

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

Claimant: [name]

Organization: [agency component]
Defense Intelligence Agency
Stuttgart, Germany

Claim: Request for "with family" rate of living quarters allowance for family residing separately from claimant and outside commuting area of post

Agency decision: Denied

OPM decision: Denied

OPM file number: 10-0046

//Judith A. Davis for

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

6/28/2011

Date

The claimant is a Federal civilian employee of the Defense Intelligence Agency (DIA) in Stuttgart, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial that his living quarters allowance (LQA) be paid at the "with family" rate while his family was residing outside the commuting area of his post of assignment. We received the claim on August 6, 2010, and the agency administrative report on October 1, 2010. For the reasons discussed herein, the claim is denied.

The claimant transferred to his position with DIA in Stuttgart on December 7, 2008, from a Department of the Army position in Vicenza, Italy, where he had resided with his family and had been receiving LQA at the "with family" rate. Immediately upon his transfer to DIA, the claimant requested that his LQA be paid at the "with family" rate under the Stuttgart rate of allowances, although his family had remained in Vicenza until June 30, 2009, before joining him in Stuttgart. The agency had instead paid his LQA at the "without family" rate under the Stuttgart rate of allowances for the period when the claimant resided in Germany without his family. The claimant states that "he believes he is entitled to LQA for the period that his family remained in Vicenza, which is in the "overseas area" to which he is assigned, and he "maintained" both residences." He also states that "DIA has not exercised discretionary authority by establishing a policy that limits LQA to a specific commuting distance."

The Department of State Standardized Regulations (DSSR) are 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, Department of Defense Instruction (DoDI) 1400.25-M 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. This also applies to any other policy guidance issued by DoD regarding foreign allowances.

DSSR Section 040 provides the following definitions, which "apply to all chapters of these regulations, unless waived or modified in specific instances":

h. "Post" means the place designated as the official station of the employee, regardless of whether he/she is detailed elsewhere or resides at another place with the authorization or approval of the head of his/her agency. (See also Section 061.)

m. "Family" or "family member" means one or more of the following individuals *residing in the same quarters as the employee at his/her post*, or who would normally reside at the post except for the existence of circumstances cited in Section 262 warranting the grant of a separate maintenance allowance, but who does not receive from the Government an allowance similar to that granted to the employee and who is not deemed to be a dependent or a member of the family of another employee for the purpose of determining the amount of a similar allowance: (emphasis added)

DSSR Section 061 provides the following guidance regarding "post classifications":

The classifications (i.e. allowance rates) for living quarters, post, transfer, education allowance, danger pay, and post differential at any place in foreign areas where

employees may be assigned are provided in the electronic Section 920 found at [the Department of State website].

Section 920 lists posts and their associated allowance rates. Posts are identified as specific employment stations, such as "Stuttgart, Germany."

Given the definition of "post" as a specific duty station, DSSR Section 132.11 provides the following guidance for the commencement of LQA grants for newly appointed or transferred employees: "When authorized, an LQA grant to a newly appointed or transferred employee shall commence at his/her *post* as of one of the following dates, whichever is latest [italics added]."

In addition, LQA is defined in Section 131.1 as follows:

"Living quarters allowance", hereinafter referred to as LQA, means a quarters allowance granted to an employee for the annual cost of suitable, adequate, living quarters *for the employee and his/her family*. [italics added]

This section in conjunction with the section that defines "family" or "family member" makes clear that LQA is to be paid for housing at the post of assignment occupied by the employee and his or her family.

This is reinforced by the provisions of DSSR Section 134.11 concerning "with family" rate pending arrival of family:

At the discretion of the head of agency, the appropriate "with family" rate of living quarters allowance may be granted to an employee who, in anticipation of the arrival of his/her family, incurs expenses for family type quarters. If the family does not arrive at the post within 60 consecutive calendar days after commencement of the grant, it shall be revised in accordance with Section 132.3c.

DoDI 1400.25-M, subchapter 1250, does not further address these issues and, as noted above, may not extend benefits that are not otherwise allowed by the DSSR.

In support of his request, the claimant included with his claim a copy of an undated memorandum from the Department of Defense's Civilian Personnel Management Service, Subject: Clarification of Living Quarters Allowance, to the Office of the Deputy Chief of Staff G-1, Department of the Army, addressing "the relationship between an employee's receipt of LQA and acceptable commuting distance, particularly when privately owned quarters are involved." He cites certain portions of this memorandum as relevant to his claim: "...neither the DSSR nor the CPM [Civilian Personnel Manual, i.e., DoDI 1400.25-M] requires that employees live within a certain distance of their duty station to receive LQA, however, the DSSR limits the amount of LQA to the maximum rate for the employee's duty station," and "...when an employee maintains more than one residence in the overseas area, the employee may submit expenses for LQA on whichever residence the employee designates as primary," although "[r]eimbursement will be limited to no more than the maximum rate in effect for the employee's assigned post of duty."

This memorandum from DoD to the Department of the Army (DA) is undated, but is referenced as the basis for a subsequent October 8, 2004, policy memorandum issued by the Department of the Army, United States Army, Europe, and Seventh Army, and its contents were incorporated into U.S. Army in Europe (USAREUR) Regulation 690-500.592, which is the USAREUR regulation implementing the provisions of the DSSR regarding LQA (both of which documents were also submitted by the claimant to support his claim.) However, its contents were not incorporated into DoDI 1400.25-M, which has been updated and reissued subsequent to 2004, and which serves as the sole source of DSSR implementing guidance for DIA. Therefore, this memorandum is not applicable to making LQA determinations regarding the claimant.

Additionally, since USAREUR Regulation 690-500.592 is the implementing regulation for LQA granting and accounting within the DA for its employees, as permitted by the DSSR, the claimant may not rely on this regulation or any other policy guidance issued by DA to support his claim since he is not a DA employee. The DA regulations implementing the DSSR have no bearing on the policies and practices of the Defense Intelligence Agency as the DA and DIA are separate Government agencies and as stated above, each head of an agency has the discretion to issue agency instructions implementing the DSSR.

Further, the claimant's assertion that he is entitled to be paid at the LQA "with family" rate while his family was residing in Vicenza because DIA has not established a policy limiting LQA to a specified commuting distance attempts to circumvent the directly applicable provisions of the controlling regulations by introducing an element that is inapplicable to his situation. Neither the DSSR nor DoDI 1400.25-M require that employees live within a specified commuting distance from their posts in order to receive LQA. However, the claimant was denied the LQA "with family" rate for the period in question because his family was not residing with him at his post in accordance with the specific provisions of the DSSR. As the claimant does not maintain that he was living outside the commuting distance of his post, the fact that DIA has not established specific restrictions on commuting distance has no bearing on his claim.

Under 5 U.S.C. § 5923 as implemented by the DSSR, LQA may be granted to an eligible employee for the cost of suitable, adequate, living quarters for the employee and his family. Family is defined to include certain individuals residing in the same quarters as the employee at his/her post. Therefore, under the regulations and policies applicable to DIA employees, the "with family" rate of LQA may only be granted to an employee if the employee's eligible family members reside in the same quarters with the employee at the employee's post.

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).

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.