2009, and additional information from the claimant on March 5, 2010. For the reasons discussed herein, the claim is denied.

The record shows the claimant was residing in Okinawa as an active duty military member when he applied for and was subsequently offered and accepted [position], effective June 30, 2008. The position was recruited locally (Area of Consideration: Okinawa-wide). The vacancy announcement stated: "The position does not incur overseas allowances. Payment of travel and transportation expenses is not authorized. However, anyone on a transportation agreement with LQA entitlements may be granted continuance."

Before the claimant received the official job offer, the selecting official, who mistakenly believed he had the authority to offer LQA and set salary within set bounds, indicated to the claimant he would be granted LQA and hired at the annual salary of approximately \$70,000. When the claimant received the official job offer from the servicing human resources office (HRO), it was made clear the salary would be \$57,146 with no LQA. The claimant accepted the position as offered and subsequently requested LQA "continuance" and transportation agreement.

On February 27, 2009, the agency denied this request. They noted that since the claimant was not authorized or granted LQA or a service agreement (formerly known as a "transportation agreement") in any prior civilian position, it appeared he was requesting "continuance" of his military Overseas Housing Allowance (OHA) as distinguished from civilian LQA. They stated there was no provision for continuance of military OHA for retired military members and although the claimant was eligible for LQA, it was not offered for the position in question. They also stated the position did not meet regulatory eligibility requirements for the negotiation of a service agreement and furthermore, the claimant was ineligible to negotiate an initial service agreement subsequent to his appointment. They noted that as a newly hired civil servant, the claimant's salary was not reduced but rather offered at a lower rate than he desired, and that he was informed of the salary prior to accepting the position.

LQA

To support his request for LQA, the claimant submitted a large volume of correspondence from various management officials and colleagues providing endorsement, opining on the merits of his case, offering interpretations or critiques of LQA policy, and reporting on "overheard" conversations related to his case. We adjudicate compensation claims by determining whether controlling regulations, policy, and other written guidance were correctly applied to the facts of the case. Third-party testimonials and opinions have no bearing on these determinations and thus will not be further addressed. The claimant's allegations of personal bias and his attempt to establish a pattern of purported "errors" or alleged misconduct by the human resources office to discredit their LQA determination likewise have no bearing on our adjudication of his claim and will not be further considered or addressed.

The claimant's main arguments in support of his claim are distilled as follows: (1) the selecting official had the authority to make LQA and salary offers; (2) the claimant should have been granted a continuance of LQA when hired for the position; (3) there were insufficient local candidates to justify recruiting locally; (4) local hires are normally temporary positions; (5) the claimant is entitled to LQA under the Status of Forces Agreement (SOFA) between the United States and Japan and the Servicemembers Civil Relief Act; (6) LQA offers have not been made equitably; and (7) the agency's actions in denying him LQA were arbitrary and capricious.

Marine Corps Base Japan (MCBJ) Order P12000.2A, Subject: Civilian Human Resources Office (CHRO), U.S. Employment/Classification Section, Chapter 16, Living Quarters Allowance, provides the following policy on granting LQA to local hires:

LQA is not authorized when there are qualified locally available candidates for hire, except when the selectee is currently receiving LQA from MCBJ, or another DoD agency on Okinawa . . . Applicants currently receiving LQA from another DoD component on island may be granted continuance of LQA at management's discretion.

It also specifically states:

If the Division Head or Commander deems it necessary to offer LQA to a locally available candidate not currently receiving LQA but meeting all eligibility requirements, the Chief of Staff, MCBJ may grant a waiver to the above prior to the entrance on duty of the employee. Only in the most compelling cases, e.g. a hard-to-fill job, shall this type of waiver be authorized.

"Local hire" is defined as:

An individual physically residing in Japan. This includes, but is not limited to, locally separated military personnel and employees of U.S. firms (contractors) or organizations.

