



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

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B-218996 (1)

June 4, 1985

The Honorable Ted Stevens, Chairman
Subcommittee on Civil Service, Post Office
and General Services
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman: .

This responds to your letter of May 23, 1985, which requests our opinion on the legality of a delegation of authority by Dr. Donald J. Devine. On the last day of his term as Director of the Office of Personnel Management (OPM), Dr. Devine signed a delegation of all of the Director's functions to a position described as the Executive Assistant to the Director which he filled on the next day.

For the reasons stated hereafter, we conclude that the delegation was not legally appropriate.

I.

The Director of OPM has a statutory 4-year term of office. 5 U.S.C. § 1102(a) (1982). There is no provision for the Director to hold over in office following the expiration of his term. Instead, the statute specifically provides that the Deputy Director of OPM "shall act as Director" when the office of Director is vacant. 5 U.S.C. § 1102(b).

Dr. Devine's 4-year term of office expired at midnight on March 25, 1985. On this same day, March 25, the position of "Executive Assistant to the Director" was established in OPM. The position description for this position stated in part:

"The Executive Assistant to the Director reports to the Deputy Director and is responsible for directing and coordinating the Office of Personnel Management's (OPM) work force.

"Under the direction of the Deputy Director, [the Executive Assistant] is responsible for the general direction and planning activities of OPM."

Also on March 25 Dr. Devine approved an action whereby the Executive Assistant to the Director position became third in the OPM line of succession after the Director and Deputy Director.

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Again on March 25, Dr. Devine approved the following delegation of authority to the Executive Assistant position:

"The delegations of authority set forth in the Administrative Manual (AM) and the AM Supplement 12-2, Authorities and Delegations Manual, not inconsistent with law, are modified--unless specifically revoked by the Director--when the position of Executive Assistant to the Director is encumbered as follows:

"All investments and delegations of authority to the Director are delegated to the Executive Assistant to the Director who may, in turn, redelegate authority at his discretion."

On the next day, March 26, Mrs. Loretta Cornelius, the OPM Deputy Director, appointed Dr. Devine to the position of Executive Assistant to the Director as a "limited emergency" appointment. Dr. Devine served in the position of Executive Assistant until his resignation from OPM effective May 3, 1985.

II.

The legality of the delegation of authority and the related actions taken on March 25 and March 26 turn on the answers to three basic issues: (1) whether the delegation itself was within the scope of the Director's authority; (2) whether the delegation circumvented the statutory limit on the Director's term of office; and (3) whether the delegation conflicted with the statutory provision for the Deputy Director to act as Director during a vacancy in the office of Director. We will address these three legal issues separately for clarity of presentation.

We have reviewed two legal opinions which fully support the legality of the delegation and other actions--a letter opinion dated May 14, 1985, by the law firm of Covington and Burling and a memorandum opinion dated May 17, 1985, by the OPM General Counsel, Mr. Joseph A. Morris. We will discuss each of the major legal arguments advanced in these opinions under the issues to which they apply.

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Authority for the Delegation

As a general proposition, governmental officials have broad authority to delegate their powers to subordinates. See, e.g., 1 Sutherland Statutory Construction § 4.14 (4th Ed. 1972), at 98-99:

"The number of rule-making, administrative, and adjudicative functions which most administrative agencies must perform makes it impossible for a single executive officer or a board or commission to discharge these functions personally. Nevertheless, in many statutes it is customary to grant power directly to the executive head or the board or commission. If the statute expressly authorizes the redelegation to a subordinate official, the subdelegation is valid. Where the statute is silent on the question of redelegation and the delegation was to a single executive head, it is almost universally held that the legislature, understanding the impossibility of personal performance, impliedly authorized the delegation of authority to subordinates. * * *

"The general principle which appears to govern decision in all of these situations is that if it is reasonable to believe the legislature intended a particular function to be performed by designated persons because of their special qualifications, then a subdelegation is invalid; but where no particular qualifications are necessary for the exercise of the function its exercise may be delegated to subordinate officials."

