

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

Claimant: [name]

Organization: Department of the Air Force
Sembach, Germany

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0016

/s/ Linda Kazinetz for

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

12/24/13

Date

The claimant is a Federal civilian employee of the Department of the Air Force (AF) in Sembach, 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 February 8, 2013, the agency administrative report (AAR) from AF on March 27, 2013, and a supplementary AAR from the Department of the Army (DA), his previous employing agency, on August 19, 2013. For the reasons discussed herein, the claim is denied.

The claimant separated from military service in Germany on June 30, 2009, and had subsequent employments in Germany with the U.S. firms L3/MPRI and Lockheed Martin before his appointment to a position with DA in Heidelberg, Germany, effective April 26, 2010. At that time, DA determined him eligible for and granted him LQA. The claimant accepted his current position with AF effective November 18, 2012. Upon his transfer to that agency, AF reviewed his hiring circumstances when he was appointed to the DA position in 2010 and concluded he had been erroneously granted LQA "because he had more than one employer since arriving overseas."

The claimant asserts he acquired eligibility for LQA while employed by DA when, effective January 15, 2012, he was given a management-directed reassignment from Heidelberg to Wiesbaden, Germany, a move he asserts "was greater than 50 miles."¹

The Department of State Standardized Regulations (DSSR) set forth basic eligibility criteria for the granting of LQA. Agency implementing regulations such as that contained in Department of Defense Instruction (DoDI) 1400.25-V1250 dated July 31, 2009, and in effect at the time of the claimant's management-directed reassignment in January 2012, may impose additional requirements or further define the DSSR criteria, but may not be applied unless the employee has first met the basic DSSR eligibility requirements.

DSSR section 031.12 states LQA 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;

¹ Although the driving distance from Wiesbaden to Heidelberg is approximately 60 miles, the claimant does not identify his place of residence at that time and its commuting distance from the new duty location in Wiesbaden as opposed to the previous duty location in Heidelberg.

(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

c. as a condition of employment by a government agency, the employee was required by that agency to move to another area, in cases specifically authorized by the head of agency.

In its reference to "such employer" (singular), DSSR section 031.12b allows for employment by a single employer overseas, after having been recruited in the United States, immediately prior to appointment to the Federal Service. The claimant had two separate employers prior to his appointment by DA in April 2010 and further, had been recruited by the earlier of these two employers in Germany rather than in the United States. Therefore, he does not meet LQA eligibility criteria under DSSR section 031.12b. The claimant does not dispute this determination.

However, the claimant asserts that "once given the HQ USAREUR/G6 Management Directed Reassignment in January 2012, I became eligible for LQA because the move was a management generated action." He believes this reassignment qualifies him for LQA under DSSR section 031.12c, and that he remains eligible in his subsequent employment with AF.

DoDI 1400.25-V1250, paragraph E2.1.g, states that, to make a determination under DSSR section 031.12c, three tests must be applied: (1) employment must be ended if the employee fails to accept relocation, (2) the relocation must be caused by a management-generated action, and (3) management must request the employee not now in receipt of LQA to relocate to another area. It also notes in paragraph E2.1.h that "certain common sense considerations" must be applied, such as if the employee's new duty station is within the local area of work of the previously established residence. In its definition of "management-generated action," DoDI 1400.25-V1250 instructs that "[t]he provisions outlined in Reference (c) [Joint Travel Regulations, Volume 2] will be used to determine if the move meets the criteria of a permanent change of station when the old and new permanent duty stations are located within the same city or area." Thus, the expectation is that the employee must physically relocate his or her residence in connection with the management-directed reassignment in order to meet DSSR section 031.12c.

In its AAR, DA states:

While it is a well-established practice in USAREUR to authorize LQA under the aforementioned provisions to employees, who are otherwise not eligible for the allowance upon their management-directed move to a new duty location and who would also meet the requirements of the JTR II, Chapter 5, Paragraph C5080-f, for a short-

distance move during the massive Army in Europe transformation activities, a specific request to grant the allowance by the employing organization would still have to be submitted to [the Office of the Deputy Chief of Staff, G-1, Civilian Personnel Directorate] for final approval. This is not an automatic grant. Since [the claimant], at the time he was reassigned to Wiesbaden was in receipt of the allowance, there was no reason for his management to submit a request for consideration and potential approval. As such, [the claimant] was not granted LQA under MDR under the provisions of the DSSR 031.12c and the DoDI 1400.25-V1250, E2.g. and h.

Thus, LQA is not granted automatically in connection with a management-directed reassignment as the claimant posits, but only upon submission of a request by the employee's management to offer LQA as an incentive to accept relocation,² and after demonstration by the employee that the criteria in DoDI 1400.25-V1250 have been met. We may not grant a claim based on hypothetical circumstances; i.e., an assumption that if the claimant had not already been (erroneously) receiving LQA, he would have been granted LQA in connection with the management-directed reassignment if his management had requested it on his behalf and if he had been found to meet the aforementioned eligibility criteria. Therefore, the claim is denied.

In its AAR, AF states in relation to the claimant's hiring circumstances:

[The claimant's] assumption that LQA should continue because the US Army had previously granted LQA due to a management directed move of his previous position, is incorrect. He applied for the position with the US Air Force being fully aware that LQA would not be granted. Payment of LQA for his last position with the US Army was due to a management directed move which is authorized in DoDI 1400.25-V1250 Enclosure 2 para 2.g. [sic], but since [the claimant] subsequently moved voluntarily to his current Air Force position the provision no longer applies.

Although the subsequent DA AAR clarified that the claimant had not been receiving LQA from DA as a result of the management-directed reassignment but rather because of an erroneous application of DSSR section 031.12b, AF correctly observes that there is no provision in DoDI 1400.25-V1250 requiring that LQA granted under DSSR section 031.12c be continued when an employee transfers between DoD components. Therefore, even if the claimant had been granted LQA by DA in connection with the January 2012 management-directed reassignment, continuation of the grant would have been at AF discretion. .

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.*

² 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.

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.