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

Claimant: [name]

Organization: Department of the Navy
Stuttgart, Germany

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0059

/s/ Linda Kazinetz for

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

6/10/14

Date

The claimant is a Federal civilian employee of the Department of the Navy in Stuttgart, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's termination of his living quarters allowance (LQA). We received the claim on August 19, 2013, the agency administrative report (AAR) on September 23, 2013, and the claimant's response to the AAR on October 24, 2013. For the reasons discussed herein, the claim is denied.

The claimant was hired from the United States by a private U.S. firm in August 2005 for a position at their Ramstein Air Base, Germany, location. While employed by the private firm, he applied and was selected for a position with the Department of the Navy in Stuttgart, Germany, was appointed on January 22, 2008, and was granted LQA. However, in May 2013 the agency notified the claimant that, as a result of a Department of Defense (DoD)-directed LQA audit, it was determined his initial LQA eligibility determination was erroneous. In its AAR, the agency states that although the claimant "was recruited from the United States by a United States firm, his contract employment was under conditions which "did not" provide for his return transportation" in that it provided escalating amounts of "transition assistance," payment of which was contingent upon at least three years of employment with the firm. The agency notes the claimant left the private firm for Federal employment after less than three years and was thus not eligible for the "transition assistance" from the firm at the time of appointment. Citing a previous OPM decision (OPM File Number 12-0001, May 21, 2012), the agency concludes:

> The Office of Personnel Management (OPM) holds that agreements contingent on the claimant's completion of certain conditions and that do not expressly and exclusively provide for returning the claimant to the United States are not acceptable... Much like in [claimant's] situation, his return would only be paid under the length of employment schedule provided for in his contract. Thus, the language of the agreement does not ensure return transportation to the United States or one of the enumerated locations in DSSR Section 031.12b or full provision for that relocation, but rather stipulates a series of conditions under which relocation to an unspecified destination would be provided.

The claimant asserts the requirements expressed above are not supported by the governing regulations which were "written to allow the Human Resources (HR) Specialist flexibility to make an eligibility determination."

The Department of State Standardized Regulations (DSSR) are the governing regulations for allowances, differentials, and defraying of official residence expenses in foreign areas. However, under section 013, they allow agencies to issue implementing regulations as follows:

> When authorized by law, the head of an agency may defray official residence expenses for, and grant post differential, difficult to staff incentive differential, danger pay allowance, quarters, cost-of-living, representation allowances, compensatory time off at certain posts and advances of pay to an employee of his/her agency and require an accounting thereof, subject to the provisions of these regulations and the availability of funds. Within the scope of these regulations, the head of an agency may issue such further implementing regulations as he/she may deem necessary for the guidance of his/her agency with regard to the granting of and accounting for these payments.

Thus, agency implementing regulations such as those contained in DoD 1400.25-M in effect at the time of the claimant's appointment may impose additional requirements to further restrict

LQA eligibility, but may not exceed the scope of the DSSR; i.e., allow for the granting of LQA in cases not otherwise permitted under the DSSR.

DSSR section 031.12 states, in relevant part, that LQA may be granted to employees recruited outside the United States under the following circumstances:

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.

The claimant submitted with his claim a copy of a job offer letter dated June 10, 2005, on "Titan Corporation" letterhead, offering him a position with "Titan Corporation, Assistance and Advisory Services (A&AS)" in their Ramstein Air Base location, and describing his return transportation benefits as follows:

> A transition assistance payment will be made to you after successful completion of continued employment subject to the following provisions. The transition assistance payment will be made upon our receipt of documentation that you have moved at least 400 miles from your last Titan duty location and that your employment termination is classified as "eligible for rehire." The payment schedule is as follows: $5,000 after the completion of three (3) full years of service from the official hire date; $7,500 after the completion of four (4) full years of service from the official hire date; $10,000 after the completion of five (5) full years of service from the official hire date. Contingent on customer continuing current work on USAFE A&AS contract, upon applicant qualifying for TESA, and applicant retaining the required security clearance.

However, in his response to the agency report, the claimant submitted an additional document he states he had recently located, consisting of a "welcome aboard package" transmitted to him via email by Titan Corporation's Stuttgart Site Manager on April 22, 2005, which he asserts provided "full details surrounding [his] repatriation/return travel package." This document,

labeled as "Team Titan," differs from the subsequent June 10, 2005, job offer letter cited above in that it describes specific "repatriation" benefits to the U.S.

