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

Claimant: [name]

Organization: Department of the Navy
Yokosuka, Japan

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 11-0027

//Judith A. Davis for

_____

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

1/27/11

_____

Date

The claimant is a Federal civilian employee of the Department of the Navy (Navy) in Yokosuka, Japan. 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 April 11, 2011, the agency administrative report on November 7, 2011, and the claimant's response to the administrative report on November 21, 2011. For the reasons discussed herein, the claim is denied.

The claimant was originally recruited to Japan by the private United States firm Computer Sciences Corporation (CSC) to work under a contract between CSC and Navy. His employment with CSC commenced in August 2008. In late 2009, he was notified by CSC that his work on this contract had been determined by Navy to be purely governmental in nature and as a result his employment with CSC would not be renewed in April 2010, but that a corresponding Navy position for which he could apply would be advertised and filled. The claimant states the position was "advertised with [LQA], for those eligible, as well as Post Allowance as part of the incentive package." The claimant applied for and was subsequently offered and accepted the position on February 25, 2010. The claimant states he was notified by the servicing human resources office in Yokosuka two weeks before his appointment that his LQA request had been denied.

The agency states the claimant is ineligible for LQA because he was a local hire and his employment with CSC did not provide for his return transportation back to the United States. The claimant counters that his designation as a local hire for LQA purposes conflicts with his standing under the Status of Forces Agreement (SOFA) between the U.S. and Japan; specifically, that he qualified for sponsorship under the SOFA as a result of his employment with both CSC and Navy, and the SOFA explicitly excludes from coverage "persons who are ordinarily resident in Japan." He also asserts he was assured return transportation while employed by CSC because as a condition of his SOFA sponsorship, if his employment with that firm ended, "CSC was not allowed to leave me in country once my visa status changed and accepted responsibility to return me to my home - in effect a return agreement." He notes he was required by Navy to "sign away return travel rights under SOFA that I previously had when employed by CSC." The claimant also submitted other documentation to support his assertion of return transportation with CSC which will be addressed individually below.

The Department of State Standardized Regulations (DSSR) set forth basic eligibility criteria for the granting of LQA. Agency implementing guidance such as that contained in Department of Defense (DOD) 1400.25-M and cited by the claimant may impose additional requirements, but may not be applied unless the employee has first met the basic DSSR eligibility criteria.[1]

DSSR section 031.11 states LQA may be granted to employees recruited in the United States:

> Quarters allowances... may be granted to employees who were recruited by the

[1] The claimant challenges the applicability of DoD 1400.25-M to his situation for the stated reason that he was a contractor when he applied for the position and when he was notified that he had been denied LQA. However, since the claimant was not potentially eligible for LQA, as an occupant of the position for which he was hired, until his actual appointment into the Federal service, the LQA denial was obviously prospective in nature to such time as the claimant became a Federal employee and the criteria stated in DoD 1400.25-M would apply.

employing government agency in the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the possessions of the United States.

The claimant does not meet basic LQA eligibility criteria under DSSR section 031.11. The claimant was residing in Japan when he was recruited by Navy in 2010. He was not residing in the United States or one of its enumerated territories or possessions as required under section 031.11. His SOFA status has no bearing on this determination. The SOFA is a diplomatic instrument that establishes the legal treatment of U.S. Armed Forces and support personnel stationed in Japan. Its primary purpose is to shield U.S. service members and DoD civilians from certain aspects of the Japanese legal and taxation systems while they are resident in Japan. Although individuals who are "ordinarily resident in Japan" are excluded from coverage under the SOFA (thus requiring a judgment be made on a person's "ordinary" place of residency), this bears no relationship to DSSR LQA criteria regarding who may be considered a United States hire, which is based simply on place of residency at the time of recruitment. The claimant's attempt to import SOFA terminology to the LQA determination process is misguided. The terms of the SOFA are not applicable for interpreting the provisions of the DSSR. SOFA status confers neither entitlement nor eligibility for LQA and SOFA provisions may not be substituted for the plain language of the DSSR in determining LQA eligibility.

DSSR section 031.12 states LQA may be granted to employees recruited outside the United States[2] 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

[2] The claimant takes exception to being characterized as a "local hire" by his agency under DSSR section 031.12, apparently associating the term "local" with individuals who have legal status to reside in the country outside the authority of the SOFA. However, DoD 1400.25-M, paragraph 1250.3.4, defines the term "locally hired" (as opposed to “U.S. hire”) as follows: "For the purpose of this Subchapter, locally hired refers to the country in which the foreign post is located."

> 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

The claimant does not meet basic LQA eligibility criteria under DSSR Section 031.12(b). Prior to his appointment, he had been recruited in the United States by the United States firm CSC and had been in continuous employment by that firm. However, his employment with CSC was not "under conditions which provided for his return transportation to the United States" or one of its enumerated territories or possessions.

