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July 31, 2008

The Honorable Robert C. Byrd
United States Senate

The Honorable Thad Cochran
United States Senate

Subject: *Department of Homeland Security—Transfer of Support Function for Principal Federal Officials*

In a letter dated May 22, 2008, you requested our opinion on whether a provision contained in the 2007 supplemental appropriations act prohibiting the Department of Homeland Security (DHS) from using appropriated funds for reorganizing the department was in effect and applicable to actions taken by DHS at the beginning of fiscal year 2008. Additionally, you asked whether, if the prohibition was in effect, DHS improperly used appropriated funds to carry out a transfer of the Principal Federal Officials (PFO) Support Program from the National Protection and Programs Directorate (NPPD) to the Office of Operations Coordination's (OPS) Management and Administration Program.

After analyzing the applicable statutes and considering DHS's views, we conclude that the prohibition was indeed in effect on October 1, 2007, the date of the transfer. We also conclude that the transfer of the program support function constituted a transfer covered by the prohibition. The support function was previously performed by NPPD. Effective October 1, 2007, the Director of Operations Coordination was tasked with providing staff support to the PFOs, and NPPD then ceased to have a staff support role regarding PFOs.

Our practice when issuing opinions is to obtain the views of the relevant agency to establish a factual record and to establish the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. In this regard, the department provided its legal views and relevant factual material. Letter from Michael D. Russell, Acting Associate General Counsel, DHS, to Susan A. Poling, Managing Associate General Counsel, GAO, July 17, 2008 (Russell Letter). DHS provided 16 attachments to its letter, including copies of letters previously sent to congressional committees under

section 872 notifying them of reorganizations or transfers. Russell Letter, at Tabs 6–16.

BACKGROUND

DHS was established by the Homeland Security Act of 2002. Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002). The Homeland Security Act defined the department’s missions to include preventing terrorist attacks within the United States, reducing the vulnerability of the United States to terrorism, and minimizing the damage and assisting in the recovery from attacks that occur within the United States. *Id.* at § 101(b). DHS began operations in March 2003. *See* GAO, *Department of Homeland Security: Progress Made in Implementation of Management Functions, but More Work Remains*, GAO-08-646T (Washington, D.C.: Apr. 9, 2008). Its establishment represented a fusion of 22 federal agencies to coordinate and centralize the leadership of many homeland security activities under a single department. *Id.*

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act) primarily establishes the programs and processes for the federal government to provide major disaster and emergency assistance to state, local, and tribal governments, individuals, and qualified private nonprofit organizations. 42 U.S.C. §§ 5121–5206. The President has assigned to the Secretary of DHS principal responsibility to coordinate management of the federal response to major incidents. Letter from Michael Chertoff, Secretary of DHS, to David Price, Chairman, Subcommittee on Homeland Security, House Committee on Appropriations, July 27, 2007 (Chertoff Letter), *contained in* Russell Letter, at Tab 3. The Federal Emergency Management Agency (FEMA), within DHS, has responsibility for administering the Stafford Act, and under the act, a federal coordinating officer (FCO) is appointed to lead the federal response to a national emergency. DHS states that while major incidents may involve the Stafford Act and be centered on emergency management, others may not involve the Stafford Act and may involve largely law enforcement responses with little role for FEMA. *Id.* For such non-Stafford Act incidents, a PFO is deployed to lead the array of federal personnel. *Id.*

There are currently approximately 75 pre-appointed PFOs. DHS, *Responses to Questions for the Record, Hearing before the Subcommittee on Homeland Security, Senate Appropriations Committee*, 18–19 (Mar. 4, 2008). The PFO is a collateral duty position, and all PFOs have other full-time responsibilities with their agencies. *Id.*, at 19. Some PFOs are designated for certain events, while approximately 38 nondesignated PFOs must be trained to step into the role of any of the PFOs if their normal responsibilities preclude them from carrying out their duties as a PFO. *Id.* The PFO support function or program management responsibilities consist primarily of training the PFOs, but also include coordinating PFO assignments with each PFO’s parent agency. *Id.* It is the transfer of the PFO support function that is at issue here.

In his letter to the Chairman of the Appropriations Subcommittee on Homeland Security, House of Representatives, the Secretary described the transfer as follows:

“I am pleased to report that, effective Fiscal Year 2008, the DHS Director of Operations Coordination will provide staff support to the PFOs. NPPD will then cease to have a staff support role regarding PFOs. This organizational transition will complete the alignment of pre-incident PFO and FCO support functions with other pre-incident strategic management planning and coordination within the Department.”

