

Decision

Matter of: Environmental Protection Agency—Legality of First Assistant Named After Vacancy Serving as Acting General Counsel

File: B-332995

Date: August 2, 2021

DIGEST

The Environmental Protection Agency (EPA) on January 20, 2021, hired Melissa Hoffer as the EPA Principal Deputy General Counsel, a position previously designated by EPA as the first assistant to EPA’s General Counsel. Ms. Hoffer also began serving as EPA’s Acting General Counsel on that same date. The President has not nominated Ms. Hoffer to permanently fill the position of EPA General Counsel. We conclude that Ms. Hoffer qualifies under the Federal Vacancies Reform Act of 1998 to serve as EPA’s Acting General Counsel because she is the first assistant to the EPA General Counsel and she need not have been the first assistant before the vacancy occurred.

DECISION

This responds to a congressional request regarding the legality of Melissa Hoffer serving as Acting General Counsel of the Environmental Protection Agency (EPA).¹ Specifically, we consider whether Ms. Hoffer was authorized to act by the Federal Vacancies Reform Act of 1998 (Vacancies Reform Act), 5 U.S.C. §§ 3345–3349d. As explained below, we conclude that Ms. Hoffer qualifies to serve as EPA’s Acting General Counsel due to the fact that she is the first assistant to the position and the President has not nominated her to fill the position permanently.

In accordance with our regular practice, we contacted EPA to seek factual information and its legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006),

¹ Letter from Senator Marsha Blackburn to Sean O’Donnell, Inspector General, EPA, and Gene L. Dodaro, Comptroller General, GAO (Jan. 25, 2021) (Request Letter). We coordinated with the EPA Office of Inspector General (OIG). The EPA OIG informed us that it would defer this matter to the subject matter experts at GAO.

available at www.gao.gov/products/GAO-06-1064SP; Letter from Managing Associate General Counsel, GAO, to Deputy General Counsel for Operations, EPA (Mar. 5, 2021); E-mail from Senior Attorney, GAO, to Deputy General Counsel for Operations, EPA, *Subject: B-332995, Request for Additional Information* (May 26, 2021). EPA responded with its explanation of the pertinent facts and legal analysis. Letter from Deputy General Counsel for Operations, EPA, to Managing Associate General Counsel, GAO (Apr. 7, 2021) (Response Letter); E-mail from Deputy General Counsel, EPA, to Senior Attorney, GAO, *Subject: Re: B-332995, Request for Additional Information* (June 8, 2021) (Response Email). EPA also provided copies of the position descriptions for the current and former Principal Deputy General Counsel. *E.g.*, EPA Form 3150-2, *Position Description for Melissa Hoffer* (Jan. 20, 2021) (EPA PD for Hoffer); EPA Form 3150-1, *Position Description for David Fotouhi* (Sept. 30, 2018) (EPA PD for Fotouhi).

BACKGROUND

The Vacancies Reform Act establishes requirements for temporarily authorizing certain individuals to serve as acting officers in vacant presidentially appointed, Senate confirmed (PAS) positions for limited periods of time. 5 U.S.C. §§ 3345–3349d. Generally, the Vacancies Reform Act limits the time an official may act. 5 U.S.C. §§ 3346(a), 3349a. The Vacancies Reform Act is generally the exclusive means for filling a vacancy in a PAS position unless another statute provides otherwise. 5 U.S.C. § 3347.

In order to monitor compliance with the Vacancies Reform Act, agencies are required to report to Congress and the Comptroller General (CG) any vacancy, the name of any acting official, nominations submitted for the vacant position, certain actions taken regarding any nomination, and all dates related to the above. 5 U.S.C. § 3349(a). GAO's responsibility under the Vacancies Reform Act is to report to Congress, the President, and the Office of Personnel Management if the CG determines that an acting official is serving longer than the authorized period. 5 U.S.C. § 3349(b). GAO also issues decisions on agency compliance with the Vacancies Reform Act when requested by Congress.

On September 22, 2020, a vacancy in the position of EPA General Counsel² occurred when General Counsel Matthew Leopold resigned. Response Letter, at 1. At that time, David Fotouhi, a non-career EPA official, served as EPA Principal Deputy General Counsel, a position previously designated by EPA as the first assistant to EPA's General Counsel. *Id.*; Response Email; EPA PD for Fotouhi. According to EPA, at the time of this vacancy, no other person was designated as

² The EPA General Counsel position requires presidential appointment and Senate confirmation under 42 U.S.C. § 4370a. Response Email. We are not aware of another statute that provides an alternative or supplemental scheme for filling a vacancy in this position. Therefore, a vacancy in this position must be filled pursuant to the Vacancies Reform Act.

the first assistant to EPA's General Counsel, no person other than Mr. Fotouhi served as an EPA Principal Deputy General Counsel, and no person was directed by the former President to serve as the EPA Acting General Counsel. Response Email. On September 23, 2020, Mr. Fotouhi began to serve as EPA's Acting General Counsel, which EPA reported to GAO on September 30, 2020. Response Email; EPA, *Submission Under the Federal Vacancies Reform Act* (Sept. 30, 2020).

