



## ≤ Cobert ≥'s actions may be valid if not exclusive to director's office, attorney says

By Anjali Patel, Esq., **cyberFEDS®** Legal Editor Washington Bureau

**IN FOCUS:** Now that the Office of Personnel Management's [inspector general](#) has said that the Federal Vacancy Reform Act prohibits OPM acting Director Beth ≤ Cobert ≥ from remaining in the post since she was officially nominated for the position in November, some are questioning whether her actions since then will stand.

At least one attorney feels this will depend on whether the disputed action was "exclusive" to the directorship office.

In an exclusive interview with **cyberFEDS®**, federal employment expert **John Mahoney** said the Federal Vacancies Reform Act and the D.C. Circuit decision in *SW General, Inc. v. National Labor Relations Board*, 796 F.3d 67 (D.C. Cir. 2015), *rehearing en banc denied* (01/20/16) are both "pretty clear" that ≤ Cobert ≥ "shouldn't have been serving as the acting director once she was confirmed as the nominee for the directorship" on Nov. 10, 2015. In addition, under the FVRA, agency actions taken by someone who is not qualified to serve as an acting director are void if they qualify as "functions and duties exclusive to the director post," **Mahoney** explained.

The FVRA definition of actions encompasses agency rules, orders, licenses, sanctions, relief, and the failure to act. [5 USC 3348](#) (a)(1); [5 USC 551](#) (13).

Though unclear which of ≤ Cobert ≥'s actions fall under the FVRA definition, during the time in question, ≤ Cobert ≥ issued:

- Senior Executive Service guidance on [rotation programs](#) and [onboarding](#).
- [Proposed rules](#) designed to support a new Human Capital Framework that integrates four human capital systems -- strategic planning and alignment, talent management, performance, and evaluation -- into effective HR management.
- [Guidance](#) on recruitment, relocation, and retention bonuses.
- Performance management [guidance](#) for the end of FY 2015 and the beginning of 2016.
- [Guidance](#) on appointments and awards during the FY 2016 election season.
- [Pay raise implementation](#).
- [Washington-area dismissal/closure procedures](#).

And since ≤ Cobert ≥ was likely not a qualified acting officer, **Mahoney** added, any function or duty required by statute or regulation to be performed exclusively by the holder of that office would be void. [5 USC 3348](#) (a)(2).

This means that "only those functions and duties that cannot be co-performed could be void."

In contrast, the functions and duties that can be co-performed by another officer within OPM might withstand a legal challenge, **Mahoney** noted.

Right now, "it's unclear what functions and duties belong only to the director of OPM" and which actions can be delegated to others, **he said.**

According to a Department of Justice Office of General Counsel Q&A [memorandum](#) on the FVRA, "most, and in many cases all, the responsibilities performed by a [presidentially nominated and Senate confirmed] officer will not be exclusive, and the act permits non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency."

## **Enforcement**

For more clarity on enforcement of these provisions, two things could happen -- either the Justice Department could petition for Supreme Court review of the D.C. Circuit's decision in *NLRB* by April or an individual could file a lawsuit, **Mahoney said.**

OPM Press Secretary Samuel Schumach previously told **cyberFEDS®** that the DOJ "filed a petition for rehearing *en banc*, which makes clear that the government does not agree with the panel opinion."

Since the D.C. Circuit decision is not a final decision and is subject to further judicial review, the "Department of Justice is evaluating the decision and will announce in the coming weeks its decision whether to ask the Supreme Court to review that ruling," Schumach said.

**Mahoney** pointed out that even if the DOJ petitions for review, that may only affect what happens with the *NLRB* case, not necessarily  $\leq$  **Cobert's** actions since her nomination.

Any decision in *NLRB* "could be potentially controlling but not necessarily binding," **he said.**

Then there is still the possibility of someone suing OPM, "which could take years to sort out," **he said,** pointing out that the individual "would have to have standing -- meaning they'd have to be harmed by the OPM decisions during that time."

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