



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

Office of the
Inspector General

February 10, 2016

MEMORANDUM FOR BETH F. COBERT
Acting Director

FROM: PATRICK E. McFARLAND
Inspector General

SUBJECT: Violation of the Federal Vacancies Reform Act

I am compelled to bring to your immediate attention that the Federal Vacancies Reform Act (FVRA), as decided by the D.C. Circuit in *SW General, Inc. v. National Labor Relations Board*,¹ prohibits your serving as the Acting Director of the U.S. Office of Personnel Management (OPM) as of November 10, 2015, the date that the President nominated you to the Senate for appointment as Director of OPM. Moreover, under the FVRA, any actions taken by you since the date of your nomination are void and may not be subsequently ratified. Our office's legal analysis is below.

If you have any questions, you may contact me, or your staff may contact Robin M. Richardson, Counsel to the Inspector General, at [REDACTED] [@opm.gov](mailto:[REDACTED]@opm.gov) or [REDACTED].

We will be providing a copy of this memorandum to Congress. Due to the severity of the issue, we are expediting our notification process and sending it to the appropriate Congressional committees tomorrow.

I. Statutory Framework.

In 1998, Congress revamped the Vacancies Act by enacting the FVRA, which, among other things, provided three ways that a vacant, Presidentially-appointed, Senate-confirmed (PAS) position may be temporarily filled with an "Acting Officer":

- (1) The "first assistant" to the office automatically becomes the Acting Officer;
- (2) The President may appoint a PAS officer from another agency; or
- (3) The President may appoint a senior employee from the same agency.²

¹ 796 F.3d 67, 74 (D.C. Cir. 2015), *reh'g & reh'g en banc denied* (Jan. 20, 2016).

² 5 U.S.C. § 3345(a)(1)-(3).

There are certain limitations regarding the service of persons appointed under these provisions. Acting Officers are generally limited to serving for 210 days of service.³ This time may be extended, however, if they are formally nominated by the President to fill the position, in which case they may serve during the period that their nomination is pending in the Senate.⁴ In addition, and as relevant here, section 3345(b)(1) of the FVRA states:

Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if-

- (A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person-
 - (i) did not serve in the position of first assistant to the office of such officer; or
 - (ii) served in the position of first assistant to the office of such officer for less than 90 days; and
- (B) the President submits a nomination of such person to the Senate for appointment to such office.

Importantly, actions taken by persons serving in violation of the FVRA “shall have no force and effect” and may not be ratified.⁵

II. Controlling D.C. Circuit Decision.

In a recent case before the U.S. Court of Appeals for the D.C. Circuit, *SW General, Inc. v. National Labor Relations Board (NLRB)*, NLRB argued that the section 3345(b)(1) limitation applies only those persons serving as acting officers by virtue of having been the “first assistant” under section 3345(a)(1).⁶ NLRB relied on the longstanding U.S. Department of Justice (DOJ) Office of Legal Counsel’s (OLC) interpretation and historical practice.⁷

On August 7, 2015, the U.S. Court of Appeals for the D.C. Circuit explicitly rejected NLRB’s arguments, holding that the prohibition in section 3345(b)(1) applies to *all* acting officers and not just those officers who previously served as first assistants.⁸ The court squarely addressed the relevant FVRA sections: “[w]e therefore hold that the prohibition in subsection (b)(1) applies to all acting officers, no matter whether they serve pursuant to subsection (a)(1), (a)(2), or (a)(3).”⁹

On October 5, 2015, DOJ sought further review before the D.C. Circuit, filing on behalf of NLRB a petition for rehearing and rehearing *en banc*. On January 20, 2016, the D.C. Circuit

³ *Id.* § 3346(a)(1)-(2).

⁴ *Id.* § 3346(a)(2).

⁵ *Id.* § 3348(d)(1)-(2).

⁶ *SW General, Inc. v. National Labor Relations Board*, 796 F.3d 67, 74 (D.C. Cir. 2015), *reh’g & reh’g en banc denied* (Jan. 20, 2016).

⁷ *See, e.g.*, 23 Op. O.L.C. 60, 64 (1999); *accord* 25 Op. O.L.C. 177, 179-81 (2001).

⁸ 796 F.3d at 78.

⁹ *Id.*

denied these petitions, and the D. C. Circuit's decision is final.¹⁰ Under the applicable rules, should DOJ decide to seek review before the Supreme Court, then the petition for certiorari would be due within 90 days from January 20, 2016, unless extended.¹¹

III. FVRA Prohibits OPM's Acting Director From Serving As Acting Director As Of The Date Nominated To Be The Director.

On July 10, 2015, the President appointed you to serve as Acting Director of OPM. At that time, you were the Deputy Director for Management of the Office of Management and Budget and a PAS officer, and as such, your appointment fell under section 3345(a)(2). However, on November 10, 2015, while DOJ's petition for further review before the D.C. Circuit was pending, the President nominated you to be the Director of OPM. Because you were never a "first assistant" to the OPM Director and the President nominated you to be the Director of OPM on November 10, 2015, the FVRA, as decided by the D.C. Circuit in *NLRB*, prohibits you from serving as the Acting Director as of the date of your nomination.

Therefore, under the FVRA, any actions taken by you since the date of your nomination are void and may not be subsequently ratified.¹² Consequently, these actions may be open to challenges before the federal district court for the District of Columbia.

¹⁰ 796 F.3d 67 (D.C. Cir. 2015), *reh'g & reh'g en banc denied* (Jan. 20, 2016).

¹¹ *See* S.Ct. R. 13.3.

¹² 5 U.S.C. § 3348(d)(1)-(2).