



United States
**Office of
Personnel Management**

Washington, DC 20415

**Compensation Claim Decision
Under section 3702 of title 31, United States Code**

Claimant: [name]

Organization: Headquarter, U.S. European Command
Department of Defense
Stuttgart, Germany

Claim: Request for Living Quarters Allowance

Agency decision: Denied

OPM decision: Denied

OPM contact: Robert D. Hendler

OPM file number: 05-0043

/s/ Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability
Human Capital Leadership
and Merit System Accountability

5/5/2006

Date

The claimant is employed in a [position] with Headquarters (HQ), United States (U.S.) European Command, Department of Defense (DoD), in Stuttgart, Germany. The claimant was hired locally overseas on February 1, 1999, in that position, and is requesting the Office of Personnel Management (OPM) to reconsider his agency's decision regarding his eligibility to receive living quarters allowance (LQA), and is "seeking extraordinary relief." We received the compensation claim on September 16, 2005, and the claim administrative report on December 14, 2005. For reasons discussed herein, the claim is denied.

The record shows that the claimant retired from military service on November 1, 1997, while stationed overseas, and applied for his current position in October 1998, while physically residing in Germany. The claimant's resumes, dated September 15, 1997, and, July 11, 1998, indicate his residence as Oberursel, Germany. The claimant was offered his current civilian position on December 24, 1998, and appointed on February 1, 1999.

The claimant believes that he is eligible for LQA because he applied for his current position (October 16, 1998) prior to the one-year expiration (November 1, 1998) of substantially continuous employment, his transportation entitlement was not lost, and recent changes in the Department of the Army's regulations allow local hires to receive LQA. The claimant referenced Department of State Standardized Regulations (DSSR) 031.12, which authorize LQA for employees recruited outside the U.S. if the employee's residence is "fairly attributable" to U.S. Government employment. The claimant believes his residence at the time of employment was fairly attributable to U.S. Government employment because he was an active U.S. Air Force officer serving in Germany when he retired.

The claimant asserts that during the job offer he was told by the hiring official that he would receive LQA. However, the claimant states that upon reporting to duty he was told by the Civilian Personnel Operations Center (CPOC) at Stuttgart, Germany, that he was not entitled to LQA because he was a local hire. The claimant further asserts that a technical error occurred in the processing of his application which may have attributed to him not receiving LQA. The claimant states the CPOC did not have the updated copy of his resume showing his current employment status at the time of employment and, therefore, may have thought he was currently employed with the U.S. Government and was not retired military. The claimant also states "it was the desire of his prospective supervisor to effect the hiring action within the timeframe for him to be eligible to receive LQA." It is well established that the misinformation provided by agency officials may not form the basis for the payment of a claim otherwise barred by law. See *Richmond v. OPM*, 496 U.S. 414, 425-426 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed Cir. 1997); and 60 Comp. Gen. 417 (1981). *Carl H.L. Barksdale*, B-219505 (November 29, 1985); *E. Paul Tischer, M.D.*, 61 Comp.Gen. 292 (1982).

When the claimant's initial request for LQA was denied, by his local human resources office, he appealed to HQ, United States Army, Europe's (USAREUR) office of the Deputy Chief of Staff, Personnel. That office issued the agency denial on October 17, 2002, on the basis LQA eligibility requirements must be met on the date of appointment. The agency agrees the claimant did meet the LQA eligibility requirements when he applied for the position. However, he did not meet LQA eligibility requirements on the date he became a U.S. Government civilian employee because the one year of "substantially continuous employment" had expired.

Even though the claimant met the criteria in section 013.12 of the DSSR at the time he applied for the position, regulation specifies further that, except in unusual circumstances, an LQA is to be used as an incentive to persuade employees in the U.S. to apply for overseas positions. DSSR 013 provides that agencies may issue implementing regulations regarding granting of and accounting for these payments. As stated in DoD 1400.25-M, December 1996:

Overseas allowances and differentials (except the post allowance) are not automatic salary supplements; 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.

The specific circumstances under which an employee who is hired in a foreign area *may* be granted the allowances provided in section 031.12 of the DSSR, as supplemented by this chapter. (Emphasis added).

Conditions for LQA are set forward in Section 031.12 of the DSSR and provide that quarters allowances *may* be granted to employees recruited outside the U.S., when:

- 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 employment by the United States Government; and
- b. prior to appointment, the employee was recruited in the United States . . . by
 - (1) the United States Government, including its Armed Forces, . . .
 - (4) . . . and has been in substantially continuous employment by such employer under conditions which provided for his/her return transportation to the United States

As stated in DoD 1400.25-M, December 1996, implementing DSSR 031.12b:

. . . former military members shall be considered to have “substantially continuous employment” for up to one year from the date of separation or when transportation is lost, or until the retired and/or separated member or employee uses any portion of the entitlement for government transportation back to the U. S. *whichever occurs first (emphasis added).*

The DSSR further provides that the head of the agency, upon determination that unusual circumstances in an individual case justify such action, *may* waive Section 031.12b. Thus, the DSSR authorizes, but does not require, agency officials to grant an LQA when an employee fulfills the basic eligibility requirements as defined in 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. *Joseph P. Carrigan*, 60 Comp. Gen. 243, 247 (1981); *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979).

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, March 15, 1982. The claimant's resume lists Germany as his residence when he was hired, and is, therefore considered, a "local hire." The claimant accepted the civilian position after the agency informed him that he was not entitled to LQA. The claimant retired from the military on November 1, 1997, and was appointed to the civilian position on February 1, 1999; after the one-year expiration period of substantially continuous employment which expired on November 1, 1998. The claimant did not fulfill the requirement of having substantially continuous employment. The agency decision of November 17, 2002, regarding the claimant's eligibility to receive an LQA is not arbitrary, capricious, or unreasonable. 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.