



Decision

Matter of: Social Security Administration—Legality of Service of Acting Commissioner

File: B-333543

Date: February 1, 2022

DIGEST

The Federal Vacancies Reform Act of 1998 (Vacancies Act), 5 U.S.C. §§ 3345–3349d, is the exclusive means for an acting official to serve in a vacant executive branch position that requires presidential appointment and Senate confirmation unless another statutory provision expressly designates an acting officer or authorizes the President, a court, or the head of an executive department to make a designation. Section 702(b)(4) of the Social Security Act, 42 U.S.C. § 902(b)(4), provides that the President may designate an Acting Commissioner of the Social Security Administration. On July 9, 2021, the President designated an Acting Commissioner of Social Security pursuant to the Social Security Act, not the Vacancies Act. Neither the Vacancies Act’s time limitations on acting service nor the restrictions on performance of the position’s functions and duties apply to the Acting Commissioner.

DECISION

This responds to a congressional request regarding the legality of Dr. Kilolo Kijakazi's service as Acting Commissioner of Social Security at the Social Security Administration (SSA).¹ As explained below, we conclude that Dr. Kijakazi is lawfully serving as the Acting Commissioner under section 702(b)(4) of the Social Security Act. See 42 U.S.C. § 902(b)(4).² Neither the Vacancies Act’s time limitations on

¹ Letter from Senator Mike Crapo, Representative Kevin Brady, Senator Todd Young, Representative Tom Reed, and Senator Tim Scott to Comptroller General (Aug. 24, 2021).

² The Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (Aug. 14, 1935), is codified as amended in various sections of title 42 of the United States Code.

acting service nor the restrictions on performance of the position's functions and duties apply to Dr. Kijakazi.

In accordance with our regular practice, we contacted SSA to seek factual information and its legal views on this matter.³ SSA responded with its explanation of the pertinent facts and legal analysis.⁴ SSA also provided a copy of the President's designation of Dr. Kijakazi as Acting Commissioner.⁵

BACKGROUND

The Vacancies 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. 5 U.S.C. §§ 3345–3349d. The Vacancies Act is the exclusive means for an acting official to serve in a covered position unless another statutory provision expressly designates an officer or employee to temporarily serve in an acting capacity in a specified position or authorizes the President, a court, or the head of an executive department to make such a designation. 5 U.S.C. § 3347.

SSA is an independent agency in the executive branch and is responsible for administering the old-age, survivors, and disability insurance program as well as the supplemental security income program. 42 U.S.C. § 901. The Commissioner of Social Security leads the agency and is a presidentially appointed, Senate-confirmed (PAS) position. 42 U.S.C. § 902(a).

On July 9, 2021, the President removed Andrew Saul, the Commissioner of Social Security,⁶ from office, creating a vacancy in the position.⁷ That same day, the

³ 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>. Letter from Managing Associate General Counsel for Appropriations Law, GAO, to General Counsel, SSA (Sept. 21, 2021); Email from Senior Attorney, GAO, to General Counsel, SSA, *Subject: Follow up on SSA Development Letter (B-333543)* (Oct. 28, 2021).

⁴ Letter from General Counsel, SSA, to Managing Associate General Counsel for Appropriations Law, GAO (Oct. 21, 2021) (Initial Response Letter); Letter from General Counsel, SSA, to Senior Attorney, GAO (Nov. 10, 2021) (Follow-up Response Letter).

⁵ Presidential Memorandum for Kilolo Kijakazi, Deputy Commissioner for Retirement and Disability Policy, SSA (July 9, 2021) (Presidential Designation).

⁶ Mr. Saul was nominated on April 12, 2018, re-nominated on January 16, 2019, and confirmed by the Senate on June 4, 2019. Initial Response Letter, at 1.

⁷ Initial Response Letter, at 1–2.

President designated Dr. Kilolo Kijakazi, SSA's Deputy Commissioner for Retirement and Disability Policy, as Acting Commissioner pursuant to "the Constitution and the laws of the United States, including section 702(b)(4) of the Social Security Act."⁸ Dr. Kijakazi is the only official that has served as Acting Commissioner since the vacancy began, and no one has been nominated to the position.⁹

DISCUSSION

At issue here is whether Dr. Kijakazi is eligible to serve as Acting Commissioner, and, if so, whether there are any time or other limitations on her acting service.

