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
Stuttgart, Germany

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0022

/s/ Linda Kazinetz for

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

2/25/14

Date

The claimant is a Federal civilian employee of the Department of the Army (DA) in Stuttgart, 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 April 9, 2013, the agency administrative report on October 21, 2013, and the claimant's addendum to his claim on November 5, 2013. For the reasons discussed herein, the claim is denied.

The claimant entered active duty military service with the U.S. Navy in the Philippines on May 1, 1990, followed by a series of reenlistments ending with his last reenlistment in California on January 12, 2010, for a three-year tour of duty in Stuttgart, Germany. He retired from the U.S. Navy on February 28, 2013, in Stuttgart but was appointed to his current position effective January 14, 2013, while on military terminal leave. The agency determined the claimant to be ineligible for LQA under the Department of State Standardized Regulations (DSSR), section 031.12b, because he entered into the U.S. Navy in the Philippines.

The DSSR sets forth basic eligibility criteria for the granting of LQA, supplemented by agency implementing regulations such as that contained in Department of Defense Instruction (DoDI) 1400.25, Volume 1250 (dated June 26, 2006, and in effect at the time of the claimant's appointment.) These implementing regulations may impose additional requirements, but may not be applied unless the employee has first met the basic DSSR eligibility criteria.

DSSR Section 013.11 states LQA may be granted to employees recruited in the United States:

> Quarters allowances... 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.

The claimant does not meet the basic LQA eligibility criteria under DSSR Section 031.11. The claimant was residing in Germany when he was recruited by the Department of the Army in January 2013. He was not residing in the United States or one of its enumerated territories or possessions as required under Section 031.11. The claimant states that he is "not a local resident of Germany," that he is a California registered voter, pays California State taxes, and "California is [his] permanent residence." However, the determining factor for LQA eligibility under Section 031.11 is the geographic place of physical residency at the time of recruitment, not the place of what the employee may consider his or her “permanent residence.”

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:

> (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

The issue relevant to this claim is the claimant's place of recruitment prior to his Federal appointment for purposes of LQA eligibility under Section 031.12b and specifically, how the term "recruited" is defined within the context of a former military member's service history. DSSR Section 031.12b allows for employment by a single employer overseas, after having been recruited in the United States, immediately prior to appointment to the Federal Service. This encompasses prior employment by private firms, international organizations, foreign governments, and the U.S. Government, including the military. The application of Section 031.12b to the conditions of prior civilian employment is fairly clear, in that there must be continuity of employment (i.e., "substantially continuous employment") by a single employer from the time of initial recruitment in the United States by that employer up to the point of Federal appointment. Section 031.12b does not, however, address the complicating circumstances of long-term military service, such as periodic reenlistments, movement between the regular military and the reserves, and reactivations to active duty as they relate to issues regarding the place of recruitment and whether there has been continuity of employment by a single employer.

The DoDi is silent on this issue, thereby conceding the interpretation of the term “recruited” to the individual Service agencies. For purposes of determining LQA eligibility in the case of former military members, DA relies on the issuance of the DD214 as the basis for distinguishing separate recruitment actions. The DD214, Certificate of Release or Discharge from Active Duty, is issued upon a military service member's retirement, separation, or discharge from active duty, and is recognized as the fundamental military service document. A new DD214 is issued following release or discharge from what the Service regards as each separate period of military service, with the "place of entry into active duty" for that period of service identified in block 7a. DA regards the separation from military service documented by a DD214 as a termination of such employment regardless of whether the individual subsequently re-enters the military in some capacity, and any subsequent re-entry as a new recruitment that in turn generates issuance of a new DD214 upon its termination. Reenlistment, on the other hand, does not generate issuance of a new DD214, and the place of reenlistment is not identified as the "place of entry into active duty" on the DD214 subsequently issued upon release or discharge. Thus, DA regards reenlistment as an extension of an existing service period, tantamount to a civilian employee employed under a time-limited contract with a private firm who signs a new contract with the same firm. In neither case does DA consider this a new recruitment action.

Within this context, DA determined the claimant does not meet basic LQA eligibility criteria under DSSR Section 031.12b. They state that "his initial enlistment with the U.S. Navy occurred when he lived in the Philippines, his native country," that "[h]e continuously served with the U.S. Navy until his official separation/retirement on 28 February 2013 in Stuttgart, Germany," and "[h]is reenlistments immediately following his initial enlistment/entry into the service in 1990 up until his last re-enlistment in California on 12 January 2010, do not constitute a recruitment by the Navy, since the active recruitment process has long since been completed, i.e., the recruitment process occurred either by the active pursuit on [claimant's] part to become a member of the U.S. Navy in 1990 or the U.S. Navy actively soliciting for his services at that time. As a result, his subsequent re-enlistments with the U.S. Navy may be considered tantamount to the extension of an employment contract." This is supported by the claimant's DD214, which identifies his "place of entry into active duty" in block 7a as "NRB Subic Bay, Philippines."