Chertoff Letter, at 2.

When it was enacted in 2002, section 872 of the Homeland Security Act provided the Secretary with authority to reorganize the department, but required that the Secretary provide notice to Congress prior to any reorganization. Specifically, section 872 of the Homeland Security Act states that “[t]he Secretary may allocate or reallocate functions among the officers of the Department, and may establish, consolidate, alter, or discontinue organizational units within the Department . . .” Pub. L. No. 107-296, § 872. The Secretary must provide notice 60 days in advance of taking any such action, and the notice is required to include the rationale for the action.¹ *Id.*

In 2007, however, Congress prohibited the Secretary from using appropriated funds to carry out section 872. In May 2007, after receiving its annual appropriation for fiscal year 2007,² DHS received a supplemental appropriation. U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, 121 Stat. 112 (May 25, 2007) (Supplemental Appropriation). Section 3501 of the Supplemental Appropriation provides that “[n]one of the funds provided in this Act, or [the DHS Appropriations Act], shall be available to carry out section 872 of Public Law 107-296 [the Homeland Security Act of 2002].” Pub. L. No. 110-28, § 3501.

For the beginning of fiscal year 2008, Congress enacted a continuing resolution to fund DHS. *See* Joint Resolution, Pub. L. No. 110-92, 121 Stat. 989 (Sept. 29, 2007) (Continuing Resolution). The Continuing Resolution appropriated for fiscal year 2008:

“Such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2007 and under the authority and conditions provided in such Acts for continuing projects or activities . . . for which appropriations, funds, or other authority were made available in [listed appropriations acts] . . .”

¹ Alternatively, the Secretary may undertake a reorganization pursuant to a Reorganization Plan submitted by the President to the appropriate congressional committees. Pub. L. No. 107-296, § 1502.

² Department of Homeland Security Appropriations Act, Pub. L. No. 109-295, 120 Stat. 1355 (Oct. 4, 2006) (2007 DHS Appropriations Act).

Pub. L. No. 110-92, § 101. The listed appropriations acts included the 2007 DHS Appropriations Act.

Section 104 of the Continuing Resolution provided that no funds provided under the Continuing Resolution “shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2007.” *Id.* § 104.

You state in your letter to us that you believe the prohibition against transfers under section 872 of Public Law 107-296 was “in effect during the pendency of the [fiscal year] 2008 continuing resolutions” which began on October 1, 2007. In addition to asking for our view on this question, you ask whether the transfer of the PFO support function would be subject to the prohibition.

ANALYSIS

The question of whether the prohibition contained in section 3501 of the Supplemental Appropriation was in effect on October 1, 2007, can be resolved by looking to the terms of the various statutes involved. As stated above, the prohibition at issue first appeared in the Supplemental Appropriation enacted in May 2007. By its terms, this provision prohibited any funds provided in that Act as well as any funds provided by the 2007 DHS Appropriations Act from being used to carry out transfers under section 872 of Public Law 107-296. Pub. L. No. 110-28, § 3501. Thus, the prohibition against such transfers became a condition on the use of funds provided by the 2007 DHS Appropriations Act.

In the Continuing Resolution, Congress specifically identifies the 2007 DHS Appropriations Act as the reference bill for determining the rate for operations during fiscal year 2008 and states that the funds are provided under the “authority and conditions” provided in the fiscal year 2007 DHS Appropriations Act. Pub. L. No. 110-92. Moreover, section 104 of the Continuing Resolution prohibited funds from being used for any project or activity for which funds were not available in 2007. Because the section 3501 prohibition is a condition imposed on the department’s fiscal year 2007 appropriation and a reorganization under section 872 could not have been made in 2007, we conclude that the prohibition was in effect during the pendency of the Continuing Resolution, including on October 1, 2007, the date of the transfer.

The next question, then, is whether the transfer of the PFO support function was a transfer covered by the prohibition. As stated, section 3501 prohibited the Department from using appropriated funds to “carry out section 872.”

Section 872 addresses the authority of the Secretary to “allocate or reallocate functions” among the officers of the department or “to establish, consolidate, alter, or discontinue organizational units.” The Homeland Security Act defines the term “functions” as including “authorities, powers, rights, privileges, immunities,

programs, projects, activities, duties, and responsibilities.” Pub. L. No. 107-96, § 2(8). In interpreting statutes, the federal courts have developed a number of well-recognized conventions or canons of statutory construction. The most important canon is the “plain meaning rule.” The Supreme Court described this rule as follows: “Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute . . . Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). In other words, when the language of a law is clear and unambiguous on its face, it is the plain meaning of that language that controls. B-307720, Sept. 27, 2007.

