



United States
**Office of
Personnel Management**

Washington, DC 20415

Date: JUN 15 2005

Matter of: [name]

File Number: 04-0030

OPM Contact: Robert D. Hendler

The claimant is a civilian employee of the Defense Logistics Agency (DLA), hired while living in the United States. He requests reconsideration of his agency's decision denying him retroactive payments of Separate Maintenance Allowance (SMA) from August 2001 until he began receiving SMA in September 2003. We received the claim on February 19, 2004, and the agency administrative report on August 5, 2004. For the reasons discussed herein, the claim is denied.

While living in the United States, the claimant received a job offer in July 2001 for a full-time permanent [position] at the DLA Europe, in Weisbaden, Germany. He accepted the position and arrived in Germany from the United States on August 10, 2001. His family remained in the United States.

He applied for living quarters allowance (LQA) and a post allowance (PA) on October 24, 2001, and began receiving both in approximately November 2001. Through conversation with a colleague in early September 2003, he discovered that he had not received an SMA to which he believed he was entitled. In September 2003, the claimant submitted a request for SMA, which was approved. Simultaneously, the claimant submitted a request for retroactive SMA to cover the period from his arrival in Germany in August 2001 through September 2003.

On December 4, 2003, and January 12, 2004, the DLA denied the claimant's request for retroactive SMA in accordance with the Department of State Standardized Regulations (DSSR), Section 265, Separate Maintenance Allowance, which states that SMA commences with the latest of the following: date on which employee submits application for SMA grant, or date of assignment, or date on which the employee begins travel under an order of assignment, or date on which the separation from the member of the family occurs. The agency wrote that the Customer Service Office Columbus (CSO-C) routinely advises employees traveling overseas of their OCONUS allowances and travel processes via telephone conversations with the employees. CSO-C also shares information with

employees about the human resources website, where additional guidance on overseas allowances is available.

The claimant advised that the human resources office responsible for in-processing of new employees never advised him about the guidance on overseas allowances on the human resources website or of his entitlement to SMA.

The agency administrative report indicated that the claimant applied for SMA on September 9, 2003. The agency reviewed his claim and found that he met the provisions of DSSR, Section 262.2. His claim for the upcoming year was approved and he began receiving SMA on September 23, 2003. The agency denied the claimant's request for retroactive SMA because they could not substantiate the claimant's allegation that the CSO-C failed to advise the claimant of his overseas allowance entitlements. They also advised that there were no regulatory provisions in either the DSSR or the Department of Defense regulations 1400.25, Subchapter 1250 that would allow retroactive SMA payment to the claimant.

Section 261.1 of the DSSR defines a separate maintenance allowance as an allowance to assist an employee who is compelled by reason of dangerous, notably unhealthful, or excessively adverse living conditions at the post of assignment in a foreign area, or for the convenience of the Government, to meet the additional expense of maintaining family members elsewhere than at such post. This allowance may also be authorized to an employee who personally requests such an allowance, based on special needs or hardship involving the employee or family member.

Section 265 of the DSSR indicates that the grant of an SMA to an employee in connection with assignment to a new post shall commence as of the latest of the following dates:

- (1) date on which employee submits Standard Form 1190, Application for SMA Grant or
- (2) date of assignment; or
- (3) date on which the employee begins official travel under an order of assignment; or
- (4) date on which the separation from the member of family occurs.

It further states that if a SMA is granted to an employee during the period of service at a post of assignment, the grant shall commence as of the latter of the following dates:

- (1) date on which employee submits Standard Form 1190, Application for SMA Grant; or
- (2) date on which the separation from the member of family occurs.

Department of Defense 1400.25-M, Subchapter 1250.6.1.5 dated December 1996, specifies that head of agencies are authorized to make determinations concerning payment of a

separate maintenance allowance, including changes of election, and waivers of indebtedness for advance payments.

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. Although the claimant stated that he was not informed in a timely manner of his entitlement to SMA or was provided different information, it is well established that a claim may not be granted based on misinformation that may have been provided by Federal employees. Equitable considerations cannot justify the retroactive payment of benefits not authorized by existing statute and regulations. See *Richmond v. OPM*, 496 U.S. 414, 425-426 (1990); *Falso v. OPM*, 116 F.3d459 (Fed Cir. 1997); and 60 *Camp. Gen.* 417 (1981).

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.