The authority to delegate is granted explicitly to the OPM Director by 5 U.S.C. § 1103(a), which enumerates the functions vested in the Director and provides that these functions "shall be performed by the Director, or subject to section 1104 of this title, by such employees of the Office as the Director designates * * *." ^{1/}

^{1/} Section 1104 provides in part that the Director may delegate functions to heads of other agencies.

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Therefore, the OPM Director enjoys broad authority to delegate his functions, and both of the legal opinions supporting Dr. Devine's actions rely on the language of § 1103(a) to justify the March 25 delegation. The Covington and Burling opinion asserts that § 1103(a) "clearly authorizes the kind of delegation at issue here." The General Counsel opinion goes even further. It maintains that 5 U.S.C. § 1104(a)(2) allows the OPM Director to delegate to heads of other agencies any of his functions except authority over competitive examinations for administrative law judges, and concludes from this:

"If, subject only to the express reservation in the statute, the Director may delegate his functions in whole to the head of an entirely different agency, then, a fortiori, he may delegate them to his own subordinates [under § 1103(a)]."

While Dr. Devine's delegation of all of his functions to the Executive Assistant may not violate the literal terms of § 1103(a), we do not believe that it constitutes a valid exercise of the authority granted by that provision. Rather, in our opinion, this delegation differs both in kind and in degree from the type of action contemplated by § 1103(a) or any similar delegation provision. Regardless of what the literal terms of a delegation statute provide, we are aware of no legal precedent, legislative history or logic to support the assertion that an agency head can delegate all of his functions to a subordinate.^{2/}

^{2/} We note that the argument in the General Counsel's opinion based on 5 U.S.C. § 1104 only serves to illustrate the fallacy of a literal interpretation of delegation provisions. The functions vested in the OPM Director under § 1103(a) include "appointing individuals to be employed by the Office [OPM]" and "directing and supervising employees of the Office, distributing business among employees and organizational units of the Office, and directing the internal management of the Office * * *." The General Counsel cannot seriously argue that, although literally within the scope of § 1104, the OPM Director could delegate functions such as these to the head of another agency.

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This assertion is, in our view, particularly unjustified in a situation such as the present case where the blanket delegation is made to a position which is not even subject to Presidential appointment and Senate confirmation, as are the positions of Director and Deputy Director. That is, when the law requires that the nomination of a person to be Director of OPM receive the advice and consent of the United States Senate prior to appointment by the President, the law must be understood as requiring the informed consent of the Senate that the nominated person will act as Director. If a person for whom senatorial consent is thus obtained could, once appointed to office, delegate his entire responsibility and functions to a subordinate official of the agency, for whom no senatorial confirmation is required, then the act of the Senate in advising and consenting to the appointment of that Presidential nomination would become in effect a nullity.

For the reasons stated above, we believe that a delegation of the scope here involved would be unauthorized under § 1103(a) even if it had nothing to do with expiration of the OPM Director's term. But, of course, this delegation was indeed related to expiration of the Director's term--which raises a second problem. Delegations normally are authorized and effected to remove the burden on an agency head of personally executing the function or functions in question. 1 Sutherland Statutory Construction § 4.14, above. Obviously this was not Dr. Devine's purpose in approving the delegation here on the last day of his term. Instead, the only evident purpose was to create a new position (which was, in fact, established on the same day) having the full powers of the Director in contemplation of Dr. Devine's leaving office. Again, this goes beyond any recognized use of which we are aware for a delegation authority.

In conclusion, it is our opinion that Dr. Devine's March 25 delegation went beyond the scope of his authority under 5 U.S.C. § 1103(a)^{3/}

^{3/} In addition to their arguments in support of the delegation as described above, both opinions state that since the delegation was expressly made effective to the extent "not inconsistent with law," it cannot be illegal. This merely begs the question; to the extent that the delegation was indeed "inconsistent with law" and Dr. Devine took actions under it, such actions clearly would be affected.

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Limitation on the Director's Term

The next issue is whether the March 25 delegation illegally circumvented the 4-year statutory limit on the term of the OPM Director. In our opinion, it did.