When we examine the terms contained in section 872 and apply them to the facts before us, we see that the term “function” is broadly defined and that other key terms such as “reallocate,” “alter,” and “organizational unit” are clear and unambiguous when viewed in the context of DHS’s organizational structure. The two organizational units involved in the transfer, NPPD and OPS, are significant components of DHS. NPPD is a Directorate and is led by an Under Secretary of the department. OPS, headed by the Director of Operations Coordination, works to deter, detect, and prevent terrorist acts by coordinating the work of federal, state, territorial, tribal, local, and private sector partners, and by collecting and fusing information from a variety of sources. The Director has a leadership position within the department on a par with other key department officials and reports directly to the Secretary. DHS Organizational Chart, *contained in* Russell Letter, at Tab 5. By transferring the PFO support function, the Secretary is reallocating this significant responsibility to the Director of Operations and, in the Secretary’s own words, completing an “organizational transition.” Chertoff Letter. Moreover, DHS is modifying both NPPD and OPS organizations. As a result of the transfer, NPPD will “cease to have a staff support role” and OPS will be responsible for, among other things, training a cadre of 75 PFOs. *Id.* We therefore conclude that the Secretary is “reallocat[ing] functions” and “alter[ing]” two “organizational units” under section 872 in violation of the prohibition.

DHS argues that the Homeland Security Act vests the Secretary with the authority to make changes to allow the department to function more efficiently and that the transfer was authorized under this authority. *See* Pub. L. No. 107-296, § 102(a)(2), (a)(3). DHS also points to the Secretary’s broad statutory authority to delegate functions of the department and asserts that the transfer is essentially a redelegation in which the Secretary is effectively ending his delegation to NPPD and redelegating the PFO function to OPS. *See id.* at § 102(b)(1).

DHS’s arguments in this regard are unpersuasive since they fail to recognize the well-established canon of statutory construction that each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole. *See* B-302335, Jan. 15, 2004, *quoting* 2A Sutherland, *Statutes and Statutory Construction* § 46:05, at 154 (6th ed. 2000). In ascertaining the plain meaning of a statute, we necessarily look to the particular statutory language at issue, as well as the language and design of the statute as a whole.

The Homeland Security Act provides that the Secretary shall have “direction, authority, and control over” the department and vests “all functions of all officers, employees, and organizational units” in the Secretary. Pub. L. No. 107-296, §§ 102(a)(2), (a)(3). DHS argues that the Secretary, thus, has the authority, independent of section 872, to reorganize the department. However, reading the Homeland Security Act as a whole, we construe section 872, which was enacted as part of the same Act establishing the department, as a limitation on any general or inherent authority of the Secretary to reorganize the department which may otherwise be inferred from sections 102(a)(2) and (a)(3).

With respect to DHS’s argument that the transfer of function here was essentially a redelegation, we point out, initially, that nothing in the record suggests that the Secretary viewed this organizational transfer as a delegation (or redelegation). Second, the Secretary is authorized to delegate “except as otherwise provided by this Act.” Pub. L. No. 107-296, § 102(b)(1). To the extent that a delegation results in a reorganization as described in section 872, section 872 would apply. Reading the delegation authority as suggested by the department would effectively remove the section 872 limitation, since such a reading would permit the Secretary to reallocate any function among the officers, employees, and organizational units of the department in disregard of section 872. Because of the clause in section 102(b)(1), “except as otherwise provided by this Act,” it is clear that Congress intended the Secretary’s delegation authority to yield to the section 872 reorganization provision.

Next, DHS asserts that 5 U.S.C. § 301 provides additional authority to make “minor modifications.” Russell Letter, at 7. This statute, commonly referred to as the “housekeeping statute,” is a general grant of authority to agencies to manage their own affairs by issuing internal regulations governing performance of the agency’s business. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979). The statute, which dates back to George Washington’s administration, cannot reasonably be understood to supersede a specific limitation, established in the department’s organic legislation, on the Secretary’s authority to reorganize the department. Rather, to the extent that this statute is relevant, it is limited by section 872, the later, specific enactment addressing the scope of the department’s authority to organize the department. *See* B-308715, Apr. 20, 2007 (stating that “it is well established that a later enacted, specific statute will typically supersede a conflicting previously enacted, general statute to the extent of the inconsistency”).

