

**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: Voluntary Separate Maintenance
Allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 11-0028

//Judith A. Davis for

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

12/21/2011

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 denial of separate maintenance allowance (SMA) for the period of January 29, 2011, to May 31, 2011. We received the claim on July 28, 2011, the agency administrative report (AAR) on August 22, 2011, and the claimant's response to the AAR on October 25, 2011. For the reasons discussed herein, the claim is denied.

The claimant arrived in Heidelberg, Germany, on January 29, 2011, on official permanent-change-of-station orders. He requested and was approved delayed travel for his family to allow his children the opportunity to complete the school year in the United States. He was unaware of the availability of SMA until April 2011, and as such did not request SMA through submission of Standard Form (SF) 1190 until May 11, 2011. His family arrived in Germany on June 1, 2011. The agency denied his request for SMA on July 8, 2011, on the basis that the Department of State Standardized Regulations (DSSR), as the governing regulations for overseas allowances such as SMA, preclude granting voluntary separate maintenance allowance (VSMA) to the claimant prior to the date he submitted the SF-1190, and by which time the separation from his family did not meet the 30-day threshold for granting of the allowance. The claimant asserts he should not be denied VSMA due to the failure of the local civilian personnel advisory center in Heidelberg to inform him of the availability of the allowance and the requirements for requesting same.

DSSR section 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 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 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 11, 2011.

The claimant states that "[a] reasonable application of the 265.1 would be to use the "OR" for rule (2 or 3). As both of those dates are the same 28 January 2011." However, we may not disregard the clear language of section 265.1, that the latest of the three listed events is controlling for the granting of VSMA.

DSSR section 262.4 states:

For Voluntary SMA, the separation from the family member must reasonably appear to require a separation for at least 90 consecutive calendar days and be for conditions

described in Section 262.2 [career, health, educational or family considerations], except as provided below:

Exceptions: The 90-day period may be reduced to 30 days and the change-of-election provisions of 264.2(2) do not apply when:

- (1) adequate medical facilities in the area are not available for pre- and post-natal care; or
- (2) family members are detained in the United States for medical clearance; or
- (3) children must begin or complete a school year before the employee has arrived at post or after the employee has departed on transfer to another post in a foreign area.

Thus, DSSR section 265.1(1) is linked directly to section 262.4a, the language of which is clearly prospective in nature ("the separation from the family member *must reasonably appear to require* a separation for at least 90 consecutive calendar days," reduced to 30 days in the specified situations.) In other words, this section presumes the separation for which VSMA may be granted has not yet occurred at the time the SF-1190 is submitted. This interpretation is reinforced by the effective prohibition in section 265.1 to grant VSMA for a period of separation occurring before the employee's submission of the SF-1190. Therefore, since the claimant's separation from his family after his submission of the SF-1190 was less than 30 days, he is precluded from receiving VSMA after May 11, 2011.

The claimant seeks relief based on consideration of fairness. OPM's authority under 31 U.S.C. § 3702(a)(2), for claims under its jurisdiction is narrow and restricted to adjudicating compensation and leave claims based on statute and implementing regulations. OPM is without authority to settle claims on the basis of perceived fairness or equity. (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 sections 265.1 and 262.4 limiting its granting only within the parameters of certain well-defined circumstances.

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 deny VSMA 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. *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 regulations cannot be considered arbitrary, capricious, or unreasonable. Accordingly, the claimant's request for VSMA 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 action in an appropriate United States court.