

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

Claimant: [name]

Organization: Department of the Army
Weisbaden, Germany

Claim: Living quarters allowance increase based
on rent increase

Agency decision: Denied

OPM decision: Denied

OPM file number: 12-0008

//Judith A. Davis for

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

2/13/2013

Date

The claimant is a Federal civilian employee of the Department of the Army in Kaiserslautern, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of an increase in his living quarters allowance (LQA). We received the claim on October 25, 2011, the agency administrative report on April 23, 2012, and the claimant's response to the AAR with additional documentation on June 22, 2012. We subsequently received the agency's comments regarding this documentation on July 5, 2012, and the claimant's response to the agency's comments on July 12, 2012. For the reasons discussed herein, the claim is denied.

The claimant's initial rental contract in Weisbaden, entered into on June 12, 2010, and to be effective July 15, 2010, set the monthly rent at €(euros)2,800.00 (\$3783.78) plus €430.00 (\$581.08) for utilities. The claimant subsequently agreed to two rent increases in connection with property improvements made by the landlord, the first in September 2010 for €250.00 and the second in April 2011 for €400.00, which together raised the monthly rent to €3450.00. The claimant requests a \$878.38 (€650.00 equivalent) increase in his monthly LQA grant to fully compensate him for his rental costs.

The agency states the claimant had requested two modifications to his basic rental contract within a relatively short period of time, resulting in what they consider to be an excessive €650.00 rent increase for significant alterations to a dwelling that was already above standard. The agency denied the requested LQA increase on the basis that the alterations to the rental quarters resulting in the two successive rent increases were not for the purpose of rendering it habitable as would be permitted under Department of State Standardized Regulations (DSSR) Section 137, that the claimant did not meet the requirements in that section for any additional grant, and that regardless, Section 137 only allows for a one-time reimbursement rather than an increase in the basic LQA grant.

The claimant believes the LQA increase is allowable because the €3450.00 monthly LQA grant requested is below the maximum rate for his quarters group and family size in the Weisbaden area, and he asserts "[i]t appears by the DSSR that rent is clearly a 100% covered allowance." He states "[t]he DSSR does not address situations when rent is increased... instead waiving this subject matter to the German Tenancy Laws," with which he asserts his rent increase is in compliance. He states he is not requesting reimbursement for alterations or improvements under DSSR Section 137 but rather an increase in his monthly LQA grant for rental costs on the basis that the rent increases represent a "tiered" rent structure (i.e., where scheduled rent increases are built into a rental contract).

The DSSR sets forth the basic criteria for the granting and payment of LQA. DSSR Section 131.1 defines LQA as "a quarters allowance granted to an employee for the annual cost of suitable, adequate living quarters for the employee and his/her family." Section 131.3, Scope, further states:

The LQA rates are designed to cover substantially all of the average employee's costs for rent, heat, light, fuel, gas, electricity, water, taxes levied by the local government and required by law or custom to be paid by the lessee, insurance required by local law to be paid by the lessee, and agent's fee required by law or custom to be paid by the lessee.

Thus, LQA is intended to cover "substantially all" rather than "all" of the allowable costs, including rent, incurred by the average employee for "suitable, adequate living quarters." DSSR Section 134, Determination of Rate, states:

Except as otherwise prescribed in Sections 134, 136, and 137, an employee shall receive an allowance for allowable quarters costs for items listed in Sections 131.2 and 131.3 or the maximum rate for the post (Section 040h) indicated in Sections 920 and 135, whichever is less, unless the rate is revised by administrative action in accordance with sections 134.2, 136 and 137.

This stipulation that the LQA recipient receive the lesser of either the allowable costs or the maximum rate for the post is reiterated in DSSR Section 135.1, Rates of Payment:

The rate of payment of the various quarters allowances is obtained by applying the appropriate allowance classification of the post in Section 920 to Sections 135.2 through 135.5. Rates so obtained for the living quarters allowance are maximum and the employee receives either the maximum rate or the amount of allowable expenses, whichever is lower.

Thus, when the allowable expenses for "suitable, adequate living quarters" are less than the maximum rate for the post, then the LQA rate is set at that lower amount. There is no provision in the DSSR for payment of the full amount of rent. If the rent being paid by an LQA recipient for "suitable and adequate" quarters is below the maximum rate for the post, this does not confer entitlement to procure upgrading of the existing quarters beyond what would be reasonably considered as "suitable and adequate" up to that maximum rate.

