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

Claimant: [name]

Organization: [agency component]
Grafenwoehr, Germany

Claim: Request for Living Quarters Allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 08-0008

//Judith A. Davis for

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

2/3/2009

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Date

The claimant is a Federal civilian employee of the Department of the Army at [agency component] in Grafenwoehr, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's decision denying him living quarters allowance (LQA). We received the claim on January 25, 2007, and the agency administrative report (AAR) on April 25, 2008. For the reasons discussed herein, the claim is denied.

The claimant separated from military service effective September 30, 2005. Before his separation, he applied for [position], while stationed in Korea on active duty, and received a tentative job offer on June 23, 2005. He returned to the United States (U.S.) on July 1, 2005, on permissive temporary duty (TDY) scheduled from July 2-31, 2005, to be converted to terminal leave from August 1-September 30, 2005. He accepted the position on July 7, 2005, while physically present in the U.S.

On December 3, 2007, the Department of the Army denied the claimant's request for LQA, stating that under the regulation in effect at the time of hire, Army in Europe Regulation (AER) 690-500.592, dated June 20, 2003, the claimant did not qualify for LQA as either a local hire or a U.S. hire. Specifically, the agency stated that he did not qualify for LQA as a U.S. hire because he did not reside in the U.S. for one year prior to accepting the formal job offer, and he did not qualify for LQA as a local hire based on his own statement via email that he had used his military orders to move back to the U.S. from Korea.

The claimant argues he qualifies for LQA because this regulation, under its definition of "U.S. hire," states "employees serving on a mandatory mobility agreement are exempt from the 1-year residency requirement." He states he "*was* on a mandatory mobility agreement in Korea (dependent-restricted tour)." He also submitted a memorandum signed by the Chief of the Transportation Division at Grafenwoehr stating he "did not use any portion of his travel and transportation entitlement for himself or his family" because he was hired for his current position at Graenwoehr "prior to movement to his home of selection."

AER 690-500.592, dated June 20, 2003, defines a U.S. hire as follows:

> A person who permanently resided in the United States . . . from the time he or she applied for employment until and including the date he or she accepted a formal job offer. The residence must have been for at least 1 year immediately before accepting a formal job offer. Employees serving on a mandatory mobility agreement are exempt from the 1-year residency requirement.

The term "employee" as used in the paragraph above refers to a *civilian* employee. Within the context of the LQA eligibility requirements in AER 690-500.592 (paragraph 5), the terms "employee" and "former military member" are addressed separately and are not interchangeable. A mandatory mobility agreement is a formal agreement between a civilian employee and his or her employing agency or organization acknowledging obligatory job mobility. This does not relate to military service which is inherently mobile. As such, the claimant does not qualify for LQA as a U.S. hire because he applied for the position while in Korea and did not meet the one-year U.S. residency requirement.

In arguing for LQA eligibility as a U.S. hire, the claimant references a provision in a later version of AER 690-500.592, wherein "applicants recruited from the U.S. who were present overseas based on orders for unaccompanied assignments that provided for their return

transportation to the U.S. will be considered to be permanently residing in the U.S. for eligibility purposes," with the time spent overseas under such conditions counting toward meeting the residency requirements (see AER 690-500-592, section II, "physical residency," dated November 18, 2005). However, since this provision was not effective until the actual date of the revised regulation, which was after the claimant's date of hire, it may not be applied to his case.

AER 690-500.592, dated June 20, 2003, defines local hire as follows:

> A person hired to fill a position who is physically residing in the country in which the position is located or in any other country outside the United States, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the former Canal Zone, or a possession of the United States.

The regulation also states that for local hires, both of the following eligibility criteria must be met:

(a) Before being appointed, the employee was recruited in the United States by the U.S. Government, including its Armed Forces; a U.S. firm, organization, or interest; or an international organization in which the U.S. Government takes part.
(b) The employee has been in substantially continuous employment by one of the employers in (a) above under conditions that provided for the employee's return transportation to the United States.

Further:

> Former military members and civilian employees will be considered to have "substantially continuous employment" for up to 1 year after the date of separation; or until the initial transportation entitlement is lost or extended; or until the retired, separated member or employee uses a substantial portion (50 percent or more) of the entitlement for Government transportation back to the United States, whichever occurs first.

The claimant believes he qualifies for LQA as a local hire because he was on permissive TDY rather than terminal leave when he returned to the U.S. from Korea. The claimant separated from the military while in Korea with an effective date of September 30, 2005. He was granted permissive TDY from July 2-31, 2005, to be followed by terminal leave until his retirement date. He used this permissive TDY to travel from Korea to Gig Harbor, Washington. His travel and transportation entitlement allowed for him to be moved to his home of selection (Baltimore). The local opinion of the Grafenwoehr Transportation Division is that although the Government paid for the claimant's travel from Korea to Gig Harbor, Washington, including the transport of his household effects, because this was not his home of selection and therefore not his ultimate destination, this did not constitute use of his travel and transportation entitlement.

The intent of AER 690-500.592 is that a local hire be an employee who is physically residing overseas when hired. A local hire is eligible for LQA if he or she has an intact transportation entitlement back to the United States. The claimant and his personal effects had moved back to the U.S. when he accepted the job offer. Regardless of whether this technically constituted use of his transportation entitlement, he had no further authorization to return to Korea at

Government expense and, thus, was no longer residing in Korea at the time of selection. Therefore, he cannot be considered a local hire for LQA purposes.

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 not considered a U.S. hire for LQA purposes because he applied for the position while stationed in Korea and did not meet the one-year U.S. residency requirement, and was not a local hire for LQA purposes because he was not residing overseas at the time of hire. Within the context of AER 690-500.592, the terms "U.S. hire" and "local hire" do not constitute "official hiring categories" for recruitment purposes but rather are used only to describe the circumstances under which U.S. and overseas job applicants qualify for LQA. 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.