

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

**Claimant:** [name]

**Organization:** Department of the Navy  
Atsugi, Japan

**Claim:** Living quarters allowance, 45-day annual  
leave accumulation, and home leave

**Agency decision:** Denied

**OPM decision:** Denied

**OPM file number:** 12-0038

/s/ Linda Kazinetz for

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Robert D. Hendler  
Classification and Pay Claims  
Program Manager  
Agency Compliance and Evaluation  
Merit System Accountability and Compliance

2/4/14

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Date

The claimant is a Federal civilian employee of the Department of the Navy in Atsugi, Japan. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's termination of his living quarters allowance (LQA) and other associated overseas benefits. We received the claim on September 18, 2012, the agency administrative report (AAR) on November 23, 2012, and the claimant's comments on the AAR on December 9, 2012. For the reasons discussed herein, the claim is denied.

The claimant retired from military service in Atsugi, Japan, on August 31, 2002. He did not use any of his military return transportation back to the United States, and the record shows the entitlement was extended to December 18, 2008. While residing in Atsugi, the claimant accepted employment, effective December 16, 2002, to a GS-7 position which conferred neither LQA nor return transportation back to the United States. He subsequently applied for, was offered, and accepted his current GS-9 position assigned to the same Command, effective May 27, 2007.

The agency authorized LQA, home leave, and 45-day annual leave accumulation upon the claimant's appointment to the GS-9 position, because he was considered to be in "substantially continuous employment" from military service pursuant to Department of Defense Instruction (DoDI) 1400.25-M, Volume 1250 (V1250). A June 9, 2009, memo from the Satellite Human Resources Office (HRO), Atsugi, Japan, states the agency apparently approved LQA based on the claimant's "non-use of his military transportation entitlement resulting from his separation from the Military back in August 2002."

However, in a February 16, 2010, letter from Commander United States Naval Forces, Japan, the claimant was notified that the initial LQA eligibility determination was incorrect and his LQA and other associated overseas benefits would be retroactively terminated to May 2007. The agency states the claimant was "...not recruited into a position that offered LQA within 1 year from the date [the claimant] retired from military service which provided [the claimant] return transportation back to the United States."

DoDI 1400.25-V1250 specifies that 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.

In keeping with the stated purpose of LQA as a recruitment incentive, LQA eligibility is established at the time of initial appointment. This is based on the Department of State Standardized Regulations (DSSR), which set forth basic eligibility criteria for granting LQAs. Although agency implementing regulations such as that contained in DoD 1400.25-M dated December 1996 and in effect at the time of the claimant's appointment in December 2002, further defines 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 [italics added]

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. The claimant met the basic LQA eligibility criteria under DSSR section 031.12b at the time of his appointment to the Federal service. Although eligible, he was appointed to the Federal service on December 16, 2002, to the GS-7 position which was, as stated in the AAR, a "local announcement which did not provide a Transportation Agreement" and did not provide for LQA. Therefore, he was not provided LQA at the time of his initial hire by the Navy. Any subsequent position changes are not "appointments" but rather internal placements occurring within the context of that initial appointment. In other words, LQA may only be conferred at *the time of appointment* if eligibility requirements are met and if the agency has offered it as a recruitment incentive for the position. LQA may not be conferred as a result of a later position change except as permitted by DoD 1400.25-M in the case of a management-generated relocation to another area. Since any subsequent positions held by the claimant after his December 16, 2002, appointment do not constitute his "initial" selection, they are rendered inapplicable for LQA purposes.

In his claim request to OPM, the claimant states:

I had a travel entitlement to home of selection from the US Navy extended...until 18 Dec 2008 with an option to extend a maximum to 18 Dec 2009. I did not extend it since HRO Yokosuka issued me a 24 month Transportation agreement...

