

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

Claimant: [name]

Organization: Department of the Air Force
Ramstein Air Force Base, Germany

Claim: Separate maintenance allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0034

/s/ Linda Kazinetz for

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

1/30/14

Date

The claimant is a Federal civilian employee of the Department of the Air Force (AF) at Ramstein Air Force Base, Germany. She requests the U.S. Office of Personnel Management (OPM) reconsider her agency's denial of separate maintenance allowance (SMA) for the "time period [claimant's spouse] had to stay in the US while [claimant] sought a wheelchair friendly, handicapped accessible, pet companion friendly house." We received the claim on April 9, 2013, and the agency administrative report (AAR) on June 28, 2013. For the reasons discussed herein, the claim is denied.

While residing in the United States, the claimant applied and was selected for a position assigned to the AF base, effective October 13, 2012. She arrived in Germany from the United States, while her spouse remained in the United States. The claimant initially requested SMA from her agency in a January 9, 2013, email with an attachment, which the agency states was erroneously dated October 14, 2012. The claimant said her request for SMA was due to the delay in locating a house adequate to the needs of her spouse's medical conditions, stating:

Due to this difficulty and [her spouse's] fear about the accessibility in Germany (we have lived here together before, in Garmisch and it was always a challenge for him to fully enjoy our time together) [her spouse] has chosen not to come over permanently. His caregiver in the US will escort him over for visits.

In a February 15, 2013, email to the agency, the claimant said she located a house scheduled to be available in June 2013. Although her initial January 2013 SMA request said her spouse "has chosen not to come over permanently," the subsequent February 2013 email requested SMA for the period of time the claimant spent locating a house until her spouse's arrival in Germany, to "cover the time [the claimant and her spouse] have been apart (4 months at least)."

The AF denied the claimant's SMA request, referencing the Department of State Standardized Regulations (DSSR), Section 262.2 for Voluntary SMA, which states an agency may authorize an allowance for "special needs or hardship" including but not limited to "career, health, educational or family considerations" for defined family members. The agency's undated decision states:

Based on our established past practice, SMA is approved to allow children to complete the current school year or when a family member requires medical care not available overseas. In your specific situation, we recognize the fact that your husband has special needs due to being bound to a wheelchair. However, the enduring separation is a result of personal choice rather than compelling need. The Housing Office specifically will not concede [*sic*] that no appropriate housing was available which would facilitate your husband's disability.

The claimant disagrees with her agency's decision, stating that there were no adequate houses suitable to the needs of her spouse and that housing officials failed to provide "hard copy proof supporting the statement that handicapped housing was available." She further states housing officials previously provided a signed letter permitting her to store her household goods beyond the initial 90 days authorized based on her difficulty in locating an adequate house. However, the AF's AAR to OPM states that SMA requests based on special needs or hardship reasons are granted when appropriate documentation is provided. In the claimant's situation, the agency

states the housing officials would not provide a statement regarding the unavailability of suitable housing and instead indicated that “housing was available but not to [the claimant’s] liking.”

Section 261.2 of the DSSR emphasizes that:

SMA is intended to assist in offsetting the *additional expense* incurred by an employee who is *compelled by the circumstances described below* [in section 262, one of which being where Voluntary SMA is authorized] *to maintain a separate household* for the family or a member of the family. [italics added]

Section 263.1 further notes that “[w]hen a member of family would not normally reside with the employee, this individual does not meet the definition of member of family” and thus in these circumstances SMA is not warranted.

The intent of the regulations is clearly that SMA be granted only in those cases where the employee would otherwise be compelled to maintain a separate household for a family or family member and thus would be burdened with assuming the additional expenses associated therewith, not to defray the costs of an existing housing arrangement.

At our request for additional documentation, the agency provided the claimant’s permanent change of duty station travel orders, dated August 20, 2012, for her position in Germany to establish her eligibility. The orders authorize the additional shipment of household goods from the same address identified as the alternate departure point for her spouse. Thus, it is unclear whether the claimant and her spouse were residing together prior to her acceptance of the position in Germany, and neither the claimant nor the agency submitted any other documentation establishing whether the claimant and her spouse resided together prior to her acceptance of the position in Germany.¹ Therefore, we are unable to reach a decision as to whether the claimant meets the eligibility requirements for SMA as expressed in DSSR sections 261.2 and 263.1. However, the claim is denied for the reasons discussed below.

The Overseas Differentials and Allowances Act, as amended and codified in Section 5921 – 5928 of title 5, United States Code (U.S.C.), provides that, under regulations prescribed by the President, a SMA may be paid to Federal employees in foreign areas. Section 5924(3) of title 5, U.S.C., states that SMA may be granted to assist an employee who is compelled or authorized, because of dangerous, notably unhealthy, or excessively adverse living conditions at the employee’s post of assignment in a foreign area, or for the convenience of the Government, or who requests such an allowance because of special needs or hardship involving the employee or the employee’s spouse or dependents, to meet the additional expenses of maintaining, elsewhere than at the post, the employee’s spouse or dependents, or both.

By Executive Order, the President delegated this authority to the Secretary of State, who issues the DSSR governing overseas allowances and differentials. The DSSR further delegates the authority to grant SMA to the heads of Federal agencies. Section 262 of the DSSR states:

¹ The agency states that because they denied the claimant’s SMA request on other grounds, they did not request such documentation because it was not germane to their decision.

SMA may be granted to an employee whenever the head of agency determines that the employee is compelled to maintain any or all members of family elsewhere than at the foreign post of assignment...

The language applying to SMA in 5 U.S.C. 5924 is permissive rather than mandatory, and the language in the DSSR is similarly permissive. By the use of the permissive term “may” as opposed to the mandatory terms “will,” “shall,” or “must” in relation to SMA, agencies are granted discretionary authority in allowing or disallowing SMA in individual cases. Under statutes that vest a degree of discretion in administrative agencies, our review is generally confined to deciding whether an agency’s action must be viewed as arbitrary, capricious, or so at variance with the established facts as to render its conclusion unreasonable.

Thus, an agency may deny SMA payments 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 this case, the agency has stated they do not grant SMA based on special needs or hardship reasons without the accompanying supporting documentation (i.e., in this instance, a statement from housing officials verifying the inadequacy of appropriate housing). Where an agency decision is consistent with their established practice in similar situations, it cannot be considered arbitrary, capricious, or unreasonable, and there is no basis on which to reverse the decision.

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.