

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

**Claimant:** [name]

**Organization:** [agency component]  
Defense Intelligence Agency  
United States Africa Command  
Stuttgart, Germany

**Claim:** Request for living quarters allowance  
and associated benefits

**Agency decision:** Denied

**OPM decision:** Denied

**OPM file number:** 10-0043

//Judith A. Davis for

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

7/1/11

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Date

The claimant is a Federal civilian employee of the Defense Intelligence Agency (DIA) in Stuttgart, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of living quarters allowance (LQA) and all associated benefits<sup>1</sup>. We received the claim on July 13, 2010, the agency administrative report (AAR) on August 31, 2010, and additional information from the claimant's former employing agency, the Department of the Army (DA), on February 11, 2011. For the reasons discussed herein, the claim is denied.

In his June 29, 2010, claim request to OPM, the claimant states he was recruited for and accepted a DA "[GS-7/8] position" with the Headquarters, U.S. European Command, in Stuttgart, Germany, in June 2004 while employed at a commercial bank in [city & State, U.S.]. He states that when he inquired how he would be relocated, the hiring official advised him to relocate himself:

Neither the Hiring Official at the organization, nor the Civilian Personnel Advisory Center (CPAC) HR [human resources] Specialist assigned to my action notified me of the necessity of Orders to initiate travel or the requirement to sign a Transportation Agreement to initiate a relocation to OCONUS [outside the continental United States] duty station. I was also not advised that in the absence of these documents, I would be excluded from receiving substantial benefits during my employment in the region.

The claimant states the established practice of HR offices "in this theater" is to only recruit potential employees from the continental United States (CONUS) into GS/GG-09 positions and above and that he was an exception to this practice. He states that Department of State Standardized Regulations (DSSR) allow for individuals recruited from CONUS to receive LQA regardless of grade. The claimant states that after following up, the "CPAC advised that since I was below the GS-09 level at the time of recruitment, I was not eligible to initially receive these benefits, but once I reached the GS-09 level, I would become eligible, due to my recruitment from CONUS, and they would be initiated at that time."

The claimant states that in August 2007, when he "was recruited into a [GG-09/12] position," he "inquired into the initiation process for [his] benefits." He states he was told by his new organization's HR branch he was a local hire and ineligible for "these benefits." The claimant states that "a close review of [his] initial in-processing paperwork revealed that [he] had indeed signed a Transportation Agreement upon [his] arrival into the local community," but was advised that even if he had been hired from CONUS and signed a transportation agreement, he "had no orders directing [his] relocation, so [he] was still ineligible for benefits." The claimant states that after "conversion to DIA [transfer of his position from DA to DIA]" his: "incorrect status as a Local Hire was "locked," and regardless if this status was incorrect or not, it was ineligible for review. Additionally, as I was locked in status as a Local Hire, I remained ineligible for the transportation benefits and subsequent allowances."

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<sup>1</sup> Under 5 CFR 178.102(a)(3), a claimant must receive a final agency claim denial before the claim may be brought before OPM. Therefore, this decision will not address the claimant's request for home leave under 5 U.S.C. 6305(a) or enhanced leave accrual under 5 U.S.C. 6304(b) since the agency has not issued a final decision on these matters.

The AAR states that upon the mass transfer of United States European Command employees, DIA initially deferred to DA's determination regarding the claimant's LQA eligibility, but subsequently reviewed the matter extensively upon prompting by the claimant:

We have carefully examined the information he [the claimant] has provided. It has not persuaded us that the initial Army determination was wrong. Additionally, one cannot suddenly become eligible for LQA benefits if that person was not eligible for them, unless some change in the individual's family situation or some other event recognized in LQA regulations established one's eligibility at a later date.

The record shows the claimant was a CONUS hire for purposes of LQA eligibility determination. The DSSR are the governing regulations for allowances, differentials, and defraying of official residence expenses in foreign areas. Within the scope of these regulations, the head of an agency may issue further implementing instructions for the guidance of the agency with regard to the granting of and accounting for these payments. Thus, Department of Defense Instruction (DODI) 1400.25-M, dated December 1996, and Army in Europe Regulation (AER) 690-500.592, dated June 20, 2003, in effect when the claimant was appointed, implement the provisions of the DSSR but may not exceed their scope; i.e., extend benefits that are not otherwise provided for in the DSSR.

AER 690-500.592, dated June 20, 2003, limits LQA to:

U.S. hires in grades GS-09 (or equivalent), WG-11, W1-09, 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 GS-09 (or equivalent level).

