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

Claimant: [name]

Organization: Defense Intelligence Agency
Stuttgart, Germany

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0042

/s/ Judith A. Davis for

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

10/24/13

Date

The claimant is a Federal civilian employee of the Defense Intelligence Agency (DIA) in Stuttgart, Germany. She requests the U.S. Office of Personnel Management (OPM) reconsider her agency's termination of her living quarters allowance (LQA). We received the claim on June 4, 2013, the agency administrative report (AAR) on July 17, 2013, and the claimant's response to the AAR on July 18, 2013. For the reasons discussed herein, the claim is denied.

The claimant's employment history is outlined in her resume included with her claim, supplemented by additional information provided by the claimant in her claim request. Her resume shows her stationed in the United States with the U.S. Army from March 1, 1993, to November 17, 1998, and then on an overseas tour in the United Kingdom from December 20, 1999, to February 5, 2000. (The claimant partially explains the one-year gap between these assignments by stating in her response to the AAR that "[f]rom August to 18 December 1999, I was physically attending full-time University in the United States," although she does not address her whereabouts from November 1998 to August 1999.) Immediately following her assignment in the United Kingdom, her resume shows another overseas military assignment in Heidelberg, Germany, from February 15, 2000, to September 30, 2000.

The claimant states in her claim that after the end of her military tour, she "returned to my home in the United States in October 2000, living there for 3.5 months and giving birth to my first child," and that she was unemployed during this time. She explains that her husband, a non-U.S. citizen who was living in Latvia at the time, was unable to accompany her to the U.S. because of his immigration status, and in January 2001 they met in Heidelberg, Germany, for what she describes as a "short reunion." She states: "I bought a roundtrip ticket for a one month stay, having to return to the U.S. and search for employment. I was in Germany on vacation, in a transient status." She states that while in Heidelberg, she visited with her former supervisor who "advised me of a position in Italy and encouraged me to apply." She subsequently applied and was selected for the position with Premiere Technology Group (PTG), a U.S.-based defense contractor, and reported to the position directly to Italy from Germany effective February 5, 2001. She states "[i]n addition to the relocation of my HHG [household goods] from my home, my contract also stipulated return of HHG and family to the U.S., and I was also provided with a housing allowance as an incentive." The claimant was appointed to a Federal service position with the Department of the Army (DA) at Headquarters, U.S. European Command (USEUCOM), in Stuttgart, Germany, on August 21, 2006, at which time she was found eligible for LQA, and was later transferred to DIA on October 12, 2008.

In May 2013 the claimant was notified that, as a result of a Department of Defense (DoD)-directed LQA audit, it was determined she 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 and have been substantially continuously employed by such employer under conditions providing for return transportation to the U.S.

The 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, dated June 26, 2006, and Army in Europe Regulation (AER) 690-500.592, dated November 18, 2005, in effect when the claimant was appointed, implement the provisions of the

DSSR but may not exceed their scope; i.e., extend benefits that are not otherwise provided for in the DSSR.

DSSR section 031.11 states LQA may be granted to employees recruited in the United States:

> Quarters allowances prescribed in Chapter 100 may be granted to employees who were recruited by the employing government agency in the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the possessions of the United States.

Relative to these criteria, DoDI 1400.25-M defines "U.S. hire" as follows:

> SC1250.3.7. U.S. Hire. A person who resided permanently in the United States, or the Northern Mariana Islands, from the time he or she applied for employment until and including the date he or she accepted a formal offer of employment.

Thus, an employee's status as a "U.S. hire" is based on physical residency at the time of recruitment for the position in question. As such, the claimant does not meet LQA eligibility criteria under DSSR section 031.11 because she was residing in Italy, not the U.S., when she was recruited for her position at USEUCOM in 2006.

DSSR section 031.12 states 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; or

Prior to her appointment to her position at USEUCOM, the claimant was employed by the U.S. firm PTG in Italy. She applied and was selected for the PTG position while she was in Germany.

Thus, prior to appointment, she was not recruited by PTG in the U.S. or one of the enumerated territories or possessions. In addition, the PTG "Offer Letter for Continued Employment" dated January 30, 2003, which the claimant submitted with her claim, includes the following section regarding relocation benefits:

> You are authorized to ship Household Goods and one vehicle from Alaska to Vicenza, Italy. The cost of the shipment is not to exceed $10,000. A return shipment to Alaska is authorized in the same amount. Additionally, PTG will pay for an airline ticket for you and your immediate family from Alaska to Vicenza, Italy.

Since this does not indicate PTG had obligated itself to pay for an airline ticket for the claimant from Vicenza back to the U.S., she has not demonstrated that prior to appointment, she had been in substantially continuous employment under conditions which provided for her return transportation to the U.S. or one of the enumerated territories or possessions. As such, the claimant does not meet LQA eligibility criteria under DSSR section 031.12b.

In her response to the agency report, the claimant states: "I did not have any apartment, hotel or residence in Germany… My resume had a US address where I resided, my furniture resided, my mail was received... DIA has a burden to prove that I lived in Germany when I accepted an employment offer for a position in Italy... USAREUR regulations state that a local hire is considered someone who lives in the country as their place of employment. My employment offer was for Italy.... I did not and could not have lived in Germany as I had no protection under the Status of Forces Agreement [SOFA]."

The crux of the claimant's argument is that because she was purportedly only in Germany "on vacation, in a transient status" when she was recruited by PTG, the U.S. should have been considered her place of residency. However, the plain language of DSSR section 031.12b requires that, relative to the employment prior to appointment, the employee have been "recruited" in the U.S. or one of its territories or possessions. The claimant acknowledges that she was informed of, encouraged to apply for, and selected for the position with PTG while she was physically present in Germany. This physical presence does not require either legal residency (i.e., SOFA status), home ownership, or apartment or hotel rental, nor is it subject to a minimum time duration.