The DSSR does not address rent increases, but does make provision for reimbursing an LQA recipient for the cost of needed repairs within the first three months of a rental agreement. This topic is addressed in DSSR Section 137, Allowance for Necessary and Reasonable Initial Repairs, Alterations, and Improvements Under Unusual Circumstances, as follows:

The purpose of this allowance is to cover, under unusual circumstances, the cost of initial repairs, alterations and improvements which are incurred within 3 months of a rental agreement and which are basic to making the employee's first permanent residence at a post habitable. Before granting the initial repair allowance, the head of agency shall determine that: (1) the lessor will not assume the cost of the repairs; (2) the quarters are below reasonable standards of health, safety or comfort; and (3) no adequate rental quarters are known to be available locally at a rate which, when combined with estimated utility and tax costs, is within the maximum authorized allowance for the employee concerned.

The initial repair allowance which must be approved administratively in advance might include reimbursement for such housing related expenses as: (a) repairs required to eliminate leakage or drafts, to fortify or replace structural components, or to replace defective plumbing, wiring, heating, or lighting fixtures or other essential facilities or equipment; (b) alterations to provide improved access or ventilation and light, such as

new or additional windows and doors; and (c) improvements such as plumbing, heating, or lighting fixtures and equipment, screening, pest control, insulation where required by extreme climate, painting where required for hygienic reasons or in connection with authorized repairs or alterations, and other changes to make the quarters reasonably habitable. The allowance is not designed to cover redecoration, repair, renovation or replacement of furnishings, erection of additions to any structure or of garages, or the removal of garages or other outbuildings or improvement of grounds.

The total initial repairs allowance shall be the estimated cost of allowable items, not to exceed the difference between the quarters allowance to which the employee would actually be entitled for 2 years, and his/her maximum authorized allowance for 2 years. No employee shall be granted more than one initial repairs allowance during a period of continuous assignment to a post.

This one-time "repair allowance" is thus intended for unusual circumstances where the quarters are below reasonable standards of health, safety or comfort, the lessor will not pay for the repairs or upgrades, and no other adequate quarters are available locally. It may only be used to pay for the cost of the specified types of repairs or alterations required to make a residence "reasonably habitable" and may not be used to pay for the cost of renovations.

None of these conditions exist in the claimant's situation. In a May 20, 2011, email to his agency regarding his request for LQA increase, the claimant attempted to justify the rent increase and higher resulting monthly rent by stating:

[t]he house which I rent is higher in rent because it is an above average or 'special home' in an exceptional location in the vineyards [sic]. A nature protected field and river belong to the home. This is NOT an average home. It cannot be compared to average mietspiegel [rent index]. We chose the home because it was in the interest of my children's physical well being given the natural products of the home and surrounding areas.

The agency reported that in this email the claimant characterized the alterations made to the property by the landlord as "modernizations," and the claimant has not disputed this account.

In his initial claim letter to OPM, the claimant presented no argument that his living quarters at the commencement of the lease were "below reasonable standards of health, safety, or comfort." Rather, he presented the situation as his having "moved into a place where modifications and restorations were being planned by the landlord due to a fungus problem in the past," and that he "decided to renew the contract later when the restorations were complete and fair to the new market value of the rental property." In addition, he stated that "[t]he landlord also increased the living space given my family size."

In his response to the AAR, the claimant changed his depiction of the previously-described "above average or special home" to that of a "modest 4 bedroom, 2.5 baths, family home, which does have some unique characteristics." He also stated he has "never requested Allowances to pay for renovations," without clarifying the distinction he appears to be making between

"renovations" and his previously-cited "modernizations," which terms would appear to be synonymous.

However, the letters from the claimant's landlord which the claimant presented to the agency in connection with his request for LQA increase describe different circumstances than those asserted by the claimant. The basis for the first rent increase occurring after two months of occupancy is undocumented. In connection with this increase, the claimant submitted a letter from the landlord dated September 22, 2010, stating only "[a]s per your expressed wishes, in addition to agreement of the rental contract, we have made the additional investments to the rental property." The second rent increase occurred after nine months of occupancy, well outside the three-month window stipulated in DSSR Section 137. The basis for this increase as stated in a letter from the landlord dated April 12, 2011, was for "[a]s requested, a full reconstruction of the basement and remodeling of the gardens to render them more suitable for children." The landlord requested in this letter that the "newly negotiated monthly rent be paid as of 01 May 2011."

Regardless of the claimant's differing accounts as to the exact nature of the property alterations (variously either "modernizations," fungus abatement, or increased living space), which in turn conflict with the landlord's description of the work performed (basement reconstruction and landscaping), it is undisputed that the landlord paid for the improvements in exchange for a rent increase by mutual agreement. The claimant has provided no evidence nor has he advanced the argument that no other suitable quarters are available locally. Even if these conditions existed, the claimant would have been required to receive approval in advance before incurring these expenses. Thus, DSSR Section 137 is not applicable to his request for LQA increase.