As the position in question was the claimant's initial Federal civilian appointment, he was not already receiving LQA when selected and thus was not eligible for continuance. Claimant's apparent attempt to qualify for LQA "continuance" based on his military Overseas Housing Allowance (OHA) as distinguished from civilian LQA is misplaced. Claimant's attempt to conflate the provisions of two separate and disparate statutes is contrary to the basic principles of statutory and regulatory construction. As a locally separated military member physically residing on Okinawa at the time of hire, he was a "local hire." MCBJ Order P12000.2A clearly delegates authority to waive the LQA restriction on local hires to the Chief of Staff prior to the employee's entrance on duty. Thus, the claimant's selecting official did not have the authority to offer initial LQA. It is well settled that a claim may not be granted based on misinformation that may have been provided by agency officials. 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).

The claimant cites the definition of "head of Agency" in the Department of State Standardized Regulations (DSSR) as "either the head of a government agency or anyone designated by him/her to make determinations in his/her behalf" as evidence that the selecting official is "granted/delegated authority to authorize benefits." However, specific agency delegations are neither designated nor implied in either this definition or elsewhere in the DSSR. Department of

Defense (DoD) Manual 1400.25-M, which sets forth DoD implementing policy for the DSSR, specifically states that various waiver authorities related to overseas allowances including LQA are “delegated to the Heads of the DoD Components” and that “[t]hese officials may further delegate these authorities in writing.” That written delegation for MCBJ is accomplished through MCBJ Order P12000.2A cited above.

The claimant attempts to establish there were insufficient local candidates to justify local recruitment by either questioning the qualifications of the other candidates on the selection certificate for the position or asserting their supposed unwillingness to have accepted the position if it had been offered. Speculations of this nature are irrelevant to our adjudication of the claim, which concerns solely whether the agency has incurred a monetary obligation to the claimant based on how the position was actually advertised and recruited. Management’s statutory right under 5 U.S.C. 7106(a) to make selections to fill positions is not subject to review as part of the compensation claims settlement process.

The claimant asserts local hires are normally temporary positions and cites the definition of “local hire appointment” in title 5, Code of Federal Regulations (CFR) 315.608(e)(4) as:

An appointment that is not actually or potentially permanent and that is made from among individuals residing in the overseas area.

The claimant construes this as a global definition of the term “local hire,” disregarding that this paragraph refers to a type of noncompetitive *appointment* and is followed by a listing of hiring authorities for specific types of overseas non-permanent employment to which the definition exclusively applies. 5 CFR 315.608 covers the “noncompetitive appointment of certain former overseas employees,” i.e., family members accompanying sponsors officially assigned to an overseas area, and the above definition is applicable only within that context. The claimant’s misguided attempt to import the definition of “local hire” from one regulation to another unrelated regulation is contrary to the basic principles of statutory and regulatory construction.

To support his treatment as a U.S. hire for LQA purposes, the claimant cites section 9 of the Status of Forces Agreement (SOFA) with Japan:

Members of the United States armed forces, the civilian component, and their dependents shall be exempt from Japanese laws and regulations on the registration and control of aliens, but shall not be considered as acquiring any right to permanent residence or domicile in the territories of Japan.

Pursuant to this paragraph, the claimant states:

If you were in the military when you were in Japan, then you and your dependents were in Japan under the SOFA agreement, so you were not legally considered as having ‘residence or domicile in the territories in Japan.’ Your legal residence and domicile were considered whatever your home state is, and the same is true of your dependents. The SOFA agreement will override the DSSR, OPM and any CHRO regulations and is unique for military members stationed in Japan.

The claimant's assertion regarding the applicability of SOFA to LQA determinations is misplaced. The SOFA is a diplomatic instrument that establishes the legal treatment of U.S. Armed Forces stationed in Japan. Its purpose is to shield U.S. servicemembers and DoD civilians from the Japanese legal and taxation systems, not from U.S. laws and regulations. Section 9 establishes only that military members, the civilian component, and their dependents do not acquire the right to permanent residence in Japan as a result of their posting in that country. This confers neither entitlement nor eligibility for LQA. The claimant's attempt to rely on and apply SOFA terminology to the LQA determination process is contrary to the basic principles of statutory and regulatory construction.

