

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

Claimant: [name]

Organization: [agency component]
Department of Defense
Stuttgart, Germany

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 11-0005

//Judith A. Davis for

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

7/1/11

Date

The claimant is a Federal civilian employee of the Department of Defense (DoD) in Stuttgart, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of living quarters allowance (LQA). We received the claim on October 4, 2010, and the agency administrative report (AAR) on January 5, 2011. For the reasons discussed herein, the claim is denied.

The claimant separated from active duty military service in Augsburg, Germany, in June 1995, after which he held a series of contractor positions with two different private firms in Germany and the United Kingdom. This employment commenced with the firm Sterling Software in Augsburg, Germany, for which the claimant worked from June 21, 1995, to November 29, 1998. He was subsequently hired by the firm Computer Science Corporation (CSC) in Germany for a position in the United Kingdom from November 30, 1998, to May 31, 2002, followed by subsequent employment contracts with that firm for positions in Darmstadt, Germany, from June 1, 2002, to January 30, 2006, and in Heidelberg, Germany, from January 2006, to February 28, 2009. The claimant applied for his first Federal civilian position during its announcement period of February 2-17, 2009, while he was residing and employed by CSC in Germany. Upon conclusion of his employment with CSC, the claimant returned to the United States on March 2, 2009, using a portion of the return travel authorization granted him by that firm. The Federal civilian job offered was extended to and accepted by the claimant while he was in the United States, and he entered on duty on June 11, 2009.

The claimant believes he is eligible for LQA because subsequent to his military separation, he was "under continuous contract, receiving living quarters allowance with full return rights to the United States until February 2009 when I returned to the US," "utilizing portions of [his] relocation provided by CSC," and thus met the "local hire requirements" of Department of State Standardized Regulations (DSSR), section 031.12, and the "substantially continuous employment" requirements of Army in Europe Regulation (AER) 690-500.592." In support of his claim, he also provided a copy of an email dated April 3, 2009, from a human resources specialist at the Department of the Army's (DA) Civilian Personnel Advisory Center (CPAC), Fort Huachuca, Arizona, which recruited for the position, stating he was authorized LQA.

The agency counters that the claimant's hiring circumstances rendered him ineligible for LQA as he did not meet the basic requirements stipulated by the DSSR in connection with Department of Defense Instruction (DoDI) 1400.25-Volume 1250 (V1250). They also note the recruiting CPAC informed the claimant on May 29, 2009, of their erroneous LQA determination and told him he was not eligible for the allowance, and was thus apprised of his ineligibility before he entered on duty.

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. See DSSR 013. Thus, 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. In addition, an LQA applicant must fully meet the relevant provisions of the DSSR before the supplemental requirements of the DoD or DA implementing guidance may be applied.

Section 031.12 of the DSSR covering employees recruited outside the United States states:

Quarters allowances prescribed in Chapter 100 *may* [emphasis added] 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]

Prior to his appointment to his first Federal civilian position on June 11, 2009, the claimant was employed by the private firm CSC. However, this firm had not recruited him in the United States or any of the other enumerated locations in DSSR section 031.12b above. Rather, it had recruited him from his previous employer in Germany, the private firm Sterling Software. DSSR section 031.12b limits "substantially continuous employment" to employment by one qualifying employer listed above rather than multiple such employers prior to appointment.

In addition to this initial disqualifying circumstance, the claimant has not established that he was in substantially continuous employment "under conditions which provided for his return transportation to the United States" or its territories with his initial employer. He has not provided documentation, such as an employment contract or relocation agreement, showing that Sterling Software, the firm which recruited him from the United States, had obligated itself to repatriate him to the United States upon the termination of his employment. He provided only a letter from an individual identifying himself as the claimant's predecessor in his former position with that firm, asserting the claimant had "full return rights to his home of record, Yakima Washington," as the "standard contractual terms for all Sterling Software employees working overseas, the same contractual guarantees offered me, and passed to him upon replacing me." We do not accept this as valid documentation of repatriation rights as there is no indication this individual is or was authorized by Sterling Software to represent its position regarding its explicit

financial commitments to its employees and regardless, such assertions purporting otherwise undocumented benefits during a past period of employment are neither enforceable nor do they substitute for written commitment to such benefits conferred at the actual time of employment. Therefore, although the claimant provided documentation that he was subsequently afforded repatriation benefits during at least portions of his following employment with the firm CSC, he has not established that he had been in "substantially continuous" employment under such conditions, and specifically by the employer which recruited him in the United States.

Therefore, the claimant does not meet the basic requirements of DSSR section 031.12b for employees recruited outside the United States and is not eligible for LQA. Since basic DSSR eligibility is not established, application of DoD or DA implementing guidance to the claimant's circumstances is moot.

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.

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).

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 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 had successive employment with multiple employers in Germany prior to his appointment to his first Federal civilian position. Furthermore, he has not established that his employment by the firm which recruited him from the United States or its territories was under conditions providing for his return transportation to such location, rendering him ineligible for LQA. 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.

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.