

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

Claimant: [name]

Organization: [agency component]
U.S. Army in Europe
U.S. Department of the Army
Mannheim, Germany

Claim: Request for Living Quarters Allowance

Agency decision: Denied

OPM decision: Denied

OPM contact: Robert D. Hendler

OPM file number: 06-0030

/s/ Robert D. Hendler

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

January 19, 2007

Date

The claimant is a former military member hired overseas. He occupies a [GS-12] position with the [agency component], U.S. Army in Europe (USAREUR), Department of the Army, in Mannheim, Germany (GE). The claimant requests reconsideration of his agency's decision concerning his eligibility for living quarters allowance (LQA). The Office of Personnel Management (OPM) received the compensation claim on April 19, 2006, and the complete agency administrative report on November 1, 2006. For the reasons discussed herein, the claim is denied.

On May 20, 1993, the claimant states he was offered, and accepted employment with Datalect Computer Services, a private sector contractor in GE. He retired from active military service on May 31, 1993, and officially separated from military duty in GE on August 31, 1993. His employment agreement with Datalect did not include return transportation rights until July 19, 1994. The claimant states one of the reasons the agency gave for denying him LQA was that Datalect was not a U.S. firm. However, he asserts, Datalect was a "...fully qualified federal contractor... that provided computer maintenance support to USAREUR." On July 19, 1994, the claimant was officially recognized and accredited by USAREUR as a private sector contract technical services representative to work on classified systems under contract #DAJA37-93-D-0065. As a result, he states he was placed under Datalect's U.S. base company F.C.I.C. Inc., received full logistics support, an ID card and return transportation rights.

The claimant states he applied for, and was appointed to a [GS-9] position as a local hire with USAREUR in GE effective August 5, 1996. He states he first requested LQA in July 1998, based on the USAREUR Regulation 600-500-592 issued in 1998, and that his agency denied the request because he had not been appointed as a Federal civilian employee within one year of his military separation. His second request, submitted July 21, 2003, was based on the Army in Europe Regulation 600-500-592 update effective July 1, 2003. The agency denied this request based on section 5(a) of the cited regulation, because he left active duty on August 31, 1993, and was not appointed as a Federal civilian employee until August 5, 1996. The agency stated: "Unfortunately, 05 August 1996 was beyond the initial year of your transportation agreement (31 August 1993 – 31 August 1994)." The claimant consulted with the Manheim Law Center – Legal Assistance Office (MLC-LAO) prior to submitting his next LQA request on December 29, 2005. He states the legal office (*staff*) agreed he had "...provided sufficient evidence to fulfill all the requirements as stated in the regulation." This third claim was based on the AE regulation update effective November 18, 2005. His agency again denied him LQA. The claimant states:

I retired on 31 Aug 1993. USAREUR had a standing policy that all retirees must wait six months before submitting a Federal job application and the remaining six months there was a USAREUR hiring freeze in effect. This pushed me outside the one year windows of opportunity. But I did "substantially continuous work for a U.S. Federal Contractor and the Manheim USO.

Enclosures 1, 2, and 3 of the claim all state the claimant worked for the USO (United Service Organizations). However, the record contains no further information about his involvement with this organization. Information available on-line regarding the USO states it was chartered by the U.S. Congress as a non-profit charitable corporation, and operates as a volunteer organization to provide morale and recreational services to members of the U.S. military worldwide. By neglecting to describe the actual nature of this work (paid or volunteer; employment agreement provisions, i.e., return transportation rights; period of time covered; etc.) the claimant has failed

to meet his burden to establish his USO work as employment for consideration in determining his eligibility for LQA (see 5 CFR 178.105).

The claimant provided a copy of a memorandum prepared by [name] of the MLC-LAO, on his behalf, to the 21st Theater Support Command Inspector General, after the agency's third denial of his request. The memorandum dated February 15, 2006, states:

He [the claimant] was continuously employed by Datalect Computer Services as first a manager, and later appointed as a technical expert. Datalect Computer Service[s] was [a] private company which provided computer maintenance to USAREUR. This is a British company that received a federal government contract from the U.S. Army, but had an operating office in Germany.

This memorandum also outlines the claimant's efforts to receive LQA since July 1998, and includes a statement by [name] concerning her discussion with the agency representative who last denied the claimant's request, in which [she] states she was assured the claimant was eligible and should resubmit his application.

The claimant believes he is entitled to LQA, although his "...situation does not fit the normal template that the approval authority use to filter eligibility requirements," because after leaving active military service he: worked for a U.S. firm; was authorized logistical support and transportation rights back to the U.S.; was substantially continuously employed by a U.S. firm, organization, or interest or an international organization in which the U.S. Government takes part; and was hired locally, in GE, for a GS-9 grade level position. Enclosures 1, 2, and 3 of the claim each also refer to former military members as being considered to have "substantially continuous employment" for up to one year after their date of separation.

