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 Heidelberg, Germany
Claim:	Living quarters allowance
Agency decision:	Denied
OPM decision:	Denied
OPM file number:	12-0018

/s/ Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Agency Compliance and Evaluation
Merit System Accountability and Compliance

5/23/2013

Date

The claimant is a Federal civilian employee of the Department of the Army in Heidelberg, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's cessation of his living quarters allowance (LQA). We received the claim on March 6, 2012, and the agency administrative report on May 16, 2012. For the reasons discussed herein, the claim is denied.

The claimant had submitted a request to his agency to extend the rental portion of his LQA beyond the initial ten-year period for personally owned quarters (POQ) as a result of his acquisition of a second property, approximately 198 miles from his duty station, which he had newly designated as his "primary residence." In the course of reviewing his request, the agency determined the claimant had been erroneously granted LQA in 1997 when he was initially appointed to the Federal service and his LQA was accordingly terminated in its entirety.

The record shows the claimant entered active duty military service with the U.S. Army/Regular Army in Los Angeles, California, on December 28, 1976. On November 19, 1989, he was discharged from active duty at Fort McClellan, Alabama, for the reason stated on his DD Form 214 (DD214), Certificate of Release or Discharge from Active Duty: "ordered to active duty as a warrant officer in the U.S. Army." On November 20, 1989, he entered active duty in the U.S. Army Reserve at Fort McClellan. On April 1, 1992, he was discharged from the U.S. Army Reserve in Nuernberg, Germany, where he held the rank of Warrant Officer 1, for the reason stated on his DD214: "failure of selection, permanent promotion." On April 2, 1992, he enlisted in the Regular Army in Schweinfurt, Germany, at the enlisted rank of Sergeant First Class (pay grade E7) for four years, and was subsequently reassigned to Fort Leavenworth, Kansas. On December 3, 1993, during the term of this enlistment, he reenlisted again in the Regular Army at Fort Leavenworth for five years with the same enlisted rank, and was subsequently reassigned to Germany with a reporting date of not later than May 31, 1994. He retired from active duty military service in Schweinfurt, Germany, on January 31, 1997, and was appointed to his first Federal civilian position with the Department of the Army in August 1997, with LQA benefits.

The agency determined that the circumstances of the claimant's reenlistment in the Regular Army in 1992 while he was stationed in Germany rendered him ineligible for LQA under Department of State Standardized Regulations (DSSR) Section 031.12b, for the stated reason that "[s]ince [claimant] re-entered the military service in Germany following his separation from the warrant officer corps and his simultaneous enlistment, he effectively was recruited by the U.S. Army in Germany."

The claimant counters that he had no break in service between his discharge from the U.S. Army Reserve on April 1, 1992, and his subsequent reenlistment in the Regular Army on April 2, 1992. He asserts that military members retain the residency of their home States, and that his "home of record" throughout his military career as recorded on his DD214s was Oceanside, California. He cites the Joint Federal Travel Regulation/Joint Travel Regulation which defines "home of record" as "the place recorded as the individual's home when commissioned, appointed, enlisted, inducted, or ordered into a tour of active duty unless there is a break in service of more than one full day," and which further states "[o]nly if a break in service exceeds one full day may the

member change the home of record."[1] He asserts he remains eligible for LQA under Army in Europe Regulation (AER) 690-500.592, paragraph 7a(2), because "US Servicemembers who are discharged from military service overseas and who are hired by the federal government as government civilian employees can still receive LQA provided their hire occurs within one year of their release from active duty."

The DSSR sets forth basic eligibility criteria for the granting of LQA. Agency implementing guidance such as that contained in AER 690-500.592 and cited by the claimant may impose additional requirements, but may not be applied unless the employee has first met the basic DSSR eligibility criteria.

DSSR Section 013.11 states LQA may be granted to employees recruited in the United States:

> Quarters allowances... may be granted to employees who were recruited by the employing government agency in the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the possessions of the United States.

The claimant does not meet basic LQA eligibility criteria under DSSR Section 031.11. The claimant was residing in Germany when he was recruited by the Department of the Army in 1997. He was not residing in the United States or one of its enumerated territories or possessions as required under Section 031.11. The determining factor for LQA eligibility under Section 031.11 is the geographic place of physical residency, not "home of record" as may be applicable for travel authorization purposes. Provisions of the Joint Federal Travel Regulations/Joint Travel Regulations are applicable only for the purpose of determining travel and transportation allowances and may not be imported into the DSSR to establish LQA eligibility.

DSSR 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;

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[1] The claimant erroneously states the cited definition "provides 'only if a break in service exceeds one full day' can change the place a an [sic] individual was enlisted onto active duty." However, under this definition, a break in service exceeding one day allows a military member to change the recorded home of record, not the place of enlistment, which are not necessarily the same locations.

(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; or

Prior to his appointment by the Department of the Army in 1997, the claimant, for purposes of DSSR Section 031.12b above, was "employed" by the U.S. Army/Regular Army. The claimant's first enlistment in the U.S. Army occurred in the U.S., and his military career included two separate discharges and at least two tours of duty in Germany before his eventual retirement in Germany. The issue relevant to this claim is his place of recruitment prior to his Federal appointment for purposes of LQA eligibility under Section 031.12b.