At midnight on January 19, 2021, Mr. Fotouhi resigned. Response Letter, at 1. The following afternoon, EPA hired Melissa Hoffer as a non-career official to the position of EPA Principal Deputy General Counsel. *Id.*; Response Email; EPA PD for Hoffer. According to EPA, Ms. Hoffer automatically became the Acting EPA General Counsel pursuant to the Vacancies Reform Act, 5 U.S.C. § 3345(a)(1), because she is the first assistant to the EPA General Counsel.³ Response Letter, at 1. On April 28, 2021, the President nominated Jeffrey Prieto for the position of the EPA General Counsel. EPA, *Submission Under the Federal Vacancies Reform Act* (May 4, 2021).

DISCUSSION

At issue here is whether the Vacancies Reform Act permits Ms. Hoffer to serve as the EPA Acting General Counsel.

Categories of Persons Eligible to Serve as Acting Officer

Section 3345 of the Vacancies Reform Act identifies three categories of persons who may temporarily perform the functions and duties of a vacant PAS position.⁴ Under the act, the "first assistant" to the vacant PAS position automatically becomes the acting officer in case of a vacancy unless the President designates another individual who satisfies the Vacancies Reform Act eligibility requirements or a separate statute provides otherwise. 5 U.S.C. §§ 3345(a)(1), 3347(a). Alternatively, the President may designate two other categories of persons as acting officers. First, the President "may direct" a person serving in another PAS position to serve as the acting officer. 5 U.S.C. § 3345(a)(2). Second, the President "may direct" an "officer or employee" of the same agency to serve as the acting officer if such individual served in a position at that agency with a rate of pay equal to or greater than a GS-15 on the General Schedule pay scale for at least 90 days during the 365-day period preceding the vacancy. 5 U.S.C. § 3345(a)(3).

³ EPA notified GAO as required by the Vacancies Reform Act, 5 U.S.C. § 3349(a), that Ms. Hoffer assumed the role of the EPA Acting General Counsel. EPA, *Submission Under the Federal Vacancies Reform Act* (Feb. 10, 2021).

⁴ The Vacancies Reform Act also authorizes a person to serve as an acting officer in other limited circumstances, including under a recess appointment or by express statutory designation. 5 U.S.C. § 3347. *See also* B-331650, Aug. 14, 2020 (considering the legality of acting under a statutory vacancies provision outside of the Vacancies Reform Act); B-332451, Aug. 21, 2020 (reconsideration denied).

EPA informed us that the President did not direct Ms. Hoffer, or any other person, to serve as the EPA Acting General Counsel. Response Email. Thus, we are only left to consider whether Ms. Hoffer is eligible to serve as the EPA Acting General Counsel because she is the first assistant to the EPA General Counsel.

Eligibility Based on Serving as a First Assistant

We first consider whether the position of EPA Principal Deputy General Counsel qualifies as the first assistant to the EPA General Counsel. The Vacancies Reform Act does not define the term “first assistant.” GAO, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R (Washington, D.C.: Feb. 23, 2001), at 2. However, GAO has long recognized that the legislative history indicates that first assistant positions may be designated by statute or regulation. See *Id.* GAO has also recognized that, before a vacancy occurs, agencies may designate first assistant positions through other documentation. *Id.* Examples of other documentation used by agencies include agency orders, agency directives and position descriptions. *Id.*

Here, EPA’s position description for the Principal Deputy General Counsel designated that position as the first assistant to the EPA General Counsel. Response Email; EPA PD for Fotouhi. This designation was already in effect prior to the resignation of General Counsel Leopold. Response Email; see also EPA PD for Fotouhi. Since Mr. Leopold’s resignation, the position description for the Principal Deputy General Counsel has continued to designate that position as the first assistant to the General Counsel. Response Email. Therefore, for purposes of the Vacancies Reform Act, the position of EPA Principal Deputy General Counsel qualifies as the first assistant to the EPA General Counsel.

