

**Compensation Claim Decision**  
**Under section 3702 of title 31, United States Code**

**Claimant:** [name]

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

**Claim:** Request for Living Quarters Allowance

**Agency decision:** Denied

**OPM decision:** Denied

**OPM file number:** 07-0036

/s/ for

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Robert D. Hendler  
Classification and Pay Claims  
Program Manager  
Center for Merit System Accountability

3/17/2008

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Date

The claimant is a former military member who retired from the U.S. Navy in Germany (GE) on December 1, 2003, and was first appointed in GE effective August 21, 2005, to [position], as a Department of the Army civilian employee overseas. At the time he initiated this claim, he occupied [position] with the [agency component], Department of the Army, in Mannheim, GE. The claimant requests reconsideration of his agency's denial of living quarters allowance (LQA) stemming from his appointment to his current position. The U.S. Office of Personnel Management (OPM) received the compensation claim on November 27, 2006, and the complete agency administrative report (AAR) on September 18, 2007. For the reasons discussed herein, the claim is denied.

The claimant indicates that from the time he retired from the military to the date of his appointment he was not employed and notes that he has not used the transportation entitlement back to the United States (U.S.) which was granted upon his retirement. He asserts he resided in the U.S. from November 2004 to August 2005 when he stayed with his father in Makinen, Minnesota. The claimant states that during the recruitment and appointment process the agency indicated he was eligible for LQA but subsequent to his appointment and upon review of LQA eligibility documents, the agency found he did not meet the agency's eligibility criteria for the allowance. He believes, in the interest of fairness and individual merit, he should receive the LQA which the agency initially offered.

The September 4, 2007, AAR states the claimant retired and separated from active military service on December 1, 2003, remained in GE with his wife, and did not use any of his military transportation entitlement back to the U.S. The agency indicates the claimant applied for his current position on March 15, 2005, and a tentative job offer was made to him on June 14, 2005, which was confirmed by letter dated July 14, 2005. The agency states the July 14 letter used a standard template for overseas hires which inadvertently informed the claimant he was authorized LQA. However, the email forwarding the July 14 letter informed the claimant he was not eligible for LQA.

In denying the LQA, the agency indicates that the claimant was not permanently residing in the U.S. at the time of his hire, but was only visiting as evidenced by flight records of numerous trips he made to the U.S. from November 2004 to August 2005. Those records show that he was in GE at the time he applied for the job (March 15, 2005) and was outbound from the U.S. to GE on June 14, 2005, when he accepted the job offer. The records indicate he was in GE from January 12, 2005, to June 6, 2005. Moreover, his resume reflects a military post office address in GE as well as German telephone numbers for work and home. Therefore, the agency states the claimant is not a U.S. hire within the meaning of DOD Manual 1400.25-M, subchapter 1250.3.7. which defines a U.S. hire as "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."

The agency also states that the claimant is not eligible for LQA as a locally hired employee; i.e., an employee recruited from outside the U.S. The agency cites Department of State Standardized Regulations (DSSR), Section 031.12, concerning granting LQA to employees recruited from outside the U.S. In relevant parts, the DSSR, Section 031.12 provides that quarters allowance may be granted to employees recruited from outside the U.S. when:

- a. the employee's actual place of residence in the place to which the quarters allowance applied at the time of receipt shall be fairly attributable to his employment by the United States Government; and

b. prior to appointment, the employee (1) was recruited in the United States by (2) the United States Government, including its Armed Forces; (3) a United States firm, organization, or interest; (4) an international organization in which the United States Government participates; or (5) a foreign government and had been in substantially continuous employment by such employer under conditions which provided for his or her return transportation to the United States...

The AAR indicates implementing guidance by DOD further defines the provisions of DSSR Section 031.12b under DOD Manual 1400.25-M, SC1250.5.1.1 by stipulating former military and civilian members shall be considered to have "substantially continuous employment" for up to one 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 U.S., whichever occurs first. The Department of the Army in Europe (USAREUR) implements the definition of employees hired from outside the USAREUR Regulation 690-500.592, paragraph 5.a.(2), June 20, 2003, which was in effect at the time of the claimant's appointment.

The agency concludes that the circumstances of the claimant's retirement from the U.S. Navy on December 1, 2003 in GE, his continued residence with his wife in GE, interrupted only by occasional visits to the U.S., and the expiration of his military transportation entitlement in December 2004, resulted in his no longer meeting the definition of having substantially continuous employment set forth by DOD for eligibility for LQA. Therefore, he is neither eligible for LQA as a local hire employee nor, as previously discussed by the agency, as an employee hired from the U.S.