DSSR Section 031.12b allows for employment by a single employer overseas, after having been recruited in the United States, immediately prior to appointment to the Federal Service. This encompasses prior employment by private firms, international organizations, foreign governments, and the U.S. Government, including the military. The application of Section 031.12b to the conditions of prior civilian employment is fairly clear, in that there must be continuity of employment (i.e., "substantially continuous employment") by a single employer from the time of initial recruitment in the U.S. by that employer up to the point of Federal appointment. Section 031.12b does not, however, address the complicating circumstances of long-term military service, such as periodic reenlistments, movement between the regular military and the reserves, and reactivations to active duty as they relate to issues regarding the place of recruitment and whether there has been continuity of employment by a single employer.

For purposes of determining LQA eligibility in this case, the agency relies on the issuance of the DD214 as the basis for distinguishing separate recruitment actions. The DD214 is issued upon a military service member's retirement, separation, or discharge from active duty, and is recognized as the fundamental military service document. The agency regards the separation from military service documented by a DD214 as a termination of such employment regardless of whether the individual subsequently re-enters the military in some capacity, and any subsequent re-entry as a new recruitment.

Within this context, the agency determined the claimant does not meet basic LQA eligibility criteria under DSSR Section 031.12b. They state that "...irrespective of the circumstance that his military service was factually continuous since December 1976; nevertheless, his separation from the service and re-entry into the same outside of the United States, for LQA purposes, cannot be disregarded." The claimant was discharged from the U.S. Army Reserve on April 1, 1992, was issued a DD214 documenting the discharge, and opted to immediately re-enter the military in the Regular Army on April 2, 1992, while stationed at Schweinfurt, Germany. Hence, the DD214 issued him upon his retirement on January 31, 1997, shows "place of entry into active duty" as Schweinfurt, Germany, rather than the locations of his initial enlistment or earlier reenlistments in the U.S. Accordingly, the agency regards his April 2, 1992, entry into

the Regular Army as constituting a "recruitment" action for purposes of determining LQA eligibility under Section 031.12b. As such, prior to his civilian appointment by the Department of the Army, the claimant was employed by the U.S. Army/Regular Army which had recruited him *in Germany* rather than in the U.S. or one of its enumerated territories or possessions as required under DSSR Section 031.12b.

Within the above context, the claimant's last reenlistment in the Regular Army at Fort Leavenworth, Kansas, on December 3, 1993, after which he returned to Germany before his eventual retirement in 1997, does not constitute a break in employment (i.e., a new recruitment) for LQA eligibility purposes. The claimant presents the circumstances precipitating this reenlistment thus: "After my [initial] Germany assignment I was transferred in the normal course of military rotations to Fort Leavenworth, Kansas. At that point, my tour of enlistment expired and I was again reenlisted, this time in Kansas." However, this account is not supported by the claimant's enlistment documentation. The Enlistment/Reenlistment Document, Armed Forces of the United States, signed by the claimant on April 2, 1992, in Schweinfurt, Germany, identifies the term of enlistment/reenlistment in block B.8. as four years. The Request for Regular Army Reenlistment or Extension, DA Form 32340-R, signed by the claimant on November 3, 1993, identifies the "date of entry on current enlistment" as April 2, 1992, the "length of current period of enlistment" as four years, and the "current ETS" (expiration term of service) as April 1, 1996. The claimant's last reenlistment occurring on December 3, 1993, overlapped the previous enlistment. Thus, the claimant's enlistment documentation shows the April 2, 1992, term of enlistment had not expired when he reenlisted in 1993. The claimant has not produced a DD214 showing he was discharged or otherwise separated in connection with this last reenlistment to support his assertion that the previous enlistment had expired. Therefore, the December 3, 1993, reenlistment does not supplant his April 2, 1992, recruitment in Germany by the U.S. Army/Regular Army as documented on the DD214 issued him upon his retirement.

The claimant's citation of AER 690-500.592, paragraph 7a(2), to support his request for LQA is moot as he does not meet basic LQA eligibility criteria under DSSR Sections 031.11 or 031.12b and will not be addressed.

After submission of his initial claim, the claimant provided additional documents intended to support his claim, consisting of several 1992 Leave and Earnings Statements (LESs), and specifically an April 1992 LES which he states "shows no Separation only PCS to new duty station on 02 Apr 92." The relevance of this document to his claim is unclear as an LES contains only the information relevant for payroll purposes. As noted above, the claimant's DD214 dated April 1, 1992, is the official documentation of his separation from military service effective that date.

Also after submission of his initial claim, the claimant submitted a letter dated October 18, 2012, wherein he states he had been told by a representative of the Heidelberg Civilian Personnel Advisory Center (CPAC) in March 2011 that he would receive LQA for his second POQ, and that he would not have purchased the home if he had been told he was ineligible. He included copies of an email exchange between himself and the representative which allude to an earlier conversation regarding LQA but do not make clear the substance of any information that may have been conveyed. Regardless, it is well settled by the courts that a claim may not be granted based on misinformation provided by agency officials. Payments of money from the Federal

Treasury are limited to those authorized by statute, and erroneous advice given by a Government employee cannot estop the Government from denying benefits not otherwise permitted by law. See *OPM v. Richmond*, 496 U.S. 414, 425-426 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed.Cir. 1997); and 60 Comp. Gen. 417 (1981). Therefore, that the claimant may have been told or otherwise believed that he would be eligible for LQA for his second POQ does not confer eligibility not otherwise permitted by statute or its implementing 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). 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. *Joseph P. Carrigan*, 60 Comp. Gen. 243, 247 (1981); *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979). The agency's standard practice of relying on the issuance of a DD214, the fundamental military service document, to document the termination of a period of military employment, and their consideration of any subsequent re-entry into the military as constituting a new recruitment action, is not arbitrary, capricious, or unreasonable. Therefore, we find 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.