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

**Claimant:** [name]

**Organization:** Military Surface Deployment and Distribution Command
Camp Arifjan, Kuwait

**Claim:** Request for separate maintenance allowance and post hardship differential

**Agency decision:** Denied

**OPM decision:** Denied

**OPM file number:** 12-0017

/s/ Judith A. Davis for

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

9/26/13

Date

The claimant is a Federal civilian employee of the Military Surface Deployment and Distribution Command (SDDC), at Camp Arifjan, Kuwait. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of separate maintenance allowance (SMA) and post hardship differential. We received the claim on March 14, 2012, and the agency's administrative report (AAR) on September 17, 2012. For the reasons discussed herein, the claim is denied.

The claimant's initial Federal civilian employment was with the U.S. Army Sustainment Command (ASC), when he occupied a temporary position as a [position] at Camp Arifjan, Kuwait. His employment began on February 20, 2011, and was scheduled to not exceed March 20, 2012. While employed in this position, the claimant applied and was selected for, and was subsequently appointed to, his position with the SDDC. He was officially appointed to his current position with the SDDC on January 1, 2012.

The agency's initial decision, dated March 6, 2012, denied the claimant's request for involuntary separate maintenance allowance (ISMA), stating, "Based on the documents provided, [the claimant] did not reside in the same household as his family prior to his current assignment in Kuwait with the 595th U.S. Army Transportation Terminal Group in the position of Transportation Planning Specialist, GS-2101-11."

The AAR expanded on the agency's reason for denying the claimant's request for SMA. The agency concludes that since the claimant was ineligible for living quarters allowance (LQA), he is also not entitled to SMA or post differential, citing the Department of State Standardized Regulations (DSSR) which contain the governing regulations for allowances, differentials, and defraying of official residence expenses in foreign areas. In the AAR, the agency states:

> …[the claimant] cannot be considered for the allowance as he is not eligible for LQA. The DSSR Section 031.2 is specific in stating that "[o]ther cost of living allowances [e.g., separate maintenance allowances] […] prescribed in subchapter 260 […] may be granted […] only to those employees who are eligible for quarters allowances under Section 031.1."
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> In addition, we wish to note that since [the claimant] is not eligible for LQA, the DSSR Section 031.3 equally precludes him from receiving post differential prescribed in chapter 500 of the DSSR.

In a November 15, 2012, email provided in response to our request for additional information, the agency indicates that although the claimant is living in Government-leased military housing and thus not receiving LQA, his entitlement to post differential was terminated. Consequently, the claimant asks OPM to reconsider his agency's denial of SMA and post differential. For the reasons discussed herein, the claim is denied.

*LQA*

The DSSR sets forth basic eligibility criteria for granting LQA. 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. See DSSR 013. Agency implementing guidance such as that contained in Army in Europe Regulation (AER) 690-500.592 and Department of Defense Instruction (DoDI) 1400.25-V1250 may impose additional requirements, but may not be applied unless the employee has first met the basic DSSR eligibility criteria.

Under Section 031.11 of the DSSR covering employees recruited in the United States:

> Quarters allowances provided 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.

In his October 22, 2012, rebuttal to the agency's AAR, the claimant states he was confined to the base throughout his employment with ASC and that he was required "…to pay taxes as Camp Arifjan was considered US SOIL. In November of 2011, I was offered a position with the 595th Transportation Brigade." He does not explain his reason for characterizing the base as being United States soil, but we surmise he is asserting eligibility for LQA as a United States hire under Section 031.11. However, the plain language of the DSSR of "recruited by the employing government agency in the United States" clearly connotes physical presence in the United States at the time of recruitment. The claimant was physically residing in Kuwait when he applied and was selected for the SDDC position. As evidence, he completed a November 25, 2011, LQA questionnaire, where he indicates he was not physically residing in the United States when he applied, received, or accepted his current position. Consequently, the claimant is not eligible for LQA under the plain language of DSSR Section 031.11 because he was not residing in the United States or one of its enumerated territories or possessions when he was recruited by the SDDC.

