

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

Claimant: [name]

Organization: [agency component]
Department of the Army
Heidelberg, Germany

Claim: Request for Living Quarters Allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 10-0014

//Robert D. Hendler

Robert D. Hendler
Classification and Pay Claims
Program Manager
Merit System Audit and Compliance

6/22/2011

Date

The claimant is a Federal civilian employee of the [agency component], Department of the Army, in Heidelberg, 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 January 12, 2010, and the agency administrative report (AAR) on April 8, 2010. For the reasons discussed herein, the claim is denied.

The claimant retired from military service on July 31, 2007, in Baumholder, Germany. Following his retirement from military service, he was appointed on March 3, 2008, to a [temporary position] with the [agency component] in Schwetzingen, Germany, not to exceed August 15, 2008. The claimant initially received LQA when he was appointed to the temporary position because he was considered to be in "substantially continuous employment for up to 1 year after separation" from military service pursuant to Department of Defense (DoD) Manual 1400.25, Subchapter 1250, paragraph 1250.5.1.1 (administratively reissued as DoD Instruction (DoDI) 1400.25-Volume 1250 paragraph 5.e2.1.a, on July 31, 2009.). After this temporary appointment expired, the claimant was re-employed on September 29, 2008, when he was appointed to his [current position] in Heidelberg. Thus, at the time of this appointment, the claimant had experienced a six-week break in service.

The claimant asserts that the date of selection for his [current position], which he identifies as August 12, 2008, should be the determining factor for LQA eligibility because this selection date coincided with his [temporary position], thereby qualifying him for LQA "continuance" under the provisions of Army in Europe Regulation (AER) 690-500.592, paragraph 7.a.(3)(c).

The agency stated in its AAR that it denied LQA to the claimant in part because:

[Claimant's] subsequent employment to the [current position] did not occur until September 29, 2008, after he had a break in service of six weeks, which required the Government to re-hire him. As such, [claimant's] appointment to that position must be viewed as a new appointment as a locally hired employee who does not meet the requirements of the DSSR Section 031.12b in connection with the provisions of DoDI 1400.25-V1250 paragraph [5.]E2.1.a.

Army in Europe Regulation (AER) 690-500.592, paragraph 7.a.(3), specifies the following as one of the categories of employees for whom LQA will be granted:

Federal civilian or NAF employees selected for or converted from NAF to positions in grades GS-09 (or equivalent), WG-11, WL-09, WS-05, and above; or a position that has an equivalent target grade; a hard-to-fill position; or a career program position at any grade; who meet all of the following¹:

- (a) Are transferring to the European theater from another overseas Government activity or agency without a break in service.

¹ The YA-02 pay band in which the claimant's position was placed under the National Security Personnel System encompasses General Schedule (GS) grades 9 through 13.

- (b) Meet basic eligibility criteria in DSSR, section 031.11 or 031.12a and b.
- (c) Were already receiving or eligible to receive LQA at the time of selection.

Paragraph 7.a.(3) requires that all three of the above conditions be met. The claimant was receiving LQA at the time of selection to his current position, which was apparently on or shortly after August 15, 2008², and thus paragraph 7.a.(3)(c) is met. However, paragraph 7.a.(3)(a) and (b) are not met because when the claimant was appointed to his current position on September 29, 2008, he had already experienced a break in service from his previous appointment on August 15, 2008, and he did not meet basic eligibility criteria in the Department of State Standardized Regulations (DSSR) Section 031.11 or 031.12a and b.

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;
 - (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; or

Department of Defense (DoD) implementing guidance for the DSSR contained in DoDI 1400.25-V1250 paragraph 5.e2.1.a, states in part "...former military and civilian members shall be considered to have substantially continuous employment for up to 1 year from the date of separation..." Since the claimant separated from military service on July 31, 2007, this one year of eligibility expired on July 31, 2008, and the claimant was not appointed to his current position

² The claimant's SF-50 includes the notation "Selected from [vacancy announcement number & date]. However, the Referral List Candidate Selection form submitted by the selecting supervisor is dated 8/15/2008, with the claimant's name listed as the third choice selectee. Thus, the claimant would have been actually selected for the position after the first two candidates had declined the position. That date is not annotated on the Candidate Selection form.

until September 29, 2008, after he had experienced a six-week break in service when his temporary appointment expired on August 15, 2008. Therefore, the claimant cannot be considered to meet the eligibility requirements for “substantially continuous employment” as defined in DoDI 1400.25-V1250 paragraph 5.e2.1.a.

The record shows that prior to his current appointment, which commenced on September 29, 2008, the claimant was not recruited in the United States but rather in Germany and must therefore be considered a local hire for LQA eligibility determination purposes. As such, his hiring circumstances prohibit the granting of LQA as he did not meet the basic eligibility requirements of DSSR Section 031.12b, as further defined in DoDI 1400.25-V1250 paragraph 5.e2.1.a, in regard to "substantially continuous employment."

The claimant states “I was originally told...that I was entitled LQA.” It is well settled that a claim may not be granted based on misinformation that may have been 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 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).

The claimant references a work colleague who was also in a temporary position set to expire yet was “offered an advantage” by being sworn in that same day. The claims jurisdiction of OPM is limited to consideration of legal and regulatory liability. OPM has no authority to authorize payments based on consideration of equity. Therefore, the claimant's assertion he has not been treated equitably has no applicability to our claim settlement determination.

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 actions 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).

When 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, March 15, 1982. In this case, the claimant's initial Federal civilian employment with the United States Government in a temporary appointment ceased on August 15, 2008, and he was subsequently rehired as a locally hired employee after a break in service. Ultimately, the claimant's hiring circumstances rendered him ineligible for LQA as he did not meet the requirement for "substantially continuous employment" under DSSR Section 031.12b as that term is further defined in DoDI 1400.25-V1250 paragraph 5.e2.1.a. An agency decision which is consistent with stated policy or regulatory guidance cannot be considered arbitrary, capricious, or unreasonable. Accordingly, the claim for LQA is denied.

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.