When HRO Yokosuka refused to renew my Agreement, I was placed in a position of being stranded in Japan with my family and household goods...I feel this decision to terminate my allowances was arbitrary and capricious. I had all allowances including LQA and Transportation Agreement and accepted the job under those terms. I had the

allowances for 3 years, had I known the transportation agreement would not be granted, I could have used my military transportation to return home. [underlining in the original]

Because LQA eligibility is based on circumstances existing prior to appointment, the status of the claimant's military transportation entitlement back to the United States has no bearing on his LQA eligibility determination as of May 27, 2007.<sup>1</sup>

The agency's February 2010 letter to the claimant references Chapter 4 of the Joint Travel Regulations (JTR), stating:

...[The JTR] provides eligibility requirements for an employee to negotiate a transportation agreement. Specifically, Paragraph C4002B1c requires eligibility determinations for travel and transportation allowances must be determined at the time of appointment, or at the time the employee loses eligibility for return travel and transportation allowances to avoid misunderstandings later... Your initial appointment to a position in the OCONUS area was in December 2002. At that time, management decided not to offer travel and transportation entitlements.

In his AAR comments to OPM, the claimant states:

The next claim is that per the DOD Joint Travel Regulations (JTR) reads "must be determined at the time of appointment, or at the time the employee loses eligibility for return travel benefits." This decision was based solely on the first statement "[d]etermined at the time of appointment" and disregarded the latter part of "or at the time the employee loses eligibility for return travel benefits". As I stated in my claim, my transportation agreement was valid until Dec 2008. When I initially entered the civil service in Dec 2002, I had asked for an LQA agreement, HRO informed me that since my position was only offered within Japan and not world-wide I was not eligible. They failed to inform me of the waiver process.

We conclude the claimant is asserting that, by the agency's failing to advise him of his rights provided for by the JTR, he was unable to take timely, adequate action to negotiate a transportation agreement. OPM's claims adjudication authority under section 3702(a)(2) of title 31, United States Code (U.S.C.), is narrow and limited in the case of overseas allowance claims to determining whether a claimant is eligible for certain allowances and, if so, whether the claimant has received them in accordance with agency policies and procedures. However,

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<sup>1</sup> DoD 1400.25-M specifies that former military and civilian members are 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 uses any portion of the entitlement for Government transportation back to the United States, *whichever occurs first*. The claimant's retirement from military service occurred on August 31, 2002; thus, regardless that his military transportation entitlement was extended to December 2008, his period of substantially continuous employment under DoD 1400.25-M ended one year later on August 31, 2003.

agency decisions regarding transportation agreement negotiations with employees are at the discretion of the agency and are not subject to review under 31 U.S.C. 3702(a)(2)<sup>2</sup>.

Furthermore, 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, information, or actions of 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 agency did not explain waiver-related information or erred in its advice to the claimant when it found him eligible for LQA, a determination later rescinded, does not confer eligibility not otherwise permitted by statute or its implementing regulations.

The agency's February 2010 letter to the claimant explains the decision to approve 45-day annual leave accumulation and home leave upon his promotion to the GS-9 position was erroneous, stating in pertinent part:

Paragraph 630.602 [of title 5, Code of Federal Regulations (CFR)] entitles an employee to home leave when [5 U.S.C. 6304(b)] is met regarding eligibility for the accumulation of a maximum of 45 days of annual leave. At the time of your appointment in December 2002, you would have been eligible for this entitlement had management offered it as an incentive since you were originally recruited in the United States for service in the military, had been in substantially continuous employment and had return transportation entitlements back to the United States upon completion of military service. However, in May 2007, when you were promoted, you were originally recruited in the United States and had return transportation entitlements; however, you were no longer "substantially continuously" employed since it had been longer than a year since you left military service. Your civilian service between December 2002 and May 2007 did not afford you return transportation entitlements and couldn't be used for eligibility determinations. Since you do not meet the requirements in [5 U.S.C.] to accumulate a maximum of 45 days of annual leave, your eligibility for home leave in May 2007 was erroneous and must be corrected.

Eligibility for 45-day annual leave accumulation under specified conditions is established by statute without provision for the exercise of discretionary authority by the agency. Eligibility criteria for 45-day annual leave accumulation are set forth in 5 U.S.C. 6304:

(b) Annual leave not used by an employee of the Government of the United States in one of the following classes of employees stationed outside the United States accumulates for use in succeeding years until it totals not more than 45 days at the beginning of the first full biweekly pay period, or corresponding period for an employee who is not paid on the basis of biweekly pay periods, occurring in a year:

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<sup>2</sup> We note that travel, transportation and relocation claims brought under 31 U.S.C. 3702(a)(3) fall under the jurisdiction of the General Services Administration's Civilian Board of Contract Appeals. See <http://www.cbca.gov/>.

