

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

Claimant: [name]

Organization: [agency component]
Department of the Army
Darmstadt, Germany

Claim: Living quarters allowance and home
leave

Agency decision: Denied

OPM decision: Denied

OPM file number: 10-0037

//Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Merit System Audit and Compliance

9/14/11

Date

The claimant is a Federal civilian employee of the [agency component], Department of the Army (DA), in Darmstadt, Germany. She requests the U.S. Office of Personnel Management (OPM) reconsider her agency's denial of living quarters allowance (LQA) for the period of employment from her appointment on October 3, 2005, to the present. She also requests past and future renewal-agreement travel (RAT), "reinstatement of her return rights," and "back and future home leave."¹ We received the claim from the claimant's representative (hereinafter referred to as "claimant") on June 8, 2010, the agency administrative report (AAR) on August 11, 2010, the claimant's response to the AAR on September 15, 2010, and the agency's rebuttal of that response on September 30, 2010. For the reasons discussed herein, the claim is denied.

On June 29, 2004, the claimant was offered and accepted a position as an interrogator/debriefer with the private firm Lockheed Martin duty-stationed at Guantanamo Bay, Cuba. The Lockheed Martin contract with the U.S. Government ended in January 2005 and a new contract was awarded to the private firm Chenega Technology Services Corporation (CTSC). On January 24, 2005, while still on Guantanamo, the claimant was offered and subsequently accepted continued employment with CTSC as a senior strategic debriefer, which commenced on or about February 1, 2005. On July 7, 2005, the claimant was extended the tentative job offer of [position], with [agency component] in Darmstadt, Germany, which she accepted on July 12, 2005. The offer was confirmed by the agency on August 16, 2005, while the claimant was on Guantanamo. The claimant departed Guantanamo on August 17, 2005, for Bristol, Tennessee, where she accepted the firm job offer. She departed the United States for Germany on September 28, 2005, and was appointed to the position on October 3, 2005.

In her appeal letter, the claimant asserts she is eligible for LQA under the Department of State Standardized Regulations (DSSR), section 031.12b, as a "local hire" because her employment at Guantanamo Bay had been "substantially continuous" and she had not used any portion of her return transportation entitlement back to the United States prior to her formal acceptance of the position, having self-funded her return flight from Guantanamo to the United States and having requested and subsequently received reimbursement from CTSC for these transportation costs in November 2005, after her appointment to the position. She also asserts in her appeal letter that she should be granted LQA because she had initially been told by the agency that she was eligible and "was subsequently notified that she was not eligible for LQA on Friday, September 30, 2005, the day after her arrival in Germany and acceptance of the position," and that "insofar as the Agency promised [claimant] that it would provide her with an LQA, a promise that she reasonably relied upon to her detriment, the Agency is legally precluded from denying her the allowance."

The agency states in its AAR that the claimant is ineligible for LQA for two reasons: (1) prior to her appointment into Federal service she had not been recruited in the United States; and (2) she did not have substantially continuous employment under conditions which provided for her return transportation to the United States when she was employed by Lockheed Martin from June 2004 to January 2005. The agency further states that as such, the issue of whether she used the transportation entitlement granted to her by CTSC is moot.

¹ Neither RAT nor "return rights," the latter presumably referring to return transportation at the end of her overseas tour, are compensation claims which fall within OPM's jurisdiction under section 3702(a)(2) of title 31, United States Code, and will therefore not be addressed in this decision.

In her response to the AAR, the claimant introduces the alternate rationale that she is eligible for LQA as a “U.S. hire” under DSSR "section 032.11" (an apparent error that should read "section 031.11”) because: (1) she maintained a residence in the United States while employed on Guantanamo; and (2) she did not accept the position offer until after she had returned to the United States. She also reiterates that even if this interpretation is not supported:

... as Exhibit A clearly demonstrates, the employment contract with Lockheed provided for return transportation rights to the United States from Cuba. After Chenega assumed responsibility for Lockheed’s operations, it too offered [claimant] return transportation rights. Thus, at all times during which she was employed in Cuba, [claimant] had at her disposal government-funded transportation rights back to the United States, thereby satisfying the final clause in § 032.12(b) [sic]. Furthermore, [claimant’s] employment was substantially continuous insofar as she never made use of the government-funded transportation rights that were offered to her. As the agency acknowledges, at the time that she traveled from Cuba to Bristol, Tennessee in or around August 2005, prior to accepting the position in Heidelberg, [claimant] used her own money to pay for the trip... As such, [claimant’s] tenure with Lockheed and Chenega fulfills the definition of “substantially continuous employee” as stated in the DSSR and interpreting case law.

