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

Claimant: [name]

Organization: Defense Intelligence Agency
Stuttgart, Germany

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0043

/s/ Judith A. Davis for

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

10/24/13

Date

The claimant is a Federal civilian employee of the Defense Intelligence Agency (DIA) in Stuttgart, Germany. She requests the U.S. Office of Personnel Management (OPM) reconsider her agency's termination of her living quarters allowance (LQA). We received the claim on June 13, 2013, and the agency administrative report (AAR) on July 22, 2013. For the reasons discussed herein, the claim is denied.

The claimant's employment history is outlined in her resume included with the AAR, supplemented by additional information provided by the claimant in her claim request. Her resume shows her stationed in Spain with the U.S. Navy from October 23, 1989, to December 22, 1993, and at "multiple CONUS & OCONUS sites" with the U.S. Naval Reserves from December 23, 2003, to April 23, 2002 [sic]." She states in her claim that in 2001, she was "a reservist involuntarily activated (active duty) in support of Operation Enduring Freedom with orders to report to Norfolk, Virginia" and that after approximately four months, she received temporary duty transfer orders to Headquarters, U.S. European Command (USEUCOM), in Stuttgart, Germany, where she remained until demobilized in August 2003 prior to her October 12, 2003, discharge from active duty military service. She states:

> Prior to departing Germany I was approached by contracting company (Affiliated Computer Services, Inc (ACS)) and asked if I would consider returning from the states and work as a contractor. I signed an offer letter with ACS prior to departing for demobilization. I returned to my permanent residence in NJ and made preparations for ACS to PCS [permanent change of station] me back to Germany at their expense.

The claimant apparently began working for ACS in Stuttgart shortly thereafter and states that "in 2005 this position was converted to a Department of the Army [DA] civilian position. I applied and was selected." This was the claimant's initial Federal service appointment, effective September 19, 2005, at which time she was found eligible for LQA. She was later transferred to DIA in October 2008.

In May 2013 the claimant was notified that, as a result of a Department of Defense (DoD)-directed LQA audit, it was determined she did not meet the LQA eligibility provisions in the Department of State Standardized Regulations (DSSR), section 031.12b, which requires that an employee recruited outside the United States must, prior to appointment, have been recruited in the United States by his or her previous employer and have been substantially continuously employed by such employer under conditions providing for return transportation to the U.S.

The 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-M, dated December 1996, and Army in Europe Regulation (AER) 690-500.592, dated June 20, 2003, in effect when the claimant was appointed, implement the provisions of the DSSR but may not exceed their scope; i.e., extend benefits that are not otherwise provided for in the DSSR.

DSSR 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.

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 for the position in question. As such, the claimant does not meet LQA eligibility criteria under DSSR section 031.11 because she was residing in Germany, not the U.S., when she was recruited for her position with DA in 2005.

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

Prior to her appointment to her position with DA, the claimant was employed by the U.S. firm ACS in Germany. She was recruited by ACS and accepted the offered position while she was in Germany. Thus, prior to appointment, she was not recruited by ACS in the U.S. or one of the

enumerated territories or possessions. In regard to return transportation, the claimant submitted a copy of a "Memorandum of Understanding" on ACS letterhead signed by her on July 14, 2003, stating that ACS would pay her "Reimbursable Relocation Expenses upon returning to the United States, not to exceed $25,000." However, although this Memorandum has "Approved" and "Signed" blocks for the approving official, a name is typed into the "Signed" block with no actual signature. This unsigned document does not establish that the claimant had been in substantially continuous employment under conditions which provided for her return transportation to the U.S. As such, the claimant does not meet LQA eligibility criteria under DSSR section 031.12b.

The claimant asserts she should be considered a U.S. hire because, at the time of her recruitment by ACS, she "was on involuntary mobilization orders that assigned [her] temporarily to Germany from her permanent duty station in the Continental United States," that her "permanent residence was in the States at the time of recruitment," and that she "did not set up any permanent housing/residency in Germany and planned to return to the States." However, the claimant is conflating the eligibility criteria for U.S. hires under DSSR 031.11 with the eligibility criteria for non-U.S. hires under DSSR 031.12b. An employee's status as a U.S. hire or a non-U.S. hire is determined at the time of appointment *based on the employee's circumstances immediately preceding that appointment.* Since the claimant was not recruited by DA directly from the United States, she is not considered a "U.S. hire" under DSSR section 031.11. Any consideration of her permanent residency prior to her recruitment by ACS is not relevant to this determination.