Finally, DHS argues that the department has consistently determined that in order for a reorganization to fall under section 872, it must involve a program established by the Homeland Security Act or another statute or involve a program with another significant variable, such as “previous, demonstrated Congressional interest.” Russell Letter, at 8. We see no basis for reading section 872 in this way. The language of the statute is quite broad and does not include limiting language. The definition in the statute of “functions” includes “programs” and is not limited by number of employees

affected, amount of money involved, or whether or not the function is established by statute.³ See Pub. L. No. 107-296, § 2(8).

Regardless, the transfer of the PFO support function would appear to meet the criterion of “previous, demonstrated Congressional interest.” The role of the PFO has been a matter of congressional interest for several years. For example, following the federal response to Hurricane Katrina, the House Bipartisan Committee on Katrina issued a report in February 2006 finding, among other things, that “there was confusion over the role and authority of the PFO.” *A Failure of Initiative, Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina*, H.R. Rep. No. 109-377, at 135 (2006). The report also emphasized the importance of PFO-designates completing a training program. *Id.* Moreover, GAO has been asked to testify about the roles, responsibilities, and lines of authority with respect to the DHS Secretary and the FEMA Administrator. GAO has identified persistent confusion about the key leadership roles, including the roles of the PFO and FCO, and, as recently as June 2008, GAO was asked by the Committee on Homeland Security, House of Representatives, for its assessment of whether the roles of the PFO and FCO have been sufficiently clarified. GAO, *Hurricane Katrina: GAO’s Preliminary Observations Regarding Preparedness, Response, and Recovery*, GAO-06-442T (Washington, D.C.: Mar. 8, 2006); *Emergency Management: GAO Responses to Post-hearing Questions for the Record*, GAO-08-1003R (Washington, D.C.: July 15, 2008).

We also believe that reading the section 872 authority as applicable to the transfer of the PFO support program would be consistent with DHS’s prior use of the section 872 authority.⁴ For example, in 2003, the Department provided notice under section 872 that it was transferring the Federal Air Marshall Program and Explosives Unit from the Transportation Security Administration to the then-Bureau of Immigration and Customs Enforcement. Russell Letter, at 5. DHS states further that “[m]oving this program [from] one agency to another is precisely [the] type of reorganization that requires section 872 notice to Congress.” *Id.* Similarly, in 2004, DHS informed

³ DHS also asserts that the transfer is not covered by section 872 because the PFO function is a collateral duty. The function transferred, however, was the PFO support function, not the PFO function itself. In any event, the definition of “functions” includes “duties” and is not limited to full-time or primary duties. See Pub. L. No. 107-296, § 2(8).

⁴ DHS states that it has provided written notice to Congress under section 872 of the Homeland Security Act nine times, but that in five of these cases, section 872 notice was not required. Russell Letter, at 4–6. While we do not express an opinion on whether notice was in fact required, we note that with one exception, each of the letters to Congress advised that the notification was being provided “in accordance with Section 872 of the Homeland Security Act.” See Russell Letter, Tabs 6–16. Regarding the notification letter that did not contain an explicit reference to section 872, DHS advises that the transfer at issue in that letter was in fact conducted pursuant to section 872. See Russell Letter, at 5 and Tab 11.

Congress of its intent to move the Air and Marine Operations from U.S. Immigration and Customs Enforcement to U.S. Customs and Border Protection in order to realign and streamline resources. *Id.* More recently, DHS states that it used its section 872 authority to transfer the US-VISIT program into NPPD. Russell Letter, Tab 16, at 7. In its notification letter, DHS explained that the “US-VISIT mission includes routine and extensive coordination across multiple DHS components, with foreign governments, and with other Federal agencies We are relocating the program to the NPPD to support coordination for the program’s protection mission and to strengthen DHS management oversight.” Russell Letter, Tab 15, at 8. Turning to the transfer of the PFO support function at issue here, we see no reason to believe, based on past practices of the department, that section 872 was not applicable. Indeed, the Secretary himself characterized the transfer of the PFO support function as an “organizational transition.” Chertoff Letter, at 2.

CONCLUSION

The prohibition against using the authority provided under section 872 of the Homeland Security Act to transfer functions within the Department was in effect during the pendency of the Continuing Resolution, including on October 1, 2007, the date of the transfer. The “organizational transition” of moving staff support for PFOs from one organizational unit to another was a transfer under the plain meaning of section 872 and was similar to prior transfers for which DHS provided notice under that authority. We conclude that DHS’s transfer of the PFO support program, effective October 1, 2007, was within the scope of section 872 and therefore was prohibited under the Continuing Resolution.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Gary L. Keplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Keplinger
General Counsel