Eligibility When Person Named as First Assistant after Vacancy Occurs

Next, we consider whether a person named as the first assistant after a vacancy occurs in a PAS position qualifies to serve as the acting PAS officer. We have previously determined that “a person need not have been in the first assistant position before the vacancy occurs in order to serve as acting officer, unless that person is also nominated for the position.” GAO, *Changed Interpretation of Requirements Related to First Assistants Under the Federal Vacancies Reform Act of 1998*, GAO-02-272R (Washington, D.C.: Dec. 7, 2001), at 2. More recently, GAO has continued to apply this reasoning. See, e.g., B-331539, Sept. 18, 2020 (noting that Michael Bright, who became the first assistant to the Government National Mortgage Association President after such PAS position became vacant on January 20, 2017, was eligible to serve as the Acting President from July 11, 2017, when he became the first assistant, until November 16, 2017).

Here, on January 20, 2021, Ms. Hoffer became the EPA Principal Deputy General Counsel, a position that EPA had previously designated as the first assistant to the EPA General Counsel. Response Letter, at 1; Response Email; EPA PD for Hoffer;

EPA PD for Fotouhi. Upon becoming the EPA Principal Deputy General Counsel, Ms. Hoffer automatically became the Acting General Counsel pursuant to the Vacancies Reform Act. Response Letter, at 1. Ms. Hoffer has not been nominated to serve as EPA General Counsel. Rather, on May 4, 2021, we received EPA's Vacancies Reform Act submission indicating that on April 28, 2021, the President nominated Jeffrey Prieto for the EPA General Counsel position. EPA, *Submission Under the Federal Vacancies Reform Act* (May 4, 2021). Since the President did not nominate Ms. Hoffer for the vacant position, Ms. Hoffer is not precluded from serving as EPA Acting General Counsel by the Vacancies Reform Act limitation on a first assistant serving as the acting officer when such person served as first assistant for less than 90 days during the 365-day period prior to the vacancy. 5 U.S.C. § 3345(b)(1). Pursuant to the Vacancies Reform Act, Ms. Hoffer may continue to serve as the Acting General Counsel during the pendency of Mr. Prieto's nomination so long as the President does not designate another eligible person as the acting officer.⁵ 5 U.S.C. § 3346(a)(2).

In coming to this conclusion, we distinguish this case from B-318244, June 18, 2014. In that decision where we considered the eligibility of David Cade to serve as the Department of Health and Human Services Acting General Counsel, we stated that “[a]s the Deputy General Counsel who was the first assistant to the General Counsel when the vacancy arose, Mr. Cade was eligible to serve as Acting General Counsel pursuant to section 3345(a)(1).” B-318244, June 18, 2014, at 7. That decision is not to be read to stand for the position that an individual must be the first assistant at the time the vacancy arose. Instead, the above quoted language from that decision simply describes the facts supporting the eligibility of a particular officer to act rather than the legal requirements to act.

We also distinguish our conclusion here from the decision in *SW General, Inc., v. NLRB*, 796 F.3d 67, *aff'd*, 137 S. Ct. 929 (2017). In that decision, neither the United States Court of Appeals nor the Supreme Court reached a conclusion on the qualifications to act when a person serving pursuant to § 3345(a)(1) of the Vacancies Reform Act is not nominated to permanently fill the PAS position. In fact, the United States Court of Appeals noted that it was not deciding the issue and the Supreme Court did not consider the issue. *SW General*, 796 F.3d, at 76, 78 (“Although we do not decide its meaning today, subsection (a)(1) may refer to the person who is serving as first assistant when the vacancy occurs.”) (emphasis omitted); see 137 S. Ct. at 944 (holding that certain persons directed by the President to serve as acting general counsel under the Vacancies Reform Act are prohibited from continuing to act when the President nominates such person to permanently fill that position).

⁵ If the President's nomination of Mr. Prieto is “rejected by the Senate, withdrawn, or returned to the President by the Senate,” then Ms. Hoffer may serve for 210 days after the date of such rejection, withdrawal, or return. 5 U.S.C. § 3346(b)(1).

As the EPA Principal Deputy General Counsel and first assistant to the EPA General Counsel, Ms. Hoffer became eligible to serve as the EPA Acting General Counsel upon appointment as the EPA Principal Deputy General Counsel.

CONCLUSION

For the reasons explained above, we conclude that EPA designated the position of EPA Principal Deputy General Counsel as the first assistant to the EPA General Counsel. EPA made this designation in the position description for the EPA Principal Deputy General Counsel before the current vacancy in the position of EPA General Counsel occurred. After this vacancy occurred, Melissa Hoffer was hired by EPA on January 20, 2021, as the EPA Principal Deputy General Counsel. The President has not nominated Ms. Hoffer to permanently fill the position of EPA General Counsel. Therefore, Ms. Hoffer qualifies under the Vacancies Reform Act to serve as EPA's Acting General Counsel because Ms. Hoffer is the first assistant to the EPA General Counsel and she need not have been in the first assistant position before the vacancy occurred.



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