Conditions for LQA regarding this claim are set forth in USAREUR Regulation 690-500.592 dated June 20, 2003, which is the governing regulation for LQA eligibility on the date of the claimant's hire. Section 5.a. indicates that LQA will be granted for the following types of APF (Appropriated Fund) employees:

(1) U.S. hires in grades GS-09 (or equivalent), WG-11, WL-09, WS-05, and above. This includes U.S. hires selected for entry-level positions with target grades GS-09 and above. Grade restrictions do not apply to applicants selected for career program positions below the GS-09 (or equivalent) level.

(2) Local-hire appointments to positions in grades GS-09 (or equivalent), WG-11, WL-09, WS-05, and above. This includes local hires selected for entry-level positions with target grades of GS-09 and above. Grade restrictions do not apply to applicants selected for career-program positions below the GS-09 (or equivalent) level. Both of the following eligibility criteria must be met:

(a) Before being appointed, the employee was recruited in the United States by the U.S. Government, including its Armed Forces; a U.S. Firm, organization, or interest; or an international organization in which the U.S. Government takes part.

(b) The employee has been in substantially continuous employment by one of the employers in (a) above under conditions that provided for the employee's return transportation to the United States.

The regulation defines “U.S. hire” as “A person who permanently resided in the United States, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the former Canal Zone, or a possession of the United States from the time he or she applied for employment until and including the date he or she accepted a formal job offer. The residence must have been for at least 1 year immediately before accepting a formal job offer. Employees serving on a mandatory mobility agreement are exempt from the 1-year residency requirement.”

The regulation notes that former military members and civilian employees will be considered to have “substantially continuous employment” for up to one year after the date of separation; or when the initial transportation entitlement is lost or extended; or until the retired, separated member or employee uses a substantial portion (50 percent or more) of the entitlement for Government transportation back to the United States, whichever occurs first.

Section 1.b. of the regulation directs it be used with Department of State Standardized Regulations,-Government Civilians, Foreign Areas (DSSR) and Department of Defense (DOD) 1400.25-M, subchapter 1250, Overseas Allowances and Differentials.

It is Department of Defense (DOD) policy, under DOD 1400.25-M, SC 1250.4.3. that:

Overseas allowances and differentials (except the post allowance) are not automatic salary supplements, nor are they entitlements. They are specifically intended to be recruitment incentives for U.S. citizen civilian employees living in the United States to accept Federal employment in a foreign area. If a person is already living in the foreign area, that inducement is normally unnecessary. Individuals shall not automatically be granted these benefits simply because they meet eligibility requirements. .

LQA eligibility criteria properly used to adjudicate this claim are as follows:

USAREUR Regulation 690-500.592 (20 June 2003), Section 5. a. (1) and (2) as summarized above, addressing LQA entitlement for APF employees who are recruited in or from outside the United States or its possessions for positions in grades GS-09 (or equivalent) and above.

DSSR, section 031.1, Quarters Allowances, subsection 031.12, Employees Recruited Outside the United States. (a, b and c) states quarters allowance may be granted to employees recruited outside the U.S., 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

- c. as a condition of employment by a Government agency, the employee was required by that agency to move to another area, in cases specifically authorized by the head of agency.

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

DOD 1400.25-M, SC1250.5.1., LQA states:

- 1.) SC1250.5.1.1. Quarters Allowance Eligibility Policy-Under the provisions of section 031.12b, 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.
- 2.) SC1250.5.1.3.-For a waiver of section 031.12b, DSSR, to be approved, one of the following situations must have occurred:
  - a) SC1250.5.1.3.1.-The sponsoring spouse dies.
  - b) SC1250.5.1.3.2.-Sponsoring spouse becomes physically or mentally incapable of continued employment with the Government.
  - c) SC1250.5.1.3.3.-The couple is divorced or legally separated. (A legal separation is deemed to exist when either the employee or spouse has initiated legal action to dissolve the marriage or one separates from bed and board short of applying for a divorce.)
  - d) SC1250.5.1.3.4.-Sponsoring spouse left the post or area permanently.
  - e) SC1250.5.1.3.5.- Spouses could not maintain a common dwelling due to the relocation of either spouse’s work place.
  - f) SC1250.5.1.3.6.-The employee is an incumbent of a position designated as emergency-essential in accordance with DOD Directive 1404.10.
- 3.) SC1250.5.1.4.-Except for the circumstances described in SC1250.5.1.3.2., a waiver of section 031.12b, DSSR, will not be made for a married employee who accompanied or followed his or her spouse to a foreign area and still resides with that spouse.

- 4.) SC1250.5.1.5.-Section 031.12b, DSSR, will be waived for locally hired U.S. citizen employees who have, immediately prior to appointment, been directly employed by the United States as foreign nationals under third-country citizen contracts or agreements that provided them with living quarters allowance or housing at no cost.

DOD Manual 1400.25-M, Section SC1250.3.7., which defines U.S. Hire as “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.”

