



B-334563

February 8, 2023

The President
The White House

Subject: *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998: General Counsel, Federal Labor Relations Authority*

Dear Mr. President:

We have previously concluded that while the Federal Vacancies Reform Act of 1998 (Vacancies Act)¹ authorizes an official to act in a presidentially appointed, Senate-confirmed position (PAS position) during the pendency of the first and second nominations to the position, the Act does not authorize acting service during the pendency of the third or successive nominations.² Here, we also consider whether a nomination qualifies as a first or second nomination under the Vacancies Act if no acting official is eligible to serve in the vacant position while the nomination is pending. As explained below, we conclude that a nomination made to a vacant position qualifies as the first or second nomination regardless of whether an acting official is eligible to serve in the position. Accordingly, pursuant to section 3349(b) of title 5 of the United States Code, we are reporting that the service of Charlotte A. Dye as Acting General Counsel of the Federal Labor Relations Authority (FLRA) from November 16, 2021, through the present day, is in violation of the Vacancies Act.³

¹ 5 U.S.C. §§ 3345–3349d.

² B-333853, June 28, 2022. Acting service would, however, be permitted if the pendency of the nomination coincides with an acting service period provided by the Act, such as the 300-day period beginning on a transitional inauguration day. *Id.*

³ We contacted FLRA to seek factual information and its legal views on the matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to Solicitor, FLRA (Aug. 31, 2022). FLRA responded with its explanation of pertinent facts, legal analysis, and supporting documents. Letter from Solicitor, FLRA, to Assistant General Counsel for Appropriations Law, GAO (Sept. 30, 2022) (FLRA Letter); FLRA, *Exhibit A – FLRA Responses to Questions Posed by GAO in its August 31, 2022 FLRA Development Letter No. B-224563* (Oct. 3, 2022) (FLRA Specific Responses).

Requirements of the Vacancies Act

The Vacancies Act establishes requirements for temporarily authorizing an acting official to perform the functions and duties of certain vacant PAS positions. The Act identifies three categories of persons who may temporarily perform the functions and duties of a vacant PAS position.⁴ The first assistant to the vacant position automatically serves as acting officer unless the President designates an individual in one of the other categories.⁵ The President may designate as acting officer either an individual serving in another PAS position or a senior agency officer or employee who has served for a minimum period of time prior to the vacancy.⁶

If no nomination has been submitted for the vacant position, the Vacancies Act generally limits the period of acting service to 210 days beginning on the date the vacancy occurs.⁷ But when a vacancy exists during the 60-day period beginning on the date of a transitional inauguration day, the 210-day period is extended by 90 days, allowing for 300 days of additional acting service beginning on the transitional inauguration day or the date the vacancy occurs, whichever is later.⁸ If a nomination has been submitted, acting service is permitted during the pendency of a first or second nomination and, if the nominee is not confirmed, for up to 210 days after the date the first or second nomination is rejected, withdrawn, or returned.⁹ The Comptroller General is required, upon a determination that an acting official has served longer than the allowable period, to report such findings to Congress, the President, and the Office of Personnel Management.

BACKGROUND

FLRA reported that the General Counsel position became vacant on January 20, 2017.¹⁰ At the time of the vacancy, Peter A. Sutton was serving as Deputy General Counsel, the first assistant to the General Counsel position.¹¹ Mr. Sutton became Acting General Counsel pursuant to the Vacancies Act on January 20, 2017, and

⁴ 5 U.S.C. § 3345.

⁵ *Id.* § 3345(a)(1).

⁶ *Id.* §§ 3345(a)(2)–(3).

⁷ *Id.* § 3346(a)(1).

⁸ *Id.* § 3349a(b).

⁹ *Id.* §§ 3346(a)(2), (b).

¹⁰ FLRA Specific Responses, at 1.