The claimant asserts that he "was recruited/brought over from the U.S. to Germany by the U.S. Armed Forces on 6 Apr 2010" in connection with his last reenlistment and as such, meets the eligibility criteria under section 031.12b(1) in that immediately prior to appointment, he was recruited in the U.S. by the Armed Forces. To support this assertion, he included with his claim a December 20, 2012, email exchange between a representative of the Headquarters, U.S. European Command (EUCOM) civilian personnel office and the Chief, Pay and Classification Branch, of the HROPS Compensation Division, Defense Civilian Personnel Advisory Services, wherein the EUCOM representative asks:

> Has there [has] been any formal decision on this issue of denying a US service member LQA because they originally enlisted in the military in an OCONUS location regardless of the fact they were residing in CONUS and PSC'd from a CONUS station to OCONUS prior to getting out of the service? I've discussed this with USAFE and they do not interpret the DSSR this way. Navy has also said that they would approve LQA for a service member in the situation I have described. Since DoD is the proponent of the 1250 which relies on the DSSR, we believe the defining interpretation should come from your folks.

The response from the Chief, Pay and Classification Branch states: "I don't see the DSSR 031.12b use of recruitment as having the qualifiers "first", "initial', or "original". Lacking those qualifiers, recruitment refers to the latest recruitment (i.e., the recruitment that brought the person overseas)."[1] He also states: "Overall, the intent of the DSSR is to not pay a local resident's rent when they begin U.S. federal employment abroad."[2]

[1] We note that DSSR section 031.12b also lacks the qualifier "latest" in connection with the concept of "recruitment." Therefore, this interpretation is no more indicated or implied than the qualifiers "first," "initial," or "original" but rather is left open for further agency definition. We also note that this interpretation would disqualify from LQA eligibility those former military members who were originally recruited in the United States followed by reenlistments overseas.

[2] This statement is not entirely accurate, as DSSR section 031.12b clearly allows for the granting of LQA to "local hires," i.e., persons recruited outside the U.S., under the conditions stipulated.

OPM's claims adjudication authority under 31 U.S.C. § 3702(a)(2) is limited to deciding if the governing statutes and regulations have been properly interpreted and applied in determining the pay and/or benefits to which an employee is entitled. An email communication expressing an opinion does not have the force or effect of an issued regulation. Therefore, the above-cited exchange has no bearing on our claim determination. However, we note that it incorrectly characterizes DA policy as relying exclusively on the place of original enlistment in the military as the place of recruitment. As discussed above, DA relies on the place of recruitment as identified on the individual's latest DD214 as the latest recruitment. In those cases where the individual has an unbroken history of active duty military service, as in the present claim, this will be the place of original recruitment by the military. However, in other cases where the individual has, for example, been discharged from active duty military service and enlisted in the reserves, thus being issued a new DD214 showing a new place of recruitment, this new place of recruitment documented on the DD214 would be treated as the latest recruitment. The DA policy of relying on the latest DD214 as the official record of the latest place of recruitment by the military preceding appointment has been documented in several previous OPM decisions. *See* OPM File Numbers 04-0002, 07-0002, and 12-0018.

The claimant states that "other Service agencies including the Office of the Secretary of Defense (OSD) [as cited above] have a different interpretation of this regulation from the Army," and asserts "there should be only one interpretation of the rule across the board." DSSR section 013 provides that "[w]ithin the scope of these regulations, the head of an agency may issue such further implementing regulations as he/she may deem necessary for the guidance of his/her agency with regard to the granting of and accounting for these payments." Thus, responsibility for ensuring consistent practices among the Service agencies rests with DoD through its issuance of the DoDI. Since DoD has not addressed this issue in its regulations (i.e., the DoDI) by further defining the term "recruited" as it applies to military enlistments and reenlistments, the individual Service agencies may establish their own policies in this regard, and we may not apply the purported policies of the other Service agencies to the claimant's hiring circumstances by DA.

The claimant also states: "It is important to consider that LQA determination would not be an issue had I applied for this recruitment benefit from my previous duty station in California. My application for employment at this time and from this location (Germany) has occurred only because DoD ordered me to move to Stuttgart for military service. If not for the U.S. Government sending me overseas at this time, the circumstances would be in my favor." However, the claimant also stated that his last reenlistment in California on January 12, 2010, was "for orders to Headquarters, U.S. European Command, Stuttgart, Germany." This renders his situation no different from that of a civilian employee who accepts a transfer overseas with a Federal or private sector employer because in either case, the employee would have been eligible for LQA under DSSR section 031.11 if he or she had remained in and been recruited directly from the United States.

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). The agency's practice of relying on the issuance of a DD214, the fundamental military service document, to delineate separate periods of military service, and of relying on the latest issued DD214 as a record of the latest place of recruitment, is not arbitrary, capricious, or unreasonable. In this case, the claimant's latest DD214 shows his place of recruitment as the Philippines. Therefore, we find no basis upon which to reverse the decision.

The claimant states that the agency initially offered him LQA during the recruitment process but later withdrew it two weeks prior to his "initial start date," placing his family in a difficult situation. However, 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 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). Therefore, that the claimant may have been led to believe that he would receive 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 the OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States court.