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

Claimant: [name]

Organization: Defense Intelligence Agency
Seoul, Korea

Claim: Living quarters allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0050

/s/ Linda Kazinetz for

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

3/7/14

Date

The claimant is a Federal civilian employee of the Defense Intelligence Agency (DIA) in Seoul, 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 request on July 23, 2013, and the agency administrative report on November 14, 2013. For the reasons discussed herein, the claim is denied.

The claimant was officially separated from military service at Yongsan Garrison, Korea, on March 31, 2012. While residing in Korea, he was recruited for and accepted employment with the U.S. firm Cubic Applications, Inc. (CUBIC), effective April 1, 2012. He applied for, was selected, and subsequently appointed to his current Federal service position, effective November 5, 2012.

At the time of the claimant's appointment to the Federal service, the agency initially concluded he was eligible for and thus granted him LQA. On May 1, 2013, the agency notified the claimant that a review of his records had determined he had been erroneously determined eligible for LQA upon his appointment to the Federal service, and that the allowance was therefore being terminated. The basis for this determination was that 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.

The agency explains in its May 25, 2013, email to the claimant that he did not meet DSSR section 031.12b requirements since he "had more than one employer in the overseas area prior to [claimant's] appointment into federal civilian service." The agency further explains, "military members who separated in a location outside the U.S., had intervening employment as other than a federal civilian employee, for any amount of time, and were subsequently hired for federal civilian employment with [Department of Defense] are not eligible for LQA," thus concluding the claimant's overseas employment with CUBIC rendered him ineligible for LQA.

The claimant challenges the agency's findings, stating in his claim request:

> ...as a member of the US military assigned to Korea I did in fact retire out of Korea. CUBIC applications hired me, on a part-time basis, for three weeks. After my part-time employment, I quit CUBIC Applications and returned to the US, where I lived for approximately two months. CUBIC Applications then offered me a full-time position, which I accepted, and started on 31 July, 2012. On 1 August, 2012, DIA made the final offer for my current position which, I accepted with a start date of 5 November, 2012. Because I returned to the US for almost two months, my employment with CUBIC Applications was not concurrent with my military service. Therefore, I had one overseas employer prior to my acceptance with DIA, not two as indicated in my determination which made me ineligible for LQA.

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. Thus, Department of Defense Instruction (DoDI) 1400.25-V1250 implements the provisions of the DSSR, but may not exceed their scope; i.e., extend benefits that are not otherwise provided for in the DSSR. Therefore, 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. DSSR section 031.12 states, in relevant part, that LQA may be granted 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.

The agency's language that the claimant had "more than one employer in the overseas area" as the basis for his LQA ineligibility is not used in the DSSR. Rather, it is an abbreviated way of characterizing section 031.12b, which allows LQA eligibility in those instances where the employee, prior to appointment, had "substantially continuous employment" with one of the entities listed under b(1) through b(4), and which entity (i.e., the singular usage of "such employer") recruited the employee in and provided return transportation to the United States or its territories or possessions. Therefore, by extension, an employee who has had more than one "employer" overseas prior to Federal appointment would be disqualified because the initial overseas employer rather than the employer immediately preceding appointment would have recruited the employee in the United States.

The basis of the claimant's assertion of LQA eligibility is that because he returned to the United States, his employment with CUBIC was "not concurrent" with his military service, thus he had been in substantially continuous employment by one employer, not two, prior to his accepting the DIA appointment. The claimant seeks to separate his employment with CUBIC into two separate and distinct segments with a break in continuous service from June 8, 2012, to July 23, 2012, when, as he asserts in his claim request, he "moved back" to the United States after he "quit" his part-time position with CUBIC on some unspecified date after May 6, 2012. He concludes that, immediately prior to appointment to his Federal service position, he had "one overseas employer prior to [his] acceptance with DIA;" i.e., with CUBIC when employed in the full-time position. The claimant provided no documentation showing he resigned his part-time

position with CUBIC, only stating in his claim request that he "provided an oral statement to the Program Manager." To establish that he “moved back” to the United States, he submitted a copy of his passport and airline ticket documenting his travel history to and from the United States during the period in question. Based on the facts presented, we do not find the claimant's assertion that he “moved back” to the United States persuasive. For example, the record includes a May 12, 2012, email from a DIA human resources official to the claimant with a preliminary offer for his current position. The claimant's response to the offer was not submitted, but presumably he accepted the employment offer or he would have been removed from consideration at that time. Since his acceptance of DIA's May 12 offer contradicts his assertions that he "moved back" to the United States on June 8, we conclude the claimant's trip to the United States was transitory and incidental to his subsequent return travel to Korea to fulfill his employment commitments.

The claimant states that CUBIC offered him a full-time position on May 25, 2012, which he indicates he did not accept immediately. However, the record includes a May 25, 2012, memorandum (SUBJECT: Accreditation Letter for Contract (W91QVN-09-C-0039)) for Headquarters, U.S. Forces Korea, specifically identifying the claimant as an employee of CUBIC with June 4, 2012, to September 27, 2012, as the stated period of accreditation. The record also includes a July 9, 2012, employee status change notice issued by CUBIC for the claimant stating in the comments section (text was crossed out with a marker but still legible) that the change in status to a full-time position would be effective July 30, 2012. Owing to the lack of documentation verifying the claimant resigned from his part-time position with CUBIC, combined with the documentation showing the U.S. firm considered him an employee during the timeframe he said he was not employed, we do not find the claimant’s assertions that a break in service occurred between his part- and full-time employment with CUBIC. Thus, we conclude immediately prior to appointment to his Federal civilian position, the claimant was employed by CUBIC. The firm, however, had not recruited him in the United States or any of the enumerated locations in DSSR section 031.12b. Rather, the claimant was recruited in the United States by the U.S. Army as evidenced by his DD Form 214, Certificate of Release or Discharge from Active Duty, showing his place of entry into active duty as Norman, Oklahoma. His subsequent employment by CUBIC broke the continuity of employment by a single employer (i.e., "such" employer that recruited him in the United States).

Even assuming he was able to establish that he resigned his part-time employment with CUBIC and show he resided in the United States thereafter, the claimant provided no documentation indicating he was recruited in the United States for full-time employment with the U.S. firm. Instead, the claimant states he was offered a full-time position with CUBIC on May 25, 2012, when he was still presumably overseas until his departure to the United States on June 8. Therefore, we conclude the claimant was not recruited by CUBIC, either for his part- or full-time employment, while in the United States or one of its territories or possessions as required by DSSR section 031.12b.

The claimant has submitted no documentation indicating that CUBIC provided for his return transportation to the United States as an employment benefit. The record includes the March 16, 2012, offer request from CUBIC identifying the claimant as the candidate for a part-time position, leaving the LQA field blank and the relocation agreement box marked "no." No evidence has been submitted showing the claimant's employment was modified to provide him with return transportation. We conclude there is insufficient documentation in the claim record

to establish whether CUBIC provided the claimant with return transportation to the United States or its territories or possessions as required under DSSR section 031.12b.

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 a foreign area, that inducement is normally unnecessary. Furthermore, 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.

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

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.