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DECISION



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

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FILE: B-150136

DATE: May 16, 1978

**MATTER OF: Department of Energy--Acting Officials'
Status and Authority**

- DIGEST:**
- 1. The positions of General Counsel, Inspector General, and Assistant Secretaries, established by the Department of Energy Organization Act, Pub. L. No. 95-91, require Presidential nomination and Senate confirmation. Section 902 of the Act authorizes the President to make interim appointments of officers previously confirmed by the Senate. Four of the five interim appointees serving in such positions had not been previously confirmed by the Senate. Hence, they were improperly appointed.**
 - 2. Although Vacancies Act, 5 U.S.C. §§ 3345-49, which was intended to preclude extended filling of office subject to Senate confirmation without submission of nomination to Senate, applies to "executive departments" which includes Department of Energy, Act does not apply to the named positions because these positions have never been filled and therefore have not been vacated as contemplated by the Act.**
 - 3. Validity of decisions made by four acting officials of the Department of Energy during period they were not authorized to hold positions could be challenged. Secretary is advised to consider ratifying those decisions.**

By congressional request, the General Accounting Office has been asked for a legal opinion as to the eligibility of the following persons to continue to serve in an acting capacity at the Department of Energy, in positions that require confirmation by the Senate:

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Eric J. Fygi	Acting General Counsel
Joseph Seltzer	Acting Inspector General
Donald A. Beattie	Acting Assistant Secretary for Conservation and Solar Applications
Donald M. Kerr	Acting Assistant Secretary for Defense Programs
James L. Liverman	Acting Assistant Secretary for Environment

The following information has been provided our Office by the Department of Energy concerning the officers presently serving in acting capacities. Mr. Fygi was appointed Acting General Counsel by the Secretary on September 28, 1977, effective October 1, 1977. On September 30, 1977, Mr. Fygi was serving as the Deputy General Counsel, a position not requiring Senate confirmation. Mr. Fygi has never been confirmed by the Senate to serve in any capacity. On September 23, 1977, Mr. Lynn R. Coleman was nominated by the President to serve as General Counsel. The nomination of Mr. Coleman was returned when the Senate adjourned and resubmitted to the Senate on January 26, 1978. Mr. Coleman was confirmed by the Senate on May 9, 1978.

Mr. Joseph Seltzer was appointed Acting Inspector General effective October 15, 1977, by William S. Heffelfinger, Director of Administration, acting on behalf of the Secretary. Mr. Seltzer has never been confirmed by the Senate to serve in any capacity. On April 19, 1978, Mr. J. Kenneth Mansfield was nominated by the President to serve as Inspector General, and was confirmed by the Senate on May 3, 1978.

On September 28, 1977, the Secretary appointed Mr. Donald A. Beattie to serve as Acting Assistant Secretary for Conservation and Solar Applications, effective October 1, 1977. At the time of his appointment, Mr. Beattie was serving both as Deputy Assistant Administrator and Acting Assistant Administrator for Solar, Geothermal, and Advanced Energy Systems, Energy Research and Development Administration. Mr. Beattie has never been confirmed by the Senate to serve in any capacity. On January 25,

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1978, the President nominated Ms. Omi Walden to serve as the Assistant Secretary for Conservation and Solar Applications.

On December 29, 1977, Mr. Heffelfinger, acting on behalf of the Secretary, appointed Mr. Donald M. Kerr to serve as Acting Assistant Secretary for Defense Programs, effective January 1, 1978. At the time of his appointment Mr. Kerr was serving as Deputy Assistant Secretary for Research, Defense Programs, and continues to concurrently serve in that position. Mr. Kerr has never been confirmed by the Senate to serve in any capacity. No nomination has been submitted for this position.

Mr. James L. Liverman was appointed by the President on September 30, 1977, to serve as Acting Assistant Secretary for the Environment, effective October 1, 1977. On September 30, 1977, Mr. Liverman was serving as the Assistant Administrator for Environment and Safety, Energy Research and Development Administration (ERDA), a position for which Mr. Liverman received Senate confirmation. No nomination has been submitted for this position.

The position of General Counsel was established by section 202(b) of the Department of Energy Organization Act of 1977, approved August 4, 1977, Pub. L. No. 95-91, 91 Stat. 565, 569 (42 U.S.C. § 7132(b)). This section provides:

"(b) There shall be in the Department * * * a General Counsel, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall perform such functions and duties as the Secretary shall prescribe. * * * [T]he General Counsel shall be compensated at the rate provided for level IV of the Executive Schedule under section 5315 of Title 5."

