



B-323944

June 27, 2014

The President
The White House

Subject: *Violation of the 210-Day Limit Imposed by the Federal Vacancies Reform Act of 1998—Department of Justice, Office of Victims of Crime*

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 1998¹ (herein “the Vacancies Reform Act”) at the Office of Victims of Crime (OVC), Department of Justice, with respect to the Director position. Until passage of the Presidential Appointment Efficiency and Streamlining Act of 2011 (herein “the Streamlining Act”),² the position of Director of OVC was a Presidential appointment subject to Senate confirmation under the provision of 42 U.S.C. § 10605, and thus was subject to the Vacancies Reform Act. Specifically, we are reporting that the service of Joye E. Frost as Acting Director of OVC beginning November 17, 2009, until October 9, 2012, was in violation of the Act. Since there is no current violation due to the position no longer being subject to the Vacancies Reform Act, we believe no further action on this issue is necessary.

The Vacancies Reform Act establishes requirements for temporarily authorizing an acting officer to perform the functions and duties of certain vacant positions that require Presidential appointment and Senate confirmation. It generally limits the period of time that such a position may be filled with an acting officer to 210 days. 5 U.S.C. § 3346(a)(1). However, with respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day,³ the 210-day period begins 90 days after such transitional inauguration day or the date the vacancy occurs, whichever is later. 5 U.S.C. § 3349a(b). After expiration of any acting officer’s allowed period of service the position is to remain vacant; any non-delegable function or duty of that

¹ Pub. L. No. 105-277, Div. C, Title I, Oct. 21, 1998, as amended, 5 U.S.C. §§ 3345-3349d.

² Pub. L. No. 112-166, 126 Stat. 1283 (Aug. 10, 2012).

³ The term “transitional inauguration day” means the date on which any person swears or affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office.” 5 U.S.C. § 3349a(a).

position can only be performed by the head of the agency.⁴ 5 U.S.C. § 3348(b). Section 3349(b) requires the Comptroller General, upon a determination that an acting officer is serving longer than the 210-day period and any applicable extension, to report such findings to Congress, the President, and the Office of Personnel Management.

As required by the Vacancies Act, the Department reported to GAO that a vacancy in the position of Director, OVC, occurred on January 20, 2009. The Department further reported that Ms. Frost was directed by the President to serve as Acting Director on that same day. Prior to that date, Ms. Frost had been serving as the Principal Associate Director for OVC. Although not specifically addressed by the Department, Ms. Frost's designation as Acting Director appears in accordance with the Vacancies Reform Act, specifically 5 U.S.C. § 3345(a)(3), which permits the President to designate a career senior agency employee to serve as the acting official.⁵ Ms. Frost continues to serve as the head of OVC.

As previously discussed, with respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 210-day limit on the service of acting officers under the Vacancies Reform Act begins 90 days after the transitional inauguration day or the date the vacancy occurs, whichever is later. 5 U.S.C. § 3349a(b). In this instance, the OVC Director vacancy existed on January 20, 2009, the transitional inauguration day. Accordingly, the 210-day period began to run 90 days after January 20, 2009—on April 20, 2009—and ended on November 16, 2009. Consequently, the position should have been vacant beginning November 17, 2009.

The requirement that the position be vacant terminated on October 9, 2012, by operation of law. This was the effective date of section 2 of the Streamlining Act, which eliminated the Senate confirmation requirement for a number of positions government-wide, including the Director of OVC.⁶ As a consequence of the position no longer being subject to Senate confirmation, the position was also no longer subject to the requirements and restrictions of the Vacancies Reform Act. Accordingly, the position should have been vacant from November 17, 2009, until October 9, 2012.

⁴ The term “function or duty” in the Act means any function or duty of the office that is established by statute or regulation, and is required by statute or regulation to be performed by the applicable officer (and only that officer). 5 U.S.C. § 3348(a)(2).

