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

Claimant: [name]

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

Claim: Request for Living Quarters Allowance and Temporary Quarters Subsistence Allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 10-0009

//Judith A. Davis for

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

9/2/10

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Date

The claimant is a Federal civilian employee of the Department of the Army at the [agency component] in Kaiserslautern, Germany. He requests a waiver of eligibility requirements for Temporary Quarters Subsistence Allowance (TQSA) and Living Quarters Allowance (LQA) "based on errors that took place at the Civilian Personnel Advisory Center (CPAC) in Kaiserslautern, Germany." We received the claim on December 1, 2009, and the claim administrative report on May 25, 2010. For the reasons discussed herein, the claim is denied.

The claimant held a series of appropriated fund positions with the Department of the Army in Germany from June 1, 2004, until November 23, 2008, as a locally hired employee under a "family member appointment" without eligibility for LQA or a transportation entitlement back to the United States. He then accepted a position under a career conditional appointment at Scott Air Force Base, Illinois, which he occupied from November 23, 2008, until August 2, 2009. He applied for his current position as [position] at the [agency component] in Kaiserslautern during its announcement period of April 14-30, 2009, and was subsequently selected for and accepted the position in May 2009. The position offer letter stated "You are eligible for Post Allowance and LQA," and the claimant asserts he was verbally assured of such by the Civilian Personnel Advisory Center (CPAC) in Kaiserslautern prior to acceptance. Shortly after his entrance on duty in Germany, he was notified by the CPAC that "they had erroneously authorized LQA and would not be able to reimburse [his] moving/travel costs nor would they be able to pay a housing allowance."

The claimant requested a waiver of eligibility requirements for LQA from the Civilian Personnel Directorate, Office of the Deputy Chief of Staff, United States Army, Europe, which was denied by letter dated November 2, 2009. The agency states the claimant "did not meet the locally imposed eligibility criterion for LQA under AER [Army in Europe Regulation] 690-500.592, paragraph 7.a.(1), of a 1-year residency requirement in the United States prior to accepting the formal job offer for his current position for those employees who have previously vacated a civilian position in the OCONUS area," and that misrepresentation by Government officials to the contrary does not confer eligibility where none would otherwise exist.

Army in Europe Regulation 690-500.592 stipulates that LQA will be granted for the following Appropriated Fund (APF) employees:

(1) Employees recruited in the United States or its possessions for positions at grade GS-09 (or equivalent), WG-11, WL-09, WS-05, and above. This includes employees selected for entry-level positions with target grades at or above these grade levels. Grade restrictions do not apply to applicants selected for hard-to-fill positions or career program positions (AR 690-950 or appropriate agency career program guidelines) below the GS-09 (or equivalent) level. Employees who previously vacated an outside the United States (OCONUS) civilian or contractor position must have resided permanently in the United States for at least 1 year immediately before accepting the formal job offer. This 1-year residency requirement does not apply to-

(a) Employees serving on a mandatory mobility agreement.

(b) Applicants hired into hard-to-fill positions.

(c) Applicants who were civilian or contractor employees serving overseas in an area where family members were not authorized on an assignment that provided for their return transportation to the United States.

The claimant did not meet these criteria because he did not reside permanently in the United States for at least one year immediately before accepting the formal job offer for his current position and none of the three exclusions cited above apply. We note these criteria state not simply "reside" but "reside permanently," the expectation being that the United States would be the employee's permanent residence were it not for the OCONUS employment. This precludes the granting of LQA to employees who, for all intents and purposes, maintain permanent residency overseas but relocate temporarily to the United States for the purpose of establishing LQA eligibility. The claimant, in his waiver request to the Civilian Personnel Directorate, stated:

> I was a family member dependent child of a military member. I was raised mainly in Europe and attended DODDS schools. I met my spouse overseas who was also a family member dependent child. My spouse works for [agency component] at Ramstein. I was hired as a family member for the Army with USAREUR. Our intent was to stay overseas as we both considered this as home, much the same way someone from Georgia considers Georgia as their home…As the dollar rate kept falling it became more difficult to be financially stable. My spouse and I decided that we would apply for positions in the States and we both started applying…We knew that it would be much easier to live if we were authorized a housing allowance. We did plan on returning to Europe sometime in the future.

Thus, the agency appropriately noted in its waiver denial that:

> based on your own statements that Germany is the geographic focal point of your life and supported by your employment history as a locally hired employee without eligibility for LQA in various positions since 01 June 2004 until 23 November 2008 with organizations in Landstuhl, Kaiserslautern, and Heidelberg, your brief incumbency of a position at Scott Air Force Base in Illinois until your return to Germany on 02 August 2009, is characteristic of the basis on which reference 1d. [AER 690-500.592] prohibits the grant of LQA.

Department of Defense (DoD) Manual 1400.25-M specifies 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.

The claimant by his own words acknowledges that he considers Germany his home, that he intended to stay overseas but accepted brief employment in the United States to establish eligibility for LQA because it would be "easier to live if [he] were authorized a housing allowance," and that he planned on "returning to Europe sometime in the future." This does not suggest permanent residency in the United States on the part of the claimant and the agency would be within its discretionary authority to deny an intended recruitment incentive without this basic supposition.

For the purposes of the instant claim, however, it is well settled that a claim may not be granted based on misinformation that may have been 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 estop 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).

The Department of State Standardized Regulations (DSSR), the governing regulations for the payment of quarters allowances which serve as the basis for the implementing policy in AER 690-500.592, do not grant OPM the authority to waive any of the provisions therein. Authority to waive certain requirements pertaining to employees recruited outside the United States is reserved to the head of the employing agency. As the claimant was recruited in the United States, this would not be applicable in his case.

DSSR Section 111 defines "quarters allowance" as an allowance granted under sections 120 (TQSA) or 130 (LQA) of these regulations. Eligibility requirements for quarters allowances set forth in Section 031 do not distinguish between LQA and TQSA, the latter of which covers only transient quarters occupied before the permanent quarters covered by LQA are secured. Thus, eligibility for TQSA is dependent on eligibility for LQA and may not be considered separately. However, we may not render a decision on this matter in that TQSA is a lodging expense. As such, TQSA claims fall under the jurisdiction of the General Services Administration's Civilian Board of Contract Appeals.

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).

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 not permanently resided the requisite one year in the United States prior to accepting the formal job offer for his current position. An agency decision which is consistent with stated policy or regulatory guidance cannot be considered arbitrary, capricious, or unreasonable. 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 employee's right to bring an action in an appropriate United States court.