The implementing regulations for OPM's claims adjudication authority under section 3702(a)(2) of title 31, United States Code, 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 DSSR contains 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-V1250 implements the provisions of the DSSR but may not exceed their scope; i.e., extend benefits that are not otherwise provided for in the DSSR. However, an LQA applicant must fully meet the relevant provisions of the DSSR before the supplemental requirements of the DoD or other agency implementing guidance may be applied.

DSSR Section 031.11 provides the following specific language covering 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.

Relevant to the claimant's assertion that she is eligible for LQA as a "U.S. hire" pursuant to section 031.11 above, the agency provided the following timeline detailing the circumstances of her recruitment by DA in their November 21, 2008, draft reply to a Congressional inquiry, which the agency provided as part of the AAR:

[Claimant], however, was recruited by the U.S. Government for a position in Germany while she was in Cuba. The record shows that the recruitment action for her [position] with [installation] in Darmstadt, Germany, originated in April 2005, while [claimant] was in Cuba (RPA#[number]), placing her in Cuba when she applied for the position, and on July 7, 2005 when the agency extended to her a tentative offer of this position. On July 12, 2005, [claimant] transmitted a fax from Guantanamo Bay to the agency, accepting this tentative offer and providing documents to that end. Her LQA questionnaire establishes that she was employed with CTSC until July 15, 2005... [Claimant] acknowledges that on 16 August 2005 the agency extended a "firm job offer" (apparently a confirmation of the tentative job offer made to her on July 7, 2005). According to her own statements, [claimant] was still in Cuba even at that time, but departed on August 17, 2005, with an eventual destination of Bristol, TN., where she accepted the agency's final offer. Therefore, recruitment records show that the hiring process occurred while she was outside the United States and as such, cannot be considered a U.S. hire.

The claimant presents two bases for being considered a "U.S. hire": (1) that at the time she received the initial job offer, she maintained a residence in Monroe, Louisiana, and (2) "by virtue of the fact that the Agency kept open its offer of employment to [claimant] even after her arrival at her home of record in Bristol, Tennessee, the Agency recruited [claimant] while she was physically in the United States."

In regard to the first statement, the plain language of "recruited by the employing government agency *in the United States*" clearly connotes physical presence in the United States at the time of recruitment. This language does not allow for a more expansive interpretation such as the maintenance of a residence in the United States. Therefore, whether an employee is deemed to be recruited in the United States or outside the United States is dependent on the location of the employee when recruited, not on the existence of a legal residence at some place other than where the employee is actually located at that time.

This is reinforced by DoDI 1400.25-V1250, which defines "U.S. hire" as:

A person who resided permanently in the United States, or the Northern Mariana Islands, from the time he or she applied for employment until and including the date he or she accepted a formal offer of employment.

Regarding the second statement, the claimant does not dispute that she was physically residing on Guantanamo when she applied and was selected for the position, as stated by her in a September 14, 2005, email to a representative of the servicing Civilian Personnel Advisory Center (CPAC) in Heidelberg, Germany:

I resigned from my position in Guantanamo because I accepted the position in Darmstadt.

Guantanamo is not open to civilians. Once I resigned to accept the Darmstadt position, I was forced to leave the base.

I did NOT buy a ticket to Germany because I did not want to be considered a local hire.

Thus, the claimant's brief return to the United States from Guantanamo was transitory and incidental to her subsequent travel to Germany, and her acceptance of the firm job offer while in the United States does not constitute her having been recruited there. As evidenced by the agency's timeline provided above and not disputed by the claimant, all of the recruitment actions taken by the agency, from the job announcement to its tentative and firm position offers, occurred while the claimant was physically residing on Guantanamo. Therefore, the claimant may not be considered a U.S. hire for LQA eligibility purposes under DSSR Section 031.11.

Section 031.12 of the DSSR provides the following specific language 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:

- 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 [italics added]

Immediately prior to her appointment to her first Federal civilian position on October 3, 2005, the claimant was employed by the United States firm CTSC. However, this firm had not recruited her in the United States or any of the other enumerated locations in DSSR Section 031.12b above. Rather, it had recruited her from her previous and initial employer on Guantanamo, the United States firm Lockheed Martin. DSSR Section 031.12b limits "substantially continuous employment" to employment by one qualifying employer listed above rather than multiple such employers prior to appointment.

