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

Claimant: [name]

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

Claim: Request for Living Quarters Allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 08-0106

//Judith A. Davis for

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

7/17/2009

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Date

The claimant is a Federal civilian employee of the Department of the Army at the [agency component] in Stuttgart, 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 May 20, 2008, the agency administrative report (AAR) on February 18, 2009, and the claimant's response to the AAR on March 26, 2009. For the reasons discussed herein, the claim is denied.

The claimant entered the Federal service on January 4, 1998, on an excepted appointment as Logistics Management Specialist, GS-346-9, with the Department of the Army in Uniondale, New York. He resigned from that position on March 6, 1998. He subsequently entered military service on April 1, 1998, in Stuttgart and separated from military service on September 18, 2000, also in Stuttgart. He re-entered military service on September 19, 2000, and separated on March 16, 2001, both while still in Stuttgart. He re-entered the Federal service on May 21, 2001, on a term appointment not to exceed May 20, 2005, as Management and Program Analyst, GS-343-11, with the Department of the Army, U.S. European Command, in Stuttgart. He was not granted LQA at that time because he was a local hire and the position was not designated as hard-to-fill. While in this position, he was involuntarily mobilized by the Army and placed in a leave without pay (LWOP) status from December 10, 2002, until November 18, 2003, and again from January 13, 2005, to June 10, 2007. In the interim, he was converted to a career conditional appointment on May 16, 2004, with the same title and grade, and later on November 11, 2007, his position was converted to Management Analyst, YA-343-02 under the National Security Personnel System. He states that during his final tour with the military, he was accessed back into the active Army in December 2004, subsequently retired from the military on May 31, 2007, and returned from LWOP to his former position at the [agency component] in Stuttgart. Effective April 27, 2008, he was reassigned to [position], still with the [agency component] in Stuttgart. On April 30, 2008, a realignment was processed transferring this position organizationally to [agency component] in Stuttgart.

The claimant asserts that when he was placed back in the active Army in May 2004 until his retirement from the military in May 2007, he acquired a return transportation entitlement which in effect changed his status from when he was hired in May 2001. He states his entitlement to return transportation in his retirement orders indicates his military service was "substantially continuous," his residence in Germany was directly attributable to his military service, and he was hired into his new position at [agency component] within one year of retiring from active duty and had not used any portion of his transportation entitlement prior to accepting the position. He believes he should be granted LQA in this new position. The agency denied his request on April 8, 2008.

The agency states the claimant was a local hire at the time of appointment in May 2001 and was not eligible for LQA at that time because he was not originally recruited in the United States by the Armed Forces but rather entered military service in the overseas area prior to his appointment as a civilian.

Section 031.12 of the Department of State Standardized Regulations (DSSR) 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

The claimant misconstrues the relevant portions of the DSSR pertaining to LQA eligibility. The LQA eligibility criteria outlined in DSSR section 031.12b relate to an employee's circumstances *prior to appointment*. The claimant was not appointed to his current position at [agency component] in April 2008 because he was already on Department of the Army rolls. The claimant was appointed to the position of Management and Program Analyst, GS-343-11, with the Department of the Army, [agency component], in May 2001. From then until the present time, he has never left Department of the Army rolls and was in an LWOP status during his final military tour immediately prior to returning to his position at the [agency component] and subsequent realignment of his current position to [agency component]. Thus, his accrual of a return transportation entitlement back to the United States during his final military tour is not germane in terms of his LQA eligibility status as this occurred after, rather than before, the last civil service appointment that brought him onto the rolls of an executive agency without a subsequent break in service.

In asserting his case for LQA eligibility, the claimant references the following subchapter of Department of Defense Manual 1400.25-M:

> SC1250.5.1.1. Quarters Allowance Eligibility Policy. Under the provisions of Section 031.12b of Reference (b), 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.

These criteria serve only to further define what constitutes "substantially continuous employment" under DSSR section 031.12b. Since the DSSR eligibility criteria relate exclusively to pre-appointment circumstances, the claimant's hiring into the [agency component] position within one year of his military retirement has no bearing on his LQA eligibility status.

The claimant's LQA eligibility status derives from the LQA determination made at the time of his May 21, 2001, appointment to his previous position with the Department of the Army at the [agency component]. We note the claimant has not challenged the LQA determination made at that time. In addition, according to section 178.104(a) of title 5, Code of Federal Regulations, all claims against the United States Government are subject to the six-year statute of limitations

contained in 31 U.S.C. 3702(b) (Barring Act). *Matter of Robert O. Schultz*, B-261461, (November 27, 1995). Unless an individual submits a claim to the appropriate agency before the six year period elapses, the claim on the obligation is barred. The Barring Act, as does any statute of limitations, starts to run when the claim first "accrues." A claim first accrues on the date when all events have occurred which fix the liability, if any, of the United States, entitling the claimant to sue or to file a claim. Thus, we are precluded by law from considering the LQA determination made at the time of the claimant's appointment in May 2001.

Although we are time barred from adjudicating an LQA claim relating to the claimant's May 21, 2001, appointment, we note the claimant was a local hire at the time of appointment in that he was physically residing in the Stuttgart area. The governing regulation at the time of the claimant's appointment in May 2001 was U.S. Army in Europe Regulation 690-500.592, dated March 1, 1999. In regard to local hires, this regulation states:

> LQA may be authorized for appropriated-fund employees selected for identified hard-to-fill positions when they are local hires or individuals hired from the United States who do not meet the 1-year residency requirement. This authorization may be granted only if LQA was authorized by the commander of the funding activity before recruitment.

Since the position to which the claimant was appointed in May 2001 was not designated as hard-to-fill, it would appear the LQA determination made at that time was appropriate.

DoD Manual 1400.25-M specifies overseas allowances are not automatic salary supplements, nor are they entitlements. They are specifically intended as 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. LQA is specifically not designed or intended as a retention incentive.

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. LQA determinations for locally hired employees in foreign areas are made at the time of initial appointment. Because LQA is intended as a recruitment incentive, the LQA determination is not revisited when the employee voluntarily moves to another position in the same foreign area. The agency's action is not arbitrary, capricious, or unreasonable. Accordingly, the claim for an 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.