

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

Claimant: [name]

Organization: Theater Logistics Support Center-Europe
Directorate for [name]
[name] Army Area Command
([acronym])
Department of the Army
[location], Germany

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 12-0002

//Judith A. Davis for

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

8/27/2012

Date

The claimant is a Federal civilian employee of the Department of the Army in [name], 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 October 11, 2011, and the agency administrative report (AAR) on November 10, 2011. For the reasons discussed herein, the claim is denied.

The claimant separated from active duty military service in [location], Germany, on April 30, 2010, after which he was employed by the local chapter of the [name] College in Germany from May 26, 2010, to June 20, 2011. He was selected for his current position on February 4, 2011, but was not officially offered the position until May 24, 2011. The lengthy delay in the hiring process was largely due to the Department of the Army's "hiring pause," during which job offers could not be extended to selected employees who applied for certain positions. The claimant was appointed to the position on June 20, 2011, after being informed during in-processing that the hiring delay had rendered him ineligible for LQA.

The agency maintains the claimant's hiring circumstances rendered him ineligible for LQA as he did not meet the one-year moratorium of "substantially continuous employment" provided under Department of Defense Instruction (DoDI) 1400.25-Volume 1250 (V1250) for locally hired employees, and as a result did not meet LQA requirements under Department of State Standardized Regulations (DSSR) Section 031.12b in connection with the DoD guidance.

The claimant states:

In light of the mitigating circumstance which prevailed during my hiring action, I respectfully request that LQA be allowed as part of the compensation package associated with my employment with Department of Army in Europe under 'common sense considerations' within the context of the base guidance in the DSSR, which does not specify the 1 year clause. A favorable decision is consistent with the spirit and intent of our regulatory guidance given that my one year time constraint lapsed through no action or inaction on my part.

The DSSR sets forth basic eligibility criteria for the granting of LQA. Agency implementing guidance such as that contained in DoDI 1400.25-V1250 may impose additional requirements, but may not be applied unless the employee has first met the basic DSSR eligibility criteria.

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

Subsection 031.12b may be waived by the head of agency upon determination that unusual circumstances in an individual case justify such action.

Immediately prior to appointment, the claimant was employed by [name] College in Germany. Although not specifically stated in the record, the claimant has provided no documentation to contradict that [name] College had recruited him in Germany, where he had separated from active duty military service. As such, prior to appointment, he had not been recruited in the United States or one of the enumerated territories or possessions by his previous employer ([name] College). Further, a July 22, 2011, letter signed by a "human resources supervisor" at [name] College and submitted by the claimant in response to our request for documentation of return transportation benefits provided by the College, describe only his work hours and salary. Therefore, the claimant has submitted no documentation indicating that [name] College provided for his return transportation to the United States or one of the enumerated locations as an employment benefit. Since the claimant was not recruited in the United States prior to appointment by his previous employer ([name] College), under conditions that provided for his return transportation to the United States, he does not meet basic LQA eligibility requirements under the DSSR for locally hired employees. That his military transportation entitlements were still intact is not relevant for purposes of DSSR section 031.12(b) because that section specifically refers to the employer "prior to appointment," which in the claimant's case was [name] College.

Further, DoDI 1400.25-V1250, Enclosure 2, paragraph 1, provides DoD's definition of "substantially continuous employment" as that term is used in DSSR section 031.12(b):

Under the provisions of section 031.12b of Reference (b) [DSSR], 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 and/or separated member or employee uses any portion of the entitlement for Government transportation back to the United States, whichever occurs first.

There is no dispute the claimant did not meet the one-year requirement because it is clear from the record that over one year had elapsed between his military separation and his appointment. As such, even if the claimant met basic DSSR eligibility requirements regarding substantially continuous employment, OPM would have no authority to waive the additional eligibility requirements set forth in DoDI 1400.25-V1250, Enclosure 2, paragraph 1.

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 OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States court.