

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

Claimant: [name]

Organization: [agency component]
Kaiserslautern, Germany

Claim: Request for Living Quarters Allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 10-0007

//Judith A. Davis for

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

1/11/2011

Date

The claimant is a Federal civilian employee of the Department of the Army at the [agency component] in Kaiserslautern, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of living quarters allowance (LQA). We received the claim on November 9, 2009, the agency administrative report (AAR) on February 17, 2010, and the claimant's comments on the AAR on March 29, 2010. For the reasons discussed herein, the claim is denied.

The claimant separated from active duty military service in Germany in October 1992 and entered civilian Federal employment with the Defense Logistics Agency (DLA) in Germersheim, Germany, as a [WG-5 position]. He subsequently occupied several other positions within DLA until August 2002, when he resigned from the Federal service and began private sector employment. During this period of employment with DLA, the claimant was deemed eligible for and received LQA, which terminated with his resignation.

The claimant returned to Federal employment on June 1, 2004, with the Department of the Army's 1st Transportation Movement Control Agency (TMCA) in Kaiserslautern, Germany, as a [GS-7 position]. He was deemed ineligible for and did not receive LQA in this position. When this appointment terminated on May 13, 2006, he transferred to DLA as a [GS-9 position] (target grade GS-11), for a two-year tour in Kuwait. Since his last permanent duty station and actual residence was Germany, DLA did not grant him a return transportation entitlement to the United States but rather return rights within DLA back to Germany. During this tour in Kuwait, the claimant received Temporary Quarters Subsistence Allowance (TQSA) prior to his occupancy of government housing. He was given a relocation incentive for accepting this position, and was granted home leave accrual by DLA while stationed in Kuwait.

The claimant returned to Germany to his [current position] (GS-11 equivalent), in Kaiserslautern on May 11, 2008. With this appointment, the agency deemed him ineligible for LQA as a locally hired employee without a transportation entitlement back to the United States.

The claimant asserts he is eligible for LQA. His arguments to support this assertion are twofold. First, the claimant asserts that since he received TQSA when he first arrived in Kuwait, and TQSA may only be granted to employees otherwise eligible for LQA, he must therefore have been eligible for LQA when he was stationed in Kuwait. He also asserts that since he received a relocation bonus in the Kuwait position for occupying a hard-to-fill position, he would now retain "continuing eligibility" under Army in Europe Regulation (AER) 690-500.592, section 9. The claimant submitted as evidence a letter from the DLA Overseas Program Manager stating: "This letter is to confirm that from his arrival at Defense Distribution Depot Kuwait, 5-14-2006 until his departure from Kuwait that [claimant] was authorized government housing in lieu of LQA. If government housing was not available then LQA would have been paid."¹

Second, the claimant posits that he was in effect a U.S. hire in the Kuwait position. As support for this assertion, he states that home leave, which he was granted while stationed in Kuwait, is defined on DLA's website as a "Leave category available to an overseas area, were originally

¹ The basis for DLA's assertion that the claimant was eligible for LQA while stationed in Kuwait is unclear. As will be addressed in more detail below, he was indisputably a local hire without a return transportation agreement back to the United States and thus did not meet the basic eligibility requirements of Department of State Standardized Regulations (DSSR) section 031.12.

recruited for an overseas assignment from the states (including its territories or possessions) and have completed a one time requirement of 24 months of continuous service abroad.” He also notes that his DLA Return Placement Agreement (DoD Rotation Agreement) “deem higher headquarters the jurisdiction over the overseas location which I was assigned in Kuwait and that management could direct my reassignment to a position within the activity in the CONUS at any time....” He states that:

Together, with the mobility agreement/statement, the accumulation of home leave, the approval of TQSA and RAT Travel, the relocation bonus and the statement that DLA have [sic] jurisdiction over the DLA overseas activity which I was being assigned, indicated that the assignment was possibly a position slotted from the states, yet directing me to the assignment in overseas area (Kuwait).

The agency counters that the claimant was a locally hired employee when he began his employment with TMCA in 2004 because he had been residing in Germany prior to his appointment, that he remained a locally hired employee residing in Germany when he transferred to DLA in Kuwait, and as such he was and remains ineligible for LQA. The agency disputes DLA’s assertion that the claimant was eligible for LQA in the Kuwait position.