The plain language of DSSR section 031.12b requires that, relative to the employment prior to appointment, the employee have been "recruited" in the United States or one of its territories or possessions. The claimant acknowledges she was recruited by ACS and accepted the position with that firm while she was physically present in Germany. This physical presence does not require "permanent" residency in terms of housing or time duration.

The claimant also cites "the 2005 Army in Europe USAREUR Regulation 690-500.592 which is still currently being used," from which she states "USAREUR policy defines physical residency, 'applicants recruited from the United States who were present overseas based on orders from unaccompanied assignments that provided for their return transportation to the United States will be considered to be permanently residing in the United States for eligibility purposes.'" However, AER 690-500.592 dated November 18, 2005, was not in effect when the claimant was appointed on September 19, 2005, and the regulation in effect at that time, dated June 20, 2003, did not include this provision in its definition of physical residency as follows:

> For the purpose of determining local-hire status, physical residence is the actual permanent presence of an applicant overseas for more than merely a transitory or tourist purpose as finally determined by the proponent of this regulation, regardless of the applicant's home of record, legal residence, or domicile.

Regardless, this definition pertains to an employee's circumstances immediately prior to appointment to the Federal service, in that it describes certain conditions under which an employee may be considered a U.S. hire under DSSR section 031.11 versus a "local" (i.e., non-U.S.) hire under DSSR section 031.12. The claimant was not recruited by DA directly from the

U.S., and the AER 690-500.592 definition of "physical residency" would not be applied to her circumstances prior to her recruitment by ACS in an attempt to establish status as a U.S. hire.[1]

The appellant asserts that because the DoDI 1400.25-M in effect at the time of her hiring by DA "allowed or gave agencies discretion for interpretation in unusual circumstances," then "the DIA audit team should not be able to overturn the 2005 Army decision." The claimant is apparently referring to DoDI section SC1250.5.1.1.2.2, Waivers, which states:

> The requirements of Section 031.12b of the DSSR may be waived in individual cases when unusual circumstances exist. In such cases where the Major Command recommends a waiver, the case shall be forwarded to the serviced DoD Component headquarters for consideration by the Agency head. All other requests should be returned by letter to the employee explaining the reasons for non recommendation. Head-of-Agency authority may be redelegated to the appropriate Major Command...

The agency's May 1, 2013, notification to the claimant that her LQA was being terminated stated "the previous determination that you were eligible to receive LQA was erroneous." There is no documentation or other indication that the claimant was granted LQA by DA in 2005 by means of a properly-executed waiver of DSSR section 031.12b under DoDI section SC1250.5.1.1.2.2. Therefore, the claimant's assertion that DA exercised its discretion to grant her LQA under this section and that their discretionary authority should be upheld lacks merit.

The claimant suggests that the August 3, 2005, offer letter she received for her initial Federal service appointment with DA, which stated she was eligible for LQA, was "legally binding." However, 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 she was eligible for LQA upon her appointment to the Federal service and had received LQA based on that initial determination does not confer eligibility not otherwise permitted by statute or its implementing regulations.

The claimant makes various assertions regarding the propriety and equity of the DoD-directed LQA audit and its subsequent implementation. 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 the claimant for the stated claim under the applicable statute and implementing regulations. The scope of OPM's authority under 31 U.S.C. 3702(a)(2) does not extend to broader issues such as reviewing the conduct and implementation of an agency's internal audit activities .

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[1] The claimant also attempts to import the definition of "temporary duty location" in the Federal Travel Regulation and the criteria for payment of basic housing allowance contained in title 37, United States Code (Pay and Allowances of the Uniformed Services), to the DSSR. However, the content of these separate and disparate statute and regulations may not be conflated to substitute for the plain language of the DSSR.

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). As discussed previously, the claimant has failed to do so. 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.

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.