By virtue of the delegation of all of the OPM Director's functions to the Executive Assistant position on March 25, Dr. Devine continued to be vested with the full range of the Director's functions when he assumed this position on March 26, upon expiration of his term. In other words, under the delegation he continued to possess the functions immediately after his term ended that he possessed as Director. This is the specific and inevitable effect of the delegation on its face. As discussed hereafter, it is difficult to know precisely on what basis from March 26 onward Dr. Devine held the Director's functions--on a shared basis with Mrs. Cornelius, as a substitute for her unless and until she chose to assume authority, or under yet a different understanding. Nevertheless, the conclusion seems to us inescapable that, pursuant to the delegation, Dr. Devine did retain the OPM Director's functions in some capacity after expiration of his term.

In our opinion, Dr. Devine's continued possession of the Director's functions after March 25 cannot be reconciled with 5 U.S.C. § 1102(a) and must be regarded as an illegal circumvention of the 4-year term limitation in that provision. The situation here is similar to that in our decision 56 Comp. Gen. 761 (1977). This case concerned the validity of J. Robert Hunter's service as Deputy Insurance Administrator in the Department of Housing and Urban Development. Mr. Hunter previously had served as Acting Insurance Administrator but his right to hold that position ended with expiration of the 30-day limit for temporary appointments under the so-called "Vacancies Act," 5 U.S.C. §§ 3345-3349. In holding that Mr. Hunter could not continue to perform thereafter under a delegation of the Insurance Administrator's functions to him as "Deputy Administrator," we observed:

"In informal discussions with HUD, prior to its decision to create the position of Deputy Administrator, it was argued that the Secretary has broad authority to delegate any or all of her functions to subordinate employees (42 U.S.C.

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3535(d)), and therefore it was permissible for her to delegate all the functions relating to the insurance programs of HUD to Mr. Hunter in some capacity other than as Acting Administrator. We concede that a literal reading of the statute would permit the Secretary to refuse to give even a properly appointed Administrator any of the duties that would normally seem appropriate to his office. However, in this case, she has already delegated the duties to an Administrator, and made them part of his job description. Once the period in which he may legally perform those duties has expired, any redelegation to another position--particularly if the other position is occupied by the same man who can no longer serve as Administrator--would seem a patent circumvention of the Vacancies Act." 56 Comp. Gen. at 764.X (Emphasis supplied.)

We are not persuaded by the arguments in the two opinions that the delegation does not circumvent the limit on the Director's term. The Covington and Burling opinion states that the only congressional purpose in enacting the 4-year term was to grant the Director a measure of independence from the President. This opinion further observes that there is no limit on the number of terms a Director may serve and that Congress clearly contemplated that there might be an "interregnum" between one individual's terms. Further:

"Congress made no affirmative provision for handling any such interregnum, nor did it prohibit any particular arrangements. Accordingly, any arrangements not otherwise inconsistent with law are permissible."

As to the first argument, Congress' rationale in enacting the statutory limit on the OPM Director's term is immaterial. The point is that a statutory limit was imposed which clearly

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prevents the Director from continuing in office once his term expires.^{4/}

Next, we agree that there is no limit on the number of terms that an OPM Director may serve and that Congress may well have envisioned an interregnum. However, Congress did provide a specific arrangement which governs a "vacancy" in the office of Director--under § 1102(b) the Deputy Director becomes Acting Director. Therefore, we do not understand the basis for the suggestion in the Covington and Burling opinion that the law made no affirmative provision for an interregnum. We think it does so in the same manner as it covers any other vacancy in the office of Director. This suggestion likewise finds no support in the General Counsel's opinion, which clearly recognizes that Mrs. Cornelius became Acting Director as a matter of law upon expiration of Dr. Devine's term.

Finally, there were no doubt practical reasons for desiring Dr. Devine's continued presence and involvement at OPM during the "interregnum." However, this could certainly have been accomplished in many ways that would raise no question of circumventing § 1102. We fail to see why it should have been necessary to grant Dr. Devine the Director's functions in order to obtain his continued presence at OPM.

Effect on the Deputy Director's Authority

Whether the delegation of authority violated Mrs. Cornelius' statutory role as Acting Director of OPM from March 25 to May 3 presents the most difficult issue. We have no direct information as to the relationship between Dr. Devine and Mrs. Cornelius during this period. Moreover, the discussions on this point in the two opinions consist primarily of general

^{4/} We note that the OPM General Counsel's opinion concedes the effect of the term limitation:

"OPM's organic statutes do not provide for the holding-over of a Director whose term of office has expired. Because the same statutes do provide for the holding-over of certain other officers, * * * it must be presumed that Congress did not intend for a Director of OPM to continue in office after the end of his four-year term. * * *

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characterizations which seem to us ambiguous and at times somewhat contradictory.