For the present purposes of LQA determination, the claimant’s LQA eligibility status when he occupied the Kuwait position and whether that position was designated as hard-to-fill are moot. Requirements for retaining “continuing eligibility” for LQA under AER 690-500.592, section 9, are as follows:

Unless otherwise prescribed, all employees who met the eligibility criteria in prevailing regulations at the time of appointment but who do not meet the criteria of this regulation will continue to receive LQA. Additionally, if an employee is receiving LQA based on occupying a hard-to-fill position and leaves that position, the employee’s LQA will continue.

This is not applicable to the claimant’s situation as he was not receiving LQA while stationed in Kuwait². That he was occupying government quarters is not equivalent to receiving LQA in relation to the above stipulations, i.e., a benefit that was never received cannot be “continued.”

The DSSR set forth basic eligibility criteria for the granting of LQA. 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.

² 5 U.S.C. § 5923(a) states: “When Government owned or rented quarters are not provided without charge for an employee in a foreign area, one or more of the following quarters allowances may be granted when applicable....” Thus, the provision of Government owned or rented quarters has no effect on determining LQA eligibility since occupying Government owned or rented quarters does not constitute an “allowance” within the meaning of 5 U.S.C. § 5923(a).

Relative to these criteria, DoD Manual 1400.25-M defines “U.S. hire” as follows:

SC1250.3.7. U.S. Hire. A person who resided permanently in the United States, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the former Canal Zone, or a possession of the United States 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. The claimant was residing in Kuwait prior to his appointment to his current position at the 21st Theater Sustainment Command in Kaiserslautern, Germany, and consequently cannot be considered a U.S. hire. That position’s organizational relationship with DLA headquarters in the U.S. and any benefits the claimant may have been receiving are irrelevant to applying the plain language of this definition.

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

The claimant did not meet these criteria in that prior to appointment to his current position, he was not recruited in the U.S. or any of the other enumerated locations as he was residing in Kuwait. Further, he did not have a return transportation agreement back to the U.S. but rather a limited transportation entitlement back to the location of his previous residency in Germany, as stipulated in the Department of Defense transportation agreement signed by the claimant on January 6, 2006, in connection with his acceptance of the Kuwait assignment:

I understand and agree that:

- a. When I complete 12 months, the prescribed tour of duty, I will be eligible for return travel and transportation allowances at Government expense for myself, my dependents, or my household effects, to my actual residence at time of appointment stated above [identified as Germany under “last permanent duty station”] for purposes of separation from the service, unless separated early for reasons beyond my control that are acceptable to the agency concerned.

The DoD Return Placement Agreement signed by the claimant on April 5, 2006, which he refers to as his “mobility agreement,” does not constitute a return transportation agreement within the meaning of DSSR section 031.12. This agreement states as follows:

I understand that upon accepting this position, I am NOT entitled to return rights to any position with DLA in the United States. I understand that upon completion of 12 months of service, which is the prescribed tour of duty specified in my transportation agreement [i.e., the document cited above], unless my tour is extended, I will be required to accept return placement to a position in the United States.

I understand that return placement will be effected through the placement efforts of my recruiting DLA activity or will be made under the provisions of the DoD Priority Placement Program (DoD Manual 1400.20-1-M).

This document is not synonymous with the return transportation agreement cited above. This Return Placement Agreement stipulates only the conditions under which the claimant would be placed in a position back in the U.S., i.e., it relates solely to his return *placement*, not his return *transportation*. His return transportation rights are stipulated in the actual return transportation agreement cited above, which in his case specifically identifies Germany as the last permanent duty station to which he would be returned.

DoD Manual 1400.25-M specifies overseas allowances are not automatic salary supplements, nor are they entitlements. They are specifically intended as 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. 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 the circumstances justify such action, and the agency’s action will not be questioned unless it is determined the agency’s action was arbitrary, capricious, or unreasonable. *Joseph P. Carrigan*, 60 Comp. Gen. 243, 247 (1981); *Wesley L. Goecker*, 58 Comp. Gen. 378 (1979); *OPM Decision S9700047* (1997). In this case, the claimant was a local hire without a return transportation agreement back to the United States who was neither already receiving nor eligible for LQA at the time of appointment to his current position. The agency’s action is not arbitrary, capricious, or unreasonable. Accordingly, the claim for an LQA is denied.

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.