

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

Claimant: [name]

Organization: Camp Smedley D. Butler
United States Marine Corps
Okinawa, Japan

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 12-0019

/s/ Judith A. Davis for

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

10/9/2012

Date

The claimant requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of living quarters allowance (LQA) for the term of his appointment from November 9, 2009, to November 11, 2011, when serving as a Federal civilian employee of the U.S. Marine Corps (USMC) at the Marine Corps Base (MCB) Camp Smedley D. Butler in Okinawa, Japan. We received the claim from the claimant's representative (hereinafter referred to as "claimant") on March 22, 2012, and the agency administrative report (AAR) on April 27, 2012. For the reasons discussed herein, the claim is denied.

The claimant was officially separated from military service at MCB Camp Butler, Okinawa, Japan on July 31, 2001. He was recruited for and accepted employment with the United States firm Computer Sciences Corporation (CSC) while residing in Okinawa, Japan, effective from July 2001 to November 2009. He was subsequently appointed to the Federal service at the MCB Camp Butler on November 9, 2009.

At the time of the claimant's appointment to the Federal service, the agency initially concluded the claimant was entitled to and thus granted him LQA. On January 19, 2010, the MCB's Civilian Human Resources Office (CHRO) notified the claimant that their initial LQA eligibility determination was erroneous and his LQA was being retroactively terminated. The basis for this determination was that he had not been recruited in the United States prior to his Federal service appointment, and he was not appointed within one year from the date of separation from the armed forces.

The claimant asserts he is eligible for LQA as a United States hire under Section 031.11 of the Department of State Standardized Regulations (DSSR), which set forth basic eligibility criteria for the granting of LQA. To support his assertion, he states his permanent home is in Plainsboro, New Jersey, where he had originally intended to return after separating from military service; the CSC recruited him from the United States and transported him to Dumfries, Virginia, for training and new hire processing; and he remained employed with CSC until he began Federal service in 2009.

Under Section 031.11 of the DSSR covering employees recruited in the United States:

Quarters allowances prescribed in Chapter 100 may be granted to employees who were recruited by the employing government agency in the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the possessions of the United States.

The DSSR contains 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. See DSSR Section 013. Thus, Department of Defense Instruction (DoDI) 1400.25-V1250 implements the provisions of the DSSR, but may not exceed its scope; i.e., extend benefits that are not otherwise provided for in the DSSR. However, an LQA applicant must fully meet the relevant provisions of the DSSR before the supplemental requirements of the DoDI or other agency implementing guidance may be applied.

Pursuant to DSSR Section 031.11, DoDI 1400.25-V1250 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 plain language of the DSSR of “recruited by the employing government agency in the United States” clearly connotes physical presence in the United States at the time of recruitment. The unambiguous language does not allow for a more expansive interpretation; e.g., the maintenance of a residence or legal domicile in the United States. Whether an employee is deemed to be recruited in the United States or outside the United States is dependent on the location of the employee when recruited, not on the existence of a legal residence at some place other than where the employee is located at that time. Therefore, the claimant's maintenance of legal residency in New Jersey during his military service has no bearing on his LQA eligibility under DSSR Section 031.11.

The claimant does not dispute that he was physically residing in Okinawa when he applied and was selected for the Federal service position. As evidenced by the information provided by the agency, all of the recruitment actions taken by the agency, from the job announcement to position selection, occurred while the claimant was physically residing in Okinawa. The position was recruited locally (Area of Consideration: Okinawa-wide). The vacancy announcement stated: “This position does not incur overseas allowances. Payment of travel and transportation expenses is not authorized. However, anyone on a transportation agreement with LQA entitlements may be granted continuance.”

Marine Corps Base Japan (MCBJ) Order P12000.2A, Subject: Civilian Human Resources Office (CHRO), U.S. Employment/Classification Section, Chapter 16, Living Quarters Allowance, provides the following policy on granting LQA to local hires:

LQA is not authorized where there are qualified locally available candidates for hire, except when the selectee is currently receiving LQA from MCBJ, or another DoD agency in Okinawa... Applicants currently receiving LQA from another DoD component on island may be granted continuance of LQA at management's discretion.

As the position in question was the claimant's initial Federal civilian appointment, he was not already receiving LQA when selected and thus was not eligible for continuance. Consequently, the claimant is not eligible for LQA under the plain language of DSSR Section 031.11 because he was not residing in the United States or one of the enumerated territories or possessions when he was recruited by MCB Camp Butler.

