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

Claimant: [name]

Organization: Headquarters, U.S. Africa Command
Joint Activities/Department of the Army
Addis Ababa, Ethiopia

Claim: Voluntary separate maintenance allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0015

/s/ Linda Kazinetz for

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

12/24/13

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Date

The claimant is a Federal civilian employee of the U.S. Africa Command in Addis Ababa, Ethiopia. She requests the U.S. Office of Personnel Management (OPM) reconsider her agency's denial of voluntary separate maintenance allowance (VSMA). We received the claim on February 19, 2013, and the agency administrative report (AAR) on September 17, 2013. For the reasons discussed herein, the claim is denied.

The claimant asserts that after accepting her current position in Addis Ababa, Ethiopia, on January 12, 2011, she learned that people with certain medical conditions are advised against living there because of the high altitude, and that "therefore I informed my HQ that [spouse] would not be accompanying me and I would therefore be requesting VSMA." She included a copy of an email dated April 9, 2011, she sent to several individuals, presumably in her management chain, expressing this intent prior to her arrival at post on June 25, 2011. She also submitted a statement from a physician dated December 20, 2012, attesting to her spouse's medical conditions, and a copy of Standard Form (SF) 1190, Foreign Allowances Application, Grant and Report, signed by herself on September 13, 2011, and by her spouse on April 19, 2012.

In its AAR, the Civilian Personnel Directorate of the Office of the Deputy Chief of Staff, G1, United States Army, Europe, which is the office with final approval authority for SMA requests, states that "although [claimant] may argue in email communication of 09 April 2011, she requested SMA which may be reconciled with the provisions of DSSR [Department of State] Section 264.2.b., whereby an employee "[a]t the time of assignment... must elect (1) to have a family member included on the employee's travel orders or (2) not placed on the travel orders and instead be placed on VSMA, a favorable endorsement with a complete package, to include a signed SF1190 by both [claimant and her spouse], were not submitted to this office for final approval or disapproval of the request.[1]" However, in response to OPM's requirement that a final agency decision be issued before OPM will accept a claim, the agency denied the claimant's VSMA request by memorandum dated August 27, 2012, on the basis that "[i]t is unclear from the documents that the couple resided in the same household, neither immediately prior to [claimant's] assignment to Beijing, China nor during her previous overseas assignments in Cairo, Egypt following her marriage in 2004," and therefore "it cannot be stated with confidence that [claimant] would normally reside with her spouse." The agency further noted the claimant's spouse "is employed as a U.S. Government civilian employee and as such, subject to worldwide assignment availability; the DSSR Section 263.2 explicitly prohibits the grant of the allowance under such circumstances."

The claimant asserts that following her marriage on May 31, 2004, she accompanied her spouse overseas on October 4, 2004, where they resided together in Cairo until March 27, 2007, when they returned to their home of record in Idaho. She asserts they continued to reside together until her assignment to Beijing on September 29, 2008. She also asserts that her spouse, a civilian engineer with the Air Force at Mountain Home Air Force Base, Idaho, is not subject to worldwide assignment availability.

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[1] The agency states the claimant's management declined to endorse her VSMA request and they received only an undated physician's statement and an SF-1190 not signed by the claimant's spouse.

The DSSR set forth basic eligibility criteria for the granting of SMA. Section 261.1.a of the Department of State Standardized Regulations (DSSR) states:

> Separate maintenance allowance (SMA) is an allowance to assist an employee to meet the *additional expenses* of maintaining members of family elsewhere than at the employee's foreign post of assignment. [Italics added.]

VSMA is a type of SMA which, under DSSR section 261.1.a.(2), may be granted to an employee who personally requests such an allowance, based on special needs or hardship involving the employee ore family member(s). VSMA is further defined in DSSR section 262.2, which states:

> An agency may authorize VSMA when an employee requests VSMA for special needs or hardship prior to or after arrival at post for reasons including but not limited to career, health, educational or family considerations for family members as defined at DSSR 040m.

DSSR section 261.2 describes the purpose of SMA as follows:

> SMA is intended to assist in offsetting the *additional expense* incurred by an employee who is *compelled by the circumstances described below* [one of which being where VSMA is authorized for special needs or hardship of the employee] *to maintain a separate household* for the family or a member of the family. [Italics added.]

DSSR section 263 describes several circumstances under which SMA is not warranted, including section 263.1, wherein "[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 SMA would thus not be allowable.

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 be burdened with assuming the additional expenses associated therewith, and not where it would merely defray the costs of an existing housing arrangement. In this case, the claimant acknowledges that she and her husband were already maintaining two separate residences when she accepted her assignment in Addis Ababa, in that she had resided in China while he remained in Idaho for almost three years immediately preceding this assignment. Therefore, regardless of any consideration of whether the claimant "normally" resides with her spouse, the operative issue is whether her assignment in Addis Ababa imposed "additional expenses" of maintaining a separate household that would not otherwise have been incurred. See B-192267.2, *Matter of Carl M. Bauer,* February 17, 1989; and OPM file number 08-0009 at http://www.opm.gov/policy-data-oversight/pay-leave/claim-decisions/decisions/. As the claimant did not incur any additional expenses arising from her assignment in Addis Ababa, the plain language of the DSSR is not met, and the claim for VSMA is accordingly denied.

DSSR section 263.2 further disallows SMA in those circumstances "[w]hen the spouse or domestic partner of an employee is either a member of the military services or is a U.S. Government civilian employee subject to worldwide assignment availability." That the term "U.S. Government employee" is not used alone but is rather appended by the term "subject to worldwide assignment availability" indicates this refers to U.S. Government employees whose

positions explicitly require such mobility as a condition of employment. There is no documentation in the claim record establishing whether the claimant's spouse occupies such a position. However, we need not address this issue further as the claim is disallowed for the reasons discussed above.

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). Since an agency decision made in accordance with established regulations as is evident in the present case cannot be considered arbitrary, capricious, or unreasonable, there is no basis upon which to reverse the decision.

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.