Under Section 031.12 of the DSSR covering employees recruited outside the United States:

> Quarters allowances prescribed in Chapter 100 may be granted to employees recruited outside the United States, provided that:
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> 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
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> 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:
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> 1) the United States Government, including its Armed Forces;
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> 2) a United States firm, organization, or interest;

> 3) an international organization in which the United States Government participates; or
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> 4) a foreign government
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> 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 [italics added]

The agency asserts in the AAR that the claimant is a local hire, thus requiring application of DSSR Section 031.12b. They further state he is ineligible for LQA based on his not having maintained substantially continuous employment under conditions providing for his return transportation to the United States during the period between his ASC employment and the SDDC appointment. "Substantially continuous employment" must be with the employer which recruited the employee in the United States immediately prior to appointment and induced the employee to accept overseas employment. In reviewing the claimant's LQA eligibility, the agency concluded that after receiving the job offer from SDDC, he shortly thereafter resigned from the SDDC and used his entitlement to Government-paid transportation to return to the United States; thus, his break in service and return to the United States was detrimental to his entitlement to LQA. The AAR explains:

> …based on the acceptance of the tentative job offer for his current position in late November 2011, he used his civilian transportation entitlement to return him to the United States for what appears to initially out-process from the 401st Army Field Support Brigade and later to await re-stationing orders from the [civilian personnel advisory center] to transfer him back to Kuwait on assignment with the 595th U.S. Army Transportation Brigade. The record, in the form of SF50s, shows a seamless transition from his position as [GS-12] with the 401st Army Field Support Brigade, to his current position as [GS-11] with the 595th U.S. Army Transportation Brigade in Kuwait; however, the record equally shows that [the claimant] returned to the United States where he must have had a break-in-service, from some time at the end of November or early December 2011, until his appointment effective 01 January 2012…

The implementing regulations for OPM's claims adjudication authority under section 3702(a)(2) of title 31, United States Code (U.S.C.), are contained in title 5, Code of Federal Regulations (CFR), Part 178. Section 178.105, which addresses the basis of claim settlements, states:

> The burden is upon the claimant to establish the timeliness of the claim, the liability of the United States, and the claimant's right to payment. The settlement of claims is based upon the written record only, which will include the submissions by the claimant and the agency. OPM will accept the facts asserted by the agency, absent clear and convincing evidence to the contrary.

The agency concludes the claimant, immediately prior to his SDDC appointment, was no longer employed under conditions which provided for his return transportation to the United States,

assuming he was employed at the time.[1] In his October 22, 2012, rebuttal to the AAR, the claimant does not dispute or contradict the statements made by the agency relating to its LQA determination, other than to include statements characterizing Kuwait as United States soil, which we previously refuted as the claimant's presumed attempt to claim eligibility as a United States hire under Section 031.11 of the DSSR. His rebuttal instead makes statements substantiating the agency's timeline of events; e.g., he states that the "[civilian personnel office] told me I would have to redeploy back to the USA and turn in all my gear and wait for my orders from SDDC. So in December 2011 I flew back to the USA to await orders to return back to Kuwait…" The claimant does not contest the agency's statements regarding the manner of his return to the United States; thus, we conclude the claimant used his entitlement to Government-paid transportation to return to the United States and was no longer in substantially continuous employment under conditions providing him with return transportation to the United States as required by Section 031.12b of the DSSR, thereby rendering him ineligible for LQA.

The claimant's attempt to discredit the agency's LQA determination by referring to the erroneous advice given by the civilian personnel office has no bearing on our adjudication of his claim. He also states he was told by the civilian personnel representative that he would be entitled to SMA and other allowances. 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, the claimant being told he would be eligible for SMA and other entitlements 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 upon which to reverse the decision.

[1] The January 1, 2012, SF-50 documenting the claimant's appointment to SDDC states the "Nature of Action" as "Conversion to Career Conditional Appointment" from ASC to SDDC. However, in a December 22, 2011, email to a civilian personnel advisory center representative regarding his return to the United States in December 2011, the claimant states: "I did not come back to an organization. I was a temporary hire with AMC… I was unemployed." The claimant's status during the gap in employment between his ASC and SDDC positions is unexplained.

*SMA*

Under Section 031.2 of the DSSR, the claimant's eligibility for SMA flows from his eligibility for LQA:

> …Other cost-of-living allowances (foreign transfer allowance, home service transfer allowance, separate maintenance allowances, education allowances, and educational travel)… may be granted subject to exceptions contained in the foregoing chapters, only to those employees who are eligible for quarters allowances under Section 031.1.

