

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

**Claimant:** [name]

**Organization:** Drug Enforcement Administration  
U.S. Department of Justice  
[city & State]

**Claim:** Continued eligibility and waiver of  
indebtedness for education allowance

**Agency decision:** Denied

**OPM decision:** Denied with regard to eligibility  
Denied for lack of jurisdiction for waiver

**OPM file number:** 13-0052

/s/ Linda Kazinetz for

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

6/3/14

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Date

The claimant is a Federal civilian employee of the Drug Enforcement Administration (DEA), U.S. Department of Justice, in [city & State]. The claim was transferred to the U.S. Office of Personnel Management (OPM) by the Civilian Board of Contract Appeals (CBCA) to which the claimant had originally sent his request. The claimant requests reconsideration of the agency's denial of his request to waive repayment of an education allowance. We received the claim from CBCA on July 9, 2013. For the reasons discussed herein, the claim is denied.

The claimant requests a waiver of the \$33,000 debt owed to the DEA, incurred from the tuition paid by the agency for his two dependent children to attend a school away from post during the second semester of the 2011/2012 school year. The DEA paid an entire year's tuition (i.e., a total of \$33,000 per child per year) for both children in August 2011. The agency states the education allowance terminated on November 18, 2011, when the claimant transferred from Bogota, Columbia, the location from which the "away from post" education allowance was based, to [city & State]. His children remained at the school for the second semester commencing January 11, 2012.

The agency seeks to recoup costs of tuition for the attendance of the claimant's two dependent children covering the second semester of the school year. The claimant's August 1, 2012, waiver request to his agency was denied on August 30, 2012. He subsequently forwarded his waiver request to the CBCA on November 5, 2012.

As a result of legislative and executive action, the authority to waive overpayment of pay and allowances now resides with the heads of agencies, regardless of the amount. See the General Accounting Office Act of 1996, Pub. L. No. 104-316, 110 Stat. 3826, approved October 19, 1996, and the Office of Management and Budget (OMB) Determination Order dated December 17, 1996. Neither Pub. L. No. 104-316 nor OMB's Determination Order of December 17, 1996, authorizes OPM to make or to review waiver determinations involving erroneous payments of pay or allowances. Therefore, contrary to what was implied by CBCA in its June 25, 2013, decision to the claimant, OPM does not have jurisdiction to consider, or issue a decision on, the request for a waiver of a claimant's indebtedness to the United States. Because the issue of waiving the claimant's indebtedness is vested in the employing agency, the DEA, the claim must be denied, in part, for lack of jurisdiction.

In his request to CBCA, the claimant states his disagreement with his agency's interpretation of the criteria set forth by the Department of State Standardized Regulations (DSSR) for the granting, payment, and waiver of repayment of education allowances. He asserts the DSSR criteria "lead a lay person to the assumption that an educational allowance provided for a full school year," and that DSSR Section 274.22 permits debt forgiveness in a situation like his. He also disagrees with the agency's determination that he is ineligible for a waiver under DSSR Section 276.52.

Provisions of section 3702(a)(2) of title 31, United States Code (U.S.C.) and its implementing regulations (part 178 of title 5, Code of Federal Regulations (CFR)) are intended to provide recourse to challenge Federal agency decisions regarding entitlement to compensation. A claim settlement reflects the final administrative review on the application of law and regulation with regard to the merits of a claim. OPM's claim settlement authority is limited to determining whether a claimant owes an underlying debt to the Federal Government. In the instant case, the

claimant challenges the agency's interpretation of education allowance criteria in the DSSR, which is reviewable by OPM under the provisions of 31 U.S.C. 3702(a)(2).