Dr. Kijakazi's Eligibility

The Vacancies Act is the exclusive means for temporarily authorizing an acting official to perform the functions and duties of most vacant PAS positions in executive agencies unless an exception applies. 5 U.S.C. § 3347(a). In particular, an official may act under a statutory provision other than the Vacancies Act if that provision either expressly "designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity," or expressly "authorizes the President, a court, or the head of an Executive department" to make such a designation. 5 U.S.C. § 3347(a)(1); B-331650, Aug. 14, 2020.

The Commissioner of Social Security is a PAS position subject to the Vacancies Act.¹⁰ However, the President designated Dr. Kijakazi as Acting Commissioner pursuant to section 702(b)(4) of the Social Security Act. Section 702(b)(4) states, in relevant part:

The Deputy Commissioner [of Social Security]¹¹ shall be Acting Commissioner of the Administration during the absence or disability of the Commissioner and, unless the President designates another officer of the Government as Acting Commissioner, in the event of a vacancy in the office of the Commissioner.

42 U.S.C. § 902(b)(4).

Because the provision expressly designates an officer to serve as Acting Commissioner (the Deputy Commissioner of Social Security) and authorizes the

⁸ Initial Response Letter, at 1; Presidential Designation.

⁹ Initial Response Letter, at 2.

¹⁰ See 5 U.S.C. §§ 3345(a), 3347(a); 42 U.S.C. §§ 901(a), 902(a)(1); B-329853, Mar. 6, 2018.

¹¹ The Deputy Commissioner of Social Security, like the Commissioner, is a PAS position. 42 U.S.C. § 902(b)(1).

President to designate another officer as Acting Commissioner, the provision provides authority, independent of the Vacancies Act, to designate an Acting Commissioner. See 5 U.S.C. § 3347(a); S. Rep. No. 105-250, at 15–17 (1998) (expressly identifying section 702(b)(4) as falling within a similarly-worded exception in an earlier version of the bill).

Next, we turn to whether Dr. Kijakazi is authorized to serve under this position-specific authority. Section 702(b)(4) states that the Deputy Commissioner of Social Security becomes the Acting Commissioner when there is a vacancy in the position, unless the President designates another “officer of the Government” to act. See 42 U.S.C. § 902(b)(4). Dr. Kijakazi was not the Deputy Commissioner of Social Security,¹² and so, we consider whether Dr. Kijakazi was “another officer of the Government” who is eligible to act by designation of the President. See *id.*

Generally, to interpret a statute, we begin with the text, giving ordinary meaning to statutory terms unless otherwise defined. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013); B-331739, Mar. 18, 2021; B-331312, Mar. 8, 2021. Additionally, we do not construe statutory terms in isolation, but rather, in the context of the whole statute. B-331312, at 5 (citing 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 46:5, at 204 (7th ed. 2009)). When a statute uses an identical word more than once, the settled principle of statutory construction is that the word has the same meaning in the absence of evidence to the contrary. B-331739; 43 Comp. Gen. 252, 254 (B-151007, Sept. 12, 1963) (citing *United States v. Cooper Corp.*, 312 U.S. 600 (1941); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932)).

The Social Security Act does not define “officer.” But the use of the term in other parts of that act sheds light on its meaning in section 702(b)(4). Specifically, section 704 of the act provides that the Commissioner shall appoint officers and employees as necessary to carry out SSA’s mission, and “such officers and employees shall be appointed . . . in accordance with title 5.” 42 U.S.C. § 904(a)(1). Further, section 2104 of title 5 of the United States Code defines “officer,” in pertinent part, as an individual who is required by law to be appointed in the civil service by the head of an agency, is engaged in the performance of federal functions authorized by law, and is subject to the supervision of the agency head. 5 U.S.C. § 2104(a).

As Deputy Commissioner for Retirement and Disability Policy, Dr. Kijakazi was an “officer” as defined by 5 U.S.C. § 2104(a). First, section 704(a) of the Social Security Act directs the head of the agency, the Commissioner, to appoint additional officers, and Dr. Kijakazi was appointed to be Deputy Commissioner for Retirement and Disability Policy by Commissioner Saul.¹³ Second, the Deputy Commissioner

¹² See Initial Response Letter, at 5.

