Date: March 16, 2006

Matter of: [name]

File Number: 05-0034

OPM Contact: Robert D. Hendler

The claimant is a former Government contractor hired locally overseas by Department of the Air Force. He is requesting that the U.S. Office of Personnel Management (OPM) reconsider his agency's decision regarding his entitlement to receive a living quarters allowance (LQA) and home leave. We received the claim request on August 12, 2005, and the agency administrative report on January 6, 2006. We received a request for summary judgment from the claimant in a letter dated November 29, 2005, and comments on the agency administrative report provided by e-mail on January 8 and February 2, 2006. Subsequent to filing the claim, the agency granted the request for home leave. Thus, that issue is moot. For the reasons discussed herein, the LQA claim is denied.

The claimant states that in December 2002 he was recruited by Scientific Applications International Company (SAIC), a Government contractor, from his home in Clarksburg, West Virginia, and:

> was provided LQA for myself and my family in accordance with Department of State Regulations (DSSR), Joint Travel Regulations (JTR) and Federal Acquisition Regulations as agreed upon between the DoD [Department of Defense]-Defense Information System Agency (DISA) and SAIC, provided for in DoD-DISA Defense Information Systems Network-Global Solutions Contract DCA200-02-D-5001. The DoD agreed to full logistical support including LQA.

The claimant cites his status as a "Technical Expert" as provided for in the Status of Forces Agreement (SOFA), Article 73, Exchange of Notes, July 1995 between the United States Government and the Federal Republic of Germany. He asserts the "international treaty provides for full logistical support, including LQA as well as 'civilian component membership' status." The claimant interprets this treaty as superseding United States domestic law. It appears the claimant's rationale is that since he was receiving LQA under a DoD contract, he was considered a member of the "U.S. civilian component," and that his LQA should have continued upon his appointment to a Federal Government civilian position (Telecommunications Specialist, GS-391-9) on December 15, 2003, in Germany. This inference is based on his assertion: "Therefore, the agency should have considered me a

"U.S. Hire", rather than a 'Local Hire" [sic] employee, and should have approved all incentives or entitlements." He further asserts:

> Any language in the JTR and DSSR as to what is…"normally not required," [referring to the incentive of allowances not normally being required for local hires] was written to consider individuals already living in Germany that were not previously affiliated with the military and not already receiving Living Quarters Allowances or entitlement.

Thus, the claimant appears to argue that Air Force limitations on extending LQA to local hires should be ignored.

The agency administrative report acknowledges that the claimant was eligible for LQA, but states:

> DoD 1400.25-M, Subchapter 1250, paragraph SC1250.4.1., states: *"Overseas allowances and differentials are specifically intended to be 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 the foreign area, that inducement is normally unnecessary.*
>
> HQ USAFE/DPC Memo, dated 31 March 2003, paragraph 4, and DoD 1400.25-M, Subchapter 1250, paragraph SC1250.1.1.1 further state that: "Individuals authorized to approve overseas allowances shall determine whether the allowance is necessary for recruitment purposes." and "when the incentive is not necessary, no further determination is required.
>
> In reference to paragraph C.1. in [claimant's] claim, the agency's' policies and guidelines cited above clearly state that granting of LQA is a two-step process in which the Civilian Personnel Office first has to determine whether the payment of an allowance is actually needed in the recruitment process (position eligibility) and, only if it is needed, the employee's personal eligibility is determined IAW the DSSR, Section 031.12. Even though [claimant] does meet the requirements of the DSSR, the payment of the LQA had to be denied, because the position he had applied for did not meet the requirements for position eligibility.
>
> At the time of [claimant's] initial hire in Dec 03, LQA payments for locally hired employees were only granted if it was determined a position was "hard-to-fill" and the LQA was therefore needed in the recruitment process. In [claimant's] case these conditions were not fulfilled, since there were a total of 19 candidates referred for his position and four of them were already living in the overseas area.

The agency stated the claimant's "Technical Expert status…did not have any relevance …since [claimant's] personal eligibility was not a factor," and "entitlements granted by a

contractor to a contract employee do not transfer with the employee upon entering Federal service." The agency responded to the claimant's statements regarding other employees who received LQA, explaining that the facts in their cases were not similar to those in the instant case. The agency states that the claimant "ultimately chose to accept the position in Ramstein having full knowledge that his position would not qualify for the LQA payment." The agency also advised that it had reviewed the claimant's Home Leave situation, and that "he will be authorized Home Leave retroactively to the date of his initial appointment."