¹¹ See FLRA Letter, at 3, 6.

held that role until November 16, 2017.¹² After this, FLRA reported that the positions of General Counsel and Deputy General Counsel were vacant for purposes of the Vacancies Act, and there were no presidential nominations to the position, until April 11, 2019, when President Trump nominated Catherine Bird to be General Counsel.¹³ This nomination was returned by the Senate on January 3, 2020.¹⁴ Ms. Bird was nominated for a second time on February 12, 2020, and this nomination was returned on January 3, 2021.¹⁵ According to FLRA, no one served as Acting General Counsel during the pendency of, or directly following Ms. Bird's first or second nominations.¹⁶

President Biden was inaugurated on January 20, 2021. Following his inauguration, President Biden designated Charlotte A. Dye to serve as Acting General Counsel on March 23, 2021.¹⁷ On August 9, 2021, President Biden nominated Kurt T. Rumsfeld for the position of General Counsel.¹⁸ This nomination was returned by the Senate on January 3, 2022.¹⁹ Mr. Rumsfeld was re-nominated on January 4, 2022, and the nomination was returned on January 3, 2023.²⁰ Ms. Dye continues to serve as Acting General Counsel.²¹

¹² *Id.*; see 5 U.S.C. § 3345(a)(1).

¹³ See FLRA Letter, at 6, 8. Congress.gov, 116th Congress, PN615 — Catherine Bird — Federal Labor Relations Authority, *available at* <https://www.congress.gov/nomination/116th-congress/615> (last visited Feb 1, 2023).

¹⁴ *Id.*

¹⁵ Congress.gov, 116th Congress, PN1504 — Catherine Bird — Federal Labor Relations Authority, *available at* <https://www.congress.gov/nomination/116th-congress/1504> (last visited Feb. 1, 2023).

¹⁶ FLRA Letter, at 10.

¹⁷ FLRA Specific Responses, at 1–2.

¹⁸ Congress.gov, 117th Congress, PN1013 — Kurt Thomas Rumsfeld — Federal Labor Relations Authority, *available at* <https://www.congress.gov/nomination/117th-congress/1013> (last visited Feb. 1, 2023).

¹⁹ *Id.*

²⁰ Congress.gov, 117th Congress, PN1597 — Kurt Thomas Rumsfeld — Federal Labor Relations Authority, *available at* <https://www.congress.gov/nomination/117th-congress/1597> (last visited Feb. 1, 2023).

²¹ FLRA Specific Responses, at 2.

DISCUSSION

Legality of Charlotte Dye's Acting Service

The Vacancies Act permits acting service for 210 days after a vacancy occurs²², during the pendency of a first or second nomination for the office²³, and for additional 210-day periods after the rejection, return or withdrawal of the first or second nomination.²⁴ Further, in presidential transition years, the Vacancies Act allows for an additional 300 days of eligible acting service from the date of inauguration day notwithstanding prior periods of acting service.²⁵ We were recently asked to consider whether the Vacancies Act also authorizes acting service for the pendency of a third or successive nomination to a vacant office where the first and second nominations were made by a different president.²⁶ We concluded that the Vacancies Act does not authorize such additional acting service, and therefore, the first or second nominations to an office, regardless of whether the nominations were made by a prior president, will count as the first and second nominations under the Vacancies Act.²⁷

Here, we consider a similar situation. President Trump nominated Ms. Catherine Bird to the position of FLRA General Counsel on two separate occasions—first, on April 11, 2019, and following the return of the first nomination, on February 12, 2020, with the latter nomination returned on January 3, 2021. Pursuant to the Vacancies Act, an eligible officer could have served as Acting General Counsel during the pendency of those two nominations. Because the vacancy existed on the day of President Biden's inauguration, January 20, 2021, an eligible official was permitted to act in this position for an additional 300 days beginning on that day.²⁸ This period of permissible service ended on November 15, 2021.

President Biden appointed Ms. Dye as Acting General Counsel on March 23, 2021. On August 9, 2021, President Biden nominated Kurt T. Rumsfeld for the position of General Counsel.²⁹ This nomination was returned by the Senate on January 3,

²² 5 U.S.C. § 3346(a)(1).

²³ *Id.* § 3346(a)(2).

²⁴ *Id.* § 3346(b).

²⁵ *Id.* § 3349a(b)(1).

²⁶ B-333853, June 28, 2022.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Congress.gov, 117th Congress, PN1013 — Kurt Thomas Rumsfeld — Federal Labor Relations Authority, *available at* <https://www.congress.gov/nomination/117th-congress/1013> (last visited Feb. 1, 2023).