This AER also provided for granting LQA to "employees selected for identified hard-to-fill positions" who were "hired from the U.S...at any grade."

The GS-303-7/8 DA vacancy announcement for the claimant's initial OCONUS job offer did not provide for LQA. While it was not identified as a career program position, the announcement shows a career ladder to GS-8. Since the claimant's GS-8 full performance level was below GS-9, the claimant was not eligible under the first AER criterion. Because this job was not identified as hard-to-fill on the AER's hard-to-fill position list, the claimant was not eligible for LQA under the second AER criterion. Therefore, the claimant was not eligible for LQA at the time of his initial OCONUS hire by DA.

The claimant points to an "[i]nformational document distributed by the Stuttgart, Germany local CPAC office confirming LQA benefits for hires recruited from CONUS." This document consists of frequently asked questions about LQA and other overseas allowances and answers to those questions. The claimant highlighted the previously discussed AER criteria and also highlighted the following provisions relating to local hires:

Additionally, local hires, immediately prior to appointment, must have been recruited in the U.S. by the U.S. Government, including the Armed Forces; a U.S. firm, organization, or interest; etc., under conditions that provided for the employee's return transportation to the United States:

This appears to relate to the claimant's assertion that he signed a transportation agreement on his arrival in Germany, thus further supporting his eligibility for LQA. This argument is unavailing since the requirement for such an agreement pertains to local hires and the claimant was a CONUS hire. In addition, the transportation agreement provided by the claimant does not provide for return transportation to the United States or the other enumerated territories or possessions as required under DSSR section 031.12 to meet eligibility for LQA as a local hire; it is limited to "transfer in the same or to a different overseas geographic locality."

Contrary to the claimant's assertion, he did not become eligible for LQA when he applied and was selected for an OCONUS GG-09 position. As discussed in Department of Defense Manual 1400.25-M, Subchapter 1250, Section D (December 1996), in force at the time of the claimant's 2004 appointment, LQA determinations are made at the time of initial appointment:

1. 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.

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 or information provided by a Government employee cannot bar the Government from denying benefits which are not otherwise permitted by law. See *Office of Personnel Management v. Richmond*, 496 U.S. 414, *rehearing denied*, 497 U.S. 1046, 111 S. Ct. 5 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed.Cir. 1997); and 60 Comp. Gen. 417 (1981). Therefore, the claimant may not rely on the erroneous advice he appears to have received from a CPAC official that he would become eligible for LQA once he reached the GS-09 level since he was recruited from CONUS.

The claimant also states he requested "waivers of the eligibility requirements for LQA" as provided for in the AER and DSSR. OPM's claim adjudication authority under 31 U.S.C. § 3702(a)(2) is narrow and limited in the case of LQA claims to determining whether a claimant is eligible for LQA and, if so, whether the claimant has received LQA in accordance with the DSSR and agency policies and procedures. OPM is not granted waiver authority over any provisions of either the DSSR or implementing agency regulations. An agency's decision to waive LQA eligibility requirements is, by its very nature, at the discretion of the agency and is not subject to OPM review under 31 U.S.C. § 3702(a)(2).

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. In this case, the claimant did not meet DA eligibility requirements for LQA as discussed previously in this decision. DA's action is not arbitrary, capricious, or unreasonable as it is consistent with its own published regulatory guidance, nor is DIA's decision to defer to DA LQA determinations for DA employees transferred to DIA. Therefore, the request for LQA is denied.

Claims by Federal employees under 31 U.S.C. § 3702(a)(3) for travel, transportation, and relocation expenses incurred are under the jurisdiction of the General Services Administration's

Civilian Board of Contract Appeals and are not subject to review under OPM's claim adjudication authority in 31 U.S.C. § 3702(a)(2). The claimant's request for additional retirement credit is also not subject to review under 31 U.S.C. § 3702(a)(2). Therefore, these portions of the claim are denied for lack of jurisdiction.<sup>2</sup>

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.

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<sup>2</sup> The claimant has not stated a statutory or regulatory basis for crediting "1.5 days towards retirement for every day worked while a DoA Civilian" or "1.7 days towards retirement for every day worked as a DoD civilian." Documentation in the file shows the claimant is covered under the Federal Employee's Retirement System codified in chapter 84 of title 5, United States Code, and the claimant should review same to determine how to proceed on this portion of his claim.