The claimant cites the aforementioned DoDI definition of "U.S. hire" as "a person who resided permanently in the United States, or the Northern Mariana Islands, from the time he or she applied for employment until and including the date he or she accepted a formal offer of employment," and attempts to apply this to her circumstances when she was hired by PTG. However, the claimant is conflating the eligibility criteria for U.S. hires under DSSR 031.11 with the eligibility criteria for non-U.S. hires under DSSR 031.12b. An employee's status as a U.S. hire or a non-U.S. hire is determined at the time of appointment *based on the employee's circumstances immediately preceding that appointment.* Thus, the DoDI definition of "U.S. hire" pertains to eligibility under DSSR section 031.11; i.e., employees recruited directly from the U.S., and it describes the conditions under which section 031.11 may be considered met. It does not pertain to eligibility under DSSR section 031.12b; i.e., employees who have had intervening employment between their U.S. residency and Federal service appointment, as these employees are not "U.S. hires" under the DSSR. Since the claimant was not recruited by DA

directly from the U.S., she is not considered a "U.S. hire" under DSSR section 031.11, and the DoDI definition of "U.S. hire" may not be applied to her circumstances prior to her recruitment by PTG.

The claimant also cites AER 690-500.592 which defines "physical residency" as follows:

> For the purpose of determining local-hire status, physical residence is the actual permanent presence of an applicant overseas for more than merely a transitory or tourist purpose, regardless of the applicant's home of record or legal residence. Applicants recruited from the United States who were present overseas based on orders for unaccompanied assignments that provided for their return transportation to the United States will be considered to be permanently residing in the United States for eligibility purposes. The time spent overseas under such conditions will be viewed as physical presence in the United States, and the time will count toward meeting the residence requirement. [1]

The claimant likewise attempts to apply this definition to her circumstances when she was hired by PTG. However, this definition pertains to an employee's circumstances immediately prior to appointment to the Federal service, in that it describes certain conditions under which an employee may be considered a U.S. hire under DSSR section 031.11 versus a "local" (i.e., non-U.S.) hire under DSSR section 031.12. The claimant was not recruited by DA directly from the U.S., and the AER 690-500.592 definition of "physical residency" may not be applied to her circumstances prior to her recruitment by PTG in an attempt to establish status as a U.S. hire.

The claimant also believes she cannot be considered a "local hire" for a position in Italy for which she was recruited in Germany, and cites the DoDI definition of "locally hired" as "refers to the country in which the foreign post is located." However, the term "local hire" is not used in the DSSR. Rather, the DSSR provides LQA eligibility criteria for either employees who were recruited *in the United States* (section 031.11), or for employees who were recruited *outside the United States* (under the conditions stipulated in section 031.12b). In the latter case, there is no distinction made between employees who were recruited in the country where the position is located and those recruited in another foreign country. The DoDI uses the term "locally hired" only within the specific context of paragraph 1.c.(2)e, as a qualifier for when DSSR section 031.12b may be waived for former foreign nationals. It may not be used to supplant the DSSR section 031.12b reference to "employees recruited outside the United States." Even assuming, *arguendo*, that DSSR section 031.12b were restricted to employees recruited in the country in which the foreign post is located, the claimant would not be eligible under either section 031.12b, because she was recruited in Germany for a position in Italy, or section 031.11, because she was not recruited in the U.S.

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[1] We note that prior to July 11, 1972, DSSR section 031.12 included subsection d: "the employee was temporarily in a foreign area for travel or formal study and immediately prior to such travel or study had resided in the United States, the Commonwealth of Puerto Rico, the Canal Zone, or a possession of the United States." See Comptroller General decision B-1826012, August 12, 1975. The "physical residency" definition in AER 690-500.592 was apparently based on this earlier DSSR provision.

In addition, the claimant cites AER 690.592, section 7.a.(2), which states in relevant part:

> Former military members and civilian employees will be considered to meet the DSSR, section 031.12, eligibility of "substantially continuous employment" if they are appointed within one year after the date of separation or when the transportation entitlement is lost, whichever occurs first. Active Reserve duty performed during the 1-year period will extend that period by the amount of time served.

She asserts this provision, "given my Army Reserve tour of duty in Germany and the time allotted afterwards, would have made me eligible as if I had applied for the position while still on tour." This provision pertains to eligibility under DSSR section 031.12b and allows former military members a period of one year after separation or loss of their transportation entitlement to be considered "substantially continuously employed" by the military immediately prior to appointment to the Federal Service, extended by the amount of time spent on Active Reserve. This does not apply to the claimant's situation as her military service ended in 2000, immediately prior to her employment by PTG rather than prior to her appointment to the Federal service.

The claimant seeks to challenge the actions taken by her agency in conducting the audit process, calling the audit "inequitable." OPM adjudicates compensation and leave claims for Federal employees under section 3702(a)(2) of title 31, United States Code (U.S.C.). This authority is narrow and limited to consideration of whether monies or leave are owed the claimant for the stated claim under the applicable statute and implementing regulations. The scope of OPM's authority under 31 U.S.C. 3702(a)(2) does not extend to broader issues such as reviewing the conduct and implementation of an agency's internal audit activities.

In addition, 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 estop 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 told she was eligible for LQA upon her appointment to the Federal service and had received LQA based on that initial determination does not confer eligibility not otherwise permitted by statute or its implementing regulations.

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). As discussed previously, the claimant has failed to do so. 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.

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