

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

**Claimant:** [name]

**Organization:** U.S. Army Corps of Engineers,  
Europe District  
Department of the Army  
Katterbach, Germany

**Claim:** Continuation of payment for the rental portion of living quarters allowance for personally owned quarters beyond initial 10-year period

**Agency decision:** Denied

**OPM decision:** Denied

**OPM file number:** 11-0001

//Judith A. Davis for

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

2/14/2012

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Date

The claimant was a Federal civilian employee of the U.S. Army Corps of Engineers, Europe District, in Nuernberg and Katterbach, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of payment for the rental portion of his living quarters allowance (LQA) for personally owned quarters (POQ) for the period from May 11, 1998, to October 17, 1999. We received the claim on November 1, 2010, and the agency administrative report (AAR) on February 25, 2011.<sup>1</sup> For the reasons discussed herein, the claim is denied.

The claimant was employed with the U.S. Army Corps of Engineers in Germany from November 1987 to October 17, 1999. He began this employment stationed at the Nuernberg Area Office in Fuerth, Germany, where he purchased POQ in the nearby municipality of Langenzenn, on which residence he received the rental portion of his LQA for the ten-year period from May 10, 1988, to May 10, 1998. The POQ were located approximately 10 miles from his duty station in Fuerth. During this period, effective October 19, 1995, the claimant's position was relocated to Katterbach, Germany, as a result of base closure. The POQ were located approximately 30 miles from this new duty station in Katterbach. The claimant continued commuting from Langenzenn to Katterbach until May 11, 1998, when he moved from his POQ in Langenzenn to new POQ in Stein, Germany, closer to the Katterbach duty station. He believes the rental portion of his LQA should have been continued beyond the initial ten-year period as a result of this relocation.

The agency counters that the claimant was not entitled to continuation of the rental portion of LQA beyond the initial ten-year period because his new duty location of Katterbach was within commuting distance of his POQ in Langenzenn as evidenced by his commuting daily to Katterbach for over two and one-half years.

The Department of State Standardized Regulations (DSSR) contain the governing regulations for allowances, differentials, and defraying of official residence expenses in foreign areas. Section 136 of the DSSR addressing POQ states:

- a. When quarters occupied by an employee are owned by the employee or the spouse, or both, an amount up to 10 percent of original purchase price (converted to U.S. dollars at original exchange rate) of such quarters shall be considered the annual rate of his/her estimated expenses for rent. Only the expenses for heat, light, fuel (including gas and electricity), water, garbage and trash disposal and in rare cases land rent, may be added to determine the amount of the employee's quarters allowance in accordance with Section 134. The amount of the rental portion of the allowance (up to 10 percent of purchase price) is limited to a period not to exceed ten years at which time the employee will be entitled only to above utility expenses, garbage and trash disposal, plus land rent.

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<sup>1</sup> The claimant states he initially submitted this claim to his agency in May 1998 but the claim was never processed, although he is unable to produce a copy of the original claim submission and the agency has no record of its receipt. However, he resubmitted the claim to the agency by letter dated April 10, 2004, the cover letter of which he transmitted to the agency via email on April 21, 2004, and the claim is preserved as of that date.

- b. The following transactions shall not be considered to meet the intent of these regulations so as to warrant payment of the rental portion of living quarters allowance beyond the initial ten year period specified in Part a:
- (1) sale or gift of quarters owned by the employee or the spouse, or both with employee remaining in the same quarters, or
  - (2) the purchase or exchange and move to other quarters in daily commuting distance of the same post.

Payment for utilities and (if necessary) land rent may be continued beyond the 10 year period. The head of agency may waive provisions of Part b in unusual circumstances.

Section 013 of the DSSR, addressing the authority delegated to the heads of agencies, states:

When authorized by law, the head of an agency may defray official residence expenses for, and grant post differential, difficult to staff incentive differential, danger pay allowances, quarters, cost-of-living, representation allowances, compensatory time off at certain posts and advances of pay to an employee of his/her agency and require an accounting thereof, subject to the provisions of these regulations and the availability of funds. Within the scope of these regulations, the head of an agency may issue such further implementing regulations as he/she may deem necessary for the guidance of his/her agency with regard to the granting and accounting for these payments. Furthermore, when the Secretary of State determines that unusual circumstances exist, the head of an agency may grant special quarters, cost-of-living, and representation allowances in addition to or in lieu of those authorized in these regulations.

The DSSR does not delineate those circumstances under which the rental portion of LQA for POQ may be continued beyond the initial ten-year period otherwise provided for under section 136a. However, implicit in its identification of disqualifying circumstances in section 136b is the understanding that section 013 delegates authority to the head of agency to defray these official residence expenses through the issuance of "further implementing regulations." This authority is specifically reserved to the head of agency and is not delegated to OPM in its claims adjudication authority. Thus, the DSSR allows the agency the flexibility to define those circumstances under which it will provide for payment of the rental portion of LQA for POQ beyond the initial ten-year period in its implementing regulations, subject to the restrictions in section 136b. However, OPM may not extrapolate from the specific language of the DSSR to credit circumstances not explicitly allowed by the agency's implementing regulations.

The implementing regulations issued by the Department of Defense (DoD) and in effect at the time the claim accrued<sup>2</sup>, DoD 1400.25-M, December 1996, do not provide any further guidance authorizing payment of the rental portion of LQA for POQ beyond the initial ten-year period as addressed in section 136 of the DSSR. However, the regulatory history of the treatment of this issue by DoD is particularly relevant in this case. DoD 1400.25-M was immediately preceded by

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<sup>2</sup> The claim accrued on May 11, 1998, the date the claimant relocated to the new POQ.

