

Compensation Claim Decision
Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: [agency component]
U.S. Army Southern European Task
Force
Vicenza, Italy

Claim: Voluntary Separate Maintenance
Allowance (VMSA)

Agency decision: Denied

OPM decision: Denied

OPM file number: 10-0005

//Judith A. Davis for

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

4/16/10

Date

In his July 7, 2009, claim request which the U.S. Office of Personnel Management (OPM) received on October 21, 2009, the claimant seeks to challenge the Department of the Army's June 24, 2009, decision which granted him VSMA effective May 18, 2009, rather than March 30, 2009. The claimant occupies [position] in the [agency component], U.S. Army Southern European Task Force, in Vicenza, Italy. We received the agency administrative report (AAR) on December 19, 2009. For the reasons discussed herein, the claim is denied.

The claimant states he departed Colorado Springs, Colorado, on March 30, 2009, and arrived in Italy on March 31, 2009, traveling to his duty station in Vicenza, Italy. He states that during his in-processing in Vicenza, he was told about separate maintenance allowance (SMA). The claimant also states the human resources staff member who in-processed him emailed the SMA form (Foreign Allowances Application, Grant and Report, SF-1190) to his sponsor, but his sponsor failed to tell the claimant he had received the form. Due to the duties associated with his move and his new job, the claimant states he did not "reengage...with regard to SMA until mid May [sic]" and subsequently submitted his SMA "paperwork." The claimant requests his SMA start date be changed "to 30 March from 18 May due to circumstances beyond [his] control."

The AAR confirms the facts presented by the claimant regarding his departure and arrival dates. The report states the claimant requested and was granted delayed travel for his wife and two children to afford his children the opportunity to complete their high school year prior to their departure for Europe. The AAR states the claimant signed the SF-1190 on May 18, 2009, which is the date the agency accepts as the official date of submission. The report acknowledges the claimant was separated from his family at least since March 31, 2009, and states it is unfortunate the claimant was not informed of the possibility to request VMSA prior to his departure from the United States. The AAR states, however, that Department of State Standardized Regulations (DSSR) preclude granting VSMA to the claimant prior to May 18, 2009, the date he submitted his SF-1190.

Based on the record, we agree with the agency that the claimant's eligibility for VSMA is derived from his eligibility for living quarters allowance under DSSR 031.11 and 031.2; that his family members meet the definition for the allowance under DSSR 040m and that VMSA under DSSR 262.2 has been adopted as a discretionary allowance by Army in Europe Regulation (AER) 690-500.592, Civilian Personnel Living Quarters Allowance, 18 November 2005. The report states, however, that DSSR 265.1 precludes granting the claimant VSMA prior to May 18, 2009.

DSSR 265.1 states:

The grant of ISMA or VSMA to an employee in connection with assignment to a new post shall commence as of the latest of the dates on which the:

- (1) employee submits SF-1190 application for SMA grant (See also Section 262.4a and 262.4b); or
- (2) employee begins official travel under an assignment order; or
- (3) separation from the family member occurs (See also Section 263.8).

Since the claimant's submission of his SF-1190 was the latest date under DSSR 265.1, the claimant is precluded from receiving VSMA prior to May 18, 2009.

The claimant seeks relief "due to circumstances beyond [his] control." OPM's authority under 31 U.S.C. § 3702 for claims under its jurisdiction is narrow and restricted to adjudicating compensation and leave claims. OPM is limited to settling claims based on statute and implementing regulations; it is without authority to settle claims on the basis of equitable or moral consideration. (See OPM file number S001798, July 8, 1998; B-190408, December 21, 1977; and B-141281, February 5, 1960).

It is well established that retroactive pay actions may only be granted where the erroneous action was contrary to statute, regulation, or a nondiscretionary agency policy implementing same. (See OPM file number S001798, July 8, 1998; 63 Comp. Gen. 417 (1984); B-192295, November 1, 1978). Failure to counsel or advise the claimant of his potential eligibility for VSMA does not overcome the clear and unambiguous language of DSSR 265.1 which precludes commencing VSMA prior to the latest of the three dates listed in DSSR 265.1(1)-(3).

The statutory and regulatory languages are permissive and give agency heads considerable discretion in determining whether to grant VSMA to agency employees within the confines of controlling regulation. *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979). Thus, an agency may withhold VSMA 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). An agency decision which properly applies the controlling regulation cannot be considered arbitrary, capricious, or unreasonable. Accordingly, the claim for VSMA prior to May 18, 2009, is denied.

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.