



B-336092

January 16, 2025

The President
The White House

Subject: *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998: Assistant Attorney General for the Office of Legal Policy, U.S. Department of Justice*

Dear Mr. President:

Pursuant to section 3349(b) of title 5 of the United States Code, we are reporting a violation of the Federal Vacancies Reform Act of 1998 (Vacancies Act)¹ at the U.S. Department of Justice (DOJ) with respect to the position of Assistant Attorney General (Assistant Attorney General) for the Office of Legal Policy (OLP). Specifically, we are reporting that the service of Susan Davies as Acting Assistant Attorney General from January 6, 2024, to March 20, 2024, was in violation of the Vacancies Act.² Because no one is currently using the acting title for this position, there is no continuing violation.

¹ 5 U.S.C. §§ 3345–3349d.

² We contacted DOJ to seek factual information and its legal views on the matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to Assistant Attorney General for Administration, DOJ (Mar. 12, 2024). DOJ responded with its explanation of pertinent facts, legal analysis, and supporting documents. Letter from General Counsel, DOJ, to Assistant General Counsel for Appropriations Law, GAO (Apr. 25, 2024) (DOJ Response) (with attachments). Subsequently, we requested additional information from DOJ. Email from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, Justice Management Division, DOJ (Oct. 17, 2024). DOJ responded via email with a supplemental response. Email from General Counsel, Justice Management Division, DOJ, to Assistant General Counsel for Appropriations Law, GAO (Nov. 8, 2024) (DOJ Supplemental Response).

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 positions that require presidential appointment and Senate confirmation. 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. 5 U.S.C. § 3346(a)(1). After the expiration of the period of permissible acting service, the position must remain vacant and only the head of the agency may perform the functions or duties of the position. 5 U.S.C. § 3348(b). 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. 5 U.S.C. § 3349(b).

BACKGROUND

DOJ reported that the position of Assistant Attorney General became vacant on June 10, 2023, and that Susan Davies began serving in an acting capacity on the same day.³ GAO's Executive Vacancy System. In accordance with the Vacancies Act, the period of permissible acting service ended on January 5, 2024, the last day of the 210-day period beginning on the date the vacancy occurred. See 5 U.S.C. § 3346(a)(1). However, Ms. Davies was listed as Acting Assistant Attorney General on OLP's website after January 5, 2024. Additionally, Ms. Davies was identified as Acting Assistant Attorney General in a *Federal Register* notice issued after January 5, 2024. *Civil Monetary Penalties Inflation Adjustments for 2024*, 89 Fed. Reg. 9764 (Feb. 12, 2024) (February 12 Notice) (identifying Ms. Davies as "Acting Assistant Attorney General, Office of Legal Policy"). In its response, DOJ acknowledged that "[b]y operation of law, [Ms. Davies'] acting service ended on January 5, 2024," and that DOJ "continued to refer to Ms. Davies incorrectly as Acting [Assistant Attorney General] until approximately March 20, 2024, including by listing her as Acting [Assistant Attorney General] on the OLP website."⁴ In its supplemental response, DOJ stated that the February 12 Notice "is an example of a mistaken reference to Ms. Davies as Acting [Assistant Attorney General] after her acting period expired."⁵ Regarding the February 12 Notice and OLP's website, DOJ stated that "the Department regrets this error."⁶

³ DOJ explained that Ms. Davies automatically became the Acting Assistant Attorney General on June 10, 2023, by virtue of serving as the Principal Deputy Assistant Attorney General for OLP, which is the first assistant to the vacant position for purposes of the Vacancies Act. DOJ Response; see 28 C.F.R. § 0.137(b); 5 U.S.C. § 3345(a)(1).

⁴ DOJ Response, at 1, 3.

⁵ DOJ Supplemental Response.

⁶ DOJ Response, at 2; DOJ Supplemental Response.

DISCUSSION

We have previously determined that an agency violates the Vacancies Act time limitations if the agency identifies an individual as an acting officer on official agency documents and/or on the agency's website after the end of the period of permissible acting service. See, e.g., B-335739, Feb. 8, 2024. It is immaterial whether the identification was due to a mistake made by the agency. See B-335739, Feb. 8, 2024; B-333857, Apr. 18, 2022. As we previously determined, it is vital for officials to discontinue use of the acting title when the permissible period of acting service ends in order to convey to Congress, the public, and other government agencies that an official is no longer authorized to perform the functions and duties of the vacant position. B-335739, Feb. 8, 2024; see 5 U.S.C. § 3348(b), (d).

Here, we find that DOJ held Ms. Davies out to the public as Acting Assistant Attorney General after the period of permissible acting service ended by identifying her as Acting Assistant Attorney General on OLP's website and in the February 12 Notice. Ms. Davies' use of the Acting Assistant Attorney General title from January 6, 2024, through March 20, 2024, was not authorized by the Vacancies Act and violated the Act's time limitations.⁷

The Vacancies Act includes an enforcement mechanism that restricts the performance of certain functions and duties of a vacant position when no "officer or employee is performing the functions and duties in accordance with" the Act. 5 U.S.C. § 3348(b). In that situation, "the office shall remain vacant" and only the head of the agency may perform the functions or duties of the position. *Id.* An action taken by any other person "in the performance of any function or duty . . . shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d). The Vacancies Act defines "function or duty" as any function or duty of the position that is established by statute or regulation (including any regulation in effect at any time during the 180-day period preceding the date of the vacancy) and required by statute or regulation to be performed by the applicable officer (and only that officer). 5 U.S.C. § 3348(a)(2). Agency officials who are not validly acting may, however, still be authorized to take certain actions in their official positions, so long as they are not performing a "function or duty" of the vacant position.

⁷ Ms. Davies was also listed as Acting Assistant Attorney General in a *Federal Register* notice issued on February 9, 2024. *Semiannual Regulatory Agenda*, 89 Fed. Reg. 9604 (Feb. 9, 2024) (February 9 Notice). In its response, DOJ noted that while the February 9 Notice was issued after January 5, 2024, it was dated August 17, 2023, at which time Ms. Davies was permissibly acting. DOJ Response. DOJ also noted that it does not control when the notices are actually published. *Id.* Because GAO finds that DOJ violated the Vacancies Act time limitations when DOJ held Ms. Davies out to the public as Acting Assistant Attorney General after the end of the period of permissible acting service by identifying her as Acting Assistant Attorney General on OLP's website and in the February 12 Notice, we need not address DOJ's assertions regarding the February 9 Notice.

In response to our inquiry, DOJ reported that there are no functions or duties meeting the Vacancies Act definition with respect to the Assistant Attorney General position.⁸ Based on DOJ's response, we have no basis to conclude that any actions taken by Ms. Davies after January 5, 2024, must be nullified or viewed as having no force or effect.

CONCLUSION

An agency's identification of an individual as an acting officer on official agency documents or the agency website after the end of the period of permissible acting service constitutes a violation of the Vacancies Act time limitations. Because DOJ identified Ms. Davies as Acting Assistant Attorney General after the end of the period of permissible acting service, Ms. Davies' use of the acting title from January 6, 2024, through March 20, 2024, was not authorized by the Vacancies Act and violated the 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 Government Reform, the Senate and House Committees on Appropriations, the Senate and House Committees on the Judiciary, 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 Kristine Hassinger, Assistant General Counsel, at (202) 512-8152.

Sincerely,



Edda Emmanuelli Perez
General Counsel

⁸ DOJ Response, at 2.