

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

Claimant: [name]

Organization: Department of the Air Force
Ramstein, Germany

Claim: Continuation of payment for the rental portion of living quarters allowance for personally owned quarters beyond ten years

Agency decision: Denied

OPM decision: Denied

OPM file number: 12-0033

/s/ Chris Hammond for

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

3/7/14

Date

The claimant is a Federal civilian employee of the Department of the Air Force (AF) in Ramstein, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of his request to extend his living quarters allowance (LQA) beyond the ten-year limit for personally owned quarters (POQ). We received the claim on August 13, 2012, the agency administrative report (AAR) on August 23, 2012, and the claimant's response to the AAR on August 27, 2012. For the reasons discussed herein, the claim is denied.

The claimant purchased a house with his LQA grant on June 1, 2002, which he occupied until May 2012. Shortly before the end of the ten-year period allowed for an LQA grant used toward the purchase of POQ, the claimant moved into rental quarters with the expectation that his full LQA would continue, as was permitted by Department of Defense (DoD) LQA regulations in effect at the time. However, in the interim new DoD regulations were disseminated disallowing payment of the rental portion of LQA if the employee owns a house at the permanent duty station. The agency notified employees of this change by memorandum dated June 11, 2012, stating the payments would be terminated effective that date. Since the new regulations did not specifically address the treatment of employees in the claimant's situation, the agency subsequently notified him by letter dated August 6, 2012, that it was granting him a "grace period" until September 30, 2012, at which time the rental portion of his LQA would be "terminated effective retroactively to 27 Aug 2012 (11 Jun 2010 plus 78 days of remaining [ten-year] entitlement)," unless he had by then either sold his POQ, thus reviving his LQA for rental expenses, or moved back into his POQ. The agency subsequently reported the rental portion of the claimant's LQA was terminated on September 12, 2012, although he still receives payment for utilities.

The claimant states in his claim request that "[i]n March 2012, I received notification of the DoD LQA policy change that I would not be able to rent accommodation and own a house within the same location," but by the time he was notified, he had already rented out his POQ to another family and entered into a rental contract for other housing. He requests "an exception to policy" regarding the decision to terminate the rental portion of his LQA on the basis of hardship. In addition, in his response to the AAR, he asserts his belief that the new regulation "is intended for future employees who choose to purchase their home," citing an article published in the journal Stars and Stripes which makes the general observation that Federal cutbacks "enacted so far apply only to future hires." He also asserts that "the DoDDS [Department of Defense Dependent Schools] teachers here in Germany impacted under the same situation as myself have had their entitlements grandfathered," and requests the same "flexibility" be applied to his situation.

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, Volume 1250, dated February 23, 2012, 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.

Section 136 of the DSSR addressing POQ states:

- a. When quarters occupied by an employee are owned by the employee or the spouse, or both, an amount up to 10 percent of original purchase price (converted to U.S. dollars at original exchange rate) of such quarters shall be considered the annual rate of his/her estimated expenses for rent. Only the expenses for heat, light, fuel (including gas and electricity), water, garbage and trash disposal and in rare cases land rent, may be added to determine the amount of the employee's quarters allowance in accordance with Section 134. The amount of the rental portion of the allowance (up to 10 percent of purchase price) is limited to a period not to exceed ten years at which time the employee will be entitled only to above utility expenses, garbage and trash disposal, plus land rent.
- b. The following transactions shall not be considered to meet the intent of these regulations so as to warrant payment of the rental portion of living quarters allowance beyond the initial ten year period specified in Part a:
 - (1) sale or gift of quarters owned by the employee or the spouse, or both with employee remaining in the same quarters, or
 - (2) the purchase or exchange and move to other quarters in daily commuting distance of the same post.

Payment for utilities and (if necessary) land rent may be continued beyond the 10 year period. The head of agency may waive provisions of Part b in unusual circumstances.

Section 013 of the DSSR, addressing the authority delegated to the heads of agencies, states:

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 allowances, 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 and accounting for these payments.

Furthermore, when the Secretary of State determines that unusual circumstances exist, the head of an agency may grant special quarters, cost-of-living, and representation allowances in addition to or in lieu of those authorized in these regulations.

DSSR section 013 delegates authority to the head of agency to defray official residence expenses through the issuance of "further implementing regulations." This authority is specifically reserved to the head of agency and is not delegated to OPM in its claims adjudication authority. Thus, OPM may not grant a claim based on circumstances disallowed by the agency's implementing regulations or otherwise waive their provisions. In addition, the use of the permissive term "may" in this section as opposed to the mandatory terms "shall" or "will" identifies these allowances as discretionary on the part of the agency.

