

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

Claimant: [name]

Organization: [agency component]
Department of the Air Force
Izmir, Turkey

Claim: Separate maintenance allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 11-0020

//Judith A. Davis for

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

12/14/2011

Date

The claimant was a Federal civilian employee of the Department of the Air Force (AF) in Izmir, Turkey. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of separate maintenance allowance (SMA) for the period commencing with his arrival in Turkey on January 20, 2010, until his return to the United States in January 2011. The claim was transferred to OPM by the U.S. Civilian Board of Contract Appeals to which the claimant had erroneously sent his request. We received the claim on March 16, 2011, and the agency administrative report (AAR) on May 9, 2011. For the reasons discussed herein, the claim is denied.

The claimant's position in Izmir was designated as a one-year unaccompanied tour. The claimant states that when he was offered the position, he inquired about the availability of SMA since his wife would not be accompanying him, for the stated reasons that she had to care for her mother and there was no job for her in Izmir. He states the servicing AF civilian personnel office told him he could not request SMA until he arrived at the post, but the Commander told him he would "support" his request for SMA. The claimant states he "had received this allowance on a previous assignment in Korea under these same circumstances" and "accepted the assignment with every expectation to have the request approved." The Commander subsequently denied the claimant's request for SMA on the basis that the claimant "accepted the position knowing that it was an unaccompanied tour" and his request did not "express new or unknown hardship since accepting the position." After submission of his claim, the claimant raised the additional issue that his successor in the Izmir position had been granted SMA.

The agency reiterated its reasoning in the AAR that the claimant's SMA request was denied because "this is a discretionary allowance" and "no inconvenience was caused to the employee as this was not a management directed reassignment," the claimant having "accepted the position at his own discretion knowing that Izmir was an unaccompanied location at the time."

The Overseas Differentials and Allowances Act, as amended and codified at 5 U.S.C. 5921-5928, provides that, under regulations prescribed by the President, separate maintenance may be paid to Federal employees in foreign areas. Section 5924(3) of title 5, United States Code (U.S.C.), states that a separate maintenance allowance may be granted to assist an employee in a foreign area who is compelled or authorized, because of dangerous, notably unhealthful, 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.

The President, by Executive Order, delegated this authority to the Secretary of State, who issues the Department of State Standardized Regulations (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:

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 because of the following circumstances:

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, the agencies are granted discretionary authority in allowing or disallowing SMA in individual cases. Under statutes that vest a degree of discretion in the 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.

The claimant does not specify the type of SMA he is requesting. However, he would not have been eligible for Voluntary SMA (VSMA) which an agency may authorize for "special needs or hardship" including but not limited to "career, health, educational or family considerations" for defined family members. Since Izmir was designated as an unaccompanied post, his separation from his wife could not be considered voluntary regardless of any extenuating family circumstances that may have existed. Likewise, he would not have been eligible for Transitional SMA (TSMA) which an agency may authorize "to assist an employee with additional costs incurred when family members are required to temporarily occupy commercial housing while establishing permanent housing following an evacuation" or in connection with certain specified circumstances occurring during unaccompanied tours. The claimant does not state his wife was required to temporarily occupy commercial housing as a consequence of his Izmir tour. The claimant may have been eligible for Involuntary SMA (ISMA) under DSSR section 262.1, which states:

An agency may authorize ISMA when adverse, dangerous, or notably unhealthful conditions warrant the exclusion of members of family from the area or when the agency determines a need to exclude members of family from accompanying an employee to the area.

In support of his request, the claimant cites another employee who was granted ISMA at Izmir. The claims jurisdiction of OPM is limited to consideration of statutory and regulatory liability. OPM has no authority to authorize payment based solely on consideration of equity. However, we note that information provided by the servicing AF civilian personnel office at Izmir indicates they have only previously granted ISMA in those cases where the circumstances compelling the employee's unaccompanied tour were beyond the employee's control. The claimant's predecessor in the position was granted ISMA as a result of Izmir being designated as an unaccompanied tour requiring the departure of dependents from the post during that employee's occupancy of the position. This same employee was granted ISMA again upon his "management reassignment" back to Izmir when the claimant vacated the position. No other employees, including those who applied for and accepted positions at Izmir as unaccompanied tours through the normal recruitment process, have been granted ISMA. Based on this information, the agency's exercise of its discretionary authority to disallow ISMA to the claimant cannot be considered as arbitrary, capricious, or unreasonable. Therefore, the claim is denied.

The agency noted in the AAR that the claimant's spouse was a government employee and cited DSSR section 263.2, which states SMA is not warranted "[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." However, the agency produced no

documentation indicating the claimant's spouse was employed under such mobility requirement and therefore DSSR 263.2 is not applicable to this claim.

To support his request for ISMA, the claimant raises the issue of equity with the military personnel at Izmir, whom he states “are paid housing, SMA and imminent danger pay.” Military and Federal civilian pay and benefits are authorized under separate statutes with no expectation of equivalence and may not be compared as a means of justifying the payment of benefits that would not otherwise be allowed.

The statutory and regulatory languages are permissive and give agency heads considerable discretion in determining whether to grant SMA to agency employees. 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). Where an agency decision is consistent with their previous 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 the Office of Personnel Management. Nothing in this settlement limits the claimant’s right to bring an action in an appropriate United States court.