In his response to the AAR, the claimant reiterates that when he secured the rental property, "modifications and restorations were being planned and already underway by the landlord due to water damage and a mold problem he had in the basement and surrounding area." He states that he "made an agreement with the landlord that [he] would move into the home prior to work completion but pay a lower rent which reflected the status of the home," and that "[u]pon completion of the work we would make new rental contracts which reflected the fair market value for the home." He submitted with this response a document dated June 12, 2010, signed by the claimant and the landlord, titled "Supplemental Agreement concerning the Determination of Rental Costs." This "supplemental agreement" states (as translated from German to English by the agency):

I herewith declare to be in agreement to rent the rental property at [address] to [claimant] even before the completion of all renovation work at a significantly lowered monthly rent in the amount of €2,800.00. I do so to accommodate him and his desire to move in at an earlier date. In return, [claimant] is willing to agree to a tiered rental increase which is tied to the completion of the various renovation projects. Thus, the regular monthly rent in the amount of €3,450.00 would be approached and due before the end of the first year of renting the property.

Since this was a newly-submitted document provided directly to OPM by the claimant, we afforded the agency the opportunity to review this "supplemental agreement" for potential impact

on its decision to deny the claimant's request for LQA. In response, the agency questions the authenticity of the document and declines to give it further consideration. They note it was not submitted with the rental contract of June 12, 2010, upon the claimant's initial request for LQA commencement or during their subsequent extensive discussions with the claimant regarding the requested LQA increase, nor was it cited in correspondence from the attorneys consulted by the claimant and the landlord regarding the propriety of the rent increases under the German Civil Code. The claimant counters that “[i]t was not until I sought legal assistance during this appeal that I ascertained the letter which was in the landlord’s possession documenting our tiered structured agreement. The landlord had this document for his own security to ensure I would cooperate with the rental increases.”

Although this document was ostensibly signed on the same day as the rental contract in that both are dated June 12, 2010, the claimant has provided no evidence that he either submitted or mentioned to the agency the existence of a supplement to the rental contract in connection with his initial request for LQA commencement or his subsequent request for LQA increase, or when he submitted his LQA claim to OPM. The record contains a copy of a letter addressed to the claimant from a "Legal Assistance Attorney," dated October 17, 2011, and accompanied by a translation from German to English, which discusses the requirements of the German Civil Code regarding rent increases. Since this is presumably the "legal assistance" the claimant had sought when he "ascertained" the "supplemental agreement," his delay in not submitting this document to OPM until June 22, 2012, remains unexplained. Although the claimant states the landlord "had this document for his own security" to ensure cooperation with a future €650.00 rent increase, there is no reference or notation regarding this significant intended increase in the rental contract itself.

Further, the wording used in the "supplemental agreement" cannot be reconciled with the landlord’s two later letters to the claimant requesting commencement of the rent increases. Whereas the June 12, 2010, “supplemental agreement” refers only to “the *completion* of the various renovation projects” presumably already in progress as the basis for the subsequent rent increases, the September 22, 2010, letter from the landlord requesting a €250.00 monthly rent increase refers to unspecified “*additional* investments to the rental property” made “*per [the claimant’s] expressed wishes*, in addition to agreement of the rental contract” as the basis for the rent increase. The April 12, 2011, letter from the landlord requesting “the *newly negotiated* monthly rent” similarly refers to “[*a*]s requested, a full reconstruction of the basement and remodeling of the gardens” as the basis for the rent increase. Neither letter cites the June 12, 2010, “supplemental agreement” as establishing an agreed-upon rent increase, and the September 22, 2010, letter specifically characterizes the additional investments as being "in addition to agreement of the rental contract" rather than per any supplemental agreement to that contract. The claimant asserts that the landlord's letters "which note that I made requests for certain modernizations or updates were simply to ensure that those updates which were planned anyway would actually get completed," and that "[w]hile the owner was already in the process of completing work on his home, I was allowed input on some of the work." However, his statements are contradicted by the plain and unequivocal language of the landlord's letters, which refer to "additional investments" made at the claimant's "expressed wishes." These two letters indicate the rent increases were for renovations made at the claimant’s request rather than for work that was already in progress when the rental contract was signed and that at least in the case

of the second increase, the rent (which was then €3450.00) was “newly negotiated” as opposed to having been already established via the purported "supplemental agreement" of June 12, 2010.

