Compensation Claim Decision
Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: [agency component]
Aviano Air Base
Aviano, Italy

Claim: Living Quarters Allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 09-0006

//Judith A. Davis for

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

1/11/2010

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Date

The claimant is a Federal civilian employee of the U.S. Air Force Europe (USAFE) stationed at Aviano Air Base Station (ABS), Italy. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's decision regarding his eligibility for living quarters allowance (LQA). We received the claim on December 3, 2008, and the agency administrative report (AAR) on March 17, 2009. For the reasons discussed herein, the claim is denied.

The claimant applied on May 23, 2008, for a position [position] with the [agency component] at Aviano Air Base while on active military duty and residing in Aviano, Italy. The claimant states he returned to the United States (U.S.) June 29, 2008, to retire from military service. He states he told the hiring authorities:

> I would fund my own and household goods move but that I required a LQA to afford the high cost of rent. The hiring authorities stated that LQA was not automatic, but that I would be eligible for LQA because I was hired from the United States, not locally.

The claimant states he contacted the servicing civilian personnel office (CPO) which instructed him to "complete some LQA paperwork," and denied his LQA request on July 9, 2008.

The claimant disagrees with the agency's denial of LQA based on its conclusion the claimant was a local hire. The claimant states he was not a local hire, pointing to the address on his resume and job applications which show an address in Gibsonia, Pennsylvania. Alternatively, the claimant states he acted in good faith by accepting a verbal agreement that he would fund his own travel and transportation expenses to Italy because he would receive LQA upon arrival. The claimant states he contacted the hiring authority which told him not to worry about the denial. However, once he arrived he was informed he would not receive LQA and was advised to write to OPM for a review of his case.

The AAR from the CPO states the Request for Personnel Action (RPA) and RPA checklist to fill the claimant's position advertised to internal and external candidates in the local commuting area of Aviano. Aviano has a long standing policy LQA will not be granted to local hires. The AAR states the RPA was submitted to the Air Force Personnel Center (AFPC) with an alternate name request for the claimant who applied for the position on May 23, 2008, while still on active duty in Aviano. The agency states the claimant was referred as a Veteran's Employment Opportunities Act candidate on a certificate dated May 30, 2008, was selected on June 4, 2008, and returned to the United States on June 29, 2008, with a retirement date of September 1, 2008. The AAR states the claimant was found ineligible for LQA on July 9, 2008, was so notified by email and in writing, and the selecting official was also notified of the outcome. The agency also states the claimant accepted the position without LQA or paid permanent change in station (PCS) expenses and did not make an inquiry to the CPO after the final decision on LQA prior to accepting the position offer or before the claimant in-processed and reported for duty.

The AAR refers to Department of Defense (DoD) Manual 1400.25 (DoD 1400.25-M) which defines a U.S. hire as a person who resided permanently in the U.S. or the Northern Mariana Islands from the time she or he applied for employment until and including the date she or he accepted a formal offer of employment. Because the claimant resided in Aviano at the time he applied for employment, the AAR states the claimant was not a U.S. hire. The AAR also states

the claimant failed to meet the requirements of DoD Manual 1400.25 M, Subchapter 1250 and U.S. Air Force in Europe (USAFE) Policy Letter dated 16 May 2007, to be treated as eligible for LQA as an employee recruited outside the U.S. ("substantially continuous employment") because he had used his entitlement to Government transportation back to the U.S. and had separated in the U.S. The agency states in order to authorize LQA, both the person and the position must be eligible for LQA. The AAR refers to the RPA for the position to which the claimant was appointed which states PCS expenses would not be authorized, but does not indicate how this affects the position's status with regard to LQA.

Under the controlling Department of State Standardized Regulation (DSSR), employees recruited in the U.S. are eligible for LQA. DSSR 013 grants authority to agency heads to issue further implementing regulations with regard to the granting of and accounting for LQA and other overseas allowances. Under this authority, DoD 1400.25-M specifies 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 U.S. to accept Federal employment in a foreign area. If a person is already living in the foreign area, that inducement is normally unnecessary. DoD Manual 1400.25-M, SC1250.6. delegates to the heads of DoD agencies and their designees substantial discretion to determine when to grant oversees allowances.

Given its common meaning, the phrase "recruited by the employing government agency in the United States..." means an agency has actively sought to induce eligible U.S. civilians to apply for a specific oversees vacancy. The RPA for the Budget Analyst, YA-0560-02, position for which the claimant was selected, in stating it was for "internal and external recruitment for the local commuting area only" shows this requirement was not met. That the claimant listed a U.S. address on his application for the position has no effect on this determination.

Since the RPA was limited to local commuting area applicants and the claimant applied when he resided in the Aviano commuting area, we find the claimant was a local hire for purposes of determining eligibility for LQA. DSSR 031.12 states employees recruited outside the U.S. must have "substantially continuous employment" and meet other criteria to be eligible for LQA. DoD 1400-25 M, SC1250.5.1.1.2.1 states former military and civilian members shall be 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 and/or separated member or employee uses any portion of his or her entitlement to Government transportation back to the U.S., whichever occurs first. The above cited USAF Memorandum on Living Quarters Allowance states: "The separation from military or civilian service must take place overseas; separation in the United States and subsequent return to the overseas at personal expense interrupts the overseas service and rules out applicability of SC1250.2.1.1". The claimant chose to retire in the U.S. and accept payment for his move from the U.S. Air Force. As a result the claimant does not have substantially continuous employment. In addition, this USAFE policy instruction stipulates to meet "substantially continuous employment" a prospective employee "must not have used part or all of his/her return transportation entitlement…" Thus, the claimant also fails to have substantially continuous employment because he used his transportation entitlement to return to the U.S.

When the agency's factual determination is reasonable, we will not substitute our judgment for that of the agency. See e.g., *Jimmie D. Brewer*, B-205452, March 15, 1982. In this case, the claimant was residing in Italy when he applied for the position and was considered. No recruitment incentive was necessary as the position was recruited locally and was not considered hard to fill. The claimant's selection did not save the Government PCS expenses since these were not authorized for the position; nor is this a consideration in determining whether LQA will be offered. Whether an employing organization is willing to pay LQA is not in itself a justification for the expenditure of Government funds for individual benefit.

In the alternate claim, the claimant stated he acted in good faith by accepting a verbal agreement that he would fund his own travel and transportation expenses to Italy because he would receive LQA upon arrival. It is well established that 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. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 110 S. Ct. 2465, *rehearing denied*, 497 U.S. 1046, 111 S. Ct. 5 (1990). See also OPM file number S9700423; OPM file number 9700369, January 15, 1998; OPM file number S98001982, October 2, 1998; and OPM file number S001584, November 16, 1998. The agency's action is not arbitrary, capricious, or unreasonable. Accordingly, the claim for an LQA is denied.

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