

## Office of Government Ethics

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### Letter to a Federal Employee dated June 3, 1993

This is in response to your letter to this Office concerning the validity of a waiver issued to you by [Agency A] pursuant to the provisions of 18 U.S.C. § 208(b). I am sorry for the delay in responding to your question.

The issue arose because your spouse is employed at [a company], and you were employed at [a Department's] Office at that [company's] plant. I understand that prior to the transfer of the [Department's] Office to [Agency B], your office was under [Agency A's] Office. According to your letter, you were among approximately 33 employees whose spouses were employed by the [company's] plant, and who had been granted agency-issued regulatory waivers by [Agency A].

Your [Agency A] waiver was issued prior to November 30, 1989. That is the date the Ethics Reform Act of 1989 was passed. Prior to that date, individual agencies were authorized to issue either individual waivers pursuant to 18 U.S.C. § 208(b)(1) or agency regulatory waivers pursuant to 18 U.S.C. § 208(b)(2). You had received from [Agency A] an agency regulatory waiver under the old (1962) version of 18 U.S.C. § 208(b)(2). That provision stated in relevant part:

(b) Subsection (a) hereof shall not apply . . . (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services.

Section 405 of the Ethics Reform Act of 1989 amended 18 U.S.C. § 208 so that while agencies could continue to issue individual waivers under 18 U.S.C. § 208(b)(1), they no longer had statutory authority to issue agency regulations on waivers. The revised version of 18 U.S.C. § 208(b)(2) specifically authorized the Director of the Office of Government Ethics to issue regulations on waivers. The provision states in relevant part:

(b) Subsection (a) shall not apply--

....

(2) if, by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published in the Federal Register, the financial interest has been exempted from the requirements of paragraph (1) as being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies;

After your office was transferred to [Agency B], [Agency B] refused to honor your existing waiver granted pursuant to [Agency A] regulations. After reviewing your request for a waiver, [Agency B] declined to grant you a new waiver. During a conversation with a member of my staff on June 1, 1993, you indicated that because you were denied a waiver, you were forced to retire.

You asked in your letter if the provisions of the "Standards of Ethical Conduct for Employees of the Executive Branch," specifically the provision at 5 C.F.R. § 2635.402(d)(1), would keep your [Agency A] waiver in effect despite the transfer of your office to [Agency B], and despite [Agency B's] position. The provision states:

"(1) Regulatory waivers. Under 18 U.S.C. 208(b)(2), regulatory waivers of general applicability may be issued by the Office of Government Ethics based on its determination that particular interests are too remote or too inconsequential to affect the integrity of the services of the employees to whom the waivers apply. Pending issuance of superseding regulatory waivers under this authority, agency regulatory waivers issued under 18 U.S.C. 208(b)(2) as in effect prior to November 30, 1989, continue to apply."

The answer to your question is this rule would not keep your [Agency A] waiver in effect. The rule was designed as a savings

provision, i.e., one that would allow agency waivers, granted pursuant to existing agency regulations, to remain effective until the Office of Government Ethics issued superseding regulations on waivers. At the present time the Office of Government Ethics has not yet completed drafting section 208(b)(2) regulations on waivers. Because our standards of conduct regulations were issued before our section 208(b)(2) waiver regulations, without this savings provision, all previous regulatory waivers issued by all agencies would be invalidated. To avoid such invalidation, the savings provision was included. The savings provision would continue waivers issued pursuant to an agency's regulations. However, the savings provision would not preclude an agency from reviewing the applicability of its regulatory waivers to one or more of its employees. In addition, the savings provision would not make the waivers issued pursuant to the regulations of one agency applicable to a different agency. The Office of Government Ethics did not intend, nor does it have statutory authority, to compel an agency to continue a regulatory waiver granted to an employee by another agency.

The savings provision you cited in the "Standards of Ethical Conduct for Employees of the Executive Branch" would not have helped in your case once contract administration and other oversight were transferred from [Agency A] to [Agency B]. At that time, [Agency A] no longer had jurisdiction over you; their regulations were no longer applicable to you, including their regulations on waivers. When your position was transferred to the jurisdiction of [Agency B], [Agency B's] regulations became applicable to you, including their regulations on waivers. It was within the authority of [Agency B] to review the applicability of [their regulations to] your position, or any position under their jurisdiction, to determine whether to grant a regulatory or an individual waiver, or not to grant such waivers. For these reasons, it is our opinion that [Agency B] had the authority to decide whether or not to revoke your waiver or whether to grant you a new waiver.

I hope this information clarifies the relationship of the Standards of Conduct to regulatory waivers.

Sincerely,

Stephen D. Potts  
Director