Based on the above considerations, we find the agency's decision to disregard this newly-surfaced document is reasonable, as it conflicts with both the claimant's previous statements and with other documents he submitted to his agency when he initially requested the LQA increase and to OPM when he filed his claim.

The DSSR does not make any explicit provision for increasing an LQA grant based on rent increase. However, DSSR Section 132.5, Costs, states:

Employees shall submit written estimates of costs, or actual costs if they are known, to the head of agency on Section 960 LQA Annual/Interim Expenditures Worksheet attached to the SF-1190, Foreign Allowances Application, Grant, and Report, whenever an LQA grant commences. Thereafter, each employee shall show the actual annual expenses of rent and utilities, supported by receipts or other satisfactory evidence, whenever requested by the officer designated to grant allowances, the Department of State, or other responsible authority.

Thus, an LQA grant is based on the cost of “suitable, adequate living quarters” *as established at the time the LQA grant commences*. Thereafter, the LQA recipient must show the actual annual expenses of rent and utilities associated with these “suitable, adequate living quarters” when requested by the granting agency. The Department of the Army’s regulations implementing the DSSR, Army in Europe Regulation (AER) 690-500.592, require an initial mandatory reconciliation at the end of the first year of the rental period but not later than 15 months, to ensure that the costs projected for the "suitable, adequate living quarters" on which the LQA grant was based are supported. However, they also provide for “voluntary reconciliation” as follows:

While there are no requirements for reconciliations in addition to the initial one described in subparagraph a above, employees may request reconciliation whenever they believe that a significant change in expenses has occurred. The purpose of this provision is to correct unusual gains or losses to the employee.

A rent increase that has occurred as a result of an LQA recipient requesting renovations or alterations to the “suitable, adequate living quarters” on which the LQA grant was based cannot be considered an “unusual” loss. In this case, the rent increase was mutually agreed upon by the claimant and his landlord in exchange for non-essential upgrades to a property that had already been considered “suitable and adequate.” AER 690-500.592 adopts the language of the DSSR in specifically defining LQA as follows:

LQA is a payment intended to cover substantially all average allowable costs for suitable, adequate lodging and selected utilities.

Thus, the agency has discretion to consider any employee request for LQA grant within the context of “average” allowable costs for “suitable, adequate lodging” rather than merely approving all requests up to the maximum rate for the post. In this case, the agency granted the claimant an LQA amount to fully compensate him for his rental costs as established in the rental contract he entered into on June 12, 2010. The agency then exercised its discretion in disallowing for LQA purposes what they considered to be an “unusually high increase of monthly rent of €650.00 or \$878.38, even for the high-cost rental area of greater Weisbaden, as a result of modifications and alterations done to a habitable rental dwelling” at the claimant's request.

Although the claimant has challenged the agency's methodology for arriving at their determination of typical rental costs in the Weisbaden area by citing other rental properties, this is immaterial to our adjudication of his claim, which is limited to consideration of statutory and regulatory entitlement. The claimant is not entitled to the maximum LQA rate allowable under applicable regulation, and the agency has the discretion and the fiduciary responsibility to ensure that unreasonable costs are not being incurred in the disbursement of public funds. 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.

The claimant's assertion that "the DSSR fails to address issues related to rent increase... more than likely because the DSSR waives such issues to the German Tenancy Laws" in the determination of individual employee LQA rates is incorrect. The expenditure of Federal Government funds is always determined by the application of U.S. statute and regulations. If a benefit requested by a Federal employee is not specifically conferred by U.S. statute or regulation, then that benefit does not exist. Whereas German civil law establishes the respective rights and obligations of lessors and lessees residing in Germany, including LQA recipients, they have no bearing on an agency's discretionary determination of LQA eligibility or amounts. Therefore, whether German civil law allows rent to be increased within less than 12 months after commencement of the rental contract, this does not impose a requirement for a corresponding increase in LQA grant to a Federal employee. This is not, as the claimant asserts, a "German Tenancy Law" issue, but rather a question of the proper determination of LQA grant within the parameters of the applicable Federal regulations.

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). The DSSR establishes only basic LQA eligibility parameters and bestows considerable discretion to agency heads to decide under what circumstances they will actually grant LQA to eligible individuals. See *Mark Roberts v. United States*, U.S. Court of Federal Claims, No.10-754C (April 30, 2012; reissued May 21, 2012). DSSR Section 013 authorizes agency heads to issue further implementing regulations for their own agencies. 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). In the present case, the agency's decision to disallow the requested LQA

increase is not considered arbitrary, capricious, or unreasonable, and there is no basis upon which to reverse the decision.

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