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
Grafenwoehr, Germany

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0002

/s/ Judith A. Davis for

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

9/30/13

Date

The claimant is a Federal civilian employee of the Department of the Army in Grafenwoehr, 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 October 29, 2012, and the agency administrative report on June 25, 2013. For the reasons discussed herein, the claim is denied.

The claimant's first period of United States military service was from October 1986, when he entered the Army in New York, until 1991, when he separated at Fort Dix, New Jersey. His second period of military service commenced in June 1997, when he re-entered the Army in Würzburg, Germany, until his retirement on July 31, 2011, in Vilseck, Germany. Following his retirement, he was appointed to his current position with the Department of the Army on August 14, 2011. The agency found him ineligible for LQA as a "local hire" who had been recruited outside the United States in connection with his second military enlistment.

The claimant asserts in his claim request that "Army in Europe Regulation 690-500.592 states for the purpose of determining local-hire status, physical residence is the actual permanent presence of an applicant overseas for more than merely a transitory or tourist purpose, regardless of the applicant's home of record or legal residence." The claimant does not describe the circumstances of his hiring in his claim request. However, he submitted with his claim a memorandum dated November 1, 2011, from a Department of the Army "legal assistance attorney" asserting:

> [Claimant] was recruited in the United States. His physical residence and home was in Queens, New York, at the time of his recruitment. He was only in Germany on a tourist visa and at this time he happened to sign his Army contract in Wurzburg Germany, while visiting friends in Germany. He was not living in Germany and did not have any legal residency or status in Germany. The LQA rules specifically do not apply to individuals who are outside the United States on only a tourist or transitory basis. The rules are intended to apply to local hires for people who have a legal residency status in the country, not an American tourist who stops by the recruiting station to sign his contract. [Claimant] had actually been recruited at an Army recruiting station in Far Rockaway, New York.

This largely reiterates the information the claimant provided in an October 4, 2010, email to the agency in connection with his initial LQA request:

> . . . I received an email stating that I did not qualify. . . because my DD 214 states that I entered the military from the recruiting station at Leighton Barracks, Wuerzburg in June, 1997. I was in Germany visiting when I decided to enter active duty. At no time was I a resident of Germany and have never had a visa, I just visited Family in Germany. My intention was to rejoin the military from my home station but I called my recruiter in New York from Germany at the time and he stated it would not make a difference if I entered active duty in Leighton Barracks, Wuerzburg.

The DSSR set forth basic eligibility criteria for the granting of LQA. Section 031.11 states LQA may be granted to employees recruited in the United States:

> Quarters allowances prescribed in Chapter 100 may be granted to employees who were recruited by the employing government agency in the United States, the Commonwealth

> of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the possessions of the United States.

Relative to these criteria, DoD Manual 1400.25-M defines "U.S. hire" as follows:

> SC1250.3.7. U.S. Hire. A person who resided permanently in the United States, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the former Canal Zone, or a possession of the United States from the time he or she applied for employment until and including the date he or she accepted a formal offer of employment.

Thus, an employee's status as a "U.S. hire" is based on physical residency at the time of recruitment for the position in question. As such, the claimant does not meet LQA eligibility criteria under DSSR section 031.11 because he was residing in Germany when he was recruited for his current position.

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:
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> (1) the United States Government, including its Armed Forces;
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> (2) a United States firm, organization, or interest;
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> (3) an international organization in which the United States Government participates; or
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> (4) a foreign government
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> 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

Army in Europe Regulation (AER) 690-500.592 in effect at the time of the claimant's appointment defines "physical residency" as follows:

> For the purpose of determining local-hire status, physical residence is the actual permanent presence of an applicant overseas for more than merely a transitory or tourist purpose, regardless of the applicant's home of record or legal residence. Applicants recruited from the United States who were present overseas based on orders for

> unaccompanied assignments that provided for their return transportation to the United States will be considered to be permanently residing in the United States for eligibility purposes. The time spent overseas under such conditions will be viewed as physical presence in the United States, and the time will count toward meeting the residence requirement.[1]

Although the claimant asserts he was merely visiting either family or friends in Germany when he re-entered the Army in June 1997, he does not specifically state either in his claim request or in his earlier email communications with the agency that he was residing in the United States, nor does he identify an actual place of residence in the United States immediately preceding this purported visit, beyond stating he "was not living in Germany when [he] went to Leighton Barracks to rejoin the military." Further, he does not provide any documentation that would establish his permanent residency in the United States immediately prior to his second military enlistment (e.g., employment documents, lease, utility bills, etc.). The only document contained in the record relevant to the claimant's place of residence in June 1997 is the DD 214 issued upon his retirement which identifies his "place of entry into active duty" as "Wuerzburg, Germany." Thus, in the absence of any other documentation establishing his physical residency in the United States at the time of his second military enlistment in June 1997, and documentation indicating that he was recruited by the Army in the United States at that time, the claimant does not meet LQA eligibility criteria under DSSR section 031.12. Specifically, he has not demonstrated that prior to appointment to his current position, he was recruited by Army in the United States or one of its territories or possessions. Therefore, his claim is denied.

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). 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.

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[1] We note that prior to July 11, 1972, DSSR section 031.12 included subsection d: "the employee was temporarily in a foreign area for travel or formal study and immediately prior to such travel or study had resided in the United States, the Commonwealth of Puerto Rico, the Canal Zone, or a possession of the United States." See Comptroller General decision B-1826012, August 12, 1975. This earlier DSSR provision still reflected in the "physical residency" definition in AER 690-500.592 was no longer in effect when the claimant re-entered the Army in June 1997.