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DE/IN 135/137

75-5996

**\*OGC Has Reviewed\***

17 December 1975

MEMORANDUM FOR: Director of Central Intelligence

SUBJECT : Waiver of Agency Regulations

REFERENCE : Memo for the DCI fm IG, dtd 5 Dec. 75, Subj:  
Employee Appeal for Recompense

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1. Referent memorandum outlines the case of an employee who filed a grievance with the Inspector General for the denial of reimbursement for the shipment of a foreign-purchased automobile to the United States in June 1974. This employee was overseas in the fall of 1972 when Congress expressed an intent to cease Government payment of the shipping costs to the United States of foreign automobiles purchased by Federal employees overseas. The Agency considers itself bound by this expression of congressional intent and, accordingly, sent a book cable to the field notifying employees of the prohibition. In addition, Headquarters Regulation [REDACTED] was changed accordingly, effective 1 January 1973.

2. The employee in this case initially asked for a ruling from this Office that his POV was not foreign purchased, and hence not within the prohibition. In OGC 74-1868, dated 15 October 1974, this Office expressed the legal opinion that the vehicle in question was foreign purchased under both the Maryland Uniform Commercial Code and, more importantly, the intent of Congress as outlined in the House Report in the DOD Appropriation Act (House Report No. 92-1389, 11 September 1972).

3. The employee then submitted a request for reconsideration of our opinion, repeating essentially his former statements, but making a new allegation that he thought PCS orders were required to ship his POV to the U.S. even after receipt of the book cable. However, he never did claim that he would have shipped his POV home if he had been aware of the true state of things, and specifically stated it would have been a hardship to do so. In OGC 75-2114, dated 5 June 1975, this Office again stated that the employee was not entitled to payment. After reconsidering the employee's request the Inspector General, on 5 December 1975, recommended and you approved that the employee be reimbursed the cost of shipment of his POV.

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4. I strongly recommend that you reverse your decision approving payment for shipment of the employee's POV to the U.S. in June 1974. (I understand that payment has been withheld pending your review of this and a DDA memorandum.) In my opinion the reasons which existed for implementation of the ban on shipment at Government expense clearly apply to the employee in this case. Thus, your action in permitting reimbursement to the employee amounts to either:

- a. a retroactive change in the Agency's decision in the fall of 1972 to abide by the congressional ban, or
- b. a waiver of the regulation for an individual case.

The former represents a reversal of policy for which it might be wise, or perhaps necessary, to consult the appropriate committees of Congress. If, however, this is your decision, I recommend that an employee notice be published which advises all persons similarly situated that they may be entitled to receive payment for expenses incurred by them in the shipment of such vehicles. If the latter is your decision, it creates a problem of uniform enforcement of the regulation and questions of equity for others who are similarly situated. A recent commentary on the adherence to regulations by agencies which have created them noted the following:

Some agency violations of regulations may result in more favorable, rather than less favorable, treatment to the excepted party. For example, agencies have sometimes failed to enforce regulations requiring that a person seeking a government benefit comply with certain application procedures or meet specified substantive qualifications. Since such violations, or waivers, allow a person a benefit to which he would not otherwise be entitled, they may be unfair to those similarly situated who are denied waivers.

\* \* \* \*

Moreover, an agency's practice of waiving its regulations, without explanation, may breed resentment among those who are denied waivers, particularly as the number of persons who are granted them increases. 87 Harv. L. Rev. 629, 637 (1974).

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In referring to agencies' selective enforcement of regulations, Kenneth Culp Davis, a leading authority on administrative law practice, has stated in his book, Discretionary Justice, U. of Ill. Press (1969), at page 170:

The discretionary power to be lenient is an impossibility without a concomitant discretionary power not to be lenient, and injustice from the discretionary power not to be lenient is especially frequent; the power to be lenient is the power to discriminate. (Emphasis in original.)

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5. Again, I strongly recommend that you reverse your decision in this case or take the other action which I have indicated.

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Acting General Counsel

cc: ✓ DDA  
IG

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