Since the claimant is ineligible for LQA, he is likewise ineligible for SMA. However, we considered the merits of the agency's argument that the claimant, had he been eligible for LQA, would not be eligible for SMA since he did not reside in the same household as his family prior to his current SDDC assignment.

The Overseas Differentials and Allowances Act, as amended and codified in Section 5921 – 5928 of title 5, U.S.C., provides that, under regulations prescribed by the President, an SMA may be paid to Federal employees in foreign areas. Section 5924(3) of title 5, U.S.C., states that SMA may be granted to assist an employee who is compelled or authorized, because of dangerous, notably unhealthy, or excessively adverse living conditions at the employee's post of assignment in a foreign area, or for the convenience of the Government, or who requests such an allowance because of special needs or hardship involving the employee or the employee's spouse or dependents, to meet the additional expenses of maintaining, elsewhere than at the post, the employee's spouse or dependents, or both.

Section 261.1.a of the DSSR states:

> Separate maintenance allowance (SMA) is an allowance to assist an employee to meet the *additional expenses* of maintaining members of family elsewhere than at the employee's foreign post of assignment in a foreign area, or for the convenience of the Government. [Italics added]

Section 261.2 emphasizes that:

> SMA is intended to assist in offsetting the *additional expense* incurred by an employee who is *compelled by the circumstances described below* [in section 262, one of which being where ISMA is authorized] to *maintain a separate household* for the family or a member of the family. [Italics added]

Section 263.1 further notes that "[w]hen a member of family would not normally reside with the employee, this individual does not meet the definition of member of family" and thus in these circumstances SMA is not warranted. The intent of the regulations is clearly that SMA be granted only in those cases where the employee would otherwise be compelled to maintain a separate household for a family or family member and thus be burdened with assuming the additional expenses associated therewith, not to defray the costs of an existing housing arrangement.

The claimant's SMA request to his agency included his wife and two children. In his January 15, 2012, request, he asks the agency for SMA to "assist in offsetting the additional expense incurred while maintaining a separate household in CONUS for my family members." However, statements in his claim to OPM (e.g., "[i]f I was not working in Kuwait I would be live [sic] with my wife") appear to narrow his SMA request to cover his wife only. The claimant asks for SMA based on his wife not being able to accompany him to the duty station. This type of situation is covered under DSSR Section 262.1 (ISMA – For the Convenience of the Government) which states:

> An agency may authorize ISMA when adverse, dangerous, or notably unhealthful conditions warrant the exclusion of members of family from the area of when the agency determines a need to exclude members of family from accompanying an employee to the area.

The claimant completed a Foreign Allowances Application, Grant and Report (SF-1190), dated January 15, 2012, indicating that each of his children live at separate residences different from the one he stated he resided at with his wife. The agency's initial decision denied the request for SMA, based on a review of this and other documents, stating:

> …[the claimant] did not reside in the same household as his family prior to his current assignment in Kuwait with the 595th U.S. Army Transportation Terminal Group… Even though [the claimant] produced documents that attempt to purport that he resided with [claimant's wife] at an address in Fairburn, Georgia immediately prior to his current assignment in Kuwait, official Government records show that two different residences, one in Mississippi and another in Marianna, Florida, the latter of which appears to be [the claimant's] home-of-record. Because the family did not reside with [the claimant], the DSSR Section 263.1 does not permit granting ISMA under such circumstances, despite his current assignment being one in which, for the convenience of the government, family members are not authorized and for which ISMA under DSSR Section 262.1 would normally be granted.

The language applying to SMA in 5 U.S.C. 5924 is permissive rather than mandatory, and the language in the DSSR is similarly permissive. By the use of the permissive term "may" as opposed to the mandatory terms "will," "shall," or "must" in relation to SMA, agencies are granted discretionary authority in allowing or disallowing SMA in individual cases. Under statutes that vest a degree of discretion in administrative agencies, our review is generally confined to deciding whether an agency's action must be viewed as arbitrary, capricious, or so at variance with the established facts as to render its conclusion unreasonable.