¹³ Follow-up Response Letter, at 2.

for Retirement and Disability Policy performs federal functions under the authority of law. For example, the position description specifies that “[t]he Deputy Commissioner for Retirement and Disability Policy is a key Agency official who . . . is accountable for carrying out and managing major phases of [SSA] programs.”¹⁴ Finally, Dr. Kijakazi was subject to the supervision of, and directly reported to, the head of the agency, the Commissioner, in that position.¹⁵

Since Dr. Kijakazi was an officer for purposes of 5 U.S.C. § 2104(a), we conclude that Dr. Kijakazi was also an “officer of the Government” for purposes of section 702(b)(4) of the Social Security Act. Therefore, Dr. Kijakazi was eligible to become the Acting Commissioner pursuant to the President’s designation on July 9, 2021.¹⁶

Time Limitations on Dr. Kijakazi’s Acting Service

We next consider whether there are any limitations on the time period Dr. Kijakazi may serve as Acting Commissioner.

The Social Security Act does not prescribe any time limitations for an individual serving as Acting Commissioner. See 42 U.S.C. § 902(b)(4). In contrast, the Vacancies Act expressly limits the time period for acting service and sets forth specific time limitations in various situations. See 5 U.S.C. § 3346.¹⁷ We therefore consider whether the Vacancies Act’s time limitations apply to an official serving as Acting Commissioner under section 702(b)(4) of the Social Security Act.

The Vacancies Act’s time limitations in section 3346 apply to “the person serving as an acting officer as described under section 3345.” 5 U.S.C. § 3346(a). Section 3345, in turn, identifies the categories of individuals who may serve as acting

¹⁴ Follow-up Response Letter, at 3; see SSA, *SSA Organizational Manual: Chapter TM – The Office of Retirement and Disability Policy*, available at <https://www.ssa.gov/org/orgDCRDP.htm> (last visited Jan. 31, 2021) (providing a more detailed description of the position’s duties).

¹⁵ Follow-up Response Letter, at 3 (quoting the position description, which states that the Deputy Commissioner for Retirement and Disability Policy “reports directly to the Commissioner of Social Security”); see SSA Organizational Manual: Chapter TM.

¹⁶ See Presidential Designation.

¹⁷ If no nomination has been submitted, the allowable period of acting service is generally 210 days beginning on the date the vacancy occurs. 5 U.S.C. § 3346(a)(1). If a nomination has been submitted, acting service is permitted during the pendency of a first or second nomination and for up to 210 days after the date the first or second nomination is rejected, withdrawn, or returned. 5 U.S.C. § 3346(a)(2), (b).

officials under the Vacancies Act. 5 U.S.C. § 3345. As discussed above, section 3347 provides that sections 3345 and 3346 are generally the exclusive means of temporarily authorizing an acting official to perform the functions and duties of a vacant position, but an acting official may be designated under another statutory provision meeting certain criteria. 5 U.S.C. § 3347(a)(1). Section 3347 thus distinguishes between the Vacancies Act provisions at sections 3345 and 3346 on the one hand and the statutory provisions described in section 3347(a)(1) on the other, characterizing these position-specific authorities as a means of designating an acting official independent of sections 3345 and 3346. *See Hooks v. Kitsap Tenant Support Services, Inc.*, 816 F.3d 550, 555–56 (9th Cir. 2016); *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 139 (D.D.C. 2019), *aff'd on other grounds*, 920 F.3d 1 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020). In other words, when an individual is serving as an acting official under one of the statutory provisions described in section 3347(a)(1), they are not serving pursuant to section 3345. Consequently, they are not subject to the time limitations in section 3346.¹⁸

In this case, because Dr. Kijakazi is serving as Acting Commissioner under a position-specific authority in accordance with section 3347, the time limitations in section 3346 do not apply to her acting service. Further, because the Social Security Act does not limit the period an individual may serve as Acting Commissioner, Dr. Kijakazi may serve indefinitely as Acting Commissioner under that authority until the President designates another individual to act or a new Commissioner is confirmed by the Senate. *See Casa de Maryland, Inc.* 486 F. Supp. 3d at 955–56; *Batalla Vidal*, 501 F. Supp. 3d at 130 n.9; *Immigrant Legal Resource Center* 491 F. Supp. 3d at 538; S. Rep. No. 105-250, at 17.