Relative to POQ, DoDI 1400.25, Volume 1250, dated February 23, 2012, states under Enclosure 2, paragraph 2.1.:

The annual rent payable for personally-owned quarters (POQ) is based on the purchase price or appraised value of the property, converted to U.S. dollars at the exchange rate in effect at the time of purchase. Employees who own, or are purchasing a POQ, may not be paid quarters allowances under a rental contract if the POQ is within the employee's local area of work.

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 for the stated claim under the applicable statute and implementing regulations. In this case, the DoDI is clear that employees with POQ may not be paid LQA for a rental contract if the POQ is in the local area of work. OPM has no authority to waive this provision within the context of the claims adjudication function it performs under section 31 U.S.C. 3702(a)(2), and any decision to “grandfather” its implementation is at the sole discretion of DoD as the proponent of the DoDI.¹ In addition, the scope of OPM's authority under 31 U.S.C. 3702(a)(2) does not extend to considering claims on the basis of hardship or equity but rather exclusively on the application of statute and regulation. Therefore, the claimant's request for extension of the rental portion of LQA for POQ beyond the ten year limit is denied.

In support of his request, the claimant states: “When I left the United States Marine Corp in 1983 I was hired by the United States Navy and since I maintained continuous employment I was given certain entitlements... When I transferred from the USN to the USAF in 1993, a determination was made by the USAF that my entitlements would continue...” However, as cited previously in DSSR section 013, LQA is a discretionary allowance subject to the provisions set forth in agency implementing regulations within the scope of the DSSR. This is reiterated in DoDI 1400.25-V1250, paragraph 4.c., which specifically states: “Overseas allowances and differentials are not automatic salary supplements nor are they entitlements.” Therefore, neither LQA nor its continuance are entitlements but rather are discretionary allowances subject to the limitations imposed by the DSSR and agency implementing regulations.

In reviewing the documentation submitted by the claimant in connection with his request for continuation of LQA, we noted there is no evident basis on which the claimant was initially granted LQA in 1984 by the Department of the Navy upon his first Federal appointment. A February 17, 1984, letter from the Naval Civilian Personnel Command (NCPC), European Field Office, London, U.K., addressing the claimant's LQA eligibility at the request of the Consolidated Civilian Personnel Office (CCPO), U.S. Naval Activities, U.K., states:

[Claimant] was discharged from the U.S. Marine Corps locally in November 1983 with return transportation rights to his home of record in the United States. [Claimant] was employed by the Navy Exchange at West Ruislin from December 1983 through 5 February 1984. On 6 February 1984 he was employed by Office of Naval Research, London.

¹ The claimant's apparent reliance on the Stars and Stripes article as a source of regulatory guidance is misplaced as this journal's reporting has no bearing on the interpretation of the clear and unambiguous language of the DoDI at Enclosure 2, paragraph 2.1.

Reference (b) [Department of Defense 1400.25-M, Civilian Personnel Manual 592.2-2b (1)] states “Under the provisions of section 031.12b, DSSR, former military and civilian members will be considered to have “substantially continuous employment” from the date of separation until the date on which their entitlement to government-paid transportation back to the United States expires.” Therefore, [claimant] does qualify for Living Quarters Allowance if he did not use or lose his entitlement to return transportation to the States as granted by the U.S. Marine Corps. His employment with the Navy Exchange in itself would not disqualify him from receiving Living Quarters Allowance.

However, the Standard Form 50 (SF-50) documenting this Overseas Limited Appointment, effective February 6, 1984, which we obtained from his records in the course of adjudicating his claim, states in the “Remarks” section: “Local hire status. Ineligible for TLA, LQA, or home leave.”

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 appointment², 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.