The CSC offer of employment letter did not identify return transportation as one of the included benefits. The claimant submitted a letter dated September 13, 2010, from an individual identified as CSC's "OITO Director" stating: "In regard to former CSC employees, CSC would like to confirm that for the personnel that were hired in the states or those that possessed a valid transportation agreement at the time of hire that CSC would provide for return airline ticket. This ticket would be to tax home of record in the USA for personnel as required by applicable SOFA regulations." The claimant also submitted a "Letter of Employment" dated January 25, 2010, and signed by a CSC "Group Manager, OCONUS Information Technology Operations" which stated only that the claimant's "authorized entitlements by CSC" were LQA, Cost of Living Allowance, and "travel."

DSSR Section 031.12(b) requires conditions be in place at the time of employment to specifically ensure return transportation to the United States or another of the enumerated locations. The claimant's employment contract did not provide for return transportation at the time it was entered into by the claimant and CSC. No evidence has been submitted that shows the employment contract was modified to provide the claimant with return transportation. A letter from a CSC representative, who may or may not be authorized to speak for the firm regarding its employee benefit obligations, and purporting past benefits that were not stated in the original employment contract as an attempt to establish terms on which the contract itself was silent, does not establish that CSC was bound under the contract to provide return transportation to the United States and is not acceptable for purposes of LQA determination.

The claimant asserts that because he was SOFA-sponsored while he was employed by CSC, that firm was responsible for his return transportation regardless of whether it was explicitly stated in his employment contract. He cites Article IX, section 5 of the SOFA, which states: "If the status of any person brought into Japan... is altered so that he would no longer be entitled to such admission, the United States authorities shall notify the Japanese authorities and shall, if such person be required by the Japanese authorities to leave Japan, assure that transportation from Japan will be provided within a reasonable time at no cost to the Government of Japan." Beyond our previous observation that SOFA criteria are inapplicable to the LQA determination process, we note this provision mandates neither that the "transportation from Japan" be *back to the United States* (i.e., the "repatriation" required under DSSR section 031.12(b) rather than transportation to an alternate destination requested by the employee), nor that the employing organization assume the cost of this transportation. Therefore, there is no "return agreement" implicit in the SOFA and binding on the employing organization, in this case CSC, that would meet the requirements of section 031.12(b).

The claimant also submitted several other documents purporting to show that CSC had obligated itself to provide him return transportation to the United States. Among these are two "Contractor Letters of Identification" dated July 28, 2008, and September 9, 2009, and issued by a Navy "Contracting Officer Representative," which state "[t]he [claimant] is a contractor employee authorized travel to perform contract work in Japan." These letters identify the claimant's "Transfer Date from Japan" as March 31, 2010, and provide the name and address of a CSC contact under "Complete Billing Address for travel on AMC." The claimant represents these letters as providing "a return date and CSC billing address for my return travel." However, these letters state they are provided in accordance with "JTR [Joint Travel Regulation] Appendix E," which requires their issuance for contractors to carry with them while on Government-related travel. We may only conclude they serve solely to identify the holder as being authorized travel for the specific purpose stated; i.e., "to perform contract work in Japan." There is no indication these letters, issued by Navy, have any relevance to CSC's obligation regarding the claimant's return travel upon completion of his employment with that firm.

The claimant also submitted the 2005 "Performance-Based Statement of Work" (PBSOW) and its 2010 extension for the contract under which he worked while employed by CSC. The former states under section 7.4 that "[t]he contractor shall provide for relocation for its workforce to/from the ITSC/ITOCs[3] and outlying remote sites at no additional cost to the government;" the latter states under section 9.3 that "[t]he contractor shall provide for relocation for its workforce to/from the TNOSC/LNSCs[4] and outlying remote sites at no additional cost to the Government." Although the claimant states "[t]he language used makes it clear that these sections were included in order to move responsibility for providing workforce relocation costs from the Government sponsor to the contractor," the PBSOWs address only CSC's obligation for the relocation of its employees within Japan for the performance of work under the contract. Neither of these documents refer to CSC's obligation for return travel of its employees upon conclusion of their employment with that firm.

To support his request for LQA, the claimant states he was "already receiving LQA from the U.S. Navy" when he was employed by CSC and the subsequent LQA denial by Navy resulted in a "drastic cut in compensation." However, the claimant was receiving LQA from CSC while he was employed by that firm as part of their benefits package. These costs were reimbursed by Navy under its contract with CSC. The claimant's receipt of LQA while employed by CSC has no bearing on his LQA eligibility under the DSSR.

The claims jurisdiction of OPM under section 3702(a)(2) of title 31, United States Code, is limited to consideration of statutory and regulatory liability. OPM has no authority to authorize payment based on subjective considerations such as personal hardship as expressed by the claimant. Likewise, the claimant cites various instances of what he characterizes as mishandling of his LQA request by his agency. These are not germane to OPM's independent review and adjudication of his claim, which is based solely on application of the controlling statutes, regulations, and/or policies, and will not be further considered or addressed.

[3] Information Technology Services Centers/Information Technology Operations Centers
[4] Theater Network Operations and Security Centers/Local Network Service Centers

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.

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