UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Merit System Audit
and Compliance

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

Claimant:	Byron E. Sykes
Organization:	302d Military Intelligence Battalion 66th Military Intelligence Brigade Intelligence and Security Command Department of the Army Darmstadt, Germany
Claim:	Request for living quarters allowance
Agency decision:	Denied
OPM decision:	Denied
OPM file number:	10-0018

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

6/22/2011
Date

The claimant is a Federal civilian employee with the 302d Military Intelligence Battalion, Department of the Army, in Darmstadt, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of living quarters allowance (LQA). We received the claim on January 26, 2010, and the agency administrative report (AAR) on April 16, 2010. For the reasons discussed herein, the claim is denied.

The claimant initially separated from active duty military service in Germany on September 3, 2000. He subsequently accepted a non-appropriated fund (NAF) position with the Department of the Army in Germany, which he held from September 2000 to January 2003. His military service was reactivated in Germany on January 3, 2003, for service in Iraq, and he was officially discharged from that service on October 14, 2003, again in Germany. In April 2004 he commenced employment with a private contractor, CACI, in Germany, followed by other subsequent positions with that firm in the United Kingdom, commencing in March 2005, and again in Germany, commencing in December 2006. In March 2009, he left employment with CACI to accept a position with another firm, SOS International (SOSi), also in Germany, which position he occupied until August 2009. He accepted his current position with the Department of the Army on August 31, 2009.

The claimant asserts that after his second discharge from military service in October 2003 and before his employment with CACI in April 2004, he returned to the United States (U.S.) and resided with his father in Hollis, New Hampshire. To support this assertion, he submitted a copy of his W-2 Wage and Tax Statement 2003 documenting his brief employment in New Hampshire from September-December 2003; his New Hampshire driver's license issued May 25, 2007, with the address shown being his father's address; his CACI position offer letter dated March 26, 2004, addressed to him at his father's address in Hollis, New Hampshire; and a letter from German municipal authorities dated June 18, 2009, confirming the dates of his residency registration as April 1, 2004, to January 24, 2005. He believes this documentation establishes his eligibility for LQA as a U.S. hire under Department of State Standardized Regulations (DSSR). He states:

> I argue that I cannot have established residence OCONUS [outside the continental United States], in this case Germany as implied by USAREUR, because Germany requires foreigners have a residency permit in order to live there. Since such a residency permit is conditional upon demonstrating employment, and my employment in Germany did not begin until April 2004, when I began working as a contractor for a U.S. firm, it is not possible that my residence was OCONUS at the time of my original hiring for OCONUS employment.

The agency states the claimant did not provide sufficient documentation to establish U.S. residency for the period in question, i.e., his actual physical residency when CACI recruited him in 2004. The AAR notes that the claimant's W-2 showing his earnings in 2003 does not establish where he was residing in 2004, that his possession of a New Hampshire driver's license likewise does not establish physical residency and, moreover, the license was not issued until May 2007. They also note that although the claimant was required by German law to register and obtain a residency/work permit that would allow him to legally work for CACI in Germany beginning in April 2004, he was not obligated to do so for up to 90 days upon his return to Germany in a tourist status, thus the confirmation letter he submitted does not establish when he actually registered. The agency reports that despite requests made to the claimant, he did not provide copies of his passport and/or airline tickets which would document his travel history to

and from the U.S. during the period in question. The agency also notes that aside from the question of his physical residency when he was recruited by CACI, the claimant had not been recruited in the U.S. by his subsequent employer, SOSi, immediately prior to his Federal appointment.[1]

DSSR 031.12 states:

031.12 Employees Recruited Outside the United States

Quarters allowances prescribed in Chapter 100 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; or

Substantially continuous employment in DSSR 031.12b must be with the *employer* (singular) which recruited the employee in the U.S. and induced the employee to accept overseas employment. The claimant's leaving CACI to work for SOSi ended the required continuous employment with the employer, in his case CACI, which recruited him in the U.S. Thus, the claimant lost LQA eligibility under the DSSR when his employment with CACI ended and his claim for LQA is accordingly denied.

Since the claimant fails to meet DSSR eligibility requirements based on the lack of substantially continuous employment as that term is used within the context of paragraph 031.12b, whether he actually resided in the U.S. prior to his recruitment by CACI is moot. Therefore, we need not address the issue of the claimant's residency prior to his employment with CACI.

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[1] To support its position, the agency cites OPM File Number 08-0009 dated September 18, 2008. As this decision has not yet been posted on OPM's website, a redacted copy of OPM File Number 08-0009 is attached to this decision for the claimant's reference.

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 employee's right to bring an action in an appropriate United States court.

Distribution

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