Based on the information provided in the aforementioned letter, the claimant, prior to his appointment by the Department of the Navy on February 6, 1984, was employed in a nonappropriated fund (NAF) position with the Navy Exchange (an NAF organization). The Navy Exchange had recruited him in the U.K. in December 1983 following his November 1983 discharge from military service. The letter states the claimant would be eligible for LQA if he

² The term "prior to appointment" is construed as meaning prior to appointment to the position for which the LQA determination is being made.

had not used or lost his return transportation rights deriving from his military service. However, although prior to his appointment the claimant was employed by an NAF organization of the U.S. Government (as permitted under DSSR section 031.12b (1)), the Navy Exchange had not recruited him in the United States or one of the enumerated territories or possessions. Further, there is no indication his employment with the Navy Exchange provided for his return transportation to the United States or one of its territories or possessions, as the February 17, 1984, NCPC letter makes his LQA eligibility contingent on his retention of his military return transportation benefits in order to satisfy the conditions of DSSR section 031.12b. However, DSSR section 031.12b clearly states return transportation must be provided by "such employer" listed in section 031.12b(1) through (4) with whom the individual was employed immediately preceding appointment, which in this case was the Navy Exchange. Therefore, the claimant's retention of his military return transportation benefits would not substitute for the provision of such benefits by the Navy Exchange, as erroneously advised in NCPC's letter. However, even if the claimant had been provided such benefits by the Navy Exchange, this would not be sufficient to establish his eligibility under section 031.12b as he had not been recruited by the Navy Exchange in the United States or one of its territories or possessions. Thus, the record indicates the claimant did not meet LQA eligibility criteria under DSSR section 031.12b in connection with the position to which he was appointed by the Department of the Navy on February 6, 1984. This is reinforced by the SF-50 issued in connection with this appointment, which states he was ineligible for LQA.

The NCPC letter conferred LQA eligibility on the claimant under DoD 1400.25-M, Civilian Personnel Manual (CPM) 592.2-2b (1), which allowed former military members to be considered to have "substantially continuous employment" from the date of separation until the date their entitlement to government-paid transportation back to the United States expired. However, since LQA eligibility criteria contained in DoDI 1400.25, Volume 1250, may not exceed the scope of the DSSR as stated in DSSR section 013, its provision for a one-year period of "substantially continuous employment" following military separation does not supplant or negate the requirement of the DSSR under section 031.12b that an intervening employer prior to appointment have recruited the employee in the United States and that "such employer" have provided the employee return transportation to the United States or its territories or possessions.

Information provided by the agency indicates the claimant was hired by AF in the U.K. on March 21, 1993, on an Overseas Limited Appointment, not to exceed March 20, 1995, and was converted to an Excepted Appointment by AF, still in the U.K., on April 2, 1995. He retained his LQA under both appointments, although there is no documentation in the record indicating whether a review of his LQA eligibility in connection with these new appointments occurred. On July 31, 1996, he was reassigned to Ramstein, Germany, with AF on a transfer-of-function, again retaining his LQA. The August 12, 1996, memorandum from United States Air Forces in Europe (USAFE) notifying him that he was "entitled" to LQA states in the "Remarks" section that "Employee was locally hired in England under CPM 592, para 2-2b(1) prior to reassignment to Germany," thus perpetuating the initial erroneous LQA determination.

The record contains several documents clarifying AF LQA policy during this time period. An October 2, 1995, memorandum from Headquarters, United States Air Force (USAF), addressing the LQA eligibility of three other individuals, states:

...Air Force policy is that NAF employees recruited outside the United States are not entitled to LQA. DoD Manual 1401.1-M, Chapter VII, para 4, b(1) referenced in our memorandum addresses employees recruited in the United States. Paragraph b(4) of the same section states that Heads of Components shall determine which, if any allowances and differentials to prescribe for those eligible employees who are recruited outside the United States, e.g., locally hired employees. If allowed, they are not to exceed those prescribed for appropriated fund employees. The Air Force does not allow payment of LQA for employees recruited outside the United States. Available documentation shows this to be the case as far back as November 1989... Locally hired NAF employees currently receiving LQA are to be provided a 30-day written notification that as a result of recent reviews on overseas allowances and differentials, LQA is being discontinued.

An October 6, 1995, memorandum from Headquarters, USAFE, addressing the above USAF memorandum states:

Living quarters allowance for all "local hire" employees must be canceled. Air Force policy is that no "local hire" NAF employees will receive LQA. When "local hire" employees [sic] LQA is to be canceled, they will be provided a 30-day written notification issued from the Human Resources Office stating that their LQA is discontinued and giving reasons for the action being taken.

There is no indication any action was taken to terminate the claimant's LQA as a result of the above memoranda.

