

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

Claimant: [name]

Organization: Department of the Army
Kaiserslautern, Germany

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 12-0001

//Judith A. Davis for

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

5/31/2012

Date

The claimant is a Federal civilian employee of the Department of the Army in Kaiserslautern, 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 on November 18, 2011. For the reasons discussed herein, the claim is denied.

The claimant was originally recruited to Germany by the private United States firm L3 Communications to work under a contract between L3 and the Department of the Air Force (Air Force). His employment with that firm commenced on February 28, 2009. After his position with L3 was identified for conversion to in-sourcing, the claimant was competitively appointed to a position with Air Force effective April 26, 2010. This position afforded him both LQA and a transportation agreement back to the United States, the latter upon completion of 22 months service. The claimant subsequently applied and was selected for a position with Army to which he transferred on August 14, 2011, after being informed by Army that his LQA would be discontinued in the new position.

The agency states the claimant is ineligible for LQA and that he had been erroneously granted such by Air Force. Specifically, they state he was a local hire and his employment with L3 did not provide for his return transportation back to the United States, and that Air Force improperly interpreted Department of Defense (DoD) implementing instructions for LQA in waiving these requirements for former U.S. citizen contractor employees in their own internal policy guidance.

The claimant counters that his transportation agreement with Air Force "overrides his transportation agreement with L3" and states that Air Force "under guidance of the C2C [Contractor to Civilian] program allowed for LQA and the transportation agreement under proper DoD directive (USAFE Instructions 36-705) to convert civilian contractors back to civilian GS." The claimant states the position he occupies is "an LQA Supported Position" and he raises the issue of whether Army has "the authority to reverse or over-ride [Air Force] authority in recruitment of GS employees."

The Department of State Standardized Regulations (DSSR) set forth basic eligibility criteria for the granting of LQA to U.S. Government civilian employees. All individuals appointed to the Federal service overseas in appropriated fund positions are subject to these criteria in determining their LQA eligibility. Although an agency may offer LQA as a potential benefit for any individual position, the employee selected for the position must be determined eligible before this allowance may be granted. This applies equally to former contractors selected for civilian positions as for any other individuals appointed to the Federal service. The determination of LQA eligibility is separate and distinct from the recruitment process. Although agency implementing guidance such as that contained in DoD Instruction (DoDI) 1400.25, Volume 1250, and cited by the claimant further define the conditions under which allowances may be granted, they may not disturb the fundamental eligibility criteria of the DSSR and may not be applied unless the employee has first met these 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

In its description of circumstances surrounding an employee's recruitment and employment occurring immediately "prior to appointment" as the basis for LQA eligibility, the DSSR makes clear that eligibility is established at the time of appointment; i.e., based on the circumstances existing prior to the employee's initial appointment to the Federal service. Within this context, the claimant did not meet basic LQA eligibility criteria under DSSR section 031.12b at the time of his appointment to the Federal service with Air Force on April 26, 2010. Prior to his appointment, he had been recruited in the United States by the United States firm L3 and had been in continuous employment by that firm. However, his employment with L3 was not "under conditions which provided for his return transportation to the United States" or one of its enumerated territories or possessions.

The claimant's December 19, 2008, offer letter from L3 which described his employment benefits stated the following in regard to return transportation:

A repatriation payment will be made to you after successful completion of continued employment subject to the following provisions. The repatriation payment will be made upon our receipt of documentation that you have moved at least 400 miles from your last LSG [L3 Communications Services Group] duty location and that your employment termination is classified as "eligible for rehire." The payment schedule is as follows:
\$5,000 after the completion of three (3) full years of service from the official hire date;
\$7,500 after the completion of four (4) full years of service from the official hire date;
\$10,000 after the completion of five (5) full years of service from the official hire date.

DSSR section 031.12b requires conditions be in place to specifically ensure return transportation to the United States or one of the enumerated locations. The L3 "repatriation" payment cited above was contingent on the claimant's completion of certain conditions and does not expressly

and exclusively provide for returning the claimant to the United States. It would be paid only under the length of employment schedule in the claimant's L3 offer letter, so long as he moved at least 400 miles from his last L3 duty location and his employment termination was classified as "eligible for rehire." The payment would be made after the actual relocation had occurred, was not contingent on return to the United States, and could be used to offset the cost of relocation to another overseas location rather than back to the United States. In addition, there was no return transportation provided for employment of less than three years duration, and the staggered nature of the payment schedule would not necessarily cover the full cost of the relocation. Thus, the language of the agreement does not ensure return transportation to the United States or one of the enumerated locations in DSSR section 031.12b or full provision for that relocation, but rather stipulates a series of conditions under which relocation to an unspecified destination would be provided. The claimant did not meet these conditions because he would not have been eligible for the relocation payment until after he had completed three years of employment with L3 in February 2012. Therefore, at the time of his appointment with Air Force, he was not employed by L3 "under conditions which provided for his return transportation to the United States" or one of the enumerated locations, nor was he even eligible for the limited relocation payment provided by that firm as he had only been employed by them for about one year. The effect of DSSR section 031.12b is to allow LQA only in those cases where the employee has accepted employment in an overseas area with specific provision to return to the United States at the conclusion of that employment. Coupled with the requirement that the employee have been recruited from the United States by that employer, this serves to allow LQA only to those individuals whose residence in the overseas area is not seemingly intended as permanent or protracted.

Because LQA eligibility is based on circumstances existing prior to appointment, the claimant's subsequent accrual of a transportation agreement back to the United States by Air Force, regardless of the propriety of the granting of this agreement,¹ has no bearing on his LQA eligibility determination as of April 26, 2010.

