

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

Claimant: [name]

Organization: Department of the Army
[agency component]
Vicenza, Italy

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 11-0012

//Judith A. Davis for

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

9/15/11

Date

The claimant is a Federal civilian employee of the Department of the Army employed in Vicenza, Italy. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of living quarters allowance (LQA) for the period commencing with his appointment on March 2, 2009, to the present. We received the claim on December 10, 2010, the agency administrative report (AAR) on March 10, 2011, and the claimant's comments on the AAR on March 18, 2011. For the reasons discussed herein, the claim is denied.

The claimant's initial Federal civilian employment was with the Department of Defense Dependents Schools (DoDDS) in Ansbach, Germany, which commenced in September 1995, after which he held a series of contractor positions in Germany and Italy. His contractor employment began with the U.S. firm DynCorp in March 1997 in Germany, proceeded to the U.S. firm Logicon in Germany from November 2000 to April 2006, and concluded with the U.S. firm CACI in Vicenza, Italy, in February 2009. He applied and was selected for, and was subsequently appointed to, his position with the U.S. Army Africa while residing in Italy.

The agency denied his request for LQA on the basis that although DynCorp and Logicon provided transportation entitlements to return him to the U.S. at the conclusion of his employment with those firms, his last contractor employment with the firm CACI did not convey such entitlements in their job offer and acceptance letters.¹ The claimant counters that the agency should have accepted as evidence of return rights a memorandum dated October 24, 2008, from a CACI representative identified as "CACI HR Manager Europe," Subject: Confirmation of employment and relocation for CACI employee [claimant] and addressed "To Whom It May Concern," stating: "[Claimant] is entitled to receive a relocation back to the United States upon termination of contractual employment." He asserts the agency set a precedent in granting LQA to another employee "using the same documentation under dispute prior to [his] hiring." He also asserts the agency "unilaterally and illegally changed the terms of [his] employment in violation of AER [Army in Europe Regulation] 690-500.592" and "common contract law" because he was initially told he was eligible for LQA by a member of the Civilian Personnel Advisory Center (CPAC) in Vicenza prior to his appointment.

The Department of State Standardized Regulations (DSSR) set forth basic eligibility criteria for the granting of LQA. Agency implementing guidance such as that contained in AER 690-500.592 and cited by the claimant may impose additional requirements, but may not be applied unless the employee has first met the basic DSSR eligibility criteria.

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

¹ In its AAR, the agency expanded the basis for its denial consistent with other OPM claim decisions regarding the interpretation of "substantially continuous employment" which serves as the primary basis for this claim decision as addressed below.

- 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 does not meet basic LQA eligibility criteria under DSSR Section 031.12b. “Substantially continuous employment” must be with the *employer* (singular) which recruited the employee in the U.S. immediately “prior to appointment” and induced the employee to accept overseas employment. Prior to appointment by the [agency component], the claimant was recruited by the U.S. firm CACI from the firm Logicon in Germany. His U.S. residency was removed from his appointment by four separate employers in Europe. The claimant’s leaving DoDDS to work for DynCorp ended the required continuous employment with the employer, in this case DoDDS, which recruited him in the U.S. Thus, the claimant lost LQA eligibility under the DSSR when his employment with DoDDS ended, and his claim for LQA is accordingly denied.

Living quarters allowance is not an automatic salary supplement or an entitlement. It is specifically intended as a recruitment incentive for U.S. citizen civilian employees living in the U.S. to accept Federal employment in a foreign area. If a person is already living in the foreign area, that inducement is normally unnecessary. Thus, the LQA criteria for employees recruited outside the U.S. serve to disqualify those whose residency overseas is not transitory.

Since the claimant fails to meet DSSR eligibility requirements based on the lack of substantially continuous employment as that term is used within the context of DSSR Section 031.12b, whether he had a return transportation entitlement from CACI is irrelevant. Therefore, we need not address the issue of CACI employment benefits, either in terms of their relevance to his case or the agency’s application of this provision in other cases. In addition, since the claimant fails to meet DSSR eligibility requirements, we need not address the claimant’s arguments regarding the proper application of AER 690-500.592 to his circumstances.

The claims jurisdiction of OPM is limited to consideration of legal and regulatory liability. OPM has no authority to authorize payment based solely on consideration of equity. Therefore, the claimant’s assertion he has not been treated equitably has neither merit nor applicability to our claim settlement determination.

In his response to the AAR, the claimant refers to the Status of Forces Agreement (SOFA) (presumably Article 72 of the Supplementary Agreement (SA) between Germany and the U.S. under the NATO SOFA) and Technical Expert Status Agreement (presumably Article 73 of the SA) between Germany and the U.S., as requiring a return transportation agreement be in place because “the Government or the Government’s status proxies were obligated to ensure that [he] was originally brought from the U.S to provide support to U.S. forces and would be returned to the U.S. after such status ended.” We take this statement to mean the claimant is suggesting these agreements must be construed as automatically ensuring him return transportation as required to meet DSSR Section 031.12b. The claimant’s assertion regarding the applicability of SOFA and the Technical Expert Status Agreement to LQA determinations is misplaced. For example, SOFA is a diplomatic instrument that establishes the legal treatment of U.S. Armed Forces stationed in Germany. Its purpose is to shield U.S. service members and DoD civilians from certain aspects of the German legal and taxation systems, not from U.S. laws and regulations. It confers neither entitlement nor eligibility for LQA. The claimant’s attempt to rely on and apply SOFA terminology to the LQA determination process is contrary to the basic principles of statutory and regulatory construction.²

It is well settled by the courts that a claim may not be granted based on misinformation provided by agency officials. 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 he was eligible for LQA by the Vicenza CPAC based on their preliminary review of his LQA questionnaire 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). 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 on which to reverse the decision.

² In his response to the AAR, the claimant requested “OPM include a legal review of [the AAR] by a government attorney familiar with provisions of the Fair Labor Standards Act [FLSA] and labor law.” It is unclear why the claimant references the FLSA as the Act provides child labor protections and covers the payment of minimum wage and overtime pay for certain U.S. employees in the U.S. and locations excluded from *Exempt area* as defined 5 CFR 551.104. Its provisions do not extend to U.S. employees in Germany (see 5 CFR 551.212, Foreign exemption criteria). It is also unclear why the claimant refers to labor law since he did not occupy a bargaining unit position during the period of his claim.

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