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

**Claimant:** [name]

**Organization:** Department of the Army
Heidelberg, Germany

**Claim:** Living quarters allowance

**Agency decision:** Denied

**OPM decision:** Denied

**OPM file number:** 11-0001

//Judith A. Davis for

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

9/15/2011

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Date

The claimant is a Federal civilian employee of the Department of the Army in Heidelberg, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of living quarters allowance (LQA). The claimant submitted his claim to his agency on March 16, 2010, and his claim is preserved as of that date. OPM subsequently received the claim on November 9, 2010, the agency administrative report (AAR) on December 9, 2010, and the claimant's response to the AAR on December 28, 2010. For the reasons discussed herein, the claim is denied.

The claimant's Federal civilian employment history as documented on his Standard Form 50s, a record of which we requested from his agency, is as follows:

The claimant separated from active duty military service in Heidelberg, Germany, on August 29, 2002. He was appointed to the position of Secretary (OA), GG-318-6, on September 23, 2002, in Heidelberg, located in the [agency component]. He was re-called to active duty military service in Iraq in January 2003 and as such was placed on leave without pay (LWOP) effective January 13, 2003, and was returned to duty to his previous position on April 4, 2004. He was temporarily promoted to the position of Secretary, GG-318-7, in the [agency component], effective August 8, 2004, not to exceed February 7, 2005. At the expiration of the temporary promotion on February 7, 2005, he was changed to a Secretary (OA), GG-318-6, position in the [agency component], and was non-competitively promoted in that position to Secretary, GG-318-7, effective April 17, 2005, as a result of "position review." The claimant competed and was selected for the position of Administrative Support Specialist, GG-301-9, which action was effective December 11, 2005; was promoted to Administrative Support Specialist, GG-301-11, on November 23, 2008; was reassigned to the position of Intelligence Specialist, GG-132-11, on May 10, 2009; and was converted to Intelligence Specialist (Ops Supt), IA-132-03, on July 17, 2009.

The claimant acknowledges in his claim that although his initial appointment did not meet the requirements for the granting of LQA, he asserts that his subsequent "appointments" conferred LQA eligibility. He states:

> In summary, prior to my second appointment I was recruited in the United States by its Armed Forces, my military transportation entitlements are intact, I've had substantial continuous employment, and I competed for my second appointment which was at the GS07 level and classified as hard-to-fill. Furthermore, it has been established that I previously met all requirements set forth by the DSSR Section 031.12b and the DoDI 1400.25-V1250 following my tour from Active Duty in 2002. Thirdly, I have held positions at the GG-09 and GG-11 grade level following my initial and second appointment with no need to utilize the hard-to-fill posture.

He expands upon this assertion in his response to the AAR as follows:

> My successive appointments to vacant positions took effect under revised regulations and should be governed by those directives in place at the time. Although I was ineligible for LQA on 23 September 2002, my eligibility should have been reexamined when I changed duties and were [sic] reassigned to a different position on 8 August 2004.

The agency asserts that since the claimant's hiring circumstances in September 2002 rendered him ineligible for LQA under the requirements of USAREUR [U.S. Army-Europe] Regulation 690-500.592, i.e., either being appointed to a position that is at or above the GS-09 grade level or to a position that is designated as "hard-to-fill," they may not "instate eligibility for the allowance in 2010 where none existed before."

All claims against the United States Government filed under the provisions of 31 U.S.C. 3702(b) are subject to a six-year statute of limitations. To satisfy this statutory limitation, a claim must be received by OPM or by the department or agency out of whose activities the claim arose within six years from the date the claim was accrued. Since the subject claim is preserved as of March 16, 2010, we will not address the claimant's LQA eligibility at the time of his appointment on September 23, 2002, as this is well outside the six-year statute of limitations, and we limit our decision to consideration of whether his eligibility changed upon his temporary promotion to the Secretary, GG-318-7, position on August 8, 2004.

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, DoDI [Department of Defense Instruction] 1400.25-V1250 (now DoD 1400.25-M) 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. The same holds true for USAREUR Regulation 690-500.592, which provides additional implementing guidance for Department of the Army components in Europe. Although these implementing regulations may not extend benefits that are not conferred by the DSSR, they may impose additional LQA qualifying conditions.

The USAREUR regulations in effect at the time of the claimant's temporary promotion to Secretary, GG-318-7, on August 8, 2004, restricted the receipt of LQA for locally hired employees to those *initially* selected for identified "hard-to-fill" positions. The claimant asserts and the agency does not dispute that this Secretary, GG-318-7, position was designated as "hard-to-fill." However, contrary to the claimant's assertion, this was not a second "appointment" but rather a temporary promotion. The claimant was *appointed* to the Federal service under an Excepted Appointment on September 23, 2002, and the appointment affidavit was executed on September 9, 2002. All of his subsequent position changes occurred within the context of that appointment. Since any subsequent positions held by the claimant after his appointment in September 2002 do not constitute his "initial" selection, they are rendered inapplicable for LQA purposes; i.e., LQA is restricted to those locally hired employees *initially* selected for identified hard-to-fill positions. Any subsequent occupancy of a hard-to-fill position is not an LQA qualifying event.

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.

In keeping with the stated purpose of LQA as a recruitment incentive, LQA eligibility is established at the time of initial appointment. This is based on DSSR section 031.12, which 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: [italics added]

(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

Therefore, an employee's LQA eligibility is determined by his or her circumstances at and immediately *prior to appointment*, which in the claimant's case was on September 23, 2002. Any subsequent promotions or reassignments experienced by the claimant and the status of his military return transportation entitlements at the time of his temporary promotion have no bearing on this initial establishment of LQA eligibility.

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. 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. 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 may not accrue LQA eligibility by promotion or reassignment subsequent to his initial appointment. Accordingly, the claim for LQA is denied.

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.