

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

**Claimant:** [name]

**Organization:** [agency component]  
Defense Security Cooperation Agency  
Garmisch, Germany

**Claim:** Request for Living Quarters Allowance

**Agency decision:** Denied

**OPM decision:** Denied

**OPM file number:** 09-0045

//Robert D. Hendler

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Robert D. Hendler  
Classification and Pay Claims  
Program Manager  
Center for Merit System Accountability

August 3, 2010

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Date

The claimant is a Federal civilian employee of the Defense Security Cooperation Agency at the [agency component] in Garmisch, Germany. She requests the U.S. Office of Personnel Management (OPM) reconsider her agency's denial of living quarters allowance (LQA). We received the claim on August 11, 2009, the claim administrative report on October 7, 2009, and the claimant's response to the administrative report on October 29, 2009. For the reasons discussed herein, the claim is denied.

Prior to the claimant's employment with the [agency component], she held a series of Nonappropriated Fund (NAF) positions in Garmisch, Germany. On November 12, 2000, she was hired for a limited tenure, part-time position as Resort Hotel Attendant, NA-7401-03, with the Armed Forces Recreation Center, Europe, not to exceed December 11, 2001. She was considered a U. S. hire and was granted a transportation entitlement as part of her conditions of employment for a service obligation of 13 months. Following an internal reassignment, on November 29, 2001, she was promoted into a part-time Bartender, NA-7405-04, position, and on December 12, 2001, her limited tenure appointment was extended for an additional year to December 11, 2002. On October 26, 2002, she separated from the limited tenure appointment and on October 30, 2002, was reinstated into a full-time Bartender, NA-7405-04, position. The aforementioned transportation agreement remained intact for the duration of the claimant's tenure in these various NAF positions, and it stated:

Employees who have completed the required tour of duty, and choose to remain in Germany (due to conversion or transfer to another position) or separate from NAF employment, will be eligible for a return trip to their home of record through issuance of Government Travel Orders which are valid for up to two years from date of preparation. Continued employment or reemployment would constitute "local hire" status, and does not entitle employee to benefits associated with CONUS hires as defined in DSSR or JTR Vol II (e.g. home leave, transportation agreement, shipment of HHG, POV, etc)..

On August 15, 2008, the claimant resigned from the Bartender, NA-7405-04, position and on August 17, 2008, was appointed to an Appropriated Fund career position as [YB-303-02 position] (GS-7 equivalent) with the [agency component]. The position was designated as hard-to-fill. The vacancy announcement stated:

This position is identified as HARD TO FILL for the purpose of authorizing living quarters allowance (LQA). LQA is authorized for the local hire selectee who also meets basic requirements of the Department of State Standardized Regulations (DSSR) 031.12b, and Department of Defense (DoD) 1400.25M, Subchapter 1250.

The claimant was promoted into her current [YA-341-02 position] on April 12, 2009. However, she believes she should have been granted LQA when she was initially appointed to the YB-303-02 position at the [agency component], as a consequence of her then-intact transportation agreement, substantially continuous employment, and the YB-02 position having been deemed a hard-to-fill position granting LQA if the basic requirements of the DSSR and DoD 1400.25M were met. The claimant asserts the agency, in denying her request for LQA, improperly applied the requirements of Army in Europe Regulation (AER) 690-500.592 as this regulation was not cited in the vacancy announcement. She also asserts that since, in the written job offer she received for the position and subsequent communications with the agency, the basis provided for the LQA denial was the lack of an intact transportation agreement, evidence of which she

produced when she requested reconsideration of the denial, this should have been the sole deciding factor in determining her LQA eligibility.

As discussed in OPM File Number S004184 (March 21, 2000), LQA claims for NAFI employees are not reviewable by OPM and do not fall under the claim provisions of 31 U.S.C. § 3702:

Thus, Executive Order 11137, as amended, declares employees of NAF activities to be employees of the United States for the purposes of the provisions in 5 U.S.C. Chapter 59, subchapter III, including the LQA provisions of 5 U.S.C. 5923.