2022.³⁰ Mr. Rumsfeld was re-nominated on January 4, 2022, and the nomination was returned on January 3, 2023.³¹ Because these were the third and fourth nominations to the position, neither of the nominations extended the eligible period that Ms. Dye or any other eligible officer could serve as Acting General Counsel. Therefore, Ms. Dye has not been eligible to serve in the position since November 16, 2021.

Impact of Eligibility of Acting Service on Nominations

In its response to GAO, FLRA suggests that only two of the nominations should count for purposes of calculating the time limitations under the Vacancies Act—those of Mr. Rumsfeld. Therefore, FLRA asserts that Ms. Dye is permitted to serve through the pendency of Mr. Rumsfeld’s second nomination to the position.³²

To support its position, FLRA proposes that periods of acting service under section 3346(a)(2) can only occur if there is a person who can serve as an acting officer under section 3345.³³ According to FLRA, no one could serve as Acting General Counsel, unless the President appointed an acting officer to that position under sections 3345(a)(2) or (3), because there was no institutional mechanism for appointing a first assistant to the position following Mr. Sutton’s departure.³⁴ FLRA contends that if there is no one eligible to serve under section 3345 when a nomination is made, such as a first assistant or someone designated by the President to act, the nomination does not count as the first or second nomination for purposes of section 3346(a).³⁵ FLRA asserts that until President Biden appointed Ms. Dye to act as General Counsel on March 23, 2021, there were no nominations to the position for purposes of calculating the time limitations in section 3346(a)(2).³⁶ Therefore, according to FLRA, the two nominations that occurred prior to Ms. Dye’s designation should not count as nominations to the position for purposes of section 3346(a)(2), making Mr. Rumsfeld’s nominations the first and second nominations under such section.³⁷

³⁰ *Id.*

³¹ Congress.gov, 117th Congress, PN1597 — Kurt Thomas Rumsfeld — Federal Labor Relations Authority, available at <https://www.congress.gov/nomination/117th-congress/1597> (last visited Feb. 1, 2023).

³² FLRA Letter, at 3.

³³ FLRA Letter, at 11.

³⁴ *Id.* at 3.

³⁵ *See id.*, at 11.

³⁶ *Id.* at 3, 11.

³⁷ *Id.* at 11; see FLRA Specific Responses, at 1. FLRA’s response includes an alternative theory as well. FLRA contends that the “spring back” provision in

This interpretation ignores the plain text of section 3346(a), as discussed in the district court cases FLRA cites in support of its alternative theory, and is inconsistent with prior GAO decisions. Section 3346(a) states that “the person serving as an acting officer as described under section 3345 *may* serve in the office” for both 210 days “beginning on the date the *vacancy* occurs” and “once a first or second nomination for the *office* is submitted to the Senate . . . for the period that the nomination is pending in the Senate.”³⁸ Section 3346(a) makes reference to “the person serving as an acting officer” under section 3345 to specify that the time limitations of the Vacancies Act only apply to someone serving as an acting officer under section 3345 and not to individuals serving under position-specific vacancy statutes.³⁹ The active verb in section 3346(a) is not “serving” but rather “may serve,” reflecting that the Vacancies Act merely authorizes, but does not require, the President to designate an acting official to serve during the prescribed periods when there is a vacancy.⁴⁰

5 U.S.C. § 3346, identified by GAO and several district courts, interpreted in conjunction with section 3349a(b), would allow Ms. Dye to serve for 210 days beginning 90 days after President Biden’s inauguration day, and, additionally, during the pendency of Mr. Rumsfeld’s nominations. *Id.* at 11–15. This argument is not persuasive. GAO has previously held that the practical effect of this special timing rule is simply to afford an incoming administration an additional 300 days of acting service beginning on the transitional inauguration day. B-333853. Section 3349a(b) does not reset permissible periods of acting service pursuant to section 3346(a)(2), and nominations made during prior administrations count toward the total number of nominations for the position. *Id.* Moreover, the recent district court cases cited by FLRA are not at odds with our recent decision, but simply conclude, as GAO has stated in past decisions, that section 3346(a)(2) allows for acting service during the pendency of a first or second nomination, even if the nomination is submitted after the initial 210-day acting service period expires. *See, e.g., Bauer v. Kijakazi*, No. 21-CV-2008, 2022 WL 2918917, at *8 (N.D. Iowa July 25, 2022); B-328888, Mar. 3, 2017.