The agency provided a written response to the MLC-LAO memorandum, dated February 28, 2006, citing DSSR section 031.12, Employees recruited outside the U.S. and USAREUR regulation 690-500.592, November 18, 2005, Civilian Personnel Living Quarters Allowance. The agency states:

After your military separation on 31 August 1993, you accepted employment with Datalect Computer Services GMBH (Gesellschaft mit beschaenkter Haftung) with a contract that was effective 20 May 1993. Datalect Computer Services GMBH was a German Company and therefore did not meet requirements as outlined in paragraph 3 [i.e., AE Regulation 690-5000.592, November 18, 2005, authorizes LQA to a local hire employee if the individual is appointed to a position in grades GS-9 (or equivalent) and above. In addition, before being appointed the employee must have been originally recruited in the United States and continuously employed by the United States Government including its Armed Forces, a U.S. firm, organization, or interest, or an international organization in which the U.S. Government takes part under conditions providing for the employees return transportation to the United States]. In addition, the official contract identified that you were hired by the contractor overseas and the contract itself did not mention any return transportation entitlement.

The agency administrative report to OPM, dated June 9, 2006, states:

[Claimant] applied for LQA on 29 July 2003 due to the new USAREUR Regulation 690-500.592 effective 1 July 2003. [Claimant] was denied Living Quarters Allowance as he did not meet the criteria for a local hire.

.....
[Claimant] applied to the US Army in Europe as a local hire and was appointed as a [GS-9 position] effective 5 August 1996. The position was not a hard to fill position and [claimant] was not employed by a company which provided return transportation. Therefore, he did not meet the eligibility requirements for LQA.

The claimant makes various statements concerning the manner in which his agency has handled his LQA requests. OPM's authority to adjudicate compensation and leave claims flows from 31 U.S.C. §3702 which is narrow and restricted to those matters. In adjudicating this claim, our only concern is to make our own independent decision about eligibility for LQA by comparing the facts in the case to criteria in Federal regulations and other Federal guidelines. Therefore, we have considered the claimant's statements only insofar as they are relevant to making that comparison.

Conditions for LQA regarding this claim are set forth in USAREUR regulation 690-592, dated April 28, 1992, which was the governing regulation for LQA eligibility on the date of the claimant's hire. Section 1(b) of the regulation directs it be used with Department of State Standardized Regulations (Government Civilians, Foreign Areas) (DSSR) and Department of Defense (DOD) 1400.25-M, Civilian Personnel Manual (CPM) chapter 592, Overseas Allowances and Differentials, dated June 10, 1988.

It is Department of Defense (DoD) policy, under DoD 1400.25-M, that:

The foreign post differentials and foreign area allowances (except the post allowance), are not automatic salary supplements attached to all positions in the foreign area. They are intended to be recruitment and/or retention incentives for United States 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 specific circumstances under which an employee who is hired in a foreign area, **may** (*emphasis added*) be granted the allowances [including LQA] are provided in section 031.12 of the DSSR, as supplemented by this chapter [CPM 592]; and

Employees recruited outside the U.S. will have their eligibility for quarters allowance determined at the time of hire and at any time pertinent **changes in their individual status** (*emphasis added*) occur that may confer eligibility.

The claimant did not receive LQA at the time of his appointment. In July 1998, he first requested the agency grant him LQA based on USAREUR 690-500-592 issued in 1998, and two times thereafter based on subsequent policy updates. As stated above, and in accordance with pertinent guidance, LQA eligibility decisions are made at the time of the employee's appointment (i.e., August 5, 1996 in the instant claim) and if or when changes in a particular employee's circumstances result in a situation that may make them eligible.

The claimant's requests to the agency for LQA are not based on actual changes to his status or employment circumstances. Instead, each endeavors to show how his situation meets the

eligibility requirements provided in updated/revised versions of USAREUR 690-500-592 issued after the date of his appointment. These issuances are not germane to this claim.

LQA eligibility criteria properly used to adjudicate this claim are as follows:

DSSR, section 031.1, Quarters Allowance, subsection 031.12, Employees Recruited Outside the U.S. (a, b and c)) states: “Quarters allowance may be granted to employees recruited outside the U.S., 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
- c. as a condition of employment by a Government agency, the employee was required by that agency to move to another area, in cases specifically authorized by the head of agency.

Subsection 031.12(b) may be waived by the head of agency upon determination that unusual circumstances in an individual case justify such action.

