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

Claimant: [name]

Organization: U.S. Department of the Army
Pusan, Korea

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0060

/s/ Linda Kazinetz for

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

3/25/14

Date

The claimant is a Federal civilian employee of the U.S. Department of the Army (DA) in Pusan, Korea. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's termination of his living quarters allowance (LQA). We received the claim request on August 21, 2013, and the agency administrative report on November 7, 2013. For the reasons discussed herein, the claim is denied.

The claimant began employment with OeDae Language Center (OeDae) in Korea, on June 6, 2007, ending employment on June 13, 2008. He accepted a position with L-3 Communications Corporation (L-3), also in Korea, effective June 16, 2008, the date recorded on his resume. The claimant occupied this position until he applied for, was selected, and subsequently appointed to his current Federal service position, effective May 26, 2009.

At the time of the claimant's appointment to the Federal service, the agency initially concluded he was eligible for and thus granted him LQA. On May 1, 2013, the agency notified the claimant that a review of his records disclosed he had been erroneously determined eligible for LQA upon his appointment to the Federal service, and that the allowance was therefore being terminated. The basis for this determination was that he did not meet the LQA eligibility provisions in the Department of State Standardized Regulations (DSSR), section 031.12b, which requires that an employee recruited outside the United States must, prior to appointment, have been recruited in the United States by his or her previous employer.

The agency explains in its May 2013 letter the claimant did not meet DSSR section 031.12b requirements since he "had more than one employer in the overseas area prior to [claimant's] appointment into appropriated fund Federal civilian service," thus concluding his employment with OeDae and L-3 while in Korea made him ineligible for LQA. In its administrative report to OPM, the agency further explains:

> [The claimant] was employed by OEDAE until June 13, 2008. [The claimant] documented within his resume that he began work with a second contractor, L-3 Communications, on June 16, 2008 (Encl 7). He had a three day break in service between employers; however, his claim that he returned stateside during this period is unsubstantiated (Encl 9) and irrelevant in making a determination regarding eligibility for LQA. The fact that [claimant] had been employed with multiple contractors prior to his civilian employment is a clear violation of the DSSR 031.12b.

The claimant challenges the agency's findings, stating in the claim request that although he was employed with two contractors prior to appointment to Federal service, he "left the first contracted position and had a break in service prior to starting the second one." He further explains in his claim request:

> I was clearly recruited in the United States prior to employment [in accordance with] DSSR 031.12. My offer letter from L-3 Communications further supports my claim; therefore, I met the requirements for substantially continuous employment. Furthermore, Contracting Command Korea determined I was a resident of the United States, which was a critical requirement in being approved as a invited contractor under [Status of Forces Agreement (SOFA)]. Local hires were not authorized SOFA benefits.

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, Department of Defense Instruction (DoDI) 1400.25-V1250 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. Therefore, an LQA applicant must fully meet the relevant provisions of the DSSR before the supplemental requirements of the DoDI or other agency implementing guidance may be applied. DSSR section 031.12 states, in relevant part, that 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;

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. [italics added]

The agency's language that the claimant had "more than one employer in the overseas area" as the basis for his LQA ineligibility is not used in the DSSR. Rather, it is an abbreviated way of characterizing section 031.12b, which allows LQA eligibility in those instances where the employee, prior to appointment, had "substantially continuous employment" with one of the entities listed under b(1) through b(4), and which entity (i.e., the singular usage of "such employer") recruited the employee in and provided return transportation to the United States or its territories or possessions. Therefore, by extension, an employee who has had more than one "employer" overseas prior to Federal appointment would be disqualified because the initial overseas employer rather than the employer immediately preceding appointment would have recruited the employee in the United States.

The basis of the claimant's assertion of LQA eligibility is that a "break in service" occurred between his OeDae and L-3 employment, and the latter firm recruited him from the United States as documented by their job offer letter showing it was mailed to a North Versailles, Pennsylvania

address. He also states he was granted SOFA benefits, providing the Invited Contractor and Technical Representative Personnel Data Report (USFK REG 700-19) identifying him as an L-3 contractor, the date of hire as July 1, 2008, the place of hire as Pennsylvania, and the date of entry into Korea as July 3, 2008. The claimant concludes he had been in substantially continuous employment by one employer, not two, prior to his accepting the DA appointment. However, his SOFA status has no bearing on his LQA determination. The SOFA is a diplomatic instrument establishing the legal treatment of U.S. Armed Forces and support personnel stationed in Korea. Its primary purpose is to shield U.S. service members and Department of Defense civilians from certain aspects of Korea's legal and taxation systems while residing in the country. The claimant's attempt to insert SOFA documentation and terminology to the LQA determination process is inappropriate. SOFA status confers neither entitlement nor eligibility for LQA, so the terms of the SOFA are not applicable for interpreting the provisions of the DSSR.

We do not find the claimant's assertion he was recruited by L-3 from the United States persuasive nor the supporting documentation reliable or consistent. The firm's June 27, 2008, job offer letter was mailed to a Pennsylvania address, but we note the letter was marked revised and includes the wording "[i]n anticipation that you will be joining us on July 1, 2008." These dates conflict with the information reported in the claimant's resume that he started employment with L-3 on June 16, 2008. We reviewed the claimant's entry and exit certificate from the local immigration office during the relevant timeframe, noting he entered Korea on June 5, 2007, exited on June 29, 2008, and re-entered on July 3, 2008. Regardless of L-3's job offer being mailed to a United States address, the claimant's entry and exit certificate shows the claimant was physically residing in Korea upon issuance of the June 27, 2008, job offer letter[1]. We conclude the claimant was not recruited by L-3 while in the United States or one of its territories or possessions as required by DSSR section 031.12b.

A review of the claimant's resume also shows a two-month gap between his stateside and OeDae employment; thus, we are unable to determine if OeDae recruited him while residing overseas or, as required by DSSR section 031.12b, in the United States or one of its territories or possessions. Even if we were able to verify the claimant was recruited in the United States by OeDae, his subsequent employment with L-3 broke the continuity of employment by a single employer (i.e., "such employer that recruited him in the United States"). Immediately prior to appointment to his Federal civilian position, the claimant was employed by L-3. The firm, however, had not recruited him in the United States or any of the enumerated locations in DSSR section 031.12b.

[1] The claimant did not provide sufficient information to conclude where he was physically residing during any break in service between the OeDae and L-3 employment. His entry and exit certificate shows he was physically residing in Korea from June 13, 2008, to June 16, 2008; i.e., the "break in service" between the OeDae and L-3 employment as stated in his resume. L-3's offer letter indicates a July 1, 2008, start date. Although the entry and exit certificate shows the claimant was in Korea from June 5, 2007, to June 29, 2008, the record does not identify his whereabouts from June 29, 2008, to July 3, 2008, his reentrance date into Korea. Thus, we conclude the claimant was not recruited by L-3, during any "break in service" between OeDae and L-3 employment, in the United States or one of its territories or possessions as required by DSSR section 031.12b.

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 a foreign area, that inducement is normally unnecessary. Furthermore, 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 upon which to reverse the decision.

It is well settled by the courts that a claim may not be granted based on misinformation provided by agency officials, such as that resulting in DA's erroneous granting of LQA to the claimant. Payments of money from the Federal Treasury are limited to those authorized by statute, and erroneous advice given by a Government employee cannot bar 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 was erroneously determined to be eligible for LQA upon his appointment to the Federal service and had received LQA based on that determination does not confer eligibility not otherwise permitted by statute or its implementing regulations.

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.