³⁸ 5 U.S.C. § 3346(a) (emphasis added). *See, e.g., Bauer*, 2022 WL 2918917, at *8 (concluding that “the plain language of [section 3346(a)] authorizes acting service in two instances: during the initial 210 days after a vacancy is created, and while a nomination is pending”); B-328888 (stating that “[t]he Act . . . contains a spring-back provision that allows an acting official to resume performing the duties of the office once a first or second nomination is submitted to the Senate for the period that such nomination is pending in the Senate”).

³⁹ *See Lance M.* 2022 WL 3009122, at *13; B-333543, Feb. 1, 2022.

⁴⁰ *Cf. Bauer*, 2022 WL 2918917, at *5 (stating that “[b]y using ‘may serve,’ Congress did not convey that the person had to be currently serving for the nomination rule in subsection (a)(2) to apply”).

FLRA's attempt to distinguish this situation from our recent decision regarding the Acting Inspector General of the Department of Defense is also unpersuasive.⁴¹ In that decision, we concluded that the "first or second nomination" in section 3346(a)(2) refers to the first two nominations submitted to the Senate after the vacancy occurs and does not include a third or subsequent nomination, even if those later nominations represent the first or second nomination submitted by a newly inaugurated President.⁴² That conclusion did not depend on the presence or absence of acting officials during one or more of the acting service periods.⁴³ Had Congress intended to condition the acting service period afforded by section 3346(a)(2) on there being a person who can act, it could have included that condition in section 3346(a)(2). Congress did not, and so, we do not construe section 3346(a) beyond its plain meaning.⁴⁴ Accordingly, Ms. Dye's service as Acting General Counsel from November 16, 2021, through the present day violates the Vacancies Act's time limitations.

CONCLUSION

The Vacancies Act authorizes acting service during the pendency of the first and second nominations to a vacant office. But the Act does not require that there be an eligible acting official when the nomination is made in order for the nomination to count as the first or second nomination. Because two nominations were submitted

⁴¹ FLRA Letter, at 15. FLRA does not take issue with our recent holding. Instead, FLRA asserts that the facts of this vacancy make it distinguishable from the facts of our recent decision. We disagree. Even taking the facts as FLRA presents them, it remains true that in both instances, officials were acting during the pendency of third or successive nominations.

⁴² See B-333853. On October 21, 2022, the Department of Justice's Office of Legal Counsel (OLC) issued a legal opinion at odds with this decision. Specifically, OLC concluded that "[u]pon the inauguration of a new President, the Federal Vacancies Reform Act restarts the entire timing sequence for acting service in a position that was vacant on inauguration day, authorizing an acting official to serve for up to 300 days after inauguration day, during the pendency of the new President's first and second nominations for the vacant position, and for 210 days following the rejection, withdrawal, or return of a first or a second nomination submitted by the new President." 46 Op. Off. Legal Counsel __ (Oct. 21, 2022), *available at* https://www.justice.gov/d9/2022-11/2022-10-21_-_vra_multiple_nominations.pdf (last visited Feb. 1, 2023).

⁴³ See *id.*

⁴⁴ See *id.* This reading is also supported by the legislative history of the Vacancies Act. See S. Rep. No. 105-250, at 6–7 (1998) (explaining that legislative action was needed in light of *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998), in which the court held that time limits under the previous vacancies statute did not begin to run until someone actually took office as acting pursuant to the statute).

for the FLRA General Counsel position and returned prior to the most recent transitional inauguration day, the submission of successive nominations did not permit additional acting service. Therefore, Ms. Dye's service as Acting General Counsel from November 16, 2021, through the present day violates the Vacancies Act's time limitations.

In accordance with the requirements of the Vacancies Act, we are also sending letters reporting this violation to the chairs and ranking members of the Senate Committee on Homeland Security and Governmental Affairs, the House Committee on Oversight and Accountability, the Senate and House Committees on Appropriations, and the Director of the Office of Personnel Management.

If you have any questions regarding this matter, please contact Shirley A. Jones, Managing Associate General Counsel, at (202) 512-8156, or Charlie McKiver, Assistant General Counsel, at (202) 512-5992.

Sincerely yours,

A handwritten signature in cursive script that reads "Edda Emmanuelli Perez".

Edda Emmanuelli Perez
General Counsel