

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

Subject Card



B-150136

FEB 27 1978

The Honorable Elizabeth Holtzman
House of Representatives

Dear Ms. Holtzman:

This is in response to your letter dated January 30, 1978, concerning the service of Mr. James M. H. Gregg as Acting Administrator of the Law Enforcement Assistance Administration (LEAA). You note that the last presidentially appointed Administrator, Richard W. Velde, resigned on February 25, 1977, and at the time of Mr. Velde's resignation, Mr. Gregg was Assistant Administrator, Office of Planning and Management, the highest ranking official then serving since the two Deputy Administrator positions were vacant. You inquire as to the authority for Mr. Gregg to serve as Acting Administrator for any period in excess of 30 days from the date of Mr. Velde's resignation in view of the provisions of the Vacancies Act, 5 U.S.C. §§ 3343-3349 (1976). You also note that LEAA's enabling legislation does not reveal any provision for the appointment of an acting administrator. By letter dated February 10, 1978, we requested the views of the Department of Justice in regard to Mr. Gregg's service but in consideration of the urgency with which you view this matter, we are responding without benefit of a reply from Justice.

Under 42 U.S.C. § 3711(a) (Supp. V, 1975) Congress provided for appointing the Administrator and two Deputy Administrators of LEAA as follows:

"There is hereby established within the Department of Justice, under the general authority of the Attorney General, a Law Enforcement Assistance Administration (hereinafter referred to in this chapter as 'Administration') composed of an Administrator of Law Enforcement Assistance and two Deputy Administrators of Law Enforcement Assistance, who shall be appointed by the President, by and with the advice and consent of the Senate."

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Sections 3345, 3346, and 3347 of title 5, United States Code, provide methods for the temporary filling of vacancies created by the death, resignation, sickness or absence of the head of an executive or military department, or the head of a bureau thereof whose appointment is not vested in the head of the department. Section 3349 of title 5 makes the methods described in the preceding sections the sole means for filling the vacancies described therein, except in the case of a vacancy occurring during a recess of the Senate.

Section 3348 of title 5, United States Code, imposes a 30-day limit on temporary appointments under sections 3345, 3346, and 3347 for positions which are subject to Presidential appointment and Senate confirmation. That section is worded as follows:

"§ 3348. Details; Limited in time.

A vacancy caused by death or resignation may be filled temporarily under section 3345, 3346, or 3347 of this title for not more than 30 days."

You have furnished our Office with a copy of LEAA Instruction I 1310.18A dated September 10, 1974, entitled "Designation of An Acting Administrator, LEAA" which appears to implement the succession procedure mandated by sections 3345, 3346, and 3347 of title 5, United States Code. However, the internal LEAA instruction is silent as to the 30-day limit imposed by 5 U.S.C. § 3348.

All of the cited sections are derived from the Act of July 23, 1868, ch. 227, 15 Stat. 168, hereinafter referred to as the Vacancies Act. The legislative history of the Act makes it clear that the provisions now codified as sections 3345 through 3349 of title 5 were intended to preclude unreasonable delays in submitting nominations for offices subject to Senate confirmation. See e. g., 39 Congressional Globe 1163, 1164 (February 14, 1868).

In 1973 when Mr. L. Patrick Gray III was designated Acting Director of the Federal Bureau of Investigation (FBI), we were asked to decide whether the Vacancies Act was applicable to the Department of Justice and in turn to the position of Director of the FBI. Our opinion in that case, B-150136, February 22, 1973, holding that the Vacancies Act did apply, would appear to be equally applicable to Mr. Gregg's service.

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The Department of Justice disagreed with our conclusion in the Patrick Gray case. The basis for the Department's view was that 28 U.S.C. § 510 supersedes 5 U.S.C. § 3348. Section 509, title 28 United States Code, places all functions of the Department of Justice, with certain exceptions not pertinent here, in the Attorney General. Under section 510 the Attorney General may authorize any other officer or employee of the Department of Justice to perform any function of the Attorney General. Our Office views section 509 as placing full accountability in the Attorney General for the functions of his agency. However, section 510, while permitting him to delegate his functions, does not in our opinion supersede the provisions of the Vacancies Act. B-150136, February 22, 1973.

We note that the position of Administrator has been without a nominee for approximately one year. This appears to be precisely the sort of "unreasonable" delay the Vacancies Act was enacted to prevent. In the absence of any other statutory authority to fill the position on a temporary basis outside the Vacancies Act, we conclude that the 30-day limit is applicable, and began to run on February 26, 1977, the day after the resignation of Mr. Velde. Thus, from March 28, 1977, to date, there was no legal authority for anyone to perform the duties of the Administrator except the Attorney General himself, in whom, by statute, all the Administrator's functions are vested. 28 U.S.C. § 509 (1970).

As indicated by the LEAA instruction cited above, the Assistant Administrator, Office of Planning and Management, the position occupied by Mr. Gregg, may act for the Administrator in the Administrator's absence. The instruction states that the absence of the Administrator and the Deputy Administrators should result from (1) travel outside the Metropolitan Washington area, (2) incapacity, or (3) vacancy of position. The first two types of absences contemplate a situation in which there is a duly appointed Administrator, who may be absent and unable to perform his duties for various reasons, including travel, sickness, etc. This is a duty commonly assigned to deputies or first assistants throughout the Government and is certainly not objectionable per se. The third type of absence contemplates a vacancy in the office of Administrator. Since this situation is covered by the Vacancies Act and the time has expired when anyone—whatever his title—may serve as Acting Administrator, Mr. Gregg may not perform the duties of such office.

We are mindful of the practical difficulties of being forced to run a program with no one at the head to make decisions.

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However, until the President submits a nomination to the Senate, such decisions can only be made legally by the Attorney General.

You have called our attention to the fact that official actions taken by Mr. Gregg, such as the signing of grant awards, have at least in some instances been taken in his capacity as Assistant Administrator, Office of Planning and Management. However, since, as indicated above, there is no legal authority for Mr. Gregg to occupy the position of Acting Administrator during the vacancy of the office of Administrator, the validity of Mr. Gregg's actions in the capacity of Acting Administrator could be challenged. Therefore, it would appear that the Attorney General should give consideration to ratifying such actions. See 56 Comp. Gen. 761 (1977).

Sincerely yours,

R.F.KELLER

Deputy | Comptroller General
of the United States

APPOINTMENTS
Presidential
"Vacancies Act" restrictions
Presidential appointees

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Law for
Presidential
Administration (LEA) Administrator