The claimant's January 9, 2006, response to the agency's administrative report restated his initial rationale. He stated the agency contradicted its own LQA policy that:

> *"All recruitment and vacancy announcement should state whether LQA will or will not be granted. If the position is determined to be appropriate for LQA, the vacancy announcement should state that LQA will be subject to the employee meeting eligibility criteria."*
>
> The Agency's announcement 03JUNEXT-525917-LS, dated July 2003, upon which I was hired, clearly states within the "OTHER INFORMATION" section, "*Living Quarters is based on actual housing /utilities expenses and is* ***authorized***." (Emphasis noted).
>
> The Agency's [sic] has already determined that I was personally eligible. Their current policy along the Agency's own position announcement, clearly qualifies the position as LQA eligible.

The claimant states he:

> did not receive their 10 Dec. email [sic] decision until after my Monday, Dec 15, appointment, when I downloaded my personal email [sic] account from the previous weekend….In fact, the formal decision to deny LQA was not signed until January 14, 2004, nearly one month after my appointment. If I knew that my LQA would have been denied, I would not have resigned from my previous position on Dec. 14….With the Agency's LQA approval on Dec.5, I fully expected and planned for the agency to continue paying LQA. However, they reneged. I have to struggle another year until I am eligible for DoD Preferred Placement Program, which, if selected, will pay for a move back to the U.S. Otherwise, with my bank account empty, my family and I will be stranded in Germany, unable to work on the local economy and support ourselves.

In a letter forwarded in a February 2, 2006, e-mail, the claimant pointed to the agency's Home Leave decision stating:

> With that in mind, the Air Force agrees that I was hired from the U.S., and that I had a return transportation agreement. Therefore, my argument for Living Quarters Allowance is further supported by the accumulation of facts

> and federal regulations; not to mention the overwhelming presence of an international treaty: NATO SOFA, Articles 72 and 73.

The claimant's rationale rests upon his attempt to graft selected portions of SOFA to the provisions of 5 U.S.C. §5921(3), 5 U.S.C. §5922(b), 5 U.S.C. §5922 (c) and 5 U.S.C. §5924(4)(B) to establish that he should be treated as an employee for purposes of the payment of allowances and differentials authorized by 5 U.S.C. §§5921-5925. Laws *in pari materia*, or upon the same subject matter, must be construed with reference to each other and should be interpreted harmoniously. *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990); *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-566 (1845); *Alexander v. Mayor and Commonality of Alexandria*, 9 U.S. (5 Cranch) 1, 7-8 (1809). This assumes that, when Congress passes a new statute, it is aware of all previous statutes on the same subject. *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972). In addition, it is well settled that "[t]he starting point for interpretation of a statute is the language of the statute itself," and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 835, 110 S. Ct. 1570, 1575 (1990), citing Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980).

SOFA makes it clear that its purpose is to establish that Technical Experts are members of the "civilian component" for the express purpose of exempting them from German tax and other employment laws as would normally apply to a resident of the Federal Republic of Germany hired off the local job market. Thus, SOFA has no bearing on and may not be referenced in applying the 5 U.S.C. provisions that provide for granting of LQA and other overseas allowance. In applying those statutory provisions, the definition of "employee" in 5 U.S.C. §5921(3) must be used as stipulated in the statute itself. The clear and unambiguous meaning of "employee" is an "employee in or under an agency;" i.e., a Federal employee and not a contract employee as the claimant was when he was employed by SAIC. Thus, the claimant's apparent argument that he be treated as a U.S. hire based on SOFA must be rejected as contrary to the plain language of the controlling statute and established principles of statutory construction. The claimant's attempt to graft the statutory provisions of home leave in support of his LQA claim is similarly contrary to established principles of statutory construction since they apply only to the granting of home leave and must be rejected.

The claimant seeks to overturn the agency's action based on its failure to follow its own established procedures with regard to information on LQA in all recruitment and vacancy announcements. A December 11, 2003, e-mail in the agency administrative report acknowledges that erred in its initial determination that the claimant was eligible for LQA, and "we have found that our local announcement and RPCs many times appear contradictory or at the least, not clear to the applicant." We find this to be true in the announcement for the claimant's position. However, we find that the claimant's quotation "*Living Quarters is based on actual housing /utilities expenses and is* ***authorized***." is incomplete and misleading in that it is preceded by:

> This is a 36-month tour. In addition to basic pay, Overseas Allowances, transportation entitlements, Housing (tax-free Living Quarters Allowance or On Base Housing, and shipment of household good [sic] and privately owned vehicle may be authorized.