The record shows the difficulty in establishing the claimant's place of actual residence in the United States stems back to his ASC employment. The claimant states that prior to his initial Federal civilian employment, he lived with his parents at a Florida residence; from August to December 2010, he maintained a Mississippi residence while attending part-time classes at a local community college; and after being selected for and offered the ASC position in November 2010, he lived with his future spouse at her Georgia residence from December 2010 until his deployment to Kuwait. The claimant states that although they married in February 2011, he did not obtain any official documentation at that time showing the Georgia address. His subsequent

travel and employment documents do not list the Georgia address as his residence. The claimant's April 19, 2012, memorandum to OPM further explains his in-processing with ASC:

> When I was try to prove my home record I had nothing show Fairburn, GA, because I only live their briefly. So at the time I could only prove reside at my mother house in Florida. Since then I have change all my stuff to my house in Fairburn and when I was question by [the human resources specialist] I sent her stuff showing that I am support and take care of my wife. [sic]

The claimant's statements suggest he has since obtained official documentation identifying the Georgia address as his place of actual residence in the United States. We reviewed the documents submitted by the claimant and agency to determine his actual residence at the time of his SDDC appointment, which commenced on January 1, 2012. Documents reviewed include: (1) the February 15, 2011, Request/Authorization for DOD Civilian Permanent Duty or Temporary Change of Station Travel (DD Form 1614), identifying his Mississippi address as his actual place of residence; (2) the November 25, 2011, LQA questionnaire where the claimant indicates he lived at his Florida address from March 25, 2010, to March 14, 2011, and at Camp Arifjan, Kuwait, from March 15, 2011, to November 25, 2011; (3) the December 6, 2011, Request for Orders, identifying his Florida address as his place of hire/home of record, signed and certified by the claimant; (4) the December 22, 2011, email from the claimant to a civilian personnel advisory center representative where he identifies his Florida residence as his return address post-ASC employment; and (5) the December 27, 2011, DD Form 1614, indicating the departure location identified in a December 21, 2011, travel order was being amended to read the claimant would be departing for Kuwait from his Florida residence in January 2012.

We reviewed the documents submitted by the claimant showing his Georgia address including his 2011 income tax return form (which does not establish his place of actual residence) and a February 14, 2012, dentist bill addressed to him at the Georgia address (after he had already deployed to Kuwait) for services rendered to his son. The record also includes a March 16, 2012, travel order indicating the claimant departed from Atlanta, Georgia, on January 3, 2012, to his Kuwaiti post. However, despite assertions that he has since obtained documentation to reflect residence at the Georgia address, the claimant did not submit a driver's license, lease agreement, utility bills, or any other documentation to establish that he was actually living at the Georgia address prior to his employment with SDDC.

The agency is responsible for determining the location of an employee's residence based on the individual facts and circumstances in each case. *Matter of Leon H. Liegel*, B-212697 (December 23, 1983); *Matter of Alexander Sambolin*, B-196466 (December 2, 1982). An agency is not precluded from correcting errors in overseas assignment records when it is later shown clearly that an employee's place of actual residence was different than the place specified in the agreement and related documents. *Matter of Leon H. Liegel, supra*. Agency decisions on such matters are subject to reversal only upon a showing that they were clearly arbitrary, capricious, or contrary to law. *Id*. It is clear from the record that the agency weighed all of the facts and circumstances in reaching its decision on the claimant's place of residence and his entitlement to SMA. Considering all of the facts together, and as they are set forth in the claim file, the agency was not arbitrary or capricious in determining that the claimant's Georgia residence cannot be proven to be his place of actual residence at the time of his appointment to SDDC and that he is not entitled to SMA.

*Post differential*

Under Section 031.3 of the DSSR, the claimant's eligibility for post differential flows from his eligibility for LQA:

> Post differential prescribed in Chapter 500 may be granted to employees who are described in Sections 031.11 and 031.12 (eligible for quarters allowances)…

Since the claimant was not directly recruited by the agency from the United States or its territories or conversely, having been recruited from outside the United States, has not established that he had been in substantially continuous employment under conditions that provided for his return transportation to the United States, he is likewise ineligible for post differential and the claim for post differential is accordingly denied.

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.