

**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
Rota, Spain

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0047

/s/ Linda Kazinetz for

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

3/20/14

Date

The claimant is a Federal civilian employee of the Department of the Navy in Rota, Spain. 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 on July 3, 2013, the final agency administrative report (AAR) on October 8, 2013, and the claimant's response to the AAR on October 8, 2013. For the reasons discussed herein, the claim is denied.

The claimant retired overseas from active duty military service on July 31, 2008. He began contractor employment with the private firm Wittenberg Weiner Consulting at Naval Station Rota on August 1, 2008, until his employment contract expired on July 31, 2010. He was appointed to his position with the Department of the Navy on October 12, 2010. In May 2013 the claimant was notified that, as a result of a Department of Defense (DoD)-directed LQA audit, it was determined his initial LQA eligibility determination was erroneous. The agency identifies his "initial employment with a contractor after his military retirement and his break in service" as the basis for their LQA ineligibility determination.

The claimant asserts his LQA eligibility under sections 031.12a and b of the Department of State Standardized Regulations (DSSR). He states he was recruited in the United States by the military and "immediately reported to work the day after [his] retirement from the military." He states he did not use any portion of his "return transportation privilege from the United States or Wittenberg Weiner Consulting," and that his "actual place of residence in the place to which the quarters allowance is applied is fairly attributable to [his] employment by the United States Government." In his response to the AAR, the claimant additionally states: "I feel that I've only been with one employer my entire life. That's with the Department of Defense, whether directly or indirectly. My employment has always been for United States Navy to include the DOD contractor position." ... I was UNEMPLOYED and travelling when a phone call was made to my home in Florida to report to HRO."

The claimant also cites Department of Defense Instruction (DoDI) 1400.25, Volume 1250¹, under which "former military and civilian members shall be considered to have "substantially continuous employment" for up to 1 year from the date of separation or when transportation entitlement is lost, or until the retired or separated member or employee uses any portion of the entitlement for government transportation back to the United States, whichever occurs first."

The Department of State Standardized Regulations (DSSR) are the governing regulations for allowances, differentials, and defraying of official residence expenses in foreign areas. However, under section 013, they allow agencies to issue implementing regulations as follows:

When authorized by law, the head of an agency may defray official residence expenses for, and grant post differential, difficult to staff incentive differential, danger pay allowance, quarters, cost-of-living, representation allowances, compensatory time off at certain posts and advances of pay to an employee of his/her agency and require an accounting thereof, subject to the provisions of these regulations and the availability of funds. *Within the scope of these regulations*, the head of an agency may issue such further implementing regulations as he/she may deem necessary for the guidance of his/her agency with regard to the granting of and accounting for these payments. [Italics added.]

¹ The claimant erroneously attributes this provision to DSSR section 031.12b.

Thus, agency implementing regulations such as those contained in DoDI 1400.25, Volume 1250, may impose additional requirements to further restrict LQA eligibility, but may not exceed the scope of the DSSR; i.e., allow for the granting of LQA in cases not otherwise permitted under the DSSR.

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

Quarters allowances prescribed in Chapter 100 may be granted to employees who were recruited by the 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.

Relative to these criteria, DoDI 1400.25, Volume 1250², defines “U.S. hire” as follows:

U.S. Hire. A person who resided permanently in the United States or the Northern Mariana Islands, from the time he or she applied for employment until and including the date he or she accepted a formal offer of employment.

Thus, an employee’s status as a “U.S. hire” is based on physical residency at the time of recruitment for the position in question.

Although the claimant does not directly assert LQA eligibility under DSSR section 031.11, he states he has never been a permanent resident of Spain, is a registered voter in the state of Florida, and possesses a current Florida driver’s license. He also asserts that “[i]n the end, recruitment was carried out in the United States via a phone call from Rota's Human Resources Office received by a family member at my actual place of residence in Florida.” However, he acknowledges his residence overseas at the time of recruitment. As such, the claimant does not meet LQA eligibility criteria under DSSR section 031.11 or its implementing regulations in DoDI 1400.25, Volume 1250, because he was overseas rather than in the United States when he was recruited for his position with Navy in 2010. The other circumstances cited by the claimant do not satisfy the plain and unambiguous language of “recruited in the United States” in DSSR section 031.11. *See* OPM File Numbers 12-0019, 10-0037, and 08-0114.

