



441 G St. N.W.
Washington, DC 20548

B-328888

March 3, 2017

The President
The White House

Subject: *Violation of the 210-Day Limit Imposed by the Federal Vacancies Reform Act of 1998—
Department of Energy, Director of the Office of Science*

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” or “the Act”) at the Department of Energy (DOE), with respect to the Director of the Office of Science position. The Director of the Office of Science is a Presidential appointment subject to Senate confirmation,² and thus is subject to the Vacancies Reform Act. 5 U.S.C. § 3345(a). Specifically, we are reporting that the service of Dr. Patricia Dehmer as Acting Director of the Office of Science from the period of November 14, 2013, until November 18, 2013, and from July 16, 2015, until December 17, 2015, was in violation of the Act. Since the position was subsequently filled, we believe no further action on this issue is necessary.

The Vacancies Reform 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. The Act generally limits the period of time that such a position may be filled with an acting official to 210 days. 5 U.S.C. § 3346(a)(1). After expiration of the allowed period of service, the position is to remain vacant. 5 U.S.C. § 3348(b). Section 3349(b) requires the Comptroller General, upon a determination that an acting official has served longer than the 210-day period (and any applicable extensions), to report such findings to Congress, the President, and the Office of Personnel Management.

As required by the Vacancies Reform Act, DOE reported to GAO on October 17, 2013, that a vacancy in the position of Director of the Office of Science, DOE, occurred on April 13, 2013. DOE further reported that Dr. Patricia Dehmer began serving as Acting Director of the Office of Science on April 13, 2013. Prior to that date, Dr. Dehmer held the position of Deputy Director for Science Programs in DOE’s Office of Science.³ On November 18, 2013, the President nominated Marc Kastner for the position of Director of the Office of Science for the first time. Mr. Kastner’s first nomination was returned on January 3, 2014. Mr. Kastner was nominated for a second time on January 6, 2014, and his second nomination was returned on December 17, 2014. On August 5, 2015, Cherry Murray was nominated for the position of Director of the

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

² The Director of the Office of Science is one of the positions subject to the requirements for a Presidential appointment and Senate confirmation in accordance with 42 U.S.C. § 7139.

³ Dr. Dehmer’s designation as Acting Director of the Office of Science appears to be in accordance with the Vacancies Reform Act, specifically 5 U.S.C. § 3345(a)(1), which permits the first assistant to the vacant position to serve as the acting officer.

Office of Science and on December 10, 2015, Ms. Murray was confirmed. DOE reported that Dr. Dehmer ceased to serve as Acting Director of the Office of Science on December 17, 2015.

As noted above, the Vacancies Reform Act generally limits the service of acting officials to 210 days from the date of the vacancy. 5 U.S.C. § 3346. In this instance, the 210-day limit on the period of acting service ended on November 9, 2013, but since the Senate was not in session on that day, the Act extended the 210-day period to the day after the Senate next reconvened, which was November 13, 2013.⁴ The Act also 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.⁵ Thus, Dr. Dehmer could resume her service as Acting Director on November 18, 2013, when the President submitted Mr. Kastner's nomination to the Senate. However, Dr. Dehmer's service as Acting Director from November 14, 2013, until November 18, 2013, was in violation of the time limitation in the Act.

The Act also allows acting service for up to 210 days after the date that a first or second nomination has been rejected, withdrawn, or returned.⁶ Thus, Dr. Dehmer was permitted to continue her service as Acting Director of the Office of Science through July 15, 2015, which was the end of the 210-day period of permissible acting service after the return of the second nomination on December 17, 2014.⁷ Therefore, Dr. Dehmer's service from July 16, 2015, until December 17, 2015, violated the Act.

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, Senate Committee on Energy and Natural Resources, House Committee on Oversight and Government Reform, House Committee on Energy and Commerce, Senate and House Committees on Appropriations, and Director of the Office of Personnel Management.

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

Sincerely yours,



Susan A. Poling
General Counsel

⁴ 5 U.S.C. § 3348(c).

⁵ 5 U.S.C. § 3346(a)(2).

⁶ 5 U.S.C. § 3346(b).

⁷ The spring-back provision only permits the resumption of acting service once a first or second nomination is submitted, but does not extend to a third nomination. 5 U.S.C. § 3346(a)(2).