

**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
Hohenfels, Germany

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 11-0010

//Judith A. Davis for

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

11/15/2011

Date

The claimant is a Federal civilian employee of the Department of the Army employed in Hohenfels, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of living quarters allowance (LQA) for the period commencing with his appointment on February 25, 2002, to the present.¹ We received the claim on January 5, 2011, and the agency administrative report (AAR) on February 11, 2011. For the reasons discussed herein, the claim is denied.

The claimant entered military service in Germany on October 20, 1981, and was officially separated from military service at Fort Drum, New York, on October 31, 2001. However, he returned to Germany on September 8, 2001, using his military retirement orders while on terminal leave. After returning to Germany, he applied for and accepted employment with the United States firm Raytheon, Technical Services Company, LLC, in Hohenfels effective December 15, 2001. He was appointed to the Federal service as a Military Maneuver Analyst, GS-301-11, with the Combat Maneuver Training Center in Hohenfels on February 25, 2002.

The agency denied his request for LQA because they considered him a local hire who had been recruited by Raytheon overseas, and because Raytheon had not provided him with a return transportation agreement upon his employment with that firm. The claimant asserts that "the policy back in 1981 stated, enlistees were considered enlisting on U.S. soil when enlisting on a German Kaserne, which meant I was a U.S. enlistee." He also provided a letter dated November 3, 2005, from a Raytheon representative identified as "European Regional Manager" stating that:

A U.S. Army Military Retiree, [claimant] was hired 1 month after his terminal leave ended. Because of that I did not enter into a relocation/transportation agreement with him at that time. However, had the contract terminated Raytheon would have paid his transportation to the U.S. while he was employed with our company overseas. Additionally, if the U.S. Government's obligation to relocate [claimant] to the United States had expired, I would have entered into a relocation agreement to retain his services on the contract. It is our practice to enter into a transportation agreement with the key employee at the time that the army's obligation expires.

The Department of State Standardized Regulations (DSSR) set forth basic eligibility criteria for the granting of LQA. Agency implementing guidance such as that contained in Army in Europe Regulation (AER) 690-500.592 and cited by the claimant may impose additional requirements, but may not be applied unless the employee has first met the basic DSSR eligibility criteria.

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

¹ A claim was filed on the claimant's behalf with his agency by the Office of the Staff Judge Advocate on October 26, 2006, and the claim is thus preserved as of that date.

- 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

The claimant does not meet basic LQA eligibility criteria under DSSR Section 031.12(b). Prior to his appointment, he was employed by the United States firm Raytheon. However, he was physically residing in Germany when he was recruited by Raytheon in 2001. Therefore, he was not recruited by Raytheon in the United States or one of its territories or possessions. This determination is based on place of physical residency at the time of recruitment. Any geopolitical consideration regarding the place of his 1981 enlistment in the military is not germane to his physical residency in 2001 or application of the DSSR.

Further, even if Raytheon had recruited the claimant in the United States or one of its territories or possessions, the claimant was not employed by Raytheon under conditions which provided for his return transportation to the United States or one of its territories or possessions. DSSR Section 031.12b requires conditions to be in place at the time of employment to specifically ensure return transportation to the United States or another of the enumerated locations. The claimant's employment contract did not provide for return transportation at the time it was entered into by the claimant and Raytheon. This is confirmed by the letter from a Raytheon representative dated November 3, 2005. No evidence has been submitted that shows the employment contract was modified to provide the claimant with return transportation. A letter from a Raytheon representative purporting past benefits that were not stated in the original employment contract as an attempt to establish terms on which the contract itself was silent, does not establish that Raytheon was bound under the contract to provide return transportation and is not acceptable for purposes of LQA determination.

The issue regarding the place of the claimant's enlistment and discharge from the military, which was raised by the claimant as a result of previous correspondence between him and his agency, appears to be related to provisions of Department of Defense Manual 1400.25, Subchapter 1250, in effect at the time of his appointment. These provisions disqualified from LQA eligibility former military members hired locally if any portion of their Government transportation *back* to the United States had been used; thus, the agency apparently reasoned this language implied that an individual who enlisted overseas and/or separated in the United States could not be considered

to have transportation entitlement *back* to the United States for LQA eligibility purposes.² However, since the claimant fails to meet DSSR eligibility requirements based on his recruitment locally and his lack of a return transportation agreement from Raytheon, the place of his military enlistment and separation is moot. Therefore, we need not address this issue within the context of this decision.

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). 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 on which to reverse the decision.

This settlement is final. No further administrative review is available within the Office of Personnel Management. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States Court.

² Since LQA is specifically intended solely as a recruitment incentive, the regulations serve to disqualify individuals who are already residing overseas with no transportation agreement to repatriate them, based on the concept that such individuals do not require a recruitment incentive to accept Federal employment overseas.