The Covington and Burling opinion states that during this period Dr. Devine testified at several congressional hearings, other than his confirmation hearing, and that Mrs. Cornelius had Dr. Devine chair the meetings of OPM's Senior Staff, Senior Policy and Noncareer Policy meetings. On the other hand, the General Counsel opinion describes the relationship as one in which Mrs. Cornelius and Dr. Devine shared the power of the Director, but with Dr. Devine having a subordinate role. It adds that this relationship:

"* * * represents a reasonable adaptation of the traditional relationship between the Director and the Deputy Director to the exigencies of a circumstance in which the office of Director was vacant; with the Deputy Director acting, by operation of law, as the Director, the Executive Assistant to the Director was needed to act, by operation of sound discretion, as the Deputy Director. The Delegation of Authority that is at issue here achieved precisely that result."

At another point the General Counsel opinion asserts that:

"* * * considerable evidence exists that his [Dr. Devine's] appointment to a subordinate position within OPM was intended less to perpetuate his direct leadership of the agency and more to facilitate the processes of his interaction with Congress in his capacity as Director-Designate, not altogether unlike arrangements made in times of transition of Presidential Administrations. * * *"

The General Counsel frames the issue of whether the delegation was inconsistent with Mrs. Cornelius' status as Acting Director as follows:

"* * * The test of the arrangement here in question, then, will be the right of the Deputy Director, in her capacity as Acting Director, to control the conduct of the Executive Assistant to the Director. If that right is unambiguous and

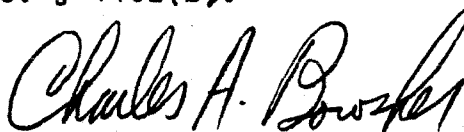
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assertable, then it cannot be said that the functions delegated to the Executive Assistant to the Director improperly encroach upon the Deputy Director's authority."

We agree with this statement of the issue, but have less confidence in the conclusion that Mrs. Cornelius' right of control was "unambiguous and assertable." In our view, the relevant documents are not entirely clear on this point. It is true that the position description for the Executive Assistant and the revised line of succession made the Executive Assistant subordinate to Mrs. Cornelius as Acting Director. Also, the delegation of authority was expressly made subject to revocation by "the Director"--a power that clearly would devolve to Mrs. Cornelius as Acting Director.

On the other hand, the position description for the Executive Assistant did not refer to the delegation of authority and did not reflect the full range of the Executive Assistant's functions under the delegation. Moreover, it is not clear to us whether Mrs. Cornelius knew of the delegation during the March 26 - May 3 period. We also do not understand why it was not left to Mrs. Cornelius to fashion a delegation to Dr. Devine after she became Acting Director if only a subordinate role was intended for him.

In view of these uncertainties and our lack of more specific information, we cannot express an opinion at this time on whether the delegation undercut Mrs. Cornelius' role as Acting Director in violation of 5 U.S.C. § 1102(b).



Comptroller General
of the United States

DELEGATION OF AUTHORITY

Heads of agencies to subordinates
Authority exceeded

APPOINTMENTS

Validity

UNRESTRICTED

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DIGEST

June 4, 1985

Chairman, Senate Governmental Affairs Committee, asked several questions concerning the delegation of authority by the Director of the Office of Personnel Management (OPM) following the end of his 4-year term. In our letter to Senator Stevens (B-218996, dated today), we concluded that the delegation of authority to the position of Executive Assistant to the Director was not legally appropriate. In answers to related questions we concluded: (1) that the position of Executive Assistant was properly created under the SES; (2) that actions taken by Dr. Devine after the expiration of his term could be validated on the basis of the de facto rule or by ratification by the Acting Director of OPM; (3) that the Freedom of Information Act requires that delegations of authority be made promptly available to the public; and (4) that the Hatch Act applies to the position of Executive Assistant to the Director of OPM.