

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

Claimant: [name]

Organization: Defense Contract Audit Agency
Weisbaden, Germany

Claim: Allowable costs for Living Quarters
Allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 10-0029

//Judith A. Davis for

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

6/6/11

Date

The claimant is a Federal civilian employee of the Defense Contract Audit Agency (DCAA), formerly duty-stationed in Weisbaden, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of building insurance and property taxes as allowable costs in connection with his approved living quarters allowance (LQA) while he was employed in Weisbaden from October 2007 to January 3, 2010. We received the claim on April 7, 2010, the agency administrative report (AAR) from the Department of the Air Force (AF) as the servicing human resources office on May 27, 2010, and additional clarifying information from AF on February 24, 2011. For the reasons discussed herein, the claim is denied.

The claimant requests "a hearing relating to [OPM's] determination on overpayments." The governing regulations for OPM's claims adjudication authority under 31 United States Code (U.S.C.) 3702(a)(2) are contained in Part 178 of title 5, Code of Federal Regulations (CFR). Section 178.105 precludes the conduct of hearings in the claims adjudication process:

The burden is upon the claimant to establish the timeliness of the claim, the liability of the United States, and the claimant's right to payment. The settlement of claims is based upon the written record only, which will include the submissions by the claimant and the agency. OPM will accept the facts asserted by the agency, absent clear and convincing evidence to the contrary.

Therefore, the claimant's request for a hearing for this matter is denied.

The claimant believes building insurance and property taxes should have been included in his LQA as allowable costs. He states he was living in a multi-unit dwelling and that:

My landlord used the legal contract required by local law as the basis of my lease agreement... This lease contract format, required by local law, requires that Property Taxes and Building Insurance costs be shown separately from the basic rent.

My lease contract, approved by the Weisbaden Housing Office, specifically shows Building Insurance Costs and Property taxes as applicable common costs, separate from the basic rent, because my landlord correctly and lawfully used the required lease contract format.

The claimant believes his claim is supported by the Department of State Standardized Regulations (DSSR) and states "the DSSR allows for employee reimbursement of building insurance and property taxes when local law requires that these necessary living costs be shown separately from the basic rent." He also provided a copy of guidance issued by the Headquarters, United States Army-Europe (USAREUR), stating that for purposes of their LQA processing for Department of Army employees, where landlords are permitted by the laws of the country to pass on taxes to their tenants, it is considered customary to do so, and therefore taxes included in rental agreements and leases are allowable.

DSSR Section 131.3 states:

The LQA rates are designed to cover substantially all of the average employee's costs for rent, heat, light, fuel, gas, electricity, water, taxes levied by the local government and required by law or custom to be paid by the lessee, insurance required by local law to be

paid by the lessee, and agent's fee required by law or custom to be incurred by landlord and paid by lessee.

Additionally, insurance is more specifically addressed in DSSR Section 131.2 as follows:

"Rent", exclusive of heat, light, fuel (including gas and electricity), water and taxes, means the annual cost of suitable, adequate living quarters for an employee and his/her family. When approved by the head of agency as necessary to provide such living quarters, rent may include in addition to the basic annual rent, the cost of... (3) insurance on the property and/or furnishings if so rented, if such insurance is required by local law to be paid by the lessee;

The claimant submitted a copy of the "supplement to the rental contract - common charges and utilities" which constituted part of his lease. This supplement lists the various common expenses that may be shared by the tenants of a multi-unit dwelling in addition to the set rent, with a section where the individual landlord indicates those applicable, i.e., those expenses the landlord is dividing among the lessees.

Under DSSR Section 131.3, "insurance required by local law to be paid by the lessee" is an allowable LQA cost, as are "taxes levied by the local government and required by law or custom to be paid by the lessee." The claimant's assertion that the DSSR allows for reimbursement of these costs merely "when local law requires that these necessary living costs be shown separately from the basic rent" is contradicted by the plain and unambiguous language of DSSR Section 131.3. The claimant appears to misinterpret the requirement under German rental law that utilities and common costs being passed on to lessees must be separately identified in rental contracts. That landlords in Germany are *permitted* to pass on certain costs directly to their lessees as part of the common utilities is not tantamount to a legal imperative that they do so. An individual landlord may opt not to pass on some or any of these costs directly to the lessees, and this would be so indicated on the supplement to the rental contract.

Under 5 U.S.C. § 5923 as implemented by the DSSR, LQA is a discretionary allowance that may only be granted when specific circumstances are met. LQA may be granted to an eligible employee for the cost of suitable, adequate, living quarters for the employee and his family. 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).

The United States Air Force-Europe (USAFE) has not issued its own implementing regulations regarding the granting of LQA and associated allowable costs. However, the agency states that based on research of German rental law, there is no legal requirement in Germany that either property taxes or building insurance be paid by the lessee, and therefore the agency does not consider these as LQA allowable costs. As such, USAFE's practice has been to disallow reimbursement for property taxes and building insurance, and employees granted LQA are given

detailed written guidance on what costs will not be reimbursed. This guidance clearly lists insurances and taxes as non-reimbursable costs. The stated purpose of this guidance is to help employees avoid accepting charges in their rental contracts for which they will not be reimbursed. The claimant does not dispute that he received a copy of this guidance prior to signing a rental agreement that included these costs.