Even if the claimant had been employed exclusively by Lockheed Martin on Guantanamo, she has not established by the documentation submitted that this firm recruited her in the United States. The only pertinent documentation in the claim record is the position offer letter from Lockheed Martin to the claimant, addressed to her at an address in Monroe, Louisiana, which had a signature line whereby the claimant was to indicate her acceptance or rejection of the position. However, the letter was dated June 29, 2004, as was the date of the claimant's signature, thus suggesting that the claimant may have received the letter by email or fax, and she subsequently signed and returned the letter by fax as instructed in the letter. Therefore, this letter in itself does not serve as evidence of the claimant's actual physical location or geographic residency when she was recruited by Lockheed Martin. This is compounded by the claimant's own statement in a November 23, 2005, email to a human resources specialist at Headquarters, United States Army, Europe (HQ USAREUR), wherein she was attempting to establish LQA eligibility:

After separating from the Army in April 2004 (I was a Reserve soldier called to active duty for Iraq), I accepted a DoD contracting position in Iraq and then another DoD contracting position in Guantanamo Bay, Cuba.

The claimant makes no mention of an intervening residency in the United States between these two contracting positions in Iraq and Guantanamo at some point in the relatively brief period of time represented (i.e., April-June 2004), during which time she may have been recruited in the United States by Lockheed Martin. Therefore, the claimant has not submitted sufficient documentation (e.g., airline tickets or passport) to establish that immediately prior to appointment, she was recruited in the United States or one of its territories or possessions by a qualifying employer listed at DSSR section 031.12b.²

In addition to these initial disqualifying circumstances, the claimant has not established that she was in substantially continuous employment "under conditions which provided for her return transportation to the United States" or one of its enumerated territories or possessions. The claimant submitted a copy of the employment confirmation letter she received from CTSC, dated January 24, 2005, which provided her a repatriation benefit as follows: "If you decide not to extend for a second year, CTSC will relocate you to your stateside residence of record." However, the claimant has not provided documentation showing that Lockheed Martin, the firm which recruited her to Guantanamo, had obligated itself to repatriate her to the United States upon the termination of her employment. The "Memorandum of Understanding - Relocation Coverage by Lockheed Martin/GHRS" explaining the relocation benefits offered by Lockheed Martin and signed by the claimant on June 29, 2004, stated the firm would pay for shipment of household goods and privately owned vehicle and would reimburse the claimant for one airplane ticket from Jacksonville, Florida, to Guantanamo Bay. It made no mention of any relocation benefits offered the claimant back to the United States at the termination of her employment.

To support her assertion that Lockheed Martin had provided her with repatriation benefits, the claimant submitted a "Letter of Identification and Authorization (LOIA)" dated July 13, 2004, which she erroneously identifies as being from Lockheed Martin but which was in fact issued to

² If the claimant was recruited by Lockheed Martin while in Iraq, any potential eligibility for LQA under DSSR Section 031.12b would have ended upon leaving her initial (singular) overseas contractor position in Iraq as discussed previously in this decision.

her and signed by an individual identified as Contracting Officer Representative and Acting Deputy J2 for Technology and Resources (i.e., a DA official), which states:

The bearer of this letter is an employee of Lockheed Martin Corporation, which has a Government contract... with this agency. During the period of the contract, 1 February 2004 through 31 January 2009, the named bearer is eligible and authorized to use MILAIR and available government transportation to ship household goods (HHG) and a privately owned vehicle (POV) from NAS Jacksonville, Florida to U.S. Naval Base Guantanamo Bay, Cuba and from U.S. Naval Base Guantanamo Bay, Cuba to Jacksonville, Florida at travel discount rates in accordance with Government contracts and agreements.

The claimant presents this LOIA, in concert with a second, almost identical LOIA issued to her later by another DA Contracting Officer Representative in connection with her employment with CTSC, to establish that "during her tenure of employment at Guantanamo Bay, [claimant] at no point occupied a position for which transportation rights from Cuba to the United States were not available," albeit by the U.S. Government. However, DSSR Section 031.12b clearly requires the employee be in "substantially continuous employment by such *employer* [i.e., the employer which originally recruited the employee in the United States or one of its territories or possessions] under conditions which provided for his/her return transportation to the United States" or one of its enumerated territories or possessions. This letter, having been issued by DA, did not and could not obligate Lockheed Martin to return the claimant to the United States upon termination of her contract, nor did it even provide for her return transportation by the U.S. Government within the meaning of DSSR Section 031.12b. It only allowed her the use of MILAIR and available government transportation to ship her household goods at travel discount rates, since air transport to and from Guantanamo is controlled. It did not provide payment for the shipment of her household goods or for her air fare back to the United States.

The claimant also submitted as supporting documentation an email dated September 19, 2005, from an individual at Lockheed Martin identified as "Contracts Negotiation Manager," transmitting to the claimant their "HR response" to an earlier email identified as "GTMO contract - memo requested." This "HR response" states only that:

[Claimant] was our employee from 7-19-04 until 2-2-05. She and the other analyst were rebadged to Chenega Technology. The HR contact at the time was [name and telephone number.] Chenega should have been responsible for her return to the states.