The claimant was previously assigned to a position with the Cartagena Resident Office (RO) on an accompanied trip with his wife and other family from July 2007 to November 2011. He was granted an education allowance to cover his two dependent children's enrollment at a boarding school in the United States effective September 2008. The agency paid the tuition for his children's entire 2011/2012 school year in August 2011. The claimant applied and was selected for a position assigned to the agency's [city & State] office in September 2011. He was on temporary duty assignment to Afghanistan from September to December 2011 but briefly returned to the RO to complete the exit process on November 18, 2011, when thereafter his wife departed for the United States and he returned to Afghanistan. After his temporary duty assignment, the claimant travelled to a Stafford, Virginia address where his wife subsequently joined him in December 2011. Meanwhile, both dependent children remained at the boarding school for the second semester commencing January 11, 2012. On June 7, 2012, the agency officially notified the claimant of its intent to seek repayment of the \$33,000 in tuition for his two dependent children's attendance during the second semester of the school year.

There is no dispute the claimant was eligible for an education allowance on behalf of his dependent children for a "school away from post" as described under DSSR Section 270, wherein an education allowance may be provided for a school away from post when adequate schools are unavailable at the employee's post. However, the claimant asserts education allowances are provided for in full school year increments, citing the DSSR Section 271 definition:

"School year" means the total number of calendar days involved in obtaining, by means of a specific educational facility, elementary or secondary schooling within one prescribed maximum rate in one 12 month period.

The claimant also points to language in DSSR Section 274.11, Normal Grant, stating in pertinent part that "[a]n employee normally may be granted for each school year, or fraction thereof." He does not explain the significance to his claim of his establishing the grant of an education allowance by school year increment; however, we conclude he is attempting to construe that the criteria for education allowances, if provided for in school year increments, do not permit for their partial recovery. This rationale is clearly contrary to the intent and plain language of the education allowance criteria in the DSSR. As described under DSSR Section 274.21, a grant is normally terminated at the end of the school year when no amendment is required. However, DSSR Section 274.22, Other Terminations, states in relevant part that "[w]here a grant is not terminated normally under Section 274.21, it will be terminated as of the following applicable date: a. the date the employee transfers or is separated." This is reinforced by the DEA's Foreign Orientation Handbook, stating in question and answer format that an education allowance expires on the "[d]ate on which the employee transfers or is separated." Thus, the claimant was no longer eligible for an education allowance effective November 18, 2011, when he transferred from the post from which the grant was based<sup>1</sup>.

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<sup>1</sup> The claimant also lost eligibility for an education allowance upon his wife's return to the United States. DSSR Section 273.6 states in relevant part that a grant will not be paid for a child in the United States "who has a natural or adoptive parent or step-parent residing in the U.S."

The agency paid in advance for the entire 2011/2012 school year for the claimant's children. Regardless, the DSSR allows for partial recovery of the grant as described by Section 274.22:

If the authorizing officer determines that revision of the grant is necessary in connection with the above terminations, the recomputed grant should provide for recovery of payment or increased payment when applicable. An employee who is forced to withdraw a child from a "school at post" or "school away from post" as a result of transfer should not be financially penalized by reason of unavoidable educational expense.

The claimant compares his transfer from Bogota, Columbia to DSSR Section 274.22 describing an employee "forced to withdraw a child" from school as a result of transfer, and that he should not be financially penalized for the educational expense. In its response to the CBCA request for information, the agency states:

...Claimant was not forced to withdraw his children from school; the only difference caused by his transfer was that the DEA would no longer pay for the education. Claimant's transfer was made at his request. Furthermore, the DEA did not require Claimant to repay the education allowance for the first semester on a pro-rated basis, as it could have under this same section: "If the authorizing officer determines that revision of the grant is necessary with the above termination, the recomputed grant should provide for recovery of payment or increased payment when applicable." DSSR § 274.22(e)-(f). One-fourth of the first semester remained when Claimant became ineligible for the education allowance.

DSSR Section 274.22 describes an employee "forced to withdraw" a child from school as a result of a transfer; for example, when the parent upon transferring is prohibited from leaving a child behind because the school does not provide for the boarding of its students or the child is legally unable to stay in the country once the parent departs. Since the claimant was not "forced to withdraw" his children from the boarding school, as evidenced by both children remaining at the boarding school for the second semester of the 2011/2012 school year, DSSR Section 274.22 does not apply to his situation.