DOD 1400.25-M (CPM chapter 592), Subchapter 2, Quarters Allowance, section 2.2(b), Eligibility – Employees recruited outside the U.S., states:

- 1.) Under the provisions of section 031.12(b), DSSR, former military and civilian members will be considered to have “substantially continuous employment” for one year from the date of separation or until the retired/separated member or employee uses any portion of entitlement to government-paid transportation back to the U.S., whichever comes first.
- 2.) The requirements of section 031.12(b) of the DSSR may be waived in individual cases when unusual circumstances exist. If the Major Command recommends a waiver, the case will be forwarded to serviced DOD Component headquarters for head-of-agency consideration. All other requests should be returned by letter to the employee explaining the reasons for non-recommendation.
- 3.) Officials identified in paragraph 1-2(a) of this chapter (that is, appointing officers) will waive DSSR section 031.12(b) requirements for locally hired

employees when, but for the condition surrounding the employment, the employee would be residing in the United States, Puerto Rico, any U.S. possession, or the former Canal Zone. One of the following must have occurred for this waiver:

- a) Death of sponsoring spouse.
 - b) Sponsoring spouse becomes physically or mentally incapable of continued employment with the Government.
 - c) Divorce or legal separation; a legal separation deemed to exist at such time as either the employee or spouse shall have initiated legal action to dissolve the marriage or one separates from bed and board short of applying for divorce.
 - d) Sponsoring spouse left the post or area permanently.
 - e) Either spouse's work location became so separated that a common dwelling could not be maintained.
 - f) The employee is an incumbent of a position designated as emergency-essential in accordance with DOD Directive 1404.10.
- 4.) Except for the circumstances described in (3)(b), waiver of section 031.12(b), DSSR, will not be made for the married employee who accompanied or followed his/her spouse to a foreign area and is still residing with that spouse.
- 5.) Section 031.12(b), DSSR, will be waived for locally hired U.S. citizen employees who have, immediately prior to appointment, been directly employed by the U.S. as foreign nationals under third country citizen contracts or agreements that provide them with living quarters allowance or housing at no cost.

The record shows the claimant retired from active service with the U.S. military in GE on May 31, 1993. After retiring from the military, he was employed in GE by a British private sector company, Datalect, which provided computer maintenance services under contract to the USAREUR. His employment agreement did not include return transportation rights. The claimant was officially separated from the military on August 31, 1993. On July 19, 1994, as a Datalect employee, he was accredited by USAREUR as a contract technical services representative to work on classified systems; was placed under Datalect's U.S. based company, F.C.I.C. Inc.; and received return transportation rights. While living and working in GE he applied for and accepted a Federal civilian position as a [GS-9] with the USAREUR, as a local hire, and was appointed on August 5, 1996.

In order to have been eligible for LQA on August 5, 1996, as described above, the claimant's employment history would have to have met DSSR section 031.12 (a) **and** (b) **or** (c) as supplemented by DOD 1400.25-M, subchapter 2, section 2.2(b).

The claimant met DSSR section 031.12 (a), as it was defined at the time of his appointment. His actual place of residence would have been fairly attributable to his employment by the U.S. Government at the time he would have **received** LQA, had he been granted the allowance. The criteria is for individuals already living overseas and makes no distinction between continued

residence, or the establishment of a new residence as a result of accepting an offer of Federal civilian employment.

As a former military member, the claimant was “considered to have substantially continuous employment” under conditions providing for his return transportation to the U.S. for one year from his date of separation. However, this expired on August 31, 1994, and he was not appointed until August 5, 1996. DSSR 031.12 (b) requires employees be recruited in the U.S. prior to appointment as a Federal civilian employee overseas. Prior to his appointment as a USAREUR civilian employee the claimant was an employee of a foreign owned company operating in GE. He was not recruited in the U.S. by the U.S. Government, a U.S. firm, organization, interest, foreign government or international organization in which the U.S. participates and substantially continuously employed by them under conditions providing for his return transportation to the U.S. until his civilian appointment with USAREUR. Nor was he recruited from the U.S. by the U. S. military, then substantially continuously employed by them until the date of his appointment as a Federal civilian employee overseas. The claimant did not meet DSSR 031.12 (b). Therefore, we find at the time of his appointment, the claimant met DSSR 031.12 (a), but not (b) or (c), and, therefore, he was ineligible for LQA. In addition, the record does not show the claimant met any of the special circumstances of DOD 1400.25-M, (2), (3), (4), or (5), as described above for waiving DSSR 031.12(b), or the conditions specified for crediting DSSR 031.12 (c).

The claimant states the agency has been inconsistent in the reasons provided for denying his three LQA requests. He further states he contacted the Department of the Army, Mannheim Law Legal Center – Legal Assistance Office, prior to submitting his third request and, after they reviewed his case, they told him he was eligible for LQA. However, it is well established that a claim may not be granted based on misinformation that may have been provided by Federal employees. See *Richmond v. OPM*, 496 U.S. 414, 425-426 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed Cir. 1997); and 60 Comp. Gen. 417 (1981); *Carl H.L. Barksdale*, B-219505 (November 29, 1985); *E. Paul Tischer, M.D.*, 61 Comp.Gen. 292 (1982).

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).

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. The Department of the Army decision regarding the claimant’s entitlement to LQA is not arbitrary, capricious, or unreasonable. Accordingly, this claim for LQA is denied.

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.