Information readily available on the Internet reveals that Titan Corporation was acquired by the firm L-3 Communications on June 3, 2005, after which it operated as the "Titan Group" of L-3. (This acquisition was also addressed in OPM File Number 10-0037, September 2, 2010.) The "transition assistance" benefits described in the claimant's June 10, 2005, offer letter are similar to those provided by L-3 Communications, familiar to us from other claims. *See* OPM File Numbers 12-0001 and 10-0037, also 09-0021, May 18, 2009. Thus, we conclude that the Titan "welcome aboard package" transmitted to the claimant in April 2005 was no longer valid when he was offered the position on June 10, 2005, because in the interim, Titan had been acquired by L-3 and no longer existed as a separate entity. Hence, the job offer letter, although still on Titan Corporation letterhead, reflected the L-3 benefits package and specifically the claimant's return transportation benefits during his employment with that firm. Therefore, we cannot consider the "welcome aboard package" as representing the return transportation benefits afforded him by his contractor employment preceding his Federal appointment.

The claimant challenges the reasoning in OPM File Number 12-0001, which the agency used as the basis for the termination of his LQA. Specifically, the claimant addresses the following three disqualifying conditions addressed in that decision and cited by the agency: (1) the claimant had not satisfied the minimum three-year service requirement with the contract firm and thus was not eligible for the firm's "transition assistance payment" at the time of appointment; (2) the "transition assistance payment" was not for relocation exclusively to the U.S.; and (3) the "transition assistance payment" did not provide full provision for return transportation to the U.S. We address these points individually below:

(1) We have revisited and are reversing our conclusion in OPM File Number 12-0001 that an employee must have satisfied any minimum service requirement established by the previous employer for receipt of a qualifying repatriation benefit in order to meet DSSR section 031.12b. DSSR section 031.12b requires that an employee, prior to appointment, be recruited in the U.S. (or other listed areas) and be in substantially continuous employment by such employer under conditions which provided for his/her return transportation to the U.S. (or other listed areas). The determination as to whether the employee was employed under LQA-qualifying conditions (i.e., in substantially continuous employment under conditions providing for return transportation to the U.S.) is made based on the conditions in place prior to appointment. The most compelling consideration influencing our determination to reverse our prior conclusion (rendering a claimant ineligible for LQA because he failed to satisfy the service requirement prior to appointment) is the recognition that, if the time spent employed prior to satisfaction of a service requirement is not considered qualifying under DSSR section 031.12b, then it must not be considered qualifying both for employees who are appointed before completion of the service period and for employees who are appointed after completion of the service period. In other words, if an employee appointed before completion of the service period is not considered to have been employed under conditions providing for his/her return transportation to the U.S. because the minimum service requirement had not been met, then it is also the case that, for an employee appointed after completion of the service period, the employee is not considered to have been "substantially continuously employed" under conditions which provided for his/her return transportation to the U.S. for the period of time before the minimum service requirement had been met. As such, under our prior reading, the mere existence of a length-of-service contingency would be a

disqualifying factor regardless of whether the employee had satisfied it at the time of appointment. We do not believe this is a reasonable interpretation of the intent of DSSR section 031.12b. Therefore, we no longer consider satisfaction of a length-of-service contingency associated with a relocation benefit as required in order for the employee to have been employed "under conditions which provided for his/her return transportation to the United States."

(2) The claimant asserts that DSSR section 031.12b does not include the word "exclusively," that "[t]he contracting firm writes flexibilities into their transportation agreement to allow for other options that may exist at the completion of the employment contract," and that it is his "full intent to return to the United States upon completion of his contract." In considering the meaning of the phrase "under conditions which provided for his/her return transportation to the United States," it is instructive to consider the underlying intent of LQA. LQA is granted to employees recruited directly from the U.S. and secondarily, to employees recruited outside the U.S. under very specific and limited conditions. As articulated in DoD 1400.25-M, it is DoD policy that:

> Overseas allowances and differentials (except the post allowance) are not automatic salary supplement; nor are they entitlements, They are specifically intended to be 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.

Thus, LQA is designed as an overseas recruitment incentive for individuals residing in the U.S., and for individuals currently employed overseas (for certain specified entities) but with the specific provision that at the conclusion of that employment, the individual is to be returned to the U.S. (or other enumerated locations stipulated in DSSR 031.12b) by the employing entity. This allows the granting of LQA only to individuals who have primary residency in the U.S. and are expected to resume that residency at the conclusion of the overseas employment. In other words, subsequent return to the U.S is a specific "condition" of the employment, not merely an "option." The employee may, at his or her own initiative, incur the cost of relocating elsewhere, but this cost will not be borne by the employer. Although an individual working overseas may intend to return to the U.S. with or without any commitment by the employer to provide for return transportation, "intent" cannot serve as the basis for the granting of LQA. Instead, the individual's employment contract or benefits must serve as the basis for making a reasonable determination as to whether his or her return transportation to the U.S. is understood and ensured. This is in keeping with the design of LQA as a means of inducing individuals who would otherwise be returning to the U.S. to accept Federal employment overseas, and to disqualify those who have undertaken long-term residency overseas with no specific commitment or expectation on the part of their employer to return them to the U.S.

