

Date: August 19, 2002

Matter of: [name]

File Number: 02-0019

OPM Contact: Deborah Y. McKissick

The claimant requests retroactive payment of Separate Maintenance Allowance (SMA) for his dependents from July 6, 2001, until the conclusion of his tour in Saudi Arabia. He is employed with the Defense Contract Management Agency. We received the claim on March 22, 2002, and the agency's administrative report on June 10, 2002. For the reasons discussed herein, the claim is denied.

The claimant believes that the agency improperly processed his original application and his request for reconsideration. He also believes the basis for the denial of his claim is incorrect. The claimant references the situation of another employee who was authorized SMA when he had not lived with his family prior to his overseas assignment. However, we must make our decision solely by comparing the claimant's issues to Federal laws, regulations and other Federal guidelines. We cannot compare the claimant's position to others as a basis for deciding his claim.

The agency administrative report states that the agency's denial was based on the fact that the claimant and his family had lived separately since May 1999. In May 1999, the claimant's family returned to Cheyenne, Wyoming, from Finland prior to the conclusion of his normal rotation time back to the United States in April 2000. The claimant resided in Bellevue, Washington, from May 2000 to June 2001. While he resided in Bellevue, his family resided in Cheyenne, Wyoming. The claimant states that his home of record is Cheyenne, Wyoming. In April 2001, the claimant accepted a position on a one-year unaccompanied tour to his current overseas assignment. On April 17, 2001, the claimant was informed that there may be a problem with granting him SMA because he was not living with his family. The claimant submitted his request for SMA on May 15, 2001, and reported to his overseas assignment on July 6, 2001. The agency denied the claimant's request and his reconsideration for SMA.

The agency explains that granting an SMA is not dependent upon the location of the employee's home of record and that its decision not to grant the claimant's request for SMA was based on its determination that the claimant did not normally reside with his family prior to assignment to his new duty station. The claimant and the agency agree

that he and his family did not reside together prior to the new overseas assignment. The agency further explains that SMA is not an entitlement but an allowance “designed to offset the cost to an employee of maintaining two households, which is necessitated because of the employee’s overseas assignment.”

The agency referenced the Department of State Standardized Regulations (DSSR), Section 263.1. The DSSR, Section 263.1, states:

Member of Family Not Normally Residing With Employee

When a member of family would not normally reside with the employee, this individual does not meet the definition of member of family.

It has been established that the claimant did not reside with his family for approximately one year prior to his voluntary overseas assignment.

The Overseas Differentials and Allowances Act, Pub. L. 86-707 74 Stat. 793, 794 (Sept. 6, 1960), as amended and codified at 5 U.S.C. 5922-5924, provides that, under regulations prescribed by the President, separate maintenance may be paid to Federal employees in foreign areas. The President, by executive order, delegated this authority to the Secretary of State, who issued Standardized Regulations concerning eligibility to receive, and payment of, separate maintenance. Section 077.31 of the DSSR further delegates the authority to grant separate maintenance to agency employees to the heads of Federal agencies.

Section 5924(3) of title 5, United States Code, 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.

Where the agency’s factual determination is reasonable, we will not substitute our judgment for that of the agency. See *Jimmie D. Brewer*, B-205452, Mar. 15, 1982. According to the agency and the claimant, the claimant and his family did not reside together for approximately a year prior to his voluntary overseas assignment. In view of the permissive rather than mandatory language in the applicable statutes and regulations, as noted above, the degree of discretion that heads of agencies have in determining whether to authorize these allowances, and the facts of this claim, we cannot say the agency’s application of the Federal regulation in this case was arbitrary or capricious. Accordingly, the claim is denied.

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.