The claimant cites the following provision of United States Air Forces in Europe (USAFE) Instruction 36-705², which provides Air Force implementing guidance on benefits and allowances for United States employees in USAFE, as supporting his request for LQA:

3.2.3.2. Former contractor employees. IAW DoDI 1400.25-V1250, Encl.2,1.e., the requirements of DSSR 031.12b. are waived if local-hire employees were previously employed by a contractor under the status of a member of the civilian component, as defined by Art.I.1.b. of the NATO Status of Forces Agreement and had been provided a

¹ The agency questioned the validity of the transportation agreement afforded the claimant by Air Force on the basis that such an agreement may only be conferred if a corresponding previous agreement, either through military service or contractor employment, was in existence. We do not address this issue as it is not germane to our LQA eligibility determination.

² USAFE Instruction 36-705 is dated July 25, 2011, and thus is not applicable to determination of the claimant's LQA eligibility upon his appointment with Air Force on April 26, 2010. However, in relation to paragraph 3.2.3.2., this Instruction incorporates the verbatim language of USAFE policy memorandum, Subject: Appointment of OCONUS US Government Contractor Employees as Air Force Civil Service Employees, dated August 18, 2009, which preceded the claimant's appointment.

quarters allowance or housing at no cost. Additionally, such individuals must be appointed, i.e. enter on duty, within 30 calendar days after termination of the contractor employment.

However, DoDI 1400.25-V1250, Enclosure 2, paragraph 1.e., on which the above paragraph 3.2.3.2. is purportedly based, reads as follows:

Section 031.12b of Reference (b) [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 LQA or housing at no cost.

The Air Force's citation of this DoDI waiver provision to grant LQA to locally-hired former contractor employees is inexplicable.³ The DoDI refers to third-country citizens (e.g., individuals employed by the United States in Germany who are citizens of another NATO country) employed by the United States as foreign nationals who acquire United States citizenship during the course of that employment prior to their appointment. We are unable to reconcile the Air Force's equation of this category of employees, non-United States citizens employed under contract directly by the United States who later acquire citizenship and are subsequently appointed to the Federal service, to former contractor employees (particularly those with United States citizenship by birth) employed by private firms. This directly contradicts the plain language of DoDI 1400.25-V1250, Enclosure 2, 1.e., and disregards the non-discretionary language of DSSR section 031.12b. Therefore, we may not rely on the language of the August 18, 2009, USAFE policy memorandum (later incorporated as USAFE Instruction 36-705, paragraph 3.2.3.2.) in determining the claimant's LQA eligibility as its basic premise is profoundly flawed. Further, the claimant, as a former contractor employee directly employed by a private United States firm, who has provided no information to indicate he was anything other than a United States citizen while so employed, is not eligible for waiver of the requirements of DSSR section 031.12b under DoDI 1400.25-V1250, Enclosure 2, 1.e.

It is also relevant to note that DSSR section 031.12c specifically states:

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

This is reiterated in DoDI 1400.25-V1250, paragraph 4a, which identifies among the authorities delegated to the Heads of the DoD Components in accordance with the DSSR, which may be further delegated in writing, the following:

(c) The authority under section 031.12c of Reference (b) [DSSR] to waive the requirements of section 031.12b of Reference (b) in individual cases when unusual circumstances exist.

³ Discretionary waiver authority is delegated to the heads of agencies under DSSR section 013 and thus is not under OPM's purview. However, the use of the mandatory term "will be waived" in DoDI 1400.25-V1250, Enclosure 2, paragraph 1.e., removes it from the realm of the discretionary.

Neither the DSSR nor DoDI 1400.25-V1250 delegate to the agencies authority to institute an ongoing waiver of the requirements of DSSR section 031.12b for entire categories of individuals as in USAFE Instruction 36-705, paragraph 3.2.3.2. Rather, this authority is limited to "individual cases when unusual circumstances exist." DoDI 1400.25-V1250, Enclosure 2, 1.c.-e., specifically lists those circumstances considered appropriate "[for] a waiver of section 031.12b of [the DSSR] to be approved." The recruitment and appointment of former contractor employees to the Federal service is neither listed nor would it be regarded as an "unusual circumstance."

The claimant questions Army's authority to reverse Air Force's decision to grant him LQA. However, the granting of allowances and benefits such as LQA derives from the relevant authorizing statutes and regulations governing the expenditure of public funds. No entitlement exists for an employee to continue receiving an allowance or benefit that is found to have been granted improperly; i.e., contrary to the specific provisions of the authorizing statute or regulations. Thus, Army was responsible for ensuring that any continuance of LQA on their part was based on proper application of the authorizing regulations, as is expressly provided in Army's implementing LQA guidance, Army in Europe Regulation (AER) 690-500.592, paragraph 7a.(3), which states that LQA will be granted to employees in specified positions who meet all of the following conditions:

- (a) Are transferring to the European theater from another overseas Government activity or agency without a break in service.
- (b) Meet basic eligibility criteria in DSSR, section 031.11 or 031.12a and b.
- (c) Were already receiving or eligible to receive LQA at the time of selection.

Thus, AER 690-500.592 allows for the continuance of LQA for employees transferring to Army from another Government agency, but only if the employee meets basic DSSR eligibility criteria, thus recognizing the DSSR as the primary determinant of LQA eligibility.

The claims jurisdiction of OPM under section 3702(a)(2) of title 31, United States Code, is narrow and limited to consideration of whether monies are owed for the stated claim. Therefore, we may not address other unrelated issues raised by the claimant, such as the "career progression and development" of former contractor employees in-sourced by DoD. In addition, we do not address other issues raised by the claimant regarding the legality of his appointment with Air Force and subsequent recruitment by Army as these are not germane to our determination of his LQA eligibility.

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