DSSR section 031.12 states, in relevant part, that LQA may be granted to employees recruited outside the United States under the following circumstances:

- 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 appointment³, 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:

² The version in effect at the time of the claimant’s appointment is dated December 1996 incorporating change 1, June 26, 2006, administratively reissued July 31, 2009.

- (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.

The claimant provides the following explanation for the break in employment between the expiration of his employment contract with Wittenberg Weiner Consulting and his appointment by Navy:

I was offered the position on 20 July, 2010 while still working under contract with Wittenberg Weiner Consulting. My contract expired 31 July, 2010. I expected to begin my GS appointment based on the command management report date of 01 August, 2010... Unfortunately, the process for the "change of status" took much longer than expected... These unusual circumstances for the break in service occurred by no fault of my own. It should be considered that the situation was not only beyond my control, but beyond the control of Rota's Human Resources Office and the United States Government making my eligibility an unwarranted analytical decision.

In the meantime, I toured around Europe with all intentions of returning to the United States after my travels... Although my break in employment was significantly less than the year permitted under the regulation, it appears that any break is now being construed to eliminate a proper piece of my agreed compensation package.

The claimant, prior to his appointment by Navy on October 12, 2010, was unemployed following the expiration of his employment contract with Wittenberg Weiner Consulting on July 31, 2010.⁴ Therefore, prior to his appointment by Navy, he was not employed by one of entities listed in DSSR section 031.12b(1) through (4) under conditions providing for his return transportation to the United States or one of the enumerated territories or possessions. Thus, the claimant does not meet LQA eligibility criteria under DSSR section 031.12b.

³ The term "prior to appointment" is construed as meaning prior to appointment to the position for which the LQA determination is being made.

⁴ The claimant's employment with Wittenberg Weiner Consulting would not have been qualifying under DSSR section 031.12b even if the break in employment had not occurred as they had not recruited him in the United States. Further, there is no contemporaneous documentation in the claim record establishing this employer had, *at the time of hire*, provided him return transportation benefits to the United States.

Because the basic qualifying provisions of the DSSR must be met before agency implementing regulations may be applied, the claimant's intervening employment by Wittenberg Weiner Consulting⁵ and subsequent period of unemployment following his military retirement supersede any consideration of LQA eligibility under the "substantially continuous employment" provision of DoDI 1400.25, Volume 1250, based on the conditions of his separation from military service. This provision supplements but does not replace the provisions of DSSR section 031.12b. A former military member or civilian employee may retain "substantially continuous employment" for up to one year after separation from military service or employment by the U.S. Government if that employment is qualifying under DSSR section 031.12b; i.e., if it constituted the employment held immediately prior to appointment and additionally, if "such employer" had recruited the employee in the United States and provided return transportation to the United States or one of its territories or possessions. Even assuming *arguendo* the DoDI could be applied, the claimant's application of its "substantially continuous employment" provision to his break in employment between his contractor employment and Federal appointment is erroneous. The one year of "substantially continuous employment" permitted in the DoDI is calculated from the date of military separation. The claimant's initial Federal appointment was made over two years after his military retirement, and any period of creditable "substantially continuous employment" would have expired in July 2009, one year after his military retirement in July 2008.

The claimant requests that OPM "honor [his] original job offer incentives package which included Living Quarters allowance." However, it is well settled by the courts that a claim may not be granted based on misinformation 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). 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 to continue receiving such erroneous payments.

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). As discussed previously, the claimant has failed to do so. 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.

⁵ The claimant's assertion that his military service and contractor employment constitute one employer; i.e., the Department of Defense, is not persuasive. These are separate and distinct entities recognized as such under DSSR section 031.12b.

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.