Also to support his treatment as a U.S. hire for LQA purposes, the claimant asserts the Servicemembers Civil Relief Act "states military members are considered physically present in the United States even when they are stationed overseas." This Act postpones or suspends certain civil obligations while on active duty or deployment, such as outstanding credit card debt, mortgage payments, pending trials, taxes, and lease determinations. We assume the claimant is referring to Section 595, which states:

For the purposes of voting for any Federal office...or a State or local office, a person who is absent from a State in compliance with military or naval orders shall not, solely by reason of that absence—

- (1) be deemed to have lost a residence or domicile in that State, without regard to whether or not the person intends to return to that State;
- (2) be deemed to have acquired residence or domicile in any other State; or
- (3) be deemed to have become a resident in or a resident of any other State.

The application of this section is restricted to the purposes stated in the statute: i.e., voting by active duty military members, and under the basic principles of statutory construction may not be extended to other matters for which it is not specifically intended. Therefore, whether the claimant was covered by this Act while on military terminal leave when he entered on duty is moot for LQA purposes.

We note the claimant is attempting to use SOFA and the Servicemembers Civil Relief Act as a means of establishing status as a U.S. hire for LQA purposes only, while apparently retaining status as a local hire for the purposes of the area of consideration to which the vacancy announcement was restricted. However, the agency acknowledges the claimant was *eligible* for LQA as locally separated military member under the provisions of the DSSR but was not granted such because it was not *offered* for the position in question. The DSSR only establishes basic LQA eligibility parameters but allows the using agencies latitude to decide in what circumstances they will actually grant LQA to eligible individuals. DoD Manual 1400.25-M, which articulates DoD policy on the granting of LQA, provides the following guidance:

Overseas allowances and differentials (except the post allowance) are not automatic salary supplements, nor are they entitlements. They are specifically intended to be 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. *Individuals shall not automatically be*

granted these benefits simply because they meet eligibility requirements. [Emphases added]

This policy is reiterated in MCBJ Order P12000.2A, which states:

In determining whether or not to grant LQA, the recruitment needs, along with the expense the activity or MCBJ will incur, shall be considered . . . Individuals shall not automatically be granted LQA simply because they meet eligibility requirements.

The claims jurisdiction of OPM is limited to consideration of legal and regulatory liability. OPM has no authority to authorize payment based solely on consideration of equity. However, we note the claimant has himself acknowledged that none of the other three selectees from the vacancy announcement from which he was hired were granted LQA in their own right. Further, his assertion that he should be granted LQA because one other individual in a similar position at another location was granted it over two years ago would have the effect of obligating the agency to continue granting LQA to other occupants of the position in perpetuity regardless of the merits of any particular situation. We note LQA is designed exclusively as a recruitment incentive and is not an entitlement. The agency has the authority to offer LQA in those instances where they feel it necessary to attract qualified candidates and the fiduciary responsibility to limit it to those instances (see DSSR 013). Therefore, the claimant's assertion he has not been treated equitably has neither merit nor applicability to our claim settlement determination.

Although it has no bearing on the facts of the case, we note the claimant objects to his agency's reference to a prior OPM claim decision as support for their denial of his LQA request. He cites guidance on the OPM website stating: "The FLSA claim decisions posted on these pages do not substitute for application of our FLSA regulations and are not "case law." These decisions should not be used as the basis for other FLSA claims because these decisions do not provide enough information for direct application in other FLSA claims." This has no relevance to the instant case as the claimant's LQA request is not a Fair Labor Standards Act (FLSA) claim, which encompasses only claims regarding minimum wage, overtime pay, and child labor violations.

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. *Joseph P. Carrigan*, 60 Comp. Gen. 243, 247 (1981); *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979).

In this case, the agency restricted recruitment for the position to local candidates and consequently stated in the vacancy announcement that LQA would not be offered, in keeping with DoD and MCBJ written policy that LQA not normally be offered to job candidates already living in the foreign area. An agency decision which is consistent with stated policy or regulatory guidance cannot be considered arbitrary, capricious, or unreasonable. Accordingly, the claim for LQA is denied.

