



Decision

Matter of: Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security—Reconsideration

File: B-332451

Date: August 21, 2020

DIGEST

The Department of Homeland Security’s (DHS) request that we rescind our August 14, 2020, decision is denied, as DHS has not shown that our decision contains either material errors of fact or law, nor has DHS provided information not previously considered that warrants reversal or modification of the decision.

DECISION

The Department of Homeland Security (DHS) requests reconsideration of our decision in Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security, B-331650, August 14, 2020 (Decision), asking that we rescind the decision. Letter from Senior Official Performing the Duties of the General Counsel to General Counsel, GAO (Aug. 17, 2020). In our decision, we concluded that the appointments of both officials were issued under an invalid order of succession. GAO will modify or reverse a prior decision only if it contains a material error of fact or law. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <https://www.gao.gov/products/GAO-06-1064SP>. As explained below, DHS did not identify any material errors of fact or law and we decline to reverse or modify the decision.

BACKGROUND

The Homeland Security Act (HSA) provides a means for an official to assume the title of Acting Secretary pursuant to a designation of further order of succession by the Secretary. 6 U.S.C. § 113(g)(2). Secretary Kirstjen Nielsen exercised this power on April 9, 2019, the day before her resignation, when she established a new order of

succession for Acting Secretary as reflected in DHS 00106 (April Delegation).¹ However, upon her resignation, the official who assumed the title of Acting Secretary—Mr. Kevin McAleenan—was not the official designated in the April Delegation order of succession to serve upon the Secretary’s resignation. As a result, we concluded Mr. McAleenan’s subsequent amendments to the April Delegation order of succession were invalid and the subsequent appointments of Chad Wolf and Kenneth Cuccinelli who assumed their positions under such amendments were also improper.

While we concluded the appointments were improper, we did not review or make conclusions regarding the consequences of actions taken by these officials. We referred this question to the DHS Office of Inspector General. In that regard, we specifically suggested consideration of whether actions taken by these officials could be ratified by properly serving individuals as designated in the April Delegation to be the Acting Secretary and Senior Official Performing the Duties of the Deputy Secretary.

DECISION

In its August 17, 2020, letter, DHS asserts that our decision is “fundamentally erroneous,” but in doing so did not point to any facts which we relied upon that were in error or provide any new facts for us to consider. DHS does assert legal error, arguing that our decision failed to properly defer to its interpretation of the Memorandum which it relied upon to demonstrate that the Secretary designated Mr. McAleenan to serve as Acting Secretary. The memorandum to which DHS refers is the April 9, 2019 Memorandum to Secretary Nielsen from the then-General Counsel requesting the Secretary’s approval of the revised order of succession for Annex A. DHS letter, at 5-6.

In our decision, we addressed DHS’s focus on the Memorandum. Decision, at 8-9. DHS argues that the Memorandum introduces ambiguity and that this requires us to defer to its interpretation of the order of succession. However, given that the plain language of the April Delegation is clear, there is no need to refer to the Memorandum. Any contrary interpretation of the April Delegation by DHS would not be entitled to any deference given its clarity. An agency’s interpretation is not entitled to deference unless the controlling language is ambiguous, nor is deference available to an agency’s “*post hoc* rationalization advanced [to] defend past agency action.” See, *generally*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415, 2417 (2019) (a court should not afford deference unless the regulation is genuinely ambiguous).

In addition to its insistence on deference, DHS accused this office of political partisanship. In our oversight role, GAO produces hundreds of written products annually, including legal decisions, that examine agency programs and operations throughout the government. DHS’s demand for deference in these circumstances is not

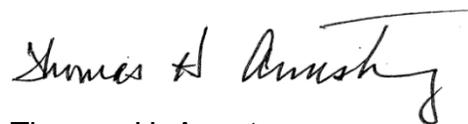
¹ The Secretary also changed the order of succession for Deputy Secretary pursuant to her general management authorities under 6 U.S.C. § 112.

only legally unsupported but also ignores the public and Constitutional imperative of oversight to ensure transparency and accountability of governmental actions.

Our August 14, 2020, decision and all of our written products represent the work of numerous professionals, each taking care to remain independent and mindful of GAO's obligation to provide nonpartisan service to the American people. All GAO products also undergo a multi-level review to assure they are intellectually sound and free from bias. Rather than trying to reach a particular conclusion, our legal decisions, this one included, are the result of a dispassionate application of the relevant law to facts, not advocacy, and are subject to rigorous legal review and signature of GAO's General Counsel.

CONCLUSION

GAO will modify or reverse a prior decision or opinion only if it contains a material error of fact or law. DHS has not demonstrated that our prior decision contains errors of either fact or law, nor has DHS presented information not previously considered that warrants reversal or modification of our decision. Therefore, we decline to reverse or modify the decision.

A handwritten signature in black ink, appearing to read "Thomas H. Armstrong". The signature is written in a cursive style with a prominent horizontal line above the first name.

Thomas H. Armstrong
General Counsel