This policy was subsequently articulated in USAFE memorandum dated July 11, 1997, Subject: Living Quarters Allowance (LQA) (97-02), which "replaces previous numbered letters relating to living quarters allowance (LQA) and provides guidance for the changes in USAFE LQA policy" and states:

2. Qualified LQA Positions: The payment of LQA will not be approved for positions normally recruited locally. LQA determinations will not be made on a mechanical grade level basis but will be based on whether LQA is necessary in the recruitment process. The final decision on which positions meet the criteria for LQA remains with the appointing authority. Approval for any exceptions due to extenuating circumstances for eligible employees will continue to reside at base level, but must be based on factors consistent with the general DoD policy.

USAFE Memorandum 97-02 also provided a "grandfathering provision" applying to "employees who have been authorized to receive LQA but no longer meet the criteria due to policy or guidance changes, such as employees occupying positions which are normally filled through local recruitment." This provision allowed that LQA for affected employees "will continue through the remainder of the current tour of duty as long as the employee continues to occupy the same position."

By USAFE letter dated September 12, 1997, the claimant was notified that based on this new policy guidance, his LQA would be terminated on March 19, 1999, when his current tour expired. This was reinforced by a February 20, 1998, memorandum from the Acting Director,

Civilian Personnel, Department of the Air Force, 11th Wing (the servicing human resources office), which states:

We agree that [claimant] was placed in the position as a result of a Transfer of Function (TOF). LQA may be granted at the new location when an employee incurs a permanent change of station as a result of TOF; however, the position must meet the criteria for payment of LQA. The position occupied by [claimant] does not meet the established criteria. Additionally, the position he occupied in the United Kingdom would not meet this criteria. We understand [claimant's] LQA will not be terminated until his current tour of duty expiration date of 19 Mar 99. As such, we find the "grandfathering" provision being implemented by your office to be fair and reasonable.

However, USAFE memorandum dated February 22, 1999, subsequently concluded:

...Recently, we noticed that [claimant] had been put on a tour in error. He has been employed continuously at GS-6 or below since prior to 8 May 89 and, therefore, should not have been on a rotation agreement. Therefore, his overseas rotation agreement was withdrawn and the grandfathering procedure established in the HQ USAFE/DPC memorandum does not apply.

The Civilian Personnel Officer, 11th Wing, responded by memorandum dated March 2, 1999:

...we have again reviewed the circumstances surrounding [claimant's] receipt of LQA. Our initial determination that his LQA be terminated remains unchanged. We understand his overseas rotation agreement has been withdrawn and that the USAFE grandfathering policy no longer applies. Although [claimant] was erroneously placed on a rotation agreement, the position he occupies does not meet the criteria established for payment of LQA.

Based on the above and [claimant] previously being notified that his LQA would terminate on 19 Mar 99, we concur with your decision to terminate LQA. Based on the prior notice, [claimant] has been provided sufficient time to prepare for the change in his overseas allowance.

A March 5, 1999, email from the Civilian Personnel Officer, USAFE, to the 11th Wing explained they had not addressed those employees "exempt from rotation at the lower grades, by oversight" and had "decided not to terminate those few until the loophole was specifically closed re their absence of a tour." It also explained that USAFE had not terminated the LQA of anyone without a tour. By memorandum dated March 8, 1999, the 11th Wing subsequently rescinded their March 2, 1999, memorandum, stating:

Once again we have reviewed the circumstances surrounding [claimant's] receipt of LQA. However, in light of others in similar situations continuing to receive LQA, we believe it would be unfair to single [claimant] out and terminate LQA. We support cancelation of [claimant's] LQA at the time LQA is terminated for other employees in lower graded positions exempt from overseas rotation.

There is no documentation in the claim record indicating any further action was taken to terminate the claimant's LQA. Thus, the initial determination to grant the claimant LQA upon his appointment by the Department of the Navy on February 6, 1984, was erroneous, as were the determinations to continue the grant upon his subsequent appointments. The agency then failed to terminate his LQA upon issuance of the July 11, 1997, USAFE Memorandum 97-02, which disqualified him under the changed AF LQA policy.³ Therefore, the claimant's request for extension of the rental portion of LQA for POQ beyond the ten year limit is denied both on the grounds that it is specifically disallowed under DoDI 1400.25, Volume 1250, and that his initial and continuing receipt of LQA was erroneous.

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.

³ The perceived inequity of terminating his LQA immediately when other employees were "grandfathered" until the end of their overseas tours resulted in his continued erroneous receipt of LQA for an additional 15 years, long after the "grandfathered" employees' LQA grants had been terminated.