

Date: March 24, 2004
Matter of: [name]
File Number: 03-0029
OPM Contact: Deborah Y. McKissick

The claimant is employed as a [position] with the Department of the Army, [agency component], in Frankfurt-Roedelheim, Germany. He is requesting reinstatement of the authorized living quarters allowance (LQA) for initial repairs for his personally owned quarters (POQ). The Office of Personnel Management (OPM) received the claim on July 29, 2003 and the agency administrative report on October 27, 2003. For the reasons discussed herein, the claim is denied.

The claimant stated that prior to the purchase of his POQ the agency authorized reimbursement under LQA for necessary and required renovations to his POQ. The following renovations were completed at the time of the purchase of the POQ: “roof repair/extension, built-out the attic (construction and electrics), roof windows, gutter heating, replacement of existing telephone system, television antenna, new windows, safety measures for doors and windows, etc., at a cost of DM 61,000.” The claimant purchased the POQ for DM 300,000 and had the required renovations and repairs completed based on advice of a Civilian Personnel Advisory Center (CPAC) employee. In accordance with local policy, he also provided all receipts and required documentation when he submitted his final LQA application.

The claimant provided several documents with his claim to OPM. In an August 28, 2002, memorandum from the Civilian Personnel Operations Center (CPOC), the claimant was authorized DM 184,000.00 LQA, including the renovation costs, effective May 1, 2002. The CPOC issued a corrected memorandum, dated December 12, 2002, which changed the claimant’s authorized LQA to DM 214,000.00, excluding renovation costs, effective May 1, 2002.

The agency administrative report states, “It is the Headquarters, United States Army Europe (HQ USAREUR) position that the claim for additional reimbursement of LQA is barred under the provisions of Department of State Standardized Regulations (DSSR), Section 136 and 137.”

The October 17, 2002 edition of the USAREUR Regulation 690-500.592, section 6b states,

b. LQA for Privately Owned Quarters (POQ). Employees eligible to receive LQA who purchase and reside at the official post of assignment are entitled to receive the rental portion of the LQA equal to 10 percent of the purchase price for a maximum of 10 years.

Department of Defense Regulations (DoD) 1400.25-M, Subchapter 1250.5.1.14, *Personally Owned Quarters (POQ)* reads, “The annual rent payable for Personally Owned Quarters is based on the purchase price or appraised value of the property, converted to U.S. dollars at the exchange rate in effect at the time of purchase.”

The Department of State Standardized Regulations, Section 136, Personally Owned Quarters, reads,

a. When quarters occupied by an employee are owned by the employee or the spouse, or both, an amount up to 10 percent of original purchase price (converted to U.S. dollars at original exchange rate) of such quarters shall be considered the annual rate of his/her estimated expenses for rent. Only the expenses for heat, light, fuel, (including gas and electricity), water, garbage and trash disposal and in rare cases land rent, may be added to determine the amount of the employee’s quarters allowance in accordance with Section 134. The amount of the rental portion of the allowance will be entitled only to above utility expenses, garbage and trash disposal, plus land rent.

DSSR Section 137, Allowance for Necessary and Reasonable Initial Repairs, Alterations, and Improvements Under Unusual Circumstances reads,

The purpose of this allowance is to cover, under unusual circumstances, the cost of initial repairs, alterations and improvements which are incurred within 3 months of a *rental agreement* and which are basic to making the employee’s first permanent residence at a post habitable. (Emphasis added).

The Overseas Differentials and Allowances Act, Pub. L. 86-707, 74 Stat. 793, 794 (Sept. 6, 1960), as amended and codified at 5 U.S.C. §§ 5922-5924 provides, under regulations prescribed by the President, that LQAs may be paid to Federal employees in foreign areas. The President, by executive order, delegated this authority to the Secretary of State who issued Standardized Regulations concerning eligibility to receive, and payment of, LQAs. Section 013 of the DSSR further delegates to the heads of Federal agencies the authority to grant LQAs to agency employees. Section 013 of the DSSR specifies that the head of an agency may grant quarters allowances and issue further implementing regulations, as he or she may deem necessary for the guidance of the agency in granting such allowances. The DoD has issued further implementing regulations through its requirements for DoD civilian employment overseas, DoD 1400.25-M, CPM 592.

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. *Joseph P. Carrigan*, 60 Comp. Gen. 243, 247 (1981); *Wesley L. Goecker*, 58 Comp. Gen. 378 (1979), *OPM Decision S9700047* (1997). The agency confirmed that the claimant's original LQA "was erroneously computed by adding the renovation costs to the original purchase price of the quarters." However, it is well settled that the erroneous advice of agency officials may not form the basis for the payment of a claim otherwise barred by law. *OPM v. Richmond*, 496 U.S. 414 (1990).

OPM does not conduct adversary hearings, but settles claims on the basis of the evidence submitted by the claimant and the written record submitted by the government agency involved in the claim. 5 CFR 178.105; *Matter of John B. Tucker*, B-215346, March 29, 1985. Moreover, the burden of proof is on the claimant to prove the liability of the government and his or her right to payment. 5 CFR 178.105; *Matter of Jones and Short*, B-205282, June 15, 1982. Thus, where the agency's factual determination is reasonable, we will not substitute our judgment for that of the agency. See e.g., *Jimmie D. Brewer*, B-205452, Mar. 15, 1982. In view of the language in the applicable statutes and regulations, as previously noted, we do not find that the agency's actions were arbitrary or capricious. Therefore, the claimant is not entitled to LQA for the renovation costs of his POQ. Accordingly, the claim is denied.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the employee's right to bring an action in an appropriate United States Court.