

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

Claimant: [name]

Organization: Defense Intelligence Agency
Yongsan, Korea

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0044

/s/ Linda Kazinetz for

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

1/23/14

Date

The claimant is a Federal civilian employee of the Defense Intelligence Agency (DIA) in Yongsan, Korea. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's termination of his living quarters allowance (LQA). We received the claim on June 20, 2013, the agency administrative report (AAR) on July 29, 2013, and the claimant's second claim request on July 31, 2013. For the reasons discussed herein, the claim is denied.

In May 2013 the claimant was notified that, as a result of a Department of Defense (DoD)-directed LQA audit, it was determined he did not meet the LQA eligibility provisions in the Department of State Standardized Regulations (DSSR) section 031.12b, which requires that an employee recruited outside the United States must, prior to appointment, have been recruited in the United States by his or her previous employer and have been substantially continuously employed by such employer under conditions providing for return transportation to the U.S. The claimant subsequently received further explanation from an agency human resources representative that the agency's previous interpretation of section 031.12b, on the basis of which he had been granted LQA, had been incorrect as clarified by recent OPM claim decisions.

In his June 20, 2013, claim request, the claimant does not challenge the agency's basis for terminating his LQA, but asserts he should continue to receive LQA because he "was hired before March 2012, prior to the OPM re-clarification of the wording in the DSSR"¹ and "accepted Federal employment under previous interpretations of the DSSR and signed a contract to receive LQA."

It is well established that where a Federal employee holds his or her position by virtue of appointment, any entitlement to compensation must be based solely on the applicable statutes and regulations, and those statutes and regulations do not give rise to an implied-in-fact contract. See *Chu v. United States*, 773 F.2d 1226, 1229 (Fed.Cir.1985) ("[A]bsent specific legislation, federal employees derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the government"; see also *Schism v. United States*, 316 F.3d 1259, 1275 (Fed.Cir.2002)(noting that "[f]ederal employees, both military and civilian, serve by appointment, not contract..."))

The claimant raises issue of equity, asserting OPM's change in the interpretation of the aforementioned section of the DSSR is causing undue hardship in the lives of affected DIA employees and their families. However, it is well settled by the courts that a claim may not be granted based on misinformation provided by agency officials, such as that resulting in DIA's erroneous granting of LQA to the claimant. Payments of money from the Federal Treasury are limited to those authorized by statute, and erroneous advice given by a Government employee cannot estop the Government from denying benefits not otherwise permitted by law. See *OPM v. Richmond*, 496 U.S. 414, 425-426 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed.Cir. 1997); and 60 Comp. Gen. 417 (1981). Therefore, that the claimant was erroneously determined to be eligible for LQA upon his appointment to the Federal service and had received LQA based on

¹ OPM first addressed the reference in DSSR section 031.12b to "previous employer" (singular) as precluding multiple overseas employers prior to Federal appointment for LQA eligibility purposes in September 2008. See OPM file number 08-0009 at <http://www.opm.gov/policy-data-oversight/pay-leave/claim-decisions/decisions/>.

that determination does not confer eligibility not otherwise permitted by statute or its implementing regulations.

The claimant also poses several questions challenging DoD's decision to limit the audit to employees currently receiving LQA, and references OPM "directing" agencies to conduct audits. OPM adjudicates compensation and leave claims for Federal employees under section 3702(a)(2) of title 31, United States Code (U.S.C.). This authority is narrow and limited to consideration of whether monies or leave are owed the claimant for the stated claim under the applicable statute and implementing regulations. The scope of OPM's authority under 31 U.S.C. 3702(a)(2) does not extend to directing agencies to conduct audits based on OPM claim decisions or to participating in the design or conduct of any such audits, which are undertaken entirely at agency discretion.²

In his July 31, 2012, claim request, the claimant requests that DSSR section 031.12b be waived under the provisions of section 031.12c, which states:

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

Although the claimant states that "the Director of DIA then has the ability to waive the requirements of subsection 031.12b, on a case by case basis and allow the issuance of LQA," he addresses his waiver request to OPM and asks for "reconsideration of all circumstances surrounding my situation and the possibility of a waiver of subsection 031,12b by the head of agency."

OPM's claims adjudication under 31 U.S.C. § 3702(a)(2) does not include the authority to waive provisions of the Department of State Standardized Regulations (DSSR), which determine LQA eligibility. DSSR section 031.12c authorizes the head of the employee's agency to waive the eligibility requirements of section 031.12b. Therefore, OPM may not consider the claimant's request for a waiver within the context of the claims adjudication function it performs under section 31 U.S.C. § 3702(a)(2). The claimant must submit his waiver request to the head of his employing agency or that individual's designee as stipulated under DSSR section 031.12c.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States court.

² The claimant states: "DIA, and ultimately OPM, approved [sic] my eligibility to receive LQA based on factors pursuant to the "clarification" that came from OPM in March 2012." However, OPM's role does not extend to making initial LQA determinations for DIA employees. That authority is vested in the claimant's employing agency and is only subject to OPM's review under the provisions of 31 U.S.C. § 3702(a)(2).