The position of Inspector General was established by section 208(a)(1) of the Act, 42 U.S.C. § 7138(a)(1), as follows:

"(a)(1) There shall be within the Department an Office of Inspector General to be headed by an Inspector General, who shall be appointed by the President, by and with the advice and consent of the Senate, solely on the basis of integrity and

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demonstrated ability and without regard to political affiliation. The Inspector General shall report to, and be under the general supervision of, the Secretary or, to the extent such authority is delegated, the Deputy Secretary, but shall not be under the control of, or subject to supervision by, any other officer of the Department."

Under section 203(a) of the Act, 42 U. S. C. § 7133(a), Congress provided for eight Assistant Secretaries as follows:

"(a) There shall be in the Department eight Assistant Secretaries, each of whom shall be appointed by the President, by and with the advice and consent of the Senate; who shall be compensated at the rate provided for at level IV of the Executive Schedule under section 5315 of Title 5; and who shall perform, in accordance with applicable law, such of the functions transferred or delegated to, or vested in, the Secretary as he shall prescribe in accordance with the provisions of this chapter. * * *"

Congress made special provision for interim appointments to be made when officers required by the Act to be appointed and confirmed by the Senate had not, on the effective date of the Act, completed the nomination and confirmation process. The requirements for the designation of interim appointments are established by section 902 of the Act, 42 U. S. C. § 7342, as follows:

"In the event that one or more officers required by this chapter to be appointed by and with the advice and consent of the Senate shall not have entered upon office on the effective date of this chapter, the President may designate any officer, whose appointment was required to be made, by and with the advice and consent of the Senate, and who was such an officer immediately prior to the effective date of the chapter, to act in such office until the office is filled as provided in this chapter. While so acting such persons shall receive compensation at the rates provided by this chapter for the respective offices in which they act."

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First, it can be seen by the clear terms of the above-quoted sections of the Act that all five officers under consideration here are required to be appointed by the President by and with the advice and consent of the Senate. Further, the record indicates that none of the five officers have been so nominated and confirmed. Therefore, the provisions for interim appointments found in section 902 of the Act, set forth above, which provides for designating officers to serve until nomination and confirmation has taken place, are for consideration. That section authorizes the President to make an interim appointment of any officer of the Government who, immediately prior to the effective date of the Act (October 1, 1977), was serving with Senate confirmation.

Consequently, in the absence of appointments made by the President in compliance with the various appointment provisions enumerated above or by use of the interim appointments provisions discussed above, only the Secretary himself, in whom, by statute, all of the agencies' functions are vested until delegated, may perform the duties of the interloping officers. Sections 201, 203(a); 42 U.S.C. §§ 7131, 7133(a).

The record indicates that Mr. Liverman was appointed by the President to serve as Acting Assistant Secretary and at the time of his appointment was serving as an Assistant Administrator, ERDA, with Senate confirmation. Therefore, in view of the provisions of section 902 of the Act, in our opinion there is no legal objection to any service by Mr. Liverman as Acting Assistant Secretary. However, none of the other four officers under review have been appointed in accordance with the requirements referred to in section 902 for interim appointments. We, therefore, conclude that Messrs. Fygi, Seltzer, Beattie, and Kerr, have not been legally appointed. Thus, there has been no legal authority for any of them to perform the duties of the respective offices.

Since there is no legal authority for Messrs. Fygi, Seltzer, Beattie, and Kerr to occupy the positions of Acting General Counsel, Acting Inspector General, and Acting Assistant Secretaries, respectively, in the absence of compliance with section 902 of the Act, the validity of their actions in their acting capacities could be challenged. Therefore, we recommend that the Secretary give consideration to ratifying such actions. See 56 Comp. Gen. 761 (1977).

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We have also been requested to discuss the applicability of 5 U. S. C. § 3348 to the subject temporary appointments at the Department of Energy. 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 3348 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.

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 in executive departments subject to Senate confirmation. See, e. g., 39 Congressional Globe 1163, 1164 (February 14, 1868). The executive departments have been defined to include the Department of Energy. 5 U. S. C. § 101 (1977). The Vacancies Act, by its terms, clearly contemplates the vacating of an office by the person occupying the position as a condition precedent for the application of its provisions. Since none of the five offices discussed above were previously occupied, it would appear that the Vacancies Act would have no application.

We believe that the Congress, in providing for interim appointments, may have been motivated by a recognition that no provision of law would otherwise allow for anyone to occupy the positions in question without the advice and consent of the Senate. The interim appointments provision is similar to the Vacancies Act in that it allows the President to appoint any officer of an executive department serving with Senate confirmation to serve as an officer of the Department of Energy in a position requiring Senate confirmation. One significant distinction between the Vacancies Act and the interim appointments provision is the absence of any time limit on the service of an interim appointee.

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under section 902, whereas an officer directed by the President under the Vacancies Act to perform the duties of a vacant office would be limited to 90 days.

Since our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the Committees on Government Operations, Governmental Affairs, and Appropriations concerning the action taken with respect to our recommendation.


**Acting Comptroller General
of the United States**