⁵ Under this provision, the President may designate an employee who has served in the agency for at least 90 days and is paid at least at the GS-15 level. According to OVC's website, Ms. Frost has worked in OVC since at least 2001.

⁶ Section 2(h)(5) of the Streamlining Act eliminated the Senate confirmation requirement for the Director, OVC, position. Section 6(a) of the Streamlining Act provided that the “amendments made by section 2 shall take effect 60 days after the date of enactment ... and apply to appointments made on and after that effective date, including any nomination pending in the Senate on that date.”

We have previously determined that using the acting title of a position during the period in which the position should be vacant violates the time limitation in the Vacancies Reform Act. For example, in B-287720, May 18, 2001, the Institute of Museum and Library Services asserted that the official who had been delegated the duties of the Director ceased to serve as Acting Director upon the expiration of the 210-day limit.⁷ However, we found instances of the official holding herself out as the Acting Director well past the 210-day limit, in violation of the Vacancies Reform Act.⁸

In response to our inquiry concerning Ms. Frost's service, the Department did not address whether Ms. Frost used the title of Acting Director, OVC, during the period in which the position was to be vacant. However, it is clear that the Department held her out to be the Acting Director during this period of time. For example, the Department's notification to us under the Vacancies Reform Act, dated February 9, 2011, designated Ms. Frost as "Acting Officer" for the vacant Director position. We have found numerous other references indicating that Ms. Frost was held out to be the Acting Director throughout the period in which the position was to be vacant, including a *Federal Register* notice issued on July 22, 2011, by OVC referring to Ms. Frost as the Acting Director.⁹ Thus, Ms. Frost's service during the period from November 17, 2009, until October 9, 2012, was in violation of the time limitation on acting service imposed by the Vacancies Reform Act.

The Vacancies Reform Act contains an enforcement provision, whereby any action taken in performing a non-delegable function or duty of the vacant position by an acting officer serving in violation of the Vacancies Reform Act shall have no force or effect and may not be ratified.¹⁰ 5 U.S.C. § 3348(d). The Department states that the position of Director, OVC does not have any functions or duties which are exclusive to the position, and we have not found any statute or regulation that establishes a non-delegable function or duty of the position. Accordingly, we have no basis upon which to conclude

⁷ B-287720, *Violation of the 210-Day Limit Imposed by the Vacancies Reform Act of 1998—Director, Institute of Museum and Library Services*, May 18, 2001, at 3.

⁸ *Id.* At 3-4.

⁹ *Establishment of the SANE/SART AI/AN Initiative Committee*, 76 Fed. Reg. 44045. Also, a Department press release on the National Crime Victims' Service Awards, dated April 20, 2012, referred to Ms. Frost as the Acting Director. An OVC publication entitled "Attorney General Guidelines for Victim and Witness Assistance" revised in May 2012 referred to Ms. Frost as the Acting Director. The OVC website, accessed on August 20, 2012, provided the biography for Ms. Frost, referring to her as the Acting Director. And a September 2012 version of the OVC "Community-Level Replication Guide" referred to Ms. Frost as the Acting Director.

¹⁰ As discussed above, generally when a position is vacant and the applicable periods for temporary service have expired, no one but the head of an agency may perform any of the non-delegable functions or duties of the vacant position. 5 U.S.C. § 3348(b)(2).

that any actions performed by Ms. Frost must be nullified or viewed as having no force or effect.

In accordance with the requirements of the Vacancies Reform Act, we are 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 Appropriations Committees, the Senate Committee on the Judiciary, the House Committee on the Judiciary, and the Director of the Office of Personnel Management.

If you have any questions regarding this matter, please call me on 202-512-5400, or Associate General Counsel Robert J. Cramer on 202-512-7227.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Thomas H. Amsh". The signature is fluid and cursive, with a long horizontal stroke at the end.

Deputy General Counsel

for Susan A. Poling
General Counsel