We acknowledge this is confusing and possibly misleading. The claimant's implied rationale would have us conclude that his claim should be granted because he believed the vacancy announcement provided for LQA and he had received a verbal offer of LQA which caused him to accept the position. However, it is well established that a claim may not be granted based on misinformation that may have been provided by Federal employees. *See Richmond v. OPM*, 496 U.S. 414, 425-426 (190); *Falso v. OPM*, 116 F.3d 459 (Fed Cir. 1997); and 60 Comp. Gen. 417 (1981).

Contrary to the claimant's assertions, LQA is not an entitlement, and eligibility for it does not require that it be granted. The Overseas Differentials and Allowances Act, Pub. L. 86-707, 74 Stat. 793, 794 (Sept. 6, 1960), as amended and codified at 5 U.S.C. §§5922-5924 provides that, under regulations prescribed by the President, LQAs "may" be paid to Federal employees in foreign areas. The President, by executive order, delegated this authority to the Secretary of State, who issued standardized regulations concerning LQA eligibility. Section 013 of the DSSRs further delegates to the heads of Federal agencies the authority to grant LQAs to agency employees. Section 013 of the DSSRs specifies that the head of an agency "may" grant quarters allowances and issue further implementing regulations, as he or she may deem necessary for the guidance of the agency in granting such allowances. Thus, the DSSRs authorize, but do not require, agency officials to grant an LQA when an employee fulfills the basic eligibility requirements in the DSSRs.

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); OPM File Number 01-0040, February 2, 2002.

The claim settlement process also does not permit us to consider the claimant's financial circumstances or rationale not based on the application of the DSSRs and the agency's implementing regulations. In view of the permissive rather than mandatory language in the applicable statutes and regulations, as noted above, the degree of discretion that heads of agencies have in determining whether to authorize these allowances, and the facts of this claim, we cannot say the agency's application of the DoD regulation and the agency's implementing policy in this case was arbitrary or capricious. Where the agency's factual determination is reasonable; we will not substitute our judgment for that of the agency. See, e.g., *Jimmie D. Brewer*, B-205452, Mar. 15, 1982.

We note that the claimant contends:

> there is a systemic problem of LQA payments throughout the DoD. Each military service applies its own interpretation of DSSR and DoD 1400.25-M Subchapter 1250 regulations, often to the detriment of DoD civilians transferring between military branch civilian employment and contractor opportunities.

The DSSRs and implementing DoD regulations permit the military services to issue implementing regulations and policies restricting the granting of LQA as discussed previously. Contrary to the claimant's description, these actions are not "interpretation of the DSSR policy," but reflect the exercise of authority authorized by the DSSRs and DoD 1400.25-M. OPM's authority to adjudicate compensation and leave claims flows from 31 U.S.C. §3702. The authority in §3702 is narrow and limited to adjudication of compensation and leave claims. Section 3702 does not include any authority to review or comment on how each DoD component exercises this delegated authority. Therefore, we may not rely on 31 U.S.C. §3702 as a jurisdictional basis for the claimant's request that "OPM...review current regulations to centralize guidance without the opportunity of interpretation by DoD agencies."

The claimant has asked for summary judgment in his favor because the agency was not timely in submitting the claim administrative report, and that "Consistent with OPM policy deadlines and case law, the Agency's Administrative report should not be considered and set aside. In this regard he cites "*Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980)." He also states that "OPM failed to respect my due-process rights and adjudicate my claim in a timely fashion."

As we discussed previously, OPM's authority to adjudicate compensation and leave claims flows from 31 U.S.C. §3702 which does not establish any timeframes for claim adjudication. Similarly, the implementing regulations for claims adjudication at 5 CFR part 178 do not establish case adjudication timeframes. Neither the statute nor its implementing regulations provide for or permit summary judgment. We also note the case the claimant relies on for this request is one issued by the Merit Systems Protection Board under its statutory and regulatory authority (see 5 U.S.C., chapter 12 and 5 CFR, chapter II). These authorities are separate and distinct from 31 U.S.C. §3702 and 5 CFR part 178 and may not be grafted onto or otherwise control the compensation and leave claims adjudication process. In addition, the statutory and regulatory claims provisions do not provide for employee-to-employee comparison as put forward by the claimant. We must decide each claim on its own merits

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