This conclusion differs from the circumstances identified in our 2018 report regarding a previous Acting Commissioner of Social Security. B-329853. In that case, we determined that Nancy A. Berryhill’s acting service violated the Vacancies Act’s time

¹⁸ The courts have similarly interpreted these provisions. *See Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 953–57 (D. Md. 2020); *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 129–31 (E.D.N.Y. 2020); *Immigrant Legal Resource Center v. Wolf*, 491 F. Supp. 3d 520, 536–38 (N.D. Cal. 2020); *see also United States v. Guzek*, 527 F.2d 552, 559–60 (8th Cir. 1975) (concluding that the time limitations in the previous vacancies statute did not apply to an Acting Attorney General serving under a position-specific statutory provision). The legislative history of the Vacancies Act also supports this interpretation. S. Rep. No. 105-250, at 17 (noting that many of the statutory provisions that fell within the scope of an earlier draft of section 3347(a) “do not place time restrictions on the length of an acting officer” and opining that the various authorizing committees might revisit whether those provisions should be repealed).

limitation because, unlike Dr. Kijakazi, Ms. Berryhill was serving under the provisions of the Vacancies Act.¹⁹

Other Limitations on Dr. Kijakazi's Acting Service

Finally, we consider whether the Social Security Act or the Vacancies Act places any other limitations on Dr. Kijakazi's acting service or her authority to temporarily perform the functions and duties of the Commissioner.

Aside from section 702(b)(4) of the Social Security Act, we have not identified any other provisions in the Social Security Act governing acting service as Commissioner. In other words, nothing in the Social Security Act expressly limits the authority of a duly designated Acting Commissioner like Dr. Kijakazi to perform the functions and duties of the Commissioner position.

The Vacancies Act includes an enforcement mechanism that restricts the performance of certain functions and duties of a vacant position when no "officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347." 5 U.S.C. § 3348(b). In that situation, "the office shall remain vacant" and "[a]n action taken by any person who is not acting under section 3345, 3346, or 3347 . . . in the performance of any function or duty . . . shall have no force or effect" and "may not be ratified."²⁰ 5 U.S.C. § 3348(b)(1), (d). Here, because we have concluded that Dr. Kijakazi is in fact performing the functions and duties in accordance with section 3347, these restrictions are inapplicable.²¹ Therefore, Dr. Kijakazi's authority to perform the functions and duties of the Commissioner is not restricted.

¹⁹ Although section 702(b)(4) of the Social Security Act uses the word "shall," suggesting that its provisions are mandatory in the event of a vacancy, courts have held that the Vacancies Act remains an alternative means of designating an acting official even when a position-specific authority includes such language. See *Hooks*, 816 F.3d at 555–56; *Guedes*, 356 F. Supp. 3d at 139.

²⁰ When the vacant office is not the head of the agency, section 3348 permits the head of the agency to perform the functions and duties of the position when no one is acting in accordance with sections 3345, 3346, and 3347. 5 U.S.C. § 3348(b)(2), (d)(1). Because the Commissioner is the head of SSA, see 42 U.S.C. § 902(a), these provisions do not apply.

²¹ Sections 3345 to 3347 specify two separate, independent authorities for acting service: (1) sections 3345 and 3346; and (2) position-specific authorities described in section 3347(a)(1). An individual acting pursuant to either one of these authorities is therefore performing the functions and duties of the position "in accordance with sections 3345, 3346, and 3347." See 5 U.S.C. § 3348(b).

CONCLUSION

The Social Security Act provides authority for the President to designate an Acting Commissioner of Social Security. Dr. Kijakazi qualifies to act under this authority. Neither the Social Security Act nor the Vacancies Act restricts or limits Dr. Kijakazi's authority to perform the functions and duties of the Commissioner while serving as Acting Commissioner nor places limitations on the length of her acting service.

A handwritten signature in black ink, reading "Edda Emmanuelle Perez". The signature is written in a cursive, flowing style.

Edda Emmanuelli Perez
General Counsel