The record shows the claimant retired from active service with the U.S. military in GE on December 1, 2003, in Otterberg, GE. He was residing in GE at that time, and upon his retirement was granted a transportation entitlement to return to the U.S. which he has not exercised.

In order to have been eligible for LQA on August 21, 2005 (his date of appointment), the claimant’s employment history would have to have met Section 5.a. (1) or (2) of USAREUR Regulation 690-500.592 (20 June 2003), and DSSR section 031.12a **and b or c** as supplemented by DOD 1400.25-M.

The claimant did not meet either section 5.a. (1) or (2) of USAREUR Regulation 690-500.592 (20 June 2003). He did not meet Section 5.a. (1) because he was not recruited in the United States or its possessions for the GS-12 position. As a result of his military service and retirement he was already residing in GE when he applied for the position (March 15, 2005) and when he was officially appointed to it (August 21, 2005), which constituted his first Federal civilian appointment. In addition, he did not meet the definition of a “U.S. hire” specified in the regulation because the record shows that he was not permanently residing in the U.S. (for at least one year immediately before accepting the formal job offer) from the time he applied for employment (March 15, 2005) until and including the date he accepted the offer of employment (June 14, 2005). For similar reasons, he did not meet the definition of a “U.S. Hire” specified in DOD Manual 1400.M-25, Section 1250.3.7. as previously discussed. The record indicates that he made several short term visits to the U.S. from his residence in GE during the period from November 19, 2004, to August 11, 2005, but was in GE from January 12, 2005, to June 6, 2005, and that he was either in transit or physically back in GE when he accepted the offer of employment. Indeed, from November 19, 2004, through August 11, 2005, he was physically in the U.S. for only 29 days, which can not be construed as permanently residing in the U.S.

The claimant does not meet Section 5.a.(2) of USAREUR 690-500.592 (20 June 2003), because he did not meet all of the eligibility criteria covering local-hire appointments to positions in grades GS-09 and above. Contrary to section 5.a.(2) (a), before being appointed he was **not** recruited in the U.S. by the U.S. Government, including its Armed Forces (he was residing in GE at the time). Unlike section 5.a.(2) (b), he would not meet the definition of “substantially continuous employment” because he was not appointed until after one year from the date of his military separation (December 1, 2003), and did not exercise his initial transportation entitlement within the specified time limits.

The claimant met DSSR section 031.12a, as it was defined at the time of his initial appointment. His actual place of residence in the place to which the quarters allowance applied at the time of receipt thereof would have been fairly attributable to his employment by the United States Government. The criteria is for individuals already living overseas and makes no distinction

between continued residence or the establishment of a new residence as a result of accepting an offer of Federal civilian employment.

Although a former military member, the claimant is not “considered to have substantially continuous employment” under the conditions previously specified in DOD 1400.25-M for employees recruited outside the U.S. DSSR 031.12b requires employees be recruited in the U.S. prior to appointment as a Federal civilian employee overseas. Prior to his appointment as a USAREUR civilian employee the claimant retired from the U.S. military in GE and continued to live there. He was not recruited in the U.S. by the U.S. Government, a U.S. firm, organization, interest, foreign government or international organization in which the U.S. participates and substantially continuously employed by them under conditions providing for his return transportation to the U.S. until his civilian appointment with USAREUR. Nor was he recruited from the U.S. by the U. S. military, then substantially continuously employed by them until the date of his appointment as a Federal civilian employee overseas. Consequently, the claimant did not meet DSSR 031.12b.

Therefore, we find at the time of his appointment, the claimant met DSSR 031.12a, but not b or c, in that he was not required to move as described in 031.12c, and thus he was ineligible for LQA. In addition, the record does not show the claimant met any of the special circumstances of DOD 1400.25-M as described above for waiving DSSR 031.12b, or the conditions specified for crediting DSSR 031.12c.

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. *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. The DA decision regarding the claimant’s eligibility for LQA is not arbitrary, capricious, or unreasonable.

In addition, even if the claimant were led to believe the agency would grant him LQA prior to his appointment, an erroneous offer of LQA does not establish an entitlement to LQA since the claimant failed to meet LQA eligibility at the time of his appointment. In the absence of specific statutory authority, the United States is not liable for the negligent or erroneous acts of its officers, employees, or agents, even though committed in the performance of their official duties. 44 Comp. Gen. 337 (1964). This has been consistently affirmed by the Courts, which have never upheld an estoppel claim against the Government for the payment of money. A rule of estoppel would invite endless litigation over both real and imagined claims of misinformation, imposing an unpredictable and substantial drain on the public fisc. *OPM v. Richmond*, 496 U.S. 414 (1990). As previously discussed, we conclude that the claimant was aware prior to accepting the position that the agency would not grant him LQA. Accordingly, this claim for LQA is denied.

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