This email does not indicate that Lockheed Martin had provided the claimant repatriation benefits at the time of her employment with that firm. By submission of this email, the claimant appears to suggest that the CTSC contract was an extension of the Lockheed Martin contract, with conveyance of the existing benefits, and that since CTSC had apparently provided repatriation benefits, then these benefits must have also been provided by Lockheed Martin. However, the claim record shows these were two separate, successive contracts, between the U.S. Government and two separate firms, and the claimant has provided no documentation establishing that Lockheed Martin provided these benefits to her at the time of her employment with that firm. Therefore, the claimant does not meet LQA eligibility requirements as a "local

hire” under DSSR Section 031.12b. That her repatriation benefits from CTSC were intact at the time of her appointment does not have a positive impact on this determination.

The claimant’s introduction of a “detrimental reliance” assertion to support her claim fails on both legal and factual grounds. 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 law, and erroneous advice or information provided by a Government employee cannot bar the Government from denying benefits which are not otherwise permitted by law. See *Office of Personnel Management v. Richmond*, 496 U.S. 414, *rehearing denied*, 497 U.S. 1046, 111 S. Ct. 5 (1990).³

Further, although the claimant asserts that she was not informed of the negative LQA determination until "Friday, September 30, 2005, the day after her arrival in Germany and acceptance of the position," this is directly contradicted by documentation she provided with her claim. Upon her acceptance of the position, the claimant was given an “LQA Eligibility Checklist” on or about September 8, 2005, which stated: “Based on the documentation provided, it is determined that the applicant is eligible for LQA.” However, this checklist was accompanied by an email from the CPAC representative stating:

Please see the advisory from the LQA cell regarding your LQA entitlement, as it stands, you will not be eligible for LQA until we can provide a contract/statement from Lockheed Martin indicating that you’re entitled to return transportation to the US from Guantanamo Bay, can you provide me with a document indicating so?

In addition, the claim record is replete with emails showing the claimant was aware that LQA had not been approved prior to her departure for Germany. For example, in a May 14, 2007, email from the claimant to a HQ USAREUR representative, the claimant states:

As you can see from the below emails from me to [CPAC representative], I was most cautious about making any moves until my LQA had been determined. My EOD (report date) to Darmstadt was pushed back several times due to the lack of LQA determination.

Thus, the claim record shows the claimant was aware the agency’s initial positive LQA determination was provisional pending her submission of acceptable supporting documentation and was ultimately dependent on final decision by HQ USAREUR.

DoDI 1400.25-V1250 specifies that overseas allowances are not automatic salary supplements, nor are they entitlements. They are specifically intended as 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.

Under 5 U.S.C. § 5923 as implemented by the DSSR, LQA is a discretionary allowance that may only be granted when specific circumstances are met. The statutory and regulatory languages are permissive and give agency heads considerable discretion in determining whether to grant LQAs

³ Contrary to the claimant’s assertions, *Bentley v. U.S.*, 3 Cl.Ct. 404, 405 (1983) and *McCallister v. U.S.*, 3 Cl.Ct. 394, 398 (1983) are inapposite to the facts of this case. As discussed in this decision, the claimant was aware before she departed for Germany on September 28, 2005, that her eligibility for LQA had not been established. In any event, *Bentley* and *McCallister* predate *Richmond* which is controlling.

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.

When 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. In this case, the claimant has not established that prior to appointment, she was recruited in the United States. Neither has she established that prior to appointment, she was recruited in the United States and had been in substantially continuous employment by an employer (singular) which provided for her return transportation to the United States. The claimant was recruited to Guantanamo by the firm Lockheed Martin. She has provided no documentation that she was afforded repatriation benefits by that firm, and she lost eligibility for LQA when she departed Lockheed Martin and began working for the firm CTSC. The agency's action was not arbitrary, capricious, or unreasonable as it was directly supported by application of the governing regulations. Accordingly, the claim for LQA is denied.

Eligibility for home leave is directly related to eligibility for LQA. Under 5 CFR 630.602, an employee who meets the requirements of 5 U.S.C. 6304(b) for the accumulation of a maximum of 45 days of annual leave earns and may be granted home leave. The requirements of 5 U.S.C. 6304(b) are similar to the LQA eligibility requirements contained in DSSR sections 031.11 and 031.12, i.e., individuals directly recruited from the United States or its territories; or individuals who were originally recruited from the United States or its territories, who have been in substantially continuous employment by other United States agencies, firms, interests, or organizations, international organizations, or foreign governments, *and* whose conditions of employment provided for their return transportation to the United States or its territories. Therefore, since the claimant was not directly recruited by DA from the United States or its territories, or conversely has not established that Lockheed Martin recruited her in the United States or its territories and afforded her a transportation agreement that provided for her return transportation to the United States, she is likewise ineligible for home leave, and the claim for home leave is accordingly denied.

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