DoD Civilian Personnel Manual, Chapter 592 (CPM 592), which provided the following specific guidance in Subchapter 2, 2-3(b)(4)(c):

An employee who is transferred to another post would become eligible for the LQA for renting quarters or for a new 10-year period for POQ. An employee who is transferred back to the same post would again become eligible for payment of the LQA for rental or POQ (new 10-year period) if it is a management-generated transfer and if the house previously owned at that base had been sold. The employee would not be entitled to the LQA except for utility expenses if he/she still owned that house and resided in it.

This guidance was omitted from the successor regulation DoD 1400.25-M, which provides only the following guidance regarding POQ in Subchapter (SC) 1250.5.1.12:

Personally Owned Quarters (POQ). The annual rent payable for POQ is based on the purchase price or appraised value of the property, converted to U.S. dollars at the exchange rate in effect at the time of purchase.

DoD 1400.25-M is silent on those circumstances under which the rental portion of LQA for POQ may be paid beyond the ten- year period provided for in DSSR section 136a, eliminating an explicit provision that was included in the predecessor regulation. Therefore, although DSSR section 136a allows the flexibility for agencies to establish circumstances under which the initial ten-year period for POQ may be extended or recommenced, DoD has not exercised its authority to provide for this flexibility in its DoD 1400.25-M implementing regulations. OPM has no authority to confer a benefit that has not been specifically allowed by the agency, and the claimant's request that payment for the rental portion of his LQA for POQ be continued is denied.

The implementing regulations issued by the Department of the Army and in effect at the time the claim accrued, United States Army, Europe and Seventh Army (USAREUR) Regulation 690-500.592, April 28, 1992, likewise do not provide any further guidance authorizing payment of the rental portion of LQA for POQ beyond the initial ten-year period as addressed in section 136 of the DSSR beyond the following in paragraph 5c:

Personally-Owned Quarters. On occupancy of rental quarters at any time during or after the 10-year period in CPM 592.2-3b(4), an employee is entitled to receive the rental portion regardless of previous occupancy of personally-owned quarters.

However, we note that under SC1250.4.1 of DoD 1400.25-M, only the following authorities are delegated to the Heads of the DoD Components:

SC1250.4.1.1.1. The authority under Section 013 of Reference (b) [DSSR] to grant waivers.

SC1250.4.1.1.2. The authority of the head of the agency to make determinations on payment of a Separate Maintenance Allowance, including changes of election, and

waivers of indebtedness for advance payments granted under 5 U.S.C. 5522 (Reference (d)).

SC1250.4.1.1.3. The authority under Section 031.12c of Reference (b) to waive the requirements of Section 031.12b of Reference (b), in individual cases when unusual circumstances exist.

Thus, DoD 1400.25-M includes no specific delegation of authority to the Heads of the DoD Components regarding extension of the ten-year limitation regarding payment of the rental portion of LQA for POQ under DSSR section 136a.

In support of his request, the claimant cites a previous OPM decision, file number 01-0051, dated March 25, 2002, which contains language from a November 7, 1994, memorandum (which he erroneously identifies as a “regulation) from Headquarters, USAREUR, to the USAREUR Civilian Personnel Operations Center. This memorandum conveyed Army’s change in interpretation of CPM 592, paragraph 2-3b(4)(c), as it related to the commencement of a new ten-year “cost recovery period” for POQ and stated:

If employees who have changed duty stations decide to rent new quarters, they would be entitled to receive the rental portion of the living quarters allowance. If they decide to purchase and move to new quarters, a new 10-year cost recovery period would begin.

However, as noted above, CPM 592 had been superseded by DoD 1400.25-M, dated December 1996, by the time the present claim accrued in May 1998. Therefore, CPM 592 and the attendant USAREUR memorandum dated November 7, 1994, were inoperative at the time the claim accrued and may not be applied in its adjudication.

The claimant similarly cites OPM file number 98001597, dated June 24, 1998, which states that “under the applicable rules issued by the Department of State and the Department of Defense,” “[a]n employee transferred to another duty station and who purchases a new residence there may receive this allowance [POQ] for another 10-year period.” Since this decision does not identify when the claim in question accrued, it cannot be determined whether it preceded or followed the issuance of DoD 1400.25-M in December 1996. Therefore, this decision has no identifiable applicability to the present case.

The claimant also cites a May 9, 1995, letter from the Chief, Human Resources, U.S. Army Engineer District, Europe, Subject: Change in Duty Station, stating that some employees being transferred from the Nuernberg Area Office to Katterbach might be entitled to travel, transportation, and other related allowances incident to a permanent change of station (PCS) at Government expense if certain conditions were met, including that the transfer be in the interest of the Government; the new duty station is at least ten miles from the old duty station; the transfer is not primarily for the convenience or benefit of the employee; and relocation of the residence is incident to the transfer. The claimant asserts he met all these criteria and additionally states “[t]his test is consistent with the JTR [Joint Travel Regulations] in effect at the time of this claim and I relied on the applicability of this test.”

The criteria cited above relate exclusively to eligibility for PCS expenses, including such expenses as subsistence and transportation, househunting trip expenses, temporary quarters subsistence expenses, transportation and storage of property, and residence transaction allowances. Permanent change of station expenses are subject to the provisions contained in the Federal Travel Regulation (FTR) at 41 Code of Federal Regulations (CFR) and supplemented by the DoD Joint Travel Regulations, Volume 2, applicable to DoD civilian employees. LQA is not a PCS expense and is subject to the provisions contained in the DSSR and other implementing agency regulations rather than the FTR and JTR. Therefore, the criteria cited by the claimant relevant to PCS expenses may not be applied in determining eligibility for LQA-associated benefits.

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).

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.