The Executive Order, however, does not declare employees of NAF activities to be employees within the meaning of 5 U.S.C. 2105, or for the purposes of considering their claims under 31 U.S.C. 3702. Moreover, title 5, U.S.C. does not include any provision that authorizes OPM to consider claims from employees of NAF activities concerning their entitlement to an LQA. Accordingly, this claim is dismissed because OPM does not have the authority to consider it.

Therefore, while we do not have jurisdiction to determine the claimant's eligibility for LQA while employed in her NAF positions and she is not requesting LQA for those positions, we must address her LQA eligibility status during that time insofar as it impacts her LQA eligibility when she transitioned from NAF to Appropriated Fund employment.

The Department of State Standardized Regulations (DSSR) set forth basic eligibility criteria for the granting of LQA. 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

Section 031.5 imposes the additional requirement that:

Part-time employees . . . shall not be granted allowance, post differential, or advances of pay . . .

Thus, in accordance with DSSR 031.5 above, the claimant did not meet basic eligibility criteria for LQA under the DSSR 031.5 while she was occupying the part-time NAF positions from November 12, 2000, to October 26, 2002. When she subsequently transitioned into a full-time NAF position on October 30, 2002, she remained ineligible for LQA under U.S. AER 215-3, Nonappropriated-Fund Personnel Policies and Procedures, dated October 23, 2001, and in effect at that time, which stipulated:

LQA and TQSA are authorized for individuals recruited outside the United States for CHRMA-serviced, regular full-time positions if, at the time of appointment, the individual is receiving a quarters allowance as a regular NAF employee of any NAFI . . . and is appointed without a break in service of more than 3 days to a position at pay level NF-4 or above, or NF-3 or above in the 1701 occupational series in the CYS Program.

Since the claimant had a break in service of four days and was not currently receiving LQA at the time of appointment into the full-time NAF position, she remained ineligible for LQA in that position. The claimant's assertion that she was not ineligible for LQA in the full-time position but rather that the position offered Government housing in lieu of LQA is contrary to the direct language of the regulation stated above. That the agency provided the claimant with dormitory-style housing at no cost does not affect or set aside her ineligibility for LQA.

When the claimant was selected for the career position at [agency component], she still did not meet basic eligibility criteria under the DSSR. Although her actual place of residence was attributable to her employment by the U.S. Government, thus satisfying section 031.12a, she no longer retained her status as having been recruited in the U.S. as required by section 031.12b. DoD Manual 1400.25-M in effect at the time of her appointment to her YB-303-02 position provides the following definitions relevant to this determination:

SC1250.3.4. Locally Hired. For the purpose of this Subchapter, locally hired refers to the country in which the foreign post is located.

SC1250.3.7. U.S. Hire. A person who resided permanently in the United States, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the former Canal Zone, or a possession of the United States from the time he or she applied for employment until and including the date he or she accepted a formal offer of employment.

As was stated in the claimant's NAF transportation agreement, when she completed the required 13-month tour of duty and chose to remain in Germany (due to transfer to another position) and subsequently separated from NAF employment, her continued employment/reemployment constituted local hire status. Thus, when she applied and was selected for her initial NAF employment in Germany, she was considered a U.S. hire because presumably she was residing in the U.S. at the time. Upon her appointment at [agency component], however, she could not be considered a local hire recruited in the U.S. prior to appointment (a status she held prior to the completion of her 13-month tour of duty), but rather a local hire who had occupied a series of NAF positions in Germany prior to appointment. As such, she did not meet section 031.12b, due to the previously cited transportation agreement barring her eligibility for "benefits associated with CONUS hires as defined in DSSR" and on this basis alone is ineligible for LQA regardless

of her having been in substantially continuous employment and having an intact transportation agreement.

AER 690-500.592, Civilian Personnel Living Quarters Allowance, 18 November 2005, prescribes policy for authorizing LQA to appropriated fund civilian employees of the U.S. Army in Europe, and as such imposes additional requirements beyond the basic eligibility criteria of the DSSR. It states that LQA will be granted for the following employees:

(3) Federal civilian or NAF employees selected for or converted from NAF to positions in grades GS-09 (or equivalent), WG-11, WL-05, and above; or a position that has an equivalent target grade; a hard-to-fill position; or a career program position at any grade; who meet all of the following:

(a) Are transferring to the European theater from another overseas Government activity or agency without a break in service.