In addition, the claimant requests the DEA seek a waiver for the recovery of his education allowance in accordance with DSSR Section 276.52, Transfers To a New Non-Foreign Post. In response, the agency explains in its submission to the CBCA:

...§ 276.52(a), contemplates a situation where the child is enrolled in a foreign-area school: "Where the employee, assigned to a post in a foreign area, receives official notice of transfer to a new post in a non-foreign area while the child is attending school and remains in the same school while the employee transfers, the head of the agency may waive recovery...." It would be an unusual situation to allow a child to remain in a foreign area when the employee departs, which is why such a waiver requires approval

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The claimant states his wife, upon her return to the United States, was "transient, unemployed and without a home capable of accommodating two teenage boys;" however, none of these conditions meet the exceptions provided for under DSSR Section 276.3 (i.e., when the parent is divested of legal custody of the child or is mentally or physically unfit to care for child).

by an agency head and “shall be reported promptly to the Secretary of State.” *Id.* This does not reflect the Claimant’s situation, as his children were not enrolled in a foreign area school but rather one within the United States, and his wife was returning to the United States.

The agency’s rationale implies that DSSR Section 276.52(a) provides for waivers only when a child is enrolled in a foreign-area school. However, the existing provision as cited above by the agency does not limit waivers to situations involving children enrolled in a foreign-area school, only describing its applicability when an employee transfers to a new post in a non-foreign area “while the child is attending school and remains in the same school” while the employee transfers. Thus, the claimant's situation is eligible for waiver consideration under DSSR Section 276.52(a). However, although DSSR Section 276.52(a) may have permitted a waiver in the claimant’s situation, the language itself is revealing. By the use of the permissive term “may” in DSSR Section 276.52 (i.e., in relation to “the head of agency may waive recovery”) as opposed to the mandatory terms “will,” “shall,” or “must,” agencies are granted discretionary authority to make their own decisions concerning the recovery and waiver of education allowances when they find the circumstances justify such action. The agency, therefore, may limit the consideration of a waiver to when a child is enrolled in a foreign-area school and other specific situations or elect to not grant waivers under this provision. The agency's decision to not grant the claimant a waiver under DSSR Section 276.52(a) is not subject to review by OPM under 31 U.S.C. 3702(a)(2) and, therefore, this part of the claim is denied for lack of jurisdiction.

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 establish that his situation meets the criteria of DSSR Section 274.22 which provides for "increased payment" of an education allowance, and this part of the claim is denied based on its merits.

The claimant states he was not advised to withdraw his children from boarding school during his exit process with the RO. He also raises concerns about the quality of guidance received, forwarding an email from the local administrative officer stating in part: “[t]he school was in fact paid in full for the 2011 – 2012 school year, but if you took my acknowledgement of that as implicit recommendation from me to keep them in school then I must take the blame for not making myself clear to you.” It is well settled by the courts that payments of money from the Federal Treasury are limited to those authorized by statute, and the erroneous advice or actions of a Government employee cannot bar the Government from denying benefits not otherwise permitted by law. See *OPM v. Richmond*, 496 U.S. 414, 425-526 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed.Cir. 1997); and 60 Comp. Gen. 417 (1981). Therefore, even if the claimant was never told to withdraw his children from boarding school or received unclear guidance from agency officials, such circumstances do not confer eligibility for an education allowance not otherwise permitted by statute or its implementing regulations.

In the claim to CBCA, the claimant said repayment of his debt would cause a financial hardship to his family. He also asserts that, in his role as the Education Representative for his foreign post, he was aware that “[t]here was no less than ten DEA employees with enrolled dependent(s) who left Cartagena during the school year and there has never been a reimbursement request.” The claims jurisdiction of OPM is limited to consideration of the statutory and regulatory merits

of the individual compensation or leave claims before us. It does not extend to consideration of the equity, fairness, or resulting hardship of the agency's actions. Therefore, the claimant's assertions have no applicability to our claim settlement determination.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States court.