Under Section 031.12 of the DSSR covering employees recruited outside the United States:

Quarters allowances prescribed in Chapter 100 *may* [emphasis added] 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 [italics added]

The claimant asserts he is eligible for LQA as a United States hire under DSSR Section 031.11 and alternatively under Section 031.12b, based on his having been recruited by CSC from the United States and having maintained substantially continuous employment during the period beginning with his discharge from military service until his appointment to the Federal service.

The "substantially continuous employment" concept is introduced under DSSR Section 031.12b covering employees recruited outside the United States. "Substantially continuous employment" must be with the *employer* (singular) which recruited the employee in the United States immediately prior to appointment and induced the employee to accept overseas employment. Prior to his civil service position, the claimant was recruited by the United States firm CSC while on active duty military service at MCB Camp Butler. The CSC letter offering him the position was dated June 14, 2001, and was addressed to him in Okinawa. The claimant has not submitted any documentation or evidence establishing that CSC recruited him in the United States. Though he maintained a legal domicile in Plainsboro, New Jersey, there is no mention of an intervening residency at this or another United States dwelling occurring between his separation from military service and CSC employment, during which time he may have been recruited in the United States.

The claimant states he was recruited from the United States by CSC as evidenced by the repatriation agreement issued him by that firm. However, any transportation benefits that may have been provided to the claimant by CSC for use at the conclusion of his employment with that firm do not alter the basic fact that he was not residing in the United States when he was recruited by CSC. In his appeal letter, he also states CSC "...transported him to the United States for training and new hire processing." Had the claimant been residing in the United States at the time of recruitment by CSC, as required for consideration as a United States hire, CSC would not have transported him to the United States for training and new hire processing. We

conclude his brief return to the United States from Okinawa was transitory and incidental to the requirements of employment with CSC and does not constitute his having been recruited there.

The record shows that prior to his Federal service appointment, the claimant was employed by CSC. The claimant was physically residing in Okinawa when he was recruited by CSC in 2001; he was not recruited by CSC in the United States or one of its territories or possessions. Rather, the claimant was recruited in the United States by the USMC, as evidenced by his Department of Defense Form 214 (DD214) showing his "place of entry into active duty" as Philadelphia, Pennsylvania. His subsequent employment by CSC broke the continuity of employment by a single employer (i.e., "such" employer that recruited him in the United States) for purposes of LQA eligibility under DSSR Section 031.12b for employees recruited outside the United States.

Supplementing DSSR Section 031.12b, DoDI 1400.25-V1250, Enclosure 2, paragraph 1a, states:

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.

In its January 19, 2011, review of his LQA eligibility, the agency concluded the claimant's LQA eligibility expired on July 31, 2002, one year after he separated from military service. The claimant, citing *Zervas v. U.S.*, 43 Fed. Cl. 757, 762 (Fed. Cl. 1999), counters that since his "entitlement to Government-paid transportation back to the United States [acquired from his military service] did not expire before he obtained new employment with CSC, his break in service was not determinative of his entitlement to LQA." However, *Zervas* is not applicable to his claim because *Zervas* contemplates an individual moving from a former military or U.S. Government civilian position to another U.S. Government civilian position before the individual's entitlement to return transportation to the U.S. expires. In the claimant's case, his intervening employment by CSC renders any retention of transportation benefits from his military service irrelevant for purposes of establishing eligibility under DSSR Section 031.12b.

DSSR Section 013 permits the heads of the using agencies to issue such further implementing regulations as they deem necessary, within the scope of the DSSR, for the guidance of their agencies with regard to the granting of and accounting for LQA. Accordingly, DoDI 1400.25-V1250 specifies that overseas allowances are not automatic salary supplements, nor are they entitlements.¹ They are specifically intended as recruitment incentives for U.S. citizen civilian

¹ The claimant cites *Thomas v. United States*, No. 10-303 (Fed.Cl. Sept. 7, 2011), to support his assertion that he is entitled to LQA. In *Thomas*, the court held that it was mandatory for the agency to compensate an employee entitled to LQA upon satisfaction of the conditions outlined by DSSR requirements. However, *Thomas* is not applicable in the present case because the claimant does not meet basic DSSR requirements. Regardless, in a subsequent decision, the Court of Federal Claims rejected the findings in *Thomas* and instead upheld the statutory and regulatory language as permissive, giving agencies discretion in determining whether to grant LQA to agency employees. See *Mark Roberts v. United States*, No.10-754C, 2012 WL 1825278 (Fed.Cl. Apr. 30, 2012, reissued May 21, 2012).

employees living in the United States to accept Federal employment in a foreign area. If a person is already living in a 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 law, 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). Therefore, that the claimant was initially found eligible for and received LQA based on the agency's review of his LQA questionnaire does not confer eligibility not otherwise permitted by statute or its implementing regulations.

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 Office of Personnel Management. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States Court.