- (1) Individuals directly recruited or transferred by the Government of the United States from the United States or its territories or possessions including the Commonwealth of Puerto Rico for employment outside the area of recruitment or from which transferred.
- (2) Individuals employed locally but –
  - (A)(i) who were originally recruited from the United States or its territories or possessions including the Commonwealth of Puerto Rico but outside the area of employment;
    - (ii) who have been in substantially continuous employment by other agencies of the United States, United States firms, interests, or organizations, international organizations in which the United States participates, or foreign governments; and
    - (iii) whose conditions of employment provide for their return transportation to the United States or its territories or possessions including the Commonwealth of Puerto Rico; or
  - (B)(i) who were at the time of employment temporarily absent, for the purpose of travel or formal study, from the United States, or from their respective places of residence in its territories or possessions including the Commonwealth of Puerto Rico; and
    - (ii) who, during the temporary absence, have maintained residence in the United States or its territories or possessions including the Commonwealth of Puerto Rico but outside the area of employment.
- (3) Individuals who are not normally residents of the area concerned and who are discharged from service in the armed forces to accept employment with an agency of the Government of the United States.

The claimant asks OPM to reconsider his agency's decision to terminate his 45-day annual leave accumulation and home leave, but he does not present a rationale as to why he meets eligibility requirements. The agency stated the claimant met the requirements set forth in 5 U.S.C. 6304(b) in December 2002; thus, we will discuss his eligibility for 45-day annual leave accumulation upon appointment to the GS-7 position. The claimant did not meet 6304(b)(1) because he was not directly recruited or transferred by the Government from the United States for employment in Japan. Rather, the claimant was already physically residing in Japan when he was recruited by the agency.

Despite the agency's assertion, the claimant did not meet 6304(b)(2)(A) because he did not meet the three separate requirements under (b)(2)(A)(i)-(iii) as required by law. He was appointed to the GS-7 position after retiring from active duty military service and, as addressed in a previous compensation claim decision issued by OPM, OPM Ref # 1996-01103 (See at <http://www.opm.gov/policy-data-oversight/pay-leave/claim->

decisions/decisions/1996/60110300/), the term “employment” is restricted to civilian employment:

The “substantially continuous employment” test in (b)(2) applies only when an individual is moving from one civilian (or private sector) position to a civilian position in the federal sector. However, members of the armed forces are not “employees,” nor is their tenure in the armed services considered “employment.” Through the definitions in section in [sic] 5 U.S.C. 6301(2), the term “employee,” as used in section 6304, incorporates the definition of employee in 5 U.S.C. 2105, which expressly applies to persons appointed into the civil service. By contrast, subsection (b)(3) expressly provides [sic] applies to persons discharged from the armed forces. Therefore, if a civilian employee hired overseas claims entitlement to home leave based on prior military service, the applicable subsection is (b)(3).

The claimant did not meet 6304(b)(2)(B) because at the time of employment he was not temporarily absent from the United States for travel or formal study; he was in Japan performing active military service.

The claimant did not meet 6304(b)(3) because, regardless of any consideration as to whether he was “normally resident” of Japan, he was not *discharged* from service in the armed forces to accept Federal civilian employment but rather *retired* from such service. See OPM File Number 11-0021 at <http://www.opm.gov/policy-data-oversight/pay-leave/claim-decisions/decisions/>. Further, the claimant had been residing in Japan, and had been retired from the military for over three months at the time of his Federal civilian employment with the Navy. Therefore, he did not meet this requirement because he did not move directly from his military position to a civilian Federal service position.

The controlling regulations for home leave are contained in 5 CFR 630.602, which states:

An employee who meets the requirements of section 6304(b) of title 5, United States Code, for the accumulation of a maximum of 45 days of annual leave earns and may be granted home leave in accordance with section 6305(a) of that title and this subpart.

Thus, the granting of home leave is dependent on eligibility for 45-day annual leave accumulation under section 6304(b). In addition, the use of the term "may be granted" rather than "shall (or will) be granted" indicates that the granting of home leave is discretionary on the part of the agency. Since the claimant was not eligible for 45-day annual leave accumulation, he was also not eligible for home leave, which regardless was not offered by the agency in connection with the GS-7 position.

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, and 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.