(b) Meet basic eligibility criteria in DSSR, section 031.11 or 031.12a and b.

(c) Were already receiving or eligible to receive LQA at the time of selection.

The claimant, as a NAF employee converting from an NAF position to a hard-to-fill position, was transferring from another overseas Government activity without a break in service, but did not meet basic DSSR eligibility criteria and was not already receiving or eligible to receive LQA at the time of selection.

Since the claimant did not meet the basic LQA eligibility criteria set forth in the DSSR, her failure to meet the additional requirements of AER 690-500.592 is moot, as is her assertion that it was improperly applied by the agency. When adjudicating a compensation claim, an agency has the responsibility to consistently and equitably apply the relevant regulations. Likewise, the agency, in its reconsideration of a claimant's LQA denial, may not reasonably limit its review to the original basis for the denial should other pertinent facts affecting that decision arise. OPM's claim adjudication process is not restricted to consideration of select aspects of the claim advanced by the claimant; rather, it is based on application of the relevant statutes and regulations to the facts of the case, which are provided by the claimant and the agency. Thus, the claimant's assertion that the mere existence of a transportation agreement acquired in an earlier position be the sole basis for granting her LQA, without regard to the conditions of that agreement and without otherwise applying directly applicable regulations, must be rejected.

In support of her claim, the claimant cites 5 United States Code (U.S.C.), Chapter 57 – Travel, Transportation, and Subsistence, Subchapter II, Section 5736, which provides that “[a]n employee of a nonappropriated fund instrumentality of the Department of Defense . . . who moves, without a break in service of more than 3 days, to a position in the Department of Defense . . . may be authorized travel, transportation, and relocation expenses and allowances under the same conditions and to the same extent authorized by *this subchapter* [emphasis added] for transferred employees.” However, the travel, transportation, and relocation expenses and allowances covered by Subchapter II of Chapter 57 do not encompass LQA, which is covered under 5 U.S.C., Chapter 59 – Allowances, Subchapter III, Section 5923.

The claimant also asserts that the AER “should not be valid in determining eligibility for LQA” because she is “unable to find where [it] has been reviewed by the ‘Per Diem, Travel and Transportation Allowance Committee’ in accordance with DoD Directive 5154.29, E.

Procedures 1.d.” However, as stated previously, LQA is not governed by Subchapter II of Chapter 57 and, thus, does not fall under the provisions of DoD Directive 5154.29. OPM’s claims adjudication authority under 31 U.S.C. 3702 is narrow and does not extend to determining or commenting on agency regulation approval propriety.

DoD Manual 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 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. The statutory and regulatory languages are permissive and give agency heads considerable discretion in determining whether to grant LQA to agency employees *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979). Thus, an agency may withhold LQA payments from an employee when it finds the circumstances justify such action, and the agency’s action will not be questioned unless it is determined the agency’s action was arbitrary, capricious, or unreasonable. *Joseph P. Carrigan*, 60 Comp. Gen. 243, 247 (1981); *Wesley L. Goecker*, 58 Comp. Gen. 378 (1979); *OPM Decision S9700047* (1997). In this case, the claimant was a local hire who was neither already receiving nor eligible for LQA at the time of selection. The agency’s action is not arbitrary, capricious, or unreasonable. Accordingly, the claim for an LQA is denied.

The claimant introduced the issues of emergency leave, renewal agreement travel (RAT), and home leave in her response to the claim administrative report. Section 178.102(a) of title 5, Code of Federal Regulations (CFR), which implements section 3702(b) of title 31, United States Code, requires claims against the Government be written and signed. Sections 178.102(a) and (b) of 5 CFR also indicate the claimant’s *employing* agency already has reviewed and issued a written decision on a claim before it is submitted to OPM for adjudication. There is no indication the claimant has filed a written, signed claim with her employing agency regarding these issues and received a final agency-level decision from a duly authorized official. In addition, the claimant did not include these issues in her initial claim submission to OPM for agency response in the claim administrative report. Therefore, the claimant must initiate a new claim for these issues and they will not be further addressed in this claim decision.<sup>1</sup>

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.

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<sup>1</sup> Travel, transportation and relocation claims fall under the jurisdiction of the General Services Administration’s Civilian Board of Contract Appeals.