We requested and obtained a copy of the "Civilian Personnel Servicing Agreement between Defense Contract Audit Agency (DCAA), Northeastern Region and Headquarters, United States Air Force (USAFE)," from USAFE which states:

The Civilian Personnel Flight (CPF) at Ramstein Air Base, Germany, 86 Mission Support Squadron (MSQ) will provide civilian personnel services to all employees permanently assigned to the European Branch Office, Defense Contract Audit Agency (DCAA), Weisbaden, Germany and the Saudi Arabia Sub-office, Riyadh.

The policies, regulations, and procedures of USAF, USAFE and the 86 MSQ CPF, will govern the administration of US Citizen employees, except for modifications designed in subsections A, B, C, E, and F of Section VI, DoD Directive 1400.16, and the following:

(4) Employee Services

(a) The 86 MSQ CPF, will provide auditors and administrative personnel of the European Branch Office, Weisbaden, Germany, employee services to include: counseling, authorizations for issuance of passports and identification privilege documents, local processing of personnel returning to CONUS upon completion of overseas tour of duty, and other in-house employment services which USAFE activity furnishes its own employees including the initiation and authorization of PCS, LQA, Return Agreement Travel, and student travel orders.

As there are no "modifications" specified to the policies, regulations, and procedures of USAF, USAFE, and the 86 MSQ CPF for DCAA employees regarding LQA authorization in paragraph (4)(a) above, this establishes that the processing of LQA for DCAA employees is to be done in accordance with the USAF and USAFE policies, regulations, and procedures. Since the USAREUR Regulations are the implementing regulation for granting LQA within the Department of the Army (DA) for its employees, as permitted by the DSSR, the claimant may not rely on this regulation to support his claim since he is not a DA employee. The DA regulations implementing the DSSR have no bearing on the policies and practices of the USAF as the DA and USAF are separate Government agencies and as stated above each head of an agency has the discretion to issue agency instructions implementing the DSSR.

As stated above, an agency's action will not be questioned unless it is determined that the agency's action was arbitrary, capricious, or unreasonable. Therefore, to find for the claimant, we would need to determine that USAFE's interpretation of local laws or customs was arbitrary, capricious, or unreasonable.

The claimant has provided no evidence or documentation to establish that property taxes or building insurance are required by local law, nor does he provide evidence to rebut USAFE's assertion that German rental law does not require payment of property taxes or building

insurance. Even if, *arguendo*, insurance were required under local law to be paid by the lessee, its inclusion as an LQA allowable cost would be entirely at the policy discretion of the agency as per DSSR section 131.2, which stipulates such inclusion must also be "approved by the head of agency."

The term "custom" as it is used in the context of the cited regulations is defined in Black's Law Dictionary as:

1. A practice that by its common adoption and long, unvarying habit has come to have the force of law.

This definition is consistent with the definition of "custom" cited by the agency which states: "An expense is 'customarily' paid if, by long and unvarying habitual actions, constantly repeated, such payment has acquired the force of a tacit and common consent within a community." The claimant has provided no evidence or documentation to establish that property taxes in Germany are *required by custom* to be paid by lessees. Based on the information of record, we cannot conclude that because landlords in Germany are permitted to pass on the cost of property taxes to their tenants, that they customarily and invariably do so, as a practice so long established and unvarying that it has taken on the force of law. Further, the agency has stated that not all of their LQA recipients are being required by their landlords to pay the local taxes on the leased properties, which in itself precludes any conclusion that payment of property taxes is required by custom.

In apparently attempting to address these alternate circumstances, the claimant states:

Please note there may be landlords in my local area who don't use the lawfully required lease contract format that my Landlord used, which requires that building insurance costs and property taxes by [sic] shown separately from the basic rent. But these Landlords would simply be hiding/burying the property taxes and building insurance costs in the basic rent, because, obviously, no sane or rational Landlord in any country will charge a rent that does not cover all costs... If other employees sail through the reconciliation process because their landlords did not properly and lawfully show building insurance and property taxes separate from the pure rent, as my Landlord did, it would be grossly unfair and inequitable to force me to pay these costs because my Landlord is simply complying with local law, when other Landlords are not.

The claimant's above assertions are speculative and have no bearing on the settlement determination of this claim. The claims jurisdiction of OPM is limited to consideration of legal and regulatory liability. OPM has no authority to authorize payment based solely on consideration of equity.

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 has provided no evidence or documentation to support that German law requires building insurance to be paid by lessees, or that German law or custom require property taxes to be paid by lessees. As such, there is no basis on which we may conclude that insurance and taxes may be regarded as LQA allowable costs in Germany. Since USAFE practice to disallow insurance and taxes is clearly communicated and uniformly applied to all LQA recipients, the

agency's action is not arbitrary, capricious, or unreasonable. Accordingly, the claim for building insurance and property taxes as LQA allowable costs 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.