

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

Claimant: [name]

Organization: Department of the Navy
Sigonella, Sicily

Claim: Allowable costs for living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 12-0016

/s/ Linda Kazinetz for

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

4/29/14

Date

The claimant is a Federal civilian employee of the Department of the Navy in Sigonella, Sicily. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of elevator maintenance fees as an allowable cost in connection with his approved living quarters allowance (LQA). We received the claim on March 6, 2012, and the agency administrative report on February 26, 2014. For the reasons discussed herein, the claim is denied.

The Department of State Standardized Regulations (DSSR) set forth the basic criteria for the granting and payment of LQA. There is no dispute the claimant is eligible for LQA under DSSR Section 031.11, wherein LQA may be granted to employees recruited in the United States by the employing agency. However, the claimant believes his elevator maintenance costs of 400 euro per year should be included in his LQA as an allowable cost, stating in his claim request that "DSSR 131.2 can be interpreted to allow this fee since it is by no means an extraneous expense."

The agency, in an undated decision, disallowed the claimant's request to include the elevator fee in the annual LQA, referencing the DSSR 131.2 requirement that allowable mandatory maintenance fees apply to common areas only. In its AAR to OPM, the agency explains:

After the [local human resources office] reviewed the lease agreement, they informed [claimant] to remove the elevator maintenance fee since it was not an allowable entitlement. The elevator maintenance fee is exclusively for [claimant's] apartment and it is not a shared maintenance fee amongst other tenants in the building. However, [claimant] disputes that his elevator maintenance fee should be part of his LQA.

The agency further states:

The employee rental unit is supplied with an internal elevator whose maintenance cost is shared between the landlord and the tenant. The cost to the tenant is 400 EURO a year. The [local housing management assistant] certifies that the rental unit occupied by [claimant] has an elevator for exclusive use of the resident. Section 131.2 of the DSSR clearly states that mandatory fees required for maintenance apply for common areas only. Typically in multi-unit dwellings, where an elevator may be used by all residents, a mandatory elevator maintenance fee can be included in LQA. In a single-unit dwelling or personally owned quarters (POQ), this fee would not be included as part of the LQA. Since the elevator in the rental unit is for exclusive use by the tenant, and is not located in a common area, the fee cannot be added to [claimant's] annual LQA.

DSSR Section 131.3, Scope, states LQA rates are intended to "cover substantially all of the average employee's costs for rent..." Specifically, "rent" is addressed in DSSR Section 131.2:

"Rent," exclusive of heat, light, fuel (including gas and electricity), water and taxes, means the annual cost of suitable, adequate living quarters for an employee and his/her family. When approved by the head of agency as necessary to provide such living quarters, rent may include in addition to the basic annual rental, the cost of...
(7) mandatory as opposed to optional fees required for maintenance of common areas ("condominium fees").

The claimant submitted a copy of the lease contract listing the various expenses to be incurred in addition to the set rent. Page 4 of the contract states, in pertinent part, "[t]he premises are

supplied with an internal elevator whose maintenance cost is share between the parties: landlord shall bare [sic] for major maintenance and tenant for minor maintenance which amounts to € 400, 000 a year.” The record also includes a January 23, 2012, email from the local housing management assistant certifying the elevator in the claimant’s rental unit is for his exclusive use.

In its description of the costs that may be included in addition to basic rent, the DSSR makes clear only mandatory costs required for the maintenance of common areas may be allowable. The claimant does not disagree the elevator in his rental unit is for his exclusive use. As such, fees for maintenance of the claimant’s elevator, for private instead of common use, are not considered as an allowable addition to his LQA as provided for under DSSR Section 131.2.

Further, language applying to DSSR Section 131.2 is permissive rather than mandatory. By the use of the permissive term “may” (i.e., in relation to “rent may include in addition to the basic annual rental...”), agencies are granted discretionary authority to determine when LQA may be granted to an eligible employee for the cost of suitable, adequate living quarters for the employee. The statutory and regulatory languages are permissive, giving agency heads considerable discretion in determining whether to grant LQAs to agency employees and when costs are considered extraneous and unrelated to the basic annual rent. *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979). Under section 178.105 of title 5, Code of Federal Regulations, 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. Goecker*, 58 Comp. Gen. 738 (1979). 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.

The claimant also requests approval of his claim since the “previous U.S. Government ([nonappropriated fund]) employee tenant was paid the elevator maintenance fee as part of his LQA.” The claims jurisdiction authority of OPM is limited to consideration of statutory and regulatory liability. OPM adjudicates compensation claims by determining whether controlling statute, regulations, policy, and other written guidance were correctly applied to the facts of the case. OPM has no authority to authorize payment based solely on consideration of equity. Therefore, the claimant’s statements regarding the previous tenant’s receipt of elevator maintenance fees as part of his LQA have neither merit nor applicability to our claim determination and will not be considered or addressed further.

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 statute, and erroneous advice given by a Government employee cannot bar the Government from denying benefits not otherwise permitted by law. See *OPM v. Richmond*, 496 U.S. 414, 425-426 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed.Cir. 1997); and 60 Comp. Gen. 417 (1981). Therefore, that the local housing office did not tell the claimant the elevator maintenance fees could not be added to his LQA does not confer eligibility not otherwise permitted by statute or its implementing regulations.

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.