These conditions are not met by an employment contract that provides a "transition assistance payment" upon demonstration that the employee has moved at least 400 miles from the last duty station. This is not a specific commitment and expectation on the part of the employer to return the employee to the U.S. upon termination of that employment. Return to the U.S. under these circumstances is merely speculative. The criteria expressed under DSSR section 031.12b are narrow and go to the very heart of the intent of LQA as a recruitment incentive. They are not, as the claimant suggests, intended to give individual HR specialists "flexibility" or "latitude" in determining who is eligible for this considerable outlay of government funds, but rather to

establish the very specific circumstances under which LQA may be granted to individuals recruited outside the U.S. and which are to be applied consistently by agency officials in making LQA determinations. *See* OPM File Numbers 08-0009 and 08-0027, September 18, 2008; 09-0021, May 18, 2009; 09-0048, March 18, 2010; and 12-0006, September 27, 2012.

(3) The claimant asserts that DSSR section 031.12b "does not stipulate a dollar amount nor does it specify "full provision" for return transportation," therefore, "[t]he amount afforded for return transportation [by his employer] is irrelevant to his case" but regardless, "the amounts listed for return transportation at the time of this contract (2005) was [sic] adequate for return transportation." DSSR section 031.12b does not define the term "return transportation," and DoD has not defined it in their implementing regulations. Therefore, we must apply what we regard as a reasonable interpretation of the term.

In interpreting the meaning of the language, "provided for his/her return transportation to the United States," we must return to the underlying intent of this provision; i.e., that the employer has committed itself to returning the employee to the U.S. to the extent that his or her return is ensured. Within this context, the claimant's June 10, 2005, offer letter from "Titan Corporation" made the following provision, in relevant part, for his relocation from the U.S. to Germany:

> You are eligible to receive a relocation package in accordance with the standard USAFE into Theater Relocation Package not to exceed $25,000.00.
> *

Thus, the employer considered that $25,000 was a reasonable amount for an employee to relocate overseas. However, it offered only from $5,000-$10,000, depending on length of service, as "transition assistance" at the conclusion of employment after the move has occurred upon demonstration that the employee has moved at least 400 miles away. This is considerably less than the amount recognized as necessary for relocation to Europe and thus is not considered a full commitment by the employer to ensure the claimant's return move to the U.S. The issue here is not whether the claimant believes the amount offered would have been sufficient, as this would vary in individual cases. The issue is whether the employer had obligated itself monetarily sufficient to ensure the employee's return to the U.S. In addition, since the "transition assistance payment" is to be made solely after demonstration that the employee has moved at least 400 miles away, it is not directly tied to paying for the cost of the relocation itself and could be used by the employee for any other purpose.[1]

In summary, we do not consider the length of service requirement stipulated in the claimant's job offer letter to be a disqualifying factor in regard to DSSR section 031.12b. However, we do not consider the claimant's benefits with Titan Group/L-3 to otherwise constitute conditions that provided for his return transportation to the U.S. A conditional payment of $5,000-$10,000 if the claimant moved at least 400 miles away from the last duty station demonstrates neither an

[1] We find the statement that this payment was "[c]ontingent on customer continuing work on USAFE A&AS contract" troubling, as it appears to imply that if the customer (presumably USAFE) were to terminate the contract, the claimant would not be eligible for this "transition assistance payment." This introduces a significant contingency that is beyond the employee's control and which appears to further undermine the employer's commitment to provide any degree of relocation assistance.

expectation on the part of the employer that the claimant would be returned to the U.S. upon conclusion of employment nor a commitment on the part of the employer to ensure that return commensurate with the commitment that was made to relocate the employee overseas.

The claimant asserts that this "interpretation of the DSSR completely contradicts the initial intent determined by the HR specialist when [claimant] was hired" and requests that "all associated benefits determined eligible and granted at initial appointment" be restored. 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 bar 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 erroneously determined to be eligible for LQA upon his appointment to the Federal service and had received LQA based on that determination does not confer eligibility not otherwise permitted by statute or its implementing regulations to continue receiving such erroneous payments.

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.