Transportation agreement

OPM does not have authority to consider this request or assert jurisdiction over any claim against the U.S. Marine Corps on this matter. The U.S. General Services Administration (GSA), not OPM, is responsible for issuing regulations on travel, transportation, and subsistence expenses and allowances for Federal civilian employees as authorized in chapter 57 of title 5, United States Code. GSA's Civilian Board of Contract Appeals is responsible for settling travel, transportation and subsistence claims. (<http://www.cbca.gsa.gov/>). Therefore, this portion of the claim is denied for lack of jurisdiction.

Salary reduction

OPM adjudicates and settles compensation and leave claims under the provisions of part 178 of 5 CFR. Section 178.102 describes the procedures for submitting claims as well as the documentation which should accompany a claim. Paragraph (a)(3) of section 178.102 specifies this documentation should include a copy of the agency's denial of the claim. Therefore, an employing agency is to have already reviewed and issued an initial decision on a claim before it may be submitted to OPM for adjudication. We accepted the instant claim as the claimant had filed an initial written claim with and received a decision from the agency on the LQA denial. However, although the salary issue was the subject of email correspondence between the claimant and agency representatives, he never actually filed a written claim request on this matter. Therefore, we may not render a decision on this portion of his claim.

We note, however, the claimant's assertion his salary was reduced from \$70,000 to \$57,142 is inaccurate. As a first-time employee in the Federal Service, \$57,142 represents the starting salary he was offered and accepted. That he was led to believe he would be earning the higher amount by an official who was not delegated authority to make salary offers does not obligate the Government for that amount. 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).

We also note that statements by the claimant in his response to the AAR and in various email communications submitted as background material suggest he may be challenging the original grade of his position and therefore its subsequent conversion into its current band and associated salary range under the National Security Personnel System (NSPS). The claimant's reliance on the compensation and leave claims settlement authority in 31 U.S.C. § 3702(a)(2) to resolve what at heart is a classification issue (i.e., the band in which the position is classified for pay purposes) is misplaced. The authority in section 3702 is narrow and limited to adjudication of compensation and leave claims. Section 3702 does not include any authority to decide position classification or job grading appeals. Therefore, OPM may not rely on 31 U.S.C. § 3702(a)(2) as a jurisdictional basis for deciding position classification or job grading appeals, and does not consider such appeals within the context of the claims adjudication function that it performs under section 3702. *Cf. Eldon D. Praiswater*, B-198758, December 1, 1980 (Comptroller General, formerly authorized to adjudicate compensation and leave claims under § 3702(a)(2), did not have jurisdiction to consider alleged improper job grading); *Connon R. Odom*, B-196824, May 12, 1980 (Comptroller General did not have jurisdiction to consider alleged improper position classification); OPM File Number 01-0016, April 19, 2001; OPM File Number 01-0045, January 7, 2002.

The clear and unambiguous language of 5 U.S.C. 5112(b) requires OPM to adjudicate appeals under the provisions of subsection (a). This subsection requires OPM “ascertain currently the facts as to the duties, responsibilities, and qualification requirements of a position.” This statutory requirement is reiterated in section 5 CFR 511.607(a)(1) and cannot be met if the requesting employee does not currently perform the work of the position he or she wishes to appeal. Therefore, the claimant’s apparent request to file a classification appeal with OPM on a position he never officially occupied; i.e., a GS-13 position, is barred by controlling statute and regulations. The claimant may appeal the classification of the position he officially occupies ([position]) which may only be classified by application of NSPS classification criteria.

Even assuming, *arguendo*, a favorable classification action had resulted from a classification appeal, the claimant may not be awarded back pay. It is well settled that employees are not entitled to back pay for periods of misclassification (5 U.S.C. 5596(b)(3)). *See United States v. Testan*, 424 U.S. 392, 400 (1976) and *Erllyn D. Felder*, B-202685, August 17, 1982.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the employee’s right to bring an action in an appropriate United States court.